IN THE SUPREME COURT OF FLORIDA

CHRYSLER CORPORATION,

Petitioner,

vs.

SPIRO PITSIRELOS,

Respondent.
_____/

CASE NO.: 90,533
Circuit Court Case No. 90-3084-CA-17
Fourth DCA Case Nos. 96-00514, 96-00215

ANSWER BRIEF OF AMICUS CURIAE ATTORNEY GENERAL OF FLORIDA

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PRELIMINARY STATEMENTS

INTEREST OF THE ATTORNEY GENERAL

The Attorney General, as chief legal officer of the State of Florida, has a vital interest in this appeal. The "Lemon Law," Chapter 681, Florida Statutes (1995), created an expeditious means of resolving motor vehicle warranty disputes between manufacturers and consumers. The Department of Legal Affairs, Office of the Attorney General administers the Lemon Law Arbitration Program, and the New Motor Vehicle Arbitration Board is established within the Department of Legal Affairs.

The Petitioner, Chrysler Corporation, challenges the constitutionality of Chapter 681. Chrysler is joined in its challenge by two motor vehicle industry trade associations, the American Automobile Manufacturers Association (AAMA) and the Association of International Automobile Manufacturers (AIAM), who filed a joint brief as Amici Curiae. Chrysler and the trade associations further seek to have this Court rewrite the statute and overturn the decisions of three District Courts of Appeal establishing the burden of proof in post-arbitration appeals by trial de novo.[1] *Mason v. Porsche Cars North America, Inc.,* 621 So. 2d 719 (Fla. 5th DCA), *rev. denied,* 629 So. 2d 134 (Fla. 1993); *Sheehan v. Winnebago Industries, Inc.,* 635 So. 2d 1067 (Fla. 5th DCA 1994), *Aguiar v. Ford Motor Company,* 683 So. 2d 1158 (Fla. 3d DCA 1996); *Chrysler Corporation v. Pitsirelos,* 689 So. 2d 1132 (Fla. 4th DCA 1997).

A declaration by this Court holding unconstitutional the challenged portions of the Lemon Law and/or overruling the decisions of the Third, Fourth and Fifth Districts cited above would drastically impair the rights of Florida's citizens and would destroy the remedial intent and

[1] Sections 681.1095(10), (12), Fla. Stat. (1995)

protective purpose of the law.

REFERENCE WORDS AND SYMBOLS

The following reference words and symbols will be used in this Brief:

The Petitioner, Chrysler Corporation, will be referred to as "Chrysler." The Amici Curiae, American Automobile Manufacturers Association and Association of International Automobile Manufacturers will be referred to singularly as "AAMA" or "AIAM" or jointly as "Amici" or "trade associations."

The Respondent, Spiro Pitsirelos, will be referred to as "Pitsirelos."

Amicus Curiae, the Attorney General of Florida, will be referred to as the "Attorney General."

The Florida New Motor Vehicle Arbitration Board will be referred to as the arbitration board or the board.

Unless otherwise indicated, all references to Chapter 681, Florida Statutes are to Florida Statutes (1995).

References to pages in the Initial Brief by Chrysler Corporation will be by prefix "IB" followed by the page number(s).

References to pages in the Initial Brief of Amici Curiae trade associations will be by prefix "AIB" followed by the page number(s).

STATEMENT OF THE CASE AND FACTS

The Attorney General adopts the Statement of the Case and Facts contained in the Answer Brief by Pitsirelos.

SUMMARY OF ARGUMENT

Chrysler and the Amici manufacturer trade associations challenge the constitutionality of various provisions of Chapter 681, Florida Statutes, Florida's "Lemon Law," on grounds ranging from violation of due process and the right of access to the courts to separation of powers. A specific provision challenged is Section 681.1095(13), Florida Statutes, which governs the damages recoverable by a consumer when a manufacturer unsuccessfully appeals a decision of the New Motor Vehicle Arbitration Board.

Chrysler and the Amici further claim that the appeal process intended by the Legislature, as set forth at Sections 681.1095(10) and (12), Florida Statutes, and as consistently interpreted by three of the five District Courts of Appeal, violates manufacturer due process rights. The Fourth District Court of Appeals, after thoroughly reviewing these issues and applying this Court's well-established tests for determining constitutionality, properly concluded that none of the arguments raised by Chrysler or the Amici were sufficient to overcome the strong presumption in favor of the validity of the statute.

Chrysler's argument to this Court is really a request for a judicial rewrite of the statute to return it to its pre-1988 version, when the consumer's only recourse was to sue the manufacturer in court. The challenged statutory provisions do not replace any preexisting common law or statutory causes of action, or defenses, manufacturers might have had; there is no violation of due process, and the Legislature's creation of the New Motor Vehicle Arbitration Board within an agency of the executive branch of government is expressly sanctioned by Florida's Constitution. There being no proven constitutional infirmity, the statute should be upheld and the Opinion of the Fourth District Court affirmed.

ARGUMENT

I. IT IS NOT UNCONSTITUTIONAL TO REQUIRE THE PARTY SEEKING RELIEF FROM AN UNFAVORABLE ARBITRATION DECISION TO BEAR THE BURDEN OF PROOF ON APPEAL.

A. Background

In 1988, the Legislature substantially revised Chapter 681, Florida Statutes, Florida's "Lemon Law," to create state-administered mandatory arbitration to resolve motor vehicle warranty disputes arising between consumers and manufacturers. Ch. 88-95, Laws of Fla. The law was again amended in 1992. Ch. 92-88, Laws of Fla. The Legislative intent is set forth in Section 681.101, as follows:

> The Legislature recognizes that a motor vehicle is a major consumer purchase and that a defective motor vehicle undoubtedly creates a hardship for the consumer. The Legislature further recognizes that a duly franchised motor vehicle dealer is an authorized service agent of the manufacturer. It is the intent of the Legislature that a good faith motor vehicle warranty complaint by a consumer be resolved by the manufacturer within a specified period of time. It is further the intent of the Legislature to provide the statutory procedures whereby the consumer may receive a replacement motor vehicle, or a full refund, for a motor vehicle which cannot be brought into conformity with the warranty provided for in this chapter. However, nothing in this chapter shall in any way limit or expand the rights or remedies which are otherwise available to a consumer under any other law.

