

Mitchell C. Shelowitz of Pearl Cohen Zedek Latzer LLP Defeats Motion to Dismiss by Bank of New York in Important CDO Litigation. In a significant victory against the Bank of New York, Shelowitz defeated Bank of New York's attempt to rely on a limitations clause in a trust indenture on behalf of RJ Capital, holder of Series A2 Notes in a CDO issued by Lexington Capital, under which the Bank of New York was appointed as Trustee. After issuing several quarters of principal and interest distributions to RJ Capital, The Bank of New York decided --without explanation -- to change course and essentially rewrite the distribution formula in the Indenture. Making matters worse, the Trustee reached into the client's bank account and clawed back several hundred thousand dollars based upon its new formula.

Relying upon a limitation on claims clause in the Indenture, the Bank of New York sought to dismiss the action by motion to dismiss. In a 29 page decision by Judge Gardephe in the U.S. District Court for the Southern District of New York, the court upheld claims against the Trustee for breach of contract and rejected the limitations clause defense, reasoning that compliance with the limitations clause would require plaintiff to demand that defendant Trustee initiate proceedings against itself to rectify the alleged error, which the court called an "absurdity." This decision is important because it precludes Indenture trustees from unqualified immunity for contravening the scope of their ubiquitous extensive obligations in CDO Indentures.

Due to the complex issues and the significance of the suit, the decision was featured on August 16, 2011 in the New York Law Journal's "Decisions of Interest."

The PCZL litigation team was comprised of Mitchell Shelowitz, Darya Dominova, and Yeseree Robinson.

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