

Transcript of Oral Arguments before the 7th Circuit Court of Appeals, Lazarou v ABPN, Case 24-1994

[Judge Michael Scudder]

Okay, good afternoon. With the panel reconstituted, the court will move to its sixth and final argument of the day, and that's in Appeal Number 24-1994. Emily Lazarou versus the American Board of Psychiatry and Neurology.

Mr. Curley, nice to see you.

[Mr. Curley]

Good morning, Your Honors, and Happy New Year. May it please the Court, my name is Philip Curley, and I represent the plaintiff's appellants in this case, Dr. Lazarou and Dr. Akhter.

This court in *SIVA v. American Board of Radiology* laid out the roadmap for what must be alleged a state of claim against a medical board such as ABPN for illegally tying the sale of its maintenance of certification or MOC product.

SIVA first found that certification products and continuing medical education products were separate and also noted that the parties in that case didn't really dispute that. But *SIVA* then went on to hold that in order to show that MOC products fell within the continuing education product market, three conditions must be met: (1) that MOC contained educational content, (2) that doctors earned CME credits from MOC, and (3) that MOC was not redundant of other CME products.

The second amended complaint here in this case was plaintiff's first opportunity to address the holding of *SIVA*. As set out in our briefs, plaintiffs here have plausibly alleged each of these three conditions of *SIVA*. ABPN does not appear to seriously dispute this.

Instead, it relies on *stare decisis* and a handful of other alternative grounds to affirm dismissal, all of which were proffered below by ABPN and none of which were adopted by the district court. ABPN also does not dispute that the district court ignored well-pleaded factual allegations, demanded a level of evidentiary detail not required by pleading jurisprudence, failed to consider all allegations and inferences in the light most favorable to plaintiffs.

[Judge Scudder]

Mr. Curley, what do you see to be the, just to jump right to it, what do you see to be the key differences?

[Mr. Curley]

Between, there are two key differences. One goes to the MOC product itself, at issue in *SIVA* in this case, and they are different and alleged differently. And the other is that the second amendment complaint here specifically addresses what Your Honor found lacking in the *SIVA* complaint.

So, there are specific allegations here as to educational content. There are specific allegations here in this case with respect to cross-elasticity and the fact that doctors view MOC as being reasonably interchangeable with other CME products. And there are specific allegations in this case that did not exist in SIVA on that cross-elasticity point. The plaintiff, Dr. Akhter, actually used CME credits that he obtained from the ABPN product for licensure purposes.

Also in this case, in this complaint, the second amendment complaint, there are extensive allegations about the acceptance of MOC by states in whole or in part in satisfaction of their CME requirements. And, also in the second amendment complaint here, but not in the SIVA complaint, there are allegations about the AMA direct credit process whereby CME credit is earned, can be earned, for using, purchasing MOC products.

So those are the allegations, the legal allegations, I would say, that the court found wanting in SIVA.

As to the MOC products themselves, in SIVA it was alleged that the MOC product there was principally a requirement that doctors buy CME products from others. There was no allegation about anything like assessment products or the ability to earn CME credits for assessment products.

Those allegations are made here in this case and distinguish the actual MOC product here from the MOC product that was offered by the American Board of Radiology. Also, the MOC product here has a waiver component, which did not exist in SIVA and was not alleged. And that component allows ABPN to waive CME requirements from other providers and substitute in their place CME from their own assessment products.

And so, there are significant factual differences between the MOC products offered by the radiology folks and the psychiatry neurology folks, even though they're both called MOC or maintenance of certification.

[Judge Scudder]

Do you think, though, that the differences today, can the Second Amendment complaint be fairly read as to altogether take a physician out of a need to go into the market for continuing medical education?

[Mr. Curley]

I'm not sure it would take a physician altogether out of that market, but I don't think that's what is required. As Your Honor pointed out in SIVA, the missing allegation was can you get CME credit for MOC? And I think we clearly allege that to be the case.

And in terms of altogether, that would seem to require that there be a complete foreclosure of competition, which was another finding or aspect of the district court's ruling. And we think the district court erred in that regard because to state a claim, you don't have to—or to prove a claim, you don't have to allege or prove complete foreclosure. Just restraint, a substantial impact on competition, which is what we have alleged in the Second Amendment complaint.

[Judge 2]

But can you focus on our reasonably interchangeable—the reasonably interchangeable analysis, which you buy into? You seem to be saying that both MOC requirements, the activity requirements and the assessment requirements, are reasonably interchangeable with CME as far as consumers are concerned. So, if you don't buy into the language that Judge Scudder just used about altogether, how is reasonably interchangeable met when it seems to me kind of all the scenarios you paint still have doctors going to third-party vendors for CME at some point?

[Mr. Curley]

Well, that is true, Your Honor. And ABPN leverages its monopoly in the certification market to force psychiatrists and neurologists to buy their own MOC product. The cross-elasticity requirement of reasonably interchangeable, again in SIVA, what was required was pleading—would, quote, “permit an inference of cross-elasticity.”

