OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

July 2019 - September 2019 (3rd Quarter)

JURISDICTION

Consumer §681.102(4), F.S.

June Therapeutic Services, LLC v. BMW of North America, LLC, 2019-0167/MIA (Fla. NMVAB July 30, 2019)

At the outset of the hearing, the Board requested testimony from Casandra Fitzgerald for the purpose of determining whether the Consumer was a "consumer" under the definition set out in section 681.102(4), Florida Statutes. Ms. Fitzgerald testified that the subject vehicle was used for both business and personal uses. The Manufacturer asserted that the vehicle was used primarily for business purposes, and alleged that the Consumer was therefore ineligible to participate in the Lemon Law. Section 681.102(4) defines "consumer" to mean "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." Accordingly, the Board held that the Consumer fell within the third clause of section 681.102(4), Florida Statutes, was a "consumer" for purposes of the Lemon Law, and was properly before the Board. The Board found that the Manufacturer presented "no evidence showing that the Consumer was not entitled by the terms of the warranty to enforce the obligations of the warranty." Results Real Estate v. Lazy Days, 505 So. 2d 587 (Fla. 2nd DCA 1987).

Motor Vehicle §681.102(14), F.S.

Carlucci v. American Honda Motor Company, 2019-0082/FTL (Fla. NMVAB July 14, 2019)

With respect to the circumstances surrounding the Consumer's acquisition of the subject vehicle, the Consumer testified that he was in Florida when he found the vehicle on an Indiana dealership's website. He explained that he could not find one for sale in Florida. In addition, the Indiana dealership offered a $30,000.00 rebate on the vehicle in question. The Consumer stated that he never went to Indiana, and that all of the lease paperwork was sent to him via FedEx, was signed by him in Florida, and was then sent back to the dealership via FedEx. Because this was a lease, he stated that he paid sales tax every month to Florida and that no sales tax was paid in Indiana. He said that the dealership arranged for the transport of the vehicle to him in Florida, and he paid the transport driver in cash upon delivery of the vehicle. He noted that he had removed a Florida license plate from an old car and immediately placed it on the subject vehicle, which had only been registered in Florida.

The Manufacturer asserted that the subject vehicle was not a "motor vehicle" as defined in the Lemon Law because it was not leased in Florida. In support of its assertion that the vehicle did not meet the statutory definition of a "motor vehicle," the Manufacturer argued that a vehicle must be sold or leased in this state to fall within the statutory definition of a "motor vehicle" set out in the Lemon Law. Specifically, the Manufacturer asserted that the lease agreement showed a dealership in Fort Wayne, Indiana was the lessor of the vehicle, that the Consumer paid Indiana sales tax, and that no Florida Lemon Law fee was paid, all demonstrating that the vehicle was leased in Indiana.

Section 681.102(14), Florida Statutes, defines a "motor vehicle" as:

> a new vehicle, propelled by power other than muscular power, which is sold in this state to transport persons or property, and includes a recreational vehicle or a vehicle used as a demonstrator or leased vehicle if a manufacturer's warranty was issued as a condition of sale, or the lessee is responsible for repairs, but does not include vehicles run only upon tracks, off-road vehicles, trucks over 10,000 pounds gross vehicle weight, motorcycles, mopeds or the living facilities of recreational vehicles ....

(emphasis added). Based on the totality of the circumstances, the Board found that the Consumer's vehicle was sold or leased in this state and was therefore a "motor vehicle" as defined in Section 681.102(14), Florida Statutes. The Board found particularly compelling that the only relationship the transaction had to Indiana was that the leasing dealership was in Indiana, whereas the Consumer never left Florida, the vehicle was delivered to him in Florida, was registered in Florida, and the Consumer was paying Florida sales tax.

NONCONFORMITY 681.102(15), F.S.

