

Constructing a **FAILURE-TO-WARN** Case

A manufacturer's own data can be one of your strongest tools. Obtaining it during discovery lays a powerful foundation for your client's case.

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We've all heard the phrase, "ignorance is bliss." Maybe you've even felt that way. But for the plaintiff attorney handling high-stakes, complex products liability cases, what you don't know *can* hurt you.

Defendants always know more about the products they design, manufacture, test, market, and sell. If your case is based on a failure-to-warn theory—whether at the time of manufacture or later—you must establish that the defendant knew of the product's foreseeable harm.

To do that, you must understand not only how the product works and poses avoidable dangers, but also how it was conceived, developed, and marketed. Your job is to uncover what the defendant knew but failed to disclose—or, worse, actively concealed to profit at the expense of consumer safety—along with any gaps in the manufacturer's knowledge.

Start by learning about the product as early as possible, both before filing suit and throughout discovery. Consult experts and other plaintiff lawyers with relevant experience and seek training

from those in the industry, regulators, and certification authorities. You'll need to examine design documents, operator and maintenance manuals, industry standards, test reports, government regulations, incident reports, complaints, and prior litigation.

Manufacturers typically know the risks their products pose—yet many hide or downplay them. A sales brochure for construction machinery might highlight efficiency or productivity, but it won't mention hazards.¹ Even the products themselves may lack warnings about known dangers, whether inherent in the product or tied to foreseeable use.

Discovery is your most effective tool for exposing this so-called blissful ignorance. Key discovery requests generally fall into four categories:

- the design principles and standards the manufacturer did or didn't know about, consider, or rely on
- similar or alternate designs the manufacturer considered, including its own and those of its competitors
- product testing and real-world experience
- other similar incidents (OSIs)

OSIs are often the most powerful evidence. They can prove that a product posed risks—even when the instructions or warnings arguably meet legal requirements.²

Other similar incidents also help jurors understand that a defect isn't a fluke but a pervasive hazard that the manufacturer should have eliminated, guarded against, or disclosed. Always pursue OSI discovery when available. It's critical for establishing what the defendant knew—and when.

Learn the Standards

Understanding the standards that apply to a product is a crucial first step in proving what the manufacturer knew. Consider a scissor lift, a common mobile elevating work platform. The



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manufacturer decides what warnings to place on the machine and in the operator's manual. It knows the lift's capabilities and risks, including the tipping point when weight is improperly distributed. It also knows how high the lift can safely extend on a slope and when its warning sensors will activate.

Product manufacturer knowledge.

Manufacturers are aware of the standards governing their products. You need to be as well. The American National Standards Institute (ANSI) develops voluntary standards for nearly every product sold in the United States, from oscillating fans to band saws.³ Flip through an ANSI manual, and you'll likely see the names of representatives from nearly every major product manufacturer in that industry. Manufacturers are often writing the rules they must follow.

They know the baseline requirements and the minimum warnings they must provide. The manufacturer's goal often becomes meeting these self-imposed standards rather than disclosing all the risks they've discovered through incidents, near misses, and internal testing. It's essential to obtain the applicable standards the manufacturer followed. They're your starting point for uncovering how the manufacturer weighed risk against utility in its product design.

You can buy ANSI standards online, but you might need to do a little research to find the applicable ones.⁴ If you can't find them on your own, ask a consulting expert. Consulting experts should be people who use the products every day. For example, in a scissor lift defect case, consult with mechanics, designers, or operators. Hands-on knowledge goes much further than what you can read in a manual.

If the consulting expert can't find the standards, request them in discovery. Be specific: Ask for the exact standards and versions in effect during the product's design and manufacturing period. Request any standards the defendant wrote or opposed. Ask whether the defendant's representatives serve on standards-setting bodies like ANSI, and, if so, how they drafted, commented, and voted on relevant standards.



Often, key records surface only after defense depositions. The information exists—you just have to persist.

