THE NEXUS OF THE TIP: THE PROPER ANALYSIS OF PROPERTY AND CONTRACT RIGHTS TO THE TIP

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I. INTRODUCTION

The act of tipping defies explanation under traditional economic models. While the tip is voluntary in nature, it is difficult to ascertain precisely what consumers receive in return. Even more difficult to determine is exactly who or what the consumer is tipping. Is it the person he hands the tip to, or is it the underlying service giving rise to the tip? This question is the basis for two lawsuits, which as of the time of this writing are making their way through Nevada's state and federal courts.

These cases illustrate the difficult nature of determining the respective rights of parties to the tip. Section I of this Note develops a theory to assist the practitioner in conceptualizing those rights. I call this theory the "Nexus of the Tip." Section II reviews the historical underpinning and the current practice of tipping, and also reviews the social and economic literature that has attempted to describe the contours of the custom. Section II.A will introduce the reader to the tipping bestowment inquiry, which defines initial parameters for determining how and to whom a consumer intends to tip. Section II.B introduces the reader to the alternative to the tip, the service charge. This is a flat fee, which a business will either charge per consumer or as a percentage of listed menu prices. Through this discussion, the reader will come to understand why the tip remains the preferred policy among employers.

Section III will introduce the reader to the Nexus of the Tip model. Section III.A merges the notion of the bestowment inquiry with a consideration of when the consumer's property rights in the tip transfer to either the server, or to the employer, depending on one's viewpoint. Section III.A.1 considers the transfer from the viewpoint of the employee who receives the tip directly from the consumer. If the practitioner seeks to attack from this perspective she will appreciate the compelling arguments that may be made through the lens of

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[1] Prior to attending law school, I was in the restaurant business for twenty years; each and every one as a restaurant server. I have worked in virtually every restaurant conceivable. Sizzler, TGI Fridays, and ultimately for some of the most highly acclaimed chefs in the world, including: Mark Franz, Michael Mina, Gary Danko & Alain Ducasse (Mr. Ducasse is the only chef in history to hold nineteen Michelin Stars throughout his career).

donative transfer. On the other hand, if the practitioner seeks to defend from the perspective of the employer, she will want to understand how state law confers the status of trustee upon the employer, and how from the employer's perspective this is beneficial. This is the subject matter of Section III.A.2 and 3.

Section III.B applies the Nexus of the Tip model to circumstances where the beneficiaries displace the state law trust approach in favor of contracts. Las Vegas is unique in that it features union contracts that do this. However, the terms in those contracts create traps for the unwary. That is, where the terms allow tipped employees to decide among themselves how and to whom they will secondarily tip, those same terms can confer the status of third-party beneficiary on the secondarily-tipped employees. This is the subject matter of Section III.B.1. In Section III.B.2, the analysis looks in detail at implications illustrated in litigation arising in late 2010, between Wynn Las Vegas and its unionized employees at its Tryst and XS nightclubs. Thus, the subject matter examined in this Note is both timely and relevant to today's practitioner.

II. The History and Custom of Tipping

Consumers often voluntarily give tips in the form of a monetary payment to workers who have performed services for them. The tipping custom is thus distinguishable from other economic transactions, because unlike tipping, most other economic exchanges involve specific obligations enforced under basic notions of contract law. If a consumer wants to obtain a particular good or service performance, he will have to perform by paying the price a seller specifies. Without paying the seller, the consumer will get nothing in return. Alternatively, if he were to steal the good, or accept performance of the service and then fail to pay for it, the seller's conversion rights become legally enforceable. In contrast, the tipping custom features obligations that are enforced by social norms and individual conscience.[2] The voluntary nature of the tip defies explanation under traditional economic models, because while consumers presumably act in their own self-interest it remains unclear what they receive in return.[3]

The amount of monetary value derived from the tipping custom in the United States cannot be ignored. Under the 2007 U.S. Economic Census data, the aggregate gratuity in full-service restaurants may be estimated at $28.8 billion annually.[4] While this number is limited to tips derived from full-service restaurants, one 1993 study found that the tipping custom extended to as many as thirty-three service professions.[5] The estimation from the U.S. Census could be more accurately described by the IRS but for the fact that tipped income is

2 Yoram Margalioth, *The Social Norm of Tipping, Its Correlation with Inequality, and Differences in Tax Treatment Across Countries*, 11 Theoretical Inquires L. 561, 562 (2010).
3 *Id.*
4 *2007 Economic Census: Sector 72: Accommodation and Food Services: Subject Series – Misc. Subjects: Average Cost Per Meal for the United States and States: 2007*, U.S. Census Bureau (Dec. 17, 2010), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-ds_name=EC0772SXSB02&-_lang=en. I make the calculation by multiplying the total sales for all full-service restaurants nationally ($192 billion) by 15%. Thus, I arrive at $28.8 billion.
5 Michael Lynn et al., *Consumer Tipping: A Cross-Country Study*, 20 J. Consumer Res. 478, 482 (1993).

so underreported in the United States. In fact, the only category of income more underreported than tipping is illegal income.[6]

The origins of the tipping custom are attributable to sixteenth-century England's coffee houses.[7] At that time, the coffee houses, known as penny universities, featured brass urns bearing the inscription: "To Insure Promptitude."[8] This practice developed further over the next two centuries whereby the London coffee houses' customers gave their waiters notes bearing the inscription "To Insure Promptitude" with coins attached.[9] By the early nineteenth-century tipping had become common in hotels as well.[10]

It was not until the late eighteenth-century that tipping made its way to the shores of America.[11] Its export to the U.S. is attributed to affluent Americans who traveled to Europe and had to tip there.[12] When they brought the custom home, it was met with heavy opposition.[13] The reason for this was that the tip was viewed as fostering the master-servant relationship in a nation built on egalitarian values.[14] Both consumer and worker groups opposed tipping by arguing that tipping ultimately disfavored its recipients because employers were reducing workers' wages and allowing the tips to compensate them for the difference.[15] Though several states had responded in opposition to the tipping custom by outlawing it in the early twentieth-century, these laws were largely abolished under pressure from employers, and under the largely held belief that attempts to abolish it were useless.[16] Indeed, today the practice has become commonplace. In fact, since 1982 where the average tip rate in U.S. restaurants was 14.4%, the average has steadily grown to 19% as of 2007.[17]

The reasons why consumers tip are less certain than the fact of the custom's historical development in the U.S. The rationales may be expressed as a desire for good service in the future,[18] a desire of social approval,[19] or as a desire to equitably compensate workers for their service.[20] Other rationales suggest that tipping: (1) reduces anxiety in tippers in regard to being the target

[6] DAVID HEMENWAY, PRICES AND CHOICES: MICROECONOMIC VIGNETTES 80 (3d ed. 1993).
[7] Ofer H. Azar, *The History of Tipping—From Sixteenth-Century England to the United States in the 1910's*, 33 J. SOCIO-ECON. 745, 752 (2004).
[8] *Id.* at 752-53.
[9] *Id.* at 753 (citing J.E. SCHEIN ET AL., THE ART OF TIPPING: CUSTOMS AND CONTROVERSIES 19 (1984)).
[10] *Id.* at 754 (citing R.A. Crouch, *Tips*, CORNHILL MAG., 1936, at 154, 544-45 (quoting a late seventeenth-century journalist as saying: "If a man who has a horse puts up at an inn, besides his usual bill, he must give at least one shilling to the waiter, sixpence each to the chambermaid, the ostler and the jackboot, making together half a crown. If the traveler only puts up to have refreshment, besides paying for his horse's standing, he has to give away in the day another half-crown, which makes five shillings in the day to the servants.").
[11] Margalioth, *supra* note 2, at 563.
[12] Azar, *supra* note 7, at 754.
[13] Margalioth, *supra* note 2, at 553.
[14] *Id.* (citing WILLIAM R. SCOTT, THE ITCHING PAIN: A STUDY OF THE HABIT OF TIPPING IN AMERICA 38 (1916)).
[15] Azar, *supra* note 7, at 757-58.
[16] *Id.* at 758.
[17] Margalioth, *supra* note 2, at 570.
[18] Lynn et al., *supra* note 5, at 479.
[19] *Id.*
[20] *Id.*

of their server's envy, (2) reduces guilt in tippers with respect to status and power inequalities between themselves and their server, (3) increases the social recognition of big tippers, and (4) increases the tipper's positive feelings about themselves as a result of paying out extra to their server.[21] While academia suggests many rationales driving the consumer's decision to tip, none definitively explain the motivation.

A functional model for the positive role tipping plays in a business starts with the notion that monitoring and pricing various inputs increases transaction costs.[22] Under this notion, the business can monitor and price these inputs with greater efficiency than can consumers.[23] The business's comparative advantage thus allows the business to obtain profit on the basis of its greater efficiencies when it produces outputs for sale to its consumers.[24] Where this notion is extended to include service businesses, monitoring and pricing their service worker's input becomes more difficult and costly given the intangible nature of the service input.[25] In the context of tipping, the economic argument is that the tipping custom is efficient in that it provides tipped workers with incentive to do a good job even in the absence of oversight from the employer.[26]

While doing well to demonstrate that tipping is an established custom in the United States, and suggesting many reasons why consumers may tip, the available academic literature falls short of suggesting how one may impute a consumer's intent to bestow a tip, and to whom that consumer intended the bestowment. Subsection 'A' will illuminate issues relating to the consumer's intent to bestow. Then Subsection 'B' will analyze the alternative to the tipping custom: "service charges," and the role that the tip and service charge play in price discrimination.

A. The "Qualified Bestower" and the "Bestowment Inquiry"

There are primarily two prongs to the bestowment inquiry.[27] First, who is qualified to bestow? Second, how does one identify that person's intent to bestow, and to whom that person intended the bestowment? To have a frame of reference as to the term "bestow," one need only turn to Merriam-Webster's Unabridged Dictionary, which defines "bestow" as "to convey as a gift—usually used with *on* or *upon*."[28] As to the first inquiry, an ordinary understanding of the context of tipping is available to anyone who has sat at a restaurant table and ordered food and beverage from a waiter. The waiter brings a course or perhaps several courses of food, and perhaps beverages. You are the diner, and

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21 Michael Lynn & Glenn Withiam, *Tipping and its Alternatives: Business Considerations and Directions for Research*, 22 J. SERVICES MARKETING 328, 329 (2008).
22 Lynn et al., *supra* note 5, at 479.
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.*
27 The "bestowment inquiry" is a term and analytical framework I have developed for this paper.
28 Merriam Webster's Dictionary, http://mw2.merriam-webster.com/dictionary.bestow (emphasis in original). This appears to be a common usage as Black's Law Dictionary similarly defines the terms "[t]o convey as a gift <bestow an honor on another>." Black's Law Dictionary, 182 (9th ed. 2009).

by virtue of your experience during the service of your meal, you are a *qualified bestower*.

As to the second part of the *bestowment inquiry* (how and to whom we may identify the qualified bestower's intent to bestow), the example continues. After you have finished (and hopefully enjoyed) your meal, you receive a corresponding check (assume it costs $100). You then consider how much you are going to leave in addition to that amount in the form of a tip. Maybe you will leave 20%, maybe 15%, or perhaps nothing at all. The point is that the typical diner will *bestow* a tip, regardless of the amount they actually bestow, even if that amount is zero. Therefore, the "tip" may be defined as the monetary manifestation of your sentiment as the qualified bestower with respect to your experience. In this context, your experience was your meal.

In *Moen v. Las Vegas International Hotel*, Judge Thompson developed a "line of service" theory in order to impute intent to bestow.[29] He argued that the mere fact that the last person in the line of service receives the tip is not sufficient to suppose that person is "the only one entitled to share in the customer's bounty."[30] In our example, that last person is the waiter who brings the check at the end of your meal. For illustration, return to the example. You are the diner with the $100 check in your hand and are weighing how much you want to leave as a tip. Here is where contemplation of the line of service theory manifests itself. You will likely have a percentage of the bill you normally tip as a ceiling percentage. Let us assume that number is 20% of the gross amount on the check.

