

## [Securities Regulation Daily Wrap Up, TOP STORY—N.D. III.: CFTC says Kraft civil contempt remedies bid now moot, case may extend into 2020, \(Nov. 13, 2019\)](#)

Securities Regulation Daily Wrap Up

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By [Mark S. Nelson, J.D.](#)

The CFTC asked a U.S. district court judge in Chicago to mull whether Kraft's motion for civil contempt sanctions is moot; meanwhile, the judge issued an order setting the next steps toward resolution of the case.

A document the CFTC filed with the U.S. district judge who is simultaneously hearing the CFTC's enforcement case against Kraft Foods Group, Inc. and Mondelez Global LLC (collectively Kraft) and considering Kraft's motion to sanction the CFTC for violating a now-vacated consent order suggests that Kraft's civil contempt motion is moot. The civil contempt matter arose after the CFTC issued a press release and individual CFTC commissioners spoke publicly about a settlement agreement in the enforcement case against Kraft, which contained a [gag order](#) purporting to bar such communications. The district judge also clarified how the enforcement case and civil contempt sanctions request will proceed during the remainder of 2019 through mid-2020 ([CFTC v. Kraft](#), November 8, 2019).

**Is Kraft civil contempt sanctions request moot?** According to the CFTC, the court should decline to further entertain Kraft's bid to have the district court impose sanctions for civil contempt based on the CFTC's alleged violations of the same court's consent order which, in Kraft's view, barred the CFTC from publicly discussing its settlement with Kraft. The CFTC argued in a suggestion of mootness filed with the district court that the court's order vacating the consent order rendered Kraft's civil contempt sanctions motion moot.

The CFTC explained further that the several purposes of civil contempt sanctions were now inapplicable. First, civil contempt proceedings can be used to coerce compliance with a court order but where, as in the *Kraft* case, the underlying order is no longer effective, there is no basis for a coercive civil contempt sanction.

Second, complainants may seek civil contempt sanctions as a form of compensation for their losses. The CFTC noted that such sanctions may remain an option in the abstract, but that arguing for the imposition of sanctions against the CFTC would be futile because, as a government agency, the CFTC has sovereign immunity and Congress has not waived that immunity regarding monetary contempt sanctions.

In a footnote, the CFTC implied that a case cited by Kraft in an earlier filing was inapt with respect to civil contempt sanctions. Specifically, the CFTC said the Seventh Circuit's opinion in *Nelson v. Steiner*, 279 F.2d 944 (7th Cir. 1960) never discussed sovereign immunity and the fee award noted by the court there was uncontested.

The last substantive paragraph of *Nelson v. Steiner* explained that the plaintiff had asked the appellate court to order the district court to make an additional award of costs for the appeal beyond the costs already awarded by the district court, something the appellate court declined to do. The court in *Nelson v. Steiner* also cautioned in that closing paragraph that "[t]he power to punish for contempt is to be sparingly used" (citation omitted). Moreover, the CFTC argued that other cases cited by Kraft failed to shed light on the interplay between sovereign immunity and the civil contempt sanctions sought against the federal government.

Lastly, the CFTC observed that civil contempt sanctions are not allowed when they are based on an erroneous court order. Although the CFTC suggested that it was not arguing the underlying court order was erroneous, the agency did seek to inform the court that the court might have assumed something like that because of the Seventh Circuit's opinion mostly granting the CFTC's mandamus request, in which the Seventh Circuit

referred to portions of the underlying consent order as "ineffectual." The CFTC concluded that, regardless of the arguments that could be made, Kraft's civil contempt motion should be considered moot.

**The path forward.** The district judge in the CFTC's case against Kraft recently made a series of key rulings that will help create a path forward to resolve both the CFTC's underlying enforcement action and Kraft's request for civil contempt sanctions against the CFTC. The judge in the case had [previously hinted](#) at what that path forward might look like. On the same day the CFTC filed its suggestion of mootness in the civil contempt proceeding, the court issued an [order](#) addressing the following items:

- Kraft's motion to strike the CFTC's expert's report was denied, although Kraft will have an opportunity to "explore, analyze, and test" any opinions contained in that report. The judge also re-opened expert discovery for the limited purpose of a second deposition of the CFTC's expert, which may last up to 7 hours, and is set to occur before the end of 2019. Kraft may respond by offering supplemental expert opinions.
- The court denied Kraft's motion to exclude the CFTC's expert.
- Cross motions for summary judgment filed by the CFTC and Kraft also were denied, but without prejudice.
- The district judge addressed issues tied to a related private civil case filed against Kraft and which is based on largely the same facts asserted by the CFTC in its enforcement case against Kraft. As a result, the judge scheduled a November 20, 2019 status hearing at which the CFTC and Kraft must address, among other things, the CFTC's motion to compel the production of deposition transcripts in the private civil case.
- The court ordered the CFTC and Kraft to file any revised dispositive motions by mid-April 2020 and set a hearing date on those motions for June 2020.
- The district judge indicated that Kraft's motion for civil contempt sanctions remains under consideration. By separate minute order, the court set a compressed time frame for Kraft to respond to the CFTC's suggestion of mootness filing and said that the CFTC would not be allowed to further reply to Kraft.

The case is [No. 15-cv-02881](#).

Attorneys: Daniel J. Davis, General Counsel, for the CFTC.

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

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