

Skadden Argues Before Supreme Court Against Private Right of Action in ICA Disputes

Skadden

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Partner Shay Dvoretzky argued before the U.S. Supreme Court on December 10, 2025, in *FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.* The case, in which the Court granted certiorari on June 30, 2025, involves a circuit split over whether there is an implied private right of action in Section 47(b) of the Investment Company Act of 1940 (ICA) for private litigants to bring suit to rescind contracts alleged to violate the ICA. The Skadden team, arguing against such a private right of action, also includes Parker Rider-Longmaid, Steven Marcus, Sherry Tanious, Scott Musoff, Eben Colby and Marley Ann Brumme.

The Securities and Exchange Commission (SEC) has the primary authority to enforce the ICA, which regulates registered investment companies such as closed-end funds, mutual funds and exchange-traded funds. Saba Capital Master Fund sued several closed-end funds, arguing that the funds violated the ICA by adopting certain governance provisions in their bylaws designed to protect long-term investors from predatory hedge funds like Saba. Saba's suit, filed originally in the Southern District of New York, sought to rescind the bylaws it alleged were unlawful under the ICA. The Second Circuit previously recognized an implied right of action under Section 47(b), diverging from the Third and Ninth Circuits, which had rejected such a right.

The Court's decision could have a significant impact on private litigation involving 1940 Act registered funds. Rejecting a private right of action, as the petitioning funds argue the Court should do, would reinforce the SEC's primary enforcement role, and maintain greater regulatory certainty for funds — an important element of this \$38 trillion industry that many Americans depend on for their savings and investments. Conversely, if the Court affirms the Second Circuit's view and finds that Section 47(b) does confer a private right of action, the plaintiffs' bar will likely increasingly look to Section 47(b) as a means for claiming alleged violations of the ICA's other sections.

The Supreme Court's decision is expected by July 2026.

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