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California Supreme Court: Employees Cannot Sue Under Labor Code Section 351 for Alleged Unlawful Tip Pooling

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Does California Labor Code Section 351, which prohibits employers from taking "any gratuity or part thereof that is paid, given to, or left for an employee by a patron," create a private right of action for employees? In *Lu v. Hawaiian Gardens Casino, Inc*., the California Supreme Court holds that Section 351 does not contain a private right to sue.

This decision, issued on August 9, 2010, forecloses employees from bringing class action lawsuits for alleged violation of California's tip-pooling statute, which until now has been one of the engines driving wage and hour class action litigation in California.

BACKGROUND

Plaintiff Louie Hung Kwei Lu sued Defendant Hawaiian Gardens Casino, Inc. (the "Casino"), challenging the legality of the Casino's policy of requiring casino dealers to contribute part of the gratuities they received to a tip pool for employees who provided service to casino patrons. A tip pool is a pool into which employees place some or all of the gratuities they receive to be redistributed among themselves or other employees.

The Casino had a written tip pool policy that required dealers to segregate 15 to 20 percent of the tips they received at the close of each shift. The Casino then deposited the pooled tips in a tip pool bank account for later distribution to designated employees who provided service to customers, such as chip runners, hosts, and concierges.

Lu filed a class action lawsuit against the Casino on behalf of himself and other casino dealers, alleging that the Casino's tip pooling policy amounted to a conversion of dealers' tips and violated Labor Code Section 351, among other things. The complaint also alleged that the Casino's conduct giving rise to the alleged statutory violation constituted an unfair business practice under California's unfair competition law ("UCL") (Bus. & Prof. Code, § 17200 et seq.).

PROCEEDINGS IN THE TRIAL COURT

The Casino moved for judgment on the pleadings of the cause of action for violation of Labor Code Section 351, contending that there is no private right to sue for violation of that statute. The trial court granted the motion and also granted the Casino's subsequent summary adjudication motions on the remaining causes of action and dismissed the case. Lu appealed.

IN THE COURT OF APPEAL

When the Second District Court of Appeal decided Lu's appeal in January 2009,[1] no California court had yet determined whether Labor Code Section 351 contained a private right to sue. The federal district court in *Matoff v. Brinker Restaurant Corp.* had earlier held that Section 351 does not contain a private right of action.[2] But *Matoff* was not controlling on the state court.

The court of appeal held that Lu did not have a private right of action under Section 351. The court further held, however, that Section 351 may nonetheless serve as a predicate for a UCL claim. Finding that Lu presented triable issues of fact about whether the Casino's tip pool policy violated Section 351, the court of appeal reversed the trial court's summary judgment on the UCL cause of action premised on a violation of Section 351, but affirmed the judgment in all other respects.

GRODENSKY V. ARTICHOKE JOE'S CASINO

Two short months later, in March 2009, the First District Court of Appeal held, in direct contrast to *Lu*, that Labor Code Section 351 does provide a private right of action.[3]

In that case, a dealer filed a class action against his casino employer and alleged claims for conversion, violation of Labor Code Section 351 and violation of the UCL after the casino implemented a mandatory tip pooling policy for its dealers. On appeal from a judgment in favor of the dealers, the casino argued, among other things, that Section 351 did not provide a private right of action. The court of appeal rejected this argument, concluding that the context and legislative history of the statute confirmed that the Legislature intended to provide employees with a private right of action—thus creating a split of authority.

The Supreme Court granted review of *Grodensky* and noted that further action in that matter would be deferred pending consideration and disposition of *Lu*.

BEFORE THE CALIFORNIA SUPREME COURT

The California Supreme Court granted Lu's petition for review to resolve the conflict between *Lu* and *Grodensky*. The Court limited review to the sole issue of whether Section 351 gives employees a private right of action. The Court held that it does not.

The Court began by noting the general principle that the violation of a statute does not necessarily give rise to a private cause of action. Rather, "whether a party has a right to sue depends on whether the Legislature has 'manifested an intent to create such a private cause of action' under the statute." The Court noted that Section 351 does not include explicit language regarding a private cause of action and, therefore, it was necessary to look to the statute's legislative history. Based on that history, the Court concluded that there was no clear indication the Legislature intended to create a private cause of action in enacting Section 351. Rather, the legislative history simply affirmed what courts had "long held": that gratuities ordinarily belonged to the waiter or waitress absent a contrary agreement, but did not reflect a legislative intent

[1] *Lu v. Hawaiian Gardens Casino, Inc.*, 170 Cal. App. 4th 466 (2009).
[2] *Matoff v. Brinker Restaurant Corp.*, 439 F. Supp. 2d 1035 (C.D. Cal. 2006).
[3] *Grodensky v. Artichoke Joe's Casino*, 171 Cal. App. 4th 1399 (2009).

to give employees a new statutory remedy to recover misappropriated tips.[4]

Lu argued that the Legislature must have "implicitly created" a private cause of action and relied on the Restatement test for determining tort liability for violation of a statute.[5] The Court, however, declined to apply the Restatement test in the context of a statutory violation, as opposed to a constitutional violation.[6] Lu also argued that without a private right to sue there was no comprehensive scheme for enforcing Section 351. Rejecting this argument, also, the Court noted that to the extent an employee may be entitled to misappropriated tips, there is no reason why other remedies, such as a common law action for conversion, may not be available under appropriate circumstances.[7] The Court also rejected Lu's argument that a violation of Section 351 is a per se violation of an employment contract.[8]

Notably, the Court did not address whether Section 351 could serve as the predicate for a UCL claim, as the court of appeal had held.

PRACTICAL IMPLICATIONS FOR EMPLOYERS

Lu is a significant decision for California employers who have tip pooling policies. *Lu* leaves a number of questions unanswered: Are tip pools lawful under Labor Code Section 351? Who may participate in them? Can Section 351 serve as the predicate for a UCL claim? But importantly, *Lu* has disposed of one weapon in the plaintiffs' wage and hour class action arsenal. Employees do not have a private right of action to sue for violation of Section 351.

[4] *Lu v. Hawaiian Gardens Casino, Inc.*, (Aug. 9, 2010, S171442) __ Cal.4th __, slip op. at 10.
[5] *Id.* at 12.
[6] *Id.* at 14.
[7] *Id.* at 15.
[8] *Id.* at 15, fn.9.