

# **Taking On Toyota**

**By Rob Ammons and April Strahan**

Toyota's troubles with sudden acceleration have given rise to litigation seeking to hold the carmaker accountable. Pursuing these cases in the courtroom will require a smart strategy and the willingness to face a tough, well-financed defendant.

In August 2009, 911 operators in San Diego received a panicked call: "We're in trouble . . . There's no brakes—end freeway half mile!" The call came from Chris LaStrella, a passenger in a Lexus that was being driven by his brother-in-law, Mark Saylor, a California highway patrolman.

The car had suddenly accelerated to 120 mph, and Saylor couldn't stop it. Moments later, it struck another car, careened into an embankment, plummeted into a dry riverbed, and erupted in flames, killing LaStrella, Saylor, Saylor's wife, and the Saylor's 13-year-old daughter. Investigators found floor mats intended for a different model in the car and learned that its previous owner had reported that the accelerator became stuck.<sup>1</sup>

Because of stories like this, Toyota now faces hundreds of [lawsuits](#),<sup>2</sup> and polls show it has squandered the confidence of the American public. Last March, a Bloomberg poll showed that 4 in 10 Americans "would definitely not buy a Toyota."<sup>3</sup> Only an aggressive marketing campaign, promising a 60-month, interest-free car loan, among other perks, was able to save Toyota's withering sales.

Toyota recalled 8.5 million cars to install safeguards against sudden unintended acceleration (SUA), which has claimed at least 78 lives and injured 1,011 people in 2,166 crashes since 1999.<sup>4</sup> But drivers still complain of SUA episodes, and half of the 2,263 complaints that were received by consumer advocate Safety Research & Strategies, Inc., (SRS) before February 2010 involved vehicles that were not part of the recall.<sup>5</sup>

Responding to the problem of pedals trapped by floor mats—which was believed to cause some of the SUA incidents—Toyota issued floor mat recalls last year, telling 4.4 million Toyota owners to remove them until the company found a remedy. But complaints started coming in about the gas pedals themselves, which were sticking in the open-throttle position.

In January of this year, the company admitted its accelerator pedals could have a "dangerous" sticking defect.<sup>6</sup> A week later, it recalled 2.3 million more cars, claiming it had just learned of the problem in January. But Toyota knew of potential problems with its electronic throttle control system at least as of March 2004, when NHTSA opened defect investigation PE04021 based on reports of problems with its electronic throttle control system.<sup>7</sup> The investigation included 2002–2003 Lexus ES300 models as well as 2002–2003 Toyota Camry and Camry Solara models.<sup>8</sup>

Toyota's troubles started more than a decade ago. In 1998, the carmaker introduced an electronic throttle control system (ETCS) in some models. This year, safety experts showed Congress studies revealing that the ETCS didn't always record a diagnostic test code when a fault was introduced. Those lost signals, said David

Gilbert, an automotive technology professor at Southern Illinois University who did the research, can cause a voltage spike and lead to wide-open throttles.

The original ETCS, while electronically controlled, included a mechanical fail-safe. If the ETCS failed, the magnetic clutch in the throttle control motor would stop, allowing the accelerator cable to magnetically control the throttle.<sup>9</sup> But by 2002, a new ETCS was designed and widely implemented in Toyotas. This new system did not include a fail-safe mechanism.

The electronic system seems to have been at play in at least some of the SUA incidents. When a 2007 Avalon lurched into a Toyota dealership with a racing engine and smoking brakes, the dealer called a Toyota representative, who authorized the dealer to replace the throttle unit, gas pedal, and related sensors. The car had taken off without warning and no amount of brake force could stop it; the driver was only able to slow it down by shifting between drive and neutral until he reached the dealership. Before calling Toyota, the dealer confirmed that the floor mats were properly positioned, and a service technician tried unsuccessfully to pull up on the gas pedal.<sup>10</sup>

