OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2012 - March 2012 (1st Quarter)

JURISDICTION:

Consumer §681.102(4)F.S.

RRZ Corporation v. Daimler Vehicle Innovations USA, LLC, 2011-0271/MIA (Fla. NMVAB February 17, 2012)
The Consumer complained of an engine condition problem in his 2010 Smart ForTwo Pure Coupe. The President of R.R.Z. Corporation explained the vehicle was utilized as a security vehicle for South Florida Security Group; sometimes the vehicle was parked at a guard house, and sometimes it was used for random patrol within the community to which it was assigned. The Manufacturer asserted that R.R.Z. Corporation was not a "consumer" as defined by the Lemon Law, because the vehicle was not used primarily for personal, family, or household purposes. The Board rejected the Manufacturer's assertion on the basis of *Results Real Estate v. Lazy Days R.V. Center*, 505 So.2d 587 (Fla. 2d DCA 1987). There was no evidence that R.R.Z. Corporation was not entitled by the terms of the warranty to enforce the obligations of the warranty. §681.102(4), Fla. Stat.

NONCONFORMITY 681.102(15), F.S.

Bryant v. Hyundai Motor America, 2011-0275/STP (Fla. NMVAB March 5, 2012)
The Consumers complained that the engine failed in their 2010 Hyundai Santa Fe, because it was not getting any oil. The Consumer testified that he took the vehicle to the dealership for a routine oil change and, while he was driving home from the oil change, the vehicle began making a terrible noise, he pulled over, called for assistance, and had the vehicle towed back to the dealership, where it was discovered the gasket had not been properly installed by the authorized service agent after the oil change. The Manufacturer asserted several statutory affirmative and other defenses to the claim; however, at the hearing, evidence was presented as to only the following: the Manufacturer should not be responsible for repurchasing this vehicle, because the alleged nonconformity was the result of "an accident at the dealership," and "[t]he dealership paid for the cost to replace the engine." The Service Manager at the manufacturer's authorized service agent acknowledged that the engine failed and had to be replaced due to oil starvation as a result of a gasket being improperly installed during an oil change performed by the Manufacturer's authorized service agent. He explained that the dealership did not attempt to claim it against the Manufacturer's limited warranty; rather, it notified its insurance carrier, which paid for the repair. The evidence established that the engine failure as a result of the engine not getting any oil substantially impaired the use and value of the vehicle, thereby constituting a nonconformity as defined by the statute and the applicable rule. The Manufacturer's assertion that it should not be

responsible for repurchasing the Consumers' vehicle was rejected, because the above-quoted definition of "nonconformity" excludes only those substantial defects or conditions that result from an "accident, abuse, neglect, modification, or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent." §681.102(15), Fla. Stat. [Emphasis added]. The undisputed evidence established that the nonconformity was the result of Hyundai's authorized service agent failing to properly install the gasket during an oil change; therefore, it did not fall within the exclusionary language of the statutory definition. Accordingly, the Consumers were awarded a refund.

Kagan v. Toyota Motor Sales USA, Inc., 2011-0300/FTL (Fla. NMVAB March 15, 2012)
The Consumer complained that the rear defogger/defroster took too long to clear the rear window in his 2011 Lexus RX350. The Consumer testified there were times when he was up north and the weather conditions were such that ice formed on the vehicle's windows. According to him, the rear defogger/defroster often was on for 15 minutes before the rear window was clear enough that he felt he could safely drive the vehicle. The Manufacturer asserted that the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. According to the Field Technical Specialist for the Lexus Southern Area, the rear defogger/defroster was "working as designed." A majority of the Board concluded that the defogger/defroster taking too long to clear the rear window substantially impaired the use, value and safety of the vehicle, thereby constituting a nonconformity as defined by the statute and the applicable rule. Accordingly, the Consumer was awarded a refund.

Hess v. Ford Motor Company, 2011-0316/ORL (Fla. NMVAB March 6, 2012)
The Consumer complained that, intermittently, his 2011 Ford Edge's Sync system failed to operate properly. The Consumer testified that the Sync system controlled numerous systems in the vehicle, including the heat, air conditioning, and heated seat functions. In addition, the Sync system controlled the audio system, which included the radio, as well as a built-in Bluetooth which was supposed to allow hands-free cell phone capability and the ability to listen to music from an iPod. Although the Consumer had an iPhone, she stated that, more often than not, the Bluetooth did not work properly, which was particularly problematic, since the Consumer was assigned to work in both the Washington, D.C. area and New York, where it is illegal to use a handheld cell phone while driving. According to the Consumer, she never was able to use the built-in Bluetooth to access a service associated with the Sync system, which would give her directions to a destination as well as traffic information; rather, she had to pull over and use the GPS in her phone, because there was no alternative available which allowed her to manually input a destination and receive the directions. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle, and any nonconformity was corrected within a reasonable number of attempts. A Ford Field Service Engineer testified that, in his opinion, the problems the Consumer was having with the Sync system would have been solved when the "APIM" was replaced. He said he had no problem syncing his own phone (a Blackberry) during his test drive at the final repair attempt. At that time, he made and received phone calls through the Sync system without any problem and he was able to access the navigation service. He also explained that he "typically sees compatibility issues" when Consumers complain about the Sync system, although he acknowledged that iPhones do typically work with the system. The Board found that the intermittent failure of the Sync system to operate

properly substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumer was awarded a refund.

MANUFACTURER AFFIRMATIVE DEFENSES §681.104(4), F.S.

Defect does not substantially impair use, value or safety of vehicle §681.104(4)(a), F.S.

Rivera-Reyes v. Chrysler Group LLC, 2011-0276/ORL (Fla. NMVAB January 17, 2012)
The Consumer complained that there was rust present in the second and third row seats in his 2011 Dodge Grand Caravan. The Consumer testified that a few weeks after purchase, he noticed a substantial amount of rust on the frame and seat area of the second and third row seats. He was originally told by the authorized service agent that the vehicle was "built that way" and "there was no fix." Subsequently, when he called Chrysler Customer Service, they instructed the authorized service agent to take the seat apart and apply new coating. According to the Consumer, when he picked up the vehicle, he observed that the seat frame area was treated, but he could still see rust. He did acknowledge that the vehicle ran fine mechanically and that he had not heard any noises from the seats. The Manufacturer asserted that the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle, or alternatively, that the vehicle was repaired within a reasonable time. The Manufacturer's representative testified that, at the second repair attempt, the second row seats were removed to access the affected areas. The second and third row seat frames were cleaned with steel wool and painted over with a semi-gloss rust product. At the Manufacturer's final repair attempt, he observed minor surface rust in small areas and cavities; those areas were re-cleaned and painted. According to him, the amount of rust was minor and similar to any other rust one would see on un-painted areas of a vehicle due to the moisture in Florida. During the hearing, the individual seats in the second and third row were visually inspected by the Board, using a flashlight to peer into the various crevices. A minimal amount of rust was seen in the crevices. The surfaces exhibited a slight overspray which would not have been noticeable unless it was pointed out. The Board found that the rust in the second and third row seats complained of by the Consumer did not substantially impair the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the Consumer's case was dismissed.

