CONSUMER RIGHTS ARE GIG WORKERS' RIGHTS? REGULATING THE GIG ECONOMY AT THE INTERSECTION OF CONSUMER PROTECTION LAW AND EMPLOYMENT LAW

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I. INTRODUCTION

Toño Solís trudged through the teeming rain, through rapidly flooding city streets.[1] Elsewhere in the city, riders were evacuated from subway cars that were inundated with storm runoff.[2] In all, the storm, which was a remnant of Hurricane Ida, claimed the lives of at least forty-three people in the New York-New Jersey metropolitan area.[3] Solís completed his night's work with a trip from Brooklyn to Queens, at 9:30 p.m., as conditions deteriorated even further.[4] One might wonder what sort of work Toño Solís does that subjects him to these life-threatening conditions. Solís, like so many others working in 2021, is a gig worker and delivers food for an app-based delivery service.[5] Although one would think that he was paid handsomely for risking his life that night, Solís made just $5 for that last trip to Queens, and $115

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[1] Claudia Irizarry Aponte, *Food Delivery Workers Toiling Through Historic Flooding Call Skimpy Wages and Tips 'A Cruel Joke,'* CITY (Sept. 2, 2021, 9:40 PM), https://www.thecity.nyc/2021/9/2/22655142/nyc-food-delivery-workers-deliveristas-cheap-tips-ida-storm.

[2] Jesse O'Neill, *Flash Flooding Causes Mayhem on NYC Streets and Subways*, N.Y. POST (Sept. 1, 2021, 11:25 PM), https://nypost.com/2021/09/01/nyc-streets-subway-stations-overrun-by-flash-floods.

[3] Andy Newman et al., *What We Know About the People Who Died in the Flooding*, N.Y. TIMES (Sept. 14, 2021), https://www.nytimes.com/2021/09/02/nyregion/ida-new-york-city-deaths.html.

[4] Aponte, *supra* note 1.

[5] *Id.*

for the night—$12 per hour and substantially *less* than the city's $15 minimum wage.[6]

The minimum wage does not apply to gig workers like Toño because they are largely independent contractors.[7] Nor do most gig workers receive paid sick time, health care, or workers' compensation.[8] To offer at least some protections for these workers, government regulators have turned to an area of law traditionally concerned with the rights of consumers rather than providers of services—consumer protection law.[9] Because these laws include broad definitions of consumers, along with strong private rights of action with real monetary penalties, consumer protection laws can provide some redress for workers where traditional employment law remedies may be out of reach.[10]

In Part II, this Comment will provide a brief history of the gig economy with descriptions of different gig workers, their current status in most jurisdictions as independent contractors, and the implication of that classification for employment rights and regulatory enforcement. Part III will describe the history of consumer protection law and then transition into the trend of regulators using these laws to enforce what have traditionally been employment rights. With clever interpretation and application, these laws have been adapted to protect gig workers as "consumers" of gig economy platforms where companies have engaged in unfair or deceptive business practices—the traditional offenses policed by consumer protection law. Unfair practices, where an actor in commerce takes advantage of their customer, and deceptive practices, where one lies or gives a misrepresentation about a product or service, can be applicable to common issues in employment, like nonpayment of wages, unsafe working conditions, and other transgressions.[11]

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[6] *Id.*

[7] *See* Keller v. Miri Microsystems LLC, 781 F.3d 799, 806 (6th Cir. 2015).

[8] *See, e.g.*, Chris Benner et al., *On-demand and On-the-edge: Ride-hailing and Delivery Workers in San Francisco*, U. CAL. SANTA CRUZ INST. FOR SOC. TRANSFORMATION (May 5, 2020), https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemand-n-OntheEdge_MAY2020.pdf; MARIA FIGUEROA ET AL., ESSENTIAL BUT UNPROTECTED: APP-BASED FOOD COURIERS IN NEW YORK CITY 15 (2021), https://img1.wsimg.com/blobby/go/6c0bc951-f473-4720-be3e-797bd8c26b8e/091321_Full%20Los%20Deliveristas%20Unidos%20-%20Industry.pdf.

[9] *See, e.g.*, Complaint, District of Columbia v. Doordash, Inc., No. 2019 CA 007626 B (Sup. Ct. D.C. 2020) [hereinafter Doordash Complaint].

[10] *See infra* Part III.

[11] *See* 15 U.S.C. § 45.

Finally, Part IV will highlight the important features of consumer protection statutes that allow them to be used this way, some common pitfalls found in state statutes and how they can be fixed, as well as discuss some of the other pros and cons of the regulatory scheme. This Comment will show that consumer protection law should continue to be used as a tool to regulate the gig economy where traditional employment law may be inapplicable. These laws, with minimal changes to expand consumer definitions and enhance private causes of actions, can be a tool in the regulator's toolbox to enforce workplace standards. Finally, Part V is the conclusion of the Comment.

A. *The Gig Economy*

The "gig economy" is made up of workers offering their services on a for-hire or freelance basis.[12] In the last several years, the gig economy has exploded with platforms where these workers can connect to purchasers of their services.[13] Sources estimate that 30 percent of workers have performed some form of freelance work, while 10 percent of workers identify freelancing as their full-time job.[14] Possibly portending even greater future growth, young workers—especially those part of the Gen X and Millennial generations—have been reported to be freelancing at high rates.[15]

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[12] *See Gig Economy*, INVESTOPEDIA, https://www.investopedia.com/terms/g/gig-economy.asp (last updated Mar. 31, 2022).

[13] *See* Sydney Brownstone, *Gig Economy Explosion: 53 Million American Freelancers Are Their Own Bosses*, FAST CO. (Sept. 5, 2014), https://www.fastcompany.com/3035325/gig-economy-explosion-53-million-american-freelancers-are-their-own-bosses ("According to a new survey commissioned by Freelancers Union and Elance-oDesk, freelance workers make up 53 million people, or 34% of the American workforce."); Richard Partington, *Gig Economy in Britain Doubles, Accounting for 4.7 Million Workers*, THE GUARDIAN (June 27, 2019, 7:01 PM), https://www.theguardian.com/business/2019/jun/28/gig-economy-in-britain-doubles-accounting-for-47-million-workers.

[14] Paul Davidson, *Classifying Workers as Independent Contractors Is Now Tougher After a Trump-era Rule Is Dropped*, U.S.A. TODAY (May 21, 2021, 11:58 AM), https://www.usatoday.com/story/money/2021/05/05/independent-contractor-ruling-makes-tougher-call-workers-contractors/4956332001.

[15] A report by the company Upwork found that 53 percent of Gen Z workers reported freelancing, while 40 percent of Millennials responded that they had freelanced. Press Release, Upwork, Sixth Annual "Freelancing in America" Study Finds That More People Than Ever See Freelancing as a Long-term Career Path (Oct. 3, 2019), https://www.upwork.com/press/releases/freelancing-in-america-2019.

Gig-work companies argue that their workers prefer flexibility and work less than regular full-time workers.[16] Recent studies of gig workers, however, have found the opposite. A study of over 600 San Francisco-based gig workers found that 71 percent worked more than thirty hours per week, with 50 percent responding that they worked more than forty hours, and 30 percent responding that they worked more than fifty hours weekly.[17] A 2021 study of app-based delivery workers found that 81 percent of workers surveyed said they worked five or more days, and 64 percent responded that they work six or seven days a week.[18]

Debates and legal fights about how these workers should be classified are ubiquitous.[19] Scholarship on the issue is also extensive, with many arguing that gig workers are misclassified as independent contractors, leaving them vulnerable to abuse.[20] These debates have

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[16] *See* Tony Xu, *Building the Future of Work, Right Now*, BUS. INSIDER (Nov. 29, 2020, 8:04 AM), https://www.businessinsider.com/prop-22-freelance-uber-door-dash-economy-gig-workers-2020-11 ("91% of [Doordash workers] work fewer than 10 hours per week, with an average of four or fewer hours. More than 4 out of 5 [Doordash workers] say that gig work is not their main source of income, and more than 3 out of 4 [Doordash workers] say they have another job or are in school.").

[17] Benner et al., *supra* note 8, at 21.

[18] ESSENTIAL BUT UNPROTECTED, *supra* note 8, at 17.

[19] *See e.g.*, Travis Clark, *The Gig Is Up: An Analysis of the Gig-Economy and an Outdated Worker Classification System in Need of Reform*, 19 SEATTLE J. SOC. JUST. 769 (2021); Hasmik Petrosian, *Uber and Beyond: A System for Regulating Gig-Businesses Without Destroying Them*, 41 T. JEFFERSON L. REV. 87 (2018).

[20] Scholars have also suggested numerous solutions for the alleged misclassification issue. *See* Orly Lobel, *We Are All Gig Workers Now: Online Platforms, Freelancers & the Battles Over Employment Status & Rights During the COVID-19 Pandemic*, 57 SAN DIEGO L. REV. 919, 943–44 (2020) (arguing for the expansion of employment law protections as well as social safety net benefits to gig workers just as these were expanded on an emergency basis during the COVID-19 pandemic); Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 39 N. Ill. U. L. Rev. 379, 384 (2019) (stating that the ABC test is the appropriate test for evaluating modern day gig work); Naomi B. Sunshine, *Employees as Price-Takers*, 22 LEWIS & CLARK L. REV. 105, 110 (2018) (proposing a rebuttable presumption that workers who cannot set the price of their services are employees); Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 483 (2016) (arguing that gig workers' employment status should be tested under principals of employer dominance, and as applied to Uber, asserting that Uber drivers are employees). *But see* Eric A. Posner, *The Economic Basis of the Independent Contractor/Employee Distinction*, 100 TEX. L. REV. 353, 353 (2021) (asserting that gig workers are properly classified as independent contractors because they do not require the protections of employment and labor law because their work is "not subject to labor monopsony").

serious implications for both the workers, who may be entitled to more rights and benefits, and for companies, who benefit from low labor costs in the current model and take on less liability.[21] Independent contractors typically do not qualify for paid sick leave laws, nor receive paid sick leave from gig work employers.[22] Additionally, gig economy platforms typically do not provide employer-sponsored health care plans.[23] Even more troubling, the study found that "45% [of gig workers] couldn't handle a $400 emergency payment without borrowing."[24]

Moreover, gig-work employers have created a plethora of regulatory challenges for local governments. For instance, Uber and similar companies have sidestepped the traditional taxi and for-hire car service regulations at the expense of entrenched taxi interests.[25]

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[21] *See, e.g.*, Richard Reibstein, *Déjà Vu in the Independent Contractor Misclassification Arena: August 2021 News Update*, JD SUPRA (Sept. 15, 2021), https://www.jdsupra.com/legalnews/deja-vu-in-the-independent-contractor-5497740 (collecting recent worker classification law suits); Dori Goldstein & Ricard Pochkhanawala, *ANALYSIS: Gig-Worker Classification Battles Spread to New Fronts*, BLOOMBERG L. (Nov. 16, 2020, 4:52 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-gig-worker-classification-battles-spread-to-new-fronts; Shira Ovide, *Gig Work Is Risky for Apps, Too*, N.Y. TIMES (Sept. 11, 2020), https://www.nytimes.com/2020/09/11/technology/gig-work-business-model.html; Kate Conger & Daisuke Wakabayashi, *Massachusetts Sues Uber and Lyft Over the Status of Drivers*, N.Y. TIMES (July 14, 2020), https://www.nytimes.com/2020/07/14/technology/massachusetts-sues-uber-lyft.html; *see also Independent Contractors*, WORKPLACE FAIRNESS, https://www.workplacefairness.org/independent-contractors#2 (last visited Sept. 29, 2022); Noam Scheiber, *Uber and Lyft Ramp Up Legislative Efforts to Shield Business Model*, N.Y. TIMES (Oct. 21, 2021), https://www.nytimes.com/2021/06/09/business/economy/uber-lyft-gig-workers-new-york.html ("Gig companies like Uber and Lyft have long resisted classifying workers as employees, stating in regulatory filings that doing so would force them to alter their business model and risk a financial hit.").