Magnante v. Toyota Motor Sales, USA, Inc., 2019-0126/FTM (Fla. NMVAB July 26, 2019)

The Consumers complained of a brake squealing noise in their 2016 Lexus GS-350 F Sport. The Consumer testified that the brake squeal was a "really pronounced sound" that occurred both in reverse and when the vehicle was being driven forward. Although the squealing noise was intermittent, the Consumer estimated that he heard the noise approximately 90 percent of the time. He said that after each repair, the noise appeared to be corrected; however, the noise would always come back after three or four weeks. He last heard the squeal on the morning of the hearing. He stated that he was repeatedly promised that the Manufacturer would develop an updated brake pad that would cure the problem, but has been told that the updated part was still not available. He said he was told the brake noise was an "operational characteristic" of the vehicle, but asserted that he would not have purchased the vehicle if he had known of this characteristic. The Consumers' witness testified that she was a neighbor of the Consumers and she had also driven the vehicle. She said that the brake squeal was an extremely loud, grating sound that can be heard from inside the vehicle even with the radio and air conditioner on. A different Consumers' witness testified that he has been on the phone with the Consumers while

they were driving in the vehicle and he heard, over the phone, when the brakes were being applied. A third witness testified that he previously worked for Toyota and he also owned a used car lot. He expressed his opinion that the value of the Consumers' vehicle was reduced due to the brake squeal noise and stated that "no one would buy a vehicle with this problem."

The Manufacturer asserted that the alleged nonconformity did not substantially impair the use, value or safety of the vehicle. The Manufacturer's representative testified that the first documented complaint about brake noise was on September 2, 2017, and at that time the front brake pads and rotors were replaced. According to him, the F-Sport models have high performance brakes and "a low speed squeal is an operational characteristic" of these brakes. No repairs were made even though some brake noise was heard when the Consumers took the vehicle in for repair on January 4, 2018, and March 10, 2018, because it was deemed to be "normal" noise. Subsequently, on June 16, 2018, the authorized service agent again replaced the front brake pads to try to lessen the squealing, and on August 22, 2018, a thicker grease was applied between the shim and the brake pad to try to "change the harmonic" and lessen the squeal. When the Consumers returned with the same brake noise complaint in December 2018, they were advised that the Manufacturer was aware of the problem, but that no parts were available. He confirmed that the Manufacturer was working on a new brake pad that would make less noise, and he also acknowledged that he does not know when the new parts would be available.

The Board found that the evidence established that the brake squealing noise substantially impaired the use and value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the 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.

Radmanesh v. Volkswagen/Audi of America, Inc., 2019-0244/STP (Fla. NMVAB July 26, 2019)

The Consumers complained of a lane assist defect, which resulted in their 2018 Volkswagen Atlas pulling to the left. The vehicle was presented to the Manufacturer's authorized service agent for repair of the lane assist defect on November 7-21, 2018 (problem not duplicated; no repairs performed); and December 11-13, 2018 (no faults found; problem not duplicated; no repairs performed). On January 2, 2019, the Consumers sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the notification on January 7, 2019, but did not contact the Consumers to schedule a final repair attempt.

The Board found that the evidence established that the lane assist defect, which resulted in the vehicle pulling to the left, 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 question remaining for determination was whether a reasonable number of repair attempts had been undertaken. Section 681.104(3), Florida Statutes, creates a presumption of what constitutes 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 lane assist nonconformity was presented for repair to the Manufacturer's authorized service agent on at least two occasions. At both repair attempts, the Manufacturer was unable to duplicate the problem and no repairs were performed. Thereafter, the Consumers provided statutory written notification to the Manufacturer, but the Manufacturer did not contact the Consumers to schedule a final repair attempt. Accordingly, under the circumstances of this case, and in light of the fact that there were serious safety implications associated with the nonconformity, the Board found that the Manufacturer failed to correct the nonconformity after a reasonable number of attempts. Accordingly, the Consumers were qualified for the requested relief under the Lemon Law and a refund was awarded.

Kamajian v. BMW of North America, LLC, 2019-0290/STP (Fla. NMVAB September 26, 2019)

The Consumer complained of the windows and sunroof in his 2018 BMW 740i would autonomously open, without owner input, while the vehicle was parked. The Consumer testified that it was approximately one month after he took delivery of the vehicle when he first observed that all four windows and the sunroof had opened on their own, while the vehicle was parked for the day at his workplace. He explained that the same problem occurred thereafter once every few months. He estimated that the problem happened a total of 10 or 12 times while the vehicle was parked at his workplace, and one time while the vehicle was parked at his condominium. He stated that when he was at work, he usually parked the vehicle 50 to 75 yards away from his office, that he did not keep his key fob in his pocket while in the office, and that he habitually placed the key fob on his desk when he arrived, where it remained untouched all day until he left work for the day. He testified that he last experienced the problem in June 2019.

