

Recalls Put Toyota Under Lawyers' Microscope

BY ZACK NEEDLES

Of the Legal Staff

Pennsylvania plaintiffs firms are ready to scrutinize Toyota from several different angles following the company's recall woes, but admit they face a number of hurdles.

Toyota Motor Corp. has come under heavy fire since late January, when it announced a recall of more than 8 million vehicles worldwide for what the carmaker referred to in a press statement as "stuck-ing accelerator pedals," followed by more than 400,000 hybrid vehicles worldwide in early February after customers complained



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everything from personal injury cases involving Toyota vehicles to consumer class actions involving Toyota owners, as well as shareholder-derivative litigation and lemon

of what the company has termed "inconsistent brake feel."

The announce-ments have sparked legal activity nationwide and

Pennsylvania plaintiffs firms have already gotten involved in or are investigating

law claims.

Stephen A. Sheller of Sheller P.C. in Philadelphia said his firm "can't keep up with" the volume of calls it has been receiving since media reports of the recalls surfaced a few weeks ago.

Sheller P.C. is currently handling both personal injury cases involving Toyota vehicles and class action suits in which Toyota owners allege that they've suffered economic harm due to the decreased value of their vehicles, Sheller said.

Sheller said one of the challenges in both types of cases is that there is still so much

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that is unknown about the nature of the alleged defects in Toyota vehicles.

"We still don't know the real story here. [Toyota is] trying to claim it's a stuck gas pedal, but I think it's a throttle problem," Sheller said, referring to the search for a culprit behind unintended acceleration.

Tom Kline of Kline & Specter in Philadelphia, which is currently investigating three catastrophic injury cases involving Toyota vehicles, said one of the biggest obstacles thus far has been the carmaker's refusal to disclose information contained on each vehicle's Electronic Data Recorder, or EDR, which is the automobile equivalent of an airplane's black box recorder.

That data, Kline said, could provide clues as to exactly what happened internally leading up to each crash.

"It has raised the pre-litigation issue for us as to how to go about getting the data," Kline said. "It raises the issue of whether to go to Toyota pre-litigation or whether to file a writ with a demand for pre-complaint discovery or some other strategy depending upon the circumstances involved in the particular case."

Sheller said the EDRs also factor into the consumer class action litigation, as one of the damages concepts is that Toyota owners and leasees should not have to make monthly payments on their vehicles until the black box data are released.

PLAYING DETECTIVE

But even before the exact nature of the alleged defect can be considered, plaintiffs lawyers have a lot of work to do, especially in personal injury cases, according to Alan M.

Feldman of Feldman Shepherd Wohlgelemer Tamer Weinstock & Dodge in Philadelphia.

Feldman said the firm just recently took its first case involving the driver of a Toyota Corolla who was seriously injured in an accident that occurred when the car allegedly accelerated without warning.

"What's interesting about these cases is that I think people will find that sometimes you'll know if you've had an episode of unintended acceleration, but if it resulted in serious injury, [attorney] may have to put the pieces together," he said. "If someone is, God forbid, killed [or] has no memory of what happened, you have to look at the surrounding circumstances. You have to be a little bit of a detective and play 'CSI.'"

John Gismondi of Gismondi & Associates in Pittsburgh said that in any accident case involving an alleged vehicle defect, the plaintiff's attorney must first eliminate the possibility that the crash was the driver's fault.

"If one of these Toyota cases came across my desk, the first thing I'm going to do is look and see if I can eliminate driver error," he said, adding that he has not received any inquiries regarding crashes involving allegedly defective Toyota vehicles. "I'm going to look at the driver's age and experience and the circumstances of how [the accident] happened."

Kline said the first step his firm takes in investigating one of these cases is to determine whether the vehicle involved in the accident has been preserved.

"You need to have the vehicle to do the investigation and prove the case," he said, echoing Feldman's sentiments that the recent recall announcements have caused a number of people to re-evaluate the possible causes behind previously unexplained crashes involving Toyota vehicles.

"This is truly a situation where you have to

solve a mystery with what is now a much better set of clues," Kline said.

But attempting to solve those mysteries and litigate those cases is neither easy nor cheap, said Matthew A. Casey of Ross Feller Casey in Philadelphia.

"Recall cases are labor-intensive, really expensive and there are issues related to whether or not the recall is admissible," Casey said.

Casey said his firm recently wrapped up a recall case against another manufacturer regarding a different product that had a number of parallels to the current litigation against Toyota.

That case cost the firm upwards of \$300,000 to litigate, according to Casey.

"We expect the same kind of resources will have to be put into the Toyota cases to the extent any end up working out," Casey said, explaining that his firm is currently looking into a few potential Toyota-related catastrophic injury cases. Casey added that in cases against large corporations, plaintiffs attorneys need to be prepared from day one to take the case to trial.

"Often times when you have a big corporate defendant, they're not afraid to try cases," he said. "Recall cases are no different. They often try or, if not, go right up to the courthouse steps."

Of course, personal injury lawyers aren't the only ones who face challenges when going up against Toyota.

Craig T. Kimmel of Kimmel & Silverman in Ambler, Pa., said his firm is handling a number of cases for Toyota owners seeking buybacks under state lemon laws in light of the recall announcements.

Kimmel said that even though recalls do not preclude lemon law claims, "the biggest obstacle for the consumer and lawyer is Toyota claiming, 'We have a fix.'"

Feldman cited a similar challenge for attorneys attempting to bring consumer class actions

against the automaker.

"If a class action is brought alleging a defect and the manufacturer issues a recall to fix it, that's the end of the class action," he said, adding that he anticipates these class actions will also have difficulty getting around warranties, which may exclude consequential damages and limit the manufacturer's obligation to repair or replace defective parts.

THE MOST IMPORTANT FACTORS

J. Scott Kramer, a partner in Duane Morris' trial practice group in Philadelphia, said the most important factors in every case against Toyota will be the answers to the questions of when the company knew about the defects and when it worked to correct them.

The question of "faked notice and failure to act is what really drives the entire engine, so to speak," he said. "It's critical for personal injury, for punitive damage claims and it really impacts the brand. There are lots of stories of crisis management saving a company."

With regard to the consumer class actions, Kramer said Toyota could make an "impressive case" with the argument that its cars have not been significantly devalued since the recall will essentially make Toyota owners whole by fixing the problem.

But Kramer, who said he has never personally represented Toyota, also admitted that the litigation has the potential to cost the company tens of billions of dollars and the public relations fallout could prove "very damaging."

"If you look at the magnitude of the problem, is it going to cost a tremendous amount of money? Yes," he said. "The Vioxx settlements cost almost \$5 billion and that was a product with a lot fewer consumer users and not less certainty on causation."

A spokesperson for Toyota said it's company policy not to discuss pending litigation. •