

Most Feared Plaintiffs Firm: McKool Smith

By **Kevin Penton**

Law360, New York (October 15, 2015, 5:48 PM ET) -- After a year in which they raked in nearly \$1 billion in verdicts and publicly available settlements from deep-pocketed opponents, attorneys with McKool Smith PC say they are also particularly proud of representing a “salt of the earth” developer in a multimillion-dollar case that included a hearing beneath an oak tree.

McKool Smith’s high-profile fights involving Sears Holding Corp., Fontainebleau Miami Beach owner Jeffrey Soffer and Bank of America NA from July 2014 to July 2015 brought attention to the firm and compensation to its clients, helping the firm land on Law360’s Most Feared Plaintiffs Firms list for 2015, the second time in three years that it has earned the distinction.

But when asked to point to its successes, the firm’s officials made sure to single out its representation of developer William Duane Horton as he sued a financial services firm in a Tennessee state court. In a case complicated by handshake and email deals rather than formal written contracts, McKool Smith attorneys convinced a jury that a \$36.5 million verdict in Horton’s favor was proper.

Robert Manley, a McKool Smith principal, recalls grabbing his briefcase and beginning to walk out of his office for a business lunch one early afternoon when his secretary told him there was a potential new client on the line. As Manley first listened to Horton recount the details of his aborted development project and his dealings with eventual defendant Sterne Agee & Leach Inc., the attorney put down his briefcase and knew he’d be skipping lunch, he said.

By the following week, McKool Smith attorneys were on the scene to begin their work on the case, Horton said, laboring with a dedication to detail and with a respectful tone to all sides that greatly impressed him.

“No one has ever done a better job than McKool Smith,” said Horton, who picked the firm after

FEARSOME FACTS

McKool Smith

\$2.55 billion

Value of verdict awards since 2005

9

Number of verdicts worth more than
\$100 million since 2005

5

Trial wins in 2015

spending months researching who could best represent him and the related companies that had collaborated on the deal. “I can’t tell you enough how we will always be grateful to them.”

After more than three years of legal battles, based on allegations that the financial services firm and one of its former investment bankers had violated a deal with Horton and the companies by also working on a competing project for the site of a proposed hotel and convention center, a jury in June awarded the plaintiffs \$36.5 million, according to court documents.

The sides later settled the matter for an undisclosed sum, Manley said, bringing to a close a case that included the hearing beneath an oak tree on a Saturday, after the power went out in the courtroom. One of the more challenging aspects of the case was that the agreement between Horton and the defendants was laid out over the course of various emails and verbal conversations, Manley said.

“In Chattanooga, Tennessee, a man’s word is still as good as a bond,” said Manley, who felt proud to represent Horton. “Duane is a real good, salt-of-the-earth kind of guy. He was the one who got his friends and family together into this deal, and felt personally responsible.”

During the same period, firm principal Sam Baxter worked on another high-profile case that also included a small entity as a client, representing Droplets Inc. in a case in the federal Eastern District of Texas where it alleged that Sears and Overstock.com Inc. had infringed three of its patents related to graphic user interfaces by including various features on their websites. It only took the jury about three hours in January to conclude that the companies had infringed, finding Sears liable for \$11 million in damages and Overstock liable for \$4 million, Baxter said.

“It’s always nice to represent a small company and help them overcome actions by a large company,” Baxter said.

McKool Smith is also proud that its work in the courtroom may help draw added scrutiny to an arguably unsafe product, Baxter said, pointing to the firm’s work in a False Claims Act case involving allegations that Trinity Industries Inc. made unauthorized alterations to its guardrail systems. That case ended in a \$663.4 million final judgment.

“Hopefully, we helped put a stop to these things being put out on the highway,” Baxter said.

In that case in the Eastern District of Texas, Baxter — working together with attorneys from firms including DuretteCrump PLC, Boies Schiller & Flexner LLP and Ward & Smith Law Firm — successfully argued that Trinity violated the FCA by allegedly not telling the U.S. Federal Highway Administration that it had changed the design for the roadway safety feature before collecting public dollars for the altered part, he said.

Baxter represented Joshua Harman, a guardrail installer who filed the case on behalf of the federal government after claiming that he noticed what appeared to be a change in the severity of injuries in accidents involving the parts, the attorney said. In June, U.S. District Judge Rodney Gilstrap **tripled** the jury’s original \$175 million verdict in the case and tacked on more than \$138 million in penalties, awarding a total of \$218 million to Harman and the balance of the \$663.4 million judgment to the U.S., according to the final judgment.

“It’s pretty clear that these parts should not be out there,” said Baxter of the guardrails. Trinity is appealing the decision, according to its August notice to the Fifth Circuit.

Other big cases earning the firm its Most Feared distinction this year include two related cases involving the failed Fontainebleau Resort and Casino project in Las Vegas. McKool Smith represented sets of investors, lenders and investment companies who alleged that they were misled over the development's actual construction costs and over the amount of financing the project raised, said Michael Hennigan and Kirk Dillman, two firm principals who worked on the cases in Nevada federal court and in a county court in the state.

At one point during one of the trials, Hennigan said he raised two of his fingers — one to represent the set of records allegedly kept by Fontainebleau Resorts LLC that showed the project to be solvent, and the other to represent the books that allegedly showed the project to be insolvent.

“We have a skeleton of a building in Vegas to prove that it was the insolvent book,” Hennigan told Law360, noting it showed which of the two books was more accurate.

In February, a Clark County judge approved a \$115 million settlement of the case between the investors and Fontainebleau, Dillman said. Soffer was a principal of the company, the attorney said.

In the same month, Bank of America disclosed in a securities filing with the U.S. Securities and Exchange Commission that it had paid \$300 million to settle a federal case where the approximately 40 lenders and investment companies represented by McKool Smith alleged that the bank had improperly induced them to finance the project.

Officials with the firm, which boasts 185 attorneys across eight offices, declined to outline McKool Smith's other settlement amounts from July 2014 to July 2015, citing the confidentiality of the deals, they said.

McKool Smith's successful verdict results over that period are indicative of the importance of the U.S. jury system, where regular people are asked to consider matters that are often supremely complex and to weigh which argument in a case makes more sense, Baxter said. The attorney argues that juries are often underestimated for what they can digest and properly judge.

“Juries really are collectively in tune to what happens in a courtroom,” Baxter said. “We very much believe in the jury system.”

--Editing by Rebecca Flanagan and Sarah Golin.