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Drinker Biddle Nets \$1.8 Mil. Award in Fee Fight

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Drinker Biddle & Reath won a \$1.78 million verdict against a former client late last year after the client disputed the alternative fee arrangement the two sides agreed to in a patent litigation matter.

Details of the case, *Drinker Biddle & Reath v. AgriZap Inc.*, came to light earlier this month and highlight a type of dispute that rarely makes it to trial and one firms rarely want publicized.

After three hours of deliberation shortly before Thanksgiving, a Philadelphia jury found, on a 10-2 vote, that the firm's fees were reasonable. The jurors said client AgriZap had to pay the firm \$1,785,876 to cover around \$1.5 million in fees and more than \$200,000 in costs accrued during two months of preparation and the ensuing February 2007 trial in *AgriZap v. Woodstream*.

Drinker Biddle was hired by California-based AgriZap in a Dec. 13, 2006, fee agreement after the company's case involving its patent for the "Rat Zapper" was transferred from a California court to the U.S. District Court for the Eastern District of Pennsylvania. According to court documents, AgriZap hired the Drinker Biddle team, led by partner Gregory Lavorgna, for its experience with intellectual property law and the fact it was local to the Eastern District court.

AgriZap President and CEO Robert Noe, a lawyer by training, told Drinker it wouldn't be able to pay its bills during trial and asked if an alternative arrangement could be made. Some negotiations ensued and Noe signed an agreement Dec. 13. According to court documents, if AgriZap lost at trial, Drinker Biddle's accumulated hourly fees and costs would be due within the following 18 months. If the company won at trial or a settlement was reached, AgriZap would have to immediately pay Drinker Biddle treble its hourly fees plus costs.

The case, set for trial Feb. 20, involved two patent claims and a fraudulent misrepresentation claim. Drinker Biddle brought on partner Mary E. Kohart a few weeks before trial to handle the fraud claim. Aside from AgriZap seeking to prove patent infringement, it also had to fight off claims by Woodstream that the patent was unenforceable.

The federal jury ruled in AgriZap's favor on all counts, awarding the company \$2.7 million. Woodstream then sought to settle for \$2.2 million plus continuing royalty payments. AgriZap turned down the offer, at what Drinker Biddle says was against the advice of its attorneys. AgriZap disputes this, according to court documents.

About a week after the trial, according to court papers, Drinker Biddle sought payment for nearly \$5 million, which included the hourly fees trebled plus costs, as outlined in the fee agreement. AgriZap said it was surprised to learn so many hours were put onto this case. In a court filing Thursday, AgriZap said 5,225 hours of work were put into the matter by more than 35 Drinker Biddle attorneys and paralegals over three months.

Woodstream appealed the verdict, but Drinker Biddle did not represent AgriZap at that point. An appellate court reversed the patent claims, bringing the verdict down to \$1.275 million for the fraud claim and finding AgriZap's patent unenforceable, according to court papers.

According to those court papers, Drinker Biddle said it was hired at the "eleventh hour" to handle a very complex "bet-the-company" case that was made more difficult by missteps of prior counsel and previous unfavorable rulings. It said it had to pull attorneys off of other matters to ensure the firm was up-to-speed in time for trial.

AgriZap argued in court papers it thought the majority of the work was done prior to Drinker Biddle coming on board and was surprised to see \$1.5 million in hourly fees for nearly three months of work.

Throughout the course of the fee litigation, AgriZap pointed out that Drinker Biddle essentially failed to accomplish what it was hired to do — win the patent claims — and allowed its client to enter a fee agreement that had no correlation between what AgriZap's award was and what the fees were. The company pointed out that it could have won \$1,000 in the underlying case and still had to pay Drinker Biddle nearly \$5 million under the fee arrangement, according to court filings.

"To me, one of the things that is most troubling is the terms of the fee agreement whereby a firm with the credentials and reputation of Drinker would allow a client to enter into an agreement where they agreed to pay the full hourly fees and Drinker was still asking for triple those fees for any settlement or judgment regardless of the amount [awarded to AgriZap]," AgriZap attorney Alan K. Cotler of Reed Smith said in an interview. "And to compound that, even after the client ended up with only \$1.275 million, they continued to try to collect \$5 million and sued them for \$5 million and it was only at the hearing on the charging lien that they decided to retreat from the trebling of the fees."

Drinker Biddle's attorneys, Dean R. Phillips and Deborah H. Simon of Elliott Greenleaf & Siedzikowski, have a different take. Phillips said Drinker Biddle was disappointed to have to sue for the fee, but did so as a last resort given AgriZap's unwillingness to make "reasonable efforts" to resolve the dispute.

