When Dicta Attacks: Elliott v. Commodity Futures Trading Commission

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When Dicta Attacks: Elliott v. Commodity Futures Trading Commission

Joanna E. Barnes*

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I. INTRODUCTION

In *Elliott v. Commodity Futures Trading Commission*, the Seventh Circuit affirmed the decision of the Commodity Futures Trading Commission ("CFTC"), based on application of a deferential standard of review for administrative agency decisions. However, the court effectively applied the *Daubert* standard to expert witness testimony using the science of probability, and, splitting with the Second Circuit, made illegal freshening transactions conducted in a competitive market.

The Seventh Circuit's decision rests on a deferential standard of review. After analyzing whether the appropriate standard of review was de novo or deferential, the court could have simply stated that it had to defer to the CFTC's decision and written a one paragraph opinion. Instead, the court addressed, as dicta, whether the testimony of the CFTC's expert witness should and would meet the requirements of *Daubert v. Merrell Dow Pharmaceutical, Inc.* Although this issue is intriguing, the most captivating element of the *Elliott* dicta is that in upholding the CFTC's finding of wrongdoing in transacting freshening trades and claiming that circumstantial evidence supported a finding of wash sales, the Seventh Circuit split with the Second Circuit holding in *Stoller v. Commodity Futures Trading Commission*. Dicta is persuasive, rather than mandatory authority, and the *Elliott* dicta is especially persuasive. The court's failure to explicitly state that symmetrical freshening trades conducted by open outcry were illegal wash sales results in dangerously persuasive, but presently legally toothless, dicta.

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1. See *Elliott v. Commodity Futures Trading Comm'n*, 202 F.3d 926 (7th Cir. 2000).
2. *Id*.
3. *Id*. at 927.
4. *Id*. at 933-35 (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993)).
5. See *id*. at 939 (Easterbrook, J., dissenting) (discussing *Stoller v. Commodity Futures Trading Comm'n*, 834 F.2d 262 (2d Cir. 1987)).
7. See *id*. ("It is common for yesterday's dictum to develop into today's doctrine.").
This paper examines all three issues of the Elliott decision. Part II concisely explains commodities futures exchanges and key terms used in this paper. Part III summarizes the procedural history and facts of Elliott. Part IV discusses each of the three issues in Elliott, that is, standard of review, evidentiary issues, and trading practices; examining the history, instant opinion, and potential impact of each. Part V briefly concludes.

II. BRIEF EXPLANATION OF COMMODITIES FUTURES EXCHANGES AND KEY TERMS

A commodities futures market is an exchange where traders buy and sell bi-lateral sales contracts for a specific commodity. A "future" is the obligation to buy a certain quantity, called a "contract," of a specific commodity at a particular future date (e.g., December wheat), called the "delivery date." As the delivery date approaches, a market morphs from a futures market to a "spot" or "cash" market. At this point, contracts holders of the commodity must accept delivery of the commodity. As the market becomes a cash market, professional futures traders sell contracts to those who want the actual commodity. For example, a bread company that wanted actual wheat, not just wheat futures, might buy wheat futures intending to take delivery. As the spot market emerges, the price of futures contracts, affected by the changing nature of the market, becomes more volatile. A professional trader tries to maximize his

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8. See infra notes 12-35 and accompanying text.
9. See infra notes 36-57 and accompanying text.
10. See infra notes 58-204 and accompanying text.
11. See infra notes 205-211 and accompanying text.
13. Id. at 8.
14. Id. at 4-5.
15. Id. at 83.
16. See id.
17. Elliott v. Commodity Futures Trading Comm'n, 202 F.3d 926, 928 (7th Cir. 2000).
profits while avoiding taking delivery of the commodity. The stakes are high: if the trader is forced to take delivery, he will have to pay storage space rental fees for each day to store the wheat until he finds a buyer.

A wash sale, for purposes of securities and commodities futures trading, is an illegal pre-arranged sale between two or more traders that results in no aggregate gain or loss of securities or money. Traders who participate in wash sales are rarely subject to any risk, due to pre-arrangement. Wash sales are illegal because the collusion between the traders renders the trades noncompetitive. Many wash sales are conducted between two or more entities

18. Id.
19. NEW YORK INSTITUTE OF FINANCE, supra note 12, at 83.
20. The term "wash sale" has a different nuance for purposes of tax law due to the timing of a wash transaction for purposes of tax law. Tax law defines "wash sale" to mean a purchase and sale of "substantially identical" securities within a sixty-day period. 26 U.S.C. § 1091 (2001). Wash sales are illegal in securities and commodities law, but a sale may not be illicit using just the tax law definition. The broadness of the tax law definition allows for sales that would not be considered illicit for securities and commodities law purposes because it is entirely possible to buy and sell the same security in a sixty day period for the same price without pre-arranging to do so or intending to remove the risk from the transaction.
23. See Elliott, 202 F.3d at 938 (citing Stoller v. Commodity Futures Trading Comm’n, 834 F.2d 262, 264 (2d Cir. 1987)).
controlled by the same party. The purpose of these trades is to artificially inflate the trading volume to attract the interest of other traders.

Freshening is a legitimate trading practice used by professional traders who wish to stay in the futures market during the delivery month. Delivery on futures contracts is on a first-in-first-out basis, that is, traders who have held their positions longest take first delivery of the cash commodity. In order to avoid taking delivery of a cash commodity, traders "freshen" their positions by selling soon-to-be-delivered cash commodity and buying similar quantities of later-delivered commodity.

A spread is the difference between two prices. The issues discussed in this article involved the spread between the price for which one trader buys (or sells) and another trader sells (or buys).


27. Elliott, 202 F.3d at 928 (Cudahy, J.).

28. Id.


30. Elliott, 202 F.3d at 928. The Elliott opinion describes Petitioners as "trading spreads." The commodities business definition of "trading spreads" means to trade two complimentary positions at once so that one position hedges the other. The two positions are such that one commodity could replace the other. For
When a market is less liquid, spreads between prices in separate transactions are smaller.\footnote{31} No matter how illiquid a market, spreads are not usually identical in a competitive market.\footnote{32}

Wheat is traded on most midwestern commodities markets, including the Chicago Board of Trade ("CBOT"), the Kansas City Board of Trade, and the Minneapolis Grain Exchange.\footnote{33} A contract of wheat is five thousand bushels.\footnote{34} On the CBOT, wheat is delivered in July, September, December, March, and May.\footnote{35}

### III. PROCEEDURAL HISTORY AND FACTS OF ELLIOTT

#### A. Procedural History

The Division of Enforcement ("Enforcement") of the CFTC brought an action against Elliott, Maritote, Schaer, and Sion example, a spread could be buying pork bellies and selling lean hogs, buying corn and selling wheat, or buying July wheat and selling September wheat. It does not appear that Petitioners were actually trading spreads, under the term of art definition. Petitioners were all long on (that is, they bought) wheat. After the transactions, Petitioners were still long on wheat.

