

## In Stent Patent War, Boston Scientific Caves (Again), Agrees to Pay Johnson & Johnson \$1.725 Billion to Settle Three Cases

By Alison Frankel

On the one hand, you have to feel a tiny bit sorry for the Patterson Belknap Webb & Tyler team that was to have started trial last Friday in Delaware federal district court. It would have been a helluva trial for Patterson's client, the Cordis unit of Johnson & Johnson. J&J had already won a 2005 judgment of infringement against Boston Scientific, its bitter rival in the cardiac stent business. So the only issues at trial would have been J&J's lost profits and Boston Scientific's willfulness.

Moreover, a pair of pretrial rulings (here and here) by the incredibly hard-working Wilmington federal district court judge Sue Robinson appeared to favor J&J. Judge Robinson rejected Boston Scientific's efforts to limit J&J's lost profits because J&J was found to have infringed a different Boston Scientific patent. She also ruled the jury could be told that Boston Scientific went to market with its stent despite early warnings from her and from the U.S. Court of Appeals for the Federal Circuit that J&J would likely prevail on the merits of its infringement claim.

On the other hand, the Patterson team--which included Gregory Diskant, Eugene Gelernter, Scott Howard, Michael Buchanan, Kathleen Crotty, and Catherine Williams--was probably pretty happy about helping its longtime client achieve the whopping settlement J&J announced Monday: Boston Scientific will pay J&J \$1.725 billion to resolve three Delaware patent cases. (Two were to have been tried back-to-back before Judge Robinson, beginning last Friday. The third case, which involved a later-generation stent patent, had a September trial date.)

Patterson Belknap and Boston Scientific's lawyers from Kirkland & Ellis have battled since 2003 in the cases settled Monday. Johnson & Johnson failed to obtain a preliminary injunction against Boston Scientific back when Boston Sci first introduced its drug-eluting stent line, but it later won a jury verdict of infringement, which was subsequently upheld by the Federal Circuit. Boston Scientific, meanwhile, won its own infringement jury verdict and appellate affirmance--but on a drug-eluting stent patent that was considered

much less valuable. Boston Scientific's team throughout the litigation was led by John Desmarais, who, as we told you Monday, just announced he's stepping down from his Kirkland partnership to pursue a patent licensing business. Desmarais didn't return our call for comment. J&J had Delaware counsel from Ashby & Geddes; Boston Scientific had Young Conaway Stargatt & Taylor.

The three cases in Monday's deal were obviously not among those that were settled as part of last year's \$716 million deal between Boston Scientific and J&J, which mostly resolved litigation over first-generation stents. But it's becoming clear that Boston Scientific's management team--headed by new CEO Ray Elliott--is in serious settlement mode. "We have recently made a concerted effort to mitigate risk throughout the company, including litigation risk," Elliott said in Boston Sci's statement on Monday's settlement. "We believe today's settlement--while substantial--is in the best interest of the company and its shareholders. It resolves major litigation without exposing Boston Scientific to the uncertainties of a jury trial and a potential damages award that was impossible to predict...With the resolution of these matters, there are now no material judgments or jury verdicts pending against the company."

Lest you think the stent patent war is now over, we have to remind you of yet another ongoing case. We told you last month about a summary judgment ruling by Judge Robinson (yes, her again; she apparently never sleeps) in favor of Boston Scientific. In that case, Judge Robinson found four J&J drug-coated stent patents invalid. J&J has said it plans to appeal the ruling, and its statement on Monday's settlement notes that the settlement does not resolve claims at issue in that case.

As for Patterson Belknap's trial team, it will soon get another chance to test its skills before Judge Robinson. Diskant has a scheduled March 6 trial in another patent case before the judge (though this one doesn't involve cardiac stents).