

## AMERICAN NEEDLE'S PUZZLING CHOICE OF FORUM AND ITS CONSEQUENCES

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Over the past few decades professional sports leagues have regularly contended, in response to antitrust challenges to agreements between their members, that they should be viewed as a single economic enterprise and therefore incapable of conspiring within the meaning of Section 1 of the Sherman Antitrust Act ("Section 1").<sup>1</sup> The "single entity" defense asserts that a league and its members should be conceived of as organizationally equivalent to a partnership with geographically scattered offices or a corporation and its subsidiaries.<sup>2</sup> The contention is that although the league is comprised of separately owned teams, these clubs must cooperate as if they were a single economic undertaking for the league to operate effectively. In short, the argument is that the clubs are joint suppliers of a league product and they should be viewed as necessary collaborators that supply nothing alone.<sup>3</sup>

The consequence of accepting the single entity defense would be that the necessary "contract, combination, or conspiracy" under Section 1 would be absent.<sup>4</sup> Rather, the arrangements between league members, such as rules governing sale and relocation of franchises, would be regarded as the internal regulations of a single legal and economic body. Accordingly, league arrangements would be immune from scru-

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1. 15 U.S.C. § 1 (2012).

2. See generally Maxwell M. Blecher & Howard F. Daniels, *Professional Sports and the "Single Entity" Defense Under Section One of the Sherman Act*, 4 WHITTIER L. REV. 217 (1982).

3. See STEFAN SZYMANSKI, PLAYBOOKS AND CHECKBOOKS: AN INTRODUCTION TO THE ECONOMICS OF MODERN SPORTS 51-53 (2009); PAUL WEILER, LEVELING THE PLAYING FIELD 298-304 (2000) (the nature of the league).

4. See 15 U.S.C. § 1.

tiny under Section 1. The United States Supreme Court decisively rejected this claim in *American Needle, Inc. v. National Football League*,<sup>5</sup> a case on appeal from the Court of Appeals for the Seventh Circuit that involved a challenge to the joint management of National Football League (NFL) teams' intellectual property. Prior to *American Needle*, the lower federal courts generally rejected the single entity defense.<sup>6</sup> Instead, the predominant judicial response was to view a league as a form of joint venture with multiple firms and to apply the rule of reason in assessing the antitrust legality of agreements between league members.<sup>7</sup>

The *American Needle* dispute originated with a change in practice by the NFL's marketing arm. For more than twenty years American Needle had received a non-exclusive license from NFL Properties, the league's marketing and licensing arm,<sup>8</sup> to manufacture headwear bearing the NFL clubs' names and logos (e.g., baseball caps).<sup>9</sup> But, in 2000, NFL Properties altered its policy and granted a ten-year exclusive license to manufacture team-branded headwear to Reebok, American Needle's principal competitor.<sup>10</sup> This shift from multiple vendors led American Needle to file an antitrust suit in the Northern District of Illinois, near the company's headquarters, in which it contended that the new licensing ar-

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5. *American Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010).

6. See, e.g., *Sullivan v. Nat'l Football League*, 34 F.3d 1091 (1st Cir. 1994); Philip J. Closius, *Professional Sports and Antitrust Law: The Ground Rules of Immunity, Exemption, and Liability*, in GOVERNMENT AND SPORT: THE PUBLIC POLICY ISSUES 140, 149-53 (Arthur T. Johnson & James H. Frey eds., 1985).

7. See, e.g., *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004), *rev'd on other grounds*, 369 F.3d 124 (2d Cir. 2004); Stephen F. Ross, *Competition Law as a Constraint on Monopolistic Exploitation by Sports Leagues and Clubs*, 19 OXFORD REV. ECON. POL'Y 569, 578 (2003) (view that leagues are analogous to corporations is severely flawed; courts have rejected argument based on formal organization of leagues as unincorporated associations of separately owned teams that do not share profits or losses, the independent management of each team, and active competition among teams that would occur but for challenged restraints).

