

McKool Smith Wins  
Most Top Verdicts

# THE NATIONAL LAW JOURNAL

**VERDICTSEARCH**

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# TOP 100 VERDICTS *of* 2008

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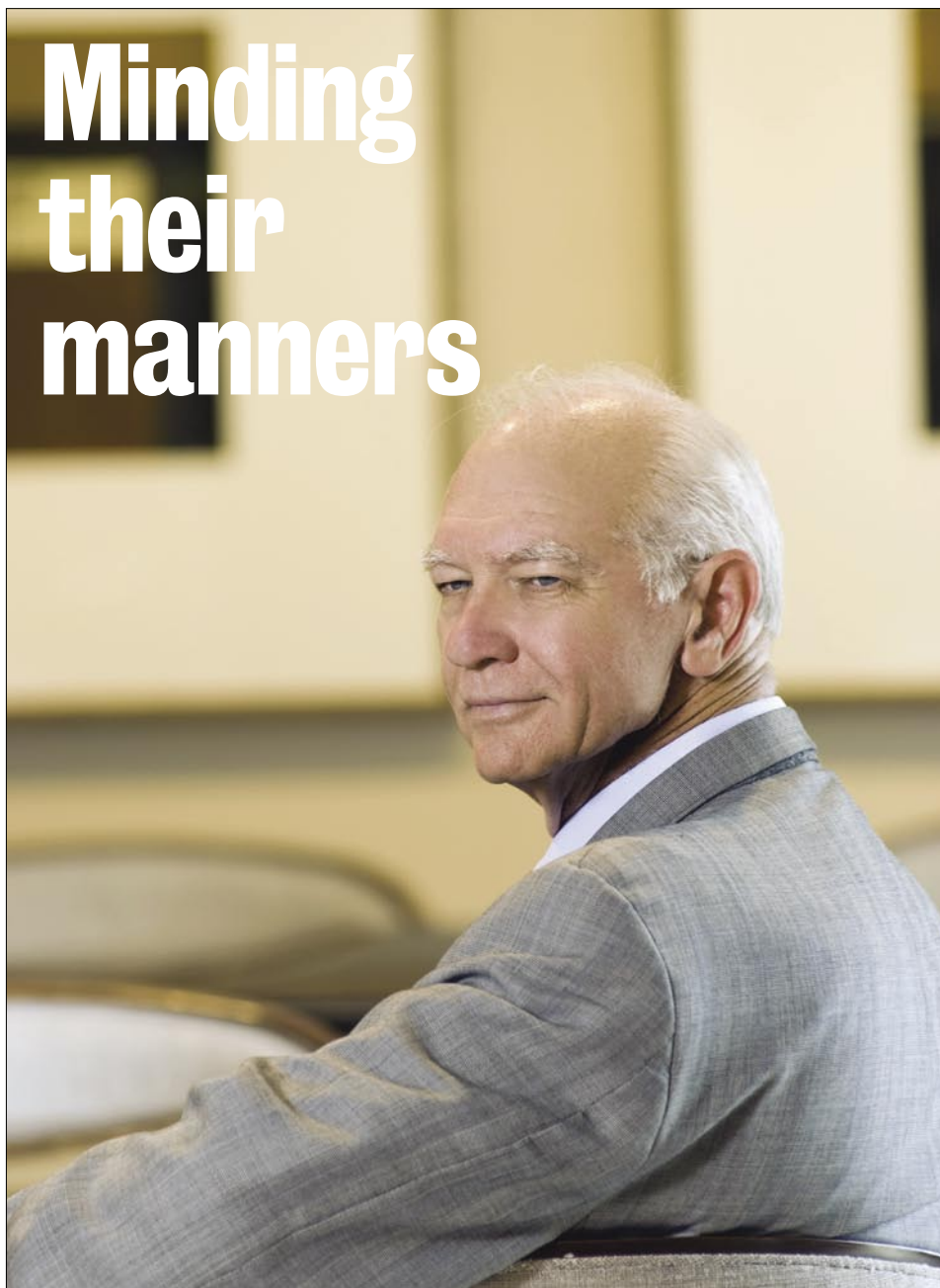
### **METHODOLOGY**

