formulated by the other circuits.[92]

Hunter does not attempt to completely eliminate case-by-case analysis. In the area of analyzing the reasonableness of fourth amendment searches, the delicate balance between the interests of the state and the rights of the individual will sway one way or the other on the facts of the particular case. Yet, in the final analysis, the labeled, articulated standard does serve a useful purpose. Strip searches, even when conducted by professionals, are humilating and degrading. In order to preserve the integrity of the concept that "one's anatomy is draped with constitutional protection,"[93] the existence of an explicit, labeled standard enforces the premise that a higher level of scrutiny will be used by courts when confronted with a strip search.[94]

In remanding the case, the Eighth Circuit did offer Iowa prison officials some alternative suggestions for controlling prison visits when only a "mere suspicion" exists that a visitor may attempt to smuggle contraband.[95] At relatively little cost, visits could be carried on while the parties were seated across from one another at wide tables with glass partitions, and telephones for private communicatons between prisoners and visitors could be provided.[96] Beyond these suggestions, the court left the specifics to prison officials, stating that it was not the court's function to become too involved in matters of prison administration or security.[97] The end result of this decision, however, was that the security interests of the state were protected while the fourth amendment rights of the visitors to be free from strip searches, absent a reasonable suspicion that they will attempt to smuggle contraband, were maintained.

Thomas J. McCann

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92. *See supra* note 8 and accompanying text. Of the remaining federal circuits, the Tenth and Third Circuits have adopted the "real suspicion" standard. *See* United States v. Fitzgibbon, 576 F.2d 279, 284 (10th Cir.), *cert. denied*, 439 U.S. 910 (1978); United States v. Diaz, 503 F.2d 1025, 1026 (3d Cir. 1974). The First Circuit has gone so far as to apply the underlying concepts of the "reasonable suspicion" test as a starting point, but described the analysis in *Afanador* as being "indefinite." United States v. Wardlaw, 576 F.2d 932, 934 (1st Cir. 1978).

93. United States v. Afanador, 567 F.2d at 1331.

94. 672 F.2d at 676.

95. *Id.*

96. *Id.*

97. *Id.*

ANTITRUST—A GROUP HEALTH PLAN SUBSCRIBER WHO RECEIVES THE SERVICES OF A PSYCHOLOGIST SUFFERS AN ANTITRUST INJURY PREDICATED UPON THE PLAN'S FAILURE TO REIMBURSE THE SUBSCRIBER FOR THE COSTS OF SUCH TREATMENT, AND THEREFORE HAS STANDING TO MAINTAIN A TREBLE DAMAGE ACTION UNDER SECTION 4 OF THE CLAYTON ACT. *Blue Shield of Virginia v. McCready*, (U.S. Sup. Ct. 1982).

Carol McCready was insured pursuant to a group health plan issued by Blue Shield of Virginia.[1] According to the plan, subscribers were partially reimbursed for costs incurred with respect to outpatient psychotherapy treatments provided by psychiatrists but not clinical psychologists, unless the psychologist's treatments were billed through and supervised by a medical doctor.[2] After being treated by a clinical psychologist, McCready submitted claims to Blue Shield which were routinely denied[3] because the treatments "had not been billed through a physician."[4] McCready brought a class action suit[5] in federal district court alleging that the defendants[6] had engaged in an unlawful conspiracy to exclude psychologists from receiving compensation under the Blue Shield plan, in violation of section 1 of the Sherman Act.[7] McCready also alleged that the failure to reimburse her was in furtherance of the conspiracy and that she had sustained injury to her property for which she was entitled to treble damages pursuant to section 4 of the Clayton Act.[8]

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1. Blue Shield of Virginia v. McCready, 102 S. Ct. 2540, 2543 (1982).