Accident, Abuse, Neglect, Unauthorized Modification §681.104(4)(b), F.S.

Ferrone v. BMW of North America, LLC, 2011-0297/FTL (Fla. NMVAB February 29, 2012)
The Consumer complained of a defective air bag sensor in the passenger seat in his 2011 Mini Cooper. The Consumer testified that, when someone was sitting in the passenger seat, the "passenger air bag disabled" warning light displayed. The Consumer testified he once worked for the Manufacturer's authorized service agent as a technician and during that time he made seat mat sensor repairs several times each week. The Manufacturer asserted the alleged nonconformity was the result of unauthorized modifications or alterations of the motor vehicle by persons other than the manufacturer or its authorized service agent; and the claim by the consumer was not filed

in good faith. The Service Manager at Vista Motor Company, the authorized service agent, testified he was involved with the vehicle on two occasions. At first, it was believed that the sensor in the passenger seat mat was defective so it was replaced. The second time the vehicle was brought in for the same complaint, the technician noticed that the seat mat was unplugged from the seat harness, and it was reconnected. At the third repair for this issue, the technician noticed the rear corner of the seat mat was damaged and, because the sensor mechanism itself had scratches on it, it appeared as if an instrument like a screw driver had been inserted into the mat. Nevertheless, as a "goodwill gesture," the sensor on the passenger side was replaced a second time. The Board found that tampering by persons other than the Manufacturer or its authorized service agent caused the defective passenger side seat mat sensor which triggered the illumination of the warning light. The complained of defect did not constitute a "nonconformity" as defined by the statute; therefore, the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

Laderer v. Chrysler Group LLC, 2011-0251/FTM (Fla. NMVAB January 30, 2012)
The Consumer requested, as an incidental charge, reimbursement of $33.07 the authorized service agent required her to pay for gas for its lengthy test-drive of 303 miles performed at the Manufacturer's final repair attempt. The Board granted the request.

Mariaca v. American Honda Motor Company, 2011-0292/MIA (Fla. NMVAB February 10, 2012)
The Consumer's 2010 Honda Accord V6 had an engine condition which the Board found to be a nonconformity and awarded the Consumer a refund. As an incidental charge, the Consumer sought reimbursement of $167.70 for airfare to fly to Jacksonville to pick up the vehicle when he purchased it; the Manufacturer objected, and argued the airfare was not directly caused by the defect. The Consumer's request was denied by the Board as it was not directly caused by the nonconformity.

Collateral Charges §681.102(3), F.S.

RRZ Corporation v. Daimler Vehicle Innovations USA, LLC, 2011-0271/MIA (Fla. NMVAB February 17, 2012) (See "Consumer"above)
The Consumer requested reimbursement of $620.60 for an advertising "wrap around" on the vehicle as a collateral charge, which was granted by the Board.

MISCELLANEOUS PROCEDURAL ISSUES

Rueda v. American Honda Motor Company, 2011-0255/MIA (Fla. NMVAB March 5, 2012)
During the hearing, the Manufacturer sought to assert the following statutory affirmative defenses not timely raised in its Manufacturer's Answer or any amended Answer: the alleged nonconformity does not substantially impair the use, value or safety of the motor vehicle;

alternatively, the alleged nonconformity was repaired in a reasonable number of repair attempts. Paragraph (8), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, requires that any affirmative defenses not raised in the Manufacturer's Answer or in an amended Answer and filed within the prescribed time periods may not be raised at the hearing, except as otherwise provided in the rules or as permitted by the Board. Counsel for the Manufacturer gave the following explanation for the failure to timely assert the defense(s): the Manufacturer received the "file" for this case in its mailroom on December 23, 2011. The Manufacturer's "Mediation Group" received the documents on December 28, 2011. The Honda department responsible for handling Lemon Law claims was shut down between Christmas and New Year, and did not resume operations until January 3, 2012. The employee to whom this case was assigned failed to forward the file to outside counsel due to the increased workflow created by the close-down for the holiday season. The Consumer objected to the Manufacturer's request. Upon consideration, the Board declined to permit the untimely asserted defenses.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2012 - June 2012 (2nd Quarter)

NONCONFORMITY 681.102(15), F.S.. (2012)

Peterson and George v. Kia Motors America, Inc., 2012-0022/TPA (Fla. NMVAB April 19, 2012)

The Consumers complained of a pull to the right in their 2011 Kia Sorrento. The Consumer testified that, as a former race car driver, he had owned more than 200 vehicles; none pulled in either direction as drastically as the subject vehicle. According to him, the pull to the right was so severe, that if he was driving on a three lane highway in the left lane, the vehicle pulled across the other two lanes, in a matter of "seconds." The Manufacturer argued that the pull to the right did not substantially impair the use, value or safety of the motor vehicle; alternatively, the pull was repaired before the final repair attempt, within a reasonable number of attempts. The Manufacturer's witness testified that there are many "environmental factors" that can cause a vehicle to "drift"; for example, road crown, puddles in the road, and different air pressures in the front tires. He opined what the Consumers were experiencing was "torque steer," which is "normal for a unibody, front wheel drive, McPherson suspension vehicle." He explained that Kia designed a longer axle on the right side of this vehicle so when the driver accelerates rapidly, there is bound to be normal "torque steer" to the right. A driver can still get "torque steer" while using the cruise control because it is based on operating tension rather than foot motion. He further opined that torque steer was a "physics" dynamic, which can't be changed; consequently, "nothing more can be done" to the vehicle. During the hearing, the Board inspected and test drove the vehicle in the presence of the parties. A test drive was performed for a total of 17 miles on local roads and highways at speeds of 45-60 miles per hour. A stop watch was used to denote how long a pull or drift would last. A severe sudden pull to the right was experienced, causing the driver to "fight" the vehicle, especially at higher speeds. The pull was so quick that the stop watch was unable to be employed. The Board found the evidence presented by the parties, including the test drive performed during the hearing, established that the pull to the right substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The nonconformity continued to exist after the final repair attempt. Accordingly, the Consumers were awarded a refund.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.:

What Constitutes a Reasonable Number of Attempts §681.104, F.S.; §681.1095(8), F.S.

