Strategic Perspectives

Supreme Court preview: will closed-end funds case derail SEC's expected move to expand retail investors' access to private markets?

Highlights

- Explore how a new implied private cause of action could upend SEC plans to further open private markets to retail investors.
- Grasp the esoteric features of closed-end funds and how shareholder activism can affect closed-end fund valuation.
- Get up to date on recent SEC developments regarding closed-end funds.

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By Mark S. Nelson, J.D.

The Supreme Court will soon decide a key question regarding the legal liability of closed-end funds. In June 2025, the justices agreed to hear a case asking the question whether Section 47(b) of the Investment Company Act (ICA) creates an implied private cause of action for rescission of contacts that violate the ICA. The outcome of the case could influence whether fund companies, if allowed to by the Securities Exchange Commission (SEC), will become more open to retail investors.

Introduction

The case brought by Saba Capital Master Fund, LTD against FS Credit Opportunities Corp. and other funds probed the limits of ICA Section 18(i), which provides that fund shareholders are entitled to the same vote as other fund shareholders. Saba Capital asserted that it had a right to buy a controlling voting interest in FS Credit Funds but that resolutions adopted by those funds under a state control share acquisition law barred Saba Capital from achieving its objective of acquiring enough shares to force governance changes that may result in increased shareholder value. As a result, Saba Capital sought to have the control share acquisition resolutions rescinded under a provision in the ICA.

The Supreme Court, in a decades-long shift, has generally become increasingly hostile to creating new implied private causes of action, at least when such actions are not grounded in an express statutory grant by Congress. Historically, the justices applied a multi-factor test that emphasized statutory purpose but, in recent years, the justices have adopted a narrower test that emphasizes statutory text and structure. The closed-end funds case will test whether a majority of the justices agree that a cause of action must be implied in order to give effect to the remedy expressly granted in the ICA's text.

The case also will be decided in an environment in which the Trump Administration has issued an executive order (EO) directing the Department of Labor (DOL) and the SEC to find ways to permit 401(k) retirement plans to include alternative assets. The EO also calls for the SEC to consider the ways in which it can give retail investors greater access to private market investments more generally.

The main wild card is the EO's language about removing litigation barriers that could stand in the way of broadening 401(k) investment options. That raises questions about whether the Trump Administration has the authority to curtail ERISA lawsuits. Likewise, the closed-end funds case now pending before the Supreme Court could

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Opening private markets?

The latest debate over retail investors' access to private markets follows the issuance of an executive order directing federal regulators to enable such access.

- In prepared remarks to the Practising Law Institute's SEC Speaks 2025 gathering in Washington, D.C., SEC Chair Paul S. Atkins suggested that the SEC should be open to easing the restrictions on investments in closed-end funds, which he noted typically invest in private equity funds and hedge funds. Atkins said his intent is for the Commission to mull whether such action could give retail investors more opportunities to diversify their holdings consistent with their investment time frames and risk profiles.
- Natasha Vij Greiner, then-Director of the SEC's Division of Investment Management, noted in a speech that registered investment companies' holdings of private funds had increased significantly since 2019 and that closed-end funds may be a more flexible way for more investors to gain exposure to private markets. "As a result, I believe it is appropriate to consider under what circumstances private fund investments should be available to investors who are not accredited investors or qualified purchasers, through these registered fund vehicles," said Greiner. "That said, robust disclosure is appropriate for funds that are available to retail investors and that invest in complex assets like private funds."
- Nine of the 30 Republicans on the House Financial Services Committee, including Chair French Hill (R-Ark), wrote a letter to SEC Chair Atkins urging him to quickly implement goals for the SEC under the Trump Administration's executive order regarding alternative assets. "Given these directives, we encourage the SEC to provide swift assistance to the Secretary of Labor and to make any necessary revisions to its current regulations and guidance," said the GOP lawmakers. "We also request the SEC review bipartisan legislation being advanced in the 119th Congress concerning accredited investors. We are hopeful that such actions will help the 90 million Americans that are currently restricted from investing in alternative assets to secure a dignified, comfortable retirement."
- In the Senate, Banking Committee Ranking Member Elizabeth Warren (D-Mass) issued a statement in which she focused on Wall Street's role in opening up risky investment opportunities for retirement savers. "President Trump just granted private equity billionaires their biggest wish: access to Americans' retirement savings," said Warren. "But it's a rotten deal: the data shows private equity has failed to deliver the returns it has promised while saddling investors with exorbitant fees. Trump's executive order will expose Americans' retirement savings to risky investments with little transparency and weak protections—as well as to highly volatile crypto assets."
- The Managed Funds Association (MFA) offered an industry view of the proposed opening of private market investments options to retail investors, albeit only in the context of 401(k)s. The MFA stated five principles that emphasize flexibility, strategy-neutral regulations, the presence of professional investment managers, fees based on the nature of the investment services delivered, and an admonition against "[o]verzealous litigation."
- The Retirement Investment Choice Act (H.R.5748), sponsored by Rep. Troy Downing (R-Mont), would codify the Trump Administration's EO on alternative assets.

expand or shut down investor lawsuits over fees and other disputes, making closed-end funds, which some SEC officials have suggested could be one of the best vehicles for retail investors to gain exposure to private markets, more or less desirable for that purpose.

Shareholder activism and the mechanics of closed-end funds

Petitioner FS Credit, with an assist from the Solicitor General, has persuaded the U.S. Supreme Court to hear its claim that ICA Section 47(b) does not create an implied private cause of action. The case will test how willing the current Supreme Court is to find the existence a private cause of action despite possibly less than explicit statutory language. (*FS Credit Opportunities Corp. v Saba Capital Master Fund, Ltd.*, certiorari granted, No. 24-345 (U.S. June 20, 2025)).

