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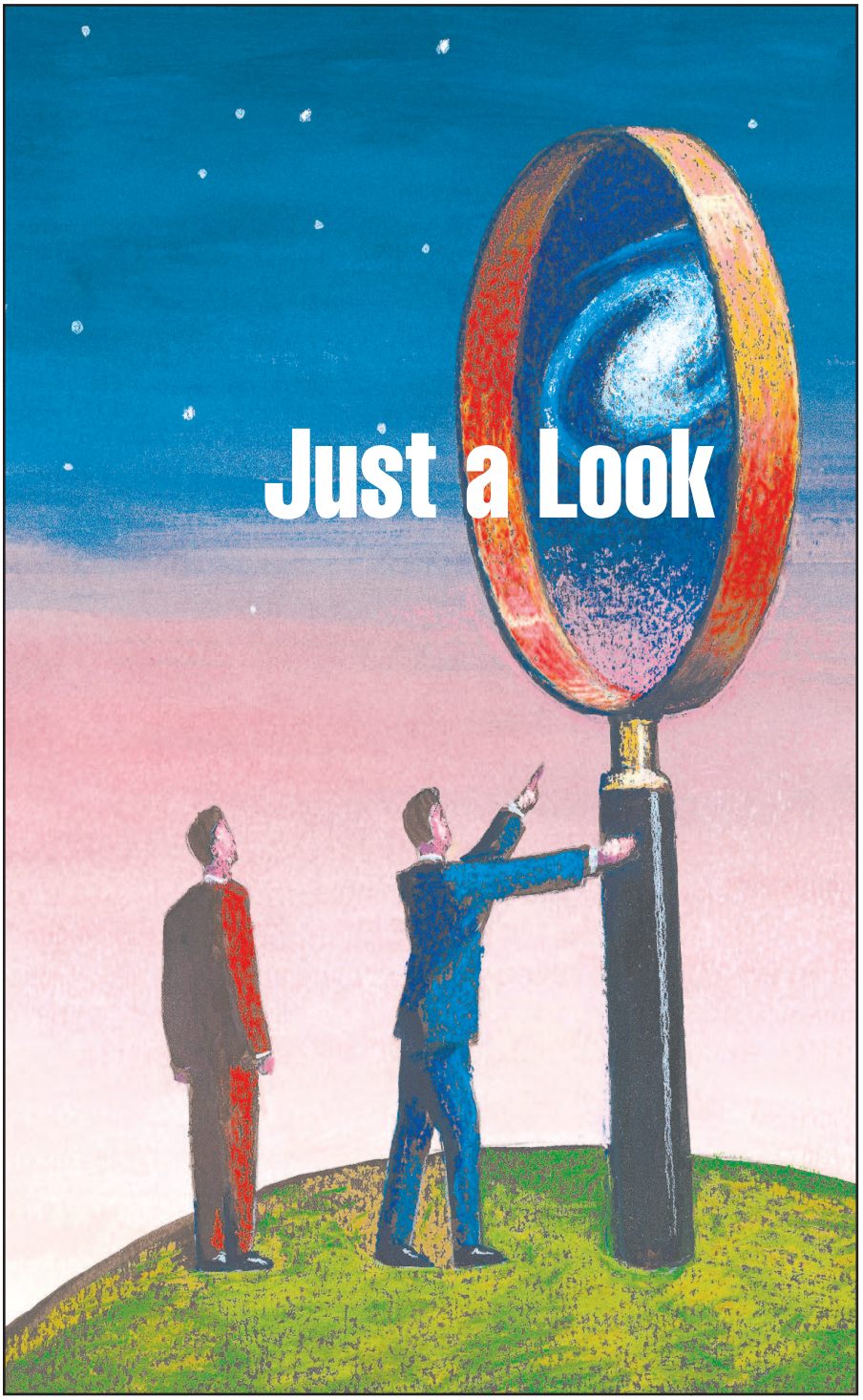

Just a Look

Courts should let antitrust plaintiffs explore possible conspiracies.

