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Drive at Your Own Risk: Uber's Misrepresentations to UberX Drivers About Insurance Coverage Violate California's Unfair Competition Law

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DRIVE AT YOUR OWN RISK: UBER VIOLATES UNFAIR COMPETITION LAWS BY MISLEADING UBERX DRIVERS ABOUT THEIR INSURANCE COVERAGE

Abstract: Ride-sharing services such as Uber and Lyft have revolutionized the private transportation market. Given the lack of clear regulations over these businesses, however, insurance industry experts disagree with Uber about the adequacy of uberX drivers' existing insurance coverage. This Note asserts that Uber misleads uberX drivers about the type and amount of coverage available to them, as uberX drivers have no first-party protections in place while they drive around searching for fares. This Note further argues that based on these insurance misrepresentations, Uber may be liable to injured uberX drivers under California's unfair competition law for engaging in unfair business practices. Accordingly, uberX drivers should be entitled to restitution for their injuries and injunctive relief to prevent Uber from continuing to mislead uberX drivers about their insurance coverage.

INTRODUCTION

On New Year's Eve of 2013, around eight o'clock at night, six-year-old Sofia Liu was walking in downtown San Francisco with her mother and four-year-old brother.[1] As the family crossed a street in a crosswalk, a Honda sport utility vehicle taking a right-hand turn failed to yield to the pedestrians and struck the Liu family.[2] Sofia's brother and mother survived the accident, but Sofia did not.[3] As it turned out, the driver of the Honda was an uberX driver.[4] Although the uberX driver did not have a passenger at the time, he was logged into the Uber Technologies, Inc. ("Uber") mobile phone application ("app") and searching for fares.[5] Thus, when Sofia's parents sued the driver for wrongful death, Uber de-

[1] *Family of Girl Killed in SF Crosswalk Suing Uber for Wrongful Death*, CBS SF BAY AREA (Jan. 27, 2014, 4:13 PM), http://sanfrancisco.cbslocal.com/2014/01/27/family-of-girl-killed-in-sf-crosswalk-suing-uber-for-wrongful-death/, *archived at* http://perma.cc/G3XE-5TJK; Henry K. Lee, *Former Uber Driver Charged in Girl's Crosswalk Death in S.F.*, SFGATE (Dec. 9, 2014, 5:37 PM), http://www.sfgate.com/crime/article/Former-Uber-driver-charged-in-girl-s-crosswalk-5944049.php, *archived at* http://perma.cc/9TML-UZ58.

[2] Lee, *supra* note 1.

[3] *Id.* (noting that in December of 2014, the uberX driver was charged with vehicular manslaughter for Sofia's death).

[4] *Family of Girl Killed in SF Crosswalk Suing Uber for Wrongful Death*, *supra* note 1.

[5] *Id.*; Doug Sovern, *Parents of San Francisco Girl Fatally Struck by Uber Driver Seek Stricter Ridesharing Rules*, CBS SF BAY AREA (June 25, 2014, 4:01 PM), http://sanfrancisco.cbslocal.com/2014/06/25/uber-and-other-app-ride-services-urged-to-carry-commercial-insurance-before-state-senate/,

nied that its commercial auto insurance policy covered the driver's liability in between fares.[6]

As ride-sharing becomes more and more common, so do ride-sharing accidents and subsequent insurance coverage disputes.[7] 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.[8] Indeed some uberX drivers involved in accidents

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archived at http://perma.cc/4UY4-FLCB (reporting that Sofia's mother alleges that she saw the uberX driver using his phone). *But see* Lee, *supra* note 1 (reporting that Uber maintains that the uberX driver was not responding to a ride request in the app at the time of the accident).

[6] Carolyn Said, *Hybrid Insurance for Uber, Lyft Drivers Is on the Way*, SF GATE (Nov. 14, 2014, 5:17 PM), http://www.sfgate.com/business/article/Hybrid-insurance-for-Uber-Lyft-drivers-is-on-the-5894075.php, *archived at* http://perma.cc/9UQB-WVGR; Sovern, *supra* note 5. Since Sofia's death in December 2013, Uber has begun providing a contingent liability policy to cover uberX drivers when the driver has the app on but does not yet have a passenger. *See* Nairi Hourdajian, *Eliminating Ridesharing Ambiguity*, UBER (Mar. 14, 2014), http://blog.uber.com/uberXridesharinginsurance, *archived at* http://perma.cc/LTS4-AWQR [hereinafter Hourdajian, *Eliminating Ridesharing Ambiguity*] (announcing Uber's new contingent liability coverage in the wake of the San Francisco tragedy). Problems with this solution are explored below. *See infra* notes 46–68 and accompanying text (explaining Uber's insurance for ride-sharing drivers).

[7] *See* Brad Aaron, *TLC: Driver Who Killed Man on UES Works for Uber [Updated]*, STREETSBLOG (Jan. 5, 2015), http://www.streetsblog.org/2015/01/05/tlc-unlicensed-driver-who-killed-man-on-ues-works-for-uber/, *archived at* http://perma.cc/5H8S-7HHX (reporting on a statement Uber issued after an Uber driver killed a man in New York City in January 2015, which pointed out that the Uber driver had a commercial insurance policy associated with his taxicab license); Emily Badger, *The Strange Tale of an Uber Car Crash and What It Means for the Future of Auto Insurance*, CITYLAB (Sept. 10, 2013), http://www.citylab.com/commute/2013/09/real-future-ride-sharing-may-all-come-down-insurance/6832/, *archived at* http://perma.cc/B7M6-7D3C [hereinafter Badger, *Strange Tale*] (noting that Uber argued that its auto insurance did not cover an Uber driver who injured two people in a March 2013 accident because the driver did not have a customer at the time); Vauhini Vara, *Uber, Lyft, and Liability*, NEW YORKER (Nov. 4, 2014), http://www.newyorker.com/business/currency/uber-lyft-liability, *archived at* http://perma.cc/J5EE-62P8 (explaining that in the wrongful death lawsuit over Sofia's death, Uber denied that its liability policy covered the driver because he did not have a passenger at the time); Randy Wallace, *Accident Leaves Houston Uber Driver with Regrets*, MY FOX HOUSTON (Jan. 4, 2015, 10:30 PM), http://www.myfoxhouston.com/story/27656550/accident-leaves-houston-uber-driver-with-regrets, *archived at* http://perma.cc/8KDM-7XS6 (reporting that a Houston uberX driver who caused a collision was unable to get compensation for his own injuries through Uber's insurance); *see also* Said, *supra* note 6 (noting the vast potential for insurance coverage disputes, given that ride-sharing drivers' insurance coverage varies over time).

[8] *See Sharing a Ride, but Not Insurance: Ridesharing Drivers May Face Insurance Coverage Gap*, NAT'L ASS'N OF INS. COMM'RS (Aug. 2014), http://www.naic.org/documents/consumer_alert_ridesharing_drivers.htm, *archived at* http://perma.cc/65ZH-W325 [hereinafter *NAIC Consumer Alert for Ridesharing Drivers*] (warning ride-sharing drivers about their potential gaps in insurance and the various livery exclusions contained in many personal policies); *Notice to Transportation Network Company Drivers*, CAL. DEP'T OF INS., http://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commiss-opinion/TransNetwkDrvrs.cfm, *archived at* http://perma.cc/25ZU-TSWQ (last visited May 17, 2015) (warning ride-sharing drivers that transportation network companies ("TNCs") do not provide medical payments, comprehensive, collision, or uninsured/underinsured motorist ("UM/UIM") insurance coverages). *But see* Hourdajian, *Eliminating Ridesharing Ambiguity*, *supra* note 6 (stating that "drivers who use our app . . . should have the confidence that any potential 'insurance gap' is covered with a safety net"); Nairi Hourdajian, *Insurance for uberX*

have unexpectedly found themselves without the benefit of Uber's auto insurance.[9] Just as with the uberX driver who killed Sofia Liu, Uber denied that its insurance policy covered a Houston uberX driver's medical bills and vehicle repairs after he got into an accident while transporting passengers in December of 2014.[10]

Based on the discrepancy between Uber's claims about uberX drivers' insurance coverage and the actual coverage drivers receive, injured uberX drivers may be able to sue Uber in California for engaging in unfair business practices.[11] Violations of California's unfair competition law ("UCL") could ex-

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with Ridesharing, UBER (Mar. 19, 2015), http://blog.uber.com/ridesharinginsurance, *archived at* http://perma.cc/YL28-XH3M [hereinafter Hourdajian, *Insurance for uberX*] (stating that the limits of Uber's contingent liability policy, which covers uberX drivers between trips, "meets or exceeds the requirements for [third] party liability insurance in every state"). *See generally* NAT'L ASS'N OF INS. COMM'RS, TRANSPORTATION NETWORK COMPANY INSURANCE PRINCIPLES FOR LEGISLATORS AND REGULATORS (2015), *available at* http://www.naic.org/documents/committees_c_sharing_econ_wg_exposure_adopted_tnc_white_paper_150331.pdf?1430061828513, *archived at* http://perma.cc/33Z3-M9TB [hereinafter NAIC WHITE PAPER ON TNC INSURANCE] (examining the insurance coverage issues that plague ride-sharing drivers and proposing legislative solutions).

[9] *See* Vara, *supra* note 7 (stating that Uber denied that its commercial liability policy covered the driver responsible for killing the six-year-old girl in San Francisco); Wallace, *supra* note 7 (reporting that Uber's liability policy did not cover a Houston uberX driver's personal medical bills or vehicle damage).

[10] *See* Catherine L. Rassman, *Regulating Rideshare Without Stifling Innovation: Examining the Drivers, the Insurance "Gap," and Why Pennsylvania Should Get on Board*, 15 PITT. J. TECH. L. & POL'Y 81, 89 (2014) (explaining how Uber denied insurance coverage for the uberX driver when Sofia's parents sued Uber); Wallace, *supra* note 7 (reporting that Uber refused insurance coverage for a Houston driver's injuries). Note that liability and coverage are two separate legal issues in an insurance dispute. *See* Jordan v. Consol. Mut. Ins. Co., 130 Cal. Rptr. 446, 448–49 (Cal. Ct. App. 1976) (distinguishing between liability and coverage issues where judgment was entered against deceased driver for causing car accident and injured plaintiff argued that vehicle owner's insurance policy should pay the judgment). Liability refers to the determination of fault in the accident. *See id.* at 448 (noting that the decedent, a Gulf Station employee, was liable for causing the plaintiff $55,000 in damages while driving a customer's Corvette). Coverage, on the other hand, refers to the amount and type of insurance proceeds to which an injured party has access. *See id.* at 452, 456 (finding that the Corvette owner's insurance policy covered anyone with permission to drive the vehicle). This Note is concerned with coverage (i.e., an uberX driver's access to insurance proceeds) rather than who is liable when an uberX driver gets into an accident. *See infra* notes 46–68 and accompanying text (explaining uberX drivers' access to insurance policies).

[11] *See* CAL. BUS. & PROF. CODE §§ 17200, 17203 (West 2012) (stating that "[a]ny person who engages, has engaged, or proposed to engage in unfair competition may be enjoined," and defining unfair competition as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [California false advertising laws]"); Dan Packel, *Lyft, Uber Ridesharing Bids Fall Short, Pa. Insurers Say*, LAW360 (Sept. 16, 2014, 3:53 PM), http://www.law360.com/articles/577690/lyft-uber-ridesharing-bids-fall-short-pa-insurers-say, *archived at* http://perma.cc/T8FJ-926M[hereinafter Packel, *Lyft, Uber Ridesharing Bids*] (noting the Insurance Federation of Pennsylvania's opinion that Uber lacks adequate insurance and insurance education for uberX drivers). This Note examines California law because Uber's and Lyft's driver agreements contain a choice of law provision stating that California law governs the agreements. *See* O'Connor v. Uber Tech., Inc., No. C–13–3826, 2014 WL 4382880, at *1 (N.D. Cal. Sept. 4, 2014) (providing the language of the California choice of law provision in Uber's driver licensing agree-

pose Uber and other transportation network companies ("TNCs") to ride-sharing drivers' claims for restitution and injunctive relief, as well as negative publicity.[12] Accordingly, it is in the best interests of TNCs and ride-sharing drivers to heed the numerous warnings from insurance industry insiders about drivers' insurance gaps.[13]

This Note argues that Uber's misrepresentations to uberX drivers should be found to violate California's UCL, as they constitute an unfair business practice.[14] Part I discusses how ride-sharing apps function and Uber's insur-

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ment); Cotter v. Lyft, Inc., 13–cv–04065, 2014 WL 3884416, at *4 (N.D. Cal. Aug. 7, 2014) (stating that Lyft's driver contracts contain a California choice of law provision). This Note does not examine the enforceability of these choice of law provisions, nor does it address whether California has personal jurisdiction over out-of-state plaintiffs. *Cf.* Ehret v. Uber Tech., Inc., No. C–14–0113, 2014 WL 4640170, at *1, *4–5 (N.D. Cal. Sept. 17, 2014) (allowing an out-of-state consumer's UCL claims against Uber to proceed); *O'Connor*, 2014 WL 4382880, at *11–12 (upholding Uber's contractual choice of law provision but refusing to apply California law extraterritorially and dismissing out-of state Uber drivers' UCL claims).

[12] *See* CAL. BUS. & PROF. CODE §§ 17203–17204 (providing that "[a]ny person who engages . . . in unfair competition may be enjoined," and that actions for injunctions may be brought "by a person who has suffered injury in fact and has lost money or property as a result"); Cel-Tech Commc'n, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 539 (Cal. 1999) (stating that plaintiffs can obtain restitution as well); *see* Serena Saitto, *Inside Big Taxi's Dirty War with Uber*, BLOOMBERG BUS. (Mar. 11, 2015, 8:00 AM), http://www.bloomberg.com/news/articles/2015-03-11/inside-big-taxi-s-dirty-war-with-uber, *archived at* http://perma.cc/4TR4-63HU (reporting that taxi associations have hired people to dig up dirt on Uber); Vara, *supra* note 7 (reporting that the statement Uber posted to its website following Sofia's death seemed callous in comparison to Lyft Inc. ("Lyft")'s handling of a similar incident). This Note examines California's UCL case law because it may provide guidance to other states in interpreting their similar unfair competition statutes. *See* Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2012) (stating that "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful"); Neil A. Helfman, *Proof of Statutory Unfair Business Practices*, 36 AM. JUR. PROOF OF FACTS 3D 221, 229–30 (1996) (updated Apr. 2015) (describing how many states, including California, followed the Federal Trade Commission Act ("FTCA")'s lead and enacted similar statutes prohibiting unfair competition).

[13] *See, e.g.*, Eric Nordman, *Ride-Sharing: New Technology Creates Insurance Challenges*, CIPR Newsletter (Nat'l Ass'n of Ins. Comm'rs & Ctr. for Ins. Pol'y & Research, Kansas City, Mo.), July, 2014, at 7–8, *available at* http://www.naic.org/documents/cipr_events_140819_rideshare_newsletter.pdf, *archived at* http://perma.cc/26R4-A83U (pointing out gaps in ride-sharing drivers' insurance that arise from the fact that drivers' personal auto policies will not cover commercial activity); *Commercial Ride-Sharing*, NAT'L ASS'N OF INS. COMM'RS, http://www.naic.org/cipr_topics/topic_commercial_ride_sharing.htm, *archived at* http://perma.cc/3QGF-FPTY (last updated Oct. 24, 2014) (stating that approximately twenty-five states have issued bulletins warning consumers about potential gaps and limitations of ride-sharing insurance coverage); *NAIC Consumer Alert for Ridesharing Drivers*, *supra* note 8 (warning ride-sharing drivers that they may face a gap in coverage between their personal policies and TNCs' commercial policies); *Notice to Transportation Network Company Drivers*, *supra* note 8 (advising ride-sharing drivers to purchase "a commercial policy with medical payments, comprehensive, collision and UM/UIM" to fill the gaps in their insurance coverage); *Sharing a Ride, but Not Insurance: Protect Yourself as a Ridesharing Passenger*, NAT'L ASS'N OF INS. COMM'RS (Aug. 2014), http://www.naic.org/documents/consumer_alert_ridesharing_passengers.htm, *archived at* http://perma.cc/R9SZ-5WLW [hereinafter *NAIC Consumer Alert for Ridesharing Passengers*] (warning ride-sharing customers that TNCs and ride-sharing vehicles are not subject to the same licensing and insurance requirements as taxis and limos).

[14] *See infra* notes 188–243 and accompanying text.

ance structure for uberX drivers.[15] Part II introduces California's UCL and examines the different tests for unfairness that courts use to determine whether a given business practice violates the UCL.[16] Finally, Part III argues that courts should find Uber's misrepresentations about the availability of insurance coverage for uberX drivers to be unfair in violation of the UCL, thereby entitling injured uberX drivers to restitution and injunctive relief.[17]

I. THERE'S AN APP FOR THAT: UBER'S RISE AND EXISTING INSURANCE COVERAGE FOR UBERX DRIVERS

With the rising popularity of ride-sharing, there is an increasing need to regulate the insurance coverage of ride-sharing drivers.[18] This Part examines Uber's rapid expansion into the transportation market and existing insurance coverage for uberX drivers.[19] Section A provides a brief background on Uber and its dominance in the ride-sharing market.[20] Section B then explores how Uber drivers, particularly uberX drivers, are insured.[21] Finally, Section C discusses recent attempts to regulate TNCs that could impact how Uber and other ride-sharing companies structure their insurance.[22]

A. Giving Them a Run for Their Money: The Emergence of Ride-Sharing Shakes Up the Transportation Industry

As the sharing economy expands, ride-sharing has become a popular and commercially viable peer-to-peer service.[23] Ride-sharing is a transportation service whereby people without commercial licenses use their own personal

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[15] *See infra* notes 18–83 and accompanying text.

[16] *See infra* notes 84–179 and accompanying text.

[17] *See infra* notes 180–243 and accompanying text.

[18] *See* Nordman, *supra* note 13, at 6–8 (discussing the emergence of ride-sharing facilitated though TNCs and the California Insurance Commissioner's recommendations for regulating ride-sharing insurance to protect drivers and passengers); *NAIC Consumer Alert for Ridesharing Passengers*, *supra* note 13 (assuring consumers that state insurance regulators and legislators are starting to regulate TNCs). This Note uses the terms "regulation" and "law" interchangeably to refer to any legal rule governing the public's behavior. *See infra* notes 18–243 and accompanying text (employing these terms).

[19] *See infra* notes 18–83 and accompanying text.

[20] *See infra* notes 23–45 and accompanying text.

[21] *See infra* notes 46–68 and accompanying text.

[22] *See infra* notes 69–83 and accompanying text.

[23] *See* CHRISTOPHER KOOPMAN ET AL., MERCATUS CENTER, THE SHARING ECONOMY AND CONSUMER PROTECTION REGULATION: THE CASE FOR POLICY CHANGE 3–5 (Dec. 2014), *available at* http://mercatus.org/sites/default/files/Koopman-Sharing-Economy.pdf, *archived at* http://perma.cc/V3KN-BAB9 (discussing the rapid growth and value of the sharing economy, loosely defined as an internet marketplace where individuals come together to exchange underutilized goods or services). Well-known sharing economy companies include Airbnb, Uber, Lyft, and TaskRabbit. Molly Cohen & Corey Zehngebot, *What's Old Becomes New: Regulating the Sharing Economy*, 58 BOS. B.J., Spring 2014, at 6, 6.

vehicles to provide rides to strangers for a fee.[24] Ride-sharing drivers provide customers with door-to-door service to their destinations, just like a taxicab, but the transaction tends to be cheaper and more convenient for the customer.[25] As a result, ride-sharing has introduced competition into the taxicab market.[26]

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[24] John G. Browning, *Emerging Technology and Its Impact on Automotive Litigation*, 81 DEF. COUNS. J. 83, 84 (2014); Ken Yeung, *Class-Action Lawsuit Filed Against Uber by San Francisco Taxi Drivers for Unfair Competition*, THE NEXT WEB (Nov. 14, 2012, 5:59 PM), http://thenextweb.com/insider/2012/11/14/class-action-lawsuit-filed-against-uber-by-san-francisco-taxicab-drivers-citing-unfair-business-competition/, *archived at* http://perma.cc/D2LU-L64C (describing California cab drivers' class action lawsuit alleging that uberX operates as an illegal taxicab and limousine service). Ride-sharing providers are not subject to the same local licensing and insurance requirements that apply to taxicabs and limousines. *NAIC Consumer Alert for Ridesharing Passengers*, *supra* note 13; *see* Boston Cab Dispatch, Inc. v. Uber Techs., Inc., No. 13-10769-NMG, 2014 WL 1338148, at *1–3 (D. Mass. Mar. 27, 2014) (explaining how Boston taxicabs are regulated by Boston Police Department Rule 403 and that Uber vehicles do not fall within the scope of Rule 403). *See generally* BOS. POLICE DEP'T, RULE 403, HACKNEY CARRIAGE RULES AND REGULATIONS (Aug. 29, 2008), *available at* https://static1.squarespace.com/static/5086f19ce4b0ad16ff15598d/t/52af61e1e4b0871946c07a41/1387225569980/Rule+403.pdf, *archived at* http://perma.cc/JTN7-6B3P (prescribing the Boston Police Commissioner's taxicab and radio association regulations); Thomson Reuters, *Licensing of Taxi Drivers*, 0140 REGSURVEYS 2 (June 2014) (providing a fifty-state survey of state regulations for licensed taxicab drivers). Car-sharing is also distinguishable from ride-sharing in that car-sharing involves a company or individual renting cars out to drivers, as rental car companies do. *See* Browning, *supra*, at 84–85 (pointing out the similarity between car- and ride-sharing and rental car companies); *Side by Side Comparison of Car Sharing and Ridesharing*, NAT'L ASS'N OF INS. COMM'RS, http://www.naic.org/documents/cipr_events_140819_sidebyside_rideshare_carshare.pdf, *archived at* http://perma.cc/2U4X-M2VX (last visited May 17, 2015) (demonstrating how car-sharing and ride-sharing differ); *see also* ZIPCAR, http://www.zipcar.com, *archived at* http://perma.cc/8YPY-5KQ4 (last visited May 17, 2015) (explaining that ZipCar is a car-sharing company that owns vehicles that members rent to drive themselves around).

