OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2013 - March 2013 (1st Quarter)

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

Rue v. Toyota Motor Sales USA, Inc., 2012-0352/STP (Fla. NMVAB February 10, 2013)
The Consumer complained of a foul odor of mold or mildew intermittently emanating from the air conditioner vents in her 2011 Toyota Camry when the vehicle was first started or after the car had been sitting for a few hours. The Consumer testified this odor sometimes lasted for two to four minutes before dissipating. During that time, she rode in the vehicle with the windows open, because it was not convenient to employ the procedure suggested by the Manufacturer's authorized service agent, which was to get into the vehicle, open all the windows, turn on the engine and air conditioner, get out of the vehicle and let the air conditioner blow for two minutes, and then get back into the vehicle and drive away. None of the repairs corrected the problem. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer also asserted that any alleged odor in the vehicle was "the direct result of environmental conditions." In support of that assertion, the Manufacturer's witness testified that he experienced a "faint whiff of something" for "one to two seconds" on two of the repair visits; however, he acknowledged he did not know how long the vehicle had been sitting after the Consumer dropped it off and before he performed his test. In his view, "you will smell something for a brief moment in any air conditioner." The Consumer's vehicle was dropped off the night before the final repair attempt in order to try to duplicate the conditions under which the Consumer experienced the intermittent air conditioner odor. According to the Manufacturer's representative, "it is not uncommon to notice a somewhat musty odor" upon initial start-up in any vehicle; however, he stated that he did not notice this odor at all in the Consumer's vehicle. A majority of the Board concluded the evidence established that the intermittent foul odor substantially impaired the use and value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumer was awarded a replacement vehicle.

Browning v. Toyota Motor Sales USA, Inc., 2012-0347/FTL (Fla. NMVAB February 15, 2013)
This Consumer complained of a foul odor emanating from the air conditioner in her 2012 Toyota Venza when the a/c was first turned on, and often times while the vehicle was being driven. The Consumer's husband testified that an "unpleasant, obnoxious smell" started coming from the air conditioner vents about one month after they took delivery of the vehicle. The odor did not go away but started to get worse, and the hotter the ambient temperature, the longer the odor would last. When he entered the vehicle, he turned the air conditioner on, put the windows down, and held his breath while he blasted the air conditioner to blow some of the odor out of the vehicle. Nevertheless, sometimes the foul odor lasted 20 to 30 minutes into the drive. The Consumer testified she was the intended driver of the vehicle, but after the odor problem arose she started

having allergy issues and she began driving her husband's vehicle instead. She testified her allergy issues stopped with the change of vehicles. A service writer at one of the Manufacturer's authorized service agents, told the Consumer nothing could be done and they would not even attempt a repair. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle; and the alleged nonconformity was the direct result of "environmental conditions." The Manufacturer's representative testified he conducted the Manufacturer's final repair attempt. He acknowledged that, when he turned on the air conditioner, he experienced an odor that was "not desirable." When he drove the vehicle the odor began to dissipate. He explained that the evaporator in the air conditioning unit was warm, and when the air conditioner was turned on it blew cold air on the evaporator, causing condensation to build up in the unit. Therefore, when the vehicle was shut off, the air conditioner should be switched to outside air for the air to circulate in the unit and help dry out any water that has accumulated; otherwise, the accumulated water can start to smell. Following that practice will not eliminate any air conditioner odor, but it will lessen it, and, according to him, this problem was more prevalent in South Florida because of its wet environment and high humidity. The Board found that the foul odor emanating from the air conditioner substantially impaired the use and value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumer was awarded a refund.

Karp v. Toyota Motor Sales USA, Inc.-Lexus Division, 2012-0270/FTL (Fla. NMVAB January 30, 2013)

In a third air conditioner odor case, the Consumer complained of a foul odor from the air conditioner in her 2012 Lexus IS 250. According to the Consumer, the smell was "vinegar-y" and offensive, and was worse when the vehicle was first started in the morning, so much so that she would leave the door open when she started the car, and started her drive with the windows down in order to air out the vehicle. She testified that on some days the smell tapers off after approximately 30 minutes, but on other days – particularly very hot days – the smell would last all day. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle, because the "concern had been repaired and the customer's vehicle was currently up to the manufacturer's specifications." The Manufacturer's witness testified that the odor complained of by the Consumer had to have been caused by micro-organisms on the air conditioner evaporator, but because neither he nor the authorized service agent had ever been able to recreate the odor, the problem had to have been corrected by the repairs that were performed. The Board found that the foul odor coming from the air conditioner 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.

Browning v. Toyota Motor Sales USA, Inc., 2012-0347/FTL (Fla. NMVAB February 15, 2013) (*See "Nonconformity" above*)
The Manufacturer stipulated that the vehicle was presented to an authorized service agent for repair of the air conditioner odor nonconformity on September 12, 2012 (no repair order given to Consumer) and September 13, 2012, when water was found around the evaporator core, and an air conditioner mist service was performed. The Manufacturer stipulated that it was afforded a final opportunity to repair the vehicle after receipt of written notification from the Consumer. On October 10, 2012, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, the evaporator was cleaned and the Consumer was instructed to set the air conditioner to outside air prior to turning off the vehicle. The Consumer again brought the vehicle in for repair of the foul odor on October 27, 2012, and November 17, 2012. The evidence established that the nonconformity was subjected to repair by the Manufacturer's service agent a total of five times. Under the circumstances, the Manufacturer had a reasonable number of attempts to conform the subject vehicle to the warranty as contemplated by the Lemon Law. Accordingly, the Consumer was awarded a refund.

