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CASENOTES

*BLUE SHIELD OF VIRGINIA v. McCREADY** DEFINING THE SCOPE AND RATIONALE OF CONSUMER STANDING TO SUE UNDER CLAYTON SECTION 4

The United States Supreme Court has ruled that a consumer has standing to maintain a treble-damage suit under section 4 of the Clayton Act,¹ despite the fact that the claimed injury did not result from the anti-competitive effects of an anti-trust violation, but was rather the very means by which the anti-trust violators sought to restrain competition.² In *Blue Shield of Virginia v. McCready*,³ the consumer's injury came about in the context of a cost manipulation scheme instituted by an organization acting as the agent⁴ of one set of service suppliers (psychiatrists) seeking to divert the consumer's trade from rival service suppliers (psychologists).⁵ In resolving the issue of whether the injured consumer could bring an action under section 4 of the Clayton Act, the Court affirmed Congress' broad remedial objective in enacting section 4: "to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations."⁶

As an employment benefit, Carol McCready received coverage under a prepaid group health plan purchased from Blue Shield of Virginia (Blue Shield).⁷ Under this plan, subscribers

* 457 U.S. 465 (1982).

1. 15 U.S.C. § 15 (1976).

2. *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982).

3. 457 U.S. 465 (1982).

4. "Blue Shield Plans are not insurance companies, though they are, to a degree, insurers. Rather, they are generally characterized as prepaid health care plans, quantity purchasers of health care services [I]n a real and legal sense, the Blue Shield Plans are agents of their member physicians." *Id.* at 469 n.4 (quoting *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 480 (4th Cir. 1980)).

5. 457 U.S. at 478-84.

6. *Id.* at 472.

7. *Id.* at 468.

were entitled to reimbursement of eighty percent of their costs for out-patient psychotherapy services.⁸ During the period of coverage, McCready received treatment from a clinical psychologist. She unsuccessfully sought reimbursement of the costs from Blue Shield; Blue Shield would reimburse only for bills submitted by physicians.⁹ In 1978, McCready instituted a class action in federal court on behalf of all persons like herself who were entitled to reimbursement from Blue Shield for the cost of psychological services obtained since 1973, but who had, nevertheless, not been reimbursed.¹⁰ Her complaint alleged a conspiracy by Blue Shield to boycott psychologists, in violation of

8. *Id.* See *McCready v. Blue Shield of Virginia*, 649 F.2d 228, 231 (4th Cir. 1981).

9. 457 U.S. at 468 n.2. The Court recited the following allegations by McCready as the basis for its assumptions: "that but for the alleged conspiracy to deny payment [McCready] would have been reimbursed by Blue Shield for the cost of her psychologist's services"; *id.*; that between 1962 and 1972 Blue Shield had regularly paid for the services of psychologists, and ceased doing so in 1972 presumably because of the alleged conspiracy; that in 1973 the Virginia legislature enacted "freedom of choice" legislation requiring Blue Shield to reimburse subscribers for psychotherapy provided by psychologists; and that Blue Shield was obligated to comply with that statute. *Id.* The freedom of choice statute was held invalid by the Virginia Supreme Court in 1980. *Blue Cross of Virginia v. Commonwealth*, 221 Va. 349, 269 S.E.2d 827 (1980). The statute was promptly amended to cure the constitutional infirmity. See *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 501 F. Supp. 1232, 1235 (E.D. Va. 1980).

10. 457 U.S. 468-69. The Court noted that *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981), raised similar issues, and that an examination of *Virginia Academy* was "helpful in understanding the precise nature of McCready's claim." 457 U.S. at 469 n.4. The Court summarized the *Virginia Academy* holding as follows: "Finding that Blue Shield's policy of denying reimbursement for the psychotherapeutic services of psychologists unless billed through physicians, was not merely a cost-containment device or simply 'good medical practice,' as claimed by Blue Shield, the [court of appeals] held that Blue Shield had violated the Sherman Act." *Id.* Psychologists were quick to recognize that whoever controlled third-party reimbursement policies for health care would, "de facto, determine which health-care professions would be recognized as autonomous practitioners." 38 AM. PSYCHOLOGIST 30, 38 (1983). Thus, the issue for psychologists in contesting a physician-controlled reimbursement scheme "was not reimbursement *per se*, but autonomy for the [ir] profession, and, [ultimately] freedom of choice for the consumer" in selecting among competing, equally-qualified suppliers of psychotherapy services. *Id.*

Acting on this recognition, during the 1960's a committee of the American Psychological Association worked diligently to get freedom-of-choice legislation enacted on a state-by-state basis across the nation. During this period, the committee's chairman, Dr. Milton Theaman, "successfully negotiated the first significant commercial insurance program to reimburse psychologists independent of physician involvement." *Id.* That landmark achievement led to "a new era in the recognition of psychology as an independent profession." *Id.*

section 1 of the Sherman Act.¹¹ Her complaint also alleged that Blue Shield's refusal to reimburse patients treated by psychologists was an essential element of the conspiracy and that such a refusal caused an economic injury compensable under the Clayton Act.¹²

The district court dismissed McCready's complaint, ruling that she lacked standing to sue.¹³ The United States Court of Appeals for the Fourth Circuit reversed, holding that McCready's alleged injury was within the scope of section 4 of the Clayton Act and that she could, therefore, bring suit against Blue Shield. Accordingly, McCready's case was remanded to the district court for further proceedings.¹⁴ On petition by Blue Shield, the United States Supreme Court granted *certiorari*.¹⁵

The threshold requirement for a private treble-damage action, established by the language of section 4 of the Clayton Act, is the existence of an antitrust violation. In *McCready*, the antitrust complaint was founded upon Blue Shield's selective refusal to reimburse its subscribers for treatment provided by psychologists. This selective refusal was identified as the means employed by Blue Shield to restrain competition in the psychotherapy market. The Court identified the specific question for its consideration as "whether a subscriber who employed the services of a psychologist has standing to maintain an action under [section] 4 of the Clayton Act based upon the [Blue Shield] plan's failure to provide reimbursement for the costs of [her] treatment."¹⁶

The Court set forth, as the basis of its analysis, the proposition that section 4 was to be "applied . . . in accordance with its plain language and its broad remedial and deterrent objectives," subject only to "some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting."¹⁷ Because the plain language of section 4 would permit

11. 457 U.S. at 469-70. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1976).

12. 457 U.S. at 470. "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1976).

13. *McCready v. Blue Shield of Virginia*, 649 F.2d 228, 229 (4th Cir. 1981) (discussing unreported district court opinion), *aff'd*, 457 U.S. 465 (1982).

14. 649 F.2d at 232.

15. *Blue Shield of Virginia v. McCready*, 454 U.S. 962 (1981).

16. 457 U.S. at 467.

17. *Id.* at 473. In so doing, the Court identified the basic issue of the case as one of statutory construction: whether to "infer a limitation on the

redress to McCready for the injury she claimed, standing would be denied her only if the particular facts of her case coincided with certain limits the Court had previously recognized as applying to the treble-damage remedy.¹⁸ The Court proceeded to consider two types of limitations it had identified—one with regard to classes of persons,¹⁹ and the other, concerning forms of injury²⁰—that, as a matter of policy, required denial of redress.