[25] *See NAIC Consumer Alert for Ridesharing Passengers*, *supra* note 13 (comparing taxicabs to uberX and noting that uberX is a cheaper but less safe alternative); Luke O'Neil, *Hail, Boston: The Uber vs Taxi Livery War Is Changing the Industry*, BOS. MAG. (Aug. 2014), http://www.bostonmagazine.com/news/article/2014/07/30/uber-vs-taxis/, *archived at* http://perma.cc/XQ3J-UQBC (discussing Uber's advantages over taxicabs, including the convenience of hailing a car from indoors). *But cf.* Lori Aratani, *Proposal Would Allow D.C. Cabs to Embrace 'Surge Pricing*,*'* WASH. POST (Apr. 7, 2014), http://www.washingtonpost.com/local/trafficandcommuting/proposal-would-allow-dc-cabs-to-embrace-surge-pricing/2014/04/07/0bb48f28-be85-11e3-b195-dd0c1174052c_story.html, *archived at* http://perma.cc/FD28-DBBT (explaining Uber's practice of surge pricing, or raising prices in response to increased demand).

[26] *See* Josh Barro, *Under Pressure from Uber, Taxi Medallion Prices Are Plummeting*, N.Y. TIMES (Nov. 27, 2014), http://www.nytimes.com/2014/11/28/upshot/under-pressure-from-uber-taxi-medallion-prices-are-plummeting.html?_r=0&abt=0002&abg=1, *archived at* http://perma.cc/FD4J-GUYR (describing how the prices of taxicab medallions are down in many cities due to competition from Uber and Lyft); *Commercial Ride-Sharing*, *supra* note 13 (describing ride-sharing as a new alternative to public transportation); *London's Anti-Uber Taxi Protest Brings Traffic to Standstill*, BBC NEWS (June 11, 2014), http://www.bbc.com/news/uk-england-london-27799938, *archived at* http://perma/cc/GW5M-8WDC (describing a London taxicab protest against Uber, which resulted in an 850% increase in downloads of the Uber app); O'Neil, *supra* note 25 (pointing out that a few medallion owners cornered the Boston taxicab market and drove up costs, until Uber began offering customers other options).

Furthermore, ride-sharing has the potential to reduce traffic, relieve the burden on public transportation systems, and improve community relations.[27]

Transportation network companies ("TNCs") enable ride-sharing transactions between drivers and customers.[28] TNCs do not own any vehicles; rather, TNCs connect customers with nearby drivers through a mobile phone application ("app"), much like a taxi dispatcher does.[29] To hail a ride-sharing driver, customers download the TNC's app, store their credit card information in the app, and then request a ride from a driver in the area.[30] Any of the TNC's local drivers logged into the app on their mobile phones can accept the ride request.[31] After the ride is complete, the TNC app charges the fare to the customer's credit card automatically.[32] TNCs profit by taking a percentage of the fares and leaving the remainder to the drivers.[33]

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[27] *See Accelerating the Lyft Movement*, LYFT BLOG (Mar. 11, 2015), http://blog.lyft.com/posts/2015/3/11/accelerating-the-lyft-movement, *archived at* http://perma.cc/KD4P-2LGS (stating Lyft's goal of fostering community); *Commercial Ride-Sharing*, *supra* note 13 (stating that TNCs can "lessen traffic congestion, improve the environment, and enhance social connection"); Gregory Ferenstein, *Two New Studies Show Why Uber Makes Cities More Productive and Less Congested*, VENTUREBEAT (Sept. 3, 2014, 2:12 PM), http://venturebeat.com/2014/09/03/two-new-studies-show-why-uber-makes-cities-more-productive-and-less-congested/, *archived at* http://perma.cc/H3G7-B2RE (explaining studies in San Francisco and New York City that found that ride-sharing reduced rider waiting times and city congestion and could reduce traffic pollution). *But see* Melkorka Licea et al., *More Uber Cars Than Yellow Taxis on the Road in NYC*, N.Y. POST (Mar. 17, 2015, 11:43 PM), http://nypost.com/2015/03/17/more-uber-cars-than-yellow-taxis-on-the-road-in-nyc/, *archived at* http://perma.cc/7XQ5-2A3A (noting that with more Uber limousines in New York City than medallion-bearing cabs, traffic congestion has increased along with competition).

[28] *See* Nordman, *supra* note 13, at 6 (explaining how TNCs' online platforms facilitate ride-sharing by connecting riders with drivers through a mobile phone application). Other ride-sharing TNCs include Lyft and Sidecar. *See* Browning, *supra* note 24, at 84.

[29] *See Boston Cab*, 2014 WL 1338148, at *2 (explaining how the Uber app generates assignments for Uber drivers, similar to the way in which taxicab radio associations provide dispatch services to taxicab drivers); Browning, *supra* note 24, at 84 (comparing TNCs, which do not own any vehicles, to taxi dispatchers because they connect drivers with nearby riders). Uber, Lyft and Sidecar all function in the same way. *Compare* UBER, https://www.uber.com, *archived at* http://perma.cc/4ETG-FZZY (last visited May 17, 2015) (explaining that customers use the Uber app to hail a ride with an Uber vehicle), *with* LYFT, https://www.lyft.com, *archived at* http://perma.cc/J6G3-T6S5 (last visited May 17, 2015) (explaining that the Lyft app connects customers with ride-sharing drivers), *and* SIDECAR, https://www.side.cr, *archived at* http://perma.cc/UX8J-XDFD (last visited May 17, 2015) (explaining how the Sidecar app similarly connects customers with ride-sharing drivers, except customers learn in advance how much the fare will cost).

[30] *See Boston Cab*, 2014 WL 1338148, at *2 (describing how Uber customers use the Uber app to request a ride).

[31] *See id.* (stating that taxicab drivers choose to make themselves available for hire through the Uber app while also remaining available for dispatch by their radio associations); Browning, *supra* note 24, at 84 (discussing how the Uber app uses cell phone GPS technology to connect customers with nearby drivers).

[32] *See Boston Cab*, 2014 WL 1338148, at *2 (stating that the Uber fare is charged to the customer's preauthorized credit card); Nordman, *supra* note 6, at 6 (stating that no tipping is involved in an Uber transaction). The driver's cell phone tracks the distance and duration of the ride, which are then used to calculate the fare. *See* Mike DeBonis, *Uber Runs Afoul of Massachusetts Regulators*, WASH.

The world's largest TNC is Uber.[34] Founded in San Francisco in 2009, Uber currently operates in fifty-five countries and in over 260 cities worldwide.[35] Hundreds of thousands of drivers use Uber's platform to provide rides to customers, and Uber continues to grow its fleet of drivers and expand its services.[36] Among the various transportation options Uber offers, its most pop-

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POST (Aug. 16, 2012), http://www.washingtonpost.com/blogs/mike-debonis/post/uber-runs-afoul-of-massachusetts-regulators/2012/08/10/e8044bc6-e317-11e1-98e7-89d659f9c106_blog.html, *archived at* http://perma.cc/9B4Z-NPFB (noting that Massachusetts regulators challenged but ultimately approved of Uber's GPS metering system, and providing a link to the Massachusetts Division of Standards' order).

[33] *See Ehret*, 2014 WL 4640170, at *1 (challenging Uber's practice of charging customers a twenty percent fee on top of its metered fare, calling the fee a driver gratuity, and then keeping a "substantial" portion for itself); *Boston Cab*, 2014 WL 1338148, at *2 (alleging that Uber adds a twenty percent "gratuity" for drivers to its fares but only remits half of the gratuity to drivers); Nordman, *supra* note 13, at 6 (stating that TNCs take a percentage of drivers' sales).

[34] *See* Scott Austin et al., *The Billion-Dollar Startup Club*, WALL ST. J. (Feb. 28, 2015), http://graphics.wsj.com/billion-dollar-club/, *archived at* http://perma.cc/PH3W-92RU (noting that Uber was valued at over $41 billion in December of 2014, making it the second largest venture-backed private company in the world); Michael Wolff, *The Tech Company of the Year Is Uber*, USA TODAY (Dec. 22, 2013, 10:54 PM), http://www.usatoday.com/story/money/columnist/wolff/2013/12/22/the-success-of-app-based-car-service-uber/4141669/, *archived at* http://perma.cc/44VG-D3B5 (stating that if Uber meets its goal of earning $50 billion in revenue, it would become the world's largest transportation company). *But see* Scott Cendrowski, *China Has a New Taxi App Monopolist—and It Isn't Uber*, FORTUNE (Feb. 16, 2015, 6:30 AM), http://fortune.com/2015/02/16/china-has-a-new-taxi-app-monopolist-and-it-isnt-uber/, *archived at* http://perma.cc/3EKD-XGS7 (describing the battle among taxi-hailing apps in China, where Uber is relatively new to the market). Uber's closest competitor in the United States, Lyft, was valued at $2.5 billion in March of 2015. *See* Austin, *supra*; Adam Lashinsky, *Uber Banks on World Domination*, FORTUNE (Sept. 18, 2014, 7:25 AM), http://fortune.com/2014/09/18/uber-banks-on-world-domination/, *archived at* http://perma.cc/5FP4-NR6D (referring to Lyft as Uber's "pip-squeak rival").

[35] *See* Lashinsky, *supra* note 34 (describing Uber's origins); *Where Is Uber Currently Available?*, UBER, https://www.uber.com/cities, *archived at* http://perma.cc/3HWP-BCF4 (last visited May 17, 2015) (listing cities where Uber operates). By comparison, Lyft operates in only sixty U.S. cities. *See Cities We're In*, LYFT, https://www.lyft.com/cities, *archived at* http://perma.cc/TR56-XADM (last visited May 17, 2015) (listing the cities in which Lyft operates).

[36] *See* Emily Badger, *Now We Know How Many Drivers Uber Has—And Have a Better Idea of What They're Making*, WASH. POST (Jan. 22, 2015), http://www.washingtonpost.com/blogs/wonkblog/wp/2015/01/22/now-we-know-many-drivers-uber-has-and-how-much-money-theyre-making%E2%80%8B/, *archived at* http://perma.cc/E66R-V84A [hereinafter Badger, *Now We Know*] (reporting that Uber had over 162,000 active drivers in December 2014 and that its cadre of drivers has doubled every six months over the past two years); Lashinsky *supra* note 34 (reporting that Uber claims to have hundreds of thousands of drivers and describing Uber's growth strategy). In addition to providing ground transportation, Uber has experimented with water transportation, food delivery, and helicopter rides. *See* Kate, *Elevate Your Ride to Coachella Valley with UberCHOPPER*, UBER (Apr. 1, 2015), http://blog.uber.com/festivalchopperSD, *archived at* http://perma.cc/FD5S-KT75 (describing Uber's helicopter service); Maya Kosoff, *Uber's Seamless Killer Is Launching a Dinner Option in Los Angeles*, BUS. INSIDER (Dec. 8, 2014), http://www.businessinsider.com/ubers-seamless-killer-uberfresh-is-launching-a-dinner-option-in-los-angeles-2014-12, *archived at* http://perma.cc/4RHC-4G4E (describing Uber's food delivery service); Conor Myhrvold, *Uber Boat Meets #Uberdata*, UBER (July 15, 2014), http://blog.uber.com/uberboatrecap, *archived at* http://perma.cc/7YND-RHXJ (describing Uber's boat service).

ular service is uberX, the low cost ride-sharing option.[37] Uber continues to actively recruit uberX drivers to meet the demand for ride-sharing services.[38]

Because Uber does not have to comply with local taxicab and limousine regulations, it has pursued innovative but controversial business methods.[39] Regulators have challenged its practice of surge pricing—increasing fares during high-demand periods—as price gouging.[40] Critics have argued that Uber provides insufficient training for drivers and improperly classifies them as independent contractors rather than employees.[41] Passengers and taxicab compa-

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[37] *See* Ferenstein, *supra* note 27 (demonstrating that uberX ride-sharing is Uber's most popular service, as researchers found fifty-three percent of survey respondents were riding with uberX, as opposed to an Uber limo, Lyft, Sidecar, or taxi); UBER, *supra* note 29 (stating that Uber customers can request a ride from an Uber-affiliated limo, taxi, or a lower-cost uberX vehicle). Lyft and Sidecar, on the other hand, only offer ride-sharing vehicles. *See* LYFT, *supra* note 29; SIDECAR, *supra* note 29.

[38] *See* Ken Bensinger & Johana Bhuiyan, *Uber Advises Drivers to Buy Insurance That Leaves Them Uncovered*, BUZZFEED NEWS (Dec. 22, 2014), http://www.buzzfeed.com/kenbensinger/ubers-yawning-insurance-gap?utm_term=.edjMADgPZ#.ubq9WDJbQz, *archived at* http://perma.cc/X6W4-Q8A2 (reporting on an uberX driver recruiting event held at a car dealership); Lashinsky, *supra* note 34 (describing Uber's strategy of partnering with dealerships and lenders to help uberX drivers with poor credit finance new cars, getting them on the road faster); Douglas MacMillan, *Uber Cuts Deals to Lower Car Costs*, WALL ST. J. (Nov. 25, 2013), http://blogs.wsj.com/digits/2013/11/25/uber-cuts-deals-to-lower-car-costs/, *archived at* http://perma.cc/FF7G-8QZT (explaining that Uber partners with Toyota, GM, and lenders to obtain discounts and financing for its drivers). It is possible that Uber misleads uberX drivers about the insurance coverage they need so that it can recruit drivers more quickly. *See* Bensinger & Bhuiyan, *supra* (reporting that an Uber representative told potential uberX drivers that they do not need commercial auto insurance, which most drivers cannot afford).

[39] *See Boston Cab*, 2014 WL 1338148, at *6–7 (alleging that Uber engages in unfair competition by avoiding the costs of complying with taxi regulations); Saitto, *supra* note 12 (stating that Uber's strategy is to launch services without regard to regulations and then force local regulators to adapt). Under Boston's local regulations, for example, taxis must carry a hackney license, belong to a radio association, and pass regular vehicle inspections and criminal background checks. *See Boston Cab*, 2014 WL 1338148, at *1–2 (stating that Boston's Police Commissioner regulates taxis). *See generally* BOS. POLICE DEP'T, RULE 403, *supra* note 24 (prescribing regulations for Boston taxis).

[40] *See* Aratani, *supra* note 25 (stating that legislators are considering allowing taxis to engage in surge pricing as well so that they can compete with Uber); Ben Walsh, *Here's Why Uber Is Tripling Prices During a State of Emergency*, HUFFINGTON POST BUS. (Jan. 27, 2015, 12:59 PM), http://www.huffingtonpost.com/2015/01/26/uber-price-surge-blizzard_n_6548626.html, *archived at* http://perma.cc/93HR-ZQ55 (discussing criticism Uber faced after it raised prices during the terror attacks in Sydney, Australia and Hurricane Sandy in the United States). Lyft also engages in surge pricing. Walsh, *supra*.

[41] *See* Richard Epstein, *Uber and Lyft in California: How to Use Employment Law to Wreck an Industry*, FORBES (Mar. 16, 2015, 10:57 AM), http://www.forbes.com/sites/richardepstein/2015/03/16/uber-and-lyft-in-california-how-to-use-employment-law-to-wreck-an-industry/, *archived at* http://perma.cc/FGV9-XQJT (discussing two class action lawsuits against Uber pending in California that challenge Uber's practice of classifying drivers as independent contractors); Ellen Huet, *Uber Skimps on Driver Training, Then Charges Drivers $65 for Basic Driver Skills Course*, FORBES (Oct. 28, 2014, 9:00 AM), http://www.forbes.com/sites/ellenhuet/2014/10/08/uber-skimps-on-driver-training-then-charges-drivers-65-for-basic-driver-skills-course/, *archived at* http://perma.cc/9U2G-5S8W [hereinafter Huet, *Uber Skimps on Driver Training*] (criticizing Uber for requiring drivers to pay for their own training); Ellen Huet, *What Happens to Uber Drivers and Other Sharing Economy Workers Injured on the Job?*, Forbes (Jan. 6, 2015, 1:15 PM), http://www.forbes.com/sites/ellenhuet/2015/01/06/workers-compensation-uber-drivers-sharing-economy/, *archived at* http://perma.cc/9JUJ-ZS2Y

nies have sued Uber over its practice of charging mandatory driver gratuities and taking its fees out of those gratuities.[42] Uber is also facing lawsuits over its allegedly inadequate driver screening processes.[43] Finally, and most importantly for the purposes of this Note, the insurance industry has warned that Uber does not provide drivers with adequate auto insurance.[44] But given that ride-sharing appears to be the future of transportation, regulators are wary of over-regulating TNCs and stifling innovation.[45]

[hereinafter Huet, *Sharing Economy Workers Injured on the Job*] (questioning whether Uber properly classifies drivers as independent contractors, as it allows Uber to avoid providing them with overtime pay, worker's compensation, sick days, and health insurance); *London's Anti-Uber Taxi Protest Brings Traffic to Standstill*, *supra* note 26 (reporting that the London taxi drivers intended their Uber protest to highlight the intense training that taxi drivers undergo).

[42] *See Ehret*, 2014 WL 4640170, at *1 (recounting a customer's allegations that Uber misrepresents its fees as a driver "gratuity"); *Boston Cab*, 2014 WL 1338148, at *2 (recounting the taxicab dispatch companies' allegations that Uber's practice of charging customers a twenty percent gratuity, and keeping half, exceeds the maximum fare taxicabs are allowed to charge).

[43] *See* Andrew Lopez, *Prices Slashed for UberX as Opposition Raise Questions Over Safety*, NBC LOS ANGELES (June 23, 2014, 12:04 PM), http://www.nbclosangeles.com/news/local/UberX-Cuts-Prices-as-Opposition-Raises-Questions-Over-Safety-264278051.html, *archived at* http://perma.cc/W2ZY-VHB3 (pointing out that uberX drivers are not subject to the same background checks as taxicab drivers); Kurt Orzeck, *Calif. DAs Hit Uber with Consumer-Safety Suit as Lyft Settles*, LAW360 (Dec. 9, 2014), http://www.law360.com/articles/603221/calif-das-hit-uber-with-consumer-safety-suit-as-lyft-settles, *archived at* http://perma.cc/J4BQ-PBJ5 (reporting that California authorities sued Uber and Lyft for misleading consumers about the quality of their background checks).

[44] *See Commercial Ride-Sharing*, *supra* note 13 (describing potential gaps in insurance coverage for uberX and other ride-sharing drivers); Stephanie Friedhoff, *Insurance Could Make Road Bumpy for Uber and Lyft*, BOS. GLOBE (Jan. 7, 2015), *available at* http://www.bostonglobe.com/business/2015/01/07/insurance-questions-latest-bump-road-for-ride-share-companies/wegXpHUBpZHwtUXNHJSf6H/story.html, *archived at* http://perma.cc/MRF4-YK5T (stating that insurers opine that ride-sharing drivers have sufficient auto insurance coverage).

[45] *See* Steve Chapman, *The Flimsy Case for Regulating Uber*, CHI. TRIBUNE (Jan. 2, 2015, 4:00 PM), http://www.chicagotribune.com/news/opinion/chapman/ct-uber-regulation-background-pricing-sexual-assault-perspec-0104-20150102-column.html, *archived at* http://perma.cc/RB4L-TF4N (arguing against regulating Uber and contending that heavy regulation made the taxicab industry inefficient); Farhad Manjoo, *Uber, a Rising Business Model That Could Change How You Work*, N.Y. TIMES (Jan. 28, 2015), http://www.nytimes.com/2015/01/29/technology/personaltech/uber-a-rising-business-model.html, *archived at* http://perma.cc/GJ8L-7V5V (reporting on the "uberization" of different types of jobs and noting that the number of new drivers on Uber's platform doubles every six months); Saitto, *supra* note 12 (reporting that app systems for hailing rides is here to stay and that regulators should level the playing field for competitors); Harrison Weber, *As Uber Battles 13 Lawsuits, Cabbies & State Agencies Are Out for Blood (Update)*, VENTUREBEAT (May 8, 2014), http://venturebeat.com/2014/05/08/as-uber-battles-13-lawsuits-cabbies-state-agencies-are-out-for-blood/, *archived at* http://perma.cc/A2ZR-8BXB (warning that the numerous lawsuits against Uber could hurt innovation and potentially put all ride-sharing companies out of business); *see also supra* notes 69–83 and accompanying text (discussing recent attempts to regulate ride-sharing).

B. Mind the Gap: Potential Problems with UberX Drivers' Insurance Coverage

Since uberX accidents have become more common, Uber has opened up about its insurance coverage for ride-sharing drivers in an effort to ensure the public that ride-sharing is safe.[46] Uber's customers appear fully covered for their injuries; however, uberX drivers' access to compensation is less certain.[47] The uncertainty surrounding uberX drivers' coverage while they are driving around searching for fares is particularly problematic, as operating a mobile phone app while driving is risky behavior.[48] Uber structures its insurance for uberX drivers in the following way.[49]

An uberX driver's insurance coverage varies depending on the driver's activity, which can be divided into three distinct time periods.[50] During period

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[46] *See* Hourdajian, *Eliminating Ridesharing Ambiguity*, *supra* note 6 (announcing contingent liability coverage for drivers during the trolling period in hopes of eliminating any confusion about coverage that arose after an uberX driver accidentally killed a young girl in San Francisco); Zara Rahim, *Certificate of Insurance—U.S. Ridesharing*, UBER (Jan. 11, 2015), http://blog.uber.com/certificatesofinsurance, *archived at* http://perma.cc/5ZBD-RMT2 (providing hyperlinks to Uber's insurance certificates for every state).