Last August, U.S. Department of Transportation officials briefed members of Congress on preliminary results of the government's ongoing investigation of SUA in Toyota vehicles. Tests had so far found no connection between Toyota's ETCS and SUA, but investigators had not yet ruled it out as a possible cause.<sup>11</sup>

As Sean Kane, the president of SRS, noted in a 2010 congressional hearing where Gilbert's research was presented, the cause of SUA is still unclear. "It is becoming increasingly apparent that Toyota SUA incidents stem from multiple causes . . . across many years, makes, and models of Toyota vehicles, under a wide range of driving conditions," Kane said.<sup>12</sup>

Gilbert's story is a good example of the lengths to which Toyota will go to protect its image and bottom line. Gilbert sent the results of his experiments to Toyota and to the National Highway Transportation Safety Administration (NHTSA). After getting little response from either one, he went to SRS, which hired him to continue his work. Then Toyota became interested—not in the message but in the messenger.

Toyota turned to Exponent, a research company headquartered in Menlo Park, California. Exponent devised testing that refuted Gilbert's results and distributed its report internationally. Just days after Gilbert appeared before the congressional committee, Toyota attorney Vince Galvin visited Gilbert's university—which had received generous donations from Toyota in the form of vehicles, money, and internships for technology students.<sup>13</sup> On the morning of March 2, 2010, university officials called Gilbert into a meeting. —Gilbert's employment contract was revised to include a visit to Exponent's facilities for a demonstration aimed at dispelling Gilbert's findings.<sup>14</sup> Gilbert attended Exponent's demonstration but was unconvinced by what he saw.

It's clear that Toyota is willing to spend money to protect its reputation—in this case, funding testing designed to defend potential SUA cases. And that's an indication of what the company's approach to SUA lawsuits will likely be: Outspend the plaintiff.

## **Preliminary steps**

No doubt, pursuing an SUA case will be even more expensive and time-consuming than other types of cases against auto manufacturers already are. So how should you prepare to take up the challenge?

Your investigation should begin with the same steps you would use in any automotive products liability case. Immediately secure the vehicle and photograph and videotape its physical condition and the condition of components suspected of causing SUA—specifically, the accelerator pedal, gear selector, and floor mats.

Have a qualified mechanic evaluate the car and its components. Do not do anything that could be considered “destructive,” as you will face spoliation claims from Toyota.

Get complete maintenance records for the vehicle. Note any repairs to the gas pedal and any maintenance that may have involved removing or replacing the floor mat retention clip. Find out if the vehicle has undergone all recall repairs and regular maintenance.

The vehicles that Toyota recalled for problems related to SUA are

- *Toyota*: 2005–2010 Avalon; 2007–2010 Camry; 2009–2010 Corolla; 2008–2010 Highlander; 2009–2010 Matrix; 2004–2009 Prius; 2009–2010 RAV4; 2008–2010 Sequoia; 2005–2010 Tacoma; 2007–2010 Tundra; 2009–2010 Venza
- *Lexus*: 2007–2010 ES350; 2006–2010 IS250/350
- *Pontiac*: 2009–2010 Vibe.<sup>15</sup>

Ask about previous problems. Has the plaintiff or any previous owner experienced SUA or problems with the brakes?

And anticipate defenses. Investigate the plaintiff’s driving record: Does he or she have any driving-related tickets or arrests? Any incidents of texting while driving? Ferret out any driver negligence before filing suit.

The preliminary investigation should point you toward thinking about what type of claim will hold up in your case. Consider the following:

[\*Manufacturing defect\*](#) . A claim of manufacturing defect is unlikely in SUA cases. None of the defects suspected as the cause of SUA are linked to the manufacturing process.

*Marketing defect*. Marketing defect/failure-to-warn claims against Toyota will most often relate to floor mats or push-button ignitions. With floor mats, focus on a failure to warn about improper installation. Toyota knew that its customers installed floor mats but gave them no warning about the potential dangers of improperly installed mats—at least not until the mats presented the most convenient, least expensive culprit to blame for SUA.