8. Founded in 1963, NFL Properties, LLC, operates as a subsidiary of National Football League, Inc. It engages in licensing and marketing of the team-owned trademarks and logos. The legality under the antitrust laws of the agreement to engage in this marketing collectively is being challenged in the *American Needle* litigation.

9. Sales of the NFL merchandise constituted approximately 25% of American Needle's annual revenues. See Allison Petty, *Illinois Company Takes on NFL in Supreme Court*, CHI. DAILY L. BULL. Jan. 12, 2010, at 1.

10. *American Needle*, 130 S. Ct. at 2205.

rangement violated Section 1.<sup>11</sup> The lawsuit, in fact, contested the legality of two related “agreements”: 1) the “agreement” among NFL members to market their intellectual property collectively rather than individually; and 2) the exclusive licensing agreement between the joint decision-maker and Reebok.<sup>12</sup>

The NFL responded to the challenge to the first of these agreements with the single entity defense. The District Court<sup>13</sup> and Seventh Circuit Court of Appeals<sup>14</sup> both accepted the single entity claim with respect to the aspect of league and team operations involving exploitation of intellectual property rights, holding that the league members’ decision to act jointly in licensing was exempt from antitrust scrutiny. Accordingly, both courts granted partial summary judgment to the NFL defendants. The Supreme Court unanimously reversed, concluding that the NFL’s licensing activities constitute concerted action that is not beyond the coverage of Section 1.<sup>15</sup>

The focus of this article is not on the correctness *vel non* of the Supreme Court decision, though we do believe the case was correctly decided. Rather we want to look at a question of litigation strategy, in particular the choice of forum by the plaintiff in the lawsuit, American Needle, and its lawyer. When assessed against the existing array of appellate court

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11. American Needle’s headquarters are located in Buffalo Grove, Illinois, approximately thirty miles northwest of Chicago. A small family-owned company with about fifty employees, its financial figures are not public. *American Needle, Inc. v. New Orleans La. Saints*, 385 F. Supp. 2d 687, 689 (N.D. Ill. 2005).

12. In fact, there were four actions taken by the league and its members that are potentially relevant to the dispute—the decision to begin collective licensing efforts, the decision to make the marketing arm, National Football League Properties, the teams’ exclusive licensing agent, the decision to offer only a blanket license, and the decision to engage with a single headwear licensee. American Needle’s construction of its claim in the lower courts was somewhat unclear as to which of these actions it was challenging. See Brief for the United States as Amicus Curiae Supporting Petitioner at 17-18, 19-20, *American Needle, Inc. v. Nat’l Football League*, 130 S. Ct. 2201 (2009) (No. 08-661).

13. *American Needle, Inc. v. New Orleans Louisiana Saints*, 496 F. Supp. 2d 941 (N.D. Ill. 2007) (NFL, NFLP, and NFL teams qualified as single entity and therefore were incapable of conspiring in violation of Sherman Act section 1).

14. *American Needle, Inc. v. Nat’l Football League*, 538 F. 3d 736 (7th Cir. 2008) (with regard to licensing of intellectual property NFL and its constituent teams constituted a single entity worthy of immunity).

15. *American Needle*, 130 S. Ct. at 2217.

decisions, that choice appears mystifying. And understanding the choice underlines the contingencies that shape decisions that, in turn, produce consequences of moment.

In assessing the plaintiff's choice of forum it is necessary to examine the procedural and substantive landscape it faced. Procedurally, the principal considerations would have been venue and jurisdiction. Examination of these topics indicates that a prospective plaintiff would have wide geographical latitude when selecting the federal district court in which to file an antitrust complaint. With respect to venue – identification of the district where an action may be properly commenced – the special venue provisions of the Clayton Antitrust Act are expansive, designed primarily for the convenience of the plaintiff by removing obstacles to the assertion of federal jurisdiction, and facilitative of private antitrust enforcement. Section 4 of the Clayton Antitrust Act (“Section 4”), which applies to actions against natural persons, corporations, and other business entities, permits an antitrust action to be filed in any district in which the defendant “resides or is found or has an agent.”<sup>16</sup>