Trovato and Towle v. Nissan Motor Corporation USA, 2012-0074/TPA (Fla. NMVAB June 5, 2012)
The Consumers complained that the steering wheel was off center; the motor of the power window on the passenger side made a "scraping" or "grinding" noise when the window moved up or down; and the passenger seat frame was cracked and moving at the seat track weld joints, which was coupled with damage to the passenger door, in their 2011 Nissan Pathfinder.
The Board found these problems to be nonconformities for which there were a total of 29 cumulative out-of-service days. A majority of the Board concluded that, under the circumstances, the Manufacturer had a reasonable number of attempts to conform the subject vehicle to the warranty as contemplated by the Lemon Law. Accordingly, the Consumers were awarded a refund.

What Constitutes Written Notification Under §681.104(1)(a), F.S.; §681.104(1)(b), F.S.

Gavcovich v. BMW of North America LLC, 2012-0086/MIA (Fla. NMVAB June 21, 2012)
The Consumers asserted that their 2010 BMW Mini Cooper stalled while driving. After presenting the vehicle to the Manufacturer's authorized service agent for repair of the above problem at least three times, the Consumers sent a two-page letter, dated March 3, 2012, addressed to the Manufacturer's authorized service agent at "Braman Service Department" in Miami, Florida. The letter indicated that copies were furnished to "Mini Financial Services, Customer Service" and to "Mini USA" via email. By letter dated March 19, 2012, Mini Financial Services responded, acknowledging receipt of the Consumers' letter and stating that, "We have addressed your letter and concern to the manufacturer, MINI USA, to advise them of your correspondence." Ultimately, a copy of the letter was received by the "Mini USA Customer Relations Department in Ohio," according to an affidavit by an employee of BMW of North America, LLC (BMWNA), the parent company of Mini USA, and the Manufacturer in this case. At the hearing, the Manufacturer, through counsel, stipulated to receipt of a copy of the Consumers' March 3, 2012, letter; therefore, BMWNA's receipt of the letter was not at issue.

The Consumer's two-page letter to the service agent began with this statement: "I am writing this letter to inform you of my dissatisfaction with the service we have received and our Mini Cooper in general." The letter went on to recount the repair history of the vehicle, giving the dates of repair, outlining what occurred each of the four times the vehicle was brought to Braman BMW for a complaint of stalling, and expressing concern with the vehicle's performance. According to the Affidavit of the BMWNA employee:

> Since said letter was a customer dissatisfaction letter and not a Motor Vehicle Defect Notification or request for final repair attempt under the Florida Lemon Law statute, said letter was not forwarded to Mini USA Customer Relations

Department in New Jersey, which deals with Lemon Law issues such as Motor Vehicle Defect Notifications.

The Affidavit went on to state that, had the letter been a notification of a final repair opportunity, it would have been forwarded to the New Jersey office as part of "routine protocol" and a BMW/Mini field technical specialist would have been contacted to schedule a final repair attempt; however, this did not happen and BMWNA did not have a final repair attempt. The Field Technical Specialist for BMWNA, testified that, normally, he is only sent by BMWNA to perform a final repair attempt if a Motor Vehicle Defect Notification form is received. If a letter is received, he works an appointment to review the vehicle into his regular schedule. His research and diagnostics are more detailed when there is a final repair attempt. The Manufacturer, through counsel, contended that, while it received a copy of the Consumer's letter, for the reasons set forth in the Affidavit, the content of the letter was not sufficient to constitute the written notification of a final repair opportunity required by Section 681.104(1)(a), Florida Statutes, and since the Manufacturer did not have the final repair opportunity, the claim should be dismissed. The Board noted that the Consumers were not required to use the "Motor Vehicle Defect Notification" form in order meet the statutory notification requirement, because the statute does not require that a consumer's written notification be in any particular form, except in writing. However, upon review of the content of the letter in conjunction with the statutory requirement, the affidavit from the BMWNA employee, and the fact that the Manufacturer did not perform a final repair attempt, the Board concluded that the March 3, 2012, letter was not sufficient to give the Manufacturer the statutory opportunity for a final repair. Accordingly, the claim was dismissed.

MANUFACTURER AFFIRMATIVE DEFENSES §681.104(4), F.S.

Defect does not substantially impair use, value or safety of vehicle §681.104(4)(a), F.S.

Brundidge v. Chrysler Group LLC, 2012-0047/ORL (Fla. NMVAB April 30, 2012)
The Consumers complained of a steering wheel vibration at highway speeds in their 2011 Jeep Cherokee. According to the Consumer, the vibration was an intermittent occurrence that happened for couple of seconds when the vehicle was being driven at speeds of 70 miles per hour and above, and then it went away. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative test drove the vehicle with the Consumer at the Manufacturer's prehearing inspection. The Consumer told him that he both felt the vibration and saw it. The Manufacturer's representative did see the passenger seat "quiver a little," but all he felt was "road feel," and in his view, the Consumer was simply "feeling the road" in the steering wheel. A majority of the Board concluded that the evidence failed to establish that the intermittent steering wheel vibration at highway speeds complained of by the Consumers substantially impaired the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the Consumers' case was dismissed.

Accident, Abuse, Neglect, Unauthorized Modification §681.104(4)(b), F.S.

Kashtan v. Toyota Motor Sales USA Inc, 2012-0072/STP (Fla. NMVAB May 24, 2012)
The Consumers asserted that their 2011 Toyota Camry suddenly and unexpectedly accelerated, which propelled the vehicle through some bushes and resulted in damage to the front end of the vehicle. The Consumer testified that she was pulling into a parking place at approximately five miles per hour, with her foot still on the brake, when the vehicle suddenly accelerated out of control. According to her, even though she was braking the whole time, the vehicle continued to go forward, and after she went through the bushes, she crossed a sidewalk and grass, and then entered the outer lane of a busy street, whereupon the vehicle gave a little "jerk" and came to a stop. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle, because the Consumers' accident did not result from a nonconformity. The Manufacturer's representative testified that his inspection revealed no evidence of a sticky accelerator pedal nor of floor mat entrapment, and he pointed out that the Consumers' vehicle was equipped with the improvements developed as countermeasures against unintended acceleration. Since a driver cannot accelerate by depressing the brake pedal, in order for the scenario described by the Consumers to have occurred, both the throttle and the brake, two independent systems within the vehicle, would have had to have failed at the same time. However, there was no evidence of any mechanical or electronic failure of any system within the Consumers' vehicle. In the Manufacturer's view, the only reasonable explanation for the vehicle to have accelerated as it did, was that the Consumer thought she was pressing the brake pedal when, in fact, she was inadvertently pressing the accelerator pedal. Upon consideration of the evidence presented, the Board concluded that the greater weight of the evidence supported the Manufacturer's affirmative defense that the sudden acceleration complained of by the Consumers was caused by an accident by persons other than the Manufacturer or its authorized service agent, to-wit: the Consumer inadvertently pressing the accelerator instead of the brake pedal. Accordingly, the Consumers' case was dismissed.

