OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2018 - March 2018 (1st Quarter)

JURISDICTION:

Consumer §681.102(4), F.S.

Mutch Expedite LLC, Robert Moffett and Matthew Reid v. Ford Motor Company, 2017-0471/JAX (Fla. NMVAB February 13, 2018)

The Manufacturer asserted the "Owner" was "not a 'Consumer'" as that term was defined by the Lemon Law. The Manufacturer elicited testimony from one of the Consumers that the vehicle was a "commercial vehicle," and was not used for personal, family or household purposes. In order to be eligible for the refund or replacement remedies set forth at Section 681.104(2), the person seeking such relief must be a "Consumer." Section 681.102(4), Florida Statutes defines a "Consumer" as:

> the purchaser, other than for purposes of resale, or the lessee, of a motor vehicle primarily used for personal, family, or household purposes; any person to whom such motor vehicle is transferred for the same purposes during the duration of the Lemon Law rights period; and any other person entitled by the terms of the warranty to enforce the obligations of the warranty.

(emphasis added). The Manufacturer asserted that the Consumers were not qualified for relief under the Lemon Law in this case because the vehicle was used solely for commercial or business purposes. That argument was rejected on the basis of *Results Real Estate v. Lazy Days R.V. Center*, 505 So. 2d 587 (Fla. 2nd DCA 1987); the Manufacturer presented no evidence showing the Consumers were not entitled by the terms of the warranty to enforce the obligations of the warranty. §681.102(4), Fla. Stat. Therefore, the Manufacturer's assertion was denied and the Consumers were subsequently awarded a refund by the Board.

NONCONFORMITY 681.102(15), F.S.

Silberstein v. Volkswagen/Audi of America, Inc., 2017-0369/FTL (Fla. NMVAB January 25, 2018)

The Consumer complained of an intermittent brake noise in his 2015 Audi S5 Cabriolet. Shortly after his purchase of the vehicle, the Consumer began to notice an intermittent brake squeak that mostly occurred when bringing the vehicle to a stop from low speeds. He explained

that because 80% of his driving was done around town, most of his driving was done at low speeds. The Consumer testified that the squeak initially occurred infrequently, but increased in frequency as the vehicle's mileage increased. And while the noise initially occurred most often in the morning, as the vehicle's mileage increased the Consumer began to hear the noise throughout the day. The Consumer stated that by the September 16, 2016 repair attempt, when the vehicle had more than 8,000 miles, he felt like the brakes were "screaming like a banshee." The Consumer acknowledged that the repairs performed at that time, replacement of the brake pads and rotors, did improve the noise. The improvement was only temporarily, however, and as it had after initially purchasing the vehicle, the noise began again and steadily increased in frequency until the brake pads, rotors and guide pins were replaced in July 2017, this repair again occurring after approximately 8,000 more miles were put on the vehicle. According to the Consumer, the noise in question could be heard whether the vehicle's convertible top was up or down, and could also be heard when the radio was playing. In addressing the current noise level, the Consumer testified that the vehicle has accumulated less than 8,000 miles since the July 2017 final repair attempt, so the noise was not currently at its worst; however, it has been steadily increasing since that repair, and he was certain that it would continue to worsen as it consistently had in the past. The Consumer played two videos for the Board which demonstrated the noise. According to the Consumer, the videos were taken on July 16, 2017, with 17,551 miles on the vehicle, and on December 14, 2017, with 21,716 miles on the vehicle. The Consumer stated that he was concerned for his safety because he has always understood that a brake noise was indicative of a need to change the brake pads and/or rotors; therefore, to continue driving the vehicle when it had a brake noise was not safe.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's witness testified that he personally was never able to reproduce the noise. He acknowledged that, according to the repair orders, another service consultant did reproduce the noise. A second Manufacturer's witness testified that the brake pads and rotors were replaced as a "goodwill" gesture.

The Board found that the evidence established that the intermittent brake noise 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.

Moncada v. Mercedes-Benz USA, LLC, 2017-0461/WPB (Fla. NMVAB February 5, 2018)

The Consumers complained of a brake squeal in their 2017 Mercedes-Benz GLC-CL. Mr. Moncada testified that the brakes intermittently squealed when he applied pressure to the brake pedal, and said the problem occurred at least once each time he drove the vehicle. He noted that the brake squeal would initially subside after each repair visit, but would eventually return and progressively get louder after each successive repair. He added that he has limited his use of the vehicle due to his concerns for his safety. He acknowledged that the problem continued to exist and occurred on the day of the hearing.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative testified that it is

not uncommon for a consumer to hear a brake squeal when a consumer brakes for the first time each time the vehicle was being driven. He testified that he was able to duplicate the brake squeal during a test drive at the final repair attempt but did not find any problems with the functionality of the brakes or detect any safety concerns with the vehicle. He stated that the vehicle drives in a similar manner to other like models. He noted that two local information bulletins, which were created by the Manufacturer to address known consumer concerns, were performed on the vehicle multiple times to reduce the brake noise.

A majority of the Board found that the evidence established that the brake squeal substantially impaired the use of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumers were awarded a refund.

Lyndaker v. Mercedes-Benz USA, LLC, 2017-0528/MIA (Fla. NMVAB February 22, 2018)

The Consumer complained of a malfunctioning information display system in his 2017 Mercedes Benz E300W. The Consumer testified that shortly after he leased the vehicle, he experienced a problem with the information display system, which encompassed the digital instrument cluster above the steering wheel and the command screen in the center of the front dashboard. He explained that the digital instrument cluster, which displayed the odometer and gas gauge, and the command screen, which displayed the radio and temperature controls, would flicker off for two to three seconds and then automatically turn back on. He stated that in September 2017, the digital instrument cluster went completely black and would not turn back on. He testified that after the first repair attempt, the digital instrument cluster was working properly but the command screen continued to flicker on and off. He explained that the command screen continued to flicker, that it occurred every third time that the vehicle was driven, and that it last occurred two days prior to the hearing. He admitted that he drove the vehicle less frequently and no longer used features like self driving because he did not feel safe in the vehicle.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative testified that he never conducted a physical examination of the vehicle, but confirmed that the dealership replaced the digital instrument cluster at the September-October 2017 repair attempt. He acknowledged that the vehicle remained at the authorized service agent for so long because the replacement part was not delivered to the dealership until October 27, 2017. He stated that the dealership was never able to duplicate the concern with the command screen, and asserted that even if the Consumer was experiencing a flickering of the command screen, the Consumer still had physical control over the features displayed within the command screen. He also noted that the Consumer can adjust the settings of the radio and temperature controls with manual knobs, and even has the option of turning off the command screen entirely.

The Board found that the evidence established that the malfunctioning information display system 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.:

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

Zumarraga v. American Honda Motor Company, 2017-0417/MIA (Fla. NMVAB March 20, 2018)

The Consumer complained of a vibration at idle while in gear and a hesitation/shudder upon acceleration from a stop in her 2015 Honda CR-V. The evidence established that the vibration at idle while in gear and the hesitation/shudder upon acceleration from a stop substantially impaired the use and value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. With regard to the hesitation/shudder upon acceleration from a stop, the vehicle was presented to the Manufacturer's authorized service agent for repair on January 26, 2017, when no repairs were performed, and May 4, 2017, when no repairs were performed. On August 15, 2017, the Consumer sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the notification on August 22, 2017. On August 29, 2017, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. The Manufacturer's representative stated that during the final repair attempt, he performed one of two countermeasures available for complaints regarding vibrations that occurred when the vehicle registered 1,000-1,200 RPM at takeoff. He acknowledged that he did not perform the second countermeasure, a software update, because the Consumer declined to sign a waiver acknowledging that the software update may decrease fuel economy. The vibration at idle while in gear and the hesitation/shudder upon acceleration from a stop continued to exist after the final repair attempt.

While section 681.104(3), Florida Statutes, creates a presumption of a reasonable number of attempts, a consumer is not required to prove the elements of the statutory presumption in order to qualify for relief under the Lemon Law; the statute does not specifically define how many attempts are required before it can be concluded that a manufacturer has had a reasonable number. With regard to the hesitation/shudder upon acceleration from a stop, a majority of the Board found that the evidence established that the nonconformity was presented for repair to the Manufacturer's authorized service agent on two occasions, prior to the Manufacturer's receipt of written notification, and was then subject to repair by the Manufacturer at the final repair attempt. The hesitation/shudder upon acceleration from a stop continued to exist after the final repair attempt. Since the Manufacturer did not perform the software update, and there was no alternative repair option offered by the Manufacturer for the hesitation/shudder upon acceleration from a stop nonconformity, it would have been pointless for the Consumer to bring the vehicle back to the authorized service agent for additional repairs beyond the two visits that occurred prior to the final repair attempt. A majority of the Board found that under the circumstances of the case, the Manufacturer had been afforded a reasonable number of attempts to correct the nonconformity, and had failed to do so. Accordingly, the Consumer was awarded a refund.

Quintana v. Toyota Motor Sales, USA, Inc., 2017-0495/MIA (Fla. NMVAB February 14, 2018)

The Consumer complained of a pull to the right in her 2017 Lexus GX460. The evidence 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 vehicle was presented to the Manufacturer's authorized service agent for repair of the pull to the right on June 6-8, 2017. In addition, the Consumer also took the vehicle to the authorized service agent complaining of the pull to the right on August 2-7, 2017, and August 14-15, 2017, at which time the authorized service agent road tested the vehicle, but performed no repairs. On July 6, 2017, the Consumer sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the notification on July 10, 2017. On October 16, 2017, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, a four wheel computer alignment was performed and a new set of tires were installed on the vehicle. The Consumer then test drove the vehicle and continued to experience a pull to the right so the original tires were reinstalled on the vehicle. The pull to the right continued to exist after the final repair attempt.

The Lemon Law does not specifically define how many attempts are required before it can be concluded that a manufacturer has had a reasonable number. Section 681.104(3), Florida Statutes, creates a presumption of a reasonable number of attempts; however, a consumer is not required to prove the elements of the statutory presumption to qualify for relief under the Lemon Law. The evidence established that the nonconformity was presented for repair to the Manufacturer's authorized service agent on one occasion, June 6, 2017, prior to the Manufacturer's receipt of written notification, and was then subject to repair by the Manufacturer at the final repair attempt on October 16, 2017. The pull to the right nonconformity continued to exist after the final repair attempt. Following the June 6, 2017 repair, the authorized service agent told the Consumer not to bring the vehicle back to the dealer for additional repairs and provided the Consumer with a copy of the Consumer Guide to the Florida Lemon Law. Even though the Consumer was told not to seek additional repairs by the authorized service agent, the Consumer provided the Manufacturer's authorized service agent with two additional repair attempts, on August 2, 2017, and August 14, 2017, before the final repair attempt was conducted. Under the circumstances of the case, the Board concluded that the Manufacturer had a reasonable number of attempts to conform the subject vehicle to the warranty as contemplated by the Lemon Law. Having failed to do so, the Consumer was qualified for the requested relief under the Lemon Law and was awarded a refund.

