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Appian Reimagines The High-Low to Preserve $500M-$2B in Trade Secret Damages

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By: Matthew S. Murphy

As the calendar turns to November, a "high-low" (at least here in the basketball capital of the world) usually refers to a basketball play where one player at the high post passes the ball to a second player at the low post to create a scoring opportunity. It can be highly effective for breaking down a defense. In litigation, however, a "high-low" usually refers to a negotiated agreement that sets low and high limits on any awarded damages. The plaintiff obtains assurance that it will recover at least a minimum sum; the defendant caps its potential exposure.

In *Appian Corp. v. Pegasystems, Inc.*, Appian secured a $2 billion jury verdict for trade secret misappropriation relating to its low-code application development platform.[1] An appeal has been pending in the Court of Appeals of Virginia for the past year. However, Appian recently announced in an SEC filing (link below) that it had purchased judgment preservation insurance for $53.8 million to preserve a $500 million recovery floor. If Appian's ultimate recovery falls short of $500 million, or Pegasystems cannot pay up to this same amount, the insurers will be responsible for the difference. Thus, Appian has preserved a damages high-low of $500 million to $2 billion.

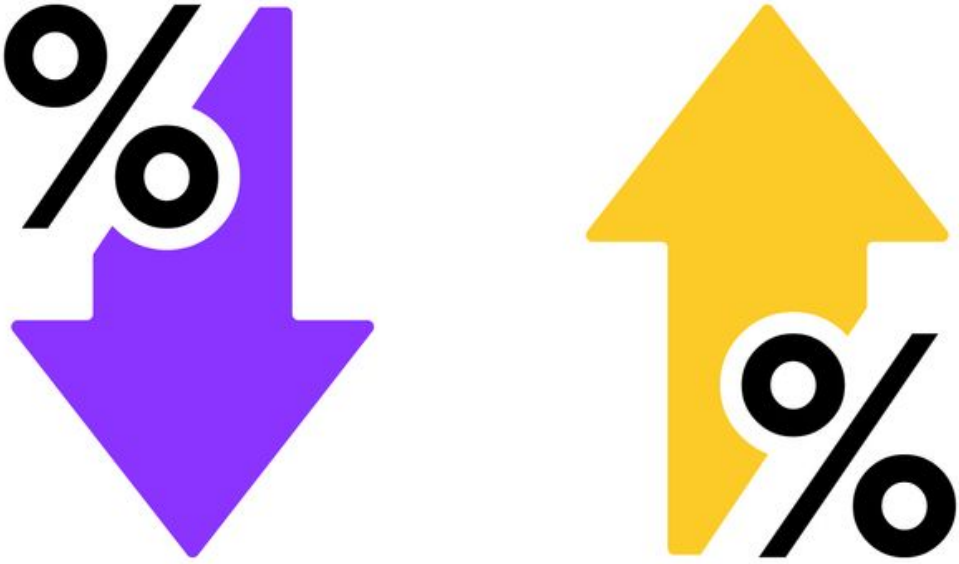
Appian did not seek to insure the entirety of the jury's verdict, and its rationale for selecting its "low" was not disclosed in its SEC filing. However, Pegasystems' appeal involves a thorny damages causation question, which has drawn amici attention from the American Intellectual

Property Law Association and several university professors. More specifically, the appeals court will consider whether a trade secret plaintiff, at least under Virginia state law, must prove the amount of a defendant's profits specifically attributable to the misappropriation, or whether the defendant bears the burden of proving the amount of its profits that did not flow from the misappropriation. At least in the patent world, the Federal Circuit has repeatedly disapproved of large damages awards that failed to sufficiently apportion damages to only the patented features. However, U.S. patent laws, unlike trade secret laws, do not permit the recovery of unjust enrichment damages, including the disgorgement of the wrongdoer's profits.

Regardless of how this interesting appeal issue gets resolved, Appian has *scored* at least $500 million in damages running its own high-low action.

1. https://www.reuters.com/technology/appian-wins-204-bln-verdict-against-pegasystems-2022-05-10/

> **"We are pleased to have obtained judgment preservation insurance with respect to the $2.1 billion Pega judgment for willful and malicious trade secret appropriation," said Matt Calkins, Founder and CEO of Appian. "It secures a significant floor amount of recovery for Appian's shareholders."**
> **investors.appian.com/...**



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