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Supreme Court Reaffirms Narrow Path for Implied Rights of Action

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Today, the Supreme Court in *FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.* held that Section 47(b) of the Investment Company Act does not create an implied private right of action for rescission of contracts that allegedly violate the Act. The decision eliminates a litigation path that private plaintiffs have used to challenge closed-end fund governance measures and signals that the Court continues to be extremely skeptical of implied private rights of action.

The ICA regulates investment companies and requires, among other things, that every share of stock in such a company be voting stock with equal voting rights. Section 47(b) of the ICA, in turn, provides that a court generally may not deny rescission of a contract, “at the instance of any party,” if the contract violates the ICA.

Saba Capital, an activist investor, sued FS Credit Opportunities Corp., arguing that FS Credit unlawfully limited voting rights for shareholders holding certain large positions. The key question was whether Section 47(b) provides Saba with a private right of action to sue for enforcement of the ICA, or whether it merely clarifies the remedies available once a party is already in court. The district court, following Second Circuit precedent, held that Section 47(b) creates an implied private right of action and granted Saba summary judgment. The Second Circuit summarily affirmed, and the Supreme Court granted certiorari to resolve a circuit split.

The Supreme Court reversed and remanded in a 6-3 decision. Writing for the Court, Justice Barrett explained that “Congress, not the Judiciary, decides who may enforce the law.” Under the Court’s modern private-right-of-action cases, a statute must contain rights-creating language aimed at a particular class of persons in order to create a private right of action. Section 47(b), the Court explained, does no such thing. The operative language, that “a court may not deny rescission at the instance of any party,” is directed at what the *courts* can do rather than individual plaintiffs.

The Court explained that under the common law, rescission is a remedy for when a party successfully asserts a defense such as fraud, and nothing in 47(b) explicitly changes that understanding. The Court also relied on statutory structure. The ICA gives the SEC primary enforcement authority and expressly authorizes private suits in two provisions. The Court explained that Congress's decision to create a comprehensive agency enforcement scheme cuts against a private right of action. And the presence of express remedies elsewhere in the statute, the Court reasoned, show that Congress knew how to create private rights of action when it wanted to do so. The Court further rejected Saba's reliance on *Transamerica Mortgage Advisors v. Lewis*, which recognized an implied rescission action under the Investment Advisers Act based on the statute's "shall be void" language. Congress deleted that language from Section 47(b) in 1980 and replaced it with text focused on what "a court" may do. That amendment, the Court concluded, made Section 47(b) materially different.

Justice Jackson, joined by Justice Sotomayor and in part by Justice Kagan, dissented. She would have held that Section 47(b)'s rescission right creates a cause of action because the scope of the right only makes sense if a plaintiff can raise it as a sword

rather than a shield. The dissent also argues that the legislative history confirmed Congress's expectation that private enforcement remain available. Justice Kagan filed a short dissent, agreeing with Justice Jackson's textual and structural analysis but declining to join her broader discussion of legislative history.

The decision is an important one for investment companies facing litigation, especially from activist investors or other similar entities. The practical result is a meaningful narrowing of private ICA litigation by foreclosing Section 47(b) from being used as an all-purpose vehicle to seek rescission of contracts allegedly violating the ICA. The decision did not address other avenues for relief, such as SEC enforcement authority.

The decision marks another strong step by the Court against implied rights of action. In past decisions, the Court had left open the possibility that a statute which did not explicitly provide for a private right of action may nonetheless create one with language that showed sufficient congressional intent. But in *FS Credit*, the Court made clear that even a statute which provides for a specific remedy is not enough to imply access to the courts. The Court's decision reinforced the high bar for implying a private right of action where Congress has not created one expressly.

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