Indiana Law Journal

Volume 94 | Issue 4 Article 4

Fall 2019

Protecting Consumers As Sellers

Jim Hawkins
University of Houston - Main, jrhawkins@uh.edu

PROTECTING CONSUMERS AS SELLERS

JIM HAWKINS*

When the majority of modern contract and consumer protection laws were written in the 1950s, '60s, and '70s, consumers almost always acted as buyers, and businesses almost always acted as sellers. As a result, these laws reflect a model of strong sellers and weak buyers. But paradigms are shifting. Advances in technology and constraints on consumers' financial lives have pushed consumers into new roles. Consumers today often act as sellers—hawking gold to make ends meet, peddling durable goods on eBay, or offering services in the sharing economy to make a profit. Consumers and business models have changed, but the laws have not. This Article uncovers the new role that consumers play as sellers and argues that lawmakers should reform outdated laws to protect them.

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* Professor of Law and George Butler Research Professor, University of Houston Law Center. My sincere thanks for comments about this Article from Emily Berman, Rashmi Dyal-Chand, Stacy-Ann Elvy, David Friedman, Pamela Foohey, Larry Garvin, Courtney Hawkins, Samuel Hopper, James Nelson, Jeff Sovern, Kellen Zale, and participants of the Property Implications of the Sharing Economy symposium. For research assistance, I thank Jennifer Chang and Saman Yigal Saghian.

INTRODUCTION

When the drafters of the Uniform Commercial Code (UCC) published it in 1952, they sought to unify and simplify the numerous, chaotic contract laws that existed across different states and industries in the United States.[1] The consumer movement was not fully organized at the time.[2] Still, even with the movement in its infancy,[3] the UCC plainly reflects an impulse to treat merchants and consumers differently,[4] and early commentary recognized that impulse.[5] As the consumer movement grew in the 1960s and '70s, Congress and state legislatures passed consumer protection statutes that offered consumers unique benefits.[6]

Today, the impulse of the law to treat consumers differently than merchants is so firmly established that academic scholarship on contracts routinely invokes consumer status as a theoretical basis for different rules.[7] Modern contract law, in

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1. Notes & Comments, *The Uniform Commercial Code, Section 1-206—A New Departure in the Statute of Frauds?*, 70 YALE L.J. 603, 609 (1961); Karl N. Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367 (1957).

2. Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 540 (1987).

3. Fred H. Miller, *Consumer Leases Under the Uniform Commercial Code Article 2A*, 39 ALA. L. REV. 957, 958–59 (1988).

4. *See, e.g.*, U.C.C. § 2-205 (AM. LAW INST. & UNIF. LAW COMM'N 2017) (fixing special rules for merchants under the UCC's statute of frauds); *id.* § 2-207(2) (establishing different formation rules for merchants and non-merchants); *id.* § 2-314 (setting out the warranty of merchantability as only applying against merchants).

5. Recent Cases, *Uniform Commercial Code — Construction — Inadequacy of Consideration Is Sufficient to Establish Unconscionableness of Contract.* — American Home Improvement, Inc. v. MacIver *(N.H. 1964).*, 78 HARV. L. REV. 881, 898 (1965).

6. Miller, *supra* note 3, at 958–59. For several examples, see 15 U.S.C. § 2310 (2012); N.J. STAT. §§ 56:8-1 to -210 (West 2012); TEX. BUS. & COM. CODE ANN. §§ 17.46–.63 (West 2011).

7. *See* Recent Cases, *Torts — Liability of Maker or Vendor of Chattel to Third Person — Manufacturer Is Liable to Ultimate Consumer for Loss of Value of the Bargain*. — Santor v. A & M Karagheusian, Inc., *44 N.J. 52, 207 A.2d 305 (1965).*, 79 HARV. L. REV. 1299, 1319 n.26 (1966) ("Like the notice requirements, the requirements for an effective disclaimer under commercial law should depend on whether consumers or merchants are involved."); *see also* Gregory E. Maggs, *Internet Solutions to Consumer Protection Problems*, 49 S.C. L. REV. 887, 888–89 (1998) ("The legal system protects consumers in a variety of ways. For example, the common law of contracts and the [UCC] afford traditional safeguards to consumers. . . . Various specific consumer protection statutes supplement the general protection offered by contract and tort law. For instance, both federal and state legislation prohibit unfair trade practices. . . . Despite the existence of these laws, consumers continue to face a variety of problems. For example, consumers often do not realize the choices available to them in the marketplace. Also, consumers rarely fully understand the terms of contracts to which they agree. Moreover, consumers, in many cases, do not have effective methods of asserting their rights and resolving disputes." (footnotes omitted)).

both cases and statutes, firmly establishes this dichotomy between consumers and nonconsumers.[8]

Laws vary somewhat in their definitions,[9] but these "consumers" that warrant special legal protections are most commonly defined in both state and federal laws as individuals or natural persons.[10] For instance, the Truth in Lending Act, which has the leading definition of a consumer,[11] limits a "consumer" to "a natural person."[12]

Although a "natural person" has the ability to both buy and sell, interestingly, when academics discuss "consumers," they almost universally assume that consumers are acting as buyers.[13] Lawmakers likewise act with this assumption in

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8. Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 WAKE FOREST L. REV. 295, 296 (2005) ("Beyond these legal dichotomies are status-driven dichotomies that cut across legal lines. Two such dichotomies important in modern contract law are consumer versus non-consumer and merchant versus non-merchant. These appear throughout the statute books and even, though unsystematically, in the *rationes decidendi* of the cases.").

9. *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 17.45(4) (West 2011) (defining consumer as "an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more").

10. *See, e.g.*, 12 U.S.C. § 5481 (2012) (stating the same definition for the Dodd-Frank Wall Street Reform and Consumer Protection Act); 15 U.S.C. § 1681a(c) (2012) (stating the Fair Credit Reporting Act's definition: "The term 'consumer' means an individual."); 15 U.S.C. § 1692a(3) (2012) (stating the Fair Debt Collection Practices Act's definition as "any natural person obligated or allegedly obligated to pay any debt"); *see also* Robert D. Cooter & Edward L. Rubin, *A Theory of Loss Allocation for Consumer Payments*, 66 TEX. L. REV. 63, 66 n.18 (1987) ("A consumer is most simply defined as a natural person.").

11. KATHERINE PORTER, MODERN CONSUMER LAW 23 (2016).

12. For instance, the Truth in Lending Act states that the "adjective 'consumer', used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person." 15 U.S.C. § 1602(h) (2012); *see also* 12 C.F.R. § 1026.2(a)(11) (2018) ("*Consumer* means a cardholder or natural person to whom consumer credit is offered or extended.").

13. For only a few examples, see Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge that Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 723 (2008) ("Consumer standard form contracts (SFCs) are executed between firms that sell products and services and individuals who consume them."); Garvin, *supra* note 8, at 309 (discussing how little information a "consumer buyer" typically has); Jennifer S. Martin, *An Emerging Worldwide Standard for Protections of Consumers in the Sale of Goods: Did We Miss an Opportunity with Revised UCC Article 2?*, 41 TEX. INT'L L.J. 223, 226–27 (2006) ("This Article's focus is on how the Revision represents a missed opportunity for the United States to be a leader in what appears to be an emerging worldwide consensus in favor of providing consumer protections in the contracting process for sale of goods transactions. Our internal markets have changed substantially from the era when UCC Article 2 (Current Article 2) was first enacted and are now dominated by 'strong sellers,' which include, but are not limited to, chain retailers, such as Wal-Mart, Microsoft, General Electric, General Motors, and Best Buy. These sellers, because of their position in the marketplace and their bargaining power, are typically able to set contractual terms and conditions unilaterally." (footnotes omitted)); T. Danielle Smith, Note, *The Minority Approach that Could Protect the Majority of Kentucky Consumers: Relaxing the Privity Requirement for Implied Warranties of Merchantability*, 52 U.

mind. For example, although the Truth in Lending Act defines consumers as natural persons, who presumably could act as the lenders rather than the borrowers, the Act limits consumer transactions to credit transactions that are "primarily for personal, family, or household purposes."[14] Similarly, the Bankruptcy Code defines the term "consumer debt" as "debt incurred by an individual primarily for a personal, family, or household purpose."[15]

Limiting consumer transactions to those in which the consumer is the buyer probably made sense when these statutes were written. Personal computers, the internet, and cellular telephones, along with the power they give individuals to sell goods and services, had yet to be invented. There was no eBay, no Amazon marketplace, no Uber, and no Etsy. When states enacted the UCC and consumer protection laws, consumers were buyers, and usually, they were buying from larger, more powerful sellers. Because consumer buyers were in positions of weakness compared to merchant sellers, lawmakers drafted contract and consumer protection laws that reflected a strong seller / weak buyer paradigm and offered special protection to buyers.[16]

Even at the time that it was written, Grant Gilmore, one of the UCC's architects, recognized the limits on drafters: "The draftsman is called upon to build a coherent pattern out of the infinite variety of business customs and practices in an unstable and rapidly changing economy."[17] But, one of the UCC's chief benefits is supposed to be that it is inherently adaptable and "provides within itself a method and principle of future growth."[18]

The drafters simply could not have anticipated the modern world, however. Today, consumers regularly hire other consumers through ridesharing apps like Uber and Lyft, employing those drivers to use their personal vehicles to take them somewhere.[19] Uber alone currently has two million consumers selling driving services.[20] Other consumers sell jewelry to gold buyers. They make shampoo and homemade soap in their kitchens and then sell it online on Etsy and Amazon marketplace. They sell used baby clothes and vintage books on eBay.

Although the UCC was meant to adapt to changing business practices, the drafters anticipated moving from deals involving "horses and haystacks" to those involving

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LOUISVILLE L. REV. 583, 602 (2014) ("Sellers, both those that manufacture and those that do not, arguably have a greater knowledge about their good than an ultimate consumer [buyer]. Further, manufacturers are most often in the best position to protect themselves from liability." (footnotes omitted)).

14. 15 U.S.C. § 1602(h).

15. 11 U.S.C. § 101(8) (2012).

16. James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT'L L. 109, 125 (2003).

17. Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341, 1341 (1948).

18. Arthur Linton Corbin, *The Uniform Commercial Code–Sales; Should It Be Enacted?*, 59 YALE L.J. 821, 836 (1950).

19. *E.g.*, *Always the Ride You Want*, UBER, https://www.uber.com/ride [https://perma.cc/Q8ZN-AERB].

20. Garrett Camp, *Uber's Path Forward*, MEDIUM (June 20, 2017), https://medium.com/@gc/ubers-path-forward-b59ec9bd4ef6 [https://perma.cc/A724-S457].

mass production.[21] They could not—and did not—anticipate the fundamental category change from weak consumers acting solely as buyers to consumers also acting as sellers.[22] As a consequence, the ability of the UCC to adapt to changing transactional forms has reached its limit. Existing law fails to deal with or protect this new category of consumers.

Yet, despite this lack of protection, consumers who act as sellers face real risks in selling. Some risks are legal: In one famous Texas case, a boat owner took his boat to a mechanic for repair and then sold the boat, stating the boat was in "excellent condition."[23] The defendant "did not know the statements were false, nor did he make the statements recklessly," but the Texas Supreme Court still held that the plaintiff had succeeded in bringing a claim for misrepresentation under the state's consumer protection law.[24] Other risks are financial, such as the risk of being underpaid for a good or service. In the gold buying industry, for example, sellers were offered $175 for jewelry valued at $590.[25] Finally, consumer sellers face discrimination in this new economy.[26] Experiments have found that buyers pay minorities less on eBay than whites. "[Baseball c]ards held by African-American sellers sold for approximately 20% ($0.90) less than cards held by Caucasian sellers" in one experiment.[27]

The market has fundamentally changed, and the law has failed to adapt. Moreover, existing legal scholarship also has failed to address either the shift in consumer roles or the corresponding lack of legal protection.[28] This Article aims to correct this oversight. It argues that consumers in the modern economy engage in substantial economic activity as sellers and that these new consumers need new laws that protect them in their new role.

Part I begins by exploring how contract and consumer protection laws safeguard consumers exclusively when they act as buyers. It shows how the UCC, the common law, state consumer protection laws, and federal law all offer numerous benefits to consumers, but only when they act as buyers. Part II explores economic and technological changes that have created consumer sellers. It describes gold buying, eBay, and the sharing economy as major economic spaces in which consumers act as sellers, and it explores the risks that consumers face in these markets. Finally, Part III argues that policymakers should protect consumers as sellers. It offers justifications for regulatory intervention and suggests specific policies that lawmakers should consider.

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21. Gilmore, *supra* note 17, at 1341.

22. Karl N. Llewellyn, *Some Realism About Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237 (1931) (arguing that the same law cannot apply to "dissimilar and non-simple fact situations").

23. Pennington v. Singleton, 606 S.W.2d 682, 685 (Tex. 1980).

24. *Id.*

25. *See infra* Section II.A.

26. *See infra* Section II.B & C.

27. Ian Ayres, Mahzarin Banaji & Christine Jolls, *Race Effects on eBay*, 46 RAND J. ECON. 891, 891 (2015).

28. *See supra* note 13.

I. BUYERS' RIGHTS UNDER STATUTES AND THE COMMON LAW

Consumers have many important rights that only apply when they are buyers. While some of these rights are easy to discern from the UCC, the common law, state consumer protection statutes, and federal law, others are not so readily apparent. In this Part, I explore these laws and show how they are fundamentally buyer-centric in terms of protections offered to consumers.

The point of this Part is not to argue that every buyer's right in these laws should have a seller's right analog, but instead to point out how modern contract and consumer protection law is almost entirely a one-way ratchet favoring consumers acting as buyers. I explore some of the rationales for buyer protections, such as power and information asymmetries, in Parts II and III. For now, it is enough to remember that consumer buyers often lack the power that merchants have in these relationships, and merchants often have substantially more information. Yet, as Parts II and III will demonstrate, these asymmetries can sometimes benefit strong buyers at the expense of weak sellers.

