

Audio Transcription Oral Arguments
Kenney v. American Board of Internal Medicine

AUDIO TRANSCRIPTION

OF

ORAL ARGUMENT

KENNEY VS. AMERICAN BOARD OF INTERNAL MEDICINE

NO. 20-1007

Transcribed by: Joanne M. Gagliardi, CSR, RPR

Date Transcribed: December 1, 2020

1 JUDGE CHAGARES: Thank you. The first
2 case this morning will be No. 20-1007, Kenney
3 vs. American Board of Internal Medicine. We
4 welcome counsel. Although we wish we could see
5 you live, we're happy to be doing this via Zoom.

6 And with that said, Counsel, would you
7 like to reserve some time for rebuttal?

8 MR. CURLEY: Yes, your Honor, I'd like to
9 reserve two minutes of my time for rebuttal.

10 JUDGE CHAGARES: Okay. That's granted. I
11 will keep track of time, and I suggest that you
12 do so too so you don't get thrown off when we
13 call it, okay?

14 So you have a total of 15 minutes, and
15 your opening argument will be 13, okay?

16 MR. CURLEY: Thank you.

17 JUDGE CHAGARES: All right. You can
18 proceed when you're ready.

19 MR. CURLEY: May it please the Court.
20 Good morning. My name is Philip Curley. I
21 represent the plaintiff-appellants.

22 Your Honor, as the district court went
23 well beyond its purview when it dismissed with
24 prejudice the plaintiffs' tying claims, there

1 are five reasons that ruling should be reversed.
2 First, the Court took it upon itself to restate
3 the tying claims entirely. Plaintiffs allege
4 that having first purchased certifications, they
5 are forced later by ABIM to buy its Maintenance
6 of Certification product, referred to by its
7 acronym MOC and pronounced "mock;" and that if
8 they do not later buy MOC, their certifications
9 are revoked.

10 The district court wrongly redefined the
11 essence that put it -- as the Court put it, as
12 something plaintiffs never alleged; that in
13 order to purchase certifications, quote,
14 internists are forced to purchase MOC products
15 as well. The district court got it exactly
16 backwards and then dismissed its own claim.

17 JUDGE GREENWAY: But let me ask you a
18 question about the tying claim, and you can help
19 me. I thought the key issue here was single
20 product versus separate products; and I want you
21 to help me on how to think about this.

22 Now, it seems to me that the objective of
23 every internist is to be certified, and the
24 ABA -- the ABIM has set up two ways to be

1 certified, depending on where the internist is
2 in his or her career, right: Initial
3 certification and then the MOC which keeps them,
4 quote unquote, certified or deemed certified as
5 opposed to not certified.

6 Now, the district court said that there's
7 one product, and that was because what the ABIM
8 is selling is the certifications. What's the
9 flaw in that approach, particularly when you
10 look at the typical tying claim where there are
11 two products, each of which have a separate
12 effect on the market?

13 MR. CURLEY: Well, the flaw in that
14 approach, your Honor, I think is that the test
15 for separate products, of course, is whether
16 there is separate demand; and ABIM sells two
17 different products. Certification has always
18 been a one-time snapshot assessment of
19 postgraduate medical education and residency
20 training. That's what it's been for the 90
21 years that it's been around.

22 The MOC product, on the other hand --

23 JUDGE GREENWAY: (Inaudible) disagreement
24 about that, but go ahead.

1 MR. CURLEY: The MOC product, on the other
2 hand, is different. According to ABIM's own
3 form 990 filed with the IRS, MOC, quote, means
4 something different, end quote, from
5 certifications, and MOC is designed to help keep
6 internists current. So that's the difference
7 between the two products.

8 And the history of the two products
9 supports separate demand. MOC is a continuing
10 professional development product that has been
11 sold separately from certifications, not only by
12 hundreds of other vendors over the decades, but
13 also by ABIM itself.

14 JUDGE GREENWAY: But here's what I don't
15 understand, Counsel: The complaint of the
16 plaintiffs is we're not certified. If each of
17 the plaintiffs that are named ended up being
18 certified, there would be no issue here. So it
19 seems to me that the certification is what's
20 key. Tell me why that's wrong? Am I just
21 thinking about this wrong?