At its heart, the case involves the somewhat unique nature of closed-end funds and how their value is tracked. Respondent Saba Capital Master Fund, Ltd. invested in several closed-end funds offered by FS Credit that were subject to Maryland law. Saba Capital's investment strategy is rooted in shareholder activism and seeks to bring about changes in governance or strategy at closed-end funds to push these funds' share prices higher.

Specifically, Saba Capital looks for a fund that has a share price below its current per share net asset value. Saba Capital, for example, said it could unlock value by electing new board members, pushing FS Credit to buy back shares at or near their NAV, or by seeking to convert the closed-end fund into an open-end fund. FS Credit and Saba Capital, for obvious reasons, dispute whether such a strategy helps or hurts closed-end fund shareholders.

However, funds like those offered by FS Credit have attempted to blunt the impact

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of activist investors by, in the case of FS Credit, invoking the Maryland Control Share Acquisition Act (MCSAA). The MCSAA strips an investor of their voting rights once they acquire 10 percent of the voting shares in a fund absent approval by the non-interested shareholders. Saba Capital sued FS Credit under ICA Section 47(b) to invalidate decisions made by FS Credit's funds to invoke the MCSAA in an effort to block Saba Capital's purported governance agenda.

The lower court decisions

The U.S. District Court for the Southern District of New York concluded that Saba Capital had Article III standing, that personal jurisdiction existed over the various defendant funds, and that Saba Capital was entitled to summary judgment on its substantive claim for rescission. The district court cited Second Circuit precedent for the proposition that Section 47(b)(2) created a private cause of action for rescission.

The Second Circuit affirmed with only a slight tweak to the lower court's rationale for exercising personal jurisdiction. First, Article III standing existed because despite not having invested in 10 percent of each fund, Saba Capital nevertheless incurred substantial risk that the perceived injury would occur, had averred that it could reach 10 percent levels in some funds within a short period of time, and FS Credit failed to rebut those claims. Personal jurisdiction existed over the defendant funds because of the ICA's provision for nationwide service of process provided that the venue selected is appropriate. Here, the Second Circuit said venue in New York City was proper because the defendant funds listed their shares on the New York Stock Exchange, used New York brokers to effect trades, and paid for "data resources" that allowed access to financial data. Thus, venue was proper in the Southern District of New York and minimum contacts with the U.S. was a sufficient basis to establish personal jurisdiction. For this reason, the Second Circuit did not consider other theories of personal jurisdiction that had been discussed by the district court, including New York's long-arm statute.

With respect to the substantive issue of whether Saba Capital could vote its shares in the funds, the court began with a review of key provisions in the ICA. For one, subject to certain exceptions and qualifications, ICA Section 18(i) provides that "…every share of stock hereafter issued by a registered management company…shall be a voting stock and have equal voting rights with every other outstanding voting stock." Because "voting stock," the key term in Section 18(i), is not defined in the ICA, the court looked to two other ICA definitions to explain the scope of Section 18(i). First, ICA Section 2(a)(42) defines "voting security" to mean "any security presently entitling the owner or holder

Expanding indirect access to private funds

The SEC's Division of Investment Management issued Accounting and Disclosure Information (ADI 2025-16) on August 15, 2025, in which the Division stated that its staff, upon reviewing registration statements filed by registered closed-end funds that invest in private funds (CE-FOPFs), will no longer issue comments requesting the registrant to include accredited investor status, minimum investment requirements, or to limit investment in private funds to 15 percent of its assets.

ADI 2025-16 explained that, for the past 20 plus years, CE-FOPFs that invest 15 percent or more of their assets in private funds typically require their investors to be accredited investors and these funds have imposed a minimum initial investment amount of at least $25,000. However, investors who indirectly invest in private funds still have additional protections under the federal securities laws that do not exist for investors who directly invest in private funds.

ADI 2025-16 also noted the areas that CE-FOPFs should address in their disclosures:

- Ensure that registration statements are "clear, concise, and understandable" and in compliance with the agency's Plain English rule.
- Closed-end funds must disclose all information mandated by Form N-2.
- CE-FOPFs should describe fee structures employed by underlying private funds (e.g., the potential impact of performance-related compensation on returns and the potential for performance fees to generate "netting risk" even if underlying private funds' or the CE-FOPF's overall performance is negative).
- Consider making disclosures about the underlying private funds.
- Explain that underlying private funds are not limited by the Investment Company Act and that shareholders may have limited information about underlying private funds.
- Consider making disclosures about the material risks related to the underlying private funds' legal jurisdictions, the "liquidity terms" for private fund investments, and tax considerations.
- Make certain filings to update registration statements under Securities Act Rules 424, 486(a), and 486(b) to reflect the current guidance.

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thereof to vote for the election of directors of a company." ICA Section 2(a)(36) defines "security," the key term contained in the definition of "voting security," to mean, among other things, "any…stock."

The Second Circuit, citing another case in which Saba Capital had been involved, explained that the MCSAA functions such that Saba Capital cannot "presently" vote its shares, which then lose their character as "voting stock." Moreover, because some shares are treated differently than others for purposes of voting, Saba Capital's shares would lose their "equal voting rights." The appeals panel rejected FS Credit's argument that the MCSAA resolutions were required by law because FS Credit voluntarily opted into the MCSAA.

Implied cause of action?

FS Credit argued in its petition for certiorari and in later briefing that the justices should take the case and clarify that Section 47(b) of the ICA does not create an implied private cause of action. FS Credit cited the growing trend of the justices shying away from finding implied private causes of action and why the language of Section 47(b) does not allow such a finding.