[47] *See* Tim Fernholz, *A Coverage Dispute Between Uber, Lyft, and Insurers Leaves Drivers Exposed*, QUARTZ (Mar. 23 2015), http://qz.com/365854/a-coverage-dispute-between-uber-lyft-and-insurers-leaves-drivers-exposed/, *archived at* http://perma.cc/39Y7-KH8U (discussing the uncertainty that remains over whether uberX drivers are covered by insurance while they drive around searching for fares); Hourdajian, *Insurance for uberX*, *supra* note 8 (indicating that Uber has a commercial liability policy that kicks in when the uberX driver accepts a fare request and continues through the duration of the ride). *But see* Stephanie Francis Ward, *Internet Car Companies Offer Convenience, but Lawyers See Caution Signs*, ABA J. (Jan. 1, 2014 10:00AM), http://www.abajournal.com/magazine/article/internet_car_companies_offer_convenience_but_lawyers_see_caution_signs, *archived at* http://perma.cc/YM6B-C4WD (noting that some lawyers believe $1,000,000 will not go very far in a serious accident with multiple injured parties). Uber's commercial liability policy will pay for up to $1,000,000 in third party damages caused by the uberX driver and up to an additional $1,000,000 for injuries caused by an underinsured third party driver. Hourdajian, *Insurance for uberX*, *supra* note 8.

[48] *See* NAIC WHITE PAPER ON TNC INSURANCE, *supra* note 8, at 5–6 (explaining that most insurers and consumer protection groups believe that ride-sharing drivers post a greater risk during the trolling period because they are required to use their cell phones); Badger, *Strange Tale*, *supra* note 7 (describing how an Uber driver, with the app on but without a passenger, struck another vehicle that dislodged a fire hydrant and struck a pedestrian); Matt Richtel, *Distracted Driving and the Risks of Ride-Hailing Services Like Uber*, N.Y. TIMES (Dec. 21, 2014, 7:00 AM), http://bits.blogs.nytimes.com/2014/12/21/distracted-driving-and-the-risks-of-ride-hailing-services-like-uber/, *archived at* http://perma.cc/P8BN-7KAR (explaining how Uber drivers trolling for fares have fifteen seconds to manually respond to a ride request on the app or they risk losing the fare and access to Uber's driver platform); Sovern, *supra* note 5 (reporting that mother of young girl killed by uberX driver claimed to have seen driver looking at his phone when he hit her daughter).

[49] *See infra* notes 50–68 and accompanying text (explaining uberX drivers' insurance coverage).

[50] *See* Hourdajian, *Eliminating Ridesharing Ambiguity*, *supra* note 6 (showing that uberX ride-sharing insurance coverage varies based on whether the driver has the app off or on and whether the driver has a passenger). Lyft has a nearly identical insurance structure. *Compare id.* (stating that an uberX driver is covered by his or her personal insurance and Uber's contingent liability policy while the app is on but no ride is in progress, and then Uber's full commercial liability coverage kicks in once the driver accepts a ride request), *with We Go the Extra Mile for Safety*, LYFT, https://www.lyft.

one, the driver is neither using the Uber app nor seeking fares.[51] Uber asserts on its website that all drivers have auto insurance policies that cover them during this time.[52] During period two, the uberX driver is logged into the Uber app and seeking fares, but has not yet accepted a ride request.[53] Uber's website states that the driver's personal policy is in effect during this period.[54] Uber also carries a contingent liability policy that covers the driver in the event that the driver's insurer denies coverage for an accident during period two.[55] Finally, period three commences when the uberX driver accepts a ride request and

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com/safety, *archived at* http://perma.cc/3CM9-FANC (last visited May 17, 2015) (stating that Lyft's contingent liability policy covers the driver while the app is on but no ride is in progress, and then Lyft's commercial liability coverage begins once the driver accepts a ride request).

[51] *See* Hourdajian, *Eliminating Ridesharing Ambiguity*, *supra* note 6 (providing a visual of an uberX driver's insurance coverage over the course of a ride, indicating that Uber's insurance is unavailable to drivers when the app is off). The uberX driver is essentially off-duty during this time. *See id.*

[52] *See id.* (indicating that uberX drivers have "personal auto insurance" coverage when the "Uber app [is] off"). This Note is concerned with Uber's assertions about ride-sharing drivers' insurance because many uberX drivers rely on Uber to tell them what insurance they need. *See* Bensinger & Bhuiyan, *supra* note 38 (reporting that many uberX drivers rely on Uber's representations about insurance because they are inexperienced with transportation). Most uberX drivers only carry personal auto insurance, although some insurance officials believe that they should have commercial policies. *See id.* (explaining that many uberX drivers do not have commercial insurance because it costs three to ten times more than personal insurance); *NAIC Consumer Alert for Ridesharing Drivers*, *supra* note 8 (warning ride-sharing drivers that personal policies likely will not cover commercial activity, so they should consider purchasing a commercial policy).

[53] *See* Hourdajian, *Eliminating Ridesharing Ambiguity*, *supra* note 6 (indicating that a second time period commences when the uberX driver logs into the app and is waiting for a trip request).

[54] *See id.* (stating that when ride-sharing drivers have the Uber app on, "the vast majority of personal insurance policies cover this period either by the plain terms of the insurance policy, or due to the insurance requirements set by state"); Hourdajian, *Insurance for uberX*, *supra* note 8 (stating that "[d]uring the time that a ridesharing partner is available but between trips, most personal auto insurance will provide coverage").

[55] *See* Hourdajian, *Insurance for uberX*, *supra* note 8 (indicating that Uber's "contingent liability coverage" also covers uberX drivers while they search for fares for up to $50,000 in damages per person, up to $100,000 in damages per incident, and up to $25,000 in property damage). Liability polices pay for injuries to third parties that the driver causes but not for the driver's own injuries. ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 918 (5th ed. 2007) (explaining liability coverage). Drivers must purchase first-party coverage if they intend to insure their own medical expenses and property. *See id.* (explaining personal injury protection and underinsured motorist, collision, and comprehensive coverages, all of which are first-party coverages). Personal injury protection pays for the insured driver's own medical expenses. *Id.* Underinsured motorist coverage ("UI/UIM") pays for the insured's own medical expenses if another driver that lacks sufficient liability policy injures the insured. *Id.* Finally, collision and comprehensive coverages compensate the insured for damages to his or her property. *Id.* at 918, 968–69 (explaining that collision coverage pays for vehicular damage caused by impact with another object, whereas comprehensive coverage pays for vehicular damage caused by other perils, such as a bridge collapse). Uber's liability policy for uberX drivers during the trolling period, which will only pay for third parties' injuries, is also "contingent" because it only pays if the driver's personal auto insurer completely denies the claim or pays nothing. *See* Hourdajian, *Insurance for uberX*, *supra* note 8.

spans the duration of the ride.[56] During period three, Uber's website indicates that its primary commercial liability policy covers uberX drivers.[57]

Although Uber asserts that uberX drivers' personal insurance covers them while they drive around searching for fares (during period two), a coverage gap may persist during this time.[58] Drivers' personal policies usually do not cover commercial activities.[59] In addition, most personal auto polices contain express livery exclusions stating that the policy will not cover the insured if the insured uses the vehicle to carry persons for a fee.[60] Trolling for fares alone can trigger livery exclusions.[61] Therefore, insurers can refuse to provide uberX drivers with coverage under their personal policies, or rescind their personal policies entirely, if insurers discover that the drivers engaged in ride-sharing.[62]

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[56] *See id.* (indicating that Uber's commercial insurance coverage applies during a period beginning from the moment the uberX driver accepts the trip until the trip is completed).

[57] *See id.* (indicating that as soon as the uberX driver accepts a ride request, the driver is covered by Uber's commercial liability policy, as well as an additional $1,000,000 in UI/UIM motorist coverage, personal injury protection in select states, and contingent comprehensive and collision coverage up to the value of the car). Uber's commercial liability policy is "primary" because it takes precedence over the uberX driver's personal policy, but it will not take precedence over any commercial policy on the vehicle. *See id*.

[58] *Compare id.* (indicating that most uberX drivers' personal policies will cover them when they have the app on and are searching for fares), *with* Bensinger & Bhuiyan, *supra* note 38 (noting that because personal policies issued by Allstate, State Farm, Progressive, and Geico do not cover any sort of ride-sharing, some insurers have cancelled policies of drivers who engaged in ride-sharing), *and* Ellen Huet, *Rideshare Drivers Still Cornered into Insurance Secrecy*, FORBES (Dec. 18, 2014, 2:45 PM) http://www.forbes.com/sites/ellenhuet/2014/12/18/uber-lyft-driver-insurance/, *archived at* http://perma.cc/DC6F-3SSL [hereinafter Huet, *Rideshare Drivers Cornered into Secrecy*] (interviewing ridesharing drivers, some of whose insurers dropped them because of their ride-share driving), *and Notice to Transportation Network Company Drivers*, *supra* note 8 (advising drivers to get their own commercial auto policies with first party coverages, particularly medical payments, comprehensive, collision, and UI/UIM coverages, as TNCs' insurance policies may leave coverage gaps).

[59] *See* Mooney v. Nationwide Mut. Ins. Co., 822 A.2d 567, 569, 571 (N.H. 2003) (holding that insurer was authorized to rescind insured's personal policy because he put his car to commercial use by delivering mail for his employer); JERRY & RICHMOND, *supra* note 55, at 917 (distinguishing between personal auto insurance and commercial auto insurance); *NAIC Consumer Alert for Ridesharing Drivers*, *supra* note 8 (warning ride-sharing drivers that most personal policies contain livery exclusions that do not cover commercial activities, so insurers may refuse to insure them if they conduct business with their personal vehicles).

[60] *See NAIC Consumer Alert for Ridesharing Drivers*, *supra* note 8 (warning drivers that most personal auto policies have livery exclusions, which may exclude the time period when the driver is available for hire); *Notice to Transportation Network Company Drivers*, *supra* note 8 (providing the language of the typical livery exclusion found in personal auto policies).

[61] *See* Friedhoff, *supra* note 44 (noting that the insurance industry overwhelming opines that trolling for rides is not covered by personal auto policies that contain a livery exclusion); Rassman, *supra* note 10, at 88, 90 (discussing how commercial activity can trigger livery exclusions, despite Uber's claims that personal auto policies are effective, which leads to confusion over whether personal policies will cover uberX drivers while they drive around searching for fares).

[62] *See* JERRY & RICHMOND, *supra* note 55, at 391–97, 717–23 (discussing insurers' main justifications for terminating coverage—misrepresentation, breach of warranty, or concealment—and distinguishing representations from warranties). This risk of total loss of personal insurance leads some ride-sharing drivers to lie to their insurers about their ride-sharing. *See* Friedhoff, *supra* note 44 (re-

Moreover, Uber's contingent liability policy does not compensate uberX drivers for their own physical and property damages in the event of an accident.[63] The policy will not compensate uberX drivers for their bodily injury or vehicle damage, because liability coverage only covers third party injuries that the uberX drivers cause.[64] Further, Uber does not carry personal injury protection for drivers during this period, which would compensate uberX drivers for their own bodily injuries regardless of fault.[65] Nor does Uber provide uberX drivers with collision or comprehensive coverages, which would pay for damage to the drivers' vehicles.[66] Finally, Uber also lacks uninsured/underinsured motorist ("UI/UIM") coverage for uberX drivers during this period.[67] UI/UIM coverage would pay for uberX drivers' injuries if a motorist without third-party liability coverage caused the accident.[68]

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porting that some uberX drivers avoid telling their insurers that they drive for Uber to keep their personal coverage); Huet, *Rideshare Drivers Cornered into Secrecy*, *supra* note 58 (interviewing drivers who lied to their personal auto insurers about engaging ride-sharing to avoid losing coverage).

[63] *See* Fernholz, *supra* note 47 (reporting that insurers are pessimistic about Uber's contingent liability coverage for uberX drivers during the trolling period, which Uber claims fills any coverage gap); Wallace, *supra* note 7 (reporting an Uber spokesperson's statement that liability policies only compensate injured third parties, not the injured uberX driver).

[64] *See* JERRY & RICHMOND, *supra* note 55, at 918 (explaining that liability coverage is third-party protection that compensates only injured third parties, whereas first-party protection compensates the driver for his or her own injuries).

[65] *See id.* at 918, 923–24 (explaining personal injury protection and no-fault laws); Hourdajian, *Insurance for uberX*, *supra* note 8 (displaying an uberX driver's insurance coverage over the course of a ride-sharing transaction, which lacks personal injury protection while the driver is searching for fares). Many states mandate personal injury protection to ensure that drivers' own injuries are compensated. *See* JERRY & RICHMOND, *supra* note 55, at 97 (citing Tomai-Minogue v. State Farm Mut. Auto. Ins. Co., 770 F.2d 1228, 1235 (4th Cir. 1985)) (explaining that states regulate the amount and type of auto insurance coverage people must buy to ensure that injured persons have access to adequate compensation); *Summary of State Laws Related to Auto Insurance*, NAT'L ASS'N OF INS. COMM'RS, http://www.naic.org/documents/committees_c_d_auto_insurance_study_group_related_auto_law_summary.pdf, *archived at* http://perma.cc/7RJN-FKNM (last visited May 17, 2015) (indicating that seventeen states mandate drivers carry personal injury protection).

[66] *See* JERRY & RICHMOND, *supra* note 55, at 918 (stating that comprehensive and collision are first-party coverages that cover damage to the insured's own vehicle); Hourdajian, *Insurance for uberX*, *supra* note 8 (displaying an uberX driver's insurance coverage over the course of a ride-sharing transaction, which lacks comprehensive and collision coverages while the driver is searching for fares).

[67] *See* Hourdajian, *Insurance for uberX*, *supra* note 8 (displaying absence of UI/UIM coverage for uberX drivers while they are driving with the app on and searching for fares).

[68] *See* JERRY & RICHMOND, *supra* note 55, at 918 (explaining that underinsured motorist coverage is a first-party coverage). UI/UIM coverage is required in most states. *See Summary of State Laws Related to Auto Insurance*, *supra* note 65 (indicating that thirty-five states require drivers to carry uninsured motorist coverage, although drivers in some states can reject the coverage in writing).

C. Back to the Drawing Board: Recent Attempts to Regulate TNCs and Ride-sharing Insurance

As Uber's insurance practices have become more public, so too has the discourse surrounding them.[69] Uber asserts that its insurance complies with the law in all states, but because TNCs do not fit neatly into existing regulatory frameworks for transportation, it is unclear which laws even apply.[70] Realizing that Uber manages to deny insurance coverage for its drivers regularly, state insurance commissioners and lawmakers have begun pursuing legislation that will directly govern TNCs' activities.[71]

Although many of the proposed laws create specific insurance requirements for ride-sharing, some insurance officials believe that they may not go far enough to protect uberX drivers.[72] California, for example, emerged as a

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[69] *See, e.g.*, Don Jergler, *Uber Announces New Policy to Cover Gap*, INS. J. (Mar. 14, 2014), http://www.insurancejournal.com/news/national/2014/03/14/323329.htm, *archived at* http://perma.cc/97RY-XHU8 (reporting that the Property Casualty Insurers Association of America has been publicly advocating for TNCs to fill the gaps in ride-sharing drivers' insurance); Vara, *supra* note 7 (criticizing Uber's handling an insurance dispute arising from an accident involving an uberX driver that resulted in death of young girl in San Francisco); Ward, *supra* note 47 (providing an overview of the various legal issues, including lack of insurance coverage, that ride-sharing raises).

[70] *See Commercial Ride-Sharing*, *supra* note 13 (stating that ride-sharing does not fit into insurers risk-pooling models for personal auto insurance because the risks are not yet well understood; additionally, TNCs may not be subject to taxi and limo regulations that mandate proper insurance); Hourdajian, *Insurance for uberX*, *supra* note 8 (stating that Uber's contingent liability policy in effect between trips "meets or exceeds the requirements for [third] party liability insurance in every state in the U.S.," and that personal injury protection "is provided in certain states at similar levels as limos or taxis in those cities"). It is questionable whether Uber's insurance for ride-sharing drivers does in fact comply with local laws. *Compare* TEX. INS. CODE ANN. § 1952.152 (West 2009) (mandating that all insured carry personal injury protection coverage), *with Certificate of Liability Insurance*, UBER (Dec. 19, 2014), https://uber-regulatory-documents.s3.amazonaws.com/insurance/COIs/TX.pdf, *archived at* http://perma.cc/8AUD-AVMB (providing proof of Uber's insurance coverage in Texas, which lacks personal injury protection).

[71] *See Commercial Ride-Sharing*, *supra* note 13 (noting that state insurance regulators are working with TNCs to ensure that drivers are adequately covered, even though insurance regulators usually oversee insurance companies and agents); Jergler, *supra* note 69 (stating that Uber is working with insurers and lawmakers to ensure that ride-sharing drivers have proper coverage). *See generally* PROPERTY CAS. INSURERS ASS'N OF AM., TRANSPORTATION NETWORK COMPANY (RIDE SHARING) ISSUE STATUS (Aug. 8, 2014), *available at* http://www.naic.org/documents/cipr_events_140819_tnc_issue_status.pdf, *archived at* http://perma.cc/E9WM-BFZ7 (listing states' regulatory actions pertaining to ride-sharing safety and insurance).

[72] *See, e.g.*, CAL. PUB. UTIL. CODE § 5433 (West Supp. 2015) (requiring TNC drivers to carry certain minimum amounts of insurance starting (a) when the driver logs into the app, and (b) when the driver accepts a ride request, but not stating *who* should maintain the policies and not mandating first-party coverages for the driver); A.B. 6090, 2015 Assemb., 238th Legis. Sess. (N.Y. 2015) (proposing to require TNCs in New York to: (a) provide first party coverage for drivers *while they are transporting passengers*, without mentioning the trolling period; and (b) disclose to drivers that their personal *liability* policies may not cover them while the TNC app is on, but not mentioning that their personal first party benefits may be entirely unavailable as well); H.B. 931, 189th Gen. Court, Reg. Sess. (Ma. 2015) (proposing to require TNCs to (a) provide *liability* coverage to drivers that complies with Massachusetts' mandatory minimums from the moment they turn the app on, but without mention first-

leader in the regulatory race following Sofia Liu's death in San Francisco on New Year's Eve in 2013.[73] Starting on July 1, 2015, California will require TNCs drivers to be covered by insurance starting the moment they log into the app, even if they do not yet have a passenger.[74] The law also requires TNCs to make certain disclosures to drivers in their driver agreements.[75] TNCs must disclose the limits of their liability policies, and that drivers' personal policies will not cover them while they are using the TNCs' platforms.[76] TNCs also will no longer be able to provide coverage that is contingent upon drivers submitting claims to their personal insurers first.[77] California's attempts to fill the coverage gap during period two, when the uberX drivers are trolling for fares, and educate ride-sharing drivers about their insurance are steps in the right direction.[78]

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party coverages, and (b) disclose to drivers that their personal policies may not be in effect, but without requiring the TNCs to provide any detail); NAIC WHITE PAPER ON TNC INSURANCE, *supra* note 8, at 6 (noting that some states have enacted legislation to fill ride-sharing insurance coverage gaps, but holes still remain).

[73] *See* Nordman, *supra* note 6, at 6–7 (describing California's Insurance Commissioner as the leader in the insurance community with regard to regulating TNCs and discussing his recommendations); Dan Packel, *Calif. Bill on Uber, Lyft Insurance Offers Road Map for Pa.*, LAW360 (Aug. 29, 2014, 5:47 PM), http://www.law360.com/articles/572365/calif-bill-on-uber-lyft-insurance-offers-road-map-for-pa, *archived at* http://perma.cc/PAF9-5MBT [hereinafter Packel, *Calif. Bill*] (reporting that Pennsylvania legislators will look to California as they attempt to regulate ride-sharing insurance); Vara, *supra* note 7 (reporting that California lawmakers were spurred into action by Sofia's death in San Francisco).

[74] CAL. PUB. UTIL. CODE § 5433(b)–(c) (imposing new insurance requirements on TNCs effective July 1, 2015). "[F]rom the moment a participating driver logs on to the . . . platform until the driver accepts a request . . . and from the moment . . . the ride is complete . . . until the driver . . . accepts another ride request . . . [TNC] insurance shall be primary" and provide up to $50,000 for personal injury per person, up to $100,000 for personal injury per accident, and up to $30,000 for property damage *Id.* § 5433(c). Then, "from the moment a participating driver accepts a ride request . . . until the driver completes the transaction . . . [TNC] insurance shall be primary and in the amount of one million dollars ($1,000,000) for death, personal injury, and property damage." *Id.* § 5433(b).

[75] *See id.* § 5432 (imposing disclosure requirements effective July 1, 2015).

[76] *Id.* § 5432(a)–(b) (requiring that TNCs disclose in their driver agreements "the insurance coverage and limits of liability that the [TNC] provides while the driver uses . . . [the TNC's] platform," and that "the driver's personal automobile policy will not provide collision or comprehensive coverage for damage to the [driver's] vehicle . . . from the moment the driver logs on to the [TNC's] . . . platform to the member the driver logs off"). TNCs also must provide drivers written notice that their "personal automobile insurance policy will not provide coverage because the driver uses a vehicle in connection with a [TNC's] . . . platform." *Id.* § 5432(a).

