

A Closer Look At Deflategate's Venue Battle

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Round one of Deflategate has concluded ... it's now time for round two.

The initial battle over judicial forums between the National Football League and the [National Football League Players Association](#) to find the most favorable venue to support their legal position has ended with U.S. District Judge Richard Kyle ordering the NFLPA's petition to vacate the arbitration award rendered by Commissioner Roger Goodell to be transferred to the United States District Court for the Southern District of New York.



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Just hours after Goodell upheld the four-game suspension of [New England Patriots](#) quarterback Tom Brady, the league's management council had launched a preemptive strike against the NFLPA by filing a complaint in the U.S. District Court for the Southern District of New York, where the [NFL](#) is headquartered, seeking to confirm Goodell's "Final Decision on Article 46 Appeal of Tom Brady." (Article 46 of the NFL-NFLPA collective bargaining contract allows discipline of a player for conduct "detrimental to the integrity of, or public confidence in, the game of professional football.") The case has been assigned to Judge Richard Berman, and he already has ordered the NFLPA to respond to the NFL's filing by Aug. 13, well before the standard period to answer a complaint.

Brady and the NFLPA attempted an end run around the New York action in the historically player-friendly federal district court in Minnesota. They filed a petition to vacate Goodell's arbitration award. Relying on a history of success in this venue, Brady and the NFLPA sought to vacate Goodell's award. They were blocked, however, on Thursday when the Minnesota court said the Brady and his union must do battle with the NFL in New York in light of the league's earlier, first-filed suit.

Absent any change in the NFLPA's litigation, Brady and the NFLPA may be expected to respond to the NFL action directly, contending (as they attempted to do in Minnesota) that Goodell:

- (1) disregarded the "law of the shop" which requires NFL players to have advance notice of potential discipline,
- (2) disregarded the "law of the shop" that conduct detrimental discipline be fair and consistent,
- (3) denied Brady access to evidence and witnesses central to his appeal and his rights to a fundamentally fair hearing, and
- (4) was incapable of serving as an impartial arbitrator as a result of his handling Brady's initial discipline and appeal.

Specifically, the NFLPA asserts that there was no direct evidence of Brady's culpability cited in

the report prepared by NFL-appointed investigator, attorney Ted Wells, and his investigative team, and that Goodell's discipline was based on a "general awareness" standard created by the commissioner to justify an "absurd and unprecedented punishment". The NFLPA also asserts that no NFL player has ever served a suspension for "noncooperation" or "obstruction," as Goodell has imposed upon Brady.

The NFLPA had hoped that its action would be heard before U.S. District Judge David S. Doty, in Minneapolis. In February, Judge Doty vacated an award in the Adrian Peterson child abuse disciplinary matter when he determined that the discipline issued to Peterson was inappropriate for lack of notice and that the discipline imposed was based upon a policy that didn't exist at the time of the Peterson's alleged rule violation. But Brady's case was assigned to Judge Richard Kyle, instead, who "perceive[d] no reason for this action to proceed in Minnesota."

Here, based on its previous Minnesota claims, the NFLPA had hoped to reprise a similar argument on behalf of Brady. Now the union will be forced to assert those arguments in the NFL's selected venue. The union will assert similar arguments to U.S. District Judge Richard Berman and allege that Brady was never informed he could be punished for his refusal to turn over his cellphone to Wells and his team. It may also ask the New York court to vacate the Goodell arbitration decision before the Patriots' regular-season opener against the [Pittsburgh Steelers](#) — or issue an injunction that allows Brady to play.

The dual filings of the NFL and NFLPA presented an interesting legal issue: Which lawsuit has priority? Typically, when federal judges are faced with the issue of deciding which of two competing lawsuits filed in separate federal jurisdictions has priority, they usually invoke the first-to-file rule. While this rule is not codified, the rule is generally considered an appropriate case management mechanism within the federal system. In general, the first-to-file rule gives priority to the first action filed over the subsequent action. The general judicial interpretation of the rule gives the decision-making authority of the precedence of the first filed action to the district court judge assigned to that suit.

Federal courts have applied exceptions to the first-to-file rule if its application would create an injustice upon the party that filed the second action. One such exception that presents a strong argument against giving the first filed suit priority is the "anticipatory suit" exception. The purpose of this exception is to discourage procedurally unfair suits filed to frustrate settlement discussions, or to engage in brinkmanship, or to transform a party from defendant to plaintiff not to pursue a claim or right.

One specific rationale that supports the application of "anticipatory suit" exception is the court's pursuit of procedural fairness. This specific rationale reflects the general judicial concern that a plaintiff should not lose its choice of the forum because the defendant anticipated the impending suit and preemptively struck by filing suit first in a different court.

Here, as you can see from the separate filings made by each party, the judicial forum where the dispute will be decided is crucial and can have a significant impact on the final judicial determination. Therefore, it is critical for litigants to start analyzing and assessing proper strategy early in the process to maximize any procedural advantage that can be achieved. The NFL

effectively utilized the first-to-file rule and gained a perceived early advantage at this phase of the litigation.

Judge Kyle specifically acknowledged that the NFL's filing of the New York action "triggered application of the first-filed rule." Judge Kyle acknowledged that the rule recognizes "comity between coequal federal courts and promotes the efficient use of judicial resources by authorizing a later-filed, substantially similar action's transfer, stay or dismissal in deference to an earlier case."

Judge Kyle concluded that the actions filed in Minnesota by the NFLPA and the NFL's action filed in New York were almost duplicative and that the two cases and the issues presented in both were "flip-sides of the same coin." In conclusion, Judge Kyle stated that the "cases are part and parcel of the same whole and should be heard together in the most appropriate forum: the Southern District of New York, where the arbitration occurred, the Award issued, and the first action concerning the Award was commenced."

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