The Manufacturer stipulated that the vehicle was presented to an authorized service agent for repair of the windows and sunroof autonomously opening on the following dates: October 17, 2018, when the problem could not be duplicated, and the Consumer was advised that he may be inadvertently pressing the key fob while it is in his pocket; November 30, 2018, when a fault code was found for "anti-theft activated via key," and it was recommended to the Consumer that he read the Owner's Manual; February 12, 2019, when no fault codes were found, and the problem could not be duplicated; April 9, 2019, when no fault codes were found, and the Consumer was supplied with a protective case for his key fob; and April 22, 2019, when no fault codes were found, and the problem could not be duplicated. The Manufacturer stipulated that it was afforded a final opportunity to repair the vehicle after receipt of written notification from the Consumer. On June 19-21, 2019, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, the windows and sunroof were tested from every switch and remote, and the vehicle was coded with two-button function and conversion, correcting the windows and sunroof autonomously opening while the vehicle was parked, without owner input.

The Board found that the evidence established that the windows and sunroof autonomously opening while the vehicle was parked, without owner input, 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 issue remaining was whether a reasonable number of attempts were undertaken to correct the windows and sunroof autonomously opening. The Board unanimously found the evidence established that the nonconformity was corrected at the sixth repair attempt for the problem on June 19-21, 2019, which was the Manufacturer's final repair attempt following written notification from the Consumer, when the vehicle was recoded with two-button function and conversion. However, the Board members split with regard to whether the nonconformity was repaired within 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. 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. According to one Board member, the nonconformity was corrected within a reasonable number of attempts, concluding the case should be decided in favor of the Manufacturer. The two remaining members, however, found that based on the repair history, the Manufacturer, through its authorized service agent, had failed to correct the nonconformity within a reasonable number of attempts, as contemplated by the Lemon Law, and concluded that the case should be decided in favor of the Consumer. Pursuant to Section 681.1095(2), Florida Statutes, a majority vote of the three-member board panel was required to render a decision. Two members having voted in favor of the Consumer, the Consumer was therefore 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.

McGraw v. FCA US LLC f/k/a Chrysler Group, LLC, 2019-0219/TLH (Fla. NMVAB July 19, 2019)

The Consumer complained of a malfunction of the air suspension system in his 2018 Jeep Grand Cherokee, which he had purchased in February of 2018. According to the Consumer, a warning message for "air suspension system malfunction" had illuminated several times. He stated that he had also heard a grinding sound from the right front of the vehicle; however, he was uncertain as to when this grinding sound first began. The Consumer acknowledged that in November 2018, the vehicle was involved in an accident that required replacement of the right rear quarter panel by an independent body shop, to which he was directed by his insurance company. He also acknowledged that he had not heard the grinding noise or experienced the illumination of the air suspension system malfunction light since the repair attempt that started in February of 2019.

The Manufacturer asserted the alleged nonconformity was the result of an accident, 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 witness explained that the first repair, which took place in Miami, involved a malfunction of the air suspension system's