[77] *Id.* § 5433(d) ("Coverage under a [TNC] insurance policy shall not be dependent on a personal automobile insurance policy first denying a claim nor shall a personal automobile insurance policy be required to first deny a claim.").

[78] *See* Packel, *Calif. Bill*, *supra* note 73 (noting that Pennsylvania lawmakers, trial lawyers, and insurers agreed that California's new TNC insurance regulations would serve as a useful guide for their state).

Some insurance officials believe, however, that California's law does not fully protect uberX drivers' interests.[79] The law does not dictate whether the TNC or the driver must maintain the drivers' insurance coverage required for period two, while drivers are searching for fares.[80] Nor does the law require drivers to be covered by first-party insurance during period two, which would pay for the drivers' own injuries.[81] Further, California's required disclosures about drivers' insurance coverage may end up buried in fine print in the driver agreements, making them of little use in educating drivers.[82] These potential loopholes concern some insurance officials, as they want greater assurances that these new laws will adequately inform and protect drivers.[83]

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[79] *See* CAL. PUB. UTIL. CODE §§ 5432–5433 (discussing insurance coverage for TNC drivers but not directly addressing first-party protection for drivers, adequate disclosures, and who must provide drivers with coverage during the trolling period); *cf.* A.B. 3765, 216th Leg., 2014 Sess. (N.J. 2014) (stating that the "[TNC] shall provide" drivers with commercial liability coverage, "property damage and uninsured and underinsured motorist coverage, medical payments coverage . . . and optional collusion and comprehensive coverage," which "shall be in force and effect from the time the . . . provider makes itself available for hire by logging into the [TNC]'s application . . . and continuing during any transportation network trip . . . until the . . . provider logs out").

[80] CAL. PUB. UTIL. CODE § 5433(c)(1)(A)–(C) (stating that requirements for insurance during the trolling period "may be satisfied by . . . [TNC] insurance maintained by a participating driver" or "insurance maintained by a [TNC] that provides coverage in the event a participating driver's insurance policy" fails to provide coverage). By contrast, New Jersey's proposed law clearly states that TNCs must provide coverage to ride-sharing drivers from the moment they log into the app through the duration of every trip. *See* N.J. A.B. 3765 (stating that the "[TNC] shall provide coverage . . . to the provider contracting with the [TNC]").

[81] *See* CAL. PUB. UTIL. CODE § 5433 (not discussing first party coverages for the driver, other than requiring UI/UIM coverage to be in effect during a ride); JERRY & RICHMOND, *supra* note 55, at 918 (explaining first-party coverages). New Jersey, on the other hand, proposes to require TNCs to provide drivers with "property damage and uninsured and underinsured motorist coverage, medical payments coverage . . . and optional collusion and comprehensive coverage," which must be in effecting whenever the driver's TNC app is on. *See* A.B. 3765.

[82] *See* CAL. PUB. UTIL. CODE § 5432 (mandating only that disclosures must be in writing, and some must be given in the driver agreements). New Jersey's proposed disclosures will more effectively warn ride-sharing drivers about the potential for insurance gaps. *See* A.B. 3765 (requiring explicit disclosures to drivers about the insurance implications of ride-sharing, which must be "on a separate sheet of paper," "in 14-point bold type," and "signed by the [driver]").

[83] *See NAIC Consumer Alert for Ridesharing Drivers*, *supra* note 8 (providing ride-sharing drivers with questions to ask TNCs about their insurance coverage and advising them to talk to their personal insurers); Packel, *Lyft, Uber Ridesharing Bids*, *supra* note 11 (noting that Pennsylvania insurance officials have criticized TNCs for not providing ride-sharing drivers with "adequate insurance education"). *But see* Fernholz, *supra* note 47 (quoting an Uber representative as stating "it's up to [drivers] to be able to read their own personal insurance policy to see if it works").

II. KEEPING THEM HONEST: FIGHTING UNFAIR BUSINESS PRACTICES WITH UNFAIR COMPETITION LAWS

When companies act unethically, unfair competition laws play an important role in righting the wrongs of the company.[84] To determine whether Uber Technologies, Inc. ("Uber") engages in an unfair business practice when it makes assertions about uberX insurance, it is important to examine the standards courts use to determine whether a business practice is unfair.[85] As such, Section A of this Part discusses California's unfair competition law ("UCL") and explains why California law is appropriate for evaluating Uber's insurance practices.[86] Section B then explains how California courts distinguish between UCL lawsuits brought by business competitors versus consumers.[87] Finally, Section C examines the different tests for unfairness that courts use to assess competitor and consumer UCL claims.[88]

A. Giving the Public a Voice: California's Unfair Competition Law

California's UCL is the proper law under which to analyze possible uberX driver claims against Uber for unfair competition for two reasons.[89] First, although the Federal Trade Commission Act ("FTCA") also prohibits unfair competition by businesses, it does not provide a private right of action.[90] As such, most states, including California, have adopted similar unfair competi-

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[84] *See* Federal Trade Commission Act, 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."); H.R. REP. NO. 103-138, at 2–4 (1993) (discussing the purpose underlying the Federal Trade Commission Act ("FTCA") of protecting consumers from unfair business practices on both a case-by-case and industry-wide basis); Helfman, *supra* note 12, at 228–29 (explaining that unfair business practices could not be controlled through common law, so Congress enacted section five of the FTCA, and many states followed suit). State unfair competition laws serve as powerful tools for consumers, who cannot enforce the FTCA. Helfman, *supra* note 12, at 229.

[85] *Compare* Hourdajian, *Eliminating Ridesharing Ambiguity*, *supra* note 6 (stating that uberX drivers should feel confident that they do not have any insurance gaps), *with NAIC Consumer Alert for Ridesharing Drivers*, *supra* note 8 (warning ride-sharing drivers about the potential gaps in their insurance).

[86] *See infra* notes 89–104 and accompanying text.

[87] *See infra* notes 105–115 and accompanying text.

[88] *See infra* notes 116–179 and accompanying text.

[89] *See* CAL. BUS. & PROF. CODE §§ 17200–17203 (West 2012) (providing that "[a]ny person who engages . . . in unfair competition may be enjoined," and "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 . . . of Part 3 of Division 7 of the Business and Professions Code").

[90] 15 U.S.C. § 45(a)(2) (stating that "[t]he [FTC] is hereby empowered and directed to prevent persons . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce"); *see* Helfman, *supra* note 12, at 229 (noting that the FTCA does not provide a private right of action).

tion statutes to give consumers a way to sue businesses acting unfairly.[91] Second, California law is likely to apply to uberX drivers' claims against Uber because Uber's driver agreements contain a California choice of law provision.[92] Therefore, this Note focuses on Uber's potential liability to uberX drivers under California's UCL.[93]

Like many other unfair competition laws, California's UCL prohibits "unfair . . . business act[s] or practice[s]," among other types of unethical behavior.[94] The UCL purports to ameliorate the societal harm caused by businesses acting unethically in a variety of contexts.[95] Almost any conduct in commercial markets for goods and services constitutes a business practice under the UCL.[96] Both public prosecutors and private individuals can sue under the

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[91] *See, e.g.*, CAL. BUS. & PROF. CODE §§ 17203–17204 (providing that "[a]ny person who engages . . . in unfair competition may be enjoined," "by [any] person who has suffered injury in fact and has lost money or property as a result of the unfair competition"); 815 ILL. COMP. STAT. ANN. 505/2, 505/10a (2012) (stating that "[u]nfair methods of competition and unfair or deceptive acts or practices . . . in the conduct of any trade or commerce are hereby declared unlawful," and that "[a]ny person who suffers actual damage as a result of a violation of this Act committed by any other person may bring an action against such person"); MASS. GEN. LAWS ch. 93A, §§ 2(a), 9(1) (2012) (stating that "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful," and "[a]ny person . . . who has been injured . . . may bring an action in the superior court"); *see also* Helfman, *supra* note 12, at 229–30 (describing how many states have adopted unfair competition statutes modeled after the FTCA or one of the three model statutes promulgated by the FTC).

[92] *See* O'Connor v. Uber Tech., Inc., No. C–13–3826, 2014 WL 4382880, at *1, *11 (N.D. Cal. Sept. 4, 2014) (upholding Uber's contractual choice of law provision, but ultimately refusing to apply California law extraterritorially); Ehret v. Uber Tech., Inc., No. C–14–0113, 2014 WL 4640170, at *1, *4–5 (N.D. Cal. Sept. 17, 2014) (allowing an out-of-state consumer's UCL claims against Uber to proceed).

[93] *See infra* notes 94– 243 and accompanying text (analyzing Uber's potential liability to uberX drivers under California's UCL).

[94] CAL. BUS. & PROF. CODE §§ 17200, 17203; *see* 815 ILL. COMP. STAT. ANN. 505/2; MASS. GEN. LAWS ch. 93A, § 2(a). California's UCL proscribes many types of unfair competition, including unfair business practices, unlawful business practices, fraudulent business practices and misleading advertising. *See* CAL. BUS. & PROF. CODE § 17200. Although these prongs of liability are not mutually exclusive, this Note is only concerned with the "unfair" business practices prong of liability. *See infra* notes 95–243 and accompanying text; *see also* Sharon J. Arkin, *The Unfair Competition Law After Proposition 64: Changing the Consumer Protection Landscape*, 32 W. ST. U. L. REV. 155, 157 (2005) (explaining that although the California UCL has multiple prongs of liability, the vast majority of lawsuits are predicated on unlawful, unfair, and/or fraudulent business practices).

[95] *See* Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 539–40 (Cal. 1999) (stating that the "sweeping" language of the UCL gives courts latitude to enjoin new, creative unfair business schemes as they arise); Arkin, *supra* note 94 (discussing the UCL's broad intent to protect all of society, including business competitors and the consuming public).

[96] *See* Celebrity Chefs Tour, LLC, v. Macy's, Inc., 16 F. Supp. 3d 1159, 1169–70 (S.D. Cal. 2014) (holding that distributing a television show for broadcast constituted a business practice); Drum v. San Fernando Valley Bar Ass'n, 106 Cal. Rptr. 3d 46, 48, 51–52 (Cal. Ct. App. 2010) (treating the bar association's refusal to sell its membership list as a business practice and applying several tests for unfairness under the UCL). *But see* Tecza v. Univ. of S.F., 532 Fed. App'x 667, 668–69 (9th Cir. 2013) (holding that disclosure of a student's private medical information was not a business practice).

UCL.[97] To establish standing, plaintiffs must demonstrate that the business practice that caused them economic injury that is at the core of the claim.[98] The bar for demonstrating a cognizable injury under California's UCL is very low.[99] Restitution and injunctive relief are the only remedies available to individual plaintiffs, however, because courts assume that plaintiffs will seek damages through other legal avenues.[100]

The standard California courts use to evaluate whether conduct is unfair depends on whether the plaintiff is a competitor or a consumer.[101] A competitor alleging unfair business practices must prove that the conduct violated antitrust

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[97] CAL. BUS. & PROF. CODE § 17204 (stating that "[a]ctions for relief pursuant to this chapter shall be prosecuted . . . by the Attorney General or a district attorney . . . or by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition").

[98] *See id.*; Kwikset Corp. v. Superior Court, 246 P.3d 877, 884–85 (Cal. 2011) (explaining the UCL's standing requirements). Plaintiffs whose claims are based on a business's misrepresentations must also demonstrate actual reliance to have standing. *See In re* iPhone Application Litig., 6 F. Supp. 3d 1004, 1015 (N.D. Cal. 2013) (dismissing plaintiffs' UCL claims for failure to establish actual reliance on the defendant's misrepresentations about its data collection and privacy practices). California's UCL did not require plaintiffs to demonstrate any injury until voters passed Proposition 64 in 2004, which tightened the UCL standing provisions to require plaintiffs to demonstrate an injury in fact. *See* 2004 Cal. Legis. Serv. Prop. 64 (West) (codified as amended at CAL. BUS. & PROF. CODE §§ 17203, 17204, 17206, 17535, 17536 (West 2012)); Arkin, *supra* note 94, at 156, 167–69 (explaining that Proposition 64 requires plaintiffs to demonstrate an actual economic injury, not merely a prospective or possible injury, because plaintiffs' attorneys abused the UCL).

[99] *See Kwikset*, 246 P.3d at 885–86 (stating that the economic injury requirement is not difficult to satisfy; it can even consist of overpaying in a transaction). Most states with unfair competition laws require plaintiffs to demonstrate an actual economic injury in order to have standing. *See* Camasta v. Jos. A. Bank Clothiers, Inc., 761 F.3d 732, 740 (7th Cir. 2014) (interpreting "actual damage" requirement of Illinois's unfair competition statute to require the plaintiff to demonstrate actual pecuniary loss, such as paying more for an item than it is worth); Helfman, *supra* note 12, at 233 (indicating that most states predicate standing for unfair competition lawsuits on actual injury). *But see* Ruiz v. Bally Total Fitness Holding Corp., 496 F.3d 1, 5 (1st Cir. 2007) (holding that an injury sufficient to establish standing under Massachusetts's unfair competition statute can consist of an economic or non-economic loss).

[100] *See* CAL. BUS. & PROF. CODE §§ 17203, 17205 (stating that anyone who "engage[s] in unfair competition may be enjoined"; that "[a]ny person may pursue representative claims for relief on behalf of others only if the claimant meets the standing requirements"; and "the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state"); *Cel-Tech*, 973 P.2d at 539 (noting that private plaintiffs' UCL remedies are limited to injunctive relief and restitution); Helfman, *supra* note 12, at 232–33 (stating that states enacted unfair competition laws to enjoin bad business behavior because common law remedies were not always effective). Public prosecutors can also seek civil penalties under the UCL. CAL. BUS. & PROF. CODE § 17206 (providing that "[a]ny person who engages . . . in unfair competition shall be liable for a civil penalty . . . which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General" or other public prosecutors).

[101] *See Drum*, 106 Cal. Rptr. 3d at 51 (noting that the test for unfair business practices differs based on whether the plaintiff is a competitor or a consumer of the defendant). Whether a business practice is unfair under the UCL is a factual issue. Countrywide Fin. Corp. v. Bundy, 113 Cal. Rptr. 3d 705, 723 (Cal. Ct. App. 2010).

law or policy or otherwise harmed competition.[102] A consumer, however, can establish unfairness under three different standards used by the appellate courts.[103] Regardless of which standard applies, the legislature intended courts to construe the UCL's unfairness prong broadly to allow them to strike down new, harmful business schemes as they arise.[104]

B. Friend or Foe?: Distinguishing Between Consumer and Business Competitor UCL Claims

Courts evaluating claims under the UCL's unfairness prong must first decide whether the plaintiffs are competitors or consumers of the defendants, because competitors must satisfy a stricter standard of unfairness.[105] If plaintiffs allege that the defendants' actions harmed their particular businesses or competition generally, courts will treat them as competitors of the defendant.[106] For example, in 1999, in *Cel-Tech Communications, Inc. v. Los Angeles*

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[102] *See Cel-Tech*, 973 P.2d at 544 (adopting a standard for unfair business practices that applies when a plaintiff brings a UCL claim against a direct competitor, which is grounded in antitrust principles). Anticompetitive practices tend to reduce competition and are the target of antitrust legislation. *See id.* at 543–54 (looking to the FTCA and federal antitrust law to determine what constitutes anticompetitive conduct); Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 238–41 (1980) (explaining that violations of the Sherman Act, such as price fixing, and Clayton Act, such as forming an agreement that will create a monopoly, can serve as the basis for unfair competition lawsuits under the FTCA).

[103] *See Drum*, 106 Cal. Rptr. 3d at 53–54 (describing three lines of consumer UCL cases that emerged after the Supreme Court of California decided *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* in 1999, all applying different standards for unfairness). The Supreme Court of California has not decided which test is proper in consumer lawsuits. *Id.* at 53.

[104] *See Cel-Tech*, 973 P.2d at 540 (stating that the legislature intended the standard for unfairness to be broad enough to allow courts to enjoin "innumerable new schemes which the fertility of man's invention would contrive") (internal quotation marks omitted); People *ex rel.* Mosk v. Nat'l Research Co. of Cal., 20 Cal. Rptr. 516, 520–21 (Cal. Ct. App. 1962) (stating that because unfair business schemes "may run the gamut of human ingenuity and chicanery," the legislature must have intended the UCL to be inclusive); Helfman, *supra* note 12, at 231–33 (explaining that the purpose of state unfair competitions laws is to provide a broader cause of action with broader remedies than the FTCA).

[105] *See, e.g.*, Rankin v. Global Tel*Link Corp., No. 13–cv–01117–JCS, 2013 WL 3456949, at *16 (deciding to treat plaintiff as a competitor rather than consumer before applying the competitor test for unfairness); *Cel-Tech*, 973 P.2d at 544 & n.12 (Cal. 1999) (adopting a narrow, antitrust policy-based standard for unfairness for competitor lawsuits and stating that nothing in the opinion relates to consumer actions); Progressive W. Ins. Co. v. Yolo Cnty. Superior Court, 37 Cal. Rptr. 3d 434, 453 (Cal. Ct. App. 2005) (opining that the narrower standard of unfairness used in competitor cases is inappropriate for consumer cases because consumers are more vulnerable than businesses). Some courts will avoid deciding whether a plaintiff is a consumer or competitor if they find that the plaintiff failed to meet either standard of unfairness. *See Drum*, 106 Cal. Rptr. 3d at 51 (holding that the court need not determine whether the plaintiff was a competitor or consumer because the plaintiff failed to satisfy either standard of unfairness).

[106] *See, e.g.*, Levitt v. Yelp! Inc., 765 F.3d 1123, 1136–37 (9th Cir. 2014) (applying the competitor standard of unfairness because the plaintiffs were business owners who claimed the defendant's actions hurt their business prospects); *Rankin*, 2013 WL 3456949, at *16 (utilizing the competitor test

Cellular Telephone Co., the Supreme Court of California treated the plaintiff and defendant as competitors under the UCL.[107] The plaintiff, a cell phone retailer, accused another cell phone retailer of below-market pricing, an anti-competitive practice.[108] Similarly, in 2014, in *Levitt v. Yelp! Inc.*, the Ninth Circuit for the U.S. Court of Appeals held that the plaintiff and defendant were competitors.[109] Although the small business owners who sued Yelp! Inc. did not compete with the defendant directly, they alleged harm to competition as a result of Yelp!'s conduct.[110]

If the plaintiffs suing under the unfair business practices prong of the UCL do not claim that the defendants caused them business injuries or engaged in anti-competitive activities, however, the court will treat them as consumers.[111] As such, California courts have treated defendants' employees and customers both as consumers for the purposes of their UCL claims.[112] For instance, in 2012 in *Aleksick v. 7-Eleven, Inc.*, California's Fourth District Court of Appeal treated a franchise employee as a consumer in her suit against the franchisor based on its payroll practices.[113] Likewise, in 2014 in *Ehret v. Uber Technologies, Inc.*, the U.S. District Court for the Northern District of Califor-

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of unfairness because the plaintiff alleged that the defendant monopolized the market); *Cel-Tech*, 973 P.2d at 544–46 (holding that the competitor standard of unfairness applied to the cell phone seller's claims that its direct competitor sold cell phones at a loss to drive the plaintiff out of business).

[107] *See Cel-Tech*, 973 P.2d at 545 (applying the competitor standard of unfairness).

[108] *Id.* at 532–33.

[109] *See Levitt*, 765 F.3d. at 1136 (applying the competitor standard of unfairness after the small business owners conceded its applicability to their claims).

[110] *See id.* (noting that although the small business owners did not compete with Yelp!, they alleged a loss of competitiveness); *see also Rankin*, 2013 WL 3456949, at *16 (treating the plaintiff bail bond company as a business competitor because the first amended complaint alleged harm to competition); First Amended Complaint at 10, *Rankin*, 2013 WL 3456949 (3:13-cv-01117-JCS) (alleging that the disruption in defendant's telephone services damaged the plaintiff's business and hurt competition within the bail bonds industry).

[111] *See, e.g.*, *Ehret*, 2014 WL 4640170, at *10 (treating the plaintiff as a consumer because she argued that the fees she paid to Uber were unfair); McKell v. Wash. Mut., Inc., 49 Cal. Rptr. 3d 227, 240–41 (Cal. Ct. App. 2006) (treating the plaintiffs as consumers because they alleged that their mortgage lender overcharged borrowers for underwriting); Wilner v. Sunset Life Ins. Co., 93 Cal. Rptr. 2d 413, 422–23 (Cal. Ct. App. 2000) (treating the plaintiff policyholder as a consumer because she claimed her insurer's deceptive sales tactics were unfair).

[112] *See, e.g.*, Donohue v. Apple, Inc., 871 F. Supp. 2d 913, 916, 928 (N.D. Cal. 2012) (applying a consumer standard for unfairness to an Apple customer's claims); Aleksick v. 7-Eleven, Inc., 140 Cal. Rptr. 3d 796, 807–08 (Cal. Ct. App. 2012) (applying a consumer standard for unfairness to the franchise employee's claims against a franchisor); *Wilner*, 93 Cal. Rptr. at 422–23 (applying the consumer standard of unfairness in to the policyholder's claims against the insurer from whom she purchased insurance). To be considered a consumer under the UCL, a plaintiff need not transact business with the defendant, but he or she must be able to establish standing. *See* Camacho v. Auto. Club of S. Cal., 48 Cal. Rptr. 3d 770, 773, 779 (Cal. Ct. App. 2006) (treating a debtor as a consumer in his lawsuit against a debt collector for its collection practices, but dismissing his case because he lacked an injury).

