

## PRO BANKRUPTCY

# Morgan Stanley Must Face \$375 Million Tops Creditors Lawsuit

Judge says creditors' trustee made plausible argument over dividends to former owners that should be litigated



The creditors allege Morgan Stanley and other former owners of Tops paid themselves \$375 million in dividends while leaving the grocery chain insolvent.

PHOTO: LUCAS JACKSON/REUTERS

By *Akiko Matsuda* and *Soma Biswas*

Updated Oct. 13, 2022 4:38 pm ET

A trustee for Tops Friendly Markets creditors can move forward with a lawsuit against Morgan Stanley and other company backers over dividends paid before the grocery chain filed for chapter 11.

The creditors filed the claims in 2020 against Morgan Stanley Investment Management and other former owners of Tops, alleging the private equity owners paid themselves \$375 million in dividends while leaving Tops insolvent, unable to cover its debts and pension obligations.

Bankruptcy Judge Robert Drain of the U.S. Bankruptcy Court in White Plains on Wednesday declined to dismiss the lawsuit, saying the trustee made a plausible argument

to support the case despite the private equity owners' objections.

The judge went beyond the Tops case to comment on how the bankruptcy code allows private equity owners to “loot privately-held companies to the detriment of their non-insider creditors with effective impunity.”

A spokesperson for Morgan Stanley declined to comment. Representatives for the private equity owners didn't immediately return requests for comment.

“We are happy with the decision and look forward to prosecuting the case for the benefit of the creditors of Tops,” Kyle Lonergan, the lawyer representing the trustee for creditors, said in a statement.

The lawsuit alleged that the private equity owners made four separate dividend payments to themselves worth hundreds of millions of dollars, while they were aware the company's pension plans were significantly underfunded.

The first \$105 million paid out in October 2009 was made when the company was insolvent, the lawsuit said.

## **Tops and Morgan Stanley were well aware of the dire condition of the United Food and Commercial Workers pension plan and knew it would become insolvent.**

— Bankruptcy Judge Robert Drain

The trustee also argued that the two appraisal firms Tops hired to analyze the valuation of the company had both agreed not to independently verify the accuracy and completeness of Tops' financial conditions, including its pension liabilities.

Morgan Stanley has argued that if the dividends had rendered Tops insolvent, the company wouldn't have operated for so many years after the dividends were paid between 2009 and 2013.

“Tops and Morgan Stanley were well aware of the dire condition of the United Food and Commercial Workers pension plan and knew it would become insolvent,” the judge said in his ruling.

Judge Drain, however, agreed to dismiss two counts related to fiduciary duty of Morgan Stanley and two former Tops board members.

Morgan Stanley sold Tops to the grocery chain's management group in 2013. The company, which filed for chapter 11 in February 2018, exited bankruptcy in November the same year under the reorganization plan that terminated one pension plan and settled with the other, leaving it with more than \$1 billion in losses.

**Write to Akiko Matsuda at [akiko.matsuda@wsj.com](mailto:akiko.matsuda@wsj.com) and Soma Biswas at [soma.biswas@wsj.com](mailto:soma.biswas@wsj.com)**

Copyright © 2022 Dow Jones & Company, Inc. All Rights Reserved

This copy is for your personal, non-commercial use only. To order presentation-ready copies for distribution to your colleagues, clients or customers visit <https://www.djreprints.com>.