AUTOMOTIVE

DOES THE NHTSA REALLY NEED MORE COMPELLING *CIVIL* PENALTIES?

by Richard A. Wilhelm
February 2012

Toyota paid almost $50 million[1] in civil penalty settlements in 2010 for untimely recalls of various vehicles to correct unintended acceleration and steering control related safety defects. Thereafter, Congress began consideration of proposed legislation that, among other things would increase maximum civil penalties from $15 million (not adjusted for inflation)[2] to $200 million[3] or even $300 million[4]. These legislative efforts never became law.

However on December 14, 2011, the Senate Commerce Committee reported out new legislation, The Motor Vehicle and Highway Safety Improvement Act of 2011, which, among a host of other things, including appropriations for the NHTSA, seeks to increase the maximum civil penalty amount to $250 million.[5] So, the necessity and justification for such a large increase is again an issue. How the agency will apply such a large range of penalties in the context of untimely reporting is also an issue. With respect to the first issue, members of Congress appear to believe that the NHTSA needs a much, much bigger stick to yield in enforcement actions concerning the timeliness of defect and noncompliance reports and recalls.[6] With respect to the latter issue, Congress offers up factors to consider in determining the amount of a given penalty but provides little helpful guidance on how those factors would be fairly considered against a much broader range and magnitude of possible penalty amounts. This article explores these issues.

The first issue is whether this increase is necessary and justified. One possible justification could be that history demonstrates that $15 million was insufficient punishment for the untimely recalls the NHTSA did prosecute. Does a comparison with historical civil penalties actually imposed demonstrate a need for higher penalty amounts? Framed somewhat differently, has the NHTSA routinely bumped up against the old maximum of $15 million thereby demonstrating a need for higher amounts? What about in comparison with penalties the CPSC has actually imposed on consumer product manufacturers for untimely reporting of substantial product hazards and violations of standards? Has it routinely bumped up against its own $15 million statutory limit[7]?

Another possible justification could be that the current maximum penalty is too small given the relative wealth of the automobile industry and their ability to pay. For example, the Justice Department recently imposed criminal penalties in the hundreds of millions of dollars against auto suppliers in its criminal antitrust investigations. Do those huge criminal penalties justify similar penalties for NHTSA civil enforcement efforts?

The short answer to this question is that historical civil and recent criminal penalty comparisons do not provide compelling or valid support for such significant increases.

After the imposition of civil penalties against Toyota in 2010, the NHTSA published a "listing of civil penalty settlement amounts collected from Fiscal Year (FY) 1999 through [mid 2011]." There were actually relatively few civil penalties for "untimely recalls." Including the three Toyota recalls in 2010, the total number was fourteen. Excluding the 2010 Toyota penalties, the highest penalty amount was $1 million in 2004-5 (GM), the second highest was $425,000 in 1999 (Ford) and the third highest was $400,000 (Chrysler). The others were less than $200,000. Some were less than $20,000. The size of these penalties was not constrained by published criteria for determining their amount other than the statutory directive to consider the size of the business and the gravity of the harm.[8] Given the size of GM, Ford and Chrysler, the penalty amounts suggest the lack of gravity of harm.

BMW recently agreed to pay a $3 million civil penalty for untimely and incomplete reporting involving both passenger vehicles and motorcycles. The NHTSA claimed that BMW repeatedly filed incomplete defect reports with the agency and then took an inordinate amount of time to provide the omitted information. In a number of instances, the omitted information appears to have been estimates of the percentage of vehicles that actually contain the defect or noncompliance. Generally, the potentially affected vehicle populations involved in these recalls were small (less than 2000). In those cases involving larger populations, the percentage actually containing the defect was very small (0.1% to 2%). The largest vehicle population for which a report was filed has not been recalled because NHTSA granted BMW's petition for inconsequential noncompliance (tire label specified tire size and pressure for a spare while the vehicles had run flat tires and hence, no spare tire).[9] None appear to have involved accidents or injuries. Although the amount of the penalty is somewhat higher than historical penalties (because it involves a number of violations), the penalty still reflects the lack of gravity of harm.

