

**“TOUCHY MATTERS:”
END ARBITRATION
FOR SEXUAL ASSAULT
UNDER EMPLOYMENT AGREEMENTS**

By Nicole Thompson

INTRODUCTION

Does the workplace end at the bedroom door? And can sexual assault claims be compelled to arbitration under employment contracts containing mandatory pre-dispute arbitration clauses? These issues recently arose in the complex case of Jamie Leigh Jones, a young woman raped while working in Iraq for a subsidiary of Halliburton/Kellogg, Brown & Root (“KBR”). Although the Appellate Court of the 5th Circuit decided in Jones’ favor, the dismissal of certiorari brought by KBR to the United States Supreme Court does nothing to resolve the lack of consistency within the circuits regarding whether sexual assault claims will be compelled to arbitration. Nor does it alleviate the reliance of this question on idiosyncratic details specific to each case and jurisdiction-specific rules. For this reason, legislation must be passed to eliminate the non-uniform treatment of sexual assault and to restore employees’ right to trial for sexual assault related torts that can be lost when agreeing to contracts containing pre-dispute arbitration provisions.

Typically a prospective employee will be confronted with an employment application or contract, often a form contract, which requires her to sign away her rights to a trial, before she will be considered for employment. Although the prospective employee may be given time to consider the terms and to discuss them with an attorney, typically a person in the

position of job applicant will forego the expense and responsibility of careful review in exchange for the opportunity to secure a position. Although this does not relieve the applicant of the assumed understanding of what she signs, the disparity in power between the two parties will often put her in a position with no leverage to bargain for a change in terms.

When an arbitration provision is read in the context of a job opportunity, the prospective employee may consider the rights she has relative to matters of employment without contemplating what disputes could arise that are not of a contractual nature or that involve events taking place outside of work. By signing such an agreement, the prospective employee risks her right to a full trial to air her tort claims, including intentional wrongs.

In the case discussed in this article, Jamie Leigh Jones was allegedly gang-raped by her co-workers while in Iraq in the living quarters assigned to her by her employer. Because Jones had signed an employment agreement containing a pre-dispute arbitration provision, KBR made a motion to compel arbitration of her claims, which included assault and battery, intentional infliction of emotional distress, and false imprisonment. In this particular case, the court held that Jones' sexual assault claims should go to trial, but in many cases of sexual assault, courts instead chose to compel arbitration.

In February, 2010, the Department of Defense Appropriations Act was passed containing a provision that prohibits federal contractors or subcontractors with contracts of \$1,000,000 or more, from requiring mandatory arbitration of claims brought by employees.¹ This provision was prompted by the Jamie Leigh Jones case.² However, it only applies to federal contractors whose agreements can be enforced in the United States, and it may be waived by the Secretary of Defense should he determine such action necessary to protect

¹ Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, § 8116, 123 Stat. 3409 (2010).

² Jack Dew, *Amendment sponsored by Sen. Al Franken of Minnesota could herald additional arbitration reform*, MASS. LAW. WKLY, March 1, 2010.

national security.³ While this initial step affording a subset of plaintiffs more control over actions they may bring against employers is notable, a legislative approach with broader reach must be taken to protect the right to trial of employees not employed through a federal contract entering into arbitration agreements.

THE FEDERAL ARBITRATION ACT APPLIES TO EMPLOYMENT AGREEMENTS

The Federal Arbitration Act of 1925 (“FAA”) codifies the validity of arbitration for maritime and interstate commerce transactions where a written contract provision or agreement elects to settle disputes through arbitration.⁴ It was enacted to combat the courts’ hostility to enforcement of such agreements.⁵ The Supreme Court stated that the FAA “creates a body of federal substantive law”⁶ which is “applicable in state and federal court.”⁷

When the FAA was enacted, there was uncertainty as to whether or not employment disputes would fall under its purview.⁸ This was in part due to the wording of the act, which prohibits arbitration of disputes arising out of employment contracts for various transportation workers and others “engaged in foreign or interstate commerce.”⁹ The act created a question as to whether it precluded arbitration for all employment agreements.¹⁰

The question was approached by the 1991 Supreme Court *Gilmer* decision in which an age discrimination claim brought under the ADEA Act was compelled to arbitration where the employee had signed a securities registration application containing an arbitration

³ Department of Defense Appropriations Act, § 8116(d).

⁴ Federal Arbitration Act of 1925, 9 U.S.C. § 2 (2006).