The statute requires that, if a manufacturer cannot conform the vehicle to the warranty by correcting a nonconformity, which is defined at Section 681.102(15), Florida Statutes, as a "defect or condition that substantially impairs the use, value or safety of the motor vehicle..." within a reasonable number of attempts, the consumer is entitled to be returned to the status quo ante by virtue of receipt of a full refund or replacement vehicle, with an offset to the manufacturer

for the consumer's use of the vehicle. §681.104(2), Fla. Stat. If the manufacturer fails to provide the required remedy, the consumer must request arbitration by the New Motor Vehicle Arbitration Board as a precondition to filing a civil action for the remedy. §§681.109, 681.1095(4), Fla. Stat. If the consumer's claim is deemed eligible for arbitration, the manufacturer is compelled to submit to the arbitration. §681.1095(5), Fla. Stat. Decisions of the Arbitration Board are final and binding on the parties unless appealed to the circuit court. §681.1095(10), Fla. Stat. The appeal to the circuit court is by trial de novo, and is invoked by the appealing party filing a petition "stating the action requested and the grounds relied upon for appeal." §681.1095(12), Fla. Stat. The decision of the Arbitration Board is admissible in evidence in the circuit court proceeding. §681.1095(9), Fla. Stat.

If a manufacturer appeals a decision of the Arbitration Board to the circuit court and the board's decision is upheld, Section 681.1095(13), Florida Statutes provides:

> If a decision of the board in favor of the consumer is upheld by the court, recovery by the consumer shall include the pecuniary value of the award, attorneys fees incurred in obtaining confirmation of the award, and all costs and continuing damages in the amount of $25 per day for each day beyond the 40-day period following the manufacturer's receipt of the board's decision. If a court determines that the manufacturer acted in bad faith in bringing the appeal or brought the appeal solely for the purpose of harrassment or in complete absence of a justiciable issue of law or fact, the court shall double, and may triple, the amount of the total award.

B. Burden of Proof on Appeal.

Chrysler urges reversal of the well-reasoned decision of the Fourth District Court of Appeals rendered below, and the decisions of two other District Courts, establishing that the burden of proof in arbitration appeals filed by manufacturers pursuant to Sections 681.1095(10)

and (12), Florida Statutes, rests upon the petitioning manufacturer. While Chrysler attempts to cloak its argument in constitutional terms, what Chrysler truly seeks is a judicial rewrite of the post-arbitration appeal process established by the Legislature.

Chrysler seeks to have the burden of going forward and the ultimate burden of persuasion in appeal proceedings under Chapter 681 remain with the consumer when a manufacturer petitions for relief from having to comply with an unfavorable decision of the arbitration board. Such an interpretation is contrary to the overall remedial intent of the statute. The Fourth District rejected Chrysler's argument and adopted the interpretation applied by its sister courts in its holding:

> We find no error in the trial court's recognizing that Appellant had the burden of proof in the trial. Under the statutory scheme, the trial, albeit before a jury, is the method by which a losing manufacturer seeks relief from the arbitrators' decision. The arbitration board decision is introduced in the de novo trial and is presumed to be correct. *Aguiar v. Ford Motor Co.,* 683 So.2d 1158 (Fla. 3d DCA 1996); *Mason v. Porsche Cars of N. America,* 621 So.2d 719 (Fla. 5th DCA), *rev. denied*, 629 So.2d 134 (Fla. 1993). We have considered *General Motors Corp. Pontiac Motor Div. v. Neu,* 617 So.2d 406 (Fla. 4th DCA 1993) and deem it inapposite. As the court recognized in *Mason,* "The benefits and importance of the compulsory arbitration process would be minimized if the simple filing of a petition would force the successful party in arbitration to seek affirmative relief in the circuit court." *Mason* at 721. The legislature has deemed the circuit court action as an "appeal" from an adverse arbitration decision. As in any appeal, it is the appellant's burden to demonstrate any error or abuse of discretion to the review tribunal. No other interpretation of this statutory scheme is reasonable.

Chrysler Corporation v. Pitsirelos, 689 So. 2d 1132,1133-34 (Fla. 4th DCA 1997).[2]

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[2] In a recent review of a hybrid form of judicial review of medical malpractice arbitration awards, in *St. Mary's Hospital Inc.& Women's Health Services, Inc. v. Phillipe,* 22 Fla.L.Weekly D1853, 1855 (Fla. 4th DCA July 30, 1997), the Fourth District Court noted that "the kind of

Chrysler asks this Court to ignore the clear intent of the statutory appeal provisions and apply the traditional, Black's Law Dictionary definitions of "appeal" and "trial de novo," because, according to Chrysler, to apply the legislative intent is too confusing when assessing the burden of proof. In support of its contention, Chrysler cites to several opinions of the appellate courts of other states, but fails to mention this Court's Opinion in *Young v. Department of Community Affairs,* 625 So. 2d 831 (Fla. 1993), which addressed a very similar statutory scheme.

Young addressed the issue of which party bears the burden of going forward and the ultimate burden of persuasion in an "appeal" to the Florida Land and Water Adjudicatory Commission (Commission) pursuant to Section 380.07, Florida Statutes (1987). The Youngs sought and were awarded permits by Monroe County to remove vegetation and raise nursery stock on their Big Pine Key property, an area previously designated by the state as an area of critical state concern. Because the permits constituted development orders, copies were transmitted to the Department of Community Affairs (Department) pursuant to Section 380.07(2), Florida Statutes (1987).

