



# NPGA Policy Analysis:

## The Case for an LP-Gas Container Law

### What is a “container law”?

A container law restricts the filling of an LP-gas (propane) storage tank, or container, to its owner or someone with his authorization. A typical law states, in part, “An LP-gas container shall be filled only by the owner or upon the owner’s authorization.”

### Since only qualified, trained people can dispense LP-gas, why do we need such a regulation in the first place?

The industry’s safety experience has clearly demonstrated the need to restrict who can fill a tank. Safety requires more than just specifying that a person be qualified or trained to fill a container.

**The container is an integral part of a pressurized fuel system. If it is filled improperly, becomes damaged because of the filler’s negligence, or is filled with contaminated gas, an accident could occur, resulting in property damage and personal injury.**

The need for such a restriction is acknowledged by the **U.S. Consumer Product Safety Commission** and organizations of safety regulatory officials such as the **National Association of State Fire Marshals**, among others. In fact, **U.S. Department of Transportation** rules (which date back to at least 1919) say that...

“A container charged with a compressed gas must not be shipped unless it was charged by or with the consent of the owner of the container.” (49 CFR 173.301(b))

Similarly, the U.S. Department of Labor’s **Occupational Safety & Health Administration** regulations include the stipulation that...

“...containers shall be filled or used only upon authorization of the owner.” (29 CFR 1910.110(b)(14)(ii))

These regulations are based on the fact that the tank's owner best knows the condition of the tank and only the owner or the owner's authorized agent can be counted on to take the necessary safety precautions during the filling operation and to thoroughly inspect the container and its appurtenances at each filling. Moreover, industry standards and federal rules, alike, hold a container owner responsible for ensuring the container's suitability and qualification for service. If anyone may fill a container without the owner's knowledge or authority, the owner will be hard pressed to meet his legal obligations.

Why is a state law needed if federal laws are explicit on this point?

Federal laws and regulations apply only to interstate commerce. State agencies that regulate the use and transportation of LP-gas typically base their regulations on industry standards. While this system has generally worked well, it can leave gaps in the state's regulatory scheme if, for example, a federal law does not apply or an industry standard is modified.

**A state container law would not be dependent upon federal regulations or industry standards, nor would it be affected by changes to them. And in fact, container laws have been adopted in some 30 states, to date.**

But is it really in the public interest to pass a container law?

The concern and need for a state law relates to the larger cylinders and tanks built according to specifications of the U.S. Department of Transportation (DOT) and the American Society of Mechanical Engineers (ASME). DOT cylinders and ASME tanks are commonly used at residential and commercial locations for space heating, cooking, and water heating.

These containers are not usually owned by consumers, though they may be. Most often, the LP-gas marketer retains ownership in order to oversee the safe operation of the fuel system, since consumers and business owners cannot be expected to inspect and maintain their containers properly. Moreover, the LP-gas supplier who retains ownership of the container can also monitor its condition and use throughout its service life. This affords an extra level of safety and assurance for the consumer.

**Without a container law, anyone is free to fill any tank, regardless of ownership. This undermines all safety programs. The result could well be fewer companies willing to lease tanks and consumers having to assume full responsibility for tank maintenance.**

Under liability laws, the owner of the tank could be found liable, even though blameless, if an accident occurred because of negligence on the part of the supplier who filled the tank.

“If anyone can fill a tank I own,” the marketer will reason, “I’ll still be held accountable. That exposes me to a liability I cannot afford.”

At the same time, insurance companies have indicated the increased risk would force them to raise the premium LP-gas marketers pay where “unknown” suppliers are free to fill anyone’s tanks. The likelihood that some small marketers will be unable to afford insurance may result in a less competitive market.

**Inevitably, safety will deteriorate as more and more tanks are owned by consumers, who buy their fuel from small, undercapitalized and underinsured suppliers who fill tanks but provide no inspection, maintenance, or repair service.**

Doesn’t a container law act as a restraint on trade in contravention of antitrust laws?

A container law reflects basic property law rights. Attorney Terry Calvani of the firm of Pillsbury, Madison and Sutro of Washington, D.C., an expert on antitrust law and a former commissioner of the Federal Trade Commission, has studied this question thoroughly. Mr. Calvani makes these points:

1. **Leasing tanks to consumers gives LP-gas suppliers no control over the market.** Leases are short-term, usually for 30 days, and consumers can easily change gas suppliers, with only a minimal cost for switching tanks.
2. **Entry into the LP-gas market is relatively easy,** for start-up companies or for established companies expanding into new market areas. “An absence of entry barriers into a market constrains anticompetitive conduct, irrespective of market share,” Calvani said.
3. **A container law is amply justified on the grounds of consumer safety.** It is clear from court cases, Calvani noted, that there is no antitrust violation in adopting a policy designed to promote safety.

This issue was litigated in March 1992 when U.S. District Court Judge Thomas Greene invalidated an antitrust opinion issued by the Utah Attorney General that a rule instituted by the Utah Liquefied Petroleum Gas Board requiring that propane tanks be filled only by their owners violated federal antitrust laws. Shortly thereafter, the Utah Governor signed amendments to the state LP-gas law requiring permission of the owner to fill a tank.

