Selendy &Gay

Recent Victories

Selendy & Gay has attained an extraordinary set of victories across multiple areas of practice. Just a few of our victories include our representation of:

- An **ad hoc group of term lenders**, in New York Supreme Court, alleging defendants TriMark, its equity sponsors and several lenders, worked in secret and in bad faith to amend the operative credit agreement and to eviscerate bargained-for lender protections, stripping plaintiffs of their pro rata rights. On August 16, 2021, the Court rejected defendants' motions to dismiss the core contract claims, sending a clear signal that the spate of lender-on-lender violence in the leveraged loan market will not remain unchecked.
- Ten public service workers, members of the **American Federation of Teachers union**, in a settlement of a proposed nationwide class action lawsuit with Navient, one of the nation's largest student loan servicers, challenging Navient's practices with respect to advising federal student loan borrowers on Public Service Loan Forgiveness (PSLF). We secured preliminary approval of a class settlement under which Navient agreed, among other things, to enhance its call center practices and to contribute $1.75 million to a nonprofit organization that provides education and student loan counseling to public service borrowers.
- **Cyrus Vance, the Manhattan District Attorney,** as co-counsel in securing a landmark Supreme Court decision which reaffirmed the centuries-old principle that "no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding."
- **Joint Liquidators and Foreign Representatives for three of the largest Madoff feeder funds** in over 300 adversary proceedings before the U.S. Bankruptcy Court for the Southern District of New York. We defended the Joint Liquidators' foreign common law claims from dismissal by "knowledge defendants" who are alleged to have known their redemption values were inflated by the Madoff fraud. The Bankruptcy Court rejected the knowledge defendants' arguments that the U.S. Bankruptcy Code's statutory safe harbor applied to bar those particular claims. As a result, the Joint Liquidators may continue their pursuit of more than $2 billion in overpaid redemptions.
- **SJP Properties, a New York-based real estate developer**, in obtaining a unanimous reversal from the Appellate Division, First Department of a trial court decision ordering SJP to tear down numerous floors of its residential building at 200 Amsterdam Avenue on Manhattan's Upper West Side. The New York Court of Appeals subsequently denied the challengers' motion for leave to appeal, bringing the lengthy battle to a close.
- A class action on behalf of **hundreds of thousands of New York City public employees and retirees**, successfully arguing to the New York Court of Appeals that New York's consumer protection law covers misrepresentations regarding the scope of coverage in an insurer's marketing materials.
- A **major energy company,** as respondent in a confidential international arbitration victory in front of a AAA Panel that awarded claimant zero and dismissed with prejudice its claim for hundreds of millions of dollars.
- A **leading biotechnology company**, in successfully obtaining a judgment dismissing a complex patent infringement suit brought by a multinational pharmaceutical company that sought over $500 million in damages.

