Trial De Novo and Evidentiary Presumptions
Under the “Lemon Law”: Analysis and
Comment

Larry M. Roth∗
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** B.S., University of Tennessee, 1973; J.D., University of Florida, 1975. The Author wishes to thank Christi L. Underwood of Foley & Lardner (Orlando office) for her assistance in reviewing and commenting on this Article.

Author’s Note: This article reflects the personal opinions of the author, developed mostly as a result of particular litigation experiences. The views set forth below are not intended to represent or to reflect the opinions of any other person, or any motor vehicle manufacturer, distributor, dealer, or client.
To consumers, car dealers, wholesale distributors, and manufacturers of motor vehicles, Florida’s statutory framework known as the Motor Vehicle Warranty Enforcement Act (“section 681”) has become an important factor of economic and commercial life. In common parlance, this statute is known as the Lemon Law. The “Lemon” reference pertains to a motor vehicle. The Lemon Law has also become important to lawyers, as it has spawned a new and different type of litigation and legal counseling. As the number of new motor vehicles sold in Florida increases with population growth, so too does the financial risk exposure arising from Lemon Law claims. This results in an increasing number of consumers who are unhappy with their new vehicles.

To date, the judicial analysis of the Lemon Law has been unsettled, confusing, and even contradictory. In September 1998, the Supreme Court of Florida had the opportunity to establish an understandable and realistic construction of the Lemon Law. Yet, the court in Chrysler Corp. v. Pitsirelos missed that opportunity. For example, when confronted with the trial de novo language of section 681, the court followed the Fifth District’s decision in Mason v. Porsche Cars of North America, Inc., a case which this article will demonstrate was wrongly decided. As such, in relying on Mason I, the Supreme Court of Florida also reached the wrong result.

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1. FLA. STAT. §§ 681.10–.118 (1999). This article discusses several cases that have arisen under the 1988–1993 versions of that statute. The present statute has not changed in substance on the issues discussed herein. Only the numbering scheme has been revised. Unless otherwise noted, all references are to the 1999 statutes.

2. Automobile dealers have historically been specifically excluded under the Lemon Law. They are deemed to be the manufacturer’s agent under that law. See FLA. STAT. § 681.102 (1991). Only recently has section 681.102(1) of the Florida Statutes been amended to include a “franchised motor vehicle dealer.” Id. § 681.102 (1999). A dealer’s liability under the Lemon Law is precluded, although there are some remedies available to a manufacturer. Id. § 681.113 (1999). This is not an issue for discussion in this article.

3. Id. § 681.102 (1999).

4. See, e.g., Chrysler Corp. v. Pitsirelos, 721 So. 2d 710 (Fla. 1998).

5. Id. at 710.

6. Id.

7. Id.

8. Id. at 713–15.

9. 621 So. 2d 719 (Fla. 5th Dist. Ct. App. 1993) [hereinafter “Mason I”].

10. Id.
I. INTRODUCTION

The genesis for this article derived from trial and litigation experiences in a particular Lemon Law case, the Mason I litigation referred to above. The intent here is to analyze the procedural and evidentiary inconsistencies that have been judicially read into the Lemon Law, and to ultimately recommend not only legislative or political changes, but also a different judicial approach from that which the appellate courts have followed to date. This article will therefore critique the current law, both statutory and judicial, as to what a trial de novo is under section 681.1095(12) of the Florida Statutes, and the evidentiary weight to be given a “decision” of a Lemon Law arbitration board in a subsequent judicial proceeding.

Essentially, Lemon Law arbitration is an alternative dispute resolution proceeding. It is informal and intended to be inexpensive and expeditious. The statute does, however, permit a trial de novo in the circuit court subsequent to these informal proceedings. On this issue, precedent was first established by Mason I in 1993, where the court held that a trial de novo under the statute is really an “appeal” to the circuit court after an arbitration award. That decision, interpreting the Lemon Law statute, was arguably a consumer interest driven result, and not a strict judicial interpretation of

11. Id. See also Mason v. Porsche Cars of N. Am., Inc., 688 So. 2d 361 (Fla. 5th Dist. Ct. App. 1997) (setting aside the attorneys’ fee award for Porsche) [hereinafter “Mason II”]. Mason I has already had impact beyond section 681 circumstances. In Kahn v. Villas at Eagle Point Condominium Ass’n, the Second District used Mason I to interpret a different statutory scheme, section 718.1255(4)(c) of the Florida Statutes. 693 So. 2d 1029 (Fla. 2d Dist. Ct. App. 1997). The statute involved did not discuss an appeal from the arbitration, but whether a “complaint” for trial de novo could be filed in circuit court. Id. at 1030. Kahn involved a dispute over a deck addition to a condominium unit. Id. The dispute, by statute, was handled in a non-binding arbitration proceeding. Id. Unlike section 681, these arbitration proceedings are presided over by the Department of Professional Regulations which employs “full-time attorneys to act as arbitrators.” Fla. Stat. § 718.1255(4) (1995). In Kahn, there was a two-page opinion requiring the owners to remove their deck. Kahn, 693 So. 2d at 1030. Kahn claimed that the condo owner had the burden of persuasion to “demonstrate some error in the administrative decision.” Id. The court, however, did not determine burden of proof, so that there was no ruling on the presumptive validity of the administrative decision. Id. The property owners lost at the administrative level and then again at the bench trial. Id. The trial judge did not review the administrative order, which the Second District thought inappropriate. Id. Section 718.1255(4), unlike section 681, requires that arbitrators have specialized background in that case, being members of the Florida Bar. § 718.1255(4).


13. § 681.1095(12).

legislative intent. In Chrysler Corp. v. Pitsirelos, 15 the Supreme Court of Florida adopted the Mason I conclusion, without critique or its own analysis. 16 Yet, there are patent errors in the case law analysis of Mason I which should have been discerned by the Supreme Court of Florida, and not otherwise made the law of Florida in Pitsirelos. As the law now stands, a manufacturer who loses at the arbitration level and requests a trial de novo must show up on the courthouse steps as a plaintiff, with the burden of persuasion to disprove that the vehicle is not a “Lemon.” 17 As such, this is not a trial de novo and is not what the statute intended.

The second major point of the article discusses whether a written Lemon Law arbitration “decision” should have any evidentiary presumption of correctness in the subsequent de novo judicial proceeding. The Pitsirelos court held that it should not, overturning several lower court decisions, including the Mason II appeal decided by the Fifth District. 18 Yet, this particular result by the Supreme Court of Florida is inconsistent with its conclusion in Pitsirelos regarding what a trial de novo is or is not under the Lemon Law. Regardless of any evidentiary presumption given the formal written arbitration board “decision,” particularly since it is prepared by the Florida Attorney General’s lawyers, it is a powerful piece of evidence on its own. The Pitsirelos dissent on this issue recognized that point. 19 This evidentiary presumption issue is inextricably tied to the trial de novo analysis since the statute mandates this written “decision” be admitted into evidence. 20 As this article will demonstrate, the legislature obviously intended to protect a consumer who is forced to litigate in a trial de novo after the arbitration process. This piece of evidence is substantial and persuasive, with or without any presumption, and affords protection to the consumer if litigation ensues.

Thus, the courts’ struggles in Mason I, Mason II, and Pitsirelos, to force a consumer protection friendly result were unnecessary. The statute, section 681, has ample built-in protections so that an individual consumer is not overwhelmed by a manufacturer’s litigational resources. That is the analytical theme of this article. The ultimate and effective resolution of these errors, however, must rest with the legislature.

15. 721 So. 2d 710 (Fla. 1998).
16. Id. at 713.
17. Mason I, 621 So. 2d at 721.
18. Pitsirelos, 721 So. 2d at 711.
19. Id. at 715.
II. LEMON LAW LEGISLATION

A. What is the Lemon Law?\(^21\)

Simply put, the Lemon Law allows a consumer to obtain a refund or a replacement if their motor vehicle meets the requisite statutory criteria.\(^22\) The law defines the meaning of a “Lemon.”\(^23\) Once statutory prerequisites are met, a presumption that the motor vehicle has deficiencies is established for the consumer.\(^24\) This statutory relief is intended to be nonjudicial, expeditious, and inexpensive.\(^25\) An attorney is not needed, although any party can appear with counsel.\(^26\)

In order to qualify for relief under the Lemon Law, a motor vehicle must possess a “nonconformity.”\(^27\) The statute defines “nonconformity” as a

21. See generally Robert A. Butterworth, Consumer Guide to the Florida Lemon Law (1997), which recites, for the lay public, their rights under the law. This article is not intended to be a practice guide for the Lemon Law. There are no real Continuing Legal Education (“CLE”) publications which are designed to be a tool for the attorney practicing in this field. See Duane A. Daiker, Note, Florida’s Motor Vehicle Warranty Enforcement Act: Lemon-Aid for the Consumer, 45 FLA. L. REV. 253 (1993) for a good overview of section 681. A general overview of the Lemon Law statutory provisions is contained in Raymond G. Ingalsbe, Florida’s New Car Lemon Law: An Effective Tool for the Consumer, 64 FLA. B.J. 61 (Oct. 1990).


23. Id. § 681.104(1).

24. Id. § 681.104(3)(a)–(b).

25. “There is no fee for having your case heard by the Florida New Motor Vehicle Arbitration Board.” Butterworth, supra note 21, at 6.

26. “You are not required to have an attorney represent you, although use of an attorney is permitted (at your expense).” Id.

27. § 681.102(16). See also § 681.103(1), which provides: “Nonconformity” means a defect or condition that substantially impairs the use, value, or safety of a motor vehicle, but does not include a defect or condition that results from an accident, abuse, neglect, modification, or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent. Id. § 681.102(16).
condition that substantially impairs value, safety, or use.\textsuperscript{28} Basically, it establishes a defect, but obviously this statutory conclusion can be quite subjective.\textsuperscript{29} A Lemon Law arbitration panel is the one to decide if a nonconformity in the motor vehicle exists.\textsuperscript{30}

A motor vehicle is also defined in section 681.\textsuperscript{31} Not every vehicle on the highways falls within the statute.\textsuperscript{32} While heavy trucks do not,\textsuperscript{33} the nonliving portions of recreational vehicles do.\textsuperscript{34} For the vast majority, however, the Lemon Law operates to benefit consumers who own passenger cars, sport utility vehicles, and pickup trucks.\textsuperscript{35}

The philosophical foundations for the Lemon Law had their origins in the consumer protection movement, which began during the 1970s.\textsuperscript{36} From Henry Ford’s mass production technology until the advent of this consumerism, automobile manufacturers and dealers clearly had an advantage over a purchaser if a car was a “lemon” or was “defective.”\textsuperscript{37} The normal relief for a consumer was to file a lawsuit seeking common law remedies,\textsuperscript{38} to file a U.C.C. claim,\textsuperscript{39} or perhaps an action under the

\begin{itemize}
\item \textsuperscript{28} § 681.102(16).
\item \textsuperscript{29} See Butterworth, \textit{supra} note 21, at 2–3.
\item \textsuperscript{30} FLA. ADMIN. CODE § 2-32.033 (1993) (Decision of the Board).
\item \textsuperscript{31} FLA. STAT. § 681.102(15) (1999).
\item \textsuperscript{32} Butterworth, \textit{supra} note 21, at 2.
\item \textsuperscript{33} § 681.102(15) (“but does not include vehicles run only upon tracks, off-road vehicles, trucks over 10,000 pounds gross vehicle weight, motorcycles, mopeds, or the living facilities of recreational vehicles.”).
\item \textsuperscript{34} Id. § 681.102(21). “‘Recreational vehicle’ means a motor vehicle primarily designed to provide temporary living quarters for recreational, camping, or travel use, but does not include a van conversion.” Id.
\item \textsuperscript{35} See generally, Butterworth, \textit{supra} note 21, at 2–3.
\item \textsuperscript{37} The philosophical basis for these laws was to even the otherwise unfair economic interests favoring the big corporation/manufacturer over the individual consumer. See Harvey M. Sklaw, \textit{The New Jersey Lemon Law: A Bad Idea Whose Time Has Come}, 9 SETON HALL L.J. 137, 137 (1985) (“The lemon is the apparently irreparable new automobile; the shiny chrome plated monster which has turned upon its master. Not only has this monster turned upon the buyer, but the seller has washed his hands of the whole affair.”).
\item \textsuperscript{38} See, \textit{e.g.}, McCraney v. Ford Motor Co., 282 So. 2d 878 (Fla. 1st Dist. Ct. App. 1973).
\end{itemize}
Magnuson-Moss Act.40 Except if brought in small or summary claims court, an attorney and the full legal process applied.41 This would then, of course, take time and money.

To eradicate a perceived imbalance which favors the economic power of the manufacturers, the Florida Legislature in 1983 determined, as a matter of public policy, that an automobile purchase is a major event in the financial life of a person, requiring state protection.42 Section 681.101 of the Florida Statutes states in part:

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 . . . . 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 a consumer may receive a replacement motor vehicle, or a full refund, for a motor vehicle which cannot be brought into conformity with the warranty provided for in this chapter.43

B. The Lemon Law Arbitration Board

The initial decision-maker in a conflict between a consumer and the automobile manufacturer is the New Motor Vehicle Arbitration Board (“Board”). This structure was first created by legislative amendments to the Lemon Law in 1988.44 Before the Board existed, there was no enforcement mechanism under section 681 for the consumer, except litigation. The legal rights were created, but the remedy had to be obtained in court.

Arbitration was designed to be an alternative dispute procedure. The Florida Rules of Civil Procedure and Florida Rules of Evidence do not apply.45 If a qualified motor vehicle under section 681 is found to be a statutory “Lemon,” a repurchase by the manufacturer or a new vehicle

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41. See Senate Staff Analysis and Economic Impact Statement, SB 0462, at 1 (available at Fla. Dep’t of State, Div. of Archives, ser. 18, carton 1281, Tallahassee, Fla.).
43. § 681.101.
replacement is required. In the Mason case, the arbitration panel ordered a refund. Porsche then exercised its statutory right to seek a trial de novo in circuit court. There is no constitutional basis for the New Motor Vehicle Arbitration Board. Arbitrators, for the most part, have no qualification requirements. They are appointed by the Attorney General’s Office, three per panel. One arbitrator on a panel has to be “a person with expertise in motor vehicle mechanics.”

Lemon Law arbitrators are not professionally trained. They are not required to have special training such as administrative law judges, American Arbitration Association qualified individuals, or any other individuals. The Attorney General’s Office is responsible for determining qualifications and training. Yet, the Attorney General (“AG”) also acts as legal counsel to the Board. Paradoxically, the AG also provides advice to and answers questions from consumers.

The Mason II arbitration involved a 1991 Porsche Carrera 2 high performance sports car, and the alleged defect was the transmission, among other things. The expert on the Mason I panel was a technician from a recreational vehicle (“RV”) facility, with no experience with Porsche Carreras generally, or with the specific tiptronic transmission that was the

46. FLA. STAT. § 681.104(2)(a)-(b) (1999); FLA. ADMIN. CODE ANN. r. 2-32.033(5)(d).
47. Mason I, 621 So. 2d at 720.
48. Id.
49. § 681.1095(1); FLA. ADMIN. CODE ANN. r. 2-32.003 (1993). “Each Board member shall be accountable to the Attorney General for the proper performance of his/her duties as a member of the Board.” Id. at 2-32.005(1). In other contexts, of course, Florida requires specific qualifications for individuals who arbitrate or mediate disputes. See, e.g., FLA. STAT. §§ 44.103, 104, 723.038.
50. § 681.1095(3); FLA. ADMIN. CODE ANN. r. 2-32.004 (1993) (Board Composition; Compensation; Vacancies).
51. § 681.1095(3) (One member “must not be employed by a manufacturer or a franchised motor vehicle dealer or be a staff member, a decisionmaker, or a consultant for a procedure.”); FLA. ADMIN. CODE ANN. r. 2-32.004(2) (1993).
52. See FLA. STAT. § 120.65 (1999).
53. Id. § 681.1095(3); FLA. ADMIN. CODE § 2-32.004 (1993).
54. FLA. ADMIN. CODE ANN. r. 2-32.006(2) (1993).
55. The consumer testified in Mason I to advice and help received from the Attorney General’s Office. Mason I, 621 So. 2d at 719. See Butterworth, supra note 21, printed in inside cover, for a guide that “represents the Attorney General’s interpretation of the [Lemon Law]. If you have a question or are uncertain about a particular aspect of this law, contact the Lemon Law Hotline operated by the Department of Agriculture & Consumer Services, or write the Office of the Attorney General, Lemon Law Arbitration Program.” Id.
56. Mason II, 688 So. 2d at 363 (Fla. 5th Dist. Ct. App. 1997).
mechanical component in dispute. Not one member of the *Mason* Board had ever driven such a vehicle, or knew anything about this type of high performance sports car.

These arbitration hearings usually last about two hours. Test rides are permitted, but not required. In *Mason*, only a very brief test ride was used to help determine that the car was a "Lemon." The entire process lasted one hour and fifty minutes.