Throughout the year, VerdictSearch strives to report as many jury verdicts (and decisions and settlements) as possible from around the nation. In addition to accepting submissions from attorneys, we develop leads by scouring the courts, cultivating relationships with law firms and searching the Internet and other news sources, including Incisive Media's large family of legal publications. Our exhaustive efforts allow us to present this list with every confidence that it is comprehensive. However, if we left anyone out, we apologize.

Verdicts are ranked by gross award. They do not reflect reductions for comparative negligence or assignment of fault to settling defendants or nonparties; remittiturs, additurs and reversals; and attorney fees and costs (unless awarded by the jury). In situations where awards are automatically trebled or doubled by statute, the trebled amount determines rank. It is within the sole discretion of the editors to make adjustments to rank where necessary to reflect statutes that provide for election of remedies or other types of overlapping awards.

# VERDICTS

## Minding their manners



Sam Baxter: “You don’t want the jury to think you’re trying to hide anything from them,” he said. “Objections to leading questions? We don’t make ’em.”

McKool Smith finds that politeness is the way to a jury’s heart.

By June D. Bell  
Special to The National Law Journal

The litigators at McKool Smith had a banner year in 2008. The Dallas-based firm racked up four courtroom wins totaling \$358 million for clients ranging from retired National Football League players to companies that make angioplasty balloons and plasma televisions. Intellectual property cases—especially those litigated in the federal Eastern District of Texas—kept the firm busy.

One of the busiest of McKool’s lawyers was Samuel F. Baxter, who tried six patent cases in 2008. He secured a \$250 million victory for Medtronic Inc. against Boston Scientific Corp., a win that ranked No. 12 on NLJ affiliate VerdictSearch’s Top 100 Verdicts of 2008. He also persuaded a jury to award \$59 million to Pioneer Corp. in a plasma screen picture technology case against Samsung SDI Co. Ltd. That case was ranked No. 36 on the Top 100 list.

Baxter, who’s not a patent attorney, said that the most powerful weapons in his arsenal are extensive feedback from shadow juries and a Texas-sized serving of courtesy.

Baxter, a former prosecutor and judge, said that he relies heavily on ad-

vice and criticism from shadow juries and jury consultants to fine-tune his trial strategy. Each night during the Medtronic trial, he combed a jury consultant's daily five-page report summarizing the shadow panel's take on that day's courtroom action and suggesting tweaks in his strategy.

In the Medtronic case, Baxter considered the opinions of at least four shadow panels as he refined his courtroom presentation and fleshed out confusing points about Medtronic's claim that Boston Scientific's angioplasty and balloon catheters infringed on Medtronic's patents. *Medtronic Vascular Inc. v. Boston Scientific Scimed Inc.*, No. 2:06-cv-78 (E.D. Texas).

Medtronic alleged infringement of four patents. Boston Scientific's lead attorney, Matt Wolf of Howrey in Washington, won a summary judgment of noninfringement on one of the patents and had a claim of willful infringement dismissed before trial.

### Keeping it simple

Each side was given 16 hours to present its case in the Eastern District of Texas courtroom. That constraint forced Baxter to trim his case to its essentials, including a charismatic Irish inventor and extensively prepared witnesses who were both plainspoken and agreeable.

McKool Smith's attorneys teach witnesses to remain nonconfrontational even during inflammatory cross-examinations.

"There are so many experts who want to argue," said McKool's Ted Stevenson, Baxter's co-counsel on the Medtronic case. "If it's 'yes' or 'no,' just be polite and inform the jury. On cross, you've got to protect your demeanor....I can fix anything on redirect."

McKool Smith litigators make a point of rarely objecting to anything from opposing counsel.

"You don't want the jury to think you're trying to hide anything from them," Baxter said. "Objections to leading questions? We don't make 'em."