2. *Id.*

3. McCready v. Blue Shield of Virginia, 649 F.2d 228, 230 n.4 (4th Cir. 1981). McCready was inadvertently paid $128.00 for one claim submitted for psychological services. *Id.* Blue Shield attempted to obtain a refund when the error was discovered. *Id.*

4. Blue Shield v. McCready, 102 S. Ct. at 2543.

5. *Id.* The class consisted of "all Blue Shield subscribers who had incurred costs for psychological services since 1973 but who had not been reimbursed." *Id.*

6. McCready v. Blue Shield, 649 F.2d at 229. Also named as defendants were Blue Shield of Southwestern Virginia, Medical Services of the District of Columbia, and the Neuropsychiatric Society of Virginia. *Id.* The Virginia Academy of Clinical Psychologists had filed a similar claim against these same defendants. *See Virginia Academy of Clinical Psychologists v. Blue Shield of Viriginia, 624 F.2d 476 (4th Cir. 1980).*

7. 15 U.S.C. § 1 (1976). That section provides, in relevant part: "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 . . . ." *Id.*

8. Blue Shield v. McCready, 102 S. Ct. at 2544. Section 4 of the Clayton Act states:

> 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 (Supp. IV 1980).

The district court dismissed the complaint on the ground that McCready lacked the requisite standing to maintain such an action.[9] The court determined that the injury which she allegedly sustained was "too indirect and remote" to be considered an antitrust injury.[10] The court of appeals reversed, and in a split decision held that McCready had alleged an injury within the meaning of section 4 of the Clayton Act and, therefore, did have standing to bring the action.[11] The United States Supreme Court granted certiorari and *held*, affirmed.[12] A group health plan subscriber who receives the services of a psychologist suffers an antitrust injury predicated upon the plan's failure to reimburse the subscriber for the costs of such treatment, and therefore has standing to maintain a treble damage action under section 4 of the Clayton Act. *Blue Shield of Virginia v. McCready*, 102 S. Ct. 2540 (1982).

The *McCready* Court was faced with a case of first impression involving the difficult question of when a plaintiff will be granted standing to commence an antitrust treble damage action. In addition to addressing the specific question of whether Carol McCready had such standing, the Court was confronted with a broader issue concerning the proper application of the "so-called standing requirement of [section] 4 of the Clayton Act."[13] Prior to this decision the Supreme Court had offered no real direction to the lower courts with respect to determining the availability of the section 4 remedy.[14] In holding that McCready did have the requisite standing, the Court has sought to provide the lower courts with at least adequate guidance,[15] such that now there may be judicial unity in granting section 4 standing.

Underlying the majority's analysis in *McCready* was the importance of the original purpose of antitrust legislation. The Sherman Act was created in order to protect against monopolies and other conspiracies in restraint of trade.[16] In order to further enhance consumer welfare, Congress enacted section 4 of the Clayton Act as a statutory basis for private antitrust litigation.[17] The *McCready* Court noted that by enacting section 4, "Congress sought to create a private enforcement mechanism that would deter [anti-

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9. Blue Shield v. McCready, 102 S. Ct. at 2544.
10. McCready v. Blue Shield, 649 F.2d at 230.
11. *Id.* at 232.
12. Blue Shield v. McCready, 102 S. Ct. at 2545, 2552. In a 5-4 decision, the majority opinion was delivered by Justice Brennan, who was joined by Justices White, Marshall, Blackmun and Powell, *Id.* at 2542, 2552. Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger and Justice O'Conner joined. *Id.* at 2552. Justice Stevens filed a separate dissenting opinion. *Id.* at 2555.
13. Alioto & Donnici, *Standing Requirements for Antitrust Plaintiffs: Judicially Created Exceptions to a Clear Statutory Policy*, 4 U.S.F.L. Rev. 205, (1970).
14. Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809, 810 (1977).
15. *Id.*
16. 1 P. Areeda & D. Turner, Antitrust Law § 302 (1978).
17. *Id.* at § 303.

trust] violators and deprive them of the fruits of their illegal actions . . . ."[18] By allowing section 4 standing to a party who had sustained an injury by reason of an antitrust violation, Congress hoped to "provide ample compensation to the victims" of such illegal activity.[19] Additionally, Congress sought to make the antitrust laws self-enforcing by deterring violations.[20]

In arriving at its decision, the *McCready* Court looked first to the actual language of section 4.[21] The majority noted that section 4 of the Clayton Act " 'contains [very] little in the way of restrictive language.' "[22] Section 4 provides "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained . . . ."[23] The *McCready* Court recognized that this lack of restrictive language "reflects Congress' 'expansive remedial purpose' in enacting [section] 4," and consistent with this legislative intent, the Court refused to "engraft artificial limitations" with regard to the section 4 remedy.[24] Thus, the majority stated that it would apply section 4 "in accordance with its plain language and its broad remedial and deterrent objectives."[25]

