In the

ORIGINAL

Supreme Court of the United States

BLUE SHIELD OF VIRGINIA ET AL.,

Petitioners,

v.

CAROL McCREADY

NO. 81-225

Washington, D. C.

March 24, 1982

Pages 1 thru 46

ALDERSON REPORTING

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Washington, D. C.

Wednesday, March 24, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:19 o'clock p.m.

APPEARANCES:

GRIFFIN B. BELL, ESQ., Atlanta, Georgia; on behalf of the Petitioners.

WARWICK R. FURR, II, ESQ., Vienna, Virginia; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Blue Shield of Virginia against McCready.

Mr. Bell.

ORAL ARGUMENT OF GRIFFIN B. BELL, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BELL: May it please the Court, this case presents two questions. The first question is, was there an antitrust injury alleged so as to withstand a motion to dismiss under Rule 12(b)(6), and I use antitrust injury in the same vein as this Court used it in Brunswick versus Pueblo Bowl-O-Mat. The second question, was Blue Shield exempt from antitrust laws as being in the business of insurance under the McCarren-Ferguson Act. This was a class action with one plaintiff purporting to represent the class.

QUESTION: The class she claims to represent are the patients, are they not?

MR. BELL: Patients. Well, the patients, all patients who went to a clinical psychologist and who at the same time were entitled to benefits under Blue Shield contracts. This plaintiff was an employee of Prince William County. Prince William County had a contract for medical services which they purchased from Blue Shield of Virginia. Plaintiff was treated by a

clinical psychologist, and sought reimbursement from Blue Shield of Virginia. That is the gist of the complaint. She wishes to be reimbursed.

Her request for reimbursal was refused on the grounds that the plan only covered physician's services and other allied health services which are supervised by and billed through a physician.

The case is complicated by the fact that there was another case filed at the same time. They started out being heard together, and one was decided last year by the Fourth Circuit. It is called the VACP case. In that case, the district court ruled for the Blue Shield plans and psychiatrists, but the Fourth Circuit said that there was a restraint. The restraint was in the sector or area of restraining clinical psychologists by not covering them under these contract. It was a plan that was devised, so the court held, by the two plans, two plans in Virginia, both of whom are in this case, along with the doctors and particularly the psychiatrists, to block out the clinical psychologist from being covered.

Now, that is the antitrust allegation that is the base for this case brought by this patient of a psychologist. I am going to spend a little time arguing the McCarren-Ferguson point, because this Court granted

certiorari on a Second Circuit case called Pireno, and it is pending here now. It is very much on our case, and if we are exempt from antitrust coverage by McCarren-Ferguson, then you wouldn't necessarily reach the other point which is antitrust injury.

Unfortunately, though, the questions tie together because it has been held at one point in the case, in the district court, that there was a boycott, so if there was a boycott, then we have to get back to the same issue, target area, was Mrs. McCready in the sector or the area where the antitrust violation took place.

There are three elements that must appear to have an exemption under the McCarren-Ferguson Act. First, there must be the business of insurance. Second, there has to be state regulation of the activity in question. And third, it must appear that there is no boycott. There can't be a boycott and still have coverage. They have the exemption.

Now, there is no doubt there was state regulation here. That is what the lawsuit was about. The two plans would not follow the state law. They contested it, and finally lost, but they won part of the case, and that was that the Virginia Supreme Court said the statute required that they deal directly with

psychologists. The Virginia Supreme Court said that that was unconstitutional. It was not corrected up until July 1, 1979, so we are talking about damages that accrued before July 1, 1979, but I don't think it is contested, the the state regulation, so if this was the business of insurance, this policy that they had that you could only get allied health or medical -- health services through a doctor, if that was underwriting or spreading of the risk within the meaning of the Royal Drug case, then we have the question -- we have the business of insurance.

So, the only element left to be decided would be, was there a boycott. Now, the boycott that the District Court found, Judge Bond, this is the only mention that has been made of this in all this litigation, was that there was a boycott alleged. Well, at that time, he was dealing with a motion to dismiss involving the doctors and the plans as well as Mrs. McCready's case, and I read that to mean he was talking about a boycott in this primary level or this sector between doctors and psychologists.

If so, then the same answer would come from the argument I am next going to make about antitrust injury would indicate that there was no boycott, so that's why I say that the two issues tie together.

QUESTION: Mr. Bell, I am not sure that I understand how we properly reach the McCarren-Ferguson Act issue. Now, the court of appeals didn't consider it, did it?

MR. BELL: The court of appeals ignored it. Well, I won't say ignored it. They did not consider it.

QUESTION: And so normally, presumably, we wouldn't get into it, and does this case come to us on a motion under Rule 12(b)(6) of the Federal Rules?

MR. BELL: It does.

QUESTION: And we have to assume that the allegations of the complaint are considered favorably to the pleader, and has the plaintiff below at least allege both a boycott and coercion.

MR. BELL: They alleged a boycott twice in there, in the complaint.

QUESTION: So I wasn't sure how we would get into the McCarren-Ferguson Act issue.

