

In Breach of Contract

WHEN CAN A HOMEOWNER CANCEL A VALID CONSTRUCTION AGREEMENT ONCE MATERIALS HAVE BEEN ORDERED AND THE JOB'S BEEN SCHEDULED?

BY JIM CORY / SENIOR CONTRIBUTING EDITOR

It's early June. A New Jersey homeowner notices that the flat roofed part of his house is starting to sag in one corner. He's had on-again off-again leaks when it rains. He can see where the soffit and fascia are rotten in places. He asks around. Several neighbors recommend a roofer named Joe. Joe, whose company is an LLC and who maintains an office with a receptionist, specializes in replacing the type of flat roof prevalent in the neighborhood.

Getting Started

From the top of the ladder, Joe confirms that it's as bad as it looks. His proposal involves rebuilding the roof structure under the sinking corner, re-roofing with a new coating product that carries an extended 25-year warranty, and replacing the rotted soffit and fascia. The cost: \$14,800.

The homeowner wants to know if this can be done before September, since the situation is obviously deteriorating and he doesn't want to go through a rainy season, let alone winter, with the roof in that condition. Joe assures him that it can, and that in fact it would have to be, since the new roof coating won't adhere once the temperature drops below a certain point. He says he'll schedule the job for late July. Joe collects a \$5,000 deposit check. This being New

Jersey, he includes that July start date in the contract.

Fast forward to November. The homeowner is losing his mind. Joe has come out a few times to look things over but nothing's been started. The homeowner calls Joe's office. The receptionist takes a message, but no one calls back. He calls Joe's cell phone and leaves voice mail messages there, too.

The month before, Joe had promised to get the job underway, but then failed to show up. When the homeowner contacted him, Joe explained that his mother had died. A week followed. A second week. A third.

Right before Thanksgiving, the homeowner visits an attorney. The attorney, who doesn't know Joe, says that Joe is running a scam. He advises the homeowner to immediately cancel the contract and demand his money back. The homeowner leaves a message to this effect on Joe's cell phone. No one has responded to the homeowner's previous messages but Joe responds to this one right away. He has already bought the coating product for \$1,400, he tells the homeowner. Can they discuss it?

They agree on a time for the homeowner to meet Joe at the house, but Joe fails to show up or call either that day or that week. The homeowner leaves another message instructing Joe to deliver the materials to the house and to write him a check for the balance.

ORIGINS OF THE RULE

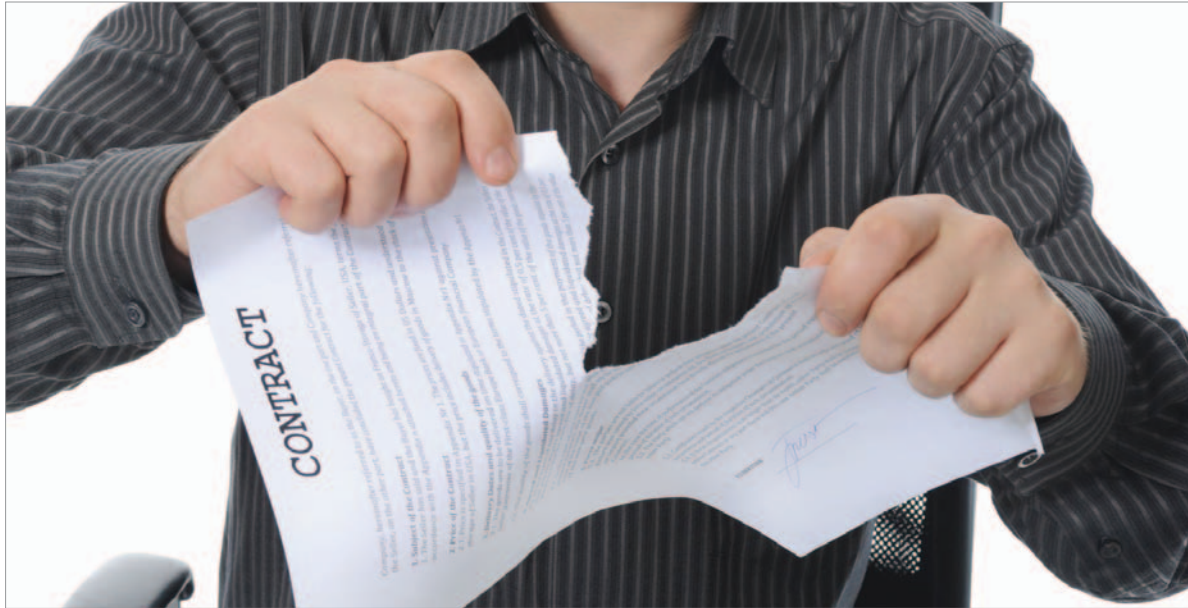
According to the Federal Trade Commission (FTC), its role is to “[work] for consumers to prevent fraudulent, deceptive, and unfair business practices and to provide information to help spot, stop, and avoid them.” To that end, during the late 1960s, in response to the high-pressure tactics of in-home sales, the FTC established a consumer-protection rule that would provide buyers with the opportunity to change their mind and cancel such agreements. The Right to Rescind rule doesn't apply to all products and services, but it does count for most home improvement transactions.