\footnote{31} Id. at 928-29. Support for this point of the Elliott opinion is particularly unclear. Numerous sources state that smaller spreads between bid-offer prices generally indicate a more liquid market. See, e.g., PRACTISING LAW INSTITUTE, Order No. B0-00R6, Michael A. Goldstein, 2000 SWAPs & Other Derivatives in 2000 Energy Commodity Derivatives, 1215 PLI/Corp 483, 487 (2000) ("[T]he market is deep and liquid . . . and, therefore, multiple quotes . . . will be within a fairly narrow bid-offer spread . . . "). Whether Rooney's assertion as reported in the Elliott opinion is true, that is, that transaction price spreads, as opposed to bid-offer price spreads, are small in a less liquid market, is unclear. The Elliott opinion admits, in dicta, that no statistical evidence supports Rooney's assertion. See Elliott, 202 F.3d at 934. Increasingly creative termed searches on Westlaw yielded no support for Rooney's assertion, tending instead to yield information about run off from fields spread with liquid manure.

\footnote{32} Id. at 928-29. The idea is logical: in a competitive market, prices constantly adjust to adapt to most recent supply and demand requirements. In Elliott, one of the Seventh Circuit's criticisms of the CFTC's case was that no statistical evidence was presented to support this concept, i.e., no study showing price movements in competitive markets was presented. Id. at 935.

\footnote{33} NEW YORK INSTITUTE OF FINANCE, supra note 12, at 9-10.

\footnote{34} DOWNES AND GOODMAN, supra note 29, at 950-51.

\footnote{35} Id.
("Petitioners") alleging pre-arranged and noncompetitive trading in the form of wash sales.\textsuperscript{36} An Administrative Law Judge ("ALJ") ruled against Enforcement.\textsuperscript{37} Enforcement appealed to the CFTC, which is empowered by the Administrative Procedure Act to review the ALJ’s decision de novo making findings of both fact and law.\textsuperscript{38} The CFTC found in favor of Enforcement.\textsuperscript{39} Petitioners appealed the CFTC decision to the United States Court of Appeals for the Seventh Circuit, which affirmed the CFTC’s decision.\textsuperscript{40} Petitioners then appealed the circuit court decision to the Supreme Court, which denied certiorari.\textsuperscript{41}

\textbf{B. Facts}

In late February and early March of 1991, Petitioners, four high-volume pit traders in wheat futures at the CBOT, made a series of thirty-two trades:

1. February 25. Elliott sold 1000 March-July spreads at 21 cents to Maritote. Elliott bought 1000 of the same spread at the same price--450 from Maritote and 550 from Sion. Sion got his 550 from Maritote, also at 21 cents. Schaer was not involved.\textsuperscript{42}

\begin{center}
\begin{tikzpicture}

\node (Elliot) at (0,0) {Elliot};
\node (Maritote) at (2,2) {Maritote};
\node (Sion) at (-2,2) {Sion};
\node (Schaer) at (2,-2) {Schaer};
\draw [->] (Elliot) -- (Maritote) node [midway, above] {1000};
\draw [->] (Maritote) -- (Sion) node [midway, above] {550};
\draw [->] (Sion) -- (Elliot) node [midway, below] {550};
\draw [->] (Sion) -- (Schaer) node [midway, below] {550};
\draw [->] (Elliot) -- (Schaer) node [midway, above] {450};
\end{tikzpicture}
\end{center}

\textsuperscript{36} Elliott v. Commodity Futures Trading Comm’n, 202 F.3d 926, 927 n.1 (7th Cir. 2000).
\textsuperscript{37} Id. at 931.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id. at 938.
\textsuperscript{41} Elliott v. Commodity Futures Trading Comm’n, 202 F.3d 926 (7th Cir. 2000), cert. denied, 531 U.S. 1010 (2000).
\textsuperscript{42} Elliott v. Commodity Futures Trading Comm’n, 202 F.3d 926, 928 (7th Cir. 2000).
2. February 26. Elliott sold 735 March-May spreads at 10.75 cents to Maritote. Elliott bought 735 of the same spread at the same price from Sion. Maritote sold 735 of the same spread at the same price to Sion. Schaer was not involved.\textsuperscript{43}

3. February 27. Trading only March-May spreads at 11.5 cents, Elliott bought 1500 from Maritote, sold 2500 to Sion and then bought another 1000 from Maritote. Maritote bought 2500 of the same spread at the same price from Sion. Schaer was not involved.\textsuperscript{44}

4. March 4. Elliott bought 1000 March-May spreads at 9.5 cents from Sion, then turned around and

\begin{itemize}
\item [\textsuperscript{43}] Id.
\item [\textsuperscript{44}] Id. at 928-29.
\end{itemize}
sold them to Maritote. In two separate trades, each of 500, Maritote sold 1000 of the same spread at the same price to Schaer. Schaer sold them to Sion.\footnote{Id. at 929.}

\[
\text{Elliot} \quad 1000 \quad \text{Maritote}
\]

\[
1000 \quad 500 \quad 500
\]

\[
\text{Sion} \quad 1000 \quad \text{Schaer}
\]

5. March 6. Elliott bought 2500 March-May spreads at 10.75 cents from Sion and sold them to Schaer. Schaer sold the same quantity of the same spread at the same price to Sion. Maritote was not involved.\footnote{Id.}

\[
\text{Elliot} \quad 2500 \quad \text{Maritote}
\]

\[
2500 \quad 2500
\]

\[
\text{Sion} \quad 2500 \quad \text{Schaer}
\]
6. March 7. Elliott sold 2500 March-May spreads at 10 cents to Schaer and bought the same quantity of the same spread at the same price from Sion. Sion bought 2500 from Schaer. Maritote was not involved.\textsuperscript{47}

\begin{center}
\begin{tikzpicture}
  \node (E) at (0,0) {Elliot};
  \node (M) at (2,0) {Maritote};
  \node (S) at (0,-2) {Sion};
  \node (Schaer) at (2,-2) {Schaer};
  \draw[->] (E) -- (S) node[midway,above] {2500};
  \draw[->] (S) -- (Schaer) node[midway,above] {2500};
  \draw[->] (M) -- (Schaer) node[midway,above] {2500};
\end{tikzpicture}
\end{center}

7. March 8. Maritote bought 500 March-May spreads at 9.5 cents from Sion and sold them to Schaer at the same price. Elliott bought 2000 March-May spreads at 9.5 cents from Sion and sold them to Schaer. Schaer sold all 2500, in two trades, to Sion.\textsuperscript{48}

\begin{center}
\begin{tabular}{c|c|c|c|c|}
\multicolumn{2}{c}{} & \multicolumn{2}{c}{Elliot} & \multicolumn{1}{c}{Maritote} \\
\hline
\multicolumn{3}{c}{} & 2000\textsuperscript{Sc} & 2000\textsuperscript{St} \\
\hline
\multicolumn{3}{c}{} & 0 & 0 \\
\hline
\multicolumn{3}{c}{} & 500\textsuperscript{M} & 2500\textsuperscript{St} \\
\hline
\multicolumn{3}{c}{} & 0 & 0 \\
\end{tabular}
\end{center}