MR. BELL: Well, this was in the district court, and the court of appeals did not consider it, and it was called to the court of appeals' attention on the petition for rehearing, and I would assume that the Court can deal with any issue that is in the case as a part of the case, but I think that the short answer to the question is that in spite of the fact that a boycott

is alleged, if the Court should conclude that the injury suffered by Mrs. McCready was not in the area of the antitrust violation, then there couldn't be a boycott. Even if there was a boycott, it would not relate to her. It wouldn't --

QUESTION: Well, if you are right on the standing issue, that would end it, wouldn't it?

MR. BELL: It would end it.

QUESTION: You never get to the McCarren-Ferguson Act then.

MR. BELL: You wouldn't have to get to the McCarren-Ferguson question.

QUESTION: Right.

MR. BELL: So, I will go -- I will just mention one other thing about McCarren-Ferguson, and then I will discontinue that argument, and that is that in the Royal Drug case, and there have been some other cases -- there is one case in the Fourth Circuit where they said that peer review was the business of insurance. Pireno in the Second Circuit says peer review is not. Well, this question we have, it seems to me, whether we ought to cover clinical psychologists, goes to the heart of the relationship between an insurer and a subscriber or policy-holder, if you will. It also goes to the heart of underwriting. Do you care to

underwrite, do you wish to underwrite this kind of business, and how will the risk be spread? Is the mechanics of it such that it bears directly on spreading the risk?

I think it does, but I will go on to the next argument, because the next argument would end the case if we are right about it, and that is antitrust injury. Was there an antitrust injury here within the meaning of the decision in Brunswick versus Pueblo Bowl-O-Mat. The Fourth Circuit cited only two cases in support of their rule, and one was Reiter versus Sonotone, a case involving a direct purchaser and price fixing, nothing like this case.

They cited their own case of South Carolina Council of Milk Producers, where there had been a breakdown in the competitive level of the retail marketing. Milk was being sold as a loss leader. The farmers, the milk producers brought a suit saying that it was adversely affecting the price of milk, and the Fourth Circuit went off on two points. One was whether these milk producers were in the sector of the economy which was endangered by the antitrust activity, the breakdown in competition, and then whether there was proximate cause which would lead from that to these milk producers.

They decided this case almost on the same basis, which I think converts the antitrust law almost into a general tort statute, and it is difficult, though, to take any of the rules I have found in the country, in all the cases in the circuits, and the learned treatises, and apply them to facts. Judge Bond said it pretty well in the district court. He said that while standing an antitrust injury may not be the same issue, here there is no standing because there is no antitrust injury. He put it -- he tested it rather than starting out with a definition.

I think that Judge Mansfield in the Calderone case almost hit onto a workable formula, but he kept changing from target area to target, and I suppose there can be sometimes where you wouldn't be a direct target, yet you would still be covered if the -- if you were in the area of the breakdown in the economy, so I first got off on the idea that maybe we ought to talk about targets, but I'm not certain that's the way to do it, and I end up, after looking at all the cases, where there seems to be two clear groups. One is what some of the writers call categorization. That would be like a landlord or shareholder, a creditor who doesn't have standing to complain about the antitrust violation. And then the others, it seemed to me to get down to whether

you are too far away from where the breakdown in the economy took place.

This seems to me to be that kind of a case.

QUESTION: Mr. Attorney General, it sounds like that particular approach and maybe the target area, too, is just an early way in the case to decide the question of causation, and to avoid a long trial on that if it's clear enough, because even if you lose at this stage, you are goingn to be making the same argument down on the end of the case that whatever injury that was suffered here wasn't caused by the breakdown in competition.

MR. BELL: We would be making that argument.

QUESTION: You are still going to be making it later in the case.

MR. BELL: Oh, yes.

QUESTION: You say that you ought to be able to make it now and avoid a long trial.

MR. BELL: We are saying that the question can be truncated, because it appears as a matter of law that Mrs. McCready was far removed from the breakdown in the competition which was between the doctors, that she was two steps away.

QUESTION: Isn't what you are saying in essence that antitrust injury is a narrower concept than

injury which flows in a but for causation way from an antitrust violation?

MR. BELL: Exactly, and we think the Fourth Circuit treated it just like tort injury. Antitrust injury carries treble damages and attorneys' fees, and we don't think Congress -- in fact this Court said so in Brunswick, that it was to be a narrower category, and the question, the problem is how to draw the line. It is very difficult to draw the line, but in this case it seems to me that this lady is two steps away. She is what we might call a policyholder. She was in a market where you could buy all the insurance you wanted, no competitive breakdown there. She was also in another market. She was in the health services market. She could get a doctor or get a clinical psychologist, and that was unrestrainted.

The restraint was farther over, between the doctors and these plans for not covering clinical psychologists, so we -- our argument is that if there was an antitrust violation, which the Fourth Circuit held in the other case, then you have to define the sector of the economy and draw a line around it or circle it, and then the next step, was she injured by something that happened within that circle, and we say she was not.