So, the number of alleged NHTSA violations for untimely reporting and recalls since 1999 is relatively small as are the amounts of the settlements. This probably results from the fact that the OEMs have an established relationship with the NHTSA and have active and sophisticated groups that monitor field performance and evaluate potential safety defects in their vehicles. The sheer number of recalls undertaken by OEMs during the last decade show that the OEMs' internal processes and NHTSA's external enforcement efforts appear to be working and that the industry is not gaming the agency. They also suggest that Toyota's reporting failures were an anomaly. The NHTSA has not routinely imposed civil penalties at or close to the $15 million maximum. Historically, the NHTSA has not seen the need to impose the maximum civil penalty, Toyota being the exception.

So, how do the NHTSA penalties compare with civil penalties imposed by the CPSC? A review of notices of provisional settlements of civil penalties published from January 1, 2008 though the present shows that the CPSC has imposed more civil penalties for reporting violations and that the amount of those settlements are sometimes slightly higher than NHTSA settlements. Excluding penalties relating to banned lead paint on children's products and banned drawstrings on children's clothing, the CPSC accepted 5 settlements of civil penalties in the range of $960,000 to $1.3 million.[10] The next highest was $715,000. There were 8 settlements in the $500,000 to $600,000 range and a few more below $400,000. There were 16 settlements for lead paint which averaged $314,375 ($123,500 if the two largest ($2.3 and $1.0 million) are excluded). There were 43 settlements for children's clothing/drawstring violations which averaged $92,000 ($45,500 if the top five are excluded).

That the CPSC imposed a greater number of civil penalties over a 4 year period than the NHTSA imposed over 12 years is not surprising. The manufacturers comprising the auto industry in the US are a more cohesive group than the large number of manufacturers and importers comprising the consumer product industry. Small manufacturers and importers are constantly entering the consumer product market selling a much larger variety products having a larger variety of intended uses and utility. And, in contrast to the auto industry, many have no interaction with the CPSC at all or on a regular basis. Also, the consumer product industry does not uniformly have the same level of product safety and review procedures as does the auto industry. In any case, like the NHTSA, the CPSC was not routinely bumping up against the $15 million maximum civil penalty.

Excluding Toyota, the CPSC settlements amounts are roughly in line with NHTSA civil penalties. While this might not make sense from the standpoint of the cost of a consumer product versus the cost of an automobile, it probably makes more sense considering that both types of products can pose significant safety risks and motor vehicle are equipped with an abundance of often sophisticated safety equipment to protect occupants.

The Justice Department recently announced criminal fines against three automotive suppliers stemming from its ongoing price fixing investigation. Those criminal fines are $78 million, $200 million and $470 million. Do these fine amounts support a $250 million maximum civil penalty for untimely reporting and recalls? First, it should be noted that the maximum fine under the Sherman Act is actually $100 million. The two higher fines were based not on the Sherman Act but rather on the alternative fine provision of 18 USC §3571(d) which bases the fine on twice the gross gain or loss resulting from the criminal offense. Notably these fines were agreed to as part of a plea and not through criminal prosecution.

Ignoring the fact that the proposed maximum civil penalty is 2 and 1/2 times the maximum criminal fine in the Sherman Act, the amount of the criminal penalties agreed to under these pleas could provide justification for higher NHTSA civil penalties if only a company's ability to pay is taken into consideration. Ability to pay was presumably taken into consideration during plea negotiations with the suppliers. And, at present, the major OEMs and suppliers can afford to pay such amounts. However, this comparison is not justified or valid. Waiting too long to conduct a recall (which can frequently be explained by an honest disagreement about the extent of a defect or whether through some attenuated causal chain it is safety related) is not comparable to conspiring for 10 years to fix prices in violation of US and international laws. Also, the backdrop behind an auto company's analysis of whether a safety defect exists and a recall is required includes publically available complaints by vehicle owners and now routine submissions to the NHTSA pursuant to the TREAD Act. This is nothing like conspiring to break the law behind closed doors. And obviously, the fact that price fixing is a crime and an untimely recall is not[11] undermines any comparison. Thus, a comparison with criminal antitrust conspiracy penalties, while tempting to make because of the relative financial means of the companies involved, is not an appropriate comparison in the context of untimely reporting. Thus, the new maximum penalty amount is not necessary or justified using either of the historical or criminal yardsticks discussed above.

If not justified in the first place, how can the NHTSA possibly apply the higher range of penalties in practice in a way that is fair and reasonable and not punitive? What type of conduct will merit imposition of the maximum penalty? Will the standard be Toyota's conduct. Did Toyota deserve a $250 million civil penalty instead of $50 million. Also, since Toyota's actual penalty arose from three separate violations, did its conduct really merit a $750 million penalty? On the other hand, how will the NHTSA apply the new penalty range to conduct that previously resulted in civil penalty amounts below $1 million? Will every penalty simply be increased by a factor of 16? Could the agency ever be able to again justify a $1 million penalty for a violation?