Prior to its application of the statute to the facts in *McCready*, however, the majority found it necessary to acknowledge the existance of genuine limitations regarding the availability of the treble damage remedy.[26] Those limitations include the danger of possible duplicative recovery, the relationship of the injury sustained to the alleged antitrust violation, and considerations regarding the type of injury against which the antitrust statutes were intended to protect.[27] These limitations formed the framework of the Court's analysis regarding the issue of whether McCready would be enti-

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18. 102 S. Ct. at 2545.

19. *Id.*

20. Comment, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570, 571 (1964).

21. 102 S. Ct. at 2545.

22. *Id.* (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979)).

23. 15 U.S.C. § 15 (Supp. IV 1980). Congressional history indicates that the term "any person" was intended to have a "naturally broad and inclusive meaning." *See* Pfizer, Inc. v. Government of India, 434 U.S. 308, 312 (1978). The *Pfizer* opinion noted that "[t]here was no mention in the floor debates of any more restrictive definition." *Id.* The Supreme Court has previously considered the meaning of "business or property" in *Reiter v. Sonotone Corp.*, 442 U.S. at 339. The *Reiter* Court held that "[a] consumer whose money has been diminished by reason of an antitrust violation has been injured in his property within the meaning of [section] 4" of the Clayton Act. *Id.* Additionally, the Court has stated that "[t]he [Clayton] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948).

24. 102 S. Ct. at 2545.

25. *Id.*

26. *Id.*

27. *Id.* at 2546, 2548.

tled to the section 4 remedy.

The Court began its analysis by examining whether there existed the possibility of subjecting Blue Shield to a double recovery if McCready were granted standing.[28] Noting that the task of "disentangling overlapping damages claims" should not be imposed lightly on the judicial system,[29] the Court discussed two prior decisions which dealt with the policy considerations against double recovery.[30] In *Hawaii v. Standard Oil Co.*,[31] the Court denied antitrust standing to the State of Hawaii and held that the State could not sue for damages to its general economy allegedly resulting from an unlawful antitrust conspiracy.[32] Since section 4 allows a private citizen to maintain the treble damage action, the Court was concerned that allowing the State to have standing might subject the defendants to duplicative adverse judgments.[33] The same policy concerns were expressed in *Illinois Brick Co. v. Illinois*,[34] where the Supreme Court deemed the danger of a double recovery against an antitrust defendant to be an unacceptable risk.[35]

The *McCready* Court properly determined that, under the facts of the case, the risk of duplicative adverse judgments against Blue Shield was not of immediate concern.[36] McCready had already paid her psychologist for the costs of the treatments she received.[37] Consequently, the psychologist could make no claim against Blue Shield and thus there was no possibility of subjecting Blue Shield to "duplicative exaction."[38] Additionally, the Court discounted any possibility of an adverse effect on Blue Shield resulting from any action against them on the part of McCready's employer, since it was the employee subscribers, and not the employer purchaser, who were injured by the antitrust violations.[39]

The Court then turned its analysis to what is perhaps the most distinct and critical limitation regarding the availability of antitrust standing: whether a party's injury is too remote to allow section 4 standing.[40] Once again, the Court acknowledged the unrestrictive language of section 4 and

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28. *Id.* at 2546.
29. *Id.* at 2547, n.11.
30. *Id.* at 2546-47.
31. 405 U.S. 251 (1972).
32. *Id.* at 226.
33. *Id.*
34. 431 U.S. 700 (1977). The *Illinois* Court refused to grant section 4 standing to an indirect purchaser of goods who allegedly sustained economic injury resulting from a price fixing conspiracy. *Id.* at 731-32. In ruling that only the direct purchaser could maintain the action the Court stated that it was "unwilling to 'open the door to duplicate recoveries' under [section] 4." *Id.* at 732 (quoting Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972)).
35. Illinois Brick Co. v. Illinois, 431 U.S. at 730-31.
36. 102 S. Ct. at 2546.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 2547.

the congressional purpose behind its enactment, but the opinion further noted that the severity of the treble damage remedy necessitated "the need for some care" in the application of section 4.[41] Thus, the Court divided its attention between two primary considerations: an examination of the injury sustained in relation to the alleged antitrust violation, and an analysis of McCready's injury to determine whether it was the type of injury Congress intended to protect against by providing the treble damage action.[42] In so doing, the Court articulated a standard for determining the availability of standing to sue in private antitrust actions.

