

Fine Print Subservience

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Date : July 30, 2019

Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine Print Fraud*, 72 **Stan. L. Rev.** __ (forthcoming 2020), available at [SSRN](#).

Sellers entice consumers to make purchases by advertising many lovely benefits of their products. It is quite common, however, to then qualify and narrow these marketing promises in the fine print terms attached to the transactions. What if sellers outright deceive consumers—by making loud promises that they surreptitiously negate or contradict in the fine print? What if, say, a phone carrier runs an ad for an “unlimited” data plan which, under the terms of service, is actually strictly limited?

In a surprising article, Meirav Furth-Matzkin and Roseanna Sommers (academic fellows at the University of Chicago Law School) expose the cognitive impact of this tension between explicit promises and fine print. Consumers, their experiments show, may feel committed to the fine print, even when it strips away explicit promises made to them. Laypeople are “intuitive formalists”: not only do they (incorrectly) believe that such conflicting fine print is binding, they also think this is how things should be! They blame themselves for not reading and knowing what’s in the boilerplate, and they are unlikely to complain or to hold the deceiving business accountable.

Lawyers know that consumer protection law does not permit deception. Material promises and representations made before the contract become part of it, and efforts to negate them in the fine print are ineffective, and rightly so. Luring consumers with phantom perks that the business has no intent to confer is fraud. But consumers don’t know what lawyers know. How do they react in the face of fine print terms that conflict with their expectations—those formed by the business’s explicit promises?

In [prior work](#), Tess Wilkinson-Ryan showed that obligations appearing in the fine print are viewed by people as morally and legally legitimate even when they are not. But what if they directly conflict with an explicit assurance? In a set of experiments, a disturbing effect is drawn out: people feel subservient to the fine print. In one scenario, subjects were asked about a car loan guaranteed to be “without any fees” but which in fact came with Terms and Conditions requiring a \$3 fee with each payment (totaling, overall, hundreds of dollars). The scenario was presented to lay people (M-Turk) as well as to Harvard/Yale legally trained folks. The two populations agreed that in light of the advertised promise it would be unfair to hold to a consumer bound to pay the fees. But they differed in two important ways. The legal elite correctly doubted whether the consumer “consented” to the fees, and tended to think courts are unlikely enforce them. The larger population reported a glummer attitude, saying that the consumer consented and that courts would enforce the boilerplate.

People do recognize fraud when they see it; and yet, the presence of fine print alters their judgment. In a separate experiment, respondents were given the same “no fees” express promise and were subsequently (and fraudulently) charged the fees. But one group did not receive any fine print disclosure of the fees (“fraud only” treatment), whereas the other group did receive an unread disclosure (“fraud and fine print” treatment). In the “fraud only” condition, the vast majority of respondents (85%) condemned the business for its fraudulent practice and wanted to take some kind of action. In the “fraud and fine print” condition, by contrast, most people (73%) surrendered and yielded to the fee. Given a disclosure—albeit a useless one—they no longer thought that they were wronged,

and did not even intend to post a negative review of the business's deceitful tactics.

The enormous power that fine print exerts on people's perceptions of their obligation was further demonstrated when comparing "fraud and fine print" to a different treatment in which there is no fraud, only fine print. For one group of respondents, the disclosed fees conflicted with the advertised terms. For another group, there was no advertisement and thus no conflict—they were simply charged fees that were stipulated in the fine print. One would expect consumers to be more upset when the fine print terms conflict with an explicit promise. But no! misrepresentation or not, in both cases the existence of fine print leads people to feel equally beholden to the obligations buried in it.

These results reinforce the sobering insight of prior work: consumer protection doctrines are weakened by people's cognitive response to fine print. Forget lawsuits, even the modest hope that consumers would denounce fraud by posting negative reviews may be over-estimated. The psychology of fine print seems to join the economics of litigation as barriers to private actions by consumers.

The article correctly recognizes that an entirely different regulatory action—relying on public rather than private enforcement—may be needed to address deception. But, like many other studies of consumer trouble, this article too does not resist the allure of the disclosure panacea. Could the easiest of all regulations—the one-size-fits-all mandated disclosure—solve the problem of consumers' intuitive formalism? Could consumers be taught that fine print does not absolve fraud? The authors want to test this possibility, and indeed find that telling their participants about the law—about the rule that small terms cannot contradict the explicit statements made before the contract—has a modest effect in counteracting the psychological effect of fine print. They conclude that "education" about the law could be effective. They acknowledge that the effect they measure in the lab may not apply in the real-world, where consumers are overwhelmed by disclosures. Still, I am left wondering: why design a disclosure treatment known (and candidly admitted in the ensuing discussion) to be externally ineffective? Why dilute the agonizing lesson of the study with a gesture towards useless disclosure solutions?

Puzzled as I may be about ending such an excellent article with the superfluous notion of consumers' "education," my appreciation for the authors' primary insight remain unshaken. I now realize the deeper futility of the pervasive hopes that consumers could read the fine print and rebel against its deceptive portions.

Cite as: Omri Ben-Shahar, *Fine Print Subservience*, JOTWELL (July 30, 2019) (reviewing Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine Print Fraud*, 72 **Stan. L. Rev.** __ (forthcoming 2020), available at SSRN), <https://contracts.jotwell.com/fine-print-subservience/>.