

WALTHAM CONSTRUCTION SUPPLY CORP.
V. FOSTER FUELS, INC.

Confidential Instructions for Foster's In-house Counsel

You are the inside general counsel for Foster Fuels, an independent regional supplier of diesel and other fuels, oils, lubricants and related products. The company was founded twenty five years ago by your father as a one-man operation and has grown to twenty employees and a fleet of a dozen tank trucks. It competes against the major oil companies and other independents, servicing primarily commercial accounts. Foster obtains its diesel fuel inventory by purchasing excess supplies from the major oil companies or by buying in the spot market, and then sells the fuel under its own brand name. The oils, lubricants and other secondary products that it sells are re-manufactured by Foster out of fluids collected from area garages. After filtering and reprocessing the recycled fluids so that they meet the technical standards for new products, they are sold under the Foster brand name.

At the time this dispute arose, Foster Fuels was selling Waltham about 100 gallons of fuel per truck, or a total of 15,000 gallons for the fleet, each month, but the relationship ended after this incident. Foster's price was a few cents below the current market price for branded fuel. Foster made about 20 cents per gallon on each sale over its wholesale cost of fuel, although Foster's actual profit, taking into account fixed overhead, would be more like 3 - 5 cents per gallon. As a result, you made \$500 to \$750 per month on the fuel sales, and perhaps another \$100 per month on oil and related products.

The president of the company, James Foster, is your father. You worked for a couple of years after law school for a law firm, then moved in-house as the first (and still the only) lawyer employed by the company. You are being represented in this case by outside litigation counsel. Your father is mad as hell about this case. You and your father get along pretty well, considering everything, but he is definitely the boss of the operation. He has gradually built up this business over more than two decades, underselling the major oil companies but putting up with constant badmouthing from their salesmen ("Sure Foster is cheap, but that's because they don't meet our quality standards...") This is the first significant product quality claim against Foster Fuels, and your father won't let his reputation be trashed without a fight. Making things worse, a few months after the Waltham case was filed your sales manager had a terrible experience at an industry convention. He was in the middle of a sales pitch to the VP of a local sand and gravel supplier when a lawyer from Waltham's law firm came up and said, "Trying to sell more of that crap antifreeze, are you?" If there was ever any chance of settling this case early, that below-the-belt hit ended it.

Of course, this is the same sales manager apologized to the Waltham manager for selling him the wrong product before he'd even had the sample analyzed. The plaintiff is making a big deal out of the PG vs. EG issue, but your people tell you that it doesn't make any practical difference: EG is the glycol of choice for large diesel engines for technical reasons because it's more durable in the long run, but neither PG nor EG causes damage to rubber or neoprene. So the PG vs. EG issue is a complete red herring. However this, combined with the fact that Foster antifreeze is made out of environmentally-friendly recycled products and therefore could theoretically have had an extraneous chemical in it, was enough to lose you summary judgment. The jury will hopefully get it straight.

On the substance of the matter, it's a mystery to everyone at Foster why so many Waltham trucks got sick all of a sudden. You don't have the slightest idea why, but it's pretty clear that Foster antifreeze could not have been the cause. The only chemical your people have seen do that kind of damage to rubber and neoprene is some kind of oil or petroleum-based substance. You've had the antifreeze that your sales manager had returned from Waltham tested, and there is no evidence that it causes any corrosion to coolant system components. You think you've got an excellent defense, since they haven't yet produced anyone who can identify any chemical in the Foster antifreeze that would cause this type of damage.

Apart from liability, the plaintiff's damages aren't anything like their demand. As far as you can see, damages are limited to the 21 trucks that have had engine overhauls. Most of those overhauls would have been done anyway, sooner or later; Waltham's real cost is that it had to do the overhauls of those 21 trucks earlier than ordinary. As to the trucks that got the antifreeze but have been running fine for two years, you don't see how they could be "stigmatized" nor have you seen evidence to back this claim up.

Given the quarreling over discovery, defense costs have probably run over \$50,000 so far, and you would guess another \$40-50,000 through trial. In addition, this case has become a major distraction for your father. This makes it a real problem for you, because of the work involved in briefing him over and over and the inability to get prompt decisions on the real problems facing the business. Although Foster Fuels is in no danger of going under, the business has suffered because of this litigation.

You can't see damages in this case much over \$200,000 even if the plaintiff wins -- and it won't. The real issue is what a court finding against Foster, even in a minor amount, would do to its reputation in the region; that's a business problem, and you'd be willing to pay in the low six figures to avoid that risk. It would make sense to get rid of the claim if it can be done on reasonable monetary terms, and as long as it doesn't hurt Foster's reputation in the market.