With regard to the first of these considerations, the *McCready* majority noted that lower courts have imposed "proximate cause" requirements to test the remoteness of the injury, based upon disparate interpretations of the language in section 4 which requires that the injury complained of be caused "by reason of" an antitrust violation.[43] According to the Court, the most traditional of these "proximate cause" approaches are the "direct injury" and "target area" tests.[44]

In order to understand fully the Court's analysis in *McCready*, a brief examination of one of the fountainhead cases regarding the rather restrictive "direct injury" test may be helpful. In *Loeb v. Eastman Kodak Co.*,[45] the Third Circuit Court of Appeals denied section 4 standing to an employee/shareholder of a photographic supply house that was forced out of business as a result of illegal antitrust conduct.[46] Finding that the alleged violation was directed at the corporation and not at the individual stockholders, the *Loeb* court stated that the plaintiff's injury as a shareholder was "indirect, remote and consequential."[47] The Ninth Circuit reached an analogous result in *Conference of Studio Unions v. Lowe's, Inc.*[48] The *Lowe's* court held that in order for a plaintiff to be granted antitrust standing, "[h]e must show

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41. *Id.* at 2549. The majority stated that "[i]t is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *Id.* at 2547.

42. *Id.* at 2548.

43. *Id.* at n.13, n.14.

44. *Id.* at n.14.

45. 183 F. 704 (3rd Cir. 1910). *See also* Ames v. American Telephone & Telegraph Co., 166 F. 820 (C.C.D. Mass. 1909). In this action by a shareholder against the defendant corporation, the only injury alleged was to the corporation itself. *Id.* at 821-22. The court held that a general assertion that the plaintiff had been injured in his business or property was insufficient as an allegation of injury to the plaintiff as distinguished from the alleged injury sustained by the corporation. *Id.* at 821-24.

46. Loeb v. Eastman Kodak Co., 183 F. at 705.

47. *Id.* at 709.

48. 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). In *Lowes*, an antitrust action was brought by the employees of a business which was effectively destroyed as a result of the defendants' illegal conspiracy. *Id.* at 52. Since the action was brought by employees of the injured competitor and not by the competitor directly, the court dismissed the action because the plaintiffs had only incidentally been injured. *Id.* at 54.

that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry."[49] Therefore, according to these decisions, only a party who has been "directly" injured by an antitrust violation can be granted section 4 standing.

Blue Shield took the position that McCready could not be granted standing because her injury was too "incidental and remote" from the alleged antitrust violation.[50] The rationale for this argument was that because the alleged conspiracy was directed at psychologists, they would be the only persons entitled to section 4 standing.[51]

The *McCready* Court interpreted Blue Shield's "remoteness" argument as being more consistent with the "target area" test used by several of the circuit courts.[52] The "target area" approach is virtually analogous to a proximate cause analysis in that it requires a plaintiff to be actually within the target area of the antitrust violation.[53] According to the rule of this test, standing cannot be granted to a plaintiff who has only been incidentally injured; thus "the bystander who has hit but not aimed at"[54] will not be able to recover in a treble damage action.[55]

In support of its argument, Blue Shield relied on the decision in *Calderone v. United Artists*[56] where the Second Circuit Court of Appeals refused to grant standing to a non-operating landlord of several motion picture theatres who had sought to recover for injuries allegedly caused by an illegal conspiracy to restrain trade in the distribution of motion pictures.[57] The facts were somewhat parallel to the situation in *McCready*. In *Calderone* the alleged conspiracy was admittedly aimed at competing movie distributors and not at the plaintiff,[58] just as Blue Shield's alleged conspiracy was aimed at excluding psychologists from the psychotherapy market rather than at the individual group health plan subscriber.[59] In determining that the non-operating landlord lacked section 4 standing, the *Calderone* court noted that the only relevant factor to consider was whether or not the plaintiff was the "target" of the illegal conspiracy.[60] The fact that the injury derived from or was incidental to the antitrust violation was "legally

