

Texas Powerhouse: McKool Smith

By **Danielle Nichole Smith**

Law360 (September 5, 2019, 1:18 PM EDT) -- McKool Smith PC continued to demonstrate its prowess both in and outside the courtroom this past year, scoring a \$10.6 million patent infringement verdict for PanOptis, convincing a jury that licensing fees charged by Ericsson were fair, reasonable and non-discriminatory, and invalidating a patent Sanofi was accused of infringing.

Initially founded in Dallas by principals Mike McKool and Phillip N. Smith Jr. with just 13 attorneys in 1991, McKool Smith has since expanded nationwide with offices in Los Angeles, New York and Washington, D.C. However, the firm has maintained its roots in Texas, with nearly half of its 150 U.S. attorneys based in its four offices in the Lone Star state, once again earning a spot as one Law360's 2019 Texas Powerhouses.

McKool Smith's solid reputation as a go-to trial litigation firm has continued to help it stand out among its peers, the firm's attorneys said. Often, companies that are generally represented by large law firms will turn to McKool Smith when they realize they're going to have to go court, Mike McKool told Law360.

John Garvish, a principal in the firm's Austin office, said that McKool Smith's first goal is to always understand the story behind a case. When lawyers understand the motivations behind actions, their legal arguments become stronger, he said.

"It makes sense to the jury or the PTAB judge or the district court judge — whoever may be deciding the issues in your case — because they understand the equities involved in the different parties' positions," Garvish said. "I think that's a critical aspect of being persuasive."

Just this past year, Garvish and other McKool Smith attorneys were able to persuade the U.S. Patent Trial and Appeal Board that all 17 claims of a patent owned by Amgen unit Immunex were invalid as obvious. Immunex Corp. had asserted the patent, U.S. Patent No. 8,679,487, in California federal court against Sanofi-Aventis US LLC's drug Dupixent, which is used to treat eczema.

Garvish said the team had been able to explain why Immunex Corp. sought such broad claims and why those claims were consequently open to validity challenges, ultimately securing a win for Sanofi and Regeneron Pharmaceuticals Inc. at the PTAB in February. The judge's findings are currently being appealed to the Federal Circuit, but Garvish said they are working to have the decision upheld.

Garvish noted that Dupixent is projected to achieve blockbuster drug status in 2019, which would mean that it generated at least \$1 billion in annual sales.

McKool Smith attorneys also proved themselves to be persuasive before juries, securing a \$10.6 million verdict for Optis Wireless Technology LLC and PanOptis Patent Management LLC in their patent infringement suit against Huawei Technologies Co. Ltd. Ultimately, the jury in the Eastern District of Texas found in August 2018 that all five of the wireless and video patents owned by PanOptis were valid and had been willfully infringed.

Ted Stevenson III, a McKool Smith principal in Dallas who worked on the case, told Law360 that the suit was interesting because Huawei didn't contest the validity of two patents or that two other patents had been infringed.

"It's rare that the defendant admits validity or admits infringement as to some of the claims, but that happened here — which I think is a testament to the strength of the patents," Stevenson said.

Another victory for McKool Smith came in a case from HTC Corp. and HTC America Inc. in the Eastern District of Texas accusing Ericsson Inc. of flouting its contractual duty to offer licensing fees for its standard-essential cellular patents that were fair, reasonable and nondiscriminatory, or FRAND.

After a five-day trial in February, Stevenson and other attorneys were able to convince a jury that Ericsson hadn't breached its contractual obligations. The decision is currently on appeal at the Fifth Circuit.

Stevenson said the case involved a lot of jury work since the issues surrounding licensing were foreign to pretty much everyone. The attorneys conducted a lot of jury research with multiple mock jury exercises to understand what was persuasive and important to juries and how to explain why the rates were FRAND, he said.

"We learned a lot from that, and it boiled down to some fairly simple things, which we were able to pretty effectively put on at trial," Stevenson said.

McKool Smith's Texas attorneys also racked up wins outside the state last year. In August 2018, lawyers from the firm's offices in Dallas, Austin and New York helped WiLan Inc. get a \$145 million patent infringement verdict against Apple Inc. in the Southern District of California. The judge has since granted Apple's request for a new trial on damages, and that is currently slated for January.

At the International Trade Commission, the firm scored a win for TiVo and Rovi Corp. when an administrative law judge found that certain Comcast Corp. receivers infringed two Tivo patents.

And in another win at the PTAB, McKool Smith helped surgeon Dr. Ford Albritton succeed in an inter partes review where Acclarent Inc. challenged the validity of his claims for a surgical device patent he had asserted against the company. The PTAB found in July 2018 that none of the challenged claims weren't patentable.

According to McKool, the firm started out doing commercial litigation before expanding to patent infringement matters in the mid-1990s. But the firm's national reputation didn't really begin to blossom until the early 2000s when its national patent practice started racking up victories, McKool said. The firm's been on the radar of the part of the market that can use its services ever since, he added.

Stevenson said the firm's future would in many ways be defined by the people who are trying its cases, saying "in many regards, you go where the market takes you." Stevenson noted that the firm had seen an uptick in antitrust cases, and that though the patent docket is generally moderating a bit, they were still very busy in that area as well.

McKool ultimately predicted there will be a trend of the commercial practice predominating over the patent practice, as there have been cases decided and laws passed that have been curtailing the number of patent filings.

"I think it's going to be more commercial, but I think we're situated well to continue our place among the litigation firms in our region," McKool said.

--Additional reporting by Dani Kass, Ryan Davis, Daniel Siegal and Matthew Bultman. Editing by Philip Shea.