A. Buyers' Rights Under the Uniform Commercial Code

The Uniform Commercial Code (UCC) contains a variety of special provisions that are meant to protect buyers when the transaction involves a sale of goods.[29] The most recognizable protections the UCC affords to buyers are found in the statute's warranties. For instance, in every sale by a merchant, the seller impliedly warrants that the goods are merchantable, which in the vast majority of cases means that the goods "are fit for the ordinary purposes for which such goods are used."[30] While this warranty may seem commonplace to lawyers who learn about it in their first year of law school, it is powerful.[31] As one example, it was one of the legal claims in the litigation against big tobacco companies that survived scrutiny.[32] Case law explains the focus of the implied warranty of merchantability—to protect buyers.[33] It protects them by, among other things, shifting the risk of nonperformance to the seller.[34] The federal Magnuson-Moss Warranty Act makes disclaiming implied warranties to consumers difficult,[35] and even if the warranty is disclaimed, the warranty at least

29. U.C.C. § 2-105 (AM. LAW INST. & UNIF. LAW COMM'N 2017).

30. *Id.* § 2-314(2)(c).

31. Williston calls it "the broadest and most important warranty in the Uniform Commercial Code." 18 RICHARD A. LORD, WILLISTON ON CONTRACTS § 52:68 (4th ed. 2015).

32. Franklin E. Crawford, *Fit for Its Ordinary Purpose? Tobacco, Fast Food, and the Implied Warranty of Merchantability*, 63 OHIO ST. L.J. 1165, 1168 (2002).

33. *E.g.*, Gared Holdings, LLC v. Best Bolt Prods., Inc., 991 N.E.2d 1005, 1013 (Ind. Ct. App. 2013) ("The implied warranty of merchantability is imposed by operation of law for the protection of the buyer, and it must be liberally construed in favor of the buyer.").

34. Vincent M. Gonzales, *The Buyer's Specifications Exception to the Implied Warranty of Fitness for a Particular Purpose: Design or Performance?*, 61 S. CAL. L. REV. 237, 245 (1987).

35. 15 U.S.C. § 2308(a) (2012) ("No supplier may disclaim or modify (except as provided in subsection (b) of this section) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect

injects information into the transaction because the disclaimer makes known the existence of implied warranties in the first place.[36]

The second implied warranty is the implied warranty of fitness for a particular purpose. Sellers warrant that goods will be fit for the particular purpose the buyer has in mind if the seller "has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods."[37] The focus, again, is on protecting buyers from bearing the risk of loss.[38]

Even express warranties under the UCC only operate against sellers in favor of buyers, not the other way around. Section 2-313 describes how "[e]xpress warranties *by the seller* are created."[39] The purpose of enforcing express warranties is "to underscore the integrity and efficiency of the bargaining process and to make it easier for the parties involved to allocate the risks among themselves through private agreements."[40] Yet, curiously, the UCC only protects buyers through its express warranty provisions.

The UCC also protects buyers through less easily recognizable provisions. For instance, consumers as buyers can seek consequential damages for breach of contract, but sellers are limited to incidental damages.[41] While some courts ignore the difference between incidental and consequential damages[42] or assert the line between the two is suspect,[43] the UCC's exclusion of consequential damages for sellers often matters and puts buyers in a superior position in terms of remedies for breach of contract.[44] As one example, the Supreme Court of Colorado refused to award damages to an aggrieved seller for fees it incurred after the buyer refused to accept delivery of a chemical. The court explained: "By holding that Bandimere could recover damages that were the consequence of Jelen's breach, the court of

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to such consumer Product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.").

36. I appreciate Larry Garvin bringing this point to my attention.

37. U.C.C. § 2-315 (AM. LAW INST. & UNIF. LAW COMM'N 2017).

38. *E.g.*, Vlases v. Montgomery Ward & Co., 377 F.2d 846, 849 (3d Cir. 1967).

39. U.C.C. § 2-313 (emphasis added).

40. Gonzales, *supra* note 34, at 242.

41. *Compare* U.C.C. § 2-712(2) ("The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages . . . .") *with id.* § 2-706(1) ("[T]he seller may recover the difference between the resale price and the contract price together *with any incidental damages* allowed under the provisions of this Article . . . ." (emphasis added)).

42. Henry Deeb Gabriel, *The 2003 Amendments of Article Two of the Uniform Commercial Code: Eight Years or a Lifetime After Completion*, 52 S. TEX. L. REV. 487, 513 (2011) ("[T]he courts have been apt to find what are in effect a seller's consequential damages as incidental damages, and therefore have allowed these damages to sneak in the back door.").

43. Plaintiffs' Reply to Defendant's Response to Motion *In Limine* Regarding Damages at 5, Pucci v. Annapolis Sailyard, Inc., No. 10CV2968 (D. Md. 2010), 2010 WL 9068899 ("The line between incidental and consequential damages is rather unclear.").

44. Roy Ryden Anderson, *In Support of Consequential Damages for Sellers*, 11 J.L. & COM. 123, 127 (1992) ("[S]ellers do, at least on occasion, suffer consequential loss and that loss may represent the major portion of their damages. Nevertheless, the courts to date have consistently construed Section 1-106 to bar a seller's recovery of consequential damages.").

appeals blurred the distinction between U.C.C. seller's and buyer's remedies. Section 4–2–715 specifically allows buyers to recover consequential damages resulting from the seller's breach."[45]

The UCC explicitly prevents sellers from limiting buyers' consequential damages for personal injuries. Section 2-719(3) states: "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."[46] Again, only buyers' damages for personal injuries are protected by this rule.[47]

Finally, the UCC benefits consumers when they act as buyers because there are provisions that privilege consumer buyers but no provisions aimed at consumer sellers. Section 2-502 gives consumer buyers who have paid for the goods the right to specific goods, whereas nonconsumer buyers have to show the seller is insolvent.[48] No provisions like this exist for consumer sellers, demonstrating the UCC's assumption that consumers are buyers.

B. Buyers' Rights Under the Common Law

In addition to contracts involving the sale of goods under the UCC, consumer buyers also enjoy important protections when contracting under the common law. Because the law of each state is different, the exact protections are more difficult to articulate. But, depending on the state, buyers obtain implied warranties when purchasing new homes[49] and used homes,[50] leasing real property,[51] and hiring

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45. Jelen & Son, Inc. v. Bandimere, 801 P.2d 1182, 1186 (Colo. 1990).

46. U.C.C. § 2-719(3).

47. This Article does not argue that sellers should necessarily have the exact same warranties or remedies that buyers have; instead, at this point, it merely intends to demonstrate that the UCC conceptualizes consumers solely as buyers.

48. U.C.C. § 2-502. For an explanation of the provision, see Linda J. Rusch, *Property Concepts in the Revised U.C.C. Articles 2 and 9 Are Alive and Well*, 54 SMU L. REV. 947 (2001).

49. *See* Jeff Sovern, *Toward a Theory of Warranties in Sales of New Homes: Housing the Implied Warranty Advocates, Law and Economics Mavens, and Consumer Psychologists Under One Roof*, 1993 WIS. L. REV. 13, 14–15 (1993) ("[T]oday a majority of jurisdictions have created such implied warranties, sometimes referred to as warranties of habitability or fitness for intended purpose, and other times called warranties of workmanlike or skillful construction, or even warranties of merchantability.").

50. *See* Dean J. Zipser, *Builders' Liability for Latent Defects in Used Homes*, 32 STAN. L. REV. 607, 609 (1980) (discussing judicial and legislative use of implied warranties to protect purchasers of used homes).

51. *See, e.g.*, Jerald Clifford McKinney, II, *Caveat Who?: A Review of the Landlord/Tenant Relationship in the Context of Injuries and Maintenance Obligations*, 35 U. ARK. LITTLE ROCK L. REV. 1049, 1059 (2013) ("There are four traditional exceptions to the *caveat lessee* doctrine that have developed in the common law of many states: (1) a hidden danger in the premises of which the landlord, but not the tenant, was aware (*i.e.*, the latent defect exception); (2) premises leased for public use; (3) common areas retained under the landlord's control (*i.e.*, the retention of control exception); or (4) premises negligently repaired

services.[52] These warranties are all one way, benefitting buyers without corresponding implied warranties of any sort for sellers.[53]

C. Buyers' Rights Under State Consumer Protection Laws

In addition to rights under the UCC and common law, consumers acting as buyers in every state make their purchases under the protection of unfair and deceptive practices laws.[54] These laws vary by state, but Texas's Deceptive Trade Practices-Consumer Protection Act (DTPA) serves as a useful example of the benefits buyers enjoy under state unfair and deceptive practices statutes nationwide. Texas's law offers numerous improvements for plaintiffs over the rules that the common law established, but the DTPA explicitly only provides these rights to consumers as buyers.

One major benefit to consumers that the DTPA affords is that plaintiffs do not have to show the defendant acted intentionally or knowingly. The Texas legislature passed the DTPA because common law fraud was so difficult to establish.[55] To establish fraud in Texas (as in many states), the plaintiff must establish that the defendant specifically intended the plaintiff to rely on false statements.[56] Establishing that specific intent, however, is very difficult.[57] The DTPA allows consumers to bring a cause of action without proving that the defendant knew a statement was false.[58] It is enough that it is a misrepresentation.[59]

In addition to not having to prove any specific mental state, plaintiffs under the DTPA do not have to meet tort's proximate cause standard. Instead, plaintiffs merely

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by the landlord.").

52. *See* Shubha Ghosh, *Decentering the Consuming Self: Personalized Medicine, Science, and the Market for Lemons*, 5 WAKE FOREST J.L. & POL'Y 299, 335 (2015) ("Some states, such as Texas, have expanded the reach of implied warranties under the UCC to the provision of services.").

53. Again, the point is not that the common law should have corresponding seller warranties for each of these buyer warranties but rather that the common law attempts to protect buyers, not sellers.

54. Aaron Perzanowski & Chris Jay Hoofnagle, *What We Buy When We Buy Now*, 165 U. PA. L. REV. 315, 363 (2017).

55. RICHARD M. ALDERMAN, TEXAS CONSUMER LAW ch. 1 (2017).

56. Shannon v. Law-Yone, 950 S.W.2d 429, 433 (Tex. App. 1997) ("The elements of common-law fraud or misrepresentation are: 1) a material misrepresentation was made; 2) the misrepresentation was false; 3) it was false at the time it was made; 4) the speaker knew it was false or made the misrepresentation recklessly without any knowledge of its truth or falsity; 5) the misrepresentation was made with the intention that it be acted upon by the recipient; 6) the recipient did act in reliance; and 7) the recipient was injured as a result of that reliance (i.e. damages).").

57. Bruce A. Markell, *Bankruptcy, Lenity, and the Statutory Interpretation of Cognate Civil and Criminal Statutes*, 69 IND. L.J. 335, 368 (1994).

58. Texas's statute is similar to other states in making misrepresentation claims easier to establish. Edward X. Clinton, Jr., *Do Businesses Have Standing to Sue Under State Consumer Fraud Statutes?*, 20 S. ILL. U. L.J. 385 (1996).

59. Pennington v. Singleton, 606 S.W.2d 682, 689–90 (Tex. 1980).

have to prove that the defendant's conduct was the producing cause of an injury.[60] While producing cause is similar to proximate cause because both require proof the conduct was the cause in fact of the injury, "the proximate cause element of a negligence claim requires greater foreseeability."[61]

Another important provision in some state consumer protection laws makes unconscionability a cause of action and not just a defense to breach of contract. Under traditional contract law, unconscionability operates solely as a defense to breach of contract. In the famous *Williams v. Walker-Thomas Furniture Co.* case, for instance, the court established that an unconscionable contract is not enforceable.[62] It simply stopped the business from enforcing the contract; it did not give the consumer the right to any damages for the business's illicit behavior. The DTPA, however, enables consumers to use unconscionability as a cause of action: "A consumer may maintain an action where any of the following constitute a producing cause of economic damages . . . any unconscionable action or course of action by any person."[63] Where other causes of action do not fit defendants' conduct exactly, unconscionability can provide relief to consumers. In New Mexico, consumers have used unconscionability to obtain restitution from unfair payday loans.[64]

Finally, plaintiffs enjoyed substantially enhanced remedies under the DTPA. Unlike the norm in contract causes of action, DTPA plaintiffs can recover punitive damages in some cases.[65] Also, unlike most common law causes of action, a DTPA plaintiff can recover attorney's fees.[66]

While the DTPA provides many advantages to plaintiffs, it only offers these advantages when consumers are buying. To qualify for relief under the statute, plaintiffs must establish that they sought or acquired goods or services *by purchase or lease*.[67] Plaintiffs who do not meet this narrow definition fall outside of the DTPA's protection.[68] Texas's emphasis on consumers exclusively being buyers is not unique.[69]

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60. TEX. BUS. & COM. CODE ANN. § 17.50(a) (West 2011).

61. Bryant v. S.A.S., 416 S.W.3d 52, 58 (Tex. App. 2013), *order withdrawn* (Dec. 19, 2014); *see also* Church & Dwight Co. v. Huey, 961 S.W.2d 560, 569 (Tex. App. 1997) ("Such a cause has the same cause-in-fact element as proximate cause, but does not require foreseeablity [sic].").

62. 350 F.2d 445, 448 (D.C. Cir. 1965).

63. TEX. BUS. & COM. CODE ANN. § 17.50(a)(3).

64. Associated Press, *New Mexico Judge Orders FastBucks to Pay $32M in Restitution*, ALBUQUERQUE J. (Nov. 9, 2016, 12:23 PM), https://www.abqjournal.com/885701/new-mexico-judge-orders-fastbucks-to-pay-32m-in-restitution.html [https://perma.cc/EY5A-LK8R].

65. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1).

66. *Id.* § 17.50(c).

67. *Id.* § 17.45(4).

68. *E.g.*, March v. Thiery, 729 S.W.2d 889, 896 (Tex. App. 1987).

69. *See, e.g.*, HAW. REV. STAT. ANN. § 480-1 (West 2008) ("'Consumer' means a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment."); OKLA. STAT. ANN. tit. 15, § 752 (West 2013) ("'Consumer transaction' means the advertising, offering for sale or purchase, sale, purchase, or distribution of any services or any property . . . ."); OR. REV. STAT. § 81.150 (2017) ("'Consumer' means

D. Buyers' Rights Under Federal Law

Finally, following these state laws, federal laws aimed at protecting consumers also solely focus on consumers who are buyers. As I mentioned in the Introduction, federal consumer law defines the transactions that different acts apply to by focusing on consumers' buying.[70] One major locus of federal consumer law is the Federal Trade Commission Act (the "FTC Act"). Interestingly, the FTC Act does not say anything about protecting consumers or individuals or helping buyers or sellers, but instead it simply outlaws "unfair methods of competition" and "unfair or deceptive acts or practices."[71] Theoretically, the FTC could use its authority to protect both buyers and sellers who suffer from unfair and deceptive conduct.

