By
Alan Rutkin

Will Insurers Still Ride With Toyota?

The carmaker could lose out if it didn't tell the full story of 'stuck' accelerators.

Over the many years that this column has appeared, two themes have repeatedly recurred: one, new liability issues always lead to new insurance coverage issues, and two, a rule from the world of politics—the cover-up is often worse than the crime. Both of these themes are seen in the recent developments concerning the accelerating Toyotas.

As every living human has surely heard, Toyota cars reportedly have been suddenly accelerating. By mid-February, the *Financial Times* reported that Toyota was facing dozens of class-action lawsuits that could cost billions. The House Oversight and Government Reform Committee raised questions about Toyota's reporting. And by the beginning of April, Toyota's news got even worse. The U.S. Department of Transportation announced it would seek a $16.4 million fine against Toyota because the company did not promptly report the acceleration problems.

Questions center on when the company first learned of these serious flaws.

The Toyota situation raises both of this column's recurring themes. We have a new liability issue and a disclosure issue, and these issues combine to form an overriding insurance question: If Toyota was, in fact, holding back information, does this affect Toyota's rights to insurance?

In addition to reporting specific claims and suits, a policyholder has at least two other disclosure obligations. First, a policyholder must be forthright in a policy application. Second, a policyholder must report circumstances that may lead to claims. The breach of either of these two disclosure duties can result in a forfeiture of coverage.

The duty to be forthright is often overlooked. In the application process, a policyholder is obligated to clearly and accurately disclose information material to the risk being insured. The extent of this obligation and the available remedies will vary state by state, depending upon, among other factors, policy applications, policy terms, state statutes and state case law. The varying issues include the insured's intent. Some states limit coverage defense to instances in which the information was withheld intentionally; other states do not impose an intent requirement.

But as a general proposition, if the insured concealed or misrepresented facts in the policy application, the insurer may be entitled to rescind the policy. Moreover, failing to disclose information may put the policyholder in violation of policy conditions that may have warranted that full disclosure was being provided. Simply put, if the policy application was not accurate and complete, the insurer may be permitted to void the policy.

The second duty that may be implicated is a condition requiring policyholders to report any circumstances likely to give rise to claims. Importantly, this goes beyond the standard obligation to provide prompt notice of actual claims. There will be no dispute that Toyota was required to promptly notify its insurers of all claims and suits concerning the acceleration issue. But Toyota may have been required to go further. If it knew of a flaw in its cars, this might be considered a circumstance likely to lead to claims, and depending upon the controlling policy language, may have triggered another reporting obligation.

Just as the rule against cover-ups originated in the political theater, so too did the rule for addressing cover-ups. Ultimately, the question will become, "What did Toyota know and when did Toyota know it?" The answer will affect both Toyota's liability and its claim for insurance. BR

Best's Review *columnist Alan Rutkin is a partner at Rivkin Radler LLP in Uniondale, N.Y., and chairman of the ABA's Insurance Coverage Litigation Committee, Tort Trial and Insurance Practice section. He may be reached at* alan.rutkin@rivkin.com.

Listen to an interview with Alan Rutkin at *www.ambest.com/audio*