

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA

RECEIVED

JOHN HARDING,
individually and on behalf of all
others similarly situated,

Plaintiff,

v.

TOYOTA MOTOR CORPORATION,
a foreign corporation, and
TOYOTA MOTOR SALES, USA, INC.,
a California corporation,

Defendants,

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CLERK OF DISTRICT COURT
MIDDLE DISTRICT ALA

Civil Action No. _____

JURY TRIAL REQUESTED

CLASS ACTION COMPLAINT

Plaintiff, John Harding, sues Defendants, Toyota Motor Corporation and Toyota Motor Sales, USA, Inc., and alleges as follows:

PARTIES

1. Plaintiff, John Harding ("Plaintiff") as an individual consumer, who at all times material hereto, was and is a resident of Autauga County in the State of Alabama.
2. Defendant, Toyota Motor Corporation, is a Japanese Corporation having its principal place of business at 1 Toyota-Cho, Toyota City, Aichi Prefecture 471-8571, Japan. Toyota Motor Corporation designs, develops and manufactures automobiles that are sold throughout the world.
3. Defendant, Toyota Motor Sales, USA, Inc., is a corporation organized and existing under the laws of the State of California with its principal executive offices located at 19001 S.2. Western Avenue, Torrance, California 90509. Toyota Motor Sales, USA, Inc. markets, distributes and sells vehicles manufactured by Defendant Toyota Motor Corporation throughout the United States.

JURISDICTION AND VENUE

4. This court has jurisdiction over this class action under 18 U.S.C. § 1332(d), which under the provisions of the Class Action Fairness Act (“CAFA”) explicitly provides for the original jurisdiction of the Federal Courts of any class action in which any member of the plaintiff class is a citizen of a State different from any defendant, and in which the matter in controversy exceeds in the aggregate the sum of \$5,000,000, exclusive of interest and costs. Plaintiff alleges that the total claims of individual class members in this action are well in excess of \$5,000,000 in the aggregate, exclusive of interest and costs, as required by 28 U.S.C. § 1332(d)(2), (5). Plaintiff is a citizen of the State of Alabama whereas, as set forth above, Defendant Toyota Motor Corporation is a citizen of a foreign country, Japan, and Defendant Toyota Motor Sales, USA, Inc. is a citizen of the State of California. Furthermore, Plaintiff alleges that the total number of members of the proposed Class is greater than 100, pursuant to 28 U.S.C. § 1332(d)(5)(B). Therefore, diversity of citizenship exists under CAFA as required by 28 U.S.C. § 1332(d)(2)(A).

5. Venue in this district is proper pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the claims alleged occurred in this district, Plaintiff resides in the this District, and Toyota Motor Corporation and Toyota Motor Sales, USA, Inc. are subject to personal jurisdiction in this District.

FACTUAL ALLEGATIONS

6. Toyota Motor Corporation is the world’s largest automobile manufacturer, with approximately \$270 billion in revenue. It designs and develops a wide range of automobiles including the brands Toyota, Lexus and Scion.

7. Toyota Motor Sales, USA, Inc., a subsidiary of the Toyota Motor Corporation, distributes, markets, and sells the Toyota, Lexus and Scion automobiles throughout the United States (Toyota Motor Corporation and Toyota Motor Sales, USA, Inc. collectively referred to as “Toyota”). Approximately two million Toyota vehicles are sold annually in the United States through over 1,500 dealerships.

8. Toyota prides itself on the safety of its vehicles. The website www.SafetyToyota.com, devoted exclusively to promoting the safety of Toyota vehicles, claims:

“What can we do to realize an ideal vehicle, which is a goal we never cease pursuing? That is what we always have in mind. What technology can prevent an accident in any situation and minimize the damage in an accident? Toyota has been developing various safety technologies by using variant means..., in addition to the verification at the collision test center that can reproduce many different types of accidents. ‘What causes accidents?’ ‘What can be done to prevent accidents?’ ‘What mitigates the damage of accidents that have occurred?’ These are the questions to which we are constantly seeking answers. Our technologies will continue to advance toward the ultimate goal of making a vehicle that is safe for everybody.”

9. Toyota automobile owners have been reporting incidents of sudden unintended acceleration of their vehicles since the 1990s. Sean Kane, a safety researcher, reported that his firm has documented thousands of reports of unintended acceleration. See “Toyota’s Slow Awakening to a Deadly Problem” as Exhibit A, attached hereto.

10. The National Highway Traffic Safety Administration (“NHTSA”), which helps investigate consumer complaints of automotives, has, over the years, received far more sudden acceleration complaints for Toyota vehicles than for any other manufacturer. As a result of these complaints, NHTSA has launched more investigations into Toyota vehicles concerning this issue than all other automobile manufacturers combined. These investigations, relying on data provided by Toyota, had concluded that most of the accidents were caused by drivers accidentally hitting the accelerator pedal as opposed to the brakes.

11. Further, Toyota has downplayed or dismissed owner complaints, blaming it on driver error or other situation-specific reasons.

12. In 2007, due to an overwhelming number of customer complaints, Toyota conducted an investigation and determined that the floor mats were the cause of the accelerator problems, as it had the tendency to obstruct the accelerator pedal. Toyota further announced that the accelerator pedals were in no way a safety threat.

13. On August 28, 2009, California Highway Patrol Officer Mark Saylor, while

driving on the San Diego Freeway, could not slow down his 2009 Lexus ES 350 even after continuously applying the brakes, reaching speeds upwards of 130 miles per hour. While driving, he was on the phone with the police dispatcher and said: "We're in trouble...There's no brakes." Moments later, Officer Saylor, as well as three others on board, were dead.

14. A month after the Saylor tragedy, and after mounting pressure, Toyota recalled approximately four million vehicles from model years as far back as 2004 (the "September 2009 Recall").

15. Toyota, however, again claimed that the recall was due to improper installation of floor mats causing them to jam the accelerator pedal, and no defect with the accelerator existed. NHTSA, who believed there was an underlying problem with the accelerator pedals, criticized Toyota for making "inaccurate and misleading statements."