\textsuperscript{47} Id.
\textsuperscript{48} Id.
8. March 13. Elliott bought 1800 March-May spreads at 8.75 cents from Schaer and sold them to Sion. Sion sold 2600 of the same spread at the same price to Schaer and then bought 800 back. Maritote was not involved.\textsuperscript{49}

As a result of these trades, on no day did any of the four experience any net gain or loss of either money or wheat futures.\textsuperscript{50} These facts were undisputed.\textsuperscript{51}

Before the ALJ hearing, Enforcement filed the affidavit of Enforcement's investigator, Rooney.\textsuperscript{52} Rooney was a hybrid fact-opinion witness.\textsuperscript{53} Rooney's affidavit set forth the facts as stated above, as well as Rooney's expert opinion that these trades were noncompetitive.\textsuperscript{54} Rooney based his opinion on the size of the trades, the absence of net gains or losses, the absence of the involvement of other traders, the trade configurations, and audit trail irregularities.\textsuperscript{55} On cross-examination, however, Rooney conceded that his conclusion that the trades were unfair was not based on a rigorous statistical analysis.\textsuperscript{56} Additionally, Petitioners were

\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id. at 930.
\textsuperscript{53} See id. at 927-31 (describing Rooney's testimony setting forth the facts of the case and his conclusions based on the facts).
\textsuperscript{54} Id. at 929-30.
\textsuperscript{55} Id.
\textsuperscript{56} Id. at 931.
prevented from conducting an effective cross-examination of Rooney because many of the factual and statistical bases for his conclusions consisted of computerized CBOT records that Rooney failed to bring to court.\textsuperscript{57}

IV. ISSUES

A. Standard of Review

1. Prior Case Law

The Administrative Procedure Act ("APA") provides that a party that losses at the agency level of review may appeal the decision to the appropriate court of appeals.\textsuperscript{58} The reviewing court must overturn any agency decision that is inconsistent with the Constitution, statutory authority, or general principles of fairness.\textsuperscript{59}

\begin{itemize}
\item \textsuperscript{57} Id.
\item \textsuperscript{58} 5 U.S.C. § 7123 (2001).
\item \textsuperscript{59} See 5 U.S.C. § 706 (2001). The entirety of section 706 of the APA is set forth here for the reader's convenience:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

\begin{enumerate}
\item compel agency action unlawfully withheld or unreasonably delayed; and
\item hold unlawful and set aside agency action, findings, and conclusions found to be-
\begin{enumerate}
\item arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
\item contrary to constitutional right, power, privilege, or immunity;
\item in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
\item without observance of procedure required by law;
\item unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
\end{enumerate}
\end{enumerate}
\end{itemize}
Generally, questions of pure fact and questions of mixed fact and law decided in formal adjudications under the APA are not reviewed unless the reviewing court holds that the lower court acted arbitrarily or capriciously, or abused its discretion, or lacked "substantial evidence" for its decision. "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." The standard of proof applied by an appellate court in determining whether the fact finder below made a decision based on substantial evidence is whether the fact finder had "enough [evidence] to prevent a judge from directing a verdict." Issues of pure fact decided in informal adjudications are reviewed under the guidelines for review set forth in section 706 of the APA other than subsection (2)(e); in practice, this means that questions of fact are usually reviewed only when the agency has acted arbitrarily or capriciously. Issues of pure law are reviewed de novo.

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.


[E]vidence is substantial if it is enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury, and our rulings as to review of credibility conform to that test. Applying those rulings, we cannot say that [the testimony given] was hopelessly incredible or beyond the power of demeanor evidence to satisfy any doubts raised by the words; and their testimony alone would go a long way, if not, indeed, all the way, needed to support the finding of ratification.

Id.


64. Id.
The first step in a standard of review analysis is determining the type of question presented. Historically, appellate courts have varied in the extent to which they went to reframe the question in order to review the issue.65

Prior to its decision in Elliott, the Seventh Circuit issued several opinions in cases to which the CFTC was party on standard of review issues.66 In LaCrosse v. Commodity Futures Trading Commission, the court held that the court will disturb factual determinations only when they are not supported by the weight of the evidence.67 The court added that it applies a deferential standard questions involving the agency’s expertise, so long as the decision is reasonable.68 In Ryan v. Commodity Futures Trading Commission, the court stated that the findings of an agency that ran counter to those of the ALJ in the case would receive less weight than such findings would normally receive.69 In Cox v. Commodity Futures Trading Commission, the court reiterated its findings in LaCrosse and Ryan.70

65. As Judge Friendly wrote in Marcus Trucking:

Neither is this doctrine with respect to inferences limited to inferences from evidentiary facts to the fact made determinative by the statute rather than, as here, to an intermediate fact without statutory significance in itself; even as to matters not requiring expertise a court may not displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it. We are told again that other circuits have been less self-denying in this matter of reviewing inferences, sometimes by resort to what is called the important qualification that the reviewing court may substitute its judgment if it chooses to turn the question of inference into a question of law.

Marcus Trucking, 286 F.2d at 592 (citations omitted).

66. See Ryan v. Commodity Futures Trading Comm’n, 145 F.3d 910 (7th Cir. 1998); Cox v. Commodity Futures Trading Comm’n, 138 F.3d 268 (7th Cir. 1998); LaCrosse v. Commodity Futures Trading Comm’n, 137 F.3d 925 (7th Cir. 1998).

67. LaCrosse, 137 F.3d at 929.

68. Id.

69. Ryan, 145 F.3d at 916.

70. See Cox, 138 F.3d 268.
2. Analysis of Issue in Elliott

a. Sufficiency of Evidence

As discussed in the section below discussing the evidence issues in Elliott, the underlying facts in the controversy were undisputed.\(^71\) The Petitioners' liability rested entirely on the inference drawn from the facts.\(^72\) In the ALJ hearing, Enforcement presented an expert witness, Rooney, who presented both the undisputed facts and his opinion based on the circumstantial evidence.\(^73\) Petitioners were unable to cross-examine Rooney regarding the basis of his inferences (e.g., lack of profits implies illicit trading practices) because Rooney was unable to present reasons and did not bring the computer printouts underlying his assertions to trial.\(^74\)

On appeal, the primary issue was standard of review.\(^75\) Petitioners framed the question as one of sufficiency of evidence.\(^76\) As noted above, appeals courts review sufficiency of evidence cases de novo. The court noted that even though only circumstantial evidence was presented, the CFTC could still meet its burden.\(^77\) The court stated that the CFTC must do more than present circumstantial evidence

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71. See infra notes 115-171 and accompanying text; see also Elliott v. Commodity Futures Trading Comm'n, 202 F.3d 926, 930 (7th Cir. 2000).
72. Id. at 927.
73. Id. at 927-31
74. Id. at 930-31.
75. See id. Although the court discussed the evidence issues in detail and the trading practices issue in somewhat less detail, the case turned on standard of review.
76. Id. at 931.
77. Id. (citing In re Buckwalter, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,995 at 37,684 (CFTC Jan. 25, 1991)). In Buckwalter, the Commission held that “[r]eliable circumstantial evidence is not only sufficient, it is the only evidence that is likely to exist in most cases.” Id. at 931 n.34 (citing c.f. Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1043 (2d Cir. 1976)).
evidence and claim that the circumstances indicated wrongdoing. The CFTC must establish that the circumstantial evidence renders the fact of wrongdoing "more likely than not." The court quotes Abrams, which states, "[i]f both innocent and culpable inferences are equally supported by the record, the [CFTC] fails in its burden of proof." The court goes on to state that "[e]vidence of unusual trading patterns, like that presented here, commonly gives rise to an inference of culpability."

