OBER | KALER
Attorneys at Law

In This Issue

Construction OberView®

April 2009

The Dangers of Destroying Project Documents

Anthony Vittoria 410-347-7692
afvittoria@ober.com

It's a harsh punishment, but it is happening with increasing regularity – courts are dismissing monetary claims, not because those claims are invalid, but because the party asserting the claim failed to preserve relevant documentation. In other words, even if you have a strong case regarding your company's rights, those rights can be forfeited if your company does not follow the rules and laws regarding the preservation of evidence.

This is exactly what happened in a recent decision by the United States District Court in Delaware in the 2009 case of *Micron Technology, Inc. v. Rambus, Inc.* At issue were Rambus' patents that were worth hundreds of millions of dollars in potential revenue. The federal court ruled that Rambus could not enforce its valid patent rights against Micron Technology because Rambus had destroyed documents relating to those patents.

In civil lawsuits in the United States, the parties are required to exchange documents and information – both good and bad – to the other party in a pre-trial process called discovery. Because of the requirement to turn over relevant documents, it has long been the law, in both the federal and the state courts, that parties to litigation have an obligation to preserve, and not destroy (or "spoliate"), documents that may be relevant to the case. Importantly, this requirement kicks in *before* litigation is actually initiated, commencing at the time that litigation is first "reasonably anticipated." Parties are subject to sanctions, which can range from the harshest sanction of dismissal of a claim or defense, to lesser sanctions – including adverse jury instructions and the award of monetary sanctions – for the intentional or negligent "spoliation" of evidence.

Adding another layer of complexity, Congress recently amended the Federal Rules of Civil Procedure – the Rules that govern litigation in our federal courts – to take into consideration electronically stored information, such as e-mails, spreadsheets and computer programs. Most states have followed suit. Those amendments require the courts to treat electronic documents in the same manner as they treat traditional paper documents. This means that your company could be subject to sanctions if, for example, it fails to shut off the automatic delete function on its e-mail server after litigation was first reasonably anticipated.

Without the requirement that a party begin preserving documents as soon as litigation is reasonably anticipated, parties may simply wait to file suit until after they have destroyed all of their harmful documents. This is precisely what the federal court found that Rambus had done in its lawsuit with Micron Technology. Because of the egregiousness of Rambus' conduct, the Court held that the appropriate sanction was the dismissal of Rambus' claims. ▸ *PAGE 2*

New Opportunities for Local Contractors

Eric Radz 410-347-7393
eradz@ober.com

While the overall economy may be in a period of stagnation, the recently enacted American Recovery and Reinvestment Act (ARRA) will offer contractors many opportunities over the next decade to work with local and state governments in the rehabilitation and improvement of our nation's infrastructure, wastewater treatment systems and drinking water infrastructure.

Just two weeks after the ARRA was signed into law, Maryland's Governor Martin O'Malley announced the first transportation project in the nation to be funded by the Act – a $2.1 million road resurfacing and improvement project in Montgomery County along New Hampshire Avenue. This project was part of the initial phase of ARRA-funded projects in Maryland, which included other highway projects involving road resurfacing, bridge maintenance, new ADA compliant sidewalks and safety guardrail projects, and transit projects such as improvements to MARC train stations.

On March 17, 2009, Governor O'Malley announced a second round of transportation infrastructure projects. Under Phase 2, $137 million will be directed towards statewide road and bridge projects. These projects will include rehabilitating the state's roads and bridges. Additionally, $62 million will be given to local governments so that all 23 Maryland counties can use the funds to address their own transportation issues.

Coupled with the initial phase of ARRA-funded projects announced in February, the Phase 2 announcement brings the total amount that Maryland will receive from federal funding under the ARRA for transportation projects to $502 million. This amount is expected to be increased to $610 million in the near future. In addition to the influx of money into the State, the $610 million investment is expected to create 17,500 jobs across Maryland.

Not to be outdone, the District of Columbia will receive upwards of $123 million for transportation projects, including citywide paving restoration, citywide streetlight construction, sidewalk replacement, streetscape improvements and bridge reconstruction.