⁵ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001).

⁶ *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (quoting *Moses H. Cone Mem’l. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

⁷ *Southland*, 465 U.S. at 12.

⁸ *Circuit City*, 532 U.S. at 126-27 (Stevens, J., dissenting).

⁹ Federal Arbitration Act of 1925, 9 U.S.C. § 2 (2006).

¹⁰ *Circuit City*, 532 U.S. at 126-27. (Stevens, J. dissenting).

agreement.¹¹ The Supreme Court ruled that because the employee had agreed to arbitrate a statutory claim, arbitration could take the place of a civil trial to resolve the dispute.¹² Although the context of the agreement was the employment of a securities dealer, the agreement in question was not an employment agreement.¹³

In 2001 the Supreme Court finally answered the question in its decision in *Circuit City* holding that although transportation workers' employment agreements were excluded from coverage under the FAA, other employment agreements were not.¹⁴ In that case, a retail sales employee of Circuit City electronics store sued claiming employment discrimination.¹⁵ The Supreme Court permitted arbitration of the claim holding that employment agreements could be arbitrated under the FAA.¹⁶

These decisions in combination with the decision in *Southland* which prevents states from undercutting enforcement of arbitration agreements¹⁷, and *Allied-Bruce*, which held that the FAA preempts state contract law¹⁸, prevent states from setting their own public policy through enacted legislation requiring judicial resolution of employment disputes. As a result, preserving rights for employees entering arbitration agreements must be addressed through federal legislation.

Because so much more is at stake than is immediately evident to a prospective employee entering an employment agreement with a pre-dispute arbitration clause, the threat to an individual's right to trial should be addressed by amending the Federal Arbitration Act to forbid mandatory pre-dispute arbitration provisions in employment agreements.

¹¹ *Gilmer*, 500 U.S. at 23.

¹² *Id.* at 25-26.

¹³ *Id.* at 23.

¹⁴ *Circuit City*, 532 U.S. at 109.

¹⁵ *Id.* at 110.

¹⁶ *Id.* at 119.

¹⁷ *Southland*, 465 U.S. at 12.

¹⁸ *Allied-Bruce Terminex Cos., Inc. v. Dobson*, 513 U.S. 265, 273 (1995).

JONES v. HALLIBURTON

Jamie Leigh Jones began working in Baghdad, Iraq for a KBR affiliate as an IT Customer Support Analyst in July 25, 2005.¹⁹ Four days earlier, she had signed an employment agreement which contained an arbitration provision accepting the terms of a Dispute Resolution Program (“DRP”).²⁰ The agreement required as “its last step, that any and all claims ... against Employer *related to your employment*, ... and any and all *personal injury claim[s] arising in the workplace* ... be submitted to binding arbitration instead of to the court system.”²¹ The DRP explicitly defines dispute to include “all legal and equitable claims, demands, and controversies, of whatever nature or kind, whether in contract, tort, under statute or regulation, or some other law, ... including, but not limited to, any matters with respect to ... *any personal injury allegedly incurred in or about a Company workplace*.”²²

Within two days of arriving in Iraq, Jones says she complained of the sexually hostile living environment present in the company-provided barracks in which she was required to stay.²³ Jones claims that no action was taken on her behalf.²⁴ Three days after arrival, Jones alleges being given drugs, beaten and gang-raped by KBR employees in her bedroom in the barracks.²⁵ Injuries resulting from the attack included “torn pectoral muscles”²⁶ and “ruptured breast implants.”²⁷ After a rape kit was administered, Jones states that she was locked in a

¹⁹ Jones v. Halliburton Company, 625 F. Supp. 3d 339 at 343.

²⁰ Jones v. Halliburton Company, 583 F.3d 228 at 230.

²¹ *Id.* at 231 (alteration and emphasis in original).

