

# Skadden Delaware Commercial Litigation Capabilities

Skadden

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Recent developments in Delaware business law illustrate the axiom that “the only thing that is constant is change.” Take, for example, the 500% increase in the number of Delaware domiciled business entities since 1992, according to the [2018 Annual Report of the Delaware Judiciary](#). Or the yearly amendments to the Delaware General Corporation Law, which have resulted in several dozen statutory changes in just the last decade. Beyond that, more than 1,500 decisions are issued by the Delaware judiciary each year, and four new Delaware Supreme Court justices, four new vice chancellors and six new Superior Court judges have taken the bench since the beginning of 2014. Recently, the Court of Chancery has noted that its docket now includes more “complex commercial” matters than ever before. The result is a constantly evolving litigation landscape in Delaware.

Over the last 40 years, Skadden’s Wilmington litigation group has been at the epicenter of the evolving landscape of Delaware law. Our Wilmington litigators have played a significant role in many seminal decisions that form the bedrock of Delaware corporate law today. Still known for its decades of experience in traditional corporate disputes such as mergers and acquisitions litigation, Skadden’s Delaware litigation group also has successfully represented its clients in many complex commercial matters in the Delaware courts.

As highlighted below, just in the last few years, our Wilmington litigation partners have successfully handled a broad array of corporate and commercial disputes in the Delaware state and federal courts and other venues.

## Alternative Entities

Alternative entities such as limited liability companies and limited partnerships are flexible tools for addressing unique business situations and are almost limitlessly customizable as a matter of Delaware law. These entities are creatures of contract, and their fundamental governance documents are often unique. Thus, when disputes arise, the resulting litigation is often complex and fact-specific.

- In *Bayer-Highland & Family Partnership, Ltd., et al. v. RF Capital Holdings, LLC*, Skadden represented one member of a three-member LLC in expedited litigation over control of the LLC. 2018-0206-JTL (Del. Ch.). Two members of the LLC approved the merger of the LLC into a new entity, thereby adopting a new LLC agreement and stripping the third member of its contractual rights to control. Skadden successfully persuaded the Court of Chancery to rescind the merger, delivering control back to the third member and recovering the full costs of the litigation (including attorneys’ fees) from the other two members.

## Fraud and Breaches of Representation and Warranties

Nearly every commercial contract contains representations and warranties made by both buyer and seller. Given the high-stakes nature of modern commercial transactions, subsequent litigation over purported misrepresentations and fraud is on the rise in the Delaware Court of Chancery and Superior Court as well as the U.S. District Court for the District of Delaware.

- In *A. Schulman, Inc. v. Citadel Plastics Holdings, LLC, et al.*, Skadden filed breach of contract and fraud claims on behalf of the plaintiff, which had purchased a business for approximately \$800 million. C.A. No. 12459-VCL (Del. Ch.). The plaintiff secured a favorable settlement shortly after a multiday trial.

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- In *IAC Search, LLC v. Conversant LLC*, Skadden represented the plaintiff buyer in representation and warranty litigation regarding allegedly falsified website tracking data. C.A. No. 11774-CB (Del. Ch.). IAC settled on favorable terms prior to trial.
- In *Air Products and Chemicals Inc. v. Wiesemann et al.*, Skadden successfully obtained a trial verdict in the defendants' favor on fraud and breach of representation and warranty claims arising out of the sale of a trucking company. Civ. No. 14-1425-SLR (D. Del). Skadden also successfully recovered the defendants' attorneys' fees and costs from the plaintiff acquirer pursuant to an indemnification right.

## Restrictive Covenants

Delaware courts are often willing to enforce restrictive contractual covenants as a matter of Delaware law. Given the realities of modern corporate transactions and executive service, litigation regarding the scope and enforcement of contractual restrictions is on the rise.

- In *American Apparel, Inc. v. Dov Charney*, Skadden represented the plaintiff clothing company in expedited litigation against its former CEO, Dov Charney. C.A. No. 11033-CB (Del. Ch.). Charney had signed a standstill agreement that restricted his ability to solicit proxies and required him to refrain from other activities that would interfere with the management of the company. Skadden successfully obtained, on an expedited basis, an injunction requiring Charney to comply with the restrictive terms of the standstill agreement at issue.
- In *The Coca-Cola Company v. Monster Energy Limited and Monster Energy Company*, Skadden represented Coca-Cola in an arbitration proceeding regarding whether the introduction and sale of a new beverage, Coca-Cola Energy, was allowed under the terms of a contract between the companies. AAA Case No. 01-18-0004-0759. Skadden successfully obtained a judgment holding that Coca-Cola could sell and distribute Coca-Cola Energy in markets where it was already launched and in additional markets globally.