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

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

Lamoureux v. Kia Motors America, Inc., 2017-0356/FTL (Fla. NMVAB March 27, 2018)

The Consumers complained of sludge build-up in the engine resulting in exhaust smoke in their 2015 Kia Optima. The Consumer's daughter testified that she was the primary driver of the vehicle in question, and that when the vehicle was taken to the authorized service agent on February 16, 2017, there were large clouds of white smoke coming from the vehicle. She received a phone call shortly after leaving the vehicle, and was told that it needed a new engine. She testified that she was not concerned, since the vehicle was under warranty, and that she passed the information along to her father; once she had passed the information along, the matter was "out of her hands at that point." With regard to the vehicle's oil changes, she testified that her father performed the oil changes on almost all of the family's vehicles, including the subject vehicle. She testified that she had seen him under the car while it was jacked up in the driveway, that her father kept a log of the oil changes he performed on the vehicle and that she trusted that her father changed the oil correctly. With regard to the reason that the vehicle was taken to Pep Boys for an oil change on February 16, 2017, the same day the vehicle was taken to the authorized service agent, instead of the oil being changed by her father, she testified that her parents were going out of town, "they were under time constraints," and they had a coupon for a free oil change. She acknowledged that she had been seeing white smoke coming from the vehicle's exhaust by that time, and that Pep Boys told her there was sludge in the engine and that the engine needed to be replaced. The Consumer testified that her husband purchased the materials he used to perform oil changes at Pep Boys, and she acknowledged that no receipts for the materials were provided to their attorney for submission at hearing. With regard to the out-of-town trip that was the driving factor in taking the vehicle to Pep Boys for an oil change on February 16, 2017, and why her husband didn't simply change the oil when they returned, she acknowledged that it was not an extended trip – perhaps a long weekend – and testified that other than the coupon they had, there was "no reasoning, that's just the way it worked out."

The Manufacturer asserted the alleged nonconformity was the result of abuse, neglect, or unauthorized modifications or alterations of the motor vehicle by persons other than the manufacturer or its authorized service agent. The Manufacturer's representative testified that oil performs many functions in an engine. It cools the engine, lubricates its parts, and provides hydraulic pressure to its components. However, over time, engine oil accumulates soot or carbon dust from the burning gasoline, and needs to be periodically changed to keep it clean; if the oil is not periodically changed, soot accumulations will build to a point where the oil becomes a paste or "sludgy" substance. He testified that he inspected the subject vehicle in June of 2017. He test drove the vehicle, and while the engine started without problem, he observed greyish blue smoke coming from the tailpipe. He then pulled the vehicle into the shop, and verified that the oil level was full, consistent with the oil having just been changed by Pep Boys. He also inspected the valve train photos that the authorized service agent had previously taken, which showed sludge. The vehicle was put on a lift and the oil pan was removed, revealing sludge deposits. He also, in scanning the vehicle for codes, discovered a misfire code in the vehicle history that was consistent with a vehicle that was burning oil, although the vehicle was

not misfiring at the time of his inspection. With regard to why the engine would be burning oil, he explained that the amount of sludge found in this engine would clog up the oil control rings; as a piston moves up and down inside a cylinder, there are two compression rings at the top to seal air, and there was an oil control ring at the bottom to release oil out of the bottom of the cylinder. However, if oil becomes sludge, it could not pass through the oil control ring and was trapped in the cylinder, where it would burn. He opined that was what was occurring in this engine. Returning to the details of his inspection, he noted that, consistent with the recent Pep Boys oil change, the oil in the vehicle was clean, but there were sludge deposits coating the surface areas of the engine components. Specifically, he testified that there was sludge throughout the drive train, and through the bottom of the engine, consistent with a lack of maintenance. In his opinion, the engine oil in this vehicle was not properly maintained. As for the maintenance log submitted by the Consumers to document oil changes performed by them, he testified that the document was not provided to the Manufacturer during their investigation, when information about the maintenance of the vehicle had been sought, and was not submitted as evidence at the Better Business Bureau hearing. The Manufacturer's witness testified that he was involved with the vehicle when it was brought in to the authorized service agent on February 16, 2017. According to him, the engine valve cover was removed and the initial finding was that the engine was "sludged," resulting in smoke coming from the engine. In his experience, this was a result of lack of maintenance. After observing the condition of the engine, he testified that he had the service advisor contact the owner to request the maintenance records for the vehicle. According to him, the service maintenance log submitted into evidence at hearing by the Consumers was never provided to the authorized service agent.

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. (emphasis added). The evidence established that the sludge build-up in the engine resulting in exhaust smoke was the result of neglect, specifically a failure to perform regular oil changes on the vehicle. The complained of defect did not constitute a "nonconformity" as defined by the statute; therefore the Consumers' case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

Navitsky v. General Motors, LLC, 2017-0515/ORL (Fla. NMVAB March 23, 2018)

The Consumer's 2016 Chevrolet Cruze was declared a "Lemon" by the Board, because of a water leak that substantially impaired the use, value and safety of the vehicle. The Consumer requested reimbursement of the following as incidental charges: $6.50 for postage to send written notification to the Manufacturer; $100.00 to have the vehicle professionally detailed; $130.59 for a replacement tire; and $143.00 for Do-It-Yourself pest control products. The Manufacturer objected to reimbursement of the detailing and pest control costs, arguing that the physical condition of the vehicle was due to the way the Consumer kept her car, not to any

nonconformity. The Consumer's request for reimbursement for $100.00 to have the vehicle professionally detailed; $130.59 for a replacement tire; and $143.00 for Do-It-Yourself pest control products as incidental charges were denied as the charges were not directly caused by a nonconformity. §681.102(7), Fla. Stat.

MISCELLANEOUS PROCEDURAL ISSUES:

Quintana v. Toyota Motor Sales, USA, Inc., 2017-0495/MIA (Fla. NMVAB February 14, 2018)

The Manufacturer's Answer in this case was due to be filed on December 31, 2017, but was not filed until January 4, 2018. Pursuant to paragraph (8), *Hearings Before the Florida New Vehicle Arbitration Board*, "the Manufacturer's Answer form must be filed with the Board Administrator no later than 20 days after receipt of the Notice of Arbitration," and any affirmative defenses raised in the Manufacturer's untimely Answer "cannot be raised at the hearing, unless permitted by the Board." At the hearing, counsel for the Manufacturer asserted that the Manufacturer's untimely answer was due to excusable neglect. The Manufacturer's Lemon Law and Arbitration Administrator, Lexus Southern Area Office, submitted an affidavit in which she claimed that the untimely answer was the result of unintentional oversight due to a heavy workload and holiday office closure. The Consumer objected to the untimely Answer being considered by the Board. Upon consideration, a majority of the Board declined to admit the Manufacturer's Answer, and the Manufacturer was not permitted to present evidence in support of its defenses.

Alvarez-Sang v. Hyundai Motor America, 2017-0222/TPA (Fla. NMVAB January 1, 2018)

Six days before the hearing, counsel for the Consumer emailed videos purporting to demonstrate the alleged nonconformity occurring to the Board's eFiling box. Pursuant to the Board's eFiling requirements, "[r]eadable text documents in .pdf format ONLY" may be filed electronically; therefore, the videos were returned to Counsel with the notification that the videos had not been accepted for filing. The videos were not again submitted until the day of hearing, at which time counsel for the Consumer advised the Board that the testimony of the Consumer and her two witnesses "would bring out the issue," and the videos would only be used to highlight and help the Board see exactly what the witnesses were describing. Upon consideration, the Board declined to accept the videos into evidence.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2018 - June 2018 (2nd Quarter)

JURISDICTION:

Wellington Florist, Inc. and John Varvarigos v. FCA US LLC, 2018-0021/WPB (Fla. NMVAB May 23, 2018)

The Manufacturer argued that the Consumer's case should be dismissed because it was not timely filed. Section 681.109(4), Florida Statutes, states that 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 . . .." The Lemon Law rights period is defined under 681.102(9), Florida Statutes, as "the period ending 24 months *after* the date of original delivery of a motor vehicle to a consumer." In this case, the date of delivery of the subject vehicle was November 18, 2015, and the Consumers filed the Request for Arbitration with the Board on January 18, 2018. The Manufacturer asserted that the filing deadline in this case was January 17, 2018, and that the Consumers' Request for Arbitration was therefore one day late. The Consumers asserted that because the end of the Lemon Law rights period applicable in this proceeding fell on a weekend, the Board should look to the Florida Rules of Judicial Administration, Rule 2.514 (a)(1) in calculating the expiration of the Lemon Law rights period. In that case, the Consumers' "period ending 24 months *after* the date of original delivery of the motor vehicle to a consumer" would fall on the weekend of November 18, 2017 and therefore "the period ending 24 months *after* the date of original delivery" to the Consumers would be extended to the following Monday, November 20, 2017. A majority of the Board found that the expiration of the Lemon Law rights period, in this case, fell on November 18, 2017, which was a Saturday, and therefore, based on the guidance provided by the Florida Rules of Judicial Administration, the expiration date should be extended to the following Monday, November 20, 2017. The majority of the Board calculated that 60 days *after* the expiration of the Lemon Law rights period fell on January 19, 2018, making the filing timely. The Manufacturer's assertions to the contrary were rejected.

Consumer §681.102(4)F.S.

Johnston v. Ford Motor Company, 2017-0502/ORL (Fla. NMVAB April 13, 2018)

The Consumer complained of a condition in which the engine went into limp mode due to the powertrain control module receiving a faulty reading in his 2015 Ford F150. The Consumer testified that the vehicle had 84,645 miles on it, and 90 percent of the miles put on the vehicle were for work. The Manufacturer asserted that the Consumer was not entitled to relief because he used his truck for business purposes and therefore he did not meet the definition of a "consumer" under the Lemon Law.

In order to be eligible for the refund or replacement remedies set forth at Section 681.104(2), the person seeking such relief must be a "consumer." Section 681.102(4), Florida Statutes defines a "consumer" as:

> [T]he purchaser, other than for purposes of resale, or the lessee, of a motor vehicle primarily used for personal, family, or household purposes; any person to whom such motor vehicle is transferred for the same purposes during the duration of the Lemon Law rights period; and any other person entitled by the terms of the warranty to enforce the obligations of the warranty.

(emphasis added). The Manufacturer had asserted that the Consumer was not entitled to relief under the Lemon Law because the vehicle was used 90 percent of the time for business purposes. The Manufacturer's argument, however, ignores the third category of individuals entitled to relief under the Lemon Law. The Manufacturer presented no evidence showing the Consumer was not entitled by the terms of the warranty to enforce the obligations of the warranty, and in fact had not so asserted. The Manufacturer's argument was rejected by the Board. *Results Real Estate v. Lazy Days R.V. Center*, 505 So.2d 587 (Fla. 2d DCA 1987).

Warranty §681.102(22)F.S.

Johnston v. Ford Motor Company, 2017-0502/ORL (Fla. NMVAB April 13, 2018)

The Consumer complained of a condition in which the engine went into limp mode due to the powertrain control module receiving a faulty reading in his 2015 Ford F150. The Consumer testified that the vehicle had 84,645 miles on it, and 90 percent of the miles put on the vehicle were for work. The Manufacturer asserted that the alleged nonconformity occurred outside Ford's warranty coverage. The Manufacturer's representative testified that Ford's "bumper to bumper" warranty for 2015 vehicles was 36,000 miles or three years, whichever came first, and the powertrain warranty was 60,000 miles or five years, whichever came first.