Now, we have addressed that in the Second Amendment complaint. We have a section of the Second Amendment complaint that was not in the SIVA complaint titled, “MOC is Interchangeable with Other Products in the CME Market.” And again, Dr. Akhter, I think, plaintiff here is the ultimate example of that. We did not have a Dr. Akhter in the SIVA case. In other words, he actually used the CME credit he obtained from ABPN towards state licensure. So that

[Judge Scutter]

So that shows— In part used it, right?

[Mr. Curley]

In part. But every CME product is only used in part. I'm not aware, nor are my clients, of any CME product that by itself establishes or provides all the CME credits required for licensure.

I see I only have 30 seconds.

[Judge Scutter]

Do you want to reserve some time for rebuttal and just see how the dialogue goes on the other side?

[Mr. Curley]

Yes.

[Judge Scutter]

Yeah, that's fair. Thank you. Yeah, you're welcome.

Okay, Mr. Sullivan.

[Mr. Sullivan]

Good morning, Your Honors. Christopher Sullivan on behalf of the Appellee American Board of Psychiatry and Neurology.

And where I'd like to start is with an analogy that you, Judge Scudder, asked the American Board of—Counsel for American Board of Radiology in that oral argument in SIVA. And that was—and you might not recall it and the other judges might not have heard it—was you

used the analogy of wouldn't you admit, American Board of Radiology, that if all you required for recertification was 10 bats and nothing more, and those 10 bats had to come from you, the American Board of Radiology, wouldn't that be a problem? And the answer is it would.

But here's the difference. First, there's more than the 10 bats or the CMEs. There's a longitudinal assessment, three three-year blocks of that, or a secure proctored tenured examination.

There's practice improvement process. They have to go through, a 24-month three-step process.

[Judge Scutter]

Yeah, so all you're doing with that—I remember it—all you're doing is saying it's a different product.

You know, to put on a complete parallel the market for continuing medical education to maintain licensure with board certification and all that board certification entails, one, to receive and then two, to maintain, it's kind of an apples and oranges comparison. That's what you're saying.

[Mr. Sullivan]

That's not what I'm saying.

That is what the American Board of Radiology was arguing. We're not pushing the two-product argument, not because SIVA found that there was two products. That's wrong.

What SIVA court said is they thought it might have been premature for the district court. So, we didn't push that. We respect the decision.

What I'm pointing out now is that in the interchangeability, there isn't interchangeability because there is the more, right? There's the things other than CMEs. But here's the key.

It's the second point, the second distinction, is the ABPN doesn't make bats. And that's where every court, every district court, and every appellate court, including this court, has rested the dismissal on, is what they deem was no financial interest in the CME market. In other words, all of these CMEs come from third-party providers.

[Judge Scudder]

You're saying, physicians have to go into the marketplace. They can't shop within the board for CME because you don't provide CME.

[Mr. Sullivan]

Correct.

[Judge Scudder]

You have to go into the marketplace for CME and acquire it. And that's a competitive market.

[Mr. Sullivan]

Exactly, Your Honor. Yes. I would say it a little bit more strongly, and I can quote the language from SIVA that goes exactly to this point. It's quite a lengthy quote, and I've got it in the brief, so I won't.

But the board, the American Board of Psychiatry and Neurology, doesn't compete in the CME market. It doesn't consume CMEs. It doesn't produce CMEs. It doesn't sell CMEs.

[Judge Scudder]

Right. Okay, so one of the points Mr. Curley is making is he's saying, well, there are some differences. It's not 100% factually aligned with SIVA. Do you want to speak to the differences he observes?

[Mr. Sullivan]

Yes.

They finally highlight there's only three differences that they observe. I think it's page nine of the reply. One was that Mr. Curley mentioned was that there's educational content, which is in the SIVA complaint. That's not new. That is not a difference that's in the SIVA complaint. The only one ostensibly that's a change is the fact of these statutes that allow some states to apply MOC, which is a 10-year process, for some CMEs.

That's the only kind of difference between that and SIVA. Here's what I'd say to that, Your Honor. First of all, those statutes were around well before the first complaint was filed in March 6 of 2019.

We've gone through multiple complaints, and every court that has looked at this, including this court in SIVA, has dismissed with prejudice at the pleading stage. So what that is telling you is that there are no set of facts. In other words, while that fact is new, the theory is the same. The analysis is the same. The relevant competitive market is the same as SIVA. Nothing materially has changed.

[Judge 2]

Let me ask you to respond to their argument that the complaint we're looking at today is really their first— was their first opportunity to address everything after SIVA. So this would not be the fourth bite at the apple that they're asking the district court for, but really a second bite. Can you respond to that?

Why should they not have a second chance post-SIVA, particularly given some of the details they're asking us to take judicial notice of? But presumably they would fold into a new complaint.

[Mr. Sullivan]

Well, first of all, it's not exactly correct. While the briefing for the first amended complaint was pending, SIVA came down, and that judge, Judge Packold, I believe it was at the time,

requested supplemental briefing on the effect of SIVA. So that was with the first amended complaint.