[113] *Aleksick*, 140 Cal. Rptr. at 807–08 (applying the consumer standard of unfairness to the employee's claims that the franchisor's payroll practices deprived her of income).

nia treated a rider suing Uber over its fees as a consumer.[114] Because courts subject consumers to different standards of unfairness, determining whether plaintiffs are competitors or consumers is a threshold issue for courts.[115]

C. All Plaintiffs Are Not Created Equal: Different Standards of Unfairness for Business Competitors and Consumers Suing Under the UCL

California courts apply different standards to determine whether business activities are unfair under the UCL depending on whether the plaintiff is a business competitor or a consumer.[116] For claims brought by competitors, courts apply a narrow antitrust standard of unfairness referred to as the *Cel-Tech* test.[117] Most competitor claims are dismissed under this test, however, because it is difficult to plausibly plead harm to competition.[118]

California courts apply three different tests to determine unfairness in UCL claims brought by consumers, however, because the Supreme Court of California has not yet adopted a uniform standard.[119] Accordingly, this Section

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[114] *Ehret*, 2014 WL 4640170, at *10 (applying the consumer standard of unfairness to the customer's claims that she paid more for the transaction than she would have if Uber had not misrepresented its fees).

[115] *See Rankin*, 2013 WL 3456949, at *16 (deciding that the plaintiff was a competitor before analyzing whether the defendant's conduct was unfair under the competitor standard). *But see Drum*, 106 Cal. Rptr. at 51, 54 (refusing to decide whether the plaintiff was a competitor or consumer yet affirming the dismissal for failure to state a UCL claim).

[116] *See* Zhang v. Superior Court, 304 P.3d 163, 174 n.9 (Cal. 2013) (pointing out the various standards for unfairness that appellate courts apply to consumer UCL actions); *Cel-Tech*, 973 P.2d at 544 & n.12 (adopting a new test for unfairness to be used in competitor UCL lawsuits but stating that its opinion does not apply to consumer lawsuits).

[117] *Cel-Tech*, 973 P.2d at 544 (holding that a business practice is unfair to competitors if it "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws . . . or otherwise significantly threatens or harms competition"). Since *Cel-Tech*, courts have applied this anticompetitive standard for unfairness to all UCL claims brought by competitors. *See, e.g.*, *Levitt*, 765 F.3d at 1136 (applying the *Cel-Tech* test for unfairness to business competitors' UCL claims); *Rankin*, 2013 WL 3456949, at *16 (same); *Drum*, 106 Cal. Rptr. 3d at 51 (same).

[118] *See, e.g.*, *Levitt*, 765 F.3d at 1136–37 (dismissing small business owners' allegations that Yelp! harmed competition by manipulating ratings of certain business because plaintiffs failed to demonstrate how it violated antitrust principles); *Rankin*, 2013 WL 3456949, at *16 (dismissing bail bond company's claims against prison telephone service provider because plaintiff failed to demonstrate that defendant created a monopoly or otherwise violated antitrust law); *Drum*, 106 Cal. Rptr. 3d at 51–52 (dismissing plaintiff's claim based on defendant's refusal to sell him its mailing list because an independent actor refusing to deal does not implicate antitrust law, even if it affects prices). *But see Cel-Tech*, 973 P.2d at 546 (remanding the case for trial, noting that the unusual circumstances might satisfy the new standard for unfairness). Pleading harm to one's business prospects is insufficient to satisfy the *Cel-Tech* standard of unfairness. *See id.* at 544 (noting that "injury to a competitor" does not establish harm to competition or implicate antitrust law).

[119] *See* Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 736 (9th Cir. 2007) (observing that the California courts have not yet decided what is the standard for unfair business practices when consumers sue under the UCL, and explaining three different standards that have emerged); *Zhang*, 304 P.3d at 174 n.9 (noting that *Cel-Tech* did not resolve the issue of which standard for unfairness applies in consumer actions); *see also Camacho*, 48 Cal. Rptr. 3d at 776–77 (applying the "section 5

examines the different consumer tests for unfairness available to plaintiffs.[120] Subsection 1 describes the balancing test for unfairness, which predated *Cel-Tech*.[121] Subsection 2 discusses a policy-based standard of unfairness that some courts adopted after *Cel-Tech*, which this Note refers to as the "revised *Cel-Tech* test."[122] Lastly, Subsection 3 explains the "section 5 test" for unfairness, which some courts developed by looking to the FTCA, just as *Cel-Tech* did.[123]

1. The Balancing Test for Unfair Business Practices

Many California courts apply a balancing test to determine if a business practice is unfair to consumers under the UCL.[124] Under the balancing test, courts weigh the utility of the conduct against the gravity of the harm to the consumer.[125] Conduct is unfair if it "violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits."[126] This balancing test previously applied to all plaintiffs' allegations of unfair business practices, until *Cel-Tech* held in 1999 that competitors must use a narrower test.[127] Thus, not surprisingly, some low-

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test" for unfairness to a consumer's UCL claim, based on the FTCA's definition of unfair business practices); Gregory v. Albertson's, Inc., 128 Cal. Rptr. 2d 389, 395 (Cal. Ct. App. 2002) (applying a test (that this Note refers to as the revised *Cel-Tech* test) which defines unfair business practices as violative of a public policy that is tied to specific legislation); *Wilner*, 93 Cal. Rptr. 2d at 422–23 (applying the balancing test for unfair business practices).

[120] *See infra* notes 124–179 and accompanying text.

[121] *See infra* notes 124–154 and accompanying text.

[122] *See infra* notes 155–169 and accompanying text.

[123] *See infra* notes 170–179 and accompanying text.

[124] *See, e.g.*, *McKell*, 49 Cal. Rptr. 3d at 240 (holding that test for unfairness involves weighing utility of defendant's conduct against harm to plaintiff); *Progressive*, 37 Cal. Rptr. 3d at 453 (concluding that balancing test should apply in consumer actions, and allowing case to proceed so that defendant could present evidence justifying its seemingly unethical practice); *Wilner*, 93 Cal. Rptr. 2d at 422 (holding that the test for whether a practice is unfair to consumers involves balancing the impact on the plaintiff against the defendant's justifications for the conduct).

[125] *See Wilner*, 93 Cal. Rptr. 2d at 422.

[126] *McKell*, 49 Cal. Rptr. 3d at 240. In 2000, in *Wilner v. Sunset Life Insurance Co.*, California's Second District Court of Appeal framed the test slightly differently, stating that conduct is unfair if it "offends an established public policy" or "is immoral, unethical, oppressive, unscrupulous *or* substantially injurious to consumers" (emphasis added) (internal quotation marks omitted). *Wilner*, 93 Cal. Rptr. 2d at 422.

[127] *See Cel-Tech*, 973 P.2d at 543 (holding that the balancing test for unfairness no longer applies in competitor claims because it is "too amorphous" to provide meaningful guidance to businesses). *Cel-Tech* also described the balancing test that lower courts use to define unfairness. *Id.*; *see* State Farm Fire & Cas. Co. v. Superior Court, 53 Cal. Rptr. 2d 229, 234–35 (Cal. Ct. App. 1996) (stating that courts "must weigh the utility of the defendant's conduct against the gravity of harm to the alleged victim") (internal quotation marks omitted); People v. Casa Blanca Convalescent Homes, Inc., 206 Cal. Rptr. 164, 177 (Cal. Ct. App. 1994) (stating that a business practice is unfair if it "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers"); Motors, Inc. v. Times Mirror Co., 162 Cal. Rptr. 543, 546 (Cal. Ct. App. 1980) (stating that determining "whether a particular business practice is unfair neces-

er courts still hold that the balancing test is proper for evaluating unfairness in consumer claims, as *Cel-Tech* did not deal with consumers.[128] Although the balancing test is imprecise, its flexibility allows courts greater discretion to protect consumers, who are more vulnerable to abuse than business competitors.[129]

This flexible balancing test allows courts to intervene when a business engages in a pattern of misleading the public.[130] For example, in 2000, in *Wilner v. Sunset Life Insurance Co.*, California's Second District Court of Appeal held that an insurer's sales practices were unfair under the UCL.[131] Sunset Life Insurance Co. ("Sunset") convinced customers to replace their existing whole or term life insurance, bought from other companies, with Sunset's universal life insurance by deceiving them about their benefits and premiums.[132] Further, Sunset failed to determine whether universal life insurance was suitable for the new customers and concealed the inferiority of the product, despite knowing that the product was inappropriate for most people.[133] Weighing the harm to the deceived policyholders against Sunset's lack of justification for its "immoral, unethical and unscrupulous" sales practices, the court found the practice was unfair under the UCL.[134]

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sarily involves an examination of its impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer").

[128] *See, e.g.*, *Progressive*, 37 Cal. Rptr. 3d at 453 (Cal. Ct. App. 2006) (applying the balancing test because (1) *Cel-Tech* did not disapprove of its use in consumer claims, (2) the state Supreme Court has not yet overruled it, and (3) the statutory term "unfair" should be construed broadly to fulfill the legislative intent); *McKell*, 49 Cal. Rptr. 3d at 240 (applying the balancing test); *Wilner*, 93 Cal. Rptr. 2d at 422 (applying the balancing test).

[129] *See Cel-Tech*, 973 P.2d at 543 (calling the balancing test "vague"); *Progressive*, 37 Cal. Rptr. 3d at 453 (stating that the balancing test should apply in consumer actions because its broad reach enables courts to better protect consumers, who lack resources to protect themselves from unscrupulous businesses); *see also* Leslie E. Schuster, *For the "Deals" No Shopper Could Pass Up: The Ninth Circuit's Interpretation of California's False Advertising Law in* Hinjos v. Kohl's Corporation, 47 LOY. L.A. L. REV. 1049, 1056–1058 (2014) (discussing the psychological factors that influence consumer behavior and decision-making).

[130] *See, e.g.*, *Ehret*, 2014 WL 4640170, at *1 (noting the plaintiff's allegation that the transportation network company had a pattern of disguising its fees as driver gratuities); *McKell*, 49 Cal. Rptr. 3d at 234 (noting that the mortgage lender had a pattern of overcharging mortgagors for underwriting); *Progressive*, 37 Cal. Rptr. 3d at 438–39 (describing the plaintiff's allegations that the insurer had a pattern of demanding reimbursement without regard to whether it was legally entitled to the money); *Wilner*, 93 Cal. Rptr. 2d at 416, 422 (finding that the insurer had a pattern of selling unsuitable replacement insurance policies to new customers).

[131] *Wilner*, 93 Cal. Rptr. 2d at 422.

[132] *Id.* at 422–24. Sunset tricked customers into believing that their replacement policies provided greater death benefits for the same (or lower) premiums than their existing policies, when in fact the premiums for the replacement policies would certainly rise. *Id.* at 423.

[133] *Id.* at 422. The court noted that Sunset's deceptive methods for selling the policies to new customers differed from the procedures it followed when selling the policies to preexisting customers. *Id.* at 423. For its preexisting customers, Sunset conducted suitability determinations and cost-benefit analyses for the policyholders before selling them universal life insurance. *Id.*

[134] *Id.* at 423–24 (citing *State Farm*, 53 Cal. Rptr. 2d at 235).

Similarly, in 2006, in *Progressive West Insurance Co. v. Yolo County Superior Court*, California's Third District Court of Appeal applied the balancing test and allowed an insured's UCL claim against his insurer to proceed.[135] Progressive West Insurance Co. ("Progressive") misrepresented its rights with respect to policyholders and demanded reimbursements to which it was not necessarily entitled.[136] Just as in *Wilner*, the court deemed the insurer's practice "immoral, unethical, oppressive, unscrupulous or substantially injurious" to claimants.[137] It also noted that Progressive had not yet provided a reason or motive to justify its practices.[138] Thus, the court held that the plaintiff properly stated a claim under the unfairness prong of the UCL.[139]

Courts also use the balancing test to protect consumers from businesses that disguise their costs and fees.[140] For instance, in 2006, in *McKell v. Washington Mutual, Inc.*, California's Second District Court of Appeal allowed a homeowners' UCL suit to proceed against their mortgage lender for its misrepresenting underwriting costs.[141] The lender misled borrowers about the cost of the federal government's automated underwriting program, charging them substantially more for the service than it cost.[142] The lender's defense, that the court should not get involved with its fee practices because lending is already heavily regulated, did not justify the harm it caused homeowners from failing to pass on savings accrued from automatic underwriting[143] Further, the lender's overcharging homeowners undermined established federal public policy aimed at increasing home ownership by making underwriting cheaper and faster.[144] Therefore, the court held that the lender's fees were potentially unfair under the UCL.[145]

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[135] *Progressive*, 37 Cal. Rptr. 3d at 438–39, 453.

[136] *Id.* at 453. The plaintiff alleged that the insurer acted in bad faith by seeking full reimbursement of medical payments from payees, even though multiple common law doctrines limit an insurer's right to reimbursement. *Id.* at 438–39.

[137] *Id.* at 453 (internal quotation marks omitted).

[138] *Id.*

[139] *Id.* at 450.

[140] *See Ehret*, 2014 WL 4640170, at *9–10 (holding that the Uber customer stated a UCL claim against the transportation network company for disguising its fees as driver gratuities); *McKell*, 49 Cal. Rptr. 3d at 235, 237 (holding that the mortgage holder stated a UCL claim against the lender for disguising the true cost of underwriting from customers).

[141] *McKell*, 49 Cal. Rptr. 3d at 235, 237.

[142] *Id.* at 235. The lender charged borrowers hundreds of dollars for automated underwriting and did not disclose that it actually only cost the bank twenty dollars to perform. *Id*. The bank also charged some borrowers for underwriting services that it did not provide. *Id.*

[143] *Id.* at 241

[144] *See id.* at 235, 240–41 (explaining the federal policy underlying the automatic underwriting program as increasing homeownership by lowering borrowing costs, reducing underwriting risks, and speeding up the process).

[145] *See id.* at 241 (holding that the plaintiffs sufficiently alleged unfair business practices under the UCL); *see also State Farm*, 53 Cal. Rptr. 2d at 235 (stating that a business practice is unfair if it "offends established public policy").

Likewise, in *Ehret*, the court used the balancing test to allow the Uber passenger's UCL claim against Uber to proceed.[146] Uber represented to riders that the twenty percent fee tacked on to all fares was a driver gratuity, when in fact Uber kept a substantial portion of that fee.[147] Applying the balancing test for unfairness, the court noted that Uber provided no justification for the practice that could outweigh the plaintiff's injury, i.e., that she paid more than she would have for the transaction but for Uber's misrepresentations.[148] Therefore, Uber's practice of disguising fees as driver gratuities was at least arguably unfair, and the customer's UCL claim was allowed to proceed.[149]

On the other hand, a company's poor product design alone is unlikely to satisfy the balancing test for unfair business practices.[150] For example, in 2012, in *Donohue v. Apple, Inc.*, the U.S. District Court for the Northern District of California dismissed a customer's UCL claim against his cell phone's manufacturer.[151] The customer alleged that the manufacturer, Apple, Inc. ("Apple") designed a new signal meter that artificially inflated the phone's apparent signal strength.[152] The court applied the balancing test and determined that Apple's use of a faulty signal meter in its phones was not "immoral, unethical, oppressive or unscrupulous" absent evidence that Apple intended to mislead or

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[146] *Ehret*, 2014 WL 4640170, at *10.

[147] *Id.* Uber keeps half of the driver "gratuity," or ten percent of the overall fare. Boston Cab Dispatch, Inc. v. Uber Techs., Inc., No. 13-10769-NMG, 2014 WL 1338148, at *2 (D. Mass. Mar. 27, 2014).

[148] *Boston Cab*, 2014 WL 1338148, at *6, *10 (describing the plaintiff's alleged injury as surrendering more in the transaction than she otherwise would have due to Uber's misrepresenting its fees as driver gratuities). The fact that the twenty percent fee was mandatory did not factor in determining whether the plaintiff's injury was sufficient to establish standing. *Id.* at *7.

[149] *See id.* at *7. (allowing the plaintiff's UCL claim to proceed because no evidence existed at the motion to dismiss stage of Uber's justification for calling its fees driver gratuities); *see also State Farm*, 53 Cal. Rptr. 2d at 234 (stating that to test whether a business practice is unfair, courts must weigh the wrongdoer's justifications against the victim's injury).

[150] *See Donohue*, 871 F. Supp. 2d at 928 (dismissing the plaintiff's UCL claim based on the new design of the phone's signal meter because there existed no evidence that the manufacturer purposefully designed the signal meter to artificially inflate signal strength). There was no precedent showing that a poor product design, without related misrepresentations or knowledge of the product design's danger, can constitute an unfair business practice. *Id.*; *cf.* Peterson v. Mazda Motor of Am., Inc., 44 F. Supp. 3d 965, 973 (C.D. Cal. 2014) (holding that the consumer adequately stated claim under the unfairness prong of the UCL because the vehicle manufacturer knew that the cars had an assembly defect that would likely result in dangerous and costly engine problems for buyers, and the manufacturer had not argued the utility of its conduct).

[151] *Donohue*, 871 F. Supp. 2d at 928.

[152] *Id.* at 927 (describing the plaintiff's UCL claim based on the flawed signal meter design). Instead of incorporating formulas recommended by wireless network providers to determine signal strength of the phones, Apple developed its own secret formula based on a series of tests that, in retrospect, were flawed. *Id.* at 917. Apple publicly acknowledged and fixed its signal meter design flaw soon after the product launched. *Id.*

deceive customers about connectivity.[153] Therefore, the court found the design was not unfair under the UCL.[154]

2. The Revised *Cel-Tech* Test for Unfair Business Practices

As an alternative to the balancing test, a series of consumer UCL cases use a policy-based test for unfairness adapted from the competitor test laid out in *Cel-Tech*.[155] Under this revised *Cel-Tech* test, a business practice is unfair to consumers if it violates a public policy that is "'tethered' to specific constitutional, statutory or regulatory provisions."[156] Lower courts justified adopting this new test by pointing to language in *Cel-Tech*, which criticized the balancing test as "too amorphous," and reading such criticisms as overruling the balancing test entirely.[157] By requiring a public policy violation to be tethered to a specific law, the revised *Cel-Tech* test addresses the Supreme Court of California's concerns about vagueness, making for a stricter alternative to the balancing test.[158]

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[153] *Id.* at 928 (noting that without facts showing that Apple knowingly installed a flawed signal meter or made misrepresentations about it, the court will not get involved); *see McKell*, 49 Cal. Rptr. 3d at 240 (stating that a business practice is unfair if it is "immoral, unethical, oppressive or unscrupulous") (internal quotation marks omitted); *cf. Peterson*, 44 F. Supp. 3d at 973 (noting the plaintiff's allegations that the manufacturer knew that its engine design put the public safety at risk).

[154] *Donohue*, 871 F. Supp. 2d at 927–28.

[155] *Compare* Graham v. Bank of Am., N.A., 172 Cal. Rptr. 3d 218, 233–34 (Cal. Ct. App. 2014) (adopting what this Note refers to as the revised *Cel-Tech* test and stating that an unfair business practice must be "tethered" to a specific law or public policy), *and Aleksick*, 140 Cal. Rptr. 3d at 807 (stating that an unfair competition claim must be predicated on a public policy that is tied to a specific law), *with Cel-Tech*, 973 P.2d at 544 (defining unfair business practices as violating or threatening to violate antitrust law or policy).

[156] *See Gregory*, 128 Cal. Rptr. 2d at 395 (establishing the revised *Cel-Tech* test for unfairness) (quoting *Cel-Tech*, 973 P.2d at 543).

[157] *Cel-Tech*, 973 P.2d at 543 (referring to the definitions of unfairness under the balancing test as "too amorphous and provid[ing] too little guidance to courts and businesses"); *see Gregory*, 128 Cal. Rptr. 2d at 394–95, 395 n.3 (disapproving of other California courts that continue to apply the balancing test and reading *Cel-Tech* as signaling that the balancing test for unfairness is too vague in any context); *see also Graham*, 172 Cal. Rptr. 3d at 233–34 (following the *Gregory* rationale and rejecting the balancing test); *Aleksick*, 140 Cal. Rptr. 3d at 807 (same). Critics of the revised *Cel-Tech* test disagree, and point out that the Supreme Court of California explicitly stated that it did not want *Cel-Tech*'s narrow test to apply to consumers. *See Cel-Tech*, 973 P.2d at 544 n.12 ("This case involves an action by a competitor alleging anticompetitive practices. Our discussion and this test are limited to that context. Nothing we say relates to actions by consumers . . . ."); *Progressive*, 37 Cal. Rptr. 3d at 543 (refusing to apply the *Cel-Tech* language to consumer actions because the Supreme Court explicitly declined to extend its holding to consumers).

