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Punitive Damages Clause of the Virginia Uniform Trade Secrets Act Not So Punishing, Says the Eastern District of Virginia in a Case of First Impression

Punitive damages under the Virginia Uniform Trade Secrets Act ("VUTSA") may have relatively little impact per a recent decision by the Eastern District of Virginia. In *E.I. DuPont De Nemours and Co. v. Kolon Industries, Inc.*, a case of first impression on this point, the Court capped VUTSA punitive damages at \$350,000 regardless of the number of misappropriations or the amount of compensatory damages awarded.

The VUTSA permits punitive damages if trade secrets are willfully and maliciously misappropriated. The Act provides in part that a "court may award punitive damages in an amount not exceeding twice any award [of compensatory damages], or \$350,000 whichever amount is less." Va. Code Ann. § 59.1-338(B) (2011). Under the Uniform Trade Secrets Act, punitive damages up to twice the amount of compensatory damages are available for willful and malicious misappropriations.

Background of the *DuPont* Litigation

In *DuPont*, a jury found in September of 2011 that Kolon, a South Korean company, willfully and maliciously misappropriated 149 trade secrets related to DuPont's production and marketing of its trademarked product, Kevlar. The jury returned a verdict of \$919 million in compensatory damages to DuPont under the VUTSA. DuPont argued it was entitled to \$350,000 in punitive damages for each of the 149 trade secrets that Kolon maliciously misappropriated, for a total of \$52.15 million – or approximately 5% of the compensatory award.

The Court's Conclusion

The Court disagreed with DuPont and, in predicting how the Virginia Supreme Court would rule, decided that the General Assembly did not intend for the cap to apply to each trade secret at issue in a lawsuit.

In reaching this conclusion, the Court borrowed reasoning applied by the Fourth Circuit Court of Appeals in its interpretation of Va. Code Ann. § 8.01-38.1, the Virginia statute which generally limits punitive awards granted under Virginia law to \$350,000. In *Al-Abood v. El-Shamari*, the Fourth Circuit held that the cap in Va. Code Ann. § 8.01-38.1 is the total amount to be awarded in any action regardless of the number of defendants. See *Al-Abood*, 217 F.3d 225, 237 (4th Cir. 2000). The Court also pointed out that, of the states that have adopted the Uniform Trade Secrets Act, Virginia is the only state that set an express cap on punitive damages. In other states, and in the Uniform Trade Secrets Act, the cap on punitive damages is linked only to the amount of compensatory damages awarded, e.g., a punitive award cannot exceed twice the amount of the compensatory award. The Court also contrasted the VUTSA with other non-Virginia statutes that explicitly permit recovery of punitive damages on an event-by-event basis, and noted that the Virginia General Assembly chose not to do this.

In sum, the *DuPont* Court held that there was "no ambiguity" in the VUTSA, and that a party cannot recover more than \$350,000 in punitive damages per award. DuPont's punitive damages award was thus limited to \$350,000.

Implications of the Court's Ruling

The impact of the Court's ruling is not yet clear. A potential defendant's exposure under the VUTSA will likely be limited under this reading of the Act. The *DuPont* decision, however, is persuasive authority for Virginia state courts. Some plaintiffs, however, may be less inclined to consolidate allegations regarding more than one trade secret in a single lawsuit if separate actions would not raise issues of res judicata.

For additional information or for any questions regarding the *DuPont* decision, you are invited to contact the authors or their colleagues in [Venable's Commercial Litigation Practice Group](#).

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