The Board rejected the Manufacturer's argument that the Consumer was not entitled to relief under the Lemon Law on the ground that his vehicle was "out of warranty" because it had 84,645 miles on it. Chapter 681, Florida Statutes, Florida's "Lemon Law" or "Motor Vehicle Warranty Enforcement Act," was created to provide consumers with relief "for a motor vehicle which cannot be brought into conformity with the warranty provided for in this chapter." §681.101, Fla. Stat. [emphasis added]. Under Chapter 681, a manufacturer has a duty to conform a motor vehicle to the warranty provided for in Chapter 681 if the problem is first reported by the consumer to the manufacturer or its authorized service agent during the Lemon Law rights period, without regard to the vehicle's mileage. §681.103(1), Fla. Stat. The "Lemon Law rights period" is defined as "the period ending 24 months after the date of the original delivery of a motor vehicle to a consumer." §681.102(9), Fla. Stat. The evidence established that the Consumer took delivery of the subject vehicle on December 8, 2015, and the complained-of problem was first reported on September 18, 2017. Even if the term of the Manufacturer's written express warranty had expired, the Lemon Law rights period had not; therefore, the vehicle was not excluded from coverage under the Lemon Law.

NONCONFORMITY 681.102(15), F.S.

Bruscantini v. Ford Motor Company, 2017-0563/MIA (Fla. NMVAB April 5, 2018)

The Consumer complained of an "infotainment" system malfunction in which the system intermittently failed to work, and loose exterior side mirrors in his 2015 Ford F-150. The first time that the Consumer took the vehicle in for the infotainment system malfunction, there was no audio or visual being produced by the system. The Consumer testified that he was unable to turn the radio on or to utilize his cellular telephone through the vehicle's hands-free system (Bluetooth). On another occasion, he presented the vehicle to the authorized service agent with a complaint that the vehicle's FM radio worked, but neither the AM radio nor the Bluetooth connection functioned. At another repair attempt, only the vehicle's AM radio did not work. And on yet another occasion, neither the vehicle's AM or FM radio would function. After each repair attempt, the infotainment system would function properly for a period of time, and then intermittently stop working. At the time of the hearing, the Consumer testified that the infotainment system was malfunctioning about once a month, and that he was unable to predict when the malfunction would occur. With regard to the repair orders submitted into evidence, the Consumer testified that they were not an accurate reflection of all of the repair attempts for the infotainment system malfunction, as there were times when he presented the vehicle for repair but was not provided with a repair order. The Consumer also advised that when a repair order would refer to a problem with the "display screen," neither the radio nor the Bluetooth features of the vehicle were working. With regard to the loose side mirrors, the Consumer explained that the vehicle's side mirrors were equipped with a "power folding" feature. When he utilized that feature to fold the mirrors closer to the vehicle's body, they became "loose" when they were returned to their normal use position. The looseness was manifested by the mirrors moving "back and forth" when the vehicle was driven.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle and any alleged nonconformity was repaired within a reasonable number of repair attempts. The Manufacturer's representative asserted that if there were ever a defect or condition with regard to the infotainment system, it was partially corrected when the master reset was performed, and then fully corrected when the "unknown part" was installed on June 27, 2016. The Manufacturer's witness opined that any problem with the infotainment system was due to the Consumer's cellular telephone, but offered no information to support that contention.

The Board found that the evidence established that the malfunctioning infotainment system substantially impaired the use and value of the vehicle, and that the loose side mirrors 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.

Lavoie v. Toyota Motor Sales, USA, Inc., 2017-0547/ORL (Fla. NMVAB April 23, 2018)

The Consumers complained that the driver's door locked by itself when the vehicle was unlocked in their 2016 Toyota Highlander. The Consumer testified that the driver's door locking by itself occurred at random times, from every few weeks to every few months. According to the

Consumer, when he parked the car in the garage, he would leave the "smart key" fob inside the vehicle, with all four of the doors unlocked. However, when he would return to the vehicle, the driver's door would be locked, although the other three doors would still be unlocked. He stated that he would be unable to unlock the driver's door from the outside of the vehicle using either the "keyless entry" feature, which was supposed to unlock the doors when the smart key fob was in close proximity to the vehicle, or by pressing the button on the fob. He would have to climb inside the vehicle through another door and manually unlock the driver's door from the inside. Even after the authorized service agent instructed him to not leave the key inside the vehicle, and he followed that advice, the driver's door continued to lock on its own at random times. He further testified that the driver's door had locked by itself four times since the final repair attempt in August 2017 and, when that occurred, the driver's door could not be unlocked from outside the vehicle.

The Manufacturer asserted that the vehicle was operating as designed. The Manufacturer's representative testified that the authorized service agent initially advised the Consumers to remove the smart key from the vehicle when parking overnight, and keep the smart key at least 20 feet from the vehicle, because there was a radio frequency range that could run the battery down, creating a drain on the system, and causing low voltage in the vehicle. He could not confirm whether the Consumers' vehicle was tested for low voltage. At the second repair attempt, the diagnostic trouble codes found indicated a possible loose connection in the door harness or body Electronic Control Unit (ECU). He advised the technician that it was most likely caused by the power window master switch (PWMS) in the driver's door or the wires going to it from the driver's kick panel; however, the authorized service agent was not able to duplicate the problem, so no parts were replaced at that time. At the third repair attempt, the Consumers' concern was verified, and the driver's door lock actuator assembly was replaced. When the vehicle returned with the same problem about a week later, the authorized service agent replaced the body ECU and junction block, which was the computer that sent signals to the actuator to lock the doors. He inspected the vehicle at the final repair attempt in August 2017, and found no problems. No related trouble codes were present, and he could not duplicate the Consumers' concern, so no repairs were recommended at that time. He acknowledged that "the driver's door should never lock by itself without the other doors locking," but asserted that the vehicle was fixed when the authorized service replaced the body ECU and junction block.

The Board found that the evidence established that the driver's door locking by itself when the vehicle was unlocked substantially impaired the safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumers were awarded a refund.

Isbell v. Kia Motors America, Inc., 2017-0524/WPB (Fla. NMVAB April 26, 2018)

The Consumer complained of a foul odor emanating from the air conditioning system in her 2016 Kia Soul. The Consumer testified that a moldy odor appeared every time she got in the vehicle, upon initial startup of the engine. She stated that when the odor first appears, she rolls down the windows and "blasts" the air conditioning and the odor dissipates within three to five minutes. She stated that she was allergic to mold and suspected the presence of mold in the vehicle, even after the odor dissipated, because she often suffered from physical symptoms of a mold allergy. She explained that each time she picked her vehicle up after a repair, the odor was

not present but the odor eventually returned. She added that the foul odor continued to occur in the vehicle and noted that there was a 95% probability that the Board would detect the odor during a test drive.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative testified that it was not uncommon to smell a faint musty smell inside a vehicle because bacteria can grow on the evaporator core within the air conditioning system. During his first inspection of the vehicle at the final repair attempt in September 2017, he acknowledged that he detected a faint musty odor, which dissipated after start-up, and used an inspection camera to examine the evaporator core but was not able to detect any signs of mold. He then applied TSB CLI 016, which was a deodorizer treatment of the climate control system, and explained that he sprayed a foaming disinfectant into the evaporator case, where it expands to coat all the components, reapplied the disinfectant a second time, and then applied a deodorizer to the affected area. He testified that when he inspected the vehicle a second time during the prehearing inspection in March 2018, he did not smell any musty odor or detect any signs of mold with his inspection camera. He verified that the air conditioning system was functioning properly and concluded that the vehicle was operating as designed.

A majority of the Board found that the foul odor emanating from the air conditioning system 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.:

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

Bruscantini v. Ford Motor Company, 2017-0563/MIA (Fla. NMVAB April 5, 2018)

The Board found the Consumer's complaint of loose exterior side mirrors in his 2015 Ford F-150 to be a nonconformity. The vehicle was presented to the Manufacturer's authorized service agent for repair of the loose mirrors on March 15, 2017, when the mirrors were "resynchronized"; and August 3-9, 2017, when the Consumer was provided with written instructions on how to "resynchronize" the mirrors and was told that there was nothing more that could be done to repair the loose mirrors. Subsequently, the Consumer sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer did not contact the Consumer within 10 days to arrange for a final repair attempt. The malfunctioning loose mirrors continued to exist.

The issue remaining was whether a reasonable number of attempts were undertaken to correct the nonconformity. Section 681.104(3), Florida Statutes, provides:

> It is presumed that a reasonable number of attempts have been undertaken to conform a motor vehicle to the warranty if, during the Lemon Law rights period …

> (a) The same nonconformity has been subject to repair at least three times by the manufacturer or its authorized service agent, plus a final attempt by the manufacturer to repair the motor vehicle if undertaken as provided for in paragraph (1)(a), and such nonconformity continues to exist.

Paragraph (1)(a) of Section 681.104, Florida Statutes, requires that, after three attempts have been made to repair the same nonconformity, the consumer must give written notice to the manufacturer of the need for repair to allow the manufacturer a final opportunity to cure the nonconformity. The manufacturer "shall have 10 days, commencing upon receipt of such notification, to respond and give the consumer the opportunity to have the motor vehicle repaired at a reasonably accessible repair facility within a reasonable time after the consumer's receipt of the response. … If the manufacturer fails to respond to the consumer and give the consumer the opportunity to have the motor vehicle repaired at a reasonably accessible repair facility …, the requirement that the manufacturer be given a final attempt to cure the nonconformity does not apply." §681.104(1)(a), Fla. Stat. (emphasis added)

Further, while section 681.104(3), Florida Statutes, creates a presumption of a reasonable number of attempts, the statute does not specifically define how many attempts are required before it can be concluded that a Manufacturer has had a reasonable number. Nor is a consumer required to prove the elements of the statutory presumption in order to qualify for relief under the Lemon Law. The evidence established that the loose side mirrors were subjected to repair by the Manufacturer's authorized service agent on at least two occasions. At the second repair attempt, the Consumer was told that nothing more could be done to correct the problem. And, as noted *supra*, the Consumer provided statutory written notification to the Manufacturer, but the Manufacturer failed to respond. Accordingly, the Board found that, under the circumstances of this case, the Manufacturer failed to correct the loose side mirrors nonconformity after a reasonable number of attempts. Accordingly, the Consumer was awarded 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.