Delaware is expected to receive funding in the amount of approximately $122 million for highway and bridge projects, and $19 million for transit projects. These projects should create 1200 jobs. Projects include construction of additional E-ZPass lanes on I-95, statewide paving and rehabilitation, bridge maintenance, replacement of concrete medians on I-95 and restoration of the Rehoboth Beach Boardwalk.

In addition to these transportation projects, the ARRA provides $4 billion throughout the country to assist wastewater treatment system upgrades, and $2 billion for drinking water infrastructure upgrades. On March 20, 2009, Governor O'Malley proclaimed that Maryland would receive $119.2 million to fund ninety five water quality and drinking water projects. These projects will include sewer upgrades, wastewater treatment improvements, storm water runoff controls, drinking water treatment improvements, wells and water storage. These projects are currently awaiting EPA final approval. The money to fund these projects will be provided in the form of grants or low interest loans.

Each state has its own recovery and reinvestment website that allows the public to track how funding received via the ARRA is allocated. Information regarding Maryland is available at http://statestat.maryland.gov/recovery.asp; Delaware at http://recovery.delaware.gov/; and the District of Columbia at http://recovery.dc.gov/recovery/site/default.asp. ■

The Dangers of Destroying Project Documents… *FROM PAGE 1*

While the Rambus case involved patent litigation, the courts are holding parties in construction litigation to the same standards. For example, in the recent case of *AAB Joint Venture v. United States* – which involved a claim for additional compensation relating to differing site conditions – the U.S. Court of Federal Claims held that the defendant was required to spend tens of thousands of dollars to restore e-mails and other electronic documents from back-up tapes. The Court based its opinion on the fact that the defendant continued to download its electronically stored information to back-up tapes even after it had a duty to preserve evidence. As a result, the fact that it was now more expensive for the defendant to retrieve that information was the defendant's own fault.

It is imperative that your company seek and retain legal advice as soon as you believe that litigation is possible. Early engagement of knowledgeable counsel helps to avoid these "traps for the unwary," and allows your company to enforce its claims and defenses to their fullest extent. ■

Pending Legislation Eases the Way for Union Organizing

Jerald J. Oppel 410-347-7338
jjoppel@ober.com

The Employee Free Choice Act (EFCA), passed by the House of Representatives in 2007, which was pending in the Senate and strongly backed by President Barack Obama, was reintroduced on March 10, 2009 as HR 1409. If passed into law, it would eliminate secret ballot elections, impose stricter penalties for various unfair labor practices, and mandate binding arbitration if initial negotiations continue beyond 120 days. Thus, EFCA simplifies the task of union organizing, and dramatically changes the face of labor law.

EFCA requires the National Labor Relations Board (NLRB) to certify a union as the exclusive employee representative, for purposes of collective bargaining, once a majority of employees, in an appropriate bargaining unit, sign union authorization cards. Currently, unions must persuade at least 30% of employees in an appropriate bargaining unit to sign authorization cards, and the NLRB holds a secret ballot election approximately 40 days later. During the 40 day intermission, employers are free to inform employees of the reasons why a union may not be in their best interest; employer education usually does not occur before the 40 day period as union activities may be done in secret. By allowing signatures to become the primary certification tool, unions will probably be chosen more often to represent employees since employers will not have time to counter a union campaign. Organized labor favors EFCA because while the union frequently presents a majority of signed authorization cards, employees often subsequently vote down the union during the secret ballot election.

Further, without a secret ballot, employees may find themselves without recourse if pressured by organizers or fellow employees to sign authorization cards. The secret ballot gives employees the chance to decide privately, without pressure from either the union or employer.

Another worrisome effect of EFCA is that a little more than half (50% + 1) of employees could bind all employees without notice to those who have not signed authorization cards. Though a majority binds all employees after a secret ballot election, current law mandates that all employees be notified of the pending election and given a chance to vote after the employer has the opportunity to present its side, which the union certainly does not present during its authorization card campaign.

Beyond the elimination of the secret ballot, EFCA increases financial penalties for the wrongful discharge of pro-union employees, to triple the back pay; imposes upon employers penalties of $20,000 per occurrence for willful and repetitive violations of employee rights; and requires that collective, good faith bargaining between the union and employer (which under current law, is permitted to continue indefinitely) be referred to mediation, and thereafter to binding arbitration, if no agreement is reached between the parties within 120 days.