An unincorporated association, such as the NFL, “resides” in all the judicial districts in which it is doing business and is “found” in any district where it continuously carries on any substantial part of its activities.<sup>17</sup> Among other wide-ranging activities, the NFL broadcasts its games regionally and nationally; it markets its intellectual property nationally; and it conducts labor relations on an industry-wide basis. Moreover, its thirty-two member teams play regularly scheduled games from which the league derives substantial financial benefit in twenty-three states. As a matter of practical, commercial reality,<sup>18</sup> these undertakings constitute doing business throughout much, if not all, of the country, and therefore a large number of federal district courts would be appropriate fora in which a suit might be heard.

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16. 15 U.S.C. § 15(a) (2012): “[A]ny 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 . . . .”

17. 1 JULIAN O. VON KALINOWSKI, ET AL., ANTITRUST LAWS AND TRADE REGULATION § 163.03[3][a][iii] (2d ed. 1996).

18. *See generally* United States v. Scophony Corp. of America, 333 U.S. 795 (1948).

With respect to personal jurisdiction, the general principles established in *International Shoe* and its progeny govern the assertion of judicial authority in antitrust actions.<sup>19</sup> These principles require: 1) that the defendant “have certain minimum contacts with [the forum] such that maintenance of the suit does not offend traditional notions of fair play and substantial justice;”<sup>20</sup> and 2) that the assertion of jurisdiction be fair and reasonable under the circumstances, with fairness measured by considering the burden on the defendant, the interest of the forum state, and the plaintiff’s interest in securing relief.<sup>21</sup> The NFL, as previously noted, is a national enterprise, and its widespread activities involve more than minimum contacts with an abundant number of states. Indeed, the same contacts that satisfy the venue requirements will ordinarily establish in personam jurisdiction.<sup>22</sup> Accordingly, the plaintiff could choose among an extensive array of courts in which judicial authority over the NFL would exist.

If identification of a forum that meets jurisdictional and venue requirements for suing the NFL is a fairly simple task, then picking an acceptable forum for the NFL’s member teams is even less restricted. Section 12 of the Clayton Act (“Section 12”) is broader than Section 4 as it concerns venue and service of process on corporations. Section 12 permits suits against corporations to be heard in districts where the corporation is an inhabitant, is found, or transacts business.<sup>23</sup> As with the NFL, the broadcasting, merchandising, labor, and scouting activities of the individual teams subjects them to

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19. *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

20. *Id.* at 316 (internal quotations omitted).

21. *Asahi Metal Ind. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987).

22. The courts have interpreted the special venue provisions so expansively that in antitrust cases, the issues of venue, personal jurisdiction (in the constitutional sense), and service of process have become virtually congruent. 2 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1215 (6th ed. 2007).

23. 15 U.S.C. § 22 (2012): “Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.”

As a practical matter, an individual team is unlikely to contest venue, as it has no interest in fragmenting the litigation and would prefer joint legal representation. Thus, in *American Needle*, one law firm represented all the league members, and the same law firm also represented the league.

personal jurisdiction in multiple states.

Rule Four of the Federal Rules of Civil Procedure governs service of process in antitrust litigation.<sup>24</sup> Rule Four presents no obstacle for our hypothetical plaintiff as it authorizes use of the long-arm statutes of the state in which the federal court hearing the case sits.

The substantive vista facing the plaintiff was clear and well-developed. Virtually every federal court that confronted the single-entity claim in the sports context rejected the argument that sports leagues should be treated as a single entity and that arrangements between member teams should therefore be free from scrutiny under Section 1.<sup>25</sup> More precisely, this characterization was dismissed by the Courts of Appeals for the First Circuit,<sup>26</sup> Second Circuit,<sup>27</sup> Third Circuit,<sup>28</sup> Sixth Circuit,<sup>29</sup> and Ninth Circuit.<sup>30</sup> The one and only

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24. FED. R. CIV. P. 4(e). Also, in at least some antitrust cases, Section 12 of the Clayton Act authorizes nationwide service of process on a corporate defendant. *See supra* note 23.