C. **Legislative History of Section 681**

There is little, at best, for guidance. The staff analysis fails to define or explain trial de novo. It simply says: "Appeals to circuit court are to be de novo." Further, unlike other statutory provisions, neither section 681 nor its legislative history says anything about who has the burden in the trial de novo.

Before the 1988 amendments, section 681 contained no specific provision about going to circuit court by appeal, trial de novo, or otherwise. Initially, there were no arbitration boards. Some type of judicial proceeding was envisioned, however, since the statute referred to bad faith claims, and the court awarding attorneys' fees to a prevailing consumer. The 1988

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58. At the deposition, none of the arbitrators remembered anything about the transmission, or its characteristics. This was the central issue since the 1991 Porsche Carrera 2 had a tiptronic transmission. It provided the driver with the unique opportunity to either drive the car like an automatic, or a stick shift. See Deposition of Sidney Mehr, November 14, 1994, Case No. Cl 94–1691, at 23–25.


60. FLA. ADMIN. CODE ANN. r. 2-32.032(10)(b) (1993).

61. *Mason II*, 688 So. 2d at 364.


63. Staff of Senate Comm. on Natural Resources, Senate Staff Analysis and Economic Impact Statement, S.B. 556, at 3 (available at Fla. Dep't of State, Div. of Archives, carton 1720, Tallahassee, Fla.).

64. See FLA. STAT. § 194.036(3) (1987).

65. FLA. STAT. § 681.106 (1983) ("found by the court").

66. FLA. STAT. § 681.104(5)(b) (1983); HB 883 4/19/83 Report, Committee on Judiciary.
revision was "a clarification that an appeal of a board decision to the circuit
court must be trial de novo."\textsuperscript{67} What the legislature initially did in 1983 was to create certain statutory
rights for a consumer, while placing legal duties upon the manufacturer.\textsuperscript{68} In
essence, a cause of action is created for the consumer whereby, if the
statutory requisites are met, a court action could be filed against the
manufacturer.\textsuperscript{69} If a lawsuit was filed, the consumer would be a plaintiff and
have to prove his/her case of a statutory violation, consistent with traditional
notions of burdens of proof and persuasion.\textsuperscript{70} The law also allowed
manufacturers to set up informal dispute resolution panels.\textsuperscript{71} These have to
be certified by the Division of Consumer Services.\textsuperscript{72} If all rules are
followed, a consumer first has to bring the motor vehicle claim there as a
condition precedent to seeking judicial redress under section 681.\textsuperscript{73} The
idea, of course, is that this may avoid litigation and informally resolve a
consumer complaint. There are some guarantees of fairness since these
manufacturers' informal dispute panels have to conform to federal
regulations, and must be certified by a state agency.\textsuperscript{74} Additionally, the
division can appoint "at least one member of the informal dispute settlement
panel."\textsuperscript{75} In 1985, qualifications were put in place to avoid training if a
person was a law graduate, qualified arbitrator, mediator, or had already
undergone division training.\textsuperscript{76} No such prequalification is required.

Apparently, there is a legislative view that guarantees of fairness
existed in these manufacturer created and state certified informal dispute

\textsuperscript{67}. Comm. Substituted for Senate Bill 556, Statement of Substantial Changes, CS/SB
556 (Apr. 14, 1988) (available at Fla. Dep't of State, Div. of Archives, ser. 18, carton 1720,
Tallahassee, Fla.).

\textsuperscript{68}. Staff of Senate Comm. on Natural Resources, Senate Staff Analysis and Economic
Impact Statement, SB 743, at 1 (available at Fla. Dep't of State, Div. of Archives, ser. 18, carton
1402, Tallahassee, Fla.). Staff of Senate Comm. on Natural Resources, Senate Staff Analysis and
Economic Impact Statement, SB 0462 (available at Fla. Dep't of State, Div. of Archives, ser. 18,
carton 1281, Tallahassee, Fla.). See Maserati Automobiles, Inc. vs. Caplan, 522 So. 2d 993 (Fla.
3d Dist. Ct. App. 1988). This case was decided under the 1983 law, prior to the establishment of
the arbitration boards. \textit{Id}.

\textsuperscript{69}. \textit{FLA. STAT.} § 681.101 (1991) (legislative intent).

\textsuperscript{70}. Senate Staff Analysis, \textit{supra} note 41, at 2.


\textsuperscript{72}. \textit{FLA. STAT.} § 681.108 (1983).

\textsuperscript{73}. \textit{Id}. § 681.108(1). Some states are similar to Florida in that a consumer must first
seek redress in the manufacturer's informal dispute resolution procedures, if the programs are

\textsuperscript{74}. 16 C.F.R. § 703 (1999).

\textsuperscript{75}. \textit{FLA. STAT.} § 681.108 (1983).

\textsuperscript{76}. No such training or exempt status prerequisites are required for Lemon Law
arbitration members.
procedures. Today, a consumer is still required to initially resort to them, and if the consumer prevails this result can be admitted into evidence in a section 681 court proceeding. Underlying this is the obvious fact that a manufacturer, after going to all the trouble to get its program certified, will settle the dispute if a loss occurs at its own informal dispute proceedings. If not, the consumer has a favorable piece of evidence to offer a judge or jury.

D. Other States and Other Laws

The Florida statutory program generally tracks those of other states. Florida’s 1983 statute was patterned after that of Connecticut’s. By 1989, forty-four states and the District of Columbia had lemon laws. When Florida established its state-run arbitration program in 1988, Connecticut, New York, Massachusetts, and Vermont already had similar programs. Different states, of course, run their programs differently.

No specific reported case decision has been found which interpreted the statutory language of trial de novo within the context of a lemon law judicial proceeding after arbitration. A review of other state statutes does not further clarify the issue. Most statutes only refer to a “trial de novo.” Interestingly, the terminology “appeal,” as used in the Florida Statutes, is not uniform. In this respect, the Georgia statute is particularly interesting. It uses the word “appeal,” but a consumer may reject the arbitration decision and “request a trial de novo of the arbitration decision in superior court.” The Texas

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78. Id. See Staff of Senate Comm. on Natural Resources, Senate Staff Analysis and Economic Impact Statement, S.B. 743 (available at Fla. Dept. of State, Div. of Archives, ser. 18, carton 1402, Tallahassee, Fla.).
79. The Senate Staff Analysis and Economic Impact Statement indicated that “[i]n recognition of consumer dissatisfactions, some states have enacted legislation to allow . . . a full refund of the purchase price on a new car to replace the defective one.” Senate Staff Analysis, note 41, at 1.
80. Id. at 2.
83. See 17 AM. JUR. 2D Consumer Product Warranty Acts § 68 (1990) for a listing of state statutes on “lemon laws.”
84. See HAW. REV. STAT. § 481I-4(d) (1993); IDAHO CODE § 48-907 (Supp. 1999); IOWA CODE ANN. § 322G.8(6) (West 1987); MINN. STAT. ANN. § 325F.665(7) (West 1990); WASH. REV. CODE ANN. § 19.118.100(1) (West 1999).
86. GA. CODE ANN. § 10-1-788 (1994).
87. Id.
This seems to imply a judicial proceeding that would be a new one from the outset.

The New York statute provides that arbitrations are to be conducted by the American Arbitration Association ("AAA"). The arbitration is final and binding. In New York, there are "professional" arbitrators or arbitrators from firms who are impartial. There is no right to trial by jury or trial de novo. Constitutional attacks on grounds of denial of trial by jury and access to courts have been rejected in New York.

Vermont's statute is interesting in several ways. First, that the Arbitration Board is appointed by the Governor, and at least one member has to be a new car dealer. Members are appointed for three year terms. "[O]ne member and one alternate shall be persons knowledgeable in automobile mechanics." The Vermont Arbitration Board receives "administrative services from the transportation board." It is the Arbitration Board in Vermont which promulgates its own rules, quite unlike Florida where the Attorney General sets the rules. This Board's composition seems more analogous to a commission, which may be appointed in Florida by the Governor, such as the Public Service Commission. Additionally, Vermont's arbitration board decision is truly only reviewable by appeal to the superior court. A specific statutory

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88. See Chrysler Corp. v. Texas Motor Vehicle Comm'n, 755 F.2d 1192 (5th Cir. 1985).
89. See In re Subaru of Am., 532 N.Y.S.2d 617 (Sup. Ct. 1988).
90. Id. at 619. In New York, the scope of judicial review is limited. Id. at 618; 5 N.Y. JUR. 2d Arbitration and Award § 180 (1997).
93. Id. See also Chrysler Motors Corp. v. Schachner, 525 N.Y.S.2d 127, 130 (Sup. Ct. 1988). In his special Pitsirelos opinion, Justice Overton raised this issue, although it was not before the court. He was of the view there was no right to a jury trial since a Lemon Law cause of action did not exist at common law. Chrysler Corp. v. Pitsirelos, 721 So. 2d 710, 716 (Fla. 1998).
95. Id. § 4174(a).
96. Id.
97. Id.
98. Id. § 4174(b).
99. § 4176(a). See Pecor v. General Motors Corp., 547 A.2d 1364, 1365 (Vt. 1988). In In re Villeneuve, the Vermont Supreme Court described well the review scope after a board decision. 709 A.2d 1067 (Vt. 1998). Under Vermont's statute, it is a limited review. Id. at 1069. Villeneuve is helpful in understanding the informality and problems which arise at these arbitration proceedings, referring to a board member's comment about a fist fight. Id. at 1070–71.
burden was established “by clear and convincing evidence.”100 Further, the
grounds for modification or vacation are specified by statute and appear
quite rigorous, such as corruption, fraud, and “evident partiality.”101

Connecticut’s statute provides for de novo review on “questions of law
raised in the application.”102 This seems more like a certiorari review. The
statute provides, “the court shall uphold the award unless it determines that
the factual findings of the arbitrators are not supported by substantial
evidence in the record and that the substantial rights of the moving party
have been prejudiced.”103 Under the Connecticut statute, arbitrators are
appointed by the Commissioner of Consumer Protection, but only one of the
three member panel can be from the industry.104 The Department may also
refer the dispute to the AAA.105

In Motor Vehicle Manufacturer’s Ass’n v. O’Neill,106 the Supreme
Court of Connecticut held that a manufacturer’s right to a jury trial, with a
lemon law claim, had not been unconstitutionally denied.107 The Connecticut
statute allows the consumer, if dissatisfied with the arbitration award, to

101. Id. The specific provisions are as follows:
(1) the award was procured by corruption, fraud or other undue
means;
(2) there was evident partiality by the board or corruption or
misconduct prejudicing the rights of any party by the board;
(3) the board exceeded its powers;
(4) the board refused to postpone a hearing after being shown
sufficient cause to do so or refused to hear evidence material to the
controversy or otherwise conducted the hearing contrary to the rules
promulgated by the board so as to prejudice substantially the rights of a party.
Id. The case of Muzzy v. Chevrolet Division, General Motors Corp. discussed at length the
burden of proof and standard of review on “appeal.” 571 A.2d 609, 612-14 (Vt. 1989). One
of the points made was the intent to have the board decisions be similar to an arbitration award
under Vermont’s Arbitration Act. Id. at 612. The judicial review of an arbitration award was
the same as under the Federal Arbitration Act. 9 U.S.C. § 9(d) (1994). See also In re
Villeneuve, 709 A.2d 1067 (Vt. 1998) (ruling on scope of review on due process as to
administrative board with members who did not personally hear the evidence).

103. Id. See Motor Vehicle Mfrs. Ass’n v. O’Neill, 523 A.2d 486 (Conn. 1987)
[hereinafter “O’Neill I”]. Florida’s original statute was intended to be modeled after
Connecticut’s statute. Staff of Senate Comm. on Natural Resources, Senate Staff Analysis and
Economic Impact Statement, S.B. 794, at 3 (available at Fla. Dep’t of State, Div. of Archives, ser.
18, carton 1281, Tallahassee, Fla.).

105. Id.
106. 561 A.2d 917 (Conn. 1989), superseded by statute as stated in General Motors
Corp. v. Dohmann, 722 A.2d 1205 (Conn. 1998) [hereinafter “O’Neill II”].
107. Id. at 921-22.
initiate a de novo civil proceeding. For the manufacturer, however, its de novo review is more limited, similar to a judicial review after a formal arbitration proceeding. Although the O'Neill court found it unconstitutional that the consumer has more judicial opportunities available than the manufacturer, its analysis centered around the traditional scope of review depending upon whether the procedure is deemed to be compulsory versus voluntary arbitration. The Connecticut procedures intend an altogether different de novo proceeding than in Florida. Although the Connecticut statute is silent on the point, apparently the burden is upon the party challenging the arbitration award.

In a later decision, General Motors Corp. v. Dohmann, the Supreme Court of Connecticut reviewed the factual record to determine if substantial evidence supported the arbitration board's decision. That review is more limited, and by statute the Connecticut Legislature tied judicial review of lemon law arbitration decisions to the same standard as an administrative agency. A Connecticut de novo review is not a trial de novo, as arguably intended in Florida. The court will simply determine whether there is a basis for the factual findings and it will not substitute its judgment for that of the arbitration board. The Connecticut law does provide, however, that questions of law are determined de novo by the court. Since an arbitration board is not a legally trained body, any issue of law must be determined by a court. This statutory procedure in Connecticut makes it quite different from that of Florida.

In Minnesota, the statute allows for a trial de novo as well, but nothing is found to further explain what is meant by that term. This statute does specifically deal with the admissibility of an informal dispute settlement award and any presumptive validity to be given it. The Minnesota statute provides: "A written decision issued by an informal dispute settlement

108. CONN. GEN. STAT. ANN. § 42-181(f) (West Supp. 1999)
110. O'Neill II, 561 A.2d at 924-25.
111. The de novo review is limited to the substantial evidence test. General Motors Corp. v. Garito, 1997 WL 804876, at *2 (Conn. Super. 1997).
112. Id.
113. 722 A.2d 1205 (Conn. 1998).
114. Id. at 1205.
115. Id. at 1210.
116. Id.
mechanism, and any written findings upon which the decision is based, *are admissible as nonbinding evidence* in any subsequent legal action and are not subject to further foundation requirements." 119 This type of Minnesota provision in the *Florida Statutes* would have changed the procedural and evidentiary holdings in *Mason I* and *Mason II* and rendered *Pitsirelos* at least partially unnecessary. The Florida statute does not say anything about the evidentiary effect of the arbitration award, only that it is admissible. It would have been better for the Florida Legislature to have said something on this subject as it has in other contexts, instead of nothing.

In Texas, lemon law disputes are handled by the Texas Motor Commission. 120 The Texas law allows a consumer to reject the Commission’s decision and seek a trial de novo. The Commission’s decision is not admissible into evidence. 121 The manufacturer, on the other hand, can only seek a limited judicial review, with no similar exclusion of an adverse Commission decision. 122 A legal proceeding by manufacturers challenging the makeup of the Commission, incidentally whose majority number are “automobile dealers,” was rejected in *Chrysler Corp. v. Texas Motor Vehicle Commission*. 123 This case also held that it is constitutional to allow consumers two shots at a manufacturer where in the subsequent lawsuit the Commission’s decision *does not come* into evidence. 124 A trial de novo in Texas for the consumer is truly as if nothing occurred previously. 125

Finally, a District of Columbia law has some requirements regarding arbitrator qualifications, which are not present in the *Florida Statutes*. 126 Of seven board members, two shall be attorneys, one from the Department of Consumer and Regulatory Affairs, two shall have training and experience in

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119. MINN. STAT. ANN. § 325F.665(7) (emphasis added).
123. 755 F.2d 1192 (5th Cir. 1985).
124. *Id.* at 1202.
125. The court explained: There is nothing *procedurally* unfair about allowing a car purchaser a second shot at a manufacturer. Its effect is to enhance the claimant’s chances of winning, but only because he can first attempt to persuade the Commission of his case. Failing in this concededly more expeditious and limited claim route, where a manufacturer faces much less exposure and a successful purchaser’s claims will likely end, the purchaser is back to where he was before the lemon law — free to pursue his suit as long as his purse and his patience endure. *Id.* at 1202 (emphasis added).
126. D.C. CT. CIV. ARBITRATION PROGRAM R. III.
“arbitration and mediation,” one member shall have consumer interests training, and the final to be a person with experience or training in the manufacture, wholesale, or retail sales of consumer goods. This statute seems to present a more balanced and professional arbitration board than in Florida, where the Attorney General basically selects members, without requiring any of the skills or experience imposed by the D.C. law.

III. CASE DECISION ANALYSIS ON TRIAL DE NOVO

A. From Mason I through Pitsirelos

In 1991, section 681.1095(12) of the Florida Statutes, provided as follows:

An appeal of a decision by the board to the circuit court by a consumer or a manufacturer shall be by trial de novo. In a written petition to appeal a decision by the board, the appealing party must state the action requested and the grounds relied upon for appeal.