²² *Id.* (emphasis in original).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Jones*, 625 F. Supp. 3d at 343.

trailer, forbidden from using a phone, and interrogated for hours.²⁸ She claims she was told that if she returned to the United States, she would not be guaranteed a job.²⁹

Prior to litigation, Jones filed a claim with the Equal Employment Opportunity Commission (“EEOC”) for sexual harassment, in which the EEOC found there had been an inadequate investigation of Jones’ sexual assault.³⁰ Jones also made a claim for Workers’ Compensation, which was granted.³¹ Although Jones filed for arbitration, under advice of new counsel, while arbitration was pending, she filed a lawsuit.³²

In district court, Jones asserted claims for negligence; negligent hiring, retention, and supervision of the employees involved in the alleged assault; negligent undertaking; sexual harassment, and hostile work environment under Title VII; retaliation; breach of contract; fraud in the inducement to enter the employment contract; fraud in the inducement to agree to arbitration; assault and battery; intentional infliction of emotional distress; and false imprisonment.³³ The claims were brought on the theory of vicarious liability.³⁴

The court of appeals affirmed the district court’s holding that all but four of the claims were arbitrable.³⁵ Those not arbitrable included assault and battery; intentional infliction of emotional distress; false imprisonment; and “negligent hiring, retention, and supervision of employees involved in the alleged assault.”³⁶ This is the last legal word on the case, because

²⁸ *Jones*, 583 F.3d at 232.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Jones*, 625 F. Supp. 3d at 344.

³⁴ *Id.*

³⁵ *Jones*, 583 F.3d at 242.

³⁶ *Id.* at 230.

on certiorari to the United States Supreme Court filed by KBR, the case was dismissed with the ascent of both parties.³⁷

ANALYSIS

As both the District Court and the Appellate Court of the 5th Circuit point out, “there is no clear consensus among courts”³⁸ on the “arbitrability under similar arbitration clauses of employee’s claims premised on sexual assault.”³⁹ This results in divergent outcomes for such employee victims.

The unpredictability stems from the need to interpret the arbitration clause, and consider the claims with respect to the language of the clause. If the parties have agreed to arbitrate, the arbitration provision will be read to determine whether the claims fall within its scope.⁴⁰ To make this determination, an arbitration clause is characterized as either broad or narrow, drawing on phrases such as “any and all claims,” “arising out of,” “in connection with,” and “related to.”⁴¹

The appellate court examined whether Jones’ claims came within the scope of the arbitration clause of her employment agreement.⁴² Based on the language, which included “any and all disputes,” “related to,” and “arising out of,” the court found the clause to be “broad.”⁴³ However, the broad designation does not result in every claim being arbitrable.⁴⁴ The question of whether sexual assault and battery are outside of the scope of the clause requires further examination.

³⁷ KBR v. Jones, 78 USLW 3447 (U.S. March 11, 2010) (No. 09-864).

³⁸ Jones, 625 F. Supp. 3d at 32.

³⁹ Jones, 583 F.3d at 235.

⁴⁰ Genesco, Inc. v. Kakiuchi & Co., 815 F.2d 840 at 844 (2d Cir. N.Y. 1987).

⁴¹ Pennzoil Exploration and Production Co. v. Ramco Energy Ltd., 139 F.3d 1061 at 1067 (5th Cir. 1998).

⁴² Jones, 583 F.3d at 235.

⁴³ Pennzoil, 139 F. 3d at 1067; Jones, 583 F.3d at 235.

⁴⁴ See *infra*, note 52.

TOUCH MATTERS

One approach taken to determine whether matters are arbitrable under a broad arbitration clause is the “touch matters” analysis. The “touch matters” language originates in *Mitsubishi v. Soler*, in which Soler, an automobile dealer, made a claim that Mitsubishi has conspired to violate the Sherman Act.⁴⁵ The Court accepted the Court of Appeals’ analysis that “although the statute was not listed among the matters for arbitration in the arbitration clause”, that because “whatever the legal labels attached to those allegations,” the claim “focused on ... [the] failure to comply with the” obligations of the extant agreement, it was arbitrable.⁴⁶ Further, because the Court found the arbitration clause broad in scope, it concluded that “insofar as the allegations underlying the claims *touch matters* covered by the [contract,] ... the Court of Appeals properly resolved any doubts in favor of arbitrability.”⁴⁷

Although the nature of the *Jones* case is very different from *Mitsubishi*, it also undergoes a “touch matters” analysis. Following the authority of *Pennzoil*, *Jones* sets out the requirement that a dispute must have a “significant relationship” to the contract to touch matters under it, but notes that “even broad clauses have their limits.”⁴⁸ Although *Pennzoil* had no need to explore those limits,⁴⁹ the *Jones* court did examine what would fall outside of the limits by looking at claims in relation to the contractual relationship.⁵⁰

⁴⁵ *Mitsubishi v. Soler*, 473 U.S. 614 at 625 (1985).

⁴⁶ *Id.*

⁴⁷ *Id.* (*emphasis added*).

