

## Another California Court Of Appeal Struggles To Come To Grips With Arbitration

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Earlier in August, we [issued an Alert](#) detailing continued hostility to arbitration of employment disputes in some corners of the California state courts, even following the U.S. Supreme Court decisions in *Stolt-Nielsen v. AnimalFeeds Internat. Corp.*, \_\_\_ U.S. \_\_\_ [130 S.Ct. 1758] (2010) (“*Stolt-Nielsen*”) and *AT&T Mobility LLC v. Concepcion*, 563 U.S. \_\_\_, 131 S.Ct. 1740 (2011) (“*Concepcion*”). On August 13, 2012, yet another California Court of Appeal weighed into the fray, but provided little clarity.

The California Court of Appeal decision in *Truly Nolen of America v. Superior Court*, Cal. App. 4th No. D060519 (2012) (“*Truly Nolen*”), underscores the unsettled state of the law. The *Truly Nolen* court recognized that the holding and reasoning of *Stolt-Nielsen* and *Concepcion* call into question the validity of several prior California Supreme Court decisions involving arbitration, including *Gentry v. Superior Court*, 42 Cal.4th 443 (2007) (“*Gentry*”). However, the *Truly Nolen* Court concluded that while *Concepcion*’s rationale undermines the holding of *Gentry*, it did not directly overrule it. Thus, the Court concluded that in the absence of California Supreme Court authority to the contrary, *Gentry*’s limitations on arbitration must still be applied. The Court then held that the trial court erred because it did not require the employees to provide a “specific, individualized, and precise” analysis demonstrating how their claims met *Gentry*’s four-factor test.

Then, in a surprising turn, the Court’s remand also directed the trial court to resolve a foundational issue of whether the parties had an *implied agreement* to submit to class-action arbitration. This direction suggests a reluctance to apply *Stolt-Nielsen*’s holding that precludes class-action arbitration absent the parties’ *express agreement*.

Thus, *Truly Nolen* reflects California courts’ schizophrenic view of arbitration of employment disputes. The Court laid the foundation for the Supreme Court to overrule the restrictions imposed by *Gentry* while at the same time opening a new avenue of attack on such provisions notwithstanding the U.S. Supreme Court holding in *Stolt-Nielsen*. One thing is certain: there is more to come.

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