Clearly, it is not the best written provision. The court in Mason I acknowledged this. The court then held that a judicial proceeding subsequent to a lemon law arbitration board is more in the nature of an “appeal,” and therefore “it [was] generally the burden of the appellant to show that the lower tribunal erred.” The lower tribunal being referred to is the AG-selected arbitration board. The result in Mason I requires the aggrieved party, no matter who, to have the burden of proof and in essence be the appellant/plaintiff at the trial de novo. This is really an appeal and not a trial de novo as if nothing had occurred previously. Mason I also holds that the manufacturer shoulders the burden of going forward to disprove that the vehicle is defective, or to prove that it is not presumptively defective.

In the first trial after Mason I, which was an interlocutory appeal, the consumer as the plaintiff went first, but Porsche had the burden to disprove that the vehicle was a “Lemon.” Mason II criticized the trial court for

127. § 40-1303(c).
129. The appellate courts have called this provision “inartfully” worded. Mason I, 621 So. 2d at 722.
130. Id. at 721.
131. Id.
132. Id. at 722–23.
133. Id. at 722.
134. Mason I, 621 So. 2d at 722.
making the consumer be the plaintiff at all and characterized those proceedings in looking glass terms of Lewis Carroll as "curiouser and curiouser." Of course, this curious procedure arose only because of the Mason I holding that a trial de novo is not really de novo. Mason II, including the reversal of a directed verdict for Porsche, among other things, held that a decision of the arbitration board has a presumption of correctness which goes to the jury like that. The party who challenges that decision has the burden of proof to demonstrate it is invalid. Absent such proof, the consumer wins.

In Sheehan v. Winnebago Industries, Inc., the Fifth District Court of Appeal, after Mason I, again determined that although a judicial proceeding subsequent to an arbitration board hearing is de novo, it is procedurally more analogous to an appeal. The party who loses at the arbitration level is the plaintiff, and has the burden of proof de novo. With no independent analysis, the Third District Court of Appeal, in Aguiar v. Ford Motor Co., followed Mason I. In General Motors Corp. v. Neu, the Fourth District Court of Appeal held that an appeal to the circuit court under section 681.1095 of the Florida Statutes should be to the trial division, and not the appellate division of the circuit court. A mandamus was granted directing the circuit court to conduct a trial, as it was wrong to have transferred the case to the appellate division of that court. Neu did not address, as did Mason I, issues of the burden of persuasion, who would be a plaintiff or petitioner, or how the de novo proceeding was to be conducted. Mason I is not cited in Neu, although it may be that the Fourth District did not yet know of the decision.

135. Mason II, 688 So. 2d at 364.
136. Id.
137. Id.
138. Id. at 369–70.
139. Id.
140. 635 So. 2d 1067 (Fla. 5th Dist. Ct. App. 1994).
141. Id. at 1067.
142. Id. at 1068.
143. 683 So. 2d 1158 (Fla. 3d Dist. Ct. App. 1996).
144. Id. at 1158.
146. Id. at 407–08.
147. Id. at 408.
148. Initially, Mason was docketed in the appellate division of the circuit court, and given an appellate case number, A1–92–34. When the trial court ordered the consumer to file a new lawsuit, a regular case number was given to the proceedings. See Mason I, 621 So. 2d at 721 n.1.
Subsequently, in *Chrysler Corp. v. Pitsirelos*, the Fourth District held that Chrysler had the “burden to demonstrate any error or abuse of discretion to the reviewing tribunal.” The “tribunal” being referred to is the Arbitration Board. The court said *Neu* is “inapposite,” and used the same “appeal” language as *Mason I* to interpret a de novo proceeding. The Fourth District in *Pitsirelos* made this statement:

> 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 reviewing tribunal [circuit court de novo]. No other interpretation of this statutory scheme is reasonable.

*Pitsirelos*’ reference to “error” or “abuse of discretion” was unfortunate and only further clouded exactly what type of proceeding is this de novo trial. The lower court’s *Pitsirelos* language gave an even different meaning to trial de novo than *Mason I*, although the latter case was cited with approval. Under the Fourth District’s *Pitsirelos* decision, the circuit court presumably looks at the record similar to how it might review an administrative proceeding under section 120 of the *Florida Statutes* or an appellate review by certiorari. Chrysler then took the case to Tallahassee, and to the Supreme Court of Florida.

The Supreme Court of Florida, on this trial de novo point, affirmed the Fourth District. Thus, *Mason I* is followed by the Supreme Court of Florida, which states that they “agree with the conclusion” reached by the Fifth District in *Mason*. Any in-depth reasoning by the court never develops on this issue, and *Pitsirelos* does nothing to examine the analytical foundation of the case law precedents *Mason I* found persuasive. Only

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149. 689 So. 2d 1132 (Fla. 4th Dist. Ct. App. 1997), *review granted*, 697 So. 2d 1215 (Fla. 1997).
150. *Id.* at 1134.
151. *Id.* at 1133.
152. The Fourth District Court of Appeal, in *Hargrett v. Toyota Motor Sales U.S.A., Inc.*, denied certiorari as the appropriate way to handle the burden of proof issue. 705 So. 2d. 1009 (Fla. 4th Dist. Ct. App. 1998). The court did not find the presence of irreparable harm. *Id.* at 1009. Petitioner (consumer) had argued that the trial court placed on her the burden of going forward even though she won at arbitration. *Id.*
153. *Pitsirelos*, 689 So. 2d at 1134. The First, Second, and Third Districts did not have any opinions in this area.
154. *Id.*
155. *Id.* at 1133.
156. *Chrysler Corp. v. Pitsirelos*, 721 So. 2d at 710, 711 (Fla. 1998).
157. *Id.* at 713.
Justice Overton, in a partial dissenting opinion, said that a trial de novo should be exactly that—"a new trial ... as if no trial whatever had been held in the first instance."

Yet Justice Overton made no attempt to examine the paradox created by the *Pitsirelos* majority of a trial de novo not meaning what it is facially intended to mean.

What seems to be motivating the Supreme Court of Florida in *Pitsirelos* was the fact that the Lemon Law is an alternative dispute resolution ("ADR") procedure. It is intended to benefit the consumer, be quick and economical. *Pitsirelos* adopts, without saying so directly, the "way station" analogy from *Mason I* to reach its result. Thus, according to that analogy, if a prevailing consumer at the arbitration board has to also be the party with the burden in a subsequent circuit court trial, this does "relegate the mandatory arbitration to simply being a procedural impediment to the consumer prior to accessing the circuit court without the counter-balancing benefit to which the prevailing party in the arbitration should be entitled." As an ADR procedure, the Supreme Court of Florida apparently thought that if it is any other way, the arbitration proceeding becomes meaningless. *Pitsirelos* takes a pro consumer approach on the trial de novo, but then undermines the same rationale by holding that the arbitration result carries no evidentiary presumption.

The supreme court in *Pitsirelos* did not examine too deeply section 681. Admittedly, there is sparse legislative analysis for guidance. As noted, nowhere in the legislative history is "trial de novo" defined or explained. Unlike other statutory provisions, neither section 681 nor its legislative history says anything about who has the burden in the trial de novo. *Mason I* and *Pitsirelos* superimposed a specific legislative intent onto the statute. Yet, the Staff Analysis simply said: "Appeals to circuit court are to be de novo." Arguably, if the legislature intended the burden to be on the party wanting a trial de novo, it could have said so as it has in other statutory provisions—for example, section 194.036(3) of the *Florida Statutes*.

The ink had not yet dried on *Pitsirelos* before the Fifth District began demonstrating how this strained concept of a trial de novo works in practice. This most recent Fifth District case, *Ford Motor Co. v. Starling* reinforces

158. *Id.* at 715 (quoting BLACK'S LAW DICTIONARY 1505 (6th ed. 1990)) (emphasis added).
159. *Id.* at 713.
160. *Id.* at 710.
161. Senate Staff Analysis, supra note 63, at 3.
163. 721 So. 2d 335 (Fla. 5th Dist. Ct. App. 1998). *Starling* was decided on October 9, 1998. *Id.* at 335. *Pitsirelos* was decided on September 17, 1998. *Pitsirelos*, 721 So. 2d at 710.
that court’s view of the de novo trial as an appellate proceeding.\footnote{Starling, 721 So. 2d at 335.} There, the court affirmed a finding for the consumer after a bench trial.\footnote{Id. at 336.} Ford “appealed” the arbitration board’s decision in favor of the consumer, a recreational vehicle purchaser.\footnote{Id. at 338. This comment by the court harkens back to the “way station” analogy of Mason I and the arbitration process becoming meaningless.} Even though Starling uses the de novo language, the circuit court proceeding was more analogous to an appeal. This conclusion is supported by the following language from Starling: “Even though this was a de novo review, it was still an appeal. Issues not raised before the arbitrator should not be presented during the de novo review or else the entire statutory arbitration process becomes a nullity.”\footnote{Id. at 338 n.7.} As such, Starling criticizes Ford for raising a new issue at trial that they had not argued earlier in the arbitration. A pure trial de novo, however, would not preclude the presentation of new issues and evidence. The Fifth District treats this like a matter that has not first been raised at the lower “tribunal,” which cannot then be asserted on “appeal” for the first time.\footnote{Mason I, 621 So. 2d at 722.} The Fifth District’s application of de novo to the Starling facts is no different from looking at an appellate record. That is, if Ford did not first raise the issue before the lower “tribunal,” or the arbitration panel, then they could not then first assert it on “appeal” to the circuit court. On this issue, the dissent in Starling argues that on a trial de novo, new issues can be raised, and even implies a constitutional deprivation if such is not the case.\footnote{Id. at 723.} Although this dissenting opinion is more correct in its “de novo” application, unfortunately the theory being espoused is also contrary to the rationale behind Pitsirelos and the Fifth District’s own Mason I decision.

B. Mason I and Pitsirelos Were Wrongly Decided

In Mason I, the court attempts to grapple with what it thought, with the help of the Attorney General’s Office,\footnote{FLA. STAT. § 681.1095(12) (1999).} is a “clear” statute, although inartfully drafted, but one which should not be interpreted to “lead to an inequitable and absurd result.”\footnote{Starling, 721 So. 2d at 338.} Nevertheless, an “absurd result” is reached. The pivotal issue of first impression in Mason I, which is subsequently relied on by Pitsirelos, became the interpretation of section 681.1095(12) of the Florida Statutes.\footnote{Id. at 723.}
The *Mason I* trial court had ruled in favor of the manufacturer and ordered a traditional trial de novo on the issues of section 681, and the consumer’s other claims under Magnuson-Moss and revocation of the sale against the dealership.\(^{173}\) *Mason I*’s conundrum arises since section 681.1095(12) uses the dual terminology of “appeal of a decision by the board,” and that a manufacturer or consumer shall be entitled to a “trial de novo.”\(^{174}\) The Fifth District attached primary significance to this “appeal” language.\(^{175}\) *Mason I,* however, fails to consider the possibility that this “appeal” reference is only procedural, with no substantive force.\(^{176}\)

Certainly the Attorney General’s amicus argument in *Mason I* that the 1988 revision intended to “balance the economic interests of litigants who otherwise might be unevenly matched”\(^{177}\) had, *arguendo,* an unstated social or philosophical impact on the panel.\(^{178}\) That is, from the societal standpoint, if an economically undermatched consumer wins at arbitration, it is unfair to have that same party file a lawsuit and then to have the burden of proof against a manufacturer who sits in a superior economic position.

During oral argument in *Mason I,* questions were asked that demonstrated a concern for the consumer being worn down by litigation, if all the manufacturer had to do was request a trial de novo every time it lost at arbitration.\(^{179}\) The panel’s view was that the litigation resources of a motor vehicle manufacturer were greater than an individual’s and potential abuse of the consumer’s rights would occur.\(^{180}\) This theme permeates *Mason I.* The Fifth District says as much when it speaks of the arbitration board becoming meaningless, if all a manufacturer has to do is ask for a trial de novo, since arbitration would then “amount to nothing more than a way station for a disgruntled party en route to circuit court.”\(^{181}\) In other words, manufacturers would use the de novo proceedings as a strategic weapon to the detriment of a weaker consumer and the litigation flood gates would then be opened.

As noted in the published opinion, the court in *Mason I* thought the manufacturer’s argument that trial de novo means a completely new proceeding was disingenuous.\(^{182}\) That panel did not think the manufacturer

\(^{173}\) *Mason I,* 621 So. 2d at 721.

\(^{174}\) Id.

\(^{175}\) Id.

\(^{176}\) Id. at 723.

\(^{177}\) Id.

\(^{178}\) *Mason I,* 621 So. 2d at 723.

\(^{179}\) Id.

\(^{180}\) Id.

\(^{181}\) Id. at 722. This “way station” analogy was from *Bystrom v. Equitable Life Assurance Soc’y,* 416 So. 2d 1133 (Fla. 3d Dist. Ct. App. 1982).

\(^{182}\) *Mason I,* 621 So. 2d at 722.
would be making the same interpretation of trial de novo if it had prevailed at the arbitration level. This is wrong. Adopting Porsche's argument on trial de novo would not have resulted in the consumer being treated any differently than a manufacturer in a subsequent lawsuit. The usual burdens of proof and persuasion would apply. Also, the manufacturer, just like a consumer, would then get the statutory benefit of having the arbitration result go into evidence.

*Mason I* did not attempt to fully analyze section 681, as undertaken in this article. Neither did that court accurately analyze in detail the statutory provisions and case law upon which it relied as precedent to conclude that the trial de novo provisions of section 681.1095(13) of the *Florida Statutes* were meant to be like an appeal with the burden on the appealing party, the appellant. Section 681, the court in *Mason I* stated, does not provide for the classical trial de novo.

[T]he 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 authorizes a trial de novo. Nevertheless, it is generally the burden of the appellant to show that the lower tribunal erred. The issue in this case has arisen because section 681.1095 does not explicitly place the burden of persuasion on either the appellant or appellee.

1. *Mason I*’s Improper Reliance on Zoning Laws

Some of the statutes discussed in *Mason I* have been repealed. *City of Ormond Beach v. Del Marco*, relied on in *Mason I*, also has as its origin

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183. *Id.*
184. *Id.*
185. *Id.* at 721.
186. *Id.* at 722.
188. 426 So. 2d 1029 (Fla. 5th Dist. Ct. App. 1983).
the Fifth District. There, section 163.250, a zoning statute, allowed for either a review by the circuit court trial de novo or by certiorari. Del Marco involved a Board of Adjustment denying a zoning variance for a windmill. The case is silent on what happened at the zoning officer level before the property owner went to the Board of Adjustment. Presumably, the property owner lost, otherwise there would have been no necessity for Board action. This is important because the Board of Adjustment could step into the shoes of the administrative official and provide the same relief. Thus, unlike Mason I, where the arbitration board is the first stop, the Del Marco complaining party has already initially been rebuffed by an administrative official at the first level.

When looking at what Del Marco says about trial de novo under then section 163.250, it is not a statute that Mason I should have analogized to the Lemon Law. This is what the Del Marco court states about a trial de novo:

A “trial de novo” then must signify the legislative intent that circuit court review involve something more than a mere examination of the record of the board of adjustment. The “trial de novo” signifies to us the legislative intent that the circuit court take new evidence and conduct a new proceeding, not for the purpose of reviewing the action of the board of adjustment, but for the purpose of acting as the board of adjustment to review the original action of the administrative official, and to grant such relief as the board of adjustment could grant, if a proper showing is made.

This language makes the point that in a trial de novo, the circuit court essentially steps into the shoes of the board of adjustment, and can grant the variance. The court does so, however, on a clean slate conducting a “new proceeding” de novo and taking “new evidence.”

Mason I seemed to miss that point. The property owner in this zoning context had the burden of establishing the basis for a variance, which the circuit court could grant just like the Board of Adjustment. That property owner also had the burden in court to establish entitlement to the variance, which is no different than his or her burden before the Board of

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189. Id. at 1029. Judge Dauksch, a member of the Mason I panel, was also on the City of Ormond Beach court.
190. Id. at 1032.
191. Id. at 1030.
192. Id.
193. Del Marco, 426 So. 2d at 1032.
194. Id.
195. Id.
Adjustment. The "aggrieved party," or the party seeking relief in Del Marco, was the property owner. If the Board of Adjustment permitted the variance, there would have been no need for any court proceeding. "So, to secure relief in a trial de novo before the circuit court, the aggrieved party must make the showing required by section 163.225, and where, as here, the petition is based on hardship, the aggrieved party has the burden of demonstrating that a hardship exists." The underlying "aggrieved party" in Mason I, the consumer, is the one making the Lemon Law claim, just like the person seeking a zoning variance. Yet, Mason I says the manufacturer is the "aggrieved party" because it lost at arbitration. However, in a subsequent trial de novo context, who is the aggrieved party at an administrative level should not matter.

Neither the Del Marco case nor Mason I evaluates what the trial de novo proceeding should have been if someone other than the property owner, as the aggrieved party, files in circuit court under section 163.250 of the Florida Statutes. Section 163.250 seems to contemplate this, although its provisions do not define an "officer, department, board, commission, or bureau of the governing body" as an "aggrieved party." Thus, it is left open as to who has the burden and who is the plaintiff. An aggrieved party, under this zoning statute, is referring to the property owner since that is the person who has to demonstrate "that a hardship exists." If the governmental authority, however, requests a trial de novo, then under the Del Marco language cited above, the court stands in the shoes of the Board.