Section 47(b)(1) of the ICA provides, in relevant part: "A contract that is made, or whose performance involves, a violation of this title, or of any rule, regulation, or order thereunder, is unenforceable by either party *** unless a court finds that under the circumstances enforcement would produce a more equitable result than non-enforcement and would not be inconsistent with the purposes of this title."

Section 47(b)(2) of the ICA provides: "To the extent that a contract…has been performed, a court may not deny rescission at the instance of any party unless such court finds that under the circumstances the denial of rescission would produce a more equitable result than its grant and would not be inconsistent with the purposes of this title."

FS Credit's merits argument

FS Credit's merits brief argued that the Supreme Court currently avoids finding new implied private causes of action and that the justices should focus narrowly on the text and structure of ICA Section 47(b).[1] According to FS Credit, all courts, including the Second Circuit panel that decided the case below, agree that Congress created two express private causes of action in the ICA and that Section 47(b) is not among them. For example, ICA Section 30(h) subjects executives at certain investment companies' to private short swing trading lawsuits brought under Exchange Act Section 16. ICA Section 36(b) provides for a private cause of action (in addition to SEC enforcement) for breach of fiduciary duty by an investment company's investment adviser regarding the adviser's receipt of compensation for services or its receipt

SEC Investor Advisory Committee recommendation

The SEC's Investor Advisory Committee met September 18, 2025, to mull several items, including a draft recommendation on retail access to private market investments. The committee urged the Commission to consider a cautious opening of private markets to a wider audience through multiple regulatory changes for registered funds, including regarding fund valuation and enhanced liquidity disclosures.

"In the Committee's view, the optimal way for retail investors to access private market assets is through *registered funds*, which allow retail investors to invest in broadly diversified funds that contain private market assets, often alongside public market assets," said the draft (emphasis in original).

The IAC said it does not plan to take a position on retail investors' direct access to private markets. But the draft recommendation said direct access, if approved, should be accompanied by appropriate guardrails to protect investors.

The North American Securities Administrators Association (NASAA) commented that: "NASAA believes that the recommended investor protection guardrails are a good start for improving the private and exempt offering marketplace but remains opposed to diluting protections in the accredited investor definition." NASAA explained that private markets remain opaque and subject to liquidity and other risks that retail investors may be unable to address on their own. NASAA added: "If Congress or the SEC chooses to expand retail investor access notwithstanding those risks, it is imperative that the SEC use its regulatory authority to mitigate the potential for investor hardship and loss. Investor protection remains part of the SEC's mission and expanding retail access to private markets, without the types of guardrails outlined in this recommendation, would be inconsistent with that mission."

1 BlackRock ESG Capital Allocation Term Trust (ECAT) and BlackRock Municipal Income Fund (MUI) submitted a letter to the Supreme Court indicating that they, as was FS Credit, were defendants-appellants in the case below and that they are respondents in the current matter. The BlackRock funds said they sought to reserve the right to participate on the merits if the justices agreed to hear the case. As of publication, BlackRock had not filed any merits stage briefs other than to join FS Credit's merits brief in support of FS Credit.

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of material payments from a registered investment company (RIC) or the RIC's security holders. That leaves only the question of whether a private cause of action can be implied from Section 47(b). In FS Credit's view, an implied cause of action under Section 47(b) would upset the grand bargain struck by Congress, the SEC, and the fund industry when the original ICA became law.

The key to FS Credit's argument is the purpose the fund ascribes to the components of Section 47(b). FS Credit argued that neither Sections 47(b)(1) nor 47(b)(2) contain any rights-creating language. Rather, both provisions state merely when a court may order equitable relief such as rescission. Section 47(b)(1) generally bars a court from enforcing an otherwise unenforceable contract unless the court makes a specific finding about why the contract ought to be enforced. Section 47(b)(2), FS Credit explained, exists for the purpose of overruling contrary state laws; that is, the provision "supersedes state contract-law doctrines that might prevent rescission even when a contract violates a federal statute."

FS Credit said that Sections 47(b)(1) and 47(b)(2) speak only to courts, not private litigants, and they would not be triggered unless a contract violates another substantive provision of the ICA. FS Credit's prototypical example is that of a breach of contract action in which Section 47(b) might then assume a defensive posture.

FS Credit also argued that the structure of the ICA counsels against finding that it creates an implied private cause of action. Here, FS Credit said the ICA emphasizes the SEC's extensive enforcement powers and limits private causes of action to two types of private claims that were expressly created by Congress.

Lastly, FS Credit argued that the Second Circuit panel focused too much on the statutory text "may not deny rescission at the instance of any party" in Section 47(b)(2) in finding that an implied private cause of action existed. FS Credit also said the Second Circuit inaptly relied on Supreme Court precedent that predated the justices' shift away from a multifactor test for implied private causes of action and to a new emphasis on statutory text and structure. The precedent, *Transamerica Mortgage Advisors, Inc. v. Lewis* (*TAMA*) (U.S. 1979), found that Investment Advisors Act Section 215(b) created an implied private cause of action because the use of the word "void" in contexts similar to ICA Section 47(b) suggested a remedy must be available somewhere) but that Investment Advisors Act Section 206 did not create a private cause of action because the SEC had extensive enforcement authorities under that provision. A key factor in FS Credit's argument is that Congress amended the ICA after *TAMA* and replaced "void" with "unenforceable," in the fund's view, rendering Section 47(b) defensive in nature and, thus, divorced from its former common law roots which continue to inform lawsuits invoking IAA Section 215(b).