You will likely consider how your reservation was handled. Further influencing your decision is how you subsequently were handled by several employees in the line of service: the hostess who takes you to your table; whether the waiter was knowledgeable about the various menus, i.e., appetizer, main course, dessert and wine menus; and whether the busser cleared plates and brought water and coffee refills in a timely and un-intrusive manner. Additional factors, which may operate to influence your decision include: bill size, server friendliness, server attractiveness, your gender, dining-party size, frequency of your patronage, and payment method.[31] On the balance of these and other considerations, you will bestow your tip as against your ceiling percentage.

The *Moen* line of service theory suggests the importance of the fact that more than one classification of employee played a role in your bestowment determination.[32] In so doing, *Moen* assumes the tip is bestowed upon the service, rather than the server. Nevertheless, this assumption ignores the fact that you, the qualified bestower, are not the only person measuring the service you received. In so doing, the assumption ignores a prevalent "usage of trade."[33] In

[29] Moen v. Las Vegas Int'l Hotel, Inc., 402 F. Supp 157, 160 (D. Nev. 1975), *aff'd*, 554 F.2d 1069 (9th Cir. 1977).
[30] *Id.*
[31] Lynn et al., *supra* note 5, at 479-80.
[32] Of course this begs the question of how far the line of service should extend. Does it include the doorman who greeted you at the entrance? The dishwasher, cleaning crew, or architect of the restaurant? All of these people arguably played some role in your experience. Yet intuitively, this is a grossly attenuated suggestion.
[33] I borrow from U.C.C. § 1-303(c) (2004) for this term which states: "A 'usage of trade' is any practice or method of dealing having such regularity of observance in a place, vocation,

our example, the trade usage *Moen* ignores is the customary right a primarily-tipped worker has most often had to determine how to distribute the primary gratuity to the secondarily-tipped employee.[34] The person whose name is on the check, and almost without exception it is your waiter's name, will also measure the service you received when he or she decides how in turn to bestow gratuity to the other employees in the line of service.[35]

This argument is supported by the functional model of the increased transaction cost associated with efficient employer monitoring and pricing of the service inputs.[36] Because the qualified bestower is in a superior position to observe the quality of service as against the employer, or even the supervisor, the optimal transaction between the qualified bestower and the primarily-tipped employee would be a written service contract.[37] However, repeating such a contract with each qualified bestower on each visit would produce prohibitive transaction costs.[38] For this reason, the norm of restaurant tipping may be viewed as an efficient substitution.[39]

From the functional model just discussed, we may reason by analogy that the primarily-tipped employee may likewise be in a superior position to monitor and price the quality of service they are receiving from the secondarily-tipped staff than is the employer or supervisor. Consider again our example, only with slightly changed facts. As you are having your meal, your water remains empty. You ordered coffee, but it has arrived twenty minutes after you ordered it, and ten minutes after you have finished the dessert you meant to enjoy with the coffee. Moreover, after you finish the first cup of coffee you have finally received, no refill is forthcoming. You look around. Your waiter is obviously busy. In fact, you have seen her at one table or another, taking orders, placing silverware, and putting orders in the computer. Clearly, she is busy and doing everything she can to keep up with the flow of business. But where is the busser? Does she have one? The truth is she may be asking herself the same question. Upset at the slow service you have received, assume that not only do you choose to bestow no tip at all, but later you call to complain to the manager. You have retained your receipt. The name on it is that of your waiter. That is the name you give the manager. Who do you think will be held responsible once management subsequently handles your complaint with its employees?

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or trade as to justify an expectation that it will be observed with respect to the transaction in question."

[34] Admittedly, this assertion comes from my own experience in the restaurant business. Without exception, as a waiter I have never been deprived of the right to determine how much and to whom I would tip among the secondarily-tipped staff.

[35] For the purposes of this paper, I shall call those other employees the "secondarily-tipped staff." By extension, I will generally refer to waiters, bartenders, cocktail servers, and table games dealers as "primarily-tipped staff." Said differently, I employ the term "primarily-tipped staff" where it accurately refers to *Moen*'s notion of the last person in the line of service who receives the primary tip, which is then subsequently divided among the secondarily-tipped staff.

[36] *See supra* text accompanying notes 22-26.

[37] Michael Conlin et al., *The Norm of Restaurant Tipping*, 52 J. ECON. BEHAV. & ORG. 297, 305 (2003).

[38] *Id.*

[39] *Id.*

It is this primary responsibility for your experience that waiters are willing to assume, because with greater responsibility comes a greater share of the cut, and customarily, the primary right to determine how and to whom the remaining portion of the gratuities will be divided among the secondarily-tipped staff. However, while research suggests that there may be elements of efficiency in the tipping custom, it further suggests that the custom is not fully efficient.[40] Therefore, this cannot conclusively explain why restaurants, hotels and others support tip implementation.

The degree to which the average consumer engages in menu price discrimination may also explain why an employer supports tip implementation. For the rational consumer, the addition of the tip to the menu price should cause them to view the price of their meal not merely in terms of the menu price, but in terms of the aggregate price of their meal. In turn, a firm should be able to increase the menu price while discouraging the rational consumer from tipping. In this way, they would be able to increase revenues directly. As a result, they would not feel the need to extract economic rent[41] from their tipped employees either by taking the tips directly, or by reducing their tipped-employees' wages to compensate for the tipped-income. However, as the next section will analyze, in addition to the functional model, the reason firms may prefer to implement tipping may be the bounded rationality[42] of their consumers. This is because those consumers may react differently to increased menu prices as compared to the additional tip expectation over the otherwise lower menu price.

B. Considering the Alternative: the "Service Charge" and Price Discrimination

For the purpose of this Note, the service charge may be understood as a flat fee, which a firm will either charge per consumer or as a percentage of listed menu prices. This is readily distinguishable from the tipping custom in that, unlike the tip, the service charge is a compulsory charge the firm makes upon the consumer. In further distinguishing the service charge from the tip, one must consider the distinction between nominal and real pricing. Nominal prices constitute only a part of the bill.[43] For example, the price of a rib-eye steak on a restaurant menu would constitute the nominal price. Whereas the real price includes the nominal price plus any additional surcharges such as tax, the service charge, and the tip.[44]

When comparing the relative expenses of competing services, consumers may focus on the nominal rather than real prices.[45] The easier the information available to consumers is to use in this comparison, the more likely they are to

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[40] *Id.* at 298.
[41] "Economic rent" is a term economists use to define one aspect of the price of goods and services. Generally, it represents the difference between total revenues, and total costs. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 9-10 (7th ed.).
[42] "Bounded rationality" is an economic term of art which refers to the fact that consumers operate with inherent cognitive limitations. Thus, a consumer may have a limited ability to understand information about the product or service they are purchasing. *Id.* at 393.
[43] Lynn & Withiam, *supra* note 21, at 329.
[44] *Id.*
[45] *Id.* at 330.

apply it in their decision.[46] Because nominal prices are explicitly stated, they are generally more accessible to the consumer.[47] One study specifically suggests that nominal prices influence subjective comparisons of expensiveness even after the consumer has adjusted for the additional surcharges.[48] The reason the firm may prefer the tip to the service charge is that tipping as a form of price discrimination features two key aspects. First, the tip offers a voluntary form of consumer price differential.[49] As against the price-insensitive consumer,[50] the price-sensitive consumer is more likely to avoid paying a price premium by tipping less than the norm.[51] Second, while the firm does not *directly* receive revenues from tips as they would in charging premiums to price-insensitive consumers for other products, they do receive the *indirect* benefit of the tip in the form of lower labor costs.[52] Therefore, the price discrimination that tipping provides may translate to increased sales and profits to the extent that price-sensitive consumers are filling otherwise empty seats.[53]

On the other hand, where the firms add a service charge, they are able to control directly the distribution of that revenue. This allows them not only to distribute those funds to the workers who would customarily receive tips, but also to those who customarily would not. The use of the service charge may allow the firm to raise the average wage rate of its labor force, thus contributing to lower turnover rates and increased competitiveness in recruiting new employees.

To illustrate the challenges of service charge implementation, entertain the following hypothetical. Assume you are in a very busy Las Vegas nightclub. The music is so loud that you have to yell at your companions to be heard, so you text them instead. You want to purchase four "rum & Coke" cocktails, but you have to wade through several layers of revelers before you can even get to the bar. Then it takes you another several minutes to get the bartender's attention. When he finally acknowledges you, you yell your order to him: "FOUR RUM & COKES!" He returns with your cocktails and yells back to you, "THAT WILL BE $40." Assume you pay cash. When you hand over your payment, you give the bartender $50 and tell him to keep the change. Do you ask for your receipt? Moreover, do you look to see if the cost included a service charge? If it indeed included a 2% service charge, would you take your tip back? What if the service charge was 20%? Would you wade back through the masses to take your tip back then?

Now change the facts. You are sitting in an upscale restaurant with one other dining companion. At the end of your meal, your waiter brings you your check. As you relax over your final sips of exquisite espresso, you notice a

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46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.* at 331.
50 Price insensitivity is a referent to the price a consumer is willing to pay for a good or service. Theoretically, price-insensitivity will increase with higher levels of income as against the price-sensitive consumer. *Id.*
51 *Id.* Recall that the norm in the U.S. as of 2007 is 19%. *See supra* text accompanying note 17.
52 Lynn & Withiam, *supra* note 21, at 331 (emphasis added).
53 *Id.*

service charge is included. Assume the cost of the meal was $200. Would the fact that the service charge is 2% affect the way you tip your server? What if the service charge was 20%?

In the nightclub hypothetical, the transaction costs of retrieving the tip in light of the service charge revelation are likely prohibitive to the extent that going back to get the tip is not worth the tip you left. However, in the more relaxed environment of the upscale restaurant, the transaction costs are much lower. Your consideration of the service charge and how it will impact your decision to tip may now be made at the comfort of your own table. Indeed the nightclub versus restaurant distinction plays out on the Las Vegas Strip every night.[54]

In the context of the casino and gaming industry, the service charge simply seems inapplicable. Casinos derive their profit from the consumer's gaming losses. To tack on a service charge, the casino would essentially have to tax a gambler for playing. For this reason, a casino cannot contemplate the service charge and hope to remain competitive against those who do not. Thus, if the casino seeks to extract rent from the tip in order to pay out its other non-traditionally tipped employees, it must do so by taking the tip *directly* from the table games dealers to whom the tip is otherwise bestowed.

In summary-against the service charge-the tip features advantages to the firm because it is consistent with established social norms, it may serve as an efficient monitoring and pricing device, and it offers the price-sensitive consumer a greater degree of control in price discrimination. In contrast, the automatic service charge offers firms direct control over the distribution of the rents that tipped-workers normally derive from their tips. This in turn may raise the average income of the workers, thus contributing to long-term stability and increased competitiveness in recruitment. However, consumers may resent add-on service charges to their bill, especially where the nature of those charges are not fully articulated in advance. Moreover, in the context of gaming, it is difficult to imagine how a casino could add a service charge on a hand of blackjack and yet remain competitive.

III. A Model Theory of the Tipping Custom under Property and Contract Law

A useful way to consider the rights of parties with respect to the tip is represented in what shall be called the "Nexus of the Tip" model (see Figure 1).

[54] For example, at the nightclub Mix in Las Vegas at Mandalay Bay, the cost of reserving a table requires that for every four guests seated at a table, a bottle of alcohol must be purchased. Basic bottles such as a 750 ml of Grey Goose vodka can start at $350. A 20% service charge is included. However, under the Culinary Union's collective bargaining agreement affecting virtually every major casino on the Strip, a compulsory tip is not included in restaurants unless the party size is for eight or more guests. *See, e.g.,* Collective Bargaining Agreement between Mandalay Bay Resort and Casino & Local Joint Executive Board of Las Vegas 2007-2012, at 7 (2007) (Art. 5.02: Gratuities states, "A gratuity shall be added to checks for parties of eight (8) or more in all full service restaurants for guests paying with cash or credit card.") [hereinafter Mandalay Bay Contract].