The denial of recovery to certain classes of persons reflected a concern with the potential for overlapping recoveries stemming from a single antitrust violation.²¹ The Court conceded that it might also be placing limitations on recovery by certain classes of persons, based upon its evaluation of the extent to which their damages might be speculative and difficult to prove.²² In reviewing the particular facts of *McCready*, the Court found no possibility of duplicative recovery in the absence of other injured parties,²³ and no speculation necessary to deter-

rule of recovery suggested by the plain language of § 4." *Id.* at 485. It identified its refusal to "engraft artificial limitations on the § 4 remedy" as "[c]onsistent with the congressional purpose." *Id.* at 472. In this context, the Court referred to *Reiter v. Sonotone Corp.* (442 U.S. 330 (1979)), in which it "rejected the argument that the § 4 remedy [was] available only to redress injury to commercial interests." 457 U.S. at 473.

18. *Id.* at 473.

19. *Id.* at 473-75. See, e.g., *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) *reh'g denied*, 434 U.S. 881 (indirect purchasers as a class were denied the right to claim that overcharges to the direct purchasers had been passed on to them and thus could not claim damages under § 4). It is noteworthy that Justice Brennan, author of the majority opinion in *McCready*, was also the author of a lengthy and impassioned dissent to the *Illinois Brick* decision. Several of his concerns expressed in that dissent find their resolution in *McCready*:

Today's decision [in *Illinois Brick*] that § 4 affords a remedy only to persons who purchase directly from an antitrust offender is a regrettable retreat. . . . [I]t flouts Congress' purpose and severely undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement. . . . [I]t is essential to the public interest to preserve the effectiveness of the private treble-damages action.

Illinois Brick Co. v. Illinois, 431 U.S. at 749-50 (Brennan, J., dissenting) *reh'g denied*, 434 U.S. 887.

20. The Court indicated that limitations on the availability of the § 4 remedy to particular classes of persons, as in *Illinois Brick*, are analytically distinct from limitations on its availability for particular forms of injury. 457 U.S. at 476. See *infra* text accompanying notes 26-41.

21. 457 U.S. at 474-75.

22. *Id.* at 475-76 n.11.

23. The Court considered the variety of parties who might have suffered harm from Blue Shield's selective reimbursement policy, before concluding that the circumstances of this case offered "not the slightest possibility of duplicative exaction from [defendants]." *Id.* at 475. It first ruled out McCready's employer as a claimant. *Id.* It then noted that McCready's psychologist had "been fully paid for his services and [had] therefore not been

mine damages.²⁴ It concluded that recovery need not be denied to the class of persons that McCready represented.²⁵

The second type of limitation—as to particular forms of injury—required denial of the section 4 remedy for injuries sustained too remotely from the antitrust violation.²⁶ Conceding the conceptual difficulty of this criterion²⁷ and the absence of

injured by Blue Shield's refusal to reimburse [McCready] for the cost of his services." *Id.*

Finally, the Court diagrammed the effect of Blue Shield's selective reimbursement policy upon its subscribers desiring psychotherapy services. The class of subscribers McCready represented, who chose to visit psychologists and to forfeit reimbursement, incurred a direct injury through an increase in the net cost of their psychotherapy services. *Id.* at 483. A different, non-overlapping class of subscribers—who "yield[ed] to Blue Shield's coercive pressure"—chose to forgo "treatment by the practitioner of their choice" and received reimbursement for their psychotherapy services provided by the rival psychiatrists. *Id.* In the latter case, the direct injury was to the psychologists, whose customers were diverted by the reimbursement advantage that Blue Shield accorded its psychiatrist sponsors. The Court recognized that customers in the latter class had been injured only indirectly, by the suppressed competition in the psychotherapy market. *Id.*

Thus, it can be seen that the claim of the psychologists injured by the diversion of their trade is wholly separate and non-overlapping with McCready's claim, which implicates only psychologists whose trade was not diverted. The separate claim of the psychologists who lost trade because of Blue Shield's discriminatory reimbursement policy requires a more speculative assessment of damages than does McCready's claim.

24. "[McCready's] damages were fixed by the plan contract and . . . they could be 'ascertained to the penny.'" *Id.* at 476 n.11 (quoting *McCready v. Blue Shield of Virginia*, 649 F.2d 228, 231 (1981)).

McCready's damages would appear to be \$2,400. In response to the question "How much does Blue Shield owe you, in your opinion?", McCready gave this answer: "I have paid somewhere approximately around \$3,000 for group therapy, so they owe me reimbursement for a percentage of that which my understanding was 80 percent." Excerpts from the Deposition of Carol McCready, October 3, 1978, Joint Appendix, Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, No. 81-225, October Term 1981.

25. 457 U.S. at 475.

26. *Id.* at 476 n.12. The Court noted that courts of appeals have developed a wide variety of tests for remoteness. After reviewing a number of these tests, the Court concluded that it did not have to decide the relative value of these tests. *Id.* Instead, the Court directed attention to its prior involvement in the issue of remoteness in *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969) (alleged violation of the Robinson-Patman Act). In *Perkins*, the Court overturned a lower court ruling that plaintiff's injury as a retailer at the fourth-level of gasoline distribution was too far removed from the defendant-refiner's illegal discriminatory-pricing conduct at the initial level of supply to plaintiff and plaintiff's competitors. *Id.* at 650.

27. 457 U.S. at 477 n.13. The Court suggested a similarity between the kind of analysis applicable to the problem of defining remoteness and similar difficulties with the principle of proximate cause. By this analogy, the Court suggested that it had to cope with a concept that is "hardly a rigorous analytic tool," yet one which can be effectively used to establish limits as to which injuries are too remote to be actionable under § 4 of the Clayton Act. *Id.* The possible borrowings from the principle of proximate cause include

direct guidance from Congress in its application, the Court articulated two factors for gauging remoteness. One factor was "the physical and economic nexus between the alleged violation and the harm to the plaintiff." The second, and more important factor, was "the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under section 4."²⁸

In its evaluation of "physical and economic nexus," the Court looked at the connection between the injury suffered by the plaintiff and the illegal activities of the defendant. The Court rejected the argument that McCready's injury lacked the required nexus because the conspiracy was directed at psychologists and not at Blue Shield subscribers.²⁹ The Court took the position that it was unreasonable to limit the scope of the section 4 remedy to those competitors whose injury was of fundamental importance to the conspirators.³⁰ The Court recognized

"considerations . . . of convenience, of public policy, [and] of a rough sense of justice . . ." to determine what is or is not too remote. *Id.* (quoting *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 351-52, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting)).

28. 457 U.S. at 478.

29. *Id.* at 478-81.

30. *Id.* at 478. Though finding standing for McCready, the United States Court of Appeals for the Fourth Circuit was divided on the very issue of whether proper application of the target area test would or would not include her within the target area with the psychologists. The latter, as the competitors of psychiatrists, were the intended victims of the conspiracy. The patients, however, were the direct victims of the conspiracy. *McCready v. Blue Shield of Virginia*, 649 F.2d 228, 231 (4th Cir. 1981). The majority took the position that "[b]y its terms the Act does not restrict standing to competitors who are the targets of anticompetitive behavior." *Id.* See *Reiter v. Sonotone*, 442 U.S. 330 (1979) (allowing standing to a consumer); *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414, 419 (4th Cir. 1966) (plaintiff milk producers, although not direct competitors of defendant-grocers, had standing to sue for antitrust violation).