Solicitor General's cert-stage and merits views

The justices asked the U.S. Solicitor General to provide the government's view of Section 47(b) as amicus curiae. In its cert-stage amicus brief, the government reiterated many of the arguments that FS Credit had already made in its petition for certiorari and urged the court to take the case to clarify whether Section 47(b) allows for a private cause of action.

"In suits that are otherwise within the purview of a state or federal court, Section 47(b) generally renders such contracts unenforceable and potentially subject to rescission," said the government in its cert-stage amicus brief. "But it does not create any freestanding cause of action for the parties to such contracts to invoke the jurisdiction of a federal court."

The government's merits stage amicus brief largely reiterated, perhaps in somewhat greater detail, its theory that neither the text nor structure of Section 47(b) suggest that Congress intended to create a private cause of action for rescission of contracts that violate the ICA. Much like FS Credit, the government relies on the Supreme Court's increasingly stringent test for determining whether an implied private cause of action exists under a Congressional statute.

The government, but not the parties to the case, cobbled together a test from multiple Supreme court opinions for analyzing whether Congress intended to let private parties litigate. The test draws heavily from litigation regarding 42 U.S.C. § 1983, a federal statute that permits individuals to sue government actors for violations of other rights. As a result, § 1983 applies to persons acting under color of law whose actions result in "deprivation[s] of any rights, privileges, or immunities secured by the Constitution and laws." Although § 1983 itself is not a cause of action or claim, it functions as the statutory vehicle through which other rights are potentially vindicated.

The Supreme Court's more recent opinions in this area have focused on the question of whether a statue contains "rights-creating" language that is "unambiguous," especially in cases brought under § 1983 but also where separation of powers issues are especially strong, such as those involving Congressional spending powers. However, by analogy, the Supreme Court has tended to apply the same standard to the question of whether a statue outside of the § 1983

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and spending power contexts crates an implied private cause of action.[2]

From these precedents, the government extracts a test that looks like a much stronger version of *Cort v. Ash* (U.S. 1975)[3] that asks: (1) Does the statute clearly and unambiguously use rights-creating language; (2) Does the statute display an unmistakable focus on individuals like the plaintiff; and (3) Does the statute manifest an intent to create not just a private *right* but also a private *remedy* under federal law (emphasis added). Secondarily, the government noted that courts also must examine the structure of the statute.

According to the government, Section 47(b) does not unambiguously use rights-creating language, nor does it manifest an unmistakable focus on persons like Saba Capital. Specifically, the language prohibiting judicial enforcement of contracts that are invalid under the ICA (except to the extent a court finds otherwise on equitable grounds) does not suggest the existence of a private cause of action, said the government. In other words, the provision is focused on how it applies to other lawsuits, but itself does not create a new cause of action. The government added that the statute does not contain typical language focused on an individual's right to sue, such as the phrase "No person … shall…" and it instead is directed to courts.

The government also urged the justices to find that the structure of the ICA precludes a finding that Section 47(b) created an implied private cause of action. For example, ICA Sections 30(h) and 36(b) contain language expressly creating private causes of action, while Section 47(b) lacks similar express language. The government also said an analogous provision in Investment Advisers Act Section 215(b) addressing contracts that are "void" was inapt because Congress changed the ICA version of that provision (i.e., a prior version of Section 47(b)) to apply to "unenforceable" contracts only.

The Solicitor General has asked the justices to allow the government, as amicus curiae, to participate in oral argument in support of FS Credit.

Saba Capital's merits argument

Saba Capital's merits brief focuses on the law, to be sure, but overall it is less about making legal arguments than it is about making a nuanced psychological argument to convince a likely reluctant conservative majority to see how the recognition of a limited, implied equitable cause of action is necessary for shareholders to obtain the rescission remedy expressly granted by Congress in Section 47(b) without those several justices having to abandon the conservative instincts that counsel them against recognizing new implied causes of action.

The introductory section of Saba's merits brief set the tone: "Petitioners will get no argument from respondents in asserting that this Court should not reset the clock to the freewheeling days of yore," said Saba Capital. "But petitioners are dead wrong in their attempt to paint *TAMA*, a decision joined by Justices Powell and Rehnquist, as a relic of the *ancien regime*. Denying even a limited private right to rescission in a case like this or *TAMA* is to deny the statutory text."

According to Saba Capital, the amended Section 47(b) made the existence of a private cause of action for rescission more, not less, explicit by using the word "rescission" and by providing for "rescission at the instance of any party," subject only to a judicial override if a court were to find the contrary to be the more equitable result. Specifically, under the Supreme Court's *TAMA* precedent, both IAA Section 215 and ICA Section 47(b) once used the same language, and both were found to contain implied causes of action for rescission. Post-amendment, Saba Capital added, ICA Section 47(b)'s references to unenforceability made the right to rescission more explicit by using "exactly the kind of 'rights-creating language' focused on 'the individuals protected' that this court had found sufficient to demonstrate that Congress intended 'to confer rights on a particular class of persons'" (citing *Alexander v. Sandoval* (U.S. 2001) (fixing text and

2 See, *Alexander v. Sandoval* (U.S. 2001) ("Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink.")); *Gonzaga Univ. v. Doe* (U.S. 2002) ("This being so, we further reject the notion that our implied right of action cases are separate and distinct from our §1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under §1983." *** "We have recognized that whether a statutory violation may be enforced through §1983 'is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute.' But the inquiries overlap in one meaningful respect—in either case we must first determine whether Congress intended to create a federal right" (internal citations omitted)); and *Medina v. Planned Parenthood S. Atl.* (U.S. 2025) (observing that "[t]hough it is rare enough for any statute to confer an enforceable right, spending-power statutes like Medicaid are especially unlikely to do so.").