Timeliness of filing of the Request for Arbitration §681.109(4), F.S.

Nwaokoh v. Nissan Motor Corporation USA, 2012-0041/FTL (Fla. NMVAB May 31, 2012)
The parties stipulated that, on December 10, 2009, the Consumer purchased a 2010 Nissan Armada in Florida. On November 30, 2011, the Consumer filed a claim with the Better Business Bureau Autoline (BBB), the state-certified informal dispute settlement procedure sponsored by Nissan. The procedure rendered a decision denying the claim. That decision was mailed to the Consumer, along with a letter dated January 4, 2012, which informed the Consumer he had the option to accept or reject the decision, and had 14 days from the date of the letter for the BBB to receive the enclosed form indicating which option he had chosen. The letter also informed the Consumer that if the form was not received at the CBBB office within 14 days from the date of the cover letter, the decision would be considered rejected and the manufacturer would be notified. The Consumer was not satisfied with that decision and on February 9, 2012, requested arbitration by the New Motor Vehicle Arbitration Board, seeking either a refund or a replacement vehicle. The Manufacturer asserted that the request for arbitration was not filed within 60 days after the expiration of the Lemon Law rights period or 30 days after the final action of a certified procedure, whichever date occurred later. The Manufacturer maintained that the Consumer

purchased the vehicle on December 9, 2009, and that 60 days after the expiration of the Lemon Law rights period was February 7, 2012. The Manufacturer further maintained the certified program's January 4, 2012, letter should be considered the date of the program's "final action" for purposes of calculating the timeliness of the Consumer's request for arbitration, and that 30 days after the date of final action was February 3, 2012. The Manufacturer thus asserted that the Consumer's Request for Arbitration, which was filed on February 9, 2012, was untimely, as it should have been filed no later than February 7, 2012. Section 681.102(9), Florida Statutes, establishes the "Lemon Law rights period" as "the period ending 24 months after the date of the original delivery of a motor vehicle to a consumer." The time for filing a Request for Arbitration with the Board is set forth in Section 681.109(4), Florida Statutes, which states:

> (4) A consumer must request arbitration before the board with respect to a claim arising during the Lemon Law rights period no later than 60 days after the expiration of the Lemon Law rights period, or within 30 days after the final action of a certified procedure, whichever date occurs later.

In addition, Section 681.108(3), Florida Statutes, provides that every certified procedure shall submit to the Department of Legal Affairs, a copy of each settlement approved by the procedure or each decision made by a decisionmaker within 30 days after the settlement is reached or the decision is rendered. "The decision or settlement must contain at a minimum the …**statement of whether the decision was accepted or rejected by the consumer**." §681.108(3)(h), Fla. Stat. The evidence established the Consumer took delivery of the vehicle on December 10, 2009. The Lemon Law rights period expired 24 months later on or about December 10, 2011. The final action of the certified procedure was January 18, 2012 (the date of the January 4, 2012, letter plus 14 days to accept or reject the decision.). In this case, the period 30 days after the certified procedure's final action was the later of the relevant time periods. Thus, the Consumer's Request for Arbitration, filed on February 9, 2012, was timely. The Manufacturer's assertion was rejected by the Board. The case was dismissed on other grounds (nonconformity corrected within a reasonable number of attempts).

REFUND §681.104(2)(a)(b), F.S.:

Careers USA Inc. v. Land Rover of North America, 2012-0095/WPB (Fla. NMVAB June 1, 2012) At the hearing, the Manufacturer, through counsel, stipulated that the Consumer's 2010 Land Rover Range Rover was a "lemon." The Consumer requested that the Board award a replacement vehicle. Prior to the hearing, Counsel for the Manufacturer submitted a document titled "Land Rover North America's Arbitration Memorandum of Law Regarding the Consumer's Entitlement to Elect a Refund Only." It was the Manufacturer's contention that there was no statutory authority for the Consumer to choose, or for the Board to award, a replacement vehicle; rather, the Consumer could only choose a refund if the Manufacturer offered a replacement vehicle and the Consumer did not want a replacement. The Consumer, through counsel, maintained that the statute was clear that the Consumer has the right to choose between the statutory remedies, with an "unconditional right" to choose a refund. The Board rejected the Manufacturer's contention that the Board lacked the authority to award the replacement vehicle remedy to the Consumer.

Chapter 681.101, Florida Statutes, states that "it is the intent of the Legislature to provide the statutory procedures whereby a consumer may receive a replacement motor vehicle, or a full refund, for a motor vehicle which cannot be brought into conformity with the warranty provided for in this chapter." In addition, Section 681.104(2)(a), clearly provides that, once the remedy becomes mandatory, the choice of remedy rests with the Consumer. *See, King v. King Motor Company of Fort Lauderdale et. al,* 780 So. 2d 937 (Fla. 4 DCA 2001) ("For a nonconforming vehicle that the manufacturer cannot conform to the warranty, the primary statutory remedy is either a replacement vehicle or a refund, at the consumer's option." Citing §681.104(2)(a), Fla. Stat.). Considering the statute as a whole, the Board found no authority for the Manufacturer's position. The Consumer was awarded a replacement motor vehicle.

Incidental Charges §681.102(8), F.S.

Careers USA Inc. v. Land Rover of North America, 2012-0095/WPB (Fla. NMVAB June 1, 2012)
At the hearing, the Manufacturer, through counsel, stipulated that the Consumer's 2010 Land Rover Range Rover was a "lemon." The Consumer requested reimbursement of $3,237.00 paid for rental car charges incurred while the vehicle was out of service by reason of repair of the nonconformity from February 1, 2012, through April 30, 2012, plus any additional rental car charges the Consumers would incur up to the date of compliance. The Board awarded the $3,237.00 in rental car charges requested, plus any additional rental car charges incurred up to the date the vehicle is replaced.

Collateral Charges §681.102(3), F.S.

Corporate Debtication Inc. v. BMW of North America LLC, 2011-0303/WPB (Fla. NMVAB April 12, 2012)
The Consumer's 2010 BMW 750Li was declared a "lemon" by the Board. The Consumer requested reimbursement of $147.00 for window tinting as a collateral charge. The Manufacturer objected because the Consumer did not produce a receipt to substantiate payment. The Board awarded the $147.00 for window tinting as a reasonable collateral charge.