## Contract Enforcement

Depending on the nature of the relief sought and the nature of the contract itself, many contractual disputes can be litigated in the Court of Chancery and Superior Court. Skadden has handled a variety of recent actions seeking to enforce contracts both on an expedited basis and through trial.

- In *Esko-Graphics Inc. v. Schawk Digital Solutions, Inc.*, Skadden represented the plaintiff in a multiforum, expedited action to compel the closing of a transaction when the defendant refused to close based on, among other things, disputes regarding the scope of the restrictive covenant provisions and the circumstances surrounding the release of its signature pages.

C.A. No. 2018-0472-JTL (Del Ch.). The parties filed in different forums and each tried to outmaneuver the other. In Delaware, Skadden won expedited treatment and secured a final summary judgment hearing date before the contract's "outside date." The matter settled before the contractual "outside date" shortly after the Court of Chancery strongly indicated that it would consider implementing a rarely used "anti-suit injunction" to stop the defendant's lawsuit in the other forum.

- In *TA Operating LLC v. Comdata, Inc.*, Skadden successfully obtained an order of specific performance on behalf of the plaintiff after trial as well as money damages for breach of contract. In addition to the damages recovery and the order of specific performance, Skadden also secured an award of significant attorneys' fees for its clients pursuant to the contract's terms. C.A. No. 12954-CB (Del. Ch.).
- In *World Energy Ventures, LLC v. Northwind Gulf Coast LLC, et al.*, Skadden represented World Energy Ventures and successfully obtained a judgment to enforce promissory notes pursuant to a motion for judgment on the pleadings. The successful motion was filed at early stages in the proceedings and before discovery had taken place. C.A. No. N15C-03-241 WCC (Del. Super.).

## Post-Closing True-Ups and Allocations

Corporate and commercial transactions often incorporate a post-closing adjustment feature, whereby matters such as working capital adjustments, tax refund allocations and other divisions of money or property are addressed after a deal is done. In recent years, the number of disputes under these post-closing provisions has been on the rise.

- In *United BioSource LLC v. Bracket Holding Corp.*, Skadden represented the plaintiff in litigation that arose after the closing of a corporate transaction. C.A. No. 12886-CB (Del. Ch.). The defendant, which had purchased a series of businesses from United BioSource LLC (UBC), refused to turn over a post-closing tax refund as required by the governing purchase agreement. On summary judgment, the Court of Chancery found for UBC and ordered specific performance of the contractual obligation to pay over the tax refund at issue.
- In separate related action, Skadden represented the plaintiff UBC in an action to compel arbitration. C.A. No. 10840-CB (Del Ch.). Bracket, the defendant, purchased a series of businesses from UBC but refused to participate in the post-closing working capital arbitration process required by the parties' purchase agreement on the basis of purported fraud claims. UBC sought specific performance of the arbitration obligation, which the court ordered on summary judgment. Skadden subsequently represented UBC in the ordered working capital arbitration.

# Skadden Delaware Commercial Litigation Capabilities

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## Preferred Stockholder and Debtholder Disputes

Disputes involving bespoke instruments such as preferred stock certificates of designation or debt indentures are often high-stakes and factually intensive. Such stockholder and bondholder disputes have made up an increasing percentage of the Delaware courts' dockets in recent years.

- Skadden represented Merrimack Pharmaceuticals, Inc. in litigation against certain of its debtholders, who alleged that the company's sale of certain assets triggered a redemption right in their secured notes. *Wells Fargo Bank, N.A., et al. v. Merrimack Pharmaceuticals, Inc.*, C.A. No. 2017-0199-JTL (Del. Ch.). The action was settled prior to a final disposition.
- Skadden also advises various Fortune 500 and publicly traded companies on a confidential basis regarding issues related to the rights of their preferred stockholders and litigation risks surrounding preferred stock issues.

## Section 204 and 205 Matters

Sections 204 and 205 of the Delaware General Corporation Law became effective in 2014 and provide a mechanism for a corporation to validate defective corporate acts under certain circumstances. More and more of these ratification actions are contested by stockholders or other interested parties.

- In *In re Colfax Corporation*, Skadden successfully represented the independent directors in connection with a Section 205 action to cure prior corporate actions and in related derivative challenges by stockholder plaintiffs. C.A. No. 10447-VCL (Del. Ch.).
- In *In re Baxter International Inc.*, Skadden successfully represented Baxter International Inc. in securing approval under Section 205 of an amendment to the company's certificate of incorporation to clarify voting rights issues. C.A. No. 11609-CB (Del. Ch.).
- In *In re Ebix, Inc. Stockholder Litigation*, Skadden represented various individual defendants in derivative litigation and successfully secured ratification of a prior amendment to the charter of a Delaware corporation. C.A. No. 7526-VCS (Del. Ch.).

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