3 See *Cort v. Ash* (U.S. 1975) (cobbling together a four-factor test for whether an implied private cause of action exists: (1) Is the plaintiff one of the class for whose *especial* benefit the statute was enacted? (2) Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? (3) Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? and (4) Is the cause of action one traditionally relegated to state law, in an area basically the concern of the [s]tates, so that it would be inappropriate to infer a cause of action based solely on federal law? (emphasis in original))

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structure, not purpose, as the bases for implying private causes of action)).

Saba Capital also reiterated that the SEC held the view that Section 47(b) created a private cause of action for rescission even after *Sandoval* was decided. In its cert-stage supplemental brief, filed in response to the government's cert-stage amicus brief, Saba Capital had countered the government's assertion that the SEC no longer supported the view stated by the agency in an amicus brief in another case that Section 47(b) supports a private cause of action. Here, Saba Capital noted that the SEC took that position *after* the Supreme Court decided *Sandoval*, in which the justices sought to narrow the instances in which a private cause of action can be implied from a statute (emphasis added). In a footnote to its merits brief, Saba Capital reiterated that the SEC took its view after *Sandoval* was decided and suggested the Supreme court has not offered additional guidance that would invalidate the SEC's prior view that Section 47(b) created an private cause of action.

For purposes of the Supreme Court's current approach to implied causes of action, Saba Capital argued that Section 47(b)'s language focuses on a benefitted class of persons who are harmed by contracts that violate the ICA. The phrase "at the instance of any party," said Saba Capital, is "individual-centric" because it refers to an individual's relief from a contract that violates the ICA and does not merely refer "generically" to how a contract might violate the ICA. Moreover, the history of the phrase "at the instance of any party" suggests a "suit in the first instance" and not merely a defense to, or a rule of decision applicable to, another suit brought separately.

Saba Capital also argued that the structure of ICA Section 47 demonstrated that subsection (b) expressly created a limited, private cause of action for rescission. For one, Section 47(a) contains that same "void" language as IAA Section 215 and, thus, contemplates a remedy for a violation, including rescission (In its merits brief, Saba Capital noted that it also had relied on this provision below and should be allowed to pursue its Section 47(a) theory regardless of

Circuit split in focus: Part I

FS Credit and the government emphasize the deepening nature of a circuit split over Section 47(b), while Saba Capital minimizes the potential split and asserts that lower courts may eventually harmonize their views if the question presented is allowed to "percolate." The split may be most pronounced between the Second Circuit (private cause of action) and the Third and Ninth Circuits (no private cause of action). Two cases show the evolution of Second Circuit views on Section 47(b):

- The first case involved a dispute between different classes of noteholders over the distribution of assets to senior noteholders (who would be paid) and junior noteholders (who would not be paid but sought rescission or pro rata distribution) following an alleged event of default arising from the resale of notes to a buyer who was not a qualified purchaser. The Second Circuit held that Section 47(b)(2) unambiguously created a private cause of action for rescission. Among other things, the court explained that "any party" means parties to "a contract whose provisions violate the ICA." The court also explained that the ICA elsewhere referred to the SEC as the "Commission" such that "any party" did not designate the SEC as the sole enforcer of Section 47(b). However, the court concluded that the junior noteholders' claim failed because the contract at issue did not violate the ICA (*Oxford Univ. Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99 (2d Cir. Aug. 5, 2019)).

- The second case involved allegations of self-dealing related to a collateralized loan obligation in violation of the anti-waiver provision contained in Investment Advisers Act Section 215(b). The Second Circuit affirmed dismissal because "under §215(b), a contract's performance involves the violation of the IAA only if performing a contractual duty requires conduct prohibited by the IAA" and the complaint failed to allege this type of unlawful conduct. The Second Circuit added regarding the relationship between IAA Section 206—an antifraud provision—and Section 215(b), which allows only rescission: "As such, permitting claims under §215(b) based solely on conduct not required by the contract would create what Judge Sullivan described as 'a backdoor to the private right of action that the Supreme Court refused to find under §206.'" The Second Circuit also reasoned by analogy, citing *Oxford*, that IAA Section 215(b) functions similarly to ICA Section 47(b), which the *Oxford* court explained provides for "a cause of action for rescission…applying to *illegal* contracts, rather than to legal contracts performed in an illegal manner" (emphasis in original) (*NexPoint Diversified Real Estate Trust v. Acis Capital Mgmt., LP*, 80 F.4th 413 (2d Cir. Sep. 7, 2023)).

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the outcome regarding Section 47(b)). Section 47(b)(1) states that a contract in violation of the ICA is presumptively void. Section 47(b)(2) provides that "a court may not deny rescission at the instance of any party," absent a contrary finding by the court. And Section 47(b)(3) limits some aspects of the rescission remedy; specifically, the focus is on rescission of the unlawful part of a contract not the lawful part(s); the provision also would not bar recovery against any person for unjust enrichment.

With respect to legislative history, Saba Capital argued that a "fair construction" of ICA Section 1 must consider Congressional intent to address contracts that may be discriminatory, or which may tend to entrench fund management. More broadly, the relevant legislative history, Saba Capital suggested, was that lawmakers wanted private causes of action to coexist with SEC enforcement.

Saba Capital also critiqued both FS Credit's merits argument and the government's amicus brief. Saba Capital said FS Credit's textual arguments were wrong. For example, Saba Capital said that Section 47(b)(2) applies to the extent that a contract has been performed, but that a fully performed contract would leave no possibility of a

Circuit split in focus: Part II

The Third, Ninth, and Fourth Circuits have weighed in against a private cause of action.

