IP Litigator, Trade Secret Litigation, (Mar. 1, 2026)

IP Litigator

Click to open document in a browser

Andrew Schwerin and Matthew D. Kohel

Andrew Schwerin represents clients at Saul Ewing in patent and trade secret litigation on both the plaintiff and defense sides of these disputes. Outside of his litigation work, Andrew counsels clients on their IP strategy. Andrew has represented clients in connection with a range of technologies, including computing and memory storage, medical devices, biologics, and small molecule drugs.

Matt Kohel represents clients in commercial litigation, intellectual property matters, and with data privacy issues. His experience with intellectual property matters includes claims for the misappropriation of trade secrets, trademark infringement, false advertising, the sale of counterfeit goods, and cases involving a variety of patent issues. Matt also leads Saul Ewing's AI group and is a regular author, speaker, and panelist on artificial intelligence, especially as related to intellectual property, data privacy, and corporate policies on the use and management of artificial intelligence in the workplace.

Virginia Supreme Court Affirms Appeals Court's Vacatur of $2 Billion Jury Award in *Appian v. Pegasystems*

In a trade secrets case that has been closely followed from trial up through appeal, the Virginia Supreme Court affirmed the appeals court's judgment[1] in *Appian Corp. v. Pegasystems, Inc.*[2] While the case involved a host of issues relating to evidence, liability and damages, a notable aspect is the appeals courts' vacatur of the jury's $2 billion damages award. In this regard, both appeals courts held that the trial court erred both on the law of damages—which improperly shifted the burden to defendant Pegasystems to show which of its products did ***not*** incorporate Appian's trade secrets—and also the evidence of damages—whereby Pegasystems was precluded from adducing evidence that certain of its products were unrelated to the technology at issue.

Background

Both Appian and Pegasystems were "aggressively direct competitors" in the software space, specifically for business process management ("BPM") platforms, which is software that automates complex multi-step processes for businesses.[3] Beginning in 2012, Pegasystems embarked on a "competitive analysis project" whereby they sought to discover the workings of Appian's product—workings which Appian had kept closely guarded.[4] This ultimately led Pegasystems to one Mr. Zou, a software developer employed at the time by non-party Serco.[5] Critically, Zou's role within Serco gave him access to Appian's BPM platform, which Serco licensed from Appian.[6]

Zou provided intelligence of Appian's BPM to Pegasystems in three primary ways: (1) preparing video tutorials of himself building applications in Appian; (2) participating in live presentations with Pegasystems employees to the same effect; and (3) downloading and sharing confidential Appian documentation with Pegasystems.[7]

Appian learned of Pegasystems' attempts at corporate espionage in 2020 from an ironic source. Mr. Petronio, Pegasystems' head of competitive intelligence in 2010, had initiated the campaign to uncover Appian's trade secrets.[8] Mr. Petronio was ultimately laid off by Pegasystems in 2015, and was subsequently hired by Appian, eventually becoming its Senior Director of Market Intelligence and Strategy.[9] In 2020, Petronio disclosed the work he had done at Pegasystems with Zou to Appian's counsel.[10]

Appian subsequently filed several claims against Pegasystems and Zou, including claims for misappropriation of trade secrets under the Virginia Uniform Trade Secrets Act ("VUTSA").[11] At the close of trial—which ran for seven weeks—the jury found for Appian, awarding it an eye-popping $2 billion in damages.[12] Pegasystems moved to set aside the verdict, but the trial court denied the motion.[13] Appeals to the Court of Appeals of Virginia and to the Virgina Supreme Court followed.

The Jury Instructions Regarding Damages Constituted Reversible Error

One of the key disputes concerned the jury instructions. The VUTSA permits unjust enrichment damages; the parties disputed the jury instruction regarding the proximate cause of these damages.[14] Over Pegasystems' objection, the trial court granted Instruction 14:

> If you find that plaintiff Appian has proved by greater weight of the evidence its claim for misappropriation of trade secrets against defendant Pegasystems, you must find your verdict for Appian and decide the issue of damages as to Pegasystems. You may award the amount of unjust enrichment caused by misappropriation.
>
> For unjust enrichment, Appian is entitled to recover Pegasystems' net profits. Appian has the burden of establishing by greater weight of the evidence Pegasystems' sales; ***Pegasystems has the burden of establishing by greater weight of the evidence any portion of the sales not attributable to the trade secret or trade secrets and any expenses to be deducted in determining net profits***.[15]

This instruction, in the eyes of the Court of Appeals (and later the Supreme Court), constituted reversible error. Whereas multiple sources of Virginia state law counseled that the plaintiff always bears the burden of proof on damages on a VUTSA claim, Instruction 14 improperly shifted the burden onto the defendant (here, Pegasystems) to prove the portion of damages that were not attributable to the misappropriation.[16] This was a reversible error warranting remand.[17]

Pegasystems Was Improperly Barred from Adducing Evidence Showing Sales Unrelated to the Misappropriation

Not only did the $2 billion damages award rest on an incorrect jury instruction, but Pegasystems was improperly barred from adducing evidence showing that certain of its products were unrelated to the misappropriation.

