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Litigator of the Week: Do-Over More Than Doubles Award

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For Scott Cole, a principal in the Austin office of McKool Smith, the second time was the charm for client Versata Software Inc.

On May 13, a federal jury in Marshall found that SAP America Inc. of Irving had infringed on Austin-based Versata's business software patent and awarded Versata \$260 million in lost profits and \$85 million in royalties for a total of \$345 million.

In August 2009, a jury had awarded Versata \$138.6 million in *Versata Software Inc., et al. v. SAP America Inc., et al.* In October 2009, SAP filed a motion for new trial on damages, which U.S. Magistrate Judge Charles "Chad" Everingham IV of the Eastern District of Texas granted. In January, Everingham vacated part of the first verdict, basing his ruling on a 5th U.S. Circuit Court of Appeals opinion that invalidated the practice of plaintiffs approximating reasonable royalty rates by estimating 25 percent of an infringer's expected profits.

In light of Everingham's decision, Cole and other lawyers representing Versata sought damages at the second trial for royalties and for lost profits allegedly caused by SAP's inducement of infringement and infringement that persisted after SAP modified its product to avoid infringing on Versata's patent, Cole says. At the first trial, Versata sought damages only for royalties.

But before the second trial got under way, Everingham granted SAP's motion to exclude three Versata expert witnesses who planned to testify on what constitutes reasonable royalties, making the McKool Smith lawyers' task trickier, Cole says.

Sam Baxter, a principal in the Marshall office of McKool Smith who also was on the trial team for Versata, writes in an e-mail: "Scott led our team in the Versata trial, and we would not have won the case if it wasn't for his work in and out of the courtroom."

Cole says the firm has a contingent-fee agreement with Versata, but he declines to disclose how much McKool Smith will get in fees. He says he expects SAP will appeal to the 5th Circuit.

Thomas Melsheimer, a principal in Fish & Richardson in Dallas who represents SAP, did not return a telephone call seeking comment.