The Seventh Circuit failed to analyze the evidence presented in Elliott. Although the court cited law supporting the idea that circumstantial evidence must be presented in conjunction with evidence supporting inferences drawn from the circumstantial evidence, the court did not examine whether, in this case, the evidence presented to support the inferences, that is, whether Rooney’s expert testimony, established Petitioners’ liability by a preponderance of the evidence. Additionally, the court did not analyze Petitioners’ request that the question be framed as one of sufficiency of evidence or even state that the court would not consider the question as one of sufficiency of evidence.

Had the court examined the issue of sufficiency of evidence, given the court’s later criticism (as dicta) of the admission of Rooney’s expert testimony, it seems unlikely that the court would have found the evidence sufficient. As discussed in the evidence section below, the court stated that, "[h]ad the petitioners sustained

79. Id.
82. See id. at 931-33.
83. Id.
84. Id.
their attack [on the admissibility of Rooney’s testimony] and properly challenged the ALJ’s decision to admit Rooney’s opinion testimony, we might have been inclined to agree with them.”85 The court then analyzed, in detail, why Rooney’s testimony would not be admissible.86 In light of the court’s analysis, the court’s discounting Rooney’s testimony, and the Enforcement’s failure to present other evidence to establish the inference of wrongdoing, it is odd that the court apparently found the evidence to be sufficient.87 Indeed, it is odd that in evaluating the Petitioners’ argument that the court review the case de novo for sufficiency of evidence, the only mention the court made of the instant case was to state the bald fact that the Petitioners asked for sufficiency of evidence review.88 The court adequately and correctly cited the law.89 The court analyzed the facts.90 It is not clear why the court failed to apply its analysis of the law to its analysis of the facts.

b. Expertise of CFTC

The court stated that “two standards of review can apply to appeals from the CFTC.”91 If the question presented is something courts normally hear, review is de novo.92 If the question presented is within the unique expertise of the CFTC and not something with which the circuit court is familiar, review is deferential, and the circuit court must find for the CFTC so long as its holding is reasonable.93 The court stated that even if the issue is within the

85. Id. at 933 (emphasis in the original); see also infra notes 136-148 and accompanying text.
86. Id. at 933-38.
87. Id. at 938
88. Id. at 931.
89. Id. at 931-32.
90. Id. at 933-38; see also infra notes 115-171 and accompanying text.
91. Id. at 932.
92. Id. (quoting Ryan v. Commodity Futures Trading Comm’n, 145 F.3d 910, 916 (7th Cir. 1998)).
93. Id. (citing Cox v. Commodity Futures Trading Comm’n, 138 F.3d 268, 271-72 (7th Cir. 1998); LaCrosse v. Commodity Futures Trading Comm’n, 137 F.3d 925, 929 (7th Cir. 1998)).
expertise of the CFTC, "[w]hen the agency diet is food for the courts on a regular basis, there is little reason for judges to subordinate their own competence to administrative 'expertness.'" 94 The court noted that it routinely exercises plenary review over common law issues, but that the court defers to the CFTC on "determinations of the evidence necessary to prove violations of various sections of the Commodity Exchange Act [and CFTC rules]." 95

The court stated that it "believe[s] the deferential standard applies here." 96 The court stated that determining what evidence supports the inference of trading impropriety is "peculiarly within the CFTC's area of expertise." 97 In support, the court quoted Ryan: "[N]either a criminal jury nor the Seventh Circuit, however authoritative their declarations, can claim expertise in the conduct of trading at the CBOT . . . . [T]he Commission [is] certainly an expert in matters relating to trading . . . ." 98 The court stated that although it regularly dealt with sufficiency of evidence questions, it does not regularly deal with trading practice questions. 99 The court said that it was unable to locate any published opinion in which a federal court analyzed a particular set of circumstances supporting an inference of trading infractions. 100 The court noted that the CFTC regularly examines circumstantial evidence giving rise to a trading infraction. 101 The court then deferred to the CFTC. 102 The court stated that the CFTC's decision "passes muster" under the court's analysis. 103 The court reviewed in detail the circumstantial evidence examined by the CFTC and discussed in the CFTC's opinion. 104

94. Id. (quoting Hi-Craft Clothing Co. v. NLRB, 660 F.2d 910, 915 (3d Cir. 1981)).
95. Id. (citation omitted).
96. Id.
97. Id.
98. Id. (quoting Ryan, 145 F.3d at 923, (Cudahy, J., concurring)).
99. Id.
100. Id.
101. Id.
102. Id. at 932-33.
103. Id. at 933.
104. Id.
The court’s analysis of the evidence examined and analyzed by the CFTC makes little sense in light of the court’s assertion that it applied deferential review. An examination of the evidence and discussion of whether the CFTC duly weighed the evidence is appropriate to a sufficiency of the evidence review.\(^{105}\) Having ruled that it would apply a deferential standard, the court should have stopped its analysis after it discussed the CFTC’s “peculiar expertise” in weighing the evidence supporting an inference of trading infractions. Although the court clearly stated that it intended to apply a deferential reasonableness standard,\(^{106}\) the court also applied a cursory, undeclared sufficiency test.\(^{107}\) Ironically, in the following section of its opinion, the court then turned around and attacked the evidence that it had just found sufficient.\(^{108}\)

The court did not provide reasoning to support the idea that the evidence questions in this case were not within the plenary review of the circuit court.\(^{109}\) Instead, the court quoted Ryan referring to “expertise in the conduct of trading.”\(^{110}\) “Conduct of trading” is not the same as “evidence of the conduct of trading.” For example, a videotape of pit activity would be “evidence of the conduct of trading.” What the videotape shows is “conduct of trading.” Admissibility of the videotape, similar to admissibility of any video tape, would be well within the knowledge of federal courts. Application of commodities law to the events portrayed by the videotape is closer to that which would be within the “peculiar expertise” of the CFTC. Whether the videotape is admissible and

\(^{105}\) See, e.g., Apache Trading Corp. v. Toub, 816 F.2d 605 (11th Cir. 1987) (listing all the evidence considered by the Commission in a case reviewed by the circuit court for sufficiency of evidence).