[22] *See, e,g.*, N.Y. CITY DEP'T OF CONSUMER AND WORKER PROT., PAID SAFE AND SICK LEAVE LAW: FREQUENTLY ASKED QUESTIONS 8 (2020), https://www1.nyc.gov/assets/dca/downloads/pdf/about/PaidSickLeave-FAQs.; Erin Mulvaney, *Uber Drivers Say Lack of Sick Pay Shows Need for Employee Status*, BLOOMBERG L. (July 14, 2020, 3:14 PM), https://news.bloomberglaw.com/daily-labor-report/uber-drivers-say-lack-of-sick-pay-shows-need-for-employee-status.

[23] *See* Benner et al., *supra* note 8, at 18.

[24] *Id.* at 16.

[25] Fran Spielman, *Alderman Accuses Uber, Lyft of 'Predatory Fares,' Wants Price Cap Imposed*, CHI. SUN TIMES (May 24, 2021, 3:13 PM), https://chicago.suntimes.com/city-hall/2021/5/24/22451667/uber-lyft-ride-share-hailing-surge-pricing-cap-city-council-ordinance-alderman-reilly-taxi-cabs (reporting politician's argument that "the [Chicago] City Council allowed the ride-hailing industry to 'operate under less restrictive rules' than cabs — without first obtaining livery licenses from the city. That allowed thousands of ride-hailing drivers to 'flood the market.'").

Gig-work employers themselves argue that the "current employment system is outdated and unfair," and "America needs to change the status quo to protect all workers, not just one type of work."[26] Uber's CEO, Dara Khosrowshahi, further argued that simply classifying drivers as employees would cause rides to become more expensive, leading to a reduction in customers due to heightened costs.[27] Additionally, Khosrowshahi stated that the employee classification would take away "the flexibility [that drivers] have today . . . ."[28] Critics, however, respond that flexibility can still be achieved in the employee-employer framework. Further, they argue that gig-work companies say that workers sacrifice pay for flexibility, when instead workers take the gig work due to a lack of other better paid traditional jobs.[29] Others challenge that large gig-work employers deserve minimum wage exemptions, which otherwise apply to most other businesses.[30]

B. *Consumer Protection Law*

With employment law not covering gig workers, some government regulators have turned to consumer protection law to fill in this enforcement gap. One prominent federal law used in this manner, which has also been replicated on the state level, is the Federal Trade Commission Act ("FTCA").[31] The FTCA prohibits "[u]nfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce . . . ."[32] While "unfair" or "deceptive" may seem synonymous, they are two distinct violations of the law.[33] Deceptive acts involve providing false or misleading information to consumers:[34] "To prove a deceptive act or practice under § 5(a)(1), the FTC must show three elements: (1) a

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[26] Dara Khosrowshahi, *I Am the C.E.O. of Uber. Gig Workers Deserve Better*, N.Y. TIMES (Aug. 10, 2020), https://www.nytimes.com/2020/08/10/opinion/uber-ceo-dara-khosrowshahi-gig-workers-deserve-better.html.

[27] *Id.*

[28] *Id.*

[29] LINA MOE ET. AL., THE MAGNITUDE OF LOW-PAID GIG AND INDEPENDENT CONTRACT WORK IN NEW YORK STATE 21 (2020), http://www.centernyc.org/the-magnitude-of-low-paid-gig-and-independent-contract-work-in-new-york-state.

[30] Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL'Y J. 577, 586 (2016).

[31] 15 U.S.C. § 45.

[32] *Id.* § 45(a)(1).

[33] *See* CHRISTOPHER JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY 37–38, 50 (2016).

[34] *Id.*

representation, omission, or practice, that (2) is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice is material."[35]

Unfair acts cover instances where companies take advantage of consumers, but not necessarily through false information or lies—for instance, through unethical contract terms or intimidating high-pressure sales tactics; whereas deceptive acts are acts which involve providing false or misleading information to consumers.[36] The FTC must show that: (1) the act or practice causes "substantial injury to consumers"; (2) consumers cannot "reasonably avoid[]" the injury; and (3) the consumer injury is "not outweighed" by its "benefits to consumers or to competition."[37] The statute provides that the FTC "may consider established public policies as evidence to be considered with all other evidence," but "[s]uch public policy considerations may not serve as a primary basis for such determination."[38] The unfair practice language is broad and inclusive of "unfair practices that have not yet been contemplated by more specific laws."[39]

"The [FTCA] is drafted broadly to include not only traditional anti-trust violations but also 'practices that the Commission determines are against public policy for other reasons.'"[40] As the Court highlighted in *FTC v. Colgate-Palmolive Co.*, "the proscriptions in § 5 are flexible, 'to be defined with particularity by the myriad of cases from the field of business.'"[41]

Scholars have argued, however, that the unfairness prong has been underutilized in consumer enforcement actions.[42] They have termed the FTC's tendency to bring deceptive acts charges to violations more conventionally understood as "unfair" to be "deception-creep."[43] Deception-creep is in part attributed to the

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[35] FTC v. LeadClick Media, LLC, 838 F.3d 158, 168 (2d Cir. 2016) (citing FTC v. Verity Int'l, Ltd., 443 F.3d 48, 63 (2d Cir. 2006)).

[36] *Id.*

[37] 15 U.S.C. § 45(n).

[38] *Id.*

[39] FTC v. Accusearch Inc., 570 F.3d 1187, 1194 (10th Cir. 2009).

[40] *LeadClick Media*, 838 F.3d at 167–68 (quoting FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986)).

[41] FTC v. Colgate-Palmolive Co., 380 U.S. 374, 384–85 (1965) (quoting FTC v. Motion Picture Advert. Servs. Co., 344 U.S. 392, 394 (1953)).

[42] *See* Cobun Keegan & Calli Schroeder, *Unpacking Unfairness: The FTC's Evolving Measures of Privacy Harms*, 15 J.L. ECON. & POL'Y 19, 19 (2019).

[43] *Id.*

historic basis for the unfair prong, which was only designed to address business-to-business anticompetition claims.[44] Additionally, the FTC *did* have a skirmish with Congress regarding the unfairness prong being overly broad as applied to consumer actions. In 1978, Congress objected to an FTC proposed ban on all advertising to children and ultimately cut funding to the Commission.[45] This proposed ban relied on the unfairness prong and argued that targeting children was "immoral, unscrupulous, and unethical."[46] In response to Congress, the FTC issued its Policy Statement on Unfairness which set out the criteria for unfairness as: "(1) whether the practice injures consumers; (2) whether it violates established public policy; (3) whether it is unethical or unscrupulous."[47] Congress, when it amended the FTCA in 1994, incorporated a version of this test into the FTCA, which is the current test of unfairness.[48] While unfairness enforcement was at its pinnacle in the 1970s, since then the FTC has instead mostly leaned on deceptiveness in consumer cases.[49]

Scholars argue that since unfair practices have been expanded to include consumer harms, and the standard has been codified, the FTC should use this enforcement tool more frequently.[50] For instance, scholars have argued that unfair practice regulation can protect consumers' data privacy; and some enforcement has begun in this area.[51] While most FTC enforcement of gig-economy employment has used deceptive acts regulation, here, too, unfairness could be better utilized for worker protection. One similar example of how unfairness could be used in this context is *Genesco*.[52] There, the FTC prosecuted a company for transferring consumers' credit balances without

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[44] *Id.* at 21–22.

[45] Notice of Proposed Rulemaking on Television Advertising to Children, 43 Fed. Reg. 17935, 17967 (Apr. 27, 1978); Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, FTC (May 30, 2003), https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection.

[46] *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection, supra* note 45.

[47] Letter from Federal Trade Commission to Senators Wendell H. Ford and John C. Danforth (Dec. 17, 1980), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness.

[48] 15 U.S.C. § 45(n).

[49] *See* Keegan & Schroeder, *supra* note 42 at 19, 23.

[50] *See id.* at 19.

[51] *Id.* at 24–25, 32–33; *see also* Dennis D. Hirsch, *From Individual Control to Social Protection: New Paradigms for Privacy Law in the Age of Predictive Analytics*, 79 MD. L. REV. 439, 439 (2020).

[52] *In re* Genesco, 89 F.T.C. 451 (1977).

customer consent.[53] Moreover, some have argued that "taking advantage of pre-existing false consumer beliefs qualifies as an unfair practice."[54] Combining these concepts, the FTC could apply this same enforcement strategy where gig work companies impose pay structures, which are not deceptively stated, but nonetheless still unfair. Unfairness allows the FTC to enforce standards without a deceptive statement as a trigger.[55]

Today, all fifty states have some form of consumer protection law.[56] The statutes typically mirror the FTCA and also bar unfair and deceptive business practices, but some do not to the same extent as the FTCA.[57] Because of their similarities to the FTCA, these state statutes are often referred to as "Little-FTC Acts."[58] That said, a key difference between the federal and state iterations is that while all states have a private right of action for consumers to bring suits, the FTCA does not allow for actions to be brought by private consumers.[59] But not all private causes of action are created equal, and some are deficient either because they do not have sufficient damages to serve as deterrents, or they require consumers to meet high standards—which makes succeeding on claims difficult.[60]

Likely attributable to its statutory flexibility, consumer protection law has been applied to a multitude of different areas, from regulating lenders and credit card companies to product manufacturers and business franchisors.[61] The FTC has used unfair and deceptive

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[53] *Id.* at 480.

[54] Lauren E. Willis, *Deception By Design*, 34 HARV. J.L. & TECH. 115, 177 (2020).

[55] *See* Hirsch, *supra* note 51, at 479.

[56] CAROLYN CARTER, NAT'L CONSUMER L. CTR. INC., CONSUMER PROTECTION IN THE STATES 9 (2018) [hereinafter CONSUMER PROTECTION IN THE STATES], https://www.nclc.org/images/pdf/udap/udap-report.pdf.

[57] *Id.* at 12–13.

[58] Bell v. Publix Super Mkts., Inc., 982 F.3d 468, 474 (7th Cir. 2020) ("These statutes are known as 'Little-FTC Acts' because they are patterned on the Federal Trade Commission Act (FTCA).").

[59] CONSUMER PROTECTION IN THE STATES, *supra* note 56, at 33; 15 U.S.C. § 45(a)(2); Dreisbach v. Murphy, 658 F.2d 720, 730 (9th Cir. 1981) ("The Act rests initial remedial power solely in the Federal Trade Commission.").

