**Just Sign Here: Formation of Binding Contracts in New York and**

**Common Misconceptions About Forms We Are Given to Sign**

By Andrew Fallek, Esq.\*

Whether we quickly initial a rental car agreement in each place where an “x” has been added by the employee at the desk, obediently sign the admission forms at the emergency room or thoughtlessly press the “accept” or “I agree” button on a seller’s website to acknowledge that we have read and agree to the terms of usage, more often than ever, consumers find themselves signing documents that they have not fully read. This commonly happens when we are in a rush or when outside circumstances make us feel like we need to act quickly. It takes time to carefully read and understand a document and many people feel uncomfortable taking 5 to 10 minutes to read something while an employee stands silently in front of them and a line of impatient people builds behind them. Employees frequently minimize the need for you to read the entire document by casually summarizing its contents– often incorrectly-- in a sentence or two or by telling the customer that only the yellow highlighted areas need to be answered – as if the remainder of the document was meaningless -- or by telling them that it’s “standard” and that “everyone” signs it.

Under New York law, “forms” that often seem more like questionnaires than agreements can be fully binding contracts with significant consequences for the consumer. Even with otherwise seemingly well informed people, I often hear the same misconceptions repeated as people are about to hastily sign something put in front of them for their signature:

Misconception #1: “This is just a form. It is not a binding contract.”

Misconception #2: “If I sign this document but don’t read it beforehand,

it is not enforceable because I can’t agree to something when I don’t

know to what it is I am agreeing.

Misconception #3: I know it’s a binding contract, but even if I sign it

now, it’s no big deal because I have the right to cancel it within 3 days

if I change my mind.

This article will discuss all three misconceptions.

***Is a Basic “Form” a Binding Agreement?***

Some people equate the term “contract” with a formal looking written document prepared by lawyers. The word “contract” is just another word for “agreement” and in general, in New York, the terms of an agreement will be enforceable in court if there is some kind of written documentation that contains the essential terms of the agreement and is signed by the party who has breached it.[[1]](#footnote-1) The documentation need take no special form and certainly does not have to say “Contract” or “Agreement” at the top. The writing might consist of detailed pre-printed material with spaces to be filled in but could also be nothing more than hand scratched notes on the back of an envelope. If you sign that envelope and the other party wants to hold you to its terms, you will generally be bound to it. In short, a form and almost anything written and signed has the potential to be interpreted as a binding contract.

Let’s use the basic two sided form as an example. The front side, where you typically sign at the bottom, contains all of the basic terms of the deal that has been made: the name and address of the company or person providing goods or services (like a park concessionaire seeking to rent you a small boat or a doctor who will examine you), your name and address as the party receiving goods and services and the very basic terms of the transaction (i.e., rent a rowboat for one hour for x dollars on this date and leave a credit card number as security). There is enough information about the terms of the deal for a court to hold that a contract was created and if you as the consumer fail to uphold your end of the bargain – let’s say your check bounces-- the other party may sue you for damages.

The consumer usually has no real issue with language on the front side but the front side will typically say that the signor agrees to the terms on the “back” or page two of the form. It’s the other side – the side that is most often not read—that often imposes unforeseen duties on the consumer and may release the company from some of its expected duties. It’s the other side that may say, for example, that the company can charge you and your credit card for the cost of a new boat of the same make and model if they find significant damage to the rental boat (which happens to be quite old and in bad shape) when it is returned; or that the company does not represent that the boat is seaworthy; and that it is not responsible for injury to you while you are using the boat.

Reality: a form signed by you can and usually is a binding contract.

**To Read or Not to Read?**

Can you escape the consequences of your signed agreement by claiming that you didn’t read it first? Simply stated, unless there is evidence of a fraud, the general rule is that if the contract is available to you to read, your failure to do so is not a defense and you will be held to its terms.[[2]](#footnote-2) Moreover, if for some reason you can’t personally read the agreement, you are obliged to have someone else read it for you. You should, therefore, always read what you sign, and in appropriate cases, obtain counsel to review it before signing.