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49. *Id.* at 54-55.
50. Blue Shield v. McCready, 102 S. Ct. at 2548.
51. *Id.*
52. *Id.* The Court noted that "[i]n so arguing, petitioners [Blue Shield] advert to the 'target area test' of antitrust standing that prevails in the First, Second, and Fifth Circuit Courts of Appeals." *Id.* at n.14.
53. Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 363 (9th Cir. 1955).
54. *Id.*
55. *Id.*
56. 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).
57. *Id.* at 1296.
58. *Id.* at 1294.
59. Blue Shield v. McCready, 102 S. Ct. at 2544.
60. 454 F.2d at 1296.

immaterial."[61]

The majority in *McCready* rejected Blue Shield's argument almost summarily, holding that the availability of the section 4 remedy was not dependent upon the "specific intent of the conspirators."[62] The Court stated that the treble damage remedy could not be restricted to psychologists merely because they were the actual target of the conspiracy.[63] The majority correctly pointed out that denying reimbursement to subscribers was a "necessary step in effecting the ends of the illegal conspiracy,"[64] and thus, the injury suffered by McCready was "clearly foreseeable."[65]

Although several lower courts have held that section 4 standing may be granted if the plaintiff's injury was a foreseeable consequence of the antitrust conspiracy,[66] the *McCready* decision represents an acknowledgment and endorsement by the Supreme Court of the adoption of a more expansive approach with respect to the availability of the treble damage remedy. Implicit in the Court's position is the notion that both the direct injury and target area concepts are too restrictive. The majority stated that the target area analysis is "no less elusive than that employed traditionally . . . with respect to the matter of 'proximate cause.' "[67] The opinion further asserted that "the principal of proximate cause is hardly a rigorous analytical tool."[68]

In addition to arguing that McCready's injury was too remote, Blue Shield also urged that section 4 standing must be limited to members of the market against whom the conspiracy would have the most direct anti-competitive effect.[69] In so arguing, Blue Shield claimed that if section 4 standing were available to anyone other than the direct competitors of the conspirators, then the only other party entitled to such standing would be McCready's employer, since it was the purchaser of the group health plan.[70] In rejecting this argument, the Court implied that Blue Shield's contention was misdirected because it was based on an improper understanding of McCready's complaint.[71] The claim was based on the plan's failure to reimburse McCready for psychological services and not on allegations of re-

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61. *Id.*

62. 102 S. Ct. at 2548. The Court stated, "[w]e do not think that because the goal of the conspirators was to halt encroachment by psychologists into a market that physicians and psychiatrists sought to preserve for themselves, McCready's injury is rendered remote." *Id.*

63. *Id.*

64. *Id.* at 2549.

65. *Id.*

66. *See* South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 418-19 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966).

67. Blue Shield v. McCready, 102 S. Ct. at 2548.

68. *Id.* at n.13.

69. *Id.* at 2549. Blue Shield's contention was that section 4 standing was not "available to McCready because she was not an economic actor in the market that had been restrained." *Id.*

70. *Id.*

71. *Id.*

straint in the group health plan market.[72] The majority cogently stated that as a consumer of psychotherapy services who had been denied reimbursement, McCready was clearly an actor in that part of the economy which would be adversely affected by the illegal conspiracy.[73]

Having concluded that McCready was within that part of the economy endangered by the conspiracy and that her injury was not too incidental or remote, the Court addressed the final issue of whether McCready's injury was of the type that Congress sought to protect against by providing the section 4 remedy.[74] In an argument supported by the dissent,[75] Blue Shield postulated that McCready had not suffered this type of antitrust injury because her damages did not "reflect the 'anti-competitive' effect of the alleged boycott" against psychologists.[76]