\(^{106}\) Elliott, 202 F.3d at 932 (stating “[w]e believe the deferential standard applies here.”).

\(^{107}\) See id. at 933.

\(^{108}\) See id. at sections III-IV.

\(^{109}\) See id. at 932.

\(^{110}\) Id.
whether the videotape shows the basic facts that the CFTC alleges it shows are "food for the court on a regular basis." 111

The court's failure to find a published opinion where a federal court considered a particular inference of trading impropriety is irrelevant to the issue in Elliott. In a global sense, that was the question in Elliott. However, as the court implicitly recognizes as it devotes nearly the remainder of its opinion to Rooney's opinion testimony, the issue in the case was less one of whether the evidence presented supported an inference of trading impropriety as it was one of whether Rooney's testimony, the only evidence presented to establish that inference, was sufficient to create the inference. In other words, if Rooney's testimony should not have been admitted, even though the admissibility error was not preserved, the evidence could not be sufficient. The court's claim that it applied a deferential standard is undercut by its sufficiency analysis. 112

The court did not need special expertise to examine whether Rooney's evidence adequately established the inference that Petitioners' trading was illicit. No special expertise was necessary to note that Rooney's testimony rested on a foundation of knowledge that not even Rooney could defend. Therefore, the review should have been plenary and de novo. 113 Beyond the question of admissibility, the very evidence itself should have been discounted in a de novo review.

3. Potential Impact

Elliott blurs the distinction between the different standards of review of agency decisions and the requisite elements to establish the appropriateness of the standards. Before Elliott, the standards were clearer: if sufficiency of the evidence was the appropriate standard of review, then the appellate court had to review, de novo, whether the agency used enough evidence to support its finding. If a reasonableness standard was appropriate, the reviewing court had to

111. See Hi-Craft Clothing Co., 660 F.2d at 915.
112. See Elliott, 202 F.3d at 932-33.
113. See id. at 932.
give the agency deference so long as the agency’s finding was reasonable. After *Elliott*, these standards are less clear.

*Elliott*’s muddled reasoning has an impact not only on the appellants but also on those who attempt to reason out the Seventh Circuit’s law of standard of review of agency decisions. *Elliott*’s hybrid deference/sufficiency reasoning lends more weight to *Elliott*’s evidence discussion. There is no question that the evidence discussion is dicta.\(^{114}\) However, the court’s sufficiency rationale of a deference holding lends more weight to the dicta about evidence than that which dicta would otherwise carry.

**B. Evidence**

1. **Prior Case Law**

When a witness proposes to testify as to both facts and the witness’s opinion, the admissibility of each point of testimony must be evaluated based on whether it is fact or opinion. Expert testimony is analyzed under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and *Kumho Tire Co. v. Carmichael*.\(^{115}\)

In *Daubert*, the Court established the standard for admissibility of expert witness testimony under the Federal Rules of Evidence ("Rules").\(^{116}\) Before *Daubert*, the standard, set forth in *Frye v. United States*, was that expert opinion was admissible if it was based on a scientific technique whose reliability was "generally accepted" by the scientific community.\(^{117}\) In *Daubert*, the Court considered the admissibility of expert testimony regarding epidemiological analyses of the potential side effects of the drug Bendectin.\(^{118}\) The Court noted that the Federal Rules of Evidence were enacted "half a

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114. See id. at 933 ("[T]he admissibility of Rooney's testimony does not appear to be inescapably before this court. Indeed, we doubt that the petitioners have properly preserved the issue for appeal.").
115. See infra notes 116-135 and accompanying text.
118. *Daubert*, 509 U.S. at 584.
century" after Frye. The Court then attempted to reconcile the Federal Rules with Frye, reasoning that nothing in Federal Rule of Evidence 402 establishes the Frye standard "as an absolute prerequisite to admissibility" and that there is no "clear indication that Rule 702 or the Rules as a whole were intended to incorporate a 'general acceptance' standard." The Court held that the Rules "displaced" Frye. The Court set forth a new standard that trial judges must determine admissibility of expert testimony based on "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." The trial judge must "ensure that . . . scientific testimony . . . is not only relevant, but reliable." The Court suggested several methods for determining whether the information is "scientific knowledge": (i) "whether it can be (and has been) tested"; (ii) whether the purported scientific knowledge "has been subjected to peer review and publication"; (iii) "the known or potential rate of

119. Id. at 587.
120. Id. at 588. Provided here for the reader’s convenience, Federal Rule of Evidence 402 reads: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." FED. R. EVID. 402. Federal Rule of Evidence 702 reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702.
121. Daubert, 509 U.S. at 589.
122. Id. at 592.
123. Id. at 589.
124. Id. at 593.
125. Id.
error”, and (iv) the old Frye “general acceptance” test. The Court indicated that it intended the new test to be flexible and that admissibility should be considered with regard to all the Rules, not just Rule 702.

In Kumho Tire Co. v. Carmichael, the Court refined its decision in Daubert. In Kumho, the Court considered expert testimony that was not scientific, incidentally, that of engineers. Reasoning that Rule 702 does not distinguish between “scientific knowledge” and “technical or other specialized knowledge,” the Court held “Daubert’s general holding – setting forth the trial judge’s general ‘gatekeeping’ obligation – applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.” The Court added that the district court judge’s gatekeeping function is a discretionary authority that is reviewable for abuse. In a concurring opinion, Justice Scalia asserted that abandonment of the gatekeeping function is abuse of discretion.

Prior to Elliott, Daubert and Kumho Tire had not been applied to evidence presented in securities cases involving trading violations. About a year after Elliott was decided, in Primavera Familienstifung v. Askin, a Southern District of New York judge decided that Daubert applied to an expert’s price model.

126. Id. at 594.
127. Id.
128. Id. at 594-95.
130. Id. at 141.
131. Id. (citing FED. R. EVID. 702).
132. Id. at 158.
133. Id. at 158-59.
134. Searches on Westlaw did not yield any results.
2. Analysis of Issue in *Elliott*

a. *Rooney’s Testimony*

The first evidence issue would have been whether Rooney was a qualified expert witness. Additionally, this case may establish an evidentiary presumption that a pattern of symmetrical trades indicates wash sales. The court addressed the evidence issues as dicta.

Petitioners probably failed to preserve the error of admission of Rooney's opinion testimony, but the circuit court discussed it anyway, stating that had the error been preserved, "[the court] might have been inclined to agree with them." The court applied the *Daubert* test to Rooney's opinion. The court stated that Enforcement, through Rooney, presented a "numbers" case. The court found that Rooney's testimony was unreliable because Rooney failed to present: (i) reliable statistics to support the presumption that symmetrical trades indicated wash sales; (2) analysis of market liquidity or trading volume or price during similar periods; (3) evidence that freshening usually resulted in some net gain or loss; or (4) proof that audit trail irregularities definitely indicate illegal trading practices. The court held that therefore, had the error been preserved, the court might have held that Rooney’s testimony failed the *Daubert* test.

