

# The Burger Court Opinion Writing Database

## *Blue Shield of Virginia v. McCready*

457 U.S. 465 (1982)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

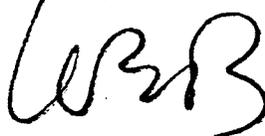
October 29, 1981

Re: No. 81-225 - Blue Shield of Virginia v. McCready

Dear Bill:

Not without some reluctance (in light of our Term running into August!) I now make a fourth to grant.

Regards,

A handwritten signature in dark ink, appearing to be 'WRB', written in a cursive style.

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 7, 1982

Re: 81-225 - Blue Shield of Virginia v. McCready

Dear Bill:

I join your dissent.

Regards,



Justice Rehnquist

Copies to the Conference

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To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Brennan**

Circulated: 5/12/82

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*WB*  
*Done for me*

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 81-225

BLUE SHIELD OF VIRGINIA, ET AL., PETITIONERS *v.*  
CAROL MCCREADY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT

[May —, 1982]

JUSTICE BRENNAN delivered the opinion of the Court.

The antitrust complaint at issue in this case alleges that a group health plan's practice of refusing to reimburse subscribers for psychotherapy performed by psychologists, while providing reimbursement for comparable treatment by psychiatrists, was in furtherance of an unlawful conspiracy to restrain competition in the psychotherapy market. The question presented is whether a subscriber who employed the services of a psychologist has standing to maintain an action under § 4 of the Clayton Act based upon the plan's failure to provide reimbursement for the costs of that treatment.

### I

From September 1975 until January 1978, respondent Carol McCready was an employee of Prince William County, Virginia. As part of her compensation, the county provided her with coverage under a prepaid group health plan purchased from petitioner Blue Shield of Virginia (Blue Shield).<sup>1</sup> The plan specifically provided reimbursement for a portion of the cost incurred by subscribers with respect to outpatient treatment for mental and nervous disorders, including psychotherapy. Pursuant to this provision, Blue Shield reim-

<sup>1</sup> With petitioner Blue Shield of Southwestern Virginia.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

May 21, 1982

No. 81-225 Blue Shield of Virginia v. McCready

Dear John;

Thank you very much for your letter of May 20 commenting upon the circulation in the above case. As is clear from that circulation, I am wary of setting forth any encompassing rule or test with respect to the question of remote antitrust injury. Without any guidance from Congress, we should tread gingerly in this area, dealing with the cases as they come before us and letting stare decisis do its work. I was also reluctant to trample upon the extensive Court of Appeals jurisprudence narrowing antitrust standing. In any event, while there may be some distinctions, I would venture that the Courts of Appeals would have no difficulty finding McCready controlling in the banker hypothetical you pose.

In reaching your decision whether to write separately in this case, I hope the following response may be helpful. The paragraph numbers correspond to the the numbers of your paragraphs.

1. In observing that the term "any person" has been afforded a near literal application, I did not mean to suggest that McCready should recover because she is a person. Similarly, I note that "property" was given a broad interpretation in Reiter, as you build on in paragraph 6 of your letter. The final, and only real point of the paragraph is that we must seek some rationale if we are to deny a remedy to someone literally granted a remedy by the language of a statute.

2. With respect to footnote 10, I would not mind noting that the basic objectives of the Act will be served by McCready's recovery only if it is demonstrated that there has indeed been a violation. The footnote treatment I give the positive policy reasons for affording McCready a remedy, all of which are quite explicit in our prior cases, hardly suggests that it is a driving force in the analysis. Indeed, it is intentionally not included in the text because the policies in favor of active private enforcement of the antitrust laws tend to go too far. (Although, I wonder if disgorgement is really

applicable in every case.) Nevertheless, I think the point made in this footnote is not essential and it could well be deleted.