Standards vary by country. Request the standards the defendant follows in international markets. Many foreign standards are more stringent than those in the United States. For example, the European Union required advanced emergency braking systems on heavy trucks and buses starting in November 2023.⁵ In contrast, the United States has yet to mandate such systems for truck manufacturers.

As a result, manufacturers often design products to meet the lowest regulatory standard applicable in each market. While manufacturers frequently claim to update or modify products for safety, our experience suggests that decisions in the U.S. market are more often driven by customer demand and market acceptance of optional features.

To better understand this dynamic, ask manufacturers for the “acceptance rates” or “take rates” of specific optional safety features over a given time period. A take rate is the percentage of customers who choose to add a particular option.

For instance, certain lane-change warning features remain optional on heavy trucks, and manufacturers track how many buyers select these features. Manufacturers often add a safety feature as standard only after seeing a consistent increase in its take rate.

Also ask whether the manufacturer provides the same warnings or features in other countries. If not, press them to explain why. When stricter warnings or features are offered abroad—especially

when they come at little cost and don’t conflict with U.S. regulations—you may be able to challenge claims that these enhancements were infeasible or too expensive for the U.S. market.

For example, as early as 1996, Australian regulations required scissor lift manufacturers to include a function lockout that prevented the lift from rising beyond a certain point if its sensors detected uneven ground.⁶ The United States has no such requirement. This kind of disparity often reveals that manufacturers tailor safety features to meet only the minimum standards of each market where they’re sold.

Products evolve. Products change—but not always for safety’s sake. Manufacturers rarely change products just to protect users. They do so when required, often only in response to updated standards. For example, ANSI updates its standards every few years. Don’t just get the standards in effect at the time of your client’s injury. Get all versions applicable during the product’s design and manufacturing.⁷ Then, request records of all product changes. You’ll often see that the design changed in response to more stringent standards. That’s powerful evidence, so keep digging.

Dive Deeper

To increase sales and market share, manufacturers track competitors closely and compile detailed comparisons. During discovery, request internal

documents, studies, tests, surveys, emails, and other communications where the manufacturer compared its product to competitors’ products.

Sophisticated manufacturers often maintain component-by-component comparisons. These materials can show where the manufacturer chose cheaper options or excluded safety options—often knowingly.

Optional safety. Many products come with features that are standard in some markets but optional in others. For instance, heavy truck manufacturers might equip European models with standard collision warning systems while offering the same feature as optional in the United States.⁸

Market-specific design. A product’s design may vary depending on where it is sold. A trash truck sold in snowy regions may have traction-enhancing tires, while the same model in hot, dry markets may not. Ask whether the manufacturer changes product designs and warnings based on geography—and why. Should climate dictate safety?

Product evaluation testing. Most products undergo rigorous testing before and after they reach the market. Manufacturers typically test during product development and may retest after incidents to identify and fix problems. Request documentation showing the results of all tests performed and any resulting design or safety changes.

Be specific in your inquiries: Ask why

a manufacturer tested the product. Was it part of routine development, or only in response to an incident or defect claim? Ask when the testing occurred. Did the manufacturer have knowledge of the issue before your client’s claim? And consider who conducted the testing. Manufacturers often rely on third-party organizations, such as Underwriters Laboratories, rather than testing individual components themselves.

Demand OSI data. Other similar incidents may be the most important evidence in a failure-to-warn case. A manufacturer that knew of a hazard, failed to address it, and didn’t warn consumers is hard to defend.

Sophisticated manufacturers use software like Oracle to track metrics, including incidents, claims, allegations, near misses, and lawsuits. These logs may include detailed information like date and location of the incidents, corrective actions, and more.⁹ One-line discovery responses listing only the year of an incident are not sufficient. You need detailed records to show the defendant was aware of the hazard and failed to act.¹⁰


If a defendant claims that certain information doesn’t exist, request its document retention policies—and be prepared to ask the court to compel production. At a minimum, manufacturers should retain records showing how customers were injured while using their products.