196. Id.
197. Id.
198. Del Marco, 426 So. 2d at 1032.
199. Id. See FLA. STAT. § 163.225(3)(a) (1981). The analogy of the "aggrieved" party under section 163 to the issue at the arbitration board under section 681 is out of place. In the zoning variance situation, the property owner will probably always be the "aggrieved" party.
200. Mason I, 621 So. 2d at 720.
201. Id. at 721–22.
202. See FLA. STAT. § 163.250 (1981). Section 163.250 states:
Judicial review of decisions of board of adjustment. — Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any officer, department, board, commission, or bureau of the governing body, may apply to the circuit court in the judicial circuit where the board of adjustment is located for judicial relief within 30 days after rendition of the decision by the board of adjustment. Review in the circuit court shall be either by a trial de novo, which shall be governed by the Florida Rules of Civil Procedure, or by petition for writ of certiorari, which shall be governed by the Florida Appellate Rules. The election of remedies shall lie with the appellant.
Id.
of Adjustment. The circuit court would hear and decide whether a zoning variance should be awarded if the property owner proves entitlement, for example, if a “hardship” can be demonstrated.204 It should not matter, because it is a new proceeding, de novo. Thus, the person seeking the variance, no matter the forum, still has the burden to prove the “hardship.”205

The intent of this zoning statute, arguably, was to have an all new circuit court trial de novo proceeding. The burden on the party trying to obtain the variance is no different from the consumer trying to show a Lemon Law violation under section 681.206 In a trial de novo, the consumer, among other things, is trying to prove the motor vehicle was a lemon, and has the benefit of certain statutory presumptions.207 To be consistent with how the Fifth District discusses trial de novo in Del Marco, their interpretation of that same concept in Mason I should have resulted, instead, with the trial court being affirmed and the consumer designated as the plaintiff in the section 681 trial de novo. Yet, the court in Mason I says this about Del Marco:

The case law interpreting this statute [Section 163.250] made clear that the aggrieved party seeking a trial de novo had the burden of proving his claim.... As this court stated in Del Marco, in a trial de novo the circuit court can take any action the Board of Adjustment could have taken upon a proper showing by the aggrieved party.208

Unlike section 681, however, in section 163.250, the aggrieved party had to be the property owner seeking the variance, no matter what the situation.209 The Lemon Law has no words about an “aggrieved party.”210 In Mason I, the court implies that the manufacturer is the “aggrieved party.”211 Whereas section 163.250 talks about any “aggrieved party” going to the circuit court, the only aggrieved party under that zoning law is the property owner, the one seeking a variance.212 Therefore, that party has the burden of proving entitlement to a variance. Even if adjoining property owners go to

204. Id.
205. Id.
208. Mason I, 621 So. 2d at 722.
211. Mason I, 621 So. 2d at 722.
court in a de novo proceeding, the property owner still has the burden to demonstrate the variance entitlement.\textsuperscript{213} 

The Lemon Law is also silent on any equivalent point.\textsuperscript{214} Under the Mason I reading of Del Marco, anyone requesting a trial de novo becomes the "aggrieved party" regardless of which party or who is saying the vehicle was a lemon.\textsuperscript{215} To the contrary, in Del Marco, the property owner always had to affirmatively prove why the variance should be granted by demonstrating a hardship.\textsuperscript{216}

The underlying statutory basis for this zoning statute and the Lemon Law are different.\textsuperscript{217} In Del Marco, the de novo proceeding is not an appeal; it is one that starts anew as if nothing occurred previously.\textsuperscript{218} There the circuit court sits \textit{ab initio} like the Board of Adjustment, and must decide whether the property owner proves that the variance should be granted.\textsuperscript{219} Under the Lemon Law, the circuit court has to decide by trial de novo or otherwise whether the consumer proves a statutory violation.\textsuperscript{220} In these contexts, a trial de novo cannot be anything like an appeal. Thus, on this point, Mason I's analogy to Del Marco was misapplied and misconstrued.

There was another inconsistency between section 681 and Del Marco's zoning statute that Mason I failed to grasp. Under the Lemon Law, the trial court may be faced with having to determine other legal claims between the parties.\textsuperscript{221} In section 163.250, the circuit court is sitting as the Board of Adjustment, doing just what the Board does.\textsuperscript{222} In the motor vehicle Lemon Law context, however, a circuit court is deciding, as in Mason, other claims like Magnuson-Moss, which an arbitration board cannot handle.\textsuperscript{223} Mason I only makes it more convoluted procedurally by requiring everyone to have the burden on their own separate claims, \textit{i.e.}, the manufacturer as aggrieved by the arbitration finding being the plaintiff, and the consumer as the proponent of a Magnuson-Moss claim as some alternative plaintiff, co-plaintiff or counter-claimant.\textsuperscript{224} It would have been more consistent for Mason I, and practical, to have the trial de novo proceed with the consumer

\begin{itemize}
\item \textsuperscript{213}\textit{Del Marco}, 426 So. 2d at 1032.
\item \textsuperscript{214}\textit{FLA. STAT.} § 681.1095 (1999).
\item \textsuperscript{215}\textit{Mason I}, 621 So. 2d at 722.
\item \textsuperscript{216}\textit{Del Marco}, 426 So. 2d at 1032.
\item \textsuperscript{217}\textit{Id.} at 1032.
\item \textsuperscript{218}\textit{Id.} at 1029.
\item \textsuperscript{219}\textit{Id.}
\item \textsuperscript{220}\textit{FLA. STAT.} § 681.1095 (1981).
\item \textsuperscript{221}\textit{Id.}
\item \textsuperscript{222}\textit{§ 163.250}.
\item \textsuperscript{223}\textit{Id.} § 681.1095.
\item \textsuperscript{224}\textit{Mason I}, 621 So. 2d at 721–22.
\end{itemize}
who is able to put into evidence the Arbitration "Decision" as plaintiff on all claims just like any typical plaintiff at trial.

One might argue a zoning statute cannot be analogized to the Lemon Law. Yet once that analogy is undertaken it should be correctly compared. Mason I failed in this task. That result, therefore, demonstrates the Fifth District did not thoroughly analyze the case it relied on, and instead may have forced a result more consistent with a particular social philosophy rather than a sound judicial construction. That is to say, a consumer friendly result.

2. Mason I's Inappropriate Reliance on Ad Valorem Tax Statutes

When the other precedent Mason I relied on is scrutinized, an even more serious misapplication of the law occurs. The other statute referred to by Mason I is section 194. Neither upon facial comparison nor by analytical construction does section 194 bear any resemblance to the Lemon Law. Section 194 involves ad valorem taxation and relief from valuations on property. It is a complicated statute which has often been amended over the years. As to what is pertinent on the trial de novo issue, a previous version of section 194 created a Board of Tax Adjustment. That Board was used by Mason I for comparison to a lemon law arbitration panel. They are, however, entirely different entities. The Board of Tax Adjustment is comprised of elected public officials who are from the governing body of the county, i.e. county commissioners and two members of the school board. All of these individuals are elected public officials. This Board has no similarity to members of a lemon law arbitration panel who are selected by an Assistant Attorney General, who are not publicly elected, and who have no qualifying substantive prerequisites for appointment.

This Board of Tax Adjustment hears tax complaints. Section 194.032(6)(c) is more precise than the later enacted Lemon Law. Section 194.036(3) specifically provided: "The circuit court proceeding shall be de

225. See id. at 722.
226. Id.
229. Mason I, 621 So. 2d at 722.
230. See Bath Club, Inc. v. Dade County, 394 So. 2d 110, 113 (Fla. 1981).
232. Id. § 681.1095(1).
233. See Ch. 77-69, § 1, 1977 Fla. Laws 120, 120 (codified at FLA. STAT. § 194.015).
novo, and the burden of proof shall be upon the party initiating the action.”\textsuperscript{234} This provision expressly sets forth who has the burden—the initiating party.\textsuperscript{235} Thus, if someone is precipitating the action in circuit court that party is the plaintiff, and has the burden of proof. The Lemon Law is significant by the absence of this type of statutory language. Yet, the Fifth District, in \textit{Mason I}, read these otherwise absent words into the statute.\textsuperscript{236} Did section 194, as relied upon by \textit{Mason I}, support a conclusion that section 681.1095(12) of the Lemon Law should be construed this same way? The answer is “No.”

An “appeal” from a tax adjustment board is quite different from a lemon law arbitration panel. First, the adjustment board is made up of publicly elected officials who are constitutional officers.\textsuperscript{237} These officers serve terms at the pleasure of the electorate, and presumably answer to the public. No similarity exists between a lemon law board member who serves at the pleasure of the AG and who is answerable only to that office.\textsuperscript{238} There are basically no checks or balances, unlike an elected official, on the arbitrator selected by the AG.

Second, the \textit{ad valorem} valuation of property and how it’s accomplished is a more complicated and a much different process than the Lemon Law.\textsuperscript{239} Special Masters can be appointed by the adjustment board, and outside experts employed to present testimony on just valuation.\textsuperscript{240} The property might be a large, sophisticated commercial complex. Not much needs to be said on how that differs from \textit{Mason}, where the consumer’s claim is that the motor vehicle shudders as a result of the transmission.\textsuperscript{241}

Third, under then section 194.032(6), not everyone “aggrieved” can have a trial de novo.\textsuperscript{242} Property appraisers, the taxing authority, cannot “appeal” from the Adjustment Board’s decision, except in certain limited circumstances.\textsuperscript{243} Yet, under section 681.1095(12), either a manufacturer or consumer can “appeal” with no restrictions on the circumstances.\textsuperscript{244}

\begin{itemize}
  \item \textsuperscript{234} \textit{FLA. STAT.} § 194.036(3) (1999).
  \item \textsuperscript{235} \textit{Id}.
  \item \textsuperscript{236} \textit{Mason I}, 621 So. 2d at 722.
  \item \textsuperscript{237} \textit{Bath Club, Inc.}, 394 So. 2d at 112. There is, of course, a constitutional basis to the Board whose members are constitutional officers. \textit{Id}. Lemon law arbitration board members are not constitutional officers nor are they publicly elected.
  \item \textsuperscript{238} \textit{FLA. STAT.} § 681.1095 (1999).
  \item \textsuperscript{239} \textit{See} \textit{FLA. STAT.} § 194.032(1)(a) (1977); \textit{FLA. STAT.} § 194.035 (1999).
  \item \textsuperscript{240} \textit{Id}., § 194.032(9) (1981 & Supp. 1982).
  \item \textsuperscript{241} \textit{Mason v. Porsche Cars of N. Am., Inc.}, 688 So. 2d 361, 363 (Fla. 5th Dist. Ct. App. 1997).
  \item \textsuperscript{242} \textit{§ 194.032(6)} (1981 & Supp. 1982).
  \item \textsuperscript{243} \textit{Id}., § 194.032(6)(a)(13) (1981 & Supp. 1982).
  \item \textsuperscript{244} \textit{Id}., § 681.1095(12) (1999).
\end{itemize}
Fourth, *Mason I* views a decision by the Board of Tax Adjustment as carrying the same validity as a lemon law arbitration “decision.” In other words, even though under section 194 a taxpayer always has the right to a trial de novo, he or she has the burden to prove the *ad valorem* valuation was in error. Even if the Property Appraiser or Tax Assessor appeals, as the court in *Mason I* stated, “he [the taxpayer] would have the burden of persuasion.” This is because, a fact not alluded to by *Mason I*, the board of adjustment for *ad valorem* taxation is a public office, with constitutional officers making the decisions. As the Supreme Court of Florida has stated, “[p]ublic officials are presumed to perform their duties in a proper and lawful manner.” That quoted statement is made within the context of a challenge to a Board of Adjustment’s tax decision. A board of adjustment, with its publicly elected officials, is presumed to be correct. Nowhere in the Florida Constitution, statutes, regulations, or case law does *Mason I* indicate the authority to elevate a lemon law arbitration board to the status of a board of tax adjustment or property appraisal adjustment board. Such an elevated political body has not a scintilla of comparison to a lemon law panel appointed, without restrictions, by the Attorney General.

3. *Mason I* Misinterpreted Case Law Precedent

The other principal case discussing trial de novo and burden of proof relied on by *Mason I* was *Bystrom v. Equitable Life Assurance Society*. That case, however, did not support the holding of *Mason I*. In fact, when correctly read, *Bystrom* totally undermines the rationale that a lemon law arbitration panel should be presumed correct with the resultant burden on the “appealing” party.

*Bystrom*, for sure, is not an easy case to understand or to read. Simply put, it involved the assessed value of the Omni International Hotel in Miami in 1978. The Omni was described as a “multi-purpose megastructure.”

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245. Now known as the Property Appraisal Adjustment Board, under section 194.
246. *Mason I*, 621 So. 2d at 722.
247. *Id*.
248. FLA. STAT. § 194.015.
249. Bath Club, Inc. v. Dade County, 394 So. 2d 110, 113 (Fla. 1981) (citing Boardman v. Esteva, 323 So. 2d 259 (Fla. 1975); Hunter v. Carmichael, 133 So. 2d 584 (Fla. 2d Dist. Ct. App. 1961)).
250. See *Mason I*, 621 So. 2d at 719.
251. 416 So. 2d 1133 (Fla. 3d Dist. Ct. App. 1982).
252. See *id*. at 1133.
253. *Id*.
254. *Id*. at 1136.
255. *Id*. 

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It was not only the value placed on the Omni that was in dispute, but also how that value was determined.\(^{256}\) The appellant was the Property Appraiser, while the taxpayers were the appellees.\(^{257}\) These taxpayers originally contested the Property Appraiser’s initial valuation of the Omni and went to the Property Appraisal Adjustment Board stating that the valuation was too high.\(^{258}\) The Board agreed, to an extent, and partially reduced the assessment.\(^{259}\) The Property Appraiser filed suit in circuit court since the statutory criteria allowing it to contest the Board’s decision had been met.\(^{260}\) An answer and counterclaim were then filed by the taxpayers since they believed the Board’s reassessment was still too high.\(^{261}\)

The first error in \textit{Mason I} was to cite as controlling authority an issue from \textit{Bystrom} that did not carry a majority of Third District judges.\(^{262}\) As to what party has the burden of proof and who is the plaintiff, \textit{Mason I} refers to language in \textit{Bystrom} which is a minority opinion.\(^{263}\) Yet, \textit{Mason I} construes that portion of \textit{Bystrom} as if it is the majority view.\(^{264}\) This mistake by the Fifth District\(^{265}\) is brought to light when \textit{Robbins v. Summit Apartments, Ltd.}\(^{266}\) is reviewed; a case not mentioned in \textit{Mason I}.\(^{267}\)

\textit{Bystrom v. Equitable Life} is easily misunderstood. In that case there is a lengthy majority opinion covering a number of legal issues. However, the portion of the main opinion entitled “The Burden of Proof,” \textit{id.} at 1140-43, represents the view of only one member of the three-member panel. Two judges joined a special concurrence, \textit{id.} at 1145-47, which took a different view of the burden of proof issue. On the question of burden of proof, the concurring opinion was joined by a majority of the panel and

\begin{itemize}
  \item \textit{Bystrom}, 416 So. 2d at 1137.
  \item \textit{Id.} at 1136.
  \item \textit{Id.} at 1137.
  \item \textit{Bystrom}, 416 So. 2d at 722;
  \item \textit{Bystrom}, 416 So. 2d at 1136.
  \item \textit{Mason I}, 621 So. 2d at 722.
  \item \textit{Id.}
  \item \textit{Bystrom v. Equitable Life Assurance Soc'y}, 416 So. 2d 1133, 1140–43 (Fla. 3d Dist. Ct. App. 1982)). These pages were from Judge Nesbitt’s opinion for the court, but on the burden of proof issues for which it was cited, this was not the majority opinion.
  \item 589 So. 2d 460, 461 (Fla. 3d Dist. Ct. App. 1991).
  \item \textit{Mason I}, 621 So. 2d at 719.
\end{itemize}
therefore represents the decision of the court. The trial court should have followed the concurring opinion on that issue.\textsuperscript{268}

This misreading of \textit{Bystrom} by \textit{Mason I} is without doubt. A proper interpretation of \textit{Bystrom} actually undermines the \textit{Mason} holding.

According to \textit{Mason I}, "[t]he third district [in \textit{Bystrom}] stated that the board’s assessment of the property value in question would be accorded presumptive validity."\textsuperscript{269} This statement was then used to equate a lemon law arbitration panel decision in favor of the consumer, as in \textit{Mason}, having the same presumption of correctness as that of a public official.\textsuperscript{270} The effect is that a manufacturer at a trial de novo has to overcome the presumptive validity of the Arbitration “Decision,” and it does so as the plaintiff on this issue. That is, the manufacturer has to prove up the negative; to disprove that the motor vehicle is defective. Under this rationale, a trial de novo according to \textit{Mason I} is not what it has always been commonly understood to be—a fresh start, a new proceeding.