16. Shortly after the September 2009 Recall, the Los Angeles Times conducted an investigation into Toyota's safety issues over the past several years. See "Toyota Found To Keep Tight Lid On Potential Safety Problems" attached hereto as Exhibit B. The article found:

" * The automaker knew of a dangerous steering defect in vehicles including the 4Runner sport utility vehicle for years before issuing a recall in Japan in 2004. But it told regulators no recall was necessary in the U.S., despite having received dozens of complaints from drivers. Toyota said a subsequent investigation led it to order a U.S. recall in 2005.

* Toyota has paid cash settlements to people who say their vehicles have raced out of control, sometimes causing serious accidents, according to consumers and their attorneys. Other motorists who complained of acceleration problems with their vehicles have received buybacks under lemon laws.

* Although the sudden acceleration issue erupted publicly only in recent months, it has been festering for nearly a decade. A computerized search of NHTSA records by The Times has found Toyota issued eight previous recalls related to unintended acceleration since 2000, more than any other automaker.

* A former Toyota lawyer who handled safety litigation has sued the automaker, accusing it of engaging in a "calculated conspiracy to prevent the disclosure of damaging evidence" as part of a scheme

to "prevent evidence of its vehicles' structural shortcomings from becoming known" to plaintiffs lawyers, courts, NHTSA and the public."

17. On January 21, 2010, Toyota finally admitted that the accelerators were not entirely free from defects, as Toyota had stated time and time again, announcing in a press release that "Our investigation indicates that there is a possibility that certain accelerator pedal mechanisms may, in rare instances, mechanically stick in a partially depressed position or return slowly to the idle position."

18. In addition to the mechanical defect(s), the Electronic Throttle Control System with Intelligence ("ETCS-i") and/or Electronic Throttle Control System ("ETC") that is designed, manufactured, distributed and sold in certain vehicles by the Defendants is defective, in that it will allow sudden unintended acceleration of the vehicle engine. The Defendants' deny these defects; just as the Defendants' have previously denied any and all of the aforementioned defects. Another safety expert said that he does not believe Toyota's pedal fix addresses the core problem.

"These are completely computer-guided systems, and we all know that electronics fail. They do fail, and they will fail. The problem with Toyota is they haven't built enough fail-safe devices into their cars to ensure that drivers get control of the vehicle when a failure happens." (US Headlines Examiner, Charisse Van Horn)

19. Following the announcement, Toyota announced an additional recall of 2.3 million U.S. built cars and trucks (the "January 2010 Recall") (all Toyota vehicles recalled for the sudden acceleration problem, and those not yet identified, referred to as "Vehicles in Question"). These models include but are not limited to the 2009-2010 RAV4, 2009-2010 Corolla, 2009-2010 Matrix, 2005-2010 Avalon, 2007-2010 Camry, 2010 Highlander, 2007-2010 Tundra, and the 2008-2010 Sequoia.

20. On January 30, 2010, the January 2010 Recall was broadened to include Toyota vehicles sold overseas, including a recall of 1.8 million units in Europe. As of the date of this recall, the total number of Toyota vehicles recalled is upwards of 7 million units.

21. Plaintiff John Harding, a resident of Autauga County, Alabama, is the owner of a

2009 Toyota Tundra.

22. Plaintiff contends that his 2009 Toyota vehicle is designed, manufactured and sold using Toyota's ETSC-i / or ETC.

23. Plaintiff's vehicle may no longer be safe to operate due to a potential sudden acceleration problem caused by a defective accelerator pedal and/or the ETC/ETSC-i system.

24. Plaintiff alleges upon information and belief, that the Defendants knew that this system was susceptible to malfunction that could result in unintended acceleration of the vehicles. The Defendants continued to manufacture vehicles with this system. The Defendants did not incorporate any failsafe or redundant equipment in their vehicles to mitigate this significant risk of injury or death, even knowing that similar systems are used by manufacturers throughout the industry.

25. Plaintiff contends upon information and belief, that the Defendants' actions have diminished or devalued Plaintiff's vehicle resulting in monetary loss.

CLASS ALLEGATIONS

26. Plaintiff repeats and realleges all preceding paragraphs, as if fully set forth herein.

27. Pursuant to F.R.C.P. 23, Plaintiff brings this action on behalf of himself and the Class comprised of all other consumers who purchased the Vehicles in Question during the relevant time period. Toyota's practices and omissions were applied uniformly to all members of the Class, so that the questions of law and fact are common to all members of the Class. All putative Class members were and are similarly affected by having purchased the Vehicles in Question for their intended and foreseeable purpose as promoted, marketed, advertised, packaged and labeled by Toyota as set forth in detail above, and the relief sought herein is for the benefit of the Plaintiff and members of the putative Class. Plaintiff alleges that the Class is so numerous that joinder of all members would be impractical.

28. Based on the annual sales of the Vehicles in Question and the popularity of the Vehicles in Question, it is apparent that the number of consumers of the Vehicles in Question would at least be in the many thousands, thereby making joinder impossible. Questions of law

and fact common to the Class exist and predominate over questions affecting only individual members, including, *inter alia*:

- (a) Whether Toyota designed, tested, manufactured, assembled, developed and sold defective Vehicles resulting in diminution of value and monetary loss to the Plaintiff and other Class members,
- (b) Whether Toyota breached express warranties in its sale of the Vehicles in Question, thereby causing harm to the Plaintiff and other Class members;
- (c) Whether Toyota breached implied warranties in its sale of the Vehicles in Question, thereby causing harm to the Plaintiff and other Class members;
- (d) Whether Toyota fraudulently concealed the risks associated with its design, testing, manufacture, assembly, development and sale of the Vehicles in Question; and
- (e) Whether Toyota's practices in connection with the promotion, marketing, advertising, packaging, labeling and sale of the Vehicles in Question unjustly enriched Toyota at the expense of, and to the detriment of, the Plaintiff and other Class members.

29. The claims asserted by the Plaintiff in this action are typical of the claims of other Class members as the claims arise from the same course of conduct by Toyota, and the relief sought is common.

30. The Plaintiff will fairly and adequately represent and protect the interests of the Class members. Plaintiff has retained counsel competent and experienced in both consumer protection and class action litigation.