The dissent in *McCready*, while accepting that *Newton* did not find direct competition a prerequisite for standing, nonetheless believed that *Newton* required rejection of McCready's claim to standing. 649 F.2d at 232 (Widener, J., dissenting). Justice Widener felt that McCready, as a subscriber to the Blue Shield plan, was not the target of Blue Shield's actions, and therefore was not within "the sector of the economy *competitively* endangered by [Blue Shield's] violation" of selectively reimbursing for psychotherapy services. *Id.* at 233 (emphasis in original). According to the dissent, the sector that was threatened contained only the psychologists. *Id.* at 234.

Even though the target area test was central to the court of appeals decision, the Supreme Court—though affirming that decision as a whole—chose not to mention the target area test in the text of its opinion. The Court restricted its discussion of this test to the footnotes. See 457 U.S. at 476 n.12, 478-79, nn.14-15. The Court took care to discuss and clearly renounce the frequently cited formulation of the target area test set forth in *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d

that the essential device in the psychiatrists' scheme to prevent subscribers from seeking the services of psychologists was the infliction of injury, in the form of higher net costs, upon those consumers who selected psychologists to provide the psychotherapy services they desired.³¹ By controlling the reimbursement policies of Blue Shield,³² the conspiring psychiatrists

1292 (2d Cir. 1971). In *Calderone*, the court denied standing to a non-operating landlord of motion picture theatres who had alleged a conspiracy among theatre operators and movie distributors to restrain competition in the exhibition of motion pictures. Holding that the landlord was not within the target area of the claimed violation, the court explained the test as follows:

In a series of decisions over the last 15 years, in all of which certiorari was denied by the Supreme Court, this court has committed itself to the principle that in order to have "standing" to sue for treble damages under § 4 of the Clayton Act, a person must be within the "target area" of the alleged antitrust conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with "targets" or with participants in an alleged antitrust conspiracy, rather than by being "targets" themselves

Id. at 1295. The *McCreedy* Court banished the *Calderone* version of the target area test with its pronouncement that "the [section 4] remedy cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market." 457 U.S. at 479.

The Court does not indicate whether, following *McCreedy*, the lower courts should cease using such aids to analysis as the target area test, properly applied. The Court avoided the task of dissecting and resolving the mass of "possibly conflicting approaches" toward the problem of remote antitrust injury developed by the courts of appeals, one of which is the target area test. *Id.* at 476 n.12. The Court's silence regarding a workable target area test can be taken as its attempt through *McCreedy* to provide a single direction to the lower courts in the form of a fresh statement of principles, uncluttered by methodological dissimilarities and varying substantive precedents.

31. 457 U.S. at 479.

32. The court of appeals in *Virginia Academy* concluded that there was "sufficient physician control of Blue Shield of Richmond to bring its actions within the purview of section 1 of the Sherman Act." 624 F.2d 476, 481 n.6. Footnote 6 provides an illustration of the nature of the physician's interest in the administration of the Blue Shield plans, with a quotation from the May 25, 1972 minutes of the Committee on Mental Health of the Medical Society of Virginia:

BLUE CROSS-BLUE SHIELD COVERAGE: Dr. Hulley . . . discussed a report of a special committee of the Neuropsychiatric Society.

The report is concerned with services provided by psychiatrists and charges involved. It has been referred to the Blue Shield Board for consideration and final disposition.

It was brought out that a number of groups, which have a part in the overall mental health picture, are little by little working their way into the therapy field. It seemed to be the consensus that The Medical Society of Virginia should take a firm stand on this encroachment and seek to stop it once and for all.

It was brought out that psychotherapy apparently means different things to different people and it was agreed that it should be defined as

could maintain an extraordinary disparity between the actual cost to the consumer of psychotherapy provided by them versus that provided by psychologists.³³ In this factual context, the Court found a sufficient connection between the injury suffered and the illegal activities of the antitrust violators to satisfy the nexus requirement.³⁴

Before concluding its evaluation of nexus, the Court disposed of the contention that McCready should not have access to the section 4 remedy because "she was not an economic actor in the market that had been restrained . . . the market in group health care plans."³⁵ The Court, reflecting the substance of McCready's complaint, placed her instead in the market for psychotherapy services.³⁶ "As a consumer of psychotherapy services entitled to financial benefits under the Blue Shield plan . . . McCready was within that area of the economy . . . endangered by [that] breakdown of competitive conditions resulting from Blue Shield's selective refusal to reimburse."³⁷

In applying its second factor for gauging remoteness to the facts of *McCready*, the Court considered the way in which the injury suffered by the plaintiff reflected the concerns of Congress in making the conduct of the antitrust defendant illegal. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,³⁸ the Court recognized that some injuries caused by antitrust violations are not of a kind with which Congress was concerned in its enactment of the antitrust laws. In *Brunswick*, the Court enunciated the

that performed by psychiatrists or under the direct supervision of psychiatrists.

624 F.2d at 481 n.6.

33. As an example of the cost disparity, consider the effect of selective refusal of reimbursement for services rendered by psychologists, assuming *arguendo* that psychiatrists and psychologists each billed the consumer at the rate of \$50 per treatment session. The net cost to the consumer would be \$10 per session (after 80 percent reimbursement) to go to a psychiatrist, but \$50 per session to go to a psychologist.

34. 457 U.S. at 479.

35. *Id.*

36. *Id.* at 480-81.

37. *Id.* (quoting Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 129 (9th Cir. 1973)).

38. 429 U.S. 477 (1977). Brunswick, the nation's largest manufacturer of bowling-center equipment, acquired bowling centers owned by several of its defaulting customers. Brunswick operated the centers in competition with the plaintiffs. Plaintiffs' claim of injury was that, without Brunswick's acquisition, the acquired alleys would have gone out of business, thus permitting the plaintiffs to make greater profits. Thus, the plaintiffs sought to recover for an injury—lost profits—caused by the preservation of competition rather than by its suppression. The procompetition versus anticompetition concern of antitrust policy was not at issue in *McCready*, which involved an alleged conspiracy to suppress competition in the market for psychotherapy services.

concept of "antitrust injury," meaning "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."³⁹ Injuries that do not satisfy this definition are not antitrust injuries and therefore not subject to redress by the section 4 treble-damage remedy.⁴⁰ While recognizing that McCready's injury preceded the anticompetitive effect intended by the conspirators rather than occurring afterwards as a reflection of the lessening of competition, the Court nevertheless found, that McCready's injury flowed from Blue Shield's illegal conduct and was therefore an antitrust injury within the meaning of *Brunswick*.⁴¹

McCready was decided by the narrowest of margins—five to four.⁴² Though differing in their conclusions, the majority opinion and the two dissenting opinions are alike in their citation of *Brunswick* as the basic authority for their positions.⁴³ (Indeed, *McCready* might be appropriately subtitled, "The Implications of *Brunswick* for Standing to Bring Private Treble-Damage Actions under Clayton section 4.")⁴⁴ Both the majority opinion⁴⁵

39. 429 U.S. at 489.