- **Third Circuit—**Retirement investors sued under the ICA and ERISA alleging that a fund company charged excessive fees on group annuity contracts they invested in via a 401(k) plan. The lower court dismissed the ERISA claims because the plaintiffs failed to make a demand on and join the trustees. Claims under ICA Sections 36(b) and 47(b) also were dismissed because the plaintiffs lacked continuous ownership of the funds (Section 36(b)) and, thus, "the Section 47(b) claim would seem to fail also." The Third Circuit held that the plan participants lacked standing to sue under ICA Section 36(b) and that they lacked a cause of action under Section 47(b). The ERISA claims were vacated and remanded.
  The appeals court, with respect to Section 47(b), reasoned that:
  1. Congressional inclusion of 36(b) in the ICA precluded other private causes of action under the ICA.
  2. ICA Section 26(f) does not create investor rights, so the plan participants could not invoke Section 47(b) to assert a claim based on Section 26(f) because 26(f) focuses on the person regulated, not the person to be protected.
  3. The appeals court also compared the Investment Advisers Act to the ICA: IAA Section 215, for example, addresses "void" contracts and ICA 47(b) addresses "unenforceable" contracts. The appeals court said "void" implies a need for a cause of action to obtain rescission, an injunction, or restitution, while "unenforceable" suggests a remedy, but does not give rise to a distinct cause of action (*Santomenno ex rel. John Hancock Trust v. John Hancock Life Ins. Co.* (3d Cir. Apr. 16, 2012)).

- **Ninth Circuit—**A pension fund claimed that Yahoo! Inc.'s investment in Alibaba.com violated an exemption granted to it by the SEC under the ICA and, thus, Yahoo! was an unregistered investment company. The court concluded that ICA Sections 3(b)(2), 7, 44, and 47(b) did not provide a private cause of action to challenge the validity of an ICA exemption. But the court focused on Section 47(b), reasoning that: (1) Congress intended for the SEC to police possible violations of ICA exemptions; (2) the statute text does not mention an express private cause of action and instead merely states that contracts made in violation of the ICA are unenforceable; and (3) the structure of the ICA demonstrates that Congress intended the SEC to have broad enforcement powers and that it did not intend to create private causes of actions under the ICA beyond the two it did create in Sections 30(h) and 36(b) (*UFCW Local 1500 Pension Fund v. Mayer* (9th Cir. July 12, 2018)).

- **Fourth Circuit—**Holders of some but not all mutual funds managed by Janus Capital Management LLC (JCM) alleged that the fund company violated the ICA by allowing some investors to engage in market timing. JCM settled the SEC's related charges. In an unpublished opinion, the appeals panel affirmed summary judgment on the ICA Section 36(b) claim, finding this provision did not afford plaintiffs a cause of action for certain types of damages. The panel also affirmed that even if the plaintiffs had standing, they would be precluded from any recovery by the funds' right to offset. With respect to ICA Section 47(b), the panel rejected the plaintiffs' theory that the phrase "other relief" in Section 36(b) allows them to seek rescission of contracts in violation of the ICA under Section 47(b) (*Steinberg v. Janus Capital Mgmt., LLC* (4th Cir. Dec. 2, 2011)).

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cause of action, thus rendering the provision useless in a defensive context. Saba Capital suggested that the government was wrong to imply that the availability of a state law rescission suit might function as an alternative to an implied cause of action under the ICA, emphasizing that that was not truly a reason to deny a federal cause of action expressly created by Congress. According to Saba Capital, both FS Credit's and the government's theories of the case would render superfluous the phrase "at the instance of any party."

Saba Capital also reiterated its cert-stage argument that the Second Circuit correctly decided in its favor while also countering FS Credit's claims that a private cause of action under Section 47(b) could open the floodgates to new litigation against closed-end funds. Here, the firm argued that the Second Circuit relied on Section 47(b)'s plain text, which that court likened to an express private cause of action, and the Supreme Court's *TAMA* opinion (*Transamerica Mortg. Advisors, Inc. v. Lewis (U.S. 1979*), which addressed similar language. The Second Circuit, Saba Capital added, applied Section 47(b) to a limited class (persons harmed by ICA-violative contracts) and limited the implied private cause of action to rescission, without a damages component. In its cert-stage briefing, Saba Capital noted that the Second Circuit had a long history of limiting the reach of Section 47(b). In one case, the Second Circuit said that Section 47(b) applied to recission only and did not create a right to compensatory damages.[4] In another case, the Second Circuit clarified that Section 47(b) is not a back door to impermissible damages under ICA Section 36(b).[5] Moreover, Saba Capital said that, in addition to circuit court restraints on the use of Section 47(b), the provision itself contains an equitable safety valve because a court can deny rescission if, under the circumstances, denial would be not only more equitable but would not be inconsistent with the ICA.

Lastly, Saba Capital denied that allowing private parties to sue each other under Section 47(b) would have adverse impacts on the fund industry. Saba Capital cited what it suggested was long experience with the similar private cause action under IAA Section 215 and the several years' experience after the Second Circuit recognized a private cause of action under Section 47(b)'s amended text for the proposition that the fund industry has not suffered unduly because of the limited private causes of action for rescission that may be brought against funds. "That resounding silence confirms that petitioners' breathless warnings of potential chaos are greatly exaggerated—which presumably explains why the government itself does not join in petitioners' doomsaying," said Saba Capital.