22 MR. CURLEY: Well, each of the plaintiffs,
23 in fact, your Honor, are certified. They each
24 purchased certifications; and then when they did

1 not buy the MOC product, those certifications
2 were revoked and that's the tie. ABIM forces
3 these four plaintiffs and internists after
4 certifications are already bought to purchase
5 the MOC product or they will revoke the
6 certification.

7 Now, certifications are, as we have
8 alleged, an economic necessity for doctors. I'm
9 not sure that's really disputed. There's case
10 law to better effectively have cited. So the
11 situation we have here is we have ABIM which has
12 an --

13 JUDGE CHAGARES: Hold on, Counsel, before
14 you go on, you say -- I mean are the internists
15 really forced to buy this?

16 MR. CURLEY: Well, they are forced to buy
17 it, your Honor, by ABIM's policy revoking their
18 certifications if they do not, and that's
19 forcing because certifications are an economic
20 necessity. They will lose their hospital
21 admitting privileges, insurance coverage,
22 malpractice coverage, so certifications in MOC
23 are an economic necessity. And we pleaded that
24 specifically and addressed that specifically in

1 the Complaint.

2 So that's the nature of the forcing; and
3 that I think as part of it was the difficulty
4 with the decision below. I'm not sure that the
5 judge really understood the nature of the
6 forcing here because he believed that our tying
7 claim required that MOC be purchased at the time
8 of the certification, and that's not the case.

9 JUDGE GREENWAY: Well, I don't -- I don't
10 see that being a problem of the district court.
11 I think you appreciated that, maybe not the
12 nuance that you're believing there is; but in
13 any case my question is this: As we look at
14 MOC, MOC involves courses of study, taking
15 examinations, completing SOFA evaluations and
16 satisfying other requirements.

17 How -- now, that shows that there's some
18 reflection of skill and training that's
19 involved, and it's not solely a reflection of
20 the purchasing power impact. Now, when you look
21 at it that way, how should that affect our
22 antitrust analysis because it's not a pure
23 product as you are asserting it seems?

24 MR. CURLEY: Well, your Honor, I do think

1 it is a pure product; and those types of
2 features that you mentioned, courses,
3 evaluations, lectures, all of those are provided
4 by other vendors. They're provided by
5 continuing medical education vendors, or CME.
6 They are provided by clinics, and Mayo Clinic
7 has their own series of courses that it offers
8 to help keep internists current. Hospitals,
9 especially major urban hospitals, have their own
10 continuing professional development courses.

11 So those features that you mentioned are
12 not unique to ABIM's CPD product. They're not
13 unique to MOC; and, in fact, those features have
14 been satisfied and those needs have been
15 satisfied by other vendors for decades without
16 those other vendors selling certification.

17 I think it's important to note here that
18 ABIM sold three other MOC-type products in the
19 '70s and '80s, sand-blown products; and they
20 were not mandatory, they were voluntary. So
21 that tells us a couple of things. First of all,
22 that ABIM itself has a history of selling those
23 two products separately; and, secondly, it tells
24 us that the only reason that MOC is successful

1 is because ABIM has now made it mandatory. If
2 you do not buy MOC, then you lose your
3 certification.

4 JUDGE CHAGARES: Can I just ask you a
5 related question? Do we have to ignore ABIM's
6 argument that allowing internists forego MOC
7 might ultimately decrease the quality of care
8 internists give?

9 MR. CURLEY: Well, I certainly think at
10 this stage you do, your Honor. I think that's
11 an (inaudible) affirmative defense for which
12 there's no record support, and the district
13 court essentially adopted or embraced those
14 types of business justification affirmative
15 defenses of ABIM in reaching its decision.

16 Now, we have alleged specifically in our
17 Complaint that there's no connection -- after
18 years of studies and research there's no
19 connection between MOC and any benefit to
20 doctors, patients or the public. So this case
21 is not about standards. This case is about
22 hundreds of millions of dollars in fees that
23 ABIM generates as a result of its tie. So
24 that's a defense that ABIM certainly is free to

1 raise, your Honor, and I'm sure that it is, but
2 it's not a defense that can be given conclusive
3 effect at this early stage in the proceedings.