The new legislation from the Commerce Committee does contain guidance for determining the amount of a civil penalty in any specific case.[12] These factors are --

1. the nature of the defect or noncompliance;
2. knowledge by the person charged of its obligation to recall or notify the public;
3. he severity of the risk of injury;
4. the occurrence or absence of injury;
5. the number of motor vehicles or items of motor vehicle equipment distributed with the defect or noncompliance:
6. the existence of an imminent hazard;
7. actions taken by the person charged to identify, investigate, or mitigate the condition;
8. the appropriateness of such penalty in relation to the size of the business of the person charged, including the potential for undue adverse economic impacts;
9. whether the person has previously been accessed civil penalties under this section during the most recent 5 years; and
10. other appropriate factors.[13]

These criteria however, while reasonable in the abstract, do not answer the questions posed above. They do not prescribe when $250 million is appropriate for a violation of the act or what penalty amount less that $250 million might be appropriate in a particular case.

These proposed criteria are very similar to those already employed by the CPSC in determining penalties within the $0 to $15 million range.[14] However the CPSC's historical practice provides no real guidance on weighing a manufacturer's conduct against the potential for a $250 million penalty. Moreover, the CPSC's criteria do not include "knowledge by the person charged." Presumably the existence of such knowledge would justify increasing the penalty, but by how much is left for future consideration by the agency.

Also, the size of the maximum civil penalty amount and the inclusion of a knowledge-based criteria for determining when such a penalty would be appropriate suggests a blurring of the distinction between civil and criminal violations under the Motor Vehicle Safety Act.[15] This blurring is not appropriate or necessary.

In conclusion, the proposed maximum penalty amount makes little sense from a historical standpoint and the magnitude of the proposed increase is not justified. Whether some increase is justified, other than those already made to account for inflation, is an open question. The only justification for the increase of this magnitude appears to be a "belief" that NHTSA has historically been so out-gunned by the industry, its enforcement hand has to be strengthened to the extent of cladding it in armor by effectively criminalizing certain undefined conduct relating to untimely reporting. History challenges that belief.

[1] There were three separate penalties of the maximum amount allowed by law of just over $16,000,000 each.
[2] Adjusted for inflation the maximum penalty is now $17,350,000. 49 CFR 578.6.
[3] HR 5381
[4] S 3302.
[5] The bill was reported out of committee as S 1449. It was subsequently incorporated, largely verbatim, into S 1813, the "Moving Ahead for Progress in the 21st Century Act."
[6] In a July 27, 2011 Press Release about this legislation, the chairman of the committee stated: "Last year we found that NHTSA lacked the authority and resources to truly challenge automakers in an investigation into auto defects. Subsequently, this committee approved legislation to strengthen NHTSA's enforcement authority, require greater accountability from automakers, and provide the agency with the resources it needs to accomplish its vehicle safety mission."
[7] 15 USC §2069
[8] 49 USC §30165(c)
[9] 77 FR 16892
[10] The largest CPSC civil penalty was $4,000,000 in 2005 which involved untimely reporting covering 12 million toddler beds, strollers, car seats and the like. 70 FR 15842
[11] The Motor Vehicle Safety Act does criminalize making false and fraudulent reports to the NHTSA. 49 USC §30170 (referring to 18 USC §1001).
[12] The legislation directs the Secretary of Transportation to issue a final rule providing an interpretation of these enumerated penalty factors within 1 year of enactment. The CPSC already has such a rule. 16 CFR 1119.
[13] In the context of the CPSC, such factors include whether the company had a reasonable compliance program in place, whether there was economic gain from noncompliance, and whether the company failed make complete and timely responses to the agency's requests for information.
[14] 16 CFR §1119.4.
[15] HR 1823, the Criminal Code Modernization and Simplification Act of 2011, which was introduced in May 2011, wherever possible defines the requisite intent for many crimes using the term "knowingly."

FOR MORE INFORMATION CONTACT:

Richard A. Wilhelm, is a member in Dickinson Wright's Detroit office. He can be reached at 313.223.3550 or rwilhelm@dickinsonwright.com.