3. I suppose that the Illinois Brick discussion is a bit of a straw man in the sense that the issue is not difficult. But I do think that the sharp intersection of competing policies at stake in Illinois Brick must be approached differently from the general question of remoteness. Indeed, Byron's opinion in Illinois Brick, 431 U.S., at 728 n. 7, is quite explicit on this point, as I point out at 9-10; the Court expressly reserved the standing question as it was presented in that case; indeed, even the opinions below did not suggest the claim was too remote merely because it was indirect, but rather rested on the change in the product for that conclusion. To be sure, Illinois Brick might have held that "indirect victims" of a price-fixing conspiracy are barred simply because their claim is indirect. (cf. your letter at ¶6). It did not. That case was concerned with the peculiar problems of passed-on overcharges in light of our holding in Hanover Shoe, and drew a clear line in the important situation in which it applies. But it offered no general rule about indirectness outside the context of "pass-ons."

In sum, the question decided in Illinois Brick and the question presented here, are not at all analogous. Could we meaningfully balance, as Byron did with respect to the competing policies in Illinois Brick, the broad policy in favor of active enforcement against the equally vague "principle" that not everyone should recover because it hurts defendants too much?

4. In addressing the economic market issue, I was of course addressing the petitioner's argument. The argument is taken from the target area discussion in the dissenting opinion below, which in turn draws sustenance from a long line of target area jurisprudence in other Courts of Appeals. Frankly, I think the market analysis is likely to be useful in many, though perhaps not all, cases dealing with remoteness. I thought it proper to use it here.

Doesn't your argument that "in a secondary boycott case, the primary victim need not be acting in the secondary market," lead to a terminological morass? See, for example, the way "boycott" is used by respondent in her complaint, cited in the circulation at 3. Do you mean that the "primary victim [the boycotted party, the

banker in your hypothetical, Ms. McCready here?] need not be acting in the primary market [psychiatric services in your hypothetical, insurance plans here??]" Whatever the proper terminology, I suggest that we are talking about nothing more than what ultimately turns out to be the very holding of this case. It might be possible to state the holding in those terms, perhaps by way of a footnote, if we could settle on who is who. But clearly the market analysis I employ does not detract from that holding. With respect to the banker who was boycotted by psychiatrists, the banker would clearly have standing. In my view, the banker would suffer the violation within the banking market in which he, and the conspirators' plan, operated. Just as Ms. McCready.

5. I agree with you that the issue of intervening cause is a genuine one, and amounts to a question of fact. Footnote 17 thus should have included a cross-reference to footnote 2, where that point is made explicitly. Of course, I would not mind making it explicit twice.

6. With respect to the injuries Congress sought to redress, I doubt that Sonotone provides the full answer. To take the most ludicrous example, Ms. McCready might have been coerced into going to a psychiatrist by Blue Shield, and been so poorly treated by that psychiatrist that she drove her car into a tree--causing injury to her property. In Sonotone, Ms. Reiter paid an artificially inflated price for the product she purchased. Drawing on language in Brunswick, petitioners, and the dissenting judge below, found it persuasive that McCready did not pay an inflated price at all. Do we not have to address that issue?

At the least, Brunswick suggests that in answering this question we are to be concerned with the forms of injury that Congress would have been primarily concerned about in making any particular course of conduct illegal. In a price-fixing case, artificially inflated prices are of that type. In a secondary boycott case, both the boycotted party, and the ultimate victim, are surely within the area of concern. The circulation says we "know" this because of the intimate connection between the particular injury and the alleged unlawful conspiracy. Of course, I would not mind making this more explicit.

In your penultimate paragraph, you express the view that the customers of a competitor put our of business

could not sue. You suggest that the rule of Illinois Brick would control that case. I think that this is clearly incorrect, at least absent a very significant extension of Illinois Brick.

In addition, there is the question whether the injury you hypothesize is sufficiently proximate to warrant a \$4 recovery--that is a different question from Illinois Brick, and one that is closely related to the question addressed in McCready. While I have not given the hypothetical extensive thought, I think the answer is that there would probably not be standing in your hypothetical. Certainly nothing about McCready would suggest a contrary result: She was the tool of the conspiracy, as I point out at the outset; the customers in your hypothetical are not. In any event, I see no reason to reach your hypothetical on these facts.

Sincerely,

*Bill*  
W.J.B., Jr.

Justice Stevens

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

May 24, 1982

RE: No. 81-225 Blue Shield of Virginia v. McCready

Dear John:

This circulation was meant to meet suggestions of Justice Blackmun and Justice Powell. It does not attempt to meet your concerns.

