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Litigator of the Week: Reversing a $2B Trade Secret Verdict, the Largest in Va. History

By Ross Todd
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Our Litigators of the Week are **Josh Rosenkranz**, **Eric Shumsky** and **Chris Cariello** of **Orrick, Herrington & Sutcliffe**. After taking on an appeal for Massachusetts software company Pegasystems Inc. post-trial, the Orrick team secured a ruling this week from a Virginia appellate court wiping out a $2 billion trade secret damages verdict won by rival Appian Corp.

The Virginia Court of Appeals found that the trial court erred in multiple ways, including via a jury instruction that relieved Appian of the burden to link the alleged trade secret misappropriation with damages. That ruling allowed jurors to rely on Pega's total sales when calculating damages.

The appellate court also found the trial judge improperly kept Pega from demonstrating its software simply because it was on a different laptop than the one provided to Appian in discovery.

The court stopped short of granting Pega's request for judgment as a matter of law that Appian hadn't established misappropriation of any trade secrets. But in remanding the case for retrial, the appellate court said that any new jury should not be instructed, as the first one was, that the number of people with access to Appian's platform was "not relevant."

Courtesy photos

L-R: Eric Shumsky, E. Joshua Rosenkranz, and Christopher J. Cariello of Orrick.

Lit Daily: How did this appeal come to you and the firm?

Josh Rosenkranz: When we read about the result, it was evident that something had gone very wrong at trial, and this seemed like just the sort of case in which we've had a lot of success: a huge verdict with ripples across the industry presenting important legal issues. One of our partners had a contact in Pega's in-house legal team and reached out to offer help. We met with the Pega team multiple times and were brought in to help on post-verdict motions even before the appeal.

Who was on your team and how did you divide the work?

Eric Shumsky: Within Orrick, we assembled an outstanding appellate team for this case, and everyone played a critical role. Josh served as lead counsel, and my partner Chris Cariello and I led the legal strategy and briefing. And we had three star associates—**Jeremy Peterman**, **James Flynn** and **Jonas Wang**—who mastered the law and record and did a phenomenal job on the briefing and argument prep. Half the team owned the liability issues and the other half owned damages, but our process was intensely collaborative at all stages and on all issues.

Rosenkranz: Speaking of collaboration, our Virginia co-counsel, **Monica Monday** and her partner, **Mike Finney**, at **Gentry Locke**, were also critical members of the appellate team, who had a history with the case protecting and refining the appellate record. Monica is a giant of the Virginia appellate bar. Her extraordinary experience with the Virginia appellate courts was invaluable. On top of that, Monica and Mike are extraordinarily sharp and creative legal minds, who were very much thought partners every step of the way.

Walk me through the first steps you take on an assignment like this—an appeal coming after a 7-week trial your firm wasn't involved in that resulted in the largest verdict in Virginia history.

Rosenkranz: Step one is simple, and it's my first step on every case: I open a new document and I write down my present sense impressions as I read key briefs and portions of the record. I'll return to that document throughout the appeal, even after I'm fully immersed, because I always want to remind myself how a judge or law clerk who is brand new to the case will react to the facts and the issues.

After getting our arms around the basic contours of the case, we sit down with trial counsel and clients to understand their perspective about what happened—what they view as the key themes, the key issues and evidence, and where things went sideways. We also want to hear the narrative from the client's perspective. We analyze and workshop all the possible legal issues—there were over a dozen in this case—and how they interact with each other and with our emerging narrative.

On both legal issues and narrative, the objective is to evaluate everything with fresh eyes. We want to reach our own independent view on the strength of our legal arguments, how the appellate court will view the cold record, and ultimately how each potential issue will play before an appellate court.

Let me ask all three of you this: When you sat down with this trial record, what jumped off the page?

Chris Cariello: In a lot of appeals, you're looking for one thread you can pull to make everything unravel. Here, we were struck by the multiple errors that affected very different aspects of the case, but that reinforced each other to result in a fundamental injustice. The alleged trade secrets were nothing but visible features of the plaintiff's software—features that any user could readily observe. Not only that, Pega was precluded from even talking about just how many thousands of users knew these claimed "secrets" just by using the software. And beyond all that, this was a case about software where Pega was precluded from showing its software to the jury to demonstrate that it didn't copy a darn thing.

Shumsky: For me, it was the damages theory, which was extraordinary. The notion that a plaintiff could seek every dime of a defendant's sales for a multi-year period seemed dubious. As the Court of Appeals correctly pointed out, that approach could cause "chaos" in the business community.

Rosenkranz: I would just add that this case involved a feature that is common to many of the multi-billion-dollar verdicts I've appealed: a salacious narrative. Appian spun that narrative out of a handful of poorly worded emails and mischaracterizations of innocent facts. That approach works well for juries, and as predicted, Appian carried that approach through to the appeal. Our job as appellate lawyers in that circumstance—where someone is focused more on mudslinging than on the law—is to get the court

comfortable enough with the facts that it is willing to resolve the critical legal issues based on the law.

On appeal, you identified a string of problems with how this trial was conducted. How do you decide the time and weight to give to each issue when you have as many as you did here?

Shumsky: For the reasons Chris noted, it was especially painful to winnow the issues down to the six we presented, and even six is twice as many issues as we usually aim for. But here, we thought it was critical for the appellate court to understand just how hamstrung Pega had been in presenting its case. And it was especially important for the appellate court to remove those impediments for any retrial. That's not our usual strategy, but that's the truth of how the jury got to such an inflated damages award, and the appellate court needed to see that.

Josh, with this decision now in hand, what stands out to you from the oral argument last year?

Rosenkranz: What stands out is how deeply prepared and thoughtful the panel was. As an appellant, my biggest fear is not having enough time to hit our most important issues. This panel gave us the time. It pressed both advocates on all our most important issues—and even brought up on its own initiative some of the fundamental errors I didn't think I would have time to address. The questions at argument were very insightful, and the end result is a remarkably thorough and precise opinion. It was an object lesson in how oral argument can be a device to help a panel to sharpen its own understanding of the issues.

Another memorable aspect of the argument was the venue—it was held in a beautiful, historic courthouse in Loudoun County, Virginia.

What can other trade secrets defendants take from what you were able to accomplish here?

Cariello: One lesson is to be careful with competitive intelligence activities that a competitor later may spin as "corporate espionage." This case arises from market research spearheaded by Pega's former head of competitive intelligence, who now works for Appian. You would think that trying to learn about the features of a competitor's product is fair competition. But, before the jury, Appian spun this competitive intelligence—done by someone it trusts enough to employ—into this salacious story and ultimately a bid for billions in damages.

Another is to force trade secret plaintiffs to be precise in defining the alleged secret, explaining why it's a secret, and showing that it was misappropriated. You can't let a plaintiff get away with lumping together vaguely defined features and then asking for some massive damages award untethered to the value of each secret. And if the plaintiff does try that, you have to be ready to preserve every objection to that approach.

What will you remember most about this matter?

Rosenkranz: Our client's faith in the outcome and in us to deliver it. Pega always believed it would be vindicated, and it trusted the appellate process. From the legal department to the CFO and the CEO, the entire Pega team have been phenomenal strategic partners. I will never forget spending a day in Cambridge with all of those folks, as well as our Virginia co-counsel and the trial team, methodically and collaboratively working through which issues we were going to raise, and how, and which ones we would have to leave on the cutting room floor. This is the sort of collaboration on which we really pride ourselves. We had laid out our recommendations in a 130-page memo. But there was no ego in that room, just everyone's commitment to get to the best result. I'm thrilled that we were able to deliver a result we've all worked so hard for.