

Toyota plaintiffs find validation in fine

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The federal government's \$16.4 million civil penalty against Toyota Motor Corp. could bolster legal claims that the automaker committed fraud and racketeering. It also could assist plaintiffs' attorneys in obtaining thousands of documents for use in their cases, according to plaintiffs' lawyers and legal experts.

The penalty certainly doesn't make the plaintiffs' case for them — particularly since it deals specifically with the recall of accelerator pedals in its vehicles and not the more expansive issues associated with the electronic throttle system, a key allegation in many of the pending lawsuits.

Still, "factually, it validates the legitimacy of our allegations that Toyota has been misleading the federal government and consumers, as far as the severity of the problems with their sticky pedals and their whole electronic throttle control system," said Tim Howard, a professor at Northeastern University School of Law in Boston who is leading a consortium of more than two dozen plaintiffs' lawyers with suits against Toyota.

On April 5, U.S. Transportation Secretary Ray LaHood announced the civil penalty, which is the largest that could be brought against an automobile manufacturer. "We now have proof that Toyota failed to live up to its legal obligations," he said. "Worse yet, they knowingly hid a dangerous defect for months from U.S. officials and did not take action to protect millions of drivers and their families."

The company has two weeks to decide whether to appeal or pay the fines. Toyota issued a statement on April 6 saying that it was considering its response to the fine. "Toyota has and will continue to practice its philosophy of satisfying consumers with high quality vehicles that are safe and reliable, and responding to consumer feedback with honesty and integrity," the company said.

Among those steps, Toyota said, is appointing a new chief quality officer for North America.

'INEXPLICABLE AND INEXCUSABLE'

Toyota has recalled more than 8 million vehicles worldwide because they are susceptible to uncontrolled acceleration.

LaHood noted that companies are supposed to report safety defects to U.S. regulators within five days of discovering the problems, but Toyota waited until Jan. 21 — about four months after first issuing repair notices in Canada and Europe — to recall 2.3 million vehicles.

The findings, Howard said, go to the heart of legal claims that Toyota committed fraud against consumers. The fines also may assist suits alleging that Toyota violated the Racketeer Influenced and Corrupt Organizations Act (RICO) by conspiring to mislead consumers and the federal government about the extent of its safety problems, he said. "That's the basis for the fines, as well," said Howard, who has brought RICO claims in several of his cases. "These fines and civil actions parallel each other."

Richard Arsenault, senior partner at Neblett, Beard & Arsenault in Alexandria, La., another plaintiffs' lawyer with RICO claims, said the findings could influence jurors. "Anytime you make material misrepresentations to government agencies and regulatory bodies, that certainly is conduct that is hard to explain away," he

said. "Just negligently doing something or making a mistake is one thing." But intentionally misleading a regulatory agency — "it's inexplicable and inexcusable."

The penalty could aid class actions filed on behalf of shareholders, said Darren Robbins, a partner at San Diego's Robbins, Geller, Rudman & Dowd, which has a class action pending against Toyota on behalf of the automaker's shareholders. "It is further confirmation that the statements made by defendants were false and misleading," he said.

Nearly 140 lawsuits have been filed on behalf of consumers against Toyota. Another 100 have been filed on behalf of individuals who were injured or died, allegedly due to sudden unintended acceleration of their Toyota vehicles. The U.S. Judicial Panel on Multidistrict Litigation, issued an order on April 9 consolidating all the Toyota cases before U.S. District Judge James Selna of the Central District of California.

Once the cases are consolidated, plaintiffs' lawyers will begin discovery requests. The National Highway Traffic Safety Administration (NHTSA) findings could help them seek out more documents, said Carl Tobias, a professor at the University of Richmond School of Law who specializes in products liability law.

"It may strengthen their cases or their procedural posture when they ask for discovery," he said of the plaintiffs' lawyers. "I'm not saying this is the end of it, or that this will prove that, but it may help them."

Mark Robinson, a partner at Robinson, Calcagnie & Robinson in Newport Beach, Calif., who has filed two suits against Toyota, was more skeptical about whether the penalty would help in obtaining the 80,000 pages of Toyota documents that NHTSA reviewed before reaching its decision. "The fact that they got fined 16 times more than any other company has been fined, that's significant. And maybe it'll help us with our judge," he said. "But in the end, it's up to the judge."

However, Knox Nunnally, a partner at Houston's Vinson & Elkins, said the plaintiffs' lawyers stand a good chance of obtaining documents that Toyota turned over to a governmental agency. "Any negative thing that the government does toward Toyota, such as these fines...will be utilized as trial exhibits by the plaintiffs' bar in most cases that they try."

The government sanction covered Toyota's conduct since September with respect to the recall of accelerator pedals; it did not address allegations in many of the pending lawsuits that the electronic throttle systems in its vehicles, not accelerator pedals or floor mats, were to blame for sudden-acceleration problems dating to 2002.

"You're dealing with, in that situation, a specific defect of the sticky pedal," said R. Graham Esdale Jr., a shareholder at Beasley, Allen, Crow, Methvin, Portis & Miles in Montgomery, Ala., which has filed personal injury suits against Toyota. "I don't know how much difference it would make along those lines other than just the mindset to conceal and hide."

The penalty would have little to no effect on most personal injury suits, he said, unless a plaintiff could prove that a faulty accelerator pedal caused his or her Toyota to suddenly surge forward, causing injuries or death, during one of the four months in which the company knew about the problems but had yet to recall its vehicles in the United States.

"I look at this NHTSA penalty as unrelated to the sudden-acceleration problems," Robinson said. "It's a distraction. You're distracting the public from the issue. The issue is sudden acceleration."

BROAD BRUSH

It is common for plaintiffs' counsel to paint with a broad brush a company's defect problems surrounding a recall, said Nunnally, who was lead liaison counsel in Texas for Bridgestone/Firestone Inc., in the litigation following the recall of tires on Ford vehicles a decade ago. In focusing on the electronic problems, plaintiffs' lawyers are attempting to expand Toyota's legal liability beyond a single product line, he said.

"One of the most important things for the mass tort defendant is to limit what your problem is to a certain product line," Nunnally said. "And it's going to take a while for that to be resolved."

Plaintiffs' lawyers also face a "serious defense" in response to the NHTSA penalty, even if Toyota agrees to pay, he said. Toyota could argue that the government is wrong, or that the subject of the penalty — the accelerator-pedal recall — bears no resemblance to claims that the electronic throttle system is defective in its vehicles, Nunnally said. Toyota could argue that " 'it's unfair to saddle us with what the government has found is a problem in that area with the problem you're suing for in that area.' That's a viable defense."

Many plaintiffs' lawyers are pinning their hopes on additional penalties that the government could assess against Toyota. NHTSA has indicated that investigations are pending into Toyota's other recalls tied to sudden-acceleration issues. NHTSA also has brought in engineers from NASA to help in assessing whether the electronic throttle is to blame for Toyota's recent troubles.

"I don't have a crystal ball, but I think this is probably the tip of the iceberg. One by one, as they connect dots, you'll see more of these kinds of actions surface," Arsenault said. "The investigation is ongoing, and with more time, and as they continue to review these hundreds of thousands of documents, we'll see more of this."