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# RISKY Business

## Reducing risk for used equipment sales

By Bruce Wickersham

A contractor who did not want to spend the money for new scaffolding equipment for his residential contracting business called several Philadelphia-area rental companies seeking to buy used equipment. Rental World in Limerick, Pa., was willing to sell the used braces and cross-bars the contractor was looking for at a price he could afford. The purchase of the "as is" used equipment, however, required the contractor to sign a purchase order that included an agreement to defend and indemnify Rental World from any accident arising out of the use of the equipment.

You guessed it — the contractor failed to erect the scaffolding in compliance with Occupational Safety and Health Administration (OSHA) regulations. A worker fell several stories when the scaffolding collapsed and sustained serious personal injuries. The attorney for the injured worker sued the contractor and Rental World for negligence and demanded \$500,000 in settlement.

Rental World was proactive in its corporate risk management, kept good records of its used equipment sale transactions and appointed a company representative willing to support defense counsel. As a result, in a matter of days, a legal "demand letter" to the contractor was served, insisting that he take over the defense of Rental World in the lawsuit. The contractor's lawyer refused to respond, so a deposition of the contractor was scheduled.

During the full-day deposition, the contractor was forced to concede that he purchased the equipment used, "as is," with the opportunity to inspect it before buying, that he personally signed the purchase order and that there was contract language requiring him to defend and indemnify Rental World for any accident arising out of the use of the scaffolding. He also was forced to acknowledge a separate contract clause permitting Rental World to recover all attorneys' fees and costs.

The contractor's lawyer still refused to take over the defense of Rental World, so ARA Insurance Services approved a pursuit of a breach of contract lawsuit against the contractor. While this decision increased litigation costs because of the filing of a separate lawsuit, the strategic gamble was that, if successful, AIS Insurance Services might recover the overall litigation costs incurred in defending Rental World.

Rental World was ultimately dismissed by the injured worker's lawyer and the court held a hearing, granted Rental World a "win" on the separate lawsuit and ordered the contractor to reimburse ARA Insurance Services the \$55,000 spent on attorneys' fees and costs in both lawsuits. The court found the indemnity contract language in Rental World's form purchase order to be legally "unambiguous" and rejected several arguments by the contractor to avoid responsibility.

The immediate benefit to Rental World because of this reimbursement is a lowered loss ratio. The long-term benefit to Rental World and other Pennsylvania rental centers is a court opinion supporting used equipment contract provisions in claims by future injured workers.

This true "success story" only came about because a prepared rental center had a used equipment sales contract with strong, favorable indemnification and attorneys' fees/costs language and an aggressive litigation plan, which was developed by ARA Insurance Services and its select law firm, Praetorian Insurance Co. and Berkley Risk Administrators Co. provided the insurance coverage and claim handling for ARA Insurance Services in this matter.

If you have not had your sales or rental contract language recently reviewed, you should consider taking the time to do so as part of your company's risk management activities to ensure you are as prepared as Rental World. Used equipment sales need not be a risky business. *RM*

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Bruce Wickersham handled this case and is an attorney on the defense counsel team for ARA Insurance Services. He specializes in the representation of equipment manufacturers and retailers in court and risk management. He can be reached at Post & Schell, P.C., Philadelphia, (215) 587-6612, or e-mail [twickersham@postschell.com](mailto:twickersham@postschell.com).