Sincerely,



Justice Stevens



To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Brennan**

Circulated: \_\_\_\_\_

Recirculated: 5/24/82

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-225

**BLUE SHIELD OF VIRGINIA, ET AL., PETITIONERS v.  
CAROL McCREADY**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT

[May —, 1982]

JUSTICE BRENNAN delivered the opinion of the Court.

The antitrust complaint at issue in this case alleges that a group health plan's practice of refusing to reimburse subscribers for psychotherapy performed by psychologists, while providing reimbursement for comparable treatment by psychiatrists, was in furtherance of an unlawful conspiracy to restrain competition in the psychotherapy market. The question presented is whether a subscriber who employed the services of a psychologist has standing to maintain an action under § 4 of the Clayton Act based upon the plan's failure to provide reimbursement for the costs of that treatment.

I

From September 1975 until January 1978, respondent Carol McCready was an employee of Prince William County, Virginia. As part of her compensation, the county provided her with coverage under a prepaid group health plan purchased from petitioner Blue Shield of Virginia (Blue Shield).<sup>1</sup> The plan specifically provided reimbursement for a portion of the cost incurred by subscribers with respect to outpatient treatment for mental and nervous disorders, including psychotherapy. Pursuant to this provision, Blue Shield reim-

<sup>1</sup> With petitioner Blue Shield of Southwestern Virginia.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

June 4, 1982

No. 81-225 Blue Shield of Virginia v. McCready

Dear Bill:

In response to your dissenting opinion, I propose to add the following footnote to the sentence on page of 18 of the 2d draft, ending with the words "congressional concern":

The dissent is of course correct in asserting that the "injury suffered by the plaintiff must be of the type the antitrust laws were intended to forestall," post, at 2. But the dissent takes an unrealistically narrow view of those injuries with which the antitrust laws might be concerned, and offers not the slightest hint--beyond sheer ipse dixit--to help in determining what kinds of injury are not amenable to §4 redress. For example, the dissent acknowledges that "a distributor who refused to go along with the retailer's conspiracy [to injure a disfavored retailer] and thereby lost the conspiring retailer's business would ... have an action against those retailers," post, at 6. The dissent characterizes this circumstance as a "concerted refusal to deal," and is thus willing to acknowledge the existence of compensable injury. But the dissent's is not the only pattern of concerted refusals to deal. If a group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists, the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions. And plainly, in evaluating the reasonableness under the anti-trust laws of the psychiatrists' conduct, we

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would be concerned with its effects not only on the business of banking, but also on the business of the psychologists against whom that secondary boycott was directed.

McCready and the banker and the distributor are in many respects similarly situated. Contrary to the dissent's assertion, post, at 6, n. 6, McCready does allege 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.

I will include this change in the next printed circulation.

Sincerely,



W.J.B., Jr.

Justice Rehnquist

Copies to the Conference

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Brennan**

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2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-225

**BLUE SHIELD OF VIRGINIA, ET AL., PETITIONERS v.  
CAROL MCCREADY**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT**

[May —, 1982]

JUSTICE BRENNAN delivered the opinion of the Court.

The antitrust complaint at issue in this case alleges that a group health plan's practice of refusing to reimburse subscribers for psychotherapy performed by psychologists, while providing reimbursement for comparable treatment by psychiatrists, was in furtherance of an unlawful conspiracy to restrain competition in the psychotherapy market. The question presented is whether a subscriber who employed the services of a psychologist has standing to maintain an action under § 4 of the Clayton Act based upon the plan's failure to provide reimbursement for the costs of that treatment.

I

From September 1975 until January 1978, respondent Carol McCready was an employee of Prince William County, Virginia. As part of her compensation, the county provided her with coverage under a prepaid group health plan purchased from petitioner Blue Shield of Virginia (Blue Shield).<sup>1</sup> The plan specifically provided reimbursement for a portion of the cost incurred by subscribers with respect to outpatient treatment for mental and nervous disorders, including psychotherapy. Pursuant to this provision, Blue Shield reim-

<sup>1</sup> With petitioner Blue Shield of Southwestern Virginia.