31. Certification of this class action is appropriate under F.R.C.P. 23(b) because the questions of law or fact common to the respective Class members predominate over questions of law or fact affecting only individual members. This predominance makes class litigation superior to any other method available for the fair and efficient adjudication of these claims. Absent a class action remedy, it would be highly unlikely that the representative Plaintiff or any other Class member would be able to protect their own interests because the cost of litigation through individual lawsuits might exceed expected recovery. Certification is also appropriate

because Toyota acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief with respect to the Class as a whole. Further, given the large number of consumers of the Vehicles in Question, allowing individual actions to proceed in lieu of a class action would run the risk of yielding inconsistent and conflicting adjudications.

32. A class action is a fair and appropriate method for the adjudication of the controversy, in that it will permit a large number of claims to be resolved in a single forum simultaneously, efficiently, and without the unnecessary hardship that would result from the prosecution of numerous individual actions and the duplication of discovery, effort, expense and burden on the courts that such individual actions would engender. The benefits of proceeding as a class action, including providing a method for obtaining redress for claims that would not be practical to pursue individually, outweigh any difficulties that might be argued with regard to the management of this class action.

I. FIRST CAUSE OF ACTION **(BREACH OF EXPRESS WARRANTY)**

33. Plaintiff repeats and realleges all preceding paragraphs, as if fully set forth herein.

34. Toyota provided the Plaintiff and other members of the Class with written express warranties including, but not limited to, that the Vehicles in Question were completely safe to operate. Specifically, Toyota's website promises that their ultimate goal is "making a vehicle that is safe for everybody."

35. Toyota breached these express warranties which resulted in damages to the Plaintiff and other members of the Class, who overpaid for the Vehicles in Question, as the Vehicles in Question were not safe as they may contain a defective accelerator pedal mechanism and/or the ETC/ETSC-i system causing sudden acceleration, potentially resulting in death, and as such, the Vehicles in Question were not safe to operate.

36. As a proximate result of the breach of warranties by Toyota, the Plaintiff and Class members have suffered damages in an amount to be determined at trial in that, among other things, they purchased and paid for a product that did not conform to what was promised as

promoted, marketed, advertised, packaged and labeled by Toyota, and they were deprived of the benefit of their bargain and spent money on a product that did not have any value or had less value than warranted or a product they would not have purchased and used had they known the true facts about it. The Plaintiff and other members of the class are further harmed in having to spend money on attaining other transportation while the Vehicles in Question are being fixed. Additionally, or in the alternative, the Plaintiff and other members of the class suffered actual damages, including a diminution of value of the subject vehicles (the difference in market value of the product in the condition in which it was delivered, and its market value in condition in which it should have been delivered according to contract of parties).

II. SECOND CAUSE OF ACTION

(BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY)

37. Plaintiff repeats and realleges all preceding paragraphs, as if fully set forth herein.

38. Plaintiff and other Class members purchased the Toyota's Vehicles in Question, which were promoted, marketed, advertised, packaged and labeled as being safe to operate. Pursuant to these sales, Toyota impliedly warranted that the Vehicles in Question would be merchantable, including that the Vehicles in Question would be fit for the ordinary purposes for which such goods are used and conform to the promises or affirmations of fact made in the Vehicles' in Question promotions, marketing, advertising, packaging and labels. In doing so, the Plaintiff and other Class members relied on Toyota's representations that the Vehicles in Question were safe to operate, and at or about that time, Toyota sold to the Plaintiff and other Class members the Vehicles in Question. By its representations regarding the reputable nature of its company and related entities, and by its promotion, marketing, advertising, packaging and labeling of the Vehicles in Question, Toyota warranted that the Vehicles in Question were safe to operate. The Plaintiff and Class members bought the Vehicles in Question from Toyota, relying on Toyota's representations that the Vehicles in Question were safe to operate; however, these vehicles may have contained a defective accelerator pedal mechanism and/or the ETC/ETSC-i

system causing sudden acceleration which could potentially result in death.

39. Toyota breached the warranty implied at the time of sale in that the Plaintiff and Class members did not receive a vehicle which was safe to operate and thus, the goods were not merchantable as fit for the ordinary purposes for which such goods are used or as promoted, marketed, advertised, packaged, labeled or sold.

40. As a proximate result of this breach of warranty by Toyota, the Plaintiff and Class members have suffered damages in an amount to be determined at trial in that, among other things, they purchased and paid for a product that did not conform to what was promised as promoted, marketed, advertised, packaged and labeled by Toyota, and they were deprived of the benefit of their bargain and spent money on a product that did not have any value or had less value than warranted or a product they would not have purchased and used had they known the true facts about it. The Plaintiff and other members of the class are further harmed in having to spend money on attaining other transportation while the Vehicles in Question are being fixed. Additionally, or in the alternative, the Plaintiff and other members of the class suffered actual damages, including a diminution of value of the subject vehicles (the difference in market value of the product in the condition in which it was delivered, and its market value in condition in which it should have been delivered according to contract of parties).

III. THIRD CAUSE OF ACTION

(BREACH OF IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE)

41. Plaintiff repeats and realleges all preceding paragraphs, as if fully set forth herein.

42. Plaintiff and other Class members purchased Toyota's Vehicles in Question, which were promoted, marketed, advertised, packaged and labeled as being safe to operate. Pursuant to these sales and by its representations regarding the reputable nature of its company and related entities, Toyota impliedly warranted by its promotion, marketing, advertising, packaging and labeling of the Vehicles in Question that they were safe to operate. The Plaintiff and Class members bought the Vehicles in Question from Toyota, relying on Toyota's skill and

judgment in furnishing suitable goods as well as Toyota's representations that the Vehicles in Question were safe to operate. However, Toyota's Vehicles in Question were not safe to operate as they may have contained a defective accelerator pedal mechanism and/or the ETC/ETSC-i system causing sudden acceleration potentially resulting in death.

43. Toyota breached the warranty implied at the time of sale in that Plaintiff and Class members did not receive products that were safe to operate as they possibly contained a defective accelerator pedal mechanism and/or the ETC/ETSC-i system potentially resulting in death, and thus the goods were not fit for the purpose as promoted, marketed, advertised, packaged, labeled or sold.