malfunction light, which had illuminated due to a failure of the sensor. Upon replacement of the sensor, the light malfunction was corrected. He explained that, to his knowledge, the first time there was any complaint involving a problem with the air suspension system itself was on December 10, 2018, when the Consumer left the vehicle with the authorized service agent after working hours, leaving a note indicating that he was experiencing an intermittent grinding noise and a jerk in the front end, and that a message to "service air ride/suspension" had illuminated. However, the Consumer retrieved the vehicle the next day before it could be inspected. He said that the next time the vehicle was taken to the authorized service agent was on January 28, 2019, at which time the Consumer complained that the air suspension warning message had illuminated and that he was hearing an occasional grinding noise in the right front when he started the car. The witness, who personally worked on the vehicle at that time, explained that the grinding noise described by the Consumer was from the air suspension compressor, which would not run at all when he examined the vehicle. He first discovered a "blown" fuse for the compressor, which he replaced. While the compressor then began to run, it would not complete a ride height adjustment. He ran further diagnostic tests and found an "over-temp" code, indicating to him that the air suspension compressor was running too long and overheating, so he replaced the compressor. He next tested the air suspension system for leaks, and found the system was operating within normal parameters. Because he could not find a root cause for the compressor failure, he also replaced a relay in the air suspension system "just to be safe." He explained that the vehicle was next returned to the authorized service agent on February 14, 2019, with the rear of the vehicle sagging to the bump stocks. He explained that he found that the air suspension system's left rear air bag had failed, was not seated properly in the control arm, and was "crushed." He stated that it was very rare for a suspension air bag to need replacement and that he was unable to initially determine a reason for the failure of the air bag. After replacing the air bag, he needed to test the system and attempted to access the fill-tank in the normal manner, through the back seat. He found, however, that the fill-tank had somehow shifted, and he had to access it through the trunk. In the process of trying to reach the tank, he discovered body shop dust below the trunk's load floor and observed that there had been repair work on the right rear of the vehicle. He stated that he believed a small leak, which was too small to show up in the test he performed in January, was created in the left rear air bag during the accident, and in the months since the accident had slowly led to failure of the air bag. According to him, the vehicle being hit with enough force to require replacement of the right rear quarter panel could cause damage to the suspension system air bag in the left rear. He specifically stated that, in his opinion, the suspension air bag failed as a result of the accident.

A nonconformity is defined as a "defect or condition that substantially impairs the use, value or safety of a motor vehicle, <u>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</u>." §681.102(15), Fla. Stat. [emphasis added]. Upon consideration of the evidence presented, a majority of the Board concluded that the evidence established that the air suspension system malfunction was the result an accident and, as such, the complained-of defect did not constitute a "nonconformity" as defined by the statute. The Board member who found that the air suspension system malfunction was not the result of an accident, also found that it was repaired within a reasonable number of attempts. Accordingly, the Board unanimously found that the Consumer was not entitled to repurchase relief under the Lemon Law and dismissed the case.

Vidal v. FCA US LLC f/k/a Chrysler Group, LLC, 2019-0265/ORL (Fla. NMVAB September 17, 2019)

The Consumer complained of an engine condition in his 2016 Dodge Challenger characterized by illumination of the check engine warning light, stalling, and failure to start. The Consumer testified that he purchased a "Tazer 2nd Gen Unlocker/Line Lock/Light Show" (hereinafter referred to as the "Tazer") approximately four months after his April 2017 purchase of the vehicle, and that he installed the Tazer at that time by plugging the Tazer into the vehicle's data port. He explained that he installed the Tazer to view additional information on the navigation screen that he was unable to see before installing the Tazer, including braking distance and changes in acceleration. According to the Consumer, the installation of the Tazer did not change the performance of the vehicle. He also commented that "it is an automatic car, so [he] cannot over-rev it." In addition, he testified that he has never taken the powertrain control module (PCM) out of the vehicle. He explained that he first brought the vehicle to the authorized service agent for repair on March 21, 2019, because the check engine warning light had turned on within the preceding 24 hours. He stated that the authorized service agent told him at that visit that a piece of the piston from cylinder one had broken off; as a result, in order to repair the problem, the piston was replaced, and the intake manifold was replaced too, in case the piston piece had lodged inside the system. He testified that, after the repairs were made, he picked up the vehicle from the authorized service agent on April 5, 2019, and the vehicle seemed to be operating normally. However, on April 10, 2019, after he pumped gas into the vehicle, he drove approximately 50 feet, then the vehicle suddenly stalled and would not start again. He said that he had the vehicle towed that night to the authorized service agent. He explained that, after the vehicle was inspected on or around April 11, 2019, he was told by the authorized service agent that the exhaust valve had broken off and collided with the piston from cylinder one, creating a hole in the piston, and that the engine was damaged. He explained further that the authorized service agent informed him that the Manufacturer would no longer authorize warranty repairs to the vehicle because the Manufacturer had determined that modifications to the PCM, including modifications made to the PCM's software by the Tazer that he installed on the vehicle a few months after purchase, had caused the engine condition.