The paradox is that a majority of judges in \textit{Bystrom} say the exact opposite from what \textit{Mason I} attributed to them.\textsuperscript{271} The burden in \textit{Bystrom} rests on the party initiating the circuit court action.\textsuperscript{272} But that result was required by express statutory language, words which were conspicuously left out of the Lemon Law.\textsuperscript{273} As the actual \textit{Bystrom} majority states, the presumption of validity is not to be attributed to the Board of Adjustment’s decision,\textsuperscript{274} as \textit{Mason I} interprets, but instead to the Property Appraiser’s initial tax assessment.\textsuperscript{275} Judge Pearson’s majority opinion in \textit{Bystrom} states the following:

Moreover, the presumption in favor of the validity of the property appraiser’s assessment is unaffected by the fact that the burden of proof in the Circuit Court is upon the party initiating the action and that an appraiser may, by virtue of a recent change in the law, initiate the action. To accord presumptive correctness to the Board of Adjustment valuation would effectively vitiate the presumptive correctness accorded the property appraiser’s assessment.\textsuperscript{276}

\textsuperscript{268} Robbins, 589 So. 2d at 461.
\textsuperscript{269} Mason I, 621 So. 2d at 722.
\textsuperscript{270} Id.
\textsuperscript{271} Bystrom, 416 So. 2d at 1145–47.
\textsuperscript{272} Id. at 1140–41.
\textsuperscript{274} Bystrom, 416 So. 2d at 1147.
\textsuperscript{275} Id. at 1143.
\textsuperscript{276} Id. at 1146 (Pearson, J., concurring).
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The majority in Bystrom, consisting of two judges in Judge Pearson’s concurring opinion, in fact concluded the exact opposite from what Mason I accredited to that case. Judge Pearson, for the majority on this burden of proof analysis, says that the Board is not to have its decision carry any presumptive validity at the trial de novo. Only the property appraiser’s initial tax assessment was to have that presumptive correctness. This is the antithesis to the Mason I rationale which makes no reference or citation to Judge Pearson’s actual majority opinion. Instead, only Judge Nesbitt’s opinion is highlighted, which on the issue cited by Mason I is not a majority holding.

To compound this, Mason I then ties its analysis of who has the initial burden of proof to whichever party challenges the lemon law arbitration board decision. In Mason, it was the manufacturer. Thus, if the manufacturer wants a trial de novo after an adverse lemon law arbitration hearing, since the panel’s decision has presumptive correctness, the burden of proof will always be on the party attacking or challenging that decision. In essence, therefore, this proceeding is not truly de novo. As stated by Mason I:

The third district reasoned that if it were otherwise, the proceedings before the board [of tax adjustment, later called property appraisal adjustment board] would amount to nothing more than a way station for a disgruntled party en route to circuit court. Therefore, the party attacking the decision of the value adjustment board

277. Id.
278. Id. Under section 194, the burden varies depending upon whether the Property Appraiser has followed statutory requirements. If so, the initiating taxpayer has a burden of proof of “clear and convincing evidence.” Otherwise, the burden is by the preponderance of the evidence. FLA. STAT. § 194.301 (1999). The Legislature changed the burdens which were discussed in Bystrom, and lessened them to favor the taxpayer. Wetherell, supra note 228, at 229.
279. Bystrom, 416 So. 2d at 1147. Property Appraiser is a constitutional officer. FLA. CONST. art. VIII, § 1(d). See District Sch. Bd. v. Askew, 278 So. 2d 272, 276 (Fla. 1973).
280. Mason I, 621 So. 2d at 719.
281. Bystrom, 416 So.2d at 1146 n.15. “Judge Pearson’s concurring opinion, joined by Judge Hubbart, is actually the majority opinion with respect to the portion of the decision relating to the taxpayer’s burden of proof in an ‘appeal’ of the VAB’s decision.” Wetherell, supra note 228, at 195.
283. Id. at 721.
284. Id.
would have the burden of overcoming of the presumption of correctness. 285

This *Bystrom* reference is from the minority statements by Judge Nesbitt. 286 *Mason I*, of course, said nothing about adopting a minority opinion of a Third District panel. This erroneous *Bystrom* analysis by the Fifth District is the same interpretation argued by the Attorney General in its *Mason I amicus curiae* brief. 287 It seems, perhaps, the *Mason I* panel may have blindly relied on what the Attorney General said without digging any deeper.

The “way station” metaphor in *Mason I*, attributed to *Bystrom*, is likewise used in error. *Mason I* thought that if the burden is not placed on the party who challenges the lemon law arbitration decision, the Board becomes meaningless and in that case manufacturers, by filing in circuit court, could force the consumer to start all over with the burden to prove his or her claim. This would seem unfair.

This “way station” analogy, however, also used by Judge Pearson for the majority in *Bystrom*, but to make an entirely different point from the *Mason I* interpretations. 288 While *Mason I* is concerned about the arbitration board becoming meaningless, 289 the *Bystrom* majority, in contrast, does not want the Board of Adjustment being used manipulatively by taxpayers to circumvent the presumptive validity of the Property Appraiser’s initial tax assessment. 290 Unlike *Mason I*, the *Bystrom* majority is not concerned about the Board of Adjustment becoming meaningless. 291 The *Bystrom* majority says it can become so. 292 The majority of *Bystrom* judges were not worried about the Board of Adjustment, but instead about the Property Appraiser’s initial assessment becoming meaningless. 293 Only the Property Appraiser’s assessment should have a presumption of correctness, not the Board’s. The

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286. *Id.*
287. *See Amicus Brief, at 9–10; Mason I, 621 So. 2d 719* (Fla. 5th Dist. Ct. App. 1993) (No. 92-3074).
288. *Bystrom*, 416 So. 2d at 1142. “Consequently, the identical public policy considerations exist to accord the Board’s reevaluation presumptive validity…. If it were otherwise, proceedings before the Board would amount to nothing more than a way station for a disgruntled party en route to circuit court.” *Id.*
289. *Mason I, 621 So. 2d at 721.*
290. *Bystrom, 416 So. 2d at 1142.*
291. *Id.*
293. *Bystrom, 416 So. 2d at 1147.*
Mason I court actually concluded just the opposite with regard to the Lemon Law of the Bystrom holding. 294

When properly read, the Bystrom majority opinion states that, in a de novo trial context, the Board of Adjustment decision can indeed be meaningless. 295 “Lastly, because the very nature of the proceeding in the Circuit Court is de novo, there is no presumption of correctness which attaches to the valuation made by the Board of Adjustment.”296 Law review commentators dealing with section 194 have pointed out that Bystrom does not stand for the proposition that the Adjustment Board’s decision is entitled to any presumptive correctness.297 Thus, the Board of Adjustment proceeding can indeed appear as if it had never occurred. Mason I misreads and misapplies Bystrom as support for the Fifth District’s conclusion that anyone who challenges a lemon law arbitration decision has the initial burden, ergo, becomes the plaintiff on that issue.

Mason I should have reached a different result, and not held that the party losing at arbitration has to be the plaintiff in the trial de novo on that issue. As a correct analysis of Bystrom demonstrates on this point, Mason I should not have stood for any precedential authority and its rationale behind the trial de novo issue should have been overruled by the Supreme Court of Florida in Pitsirelos.298 This is particularly true since Pitsirelos implicitly agreed with the Bystrom majority when holding that the lemon law arbitration board decision does not have a presumption of correctness.299 Thus, Pitsirelos should have repudiated Mason I on this de novo issue instead of adopting it.

The theory upon which a property appraisal for tax purposes operates, like in Bystrom, is totally different from the Lemon Law statute. Mason I either did not understand these differences, or chose to ignore them. According to the Mason I rationale, based on its Bystrom reliance, the prevailing consumer becomes one in the same as the arbitration panel in the circuit court suit.300 Bystrom, however, held that even if the taxpayer wins at the adjustment board level and the Property Appraiser appeals, the presumption of correctness attaches only to the Appraiser’s initial assessment, and not with the Board of Adjustment’s subsequent decision.301

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294. Mason I, 621 So. 2d at 722.
295. Id.
296. Bystrom, 416 So. 2d at 1147.
297. Wetherell, supra note 228, at 195.
298. Chrysler Corp. v. Pitsirelos, 721 So. 2d 710 (Fla. 1998).
299. Id. at 714.
Thus, the taxpayer cannot simply rest on the Board’s decision. The Property Appraiser, if it appeals, may have to be a plaintiff because it is the person who initiates the circuit court action under that particular statutory language, but its initial tax assessment was still presumptively correct. The assessor only has to demonstrate following its statutory guidelines in making the assessment. The Board of Adjustment decision simply has neither importance nor precedence.

In its reliance on Mason I, and by not discerning the error in that court’s citations of Bystrom, the Supreme Court of Florida, in Pitsirelos, reached an unsupportable result. As noted, one of the reasons Mason I concludes that a party challenging the arbitration panel’s decision has the burden is because a lemon law arbitration board is a public body like the Board of Tax Adjustment in Bystrom. The arbitration panel’s decision, therefore, carries the presumption of correctness. Thus, the party challenging the Board’s ruling de novo has to be the plaintiff on the Lemon Law issue because arbitration panels are presumed to be correct. Otherwise, the Lemon Law arbitration process becomes meaningless. Yet, despite adopting Mason I’s conclusions about trial de novo, Pitsirelos, to the contrary, holds that a lemon law arbitration panel decision does not carry any presumption of correctness. As a matter of logic, therefore, it should have been impossible for the Supreme Court of Florida to reach the same conclusion as Mason I on the trial de novo issue. To have done so can only mean that Pitsirelos is also wrongly decided.

C. What a Trial de Novo Should Be

In legal history de novo trials have been seen differently than the Pitsirelos and Mason I interpretations. Pitsirelos creates an amalgam status for a trial de novo, existing somewhere between the pure concept and a traditional appellate procedure. True, section 681.1095(12) uses the word “appeal.” Pitsirelos, relying on Mason I, seizes upon that terminology to conclude the legislature intended, although without saying so, that the trial de novo in circuit court is like an appeal. Pitsirelos and Mason I together,

302. See id.
303. Id.
304. Id.
305. Pitsirelos, 721 So. 2d at 710.
306. Mason I, 621 So. 2d at 721.
307. See Robbins, 589 So. 2d at 461.
308. Pitsirelos, 721 So. 2d at 714.
309. See id. at 710.
311. Pitsirelos, 721 So. 2d at 713–14.
hold that the party asking for the trial proceeding has the burden and becomes the plaintiff.\textsuperscript{312} Thus, the de novo proceeding is not truly a new one. \textit{Pitsirelos} and \textit{Mason I} places a lemon law trial de novo under section 681 into a twilight zone lying somewhere between the polarity of a completely new trial proceeding, and an appellate review for adequacy of a lower tribunal's record. In his partial dissent, Justice Overton would have found otherwise in \textit{Pitsirelos}, arguing that a trial de novo is exactly what it has always been thought to be—a new proceeding as if nothing had taken place earlier.\textsuperscript{313}

From a definitional standpoint, a de novo trial has been viewed in the pure sense. It is defined as follows, "[a] new trial; or retrial had in which the whole case is retried as if no trial whatever had been had in the first instance."\textsuperscript{314} Read literally this definition itself undermines the rationale upon which \textit{Pitsirelos} is decided. A trial de novo proceeding is an entirely fresh one, without encumbrance of what has already occurred.\textsuperscript{315} Of course, the legislature can alter this traditional application of de novo in its statutory provisions, as it has done in other instances. For example, section 194.032(6)(c), as now written, qualifies the de novo procedure by stating that "the burden of proof shall be upon the party initiating the action."\textsuperscript{316} Inherent in this is the existence of an earlier proceeding which carries some evidentiary weight to the subsequent trial de novo.

Section 681.1095(12) does not have the type of qualifier like section 194.032(6)(c).\textsuperscript{317} One must assume this omission from the Lemon Law is intentional. Since its inception in 1988, this language in section 681 has remained unchanged: "shall be by trial de novo."\textsuperscript{318} One can argue that the legislature does not see a lemon law arbitration panel on the same elevated plane as a public official or public body, such as the constitutionally

\textsuperscript{312} \textit{Id.} at 714; \textit{Mason I}, 621 So. 2d at 721–22.

\textsuperscript{313} \textit{Pitsirelos}, 721 So. 2d at 715.

\textsuperscript{314} \textit{Ballantine's Law Dictionary} 1505 (6th ed. 1990); "de novo": "Anew; afresh; a second time." \textit{Id.} at 435. \textit{Accord}, \textit{Black's Law Dictionary} 435 (6th ed. 1990). The de novo concept has its roots deep into common law jurisprudence. The concept of trial de novo apparently derives from "\textit{venire de novo}." \textit{See} \textit{Day}, \textit{Common Law Procedure Acts} 290 (1872). The precursor procedure would allow for a second trial on the issue with a new jury, and is different from a new trial concept. \textit{8 Definitions of Words and Phrases} 7291 (1905). There were different situations where the de novo second trial was grantable. \textit{See} \textit{2 Tidd, The Practice of the Courts of King's Bench and Common Pleas} 921–22 (1840). It is clear from this history that this second trial would be as if the first one never occurred. \textit{See} Sewall v. Glidden, 1 Ala. 54, 58 (1840) ("means according to our practice, nothing more, than submitting the case to another jury for trial.").

\textsuperscript{315} \textit{Ballantine's Law Dictionary} 1505 (6th ed. 1990).

\textsuperscript{316} \textit{Fla. Stat.} § 194.036(3) (1999).

\textsuperscript{317} \textit{Id.} §§ 681.1095(12), 194.036(3).

\textsuperscript{318} \textit{Id.} § 681.1095(12).
established property appraiser. That official’s public duty of setting property valuations for *ad valorem* taxation is quite different from determining whether a transmission rattles or the brakes squeal on a car. *Pitsirelos*, inconsistent with its holding on the trial de novo issue, impliedly recognizes this by concluding that a lemon law arbitration panel’s decision does not carry with it a presumption of correctness.\(^{319}\) Thus, by definition it has to be different from a public official or body. Accordingly, the Supreme Court of Florida should not have interpreted trial de novo to be the same as an appeal. By doing so *Pitsirelos* goes contrary to legislative intent.

The provisions within the Lemon Law address the situation where a trial de novo request is not undertaken for proper reasons.\(^{320}\) This is quite contrary to the underlying decisional themes in *Mason I* and *Pitsirelos* who thought manufacturers might abuse consumers by always seeking a trial de novo. To the contrary, section 681 has built-in protections to keep the consumer from being bludgeoned by the superior economic and litigational weapons of the manufacturer.\(^{321}\) There are, quite simply, serious consequences to a manufacturer for bringing a frivolous de novo proceeding.\(^{322}\) These statutory protections, which are neither analyzed nor referred to in *Pitsirelos* or *Mason I*, support the conclusion that the legislature has always intended the “trial de novo” to be a new trial, starting from scratch.

Over the years and in other contexts, the Supreme Court of Florida has interpreted trial de novo in a different way from it’s holding in *Pitsirelos*. These historical cases viewed de novo in the pure definitional sense.\(^{323}\) For example, in 1909, the Supreme Court of Florida interpreted an old constitutional provision which said “appeals from justices of the peace courts in criminal cases may be tried de novo under such regulations as the legislature may prescribe[.]”\(^{324}\) That case, *Nichols v. Bullock*,\(^ {325}\) involved a situation where the circuit court had allowed new charges and proceedings to be filed after the appeal from a county court conviction, but not from the Justice of the Peace (“JP”) Court.\(^ {326}\) The *Bullock* court held that the circuit court’s jurisdiction under this provision is truly appellate, and it cannot conduct a de novo trial proceeding.\(^ {327}\) Even though the constitutional

\(^{319}\) *Pitsirelos*, 721 So. 2d at 711.

\(^{320}\) FLA. STAT. § 681.106 (1999). That statute deals with bad faith claims by a consumer. *Id.*

\(^{322}\) *Id.*

\(^{323}\) See *Nichols v. Bullock*, 50 So. 418 (Fla. 1909).

\(^{324}\) *Id.* at 419 (interpreting FLA. CONST. art. V, § 22).

\(^{325}\) *Id.* at 418.

\(^{326}\) *Id.*

\(^{327}\) *Id.* at 419.
provision there talks in terms of “appeals” from the JP courts, for the trial de novo in circuit court Bullock is quite clear that this is a totally new proceeding.

It is provided that appeals from justice of the peace courts in criminal cases may be tried de novo under such regulations as the Legislature may prescribe, but this last provision is there expressly confined to appeals from courts of justices of the peace, and does not authorize a trial de novo in the circuit court in a criminal case arising before the county judge and appealed from his court to the circuit court. [The statute] also expressly confines its provisions for trials de novo in the circuit courts to appeals in criminal cases from courts of justices of the peace. So far, then, as appeals in civil or criminal cases are concerned from county judge’s courts to the circuit courts, the jurisdiction of the latter is appellate only, and in such cases the circuit courts cannot exercise any original jurisdiction, such as permitting new or amended affidavits or charges to be there for the first time filed, or by trying the case anew before the circuit judge or before a jury.

Here, the Supreme Court of Florida delineates the contrast between a true appellate proceeding and a trial de novo which starts “anew,” even if the procedural avenue to circuit court is by way of “appeals.” This “appeal” language used is the same language as in section 681. Yet, Pitsirelos and Mason I interpret “appeal” in a completely different way from Bullock.

