



# Trade Secret Litigation

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## Virginia Appeals Court Reverses \$2 Billion Jury Award to Appian in Trade Secrets Misappropriation Case

### Introduction

In May 2022, a jury in the Circuit Court for Fairfax County, Virginia awarded Appian Corp. (Appian) in excess of \$2 billion in damages from Pegasystems, Inc. (Pegasystems) for misappropriating Appian's trade secrets in violation of the Virginia Uniform Trade Secrets Act (VUTSA). This award was the largest damages verdict in Virginia court history, and is among the largest awards in a trade secret case.

But on July 30, 2024, the Court of Appeals of Virginia reversed the judgment of the lower court on the VUTSA claims and remanded for a new trial. In short, while it rejected Pegasystems' claim that Appian failed to establish misappropriation of any trade secret as a matter of law, the appellate court held that the trial judge:

1. erred in granting a jury instruction that "relieved Appian of its proper burden to prove causation between the alleged misappropriation and any damages"<sup>1</sup>; and
2. erred in excluding certain evidence that Pegasystems had sought to rely on to show that (i) it did not steal from Appian

as alleged; and (ii) Appian did not adequately guard its alleged trade secrets (thus forfeiting trade secret protection).

### Background of VUTSA and Facts of the Case

The VUTSA, as with other trade secrets statutes, exists to protect the trade secret owner from another's misuse of that secret.<sup>2</sup> "To state a trade secret claim [under the VUTSA], a plaintiff must allege sufficient facts to establish (1) the existence of a trade secret, and (2) its misappropriation by the defendant."<sup>3</sup> As to the first prong, a "trade secret" is information that derives independent economic value from not being known or readily ascertainable by proper means, and its secrecy must be reasonably protected.<sup>4</sup> And for the second prong, the VUTSA essentially defines misappropriation as the improper acquisition or unauthorized use or disclosure of another's trade secret.<sup>5</sup>

The parties in *Pegasystems* are competitors and industry leaders in the business process management (BPM) space. Essentially,

"[b]oth companies offer platforms that enable third party business customers to build complex software applications . . . that automate processes, such as fulfilling orders or opening new customer accounts."<sup>6</sup> Appian presented evidence at trial demonstrating that Pegasystems hired a consultant who surreptitiously gained access to Appian's platform<sup>7</sup> and shared its strengths and weaknesses with Pegasystems.<sup>8</sup> Appian's expert testified that Pegasystems then made changes to its own platform that were strikingly similar to Appian's product, and that Pegasystems used the consultant's intel to improve its own platform and attack Appian's weaknesses.<sup>9</sup>

Appian sued Pegasystems when it found out about its competitor's activities from a former Pegasystems employee. A Virginia jury subsequently (1) found that Pegasystems misappropriated Appian's trade secrets, and (2) awarded Appian more than \$2 billion in damages for the misappropriation.

### Appellate Court Reverses

The Court of Appeals of Virginia reversed the lower court's judgment on several grounds. *First, and foremost*, the appellate court held that the trial court improperly excluded critical damages evidence. To this end, the trial judge erroneously issued a jury instruction that allowed Appian to rely on Pegasystems' total sales to establish its damages. This, the appellate court held, was improper because it effectively shifted the burden to Pegasystems to prove that its total product sales were not related to the misappropriation (i.e., relieving Appian of its burden, as the plaintiff, to prove that Pegasystems' total sales constituted unjust enrichment resulting from the misappropriation).<sup>10</sup> In other words, the \$2 billion verdict

did not reflect Appian's damages proximately caused by Pegasystems' misappropriation, as required by the VUTSA.<sup>11</sup>

In addition, "the trial court then . . . preclude[d] Pega[systems] from presenting evidence, or conducting cross-examination, to demonstrate that much of [its] total sales revenue was attributable to products with which Appian did not compete and that had 'nothing to do with' the misappropriation."<sup>12</sup> This ruling was based on the lower court's misinterpretation of an interrogatory response where Pegasystems disclaimed revenue records based on different *product versions*, as opposed to revenue records for different *products*. The trial court missed this distinction and mistakenly conflated the discovery response as disclaiming revenue records for all of Pegasystems' products or other lines of business.<sup>13</sup> The appellate court therefore found no "justifiable basis for the trial court's decision to bar admission of evidence of [Pegasystems'] massive revenue from products which had nothing to do with any alleged misappropriation."<sup>14</sup>

*Second*, the appellate court held that the trial court erred in precluding Pegasystems from introducing at trial versions of its software that pre-dated and post-dated the alleged misappropriation. The trial court did so on the mistaken basis that Pegasystems' "software was inadmissible unless it was contained on the same physical object [a computer] on which it was produced to the opposing party in discovery."<sup>15</sup> Instead, the appellate court found that Pegasystems was entitled to introduce a copy of its software on a different computer because it was highly relevant and could be authenticated.<sup>16</sup>

*Third*, the appellate court faulted the trial judge for excluding evidence regarding the number of users of Appian's platform. Pegasystems had sought to proffer evidence that "thousands of people had access to the alleged trade secrets,"<sup>17</sup> undercutting Appian's claims that it closely guarded its trade secrets and that such trade secrets were not generally known/ascertainable. The trial court excluded such evidence as irrelevant. By contrast, the appellate court found that "while the number of people with access to information is not, in isolation, determinative of the information's trade secret status—such evidence is hardly irrelevant."<sup>18</sup> Thus, the trial court's exclusion "improperly removed a relevant factor from the jury's consideration" of the trade secrets' status and "denied Pega[systems] the opportunity to effectively argue that Appian forfeited its trade secret protection by broadly sharing the information with thousands."<sup>19</sup>

## Takeaway

To prevail on a claim for trade secret misappropriation, the plaintiff must make several factual showings, including initially that information qualifies as a trade secret and that the alleged misconduct meets the definition of misappropriation. In addition to establishing liability, the plaintiff must establish a causal connection between the misappropriation and the alleged damages. As the *Pegasystems* case makes plain, preservation of the factual record is paramount to not only winning your case but also protecting that victory on appeal.

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1. *Pegasystems, Inc. v. Appian Corp.*, No. 1399-22-4, 2024 WL 3571808, at \*32 (Va. Ct. App. July 30, 2024).

2. *Id.*, at \*9 (citations omitted).

3. *Id.* (citation omitted).

4. *Id.* (citations omitted).

5. *Id.*, at \*9-10 (citation omitted).

6. *Id.*, at \*1.

7. The consultant had access to Appian's platform through his employment with a third party that had a license to the platform.

8. *Id.*, at \*2.

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9. *Id.*  
10. *Id.*, at 16.  
11. *Id.*  
12. *Id.*, at \*21 (further noting that Pegasystems had evidence showing that more than 50% of its revenue was derived from sales of products not competing with Appian).  
13. *Id.*, at \*22.  
14. *Id.*, at \*23 (citation omitted).  
15. *Id.*, at \*26.
16. *Id.* (“In a technical case where a multi-billion-dollar claim turned on whether and how Pega[systems] copied Appian’s functions, the trial court prevented Pega[systems] from displaying its software and any demonstrative images taken from it. This deprived Pega[systems] of evidence that could show that functions it was accused of stealing actually pre-dated [the alleged misappropriation] or differed from Appian’s.”).
17. *Id.*, at \*30.  
18. *Id.*, at \*31 (“To the contrary, who is given access to such information, and in what numbers, are among the most important factors in assessing both whether the information was generally available and the reasonableness of efforts to maintain its secrecy.” (citations omitted)).  
19. *Id.*, at \*32.

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