Babbitt v. American Honda Motor Company, 2018-0070/ORL (Fla. NMVAB May 12, 2018)

The Consumer complained of excessive condensation on the interior windows in his 2016 Honda Civic. The Consumer testified that when the outside temperature and humidity level significantly fluctuate, for example when there was a cold front and the temperature substantially dropped, all of the windows and the sunroof acquired a "layer of water" on the inside of the vehicle. He first observed the excessive condensation in August 2016 and stated that, when it occurred, he turns on the defroster to remove the moisture, which would dissipate within about 10 minutes. According to him, the condensation problem continued to occur approximately once every two months, and it most recently occurred two weeks before this hearing. He explained that the vehicle was not garaged when parked at his home, and noted that he drove the vehicle

five to seven miles about twice a week. He acknowledged that he had not seen standing water in the vehicle, or felt any dampness on the headliner, nor has the condensation dripped on him or created an odor in the vehicle.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's witness testified that he inspected the vehicle on numerous occasions, beginning with the Consumer's second or third repair visit. Although he acknowledged that the authorized service agent had replaced the sunroof glass and seal in August 2016, and then readjusted the sunroof glass in August 2017, he noted that the authorized service agent had utilized a water leak specialist to look for a water entry point and the specialist found no standing water or leaks. The Manufacturer's representative testified that he participated in the final repair attempt on January 30, 2018, from a remote location, using Facetime, while the technician at the authorized service agent performed a pressure washer test, hitting the seams to check for pinhole water leaks. During the water testing, he observed one drop of water in the trunk where the mounting bolts for the taillight were, and when the technician pulled out the right rear taillight, foliage debris was observed on the taillight grommet, so the right rear taillight was replaced. No other water leaks were detected. According to him, the complained-of condensation was a "phenomenon," and he explained that "it is a perfect storm" for a "greenhouse effect" to occur because the vehicle was sitting outside in a hot, humid area, and not driven much by the Consumer. He opined that there was "nothing wrong" with the vehicle and stated that running the climate control system more often would limit the moisture in the vehicle.

The Board found that the evidence failed to establish that the excessive condensation on the interior windows, as 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 Consumer's case was dismissed.

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

Johnston v. Ford Motor Company, 2017-0502/ORL (Fla. NMVAB April 13, 2018)

The Consumer complained of a condition in which the engine went into limp mode due to the powertrain control module receiving a faulty reading in his 2015 Ford F150. The Consumer stated that the first time he experienced the problem was on September 18, 2017. At that time, he was driving on the interstate at 75 miles per hour, the temperature gauge went to "extreme hot" and the engine went into "limp mode," meaning the vehicle cannot be driven over about 15 miles per hour. The vehicle was towed to the authorized service agent, and the computer was flashed. The problem seemed to be fixed, but the same thing happened the day after he picked up the vehicle from that repair. The vehicle was again towed in for repair, and a sensor was replaced. Two days after he picked up the vehicle, the problem occurred for a third time, and that time the powertrain control module (PCM) was replaced. He picked up the vehicle from this repair visit on October 4, 2017, and the next day, as he was getting off the turnpike, the temperature gauge showed the truck was overheating and it went into limp mode again. He explained that he knew the truck was not really overheating because he checked and there was no "boil-over" of the coolant, and even when the engine was turned off for three hours, when it was turned back on, it would still show that the engine was overheating. The vehicle was again towed to the authorized

service agent, and he was subsequently advised that the problem had been occurring due to rodent damage on the wiring harness to the PCM. He was very upset at hearing this because he believed that cause for the problem had previously been ruled out, and he obtained the damaged wiring harness from the authorized service agent. He displayed the wiring harness to the Board at the hearing and asserted his view that the damage on the wiring looks like it was caused by wire cutters rather than by rodents. He acknowledged that the problem had not recurred since the wiring harness was replaced.

The Manufacturer asserted that the alleged nonconformity was caused by neglect in the form of rodent damage. The Manufacturer's representative stated that she had no personal knowledge of the Consumer's vehicle, but said that she had reviewed the repair orders as well as Ford's internal notes. According to her review, Adam Kuffel was the Field Service Engineer who inspected the Consumer's vehicle after the Manufacturer received written notice. She reported that Mr. Kuffel had checked for diagnostic trouble codes and none were found, and the vehicle operated properly during Mr. Kuffel's 11-mile test drive. According to her, Mr. Kuffel was sent a photograph of the wiring harness that had previously been removed from the Consumer's vehicle, which he used to confirm the authorized service agent's conclusion that the wiring harness had been damaged by rodents. She explained that the wiring harness on the Consumer's vehicle was hidden and requires a "tear down" to be able to see it, and nothing in the repair orders or internal notes showed that this was done until the last repair order. She also explained that the nature of the rodent damage seen was consistent with an intermittent problem that, over time, might begin to occur more often. She concluded that the vehicle was fully repaired at the repair visit that began on October 5, 2017, when the wiring harness was replaced, because there had not been a recurrence of the problem since then.

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. [Emphasis added]. The Board found that the evidence established that the engine going into "limp mode" due to the PCM receiving a faulty reading was the result of rodent damage to the wiring harness to the PCM, unrelated to any action of the manufacturer or its authorized service agent. As such, the complained of defect was the result of accident, abuse, neglect, modification or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent, and did not constitute a "nonconformity" as defined by the statute. Accordingly, the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

Jancura v. Maserati North America, Inc., 2017-0550/WPB (Fla. NMVAB April 26, 2018)

The Consumer's 2016 Maserati GranTurismo was declared a "Lemon" by the Board due to a water leak in the backseat and trunk. The Consumer requested reimbursement of the following as incidental charges: unknown amount for monthly payments for his replacement

vehicle, 6% of the value of the lemon vehicle for a future lost tax credit and $500.00 for clothing and shoe damages. The Manufacturer objected to reimbursement for 6% of the value of the lemon vehicle for a future lost tax credit because this type of request related to a future purchase does not fall within the purview of the statute. The Manufacturer also objected to reimbursement for $500.00 for clothing and shoe damages because the Consumer did not keep receipts for the clothing and shoes and thus could not provide a receipt at the hearing. The Board awarded the Consumer $500.00 for clothing and shoe damage as an incidental charge and therefore, the Manufacturer's objection to the clothing and shoe damage reimbursement was denied. The Consumer's request for reimbursement of monthly payments made on the Consumer's replacement vehicle, and for 6% of the value of the lemon vehicle for a future lost tax credit, was denied. §681.102(7), Fla. Stat.

Seefeldt v. General Motors LLC, 2017-0311/WPB (Fla. NMVAB May 24, 2018)

The Consumer's 2017 Cadillac Escalade was declared a "Lemon" by the Board due to the authorized service agent's placement of the floor mat that caused unintended acceleration. The vehicle was out of service by reason of repair on March 28, 2017 through the present (April 12, 2018), for a total of more than 381 cumulative out-of-service days. The Consumer requested reimbursement of $2,619.50 for the Enterprise rental receipt from August 8-September 23, 2017; $690.99 for Uber receipts for reasonable transportation costs; and an unknown amount for the expert witness fee, as incidental charges. The Board awarded the Consumer $2,619.50 for the Enterprise rental receipt from August 8-September 23, 2017; and $690.99 for Uber receipts for reasonable transportation costs, as incidental charges. The Board denied reimbursement for the expert witness fee. §681.102(7), Fla. Stat.

Reasonable Offset for Use §681.102(19), F.S.

Cyber Marketing and Research, LLC and Musarrat Abdulhussein v. Tesla Motors Inc., 2017-0564/ORL (Fla. NMVAB April 30, 2018)

The Consumer's 2016 Tesla Model X was declared a "Lemon" by the Board. Prior to filing with the Board, the Consumers filed a claim with the National Center for Dispute Settlement (NCDS). Since NCDS was not a state-certified informal dispute resolution procedure in the State of Florida for Tesla Motors, Inc., the Consumers were not required to resort to that program. Nevertheless, the Consumers submitted their claim for a documents-only NCDS arbitration hearing on December 5, 2017. For the purpose of calculating the statutory reasonable offset for use, mileage attributable to the Consumers up to the date of the NCDS hearing was 21,265 miles. The Manufacturer, through Counsel, objected to cutting off the mileage as of the date of the NCDS hearing, arguing that it would give the Consumers "a windfall" because it was not a state-certified procedure and, in addition, it was a "documents only" hearing that created "no impediment to the Consumers' day." The Manufacturer's objection to cutting off the mileage as of the date of the NCDS hearing was denied by the Board.

MISCELLANEOUS PROCEDURAL ISSUES:

Krajec v. Ford Motor Company, 2018-0047/ORL (Fla. NMVAB May 20, 2018)

On March 19, 2018, the Manufacturer filed its "Brief in Support of Defendant's Ford Motor Company's Motion to Stay/Dismiss Proceedings." The Manufacturer asserted that the current proceeding should be stayed or dismissed because the Consumer was bound by a federal court judgment approving settlement in a class action lawsuit, and that the Consumer's continued pursuit of her Lemon Law claim was in violation of that judgment. On May 10, 2018, the Consumer filed her "Response to Ford's Motion to Stay/Dismiss Proceedings." Having reviewed the pleadings and heard arguments from the parties, upon consideration, Ford's Motion to Stay/Dismiss Proceedings was denied by the Board.

Musil v. Volkswagen/Audi of America, Inc., 2017-0583/FTM (Fla. NMVAB April 22, 2018)

On Thursday, March 15, 2018, counsel for the Consumers emailed to the Board's eFiling box three videos purporting to demonstrate the alleged nonconformities occurring. Pursuant to the Board's eFiling requirements, "[r]eadable text documents in .pdf format ONLY" may be filed electronically; therefore, the videos were not accepted for filing at that time. The email stated that the videos would be sent vis "UPS 2nd Day Air to the AG's office in Tampa." The three videos were not received by the Board Administrator until Monday, March 19, 2018, three days before the hearing. Pursuant to paragraphs (6) and (10), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, the Board may decline to consider documents that have not been filed with the Board Administrator, and provided to the opposing party, no later than five days before the scheduled hearing. At the hearing, the Manufacturer objected to the admittance of the three videos, as not submitted timely. Upon consideration, the Board declined to accept the videos into evidence.

Beene v. General Motors LLC, 2018-0036/FTL (Fla. NMVAB May 10, 2018)

At the beginning of the hearing, the Manufacturer sought to introduce Bulletin 06-06-05-001G, regarding the vehicle's active fuel management system, which had not been previously filed with the Board Administrator or provided to the opposing party. The Consumer objected to admission of the bulletin, asserting that it had not been timely submitted by the Manufacturer. Pursuant to paragraph (10), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, the Board may decline to consider documents that have not been filed with the Board Administrator, and provided to the opposing party, no later than five days before the scheduled hearing. Upon consideration, the Board determined that the bulletin would not be admitted into evidence because the document was available as of April 1, 2016, which provided the Manufacturer more than sufficient time to timely submit the document to the Board Administrator and opposing party.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

July 2018 - September 2018 (3rd Quarter)

JURISDICTION:

Consumer §681.102(4) F.S.

Grant v. Kia Motors America, Inc., 2017-0494/TLH (Fla. NMVAB August 17, 2018)

The Manufacturer asserted the Consumer did not have standing to request relief as she was a co-owner of the motor vehicle and not everyone with an ownership interest in the motor vehicle was a party to this matter. In support of that defense, the Manufacturer, in closing argument, asserted that the Consumer did not have standing to independently pursue her arbitration claim because the co-owner of the vehicle, her husband Delano Grant, was not included as a party. The Manufacturer did not dispute that Alicia Grant was a purchaser, and owner, of the vehicle. The Manufacturer asserted that the Consumer did not have standing to pursue this arbitration claim without adding her husband, the co-purchaser of the vehicle, as a party to the proceeding.