4 JUDGE GREENWAY: Judge Chagares, I wanted
5 to move to RICO, if that's okay.

6 JUDGE CHAGARES: Sure.

7 JUDGE GREENWAY: Counsel, now on RICO,
8 let's assume for the moment that point
9 (inaudible) bring the RICO claim, right? When I
10 look at paragraph 135 of the Amended Complaint,
11 after providing a list of the seven statements
12 that you allege beneath that, the same or
13 similar statements of fact and others to the
14 same effect have been made by ABIM and its
15 agents repeatedly over the years in addition to
16 appearing on the website.

17 Now, obviously that speaks to the fraud
18 part of your claim, and I want to talk about
19 9B's requirement of fraud with particularity.
20 How is that statement in 135 not the antithesis
21 of the particularity requirement of 9B requiring
22 that fraud be pled with particularity date, time
23 and place?

24 MR. CURLEY: Well, I think, first of all,

1 in the paragraph preceding that there is a
2 specific reference to -- if I recall correctly,
3 to a statement made by the then-president of
4 ABIM a date and source and location; but I think
5 that the website --

6 JUDGE GREENWAY: There's no specific date
7 in paragraph 134. It says the summer of '99,
8 which speaks to the lack of date, time and
9 place, so ...

10 MR. CURLEY: Well, I believe it does refer
11 to the publication in which that statement was
12 published. So I think it satisfies 9B, and I
13 think the allegation with respect to the website
14 do as well. Those are continuing statements
15 that have been out in the public since it was
16 posted on the website and there today. So
17 there's no mystery to ABIM what we are claiming
18 the fraudulent misrepresentations are or when
19 they were made and where.

20 JUDGE GREENWAY: Well, but where in the
21 Complaint -- if you say there's no mystery,
22 where in the Complaint do you allege that
23 plaintiffs read or heard these statements?
24 Where do you allege that the plaintiffs'

1 employers read or heard these statements?

2 MR. CURLEY: We do allege that, your
3 Honor. I don't have the specific paragraphs at
4 my fingertips, but we do allege that the third
5 party's hospitals and insurance companies heard
6 those and believe those misrepresentations and
7 as a result were convinced to require internists
8 to buy the MOC product.

9 JUDGE GREENWAY: So your -- it's your
10 position that you've pled sufficiently and with
11 sufficient particularity date, time and place?

12 MR. CURLEY: Yes, your Honor. We believe
13 we satisfied rule 9B, and of course that wasn't
14 the basis of the decision below, although you're
15 certainly free to raise the question now.

16 I see that I only have one minute left.
17 I'm happy to answer more questions if you'd like
18 to, but I would like to save that for rebuttal,
19 if I could.

20 JUDGE CHAGARES: Well, I actually have
21 another one. Judge Greenway, are you done with
22 that line of questioning?

23 JUDGE GREENWAY: I am. After you, sir,
24 I'd like to ask a question on monopolization,

1 but I'm happy to wait. No worries.

2 JUDGE CHAGARES: I was just going to just
3 jump back to and we'll -- no problem. Another
4 question of tying. You know, there are cases
5 cited on franchises and all, but does the fact
6 that ABIM is a professional organization matter
7 here analytically?

8 MR. CURLEY: I don't think it does. There
9 certainly is no exemption in the Sherman Act.
10 for professional organizations or associations,
11 and I think the important point here is that
12 ABIM is the uncontested monopoly supplier
13 certification, so it has -- it doesn't have just
14 market power, it has monopoly power and that's
15 what gives it the ability to force enter and
16 it's to buy MOC.

17 So, no, your Honor, I don't think that --
18 that professional organizations -- even assuming
19 ABIM is one, I think it's more of a trade
20 association and pursues its own interests and
21 not the interests of the internist community or
22 patients; but even assuming it were, I don't
23 think that can set off (inaudible).

24 JUDGE CHAGARES: Judge Greenway, go ahead.

1 JUDGE GREENWAY: Oh, thanks so much.
2 I just wanted to pick up on something
3 Judge Chagares asked you and your comment. If
4 the MOCs are not the equivalent of the NBPAS's
5 MOC product and the CME's, is there even an
6 effect on the market?

