Focus
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Tipping the Scales

By Alana H. Rotter

Do you know where your tips are going?

Many employees voluntarily share their tips with co-workers. But many employers also require employees to share their tips. Questions about this practice, often referred to as "tip pooling," have kept the California courts busy this year: There have been five appellate decisions on mandatory tip redistribution policies since January.

In the recent opinions, courts have addressed who restaurant, casino and Starbucks employees can be forced to share their tips with and under what circumstances. The Supreme Court also has granted review on a related issue, whether employees have a private right of action to challenge mandatory tip redistribution policies. The answers to these questions impact not only employers and employees, but also consumers interested in knowing who benefits from the gratuities they leave.

No California statute addresses mandatory tip redistribution. The closest provision on point is Labor Code Section 351. Section 351 prohibits employers and their agents from collecting, taking or receiving any part of a gratuity that is paid, given to or left for an employee. It further declares "[e]very such gratuity ... to be the sole property of the employee or employees to whom it was paid, given, or left for." The rub is how to decide (or who gets to decide) for whom the tip is left.

Leighton v. Old Heidelberg, Ltd., 219 Cal.App.3d 1062 (1990), was the first case to consider whether a mandatory tip redistribution scheme violated Section 351. The 2nd Appellate District upheld a restaurant policy requiring waitresses to share tips with busboys and bartenders who served their tables. The court reasoned that California has no policy against mandatory tip pooling and that if the Legislature had intended Section 351 to prohibit the practice, it could have said so. As to who owns a tip, *Leighton* assumed that most diners intend tips as "rewards for good service no matter which one of the employees directly servicing the table renders it." Permitting employers to decide how tips should be equitably shared among co-workers "promote[s] peace and harmony among employees" and ensures that employees will "provide good service to the public." A contrary rule, the court suggested, would "leave[] the door open to anarchy in the restaurant industry."

Leighton triggered a vigorous dissent. Justice Earl Johnson characterized mandatory tip pooling as "a disguised way of requiring waiters or waitresses to pay the market salaries of busboys and bartenders," allowing employers to pay lower wages than they otherwise would have to. In his view, an employer impermissibly takes an employee's tip when it orders an employee to transfer part of a tip to a co-worker. If the Legislature had wanted to empower employers to divide tips to ensure workplace harmony, Johnson asserted, it could have done so. Instead, it made tips the personal property of employees. The result should be that mandatory tip pooling violates Section 351 unless an employer can prove that its customers intended that gratuities given to a server be shared with busboys and bartenders.

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After *Leighton*, tip redistribution policies received little judicial attention for many years. The one exception was *Jameson v. Five Feet Restaurant, Inc.*, 107 Cal.App.4th 138 (2003), which agreed that tip pools are generally permissible but struck down a mandatory pool that included restaurant managers because Section 351 prohibits an employer's "agent" from taking employee tips.

The New Surge

After two decades of near dormancy in the appellate courts, the tip-pooling issue has roared back to life: Since the beginning of the year, five appellate decisions have addressed mandatory tip redistribution policies. *Chau v. Starbucks Corp.*, 174 Cal.App.4th 688 (2009); *Etheridge v. Reins International California Inc.*, 172 Cal.App.4th 908 (2009); *Budrow v. Dave & Busters of California, Inc.*, 171 Cal.App.4th 875 (2009); *Grodensky v. Artichoke Joe's Casino*, 171 Cal.App.4th 1399 (2009), review granted, S172237; *Lu v. Hawaiian Gardens Casino, Inc.*, 170 Cal.App.4th 466 (2009), 170 Cal.App.4th 1370a, review granted, S171442.

Although the recent decisions involve different facts and rationales, each holds that the challenged policy does not violate Section 351. The opinions also have something else in common: Each resulted in a petition for Supreme Court review.

The Supreme Court granted review in *Lu*, which involved casino tips, on the narrow issue of whether employees have a private right of action under Section 351 to sue for wrongfully taken tips. It also granted review in *Grodensky*, another casino tip case, but deferred briefing pending a decision in *Lu*.

