

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

Confidential Instructions for Foster's Outside Counsel

You aren't very impressed with this case. As usual, it began with a lot of allegations which have not held up under scrutiny. Basically, Waltham is planning to put on a "res ipsa loquitur" case, suggesting that since nothing like this had happened before and the trucks suffered unusual damage shortly after supposedly being serviced with your client's antifreeze, nothing other than the antifreeze could have caused the damage. The plaintiff has been unable so far to produce evidence that anything in the Foster product caused damage to Waltham's trucks. Your own expert can't find any corrosive chemical in the antifreeze samples Foster retrieved from Waltham. It's true that oil and some petroleum-based compounds can corrode rubber and neoprene this way, especially when it gets hot, but Waltham hasn't produced any evidence that there was, in fact, any oil in the Foster antifreeze.

The Foster manager's remark about the barrels containing the wrong type of antifreeze obviously doesn't help you. This issue seems to have been a major factor in the trial judge's decision to deny your motion for summary judgment. But you will be able to put on an expert at trial that will say that while "wrong" antifreeze may not be as durable as the "right" kind in the long run, it will not damage rubber or neoprene. The only point that worries you is that Foster does recycle used antifreeze collected from area garages and resells it under the Foster brand name. The antifreeze Waltham got was recycled, and was also somewhat weaker than major-brand coolant. Juries sometimes start to speculate, and they might decide that some foreign chemical crept into the Foster product and caused Waltham's damages, or tie this into some unhappy experience they had with a "Brand X" product.

The damages are also much weaker than Waltham claims. At most, what you have is 21 vehicles that were overhauled, and your client tells you that Waltham runs its trucks into the ground, so that many of the damaged trucks would have needed an overhaul sooner or later anyway. You don't buy Waltham's theory that vehicles that were exposed to Foster antifreeze, but have shown no ill effects for two years, are nevertheless under some kind of "stigma" that makes them less valuable.

The maximum exposure to your clients in this case looks like \$206,000 for overhauls (\$9,800 per truck for 21 trucks), since there's nothing specific to support the stigma theory, but you're not too worried. Whatever the total damages that might theoretically be granted, there needs to be a big

discount for risk, like 50 to 75 per cent. As to interest, you know that 12 per cent statutory interest is running on the claim, but that's only if they win.

Foster's inside counsel seems interested in settling. It's possibly because they're afraid of bad publicity from a trial, but also they know that taking this case all the way through trial will about \$60,000 more, and there's always a chance that a jury will buy Waltham's story, so your sense is that they'd offer money to make the case go away on the right terms. If the plaintiff is reasonable, your clients will probably settle. Otherwise, you'll continue doing your job and look for a better chance down the road.