7 MR. CURLEY: Well, I think there is, your
8 Honor. The effect is on the market for consent
9 for continuing professional development
10 products. All of those products, the MOC
11 product, the NBPAS product and the CME products,
12 those are all intended to help keep internists
13 current; and different vendors approach that in
14 different ways, but that's the goal of all of
15 them. So that is the market, and I think it
16 does --

17 JUDGE GREENWAY: So --

18 MR. CURLEY: I'm sorry?

19 JUDGE GREENWAY: So all three of them in
20 your view are vying for internists in the same
21 market?

22 MR. CURLEY: Absolutely, your Honor.
23 They're all vying for the internists' dollar to
24 buy these products to help them keep current.

1 JUDGE GREENWAY: I had one last question
2 on monopolization, if that's okay?

3 JUDGE CHAGARES: Sure.

4 JUDGE GREENWAY: Thanks. So just to focus
5 on monopolization for a second, the district
6 court assumed in its opinion that the market for
7 the monopolization claim was the same market
8 that the plaintiffs had alleged with the tying
9 claim, so essentially that they're separate
10 markets. Do you have any quarrel with that
11 analysis?

12 MR. CURLEY: I don't, your Honor. As we
13 allege, the mark that it's the subject of our
14 claim, our section 2 claim, is the MOC -- is the
15 MOC market. Now, the interesting thing say
16 anything about the MOC market, M-O-C market, is
17 that it's a captive market; and although it is a
18 CPD product, continuing professional development
19 product, as a result of ABIM's tying and
20 monopolization, it has created a captive market
21 for that particular product, giving consumers,
22 here the internists, no choice but to buy the
23 MOC product.

24 JUDGE GREENWAY: Well, how are the markets

1 different? I -- is the market for the purpose
2 of the monopolization claim different than the
3 market for the purpose of the tying claim?

4 MR. CURLEY: No, your Honor. The tied
5 product is MOC for the tying claim, and the
6 market that is the subject of the section 2
7 claim is also the MOC market.

8 JUDGE GREENWAY: Thank you.

9 JUDGE CHAGARES: I just had another
10 question and maybe you can enlighten us on this.
11 It seems that the district court and the parties
12 have really spent a lot of time on the per se
13 analysis. What about the rule of reason
14 analysis? Is there any reason to resort to
15 that?

16 MR. CURLEY: I don't think so, your Honor,
17 although it did plead an alternative rule of
18 reason account, but here and the Supreme Court
19 in the third circuit precedent I think is pretty
20 clear when the seller of the tying product has
21 monopoly power, the anti-competitive effect, the
22 injury is presumed, which makes it susceptible
23 to a per se pie.

24 We did complete an alternative rule of

1 reason and we believe we've repled antitrust
2 injury without having to presume it, but the
3 monopoly that ABIM has is so strong that we
4 believe per se treatment is appropriate.

5 JUDGE CHAGARES: Thank you.

6 Judge Greenway, anything more?

7 JUDGE GREENWAY: Many more things, but no.

8 JUDGE CHAGARES: Okay.

9 Judge Nygaard, do you have anything to
10 ask?

11 JUDGE NYGAARD: No, Judge Chagares. Both
12 you and Judge Greenway have asked all the
13 questions I had.

14 JUDGE CHAGARES: Thank you. All right,
15 Counsel, thank you.

16 We'll turn to appellee's counsel.

17 MS. JOHN: Good morning, and thank you,
18 your Honor. Leslie John on behalf of the
19 appellee, American Board of Internal Medicine.

20 May it please the Court. This case is
21 about the right of the American Board of
22 Internal Medicine to set its own standards for
23 what it means when it says a physician is ABA --
24 ABIM or Board certified. 30 years ago in 1990,

1 ABIM decided that it would require physicians to
2 demonstrate that they were remaining current in
3 their knowledge in the medicine in order to
4 maintain their Board certifications.

5 Now, appellees claim -- appellants claim
6 that they're entitled to lifetime certification
7 because they would rather not take the periodic
8 examinations; but that is not the product that
9 they bought. This is one of a handful of cases.
10 This case, the Lazarou case and the Siva cases
11 against certification organizations, and three
12 different courts have all looked at these
13 allegations and each one has reached the same
14 conclusion; that they simply don't amount to an
15 antitrust claim, whether it be tying or
16 monopolization or unjust enrichment, and they
17 certainly don't amount to a RICO violation; and
18 this is the only case in which that particular
19 fraud claim has been asserted.