And yet, both the FTC and courts interpreting the FTC Act assume that the entities that the Act protects are buyers. As one example, when the FTC created a policy statement on its authority to prevent unfair acts in commerce in 1980, it placed its emphasis on injuries to consumers.[72] That standard is now part of the Act itself.[73]

More recently, in the context of the sharing economy where consumers plainly act as sellers (as discussed in Section II.C), the FTC exclusively considers buying consumers to be "consumers." It ignores people who are selling services in their capacity as sellers. In a report on the sharing economy, the FTC contrasts "suppliers (who frequently are individuals or small entities) and consumers."[74] In both this example and the unfairness example, it is plain that the FTC views its authority as limited to correcting market failures that buyers experience, not sellers.

In terms of judicial approaches to the FTC Act, consider this summary of the relevant legal principles governing the FTC Act from the Second Circuit[75]:

> The central purpose of the provisions of the Federal Trade Commission Act under discussion is in effect to abolish the rule of *caveat emptor* [i.e., buyer beware] which traditionally defined rights and responsibilities in the world of commerce. . . . [It] has been replaced by a rule which gives to *the consumer* the right to rely upon representations of facts as the truth

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an individual who is purchasing goods or services for personal, family or household purposes.").

70. *See supra* notes 10–12.

71. *See* 15 U.S.C. § 45(a)(1) (2012) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").

72. JOHN A. SPANOGLE, RALPH J. ROHNER, DEE PRIDGEN & JEFF SOVERN, CONSUMER LAW: CASES AND MATERIALS 67–68 (3d ed. 2007).

73. *See* 15 U.S.C. § 45(n) (defining an "unfair act" only as an act 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").

74. FED. TRADE COMM'N, THE "SHARING" ECONOMY: ISSUES FACING PLATFORMS, PARTICIPANTS & REGULATORS 1 (2016), http://www.ftc.gov/system/files/documents/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission-staff/p151200_ftc_staff_report_on_the_sharing_economy.pdf [https://perma.cc/GSS5-ZDK5].

75. *See* SPANOGLE ET AL., *supra* note 72, at 36 (stating that the *Sterling Drug* opinion summarizes existing law on the FTC Act).

> . . . . "*[T]he buying public* does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied." . . . [The law] has very little faith indeed in the intellectual acuity of the "ordinary *purchaser*" who is the object of the advertising campaign. . . . "The *average purchaser* has been variously characterized as not 'straight thinking' . . . . The language of the *ordinary purchaser* is casual and unaffected."[76]

Repeatedly, the court emphasizes that the FTC Act protects consumers and that consumers are only buyers or purchasers.

Like under the UCC, the common law, and Texas's DTPA, federal consumer law protects consumers only as buyers. Buyers are weak individuals, this approach assumes, and sellers are often strong businesses. As the next Part explains, however, a significant number of consumers in the modern economy act as sellers.

II. CONSUMERS SELLING

Because of changing market conditions and changing technology, consumers have increasingly taken on the role of sellers. This Part outlines three important spaces in which consumers predominately sell, and it demonstrates the dearth of laws to protect consumers and the numerous risks consumers face as sellers in these markets. In the first example, gold buying, market conditions have created an environment for consumers to become sellers. In the two other examples, eBay and the sharing economy, technological changes have provided a novel capacity for consumers to act as sellers.

A. Gold Buying

For consumers on the fringe of the mainstream economy, payday lenders, title lenders, pawn shops, and check cashers serve as alternatives to banks and credit unions.[77] Consumers who own their car but do not have strong credit histories can turn their car titles into collateral for a loan, for instance, when they face a liquidity crisis.[78] While almost completely unrecognized in legal academic literature, gold buyers offer another alternative to traditional banks and fringe credit providers.

The economic distress from the Great Recession and skyrocketing gold prices created a perfect environment for gold buyers to thrive.[79] To understand the

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76. FTC v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963) (emphasis added) (citations omitted).

77. *See generally* Jim Hawkins, *Regulating on the Fringe: Reexamining the Link Between Fringe Banking and Financial Distress*, 86 IND. L.J. 1361 (2011) (describing the business models of various fringe credit providers).

78. Jim Hawkins, *Credit on Wheels: The Law and Business of Auto-Title Lending*, 69 WASH. & LEE L. REV. 535 (2012).

79. Deirdre Fernandes, *Gold Is Losing Its Shine for Investors*, BOS. GLOBE (Dec. 19, 2014, 8:38 PM), https://www.bostonglobe.com/business/2014/12/20/gold-losing-its-shine-for-investors/4X531gUg8rb6f5JQrkglaJ/story.html [https://perma.cc/XH22-VDE8] (noting that the facts that gold hit $1900 an ounce in 2011 and that the economic was in financial crisis

economic growth of this industry under these conditions, consider just one company: Gold & Silver Buyers. This company's revenue skyrocketed during the Great Recession, jumping from $132,065 in 2007 to $15.2 million in 2010.[80] At one point, Gold & Silver Buyers was opening a store a week.[81] Another company, Cash4Gold, was so successful that it secured Super Bowl commercial time for an advertisement with Ed McMahon and MC Hammer telling people to send in their gold records and gold commodes for cash.[82]

Modern day gold buyers fill the role traditional jewelers used to play in recycling precious metals. Traditionally, merchants traveled to different jewelers to purchase their scrap gold to be refined and made into jewelry by a business that could accumulate enough scrap to create jewelry.[83] Now, retail establishments offer to buy gold in person, or internet companies tell consumers to send in gold. These internet-based businesses then send the consumer a check as payment, and the consumer can either cash it and complete the transaction or request the gold buyer return the gold.[84]

State laws regulate the gold buying industry, but they are not in place to protect people selling gold. For instance, states have laws that require gold buyers to register with the state.[85] These registration requirements, however, attempt to prevent thieves from unloading stolen gold.[86] Similarly, some states require gold buyers to hold gold that they have purchased for a set period of time[87] or to keep extensive records about

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created a "gold fever").

80. Andrew Shen, *The Ten Fastest-Growing Companies in America*, BUS. INSIDER (Sept. 23, 2011, 10:00 AM), https://www.businessinsider.com/inc-fastest-growing-companies-2011-9 [https://perma.cc/ERD2-RN4Q].

81. *Solid Gold Week for Largest Precious Metals Buyer in Texas*, BUS. WIRE, Aug. 12, 2011, https://www.businesswire.com/news/home/20110812005596/en/Solid-Gold-Week-Largest-Precious-Metals-Buyer [https://perma.cc/S2MY-4SRW].

82. Cash4Gold, *MC Hammer & Ed McMahon in Cash 4 Gold Ad*, YOUTUBE (Jan. 31, 2009), https://www.youtube.com/watch?v=TrNipeP4HvQ [https://perma.cc/9TMD-ED6M].

83. R. ALLEN HARDY, THE JEWELRY REPAIR MANUAL 267 (1996).

84. As one example of this procedure, see CASH4GOLD, http://www.cash4gold.com [https://perma.cc/9S5T-U9QD].

85. *E.g.*, G.A. CODE ANN. § 43-37-2 (2016).

86. Brian Day, *Police Issue Warning About Buying and Selling Gold*, PASADENA STAR-NEWS (Jan. 2, 2011, 12:00 AM), https://www.pasadenastarnews.com/2011/01/02/police-issue-warning-about-buying-and-selling-gold [https://perma.cc/B4EZ-5CVE] (last updated Aug. 29, 2017, 11:04 AM) ("'The Pasadena Police Department would like to inform the public that buying gold is against the law unless you are licensed by the California Department of Justice,' the statement said. In addition, police added, 'Gold buyers are required by law to ask for identification from whoever they buy from and maintain a description of the items they are buying. This information is then reported to law enforcement.' . . . The license required to sell gold is the same as that of other 'second-hand dealers' who deal in items with serial numbers such as computers, cell phones, iPods and video game systems.").

87. *See, e.g.*, VA. CODE ANN. § 54.1-4104(A) (2013) ("The dealer shall retain all precious metals or gems purchased for a minimum of 15 calendar days from the date on which a copy of the bill of sale is received by the chief law-enforcement officer of the locality in which the purchase is made. Until the expiration of this period, the dealer shall not sell, alter, or dispose of a purchased item in whole or in part, or remove it from the county, city, or town in which the purchase was made.").

the transaction,[88] but these requirements protect third parties who may have been victims of theft, not the party selling the gold.

When people purchase gold from sellers (or act as consumer buyers), governments protect their rights. State authorities and the FTC[89] pursued the company Goldline for "bait-and-switch tactics, fraud, and overcharging."[90] The only protection for sellers in a few states is a requirement that businesses post the price they will pay for gold and that businesses use approved scales.[91] But, these sorts of provisions are few and far between.

Yet, despite the absence of regulation, consumers selling their gold face significant risks. Indeed, the gold buying market is the exact opposite of the standard relationship between buyers and sellers. Here, sellers are weak, and buyers are strong.

Consumers selling gold are often vulnerable to begin with. People who use fringe banking institutions akin to gold buyers are poorer, less educated, and have fewer options than mainstream consumers.[92] Senior citizens are particularly at risk in gold transactions, according to the American Association of Retired Persons.[93]

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88. *See, e.g.*, MASS. ANN. LAWS ch. 266, § 142A (2010) ("Whoever is in the business of purchasing gold, silver or platinum shall enter in a book kept for that purpose a description of the item, quantity purchased, the purchase price and the name and address of the seller; provided that the purchase price of such item is at least fifty dollars. Any person who sells gold, silver or platinum shall be required to show to the buyer prior to said sale identification which includes a photograph of said seller. Said book shall at all times be open to the inspection of the chief of police of a city or town or of any other officer having similar duties or any officer authorized by either of them, or a state police officer. Whoever violates any provision of this section shall be punished by a fine of not more than one thousand dollars or imprisonment of not more than one year, or both such fine and imprisonment.").

89. Press Release, FTC, FTC Settlement Bans Precious Metal Marketers from Selling Investment Opportunities (Mar. 4, 2014), https://www.ftc.gov/news-events/press-releases/2014/03/ftc-settlement-bans-precious-metal-marketers-selling-investment [https://perma.cc/22PZ-JR8M].

90. James Ledbetter, *Why Gold Buyers Are So Susceptible to Fraud*, MARKETWATCH (July 28, 2017, 2:45 PM), http://www.marketwatch.com/story/why-gold-buyers-are-so-susceptible-to-fraud-2017-06-13 [https://perma.cc/UH9L-8SSD].

91. *See, e.g.*, MINN. STAT. ANN. § 325F.733 subdiv. 7 (West 2011) ("Every precious metal dealer shall prominently post in a conspicuous place and in letters exceeding one inch in height the minimum prices per ounce or pennyweight that are currently being paid by the dealer for precious metals and a warning notice that unless otherwise informed, the prices offered are based on the meltdown value of the precious metal, rather than the value of the item in its existing form. Precious metal items shall be weighed in plain sight of the prospective seller on scales approved by the Division of Weights and Measures of the Department of Commerce in accordance with sections 239.011 and 239.09.").

92. PEW CHARITABLE TRS., PAYDAY LOAN FACTS AND THE CFPB'S IMPACT (2016), https://www.pewtrusts.org/-/media/assets/2016/06/payday_loan_facts_and_the_cfpbs_impact.pdf [https://perma.cc/KA7N-U4MS] ("Average borrowers earn about $30,000 per year, and 58 percent have trouble meeting their monthly expenses.").

93. Doug Shadel & Joe Eaton, *The Golden Fleece*, AARP (Aug./Sept. 2016), http://www.aarp.org/money/scams-fraud/info-2016/gold-coin-investment-scams.html [https://perma.cc/LGE7-FK8J].

One significant risk that consumers face is that gold buyers will radically underpay them for their gold. A series of N.Y.C. Department of Consumer Affairs inspections found that gold buyers engaged in false advertising, did not separate gold pieces when they weighed them, and did not test accurately for karat rate, resulting in undervaluing the gold they purchased.[94] The "inspections found a range of prices, from $175 to $450, for the same pieces of jewelry which were independently appraised at $590."[95] A congressman proposing a federal law in 2010 for this market stated "that research by his office and by Consumer Reports showed that Cash4Gold paid only 11 percent to 29 percent of the actual value of valuables sent to them."[96] The reason it is especially easy for gold buyers to take advantage of consumers in this market is that the items being sold "were not necessarily purchased in the first instance for investment value. Indeed, the consumer may have little idea how much the items were worth when they were purchased, or what they are worth at current market prices."[97]

A second risk is that gold buyers will not return the gold after sellers send it to them. In a class action in Florida, plaintiffs alleged that a gold buyer was failing to return gold that plaintiffs had only sent to it for a price quotation.[98] In a twist to this direct fraud, some argue that gold buyers send offers slowly to sellers so that the seller has little time to reject the offer before the contract becomes effective. Cash4Gold, for instance, assumes the consumer has accepted the offer ten days after it is made,[99] so an unscrupulous buyer could delay mailing the offer for several days to make it less likely the seller could object.[100]

While gold buying is the exact opposite of the relationship assumed in modern contract law of strong sellers / weak buyers, not all instances of consumers acting as sellers follow this model. In the following two examples, both buyers and sellers are weak. The strong party is the platform that facilitates the transaction in the first place.

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94. Press Release, N.Y.C. Dep't of Consumer Affairs, Department of Consumer Affairs Commissioner Mintz Announces Results of Holiday Gold Buying Sweep: Undercover Investigations Reveal Deceptive Weighing Practices and Widely Variable Pricing Valuations (Dec. 22, 2011), https://web.archive.org/web/20150731005947/http://www.nyc.gov/html/dca/html/pr2011/pr_122211.shtml [https://perma.cc/YZU2-M7Q8].

95. *Id.*

96. Colin Moynihan, *The Charge: Not So Much Cash 4 that Gold*, N.Y. TIMES: CITY ROOM (Jan. 19, 2010, 6:15 PM), https://cityroom.blogs.nytimes.com/2010/01/19/the-charge-not-so-much-cash-4-that-gold [https://perma.cc/2YK9-BLTD].