⁴⁸ *Pennzoil*, 139 F. 3d at 1067 (5th Cir. 1998).

⁴⁹ *Id.*

⁵⁰ *Jones*, 583 F.3d at 235.

THE CONTRACTUAL RELATIONSHIP

As the 11th Circuit Appellate Court in *Telecom Italia* points out, the “ ‘arising out of or related to’ language is problematic when a tort is concerned.”⁵¹ The court states that if a claim can be made independently of the contractual relationship, then it is not related to the agreement and thus is not arbitrable.⁵²

In the *Telecom Italia* case, Wholesale Telecom Corp. (“WTC”) brought a third-party complaint against Telecom Italia for tortious interference with WTC’s contract with Telemedia International U.S.A., Inc. (“TMI”). Although the clause was broad, the court said it was “not [so] broad as” to include *any* dispute brought by one party against the other.⁵³ TMI was said to have charged onerous rates and to have submitted late, inflated invoices to shock WTC into “abandon[ing] its contract with Telecom Italia.”⁵⁴ The court concluded that the “tortious interference claim neither ar[o]se[] out of nor [wa]s related to WTC’s lease with TMI” because Telecom Italia’s conduct did not rely on a contractual relationship with WTC.⁵⁵

In most circuits, it has been determined that the analysis must flow from “factual allegations” rather than from the legal causes of action asserted in the complaint.⁵⁶ In the 5th Circuit, the Ford court explains that the reason for examining facts of the case over legal theory is to avoid allowing “artful pleading to dodge arbitration of a dispute otherwise ‘arising out of or relating to’ (or legally dependent on) the underlying contract.”⁵⁷ Based on analysis of Texas case law, the court defines the test for whether a tort claim “relates to” a contract as

⁵¹ *Telecom Italia, Spa v. Wholesale Telecom Corporation*, 248 F.3d 1109 at 1114 (11th Cir. 2001).

⁵² *Id.* at 1116.

⁵³ *Id.* at 1114.

⁵⁴ *Id.* at 1113.

⁵⁵ *Id.* at 1116; *Mitsubishi*, 473 U.S. at 625.

⁵⁶ *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840 at 846 (1987).

⁵⁷ *Ford v. Nylcare Health Plans of the Gulf Coast, Inc.*, 141 F.3d 243, 250 (5th Cir. 1998).

“whether it could be maintained without reference to the contract.”⁵⁸ The court concluded that although Ford’s false advertising claim referred to the contract, it did not arise out of his agreement with an HMO because “[n]one of [the] elements [of the tort action] depends, *as a legal matter*, on the agreement” so it therefore “*could* [be maintained] without reference to” the contract.⁵⁹

The *Jones* analysis is similar to the approach taken in *Telecom Italia* and *Ford*. Providing examples of sexual assault cases in the context of arbitration agreements, the *Jones* court gives ample evidence that such assault is often found outside of the employment relationship and thus beyond the scope of an arbitration provision, broad or narrow.⁶⁰ The court stops short, however, of proclaiming that rape and “sexual assault allegations can never ‘relate to’ someone’s employment.”⁶¹

In contrast, a number of outcomes find that despite the nature of the injury, the co-worker relationship is a sufficient link to determine that the injury arose out of the employment relationship.⁶² For example, in *24 Hour Fitness*, an employee who had repeatedly complained of sexual harassment, who alleged assault and battery, among other claims, had all but one claim foreclosed by summary judgment where the court found there

⁵⁸ *Id.* at 251.

⁵⁹ *Id.* (emphasis in the original).

⁶⁰ *Smith ex rel. Smith v. Captain D’s, LLC*, 963 So.2d 1116, 1121 (Miss. 2007) (holding sexual assault “was unquestionably beyond the scope of [a broad] arbitration clause... ”); *Niolet v. Rice*, 20 So.3d 31 34 (Miss. Ct. App. 2009) (holding that sexual assault and battery “in no way touch[ed] upon matters covered by the [broad arbitration provision of] the [employment] agreement.”); *Hill v Hillard*, 945 S.W.2d 948, 952 (Ky. Ct. App. 1996) (holding that a rape perpetrated by a co-worker during a work-related convention was “independent of the employment relationship.”); *Tolliver v. Kroger Co.*, 498 S.E.2d 702, 713 (W. Va. 1997) (concluding that “[a]ssault and battery conduct is not part of, nor a condition of employment.”).

