“Hey, watch this!” … and other Infamous Rental Customer Jargon

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“How did that happen?” “It was like that when it got here!” “That track was defective!” “You didn’t tell me I couldn’t … [complete with literally any form of insane activity].” “I thought I bought the Damage Waiver!” etc. etc. Given the many (innumerable) times we’ve heard the above from our clients’ customers (and their lawyers), we thought a few answers to some of the inevitable legal questions involved might prove helpful to our readers.

Q 1: If a customer damages my equipment or causes an accident, am I on the hook for their mistake?
One of the biggest sources of risk begins the moment your equipment leaves your facility. Once it’s out of your yard, you have little or no control over how it’s used. That’s why every rental agreement should include an “Indemnity, Defense, and Hold Harmless” clause which shifts liability to the customer for any liabilities, claims, damages, or lawsuits resulting from the customer’s use (or misuse) of rented equipment. Your rental contract should also clearly define how, where, and by whom the equipment may be used. This provision should prohibit misuse, abuse, unauthorized repairs or modifications, and any illegal activity that could void insurance coverage. It should also affirmatively require the customer to operate the equipment safely, within its rated capacity a critical issue, as overloading is a common problem in the rental industry—only at the agreed-upon location, and in full compliance with all applicable laws, including EPA, OSHA, and ANSI standards, as well as the manufacturer’s written instructions. Note: This language should obligate the customer to comply with all of the above; it should not obligate the rental company to provide it, as customers can obtain that information from a host of sources, including manufacturers, online publications, etc. Including a robust “Terms of Use” provision not only helps prevent misuse, it also strengthens your Indemnity, Defense, and Hold Harmless clause. When these provisions are used together, a customer’s misuse of your equipment automatically triggers the customer’s obligation to cover any resulting damage, injury, or loss, including a duty to indemnify (pay), defend (hire and pay for an attorney), and hold harmless (not sue) the rental company.

Q 2: Can I be held liable for equipment defects or malfunctions, even if I did not manufacture or design the equipment I rent to customers?
Incorporating clear warranty disclaimers into your rental contract is essential to protect your business from unforeseen legal and financial liabilities arising from equipment performance issues. Without these protections, you could be held liable for defects or malfunctions, even when you had no role in designing or manufacturing the equipment (though rental companies often have a right to seek “contribution” from the responsible party(ies), including designers and manufacturers). Crucially, “failure to warn” (of potential hazards associated with potential uses and misuses of equipment) impact rental operators far more commonly because rental operators are typically charged with the obligation to ensure their customers receive proper warnings. Unfortunately, “failure to warn” claims have become so ingrained in products liability law as to be sources of “strict liability” which requires only a showing that a warning was inadequate and that someone or something was harmed as a result – even if the rental company did nothing wrong. Plaintiffs’ attorneys have, of course, seized upon this to file countless lawsuits against equipment lessors, and that pattern persists to this day. Perhaps more problematically, warranty claims, both express (those you mean to make), and implied (those you don’t mean to make but that the law implies you made even if you say nothing at all) often further ensnare rental companies. Article 2A of the Uniform Commercial Code (UCC),

adopted in almost every state, governs leases of tangible property, including equipment rentals. Under the UCC, express warranties can be created through any promises or descriptions you make about your equipment, whether in writing, marketing materials, or conversations. These representations can become legally binding unless properly disclaimed. The UCC also automatically implies warranties, such as the Warranty of Merchantability, which guarantees that your equipment is fit for ordinary use, and the Warranty of Fitness for a Particular Purpose, which applies if the customer relies on your expertise when selecting the equipment.

To effectively disclaim such warranties, your rental contract must include clear, conspicuous statements—typically in bold, capitalized text—stating that the equipment is provided "AS IS" or "WITH ALL FAULTS", and that you make "NO WARRANTIES, EXPRESS OR IMPLIED". But that's just the starting point. If the implied warranties of merchantability and fitness are to be waived, the contract must also ***specifically identify*** those disclaimed warranties. Your contract should also make clear that you did not manufacture or design the equipment, and that product descriptions, specifications, or advertisements do not constitute representations or warranties. Including these disclaimers helps ensure that liability for defects or malfunctions remains where it belongs—with the original manufacturer and designer – and not with your business

Q 3: How can my rental contract help ensure I can recover my equipment if a customer fails to return it on time?