It is not too late for companies who wish to do so to contact their elected representatives to voice their opposition to, or to lobby for alterations to the bill. However, while passage of EFCA in its current form is not guaranteed due to wide opposition by employers, passage of a bill changing the labor law in some way is likely. Employers should therefore take preliminary action to prepare their organizations and workforce:

First, it is prudent to communicate to employees the significance of authorization card signatures and the right to decide whether or not to sign. This cannot be done too early; reaching out to employees at the hiring or orientation stage of employment ensures that employees are aware of the effects of union organizing before a campaign begins.

Second, implement effective preventative policies now, because implementing such policies during a union campaign may be deemed to be an unfair labor practice. For example, limiting visitors to the workplace may eliminate the ability of union organizers to campaign on site. Non-solicitation and appropriate e-mail policies can also help to discourage on site campaigning. Employers should also ensure that employees are encouraged to approach management with concerns and questions. If managers openly communicate and actively seek and respond to concerns, employees may not see a need for union representation.

Finally, train management to be aware of and respond quickly, but lawfully, to signs that a union campaign is taking place. Responding early to warning signs of a campaign will be vital if EFCA is passed, since employers will not have a designated opportunity to counter a union campaign.

For more information, please contact the author, Jerald J. Oppel, at 410-347-7338 or jjoppel@ober.com. ■

Mr. Oppel is chair of Ober|Kaler's Employment & Labor Group.

Pro-Union Executive Orders Impact Government Contractors

Neil Duke 410-347-7398
neduke@ober.com

Since the end of January 2009, President Barack Obama has signed four Executive Orders that will greatly enhance union organizing activities in the months and years ahead, especially in government contracting. A federal government contractor is defined as a private company or entity that provides goods or services under contract to the government. Does that describe your company? If so, the following initiatives should be read with great interest.

An Executive Order entitled *"Notification of Employee Rights Under Federal Labor Laws,"* creates posting obligations for all government contractors. This Order mandates that government contractors post signs informing employees of their rights to engage in collective bargaining under the National Labor Relations Act. The Order also instructs that government contractors are no longer permitted to post signs informing employees of their rights to limit their financial support to unions. That particular provision reverses prior Bush administration policy. Noncompliance with this Order are grounds for a host of sanctions.

Another Order that revokes a Bush administration policy, and that will have major financial consequences due to the billions of dollars to be spent on government-related construction projects identified in the economic stimulus package, is the *"Use of Project Labor Agreements for Federal Construction Projects."* Under this Order, executive agencies will now be permitted to require the use of union-only project labor agreements on high-dollar construction projects (>$25million). This Order is expected to give organized labor a distinct advantage in contracting opportunities for significant projects.

A third Executive Order is dubbed, *"Economy in Government Contracting."* This Order prohibits federal contractors from being reimbursed for expenditures they might incur in the process of attempting to steer their workers from forming unions or engaging in the collective bargaining process.

The fourth Executive Order is called, *"Non Displacement of Qualified Workers Under Service Contracts,"* which requires a successor federal government contractor to offer employment to the "carryover workforce" of the predecessor contractor. Specifically, the Order mandates the inclusion of a clause in all service contracts (and solicitations for such contracts) that obligates successor contractors to give preferential hiring rights to the existing workforce of the predecessor contractor (other than managerial and supervisory employees). The anticipated controlling regulations are expected to include punitive measures for noncompliance, such as debarment and suspension, and compensatory damages to affected employees.

Employers who function as government contractors are best advised to consider how the recently signed Executive Orders will impact their place of business.

For assistance in addressing union organizing activities in your workplace, or advice relating to your general human resources needs, please contact the author, Neil E. Duke, at 410-347-7398 or neduke@ober.com. ■

Mr. Duke is a principal in Ober|Kaler's Employment & Labor Group.

Maryland
120 East Baltimore Street
Baltimore, MD 21202
410-685-1120

Washington, D.C.
1401 H Street, NW
Washington, DC 20005
202-408-8400

Virginia
450 West Broad Street
Falls Church, VA 22046
703-237-0126

Visit us online at
www.ober.com