

CLIENT ALERT

Rambus Redux: Federal Circuit Reconciles District Court Split Regarding When Duty To Preserve Is Triggered

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The Court of Appeals for the Federal Circuit issued two significant spoliation decisions this month in related litigation involving Rambus's destruction of documents during a period in which the company was developing its IP litigation strategy. In *Micron v. Rambus*, 2011 WL 1815975, and a companion case, *Hynix v. Rambus*, 2011 WL 1815978 (both Fed. Cir. May 13, 2011), the Court clarified the legal standards requiring that (a) the duty to preserve evidence attaches when litigation is pending or reasonably foreseeable, and (b) the dispositive sanction of dismissal is justified only upon a showing of bad faith and prejudice.

Reasonably Foreseeable Litigation Standard. In the *Micron* case, the Court affirmed the District Court of Delaware's ruling that Rambus spoliated evidence by implementing a document retention policy as part of its "key goals" for "litigation readiness" that included, in part, conducting company-wide "shred days," destroying email back-up tapes, and instructing outside counsel to purge its patent files. Although litigation had not commenced at the time of the document destruction, the Court held that it was not clear error for the *Micron* district court to conclude that litigation was "reasonably foreseeable," given the totality of the circumstances, at the point when Rambus executives clearly articulated the time frame and motive for implementing their litigation strategy, for the following reasons:

- The *raison d'être* for the document retention policy was to further Rambus's litigation strategy by frustrating the fact-finding efforts of future adverse parties.
- Rambus had knowledge of likely infringing activity by particular manufacturers, which made litigation more objectively likely to occur.
- Rambus took steps in furtherance of litigation, including prioritizing defendants and forums, creating claims charts and determining an expected timeline for litigation.
- As the plaintiff-patentee, Rambus controlled the decision to pursue litigation.
- The nature of the relationship between Rambus and the manufacturers made litigation more reasonably foreseeable.

The Court rejected Rambus's contention, and the District Court for the Northern District of California's holding in *Hynix*, that litigation is reasonably foreseeable only when litigation is "imminent" or probable without significant contingencies. The Court found this to be too strict a standard and one that would vitiate the reasonably foreseeable test. Instead, the Court held that the reasonably foreseeable standard is flexible and requires the consideration of the wide variety of facts relevant to any specific spoliation inquiry. The Court noted, however, that "where a party has a long-standing policy of destruction of documents on a regular schedule, with that policy motivated by general business needs, which may include a general concern for the possibility of litigation, destruction that occurs in line with the policy is relatively unlikely to be seen as spoliation."

Dispositive Sanctions. Although it affirmed the finding of spoliation, the Federal Circuit vacated the *Micron* court's sanction of dismissal because it failed to adequately determine the extent to which Rambus acted in bad faith - *i.e.*, intentionally destroyed evidence to impair the ability of a potential defendant to defend itself. The Court held that dismissal is warranted only when

there is "clear and convincing evidence of both bad faith spoliation and prejudice to the opposing party." Further, in exercising its inherent power to impose sanctions, a district court must consider "whether there is a lesser sanction" that will "vindicate the trifold aims of (1) deterring future spoliation of evidence; (2) protecting the defendants' interests; and (3) remedying the prejudice defendants suffered" This holding contrasts with at least one recent district court ruling that utilized a "gross negligence" and rebuttable presumption of prejudice standard in imposing sanctions for spoliation.

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These rulings confirm that the duty to preserve evidence begins before litigation is formally commenced, and potential litigants need to ensure that adequate steps are taken to preserve relevant evidence when the mere *possibility* of litigation becomes *reasonably foreseeable*. Companies should not be concerned about implementing appropriate document retention and information management policies that are "motivated by general business needs," but care must be taken to evaluate preservation obligations regarding potential, as well as pending, litigation.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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