Chapter 681, Florida Statutes, does not set forth any requirement that all owners of a motor vehicle be named parties to an arbitration. Rather, in order to be eligible for the refund or replacement remedies set forth at Section 681.104(2), the person seeking such relief must be shown to be a "consumer." Section 681.102(4), Florida Statutes, defines a "consumer" as:

> [T]he purchaser, other than for purposes of resale, or the lessee, of a motor vehicle primarily used for personal, family, or household purposes; any person to whom such motor vehicle is transferred for the same purposes during the duration of the Lemon Law rights period; and any other person entitled by the terms of the warranty to enforce the obligations of the warranty.

The Manufacturer did not contest that Ms. Grant met the definition of a "consumer"; rather, the Manufacturer insisted that all individuals who meet the definition of "consumer" for a particular vehicle must be party to any Lemon Law arbitration for that vehicle. Chapter 681 imposes no such requirement. Section 681.104(2)(a), Florida Statutes, does require, in the event a consumer is successful at hearing, that "clear title to and possession of the motor vehicle" be transferred to the manufacturer. This language protects the manufacturer's legitimate interest in acquiring clear title to a reacquired vehicle. In the present case, the evidence established that Ms. Grant was a "consumer" under section 681.102(4), Florida Statutes, and had standing to pursue this arbitration. The Manufacturer's assertion that the Consumer did not have standing to request this relief solely because of the absence from the arbitration of a co-owner of the motor vehicle was rejected by the Board. Ultimately, the Consumer was awarded a refund.

Epic Global Management and Lamash v. Mercedes-Benz USA, LLC., 2018-0143/FTL (Fla. NMVAB July 11, 2018)

Prior to the start of testimony, the Manufacturer moved to dismiss the Consumers' claim, arguing that Epic Global Management could not be a "consumer" under Florida Lemon Law as it was not a "person." Noting that both Epic Global Management and Victor Lamash were listed as lessees on the lease agreement as well as the Request for Arbitration, and that Victor Lamash was clearly a person who had the authority to enforce the vehicle's warranty, the Board ruled that there was no need to rule on the argument presented. The Manufacturer's Motion to Dismiss was denied.

Ogden v. BMW of North America, LLC., 2018-0211/FTL (Fla. NMVAB September 26, 2018)

The Manufacturer argued that the Consumer was not qualified for relief under the Lemon Law, because the Consumer no longer met the definition of "Consumer," as defined by the statute. More specifically, the Manufacturer asserted that the Consumer no longer had possession of the vehicle and was not eligible to regain possession of the vehicle because the vehicle was repossessed on August 20, 2018 by the lessor, BMW Financial Services. Counsel for the Manufacturer proffered that he received an electronic message (e-mail) from BMW Financial Services informing him that the vehicle had been repossessed because the Consumer had not made a payment for approximately seven months. Counsel also proffered that in a previous telephone call between himself and the Consumer, the Consumer acknowledged that the vehicle had been repossessed. The Manufacturer argued that, if the Board were to make a finding that the vehicle was a "lemon" and subsequently ordered the Manufacturer to repurchase the vehicle, the Consumer could not comply with the statute requiring him to deliver possession to the Manufacturer.

The Consumer acknowledged that he had not made a monthly payment to the lessor, BMW Financial Services, since November 2017. He admitted that on August 20, 2018, the vehicle was towed from his residence, and assumed it was towed to the Manufacturer's authorized service agent. He also acknowledged that he had seen, in the Manufacturer's Amended Answer, the Manufacturer's assertion that the vehicle had been repossessed. In response to the Board's question as to whether he had made any effort to contact the Manufacturer or the lessor since the vehicle was towed from his residence, he confirmed that he has never contacted the Manufacturer or the lessor to inquire about his vehicle.

Section 681.104(2)(a), Florida Statute, provides:

> If the manufacturer or its authorized service agent, cannot conform the motor vehicle to the warranty by repairing or correcting any nonconformity after a reasonable number of attempts, the manufacturer . . . shall repurchase the motor vehicle and refund the full purchase price to the consumer, less a reasonable offset for use, or, in consideration of its receipt of payments from the consumer of a reasonable offset for use, replace the motor vehicle with a replacement motor vehicle acceptable to the consumer. . . . Upon receipt of such refund or replacement, the consumer, lienholder, or

> lessor shall refurnish to the manufacturer clear title to and possession of the motor vehicle.

In order to be eligible for the refund or replacement remedies set forth in Section 681.104(2), the person seeking such relief must be a "consumer." Section 681.102(4), Florida Statutes, defines a "consumer" as:

> [T]he purchaser, other than for purposes of resale, or the lessee, of a motor vehicle primarily used for personal, family, or household purposes; any person to whom such motor vehicle is transferred for the same purposes during the duration of the Lemon Law rights period; and any other person entitled by the terms of the warranty to enforce the obligations of the warranty.

If the Consumer were to prevail in the arbitration hearing, the Consumer must deliver possession of the vehicle to the Manufacturer upon the Manufacturer's compliance with the Board's decision. This requirement necessarily contemplates that the Consumer will be in possession of the vehicle or otherwise capable of delivering the vehicle to the Manufacturer at the time compliance occurs. As the Consumer acknowledged in his testimony, he was no longer in possession of the vehicle, and was no longer capable of delivering possession of the vehicle to the Manufacturer. Since the Consumer is no longer in lawful possession of the vehicle, the Consumer no longer stood in the position of lessee, and was not entitled to enforce the obligations of the warranty. Consequently, the Consumer no longer met the definition of a Consumer under the statute, and does not qualify for the refund/replacement remedies of the statute. Accordingly, the Consumer's claim must be dismissed.

Warranty §681.102(22)F.S.

Christiani v. Nissan Motor Corporation, USA, 2018-0218/JAX (Fla. NMVAB August 2, 2018)

The Consumer complained of excessive rust in the undercarriage of her 2017 Nissan Rogue. The Manufacturer asserted the alleged defect was not covered by the Manufacturer's Warranty. The Board unanimously rejected the Manufacturer's argument that the Consumer was not entitled to relief under the Lemon Law on the ground that her complaint was not covered under the Manufacturer's warranty. Chapter 681, Florida Statutes, Florida's "Lemon Law" or "Motor Vehicle Warranty Enforcement Act," was created to provide consumers with relief "for a motor vehicle which cannot be brought into conformity with the warranty provided for in this chapter." §681.101, Fla. Stat. [emphasis added]. Under Chapter 681, a manufacturer has a duty to conform a motor vehicle to the warranty provided for in Chapter 681 if the problem is first reported by the consumer to the manufacturer or its authorized service agent during the Lemon Law rights period. §681.103(1), Fla. Stat. The "Lemon Law rights period" is defined as "the period ending 24 months after the date of the original delivery of a motor vehicle to a consumer." §681.102(9), Fla. Stat. The evidence established that the Consumer took delivery of the subject vehicle on January 11, 2018, and the complained-of rust concern was first reported on February 21, 2018, well within the rights period. Therefore, the vehicle was not excluded from coverage under the Lemon Law.

NONCONFORMITY 681.102(15), F.S. (2018)

Cowin v. Jaguar Land Rover North America, LLC, 2018-0168/ORL (Fla. NMVAB July 2, 2018)

The Consumer complained that the Bluetooth system was not operating properly in his 2017 Jaguar XF. The Consumer testified that his vehicle had a Bluetooth system that should of allowed him to push a button and speak a command to make or take a telephone call, and if music was playing at the time, the audio system was supposed to stop playing music and shift over to the phone call. However, while he was in the middle of a phone call, the radio would suddenly start playing. When that happened, the phone call was not disconnected, and he could not get back to the call, even by using his hand-held phone. He explained that he made sure his Blackberry smart phone would be compatible with the vehicle before he leased it because he used his time in the car to make patient and pharmacy calls, as well as calls to his family. According to him, the dealership had reviewed information from his phone and confirmed that the phone should be compatible. Because of the problem, he said he did not use the hands-free Bluetooth system if he had to make an important call; rather, he would pull off the road, unpair his phone and then hold it while making the call. He stated that he was given a loaner vehicle during the time his vehicle was in for repair in April. The authorized service agent called and asked him to see if his phone worked in the loaner, so he paired his phone with the vehicle and found that he had no problem using his phone with the Bluetooth system in that vehicle from April 3, 2018 through April 10, 2018, when he picked up his vehicle. Although he was told the radio had been replaced in his vehicle, he had continued to experience the same problem with the Bluetooth system, with the most recent occurrence being the day before the hearing.

The uncontroverted evidence established that the Bluetooth system not operating 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.

Finley v. Toyota Motor Sales, USA, Inc., 2018-0198/FTM (Fla. NMVAB September 17, 2018)

The Consumers complained of a severe hesitation upon acceleration in their 2016 Lexus IS 200t. One Consumer testified that she was afraid to drive the vehicle because, at least three or four times per week, the vehicle would severely lag or hesitate while she was trying to accelerate, both at low and high speeds. She explained that the hesitation occurred mostly while accelerating onto the interstate or when passing another vehicle. She first experienced the hesitation less than one month after taking delivery of the vehicle, and the problem had persisted without improvement despite the Consumers' usage of premium fuel in the vehicle, as recommended by the authorized service agent, and despite the replacement of the vacuum regulator valve at the August 2017 repair visit. Additionally, the other Consumer testified that he drove the vehicle to the hearing, and felt the vehicle hesitate three times during the drive, including while accelerating from 55 to 65 miles per hour to pass a semi-truck.

The Manufacturer asserted 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 on November 18-20, 2017, including test-driving the vehicle 19 miles on city streets and in stop-and-go traffic reaching a maximum speed of 45 miles per

hour, and using a diagnostic tool to monitor the engine control and transmission control computers. He stated that he never experienced the "turbo lag" or "hesitation" complained of by the Consumers; however, he acknowledged that he did not test drive the vehicle at high speeds on the interstate. He confirmed that the vehicle was running with premium fuel, as recommended by the Manufacturer, based upon the "knock learn value" that he recorded during his inspection.

During the hearing, the Board inspected and test drove the vehicle. The parties waived their right to be present in the vehicle during the test drive. The Board drove the vehicle five miles on local roads, including performing accelerations at various speeds and reaching a maximum speed of 55 miles per hour, to replicate the Consumers' complaint. The Board experienced the hesitation complained of by the Consumers several times during the test drive. When the Board slowed the vehicle to 20 miles per hour, then pressed the gas to the floor to accelerate, the Board felt a definite hesitation before the vehicle accelerated and took off; that was tried three different times and the hesitation was observed all three times. Additionally, when the Board accelerated the vehicle at 40 miles per hour, to simulate passing another vehicle, the Board felt a hesitation that was even more pronounced; one Board member opined that there was a "definitive lag" between the time that the gas was pressed to the floor and the time that the vehicle took off. Another Board member described the hesitation experienced as "pretty severe," and noted that it could be felt when accelerating hard.