20 Now, the parties agree on two key points.
21 Appellants agree with ABIM that ABIM should not
22 be prevented from determining its own standards.
23 And the appellants also agree ABIM should not be
24 required to accept any other continuous

1 professional development or CPD product as a
2 substitute for its certification or MOC. And
3 those areas of agreement can be found in the
4 appellants' opening brief at pages 10, 21 and
5 60.

6 Now, those two areas of agreement show the
7 fundamental flaws that are inherent in
8 appellants' claim, the relief they are seeking
9 here that they no longer be required to have to
10 participate in MOC to maintain their
11 certifications. They ask that ABIM not revoke
12 the certifications; but, in fact, they could
13 only get that relief if ABIM were forced to
14 accept their standards or another organization's
15 standards in lieu of its own.

16 But fundamentally that's not the product
17 they bought and the only product ABIM has
18 offered which is Board certification and Board
19 certification that offered a limited time
20 certification, which by its terms would expire
21 unless the diplomate were to continue to take
22 and pass periodic examinations to demonstrate
23 his or her knowledge in the field.

24 JUDGE GREENWAY: Counsel, when you --

1 JUDGE CHAGARES: Can I ask you a question?
2 I asked your adversary as well. Does the fact
3 that ABIM is a professional organization or
4 something like that matter analytically?

5 MS. JOHN: It does matter analytically
6 because I do believe the rule of reason would
7 govern the analysis here. And so the rule of
8 reason would require as per se that there be two
9 separate products that they're not beforcing
10 [sic], so in that respect the test for tying is
11 the same whether it's per se or rule of reason.

12 But what the rule of reason does is it
13 also adds in another requirement, and that
14 requirement is that, in fact, you show an effect
15 on competition in the tied product market; and
16 the effect on competition in the tied product
17 market here, the tied product market is MOC, or
18 Maintenance of Certification.

19 Now, in his argument appellant --
20 appellants' counsel confuses it because he says
21 the tied product market is continuous
22 professional development, but it's not. If you
23 look at the allegations in the Amended
24 Complaint, it's MOC. Continuous professional

1 development is something that could be
2 different, so, for instance, taking continuing
3 medical education, and, in fact, ABIM accepts
4 continuing medical education from any number of
5 providers. That allegation can be found in the
6 Amended Complaint.

7 So here if it's rule of reason, you have
8 to show an effect in the tied market, which is
9 MOC, not CPD, and that's something, quite
10 frankly, the allegations in the Amended
11 Complaint don't do. And I would just direct
12 your attention to the cases of this court in the
13 Massachusetts School of Law at Andover vs. ABA,
14 U.S. vs. Brown University. Those cases quite
15 clearly establish that rule of reason applies
16 when considering rules adopted by professional
17 societies. And the court went on to say, and
18 this is in the Massachusetts School of Andover
19 case, even when the behavior resembles conduct
20 usually subject to a per se approach. So I do
21 think it's rule of reason, as your Honor has
22 asked.

23 JUDGE CHAGARES: One other point. You had
24 said there are two things you agree on. In

1 appellants' brief, page 17 and note 7 they say
2 ABIM doesn't contest, for purposes of the motion
3 to dismiss, that it possesses monopoly power
4 over -- in the certifications. Is that true?

5 MS. JOHN: Well, it's not a grounds that
6 we -- we don't concede that ground, but we don't
7 raise that on our motion to dismiss. We raised
8 a separate product in the forcing issues, as
9 well as the rule of reason issue on the motion
10 to dismiss. We haven't raised that as a
11 separate argument, but we don't concede it.

12 JUDGE CHAGARES: Judge Greenway, I'm
13 sorry.

14 JUDGE GREENWAY: No, no, please, let's
15 just --

16 JUDGE CHAGARES: No, I thought I -- go
17 ahead.

18 JUDGE GREENWAY: Yeah, let's just talk
19 about rule of -- not rule of reason -- RICO for
20 a moment. Okay. So I asked your adversary
21 about pleading forward with particularity
22 pursuant to 9B, and I said just put aside
23 standing for a moment. I know that the
24 principal basis for the district court's

1 decision with standing, but my inquiry is: Even
2 if you get past standing, is there fraud pled
3 with particularity?