[60] *See* N.Y. GEN. BUS. § 349(h) (LexisNexis 2022) (limiting treble damages to "one thousand dollars"); CONSUMER PROTECTION IN THE STATES, *supra* note 56, at 38.

[61] *See* FTC v. LeadClick Media, LLC, 838 F.3d 158, 167–68 (2d Cir. 2016) ("The FTC Act is drafted broadly to include not only traditional anti-trust violations . . . ."); Press Release, FTC, FTC Sends More than $1.7 Million in Refunds to People who Lost Money to Student Loan Debt Relief Scam (Feb. 10, 2021), https://www.ftc.gov/news-events/press-releases/2021/02/ftc-sends-more-17-million-refunds-people-who-lost-

practices to punish companies for charging its customers hidden fees, viewing their private information without consent, and misrepresenting business opportunities.[62] Of particular interest to this Comment is how regulators have used these laws to address claims of unfair and deceptive practices against gig workers by gig-work companies. These claims, which include allegations of wage theft and misrepresentation of benefits, share traits of claims historically within the employment law sphere but are out of reach to employment regulators due to gig workers' classification as independent contractors.[63] While the cases have thus far centered around deceptive acts, problems such as exploitive pay structures and hazardous working conditions could arguably also be regulated under the unfair acts prong of these laws.

Seemingly leaving themselves open for their workers to be classified as consumers, under consumer protection laws like the FTCA, some gig-work companies have referred to their workers as "consumers" of their platforms.[64] Laws that allow for gig workers to be included as consumers and have strong, private rights of action that allow for swift resolution of these types of violations.

II. THE GIG WORKER AND WORKPLACE ENFORCEMENT

Nationwide, the battle over gig work roils, with states, the federal government, and courts attempting to apply employment law to the new gig economy. At times, these efforts have been met with backlash from powerful gig-work lobbies. First, this Part will review the status of traditional employment laws and classification fights. Then, this Part will look at where consumer protection laws may, at least temporarily while these fights continue, offer some redress for gig workers.

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money-student; Press Release, FTC, FTC Alleges Fuel Card Marketer FleetCor Charged Hundreds of Millions in Hidden Fees (Dec. 20, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/ftc-alleges-fuel-card-marketer-fleetcor-charged-hundreds-millions; Press Release, FTC, VIZIO to Pay $2.2 Million to FTC, State of New Jersey to Settle Charges It Collected Viewing Histories on 11 Million Smart Televisions without Users' Consent (Feb. 6, 2017), https://www.ftc.gov/news-events/press-releases/2017/02/vizio-pay-22-million-ftc-state-new-jersey-settle-charges-it; Press Release, FTC, FTC Recovers $160,000 for Franchisees Who Bought Web Services Businesses (May 15, 2007), https://www.ftc.gov/news-events/press-releases/2007/05/ftc-recovers-160000-franchisees-who-bought-web-services.

[62] *See* sources *supra* note 61.

[63] *See, e.g.*, Complaint at 1, FTC v. Amazon, Inc., No. C-4746 (F.T.C. 2021) [hereinafter Amazon Complaint]; Doordash Complaint, *supra* note 9.

[64] Transcript of Summary Judgment Proceedings at 16, O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (No. C 13-3826 EMC).

A. *Traditional Employment Laws and the Classification Battle*

As independent contractors, most gig workers are not eligible for standard employment protections. Independent contractors are not covered by the Fair Labor Standards Act ("FLSA"), which mandates a minimum wage and overtime pay after forty hours.[65] Gig workers have reported earning as low as $7.50 per hour when factoring in expenses.[66] Nor are independent contractors protected against employment discrimination; they are excluded by the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), and Title VII of the Civil Rights Act.[67] Scholars have noted that without a mandate to provide reasonable accommodations, some gig-work companies seem reluctant to proactively offer solutions to accommodate differently-abled workers.[68] For instance, companies are disinterested in accommodating disabled drivers who may need hand controls to drive or workers whose vision or hearing prevent them from interacting with phone apps.[69]

Additionally, independent contractors are ineligible for many traditional employment benefits. Independent contractors typically do not qualify for paid sick leave.[70] Lack of sick time is a particularly grave concern in light of the COVID-19 pandemic. In New York, rideshare drivers were some of the first casualties of the virus.[71] Tragically, driver Anil Subba, a Nepalese immigrant from Queens, died on March 24, 2020 of COVID-19 after picking up a sick passenger at

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[65] Keller v. Miri Microsystems LLC, 781 F.3d 799, 806 ("Under the FLSA, only employees are entitled to overtime and minimum-wage compensation. Independent contractors do not enjoy FLSA's protections.").

[66] Carmen Figueroa, *Opinion: We Need the Flexibility Gig Work Promises and Basic Rights*, S. SEATTLE EMERALD (Aug. 18, 2021), https://southseattleemerald.com/2021/08/18/opinion-we-need-the-flexibility-gig-work-promises-and-basic-rights/.

[67] Alexander v. Avera St. Luke's Hosp., 768 F.3d 756, 761 (8th Cir. 2014) (showing the exclusion of independent contractors from the ADA and ADEA); Alberty-Vélez v. Corporación de P.R. para la Difusión Pública, 361 F.3d 1, 6 (1st Cir. 2004) (excluding independent contractors from Title VII).

[68] Paul Harpur & Peter Blanck, *Gig Workers with Disabilities: Opportunities, Challenges, and Regulatory Response*, 30 J. OCCUPATIONAL REHAB. 511, 514 (2020).

[69] *Id.*

[70] *See, e.g.*, N.Y. CITY DEP'T OF CONSUMER AND WORKER PROT., PAID SAFE AND SICK LEAVE LAW: FREQUENTLY ASKED QUESTIONS 8, https://www1.nyc.gov/assets/dca/downloads/pdf/about/PaidSickLeave-FAQs.pdf (last updated Nov. 2, 2020).

[71] Jiayang Fan, *The Uncertain Life of New York City's Immigrant Uber Drivers During the Pandemic*, NEW YORKER, (Apr. 29, 2020), https://www.newyorker.com/news/daily-comment/the-uncertain-life-of-new-york-citys-immigrant-uber-drivers-during-the-pandemic.

J.F.K. Airport.[72] Moreover, gig workers handled food deliveries throughout the pandemic, especially to those at-risk for serious COVID-19 cases, who avoided making trips outside the home for food.[73] It is concerning that those workers may not be able to afford to call out of work if they themselves were ill.

The fight over gig worker classification continues both federally and at the state level. In 2019, the Trump administration's Department of Labor and National Labor Relations Board (NLRB) issued opinions that gig workers on online platforms were not employees.[74] Under the National Labor Relations Act, independent contractors are excluded from labor law protections, such as the right to engage in protected, concerted activity to better their working conditions.[75] The Biden Administration has prioritized this status for quick reversal.[76] On December 27, 2021, the NLRB invited briefs on the question of which test should be used to determine independent contractor status.[77]

Nationwide, jurisdictions vary even on which test to apply to determine if a worker is an employee or an independent contractor. Some courts apply the common law "right to control" multi-factor test. Formulations vary, but courts agree that the essence of the test is "whether the [employer] has the right to control the manner and means of accomplishing the [work] desired."[78] The test also typically considers factors including:

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[72] *Id.*

[73] *See* Paige Smith, *People Have to Eat, Creating Boom for Food-Delivery Gig Workers*, BLOOMBERG L. (Mar. 20, 2020), https://news.bloomberglaw.com/daily-labor-report/people-have-to-eat-creating-boom-for-food-delivery-gig-workers.

[74] U.S. Dep't of Labor, Wage and Hour Op. Letter FLSA2019-6 (Apr. 29, 2019); Memorandum from the N.L.R.B. on the Uber Technologies, Inc., Cases 13-CA-163062, 14-CA-158833, and 29-CA-177483 (Apr. 16, 2019).

[75] 29 U.S.C. §§ 152 (3), 157.

[76] *See Independent Contractor Status Under the Fair Labor Standards Act*, U.S. DEP'T LABOR, https://www.dol.gov/agencies/whd/flsa/2021-independent-contractor (last visited Sept. 21, 2021); Memorandum on Mandatory Submissions for Advice, Jennifer Abruzzo, General Counsel, N.L.R.B. (Aug. 12, 2021), https://www.nlrb.gov/news-outreach/news-story/general-counsel-jennifer-abruzzo-releases-memorandum-presenting-issue (listing as priority revisiting Trump-era Supershuttle independent contractor test).

[77] Press Release, N.L.R.B., NLRB Invites Briefs Regarding Independent Contractor Standard (Dec. 27, 2021), https://www.nlrb.gov/news-outreach/news-story/nlrb-invites-briefs-regarding-independent-contractor-standard.

[78] O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1148–49 (N.D. Cal. 2015); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (quoting Cmty. for

> [the] skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; [and] the method of payment . . . .[79]

The "economic realities test" is another independent contractor test that courts use. The economic realities test examines the totality of circumstances and asks if the worker "depend[s] upon the business to which they render service for the opportunity to work."[80] Put simply, an independent contractor is one who is "in business for [themself]."[81] In 2014, the NLRB adopted an economic realities-adjacent "entrepreneurial opportunity" test, which asked if the worker was "rendering services as part of an independent business."[82] This test, however, was overruled in 2019 when the NLRB instead relegated entrepreneurial opportunity to merely one factor of its common law test.[83]

Finally, several states have adopted the more streamlined "ABC test."[84] This test, as exemplified in the California formulation, puts the burden on the employer to show: (A) the worker is not controlled or directed by the hiring entity when performing the work; (B) the worker performs work outside the usual course of the hiring entity's business; and (C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work.[85] If the employer can show all of these elements, the worker is an independent contractor rather than employee.[86]

Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989) (noting common law test "consider[s] the hiring party's right to control the manner and means by which the product is accomplished")).

[79] *Darden*, 503 U.S. at 323 (quoting *Reid*, 490 U.S. at 751).

[80] Myers v. Reno Cab Co., 492 P.3d 545, 551 (Nev. 2021) (quoting Terry v. Sapphire /Sapphire Gentlemen's Club, 336 P.3d 951, 956 (Nev. 2014)).

[81] *Id.* (quoting Henderson v. Inter-Chem. Coal Co., 41 F.3d 567, 570 (10th Cir. 1994)).

[82] FedEx Home Delivery, 361 N.L.R.B. 55 (2014).

[83] SuperShuttle DFW, Inc., 367 N.L.R.B. 75 (2019).

[84] *See, e.g.*, Assemb. B. No. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019); CONN. GEN. STAT. § 31-222(a)(B)(ii) (2022); N.J. STAT. ANN. § 43:21-19(i)(6) (West 2022).