In support of this argument, Blue Shield relied heavily on language from the Court's previous decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[77] The *Brunswick* Court denied antitrust standing to a plaintiff who had alleged that the defendant had violated section 7 of the Clayton Act[78] by creating a monopoly in the bowling industry.[79] The Court stated that in order to recover treble damages, a plaintiff must prove that he sustained an "antitrust injury" which was one that flowed from the unlawful character of the defendants' acts and which reflected the anti-competitive effect of the challenged violation.[80] Since the plaintiff in *Brunswick* had not met this burden of proof, the Court determined that the injury complained of was not the type that the Clayton Act was intended to redress.[81]

The majority in *McCready* agreed that *Brunswick* embraced "the gen-

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72. *Id.* The majority noted that McCready's claim was "premised on a concerted refusal to reimburse under a plan that was . . . purchased . . . by her employer for her benefit." *Id.*

73. *Id.* The Court stated, "we think it clear that McCready was 'within that area of the economy . . . endangered by [that] breakdown of competitive conditions' resulting from Blue Shield's selective refusal to reimburse." *Id.* (quoting *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 129 (9th Cir. 1973)).

74. Blue Shield v. McCready, 102 S. Ct. at 2549. The Court stated "[w]e turn finally to the manner in which the alleged injury reflects Congress' core concerns in prohibiting the antitrust defendants' course of conduct." *Id.*

75. *Id.* at 2554(Rehnquist, J., dissenting). *See infra* note 87 and accompanying text.

76. *Id.* at 2550.

77. 429 U.S. 477 (1977).

78. 15 U.S.C. § 18 (1976). The respondents also alleged a price fixing scheme in violation of section 1 of the Sherman Act, but this allegation was withdrawn prior to trial. Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 480, n.3.

79. *Id.* The defendant/petitioner in *Brunswick* was a manufacturer of bowling equipment who acquired the operations of two hundred twenty-two bowling centers, making it the largest operator of bowling centers in the country. *Id.* at 479-80. The plaintiff/respondents were operators of three competing centers who, in a somewhat "novel" argument, claimed that they sustained lost income because the bowling centers in question would have gone bankrupt had they not been acquired by the petitioner. *Id.* at 480, 490.

80. *Id.* at 490.

81. *Id.* at 490-91.

eral principal that the treble-damages recoveries should be linked to the pro-competition policy of the antitrust laws."[82] The Court found, however, that the *Brunswick* decision was not so limiting as to exclude McCready's injury from redressability.[83] The Court also stated that in order to recover treble damages, a section 4 plaintiff was not required to "prove an actual lessening of competition . . . ."[84] The majority held therefore, that it was "plain that McCready's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws."[85]

Justice Rehnquist disagreed with the majority's reasoning, finding it to be inimical to the Court's holding in *Brunswick*.[86] His dissent stressed that McCready had alleged "no anti-competitive effect upon herself," nor did she allege that the conspiracy had adversely affected either the availability or the price of the services she received.[87] In response to this argument, and in support of its determination, the majority noted that McCready had charged Blue Shield with a "purposefully anti-competitive scheme," and that she sought damages sustained as a result of "Blue Shield's attempt to pursue that scheme."[88] Despite the fact that she was not a direct target of the conspiracy, the Court found that the injury sustained by McCready was "inextricably intertwined" with the anti-competitive effect contemplated by Blue Shield when it conspired to exclude psychologists from the psychotherapy market.[89]

Justice Rehnquist rejected this assertion and accused the Court of utilizing conclusory labels in a situation where actual analysis was required.[90] Stating that analysis was most important in the area of antitrust law, the dissent argued that the Court had "failed to provide any sort of reasoned basis for its decision."[91] Justice Rehnquist maintained that a person may not have section 4 standing simply because he had suffered an injury "as a necessary step in effectuating a conspiracy to place third parties at a competitive disadvantage."[92] Thus, the Rehnquist dissent concluded that McCready should have been denied standing because she did not "show that the challenged practice [was] illegal with regard to its effect upon her."[93]

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82. Blue Shield v. McCready, 102 S. Ct. at 2550.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 2552(Rehnquist, J., dissenting).
87. *Id.* at 2554.
88. *Id.* at 2550-51.
89. *Id.* at 2551.
90. *Id.* at 2555(Rehnquist, J., dissenting).
91. *Id.*
92. *Id.* at 2553.
93. *Id.* at 2554. Justice Rehnquist also stated that the risk of duplicative recovery would be obvious if McCready's injury were "truly inextricably intertwined with any injury actually