What if you read it and discover provisions that are grossly unfair to you and you are told that no changes are allowed? That is a very common situation. Often the form is presented to you by a low level employee who genuinely has no authority to consent to any alterations.

The obvious answer is don’t sign it. But it may not be that easy when you need that rental car to get to a wedding starting in one hour or you’ve driven two hours with a car full of kids waiting to go rafting on a hot summer day. If I encounter such a situation and I can tell that the low leveI employee is too busy to even look at the completed form, particularly if it is a multipage form, I often just discretely cross-out the objectionable language and initial the changes without saying a word to the employee. Most do not notice. If they do notice, tell them you want to keep the changes and let them turn you down. If they insist on you signing a new form, keep the old one showing your proposed changes.

**Grossly Unfair Provisions**

The law may sometimes provide you with relief from the terms of your agreement if a court finds the agreement “unconscionable.” An unconscionable contract has been defined as one which "is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms.”[[3]](#footnote-3)

In making that determination, courts tend to look at whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming it is unconscionable, and whether there was disparity in bargaining power. That’s why actually asking for changes on a form and being turned down can support a claim that you had no bargaining power.

**Statutory Protections**

New York State has a variety of statutes that may render some language in the contract unenforceable or void, especially language that attempts to eliminate to limit or eliminate the other party’s liability for its own negligence. Some businesses that are the frequent object of lawsuits for personal injury or property damage attempt to prevent you from suing them from negligence, when for example, the beat up old raft they rent you deflates in the river and you are injured. Sometimes the word “release” or “waiver” will be used in the rental agreement. Other times such language may be contained on the back of an admission ticket or a receipt or posted at the point of entry. The words vary but the language must unequivocally state an intention to relieve the defendant of its liability for negligence.

A typical New York law that prohibits the enforcement of such language is General Obligations Law § 5-322, entitled “Agreements exempting caterers and catering establishments from liability for negligence void and unenforceable.” It states:

Every covenant, agreement or understanding in or in connection with or collateral to any contract entered into with any caterer or catering establishment exempting the said caterer or catering establishment from liability for damages caused by or resulting from the negligence of the caterer or catering establishment, his agents, servants, employees or patrons at the affair contracted therefor, shall be deemed to be void as against public policy and wholly unenforceable (emphasis added).

So you can generally enter into a contract for the wedding of your dreams even though you are unhappy with a contract provision saying that the caterer is not liable for its own negligence but you should try to cross-out the provision anyway.

New York State has similar provisions covering the lessors of real property (General Obligations Law § 5-321); building service or maintenance contractors (General Obligations Law § 5-323); and owners and contractors engaged in construction, alteration and repair (General Obligations Law § 5-322.1).

Of course, many provisions are subject to exceptions. For example, General Business Law § 5-326 contains such a provision for “pools, gymnasiums, places of public amusement or recreation and similar establishments.” Although seemingly clear on its face – you can sue if you are injured due to a negligently maintained piece of exercise equipment even if the contract says otherwise -- the courts have drawn a distinction between facilities used solely for recreation (the statute applies and the recreational facility will remain liable for its own negligence) and those used only for instruction in recreation like schools teaching scuba diving or skydiving (the statute doesn’t apply and you cannot sue if you are injured). Where a facility is used for both recreation and instruction, the decisions vary.

**Do You Have the Right to Cancel a Contract Within 3 days?**

Many people are under the impression that there is a general legal right to cancel contracts within a certain amount of time of signing, often thought to be three days. This is not generally true. Unless there is a specific statute granting you such a right or language specifying a right to cancel in the contract itself, there is no general right to cancel a contract.

Where does this misconception come from? There are statutes and regulations that do provide for cancellation within three days in very specific situations.

1. **The Federal Trade Commission’s “Cooling Off” Rule for Door to Door Sales.**

Federal regulations, which apply in New York, give consumers a three day “cooling off” period during which buyers can simply change their minds, cancel the sale and get a full refund of any money paid for some sales. But these regulations are aimed primarily at so-called “door to door” sales which are initiated face to face at a buyer’s home or workplace, and at other areas where the buyer may be temporarily located, like hotels, dormitories, restaurants, convention centers or fairgrounds. The rule only covers sales above $25 and does not apply to sales made at these locations by phone or mail.

