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# ***ASSENT TO TERMS IN CONSUMER CONTRACTS***

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## **I. New Contract Formats Are Prevalent in Consumer Contracts.**

### **A. These are not your father’s consumer contracts.**

“With the rise of internet commerce and electronic recordkeeping over the last two decades, courts have grappled with electronic forms of transactions where novel methods have been used to form contracts. These new contract formats—variously called “shrinkwrap,” “clickwrap,” or “browsewrap” agreements—have terms that are often not fully revealed to the buyer until after the transaction is complete.”

State ex rel. U-Haul Co. of W. Virginia v. Zakaib (“U-Haul I”), 232 W. Va. 432, 439–40, 752 S.E.2d 586, 593–94 (2013) (*internal quotations and footnotes omitted*).

The *U-Haul I* Court defined these new agreements:

1. A shrinkwrap agreement is a one-page writing inside transparent plastic wrapped around a product (often computer software) that can be read by a purchaser before tearing open the plastic wrap. The writing typically states that, if the purchaser opens the shrinkwrap packaging and uses the product inside, then the purchaser is agreeing to a contract drafted by the seller.
2. A browsewrap agreement with a customer by posting terms and conditions that typically can only be accessed through a hyperlink at the bottom of the screen. Unlike a clickwrap agreement, a browsewrap agreement does not require the user to manifest assent to the terms and conditions expressly. A party instead gives his assent simply by using the website.
3. A clickwrap or click-through agreement usually appears on an internet webpage and requires that a user consent to any terms or conditions by clicking on a dialog box on the screen in order to proceed with the internet transaction. To form such an agreement, users typically click an ‘I agree’ box after being presented with a list of terms and conditions of use.

**B. But, the old rules for enforceability and interpretation still apply.**

An agreement where the terms are presented in an electronic form, or one that is signed electronically, is therefore interpreted and applied using the same common law rules that have been applied for hundreds of years to oral and written agreements.

*U-Haul I*, 232 W. Va. at 441, 752 S.E.2d at 595.

**C. And, terms can still be incorporated by reference.**

*[W]*e hold that, in the law of contracts, parties may incorporate by reference separate writings together into one agreement. However, a general reference in one writing to another document is not sufficient to incorporate that other document into a final agreement. To uphold the validity of terms in a document incorporated by reference, (1) the writing must make a clear reference to the other document so that the parties' assent to the reference is unmistakable; (2) the writing must describe the other document in such terms that its identity may be ascertained beyond doubt; and (3) it must be certain that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship.

*U-Haul I*, 232 W. Va. at 444, 752 S.E.2d at 598.

**D. Browsewrap assent is disfavored. Or is it?**

**1. The Court's standard shows disfavor:**

*[C]*ourts have been wary to enforce browsewrap agreements where the terms and conditions are heavily obscured, often only briefly referenced at the bottom of a page buried deep within a website. Because visitors to the website are often completely unaware that they are bound by the website's terms simply by being on the website, much less aware of the substance of those terms, browsewrap agreements in which terms and conditions are heavily obscured have been viewed with suspicion.

*Citizens Telecommunications Co. of W. Virginia v. Sheridan*, 239 W. Va. 67, 72, 799 S.E.2d 144, 149 (2017).

**2. But the Court seems to strictly construe what constitutes browsewrap.**

Distinguishing browsewrap caselaw where notice of terms given other ways:

Although Frontier made the Terms and Conditions accessible online, they also indisputably were distributed to Respondents in the November 2012 paper billing statement. The contract between Frontier and its customers was not executed over

the Internet or any other electronic platform; the Terms and Conditions merely were made available in more than one medium. Likewise, acceptance of Frontier's Terms and Conditions was not manifested through use of its website alone, which is the hallmark of a browsewrap agreement. In fact, Frontier admits it was not necessary for customers to ever visit the website in order to continue service. Rather, acceptance of the Terms and Conditions occurred through continued use of Frontier's Internet service.

*Id.*

## **II. Assent To Modification Of Existing Contracts May Be Different.**

### **A. General contract principles apply.**

In *Schumacher Homes of Circleville, Inc. v. Spencer*, 237 W.Va. 379, 391-92, 787 S.E.2d 650, 662-63 (2016), the Court confirmed the applicability of general contract principles:

The general tools for examining contracts are familiar to any first-year law student: ambiguity, coercion, duress, estoppel, fraud, impracticality, laches, lack of capacity, misrepresentation, mistake, mutuality of assent, unconscionability, undue influence, waiver, or even lack of offer, acceptance or consideration. If the contract defense exists under general state contract law principles, then it may be asserted to counter the claim that an arbitration agreement or a provision therein binds the parties.

In *Citizens Telecommunications Co.*, 239 W. Va. 67, 73, 799 S.E.2d 144, 150 (2017), the Court applied these general principles to the modification of a consumer contract:

Notice requirements and mutual assent to modification are contract principles that apply irrespective of the subject matter of the term or terms being modified. . Thus, the arbitration provision added to Frontier's Terms and Conditions is subject to the same scrutiny and notice requirements as any other modification of a contract.

*Id.* (citing *Schumacher Homes, supra*).

### **B. Assent can be shown by silence and action if notice is effective.**

The Terms and Conditions at issue here are the prototypical unilateral contract. A unilateral contract is established "where one party makes a promissory offer and the other accepts by performing an act rather than by making a return promise." *Cook v. Heck's Inc.*, 176 W.Va. 368, 373, 342 S.E.2d 453, 458 (1986). We have recognized "[t]hat an acceptance may be effected by silence accompanied by an act of the offeree which constitutes

a performance of that requested by the offeror.” *First Nat’l Bank v. Marietta Mfg. Co.*, 151 W.Va. 636, 641-42, 153 S.E.2d 172, 176 (1967). Frontier presented its Terms and Conditions as a condition of providing Internet service to customers, and Frontier’s customers accepted those Terms and Conditions by using and paying for that Internet service, forming a unilateral contract.

*Citizens Telecommunications Co.*, 239 W. Va. at 73, 799 S.E.2d at 150.

### **III. Location, Location, Location . . . Choice Of Law Matters.**

#### **A. *U-Haul I*’s standard is a matter of West Virginia law.**

We note that [the Arizona incorporation by reference] standard differs from the West Virginia standard for incorporation by reference. . . .

[See] *State ex rel. U–Haul Co. of W. Virginia v. Zakaib*, 232 W.Va. 432, 752 S.E.2d 586 (2013). Thus, the outcome of this case may be different were we to apply U–Haul.

*W. Virginia CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.*, 238 W. Va. 465, 475, n.11, 796 S.E.2d 574, 584, n.11 (2017).

#### **B. The Court will use the presence of choice of law clauses (or presumably other applicable choice of law rules) to apply another state’s law on assent.**

“As we explained above, however, we are bound to apply the contracting parties’ choice-of-law to this matter. Accordingly, we apply the law of Arizona.”

*Id.*

### **IV. Application.**

#### **A. *Evans v. Bayles*, 237 W.Va. 269, 787 S.E.2d 540 (2016).**

##### **Incorporation recognized**

- Arbitration provisions were set forth in a brokerage agreement that was incorporated by reference into a signed application.
- Application not only referenced the arbitration clause in brokerage agreement, but also expressly referenced where the arbitration provision could be found within the brokerage agreement.
- Application included acknowledgement that customer received and read incorporated by reference.

- Testimony in case that broker called the predispute arbitration clause to customer's attention, that he explained the arbitration process to the customer, that he provided a complete copy of the incorporated agreement to the customer. Brokerage Agreement to the decedent.

*Id.* at 273, 787 S.E.2d at 544.

**B. *G & G Builders, Inc. v. Lawson*, 238 W. Va. 280, 794 S.E.2d 1 (2016).  
Incorporation rejected**

- Question of whether 12 page American Institute of Architects form agreement which contained statement in the right-hand margin of the first page of the Agreement that "AIA Document A201-1997, General Conditions of the Contract for Construction, is adopted in this document by reference" was effective to impose arbitration requirement contained in the AIA General Conditions.
- Purportedly incorporated General Conditions were neither attached nor provided to customer.
- There was no provision in the agreement requiring Mr. Lawson to acknowledge that he had received, read, or agreed to the General Conditions.
- There was no allegation that the General Conditions were brought to customer's attention.
- Customer denied seeing General Conditions prior to litigation.
- The word "arbitration" does not appear anywhere in the agreement.

**C. *Navient Solutions., Inc. v. Robinette*, No. 14-1215, 2015 WL 6756859 (Mem.)  
(W. Va. Nov. 4, 2015).  
Incorporation recognized**

- Question of whether student loan application and promissory note were two separate agreements.
- Court found that the unity of the various contracts is demonstrated by their repeated references to the promissory note on the signature page.
- Borrower expressly acknowledged that the "terms and conditions set forth in the Promissory Note constitute[d] the *entire agreement*" between herself and Navient.
- Borrower also acknowledged: "I have read and agree to the terms of the Promissory Note accompanying this application."



- No testimony that promissory note was orally called to borrower's attention or that arbitration was mentioned in agreement.

**D. *Citizens Telecommunications Co. of W. Virginia v. Sheridan*, 239 W. Va. 67, 74, 799 S.E.2d 144, 151 (2017).  
Contractual amendment recognized.**

- Customer given notice on page four of billing statement that a modification to the terms and conditions was being made relating to the arbitration provision, which was to become effective in forty-five days.
- Billing statement referred customers to website, where the terms and conditions could be accessed online.
- Billing statement advised that customers could also call for information concerning the modification.
- Entirety of terms and conditions included in one of the monthly bills.
- Customers argued that terms and conditions are difficult to find on website and that they never actually read the arbitration provision because it was not printed separately and directly on the bill.