As a distributor of welding hard goods and other products, you sell a wide variety of items from a number of manufacturers. While this can be convenient for your customers, each product you sell carries an additional risk to your company. It’s not a wise business decision to significantly reduce the number of products you sell because you’re worried about the risk. But it is a wise business decision to take simple steps to protect your company from product-related lawsuits and place the liability back where it should be, on the manufacturer.

Fume litigation highlighted the importance of the retailer/manufacturer relationship in regards to liability. Many distributors today receive indemnification agreements to address fume litigation, but what about the liability from all of the other products you sell? No one knows what the next “fume litigation” source could be.

Many states have enacted laws that in certain specified circumstances, help protect the distributor who simply “passes through” goods produced by the manufacturer. However, even in states that possess these types of favorable laws, the legal fees incurred could be expensive.

How to insulate yourself from your manufacturer’s liability:

**Indemnification / Hold Harmless Clause**

Maintain a contract with your manufacturer that includes a hold harmless and indemnification clause. In such a clause, the manufacturer agrees that your business is not responsible for any losses, costs, damages, expenses or liability associated with a lawsuit that stems from a products liability claim by one of your customers. In addition, the clause requires the manufacturer to repay you for any claims pursued against you due to the manufacturer’s product.

Sample wording:  *To the fullest extent permitted by law, Manufacturer shall defend, indemnify and hold harmless Your Welding Supply Company, its affiliated and subsidiary companies and their respective officers, directors, employees and agents, from and against all claims, damages, losses, costs, expenses, judgments and liabilities, including but not limited to attorney’s fees, costs and expenses, arising out of or in connection with Manufacturer’s product or service, provided that any such claim, damage, loss, costs, expenses, judgments or liabilities are attributable to bodily injury, sickness, disease or death, or to injury or destruction of tangible personal property, including the loss of use resulting therefrom, that is caused in whole or in part by any act or omission of the Manufacturer, anyone directly or indirectly employed by them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by any party indemnified hereunder.*

In the event such indemnity as described above is prohibited by law, then said indemnity shall only be to the extent caused by the negligent acts or omissions of the Manufacturer or anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable, to the extent allowed by applicable law.

It is very important to thoroughly review every contract you receive to sign from anyone, including manufacturers, vendors, and contractors, for indemnification wording. Thousands or even millions of dollars worth of liability could be transferred with one single line of words in a contract. Additionally, your insurance policy may need to be amended based upon any liability you may assume by contract. Contracts should be reviewed by trained employees, attorneys, your insurance carrier and risk management professionals.

“I receive contracts to sign on a regular basis, which all require a thorough review. About 90% of the contracts I see are unacceptable in their original form and require some additional revision or modification to make the terms acceptable to our company.” John Hanlon, S.J. Smith Co.

**Additional Insured – Vendors**

In addition to the hold harmless / indemnification agreement, make sure that you’re covered under your manufacturer’s insurance policy. To obtain the insurance coverage under your manufacturer’s General Liability policy, request to be added as an “Additional Insured – Vendor”. This will effectively give you access to your manufacturer’s policy for any defense or settlement arising out of a lawsuit, alleging bodily injury or property damage from your manufacturer’s product. Most manufacturers will already have this endorsement on their policy, but the responsibility rests on you – the retailer – to request it. This
practice is common amongst well known retailers, such as Wal-Mart and Target.

There are a few stipulations to the standard “Additional Insured – Vendors” endorsement that you must keep in mind:

- **Repackaging** – Repackaging of the product voids the coverage, except when it’s for the sole purpose of inspection, demonstration or testing. This is common with welding rods or wire that are purchased in bulk and broken into smaller quantities for sale. As a distributor, try to avoid this practice.

- **Labeling or Relabeling** – Labeling or relabeling of the product also voids this coverage. It is critical to avoid this practice all together. The manufacturer’s package includes key warnings, directions, and descriptions of the product that could be left out, which could put the end user of the product at great risk.

- **Request Additional Insured status in writing** – Simply obtaining Additional Insured status is often not enough to enact this clause. Often times the Additional Insured status is not triggered unless the request is put in writing. So when you’re drafting the hold harmless / indemnification wording, include another sentence at the bottom “Manufacturer agrees to name [Your Welding Supply Company] as an Additional Insured – Vendor with regard to Manufacturer’s General Liability policy.”

**Certificate of Insurance**

The last item to have in place is a valid certificate of insurance. A valid certificate of insurance shows proof that the manufacturer has insurance coverage. If the manufacturer does not have insurance coverage, your business could end up paying for defense and settlement in the event of a lawsuit. You will also need to put into place a system to ensure that you receive a yearly renewal of each certificate of insurance you receive. If the certificate of insurance is out of date, the coverage afforded may have lapsed.

At minimum, you should require General Liability and Workers’ Compensation coverage. For key manufacturers or higher risk products, it might also be wise to request Umbrella Liability and Auto Liability coverage.

The valid certificate of insurance should include the manufacturer’s name and address, their insurance company(s), the requested limits, the Additional Insured – Vendors endorsement, the dates that the policy is in force and the name of the certificate holder (you). For a sample Certificate of Insurance, please contact the author.

**Conclusion**

Not all manufacturers will be 100% receptive to the above steps, which shouldn’t come as any surprise. Manufacturers have their own self interest in mind as their number one priority. If your manufacturer will not comply with your requirements or demands liability be transferred to your company, you can make an informed decision of the additional risk your company faces.

This can be a big project, so my recommendation is to start first with the manufacturers whose product you sell the most and/or the products that are most susceptible to liability lawsuits (i.e. welding rods, power saws or acetylene gas). Once your key manufacturing partners are taken care of, move down the line. If you are not utilizing these techniques, your bottom-line is exposed.

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Steps to Shift Liability Back to the Manufacturer:

- Obtain an Additional Insured – Vendors Endorsement
- Require Additional Insured Status in Writing
- Do Not Change, Modify, or Repackage Product
- Obtain an Indemnification and Hold Harmless Agreement in your favor
- Obtain a Certificate of Insurance from ALL of your manufacturers

**Bonus Material:**

**Imported Products**

Many companies have begun importing product directly from foreign countries, such as China and India. Keep in mind that directly importing product from foreign countries can expose your business to additional risk. If you are purchasing product made in a foreign country, but buying it from a distributor in the United States, you should be insulated by the domestic distributor if you take the recommended steps above to mitigate your risk. But if you’re purchasing your product directly from a foreign country, beware!

It is possible that if you import directly, your company maybe the first line of defense if someone is injured because of a product you’ve imported. This makes it more important to ensure that additional precautions are taken, such as, obtaining a written agreement and evidence of insurance from your foreign suppliers.

If you are currently directly importing product from overseas it is imperative to understand the additional liability assumed by your company. The additional liability could be severe and in some cases, far outweigh the pricing advantages gained by this practice.

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