[85] Assemb. B. No. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019)

[86] *Id.*

At the state level, regulatory and statutory efforts to classify gig workers as employees have faced backlash from gig-work companies. In New Jersey, the state Department of Labor and Workforce Development, alleging worker misclassification, has charged rideshare companies Uber and Lyft cumulatively with hundreds of millions of dollars in unpaid unemployment and disability insurance bills.[87] Similarly, in Massachusetts, state Attorney General Maura Healey has sued Uber and Lyft, alleging that the companies have misclassified their workers, thereby avoiding paying workers the benefits to which they are legally entitled.[88] In a statement, the Attorney General proclaimed that "[t]his business model is unfair and exploitative. We are seeking this determination from the court because these drivers have a right to be treated fairly."[89] Lyft responded through a spokesperson that "[t]his lawsuit threatens to eliminate work for more than 50,000 people in Massachusetts at the worst possible time."[90]

New York City has passed local laws that give gig workers who work for delivery platforms certain rights and protections such as access to restaurant bathrooms, limits on trip distances, guarantees that tips are paid to workers, and a minimum payment per trip to be set by January 1, 2023.[91] Supporters of the bills hope that they "can serve as a 'framework' for other municipalities."[92] These laws, however, have stopped short of requiring that gig workers be classified as employees.[93]

Much like their entrance into the markets, gig-work companies have responded aggressively to challenges to their business model. In California, the state fight over worker classification began with *Dynamex*

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[87] Erin Mulvaney, *New Jersey Pursues Lyft on Taxes, Keeping Pressure on Gig Model*, BLOOMBERG L. (Nov. 5, 2010, 1:03 PM), https://news.bloomberglaw.com/daily-labor-report/new-jersey-pursues-lyft-on-taxes-keeping-pressure-on-gig-model; Chris Opfer, *Uber Hit With $650 Million Employment Tax Bill in New Jersey*, BLOOMBERG L. (Nov. 14, 2019, 4:31 PM), https://news.bloomberglaw.com/daily-labor-report/uber-hit-with-650-million-employment-tax-bill-in-new-jersey?context=article-related.

[88] Healey v. Uber Techs., Inc., No. 2084CV01519-BLS1 (Mass. Super. Ct. Mar. 25, 2021); Kate Conger & Daisuke Wakabayashi, *Massachusetts Sues Uber and Lyft Over the Status of Drivers*, N.Y. TIMES (July 14, 2020), https://www.nytimes.com/2020/07/14/technology/massachusetts-sues-uber-lyft.html.

[89] Conger & Wakabayashi, *supra* note 88.

[90] *Id.*

[91] *See* 20 N.Y.C. ADMIN. CODE §§ 1521–23.

[92] Josefa Velasquez & Claudia Irizarry Aponte, *NYC Set to Pass Food Delivery App Laws Securing Workers Minimum Pay, Bathrooms and More*, CITY (Sept. 22, 2021, 12:38 PM), https://www.thecity.nyc/work/2021/9/22/22687983/nyc-landmark-food-delivery-worker-pay-bathrooms.

[93] *See generally* 20 N.Y.C. ADMIN. CODE §§ 1521–24.

Operations W., Inc. v. Superior Ct.[94] There, a delivery driver for Dynamex, a national courier, claimed that he was misclassified as an independent contractor.[95] Drivers set their own schedules and could reject specific deliveries but were required to notify the company about their schedule and delivery rejections.[96] Drivers also wore Dynamex uniforms and drove in Dynamex-labeled trucks.[97] The Supreme Court of California considered three different tests for determining if a worker is an employee or independent contractor.[98] The court ultimately settled on the ABC test of independent contractors, which requires employers to show that: (A) the employer does not control or direct the performance of the work; (B) the work is outside the usual course of the business; and (C) the worker typically performs the work in an independently established trade, occupation, or business.[99] Applying the test, the court determined that the workers were employees because the employer could not show elements B and C; therefore, the court held that making deliveries was not work outside the usual course of business, and the workers did not perform their trade independent of Dynamex.[100]

After the *Dynamex* decision, the California legislature immediately went to work on a bill codifying the ABC test. Assembly Bill 5 ("AB5") incorporated the ABC test into California law. The bill was introduced on December 3, 2018, and became effective January 1, 2020.[101] The backlash from gig-work companies was immediate. Uber and Lyft refused to convert their drivers to employees, leading to a lawsuit from the California Attorney General.[102] The companies also warned they would leave the state if AB5 remained in effect.[103]

To fight back against AB5 and lawsuits from the California Attorney General, gig-work companies used a California voter

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[94] Dynamex Operations W., Inc. v. Superior Ct., 416 P.3d 1 (Cal. 2018).

[95] *Id.* at 9.

[96] *Id.* at 8.

[97] *Id.*

[98] *See id.* at 30 n.20, 33–36.

[99] *Id.* at 35–36.

[100] *Dynamex*, 416 P.3d at 40–42.

[101] *Id.*

[102] *See generally* People v. Uber Techs., Inc., No. CGC-20-584402, 2020 Cal. Super. LEXIS 152 (Cal. Super. Ct. Aug. 10, 2020).

[103] Sara Ashley O'Brien, *Uber and Lyft Get Reprieve from Court, Won't Shut Down in California for Now*, CNN (Aug. 20, 2020, 4:35 PM), https://www.cnn.com/2020/08/20/tech/uber-lyft-california-shutdown/index.html.

referendum to put Proposition 22 on the ballot.[104] Proposition 22 would explicitly permit gig workers to be classified as independent contractors.[105] Uber and other companies spent over $200 million on voter outreach to support the measure, making it the most expensive referendum vote ever in the United States.[106] Ultimately, their efforts were successful: Proposition 22 passed with 58 percent voter approval.[107]

Shortly after their victory, gig-work companies made clear their intention to replicate the Proposition 22 playbook nationwide.[108] "You'll see us more loudly advocate for new laws like Prop 22," Uber CEO Dara Khosrowshahi told investors, and DoorDash CEO Tony Xu issued a statement saying: "We're looking ahead and across the country, ready to champion new benefits structures that are portable, proportional, and flexible."[109] Already, gig-work companies have plans in place to run a ballot initiative campaign similar to Proposition 22 in Massachusetts.[110] "If the coalition is successful [in their ballot initiative petition], Massachusetts voters will decide [in 2022] whether gig workers should be considered independent contractors."[111]

But one year after Proposition 22's approval, a California state Superior Court held that the proposition was unconstitutional and unenforceable as an infringement on legislative power and a violation of the rule that referenda must cover only one subject.[112] Much like the larger fight over gig-worker classification, the fight over Proposition 22 is far from over: a pro-Proposition 22 organization, the

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[104] Margot Roosevelt & Suhauna Hussain, *Prop. 22 Is Ruled Unconstitutional, a Blow to California Gig Economy Law*, L.A. TIMES (Aug. 20, 2021, 10:22 PM), https://www.latimes.com/business/story/2021-08-20/prop-22-unconstitutional.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *See* Josh Eidelson, *Election Day Gave Uber and Lyft a Whole New Road Map*, BLOOMBERG L. (Nov. 8, 2020, 7:00 AM), https://news.bloomberglaw.com/daily-labor-report/election-day-gave-uber-and-lyft-a-whole-new-road-map.

[109] *Id.*

[110] Kate Conger, *Gig Companies Want Massachusetts Voters to Exempt Workers from Employee Status*, N.Y. TIMES (Aug. 4, 2021), https://www.nytimes.com/2021/08/04/business/gig-workers-massachusetts.html.

[111] *Id.*

[112] Castellanos v. State, No. RG21088725, 2021 Cal. Super. LEXIS 7285, at *16–18 (Cal. Super. Ct. Aug. 20, 2021).

Protect App-based Drivers & Services Coalition, has already appealed the Superior Court's ruling.[113]

The push and pull on the federal level between administrations and the fights at the state level show that the question of employment classification is highly politicized and subject to change from year to year. For gig workers, especially those living paycheck to paycheck, these fights may ultimately benefit them (or not), but they offer little practical assistance in the interim if they remain locked out of remedies provided by employment law. Consumer protection law can fill this gap.

B. *Using Consumer Protection Law to Regulate Wage Theft and Employment Misrepresentations as Unfair and Deceptive Practices*

There is some recent precedent for using consumer protection statutes barring unfair and deceptive practices to regulate those same violations when they occur against gig workers. The recent cases span different political administrations, and regulators have brought actions both federally and at the state level. Despite their many statutory differences, the state statutes share five common purposes: (1) to make victims whole for their losses; (2) to punish bad actors who commit the prohibited acts; (3) to allow for consumers to bring their claims, particularly when legal fees may exceed the actual damages; (4) to incentivize attorneys to take on consumer protection cases; and (5) to deter future fraud, and deceptive and unfair business practices.[114]

In the most recent example, in 2021, the FTC alleged that Amazon violated Section 5(a) of the FTCA's bar on deceptive business practices by telling their drivers that they would receive tips, when, in fact, the tips went to their base wages.[115] The Complaint referred to Amazon drivers as "consumers [that] can sign up as drivers to deliver products to Amazon customers."[116] The Complaint alleged that Amazon misappropriated $61 million of tips from hundreds of

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[113] Maeve Allsup, *Prop 22 Backers Appeal Ruling Striking California Gig Worker Law (1)*, BLOOMBERG L. (Sept. 23, 2021, 10:16 AM), https://news.bloomberglaw.com/us-law-week/prop-22-backers-appeal-ruling-striking-california-gig-worker-law; Notice of Appeal, Castellanos v. State, 2021 Cal. Super. LEXIS 7285 (Cal. Super. Aug. 20, 2021) (No. RG21088725).

[114] Debra Pogrund Stark & Jessica M. Choplin, *Does Fraud Pay? An Empirical Analysis of Attorney's Fees Provisions in Consumer Fraud Statutes*, 56 CLEV. ST. L. REV. 483, 499 (2008).

[115] Amazon Complaint, *supra* note 63, at 12.

[116] *Id.* at 2.

drivers.[117] To support the allegations, the Complaint cited Amazon's advertising and company materials, which stated that drivers would keep 100 percent of the tips, while actually taking those tips and counting them toward base wages, to make out a claim of deceptive trade practices.[118]

Further, the Complaint alleged that Amazon's terms of service for drivers "promised to 'provide [drivers] with any tips [they] earn'" and "promise[d] that 'Amazon will pass through any tips payable to you.'"[119] The Complaint also made out a claim of deceptive practices towards the *customer*-consumers, who were also told their tip money would be paid as tips to the drivers.[120] Allegedly "[w]hen customers click[ed] on the recommended tip amount, the next screen explain[ed] that '100% of tips are passed on to your courier.'"[121]

The lawsuit was settled swiftly—within a year—when Amazon agreed to pay $61.7 million to make drivers whole.[122] Additionally, the settlement barred Amazon from changing driver compensation without receiving drivers' informed consent.[123] The Consent Order also provided for continued monitoring and recordkeeping requirements for Amazon for information relating to the settled charges.[124] The court ordered Amazon to provide a compliance report within one year, keep records of systems and procedures used to process driver tips as well as any advertisements concerning driver tips for ten years, and maintain those records for five years.[125]

The FTC also used the FTCA to bring a false and deceptive claims case against Uber in 2017.[126] In its 2017 Complaint, the FTC alleged that Uber misled drivers with false and deceptive claims about their

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[117] *Id.*

[118] *Id.* at 2–3, 8–9.

[119] *Id.* at 3.

[120] *Id.* at 6–8.

[121] Amazon Complaint, *supra* note 63, at 7.