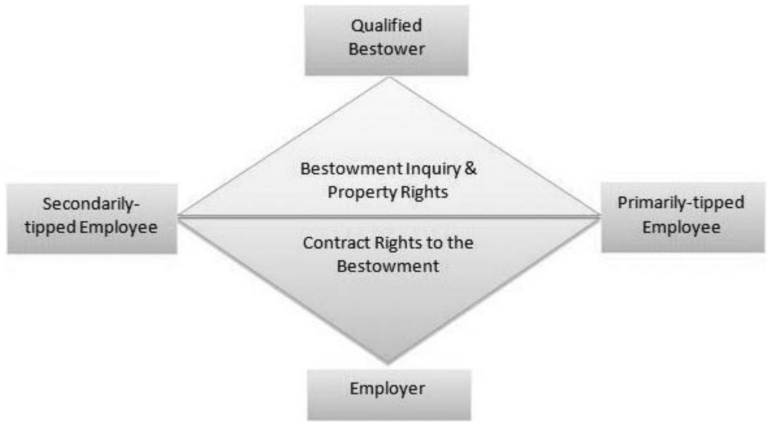

FIGURE 1

The model begins with the qualified bestower's ("QB") relationship to the tip as against the primarily-tipped employee, the secondarily-tipped employee, and the employer (collectively: "the house"). Both the primarily and secondarily-tipped employees have a direct relationship to the QB, because he may hand either one of them the money directly. In contrast, the employer has only an indirect relationship to the QB by virtue of its contractual relationship to its tipped employees.

To illustrate this relationship, consider the following hypothetical. The QB has just finished his meal in a full-service restaurant. The server brings him his check in a check-presenter.[55] He opens the check-presenter and sees the check. It is in the amount of $100. He takes one $100 bill and one $20 bill out of his wallet, places it in the check-presenter, and hands it back to the server. The server takes the check-presenter along with its contents to a cash register, puts the cash amount of the check, $100, into the register, and then changes the remaining $20 bill into one $10 bill and two $5 bills. The server returns with the change in the check presenter, and hands it back to the QB. The QB then opens the check-presenter, and removes one $5 bill. He then puts the $5 bill in his pocket and leaves the remaining amount, $15, in the check-presenter, which he then closes. As he gets up from his table, he hands his server the check-presenter, thanks the server and walks out of the restaurant. At what point does his property interest in the money he left in the check-presenter transfer to the house? Specifically, at what point in the exchange can the house assert a superior property interest in the cash as against the qualified bestower?

Now add one more fact to this scenario. On the way out, the QB sees the busser who was working with his waiter, and hands him the remaining $5 bill. Does the fact that this action, which takes place away from the point of sale, somehow operate to exclude all others from asserting a superior property interest in the $5 bill as against the busser? Said differently, above the $15 left on

[55] Within the restaurant industry, "check presenter" is a term of art. "Check presenters" would be familiar to anyone who has been presented the "check" or bill for their meal inside, or on top of any object that is used specifically for that purpose.

the table, does the side-tip, which is clearly aimed at an individual, require a different analysis?

A. The Bestowment Inquiry and the Relative Property Rights of the Parties at the Nexus of the Tip

FIGURE 2

Figure 2 represents the point in the transaction that the QB maintains the superior property right in the money he left in the check-presenter. Once the tip has passed through the bottom line of the "Bestowment Inquiry & Property Rights" triangle and enters the "Contract Rights to The Bestowment" triangle, the QB has forfeited his superior property interest in the tip as against the house. This is represented in Figure 3.

This relationship also attaches to the "side-tip" the QB offers the busser on his way out. Intuitively we know that at some point the property interest transfers. However, regardless of the pressure the social norm of the tipping custom may exert on the QB, this transfer is entirely voluntary. In order to ascertain when the property right has transferred, the first step is to characterize properly the QB's interest in the bestowment as a property interest.

FIGURE 3

The money the QB will use to manifest his sentiment above his contractual obligations with respect to his experience contains all of the sticks associated with his bundle of rights in property.[56] So long as he does not violate public policy, he has the right to *possess* and *use* his money any way he

[56] *See*, *e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (referring to the "bundle of rights that are commonly characterized as property").

wants,[57] regardless of whether he spends it on a menu item, or whether he bestows it as a tip. After reviewing the menu and thus having reasonable notice of the price for the items, he then orders and consumes those items. In this sense, he has accepted the employer's offer to enter into a contract to consume food and beverage at a stated price in exchange for his payment of money in return. In contrast, after reviewing the check he receives at the end of his meal, he *voluntarily* transfers his money through the bestowment of the tip, likely as a percentage of the nominal price. Rather than an obligation arising from his contractual agreement, his bestowment arises from his sense of obligation under a social norm—the tipping custom. His is the right to *transfer* that money to whomever he wants. As well, it is his right to *exclude* from the bestowment whomever he wants.

The difficulty in determining to whom the QB intends the bestowment remains. If the transaction costs were not so high, the employer could interrogate the QB as to whom he intended the bestowment. However, the transaction costs are high and may be characterized in at least three ways. First, interrogating a QB over just what they meant to do in their moment of gratuitous behavior may operate to persuade them not to return for this insult a second time.[58] Second, the employer may be told that the intended recipient is whoever the primarily-tipped employee wants it to be, thus excluding the employer from preempting the primarily-tipped employee's discretion in the tip-out. Finally, because monitoring every QB, so as to know when they are finished making their determination, would incur opportunity costs where the operation of the business requires the interrogator to engage in other aspects of the business.

Having properly characterized the QB's interest in the bestowment as a property interest, while at the same time not having his specific instruction as to whom and in what amounts he intended the bestowment, the second step requires that we characterize his intent under property law with greater precision.

In the following two sections, the analysis will first contemplate the property rights relative to the gratuity assuming the QB intends to tip the primarily-tipped employee. Then the analysis will contemplate these rights assuming the QB intends to tip the service and all those who played a role in delivering it. In order to properly characterize the QB's intent in either circumstance, the analysis turns on donative intent. Therefore, the analysis begins with contemplation of the relationship between gifting, exchange and conversion.

[57] State v. Shack, 277 A.2d 369, 372 (N.J. 1971) (stating that "[p]roperty rights serve human values. They are recognized to that end, and are limited by it."). As an inherently limited proposition, property rights exist to the extent they serve a socially acceptable justification. JOHN G. SPALDING, UNDERSTANDING PROPERTY LAW 4 (2d ed. 2007).

[58] This behavior is expressly prohibited by some employers. *See* Mandalay Bay New Hire Orientation (Rule of Conduct #26 states that this is a form of hustling tips, and that the associated discipline may include termination for a first time offense).

1. From the Primarily-Tipped Employee's Perspective: Whether the Bestowment is a Gift or an Exchange; and Whether the Employer's Preemption of the Primarily-Tipped Employee's Discretion of How Much and to Whom to Secondarily Tip Constitutes Conversion

There are essentially two issues this section addresses. First, has the QB exhibited donative intent to a particular employee when bestowing the tip? Second, if so, can the QB fully transfer his superior property right to that person as against any property right the employer may assert in the tip? After first discussing the elements of a proper gift inter vivos, the analysis will deconstruct the notion of the "gift" to demonstrate why there is no pure gift in the context of the bestowment, and that while distinguishable, donative transfers are in fact inseparable from exchange relationships. Finally, the analysis will overlay these considerations with whether employers engage in fraudulent behavior, as embodied in the image of the Trojan horse, so as to induce conversion of the QB's bestowment to the employee.

The common law specifies three requirements for a valid gift inter vivos: (1) *intent* (the donor must intend to make an immediate gift); (2) *delivery* (the donor must deliver the gift); and (3) *acceptance* (the donee must accept the gift).[59] In the example in which the QB leaves the $15 tip in the check-presenter while taking back the $5 bill, we may impute his intent to make the gift. Then, when he gets up from the table and hands the check-presenter to his server, he has actually delivered the gift. Finally, the server accepts the check-presenter (and the cash in it) as the QB walks out the door of the restaurant. From these facts alone, we may say that the QB's rights in the tip have become inferior to those of the server. At this point, the server may reasonably rely on the fact that the QB has left that property and has no intent to return for it. We may also apply this analysis to the side-tip the QB bestows on the busser. He took back the $5 bill from the change his server brought him and put it in his pocket. He handed the $5 bill to the busser only after leaving his table. To the reasonable person, this action would demonstrate his intent to bestow a separate amount to the busser from that which he left in the check presenter on the table. The act of taking the $5 from his pocket and then handing it to the busser is actual delivery. Finally, when the busser accepts the $5 bill, the transfer of the property interest is complete.

However, the issue of whether the tip may be characterized as a "gift" requires further analysis. This analysis begins by distinguishing a gift as against an "exchange." While a gift may be characterized as a voluntary unilateral transfer of a property right, an exchange may be characterized as a voluntary reciprocal transfer of respective property rights.[60] There is one more transfer that need be explored: conversion. Conversion is an intentional exercise of control over property, which so seriously interferes with the right of another to

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[59] Schmanski v. Schmanski, 984 P.2d 752, 756 (Nev. 1999) (citing 38 AM. JUR. 2d *Gifts* § 17 (1999)).

[60] Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. R. 295, 296 (1992).

control it, that the person whose right was interfered with may seek damages.[61] Said differently, conversion is the involuntary unilateral transfer on the part of the donor.[62] Consider this relationship in the form of the following diagram:

FIGURE 4

Each of the three categories is related to the others in the sense that they are all transfers. To the extent that each category is present in a transaction, each will overlap with the others. For example, we may characterize the bestowment of the tip as a gift because it is a voluntary unilateral transfer from the QB to the primarily-tipped employee. This is because it operates independent of the nominal pricing contractual relationship established between the QB and the employer by virtue of their exchange. Moreover, the bestowment typically occurs when the meal is over and the check is presented. Recall that when the QB makes the bestowment, his action defies explanation under traditional models of economic exchange. This is because while through bestowment the QB acts in his own self-interest with respect to the pressure the social norm of tipping creates, it remains unclear what he receives in return. However, by virtue of the fact that the QB acts in his own self-interest, his "gift" bleeds over into the category of exchange, even if only ever so slightly.

How conversion enters the mix may best be understood through the earlier discussion of the "service charge."[63] Recall that there are several reasons the firm may prefer the tip to the service charge: (1) tipping is a superior form of price discrimination; (2) tipping is consistent with social norms; and (3) the person being served is in a superior position as against the employer to price and value the service he receives.[64] However, because tipping is a direct payment to the employee, the employer loses at least some discretion in how the tip is distributed secondarily. In the absence of a statute or contract preventing it from doing so, the employer may compensate for this by requiring its employees to turn over their tips to the employer. Nevertheless, they may still incur losses where the tips are made in cash rather than credit card transactions due to theft of the cash tips by employees.

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61 RESTATEMENT (SECOND) OF TORTS § 222A(1) (1965).
62 Rose, *supra* note 60, at 297.
63 *See supra* text accompanying notes 43-54.
64 *See supra* text accompanying notes 18-21.