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

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

Gallegos v. American Honda Motor Company., 2012-0365/MIA (Fla. NMVAB March 1, 2013)
The Consumer complained of an oil leak in her 2011 Honda Accord. The Consumer testified when she leased the vehicle she was told she could take the vehicle to any Auto Nation dealership for maintenance service. Therefore, she sometimes took her vehicle to Auto Nation Nissan, and sometimes to Auto Nation Honda. On August 6, 2012, the Consumer took the vehicle to the Auto Nation Nissan dealer for an oil and filter change. Subsequent to that maintenance service, she was parked at her friend's home and her friend saw an oil leak on the ground/pavement under her vehicle. The Consumer took the vehicle back to Auto Nation Nissan on September 27, 2012, where it was confirmed there was a hairline crack near the drain bolt. She was advised to take the vehicle to a Honda dealership for a possible warranty repair. She went to the Honda dealership for service the very next day. On November 7, 2012, the oil was checked by the Nissan dealer. On December 4, 2012, the Consumer took the vehicle to South Motors Honda, a Honda authorized service agent, because the oil light was blinking. It was discovered that the oil pan was cracked near the drain bolt. The Honda service agent attributed the crack to the last oil service which had been performed by the Nissan dealer and, rather than perform a repair under Honda's warranty, the cost of the repair was quoted to the Consumer. The Consumer took the vehicle to the Nissan dealer on December 18, 2012, where the crack in the oil pan near the drain bolt was verified, the oil was topped off and the Consumer was cautioned about driving the vehicle, because the oil level would drop. The Consumer then took the vehicle to the Auto Nation

Honda authorized service agent on December 19, 2012, when the oil pan was replaced. The Consumer did not believe the vehicle was leaking oil after that date.

The Manufacturer asserted the alleged nonconformity was the result of accident, abuse, neglect or modification or alteration of the vehicle by persons other than the Manufacturer or its authorized service agent. The Service Manager at Auto Nation Honda of Miami, testified that, on December 19, 2012, when the vehicle was returned to the Auto Nation Honda authorized service agent, a technician replaced the oil pan. The technician testified the oil pan had a hairline crack coming from near the drain bolt. The crack was attributed to over-torquing of the drain bolt and not to a defect in the oil pan; therefore, it was not treated as a warranty repair. The Service Manager for Auto Nation Nissan of Kendall, testified that the repair was billed out to Auto Nation Nissan of Kendall, because it was concluded by two Honda dealers (Auto Nation and South Motors) that over-torquing caused the crack in the oil pan, and his Nissan dealership had performed the oil changes. The District Parts & Service Manager for American Honda Motor Company, testified that Auto Nation Nissan is not an authorized service agent of American Honda Motor Company.

The Board found the evidence established that the oil leak complained of by the Consumer was caused by the over-torquing of the drain bolt by the Nissan authorized service agent. Since the defect was not the result of accident, abuse, neglect, modification or alteration of the vehicle by American Honda Motor Company or its authorized service agent, it was not a nonconformity as defined by the statute. Accordingly, the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Lyons v. Ford Motor Company, 2012-0324/WPB (Fla. NMVAB February 7, 2013)
The Consumer's 2011 Ford Explorer was declared a "lemon" by the Board. The Consumer paid $2,000.00 in cash as a down payment. The purchase documents also reflected that a vehicle rebate in the amount of $3,250.00 was provided by the Manufacturer towards the purchase of the vehicle, which the Consumer argued should be included in the refund calculation as cash awarded to him. According to the Consumer, at the time of purchase, he had the option of either accepting the rebate as cash or applying the rebate to the price of the vehicle. He argued that he should not be penalized for applying the rebate toward the purchase price of the vehicle. The Consumer's request to be reimbursed the $3,250.00 manufacturer's rebate was denied by the Board. Instead, the purchase price of the vehicle was reduced by $3,250.00 for the rebate in order to calculate the statutory reasonable offset for use.

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

Weiser v. Chrysler Group LLC, 2012-0378/FTL (Fla. NMVAB March 4, 2013)
At the hearing, the Manufacturer, through its representative, stipulated that the Consumer's 2011 Chrysler 200 was a "lemon." To purchase the vehicle, the Consumer traded in a used 2003 Chevrolet Trailblazer for which a net trade-in allowance of $3,200.00 was received, according to the purchase contract. The net trade-in allowance reflected in the purchase contract was not acceptable to the Consumer. The NADA Official Used Car Guide (Southeastern Edition) (NADA

Guide) in effect at the time of the trade-in did not list a retail price for the 2003 GMC Trailblazer. The Consumer submitted a copy of the May through August 2011 NADA Official Older Used Car Guide (National Edition), which did list the 2003 GMC Trailblazer. The Manufacturer objected to the use of the NADA Older Used Car Guide and argued that either the NADA Guide (Southeastern Edition) in effect at the time of the trade-in should be used for calculating the net trade-in allowance, or the gross trade-in allowance which was reflected in the purchase contract should be used. The Manufacturer's objection to the use of the Official Older Used Car Guide to determine the retail value of the trade-in vehicle was denied by the Board. According to the NADA Official Older Used Car Guide, the trade-in vehicle had a base retail price of $8,225.00. Adjustment for mileage and accessories as testified to by the Consumer and/or reflected in the file documents, resulted in a net trade-in allowance of $7,175.00. Accordingly, the Consumer was entitled to a refund of $7,175.00 for the net trade-in allowance.