The strategy paid off when the federal jury returned a verdict of \$250 million for Medtronic. The award was reduced to \$19 million by Judge T. John Ward, who also found two of the three patents at issue were unenforceable.

### 'Worthy adversaries'

"Boston Scientific was obviously pleased with the court's decision," said Wolf, who described the McKool Smith team as "worthy adversaries."

Early this year, the parties confidentially settled all pending litigation between themselves.

In the Pioneer litigation, the client alleged that Samsung had infringed on two patents that brighten and sharpen the picture on plasma televisions. The eight-day trial in Marshall, Texas, resulted in a \$59.3 million verdict for willful infringement. *Pioneer Corp. v. Samsung SDI Co. Ltd.*, No. 2:06-cv-384 (E.D. Texas).

Baxter tried the case with Harold J. McElhinny of Morrison & Foerster's San Francisco office. The verdict is being appealed.

McKool scored a touchdown for about 2,000 retired NFL players who claimed the National Football League Players Association violated a licensing agreement. The players alleged that they were not receiving any of the proceeds to which they were entitled from the sale of NFL-themed video games, jerseys and other merchandise despite having signed a licensing agreement with the union, said Lewis T. LeClair, the McKool Smith attorney who was lead trial counsel. *Adderley v. National Football League Players Association*, No. C 07-CV-00943 WHA (N.D. Calif.).

LeClair tried the case with Ronald Katz in Los Angeles-based Manatt, Phelps & Phillips' Palo Alto, Calif., office. They asked for damages of \$29 million to \$88 million; the jury awarded \$7.1 million. The panel did award \$21 million in punitive damages, an amount LeClair and Katz sought. The verdict is being appealed.

McKool's other significant win during 2008 came in an intellectual property case that pitted the inventor of a handheld computer game controller against Microsoft Corp.

Texas inventor Brad Armstrong and his company, Anascape Ltd., sued Microsoft and Nintendo for patent infringement. Microsoft settled the week before the spring trial, leaving Nintendo to face McKool's trial team last spring. *Anascape Ltd. v. Microsoft Corp.*, No. 9:06-cv-158 (E.D. Texas).

Anascape was represented by Douglas A. Cawley of McKool Smith and Robert Parker of Parker, Bunt & Ainsworth of Tyler, Texas. The jury awarded \$21 million of the \$50 million Anascape sought. That verdict is being appealed.



Lewis LeClair: The litigator helped secure licensing payments for retired NFL players.



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## #74 Class of retired players sued NFL entities over revenue shares

**Case Type:** Breach of Contract — Torts — Breach of Fiduciary Duty — Civil Practice — Class Action

**Case:** *Adderley v. National Football League Players Association*, N.D. Calif., 3:07-CV-00943-WHA, 11/10/2008

**Plaintiffs' Attorney:** Ronald S. Katz, Manatt, Phelps & Phillips, LLP, Palo Alto, Calif.; Lewis T. LeClair, McKool Smith, Dallas

**Defense Attorney:** Jeffrey L. Kessler, Dewey & LeBoeuf LLP, New York

**Jury verdict:** \$28,100,000

**FACTS & ALLEGATIONS** The plaintiff class members are more than 2,000 retired National Football League players. The players signed a group license agreement with the National Football League Players Association (NFLPA), which covered the group licensing of video games, collectables, and other merchandise.

The plaintiffs sued the NFLPA and its marketing subsidiary, National Football League Players Inc., alleging breach of contract and breach of fiduciary duty. The plaintiffs claimed that they were not compensated pursuant to the group license authorizations, and that they were entitled to shares of licensing revenue from deals negotiated by the NFLPA. The plaintiffs also alleged that the defendants failed to adequately market their rights to third parties such as Electronic Arts--maker of the Madden NFL video games--which could have been lucrative for the class members.

The plaintiff's sports economy expert testified that retired players helped make the NFL what it is today, and that it was advantageous to the defendants to represent retired players. He also discussed the usual and customary range for sports figures to pay to have themselves licensed.