25. *E.g.*, Stephen F. Ross & Stefan Szymanski, *Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald's and Less Like the United Nations*, 16 MARQ. SPORTS L. REV. 213, 238 (2006) (single-entity treatment of sports leagues has been "overwhelmingly rejected").

26. *Sullivan v. Nat'l Football League*, 34 F.3d 1091 (1st Cir. 1994) (challenge to league policy against sale of ownership interest in team to public through offering of publicly traded stock); *see Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 55–59 (1st Cir. 2002).

27. *North American Soccer League v. Nat'l Football League*, 670 F.2d 1249 (2d Cir. 1982) (challenge to NFL prohibition on members investing in team in another professional sports league); *see Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 70–71 (2d Cir. 1988).

28. *Mid-South Grizzlies v. Nat'l Football League*, 720 F.2d 772 (3d Cir. 1983) (challenge to league team entry rule; rejection of qualified applicant).

29. *Nat'l Hockey Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005) (challenge to league eligibility rule limiting number of "overage" players permitted to each team).

30. *Los Angeles Mem. Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381 (9th Cir. 1984) (challenge to league team relocation rule); *see Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 113, 1148–49 (9th Cir. 2003). The Courts of Appeals for the District of Columbia and the Eighth Circuit had also implicitly indicated a lack of sympathy for the defense. *See Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183–87 (D.C. Cir. 1978) ("given the joint-venture status of the NFL clubs;" application of rule of reason to assess legality of draft); *Mackey v. Nat'l Football League*, 543 F.2d 606, 616–20 (8th Cir. 1976) (joint venture character of league calls for rejection of application of per se rules but requires assessment under rule of reason).

Without going into detail as to each court's reasoning in support of its conclusion that league arrangements—whether rules about franchise location, franchise sale, team en-

Court of Appeals that indicated some sympathy for the single-entity argument with respect to a sports league was the Seventh Circuit. While not ruling on the issue, the court demonstrated an attraction to the proposition that, at least for some purposes, a sports league could well be deemed a single entity.<sup>31</sup>

Aware that the NFL would raise the single entity defense, a prudent and unconstrained plaintiff, then, presumably would opt to file its complaint in the First, Second, Third, Sixth, or Ninth Circuits.<sup>32</sup> At a minimum, it would avoid filing in the Seventh Circuit. Yet, American Needle did just

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try, or cross-ownership—constitute concerted rather than independent action, one can say that though these courts rejected the characterization of a league as a single entity comprised of separately managed divisions and therefore incapable of forming the combination, contract, or conspiracy required by Section 1, they have understood that a league has a dual personality—in some respects it is an enterprise in its own right, but it also makes rules for its members' marketplace behavior. Therefore, courts have largely recognized that sports leagues lie in between ordinary business firms, whose collaboration is suspect, and completely integrated enterprises subject only to Section 2 of the Sherman Act. And they have also recognized that these situations require “in-between” substantive antitrust rules. 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 326-29 (2d ed. 2003). See generally Judd E. Stone & Joshua D. Wright, *Antitrust Formalism Is Dead! Long Live Antitrust Formalism! Some Implications of American Needle v. NFL*, 2009–2010 CATO SUP. CT. REV. 369 (need to tailor rule of reason to take account of the economic realities surrounding complicated, interdependent enterprises).

31. Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d 593, 598–600 (7th Cir. 1996).