[158] *Compare Cel-Tech*, 973 P.2d at 543 (stating that "vague references to 'public policy,' for example, provide little real guidance"), *and* Scripps v. Superior Court, 134 Cal. Rptr. 2d 101, 116–18 (Cal. Ct. App. 2003) (applying the revised *Cel-Tech* test to the consumer's action because, as the *Cel-Tech* court pointed out, it is the role of the legislature, not the courts, to decide which business practices are unfair), *and Gregory*, 128 Cal. Rptr. 2d at 395 (holding that under the revised *Cel-Tech* test, unfair business practices must violate a public policy that is "tethered" to a specific law because *Cel-Tech* cautions against using the broader balancing test), *with McKell*, 49 Cal. Rptr. 3d at 240 (applying

Although the revised *Cel-Tech* test is arguably broader than the test for unfairness applied to competitors, it may undermine the broad purpose of the UCL, because it is difficult for consumers to overcome.[159] For example, in 2002, in *Gregory v. Albertson's, Inc.*, California's Second District Court of Appeal applied the revised *Cel-Tech* test and dismissed a citizen's UCL claim against a grocery chain.[160] There, the plaintiff alleged that the decision of Albertson's, Inc. ("Albertson's") to keep its leasehold space unoccupied to prevent a competitor from moving in was unfair under the UCL.[161] She alleged that this decision caused the entire surrounding shopping center to deteriorate, in violation of public policy against urban blight found in California's Health and Safety Code's Community Redevelopment Law.[162] The court rejected these arguments as a matter of law, because to enforce the policy against urban blight would infringe on a separate state policy favoring freedom of contract.[163] Noting that the plaintiff's remaining allegations failed to sufficiently invoke antitrust policy or law, the court found that Albertson's conduct was not unfair.[164]

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the balancing test, which states that a business practice is unfair if it "violates established public policy" and does not require tethering the policy to a law).

[159] *See Cel-Tech*, 973 P.2d at 540 (stating that the legislature used "sweeping language" in the UCL to give courts broad latitude to enjoin a wide range of unethical conduct); *Camacho*, 48 Cal. Rptr. 3d at 776 (refusing to require consumer claims under the UCL's unfairness prong to be tethered to a legislative provision because it would undermine the broad purpose of UCL); *see also Aleksick*, 140 Cal. Rptr. 3d at 807–08 (holding that a franchisor's method of calculating employees' wages was not unfair because the Labor Code provisions invoked did not apply to the franchisor); *Gregory*, 128 Cal. Rptr. 2d at 395 (finding that a grocery chain's decision to keep its store unoccupied to prevent competitors from moving in was not unfair because the law that the plaintiff invoked did not provide a private right of action). Still, the revised *Cel-Tech* test is arguably more flexible than the *Cel-Tech* competitor test because almost any policy violation tied to a law can serve as the basis for claim, not just antitrust policy or law. *Compare Cel-Tech*, 973 P.2d at 544 (holding that unfair business practices must implicate *antitrust* policy or law) (emphasis added), *with Gregory*, 128 Cal. Rptr. 2d at 395 (holding that unfair business practices can implicate *any* public policy, as long as the policy is grounded in a specific law).

[160] *Gregory*, 128 Cal. Rptr. 2d at 397.

[161] *Id.* at 395–96.

[162] *Id.* at 395. The Community Redevelopment Law provides a means for the public to redevelop empty private property. *See* CAL. HEALTH & SAFETY CODE § 33035 (West 2010); *Gregory*, 128 Cal. Rptr. 2d at 395.

[163] *Gregory*, 128 Cal. Rptr. 2d at 395–96. The court noted that awarding an injunction against the grocery chain, Albertson's, would force them to enter into a commercial transaction. *Id.*

[164] *Id.* The plaintiff did not allege violation of any specific antitrust law, and her allegation that Albertson's acted with the motive of thwarting competition was insufficient; rather, she needed to allege that its conduct adversely affected competition. *See id.* Her allegation that the conduct reduced market choices also did not demonstrate diminished competition. *See id.* If the court had applied the balancing test to the allegations in *Gregory*, however, the case may have come out differently. *See McKell*, 49 Cal. Rptr. 3d at 240 (explaining the balancing test); *Gregory*, 128 Cal. Rptr. 2d at 390–91 (stating the plaintiff's allegations against the grocery store chain). Albertson's decision to leave its storefront empty for potentially the forty years remaining on its lease seems to violate the state's public policy against urban decay, which was established by laws favoring efficient use of land. *See McKell*, 49 Cal. Rptr. 3d at 240 (stating that under the balancing test, "[a] business practice is unfair

Similarly, in *Aleksick*, the court used the revised *Cel-Tech* test to dismiss a franchise employee's UCL claim against franchisor 7-Eleven, Inc. ("7-Eleven").[165] The employee alleged that 7-Eleven's payroll calculation methods violated the public policy favoring full payment of wages for all hours worked found in California's Labor Code.[166] The court held that the Labor Code provisions did not apply to 7-Eleven, however, because 7-Eleven was a franchisor, not an employer; thus, the plaintiff's allegations failed as a matter of law.[167] The payroll methods were therefore not unfair under the UCL.[168] Considering the outcomes in *Gregory* and *Aleksick*, the revised *Cel-Tech* test may bar consumer actions that the legislature would want to proceed.[169]

. . . if it violates established public policy"); *Gregory*, 128 Cal. Rptr. 2d at 395 (explaining how the Community Redevelopment Law allows the government to acquire vacant property through eminent domain and spend public funds to redevelop it). Albertson's actions also harm the consuming public without good reason; it forced people to travel farther to get groceries because Albertson's refused to operate in the space or let another grocery store move in. *See McKell*, 49 Cal. Rptr. 3d at 240 (stating that "the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim") (internal quotation marks omitted); *Gregory*, 128 Cal. Rptr. 2d at 390–91 (noting the plaintiff's allegation that Albertson's only justification for it conduct was to secure an advantage over competitors, which Albertson's did not rebut).

[165] *See Aleksick*, 140 Cal. Rptr. 3d at 798–99, 807–08.

[166] *Id.* at 798, 807–08. 7-Eleven required all of its franchise stores to use a truncation method of calculating payroll for their employees. *Id.* at 798. The plaintiff alleged that this practice violated several provisions of the Labor Code that pertain to overtime pay, unpaid wages, and minimum wages. *Id.* at 801.

[167] *Id.* at 802, 808. The plaintiff conceded that 7-Eleven, as a franchisor, was not her employer. *Id.* at 806.

[168] *Id.* at 808. If the court had applied the balancing test for unfairness to the employee's UCL claim in *Aleksick*, the case may have survived summary judgment. *See id.* at 798–99 (alleging that 7-Eleven's payroll practices unfairly denied the franchise employees part of their wages, in violation of Labor Code provisions that purport to ensure fair wage practices); *McKell*, 49 Cal. Rptr. 3d at 240 (stating that under the balancing test, "[a] business practice is unfair . . . if it violates established public policy"). On the other hand, however, 7-Eleven asserted that truncating wages was easier to do on the computers, and its expert opined that truncating did not reduce employee wages in the majority of pay periods. *See Aleksick*, 140 Cal. Rptr. 3d at 798–800 (describing the evidence and noting that the plaintiff sought to represent a class of injured 7-Eleven franchise employees); *McKell*, 49 Cal. Rptr. 3d at 240 (stating that the court must "examin[e] . . . [the] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer") (internal quotation marks omitted).

[169] *See Aleksick*, 140 Cal. Rptr. 3d at 808 (affirming summary judgment for the defendant); *Gregory*, 128 Cal. Rptr. 2d at 397 (affirming judgment on the pleadings in favor of defendant); Arkin, *supra* note 94, at 157 (noting that the purpose of the UCL and its predecessor, California Civil Code section 3369, is to protect the entire consuming public, so the law should not be applied narrowly); *see also Camacho*, 48 Cal. Rptr. 3d at 776 (stating that requiring unfair business practices to be tethered to a legislative provision undermines the broad purpose of the UCL, as well as the principle that a practice can be "unfair" without being "unlawful"); *Progressive*, 37 Cal. Rptr. 3d at 543 (refusing to require unfair business practices to be tethered to a specific law because the unfairness prong of the UCL is supposed to be interpreted broadly to provide adequate protection to vulnerable consumers).

3. The Section 5 Test for Unfair Business Practices

Instead of employing the balancing test or revised *Cel-Tech* test, a few California courts evaluate consumer UCL claims using the definition of unfair competition found in section five of the FTCA.[170] Under this "section 5 test," a business practice is unfair if: (1) the consumer suffered a substantial injury, (2) that he or she could not reasonably avoid, and (3) the benefits of the business practice do not outweigh the injury.[171] Courts that have adopted the section 5 test also read *Cel-Tech* as overturning the balancing test.[172] Taking a cue from *Cel-Tech* dicta, these courts look to the FTCA and import its definition of unfairness into consumer claims under the unfair business practices prong of the UCL.[173] These courts assert that the section 5 test is narrower than the flexible balancing test, thereby assuaging the Supreme Court of California's concerns about ambiguity.[174] Further, the section 5 test avoids the pitfalls of importing *Cel-Tech*'s narrow competitor standard of unfairness into consumer cases.[175]

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[170] *See, e.g.*, Zuniga v. Bank of Am. N.A., No. CV 14–06471, 2014 WL 7156403, at *6 (C.D. Cal. 2014) (citing *Camacho*, 48 Cal. Rptr. 3d at 776–77) (adopting the three-pronged test for unfairness delineated in section 5 of the FTCA); Davis v. Ford Motor Credit Co., 101 Cal. Rptr. 3d 697, 700 (Cal. Ct. App. 2009) (stating that the test for unfairness, laid out in 2006 by California's Second District Court of Appeal in *Camacho v. Automobile Club of Southern California*, guides its inquiry); *Camacho*, 48 Cal. Rptr. 3d at 776–77 (rejecting the revised *Cel-Tech* test and coining the section 5 test, based on the factors that define unfair competition under the FTCA); *see also* Federal Trade Commission Act § 5(n), 15 U.S.C. § 45(n) (2012)) (defining an act as unfair if it "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").

[171] 15 U.S.C. § 45(n); *Camacho*, 48 Cal. Rptr. 3d at 776–77 (looking to the FTCA for guidance and adopting the "section 5 test").

[172] *See, e.g.*, *Zuniga*, 2014 WL 7156403, at *6 (finding *Camacho*'s rationale for adopting the section 5 test convincing and finding unpersuasive the reasoning of courts that apply the revised *Cel-Tech* test and courts that refuse to admit that *Cel-Tech* overruled the balancing test); *Ford*, 101 Cal. Rptr. 3d at 700 (following *Camacho*'s reasoning for adopting the section 5 test); *Camacho*, 48 Cal. Rptr. 3d at 776–77 (stating that the balancing test cannot be satisfactory for consumer cases if the Supreme Court of California deemed it too vague for competitor cases, and then adopting the section 5 test); *see Cel-Tech*, 973 P.2d at 543 (stating that the preexisting definitions of unfair business practices "are too amorphous and provide too little guidance to courts and businesses . . . we must devise a more precise test for determining what is unfair").

[173] *See Camacho*, 48 Cal. Rptr. 3d at 776–77 (explaining that *Cel-Tech* instructed the court to look to the FTCA for guidance in interpreting the UCL's unfairness prong, and noting that the FTCA definition of unfairness is geared toward consumers); *see also Cel-Tech*, 973 P.2d at 564 (stating that in order to devise a new test for unfairness, the court "may turn for guidance to the jurisprudence arising under the parallel section 5 of the [FTCA]") (internal quotation marks omitted).

[174] *See Zuniga*, 2014 WL 7156403, at *6 (adopting the section 5 test, reasoning that the Supreme Court of California's concerns about the ambiguity of the balancing test spill over into consumer actions); *Camacho*, 48 Cal. Rptr. 3d at 777–78 (describing the section 5 test as "suitably broad" but "more focused" than the older definitions of unfairness, thereby making it easier to apply); *see also Ford*, 101 Cal. Rptr. 3d at 708–09 (agreeing with *Camacho's* analysis and adopting the section 5 test). For example, *Camacho* held that a collection agency's attempts to collect a valid debt from the plaintiff were not unfair under the section 5 test, as the plaintiff could have avoided incurring the debt by obeying the law in the first place. *Camacho*, 48 Cal. Rptr. 3d at 779. Similarly, in 2009 in *Davis v. Ford Motor*

Some courts caution against adopting the section 5 test for unfair business practices in consumer UCL actions, however, because the Supreme Court of California has not endorsed the test.[176] Although the *Cel-Tech* court looked to the FTCA for guidance in developing its competitor standard of unfairness, it only referenced the FTCA case law dealing with direct competitor lawsuits.[177] Additionally, the Supreme Court of California has twice declined to rule on the applicability of the section 5 test to consumers.[178] As such, the section 5 test for unfairness under the UCL may be inappropriate for consumer actions.[179]

III. Time to Come Clean: UberX Drivers Can Hold Uber Accountable for Its Insurance Misrepresentations Using California's Unfair Competition Law

Uber Technologies, Inc. ("Uber")'s misrepresentations to uberX drivers about their insufficient insurance coverage for ride-sharing violates the prohibition against unfair business practices in California's unfair competition law

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Credit Co., California's Second District Court of Appeal applied the section 5 test and held that the lender's billing practices were not unfair because the consumer could have avoided the successive late fees by making his monthly payments on time. *Ford*, 101 Cal. Rptr. 3d at 700.

[175] *See Cel-Tech*, 973 P.2d at 544 & n.12 (stating that its newly devised test for unfairness under the UCL, i.e., that the conduct must violate an antitrust law or the "spirit" of one of those laws, is limited to competitor lawsuits); *Camacho*, 48 Cal. Rptr. 3d at 776–77 (refusing to apply *Cel-Tech*'s "tethering" requirement to consumer cases because it would not serve the broad purpose of the UCL, and describing the section 5 test as "suitably broad"); *Progressive*, 37 Cal. Rptr. 3d at 453 (stating that requiring consumers to tether an alleged public policy violation to a specific law, as in *Cel-Tech*, undermines the goals of the UCL). For instance, in 2014, in *Zuniga v. Bank of America N.A.*, the U.S. District Court for the Central District of California applied the section 5 test and found that the lender's dual-tracking foreclosure practice was unfair. *Zuniga*, 2014 WL 7156403, at *8–10. Although the plaintiff homeowner was responsible for defaulting on the loan, she could not avoid dual-tracking, which caused her injury. *Id.* at *9. Furthermore, dual-tracking did not produce a benefit that outweighed the plaintiff's injury; in fact, the legislature tried to ban dual-tracking to keep people in their homes. *Id.*

[176] *See Lozano*, 504 F.3d at 736 (refusing to adopt the section 5 test for unfairness in the absence of a clear holding from the Supreme Court of California); *Donohue*, 871 F. Supp. 2d at 928 (same).

[177] *See Cel-Tech*, 973 P.2d at 543–44, 544 n.11 (stating that the court was only referencing FTCA law that interpreted unfair competition in the consumer context). The court then stated that nothing in its discussion pertained to consumer lawsuits and that it had no opinion on FTCA cases involving consumers. *Id.* at 544 n.12. In 2007, in *Lozano v. AT & T Wireless Services, Inc.*, the U.S. Court of Appeals for the Ninth Circuit stated that the FTCA definition of unfairness does not provide appropriate guidance for consumer actions because it involves anticompetitive conduct. *Lozano*, 504 F.3d at 736.

[178] *See* Rose v. Bank of Am., 304 P.3d 181, 187 n.9 (Cal. 2013), *cert. denied*, 134 S. Ct. 2870 (2014) (noting that the lower court applied three different tests for unfairness, but refusing to address the issue because it was not fully briefed); *Zhang*, 304 P.3d at 174 n.9 (noting that the appellate courts use different tests for unfair business practices in consumer UCL lawsuits, including the section 5 test, but declining to decide which test is proper).

[179] *See Lozano*, 504 F.3d at 736 (stating that it is not appropriate to apply the FTCA test to consumers without guidance from the Supreme Court of California). *But see Camacho*, 48 Cal. Rptr. 3d at 777 (opining that because the FTCA definition of unfairness is "on its face geared to consumers," it is appropriate for consumer UCL actions).

("UCL").[180] Uber misrepresents to uberX drivers that the combination of their personal policies plus Uber's contingent liability policy covers them completely while they drive around searching for fares.[181] In reality, Uber knows that uberX drivers' personal policies will not cover such commercial activity.[182] Moreover, even if an uberX driver obtains coverage through Uber's contingent liability policy, it will not cover the driver's own bodily injuries or property damage under any circumstance.[183] As a result, if uberX drivers cause acci-

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[180] *See* CAL. BUS. & PROF. CODE §§ 17200, 17203 (West 2012) (stating that "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice," and "[a]ny person who engages . . . in unfair competition may be enjoined"); Packel, *Lyft, Uber Ridesharing Bids*, *supra* note 11 (reporting that Pennsylvania insurers opine that transportation network companies ("TNCs") still do not provide their drivers with adequate insurance or education about insurance); Hourdajian, *Insurance for uberX*, *supra* note 8 (displaying the insurance coverage that uberX drivers have when they are searching for fares, specifically their personal auto insurance plus Uber's contingent liability coverage).

[181] *Compare NAIC Consumer Alert for Ridesharing Drivers*, *supra* note 8 (warning ride-sharing drivers about remaining gaps in their insurance coverage, as most personal policies contain livery exclusions), *and* Rassman, *supra* note 10, at 90 (quoting the Insurance Federation of Pennsylvania's opinion that Uber's policy of offering only contingent liability coverage during the trolling period will create confusion and leaves ride-sharing drivers exposed), *with* Hourdajian, *Eliminating Ridesharing Ambiguity*, *supra* note 6 (stating that the "vast majority" of uberX drivers' personal insurance policies cover the trolling period, but if an insurer denies coverage, Uber's contingent policy will provide coverage). Lyft could be held liable under the unfair business practices prong of the UCL as well because it provides drivers with the same insurance structure as uberX drivers. *See We Go the Extra Mile for Safety*, *supra* note 50 (explaining Lyft's insurance policies for ride-sharing drivers). Lyft also has only contingent liability coverage in place for drivers during the time period while they are driving around with the app on searching for fares. *Id.*

[182] *See NAIC Consumer Alert for Ridesharing Drivers*, *supra* note 8 (warning drivers that making themselves available for hire may trigger the livery exclusion in their personal policies); Friedhoff, *supra* note 44 (reporting that insurance industry insiders disagree with Uber's statements on its website and instead believe uberX drivers are not covered by personal insurance while they drive around looking for passengers); Packel, *Lyft, Uber Ridesharing Bids*, *supra* note 11 (reporting that Uber knows about the problems with personal insurance policies that uberX drivers face). Despite this knowledge, Uber requires uberX drivers to submit claims to their personal insurers before they can access Uber's contingent liability coverage. *See* Hourdajian, *Insurance for uberX*, supra note 8 (stating that Uber's contingent liability policy will only cover uberX drivers if their personal auto insurers decline coverage or pay nothing). This contingency forces uberX drivers to choose between disclosing their ride-sharing to their personal auto insurers to get the added coverage from Uber's contingent liability policy, which risks losing their personal policies entirely), or submitting claims to their personal insurers without disclosing their commercial activities. *See* Huet, *Rideshare Drivers Cornered into Secrecy*, *supra* note 54 (discussing the dilemma that ride-sharing drivers face after getting into an accident between lying to their insurer or risk losing their personal auto coverage). Lying on an insurance claim, which some drivers do, constitutes insurance fraud. *See id.* (reporting how an uberX driver lied to her personal insurer about ride-sharing when submitting her claim); Michael S. Quinn, *Closing Arguments in Insurance Fraud Cases*, 23 TORT & INS. L.J. 744, 745 (1988) (noting that insureds commit insurance fraud if they knowingly fail to disclose that they are engaged in riskier behaviors or lie about the uses of their insured property).

[183] *See* JERRY & RICHMOND, *supra* note 55, at 918 (explaining that liability coverage by definition is third-party coverage, meaning that it only pays for other people's damages that the insured driver caused); Wallace, *supra* note 7 (reporting that Uber's liability policy did not cover a Houston

dents while searching for customers, they have no recompense for their own injuries.[184]

Accordingly, this Part argues that uberX drivers can hold Uber liable for violating the UCL with its insurance misrepresentations.[185] Section A asserts that California courts will treat an uberX driver suing Uber under the unfairness prong of the UCL as a consumer rather than as a business competitor.[186] Section B then argues that Uber's insurance misrepresentations constitute an unfair business practice within the meaning of the UCL, entitling uberX drivers to restitution and injunctive relief.[187]

A. To Use Is to Consume: Courts Should Consider uberX Drivers Consumers Rather Than Business Competitors of Uber

If uberX drivers sue Uber alleging that its misleading insurance practices are unfair under the UCL, California courts must first decide whether the uberX drivers are consumers or business competitions within the meaning of the UCL.[188] Courts should treat the drivers as consumers rather than competitors, because their claims are not based on harm to the drivers' business or competition generally.[189] Unlike the cell phone retailer that sued another cell phone

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uberX driver's medical bills and vehicle damage when he got in an accident because, as Uber explained, liability coverage only protects the driver from getting sued).

[184] *See* Hourdajian, *Insurance for uberX*, *supra* note 8 (showing that during the time uberX drivers are searching for fares, Uber does not provide uberX drivers with first-party coverage, such as personal injury protection or collision or comprehensive coverage); Wallace, *supra* note 7 (reporting that an injured Houston uberX driver had to pay for his own medical bills and vehicle damage after a ride-sharing accident, though Uber offered to pay for his vehicle after the press got involved). To get coverage for personal damages that may occur while trolling for fares, an uberX driver would need first-party coverage, such as personal injury protection, comprehensive coverage, and/or collision coverage. *See* JERRY & RICHMOND, *supra* note 55, at 918 (explaining first-party coverage, including personal injury protection (which pays for the driver's own medical expenses) and comprehensive and collision coverages (which pay for damage to the driver's own vehicle)). Absent such first-party coverage, the only way an uberX driver could obtain compensation for his or her injuries during this period is if another driver with a liability policy struck the uberX driver. *See id.* (explaining how liability coverage pays for third parties' injuries).

[185] *See infra* notes 188–243 and accompanying text.

[186] *See infra* notes 188–198 and accompanying text.

[187] *See infra* notes 199–243 and accompanying text.