[\*A marketing defect\*](#) claim is also a viable cause of action for vehicles equipped with an electronic push-start ignition. After many SUA incidents, Toyota re-introduced the fail-safe mechanism in cars with push-button ignition: If the driver pushes the

button down for several seconds, this kills the engine. This feature is mentioned in the vehicle manual, but nowhere else.

*Design defect.* This is the theory most likely to be used, whether the claims center on the ETCS, pedal malfunction, or floor mats. In all three instances, the component's design is the cause of the crash, and Toyota has all but admitted as much in the case of its floor mats and pedal by issuing recalls.

### **Alternative design and discovery**

The issue of reasonable alternative design (RAD) will be hotly contested in cases alleging design defect. The foundation for admitting RAD evidence differs among jurisdictions. Most simply require the plaintiff to prove that an alternative design was feasible but not necessarily in use. A few require proof that the RAD was in use or was cost-effective at the time the vehicle was manufactured.

Some states have adopted common law elements of products liability in statutory or quasi-statutory form, making RAD one of the requirements for bringing a lawsuit. With this in mind, always allege the existence of an RAD in your pleadings. The allegation is supported by Toyota's recalls, which show it has recognized that RADs for parts of its vehicles exist, and the existence of RADs in comparable vehicles made by other manufacturers.

*Floor mats.* Toyota has acknowledged RADs for floor mats in recent recalls. It has changed their design and repositioned pedal placement so that the floor mats no longer restrict pedal movement. These new design features, implemented by Toyota, may be used to establish an RAD.

*Sticky pedals.* A brake-to-idle feature is an RAD. This makes an automobile idle if the driver steps on the brake and accelerator pedals at the same time, which sometimes happens when a driver brakes during an SUA event. These systems are relatively inexpensive and are found in many other manufacturers' vehicles equipped with electronic throttle control.

Recognizing the importance of this safety feature, Toyota has installed a brake override chip into certain recalled models to add what it calls an extra "measure of confidence."<sup>1617</sup> Toyota has promised to install these chips in all future models worldwide.

When conducting discovery, you must request—at the very least—information about

- the development and testing of Toyota's ETCS
- advertising and marketing
- other similar incidents (for example, accident reports, personal injury and property damage claim letters, warranty repair claims, claims made through Toyota's "Customer Relations Network" or its "Customer Experience Center," and lawsuits)
- Toyota's interactions with research companies like Exponent
- ETCS suppliers
- Toyota's interactions with NHTSA
- congressional hearings on SUA.

As is almost always the case with auto manufacturers, do not expect Toyota to just hand everything over in discovery. Be prepared to file a motion to compel as soon as you receive Toyota's package of boilerplate objections and few or no responsive documents.

### **Evidentiary issues and defenses**

Next up will be evidentiary issues. Most jurisdictions admit recall evidence, at least for limited purposes. Commonly, a plaintiff must prove that the defect in the recalls is the same defect alleged in the product at issue in the lawsuit.

In most cases, evidence of a recall or "subsequent remedial measure" is not admissible as RAD evidence unless it is controverted or used in impeachment.

A minority of jurisdictions allows evidence of subsequent remedial measures in products liability cases. And evidence of other similar incidents that involve the same product is generally admissible in products liability cases to prove a defect and to show that the manufacturer knew the defect existed.

With the media attention given to Toyota SUA incidents, and the increasing number of SUA incidents that happened after the recalls, evidence of similar incidents will go a long way in convincing a jury that Toyota's electronic throttle control systems are defective.

When it comes to defense, Toyota is firmly entrenched in one predictable tactic: blame the driver. Toyota claims that drivers encountering SUA can simply hit the brakes.

And regardless of how old or young the driver is or whether the driver is a woman or a man, you can expect Toyota to find a way to use the driver's age and sex against him or her. Over 55? Senile. Under 30? Inexperienced. Female? Flighty. Male? Aggressive.