[122] Press Release, Fed. Trade Comm'n, Amazon to Pay $61.7 Million to Settle FTC Charges It Withheld Some Customer Tips from Amazon Flex Drivers (Feb. 2, 2021), https://www.ftc.gov/news-events/press-releases/2021/02/amazon-pay-617-million-settle-ftc-charges-it-withheld-some.

[123] *Id.*; Decision and Order at 3, Amazon.com Inc., No. C-4746 (F.T.C. June 9, 2021).

[124] Decision and Order at 5–6, Amazon.com Inc., No. C-4746 (F.T.C. June 9, 2021).

[125] *Id.* at 4–6.

[126] Complaint for Permanent Injunction & Other Equitable Relief at 1–2, Fed. Trade Comm'n v. Uber Techs., Inc., No. 17-cv-00261 (N.D. Cal. Jan. 19, 2017) [hereinafter Uber Complaint].

earning potential on the platform and the details of its vehicle financing plans.[127] Notably, the FTC referred to Uber drivers as "entrepreneurial consumers who are transportation providers" in their Complaint.[128] The Complaint also noted that Uber classified their drivers as independent contractors.[129] The Complaint defined Uber as a company that "distributes a mobile software application" which connects driver-consumers to passenger-consumers.[130]

The Complaint alleged that Uber overstated the wages that drivers make on the platform in advertising communications on their website and posted to other sources, such as Craigslist.com.[131] For example, postings to Craigslist advertised hourly driver earnings of $21 per hour in New Jersey and $25 per hour in Philadelphia, while actually fewer than 30 percent of New Jersey drivers made that much money and fewer than 10 percent of Philadelphia drivers made that wage.[132] Additionally, it alleged that Uber made deceptive statements to driver-consumers relating to their car leasing programs.[133] Through recruiting advertisements, Uber stated that drivers could rent cars for as little as $119 per week and with unlimited mileage.[134] In reality, the Complaint alleged the leases cost at least $200 per week, and each lease had an annual mileage cap of around 37,500 miles, constituting a deceptive practice.[135]

Uber settled with the FTC within the same *month* for $20 million.[136] The settlement also included an Order that prohibits Uber from making "false, misleading, or unsubstantiated representations" to drivers about driver income, vehicle leasing, or financing offers.[137] The Order also required Uber to save records relating to the charges for

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[127] *Id.* at 3–4.

[128] *Id.* at 3.

[129] *Id.* at 5.

[130] *Id.* at 3.

[131] *Id.* at 5–6.

[132] Uber Complaint, *supra* note 126, at 6–7.

[133] *Id.* at 3–4.

[134] *Id.* at 9.

[135] *Id.* at 9–10.

[136] *See* Press Release, Fed. Trade Comm'n, Uber Agrees to Pay $20 Million to Settle FTC Charges That It Recruited Prospective Drivers with Exaggerated Earnings Claims (Jan. 19, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/uber-agrees-pay-20-million-settle-ftc-charges-it-recruited.

[137] *Id.*; *see also* Stipulated Order for Permanent Injunction & Monetary Judgment at 3, Fed. Trade Comm'n v. Uber Techs., Inc., No. 3:17-cv-00261 (N.D. Cal. Jan. 19, 2017) [hereinafter Uber Order].

nine years and save each record for five years.[138] Further, the court retained jurisdiction to monitor compliance with the Order and, if necessary, request further information from the company.[139]

One recent case that the D.C. Attorney General brought against Doordash for similar allegations of wage misrepresentation shows the limits of regulating gig work where statutes have narrow definitions of "consumer." In *District of Columbia v. Doordash, Inc.*, the District alleged violations of D.C.'s Consumer Protection Procedures Act for deceptive trade practices.[140] In particular, it alleged that Doordash told both consumers and their workers that tips would go to the workers; instead, Doordash used them to pay base wages.[141] The District used Doordash's communications to consumers that their tips would go 100 percent to drivers as evidence of the deception because, allegedly, the tips were actually used to subsidize the workers' base wages.[142] Of note, the Complaint differentiated between "consumers" of the Doordash service and Doordash delivery "workers" or "Dashers," rather than including the workers themselves as consumers as well.[143] The Complaint was very likely precluded from including drivers as consumers due to the D.C. statute's definition of "consumer and consumer goods" as goods and services for "personal, household, or family purposes."[144]

The suit settled for $2.5 million within a year, with $1.5 million going to affected workers, $250,000 to local charities, and the settlement mandating that Doordash pay tips properly going forward and inform consumers of where exactly their monies go.[145] The settlement also included that Doordash would pay $750,000 to the District of Columbia to reimburse it for the investigation and litigation expenses connected to the case.[146]

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[138] Uber Order, *supra* note 137, at 7–8.

[139] *Id.*

[140] Doordash Complaint, *supra* note 9, at 1.

[141] *Id.* at 1–3, 7.

[142] *Id.* at 3, 7.

[143] *Id.* at 2.

[144] D.C. CODE § 28-3901(a)(2)(B) (2022).

[145] Press Release, Off. of the Att'y Gen. for D.C., AG Racine Reaches $2.5 Million Agreement with DoorDash for Misrepresenting that Consumer Tips Would Go to Food Delivery Drivers (Nov. 24, 2020), https://oag.dc.gov/release/ag-racine-reaches-25-million-agreement-doordash; *see also* Consent Order and Judgment at 4–5, District of Columbia v. Doordash Inc., No. 2019 CA 007626 B (D.C. Super. Ct. Nov. 24, 2020) [hereinafter Doordash Order].

[146] Doordash Order, *supra* note 145, at 5.

While suit was brought on behalf of deceived customer-consumers, part of the settlement paid the affected workers.[147] Although this case was successful, it shows the inherent limits to regulatory effectiveness where statutory definitions limit who can have a cause of action. If the D.C. statute had broader definitions of consumers, as this Comment suggests, the suit could have named both the customers and the workers as consumers, making for a stronger claim.

The above cases demonstrate that consumer protection law can be used effectively to bring justice for gig workers otherwise left out by employment statutes. The D.C. case highlights the limits of consumer protection law where its scope is too narrow. These statutes can be improved and used effectively to regulate gig work by broadening the definition of consumer and including a strong private right of action. Admittedly, these cases all settled and therefore did not create precedent. Still, using consumer protection laws, regulators were able to extract large settlements and make affected workers whole—more than what is possible with statutes that exclude gig workers.

III. FEATURES OF CONSUMER PROTECTION LAWS THAT WORK WELL

Regulatory efforts, as well as scholarship, have shown that certain features of consumer protection law can be helpful in regulating gig-work companies. This Part will look at two such features: (1) broad definitions of consumers and prohibited business practices and (2) robust private rights of action—showing that even laws without these features may be modified to serve as an enforcement tool in the new gig economy.

A. *Broad Definitions of Consumers and of Prohibited Business Practices*

A broad definition of the "consumer" allows state attorney generals and regulators to seamlessly bring suits against gig-work companies who engage in unfair or deceptive practices towards their workers. Statutes that deploy broad definitions of unfair and deceptive practices, without excepted industries or classifications, offer a viable tool to police the gig economy. For instance, California's Consumer Privacy Act defines a consumer as "a natural person who is a California resident."[148] Likewise, California's Unfair Competition Law's (UCL),

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[147] *Id.*

[148] CAL. CIV. CODE § 1798.140(g) (Deering through Chapter 58 of 2022 Reg. Sess., excepting Chapter 21).

"'scope is broad,' and its coverage is 'sweeping.'"[149] The UCL prohibits *inter alia*, "unlawful, unfair or fraudulent business act[s] or practice[s] and unfair, deceptive, untrue or misleading advertising . . . ."[150] "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction."[151]

Moreover, the law grants the court authority to appoint a receiver to guard against repeated violations and to make any victim whole.[152] By focusing on the broad definitions of business practices, the UCL allows for coverage in employment contexts—including claims for unpaid wages.[153]

Likewise, by allowing for remedies to be granted to "person[s] of interest," the law leaves open remedies, such as back wages for employees who were victims of unfair business practices.[154] The law is also clear in that it allows a broad cause of action for any "person," defined as "natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons."[155] Importantly, the UCL has been held to give employees a cause of action for unfair and deceptive business practices relating to their employment.[156] Further, the UCL allows for punishment of violations

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[149] People *ex rel.* Harris v. Pac Anchor Transp., Inc., 329 P.3d 180, 188 (Cal. 2014) (quoting Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 539 (Cal. 1999)).

[150] CAL. BUS. & PROF. CODE §17200 (Deering through Chapter 58 of 2022 Reg. Sess., excepting Chapter 21).

[151] *Id.* § 17203.

[152] *Id.*

[153] *See* Cortez v. Purolator Air Filtration Prods. Co., 999 P.2d 706, 710 (Cal. 2000) (Affirming "cause of action [which] alleged that defendant failed to pay overtime wages promptly on termination of the employees as mandated by Labor Code section 203[, and t]hese omissions were alleged to constitute an unfair business practice proscribed by section 17200").

[154] *See* CAL. BUS. & PROF. CODE § 17203; *see also Cortez*, 999 P.2d at 715 ("The employee is, quite obviously, a "person in interest" (§ 17203) to whom that money may be restored.").

[155] CAL. BUS. & PROF. CODE § 17201.

[156] *See, e.g.*, Aleksick v. 7-Eleven, Inc., 205 Cal. App. 4th 1176, 1193 (Cal. Ct. App. 2012) (treating employee as a consumer in their claim against their employer for misappropriated wages); Espejo v. Copley Press, Inc., 13 Cal. App. 5th 329, 367 (Cal. Ct. App. 2017) ("An order for payment of wages unlawfully withheld from an employee is a restitutionary remedy authorized by the UCL.").

which are "unlawful"—meaning unlawful under any other statute.[157] Under the UCL, a practice can be prohibited "as 'unfair' or 'deceptive' even if not 'unlawful.'"[158] This allows the UCL to operate with great flexibility and "permit[s] tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur."[159]

FTC enforcement actions have also treated gig workers as "consumers" of gig company platforms.[160] FTCA Section 5(a) gives the FTC enforcement power against "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce," and gives the courts the right to remedy consumers harmed by those violations.[161] The FTC has applied this authority broadly, bringing claims for violations perpetrated against gig workers, because the acts "affect commerce."[162] Again, by focusing on the unlawful acts, and defining them broadly, regulators are given latitude to apply the law to unfair acts which affect employees or even independent contractor "consumers" of gig economy platforms.[163] The FTCA was "drafted broadly" to encompass not just anti-trust violations but also "practices that the Commission determines are against public policy for other reasons."[164] As the Court highlighted in *FTC v. Colgate-Palmolive Co.*, "[i]t is important to note the generality of these standards of illegality; the proscriptions in § 5 are flexible[,] 'to be defined with particularity by the myriad of cases from the field of business.'"[165] In line with these goals, the FTC has rulemaking authority under the FTCA to create rules, such as to define which practices are unfair or deceptive.[166]

Like California's UCL, the FTCA's unfair practice definition is broad and inclusive of even unfair practices which are not yet

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[157] Clerkin v. MyLife.com, Inc., No. C 11-00527 CW, 2011 WL 3607496, at *6 (N.D. Cal. Aug. 16, 2011) ("Violation of almost any federal, state or local law may serve as the basis for a UCL claim.").

