

Selendy Gay and Kirkland Lead Cerberus Capital Management To a Significant Litigation Victory

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On behalf of client Cerberus Capital Management, co-lead counsel Selendy Gay PLLC and Kirkland & Ellis LLP teamed up to secure a top-to-bottom liability win on December 1, 2022 in a breach of contract action against Canadian Imperial Bank of Commerce (CIBC), one of Canada's largest banks. After a subsequent damages hearing and related decision that rejected nearly all of CIBC's damages arguments, the New York Supreme Court – on February 6, 2023 – entered judgment for Cerberus for \$855 million.

In October 2008, amidst the financial crisis, Cerberus agreed to help CIBC reduce its exposure to U.S. housing-related assets, loaning CIBC over \$600 million in exchange for payment streams calculated based on the performance of those assets. In 2011, the parties entered into a follow-on transaction, with Cerberus paying CIBC an additional \$80 million in exchange for any residual cash flows from the same payment streams if the first note was ever paid off.

The first note was repaid in 2015, but CIBC reneged on its deal and refused to pay Cerberus the full amount contractually owed. Cerberus filed suit against CIBC in November 2015.

Following a 13-day bench trial involving over a dozen witnesses, the New York Supreme Court Commercial Division issued a 42-page reasoned decision in December concluding that Cerberus clearly and unambiguously is entitled to substantial payments under the contracts and rejecting CIBC's counterclaims and defenses including fraudulent inducement, mistake and estoppel. Crediting the testimony of Cerberus executives, the Court found there was insufficient evidence that CIBC actually entered the parties' agreements with a mistaken understanding of its financial obligations; that CIBC entered the second agreement despite knowledge of a potential misunderstanding between the parties, because it wanted Cerberus's money; and that Cerberus reasonably perceived CIBC's performance and negotiations as efforts to re-trade the deal and reduce its own financial obligations.

After further argument, the Court issued a decision regarding the calculation of damages on January 3, 2023. CIBC has acknowledged, in its own public statements, that it now owes Cerberus nearly \$850 million as of December 1, 2022.

The Cerberus trial team was led by Selendy Gay partners Philippe Z. Selendy, Sean Baldwin, and Oscar Shine and associates Michael Duke, Will Rathgeber, Mathew Elder, and Drake Reed, and Kirkland partner Judson D. Brown.

Attorneys

- Philippe Z. Selendy
- Sean Baldwin
- Oscar Shine