

CENTER FOR AUTO SAFETY

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November 26, 2003

Dr. Jeffrey Runge, Administrator
National Highway Traffic Safety Administration (NHTSA)
400 7th Street SW
Washington DC 20590

Dear Dr. Runge:

In closing its investigation into stalling on the 2000-02 Ford Focus without a safety recall, NHTSA is gambling with Focus owners' lives that they won't be killed or injured when their cars stall. This is bad law and bad safety. NHTSA has litigated and won this issue. Class action attorneys have litigated and won this issue. NHTSA has conducted over 100 real safety recalls (Appendix) rather than service campaigns inaccurately labeled as safety recalls by NHTSA. As Judge Michael Ballachey held: "stalling, under almost any circumstances, presents an unreasonable risk to automobile safety and to the safety of the occupants of any such vehicle. It would defy common sense and the weight of the evidence to find otherwise." (Howard v. Ford Motor Co., No. 763785-2, Alameda County, Calif. Super Ct. 12 (Oct. 11, 2000)). By caving in to Ford, NHTSA admits that its lawyers are either less capable or more politically bound than class action attorneys who can win trials on stalling as a safety defect.

In the 1970's when NHTSA was more enforcement oriented, the agency won two cases, *United States v. General Motors Corp.*, 417 F.Supp 933 (D.D.C.), aff'd 585 F.2d 754 (1977) and *United States v. Ford Motor Co.*, 453 F.Supp 1240 (D.D.C. 1978) where US District Courts held vehicles stopped on the roadway or even on the roadside were safety defects. In the first case, *United States v. General Motors*, involving Rochester Quadrajet carburetors on GM vehicles where NHTSA determined both carburetor fires and stalling were safety defects, the court found and held:

(28) In California alone, approximately 100 people per year are killed as a result of vehicle disablement whether they remain in the vehicle or walk to get assistance. Vehicle disablement Study, April 1974, prepared for NHTSA, U. S. Department of Transportation.

(29) On the Interstate System approximately 3.6 per cent of all vehicle collisions involve parked cars on the shoulder of the highway. "Fatal Accidents on Completed Sections of the Interstate Highway System, 1969." *Public Roads*, Vol. 35, No. 10, October, 1969. [417 F.Supp at 937.]

(8) It is not necessary that a collision or death has occurred or will occur as a result of the defect. The purpose of the Act is to provide owners with an adequate margin of safety to protect against vehicle failures, which are in and of themselves an accident under the Act, and which result in an unreasonable risk of personal or property damage. See 15 U.S.C. § 1401(a)(3)(B), as amended, S.Rep.No.1301, 89th Cong.; 2d Sess. 6

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(1988) at 3, U.S. Code Cong. & Admin. News 1888, p. 2709, *United States v. General Motors Corp.* ("Wheels"), *supra*, at 436. [Id. at 938.]

(8) Even if this "defect" were not *per se* related to "motor vehicle safety," the uncontested facts of this case establish that fuel inlet plug failure results in several obvious and undeniable safety hazards. First, once the plug fails, the car "will stop running." The driver must then either abandon his vehicle in the midst of oncoming traffic or, if he can, pull over to the side of the road. Both situations are dangerous. [Id. at 938-39.]

In the second case involving windshield wipers that could fall and force motorist to stop on the road just as does stalling, *United States v. Ford*, the court held:

11. * * * Even if drivers pull to the side of the road and bring their vehicles to a stop on the shoulder they are still exposed to the risk of being struck from behind by a moving vehicle. Some drivers, unable to proceed because of loss of forward visibility, have even brought their vehicles to a stop in the middle of lanes intended for moving traffic. Having brought their vehicles to a stop, drivers imperiled by the windshield wiper failure have exited their vehicles in order to extricate themselves from the unsafe circumstances into which they have involuntarily been thrust. This too exposes them to the further risk of being struck by a moving vehicle. Vehicle collisions and attendant injuries have been associated with windshield wiper failure in the past.

For the foregoing reasons, the Court concludes that the Design Level I and Design Level II pivot assemblies contain a "defect" and that said "defect" poses an unreasonable risk within the meaning of the Safety Act. [453 F.Supp at 1250.]

Former NHTSA Chief Counsel Frank Berndt who was the chief legal architect in establishing a *per se* defects theory before the Courts pointed out in his memo on Enforcement Litigation that "any defect which disables a vehicle causing it to park along the roadside [much less than stall in traffic] presents an unreasonable risk to safety because of the hazards attendant to such parked vehicles." (A copy of the memo is attached.) Even when the Court of Appeals ruled against NHTSA in the X-Car Brake Lockup performance case, *United States v. General Motors*, 841 F.2d 400 (D.C. Cir. 1988), the Court went out of its way to uphold the validity of the earlier defects cases outlined in Chief Counsel Berndt's memo.

Ford attempts to use an unpublished 1986 study by the Transportation System Center (TSC), "Analysis of Stalling Problems," in its letter of November 19, 2003 to justify a pseudo-service campaign. Rather than supporting Ford, the study supports a safety recall. Ford attempts to make it seem that stalling recalls are not safety-related because there are fewer accidents attributed to stalling than other problems that lead to recalls. In fact TSC's study is precisely the opposite - manufacturers conduct stalling-related recalls, despite the lower rate of accidents attributed to stalling, because they recognize stalling is a safety-related defect as NHTSA successfully established through its defects litigation in the 1970's.

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NHTSA reaches a new low in safety and misleading the public in giving this a safety recall identification number, 03V-482 on its website. First, it's not a safety recall. Second, it's not even a "safety improvement campaign" as NHTSA states on its website because nothing is being improved until the Focus stalls and then it may be too late for the unlucky occupants.

In getting NHTSA to accept this pseudo-service campaign which was a first within Ford, let alone NHTSA, Ford cited two stalling investigations closed without a recall in the mid-1980's when NHTSA was closing investigation right and left without a recall. Ford even had the audacity in its November 19, 2003 letter to NHTSA to cite E84-029 where Ford withheld documents from NHTSA which Judge Ballachey relied on in finding that Ford fraudulently concealed stalling caused by TFI module failure from NHTSA.

In responding to Ford on November 21, NHTSA makes no mention of the successfully litigated defects cases which were cited with approval by none other than Judge Kenneth Starr in his X-Car Brake Lookup decision which came after both E84-029 and the TSC stalling study which Ford used to construct its house of cards. Although NHTSA expresses uncertainty over the outcome of litigation of the stalling in this investigation on failed fuel pump in the 2000-02 Ford Focus, this is virtually a legal slam dunk. NHTSA should reopen the investigation (EA02-022) and litigate rather than cave in to Ford.

Sincerely,



Clarence M. Ditlow
Executive Director