In a later case under the same constitutional and statutory provisions, the Supreme Court of Florida, in Baggs v. Frederick describes again what a trial de novo should be. The issue in Baggs involved whether an accused can have a trial de novo in circuit court after entering a guilty plea before the Justice of the Peace. The Supreme Court of Florida found there could be a trial de novo in circuit court even after a guilty plea below. There are two clear points from the Baggs decision which demonstrate why the results reached in Pitsirelos and Mason I are in conflict.

First, Baggs uses the classical definition of trial de novo even in the context of the “appeal” language. The constitutional and statutory provisions in Baggs use the trial de novo language within the aegis of an

328. Bullock, 50 So. at 419.
329. Id.
330. 168 So. 252 (Fla. 1936).
331. Id. at 252.
332. Id.
333. Id. at 252–53.
334. Id.
“[a]ppeal from the Justices of the Peace Courts.” The court in Baggs did not, unlike Pitsirelos, construe the de novo concept any differently because the proceeding came to the circuit court as an “appeal.” To that end, Baggs contains the following statement: “[T]hat the circuit court ‘shall’ proceed to try all criminal cases on appeal from justice of the peace courts de novo as though the proceedings had been originally begun in the circuit court.” Baggs did not read into the law limitations which do not appear from its language, such as restrictions on the right to trial de novo. This rationale is quite unlike what the same supreme court later did in Pitsirelos.

Second, Baggs analytically reveals the true nature of a JP court, and why a trial de novo is so important to proceed later as an original proceeding. The description of the JP courts from Baggs is not much different from how a lemon law arbitration board operates in practice:

Justice of the peace courts in Florida are not courts of record. On the contrary, they proceed with the utmost informality. For the latter reason, no doubt, the Constitution itself recognizes that appellate proceedings from such courts are best made to serve the purpose of justice through, according to the accused, an unconditional trial de novo in the circuit court, under proper forms of accusation and before a judge and jury of the highest degree of capability.

In the old days, Justices of the Peace did not have to be attorneys. This system was abolished by the major Article V revision in 1973. Lemon Law arbitration panels proceed in similar ways, without rules of evidence or judicial oversight, informally with a verbal free-for-all akin to “Judge Judy” or “The People’s Court.” This same analysis could have been undertaken first in Mason I and then later in Pitsirelos. If so, Baggs and Pitsirelos, decided by the same court, might not have been so divergent in their rationale.

There are other inconsistencies between Baggs and the Pitsirelos and Mason I holdings. As noted supra, Mason I, relied on by Pitsirelos, misreads a minority opinion in Bystrom v. Equitable Life Assurance Society

336. Id.
337. Id.
338. Id. at 253. “[W]e perceive no good reason for reading into the statutory right of appeal a limitation on its enjoyment not found in its language.” Id.
339. Baggs, 168 So. 2d at 253.
340. Id. See In re Villeneuve, 709 A.2d 1067, 1070–71 (Vt. 1998) for a good example of what happens, in reality, at a lemon law arbitration proceeding.
to be the majority.\textsuperscript{341} Yet, the majority opinion in \textit{Bystrom}, not the minority opinion relied on by \textit{Mason I}, cited to both \textit{Baggs} and \textit{Nichols}.	extsuperscript{342} This citation from \textit{Bystrom} further supports the argument that the word “appeal” as used in section 681.1095(12), and contrary to the interpretation in \textit{Pitsirelos/Mason I}, is only of procedural and not of substantive importance. The “appeal” language is just the procedural vehicle to get to circuit court. Judge Pearson in \textit{Bystrom} referred to \textit{Baggs} and \textit{Nichols} for the following proposition: “Where a statute vests jurisdiction in the Circuit Court to conduct a review or hear an appeal \textit{de novo}, rules of ordinary appellate proceedings do not apply.”\textsuperscript{343}

\textit{Pitsirelos} and \textit{Mason I} interpret trial de novo as a second proceeding, but it is more like an appeal from a lower tribunal (the lemon law arbitration panel) so that the earlier proceeding still has effect and the circuit court de novo action is not truly original. This analysis is \textit{contra} to \textit{Nichols/Baggs}, and the historical view of trial de novo. Neither \textit{Baggs} nor \textit{Bullock} are distinguishable because they are criminal cases. There has never been one definition for trial de novo in a criminal context and a different one in civil proceedings. Interestingly, the Attorney General makes this statement in its public reports on the Lemon Law: Decisions by the state-run board are final and binding upon the parties, unless within thirty days of receipt, a party files a petition in the circuit court for a trial de novo.\textsuperscript{344} The Attorney General, for whatever reason, saw fit to omit the “appeal” language. Yet, in \textit{Mason I} and \textit{Pitsirelos} the AG was arguing that the circuit court proceeding is like an appeal.

Another case supporting a different trial de novo interpretation from \textit{Pitsirelos} is \textit{Adams v. Dade County}.\textsuperscript{345} \textit{Adams} involved a statute whereby one could appeal to the circuit court when the election supervisor has stricken an elector’s name from the voting rolls.\textsuperscript{346} On appeal for a de novo proceeding, the circuit court issued a notice to show cause why the voter's name “should not be removed from the registration books.”\textsuperscript{347} In rejecting that procedure as not being a trial de novo, the Third District stated the following:

\begin{flushleft}
341. \textit{Bystrom}, 416 So. 2d at 1133.
342. \textit{Id.} at 1147 n.16.
343. \textit{Id.}
346. \textit{Id.} at 586 (discussing FLA. STAT. § 98.201 (1965)). “Appeal shall be to the circuit court in and for the county wherein the person was registered. . . . Trial in the circuit court shall be de novo and governed by the rules of that court.” \textit{Id.}
347. \textit{Adams}, 202 So. 2d at 588.
\end{flushleft}
The defect in that procedure which causes us to reject it is that it places the burden of proof on the electors and requires them to disprove the supervisor's charges on which he claims their disqualification. That result should not obtain, because it is the county or the supervisor of elections who is the complaining party and who, therefore, should occupy the position of plaintiff or complainant in the circuit court and have the burden of proof on the issues to be tried.\textsuperscript{348}

\textit{Adams} is consistent with the correct interpretation of de novo as set forth in this article. Even though the voter in \textit{Adams} initially loses and appeals, he did not have the burden as plaintiff to overcome removal from the registration list. Fundamentally, the Supervisor of Elections is the complaining party even if he or she prevails below. This is no different from a lemon law claim where the consumer, like the Supervisor, is the underlying complaining party—the one seeking relief under the law.

\section*{D. How Section 681 Intended A Traditional Trial De Novo Proceeding}

\textit{Pitsirelos} and its forerunner, \textit{Mason I}, could have reached results in line with the historical view of trial de novo and yet remained consistent to the legislative intent behind section 681. The Lemon Law statute has a number of provisions which afford adequate protection to a consumer vis-à-vis greater litigational resources available to a manufacturer. This concern over the unequal interests between consumer and manufacturer is a major theme in \textit{Mason I}. Yet, the statutory provisions of section 681 do balance fairness for the consumer in a trial de novo, even if he or she has already prevailed at the arbitration level.

First, in the judicial proceedings at circuit court, under section 681.112(1) of the \textit{Florida Statutes}, attorneys’ fees can be awarded.\textsuperscript{349} This is a substantial factor. In \textit{Pitsirelos}, at the trial level, the consumer was awarded attorneys’ fees in the amount of $171,000.\textsuperscript{350} The threat of attorneys’ fees being imposed cannot be lightly taken.

Second, if the manufacturer requests a circuit court action after arbitration, but for bad motives or intentions, section 681.1095(13) allows for additional monetary penalties to be imposed.\textsuperscript{351} The statute provides in part: “If a court determines that the manufacturer acted in bad faith in

\begin{itemize}
  \item \textsuperscript{348} \textit{Id.}
  \item \textsuperscript{349} FLA. STAT. § 681.112(1) (1999).
  \item \textsuperscript{351} FLA. STAT. § 681.1095 (13) (1999).
\end{itemize}
bringing the appeal or brought the appeal solely for the purpose of harassment, ... the court shall double, and may triple, the amount of the total award.

There is no similar provision applicable to a consumer. This creates a significant disincentive for a manufacturer to act improperly when bringing a subsequent judicial action under section 681.1095(13). In Mason, the consumer had pled "bad faith" in Porsche bringing the "appeal" to the circuit court, and double and treble damages were sought against the manufacturer. Although the trial judge had determined Porsche did not act in bad faith, the potential risk exposure created could have been well into six figures for an enhanced award. The punitive imposition on a manufacturer for bringing an appeal in bad faith and the consequences can be seen in Ford Motor Co. v. Starling. In that case, the manufacturer was sanctioned with treble damages on a $59,589 repurchase award. It is submitted that this type of award can be effective in protecting the consumer from unwarranted litigation after a successful arbitration proceeding. The potential for such an award has a chilling effect, with the trial court then able to protect the consumer to ensure the litigational playing field remains level.

Third, section 681.1095(9) permits the arbitration "decision" to be admitted into evidence. Justice Overton in his separate Pitsirelos opinion recognizes that this "decision" is a significant piece of evidence for the consumer. This is so even without any presumptions attaching. The manufacturer, just as a practical matter, is put to the daunting task of convincing a judge or jury that all the "Findings of Fact" and "Conclusions of Law" in the "decision" finding the motor vehicle to be a "Lemon" is not persuasive.

Fourth, the manufacturer is subject to a twenty-five dollar per day liquidated damages award computed from forty days after the arbitration decision is received. The intent behind section 681.1095(13) is to provide monetary relief so the consumer can obtain replacement transportation during the delay on the disposition of the litigational issues. Pitsirelos upholds this provision against a constitutional challenge, but also finds that the damages must be proven. In Mason, this potential damages exposure

352. Id.
353. Mason II, 688 So. 2d at 363.
354. Id.
355. 721 So. 2d 335 (Fla. 5th Dist. Ct. App. 1998).
356. Id. at 335.
358. Chrysler Corp. v. Pitsirelos, 721 So. 2d 710 (Fla. 1998).
359. § 681.1095(13).
360. Starling, 721 So. 2d at 335. Pitsirelos quashed the District Court of Appeal decision on the issue of presumption of correctness of an arbitration award. Pitsirelos, 721 So. 2d at 710. It also upheld the $25.00 per day "penalty" as constitutional, if prove to be a loss. Id. A
toted nearly $50,000. Again, not an insignificant sum and one which is an
incentive against the manufacturer acting unreasonably in asking for a trial
de novo.

Fifth, section 681.1095(12) seems to impose an affirmative duty on the
appellant to make sure the petition is well founded.361 The requests for trial
de novo must be in a “written petition” and “state the action requested and
the grounds relied upon for appeal.” 362 Mason I finds this provision to be
analogous to filing a notice of appeal, and is contrary to starting a legal
proceeding “anew” or de novo which ignores the benefit of the previous
arbitration hearing. It is just as reasonable, however, that section
681.1095(12) requires the “petition” to appeal as one more guarantee of
protection that litigation abuse, by either side, does not occur. Justice
Overton, again in his minority view in Pitsirelos, believes similarly.363 The
trial court under the statute essentially screens the “petition” to ensure it is
legally based before letting a “trial de novo” go forward. This provides a
“gatekeeper” role to help prevent litigation abuse.

None of the other statutes analogized in Mason I or Pitsirelos have any
type of protective infrastructure like section 681. These fail-safe provisions
distinctively separate the Lemon Law from any other statutory blueprint, and
are essentially directed unilaterally at the manufacturer. Yet, Pitsirelos and
Mason I seem oblivious to these details and differences. With these built-in
disincentives, finding that a trial de novo is a new proceeding altogether does
not contravene the Lemon Law’s legislative intent of protecting the
consumer. Even before Pitsirelos and Mason I manufacturers were not
routinely seeking appeals to the circuit court. During 1990 and 1991, a total
of only nine appeals were brought from hundreds of arbitrations. In 1992,
for example, of the total number of cases arbitrated manufacturers
“appealed” only nine percent. 364 By 1995 only twelve percent of the Board’s
decisions were being appealed. 365 This is hardly an opening of the
floodgates.366

Washington state statute imposing a $25.00 a day fine, although a little different from Florida’s
1990). Pitsirelos, 721 So. 2d at 710.
362. Id. § 681.1095(12).
363. Pitsirelos, 721 So. 2d at 715–16.
364. Id.
365. Id.
366. Id. at 713–14. Excessive appeals have not proved to be the case in reality.
Manufacturers, having lost at arbitration, do not routinely file for trial de novo proceedings in
circuit court. According to the most recent annual reports available, in 1995, 12%, or 24 out
of 200 consumer awards were “appealed” by manufacturers. Id. at 713.
From a realistic, legal, economic, and public relations standpoint, a manufacturer does not routinely want to go into court after an arbitration loss. Serious thought and evaluation has to go into any such decision. Even by the AG’s own data, there is no empirical evidence to suggest that manufacturers arbitrarily or unreasonably force consumers into a post arbitration judicial proceeding.

IV. THE EVIDENTIARY EFFECT OF A LEMON LAW ARBITRATION BOARD DECISION

It naturally follows from Mason I, where the manufacturer has the burden to overcome the arbitration award, that the issue of what evidentiary effect to give that "decision" would arise. Section 681.1095(9) states that "[i]n any civil action arising under this chapter and relating to a dispute arbitrated before the board, any decision by the board is admissible in evidence." In this section of the article, various legal interpretations by the courts regarding the evidentiary effect to be given to a lemon law arbitration decision are reviewed and discussed. These analyses have ranged from a presumptive correctness of validity to be given the "decision" with an affirmative duty on the challengers to prove why it is invalid, to the Supreme Court of Florida’s Pitsirelos statement that the "decision" comes in like any other evidence but with no presumption. Despite this straightforward approach in Pitsirelos, there needs to be further clarification due to the logical inconsistency in the Supreme Court of Florida’s trial de novo holding and then its determination that no presumption attaches to an arbitration result.

The Pitsirelos court seemingly has no idea of what form or manner these lemon law arbitration "decisions" are to be written and prepared, or from a practical standpoint the impact such a "decision" has at trial. A "decision" by the Board contains official "Findings of Fact" and "Conclusions of Law." The lay people on the arbitration panel do not write this document—the Assistant Attorney General who acts as counsel to the Board does. This document, written by the Attorney General, usurps both the judge and jury function in the circuit court’s trial de novo. Obviously, the court in Pitsirelos did not realize this fact or its true impact at trial. Justice Overton, whether or not he understood, makes oblique reference to a favorable "decision" being a strong piece of evidence to present.

367. The statute makes these Decisions of the Board admissible in evidence in any civil action. FLA. STAT. § 681.1095(9) (1999).
368. Id. § 681.1095(9) (1999).
369. Pitsirelos, 721 So. 2d at 713.
370. Id. at 715–16.
As a practical matter this “decision” as evidence is indeed significant, particularly in a jury trial. From a trial lawyer’s standpoint these “Findings of Fact” and “Conclusions of Law” are daunting to overcome after the jury sees them, usually in a trial board poster size format. Just looking at the document may be persuasive to the jury—especially with its large print of “Findings of Fact” and “Conclusions of Law.” Moreover, this also may potentially confuse a jury since the trial judge tells them, through instructions, that the court decides questions of law and they, the jury, decide the facts.\footnote{FLA. STANDARD JURY INSTRUCTIONS §§ 1.1, 2.1 (1998).} Yet, in the arbitration “decision” both are already recited.

A. Background of Evidentiary Presumptions

In order to have any presumption in Florida, the Lemon Law Arbitration Panel has to be elevated to the status of a public official or body. Several districts, most notably the Fifth District in \textit{Mason II}, gave the arbitration decision a presumption of validity.\footnote{Mason II, 688 So. 2d at 370.} To the extent it is inconsistent with \textit{Pitsirelos, Mason II} is overruled by the Supreme Court of Florida’s decision.\footnote{See Chrysler Corp. v. Pitsirelos, 721 So. 2d 710 (Fla. 1998).} None of these courts, however, truly analyze why this statutory Board should or should not be elevated to such a lofty plateau. Although \textit{Pitsirelos} reaches the correct result in denying a presumption, it gives little rationale for the decision on the issue.\footnote{Id. at 715.}

The court in \textit{Mason II} held that the arbitration award was to be given a presumptive validity of correctness.\footnote{Mason II, 688 So. 2d at 370.} This presumption is like a lower tribunal decision in “the context of an appeal.”\footnote{Id. at 715.} That court stated: “[T]he ‘presumption’ terminology we utilized in \textit{Mason} and \textit{Sheehan} was intended to refer to the presumption of validity of a lower tribunal’s decision in the context of an appeal.”\footnote{Mason II, 688 So. 2d at 370.} The trial judge in \textit{Mason} entered a ruling that the presumption for the arbitration decision was a “bubble-bursting” type.\footnote{Id.} Once competent evidence is adduced, however, that presumption vanishes. That analysis is rejected in \textit{Mason II}. The appellate court, for support,\footnote{Id. A property appraiser’s valuation carries a presumption of correctness. \textit{Id.} It is a “burden” shifting presumption, and not a “bursting bubble.” Mason II, 688 So. 2d at 370. Public policy considerations governed the establishment of that burden shifting. \textit{Id.} Thus, in a circuit court action initiated by a taxpayer they have the burden to produce evidence of the “non-existence of the fact presumed—that is, that the Property Appraiser’s assessment is not correct.” Wetherell, \textit{supra} note 228, at 226.}

\footnote{Published by NSUWorks, 1999}
looked to its conclusionary language in Sheehan and Mason I that a “trial court is to grant the Board’s decision a presumption of validity.” As such, the Fifth District in Mason II holds that it is error for the trial court not to do so in the de novo proceeding.