The Board found that the evidence established that the severe hesitation upon acceleration substantially impaired the use and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. 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.

Jones v. FCA US LLC, 2018-0150/ORL (Fla. NMVAB July 20, 2018)

The Consumer complained of an engine condition that manifested itself as excessive oil consumption and the vehicle stalling in her 2016 Chrysler 200, in which the Board found 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 vehicle was presented to the Manufacturer's authorized service agent for repair on April 25, 2016, when the stored codes were cleared, the vehicle was test driven, and no repairs were performed; July 16, 2016, when a Power Control Module (PCM) software update and a Transmission Control Module (TCM) software update were performed; November 22-23, 2016, when the PCM software was reprogrammed and the oil was changed; January 30-31, 2018, when the oil was changed, an oil consumption test was started documenting the oil level, and no repairs were performed; and March 15-24, 2018, when leak-down and compression tests were performed and the engine long block was replaced, correcting the problem. On March 30, 2018, the Consumer sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer stipulated that it received the notification on April 6, 2018. The

Manufacturer also stipulated that it was afforded a final opportunity to repair the vehicle on April 23, 2018. At that time, the vehicle was inspected, road tested for four miles, and no repairs were performed.

The Board found the evidence established that the nonconformity was subjected to repair by the Manufacturer's authorized service agent a total of five times. The statute does not specifically define how many attempts are required before it can be concluded that a manufacturer has had a reasonable number. Section 681.104(3), Florida Statutes, creates a presumption of a reasonable number of attempts; however, a consumer is not required to prove the elements of the statutory presumption to qualify for relief under the Lemon Law. The Board found the evidence established that the nonconformity appears to have been corrected at the fifth repair attempt for the problem on March 15-24, 2018, when leak-down and compression tests were performed and the engine long block was replaced, which was prior to the Consumer sending written notification to the Manufacturer and prior to the Manufacturer's final opportunity to repair the vehicle on April 23, 2018. However, in light of the fact that the Consumer first presented the stalling complaint to the authorized service agent approximately two months after purchasing the vehicle; the fact that the vehicle displayed low oil at several repair visits, even though the Consumer testified to having timely oil changes performed; and the fact that it appeared from the evidence that the excessive oil consumption issue was not investigated until the fourth repair visit, a majority of the Board concluded that the Manufacturer failed to correct the nonconformity within a reasonable number of attempts, as contemplated by the Lemon Law. The Consumer was therefore qualified for the requested relief under the Lemon Law and a refund was awarded.

Campbell v. Kia Motors America, Inc., 2018-0106/WPB (Fla. NMVAB August 28, 2018)

The Consumer complained of the engine shutting off while the vehicle was stopped or parked in her 2016 Kia Optima. The Consumer testified that, on an intermittent basis, when she pushed the button next to the steering wheel to start the engine, the engine started but immediately "cuts off." She stated that when she subsequently pushed the start button, the engine would start again. She explained that the problem could also happen when she stopped at a light; the vehicle started to shake and then "cuts off." The Consumer testified that she had reported the problem to the authorized service agent since mid 2017. The Consumer showed a video to the Board, which depicted an incident when the vehicle "cut off." Three of the Consumer's family members testified that they experienced at least one incident when the vehicle "cut off." The Consumer added that the problem last occurred the Wednesday prior to the arbitration hearing. The vehicle was presented to the Manufacturer's authorized service agent for repair of the engine shutting off on December 4-6, 2017, when the vehicle was test driven but no repairs were performed; and February 16, 2018, when the vehicle was test driven but no repairs were performed. The Manufacturer stipulated that it was afforded a final opportunity to repair the vehicle after receipt of written notification from the Consumer. On March 8, 2018, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, the vehicle was test driven in stop-and-go traffic but no repairs were performed. The engine shutting off while vehicle was stopped or parked continued to exist after the final repair attempt.

The evidence established that the engine shutting off while the vehicle was stopped or parked 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 statute does not

specifically define how many attempts are required before it can be concluded that a manufacturer has had a reasonable number. Section 681.104(3), Florida Statutes, creates a presumption of a reasonable number of attempts; however, a consumer is not required to prove the elements of the statutory presumption to qualify for relief under the Lemon Law. The evidence established that the nonconformity was presented for repair to the Manufacturer's authorized service agent, and documented on the repair order, on two occasions, December 4, 2017, and February 16, 2018, prior to the Manufacturer's receipt of written notification, and was then subject to repair by the Manufacturer at the final repair attempt on March 8, 2018. The engine shutting off while the vehicle was stopped or parked nonconformity continued to exist after the final repair attempt. The evidence also established that the Consumer had complained of this same nonconformity on other occasions when she brought the vehicle to the authorized service agent, prior to December 2017, but the complaint was not documented on the repair orders. Under the circumstances of this case, the Board concluded that the Manufacturer had a reasonable number of attempts to conform the subject vehicle to the warranty as contemplated by the Lemon Law. Having failed to do so, the Consumer was qualified for the requested relief under the Lemon Law and a refund was awarded.

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

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

Kovacs v. Mercedes-Benz USA, LLC., 2018-0280/FTL (Fla. NMVAB August 11, 2018)

The Consumer complained of defective rear transaxle, defective air conditioning system, and defective brakes in his 2018 Mercedes Benz AMG GT. The Consumer also complained that the "race start" was inoperable at the January 23, 2018, repair attempt, but early in his testimony said he did not know how to perform a race start and claimed that he was not able to describe a race start for the Board. Later in the hearing, he admitted that he had performed race starts with the AMG technician. Additionally, he confessed that he started driving the vehicle on the Palm Beach race track in April 2018, at speeds of over 100 miles per hour, but asserted that he had never "raced" the vehicle.

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 Manufacturer's witness testified that he rode in the passenger seat during a test drive with the Consumer at the February 19, 2018, repair visit, at which time the Consumer drove on Interstate 95 at speeds in excess of 100 miles per hour. He explained that they continued to a vacant parking lot, where the Consumer seamlessly demonstrated a "race start," which occurred when the Consumer turned a knob in the vehicle to the "race start" position and the vehicle launched at its optimal performance point of 4000 rotations per minute (RPM) with extreme acceleration. During the test drive, he discovered that the Consumer was improperly performing "race starts" in the vehicle's race mode, which caused the rear differential to "lock out" and triggered the illumination of the rear differential lock warning light. He confirmed that the owner's manual expressly stated that the vehicle's race mode was not intended for any kind of street use. He explained that he was able to duplicate the problem with the rear differential after learning that the Consumer was performing "race starts" in the vehicle's race mode, and determined that the

transaxle assembly needed to be replaced. He stated that at some point during or after the replacement of the transaxle assembly, the Consumer admitted to him that he "tracks" the vehicle and "runs it on the road course." He explained that if a Consumer races a vehicle, replacement of consumables such as brakes and tires become the Consumer's financial responsibility. Additionally, he advised the Consumer that after the transaxle assembly was replaced, he would need to drive the vehicle more conservatively for the next 1,000 miles, and instructed the Board that the Consumer failed to comply with the 1,000 mile break-in procedure because the Consumer admitted that he started racing the vehicle in April 2018, soon after the transaxle assembly had been replaced. He added that when the Consumer brought the vehicle to the dealership in Delray Beach two to three months ago where it currently remained, the technicians observed that the air conditioning compressor was blown for the second time, the vehicle's second set of tires was spent, and the brakes were worn, rusted and discolored. He explained that the blown AC compressor was found to have two adjacent holes at the bottom, which in his experience only happens when the air conditioning is kept on while racing the vehicle at high RPMs for a long period of time. He further explained that replacement of original tires typically doesn't occur until the vehicle has been driven 8,000-10,000 miles, and this vehicle's tires had already been replaced at only 2,000 miles. He also explained that the discoloration of the brakes was caused by excessive heat, and this level of heat can only be generated from consistent hard braking or racing. He concluded that the vehicle's problems resulted from racing the vehicle, which had caused excessive wear and tear on the vehicle's rear transaxle, air conditioning system and braking system.

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. (emphasis added) Upon consideration of the evidence presented, a majority of the Board concluded that the greater weight of the evidence supported the Manufacturer's affirmative defense that the defective rear transaxle, defective air conditioning system, and defective brakes were the result of abuse of the motor vehicle by persons other than the Manufacturer or its authorized service agent. Accordingly, none of the problems complained of by the Consumer constituted a "nonconformity" as defined by the statute, and the Consumer was therefore not qualified for repurchase relief under the Lemon Law and the case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

Rashford v. Jaguar Land Rover North America, LLC, 2018-0223/FTM (Fla. NMVAB September 19, 2018)

The Consumer's 2018 Land Rover Range Rover was declared a "Lemon" by the Board at a hearing on September 11, 2018. The Consumer requested reimbursement of $743.78, as an incidental charge, for a vehicle storage fee from May 2018 through September 2018 because the Consumer testified that he did not feel safe operating the vehicle, had not operated the vehicle since May 1, 2018, needed a place to store the vehicle, and was not comfortable leaving the

vehicle outside in the Florida climate. Upon consideration of the evidence presented, the Board found that reimbursement of $500.00 towards the vehicle storage fee from May 2018 through September 2018 was reasonable. §681.102(7), Fla. Stat.

Libro v. Jaguar Land Rover North America, LLC, 2018-0183/STP (Fla. NMVAB August 6, 2018)

The Consumer's 2018 Land Rover Range Rover Velar was declared a "Lemon" by the Board. Before the hearing, the Consumer filed a "Consumer's Trade-In Allowance Form," indicating that the net trade-in allowance reflected in his purchase agreement was not acceptable to him, and requesting that the Manufacturer send him a copy of the applicable pages of the NADA Official Used Car Guide (Southeastern Edition) (NADA Guide) in effect at the time of his trade-in. The Manufacturer did not do so. At the hearing, the Consumer stated that he would purchase online the NADA Guide value for his trade-in vehicle. The Board instructed the Consumer to obtain the NADA information within five days of the hearing and unanimously voted to include in the Consumer's refund the cost he incurred to purchase the NADA information. The Consumer provided the requested NADA information and purchase receipt, and the Manufacturer stipulated to the amounts provided, which was $55.00.

Reasonable Offset for Use §681.102(19), F.S.