40. The issue in *Brunswick* that is crucial in *McCready* is embodied in the requirement that an actionable injury must "flow from that which makes the defendant's acts unlawful." 429 U.S. at 489. The particular facts in *Brunswick*—the entry of an economically powerful giant like Brunswick into a market of "pygmy" bowling alley operators—were the basis of the argument that Brunswick's acquisitions were unlawful, because they brought into the market a competitor with a deep pocket. However, the Court recognized that plaintiffs would have suffered the same loss of profits if the bowling centers had been acquired by shallow-pocket purchasers. Thus, plaintiffs' loss did not "flow from that which makes the defendant's acts unlawful," because not every acquisition or merger is condemned by § 7 of the Clayton Act. Hence plaintiffs' harm in *Brunswick* was not the kind of harm the antitrust laws were designed to prevent. *Id.* at 488-90. Noting that "it [was] far from clear that the loss of windfall profits that would have accrued had the acquired centers failed even constitutes 'injury' within the meaning of § 4," the *Brunswick* Court rejected plaintiffs' claim of antitrust injury stating, "it is quite clear that if [plaintiffs] were injured, it was not 'by reason of anything forbidden in the antitrust laws: while [plaintiffs'] loss occurred 'by reason of the unlawful acquisitions, it did not occur 'by reason of' that which made the acquisitions unlawful." *Id.* at 488 (quoting 15 U.S.C. § 15 (1976)).

41. 457 U.S. at 485.

42. Justice Brennan delivered the opinion of the Court in which Justices White, Marshall, Blackmun and Powell joined. *Id.* at 467-85. Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger and Justice O'Connor joined. *Id.* at 485-92. Justice Stevens also filed a dissenting opinion. *Id.* at 492-95.

43. *Id.* at 479-84. *Id.* at 486-89 (Rehnquist, J., dissenting). *Id.* at 493 n.2 (Stevens, J., dissenting).

44. Writing not long after *Brunswick* was decided, Milton Handler, author of a widely-used antitrust text, identified the paradoxically significant, yet inconclusive, impact of *Brunswick*. See Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 COLUM. L. REV. 979, 989-94 (1977). His title for this portion of his article was

and the Rehnquist dissent⁴⁶ relied upon the core language in *Brunswick* defining antitrust injury⁴⁷ to support their positions.⁴⁸ At one level, it appears that the divergence between the opinions consists solely of differing views as to how the *Brunswick* antitrust injury concept should be applied to the facts of *McCready*.

However, in a footnote, Justice Brennan, author of the majority opinion, suggested the true nature of the division within the Court: "Justice Rehnquist's dissent takes an *unrealistically narrow* view of those injuries with which the antitrust laws might be concerned. . . ."⁴⁹ The majority, by espousing a

appropriately: "Clarification of the Concept of Antitrust Injury." Professor Handler suggested that the particular formulation of the injury and damage requirements provided by Justice Marshall in *Brunswick* could turn out to be a mere restatement of a common view, or at the other extreme could have far-reaching implications for all of antitrust law. *Id.* at 989. He noted that five years before writing the *Brunswick* opinion, Justice Marshall had noted in *Hawaii v. Standard Oil*, 405 U.S. 251 (1972), that "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." Handler, *supra*, at 989, quoting *Hawaii v. Standard Oil*, 405 U.S. 251, 263 n.14 (1972). Professor Handler speculated that Justice Marshall's specification in *Brunswick* of the additional element of antitrust injury as a prerequisite for recovery would have important implications for the standing doctrine, about which the lower courts disagreed. His prediction that the "antitrust injury" concept would prove central in the Supreme Court's long-awaited decision of a case in which standing was the essential issue, was a remarkable anticipation of the Court's focus in *McCready*. See Handler, *supra*, at 994-95.

45. 457 U.S. at 485.

46. *Id.* at 486 (Rehnquist, J., dissenting).

47. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." [citation omitted].

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (emphasis in original).

48. The majority opinion established antitrust injury as a rebuttable presumption, and evaluated the strength of challenges to such a presumption. It found the presumption of antitrust injury not defeated in the particular factual situation presented. 457 U.S. at 484-85. In contrast, the Rehnquist dissent did not entertain such a presumption. The dissent would place the burden of proof on the plaintiff to establish antitrust injury. Justice Rehnquist stated, "McCready must show that the challenged practice is illegal with regard to its effect upon her." *Id.* at 488 (Rehnquist, J., dissenting). Employing this approach, the dissent found antitrust injury not sufficiently shown in *McCready*. *Id.* at 492.

49. 457 U.S. at 484 n.21 (emphasis added). *McCready* illustrates the policy conflict the courts have been struggling to resolve since the early years of antitrust: where to set the limits of standing so as to properly narrow the field of antitrust plaintiffs without jeopardizing the effectiveness of private antitrust enforcement. As one commentator has noted, the task of defining the scope of standing to sue under the antitrust laws has challenged the

broader view of antitrust injury,⁵⁰ has developed *Brunswick's* inchoate concept of antitrust injury in a way that would facilitate the maintenance of a larger number and variety of private treble-damage suits. The Brennan position would open the courtroom doors to all treble-damage actions that are consistent in their facts with the broad remedial policy expressed in the unrestricted language of section 4 of the Clayton Act.

It is conceivable that the Court's decision to allow standing to McCready to maintain a treble-damage action is an event of no particular significance, i.e. one that merely reinforces well-recognized policies of antitrust law.⁵¹ It is also conceivable that

federal courts for decades. Sherman, *Antitrust Standing from Loeb to Malamud*, 51 N.Y.U.L. REV. 374-75 (1976). From this perspective, he reached the conclusion that the basic issue underlying the standing question is one of policy—how to best accommodate conflicting interests—and that the answer must necessarily be a pragmatic one. The definition of standing determines how large the class of litigants will be. The definitional line must be drawn narrowly enough to avoid a "litigation avalanche" and "treble-damage overkill" from standing too easily obtained. At the same time, the rule for determining standing must not be so restrictive that private antitrust enforcement and redress for injury are choked off. *Id.* at 405-07. At the time Sherman wrote his article, *Brunswick* had not been decided by the Court. Nonetheless, the Court's holdings in *Brunswick* and in *McCready* are consistent with the "pragmatic" approach suggested by Sherman. *McCready* can be regarded as a significant exercise in locating this important boundary line for eligible litigants, and by the limits so marked giving concrete expression to the proper balance between the conflicting policies. However, it is apparent from the vigor of the two dissents, that four of the present Justices (who may even have been the ones providing the four votes required for the granting of *certiorari*) believe that the limits of standing under Clayton § 4 should have been drawn more narrowly than was done by the majority in *McCready*. See *infra* note 78, for a subsequent Supreme Court decision narrowing standing.

50. Cf. Calvani, *The Mushrooming Brunswick Defense: Injury to Competition, Not to Plaintiff*, 50 ANTITRUST L.J. 319 (1982). Professor Calvani recognized that the full impact of *Brunswick* might be to narrow standing. Defendants could successfully employ a strategy of admitting an antitrust violation, admitting that the plaintiff was proximately injured by the violation, but pleading that plaintiff's injury was not an antitrust injury within the meaning of *Brunswick* and hence not amenable to redress under Clayton § 4. *Id.* at 320, 336, 338.