4 Your adversary referred to paragraphs
5 133 -- 134 and 135 and I think there are a few
6 paragraphs after that that essentially lay out
7 the fraud. Can you speak to the point of
8 particularity, please.

9 MS. JOHN: Yes. So I would submit
10 respectfully that fraud is not pled here with
11 particularity, so looking -- let's look at those
12 particular paragraphs of the Complaint.

13 Paragraph 134 of the Amended Complaint talks
14 about a 1999 newsletter. So we're supposed to
15 believe that somehow every hospital payor,
16 employer, or other health care entity read a
17 newsletter in 1999 when there are no allegations
18 about who this newsletter was sent to, how it
19 was disseminated and who considered it.

20 And then you turn to paragraph 135, which
21 is the ABIM website which contains statements
22 such as MOC makes a difference, and there are no
23 allegations to follow that up that may get
24 plausible that, again, every single hospital,

1 employer, health care provider or other entity
2 in the health care industry somehow looks at,
3 considers, let alone relies upon statements that
4 are on ABIM's website.

5 There are conclusory statements that
6 somehow there is a campaign of
7 misrepresentations but none of the kinds of
8 factual averments to support that are found in
9 the Amended Complaint. We don't know how it is
10 ABIM, if at all it does, communicates with this
11 vast chain. And, in fact, the plaintiffs in
12 their reply brief -- the appellants in their
13 reply brief make it clear that hospitals are not
14 a monolithic entity; that there are, you know,
15 thousands of hospitals around the United States
16 each making its own decision on whether it is
17 going to look to Board certification or not look
18 to board certification so that this -- we have
19 no details about how, in fact, this massive
20 fraud is supposedly perpetrated. And I think
21 it's most telling when it comes to the facts
22 surrounding each of the four specific appellants
23 in this case who claim that a hospital may have
24 made a decision about their admitting privileges

1 and yet there are none of the details about what
2 that hospital considered, what process that
3 hospital followed. We don't know anything that
4 would allow us to conclude, in fact, that any of
5 these entities were aware of any of these
6 statements on a website much less relied upon
7 them when making any decisions.

8 JUDGE GREENWAY: Let me just jump to
9 monopolization for a moment, two questions on
10 that. If we happen to disagree with the
11 district court's focus on MOC and initial
12 certification as one product, if we disagree
13 with that, does that mean we have to reverse on
14 the monopolization claim?

15 MS. JOHN: No, I don't think so, your
16 Honor, because for the monopolization claim
17 there has to be anti-competitive conduct at its
18 core, and there must be an abuse of monopoly
19 power. And so, for instance, let's look at the
20 forcing issue. Here the appellants of course
21 claim that they were forced to purchase MOC,
22 but, in fact, all of these appellants could
23 purchase and take the initial certification exam
24 without ever later purchasing Maintenance of

1 Certification; and, in fact, one of the
2 appellants, Doctor Manalo, did exactly that. In
3 fact, he has never taken a MOC exam. He's never
4 paid any MOC fees. So there's simply no forcing
5 here.

6 And on top of that if you'll look at the
7 case law in cases involving professional
8 certification, the courts have, in fact,
9 recognized that certifying organizations that
10 give, like ABIM does, a seal of approval but
11 don't do anything to constrain others to follow
12 it, such as in this case hospitals or employers,
13 does not violate the antitrust laws. And so
14 fundamentally their monopolization is contingent
15 on this concept of an abuse of monopoly power,
16 and there is no such abuse of monopoly power.

17 JUDGE GREENWAY: What is the --

18 MS. JOHN: Excuse me.

19 JUDGE GREENWAY: I'm sorry.

20 MS. JOHN: Oh, okay. Sorry. It also is
21 contingent, of course, on a finding of monopoly
22 power in a relevant market, and here the
23 relevant market that's alleged for purposes of
24 this particular count is MOC. It's not

1 continuous professional development, and it's
2 not certification.

3 If you look at the Amended Complaint, it's
4 Maintenance of Certification, and so there
5 really is no adequate relevant market alleged,
6 which of course is a grounds for affirming the
7 dismissal grounds that the third circuit has
8 held in cases like Queen City. You know, this
9 court can and should, you know, affirm
10 dismissals for failure to plead relevant
11 markets.