32. Another prior antitrust challenge to NFL arrangements, in this case the league's draft eligibility rules, featured a similarly perplexing choice of venue by counsel. In *Clarett v. NFL*, plaintiff filed suit in the Southern District of New York. The central issue was the scope of the non-statutory labor exemption from antitrust scrutiny. The Court of Appeals for the Second Circuit reversed the district court and held that the exemption applied and shielded the NFL rules from antitrust review. *Clarett v. Nat'l Football League*, 369 F.3d 124 (2d Cir. 2004). Several elements made the choice of venue puzzling. The Second Circuit had never expressed an opinion about the reach of the non-statutory exemption whereas other Circuits, such as the Eighth Circuit, had addressed the question and articulated a standard favorable to the plaintiff. See *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976). Moreover one of the judges on the Second Circuit at the time was Ralph Winter, who, as an academic, had authored a well-known article urging a very broad reading of the non-statutory exemption, a reading that, if accepted, surely would have led to rejection of Clarett's claim. See Michael S. Jacobs & Ralph Winter, *Antitrust Principles and Collective Bargaining: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971). While the Supreme Court decision in *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996), decided subsequent to *Mackey*, governed the *Clarett* case, surely Clarett would have had a greater likelihood of success if the case had been filed in the Eighth rather than the Second Circuit.

that by commencing its action in the Northern District of Illinois. What, other than professional irresponsibility on the part of the General Counsel, might explain this decision? Assessment of the choice inevitably involves some speculation.

Let's compose a graduated set of hypotheticals and evaluate each of them. First, assume that the plaintiff's attorney was unaware of the legal landscape because his research of the relevant federal case law was inadequate. What is the appropriate legal, professional, and moral appraisal? The ultimate question should be whether the lawyer has done what a lawyer should do in light of all relevant concerns and authorities. It is said that a lawyer has an obligation of competence.<sup>33</sup> But that reference, in fact, has two components. One element raises a question of capacity. That is, does the person generally possess the requisite knowledge, skills, and professional qualifications to competently handle a matter? The other element focuses on whether the person has handled the particular matter competently.<sup>34</sup> In our hypothetical the attorney's inquiry into and analysis of the legal aspects of the dispute, in particular the attorney's failure to ascertain readily accessible precedents, was deficient, particularly in light of what was at stake.<sup>35</sup> Not only was complex litigation involved, but also the filing decision could have resulted in a quick defeat precluding the court from hearing the claim on its antitrust merits.<sup>36</sup>

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33. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002) (competence; "a lawyer shall provide competent representation to a client"). See generally 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 3.2 (2001) ("The moral basis of [Rule 1.1] is that a lawyer's lack of 'legal knowledge and skill' almost always results from a failure to seek it.")

34. See *id.*

35. What was involved here was not a thoughtful opinion on a difficult or unsettled question that later proves wrong. Nor, presumably, was it a decision made under urgent time pressure.

36. As noted previously, see *supra* note 12, two related agreements were being contested. Summary judgment, based on the single entity argument—had it not been reversed on appeal by the Supreme Court—meant that the plaintiff would not have the opportunity to present evidence that the agreement among NFL members to jointly market their intellectual property constituted a violation of Section 1. This situation also raises the issue of when a nonspecialist attorney is obliged to either refer a case to or associate with a specialist. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. d (2000). We do not know what Jeffrey Carey, American Needle's General Counsel, told his client about his qualifications to pursue an antitrust claim, and, of course, nothing precluded him from acquiring the competence of an



Now, let's assume that the plaintiff's attorney conducted sufficient research and, as a result, was aware of the legal landscape surrounding the single entity issue, but nevertheless chose to file suit in the Seventh Circuit. Why might he have done that, and can the justifications withstand criticism? It is often stated that lawyers' tactical or strategic decisions are immune from challenge as the basis for a malpractice claim.<sup>37</sup> Lawyers are, and should be, accorded a wide range of discretion in practice technique, free of second-guessing.<sup>38</sup> But that proposition is conclusory here. That is, what makes a decision "tactical"? What qualifies as a strategic judgment? For example, what if the lawyer selected the venue for reasons of convenience? The lawyer was the General Counsel for American Needle, and the federal court in Chicago was closest to his office and corporate headquarters. Would that be deemed a tactical judgment that turned out badly, but is still shielded from scrutiny?<sup>39</sup> Hardly. Moreover, a decision based upon professional judgment can still give rise to liability as the lawyer must exercise a reasonable de-