97. *Guarantee of a Legitimate Deal Act of 2009: Hearing on H.R. 4501 Before the H. Subcomm. on Commerce, Trade & Consumer Prot.*, 111th Cong. 5 (2010), http://consumersunion.org/wp-content/uploads/2013/02/precious-metals-testimony-0510.pdf [https://perma.cc/99UN-VUFN] (statement of Charles Bell, Programs Director, Consumers Union).

98. Kirts v. Green Bullion Fin. Servs., LLC, No. 10-20312-CIV, 2010 WL 3184382 (S.D. Fla. Aug. 3, 2010).

99. *See* CASH4GOLD, *supra* note 84.

100. Moynihan, *supra* note 96.

B. eBay

While eBay's existence is, of course, not news, little has been written about how eBay has transformed consumers into sellers in ways that traditional contract and consumer protection law did not anticipate. eBay is not alone in this space;[101] indeed, there are tens of thousands of electronic marketplaces,[102] but it is certainly the market giant. As of the end of 2016, eBay "had more than 167 million active buyers and over one billion live listings globally."[103] Eighty-four billion dollars in transactions closed in 2016 over eBay's platforms.[104] eBay is valued higher than retailers JCPenney, Kmart, and Sears combined.[105] Yet, despite the substantial impact eBay has on the millions of individual sellers on eBay, academic work on eBay focuses primarily on buyers' vulnerabilities[106] or third parties' vulnerabilities,[107] not the risks that sellers face. In fact, commentary argues for expanding seller liability.[108]

The laws discussed in Part I already protect eBay buyers. Even when the individuals selling goods on eBay are just people, buyers are protected by some of the UCC warranties as well as the powerful remedies present in state consumer protection statutes. In 2009, for instance, the New Jersey Supreme Court held its

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101. eBay is not the only online marketplace for goods. Etsy also allows individuals to sell goods, although the company is much smaller with around one million sellers, and it has been focused on handmade goods. Therese Poletti, *Do Etsy's Changes Risk Making It Like eBay?*, MARKETWATCH (Oct. 3, 2013, 6:00 AM), http://www.marketwatch.com/story/do-etsys-changes-risk-making-it-like-ebay-2013-10-03 [https://perma.cc/V49A-ZPMK]. Depop is a popular and similar website aimed at younger people and less formal than eBay. Miles Brignall, *It's Part-eBay, Part-Instagram, but Is Depop Safe for Your Teenagers?*, GUARDIAN (June 3, 2017, 2:00 AM), https://www.theguardian.com/money/2017/jun/03/depop-ebay-instagram-teenagers-buy-sell-risks-fraud [https://perma.cc/82T9-RUF5].

102. Alina N. Chircu & Robert J. Kauffman, *Digital Intermediation in Electronic Commerce – the eBay Model*, *in* E-COMMERCE AND V-BUSINESS: BUSINESS MODELS FOR GLOBAL SUCCESS 45, 47 (Stuart Barnes & Brian Hunt eds., 2001).

103. EBAY, 2016 ANNUAL REPORT 4 (2016), https://ebay.q4cdn.com/610426115/files/doc_financials/financials/2016/2016_ebay_annual_report.pdf [https://perma.cc/G8X4-VAW4].

104. *Id.*

105. ADAM COHEN, THE PERFECT STORE: INSIDE EBAY 5 (2002).

106. *See, e.g.*, Mary M. Calkins, Alexei Nikitkov & Vernon Richardson, *Mineshafts on Treasure Island: A Relief Map of the eBay Fraud Landscape*, 8 PITT. J. TECH. L. & POL'Y 1, 5 (2007) ("This article surveys the current auction fraud landscape using eBay as a model, examining a number of the 'mine shafts' down which unwary users, particularly buyers, can fall . . . .").

107. *E.g.*, Jennifer Anglim Kreder & Jason Nintrup, *Antiquity Meets the Modern Age: eBay's Potential Criminal Liability for Counterfeit and Stolen International Antiquity Sales*, 5 CASE W. RES. J.L. TECH. & INTERNET 143, 144 (2014); Mark P. McKenna, *Probabilistic Knowledge of Third-Party Trademark Infringement*, 2011 STAN. TECH. L. REV. 10; Brandon Peene, *Lux for Less: EBay's Liability to Luxury Brands for the Sale of Counterfeit Goods*, 40 SETON HALL L. REV. 1077 (2010).

108. *See generally* Alexander van Voorhees, Comment, *Ebay Sellers and Article 2: Selling a Broader Merchant Concept*, 56 CASE W. RES. L. REV. 1199 (2006) (arguing that the implied warranty of merchantability should apply to individual sellers who regularly sell goods on eBay).

consumer fraud statute applied against an individual seller in *Real v. Radir Wheels, Inc.*[109] The court reasoned that the statute "prohibits certain acts performed by 'any person,' and the statutory definition of 'person' is sufficiently expansive to ensnare" a defendant who sold a car through an internet auction site.[110] Similarly, the Texas Supreme Court thirty years ago applied Texas's DTPA against individual sellers under the same theory that an individual is a person subject to the Act.[111] Other courts have implied that they would impose liability under state consumer protection laws to an internet consumer seller if the facts demonstrated liability.[112]

eBay itself purposefully does not offer substantial protections to sellers. In fact, it specifically eschews suggestions that it police transactions on its website: "Since its inception, eBay has attempted to distance itself from the actual transactions taking place on its website, which it contends are between the individual buyers and sellers, with eBay's role strictly limited to providing a trading environment."[113]

Yet, consumer sellers face a wide variety of serious risks when selling on eBay. First, sellers face the risk that buyers will undermine their reputations unfairly. Numerous economic studies have demonstrated that reputation is essential for successful selling, and positive reputations mean higher sale prices.[114] In one study, buyers were willing to pay 8.1% higher for the same goods sold by a high-reputation seller who was established than from a new seller.[115] Buyers, however, have substantial power to harm sellers' reputations by leaving negative feedback.[116] Some buyers are unreasonable in assessing sellers' performance, leading to the risk that a buyer could undermine a seller's ability to sell.[117] eBay community forums are full of sellers complaining about false reviews of their behavior.[118] In addition to harming

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109. 969 A.2d 1069, 1078 (N.J. 2009).

110. *Id.* (internal citations omitted).

111. Pennington v. Singleton, 606 S.W.2d 682, 685 (Tex. 1980).

112. *See, e.g.*, Christensen v. Foozailov, No. 2:10-cv-314 CW, 2010 WL 4052180, at *3 (D. Utah Oct. 14, 2010) (finding that eBay buyers had stated a claim under state consumer protection laws but concluding the amount in controversy was insufficient to trigger federal jurisdiction); Fleming v. Murphy, No. W2006-00701-COA-R3-CV, 2007 WL 2050930, at *6 (Tenn. Ct. App. July 19, 2007) (applying a state consumer protection law to the sale of a car by an individual seller on eBay, although ultimately concluding the seller did not violate the statute).

113. Calkins et al., *supra* note 106, at 4.

114. *See* Luís Cabral & Ali Hortaçsu, *The Dynamics of Seller Reputation: Evidence from eBay*, 58 J. INDUS. ECON. 54, 54 (2010) ("We find that, when a seller first receives negative feedback, his weekly sales rate drops from a positive 5% to a negative 8% . . . ."); Daniel Houser & John Wooders, *Reputation in Auctions: Theory, and Evidence from eBay*, 15 J. ECON. MGMT. STRATEGY 353, 353 (2006) ("Our main empirical result is that seller's, but not bidder's, reputation has an economically and statistically significant effect on price.").

115. Paul Resnick, Richard Zeckhauser, John Swanson & Kate Lockwood, *The Value of Reputation on eBay: A Controlled Experiment*, 9 J. EXPERIMENTAL ECON. 79 (2006).

116. *Id.*

117. CLIFFORD R. ENNICO, THE EBAY SELLER'S TAX AND LEGAL ANSWER BOOK 155−56 (2007).

118. *E.g.*, musicalduet, *Buyer Left Me False Feedback About Item Being Fake, Which It Is Not. It's 100% Authentic*, EBAY: EBAY COMMUNITY (Oct. 6, 2015, 7:34 PM), https://community.ebay.com/t5/Archive-Selling/Buyer-left-me-false-feedback-about-item

a seller's ability to sell at an optimal price, false, negative reviews may result in eBay withholding benefits to sellers[119] or in eBay preventing sellers from using eBay at all.[120] Of particular concern here, negative reviews affect sellers with few transactions (i.e., consumer sellers) more than sellers with many sales.[121] In addition, review systems with anonymous comments can facilitate racial bias.[122]

Second, in addition to suffering because of false negative reviews, sellers can encounter trouble when buyers unjustifiably return goods under eBay's generous return policies. eBay assures buyers with the eBay Money Back Guarantee: "To ensure all of our members have a great experience on eBay, most purchases are covered under eBay Money Back Guarantee. eBay Money Back Guarantee means you're protected if the item you ordered didn't arrive, is faulty or damaged, or doesn't match the listing. You'll get your money back."[123] If a buyer claims that the item does not match the seller's description, eBay makes a determination whether the seller must refund the buyer's money.[124]

Problems arise, however, when buyers make questionable or fraudulent return claims:

-being-fake-which-it-is/td-p/24584832 [https://perma.cc/LTQ5-CGQ2] ("So, buyer gets it in the mail and, never even giving me the courtesy of his dissatisfaction by contacting me first, he immediately leaves me FALSE, negative feedback saying it's not a Carhartt! I was shocked! He tarnished my 100% perfect rating with a LIE! How can these buyers get away with making a completely false accusation, and ebay won't remove the comment?").

119. Ben Gross & Alessandro Acquisti, Balances of Power on eBay: Peers or Unequals? 2 (May 26, 2003) (unpublished manuscript), http://groups.ischool.berkeley.edu /archive/p2pecon/papers/s2-gross-old.pdf [https://perma.cc/2XXY-ZDB5].

120. Aron Hsiao, *Top Ten Risks eBay Sellers Face*, BALANCE SMALL BUS. (Sept. 9, 2017), https://www.thebalance.com/top-ten-risks-ebay-sellers-face-1140349 [https://perma.cc/3MDN-3K65] (noting that poor reviews are "a particular problem for eBay sellers not just because they're inconvenient, embarrassing, or affect cash flow, but because they can actually lead to the effective inability to carry on day-to-day business. Both eBay and PayPal are known . . . for locking or suspending accounts that see poor feedback").

121. Gross & Acquisti, *supra* note 119, at 3.

122. *See* Nancy Leong, *The Sharing Economy Has a Race Problem*, SALON (Nov. 2, 2014, 4:58 PM), http://www.salon.com/2014/11/02/the_sharing_economy_has_a_race_problem [https://perma.cc/2S68-D75X] ("Although of course rating systems are not intended to express implicit bias, the research I've mentioned suggests that they may indeed do so by providing an avenue for individual sharing economy participants to express implicit bias. The rating system then aggregates these individual biased scores, resulting in a composite score reflecting the net effect of many biased ratings. And negative ratings can become self-perpetuating. If a passenger sees that an Uber driver has a low rating, the passenger may be primed to view the driver negatively. Such priming may lead to interpreting ambiguous conduct more negatively, and, ultimately, to more negative ratings. The result is a vicious cycle of self-reinforcing bias.").

123. *eBay Money Back Guarantee Policy*, EBAY, http://pages.ebay.com/help/policies /money-back-guarantee.html [https://perma.cc/L4X4-BJNR].

124. *User Agreement*, EBAY, http://pages.ebay.com/help/policies/user-agreement.html [https://perma.cc/SJF3-RD7X] ("You agree to comply with the policy and permit us to make a final decision on any eBay Money Back Guarantee case.").

> Fraudulent credit card "chargebacks" present the most difficult risk for online sellers. . . . The risk of fraudulent credit card chargebacks is somewhat mitigated by Paypal's "Seller Protection Policy," which provides up to $5,000 of coverage for transactions Paypal deems fraudulent, as long as the transaction meets a number of requirements. Credit card companies also sometimes provide sellers forms of protection against fraudulent chargebacks. However, these protections appear to have numerous restrictions and loopholes; in particular, the Paypal User Agreement states that its Seller Protection Policy does not cover sellers for buyers' claims that an item was received, but was "Significantly Not as Described."[125]

In disputes over returns, sellers report that eBay favors buyers in these disputes, often without investigating the underlying facts.[126] If eBay sides with the buyer, the seller risks losing the item and the money, and facing debt collections efforts if the seller is unable to pay.[127] In order to keep buyers spending money on eBay, eBay has been open that it favors buyers.[128] This policy leaves many sellers losing because of

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125. Calkins et al., *supra* note 106, at 14−15 (footnotes omitted).

126. Sophie Smith, *The Four Pitfalls of Buying and Selling on eBay*, TELEGRAPH (June 19, 2018, 9:50 AM), http://www.telegraph.co.uk/finance/personalfinance/money-saving-tips/11644187/The-four-pitfalls-of-buying-and-selling-on-eBay.html [https://perma.cc/EF5J-FMKQ]; Anna Tims, *Ebay Accused of Failing Its Sellers as Fraudulent Buyers Manipulate the System*, GUARDIAN (May 21, 2017, 1:59 AM), https://www.theguardian.com/money/2017/may/21/ebay-accused-failing-sellers-buyers-manipulate-system-protection [https://perma.cc/Y5NE-G2NP] ("[One seller] plans to start a lobby group of disaffected sellers to challenge what he sees as bias against sellers. 'My experience, and that of other sellers I have spoken to, is that buyer-fraud of this kind is rife,' he says. 'Every single seller I spoke to had a tale to tell of at least two incidents in the past year. The simple fact is the eBay policy allows this fraud.'").

127. *See* Anna Tims, *Ebay's 'No Quibbles' Returns Policy Led to a Demand for £740 from a Debt Collection Agency*, GUARDIAN (July 15, 2015, 2:00 AM), https://www.theguardian.com/money/2015/jul/15/ebay-returns-policy-demand-debt-collector [https://perma.cc/WY96-DWKM] ("Ebay's efforts to lure buyers with its no quibbles protection has proved a gift for scoundrels - my postbag sags with grief from sellers. Ebay denies that its dispute resolution system is automated, but the illogicality of many of its rulings suggests otherwise.").

