FOREWORD

ACCESS TO JUSTICE

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The theme of this symposium is Access to Justice. America has long been distinctive among developed countries in arming its Davids with procedural tools to challenge commercial Goliaths. Our progress in providing equal justice under the law has been nurtured through numerous procedural developments, such as notice pleading, class actions, and the American rule of the costs of litigation. These efforts have attracted recent efforts in other countries to experiment with such devices. Despite these procedural icons, several legal developments reviewed in this symposium raise the concern that there is today a bit less, if not a good deal less, access to justice.

In *Pleading as Information-Forcing*, Alex Reinert observes that the Supreme Court's emphasis in the pleading context on "conclusory" and "plausible" provides the key for understanding the shift *Iqbal* and *Twombly* have introduced for pleading under the Federal Rules of Civil Procedure. While each of these expressions enjoys a long history in pretrial procedures, Professor Reinert observes that confusion abounds in *Iqbal* and *Twombly* because the Supreme Court has interjected the expressions into the new context of pleading, so that this necessarily accords to each term a meaning different from its historical usage. He faults the Court for not setting forth what objective is being sought by its new formulation. Had the Court done so, lower courts could have hewed to that objective in the *Iqbal–Twombly* pleading era in a clearer and more predictable manner. Filling the void, Professor Reinert draws upon analogies in the areas of contract and legislative interpretation to illustrate how the new pleading standard can best serve a role of information-forcing.

Professor Edward Harnett provides his own insights as to the meaning of "conclusory" and "plausible" in the post-*Iqbal–Twombly* world. In *Taming* Twombly*: An Update After* Matrixx, Professor Harnett offers practical insights on how, with care and some attention to the objective of the complaint's allegations, the practitioner can best accommodate *Iqbal* and *Twombly*. While he is critical of the Court's treatment of the plausibility issue in *Matrixx*,[1] one wonders whether the complaint he raises is overstated. The important contribution of *Matrixx* is rejecting a rigid requirement that the probability of an uncertain event's occurrence had to rise to the level of statistical significance

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1. Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309 (2011).

to be material. To have acceded to this position—as counseled by the defense and taken in the trial court—would have weakened substantially the long-applied standard of materiality of speculative events, where the materiality is determined by the joint assessment of probability and magnitude. Thus—much as the plaintiffs argued in *Matrixx*—a very low probability that the company's only product, Zicam, caused anosmia would nonetheless, in the eyes of the trier of fact, be material, because if this outcome were correct, it would mean the end of the company, since it truly had but a single product line. Plausibility must be assessed not in terms of the probability that Zicam caused anosmia, but rather whether the magnitude of that event would be so great that even though its possibility is implausible it would still be material. Professor Harnett's wise counsel for how practitioners can best address the new environment—particularly by identifying in the complaint the allegations that are factual and setting forth facts and other bases that the plaintiff believes support the inferences to be drawn from the alleged facts—are immensely useful suggestions.

How the plaintiff's path to the jury is obstructed, if not terminated, by several recent legal pre-trial developments is examined by Professor Michael J. Kaufman and John M. Wunderlich in *The Judicial Access Barriers to Remedies for Securities Fraud*. Among the developments closely analyzed are the "strong inference" pleading standard introduced in 1995 by the Private Securities Litigation Reform Act,[2] with particular attention given to the courts' pushback on the use of circumstantial evidence and confidential witnesses; the potential that loss causation issues may resurface into the class action certification decision notwithstanding the Supreme Court's recent decision in *Erica P. John Fund, Inc. v. Halliburton Co.*;[3] and expert disqualification under *Daubert*.[4] The authors provide a thoughtful analysis regarding how these developments confront the Seventh Amendment guarantee of a jury trial, making the case that the Supreme Court and lower courts have provided incomplete analysis of the constitutional implications of such developments that remove from the jury such important factual inquiries. Furthermore, they review a good deal of empirical evidence that suggests that the courts employ simplifying heuristics that bias decisions against minorities and others as a consequence of the increasing accretion of power in the judiciary to make such fact-based findings.