[158] Paulus v. Bob Lynch Ford, Inc., 139 Cal. App. 4th 659, 678 (Cal. Ct. App. 2006).

[159] *Id.*

[160] *See, e.g.*, Amazon Complaint, *supra* note 63; Uber Complaint, *supra* note 126.

[161] 15 U.S.C. § 45.

[162] *See id.*; Amazon Complaint, *supra* note 63; Uber Complaint, *supra* note 126.

[163] *Id.*

[164] FTC v. LeadClick Media, LLC, 838 F.3d 158, 167–68 (2d Cir. 2016) (quoting Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986)).

[165] 380 U.S. 374, 384–85 (1965).

[166] *See* 15 U.S.C § 57a.

otherwise illegal.[167] Moreover, the statute provides that the FTC may consider public policy in determining which practices should be barred under the Act."[168]

In the FTC's 2017 Complaint against Uber for unfair and deceptive practices, the FTC referred to Uber drivers as "entrepreneurial consumers who are transportation providers."[169] The Complaint did so while also noting that Uber classified their drivers as independent contractors.[170] In a show of regulatory consistency, the FTC in its 2021 Complaint against Amazon also referred to the Amazon Flex platform delivery drivers similarly as "consumers [that] can sign up as drivers to deliver products to Amazon customers."[171] The FTC has this flexibility of enforcement because the FTC is not limited to a narrow definition of consumer; instead, they can regulate unfair or deceptive acts or practices *in or affecting commerce*.[172]

Just as broad definitions are very helpful to allow for gig economy workers to bring claims, similar laws in other jurisdictions have been construed to exclude workers from the definition of "consumers." For instance, some consumer protection laws, such as D.C.'s Consumer Protection Procedures Act ("CPPA"), limit the definition of consumers to buyers of goods and services for the "personal, household, or family purposes."[173] In *Stone v. Landis Constr. Co.*, the D.C. Court of Appeals considered a case where the appellant was a master plumber who applied for a plumbing job with the appellee.[174] After being passed over for the job, the appellant filed claims against the appellee, which included violations of the D.C. CPPA.[175] The trial court dismissed those claims.[176] In reviewing appellant's CPPA claims, the D.C. Court of Appeals considered whether appellant could be a "consumer" as

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[167] *See* FTC v. Accusearch, Inc., 570 F.3d 1187, 1194 (10th Cir. 2009); Paulus v. Bob Lynch Ford, Inc., 139 Cal. App. 4th 659, 678 (Cal. Ct. App. 2006); 15 U.S.C. § 45(n) (defining an unfair practice as an "act or practice [that]causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.").

[168] 15 U.S.C. § 45(n).

[169] Uber Complaint, *supra* note 126, at 3.

[170] *Id.* at 5.

[171] Amazon Complaint, *supra* note 63, at 2.

[172] 15 U.S.C. § 45(a).

[173] D.C. CODE § 28-3901(a)(2)(B) (2022).

[174] 120 A.3d 1287, 1288 (D.C. 2015).

[175] *Id.*

[176] *Id.*

defined by the CPPA and concluded that he could not be; therefore, he failed to state a claim.[177] The court reviewed the statutory definitions of consumer and consumer goods and concluded that to hold appellant as a consumer based on the definitions "would involve the contortion of normal language."[178] The court reached this conclusion because "[e]mployment, properly understood, is not used 'for personal, household, or family purposes'" and because "employment [does not] naturally fall even within the definition of 'goods and services,'" as "[e]mployment produces goods and services."[179]

The D.C. Court of Appeals went even further in limiting the scope of who is a harmed consumer under the CPPA in *Shaw v. Marriott Int'l, Inc.*[180] In that case, the appellants brought claims under the CPPA relating to hotel stays incurred during a business trip.[181] Interpreting the CPPA's definition of "consumer goods," the court held that because "[b]oth [appellants] stayed in the hotels to further the business purposes of their employers. They did not engage in consumer transactions within the meaning of the Act and [were] not entitled to its protections."[182]

Given the holdings of *Stone* and *Shaw*, it makes sense that when D.C. sought to use the CPPA statute against Doordash for allegedly misappropriating customers' tips intended for drivers, the D.C. Attorney General only included the customers as consumers.[183] This is likely because, given the holdings of each of these cases, they realized that they faced an uphill battle based on the statutory definitions of "consumer" and "consumer goods" as the cases essentially foreclose on such a cause of action.[184] The Attorney General was limited to classifying the customers as "consumers" because it would be difficult to argue that the Doordash workers utilized the Doordash platform for services for "personal, household, or family purposes."[185] That being said, through settlement of the case, the Attorney General was

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[177] *Id.* at 1289–92.

[178] *Id.* at 1290.

[179] *Id.*

[180] 605 F.3d 1039, 1041 (D.C. Cir. 2010).

[181] *Id.* at 1044.

[182] *Id.*

[183] Doordash Complaint, *supra* note 9, at 1–2.

[184] *See, e.g.,* Stone v. Landis Constr. Co., 120 A.3d 1287, 1288, 1291–92 (D.C. Cir. 2015); Shaw v. Marriott Int'l, Inc., 605 F.3d 1039, 1044 (D.C. Cir. 2010).

[185] D.C. CODE § 28-3901(a)(2)(B) (2022).

ultimately allowed to make the *drivers* whole, even though the customer-consumers were the main subjects of the cause of action.[186] Therefore, there still seems to be merit in pursuing these types of violations, working creatively within the statutory limitations, even in jurisdictions with limiting language.

This type of limiting language is also present in New York City's consumer protection law. There, the law limits the definition of "consumer" to a "purchaser or lessee or prospective purchaser or lessee of the consumer goods or services or consumer credit, including a co-obligor or surety."[187] Consumer goods and services are defined as those "which are primarily for personal, household or family purposes."[188]

Luckily, the problems with definitions are not intractable. State laws can be amended to be more inclusive and cover unfair and deceptive business practices, even within the workplace. With the expansion of the gig economy, and concerns regarding fair treatment of those workers, state legislatures interested in filling this regulatory void should look to this option.[189]

B. *Private Rights of Action with Meaningful Punitive Damages and Attorney Fees Without Procedural Hurdles*

While all fifty states offer a procedural cause of action for individuals to sue under their state consumer protection law, some states impose special hurdles which consumers must clear to make out a successful claim, or limit the scope of violations a consumer may take up.[190] Additionally, the FTCA does not have a private right of action at all.[191] Private rights of action are important because they make it so

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[186] Doordash Order, *supra* note 145, at 5.

[187] N.Y.C. ADMIN. CODE § 20-701(d).

[188] N.Y.C. ADMIN. CODE § 20-701(c).

[189] *See generally* Sydney Brownstone, *Gig Economy Explosion: 53 Million American Freelancers Are Their Own Bosses*, FAST CO. (Sept. 5, 2014), https://www.fastcompany.com/3035325/gig-economy-explosion-53-million-american-freelancers-are-their-own-bosses ("According to a new survey commissioned by Freelancers Union and Elance-oDesk, freelance workers make up 53 million people, or 34% of the American workforce."); Michelle Chang, *Regulators Across the US Are Targeting the Food Delivery Industry*, QUARTZ (July 20, 2022), https://qz.com/2059086/regulators-across-the-us-are-targeting-the-food-delivery-industry.

[190] *See* CONSUMER PROTECTION IN THE STATES, *supra* note 56, at 33–34.

[191] 15 U.S.C. § 45(a)(2).

that an aggrieved party does not need to rely on government agencies which may lack resources or have other priorities.[192]

History bears some of this out. It was criticism of the FTC and its alleged resource deficit and mismanagement in the 1960s that led states to pass their own Little-FTC Acts, with private rights of action, to fill in the gaps lefts by the perceived failures of the FTC at the time.[193] Private rights of action, in concert with treble damages, other punitive damages, and legal fee awards incentivize harmed workers to seek justice and attorneys to represent what may not otherwise be lucrative cases.[194]

1. The Importance of Heightened Damages and Attorney Fees

In explaining why New Jersey initially passed its consumer protection law, which included awards of treble damages[195] and

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[192] *See* Leah Nylen, *FTC Suffering a Cash Crunch as it Prepares to Battle Facebook*, POLITICO (Dec. 10, 2020, 6:50 PM), https://www.politico.com/news/2020/12/10/ftc-cash-facebook-lawsuit-444468 (reporting on internal FTC emails in which "Executive Director David Robbins said the agency would face a period of 'belt tightening' to cut costs — and that filing fewer cases and trimming litigation expenses must be on the table."); Debra Pogrund Stark & Jessica M. Choplin, *Does Fraud Pay? An Empirical Analysis of Attorney's Fees Provisions in Consumer Fraud Statutes*, 56 CLEV. ST. L. REV. 483, 490 (2008) ("With limited resources, the FTC clearly can not respond to so many consumer complaints each year."). Even where agencies do have the resources, the focus may instead be on a priority other than remedies for gig workers. *See, e.g.*, Scott Ferguson, *House Committees Seek to Spend Millions on Cybersecurity*, BANK INFO SEC. (Sept. 15, 2021), https://www.bankinfosecurity.com/house-committees-seek-to-spend-millions-on-cybersecurity-a-17544 ("[T]he House Energy and Commerce Committee voted Tuesday to approve $1 billion for the FTC to create a bureau dedicated to data security privacy as well as fighting identity theft.").

[193] Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 167 ("By 1969 denouncement of the FTC had reached its zenith with publication of critical reports from 'Nader's Raiders,' the American Bar Association, and Professor Richard Posner …. It was the perceived inadequacies of each of these institutions that lead states to enact CPAs.").

[194] *See* Lettenmaier v. Lube Connection, Inc., 741 A.2d 591, 593 (N.J. 1999) ("The Consumer Fraud Act has three main purposes: to compensate the victim for his or her actual loss; to punish the wrongdoer through the award of treble damages . . . and, by way of the counsel fee provision, to attract competent counsel to counteract the community scourge of fraud by providing an incentive for an attorney to take a case involving a minor loss to the individual.").

[195] Treble damages are civil penalties in a statute that permit or require a court to award up to three times damages to a winning plaintiff. *Treble Damages*, INVESTOPEDIA, https://www.investopedia.com/terms/t/trebledamages.asp (last updated Apr. 27, 2022). One such example is D.C.'s Consumer Protection Procedures

attorney's fees, then-Governor Cahill's Press Release stated that the legislature had done so to "provide 'easier access to the courts for the consumer, . . . increase the attractiveness of consumer actions to attorneys and . . . also help reduce the burdens on the Division of Consumer Affairs."'[196]

Likewise, the Supreme Court of South Carolina noted the public policy reason for rewarding attorney's fees as "[a]llowing plaintiffs who successfully pursue an action under the [South Carolina law] to recover their attorney's fees encourages individuals to pursue litigation to protect the public interest."[197] Furthermore, in explaining why it is justified for attorney's fees at times to exceed the actual damages in a consumer protection case, the Michigan Court of Appeals noted that "[i]n consumer protection [cases], the monetary value of the case is typically low . . . . [I]f attorney fee awards in these cases do not provide a reasonable return, it will be economically impossible for attorneys to represent their clients."[198] The court further lamented that in such a situation "practically speaking, the door to the courtroom will be closed to all but those with either potentially substantial damages, or those with sufficient economic resources to afford the litigation expenses involved."[199]

Another compelling public policy goal of these sorts of damages is to punish companies who engage in unfair and deceptive practices towards consumers.[200] Further, the possibility of stiff penalties disincentives bad behavior on behalf of gig-work companies who would otherwise be unlikely to be deterred due to their economic power.[201]

Act which allows for the court to grant a prevailing plaintiff "[t]reble damages, or $1,500 per violation, whichever is greater, payable to the consumer." D.C. CODE § 28-3905(k)(2)(A)(i). Along with treble damages, "The District of Columbia Consumer Protection Procedures Act affords a panoply of strong remedies, including . . . punitive damages and attorneys' fees, to consumers who are victimized by unlawful trade practices." Ford v. Chartone, Inc., 908 A.2d 72, 80–81 (D.C. Cir. 2006).

