

Corporate & Financial Weekly Digest

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Federal Circuit Addresses Duty to Preserve

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The U.S. Court of Appeals for the Federal Circuit recently reviewed the decisions in *Micron Tech., Inc. v. Rambus, Inc.*, 225 F.R.D. 135, (D. Del. 2009) (*Micron I*), and *Hynix Semiconductor, Inc. v. Rambus, Inc.*, 591 F.Supp.2d 1038 (N.D.Cal. 2006) (*Hynix I*), two cases that analyzed substantially identical facts but reached widely disparate conclusions. In each case, the plaintiff alleged that Rambus, Inc. committed spoliation by destroying potentially relevant documents pursuant to a document destruction policy at two company-sponsored "shred days." In both cases, the question of spoliation turned on the point at which litigation was reasonably foreseeable. The U.S. District Court for the District of Delaware determined that Rambus had committed spoliation because litigation was reasonably foreseeable prior to the destruction of documents, and issued sanctions against Rambus. Conversely, the U.S. District Court for the Northern District of California concluded that litigation was not reasonably foreseeable until after certain documents had already been destroyed, and did not sanction Rambus.

On appeal, the Federal Circuit explained that the issue of when litigation is "reasonably foreseeable" "is a fact-specific standard" that "does not trigger the duty to preserve documents from the mere existence of a potential claim or the distant possibility of a claim." Yet, the standard "is not so inflexible as to require that litigation be 'imminent or probable without significant contingencies.'" The Federal Circuit concluded in both cases that litigation was "reasonably foreseeable," and thus the duty to preserve arose, at some time prior to the second "shred day." (*Micron Tech., Inc. v. Rambus, Inc.*, 2011 WL 1815975 (C.A.Fed. (Del.) May 13, 2011)); (*Hynix Semiconductor, Inc. v. Rambus, Inc.*, 2011 WL 1815978 (C.A.Fed. (Cal.) May 13, 2011))

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