

HOW TO DETERMINE CYLINDER OWNERSHIP AND SAMPLE CYLINDER EXCHANGE POLICY

The Hazardous Materials Regulations state that a “cylinder filled with a hazardous material may not be offered for transportation unless it was filled by the owner of the cylinder or with the owner’s consent.” 49 C.F.R. §173.301(e). That section does not prohibit *filling* a cylinder without the owner’s consent, but merely the transportation in commerce of a cylinder filled without the owner’s consent.¹

A. DOT Guidance

The HMRs do not expressly state how a cylinder filler must establish the consent of an owner to fill a cylinder. In 1987, however, the Chief Counsel of the then Research and Special Programs Administration issued an interpretation, Int. No. 87-2-RSPA, of this regulatory requirement regarding two specific questions:

1. Is the consent of the owner necessary if the cylinder is not offered and accepted for transportation [*i.e.*, shipped]?
2. Is there any specific required method [*i.e.*, written proof] to establish the ownership of a cylinder?

The entire interpretation is as follows:

Under §173.301(b),² there is no prohibition against charging a cylinder without the consent of the owner of the cylinder, provided the charged cylinder is not offered for transportation in commerce. Therefore, if a person who offers a cylinder for transportation is also the person who charged it, the question of whether that person may be held accountable in a particular case depends on whether he obtained the permission of the cylinder owner to charge the cylinder. If, for example, the refiller who offered the cylinder for transportation received it from the owner, then permission to fill the container can be inferred under [§173.301(e)]. However, the refiller may be held accountable under [§173.301(e)] if he offers a container for transportation that he received from a person who he “knows” is not the owner of the cylinder. Applying

¹ However, filling a cylinder (or having a cylinder filled by another) without the owner’s consent and then using the cylinder as your own could subject the person possessing the cylinder to civil liability for the tort of conversion or to criminal penalties for theft or knowingly receiving stolen property.

² This provision was subsequently recodified as §173.301(e) without any substantive change.

the definition of “knowledge” in 49 CFR 107.299, a person has the requisite knowledge when he actually knows or should have known that an individual does not own a container. Written proof of ownership is not required. To insulate oneself from liability under [§173.301(e)], the person who offers the cylinder for transportation should have sufficient “objective” facts to establish that a particular person owned the container.

In 2001, the same agency clarified the effect of corporate purchases, take-overs, and mergers on the process of cylinder ownership identification:

We recognize that with companies terminating operations, being bought by larger companies, changing policy on deposit and consumer purchasing of containers, each geographic area and market is a collage of ownership systems. The intent of § 173.301(b) is to enhance safety by assuring a degree of control over cylinders in a person’s ownership, particularly, the environment and previous service in which a cylinder has been used. Certain cylinder requalification provisions in § 173.34(e) are limited to cylinders used exclusively in certain compressed gas service.

Letter from Hattie Mitchell, Chief, Regulatory Review and Reinvention, Office of Hazardous Materials Standards, to David Hosted, San Diego Welders Supply (June 25, 2001), Reference No. 01-0074.

The 2001 letter offers this explanation on who is responsible for identifying the owner of a cylinder and how ownership is established:

The filling of a cylinder without the consent of the owner is not itself a violation of § 173.301(b). The violation occurs when the charged cylinder is offered for transportation in commerce. Therefore, § 173.301(b) addresses the person who offers the charged cylinders for transportation. If the refiller is also the shipper of the cylinders, then the question of whether or not the refiller may be held accountable in a particular case would depend on the facts of the case.

The regulations are silent as to how cylinder ownership is established. Section 173.301(b) also does not prohibit the refill or exchange of cylinders with customers. For propane and other commonly used gases, a common acceptable practice is to exchange cylinders with customers (users) in place of refilling the customers’ own cylinders.

The letter also addressed whether a “letter of authorization” presented to the refiller by the person in possession of the cylinder constitutes “owner consent”:

A permission slip signed by a person representing himself, and who you reasonably believe to be the owner of the cylinder would be sufficient proof under § 173.301(b) that permission to fill the cylinder had been granted. However, you can be held liable accountable in a given

case if you fill and ship a cylinder given to you by a person who you know is not the owner of the cylinder, even if that person signs the permission slip.

B. Settlement of Cylinder Exchange Litigation

Recently, litigation challenging a cylinder exchange program was settled by the parties. *Airgas-Mid America, Inc. v. Thoroughbred Industrial Cylinder Exchange, LLC*, Circuit Court of Warren County, Kentucky, Div. I, Civ. Action No. 05-CI-1685. The court's notice of the settlement stated that Thoroughbred would no longer accept for exchange any non-Thoroughbred high pressure compressed gas cylinders with a capacity in excess of 200 cubic feet. Thoroughbred also agreed to return high pressure cylinders (with a capacity in excess 200 cubic feet) and large acetylene cylinders (with a capacity of between 100 and 160 cubic feet) owned by Airgas regional companies or Commonwealth Supply Company that were in the Thoroughbred inventory or which might come into Thoroughbred's possession in the future.

Under the settlement, Thoroughbred is still able to exchange any Thoroughbred cylinders previously sold to its customers.

