

Ford's Speed Control Deactivation Switch Out of Control?

by John W. Reis, Esq., Cozen O'Connor, Charlotte, North Carolina

Most homeowners would never suspect that a car secured in their garage with no key in the ignition can burn down a home. Those familiar with the latest rash of Ford recalls, however, know otherwise. Indeed, since May 1999, Ford has issued no less than three separate recall campaigns on a tiny component part, not much bigger than a sparkplug, which has been burning down homes across the country: the speed control deactivation switch. The latest recall, issued September 7, 2005, is the fifth largest recall in the history of motor vehicles.

I. WHAT IS A SPEED CONTROL DEACTIVATION SWITCH?

The speed control deactivation switch turns off the cruise control automatically when the driver steps on the brake pedal. The problem has to do with the positioning of the switch, its particular component parts, and the fact that it is constantly energized - or "hot."

II. HANDLING SWITCH FIRE CASES AGAINST FORD

Those familiar with handling subrogation claims against major manufacturers like Ford know they rarely simply "roll over," even when the product or vehicle at issue is clearly subject to a recall. On the other hand, Ford and other manufacturers will sometimes honor a claim even when the car is not yet subject to a recall so long as there is sufficient proof of defect in the particular car. In either event, success in handling such a claim requires understanding the defect, identifying the defect, documentation, notification and, often, litigation.

A. Understanding The Defect

The \$20.57 switch, which is manufactured by Texas Instruments, is adjacent to the brake master cylinder on the driver's side of the engine - in proximity to dripping brake pressure fluid. Its outside consists of a plastic housing. On the inside, it has many tiny working parts, including a pin, disc, gasket, washer, converter, movable terminal, stationary contact, and sheets of plastic to separate the exterior brake pressure fluid from these components.

The tiny plastic sheets form a seal intended to prevent brake fluid and other corrosive agents from entering the switch cavity. If contaminants break through the seal, the internal components can corrode. Because the movable terminal and the stationary contact always are energized, build-up of corrosive by-products between the movable terminal and the stationary contact can cause the two to come into contact with increasing current flowing between them and generating heat. Eventually, sufficient heat will be generated to melt the switch housing, allowing entry of air, which fuels a fire. The fire can then attack the plastic brake fluid container and/or the wiring harness located above the switch and spread throughout the engine compartment.

In sum, the switch has the following problems: (1) constant energy flow; (2) proximity to corrosive brake fluid; (3) a plastic, as opposed to a non-combustible, exterior, and (4) proximity to plastic combustible materials. Contributing factors include external heat, humidity, and salinity, which explain the predominance of fires during the summer months in the South, Southeast and other regions with high heat and/or humidity. Vehicle symptoms that sometimes appear before the fire include: cruise control not functioning; brake lights not functioning; brake warning lamp illuminating; vehicle getting stuck in "park;" battery losing charge; and

blown fuse number 12 and/or improper fuse in number 12 position. However, the absence of such symptoms does not mean the switch is not defective.

B. Identifying the Defect

Just because the vehicle in question has not yet been the subject of a recall does not mean that it is not defective. Indeed, given the history of Ford's increasing expansion of the recall, vehicles which are the subject of current claims may later be included in subsequent recalls, as is demonstrated by the following brief history lesson. Ford's May 1999 recall on the switch was limited to 1992-1993 Lincoln Town Cars, Mercury Grand Marquis, and Crown Victoria models—the "Panther Platform" series of vehicles. Yet Ford continued to install the same switch in future lines of vehicles all the way up through 2004. Ford's January 2005 recall included approximately 800,000 vehicles in the following categories: 2000 Ford F-150 trucks, 2000 Ford Expedition, 2000 Lincoln Navigator, and some 2001 Ford F-Series Supercrew Trucks (built through August 7, 2000). Ford's September 7, 2005 recall of 3.8 million vehicles includes model-years 1994-2002 F-150 pickup trucks, Ford Expeditions, Lincoln Navigators and Ford Broncos. However, the same switch, or equivalent versions, have been installed in a total of 16 million Ford vehicles, including: 1994-1998 Lincoln Mark VII/VIII, 1993-1995 Ford Taurus/Mercury Sable and Taurus SHO 2.3 L, 1992-2003 Ford Econoline vans, 1993-2003 Ford F-Series trucks, 1994-2003 Ford Windstar, 1995-2003 Ford Explorer without IVD, 2002-2003 Ford Explorer Sport/Sport Trac, 1997-2003 Ford Expedition, and 1995-2003 Ford Ranger. Ford has offered no explanation why some of these vehicles are subject to recall and some are not.

C. Documentation

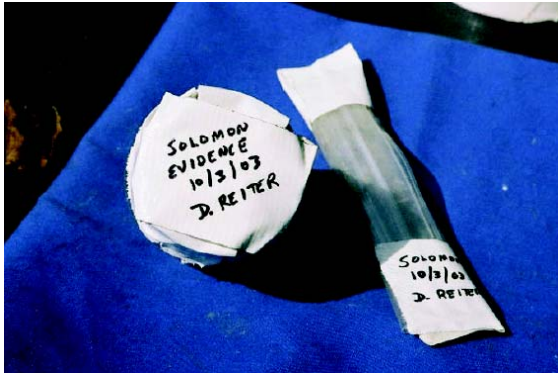
The vehicle must be well photographed and, if circumstances permit, it should be preserved for Ford's independent analysis. In particular, the vehicle should be examined for remains of the switch itself. If the vehicle is to be transported from the fire site, all parts under the engine compartment should be photographed and retained. Because the parts of the switch can be brittle, they should be protected if they are to be moved. Even when the switch is found in its original position, it can break away if the vehicle is relocated. So, ideally the vehicle should be shrink-wrapped, though sometimes this is impracticable.