Wald v. American Honda Motor Company., 2012-0267/FTL (Fla. NMVAB March 18, 2013)
The Consumer's 2011 Honda Ridgeline was declared a "lemon" by the Board. To purchase the vehicle, the Consumer traded in a used 2001 Acura MDX for which a net trade-in allowance of $3,898.00 was received, according to the purchase contract. The net trade-in allowance reflected in the purchase contract was not acceptable to the Consumer. The NADA Official Used Car Guide (Southeastern Edition) (NADA Guide) in effect at the time of the trade-in did not list a retail price for the 2001 Acura MDX. The Consumer submitted a copy of the May through August 2010 NADA Official Older Used Car Guide, which did list the 2001 Acura MDX. The Manufacturer objected to the use of the NADA Older Used Car Guide and argued that either the NADA Guide (Southeastern Edition) in effect at the time of the trade-in should be used for calculating the net trade-in allowance, or the gross trade-in allowance which was reflected in the purchase contract should be used. The Board rejected the Manufacturer's argument. According to the NADA Official Older Used Car Guide, the trade-in vehicle had a base retail price of $12,550.00. Adjustment for mileage and accessories as testified to by the Consumer and/or reflected in the file documents, resulted in a net trade-in allowance of $11,400.00. Accordingly, the Consumer was entitled to a refund of $11,400.00 for the net trade-in allowance.

MISCELLANEOUS PROCEDURAL ISSUES:

Damato v. Ford Motor Company, 2012-0246/TPA (Fla. NMVAB January 23, 2013)
During the hearing, the Manufacturer sought to introduce BBB/Autoline documents not timely received by the Board as attachments to its Manufacturer's Prehearing Information Sheet or any amended Prehearing Information Sheet. Paragraph (6), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, requires that the originals be received by the Board Administrator with copies to the opposing party or attorney "…no later than five days before the scheduled hearing" or the Board may decline to consider any attachments unless good cause is shown for the failure to comply with the rule. No reason was given by the Manufacturer's representative for the failure to timely supply the documents. The Consumers objected to the Manufacturer's request. Upon consideration, the documents were not considered by the Board.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2013 - June 2013 (2nd Quarter)

JURISDICTION:

Consumer §681.102(4)F.S.

Quality Body Works Inc. v. Chrysler Group LLC, 2013-0091/WPB (Fla. NMVAB June 27, 2013)
The parties stipulated that, on January 27, 2012, Quality Body Works, Inc. purchased a 2012 Jeep Wrangler motor vehicle, in Lake Park, Florida. Quality Body Works, Inc., (hereinafter QBW) was a New York State Motor Vehicle Dealership. The purchase contract for the vehicle did not reflect a charge for sales tax. On January 27, 2012, QBW applied to the State of Florida Department of Revenue for a "Sales Tax Certificate of Exemption" for out-of-state motor vehicle dealers, on which the following option was checked: "Motor vehicles for resale, only to licensed dealers." QBW also applied to the State of Florida for a certificate of title without registration, which application stated the vehicle was exempt from the sales tax imposed by Chapter 212, Florida Statutes. Sales tax was not paid to the state of New York, and the license plate on the vehicle indicated it was for a New York Dealer. The Manufacturer contended that QBW was not a "consumer" as defined by Section 681.102(4), Florida Statutes, because it bought the vehicle for the purposes of resale. The Board concluded that the vehicle was purchased for purposes of resale; therefore, it was not purchased by a "consumer" as defined in §681.102(4), Fla. Stat. Accordingly, QBW was not qualified for refund/replacement relief under the Lemon Law and the case was dismissed.

Motor Vehicle §681.102(14), F.S.

Coastal Prep Technology Inc. v. Ford Motor Company, 2013-0079/FTL (Fla. NMVAB May 20, 2013)
The Consumer purchased a 2011 Ford F-350 in Fort Myers, Florida. The Manufacturer asserted that the Consumer's vehicle was "not a 'motor vehicle' as defined by the lemon law." In support of that contention, the Manufacturer, through counsel, argued that the gross vehicle weight of the vehicle exceeded 10,000 pounds and therefore the truck fell within the exclusionary language of the statute. In support of that argument, the Manufacturer produced the Consumer's Florida Vehicle Registration, which reflected a "GVW" of 13,000 pounds. During the Manufacturer's prehearing inspection, the truck was weighed on a Certified Automated Truck (CAT) scale, with the Consumer in the truck as the driver and one-quarter tank of fuel, and weighed 8,320 pounds. In addition, the Manufacturer's prehearing inspection report contained a notation attributing to the Consumer a statement that he has carried a pair of boat propellers weighing 795 pounds each in the truck. It was the Manufacturer's position that the normal load carried in the truck would cause the gross vehicle weight to exceed 10,000 pounds.

The Consumer disagreed with the Manufacturer's assessment and testified that the fuel tank had a 40-gallon capacity and the fuel weighs 7.25 pounds per gallon, so the weight of an additional three-quarters tank of fuel was 217 pounds. He stated that the truck may carry anywhere from one set to three sets of boat propellers during a trip, depending on the diameter of the propellers. He explained that the smaller the diameter, the less the propeller weighs, and noted that the truck cannot carry as many sets of the larger diameter propellers at one time. The various balance reports provided by the Consumer showed the Consumer had picked up pairs of boat propellers with weights varying from 155 pounds each to 450 pounds each. The Consumer testified that the average weight of three sets of two propellers at 240 pounds each is 1,440 pounds. If this average weight of 1,440 pounds, plus 217 pounds for the additional three-quarters of a tank of fuel, is added to the CAT scale weight of 8,320, that brings the average gross vehicle weight to 9,977 pounds. The Consumer testified that the heaviest set of propellers he has carried during the three months preceding the hearing was one set weighing 735 pounds. The Consumer also noted that their driver weighs 100 pounds, while the Consumer, who was in the vehicle when it was weighed at the CAT scale, weighs 200 pounds.

The Board found the testimony by the Consumer's witnesses regarding the weight of the load normally carried in the truck to be more credible and persuasive than the assertion and evidence presented by the Manufacturer. The Manufacturer's actual weight figure, when considered in conjunction with the balance reports and the credible, firsthand testimony by the Consumer's witnesses regarding the weights of normal occupants and cargo, made it more likely than not that the gross vehicle weight of the truck did not exceed 10,000 pounds; therefore, the Board concluded that the truck was a "motor vehicle" as defined by the statute.