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 14, 18

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

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From: Justice Brennan

SUPREME COURT OF THE UNITED STATES

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JUN 18 1982

Recirculated: \_\_\_\_\_

No. 81-225

BLUE SHIELD OF VIRGINIA, ET AL., PETITIONERS *v.*  
CAROL MCCREADY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT

[June 21, 1982]

JUSTICE BRENNAN delivered the opinion of the Court.

The antitrust complaint at issue in this case alleges that a group health plan's practice of refusing to reimburse subscribers for psychotherapy performed by psychologists, while providing reimbursement for comparable treatment by psychiatrists, was in furtherance of an unlawful conspiracy to restrain competition in the psychotherapy market. The question presented is whether a subscriber who employed the services of a psychologist has standing to maintain an action under § 4 of the Clayton Act based upon the plan's failure to provide reimbursement for the costs of that treatment.

I

From September 1975 until January 1978, respondent Carol McCready was an employee of Prince William County, Virginia. As part of her compensation, the county provided her with coverage under a prepaid group health plan purchased from petitioner Blue Shield of Virginia (Blue Shield).<sup>1</sup> The plan specifically provided reimbursement for a portion of the cost incurred by subscribers with respect to outpatient treatment for mental and nervous disorders, including psychotherapy. Pursuant to this provision, Blue Shield reim-

<sup>1</sup> With petitioner Blue Shield of Southwestern Virginia.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 17, 1982

Re: 81-225 - Blue Shield of Virginia v.  
McCready

Dear Bill,

Please join me.

Sincerely yours,



Justice Brennan

Copies to the Conference

cpm

.35 1-11 3-11

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 13, 1982

Re: No. 81-225 - Blue Shield of Va. v. McCready

Dear Bill:

Please join me.

Sincerely,

*T.M.*  
T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 20, 1982

Re: No. 81-225 - Blue Shield of Virginia v. McCready

Dear Bill:

By separate letter, I am joining your opinion in this case. I wonder, however, about the following:

1. Should the very last word of the first line of footnote 4 be "Psychologists" rather than "Psychiatrists"?

2. I am somewhat concerned about the last paragraph of footnote 13. My preference would be to drop that paragraph. In any event, should it not be confined to the "statutory" duty not to violate the antitrust laws?

Sincerely,



Justice Brennan



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 20, 1982

Re: No. 81-225 - Blue Shield of Virginia v. McCready

Dear Bill:

Please join me.

Sincerely,



Justice Brennan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

October 22, 1981

81-225 Blue Shield of Virginia v. McCready

Dear Bill:

Your dissenting opinion persuades me and I will now vote to grant this case.

If it is not granted, please add my name to your opinion.

Sincerely,

*Lewis*

Justice Rehnquist

lfp/ss

cc: The Conference

*docketed*

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 17, 1982

81-225 Blue Shield of Virginia v. McCready

Dear Bill:

My vote at Conference was tentatively to reverse.

Your opinion is persuasive, but I will await the dissent before coming to rest.

Sincerely,

*Lewis*

Justice Brennan

Copies to the Conference

LFP/vde

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 4, 1982

81-225 Blue Shield v. McCready

Dear Bill:

Please join me.

Sincerely,



Justice Brennan

lfp/ss

cc: The Conference

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

From: Justice Rehnquist

Circulated: OCT 19 1981

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Re: No. 81-225, Blue Shield of Virginia, et al. v. McCready

JUSTICE REHNQUIST, dissenting.

The words "remote", "speculative", and "attenuated", are necessarily imprecise, and in the application of each of them some "line-drawing" is necessary. The basic issue raised by respondent's antitrust complaint is whether Blue Shield may reimburse subscribers for treatment by psychiatrists, but not by psychologists unless their services were supervised and billed by treating physicians.

Clearly the psychologists are the victims of this discrimination, if other necessary elements of respondent's

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

1st PRINTED DRAFT

From: Justice Rehnquist

**SUPREME COURT OF THE UNITED STATES**

Circulated: \_\_\_\_\_

BLUE SHIELD OF VIRGINIA, ET AL. v.  
CAROL MCCREADY

Recirculated: OCT 20 1981

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-225. Decided October —, 1981

JUSTICE REHNQUIST, dissenting.