[188] *See* Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 543–44 (Cal. 1999) (determining that the plaintiff and defendant were direct competitors before analyzing whether the defendant's conduct was unfair under the new competitor standard of unfairness); Rankin v. Global Tel*Link Corp., No. 13–cv–01117–JCS, 2013 WL 3456949, at *16 (N.D. Cal. July 9, 2013) (deciding that the plaintiff was a competitor, based on its allegations of monopolization, before analyzing whether the defendant's conduct was unfair under the competitor test). *But see* Drum v. San Fernando Valley Bar Ass'n, 106 Cal. Rptr. 3d 46, 51, 54 (Cal. Ct. App. 2010) (refusing to decide whether the plaintiff was a competitor or consumer, because under either standard of unfairness, the plaintiff failed to state a UCL claim).

[189] *Compare Cel-Tech*, 973 P.2d at 544–46 (applying the competitor standard to the plaintiffs' claim of unfair business practices because they alleged that the defendant's below-market pricing

retailer in the 1999 Supreme Court of California case *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, an uberX driver is not directly competing with Uber for customers.[190] Further, an uberX driver would not need to allege that Uber's practice harmed his or her ride-sharing business, as the businesses owners alleged in *Levitt v. Yelp! Inc.*, a 2014 decision rendered by the U.S. Court of Appeals for the Ninth Circuit.[191] Although any of these allegations would trigger the competitor standard of unfairness, none would make sense in the context of an uberX driver's action against Uber.[192]

Instead, uberX drivers are likely to be considered consumers of Uber, because they use Uber's platform arrange ride-sharing transactions.[193] uberX driv-

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scheme harmed competition), *and* Levitt v. Yelp! Inc., 765 F.3d 1123, 1136 (9th Cir. 2014) (applying the competitor standard of unfairness to the plaintiffs' claims even though they did not compete with Yelp! because the "crux" of their case was that Yelp! injured their businesses and helped their competitors), *with* Wilner v. Sunset Life Ins. Co., 93 Cal. Rptr. 2d 413, 422–23 (Cal. Ct. App. 2000) (treating the plaintiff as a consumer because she alleged that the defendant engaged in unfair sales tactics to sell her a bad life insurance policy). Although plaintiffs can try to frame their cases as either "competitor" or "consumer" claims with their allegations, the courts ultimately decide which standard to apply. *See Levitt*, 765 F.3d at 1136 (deciding to treat the plaintiffs as competitors); *Rankin*, 2013 WL 3456949, at *9, 16–17 (deciding to treat the plaintiff as a competitor because the allegations in the complaint were based on harm to competition rather than consumer injury, even though the plaintiff asked the court to apply the section 5 test for unfairness to consumer actions). Any uberX drivers suing Uber over its insurance misrepresentations can likely avoid the strict competitor standard, as any allegations arising from their injuries are unlikely to be related to antitrust or anticompetitive effects. *Cf. Cel-Tech*, 973 P.2d at 543–44 (adopting a narrow test for unfairness grounded in antitrust policy to apply to competitor claims, and applying it to the plaintiff cell phone retailers who alleged that the defendant's sales tactics harmed competition).

[190] *Compare id.* 532–44 (noting that the plaintiffs and defendant were in direct competition with one another, as they both sold cell phones), *with* Browning, *supra* note 24, at 84 (quoting Uber's statement that its drivers are really the transportation providers, and they use Uber's platform to conduct business, whereas Uber is not a transportation carrier and does not provide transportation services).

[191] *Compare Levitt*, 765 F.3d at 1136 (treating the plaintiffs as competitors because they alleged that Yelp!'s conduct hurt their businesses and helped their competitors), *with* McKell v. Wash. Mut., Inc., 49 Cal. Rptr. 3d 227, 241 (Cal. Ct. App. 2006) (treating the plaintiffs as consumers because they alleged that the defendant overcharged them personally for underwriting services), *and Wilner*, 93 Cal. Rptr. 2d at 422–23 (treating the plaintiffs as consumers because they alleged that the defendant had a pattern of deceiving policyholders about their own life insurance policies).

[192] *Cf., e.g.*, *Cel-Tech*, 973 P.2d at 544 (applying the competitor standard of unfairness after the plaintiffs alleged anticompetitive pricing); *Levitt*, 765 F.3d at 1136 (applying the competitor standard of unfairness after the plaintiffs alleged harm to their businesses); *Rankin*, 2013 WL 3456949, at *16 (applying the competitor standard of unfairness after the plaintiffs alleged monopolization of the bail bond industry). Moreover, neither uberX drivers nor taxicab drivers can make viable UCL allegations against Uber based on anticompetitive conduct, because ride-sharing appears to have *increased* competition within the transportation market. *See* O'Neil, *supra* note 25 (discussing how a few medallion owners corned the Boston taxicab market and drove up prices; thus, they are angry that TNCs now provide consumers with more options).

[193] *See* Ehret v. Uber Tech., Inc., No. C–14–0113, 2014 WL 4640170, at *10 (N.D. Cal. Sept. 17, 2014) (applying the consumer standard of unfairness to the Uber customer's claim against Uber for the fees she paid to Uber to use its service); Browning, *supra* note 24, at 84 (describing how mobile phone apps like Uber merely facilitate ride-sharing between drivers and passengers); Nordman, *supra*

ers are users of the Uber ride-sharing platform, just like the Uber passenger whom the U.S. District Court for the Northern District of California treated as a consumer in 2014, in *Ehret v. Uber Technologies, Inc.*[194] uberX drivers are also comparable to the life insurance policyholder whom the California Second District Court of Appeal treated as a consumer in 2000, in *Wilner v. Sunset Life Insurance Co.*[195] Just as the *Wilner* plaintiff relied on her insurer's misrepresentations about her life insurance, uberX drivers similarly rely on Uber for information about their insurance coverage.[196] Further, the questionable employment relationship between Uber and uberX drivers does not preclude application of the consumer standard, as California's Fourth District Court of Appeal demonstrated in 2012, in *Aleksick v. 7-Eleven, Inc.*[197] Therefore, California courts should treat uberX drivers suing Uber under the UCL as consumers.[198]

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note 13, at 6 (explaining how the Uber platform connects drivers with riders and takes a percentage of drivers' sales as a fee). Uber acknowledges that uberX drivers are more like users or partners of Uber. *See* MacMillan, *supra* note 38 (quoting Uber's founder as calling drivers his business partners); Ward, *supra* note 47 (quoting an Uber representative stating that drivers conduct their business on the Uber platform). When faced with a UCL lawsuit from uberX drivers, however, Uber may argue that the drivers are more like business competitors by likening the uberX drivers using Uber's platform to the businesses using Yelp!'s platform in *Levitt v. Yelp! Inc.* in 2014 in the Ninth Circuit for the U.S. Court of Appeals. *See Levitt*, 765 F.3d at 1136 (treating the plaintiff business owners as competitors even though they compete with each other, not the defendant Yelp!).

[194] *See Ehret*, 2014 WL 4640170, at *10 (treating Uber passenger as a consumer under the UCL because she used the Uber app and paid Uber the fee it tacked onto her fare); KOOPMAN ET AL., *supra* note 23, at 4 & n.4 (noting that the sharing economy is a marketplace where peers come together to exchange goods and services, and citing Uber as an example); Nordman, *supra* note 13, at 6 (explaining how Uber lets ride-sharing drivers use its platform in exchange for a percentage of drivers' sales).

[195] *See Wilner*, 93 Cal. Rptr. 2d at 422–23 (treating the life insurance policyholder as a consumer under the UCL and finding the insurer's practice unfair).

[196] *See id.* (noting that the plaintiff challenged the insurer's practice of selling life insurance policies to new customers without informing them that the policies are deliberately underfunded and not suitable for most people); Bensinger & Bhuiyan, *supra* note 38 (reporting that many uberX drivers are inexperienced with the transportation market and thus rely on Uber for insurance information); Rassman, *supra* note 10, at 90 (explaining how Uber fails to educate drivers about their potential gaps in insurance coverage). Uber's and Lyft's websites provide information about ride-sharing drivers' insurance coverage, but do not advise drivers to talk to their personal insurers about coverage. *See* Hourdajian, *Eliminating Ridesharing Ambiguity*, *supra* note 6 (providing information about Uber's insurance); Hourdajian, *Insurance for uberX*, *supra* note 8 (providing information about Uber's insurance); *We Go the Extra Mile for Safety*, *supra* note 50 (providing information about Lyft's insurance); *cf.* Fernholz, *supra* note 47 (reporting that an anonymous Uber representative stated that the drivers are responsible for determining whether their personal auto insurance will cover their ride-sharing activities); *NAIC Consumer Alert for Ridesharing Drivers*, *supra* note 8 (advising drivers to talk to their personal auto insurers before driving for a TNC).

[197] *See Aleksick*, 140 Cal. Rptr. 3d. at 798, 807–08 (treating the franchise employee as a consumer of the franchisor company, which was not her direct employer); Huet, *Sharing Economy Workers Injured on the Job*, *supra* note 41 (questioning whether Uber misclassifies its drivers as independent contractors rather than employees). Although the issue of whether uberX drivers are employees or independent contractors remains unsettled, that classification would not change the court's consumer-competitor analysis because employees and non-employees can be consumers under the UCL. *See Aleksick*, 140 Cal. Rptr. 3d. at 806, 808 n.6 (treating the plaintiff as a consumer of the 7-Eleven fran-

B. Tipping the Scale: Uber's Insurance Misrepresentations Fail the Balancing Test for Unfairness and Violate the UCL

After a California court determines that an uberX driver challenging Uber's insurance representations should be considered a consumer under the UCL, the court must decide which test for unfair business practices to apply and whether Uber's conduct satisfies that test.[199] Subsection 1 urges California courts to apply the balancing test to consumer UCL lawsuits, including any potential suit brought by an uberX driver against Uber.[200] Subsection 2 then applies the balancing test to an uberX driver's potential allegations, arguing that Uber's insurance misrepresentations constitute an unfair business practice, which entitles uberX drivers to relief. [201]

1. Courts Should Apply the Balancing Test to Consumer UCL Actions

Courts should apply the balancing test for unfair business practices to uberX drivers' UCL claims against Uber because case law supports the balancing test's continued use in consumer lawsuits, and the test effectuates the sweeping purpose of the UCL.[202] Although the Supreme Court of California has not dictated the standard for unfair business practices that courts should apply to consumer claims, it has declined three times to overrule the balancing test.[203] First,

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chisor even though she was not its employee, and hinting that her employer, the local franchise owner, could be liable to employees under the UCL); Epstein, *supra* note 41(discussing two class action lawsuits against Uber pending in California that challenge Uber's classification of uberX drivers as independent contractors). *See generally* Michelle L. Evans, *Who Is a "Consumer" Entitled to Protection of State Deceptive Trade Practice and Consumer Protection Acts*, 63 A.L.R. 5th 90–97, 119–31 (1998) (providing an overview of cases in which parties were deemed consumers for the purposes of state unfair competition laws, including cases in which employees and equipment operators were considered consumers).

[198] *See, e.g.*, *Ehret*, 2014 WL 4640170, at *10 (treating the Uber passenger as a consumer); *Aleksick*, 140 Cal. Rptr. 3d at 798, 807 (treating the franchise employee as a consumer); *Wilner*, 93 Cal. Rptr. 2d at 423 (treating the policyholder as a consumer).

[199] *See* Camacho v. Auto. Club of S. Cal., 48 Cal. Rptr. 3d 770, 773–79 (Cal. Ct. App. 2006) (stating that the test for unfair business practices in consumer actions is uncertain, analyzing the three different possible tests, choosing the "section 5 test," and applying it to the defendant's practices).

[200] *See infra* notes 202–218 and accompanying text.

[201] *See infra* notes 219–243 and accompanying text.

[202] *See* Progressive W. Ins. Co. v. Yolo Cnty. Superior Court, 37 Cal. Rptr. 3d 434, 453 (Cal. Ct. App. 2006) (concluding that the balancing test should still apply in consumer UCL actions because (1) *Cel-Tech* did not explicitly overrule it, (2) the Supreme Court of California has not overruled it in the six years since *Cel-Tech*, and (3) courts should construe unfairness broadly to fulfill the legislative intent of protecting vulnerable consumers). The balancing test holds that a business practice is unfair "if it violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." *McKell*, 49 Cal. Rptr. 3d at 240.

[203] *See* Rose v. Bank of Am., 304 P.3d 181, 187 n.9 (Cal. 2013), *cert. denied*, 134 S. Ct. 2870 (2014) (refusing to decide which standard for unfairness to apply in a consumer UCL claim because the parties did not fully brief the issue); Zhang v. Superior Court, 304 P.3d 163, 174 n.9 (Cal. 2013) (confirming that the standard for unfair business practices in consumer UCL lawsuits remains unset-

when the Supreme Court of California held in *Cel-Tech* that the balancing test no longer applies, it restricted this holding to *competitor* lawsuits.[204] The *Cel-Tech* court explicitly stated, albeit in dicta, that nothing in its UCL discussion pertained to consumer actions.[205]

Then, in 2014, in *Zhang v. Superior Court*, the Supreme Court of California implied that courts may continue to apply the balancing test to consumers.[206] The court stated in *Zhang* that the issue of which test to apply in the consumer context remains unsettled.[207] Finally, in an opinion issued that same day in 2014, in *Rose v. Bank of America*, the Supreme Court of California refused to decide which test for unfairness to apply in consumer UCL lawsuits.[208] Because California's highest court has not expressly overruled use of the balancing test in consumer actions, lower courts should continue to apply it in that context.[209]

Furthermore, the balancing test serves the broad protective goals underlying the UCL better than the alternative tests.[210] The legislature intended for the

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tled); *Cel-Tech*, 973 P.2d at 544 n.12 (leaving open the issue of which test for unfairness should apply to consumer UCL lawsuits); *see also* Smith v. State Farm Mut. Auto. Ins. Co., 113 Cal. Rptr. 2d 399, 416 n.23 (Cal. Ct. App. 2001) (reading *Cel-Tech* as supporting the continued use of the balancing test to determine unfairness in the consumer context).

[204] *See Cel-Tech*, 973 P.2d at 544 (adopting a new test for unfairness in the competitor context after deeming the balancing test too vague for businesses because it does not provide courts or businesses with any meaningful guidance about what type of conduct the UCL prohibits).

[205] *Id.* at 544 n.12 ("This case involves an action by a competitor alleging anticompetitive practices. Our discussion and this test are limited to that context. Nothing we say relates to actions by consumers . . . We also express no view on . . . federal cases . . . that involve injury to consumers . . . .").

[206] *See Zhang*, 304 P.3d at 174 n.9 (stating that despite the different tests for unfairness being used, the court would not address the issue).

[207] *Id.* (stating that "[t]he standard for determining what business acts or practices are 'unfair' in consumer actions under the UCL is currently unsettled . . . . The parties here do not address this question, nor do we.") The court cited cases that alternatively use the revised *Cel-Tech* test, the section 5 test, and balancing test in support of its contention. *See id.*

[208] *Rose*, 304 P.3d at 187 n.9 ("The Court of Appeal identified three separate tests for [the plaintiff's claim of] 'unfairness' under the UCL, and applied all three of them. Plaintiffs assert in cursory fashion that the court misapplied one of these tests. We decline to address this claim, which is neither properly raised nor sufficiently briefed.").

[209] *See* Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 736 (9th Cir. 2007) (stating that even though *Cel-Tech* disapproves of the balancing test for competitors, courts can continue to apply it to consumers in the absence of clear guidance from the Supreme Court of California as to which test should apply); Donohue v. Apple, Inc., 871 F. Supp. 2d 913, 928 (N.D. Cal. 2012) (refusing to apply the section 5 test and instead continuing to apply the balancing test because the Supreme Court of California has not approved the section 5 test); *Progressive*, 37 Cal. Rptr. 3d at 453 (applying the balancing test because it comports with case law and the consumer protection goals of the UCL).

[210] *See* Barquis v. Merchs. Collection Ass'n, 496 P.2d 817, 830 (Cal. 1972) (finding that, given the creativity of unethical businesses, the legislature intended for courts to have the power in equity to enjoin each original scheme; thus, the standard for unfairness under the UCL must be broad). The alternative tests for unfair business practices that California courts apply, in lieu of the balancing test, are the section 5 test and the revised *Cel-Tech* test. *See Camacho*, 48 Cal. Rptr. 3d at 776–77 (establishing the section 5 test, which states that a business practice is unfair if the consumer suffered a

UCL to protect all of society—not just individual customers—from businesses acting unethically and unfairly.[211] To that end, the standard for unfairness to consumers must be flexible enough to allow courts to intervene whenever businesses contrive new, unanticipated schemes.[212] The balancing test is sufficiently malleable to achieve this goal, as it allows courts to take many countervailing factors into account.[213]

In contrast, the alternative tests undermine the purpose of the UCL by reducing consumer ability to challenge newly invented unfair business schemes.[214] First, the section 5 test for unfair business practices is inappropriate for consumer actions, because it is derived from a federal statute, the Federal Trade Commission Act ("FTCA"), which does not serve the same purpose as the UCL.[215]

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substantial, unavoidable injury that is not outweighed by benefits to other consumers or competition in general); Gregory v. Albertson's, Inc., 128 Cal. Rptr. 2d 389, 395 (Cal. Ct. App. 2002) (establishing the revised *Cel-Tech* test, which holds that a business practice is unfair if it violates a written public policy that is established by law).

[211] *See* Arkin, *supra* note 56, at 157 (describing the broad scope of the UCL, despite passage of Proposition 64 narrowing the standing rules to require injury in fact). California's UCL provides only equitable relief, and not damages for individual plaintiffs, because it is intended to prevent further harm from befalling the public. *See Barquis*, 496 P.2d at 830 (discussing the court's equitable power to enjoin any business scheme that seems facially unjust); 2004 Cal. Legis. Serv. Prop. 64 (West) (codified as amended at CAL. BUS. & PROF. CODE §§ 17203, 17204, 17206, 17535, 17536 (West 2012)) (stating that the public's intent in passing Proposition 64 was to prevent frivolous UCL lawsuits but retain the right of private individuals to sue to protect the consuming public).

[212] *See* Nat'l Rural Telecommc'n Coop. v. DIRECTV, Inc., 319 F. Supp. 2d 1059, 1075 (C.D. Cal. 2003) (explaining that the statutory term "unfair" is defined broadly to give courts the maximum amount of discretion to deal with harmful business schemes); *Cel-Tech*, 973 P.2d at 540 & n.9 (explaining that the drafters of the UCL could not anticipate precisely all of the unfair business schemes that would arise in the future, so they drafted the UCL using "sweeping" language on purpose and have continually expanded the UCL's reach); *Camacho*, 48 Cal. Rptr. 3d at 776 (stating that requiring plaintiffs to tether allegations of unfairness to a specific legislative provision conflicts with the goals of the UCL, as it limits courts' abilities to strike down unfair practices). Consumers require greater protection from unfair business practices than business competitors, as consumers are constantly under pressure from businesses to buy their goods and services. *See Barquis*, 496 P.2d at 829 (referring to the psychological pressure of advertising); *Progressive*, 37 Cal. Rptr. 3d at 453 (stating that the balancing test protects vulnerable consumers from "sharp practices").

[213] *See, e.g.*, *Ehret*, 2014 WL 4640170, at *10 (balancing Uber's lack of justification for its deceptive fees against the customer's overpayment to find that the customer stated a claim against Uber); *McKell*, 49 Cal. Rptr. 3d at 240–41 (balancing the homeowners' overpayment of underwriting fees against the mortgage lender's motivations, in light of the federal policy favoring home ownership, to find that the homeowners stated a UCL claim against the lender); *Progressive*, 37 Cal. Rptr. 3d at 441, 453 (balancing the plaintiff's economic injuries against the insurer's lack of justification for its reimbursement and finding that the plaintiff's claim against his insurer could proceed).

[214] *Cel-Tech*, 973 P.2d at 540.

[215] *See* Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2012) (prohibiting "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce"); CAL. BUS. & PROF. CODE § 17200 (West 2012) (prohibiting "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising"); *Lozano*, 504 F.3d at 736 (rejecting the section 5 test for consumer UCL actions, reasoning it inappropriate to apply the Federal Trade Commission Act ("FTCA")'s definition of "unfair" to consumer actions); *Cel-Tech*, 973 P.2d at 543–44 (stating that although the FTCA and California UCL have similar pur-

The FTCA empowers the Federal Trade Commission to act to preserve competition within markets, which is not necessarily the concern of private citizens suing under the UCL for redress.[216] Likewise, the revised *Cel-Tech* test for unfairness is improper because it is too restrictive; it bars many consumer UCL actions that the legislature did not intend to block.[217] Therefore, only the balancing test affords courts the latitude they need to accomplish the UCL's sweeping goals.[218]

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poses, the statutes are enforced very differently); *Camacho*, 48 Cal. Rptr. 3d at 776–77 (deriving the "section 5 test" from the FTCA because *Cel-Tech* looked to the FTCA for guidance) (citing Federal Trade Commission Act § 5(n), 15 U.S.C. § 45(n)). In 2007, in *Lozano v. AT&T Wireless Services, Inc.*, the U.S. Court of Appeals for the Ninth Circuit held that courts facing consumer UCL claims should not copy *Cel-Tech*'s method of looking to the FTCA for guidance. *See* 504 F.3d at 736. This is because *Cel-Tech* was concerned only with anticompetitive conduct. *See id.*; *Cel-Tech*, 973 P.2d at 544 nn.11–12 (noting that the court's discussion of federal law pertained only to competitor lawsuits under the FTCA and UCL and, therefore, the discussion did not relate to consumer UCL actions).

