

## Most Feared Plaintiffs Firm: McKool Smith

By **Sindhu Sundar**

*Law360, New York (October 16, 2013, 8:00 PM ET)* -- Versata Software Inc.'s initial loss of its \$139 million award from business software giant SAP America Inc. in a patent dispute could have rattled any of its attorneys, but the team at McKool Smith PC saw to it that the firm eventually scored a much larger \$391 million bounty, niftily applying SAP's own royalty calculations to Versata's advantage in a play befitting of one of Law360's Most Feared Plaintiffs Firms.

A Texas federal magistrate judge in 2009 had set aside the \$139 million award to Versata, saying the award was based on inadmissible testimony from a Versata damages expert. In the second trial that followed in 2011, McKool Smith sought a \$285 million lost profits award for Versata, while SAP continued to insist that all Versata should get was a \$2 million award for royalties.

McKool Smith's attorneys then used SAP's own expert's testimony on royalty calculations to argue that model actually yields a \$170 million and not \$2 million royalty award. The maneuver worked, with the jury awarding \$85 million of the royalties Versata had sought. Its attorneys now jokingly call the move the "\$100 million cross," referring to the final royalties tally after interest. The jury had also awarded Versata \$260 million in lost profits, bringing its total haul to \$345 million, which swells to \$391 million after interest.

But Versata's victory, which the Federal Circuit upheld in May, stands out in recent intellectual property litigation not just for its size but for the impact it had on Versata, a relatively small Austin-based firm fighting to protect its business pricing software, McKool Smith attorneys told Law360.

"This is the kind of case the patent system was meant for," said Scott Cole, a principal at McKool Smith's Austin office, and the lead attorney in the Versata trial. "Here is a real company, developing, building and selling real products. And then you have a bigger competitor take that technology and then bundle it into its own suite, which caused obvious competitive harm to Versata."

Another argument instrumental in the scope of McKool Smith's victory was the value of the patent Versata accused SAP of infringing, Cole said. Without that, it would have been hard to make the case for the damages that Versata incurred because of the alleged infringement, he said.

"The biggest lesson to me from the Versata case is to look hard for market evidence of the value of the patent," he said. "SAP's position was that this was an 'itty-bitty,' insignificant invention. We argued that 'well, that's interesting ... we have dozens of fortune 500 companies paying millions of dollars each for this invention.'"

The win is among half-dozen nine-figure verdicts in seven years for McKool Smith's intellectual property practice, a driving force for the firm that encompasses nearly two-thirds of its more than 180 attorneys across eight offices.

The practice has racked up a series of wins since the firm's founding in 1991 in Dallas, building McKool's reputation as a go-to firm for plaintiffs intellectual property cases — more than half of which in recent years have been tried to verdict in recent years, according to Cole and the firm's name partner Mike McKool, who was the lead attorney for Versata on SAP's Federal Circuit appeal.

Since June 2011, the firm has won more than \$1 billion in verdicts and judgments for its clients, a figure that does not include settlements.

"Settlements often make the most sense for the parties, but trials are where you get to test yourself as a lawyer," Cole said. "And quite frankly, going to trial is why we all went to law school in the first place."

Another technology behemoth that McKool Smith successfully took on in recent years is Apple Inc., whose popular FaceTime video chatting application on iPhones and iPads allegedly infringed the patents held by McKool Smith client VirnetX Holding Corp.

VirnetX won a \$368 million verdict in November — one of the largest verdicts in the U.S. in 2012 — when a Texas federal jury found that Apple infringed four of VirnetX patents, a win that U.S. District Judge Leonard Davis upheld in February.

The size of such victories also means a lot to a law firm that conducts a significant amount of its work on a contingency fee basis, McKool said.

"Our willingness to engage in contingency fee work makes it feasible for some clients to initiate litigation when they may not have otherwise had the resources to do so," he said. "There is no greater commitment you can offer a client than to share in the risks of their litigation."

Meanwhile, the firm's roughly 105-attorney large commercial litigation team — some of its attorneys work in multiple practice areas — has also nailed some major victories for the state of Hawaii as well as nearly 200 cities in Texas fighting for unpaid hotel taxes from online travel companies.

Over the last decade, McKool has been leading the charge against nearly a dozen online travel companies including Hotwire Inc., Orbitz LLC and Travelocity.com LP, who are represented by Jones Day, Skadden Arps Slate Meagher & Flom LLP, McDermott Will & Emery LLP and K&L Gates LLP, the four "biggest law firms in the galaxy," according to Steve Wolens, a principal in McKool Smith's Dallas office.

The dispute, which has so far brought a \$225 million win for Hawaii and a \$55 million win for the 173 Texas cities in a class action, has centered around the argument that the online travel companies unlawfully pay bed taxes only on the wholesale prices of the rooms they purchased, and not on the retail prices that they sold the rooms for.

State, city and county tax laws often require such hotel taxes to be paid on retail and not wholesale amounts, Wolens said. The Texas suit was filed in federal court in 2006, brought for the lead city San Antonio as well as other cities. The class certification hearing took place in May 2007, and the court certified the class a year later, according to court documents.

The online travel firms appealed the certification in June 2008, which the Fifth Circuit denied the following month. In October 2009 jury found in favor of 173 named plaintiffs and a final judgment in April this year cemented the win for the cities, with a \$55 million award that includes the jury's \$20 million verdict along with penalties and interest, according to the firm.

"Online travel companies have the transactional data going back to when they first started — some of them as early as in 1994," Wolens said. "So experts don't have to guess or do fancy algorithms to determine the damages because the [online travel companies] have the records."

A common thread running through the firm's approach in its successful cases is its rigorous attention to detail that helps it develop a complete picture of the dispute, and withstand federal appeals court scrutiny as it did when it persuaded the Federal Circuit to preserve Versata's \$391 million win, according to its attorneys.

In fact, it was this thoroughness that helped Mike McKool win over Versata as a client during an interview years ago, when the software firm was trying to select firms to represent it in a different patent dispute, according to Versata general counsel Lance Jones.

"Mike showed up to the meeting with these binders and all of this understanding and knowledge of exactly who were and what this case was about," Jones said of McKool. "And we knew they were the firm to work with."

--Editing by Katherine Rautenberg.

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