Plaintiff-blaming is not limited to driver action: Poor vehicle maintenance is another favorite defense. Your accelerator pedal was repaired? The repair altered the pedal and caused the SUA. Many of these are common to standard-issue automotive cases, but Toyota has proven to be uncompromising on this defense.<sup>18</sup>

Evidence of other similar incidents can be a powerful antidote to the blame-the-plaintiff defense. Collaboration among attorneys representing similarly situated plaintiffs and sharing information are key ingredients of a successful strategy. The Attorneys Information Exchange Group (AIEG) can be a valuable resource for anyone representing a consumer injured by almost any type of defective product, including Toyotas.

Your success in handling an SUA case will hinge on your diligence in reviewing the facts surrounding the incident and gathering as much information as you can. These cases require some knowledge of Toyota's history. You should anticipate—and be prepared to counter—an aggressive defendant that can outspend most plaintiffs in money, time, and determination.

Toyota's problems are certainly not over. Last August, NHTSA announced that it had begun investigating complaints about stalling engines in Corolla and Corolla Matrix models. The problems might be caused by faulty engine control units, NHTSA said. That same month Toyota issued a recall of some of these cars.<sup>19</sup>

Toyota's refusal to deal honestly with its customers—a refusal that has hurt its once-sterling reputation for safety and integrity—has led to a day of reckoning in court. Only time will tell if Toyota's problems will continue to shape the products liability litigation landscape and whether the company is prepared to acknowledge its mistakes and fairly compensate its victims.

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#### Notes:

1. See Sean Kane et al., *Toyota Sudden Unintended Acceleration 3* (Safety Research & Strategies, Inc. Feb. 5, 2010), [www.safetyresearch.net/Library/ToyotaSUA020510FINAL.pdf](http://www.safetyresearch.net/Library/ToyotaSUA020510FINAL.pdf); Stuart Pfeifer et al., *Toyotas, Deaths, and Sudden Acceleration*, L.A. Times, (Feb. 28, 2010), <http://articles.latimes.com/2010/feb/28/business/la-fiw-toyota-deaths-list28-2010feb28>.
2. See Safety Research & Strategies, Inc., *Toyota Sudden Acceleration: The Story Unfolds*, Safety Record (Apr. 12, 2010), <http://thesafetyrecord.safetyresearch.net/2010/04/12/toyota-sudden-acceleration-the-story-unfolds>.
3. Alissa Figueroa, *Toyota Recall Response: Is the Company Doing Everything It Can?*, Christian Sci. Monitor (July 8, 2010); Mark Trumbull, *Toyota Recall Having Big Impact on Company's Reputation*, Christian Sci. Monitor (Apr. 8, 2010).
4. Safety Research & Strategies, Inc., *Toyota Sudden Unintended Acceleration: The New Numbers Are In!* (July 20, 2010), [www.safetyresearch.net/2010/07/20/toyota-sudden-unintended-acceleration-the-new-numbers-are-in](http://www.safetyresearch.net/2010/07/20/toyota-sudden-unintended-acceleration-the-new-numbers-are-in). Other publications put the total SUA-related deaths at 89 as of May 25, 2010. See e.g. Associated Press, *Toyota "Unintended Acceleration" Has Killed 89: Federal Auto Safety Agency Nearly Doubles Assessment of Americans Killed by Company's Safety Negligence in Last Decade*, CBS News (May 25, 2010), [www.cbsnews.com/stories/2010/05/25/business/main6518794.shtml](http://www.cbsnews.com/stories/2010/05/25/business/main6518794.shtml); James R. Healey, *89 Deaths May Be Linked to Toyota, NHTSA Says*, USA Today (June 4, 2010), [www.usatoday.com/money/autos/2010-05-25-toyota-acceleration-deaths\\_N.htm](http://www.usatoday.com/money/autos/2010-05-25-toyota-acceleration-deaths_N.htm).
5. H.R. Subcomm. Oversight & Investigations of the Comm. Com., Sci., & Transp., *Toyota Sudden Unintended Acceleration 1*, 111th Cong. (Feb. 23, 2010) (statement of Sean Kane, President, Safety Research & Strategies, Inc.) [hereinafter Kane testimony], [http://energycommerce.house.gov/Press\\_111/20100223/Kane.Testimony.pdf](http://energycommerce.house.gov/Press_111/20100223/Kane.Testimony.pdf).
6. Micheline Maynard, *Toyota Delayed a U.S. Recall, Documents Show*, N.Y. Times A1 (Apr. 12, 2010).
7. Off. Defects Investigation, Natl. Highway Transp. Safety Admin., *NHTSA Action Number: PE04021*, [www.odi.nhtsa.dot.gov](http://www.odi.nhtsa.dot.gov) (search for "PE04021").
8. H.R. Subcomm. Oversight & Investigations of the Comm. Com., Sci., & Transp., *Toyota Sudden Acceleration Background & Timeline of NHTSA Actions*, [http://energycommerce.house.gov/Press\\_111/20100222/Detailed.Timeline.and.Background.of.NHTSA.Actions.Regarding.Toyota.Sudden.Acceleration.pdf](http://energycommerce.house.gov/Press_111/20100222/Detailed.Timeline.and.Background.of.NHTSA.Actions.Regarding.Toyota.Sudden.Acceleration.pdf).
9. GHMKIV, *1998 Supra Electronic Throttle Control System* (Aug. 25, 2009), [www.youtube.com/watch?v=fQSfjgDjwU](http://www.youtube.com/watch?v=fQSfjgDjwU).
10. See *2010 Forecast: Toyota SUA Problems Continuing*, Safety Record (Jan. 12, 2010), <http://thesafetyrecord.safetyresearch.net/2010/01/12/2010-forecast-toyota-sua-problems-continuing>.
11. U.S. Dept. Transp. Off. Pub. Affairs, *Report: Ongoing NHTSA Research on Unintended Acceleration and Event Data Recorder (EDR) Readings* (Aug. 10, 2010).
12. Kane testimony, *supra* n. 5, at 3.
13. See Press Release, Toyota USA Newsroom, *Toyota Responds to Associated Press Article regarding Southern Illinois University*, <http://pressroom.toyota.com/pr/tms/toyota-responds-to-associated-163903.aspx>.
14. Safety Research & Strategies, Inc., *You Don't Tug on Superman's Cape*, Safety Record (Apr. 13, 2010), <http://www.safetyresearch.net/2010/04/13/you-don-t-tug-on-superman-s-cape/>.