This Mason-Sheehan presumption of validity means it also affects the burden of proof. In a way, this determination is the tail that wags the dog. Because the arbitration decision carries a presumption which shifts the burden of proof to the party attacking it, at the de novo trial the party opposing that decision is the plaintiff. In effect that presumption alters the nature of the de novo proceeding and makes it something different from what a trial de novo has traditionally been understood to be. This evidentiary presumption forces the de novo proceeding to be more like an appeal. Of course, in all appellate cases as amicus curiae the AG’s argument has been for the highest possible evidentiary presumption for an arbitration decision.

Although Mason II came after Mason I and Sheehan, its result can be said to have been driven by the Fifth District’s initial view in those earlier cases, that arbitration boards are analogous to a court, a formalized arbitration proceeding, or some public body. Thus, the “decision” comes to the reviewing court de novo with a presumption of correctness. One problem from Mason II on this issue, and not addressed, is what happens if the presumption is rebutted? Does the jury or trier of fact merely decide who wins on a general verdict form, or is there to be a specific verdict finding that evidence sufficient to overcome the presumption has been presented? No appellate case has ever tried to evaluate the basis of this rebuttable presumption as it applies to a lemon law arbitration board decision. That is to say, is it public policy or something else? Is the arbitration board a public or elected official? (The AG’s amicus briefs have argued as such.) Does this concept of the arbitration board being a lower tribunal mean that the decision is to be considered a “judgment” which is presumed to be correct? And, what is the burden of proof necessary to overcome this presumption, the greater weight or clear and convincing evidence?

379. Mason II, 688 So. 2d at 369 (emphasis omitted).
380. Id.
381. Sheehan was a bench trial, and one not by jury.
382. See Public Health Trust of Dade County v. Valcin, 507 So. 2d 596 (Fla. 1987).
384. Id. § 304.1 at 90.
385. See generally Palm Beach v. State, 342 So. 2d 56 (Fla. 1976); Boardman v. Esteva, 323 So. 2d 259 (Fla. 1975).
386. See Melbourne State Bank v. Wright, 145 So. 598, 601 (Fla. 1932).
The legislature could have said that arbitration board decisions under section 681 are to be given presumptive validity in a subsequent judicial proceeding. The legislature has done so in other situations. Yet, in section 681 they did not.

The only authority on this point within Mason II is Hollywood Jaycees v. Department of Revenue. Hollywood Jaycees is a constitutional due process case where the Department of Revenue ("DOR") reversed a board of adjustment tax exemption without affording notice or a hearing to the adversely affected taxpayer. It is a case decided under section 120 and has, therefore, no application to section 681 which specifically excludes the Arbitration Board from the administrative procedures of section 120. Of course, an administrative law proceeding is conducted in accordance with the rules of evidence. In Lemon Law arbitration, the rules of evidence do not apply.

B. The Pitsirelos Ruling on Presumptions Did Not Clarify the Issue

In Pitsirelos, the Supreme Court of Florida, as noted, held that there was no evidentiary presumption of correctness to be given a lemon law arbitration decision. Pitsirelos overruled Mason II on that point. The court interpreted section 681 at face value, whose provisions only say that the “decision” is admissible. To give it some evidentiary presumption would raise serious constitutional problems. Despite this correct ruling, the Pitsirelos court did not go far enough in its analysis. Also, Pitsirelos does not grapple with the practical effect such a decision has when introduced into evidence.

It is imperative for the Supreme Court of Florida, and other courts, to recognize the true nature of these arbitration board “decisions.” As an example, the Mason “decision” is attached as an Appendix to this article. Perhaps, if judges do understand the true nature of this type of “decision,” then some evidentiary restriction of its use might occur. Justice Overton, in his Pitsirelos concurring and dissenting opinion, indicates a better

389. 306 So. 2d 109 (Fla. 1974).
390. Id. at 109.
392. Pitsirelos, 721 So. 2d at 711.
393. Id.
394. Id.
395. Id.
396. See id.
understanding of the nature of the document and its impact if introduced into evidence. What Pitsirelos should have done is to hold that the “Fact” of the Arbitration Board’s decision is admissible, that is to say, the result only. Such a holding still is consistent with section 681.1095(9). On the other hand, if the Supreme Court of Florida wants to let the “decision” in its entirety come into evidence, then it should revisit its foundational decision that the trial de novo is not an altogether new proceeding but something closer to an appeal.

Under the analysis of this article, with a trial de novo at circuit court being truly a new proceeding, the plaintiff/consumer already has a substantial piece of evidence to support his or her case. The administrative regulations require that a lot of information be contained in the “decision” including “findings of fact,” “a conclusion with supporting rationale of whether the standards for refund or replacement have been met,” and “a statement of the remedy,” among other things. It is just as usable to a manufacturer should it win and the consumer requests a judicial proceeding. At trial this document carries persuasive impact even without any evidentiary presumption, particularly on a lay jury. It is an affirmative piece of evidence for a consumer to have, as any trial lawyer can clearly see. This written “decision” comes into evidence almost like an expert’s report, yet no foundation or predicate has to be established. There is hearsay and double hearsay in the “decision,” conclusions of law, and findings of fact. This all has formidable evidentiary persuasiveness, even in a real trial de novo. Thus, the arbitration board and its “decision” do not become a meaningless “way station” on the road to the courthouse, as feared by Mason I.

V. THE ATTORNEY GENERAL’S ROLE IN THE LEMON LAW ADMINISTRATION

Neither the legislature nor any court has examined the role played by the Attorney General in these Lemon Law proceedings. There is a potential

397. Pitsirelos, 721 So. 2d at 715.
398. See id.
400. This procedure might also benefit the Attorney General since, with the presumption, it may be less likely anyone will want to depose arbitrators which the Attorney General so vehemently opposes.
401. See Bystrom v. Equitable Life Assurance Soc’y, 416 So. 2d 1133, 1147 (Fla. 3d Dist. Ct. App. 1982) (Pearson, J., concurring in part). “[T]he Circuit Court litigation will proceed as any other original litigation, unaffected by the results of the administrative resolution. In our view, the Legislature, by providing that the Circuit Court proceeding be de novo, intended it to be no other way.” Id.
conflict of interest which is being ignored by the AG. This can be readily seen when the Lemon Law role of the AG is examined.

The true administrative power behind the Lemon Law program is the AG’s Office. The regulations controlling how the arbitration process works are formulated by the AG. An entire division and staff within the Attorney General’s Office has been created to regulate and administer the Lemon Law. Although the Division of Consumer Services is also involved in the program, its role is limited and inconsequential when compared to that of the AG.

The AG’s role here creates a potential conflict of interest which in turn taints the objectivity of the arbitration process, or at a minimum creates an appearance of impropriety. This is because the AG’s Office wears different hats in its roles as Lemon Law administrator and counselor. As noted, the AG’s Office promulgates the regulations which control the process. On a practical basis, it answers questions from consumers. Its consumer manuals provide, in essence, legal advice to those wanting to utilize the Lemon Law. The AG also selects the arbitrators and qualifies those who sit on the panels. Moreover, the AG serves as legal counsel to the arbitration board. According to the sworn testimony of the arbitrators in Mason depositions, their “Findings of Fact” and “Conclusion of Law” to support the “decision” were drafted/written by the staff counsel from the AG’s Office. The Mason Arbitrators did not see the final written “decision” after it was

402. See Fla. Stat. § 681.109 (1999); Fla. Admin. Code §§ 2-30.001(1), 2-32.002(1), (2) (1993). The Executive Director of the Lemon Law Arbitration Program is a member of the Attorney General’s Office. “The Florida New Motor Vehicle Arbitration Board is administered by the Office of the Attorney General.” Butterworth, Consumer Guide to the Florida Lemon Law 5 (1997) (emphasis added). The Division of Consumer Services of the Department of Agriculture and Consumer Services also has a role, more limited than the AG, under Section 681. See id. § 681.102(7). The Division becomes more involved with administration aspects of a consumer filing a request for arbitration. Their role is, however, limited. Id. § 681.109(2)–(6). The Division is also involved in certifying manufacturer’s informal dispute settlement programs. Id. § 681.108.


404. Id. The Lemon Law Arbitration Program is substantial within the Attorney General’s Office. For 1997–98, the total operating budget is $1,675,851. Ofc. of Attorney General Budget, provided by facsimile on 3/17/98 at 11:00 A.M. Salaries and benefits were budgeted at $1,086,058. In 1995-1996, salaries and benefits were $890,331. Id.

405. See Fla. Stat. § 681.103(3) (1999); Butterworth, supra note 21 (discussing the contents of the Lemon Law rights booklet provided to consumers).


407. Id.

drafted by the AG, which was based on the AG’s staff attorneys’ notes taken during the proceedings.\textsuperscript{409} The AG has a vested interest in the Lemon Law operation. The AG certainly obtains political benefits from a program that helps consumers, and this should not be minimized. For example, elaborate compilations of statistical data are prepared by the AG to publicize the effectiveness of the program.\textsuperscript{410} In addition, press releases are issued to trumpet Lemon Law achievements, thanks to the Attorney General.\textsuperscript{411} The Lemon Law provides a political vehicle which allows the AG to champion, rightly or wrongly, a philosophical position of consumerism. In a rhetorical sense, what politician is going to stand up and say that consumers in the electorate are getting too much? Certainly not a popularly elected AG. In its political and administrative roles, the AG wields essentially unrestricted power, unless the judiciary becomes involved. Accordingly, the AG’s Office may not be totally without bias in its Lemon Law involvement.

\textsuperscript{411} Here is a sampling of some News Release(s) from the Office of the Attorney General:

\textit{November 25, 1996} - “Florida’s Lemon Law Arbitration Program has crossed the $100 million mark in refunds and replacements for consumers whose new motor vehicles were chronically defective, Attorney General Bob Butterworth and Department of Agriculture & Consumer Services Commissioner Bob Crawford announced today. * * * ‘To provide this amount of consumer relief in fewer than eight years of operation is remarkable,’ Butterworth said. ‘It shows that Florida’s Lemon Law program is probably the most effective in the nation.’”


\textit{February 19, 1996} - “Walter Dartland has returned to the attorney general’s office to oversee the agency’s Lemon Law Arbitration Program and develop consumer protection strategies for Attorney General Bob Butterworth.”


\textit{August 15, 1997} - “Attorney General Bob Butterworth has announced that his office’s Internet home page now contains a list of vehicles bought back by manufacturers in connection with Florida’s Lemon Law since 1989. ‘Using that list, a shopper can determine whether the vehicle they are interested in buying was repurchased in Florida by a manufacturer because of complaints of chronic problems,’ Butterworth said.”

Thus, the administrative and legal roles of the AG’s Office should be recognized for what they really are. The Lemon Law is big political business. The AG’s Office, for all practical purposes, acts as Ombudsman counsel for the consumer. For example, on every known reported appellate opinion discussed in this article, the AG’s Office has argued as amicus curiae for a strong consumer position. It did so again before the Supreme Court of Florida in Pitsirelos. When the briefs of the AG are read, one has no doubt that they are committed, single-mindedly, to expanding the program and consumer rights and to protecting their political fiefdom, and power base. There is nothing wrong with this. One should not be, however, naive about it or turn away from this political reality.

As the Mason litigation demonstrates, the AG is an aggressive watchdog in protecting the legal and statutory turf it has created for itself. As with any governmental power, the potential for creeping abuse and expansion is endemic. Mason is the first case where arbitrators were actually deposed. The AG’s Office vigorously fought to prevent these depositions, entering appearances in the Mason case on several different occasions.

The absence of something less than an objective interest can be clearly seen in Mason II, where the AG once again appeared as amicus for the

412. The Attorney General’s record during an election revealed that work done for consumers in the Lemon Law area obviously proved valuable.
413. See, e.g., Chrysler Corp. v. Pitsirelos, 721 So. 2d 710 (Fla. 1998); BMW of N. Am., Inc. v. Singh, 664 So. 2d 266 (Fla. 5th Dist. Ct. App. 1995); General Motors Corp. v. Neu, 617 So. 2d 406 (Fla. 4th Dist. Ct. App. 1993); Sheehan v. Winnebago Indus., Inc., 635 So. 2d 1067 (Fla. 5th Dist. Ct. App. 1994).
414. Pitsirelos, 721 So. 2d at 710.
416. Mason v. Porsche Cars of N. Am., Inc., 688 So. 2d 361 (Fla. 5th Dist. Ct. App. 1997); Mason v. Porsche Cars of N. Am., Inc., 621 So. 2d 719 (Fla. 5th Dist. Ct. App. 1993). In Mason, the Attorney General was involved both at the trial level and the appellate level, and even after the second appeal. Additionally, the Lemon Law Arbitration Program had a staff budget of $1,675,851 in 1997-1998. Between July, 1996 and June, 1997, the Department of Revenue collected $1,877,997 for fees on the $2 per vehicle charge required by section 681.117 of the Florida Statutes. Mason I, 621 So. 2d at 719; Mason II, 688 So. 2d at 361.
417. Mason II, 688 So. 2d at 370.
418. The manufacturer subpoenaed for deposition the three arbitrators from the Mason panel. The AG filed a motion to quash and for protective order. The trial judge, on October 14, 1994, denied that motion in part and granted a protective order in part. The trial court also denied the AG’s motion to quash trial subpoenas. The three arbitrators testified in the first Mason trial. In Mason II, the AG was an amicus again. Mason II, 688 So. 2d at 364. The Fifth District expanded the scope of the discovery. Id. The arbitrators testified also in the second trial. Id. at 366.
In that appeal, while on the one hand arguing for a high threshold rebuttable evidentiary presumption for an arbitration decision,\(^\text{419}\) the AG on the other hand also argued to preclude any depositions or trial testimony from arbitrators.\(^\text{421}\) This latter position would have prevented a manufacturer, or even a consumer, from developing evidence to overcome the strong presumption of correctness the AG Office wanted for arbitration decisions.\(^\text{422}\) The Attorney General in \textit{Mason II}, after arguing that a manufacturer should not be able to depose an arbitrator or subpoena one for trial in order to overcome a presumption of correctness of the "decision,"\(^\text{423}\) attempted to elevate the Board to the status of a constitutional public official. Their Brief stated:

\[\text{T}he \text{ New Motor Vehicle Arbitration Board was established by the Legislature within the Department of Legal Affairs and consists of members appointed by the Attorney General, a officer.... The Arbitration Board acts collectively in the capacity of a public official and the party aggrieved by its decision may seek trial \textit{de novo} in circuit court.}\(^\text{424}\)

Their argument is that the Board's "decision" should have a presumptive validity which shifts the burden of proof to the challenging party, but that party should not then be able to develop testimony to rebut the "decision" or to undermine it.\(^\text{425}\) The AG clearly wants to have its cake and eat it too.\(^\text{426}\)

Even after \textit{Mason II}, when the Fifth District had ruled that arbitrators could testify and be deposed, the AG again entered an appearance in the trial court with new motions for protective orders, arguing that their handpicked

\(^{419}\) See \textit{Mason II}, 688 So. 2d at 363.

\(^{420}\) Initial Brief of \textit{Amicus Curiae}, at 17–21, Mason v. Porsche Cars of N. Am., Inc., 689 So. 2d 349 (Fla. 5th Dist. Ct. App. 1995).

\(^{421}\) Id.

\(^{422}\) Let there be no mistake, the AG's Office views these arbitrators as quasi-judicial, deserving the same protection from discovery as a judge. See Motion to Quash and for Protective Order, Case No. CI 94-1691, § 4, at 2–4 (Sept. 23, 1994).

\(^{423}\) Initial Brief of \textit{Amicus Curiae}, at 12–17, Mason v. Porsche Cars of N. Am., Inc., 689 So. 2d 349 (Fla. 5th Dist. Ct. App. 1995).

\(^{424}\) Id. at 18–19.

\(^{425}\) Id.