BY RYAN E. LONG

In 1543, Nicolas Copernicus published a revolutionary treatise that posited that the Earth revolved around the sun. Most people at the time thought this model was implausible because it rejected views, long sponsored by the Church, that the Earth did not move in space. But we know now that Copernicus, the heretic, was right.

Like Copernicus' theory of the universe, the plaintiffs' allegations of an antitrust conspiracy in *Bell Atlantic v. Twombly*, an antitrust case that the Supreme Court is in the process of deciding, may be implausible. Indeed, the U.S. Court of Appeals for the 2nd Circuit held in *Twombly* that to survive a motion to dismiss the plaintiffs needed to plead a "factual predicate" that included "conspiracy among the realm of plausible possibilities."

And like Copernicus' theory, these allegations may nonetheless prove to be true. But by imposing a "plausibility" requirement on antitrust conspiracy complaints, the 2nd Circuit's test will likely prematurely end other plaintiffs' cases.

This is not an outcome envisioned by Federal Rule of Civil Procedure 8 or by well-settled Supreme Court jurisprudence. Under the rule and such jurisprudence, a complaint must be sustained unless there is no doubt that "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Consequently, the proper role of a district court is not to act as an epistemological doubting Thomas, but only as an arbiter of what facts the plaintiffs could possibly prove in discovery. The Supreme Court should therefore affirm *Twombly*—but make clear that the test adopted by the 2nd Circuit is too rigid.

A CONSPIRACY?

In *Twombly*, the plaintiffs are a putative class of consumers. In their amended complaint, the plaintiffs alleged that the defendants conspired in violation of the Sherman Act not to compete with one another in their respective geographic markets for local telephone and high-speed Internet services. The defendants, so-called incumbent local exchange carriers, also allegedly conspired to prevent competitors from entering those markets.

This conspiracy allegedly arose after Congress passed the Telecommunications Act of 1996. The act was intended to change government-sponsored monopolies that existed before 1996 all around the country by requiring the defendants to open their regional fiefdoms to competition from local competitors (known as competitive local exchange carriers).

The plaintiffs inferred a conspiracy from the defendants' parallel behavior after the passage of the 1996 act. First, the incumbent local exchange carriers have allegedly refrained from competing against one another in their respective geographic territories. Second, they have allegedly prevented their local competitors from competing successfully by, among other things, providing poor-quality connections to the incumbents' networks.

Before the plaintiffs had an opportunity to file their motion for class certification, the U.S. District Court for the Southern District of New York dismissed their amended complaint. According to the court, the allegations of the defendants' parallel behavior, or "conscious parallelism," are not sufficiently probative of conspiratorial intentions to support a finding of antitrust violations.

The District Court came to this conclusion—at the motion-to-dismiss stage—because it applied the 2nd Circuit's test for determining the sufficiency of a complaint at the summary-judgment stage. That test requires the plaintiffs to establish at least one plus factor that "tends to exclude independent self-interested conduct as an explanation for defendants' parallel behavior."

On appeal, the 2nd Circuit reversed the trial court. The appeals court pointed out that in *Swierkiewicz v. Sorema N.A.* (2002), the Supreme Court declined to extend heightened pleading requirements to other contexts beyond fraud or mistake. Instead, the Supreme Court made clear in *Swierkiewicz* that "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions." Antitrust actions, the 2nd Circuit correctly pointed out in *Twombly*, are not among these exceptions.

RIGHT AND WRONG

The 2nd Circuit's outcome in *Twombly* is right, but its reasoning is wrong.

In *Twombly*, the 2nd Circuit seemed to accept that the requirements of Rule 8 apply to antitrust conspiracy complaints. The Supreme Court made it clear in *Conley v. Gibson* (1957) just how low the plaintiff's bar is under Rule 8: "A complaint should not be dismissed for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " Indeed, in *Twombly*, the 2nd Circuit recognized that as long as the complaint gives the defendant "fair notice of what the . . . claim is and the grounds upon which it rests" and "is not wholly frivolous," it should be sustained by a district court.