The words "remote", "speculative", and "attenuated", are necessarily imprecise, and in the application of each of them some "line-drawing" is necessary. The basic issue raised by respondent's antitrust complaint is whether Blue Shield may reimburse subscribers for treatment by psychiatrists, but not by psychologists unless their services were supervised and billed by treating physicians.

Clearly the psychologists are the victims of this discrimination, if other necessary elements of respondent's complaint may be proven, but respondent is *not* a clinical psychologist; she was *treated* by a clinical psychologist, not reimbursed by Blue Shield of Virginia for such treatment, and now seeks damages from Blue Shield because of its failure, pursuant to its contract with her, to reimburse her for the bill which she received from the clinical psychologist. The United States District Court dismissed the action on the ground that she lacked standing to sue because her injury was "too indirect and remote to be considered 'antitrust injury.'" App. to Pet. for Cert. 6a. The Court of Appeals reversed, however, and in so doing raised significant problems which I believe warrant the attention of this Court.

Despite the breadth of the language of 15 U. S. C. § 15, § 4 of the Clayton Act authorizing suits for treble damages by "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," the Courts of Appeals "have been virtually unanimous in conclud-

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pp 1, 7

To: The Chief Justice  
Justice Brennan  
Justice White  
~~Justice Marshall~~  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

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From: Justice Rehnquist

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2nd ~~PRINTED~~ DRAFT

## SUPREME COURT OF THE UNITED STATES

BLUE SHIELD OF VIRGINIA, ET AL. v.  
CAROL MCCREADY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-225. Decided October —, 1981

JUSTICE REHNQUIST, with whom JUSTICE POWELL joins,  
dissenting.

The words "remote," "speculative," and "attenuated," are necessarily imprecise, and in the application of each of them some "line-drawing" is necessary. The basic issue raised by respondent's antitrust complaint is whether Blue Shield may reimburse subscribers for treatment by psychiatrists, but not by psychologists unless their services were supervised and billed by treating physicians.

Clearly the psychologists are the victims of this discrimination, if other necessary elements of respondent's complaint may be proven, but respondent is *not* a clinical psychologist; she was *treated* by a clinical psychologist, not reimbursed by Blue Shield of Virginia for such treatment, and now seeks damages from Blue Shield because of its failure, pursuant to its contract with her, to reimburse her for the bill which she received from the clinical psychologist. The United States District Court dismissed the action on the ground that she lacked standing to sue because her injury was "too indirect and remote to be considered 'antitrust injury.'" App. to Pet. for Cert. 6a. The Court of Appeals reversed, however, and in so doing raised significant problems which I believe warrant the attention of this Court.

Despite the breadth of the language of 15 U. S. C. § 15, § 4 of the Clayton Act authorizing suits for treble damages by "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," the

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pp. 1, 6

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
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Justice Stevens  
Justice O'Connor

From: Justice Rehnquist

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-225

**BLUE SHIELD OF VIRGINIA, ET AL., PETITIONERS v.  
CAROL McCREADY**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT**

[June —, 1982]

**JUSTICE REHNQUIST, dissenting.**

Respondent's alleged "antitrust injury" in this case arises from a health insurance coverage dispute with her insurer, petitioner Blue Shield of Virginia. Respondent's complaint is that Blue Shield reimburses its subscribers for treatment by psychiatrists, but not by psychologists unless their services are supervised and billed by treating physicians. Respondent was treated by a clinical psychologist, but when she submitted claims to Blue Shield, she was denied reimbursement.

Respondent alleged in her complaint that Blue Shield's refusal to reimburse her for the costs she incurred in obtaining the services of a psychologist furthered a conspiracy by petitioners "to exclude and boycott clinical psychologists from receiving compensation under" Blue Shield's plan. App. 55. Blue Shield's refusal-to-reimburse policy is alleged to constitute a form of economic pressure on McCready and other Blue Shield subscribers to obtain the services of psychiatrists rather than psychologists. By employing this economic pressure on Blue Shield subscribers, petitioners are alleged to have placed clinical psychologists at a competitive disadvantage with regard to psychiatrists in the market for insurance-reimbursed psychological services.