Saba Capital, during its cert-stage briefing, argued extensively that the justices should not take the case because the circuit split below was not especially deep. The firm, however, did not re-assert that argument in its merits briefing. Much as Saba Capital has argued on the merits that the implied cause of action skeptics on the court previously found an exception for the IAA (and by implication for the ICA's prior language) in *TAMA* and, thus, were not in disagreement except regarding private causes of action for damages, the firm had argued at the cert-stage that, with respect to Section 47(b), lower courts were not in significant disagreement on a private cause of action for rescission because, either their views were not in direct conflict or they might harmonize their views after further percolation. It remains to be seen if any justices at oral argument will question whether certiorari in the case may have been improvidently granted given Saba Capital's possibility of pursuing a cause of action under ICA Section 47(a) and the potentially fuzzy nature of the circuit split asserted by FS Credit. It bears reminding that just one term ago the justices "DIGed" two securities law cases and dismissed them as having been improvidently granted after having heard oral argument.

Private amici views

As discussed above, the government, as amicus curiae, has made its views known to the justices. Likewise, a relatively small number of private amici have offered their views to the justices at the merits stage. Of the five private amici, four support FS Credit and one supports neither FS Credit nor Saba Capital but would urge an interpretation of the ICA favorable to Saba Capital.

The Freedom and Justice Foundation, formally not supporting either party, argued that the Supreme Court's *Sandoval* opinion is inapt in the context of private contract disputes, especially where Section 47(b) does not prescribe a public or private enforcer. According to the group, common law contract principles apply, including the principle that declaratory relief should be available such that a party need not wait to be sued and then raise Section 47(b) defensively. In the group's view, Section 47(b) does not, as the Second Circuit concluded, "create" a private cause of action so much

4 *Oxford University Bank v. Lansuppe Feeder LLC* (2d Cir. 2019).

5 *NexPoint Diversified Real Est. Tr. v. Acis Cap. Mgmt., LP* (2d Cir. 2023).

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as it "affirms" the existence of a common law-based cause of action.[6]

Three of the four groups that urged the justices to deny an implied private cause of action under Section 47(b) significantly overlap in their arguments, but their main theories can be summarized as follows: (1) Section 47(b) lacks the rights-creating language that might otherwise demonstrate Congressional intent to create a private cause of action; (2) the ICA makes the SEC the primary regulator and enforcer of the statute, including Section 47(b), such that the SEC can grant exemptions or otherwise limit application of the ICA in specific situations; (3) the ICA's independent director requirement functions to protect investors in tandem with the SEC's broad regulatory and enforcement authority under the ICA; and (4) allowing an implied private cause of action under Section 47(b) could produce regulatory uncertainty and/or open a back door to lawsuits under still more sections of the ICA beyond the two sections that already contain explicit private causes of action.[7]

A fourth group, Separation of Powers Clinic, also supporting FS Credit, however, took a more nuanced approach that would preserve some existing implied private causes of action, such as those under Exchange Act Section 14 and Exchange Act Rules 14a-8 and 14a-9. The group said that the justices have upheld those private causes of action because they have existed for a long period of time and that eliminating them now would upset regulatory and investor expectations. By contrast, the group urged the justices to hold that ICA Section 47(b) does not create an implied private cause of action because this statutory provision lacks the long history and market expectations that have been recognized regarding Exchange Act Section 14. The group said such conclusion would be consistent with the justices' reluctance to recognize new implied private causes of action.[8]

Three amici explicitly supported Saba Capital. Collectively, these amici defended the view that ICA Section 47(b) creates a private cause of action for rescission, while some of these amici also defended the practice of activist institutional investors providing a check on fund managers.

Marlton Partners, L.P., for example, said the SEC's withdrawal of guidance that functioned to discourage vote-stripping was one of several reasons to bolster judicial oversight of closed-end funds rather than to defer to the SEC or to rely on independent directors to police fund managers. The firm also observed that the ICA exists to protect investors from advisors rather than from shareholders. "Larger institutional investors (coined 'activists' by some) often carry the torch for all stockholders by expending time and money advocating for managerial improvements," said Marlton Partners. "These efforts inure to the benefit of all shareholders—long-term, short-term or otherwise—and foster competition for individual management contracts in a market that is otherwise completely uncompetitive." Marlton Partners added: "Amici's plea for a 'stable regulatory framework' is a euphemism for the freedom to decide, unilaterally without the risk of judicial oversight, whether and how to comply with the ICA."[9]

ATG Capital Management LLC also filed a friend of the court brief supporting Saba Capital. The firm reiterated many of the same points made by Saba Capital in its merits stage brief. Specifically, ATG Capital disputed the notion that ICA Section 47(b) could only be raised in defense to another lawsuit, such as a breach of contract suit. "If, as the Petitioners contend, Congress wanted to preclude a party to a contract from suing a counterparty for a declaration that the contract violates the ICA, it surely would have made that clear," said ATG Capital.[10]

The third amicus brief in support of Saba Capital had among its signatories a group of securities law scholars and former SEC

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6 Brief for Freedom and Justice Foundation, as Amici Curiae Supporting Neither Party, *FS Credit Opportunities Corp. v Saba Capital Master Fund, Ltd.*, No. 24-345 (Sep. 2, 2025).

7 Brief for Mutual Fund Directors Forum, as Amici Curiae Supporting Petitioners, FS Credit Opportunities Corp. v Saba Capital Master Fund, Ltd., No. 24-345 (Sep. 3, 2025); Brief for Chamber of Commerce of the United States of America, as Amici Curiae Supporting Petitioners, FS Credit Opportunities Corp. v Saba Capital Master Fund, Ltd., No. 24-345 (Sep. 3, 2025); Brief for Investment Company Institute and the Asset Management Group of the Securities Industry and Financial Markets Association, as Amici Curiae Supporting Petitioner, FS Credit Opportunities Corp. v Saba Capital Master Fund, Ltd., No. 24-345 (Sep. 3, 2025).

