



Toyota's nightmare

*Defendants, venue and punitive damages:
All factors in Toyota cases*

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*Fourth in a series of articles on the
Toyota litigation*

Toyota, like most foreign corporations doing business in the United States, has multiple companies, some foreign and some domestic. The basic company is Toyota Motor Corporation (TMC), which is a Japanese corporation. This is the primary defendant which must be served in Japan. The primary American company is Toyota Motor Sales USA Inc. (TMS-USA), which is a California corporation located in Torrance, about 20 miles from downtown Los Angeles.

Although Toyota will claim, in refusing to fully respond to discovery, that all engineering and manufacturing is done in Japan, there is a company in Kentucky called Toyota Motor Engineering and Manufacturing North America Inc.

(TEMA). In addition, there is a California corporation called Toyota Technical Center, USA, which is located in Ann Arbor, Michigan, and is a division of TEMA. There is also a company called Toyota Technical Center, Japan, which is a division of the parent company. All of these entities should be served.

Normally, to avoid the federal court and avoid diversity, it is necessary to name the car dealer that sold the car. However, if the dealer is not a California company and the action is filed in California, the fact that TMS-USA is a California corporation located in Torrance has the same effect.

Because of the claim of cracked throttle bodies on certain models, it may be necessary to name Asian Industry Company LTD., a Japanese company, and/or its subsidiary, Franklin Precision Industries (FPI), also located in Kentucky.

Toyota by the Numbers

According to an analysis of public databases by Safety Research and Strategies, Inc. of Rehoboth, MA, the following are the numbers of accidents, injuries and deaths that may be related to Toyota Sudden Unintended Acceleration since 1999:

Incidents	5887
Crashes	2166
Injuries	1011
Deaths	78

There are two companies which manufactured the accelerator pedal assemblies. DENSO pedals are made by Denso International America, a Delaware corporation and the parent company of



DENSO Manufacturing Michigan Inc. and DENSO Manufacturing Kentucky Inc. CTS pedals are made by a corporation in Indiana. Toyota tried to shift the blame to CTS and therefore they are a possible defendant.

Serving foreign corporations is an elaborate procedure which requires that all papers be translated into the language in question, in this case Japanese, and consumes a substantial amount of time. There are companies which specialize in this service and they should be consulted.

Venue

All Toyota cases filed or removed to the federal court have been assigned to Orange County, California. This Multi District Litigation (MDL) assignment was done, according to the order, because of the fact that Toyota is located in Southern California and it is anticipated that there will be far more cases in Southern California than elsewhere, regardless of where the accident occurred. The economic-loss class actions also have been assigned to Orange County.

In my opinion, it is preferable for the plaintiff that the Toyota cases are filed in the state court. The federal court has small, six-member jury panels and a unanimous verdict is required. This gives tremendous power to one recalcitrant juror.

Most attorneys know that if there is a diversity of citizenship, an action can be removed from the state court to the federal court. They also know that if any legitimate defendant is a California citizen or corporation, that the case cannot be removed. However, just because TMS-USA is a California corporation does not avoid removal because of a little known rule which requires that any local defendant be not only named but also served before removal is sought. 28 USC §144(b) provides that removal is allowed only if none of the parties in interest properly joined and served is a citizen of the state in which the action is brought. It is therefore recommended that TMS-USA be served the same day the action is

filed. If removal takes place anyway, the plaintiff must file a motion to remand.

Orange County is possibly the most conservative county in the United States. However, just because the MDL is located in Orange County does not necessarily mean that the trial will take place there. Our experience is that cases are often sent back to the jurisdiction in which they were filed for trial. What does occur in MDL is that discovery is severely restricted, the case moves very slowly, and often all cases get settled more or less at once. Particularly strong cases may be lost in an administrative maze and held up for months, if not years. There may be great pressure to settle them at some compromised figure which may not truly represent their real value.

Delay and death

In 1982, the Audi 5000 was recalled after pressure from NHTSA amidst a claim that their celebrated SUA (sudden unintended acceleration) problems were caused by floor mats. Later it was suggested that it was due to the placement of the brake pedal. It may be just coincidence, but at the beginning of the Toyota nightmare, Toyota claimed that the problem was floor mats. When the accidents and incidents continued despite the fact that the floor mats were in the trunk, then the claim was that certain designs of accelerator pedals were to blame. At last count, over 100 people have been killed in Toyota SUA accidents.

Critics ask, if the solution is as simple as changing floor mats or pedals, why not do it immediately? They suggest that the problem is much more difficult to solve and is related to software issues in the electronic throttle system. They further claim that SUA issues in Toyota cars have been going on for at least a decade all over the world. An analogous situation is the recall of 2003 Toyota Sequoia SUVs in 2010 for software problems having to do with the electronic stability systems. This was a seven-year delay apparently because of inability to solve the tricky electronics.

Smoking memos and punitives

On July 6, 2009, a memo was sent from Toyota's Washington, D.C., office to Yoshimi Inaba, Toyota's top U.S. executive. The memo applauds the efforts of Toyota personnel in Washington in saving more than \$100 million by orchestrating a limited recall in 2007 of 55,000 floor mats in Camry and Lexus ES sedans that had experienced SUA.

There was a series of e-mail exchanges in January 2010 which are very revealing. On January 16, Toyota executive Katsuhiko Koganei, coordinator for corporate communications at TMS-USA, sent an e-mail from Japan to Torrance urging a company spokesman to keep quiet about the SUA problem because the company had not clarified the real reason for the "sticky pedals" and the remedy had not been confirmed. Irv Miller, a vice president in Torrance, replied by indicating that "We are not protecting our customers by keeping this quiet," and "we need to come clean."

The House of Representatives Committee on Oversight and Government Reform identifies an internal memo dated September 1, 2005, in which an in-house Toyota lawyer refers to secret electronic "Books of Knowledge" not being produced in discovery. In June 2005, this same attorney indicated in an internal memo that the SUA problems have been the subject of a number of meetings and exchanges of documents between TMS-USA and TMC, and he wonders if documents and information about the meetings have been preserved.

And in congressional hearings, the CEO of Toyota admitted that in their rush to become the biggest automaker in the world, they forgot about safety.

These are just samples of some of the incriminating documents and testimony that lawyers will use to show a pattern of not reporting defects, deflecting claims and hiding the ball.

On April 5, 2010, NHTSA assessed the largest fine in history in the amount of \$16.375 million against Toyota for



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delays in reporting their SUA problems. The old record was a \$1 million fine against GM. The cover letter indicates that the problem was known in 31 countries over a long period of time and that it should have been reported no later than September 29, 2009. At \$6,000 per car, the fine should have been \$13.8 billion, but the amount is limited by statute to \$16.4 million. Legislation was introduced to increase the amount to \$25,000 per car and to remove the cap. This would have made the fine \$57.5 billion. The limits in the pending legislation have now been scaled back, after heavy lobby-

ing by the industry, to a maximum of \$200 million.

Toyota is running TV commercials that say it is spending more than a million dollars an hour to make their cars "even safer." Besides flying in the face of their contention that they have fixed the SUA problem, it is a great launching pad for arguing the extent of punitives.

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Circle of Advocates, a nationwide group of the 100 top trial lawyers in the U.S. His firm, Booth & Koskoff in Torrance (www.boothkoskoff.com), has achieved over 75 million-dollar-plus verdicts and settlements, primarily in the fields of products liability and construction accidents, and is currently representing plaintiffs in 10 separate accidents involving Toyotas, claiming design defects caused SUA.