"Suing a client is not a decision Drinker ever takes lightly and it did not do so in this case," Phillips said. "It's a step that they rarely and reluctantly take. Drinker took AgriZap's case under extreme circumstances and on short notice. It was a complicated matter involving challenging issues, patent issues and fraud issues.

"Although Drinker doesn't guarantee results the result in the federal district court was favorable to AgriZap. With respect to this lawsuit, the court ruled as a matter of law that the fee agreement, an agreement that AgriZap's president, who is himself a lawyer proposed, was not improper. The jury agreed that Drinker was entitled to the full amount, to the penny, of the fee that it requested the jury to award."

There is some disagreement over which of the sides was unwilling to reach a settlement. They had settlement discussions with former Supreme Court Justice Russell Nigro in the summer of 2008.

Cotler said Nigro suggested the fees be treated as a contingency case where Drinker Biddle got one-third of the \$1.275 million ultimately awarded AgriZap plus its costs. That would have put the verdict in the \$600,000-to-\$650,000 range, Cotler said.

He said AgriZap was willing to pay this amount but had to spread it out over several years because of cash flow issues. Cotler said the company agreed to pay more in a certain year if its profits reached a certain level. He said Drinker Biddle turned down the offer.

In response to Cotler's statement about the settlement offer, Phillips said there was never a meaningful settlement on the table and said it was never suggested by either Nigro or trial Judge Arnold New that such a proposal be accepted.

"On offer to pay out a substantially discounted lump sum over many years unsecured is not what Justice Nigro recommended," Phillips said of AgriZap's settlement proposal.

Phillips said it was AgriZap that rejected the recommendations of any judge who made one in the case.

"That was a serious source of frustration because the preference of my client was to resolve this matter amicably," he said. "We did everything conceivable to do so."

Boiled Down to Basics

Between the time Drinker Biddle filed suit in April 2008 and the two-day trial that began with jury selection Nov. 23, 2009, the parties saw the case whittled down to the basic question of whether Drinker Biddle's hourly fees were reasonable.

The trial court ultimately dismissed many of AgriZap's defenses, including that the overall fee agreement was unconscionable. In the same order, New denied Drinker Biddle's motion for partial summary judgment and noted that the firm had agreed not to seek the trebled fee at trial.

New had previously thrown out AgriZap's counterclaim for a breach of fiduciary duty, ruling the claim was based on the unconscionability of the fees, which he said could be an affirmative defense but not its own claim.

He also threw out AgriZap's expert witness. In an order posted the day of jury selection, New precluded the testimony and expert report of Temple University Beasley School of Law professor Louis M. Natali Jr. Drinker Biddle's expert, who ultimately didn't testify, was former Superior Court President Judge

Joseph A. Del Sole.

The majority of testimony at the fee trial was from Drinker Biddle attorneys explaining the work they did. Fox Rothschild partner Theodore Jobes, one of the attorneys representing Woodstream in the underlying litigation, testified as to the complexity of the underlying case and that Drinker Biddle was a worthy opponent.

In several court filings Drinker Biddle had also made a point to mention Noe's legal training and experience in business dealings. The firm also pointed out that AgriZap had outside representation the entire time it was negotiating with Drinker Biddle on the fee agreement.

Grounds for Reversal?

In its brief in support of post-trial relief filed last week, AgriZap said it had several reasons the verdict should be thrown out and a new trial awarded.

According to the filing, AgriZap again argues the fee agreement is null and void because the firm broke its fiduciary duty to the company by entering such an agreement. AgriZap also argues Drinker Biddle failed to prove the reasonableness of its fees and the hours generated during the underlying trial.

In arguing for a new trial, AgriZap said the court erred by precluding Natali's testimony and report. The court also erred, the company argued, by failing to instruct the jury that it had to consider the outcome of the underlying trial when considering the reasonableness of Drinker Biddle's fees.

"Pennsylvania law is resoundingly clear, that when a jury evaluates the 'reasonableness' of attorneys fees it must consider the 'results' of the underlying case," Cotler said in his brief supporting the motion for post-trial relief. "The jury was told here to do the opposite."

The court also erred by shifting the burden of proof to AgriZap to show the fees were unreasonable and by prohibiting AgriZap from presenting evidence that Drinker breached its duty of good faith and fair dealing by entering into the agreement, the company argued. AgriZap also took issue with its counterclaim of breach of fiduciary duty having been thrown out, according to the brief. •