TRAVEL LAW: WHEN A TIP IS NOT A TIP BUT A PROFIT CENTER

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Tipping is an ingrained part of the travel industry, especially, in the hotel, restaurant and local transportation industries and, on occasion raises the ire of consumers [See Segrave, Tipping (1998)]. "Although it has been subjected to vigorous criticism and attempts to regulate and even prohibit it since its advent in this country in the latter half of the 19th century, the practice of tipping the providers of personal services has endured and [is] now a well-accepted part of our day-to-day lives. Its acceptance however has not left the subject without controversy" [Searle v. Wyndham International, Inc. (2002)]. Indeed, and today's modern controversy is not about whether tips should be given but whether the gratuity being solicited actually is given to the provider of the service or whether management keeps all or part of the tip as extra profit.

Tipping Is Good

In Searle v. Wyndham International, Inc. (2002), a hotel patron challenged the practice of adding a 17% service charge to room service bills (without advising patrons) as a deceptive business practice. The patron claimed that the hotel 'is compelling payment of a gratuity which would otherwise be entirely voluntary, and secondly, it is tricking customers into paying servers more than they would otherwise provide by way of a 'tip'". In dismissing the complaint the court stated that 'we are not offended by the hotel's practice of treating the service charge as a means of providing reliable compensation to its employees and not a substitute for the customary tip. The hotel's service charge practices provide a guaranteed level of compensation for its servers and at the same time encourage[s] its servers to provide the hotel's guests with good service'".

Tip Diversion Is Not So Good

Unfortunately, some travel suppliers have attempted to take advantage of the customer's willingness to tip service providers and solicited tips or gratuities, all or part of which, are mislabeled and diverted into management's pockets. For example, in Ramirez v. Mansions Catering, Inc. (2010) "Plaintiffs allege

that the 20% 'service charge' separately itemized on defendants' invoices actually is a gratuity, which clients believed defendants were collecting for payment of the wait staff. The practice of retaining the service charge is said to violate (New York) Labor Law 196-d, which, among other things, prohibits employers from retaining 'any part of a gratuity or any charge purported to be a gratuity for an employee'"); Bednark v. Catania Hospitality Group, Inc. (2011) (bartenders at special functions held at Cape Codder Resort and Spa contend that an 'administrative fee' of 18% or 19% of the amount invoiced for food and beverage was 'in fact a 'service charge' as defined in the (Massachusetts) 2004 version of the Tips Act because it was 'a fee that a patron or other consumer would reasonably expect to be given to a wait staff employee, service operator or service bartender'")].

Hawaiian Tip Diversion

In Kawakami v. Kahala Hotel Investors, LLC. (2014) the court noted that "Kahala Hotel generally levies a 19% or 20% service charge for banquet events at the hotel in connection with the purchase of food or beverages. The service charges are placed in one fund. Pursuant to a Collective Bargaining Agreement (CBA) between (the hotel and union) 85% of the service charges are

distributed to the employees as tip income. The CBA then permits the hotel to retain the other 15% as the 'management's share'. At the end of the month, this portion is reclassified to offset Kahala Hotel's wage obligations to its banquet employees. Here, Kahala Hotel collected a 19% service charge from (patron) Kawakami...for his wedding reception. Kahala Hotel then retained 15% of the service charge as its management share".

The Kawakami Class Action

"Kawakami filed a (class action consisting) of customers who paid a service charge to Kahala Hotel in connection with the purchase of food and beverages (alleging) that Kahala Hotel failed to clearly disclose to (customers that it) was not distributing a portion of the service charge to its employees and in fact, retained that portion for itself...(and) that Kahala Hotel had a policy and practice of retaining a portion of the service charges and using this portion to pay managers and non-tipped employees who did not serve or assist in serving food and beverages. Kawakami alleged that such conduct was a direct violation of HRS 481B-14 and thus constituted a UDAP (unfair and deceptive business practice)...pursuant to HRS 480-2".

The Jury Award

"The jury returned its verdict, finding the Kahala Hotel's failure to disclose that not all of the service charges were directly distributed to employees as tip income was the legal cause of the injuries to the Plaintiff Class. The jury awarded the Plaintiff Class $269,114.73,which represented management share of the service charges".