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ordinary specialist. In fact, only Mr. Carey's name appears on all briefs filed before the trial court and the Seventh Circuit. *See generally* Complaint, Motions, and Briefs, *American Needle Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2009) (No. 08-661). The briefs submitted to the United States Supreme Court bear the names of Meir Feder, Andrew D. Bradt, David M. Cooper, Glen D. Nager, and Joe Sims, all of the firm Jones, Day, in addition to that of Jeffrey Carey. Glen Nager, an experienced appellate advocate, delivered the oral argument before the Supreme Court. *See* Supplemental Brief of Petitioner 13, *American Needle Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2009) (No. 08-661); *see also* Reply Brief of Petitioner 31, *American Needle Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2009) (No. 08-661).

37. *See* RONALD E. MALLIN ET AL., 2 *LEGAL MALPRACTICE* § 19.14 (2013) (need for an advocate's immunity from liability for judgmental errors); *see, e.g.*, *Biomet Inc. v. Finnegan Henderson L.L.P.*, 967 A.2d 662, 665-66 (D.C. 2009) (judgmental immunity—attorney not liable for choice of trial tactics or good faith exercise of professional judgment); *Puppolo v. Donovan & O'Connor, L.L.C.*, 35 A.3d 166, 172-73 (Vt. 2011) (strategic decisions, such as which expert to retain, which arguments to pursue, and whether to file a recusal motion, are within the discretion of the attorney); *Halvorsen v. Ferguson*, 735 P.2d 675, 681 (Wash. Ct. App. 1986) (generally errors in judgment or trial tactics do not subject an attorney to liability for malpractice).

38. *See, e.g.*, *Hazard & Hodes*, *supra* note 33, at §§ 3.2, 4.3 (broadly defined zone of professional discretion).

39. *Woodruff v. Tomlin*, 616 F.2d 924, 937 (6th Cir. 1980) (an attorneys failure to interview potential favorable witnesses does not constitute exercise of professional judgment but rather neglect of client's cause); MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (2002) ("A lawyer should pursue a matter on behalf of a client despite . . . personal inconvenience to the lawyer . . .").

gree of care and professional skill in reaching that decision. Put differently, characterizing a decision or recommendation as an exercise of judgment does not end the inquiry, it still leaves the question of whether that exercise was “reasonable.”<sup>40</sup>

A possible plausible explanation for a filing in the Northern District of Illinois might be that the litigation was conceived as a “test” case. That is, the plaintiff sought to secure a Seventh Circuit rejection of the single-entity argument, thereby bringing it in line with the other Circuits that had addressed the question, and, in the absence of a favorable Seventh Circuit ruling, a decision by the Supreme Court that dismissed the characterization. But there is no reason to think that such a conception was being pursued, and, if it were, the strategy would have been an extraordinarily risky one in terms of protecting the client’s interests. There is no indication that the case was funded by a set of interested parties in addition to American Needle, and there were no amicus briefs filed in support of American Needle in the appellate court. There were amicus briefs before the Supreme Court, but there is no reason to believe that any of these actors made a financial contribution to defray the costs of litigation.<sup>41</sup> More fundamentally, such a “test” case strategy would disserve American Needle’s interests. Rather than obtaining an assured district court victory on the single entity issue by filing in another circuit, this approach risked a defeat at the district court and appellate level with the additional expense involved. Moreover, the lawyer could offer no assurance that the Supreme Court would hear the case if the Seventh Circuit accepted the single-entity argument. Though a circuit split is a strong argument to present in a petition for certiorari, the Court grants a tiny percentage of these petitions.<sup>42</sup> Finally,

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40. *Gelsomino v. Gorov*, 502 N.E.2d 264, 267 (Ill. App. Ct.1986); *see also* *Ziegelheim v. Apollo*, 607 A.2d 1298, 1304 (N.J. 1992) (“If plaintiff’s expert’s opinion were credited . . . then [her attorney] very well could have been found negligent in advising her that she could expect to win only ten to twenty percent of the marital estate.”).