⁶¹ *Jones*, 583 F.3d at 241.

⁶² *Forbes v. A.G. Edwards & Sons, Inc.*, No. 08-CV-552, 2009 WL 424146 (S.D.N.Y. Feb. 18, 2009) (holding sexual assault was “related to” employment where member of upper management’s assault of assistant at a work conference was part of a pattern of sexual harassment.); *24 Hour Fitness, Inc. v. Super. Ct. of Sonoma Cnty.*, 66 Ca. App. 4th 1199, 1210 (Cal. Ct. App. 1998) (holding that claims related to sexual assault were conducted within the scope of employment when perpetrated by co-workers in the workplace and sexual harassment had been reported).

was no question that her co-workers were acting within the scope of their employment at the time of the incidents.⁶³ She could only avoid arbitration for one claim, where her co-worker admitted to making sexually harassing statements to her outside of the scope of his employment.⁶⁴

REASONABLE EXPECTATIONS

Much of the case law establishing whether an arbitration provision covers a tortious claim arises from disputes between corporations.⁶⁵ This is expected since arbitration developed as a mechanism with which to resolve issues arising in the course of commerce.⁶⁶ Often, trying to make the rules of business apply to individual parties has unsatisfactory results. In *Kruse v. AFLAC*, a case without claims related to sexual assault, the court found claims of defamation, discrimination and tortious interference with a contract relationship, among others, fell within the arbitration clause of an employee's contract because they "relate[d] to [non-payment of] plaintiff for services performed in [her] employment capacity."⁶⁷ The *Kruse* case identified the distinction between arbitration agreements involving only corporate parties, and those involving an individual as party when it stated that the rule excluding common law torts from arbitration provisions applies only to business-to-business contracts.⁶⁸

⁶³ *24 Hour Fitness*, 66 Ca. App. 4th at 1210.

⁶⁴ *Id.* at 1212.

⁶⁵ *Ford*, 141 F.3d at 243; *Leadertex v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20 (2d Cir. 1995). *But see Fuller v. Guthrie*, 565 F.2d 259 (2d Cir. 1977) (holding that alleged announcement made by folksinger to show audience stating that no one was being paid for their services was outside the arbitration clause because "it would stretch the meaning of 'musical services' ... to suggest that slander claims fall within it.").

⁶⁶ Federal Arbitration Act of 1925, 9 U.S.C. § 2 (2006).

⁶⁷ *Kruse v. AFLAC Int'l, Inc.*, 458 F. Supp. 2d 375, 386-87 (E.D. Ky. 2006).

⁶⁸ *Id.* at 386.

In the context of an employment agreement, a company will often specifically include torts in the list of matters expressly subject to arbitration, giving way to the “touch matters” and “contractual relationship” analyses outlined above. When they are not included explicitly, there is a question as to whether or not the parties to the agreement intended to include any torts within the scope of the arbitration clause at all. This is in contrast to the business-to-business arbitration agreement where often courts find that torts such as defamation, tortious contractual interference and false advertising are independent from the underlying agreement and thus cannot be compelled to arbitration.⁶⁹

This standard with respect to torts would be ideally suited to business-to-individual agreements where the individual party is much less able to anticipate the breadth of disputes that could be subject to arbitration. *JLM* agrees with *Leadertex* that the “touch matters” analysis and other “like phrases” do not give rise to a “principled” approach for identifying what falls within the scope of an arbitration clause.⁷⁰ Where *JLM* moved to the “contractual relationship” analysis to find that a claim of a price-fixing conspiracy involves the core issue of the contracts between the parties⁷¹, *Leadertex* employed the reasonable expectation standard.⁷² *Leadertex* concluded that a defamation claim alleging defendant represented *Leadertex* as generally dishonest, incapable of supplying appropriate goods, selling defective goods and attempting to defraud customers was independent of the contract and outside of the party’s reasonable expectations that the contract would extend to a claim of defamation.⁷³

⁶⁹ See *Fuller*, 565 F.2d at 261; *Leadertex*, 67 F.3d at 28-29; *Ford*, 141 F.3d at 250; *Telecom Italia*, 248 F.3d at 1116. But see *JLM Industries, Inc. v. Stolt-Nielsen, S.A.*, 387 F.3d 163, 175 (2d Cir. 2004).

⁷⁰ *JLM*, 387 F.3d at 172 (quoting *Leadertex*, 67 F.3d at 28).