12 JUDGE CHAGARES: Could I just ask a
13 follow-up there about forcing? How do we
14 conclude that internists aren't forced to buy
15 MOC at this stage in the litigation in light of
16 the allegations that internists can't
17 successfully practice without certification; and
18 isn't the feasibility of practicing without
19 certification ultimately a question of fact?

20 MS. JOHN: I think you can first look to
21 the facts in this case. So, for instance,
22 Doctor Manalo who never -- who did purchase
23 initial certification and never purchased
24 Maintenance of Certification, I think that

1 certainly shows that his purchase of initial
2 certification was not contingent on the later
3 purchase of Maintenance of Certification. So I
4 think that is one way you can look at it.

5 I think you can also look at it in the way
6 that the second circuit indicated in the
7 Smugglers Notch Homeowners case, which is a case
8 where -- which looked at when you're entering
9 into the transaction and you know that, in fact,
10 you're going to be required -- there are certain
11 components, parts of that entire transaction,
12 and you know that up front and you voluntarily,
13 nonetheless, enter into that contract, that
14 there is no forcing and --

15 JUDGE CHAGARES: But, Counsel, what I'm
16 talking about is it may not be so voluntary. If
17 they want to make a living, are they forced to
18 buy your product? You seem to say no, they're
19 not forced to, but is that essentially an issue
20 of fact that's more appropriate for summary
21 judgment?

22 MS. JOHN: I would suggest not because I
23 think when courts look to forcing, they look at
24 what is the situation at the time of the initial

1 purchase, and at the time of the initial
2 purchase here ABIM had a program for
3 certification; and aspects of that program were
4 initially passing your initial Board
5 certification exam, and then that that
6 certification would expire after a set period of
7 time, ten years, without -- unless that
8 diplomate passed subsequent examinations.

9 And so when they up front bought that
10 product, they knew there would be a continuing
11 obligation as part of the certification program
12 that they would have to demonstrate, in fact,
13 that they possess the requisite knowledge to
14 hold themselves out and say, yes, I am ABIM or
15 Board certified. So there is no forcing because
16 there is the knowledge up front at the time of
17 purchase of what certification entails, and that
18 was the periodic demonstration of knowledge.

19 JUDGE CHAGARES: But I suppose that the
20 most basic form of your argument is they don't
21 have to go through ABIM to practice?

22 MS. JOHN: Yes, your Honor. So, for
23 instance, if you look at the Amended Complaint,
24 the Amended Complaint is quite clear that Board

1 certification is not required to practice
2 medicine in the United States. That is simply a
3 function of state boards of medicine that
4 license doctors. You only need a license in
5 your state to practice medicine. Board
6 certification is not required.

7 Board certification is more like the stamp
8 of approval that you can hold yourself out to
9 have special qualifications. Some -- some
10 patients and employers look to that; others do
11 not, but it is not a requirement to practice
12 medicine in any state in the United States,
13 which is a fact that is pled in the Amended
14 Complaint.

15 JUDGE CHAGARES: Well, but I mean this
16 does go to your market power. I mean, yeah,
17 it's true you don't need the ABIM certification,
18 but is it really feasible not to have it in
19 reality? And I think that the allegations,
20 don't they say you -- a lot of places won't let
21 you practice. Your malpractice rates are going
22 to go higher. Reimbursement is going to be an
23 issue. So is it really feasible to practice
24 without certification, and is that something

1 that should be a subject of discovery as opposed
2 to, you know, at this juncture with a motion to
3 dismiss to resolve?

4 MS. JOHN: Well, many -- I would submit
5 many internists do, in fact, practice medicine
6 without a certification; and there are many
7 things that might affect how much you're paid,
8 what your admitting privileges are, things like
9 where you attended medical school and many other
10 factors. But it really comes back to, you know,
11 what is at issue in this case and whether, in
12 fact, there is a tying claim and whether or not
13 there is one product or two products.

14 And that really goes back to the Supreme
15 Court test in Jefferson Parish about the
16 character of demand and whether there is demand
17 for the tied product in absence of the tying
18 product. And here the appellants want to hold
19 themselves out as being Board certified. There
20 is no separate demand for the tied product in
21 absence of the tying product, and that's
22 something that I think is -- is something that,
23 you know, the court in Jefferson Parish makes
24 clear.