To ensure you can recover your property, your rental contract should grant you the right to repossess your equipment without having to first go to court if the customer defaults. Without it, reclaiming your equipment could necessitate legal action, which is both time-consuming and expensive (be careful to check local laws, however; some jurisdictions, such as Louisiana, prohibit such seizures in the absence of a court order). Worse, attempting to repossess your equipment without clear contractual authority could expose you to substantial legal liability, including allegations of breaking and entering, trespassing, burglary, property damage, or even theft. Your contract should also specify that rental charges will continue, with interest at the maximum rate permitted under applicable law (which varies widely from state to state) until the equipment is returned in acceptable condition. This not only compensates you for the extended use but also discourages late returns and damage (if the customer knows he will continue to be charged rent until damaged equipment is fully repaired, he is considerably more likely to exercise care during the rental).
Incorporating explicit prohibitions on assignments and subletting in your rental contract is also essential for safeguarding your assets. Such provisions help lessors ensure that their equipment doesn't disappear or wind up in the hands of an untrained, unlicensed, abusive, or otherwise unacceptable operator. Moreover, assignment (unless contractually prohibited) can also result in you being held responsible for the actions of a third party not originally part of the rental agreement. Including a clear prohibition against assignments and subleases without your express written consent and stating that any unauthorized attempts are void helps ensure you retain control over who uses your equipment and under what conditions.

It is also important to be aware of theft notice requirements in your state and any other states where your equipment may be used. For instance, Florida law requires rental contracts to include a theft warning initialed by the customer for law enforcement to treat a failure to return rented equipment as criminal theft. Similarly in New York, specific theft notice language is mandatory, and failure to comply can serve as a valid defense to an otherwise obvious theft claim. By incorporating these statutory requirements into your rental agreement, you strengthen your legal position and improve your chances of recovering your property in cases of non-return.

Q 4: Can my rental contract help generate additional revenue and minimize losses from defaulting customers?

Your rental contract can be strategically structured to boost revenue and reduce potential losses from customers who default on payments. One effective strategy is incorporating a credit card authorization clause to facilitate timely payments. If a customer defaults, among other things,

this provision allows you to charge outstanding balances and associated fees to their credit card.
A rental contract should always mandate comprehensive insurance that is primary (i.e., it pays before you or your company's insurance) and sufficient to cover the equipment's replacement value. Requiring customers to maintain adequate insurance is crucial, as it protects equipment lessors from out-of-pocket expenses or higher business insurance premiums due to damage or loss. For homeowner customers (who virtually never provide insurance) and some commercial customers, a viable alternative to simply incurring the risk is to offer them an "optional" limited damage waiver (allowing them to decline it only if they provide the insurance referenced above). A damage waiver, though not insurance, allows customers to limit their financial responsibility for certain instances of accidental damage to the equipment in exchange for a fee. A properly written damage waiver provision can offer value to customers, facilitate additional rentals, avoid disputes, and motivate customers to protect your equipment despite having purchased it – but only if it is written with considerable care to accommodate the applicable legal requirements and customer motivations (a "deductible" is usually a good place to start). Finally, your rental contract should clearly outline the customer's responsibility for paying all applicable taxes and fees, including equipment property tax reimbursements where permitted. Several states, like Arizona, California, and Texas, have laws that permit heavy equipment rental operators to charge customers specific fees to offset property taxes or related costs if certain conditions are met. By ensuring your rental contract complies with state-specific notice requirements and accounts for all potential revenue streams, you can boost your income while better protecting your business against payment defaults and other financial risks.

Conclusion:

From misuse and non-payment to damage or theft, a great many things can go wrong during a rental. A well-drafted rental contract should not only document the relevant business terms; it should also include substantial legal protections for the rental company, among which should be the right to recover its equipment as quickly and painlessly as possible if something goes wrong. A strong rental agreement isn't just about legal protection; it should also be a profit-boosting tool (think of damage waivers, reduced insurance claims [and premiums] and recovering for equipment downtime, cleaning, repairs, excess use, late returns, interest, attorneys' fees, and much more). A well-drafted equipment rental contract is, therefore, far more than just a formality; it's a powerful tool that can and should protect your business, your equipment, your profits, your negotiating leverage, your customer relationships, and ultimately, your peace of mind. As always, feel free to contact us if we can help at www.jwlinternational.com or 866-582-2586.