NONCONFORMITY 681.102(15), F.S.

Titlebaum v. Hyundai Motor America, 2013-0086/WPB (Fla. NMVAB June 28, 2013)
The Consumers complained of a noxious/toxic odor emanating from the air conditioner in their 2012 Hyundai Genesis. When the Consumer opened the door to the vehicle and turned the air conditioner on, she detected a very strong burning electrical or chemical smell. When the Consumers first took delivery of the vehicle, the odor was a "10" on a scale of 1 to 10, with "10" being the worst. They acknowledged it was not as strong now, but still rated it at a "6" on a scale of 1 to 10. The Consumer testified the odor in the vehicle caused his eyes to burn and gave him such terrible headaches that he had an MRI to rule out any physical problem; it did. He will not drive the vehicle unless the sunroof and all the windows are open. The Manufacturer asserted that the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's witness testified he was never personally involved in any of the repairs, and he did not recall ever being in the vehicle. However, he did know that no air conditioner parts were ever replaced in the vehicle. A different Manufacturer's witness testified he inspected the vehicle "multiple" times and never detected an unpleasant odor, even when the sunroof and windows were closed. The Board concluded that the foul odor emanating from the air conditioner 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.

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.

Sheppard v. Kia Motors America Inc., 2013-0038/WPB (Fla. NMVAB May 9, 2013)
The Consumer complained of poor gas mileage in her 2013 Kia Sorento. The Consumer testified she was the primary driver of the vehicle; she drove at least 90 percent of the time on local streets only. According to the Consumer, she got 16 or 17 miles per gallon but believed the vehicle should be getting at least 21 miles per gallon, even though it was primarily driven on local streets. The Consumer testified she did not see the sticker on the vehicle's window, but remembered reading newspaper ads that stated the vehicle would get between 21 and 24 miles per gallon when driven on local streets. The Consumer's previous vehicle also got between 16 and 17 miles per gallon, but that vehicle was a six-cylinder Jeep Grand Cherokee. She thought because the Sorento was a four-cylinder vehicle, she should be getting more miles to the gallon. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle.

The Manufacturer's prehearing inspection did not reveal any diagnostic trouble codes either current or stored. The Manufacturer's witness explained that sensors in the exhaust help monitor the fuel adaptations, meaning he was looking for codes that would indicate if there was a problem or potential problem with the fuel system. He also explained that, based on the Consumer's testimony that the vehicle was mostly driven on local streets for short stop-and-go trips, 16 or 17 miles per gallon would be expected, because most of the time the vehicle was being driven, it was in "open loop." He explained that when an engine is first started it is cold, and, in south Florida, it might take three or four minutes for the engine to reach optimum operating temperatures and be in "closed loop." An engine uses more fuel when it is operating in "open loop," and when an engine is left to idle, gas mileage will "plummet." With regard to the average miles listed on the vehicle's window sticker, he testified the engineers in Korea calculated the miles per gallon at 22 miles for city driving and 32 miles for highway driving. Those figures were revised down to 21 miles for city driving and 30 miles for highway driving, with a combined mileage of 24 miles per gallon. He testified the Consumer was being compensated for the one-mile difference in estimates plus an additional 15 percent. A majority of the Board concluded that, given that the vehicle was driven on local streets the majority of the time it was driven, the evidence failed to establish that the poor fuel consumption 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.

Lugones v. Volkswagen/Audi of America Inc., 2013-0019/MIA (Fla. NMVAB June 27, 2013)
The Consumer complained that the parking gear in the transmission intermittently failed to engage in his 2012 Volkswagen Jetta. The Consumer testified that when he drove the vehicle home after a September 2012 repair, the parking gear failed again. According to the Consumer, when this happened, he did not hear any noises coming from the engine or transmission area of the vehicle. The Consumer testified he had driven diesel trucks for 20 years so he continued to drive the vehicle and used the emergency brake whenever he wanted to put the vehicle into

"park." The Manufacturer asserted that the alleged transmission nonconformity was the result of abuse or neglect of the motor vehicle by persons other than the manufacturer or its authorized service agent, in that the transmission problem was caused by the parking paw being placed into park while the vehicle was still moving. The Manufacturer's witness testified he inspected the vehicle shifter to the transmission linkage and did not see anything external that could have caused the problem. When he called Volkswagen support it was thought the failure of the parking gear was inside the transmission, so the Manufacturer replaced the transmission with a new one; the new transmission arrived sealed with the shifter cable and linkage intact. The witness testified that he did not open the original transmission to inspect it as the Manufacturer did not authorize it.

On October 22, 2012, the Consumer returned, again complaining that the transmission would not engage into park. This time, the witness got permission from the Manufacturer to open the transmission to inspect it. Upon inspection it was determined the damage was due to an external cause, i.e., that the transmission was put into park while the vehicle was being driven. Another Manufacturer's witness testified the Consumer was informed the transmission would not be repaired under warranty. The Consumer did not want to pay for the repair so the transmission was reassembled and the Consumer took the vehicle. The board concluded that the failure of the transmission to engage into park was the result of abuse or neglect of the motor vehicle by persons other than the Manufacturer or its authorized service agent. Accordingly, the case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Coastal Prep Technology Inc. v. Ford Motor Company, 2013-0079/FTL (Fla. NMVAB May 20, 2013) (*See "Jurisdiction" above*)
The Consumer's 2011 Ford F-350 was declared a "lemon" by the Board. The vehicle was out of service by reason of repair for a total of 107 cumulative days. The Consumer requested reimbursement of $1,276.51 as an incidental charge, for the cost incurred by the Consumer to obtain a substitute truck so that it could continue operating its business of picking up and delivering boat propellers during the 107 days the Ford truck was out of service by reason of repair of the nonconformity. The Manufacturer, through counsel, objected to reimbursement of the cost incurred by the Consumer to obtain the substitute truck, asserting that the Board "does not have jurisdiction" to award such cost. The Board award included reimbursement of the $1,276.51. The Manufacturer's objection to reimbursement of the cost of obtaining the substitute truck was denied. §681.102(7), Fla. Stat.