This settlement does not bind any entity other than the parties to the lawsuit. Therefore, the settlement policy of not exchanging (or accepting for exchange and filling) high pressure cylinder with a capacity in excess of 200 cubic feet is not legally required for any company other than those in the lawsuit. As market practices differ in various geographic regions, companies may adopt their own cylinder filling and exchange policies to fit their operations, but they may not violate DOT regulations or civil or criminal law.

C. Sample Cylinder Filling and Exchange Policy

If a customer presents a cylinder for filling with another distributor's name on the neck ring, that fact would likely be sufficient to raise the question of ownership. The filler would then have constructive knowledge ("should have known") that the presenter did not own the cylinder.

Of course, the conclusive way to establish ownership in this scenario would be for the presenter of the cylinder to show a certificate of title or bill of sale indicating the serial number of the cylinder, and the seller's name on the document matches the name on the neck ring of the cylinder.

Alternatively, the filler may demand that the presenter of the cylinder sign and date a form certifying that he is the owner of the cylinder or has the permission of the owner to fill the cylinder. The form should list the serial number(s) of the cylinder(s) to be filled. A sample Cylinder Ownership Acknowledgement Form is attached to this policy. Without a document of title, however, the question is whether a customer signing the certification form is sufficient to rebut a presumption raised by the presentation for filling of a cylinder painted with another company's name. Other facts may be important to establish ownership or consent:

- Is this a known customer of the filler, or a one-time walk-in?
- Can the customer plausibly explain how he came into possession of the cylinders containing the other company's name?
- Has the customer repeatedly presented this other company's cylinders for exchange?

To be certain in establishing consent, without a bill of sale or certificate of title the better course of action would be for the filler's employees accepting cylinders for filling to telephone the other company listed on the cylinder, identify the serial number of any cylinders presented for filling, and request if the cylinders are leased or have been sold before filling those cylinders and offering them for transportation.

Here is a sample policy for distributors to use in developing your own company policy to determine cylinder ownership:

XYZ Welding Supply Company
Cylinder Ownership Policy

It is the policy of our company to fill only XYZ Welding Supply Co. cylinders (indicated by our company name on the neck ring). The following are the only allowable exceptions to this policy:

- 1. The customer has a bill of sale from a distributor or other entity and that entity's name appears on the cylinder neck ring. Make a copy of the bill of sale, file it and enter that cylinder in the customer's cylinder file. You must also make a copy of the driver's license, and keep that in the customer's file, to verify that the buyer shown on the ownership document and the person at the counter are the same. If the bill of sale indicates the buyer is a company, the person presenting the cylinder for filling must indicate how he is affiliated with that company (the counter person should telephone the company, if necessary, to verify employment).*
- 2. If the customer claims to own the cylinder but has no bill of sale or other certificate of title, look at the cylinder neck ring to determine the distributor's name. Telephone the distributor to verify ownership. Ask for a copy of the bill of sale or other ownership document for our company records, and include that document in the customer's cylinder file upon receipt. Again, if the bill of sale indicates the buyer is a company, the person presenting the cylinder for filling must indicate how he is affiliated with that company (the counter person should also verify the presenter's employment when telephoning the company) and that he has authority to have the cylinder filled. As an alternative, you may have the customer complete the sample Cylinder Ownership Acknowledgement Form.*
- 3. If the customer claims to have purchased the cylinder at a public sale, the sale document from the auctioneer will not be sufficient to prove ownership unless it is accompanied by a bill of sale from a distributor or other entity and that entity's name appears on the cylinder neck ring. Inform the customer that he must obtain a proper document of sale or title from the auctioneer indicating ownership of the cylinder before you will fill it.*
- 4. Drivers should not return to our company facilities with cylinders other than XYZ Welding Supply cylinders as marked on the neck ring. If the customer persists in demanding filling of a cylinder marked with another company name, the driver or the customer should contact the XYZ Welding Supply main office by telephone to verify ownership of the cylinder by one of the above methods or to receive further instructions.*
- 5. If a non-XYZ cylinder is found in an XYZ facility, notify management at once and every effort will be made to return the cylinder to its rightful owner.*
- 6. This policy does not apply to acetylene cylinders with a capacity of less than 100 cu. ft. or to high-pressure cylinders with a capacity of less than 80 cu. ft. Those*

cylinders may be accepted for exchange and refilled with a verbal statement by the customer that the customer is the owner or has the owner's permission to have the cylinder filled, or by completion of a written cylinder ownership acknowledgement form.

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CYLINDER OWNERSHIP ACKNOWLEDGEMENT

This is to certify that the undersigned has a legal ownership interest in the cylinder(s) described below and is therefore lawfully entitled to have such cylinder(s) filled by another party in accordance with the U.S. Hazardous Materials Regulations, 49 CFR §173.301(e).

The undersigned and his/her employer or principal further releases and agrees to hold harmless XYZ Welding Supply, its officers, directors and employees from any and all liability of any kind to any person for loss or damage to any property arising from the purchase, filling, transportation or use of the cylinders listed below or their contents.

Cylinder Identification/Numbers:

Signature

Printed Name

Date

Address:

