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Shrinkwrap, Clickwrap, and Other Software License Agreements: Litigating a Digital Pig in a Poke in West Virginia

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SHRINKWRAP, CLICKWRAP, AND OTHER SOFTWARE LICENSE AGREEMENTS: LITIGATING A DIGITAL PIG IN A POKE IN WEST VIRGINIA

I. INTRODUCTION ................................................................................... 532

II. TREATMENT OF SOFTWARE UNDER EXISTING LAW ................... 536
   A. Congress Intervenes to Prevent Software from Being Rented, Leased, or Lent ........................................................ 537
   B. Does Software Differ from Other Copyrighted Works? ........... 538
   C. The Practice of Distributing Software Under License Continues ............................................................................ 539
   D. The Legacy of ProCD and Its Progeny ..................................... 543

III. TERRIBLE TERMS ................................................................................ 548

IV. LITIGATING SHRINKWRAP AND CLICKWRAP AGREEMENTS UNDER WEST VIRGINIA LAW ............................................................ 551
   A. Is Software “Goods” Under West Virginia Law? .................. 552
      1. Shrinkwrap and Clickwrap Agreements Are Unenforceable Under West Virginia Common Law ....................................................... 554
      2. Shrinkwrap and Clickwrap Agreements Are Enforced In Spite of the U.C.C., Not Because of It.. 558
   B. Implications of the West Virginia Consumer Credit and Protection Act on Software ......................................................... 566
   C. Litigation Strategies Under West Virginia (and Federal) Law ........................................................................................ 568
      1. Choice of Law Provisions; Forum Selection and Arbitration Clauses: Not Necessarily a Foregone Conclusion .......................... 569
      2. Unconscionability: Not a Shockingly Original Strategy ........................................................................................................ 574
      3. Fraud, Duress, and Misrepresentation: Common Law Cures for the FAA Blues ................................................................. 575
      4. A Brief Tour of the Magnuson-Mossery with Regard to EULAS ................................................................. 576
      5. The U.C.C.’s Balancing Act ......................................................... 579

V. CONCLUSION ...................................................................................... 579
I. INTRODUCTION

"[The Uniform Commercial Code's] liberal recognition of the needs of commerce ... shall not be made into an instrument of abuse."¹

For centuries, merchants have sought to hustle the sale of their wares speedily or sight unseen, the obvious advantage being that the buyer, in haste, may overlook a flaw or strike a bargain on impulse, thus promoting the sale of a good that might have otherwise been passed over or purchased for a lower price given careful consideration, momentary reflection, or further negotiation. In medieval Europe, merchants were known to occasionally pass off a runt—or even the less-valued cat—as a suckling piglet at market to the unwary customer by concealing the animal in a sling-sack, known as a "poke," and conducting the transaction sight unseen under the pretense that opening the bag might allow the animal to escape.² Thus the idiom "to buy a pig in a poke" became synonymous with making a less than fully-informed purchase.³ The victim of this grift might not discover the folly of his purchase until returning home, where the poke would be opened, thereby "letting the cat out of the bag."⁴

Today, states have responded to such sharp business practices by imposing certain implied warranties upon the parties by operation of law.⁵ Notwith-

¹ U.C.C. § 1-303 cmt. 9 (2004) (referring to the admissibility of evidence regarding the usage of trade). While more than half of the states have adopted Revised Article 1 of the Uniform Commercial Code, as of this writing, no state has adopted the latest proposed amendments to Article 2. For this reason, when citing Uniform Commercial Code—General Provisions, this Note refers to the 2004 amendments to Article 1, but when citing Uniform Commercial Code—Sales, this Note refers to the 2000 version of Article 2.
² CHARLES EARLE FUNK, A HOG ON ICE AND OTHER CURIOUS EXPRESSIONS 105-06 (1948).
³ Id.
⁴ Id. at 138.
⁵ In addition to other protections, such as state consumer protection statutes (discussed infra Part IV), the Uniform Commercial Code (U.C.C.) imposes an implied warranty of merchantability on all contracts for the sale of goods where the seller is a merchant, unless otherwise agreed. U.C.C. § 2-314 (2000). The warranty of merchantability requires, among other standards, that the goods at a minimum "pass without objection in the trade under the contract description; ... are fit for the ordinary purposes for which such goods are used; and ... are adequately contained, packaged, and labeled as the agreement may require." Id. § 2-314(2). A "merchant" is defined as "a person who deals in goods of the kind or otherwise ... holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction." Id. § 2-104(1). The U.C.C. demarcates three types of merchants: merchants as to goods, merchants as to practices, and merchants as to both goods and practices. Id. § 2-104 cmt. 2. Only a merchant as to goods or a merchant as to both goods and practices makes the warranty of merchantability, not a merchant of the penultimate type. Id. § 2-314(1). However, any seller making an express "guarantee" may be obligated to provide goods that are at least "merchantable." Id. § 2-314 cmt. 4. A "consumer" is "an individual who enters into a transaction primarily for personal, family, or household purposes." Id. § 1-201(b)(11).
standing these efforts, computer software developers continue to engage in similarly prestidigitatorial tactics to reduce potential liability for defects in their products and to control distribution by offering their wares on a take-it-or-leave-it basis where the buyer must arguably "consent" to the terms of a license prior to opening the software or operating it on a computer. This is often accomplished through the use of "shrinkwrap" or "clickwrap" agreements, the terms of which are not fully revealed to the buyer until after the transaction is complete.

The Uniform Commercial Code (U.C.C.) provides that "[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Although software arguably differs from other types of "goods," because most states have yet to adopt statutes specifically designed to govern software transactions, the majority of courts have applied Article 2 of the U.C.C., at least by

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6 As used in this Note, the term "software" is equivalent to "computer program," which is defined under the United States Copyright Act as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." 17 U.S.C. §§ 101–122 (2005).

7 Although license terms employed by software developers typically include both disclaimers of warranties and limitations on remedies, this Note applies the former term to describe both.

8 While there are many names given to terms presented to software users in this manner, as used in this Note, "shrinkwrap" agreements refer to license terms "agreed to" by the user upon opening the software packaging, regardless as to whether the basic terms are viewable prior to breaking the packaging seal. "Box-top" licenses are distinguished from shrinkwrap agreements only in that box-top licenses contain all of the terms of the license on the outside of the package; therefore, the buyer may view the terms in their entirety prior to purchase, whereas shrinkwrap agreements contain only notice, or a partial listing, of the terms on the outside of the packaging that reference the terms contained inside the packaging (see infra note 22). "Clickwrap" (also known as "click-through") agreements refer to license terms displayed on the computer screen when the user installs the program or runs it for the first time. The terms are typically displayed in a scrollable window to which the user must manifest "assent" to the terms or decline them by moving the pointer over the appropriate response button and clicking the mouse. The program will not launch until the "acceptance" button is selected with the pointer, but once selected, the user is not prompted to "accept" again during subsequent use of the software.

Additionally, these types of terms will collectively be called "end user license agreements" (EULAs) throughout this Note. Although much software is distributed via the internet through "browsewrap" agreements, which may be either given away ("freeware"), shared for a limited time or with limited functionality and then either bought or disabled ("shareware"), or sold directly or indirectly from its developer, this Note is primarily concerned with consumer software purchased through a retailer ("canned" software). Furthermore, other variations on these types of agreements, such as terms of use (TOU) and terms of service (TOS) exist as well, but such agreements are not the focus of this Note. This Note is primarily concerned with the scenario where a consumer purchases mass-marketed software from a "brick and mortar" store, returns home to install the program on a home computer, and is confronted with a EULA purporting to disclaim most or all warranties and liability concerning the software. However, to a large extent, the litigation of the underlying issues arising under shrinkwrap and clickwrap agreements is common to all software and website use agreements; therefore, the matters discussed herein are generally applicable to any such set of terms.

9 U.C.C. § 2-204(1).
analogy. In doing so, several courts have found shrinkwrap and clickwrap terms to be binding under specific provisions of the U.C.C. These courts uphold the validity of shrinkwrap and clickwrap agreements based either on the U.C.C.'s promulgated predilection for the modernization and expansion of commercial practices or on the basis that the new terms modify the original sale, are proposed additions that become part of the contract, or constitute a new "offer" to which the user "accepts" through continued use of the product. However, in applying such provisions of the U.C.C. to govern software agreements, these courts misconstrue the text, fail to consult the comments, and are too oft apt to ignore those provisions that shield the buyer from obligatory ambush.

The difficulty that courts have had in deciding disputes in this area of contract law is apparent from the inconsistent holdings among the jurisdictions. While two states have adopted separate laws to govern these transactions, the West Virginia legislature has presumably deemed existing proposals, such as the Uniform Computer Information Transactions Act (UCITA), inade-

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10 See, e.g., Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 675–76 (3rd Cir. 1991) ("[T]he majority espous[es] the view that software fits within the definition of a ‘good’ in the U.C.C."); RRX Indus., Inc. v. Lab-Con, Inc., 772 F.2d 543, 546 (9th Cir. 1985) ("[Services] and system upgrading were incidental to sale of the software package and did not defeat characterization of the system as a good."); Softman Prods. Co. v. Adobe Sys., Inc., 171 F. Supp. 2d 1075, 1084 (C.D. Cal. 2001) ("A number of courts have held that the sale of software is the sale of a good within the meaning of Uniform Commercial Code."); Wachter Mgmt. Co. v. Dexter & Chaney, Inc., 144 P.3d 747, 750 (Kan. 2006) ("Computer software is considered to be goods subject to the U.C.C. even though incidental services are provided along with the sale of the software."). For a semi-exhaustive list of shrinkwrap and clickwrap cases, see Kevin W. Grierson, Annotation, Enforceability of "Clickwrap" or "Shrinkwrap" Agreements Common in Computer Software, Hardware, and Internet Transactions, 106 A.L.R. 5th 309 (2003).

11 E.g., most cases upholding the validity of shrinkwrap and clickwrap agreements stem from the holding in ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), which based its decision, at least in part, on section 2-204(1) of the U.C.C. See also M.A. Mortenson Co., Inc. v. Timberline Software Corp., 998 P.2d 305, 313 (Wash. 2000) (concluding that section 2-204 of the U.C.C. "allows the formation of ‘layered contracts’").


13 Id. § 2-209.

14 Id. § 2-207.

15 Id. § 2-206 (acceptance "shall be construed ... in any manner and by any medium reasonable under the circumstances"); ("Acceptance of goods occurs when the buyer ... fails to make an effective rejection ... [after] a reasonable opportunity to inspect them ... "). See, e.g., ProCD, 86 F.3d at 1452 ("A buyer accepts goods under § 2-606(1)(b) when, after an opportunity to inspect, he fails to make an effective rejection under § 2-602(1).")

16 "The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Uniform Commercial Code, as a whole ... ." U.C.C. § 1-103 cmt. 1 (emphasis added).

17 See infra Part II.
quate to protect consumers from overreaching by software developers (which occupy superior positions of bargaining power), thus indicating a propensity toward consumer rights.\(^{18}\) However, the stance that the West Virginia courts will adopt apropos of the issue has yet to be determined.\(^{19}\) Therefore, an examination of this developing area of contract law under the lens of existing West Virginia decisions and statutes may be useful in crafting a litigation strategy until the matter is disposed of by the West Virginia courts or a consensus can be reached among the states.

This Note examines the validity of warranty and liability disclaimers in consumer transactions regarding shrinkwrap and clickwrap agreements, and discusses litigation strategies in this field under West Virginia law. Part II of this Note discusses the current treatment of shrinkwrap and clickwrap agreements under existing law in jurisdictions outside of West Virginia to provide a

\(^{18}\) As of this writing, only Maryland and Virginia have adopted a body of law that specifically addresses shrinkwrap and clickwrap agreements, known as UCITA (see infra Part IV). However, West Virginia has explicitly rejected UCITA, and has even passed "bomb shelter" legislation to protect its residents and businesses from this uniform act. W. VA. CODE § 55-8-15 (2001). See infra Part IV.C.1. This legislation was drafted, i.a, by the Americans for Fair Electronic Commerce Transactions (AFFECT), a non-profit coalition "formed to defeat attempts to pass . . . UCITA." See http://affect.ucita.com/pdf/UCITABombShelter.pdf and http://www.ucita.com/who.html, respectively (both last visited Feb. 8, 2008). See also, H. WARD CLASSEN, A PRACTICAL GUIDE TO SOFTWARE LICENSING FOR LICENSEES AND LICENSORS 162 (2nd ed. 2007); Robin C. Capehart & Mark A. Starcher, "Wired, Wonderful West Virginia"—Electronic Signatures in the Mountain State, 104 W. VA. L. REV. 303, 340 (2002) ("This provision, which has been adopted in other states, is a reaction to the perceived 'procompany' slant of the UCITA.").

\(^{19}\) In Schultz v. AT&T Wireless Servs., Inc., 376 F. Supp. 2d 685 (N.D. W. Va. 2005), the court, in obiter dictum (and as such, the statement carries no precedential value), agreed with the finding in ProCD, that "terms inside a box of software could bind consumers who use the software after being given an opportunity to read and reject the terms and return the item." Id. at 691 (citing ProCD, 86 F.3d 1447). Finding that the plaintiff accepted the terms of an arbitration clause in consideration for "a promotional contract and a discounted phone" through activation and continued use of the phone and service, and that the provision was conscionable, the court held the arbitration clause to be legally enforceable. Id. at 692. However, contract law is generally established by the state; therefore, West Virginia courts are not bound by Schultz, except with respect to questions of federal law. See discussions on the Copyright Act, infra Part II and the Federal Arbitration Act (FAA), infra Part IV.

It should be noted that the predominant purpose of a wireless telephone contract is the provision of services, not goods. As evidence of this, many service providers offer free phones in exchange for the consumer's agreement to enter into a service contract, the monthly billing rate for which often exceeds the price of the phone (even where the latter is purchased separately), and most service contracts continue by their terms for at least a year. Furthermore, the complaint in Schultz arose "from a wireless telephone service contract," whereby the plaintiff alleged that the defendant breached by "unlawfully withdrawing funds from his bank account," thus the gravamen of the complaint was based on the service aspect of the transaction, which had nothing to do with the goods themselves. Id. at 687 (emphasis added). Because the "contract" in ProCD could only be formed under U.C.C. principles applying to goods (see infra Part IV.A.1), the allusion to ProCD in the Schultz opinion was inappropriate. "The danger of undisciplined dicta is that lawyers and nisi prius judges may take it seriously." Pittsburgh Elevator v. W. Va. Bd. of Regents, 310 S.E.2d 675, 690 (W. Va. 1983) (Neely, J., concurring in part and dissenting in part).
brief history of the reasons such agreements were created and how the courts have dealt with them, as well as to illustrate the inconsistencies and difficulties courts have struggled with in coming to terms with an economic force that outpaces the common law's ability to adapt. Part III explores terms common to shrinkwrap and clickwrap agreements, pointing out a few of the more egregious terms employed by software developers to later illustrate, in Part IV, how a proper application of the U.C.C. and West Virginia law might avert their validity in the consumer context while providing a fair playing field that not only balances the interests of the parties, but those of society at large. Part IV provides litigation strategies under West Virginia law in the event that West Virginia courts determine such terms to be valid and enforceable.

II. Treatment of Software Under Existing Law

In the beginning, software developers sought to avoid the first sale doctrine by licensing their programs rather than transferring ownership in them to purchasers. This was initially achieved through the use of "box-top" licenses, the precursor to the modern day end user license agreement (EULA). Courts generally accepted the software developer's designation of the nature of the transaction "without much examination." The rationale adopted by the courts early in the development of this area of law was that the speed and ease with which one could duplicate software would destroy the economic incentive to create it if third parties were permitted to rent software to consumers, because consumers would simply rent and copy the software rather than purchase it. Although doing so would be illegal, as copyright infringement, enforcement against individual consumers would be costly and difficult. "Thus, software producers wanted to sue the companies that were renting the copies of the program to individual consumers, rather than the individual consumers themselves. . . [b]y characterizing the original transaction between the software producer and the software rental company as a license, rather than a sale." In making the license exclusive and non-transferable, "software producers hoped

20 The first sale doctrine entitles the owner of a lawful copy of a copyrighted work "to sell or otherwise dispose of the possession of that copy" freely. 17 U.S.C. § 109(a) (2005).
21 Step-Saver Data Sys., Inc. v. Wyse Tech., Inc., 939 F.2d 91, 96 n.7 (3rd Cir. 1991).
22 A box-top license typically "provides that the customer has not purchased the software itself, but has merely obtained a personal, non-transferable license to use the program." Id. See supra note 8. The box-top license was generally succeeded by the shrinkwrap license due to increasingly complex license terms, which prevented software companies from being able to fit the entire set of terms on the outside of the software packaging.
24 See Step-Saver, 939 F.2d 91 at 96 n.7.
25 Id.
to avoid the reach of the first sale doctrine and to establish a basis in state contract law for suing the software rental companies directly.\textsuperscript{26}

A. \textit{Congress Intervenes to Prevent Software from Being Rented, Leased, or Lent}

The problem with a licensing approach was that uncertainty remained as to whether state contract law would be preempted by the Federal Copyright Act or by the Constitution itself, which grants exclusive authority over copyright matters to the federal government.\textsuperscript{27} Congress responded to this concern by amending the first sale doctrine as it applies to computers and audio recordings in 1990.\textsuperscript{28} Although this amendment does not forbid a purchaser from selling his or her copy of a software program to another, it does prevent anyone along the distribution chain from legally renting, leasing, or lending that copy for financial gain.\textsuperscript{29} However, the first sale doctrine merely severs the copyright holder's exclusive right of distribution; it does not entitle immediate or remote purchasers to copy that work.\textsuperscript{30} Since software cannot be used without a computer first copying—at the very least—some sequence of its copyrighted code into the computer's random access memory (RAM), Congress included a provision in the Copyright Act to enable immediate or remote purchasers to make a copy of the program if doing so is necessary as an "essential step in the utilization of [the] program."\textsuperscript{31} Because the first sale doctrine applies only to transfers in ownership, if a software developer merely grants a license rather than making an outright "sale" of a copy of its product, the first sale doctrine does not apply.\textsuperscript{32} Therefore, software developers encountered a dilemma: how could they sell the media on which the software program is fixed to the consumer for a onetime purchase price—thus maximizing profit—while at the same time retain ownership in the individual copies themselves? Enter the rolling contract.\textsuperscript{33}

\textsuperscript{26} \textit{Id.}.
\textsuperscript{27} U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have power to... promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."); 17 U.S.C. §§ 101–122 (2005).
\textsuperscript{28} \textit{Step-Saver}, 939 F.2d 91 at 96 n.7. \textit{See also} Computer Software Rental Amendments Act 17 U.S.C. § 109(b) (2005) ("Notwithstanding [the first sale doctrine], unless authorized by... the owner of copyright in a computer program... [no person] may, for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that [computer program] by rental, lease, or lending."). Excluded from this provision are nonprofit libraries and nonprofit educational institutions, due to the noncommercial nature of their rental, lease, and lending practices.
\textsuperscript{29} \textit{Step-Saver}, 939 F.2d 91 at 96 n.7.
\textsuperscript{30} Nadan, \textit{supra} note 23, at 560–61.
\textsuperscript{31} 17 U.S.C. § 117(a) (2005); Nadan, \textit{supra} note 23, at 56–63.
\textsuperscript{32} Nadan, \textit{supra} note 23, at 564–67.
\textsuperscript{33} Where EULAs are deemed valid and enforceable, but treated as apart from the sale of the media they are often called "rolling" or "layered" contracts, because the sale of the media upon
B. Does Software Differ from Other Copyrighted Works?

Software developers contend that computer software is a unique form of copyrighted work.\textsuperscript{34} Like other forms of material expression, software consists of an original work of authorship fixed in a reproducible, tangible medium.\textsuperscript{35} However, developers aver that unlike other forms of material expression, a single copy of software is capable of determining the success or failure of an entire business.\textsuperscript{36} This fact, if true, arguably creates two legitimate justifications for treating software differently from other forms of recorded media: market segmentation and liability limitation.\textsuperscript{37}

Market segmentation is the categorical arrangement of prospective buyers into sectors, according to each buyer's price elasticity of demand.\textsuperscript{38} The software industry achieves this by charging its commercial users more than the general public or academic users for substantially similar versions of their products.\textsuperscript{39} Price discrimination is generally legal in this context, and there are significant policy reasons for permitting market segmentation in the sale of software. If software developers were to charge the same rate to all users, not only would consumer costs increase to equalize the current price differential, but the aggregate price would increase as well, because the total number of consumers purchasing the software would decline.\textsuperscript{40} Furthermore, allowing academic purchasers a lower price than commercial entities promotes human capital to the benefit of society as a whole by increasing access to the tools that foster the technical skills of those entering the job market, which in turn leads to a more productive workforce and greater taxable revenue.

Without some artificially constructed restraint on alienation, software would be difficult, if not impossible, to segment in this manner. As pointed out by Judge Easterbrook in ProCD, a watershed decision\textsuperscript{41} on the enforceability of EULAs, "[t]o make price discrimination work . . . the seller must be able to control arbitrage," because a purchaser "could buy the software [at the lower con-
sumer price] and resell to a commercial user [at a higher price],” thus eliminating the developer’s purpose in providing the software to a segmented market.\(^{42}\)

Additionally, some limitation on software developers’ liability to consequential damages is necessary to control costs. Because an entire company may rely on only one software program to conduct business, permitting recovery for product liability without limitation can potentially hold a developer liable for consequential damages amounting to millions or even billions of dollars for a single copy of a software product.\(^{43}\) This is not often the case with traditional copyrighted works, such as books, music, movies, and art.\(^{44}\)

**C. The Practice of Distributing Software Under License Continues**

While market segmentation and liability limitation might be appropriate justifications for treating software differently from other forms of intellectual property, one justification often advanced by courts favoring differential treatment of software is not: ease of reproduction. In *Adobe Sys., Inc. v. Stargate Software, Inc.*, Judge Ware correctly noted that “software is unique from other forms of copyrighted information.”\(^{45}\) However, Judge Ware’s analysis faltered soon thereafter:\(^{46}\) “[s]oftware fundamentally differs from more traditional forms of medium, such as print or phonographic materials, in that software . . . [is] more readily and easily copied on a mass scale in an extraordinarily short amount of time and relatively inexpensively.”\(^{47}\) As one commentator correctly points out, print and music can be converted into digital form and copied at comparable rates.\(^{48}\) By the time *Stargate* was decided, this was clearly evident, and as technology evolves, the differences in time and expense of copying between the various types of media will continue to diminish.\(^{49}\) Thus, the traditional rationale—and hence, a number of court decisions—for treating software differently from other forms of copyrighted work is no longer valid.\(^{50}\) Adhering to this “duplication and dissemination” justification for differential treatment of

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\(^{42}\) *ProCD*, 86 F.3d at 1450.


\(^{44}\) *Id.* at 557.

\(^{45}\) 216 F. Supp. 2d 1051, 1059 (N.D. Cal. 2002).

\(^{46}\) *See* Nadan, *supra* note 23, at 558:

The usual argument is that software is different because it is so easily copied, therefore it needs special protection. This argument breaks down, however, as the advent of photocopying machines and electronic storage (including digitally recorded movies, music and e-books) makes copying of these other copyrighted works just as problematic.


\(^{48}\) *See* Nadan, *supra* note 23, at 558.

\(^{49}\) *Id.*

\(^{50}\) *See*, *e.g.*, Wall Data Inc. v. Los Angeles County Sheriff’s Dept., 447 F.3d 769, 781 (Cal. 2006) (quoting *Stargate*, 216 F. Supp. 2d at 1059).
software, courts would be compelled to enforce EULAs in every form of copyrighted medium; the creators of such works would be more than happy to oblige by "licensing" their products accordingly. However, unless and until the courts and society are willing to reject the first sale doctrine in toto, Judge Ware's rationale should be spurned from future decisions.

Although software may be unique in its use, distribution method, and potential liability concerns, the nature of the work itself is not. The majority of courts treat software as "goods" within the meaning of Article 2 of the U.C.C. Of those few that do not, the mistake that such courts make is to assume that Article 2 cannot or should not apply to the purchase of software, based on the fact that software includes both tangible and intangible properties. Routinely offered as the rationale for such an argument is that the media conveying the program code is incidental to what the buyer is actually paying for: an intangible copyrighted work. Such an approach distorts the issue. Article 2 of the U.C.C. is a body of law governing contracts as they relate to transactions in goods, not the goods themselves. A valid, enforceable license agreement is just that—a contract—and if a thing is movable, sellable, and not money "in which the price is to be paid," investment securities, or things in action (rights to recover money or property) it is "goods" within the meaning of Article 2 of the U.C.C. Furthermore, Article 2 explicitly provides that included within its scope are "sale[s] of a part interest in existing identified goods." A purchase

51 Attempts to bind consumers through similarly adhesive licensing "contracts" in other forms of media, such as books and music, have been used for over one hundred years in the United States, but have failed to pass contractual muster. See Straus v. Victor Talking Mach. Co., 243 U.S. 490 (1917); Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908), discussed infra Part II.D.

52 See supra note 10.

53 See, e.g., U.S. v. Brown, 925 F.2d 1301, 1308 (10th Cir. 1991) (holding that a "computer program itself is an intangible intellectual property, and as such, it alone cannot constitute [stolen] goods" within the meaning of 18 U.S.C. §§ 2314–2315 (2006)); Microstrategy, Inc. v. Netsolve, Inc., 368 F.Supp.2d 533, 537 (E.D. Va. 2005) (holding that the conversion claim was preempted by the Copyright Act because "Plaintiff alleges only the retention of intangible property, that is, software"; thus, "[n]o physical object was unlawfully retained" by the defendant). Note that "[t]he definition of goods is based on the concept of movability," not tangibility. U.C.C. § 2-105 cmt. 1 (2000).

54 Such an argument is akin to saying that a pack of Wrigley's Spearmint chewing gum is not a good because the stick of gum is incidental to what the buyer is actually paying for: "pure chewing satisfaction." See Computer (William Wrigley, Jr., Co. television commercial 1987) (on file with the United States Copyright Office, Library of Congress).

55 U.C.C. § 2-105. The distinction is required because money can be "goods" where it is the subject matter of the transaction, such as in a currency exchange. See id. cmt. 1. Thus money, which is intrinsically worthless but ascribed value on account of what it represents (an incorporeal property), is excluded from the definition of goods based solely on the manner of its use (otherwise, every non-bartered agreement would be within the scope of Article 2), notwithstanding the paper on which the money being treated as a commodity is printed is incidental to what the buyer is actually paying for: an intangible right to discharge future debts.

56 U.C.C. § 2-105.

57 U.C.C. § 2-105(3) (emphasis added).
of consumer software at retail amounts to, at the very least, ownership in the medium in which the program is fixed, which is arguably a "sale of a part interest" in the program itself—without the medium in which it is fixed, the program would cease to exist. Therefore, simply because the thing purchased involves an incorporeal component, even as its gravamen, does not mean that it falls outside of Article 2's scope.\(^\text{58}\)

Few would argue that the purchase of an audio compact disk (CD) is not a sale of "goods," and while the CD medium itself may be worth only pennies, the intangible intellectual property—that is, the music embedded in the CD—may be of immeasurable value as a work of art. However, the time, creativity, skill, and energy expended in the making of the audio recorded on the disk is of no consequence in the determination of whether Article 2 governs its purchase. Furthermore, with modern technology, an audio CD is no less easily copied than is a computer program. As Judge Weis explained in \textit{Advent Sys. Ltd. v. Unisys Corp.},\(^\text{59}\) a computer program, like an audio CD, contains "an intellectual process . . . implanted in a medium [and] widely distributed" to consumers, and while "[t]he music is produced by the artistry of musicians and in itself is not a 'good,' . . . when transferred to a laser-readable disc [it] becomes a readily merchantable commodity."\(^\text{60}\) Comparably, "when a professor delivers a lecture, it is not a good, but, when transcribed as a book, it becomes a good."\(^\text{61}\) Judge Weis further dispelled the notion that software is unique from other copyrighted work by virtue of the nature of the work itself, stating, "[t]hat a computer program may be copyrightable as intellectual property does not alter the fact that once in the form of a floppy disc or other medium, the program is tangible, moveable and available in the marketplace."\(^\text{62}\)

Judge Weis' analysis is correct. Software is simply a product that results from an intellectual process whereby the programmer authors a set of commands into patterns, called "syntax."\(^\text{63}\) These commands instruct the behavior of a computer, similar to the way in which the law is written into commands, called "statutes," that instruct the behavior of society (the difference being that unlike computers, people have freewill, and thus are able to decide

\(^{58}\) Take, for example, a hand-made table. Unquestionably, the craftsperson's art in constructing the table is a service, thus any contract entered into for the construction of such a table would not be governed by the U.C.C. However, once completed, the table is a fixed manifestation of the artist's craft, and while the cost of the labor in creating the table may centuple that of the price of the wood, no reasonable argument could be made that a remote purchaser was buying anything other than a good, even if an emblem or carving in the table could be considered a copyrighted work, as separate from the utilitarian aspects of the article and capable of independent existence. 17 U.S.C. § 101 (2005).

\(^{59}\) 925 F.2d 670 (3rd Cir. 1991).

\(^{60}\) \textit{Id.} at 675.

\(^{61}\) \textit{Id.}

\(^{62}\) \textit{Id.}

\(^{63}\) This description of software, while overly simplistic, is adequate for present purposes.
whether to obey such commands). In this sense, software authorship is not unlike a writer penning a book. In order for the syntax to be meaningful to the computer, it must be arranged in a specific form, just as a sentence must be constructed according to the rules of grammar to be meaningful to the reader. The programming language, or source code, is then converted into bits—binary digits taking the form of either zero or one—which are stamped into a CD as a series of indentations (called "pits" and "lands"), or "burned" as distortions in the surface of a phthalocyanine or azo dye, in the case of a compact disk-recordable (CD-R), and read by a laser, similar to the manner in which a stylus passes along the groove on a phonographic record—albeit in a digital, rather than an analog, signal. In essence, the program itself, while originally existing as intangible thought in the programmer's mind, is transcribed onto a CD, just as the professor's lecture is "transcribed as a book" in Judge Weis' example. Therefore, whenever an intellectual process is recorded, or "fixed," into a CD, a digital versatile disc (DVD), book, phonographic record, or any other form of tangible medium, that item becomes a good. Bifurcating software into tangible and intangible elements and applying the law differently to each while treating similar works dissimilarly produces an arbitrary result—the bane of section 1-130(3) of the U.C.C. Furthermore, as technology advances, the line between traditional notions of "goods" and "software" is diminished. Today, software is used to run cars, traffic lights, microwave ovens, portable audio devices—virtually all electronic devices. However, despite the software industry's attempts to dazzle the courts with legal legerdemain, there is nothing "mystical" about software; a court should not allow technological ignorance to govern its analysis.

64 Oliver Slattery et al., Stability Comparison of Recordable Optical Discs—A Study of Error Rates in Harsh Conditions, 109 J. RES. NAT'L INST. OF STANDARDS & TECH. 517, 520 (2004) ("The three dye types typically used in CD-Rs [are] phthalocyanine, cyanine and azo.").

65 Just as vibration of the stylus traversing the groove in the phonographic record creates a signal that is amplified into sound by a phonograph, reflection and refraction of light as the laser passes over stamped pits and lands in the CD or the burned marks in the CD-R create a pulse that is read and converted into zeroes and ones by a computer.

66 Advent, 925 F.2d at 675.

67 An underlying purpose of the U.C.C. is to "make uniform the law among the various jurisdictions." Arbitrary decisions diminish the probability of uniformity. Although not the focus of this Note, software downloaded from the internet makes a stronger case for non-U.C.C. governance. However, in such a transaction, the consumer is still contracting to purchase "things . . . moveable at the time of identification to the contract for sale," notwithstanding such "things" being minute electromagnetic particles. U.C.C. § 2-105 (2000). Most jurisdictions that have considered the issue have held that electricity, water, and even gaseous fuels, when sold, are "goods," falling within the scope of Article 2 of the U.C.C. See e.g., Gary D. Spivey, Annotation, Electricity, Gas, or Water Furnished by Public Utility as "Goods" within Provisions of Uniform Commercial Code, Article 2 on Sales, 48 A.L.R.3d 1060 (1973).
D. The Legacy of ProCD and Its Progeny

While not the first opinion to legitimize a shrinkwrap agreement, \textit{ProCD} is the case most frequently cited in the decisions that achieve this outcome. In reaching this result, \textit{ProCD} and the cases that follow its jurisprudence uphold the validity of shrinkwrap, clickwrap, and other such contracts of adhesion based on the notion that "[a]ny buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price." This notion was advanced by the \textit{ProCD} court in its oft-quoted, pruned form: "[n]otice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable."

Most shrinkwrap and clickwrap agreements require the buyer to either agree to the terms or else return the software (and any accompanying hardware) to the place of purchase for a refund. Simply "returning the package," howev-

\footnotesize{68 See e.g., McCrimmon v. Tandy Corp., 414 S.E.2d 15 (Ga. Ct. App. 1991). Notwithstanding Judge Easterbrook's claims to the contrary, \textit{McCrimmon} does directly address the issue of "the sequence of money now, terms later." \textit{ProCD}, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996) ("[O]nly three cases (other than ours) touch on the subject, and none directly addresses it."). Although the \textit{McCrimmon} court did not specifically refer to the license as a shrinkwrap agreement, the description of the license litigated fits the definition of the term. See supra note 8. The agreement at issue in \textit{ProCD} fits the definition of both a clickwrap and a shrinkwrap agreement; however, because the \textit{ProCD} court referred to the license as a shrinkwrap agreement, so too will this Note ("[T]he software splashed the license on the screen and would not let [the defendant] proceed without indicating acceptance."). \textit{ProCD}, 86 F.3d at 1452. Furthermore, the distinction does not affect the analysis for current purposes.

69 \textit{ProCD}, 86 F.3d at 1447.


71 \textit{ProCD}, 86 F.3d at 1451.

72 See e.g., \textit{APPLE, INC., SOFTWARE LICENSE AGREEMENT FOR MAC OS X 1} (2007) [hereinafter \textit{APPLE, MAC OS}], http://images.apple.com/legal/sla/docs/macosx105.pdf (last visited Feb. 8, 2008); \textit{APPLE, INC., SOFTWARE LICENSE AGREEMENT FOR iTUNES 1} (2007) [hereinafter \textit{APPLE, iTUNES}], http://images.apple.com/legal/sla/docs/itunes.pdf (last visited Feb. 8, 2008). Note that the license agreements require the buyer to either agree to the terms or "return the Apple software to the place where you obtained it for a refund" with no other recourse. \textit{Id. See also MICROSOFT CORP., LICENSE TERMS FOR MICROSOFT WINDOWS VISTA 1} (2007) [hereinafter \textit{MICROSOFT, VISTA}], http://download.microsoft.com/documents/useterms/Windows%20Vista_Ultimate_English_36d0f3e99-75e4-4875-8153-8899cf5105718.pdf (last visited Feb. 8, 2008); \textit{MICROSOFT CORP., MICROSOFT SOFTWARE LICENSE TERMS 2007 MICROSOFT OFFICE SYSTEM DESKTOP APPLICATION SOFTWARE 1} (2007) [hereinafter \textit{MICROSOFT, OFFICE}], http://www.microsoft.com/downloads/details.aspx?familyid=428556f8-246d-44a6-a21d-8e9899082b15&displaylang=en (available for download) (last visited Feb. 8, 2008). Note that the license agreements require the buyer to either agree to the terms or "return [the software] to the retailer for a refund or credit." \textit{MICROSOFT, VISTA} at 1. Unlike Apple, Microsoft purportedly gives the buyer another option if the retailer refuses to accept the item on return, stating "[i]f you cannot obtain a refund there, contact Microsoft . . . or see \textit{www.microsoft.com/info/returms.htm}." However, the end result may be the same, as this site lists reseller and retailer products under the heading: "What Products Are \textit{Not} Eligible for a
er, is not always effective as a remedy. For example, Best Buy, a major retailer of consumer electronics, explicitly states in its return policy that “[n]on-returnable items include . . . [o]pened computer software [which] can be exchanged for the identical item but cannot be returned for a refund.”73 As is most often the case in consumer software purchased at retail today, the terms governing the license are not fully revealed to the buyer until after (or just prior to) installation of the program itself. If the buyer did not agree to the first item's terms, exchanging that item for the identical item solves nothing.

Still, the vast majority of buyers will install and use the software following its purchase. Many of them will not read or understand the terms to which they are “assenting.”74 Still others might comprehend the terms of the license, but disregard them under the assumption that they are unenforceable.75 What awaits the unwary consumer may be surprising.76 Despite what many consumers believe, they might not be “buying” the software. Never mind that the consumer goes to a store to shop for software, makes a selection, pays a onetime price as part of the transaction (including a “sales” tax, which is indicated as such on the receipt), walks out of the store without signing anything (save for perhaps a credit card receipt), and makes no arrangements for any other type of agreement concerning the software (including a future charge or renewal fee)—despite looking like every other purchase this consumer has ever made—the consumer does not own the software. Why? Because the software industry says so, that is why. What the consumer gets instead is a non-negotiated license, a game where the licensor writes the rules, which the consumer cannot read until

Refund?” (emphasis added). [Author’s note: this site was altered sometime between February and December of 2008 to redirect the user to http://www.microsoft.com/mscorp/productrefund/refund.mspx. The site now provides that “[a]ll software and hardware products . . . come with a Microsoft 45-Day Money-Back Guarantee.” However, the refund is still “subject to . . . [the] license agreement provisions.”]


74 According to the Supreme Court of Appeals of West Virginia (WVSCA), “it makes little difference whether [contracts of adhesion] are in fact comprehensible—because people simply don’t read them.” Ex rel. Dunlap v. Berger, 567 S.E.2d 265, 270 n.2 (W. Va. 2002).

75 See, e.g., Arizona Retail Sys., Inc. v. Software Link, Inc., 831 F. Supp. 759, 761 (D. Ariz. 1993) (“[P]laintiff admits that he read the license agreement but thought it was unenforceable and incapable of overriding the specific representations made to him by [Defendant’s] employees.”).

76 Among the various impermissible deviations in acceptance to an offer for the sale of goods is the addition of terms that “materially alter” the offer. Such terms do not become part of the contract, even between merchants. U.C.C. § 2-207(2)(b) (2000). Clauses resulting in surprise or hardship are among those which would materially alter the contract “if incorporated without express awareness by the other party.” U.C.C. § 2-207 cmt. 4 (2000). Whether buying a product with notice or a partial listing of terms on the outside packaging, opening a package and using a program (in the case of shrinkwrap agreements), or clicking “I agree” with the mouse (in the case of clickwrap agreements) constitutes “express awareness” is subject to debate.
leaving the store and opening the "poke"; a game where the licensor reserves the right to change the rules at any time, often without notice, sometimes adding new rules while the game is being played; a game where the consumer must dance to the developer's tune or else not play the game at all.

For over a century, courts have refused to play along with various industries calling what amounts to a sale a mere "license" under similar sets of terms. In *Bobbs-Merrill Co. v. Straus*, the plaintiff printed books, for which it

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This is a legal agreement between you and Apple... Apple reserves the right, at any time and from time to time, to update, revise, supplement, and otherwise modify this Agreement and to impose new or additional rules, policies, terms, or conditions on your use of the Service. Such updates, revisions, supplements, modifications, and additional rules, policies, terms, and conditions (collectively referred to in this Agreement as "Additional Terms") will be effective immediately and incorporated into this Agreement.

Because services are governed by the common law of contracts, modifications require additional consideration on the part of the promisee under the preexisting duty rule, thereby rendering the above "agreement" unenforceable with respect to purchases made prior to the modification.

78 In *ProCD*, Judge Easterbrook compared the presentation of shrinkwrap terms in software transactions with the issues that surround other types of commerce, such as insurance, airline travel, and concerts, stating that "insurance takes effect immediately even though the home office reserves the right to withdraw coverage later" and "[t]o use the ticket is to accept the terms, even terms that in retrospect are disadvantageous." ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1451 (7th Cir. 1996). However, contracts involving insurance and airline travel are contracts for indemnification and services, and are therefore unquestionably outside the scope of Article 2, so such comparisons to contracts governed by Article 2 are meaningless (because Judge Easterbrook assumed software to be "goods" within the meaning of the U.C.C. in *ProCD*, the question of whether Article 2 applies is inapplicable for present purposes). Moreover, modifications to airline tickets are expressly governed by federal law. See 49 U.S.C. § 41707 (1994) ("To the extent... prescribe[d] by regulation, an air carrier may incorporate by reference in a ticket or written instrument any term of the contract."); 14 C.F.R. § 253.5 (2008) (implying that if the passenger is given notice, "incorporated terms may include... [the right] to change terms of the contract").

Working his way to goods transactions, Judge Easterbrook next explained that a shrinkwrap agreement is not unlike a radio sale, where the buyer may not see the warranty until it is "read for the first time in the comfort of home" or a prescription, which "come[s] with a list of ingredients on the outside and an elaborate package insert on the inside [which] describes drug interactions, contraindications, and other vital information—but, if [the defendant] is right, the purchaser need not read the package insert, because it is not part of the contract." *Id.* The problem with such comparisons is that radio sales are clearly governed by the Magnuson-Moss Act (*see infra* Part IV.C.4) and usually state consumer protection law (*see infra* Part IV.B.) and radios cannot perform tasks such as transmitting the consumer's private information to unknown recipients via the internet (*see infra* note 108 and accompanying text). Drugs are prescribed under a doctor's guidance, care, and consultation—imagine requiring a lawyer behind every consumer's shoulder, to explain the risks, as the consumer examines the terms of a shrinkwrap agreement. Even over-the-counter medications are carefully regulated by the Food and Drug Administration, which evaluates drug safety and dictates what information must be included on the packaging. The only entities regulating the reliability and safety of software are the free-market and the software industry itself.

79 210 U.S. 339 (1908).
held a valid copyright, with a notice that "[t]he price of this book at retail is $1 net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright." When the defendant, R. H. Macy and Company (Macy's), began selling the books for less than a dollar, Bobbs-Merrill sought injunctive relief under the copyright statutes, based on the terms set forth in the notice. The United States Supreme Court (SCOTUS) construed this as an attempt "by a notice [to require] that such sales must be made at a fixed sum," and found this to be invalid under copyright law. The Court stated that Macy's "made no agreement as to the control of future sales of the book, and took upon themselves no obligation to enforce the notice printed in the book, undertaking to restrict retail sales to a price of $1 per copy," but did not specifically address whether the license was a valid form of contract because "[t]here [was] no claim . . . of contract limitation [asserted by Plaintiff], nor license agreement controlling the subsequent sales of the book." The Court held that, having sold the books in question, the plaintiff could not thereafter use the copyright statutes to control the price of subsequent sales to remote purchasers via license agreement.

In Straus v. Victor Talking Machine Co., SCOTUS examined a licensing scheme similar to the modern day EULA and rejected it. The Court held a "License Notice," similar in its terms and effect to a box-top license, to be invalid despite the fact that the terms of the license were plainly visible in their entirety prior to purchase. Although not the first case to invalidate this type of restriction, the facts of the case were more analogous to the modern day EULA than previous cases decided by the Court, because the terms of the license purported to bind not only the retailers, but consumers as well. In Straus, the plaintiff, a manufacturer of phonographs and phonograph records, had a contract with its distributors whereby its machines were to be "licensed" to consumers, not sold, and were to be "used only with sound records, sound boxes, and needles manufactured by the plaintiff." The terms of the "license" were set forth on the machines themselves, and stated that "title to the machine shall remain in the

80 Id. at 341.
81 Id. at 351.
82 Id. at 350.
83 243 U.S. 490 (1917).
84 Although persuasive, not even SCOTUS can bind the states on matters of contract law, except with respect to questions of federal law, such as the FAA. See supra note 19.
85 See supra note 22.
86 The “license” terms provided, inter alia, that “[t]itle shall remain in the Victor Talking Machine Company” and that dealers had the right “to convey the license to the public to use the said machine only when a royalty of not less than $200.00 shall have been paid, and upon consideration that all the conditions of license shall be strictly observed.” Victor Talking Mach. Co. v. Strauss, 230 F. 449, 451 (2d Cir. 1916), rev’d, 243 U.S. 490 (1917).
87 243 U.S. at 495. Correspondingly, the plaintiff’s “records and sound boxes [were] licensed only for use with [its] machines.” Victor, 230 F. at 451.
plaintiff, which shall have the right to repossess it upon breach of any of the conditions of the notice . . . and [that] the acceptance of the machine is declared to be 'an acceptance of these conditions.' To which the Court replied:

[It is] clear that this “License Notice” is not intended as a security for any further payment upon the machine, for the full price, called a “royalty,” was paid before the plaintiff parted with the possession of it . . . that, notwithstanding its apparently studied avoidance of the use of the word “sale,” and its frequent reference to the word “use,” . . . [t]here remains for this “License Notice,” so far as we can discover, the function only of fixing and maintaining the price of plaintiff’s machines to its agents and to the public . . . . Courts would be perversely blind if they failed to look through such an attempt as this “License Notice” thus plainly is to sell property for a full price, and yet to place restraints upon its further alienation, such as have been hateful to the law from Lord Coke’s day to ours, because obnoxious to the public interest. The scheme of distribution is not a system designed to secure to the plaintiff and to the public a reasonable use of its machines, within the grant of the patent laws, but is in substance and in fact a mere price-fixing enterprise, which, if given effect, would work great and widespread injustice to innocent purchasers, for it must be recognized that not one purchaser in many would read such a notice, and that not one in a much greater number, if he did read it, could understand its involved and intricate phraseology, which bears many evidences of being framed to conceal rather than to make clear its real meaning and purpose. It would be a perversion of terms to call the transaction intended to be embodied in this system of marketing plaintiff’s machines a “license to use the invention.”

Substitute the word “machine(s)” for “software,” the words “within the grant of the patent laws” with “within the freedom of contract,” and “price-fixing enterprise” with “scheme to absolve itself of all liability no matter how egregious or negligent its acts or omissions” and it becomes evident that the EULA is nothing more than a rehash of a marketing scheme that was rejected by SCOTUS decades ago.

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88 Victor, 243 U.S. at 495.
89 Id. at 500–01 (citing Bauer & Cie v. O’Donnell, 229 U.S. 1, 16 (1913), which essentially held that “to call the sale a license to use is a mere play upon words”).
III. Terrible Terms

Few industries employ more sweeping, blanket waiver provisions in their "warranties" or attempt to leave the consumer with fewer remedies than the software industry. Most EULAs fly in the face of consumer protection statutes without consequence, due to the "license" status the software developer has carved out for itself. For example, Apple's Software License Agreement for Mac OS X provides a ninety day limited warranty, which seems somewhat reasonable, until the buyer takes a closer look at its terms. Written in 5.5 point font, this "warranty" applies only to the media on which the software is fixed (the CD), not the program itself, and Apple provides as "your exclusive remedy . . . at Apple's option, a refund of the purchase price of the product containing the Apple Software or replacement of the Apple Software." As for the software itself, the buyer "agrees" to accept it "as is" or not at all, "with all faults and without warranty of any kind," and should the software "prove defective, you assume the entire cost of all necessary servicing, repair or correction."

Furthermore, "in no event shall Apple be liable for personal injury, or any incidental, special, indirect or consequential damages whatsoever, including, without limitation, damages for loss of profits, loss of data, business interruption or any other commercial damages or losses," even if those damages result from a defect known to Apple. Although the license acknowledges that "[s]ome jurisdictions do not allow the limitation of liability for personal injury, or of incidental or consequential damages, so this limitation may not apply to you," regardless, "[i]n no event shall Apple's total liability to you for all damages (other than as may be required by applicable law in cases involving personal injury) exceed the amount of fifty dollars" and "[t]he foregoing limitations will apply even if the above stated remedy fails of its essential purpose." Apple's iTunes, software running the popular consumer MP3 (MPEG-1 Audio Layer 3)

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90 This section is primarily concerned with clickwrap terms for which the consumer is required to "assent" prior to using software developed by Apple, Inc. and Microsoft Corp. These companies were not chosen to unfairly "single them out," but rather to illustrate some of the concerns surrounding software that many consumers use on a regular basis. To the contrary, because Apple and Microsoft develop products that saturate the market, they are under much closer scrutiny by consumer advocacy groups and the like; therefore, many other software developers incorporate terms into their license agreements that, if enforced, would be much more oppressive to the consumer than those of Apple or Microsoft.

91 See APPLE, MAC OS, supra note 72.

92 The font used is 5.5 "Lucida Grande" (or its equivalent), as determined by copying and pasting a portion of the text into a Microsoft Word document.

93 See APPLE, MAC OS, supra note 72, at 2 (emphasis added).

94 Id.

95 Id.

96 Id. Note that in all jurisdictions, including West Virginia, that have enacted section 2-719 of the U.C.C., "[l]imitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable."
audio player, the iPod, is governed by a license following the Mac OS X license agreement verbatim in the language quoted supra.\textsuperscript{97} Therefore, in the hypothetical situation where iPods are found to cause permanent hearing damage,\textsuperscript{98} or cause pacemaker malfunction,\textsuperscript{99} due to defects known to Apple and not divulged to the public, the most a consumer could recover if such a license were to be upheld by a court would be fifty dollars, which would not even cover the cost of the medical diagnosis.

Microsoft's Software License Terms governing its Windows Vista OS and Office 2007 Professional programs fare somewhat better for the consumer than do Apple's; however, the terms still leave much to be desired.\textsuperscript{100} Although the licenses provide, in ten point font, a one year limited warranty running from the time of the first purchase—during which time "Microsoft will repair or replace the software at no charge" (buyer pays shipping) or refund the purchase price if it cannot repair the defect—the buyer "can recover from Microsoft and its suppliers only direct damages up to the amount [buyer] paid for the software [but] cannot recover any other damages, including consequential, lost profits, special, indirect or incidental damages . . . even if . . . Microsoft knew or should have known about the possibility of the damages."\textsuperscript{101} Again, as with the Apple licenses, if the terms are found to be conscionable and are otherwise upheld as valid by a court, the consumer is left without any meaningful remedy.

\textsuperscript{97} See APPLE, iTUNES, supra note 72.


\textsuperscript{99} One study conducted at the Thoracic and Cardiovascular Institute at Michigan State University found that iPods interfered with pacemakers in thirty percent of patients tested (even causing one patient's pacemaker to stop functioning), when held two inches from patients' chests. See http://www.med.umich.edu/opm/newspage/2007/ipods.htm (last visited Feb. 8, 2008). See also Mehul B. Patel et al., Pacemaker Interference with an iPod, 4 HEART RHYTHM 781 (2007). One model of Apple's iPod, the "iPod shuffle," features a "built-in clip" that Apple once recommended using to "[c]lip [the iPod] to your sleeve, lapel, coin pocket. No matter where you wear it, iPod shuffle speaks volumes about your style" (emphasis added). However, the text was altered sometime between February and December of 2008, and Apple now recommends that the user "[c]lip it to your sleeve, your running shorts, or your jacket." No reason is given for dropping "lapel" from the list, nor is there any mention of the Michigan study. See Apple's advertisement at http://www.apple.com/ipodshuffle/features.html (last visited Dec. 30, 2008). But see, Howard Bassen, Low Frequency Magnetic Emissions and Resulting Induced Voltages in a Pacemaker by iPod Portable Music Players, 7 BioMedical Engineering OnLine 7 (2008) ("it is not possible for interference to be induced in a pacemaker by the music players we tested"). Available at http://www.biomedical-engineering-online.com/content/pdf/1475-925x-7-7.pdf. Interestingly, this study did not use human subjects, unlike the Michigan study, which concluded that iPods did cause pacemaker interference.

\textsuperscript{100} See MICROSOFT, VISTA and MICROSOFT, OFFICE, supra note 72.

\textsuperscript{101} Id. at 9; MICROSOFT, VISTA, supra note 72, at 6 (emphasis added).
Other clickwrap agreements, if upheld, violate the consumer's fundamental, rather than economic, rights. For example, a number of such agreements require users to waive their free speech rights by prohibiting them from engaging in public criticism of the developing company or its products, publishing benchmark results (an objective measure of a program's performance across differing hardware configurations), or even reviews. For example, in *People v. Network Assocs., Inc.*, the developer of McAfee anti-virus and firewall programs included in its license agreements that "[t]he customer shall not disclose the results of any benchmark test or publish reviews of this product without prior consent." An online magazine sought permission to publish a review of McAfee's product and was denied. Although the court issued an injunction against Network Associates to prohibit it from restricting the right to publish such results, similar provisions are still in place in many software products. Such terms are in clear contradiction to the promotion of fair competition. Even companies that do not overtly prevent the free discussion of their products often require the publisher of a review or benchmark test to comply with certain terms.

Furthermore, many clickwrap agreements, including Apple's and Microsoft's, require consumers to concede to the transmission of "technical and related information including but not limited to technical information about your computer" or "appropriate systems computer information" from the buyer's computer to various companies and third parties across the internet without a specific description of what information is collected or how it will be used, other than to state that such information will be utilized to "improve" their products or to "verify compliance with the terms of this License." Although the terms

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103 195 Misc.2d 384 (N.Y. Sup. Ct. 2003)
104 Id. at 385–86.
105 Id. at 386.
106 Id. at 391.
108 See APPLE, MAC OS, supra note 72, at 1; APPLE, iTUNES, supra note 72, at 1 (emphasis added). See also Specht v. Netscape Comm'n's, 306 F.3d 17 (2d Cir. 2002). In *Specht*, internet users who downloaded software from the defendant's website later discovered it was clandestinely transmitting private data from their computers to the defendant.
109 See MICROSOFT, VISTA and MICROSOFT, OFFICE, supra note 72.
110 See APPLE, MAC OS and APPLE, iTUNES, supra note 72. Apple claims that it "may use this information, as long as it is in a form that does not personally identify you . . . ." Exactly how any verification of "compliance with the terms of [the] License" could be effective against alleged infringers without "personally identify[ing]" them is unclear. Apple does claim in its privacy policy that "[a]t times we may be required by law or litigation [in other words, to sue you] to disclose your personal information. We may also disclose information about you if we determine
of Apple’s and Microsoft’s privacy policies are available online, neither policy gives specifics or is comprehensive in describing what information is collected or how it is used.111 Furthermore, such monitoring is completely unnecessary to prevent software piracy because software developers can easily (and often do) incorporate a registering process into their programs whereby each copy must be activated after a set amount of days from installation to continue functioning. By incorporating unique identifiers in the software’s code and requiring users to obtain a registration key directly from the developer, the software companies can be sure that each copy of their product is activated only once, without having to continually monitor a buyer’s activities. When properly implemented, such a system adequately protects the developer and the consumer because the consumer knows when and what information is transmitted and the ability to circumvent its protection is limited.

IV. LITIGATING SHRINKWRAP AND CLICKWRAP AGREEMENTS UNDER WEST VIRGINIA LAW

Although the validity of shrinkwrap and clickwrap agreements has yet to be tested under West Virginia law, an examination of existing contract and consumer law may provide a litigation framework for future cases and controversies in the Mountain State. Recently, several members of the West Virginia House of Delegates introduced a bill that, if adopted, would prohibit adhesion contracts from waiving a person’s state or federal constitutional rights.112 If

111 See Apple’s Customer Privacy Policy, http://www.apple.com/legal/privacy/ (last visited Dec. 30, 2008) (“[t]here are also times when it may be advantageous for Apple to make certain personal information about you available to companies that Apple has a strategic relationship with or that perform work for Apple . . . .”). When the consumer inquires into Microsoft’s privacy policy as directed in the License Terms for MICROSOFT, OFFICE, supra note 72, the consumer is given a URL address, www.microsoft.com/genuine/office/PrivacyInfo.aspx, which links to the following: “We are sorry, the page you requested cannot be found. See below for search results close to your request, or try a new search” (last visited Dec. 30, 2008). The link provided in MICROSOFT, VISTA, supra note 72, is functional; however, as with Apple’s Customer Privacy Policy, no specific or comprehensive list of information is provided.

112 H.B. 2827, 78th Leg., 1st Sess. (W. Va. 2007). The language of the bill is available at: http://www.legis.state.wv.us/Bill_Text_HTML/2007_SESSIONS/RS/BILLS/hb2827%20intr.htm. The bill purports to invalidate adhesion waivers of constitutional rights as they apply to “goods and services,” defined to “include imported products, domestic products, banking services, insurance policies as well as all other services or commodities offered for sale to consumers in this state” (emphasis added). However, there is no consensus as to whether the purchase of software amounts to a “sale” or a license or if such designations preclude the application of statutes purportedly applying only to sales, nor is this issue settled under West Virginia law. Arguably, the latter language “as well as” in conjunction with the phrase “sale to consumers in this state” is severable from the former language defining goods and services, thus broadening the bill’s application to potentially include products and intangibles contracted for, though not actually “sold.” Id. The use of the word “include” and the fact that the provision is remedial futhers such interpretation.
enacted, the bill would amend the West Virginia Code to include a new section, designated section 47-11A-12b: "Adhesion waivers prohibited and unenforceable." It is not entirely clear whether such proposed legislation would be preempted by federal law or even be adopted; moreover, if software transactions are deemed not to be sales, it is not clear if the statute would be applicable to software EULAs. Therefore, W. VA. H.B. 2827 is not necessarily dispositive of the issue concerning the enforceability of shrinkwrap and clickwrap agreements, and thus further examination is necessary.

A. Is Software "Goods" Under West Virginia Law?

First, any analysis of software contractual law must begin with a determination of whether software is "goods" within the meaning of Article 2 of the U.C.C. West Virginia has adopted the language of the U.C.C. advanced by the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) virtually verbatim; however, it has yet to be settled whether West Virginia law will treat software as goods, although at least one case suggests that it will. "Goods" are defined by the U.C.C. and West Virginia law as "all things . . . which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid." As discussed in Part II, supra, the treatment of software is inconsistent among jurisdictions. However, most courts will apply Article 2 of the U.C.C. to software transactions either directly or by analogy, especially where that transaction involves consumer ("canned") software. Additionally, at least for taxation purposes, West Virginia treats software as tangible personal property, which "includes, but is not limited to . . . prewritten computer software." In Pennsylvania and West Virginia Supply Corp. v. Rose, the Supreme Court of Appeals of West Virginia (WVSCA) held that "standardized computer software discs fall within the 'common, ordinary and accepted meaning' of the phrase

113 H.B. 2827.
114 Id. See also discussion on the FAA, infra Part IV.C.1.
115 See W. VA. CODE §§ 46-2-101 to -725 (2006). See also, Vincent P. Cardi, The Experience of Article 2 of the Uniform Commercial Code in West Virginia, 93 W. VA. L. REV. 735 (1991). For this reason, this Note will refer to the West Virginia Code and the U.C.C. interchangeably when citing U.C.C. provisions hereinafter. As of this writing, West Virginia, like all other states in the U.S., has not adopted the 2003 revisions to Article 2 of the U.C.C. as recommended by ALI and NCCUSL. See supra note 1.
117 See supra Part II.
118 W. VA. CODE § 11-15A-1(12) (2003). The West Virginia Code defines "'[p]rewritten computer software'" as "'computer software', including prewritten upgrades, which is not designed and developed by the author or other creator to the specifications of a specific purchaser." Id. § 11-15B-2(32) (2006). In other words, prewritten software is software that is not custom designed.
'tangible goods, wares, and merchandise,'"120 and while this holding was made in the context of taxation classification, the Rose court agreed with the pre-UCITA holding in Comptroller of the Treasury v. Equitable Trust Co. that "intangibility should not be determined by the extent of use."121 Therefore, "a copy of a canned program does not lose its tangible character, because its content is a reproduction of the product of intellectual effort, just as the phonorecord does not become intangible, because it is a reproduction of the product of artistic effort."122 Similarly, in Advent Systems Ltd. v. Unisys Corp.,123 the Third Circuit examined "whether the U.C.C. applied to software per se," and held that "software fits within the definition of a 'good' in the U.C.C."124 This view is in accordance with the majority view that "[i]f the contract is primarily for the provision of a software program, the U.C.C. will apply. The trend has been to recognize that the U.C.C. governs software transactions."125

The U.C.C. was drawn to adapt to the changing nature of business. West Virginia's Article 1 of the U.C.C. provides the general rules applicable to transactions governed by any of the articles of Chapter 46 of the West Virginia Code, unless otherwise displaced by a particular section governing the instant transaction.126 While not part of the statutes themselves, the Official Comments that follow the U.C.C.'s provisions were written by its drafters and are therefore highly persuasive.127 These comments acknowledge the fact that:

The courts have often recognized that the policies embodied in an act are applicable in reason to subject-matter that was not expressly included in the language of the act . . . even where the subject-matter had been intentionally excluded from the act in

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120 Id. at 104 (emphasis added). The significance of the classification of software as "tangible" is discussed infra, Part IV.C.4.
122 Id. at 261. Note that W. Va. Code § 11-13D-2(17) (2008) uses the terms "prewritten" and "canned" interchangeably. Generally, the terms are used to distinguish store bought software sold at retail from custom-made software, which is often treated as a service rather than a good ("For purposes of this section the term 'tangible personal property' shall include prewritten or 'canned' computer software."). See also RRX Indus., Inc. v. Lab-Con, Inc., 772 F.2d 543, 546 (9th Cir. 1985) (applying the predominant purpose, or "gravamen," test to software transactions: "[i]n determining whether a contract is one of sale or to provide services we look to the essence of the agreement . . . [h]ere, the sales aspect of the transaction predominates").
123 925 F.2d 670, 675–76 (3d Cir. 1991). See supra Part II.
124 Advent, 925 F.2d at 675–76.
125 CLASSEN, supra note 18, at 153.
127 Notwithstanding this statement, WVSCA has expressly adopted "the official commentary to the UCC . . . as a part of our Code" and assumes that "the legislature was aware of this commentary when it adopted [Article 2 of the U.C.C.]." Greer Limestone Co. v. Nestor, 332 S.E.2d 589, 594 (W. Va. 1985). See Cardi, supra note 115 at 738 ("[WVSCA] raised the Comments to a new level of authority [in Greer] . . . "). See also infra note 189.
Nothing in Article 2 of the U.C.C., or in Chapter 46, Article 2 of the West Virginia Code, precludes treating software as a good. Chapter 46, Article 9, West Virginia's equivalent to Article 9 of the U.C.C. (Secured Transactions), defines goods to include:

[A] computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if . . . [t]he program is associated with the goods in such a manner that it customarily is considered part of the goods [or] by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods.  

West Virginia's Article 9 does preclude from the definition of goods "a computer program embedded in goods that consist solely of the medium in which the program is embedded," thus distinguishing software sold with hardware from software sold in a standalone transaction. However, the scope of West Virginia's Article 9 is limited to transactions that create a security interest in personal property. Therefore, this limitation is not likely determinative in settling the issue of whether software is "goods" within the scope of West Virginia's Article 2.

1. Shrinkwrap and Clickwrap Agreements Are Unenforceable Under West Virginia Common Law

Ultimately, whether software is treated as "goods" within the meaning of Article 2 of the U.C.C. under West Virginia law in the consumer context may very well be dispositive of the question as to whether shrinkwrap and clickwrap agreements are enforceable in the state. Even under the line of cases holding that EULAs are valid and enforceable, software licenses are treated as "ordinary contracts accompanying the sale of products," and are therefore "governed by the common law of contracts and the Uniform Commercial Code." Because no other law relevant to the issue has been adopted in West Virginia, if Article 2 does not apply, at least by analogy, the common law is all that remains to govern the transaction. Such a determination would likely render shrinkwrap and

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130 Id.
132 ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1450 (7th Cir. 1996).
clickwrap agreements unenforceable because the rationale under which such terms are theoretically permissible is dependent on the changes that the U.C.C. makes to the common law.

Whether categorized as a sale or otherwise, a consumer purchase of software at retail is a contract. By placing the item on display, the retailer is making an invitation to bargain, not an offer.\(^{133}\) The consumer makes an offer to purchase the software, which the retailer accepts by receiving payment. Were the roles reversed, a retailer would be bound to produce as many items as were accepted or else be liable in breach.\(^{134}\) Shrinkwrap and clickwrap terms are not disclosed to the consumer until after the purchase is complete. Thus, without the benefit of the U.C.C.'s liberal rules regarding the formation of contracts,\(^{135}\) the late terms must either be a proposal to modify the original agreement, a request for a waiver, or an offer to enter into a new contract altogether.\(^{136}\)

Under West Virginia common law, "[a] new agreement made under the provisions for modification in a contract must have all of the requisites of a valid and enforceable contract or it will not be binding."\(^{137}\) The requisites of a valid and enforceable contract are "competent parties, legal subject-matter, valuable consideration, and mutual assent."\(^{138}\) Therefore, if a court were to deter-

\(^{133}\) Restatement (Second) of Contracts § 26 cmt. b (1981).

\(^{134}\) Although this distinction is a basic concept of the law, it is apparently lost on Judge Easterbrook: "A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance," ProCD, 86 F.3d at 1452. But see Klocek v. Gateway, 104 F. Supp. 2d 1332, 1340 (D. Kan. 2000) ("[T]he Seventh Circuit [in ProCD] provided no explanation for its conclusion that 'the vendor is the master of the offer.' In typical consumer transactions, the purchaser is the offeror, and the vendor is the offeree.'") (citations omitted). However, in fairness, the defendant apparently made this claim in his brief. Id. at 1450. See also ProCD, 908 F. Supp. 640, 652 (W.D. Wis. 1996) (citing Barker v. Allied Supermarket, 596 P.2d 870 (Okla. 1979)). Curiously, Easterbrook cited Peeters v. State, 142 N.W. 181 (Wis. 1913) in support of this pronouncement (also cited by the district court below in reaching the opposite conclusion as to the legitimacy of the EULA at issue)—a case which stated that where "a customer comes in, picks up an article, the selling price of which he knows, hands the proprietor or a clerk the price thereof, which is received, and he departs with the article, the transaction constitutes a 'sale,'" in direct derogation from the "license" status claimed by the plaintiff software developer. Peeters, 142 N.W. 182.

\(^{135}\) U.C.C. §§ 1-103 (2004); 2-204, 2-206, and 2-207 (2000).

\(^{136}\) Because a novation (a discharge of a valid, existing obligation or contract by the substitution of a new, binding obligation or contract) is not possible without first making a new contract, the distinction is not needed here. See Ray v. Donohew, 352 S.E.2d 729, 735 (W. Va. 1986).

\(^{137}\) Wheeling Downs Racing Ass'n v. West Virginia Sportservice, Inc., 199 S.E.2d 308, 311 (W. Va. 1973). Furthermore, the party seeking the modification bears the burden of proof, which is "not sustained, as a matter of law, by merely showing the failure of plaintiff to protest the change." Monto v. Gillooly, 147 S.E. 542, 543 (W. Va. 1929). Under West Virginia common law, a modification is not binding without consideration. Exceptions to this rule are threefold: frustration, promissory estoppel, and by statute. Restatement (Second) of Contracts § 89 (1981). Because none are applicable to software transactions, without section 2-209 of the U.C.C., modification is precluded.

mine that shrinkwrap or clickwrap terms constituted proposed modifications, the terms could not become a part of the contract without additional, valuable consideration. Consideration is defined in West Virginia as "'some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by another.' A benefit to the promisor or a detriment to the promisee is sufficient consideration for a contract." With regard to end users, EULAs are designed to "give them nothing, but take from them [. . .] everything." Although the consumer has paid the valuable price set by the seller, shrinkwrap and clickwrap terms typically give the consumer nothing that the law does not already require, and often purport to take away that which the law preserves.

Furthermore, West Virginia recognizes that buyers are entitled to certain implied rights, such as the implied warranty of fitness, irrespective of whether Article 2 of the U.C.C. is applicable to the given transaction. In Thacker v. Tyree, WVSCA rejected the doctrine of caveat emptor ("buyer beware") as it applied to the purchase of a house. Implicitly acknowledging the inequities in precluding implied warranties to house sales, merely because such transactions fall outside of the scope of the U.C.C., the court stated that "[w]hatever its former status in the law of sales, the Uniform Commercial Code, by its implied warranty of merchantability and fitness found in W.Va. Code, 46-2-314 and 315, has virtually abolished the doctrine [of caveat emptor] in the sale of goods." Thus, the Thacker court held that:

[W]here a vendor is aware of defects or conditions which substantially affect the value or habitability of the property and the existence of which are unknown to the purchaser and would not be disclosed by a reasonably diligent inspection, then the vendor has a duty to disclose the same to the purchaser. His failure to disclose will give rise to a cause of action in favor of the purchaser.

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140 300 (Warner Bros. Pictures 2007).
141 See supra notes 90–107 and accompanying text. If whatever "rights" granted to the consumer by the EULA were worth trading in exchange for the consumer relinquishing their legal rights, the software developer would not have to "force" consent with an all-or-nothing contract of adhesion. Put another way, if consent to the terms were optional, would anyone click the "I agree" button? See infra note 148.
142 297 S.E.2d 885 (W. Va. 1982). Obviously, the purchase of a home is deserving of greater protection under the law than most any other consumer purchase, but the point remains that the doctrine of caveat emptor has dwindled in the consumer context.
143 Id. at 886.
144 Thacker, 297 S.E.2d at 888. Note that according to the terms of APPLE, MAC OS; APPLE, iTUNES; MICROSOFT, VISTA; and MICROSOFT, OFFICE, both Apple and Microsoft disclaim any duty to disclose defects in their products. See supra text accompanying notes 95 and 101.
Within months of deciding *Thacker*, WVSCA explicitly entitled home buyers to an implied warranty of fitness and habitability.\footnote{Gamble v. Main, 300 S.E.2d 110, 113 (W. Va. 1983).} Moreover, long before the codification of the U.C.C. and the warranty of merchantability,\footnote{The warranty of merchantability is codified as W. VA. CODE § 46-2-314 (1963).} West Virginia courts imposed substantially similar assurances by operation of law to the sale of goods.\footnote{See, e.g., Gorby v. Bridgeman, 99 S.E. 88, 90 (W. Va. 1919) ("[W]here an article is sold under an executory contract by description, or by a certain tradename, there is an implied warranty that it will be a merchantable article of the kind described."). The U.C.C. supports this expansive approach: "the warranty sections of [Article 2] are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined to ... sales contracts." U.C.C. § 2-313 cmt. 2 (2000).} Software should be no different in this regard. If the West Virginia courts were to find Article 2 of the U.C.C. inapplicable to software transactions, such a technicality should not and likely would not preclude the imposition of the implied warranties of merchantability and fitness, and because the proposed modifications or request to form a new contract offered under shrinkwrap and clickwrap terms confer no reasonably perceivable benefit to the end user, additional consideration is not given. Under this schema, the software company carves out all of the rights, interests, profits, and benefits for itself to the end user’s detriment, imposing virtually all risk on the weaker party.\footnote{The upshot for the consumer is that if the five cent CD on which the software is embedded proves defective, the software manufacturer might replace it. See supra Part III. This remedial “option” is completely lacking of consideration, because the failure to provide this remedy, at a minimum, violates federal law under most EULAs by their own terms. See infra Part IV.C.4.} Although consideration need not be equivalent in value to that for which it purports to be exchanged, where no opportunity for objection to its adequacy is given, as is the case in most software EULAs, especially clickwraps, consideration should fail.\footnote{Lowther Oil Co. v. Guffey, 43 S.E. 101, 102 (W. Va. 1903) ("During the two years the lessors did not object to the adequacy of the consideration, and it is too late to do so now.").} Additionally, consideration must be stipulated for in good faith.\footnote{Lowther Oil Co. v. Guffey, 43 S.E. 101, 102 (W. Va. 1903) ("During the two years the lessors did not object to the adequacy of the consideration, and it is too late to do so now.").} Good faith has been defined by WVSCA as an “implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.”\footnote{Lovett v. Eastern Oil Co., 70 S.E. 707, 708 (W. Va. 1911) (finding that “[t]he parties have chosen to treat [one dollar] as a sufficient consideration” (emphasis added)).} A EULA, if enforced by a court, would have the effect of destroying the consumer’s right to use the software—obviously the “fruit” of any purchase—unless the buyer assents to its terms. Moreover, “a threat of non-performance made for some purpose unre-
lated to the contract, such as to induce the recipient to make an entirely separate contract, is ordinarily improper.

At least in regard to building contracts, West Virginia courts will permit a party to waive its rights without consideration and without the benefit of the U.C.C.'s waiver provision (discussed infra). However, to be valid, a waiver must be intentionally and voluntarily made. "Voluntary choice is of the very essence of waiver. It is a voluntary act which implies a choice by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded and insisted on." A Hobson's choice is not voluntary, nor is it a choice. In sum, new contracts, modifications, and waivers are the only manner in which shrinkwrap and clickwrap terms could be introduced to the consumer under the common law; however, all three require elements that cannot be met post-transaction in the aforementioned context. Therefore, shrinkwrap and clickwrap agreements are rendered unenforceable under the common law of contracts in West Virginia.

2. Shrinkwrap and Clickwrap Agreements Are Enforced In Spite of the U.C.C., Not Because of It

The U.C.C. codified and continued the common law rules of contracts in many respects, but profoundly changed contractual law in several key areas of commercial practice. With regard to promoting its underlying purposes and policies of simplifying, clarifying, and modernizing the law governing commercial transactions, most would agree that it has been an amazing achievement. The U.C.C. has handily resolved innumerable disputes and prevented countless others from occurring. It has streamlined and economized contracting, providing certainty and confidence where once existed estimations and insecurity. However, interpreting the law under the U.C.C. is an art, not a science. Not-

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153 Steinbrecher v. Jones, 153 S.E.2d 295 (W. Va. 1967). Of course, construction contracts are not properly within the scope of the U.C.C.
155 A (Thomas) Hobson's choice is a decision that offers no real alternative. The "choice" is to either take or refuse something: "this one or none." A Hobson's choice is illusory because a choice, by definition, requires an alternative: "this one or that one." An alternative is a choice between two or more options. A popular example of a Hobson's choice is that which the Ford Motor Company posed to the American public: "[a]ny customer can have a car painted any colour that he wants so long as it is black." HENRY FORD, MY LIFE AND WORK 72 (1922). This would be a decision between a black car or no car as opposed to a choice between black or red. See also Philyaw v. Gatson, 466 S.E.2d 133, 138 (W. Va. 1995) (explaining that the claimant's choice was not a Hobson's choice because "she had the opportunity to choose between running for elective office or retaining her employment"). Note that the choice at issue was between two options, and as such, it was not the same as deciding between "retaining her employment" or nothing (i.e., quitting her position as a magistrate clerk).
withstanding the success of its flexible and facilitative mechanisms in adapting to the increasingly complex demands of business, as evidenced by the inconsistent holdings among the various jurisdictions regarding software litigation, EU-LAs have tested the limits of the U.C.C.'s ability to accomplish its lofty ambition to "make uniform the law among the various jurisdictions."\textsuperscript{157}

First, the U.C.C. provides that parties may vary the "effect" of most of its provisions by agreement, except that the obligations of good faith, diligence, reasonableness, and care may not be disclaimed.\textsuperscript{158} This means that parties may alter by agreement the legal consequences that would otherwise flow from its provisions.\textsuperscript{159} This does not give the parties nor the courts carte blanche to alter the meaning or application of its text—it is still, after all, a body of law.\textsuperscript{160} Of course, the U.C.C. recognizes that reason and policy may require the application of its concepts and provisions to matters "intentionally excluded from the act in general,"\textsuperscript{161} but the U.C.C. brushes off attempts to define its terms and concepts with a dictionary or the common law, except where its text is silent. While it makes liberal use of the commercial context, courts are not free to ignore the rules it expounds.

Second, the U.C.C. makes much ado about the concepts of course of performance, course of dealing, and usage of trade.\textsuperscript{162} Indeed, many of its provisions are useless without them. Unfortunately for sellers, these concepts are generally not applicable to shrinkwrap and clickwrap agreements. To this end, lest a court be tempted to seize upon them, an examination of the terms and their application to the canned software purchase is warranted. A "course of performance" is defined as "a sequence of conduct... that exists if... the transaction involves repeated occasions for performance by a party; and... the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection."\textsuperscript{163} Most canned software transactions involve a single transfer and delivery by the seller and a single acceptance and payment on the part of the buyer.\textsuperscript{164} Typically, shrinkwrap terms proclaim that by opening the package containing the media on which the software is stored (a onetime event), the user is manifesting assent to the agreement.\textsuperscript{165} Similarly, clickwrap terms are "splashed... on the screen and

\textsuperscript{157} Id. § 1-103(a)(3).
\textsuperscript{158} Id. § 1-302.
\textsuperscript{159} Id. § 1-302 cmt. 1.
\textsuperscript{160} Id.
\textsuperscript{161} Id. § 1-103 cmt. 1.
\textsuperscript{162} Id. § 1-303.
\textsuperscript{163} Id. § 1-303(a) (emphasis added).
\textsuperscript{164} Id. § 2-301 (2000).
\textsuperscript{165} Although a course of performance can be triggered by "repeated occasions for performance" by either party, it is the non-performing party whose acquiescence is required. Id. § 1-303(a). Some shrinkwrap agreements state that by using the software (a repeated event), the user is assenting to its terms; however, this does not alleviate the requirement of an opportunity to object to the
[will] not let [the user] proceed without indicating acceptance." However, clickwrap terms are generally proposed to the user only once, during the initial launch of the program. Therefore, under both approaches, there is but one occasion for "performance" and no "opportunity for objection to it"; hence, there is no course of performance for the court to consider. A "course of dealing" is a "sequence of conduct concerning previous transactions between the parties . . . that is fairly to be regarded as establishing a common basis of understanding." This may be applicable to some consumers, but many more will enter into a transaction with a particular software developer only once during any period of time as would reasonably permit the evocation of this provision.

Finally, a "usage of trade" is "any practice or method of dealing having such regularity of observance . . . as to justify an expectation that it will be observed." This "regularity of observance" requirement should not be interpreted to mean that any practice can become acceptable, provided that it goes unchallenged for a certain period or number of times, or if a large enough number of dealers observe the practice. All contracts or duties governed by the U.C.C. require honesty and reasonably fair dealing, which cannot be disclaimed. Moreover, where "an unconscionable or dishonest practice becomes standard," courts are permitted to police that practice "to the extent necessary to cope with the situation."

These limitations on the usage of trade are compounded by the fact that its purpose in being offered into evidence is to provide context to assist the court in deciphering "the meaning of the parties' agreement," to give "particular meaning to specific terms of the agreement," and to "supplement or qualify the terms of the agreement"—not to legitimize waivers or modifications, which is change in performance. Additionally, in order for one to be given the opportunity to accept the performance or acquiesce without objection, it follows that some reasonable opportunity to object was first given and later refused. However, the software developer's case may be made stronger on this point where the software repeatedly updates itself via an internet connection, if the update(s) provide a new opportunity for the developer to present the clickwrap terms and the terms are conspicuously displayed to the user. Moreover, if the updates improve the existing software's functionality, the subsequent clickwrap agreements are less likely to fail for want of consideration.

ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996).

Although section 1-303(a)(2) of the U.C.C. allows for either acceptance or acquiescence without objection, it still requires both "knowledge of the nature of performance" and the "opportunity for objection to it," which is simply not an option under most EULAs because to comply with the terms, buyers are forced to either accept the new and conflicting terms or else return the program: "this one or none." See supra note 155.

"But see supra note 165.

"But see supra note 166.

Id. § 1-303(b).

Id. § 1-303(c).

Id. § 1-303 cmt. 4.

Id. §§ 1-302, 1-304.

Id. § 1-303 cmt. 5.
reserved to course of performance. Additionally, usage of trade is only implied "in the vocation or trade in which [both parties] are engaged or of which they are or should be aware." Definitionally, a consumer is not engaged in the vocation or trade of dealing in software, and although a consumer may or even "should" be aware of the developer's practice of "licensing" software as opposed to "selling" it, far less presumable is the notion that the average consumer is or should be aware that by using the product they have purchased they are forfeiting virtually all of their legal (and perhaps constitutional) rights in the event that the software proves defective, thereby causing damages.

Third, notwithstanding Judge Easterbrook's interpretation of its Official Comments, section 2-207 of the U.C.C. (often called the "battle of the

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174 Id. §§ 1-303(d); 1-303(f) (formerly §§ 1-205 and 2-208). Given that the items addressed by section 1-303 of the U.C.C. are all closely associated phrases, the drafters likely excluded "usage of trade" from being relevant to proving waivers or modifications by deliberate choice, under the canon expressio unius est exclusio alterius. However, Karl Llewellyn, the Chief Reporter of the U.C.C., once pointed out that "[s]tatutory interpretation . . . speaks a diplomatic tongue," noting that "there are two opposing canons on almost every point," while at the same time conceding that "they are still needed tools of argument." Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to Be Construed, 3 Vand. L. Rev. 395, 401 (1950). Regarding this canon, Llewellyn stated that its "thrust" could be "parried" with the notion that statutory language "may fairly comprehend many different cases where some only are expressly mentioned by way of example." Id. at 405. The originally approved language of the U.C.C. stated that:

Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted without objection shall be relevant to determine the meaning of the agreement or to show a waiver or modification of any term inconsistent with such course of performance.

U.C.C. § 2-208 (1952) (emphasis added). The Comments go on to state that "[a] single occasion of conduct does not fall within this section within the language of this section . . . ." Id. § 2-208 cmt. 4.

175 U.C.C. § 1-303(d).

176 Judge Easterbrook has been described "new textualist," a theory that "suggest[s] that it is simply unconstitutional to consider anything that was not actually subject to the enactment process" in discerning the meaning of statutes. LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 19–20 (2008) ("Judge Easterbrook of the Seventh Circuit has promoted a similar agenda [to Supreme Court Justice Scalia’s new textualist approach]."). As discussed infra note 189, the Official Comments to the U.C.C. have not been enacted in most states; therefore, it is possible that Judge Easterbrook did not consult them in deciding ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996). However, because he did cite RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981) and E. ALLAN FARNSWORTH, 1 FARNSWORTH ON CONTRACTS § 4.26 (1990) to support the legitimacy of adhesion contracts under Wisconsin law in ProCD (in the context of interpreting Wisconsin's enacted version of Article 2 of the U.C.C.), neither of which were subject to the enacting process of the Wisconsin legislature in adopting the U.C.C., it is clear that Judge Easterbrook does indeed consider extrinsic sources in interpreting statutes, at least when such sources further his desired outcome for a particular case. ProCD, 86 F.3d at 1451. Because the Official Comments are far more persuasive in the interpretation of U.C.C. provisions than the aforementioned sources on which Easterbrook relied, it is fair to state that he either did consult or should have consulted the Comments prior to reaching his decision. Furthermore, in
forms”) prohibits the formation of the rolling, or layered contract, as the concept relates to the typical shrinkwrap or clickwrap agreement. Because Judge Easterbrook relied on a misunderstanding of the battle of the forms in ruling on two of the leading cases upholding shrinkwraps as valid and enforceable, a close examination of section 2-207 of the U.C.C. is required. Section 2-207 permits both additional and different terms to become part of an evolving bargain prior to the “closing of the deal,” and permits additional terms (only) to be added to an existing contract. Both scenarios are subject to certain limitations, as prescribed under section 2-207(1)-(2). However, if an expression of acceptance is both seasonable and definite, or is manifested by a written confirmation sent within a reasonable time, the acceptance is valid under section 2-207(1) notwithstanding its additional or different terms unless it expressly conditions its enforceability on the offeror’s assent to its new or different terms. This is precisely what a shrinkwrap and clickwrap “agreement” is—a written confirmation that states terms additional to or different from those agreed upon during deciding a case under West Virginia law, there is no question that the Official Comments would apply. See supra note 127.

177 Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997) (The plaintiff’s argument “pays scant attention to the opinion in ProCD, which concluded that, when there is only one form, ‘sec. 2-207 is irrelevant.’” (quoting ProCD, 86 F.3d at 1452.)); ProCD, 86 F.3d at 1452 (“Our case has only one form; UCC § 2-207 is irrelevant.”). The drafters of the U.C.C. thought otherwise. “This section is intended to deal with . . . the situation where an agreement has been reached . . . and is followed by one or both parties . . . adding terms not discussed.” U.C.C. § 2-207 cmt. 1 (2000) (emphasis added).

178 U.C.C. § 2-207 cmt. 2. Some commentators attribute the absence of the words "or different" in section 2-207(2) to a scrivener’s error. See, e.g., John L. Utz, More on the Battle of the Forms: The Treatment of “Different” Terms Under the Uniform Commercial Code, 16 UCC L.J. 103 (1983). Indeed, both Massachusetts and Montana have amended their enacted versions of § 2-207(2) to include the words “or different.” MASS. GEN. LAWS ch. 106, § 2-207(2) (1991); MONT. CODE ANN. § 30-2-207(2) (1983). Others believe this omission was intentional. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 32-36 (5th ed. 2000) (arguing that “the text of § 2-207(2) only refers to ‘additional’ terms, and the drafters could have easily inserted ‘or different’ if they had so intended”) (footnote omitted). While admittedly, the disappearance and reemergence of the word “different” in section 2-207 and the Comments that follow at times resembles thimblerig, the approach advocated by Professors White and Summers seems more plausible given that subsequent revisions of the (pre-2003) U.C.C. advanced by NCCUSL and ALI have not changed section 2-207 to account for the omission and that any error, if any, is neither clear nor obvious, whereas “[t]he scrivener’s error exception is a narrow one and should not be used simply because the court believes an error might have been made.” JELLUM, supra note 176, at 75 (emphasis added). Furthermore, remarks made by Karl Llewellyn and Soia Mentschikoff (Chief and Associate Chief Reporters of the U.C.C., respectively) during discussions of the Proposed Final Draft No. 2 of the U.C.C. reveal that the drafters were well aware of this omission and expressed reservations on whether the words were even necessary. See Douglas G. Baird & Robert Weisberg, Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207, 68 VA. L. REV. 1217, 1240 n.61 (1982) (citing Transcript of Proceedings of the Annual Meeting of the American Law Institute (ALI) in Joint Session with the National Conference of Commissioners on Uniform State Laws 27-28 (May 16-18, 1951)).

179 U.C.C. § 2-207(1).
the sale (i.e., the implied warranty of merchantability), but is expressly conditioned on the offeror’s assent (here the consumer) to the additional or different terms. This, the offeree (here the software developer) cannot do. In such a case, the analysis under section 2-207 of the U.C.C. ends—if terms were previously agreed upon, the original contract stands; if terms were merely offered, the “acceptance” expressly made conditional on assent to the additional or different terms is a counteroffer, and no contract is formed. Since, in a consumer software transaction, the deal has already been “closed,” section 2-207 of the U.C.C. is no friend of the software developer.  

Fourth, unlike the common law, the U.C.C. permits the modification of a contract without consideration. However, good faith and legitimate commercial reason are still required, as is mutual consent. Thus, both parties must agree without coercion and they must actually be in “agreement,” defined as “the bargain of the parties in fact as found in their language or inferred . . . [by] course of performance, course of dealing, or usage of trade.” It is axiomatic that a modification cannot be unilateral.  

Shrinkwrap and clickwrap terms demand consent under the threat that the (already completed) sale, however narrowly defined it may be, will be voided unilaterally. Thus, the Hobson’s choice presented by the shrinkwrap and clickwrap terms cannot be a bargain in fact between the parties, notwithstanding the software industry’s labeling the terms an “agreement.” Nor can the course of performance, course of dealing, or usage of trade be applicable to most situations of the consumer variety. As for the waiver provision of section 2-209(4), it is intended to prevent the statute of frauds from precluding modification. This is generally not an issue in consumer software transactions, because few amount to sales for the price of $500 or more. Therefore, section 2-209 of the U.C.C. does not save the EULA.

Where the parties continue as if there were a contract, a constructive contract will manifest under section 2-207(3) of the U.C.C.; however, U.C.C. “gap-fillers” (i.e., default provisions) would replace to the conflicting terms—here, the warranty of merchantability.  

An exception to this rule is a modification between merchants that comports with the requirements of section 2-207(2) of the U.C.C.  

See supra notes 89, 155 and accompanying text.  

See supra notes 162–175 and accompanying text.  

Id. § 2-209 cmt. 4.  

Id. § 2-201(1). Note that if the software purchased is $500 or more, the consumer’s case is made even stronger. This is because the receipt is likely to qualify as a signed writing by the retailer—the party against whom enforcement of the implied warranty is sought—because included on the receipt would be the retailer’s name and address, which most courts would consider a “symbol executed or adopted with present intention to adopt or accept a writing.” U.C.C. 1-201(b)(37) (2004). Furthermore, as a party authorized to promote the sale of the software developer’s product, under strict guidelines (such as prohibitions on separating “bundled” software, see
Finally, the U.C.C. changes the common law rules of formation of contracts significantly. For example, the legitimacy of rolling or layered contract-

ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996)), to the benefit of the developer, the retailer's "signature" on the receipt binds the software developer as well (although the consumer need not rely on principles of agency because under section 46A-6-108 of the West Virginia Code, privity is abolished in an action by a consumer for breach of warranty or for negligence with respect to goods, but see infra note 202 and accompanying text). W. VA. CODE § 46A-6-108 (1987). See also Dawson v. Canteen Corp., 212 S.E.2d 82, 82–83 (W. Va. 1975) ("[T]he requirement of privity of contract in actions grounded in breach of express or implied warranty is abolished in West Virginia."). However, no signed writing by the buyer would exist in relation to the shrinkwrap or clickwrap agreement sufficient to satisfy section 2-201 (see infra this note), and because the new agreement "as modified" would fall within the provisions of that section, the EULA would not be enforceable as against the consumer. This is a consequence of the language "a contract . . . is not enforceable by way of action or defense." U.C.C. § 2-201(1) (emphasis added). In such a situation, the consumer (as the party seeking to enforce the warranty of merchantability) would be the plaintiff and the software developer would be the defendant. However, the defendant would be the party asserting the existence of a contract (the shrinkwrap or clickwrap agreement) as a defense to the breach of warranty claim; thus, the consumer would raise the statute of frauds as a defense to the EULA. Therefore, even if the court would otherwise find the EULA valid and enforceable against the buyer, the statute of frauds defense would be available to the consumer because no signed writing attributable to him or her would be available to evidence the contract "as modified."

With regard to clickwrap agreements, it is arguable that the clicking of the "acceptance" button satisfies the signature requirement under section 39A-1-7(d) of the West Virginia Uniform Electronic Transaction Act. W. VA. CODE § 39A-1-7(d) (2001); see also W. VA. CODE § 39A-1-2(8) (2001) (defining "electronic signature" as a "sound, symbol or process . . . logically associated with a record"). However, the writing requirement of section 2-201 of the U.C.C. is still not satisfied because a writing must be in "tangible form." W. VA. CODE § 46-1-201(43) (2006). Although the clickwrap terms themselves likely constitute a writing, unless the program itself saves a record to the user's hard drive (or other retrievable location) after the user selects the "acceptance" button with a recording of the process the individual actually undertook, the "signed" record itself cannot be made "retrievable in perceivable form." W. VA. CODE § 46-1-201(31). A mere inference that the user "signed" the writing, as evidenced by the fact that the program was rendered fully executable, would likely be too great a stretch to fulfill this requirement. While the parol evidence rule would seem to be relevant here, as well as to the issue of which terms are to be given effect in a EULA versus the underlying purchase generally, section 2-202 explicitly limits the court's inquiry to the actual intent of the parties, not what the "reasonable" buyer would have intended. U.C.C. § 2-202. Therefore, a buyer who can successfully argue that they did not intend the EULA to be a "final expression of their agreement" may present parol evidence to contradict the writing. Id. Additionally, a buyer may assert any of a number of contract defenses, such as fraud or unconscionability, to achieve this result. See infra Parts IV.C.2-3.

With regard to agency principles, "[t]he principal cannot accept the benefits, without also bearing the burdens, of the agent's acts." Syl., Lowance v. Johnson, 75 W.Va. 784, 84 S.E. 937 (W. Va. 1915). See also RESTATEMENT (SECOND) OF AGENCY § 96 (1958) ("The purported principal must take the transaction in its entirety, with the burdens as well as the benefits. He cannot affirm a sale and disavow unauthorized representations or warranties which the purported agent made to induce it."). As discussed supra note 5, a warranty of merchantability attaches to a sale by certain types of merchants, unless otherwise agreed. Generally, the purchase of "canned" software is not accompanied by any exclusion or modification of warranties by the merchant seller. If the purchase of software from a retailer constitutes a "sale," to which the software developer is a beneficiary, than the latter ought to be held to the terms governing the original transaction.
ing is dependent on section 2-204 of the U.C.C. In *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, the Supreme Court of the State of Washington concluded that “because [section 2-204] allows a contract to be formed ‘in any manner sufficient to show agreement . . . even though the moment of its making is undetermined,’ it allows the formation of ‘layered contracts.’” In so holding, the court ignored the intent of Article 2’s drafters, which is explained in the Official Comment following the provision. The comment that follows section 2-204 of the U.C.C. clearly provides that the language “any manner sufficient to show agreement” refers to the manner of expression of agreement, not its legal effect, which is “qualified by other provisions of [the] Article.” Thus, section 2-204(1) of the U.C.C. does not exist in a vacuum, and must be read in conjunction with other provisions of Article 2 of the U.C.C., some of which are discussed supra in this Part.

Furthermore, the language “even though the moment of its making is undetermined” is “directed primarily to the situation where the interchanged correspondence does not disclose the exact point at which the deal was closed.” In the interchange between buyer and seller, the exact point at which the deal is closed is obvious: when the seller accepts the buyer’s offer, receives the buyer’s payment, and delivery is made. In the consumer software transaction context, this typically occurs when the buyer selects a box in the store, pays, is given a receipt, and is handed the box. If the software is purchased

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188 998 P.2d 305, 313 (Wash. 2000) (citing WASH. REV. CODE § 62A.2-204 (1999)). In *Mortenson*, a construction company (Mortenson), relying on the defendant’s bid analysis software to prepare its bid to construct a medical center, submitted a bid generated by the software and was awarded the contract to build. *Id.* at 309. However, the software malfunctioned and entered a bid $1.95 million lower than Mortenson had intended. *Id.* An internal memorandum revealed that the defendant was aware of the problem prior to Mortenson’s bid, but chose to correct the problem with only some of its customers. *Id.* Because Mortenson was the winning bid on the medical center, it was forced to either build at a loss or be in breach of its contract. Relying on *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), and *ProCD*, 86 F.3d 1447, the court affirmed the lower court’s finding of summary judgment in favor of Timberline on account of the software’s shrinkwrap agreement. It should be noted that *Mortenson* might have been decided differently had Mortenson been a consumer.

189 The Official Comments are not part of the statutes themselves; therefore, their text is highly persuasive, but not mandatory. *But see supra* note 127. In *Mortenson*, 998 P.2d 305, because the Washington court based its decision on the holdings of the Seventh Circuit (another persuasive, but not mandatory source), it should have first consulted the Official Comments. See WHITE & SUMMERS, supra note 178, at 13–14 (“Besides the text itself, the Official Comments appended to each section of the Code are by far the most useful aids to interpretation and construction . . . . In some instances, the comments are sounder than the text; but disparity or no, most courts follow the comments.”). The flip side to this coin is that section 1-103(3) of the U.C.C. seeks “to make uniform the law among the various jurisdictions.” U.C.C. § 1-103(a) (2004). However, where a court misconstrues the meaning of the Act, it is counterproductive to perpetuate incompetence in the name of uniformity.

190 U.C.C. § 2-204 cmt.

191 *Id.*

192 *Id.* § 2-301.
through mail-order, the sale is complete when the buyer's payment is accepted and the seller puts the software "in the possession of . . . a carrier." If the software is purchased electronically, the sale is complete when buyer's payment is accepted and the software or the activation code is transmitted over the internet. The "parties have intended to make a contract" at such point because tender of delivery and tender of payment coalesce and "there is a reasonably certain basis for giving an appropriate remedy." Thus, the deal is closed; the presumption is that sales are final. The seller may choose to implement a return policy for conforming goods, but this is at the seller's option.

Therefore, there are no avenues available to the software developer in the common law or the U.C.C. under which to validate shrinkwrap or clickwrap agreements as they relate to most consumer transactions. Notwithstanding this reality, courts have a tendency to disregard the text in favor of expanding commercial practices. At best, the latter approach should be applicable only in the commercial context—where less bargaining disparity exists and the potential for consequential damages is exponentially greater—rather than in that of the consumer variety. Although the U.C.C. aspires to promote the evolution of commercial practices, such a position must be coupled with the concept of mutuality; a contract borne of coercion is forged by duress, not agreement. Layered or rolling contracts may be acceptable under the broad banner of promoting commerce; however, such a finding will be made in spite of the text, not as a result of it. Since this issue has yet to be litigated under West Virginia law, this Note will next advance several approaches in the likely event that the West Virginia courts entertain the idea that it is a "seller's market."

B. Implications of the West Virginia Consumer Credit and Protection Act on Software

Article 2 does not "impair . . . any statute regulating sales to consumers." Furthermore, the Official Comments provide that "in a situation where the other [conflicting] statute was specifically intended to provide additional protection to a class . . . the interrelationship between the statutes may lead the court to conclude that the other statute is controlling." Article 6 of the West Virginia Consumer Credit and Protection Act regulates sales to consumers and was promulgated to provide additional protection to the public from "unfair,

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193 Id. § 2-504(a).
194 Id. § 2-204(3).
195 See supra text accompanying note 36.
196 W. VA. CODE § 46-2-102 (2008). See also WHITE & SUMMERS, supra note 178, at 8 ("Federal commercial law overrides the Code. . . . Similarly, state regulatory statutes also override the Code."); WHITE & SUMMERS, supra note 178, at 26 ("Both Article 2 and the other statutes may apply, and when the two conflict, the other statutory law typically controls.").
197 U.C.C. § 1-103 cmt. 3 (2004).
deceptive and fraudulent acts or practices.\textsuperscript{198} Therefore, Article 2 as enacted by the West Virginia legislature does not displace the West Virginia General Consumer Protection statutes.\textsuperscript{199} Of these, the provision prohibiting the disclaimer of warranties and remedies has the potential to impact shrinkwrap and clickwrap agreements significantly, and is therefore the most important of the consumer protection statutes with regard to such agreements.\textsuperscript{200} Section 46A-6-107 states:

Notwithstanding any other provision of law to the contrary with respect to goods which are the subject of or are intended to become the subject of a consumer transaction, no merchant shall... [e]xclude, modify or otherwise attempt to limit any warranty, express or implied, including the warranties of merchantability and fitness for a particular purpose; or... [e]xclude, modify or attempt to limit any remedy provided by law, including the measure of damages available, for a breach of warranty, express or implied. Any such exclusion, modification or attempted limitation shall be void.\textsuperscript{201}

Such a statute would seem to put the issue of shrinkwrap and clickwrap validity to rest in the consumer context, at least as far as liability and warranty disclaimers are concerned.

However, the issue is still subject to debate because the statute defines "consumer transaction" to mean "a sale or lease to a natural person or persons for a personal, family, household or agricultural purpose.\textsuperscript{202} The statute uses "sale" to mean "any sale, offer for sale or attempt to sell any goods for cash or credit or any services or offer for services for cash or credit.\textsuperscript{203} Under West Virginia law, "[a] 'sale' consists in the passing of title from the seller to the buyer for a price.\textsuperscript{204} Unless the parties explicitly agree to the contrary, "title

\textsuperscript{198} W. VA. CODE § 46A-6-101(1) (2008).
\textsuperscript{199} Id. §§ 46A-6-101 to -110 (2008).
\textsuperscript{200} See id. § 46A-6-107 (1974).
\textsuperscript{201} Id.
\textsuperscript{202} Id. § 46A-6-102(2) (2005). Note that because Article 2 of the U.C.C. governs transactions in goods, such a distinction does not create the same limitation on applicability to software purchases for the U.C.C. See supra Parts II.C, IV.A. The original enactment of section 46A-6-102 did not define the term "consumer transaction," but section 46A-1-102 (the general definitions section), defined "consumer" as "a natural person who incurs debt pursuant to a consumer credit sale or a consumer loan." 1974 W. Va. Acts 64. The term "consumer transaction" was defined the following year, and the definition of "consumer" was also added to section 46A-6-102, broadening the definition of "consumer" in article six to "a natural person to whom a sale is made in a consumer transaction." 1975 W. Va. Acts 291.
\textsuperscript{203} W. VA. CODE § 46A-6-102(5).
\textsuperscript{204} Id. § 46-2-106 (1963).
passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods."\(^{205}\) A seller may convey no greater interest than is so possessed; hence, if a license is valid, the seller can transfer no more than the license permits. Therefore, applicability of section 46A-6-107 of the West Virginia Code to software is not entirely clear.

In enacting the statute, in subsection (1) of section 46A-6-101, the legislature declared as its purpose "to protect the public and foster fair and honest competition," and to that end "[the] article shall be liberally construed so that its beneficial purposes may be served"; however, subsection (1) is counterpoised by subsection (2), which proclaims that the article "shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest."\(^{206}\) Although courts following the ProCD line of case law might view shrinkwrap and clickwrap agreements as "reasonable in relation to the development and preservation of business," whether West Virginia courts will agree or find such agreements "injurious to the public interest" has yet to be determined.

There need not be such uncertainty. If the legislature intended section 46A-6-107 of the West Virginia Code to govern consumer software transactions, the language of section 46A-6-102(2) of the West Virginia Code should be amended to include "licenses" or "computer information agreements" to clarify its applicability to software. It is not difficult to imagine the end run software developers might effectuate against language limited to a "sale or lease." If the legislature did not intend this provision to govern consumer software transactions, it should reconsider. Shrinkwrap and clickwrap agreements epitomize the very practices that the General Consumer Protection statutes profess as their raison d'etre to suppress, in order to "protect the public and foster fair and honest competition."\(^{207}\) By including licenses in the definition of consumer transactions, the legislature would be protecting consumers from "unfair competition and unfair, deceptive and fraudulent acts or practices,"\(^{208}\) while at the same time, preserving the legitimate benefits that licensing affords software developers: the ability to prevent arbitrage and limit liability in the commercial setting. Likewise, consumers would be guaranteed at least the minimal protections of the implied warranty of merchantability and the right to recover for contractual breach or in tort for damages caused by defective software.

C. Litigation Strategies Under West Virginia (and Federal) Law

The software industry has chosen to license its products through shrinkwrap, clickwrap, and other arrangements rather than distribute software

\(^{205}\) Id. § 46-2-401(2) (2006).
\(^{206}\) Id. § 46A-6-101 (1974).
\(^{207}\) Id.
\(^{208}\) Id.
under traditional notions of sales. As previously discussed, legitimate justifications exist for the licensing of software. Although the issues surrounding this practice have yet to be litigated in West Virginia, this section discusses several strategies under West Virginia law to assist consumers in an attempt to reach an appropriate equilibrium among competing interests. Despite the many problems with shrinkwrap and clickwrap agreements from the buyer's perspective, such contracting methodology can be a legitimate approach to recognizing the unique obstacles software developers confront in distributing their products to commercial entities when drafted responsibly. Therefore, the following discussion primarily concerns consumer transactions.

1. Choice of Law Provisions; Forum Selection and Arbitration Clauses: Not Necessarily a Foregone Conclusion

The bulk of shrinkwrap and clickwrap litigation turns on forum selection and arbitration clauses. A choice of law provision is a separate matter

209 Forum selection and arbitration clauses are typically upheld as valid and enforceable. However, recent decisions indicate that the tide may be turning with regard to EULAs. Compare DeJohn v. The .TV Corp. Int'l, 245 F. Supp. 2d 913, 921 (N.D. Ill. 2003) (quoting Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1363 (2d Cir.1993)) (Clickwrap agreement upheld as "reasonable" absent a showing of: (1) fraud or overreaching, (2) that "the party will be deprived of his day in court as a result of the 'grave inconvenience or unfairness of the selected forum,'" (3) that fundamental unfairness of the chosen law may deprive the party of a remedy, or (4) that "the clause contravenes a strong public policy of the forum state," a mandatory clause is valid [hereinafter Bremen Test]; plaintiff failed to invoke any such factor (quoting Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1363 (2d Cir.1993)), Koresko v. RealNetworks, Inc., 291 F. Supp. 2d 1157, 1163 (E.D. Cal. 2003) (Clickwrap upheld despite plaintiff's claims of fraud, conversion, unjust enrichment, and breach of covenant of good faith and fair dealing; California resident not unduly burdened by forum selection clause giving Washington exclusive jurisdiction.), AC Controls Co., Inc. v. Pomeroy Computer Res., Inc., 284 F. Supp. 2d 357, 361 (W.D. N.C. 2003) (Evidence that the plaintiff successfully negotiated the modification of terms on the same document containing the forum selection clause established the equally situated position of the parties.), 1-A Equip. Co. v. Icode, Inc. 2003 WL 549913 (Mass. App. Div. opinion certified Feb. 21, 2003) (Court upheld shrinkwrap agreement on ProCD's “[n]o tice on the outside, terms on the inside, and a right to return the software for a refund" rationale; plaintiff failed to establish that the forum selection clause resulted from unequal bargaining power between the parties or was otherwise unfair, unreasonable, or affected by fraud.), and Gates v. AOL Time Warner, Inc., 2003 WL 21375367 at *2 (N.Y. Sup. Ct. May 15, 2003) (Forum selection clauses are prima facie valid; TOS forum selection clause upheld under the Bremen Test.), with Trujillo v. Apple Computer, Inc., 578 F.Supp.2d 979, 995 (N.D. Ill. 2008) (EULA with service provider of Apple iPhone compelling arbitration held unconscionable on the grounds that its terms came too late, buyer had reason to believe that returning the phone would reduce his refund to cover a ten percent restocking fee, and showing of substantive unconscionability not required under Illinois law upon showing of procedural unconscionability concerning a "basic matter" of the contract.), Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 611 (E.D. Pa. 2007) (Taken as a whole, the defendant's unilaterally imposed clickwrap TOS held unenforceable on the grounds that it "tilt[ed] unfairly, in almost all situations, in [the defendant's] favor" and its forum selection and arbitration provision would have imposed greater costs on the plaintiff than litigating in state or federal court; held FAA did not preclude state law unconscionability attack.), and Oestreicher v. Alienware Corp., 502 F. Supp. 2d 1061, 1069 (N.D. Cal. 2007) (Court held that "California has a materially greater interest based on
from a forum selection clause, but the two are often intertwined in license provisions. A valid forum selection clause determines where a dispute will be litigated or resolved; a valid choice of law provision determines which state's laws will govern. With regard to the latter, West Virginia law unequivocally deems any choice of law provision in a shrinkwrap or clickwrap agreement that seeks to interpret the agreement pursuant to the laws of a state that has enacted UCITA or any "substantially similar" law voidable if the party against whom enforcement of the choice of law provision is sought is a West Virginia resident or a company having its principal place of business in West Virginia. In such a case, the agreement will be interpreted pursuant to West Virginia law.

UCITA is the later incarnation of the proposed, but never adopted, Article 2B to the U.C.C. Because UCITA presumes shrinkwrap and clickwrap agreements to be valid, as well as other reasons regarded as unfavorable to consumers, it failed to pass in forty-eight of the fifty states. However, several states have considered revised versions of UCITA, and NCCUSL is likely to resurrect it in the future. Furthermore, several states have accomplished sub-

the fact that California residents are invoking California consumer protection laws to seek recovery for allegedly defective products shipped into California despite clickwrap forum selection clause; court held that the consumer contract of adhesion established a minimal degree of procedural unconscionability per se, while the class action waiver constituted a high degree of substantive unconscionability; defendant's motion to compel arbitration denied.).

E.g., one of the more controversial aspects of UCITA was that it originally legalized the practice of "self-help," which enabled a software developer to monitor a consumer's use of its software via an internet connection or through internal mechanisms contained in the software. If, in the sole discretion of the vendor, the user was deemed to have violated a term of the license, the developer was entitled to terminate the user's software functionality remotely. This practice is now limited to "a right of self-help to repossess the tangible copy without breach of peace." Id. § 815(b). However, a similar measure, known as "automatic restraint" is still sanctioned under the Act. Automatic restraint is defined as "a program, code, device, or similar electronic or physical limitation the intended purpose of which is to prevent use of information contrary to the contract." Id. § 605(a). Therefore, a developer "is not liable for any loss caused by the use of the restraint to prevent use of information contrary to the contract," although the practice is not to be used as a remedy for breach. Id. § 605(d).

Currently, ALI is drafting a project entitled "Principles of the Law of Software Contracts" ("Principles") to govern "agreements for the transfer of software for a consideration." PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 1.06 (Tentative Draft No. 1, 2008). The Principles are not the law "unless and until a court adopts [them]. Courts can apply the Principles as definitive rules, as a 'gloss' on the common law, U.C.C. Article 2, or other statutes, or not at all, as they see fit." Id. at 3. It is too early to predict with a reasonable degree of certainty whether the Principles will be adopted by the majority of jurisdictions or if they will suffer the same fate as earlier attempts to handle software contracts. However, due to the modest approach taken by ALI and the greater effort to take consumer rights into consideration, at least compared to previous attempts, the Principles are likely to be persuasive to some courts.
stantially similar results, such as Washington, through the case law.\textsuperscript{217} Therefore, if a choice of law provision is at issue, it may make sense for the party seeking to have it voided advance the argument that the given state has enacted laws that are substantially similar to UCITA or has adopted such rules through its common law. Furthermore, West Virginia, like most states, has adopted the 2004 revisions to Article 1 of the U.C.C. generally, but has \textit{not} adopted the 2004 proposed amendment to section 1-301. Therefore, where a consumer or business entity purchases software under circumstances bearing a reasonable relation to West Virginia, the parties may agree to apply the law of another state only where that state has a reasonable relation to the transaction as well.\textsuperscript{218} Absent such an agreement, West Virginia law governs the transaction.\textsuperscript{219} The West Virginia courts apply the RESTATEMENT (SECOND) OF CONFLICT OF LAWS section 187(2) when "the chosen state has no substantial relationship to the parties or the transaction, or when the application of the law of the chosen state would be contrary to a fundamental public policy of the state whose law would apply in the absence of a choice of laws provision."\textsuperscript{220} In such a case, "a choice of law provision will not be given effect."\textsuperscript{221}

In West Virginia, forum selection clauses are not invalid per se.\textsuperscript{222} Forum selection clauses may determine which state has jurisdiction to hear the case (if the matter is to be litigated) or, if arbitration or mediation is made man-

\textsuperscript{217} See M.A. Mortenson Co., Inc. v. Timberline Software Corp., 998 P.2d 305 (Wash. 2000).

\textsuperscript{218} W. VA. CODE § 46-1-301(a) (2008).

\textsuperscript{219} Id. § 46-1-301(b).


\begin{quote}
In state X, A buys from the B company a ticket on one of B's steamships for transportation from X to state Y. The ticket recites that it shall be governed by Y law and also contains a provision stating that B shall not be liable for injuries resulting from the negligence of its servants. The latter provision is valid under Y local law, but invalid under that of X. In the course of the voyage, A is injured through the negligence of B's servants. A brings suit to recover for his injuries against B in state Z. In determining whether or not to give effect to the choice-of-law provision, the Z court will give consideration to the fact that the contract was drafted unilaterally by B, the dominant party, and then presented to A on a "take-it-or-leave-it" basis.
\end{quote}

\textsuperscript{221} General Elec. Co., 275 S.E.2d at 293.

\textsuperscript{222} In Caperton v. A.T. Massey Coal Co., Inc., 2008 WL 918444 (Apr. 3, 2008), cert. granted (on other grounds), 77 U.S.L.W. 3051, 77 U.S.L.W. 3292, 77 U.S.L.W. 3295 (Nov. 14, 2008) (No. 08-22), WVSCA adopted the four-part analysis advanced by the Second Circuit in Phillips v. Audio Active Ltd., 494 F.3d 378, 383-84 (2d Cir. 2007) [hereinafter Phillips Test]. Thus, a forum selection clause is presumed enforceable where: (1) reasonably communicated to the resisting party prior to entering the contract; (2) clear language specifies that jurisdiction is appropriate only in a designated forum; (3) the claims and parties at issue fall within the scope of the clause; and (4) enforcement is "reasonable." Caperton, 2008 WL 918444. West Virginia has adopted the Bremen Test for reasonableness as set forth in Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1363 (2d Cir. 1993), supra note 209.
datory under the terms of the agreement, the clause may dictate the conditions under which the dispute will be resolved. Mediators seek to lead the parties to an agreement, but cannot compel one. Arbitrators, on the other hand, hear the dispute and issue a binding decision, much like a judge. Unlike a judge, arbitrators are not always bound by precedent or even the rule of law. Furthermore, arbitrators often do not make their decisions public. Therefore, the party demanding arbitration may choose a sympathetic ear, in a location inconvenient to the other party, while avoiding the negative publicity associated with litigation when drafting the arbitration clause. As long as the terms are not “gravely inconvenient” or “unreasonable,” the provision is likely to be found valid if challenged in court. Although forum selection issues delve into contract—and therefore state—law, contracts involving interstate commerce and containing an arbitration provision fall under the aegis of federal law.

Generally speaking, arbitration clauses are governed by the Federal Arbitration Act (FAA), which declares that “[a] written provision in...a contract... involving commerce to settle by arbitration...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” In Bd. of Ed. of Berkeley County v. W. Harley Miller, Inc., WVSCA held that in the absence of fraud, there is a rebuttable presumption that arbitration clauses are valid; however, the court held that “the agreement to arbitrate must have been ‘bargained for’” to be enforceable. Additionally, “[w]henever a party can bring an arbitration clause within the unconscionability provisions of § 2-302 of the Uniform Commercial Code...then that, too, would indicate that there was no meaningful bargaining with regard to the arbitration provision and [the court] should invalidate it.” The Harley Miller court carved out one other exception to the presumption in favor of upholding arbitration clauses, holding that, “when arbitration is wholly inappropriate, given the nature of the contract, and could only have been intended to defeat just claims, the provision cannot be considered to have been bargained

See Phillips Test and Bremen Test, supra notes 222 and 209, respectively.

But see infra note 277 and accompanying text.

Id. § 2. In 2007, a bill was introduced in both houses of Congress that, if enacted, would amend the FAA to invalidate pre-dispute arbitration agreements requiring the arbitration of consumer disputes. Arbitration Fairness Act of 2007, S. 1782, 110th Cong.; H.R. 3010, 110th Cong. (2007). The definition of “consumer dispute” is broad enough to include EULAs. See S. 1782 § 3(6) (defining “consumer dispute” to include a dispute between an individual “who seeks or acquires...personal property...for personal, family, or household purposes and the seller or provider of such property”). Although the bill did not pass during the previous session, it is likely to be reintroduced in the 111th Congress. If reintroduced and enacted in its current form, the amendments would “apply to any dispute or claim that arises on or after” the date of enactment. Id. § 5.

Id. at 486–87. Section 2-302 of the U.C.C. gives courts the discretion to alter or strike an unconscionable term or terms, or refuse to enforce an unconscionable contract altogether. See infra, Part IV.C.2.
A decade later, in *Perry v. Thomas*, SCOTUS held that "state law, whether of legislative or judicial origin, is applicable [to arbitration provisions] if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." However, "[a] state law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with the requirement of [the FAA]."

In *Schultz v. AT&T Wireless Servs., Inc.*, the United States District Court for the Northern District of West Virginia cited this language to invalidate the decision in *Harley Miller* on the basis that "it was the intent of the Supreme Court of Appeals of West Virginia to specifically target arbitration agreements, rather than contracts generally." However, in *State ex rel. Dunlap v. Berger*, WVSCA held:

"[T]he Federal Arbitration Act, 9 U.S.C. Sec. 2 [1947] does not bar a state court that is examining exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public from considering whether the provisions are unconscionable—merely because the prohibiting or limiting provisions are part of or tied to provisions in the contract relating to arbitration."

This is in accordance with the SCOTUS decision in *Doctor's Assocs., Inc. v. Casarotto*, which held that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]. . . . Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions." Notwithstanding *Casarotto*, the *Schultz* court, citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coe*, stated that the *Dunlap* decision was "preempted by the FAA" on the grounds that the *Dunlap* decision imposes heightened requirements on parties seeking to enforce arbitration provisions by

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228 *Harley Miller*, 236 S.E.2d at 487.
230 *Id.*
"placing agreements to arbitrate . . . on a different footing than other contracts."

2. Unconscionability: Not a Shockingly Original Strategy

In West Virginia, a contract will be held unconscionable "when the 'gross inadequacy in bargaining power' combines with 'terms unreasonably favorable to the stronger party' . . . which in turn renders the contract unenforceable." In determining whether a contract is unconscionable, a West Virginia court "must focus on the relative positions of the parties, the nature of the entire contract, the adequacy of bargaining position, the meaningful alternatives available to the appellant, and the existence of unfair terms in the contract." Finding, inter alia, in Dunlap, that the defendant willfully engaged in fraudulent misconduct and sought to hide behind an arbitration provision, the court found the contract unconscionable because it "deprived [every customer] of their right to invoke and employ an important remedy provided by law to punish and deter illegal, willful, and grossly negligent misconduct," and by enforcing the provision, the defendant "would be categorically shielded from any liability for such sanctions, regardless of [its] level of wrongdoing."

Based on the facts of the case, the Dunlap court properly applied the West Virginia test for unconscionability, and in so ruling, the court did not evaluate the arbitration clause "on a different footing than other contracts." The contract in question was a nonnegotiated contract of adhesion, that if enforced would have precluded any liability on the part of the defendant notwithstanding its illegal acts, and although the contract at issue did not deprive the plaintiff of all meaningful alternatives, several of the defendant's employees testified that the defendant ordered them to conceal and lie about the terms when explaining them to customers. Finding Chapter 46A of the West Virginia Code to be "specifically designed to eradicate unconscionability in consumer transactions," and directly applicable to the formation of the contract at issue, the court held that the contract was unconscionable under the circumstances. In so holding, the court rejected the contract based on its result, not on its arbitration position. In this regard, the Coe court was simply incorrect. While the holding in Schultz

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235 Schultz, 376 F. Supp. 2d at 691 (quoting Coe, 313 F. Supp. 2d at 615). But see infra text accompanying note 239.


239 Id.

240 Id.

may cloud the outcome of *Dunlap*, the *Schultz* decision cannot usurp the mandatory authority of *Casarotto*.\(^{242}\) Therefore, if a buyer can overcome the rebuttable presumption that an arbitration clause is enforceable through the establishment of "generally applicable contract defenses," the buyer can clear the first hurdle in litigating his or her case against the enforceability of a shrinkwrap or clickwrap agreement, and while establishing unconscionability is by far the most common route pursued by litigants in such cases, asserting fraud, duress, or misrepresentation may prove useful as additional routes to the courthouse.

3. Fraud, Duress, and Misrepresentation: Common Law Cures for the FAA Blues

Courts may rescind a contract obtained from fraud or misrepresentation.\(^{243}\) Likewise, "[i]t is a general principle that a transaction may be avoided on account of duress and wrongful pressure."\(^{244}\) All contracts require mutual consent, which must be freely given and cannot be obtained by duress, fraud, undue influence, or misrepresentation of a material fact.\(^{245}\) In West Virginia, to prevail on a claim of fraud, the party seeking to assert it must show that the other party made one or more misrepresentations or withheld information, which it knew or should have known, concerned a material fact on which the asserting party justifiably relied and was damaged as a result.\(^{246}\) As illustrated in Part III, *supra*, license terms often contain provisions that appear to sanction fraud, such as those that preclude liability *even if* the developer knows that their product is defective. Obviously, a defect can arise to the requisite level of material sufficiency, and while the burden of showing fraud is always on the party seeking to assert it, fraud need not be proved by direct evidence. "If it satisfactorily appears from the circumstances shown, and from the conduct of the parties during the sale and subsequent thereto, that [fraud] existed, such showing will be as effective to set aside the sale as though proven by direct evidence."\(^{247}\) Furthermore, "[c]ircumstances and transactions may be *even stronger* than direct proof and furnish satisfactory proof of fraud that will outweigh the answers of defendants and evidence of the witnesses."\(^{248}\) As for the defense of misrepresentation against a claim that the consumer breached the EULA, few trades carry a greater presumption of unreasonable nondisclosure—that is, where information is readily available to the seller but not the buyer—than the software industry.

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\(^{243}\) *Tolley v. Poteet*, 57 S.E. 811, 820 (W.Va. 1907) (citing *Merchants' Bank v. Campbell*, 75 Va. 455 (Va. 1881)).


\(^{245}\) *Crouch v. Wartenberg*, 104 S.E. 117, 119 (W. Va. 1920). *See also supra* note 152 and accompanying text.


Fraud in the inducement has always been a deal breaker to contract obligation, rendering it voidable: "fraud vitiates all transactions." ProCD held that "[s]hrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable)." Judge Easterbrook would later come to regret those words . . . or at least ignore them. Hill proved that Easterbrook could not be inconvenienced by such minor vexations as good faith and honesty in fact in attainment of his desired result.

In Hill, the plaintiff purchased a Gateway computer advertised by the defendant (Gateway) as having "Altec Lansing Surround Sound Speakers with Subwoofer, a 6X EIDE CD-ROM Drive, and a Matrox MGA 'Millennium' 2MB Graphics Accelerator." Gateway proclaimed the CD-ROM drive to be "the fastest EIDE CD-ROM anywhere." Instead, what the consumer got was a CD-ROM drive that repeatedly jammed and performed like a 4x speed drive, notwithstanding the fact that a faster EIDE (Enhanced Integrated Device Electronics) CD-ROM drive than a 6x was available when Gateway made its claim; the speakers were not surround sound, nor were surround sound speakers even available from Gateway at the time (Gateway allegedly told the plaintiffs that this part of the advertisement was a "misprint"); and the graphics accelerator was "substituted" for a cheaper, less-powerful component without notice and without a reduction in price. Despite these obvious breaches of express warranties, nondisclosures, and fraud, Easterbrook found the shrinkwrap terms—"buried within hundreds of pages of important documents," to which buyers had no prior notice, and compelling arbitration with an advance fee of $2000—valid. After all, what's a little fraud among grossly unequal bargainers?

4. A Brief Tour of the Magnuson-Mossery with Regard to EULAS

The federal Magnuson-Moss Warranty Act (MMWA), inter alia, voids any attempt by a merchant (as to goods of the kind at issue) to disclaim or modify the warranty of merchantability in "consumer products." for the du-

250 ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996).
251 Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).
253 Id.
254 Id. at *1-*2.
ration of a "written warranty." The coverage period of the written warranty may be limited by the seller or manufacturer according to its terms, but it must extend for a reasonable duration. Although federal law, MMWA allows consumers to litigate claims in state court if the amount in controversy is less than $50,000, exclusive of interest and costs. Alternatively, if the consumer wishes to pursue an implied or express warranty claim arising under state law in federal court, MMWA sets the minimum pleading amount at $50,000. Such a claim may be brought regardless as to whether the buyer gave the warrantor adequate notice of breach, notwithstanding the notice requirement imposed on the buyer by the U.C.C., so long as the warrantor was given a reasonable opportunity to cure. MMWA supplies an additional count to breach of warranty claims; other remedial action may be pursued as well.

Including an MMWA count in the complaint can provide a number of benefits, such as recovery of litigation costs (including attorney's fees) to prevailing consumers; however, MMWA's application to software EULAS presents several complications. First, MMWA applies only to tangible property, although the purpose of imposing this restriction was to preclude MMWA cov-

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258 MMWA defines "consumer product" as "any tangible personal property ... distributed in commerce and ... normally used for personal, family, or household purposes." 15 U.S.C. § 2301(1) (1975) (emphasis added).
259 Id. § 2308(a) (1975). A "written warranty" is defined, in pertinent part, as:
[A]ny undertaking in writing in connection with the sale ... to refund, repair, replace, or take other remedial action with respect to the product ... which ... becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.
260 Id. § 2301(6)(B). An MMWA count can be added to a breach of implied warranty claim even though no written warranty is given, so long as the implied warranty is not otherwise excluded or modified. Id. § 2310(d)(1) (1975). There is a presumption that a written warranty under MMWA is part of the basis of the bargain, notwithstanding its lack of inclusion in the negotiation. See Murphy v. Mallard Coach Co., 582 N.Y.S.2d 528, 531 (N.Y. App. Div. 1992) (Rejecting defendant's argument that to be part of the basis of the bargain the warranty must be part of the negotiation process. "[T]he warranty card generally comes with the goods, [but is] not available to be read by the consumer until after the item is actually purchased and brought home. ... [Defendant's] interpretation would, in effect, render almost all consumer warranties an absolute nullity.
261 Id. § 2308(b) (emphasis added).
262 Id. § 2310(d)(1)–(3).
263 Id.
266 Id. § 2310(d)(2).
267 See CLASSEN, supra note 18, at 53. The issue of whether MMWA is applicable to software has yet to be adjudicated and the Federal Trade Commission (FTC) has not issued a rulemaking on the matter. Id. at 53 n.2. The case is stronger for hardware sold with preinstalled software, but a consumer adopting this approach must be willing to concede the legitimacy of the EULA.
268 See supra notes 53–67, and text accompanying notes 118–122.
erage from realty.\textsuperscript{268} MMWA has not been amended since its enactment in 1975.\textsuperscript{269} Because computers were not affordable or practical to consumers at that time, nor had EULA litigation come into existence in the consumer software context, it is likely that this limitation was not intended to preclude software from the reach of MMWA. After all, MMWA was "designed to . . . readdress the ill effects resulting from the imbalance which presently exists in the relative bargaining power of consumers and suppliers of consumer products" and address "[t]he need for minimum warranty protection for consumers" to "insure consumers have certain basic protections."\textsuperscript{270} Few products—if any—offer so little to the consumer in terms of "minimum warranty protection." Second, the safeguarding provisions of MMWA are predicated on the concept of its broadly defined "written warranty." Although some EULAs might fall within MMWA’s definition of written warranty (or "service contract"),\textsuperscript{271} others create illusory undertakings of remedial action at best.\textsuperscript{272} Finally, both definitions of "written warranty" are limited to those made in connection with a sale of a consumer product.\textsuperscript{273} In Apple’s case at least, "[y]ou own the media on which the Apple Software is recorded but Apple and/or Apple’s licensor(s) retain ownership of the Apple Software itself";\textsuperscript{274} thus, there is clearly a sale of the media, bringing it squarely into the purview of MMWA.

Consequently, the software developer cannot disclaim any implied warranty, provided the consumer establishes that: (1) a sale occurred, (2) the written warranty became part of the basis of the bargain, and (3) the software falls within the meaning of "consumer product."\textsuperscript{275} If the consumer is able to establish all three, a EULA purporting to disclaim any implied warranty, by its own terms, will be in violation of the Act, and a consumer who is harmed by the violation "may bring suit for damages and other legal and equitable relief."\textsuperscript{276} This cause of action is available to consumers irrespective of any written promise or affirmation made in connection with the sale conditioned upon submission to arbi-

\textsuperscript{268} See S. REP. No. 93-151, at 11 (1973) ("The term 'consumer product' is limited to tangible personal property, not realty. . . . To the extent that there is any necessary ambiguity in the term 'consumer product,' the ambiguity should be resolved in favor of coverage.").

\textsuperscript{269} However, the FTC is granted the authority to promulgate rules and issue statements governing the Act. See 16 C.F.R. §§ 700–703 (2008). But see supra note 266.

\textsuperscript{270} Id. at 6–7.

\textsuperscript{271} See supra text accompanying note 101.

\textsuperscript{272} See supra text accompanying notes 93–94.


\textsuperscript{274} See APPLE, MAC OS, supra note 72, at 1.

\textsuperscript{275} 15 U.S.C. § 2301. See supra note 268 and accompanying text.

\textsuperscript{276} 15 U.S.C. § 2310(d)(1) (1975). Most canned software makes certain representations of functionality and reference to the EULA terms on the outside packaging. Because any written warranty provided requires the implied warranties to continue for a reasonable duration, the buyer may argue that the EULA necessarily entailed that the software would be merchantable for a reasonable time.
tration. Thus, the consumer will not be bound by the result of the software developer's attempts to force arbitration through its EULA.

5. The U.C.C.'s Balancing Act

If Article 2 is held to be applicable to software transactions, section 2-719(3) of the U.C.C. should be applied where the buyer is a consumer. West Virginia has enacted this provision as section 46-2-719(3) of the West Virginia Code, which states that "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not." This provision of the U.C.C. effectively voids personal injury liability disclaimers when the buyer is a consumer. In addition, it allows the court some flexibility in determining whether a commercial user should be permitted to recover, and if so, how much that user is entitled to receive. Under section 46-2-302 of the West Virginia Code, the court may, in its discretion, refuse to enforce the contract in its entirety, void the unconscionable clause, or simply "limit the application of any unconscionable clause as to avoid any unconscionable result." Therefore, the consumer is protected from the worst type of product defect: physical harm, while the software developer is shielded from the far-reaching threat of unreasonable consequential damages in the commercial setting.

V. CONCLUSION

Computer software licensing is likely to remain a permanent fixture to the corpus of contract law. It is only a matter of time before the West Virginia courts are confronted by the issue of whether to uphold the validity of shrinkwrap, clickwrap, and similar additions to previously formed agreements. For decades, consumer protection statues have been successful in reducing the number of buyers falling prey to unfair, deceptive, and fraudulent practices, but with the advent of new technology comes a host of new opportunities for consumers to be exploited. Until the West Virginia Consumer Credit and Protection Act is updated to clearly include software transactions, or WVSCA rules on

277 See, e.g., Koons Ford of Baltimore, Inc. v. Lobach, 919 A.2d 722, 737 (Md. 2007) (holding that "Congress did not intend for consumers to be forced to resolve their MMWA claims through binding arbitration"). Although a consumer might be required to participate in arbitration, the result will not be binding where the statute is properly applied, as intended by the 93rd Congress.


279 Contrary to common belief, software defects have in fact been responsible for loss of life. E.g., in the mid-1980s, a glitch in the software running the Therac-25 radiation therapy device created by Atomic Energy of Canada caused massive overdose to six people, "all died or were seriously injured." Nancy G. Leveson, Safeware: System Safety and Computers 3 (1995).
the matter, there can be no assurance that the public will be adequately protected from fraudulent or shoddy software products. Unlike buyers in earlier times, today's consumer stands to bear losses far beyond the purchase price paid. Defective software products have been known to cause loss of data, harm to person and property, and reduced confidence in the market, having economic repercussions to buyers and sellers alike. Additionally, clandestine data siphoning from software developers to anonymous third-party developers increases the potential for identity theft and credit problems for the consumer. Finally, the delayed disclosure of shrinkwrap and clickwrap terms without an opportunity to reject them, short of voiding the sale, diminishes the fundamental principles of contract law that have formed the basis of bargains for centuries.

The West Virginia Legislature should amend section 46A-6-102(2) to include the term "license" or "computer information agreement" in order to secure its applicability to software. Alternatively, the courts should look to Article 2 of the U.C.C. to govern software and apply it as part of a cohesive, comprehensive approach to compliment the breadth of West Virginia law, not as piecemeal provisions arbitrarily administered by analogy. Software developers have a legitimate purpose in choosing to license their products rather than selling them outright, which in turn reduces costs to the consumer, but in doing so, new costs are borne by the individual and society. The brunt of this contractual coercion can be allayed by enforcing the warranty of merchantability in consumer purchases of software. In West Virginia, "the freedom to contract is a substantial public policy that should not be lightly dismissed," but freedom of contract is not without limits. When consumers of commercial software products look into the "poke" to reveal their purchase, will the animal that escapes be a reflection of their bargain or an unfair surprise? The answer will turn on whether West Virginia's courts interpret the Uniform Commercial Code as a promoter of agreement or as an apparatus of abuse.

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