[196] *See* Cox v. Sears Roebuck & Co., 647 A.2d 454, 460 (N.J. 1994) (quoting Press Release, Governor William T. Cahill, Assembly Bill No. 2402 (June 29, 1971)).

[197] Taylor v. Medenica, 503 S.E.2d 458, 460 (S.C. 1998).

[198] Jordan v. Transnat'l Motors, Inc., 537 N.W.2d 471, 474 (Mich. Ct. App. 1995).

[199] *Id.*

[200] *See* Lettenmaier v. Lube Connection, Inc., 741 A.2d 591, 593 (N.J. 1999) (Listing "to punish the wrongdoer through the award of treble damages" as one of the "three main purposes" of the state's The Consumer Fraud Act).

[201] *See* Srestha Roy, *Uber Slips Behind DoorDash in Market Value*, TECHSTORY (Sept. 21, 2021), https://techstory.in/uber-slips-behind-doordash-in-market-value (citing Uber's market value at $74.9 billion and Doordash's market value at $75.2 billion).

This is particularly important in a space where they are not subject to traditional employment laws, and their penalties.

While laws like D.C.'s CPPA succeed in fortifying the private cause of action with an extensive penalty structure, other state statutes—such as New York's—fail in this regard. New York's consumer protection law nominally allows for treble damages at the court's discretion, but those damages may not "exceed three times the actual damages up to one thousand dollars."[202] Furthermore, treble damages may only apply "if the court finds the defendant willfully or knowingly [committed the violation]."[203]

While courts have held that New York's statute allows for punitive damages as well, the courts set a high bar to award them.[204] "[P]unitive damages [are only to be awarded] where the conduct of the party [being] held liable 'evidences a high degree of moral culpability, or where the conduct is so flagrant as to transcend mere carelessness, or where the conduct constitutes willful or wanton negligence or recklessness.'"[205]

It is noteworthy that there is an ongoing effort in the New York legislature to amend §349(h)'s treble damage limit.[206] New York Senate Bill 2407-C would eliminate the law's $1,000 cap, instead allowing judges to award damages up to their discretion for willful or knowing violations.[207] An increase in these penalties should go a long way towards fulfilling the goals of the penalties to serve as incentives to bring cases and deterrents for companies who may engage in unfair or deceptive business practices.

2. The Impediment of Enhanced Elements for Private Consumer Actions

Additionally, statutory or common law hurdles must be removed for a consumer right of action to be effective. For instance, New York's statute has been held to require that "[Plaintiffs] must demonstrate

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[202] N.Y. GEN. BUS. LAW § 349(h).

[203] *Id.*

[204] Wilner v. Allstate Ins. Co., 71 A.D.3d 155, 167 (N.Y. App. Div. 2010) ("Moreover, the plaintiffs may seek both treble damages and punitive damages [under § 349(h)].").

[205] Pellegrini v. Richmond Cnty. Ambulance Serv., Inc., 48 A.D.3d 436, 437 (N.Y. App. Div. 2008) (quoting Buckholz v. Maple Garden Apts., LLC, 38 A.D.3d 584, 585 (N.Y. App. Div. 2007)).

[206] S.B. 2407-C, 2019 Leg., Reg. Sess. (N.Y. 2019), https://legislation.nysenate.gov/pdf/bills/2019/S2407C.

[207] *Id.* at 3:8–12.

that the acts or practices have a broader impact on consumers at large."[208] In *Elacqua v. Physicians' Reciprocal Insurers*, the Appellate Division Third Department (a division of New York's intermediate appellate court) found that an insurer's failure to notify its customers of their right to independent counsel in claims which "give[] rise to a conflict of interest between an insurer and its insured" constituted a deceptive practice under the law.[209] Further, because the deceptive practice "was not an isolated incident, but a routine practice that affected many similarly situated insureds," the court held that it satisfied the requirement that the act have a broader impact on the public at large.[210] Whereas a broader public impact was not found in *Stegich v. Saab Cars USA*.[211] In that case, the plaintiff alleged that a car dealer failed to disclose a pre-purchase repair.[212] The plaintiff, however, was unable to show that the failure to disclose "was part of a pattern of similar conduct directed at the public generally" to satisfy the broader public impact element.[213] Therefore, the plaintiff's claim failed.[214]

While this may not seem like a difficult standard, blocking out consumers who are unable to make out a nexus between their injury and a broader public impact is problematic, especially in the case of gig workers who have limited legal avenues to address their claims. For example, if a platform promised a gig worker a wage of $30 per hour but actually paid less than the minimum wage, unless that worker could show broader public impact, she would be unable to bring suit under New York's consumer protection law for want of this element, unable to bring suit under the FTCA for lack of a private right of action, and unable to bring suit under the FLSA for failure to pay the minimum wage because she is an ineligible independent contractor.[215]

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[208] Oswego Laborers' Loc. 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 25 (N.Y. 1995).

[209] Elacqua v. Physicians' Reciprocal Insurers, 52 A.D.3d 886, 887–88 (N.Y. App. Div. 2008).

[210] *Id.* at 888.

[211] *See generally* 676 N.Y.S.2d 756 (N.Y. App. Term 1998).

[212] *See id.*

[213] *Id.*

[214] *Id.*

[215] *Oswego*, 85 N.Y.2d at 25; Meyer v. Bell & Howell Co. 454 F. Supp. 801, 803 (E.D. Mo. 1978) ("[t]he Act vests initial remedial power solely in the Federal Trade Commission"); 29 U.S.C. § 203(e)(1) (covering only "employees" who are "individual[s] employed by an employer.").

Moreover, the requirement to investigate and show a business's overall practices can be a burden "so time-consuming and expensive as to make individual consumer redress impossible."[216] Such a requirement, and those like it, chill litigation by imposing a higher bar to worker-consumers' claims. For a consumer cause of action to be effective, it must be accessible for the average consumer. That means removing any additional barriers to recovery, such as New York's public impact requirement.

IV. OPPORTUNITIES AND POTENTIAL OBSTACLES

Consumer protection law as an enforcement tool has some promise, but it is not without its inherent limitations. This Part will review some of the overall advantages to utilizing these laws as well as some potential drawbacks.

A. *Quick Remedies*

The Doordash, Amazon, and Uber cases settled quickly for big money with binding terms on the companies to prevent future violations.[217] The Doordash and Amazon cases settled within one year, while the Uber case settled in only one month.[218] The cases settled for a combined $84 million, with over $80 million going towards compensating workers.[219]

Additionally, by using consumer protection laws, the government agencies involved in these cases were able to secure additional binding relief.[220] For instance, Doordash was required to ensure that "consumer tips are distributed in their entirety to the [delivery workers]."[221] Further, Doordash was required to "provide to [customer-consumers] for each delivery order an itemized summary of charges, including, but not limited to, item costs, tips paid, service fees,

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[216] CONSUMER PROTECTION IN THE STATES, *supra* note 56, at 38.

[217] *See generally* Doordash Order, *supra* note 145; Amazon Order, *supra* note 123; Uber Order, *supra* note 137.

[218] Doordash Order, *supra* note 145, at 9; Amazon Order, *supra* note 123, at 7; Uber Order, *supra* note 137, at 10.

[219] Doordash Order, *supra* note 145, at 5 ($2.5 million total with $1.5 million for affected workers); Uber Order, *supra* note 137, at 4–5 ($20 million towards a fund for affected workers); Amazon Order, *supra* note 123, at 3 ($61 million towards fund for affected workers).

[220] *See* Doordash Order, *supra* note 145, at 4; Amazon Order, *supra* note 123, at 4–6; Uber Order, *supra* note 137, at 7–8.

[221] Doordash Order, *supra* note 145, at 4.

and taxes" as well as provide to the delivery drivers "an itemized summary of the total payment for the delivery order, including base pay, tips paid and any promotional payments" for each order.[222]

While some may argue that Doordash's settlement—which does not admit to any wrongdoing and is non-precedential—will have limited impact, surely it is still a strong deterrent to similarly situated companies that Doordash had to pay out $2.5 million and faced extensive bad publicity.[223] Moreover, both the Amazon and Uber settlements included agreements by the companies to submit to continued monitoring by the government and mandated recordkeeping.[224]

By using the existing consumer protection statutes, federal and local regulators were able to move quickly to provide both prophylactic and retroactive remedies to affected workers.[225] Rather than wade into the ongoing debate regarding worker classification, using existing causes of action, workers received relief quickly as companies settled what must have been viable cases in their estimation. Furthermore, "low pay[] [and] nonpayment or underpayment of their base pay and tips" have been found to be among "the most pressing issues that app-based workers fac[e]."[226] The highlighted cases all involve some form of wage misrepresentation or misappropriation, showing that this strategy is effective in resolving these types claims and providing both monetary and injunctive relief to affected workers.[227]

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[222] *Id.*

[223] *See, e.g.*, Lauren Feiner, *Doordash Settles with DC AG for $2.5 Million Over Claims it Misled Users on Driver Tips*, CNBC (Nov. 24, 2020, 1:47 PM), https://www.cnbc.com/2020/11/24/doordash-settles-with-dc-ag-over-claims-it-misled-users.html; Dara Kerr, *DoorDash Settles Lawsuit for $2.5M Over 'Deceptive' Tipping Practices*, CNET (Nov. 25, 2020, 12:47 PM), https://www.cnet.com/tech/mobile/doordash-settles-lawsuit-for-2-5m-over-deceptive-tipping-practices; Lisa Jennings, *DoorDash to Pay $2.5 Million to Settle District of Columbia Driver Gratuity Lawsuit*, NATION'S REST. NEWS, (Nov. 25, 2020), https://www.nrn.com/finance/doordash-pay-25-million-settle-district-columbia-driver-gratuity-lawsuit.

[224] Uber Order, *supra* note 137, at 7–8; Amazon Order, *supra* note 123, at 5–6.

[225] *See* Uber Order, *supra* note 137, at 7–8; Amazon Order, *supra* note 123, at 3, 5–6.

[226] MARIA FIGUEROA ET AL., ESSENTIAL BUT UNPROTECTED: APP-BASED FOOD COURIERS IN NEW YORK CITY 22, https://img1.wsimg.com/blobby/go/6c0bc951-f473-4720-be3e797bd8c26b8e/091321_Full%20Los%20Deliveristas%20Unidos%20-%20Industry.pdf.