41. Amicus briefs in support of American Needle, the petitioner, were submitted by the player unions of the four major professional sports leagues; the American Antitrust Institute and the Consumer Federation of America; a set of economists; the NFL Coaches Association, and the United States. *See generally* *American Needle Inc. v. Nat’l Football League*, 130 S. Ct. 2201 (2009).

42. *See, e.g.*, David C. Thompson, *An Empirical Analysis of Supreme Court Certio-*

American Needle is a small, privately held company employing approximately fifty individuals.<sup>43</sup> It is not an “institutional” litigant that would benefit in other, foreseeable cases from securing greater circuit uniformity or a Supreme Court ruling. Its interest was in winning this case, and in winning it without additional, unnecessary litigation expense.

In defense of the lawyer’s action, one might claim that criticism of the filing decision is unwarranted as, after all, the case was commenced at its “natural” or “logical” location, close by the plaintiff’s headquarters, and choice of another site would have involved “forum shopping,” a practice to be discouraged. Admittedly, the judicial system has an efficiency interest in funneling cases to those locales that have a connection to either the parties or the events that gave rise to the dispute. But this interest, along with concern for the reasonableness of the forum from the defendant’s perspective, is served by the law of venue, which places geographical limitations on the plaintiff’s choice of court. And in this case, as previously noted, venue was appropriate in numerous locations outside the Seventh Circuit.<sup>44</sup> Moreover, critical reference to “forum shopping” is misplaced. What is involved here is not an attorney gaming the system by looking at and choosing among multiple state jurisdictions or by employing the “related case” designation when filing suit in order to maneuver a case before a particular judge.<sup>45</sup> Rather, enjoined to do his best for his client, the lawyer invokes a single federal law in a federal judicial system that tolerates variation and circuit

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*rari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 241 (2009) (of 8,517 petitions filed in Court’s 2005–06 Term only 78 were granted).

43. American Needle is a privately-held company; therefore financial information about its revenues and profits is not publicly available. However, the company employs approximately fifty employees, and at the time sales of NFL team products comprised 25% of its annual sales. Anna Marie Kukec, *Buffalo Grove Firm Could Change Way NFL Does Business*, DAILY HERALD (Ill.), Jan. 14, 2010, <http://www.dailyherald.com/story/?id=350779>

44. The non-Seventh Circuit district court closest to Chicago is the Western District of Michigan in Grand Rapids, which is in the Sixth Circuit and is 177 miles (and presumably three hours) northeast of Chicago.

45. See Joseph Goldstein, *Judge Lands at Center of a New York Legal Mystery*, N.Y. SUN (Dec. 3, 2007), <http://www.nysun.com/new-york/judge-lands-at-center-of-a-new-york-legal-mystery/67380> (use of related case administrative designation by plaintiffs’ lawyers to judge-shop).

splits.<sup>46</sup>

Ironically, American Needle's choice of venue ultimately produced an opportunity for the NFL, and other sports leagues, to seek national vindication of its single-entity view, an opportunity with which it would not otherwise have been presented and one it unsurprisingly embraced. When American Needle sought Supreme Court review of the Seventh Circuit's decision, the NFL, though the winning party below, supported the petition for certiorari.<sup>47</sup> This unusual step by the league reflected two considerations. First was the large potential benefit and small potential cost of a Supreme Court decision. If the league gained the Court's acceptance of the single-entity argument, the beneficial consequences would be significant as such an endorsement would probably preclude a future Section 1 challenge to any of the league's "internal" arrangements, such as its rules governing franchise entry, sale, and relocation. On the other hand, if the Court rejected the argument, as it did, the league would essentially be situated where it was before commencement of the litigation, when almost all Circuits dismissed the single-entity characterization. Second, the chance to move to the Supreme Court was exceptional and therefore to be uniquely seized in that a sophisticated and unconstrained antitrust practitioner probably would not have filed the suit in the Seventh Circuit (nor would a sophisticated future plaintiff institute suit there).

