

[The California Supreme Court Reiterates Analysis for Determining Whether a Statutory Violation Confers a Private Cause of Action](#)

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Yesterday, the California Supreme Court issued its unanimous opinion in [Lu v. Hawaiian Gardens Casino, Inc.](#), in which the high court found that a specific Labor Code provision could not be enforced by private litigants. This opinion is important in that it reiterates important cases and analyses that can be used to defeat a plaintiff's attempt to set forth a private cause of action where no such right was intended by the legislature. Unfortunately, however, the Supreme Court declined to further address the question of whether a statute that cannot independently confer a private cause of action can still be utilized as a predicate for a cause of action under the "unlawful" prong of the Unfair Competition Laws ("UCL").

Louie Lu ("Lu") was a card dealer at the Hawaiian Islands Casino in Southern California. As a dealer, he was provided tips. However, not all of the tips were his to keep. Instead, he was required to provide 15% to 20% of his tips to a community fund that was then split among other employees who were offering services to the card players, but were not as routinely tipped as the dealers (*i.e.*, floormen, poker tournament coordinators, concierges, etc.)

The tip pool policy specifically prohibited managers and supervisors from receiving any money from the pool. This exclusion of managerial persons from sharing in the tips is important, as [Labor Code Section 351](#) prohibits an employer from taking, collecting or receiving employees' tips. However, California courts have long-held that the pooling of tips to be split amongst like-situated employees, such as waiters and waitresses on the same shift, is not a violation of Section 351. Similarly, courts have held that the pooling of tips in the casino setting when those tips are spread among the non-managerial staff is perfectly acceptable and not a violation of Section 351. Lu contended that "agents" of the casino (presumably managerial employees) were improperly sharing in the pooled tips, and set forth causes of action for violation of Section 351 and Section 17200 of the UCL.

The trial court dismissed both causes of action. As to the Section 351 claim, the trial court found that the section did not provide a private cause of action, as the enforcement of that provision was explicitly provided solely to the Department of Industrial Relations. The trial court likewise found that the UCL claim must also be dismissed because Section 351 could not serve as a predicate for the "unlawful prong" of the UCL unless it could be enforced in a private cause of action, and since it could not, the UCL cause of action too could not be maintained. Lu appealed.

The appellate court agreed with the trial court that Lu could not assert a private cause of action under Section 351 itself. However, the appellate court disagreed with the trial court by finding that Section 351 could still afford Lu a private cause of action by using it as a predicate for the "unlawful" prong of the UCL. More specifically, the Court of Appeal held:

Nevertheless, Lu alleged a cause of action under the UCL for violation of Labor Code sections 351 and 450. “Virtually any law -- federal, state or local -- can serve as a predicate for an action under Business and Professions Code section 17200. The UCL is a proper avenue for Lu to challenge violations of these Labor Code provisions.

The California Supreme Court accepted Lu’s petition for review on the sole question of whether Section 351 itself afforded a private right of action – leaving the Court of Appeal’s ruling that the section can be utilized as a predicate for a UCL claim in limbo (as the entire Court of Appeal decision became depublished when the petition for review was accepted on the Section 351 issue).

The Supreme Court’s opinion provides a lengthy analysis of why Section 351 does not provide a private right of action on its own; citing with approval a number of case (including *Moradi-Shalal v. Fireman’s Fund*, *Vikco Insurance Services Inc. v. Ohio Indemnity Co.*, *Crusader v. Scottsdale Insurance Co.* and *Middlesex Ins. Co. v. Mann*) that Barger & Wolen attorneys have utilized to argue that a plaintiff does not have a private cause of action for perceived violations of the Insurance Code, including sections 790.03 and 1763. The Supreme Court decision in *Lu* provides additional fodder to combat plaintiffs who seek to expand the civil enforcement of statutory provisions by the private litigants where no such right was intended.

While the Supreme Court chose not to address the UCL aspects that were presented by the conflicting trial and appellate court decisions, that fight will surely return to California’s high court on another day.

Barger & Wolen attorneys have significant experience is defending UCL claims in state and federal court, as well as presenting arguments against plaintiffs’ attempts to assert private causes of action based on Insurance Code statutes.