An Escape Hatch for Buyer's Remorse

These types of situations happen all the time, but homeowners often have no idea of their actual legal rights—hence the recourse to an attorney. And in many cases, contractors are equally in the dark. That lack of awareness can prove costly to either or both parties.

Construction contract laws, and their requirements, vary from state to state. In every state, however, your contract must include a three-day Right to Rescind clause, as spelled out by the Federal Trade Commission (FTC).

That's because “... it doesn't matter what state you live in, the Federal Government has ruled that ANY Home Improvement Contract signed in your customer's home must give the customer



▲ THE RIGHT TO RESCIND CLAUSE GOES BY OTHER NAMES, TOO: **THREE-DAY COOLING OFF PERIOD, THREE-DAY RIGHT OF RESCISSION, OR THREE-DAY RIGHT TO CANCEL**

BUSINESS DAY DEFINED

The consumer's right to cancel a contract for a full refund extends until midnight on the third business day after the sale. Saturday is considered a business day; Sundays and federal holidays are not. New Year's Day, Washington's birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, and Christmas Day aren't considered business days.

the right to cancel the contract within 3 business days after they sign FOR ANY REASON," notes ACT Contractors Forms, a website that provides contract forms and advice. And "any reason" could mean that the homeowner simply changed his or her mind, or decided to use the money for another purpose.

The right to rescind applies to any home improvement "whose value is \$25 or more," says the FTC, and the federal rule is a minimum that every state must follow. It can get more stringent from there. Your state's law, for instance, may require that the "Right to Rescind" clause appears several times in the contract, or in a different typeface, a larger size, or on its own page. It may specify that the salesperson is required to orally explain, at least once, maybe more, what the clause is and how it works. This clause functions like an escape hatch for consumers afflicted with buyer's remorse. The 72 hours begins upon contract signing. And if your contract doesn't contain the Right to Rescind clause, or you fail to explain its purpose, the homeowner can cancel at any time.

When and Where

If your contract does contain this clause, and you do point it out at contract signing, then the Right to Rescind clause is, for homeowners, pretty much their one shot to back out of a bad deal. Moreover, it doesn't apply to every consumer purchase of any size. Rather, as Texas Attorney General Greg Abbot points out, "The three day right of rescission law applies to sales made at facilities other than the seller's place of business. Such locations may be the consumer's residence and areas rented on a

temporary or short-term basis, such as hotel rooms or convention centers."

So if a homeowner signs a contract for a new kitchen or for new windows or siding at a desk in your showroom, can he still legally rescind within three days? No, he can't, since that's your place of business. The right to rescind specifically applies to contracts signed in the home. On the other hand, if a homeowner signs a contract at your booth at a home show, that would be covered by the FTC rule. If your client cancels within that period, you're obligated to refund the entire deposit within 30 days.

Think of it this way: Homeowners aren't responsible for your marketing and sales costs. And a cancelled sale is a marketing and sales cost.

Failure to Perform

But say that 72 hours has elapsed. What are your rights as the contractor? After all, you spent time to evaluate the property, assess the situation, and prepare a proposal. You may already have ordered the materials and have the job on your schedule.