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 witness testified that he inspected the vehicle in April 2019, after the vehicle was towed in for the engine condition. He explained that he observed, and the photographs admitted into evidence portrayed, a "giant hole" in the cylinder one piston, the valve missing from the cylinder head, the broken valve found inside the cylinder, and damage to the cylinder wall. He opined that "the piston had contacted the valve and broke the valve off, then fell into the engine and destroyed the top of the cylinder." He testified that the "only way the piston can contact the valve is from over-revving the engine." He explained that the valve spring was designed to close the valve, and when the engine was revved too high, the valve spring could not close fast enough, so as a result, the piston contacted the valve. After observing the damage to the engine, he stated that he inspected the engine bay where the PCM was located. He explained, using photographs admitted into evidence, that he found "significant drag marks on the top of the plastic where the PCM has been pulled in and out of the car" He

testified that he then used a scan tool to analyze the PCM data, which revealed that the odometer in the PCM read 3,399 miles, according to the PCM data printout; however, the mileage on the vehicle's odometer on the dashboard read 16,575. According to him, the PCM odometer counter starts at zero when the PCM is put inside the vehicle, and then the PCM odometer accumulates miles while driving. He explained that if the original PCM had remained in the vehicle since the time of purchase, then the mileage reflected on the PCM's odometer should read in the same range as the mileage on the vehicle's odometer, but it did not. He opined that, at some point, the original PCM was removed from the vehicle and another PCM was installed. He added that the vehicle was designed by the Manufacturer with a speed limiter, so that the vehicle "cannot be revved past the red zone." However, he noted that there are aftermarket "plug-n-play" PCMs that allow you to change the settings, including removing speed limiters. He also testified that while he did not independently detect that the Tazer was installed on the vehicle, he learned that the Tazer was installed because the Consumer admitted installing it, and the Consumer also submitted information from "Z Automotive" describing the Tazer's features. He explained that one of the Tazer's features listed in the materials was the Tazer's ability to "AutoUpshift" the vehicle, meaning to "over-ride the factory shift points." He explained further that the installation of the Tazer modified the PCM's software, such that the engine was allowed to over-rev beyond the Manufacturer's limiters. He concluded that the complained-of engine condition resulted from over-revving of the engine, which was caused by the installation of the aftermarket Tazer and an aftermarket PCM.

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.

Upon consideration of the evidence presented, the Board concluded that the greater weight of the evidence supported the Manufacturer's affirmative defense that the engine condition characterized by illumination of the check engine warning light, stalling, and failure to start 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.

Collateral Charges §681.102(3), F.S.

Magnante v. Toyota Motor Sales, USA, Inc., 2019-0126/FTM (Fla. NMVAB July 26, 2019)

The Consumers' 2016 Lexus GS-350 F Sport was declared a "Lemon" by the Board. The Consumers requested reimbursement of $1,490.95 for new tires purchased for the vehicle a few weeks prior to the hearing. A majority of the Board voted to deny the Consumers' request to be

reimbursed for four new tires recently purchased for the vehicle, finding the tire purchase was for ordinary maintenance cost for the vehicle, not reimbursable under Chapter 681. §681.102(3), Fla. Stat.

Net Trade-in Allowance §681.102(18), F.S.

Reina and Reina Transportation v. Automobili Lamborghini America, LLC., 2019-0260/TPA (Fla. NMVAB September 4, 2019)