44. As a proximate result of this breach of warranty by Toyota, the Plaintiff and Class members have suffered damages in an amount to be determined at trial in that, among other things, they purchased and paid for a vehicle that did not conform to what was promised as promoted, marketed, advertised, packaged and labeled by Toyota, and they were deprived of the benefit of their bargain and spent money on a product that did not have any value or had less value than warranted or a product they would not have purchased and used had they known the true facts about it. The Plaintiff and other members of the class are further harmed in having to spend money on attaining other transportation while the Vehicles in Question are being fixed. Additionally, or in the alternative, the Plaintiff and other members of the class suffered actual damages, including a diminution of value of the subject vehicles (the difference in market value of the product in the condition in which it was delivered, and its market value in condition in which it should have been delivered according to contract of parties).

IV. FOURTH CAUSE OF ACTION

(FRAUDULENT CONCEALMENT)

45. Plaintiff repeats and realleges all preceding paragraphs, as if fully set forth herein.

46. Toyota had a duty to disclose the truth about risks associated with the design, testing, manufacture, assembly and development of the Vehicles in Question as set forth in detail above, but delayed and failed to do so.

47. Toyota concealed these facts relating to the accelerator pedal mechanism and/or the ETC/ETSC-i system of the Vehicles in Question when they knew, or had reason to know, the true and correct facts regarding the defectiveness of the Vehicles in Question, and that Toyota took steps to prevent these facts from becoming known to the general public in the marketing, promotion and sale of the vehicles.

48. The concealment of the true facts, from the Plaintiff and other members of the Class, was done with the intent to induce the Plaintiff and Class members to purchase the Vehicles in Question.

49. The reliance by the Plaintiff and Class members was reasonable and justified in that Toyota appeared to be, and represented itself to be, a reputable business. The Plaintiff and Class members would not have purchased the Vehicles in Question had they known the true facts about the Vehicles in Question that they may result in potential death.

50. As a direct and proximate result of the fraud and deceit alleged, the Plaintiff and Class members were induced to purchase the Vehicles in Question, who then used it for its intended and foreseeable purpose, and have suffered damages in an amount to be determined at trial.

51. Toyota knew, or should have known, that the design, testing, manufacture, assembly and development of the Vehicles in Question as set forth in detail above was defective before it issued a recall, and that Toyota intended that the customers should rely on Toyota's representations that it was a reputable and reliable business, as well as Toyota's suppression of the true facts about the Vehicles in Question, in purchasing such vehicles.

52. Plaintiff and other members of the Class, in purchasing and using the Vehicles in Question, did rely on Toyota's above representations and suppression of facts, all to their damage as hereinabove alleged. In doing these things, Toyota was guilty of malice, oppression and fraud, and the Plaintiff and Class members are, therefore, entitled to recover punitive damages.

53. Additionally, or in the alternative, the Plaintiff and other members of the class suffered actual damages, including a diminution of value of the subject vehicles (the difference

in market value of the product in the condition in which it was delivered, and its market value in condition in which it should have been delivered according to contract of parties).

V. FIFTH CAUSE OF ACTION

(UNJUST ENRICHMENT)

54. Plaintiff repeats and realleges all preceding paragraphs, as if fully set forth herein.

55. As a result of Toyota's deceptive, fraudulent and misleading labeling, advertising, marketing and sales of the Vehicles in Question, described in detail above, Toyota profited, at the expense of the Plaintiff and the Class, through the payment of the purchase price for Toyota's Vehicles in Question.

56. Under the circumstances, it would be against equity and good conscience to permit Toyota to retain the ill-gotten benefits that it received from the Plaintiff and other members of the Class in light of the fact that the Vehicles in Question were not what Toyota purported them to be. Thus, it would be unjust or inequitable for Toyota to retain the benefit without restitution to the Plaintiff and other members of the Class for the monies paid to Toyota for such Vehicles in Question.

VI. SIXTH CAUSE OF ACTION

(BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING)

57. Plaintiff realleges all prior paragraphs of this Complaint, as if set out forth herein in full and incorporated by reference.

58. Plaintiff's Agreement with the Defendant includes not only express written provisions, but also those terms and conditions, which although not formally expressed, are implied by the Law.

59. Such terms are as binding as the terms that are actually written into the agreement with the Plaintiff, and those who are similarly situated against the Defendants.

60. Inherent in all contracts and agreements is a covenant that the parties will act in

good faith and deal fairly with each other in the performance of their respective covenants and obligations under the Agreement and not take any action that will injure the other party or compromise the benefit of the Agreement.

61. The obligations of Defendants to abide by the covenant of good faith and fair dealing is heightened by the substantial imbalance of power between Defendants and the Plaintiff. This imbalance allows Defendants to implement the business scheme described in detail in this Complaint and incorporated by reference.

62. Through the actions and inactions of the Defendants as outlined above, Defendants have failed to abide by the covenant of good faith and have failed to deal fairly with the Plaintiff and others similarly situated.

63. As a proximate result of the aforesaid breach of the covenant of good faith and fair dealing by Toyota, the Plaintiff and Class members have suffered damages in an amount to be determined at trial in that, among other things, they purchased and paid for a vehicle that did not conform to what was promised as promoted, marketed, advertised, packaged and labeled by Toyota, and they were deprived of the benefit of their bargain and spent money on a product that did not have any value or had less value than warranted or a product they would not have purchased and used had they known the true facts about it. The Plaintiff and other members of the class are further harmed in having to spend money on attaining other transportation while the Vehicles in Question are being fixed. Additionally, or in the alternative, the Plaintiff and other members of the class suffered actual damages, including a diminution of value of the subject vehicles (the difference in market value of the product in the condition in which it was delivered, and its market value in condition in which it should have been delivered according to contract of parties).

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays for judgment as follows:

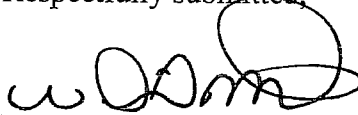
- A. Certification of the Class, certifying Plaintiffs as representative of the Class, and designating their counsel as counsel for the Class;
- B. An award of compensatory damages, and other damages, the amount of which is to be determined at trial;
- C. For interest at the legal rate on the foregoing sums;
- D. For costs of suit incurred; and
- E. For such further relief as this Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiff hereby demands a trial by jury.

