

# How We Clinched Our Biggest Win of the Year So Far: A Skadden Team's Win for the Fund Industry

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In this edition of “How We Clinched Our Biggest Win of the Year So Far,” partners Shay Dvoretzky, Eben Colby and Parker Rider-Longmaid of Skadden, Arps, Slate, Meagher & Flom explain the strategy, key decisions and challenges behind its Supreme Court victory for the fund industry.

*The following has been edited for style.*

**Please provide a brief background of the matter.**

**Dvoretzky:** In June 2026, the Supreme Court issued its opinion in *FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.*, a major decision about the scope of the Investment Company Act (ICA). Skadden led a group of firms representing investment funds that had been sued by activist investors seeking to rescind the funds’ bylaws on the grounds that they allegedly violated the ICA. From the beginning, the funds maintained that the ICA doesn’t authorize private plaintiffs like the activist investors to bring suit. The district court and the Second Circuit disagreed with us and recognized an implied private right of action under Section 47(b) of the ICA. The Second Circuit’s rule conflicted with the rule in the Third and Ninth Circuits, which did not recognize a private right of action.

Skadden led the effort to secure Supreme Court review. The Court granted certiorari and, after oral



Courtesy photos

L-R: Shay Dvoretzky, Eben Colby and Parker Rider-Longmaid of Skadden, Arps, Slate, Meagher & Flom.

argument in December, agreed with us, holding that Section 47(b) of the ICA does not create a private right of action. Justice Barrett wrote the majority opinion, which held that outside of two narrow ICA provisions that explicitly allow for private enforcement, the Securities and Exchange Commission has exclusive jurisdiction to enforce the ICA.

**What makes this your biggest win of the year? Why is this matter important?**

**Colby:** This is a significant win for the fund industry. For years, activist investors and other plaintiffs have threatened and brought litigation using Section 47(b) of the ICA. Because almost everything a fund does is structured

by contract, including a fund's bylaws, giving private plaintiffs a tool to rescind contracts based on any provision of the ICA has broad potential implications. The Third and Ninth Circuits correctly rejected those efforts, but the Second Circuit's contrary rule put funds at significant risk. Just by way of example, funds had been targeted by plaintiffs trying to rescind advisory agreements, securities lending agreements, distribution agreements and bylaws. By allowing private plaintiffs to enforce the ICA, the Second Circuit's decision created a great deal of uncertainty for the fund industry—so the court's decision is welcome news for funds and for investors who rely on them.

**Parker Rider-Longmaid:** Beyond the immediate implications for the fund industry, the decision is a powerful reaffirmation of textualism as the dominant methodology for interpreting statutes. Justice Jackson wrote a lengthy dissent defending legislative history as an interpretive tool. But that position garnered just one other vote, from Justice Sotomayor. Justice Kagan, who otherwise joined Justice Jackson's dissent, wrote separately to specifically disavow Justice Jackson's reliance on legislative history. Going forward, we can continue to expect that the Supreme Court will focus on text and structure to interpret statutes.

**Who was on your team, and how did you divide up the work?**

**Dvoretzky:** This victory was a true collaboration across Skadden and the other law firms we partnered with for the coalition of funds. Partner Eben Colby and Counsel Marley Ann Brumme, both in Skadden's Investment Management Litigation group, have been litigating this issue on behalf of funds in trial courts for years, and they had the vision to continue pressing this argument even though the Second Circuit had

held in 2019 that Section 47(b) of the ICA creates a private right of action. Kevin Hardy, a partner in Skadden's Investment Management group, has also been working with funds for more than two decades and knows how they work inside and out and has helped to structure the bylaws that give rise to these issues. We also worked with other firms who represented other funds targeted by the same activist investors, as well as various industry groups. Collectively, the team brought together a wealth of subject-matter expertise about how the ICA actually works, how funds are structured, and the risks posed by the Second Circuit's rule. And importantly, when we were trying to convince the Supreme Court to grant certiorari, the team helped us translate to the Court just how important this issue was for the fund industry—and what disastrous consequences could come from interpreting the ICA to create a private right of action.

On the Supreme Court and Appellate Litigation side, partner Parker Rider-Longmaid helped develop our winning briefing and amicus strategy. We focused on the text of Section 47(b), of course, but our goal was to situate that provision in the broader context of the ICA and the court's caselaw in a variety of areas. We wanted to make sure that the Justices would understand the work that Section 47(b) does—without granting private plaintiffs a cause of action—and had a sense of what types of other issues ruling for us would raise and how the court should think about them. And we helped the court situate the issues in broader context by securing amicus support from, among other parties, the federal government and the Chamber of Commerce.

**In terms of strategy, what do you think helped you clinch the win?**

**Colby:** I think it was a combination of arguments we brought to the table. First, as Shay alluded

to, our team was able to convince the Solicitor General's office and the SEC to support our clients—not just at the cert stage in urging the court to take the case, but at the merits stage, too, in urging the court to adopt our view. We were able to do that only by showing the Solicitor General and the SEC that the activist investors' interpretation of the ICA could have a range of negative consequences for the fund industry. Our deep knowledge of and long relationship with various parts of the fund industry was critical.

**Dvoretzky:** At the Supreme Court, we benefited from significant experience presenting arguments about a complicated statutory scheme to the Justices, who are generalists. We situated the case in the Court's effort over recent decades to curtail the doctrine of implied private rights of action. That framing primed the Court to look with skepticism at the investors' argument.

### **How did you overcome any challenges in resolving this matter?**

**Rider-Longmaid:** We faced two hurdles on the path to success, but our team's breadth and depth helped us turn those challenges to our advantage.

First, when we initially petitioned the Supreme Court for certiorari, rather than granting cert outright, the court called for the views of the Solicitor General to weigh in on behalf of the United States and the SEC in particular. In the early 2000s, the SEC had taken the view that Section 47(b) did create a private right of action—so we were in the unenviable position of convincing the government to disavow that view and take a different approach. Fortunately, as Eben noted, our team came together to impress upon the United States both the importance

of the case and the correctness of our view. The Solicitor General's office came around and supported our clients at the cert stage and then again on the merits.

Second, at the merits stage, the investors relied heavily on a 1979 Supreme Court decision, *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11. They essentially argued that TAMA controlled our case and they should win. But we were able to marshal a range of arguments, including from a host of historical sources, to distinguish TAMA and show that Congress departed from the key language in TAMA. Ultimately, we persuaded the Court that TAMA favored our clients—not the activist investors.

### **What did you learn from this matter?**

**Dvoretzky:** For Skadden, this victory is really a reminder that our strength is in our teamwork across groups. Our Investment Management group and our Litigation group have been working on this issue for years and are on the ground bringing their expertise to bear in their daily work with funds. When the funds were confronted with an adverse ruling in the Second Circuit, Skadden's Supreme Court and Appellate Litigation group was able to leverage our expertise litigating complex issues on appeal. That was possible only because the Investment Management and Litigation groups had the foresight to pursue and preserve the issue. The victory demonstrates Skadden's ability to win results for clients at every stage of litigation by close, forceful coordination.

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