- **U.S. Bank** as Trustee of an asset-backed securities trust before the New York Court of Appeals in upholding the viability of CPLR 205(a), a nearly 400-year-old pleading rule. Defendant-appellant DLJ Mortgage Capital, Inc. attempted to avoid the Trustee's timely breach of contract suit by arguing the Trustee failed to satisfy the so-called "notice-and-cure protocol" as to a defunct contracting party. Agreeing with all of the Trustee's arguments on appeal, the Court of Appeals held that CPLR 205(a) allowed a plaintiff six months after dismissal of a timely action for failure to comply with a procedural condition precedent to remedy the defect. In holding that the "notice-and-cure protocol" was a procedural condition precedent to suit, not a substantive element of a Trustee's breach of contract claim, the Court rejected a defense-friendly interpretation of its prior precedent and reaffirmed that banks that sold faulty asset-backed securities in the mid-2000s may be held accountable to those they misled. The Court's unanimous 7-0 opinion confirms New York's long-standing policy of allowing plaintiffs to correct technical defects so that courts may decide cases on the merits—a crucial result for commercial entities and individuals doing business in this state.
- **Cerberus Capital Management**, a leading private equity firm, as plaintiff in a $950 million breach of contract action against the Canadian Imperial Bank of Commerce (CIBC), one of Canada's largest banks. The dispute centers on two complex structured finance transactions backed by credit default swaps, CDOs, and RMBS. Cerberus alleges that, pursuant to the transactions, CIBC was able to offload substantial mortgage-related risks in exchange for making specified payments to Cerberus. According to Cerberus, CIBC received the benefit of the transactions but now refuses to pay what it agreed to pay for Cerberus's assumption of the risk of massive housing-related losses. The court agreed with Cerberus's interpretation of the agreements and held that CIBC's contrary interpretation was "unmoored" from the contracts. The case is now proceeding through discovery.
- **The Niskanen Center**, a leading policy think-tank, as amicus curiae supporting New Jersey in an appeal of a decision that allowed a pipeline company to use the federal power of eminent domain to seize state lands. In a precedential decision specifically citing our analysis, the Third Circuit Court of Appeals vacated the lower court's decision, holding that the Eleventh Amendment bars private parties from condemning state lands under the Natural Gas Act.
- **McKinsey & Company**, a worldwide management consulting firm, against claims by Jay Alix, founder of consulting firm AlixPartners, and Mar-Bow Partners, a company founded by Alix, challenging McKinsey's Chapter 11 disclosures under Rule 2014. In August of 2019, we achieved a significant victory in the Southern District of New York, where the Court dismissed RICO claims against our client in their entirety. Without leave to re-plead against our client, the Court concluded that Alix could not state any RICO claim in the face of binding Supreme Court and Second Circuit law requiring that Alix plead facts showing that the purportedly wrongful conduct "proximately caused" the injury alleged.
- **McKinsey & Company**, in the matter of SunEdison in the Southern District of New York, against claims by Jay Alix and Mar-Bow Partners. Alix asserted claims of false and misleading disclosures, and fraudulent preference. We successfully obtained a dismissal of Alix's motion to have the court examine his claims for lack of standing. The court in SunEdison also declined to appoint Alix as an examiner.
- **McKinsey & Company**, in the matter of Alpha Natural Resources, in successfully achieving, despite a relentless campaign, a ruling in federal bankruptcy court in Richmond, VA that Jay Alix's Mar-Bow Partners does not have standing to be heard on its ongoing conflict-of-interest dispute in relation to Alpha Natural Resources, a bankruptcy coal miner. The Court also declined to appoint an examiner to investigate Alix's allegations

independently. We also achieved a settlement with the Office of the United States Trustee with respect to bankruptcy disclosure disputes.

- **McKinsey & Company**, in arguing against a motion to reopen the closed NII Holdings bankruptcy by Jay Alix's Mar-Bow Partners and defending against allegations of fraud on the court in connection with McKinsey's disclosures. We successfully achieved a ruling from the bench in the bankruptcy court for the Southern District of New York. Deeming the allegations "fantasy," the Court denied Mar-Bow's motion to reopen for lack of standing and declined to appoint Mar-Bow as investigator of its own claims.
- **McKinsey & Company**, in the matter of Standard Register, in successfully defending against claims by Mar-Bow Partners alleging that McKinsey failed to disclose its connections, thereby committing fraud on the Court. We obtained a favorable ruling in the bankruptcy court for the District of Delaware, denying Mar-Bow's motion to reopen the matter for lack of standing, and declining to appoint an examiner to investigate Mar-Bow's claims.
- **U.S. Bank**, as trustee, in a RMBS putback action against UBS Real Estate Securities, for losses suffered by three UBS-sponsored RMBS Trusts (MARM 2006-OA2, MARM 2007-1, and MARM 2007-3). This case was the first RMBS trustee putback action to go to trial, and the settlement – an unprecedented $850 million recovery – constitutes the largest recovery ever achieved in such a case.
- **Mudrick Capital Management** in achieving a trial victory in the Delaware Court of Chancery in an action commenced under Section 220 of Delaware's General Corporation Law, seeking corporate books and records to investigate an allegedly unfair merger. In an order adopting many of our factual allegations regarding the proposed merger, the defendant was ordered to produce e-mails from its C.E.O., its General Counsel, and the chair of the Special Committee that had approved the merger. One day after this ruling, the challenged merger was called off.
- **Altaba** (formerly Yahoo Inc.), against claims by BNY Mellon Trust in Delaware Court of Chancery in front of Vice Chancellor Travis Laster that our client owed $300 million under a $1.4 billion convertible note agreement after the sale of Yahoo's operating business to Verizon. On behalf of our client, we succeeded in having the case dismissed with prejudice at the pleading stage.
- **E*Trade Financial Corp.**, an online retail brokerage firm, and its related parties, in successfully obtaining affirmance from the Second Circuit in the dismissals of two separate putative class actions related to the purported improper steering of trades. In one decision, the Second Circuit affirmed the dismissal of a putative class action alleging claims under state law as precluded by the Securities Litigation Uniform Standards Act of 1998. In the second decision, the Second Circuit affirmed the dismissal of another putative class action alleging claims under federal securities laws on a rare ground, for failure to plead reliance.