8 Brief for Separation of Powers Clinic, as Amici Curiae Supporting Petitioners, FS Credit Opportunities Corp. v Saba Capital Master Fund, Ltd., No. 24-345 (Aug. 29, 2025).

9 Brief for *Marlton Partners, L.P.*, as Amici Curiae Supporting Respondents, *FS Credit Opportunities Corp. v Saba Capital Master Fund, Ltd.*, No. 24-345 (Oct. 16, 2025).

10 Brief for *ATG Capital Management LLC*, as Amici Curiae Supporting Respondents, *FS Credit Opportunities Corp. v Saba Capital Master Fund, Ltd.*, No. 24-345 (Oct. 16, 2025).

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officials, of which the latter group included former SEC Commissioners Robert Jackson and Allison Herren Lee and former Divisional Directors Renee Jones (Division of Corporation Finance) and Henry T.C. Hu (Division of Economic and Risk Analysis).[11]

According to the securities law scholars and former SEC officials, Congress drew inspiration for the ICA from state Blue Sky laws that included voidness provisions allowing for a remedy when contracts violated state securities laws. The amici noted that state laws were careful to refer to "void*able*" contracts rather than to contracts that are void *ab initio* (emphasis in original). The amici added that Congressional understanding of voidness was further informed by the language of Section 29 of the Exchange Act of 1934, which they explained had been historically understood to confer a private cause of action, even after both Section 29 and Section 47(b) were later amended. Moreover, the amici observed that the late Louis Loss, a pioneer in the field of securities regulation (and the former editor of the Wolters Kluwer treatise "Securities Regulation - Loss, Seligman and Paredes"), had referred to the private cause of action under Section 29—and by implication its progeny—as "more express than implied."

The securities law scholars and former SEC officials also recited a trio of arguments, most of which were raised in Saba Capital's merits brief, in support of a private cause of action for rescission under Section 47(b): (1) the Supreme Court's *TAMA* opinion stands for the proposition that "void" means that the "incidents of voidness" apply, including a cause of action for rescission; (2) Section 47(b)'s use of the phrase "any party" suggests the SEC is not the only party that may seek rescission of unenforceable contracts; and (3) the SEC's prior post-*Sandoval* support for a private cause of action under Section 47(b) via an amicus brief remains relevant despite the agency's purported recent change of view.

Looking ahead

The Supreme Court will likely hear the case involving FS Credit and Saba Capital by early 2026. In the meantime, the SEC and the DOL are likely to move ahead with plans to expand the retirement account offerings available to workers and to begin to open more private market

The SEC's guidance on control share acquisition laws and closed-end funds has varied over the years.

- The now-withdrawn Boulder Letter (November 15, 2010) (incoming letter) stated: "... we believe that the use of the MCSAA by the Fund to restrict the ability of certain shareholders to vote 'control shares' (as defined and discussed below) would be inconsistent with the fundamental requirements of Section 18(i) of the Investment Company Act that every share of stock issued by the Fund be voting stock and have equal voting rights with every other outstanding voting stock. This conclusion is consistent with the wording of, and purposes underlying, Section 18(i) specifically and the Investment Company Act generally. Such a tactic would discriminate against certain shareholders by denying important voting rights and would contribute to the entrenchment of management. Although use of the MCSAA in this manner may be permitted for operating companies under state law, we believe that the Investment Company Act, with its unique regulatory approach, demands a different result for investment companies."

- The SEC later altered this guidance purportedly to allow funds to opt into control share acquisition laws. According to a Staff Statement issued by the SEC's Division of Investment Management (May 27, 2020): "The staff would not recommend enforcement action to the Commission against a closed-end fund under section 18(i) of the Act for opting in to and triggering a control share statute if the decision to do so by the board of the fund was taken with reasonable care on a basis consistent with other applicable duties and laws and the duty to the fund and its shareholders generally. We would expect any inquiry into the application of section 18(i) to be based on the facts and circumstances. In particular, the staff reminds market participants that any actions taken by a board of a fund, including with regard to control share statutes, should be examined in light of (1) the board's fiduciary obligations to the fund, (2) applicable federal and state law provisions, and (3) the particular facts and circumstances surrounding the board's action" (footnotes omitted).

11 Brief for *Securities-Law Scholars and Former Senior SEC Officials*, as Amici Curiae Supporting Respondents, *FS Credit Opportunities Corp. v Saba Capital Master Fund, Ltd.*, No. 24-345 (Oct. 17, 2025).

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investments to retail investors, consistent with the Trump Administration's EO on alternative investments.

A decision in favor of FS Credit that ICA Section 47(b) does not contain an implied private cause of action could ease the SEC's path to making closed-end funds more accessible to a wider audience. But a decision finding that an implied private cause of action exists could dampen closed-end funds' enthusiasm to widen their reach because of the risk that activist investors will more aggressively target them to force structural governance changes and that retail investors will go to court to challenge the fee structures and other unique characteristics of closed-end funds. An implied private cause of action that spurs further activist activity also could affect retail investors' appetite to invest in a type of fund that is subject to potentially conflicting financial pressures from multiple sources.

However, given that a majority of justices have in recent years sought to limit the creation of new implied private causes of action absent clear Congressional intent, it seems likely that a majority will coalesce around a decision that denies such lawsuits under ICA Section 47(b). Still, there is a remote possibility that a majority could find that a private lawsuit is the only way to give effect to the rescission remedy afforded by ICA Section 47(b).

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