But I concede that it is not very easy to draw those lines. There are no bright lines in this area of the law that I can see. I guess that is why we have a case like Illinois Brick, because you are always worrying about whether someone is too far away.

QUESTION: Well, except for the provision in the contract, though, if the contract had covered the services of clinical psychologists, she would have been reimbursed.

MR. BELL: She would have been, if the coverage had run to clinical psychologists, as it does now.

QUESTION: Well, I suppose --

MR. BELL: It has been done now by statute.

QUESTION: -- if the contract incuded chiropractors, if she went to a chiropractor, but it is a matter of contract, then, isn't it?

MR. BELL: Yes, it is.

QUESTION: Is this the basis on which -- this direct and indirect point you were mentioning, is that the basis on which you distinguish Reiter against Sonotone, that in Reiter the injury occurred directly from the conspiracy to fix the prices?

MR. BELL: Exactly. Precisely. In Reiter, Mrs. Reiter was a purchaser in a market where prices had

been fixed. She was a direct -- She suffered direct injury. She was in the sector. Here, Mrs. McCready was a long way from the sector. She would recover under a tort, general tort theory on a but for basis, and on a foreseeability basis. You would say, yes, if they would not cover clinical psychologists, and they did it in violation of the antitrust laws, there would be people in the chain that would be harmed, all the way down to a -- at least to a policyholder, but that would be a general tort approach, which we say was not intended by the Congress.

QUESTION: I take it then that we should judge this case, although I am sure you don't concede that there was an antitrust violation, but we must judge the case at this stage as though there was one --

MR. BELL: Yes.

QUESTION: -- that the promise between -- that the agreement was -- violated the antitrust laws?

MR. BELL: You would have to because of the other case which --

QUESTION: Yes.

MR. BELL: -- we lost and applied for certiorari and certiorari was denied, so they found an antitrust violation by excluding psychologists.

QUESTION: In the provision in the agreement

between Blue Cross and the doctors.

MR. BELL: Between --

QUESTION: Yes.

MR. BELL: Well, in the agreement between the two plans.

QUESTION: Yes.

MR. BELL: Blue Shield.

QUESTION: Yes.

MR. BELL: Blue Shield, and they said that that was a restraint against the psychologists, and the restraint was a very peculiar thing. It was because they were not following the Virginia law. They were contesting the Virginia law.

QUESTION: What was the antitrust violation that was found in the other case?

MR. BELL: I -- it is fairly difficult to tell from reading the opinion, but I think it was -- my best judgment was, it was a restraint by the two plans, or between the two plans.

QUESTION: A restraint of what market or of what --

MR. BELL: The market for services of a clinical psychologist.

QUESTION: People in the market for mental treatment?

MR. BELL: Just the doctors. Just the clinical psychologists, not their patients. I think that is very clear from the Fourth Circuit opinion.

QUESTION: But it's a restraint of competition, or a boycott, was it?

MR. BELL: Well, you could call it a boycott, but the court wrote about two pages on the fact that they wouldn't find a boycott because they wouldn't find a boycott to be a per se violation in the medical field. It is a very confusing opinion. I would say that --

QUESTION: Well, until you know what the antitrust violation is, it is hard to understand an argument that it didn't cause this injury.

MR. BELL: We know that the violation -- the parameters of the violation. It was in the area of the blocking out or boycotting the clinical psychologists, not giving them coverage. That is -- there is no way that I see from the opinion you could argue for a broader area.

Now, if you could argue that the violation ran to a much broader area, the field of health services, and people buying health insurance, then you would have quite a different question, and that is what makes the case hard, to draw the -- first, draw the line of where

the violation was, and then connect the plaintiff to that area of the violation. The cases say the sector where the competition was endangered by a breakdown due to the antitrust violation, but it's an area, fulcrum, it's some point of the violation.

QUESTION: Is the effect of the Fourth Circuit holding, the majority holding, that they can't have this kind of a contract?

MR. BELL: Well, they say you can't --

QUESTION: Excluding clinical psychologists?

MR. BELL: It is not quite that broad, because the Virginia legislature, the general assembly of Virginia passed a law that you had to deal directly with any of these allied health services. There are about four or five of them. One of them was clinical psychologists. It's the same as telling them they have to -- if they are going to use their services, they have to deal directly with them. I don't believe the statute goes so far as saying you have to cover these people. They called it the direct user statute, and this was in litigation for several years, and it has been out for -- now, lost it, but as I read the Virginia Supreme Court opinion, it is that you don't have to cover clinical psychologists, but if you do, you have to deal with them directly. You can't make them go through a physician,

is what it gets down to.

I would like to reserve a little time.

CHIEF JUSTICE BURGER: Mr. Furr.

ORAL ARGUMENT OF WARWICK R. FURR, II, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. FURR: Mr. Chief Justice, and may it please the Court, this is a case in which the plaintiff alleges -- alleges in here complaint a direct financial injury from conduct which has already been proven to be a violation of the antitrust laws. The allegations in the complaint in the other case that esteemed counsel referred to, the VACP case, are identical to the operative acts of antitrust violation charged in this complaint that is before the Court on this appeal from the reversal of an order dismissing a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Now, there are a couple of preliminary remarks I wanted to make before I pick up the questions of legal injury or antitrust injury and the possibility of McCarren-Ferguson exemption here.

