

# Virtus Investment Partners Asks the Court to Certify for Interlocutory Appeal Its Decision on Loss Causation Concerning Mutual Fund Disclosures

September 13, 2016 | Blog | By [Joel D. Rothman](#)

---

## VIEWPOINT TOPICS

- Securities Litigation
- Institutional Investor Class Action Recovery

---

## RELATED PRACTICES

- Institutional Investor Class Action Recovery

---

## RELATED INDUSTRIES

Although this blog is focused typically on opportunities for institutional investors to recover losses as class members or plaintiffs, we think [this decision](#) in [Youngers v. Virtus Investment Partners, Inc.](#), may also be of interest. In that case, the plaintiffs brought, on behalf of a putative class of purchasers of various mutual funds issued by Virtus Opportunities Trust (the "Virtus Trust"), claims under [Sections 10\(b\) and 20\(a\) of the Securities Exchange Act of 1934, Rule 10b-5](#) promulgated thereunder, and [Sections 11, 12\(a\)\(2\) and 15 of the Securities Act of 1933](#), as well as derivative state law claims. The case stems from alleged misstatements made by the Virtus Trust's investment advisor, Virtus Investment Partners ("Virtus Partners"), regarding the performance history of its AlphaSector Index trading strategy. Specifically, the complaint alleges that certain Virtus Trust registration statements were misleading because they stated that "the Index inception date is April 1, 2001," and did not disclose that the AlphaSector strategy was not used to manage real assets prior to October 2008 and that the represented results prior to October 2008 were back-tested. [Judge Pauley](#) of the [U.S. District Court for the Southern District of New York](#) denied the motion to dismiss filed by Virtus Partners, holding, among other things, that the plaintiff had sufficiently pleaded loss causation with respect to his Section 10(b) claims.

Virtus Partners argued that their alleged misstatements "cannot affect the value of the Virtus Trust shares and could not cause the losses alleged in the Complaint." They reasoned that, pursuant to SEC regulations, the price of mutual fund shares is calculated accounting to the funds' [net asset value](#) ("NAV"), and the NAV is calculated based on the value of the funds' underlying assets. Therefore, Virtus Partners argued, because their statements could not affect the value of the underlying assets held by the funds, their statements could not affect the NAV. This reasoning had been previously endorsed by other judges in the Southern District. [See, e.g., In re State St. Bank & Trust Co. Fixed Income Funds Inv. Litig.](#)

The Court disagreed, distinguishing a fund's price from its value. Initially, Judge Pauley determined that value, not price, should be the focus of the loss causation analysis, noting that to establish loss causation, a plaintiff must allege that the misstatement "negatively affected the value of the security." He then noted that:

“

“it is not clear that the NAV is the only measure of value for mutual fund shares.”

Judge Pauley reasoned that because the mutual fund shares are priced according to a statutory calculation and are not priced based on open-market trading, "the price of the shares does not necessarily reflect their value." He concluded that investors look to "a myriad of factors" to assess the value of an investment. In the mutual fund context, he reasoned, one such factor could plausibly include

the fund's performance history. Thus, he denied the motion to dismiss on loss causation grounds.

Virtus Partners recently filed a motion asking the court to certify its decision for interlocutory review. Specifically, they ask the Court to certify an "immediate appeal" of a single issue:

“

**"whether, as a matter of law, there is loss causation under the federal securities laws where it is undisputed that defendant's alleged misrepresentations did not affect the net asset value of mutual fund shares."**

In the motion, they point out that the Court's loss causation ruling "directly conflicts with case law in this and other Districts, including but not limited to *In re State Street Bank & Trust Co.*, 774 F. Supp. 2d 584 (S.D.N.Y. 2011)" and that the Court "acknowledged the disagreement with *State Street*." The Court has yet to rule on the motion to certify an appeal.

## Authors



**Joel D. Rothman**, Special Counsel

Joel D. Rothman is an attorney who handles commercial, securities, insurance, and employment litigation matters for Mintz clients. Joel advises institutional investors on securities class actions, represents shareholders in merger disputes, and counsels insurers in coverage disputes.