⁷¹ *JLM*, 387 F.3d at 172.

⁷² *Leadertex*, 67 F.3d at 28.

⁷³ *Id.*

The reasonable expectations approach could offer an alternative that would ensure arbitration remains “a matter of consent, not coercion”⁷⁴ for individual parties to arbitration agreements.

However, the *Jones* court did not ask whether it was Jones’ reasonable expectation that she agreed to arbitrate matters of rape and sexual assault when she agreed to her employment contract.⁷⁵ Her contract, which listed the types of matters covered by arbitration, included torts.⁷⁶ Even if she knew what a tort was, she may have expected only business related torts to be covered by the agreement. In Jones’ case, it is hard to believe that she foresaw that the types of injuries she experienced might occur and would require arbitration rather than a trial in a court of law. This illustrates the problem from the perspective of an individual entering into a contract controlling a commercial relationship.

EGREGIOUS NATURE OF INJURIES

Jones’ complaint for assault and battery was atypical measured by the level of injury she sustained. Another case in which the decision required a judicial forum for the adjudication of sexual assault is *Victoria v. Super. Ct. of L.A. Cnty.*, where a patient at a nursing home was raped and sodomized while recovering from brain surgery.⁷⁷ As in *Jones*, the egregious nature of repeated assaults may have led the court to search for a way to enable the claim to go to trial rather than to arbitration.⁷⁸ The court in *Victoria* relied on the

⁷⁴ *Ford*, 141 F.3d at 247 (quoting *Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

⁷⁵ *Jones*, 625 F. Supp.2d at 343 (the court inquired as to whether the parties agreed to arbitrate disputes through a valid agreement and whether the dispute falls in the scope of that agreement).

⁷⁶ *Id.* at 344 (employment contract provision included “any and all personal injury claim arising in the workplace”).

⁷⁷ *Victoria v. Super. Ct. of L.A. Cnty.*, 710 P.2d 833, 833-34 (Cal. 1985).

⁷⁸ *Jones* was decided following the decision in *Barker v. Halliburton*, 541 F. Supp. 2d 879 (S.D. Tex. 2008), *reconsideration denied*, No. H-07-26772008, 2008 WL 1883880 (S.D. Tex. April 25, 2008) where the court chose to compel arbitration on almost the exact same set of facts present in *Jones*, 541 F. Supp. 2d at 879.

reasonable expectation rule to say that the patient would not have signed a contract had she realized the harm she might be exposed to and that it could be precluded from trial.⁷⁹

However, the *Victoria* dissent points out the invalidity of using reasonable expectations analysis.⁸⁰ While the nursing home may have expected to be able to arbitrate any claims resulting from the conduct of its employees on the job, *Victoria* may have expected not to encounter intentional torts such as sexual assault and battery while under the care of the hospital. When looking at the agreement from each side, often opposing parties' expectations will be different, pointing to a failure to reach a meeting of the minds when the agreement was forged. Putting this standard into use would require disputed agreements to survive an examination of the contracting parties' expectations, leading courts to make inferences about something of which there is often little evidence, making it difficult to prove.

Cases such as *Jones* and *Victoria* demonstrate the kinds of claims that can arise but that do not fall into the typical category of business wrongs expected when entering a business relationship. Although arbitration may play a role in business-to-business contracts as well as in corporate-to-individual contexts, the torts of sexual assault and battery and their attendant injuries and consequences should never be compelled to arbitration as a result of mandatory, unbargained-for pre-dispute arbitration.

CONCLUSION

The available modes of review for whether a matter is within the scope of an arbitration agreement work well for business concerns arising in commercial agreements, especially because many intentional torts will be excluded. However, because the same

⁷⁹ *Victoria*, 710 P.2d at 839.

⁸⁰ *Id.* at 844 (Lucas, J., dissenting).

standard is not applied to agreements when one party is an individual, such agreements leave individuals in the position of having to arbitrate unforeseen tortious claims. A sexual assault and battery can never be satisfactorily addressed by the interpretation of an arbitration agreement because of the range of possible interpretations, and the unpredictable outcome. Sexual assault is so far outside of what is contracted for in an employment situation that it should always be adjudicated in a court of law. Thus, it is imperative that legislation be enacted putting all employees with employment contracts on equal footing with those who are protected under the Department of Defense Appropriations Act to prevent them from losing their right to sue in the case of sexual assault under mandatory arbitration provisions.