Alternatively, when employers add a service charge, they are *directly* able to control the distribution of the economic rents[65] tips would otherwise produce. This in turn allows them to raise the average wage rate of their labor force, thus contributing to both lower turnover rates, and increased competitiveness in recruitment. Unfortunately, this may also make them less competitive in the price-sensitive consumer market.[66] Instead, they abandon the service charge in favor of allowing the QB to engage in the tipping custom for the reasons described above. They can then convert the bestowment into the essence of a service charge.[67] So, a fourth reason employers would prefer the tip is such that they may indirectly control the distribution of that revenue. As a direct result of this conversion, the employer has yet again attained direct control of the distribution of the revenue, even if it has used an indirect method to do so. As long as there is no statutory or contractual provision that prevents it from doing so, the employer may hide in the belly of the Trojan horse that is the primarily-tipped employee, and wait for the QB to open the gates to their property interest in the money they will unwittingly bestow to the employer. Through this discussion, we may now add some texture to the diagram below:

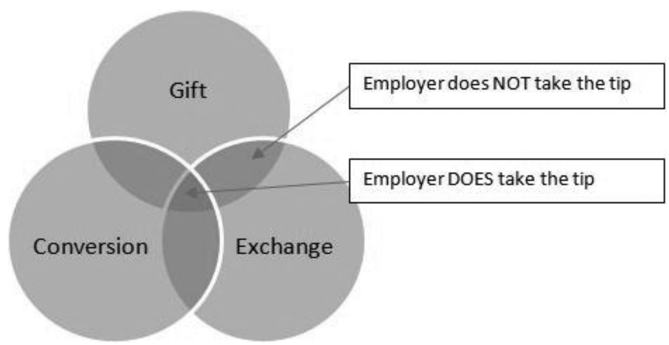

FIGURE 5

Conversion has its analogue under criminal law: larceny. Perhaps Professor Rose said it best:

> [Among other things], it includes those trickster "Greeks bearing gifts," along with modern con artists who always seem to be giving away something for nothing. The old common law name for that kind of thing was "larceny by trick;" even though I may use the image of giving you something, I am really trying to get something from you, against what would be your will if you had better sense . . . .[68]

In Nevada, a person commits larceny by taking the property he intends to deprive its owner of possession, even if that person's intent does not include

[65] *See supra* note 41.
[66] *See supra* text accompanying notes 43-53.
[67] Recall that a "service charge" may be understood as a flat fee, which a firm will either charge per consumer or as a percentage of listed menu prices. See the discussion of the "service charge" beginning *supra*, p. 10.
[68] Rose, *supra* note 60, at 297 (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, HANDBOOK ON CRIMINAL LAW 627 (1972)).

possession of the property for his own benefit.[69] Though an employer may argue that he is taking the tip not for his benefit but for that of his employees, then under this definition, he may nevertheless be guilty of larceny not only against the primarily-tipped employee, but more importantly, against the QB. While this may seem like a wild proposition, we need only look at the development of Nevada's statutory law concerning the tipping custom for support.

As far back as 1939, the Nevada legislature passed an act speaking to employers' actions in this regard.[70] At that time, Chapter 17 of the Statutes of Nevada stated in its preamble that because employers were as a matter of practice taking portions of any tips bestowed upon their employees, the legislature viewed this practice as "tend[ing] to perpetrate a fraud or imposition upon the public."[71] Moreover, the legislature viewed this as a direct result of "the employers' failure to notify the public that tips bestowed upon employees go to the employers."[72] Thus, the employer would have to post notice of its practice in a place easily seen by the public.[73] Conviction under this statute would result in a misdemeanor.[74]

The 1939 statute spoke to two employer actions that would trigger its notice to the public requirement. The first was where "[any] person who takes all or any part of any tips or gratuities bestowed upon his employees," and the second was where "[any person] who credits the same toward payment of his employees' wages."[75] In 1971, the Nevada legislature amended this statute to read:

> 1) It is unlawful for any person to:
>
> a) Take all or part of any tips or gratuities bestowed upon the employees of that person.
>
> b) Apply as a credit toward the payment of the statutory minimum hourly wage established by any law of this State any tips or gratuities bestowed upon the employees of that person.
>
> 2) Nothing contained in this section shall be construed to prevent such employees from entering into an agreement to divide such tips or gratuities.[76]

Moen v. Las Vegas International Hotel[77] was the first case to apply the 1971 amendment. The plaintiff in that case was a casino table games dealer who contended that under the statute, employers were precluded from requiring

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69 State v. Slingerland, 7 P. 280, 280 (Nev. 1885).
70 1939 Statutes of Nev. p. 13, *quoted* in Moen v. Las Vegas Int'l Hotel, 402 F. Supp. 157, 158-59 (1975).
71 *Id.*
72 *Id.* at 159.
73 *Id.*
74 The sentencing guidelines in the 1939 statute called for "a fine of not less than one hundred dollars, nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by [both]." *Id.* In 2009 dollars, the fine would be between $1,500 and $7,500. *CPI Inflation Calculator*, U.S. BUREAU OF LABOR STAT., http://www.bls.gov/data/inflation_calculator.htm (last visited Sept. 5, 2011).
75 Formerly section 1 of chapter 17 of Laws 1939, *amended by* 1971 Nev. Stat. p. 1263, codified at NEV. REV. STAT. § 608.160 (1971).
76 NEV. REV. STAT. § 608.160 (1973); subsection 1(b) was the product of amendment by S.B. 536, 1973 Leg., 57th Sess. (Nev. 1973) (amending NEV. REV. STAT. § 608.160(1)(b) to limit scope of provision barring application of tips to the state minimum wage law).
77 402 F. Supp 157 (D. Nev. 1975).

their primarily-tipped employees to share their tips, or "tip-pool," with other employees including other dealers, boxmen, casino cashiers and floormen.[78] Notwithstanding the fact that the preamble was deleted in 1971, the court found that when construing the 1971 amendment, one should "bear[ ] in mind the preamble to the 1939 statute."[79] On this basis, the court concluded that the notice requirement under the 1939 statute was "insufficient and that adequate protection of the public against the presumed fraud involved in a taking of tips . . . could not be obtained without an express prohibition of such practices."[80] Indeed the 1971 amendment's legislative history supports this conclusion. The Nevada Labor Commissioner's representative to the hearings before the Assembly Labor and Management Committee stated that the Commissioner's office was having "difficulty enforcing the posting of the Notice required by present law."[81]

Moen became the seminal case in that its analysis was adopted by the Nevada Supreme Court,[82] the Ninth Circuit Court of Appeals,[83] and most recently Nevada's Labor Commissioner.[84] Curiously, none of these opinions cite *Moen* for its premise that the legislative intent driving the 1971 amendment was for the protection of the unwary public against the presumed fraud involved when the employer takes the tips they bestow upon the primarily-tipped employee. If, as these courts have suggested, the *Moen* interpretation of the statute is correct, and must be given serious consideration, why then have those courts omitted the *Moen* premise from each of their opinions? At first, one might conclude that the rationale of *Moen* is internally inconsistent, and thus in conflict with itself.

It is only when we turn to the *Moen* analysis of the tipped-employee's property right in the tip that this apparent inconsistency may be recognized as congruent after all. As discussed above, the "gift" of the tip bestowment is fairly characterized as an exchange, and therefore understood through the same element that makes the exchange transfer understandable: self-interest.[85] The self-interest in the bestowment extends to each party in the Nexus of the Tip model. For the tipped employees, that self-interest is embodied in their desire to control directly any secondary distribution of the tip they receive, to the extent they personally feel compelled to tip at all. The employer's self-interest stems from the desire to control directly the allocation of the tip, while taking advan-

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[78] *Id.* at 158.
[79] *Id.* at 159.
[80] *Id.* at 160.
[81] *Hearing on A.B.353 Before the Labor and Mgmt. Comm.*, 1971 Leg., 56th Sess. 11 (1971) (statement of Stan Jones, Rep., Nev. State Labor Comm'n) [hereinafter *Hearing*].
[82] Alford v. Harolds Club, 669 P.2d 721, 724 (Nev. 1983) (stating "[W]e believe that the interpretation advanced in *Moen* is, in light of the legislative history and well established and commonly known Nevada employment practices, the correct one."); *see also* Baldonado v. Wynn, 194 P.3d 96, 102 (Nev. 2008).
[83] Cotter v. Desert Palace, 880 F.2d 1142, 1145 (9th Cir. 1989) (citing *Alford*, 669 P.2d at 721; *Moen*, 402 F. Supp. at 157).
[84] Baldonado v. Wynn, Nev. Labor Comm'r 7 (July 2010) (stating that *Moen* is the "seminal case" and that its "analysis must be given serious consideration.") [hereinafter Labor Comm'r].
[85] Rose, *supra* note 60, at 300.

tage of the indirect relationship they have to the tip by virtue of the tipping custom. One cannot disregard the fact that, but for the business the employer has created, the tipped employee would not have the context in which to benefit from the tipping custom at all.

Moreover, the employer may fairly argue that its self-interest is characterized as a desire to have the ability to run its business and in that regard have the ability to include within the pool those who probably have the least leverage. It is this tension between the tipped employees and the employer that ultimately led to the apparent inconsistency in the *Moen* analysis. That is, the tension in the struggle for control of the tip swallowed whole the argument that concern for sufficient protection of the public against any presumed fraud involved in the taking of tips drove the legislative intent behind the 1971 amendment. However, as the next section reveals, *Moen* created a trust relationship under state law. It is through the trust lens that one may finally view the *Moen* rationale as internally congruent.

2. From the Employer's Perspective: Whether the Qualified Bestower Intends to Tip the Service Rather than the Server, and Therefore Bestows Trustee Status upon the Employer

Since 1971, there have been several attempts to amend NRS § 608.160.[86] All but one failed.[87] The essential struggle has been over two issues. One issue revolves around whether the employer should be allowed to apply the tip as a credit against the minimum wage.[88] The other issue is whether the employer or the primarily-tipped employee should have the express right to determine how the tips will be allocated amongst the secondarily-tipped staff.[89] Despite these efforts, NRS § 608.160 has remained substantively unchanged since its inception in 1971.

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[86] S.B. 536, 1973 Leg., 57th Sess. (Nev. 1973) (amending NEV. REV. STAT. § 608.160(1)(b) to limit scope of provision barring application of tips to the state minimum wage law); S.B. 307, 1983 Leg., 62nd Sess. (Nev. 1983) (attempted amendment of NEV. REV. STAT. § 608.160 by declaring tips to be gifts and prohibiting certain deductions from wages); S.B. 549, 1993 Leg., 67th Sess. (Nev. 1993) (attempted amendment of NEV. REV. STAT. § 608.160 by providing credit for tips against minimum wage); A.B. 701, 1993 Leg., 67th Sess. (Nev. 1993) (attempted amendment of NEV. REV. STAT. § 608.160 by prohibiting the employer from applying any tips bestowed an employee as credit against wages to any employee); A.B. 284, 1995 Leg., 68th Sess. (Nev. 1995) (attempted amendment to NEV. REV. STAT. § 608.160 by prohibiting the employer from requiring the employee to share tips with certain other employees); A.B. 357, 2007 Leg., 74th Sess. (Nev. 2007) (attempted amendment of NEV. REV. STAT. § 608.160 by revising provisions governing tips and gratuities received by employees).

[87] S.B. 536, 1973 Leg., 57th Sess. (Nev. 1973) (amending NEV. REV. STAT. § 608.160(1)(b) to limit scope of provision barring application of tips to the state minimum wage law).

[88] NEV. REV. STAT. § 608.160(1)(b) (1973) currently provides that it is unlawful for employers to "[a]pply as a credit toward the payment of the statutory minimum hourly wage established by any law of [the state of Nevada] any tips or gratuities bestowed upon [their] employees."

[89] *See* A.B. 284, 1995 Leg., 68th Sess. (Nev. 1995) (attempted amendment to NEV. REV. STAT. § 608.160 by prohibiting the employer from requiring the employee to share tips with certain other employees); A.B. 357, 2007 Leg., 74th Sess. (Nev. 2007) (attempted amendment of NEV. REV. STAT. § 608.160 by revising provisions governing tips and gratuities received by employees).