Professor Geoffrey Miller examines the effects of whether *Tellabs*'[5] "cogent and compelling" language entails a unitary or bifurcated test. Whether a single or dual standard applies, he concludes that in either case a pleading standard that entails a goal greater than giving the defendant notice of the bases for the plaintiff's allegations poses a serious risk of rejecting meritorious claims

2. Pub. L. No. 104–67, § 101, 109 Stat 737, 743 (Dec. 22, 1995) *amending* Securities Exchange Act of 1934, § 21D(b)(2), 48 Stat. 881, 889 (codified as amended at 15 U.S.C. § 78u-4(b)(2) (2006)).

3. 131 S. Ct. 2179 (2011).

4. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

5. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007).

through the "strong inference" filter, particularly when this heightened pleading requirement is coupled, as it is, with the PSLRA's bar to discovery.[6] To address this risk, he presents in *A Modest Proposal for Securities Fraud Pleading After* Tellabs a thoughtful and intriguing process by which a suit failing the heightened pleading standard could continue, at least through discovery, so that not only may the suit's claimants be afforded access to justice, but such continuance will be with conditions that insulate the defendant from bearing the costs of the suit's continuation should the suit not prove successful.

Increasingly, the mantra driving law reform, particularly in the area of business organizations, is private ordering. In *Arbitration of Investors' Claims Against Issuers: An Idea Whose Time Has Come?*, Professor Barbara Black provides a balanced review of the legal hurdles to be faced by provisions in company documents that force shareholder claims to arbitration, rather than the judicial process, regardless of whether the claim is derivative, class, or individual. She closely examines the challenges both under federal and state law regarding the validity of such a bylaw or a provision in the articles of incorporation. In the background of this discussion lurks the ultimate question of who truly benefits from arbitration; the answer to this question is likely suggested by the fact that it is business and managers—not consumers or investors—who are the driving forces behind this contemporary initiative.

Arbitration continues to be the darling of business and has become ubiquitous in an ever-increasing range of commercial transactions. Professor Lawrence Cunningham's *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts* is a must read for anyone who believes the growth of arbitration is the result of mutual consent, even among sophisticated and equal contracting parties. Professor Cunningham insightfully disrobes the Supreme Court's contract rhetoric to reveal how, over the years, the Court has distorted well-established contract principles to advance the Justices' ideological vision of what they, or at least five of them, believe is a better world, contract principles notwithstanding.

Morrison v. National Australian Bank Ltd.[7] dramatically constricted the scope of the U.S. antifraud provision by holding that Congress never intended it to proscribe fraud in international securities transactions, except when the fraud occurs through a U.S. securities exchange or otherwise is a transaction made within the United States. In *Remedies for Foreign Investors Under U.S. Federal Securities Law*, Professor Hannah L. Buxbaum closely reviews post-*Morrison* decisions to conclude that *Morrison*'s approach does not complement complex global transactions as well as the former "conducts and effects" approach, certainly in the context of balancing the multiple interests of the litigants and nations as historically occurred through the "conduct and effects" comity lens. Significantly, Professor Buxbaum explores two possible approaches to

6. Securities Exchange Act of 1934, § 21D(b)(3), 48 Stat. 881, 889 (codified as amended at 15 U.S.C. § 78u-4(b)(3) (2006)).

7. 130 S. Ct. 2869 (2010).

addressing the rough patches created by *Morrison*: foreign investors invoking foreign-based claims in U.S. courts and recovery by the SEC pursuant to the FAIR fund mechanism. Her thorough consideration of each of these approaches to the law sets the stage for ongoing developments respecting whether foreign investors can enjoy access to justice in U.S. courts.

Thus, one leaves the symposium questioning whether we are just now passing through a rough patch in the road toward access to justice or whether we have departed from the route. The articles assembled in this symposium do not answer this question, but each sheds its share of light on the problems and provides a healthy understanding of the issues. We can ask for no better beacon to illuminate the path toward justice.