Of course, American Needle was ultimately successful in the Supreme Court, but the costs imposed by filing in the Seventh Circuit were substantial. The additional expense caused by this filing decision can be illustrated by a comparison between the likely course of the case in the Sixth and

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46. The offices of the prime parties to the litigation are situated outside Chicago (American Needle) and in New York City (NFL). Moreover, the NFL is one of the parties to the challenged agreement with Reebok. So New York, which is in the Second Circuit, would seem as "logical" a place for the litigation as Chicago.

47. See Brief for the NFL Respondents at 3-4, *American Needle Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2009) (No. 08-661) ("Although the result reached by the court below is correct . . . [the] NFL Respondents are taking the unusual step of supporting certiorari in an effort to secure a uniform rule that (i) recognizes the single-entity nature of highly integrated joint ventures. . . .") (emphasis omitted). In fact, the NFL sought an expansive holding that it, and other professional sports leagues, could not be implicated under section 1 under any circumstances whatsoever via *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

Seventh Circuits. Had the case commenced in the Sixth Circuit, the district court would have likely ruled for the plaintiff on the single entity issue. Unless the defendant could meet the onerous requirements for allowance of an interlocutory appeal,<sup>48</sup> it could not have appealed the issue immediately as it would not have been a final judgment. Whichever side won at the trial level, an appeal would have been taken. If plaintiff won the appeal on the single-entity issue, a further appeal to the Supreme Court, by grant of a petition for certiorari, would have been unlikely since there would not have been a conflict on the question among the circuit courts of appeal. In contrast, with the actual filing in the Seventh Circuit, the district court ruled for the defendant on the single entity issue, and appeals to the Seventh Circuit and the Supreme Court followed. The case was then returned to the district court for a trial. Thus, although there would still be an appeal of the single entity issue, under the second scenario, American Needle experiences two appeals to the Circuit Court of Appeals rather than one as well as an appeal to the Supreme Court. The result is a sizeable increase in litigation expenses.

In the end, the decision to file the case in the Northern District of Illinois invites one of four responses: first, the choice constitutes malpractice; second, it violates a rule of professional responsibility; third, while it constitutes neither malpractice nor an ethical misstep, it remains worthy of criticism; and fourth, the behavior was appropriate and offers no grounds for criticism. In fact—and despite what initially appeared to be the perplexing character of the selection—the fourth response is apt. A number of considerations, none worthy of disapproval, dictated the filing decision. Most critical

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48. See 28 U.S.C. § 1292(b) (2012)

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. . . .

Since the district court judge's ruling would have been consistent with precedent in the Sixth Circuit (and in all other circuits), it is highly unlikely that he, and the appellate court, would have certified an interlocutory appeal.

was a financial constraint. American Needle, a small company, was not in a position to hire outside counsel in another state and to compensate them on an hourly basis. This financial limitation comported with the determination by the company's general counsel to handle the litigation himself. The general counsel is a highly experienced attorney whose background includes years of major-city, large-firm practice. That he chose to educate and pursue the matter himself after considering hiring several antitrust plaintiffs' lawyers was not unreasonable. The other, though less central, factor in the filing decision was counsel's judgment that the facts of the American Needle case would not bring the NFL within the language of the Seventh Circuit Bulls' opinion that had indicated sympathy for the single entity defense. While that judgment may have been naive, and turned out to be mistaken, it can hardly be deemed incompetent.

Thus, this set of contingencies and exigencies explains what appears, on first glance, to be an inexplicable choice of forum. The decision resulting from these factors initiated, in turn, an expensive journey that offered the defendant a surprising, and welcome, appellate opportunity that, in the end, produced a Supreme Court antitrust precedent with implications for both professional sports and the commercial world beyond.