The Court concludes that McCready's inability to obtain re-

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Justice Brennan  
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Justice O'Connor

From: Justice Rehnquist

Circulated: \_\_\_\_\_

Recirculated: JUN 8 1982

pp. 1, 4-7

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-225

**BLUE SHIELD OF VIRGINIA, ET AL., PETITIONERS v.  
CAROL MCCREADY**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT**

[June —, 1982]

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and  
JUSTICE O'CONNOR join, dissenting.

Respondent's alleged "antitrust injury" in this case arises from a health insurance coverage dispute with her insurer, petitioner Blue Shield of Virginia. Respondent's complaint is that Blue Shield reimburses its subscribers for treatment by psychiatrists, but not by psychologists unless their services are supervised and billed by treating physicians. Respondent was treated by a clinical psychologist, but when she submitted claims to Blue Shield, she was denied reimbursement.

Respondent alleged in her complaint that Blue Shield's refusal to reimburse her for the costs she incurred in obtaining the services of a psychologist furthered a conspiracy by petitioners "to exclude and boycott clinical psychologists from receiving compensation under" Blue Shield's plan. App. 55. Blue Shield's refusal-to-reimburse policy is alleged to constitute a form of economic pressure on McCready and other Blue Shield subscribers to obtain the services of psychiatrists rather than psychologists. By employing this economic pressure on Blue Shield subscribers, petitioners are alleged to have placed clinical psychologists at a competitive disadvantage with regard to psychiatrists in the market for insurance-reimbursed psychological services.

*JP*

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

October 20, 1981

Re: 81-225 Blue Shield of Virginia v. McCready

Dear Bill:

Your dissenting opinion has forced me to take another look at this case. I am now persuaded that you are quite correct in urging that certiorari be granted. The general question of antitrust standing in private litigation is surely important and comes to us repeatedly; moreover, I think there is a serious danger that the Sonotone holding will be extended to cases such as this in which it is by no means clear that the rationale actually applies.

Finally, the issue is more cleanly presented in this case than in many that come to us. In sum, I have changed my vote from a deny to a grant.

Respectfully,

*JP*

Justice Rehnquist

cc: The Conference

*Entered  
on docket*

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 20, 1982

Re: 81-225 - Blue Shield of Virginia v.  
McCready

Dear Bill:

Several aspects of your opinion concern me. Let me try to explain:

1. Emphasis on the literal meaning of "Any person ..." in section 4 reminds me of our recognition of the fact that Congress cannot have intended the words "Every contract ..." in section 1 to be read literally. It is true that the broad language supports the result in this case and, as you correctly note, is consistent with the remedial and deterrent objectives of the antitrust laws, which I wholeheartedly endorse. Nevertheless, the emphasis on the all-encompassing character of those words troubles me because truly serious, industry-wide violations indirectly harm so many persons who do not have a right to recover treble damages. Moreover, there is a countervailing interest in defining the classes of eligible plaintiffs as precisely as possible to make it possible either to avoid, or to terminate at an early stage, some meritless litigation that is exceptionally burdensome to the public and the courts. Perhaps this is more a matter of tone and emphasis than substance, but it may help to explain some of my specific comments.

2. Footnote 10 on page 7 seems to assume that McCready has already won her lawsuit; moreover, its reasoning would support recovery for persons who suffered only a remote or indirect injury.

3. As I read Part A on pages 7-9, you seem to be knocking down a straw man for the purpose of demonstrating the the "remoteness" problem is analytically distinct from Illinois Brick, which rests

entirely on (a) avoiding duplicate recoveries, and (b) avoiding complicated trials of speculative questions. I agree that the issue in Illinois Brick--a price-fixing case--is analytically distinct from the issue in a secondary boycott case, but I think the same basic problem that is involved in defining the scope of the defendants' duty--or identifying the persons to whom the duty is owed--were present in that case as are present here. I do not believe your opinion would suffer if Part A were simply omitted.