The majority termed Rehnquist's dissent as being "unrealistically narrow" with respect to its view of the type of injuries that the antitrust laws were intended to forestall.[94] The Rehnquist dissent was restrictive, in that it failed to consider adequately the relevant policy considerations which were implicit in the majority's conclusion. The narrow position of the Rehnquist dissent was inconsistent with the congressional purpose behind the treble damage remedy and the unrestrictive language of the Act itself. Arguably, the majority's analysis of *Brunswick* may have been cursory, but the Court's holding was consistent with its view that the relevant policy considerations of the antitrust laws are more important than existing precedent.[95] In that regard, the Court's analysis resulted in a logical determination.

Justice Stevens, in a separate dissent, argued that there was "no basis for concluding that [McCready] [had] suffered an injury to her property by reason of the alleged antitrust violation."[96] Stevens contended that as a subscriber of the health plan, McCready was fully aware of the plan's exclusion of psychologists.[97] Accordingly, McCready could exercise one of several options available to her, such as foregoing treatment altogether, seeing a psychiatrist, or, if she desired, seeing a psychologist and not being reimbursed.[98] Since McCready made the decision as to the type of treatment she desired and therefore was presumably aware that Blue Shield would not reimburse her, Stevens concluded that her injury was not caused by reason of the conspiracy to exclude psychologists from the psychotherapy market.[99]

Justice Stevens' dissent was unresponsive to the majority's holding and superficial in terms of its analysis. In arguing that McCready made the decision of seeing a psychologist with the knowledge that she would not be reimbursed, the Stevens dissent failed to recognize the gravaman of McCready's complaint. The substance of her claim was that Blue Shield had diminished the choices available to consumers of psychotherapy services, due to the prohibitive nature of the conspiracy.[100] McCready alleged that she had been injured because the failure to reimburse her was in furtherance of the attempt to restrain trade and exclude psychologists from the psychotherapy

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suffered by the psychologists . . . ." *Id.* at 2555, n.8.

94. *Id.* at 2551, n.21. The majority also stated that the dissent "offers not the slightest hint . . . to help in determining what kinds of injury are not amenable to [section] 4 redress." *Id.*

95. 102 S. Ct. at 2551. The Court stated that "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 [section] 4 for the injury she claims." *Id.* at 2551, 2552(emphasis added).

96. *Id.* at 2557(Stevens, J., dissenting).

97. *Id.* at 2556.

98. *Id.*

99. *Id.* at 2556-57.

100. *Id.* at 2544.

market.[101] As the majority noted, the essence of the conspiracy was to compel subscribers "to choose between visiting a psychologist and forfeiting reimbursement or receiving reimbursement by foregoing treatment by the practitioner of their choice."[102] By forcing McCready to make this determination, the conspiracy had the obvious effect of restricting consumer choice.

The immediate practical result of the *McCready* decision is that group health plan subscribers may have standing to maintain a treble damage action in an attempt to redress injuries sustained under similar circumstances.[103] In addition to this practical result, however, *McCready* represents a more expansive view regarding the availability of antitrust standing. Indeed, by holding that standing may be granted to one who suffers an injury as the "necessary step in effecting the ends of an antitrust conspiracy,"[104] the Court has seemingly added a new dimension to the treble damage remedy. In making its determination, the *McCready* Court has resolved differences and redefined standards concerning the application of section 4 in the lower courts. By so doing, the Court may have finally paved the way for judicial unity, as well as predictability for litigants, regarding the availability of section 4 standing in a manner that should serve to alleviate some of the complexities that seem to be inherent in antitrust litigation.

Additionally, the *McCready* decision reflects the Court's continued concern regarding section 4 standing, given the severity of the treble damage remedy. The majority acknowledged that a line must be drawn somewhere, but recognized that such a distinction cannot be made in total disregard of the policy which supports the existence of section 4.[105] Critics may describe the Court's decision as being a value judgment rather than a precise legal analysis.[106] Nevertheless, in holding that McCready's injury was "precisely 'the type of loss that the claimed violations . . . would be likely to

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101. *Id.*

102. *Id.* at 2551.