MISCELLANEOUS PROCEDURAL ISSUES:

Falco v. Hyundai Motor America, 2012-0063/STP (Fla. NMVAB May 9, 2012)
During the hearing, the Manufacturer sought to assert the following statutory affirmative defense not timely raised in its Manufacturer's Answer or any Amended Answer: the alleged nonconformity does not substantially impair the use, value or safety of the motor vehicle. Paragraph (8*), Hearings Before the Florida New Motor Vehicle Arbitration Board*, requires that any affirmative defenses not raised in the Manufacturer's Answer or in an amended Answer and filed within the prescribed time periods may not be raised at the hearing, except as otherwise provided in the rules or as permitted by the Board. The Manufacturer's Answer must be filed with the Board Administrator no later than 20 days after receipt of the Notice of Arbitration. In this case, the Manufacturer's Answer was filed 30 days after receipt of the Notice of Arbitration. The Manufacturer's representative stated that he had recently been appointed to this case and had

no explanation regarding the late filing of the Answer. The Consumer objected to the Manufacturer's request. Upon consideration by the Board, the Manufacturer was not permitted to raise the untimely asserted affirmative defenses at the hearing.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

July 2012 - September 2012 (3rd Quarter)

JURISDICTION:

Motor Vehicle §681.102(14), F.S.

Harder v. Chrysler Group LLC, 2012-0161/TPA (Fla. NMVAB August 30, 2012)
The Consumer purchased a 2010 Ram 3500 motor vehicle on July 1, 2010. The Consumer, in his Request for Arbitration, indicated that the vehicle was not purchased in Florida, and listed Astorg Dodge Jeep Chrysler, in Parkersburg, West Virginia, as the selling dealer. At the hearing, the Consumer, who was a Florida resident, stated that he was on vacation and visiting family in West Virginia when he decided to buy a truck. He went to the Astorg dealership in Parkersburg, West Virginia, picked out the subject vehicle, signed the purchase documents and took delivery of the vehicle while in West Virginia. About a month later, he drove the vehicle to Florida. At the time he purchased the vehicle, his Florida tag was transferred to the subject vehicle, and he received the registration in the mail after he returned home. The Consumer paid Florida sales tax. The Manufacturer asserted the vehicle is not a "motor vehicle" as defined in Florida's Lemon Law. The Manufacturer, through its representative, argued that the Consumer left the State of Florida, purchased the vehicle through a West Virginia dealer, took delivery of the vehicle in West Virginia, and then drove it here. He pointed out that no Florida Lemon Law fee was paid and asserted that it is customary for a dealer to collect taxes from a purchaser based on the purchaser's state of residence; therefore, that should not be the determining factor as to whether the Consumer's vehicle was "sold in this state." He also pointed to the Consumer's own assertion in his Request for Arbitration that the vehicle was not purchased in Florida. Thus, the Manufacturer requested that the Consumer's case be dismissed because, under the totality of the circumstances, the vehicle was not sold in Florida, as is required by Section 681.102 (14), Florida Statutes. Based on the totality of the circumstances presented, the Board concluded that the vehicle was not sold in Florida; therefore, it did not constitute a "motor vehicle" under the Lemon Law. Accordingly, the Consumer's case was dismissed.

NONCONFORMITY 681.102(15), F.S.. (2012)

Colton v. Ford Motor Company, 2012-0159/WPB (Fla. NMVAB August 29, 2012)
The Consumer complained of a defective SYNC system in his 2011 Ford Explorer. The Consumer testified that intermittently, the back-up camera, navigation system and radio did not work properly. The first few times the back-up camera did not function he took the vehicle to the Manufacturer's authorized service agent, but was not given a repair order for those dates. The Consumer explained the back-up camera was of critical use to him because the vehicle had zero

visibility at ground level. There was no way to predict when the back-up camera would fail to function; it just happened several times a month. The Consumer could not say if failure of the back-up camera led to the failure of the navigation system and radio, or if they failed separately. Sometimes he was able to turn the vehicle's engine off and the systems reset themselves and worked; other times they would not work.

The General Manager of the Manufacturer's authorized service agent confirmed there were "inherent problems" with the SYNC system. The Manufacturer had SD card updates, but there was a "limit" to what could be corrected. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle; and the Manufacturer was not afforded a reasonable number of attempts to repair the vehicle. The Field Service Engineer for the Manufacturer testified he conducted the Manufacturer's prehearing inspection, and at that time the vehicle performed "as designed." He explained the back-up camera was an "optional" feature; the standard safety feature was back-up sensors. He testified there were multiple sensors on the rear bumper that could detect objects five to eight feet directly behind the vehicle and activate warning chimes. According to the witness, the sensors were on a separate system from the back-up camera so it was unlikely the back-up camera and sensors would fail at the same time; in addition, the driver could also use the outside mirrors to look for objects that might be in the way before backing up. He agreed, however, that the "angle of incidence" with the camera was much broader than with the sensors. The Board found the evidence established that the intermittent failure of the SYNC system, that is, the intermittent failure of the back-up camera, navigation system, and radio substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute. Accordingly, the Consumer was awarded a refund.

Contreras v. BMW of North America LLC, 2012-0124/MIA (Fla. NMVAB September 5, 2012) The Consumer complained of an intermittent belt squealing condition in his 2010 BMW 3-series. Each time the vehicle was repaired it seemed that the noise was corrected, but after driving another 1,000 miles the noise always came back. The squealing noise happened within 30 seconds of the engine being started, and lasted for five to 20 seconds. The noise could be heard when the windows were up, or the radio was on. According to the Consumer, the noise was so loud his neighbors knew when he was leaving for work in the morning. The last time he heard the noise was on his way to the hearing that morning. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Technical Support Engineer for BMW of North America, who had never seen the Consumer's vehicle, speculated that "something" could be getting on the air conditioner belt, causing it to slip, which, in turn, could damage the air conditioner pulley. According to the witness, it was not normal for an air conditioner pulley to be replaced, but if the air conditioner pulley was replaced, the compressor had to be replaced as well. The Shop Foreman at Braman BMW, conducted the Manufacturer's prehearing inspection and testified that moisture or dirt getting on belts in the vehicle can cause a squeaking noise. The Board found the evidence established that the intermittent belt squealing condition substantially impaired the use and value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumer was awarded a refund.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.:

What Constitutes a Reasonable Number of Attempts §681.104, F.S.; §681.1095(8), F.S.