In 1971, during hearings before the Labor and Management Committee, several opponents to the bill stated that they wanted to amend it so that the employer could not compel employees to share their tips.[90] However, members of the committee responded that the requested amendments would be overstepping into the field of management.[91] Though the *Moen* analysis did not cite this exchange in its rationale, it was likely a motivating factor for its ultimate conclusion: "the disposition of tips is properly a matter for contractual determination between the employer and employee."[92] In reaching this conclusion, the *Moen* court reasoned that given the tip-pooling language in § 608.160(2), an employer does not "take" tips within the meaning of the statute "so long as *only employees* share in the tips."[93]

Moen suggests that the tip-pooling language has two possible readings.[94] On the one hand, it could be read as: "Nothing contained in this section shall be construed to prevent such employees from entering into an agreement with other employees to divide such tips . . . among themselves."[95] On the other hand, it could be read as: "Nothing contained in this section shall be construed to prevent such employees from entering into an agreement with the employer or with other employees to divide such tips . . . among the employees."[96] *Moen* adopted the latter and broader reading of the two.[97]

At first glance, this broader reading appears to be inconsistent with the court's statement early in the opinion that when construing the 1971 amendment, one should bear in mind the 1939 preamble of the predecessor statute to NRS § 608.160.[98] However, whether the broader reading is inconsistent depends on how one characterizes the term "take" within the meaning of the statute.

On the one hand, if "take" is construed to mean *anything* that directly or indirectly benefits the employer, then certainly the *Moen* interpretation is inconsistent. This is because if the statute was meant to protect "the public against the presumed fraud involved in a taking of tips,"[99] then even the *indirect* benefits an employer gains by allocating the tips to those that might have made less could be construed as a taking.

On the other hand, if "take" is construed to mean that the employer only uses the tips for its *direct* benefit, then the *Moen* interpretation is consistent. This depends on two assumptions. The first assumption is that the notion of a direct benefit must be narrowly construed so that only "where the employer actually pockets and retains the tips to the exclusion of its employees, such an

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90 A.B. 353, 1971 Leg., 56th Sess., at 10 (Nev. 1971).
91 *Id.* at 11.
92 Moen v. Las Vegas Int'l Hotel, 402 F. Supp. 157, 160 (D. Nev. 1975).
93 *Id.* at 160 (emphasis added).
94 That language is in NEV. REV. STAT. 608.160(2) and reads: "Nothing contained in this section shall be construed to prevent such employees from entering into an agreement to divide such tips or gratuities."
95 *Moen*, 402 F. Supp. at 160 (emphasis added).
96 *Id.* (emphasis added).
97 *Id.* at 162.
98 *See supra* text accompanying footnotes 80-82.
99 *Moen*, 402 F. Supp. at 160.

action can clearly be identified as a taking."[100] Certainly, opponents to the "direct only" construction would argue that this is a mere form over substance argument. NRS § 608.160 does not mention the term 'benefit' anywhere in its language. For this reason, there is no meaningful distinction between a direct or indirect benefit. Therefore, opponents to the *Moen* rationale would conclude that an employer's use of employee tips for its own benefit is nevertheless in violation of the statute.[101]

In a hearing before the Nevada's Assembly Committee on Judiciary, Andrew Pascal, President of Wynn Las Vegas ("Wynn"), stated that the casino sought to address issues that had arisen with respect to its table games operation, and that to do this, it decided to reallocate the tip distribution.[102] Of the issues it sought to address, the most important were to: (1) get those employees "who work closest to customers to take responsibility for the customer's experience;" (2) "[get people working] in the pits to show more motivation in working side by side with the dealers;" and (3) get the "pit managers [to] take a more active role in influencing [their] guests' overall experience."[103] Note that the primary concerns voiced by Mr. Pascal were related to issues that affected the company's relationship with customer experience. Those issues, in the employer's opinion, arose from perceived inequity in pay as between the primarily-tipped employee and the employer's supervisors and managers.[104]

Wynn's reallocation of tips yielded several benefits. It likely led to an increase in retention and recruitment rates of employees in supervisor and manager positions. Moreover, the Wynn was able to improve "the quality of service throughout [its] resorts."[105] In fact, Mr. Pascal stated that since the reallocation, length of play in games, "overall volume of business with head counts of the number of people that are actively playing at any given time,"[106] and overall service had improved.[107] One view of these facts is that the employer was able to do this by taking tips previously belonging to dealers, rather than increasing its supervisors' and managers' pay directly from the casino's revenue.

The second "direct benefit only" assumption is that the QB intends to tip the service rather than the primarily-tipped employee. This is a necessary condition because, if the QB intends to tip the service, then by controlling the tip allocation the employer is acting on behalf of everyone who contributed in the line of service. Thus, the employer is effectuating the QB's intent that all who contributed to the line of service have the opportunity to partake in the tip. For example, Kim Sinatra, Senior Vice President and General Counsel, Wynn Las Vegas, testifying in the same hearing before the Assembly Committee on Judiciary as Mr. Pascal, stated that "[a]s employers we want to have the ability to run our business and include those who probably have the least leverage within

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[100] Labor Comm'r, *supra* note 85, at 16.
[101] *See generally* Brief for Appellant at 16, Baldonado v. Wynn, 194 P.3d 96 (Nev. 2008).
[102] *Hearing on A.B. 357 Before the Labor & Mgmt Comm.*, 2007 Leg., 74th Sess. at 26 (Nev. 2007) (statement of Andrew Pascal, President of Wynn Las Vegas) [hereinafter Pascal].
[103] *Id.*
[104] *See id*. at 26-27.
[105] *Id.* at 31.
[106] *Id.*
[107] *Id.*

the pool."[108] She further argued that those who have the least leverage within the pool would likely be the ones to suffer the most because they tend to be paid the least on a base wage level.[109]

Thus, under Ms. Sinatra's rationale, the "direct only" approach to understanding the term "take" within the meaning of § 608.160, establishes the employer in the role of trustee. Naturally then, the tipped employees then become beneficiaries, which then casts the QB as the trustor under the traditional trust model. For this reason, the analysis next employs principles of trust and agency law as lenses through which one may view the employer's position relative to the other parties to the Nexus of the Tip. At the heart of this inquiry is whether the QB intends the employer or the primarily-tipped employee to act as trustee for the benefit of the secondarily-tipped employee.

3. Under State Law the Primary Tip Gives Rise to a Trust

Under the *Moen* rationale, one may fairly claim that a trust relationship arises in the line of service. First, *Moen* explains that prior to the 1971 amendment giving rise to NRS § 608.160, the intent of the QB (the trustor in the trust model) was to tip the line of service, and to the extent that employers were benefiting by directly taking tips from their employees, they were violating that intent.[110] The 1971 legislature did away with the posted notice requirement[111] and replaced it with the new standard that "so long as only employees share in the tips, the statute is not violated."[112] By designating the employer as being in the superior position to effectuate the QB's intent to tip the line of service, *Moen* effectively holds that where the employer determines the tip allocation among its tipped employees, the employer accepts the role of the trustee, and relegates tipped employees to the role of beneficiaries. By Ms. Sinatra's own terms, the employer dutifully accepts this role: "[a]s employer we want to have the ability to . . . include those who probably have the least leverage within the pool."[113]

For an express trust to arise, the default rule is that the QB manifests intent to create a trust relationship and subject the trustee to duties for the benefit of one or more beneficiaries.[114] In order for the trustee role to arise in either the employer or the primarily-tipped employee, one must ascertain the point at which the QB manifests intent that one or the other assumes the role. One way to conceptualize this is to begin with the assumptions under Nevada state law[115] as a baseline framework, and characterize them as giving rise to the trust relationship.

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[108] *Hearing on A.B. 357 Before the Labor & Mgmt. Comm.*, 2007 Leg., 74th Sess. at 24 (Nev. 2007) (statement of Kim Sinatra, Senior Vice President and Gen. Couns., Wynn Las Vegas) [hereinafter Sinatra].
[109] *Id.*
[110] Moen v. Las Vegas Int'l Hotel, 402 F. Supp. 157, 160 (D. Nev. 1975).
[111] *See supra* text accompanying note 73.
[112] *Moen*, 402 F. Supp. at 160.
[113] Sinatra, *supra* note 108, at 24.
[114] RESTATEMENT (THIRD) TRUSTS § 2 cmt. a (2003).
[115] *See supra* text accompanying footnotes 100-110.

Absent an employment contract to the contrary, the employer is the trustee. Under the state law assumption that the QB intends to tip the service rather than the server, the employer (as trustee) is then in the best position to allocate that tip to all who provided the service giving rise to the tip. Likewise, under the other state law assumption that the employer may not directly benefit from the tip, but rather only determine its allocation, it does so as a trustee. Once the employer accepts this role and actively allocates tips among its staff, as Wynn has done with its dealers, the employer must accept the fiduciary duty of impartiality. This duty requires the trustee to act impartially in managing and distributing the trust property, giving due regard to the beneficiaries' respective interests.[116] Under the basic trust, the employer (as trustee) cannot justify an action that will exclusively benefit the primarily-tipped or secondarily-tipped employee as beneficiaries.[117] Rather, the employer must justify its decision with respect to the aggregate welfare of both the primarily and secondarily-tipped employees as a single class.[118] Thus under Nevada state law, the overarching directive of the duty of impartiality prescribes the employer's allocation of tips among its employees.[119]

However, a problem arises when the employer allocates a greater share of the tip to one classification over the other. For example, an employer that allocates a greater share of the tip to the primarily-tipped employee to the detriment of the secondarily-tipped employee, does so without knowing whether the QB (as trustor) intended this outcome. One might argue that a trustor would normally put a preference of this effect in the trust instrument. Perhaps in the context of a restaurant, a QB could make such a preference known in the 'tip' line on the signed copy of the credit card slip. However, in the absence of this specification, one might assume that the QB wanted the trustee to exercise discretion in balancing the interests of the tipped employees, favoring one over the other depending on whether the context justified it.

The employer may justify favoring the primarily-tipped employee with a greater tip allocation by reasoning that the primarily-tipped employee is not only a beneficiary, but also an agent of the trust. This role may be viewed in the following way:

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[116] RESTATEMENT (SECOND) OF TRUSTS §§ 183, 232 (1959).

[117] Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 651 (2004).

[118] *Id.*

[119] This duty can be varied by the terms of the trust instrument. In the union context, this is accomplished in the terms of a collective bargaining agreement. *See* Section III.B *infra*.

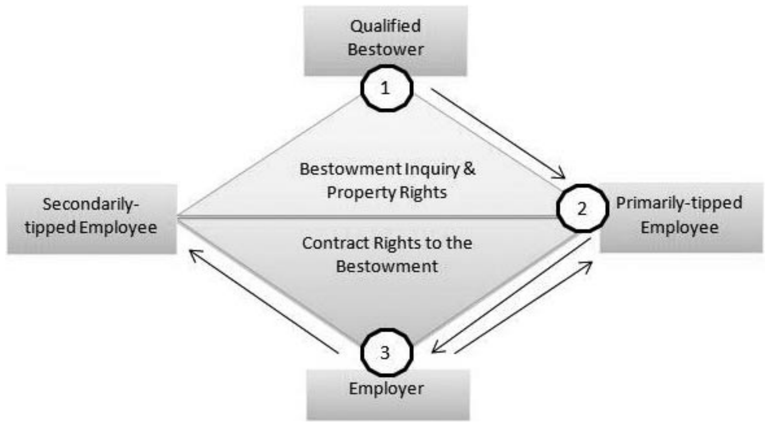

FIGURE 6

Under state law, the QB bestows the tip to the primarily-tipped employee, and this is represented at step 1 in Figure 6. But remember that one of the two assumptions under state law is that the QB is not tipping the last person in the line of service, but rather the service itself. Therefore, the primarily-tipped employee is first acting as an agent on behalf of the employer-trustee at step 2. At this step, the primarily-tipped employee-agent transfers the tip, whether actually or constructively, to the employer-trustee. It is a constructive transfer where the employer has dictated the tip allocation policy, and in compliance with that policy, the primarily-tipped employee transfers the money directly to the designated secondarily-tipped employee-beneficiary. Step 3 represents the transfer of the tip allocation through the employer-trustee to the employee-beneficiaries, regardless of whether the employer-trustee actually or constructively transfers the tip to the tipped employee-beneficiaries.