During trial, several former NFL players testified about the benefits that the NFLPA promised them, but that they never received, and about the difficulties in gaining information about the NFLPA's finances and licensing agreements.

The defense argued that the defendants did not owe anything pursuant to the contract, and that the defendants adequately marketed the class members' images.

The defense damages expert testified that there was no basis in economic analysis that retired players have contributed equally to the NFLPA's licensing revenues; that there is no support for the fact that the defendants have market power in retired player licensing; and that the percentage retained by the defendants is not materially different from other sports unions.

**INJURIES/DAMAGES** The plaintiffs alleged that they were entitled to share in the group licensing pool created by the defendants, and asked the jury to award between \$29 million and \$32 million in damages.

**RESULT** The jury found that the defendants breached the group license agreement and breached its fiduciary duty. The jury awarded the plaintiffs \$7.1 million for the breach of fiduciary duty, and \$21 million as punitive damages for total of \$28.1 million.

**POST-TRIAL** In January, the judge upheld the verdict.

## #100 Nintendo infringed patents on video game controllers: plaintiff

**Case Type:** Patents — Intellectual Property — Infringement

**Case:** *Anascape Ltd. v. Microsoft Corp.*, E.D. Texas, 9:06-CV-158-RC, 5/14/2008

**Plaintiffs' Attorney:** Douglas A. Cawley, McKool Smith, Dallas; Robert M. Parker, Parker, Bunt & Ainsworth, PC, Tyler, Texas

**Defense Attorney:** Robert J. Gunther Jr., Wilmer Cutler Pickering Hale and Dorr LLP, New York

**Jury verdict:** \$21,000,000

**FACTS & ALLEGATIONS** Between 1999 and 2005, plaintiff Anascape Ltd. was issued 12 patents for video-game controllers, including such features as a game control with analog pressure sensors and a variable sensor with tactile feedback. Nintendo of America Inc. later came out with similar controllers.

Anascape sued Microsoft Corp. and Nintendo, claiming that they had infringed Anascape's patents. Microsoft Corp. settled before trial for a confidential amount.

Anascape claimed that Nintendo infringed on its various patents when designing controllers for its Wii and GameCube systems.

Nintendo denied the allegations, contending that the subject patents were invalid. The company alleged that the patent was unenforceable because its inventor committed inequitable conduct.

**INJURIES/DAMAGES** Anascape demanded a reasonable royalty for Nintendo's alleged use of its technology.

**RESULT** The jury found patent infringement related to Nintendo's Wii Classic controller connected to the Wii remote controller, GameCube controller and Wavebird wireless controller. The jury also found that Nintendo's Nunchuk controller connected to the Wii remote controller did not infringe any patents. It awarded \$21 million.

**POST-TRIAL** A defense motion to remit the damages from \$21 million to \$2.8 million was pending at press time.

*Editor's Note* This report is based on information that was provided by plaintiff's counsel and defense counsel.

## #12 Defendant's balloon-dilation catheters infringed patent

**Case Type:** Patents — Intellectual Property — Infringement

**Case:** **Medtronic Vascular Inc. v. Boston Scientific Scimed Inc.**, E.D. Texas, 06-CV-00078-TJW, 5/27/2008

**Plaintiffs' Attorney:** **Sam F. Baxter** and **Ted Stevenson**, McKool Smith, Dallas

**Defense Attorney:** **Ed Han** and **Matt Wolf**, Howrey, L.L.P., Washington, D.C.

**Jury verdict:** **\$250,000,000**

**FACTS & ALLEGATIONS** Plaintiffs Medtronic Vascular Inc., Medtronic USA Inc., Medtronic Inc. and Medtronic Vascular Galway Ltd. claimed infringement of three patents by certain balloon-dilation catheters of Boston Scientific Scimed Inc. Balloon-dilation catheters are commonly used in angioplasty and stent delivery procedures. The Boston Scientific products in question were its Taxus Express2, Express2, Liberte, Maverick, Maverick2, Maverick XL and Quantum Maverick catheters.