The Department appealed those orders to the Commission, also pursuant to Section 380.07(2). That statute provided that "appeals" of local government orders involving areas of critical state concern shall be to the Commission. Section 380.07(3), Florida Statutes (1987), required the Commission to hold a hearing pursuant to Chapter 120, Florida Statutes. The hearing officer ruled that the burden of proof on the Department's appeal would be on the

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standard for judicial review of generic arbitration awards...can be varied by the legislature in special arbitration statutes of the kind involved here. This is, after all, substantive legislation where the powers of the legislature are plenary, subject only to constitutional limitations and the burden of clarity."

Youngs. The Youngs refused to participate in the proceeding and failed to present any evidence. The hearing officer ruled in favor of the Department on the basis that the Youngs failed to carry their burden of proof. The ruling was upheld by the Commission and subsequently affirmed by the Third District Court of Appeal. This Court reversed the Third District, stating:

> By designating the procedure in subsection (2) an appeal while providing that the hearing in subsection (3) will be pursuant to the provisions of chapter 120, the Legislature has created an internal ambiguity as to what type of proceeding is encompassed by section 380.07, and, consequently, which party bears the burden of persuasion and going forward in the proceeding.

Id. at 833.

This Court held that the type of proceeding intended was a hearing de novo, concluding that the term "appeal" as used in the statute "must be interpreted in its 'broadest, non-technical sense...to mean an application to a higher authority.'" *Id.* This Court rejected the holdings of the hearing officer, the Commission and the District Court that the Youngs, as permit applicants, carried the burden of proof before the Commission.

In *Young*, the Department sought reversal of the development order as "illegal and violative of the Monroe County Land Development Regulations and Comprehensive Plan." *Id.* This Court found that, "the effect of the Department's 'appeal' to the Commission was to 'stay the effectiveness' of an otherwise valid order." *Young* at 835. The Court concluded that, since the Department was the party asserting the affirmative that the development order was not in accordance with the cited statutes, "the ultimate burden of persuasion and the initial burden of going forward with the evidence rested on the Department." *Id.*

Proceedings before the arbitration board and appeals therefrom are exempt from the

provisions of Chapter 120. §681.1095(11), Fla. Stat. The decision of the arbitration board is final and binding upon all parties unless appealed by petition to the circuit court within the time prescribed by the statute. §681.1095(10), Fla. Stat. Thus, as in *Young,* the effect of a petition filed by a manufacturer in the circuit court is to stay the effectiveness of the board's otherwise valid order. The affirmative relief sought by Chrysler was relief from having to comply with the board's decision; thus, applying the reasoning in *Young,* Chrysler was the party asserting the affirmative in the circuit court and the burden of proof was properly placed upon Chrysler.

The concurring opinion of Justice Barkett in *Young* is instructive:

> I would harmonize the various statutes as follows: By using the word "appeal" in both sections 380.07(2) and 120.57(1)(b)(3), the Legislature indicated that the Petitioner has the ultimate burden of persuasion and that the decision by the local government is entitled to a presumption of validity. The burden of going forward, while borne initially by the party seeking review, may shift back and forth depending on the evidence presented.... However, by stating that the hearing should be held pursuant to chapter 120, the Legislature also has indicated that the hearing should encompass more than just the record below.

Young at 838 (Citations omitted).

Justice Barkett's concurring opinion in *Young, supra,* and the construction applied by the majority of the Court therein is not dissimilar to the opinion of the Fifth District Court of Appeal construing the appeal provisions of Florida's Lemon Law in *Mason v. Porsche Cars North America, Inc.,* 621 So. 2d 719 (Fla. 5th DCA), *rev. denied,* 629 So. 2d 134 (Fla. 1993). The manufacturer in that case made an argument similar to Chrysler's, urging application of the traditional definition of "trial de novo" and ignoring the legislature's use of the term "appeal." The Fifth District rejected the argument on the basis of sound rules of statutory construction.

> The manufacturer states that "de novo" means to try a matter anew, as if the same had not been heard before and as if no decision had been previously rendered. However, section 681.1095(13), Florida Statutes [1991] does not only use the term "trial de novo" but also uses the term "appeal," which by its normal definition means a review of a lower tribunal's decision. Admittedly, section 681.1095(13) is inartfully drafted but it should not be interpreted so as to lead to an absurd result.

621 So. 2d at 722.[3]

Thus, as to the burden of proof, the *Mason* court harmonized the statute as follows:

> Although the trial court characterizes section 681.1095, Florida Statutes (1991) as ambiguous, the statute is clear that once the arbitration board makes its findings, the aggrieved party may appeal to the circuit court. Although most appellate proceedings do not include a trial or evidentiary hearing, the statutory appellate procedure for Florida's lemon law authorized a trial de novo. Nevertheless, it is generally the burden of the Petitioner to show that the lower tribunal erred....
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> Section 681.1095(13) provides that the appealing party must state the action requested and the grounds relied upon for appeal. This indicates that the appealing party has the initial burden of going forward with the evidence in a trial de novo governed by the rules of civil procedure, and the overall burden of persuasion remains on the Petitioner. The benefits and importance of the compulsory arbitration process would be minimized if the simple process of filing a petition could force the successful party in arbitration to seek affirmative relief in the circuit court. If the manufacturer prevailed before the arbitration board, surely the manufacturer would not argue it had the burden on appeal to prove the correctness of the board's decision as the plaintiff in a trial de novo. Yet the manufacturer considers it appropriate to make the consumer seek affirmative relief in both the administrative and judicial forum, regardless of what transpires before the arbitration board.

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[3] The *Mason* opinion references §681.1095(13), Fla. Stat. (1991), which was renumbered in 1992 to the current §681.1095(12), but was not otherwise amended.