128. *See* Anna Tims, *It's Seller Beware as eBay's Buyer Guarantee Is Exploited by Scammers*, GUARDIAN (Apr. 25, 2016, 4:42 AM), https://www.theguardian.com/money/2016/apr/25/ebay-seller-beware-buyer-guarantee-exploited-scammers [https://perma.cc/ZZ3C-D435] ("Ebay has always been candid about the fact that its apparent bias towards buyers is to keep them spending. For this reason, while buyers can leave negative feedback against a seller, sellers are only allowed to comment positively about buyers, in case, according to its website, 'unfair feedback' causes buyers to 'decrease their shopping on eBay'. Sellers, meanwhile, are not allowed to know the identity of any comment writer so that 'buyers feel comfortable about leaving feedback'. The seller's only recourse, if a comment unjustifiably tarnishes their status, is to report a buyer privately to eBay and any negative comments are only removed if eBay receives multiple complaints about an individual."). Jane Winn has made this same point in the context of Amazon and its third-party merchants:

> With regard to consumer transactions taking place within the Amazon Marketplace, Amazon both defines and enforces the norms that apply to third-party merchants. In order to inspire consumer confidence, Amazon provides

the money back guarantee.[129] eBay's power as a platform allows it to externalize the costs of customer satisfaction onto the sellers by forcing sellers to accept unreasonable returns.[130]

Third, sellers also face risks from eBay itself. eBay is a powerful company, especially in relation to individual sellers.[131] The terms and agreements that sellers sign on with reflect this power imbalance.[132] eBay sellers agree that they use the platform at their own risk, and they agree to not hold eBay liable "for any damages or losses (including, but not limited to, loss of money, goodwill or reputation, profits, other intangible losses, or any special, indirect, or consequential damages) resulting directly or indirectly from" a wide variety of things that could go wrong with the service.[133] Even in situations where a seller could have a viable claim against eBay, eBay forces sellers to go to arbitration.[134]

The starkest example of the power asymmetry is the process for amending the agreement. eBay can "amend this User Agreement at any time by posting the amended terms on www.eBay.com" and giving thirty-days' notice.[135] Sellers consent to the amendment by their "continued access or use of our Services."[136] In contrast, for a seller to amend the agreement, the seller must obtain "mutual agreement by you and an eBay representative *who intends to amend* this User Agreement and is duly authorized to agree to such an amendment."[137]

> Amazon Marketplace buyers with a comprehensive "A-to-Z Guarantee" *that in effect forces third-party merchants to match its fanatical pursuit of customer satisfaction.* The A-to-Z Guarantee provides refunds up to $2,500 for buyers who claim an item they received was damaged, defective, or materially different from the item represented on the product detail page. Refunds may also be provided for items that did not arrive within the delivery window, if the seller has not voluntarily issued the refund. Amazon can enforce its buyer guarantee policy by charging back refunds against the seller, or even excluding the seller from the Amazon Marketplace: "Sellers with excessive guarantee claims and/or service chargebacks may be subject to warnings, suspensions, and account termination."

Jane K. Winn, *The Secession of the Successful: The Rise of Amazon as Private Global Consumer Protection Regulator*, 58 ARIZ. L. REV. 193, 201 (2016) (emphasis added) (footnotes omitted).

129. Tims, *supra* note 128.

130. Winn, *supra* note 128, at 209.

131. *See id.* (noting that "the regulatory authority exercised by global platform operators may rival that of national governments").

132. *User Agreement*, *supra* note 124.

133. *Id.*

134. *Id.* ("You and eBay each agree that any and all disputes or claims that have arisen, or may arise, between you and eBay (including any disputes or claims between you and a third-party agent of eBay) that relate in any way to or arise out of this or previous versions of the User Agreement, your use of or access to [eBay's] Services, the actions of eBay or its agents, or any products or services sold, offered, or purchased through [eBay's] Services shall be resolved exclusively through final and binding arbitration, rather than in court.").

135. *Id.*

136. *Id.*

137. *Id.* (emphasis added); *cf.* Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1630 (2017) ("While Uber drivers use the system, they may be offered a plethora of temporary contracts around price and other factors,

eBay's ability to harm sellers is irrelevant unless there is a risk it will do so. Disgruntled sellers claim eBay has failed them, alleging poor responsiveness and customer service.[138] Sellers also worry about "a shadowy set of rules and criteria" that eBay uses to generate search results and what sellers it includes on certain category pages.[139] Because eBay has the ability to harm sellers, consumer sellers using eBay are exposed because of imbalanced power in the relationship.

Finally, consumer sellers in disadvantaged groups face discrimination on eBay. Ian Ayres et al. recently conducted an experiment in which they auctioned baseball cards on eBay.[140] Some of the cards were held by African Americans, while others were held by Caucasians.[141] They found that "[c]ards held by African-American sellers sold for approximately 20% ($0.90) less than cards held by Caucasian sellers."[142] Other studies have reported similar results, with black sellers of iPods receiving "fewer and lower offers than white sellers,"[143] and Arab sellers facing discrimination in the Israeli online market for used vehicles.[144]

eBay's and other similar companies' presence in the relationship between buyers and sellers in online transactions both facilitates individuals acting as sellers and skews the legal arrangements to the sellers' detriments. Unlike gold buying where the buyer is powerful, here, the company facilitating the transaction is powerful. In any case, the law has not adapted to recognize the risks sellers face. Consumer sellers in this space remain vulnerable.

C. The Sharing Economy

The final example of consumer sellers is perhaps the most economically significant—the sharing economy. In the sharing economy, web platforms connect individual buyers of services to individual sellers.[145] Although a variety of services operate in the sharing economy, such as yoga instructors, tutors, and housekeepers, the most widely recognizable example is ridesharing. Companies like Uber and Lyft operate web platforms that enable individuals seeking rides to connect with drivers through a smartphone app.[146] The drivers are not usually professional drivers with

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and they are perennially forced to agree to new terms of service such as new commission structures, when they log in to work.").

138. Smith, *supra* note 126.

139. Hsiao, *supra* note 120.

140. Ayres et al., *supra* note 27, at 891.

141. *Id.*

142. *Id.*

143. Jennifer L. Doleac & Luke C.D. Stein, *The Visible Hand: Race and Online Market Outcomes*, 123 ECON. J. F496, F496 (2013).

144. Asaf Zussman, *Ethnic Discrimination: Lessons from the Israeli Online Market for Used Cars*, 123 ECON. J. F433 (2013).

145. Erez Aloni, *Pluralizing the "Sharing" Economy*, 91 WASH. L. REV. 1397, 1398 (2016). There are a variety of sharing activities that do not fit within my definition here. Donald Kochan offers a more expansive view of sharing: "'[S]haring' means that the assets or services are allowed to be (often nonexclusively) used or consumed by someone other than the owner of the property or provider of the services." Donald J. Kochan, *I Share, Therefore It's Mine*, 51 U. RICH. L. REV. 909, 928–29 (2017).

146. Alyssa M. Stokes, Note, *Driving Courts Crazy: A Look at How Labor and*

commercial licenses but are individuals with an available vehicle.[147] As such, the buyers and sellers in transactions in the sharing economy have relatively similar levels of power,[148] disrupting the strong seller / weak buyer paradigm of traditional law.

Web platforms are important to this market because they dramatically decrease transaction costs.[149] Specifically, web platforms match providers who have excess capacity for social use of their goods and buyers who need those goods or services.[150] In addition, web platforms create trust among buyers and sellers who are strangers because they have rating systems and consequences for malfeasance.[151]

The growth of this market has been astounding. In 2014, the sharing economy generated $15 billion in revenue, but PricewaterhouseCoopers predicts it will generate $335 billion in 2025.[152] As one notable example, just seven years after creating its first app, Uber is valued at close to $70 billion.[153] Other parts of this market are similarly amazingly large, given the smallness of each individual seller.[154] The sharing economy's appeal is largely attributed to the technology's ability to lower transaction costs and utilize resources that have excess capacity.[155]

The dominant legal debate over individuals selling services in the sharing economy is whether these individuals are employees of the platforms with which

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Employment Laws Do Not Coincide with Ride Platforms in the Sharing Economy, 95 NEB. L. REV. 853, 854 (2017).

147. Nicholas L. DeBruyne, Note, *Uber Drivers: A Disputed Employment Relationship in Light of the Sharing Economy*, 92 CHI.-KENT L. REV. 289, 292 (2017).

148. *See* Vanessa Katz, Note, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L.J. 1067, 1100–01 (2015) ("Moreover, sharing platforms standardize transactions such that providers no longer clearly occupy a superior bargaining position. . . . It is unclear how often providers actually negotiate with users. Even where these negotiations result in material changes to the contract, both parties occupy relatively even footing.").

149. Benjamin G. Edelman & Damien Geradin, *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?*, 19 STAN. TECH. L. REV. 293, 297 (2016); Christopher Koopman, Matthew Mitchell & Adam Thierer, *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, 8 J. BUS. ENTREPRENEURSHIP & L. 529, 531 (2015).

150. Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273, 276 (2004).

151. Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 147 (2016) ("At the same time, access, scale, repeat interactions, and technological identification combine to create a new system of stranger-oriented trust. The platform is introducing new forms of private regulation: reviews, ratings, and social network recommendations. These features can combine to provide alternatives to traditional regulation.").

152. PRICEWATERHOUSECOOPERS, THE SHARING ECONOMY 14 (2014), https://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf [https://perma.cc/CS59-7WL9].

153. *Uber: From Zero to Seventy (Billion)*, ECONOMIST, Sept. 3, 2016, at 17.

154. *See* Kellen Zale, *When Everything Is Small: The Regulatory Challenge of Scale in the Sharing Economy*, 53 SAN DIEGO L. REV. 949, 951 (2016) ("Airbnb has more listings for short-term accommodation than the world's largest hotel chains.").

155. Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 413, 416–17 (2015).

they work or are independent contractors.[156] Numerous lawsuits against web platforms argue that consumer sellers in the sharing economy are employees and not independent contractors.[157] Given the focus on the employee/independent contractor distinction, why should we consider the sharing economy in the context of consumers as sellers?

There are several compelling reasons for us to reconceptualize the debate about providers in the sharing economy as one about consumers' rights as sellers. First, the employee designation does not always apply. Even if consumer sellers were considered employees when they were working with Uber, for instance, other consumer sellers would still lack protection. Kellen Zale explains the spectrum:

> The level of third-party platforms' involvement in property-sharing activities varies. Some property-sharing activities—such as in informal backyard garden vegetable shares organized between neighbors via word of mouth—involve no third-party platforms. Other property-sharing activities, such as ride-sharing or short-term rentals conducted via Craigslist, involve third-party platforms, but their involvement is limited to serving as a virtual bulletin board. Finally, some third-party platforms, such as Airbnb and RelayRides, facilitate property-sharing transactions in numerous ways, such as through their membership requirements, trust

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156. *See, e.g.*, Arianne Renan Barzilay & Anat Ben-David, *Platform Inequality: Gender in the Gig-Economy*, 47 SETON HALL L. REV. 393, 397 (2017) ("Employment law scholarship has begun to pay attention to this phenomenon, focusing primarily on whether taskers should be classified as employees or independent contractors."); Rashmi Dyal-Chand, *Regulating Sharing: The Sharing Economy as an Alternative Capitalist System*, 90 TUL. L. REV. 241, 241 (2015) ("In the legal realm, however, a disturbing dissonance exists between excitement over this seemingly new way of doing business and regulatory floundering. Is Airbnb a hotel chain, a rental agency, or a website provider? Is Uber a taxicab service employing hundreds of drivers or a developer of an app? These questions remain unanswered. Yet policy makers cannot regulate the sharing economy without answering them."); Robert L. Redfearn III, *Sharing Economy Misclassification: Employees and Independent Contractors in Transportation Network Companies*, 31 BERKELEY TECH. L.J. 1023, 1024 (2016) ("Among the most challenging legal issues presented by this societal shift is whether certain sharing platform workers should be classified as employees or independent contractors."); Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 480 (2016) ("Worker advocates and others on the left accuse such companies of misclassifying their workers as independent contractors in order to avoid a host of employment law obligations . . . . The companies, in turn, typically deny that their workers are employees, casting themselves simply as technology firms . . . ."); DeBruyne, *supra* note 147, at 292 ("Although Uber continues to stand as the world's largest ride-sharing company in the transportation industry, the question of whether Uber drivers should be classified as employees or independent contractors remains unresolved.").

157. *E.g.*, O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015); *see also* Jeremias Prassl & Martin Risak, *Uber, Taskrabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, 37 COMP. LAB. L. & POL'Y J. 619, 620 (2016) ("It is unsurprising, therefore, that courts and administrative bodies have begun to find themselves tasked with determining crowdworkers' legal status . . . .").

> verification and ratings systems, and facilitation of payments between parties.[158]

Thus, focusing exclusively on the employee/independent contractor question offers less potential to offer a comprehensive regulatory solution than recognizing consumers' rights as sellers.[159]

Second, protecting individuals serving in the sharing economy with traditional employees' rights may not adequately protect them. Kate Andrias recently noted that the National Labor Relations Act is failing American workers.[160] This failure is particularly acute in the sharing economy where the relationship between the platform and worker does not fall neatly within the employee or the independent contractor framework.[161]

Finally, analyzing the sharing economy under traditional contract principles instead of just employment law models may aid policymakers who are struggling to keep up with changing technology. Agnieszka McPeak has demonstrated that traditional tort principles can inform the sharing economy: "Even though sharing-economy companies challenge the status quo with their innovative and non-traditional business approaches, pre-existing principles suffice to clarify tort liability in this new context."[162] Similarly, by thinking of individuals offering services as consumer sellers, regulators have a variety of time-tested principles to inform their approaches to regulating this novel market.

The calls to regulate the sharing economy primarily focus on consumers as buyers or public safety.[163] Governmental responses mirror these concerns for individual

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158. Kellen Zale, *Sharing Property*, 87 U. COLO. L. REV. 501, 564–65 (2016) (footnote omitted).

159. Aloni, *supra* note 145, at 1401 (criticizing scholarship on the sharing economy because it focuses on exclusively one part of the economy like ridesharing or short-term rentals).

160. Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 2 (2016).