One of the patents (called the '364 patent) covers a certain kind of balloon that has greater strength, elastic stress response and high distensibility. The other two patents (called the '358 and '057 patents) relate to a particular design intended to enable a cardiologist to get the catheter to and across a restriction in a coronary artery.

The plaintiffs sued Boston Scientific for patent infringement. The plaintiffs' liability experts included a cardiologist, two patent infringement experts and, regarding patent validity, an expert on the balloon materials.

Boston Scientific contended that the patents were invalid by anticipation and obviousness, and denied infringement. It called three experts on the infringement issue.

**INJURIES/DAMAGES** The plaintiffs sought reasonable royalties totaling \$264 million. According to the plaintiffs' counsel, the defense contended that, if the jury found liability, a reasonable royalty would be \$15 million to \$20.7 million, depending on which patents the jury found were infringed.

**RESULT** The jury found infringement by Boston Scientific and that the plaintiffs' damages were \$83 million for infringement of the '364 patent and \$167 million for infringement of the other two patents, for a total award of \$250 million.

**POST-TRIAL** In July, the court partly reversed the verdict as to the '364 patent, and accordingly the parties agreed that, based on this ruling, a reasonable royalty on the '364 patent would be \$19 million. In late August, a bench trial was held, and Judge Ward ruled that, in equity, the '358 and '057 patents were unenforceable. Thus, the only damages left were the \$19 million on the '364 patent.

## #36 Pioneer claimed infringement of plasma-display TV patents

**Case Type:** Infringement — Intellectual Property — Patents

**Case:** **Pioneer Corp. v. Samsung SDI Co. Ltd.**, E.D. Texas, 2:06-CV-00384, 10/27/2008

**Plaintiffs' Attorney:** **Sam F. Baxter**, McKool Smith, Marshall, TX;

**Harold J. McElhinny**, Morrison & Foerster, San Francisco

**Defense Attorney:** **Edward G. Poplawski**, Sidley Austin, LLP, Los Angeles

**Jury verdict:** **\$59,351,480**

**FACTS & ALLEGATIONS** Plaintiff Pioneer Corp. claimed that Samsung SDI Co. Ltd., Samsung Electronics Co. Ltd., and Samsung Electronics America Inc. infringed two patents by importing and selling Samsung plasma-display television products in the United States. The Samsung Electronics companies entered the U.S. plasma television market in 2001.

According to Pioneer, the patented technology improves the definition of the display to rival that of LCD-display televisions.

Pioneer sued Samsung SDI Company Ltd. and Samsung Electronics Company Ltd., South Korea, and Samsung Electronics America Inc., Ridgfield, N.J., for patent infringement. Another Samsung company was also sued, but it was dismissed before trial.

The patents were known as the '489 patent and the '068 patent.

The defendants denied infringement. They also asserted invalidity based on anticipation and lack of enablement.

The defendants counterclaimed, alleging infringement of their patents by Pioneer, but the counterclaims were dismissed before trial.

**INJURIES/DAMAGES** According to the plaintiff's attorneys, Pioneer sought lost profits of \$14 million on the '489 patent and reasonable royalties of \$58 million for both patents combined.

According to defense counsel, Pioneer sought lost profits of \$12 million and a reasonable royalty of \$70 million.

**RESULT** The jury found that the products in question were covered by Pioneer's patents, that the defendants willfully infringed the patents, and that Pioneer's damages were \$59,351,480.

**POST-TRIAL** Pioneer moved for an injunction and supplemental damages, as well as enhanced damages based on willfulness and an extraordinary case. It also moved for attorney fees.

Samsung moved for judgment as a matter of law or, in the alternative, for remittitur and a new trial.

*Editor's Note* This report is based on information that was provided by plaintiff's counsel and defense counsel.

According to defense counsel, defense firm Sidley Austin's involvement in the case began about six weeks before trial.