First, the Petitioners' arguments in their brief are shot through with factual assertions that the Respondent here can't be injured, or she can't prove an antitrust violation as to her, and coupled with other assertions as to why their practices are defensible, and

why they are the business of insurance. It seems to me these factual assertions miss the mark in this Court. These assertions for the most part are contested, if not bitterly contested.

To take one example, they argue that she cannot recover because her health insurance contract precludes payments to clinical psychologists. By contrast, we contend, based on the unanimous decision by the court of appeals in the VACP case, and the evidence in that record, that for many years Blue Shield interpreted the very same contracts at issue here to treat clinical psychologists as physicians and to pay them directly. More specifically, from 1962 to 1972, they did interpret the contracts to pay clinical psychologists. So we think that regardless of who is right, and we think we are right, that these are contested factual issues on important facts.

QUESTION: Well, are you suggesting that that interpretation forever binds them?

MR. FURR: No, sir, Your Honor, but I think it makes it very clear that when they make a decision in 1972 to restrict payments to clinical psychologists when they have been interpreting those same contracts to provide those payments, they are not expanding insurance coverage, they are cutting off benefits to a group of

competitors that they view as a competitive threat, and that --

QUESTION: I don't get where the competitive threat between what two entities --

MR. FURR: Between the physicians who control --

QUESTION: I am talking about the contract. The contract was not made by the physicians, was it?

MR. FURR: The contract?

QUESTION: Yes.

MR. FURR: The terms of the contract are developed by Blue Shield of Virginia. Yes, sir.

QUESTION: Well --

MR. FURR: And the contract --

QUESTION: -- and you are complaining that this contract is now construed to exclude the psychologists.

MR. FURR: No, sir. That is not our complaint. Our complaint charges that they failed to make payments for services of clinical psychologists. We don't even plead the contract. The contract is not even before this Court, except by virtue of the fact that Petitioners have inserted it.

QUESTION: Then you have confused me. You just said that at one time they construed the contract

to include direct payments to clinical psychologists, and now they construe it another way.

MR. FURR: Yes, sir. They never changed the contract. They just stopped the practice. At one time they paid, and --

QUESTION: Well, then, my question to you was, does the construction of the contract in one way forever bind them to continue to construe it the same way?

MR. FURR: No, sir, I don't think that would be correct.

QUESTION: Well, then, you have changed your answer.

MR. FURR: I misunderstood Your Honor's question.

QUESTION: Mr. Furr, what exactly is the difference if you don't get paid pursuant to contract or without contract? The complaint is that you don't get paid.

MR. FURR: That's right, Your Honor. Absolutely correct. And that's the --

QUESTION: I'm kind of lost on your answer, then. Suppose Blue Shield put in its contract that we won't pay clinical ex-ray people. Would there be a cause of action?

MR. FURR: If they put in their contract that

we will pay?

QUESTION: Will not.

MR. FURR: Will not pay? If that decision was an act that reflected an antitrust violation, there might be a cause of action, in my opinion.

QUESTION: Well, I would assume that if Blue Shield says, in order to violate the antitrust law, we will do this, I certainly didn't assume that.

MR. FURR: Yes, Your Honor.

QUESTION: They didn't say a word about antitrust.

MR. FURR: They might not say that, but suppose the decision to put a clause in the contract occurred in this way. Suppose the surgeons decided that they didn't want family physicians to treat warts without consulting a surgeon, and suppose further that the minutes of the --

QUESTION: I'm talking about insurance contracts. I'm not talking about surgeons.

MR. FURR: Well, I'm talking about -- the people who make up the language in these contracts are the physicians who control Blue Shield.

QUESTION: Did the physicians make up this contract?

MR. FURR: They made the decision to exclude --

QUESTION: Did they make up the contract?

MR. FURR: The --

QUESTION: Because I am going to ask you where that is in the record.

MR. FURR: Where the physicians make up the contract?

QUESTION: Yes.

MR. FURR: Well, Blue Shield makes up the contract.

QUESTION: I thought so.

MR. FURR: And Blue Shield is the participating physicians, as even the Petitioners say in their brief. It is a collective of physicians.

QUESTION: But the physicians didn't draw the contract. Blue Shield drew the contract.

MR. FURR: As the agent of the physicians, Your Honor.

QUESTION: Wholly apart from all this, you are alleging conspiracy, aren't you?

MR. FURR: We are alleging a combination, joint action to restrain trade and to boycott clinical psychologists from direct payments. Yes, Your Honor.

QUESTION: And it is between the physicians and Blue Shield. That's the conspiracy.

MR. FURR: The --

QUESTION: Why are you afraid to say so?

MR. FURR: The conspiracy is the member physicians, the directors of Blue Shield, and the two Blue Shield plans that collaborated together later to also --

QUESTION: Why didn't you say so?

MR. FURR: -- reinforce -- Yes, Your Honor.