Cohen v. General Motors Company- Chevrolet Division, 2012-0148/WPB (Fla. NMVAB August 10, 2012)

The Consumer complained of discoloration in the paint on both sides of the vehicle under the hood in his 2011 Chevrolet Camaro. About 10 months after taking delivery of the vehicle, the Consumer opened the hood and saw brown spots on the white cover of the wheel wells/strut towers. One month later, the spots had become large areas that appeared to be scorched or burned. The discoloration could not be removed with solvents. When he purchased the white vehicle, no one informed him there would be any discoloration and nothing in the owner's manual warned of any discoloration, according to the Consumer. He was eventually told doing anything would be "senseless," because while all covers discolor, it is only evident on those that are painted white. The Consumer testified he was told the discoloration may be attributable to yellowing of the clear coat, or because the struts were giving off nitrogen gas, which causes burning of the covers. The Consumer called two major manufacturers of struts and was told by both that the nitrogen gas used in all struts is self-contained and does not leak, and the heat from the engine of the car would not cause discoloration. According to the Consumer, the Manufacturer's authorized service agent would not replace the struts or repaint the covers, and he was never given a repair order.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Service Manager at Suburban Chevrolet, explained that the strut towers on Camaros are painted the same color as the vehicle. He believed an oil leak from the strut, and not a nitrogen leak, caused the discoloration of the inner fenders of the firewall/strut towers and did not know how high the heat from the engine would have to be to burn thru the metal plate and discolor the paint on the inside of the fenders. The Field Service Engineer for GM admitted the Manufacturer did not know what was causing the discoloration of the clear coat. He guessed the temperature of the engine would have to be between 120 and 150 degrees to cause the discoloration. The Board found the evidence established that the discoloration of the wheel wells/shock towers substantially impaired the value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The evidence established that the nonconformity was subjected to repair by the Manufacturer's service agent a total of one time, and the Manufacturer's authorized service agent thereafter declined to repair the vehicle. Further, the Manufacturer admitted that it did not know what was causing the discoloration and the only repair the Manufacturer offered was to paint the white wheel wells/strut towers black so the discoloration could not be seen. This would have been contrary to all other vehicles of the same model whose wheel wells/strut towers, according to the Manufacturer, are painted the same color as the vehicle. Under the circumstances, the Board found that the Manufacturer had a reasonable number of attempts to conform the subject vehicle to the warranty as contemplated by the Lemon Law. Accordingly, the Consumer was awarded a refund.

MANUFACTURER AFFIRMATIVE DEFENSES §681.104(4), F.S.

Defect does not substantially impair use, value or safety of vehicle §681.104(4)(a), F.S.

Rowledge v. Chrysler Group LLC, 2012-0186/TPA (Fla. NMVAB September 24, 2012)
The Consumer complained of an intermittent vibration that occurred when the vehicle was being driven at speeds of 79 to 82 miles per hour in his 2011 [Dodge] Ram 1500. According to the Consumer, the vibration was "an absolute annoyance," which came up through the seat and vibrated his body. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative argued that the Consumer's complaint of an "annoying" vibration that occurs within a three-mile-per-hour window from 79 to 82 miles per hour, above the legal speed limit, does not constitute a substantial impairment to use, value or safety. He explained that the Manufacturer denied the authorized service agent's request to replace the Consumer's tires with a "softer" Michelin tire, because it was the service agent's opinion that this was a "normal drive for that truck." Another Manufacturer's witness testified that they are only able to check items that might cause a vibration because they cannot drive the vehicle at 80 miles per hour, and they were not able to duplicate the problem driving the vehicle at lower speeds. He participated in the test-drive at the final repair attempt, during which the vehicle was driven approximately 45 miles at highway speeds, and no vibration was felt. Although they decided at that time to put Michelin tires on the vehicle to try to help the Consumer, there was no problem with the Consumer's vehicle. A majority of the Board concluded the evidence failed to establish that the vibration between 79 to 82 miles per hour complained of by the Consumer substantially impaired the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the case was dismissed.

Accident, Abuse, Neglect, Unauthorized Modification §681.104(4)(b), F.S.

Menashe v. American Honda Motor Company, 2012-0105/WPB (Fla. NMVAB August 22, 2012)
The Consumer complained of defective brakes in his 2010 Honda Accord. The Consumer testified that, intermittently, the brakes vibrated when they were applied, and a grinding noise and burning smell came from the rear brakes. The Manufacturer asserted the alleged nonconformity was the result of abuse of the motor vehicle by persons other than the manufacturer or its authorized service agent. The Shop Foreman at Delray Honda, explained that excessive heat build-up will cause brake rotors to turn blue and warp. Excessive heat build-up results from excessive braking, aggressive braking, or by the driver leaving their foot on the brake pedal while they are driving. The brake rotors on the Consumer's vehicle were blue and warped. The rotors were "resurfaced," that is, they were cut to take off the high spots so they would be even again, but rotors can only be cut so many times, then they have to be replaced. According to the witness, if brakes are defective, usually just one brake will wear; however, since all the brakes on the Consumer's vehicle needed some repair work, it was a sign of aggressive braking. Also a sign of excessive heat build-up was the fact the brake pedal was worn and was replaced in May of 2011. A nonconformity is defined as a "defect or condition that substantially impairs the use, value or safety of a motor vehicle, but does not include a defect or condition that results from an accident,

abuse, neglect, modification, or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent." §681.102(15), Fla. Stat. The Board found the evidence presented by the Manufacturer and the repair history of the vehicle established that the defective brakes were the result of abusive driving by the Consumer. The complained of defect did not constitute a "nonconformity" as defined by the statute; therefore the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Mora v. BMW of North America LLC, 2012-0153/MIA (Fla. NMVAB September 14, 2012) The Consumer's 2012 BMW 6-series motor vehicle was deemed a "lemon" by the Board. The Consumer requested reimbursement of $89.18 for rental car fuel charges incurred while the vehicle was out of service for repair as an incidental charge. The Manufacturer objected, arguing the extra charge was between the Consumer and the rental company, not the Manufacturer. The Consumer's request that he be reimbursed for the fuel charges erroneously imposed by the leasing agent was denied by the Board as not reasonable.

MISCELLANEOUS PROCEDURAL ISSUES:

Kittleson v. American Honda Motor Company, 2012-0169/ORL (Fla. NMVAB August 28, 2012) The Manufacturer asserted that the Consumer's claim must be dismissed because, prior to filing the Request for Arbitration with this Board, the Consumer did not submit the claim to the Better Business Bureau/Autoline program, which the Manufacturer contended was the state-certified informal dispute resolution procedure previously sponsored by Honda. However, the Manufacturer's assertion was not accompanied by any evidence that its dispute settlement procedure was currently certified by the Department of Legal Affairs, or was certified at the time the Consumer filed his Request for Arbitration with this Board. The Board found that the Consumer was not required to resort to the Better Business Bureau/Autoline program, because it was not a state-certified informal dispute resolution procedure for American Honda Motor Company. Accordingly, the Consumer was properly before the Board and ultimately was awarded a refund on the merits of his claim.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2012 - December 2012 (4th Quarter)

NONCONFORMITY 681.102(15), F.S.. (2012)