Dated: February 5, 2010

Respectfully submitted,



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EXHIBIT "A"

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HEADLINE: Toyota's Slow Awakening to a Deadly Problem

BYLINE: By BILL VLASIC; Matt Richtel contributed reporting from San Francisco, Clifford Krauss from Houston and Matthew L. Wald from Washington.

DATELINE: DETROIT

BODY:

The 911 call came at 6:35 p.m. on Aug. 28 from a car that was speeding out of control on Highway 125 near San Diego.

The caller, a male voice, was panic-stricken: "We're in a Lexus ... we're going north on 125 and our accelerator is stuck ... we're in trouble ... there's no brakes ... we're approaching the intersection ... hold on ... hold on and pray ... pray ..."

The call ended with the sound of a crash.

The Lexus ES 350 sedan, made by Toyota, had hit a sport utility vehicle, careened through a fence, rolled over and burst into flames. All four people inside were killed: the driver, Mark Saylor, an off-duty California Highway Patrol officer, and his wife, daughter and brother-in-law.

It was the tragedy that forced Toyota, which had received more than 2,000 complaints of unintended acceleration, to step up its own inquiry, after going through multiple government investigations since 2002.

Yet only last week did the company finally appear to come to terms with the scope of the problem -- after expanding a series of recalls to cover millions of vehicles around the world, incalculable damage to its once-stellar reputation for quality and calls for Congressional hearings.

With prodding from the National Highway Traffic Safety Administration, Toyota halted production and sales of eight models, including its top-selling Camry sedan.

And late last week, the government allowed the company to go ahead to try yet another new fix for its vehicles, which it is expected to announce on Monday.

At almost every step that led to its current predicament, Toyota underestimated the severity of the sudden-acceleration problem affecting its most popular cars. It went from discounting early reports of problems to overconfidently announcing diagnoses and insufficient fixes.

As recently as the fall, Toyota was still saying it was confident that loose floor mats were the sole cause of any sudden acceleration, issuing an advisory to millions of Toyota owners to remove them. The company said on Nov. 2 that "there is no evidence to support" any other conclusion, and added that its claim was backed up by the federal traffic safety agency.

But, in fact, the agency had not signed on to the explanation, and it issued a sharp rebuke. Toyota's

statement was "misleading and inaccurate," the agency said. "This matter is not closed."

The effect on Toyota's business is already being felt. Its sales in the United States in January are expected to drop 11 percent from a year earlier, and its market share in the United States is likely to fall to its lowest point since 2006, according to Edmunds.com, an automotive research Web site.

The company has not yet projected the cost of its recalls and lost sales. But a prolonged slowdown in sales could substantially hurt a company that once minted profit.

Toyota's handling of the problem is a story of how a long-trusted carmaker lost sight of one of its bedrock principles.

In Toyota lore, the ultimate symbol of the company's attention to detail is the "andon cord," a rope that workers on the assembly line can pull if something is wrong, immediately shutting down the entire line. The point is to fix a small problem before it becomes a larger one.

But in the broadest sense, Toyota itself failed to pull the andon cord on this issue, and treated a growing safety issue as a minor glitch -- a point the company's executives are now acknowledging in a series of humbling apologies.

"Every day is a lesson and there is something to be learned," Yoshimi Inaba, Toyota's top executive in North America, said at the Detroit auto show in January. "This was a hard lesson."

In Davos, Switzerland, on Friday, Akio Toyoda, the grandson of Toyota's founder who now heads the company, told a Japanese broadcaster that he was "deeply sorry" for the problems.

Toyota's safety problems may prove to be a hard lesson for the N.H.T.S.A., as well. Six separate investigations were conducted by the agency into consumer complaints of unintended acceleration, and none of them found defects in Toyotas other than unsecured floor mats.

In at least three cases, the agency denied petitions for further investigative action because it did not see a pattern of defects and because of a "need to allocate and prioritize N.H.T.S.A.'s limited resources" elsewhere, according to agency documents.

The investigations, and Toyota's handling of the problem, will be the subject of Congressional hearings.

But the publicity surrounding the accident near San Diego, and Toyota's repeated inability to quell consumer concerns with a definitive solution, has also prompted a flood of lawsuits reminiscent of the litigation a decade ago arising out of the rollovers of Ford Explorers equipped with Firestone tires.

In addition to cases related to individual accidents, several class-action suits have been filed against Toyota. The cases are expected to focus on why the government and the carmaker were unable to identify problems beyond the floor mats, despite mounting instances of runaway cars.

David Ennis, a Washington lawyer, said he was working on three lawsuits that had been in the works for five months. "Over the last 24 hours, everybody's a Toyota lawyer now," he said last week.

Toyota now believes that the trouble with its cars is twofold -- a combination of loose floor mats that can interfere with accelerator pedals, and a pedal that itself can stick when a driver depresses it.

Toyota has told its dealers that it will announce its fix for the faulty accelerators on Monday, but has yet to release details. The CTS Corporation, the supplier of the pedals used in recalled models, is making replacement parts. But Toyota is also expected to try to repair or modify the pedals in some vehicles.

Before last August, Toyota had issued three limited recalls to replace floor mats and change an interior part that could catch on accelerator pedals.

But after the fatal crash near San Diego, and the public release of the 911 tape, Toyota was forced to, as it said in the fall, "take a closer look."

That crash, said Clarence M. Ditlow, executive director of the Center for Auto Safety in Washington, "was a watershed event."

"It captured on tape the deaths of four people in an uncontrolled acceleration where the driver was an experienced highway patrol officer," he said. "If he couldn't bring the car under control, who could?"

A lawyer for the Saylor family said he wished that the federal government had acted more quickly about concerns over the sudden acceleration.

"They're clearly starting to become more interested in the problem and more attentive to it," said the lawyer, John Gomez, of San Diego. "Do I wish they would have done more sooner? Obviously."

In one federal inquiry on Toyota models built from 2002 to 2005, investigators found that 20 percent of the 432 complaints studied involved "sudden or unintended acceleration."

