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BY DAN ROE

WHEN THE GOING GETS TOUGH, SKADDEN'S LITIGATORS GET GOING

Skadden's litigators thrive when the stakes are high and the odds are long.

From left to right: Alisha Nanda, Allison Brown, Julie Bédard, Jessie Liu and Jenness Parker, partners at Skadden, Arps, Slate, Meagher & Flom. Photo: Ryland West/ALM

Five billion dollars hung in the balance as Skadden, Arps, Slate, Meagher & Flom trial lawyer Allison Brown faced daunting odds, including a voluntary product recall and a two-week trial in a notoriously plaintiff-friendly jurisdiction.

In a St. Louis courtroom, Brown's client, Johnson & Johnson, was being sued by a plaintiff who alleged she developed ovarian cancer as a result of using Johnson & Johnson's baby powder, asserting \$5 billion in damages claims for failure to warn, defective manufacture and design, negligent misrepresentation, breach of express and implied warranty, civil conspiracy and fraud.

Johnson & Johnson had just lost a similar lawsuit in the same jurisdiction, wherein a jury ordered the company to pay \$4.69 billion—the company's largest-ever payout—to 22 women who alleged that its talc-based products contained asbestos and had also caused their ovarian cancer.

The Circuit Court of the City of St. Louis is what the American Tort Reform Foundation calls a "judicial hellhole," known for judges and juries who favor plaintiffs attorneys. Brown was in the lion's den, and she needed a quick solution.

Alongside co-counsel Michael Brown, a Nelson Mullins Riley & Scarborough litigator who's tried more than 100 cases (most of them related to asbestos), Brown immediately put the company's vice president of women's health on the stand. She stuck to the facts: If hundreds of millions of women had used Johnson & Johnson's baby powder, which allegedly caused ovarian cancer, where was the epidemic of the disease?

And, according to Johnson & Johnson assistant GC Andrew White, she made sure the jury remembered the key facts before they deliberated.

"The way she develops her cross- or direct examination, the way she uses slideshows and how she presents witnesses, allows jurors to remember the substance of the testimony," White says. "Other lawyers may read from a script and say, 'Well, we asked all the right questions.' If the jury doesn't remember the facts, it's all for naught."

The jury deliberated for four hours before delivering a resounding win for J&J, rejecting claims that the talc in its baby powder caused cancer. Since that day in December 2019, Brown has won several other lawsuits related to the company's talcum-based powder.

High stakes and long odds are familiar territory for Skadden Arps' 600 litigators.

"Firms like ours get clients coming in when they've got significant problems," says global litigation head James Carroll. "We're not going to get the easy cases. If we've got a client who needs us and has a tough situation, that's where we want to be. The fact that it may be difficult or we have the deck stacked against us only makes it more fun."

Following that logic, the Skadden litigation team has had a ball over the past two years.

The practice followed up its high-profile Johnson & Johnson defense by defeating an appraisal challenge in JAB Holdings' acquisition of Panera Bread, during which former Panera stockholders attempted to raise the value of their shares in the company.

Then, in New York, Skadden partners Steven Sunshine and Karen Lent defended the merger of T-Mobile and Sprint against 14 state attorneys general who sought to block the combination on charges of anti-competitive practices. The subsequent deal created another future 5G provider that could rival AT&T and Verizon.

Lent proved that the plaintiffs' industry analyst, who alleged that the merger would make the telecommunications market less competitive, had minimal expertise of his own and based his reports on those of analysts who ultimately stated the opposite.

Later in 2020, Skadden attorneys represented French luxury products conglomerate LVMH in expedited litigation as it merged with American jeweler Tiffany & Co. Tiffany alleged that its position in the merger wasn't devalued by the pandemic's initial negative effect on jewelry sales, a stance that LVMH countered by claiming it wasn't obligated to close the transaction.

By October 2020, the parties agreed on modified deal terms that represented a \$430 million price reduction for the acquisition of Tiffany.

"I was impressed with the fact that they kept their cool," Louise Firestone, LVMH's vice president of legal affairs, says. "Even the very junior people at Skadden had a particular way of dealing that not only showed self-confidence and awareness of their role, but also the importance of their role. No one seemed to feel that anything they were doing was beneath them."

The litigators also set precedent and made law.

In October 2020, London-based litigators David Herlihy and David Kavanagh QC faced off against the Indian government while representing Vodafone at the Permanent Court of Arbitration in The Hague.

After years of litigation over India's attempt to impose a retroactive tax withholding onto Vodafone's investment in India, the Skadden team established that India had breached its obligation to treat the Dutch investors fairly and equitably, which set a standard for other companies looking to invest in India.

And this May, appellate partner Shay Dvoretzky went to the U.S. Supreme Court on behalf of pro bono client Edward Caniglia, a Rhode Island man whose gun was confiscated by police during a warrantless search of his home that police justified on the ambiguous basis of "community caretaking" purposes.

Dvoretzky assembled a group of diverse organizations, including the American Civil Liberties Union and the Cato Institute, to underscore the importance of the case. After a telephonic argument, Dvoretzky won a 9-0 decision in favor of Caniglia.

Dvoretzky arrived from Jones Day in November 2020, and Carroll says the appellate litigator's success in Caniglia's case spurred him to involve Dvoretzky in other cases before they go to appeal.

"In a couple of cases where we were thinking the case would very likely be appealed, we got Shay involved early," Carroll says. "He brings to the table an appellate lawyer mindset that's just a different mindset. It adds value at every stage of the case."

Balancing the risk of taking on a difficult case with the thrill of winning against all odds is Skadden's specialty, Carroll says. And when Skadden does lose, it unpacks its failure and uses any missteps to strengthen its litigators going forward.

"Our litigation group is constantly looking for ways to get better, faster and more efficient in cases, and you can't just do that with the cases that go splendidly," Carroll says. "You have to take a hard look at the cases that don't. We incorporate those learnings from postmortems and make them part of training programs. We want to get those lessons across all of our platforms." ■