621 So. 2d at 721-722.[4]

The primary guide to statutory interpretation is the determination of legislative intent. *City of Ormond Beach v. State ex rel. Del Marco,* 426 So. 2d 1029, 1031 (Fla. 5th DCA 1983). Where any ambiguity in the meaning or context of a statute exists, it must yield to the legislative purpose. *Id.* The obligation of the court is to honor the obvious legislative intent and policy behind an enactment, even where that intent requires interpretation that exceeds the literal language of the statute. *Byrd v. Richardson,* 552 So. 2d 1099, 1102 (Fla. 1989). Although the legislative intent is determined primarily from the language of the statute itself, a literal interpretation of the language of a statute need not be given when to do so would lead to unreasonable conclusions or defeat legislative intent. *Winemiller v. Feddish,* 568 So. 2d 483, 484 (Fla. 4th DCA 1990). Courts should harmonize conflicting language in statutes to the greatest extent possible. *Singleton v. State,* 554 So. 2d 1162, 1163 (Fla. 1990).

The plain language of the Lemon Law reflects the legislative intent that the party initiating an appeal to the circuit court for a trial de novo shall have the burden of proof in circuit court. Under Section 681.1095(12), Florida Statutes, the party appealing must take action by filing a petition in the circuit court. The petition must state the grounds relied upon for appeal and the action requested.

The decision of the arbitration board is admissible in evidence in the de novo circuit court action. §681.1095(9), Fla. Stat. The admission of the arbitration board's decision in evidence,

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[4] *Cf. General Motors Corp. Pontiac Motor Division v. Neu,* 617 So. 2d 406 (Fla. 4th DCA 1993) (Mandamus action wherein the Fourth District Court directed that post-arbitration appeal by trial de novo be transferred out of the circuit court's appellate division. The opinion did not address the issue of burden of proof).

rather than a meaningless act, unequivocally reflects the creation by the legislature of a presumption of validity accorded to the decision of the board which shifts to the party seeking review the burden of proof in the circuit court action. *Mason* at 722; *Sheehan v. Winnebago Industries, Inc.,* 635 So. 2d 1067, (Fla. 5th DCA 1994).[5] The arbitration board's decision is final unless appealed by either party within 30 days of its receipt. §681.1095(10), Fla. Stat. Chrysler sought relief from the decision in this case in order to avoid its finality.

The obvious policy of the Lemon Law is to give some benefits to the consumer which did not exist at common law or in other statutory remedies in order to equalize the economic disparity between unevenly matched litigants. Only the consumer can request arbitration. Contrary to Chrysler's assertion that arbitration is only mandatory for the manufacturer, the requirement of arbitration is a mandatory condition precedent to a civil action by the consumer for the refund/replacement relief provided in Section 681.104, Florida Statutes. §681.1095(4), Fla. Stat. It is also significant that the consumer has the burden of proof in the arbitration proceeding. The requirement to arbitrate first implies some benefit to the consumer who prevails at arbitration, since mandatory arbitration as a precondition to a civil action actually imposes an additional burden upon the consumer which did not exist at common law. Otherwise, a consumer who prevails in arbitration and yet still has the burden of proof in an appeal by trial de novo filed by the manufacturer has essentially regressed to a remedy worse than his common law remedy. It is not

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[5] *See, Mason v. Porsche Cars N. America,* 688 So.2d 361, 370 (Fla. 5th DCA 1997), where, in a second opinion involving a post-trial appeal of this case, the Fifth District stated, "In fact, the 'presumption' terminology we utilized in *Mason* and *Sheehan* was intended to refer to the presumption of validity of a lower tribunal's decision in the context of an appeal. The 'presumption' to which we referred is fully implementd by placing the burden of going forward in the appeal by trial de novo on the party who did not prevail in the arbitration."

reasonable to construe a remedial statute such as the Lemon Law designed to lessen the burden on the consumer in a manner which increases the burden. Accordingly, a consumer who meets the burden of proof and prevails at arbitration obtains the benefit of a shift of the burden of proof to the manufacturer. A reciprocal benefit to the manufacturer is that the consumer would have the burden of proof where the consumer appeals an unfavorable decision to the circuit court.

Either party may appeal the arbitration board's decision to the circuit court for a trial de novo. Nothing prevents a consumer who disagrees with some portion of an otherwise favorable arbitration decision from filing a cross-appeal or counterclaim in the appeal by trial de novo initiated by the manufacturer. The construction urged by Chrysler would lead to the absurd result of the consumer having the burden of proof on both a counterclaim challenging the arbitration award and on the manufacturer's appeal challenging the arbitration award. "Requiring the consumer to shoulder the burden of persuasion on both the appeal and cross-appeal would lead to an inequitable and absurd result." *Mason* at 723. "Construction of a statute which would lead to an absurd or unreasonable result or would render a statute purposeless should be avoided." *State v. Webb,* 398 So. 2d 820, 824 (Fla. 1981).

In *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15 (1976), the Supreme Court observed:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

The presumption of constitutionality has been well-established by this Court. Courts will treat statutes as presumptively valid, *Wright v. Board of Public Instruction,* 48 So. 2d 912, 914

(Fla. 1950), and all doubt will be resolved in favor of the constitutionality of a statute. *Bonvento v. Board of Public Instruction of Palm Beach County,* 194 So. 2d 605 (Fla. 1967). If there is any reasonable basis for doing so, courts will construe a statute so as to uphold it rather than invalidate it. *Sarasota County v. Barg,* 302 So. 2d 737 (Fla. 1974).

Moreover, "an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt." [Emphasis added]. *State v. Kiner,* 398 So. 2d 1360, 1363 (Fla. 1981) citing, *Knight and Wall Co. v. Bryant,* 178 So. 2d 5 (Fla. 1965) *cert. denied,* 383 U.S. 958 (1966). *Accord, Burch v. State,* 558 So. 2d 1, 3 (Fla. 1990). Every reasonable doubt should be resolved in favor of the constitutionality of a legislative act. *Carter v. Sparkman,* 335 So. 2d 802 (Fla. 1976), *cert. denied*, *Sparkman v. Carter,* 429 U.S. 1041 (1977).