51. Why did the Court grant *certiorari* to hear *McCready*? 454 U.S. 962 (1981). The court of appeals had already found standing for *McCready*, though by a different analytical route. *McCready v. Blue Shield of Virginia*, 649 F.2d 228 (4th Cir. 1981). See *supra* note 30. Furthermore, the Court had denied *certiorari*, in the related *Virginia Academy* case. 450 U.S. 916 (1981). Some speculations as to what the Court believed would be accomplished by hearing *McCready* are as follows: First, it was apparent that the lower courts were uncertain as to both the rationale and limits of the antitrust remedy under Clayton § 4. *Brunswick* had not communicated clearly either the standard of the method to be employed to determine standing. *McCready* permitted the Court an opportunity to clarify both its policies regarding who were appropriate plaintiffs under Clayton § 4 and its methods for qualifying them. See *supra* note 44. Second, *McCready* provided the Court an opportunity to confirm the consumer's right to initiate treble-damage actions to seek recovery for measurable, non-duplicative economic

McCready is a landmark case providing the precedential basis for a significant increase in consumer actions under Clayton section 4. In either case, the Court's position of closely tying the definition of antitrust injury to the legislative intent of Congress is consistent with the view that antitrust enforcement should promote economic efficiency and consumer welfare through the enhancement of competition.⁵² "The concept of antitrust injury defines the kinds of harms that should be compensable . . . to maintain [an] efficient level of deterrence" of antitrust violations.⁵³

In *McCready*, antitrust injury was defined broadly enough to encompass injury not only to competitors of the conspirators—all of whom were suppliers of services—but also to encompass injury to persons on another level of the market involving those services: i.e. to consumers. Allowing *McCready* standing to sue is consistent with the idea that the right to seek recovery should not be determined automatically by whether the plaintiff is classified as a competitor, consumer, retailer, distributor, direct purchaser or indirect purchaser in the economic transaction encompassing the antitrust violation.⁵⁴ Indeed, *McCready* supports the proposition that standing to sue should be accorded to "the plaintiff in the best evidentiary position to recover."⁵⁵

harm caused by anticompetitive conduct in the marketplace. In his final footnote in *McCready*, Justice Brennan summarized the significance of *McCready* for the consumer right of action under the antitrust laws:

McCready alleges that she has been the victim of a concerted refusal by psychiatrists to reimburse through the Blue Shield plan. Because *McCready* is a consumer, rather than some other type of market participant, the dissent finds itself unwilling to acknowledge that she might have suffered a form of injury of significance under the antitrust laws. But under the circumstances of this case, *McCready's* participation in the market for psychotherapeutic services provides precisely that significance.

457 U.S. at 484 n.21. But see *supra* note 49 for a different theory as to why this case was heard by the Court.

52. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467, 504 (1980).

53. *Id.* at 500.

54. *Illinois Brick v. Illinois*, 431 U.S. 720, 729 (1977), *reh'g denied*, 434 U.S. 881, appeared to reaffirm that direct purchasers as a category were to be preferred as plaintiffs in all cases involving violations of the antitrust laws under § 4 of the Clayton Act. *Id.* at 729. However, an analysis of the fundamental objectives of private antitrust enforcement written before *McCready* had suggested that the category of plaintiff to be preferred should be based on the potential deterrent effect of the plaintiff's suit rather than upon the plaintiff's loss and need for compensation. See Landes & Posner, *Should Indirect Purchasers Have Standing To Sue Under The Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. CHI. L. REV. 602, 605-08 (1979).

55. See Page, *supra* note 52, at 500. Consumer *McCready's* precisely measurable, non-overlapping damages made her the ideal plaintiff to sue Blue Shield for its antitrust violation.

In addition to highlighting the value of employing a functional approach to qualifying plaintiffs for section 4 actions, *McCready* also illustrates how allowing qualified "private attorneys general"⁵⁶ to bring suit for treble-damages can further antitrust enforcement by creating a climate less favorable to future antitrust violations.⁵⁷ Had the Court in the instant case denied McCready the right to press suit for treble-damages under the Clayton Act, the impact upon the conspirators of having engaged in their illegal scheme would have been minimal.⁵⁸ Unless, as a result of other litigation, Blue Shield were to be required to provide reimbursement to those subscribers to whom it had denied payment from 1972 to 1979, Blue Shield

56. The term "private attorney general" is commonly used to recognize the right accorded the citizen to seek redress under the antitrust laws for injuries caused by antitrust violations. In *Brunswick*, the Court conceded the problems inherent in "[i]ntermeshing a statutory prohibition against acts that have a potential to cause certain harms with a damages action intended to remedy those harms." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 (1977) (citing 21 CONG. REC. 2456 (1890) (remarks of Senator Sherman)). The *Brunswick* Court reviewed the history of antitrust legislation with regard to the debate over the primary function of the treble-damage remedy: as primarily to deter unlawful conduct rather than to compensate victims. It noted that "[t]reble damages were provided in part for punitive purposes . . . but also to make the remedy meaningful by counterbalancing 'the difficulty of maintaining a private suit against a combination such as is described' in the [Sherman] Act." *Id.* at 486 n.10.

A commentator, contrasting the role of "private attorneys general" in actions against regulatory agencies with actions in non-regulatory contexts, points to the presence of the Department of Justice and the Federal Trade Commission, which are "statutorily empowered to protect the public against the deleterious consequences of anticompetitive behavior." Sherman, *supra* note 49, at 400. He contends that private suits will be initiated only where there is a substantial self-interest. *Id.* Thus, the possibility of compensation via a treble-damage recovery is expected to function as an incentive for injured parties to become private attorneys general, vigorously pressing their claims against antitrust violators who have caused them injury.

57. "[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 755 (1977) (Brennan, J., dissenting), *reh'g denied*, 434 U.S. 881.

58. The Court recognized McCready's suit as essential to both the deterrent and compensation objectives of Clayton § 4:

Permitting McCready to maintain this lawsuit will, of course, further certain basic objectives of the private enforcement scheme embodied in § 4. Only by requiring violators to disgorge the "fruits of their illegality" can the deterrent objectives of the antitrust laws be fully served. . . . But, in addition to allowing Blue Shield to retain a palpable profit as a result of its unlawful plan, denying standing to McCready and the class she represents would also result in the denial of compensation for injuries resulting from unlawful conduct.

457 U.S. at 473 n.10.

would stand to enjoy a profit from its conspiratorial scheme.⁵⁹ Such an outcome seems unjust for an illegal course of conduct that was practiced over a period of years, in full public view, and in direct defiance of both its contracts and state law requiring direct reimbursement for services rendered by psychologists.⁶⁰ When antitrust violations can be so patent, accomplished with so little economic risk,⁶¹ and serve such important economic motives to the cartel practicing them, it follows that a profit-maximizing entity will correctly determine that engaging in similar illegal conduct is an acceptable business risk.⁶²

59. See *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 501 F. Supp. 1232, 1234 (1980). In this continuation of the Virginia Academy case, the plaintiff psychologists' organization sought declaratory relief but not treble damages. They also sought to have the court require Blue Shield to pay back claims for services rendered by clinical psychologists from January 1, 1972. *Id.* at 1236. Otherwise, there was no action pending under which Blue Shield would have had to account for its profits under the scheme.