But no defects were uncovered in any of the vehicles, and the rate of incidents was considered "unremarkable" in the context of the millions of cars on the road.

The petitioner in that case, Jordan Ziprin of Phoenix, said the regulators had focused exclusively on mechanical issues with his car, a 2002 Camry.

"I believe this is an electronic issue, but they have been avoiding that possibility entirely," Mr. Ziprin said in an interview.

Several lawsuits against Toyota also suggest that the company's electronic system could be at fault.

A Toyota spokesman said the company had looked extensively at its computerized electronic throttle system, which controls the speed of its cars, and had found no faults.

"If we found anything, we would take appropriate action," said the spokesman, Mike Michels. "But we continue to think it's entirely unlikely that an electronic malfunction is the cause."

A lawyer for a California man whose wife died in a 2007 crash of a Camry said the company was avoiding a potentially more pervasive problem by focusing on mats and stuck pedals, rather than its electronics.

"There are thousands of these complaints, and we're not seeing floor mats and we're not seeing stuck throttles," said the lawyer, Donald H. Slavik, of Milwaukee. The traffic safety agency "simply doesn't have the resources to analyze the electronic systems of these cars."

The agency, which is part of the Transportation Department, has stepped up its oversight of Toyota drastically since the fatal accident that involved the Saylor family.

Agency officials, who spoke on the condition of anonymity because the case was still being investigated, say their responsibility is to identify defects in autos, not to develop remedies to fix them. That responsibility, these officials said, rests with the automaker.

Many complaints by consumers were eliminated by the agency during its investigations because of possible driver error, or the lack of sufficient information about the circumstances of the incidents.

The agency separated braking problems from acceleration issues, further narrowing the number of complaints that could be linked to a faulty pedal or an electronic malfunction. Cases involving brief periods of acceleration were also considered separately from those that involved prolonged, high-speed incidents, many of which involved accidents.

Sean Kane, whose consulting firm, Safety Research and Strategies, counts plaintiffs' lawyers among its clients, contends that the agency did not push Toyota for more data, and too quickly accepted the company's explanations about floor-mat problems.

"The agency has not been very forceful with Toyota at all," Mr. Kane said. The agency "always took the low-hanging fruit for an explanation, which is the floor mat."

The discussions between federal officials and Toyota intensified in December, when the acting chief of the agency, Ronald Medford, flew to Japan to hold meetings with senior company executives, according to a government official with knowledge of the trip who was not authorized to speak publicly.

On Jan. 19, two days before the recall for the sudden-acceleration problem, Mr. Inaba of Toyota met in Washington with Mr. Medford and the new head of the agency, David Strickland.

The mounting number of complaints and accidents has led the agency to be more outspoken than it usually is during continuing investigations.

Last week, the transportation secretary, Ray LaHood, said in an interview with a Chicago radio station that Toyota had halted production of recalled vehicles "because we asked them to."

Indeed, Toyota had to be told by regulators to shut down production and suspend sales of the cars and trucks in the latest recall until it had the parts necessary to fix them. It was yet another example of a slow response from a company long known for its meticulous approach to building cars and servicing customers.

Mr. Michels, the Toyota spokesman, said the company never before had to halt production or stop selling millions of vehicles involved in a recall.

"It's not a typical case," he said. "Usually in a 'stop sale' it's a very small quantity."

In its attempts to play down the problem, Toyota may have raised more doubts among consumers.

"It thinks it can control this crisis, and in the process has thrown its own credibility out the window," said Mr. Kane, the safety consultant whose firm has documented thousands of reports of unintended acceleration.

Some owners of recalled Toyotas are now saying they are afraid to drive them. "I live only a half mile from the office and I drive there," said Elaine Byrnes, a Camry owner in Los Angeles. "If I had to go farther, I wouldn't consider it."

And the scrutiny of Toyotas will not end with its new plan to replace the pedals. Accidents are receiving swift attention from federal regulators.

On Dec. 26, a 2008 Toyota Avalon -- one of the cars under recall -- crashed just outside of Dallas. A police officer in Southlake, Tex., Roderick Page, said in an interview that "for undetermined reasons, the vehicle left the main roadway, and went through a metal pipe fence, striking a tree and causing the vehicle to flip and land upside down in a pond."

All four people in the car died. "There was no evidence that they attempted to hit the brake or slow down," he said. "Honestly, my reaction is, 'Wow.' "

Two weeks later, an investigator from the National Highway Traffic Safety Administration visited Southlake to inspect the car, accompanied by a Toyota engineer. Mr. Page said one factor they immediately ruled out was the floor mats, which were in the trunk.

URL: <http://www.nytimes.com>

GRAPHIC: PHOTOS: The wreckage of a Lexus ES 350 in which four people died in August after it accelerated out of control.(PHOTOGRAPH BY JOHN H. GOMEZ/GOMEZ LAW FIRM)(A1)

Jordan Ziprin of Phoenix said regulators had focused exclusively on mechanical issues. "I believe this is an electronic issue."(PHOTOGRAPH BY JOSHUA LOTT FOR THE NEW YORK TIMES)


Rescuers surrounding a 2008 Toyota Avalon that crashed into a pond on Dec. 26 in Southlake, Tex., killing four people.(PHOTOGRAPH BY WFAA.COM)(A11) **TIMELINE:** A Series of Warnings: Reports about uncontrolled acceleration in some Toyota vehicles first surfaced in 2002, but the company said the problem was caused either by driver errors or by floor mats and tried to minimize it. But late last year, after a crash near San Diego, the company issued the first of several recalls that culminated with the shutdown of many of its manufacturing plants.(Sources: Toyota

National Highway Traffic Safety Administration)

CHARTS: A Struggling Company: The problems with accelerator pedals affect more than half of Toyota's models at a time when the automaker is already struggling.

A Rival's Experience: **Toyota's problems** echo those of Ford a decade ago when rollover accidents in Explorers caused sales to fall.(Source: Motorintelligence.com)(A11)

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Toyota found to keep tight lid on potential safety problems

A Times investigation shows the world's largest automaker has delayed recalls and attempted to blame human error in cases where owners claimed vehicle defects.