[216] *Compare* 15 U.S.C. § 45(a)(2) (empowering the Federal Trade Commission ("FTC") to enforce the FTCA), *and* H.R. Rep. No. 103-138), at 2–4 (1993) (stating the purpose of the FTCA and the FTC's broad authority to declare practices unfair), *and* Averitt, *supra* note 102, at 228–29 (explaining the six categories of conduct that violated the FTCA as it existed in 1980, all of which involved anticompetitive conduct and/or antitrust law), *with* CAL. BUS. & PROF. CODE § 17204 (allowing any person that has suffered an economic injury as a result of a prohibited practice to bring suit), *and Barquis*, 496 P.2d at 829 (holding that the UCL not only prohibits anticompetitive practices among business competitors, but it also protects vulnerable consumers), *and* Arkin, *supra* note 94, at 157 (explaining that the goal of the UCL is broader than just protecting business competitors; it aims to protect all of society). The California UCL and FTCA have many differences, including: the UCL's broader standing provisions; the UCL's five theories of liability, compared to the FTCA's two; the UCL's longer statute of limitations; and the FTCA's exemption for insurance companies. *See* Lenore Albert & Michael Thurman, *Unfair and Deceptive Practices: A Comparison of the FTC Act and California's UCL*, 22 COMPETITION: J. ANTITRUST & UNFAIR COMPETITION L. SEC. ST. B. CAL. 51, 60–61, 67–68 (2013).

[217] *See* Graham v. Bank of Am., N.A., 172 Cal. Rptr. 3d 218, 233 (2014) (laying out the revised *Cel-Tech* test, which states that conduct is unfair if it violates a public policy that is "tethered to specific constitutional, statutory or regulatory provisions") (internal quotation marks omitted); *see, e.g.*, *Aleksick*, 140 Cal. Rptr. 3d at 807–08 (using the revised *Cel-Tech* test to dismiss the franchise employee's complaint against the franchisor for its payroll practices); Scripps v. Superior Court, 134 Cal. Rptr. 2d 101, 105, 116–17 (Cal. Ct. App. 2003) (using the revised *Cel-Tech* test to dismiss the patients' claim against their clinic for refusing to treat them after they sued for malpractice); *Gregory*, 128 Cal. Rptr. 2d at 395 (using the revised *Cel-Tech* test to dismiss the citizen's complaint against the grocery store chain for leaving its store unoccupied). If California's Fourth District Court of Appeal had evaluated the employee's claim under the balancing test (rather than the revised *Cel-Tech* test) in *Aleksick v. 7-Eleven, Inc.* it may have allowed the claim to proceed, as the franchisor's payroll practice seemed to undermine California's fair labor policies and Labor Code. *See Aleksick*, 140 Cal. Rptr. 3d at 798, 808 (explaining 7-Eleven's challenged business practice, whereby the franchisor requires its franchises to calculate payroll in a way that shorts employees' wages, and invoking California's wage statute); *McKell*, 49 Cal. Rptr. 3d at 240 (stating that any business practice that "violates established public policy" is unfair).

[218] *Compare McKell*, 49 Cal. Rptr. 3d at 240 (describing how the balancing test takes into account established public policies, consumer harm, societal benefits, defendant motivations, and more), *with Camacho*, 48 Cal. Rptr. 3d at 777 (dismissing concerns that the section 5 test, which imposes a requirement that plaintiffs must suffer substantial injury to bring a claim under the unfair prong of the UCL, further limits standing), *and Graham*, 172 Cal. Rptr. 3d at 233 (acknowledging that the revised *Cel-Tech* test for unfairness is more rigorous than the balancing test and section 5 test), *and* Wilson v.

2. Applying the Balancing Test to Uber's Insurance Misrepresentations, Courts Should Deem uberX Drivers Entitled to Relief

Applying the balancing test for unfairness to Uber's misrepresentations about ride-sharing insurance coverage, Uber's practices should be found to violate the UCL.[219] The test holds that a business practice is unfair "if it violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits."[220] Uber's practice satisfies this standard of unfairness in multiple ways.[221] Accordingly, injured uberX drivers are entitled to restitution and injunctive relief from Uber.[222]

First, Uber's misrepresentations about uberX drivers' inadequate insurance coverage violate established public policy.[223] Uber misrepresents that ub-

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Hynek, 144 Cal. Rptr. 3d 4, 11 (Cal. Ct. App. 2002) (stating that the revised *Cel-Tech* test is significantly narrower than the balancing test); *see also* Arkin, *supra* note 94, at 157 (explaining the broad scope of the UCL).

[219] *See Ehret*, 2014 WL 4640170, at *10 (applying the balancing test to determine that Uber's misleading gratuity scheme is arguably unfair and allowing the plaintiff's claim to survive a motion to dismiss); *NAIC Consumer Alert for Ridesharing Drivers*, *supra* note 8 (warning ride-sharing drivers that they may have gaps in their insurance coverage, as commercial activity voids most personal policies); Hourdajian, *Eliminating Ridesharing Ambiguity*, *supra* note 6 (stating that Uber's contingent liability coverage fills the insurance gap between when an uberX driver becomes available or hire and when he or she accepts a ride request). Unfairness is a question of fact for the judge or jury to decide on a case-by-case basis. Countrywide Fin. Corp. v. Bundy, 113 Cal. Rptr. 3d 705, 723 (Cal. Ct. App. 2010).

[220] *McKell*, 49 Cal. Rptr. 3d at 240.

[221] *See id.* (stating the factors to consider when applying the balancing test); Bensinger & Bhuiyan, *supra* note 38 (stating that Uber representatives told potential uberX drivers at a recruiting event that they do not need commercial insurance, and then told reporters that many personal policies will cover drivers during the trolling period); Hourdajian, *Eliminating Ridesharing Ambiguity*, *supra* note 6 (telling uberX drivers that they should be confident that they no longer have gaps in their insurance coverage while ride-sharing); *cf.* Packel, *Lyft, Uber Ridesharing Bids*, *supra* note 11 (reporting that Pennsylvania insurers opine that Uber's contingent liability policy, offered to drivers during the trolling period, does not fix the ride-sharing insurance problem).

[222] *See Cel-Tech*, 973 P.2d at 539 (explaining that private plaintiffs' remedies under the UCL are limited to restitution and injunctive relief). This Part assumes that uberX drivers have standing. *Cf.* Kwikset Corp. v. Superior Court, 246 P.3d 877, 885, 887 (Cal. 2011) (noting that to have standing to sue under the UCL's unfairness prong, the plaintiff must demonstrate an economic injury in fact caused by actual reliance on the defendant's misrepresentations, which are at the core of the claim). This Part also assumes that state law does not explicitly sanction Uber's conduct, as a law proclaiming Uber's insurance scheme legal could provide Uber with immunity. *Cf. Cel-Tech*, 973 P.2d at 541 (explaining that if a law sanctions a business practice, it serves as a safe harbor for defendants accused of unfair competition). Because ride-sharing and TNCs are new to the transportation market, it is unlikely that states have laws explicitly sanctioning Uber's insurance scheme. *See* Browning, *supra* note 24, at 85 (explaining that the emergence of ride-sharing has raised new questions about applicable regulations and insurance).

[223] *See* Packel, *Lyft, Uber Ridesharing Bids*, *supra* note 11 (reporting the Insurance Federation of Pennsylvania's harsh criticism of Uber's inadequate insurance coverage and education for ride-sharing drivers).

erX drivers are fully covered while they drive around searching for fares, which violates state policies favoring first-party insurance coverage.[224] Uber's misrepresentations are similar to those made by the defendant mortgage lender in 2006, in *McKell v. Washington Mutual, Inc.*, a case in California's Second District Court of Appeal.[225] The lender in *McKell* undermined federal policy aimed at reducing the cost of homeownership by misrepresenting the cost of underwriting.[226] Similarly, the remaining gaps in Uber's insurance coverage for uberX drivers undermine state efforts to ensure drivers receive compensation for their own injuries.[227] Uber's misleading uberX drivers about the applicability of their personal policies and failing to provide them with personal injury, comprehensive, collision, or uninsured motorist protection frustrates the purpose of these local laws.[228]

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[224] *See* Hourdajian, *Insurance for uberX*, *supra* note 8 (providing an overview of Uber's insurance for uberX drivers, which lacks first-party coverage for drivers while they are driving around searching for fares); *Summary of State Laws Related to Auto Insurance*, *supra* note 65 (indicating that seventeen states require drivers to carry personal injury protection and thirty-five require drivers to carry uninsured motorist coverage); *Notice to Transportation Network Company Drivers*, *supra* note 8 (advising ride-sharing drivers to consider buying a commercial liability policy with personal injury protection, comprehensive, collision, and uninsured motorist coverages to ensure that they are personally protected). Recall that first-party coverage compensates the insured for personal losses, such as personal injury protection and collision coverage. JERRY & RICHMOND, *supra* note 55, at 918.

[225] *Compare McKell*, 49 Cal. Rptr. 3d at 235, 241 (explaining how the mortgage lender overcharged homeowners for automated underwriting, in violation of federal public policy aimed at making homeownership more affordable), *with* Hourdajian, *Eliminating Ridesharing Ambiguity*, *supra* note 6 (making inaccurate statements to the public about uberX drivers' insurance coverage while they are in between fares, specifically that "the vast majority of personal insurance policies cover [the trolling] period either by the plain terms of the insurance policy, or due to the insurance requirements set by state"), *and* Friedhoff, *supra* note 44 (reporting that the insurance industry says that commercial activities, such as driving around searching for fares, are not covered by personal policies).

[226] *McKell*, 49 Cal. Rptr. 3d at 240–41.

[227] *Compare McKell*, 49 Cal. Rptr. 3d at 240–41 (explaining how the lender's activity undermined federal policy), *and* Jerry & Richmond, *supra* note 55, at 89–90, 97–98 (describing states' rationale for regulating auto insurance and imposing first-party coverage requirements), *and Summary of State Laws Related to Auto Insurance*, *supra* note 65(demonstrating that the majority of states mandate some kind of first-party coverage), *with* Hourdajian, *Eliminating Ridesharing Ambiguity*, *supra* note 6 (telling uberX drivers that they should feel confident that they have sufficient insurance coverage, despite the fact that drivers have no first party coverages in place while they drive around searching for fares).

[228] *See* Hourdajian, *Insurance for uberX*, *supra* note 8 (showing that uberX drivers are covered by Uber's contingent liability policy during the trolling period, but not showing personal injury protection, uninsured motorist coverage, or collision and comprehensive coverage); *Notice to Transportation Network Company Drivers*, *supra* note 8 (advising ride-sharing drivers to buy commercial insurance and/or first-party coverages); Packel, *Lyft, Uber Ridesharing Bids*, *supra* note 11 (noting that Uber's insurance scheme fails to meet the Insurance Federation of Pennsylvania's standards, and that offering merely contingent liability coverage in between rides will create confusion and delay during the claims process).

Second, Uber's knowingly misleading uberX drivers about their inadequate insurance constitutes immoral, unethical, and unscrupulous conduct.[229] Similar to the *Wilner* insurer who engaged in unethical and unfair conduct by knowingly selling unsuitable life insurance policies to customers, Uber knows that most uberX drivers' personal policies prohibit commercial activity.[230] Uber also knows that its contingent liability policy will not compensate the uberX driver for any of his or her own injuries, as the *Wilner* insurer knew that it was selling underfunded policies.[231] Furthermore, just like it was unscrupulous for the insurer in *Progressive West Insurance Co. v. Yolo County Superior Court* in 2005 in California's Third District Court of Appeal to demand repayments to which it was not entitled, Uber similarly disregards the law.[232] Uber unscrupulously encourages uberX drivers to submit claims to their personal insurer first for accidents that occur during the trolling period, despite the fact that personal policies do not cover commercial activity.[233]

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[229] *See Progressive*, 37 Cal. Rptr. 3d at 453 (finding that the insurer's practice of demanding reimbursement from payees without regard to legality seemed immoral and unethical); *Wilner*, 93 Cal. Rptr. 2d at 422–23 (holding that the insurer's knowingly selling inappropriate and unsuitable life insurance policies to consumers was obviously "immoral, unethical and unscrupulous," and therefore unfair). *Compare* Hourdajian, *Insurance for uberX*, *supra* note 8 (suggesting that uberX drivers' personal policies will cover them while they are in between ride-sharing trips), *with* Packel, *Lyft, Uber Ridesharing Bids*, *supra* note 11 (claiming that Uber knows that uberX drivers' personal auto insurance will not cover any sort of commercial activity, leaving drivers exposed).

[230] *Compare Wilner*, 93 Cal. Rptr. 2d at 422 (noting that the insurer tried to sell inappropriate life insurance policies to new customers, knowing that the policies were inferior and probably not in the best interests of the customers), *with* Fernholz, *supra* note 47 (reporting that an Uber representative stated that drivers know their personal policies may not apply), *and NAIC Consumer Alert for Ridesharing Drivers*, *supra* note 8 (warning uberX drivers that most personal auto policies contain livery exclusions), *and* Packel, *Lyft, Uber Ridesharing Bids*, *supra* note 11 (claiming that Uber knows about the remaining gaps in uberX drivers' personal auto insurance).

[231] *Compare Wilner*, 93 Cal. Rptr. 2d at 423 (noting that the insurer knew that the policies were deliberately underfunded but failed to tell the policyholders), *with* Wallace, *supra* note 7 (reporting that an Uber representative stated that liability insurance only protects uberX drivers from third-party lawsuits and does not compensate drivers for their injuries). Uber clearly knows the value of first-party coverages, as it provides uberX drivers with uninsured motorist coverage, contingent and collision coverage, and personal injury protection while they are on a ride-sharing trip. *See* Hourdajian, *Insurance for uberX*, *supra* note 8 (explaining the commercial insurance coverage that Uber provides for uberX drivers beginning when they accept a ride request).

[232] *Compare Progressive*, 37 Cal. Rptr. 3d at 286 (noting that the insurer's practice of demanding repayment from policyholders for any money it pays out, without regard to common law doctrines limiting the insurer's legal entitlement to such money, was unscrupulous), *with* Hourdajian, *Insurance for uberX*, *supra* note 8 (explaining that the contingent liability coverage for uberX drivers only applies if the uberX driver's personal insurer denies the claim or pays nothing).

[233] *See* Friedhoff, *supra* note 44 (reporting that driving around searching for fares is a commercial activity not covered by personal policies); Huet, *Rideshare Drivers Cornered into Secrecy*, *supra* note 54 (reporting that some uberX drivers feel pressured to lie to their insurers about engaging in ride-sharing to avoid losing their personal policies, which may constitute insurance fraud); Hourdajian, *Insurance for uberX*, supra note 8 (implying that uberX drivers must submit claims to their personal insurers for accidents that occur while they are driving around searching for fares).

Moreover, Uber's misrepresentations to uberX drivers about insurance coverage do not provide a public benefit that outweighs the harm to drivers.[234] An uberX driver that gets into an accident while searching for fares may incur injuries in the form of medical bills, vehicle repair costs, and lost wages.[235] Uber cannot provide a proper justification for its insurance scheme that outweighs this harm, just as in *Ehret*, where Uber failed to justify its misleading fee structure that harmed passengers.[236] Uber's insurance misrepresentations arguably produce a public benefit, in that more drivers may have signed up to provide transportation services through uberX because they do not~~e~~ realize their insurance exposure.[237] This benefit of having more uberX vehicles on the road, however, does not outweigh the potential economic and bodily harm to uberX drivers.[238] Therefore, Uber providing misinformation about uberX drivers' insurance coverage while they troll for fares constitutes an unfair business practice.[239]

If California courts deem Uber's insurance misrepresentations to be an unfair business practice within the meaning of the UCL, injured uberX drivers

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[234] *See McKell*, 49 Cal. Rptr. 3d at 240 (stating that if the harm to consumers outweighs the benefit of the business practice, it is unfair under the UCL); Hourdajian, *Insurance for uberX*, *supra* note 8 (outlining uberX drivers' insurance coverage).

[235] *See* Catherine Clifford, *Good News for Airbnb Hosts and Uber Drivers: Here Comes Insurance*, ENTREPRENEUR (Dec. 5, 2014), http://www.entrepreneur.com/article/240540 *archived at* http://perma.cc/A7ZP-V5KJ (noting that ride-sharing drivers who get into accidents may lose a lot of income while their cars are being repaired); Wallace, *supra* note 7 (reporting that a Houston Uber driver who was in an automobile accident had to pay for his own medical bills and vehicle repairs, although Uber offered to pay for the vehicle damage after the press got involved).

[236] *See Ehret*, 2014 WL 4640170, at *10 (allowing the Uber customer's UCL claim to proceed because Uber had not yet provided a justification for its misleading fees).

[237] *See* Badger, *Now We Know*, *supra* note 36 (reporting that Uber's fleet of drivers doubles every six months); Bensinger & Bhuiyan, *supra* note 38 (reporting that most uberX drivers are relatively inexperienced with the transportation market and rely on Uber for information); Hourdajian, *supra* note 6 (reassuring uberX drivers that they should be confident that no insurance gaps exist); O'Neil, *supra* note 25 (noting that the influx of Uber drivers disrupted the Boston taxicab market, to the benefit of consumers).

[238] *Cf.* JERRY & RICHMOND, *supra* note 55, at 97–99, 924–25 (describing the lengths state legislatures go through to ensure that all drivers have adequate insurance coverage, including mandating liability coverage and setting up residual markets through which high-risk individuals can purchase insurance); NAIC WHITE PAPER ON TNC INSURANCE, *supra* note 8, at 8–12 (explaining the risks and costs associated with ride-sharing, despite TNCs arguments that ride-sharing increases road safety by reducing the number of personal vehicles on the road).

[239] *See McKell*, 49 Cal. Rptr. 3d at 240 (stating that under the balancing test for unfairness, if the harm to consumers outweighs the benefit of the business practice, it is unfair under the UCL). *Compare NAIC Consumer Alert for Ridesharing Drivers*, *supra* note 8 (warning ride-sharing drivers about remaining gaps in their insurance coverage, including the fact that most personal policies contain livery exclusions), *and* Rassman, *supra* note 10, at 90 (quoting the Insurance Federation of Pennsylvania's opinion that Uber's offering only contingent liability coverage during the trolling period leaves drivers exposed), *with* Hourdajian, *Eliminating Ridesharing Ambiguity*, *supra* note 6 (trying to recruit new uberX drivers with representations that any gaps in ride-sharing drivers' insurance coverage no longer exist)

would be entitled to restitution and injunctive relief.[240] As such, uberX drivers should receive restitution to compensate them for any economic losses they incurred as a result of Uber's misleading them about their insurance coverage during the trolling period.[241] Further, uberX drivers should seek an injunction to enjoin Uber from continuing to operate uberX without disclosing to drivers the truth about their insurance gaps.[242] Such injunctive relief would prevent Uber from continuing to mislead uberX drivers, thus fulfilling the UCL's broad goal of protecting the public from any and all unfair business schemes.[243]

CONCLUSION

As ride-sharing services such as uberX gain popularity, courts are seeing an influx of disputes over insurance coverage for uberX drivers. uberX drivers lack adequate insurance coverage during the time period when they have the Uber app on but do not yet have a passenger. This is due in part to Uber misleading uberX drivers about the type and amount of insurance coverage available to them. Based on these misrepresentations, injured uberX drivers should be able to sue Uber under California's unfair competition law for engaging in unfair business practices. In such a lawsuit, California courts will likely treat an uberX driver as a consumer rather than a business competitor of Uber. Further, courts should apply the flexible balancing test to determine whether Uber's practice is unfair, as this test best serves the broad protective intent underlying the UCL. Applying this balancing test to Uber's insurance misrepresentations, courts should find Uber's practice unfair and grant injured uberX drivers restitution and injunctive relief. Accordingly, ride-sharing drivers should try to hold transportation network companies accountable for their statements. If Ub-

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[240] *See* CAL. BUS. & PROF. CODE §§ 17200, 17203 (prohibiting unfair business practices and providing that anyone who is injured by such practices can seek injunctive relief); *Cel-Tech*, 973 P.2d at 539 (stating that successful plaintiffs are entitled to restitution under the UCL as well).

[241] *See Cel-Tech*, 973 P.2d at 539 (indicating that UCL plaintiffs can obtain restitution); Clifford, *supra* note 235 (describing how ride-sharing drivers may suffer lost wages if involved in an automobile accident); Wallace, *supra* note 7 (discussing Uber driver who incurred medical bills and vehicle repair costs after accident); *see also NAIC Consumer Alert for Ridesharing Drivers*, *supra* note 8 (warning drivers that their personal auto policies may not cover them once they make themselves available for hire through a TNC app).

[242] *See* CAL. BUS. & PROF. CODE § 17203 (stating that businesses that engage or propose to engage in unfair business practices can be enjoined); Packel, *Lyft, Uber Ridesharing Bids*, *supra* note 11 (stating the Pennsylvania insurers opine that Uber needs more insurance coverage *and* better insurance education for ride-sharing drivers); *see also* CAL. PUB. UTIL. CODE § 5432 (West Supp. 2015) (requiring Uber to disclose to ride-sharing drivers, starting in July 2015, that their personal policies will not cover use of their vehicles in connection with a TNC).

[243] *See Barquis*, 496 P.2d at 830–31 (describing the "sweeping" language of the UCL, which empowers courts to invalidate any and all business practices that are facially unfair and dishonest); Arkin, *supra* note 94, at 157 (explaining that the broad purpose of the UCL is to protect all of society from the harm caused by unfair and unscrupulous business practices, not just business competitors).

er truly is all about sharing, it should share the responsibility for the risks it creates by putting ride-sharing drivers on the road.

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