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136. See *Elliott v. Commodity Futures Trading Comm’n*, 202 F.3d 926, 931 (7th Cir. 2000).
137. *Id.* at 927 (deciding case on the basis of standard of review).
138. *Id.* at 933.
139. *Id.* (emphasis in original).
140. *Id.* at 933-34.
141. *Id.* at 934.
142. *Id.* at 933-34.
143. *Id.* at 933.
"might" have found Rooney's testimony inadmissible, reasoning that as both fact finders apparently discounted the testimony, the issue was not properly before the circuit court.\textsuperscript{144}

Although the ALJ ruled that Rooney's testimony was admissible, it appeared that neither the ALJ nor the CFTC based their rulings on Rooney's "expert" opinion testimony.\textsuperscript{145} The court stated that "[t]his is an appropriate approach," because \textit{Daubert} and \textit{Kumho} stand for the proposition that all expert testimony that impacts a fact finding must be reliable.\textsuperscript{146} The court stated that "a fact finder should employ the reliability benchmark in situations, as here, in which unreliable expert testimony somehow makes it in front of the fact finder."\textsuperscript{147} The court assumed that Rooney's unreliable expert testimony had not been considered by the fact finder, assumed that the fact finders had not considered it because they found the evidence unreliable, and held that if the ALJ erred in admitting Rooney's expert opinion testimony, the error was harmless.\textsuperscript{148}

\textit{b. Circumstantial Evidence}

The court's assertion that neither fact finder, including the CFTC, considered Rooney's testimony raises again the question: if Rooney's testimony did not support the inference of the Petitioners' wrongdoing, what evidence did? No other evidence, circumstantial or otherwise, was presented to support the inference.\textsuperscript{149} The court wrestled with this paradox, admitting, "[w]e recognize the seeming illogic of rejecting . . . Rooney's inference on the one hand . . . while endorsing . . . the Commission's on the other."\textsuperscript{150} The court recognizes that "there is a cognizable difference."\textsuperscript{151} Consideration

\begin{footnotesize}
\begin{itemize}
\item 144. \textit{Id.} at 934.
\item 145. \textit{Id.}
\item 146. \textit{Id.}
\item 147. \textit{Id.}
\item 148. \textit{Id.} at 934-35.
\item 149. See \textit{id.}
\item 150. \textit{Id.} at 935.
\item 151. \textit{Id.}
\end{itemize}
\end{footnotesize}
of Rooney's testimony is a purely evidentiary issue.\textsuperscript{152} Consideration of the CFTC's decision is not one of whether one piece of evidence was admissible but whether sufficient evidence was presented "to raise a strong enough inference to establish liability for a violation."\textsuperscript{153}

If Rooney's evidence was discounted,\textsuperscript{154} and no other evidence of Petitioners' liability was presented,\textsuperscript{155} and the decision was not completely arbitrary,\textsuperscript{156} then there must be some evidence to support the idea that the Petitioners' behavior was wrong. The majority says that it "defer[s] to the CFTC in part because of its 'expertise' or . . . specialized knowledge."\textsuperscript{157} The court then lists some circumstantial evidence, but it supports the traders' allegations they were not liable for wash sales.\textsuperscript{158} The majority noted that the CFTC presented evidence of an "innocent" trade that took place on the same day, but at a different time, than some of the challenged trades.\textsuperscript{159} The traders claimed that no one wanted to trade with them, and although the CFTC showed that there were other traders active on the days in question, the CFTC did not present evidence that other traders wanted to trade the exact same spreads at the exact same times. As the dissent said, "[I]t is undisputed that any other trader who wanted to participate could have done so."\textsuperscript{160} The majority also noted that

\textsuperscript{152} See id.
\textsuperscript{153} Id.
\textsuperscript{154} See supra notes 136-148 and accompanying text.
\textsuperscript{155} See Elliott v. Commodity Futures Trading Comm'n, 202 F.3d 926, 926 (7th Cir. 2000).
\textsuperscript{156} No matter how high the standard of review applied or supposed to be applied, a completely arbitrary decision would have to be struck down by the circuit court. As discussed above, the Seventh Circuit did not strike down Elliott. It is safe to say, therefore, that the Elliott decision was not completely arbitrary.
\textsuperscript{157} Elliott, 202 F.3d at 935.
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 936-37.
\textsuperscript{160} Id. at 941 (Easterbrook, J., dissenting). In fact, the CFTC was unable to find any trader who wanted to partake in Petitioners' trades: The ALJ found:

The few traders who were active in the March spread during the relevant time period did not, for the most part, trade as large a volume as the [Petitioners]. The four
there were audit trail irregularities, that is, many of the challenged trades were reported on the same card.\textsuperscript{161} The strongest argument the majority can summon to tie this practice to actual liability is that reporting the transactions on the same card “is consistent with the inference that the trades were pre-arranged.”\textsuperscript{162} Evidence that the traders came to the exchange on the appropriate days is “consistent with the inference that the trades were pre-arranged.” Without more evidence (e.g., evidence as to the usual use of cards or as evidence as to the reporting of trades of the baseline “innocent” freshening transaction), this evidence of mere audit trail irregularities is unhelpful. Additionally, the CFTC could have, but did not, pursue sanctions against the Petitioners for recordkeeping violations.\textsuperscript{163}

The dissent directly addressed the question of evidence when it wrote, “Under the Administrative Procedure Act, the question now is whether that finding is supported by substantial evidence. What evidence might that be, given that all of the testimony other than Rooney’s favored the traders, and Rooney’s is worthless?”\textsuperscript{164} The dissent answered its question: “The usual way to prove agreement is co-conspirator testimony and physical evidence consistent with private deals off the trading floor. Yet everyone in a position to know the truth testified that there had been no private arrangement.”\textsuperscript{165}

\begin{itemize}
  \item [Petitioners] were among the “select guys who trade big numbers into the delivery game.” Other potential market participants chose to pursue different economic opportunities. The [Petitioners] executed large volume trades among themselves because, to put it simply, “they were the only game in town.”

  Elliott v. Commodity Futures Trading Comm’n, CFTC Docket No. 95-1, at *10 (Sept. 11, 1996).

\end{itemize}

\textsuperscript{161} Elliott, 202 F.3d at 937.
\textsuperscript{162} Id.
\textsuperscript{163} Elliott, CFTC Docket No. 95-1, at *8 (Sept. 11, 1996).
\textsuperscript{164} Elliott, 202 F.3d at 940 (citations omitted) (Easterbrook, J., dissenting).
\textsuperscript{165} Id. (Easterbrook, J., dissenting).
In *Elliott*, assuming that the Seventh Circuit was correct in stating that the ALJ and the CFTC did not consider Rooney’s unreliable expert testimony in making their findings, the only remaining evidence is the symmetry of the trades. Therefore, by inference, this case tends to establish an evidentiary presumption that symmetrical trades indicate wash sales. The dissent hints at this when it said, “Do we then use the observed behavior — consistent with [wash sales] — to infer agreement and forbid the conduct?” The dissent further stated:

The CFTC simply *assumed* that if given conduct would be unusual unless either (a) agreement had been reached, or (b) small numbers produce interdependence, then explanation (a) must be the right one even in a small-numbers case. It did not attempt to grapple with traders’ interdependence, the parallel to antitrust law, the holding of *Stoller*, or any related issue, and *Chenery* forbids us to fill those gaps.