Fernandez v. Ford Motor Company, 2013-0056/TPA (Fla. NMVAB April 23, 2013)
The Consumer testified that intermittently, when the accelerator pedal was depressed, her 2012 Ford Focus hesitated and did not move forward, and then it would suddenly jerk forward. The Board found that defect to be a nonconformity and awarded the Consumer a refund. The Consumer testified to one occasion when she was attempting to make a right-hand turn, and the vehicle failed to accelerate and then "jumped" forward without warning, which caused her to hit another vehicle. As a result of damage to her vehicle in that accident, the Consumer made a claim with her insurance and had to pay a deductible of $250.00 to have the damage repaired. The

Consumer requested reimbursement of the $250.00 for the deductible as an incidental charge. The Manufacturer objected to reimbursement of this amount, arguing that such amount required "factual findings outside the Board's authority." The Board awarded reimbursement of the $250.00 for the deductible paid by the Consumer for repair of accident damage caused by the nonconformity as an incidental charge. The evidence established the accident, consequent damage and resultant deductible charge was directly caused by the nonconformity. §681.102(7), Fla. Stat.

Reasonable Offset for Use §681.102(20), F.S.

Fernandez v. Ford Motor Company, 2013-0056/TPA (Fla. NMVAB April 23, 2013)
(*See "Incidental Charges" above*)
At the hearing, the Manufacturer, through counsel, asserted that, to calculate the reasonable offset for use, the mileage up to the date of the Board's hearing should be used, because the Manufacturer's sponsored, state-certified dispute resolution procedure (BBB/Autoline) did not have a hearing in the Consumer's case. The Consumer requested that the Board use the mileage up to the date of a settlement agreement with the Manufacturer. The Manufacturer, through counsel, argued that it did not reach a settlement agreement with the Consumer, and cited to the Consumer's response to the BBB's follow-up letter dated January 22, 2013, in which the Consumer advised that the settlement had not been performed.

On December 7, 2012, the Consumer filed a claim with the BBB/Autoline. On December 20, 2012, the BBB sent the Consumer a letter that set out the terms of a settlement agreement between the Consumer and the Manufacturer. Although the procedure was subsequently notified that the settlement was not performed to the Consumer's satisfaction and that the Consumer wished to take the matter to a hearing, the procedure declined to further consider the Consumer's complaint on the grounds that it was without jurisdiction to do so due to the vehicle having been in an accident. Calculation of the reasonable offset for use is based in part upon, "the number of miles attributable to a consumer up to the date of a settlement agreement or arbitration hearing, whichever occurs first." §681.102(19), Fla. Stat. The Board concluded that, in this case, there was first a settlement agreement between the parties as evidenced by the letter prepared by the Better Business Autoline dated December 20, 2012; therefore, the Manufacturer's assertion that the mileage up to the date of this Board's hearing be used to calculate the offset was rejected.

Huskey v. Kia Motors America Inc., 2013-0014/ORL (Fla. NMVAB May 2, 2013)
The Consumer's 2011 Kia Sorento was declared a "lemon" by the Board. For purposes of calculating the offset for use, mileage attributable to the Consumers up to the date of the Better Business Autoline hearing was 41,651 miles (42,221 odometer miles reduced by nine miles at delivery, and 561 other miles not attributable to the Consumers). The Consumers requested that the mileage attributable to them be further reduced, because they were in Michigan at the time they were contacted for the final repair attempt, and they drove the vehicle from Michigan back to Florida for the final repair attempt. Based on the evidence and testimony at the hearing, the Consumers' request to exclude mileage incurred driving the vehicle from Michigan to Florida for the final repair attempt was denied by the Board.

MISCELLANEOUS PROCEDURAL ISSUES:

Parker v. Chrysler Group LLC, 2013-0083/FTM (Fla. NMVAB April 24, 2013)
The Consumers sought to introduce, at the hearing on April 23, 2013, a Manufacturer's "Safety Recall" document that was not timely received by the Board or the Manufacturer. Paragraph (6), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, requires that documents be received by the Board Administrator with copies to the Manufacturer or Manufacturer's attorney "…no later than five days before the scheduled hearing," or the Board may decline to consider them unless good cause is shown for the failure to comply with the rule. The Manufacturer's representative objected to consideration of the document. The Consumer explained that he had not received the document until April 17, 2013. Upon consideration, the document was considered by the Board.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

July 2013 - September 2013 (3rd Quarter)

NONCONFORMITY 681.102(15), F.S.. (2013)

Razaghi v. Volkswagen/Audi of America, Inc., 2013-0141/TPA (Fla. NMVAB July 2, 2013)
The Consumer complained that intermittently, the driver's side window would not fully close in her 2012 Volkswagen Beetle. The window would go "only half way" up and then "drop" back down. When that occurred, she had to manually click the window up, or pull over to the side of the road, shut the engine off and restart. Eventually, the passenger front window would not fully close and the driver's front door would not close. She was concerned about rain and debris entering the vehicle. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle; alternatively, if there were a nonconformity, it was repaired within a reasonable number of attempts. The Manufacturer's witness testified that he was involved at the last three repair attempts. In his opinion, the "pinch protector" in the window motor was "too sensitive," causing resistance inside the motor which would prevent the window from moving all the way up. He believed that the last updated control module fixed the problem, because the dealership had not been able to duplicate the problem since it was installed. The Board concluded that the driver's side window not fully closing substantially impaired the use, value and safety of the vehicle, thereby constituting a nonconformity as defined by the statute and the applicable rule. Accordingly, the Consumer was awarded a refund.