15. For a complete list of Toyota vehicles equipped with ETCS, which are potential candidates for SUA problems, see Kane et al., *supra* n. 1, at app. C.
16. Press Release, Toyota USA Newsroom, *Toyota Extends Brake Override Feature to Provide an Additional Measure of Customer Confidence* (Feb. 22, 2010), <http://pressroom.toyota.com/pr/tms/toyota-extends-brake-override-154194.aspx>.
17. See Spencer Magloff, *House Committee Sends Toyota's President Formal Invitation to Appear*, CBS News (Feb. 18, 2010), [www.cbsnews.com/8301-503544\\_162-6220332-503544.html](http://www.cbsnews.com/8301-503544_162-6220332-503544.html).
18. See Reuters, *Toyota to Drivers: Some Unintended Acceleration Your Fault*, N.Y. Daily News (July 14, 2010), [www.nydailynews.com/money/2010/07/14/2010-07-14\\_toyota\\_to\\_drivers\\_some\\_unintended\\_acceleration\\_your\\_fault.html](http://www.nydailynews.com/money/2010/07/14/2010-07-14_toyota_to_drivers_some_unintended_acceleration_your_fault.html).
19. Toyota, Inc., *Toyota Announces Voluntary Safety Recall on Certain Toyota Corolla and Corolla Matrix Models* (Aug 26, 2010), [www.toyota.com/recall/corolla-matrix.html](http://www.toyota.com/recall/corolla-matrix.html).