The Supreme Court denied review in *Etheridge* and *Budrow*, which held that restaurant servers can be required to share tips with dishwashers, kitchen staff and bartenders. It did so in *Etheridge* even though two appellate justices specifically urged review. The court has not yet ruled on the petition for review in *Chau*, which upheld a Starbucks policy permitting shift supervisors to share tips left in a collective tip box.

Private Right of Action?

The issue currently before the Supreme Court in *Lu* — whether Section 351 permits employees to sue for wrongfully redistributed tips — has divided the appellate courts.

In *Lu*, the 2nd Appellate District held that employees have no private right of action under Section 351. The statute does not expressly authorize employees to sue, and the court found that it does not do so implicitly either. The court reasoned that no private right is necessary to effectuate the statute, since the Department of Industrial Relations can enforce it through fines and prison time. The court also found dispositive that the Labor Code Private Attorneys General Act permits employees to collect civil penalties for violations of Section 351. If Section 351 created its own private right of action, *Lu* concluded, there would have been no reason to allow enforcement through private attorney general suits.

The 1st Appellate District reached the opposite conclusion in *Grodensky*. It held that employees *do* have a private right of action under Section 351. The court reasoned that otherwise, the statute would provide employees with an unenforceable right to their own tips. *Grodensky* also found that the legislative history of Section 351 supports a private right of action and that the other available enforcement mechanisms are inadequate. Although the Department of Industrial Relations can impose sanctions and the Private Attorneys General Act authorizes civil penalties, neither the department nor a private attorney general can recover wrongfully taken tip money. To avoid the "absurd result" of employees having a property right in their tips but no way to recover them, *Grodensky* concluded that Section 351 must create a private right of action.

The Supreme Court ultimately will decide which appellate panel had it right. The answer may be of limited practical significance, though: *Lu* recognized that regardless whether Section 351 permits a private right of action, it can serve as the predicate for a claim under the Unfair Competition Law. Indeed, *Chau*, *Etheridge* and *Budrow* all were framed as Unfair Competition Law suits based on violations of Section 351.

Substantive Tip Issues

The recent decisions are notable not only because they disagree on the private right of action issue, but also because they permit tip redistribution schemes that go significantly beyond the one approved in *Leighton*.

Leighton held that waitresses can be required to share their tips with busboys and bartenders serving their tables. But under *Etheridge*, employers may redistribute tips to anyone in the "chain of service," not just those directly serving the tipper. That means a restaurant can require servers to contribute their tips to dishwashers and other staff who patrons never see and may not realize they are tipping. Dissenting Justice Joan Dempsey Klein described this result as converting a tip from the employee's property to "a part of the employer's cash flow, which the employer may take and apply toward its payroll to augment the wages of non-tipped employees, in lieu of a pay raise for those employees."

The policy upheld in *Leighton* required waitresses to share a set percentage of the tips they received. But under *Grodensky* and *Budrow*, employees also can be required to contribute a flat amount per hour worked or a flat percentage of their gross sales, regardless of the amount of tips they receive. In other words, an employer can use a tip pool to redistribute money that was not actually received as a tip — a far cry from distributing tips according to the tipper's intent.

Leighton anticipated that tips would be equitably redistributed. But *Grodensky* concludes that Section 351 does not impose any equitable constraints on tip redistribution. While *Grodensky* has been depublished and therefore is not binding, it signals that future decisions may not require tip distribution to be correlated with employees' actual roles in the chain of service. The concurring and dissenting justices in *Etheridge* set forth a different view, reasoning that any mandatory tip redistribution policy must be equitable because if tips are distributed arbitrarily, they are not treated as the property of the employees for whom they were left.

Leighton involved tip redistribution among employees. But *Chau* also allows an employer's statutory agents (in *Chau*, shift supervisors) to share tips left in a collective tip jar if they provide customer service. *Chau* reasoned that such tips are left for the whole service team, both agents and employees, and thus do not implicate the rule that employees do not have to share their tips with statutory agents.

The practical effect of these recent decisions is that employers have nearly free reign to require tip sharing among co-workers. The theoretical fractures between the decisions, however, suggest that the issue has not been finally put to rest.

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