Nguyen v. Hyundai Motor America, 2013-0119/ORL (Fla. NMVAB July 9, 2013)
The Consumers complained of a defective Infinity System in their 2012 Hyundai Santa Fe. The backup camera feature of the Infinity System did not work at the Consumer's house and garage, the navigation feature of the system gave incorrect directions, the radio did not work properly, the Bluetooth would "randomly unsync" with her phone so that she had to pull over and resync her phone, and sometimes the Bluetooth did not work at all. The navigation, Bluetooth and backup camera features were important to the Consumer when she made the choice to purchase the vehicle. She noted that her husband also had a Hyundai vehicle and the backup camera in his vehicle always worked at their house and garage. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the vehicle. The Manufacturer's representative at the hearing had no personal knowledge of the repairs made to the Consumers' vehicle and had merely reviewed the repair orders. The Manufacturer did not present any testimony from a technician or other witness with firsthand knowledge. The Board concluded that the defective Infinity System substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities. Accordingly, the Consumers were awarded a refund.

Trindade v. Ford Motor Company, 2013-0093/WPB (Fla. NMVAB July 26, 2013)
The Consumer complained that intermittently, her 2010 Ford Mustang would not start on the first try. There were times when the vehicle did not start on the second try, either. Sometimes the "no-start" condition happened three times in one day, and at other times three or four days went by before it occurred again. The vehicle had exhibited the intermittent "no start" condition since the Consumer purchase it; however, it was not until after the engine would not start at all that she brought the vehicle to the Manufacturer's authorized service agent for repair. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. Although the word "verified" was written on a repair order prepared by the Manufacturer's authorized service agent, the Manufacturer's witness testified he really was not sure the Service Director actually "verified" the no-start condition; rather, he believed the word "verified" was written on the repair order so the dealership would receive payment from the Manufacturer. The Board concluded that the intermittent no-start condition substantially impaired the value of the vehicle, thereby constituting a nonconformity. The Consumer was awarded a refund.

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

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

Kasdaglis v. Hyundai Motor America, 2013-0096/ORL (Fla. NMVAB July 5, 2013)
The Consumer complained that his 2012 Hyundai Tucson did not achieve the fuel mileage represented at time of purchase. The Consumer asserted that he should be achieving 31 miles per gallon combined highway and city driving, but instead was getting 27 to 29 miles per gallon. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Hyundai District Parts and Service Manager pointed out that, according to his own testimony, the Consumer appears to be getting fuel mileage "well-within the range" expected. The Board concluded that the fuel mileage condition complained of by the Consumer did not substantially impair the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Mizrahi/Kelly v. BMW of North America, LLC., 2013-0116/FTL (Fla. NMVAB July 29, 2013)
The Consumers' 2011 BMW 335i was declared a "lemon" by the Board. The Consumers requested reimbursement of $150.00 for insurance charges paid when they rented cars that were not provided to them by the service agent, as incidental charges. The Board granted the request and awarded the Consumers the $150.00.

Prinz Von Sachsen v. Mercedes-Benz USA, LLC., 2013-0122/WPB (Fla. NMVAB September 5, 2013)
The Consumer's 2012 Mercedes-Benz CL63 was declared a "lemon" by the Board. The Consumer requested reimbursement of the following as an incidental charge: $117.47 for a one-night hotel stay in Baton Rouge, Louisiana on April 24, 2013, where the vehicle broke down and had to be towed as a result of the nonconformities. The Manufacturer objected to reimbursement for the hotel stay, arguing that, since the Consumer was on his way back to Florida from a trip to California when the car broke down, he would have incurred hotel charges as a result of the trip regardless; therefore, the charge was not caused by the nonconformities. The Consumer testified that the breakdown of the vehicle occurred at night and he had to wait three hours for the tow truck to arrive. On April 25, 2013, he had to get a loaner vehicle from the Baton Rouge dealer to finish his trip, because his car had to remain at the Louisiana dealership for several more days. The Board awarded the Consumer the $117.47 for the one-night hotel stay in Baton Rouge, Louisiana, which was directly caused by the nonconformities.

Net Trade-in Allowance §681.102(19), F.S.

Halverson v. Mercedes-Benz USA, LLC., 2013-0183/FTL (Fla. NMVAB August 23, 2013)
To acquire the "lemon" vehicle, the Consumer traded-in a used 2007 BMW 750Li, encumbered by debt in the amount of $24,621.70, for which a gross trade-in allowance of $17,000.00 was assigned, resulting in a net trade-in allowance of $(7,621.70), according to the lease agreement. The net trade-in allowance reflected in the lease agreement was not acceptable to the Consumer. Pursuant to Section 681.102(18), Florida Statutes, the Manufacturer produced the NADA Official Used Car Guide (Southeastern Edition) (NADA Guide) in effect at the time of the trade-in. According to the NADA Guide, the trade-in vehicle had a base retail price of $30,950.00. Adjustment for mileage and accessories as testified to by the Consumer and/or reflected in the file documents, resulted in a total retail price of $28,350.00. Deduction of the debt resulted in a net trade-in allowance of $3,728.30. The Manufacturer, through counsel, requested that the Board utilize the gross trade-in allowance reflected in the lease agreement or, alternatively, that the Board reduce the NADA Guide total retail price assigned to the Consumer's trade-in vehicle, because the vehicle had been in two accidents. Section 681.102(18), Florida Statutes, states, in pertinent part:

> "[A]ny allowance for a trade-in vehicle" means the net trade-in allowance as reflected in the purchase contract or lease agreement if acceptable to the consumer and manufacturer. If such amount is not acceptable to the consumer and manufacturer, then the trade-in allowance shall be an amount equal to 100 percent of the retail price of the trade-in vehicle as reflected in the NADA Official Used Car Guide (Southeastern Edition) ... in effect at the time of the trade-in. The manufacturer shall be responsible for providing the applicable NADA book. [Emphasis added.]