D. Notification

Ford takes a hard stance in cases where it has not been notified of the loss shortly after it occurs and been given an opportunity to inspect the vehicle and its surrounding structure before the vehicle has been salvaged or destroyed. The value of the claim is directly proportional to the integrity of the remains of the vehicle and the opportunity that Ford has had to examine it.



Remains of damaged switch found at scene



Switch parts tagged, reinforced and bagged



Another speed control deactivation switch in the early stages of fire beginning to burn the plastic brake fluid container

E. Litigation

If you are not prepared to litigate, do not expect Ford to negotiate. On the other hand, Ford is in no position to take every case to trial, especially after the adverse decision in *State Farm Mutual Automobile Insurance Company v. Ford Motor Company*, in which the Louisiana Court of Appeals held that the switch was defective in design, stating:

The trial court found that a defectively designed and manufactured speed control deactivation switch, utilized in the vehicle's cruise control system, had caused the vehicle fire and resultant damage. We affirm on the basis that the switch is unreasonably dangerous in design.

1. Experts

The above case highlights the importance of retaining experienced counsel and a highly qualified expert. Key to the decision was that State Farm's expert was found more convincing than Ford's expert and was able to offer an opinion on a safer alternative design.

2. Anticipate Legal Defenses

a. The Economic Loss Doctrine

The economic loss doctrine is a principle of law limiting recovery for product liability damages pursued under tort theories (e.g., negligence or strict liability claims) where the only thing damaged is the product itself.

The economic loss doctrine was created by the courts as a way of making warranty claims more meaningful. The rationale behind the doctrine is that products are typically sold with either an express or implied warranty and the terms of such warranty should control the remedies available to the purchaser. The doctrine varies from state to state. Some states have not expressly recognized the doctrine. Many states have expanded the doctrine beyond the product liability setting, barring tort claims not just for product damages but for any claims that arise from transactions between contracting parties, including service transactions.

In vehicle fires where the only thing damaged is the vehicle itself, this is the most often cited legal defense by Ford. In many cases, the defense is valid. In others, the defense is misplaced and/or there are ways around the defense. Because this issue would require a state-by-state discussion of the nuances of the doctrine to fully discuss the impact of this doctrine, full analysis of the issue is beyond the scope of this article. However, some of the ways around the doctrine in certain states include the following exceptions: the “other property” exception allowing recovery in tort for damage, not including the vehicle itself; the “sudden and calamitous event” exception; the fact that purchase was a consumer transaction rather than a commercial one; the continuing post-sale duty to warn exception; fraud or misrepresentation; and the public safety exception. Not all of these exceptions apply in all the states.

In addition, when Ford defends on the economic loss, careful attention should be paid to whether the warranty was still in effect at the time of the loss. If it was, the economic loss doctrine will only apply to the tort claims, but not to the warranty claim. Although most car fires occur some years after the initial purchase, many of the vehicle fire cases have occurred within two to five years of the sale to the first retail purchaser. Ford generally provides a 3-year/36,000-mile bumper-to-bumper warranty and a 5-year warranty for corrosion. Typically, the warranty does not state that it is limited to the first retail purchase but applies to the “owner.” Nor typically is there a disclaimer against implied warranties, although there is language in most of Ford’s warranties that the implied warranties “are limited, to the extent allowed by law, to the time period covered by the written warranties, or to the applicable period provided by state law, whichever period is shorter.”

Some buyers also purchase extended warranties, especially when buying the vehicle used. This issue should be explored with the vehicle’s owner in the initial stages of the investigation.

In cases where the vehicle is over three years old or has over 36,000 miles to it, one possible use of the corrosion warranty should be considered. The corrosion warranty coverage provision typically lasts for five years regardless of miles driven and covers body sheet metal panels against corrosion “due to a defect in factory-supplied materials or workmanship.” The speed control deactivation switch problem arguably amounts to a “defect in factory-supplied materials or workmanship” that caused corrosion to the body sheet metal panels.

Another remedy to consider in cases where the warranty was in effect but where Ford outright denies liability without discussing the warranty provisions at all, is a count for violation of the Magnuson-Moss Warranty Act. This is a federal law enacted in 1975 that governs consumer product warranties. The Act is intended, among other things, to assure that companies honor their warranty obligations in a manner that is timely, thorough, and convenient and inexpensive to consumers. A consumer who invokes the protections of the act may be required to engage in pre-suit procedures. However, if Ford outright denies the claim and refuses to engage in pre-suit resolution, a count for violation of the Act is an option to consider. One of the benefits of the use of this act is the entitlement to fees and costs if the consumer prevails.

b. Statute Of Repose

A statute of repose establishes the outer-time frame in which any lawsuit may be filed, regardless of when the injured party discovers the injury. Statute of repose begins to run upon a certain defined occurrence. For

products, the statute in most states deems the time period to begin to run from the date of the first sale to the first retail customer.

Assume, for example, that a state has a ten-year statute of repose running from the date of the first sale to the first consumer purchaser. If that date occurred nine years and 360 days before the fire, the claims handler has five days to file suit. It is critical, therefore, that the sale date be determined immediately upon assignment of the claim and that the statute of repose for the state in question be complied with in timely fashion.

III. CONCLUSION

Just because a car falls within the recall does not mean Ford will pay for the resulting damage. On the other hand, just because the car is not subject to the recall does not mean there is no recovery potential. In all cases, the claim will need to be substantiated and well-presented to Ford. The more prepared you are to litigate, the less you will need to do so.

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