

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

**Confidential Instructions for Waltham's Outside Counsel**

This is a case that started out well but has turned sour. You'd like to settle it, but you're not sure that it can be done, at least at this point. Waltham has been a client of your firm for several years. You hadn't worked with this client before, but hoped to build up a relationship.

At the outset, you heard a classic "res ipsa loquitur" ("the thing speaks for itself") case: Waltham bought Texaco antifreeze for years, purchasing only diesel fuel from Foster. The client's manager then ordered Foster's cheaper private-brand antifreeze (which is recycled stuff that has God-knows-what in it). The damaged trucks were all serviced with Foster antifreeze; this damage showed up only in the rubber and neoprene components that come into contact with antifreeze through the cooling system, and the damage was sudden and extraordinary. No non-Foster-treated vehicles appeared to have been affected, and no one at Waltham had ever seen this kind of damage before. The engines are big and a complete overhaul, which is required to remove every rubber and neoprene part, costs nearly \$10,000. What could be simpler?

Your client had counted on this as a \$700,000 (\$10 K per vehicle for 70 vehicles) case. Your senior partner also told the client that it could recover treble damages plus attorneys' fees under the state's bad-faith-claims-settlement law, because Foster's insurer refused to offer Waltham a dollar in settlement. With attorneys' fees and legal interest on the base damages, that would total \$1.5 million. The damages, however, haven't held up to your initial expectations. For one thing, only 21 trucks have failed so far, making the out-of-pocket cost \$206,000 rather than \$700,000. Also, although there's a risk that vehicles treated with Foster antifreeze will fail prematurely which might hurt their market value, it turns out that your client doesn't actually sell its heavy trucks. Instead, Waltham's practice is to overhaul the trucks periodically, and run them for as long as 500,000 miles, until the frames rust out. As a result, there is no sales data to support your "lost value" argument. Waltham's depot manager did put you in touch with their truck dealer, who is willing to say that the trucks would sell for \$2,000 to \$3,000 less apiece because of the possibility of premature cooling system failure. The problem is that he isn't impartial and the defense is going to say that it's all speculative.

The other problem is with liability. Although you have an appealing "res ipsa" argument, you haven't been able to get the confirmation as to exactly what in the Foster antifreeze caused the damage. Your car mechanic has told you that the most likely culprit is oil, which will corrode

rubber and neoprene, especially at high temperatures. Given that Foster's "antifreeze" was recycled crud, it would not be at all surprising if this happened. The Foster people have denied problems of any kind with their product. You were nevertheless quite optimistic about your theory, and thought that a chemist could find out what was in any solution. It turns out, however, that your client had no samples left of the Foster product, so you have had to rely on a sample that Foster gave you. You submitted the Foster sample to a private expert, who reported that the sample is a weak mixture of typical antifreeze elements. The sample does not contain oil or anything that would corrode rubber. While this is not helpful, you doubt that the Foster sample was in fact taken from the antifreeze that they sold you. It looks as Foster has, at a minimum, a chain-of-custody problem or maybe has done something even more serious: switched samples.

You are privately pessimistic about proving your bad-faith-claims-settlement count against Lloyds. It turns out that when Lloyds' adjuster denied the claim, he had a report from his own expert saying that the expert had tested a sample of the Foster antifreeze and hadn't found any improper components. With this basis for their claims denial, there's little chance that a judge would say that the insurer was acting in bad faith. That would end your claim for bad faith settlement. If you can show that Foster knowingly provided you with a fake sample it would sustain a treble-damages claim against Foster, but you can't yet substantiate this tempting theory. Despite all this, the fact is that Waltham's vice president thinks that the bad faith claim against the insurer is viable. So you have a client-relations problem.

What should be done now? You were able to defeat Foster's motion for summary judgment; based on the fact that Foster's manager said that they sold Waltham the wrong antifreeze, the court ruled that there was a substantial factual dispute that required a trial. That alone will probably not be enough to convince a jury, however, once Foster's expert explains that even the "wrong" antifreeze would not corrode cooling systems.

It'll be difficult to prove hard damages much above \$206,000, which is the actual out-of-pocket repair cost for 21 trucks so far. The "lost market value" theory (49 undamaged vehicles at \$2,000-3,000 per vehicle) might be worth \$100,000 more. Mandatory legal interest now totals 24 per cent, or about \$75,000 on top of the \$306,000 in basic damages. That makes a total of \$380,000. You can argue multiple damages for the bad-faith claim, but this is likely to be a loser. The settlement value of the case is probably \$150,000 to 200,000, but it will cost your client about \$50,000 more to try the case, and it probably will not be reimbursed for this expense. So if you could get \$100 to 150,000 right now, you should probably settle, but your client may not think so.

You'll listen to the mediator if s/he has a different opinion about the value of the case and hope your client will do so as well. But, so as not to embarrass yourself or the firm, you'll start out arguing for a settlement in the high six figures and let the mediator convince you to take less.