B. Applications: When the Trust Beneficiaries Displace the State Law Trust Approach in Favor of Contracts—the Effect of the Culinary Union Contracts

Under the state law trust approach, the employer is in a superior position to dictate the terms of the trust. As in many other states, Nevada functions under at-will employment law. Thus, the only meaningful way to vary the terms of the trust is through the power of collective bargaining. For this reason, Culinary Worker's Union contracts serve a key role in the analysis. Such contracts vary the terms of the trust under the state law approach so that the employer is expressly precluded from taking an active role in the trust relationship. However, as discussed below, the language leaves open the question of which party then becomes the trustee, and to what degree of control that party has over the terms of the tip allocation. This becomes especially important to secondarily-tipped employees, who themselves become third-party beneficiaries.

With the exclusion of a handful of properties, every major casino hotel on the Las Vegas Strip ("Strip") is a party to collective bargaining agreements

("Contract(s)") with the Culinary Worker's Union ("Union").[120] Over time, as separate operators have merged into larger companies, the Contracts' language has become relatively uniform across the Strip. For example, language found in the Contracts affecting every Strip property owned and operated by MGM Resorts[121] can be found in the Contracts affecting virtually every Strip resort owned and operated by Caesars Entertainment.[122] The similarities in language can also be traced to the Wynn's Contract with the Union.

With respect to gratuities, the Contracts feature identical language and placement in Article 5 of each of the Contracts. However, while containing the exact language in Article 5.02: *Gratuities*, the Wynn Contract includes additional language, which the others do not. First, consider the following language contained in the first paragraph of Article 5.02 of each of the Contracts:

> All gratuities left by customers are the property of the employees exclusively, and no Employer or department heads not covered by this Agreement shall take any part of such gratuities or credit the same in any manner toward the payment of an employee's wages . . . .[123]

This language is further understood through the Contracts' definition of an employee, which appears at Article 1.01: *Recognition of the Union*.[124] That article defines the term "employee" as: "all employees working in classifications listed in Exhibit 1 are properly within the bargaining unit."[125] Exhibit 1 is a wage scale, which lists each classification of bargaining unit employee covered by the Contract. Among other restaurant and bar classifications, the Contracts list several categories of primarily-tipped employees,[126] as well as several categories of secondarily-tipped employees.[127]

By itself, this language operates like NRS § 608.160 in that it prevents the employer from taking tips from any employee for direct financial benefit "[w]here the employer actually pockets and retains the tips to the exclusion of

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120 Liz Benston, *Culinary Agrees to Wage Freeze*, LAS VEGAS SUN, June 20, 2009, at 2.

121 This portfolio includes Bellagio, Aria, Vdara, MGM Grand, The Signature at MGM Grand, Mandalay Bay, Mirage, Monte Carlo, New York-New York, Luxor, Excalibur and Circus Circus, *see Company Overview*, MGM RESORTS, http://mgmresorts.investorroom.com (last visited Oct. 11, 2011) *and Las Vegas Union Guide*, CULINARY WORKERS UNION, http://culinaryunion226.org/patronize.asp (last visited Oct. 11, 2011).

122 This portfolio includes Caesars Palace, Paris Las Vegas, Planet Hollywood, Harrah's Las Vegas, Flamingo Las Vegas, Bally's Las Vegas and the Rio; *Las Vegas Union Guide*, *supra* note 121.

123 Mandalay Bay Contract, supra note 54, at 7; see *also* Defs.' Mot. Summ. J. at 4-5, Carter v. Wynn Las Vegas, 2:10-cv-01868 (2010) ECF No. 17 (quoting Art. 5.02 of the Collective Bargaining Agreement between Wynn Las Vegas and the Local Joint Executive Board of Las Vegas 2005 – 2015) [hereinafter ECF No. 17].

124 *Id*.

125 Mandalay Bay Contract, *supra* note 54, at 2; *see also* ECF No. 17, *supra* note 124, at 15.

126 For example, the Mandalay Bay Contract lists the following: Specialty/Gourmet Room Server, Specialty Gourmet Captain, Buffet Server, Cocktail Server, Head Bartender and Regular Bartender. Mandalay Bay Contract, *supra* note 54, at 79-82.

127 For example, the Mandalay Bay Contract lists the following: Sommelier, Specialty/Gourmet Room Bus Person, Head Bus Person, Runner, Apprentice Bartender, Apprentice Service Bartender, and Hosts. *Id.* at 79-81.

its employees . . . ."[128] Unlike NRS § 608.160, it operates to prevent the employer from taking a bargaining unit employee's tips, so as to reallocate them to any other employee. However, the next clauses in the Wynn Contract distinguish it from that of the MGM Resorts and Caesars Entertainment Contracts.

In the sections that follow, the analysis will begin with a discussion of the Article 5.02 language in the MGM Resorts and Caesars Entertainment Contracts. The language specific to those Contracts is identical, and clearly bars management (and the Culinary Union by implication) from directing tip allocation among the bargaining unit employees. For example, if a primarily-tipped employee, or for that matter an entire group of primarily-tipped employees, choose to change the way they allocate tips to secondarily-tipped employees, there is no redress available to those secondarily-tipped employees should they not approve of the change—at least not through the grievance procedures. This then leaves the only viable option for mandatory resolution in the hands of the state courts.

For this reason, the analysis will first consider the effect of the language against the baseline of the trust assumption under state law. The analysis will then turn to litigation that has arisen out of the Article 5.02 language as it relates to the Wynn properties. That litigation has been taken up in Nevada's Federal District Court. The plaintiffs are several bartenders, cocktail servers and server assistants at the nightclubs Tryst and XS, located at Wynn and Encore, respectively. The plaintiffs are suing the Wynn for breach of contract with respect to its mandatory tip allocation.

1. Case Study One: Displacement of the State Law Trust Approach under Contract Terms at the MGM Resorts and Caesars Entertainment Properties

With the exception of the MGM Grand property, the state law trust approach discussed above is varied by contract at every property operated by MGM Resorts and Caesars Entertainment by the following language:

> All gratuities left by customers are the property of the employees exclusively, and no Employer or department heads not covered by this Agreement shall take any part of such gratuities . . . . Except as provided otherwise in this Agreement, employees shall not be required to divide their gratuities with any other person(s), and they shall not be coerced or discriminated against to cause them to do so.[129]

As discussed above,[130] the term *employee* used in the first sentence is defined to exclude all but those classifications represented by the bargaining unit. This leaves the tip allocation determination in the hands of the employees. However, the language does not determine how the employees' property interest in the tip is defined. Said differently, there is no clear directive for how the tip allocation is determined or by whom. Therefore, under this language, the

[128] Labor Comm'r, *supra* note 85, at 16 (discussing the meaning of the term "take" as that term is used in NEV. REV. STAT. § 608.160 (1973)).
[129] Collective Bargaining Agreement between Caesars Palace and Local Joint Exec. Board of Las Vegas 2002-2007, at 6 [hereinafter Caesars Contract]; Mandalay Bay Contract, *supra* note 54, at 7.
[130] *See supra* text accompanying notes 125-128.

state law trust overlay is removed from the Nexus of the Tip model. The relationship of the QB and the tipped employees is thus direct and may be viewed as follows:

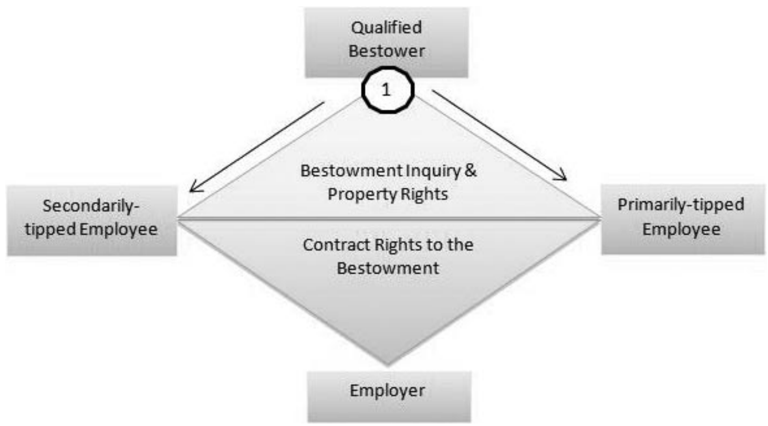

FIGURE 7

Recall the hypothetical following Figure 1. Step 1 in Figure 7 represents the point at which the QB has transferred his property rights in the money he leaves as a tip. The precise point at which the tip has passed through the bottom line of the "Bestowment Inquiry & Property Rights" triangle and entered the "Contract Rights to the Bestowment" triangle is likely specific to policies maintained by each employer.[131] Under the MGM Resorts and Caesars Entertainment Culinary Contracts, each property's respective tip refund policy is likely the extent to which those employers may involve themselves in the property right to the tip. Beyond that, however, any secondary distribution of the tip is in the hands of the tipped employees themselves.

The existence of Article 5.02 in the Contract varies the trust relationship under state law, and gives rise to a third-party beneficiary status in the secondarily-tipped employee. There are two ways through which this may occur. The first is under the employment contract between the employer and the primarily-tipped employee. The second is under a contract between primarily-tipped employees subsequent to their forty-shift probationary period under the Culinary Contracts.

One may assume that under the MGM Resorts and Caesars Entertainment Culinary Contracts that the primarily-tipped employees have agreed to allocate portions of the primary tip to secondarily-tipped staff. One may further assume

[131] For example, where a customer leaves a tip, and for any number of reasons later decides they left too much, they may come back to the restaurant and ask for some of the tip to be returned. If they do so five minutes after they have initially left, the employer may require the server to return the portion the guest is requesting. In the circumstance where the customer is disputing a gratuity amount they only became aware of when they received their credit card statement later in the month, the employer will not be able to so simply refund the tip as in the previous example. Policies respecting this second example may vary depending on the circumstances underlying the dispute.

that they have initially done so as a condition of employment, the existence of Article 5.02 notwithstanding. This is because under all the MGM Resorts and Caesars Entertainment Culinary Contracts, the employer retains a right to dismiss all new hires without recourse to the grievance procedure for the first forty shifts worked.[132] Thus, the employer could establish a tip-pool system for new outlets, and the employees would not be able to vary the terms until they completed the probationary employment period. This then establishes state at-will employment as the default contract until the probationary period is over and recourse to the grievance procedure becomes effective.

The Supreme Court of Nevada recently reiterated, "contractual obligations can be implicit in employer practices and policies."[133] Moreover, the Court emphasized that an employer may unilaterally modify the terms of an at-will employment contract with the employee's continued employment constituting sufficient consideration for the modification.[134] The Court recognized that at-will employees have no contractual rights arising from the employment relationship that limit the employer's ability to either: (1) prospectively hire and fire employees, or (2) change the terms of employment.[135] Thus, while the primarily-tipped employees are within the probationary term of forty shifts, the grievance provisions of the contract have not attached, and they have therefore entered into a constructive at-will employment contract with the employer. If the employer has set the terms of the tip allocation for secondarily-tipped staff, it has assumed the role of trustee and contracted with the primarily-tipped employees not only to serve in their role giving rise to the tip, but also in their role as agents of the trustee.

Consider this in the restaurant context. The employer, Big Casino, has just opened the Restaurant. The employer has explained to the newly hired primarily-tipped staff that the tip allocation will be administered through a tip-pool. All the food servers (primarily-tipped employees) will pool gross tips received on their respective shifts. Servers will evenly divide fifty percent of the gross tips among themselves. The remaining amount will be divided evenly among the bussers, hosts, and food-runners (secondarily-tipped staff). This may be illustrated as follows:

[132] Mandalay Bay Contract, *supra* note 54, at 50; Caesars Contract, *supra* note 130, at 44. Both contracts share identical language which states: "An employee will be considered as a probationary employee until he/she has completed forty (40) shifts of work after his/her most recent date of hire by the Employer. A probationary employee may be terminated at the discretion of the Employer, and such termination shall not be subject to the grievance and arbitration provisions of Article 21."

[133] Baldonado v. Wynn Las Vegas, 194 P.3d 96, 105 (Nev. 2008) (quoting D'Angelo v. Gardner, 819 P.2d 206, 213 (Nev. 1991)).