Govic Capital LLC and Govic v. Tesla Motors Inc., 2018-0241/TLH (Fla. NMVAB August 16, 2018)

The Consumers' 2017 Tesla Model X was declared a "Lemon" by the Board. The agreed upon value of the vehicle, for the purpose of calculating the statutory reasonable offset for use, was $121,750.00. Mileage attributable to the Consumers up to the date of the National Center for Dispute Settlement (NCDS) hearing was 12,905 miles (13,376 odometer miles reduced by 50 miles at delivery, and 421 other miles not attributable to the Consumers). Application of the statutory formula resulted in a reasonable offset for use of $13,093.20. The Manufacturer objected to cutting off the mileage as of the date of the NCDS hearing, arguing that it would give the Consumers "a windfall" because it was not a state-certified procedure, and that it was a "documents only" hearing so there was no inconvenience for the Consumers. The Manufacturer's objection to using the mileage attributable to the Consumers as of the date of the NCDS hearing was denied by the Board. §681.102(19), Fla. Stat.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2018 - December 2018 (4th Quarter)

JURISDICTION:

Frieson v. Kia Motors America, Inc., 2018-0269/ORL (Fla. NMVAB December 28, 2018)

The parties stipulated that, on March 29, 2016, the Consumer purchased a 2016 Kia Forte. On April 27, 2018, the Consumer filed a claim with the Better Business Bureau Autoline (BBB), the state-certified informal dispute settlement procedure sponsored by Kia Motors. The procedure rendered a decision denying the claim on May 14, 2018. On May 16, 2018, the BBB sent the decision to the Consumer, along with an "Acceptance or Rejection of Decision" form that was to be returned to the BBB within 14 days. The form advised the Consumer that rejection of the BBB arbitration means: "this will end Better Business Bureau involvement in my case." The Consumer rejected the BBB decision on May 23, 2018. Because the Consumer was not satisfied with the BBB decision, on June 15, 2018, he requested arbitration by the 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 also filed a "Notice of Filing Authority in Support of Affirmative Defenses" in which the Manufacturer asserted that the Consumer's claim should be dismissed because it was not filed within the timeframes required by the statute. The Manufacturer argued that the final action of the BBB occurred on May 14, 2018, the date of the BBB decision, and that the Consumer therefore had until June 13, 2018, to file his Request for Arbitration. The Manufacturer maintained that the Consumer was not eligible to seek relief under the Lemon Law since he did not file his request for arbitration until June 15, 2018, which was more than 30 days after the final action of the certified procedure.

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 before this Board is set forth in Section 681.109(4), Florida Statutes, which provides:

> 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, a copy of each settlement approved by the procedure or each decision made by a decision maker 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 that the Consumer took delivery of the vehicle on March 29, 2016. The Consumer filed his Request for Arbitration on June 15, 2018, which was more than 60 days after the expiration of the Lemon Law rights period. Accordingly, in order for the Request for Arbitration to be timely-filed, it must have been filed no later than 30 days after the final action of the BBB, the Manufacturer's certified procedure. The term "final action" is not defined in Chapter 681. The Consumer was informed in the letter dated May 14, 2018, that he had 14 days from that date within which to notify the BBB of his acceptance or rejection of the program's decision or the decision would be considered rejected and the Manufacturer would be notified. The Board found that, based on the evidence presented in the case, the final action of the certified procedure occurred on May 23, 2018, when the Consumer signed the BBB's "Acceptance or Rejection of Decision" form, rejecting the BBB decision and ending the BBB's involvement in the case. The Consumer filed the Request for Arbitration on June 15, 2018, which was well within 30 days after the final action of the certified procedure. Accordingly, the Request for Arbitration was filed within the time required by the statute, and the Manufacturer's request to dismiss the Consumer's claim was denied.

Consumer §681.102(4) F.S.

Partidas v. Mitsubishi Motors North America, Inc., 2018-0374/MIA (Fla. NMVAB December 19, 2018)

The Manufacturer filed a "Motion to Dismiss," on October 10, 2018, asserting that the Consumer was not qualified for relief under the Lemon Law because the vehicle was used primarily for commercial or business purposes. The Manufacturer alleged that the Consumer was an Uber drive who was utilizing his vehicle "to commercially transport occupants from one location to another."

In order to be eligible for the refund or replacement remedies set forth at Section 681.104(2), the person seeking such relief must be a "consumer." Section 681.102(4), Florida Statutes, defines a "Consumer" as:

> [t]he purchaser, other than for purposes of resale, or the lessee, of a motor vehicle primarily used for personal, family, or household purposes; any person to whom such motor vehicle is transferred for the same purposes during the duration of the Lemon Law rights period; and any other person entitled by the terms of the warranty to enforce the obligations of the warranty.

The Manufacturer presented no evidence showing the Consumer was not entitled by the terms of the warranty to enforce the obligations of the warranty. §681.102(4), Fla. Stat. Upon consideration, the Board denied the Manufacturer's Motion to Dismiss.

NONCONFORMITY 681.102(15), F.S.

Bandemer v. Subaru of America, Inc., 2018-0381/WPB (Fla. NMVAB December 11, 2018)

The Consumer complained of a Bluetooth incompatibility between the phone and the radio in his 2018 Subaru Forester. The Consumer testified that upon leaving the dealership after purchasing the vehicle, he attempted to make a Bluetooth phone call, by saying a contact in the order of first name, last name, as he had done when using Bluetooth in other vehicles, but the vehicle's Bluetooth was not able to locate the contact. After taking the vehicle to the authorized service agent for repair, the dealership informed him that the system in his particular vehicle was designed with a Bluetooth set up which required him to say a contact's name in the order of last name, first name when placing a call. The Consumer explained that he lists the name of contacts in his phone in the order of first name, last name and said that when making calls through Bluetooth, it was necessary that he be able to say the name of the contact in this particular order because he did not have last names associated with many of the contacts in his phone. He opined that with the current Bluetooth set-up of last name, first name, he would never be able to call any of the contacts in his phone that do not list a last name, which would impair his use of the vehicle. He stated that when driving a loaner vehicle of the same model but with an upgraded radio, he was able to use the Bluetooth as expected, by placing a call in the order of first name, last name. He also testified that the first time that he received an incoming call through Bluetooth, he observed that the display showed a phone number instead of the name of a caller. He lamented that he would miss important phone calls, such as phone calls from his elderly mother, if Bluetooth did not list the name of the caller, due to the abundance of robo and marketing calls.

The Manufacturer asserted 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. He confirmed that in the Consumer's vehicle, like in all base like model vehicles that have a Clarion radio, the Consumer must say a contact's name in the order of last name, first name when placing a Bluetooth call with his Apple iPhone 6s. He confirmed that the 6s was on the Manufacturer's list of compatible phones but cautioned that it only meant that a particular phone could be paired to the vehicle's Bluetooth. He stated that at the time of the final repair attempt, he paired his personal Apple iPhone 7s plus to the vehicle's Bluetooth and unlike the 6s, he was able to make a phone call by saying a contact's name in the order of first name, last name. He said that he also paired a Samsung Galaxy Note 8 to the vehicle's Bluetooth, and just like the Apple iPhone 6s, he could only place a phone call by saying a contact's name in the order of last name, first name. He also confirmed that both the Apple iPhone 7s plus and the Samsung Galaxy Note 8 are on the Manufacturer's list of compatible phones. He testified that the base model vehicle has an inconsistency in Bluetooth setup between different phones on the Manufacturer's compatibility list, due to the Clarion radio installed in the base model. Upon being asked by the Board to explain why the Consumer has to say a contact's name in the order of last name, first name with the Apple iPhone 6s, as opposed to first name, last name with the Apple iPhone 7s plus, the Manufacturer could not provide an explanation, much to the Board's dissatisfaction, other than suggesting that a particular phone on the Manufacturer's compatibility list may not necessarily be compatible with every feature of the vehicle's Bluetooth. He also explained that the Consumer's loaner vehicle was an upgrade from the base model, and was equipped with an upgraded radio that enabled a Bluetooth setup of first name, last name when placing a phone call. Additionally, he could not provide an explanation as to why a

different radio in the upgraded model caused the Bluetooth in the upgraded model to operate differently than the Bluetooth in the base model. He also noted that the name of the caller appearing on the Bluetooth display during an incoming call was not a feature of the Clarion radio in the base model. He asserted that the Consumer simply didn't like the way the Bluetooth operated in the base model, and alleged that the vehicle was operating as designed.

The Board found that the evidence established that the Bluetooth incompatibility between the phone and the radio substantially impaired the use and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The Manufacturer's assertion to the contrary was rejected and the Consumer was awarded a refund.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

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

All Moving Services, Inc., and Brown v. Ford Motor Company, 2018-0325/FTL (Fla. NMVAB December 26, 2018)

The Consumers complained of a knocking noise in the engine of their 2017 Ford F250. The vehicle was presented to the Manufacturer's authorized service agent for repair of that complaint on November 24, 2017, when no repair attempt was performed, and December 18, 2017, when no repair attempt was performed. The Manufacturer stipulated that it was afforded a final opportunity to repair the vehicle after receipt of written notification from the Consumers. On February 5, 2018, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, the vehicle was test driven for a mile from a cold start, and a check for diagnostic trouble codes was performed, with no codes found. The knocking noise in the engine continued to exist after the final repair attempt.

The Board found that the evidence established that the knocking noise in the engine substantially impaired the value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The issue remaining was whether a reasonable number of attempts were undertaken to correct the nonconformities. While section 681.104(3), Florida Statutes, creates a presumption of a reasonable number of attempts, the statute does not specifically define how many attempts are required before it can be concluded that a manufacturer has had a reasonable number; a consumer is not required to prove the elements of the statutory presumption to qualify for relief under the Lemon Law. The evidence established that the knocking noise in the engine nonconformity was subjected to repair by the Manufacturer's service agent a total of two times. The authorized service agent told the Consumers on November 24, 2017, at the first repair attempt, that there was no way to repair the vehicle at this time and that there *might* be a solution to repair the vehicle at some unknown point in the future for this problem. 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. The Consumer was qualified for the requested relief under the Lemon Law for the nonconformity and a refund was awarded.

Final Repair Attempt §§681.104(1)(a), 681.104(3)(a)1., F.S.

Kurth v. Nissan Motor Corporation, USA, 2018-0293/FTL (Fla. NMVAB October 3, 2018)

The Consumer complained of a display control unit malfunction that manifested itself through electrical problems with the backup camera and Bluetooth system in his 2018 Infinity Q50S. On May 2, 2018, the Consumer sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the notification on May 7, 2018. On May 25, 2018, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. When the Consumer arrived on that day, the Manufacturer told the Consumer that it was canceling the final repair attempt because there was no solution to repair the display control unit malfunction, and asked him to reschedule the final repair attempt for August 2018, when they expected to have a solution.

Section 681.104(1)(a), Florida Statutes, requires that:

> After three attempts have been made to repair the same nonconformity, the consumer shall give written notification, by registered or express mail, to the manufacturer, of the need to repair the nonconformity to allow the manufacturer a final attempt to cure the nonconformity. The manufacturer shall have 10 days, commencing upon receipt of such notification, to respond and give the consumer the opportunity to have the motor vehicle repaired at a reasonably accessible repair facility *within a reasonable time* after the consumer's receipt of the response. The manufacturer shall have 10 days, ... commencing upon the delivery of the motor vehicle to the designated repair facility by the consumer, to conform the motor vehicle to the warranty. If the manufacturer fails to respond to the consumer and give the consumer the opportunity to have the motor vehicle repaired at a reasonably accessible repair facility or perform the repairs within the time periods prescribed in this subsection, the requirement that the manufacturer be given a final attempt to cure the nonconformity does not apply.