If a statute which is claimed to be unconstitutional is susceptible of two interpretations, one of which would lead to a finding of unconstitutionality and the other of validity, the court must adopt the construction which will support the validity of the statute. *City of Daytona Beach v. Del Percio,* 476 So. 2d 197 (Fla. 1985). In testing the constitutionality of the statute, the Court should take into consideration the whole of the act, and may consider its history, the evil to be corrected or the object to be obtained, and the intention of the Legislature. *Scarborough v. Newsome,* 150 Fla. 220, 7 So. 2d 321 (Fla. 1942).

Chrysler asks this Court to rewrite the statute to provide a unilateral benefit in favor of the manufacturer. It is simply contrary to legislative intent to impute a unilateral benefit which would in effect give an additional advantage to the manufacturer within the context of a statute intended to offset the presumed advantage of the manufacturer. The holding of the Fourth District Court

in this case, as well as the decisions of the courts of the Fifth and Third Districts[6] regarding the burden of proof, represent a well-reasoned application of the rules of statutory construction and effectuate the overall remedial intent of the Legislature. Were Chrysler's position to prevail, there would be nothing to prevent manufacturers from biding their time through the arbitration process so as to require consumers to litigate their claims in circuit court. The arbitration process would no longer be an alternative to litigation, as the Legislature intended, but would be, as the *Mason* court recognized, "simply an additional procedural step to a de novo action in circuit court." 621 So. 2d at 723.

C. Separation of Powers

Chrysler's argument that the statute violates the doctrine of separation of powers because the arbitration board is established within an agency of the executive branch is without merit. As was pointed out by the Fourth District Court in its rejection of this contention,[7] Florida's Constitution clearly provides at Article V, Section 1, that "Commissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices." The New Motor Vehicle Arbitration Board created within the Department of Legal Affairs falls squarely within that provision. Exemption of the board's proceedings from the procedural provisions of Chapter 120, Florida Statutes, does not make the board's actions unconstitutional or less quasi-judicial, as Chrysler would have this Court believe.

The fact that the board arbitrates disputes between private parties also does not take it

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[6] *Mason v. Porsche Cars North America, Inc.,* 621 So. 2d 719 (Fla. 5th DCA), *rev. denied,* 629 So. 2d 134 (Fla. 1993); *Aguiar v. Ford Motor Co.,* 683 So. 2d 1158 (Fla. 3d DCA 1996)

[7] *Chrysler Corporation v. Pitsirelos,* 689 So. 2d 1132, 1135 (Fla. 4th DCA 1997).

outside the realm of constitutional permissibility. Chrysler's assertion in this regard ignores the Workers' Compensation Act (Ch. 440, Fla. Stat.) which provides for resolution of disputes between injured workers and their employers and insurance carriers by compensation judges appointed by the Governor. Adjudications by judges of compensation claims are exempt from Chapter 120. §440.021, Fla. Stat. Additionally, disputes between condominium owners and associations must be submitted to mandatory, nonbinding arbitration conducted by attorneys employed by the Department of Business and Professional Regulation, before litigation can be initiated. §718.1255(4), Fla. Stat. The Division of Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation is empowered to mediate disputes between mobile home park residents and park owners under Section 723.037, Florida Statutes. Administrative law judges of the Division of Administrative Hearings of the Department of Management Services are empowered to determine claims between patients or their representatives and physicians and hospitals to the Florida Birth-Related Neuro Injury Compensation Plan under Section 766.303, Florida Statutes. Contrary to Chrysler's assertion, resolution of disputes between private parties by government agencies, whether under Chapter 120 or some other provision such as the Lemon Law, is neither unusual nor unconstitutional.

The case cited by Chrysler, *State Dept. Of Administration v. Stevens,* 344 So. 2d 290 (Fla 1st DCA 1977), is instructive. The case dealt with the powers of a DOAH hearing officer in rule challenge proceedings; however, its rationale is applicable to proceedings by the New Motor Vehicle Arbitration Board. As the First District Court so aptly pointed out:

> There is no well-defined line of demarcation between judicial and quasi-judicial functions. The Supreme Court in *Modlin v. City of Miami Beach,* 201 So. 2d 70 (Fla. 1967) said:

> "If the affected party is entitled by law to the essentially judicial procedures of notice and hearing, and to have the action taken based upon the showing made at the hearing, the activity is judicial in nature. If such activity occurs other than in a court of law, we refer to it as quasi-judicial."

344 So. 2d at 292-293. *See also, DeGroot v. Sheffield,* 95 So. 2d 912, 915 (Fla. 1957). ("[w]hen notice and a hearing are required and the judgment of the board is contingent on the showing made at the hearing, then its judgment becomes judicial or quasi-judicial."). The arbitration board's proceedings require notice and a hearing and the decision of the board is based upon the evidence received at the hearing.

The board's proceedings are quasi-judicial and are sanctioned by Article V, Section 1 of Florida's Constitution. Chrysler and the Amici cannot prove otherwise beyond any reasonable doubt and their challenge should be rejected by this Court.

D. Due Process

Chrysler contends that the arbitration board's proceedings are not clothed with sufficient constitutional and procedural safeguards for its decisions to shift the burden of proof to a manufacturer who petitions for appeal by trial de novo. The Amici contend that due process is violated because, somehow, requiring the petitioning manufacturer to bear the burden of proof on appeal deprives manufacturers of their rights to defend in common law breach of warranty actions. The Amici's contention that the Lemon Law is in derogation of the common law because, prior to its enactment, a consumer could sue a manufacturer in court for breach of warranty, is just plain wrong. Florida's Lemon Law neither limits nor abolishes the common law or statutory actions for breach of warranty. A consumer can still sue for breach of warranty, and a manufacturer can still defend such an action in court, and none of the respective rights and

burdens of parties to such an action are in any way impacted by the enactment of the Lemon Law.

Due process does not guarantee any particular method of state procedure. The Legislature is free to choose the remedy it believes will protect the interests involved, provided its choice is not unreasonable or arbitrary and satisfies the constitutional requirements of reasonable notice and opportunity to be heard. *Matthews v. Eldridge*, 424 U.S. 319, 349 (1976); *Countrywide Insurance v. Harnett*, 426 F. Supp. 1030 (S.D.N.Y.), *Aff'd*, 431 U.S. 934 (1977). This Court has described the test as "whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive." *Lasky v. State Farm Insurance Co.,* 296 So. 2d 9, 15 (Fla. 1974).