103. The group health plan issued by Blue Shield of Iowa makes no provisions for reimbursing subscribers for the cost of treatments rendered by psychologists. *See* Blue Shield of Iowa U.C.R. Subscriber's Certificate, form number BSC-22(1-80). The Iowa legislature has not required group health plans to reimburse subscribers for the services of psychologists. The applicable Iowa statute makes mention only of the services which are provided by physicians, surgeons, dentists and podiatrists. IOWA CODE § 514.1 (1981). In an official opinion the Attorney General of Iowa has determined that physical therapists may not be directly reimbursed for their services by either a hospital or a medical service corporation created under Chapter 514. *See* Op. Att'y General, March 26, 1979. Based on Chapter 514 and the aforementioned attorney general's opinion, the logical inference is that psychologists may not be reimbursed directly for their services, at least under current Iowa law.

104. Blue Shield v. McCready, 102 S. Ct. at 2549.

105. *Id.* at 2545.

106. *Id.* at 2555(Rehnquist, J., dissenting).

cause,' "[107] the *McCready* majority maintains a logical position which "falls squarely within the area of congressional concern."[108]

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107. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 489 (quoting Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125 (1969)).

108. 102 S. Ct. at 2551.

PROBATE—FEDERAL COURTS HAVE SUBJECT MATTER JURISDICTION TO DECIDE CASES INVOLVING ACTIONS AGAINST EXECUTORS OF ESTATES FOR MISMANAGEMENT OF TRUST ASSETS.—*Hamilton v. Nielsen* (7th Cir. 1982).

Defendants, Arthur C. Nielsen, Jr. and American National Bank and Trust Company, were named as coexecutors in the will of Milton J. Hamilton, who died on October 16, 1972.[1] The decedent left an estate worth approximately $2.5 million, the bulk of which consisted mainly of shares of stock in two brokerage insurance companies.[2] While acting in their fiduciary capacity as coexecutors of the estate, the defendants were directed to pay all federal and state death taxes, all cash bequests, and the costs of administrating the estate.[3] After all of the costs were distributed, the remainder of the estate was to be placed in a trust for the benefit of the decedent's five children.[4] The will subsequently was probated in the county circuit court, which discharged both executors on December 20, 1977, after approving their final accounting.[5]

On the day before the executors were discharged by the circuit court, plaintiff, one of the decedent's children, filed a suit in the United States District Court for the Northern District of Illinois, alleging that the defendants had breached their fiduciary duty in handling the estate's assets during a period of declining market values.[6] The district court held that the defendants had not breached their duty and decreed that the attorneys' fees for defending the action were to be paid out of the plaintiff's share of the trust.[7] Plaintiff appealed the decision to the United States Court of Appeals for the Seventh Circuit.[8] The Seventh Circuit *held*, affirmed in part and

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1. Hamilton v. Nielsen, 678 F.2d 709 (7th Cir. 1982).

2. Hamilton v. Nielsen, 513 F. Supp. 204 (N.D. Ill. 1981), *aff'd in part, vacated and remanded in part*, 678 F.2d 709 (7th Cir. 1982). The primary assets of Mr. Hamilton's estate consisted of 58,718 shares of stock in Frank B. Hall and Company, 31,680 shares of stock in Zenith United Corporation, plus a nontransferable option to purchase an additional 9,375 shares of Zenith United Corporation at $2.72 per share on or before December 27, 1972. *Id.* at 205.

3. Hamilton v. Nielsen, 678 F.2d at 709.

4. *Id.* at 709-10. Plaintiff, Susan Kemper Hamilton, was one of the decedent's children for whom the trust had been established. *Id.*

5. *Id.* at 710.

6. *Id.* During the period from Mr. Hamilton's death until the estate was closed, the market value of the shares of stock in both Frank B. Hall and Company and Zenith United Corporation dropped by more than fifty percent at various times. *Id.* at 711. The plaintiff primarily alleged "that the executors were negligent in exercising the option to buy" the additional shares of Zenith United Corporation and by not selling the entire amount of Frank B. Hall and Company stock in 1972 when it was selling at over $20.00 per share compared to the market price of less than $9.50 per share in 1973. *Id.*

7. *Id.* at 710.

8. *Id.* at 709.