George v. Hyundai Motor America, 2012-0279/TPA (Fla. NMVAB November 15, 2012)
The Consumer complained of failure of the "Blue Link" system in his 2012 Hyundai Sonata. The Consumer purchased the vehicle primarily because of this "Blue Link" system as he was concerned about his two under-21-year-old children and distracted driving. Additionally all four drivers relied on the navigation feature to get from place to place. At times the display would register "Blue Link error" or "internal system error" or "system unavailable." Sometimes the system would ring the audio and then disconnect. On one occasion, his daughter received an error message at night; the navigation feature was out of service and she could not find her way out of town. Every time he brought the vehicle in for the "Blue Link" failure, he was told that it could not be duplicated and that the problem was not with the vehicle, but with the server. He was additionally told that he would be called when "the issue was resolved." He was never called. Just since September 2012, the Blue Link did not work seven out of 10 times. Most recently, on September 11, 2012, the Consumer's wife went for four hours without service. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's witness had never seen the Consumer's vehicle or spoken with any of the technicians involved. According to him, the Blue Link system is satellite based and sometimes the system will not operate when the satellite view is obstructed. Additionally, there can be times when the satellite system was "down for maintenance." The Board found that the Blue Link system malfunction substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumer was awarded a refund.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.:

Days Out of Service & Post-Notice Opportunity to Inspect or Repair§681.104(1)(b), F.S.; §681.104(3)(b)1., F.S.

MCQ Auto v. Rolls-Royce Motor Cars NA, Inc., 2012-0067/ORL (Fla. NMVAB October 5, 2012)
The 2011 Rolls-Royce Ghost had an electrical condition: the Car Access System module in one of the door handles malfunctioned and caused a constant draw on the battery, which eventually drained the battery. In addition, the windshield was broken while the vehicle was in the custody of the Manufacturer's authorized service agent. Both complaints were found to be

nonconformities by the Board. The vehicle was out of service by reason of repair of the nonconformities a total of 48 cumulative days. With respect to the broken windshield, the vehicle was presented to the service agent for repair of a "whistle" noise in the left area of the windshield. The authorized service agent was advised to "cut out the glass and look for a void" in the urethane, and the windshield was broken by the service agent when taking it out. The replacement windshield had to be shipped from England, resulting in the vehicle remaining out of service for 25 days. None of this information was stated in the written repair order prepared by the service agent. Moreover, for the first time at the hearing, the Manufacturer, through Counsel, asserted that the time it took for the service agent to repair the broken windshield should not be considered as out-of-service days, because the vehicle was not brought in for repair of a nonconformity at the time the windshield was broken.

The Board declined to accept the Manufacturer's contention that the time the vehicle was out of service for repair of the broken windshield nonconformity should not be considered "days out of service" under the statute. Such an interpretation was contrary to the plain meaning of the statute and if adopted would have led to an absurd result. The definition of "nonconformity" excludes only those defects or conditions that result from an "accident, abuse, neglect, modification, or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent." §681.102(15), Fla. Stat. The undisputed evidence established that the windshield nonconformity resulted from an accident by the authorized service agent. This was admitted by the Manufacturer's witness. The fact that repair work performed by the authorized service agent created a nonconformity where none may have existed before did not take the case outside the coverage of the Lemon Law, and clearly, since the accident was by the authorized service agent, it specifically was not excluded from the statutory definition of nonconformity. Addition of the 23 days out of service for repair of the electrical nonconformity resulted in a total of 48 days out of service. Accordingly, the Consumer was awarded a refund.

MANUFACTURER AFFIRMATIVE DEFENSES §681.104(4), F.S.

Defect does not substantially impair use, value or safety of vehicle §681.104(4)(a), F.S.

Herren v. Toyota Motor Sales USA, Inc., 2012-0217/TPA (Fla. NMVAB October 15, 2012) The Consumer complained of poor gas mileage in his 2012 Toyota Camry. He measured the vehicle's fuel consumption by keeping a log of the number of gallons of fuel it took to fill the gas tank and dividing that by the number of miles driven during that time. By his calculations, the vehicle was getting in the range of 18.9 to 19.7 miles per gallon in the city. The Consumer believed that "something had to be wrong with the engine," because the gas mileage did not fall within the Environmental Protection Agency (EPA) fuel economy estimates set forth on the Monroney sticker that was attached to the vehicle at the time of purchase (25 mpg City and 35 mpg Highway, with an "expected range for most drivers" of 20-30 mpg in the city and between 29-41 mpg on the highway). The Manufacturer asserted that the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative testified that he inspected the vehicle at the final repair attempt and found the tires were in good condition, and the tailpipe showed only normal, light-grey output. Using

"Techstream" diagnostic software, he found no diagnostic trouble codes, and all on-board monitors were "within parameters." He took the vehicle for a 75-mile test drive and did not notice any "drivability concerns" and found nothing wrong with the vehicle's fuel management. He averaged 32 miles per gallon during his test drive, which included both city and highway driving. In his view, if a part had malfunctioned and affected the fuel economy, he would expect this to show up on Techstream, but he found no malfunction or defective condition in the fuel system. He pointed out that the EPA sticker stated that "actual mileage will vary depending on how you drive and maintain your vehicle," and stated that the EPA information was provided for consumers to be able to compare model to model, not as a guarantee of the mileage a consumer will get while driving that vehicle. The Board found the evidence presented by both parties did not reveal the existence of a defect or condition that substantially impaired the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the case was dismissed.

Dungey v. Kia Motors America Inc., 2012-0211/TPA (Fla. NMVAB October 17, 2012)
The Consumer complained of poor gas mileage in his 2012 Kia Sorrento. His only complaint was that the highway mileage was overstated on the window sticker at 32 miles per gallon and he was not attaining the "advertised" highway miles based on the representation by the salesman that he would be "getting 35 miles per gallon or better" at "highway" speeds. In his opinion "highway" speeds were the stated speed limit; for example, on Interstate 75 near his home, the speed limit is 70 miles per hour and that is what he normally drives. He did acknowledge that there was nothing wrong with the operation of the vehicle or the estimated "around town" mileage. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the vehicle. The Manufacturer's witness testified the Environmental Protection Agency sticker for the vehicle indicated the "average" miles per gallon for city driving was 22 and the "average" miles per gallon for highway driving was 32. According to him, "actual" mileage achieved was based on the way a vehicle was driven and the load contained; there was a range listed on each sticker. The range for "highway" driving on the subject vehicle was 26 through 38 miles per gallon. He additionally stated that the optimum method for testing highway miles per gallon, pursuant to the federal government, was to drive at least 10 miles and attain speeds of between 48 and 60 miles per hour. Once you exceed 60 miles per hour, the vehicle responds to more "kinetic energy" and the mileage will drop down. If the vehicle were not operating properly, the engine would register a trouble code, according to the witness. Computer diagnostics revealed no fault or trouble codes on this vehicle. The Board found that the evidence failed to establish that the poor fuel mileage complained of by the Consumer substantially impaired the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the case was dismissed.