4. At pages 13-14, you respond to the argument that McCready may not recover because she was not an economic actor in the market that has been restrained by concluding that she was a consumer in that market. The better answer, it seems to me, is that in a secondary boycott case, the primary victim need not be acting in the secondary market. A banker who was boycotted by psychiatrists in order to drive psychologists out of business would, in my opinion, have adequate standing.

5. The intervening cause question that you resolve in footnote 17 on page 14 strikes me as possibly more difficult than you suggest. Suppose that at trial the defendants could demonstrate that higher premiums would flow from extending coverage to psychologists without a physician-approval requirement (I doubt that they could, but the case arises on a motion to dismiss), and that the employer, in such event, would have purchased coverage elsewhere. McCready would not then have suffered "by reason of" the conspiracy. I wonder if we should not put the intervening cause issue into the question of fact category to be resolved at trial, with a reminder that there is always at least a "but for" requirement of causal connection between violation and injury.

6. At pages 15-18, you respond to the argument that McCready's injury was not of the type that Congress sought to redress by concluding that it was "inextricably intertwined" with the injury to the psychologist. It seems to me that the correct answer to that argument is simply that it was an injury to property, as Sonotone holds. In my bank example, I

should think that the banker could recover for an injury to property without being "inextricably intertwined" with any of its customers.

As you point out in footnote 13 (page 11), it is difficult to state a general rule that will define the term "remote" in every case. I do think, however, that we could identify such a rule in cases that fit into the secondary boycott mold. Assume that defendants desire to eliminate their competitors from the market by imposing a boycott on the competitors' suppliers and they successfully drive the competitors out of business. The competitors could clearly sue; likewise, I believe, the suppliers also because the harm to them was the means by which the defendants accomplished their objective (cf. page 13 of your draft). But what about the class of persons who formerly were patrons of the competitors? Under your opinion, the patrons might recover, but under the Illinois Brick reasoning, I should think they would clearly be indirect victims who could not.

When I started to write this letter, I thought it might suggest a basis for making some changes in a draft that I could then join. I am now persuaded, however, that our approaches probably differ so much that it might be better for me to write out a separate concurrence. Instead of treating Illinois Brick as a narrow exception from the general rule that everybody can sue, I shall suggest that the question is how to apply the rule of that case to an alleged secondary boycott.

Respectfully,



Justice Brennan

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To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

*2nd Draft*

From: Justice Stevens

**SUPREME COURT OF THE UNITED STATES**

Circulated: \_\_\_\_\_

No. 81-225

Recirculated: JUN 18 1982

**BLUE SHIELD OF VIRGINIA, ET AL., PETITIONERS v.  
CAROL MCCREADY**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT**

[June 21, 1982]

JUSTICE STEVENS, dissenting.

Respondent is a consumer of psychotherapeutic services. The question is whether she has been injured in her "business or property by reason of anything forbidden in the antitrust laws."<sup>1</sup> The alleged antitrust violation is an agreement between petitioners Neuropsychiatric Society of Virginia and Blue Shield that Blue Shield would refuse to reimburse subscribers for payments made to clinical psychologists for charges that were not billed through a physician. The objective of the alleged conspiracy was to induce subscribers to patronize psychiatrists instead of psychologists.

For purposes of decision, I assume that the alleged agreement is unlawful. In analyzing the sufficiency of respondent's damage claim, it is helpful first to consider the situation in which the conspiracy would have its maximum impact on the relevant market. Given their objective, petitioners' conspiracy would be most effective if they made it perfectly clear to subscribers that they would not be reimbursed if they consulted psychologists instead of psychiatrists. For without this information, a subscriber's choice between a psychologist

<sup>1</sup>"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 of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U. S.C. § 15.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

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May 13, 1982

No. 81-225 Blue Shield of Virginia v. McCready

Dear Bill,

You have written an excellent opinion in this case. My vote at Conference was tentative and I will indulge in the luxury of waiting to see other writing before finally resolving the matter.

Sincerely,



Justice Brennan

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 3, 1982

No. 81-225 Blue Shield of Virginia v.  
McCready

Dear Bill,

Please join me in your dissent.

Sincerely,



Justice Rehnquist

Copies to the Conference

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