In order to purchase the subject 2017 Lamborghini, which was declared a "Lemon" by the Board, the "Retail Offer to Sell or Lease" ("2017 sale document") signed by the Consumers documented that the Consumers traded in a 2014 Lamborghini Aventador (the "2014 Lamborghini"), for which a net trade-in allowance of $396,255.00 was received. However, at the hearing, the Consumers argued that the 2014 Lamborghini was not a trade-in, despite the language in the 2017 sale document; rather, the Consumers asserted that the 2017 Lamborghini was actually a replacement vehicle for the 2014 Lamborghini, which they returned to the Manufacturer pursuant to a "Settlement Agreement and Release" that was not the result of a lemon law arbitration claim or a court case. As such, the Consumers asserted that they were therefore entitled to be reimbursed $461,455.13, which was their cash contribution to originally purchase the 2014 Lamborghini, rather than the $396,255.00 characterized as the 2014 vehicle's net trade-in allowance in the 2017 sale document. The Manufacturer, through its counsel, objected to the reimbursement of any amounts paid by the Consumers to purchase the 2014 Lamborghini as irrelevant, arguing that any claims relating to the 2014 Lamborghini were fully settled between the Consumers and the Manufacturer at the time the Consumers received the 2017 Lamborghini.

The Board found the Consumers were entitled to a refund of $396,255.00, the net trade-in allowance reflected in the 2017 sale document for the 2014 Lamborghini, credited toward purchase of the 2017 Lamborghini. The Board rejected the Consumers' assertion that the refund calculation for the 2017 Lamborghini should instead reflect the $461,455.13 cash originally paid by the Consumers to purchase the 2014 Lamborghini. The Board found, based on the evidence presented, that all claims concerning the 2014 Lamborghini were fully settled between the Consumers and the Manufacturer once the Consumers signed the 2017 sale document and accepted the 2017 Lamborghini. The Board further found that only the 2017 sale document, and not the documentation related to purchase of the 2014 vehicle, was relevant for the purpose of calculating the refund for the 2017 Lamborghini. Thus, in accordance with the 2017 sale document, the Board concluded that the 2014 Lamborghini constituted a trade-in vehicle, and the Consumers were entitled to a refund of the net trade-in allowance for that vehicle.

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

Neslage v. BMW of North America, LLC, 2019-0066/PEN (Fla. NMVAB August 12, 2019)

The base selling/sale price of the Consumer's vehicle, for the purpose of calculating the statutory reasonable offset for use, was $68,975.00, as reflected in the Purchase Invoice. However, attorneys for both the Consumer and Manufacturer argued that the Board should use the

cash price of the vehicle as reflected in the retail installment contract as the base/selling price. The Board rejected the argument, citing Section 681.102(19), Florida Statutes, which defines "reasonable offset for use" as "the base selling or sale price of the vehicle as reflected on the purchase invoice."

MISCELLANEOUS PROCEDURAL ISSUES:

Radmanesh v. Volkswagen/Audi of America, Inc., 2019-0244/STP (Fla. NMVAB July 26, 2019)

The Manufacturer's Answer was filed seven days beyond the date required for timely filing. Pursuant to paragraph (8), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, the Manufacturer's Answer must be filed with the Board Administrator no later than 20 days after receipt of the Notice of Arbitration, and affirmative defenses not timely raised in a timely filed Answer cannot be raised at the hearing, unless permitted by the Board. The Manufacturer did not assert why the Answer was filed untimely. In addition, the Manufacturer did not file a Prehearing Information Sheet identifying any Manufacturer witnesses, nor did any Manufacturer witnesses appear at the hearing. Upon consideration, the Board declined to admit the Manufacturer's Answer and the Manufacturer was not permitted to present evidence in support of its defenses. Counsel for the Manufacturer was permitted to cross-examine the Consumers and make a closing statement on behalf of the Manufacturer.

Pedrero and Shaw v. Toyota Motor Sales, USA, Inc., 2019-0191/JAX (Fla. NMVAB August 20, 2019)

The Manufacturer's Answer was filed on July 5, 2019, four days beyond the July 1, 2019, date required for timely filing. 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, the Manufacturer's representative did not have an explanation as to why the Answer was late; only stating that the Manufacturer's representative who handled the paperwork may have been in the hospital. Documents and correspondence submitted prior to the hearing indicated that the Manufacturer's representative was assisting her mother, who was the patient admitted to the hospital from July 1 through July 5, 2019. The Consumers objected to allowing the Manufacturer to assert its affirmative defense at the hearing. Upon consideration, the Manufacturer was not permitted to raise its untimely-asserted affirmative defense at the hearing. The Manufacturer's representative was permitted to cross-examine the Consumers, and to give a closing statement.