While not directly related to product safety, regulatory standards like those OSHA sets require employers to retain injury and illness records—such as Forms 300, 300A, and 301—for at least five years.¹¹

Approach other similar incident discovery with a careful balance of reasonableness and specificity. Courts often weigh in on the scope of these requests. For example, in a case involving a household fan lacking sufficient

fire-resistant components, request documents related to all incidents, claims, allegations, near misses, and lawsuits involving similar models, not just the specific model at issue. That includes other fire-related incidents across comparable product lines made by the same manufacturer.

Expect objections or narrowed responses. The manufacturer may limit incidents to a specific model, market, or time frame. Don’t accept it. Defendants use these tactics to make incidents appear rare. Push back with deficiency letters, motions to compel, and court orders. Often, key records surface only after defense depositions. The information exists—you just have to persist.

For plaintiff attorneys pursuing failure-to-warn claims, ignorance is never bliss. Manufacturers typically hold the very information that supports your client’s case. Your job is to uncover it. Refine your discovery. Demand OSI evidence. And, most importantly, turn the defendant’s own data into proof. 



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NOTES

1. See, e.g., Genie, *Elevated Productivity* (Dec. 2019), tinyurl.com/2x6s6pta.
2. Depending on the similarities, most courts will allow OSI evidence to show defect, provided sufficient similarity between the OSI and product at issue is established. See, e.g., *Lockley v. CSX Transp., Inc.*, 5 A.3d 383, 395 (Pa. Super. 2010) (discussing that evidence of OSIs is admissible to establish “that a defect or dangerous condition existed or that the defendant had knowledge of the defect”). Defendants will

nearly always contest the similarities. Plaintiff lawyers can improve the chances of introducing OSI evidence by choosing the “similarity” criteria carefully and not using the subjective word “similar” as much as possible in discovery and motions practice. Instead, focus on identifying the specific design features, construction defects, uses, conditions, and other relevant facts that rendered the other incidents arguably “similar” and help illustrate the product hazard, foreseeability, and causation.

3. See *About ANSI*, Am. Nat’l Standards Inst., www.ansi.org/about/introduction.
4. *ASNI Webstore*, Am. Nat’l Standards Inst., tinyurl.com/5n6ehcdx.
5. Regulation (EC) No 66/2009 of the European Parliament of the Council of July 2009 Concerning Type-Approval Requirements for the General Safety of Motor Vehicles and Separate Technical Units Intended Therefore, 2009 O.J. (L. 201/11) (superseded by Regulation (EU) 2019/2144 of the European Parliament and of the Council of 27 November 2019 on Type-Approval Requirements for Motor Vehicles and Their Trailers, and Systems, Components and Separate Technical Units Intended for Such Vehicles, As Regards Their General Safety and the Protection of Vehicle Occupants and Vulnerable Road Users, 2019 O.J. (L. 325)).
6. AS 1418.10-1996: Cranes (Including Hoists and Winches), Part 10: Elevating Work Platforms, Standards Austl., store. standards.org.au/product/as-1418-10-1996.
7. See *ANSI Webstore*, *supra* note 4. You can search for previous versions of standards here.
8. Nick Bowyer, *EU Regulation on Advanced Emergency Braking Systems Updated*, InterRegs (May 2015), tinyurl.com/352fa6uu.
9. See Oracle, *PeopleSoft Enterprise Human Resources 9.0 PeopleBook: Monitor Health and Safety* ch. 6 (2006), tinyurl.com/5t55ncce.
10. In Pennsylvania, as well as most jurisdictions, the plaintiff may rely on evidence of OSIs to prove notice and defectiveness. See *Hutchinson v. Penske Truck Leasing Co.*, 876 A.2d 978, 983 (Pa. Super. 2005). As noted above, however, it is important to convince the court that other incidents are, in fact, likely to be deemed sufficiently “similar” without unduly burdening discovery and delaying trial.
11. *OSHA’s Recordkeeping Requirements: Occupational Injury and Illness Recording and Reporting Requirements at 29 CFR Part 1904*, Occupational Safety & Health Admin., www.osha.gov/recordkeeping.