

## **Securities Regulation Daily Wrap Up, TOP STORY—7th Cir.: Appellate panel delivers major victory to CFTC in its ongoing battle with Kraft Foods, (Oct. 22, 2019)**

Securities Regulation Daily Wrap Up

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By [Brad Rosen, J.D.](#)

The Seventh Circuit Court of Appeals issued a writ of mandamus which eliminates the requirement for the CFTC's chairman, two commissioners, and high-level staff members to appear at a sanctions hearing in connection with its recent settlement with Kraft Foods.

The CFTC scored a significant victory as a Seventh Circuit Court of Appeals panel ruled in its favor granting the agency a writ of mandamus with respect to a majority of relief it requested in its protracted litigation with Kraft Foods Group and Mondelez Global. However, the matter will be remanded to district court Judge Robert Blakey, rather than being assigned to a new district court judge as requested by the CFTC. Additionally, the appellate court will permit the district court to keep its contempt inquiry open, but with respect to the CFTC only—not any of its personnel (*CFTC v. Kraft Foods Group, Inc.*, October 22, 2019, Easterbrook, F.).

In a seven-page decision written by Judge Frank Easterbrook, the appellate court directed district court Judge Blakey to withdraw his demand that Chairman Heath Tarbert, Commissioners Dan Berkovitz, and Rostin Behnam, and other Commission staff members appear in court for questioning. The appellate court also directed Blakey to desist from any effort to hold the chairman, commissioners, and staff members personally in contempt of court, or otherwise to look behind the Commission's public statements and the administrative record.

The current dispute in this matter centers around the CFTC's alleged breach of a [consent order](#) entered in August 2019 in connection with having issued public statements with regard to the settlement of an enforcement action with Kraft Foods. The CFTC had originally brought its case against Kraft in 2015.

**Mandamus is an appropriate remedy.** In granting the writ of mandamus, the appellate panel reasoned that the district court's order directing the Chairman and two members of the Commission, plus members of the staff, to appear for questioning in open court cannot be reviewed on appeal from a final decision. Further, it noted that the time taken away from their official duties will be lost forever. The panel found the Supreme Court precedent in *Cheney v. U.S. District Court* provides that mandamus is the appropriate remedy when a district court has authorized an inquest into the internal deliberations of the executive branch's senior officials. The panel observed that's a good description of the order in this matter which required the chairman and two commissioners, appointed by the President on advice and consent of the Senate, to appear and reveal what lies behind their published words.

**Neither the commissioners nor their staff could be held in contempt.** The panel found there was no justification requiring the commissioners or their staff to testify or appear before the court for questioning. The court noted they are not parties to the agreement and consent decree. Moreover, in this setting, the Commission does not have the authority to bind its members by virtue of §2(a)(10)(C) of the Commodity Exchange Act, which provides that every member of the Commission has a right to publish an explanation of his or her vote. The panel noted, this is a right that the Commission itself cannot negate by virtue of entering into a consent decree with a litigant. The panel also noted that because members of federal agencies are entitled to the assistance of their staffs, a statute entitling the Commissioners to speak their minds also means that it would be inappropriate to penalize persons who helped them do it.

**Live testimony is not required to determine the CFTC's contempt.** The panel noted that the district judge apparently believed that only evidence about a litigant's thoughts and goals supported an adjudication in contempt, and queried, who other than the chairman and commissioners could provide that evidence? However, the panel, citing Supreme Court precedence, held that disputes about civil contempt must be resolved objectively, and elaborated, "The agreement, consent decree, and press release are written documents; their meaning and effect depends on their four corners. If the Commission has done wrong, that is because of what the Commission itself said and did, not because of what any of its members or employees thought or planned." The panel concluded that there is neither the need nor justification for testimony by the chairman, any commissioners, or any members of the agency's staff.

**The CFTC's arguments to close the contempt proceeding in their entirety are weak.** In connection with Kraft and Mondelez' contention that four statements in the Commission's press release violated the consent decree, the CFTC asked the Seventh Circuit to close the contempt proceeding, asserting that that none of these statements violated the confidentiality clause of the agreement. The appellate panel rejected this request noting "The argument for mandamus on this subject is weak." The panel observed that if the district judge ultimately concludes that the Commission is indeed in contempt, its arguments can be vindicated by an appeal in the regular course.

**Other key elements of the decision.** The panel's decision also included the following:

- The CFTC's request to transfer the district court's proceedings to a different judge was denied. The panel noted the judge who entered the consent decree is in the best position to decide, as an initial matter, whether its provisions have been violated;
- The district court judge in his response stated that he no longer contemplated the possibility of criminal contempt, so that aspect of the controversy has dropped out. Accordingly, everything addressed in the decision related to concerns around civil contempt only; and
- Chairman Tarbert and Commissioners Berkovitz and Behnam's motion for leave to intervene was granted. The panel noted that although the CFTC is presently representing their interests adequately, the threat of being personally penalized for contempt of court entitles them to be litigants in their own right, so that they may take such steps as they deem wise to protect their personal interests.

The case is [No. 19-2769](#).

Attorneys: Daniel Davis and Robert Schwartz for the CFTC. Dean N. Panos, Kevin McCall, Nicole Allen, and Thomas E. Quinn (Jenner & Block LLP) and Gregory S. Kaufman (Eversheds Sutherland) for Kraft Foods Group, Inc. and Mondelez Global LLC. Zachary Fardon, Christopher O'Malley, and Patrick Otlewski (King and Spalding LLP) for Heath Tarbert, Dan Berkovitz, Rostin Behnam, James McDonald, Susan Gradman, Robert Howell, Stephanie Reinhart, and Neel Chopra.

Companies: Kraft Foods Group, Inc.; Mondelez Global LLC; Mondelez International, Inc.

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