December 23, 2009|By Ken Bensinger and Ralph Vartabedian

During a routine test on its Sienna minivan in April 2003, Toyota Motor Corp. engineers discovered that a plastic panel could come loose and cause the gas pedal to stick, potentially making the vehicle accelerate out of control.

The automaker redesigned the part and by that June every 2004 model year Sienna off the assembly line came with the new panel. Toyota did not notify tens of thousands of people who had already bought vans with the old panel, however.

It wasn't until U.S. safety officials opened an investigation last year that Toyota acknowledged in a letter to regulators that the part could come loose and "lead to unwanted or sudden acceleration."

In January, nearly six years after discovering the potential hazard, the automaker recalled 26,501 vans made with the old panel.

In a statement to The Times, Toyota said that there was no defect in the Sienna and that "a safety recall was not deemed necessary" when it discovered the problem in 2003. The company called the replacement part "an additional safety measure."

A peerless reputation for quality and safety has helped Toyota become the world's largest automaker. But even as its sales have soared, the company has delayed recalls, kept a tight lid on disclosure of potential problems and attempted to blame human error in cases where owners claimed vehicle defects.

The automaker's handling of safety issues has come under scrutiny in recent months because of incidents of sudden acceleration in Toyota and Lexus vehicles, which The Times has reported were involved in accidents causing 19 fatalities since 2001, more deaths from that problem than all other automakers combined.

After Toyota this fall announced its biggest recall to address the sudden-acceleration problem, it insisted publicly that no defect existed. That drew a rare public rebuke from the National Highway Traffic Safety Administration, which chastised the automaker for making "inaccurate and misleading statements."

In the wake of Toyota's announcement of the massive recall, The Times examined some of the ways the automaker has dealt with safety problems in recent years and found that:

- * The automaker knew of a dangerous steering defect in vehicles including the 4Runner sport utility vehicle for years before issuing a recall in Japan in 2004. But it told regulators no recall was necessary in the U.S., despite having received dozens of complaints from drivers. Toyota said a subsequent investigation led it to order a U.S. recall in 2005.

- * Toyota has paid cash settlements to people who say their vehicles have raced out of control, sometimes causing serious accidents, according to consumers and their attorneys. Other motorists who complained of acceleration problems with their vehicles have received buybacks under lemon laws.

- * Although the sudden acceleration issue erupted publicly only in recent months, it has been festering for nearly a decade. A computerized search of NHTSA records by The Times has found Toyota issued eight previous recalls related to unintended acceleration since 2000, more than any other automaker.

- * A former Toyota lawyer who handled safety litigation has sued the automaker, accusing it of engaging in a "calculated conspiracy to prevent the disclosure of damaging evidence" as part of a scheme to "prevent evidence of its vehicles' structural shortcomings from becoming known" to plaintiffs lawyers, courts, NHTSA and the public.

As a result, plaintiffs attorneys are considering reopening dozens of product-liability suits against the automaker.

Toyota has called the allegations of the attorney, Dimitrios Biller, "both misleading and inaccurate" and noted that he is also suing another former employer. The company said it had "acted appropriately in product liability cases and in all reporting to federal safety regulators."

In a written statement to The Times, Toyota said that it strove to keep government officials and consumers informed about potential safety problems with its vehicles, which it says are tested to meet or exceed federal standards.

"Toyota has absolutely not minimized public awareness of any defect or issue with respect to its vehicles," the company said.

Currently, Toyota is a defendant in at least 10 lawsuits alleging unintended acceleration that caused five fatalities and four injuries. Two of those suits are seeking class-action status.

But few, if any, sudden-acceleration cases ever make it to trial, according to attorneys who handle such cases.

After a 2007 crash of a Camry that accelerated out of control for 20 miles before killing the driver of another car in San Jose, Toyota was sued by members of the victim's family. Their attorney, Louis Franecke, said the automaker "didn't want to go to trial," and paid them a seven-figure sum in exchange for dropping the case and signing a non-disclosure form.

In an interview, Guadalupe Gomez, the driver of the runaway Camry, said he also signed a confidentiality agreement and received a settlement from Toyota. He was initially arrested on suspicion of manslaughter for causing the crash, but charges were never filed.

By settling, Toyota has managed to keep potentially damaging information out of the public eye, said Raymond Paul Johnson, a Los Angeles attorney who said he had settled four sudden-acceleration cases with the automaker.

"It's just a matter of risk control for them," Johnson said.

Toyota said that although it does not comment on individual cases, it "has resolved and will continue to resolve matters with litigants through confidential settlement when it is in both parties' interests to do so."

The majority of unintended acceleration incidents don't end up in accidents. But even after minor incidents, some consumers have obtained deals under which their cars were repurchased on favorable terms.

Tim Marks, a small businessman in Camden, Ark., parked his daughter's 2006 Lexus IS 250 in front of the dealership last year and said his family would never drive it again after experiencing four sudden-acceleration events.

"They told my daughter she was texting while driving and wasn't paying attention," Marks recalled. "She is a 95-pound, little itty-bitty thing, but she was fixing to twist off on that man."

The vehicle was bought back and the title branded as a lemon, according to vehicle registration records. It was later registered in Florida, suggesting that the dealer resold it.

Much the same thing happened to Joan Marschall, a Visalia resident whose 2003 Camry accelerated on its own three times before she complained.

"I took it to the dealer and said I wouldn't drive it again," Marschall recalled. "I said I don't care if you tell me the computer says nothing happened. I know it did."

Marschall received a lemon buyback too. Registration records show the car was transferred to a new owner in Southern California.

Toyota said it had no policy to repurchase vehicles from customers complaining about sudden acceleration, though its dealers may act on their own to "preserve goodwill."

Some motorists who have confronted safety issues said the automaker has hidden information from them.

In January, Jeffrey Pepski, a financial consultant in suburban Minneapolis, took his 2007 Lexus ES 350 to the dealer after it accelerated out of control on a Twin Cities freeway, reaching 80 miles per hour.

Toyota sent an expert to examine the car Feb. 3 and download electronic data stored on the vehicle's computers. When Pepski asked for a copy of the data, he was refused.

"They said it was proprietary," Pepski recalled.