It is impossible to estimate what proportion of eligible subscribers might later claim the reimbursement due them. However, it is certain that due to the passage of time and the belief that no reimbursement would be possible, many eligible subscribers would no longer have documentation of their expenses for treatment by psychologists, and hence would not present their claims to Blue Shield at this late date. Thus, Blue Shield will have escaped having to pay the full amount of its contractual commitment to subscribers for authorized psychotherapy services. Furthermore, conspiring psychiatrists have also enjoyed unmeasured benefits during the period beginning January 1, 1972 and ending with the Virginia Supreme Court decision in August, 1980, *Blue Cross of Virginia v. Commonwealth*, 221 Va. 349, 269 S.E.2d 827 (1980), during which they enjoyed the patronage of consumers diverted from going to psychologists by the cost differential.

60. See *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981).

61. To date, the economic risk has consisted entirely of attorneys' fees, and some of the injury has been self-inflicted. A federal district court judge awarded the Virginia Academy of Clinical Psychologists approximately \$400,000 for attorney's fees incurred during its successful antitrust action against Blue Shield of Virginia. *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 543 F. Supp. 126, 152 (E.D. Va. 1982). In responding to Blue Shield's objection to the size of the award, the federal district court stated that because much of the plaintiff's time was spent in "responding to defendant's barrages, . . . [d]efendants are certainly entitled to use whatever means they choose in an effort to forestall plaintiffs . . . but they may not complain to the [c]ourt about the hours plaintiffs naturally expended in response." *\$405,000 awarded in Va. Blues case*, 13 A.P.A. MONITOR 1, 2 (September, 1982). *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 543 F. Supp. 126, 134 (1982).

62. Without attempting a formal economic analysis of the potential effects of the psychiatrists' scheme to exclude the psychologists from the market for psychotherapy services, it can be predicted that cartel-like results would follow from successful exclusion, such as, for example, restriction of output, higher market prices (facilitated by reimbursement that masks gross price), and inefficient use of resources. See generally Page, *supra* note 52.

Deterrence requires a substantial financial penalty.⁶³ The Court's decision in this case, mandated by the congressional intent of the antitrust laws to promote unrestrained economic competition, should change the expected economic return of deliberately engaging in proscribed anticompetitive acts. This case provides a textbook illustration of why the private treble-damage action is considered by some to be the most important means of enforcement of antitrust policy.⁶⁴

Though *McCready* is most important for its general message to all potential antitrust violators, that the scope of antitrust enforcement will be as broad as the congressional mandate can be conceived, it is also important for its special message to all organizations which have been regarded historically as non-business entities.⁶⁵ It is recognized that the antitrust reasoning that has been applied to traditional business concerns should not be applied automatically to non-business entities. However, the recognition that structural differences exist⁶⁶ does not lead to a conclusion that antitrust policy should be less stringently applied to the anticompetitive activities of so-

63. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 319 (1981) ("[a]ntitrust offenses are wholly economic crimes [which] are engage[d] in for profit").

64. See Page, *supra* note 52, at 467-68. Statistics showing the increasing number of treble-damage actions brought by private parties relative to the number of suits brought by government units underscores the importance of the private action. During the period 1960-68, the ratio of government antitrust suits to private antitrust suits was only .0722. Landes & Posner, *supra* note 54 at 628-29. During the subsequent period 1969-78, this ratio dropped to .0414. *Id.* Thus, in this latter period there were twenty-five times as many private antitrust suits as government suits.

Furthermore, the government units are likely to employ a different rationale for the suits that they elect to pursue from the pool of possible suits. See *supra* note 56. The private suit is important in filling in the gaps left by the selective policies of the Department of Justice and the Federal Trade Commission.

65. See, e.g., Note, *Professions and Antitrust Law*, 11 J. L. REFORM, 387, 389 (1978) ("A profession is distinguishable from an ordinary commercial enterprise because of its preeminently non-commercial purpose and its extensive self-regulatory powers."). See also Note, *Antitrust and Nonprofit Entities*, 94 HARV. L. REV. 802, 803 (1981) ("[nonprofit firms] are able to succeed due to the trustworthiness resulting from their nonprofit status").

66. The Supreme Court has recognized that the professions are not ordinary business enterprises:

It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 687 (1978) (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 n.17 (1965)).

called non-business entities.⁶⁷ Indeed, *McCready* and the related suit by the Virginia Academy of Clinical Psychologists against Blue Shield of Virginia belong to the developing line of cases in which the courts have looked behind the veils of legitimate, non-commercial purposes to identify the operation of underlying non-justifiable, commercially-motivated restraints of trade.⁶⁸ One commentator, who had chronicled the increasingly invasive character of antitrust investigations into the health-care industry, believes that almost every shred of immunity that once cloaked this industry's activities is in the process of being stripped away.⁶⁹ The unsuccessful attempt by Blue Shield to escape judgment in this series of proceedings by claiming various immunities⁷⁰ illustrates how little in the way of special protection remains.

67. "Antitrust law has always been sensitive to the realities of the marketplace and has been particularly watchful of organizations of the various trades or professions." *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 481 (4th Cir. 1980).

68. *See, e.g., American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (engineers' nonprofit organization held liable under antitrust law for violation by volunteer member acting as its agent where member used organization's influential position to suggest that business competitor's boiler safety device did not satisfy pertinent code requirements, to discourage customers from purchasing the competitor's product); *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679 (1978) (engineering organization's canon of ethics prohibiting its members from submitting competitive bids for engineering services ruled suppression of competition not adequately justified by premise that competitive bidding would lead to unrealistically low contract prices, corner-cutting on jobs, and consequent danger to the public); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (minimum fee schedule for lawyers, published by the Fairfax County Bar and enforced by the Virginia State Bar, held to be a *per se* violation of § 1 of the Sherman Act).

69. Halper, *The Health Care Industry and the Antitrust Laws: Collision Course?* 49 ANTITRUST L.J. 17 (1980).

Almost all defenses that previously had barred antitrust analysis of the health care restrictions have been eroded. The learned profession exemption, *McCarran-Ferguson* and the business of insurance exemption, the lack of interstate commerce defense, the *Parker v. Brown* [317 U.S. 341 (1943)] state action concept, even the nonprofit defense, each has been dramatically redefined . . . perhaps only the *Noerr-Pennington* defense remains potent, but it, too, has its limitations Antitrust concepts will not be abandoned, or even bent, merely to protect the health-care industry. Whatever the attitude at the lower court level, the Supreme Court's [recent decisions suggest] stronger, rather than weaker, antitrust pressures on health industry participants.

Id. at 38-39.

70. For example, in *McCready*, Blue Shield had contended that under § 2 of the *McCarran-Ferguson Act*, 15 U.S.C. § 1012, its actions should be free from the application of the antitrust laws as "part of the 'business of insurance.'" U.S. at 465, 470 n.7. However, the Court noted that on a full factual record, the issue was resolved against Blue Shield in the *Virginia Academy* case. Because the Fourth Circuit did not address this issue in *McCready*, the Supreme Court did not see the need to reach it either. 457 U.S. at 470 n.7.