QUESTION: Well, you won on that.

MR. FURR: Yes, Your Honor.

QUESTION: You won in another case on that, haven't you?

MR. FURR: That's correct, Your Honor. So the only issue before --

QUESTION: Mr. Furr, would your position be the same and would Mrs. McCready have standing if she had purchased the policy directly from Blue Shield?

MR. FURR: Yes, I think so, Your Honor.

QUESTION: Your position would be exactly the same --

MR. FURR: Exactly the same.

QUESTION: -- as if going through the employer.

MR. FURR: She would still have standing.

QUESTION: And she presumably could have bought a policy that would have covered clinical psychologist services that did not require going through

a physician, from some other source. Is that not correct?

MR. FURR: Theoretically, that is possible, Your Honor. The only difficulty with that is, most of these health care policies are part of your fringe benefit as an employee, and very few people have the resources to go out and make an independent purchasing decision. They take the policy --

QUESTION: Let's go back to if she were buying it directly. Presumably other sources would be available. How would she have standing then for this kind of an antitrust action?

MR. FURR: If she bought a policy and part of the policy reflected an antitrust violation, and she --

QUESTION: These same circumstances.

MR. FURR: She would have standing if in fact she could show there was a violation or this stage of the litigation, plead there was a violation, plead causation, and in fact that she had been injured by the violation, by reason of the antitrust laws. She would have standing, and I think that is really the only issue that is before this Court today, because of the question how the McCarren-Ferguson issue is presented, and I would like to turn to the issue of standing to sue under Section 4 of the Clayton Act.

Just by way of summary, we think that her complaint on its face alleges sufficient facts to demonstrate the likelihood that she has been injured by an antitrust violation, and to cut off her lawsuit at this early stage would defeat two key purposes of the federal antitrust laws, compensation to victims and deterrence of practices which hinder competition, without her ever having a full day in court. Second --

QUESTION: Well, you don't suggest that the test is different at this stage, the legal test is different at this stage of the lawsuit than it would be after the trial is over, do you? It is just maybe the facts aren't as fully developed as they would be at trial.

MR. FURR: Your Honor, I think that although the Supreme Court has never really addressed the issue of standing to sue within the special context of Section 4 of the Clayton Act, that the test, or at least the stringency of the application of the test might well differ. As esteemed counsel mentioned earlier in his argument, he relies on the Brunswick case to define the concept of antitrust injury. That came up after a full trial on the merits, not at the preliminary stage of moving to dismiss a case where the ability to show the relationship of the injury to the anticompetitive

practice has not even been fleshed out by discovery, by not even a summary judgment hearing.

So, yes, I do suggest that, Your Honor. I think --

QUESTION: Well, do you suggest that at this stage it would be just a flat but for causation?

MR. FURR: I think if the plaintiff alleges -- I think that is a threshold requirement, an allegation of an antitrust violation, an allegation of cause and fact, and there has to be somehow on the face of the complaint, I would suggest, at least a possible relationship in terms of the injury to competition and the injury that was inflicted on her.

QUESTION: What if I plead in a complaint that I am a landlord and I had a tenant who has been subjected to an antitrust violation and as a result he has gone out of business, and as a result I have not been able to collect my rent? Do you think that that is antitrust injury?

MR. FURR: I think that the statute on its face would allow that case to go forward, at least into a factual investigatory stage.

QUESTION: Well, what if the factual investigatory stage fully supported the allegations of the complaint, and nothing more, that there was a

landlord, there was a tenant, the tenant had been subjected to an antitrust violation and gone out of business, and the landlord couldn't collect his rent?

MR. FURR: Well, I think that most of the courts that have dealt with that have, and you are speaking to one category of antitrust standing, the so-called landlord cases under the direct injury test, I think the courts have usually cut off injury there, or the right to assert injury because of the possibility of duplicative recovery. I suggest that we don't have those facts here, but I would have to say the statute on its face is broad enough to allow that, to allow the case to go forward.

QUESTION: Mr. Furr --

MR. FURR: Yes, Your Honor.

QUESTION: -- isn't this really a fight between the psychiatrists and the psychologists, and if so, how did you happen to exclude the psychologists from the plaintiffs in this case?

MR. FURR: Well, Your Honor, I don't believe it is just a fight between the psychologists --

QUESTION: I didn't say just a fight, but isn't it a fight or primarily a fight?

MR. FURR: I believe that it is a situation where, because of the peculiar nature of the health care

reimbursement plan here, the injury inflicted on Ms. McCready was an integral part of an effort by the Blue Shield physicians to cut off competition from competing non-M.D. health care providers, and if I could --

QUESTION: I understand that, but it still seems curious to me that the parties primarily concerned are absent from this litigation.

MR. FURR: Well, they have already prevailed in a case in which the Court has denied certiorari, Your Honor. That is the VACP case.

QUESTION: What did that case hold? I don't recall it specifically. I remember we did deny certiorari.

MR. FURR: That case held that the joint action by the defendants, the Blue Shield defendants in this identical time frame to withdraw payment and to exclude clinical psychologists from direct payment for their services was a violation of the antitrust laws.