The evidence established that the Manufacturer received the statutory written notification from the Consumer after four unsuccessful repair attempts. Upon receiving written notification, the Manufacturer must "give the consumer the opportunity to have the motor vehicle repaired at a reasonably accessible repair facility *within a reasonable amount of time* after the consumer's receipt of the response. The evidence established that the Manufacturer canceled the scheduled May 25, 2018 repair attempt upon the Consumer's arrival. The evidence further established that the Manufacturer asked the Consumer to reschedule the final repair attempt for August 2018, when the Manufacturer expected to have a solution for the display control unit malfunction. The Board found that the Manufacturer's attempt to reschedule the final repair attempt from May 25, 2018 to August 2018 did not fulfill the statutory requirement that the Manufacturer provide a final repair opportunity "*within a reasonable time* after the consumer's receipt of the [Manufacturer's] response." Therefore, the requirement that the Manufacturer be given a final repair attempt to cure the nonconformity did not apply. Ultimately, the Consumer was awarded a refund.

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

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

Fuentes and Sanchez v. Toyota Motor Sales, USA, Inc., 2018-0318/TPA (Fla. NMVAB October 24, 2018)

The Consumers complained of a four-wheel drive condition in their 2017 Toyota 4Runner. The four-wheel drive condition manifested itself by the vehicle locking in four-wheel drive "low speed," vibrating, shuddering, making a clunking noise, leaking fluids, and the steering wheel being difficult to turn, as well as failure of the transfer case assembly and the transfer case actuator. The Consumer stated that immediately after taking delivery of the vehicle, she felt a vibration in the seat and steering wheel when driving between approximately 40 and 45 miles per hour. She testified that, on February 1, 2018, while driving on the highway between 40 and 55 miles per hour, she first experienced the vibration and then the vehicle began to shudder, made a clunking noise, the engine "revved" high, she smelled a burning odor, and the "four-wheel drive low" warning light began to flash. She pulled the vehicle to the side of the road and found the steering wheel difficult to turn, even just enough to change lanes. She brought the vehicle to the authorized service agent for repair that day and was told that the vehicle was stuck in four-wheel drive "low speed" and the transfer case actuator was replaced at that repair visit. She testified that on February 10, 2018, she and the other Consumer experienced the same problems that had occurred on February 1, 2018. They took the vehicle that day to the authorized service agent for repair and at that repair visit the transfer case assembly was replaced. She explained that they experienced the same problems again on February 18, 2018 and brought the vehicle that day to a nearby Toyota dealership. She stated that no repairs were performed by that dealership, other than fluids being added, and that on February 22, 2018, at the Manufacturer's direction, the vehicle was towed to Sun Toyota where all the previous repairs to the vehicle had been done. She testified that the vehicle was presently "inoperable" and they therefore had the vehicle towed to the hearing on a flatbed truck. Both Consumers testified that they are the only drivers of the vehicle; they have never placed or driven the vehicle in four-wheel drive; they have only driven the vehicle in two-wheel drive; they have never taken the vehicle off-road or driven the vehicle in a manner that would lead to damage underneath the vehicle; and only Toyota has ever performed any work on the vehicle.

The Manufacturer asserted the alleged nonconformity was the result of abuse or neglect of the motor vehicle by persons other than the manufacturer or its authorized service agent. The Manufacturer's representative testified that at the February 1-7, 2018 repair visit, the vehicle arrived at the authorized service agent locked in four-wheel drive "low speed." He also explained that the vehicle was again locked in four-wheel drive "low speed" when it arrived at the authorized service agent for repair on February 10, 2018. He acknowledged that the transfer case actuator was replaced during the February 1-7, 2018 repair visit and that the transfer case assembly was replaced during the February 10-15, 2018 repair visit. He explained that the transfer case assembly was necessary to shift the vehicle from two-wheel drive to four-wheel drive and stated that he inspected the vehicle on February 23, 2018, at which time he examined the transfer case assembly, including the actuator, and observed that the transfer case was again locked in four-wheel drive "low speed." He explained that the transfer case being locked in four-wheel drive "low speed" was indicative that the vehicle was previously operating in four-wheel

drive "low speed." He testified that "it is an impossibility" for the transfer case assembly to place itself into four-wheel drive "low speed." He explained that, in order for the transfer case actuator to move into four-wheel drive "low speed," the vehicle required "deliberate input" for the gears to "mesh." He further explained that the vehicle must be stopped, placed in neutral gear, and the electric switch for four-wheel drive "low speed," located under the console, must be pressed to properly lock the lower gears in place.

He further testified that he reviewed the Vehicle Control History Report, sometimes referred to as the vehicle's "black box," which set forth behavioral statistics generated based upon certain driver activity. He stated that he retrieved actual data from specified dates and time intervals from the report. He explained that according to the data in the Vehicle Control History Report, just prior to the Consumers taking the vehicle to the authorized service agent for repair on February 1, 2018 and February 10, 2018, the vehicle was being revved at high engine RPMs and then shifted from neutral into gear, either drive or reverse, and vice versa, numerous times over a period of just a few seconds. He explained that this type of driving was indicative of the vehicle being "stuck in something" or the vehicle being driven in a manner that would specifically "inflict damage." He opined that the type of aggressive driving reflected in the Vehicle Control History Report demonstrated abuse or neglect in the operation of the vehicle, and that such usage of the vehicle caused damage to the transfer case. During his inspection, he observed physical damage to the transfer case, as well as fluid leaking from the transfer case actuator which was also indicative of damage.

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. [emphasis added]. A "condition" is defined as "a general problem (e.g., vehicle fails to start, vehicle runs hot, etc.) that may be attributable to a defect in more than one part." Rule 2-30.001(2)(a), F.A.C. The Board found that the evidence established that the four-wheel drive condition was the result of abuse or neglect of the motor vehicle by persons other than the manufacturer or its authorized service agent, specifically the vehicle was used in such a manner that inflicted damage to the transfer case. The complained of defect or condition did not constitute a "nonconformity" as defined by the statute; therefore, the Consumers were not qualified for repurchase relief under the Lemon Law and the case was dismissed.

Cruz v. BMW of North America, LLC, 2018-0352/MIA (Fla. NMVAB December 19, 2018)

The Consumer complained of a malfunction in the SOS call system in his 2017 BMW X6-M. The Consumer testified that two months after he purchased the vehicle, the SOS malfunction light illuminated on the dashboard. He said that the SOS malfunction light indicated that there was a communication error in the SOS call system, a system that allows the driver to contact BMW for roadside assistance or emergency services. The Consumer stated that when he picked up the vehicle from the first repair, the SOS malfunction light was gone, but reappeared one month later and has continued to reappear after each subsequent repair. He explained that at the July 2018 repair visit, the dealership informed him that the Manufacturer would no longer authorize warranty repairs to the vehicle because the Manufacturer had determined that the aftermarket wrap, which the Consumer had installed on the vehicle back in January 2017, had

caused the SOS malfunction. The Consumer added that the SOS malfunction light was currently illuminated, and the Consumer was concerned that in the event he had a car accident, he would not be able to contact emergency services via the SOS call system.

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. The Manufacturer's representative testified that at the July 2018 repair, he diagnosed a short, or fault, in the Telematics Control Unit (TCU), which caused a communication error in the SOS call system and resulted in the illumination of the SOS malfunction light. He stated that the Telecommunications Box (TCB) Module was mounted under the shark fin antenna, which sat atop the vehicle and was enclosed by a seal. He explained that during the installation of the aftermarket wrap, the seal that enclosed the shark fin antenna was cut when the installer was cutting the wrap to position it around the antenna. He explained that moisture was able to enter the TCB module through the damaged seal, causing corrosion within the TCB module, which then triggered the illumination of the SOS malfunction light. He explained that the Consumer's first complaint regarding the SOS malfunction did not occur until January 24, 2017, which was just 19 days after the aftermarket wrap was installed on January 5, 2017. He concluded that the malfunction in the SOS call system resulted from corrosion in the TCB module, which was caused by the installation of the aftermarket wrap.

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. Upon consideration of the evidence presented, the Board concluded that the greater weight of the evidence supported the Manufacturer's affirmative defense that the malfunction in the SOS call system was the result of unauthorized modifications or alterations of the motor vehicle by persons other than the Manufacturer or its authorized service agent. Accordingly, the problem complained of by the Consumer did not constitute a "nonconformity" as defined by the statute, and the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

Gyllenberg v. Ford Motor Company, 2018-0326/WPB (Fla. NMVAB November 8, 2018)

The Consumer's 2016 Ford Edge was declared a "Lemon" by the Board due to a vibration. The Consumer requested reimbursement of $64.20 for reimbursement of an invoice from New Age Automotive for diagnosing the vibration, as an incidental charge. The Manufacturer objected because the Manufacturer alleged that the Consumer took his vehicle to New Age Automotive after he filed his request for arbitration, in preparation for the arbitration hearing. The Board awarded the Consumer the $64.20 as an incidental charge and the Manufacturer's objection was denied. §681.102(7), Fla. Stat.

Yu v. Mercedes-Benz, USA, LLC, 2018-0311/MIA (Fla. NMVAB November 15, 2018)

The Consumer's 2018 Mercedes-Benz GLE350W was declared a "Lemon" by the Board on October 9, 2018, due to a defective steering rack. The Consumer stated that she took the vehicle to the authorized service agent on April 27, 2018, and the technician advised her that a code was found that indicated a steering wheel malfunction had occurred. She left her vehicle at the authorized service agent and stated that on May 3, 2018, the technician texted her and advised her that the Manufacturer had approved the repairs under warranty, so the authorized service agent would begin the repairs and provide a loaner vehicle while the vehicle was being repaired. However, after being told that repairs had begun on her vehicle, the Consumer received a text message from the authorized service agent on June 20, 2018, requesting that she pick up her vehicle and return the loaner vehicle because the Manufacturer now declined to complete any repairs on the vehicle. The Consumer requested $390.00 for towing costs from April 26, 2018, when the vehicle was towed from the Consumer's house to the authorized service agent and October 9, 2018, when the vehicle was towed from the Consumer's house to the arbitration hearing; and $4,474.64 for vehicle rental charges between April 26, 2018 and October 9, 2018 as incidental charges. The Manufacturer objected to reimbursement of the towing costs and vehicle rental charges. The Board found that the award shall include reimbursement of $390.00 for towing costs from April 26, 2018, when the vehicle was towed from the Consumer's house to the authorized service agent, and October 9, 2018, when the vehicle was towed from the Consumer's house to the arbitration hearing; and $4,474.64 for vehicle rental charges between April 26, 2018, and October 9, 2018, as reasonable incidental charges.

MISCELLANEOUS PROCEDURAL ISSUES:

McMaster and Carter-McMaster v. Nissan Motor Corporation, USA, 2018-0255/ORL (Fla. NMVAB November 3, 2018)

Prior to the hearing, the Manufacturer filed a "Motion to Dismiss," asserting that the Consumers had entered into a "Settlement Agreement and Release" on February 20, 2018, in which the Consumers "released the claims they are bringing before this Board," in exchange for $5,500.00. According to the Manufacturer, that agreement precluded the Consumers from bringing a Lemon Law case against the Manufacturer. Relying on the plain language of section 681.115, Florida Statutes, which provides that "any agreement entered into by a consumer that waives, limits, or disclaims the rights set forth in this chapter ... is void as contrary to public policy," the Board denied the Motion to Dismiss, and the hearing proceeded.