

[Securities Regulation Daily Wrap Up, TOP STORY—N.D. Ill.: Kraft argues commodities manipulation and antitrust ruling should get interlocutory review, \(Jul. 18, 2016\)](#)

Securities Regulation Daily Wrap Up

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By [Lene Powell, J.D.](#)

Kraft Foods Group and Mondelēz Global asked the Northern District of Illinois to certify three questions for interlocutory appeal arising from the court's recent ruling allowing commodities manipulation and antitrust claims to proceed against them. According to the defendants, immediate appellate review is needed because the court's decision rested on novel and unsound theories of manipulation and monopoly power unlikely to be supported by the Seventh Circuit (*Ploss v. Kraft Foods Group, Inc.*, July 15, 2016).

Alleged manipulation. In an April 2015 complaint filed in the Northern District of Illinois, the CFTC charged Kraft and Mondelēz with manipulating and attempting to manipulate the price of cash wheat and wheat futures. The CFTC alleged that the defendants caused cash wheat prices to decline, to their benefit, by taking large long futures positions in a type of wheat for which they did not have a bona fide commercial need and did not intend to take delivery.

Shortly after the CFTC brought its complaint, plaintiff Harry Ploss and other commodity futures traders filed a proposed class action based on the same set of facts, asserting that they lost money due to artificial prices caused by the defendants' alleged manipulative long wheat futures scheme. In addition to manipulation claims under the Commodity Exchange Act, the plaintiffs argued that the defendants violated the Sherman Act by gaining control of the large wheat futures interest in order to create anticompetitive prices.

In June 2016, the court largely [denied the defendants' motion to dismiss](#) the private action, though it did dismiss allegations that Kraft engaged in a wash trading scheme. The court concluded that the plaintiffs successfully alleged a commodities manipulation claim by pleading that Kraft misled the market with its actions, even absent an affirmative misrepresentation. The court also found that, for purposes of a motion to dismiss, the plaintiffs identified a relevant market and adequately pleaded that Kraft possessed monopoly power in that market.

False signaling. Kraft asked the court to certify three questions for interlocutory appeal. First, Kraft asked whether a defendant's large futures position, coupled with an alleged intent to affect market prices but absent any other false communications to the market, constitutes "false signaling" market manipulation under §§ 6(c)(1) or 9(a)(2) of the Commodity Exchange Act.

Pointing to "closely analogous" 1995 precedent in *Sullivan & Long*, Kraft argued that the plaintiffs could not have been deceived by Kraft's failure to disclose its intent to not take delivery or load out wheat, because Kraft was not required to take delivery on its long position. There was also no implicit representation about Kraft's need for wheat or its intent to take delivery. Not only was there no precedent in support of the principle that a hedger, or any trader, must have an immediate demand for wheat, an ability to store that wheat, and a "legitimate economic motive" for taking a large long position, this notion directly conflicts with CFTC hedging regulations, argued Kraft.

Artificial prices. Next, Kraft asked whether converging prices are "artificial" for purposes of the statutory provisions, when a defendant's purchases in the futures market cause cash and futures market prices to converge. Kraft said this is an issue of first impression in the commodities context, but was addressed by the Seventh Circuit in the securities context in *Sullivan & Long*. In that case, the defendant engaged in extensive naked short selling, selling so many more shares than were outstanding so that it was not possible to deliver all the shares it sold short.

The Seventh Circuit held that the short selling conduct in that case was not market manipulation, said Kraft, and there was good reason to believe that the appellate court would extend this ruling to the commodities markets. In other words, the Seventh Circuit would hold that conduct that causes convergence cannot create an artificial price, even where a party intends not to make delivery and intends to affect price through its trading, Kraft asserted.

Monopoly power. Finally, Kraft asked whether a defendant can obtain monopoly power in a futures market through open market purchases at open market prices without executing a corner or a squeeze. According to Kraft, the court was the first to hold that a party can acquire monopoly power in a commodity-settled market without executing a corner or a squeeze, and the holding cannot be squared with Seventh Circuit precedent or the economics of futures markets. By extending the definition of monopoly power, the court's ruling threatens to curtail legitimate trading by turning every large trader into a putative monopolist, argued Kraft.

"In other words, under the Court's analysis, any trader that takes a position equal to 63% of the CFTC's position limit is at risk of controlling prices and excluding competitors—meaning that antitrust claims for the first time may be viable in many futures markets even though, as here, there has been no corner or squeeze of the market," wrote the defendants.

Appropriate for review. Kraft argued that its request for interlocutory appeal should be granted because the three questions are contestable, controlling questions of law, and their resolution would expedite the litigation. Kraft observed that the court's opinion may have significant implications because the Seventh Circuit is home to the largest commodity trading market in the country. Also, certifying the manipulation questions would allow the Seventh Circuit to consider at the same time whether to also accept Kraft's appeal in the parallel CFTC case (which is being heard by a different judge) and consolidate the cases for ruling, noted Kraft.

The case is [No. 15 C 2937](#).

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Companies: Kraft Foods Group, Inc.; Mondelēz Global LLC

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