### *Summary*

The absence of a state container law controlling who may fill tanks can have financial costs to the consumer, as well as safety costs:

- Safety is a joint product of installation and proper precautions in filling and inspecting a tank. There may be times when, for safety reasons, a tank should not be filled. The owner of the tank clearly would have an incentive to repair the system before filling the tank – not so a supplier-only, who would have a disincentive to report an unsafe condition since it might mean the loss of a sale.
- A small company without an investment in tanks and no commitment to service may not have sufficient incentive to carry insurance or to be adequately funded. Nor might it have any incentive to take precautions before filling a tank. In the event of an accident, and assuming such a company could be identified, it might simply declare bankruptcy, leaving someone else to pay damages.
- If a tank is filled by more than one supplier, contaminated gas would be difficult to trace.
- “Out of gas” calls where a consumer tank has been allowed to run dry pose serious risks, yet these are sure to increase where the tank filler and tank owner are not the same, since a supplier who owns the tank is able to monitor the consumer’s usage patterns and set up regular delivery schedules.

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### Substantiating Letter References

#### **Letters from U.S. government agencies:**

Judith S. Kaleta, Chief Counsel, U.S. Department of Transportation, to Carl T. Johnson, Compressed Gas Association, July 31, 1991.

Donald W. Switzer, Chemical Engineer, U.S. Consumer Product Safety Commission, to T. C. Lemoff, National Fire Protection Association, June 24, 1991.

#### **Letters from State government agencies:**

Sharon E. Coates, Director of Liquefied Petroleum Gas Board, State of **Arkansas**, to Robert W. Grant, National Fire Protection Association, August 13, 1991.

James A. Glen, Principal Safety Engineer, State of **California**, to Arthur Cote, National Fire Protection Association, July 8, 1991.

James A. Glen, Principal Safety Engineer, State of **California**, to Robert W. Grant, National Fire Protection Association, August 20, 1991.

Richard Blumenthal, Attorney General, State of **Connecticut**, to Terry Calvani, Pillsbury, Madison & Sutro, October 2, 1991.

Tom Gallagher, Fire Marshal, State of **Florida**, to Arthur Cote, National Fire Protection Association, July 9, 1971.

Pete Paulsen, Assistant State Fire Marshal, State of **Georgia**, to Arthur Cote, National Fire Protection Association, July 8, 1991.

Pete Paulsen, Assistant State Fire Marshal, State of **Georgia**, to Robert Grant, National Fire Protection Association, August 14, 1991.

G. Rodney Raby, State Fire Marshal, Commonwealth of **Kentucky**, to Arthur Cote, National Fire Protection Association, July 3, 1991.

J Ron Hooker, Supervisor Petroleum/Propane/NH<sub>3</sub> Program, State of **Missouri**, to Robert W. Grant, National Fire Protection Association, September 16, 1991.

Seymour Puleander, Assistant Director, Office of Safety Compliance, State of **New Jersey**, to H. Emerson Thomas, Thomas Consulting Co., Inc., October 23, 1991.

James L. Mizelle, LP-Gas Engineer, State of **North Carolina**, to Arthur Cote, National Fire Protection Association, July 3, 1991.

Bob Bradley, LP Gas Administrator, State of **Oklahoma**, to Ted Lemoff, National Fire Protection Association, August 23, 1991.

H. B. Harryman, Fire Marshal, State of **South Dakota**, to Robert W. Grant, National Fire Protection Association, September 12, 1991.

***Letters from Insurance Companies:***

Charles A. Taylor, Jr., President, LPG Risk Retention Group Insurance Company, to Arthur E. Cote, National Fire Protection Association, June 27, 1991.

Wm. David Knight, Vice President, Ranger Insurance Company, to Arthur E. Cote, National Fire Protection Association, June 19, 1991.

William M. Sutcliffe, President, Underwriters Management Associates, Inc., to Art Cody [sic], National Fire Protection Association, July 3, 1991.

***Other Letters:***

Carl T. Johnson, President, Compressed Gas Association, to Robert Grant, National Fire Protection Association, August 1, 1991.

Christopher Smith, Esq., Arent Fox Kintner Plotkin & Kahn, to Carl T. Johnson, Compressed Gas Association, July 12, 1991.

### State Container Laws

Arkansas	§§53-724 through 53-727 of State Code.
California	§§13480, 14427, 13560, Business & Professions Code.
Colorado	Rev. Stats. 8-30-302
Delaware	Chapter 72
Florida	
Georgia	Act No. 558, amending Chapt. 73-2 (1979)
Hawaii	§708-838.
Idaho	§39-2203
Illinois	Chapt. 96½, §5601-5604
Indiana	Chapt. 15 of Title 22-11
Kansas	Chapt. 55, Art. 11, §55-1101 thru 55-1105
Kentucky	KRS 234.190
Maryland	Commercial Law §11-601 thru 11-606
Massachusetts	527 CMR 6.05(4)
Michigan	Michigan Compiled Laws, §429.11
Minnesota	§299F.40
Missouri	§323.030
Nevada	§590:535
New Jersey	§21:1B-4 of NJSA
North Carolina	§119-58(b)
Ohio	Regulations of Dept. of Industrial Relations
Oklahoma	§420.9(f)
Pennsylvania	Title 35, Chapt. 14A, §1322
South Carolina	Regulations of LP Gas Board
South Dakota	§34-39-9
Tennessee	§68-26-108
Texas	
Utah	§63-29a-110(6)
Virginia	Title 18.2
Wisconsin	§101.16(3)