"There is nothing per se unconstitutional about binding compulsory arbitration." *Lyeth v. Chrysler,* 734 F. Supp. 86, 92 (W.D.N.Y. 1990) (upholding New York's compulsory lemon law arbitration scheme against a similar attack by Chrysler). Courts throughout the United States have uniformly upheld compulsory arbitration statutes. *See, e.g., Andrews v. Louisville & Nashville Railroad,* 406 U.S. 320, 322 (1972); *American Universal Ins. Co. v. Del Greco,* 530 A.2d 171, 178 (Conn. 1987) and cases cited therein; *Hardware Dealers Fire Ins. Co. v. Glidden,* 284 U.S. 151 (1931); *Countrywide Insurance Co. v. Harnett,* 426 F. Supp. 1030 (S.D.N.Y. 1977), *Aff'd.,* 431 U.S. 934 (1978). Chrysler points out in its Initial Brief that Lemon Laws of other jurisdictions have been the subject of constitutional challenge. (IB at 21). However, Chrysler neglects to mention that, with one limited exception, the laws were upheld.[8] State-

[8] In *Motor Vehicle Manufacturers Association of the United States v. O'Neill,* 561 A.2d 917 (Conn. 1989), only the post-arbitration appeal procedure of Connecticut's law failed to withstand challenge on access to courts grounds. The remainder of the law, which contains a

administered compulsory arbitration is not unusual in state lemon laws. At least 13 states have some form of state-administered arbitration.[9]

The Legislature's creation of a procedural device to handle consumer complaints relating to the quality of motor vehicles sold in this state is a permissible legislative objective. The mandatory nature of the arbitration process does not make it violative of manufacturers' due process rights.

Florida's arbitration procedure satisfies the due process requirements of *Matthews v. Eldridge,* 424 U.S. 319, 349 (1976) of reasonable notice and an oppportunity to be heard. The rules of procedure of the arbitration board provide that written notice of hearings before the board be mailed to each party at least 14 days before a scheduled hearing.[10]

Section 681.1095(7), Florida Statutes, further provides:

> At all arbitration proceedings, the parties may present oral and written testimony, present witnesses and evidence relevant to the dispute, cross-examine witnesses, and be represented by counsel. The board may administer oaths or affirmations to witnesses and inspect the vehicle if requested by either party or if the board deems

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compulsory arbitration provision, was upheld on due process and equal protection grounds. Notably, the Connecticut program is administered by the state's Department of Consumer Protection. Arbitrators may be appointed by the Commissioner of Consumer Protection. Conn. Gen. Stat. §42-181.

[9] Connecticut (Conn. Gen. Stat. §42-181), District of Columbia (D.C. Code Ann. §40-1303), Georgia (Ga. Code Ann. §10-1-787), Maine (Me. Rev. Stat. Ann. Tit. 10, §1169), Massachusetts (Mass. Ann. Laws Ch. 90, §7N1/2), Montana (Mont. Code Ann. §61-4-515), New Hampshire (N.H. Rev. Stat. Ann. §357-D:5), New Jersey (N.J. Stat. Ann. §56:12-37), New York (N.Y. Gen. Bus. Law §198-a(k)), Rhode Island (R.I. Gen. Laws §31-5.2-7.1), Texas (Tex. Rev. Civ. Stat. Ann. Art. 4413(36), §3.08), Vermont (Vt. Stat. Ann. Tit.9, §4174), Washington (Wash. Rev. Code Ann. §19.118.080).

[10] A copy of the rule containing the board's procedures is included in the Appendix to this Brief. The rules included in Chrysler's Appendices 12 and 13 were repealed or not adopted.

such inspection appropriate.

Like the arbitrators of the New York program upheld in *Lyeth, supra,* Florida's arbitration board is limited to the remedies prescribed in the statute at Section 681.104(2), and is not free to fashion its own awards, regardless of the equities of a particular case. The mandatory arbitration process is a reasonable means developed by the Legislature to balance the inherently unbalanced interests of consumers and manufacturers in warranty disputes. As was pointed out by the Fifth Circuit Court of Appeals in upholding the Texas Lemon Law in *Chrysler Corporation v. Texas Motor Vehicle Commission,* 755 F.2d 1192, 1201 (5th Cir. 1985):

> The judiciary cannot justify intrusion into the weighing of economic objectives and values with the single assertion that the regulatory effort has affected "procedural rights."...The difficulty is that in terms of the deference to be accorded legislative decisionmaking, economic decisions regarding substantive entitlement, state regulation, and attainment of economic goals can be expressed, and often are expressed, in procedural terms. Placement and definitions of burdens of proof, and rules of repose, are familiar adjusting valves for state classification and entitlements drawn to achieve state regulatory goals. By necessity, then, how the procedures define the substantive decisions is an early, and certainly not the ultimate, inquiry. A state legislature entitled to deference in its regulatory scheme sufficient to license sales of a product or set standards for its quality, a fortiori can express its economic choices and attempt to achieve them with procedural tools such as placing the burden of proof and laying procedural hurdles. (Citations omitted).

The compulsory arbitration process does not interfere with any manufacturer right to initiate offensive litigation against a consumer, whatever that may be, nor does it restrict any constitutional right a manufacturer may have to a jury trial. Indeed, Chrysler had a jury trial in this case. Chrysler was the party seeking affirmative relief in the circuit court appeal by trial de novo; therefore, the burden of proof properly rested with Chrysler. To apply Chrysler's

interpretation would be to ignore the legislative intent behind the use of the term "appeal" and the language making the decision admissible in the court proceeding, and would require the consumer, who has received a favorable, presumptively valid arbitration award, to disprove its correctness. Chrysler's interpretation was properly rejected by the Fourth District Court of Appeal below. The due process attack upon the statute is unfounded and without merit; it should be rejected by this Court.