161. *Id.* at 29; *see also* Rogers, *supra* note 156, at 481 ("In the Lyft case, Judge Vince Chhabria struck a nice metaphor: if the case reached a jury it would be 'handed a square peg and asked to choose between two round holes.' Lyft drivers are not classic independent contractors since they are actually at the core of Lyft's business, and often work for the company for years. Yet they are not classic employees either." (footnote omitted)).

162. Agnieszka A. McPeak, *Sharing Tort Liability in the New Sharing Economy*, 49 CONN. L. REV. 171, 171 (2016).

163. *See, e.g.*, Katie Barglind, Note, *Innovation, Technology, and Transportation: The Need to Address On-Demand Ridesharing and Modernize Outdated Taxi Regulations in the US*, 33 WIS. INT'L L.J. 701, 712 (2016) ("Rideshare critics also argue that the on-demand services pose too great of a risk to society to be left unregulated. In short, legislators have justified stringent taxi regulations based on their concern for public safety and consumer protection." (footnote omitted)); Katz, *supra* note 148, at 1078 (noting that relationships in the sharing economy are similar in many ways to "common law special relationships [that] assume that certain transactions pose unique health, safety, and financial concerns for consumers"); Hannah A. Posen, Note, *Ridesharing in the Sharing Economy: Should Regulators Impose Über Regulations on Uber?*, 101 IOWA L. REV. 405, 408 (2015) (arguing "that the best way to protect consumers is to allow Uber to continue its operations, subject to experimental regulations directed at ensuring passenger safety"); Carl Shaffer, Note, *Square Pegs Do Not*

purchasers.[164] For instance, the FTC offered guidance to the City of Chicago as it sought to regulate ridesharing. The FTC's Office of Policy Planning, Bureau of Competition, and Bureau of Economics argued that "any regulations directed at [ridesharing] services should focus primarily on ensuring the safety of customers and drivers, deterring deceptive practices relating to fares, safety and liability, and other terms of use, and addressing other consumer protection issues, especially data security and the prevention of identity theft."[165] The focus was entirely buyer centered.

Yet, individuals selling services in the sharing economy face real risks. First, they may face discrimination based on their race or gender. Some academics have hoped that ridesharing would disrupt the discrimination that plagued taxi cabs by providing more information that participants could use to assess the trustworthiness of trading partners.[166] Based on existing empirical evidence, however, this hope has not materialized. One empirical study of profiles of service providers in the sharing economy found that women "online taskers' requested rates," on average, were 37% lower than men offering the same services.[167] Similarly, a study of data about Airbnb.com hosts revealed that black hosts charge around 12% less than nonblack hosts with similar rentals.[168] Rating systems that are so important to establishing trust

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Fit in Round Holes: The Case for a Third Worker Classification for the Sharing Economy and Transportation Network Company Drivers, 119 W. VA. L. REV. 1031, 1036 (2017) ("Other detractors in traditional industries claim the lack of regulatory oversight on sharing economy companies leads to an unfair competitive advantage and increases risk for consumers.").

164. *See, e.g.*, Andrea Bolton, Comment, *Regulating Ride-Share Apps: A Study on Tailored Reregulation Regarding Transportation Network Companies, Benefitting Both Consumers and Drivers*, 46 CUMB. L. REV. 137, 146 (2016) (quoting Birmingham Councilwoman Kim Rafferty who justified the city's regulations on ridesharing because the regulations ensure that any ridesharing "that impacts our citizens, that takes our money, that they're qualified and they're safe in their operations").

165. Letter from Staff of the FTC's Office of Policy Planning, Bureau of Competition & Bureau of Econs. to Brendan Reilly, Alderman, City of Chi. 4 (Apr. 15, 2014), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf [https://perma.cc/76M4-BDL5].

166. *See, e.g.*, Julia Y. Lee, *Trust and Social Commerce*, 77 U. PITT. L. REV. 137, 156–57 (2015) ("[I]n conditions of high uncertainty, taxi drivers approach trust decisions through cues that are costless for those who truly possess them, but costly for others to mimic. Drivers prefer older, female, and white passengers over passengers who are younger, male, and black, presumably because these characteristics are difficult to simulate. This results in the notorious difficulties faced by black male passengers in hailing cabs, particularly in large cities. Sharing economy ridesharing platforms, by virtue of the wealth of information made available to both passengers and drivers, displace reliance on heuristics to assess the trustworthiness of exchange partners." (footnotes omitted)).

167. Barzilay & Ben-David, *supra* note 156, at 398.

168. Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* (Harvard Bus. Sch., Working Paper No. 14-054, 2014), https://www.hbs.edu/faculty/Publication%20Files/Airbnb_92dd6086-6e46-4eaf-9cea-60fe5ba3c596.pdf [https://perma.cc/XWQ6-TH5D].

in the sharing economy seem to actually replicate the implicit biases in society at large.[169]

Second, they face risks dealing with the web platform that facilitates the transactions. The web platform is often the most powerful participant in the transaction.[170] Many of the transactions in the sharing economy are not part of a free market because sometimes the platform sets the prices, leaving sellers at the mercy of an incredibly powerful party.[171] The platform takes a large part of the fee that the buyer pays the seller.[172] The FTC has alleged that Uber engaged in deceptive acts relating to pay against its drivers,[173] demonstrating the risk individual sellers face relating to the web platform they use. Even in the absence of deception, web platforms control the contracts with individual sellers through retaining a right to unilaterally alter the contract.[174] Moreover, as in the case of eBay, in the sharing economy, the platform often prioritizes the buyer over the seller because the buyer is more important to the platform's bottom line.[175] In traditional consumer law, the law protects weak buyers when dealing with merchants. The sharing economy injects a powerful third party into that relationship, suggesting the need to protect consumer sellers.

Third, they face risks to personal safety. Uber drivers are sometimes attacked; people renting out a room in their home with Airbnb could experience violence. Currently, platforms in the sharing economy do little to train participants or protect

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169. ALEX ROSENBLAT, KAREN LEVY, SOLON BAROCAS & TIM HWANG, DATA & SOC'Y, DISCRIMINATING TASTES: CUSTOMER RATINGS AS VEHICLES FOR BIAS 1 (2016) ("A good deal of social science research suggests that aggregated consumer ratings are likely to be inflected with biases against members of legally protected groups. While companies are legally prohibited from making employment decisions based on protected characteristics of workers, their reliance on potentially biased consumer ratings to make material determinations may nonetheless lead to disparate impact in employment outcomes. Hence, the mediating role of the rating system opens the door to employment discrimination."); Nancy Leong, *New Economy, Old Biases*, 100 MINN. L. REV. 2153, 2162 (2016) ("Rating systems therefore instantiate the same inequality long present in the old economy.").

170. Nestor M. Davidson & John J. Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 YALE L. & POL'Y REV. 215, 262 (2016) ("On the other hand, the lack of formal protections associated with employment status in the sharing economy carries risks of power imbalances between sharing platforms and the producers who provide the goods and services.").

171. Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 89 (2015).

172. Barglind, *supra* note 163, at 710 (reporting that Uber drivers get 80% of the fee that the buyer pays).

173. Daniel A. Cotter, *Workers in Ridesharing Businesses: Employees or Independent Contractors?*, *in* SHARING ECONOMY 200:200, Westlaw (last updated Mar. 21, 2019).

174. Rogers, *supra* note 171, at 98 (explaining how Uber "often acts unilaterally toward its drivers, changing terms and conditions at will, even when drivers have invested in cars in reliance on Uber's policies").

175. Winn, *supra* note 128, at 193 ("When a platform operator is also the primary regulator of the market it creates, negative spillover effects may occur: squeezing employees and suppliers to insure that consumers get whatever they want merely pushes conflict from one part of the platform 'ecosystem' to another.").

them: "Drivers get a few tips on how to look out for themselves, but these are easily overlooked or soon forgotten in the haste to get more drivers on the road."[176]

Finally, consumer sellers face risks of legal liability. This liability can be in the form of governmental fines, such as one Airbnb participant who faced a $40,000 fine for renting out an apartment.[177] In addition to fines, consumer sellers might face eviction or penalties from their landlords or homeowner associations.[178] Indeed, some posit that Airbnb avoids informing individual participants on the risks they face from engaging in short-term leases.[179]

The other legal liability comes in the risk of gaps in insurance coverage. In 2013, an Uber driver killed a girl while the driver was on his way to pick up a passenger.[180] Uber initially refused to pay because the driver was not actively carrying a passenger.[181] The situation generated a potential gap in the driver's insurance. Uber's policy might not cover the claim because the driver was not actively engaged in driving a customer, but the driver's individual insurance may not pay the claim because it excluded claims if the driver was operating the vehicle for a commercial purpose.[182] Uber has tried to respond by increasing the insurance it provides for drivers, but some commentators think gaps remain,[183] and some scholarship argues that Uber has misrepresented the insurance coverage available to drivers.[184] Indeed, Uber has refused to operate in jurisdictions that require full-time commercial insurance for Uber drivers.[185]

One might respond to my argument that we should treat providers in the sharing economy as sellers by contending that these providers really are buyers—they purchase the services that the platform sells. An important article by Ryan Calo and Alex Rosenblat recently suggests just that. They argue that consumer law could help

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176. Molly McHugh, *Uber and Lyft Drivers Work Dangerous Jobs—But They're on Their Own*, WIRED (Mar. 10, 2016, 7:00 AM), https://www.wired.com/2016/03/uber-lyft-can-much-keep-drivers-safe [https://perma.cc/G3DB-KQSX].

177. Brittany McNamara, *Airbnb: A Not-So-Safe Resting Place*, 13 COLO. TECH. L.J. 149, 157 (2015).

178. Zale, *supra* note 154, at 985 n.158.

179. *See id.* (citing sources).

180. Tad Delin & Stacey Chiu, *Insuring the Sharing Economy: Existing Models, New Models, Traps and Mitigation of Gaps*, *in* SHARING ECONOMY 100:100, Westlaw (last updated Mar. 1, 2019).

181. *Id.*

182. *Id.*

183. *Id.*

184. 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) ("Despite Uber's representations that uberX drivers are adequately insured, some insurance industry experts believe that uberX drivers still face coverage gaps while they drive around searching for fares. Indeed some uberX drivers involved in accidents have unexpectedly found themselves without the benefit of Uber's auto insurance." (footnote omitted)).

185. *See* Bolton, *supra* note 164, at 148 ("Although Uber provides a commercial insurance policy of up to $1 million for drivers while carrying passengers, this would not meet the requirements of the ordinance. Requiring each driver to carry his or her own policy would be 'prohibitively expensive.'" (footnotes omitted)).

protect participants in the sharing economy.[186] Following the FTC in its complaint against Uber, they call sharing economy providers "entrepreneurial consumers."[187] Individuals offering rides or space in their home are consumers because they make purchases from Uber or Airbnb, just like multilevel marketing participants bought goods from Amway and then sold them.[188] Consumer law, they contend, has failed because its interventions in the sharing economy have been "outdated and superficial" in protecting individual buyers in their relationships with their platforms.[189]

Though admirable in what it would do to protect people buying services, I do not think that Calo and Rosenblat's prescription for using consumer law in the sharing economy will ultimately protect the selling participants in the sharing economy. First, not all of the risks consumer sellers face in the sharing economy relate to the platform they use. Some risks come directly from buyers, such as risks of discrimination, personal harm, and legal liability. Unless consumer law evolves to protect consumers as sellers, consumer sellers in the sharing economy remain in harm's way. Second, a lot of traditional consumer protection laws will not apply to individuals interacting with platforms if the individuals are not acting for personal, family, or household purposes. If they are acting as small businesses, many state laws will not protect them. Without changing the definition of consumer to allow for profit-generating activities, a lot of traditional consumer law will offer little help to sellers in the sharing economy.

Thus, consumers as sellers face serious risks in the sharing economy. Despite these risks, scholars and lawmakers have primarily focused either on forcing sellers into the category of employees or on protecting buyers in the sharing economy. As the following Part argues, policymakers should adopt stronger protections for consumers acting as sellers in the sharing economy and in other marketplaces.

III. PROTECTING CONSUMERS AS SELLERS

Because it was formulated in a world in which consumers were almost exclusively buyers, contract law and consumer protection law primarily protect buyers. This Part makes the argument for why policymakers should extend protections to consumer sellers, and it offers suggestions for how to best protect consumer sellers.

A. Justifying New Laws for New Consumers

The mere fact that consumers have taken on the role of sellers in many transactions today does not itself justify extending protections to consumer sellers. Yet, many of the rationales behind laws that protect consumer buyers apply equally to consumer sellers. This Section offers three bases for protecting consumer sellers: (1) power asymmetries; (2) information asymmetries; and (3) smallness. It concludes

186. Calo & Rosenblat, *supra* note 137, at 1624.
187. *Id.* at 1679.
188. *Id.* Even when Calo and Rosenblat note that salespeople can be consumers, they limit their consumer status to instances in which the salespeople are making purchases from a platform. *See id.* at 1686.
189. *Id.* at 1624.

by responding to potential counterarguments one might raise to special protections for consumer sellers.

1. Consumer sellers often encounter power asymmetries with trading partners that justify legal protections.

In an ideal world, contracting parties "meet each other on a footing of social and approximate economic equality."[190] But, often the relationship is imbalanced, and the law adjusts transactions accordingly. Contract law and consumer protection law reflect the model of a strong seller and weak buyer, and they protect the buyer because of this disparity in power. For instance, implied warranties for new homes[191] and leases[192] exist because consumer buyers have less bargaining power than sellers. Similarly, courts and scholars attack standard form contracts because of the relative power of the parties entering into them.[193]

When consumers are sellers, this same power asymmetry occurs. Gold buyers are almost always large, sophisticated businesses, and consumer sellers are often normal people who are desperate for cash.[194] While the buyers in the sharing economy and on eBay may be other consumers, the platforms that consumer sellers interact with are large companies.[195] As Part II demonstrated, the strong buyer/platforms in these relationships often use their bargaining power to extract unfavorable and potentially unfair terms, such as lopsided pricing schemes, arbitration agreements, and contract

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190. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943).

