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## Infringement Case Shows Difficulty of Protecting Intellectual Property

**LEGAL:** Supreme Court Passes on Case; KFx \$35M Award Stands

■ By KATIE CALLAHAN

**KFx Medical Corp.** filed its patent applications like any startup would and with the same goal: protecting its intellectual property.

Sometimes, that's not an easy thing to do, especially if the infringing company is larger and has more resources. In some cases, the smaller company falters as it fights to preserve its patents, unable to compete with the larger players.

That's what happened to KFx, a Solana Beach company that develops and manufactures soft tissue fixation implants and bone anchors for orthopedic surgeries and sports medicine procedures.

The company recently prevailed in its patent infringement case against a global concern, **Arthrex Inc.**, but at great cost to itself.

"It's everything for a small company to have patent protection because the large companies have so many other benefits that if we're going to survive, we have to do a really good job on our patent protection," said **Tate Scott**, the president and CEO of KFx.

The **U.S. Supreme Court** last month denied a request from Arthrex, a Florida-based global orthopedic medical device company, to review its patent infringement case with KFx. That left intact a lower court ruling awarding KFx over \$35 million for intellectual property infringement by Arthrex.

The patents in question all stemmed from a method of repairing torn rotator cuffs in the shoulder in an arthroscopic and knotless fashion during surgery.



Melissa Jacobs

**Ryan Melnick, left, a seasoned patent attorney who works for Knobbe Martens, represented CEO Tate Scott, right, and his company KFx Medical Corp. in its infringement case against Arthrex Inc. A decision by the U.S. Supreme Court not to hear the case upholds a lower court ruling awarding KFx \$35 million in damages and interest.**

**Reaffirming the Ruling**

In April 2015, the U.S. Court of Appeals for the Federal Circuit reaffirmed a Jan. 20, 2015, ruling that upheld a judgment by the U.S. District Court for the Southern District of California. The court found that Arthrex infringed three of KFx's patents and awarded the company \$29 million in damages, with additional damages and interest.

On Sept. 4, Arthrex asked the U.S. Supreme Court to hear the case, but the high court declined.

So far, KFx has paid over \$5 million to litigate and Arthrex filed new litigation in a New Jersey court against KFx and one of its inventors, Dr. **Joseph Tauro**, seeking to regain what it lost in the patent lawsuit, said **Joe Jennings**, lead counsel for **Knobbe Martens**, which is representing KFx.

KFx has filed motions for dismissal. "This company we were up against litigates fairly aggressively and this is not the first time they've lost a case and tried to take it all the way to the Supreme Court," Jennings said.

Arthrex could not be reached for comment after repeated emails and phone calls.

**Smith & Nephew**, a global medical technology company, filed a patent infringement lawsuit against Arthrex in 2004. Arthrex eventually was ordered to pay \$99 million to Smith & Nephew. It's another case that Arthrex tried to get the Supreme Court to review in November of this year. Jennings said because intellectual property has become a "hot topic" for the Supreme Court, people

think they have a chance in the handful of cases ruled on each year.

**The Clash of 2011**

KFx's case against Arthrex began in 2011.

After notifying Arthrex of its infringement, KFx decided to sue. At this point, Jennings said, an anonymous party filed a request with the patent office to re-examine the validity of the patents in question.

"They (KFx) were a small startup company backed by some venture firms who had invested in them and they'd come up with this technology and done a somewhat limited release of their product and when they were in the market, the huge companies, Arthrex being probably the biggest, had the technology incorporated into their products," said Jennings, a litigation partner in the firm's Orange County office. He's been with the approximately 275-attorney firm since 1991 and focuses exclusively on intellectual property law.

In 2009, KFx ceased sales of the patented product because it couldn't compete with other companies. This resulted in negotiating licensing with companies such as Smith & Nephew and **Johnson & Johnson** to take the intellectual property and continue to promote their products.

Scott said seven other companies infringed on KFx's patents for knotless double-row fixation technology, which allows surgeons to avoid tying knots

during arthroscopic surgery. It forced the company to change its business and technology focus, quit selling the product and lay off a large number of KFx's workforce.

After downsizing, KFx created another technology in the area of shoulder repair for the sports medicine market. The company is in the process of selling that technology, **Appian Fx**, and all of its assets. The company plans to focus on protecting its intellectual property and selling its valued technologies to larger companies.

"For a small company in particular, you can only have a certain number of barriers to entry," Scott said. "Large companies, by way of distribution, for example, can really hamper smaller companies from being able to get into that type of business. So, in the medical market in particular, it's important (to protect your patents)."

**49 Patents**

KFx has 49 patents in the U.S., Russia, Mexico, Europe, Australia and Canada. The company, founded in 2004, has gone from as many as 40 people to less than six. Scott shut down manufacturing of the patented product from the Arthrex case.

**Ryan Melnick**, a partner at the San Diego office for Knobbe Martens, filed about 80-90 patent applications on behalf of KFx, including foreign applications and the patents in question. As

a patent attorney for 12 years who's filed a few thousand patents throughout his career, Melnick said that understanding prior art, or all information made available to the public that might be relevant to a patent's claim of originality, helps ensure the patent will withstand a validity challenge.

"Representing KFx has been a very rewarding experience for me," Melnick said. "They were one of my first clients as a junior associate. I recall the initial meeting with one of the founders and his enthusiasm for how they were going to revolutionize rotator cuff repair. Their procedure has indeed become a widely used [one]. It's been a real pleasure to have a role in protecting the innovation and watch it withstand the pressure of trial and appeals up to the Supreme Court."

More than one-third of every rotator cuff repair, of the about 500,000 of them done in the United States annually, is done with a double row technique, Scott said, and this case shows the value of patents, strong legal counsel and his team at KFx.

"We do have other companies, not just Arthrex, that we are in negotiations with regarding licenses for the patents," Scott said. "I'm certainly optimistic that those will result in a fair loyalty payment to KFx and its shareholders. If it doesn't, then we'll enforce our intellectual property. We're obviously not afraid to do so; we took on the largest sports medicine company in the world and we won."