

## Hidden In Plain Sight and In All-Caps

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Yonathan A. Arbel & Andrew Toler, *All-Caps* (January 15, 2020), available at [SSRN](#).

A strange thing has been happening in the world of consumer contracts. “Contract” is being elbowed—roughly—aside by “notice.” While contract requires offer, acceptance, mutual assent and consideration, notice seems to require only conspicuousness. Accordingly, it is [important](https://contracts.jotwell.com/?p=862&preview=true) that we get conspicuousness right. Unfortunately, too often, we get it wrong. One of the most common ways we get it wrong, as Yonathan A. Arbel and Andrew Toler explain in their article, [ALL-CAPS](#) is by relying upon the effectiveness of capitalized text. Their article, the first to test the effect of capitalized text upon consumer perception, shows that all-caps not only fails to improve the quality of consent, it may diminish it for some consumers.

Arbel and Toler argue that capitalization of contract clauses is treated by judges, legislators and consumer agencies as “strong evidence, often dispositive, that the text was read and understood by the consumer.” (P. 5.) Consequently, all-caps is “used to show meaningful consent to especially onerous terms that would not be enforced but-for the use of all-caps.” (P. 10.) They review the background surrounding this faith in all-caps and find that, despite its pervasiveness, it is based upon “speculation and intuition.” (P. 6.) They explain how the focus on conspicuousness was intended to be a sort of compromise, the idea being that even if consumers don’t read all the terms in form contracts, they could read conspicuous key terms. All-caps became “a widely endorsed method of making a term conspicuous and thus rendering it enforceable.” (P. 5) But the evidence for this support of all-caps, they note, was nowhere to be found.

They then seek to test whether this reliance on all-caps is justified. They collected the standard form contracts of 500 large consumer companies, such as Amazon and Uber, and analyzed them by using specially developed code that counted instances of a letter being capitalized, and attempted to classify capitalization at the word, sentence, paragraph and header level. They found evidence of too much capitalization, including that approximately 77% of contracts had at least one paragraph that was fully capitalized. (P. 19.) They then assessed whether all-caps improves “consumer consent.” (P. 20.) By consent, the authors seem to mean “informed consent” as distinguished from a mere *manifestation* of consent, which is required for contract formation. They state that conspicuousness could arguably improve consumer consent in three ways: it could help the consumer “economize” the consumer’s attention by directing it to the most important terms; it could improve readability; and/or it could enhance deliberation by slowing down reading times. (P. 20.) They come up with a “testable hypothesis” for all these possibilities: “other things being equal, the consumer would have better recall of the conspicuous term than if the term was inconspicuous.” (P. 21.) The provision in all-caps had to do with the cancellation policy for a free trial and whether consumers could recall and understand its meaning.

I don’t think we even need a drum roll for the results since they are, unfortunately, predictable. It turns out that with “high *statistical significance*” all-caps do not enhance consumer consent and low caps is no worse than all-caps. (P. 27.) But what may be surprising is that capitalization may *diminish* the quality of consent, at least for those respondents who were older than 55 years of age (60% got questions regarding the cancellation policy wrong in the all-caps group and 31% in the low-caps group) (P. 31.) All-caps didn’t increase salience, it didn’t make the text easier to read, and it didn’t seem to focus reader attention to important terms. The authors hypothesize that all-caps *actually make it harder to read* the text! In fact, the authors suggest that ALL-CAPS is akin to textual yelling! (P. 47.) And who wants to deal with textual yelling?

The authors then undertook several exploratory studies, testing all-caps in different settings, including time pressure

and other modes of highlighting. THEY FOUND THAT ALL-CAPS WAS NOT HELPFUL BUT THAT THE USE OF **BOLD** MIGHT BE. (P. 51) (I think the use of *italics* might also be effective, *don't you agree?* But only if used *sparingly*).

The purpose of testing these other treatments was not to suggest one surefire way to enhance consumer consent. On the contrary, the authors caution against safe harbors such as capitalized text or boxes – or even bold. Too much of **anything** causes habituation which in turn leads to inattention. As long as the bold is not overused, it can be an effective strategy. **If everything is in bold, however, then it becomes harder to differentiate the important bolded text from that text which is much less important.**

The authors point out that firms seem to know very well how to communicate with consumers when they are trying to get them to buy something. Marketing materials contain a “rich, creative mix” of text sizes, colors, and typefaces and “one never finds...blocks of capitalized text, i.e., all-caps.” (P. 46.) There may be the occasional all-cap word here and there but “blocks of homogenous capitalized text are all but absent.” (P. 46.)

Arbel and Toler have some suggestions based on their findings, the most promising being the application to contracts of Lauren Willis’s performance-based approach to consumer law.<sup>1</sup> (P. 53.) Their proposal, adapted for contracts, would find certain key terms by default unenforceable unless the firm could prove that the term was conspicuous. Others have made similar suggestions regarding this type of burden shifting, and it is unclear how their proposal would differ from these other proposals. But the authors state that they leave “the full case for performance-based conspicuousness” for a later day. (P. 55.) They have done enough for today, by making a strong case against the upper case.

1. Lauren E. Willis, *Performance Based Consumer Law*, 82 CHI. L. REV. 1309 (2015)  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2485667](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2485667).

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