191. *See* McDonald v. Mianecki, 398 A.2d 1283, 1289 (N.J. 1979) ("The reasoning underlying the abandonment of *caveat emptor* in the area of home construction is not difficult to fathom. . . . Courts have also come to realize that the two parties involved in this important transaction generally do not bargain as equals."); Margaret N. Fox, Commodo Caveo*: "Lender Beware"—An Analysis of Lender Liability for Construction Defects Under the Implied Warranty of Habitability*, 59 S.C. L. REV. 493, 508 (2008) ("The rationale supporting builder-vendor liability under the implied warranty of habitability is that buyers have an unequal bargaining position in relation to sellers."); Frona M. Powell, *Builder-Vendor Liability for Environmental Contamination in the Sale of New Residential Property*, 58 TENN. L. REV. 231, 261 (1991) (explaining a court's reasoning that "policies justifying imposition of liability for such personal injuries upon the builder or developer under a strict liability or implied warranty theory included the relatively unequal bargaining position of the homeowner in relation to the builder").

192. Andrea M. Matwyshyn, *Privacy, the Hacker Way*, 87 S. CAL. L. REV. 1, 34 (2013) ("Because of the form contracts used in residential leasing, the largely take-it-or-leave-it nature of negotiations, and the significant difference in bargaining positions between landlords and tenants, courts and legislatures began to craft implied promises of landlord conduct as nonwaivable warranties into contract law."); Todd D. Ruggiero, Casenote, Brown v. Green *and* Hadian v. Schwartz*: Determining Who Is Responsible for Major Structural Repairs in Commercial Leases*, 28 PAC. L.J. 417, 423 (1997) ("Courts adopted the warranty to account for changing social conditions as well as the unequal bargaining power between tenants and landlords.").

193. Becher, *supra* note 13, at 725.

194. *See supra* text accompanying notes 80–82, 92–93.

195. *See supra* text accompanying note 105.

amendment procedures. Because employment laws often fail to protect sellers in these markets, "companies are free to impose increasingly substantial requirements on suppliers and to market these requirements as part of their brands while leaving suppliers to internalize the risks associated with transactions."[196] Thus, not only do consumer sellers face power asymmetries, they suffer because of them.[197] Just like the law protects consumer buyers who are weaker than their trading partners, the law should protect consumer sellers.

2. Consumer sellers experience information asymmetries with trading partners that warrant regulatory intervention.

When parties to a contract have vastly different amounts of information, the law will sometimes intervene to mitigate unfair bargains.[198] For instance, courts will use information asymmetries to justify using unconscionability as a defense to enforcing a contract.[199]

Even where the law does not reform deals after the fact, it often makes demands of the party with more information. Disclosures protect buyers from information asymmetries.[200] The UCC's warranty of fitness for a particular purpose is premised on the seller having superior knowledge.[201] Indeed, an essential justification for treating consumer transactions different than merchant transactions is the lack of

196. Deepa Das Acevedo, *Regulating Employment Relationships in the Sharing Economy*, 20 EMP. RTS. & EMP. POL'Y J. 1, 2–3 (2016).

197. *Cf.* Garvin, *supra* note 8, at 297 ("In their dealings with larger businesses, small businesses are treated as though the parties are essentially equal, which will not usually be true save in the most formal sense.").

198. Matwyshyn, *supra* note 192, at 33 ("Contract law on occasion seeks to punish parties who take advantage of knowledge disparities to the detriment of the other party . . . .").

199. J.H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PA. L. REV. 875, 928 (1999); *see* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489 (1970).

200. Subha Narasimhan, *Relationship or Boundary? Handling Successive Contracts*, 77 CALIF. L. REV. 1077, 1082 (1989).

201. Vincent M. Gonzales, *The Buyer's Specifications Exception to the Implied Warranty of Fitness for a Particular Purpose: Design or Performance?*, 61 S. CAL. L. REV. 237, 251 (1987) ("The warranty of fitness also efficiently and correctly allocates the incentives to assure performance among the parties to a transaction. If the buyer relies on the seller's judgment to furnish a suitable product for the buyer's particular, nonstandard purpose—assuming the seller has reason to know of such use and of the buyer's reliance—then it is clear that the seller has greater knowledge and expertise than the buyer.").

knowledge many consumers have.[202] Consumer protection statutes also protect buyers because they lack information.[203]

Information asymmetries result in inefficient transactions or may even cause market failure,[204] so policymakers can use imbalances in information to justify regulatory intervention. Also, disparate amounts of information can lead to fraud.[205]

Usually the seller has more information than the buyer.[206] But, when consumers are sellers, the standard paradigm is flipped. The buyer or a platform that facilitates the transaction often has more information than the seller. Uber, for instance, has more information about the dangers drivers face than the individual drivers. Gold buyers have much more information about the quality of gold a seller presents as well as the price points for those types of gold.

It makes sense that merchant buyers and large platforms would have more information than individual sellers because these businesses engage in the same types of transactions repeatedly and are able to learn from each transaction and amortize the cost of obtaining information over these transactions.[207] Gold sellers, on the other hand, may only sell once. Businesses are less prone to suffer from behavioral biases than individuals who systematically make suboptimal decisions because of irrational

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202. Miller, *supra* note 3, at 957 ("Consumer law recognizes that important differences exist between a commercial transaction (a transaction between merchants) and a consumer transaction (a transaction where one or both of the parties is not a merchant). A commercial transaction ordinarily will involve two knowledgeable parties. As a general proposition, therefore, one party does not need to rely on the knowledge and fairness of the other party." (footnote omitted)).

203. Jerry Kang & Benedikt Buchner, *Privacy in Atlantis*, 18 HARV. J.L. & TECH. 229, 249 (2004); *see also* Garvin, *supra* note 8, at 372 ("These statutes and common-law rules are rooted in assumptions about the inability of a consumer to make even a modestly fair deal because of a lack of information or the ability to process it.").

204. Bruce Mann & Thomas J. Holdych, *When Lemons Are Better Than Lemonade: The Case Against Mandatory Used Car Warranties*, 15 YALE L. & POL'Y REV. 1, 2–3 (1996).

205. Richard L. Fruehauf, Note, *The Cost of Knowledge: Making Sense of "Nonfortuity" Defenses in Environmental Liability Insurance Coverage Disputes*, 84 VA. L. REV. 107, 112 (1998).

206. Mann & Holdych, *supra* note 204, at 2.

207. Garvin, *supra* note 8, at 340–41("Large merchants have so high a volume of transactions that they have the capacity to get useful feedback for all but quite infrequent decisions or quite unlikely outcomes. . . . Consumers also get feedback, but that feedback may not always be plentiful. Many consumer transactions are infrequent. Even the more frequent ones may not provide useful feedback." (footnotes omitted)); *id.* at 306 ("There is no chance [for consumers] to amortize information costs over a number of transactions. The same goes for legal advice. In contrast, merchants are classically repeat players—indeed, occasional sellers often are not considered merchants. By definition, then, they have more transactions from which they can gather information and over which they can spread the costs of getting information." (footnote omitted)).

biases.[208] Finally, businesses have resources to hire lawyers and experts to inform their decision-making while consumer sellers do not.[209]

Thus, just as the law protects consumer buyers who lack adequate information to protect their interests, courts and legislatures should intervene to protect consumer sellers when their trading partners have pronounced informational advantages over them.

3. Consumer sellers' small scale justifies protection.

A third justification for protecting consumer sellers is that consumer sellers operate on such a small scale that they cannot efficiently protect themselves. A major function of private contracts or regulations is to allocate risk between parties based on which party is better at dealing with the risk.[210] In markets where two parties have different costs for bearing risk, contracts allocate the risk to the party which can bear it with the least expense.[211] The trick in allocating risk between private parties is to allocate the risk to the party which is risk neutral and not to the party which is risk averse.[212] In a market with perfect information, a risk-averse party will happily pay a risk-neutral party to bear risk.[213] If private contracts cannot allocate risks because of market failure,[214] the law should put the risk on the party that can bear it with the least expense.[215]

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208. *Id.* at 329 (suggesting businesses can mitigate the effects of cognitive errors through "selection, learning, and group decision making"). For a general description of the systematic mistakes consumers make, see DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

209. *See* Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 373 (2004).

210. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 111 (9th ed. 2014) ("Ordinary commercial contracts also shift risks, and thus provide a form of insurance. The risk-shifting or insurance function of contracts is inherent to the fact that a contract (other than a truly simultaneous exchange) by its nature commits the parties to a future course of action; and the future is uncertain.").

211. Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 849 (2003) ("Sophisticated parties know that contingencies might occur that will make performance impossible or extremely costly. If they want to share the risk of these contingencies, they can write excuses into the contract.").

212. Cooter & Rubin, *supra* note 10, at 71.

213. *Id.* Robert Cooter & Edward Rubin give the following example:

> [I]f there is a probability of one in one thousand of suffering a forgery loss of $10,000, then a risk averse consumer will pay more than $10 for the financial institution to assume it; in contrast, if the financial institution is risk neutral, it can profitably assume the risk if it is paid any amount greater than $10, plus a charge to cover the administrative costs.

Id.

214. Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551, 564–65 (1991).

215. *See* Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500–01 (1961) ("'Enterprise liability'—the notion that losses should be borne by the doer, the enterprise, rather than distributed on the basis of fault—is usually explained

When businesses are sellers, they often are in the best position to avoid costs from risks because they have superior information to the buyer.[216] Also, they are better positioned to bear risks because they can spread the cost of the risk over numerous other deals.[217] As Charles Corker explains in the context of liability for check fraud, large entities have the capacity to get insurance or self-insure against losses: "Banks can insure, although if their volume of checks is sufficiently large they may choose to act as self-insurers against smaller losses, since forgery losses out of a large volume of checks handled should be relatively predictable."[218]

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in such terms. A statement of this kind is generally followed by an additional one which implies that the enterprise can pass the loss on to the consumers in price rises, and that therefore enterprise liability is really a form of 'risk spreading.'" (footnote omitted)); Clayton P. Gillette, *Rules, Standards, and Precautions in Payment Systems*, 82 VA. L. REV. 181, 184 (1996) ("Where multiple parties (i.e., either customers or financial institutions) could take such precautions, regulations should, therefore, place the obligation on the party who can avoid the loss at the lowest cost.").

216. As Guido Calabresi and Douglas Melamed famously suggested, some situations justify "putting costs on the party or activity which can most cheaply avoid them." Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1096–97 (1972). Kabir Masson explains how this works in the context of sellers and warranties:

> Seller warranties . . . might also create a more efficient cost allocation. In this example the reallocation of risk can change the cost structure of the deal. Sally may receive a higher price for her car by taking on this extra risk through the warranty, as long as Bob is willing to pay Sally to take this risk. This is most likely to occur when it is less expensive for sellers to assume the risk than for buyers. For example, perhaps the seller has superior knowledge about the accuracy of the warranty, or perhaps the seller is better positioned to spread the costs related to defective products.

Kabir Masson, Note, *Paradox of Presumptions: Seller Warranties and Reliance Waivers in Commercial Contracts*, 109 COLUM. L. REV. 503, 508 (2009) (footnotes omitted).

217. Garvin, *supra* note 8, at 304–05 ("The consumer also lacks the merchant's ability to spread risk cost-effectively. In particular, self-insurance is not nearly as good an option for an individual as for a business. With fewer transactions, the consumer cannot assume that routine fluctuations will average smoothly. With fewer assets, the consumer cannot assume that she will be able to weather an unusually bad bit of luck. Consumers can and do buy third-party insurance, as do businesses, but even then, the types of insurance and their costs vary greatly. Some consumers are able to contract on favorable terms because their employers or their unions provide the bargaining power, and some get subsidized insurance of some types, mainly for personal injury. For economic loss or property loss, however, subsidies are relatively rare, and businesses may be able to secure superior rates." (footnote omitted)); van Voorhees, *supra* note 108, at 1213 ("A final rationale for limiting the implied warranty of merchantability to dealers is that a dealer, more than a buyer, is generally a superior loss bearer and endowed with more information and control of the product.").

218. Charles E. Corker, *Risk of Loss from Forged Indorsements: A California Problem*, 4 STAN. L. REV. 24, 31 (1951); *see also* Note, *Forged Government Checks: Misallocation of Loss by the Federal Common Law*, 66 YALE L.J. 1107, 1118 (1957) ("But the unique position of the government as a risk-distributor justifies its bearing the risk of loss where private parties would not be liable.").

Consumer sellers, on the other hand, do not have superior information, as discussed above, so they are unlikely to be the least cost avoider. Also, they often engage in few transactions, so they cannot spread the costs of risk by self-insuring against losses. Getting insurance from another party is virtually impossible because the bargaining costs for such insurance would be too high and the number of losses too low to make the insurance cost effective.[219] Uber drivers' troubles with insurance are symptomatic of this inability to accommodate risk. Consumer sellers, unlike businesses, are simply too small to protect themselves effectively, justifying lawmakers to step in to protect them and to impose risks on larger companies.

4. Potential Counterarguments

I have argued that consumer sellers' inferior information and power and their small size all should compel regulatory intervention, but one might imagine several compelling counterarguments to my suggestion that lawmakers protect consumer sellers. First, there is a long-standing opposition to creating a different law for consumers and merchants. In arguing against the UCC when it was first proposed, Samuel Williston noted:

> There is no such separation in the law of England or in that of the United States. The effect of a transaction depends upon the nature of the facts, not on the persons, unless they are bound by a special usage or custom . . . . There are no uniform usages as to all merchants throughout the United States. Nor do the particular provisions in regard to merchants bring the Code into harmony with the commercial codes of civil law countries. If a farmer or a school teacher engages in buying or selling goods or otherwise deals in mercantile transactions, he is, under the present law, and should continue to be, entitled to the same rights and subject to the same duties as if he were a merchant.[220]

Historically, of course, Williston lost this battle, and the UCC emerged with disparate treatments for merchants and consumers. While contract law is general and the UCC did make law much more uniform, there are still "many areas within contract [that] have their own special rules, and in those a close look at particular relations among consumers, small businesses, and large businesses may prove fruitful, and indeed already have."[221] Unique contexts require unique laws,[222] so fear

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219. Cooter & Rubin, *supra* note 10, at 72 ("Payment losses occur so seldom that most consumers do not appreciate the risk to which they are exposed. Furthermore, the bargaining costs for insuring the average consumer against fraud and forgery are likely to be large enough to render this insurance either unavailable or too expensive to possess broad appeal.").