QUESTION: But wouldn't you have had a stronger case if you had included them, so you wouldn't be arguing about standing?

MR. FURR: Well, Your Honor, the two cases proceeded together, and in fact, in the district court's decision, which I believe is in the appendix, the standing challenge was made to the psychologists. Judge

Bryan allowed them to go forward, and at the same time -- in fact, in the same order, dismissed Ms. McCready's complaint for lack of standing. So they actually were proceeding simultaneously, until the district court ruled.

QUESTION: But psychologists have never been a party to this case?

MR. FURR: Not to this case, because this is the treble damage case asserted by a subscriber who has been denied her reimbursement benefits.

QUESTION: But you conceded, I thought, in response to Justice Rehnquist's question, that this is like the landlord and tenant case.

MR. FURR: No, Your Honor, I would not concede that. I would --

QUESTION: I thought you said that the landlord -- that there would be a recovery, in response to his question.

MR. FURR: I don't think that Section 4 of the Clayton Act by its terms would exclude that case. I don't think Ms. McCready's case is the same. I think just as the Fourth Circuit found below, the injury inflicted on her is direct. In the landlord case, you have indirect injury, and courts have dismissed those because they are indirect or remote or fortuitous, all

the kinds of language that the courts have traditionally used when they wanted to cut back on the ambit of liability to which a defendant is exposed, even though, A, a violation has been proved, and B, cause and fact has been established.

If I could, I would like to turn to the language of Section 4 of the Clayton Act, and why I think that it cannot be construed so narrowly in the circumstances that some of the lower courts have done. I wanted to make certain at the outset that we recognize that the standing concept here is a special one. We are not talking about standing in the sense of Article III and whether there is a case or controversy that is justiciable where someone has a stakehold in the outcome.

This is clearly a special kind of antitrust standing which would, if adopted, certainly if the Petitioner's rule would be accepted, would limit actions in the federal courts for federal causes of action which reflect important federal policy. Because the limitation would involve an imposition of a judicial restriction on the exercise of Congressional power, the apparent exercise of Congressional power, we believe it is very important to look to the language of the statute itself and the purposes of the statute in order to make

certain that a restrictive reading is justified.

The statute itself says that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue in the district courts and recovery threefold his damages plus reasonable cost of suit and attorneys' fees. The language is clear and unambiguous.

QUESTION: Well, then I come back -- I am confused about your responses, and I want to clear it up -- I come back to your response to Justice Rehnquist. Under the language you just read, is it your position that the landlord was injured by the antitrust action because the tenant could no longer pay his rent?

MR. FURR: If the landlord has a financial injury, and he can prove the nexus between that financial injury and an antitrust violation --

QUESTION: Well, you have heard his hypothetical. The antitrust violation put the tenant out of business. The tenant may have some recovery for that violation, of course, but does the landlord have recovery? That is the question.

MR. FURR: The statute on its face, Your Honor, is broad enough to allow that recovery, and the question this Court, I am sure, wants is whether the lower court decisions restricting that should be the

rule of this Court. That is the issue.

QUESTION: Well, in fact, if we rely on the literal language, it would allow a shareholder of the landlord to recover, too.

MR. FURR: That's correct, Your Honor, and this has bothered the lower courts. In a series of what I would call pigeonhole cases they have developed categories that would restrict particular plaintiff, the shareholder exception --

QUESTION: But you are not arguing we should read the statute literally, are you?

MR. FURR: I think the statute has to be read in terms of, first, its language, and second, the legislative history and its purpose.

QUESTION: Well, are you arguing that we give it its full literal meaning, allow everyone to recover who is injured by reason of an antitrust violation?

MR. FURR: Well, we would argue that you allow everyone to recover who is injured -- well, first we argue you would allow everyone at least to proceed with his case past the 12(b)(6) stage who alleges that he has been injured by reason of --

QUESTION: You would allow the shareholder of the landlord whose tenant was injured to proceed beyond a motion to dimiss then.

MR. FURR: Unless allowing him to proceed would defeat antitrust policy rather than promote it, and this is where I think the Brunswick case would come into play as a possible rational reading of the statute to impose by the judiciary a limit on the ambit of liability, but the statute was designed to deter violations, and the statute was designed to see that people who had been injured because of those violations recover.

QUESTION: Well, are you asking us to overrule Illinois Brick, for example?

MR. FURR: No, Your Honor, I am not, because I think the Illinois Brick case reflects a decision to cut off the risk of duplicative recovery and administrative -- the administrative impossibility of trying to trace damages through successive chains. This case --

QUESTION: You don't have to win on the landlord's case to win your case, do you?

MR. FURR: Absolutely, Your Honor. We have a direct injury.

QUESTION: You might as well argue that.

MR. FURR: Well, we believe --

QUESTION: You are saying it is a direct injury.

MR. FURR: We believe that our client would

prevail under any of the three tests that the lower courts have developed in their struggle to limit the breadth of Section 4 of the Clayton Act. She is within the target area, as the Fourth Circuit correctly held. She has an immediate direct injury. It is not derivative. It is not fortuitous. And finally, she is a reasonably foreseeable plaintiff, which is a short of hybrid test that some other courts have adopted.