In the circumstances of this case, the Court has performed a public service by identifying conduct clearly at odds with the intent of Congress in passing the antitrust laws. The goal of promoting unrestrained economic competition was not served by the scheme of the conspiring psychiatrists to use third-party reimbursements to manipulate the cost of psychotherapy services. By their control over the reimbursement policies of Blue Shield, the psychiatrists could maintain the effective price of psychologists' services at a level far higher than their own, and in so doing, divert the demand for psychotherapy services to themselves. This scheme for restraining competition in the health-care industry was rendered particularly insidious by the public's lack of information about the merits of rival providers⁷¹ and by certain phenomena associated with insured risk.⁷² The successful conclusion of this case required the Court to penetrate the health industry's structural complexities and to discount propaganda regarding the need to have physicians supervise the work of professional psychologists. The Court's

71. "There is inevitably a great deal of ignorance and uncertainty about the quality of various forms of health care." Clark, *Does the Nonprofit Form Fit the Hospital Industry?* 93 HARV. L. REV. 1416, 1419-20 (1980). The willingness of the psychiatrists to exploit the confusion in the public mind and to make themselves into a "certifying body" to identify the proper providers of psychotherapy services was commented upon with disfavor in *Virginia Academy*.

The record demonstrates that psychologists and psychiatrists do compete; indeed it is susceptible to judicial notice Competition in the health care market between psychologists and M.D. providers of psychotherapy is encouraged by the [Virginia] legislature [I]t is not the function of a group of professionals to decide that competition is not beneficial in their line of work

Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 624 F.2d at 485. One commentator has noted the changed attitude of the courts toward the learned professions, and physicians in particular. Among the reasons he lists for the increase in litigation activity in the health care industry is "the critical reassessment of the professional's commercial interest in his calling." Halper, *supra*, note 69, at 18. He concludes that "the physician's unique role in policymaking affecting his profession . . . is no longer untouchable." *Id.*

In discussing the battles for control in a particular professional specialty (as for example, psychotherapy services) Halper notes that the contests between rival providers of the specialized service "frequently involve issues of lower-cost versus higher-cost medical care." *Id.* at 23. Thus, if psychologists were to offer psychotherapy services at prices lower than those customarily charged by psychiatrists, that latter would be obligated to lower their fees, by one means or another, to compete effectively. Limiting reimbursement to services they alone provided permitted the Virginia psychiatrists to offer psychotherapy to the public at what was functionally a predatory price, without suffering any diminution of their profit margins.

72. The phenomenon that "neither providers nor recipients have an incentive to reduce costs of [insured services] . . . since someone else is paying" has been called a "moral hazard." Note, *Antitrust and Nonprofit Entities*, 94 HARV. L. REV. 802, 804 (1981).

recognition of the illegal constraints operating in the market for psychotherapy services and their effect on consumers was evidenced by its decision to allow McCready to go forward with her treble-damage action against Blue Shield. The Court's determination that McCready had standing to sue indicates that the Court is prepared "to keep the weapon of treble-damage recovery in the hands of those ultimately injured by antitrust violations — the consumers."⁷³

In *McCready*, the United States Supreme Court took a significant step to encourage antitrust enforcement by means of private, consumer treble-damage actions.⁷⁴ It refused to be diverted from its charge to interpret statutory remedies in full ac-

73. Note, *Antitrust and the Consumer—Problems of Standing and Damage Recovery*, 25 S.D.L. REV. 392, 399-402 (1980). The writer identified the unresolved questions left in the wake of *Reiter v. Sonotone*, 442 U.S. 330 (1979) in particular, and by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). She noted that though *Sonotone* "manifest[ed] a judicial policy in favor of consumer treble-damage suits," *Illinois Brick* posed "a formidable obstacle [to consumer suits] by the direct-purchaser rule." *Id.* at 399. The writer concluded that "application of the direct-purchaser rule may well bring about a complete demise of the consumer suit." *Id.* at 402.

74. The decision in *McCready* elevates substance over form by not requiring McCready to have purchased directly from the antitrust violators—either Blue Shield or the psychiatrists—in order to bring an action for damages under § 4 of the Clayton Act. If the Court had refused standing to McCready, its action would have constituted a serious setback for the consumer treble-damage action. In *McCready*, the Court confronted a consumer antitrust suit embodying as precise a set of damages as it may ever encounter. The Court itself noted:

[O]ur cautious approach to speculative, abstract, or impractical damages theories has no application to McCready's suit. The nature of her injury is easily stated: As the result of an unlawful boycott, Blue Shield failed to pay the cost she incurred for the services of a psychologist. Her damages were fixed by the plan contract and, . . . they could be "ascertained to the penny."

457 U.S. at 475 n.11.

Furthermore, unlike many other consumer class-action antitrust suits, *McCready* did not involve infinitesimally small dollar amounts due an unmanageably large, incompletely identified and changing class constituency. Rather, *McCready* involved substantial amounts of money—in the thousands of dollars—due a limited, unchanging, and readily identifiable class of consumers: subscribers to Blue Shield of Virginia plans denied reimbursement for psychotherapy costs incurred during the years 1972-1979. See *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), cert. denied, 450 U.S. 916 (1981).

The Court ruled in favor of standing for consumer McCready with these words:

We are asked in this case to infer a limitation on the rule of recovery suggested by the plain language of § 4. But having reviewed our precedents and, more importantly, the *policies* of the antitrust laws, we are unable to identify any persuasive rationale upon which McCready might be denied redress under § 4 for the injury she claims.

457 U.S. at 485 (emphasis added). In so deciding, the Supreme Court has unequivocally affirmed a judicial policy in favor of consumer treble-damage suits.

cord with their legislative intent. In conferring standing, the Court employed an analysis that eschewed labels, rules, tests, definitions or other shortcuts to come to grips with the significant antitrust violations it encountered in *McCready*.⁷⁵ The Court made it clear that from this point on, application of the concept of antitrust injury would be paramount in determining standing.⁷⁶ By placing its trust in the proper application of such an elusive concept, the Court has not made it any easier⁷⁷ to ascertain whether the requirements for standing under section 4 of the Clayton Act will be satisfied in particular fact situations.

Despite the uncertainty it created by rejecting simple formulas for determining standing,⁷⁸ the Court provided more cer-

75. See *supra* note 30.

76. The manner in which the Court analyzed *McCready* suggests that although the concept of antitrust injury is paramount, the requirements for standing in a Clayton Act § 4 treble-damage action are fourfold. The first two requirements, procedural in nature, are concerned with negative features of the damage remedy requested in a particular claim. These requirements may be stated in rule form as follows: (1) plaintiff's claim for damages must not entail the possibility of duplicative recovery, and (2) plaintiff's claim for damages must not entail a speculative assessment as to their character and probable amount.

The third and fourth requirements, substantive in nature, set positive standards to be met with regard to the nature of the injury that is the basis of the proposed suit. These third and fourth requirements may be stated in rule form as follows: (3) plaintiff's injury must have a sufficient "physical and economic nexus" with the antitrust violation (*see supra* text accompanying notes 28-37), and (4) plaintiff's injury must be an "antitrust injury" (*see supra* text accompanying notes 38-41 and notes 53-54). The nexus requirement is met by finding plaintiff to be an economic actor in the market that had been restrained. 457 U.S. at 479. The antitrust injury requirement is met by finding plaintiff's injury to be of a kind "about which Congress was likely to have been concerned in making [the antitrust] defendant's conduct unlawful." *Id.* at 478. Thus antitrust injury can only be found in a context of conduct by a defendant that injures competition. Furthermore, to be an antitrust injury, the harm to plaintiff must be a "type of loss that the claimed violations of the antitrust laws would be likely to cause." *Id.* at 479 quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1968).