II. THE $25 PER DAY CONTINUING DAMAGES PROVISION DOES NOT VIOLATE THE EQUAL PROTECTION OR DUE PROCESS PROVISIONS OF THE FLORIDA OR UNITED STATES CONSTITUTIONS OR THE RIGHT OF ACCESS TO COURT UNDER FLORIDA'S CONSTITUTION

The Fourth District Court rejected Chrysler and the trade associations' claim that the continuing damages provision of Section 681.1095(13), Florida Statutes, denies access to the courts.[11] Applying the test enunciated by this Court in *Kluger v. White,* 281 So. 2d 1 (Fla. 1973), the Appeals Court held:

> Initially, we note that subsection (13), rather than impacting a right predating the state constitution, essentially creates a new right and remedy, recognizing that where the manufacturer elects to continue denying payment after arbitrators have determined the obligation and amount owed, it is properly and reasonably held responsible for presumed continuing damages and inconvenience caused by its delay in payment.... The patent purpose of the provision in question is to encourage manufacturers to promptly resolve these claims. It does not take away any preexisting right.

The court below properly recognized that the test for determining whether a legislative enactment violates the right of access to the courts is not applicable to the continuing damages

[11] *Chrysler Corporation v. Pitsirelos,* 689 So. 2d 1132, 1134 (Fla. 4th DCA 1997).

provision of Florida's Lemon Law. The court's interpretation of the provision is consistent with the Legislative intent expressed at Section 681.101, Florida Statutes, recognizing the hardship a defective motor vehicle undoubtedly creates for a consumer and requiring resolution by the manufacturer of good faith warranty disputes within a specified period of time. The continuing damages provision is not a precondition to the manufacturer filing an appeal of an adverse arbitration decision, and is only awarded if the manufacturer fails to prevail in the appeal.

The Appeals Court also rejected Chrysler's claim that the continuing damages provision is violative of due process. Applying this Court's test for due process violations in *Lasky v. State Farm Ins. Co.,* 296 So. 2d 9 (Fla. 1974), the court below held:

> Clearly the $25 per day continuing damage allowance is a valid legislative estimation of hard to quantify damages, including the estimated cost of renting alternative transportation. Although not conclusive, we note that this view is supported by legislative history. It can hardly be argued that the procedure adopted by subsection (10), (12) and (13) of the Act does not bear a reasonable relation to remedying unfair burdens placed on consumers by the inherent advantage of a manufacturer in a warranty dispute and appeal process. These provisions, essentially, even the playing field.

Chrysler Corporation v. Pitsirelos, 689 So. 2d 1132, 1134 (Fla. 4th DCA 1997).

Chrysler and the Amici assert that the $25 per day continuing damages provision imposes an unconstitutional penalty because the continuing damages are tied to an injury which is otherwise fully compensable as part of the pecuniary damages portion of the award. The assertion confuses the separate recovery provisions of Section 681.1095(13) and Section 681.112, Florida Statutes.

Section 681.1095(13) sets forth the recovery of the consumer when a <u>manufacturer</u> files

an appeal of a decision of the arbitration board and the court upholds the board's decision. Thus, reference to the "pecuniary value of the award" in that section relates to the amount awarded by the arbitration board. The amount of the board's award is governed by the formula contained in Section 681.104(2), Florida Statutes, which does not include or otherwise take into account the additional financial hardship suffered by the consumer during the course of the manufacturer's appeal in the circuit court. Recognizing that a consumer would be stuck with a defective vehicle during the course of the appeal in circuit court, the Legislature provided a de minimus continuous damages provision payable by the manufacturer only if the board's decision is upheld. If the board's decision is not upheld, the consumer recovers nothing.

Section 681.112, Florida Statutes does not relate to appeals of arbitration board decisions filed by manufacturers, but relates to court actions filed by consumers. It states:

> (1) A consumer may file an action to recover damages caused by a violation of this chapter. The court shall award a consumer who prevails in such action the amount of any pecuniary loss, litigation costs, reasonable atttorney's fees, and appropriate equitable relief.
> (2) An action brought under this chapter must be commenced within 1 year after the expiration of the Lemon Law rights period, or, if a consumer resorts to an informal dispute-settlement procedure or submits a dispute to the division or board, within 1 year after the final action of the procedure, division, or board.

The differences between the specific continuing damages provision of Section 681.1095(13) and the general provisions of Section 681.112 are apparent. The times for filing the actions are different--30 days from receipt of the board's decision for an appeal; one year from expiration of the rights period or resort to a manufacturer-sponsored program or the state program for a consumer action for damages. The fact that the filing of an action by a consumer under Section 681.112 can occur up to one year after resort to the arbitration board clearly

indicates that the action is for a violation unrelated to a board decision, which becomes final if not appealed within 30 days. §681.1095(10), Fla. Stat. The damages recoverable in a consumer action under Section 681.112 do not include continuing damages to compensate for delay, because that provision bears no relation to the appeal process set forth in subsections (10) (12) and (13). Likewise, the reference to "pecuniary loss" in Section 681.112 is not the same as the reference in Section 681.1095(13) to the pecuniary value of the arbitration award.

The case on appeal to this Court by Chrysler was not an action for damages filed by Pitsirelos in the circuit court; it was an appeal of the decision of the arbitration board filed by Chrysler pursuant to Sections 681.1095(10) and (12), Florida Statutes. The trial court upheld the decision of the arbitration board; therefore, Pitsirelos received the pecuniary value of the board's award, continuing damages, costs and attorney's fees, and no more. The Judgment on appeal contains no amounts for the variety of pecuniary losses to which Chrysler and the Amici seem to contend Pitsirelos was entitled. Damages were neither sought nor recovered under Section 681.112, thus there was no "double recovery" or recovery of damages otherwise ascertainable, and no unconstitutional punishment.