\(^{426}\) This is an example as to why the AG's Office may not fairly and impartially handle its role, and that either its involvement should be recognized for what it is or a different procedure established. There is, it is submitted, an appearance of impropriety with the way it is involved and the power the Attorney General wields in this area. \textit{Cf.}, Migliore v. City of Lauderhill, 415 So. 2d 62, 64 (Fla. 4th Dist. Ct. App. 1982) (recognizing that a police department complaint review board, composed exclusively of law enforcement personnel, "gives the impression of impropriety" when asked to determine the rights of the public "and one of its own.").
arbitrators were exempt from testimony. 427 This evidence had been sought in *Mason*, for litigation strategy purposes even if the arbitrators remembered nothing, in an attempt to diminish the putative importance of the arbitration “decision.” To win the *Mason* case at trial, that “decision” had to be undermined since the Fifth District had given it presumptive validity. Regardless of the case, jurors should have the opportunity to see and hear these arbitrators before deciding whether to defer their own judgment to that of the arbitration “decision.” This is particularly necessary if the written “decision” document comes into evidence. This “decision,” like any piece of evidence, should be subject to cross-examination and to challenge.

The administrative procedures promulgated by the AG establish a quasi-judicial function for these arbitration boards which creates a separation of powers issue. 428 For example, the Attorney General’s public position in court has been that these board members are “public officers.” 429 That is because these arbitrators are appointed by the AG, who is a public official and a constitutional officer. 430 Thus, the AG regulates the system, provides legal advice to one of the parties as well as to arbitrators themselves, and then actually writes the “decision” for the board. These are just too many hats for the AG to wear. The supreme court, in *Pitsirelos*, did not really have this type of evidence presented to it in deciding that case, so that separation of powers was not violated. 431

As discovered in *Mason*, arbitrators are not required to be lawyers, or members of professional arbitration organizations like AAA. 432 Many are retired and participate either for the money or as part of community service, or both. All of that is fine. But it does not make them public officials or

427. See Arbitrators Motion for Protective Order, Case No. CI 94-1691, § 3 (Oct. 14, 1997). This motion attacked the trial subpoena for the three arbitrators on the retrial. It was argued the arbitrators, even after *Mason II*, “be protected from testifying at all in the second trial of this case, as any testimony they may have would be irrelevant to the issue on appeal and at best, such testimony would be merely cumulative of the Board’s written decision, which is admissible in evidence.” *Id.*


429. *Mason II* Brief, at 19 n.5.

430. *Id.* at 18–19.

431. *Pitsirelos*, 689 So. 2d at 1134.

432. Section 681.1095(3) of the *Florida Statutes* only requires arbitrators to “be trained in the application of this chapter . . . .” *Fla. Stat.* § 681.1095(3) (1999). However, “at least one member of each board must be a person with expertise in motor vehicle mechanics.” *Id.* No member may be employed by an automobile manufacturer or dealer “or be a staff member, a decisionmaker, or a consultant for a procedure.” *Id.* A “procedure” means “an informal dispute—settlement procedure established by a manufacturer to mediate and arbitrate motor vehicle warranty disputes.” *Id.* § 681.102(17).
constitutional officers, or elevate them to a higher level. They do not seem to fit anywhere within the Article II, section 5 definition of the Florida Constitution, or as defined by other statutory provisions.

The AG’s public reliance on section 112 of the Florida Statutes in its briefs to create a legal status for these board members is misplaced. Section 112.061(2)(c) defines a public officer as follows:

An individual who in the performance of his or her official duties is vested by law with sovereign powers of government and who is either elected by the people, or commissioned by the Governor and has a jurisdiction extending throughout the state, or any person lawfully serving instead of either of the foregoing two classes of individuals as initial designee or successor.

Lemon Law arbitrators are not employees or public employees since they are not fulfilling a “regular or full-time authorized position.” Despite this argument, surely it would be the AG’s position that these “officers” or quasi-judicial officials are not subject to the financial disclosure provisions of section 112.3145.

The issue arises, therefore, about whether it matters that the AG’s Office has a purported conflict of interest due to its various roles within the Lemon Law process. It is somewhat analogous to Migliore v. City of Lauderhill, where the court saw a potential conflict of interest, although in a different context, but arguably not unlike the role the AG plays in the Lemon Law. Migliore points out the following:

Further, the fact that the board is required to be composed of law enforcement personnel belies the kind of impartiality and lack of bias that are ordinarily requisites of a panel established to determine substantive rights between the body politic (standing in

434. FLA. STAT. § 163.340(20) (1999). “Public officer” means any officer who is in charge of any department or branch of the government of the county or municipality relating to health, fire, building regulations, or other activities concerning dwellings in the county or municipality.” Id. §§ 843.0855(1)(c), 219.01(1).
435. Id. § 112.061(2)(c) (1999).
436. Id. § 112.061(2)(d).
437. Section 112.3145 of the Florida Statutes requires specified state employees and state officers to file a “statement of financial interests” with the Secretary of State every year, detailing enumerated items of income. Id. § 112.3145.
438. 415 So. 2d 62 (Fla. 4th Dist. Ct. App. 1982).
439. Id. at 64.
This quotation highlights a fundamental flaw in the Lemon Law. It now functions with the pervasive involvement of the AG’s Office. This factor should not be overlooked when determining whether or not to overhaul the statute.

VI. FUTURE CONSIDERATIONS AND ACTIONS

Probably on different levels of interest, none of the competing and contesting parties in the Lemon Law debate are happy with its present status. For example, things have not gone far enough for the consumer or the Attorney General. For the manufacturer, the Lemon Law has become a business sensitive process, particularly in a marketing era when “customer satisfaction” totally fuels the quest for selling the product.

To be sure, however, whether it is the courts or the legislature someone needs to examine closely the role the AG’s Office plays in the Lemon Law. At present, it basically roams the Lemon Law plains unrestricted and unfettered. The public positions taken by them are legally insupportable. The AG’s *amicus curiae* arguments illustrate a lack of objectiveness, while demonstrating a constant interest in protecting it’s statutory kingdom.441

One thematic basis of this article has been that the courts should not step into this political fracas, which so clearly highlights the contentious arguments over divergent Lemon Law positions. Whether a judge philosophically believes any of this is good or bad legislation, or despite his or her own personal experiences with buying a motor vehicle—and everyone has had them—none of this should be a factor. But, of course, no one in the real world believes this is very likely.

Nevertheless, any structural modifications to section 681 should be accomplished through the legislative process. That branch of government can best examine the experiential data, what the courts have done, political factors, and the empirical evidence to decide what changes, if any, to make. For example, one law student commentator, in light of appellate court

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440. *Id.*

decisions, proposes to have the legislature eliminate the trial de novo provision altogether.\footnote{Daiker, supra note 21, at 270.}

The judiciary should not attempt to play a superlegislative role here. Its participation should be more in line with the “nature of the judicial process,” and not taking sides on what is in essence a political issue. A judicial role can be best undertaken by a more historically accurate approach to the legal analysis when deciding a dispute under this law. For example, the Supreme Court of Florida, in \textit{Pitsirelos},\footnote{See \textit{Chrysler Corp. v. Pitsirelos}, 721 So. 2d 710 (Fla. 1998).} tries to take the approach of Solomon.\footnote{See \textit{id.} at 713.} It adopts the AG’s strongly consumeristic position—that the manufacturer who lost at arbitration is the plaintiff and a trial de novo does not retain its traditional meaning with the consumer starting over.\footnote{See \textit{id.} at 714.} Then, it rejects the AG’s consumerism position that the “decision” of the Board must have a rebuttable evidentiary presumption.\footnote{See \textit{id.} at 714.} In doing so, the Supreme Court of Florida only creates more inconsistency between legislative intent, strict judicial construction, and the “real” world within which Lemon Law lawyers have to operate.

Listed below are several action plans that are options for these different branches of government to consider.

A. \textit{Legislative}

To properly balance the competing social and economic interests existing between consumers and manufacturers, the legislature is more ideally suited to take up this task. Through the legislature, the debate and decision-making can, for political considerations, better dictate the future of the Lemon Law. The AG can weigh in on the political side, as he has done in the past, to argue a particular position. After all, the Attorney General is a political post, not an ostensibly neutral or unbiased position, nor should it be. Into this political recipe, motor vehicle dealers, distributors, manufacturers, and trade associations can bring whatever influence their positions can bear to the process. It is better to allow these competing interests, all vested, to battle there between AG/consumer and manufacturer rather than in a judicial forum where the fundamental analysis should be different from what is utilized in the political arena.

First, the legislature should decide what is the proper role for the AG’s Office. It is now hard to see an unbiased interest in the AG as the law presently exists and operates. The appearance of impropriety overwhelms the AG’s involvement since it is charged with selecting the arbitrators,
giving advice to consumers, running the program, providing legal counsel to the panels, writing the “decisions,” making legal interpretations for the board, while at the same time performing the executive branch role of enforcing the law against the manufacturers. This juggles too many different responsibilities.

One solution is to codify for the Attorney General what it already does anyway, which is to act as ombudsman counsel for the consumer and create, in turn, a different arbitration process like some other states have done using professional arbitrators. Hearings can still be held geographically and proceed expeditiously. The integrity of the process, however, might be less suspect. Manufacturers are now routinely appearing with counsel at arbitration proceedings because they are so important and the adverse consequences too great. Let the AG’s staff participate for the consumer since it is their position to interpret section 681 to benefit the consumer, as a matter of public policy. It is most essential to elevate the skill and professional level of the arbitration process.

Several years ago, a proposal was circulated to have the arbitration hearings handled as an administrative law procedure under the auspices of the Office of Administrative Law Judges (“ALJ”). Although this would formalize the procedure, it would also serve to more clearly reflect the realities of the Lemon Law process. If an ALJ is involved the evidentiary integrity of the proceedings is maintained. Thus, if the burden of going forward remains on the party appealing to the circuit court, then the underlying process should have more guarantees of trustworthiness to create more reliable results. Also, the AG’s Office can act as legal counsel to the consumer and be officially designated as such, which it is anyway at least de facto under the present system.

Finally, increased program costs can be handled by user fees. Already two dollars per motor vehicle is charged to fund the program. Under section 681.117(1) these fees “shall be transferred monthly to the Department of Legal Affairs for deposit into the Motor Vehicle Warranty Trust Fund.” This fee is collected when each “new” vehicle is sold. Needless to say, quite a few new motor vehicle registrations occur in Florida each year, and this will only continue to increase. This or a slightly higher

446. FLA. STAT. § 681.117(1) (1999).
447. Id.
448. Id.
449. According to Department of Revenue figures, the remittance fees collected for the $2 per vehicle charge from July, 1996 through June, 1996 was $1,877,977. (Data from D.O.R. Research and Analysis Div., 3/23/98). There are certainly an ample number of new vehicle registrations in Florida from which fees can be generated. The R.L. Polk Company’s National Vehicle Population Profile, as of July 1, 1996, indicates for the 1996 model year that 834,669 domestic cars, import cars, and light trucks were registered in Florida.
fee could generate ample funds to support any basic structural changes to section 681.

Second, if fundamental legislative changes are not implemented then ambiguities in the present law should be addressed. If the legislature intends that trial de novo be just that, then the law should be clarified. The “appeal” language can be eliminated, and a clearer statement made as to what a trial de novo is. Still, the “decision” can come into evidence for whichever party benefits, just like any other evidentiary matter, but without foundational hurdles having first to be satisfied. If the legislature intends the “appealing” party to have the initial burden and the proceeding in circuit court be like an appeal, as Pitsirelos and Mason I have held, then it can be specifically stated. The legislature has done this with other statutes, such as section 194. Additionally, if the “initiating” party is not to carry a burden, then the statute can also be amended to state that. Finally, the issue of whether the “Decision of the Board” is to have an evidentiary presumption should be addressed. The legislature can specify whether it should or should not, and if so what type of presumption. For example, section 681.1095(9) might be rewritten to say only that the fact or result of the arbitration decision can be admitted into evidence, but not the physical “decision” document itself. These are basic language changes that can be effectuated easily, and would clear up much legal uncertainty.

B. Judicial

The cases of Mason I and Pitsirelos were wrongly decided on what is a trial de novo under section 681.1095(12). Regardless what the legislature does, or fails to do, these Lemon Law issues will not go away. Thus, here are several suggestions for attorneys and judges to consider and analyze.

First, the Supreme Court of Florida, if the opportunity comes again, should follow more closely the analysis set forth in this article. It should revisit its erroneous trial de novo ruling in Pitsirelos. As argued herein, a different result than the one reached from Mason I and Pitsirelos would still be consistent with the existing legislative intent behind section 681.

Second, constitutional challenges to the statute must be well founded. Any broad-based constitutional attack on section 681, or its individual provisions, will likely fail. Certainly, at the trial courts and the appellate districts. The Supreme Court of Florida’s response to the constitutional challenge in Pitsirelos, signals where that presently constituted court wants...
the districts to go. Courts from other jurisdictions have also rejected broad-based constitutional challenges to Lemon Laws.\(^\text{452}\) If a constitutional attack is mounted it should be directed, under the present procedures, at how the law operates and its effect on a case specific basis. The court in *Pitsirelos* left this door open. The law may be facially constitutional, but as applied it may be another matter. To make a constitutional argument effective, the challenging party must develop record support for the applicational unfairness and deficiencies in the law. This should include empirical data, experiential support, and attacks on the arbitration process, its selection, implementation, and source. Simply, a “Brandeis Brief” approach is required. Discovery directed to the AG’s Office would be a necessity, although quite naturally the substantial resources of that office would object. A court hearing such a constitutional challenge must be able to see and understand how this arbitration system works. Videotaping hearings, retaining university professors to study the fairness of the lemon law arbitration process to provide expert testimony, and deposing arbitrators all would be necessary tools to mount such a valid constitutional challenge. In short, this would be a substantial and costly effort for both sides, which might be better compromised in a political and not a judicial venue.

Third, if the courts are going to let the entire written “decision” with “Findings of Fact” and “Conclusions of Law” come into evidence, then the proceeding in circuit court should truly be de novo. The consumer can present evidence of the arbitration award, and that may be all that is needed. The initial burden of going forward with proof, however, should still rest with the party claiming the motor vehicle to be a “Lemon.” From a practical standpoint, particularly in a jury trial, having the evidence of the arbitration award of “Findings of Fact” and “Conclusions of Law” will obviously be powerful. Subliminally, in and of itself this may carry the day. Alternatively, the Supreme Court of Florida can later read the statute to require only the fact or result of the arbitration “decision” be put into evidence, and not the physical document itself.

Fourth, the Supreme Court of Florida should prepare a new standard Jury Instruction relating to the legal effect of a board’s “decision.” This will help clear up confusion on the jury’s part if the full document comes into evidence. It will also ensure that too much influence is not placed on it at trial.

Fifth, the courts should not perform a legislative role in interpreting section 681 to effect a particular philosophical or social result. In light of the way the Lemon Law is set up and the AG’s involvement, a strict judicial interpretation of the statute should be followed. Ample protections are built

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\(^{452}\) See, e.g., *Lyeth v. Chrysler Corp.*, 929 F.2d 891 (2d Cir. 1991); *Chrysler Corp. v. Texas Motor Veh. Comm’n*, 755 F.2d 1192 (5th Cir. 1985).
in the statutory scheme to prevent unfairness to the consumer. The judiciary should not help rewrite the statute.

Finally, it might be argued that the latest Fifth District case of *Ford Motor Co. v. Starling* highlights the problem of literally applying the trial de novo analysis set forth in this article. *Starling*, in fact, does just the opposite. What Ford did was to stipulate away its right to argue that the coach builder had created the problem. It is a stipulation and Ford should have been bound by it whether this circuit court action was a true de novo proceeding or not. That simply was not an issue on the lemon law claim. Certainly Ford could have requested the trial court for leave to bring in Coachmen, the coach builder, on that issue. The trial judge could entertain that, if good cause existed, in a trial de novo or not. The opinion in *Starling* is silent about the record before the arbitration panel. That is, whether the manufacturer's written responses, its written declaration of a final repair attempt, or anything in the repair records indicate if Ford had even looked at the "puck" issue before going to circuit court. On the record presented, this seems to be simply a case where the manufacturer stipulated away one of its defenses. Trying to argue it thereafter was one of the reasons for the trial court's finding of bad faith in bringing the circuit court action.

If anything, *Starling* demonstrates the effective reins put on a manufacturer if it brings a subsequent legal action in bad faith. The consumer is afforded the same level of protection under the pure trial de novo theory. The manufacturer in *Starling* simply did not overcome evidence presented of a nonconformity, and in its effort to do so tried to use a defense that had been stipulated away. And for that conduct the manufacturer paid an enhanced price, plus attorneys' fees—which was not highlighted in *Starling*. The legislative intent of section 681, to protect the consumer, is satisfied in *Starling* not because the de novo was in the nature of an "appeal," but due to the manufacturer bringing an action to circuit court it should not have. This will be a deterrent next time. *Starling*'s result should not have been different had the trial been truly de novo.

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453. See FLA. STAT. § 681.
454. 721 So. 2d 335 (Fla. 5th Dist. Ct. App. 1998).
455. Id. at 335.
456. Id. at 336.
457. See id.
458. See id.
459. Starling, 721 So. 2d at 340.
460. Id.
461. Id.
VII. CONCLUSION

This article has been intended to provide an analysis of why it is necessary to change the lemon laws from their present existence to a more evolved and comprehensive law. The business of the Lemon Law is only going to grow in the future. Its economic consequences will continue to be profound to all interested parties. As the law presently exists, both from a statutory and judicial standpoint, it is flawed.