

# One Minute Memo<sup>®</sup>



## Gentry Survives For Now, But Are Its Days Numbered?

Notwithstanding the U.S. Supreme Court's 2011 decision in *AT&T Mobility v. Concepcion*, California courts continue to muddle through whether a court can mandate classwide arbitration, particularly in the context of arbitration agreements between employer and employee. *Truly Nolen of America v. Superior Court*, decided this week by California's Fourth District Court of Appeal, may at first blush appear to be just one more contradictory opinion on this issue. However, while the *Truly Nolen* court declined to follow the broad precedential scope of *Concepcion*, it gave the California Supreme Court a clear road map for overturning *Gentry v. Superior Court*. At the same time, the court raised the evidentiary bar for employees seeking classwide arbitration.

### Case Background

Alvaro Miranda and Danny Luna filed a wage and hour class action against their former employer, Truly Nolen, a nationwide provider of pest control services. Truly Nolen moved to compel individual arbitration of the plaintiffs' claims on the grounds that both Miranda and Luna had signed agreements to arbitrate their employment-related claims.

The one-page arbitration agreement provided four mandatory dispute resolution steps: (1) discussions with employee's immediate manager; (2) HR involvement; (3) mediation; and (4) binding arbitration. The agreement granted the arbitrator wide latitude to award any remedy, including all remedies that would be available if the matter were heard in court. The agreement forbade Truly Nolen from retaliating against employees for reporting to a governmental agency or requesting arbitration. Truly Nolen agreed to bear all administrative costs of the arbitration, including arbitrator fees. Finally, the agreement stated that if an employee opted not to have legal counsel at the arbitration hearing, then Truly Nolen would forgo legal representation as well. The agreement was silent as to whether class arbitrations were permissible.

The trial court granted Truly Nolen's motion to compel arbitration. But, relying on *Gentry* (holding that class-action waivers in arbitration agreements should not be enforced if certain factors indicate that class arbitration would be more effective than individual arbitration), the trial court refused to order that the arbitration proceed on an individual, rather than class, basis. Truly Nolen filed a petition for a writ of mandate on the issue of classwide arbitration.

### The Court of Appeal's Holding

The Court of Appeal vacated the trial court's denial of Truly Nolen's motion to order individual arbitration and ordered the trial court to consider whether the parties had a mutual intent to permit classwide arbitration.

The Court of Appeal comprehensively reviewed state and federal laws affecting arbitration agreements in California. The Court of Appeal discussed the split among the California courts regarding whether *Gentry* remains viable after *Concepcion*, which expressly overruled the California "Discover Bank Rule" that class-action waivers in arbitration agreements are unenforceable in some contexts. The Court of Appeal sided with the majority of courts which recognize that *Concepcion* implicitly overruled *Gentry*, in that *Discover Bank* and *Gentry* rely on the same discredited rationale. Under *Concepcion*, courts must not disregard the clear terms of the parties' arbitration agreement. But the Court of Appeal nonetheless held that it was obliged to follow *Gentry* because *Concepcion* did not expressly repudiate *Gentry* and the California Supreme Court has not yet held that *Gentry* is no longer good law.

The Court of Appeal then applied *Gentry*, concluding that the plaintiffs had failed to produce enough evidence to satisfy *Gentry*'s four-factor test. *Gentry* permits the trial court to order class arbitration only if it would be a more effective means of vindicating employee rights in light of four factors: (1) modest potential recovery amount, (2) potential for retaliation, (3) extent to which absent class members are informed of their rights, and (4) "real world obstacles" to individual arbitration. The plaintiffs here, rather than presenting evidence regarding their individual circumstances, simply submitted attorney declarations that generally discussed how similar cases satisfied the *Gentry* factors. Indeed, the protective provisions of the arbitration agreement – the prohibition against retaliation, Truly Nolen's assumption of arbitration costs, and the aggrieved employee's option to exclude lawyers from the hearing – negated the concerns reflected in the *Gentry* factors. The Court of Appeal held if *Gentry* continues to survive, it requires a "specific, individualized and precise" factual analysis, and that the plaintiffs had failed to show the *Gentry* factors were satisfied.

The Court of Appeal then addressed the trial court's failure to determine whether the parties had implicitly agreed to class arbitration despite the agreement's silence on the issue. The Court of Appeal held that the trial court must address this issue before applying *Gentry*, in a case where the arbitration agreement is silent as to class-action waiver. The Court of Appeal reasoned that *Gentry* would apply only if the parties did *not* agree to contract for class arbitration because if there is agreement to arbitrate on a classwide basis, then the court need not look to *Gentry* to effectuate the same result.

In remanding this issue, the Court of Appeal provided explicit instructions. Applying the principles set forth by the U.S. Supreme Court in *Stolt-Nielsen v. AnimalFeeds International Corp.*, the Court of Appeal held that if the trial court found mutual agreement to classwide arbitration, then the trial court should deny Truly Nolen's motion to preclude class arbitration and refer the matter to arbitration, where the arbitrator will decide whether to certify the class. But, if there is no mutual agreement to classwide arbitration, then the trial court should order the matter to arbitration on an individual basis.

## **What Truly Nolen Means**

Until the California Supreme Court or the U.S. Supreme Court expressly resolves the continuing validity of *Gentry*, expect to see *Truly Nolen* frequently cited. The case presents both sides of the argument as to whether and how *Gentry* applies in a post-*Concepcion* world. The Court of Appeal's discussion, in dicta, as to why *Concepcion* should overturn *Gentry* provides a well-articulated roadmap for a future Supreme Court opinion on the issue.

*Truly Nolen* also clarifies the evidentiary hurdle that employees face in seeking classwide relief under *Gentry*. Mere generalities will no longer suffice; now plaintiffs invoking *Gentry* must present evidence that specifically addresses the circumstances of their case. Moreover, *Truly Nolen* teaches that an effective defense to a *Gentry* argument includes provisions within the arbitration agreement itself that take *Gentry* concerns into account.

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