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Defect claims against big automakers have risen, but winning hefty settlements an uphill battle

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By **ERIC TORBENSON** / The Dallas Morning News
etorbenson@dallasnews.com

With Toyota Motor Co. making grim headlines over sudden acceleration of its cars and with nearly 20 million vehicles recalled this year, it would seem to be high season for auto defect lawyers.

Although Toyota's struggles have brought more than 200 new suits nationally and "given a breath of fresh air" to the specialty, according to Dallas attorney Todd Tracy, it's not a smooth road to easy wins or hefty settlements with automakers.

The hits to Toyota's reputation plus the financial struggles of General Motors Co. may have primed juries to award plaintiffs in these kinds of cases, but some attorneys say the carmakers are using a "scorched earth" approach to handling the suits by never settling cases and exhausting every appeal. That tactical change, plus friendlier appeals courts, have emboldened the companies.

"Cases that these companies used to settle are now being litigated further and in a more onerous manner than I've seen in my entire career," said Dallas attorney Lee Brown, whose Brown Law Firm specializes in auto defect claims. "They've taken a hard line to say they'll outspend and outlast anybody who wants to challenge them."

In states such as Texas, where the mood toward plaintiff suits has soured, automakers may see little downside in fighting cases to the bitter end.

"They're not scared of a \$25 million or \$30 million jury verdict against them anymore," said Andy Payne, a Dallas attorney with PayneMitchell Law Group who does about a third of his work on auto liability claims. "They've got a 95 percent chance it's going to get overturned by the time it gets to the Texas Supreme Court, which I think is just one of the worst courts out there right now for plaintiffs."

Spokespeople for GM, Ford Motor Co. and Toyota, the largest three automakers, each declined to comment on their respective legal strategies or the landscape for auto defect claims.

But Kurt C. Kern, a Dallas lawyer whose firm represents nearly all major carmakers, doesn't agree that there's been a shift in legal tactics, though there has been a noticeable increase in suits filed against carmakers.

"While there are certainly some unique circumstances that have arisen in the automotive industry recently, I don't necessarily believe there has been some universal shift in the approach automotive manufacturers take with respect to defending product liability cases," said Kern of Hartline, Dacus, Barger, Dreyer & Kern LLP. "Clearly, the manufacturers believe in the products they design, build and

sell and so they have, and I expect they will continue to aggressively defend claims brought against them."

Suits increasing

After a lull the last few years, suits against the big automakers have risen in recent months, the Dallas attorneys said. The bankruptcies of GM and Chrysler Motor Co. damped activity for two years, but the economic recovery for carmakers plus the recall publicity has auto defect lawyers much busier.

The last flurry of auto defect suits came in 1998 and centered on Ford and its Firestone tire issue. The tire company's approach was to settle some of the cases quietly, Brown said, but Ford "took a very hard line" against lawsuits challenging the design of the Ford Explorer, and that approach has evolved into today's legal stances, he said.

Jurors are upset at companies such as Toyota and BP PLC because of the bad press they've received, Brown said. That gives Toyota a big incentive to drag events out as long as possible so its newest safety-focused marketing messages can combat its image problem, he said.

"They would have an uphill battle with juries today," Brown said. "I don't fault them legally for doing what they're doing."

Tracy filed a suit against Toyota in Dallas federal court in July after an 18-year-old woman died when her Toyota Matrix crashed on the Dallas North Tollway. The suit identifies design defects that contributed to the death.

Tracy said he feels the case is strong but said Toyota may "choose to circle the wagons" on all claims while the impact of its recall of more than 10 million cars is still fresh in potential jurors' minds.

Even with the bad publicity, the Toyota cases won't be slam dunks. Indeed, a report this month regarding sudden acceleration cases may make it harder for plaintiffs to win against Toyota.

The National Highway Transportation Safety Administration's examination of 58 cases of sudden acceleration suggested no defect with Toyota's electronics in many of the crashes and incidents studied.

Viable claims

Even in cases where the driver of a vehicle is killed or injured through his or her own actions, there's often a viable auto-defect claim to be brought to explore whether the car's basic design may have contributed to the accident.

Government-enforced recalls also open up some liability for automakers in terms of whether they moved quickly enough to fix problems made apparent through consumer complaints.

So despite the tough landscape, there will be cases to be brought against automakers, some attorneys said.

"If the lawyer has a proven track record of winning these kinds of cases, they can get settlements still," said Tracy, who has tried more than 100 cases against every automaker except Volvo. He's not so sure that carmakers are taking a different approach to defending the cases than before; strong cases will get the attention of manufacturers.

"A lot of lawyers who have no business trying these cases are in them now because of Toyota, and it's probably a disservice to their clients because they don't know how to do these cases," said Tracy, who runs the Tracy firm.

Dallas auto defect attorney Leon Russell of Russell & Shriver LLP speculated that the slowdown in suits in the last few years may have encouraged defense lawyers to draw out cases just to maintain their billings. "If their caseloads drop, they can recommend to clients to keep going even if the case ought to be settled," he said.

While the uptick in lawsuits nationally might be encouraging for lawyers who specialize in auto defects, the long-term prognosis for the specialty may not be that rosy, Payne said.

"It's probably going to shrink because they're making cars better," said Payne, who also works in areas of aviation accidents and other negligence suits.

Safety equipment such as electronic stability control – once a fancy option on cars – will soon be mandatory on new cars and that will cut down on fatal accidents. New cars such as GM's Chevy Cruze will have 10 airbags – even ones to cushion impacts for occupants' knees.

Yet much of the best safety equipment has remained a costly option for consumers buying cars, said Brown, with regulators slow to require improvements that could save lives.

"I don't understand why vehicle safety has become an option in this country, and I think it's still a very big story," he said.