He filed a defect petition with NHTSA, and the dealer allowed Pepski to trade in the sedan for a sport utility vehicle. The Lexus ES was not branded a lemon and was resold in Minnesota, records show.

How Toyota handles requests like Pepski's has frustrated investigators and vehicle owners who want to get information contained on computers in their vehicles.

Nearly all new cars today contain an event data recorder, often called a black box, that can record several seconds of key information when accidents occur or in other circumstances.

According to Toyota, its black boxes can capture vehicle speed, engine speed, brake pedal application, accelerator pedal position and seat belt usage, among other things. That data, experts say, could be crucial to investigating causes of sudden acceleration.

Unlike manufacturers such as General Motors Co. and Ford Motor Co., Toyota's data recorders are extremely difficult for non-Toyota personnel to read, said W.R. "Rusty" Haight, a black-box expert who owns a San Diego collision investigation company.

Toyota says it has only one device in the U.S. that can read the data. An operating manual for the device, a copy of which was reviewed by The Times, indicates that it takes two passwords to operate.

On its website, Toyota says that it "will not honor EDR readout requests from private individuals or their attorneys," because its device is a prototype.

On some safety issues, Toyota has little choice but to go public.

Sudden acceleration didn't become a national issue for the automaker until this fall, when it announced its largest recall shortly after a 2009 Lexus ES accelerated out of control and crashed in San Diego County, killing an off-duty California Highway Patrol officer along with his wife, daughter and brother-in-law.

In a 5:30 a.m. conference call the day before Thanksgiving, Toyota detailed remedies to prevent acceleration problems it has blamed on gas pedals trapped by floor mats. Toyota will replace or modify pedals, replace floor mats, modify floor well padding and add new safety software to seven models, representing 4.26 million cars and trucks.

The campaign follows eight recalls in the U.S. over the last decade to fix problems that in the automaker's own words could cause sudden acceleration or faulty throttle system operation, Times research shows.

Two years ago, a NHTSA investigation found that the gas pedal in Camry and Lexus ES sedans could be trapped by rubber all-weather floor mats -- the same problem being addressed in the current recall. Toyota responded by recalling 55,000 of the vehicles, but only enlarged a warning label on the underside of the mat and on its packaging.

In 2005, Toyota recalled 3,567 Lexus IS 250 sedans because the gas pedal had a propensity to stick on a floor pad. In 2006, it recalled 367,594 Highlander and Lexus RX SUVs after receiving complaints that an interior cover could interfere with the accelerator pedal, keeping it depressed.

All those followed a 2003 recall in Canada of 408 Celicas, also for floor mat interference with the accelerator pedal.

In the ongoing Sienna recall, Toyota is replacing a hard-plastic trim panel over the center console. In its statement to The Times, the automaker said that pedal entrapment could only be caused in the event of a missing attachment clip, which might not be replaced after service work.

Toyota said it issued the recall voluntarily after a single complaint to NHTSA prompted an investigation by the agency. "In response to Toyota's voluntary campaign, regulators closed the investigation," the company said.

NHTSA officials did not respond to a written question about the recall and the agency's oversight of the matter.

The Sienna incident wasn't the only time that Toyota issued a recall long after discovering a problem.

In 1994, NHTSA slapped Toyota with a \$250,000 fine, at the time the agency's second-largest, for providing misleading information about a fuel leak in Land Cruisers and waiting two years to undertake a recall to fix the problem. Toyota acknowledged that it failed to conduct a timely recall but denied withholding information from the agency.

A decade later, Toyota recalled about 330,000 vehicles in Japan after a 2004 crash there -- caused by a broken steering linkage -- seriously injured five people. The vehicle in the accident, a Hilux Surf, was sold in the U.S. as the 4Runner. Other truck models sold here, including the Toyota 4x4 and T100 pickups, also used the same linkage, a steering relay rod.

Despite that, the company told NHTSA in an October 2004 letter that it would not conduct a U.S. recall because it had not received information here indicating a problem with the part.

Documents entered in four lawsuits filed in Los Angeles this year, however, show that Toyota had received numerous consumer complaints dating from 2000 and had replaced dozens of the parts under warranty. The documents also show that Japanese police, in an investigation of the defect, said that

Toyota employees had known about the problem since 1992 and should have initiated a recall immediately.

In September 2005, Toyota recalled nearly 1 million vehicles in the U.S. to replace the part, its second-largest campaign.

It came too late for Zackary Audulewicz of Ila, Ga., relatives said. The 20-year-old was driving his Toyota 4x4 to work in August 2003 when the pickup lost control. A witness said she heard a pop and saw a spark just before the pickup careened off the road, flipped into the air and rolled on its roof. Audulewicz was killed instantly.

"I feel like they knew about the problem long before the recall," said Don Audulewicz, Zackary's father and one of the plaintiffs in the suits. "I can't understand why whoever was making decisions at Toyota would do that."

Toyota declined to discuss the case, citing its policy not to comment on pending litigation. In a written statement, Toyota explained that its own investigation of the defective steering component part led it to broaden the recall to include the T100 truck.

On several occasions in the last decade, Toyota has been admonished by judges for failing to provide evidence. In 2000, for example, a Missouri state judge sanctioned it for failing to disclose results of five rear-impact tests of Corollas "despite numerous discovery requests." He ordered a new trial.

In 2007, California's Court of Appeal found that "Toyota had intentionally violated two orders compelling discovery" of stability test results in a case involving a Toyota-made forklift that tipped over and killed a worker. The court slapped Toyota with a \$138,984.33 sanction and ordered a new trial. Toyota, which denied wrongdoing, ultimately settled the case.

E. Todd Tracy, a Texas attorney with 22 years of experience litigating against automakers, believes that Toyota's issues with legal discovery run far deeper than a few sanctions.

Over the last three months, he has moved to reopen 17 lawsuits against the automaker related to vehicle rollovers because he now believes Toyota routinely hid information in those cases.

His argument rests on four boxes of documents submitted by Biller, the former Toyota attorney. The contents have not yet been revealed, but Tracy believes they prove that Toyota hid crucial information about rollovers in those lawsuits.

"This is clearly information that Toyota does not want the public to see," Tracy said. "For years, they were the gold standard, but right now they have more problems than they know what to do with."

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