On Appeal

In sustaining the jury verdict the Hawaii Supreme Court held that "The purpose of HRS 481B-14 is to require hotels and restaurants that apply a service charge for food and beverage service, but do not distribute the charge directly to employees as tip income, to advise customers that the service charge will be used to pay for costs or expenses other than wages and tips of employees...Similarly, the Senate Standing Committee Report specifically explained...'The purpose of (HRS 481B-14) is to enhance consumer protection with respect to service charges...it is generally understood that service charges applied to the sale of food and beverages by hotels and restaurants are levied in lieu of a voluntary gratuity, and are distributed to the employees providing the service. Therefore, most consumers do not tip for services over and above the amounts they pay as a service charge"

Employees And Consumers Harmed

In finding that Kahala Hotel's tip diversion policy violated HRS 481B-14 the Hawaii Supreme Court noted that "The employees are deprived of the extra income they would have earned had the hotel distributed the entirety of the service charge as 'tip income' and, absent disclosure, consumers are misled into believing the service charges are being used as a gratuity to employees who provide the service for which customers believe they are tipping".

And What About Uber's "Gratuities"?

In Ehret v. Uber Technologies, Inc. (2014) a California class action brought on behalf of "nationwide class of customers who have hired passenger car service drivers through (Uber's) mobile phone application...alleges that Uber charges a 20% fee above the metered fare for each ride that it misrepresents as a 'gratuity' that is automatically added 'for the driver'. In reality...a substantial portion of this 'gratuity' is retained by Uber as an additional revenue source...Plaintiff contends that Uber's 'gratuity' representations are false, misleading and likely to deceive members of the public insofar as the term 'gratuity' suggests a sum paid to the driver that 'is distinct

and different from the actual fair'...Plaintiff further alleges that by continually misrepresenting the 'gratuity' in its advertisements and then keeping a substantial portion of the gratuity, Uber 'effectively increases the 'material fare' and/or is charging an undisclosed fee. This is false advertising'".

The plaintiff asserted that these actions by Uber "constitutes an unfair business practice in violation of California's Unfair Competition Law (UCL)...an unlawful business practice in violation of the UCL insofar as the conduct in question violates (several California Civil Code and Business and Professional code provisions)...a fraudulent business practice (under the UCL)...a violation of the California Legal Remedies Act...and a breach of contract with her and the class by failing to remit the full amount of the collected gratuity to the drivers". On September 17, 2014 the Court sustained some and dismissed some of these claims [2014 WL 4640170].

Standing Under The UCL

After finding that "Plaintiff has provided sufficient factual allegations from which the Court can plausibly infer that Uber's alleged gratuity misrepresentations emanated from California", the Court found that the plaintiff had standing to assert her claims "by alleging that she would not have agreed to

the full amount that Uber charged her but for Uber's purported misrepresentations", the materiality of which and the reliance thereon resulted in a cognizable economic injury...(the) longstanding rule...under the UCL even a mandatory charge can be deceptive if it is labeled as something it is not".

UCL And CLRA Claims Stated

The Court found the claims under UCL and California's Consumer Legal Remedies Act [CLRA (prohibits "unfair methods of competition and unfair or deceptive acts or practices")] were stated based on allegations that "Uber represents that it automatically charges consumer credit card 'the metered fare + 20% gratuity' and that this '20% gratuity is automatically added for the driver' while, at the same time, it 'keeps a substantial portion of this additional charge for itself'...These allegations are sufficient to plausibly allege that a reasonable consumer would be deceived, and as a result of this deception, they expended more money than they otherwise would have but for the misrepresentation".

The Court also found that claims under CLRA § 1770(a)(5) "which makes it unlawful to represent 'that goods or services have...characteristics...which they do not have'" and CLRA § 1770(a)(14) which prohibits " a defendant from 'representing that

a transaction confers or involves rights, remedies or obligations which it does not have or involve, or which are prohibited by law" were sufficiently stated and also constituted an unlawfulness claim under the UCL.

No Breach Of Contract Claim

The Court found no breach of contract claim since "While tips or gratuities may be customary in the service industry, they are not binding obligations on the part of customers. Uber's failure to remit the 20% gratuity to the drivers does not leave Plaintiffs (or the class) liable to the drivers for any debt or amount. Accordingly, the drivers are properly considered donee beneficiaries...Plaintiff cannot seek damages for breach of contract for Uber's failure to benefit drivers...Under the UCL claim, the operative effect of the 20% gratuity statement is not a contractual promise but rather an alleged misrepresentation which skewed the transaction and causes plaintiff to expend ore money that they otherwise would have had the misrepresentation not been made".

Justice Dickerson been writing about *Travel Law* for 39 years including his annually updated law books, *Travel Law*, Law Journal Press (2015) and *Litigating International Torts in U.S. Courts*,

Thomson Reuters WestLaw (2015), and over 350 legal articles.