But the 2nd Circuit merely parroted these standards and did not apply them. Rather, the *Twombly* court set forth the following "plausibility" test: "The factual predicate that is pleaded does need to include conspiracy among the realm of plausible possibilities."

The 2nd Circuit borrowed this heightened pleading standard from other circuits and lower courts. For example, in *DM Research Inc. v. College of American Pathologists* (1999), the 1st Circuit affirmed a district court's dismissal of a complaint alleging an antitrust conspiracy because, it said, "without more detail, it is highly implausible to suppose that [one defendant had] any reason to 'agree' with" another defendant unlawfully.

At oral argument, Justice David Souter seemed to touch upon the fact that the 2nd Circuit required a complaint to first satisfy a "plausible" pleading bar before it would be required to satisfy the "no set of facts" pleading bar mandated by *Conley* when he directed the following comment to the petitioner's counsel: "But I thought the court did not get to its no-set-of-facts point until it first assumed that there had been a—a pleading on the basis of which a plausible inference of forbidden conduct would be drawn."

There is no question that this new "plausibility" pleading bar is higher than the old "possibility" pleading bar set forth in Rule 8 and *Conley*. Under the old bar, a complaint alleging merely parallel conduct by defendants would be sustained if a district judge thought that the plaintiff could possibly prove facts to support his claims.

The complaint in *Twombly* easily passes this test. One could envision correspondence or internal documents showing that the defendants' lack of competition against one another resulted from an agreement, not just historical coincidence.

But under the new bar, a district judge can dismiss such a complaint even if he believes that a plaintiff might be able to prove a case, as long as the judge thinks merely that such proof is implausible.

Even J. Douglas Richards, the plaintiffs' counsel in *Twombly* who was defending the outcome of the 2nd Circuit's decision, acknowledged at oral argument that the 2nd Circuit adopted a tougher pleading standard than Rule 8: "I think that that [alleging merely parallel conduct] would satisfy conventional pleading standards under Rule 8(a). On the other hand, I don't think it would satisfy the 2nd Circuit's standard below."

UP TO CONGRESS

This "plausibility" pleading standard in *Twombly* and other cases has been adopted out of fear. The fear is that without such a standard, class-action lawyers will be able to entangle defendants in expensive antitrust discovery and "remake the entire American economy," in the words of Justice Stephen Breyer at oral argument, on the mere allegation that corporations behaved in a parallel manner.

But regardless of whether this fear is rational, the place for raising the pleading bar for antitrust conspiracy complaints is Congress, not the courts. The Supreme Court recognized this in *Swierkiewicz:* "A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.' "

This is not an impossible task. The Private Securities Litigation Reform Act, for example, was passed in 1995 to raise the pleading bar for securities-fraud suits. The same could be done for antitrust conspiracy claims if Congress desired.

Edward D. Cavanagh makes a similar point in his Nov. 27, 2006, *Legal Times* commentary ("Plead a Little," Page 50). I agree that the proper battleground to raise the pleading standards for antitrust conspiracy complaints is Congress and not the courts.

That is precisely why I think the high court should affirm *Twombly* but make clear that the proper pleading standard for antitrust conspiracy complaints is Rule 8 as interpreted by *Conley* and its progeny. Without this qualification, the Supreme Court would be doing an end run around Congress and raising the pleading bar for antitrust conspiracy claims without an amendment of the Federal Rules.

The antitrust plaintiffs in *Twombly* and other analogous cases may or may not turn out to be as accurate as Copernicus. But surely the Federal Rules, as currently drafted, require that courts take the time to look at the evidence and find out, rather than putting their hands over their eyes for fear of sustaining an "implausible" complaint.

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