220. Samuel Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 572–73 (1950) (footnote omitted).

221. Garvin, *supra* note 8, at 370; *see also* Gilles Cuniberti, *The Laws of Asian International Business Transactions*, 25 WASH. INT'L L.J. 35, 69 (2016) ("Commercial transactions are very diverse. They can be governed by general contract law or special rules applicable only to certain types of contracts. It is possible that the disparate attractiveness of the two laws varies depending on the particular type of contract under scrutiny.").

222. *See, e.g.*, Hawkins, *supra* note 78, at 596 (arguing for title-lending-specific laws

of deviating from uniform laws should not deter lawmakers from protecting consumer sellers.

A second important argument against my suggestion is that enhancing consumer sellers' protections will necessarily diminish buyers' protections in these markets.[223] In the sharing economy, for instance, people are very concerned about buyers' rights.[224]

The problem with this argument, however, is that the policies I suggest below would primarily operate against large businesses, not individual buyers. The ways that courts protect buyers, for instance through unconscionability, depend on sellers being strong and buyers being weak. If a parallel rule applied in favor of consumer sellers, the only effect would be to limit powerful companies' rights, not individual buyers.

And, even if the effect of considering protecting consumer sellers is to limit consumer buyers' protections, there is nothing that automatically suggests we always prefer buyers to sellers. Without implementing the policies I suggest, the default is to protect buyers at the cost of sellers. If nothing else, the Article hopes to problematize defaulting to protecting only the buyer.

A final argument is linguistic in nature. Consumers, one might posit, by definition consume, so we cannot conceive of consumers as sellers because sellers only receive money and never consume goods or services. This argument is certainly appealing, but it is not necessary. Current law, as discussed above, generally defines consumers based on their entity status as individuals, not on their activity of consumption.[225] Moreover, in many consumer protection statutes, individuals currently labeled consumers are not explicitly consuming anything. For instance, the Fair Credit Reporting Act governs how credit bureaus present credit worthiness information about people.[226] These laws affect individuals even if the individuals do not order credit reports or consume the information. Similarly, debt collection laws protect people based on past debts, and consumers do not need to consume anything new to qualify for protection.[227] Thus, while it may seem intuitively strange to include sellers within the category of consumers, current law opens the door to this idea. The next Section suggests that lawmakers walk through that door and create an explicit category of consumer sellers.

B. Proposing New Laws

Having argued for why we need to protect consumer sellers, I offer here several policies that lawmakers should consider as they adapt laws to these changed circumstances. The first suggestion is broad and theoretical. The rest are practical policies judges or legislatures could implement by altering or amending current law.

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instead of general contract principles to govern title lending transactions).

223. I appreciate Kellen Zale pointing this argument out to me.

224. *See supra* note 163.

225. *See supra* notes 163–65.

226. Note, *Blown Away? The Bill of Rights After Oklahoma City*, 109 HARV. L. REV. 2074, 2088 (1996).

227. 15 U.S.C. §§ 1692a–1692p (2012).

1. Creating a category for consumer sellers.

Having unearthed a variety of situations in which sellers are consumers, I first suggest that academics and lawmakers establish a legal category of consumer sellers. In many federal and state consumer protection laws, buyers can qualify as consumers if they are acting primarily for personal, family, or household purposes.[228] Sellers should have a similar potential to fall within the category of consumer sellers, although the definition would have to change to reflect that the consumer is selling a good or service and would not qualify as a merchant of those goods or services. Thus, a consumer seller could mean "a natural person who is not a merchant and sells goods or services primarily for personal, family, or household income."

On a theoretical level, if we reconceptualize sellers as consumers, many of the arguments in the consumer protection literature for consumer buyers could potentially extend to consumer sellers. For instance, consumer advocates have for years argued against forced predispute arbitration clauses.[229] These clauses prevent individuals from suing in court, are part of contracts of adhesion,[230] and most importantly, prevent individuals from suing as a class.[231] Without the right to organize as a class, many individuals cannot obtain redress because suing as one person is too expensive.[232] In the sharing economy, mandatory arbitration clauses

228. *E.g.*, 15 U.S.C. § 1692a(5) (defining "debt" under the Fair Debt Collection Practices Act to mean "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment").

229. *E.g.*, Alex Brunino, Comment, *A Modest Proposal: Review of the National Consumer Law Center's Model State Consumer and Employee Justice Enforcement Act*, 95 OR. L. REV. 569, 580 (2017).

230. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1648–49 (2005) ("[C]ritics urge that the nonconsensual nature of mandatory consumer arbitration is itself a problem per se. Empirical studies have shown that only a minute percentage of consumers read form agreements, and of these, only a smaller number understand what they read. Some companies may even deliberately design their arbitration clauses in a manner geared to decrease the likelihood that the consumer will focus on the arbitration clause. Moreover, even to the extent that consumers might read and understand an arbitration clause imposed on a predispute basis, psychologists have shown that predictable irrationality biases will prevent them from properly evaluating the costs and benefits of accepting such a clause. For example, because people tend to be overly optimistic, they will often underpredict the need they might have to bring a claim against a company and thus undervalue what they are losing by giving up a right to sue." (footnotes omitted)).

231. Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 75–76 (2004) ("Companies are increasingly drafting arbitration clauses worded to prevent consumers from bringing class actions against them in either litigation or arbitration. If one looks at the form contracts she receives regarding her credit card, cellular phone, land phone, insurance policies, mortgage, and so forth, most likely, the majority of those contracts include arbitration clauses, and many of those include prohibitions on class actions. Companies are seeking to use these clauses to shield themselves from class action liability, either in court or in arbitration." (footnotes omitted)).

232. *Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151, 1170–81

have prevented individuals from obtaining relief for racial discrimination.[233] Consumer law scholars have offered a wide variety of reform proposals to ensure buyers have the ability to vindicate their rights, such as prohibiting class action waivers in mandatory arbitration clauses.[234] Again, however, these arguments are for consumer buyers, not sellers.[235] If individual sellers are "consumers," however, these arguments suddenly apply to consumer sellers, and legislatures can react accordingly by passing laws to protect all consumers—buyers and sellers.

Also, on a more practical level, as courts consider the applicability of contract defenses, understanding that some sellers are consumers could prompt courts to apply defenses in those cases where they would automatically reject the defense coming from a company.[236] Larry Garvin explains how a party's consumer status causes courts to relax contract doctrines:

(2009) ("Class action waivers pertaining to consumer-plaintiff actions seem to stem from illegitimate motives insofar as they raise the average litigation cost for an individual case and consequently render such cases negative-value. The problem with consumer-plaintiff arbitrations, then, is that they essentially never occur." (footnote omitted)).

233. Caitlin Toto, *Sharing Economy Inequality: How the Adoption of Class Action Waivers in the Sharing Economy Presents a Threat to Racial Discrimination Claims*, 58 B.C. L. REV. 1355, 1355 (2017) ("Victims of discrimination, however, have encountered an even greater opponent: class action waivers in arbitration agreements, which are omnipresent in sharing economy company contracts.").

234. For a discussion of different reform proposals, see Miles B. Farmer, Note, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2360–61 (2012) ("Many different proposals for reforming mandatory arbitration have been put forward. Some commentators want to ban mandatory arbitration entirely in cases of unequal bargaining power. Others seek to offer additional mechanisms for judicial review that could protect against biased or unethical proceedings." (footnotes omitted)).

235. *See, e.g.*, Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 414 (2005) ("The contractual relation is obvious in most cases: for example, cellular-phone service subscribers, mortgagees, and credit card holders receive actual, old-fashioned contracts which may contain the collective action waiver. It is less obvious that a consumer who buys a computer in a box (or a toothbrush, or plane ticket) may have engaged in a transaction effecting the waiver of her right to participate in a class action or sue in court. And yet, under current doctrine, there is little question that ordinary retail purchases of goods—whether in-store or by telephone or internet—may support the imposition of an arbitration clause and collective action waiver." (footnote omitted)); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1231 (2003) ("The second type causes buyers to waive traditional means of legal redress, such as mandatory arbitration provisions and forum selection clauses."); Florencia Marotta-Wurgler, *Are "Pay Now, Terms Later" Contracts Worse for Buyers? Evidence from Software License Agreements*, 38 J. LEGAL STUD. 309, 332 n.14 (2009) ("I interpret the specification of a particular forum or a mandatory arbitration provision as generically less buyer friendly . . . .").

236. Garvin, *supra* note 8, at 381 ("The courts routinely state that businesses normally will not be able to invoke [unconscionability] successfully, as they will have too much market power and sophistication to warrant its use. On the other hand, the courts have sometimes allowed small businesses to invoke unconscionability where the owners were especially ill-educated or ill-informed, where their market power was especially weak, where the acts of the other party were especially misleading, and the like." (footnote omitted)).

> The contract defenses are particularly good examples. Many of them invoke questions of resources, information, and cognition, just as consumer law does. Very often, common-law courts refuse to apply these doctrines to businesses, or apply them only in the most extraordinary cases. . . . Even doctrines like the parol-evidence rule are at times relaxed when there are pronounced disparities between the parties. Contract interpretation also is not immune; construing a contract against its drafter normally favors the smaller contracting party over the larger. The courts do at times refer to inequality of bargaining power as their shibboleth.[237]

If we create a legal category of consumer sellers, these defenses meant to mitigate power imbalances could more readily apply to them.

2. Eliminating intent from causes of action based on deception.

While the idea of creating a conceptual category for consumer sellers is more theoretical in nature, one practical solution policymakers could immediately implement is eliminating intent from causes of action based on a buyer deceiving a consumer seller. One of the most important advances for consumer buyers has been relaxing the requirements for proving common law fraud.[238] Intent is notoriously costly to prove, so having an intent element in a consumer seller's cause of action for deception will squelch lawsuits before they have a chance to reveal illicit conduct.

There are costs to businesses to expanding liability for unintentional deceptive conduct, but businesses are the appropriate party to bear those costs, not consumer sellers. Even in cases where businesses do not intend to deceive consumers, consumers are harmed by misrepresentations, so some party has to pay. Businesses are more likely to be able to effectively spread the cost of liability across their other transactions and are more likely to have superior access to information; thus, they are in a better position to bear the costs of unintentional deception.[239]

Better information to consumer sellers could also diminish some of the risks consumer sellers face. For instance, gold buyers may be more forthcoming about price information if sellers did not have to prove intent. Also, ridesharing platforms might offer more training about safety risks with looser standards for deceptive acts.

3. Providing attorneys' fees for consumer sellers.

Finally, policymakers should permit consumer sellers to recover attorneys' fees. Awarding attorneys' fees to consumer sellers would be extraordinary given the default rule in America of each party paying its own fees.[240] However, consumers generally cannot pursue causes of action for deception in the absence of a fee-shifting statute: "Consumer fraud statutes were enacted to protect consumers in disputes with businesses. The legislatures reasoned that consumers would not be able to obtain

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237. *Id.* at 371 (footnotes omitted).

238. *See supra* notes 55–59 and accompanying text.

239. *See supra* note 215.

240. Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 55 (1982).

recovery for fraud unless the requirements for proof of fraud were relaxed and consumers could obtain attorney fees."[241] Awarding attorneys' fees to consumer sellers (1) would incentivize private lawyers to act in the public interest like private attorneys general;[242] (2) would encourage consumer sellers to bring lawsuits;[243] and (3) would provide access to justice even in cases involving minor losses.[244] Lawsuits could help police many of the negative behaviors that currently exist in markets where consumers are sellers, so policymakers should consider awarding prevailing consumer sellers their attorneys' fees.

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Overall, despite the significance of the shift to consumers as sellers, these policy suggestions offer moderate changes to contract and consumer protection law. They will not fix all of the problems in markets where consumers are sellers, such as enduring problems involving discrimination. However, they offer immediate solutions to some of the problems that have plagued these economies, and perhaps more importantly, they open the door to rethinking how policymakers protect consumers acting as sellers.

CONCLUSION

When legal greats Karl N. Llewellyn, William A. Schnader, Soia Mentschikoff, and Grant Gilmore were drafting the Uniform Commercial Code, consumers almost always did the same thing—buy. In that context and the context surrounding the consumer protection statutes passed in the following decades, it made sense for lawmakers to focus on protecting buyers. But, as Bob Dylan wrote in this same era, "the times, they are a-changin'."[245] Now, consumers act as sellers in a substantial

241. Edward X. Clinton, Jr., *Do Businesses Have Standing to Sue Under State Consumer Fraud Statutes?*, 20 S. ILL. U. L.J. 385, 400–01 (1996); *see also* Jean Braucher, *Foreword: Consumer Protection and the Uniform Commercial Code*, 75 WASH. U. L.Q. 1, 3 (1997) ("Consumers have difficulty bringing suits because, in contrast to businesses, they do not have continuing relationships with lawyers. Finding a lawyer to handle an isolated and often small-dollar-amount dispute, in light of the expense of litigation and the rarity of full compensation even upon victory, creates a barrier to redress that is insurmountable for most consumers.").

242. Gonzalez v. Wilshire Credit Corp., 25 A.3d 1103, 1120 (N.J. 2011) ("One of the important purposes of the [Consumer Fraud Act's] counsel-fees provision is to provide a financial incentive for members of the bar to become private attorneys general." (internal quotation marks omitted)).

243. *In re* McClendon, 488 B.R. 876, 897 (Bankr. E.D.N.C. 2013) ("One of the policy considerations involved in an award of attorney fees in the context of consumer protection violations is 'to encourage private enforcement of Chapter 75.'" (quoting United Labs., Inc. v. Kuykendall, 437 S.E.2d 374, 380 (N.C. 1993)).

244. Heyert v. Taddese, 70 A.3d 680, 713 (N.J. Super. Ct. App. Div. 2013) ("The purpose of awarding attorney fees for [Consumer Fraud Act] violations is to provide an incentive for an attorney to take a case involving a minor loss.").

245. Kevyn Burger, *To Some Millennials, Bob Dylan Is a Complete Unknown*, STAR TRIB. (July 11, 2017, 4:15 PM), http://www.startribune.com/to-some-millennials-bob-dylan-is-a-complete-unknown-will-u-of-m-class-fix-that/433857693 [https://perma.cc/8EB4-ZVJA].

number of transactions, such as those in the sharing economy. It is time for consumer law scholars and lawmakers to recognize consumers as sellers and respond to protect consumers as sellers.