The only alternative to the net trade-in allowance reflected in the lease agreement was the retail price in the applicable NADA Guide. The Manufacturer provided the pertinent pages of the applicable NADA Guide as required by the above-quoted statutory provision. The Board declined the Manufacturer's request.

Reasonable Offset for Use §681.102(20), F.S.

Halverson v. Mercedes-Benz USA, LLC., 2013-0183/FTL (Fla. NMVAB August 23, 2013)
The Consumer's 2013 Mercedes-Benz C250 was declared a "lemon" by the Board. The agreed upon value in the lease agreement, for the purpose of calculating the statutory reasonable offset for use, was $35,695.28. Mileage attributable to the Consumer up to the date of the New Motor Vehicle Arbitration Board hearing was 13,125. Application of the statutory formula resulted in a reasonable offset for use of $3,904.17. The Consumer requested that the Board use the mileage up to the date of a settlement offer letter she had received from the Manufacturer, although she acknowledged that she did not accept the offer. The Manufacturer, through counsel, objected to the Board using that date, arguing that it did not reach a settlement agreement with the Consumer; therefore, the Board should use the mileage up to the date of the arbitration hearing to compute the offset. Since there never was a settlement agreement between the parties, the Board denied the Consumer's request that the mileage up to the date of the settlement offer letter be used to calculate the offset.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2013 - December 2013 (4th Quarter)

JURISDICTION:

Consumer §681.102(4), F.S.

Waggoner v. Ford Motor Company, 2013-0263/ORL (Fla. NMVAB November 22, 2013)
On June 27, 2011, Sandra Waggoner purchased a 2012 Ford Focus. On April 24, 2013, the vehicle was repossessed by the lienholder. Ms. Waggoner's estate was subsequently notified that the vehicle could be redeemed upon payment of the debt by a date certain. On July 12, 2013, the Estate was notified that, since the vehicle was not redeemed, the lienholder would retain the collateral in satisfaction of the debt owed on the vehicle. David Waggoner acknowledged at the hearing that the vehicle had been repossessed. The Manufacturer, through counsel, sought dismissal of the claim. 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," as defined in Section 681.102(4), Florida Statutes. The Board found that the vehicle which was the subject of the Request for Arbitration was repossessed by lienholder. As a result, Sandra Waggoner was no longer entitled to enforce the obligations of the warranty and did not otherwise meet the statutory definition of a "consumer." Consequently, the claim was outside the scope of the Board's authority and the case was dismissed.

NONCONFORMITY 681.102(15), F.S.

Tavarez v. American Honda Motor Company, 2013-0286/MIA (Fla. NMVAB December 6, 2013)
The Consumer complained that, when the vehicle was being driven, very loud wind/road/ambient noise could be heard inside his 2013 Honda Accord. The Consumer leased the vehicle for his wife but, about one month after taking delivery, she complained of excessive noise filtering into the vehicle from the outside. He then drove the vehicle and he too heard a lot of noise. According to the Consumer, it sounded as if a window or windows were open. When he took the vehicle to the Manufacturer's authorized service agent, he was initially told the vehicle had the "sound of the factory." The next time he brought the vehicle in for the noise complaint, he was told it was the "regular sound of the vehicle," and he should not bring the vehicle in again for the noise complaint. The Consumer played the radio very loud to help drown out the noise. The noise was usually heard when the vehicle was being driven at speeds of 40 miles per hour or more, but it could also be heard at speeds as low as 20 miles per hour. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative inspected and test drove the vehicle on two occasions. The only noise he claimed he heard was "normal tire noise" which

changed with the type of surface on which the vehicle was being driven. The Board concluded that the loud wind/road/ambient noise substantially impaired the use 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.

Palm Investments of Miami Inc. v. Toyota Motor Sales USA Inc., 2013-0233/MIA (Fla. NMVAB October 14, 2013)
Elio Guerrero, President of Palm Investments, was the primary driver of the 2013 Toyota Tacoma truck with a loud engine noise. Shortly before the first service was due on the vehicle, Mr. Guerrero began to hear a loud noise coming from the engine area, especially when the transmission was shifting between second and third gears. The longer the vehicle was driven and the hotter the engine, the louder the noise. The first time he brought the vehicle to the Manufacturer's authorized service agent, Mr. Guerrero was told to come back, because the service agent had to call the Manufacturer and open a "technical assistance case." The second time, the mechanic heard the noise and attributed it to carbon build-up on the pistons. The third time in for repair, Mr. Guerrero was told the Manufacturer did not have a fix and he would be called when a solution was found. At the hearing, the Consumer presented the testimony of an expert witness who had inspected the vehicle and rendered the opinion that the truck was experiencing "pre-ignition spark knock," which would eventually cause damage to the motor.
The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Customer Retention Specialist for Southeast Toyota Distributors, acknowledged the engine had a "ping"; however, she maintained it was a "characteristic" of the vehicle and was not a defect. She agreed if the engine exhibited "spark knock 100 percent" of the time it would cause damage to the engine and stated the Manufacturer was working on a software update to address the noise, but software updates take time and there was no update at present. The Board concluded that the loud engine 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 Consumer was awarded a refund.