A somewhat similar due process challenge was made by another manufacturer to a continuing damages provision in Washington state's Lemon Law in *Ford Motor Company v. Barrett,* 800 P.2d 367, 375 (Wash. 1990). In that case, among the consequences to be borne by the manufacturer who lost on appeal was the payment of $25 per day in continuing damages, if the manufacturer did not give the consumer free use of a comparable loaner motor vehicle. *Barrett* at 370. Ford had elected not to provide the prevailing consumer with a free loaner vehicle and became liable for payment of continuing damages. In rejecting Ford's due process claim, the

Washington Supreme Court found that any deterrent effect of the continuing damages provision upon manufacturers was outweighed by the state's interest in protecting consumers from continuing injury.

Chrysler relies primarily upon *Missouri Pacific Railway Co. v. Tucker,* 230 U.S. 340 (1913), as support for its argument that the continuing damages provision denies due process. In that case, the statute at issue imposed a liability of $500 for every charge by a common carrier in excess of the fixed rates for transporting oil. The fixed rate was $.12, but Missouri Pacific charged $3.02 more than the fixed rate. The Court found that the actual damages sustained as a result of the overcharge were readily ascertainable and the imposition of $500 for each overcharge, whether it be for a barrel or a tank car, was so grossly out of proportion to the actual damages as to constitute a taking of property without due process. Chrysler's reliance on the cited case is misplaced.

Section 681.1095(13) is a valid legislative estimation of such costs as rental of alternate transportation and hard-to-quantify damages such as inconvenience and hardship endured by a consumer during the pendency of a manufacturer's appeal of an arbitration award to the circuit court. The financial burdens of such litigation are not even remotely similar to the statutory rates so easily calculated in *Missouri Pacific, supra.* That the continuing damages provision also serves as a disincentive to meritless manufacturer appeals does no damage to its constitutionality, because the effect is not so egregious as to constitute a taking of property without due process.

More appropos to this case is the reasoning expressed by the this Court in *Harris v. Beneficial Finance Company of Jacksonville,* 338 So. 2d 196 (Fla. 1976). Beneficial challenged

the statutory minimum damage provision of the Consumer Collection Practices Act, arguing that it was an unconstitutional denial of due process. In rejecting the challenge, this Court held:

> The instant statute is sustainable as providing for liquidated damages in an area of the law in which ascertainment of the dollar amount of actual damages sustained in most instances will be extremely difficult, if not impossible, to achieve--a classic situation for application of liquidated damages.
> . . . .
> In the exercise of its police powers the Legislature chose this method of deterring wilful violations of the protective legislation it had enacted. The fact that the Act also authorizes a punitive damage recovery for the traditional case involving malice does not alter characterization of the $500 minimum award as punitive.
> . . . .
> In short, the minimum award afforded by the statute exhibits aspects of both liquidated and punitive damages. It clearly appears to have been the intent of the Legislature to provide a remedy for a class of injury where damages are difficult to prove and at the same time provide a penalty to dissuade parties such as Beneficial from engaging in collection practices which may have been heretofore tolerated industrywide. Neither objective is without the purview of proper legislative action.

338 So. 2d at 200.[12]

This Court distinguished *Missouri Pacific, supra,* "because there the actual dollar damages sustained by the injured party were readily ascertainable." *Id.* See also, *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942) (liquidated damages were upheld "where damages are difficult to calculate and damages are not imposed as a penalty").

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[12] The Court went on to recognize that double damage provisions in other protective statutes had been repeatedly upheld by the U.S. Supreme Court against due process challenges, such as the Fair Labor Standards Act and the Federal Truth-in-Lending Act. *Id.* Such protective provisions are also found in the Florida Antitrust Act, §542.22 Fla. Stat. (1989); §520.12, Fla. Stat. (1989), Fla. Retail Installment Sales; and continuing damages provisions are found in Lemon Laws of other states, such as Me. Rev. Stat. Ann. Tit.10, §1169(5) (1989), Maine; Mass. Gen. Laws Ch. 90, §7N-1/2(6) (1985), Massachusettes; RCW 19.118.100 (1987), Washington.

The continuing damages provision of Section 681.1095(13) is not an impermissible burden on manufacturers' due process. The remedial scheme established by Section 681.1095, Florida Statutes, bears a reasonable relation to the permissible legislative objective of neutralizing the inherent imbalance that exists between consumers and motor vehicle manufacturers in warranty disputes. "A regulatory scheme concerning procedures for pursuing grievances by consumers against automakers is entirely consistent with the state's broad interest concerning the ownership and operation of motor vehicles." *Lyeth v. Chrysler Corp.,* 734 F. Supp. 86, 91 (W.D.N.Y. 1990). Chrysler's right to pursue its unsuccessful appeal of the arbitration board decision in a trial de novo in circuit court was hardly deterred by the trial court's imposition of the $25 per day continuing damages. "A legislative program such as the Lemon Law is not invalid simply because it makes it easier for one group of people to gain redress at another's expense." *Lyeth* at 92. Chrysler could not overcome the presumptive validity of the statutory scheme in the appellate court and cannot sustain its challenge here. The Opinion of the Fourth District Court upholding the constitutionality of Florida's Lemon Law should be affirmed by this Court.

CONCLUSION

Based on the argument and authorities cited herein, the Attorney General urges this Court to affirm the opinion of the Fourth District Court holding the challenged provisions of Chapter 681, Florida Statutes, Florida's Lemon Law, constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to: Jack Gale, Phillips, Gale & Ziskinder, P.A., The Historic Boston House, 239 South Indian River Drive, Ft. Pierce, FL 34950; Russell S. Bohn, Caruso, Burlington, Bohn & Compiani, P.A., 1615 Forum Place, W. Palm Beach, FL 33401; Gregory A. Anderson, Anderson Law Offices, 225 Water Street, Jacksonville, FL 32202; and George N. Meros, Jr., Rumberger, Kirk & Caldwell, P.A., Post Office Box 10507, Tallahassee, FL 32302, on this _____ day of September, 1997.

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Janet L. Smith