Then they got the second amended complaint, and the only reason they got the second amended complaint, and this is in the district court's opinion, was we now know about SIVA and we're going to distinguish ourselves from SIVA. They then filed the second amended complaint, and other than the one factual, peripheral factual issue of the ability in some states to get CME credit for MOC, there's no other distinction. And that's post-SIVA for the very reason to distinguish yourself from SIVA.

I mean, the only difference with the SIVA complaint and the second amended complaint, I mean, they started out with the same draft. The ABR is in the original complaint against the ABPN. They just started omitting stuff, and that's why in the appeal we had to go back to some of the first complaint to show that there is more to MOC than just CMEs because plaintiffs just tried to get around it by taking it out, but they didn't add anything.

There's no new analysis, no new claims, no new theories, legal theories. They're identical to SIVA. So, in response to the particular point that Mr. Curley is making that, well, the difference that he's emphasizing is the, whether you want to term it a waiver of a need to get a certain number of credit hours, or credit for credit hours. Okay, he's saying it is different because there is some kind of credit or a waiver of a need. So you have this 90-hour requirement. There's a 16-hour waiver or credit. It takes you down to 74. You all know. You know what I'm talking about.

Okay, all that. So, when I look at that, I say, well, yeah, we didn't have to speak to that. The court didn't have to speak to that in SIVA, but why is it a distinction with any difference?

Because the 16 hours that are waived, the 16 hours that are credited, pick the verb you like, okay, I don't know that that shows cross-elasticity because the 16-hour waiver or the 16 hours of credit, it seems to me is the fruit of taking an examination or going through some kind of continuing, you know, kind of testing refresher with the way the MOC product works that way. I don't know that it really tells us anything about a risk to competition from tying in the CME market.

[Mr. Sullivan]
Exactly right.

It doesn't add anything because it goes, it rests on that point that I started with, right? If the ABPN had financial interest in the CME market, if it competed in the CME market, we would have a different case. But they don't, and that goes to price elasticity in the competition.

So, it doesn't matter whether...

[Judge Scudder]
They don't supply CME.

[Mr. Sullivan]
ABPN does not supply CME, doesn't produce CME, doesn't distribute CME.

[Judge Scudder]

Yeah, so we'll see what Mr. Curley says. I mean, you have to take that factual difference and say it's of legal significance that there's...

[Mr. Sullivan]

... or material difference to a legal premise rather than just a peripheral fact.

[Judge Scudder]

Okay. Anything further you want to add?

[Mr. Sullivan]

That's it. Thank you.

[Judge Scudder]

Okay, you're quite welcome. Mr. Curley.

[Mr. Curley]

I'm going to go right to that last colloquy. ABPN does produce and sell products for which doctors can earn CME credits, which in SIVA was the second condition that the court found to be missing.

[Judge Scudder]

What's the product, the successful completion of the exam?

[Speaker 1]

The product is either the 10-year exam, as Dr. Ahkter took, and you asked counsel about going into the market and how that evolves. Well, as a result of Dr. Ahkter being able to use those 60 credits from the ABPN product, he didn't have to go into the market to buy those 60 credits from other providers. That's the harm to competition.

But to get back to your question, in addition to the 10-year exam for which credit is earned, there's another product that's part of MOC, which is the three-year articles pathway. And so that's also a product for which doctors can and do obtain CME credit.

[Judge 2]

But why should we ignore the fact that Dr. Ahkter, he was given – he did that direct credit transaction. He got the 60 additional credits, but that wasn't everything he needed. He still needed more that he couldn't get from ABPN. He still had to go to the CME product market and get some additional CME from third-party vendors.

[Mr. Curley]

For licensure, that's correct. But again, that's the same with every CME product. There's no CME product of which we are aware that provides the 150 credits required by Illinois, for instance. Doctors put together a portfolio of CME credits to qualify for their licensure.

[Judge 2]

But so long as that's the case, why don't we have a problem on the lines of substitution and replaceability and so forth and so on?

[Mr. Curley]

Well, first of all, we're at the pleading stage. All we need to do is make allegations that permit an inference. But the problem is that, again, in Dr. Ahkter's case, instead of buying those 60 additional credits that he needs for licensure from other CME providers, he used the credits he got from MOC from ABPN. So that is the restraint on competition. You do not need to be perfectly fungible. You do not need to be 100 percent substitute, especially at the pleading stage.

And we think we've alleged more than enough facts to show that doctors view MOC as reasonably interchangeable with other CME products. And, in fact, that's not just a legal conclusion. Dr. Ahkter did that and so specified in the Second Amendment Complaint. But it's the same with – remember, there are two ways that doctors can use MOC for CME credits. One is this direct credit, which we've been talking about and spending most of our time, I think, talking about that. And that's the Dr. Ahkter example. But in addition to that, even without having to get the direct credit, many states accept MOC in place of the entirety of their CME requirements. So that is equally as important or maybe more important in substitutability than the direct credits.

[Judge Scudder]

Okay. Okay. Thank you very much.

[Mr. Curley]

Okay.

[Judge Scudder]

Thanks to you, Mr. Sullivan. Thanks to you, your colleagues, as well. We'll take the appeal under advisement.

[Mr. Curley]

Thank you.