QUESTION: Well, Mr. Furr, you say she is in the target area, but how do you define the target area?

MR. FURR: Well, I --

QUESTION: I thought the target of the conspiracy in your answer to Justice Powell was the competition from psychologists who compete with psychiatrists. The psychiatrists don't like that competition and want to curtail it. So couldn't one in -- I mean, it is a question of where you put the label, I suppose. Couldn't one define the target area as the competitors that the defendants want to drive out of business or harm?

MR. FURR: You could define it that narrowly, Your Honor, but if you did, I think a whole class of people who have suffered a very real financial injury would not be allowed to recover, and defendants might very well be able to profit because they would not have

been given -- forced to give up the entire pie of their antitrust violation, and since Congress has said they are supposed to give it up plus treble, I don't think we should -- I certainly don't want to endorse a restriction that would allow defendants to keep part of the illicit gains from the antitrust violation.

QUESTION: Well, except that I suppose that if the psychologist got less business because of this, he can recover, can't he?

MR. FURR: He could recover, but as the Fourth Circuit found --

QUESTION: And that is all the defendants have taken away from their competitors, is what he could recover in that case, isn't it?

MR. FURR: That's correct, Your Honor, but that still --

QUESTION: Well, then, isn't that the entire pie?

MR. FURR: No, sir, because the people who lose patients have a claim. In this case, McCready stayed with her psychologist because that was the therapist of her choice. He got paid completely. She is out of pocket the money for the antitrust violation, and the reason she is out of pocket, you have to understand how the health care practice works. Under

the major medical policy, the patient pays the provider and then files a reimbursement claim, and depending on the different circumstances, it could be an 80-20 percent split.

In order to limit the threat of these allied health care providers which is documented in the VACP case, the Blue Shield board and physicians had to impose a restriction on reimbursement. Otherwise, if they didn't impose the restriction, she would have gone to her provider, she would have paid him, there would have been no impetus to cut down on people going to independent practice in clinical psychology.

QUESTION: Well, in terms of the conpsiracy that you are talking about, would it be any different if the doctors who didn't want competition from psychologists went to all the banks in town and said, don't lend them any money, or went to the suppliers of pharmaceutical goods of one kind and said, boycott all the psychologists because we want to drive them out of business? Would she then have a claim because her psychologist was driven out of business?

MR. FURR: Well, that would be a harder case, but fortunately --

QUESTION: Would that be a harder case?

MR. FURR: It would be a harder case, because

if they went to -- if I understood your question -- to the banks and simply combined to put economic pressure to deny loans to psychologists --

QUESTION: But here --

MR. FURR: -- where would there be an injury to her?

QUESTION: Well, that is really my question, because here, as I understand the conspiracy, it is putting the economic pressure on the psychologist by saying, you are not going to get insurance reimbursement. How is that different from saying, you are not going to be able to borrow money?

MR. FURR: Because the very instrumentality used to achieve that were all the subscribers who were entitled to the benefit. They used them as vehicles to deliver antitrust punch, and that is about as direct an injury as you could possibly imagine.

QUESTION: It hurt every client who didn't abandon her psychologist or his psychologist.

MR. FURR: That's correct, Your Honor, and that was the purpose of the plan, and that's what the Fourth Circuit found below.

QUESTION: And the only way the psychologist got hurt was by the ones who did abandon them.

MR. FURR: That's correct, and then they lost

business in the process.

QUESTION: But, Mr. Furr, under the terms of the policy which were known at the time of purchase, this reimbursement wouldn't be made, and couldn't the employer or Mrs. McCready have obtained other insurance coverage that would have allowed payment? I mean, they knew that when it was obtained.

MR. FURR: Well, if Your Honor please, we address that in our brief, but there is no reason to suspect that in fact this was known. The practice was to pay. As a matter of fact, she had every reason to expect that she would be paid, and her employer, as a political subdivision of the Commonwealth of Virginia, had every reason to expect that Blue Shield would have obeyed the state statute that also required payment at that time. So, there is no -- there is nothing in this record -- of course, the case only comes up on a complaint.

QUESTION: But if that is a defense, it still is in the case.

MR. FURR: Well, it might be a defense in the case.

QUESTION: It might be.

MR. FURR: Like McCarren-Ferguson might be --

QUESTION: Yes.

MR. FURR: -- months down the road when the facts are developed, but it certainly isn't a defense at this stage of the proceeding.

To try to sum up on this part of the argument, she meets all of the classic tests that the lower courts have imposed of antitrust standing. To cut off her complaint at this early stage of the proceeding would serve no important federal purpose. There are no reasons to cut the complaint off now. There would be no double recovery, as in the landlord case possibility, no complex problems of proof or apportionment of damages, and proceeding with her case would not in any way interfere with competition in the health care market.