During discovery, Appian served Interrogatory No. 18, which asked Pegasystems to "[i]dentify all revenues received by Pegasystems for each fiscal year from 2012 through 2021 relating to ***Pega 6.3, Pega 7.0*** and any subsequent ***version***."[18]

After a back-and-forth motion practice—Pegasystems' motion for a protective order and Appian's cross-motion to compel—Pegasystems eventually answered the interrogatory.[19] Though—critically—Pegasystems lodged a number of objections, including that the interrogatory sought irrelevant information from products whose "derived revenue . . . was wholly unrelated to any competitive situation with Appian, and such revenue is not relevant to Appian's claims."[20] Pegasystems responded by further noting that it did not "record or report revenue, or any associated costs and expenses . . .based on the '***version'*** of the product sold (e.g., Pega 6.3, Pega 7.0)."[21] Pegasystems then cited to its annual Form 10-K filings and quarterly Form 10-Q filings, while invoking Virginia Supreme Court Rule 4:8(f) ((the analog to Federal Rule of Civil Procedure 33(d)).[22]

At trial, Pegasystems proffered evidence that some of its revenue was earned from the sale of non- BPM platform products that had no connection to the alleged corporate espionage. Specifically, Pegasystems proffered the testimony of its (1) CEO (that "more than 50 percent of Pega[systems'] revenue was derived from customers for these other [non-BPM] products", (2) CTO (that a portion of Pega customers "bought things that Appian didn't sell"), and (3) damages expert (similar).[23] To the trial court, this was of no moment. In its view, Pegasystems' response to Interrogatory #18 meant that it had "essentially given up" any defense that it earned significant revenue from non-BPM platform products.[24] Thus, Pegasystems had been precluded from presenting this evidence.

The trial court's exclusion of this evidence was also an error, and Pegasystems' interrogatory response had not ceded these damages arguments (contrary to the trial court's view).[25] Evidence that these sales were attributable to non-BPM products was outside the scope of Interrogatory No. 18, which asked for "versions" of specific products (and which information Pegasystems did not track by version number).[26] Further, Pegasystems' evidence of these non-BPM sales did not "contradict" its interrogatory response—because again, such evidence was outside the scope of the narrow interrogatory (though ultimately relevant to the issue of damages).[27]

Thus, remand on these issues was appropriate so that damages could be determined in line with correct jury instructions and the full scope of allowable evidence.

Conclusion

While the *Appian v. Pegasystems* case will be an exciting case to watch on remand, the issued decisions offer two key practice points for trade secrets litigants and litigators:

- **Make your discovery objections count**. Courts have been vocal in their disfavor of "boilerplate" discovery objections.[28] In *Appian v. Pegasystems*, Pegasystems took the crucial step of drawing its relevance objection to fact that Appian's discovery request read upon Pegasystems' products (and thus revenues) unrelated to the technology at issue.[29] These objections as to relevance laid the foundation for Pegasystems' appeal.
- **For damages, be prepared to show your work**. Pegasystems had been prepared to make its rebuttal damages case by showing products and revenues that were not attributable to the alleged misappropriation.[30] On remand, we'll get to look at how plaintiff Appian makes this case affirmatively, as they will (properly) bear the burden of showing proximate cause between Pegasystems' alleged misappropriation and its product revenues.

Footnotes

1 Pegasystems, Inc. v. Appian Corp., 904 S.E. 2d 247 (Va. Ct. App. 2024) ("*Pegasystems Appeals Court Decision*").

2 Record No. 240736, --- S.E. 2d ----, 2026 WL 59845 (Va. Jan 8, 2026) ("*Pegasystems Supreme Court Decision*").

3 *Id.* at *1.

4 *Id.* (quotation marks omitted).

5 *Id.*

6 *Id.*

7 *Id.* at *2.

8 *Id.* at *3.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.* at *9.

13 *Id.*

14 *Id.* at *8.

15 *Id.* (emphasis in *Supreme Court* Decision).

16 *Id.* at *13–14.

17 *Pegasystems Supreme Court Decision*, 2026 WL 59845, at *8, *13-14; *Pegasystems Appeals Court Decision*, 904 S.E. 2d at 273–74.

18 *Pegasystems Supreme Court Decision*, 2026 WL 59845, at *7, *18-19.

19 *Id.*, *7. Notably, Pegasystems had moved for a protective order as to Interrogatory Nos. 17 ***and*** 18, but Appian only moved to compel a response as to Interrogatory No. 17, noting instead in a footnote that Interrogatory No. 18 "[wa]s already before the Court on Pegasystems' motion for a protective order[,]" and it "expect[ed] a prompt response as to that interrogatory upon denial of Pegasystems' motion." *Id.* (quotation marks omitted). The trial court eventually issued an order that overruled Pegasystems' objections to No. 17 and compelled Pegasystems to answer it—but the order made no mention of No. 18. *Id.*

20 *Id.* (quotation marks omitted).

21 *Pegasystems Supreme Court Decision*, 2026 WL 59845, at *7, *18-19.

22 *Id.*

23 *Id.* at *8, *17-18.

24 *Id.* at *8 (quotation marks omitted).

25 *Pegasystems Supreme Court Decision*, 2026 WL 59845, at *18–19.

26 *Id.*

27 *Id.*

28 *E.g.*, *Ford Motor Co. v. Versata Software, Inc.*, 316 F. Supp. 3d 925, 932–33 (N.D. Tex. 2017) ("[G]eneral or so-called boilerplate or unsupported objections are improper…").

29 *Pegasystems Supreme Court Decision*, 2026 WL 59845, at *7 (""Pegasystems derived revenue…that was wholly unrelated to any competitive situation with Appian, and such revenue is not relevant to Appian's claims.").

30 *Id.*, *8.