Taken as a whole, these analyses stand for the idea that circumstantial evidence on its own, without expert testimony to explain the circumstantial evidence, may establish scienter for wash sales where the trier of fact interprets the circumstantial evidence to establish wrongdoing. Perhaps most interesting about this idea is that it is precisely the opposite conclusion as that presented in *Stoller*.

3. Analysis and Potential Impact

By casually affirming an opinion based on very little evidence, all of it circumstantial, and the interpretation of those circumstances in doubt, the Seventh Circuit leads the author to wonder when Rules

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166. See id. at 926.
167. Id. at 944 (emphasis in the original).
168. Id. (emphasis in the original).
169. See infra notes 178-90 and accompanying text.
402 and 702 would apply.\textsuperscript{170} If, as Justice Scalia suggested in his dissent to \textit{Kumho}, a trial judge’s total abandonment of his gatekeeping function is grounds to overturn or remand a decision based on abuse of discretion, it is very difficult to understand why the Seventh Circuit, having aptly analyzed Rooney’s testimony under \textit{Daubert} and \textit{Kumho}, would not overturn or remand \textit{Elliott} for abuse of discretion. Failing to overturn or remand \textit{Elliott} or to say that it \textit{would} have overturned or remanded, as opposed to “we \textit{might} have been inclined . . .”\textsuperscript{171} implies that the gatekeeper function is optional.

In this case, the ALJ wore two hats: fact finder and law finder. It is difficult to determine whether the ALJ didn’t use Rooney’s testimony because it was not reliable or because it was unneeded. The error in this case might be harmless, but the error in general is not: this case opens the door to presenting all the unreliable evidence one chooses in a bench trial, evidence that ought not to be admitted based on relevancy rules, predicated on the idea that the judge will figure out later what is relevant and/or admissible. In essence, the judge can then decide what outcome he likes, then decide to admit evidence based on whether it supports that outcome. Although this is always a danger in bench trials, it becomes a greater danger when the judge isn’t called upon to make determinations of relevancy or reliability as the evidence is presented.

Additionally, allowing uninterpreted, unexplained circumstantial evidence to serve as the only evidence required for a finding of liability not only fails to provide a guide to future courts and tribunals attempting to sort through the \textit{Elliott} holding but also creates a mechanism for a trier of fact to arbitrarily decide on an outcome notwithstanding the evidence presented or to make an uninformed decision if the trier of fact is not familiar with the type of evidence presented. As the dicta giving rise to this concept discusses the standard of review and evidence, the issues on which the Seventh Circuit based its opinion, not wash sales specifically, which the

\textsuperscript{170} \textit{FED. R. EVID.} 402 and 702.

\textsuperscript{171} \textit{Elliott v. Commodity Futures Trading Comm’n}, 202 F.3d 926, 933 (7th Cir. 2000).
Seventh Circuit did not use to ground its opinion, the dicta regarding hybrid expert-fact witness testimony might have widespread effect.

Establishing evidentiary presumptions by inference instead of explicit statement leads to chaos in legal arguments. It would be as difficult to base an entire cause of action on similar evidence using this de facto evidentiary presumption as it would be to argue that the case should not apply in similar circumstances. Also, without an explicit statement, the presumption has no boundaries, limits, or requirements. This issue will certainly be revisited in future proceedings and trials and therefore, the presumption will be refined or destroyed. However, the fact that future courts will have to revisit this issue leads to judicial inefficiency.

C. Wash Sales

1. Prior Case Law

In 1948, the Commodity Exchange Authority ("CEA"), the predecessor organization to the CFTC, described a wash sale as one in which "the intent [of the traders was] not to make a genuine bona fide trading transaction in stocks or commodities."\(^\text{172}\) The CEA issued a memorandum indicating it considered the practice that would come to be known as freshening to be a wash sale.\(^\text{173}\) The memo was “not published as an interpretive release” but as an accompaniment to the \textit{Goldwurm} decision.\(^\text{174}\) In 1959, the CEA repeated its position to the brokers, but not the general public.\(^\text{175}\) In 1955, the CEA again stated its position in an internal memorandum.\(^\text{176}\) In 1971, the CEA repeated this same position to the Chicago Mercantile Exchange.\(^\text{177}\) None of these documents were published to the general public, and “the policy apparently remained

\(^{173}\) Stoller v. Commodity Futures Trading Comm'n, 834 F.2d 262, 265 (2d Cir. 1987).
\(^{174}\) \textit{Id.}
\(^{175}\) \textit{Id.}
\(^{176}\) \textit{Id.}
\(^{177}\) \textit{Id.}
unenforced for years and the allegedly proscribed conduct apparently remained commonplace."178

In 1986, the CFTC brought an action for wash sales used to freshen in Collins.179 The CFTC alleged that Manning Stoller, a trader associated with Hornblower & Weeks-Hemphill, Noyes, Inc., committed wash sales when he freshened positions in May 1976 potato futures.180 The CFTC found that the CEA's position that freshening was a wash sale was clearly stated in Goldwurm,181 and therefore, Stoller was found to have committed wash sales.182

In Stoller v. Commodity Trading Futures Commission, the Second Circuit court ruled that mere transaction symmetry does not create a presumption of wash sales.183 Stoller appealed the CFTC's decision in Collins.184 There was no other evidence of collusion, and Stoller was the sole defendant.185 After Collins, but before Stoller, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Curran showed that in May 1976, an illegal conspiracy depressed the price of potato futures.186 Stoller was not involved in this conspiracy.187

The Second Circuit reasoned that:

An agency is free, of course, to interpret its governing statute case by case through adjudicatory proceedings rather than by rulemaking. . . . In so doing, it may "announce[e] and apply [ ] a new

178. Id.
180. Id. at 31,898.
181. Id. at 31,899.
182. Id. at 31,903.
183. Stoller, 834 F.2d at 262.
184. Id. at 263.
185. Id.
186. Id. at 263 (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982)).
187. Id.
standard of conduct." . . . However, if the Commission suddenly changes its view, as we discuss below, with respect to what transactions are "bona fide trading transactions," it may not charge a knowing violation of that revised standard and thereby cause undue prejudice to a litigant who may have relied on the agency's prior policy or interpretation. 188

The Second Circuit observed that neither the CEA nor the CFTC had ever pursued an action for freshening. 189 The court held that Stoller, in common with the general public, did not have adequate knowledge that the CFTC would seek sanctions against traders who transacted wash sales. 190 The Second Circuit held that the fact that Stoller may not have incurred a great deal of risk in the transactions was not enough to hold that Stoller engaged in wash sales, particularly in view of the CFTC's failure to adequately alert the public to the change in policy. 191