1 Justice O'Connor when she expands on the
2 words in that says that for products to be
3 treated as distinct, the tied product must at a
4 minimum be one that consumers might wish to
5 purchase separately without also purchasing the
6 tying product. And here there simply are no
7 allegations of fact sufficient to move this case
8 along to make a plausible case that there are,
9 in fact, two products here because there is no
10 consumers. There are no allegations showing
11 there is demand to purchase the tied product
12 without also purchasing the tying product.

13 JUDGE CHAGARES: All right. Thank you,
14 Counsel.

15 Judge Greenway, do you have anything more?

16 JUDGE GREENWAY: No, thank you, sir.

17 JUDGE CHAGARES: And, Judge Nygaard, do
18 you have anything more?

19 JUDGE NYGAARD: No, thank you. I have no
20 questions.

21 JUDGE CHAGARES: Okay. Thank you.

22 All right. Thank you, Counsel.

23 And we'll hear the rebuttal now.

24 I'm sorry. We can't hear you.

1 JUDGE GREENWAY: You're on mute. Mute.

2 JUDGE CHAGARES: We can't hear you.

3 MR. CURLEY: Yes. I was --

4 MR. GREENWAY: Now we can.

5 MR. CURLEY: I didn't have my clicker set
6 there. Sorry. I apologize.

7 I think the questions your Honors asked
8 and the answers that were given in almost every
9 case underscored the questions of fact that
10 exist in this case. The Viameia -- the Viamedia
11 case, a recent case from the seventh circuit
12 that came down after the decision below found
13 that both separate products and forcing are --
14 present complex issues of fact that were not
15 susceptible for resolution on summary judgment
16 much less in a motion to dismiss.

17 So another fact question that arose from
18 your inquiry was professional society. Is ABIM
19 even a professional society? We don't believe
20 it is, but in any event, there certainly is
21 nothing in the Complaint that speaks to that.
22 That's another example of an affirmative defense
23 that ABIM is trying to raise, standards,
24 professional society, internists aren't keeping

1 up, all sorts of things that can only be
2 resolved after discovery.

3 JUDGE CHAGARES: Can I go back one second?
4 Is it your fundamental point that the
5 determination of separate products, single
6 product, is a question of fact?

7 MR. CURLEY: Well, yes, it is, your Honor.
8 It depends on separate demand, and we certainly
9 alleged numerous facts that support separate
10 demand. ABIM is claiming that there's not
11 separate demand outside of the allegations of
12 the Complaint, they haven't answered yet or
13 filed any affirmative defenses; but, yes,
14 separate products is a fact question I believe,
15 as is forcing.

16 And that's what the district court did
17 here that was incorrect; it concluded that as a
18 matter of law, there could only be one product,
19 and it shouldn't have arrived at that or any
20 other conclusion in our judgment.

21 It arrogated to itself a determination of
22 the ultimate fact issue which is out of the
23 separate products. It was indifferent to our
24 allegations. It improperly weighed evidence.

1 It explicitly made findings. It used those
2 words, and had accepted ABIM's affirmative
3 defenses that are outside of the Complaint. All
4 those are in violation of the proper standards
5 in ruling on a 12(b)(6) motion to dismiss. And
6 we respectfully point out to the Court that this
7 is not a motion where only conclusory
8 recitations of law are pleaded or claims rote
9 elements are simply recited. This is a highly
10 detailed and factual Complaint, and we are
11 entitled to discovery and the right to prove our
12 claim. So we respectfully ask that the district
13 court be reversed.

14 JUDGE CHAGARES: Thank you, Counsel.

15 We thank both counsel for their excellent
16 briefs and argument today. Oh, I'm -- Judge
17 Nygaard, did you have anything you wanted to
18 add?

19 JUDGE NYGAARD: I have nothing. Thank
20 you. Thank you, Judge. No, I don't. I have
21 nothing.

22 JUDGE CHAGARES: We will take the case
23 under advisement. It's a very interesting case,
24 and, again, we'll take the case under advisement

Audio Transcription Oral Arguments
Kenney v. American Board of Internal Medicine

Page 36

1 and ask that the clerk call the next case.

2 Thank you.

3 (End of transcription.)

4 -oOo-

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24