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

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

Aviles v. General Motors – Chevrolet Division, 2013-0319/FTM (Fla. NMVAB December 2, 2013)
The Consumer complained of receiving poor gas mileage in her 2011 Chevrolet Malibu LTZ. The Consumer's husband testified that "the car drives beautifully," and stated that their "only complaint with the car was with the gas mileage." He said the estimated gas mileage for his vehicle was 22 miles per gallon in the city, 33 miles per gallon on the highway, with an average of 26 miles per gallon. He stated that he did most of his driving in city traffic and, when he checked his gas mileage on the computer information system in the vehicle, his gas mileage was much lower than these estimates. In addition, when he drove the vehicle to Tampa on I-75, he got only 20 miles per gallon; therefore, he thought "something has to be wrong" for him to be getting the mileage he was getting.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. In addition, the Manufacturer asserted that, although the U.S. Environmental Protection Agency (EPA) requires the Manufacturer to post a label indicating fuel economy, such disclosure did not create a warranty that a certain fuel economy will be achieved. The Manufacturer's witness testified that the service agent never found anything wrong during testing of the Consumer's vehicle. The last time he saw the vehicle it arrived at the dealership showing an average gas mileage of 17.2 miles per gallon and an average speed of 20 miles per hour on the driver information center computer. In addition, the tire pressure was low at 27/28 psi. After the tire pressure was set at 30 psi, the fuel tank was filled to full from a pump on the lot, and the computer was reset, the vehicle was test-driven with the Consumer in a combination of city and highway driving. Upon returning to the lot, the tank was refilled with 2.2 gallons, and the driver information center showed the distance driven at 68.8 miles, with gas mileage of 28.3 at an average speed of 38 miles per hour. The gas mileage was also manually calculated by dividing the test-drive miles of 68.8 by the 2.2 gallons of fuel used to fill the tank, for a total of 31.2 miles per gallon. The witness concluded this calculation illustrated the "optimum mpg for test drive conditions," and the vehicle was deemed to be "operating as designed." He testified that the lower gas mileage experienced by the Consumer was not abnormal, because the conditions under which the vehicle was being driven affected the gas mileage. He noted that the computer in the vehicle showed the average gas mileage on a previous visit was 16.8 miles per gallon, and that the average speed at which the vehicle was being driven was 18 to 19 miles per hour, which was very low.

The Board found that the poor gas mileage complained of by the Consumer did not substantially impair the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Collateral Charges §681.102(3), F.S.

Prandi v. Rolls-Royce Motor Cars NA LLC, 2013-0227/WPB (Fla. NMVAB December 6, 2013) The Consumer's 2011 Rolls Royce Ghost was declared a "lemon" by the Board. The Consumer requested reimbursement of $10,050.92 for oversized tires and wheels as a collateral charge. The Manufacturer objected to the Consumer being reimbursed for the cost of the oversized tires and wheels, arguing that they were not the authorized size for the vehicle. The Manufacturer's objection was granted in part. The Board award included reimbursement of $8,653.84 for wheels, but excluded the amount paid for the tires.

Incidental Charges §681.102(8), F.S.

Shook v. Toyota Motor Sales USA Inc., 2013-0117/WPB (Fla. NMVAB December 16, 2013) The Consumer's 2011 Toyota Scion XB was declared a "lemon" by the Board. The Consumer requested reimbursement of $1,350.00 for an expert witness fee as an incidental charge. The Board granted the request and awarded $1,350.00 for the expert witness fee.

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

Wappman v. American Honda Motor Company, 2013-0274/TPA (Fla. NMVAB November 6, 2013)
The Consumer's 2012 Honda Odyssey was declared a "lemon" by the Board. Prior to requesting arbitration with this Board, the Consumer filed a claim with the Better Business Bureau Autoline program, a private, alternative dispute resolution procedure sponsored by American Honda, which conducted an arbitration hearing. The Manufacturer argued the mileage used to calculate the offset should be the miles attributable to the Consumer "as of" the date of the hearing before the New Motor Vehicle Arbitration Board; whereas, the Consumer requested that mileage up to the Better Business Bureau Autoline hearing be utilized. The Board agreed with the Consumer and used mileage attributable to the Consumer up to the date of the Better Business Bureau Autoline hearing for purposes of calculating the reasonable offset for use.

MISCELLANEOUS PROCEDURAL ISSUES:

Mejia v. Kia Motors America Inc., 2013-0323/ORL (Fla. NMVAB November 21, 2013)
At the start of the hearing, the Board considered the Manufacturer's Motion to dismiss the case, which asserted that the Board lacked jurisdiction to hear the claim. The Manufacturer argued that because the Consumer's claim was premised on "personal injuries," matters relating to damages suffered as a result of personal injuries were not covered under Chapter 681 Florida Statutes. However, pursuant to Section 681.1095(8), Florida Statutes (2012), "The Board shall grant relief, if a reasonable number of attempts have been undertaken to correct a nonconformity or nonconformities." The Request for Arbitration filed by the Consumer requested the Board to determine whether the complained of defect(s) constituted a "nonconformity," as defined by the statute, and whether a reasonable number of repair attempts were undertaken, all of which was well within the Board's jurisdiction. The Manufacturer's Motion to dismiss the case for no jurisdiction was denied and the case was heard on the merits.

Baran v. American Honda Motor Company, 2013-0345/STP (Fla. NMVAB November 27, 2013)
Prior to the hearing, the Manufacturer filed a "Motion to Dismiss Consumers' Request for Arbitration," stating as grounds the Consumers' failure to first resort to the National Center for Dispute Settlement (NCDS), an informal dispute resolution procedure sponsored by American Honda. The Manufacturer argued that, because American Honda Motor Company's (AMH) warranty manual contained language requiring consumers to participate in the NCDS warranty program, the Consumers had failed to satisfy the statutory prior resort requirement contained in Section 681.108(1), Florida Statutes (2013). The Manufacturer's assertion was not accompanied by any evidence that its dispute resolution procedure was certified by the Department of Legal Affairs, as is required by Section 681.108(1), in order to trigger the prior resort requirement. The Board found that the Consumer was not required to resort to the Manufacturer-sponsored NCDS program, because it was not a state-certified informal dispute resolution procedure for American Honda Motor Company. Accordingly, the Consumer was properly before the Board and the Manufacturer's request for dismissal was denied.