2. Discussion of the Effect of Elliott on the Law Regarding Freshening Trades

The Seventh Circuit majority did not address the wash sale question. 192 The ALJ, the dissent and General Counsel for CBOT writing as amicus did, however. 193

The ALJ warned, "[ruling in favor of the CFTC] would function as a de facto ban on the freshening of a position by means of a day

188. Id. at 265-66 (citations omitted).
189. Id. at 266.
190. Id.
191. Id. at 267. "The Commission may well have the power to construe the statute in such a subtle and refined way, but the public may not be held accountable under this construction without some appropriate notice." Id. (citation omitted).
192. See Elliott v. Commodity Futures Trading Comm'n, 202 F.3d 926, 926-938 (7th Cir. 2000).
193. See id. at 938-39 (Easterbrook, J., dissenting); Brief of Amicus Curiae Chicago Board of Trade, Elliott v. Commodity Futures Trading Comm'n, 202 F.3d 926 (7th Cir. 2000) (No. 98-1305) [hereinafter Seventh Circuit Amicus Brief].
trade. . . . No trader is ever going to freshen a position if he risks liability should the freshening not occur under [CFTC sanctioned conditions].”

Concerned that the CFTC’s decision would “have the unintended consequence of imposing a de facto ban on . . . freshening,” the CBOT submitted an amicus brief on behalf of Petitioners. The CBOT sought to educate the Seventh Circuit on the issue of freshening. The CBOT noted that Rooney testified that “‘freshening . . . is a legitimate means to decrease or delay the physical delivery of a cash commodity . . . [and] has a legitimate economic purpose.’” The CBOT argued that freshening is an economic requisite to a liquid market. The CBOT went on to argue that freshening, in and of itself, is not evidence of an intention to take the risk out of trading. The CBOT then argued that the CFTC’s decision effectively banned freshening trades without properly doing so through rulemaking or adequate interpretive notification.

Not all symmetrical trades are wash sales. For example, suppose an individual sells a stock at a certain price. The stock price goes up. The individual wishes to get back in the market and executes a buy order (not a buy limit order). The market goes down again before the broker and/or market maker can effect the trade, and the buyer ends up buying in again at the same price at which he sold. The trade is symmetrical, but there is no pre-arrangement or intention to remove risk from the transaction. The scienter element of an illegal wash sale would have addressed this instance of accidental symmetrical trading.

196. Id.
197. Id. at 5-6.
198. Id. at 7.
199. Id. at 8.
200. Id. at 9-14.
After *Elliott*, the need to show scienter is in doubt. Even if there were sufficient circumstantial evidence to support the Seventh Circuit's decision, there was very little circumstantial evidence that supported a finding of scienter. As the CBOT stated,

> Given the fact that the [CFTC] has conceded that freshening is a legitimate trading strategy, it has sent inconsistent signals to the trading community by its determination that the absence of any profit or loss supports a conclusion that trades have not been competitively executed. A trader's desire to freshen with minimal loss, and his success in executing the sale and purchase at the same price, should not lead to an inference that he engaged in a noncompetitive transaction.

As another example, suppose a commodity trader wishes to freshen. The price of the commodity is so stable that it does not change. The trader has conducted a symmetrical transaction, but the trade is not pre-arranged or risk-free, so it is not a wash sale. This scenario is very close to the facts of both *Stoller* and *Elliott*, except that rather than being a stable market generally, the price was stable at the volume of trading of the defendants. In a thinly traded commodity, in order to freshen, it is entirely possible that a trader would use a symmetrical trade to accomplish freshening. Additionally, if the trader needed to freshen a very large number of contracts, even in a heavily traded commodity, the market for large trades might be thin, that is, despite there being hundreds of traders in a pit, only three or four others hold positions large enough to transact the freshening trade.

The de facto outcome of *Elliott* is that high volume traders or traders in thinly-traded commodities who wish to stay in the market

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201. *See Elliott v. Commodity Futures Trading Comm'n*, 202 F.3d 926 (7th Cir. 2000). Only the fact that some of the allegedly illicit trades were reported on the same card supports a finding of scienter.


203. *Id.*

204. *See, e.g.*, *Elliott*, CFTC Docket 95-1, at *10 (Sept. 11, 1996).*
in order to maximize profits are forced to choose on which horn of the dilemma to impale themselves. They can either transact a freshening trade that happens to be a wash sale, but for which the necessary scienter for a wash sale is absent, and hope that the agency or a self-regulatory organization will not use the potential implied evidentiary presumption to nail the trader for transacting a wash sale or they can stay in the market with the old position and bear unnecessary risk of taking delivery – unnecessary because freshening is a legitimate practice, one that could be used by a smaller volume trader or a trader in a more heavily traded commodity. Commodity trading is risky, however, that is not at issue. What is at issue is whether commodity trading should be more risky based on the volume traded, not simply because more money is at risk, but because the rules, de facto, are different because of the relative rarity of high volume traders at a particular time.

V. CONCLUSION

In Elliott, the Seventh Circuit stated that two standards of review could apply to appeals from administrative agencies.\(^205\) If the question presented is one that courts normally encounter, then the standard of review is de novo.\(^206\) If the question presented is one that is within the peculiar expertise of the administrative agency, then a deferential standard must be applied.\(^207\)

The Seventh Circuit first claimed that the case involved issues within the peculiar expertise of the CFTC, that is, wash sales and evidence thereof.\(^208\) It used this claim to decline to hand down a legal opinion on the merits of the appellants' case.\(^209\) The court then discussed the very issues it claimed it lacked expertise to discuss.\(^210\)

\(^205\) Elliott v. Commodity Futures Trading Comm'n, 202 F.3d 926, 932 (7th Cir. 2000).
\(^206\) Id.
\(^207\) Id.
\(^208\) Id.
\(^209\) Id.
\(^210\) Id. at 932-938.
It is not so much that the Seventh Circuit wanted to have its cake and eat it as much as it is the court wanted to disclaim all interest in the cake but eat it anyway.

Bad facts make bad law. This case proves this maxim in several ways. The evidence was insufficient to prove Enforcement's assertions. The opinion from the ALJ left unclear on what evidence the ALJ based his decision. The majority's opinion easily disposes of the case, but this easy disposal has disastrous implications. The case fails to resolve whether an evidentiary presumption that trade symmetry implies wash sales, and in addressing the issue as mere dicta, fails to create an issue that the Supreme Court might address. The Supreme Court grants certiorari for circuit court splits. Here, there is effectively a circuit court split with regard to wash sales, but as the majority's decision rests solely on standard of review, and secondarily (and debatably) on admissibility of expert witness testimony, the circuit court split does not officially exist. The dicta is, of course, just dicta, but the majority of the opinion is dicta, and the dicta is far better reasoned than the finding of law. The result is a thoroughly reasoned case that is useless except when it is dangerous.

211. See generally Elliott v. Commodity Futures Trading Comm'n, CFTC Docket 95-1 (Sept. 11, 1996).