Allowing her case to go forward would ensure at least the possibility of compensation to her, and would discourage defendants from adopting restrictive practices which could ultimately if successful exclude psychologists by making it too expensive for subscribers to consult them. So that we believe that if the court has to harmonize any kind of restriction rule at all on the language of Section 4 of the Clayton Act, as per Brunswick, it simply should be that we shouldn't allow an antitrust plaintiff to go forward as possibly in Brunswick where actually the recovery of damages would tend to defeat competition rather than promote it.

Here, by making her whole and making the defendants stop their practice of refusing to pay her, we also encourage competition, and in that light, she certainly should be allowed to go forward.

Now, I want to just very quickly speak to the McCarren-Ferguson Act exemption. We allege a boycott. That is sufficient under Barry to proceed. More importantly, even if the business of insurance was an issue here, it certainly cannot come up on a motion to dismiss. There is nothing in McCready's complaint that talks about underwriting of risk, distribution of risk, or insurance contracts, and if -- under Royal Drug, if the defendants want to demonstrate that their decision, which we say was simply an antitrust conspiracy, was in fact an insurance decision, they have the affirmative obligation of proving that in a plenary proceeding. There is nothing in the complaint that allows them to even make that argument.

Therefore, the McCarren-Ferguson Act exemption is not properly before this Court.

For all of these reasons, we think the case must be --

QUESTION: Well, we did grant certiorari on the question, didn't we?

MR. FURR: Well, Your Honor, the certiorari

grant was not, as I understand it, confined to any issue. Both of the issues have been raised, as I recall.

QUESTION: Yes.

MR. FURR: So the certiorari grant was not defined in that respect.

QUESTION: Well, but both questions were stated in the petition.

MR. FURR: That's correct, Your Honor.

QUESTION: And we just granted the petition.

MR. FURR: That's right, Your Honor, and we think, insofar as the grant did deal with the McCarren-Ferguson Act, it is improvident --

QUESTION: You are suggesting it was an improvident grant of certiorari --

MR. FURR: That't right, Your Honor.

QUESTION: -- on the second question.

MR. FURR: That's right. That's correct, Your Honor. That would be the position we would take.

Thank you very much.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Bell?

ORAL ARGUMENT OF GRIFFIN B. BELL, ESQ.,
ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. BELL: About two minutes, if it please the Court. On the motion to dismiss, the idea of a motion

to dismiss, counsel opposite says we ought to have a full-scale hearing. As I understand the administration of the judicial process, courts decide cases like Brunswick to teach lower courts and lawyers how to handle complicated matters. Now, if our case does fit into Brunswick, then we would be entitled to a judgment of dismissal.

That gets down to just one real -- one issue. There is only one thing dividing us, as I understand the argument. We both -- he -- The argument is that -- Mrs. McCready's argument, that you have to have an antitrust violation and causation. That is all you have to allege. I say that Brunswick teaches one other step, one other factor. You have an antitrust violation, and then you have to have a sector or market in which competition is injured.

Now, that is said in Brunswick. It says there that antitrust laws are designed to protect competition, but not competitors. Now, the competition, it is without doubt in this case that the competition injured is between the psychiatrists and the clinical psychologsits, so you have to have causation that relates to that, to that area, so you have to define that area.

QUESTION: General Bell, may I ask a question

on that? I have been thinking about this, after the question I asked your opponent. Supposing -- it is kind of hard to think through the case with the insurance in it. Supposing the doctors had gotten together and said, we are going to boycott the banks in order to get the banks to refuse to do business with the psychologists in order to drive them out of business, and they were successful, and some banks lost business as a result of the boycott. Now, they are aiming at the psychologists, but they hurt the banks in accomplishing their objective. Would they be covered or not?

MR. BELL: Well, they might be, because the way you describe it, they both are subject -- the subject matter of the boycott, the bank and the psychologist.

QUESTION: But his theory, as I understand it, in his colloquy with Justice White, is that, well, they are refusing to pay benefits to people who do business with the psychologists that we want to put out of business.

QUESTION: It is their claim to the insurance company that is denied. They pay the provider, and they put in their claim to the Blue Cross and they get turned down.

MR. BELL: They got turned down on the grounds

that they were not physician services. That is not outside the --

QUESTION: That is pretty --

MR. BELL: That's in their complaint. They say that the plan is a plan under which payment for psychological services are made when those services are rendered by a physician. That was the plan in which she was a subscriber through the county, but on the example Justice Stevens just gave, it is sort of typical of this area of the law. On the landlord question, I finally decided that all those cases fitted into something you would call derivative. They are derivative rights. The shareholders, landlords, creditors, and this case almost is a derivative case. I have not argued that, but she is a policyholder under this plan, and she is almost in the shape of a derivative right, but you can't decide this case under any sort of a magic of what has been held in a lot of other cases. It is sort of, I'd say -- each case has to go on its own. You have to have some general principles, and I think those three factors that I just gave are the factors, and not the two that my opposition argues for. One is a general tort and the other one is an antitrust type tort.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:13 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

BLUE SHIELF OF VIRGINIA ET AL., vs. CAROL McCREADY # 81-225

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BY Diane Hammond