Short answer: Once that three-day period has passed, it's difficult to legally cancel a construction contract. Any contractor understands why. Ordering needed materials, scheduling the project, lining up installers ... all consumes time and money. Typically, six to eight weeks elapse between contract signing and the actual project start date for a roofing, siding, or window job (weather permitting). It's not reasonable for the homeowner to have a sudden change of heart in, say, week five. Nor is it legally defensible for a homeowner who wants to

back out of a contract at some late date to cite trivial circumstances as a justification for doing so. These would be considered an “immaterial breach of contract,” and wouldn’t be valid grounds for termination.

But then there is Failure to Perform. That term is defined in several ways, but essentially it is a “material breach” of contract; that is, “a failure to do something so fundamental to the contract so as to defeat its essential purpose,” says The Construction Specifier. A material breach may well justify contract termination.

THE 72 HOURS BEGINS UPON CONTRACT SIGNING. AND IF YOUR CONTRACT DOESN'T CONTAIN THE RIGHT TO RESCIND CLAUSE, OR YOU FAIL TO EXPLAIN ITS PURPOSE, THE HOMEOWNER CAN CANCEL AT ANY TIME.

There are other reasons to cancel, says home improvement industry attorney D.S. Berenson, of Berenson LLP, in Great Falls, Va.: “As far as a customer canceling a contract post-rescission,” he writes in response to the example above, “there are dozens of ways to do that legally. For example, the contract used by the contractor may not have been in compliance with mandated state law. It may be missing a required disclosure, for instance. In some states, that opens up a cancellation right. The customer can also claim misrepresentation by the sales representative—or in this case, by the hypothetical Joe—and under certain state consumer protection statutes, that also can open up the right to rescind a contract, as can failure to hold the correct licensure or to place the license number on the contract or to have the sales representative licensed (such as is required in Maryland, Delaware, and four or five other states). And so on.”

In this case, Joe promised, in writing, to start the project within six weeks. Six months later, his crew had yet to put a

single nail into the roof. But even that may not give this homeowner a valid reason to cancel. Delays don’t constitute a material breach justifying termination, according to The Construction Specifier, “unless the time of performance is specified in the contract to be of the essence or unless the circumstances under which the contract was negotiated demonstrate an intention by the parties to make the timeliness of performance an essential or material term.”

If Joe was told that the need to complete the work within the promised time frame

was urgent, and after agreeing that it was urgent then dallied for half a year, for whatever reasons, a judge may well rule that Joe has broken the contract.

One More Chance? Not a Chance

In the first week of January, Joe arrived at the house with the buckets of roof coating in his truck and a check for \$3,600. He explained that not only had his mother died, but his aunt had died, and then so had the motor in his truck. He told the homeowner that he felt embarrassed because he’d never been fired from a job before. Clearly, Joe was hoping the homeowner would change his mind. But the homeowner’s patience was exhausted. Once the buckets were stacked in the garage and Joe’s truck was out of the driveway, the homeowner headed directly to the bank with that check. It cleared. **PRO**

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WHERE DOES THE RULE APPLY?

The right to rescind rule applies to contracts signed at the buyer’s home, workplace, or dormitory, or at facilities that are rented by the contractor on a temporary or short-term basis, such as hotel or motel rooms, convention centers, fairgrounds, and restaurants.

When the contract is signed at the contractor’s regular place of business and not in the customer’s home, the three-day right to rescind doesn’t apply and the customer is bound by the contract from the moment it is signed.

EXCEPTIONS TO THE RULE

The cooling off rule doesn’t cover sales that are:

- less than \$25;
- for goods/services not primarily intended for personal, family, or household purposes;
- made entirely by mail or phone;
- the result of prior negotiations at the contractor’s permanent business location where goods are regularly sold and that finish with a contract signing in the consumer’s home;
- emergency home repairs.

ONLINE RESOURCES

Federal Trade Commission:

consumer.ftc.gov

Construction Specifications Institute magazine

The Construction Specifier.

constructionspecifier.com

ACT Contractors Forms:

actcontractorsforms.com

Lawyers.com (forms and legal info):

business-law.lawyers.com