ARIZONA
LAW
REVIEW

VOLUME 45 | 2003 | NUMBER 4

CONTENTS

Page

ARTICLES

BECAUSE WE SAID SO: THE SEC'S OVERREACHING EFFORTS TO REGULATE MINI-TENDER OFFERS ..... *Miriam R. Albert* 897

A "mini-tender offer" is a tender offer to buy less than 5% of a class of securities. Because § 14(d)(1) of the Securities Exchange Act of 1934 requires bidders to register only those tender offers that will result in beneficial ownership of more than 5% of a class of securities, a bidder can complete a mini-tender offer without registering the offer with the Securities and Exchange Commission. The increasing popularity of mini-tender offers has highlighted a gap in the federal tender offer rules. According to the SEC, mini-tender offers are not subject to the filing, disclosure and procedural requirements of § 14(d) of the 1934 Act and Regulation 14D thereof, but are subject to the 1934 Act's anti-fraud provisions of § 14(e) and Regulation 14E. Thus, offerees in a mini-tender offer are, absent any additional statutory or administrative assistance, denied certain protections of the tender offer rules, including proration and withdrawal rights.

This Article is an examination of the legalities of mini-tender offers and of the regulatory responses thereto, concluding that the SEC must take steps to bring mini-tender offers conclusively within the definition of tender offer for purposes of the Williams Act, and then must promulgate binding regulations to achieve the desired investor protections.

REASONABLE ACCOMMODATION AND REASSIGNMENT UNDER THE AMERICANS WITH DISABILITIES ACT: ANSWERS, QUESTIONS AND SUGGESTED SOLUTIONS AFTER *U.S. AIRWAYS, INC. V. BARNETT* ..... *Stephen F. Befort* 931

Although enacted with widespread support, the Americans with Disabilities Act ("ADA") spawned a deluge of litigation and a startling diversity of judicial interpretation on a host of key issues. Disputes concerning the breadth of the statute's definition of "disability" initially garnered the bulk of judicial attention. More recently, the judicial focus has shifted to the ADA's reasonable accommodation requirement. In *U.S. Airways, Inc. v. Barnett*, the Supreme Court's first foray into reasonable accommodation territory, a slim majority of the Court

determined that an employer, in the absence of special circumstances, need not reassign a disabled employee to a vacant position in the face of a longstanding seniority system that would award that position to a more senior, non-disabled employee. The Court's five separate opinions, however, raise as many questions as they do answers. This Article attempts a critical analysis of those questions, many of which go to the heart of just what the ADA is intended to accomplish: questions such as the appropriateness of preferential treatment for the disabled, the burden of proof allocation for establishing the existence of a reasonable accommodation, and whether the reassignment accommodation will also defer to other types of facially neutral employer transfer and assignment policies that negatively impact employment opportunities for the disabled.

THE MYTH OF NOTICE PLEADING ..... *Christopher M. Fairman* 987

This Article challenges the prevailing rhetoric of notice pleading in the federal courts. By examining pleading practice in diverse substantive areas, a rich continuum of requirements emerges. There are narrowly-targeted forms of fact-pleading, broad-based particularity mirroring the fraud standard, and even "hyperpleading"—where virtually every element of a claim must be pleaded with particularity. From this micro-examination of pleading, the first contemporary pleading model develops: the pleading circle. Current practice is not a simple binary choice: fact-based pleading for fraud; notice pleading for everything else. Rather, there is a spectrum beginning with the universally rejected "conclusory allegation." Simplified notice pleading follows. The varieties of heightened pleading are next with their increasing particularity requirements. Ultimately, pleadings reach the point of prolixity. While potential explanations for the disconnect between notice pleading rhetoric and reality are presented, one overriding conclusion emerges—notice pleading as a universal standard is a myth.

FROM THE CLASSROOM TO THE COURTROOM: REASSESSING FOURTH AMENDMENT STANDARDS IN PUBLIC SCHOOL SEARCHES INVOLVING LAW ENFORCEMENT AUTHORITIES ..... *Michael Pinard* 1067

In the years following *New Jersey v. T.L.O.*, there has been a heightened law enforcement presence in our nation's public schools, due in large part to violence on school grounds and particularly because of certain tragic incidents that have captured nationwide attention. Some cities place police officers in schools through liaison programs between schools and local police departments. Other cities participate in the School Resource Officer program, which places officers in schools to perform a wide range of functions, sometimes even extending beyond law enforcement to teaching and counseling students. Perhaps the most formalized relationship exists in New York City, which in 1998 witnessed the transfer of responsibility over school security from the Board of Education to the New York City Police Department. While school officials in many states have long been required to report all *crimes* to law enforcement authorities, new