

Partner, Boston

Litigation



T: 617.573.4855
eben.colby@skadden.com

Education

J.D., University of Connecticut
School of Law, 2001 (with honors)
B.A., Georgetown University, 1998

Bar Admissions

Massachusetts
U.S. District Court for the
District of Massachusetts
U.S. Court of Appeals for the First,
Third and Fourth Circuits

Experience

Law Clerk, Hon. William J. Sullivan,
Chief Justice, Connecticut Supreme
Court (2001-02)

Associations

Member, Boston Bar Journal
Board of Editors
Former Co-Chair, Boston Bar
Association, Financial Services Section

Eben Colby's practice includes advising on a wide range of complex securities, corporate and regulatory matters. He has litigated in trial and appellate courts, state and federal, around the United States — including jury and bench trials — as well as regulatory investigations, administrative proceedings, and private arbitrations and mediations.

Mr. Colby focuses on counseling clients in the asset management industry, having represented the largest firms in the sector on their most significant issues for more than two decades. His experience spans from the market timing investigations and litigation of the early 2000s to excessive fee litigation under Section 36(b) of the Investment Company Act, "proprietary funds" cases under the Employee Retirement Income Security Act (ERISA) and defending funds and their boards from attacks by activist investors. This experience includes successful outcomes on billions of dollars of claims after bench and jury trials, as well as at the summary judgment and pleading stages.

Mr. Colby has extensive experience defending against activist investors. This includes litigating and advising boards on proxy voting, governance, anti-takeover defenses, board elections and fiduciary duties.

Mr. Colby has been named a Winning Litigator by *The National Law Journal* for his victories in high-stakes matters, as well as one of *NLJ's* Rising Stars in Boston. He also has been named to *The Best Lawyers in America* and recognized as one of Lawdragon's 500 Leading Global Litigators and as one of its 500 Leading Litigators in America. Additionally, he was recognized among *Boston Magazine's* Top Lawyers in 2021 and 2022, which showcases "the region's finest legal minds," and previously chosen as an Asset Management Rising Star by *Law360*.

In the civil litigation area, Mr. Colby's notable asset management matters include:

- successfully obtaining a precedent-setting trial decision in defense of a closed-end fund anti-takeover defense challenged by an activist investor as illegal under state law and the Investment Company Act of 1940
- representing a fund and its directors in offensive claims brought against an activist investor for failing to make required disclosures in a control contest
- successfully securing dismissal on all counts of excessive fee claims against one of the world's largest asset managers after a trial in the District of New Jersey. Mr. Colby led the defense of a \$1.5 billion-plus excessive fee claim brought under Section 36(b) of the Investment Company Act
- successfully obtaining a favorable trial verdict on all counts on behalf of a large asset manager alleged to have breached fiduciary duties under ERISA by including proprietary mutual funds in its \$600 million 401(k) plan, the first decision on the merits in such cases (partially affirmed and partially reversed on appeal and is subject to further appellate review)
- securing dismissal of putative class action claims brought under Sections 11 and 12 of the Securities Act of 1933 against one of the industry's largest managers of ETFs for alleged misstatements and omissions in offering documents related to the risks of so-called "flash crashes"
- obtaining a jury verdict in a Massachusetts business court in favor of an asset manager and fiduciary trust company in an action brought by a former executive involving deferred compensation and other claims, including successfully obtaining a jury finding on counterclaims that the former executive breached fiduciary duties

- securing summary judgment dismissal of a \$440 million claim alleging Rule 10b-5 fraud claims against one of the nation's largest mutual fund advisers in an MDL proceeding consolidating more than 80 putative class actions
- obtaining a rare dismissal at the pleading stage of claims that one of the country's largest asset managers violated ERISA by including proprietary funds in its \$3 billion-plus 401(k) plan
- representing an institutional money manager in the successful defense of \$360 million fraud, RICO, breach of contract and other claims brought by a corporate pension plan in a private arbitration
- securing summary judgment dismissal, affirmed on appeal, of \$180 million state court fraud, breach of fiduciary duty and other claims against an investment adviser brought by a state employees' retirement system
- representing investment advisers in more than \$150 million in employment disputes involving fiduciary duty, wrongful termination, deferred compensation and contract claims

In the regulatory arena, Mr. Colby also has defended asset managers in dozens of investigations by the SEC, the DOJ, and state and self-regulatory agencies relating to a wide range of business and compliance issues, including conflicts of interest, sales and distribution, portfolio management, trading, code of ethics and back office issues. Some examples include:

- defending a large recordkeeper in investigations by state and federal regulators regarding revenue sharing agreements
- representing a special committee of the board of directors of a large custody bank in an independent investigation of pay-to-play allegations
- defending large asset management firms and their employees in SEC insider trading investigations
- defending and negotiating the successful resolution of a SEC investigation into certain fixed income trading practices, as well as conducting several internal investigations into a range of other trading issues at multiple advisers
- conducting several independent investigations into potentially improper conduct by portfolio managers and others

Mr. Colby's practice is not limited to the asset management industry. He also has represented high-tech, life science, accounting and other firms in matters involving alleged fraud and securities law violations; theft of confidential information and trade secrets; covenants not to compete and "employee raiding" litigation; SEC and other regulatory investigations; and Delaware litigation arising from mergers and acquisitions. Most recently, Mr. Colby led a team in three trial wins that obtained permanent and injunctive relief from the Delaware Chancery Court in a dispute over a developing technology, as well as related dismissals of two bankruptcy filings as bad faith litigation tactics.

Mr. Colby is active in various *pro bono* matters and has been recognized for his work in domestic abuse prevention cases. In addition, his work obtaining significant recovery on behalf of victims of a labor trafficking scheme, as well as on behalf of workers who were unlawfully detained in a large-scale workplace immigration raid, were each recognized as part of *Bloomberg Law's* Pro Bono Innovators accolade bestowed on Skadden in consecutive years. Mr. Colby also led a Skadden team as part of a consortium of firms in obtaining a historic settlement valued at over \$20 million for Indian welders and pipefitters brought to the Gulf Coast after Hurricanes Katrina and Rita in the nation's largest-ever labor trafficking suit. In recognition of the firm's work on this matter, Skadden was among those honored with *The American Lawyer's* Global Citizenship Award (Grand Prize) as part of its Global Legal Awards. Mr. Colby has also been named to the Massachusetts Supreme Judicial Court's Pro Bono Honor Roll.

Recent Speaking Engagements

Speaker, Investment Company Institute Closed End Funds Conference, November 12, 2024

"Investment Management Litigation and Regulatory Enforcement Update," Skadden webinar, May 2, 2023

Recent Publications

"Inside the Courts," *Skadden Publication*, Recurring publication

"Investment Management Update," *Skadden Publication*, Recurring publication

"Investment Trusts and Activist Funds: What UK Companies Need To Know," *Skadden Publication*, March 4, 2024

"Leveling the Playing Field for Closed-End Funds: Shareholder Rights Plans as an Alternative to State Control Share Statutes," *Skadden Publication*, December 7, 2023

"Scienter Defenses in Securities Fraud Actions," *LexisNexis Practical Guidance*, 2022

"Delaware Enacts Protections for Closed-End Fund Investors," *The M&A Lawyer*, September 2022

"Delaware Proposes Protections for Closed-End Fund Investors," *Skadden Publication*, June 7, 2022

"Vaccination Status Impacts Jury Pools, Case Strategy," *Bloomberg Law*, October 26, 2021