[134] *Id.*

[135] *Id.* at 106.

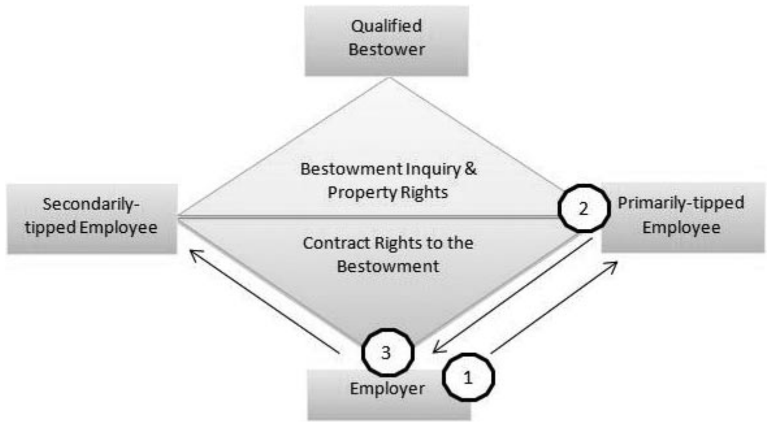

FIGURE 8

At step 1 in Figure 8, the employer offers continued employment to the primarily-tipped employee on condition that they agree to a certain tip allocation by which the employer intends to give a benefit of a certain percentage of the tip to the secondarily-tipped employee. At step 2, the primarily-tipped employee accepts the offer with continued employment constituting sufficient consideration. Thus, the employment contract is formed. That process of contract formation gives rise to step 3, whereby the secondarily-tipped employee acquires the status of intended beneficiary. This is because the primarily-tipped employee promises to act as the employer's agent, and in that role promises to allocate from the gross tip a certain amount for the benefit of the secondarily-tipped employee. The employer has conferred the right of performance from its agent (the primarily-tipped employee) upon the beneficiary (the secondarily-tipped employee). Therefore, the employer is the trustee; the secondarily-tipped employee the beneficiary.

When a contract confers the status of intended beneficiary upon a third party, this does not only mean that performance must be rendered to or for the third party's benefit. It also means that the contract manifests the intent to grant the beneficiary an independent cause of action to enforce the promise.[136] Thus, we may assume that once the terms of the tip allocation under the at-will employment contract are in place, and the primarily-tipped employee has given sufficient consideration through their continued employment, the status of third-party beneficiary has arisen in the secondarily-tipped employee. However, because the provisions of the Culinary Contract become effective after the probationary period has terminated, the employer's ability to unilaterally modify the contract ceases.

The enforceability of the at-will employment contract giving rise to the intended beneficiary in the secondarily-tipped employee is likely temporary at best. This is because the contract may be limited to a term of forty shifts worked by all the tipped-employees who were parties to the contract, at the completion of which the contract expires. Similarly, once the probationary

[136] RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981).

period ends, the primarily-tipped employees may fairly argue that the terms of the 'temporary' at-will employment contract contemplate the option of new terms by virtue of the language in Article 5.02.[137] This brings us to the second way Article 5.02 gives rise to the third-party beneficiary in the secondarily-tipped staff: under a contract between primarily-tipped employees subsequent to their forty-shift probationary period.

Return for a moment to the Restaurant that Big Casino just opened. Assume the at-will employment contract is temporary; the employees are under the Culinary Contract. Assume further that all the food servers are hired on the same day, and that on day fifty-one following their hire date, they will have completed their probationary period, and then among themselves they will revisit the terms of the tip allocation. Upon doing so, they reset the allocation by first agreeing that they will continue to pool their tips. They will retain 55% of the gross tips among themselves. The remaining amount, 45% will then be divided evenly among the bussers, hosts, and food-runners. This may be illustrated as follows:

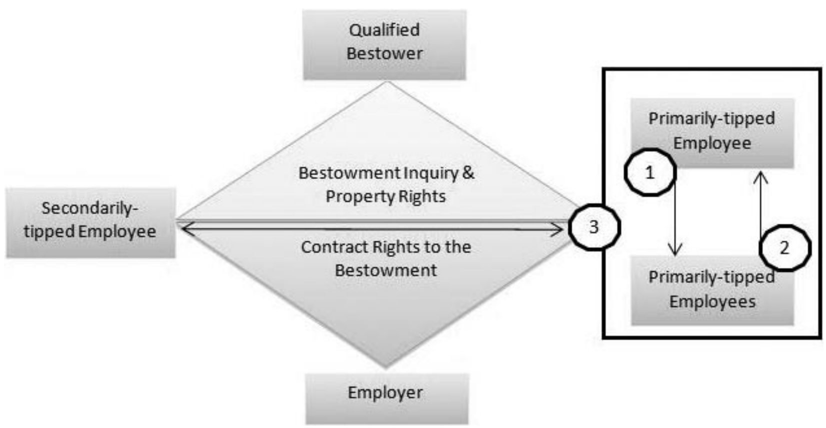

FIGURE 9

At step 1 in Figure 9, individual food servers offer to enter into a contract to pool their individual tips with all the other food servers. At step 2, all the other food servers accept the individual's offer with a promise in return to evenly distribute 55% of the total pool among the individual primarily-tipped employees. At step 3, they agree that the remaining 45% of the gross tip will be distributed evenly among all the bussers, hosts, and food-runners. By manifesting their intent to give the benefit of the 45% to the secondarily-tipped staff—by electing to create the beneficiary status as part of their agreement—they have conferred upon the secondarily-tipped staff the right to enforce the benefit because it is apparent the parties intended to give them that right. While the secondarily-tipped staff will not likely be happy with this outcome, they are not entirely without remedy.

137 *See supra* text accompanying note 131.

The Restatement (Second) of Contracts § 311 provides for the protection of a beneficiary's actual or potential reliance on a contract.[138] To the extent that beneficiaries have received no indication to the contrary, they are justified in relying on the promise.[139] If in reliance upon that promise, the beneficiary has materially changed position, such as in buying a home, then that change of position may operate to preclude subsequent modification of the contract without consent.[140] In other words, at some point after the contract is made, the benefit vests in the beneficiary, and becomes irrevocably settled on him so that it cannot be changed or withdrawn by the contracting parties without his consent.

This leaves two possibilities whereby the benefit may vest. First, it may vest under the default at-will employment contract. Of course, because the Contract expressly notices the forty-shift probationary period to all employees under the Contract, one may reasonably conclude that the Contract provides constructive notice of the potential for modification after the probationary period is over. Second, the benefit may vest at some point after the probationary period expires. The longer the primarily-tipped employees proceed without modifying the tip allocation, the more secondarily-tipped employees may rely on that inaction. In turn, this operates to vest their beneficiary interest in the tip allocation.

2. *Case Study Two:* Carter v. Wynn Las Vegas

The previous section developed the third-party beneficiary relationship as between tipped employees where primarily-tipped employees are the only parties with initial voting rights to the tip allocation "contract." However, there is room for variation on this model. This section explores a modification on the Nexus of the Tip. That is, where the terms of the contract expressly contemplate that primarily- and secondarily-tipped staff both have voting rights as to formation of tip allocation agreements. In the discussion that follows, this leads to third-party beneficiary status arising not in the traditional secondarily-tipped classifications, but rather in management itself.

In December 2010, a group of employees including bartenders, cocktail servers, and server assistants at the nightclubs Tryst and XS filed suit in the United States District Court, District of Nevada.[141] The plaintiffs have alleged breach of contract, breach of covenant of good faith, conversion and unjust enrichment.[142] Essentially, the plaintiffs seek to demonstrate that the defendant employer's policy is in violation of its terms in Article 5.02.[143] The policy mandates that employees at the nightclubs share their nightly tips with management personnel not covered by Exhibit 1 of the Wynn Contract.[144] As dis-

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138 Restatement (Second) of Contracts § 311(3) (1981).
139 *Id.* at § 311 cmt. g.
140 *Id.*
141 Amended Complaint and Jury Demand at 4-5, Carter v. Wynn Las Vegas, No. 2:10-cv-01868 (D. Nev. Dec. 15, 2010) ECF No. 8 [hereinafter Am. Compl.].
142 *Id*. at 9-11.
143 *Id*. at 9.
144 Because this Note is focused on the issue of understanding property and contract rights in the tip, the analysis considers only the Contract's mechanism for varying the terms under

cussed in detail below, the Wynn Contract requires the formation of a tip committee composed of tipped bargaining unit employees along with representatives of Wynn to determine a tip-pool allocation formula.[145]

The plaintiffs allege that for approximately the last four years in the case of Tryst, and from the date of XS's grand opening on New Year's Eve 2009, the employer had instituted a practice of requiring the tipped workers to share their tips with their managers.[146] The system they allege that was in place operated whereby "[t]he managers would write the amount owed them on the back of the nightly printed tip sheet, and then the lead bartenders would pay out that amount to the managers then scribble over the number to erase it."[147] In addition to seeking compensatory damages, the Union workers also seek to overturn that practice in favor of the guidelines set forth in the Wynn Contract.[148]

The key article driving tip allocation in the Wynn Contract is Article 5.02.[149] The pertinent language in that section is:

> All gratuities left by customers are the property of the employees and no employee or department heads not covered by this Agreement shall take any part of such gratuities or credit the same in any manner toward the payment of an employee's wages, *except as otherwise provided by the Agreement. Wynn at its sole option may institute programs whereby gratuities are pooled and disbursed on a pro-rata basis to employees based on hours worked. Wynn along with a gratuity committee for the outlet may determine and publish a formula that allocates a portion of the tips to any other classifications that have taken part in the service for which the original tip was given. If the gratuity committee and management cannot resolve the means of tip distribution, the Secretary Treasurer of the Union and the President of Wynn or their designees will be the final arbiters of any remaining issues. Management will be prohibited from receiving any other monies from employees outside the decisions of the gratuity committee*.[150]

Several aspects of this language are worth noting. If, as in the MGM Resorts Contract, the first sentence was not modified by the exceptions that follow it in the Wynn Contract, then the tips received by Wynn's employees would be subject to the analysis in the section above. However, the first exception states, "Wynn at its sole option may institute programs whereby gratuities are pooled and disbursed . . . ." This phrase suggests that Wynn may unilaterally determine the allocation, thus enabling Wynn to reallocate the tips through tip-pools in the same manner they can under NRS § 608.160. However, when read with Article 5.02, Exhibit 1 of the Contract ostensibly limits this possibility to those bargaining unit classifications employed at Tryst and XS. Therefore, the Contract operates to exclude managers from the tip-pool—unless, as

the state law trust approach discussed above. The issues arising under federal labor law with respect the Tryst and XS litigation are outside the scope of this Note.

145 Collective Bargaining Agreement between Wynn Las Vegas and the Local Joint Exec. Bd. of Las Vegas 2005-2015, 4 [hereinafter Wynn Contract].

146 Am. Compl., *supra* note 141, at 3, 6.

147 Plaintiff's Opposition to Defendant Wynn Las Vegas, LLC's Motion for Summary Judgment at 10, Carter v. Wynn Las Vegas, No. 2:10-cv-0186 (D. Nev. Jan. 14, 2011) ECF No. 22 [hereinafter ECF No. 22].

148 Am. Compl., *supra* note 141, at 13.

149 Wynn Contract, *supra* note 145, at 4.

150 *Id.* (emphasis added to language specific to the Wynn Contract as distinguished from Mandalay Bay and Caesars Entertainment Contracts).

the last sentence of the quoted paragraph provides, the gratuity committee should deem otherwise.