The “cooling off” period also does **not** apply to many of the most important transactions a person is likely to encounter such as:

* sales for real estate, insurance or securities;
* sales for emergency home repairs
* sales that begin in a retail location and finish with a contract

 signing in your home (such as ordering a carpet at a store and

 signing the contract when someone comes to your home to

 measure the floor);
 - sales made at the sellers' usual place of business when a

 contract is signed to purchase a car, furniture, a computer, or

 a stereo system;
 - sales of goods or services not intended for personal, family or

 household purposes.

Courses of instruction and training are covered by the federal cooling-off rule.

As you can see, the federal rule does not apply to sales made at a seller’s usual place of business. In other words, if you shop at the Mall or on Main Street and transact business at the seller’s store, you do not get the benefit of this FTC three day cooling off period. It also does not apply if you are making a purchase for business.

 The federal rule is intended to work with state and local regulations.

New York State has a similar statute, Public Property Law 427, covering door to door sales. It states:

1. In addition to any right otherwise to revoke an offer, the buyer

or other person obligated for any part of the purchase price

may cancel door-to-door sale until midnight of the third business

day, or until midnight of the seventh business day in the case of

a door-to-door sale of a personal emergency response service,

after the day on which the buyer has signed an agreement or

offer to purchase relating to such sale.

1. Cancellation occurs when written notice of cancellation is given

to the seller.

1. Notice of cancellation, if given by mail, shall be deemed given when

deposited in a mailbox properly addressed and postage prepaid.

1. Notice of cancellation need not take the form prescribed and shall be

sufficient if it indicates the intention of the buyer not to be bound.

Under both the federal regulation and NYS statute, buyers have until midnight of the third business day to cancel these types of sales. But in New York, the seller must also give you a notice of cancellation form and the time to cancel will not begin to run until that form is received.

 New York State also has right to cancel statutes that apply to certain industries, like Health Clubs. In the case of Health Clubs, the contract itself must contain a provision stating “CONSUMERS RIGHT TO CANCELLATION. YOU MAY CANCEL THIS CONTRACT WITHOUT ANY PENALTY OR FURTHER OBLIGATION WITHIN THREE (3) DAYS FROM THIS DATE.” See General Business Law §624.

A similar provision applies to Home Improvement contracts. See General Business Law §771.

New York State law also provides different cancellation rights and remedies when delivery of certain goods is not made within a specific time frame. See General Business Law §396-U (cancellation permitted when furniture and other household appliances not delivered on dates as promised) and General Business Law § 396-P (right to cancel when motor vehicle not delivered within 30 days of estimated delivery date) as well as cancellation rights under other circumstances.

Lastly, the contract itself may give you cancellation rights. However, you will only learn about these rights if you review the contract. Remember, these are exceptions to the general rule. In the absence of a statute or a contract provision, you have no general right to cancel a contract after you have signed it.

**Conclusion**

Carefully read forms (both sides) and other documents that you are asked to sign. If you cannot do so with an employee standing in front of you, tell them you need a few minutes and go to another location where you can concentrate. If the transaction involves a matter of consequence, and you have the time, call a lawyer or someone else with knowledge about the matter in issue. If permitted to, cross out and initial objectionable provisions. If all else fails, and you don’t want to run the risk that a court will uphold the provision, don’t sign the document and walk away. Never assume that you have a right to cancel the contract after you sign it.

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1. See General Obligations Law 5-701. In New York not every agreement needs to be in writing in order to be enforceable in a court. [↑](#footnote-ref-1)
2. *Florence v. Merchants Central Alarm Co., Inc.,* 51 N.Y.2d 793 (1980). [↑](#footnote-ref-2)
3. *Gillman v. Chase Manhattan Bank, NA*, 73 N.Y.2d 1 (1988). You would typically need to make “some showing of an `absence of meaningful choice…together with contract terms which are unreasonably favorable to the other party.'” [↑](#footnote-ref-3)