77. In the related *Virginia Academy* action, the Court declined to apply the more easily used *per se* rule of illegality to the facts of the case "because of the special considerations involved in the delivery of health services." *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 484 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981).

78. In a subsequent case, the Court took an even stronger position regarding the impossibility of formulating a precise test for awarding standing to a potential Clayton § 4 plaintiff. *Associated Gen. Contractors of Cal. v. California St. Council*, 103 S.Ct. 897 (1983).

In *Associated*, the Court stated that "the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case." *Id.* at 908. The Court went on to describe its approach as one in which "previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Id.*

In a footnote, the Court drew support from the observations of various commentators, including Professor Sherman, *see supra*, note 49, who was

tainty in a different regard—the role that consumers can have in vindicating the policies of the antitrust laws.⁷⁹ With *McCready*, the United States Supreme Court removed any doubt that qualified consumers could bring private treble-damage actions to deter anticompetitive conduct and to redress their injuries from

quoted parenthetically as follows: “[I]t is simply not possible to fashion an across-the-board and easily applied standing rule which can serve as a tool of decision for every case.” *Id.* at 907-08 n.33.

Despite differences in rhetoric between *McCready* and *Associated*, *McCready* must be reviewed as continuing to express the Court’s fundamental rationale for determining standing. In fact, it may be inferred from *Associated* that *McCready* has replaced *Brunswick* as the precedential reference point for the analysis of antitrust standing issues. *Associated* is replete with favorable citations to *McCready* made in the course of applying the so-called “relevant factors” to the facts of that case. The remnant of *Brunswick* which is retained, is the definition of antitrust injury—now named the “Brunswick test”—which was a central element of the analysis in *McCready*. *Id.* at 910.

Nonetheless, *Associated* is more than a mere echo of *McCready*. It succeeds in making standing more difficult to obtain under essentially the same substantive rules stated in *McCready*. It does so by the introduction of two procedural changes. The first change is a shift in the burden of proof (comparable to that proposed by the Rehnquist dissent in *McCready*) whereby the plaintiff is deprived of the initial presumption of entitlement to standing. The stance in *Associated* is that the plaintiff must in effect have already won the case on the pleadings to qualify for the right to embark upon a treble-damage action, through a grant of standing. *Id.* at 913.

The second innovation is the development of the concept of the proper plaintiff—defined as the one in the best evidentiary position to sue. The Court will consider the field of all potential plaintiffs and their relation to the antitrust violation, and may deny standing to the plaintiff seeking to carry the suit forward if it does not deem that plaintiff the one best qualified to do so. *Id.* at 911, 913.

Both of these elements added by *Associated* can be expected to narrow the class of litigants who will be successful in obtaining standing. The Court may have felt some relief in making standing more difficult to obtain—*Associated* was decided by a majority of 8 to 1. The lone dissent was by Justice Marshall, who denounced the decision as “an unwarranted judge-made limitation on the antitrust laws.” *Id.* at 913.

79. The only prior consumer suit decided by the Court that invoked § 4 of the Clayton Act was *Reiter v. Sonotone*, 442 U.S. 330 (1979). In *Sonotone*, the Court held that “a consumer deprived of money by reason of allegedly anticompetitive conduct is injured in ‘property’ within the meaning of § 4.” *Id.* at 344. The plaintiffs therefore had standing to bring the lawsuit. The Court implied that to deny the plaintiff’s standing would allow the price fixing to go unchallenged altogether. *See id.* at 342. *Sonotone* is important largely because it rejected the argument that the § 4 remedy was available only to redress injury to commercial interests. Though *Sonotone* established a judicial policy in favor of consumer treble-damage suits, it left unanswered a multitude of questions about standing and damage recovery in relation to consumer antitrust suits. *See Notes, Antitrust and the Consumer — Problems of Standing and Damage Recovery*, 25 S.D.L. REV. 392, 401-02 (1980).

The manner in which the Court analyzed and decided *McCready* resolves a number of these questions, especially those relating to the proper tests to apply to determine standing, and the circumstances in which damages are provable and therefore amenable to judicial remedy.

such conduct.⁸⁰

A. Joanne Holloway*

80. After the Court had ruled that McCready's class action suit could go forward, the case was returned to the District Court for the Eastern District of Virginia for trial. That court determined that pursuant to Rule 23 of the Federal Rules of Civil Procedure, the lawsuit was to be maintained as a class action for purposes of settlement only, on the basis of a tentative agreement reached between McCready and counsel for the class on the one hand, and the several defendants on the other hand. The stipulated reason for pursuing the alternative of compromising and settling the action in lieu of going to trial was "to reduce further expense, inconvenience and the distraction of burdensome and protracted litigation." The proposed settlement agreement contained a specific disclaimer that the document be construed as an admission of any fault or liability by the defendants. In agreeing to the proposed settlement, McCready effectively surrendered the right to treble-damages for herself and for the class by agreeing to a remedy that amounted to actual damages. The proposed settlement was in essence, an undoing of the defendant's violation.

Notice was provided to potential claimants by two methods: Publication of notices in major newspapers throughout the state of Virginia, and letters sent to all clinical psychologists certified as practicing in the state during the claim period of July 1, 1974 through December 31, 1980. Provision was made for potential claimants to exclude themselves from the class if they wished. In addition to receiving the eighty percent reimbursement of fees they had paid psychologists for necessary treatment during the class period, eligible claimants were to receive interest on the amounts paid for which they had remained unreimbursed, at the rate of nine percent per annum, calculated from a date 60 days after their payment, until reimbursement by Blue Shield following approval of the class action settlement.

On March 15, 1983, the order approving the class action settlement was approved by the court. It was noted that five persons had excluded themselves as members of the settlement class. In addition to committing itself to the belated payment of its subscriber's claims, with interest, Blue Shield agreed to pay the attorneys' fees and costs of McCready and the class counsel, which was specified as amounting to \$140,000 through July 7, 1982, plus an allowance for documented fees and costs until final dismissal of the action, up to a maximum additional payment of \$20,000. The final order provided that McCready's class action would be dismissed with prejudice upon certification to the court that all the terms of the settlement had been fully carried out.

Thus, the ultimate result of Carol McCready's suit for redress of the injuries sustained by her and by other consumers of psychotherapy services denied reimbursement by Blue Shield's conspiratorial plan in violation of the antitrust laws, was to see justice done. Acting as a private attorney general, she was successful in making the antitrust violators "disgorge the 'fruits of their illegality.'" In Justice Brennan's opinion, McCready's lawsuit was a prime example of how the "private enforcement scheme embodied in § 4" works to serve the "deterrent objectives of the antitrust laws" by taking away the profit from unlawful conduct. *Id.* *McCready v. Blue Shield of Virginia*, 457 U.S. at 493 n.10. (Copies of the district court orders involved in various stages of the *McCready* class action settlement were courteously provided by Thomas M. Brownell, Esq. of the firm of Lewis, Mitchell & Moore of Vienna, Virginia, one of a team of attorneys representing Carol McCready throughout the litigation.)

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