Benson v. Toyota Motor Sales USA, Inc., 2012-0249/JAX (Fla. NMVAB November 16, 2012)
The Consumer complained of poor fuel mileage in his 2011 Toyota RAV4. According to him, the 2011 RAV4 he traded in for the 2011 RAV4 which was the subject of the case had been getting 27.4 miles per gallon. He asserted that the subject vehicle, however, was getting only 25.4 miles to the gallon. While he acknowledged that the mileage he claimed to be getting on the subject vehicle was within the fuel economy estimates published by the Environmental Protection Agency ("EPA") for the vehicle, he felt that it was wrong for the vehicle to get lower mileage

than the vehicle he used as a trade-in. He also noted that the vehicle was not attaining the 33 highway miles per gallon that he believed the selling dealer represented he would get from the vehicle. The Manufacturer asserted that the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle, "because the vehicle was operating properly and as designed;" and the gas mileage asserted by the Consumer did not reflect the actual gas mileage of the vehicle. The Manufacturer's representative testified that the gas mileage figure asserted by the Consumer could not be considered reliable, because the method used by the Consumer to calculate that mileage rendered the Consumer's number unreliable. As background, he noted that the EPA's gas mileage estimates for the Consumer's vehicle were 18 to 26 miles per gallon for city driving, and 23 to 33 miles per gallon for highway driving. He explained that the EPA's gas mileage estimates are obtained under carefully controlled laboratory conditions that were impossible to duplicate in the field. However, when he tested the Consumer's vehicle to check its gas mileage, he took a number of steps to assure that his figures would be as accurate as possible, steps which had not been taken by the Consumer. Those steps included using the same gas station and gas pump when filling and refilling the vehicle (because the calibration of the pump shut-off valves may differ between stations and pumps), "filling to the 'second click'" of the shut-off valve in order to eliminate any "false fill" issues, and facing the vehicle in the same direction when filling up, in case the pavement at the pump is not level. He testified that, using that methodology, the gas mileage of the vehicle on his two test drives was 26.88 miles per gallon at the final repair attempt, and 28.1 miles per gallon at the prehearing inspection. He further testified that he also checked the Consumer's vehicle for any diagnostic codes that would indicate problems, and checked the vehicle's brakes to make sure there was no drag on the wheels. No problems were found. The Board found the evidence failed to establish that the poor fuel mileage complaint made by the Consumer substantially impaired the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the case was dismissed.

Accident, Abuse, Neglect, Unauthorized Modification §681.104(4)(b), F.S.

Wachs v. Nissan Motor Corporation USA, 2012-0215/WPB (Fla. NMVAB October 15, 2012) The Consumers complained of an unintended acceleration in their 2011 Infiniti G25. The Consumer testified that, once in February 2012, and the second time in June 2012, when he was a passenger in the vehicle and his wife was driving, the vehicle suddenly accelerated. The first time this happened heavy application of the brake pedal stopped the vehicle, but only after the vehicle crossed Federal Highway and "T-boned" another vehicle. The second time the unintended acceleration happened, it was raining heavily and his wife was about to valet their vehicle when it suddenly accelerated. She turned the steering wheel so she would not hit the valet, and the vehicle hit the building instead. In its Answer filed prior to the hearing, the Manufacturer asserted the defense of driver error. The Manufacturer's representative explained all Nissan and Infiniti vehicles incorporate a "brake override" system; that is, if the brake pedal and accelerator pedal are both depressed, the brake pedal will "override" the accelerator pedal and the vehicle will come to a stop. The Consumers did not bring the vehicle to a Manufacturer authorized service agent after either accident, and while there was no information regarding the first mishap, because the airbag deployed after the second mishap, they were able to obtain data from the airbag sensor.

Whenever an airbag deploys, the Event Data Recorder (EDR) stores information related to airbag deployment for seven seconds before and seven seconds after an accident in the vehicle's on-board computer. Another Manufacturer's witness testified that, after the second accident, the vehicle's diagnostic unit was replaced, but he was able to retrieve the original diagnostic unit from the body shop. The data revealed the brake pedal was released prior to, during and after the point of impact; and the accelerator pedal position showed that it was depressed lightly three seconds before impact, and depressed heavily two seconds before impact. The Manufacturer's position was that the Consumer unintentionally pressed the accelerator pedal when she intended to depress the brake pedal, and the vehicle responded to driver input, rather than the cause being any defect in the vehicle. The evidence failed to establish that the problem complained of by the Consumers was a defect or condition that substantially impaired the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute; rather, the Board found the evidence was more persuasive that the complaint resulted from the actions of the driver. Accordingly, the case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Garcia v. BMW of North America LLC, 2012-0220/ORL (Fla. NMVAB November 5, 2012) The Consumer's 2011 BMW 535i was deemed a "lemon" by the Board. At the hearing, the Consumer presented the testimony of Robert Richardson, Automotive Litigation Consultants, LLC, who testified as an expert. The Consumer requested reimbursement of $1,580.00 for expert fees associated with the evaluation of the vehicle by Mr. Richardson and his attendance at the arbitration hearing as an incidental charge. The Manufacturer, through counsel, objected to any reimbursement for expert fees, asserting it was not necessary for a consumer to present expert testimony at a Lemon Law hearing and that such fees do not qualify for reimbursement under the statutory definition of "incidental charge." The Board awarded $790.00 as a reasonable amount for the expert's evaluation of the vehicle and attendance at the hearing. The Manufacturer's objection to reimbursement for the expert's fees was denied.

MISCELLANEOUS PROCEDURAL ISSUES:

Jenson v. Toyota Motor Sales USA, Inc., 2012-0262/ORL (Fla. NMVAB November 21, 2012) At the beginning of the hearing, the Consumer's local counsel advised the Board that, neither the Consumer's Attorney of record, nor the Consumer, had received any of the Manufacturer's Exhibits listed on the Index to Case File. Upon inquiry, the Manufacturer's representative, who had no personal knowledge of the transmission of the documents to the Consumer's Attorney, produced an email that was sent on behalf of the Manufacturer to the Consumer's Attorney; however, the email contained only one attachment: the prehearing information sheet. Pursuant to paragraphs (10) and (22), *Hearings Before the Florida New Motor Vehicle Arbitration Board,* all documents a party intends to present for consideration by the Board must be received by the Board Administrator and the opposing party no later than five days before the hearing. Failure to

do so may result in the Board declining to consider the documents "unless good cause is shown for the failure to comply." The Manufacturer having failed to show good cause for the failure to comply with the time requirements in the rules, the documents were not considered by the Board.