The third sentence clarifies that while Wynn may require a tip-pool, and that the allocation may be distributed on a pro-rata basis for hours worked, the actual formula employed in making the determination is not a matter of Wynn's sole discretion. Instead, Wynn, along with a gratuity committee for the outlet, must make that determination. The language further modifies the formula to include "any other classifications that have taken part in the service for which the original tip was given."[151]

The problem, however, is that the process of gratuity committee formation is not specified in the Wynn Contract. Moreover, not all outlets covered under the Wynn Contract have gratuity committees.[152] To the extent they do, their formation has apparently occurred in a manner that is specific to the outlet, rather than through any stated or posted policy that applies property-wide.[153]

Consider that the plaintiffs have chosen to litigate the case rather than consent to the formation of a gratuity committee pursuant to section 5.02.[154] In their court documents, the plaintiffs state that the tip committee was initially formed in September of 2010.[155] The plaintiffs' documents further state that in "October of 2010, the Tip Committee elected members. At the direction of Wynn, Management Personnel were included as members of the Tip Committee."[156] This suggests that the Wynn management personnel formed at least part of the committee without indicating on what basis. Nevertheless, what remains unclear is exactly who initially formed the committee, and by what process they formed it.

The initial tip committee for the nightclubs included slots for two cocktail servers, two bartenders, two server assistants, two barbacks and two managers.[157] Notably, the committee consisted of two representatives from each of the designated classifications.[158] Subsequently, Wynn and both the Culinary and Bartenders' Unions reformed the tip committees to include slots for three bartenders, five cocktail servers, one bar-back, and four server assistants.[159]

Given that the Article 5.02 language has been in place since the Wynn Resort opened in mid-2005, one could reasonably conclude that the employer and the Unions would have instituted a well-established and functional procedure prior to the current litigation. Indeed, attorneys for Wynn Las Vegas, the Culinary Union, and the Bartender's Union have been involved in the forma-

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151 *Id*.
152 Interview with anonymous source, Las Vegas, Nev. (May 18, 2011) [hereinafter May 18 Interview].
153 *Id.*
154 ECF No. 22, *supra* note 147, at 11.
155 *Id.* at 12.
156 *Id.* (internal citations omitted).
157 May 18 Interview, *supra* note 152.
158 While the plaintiffs' court documents suggest that there were no bartenders representing their classification on the Tip Committee, a conversation with several sources close to the case indicates that is not correct. According to those sources, the September Tip Committee included two bartender representatives on both the Tryst and XS tip committees.
159 Interview with anonymous source, Las Vegas, Nev. (Mar. 22, 2011) [hereinafter Mar. 22 Interview].

tion and re-formation of the tip committees at Tryst and XS.[160] This fact fairly raises two issues. The first issue is whether their current procedures comport to the standard set forth in Article 5.02, including the method for determining: (1) the formula for how many representative slots from each classification would be included on the tip committee, (2) the subsequent selection process, and (3) the resulting allocation formula. The second issue is whether, under the third-party beneficiary analysis discussed above, this process is legitimate at all.

With three nightclubs and as many as thirty-four food and beverage outlets[161] under the Culinary Contract,[162] the potential for variation on tip committee formation in each of these outlets is tremendous. Moreover, consider the potential money at issue. Food and beverage revenues for the third quarter in 2010 were $111.8 million.[163] If we multiply that number by a modest 15% average tip, the 2010 third quarter tip allocation in gross could reasonably be $16.77 million. Depending on the outcome of the Tryst and XS litigation, the remaining nightclub and other food and beverage outlets under the Culinary Contract may seek to revisit their own tip allocations. Certainly, this fact cannot be lost on Wynn, given the amount of compensation the tip allocation at the remaining outlets may be providing for managers. One very distinct possibility is that the re-formation of the tip committees at Tryst and XS suggests that the formula used thus far at Wynn's other outlets could be challenged against the standard ultimately established for the two nightclubs.

Recall that the fourth sentence in Article 5.02 provides a method for resolving any dispute arising from the means of tip distribution. Specifically, the article provides that "the Secretary Treasurer of the Union and the President of Wynn or their designees will be the final arbiters of *any* remaining issues."[164] However, should these final arbiters themselves disagree over how to resolve those issues, there is one final step in the process: arbitration.[165] Wynn Las Vegas argues that if the process that Article 5.02 outlines does not resolve the issue, then the issue becomes a grievance subject to Article 21.03: Procedure for Adjusting Grievances.[166]

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[160] *Id.*

[161] Matt Maddox, Wynn Resorts, Presentation to the Gaming Investment Forum 2010, at 5 (2010); *available at* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDA0OTgzfENoaWxkSUQ9NDEzODgyfFR5cGU9MQ==&t=1.

[162] The Wynn Contract features an ownership clause at Article 29.01. Essentially, it prescribes that the Contract extends to all employees in classifications listed in Exhibit 1, which employed in operations that are "owned by, operated by, or substantially under control of [Wynn Las Vegas]." However, the Culinary Union and the employer may vary these terms through side letter agreements. These agreements may provide for the exclusion of a particular outlet from becoming unionized.

[163] Press Release, Wynn Resorts, Limited Reports Third Quarter Results (Nov. 2, 2010) http://phx.corporate-ir.net/staging/phoenix.zhtml?c=132059&p=irol-newsArticle&ID=1490653&highlight='target=.

[164] Wynn CBA, *supra* note 146, at 4 (emphasis added).

[165] *Id*.

[166] Defendant Wynn Las Vegas, LLC's Motion for Summary Judgment at 8, Carter v. Wynn Las Vegas, 2:10-cv-01868 (D. Nev. Dec. 22, 2011) ECF No. 17 (discussing Wynn Contract, *supra* note 145, at 42-43).

The remaining issue is whether under the third-party beneficiary analysis discussed above,[167] this process can be challenged, and if so, by whom? When all the bargaining unit employees at Wynn voted to ratify the Culinary Contract with their employer, they agreed to Article 5.02's provisions which require that tipped employees contract to pool their individual tips with all the other tipped workers that take part in the service for which the primary tip is given. Rather than contemplating traditional secondarily-tipped employees[168] as third-party beneficiaries, the initial tip agreements[169] at Tryst and XS contemplate the managers as third-party beneficiaries. This is because the terms of the Wynn CBA grant an express right to the traditional secondarily-tipped employees to enter into a tip allocation contract with the primarily-tipped employees.[170] This contract is expressly crafted either to convey or not convey the benefit of a secondary tip to management, which can be reflected in the Nexus of the Tip model as follows:

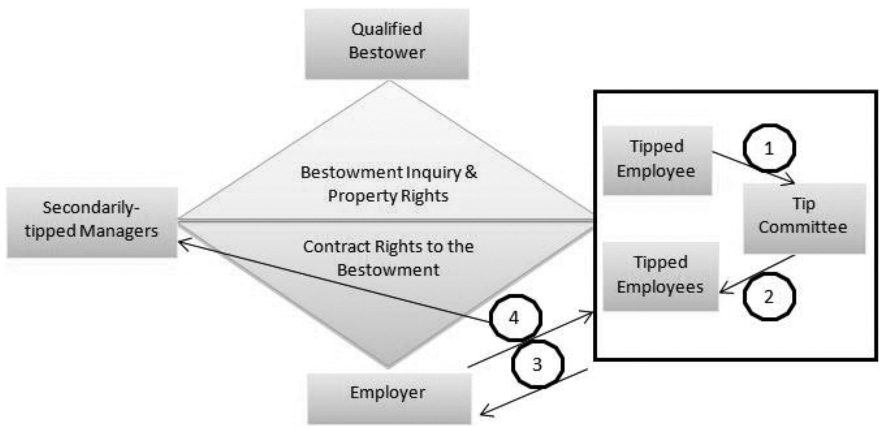

FIGURE 10

At step 1 in Figure 10, the individual tipped employees in each job classification vote for a representative or representatives to the tip committee. At step 2, the tip committee then negotiates and determines through a vote whether managers will be included in the tip-pool. At step 3 (which may occur simultaneously with step 2), Wynn and the tip committee will determine and publish the tip allocation formula. If that allocation formula includes managers in the pool, then at step 4, the managers become third-party beneficiaries. Provided that their rights have vested, the contract for tip allocation manifests the intent to grant those managers an independent cause of action to enforce the promise.[171]

167 *See supra*, section III.B.1.
168 In this case the bar backs and server assistants would be the secondarily-tipped employees.
169 Recall that these tip agreements are the subject of the current litigation. *See* text accompanying footnotes 141-149.
170 Mar. 22 Interview, *supra* note 159.
171 *See* RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981).

However, as discussed above,[172] the point at which the managers' rights as third-party beneficiaries in that contract have vested is dependent on the facts and circumstances of their reliance on the benefit. In the case of Tryst, more than four years have passed since the current tip agreement was put in place, and in the case of XS, more than two years have passed since it opened under the current tip agreement, yet the primarily-tipped employees did not execute the provisions under Article 5.02. Taken together, this suggests that reliance upon the promise likely caused the managers to materially change their position. Therefore, the benefit may have vested in the managers—the third-party beneficiaries—becoming irrevocably settled on them, not to be changed or withdrawn without their consent.

In conclusion, when the trust beneficiaries replace the state law trust approach by contract, the ancillary effect is the creation of a third-party beneficiary interest in the secondarily-tipped employee. Under the state law trust approach, tipped employees must yield to the employer-trustee if it unilaterally modifies the tip allocation terms. This is not necessarily so where the trust beneficiaries opt to displace the trust, as we have seen with the examples of the Culinary Contracts.

On the one hand, where primarily-tipped employee classifications decide unilaterally to modify the tip allocation after the Culinary Contract probationary period has run, it may be challenged under the third-party beneficiary theory discussed above. On the other hand, where the Culinary Contract contemplates a method for legitimizing the determination of tip allocation, that process, if handled *ad hoc*, may nevertheless be challenged. This is what is occurring at the Wynn properties. In both cases, contracts contemplating tip allocation to third parties arise either between the employer and the primarily-tipped employee, or between the individual primarily-tipped employee and the class of primarily-tipped employees. In either case, where those contracts for tip allocation contemplate conferring a benefit to the secondarily-tipped employee, they give rise to the status of third-party beneficiary in that employee. As a result, employees who may fairly claim this status may challenge any re-formation of the tip allocation contract on the basis of their vested third-party rights.

Because such challenges come down to disputes between employees, which both the unions and the employer are expressly prohibited from interfering with (in the case of the MGM Resorts and Caesars Entertainment Contracts), these disputes are not subject to the grievance procedures under the Contracts, and may be litigated. The challenge in the case of the Wynn Contract is more complex because it may involve a combination of a challenge between the employees, and a challenge between the employees and a determination made by a union officer as well as a corporate officer. For this reason, there is more than one way to validly take the challenge to court rather than go through the motions of a grievance procedure.

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[172] *See supra* text accompanying notes 168-171.

IV. Conclusion

Through a review of the tipping custom's history and nomenclature, this Note has introduced the reader to a working understanding of the fundamental basis of the tip. Its origins in western culture go back centuries. The reasons that consumers tip are many, and yet imputing their intent to tip for any particular reason or to any particular person in the line of service remains an inquiry that yields imprecise results. Perhaps the best formulation of this intent is to reduce it to our understanding of the employer's superior position under at-will employment at common law. Nevertheless, it is helpful to the practitioner to understand the tension between the perspectives of the primarily-tipped employee and the employer–that is, to understand the implications if one imputes the qualified bestower's intent to tip the server, or merely the service. Because the latter approach favors the employer, it is important to understand that under Nevada state law, a qualified bestower's intent to tip the service gives rise to a trust relationship between the parties at the Nexus of the Tip. If a practitioner uses this as a baseline approach, the practitioner is armed with an understanding of the ramifications of variations on this approach in any at-will employment state.

Where beneficiaries find themselves in a position to replace the trust approach in favor of a contract, the case studies expose traps for the unwary. Therefore, the practitioner should make sure that beneficiaries understand the ramifications of the terms of their contract. This means when they enter into contracts to allocate tips to third-party beneficiaries, they may be inextricably bound to those terms unless they have otherwise expressly so provided. For this reason, it is imperative that practitioners pay careful attention to contract terms allocating tips on behalf of their clients, or the resulting price may indeed be great.