[227] *See* Amazon Complaint, *supra* note 63, at 11; Amazon Order, *supra* note 123, at. 3–6; Uber Complaint, *supra* note 126, at 11; Uber Order, *supra* note 137, at 4–8;

B. *Already Existing Laws Need Only Minor Tweaks so Regulators Can Move Fast as Gig-Work Companies Enter the Market.*

Rather than requiring entirely new legislation, all fifty states already have consumer protection laws that prohibit some form of unfair and/or deceptive practices.[228] This Comment suggests that by expanding the definition of a consumer past a purchaser of only goods and services for the "personal, household, or family purposes," such as in the D.C.'s CPPA, regulators would be able to monitor and adjudicate far more instances of unfair and deceptive conduct, including towards gig workers.[229]

The model for a state statute that does not have this problem would be California's UCL, which allows for a broad cause of action for any unfair or deceptive practice, without limiting standing to consumers of non-business goods and services.[230] Likewise, the FTCA could be mirrored becauses it also does not include restrictive definitions of consumers.[231] This strategy would be particularly fitting as it would also be consistent with state statutes' origins as Little-FTC Acts.[232]

For instance, some have suggested that Uber may be susceptible to claims of unfair and deceptive business practices in its assertions surrounding insurance coverage for its drivers under California's UCL.[233] This sort of claim, which involves the sale of insurance to be used professionally rather than for "personal, household, or family purposes," is only possible under a statute like the UCL or the FTCA, both of which focus broadly on prohibited acts without restrictive definitions of "consumers."[234] Because the sale of car insurance to a professional driver, to be used while driving professionally, falls squarely outside of "personal, household, or family purposes," an Uber

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Doordash Complaint, *supra* note 9, at 10, 12; Doordash Order, *supra* note 145, at 4–5, 8.

[228] CONSUMER PROTECTION IN THE STATES, *supra* note 56, at 9.

[229] D.C. CODE § 28-3901(a)(2)(A)–(a)(2)(B)(i) (2022).

[230] *See* CAL. BUS. & PROF. CODE §§ 17200, 17203 (Deering 2022); *infra* Part III.

[231] 15 U.S.C. § 45.

[232] *See* Bell v. Publix Super Mkts., Inc., 982 F.3d 468, 474 (7th Cir. 2020).

[233] Jennie Davis, *Drive at Your Own Risk: Uber Violates Unfair Competition Laws by Misleading Uberx Drivers About Their Insurance Coverage*, 56 B.C. L. REV. 1097, 1098–99 (2015) ("Based on the discrepancy between Uber's claims about uberX drivers' insurance coverage and the actual coverage drivers receive, injured uberX drivers may be able to sue Uber in California for engaging in unfair business practices.").

[234] *Compare* CAL. BUS. & PROF. CODE §§ 17200, 17203 (Deering 2022) *and* 15 U.S.C. § 45, *with* D.C. CODE § 28-3901(a)(2)(B)(i) (2022).

driver with that or a similar claim (perhaps a claim regarding a misrepresentation of vehicle lease terms as in the Uber Complaint) would be without a cause of action under the D.C. CPPA.[235]

It only makes sense that in D.C.'s complaint against Doordash for withholding tips from delivery workers, the Attorney General chose to label the customers as consumers.[236] This is likely entirely due to the statutory construction, which greatly restricts who is a consumer.[237] While the D.C. CPPA serves as a model in terms of the types of remedies offered to prevailing consumers—remedies such as treble damages, punitive damages, and attorney fees—it blocks out large swathes of injured consumers, such as gig workers, with its restrictive definitions of consumers and consumer goods.[238] This makes such a statute difficult to use to regulate unfair and deceptive practices perpetrated against gig workers, although it was used successfully in the above-mentioned *District of Columbia v. Doordash* Complaint.[239]

Another modification that states can make to strengthen their laws and make them more effective in deterring violations against gig workers is to enhance their statutes' available damages for prevailing plaintiffs.[240] One example of this is the current bill working its way through the New York legislature to increase the amount of punitive damages a judge may grant a winning plaintiff under its consumer protection law.[241] New York Senate Bill 2407-C would eliminate the law's $1,000 cap and allow for judges to award damages up to their discretion for willful or knowing violations.[242] This impactful change, which would go a great way towards modernizing New York's statute, is accomplished simply by striking the words "to an amount not to exceed three times the actual damages up to one thousand dollars."[243] This is not such a Herculean task, and clearly the impact would be great

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[235] D.C. CODE § 28-3901(a)(2)(B)(i) (2022); *see generally* Stone v. Landis Constr. Co., 120 A.3d 1287 (D.C. Cir. 2015); Shaw v. Marriott Int'l, Inc., 605 F.3d 1039 (D.C. Cir. 2010); *see* Uber Complaint, *supra* note 126, at 1.

[236] Doordash Complaint, *supra* note 9, at 1–2.

[237] *See* D.C. CODE § 28-3901(a)(2)(B)(i) (2022); *Stone*, 120 A.3d at 1290–92.

[238] D.C. CODE §§ 28-3901(a)(2)(A)–(B), 28-3905(k)(2)(A)–(C); Ford v. Chartone, Inc., 908 A.2d 72, 80–81 (D.C. Cir. 2006) (quoting Dist. Cablevision Ltd. P'Ship v. Bassin, 828 A.2d 714, 717 (D.C. Cir. 2003)).

[239] *See supra* Part II.

[240] *See supra* Part III.

[241] S.B. 2407-C, 2019 Leg., Reg. Sess. (N.Y. 2019).

[242] *Id.*

[243] *Id.*

because it is hard to imagine that the potential of a $1,000 fine would have much of a deterrent impact on gig-work companies valued in the billions.[244] Moreover, as noted above, the greater the value of damages possible, the greater the incentive for attorneys to take the cases.[245]

C. *Consumer Protection Is Less Political Than Other Areas, So It May Be Easier to Make Reforms and Use These Laws as Regulatory Tools in the Gig Economy.*

Federally, the FTC is designed to be a non-political, non-partisan agency.[246] It is governed by five commissioners whom the President nominates and the Senate confirms to serve seven-year terms.[247] As an independent agency, FTC commissioners may not be removed for political reasons.[248] This structure has allowed for minority-party FTC leadership to carry over even through presidential elections—such is the case now where a majority of commissioners are Republican—and will likely stay that way through more than half of Democratic President Joe Biden's first term (that is, unless commissioners resign).[249] One might think that such a composition would presage a shift towards free market and business friendly regulations and away from enforcement of gig-worker employment protections. With relative consistency, however, the FTC has pursued these sorts of 5(a) unfair and deceptive business practice claims against gig-work companies, with similar actions versus Uber for misrepresenting drivers' wages and car leases in 2017 and now in 2021 versus Amazon for misrepresenting drivers' wages.

Richard A. Posner, a Circuit Court Judge and Law Professor who started his career at the FTC, posits an explanation for this

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[244] *See* Srestha Roy, *Uber Slips Behind DoorDash in Market Value*, TECHSTORY (Sept. 21, 2021), https://techstory.in/uber-slips-behind-doordash-in-market-value (citing Uber's market value at $74.9 billion and Doordash's market value at $75.2 billion).

[245] *See supra* Part III.

[246] *See, e.g.*, Chris Jay Hoofnagle, Woodrow Hartzog, & Daniel J. Solove, *The FTC Can Rise to the Privacy Challenge, but Not Without Help from Congress*, BROOKINGS (Aug. 8, 2019), https://www.brookings.edu/blog/techtank/2019/08/08/the-ftc-can-rise-to-the-privacy-challenge-but-not-without-help-from-congress/ ("The FTC's structure, with no more than three out of five commissioners allowed to be from the same political party, has helped it remain bipartisan.").

[247] 15 U.S.C. § 41.

[248] *See* Humphrey's Executor v. United States, 295 U.S. 602, 624–28 (1935).

[249] Mike Cowie & James Fishkin, *The FTC in a Biden Administration Could Remain Republican Controlled for More Than 2 Years*, JDSUPRA (Oct. 4, 2020), https://www.jdsupra.com/legalnews/the-ftc-in-a-biden-administration-could-67484.

phenomenon, which seems so anachronistic to our hyper-partisan climate, writing: "What is even more remarkable is that antitrust and consumer protection have so far lost their traditional ideological coloration that the FTC has become effectively bipartisan, in the sense that changes from administration to administration in the policies of the Commission are incremental rather than radical."[250]

That being said, recent accusations of partisanship *have* flared up surrounding the FTC.[251] It does not seem as yet, however, that any partisan issues have hampered the FTC from investigating and pursuing claims for violations relating to gig workers.[252] Further, that all fifty states have some form of consumer protection law prohibiting some variation of unfair and/or deceptive acts also indicates that all states at least see consumer protection as a priority.[253] But not all of those laws are as strong as they could be, nor are all suited to be used to protect gig workers due to various deficiencies.[254] As noted above, however, with relatively small tweaks, even the weaker state laws could be effective in filling the enforcement void for gig workers.[255]

V. CONCLUSION

Consumer protection laws such as the FTCA and state and local Little-FTC Acts can serve as effective regulatory tools for government agencies interested in regulating the working conditions of gig-economy workers. While the fight over classification continues to work its way through state legislatures and state and federal courts, these laws provide a solution for the enforcement gap created by gig worker independent contractors' ineligibility for protective laws such as the FLSA, Title VII, ADA, and the ADEA—just to list a few.

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[250] Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761, 764 (2005).

[251] *See* Letter from Jim Jordan, Cathy McMorris Rodgers, and James Comer, U.S. Reps., U.S. House of Reps., to Lina Khan, Chair, and Noah J. Phillips, Rohit Chopra, Rebecca K. Slaughter, and Christine S. Wilson, Comm'rs, Fed. Trade Comm'n (July 29, 2021), https://republicans-judiciary.house.gov/wp-content/uploads/2021/07/2021-07-29-JDJ-CMR-JC-to-FTC.pdf (alleging the FTC of "partisan changes [to] position the Biden FTC to reshape radically the American economy"); *see also* Nihal Krishan, *EXCLUSIVE: Top Republicans Torch FTC for 'Partisan Changes' That Will Harm Consumers*, YAHOO! NEWS (July 29, 2021), https://news.yahoo.com/exclusive-top-republicans-torch-ftc-182100552.html.

[252] *See* Uber Complaint, *supra* note 126; *see also* Amazon Complaint, *supra* note 63.

[253] CONSUMER PROTECTION IN THE STATES, *supra* note 56, at 9.

[254] *See id.* at 1–4 (2018); *supra* Part III.

[255] *See supra* Part IV.

While an imperfect solution, consumer protection laws work best to protect gig workers where statutory language broadly defines unfair and deceptive practices without restrictive definitions of consumers that would exclude gig workers. Furthermore, statutes with strong private rights of action that include punitive damages (often including treble damages), attorney fees, and freedom from procedural or substantive hurdles for consumers facilitate the laws' usefulness for protecting workers. Luckily, as this Comment suggests, even where laws are not optimal today, with minor changes, they can be modified to be more effective in regulating the gig economy.


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