

Selected Cases Related to Data Preservation, Legal Holds and Spoliation

Case Reference	Description
Pillay v Millard Refrigerated Services 2013 WL 2251727 (N.D.Ill., May 22, 2013)	Employment case where plaintiff sought spoliation motion for destruction of performance data due to routine data destruction; resulted in adverse inference sanction.
Kirgan v FCA LLC 2013 U.S. Dist. LEXIS 51747 (C.D. Ill., Apr. 10, 2013)	Employment case involving defendant's routine destruction of calendar entries (despite issuing a LH notice) and false testimony; court granted adverse inference and monetary fine
Dunbar v Google 2013 US Dist LEXIS 48630 (N.D.Cal, Apr. 2, 2013)	Plaintiff sought prior versions of documents retained in defendant's document management system; court ordered additional discovery
Frank Gatto v United Air Lines, et al, 10-cv-1090-ES-SCM (D. NJ Mar. 25, 2013)	Personal injury case where defendant sought sanctions related to the deletion a Facebook account, resulting in an adverse inference sanction.
Kenneth Day v LSI Corp., No. CIV 11-186-TUC-CKJ (D. Ariz., Dec. 20, 2012)	Employment discrimination case, where a critical witness was excluded from the original preservation request and legal hold; data was subsequently lost, resulting in default judgment and adverse inference sanctions
E.E.O.C. v. JP Morgan Chase Bank N.A., No. 2:09-cv-00864 (S.D. Ohio Feb. 28, 2013)	EEOC discrimination case involving destruction of data due to untimely issuance of a legal hold and failure to suspend routine email culling, resulting in permissive adverse inference.
E. E. O. C. v. Ventura Corp., Civ. No. 11-1700 (PG), 2013 U.S. Dist. LEXIS 19662 (D.P.R. Feb. 12, 2013)	Title VII complaint where relevant documents were shredded and emails lost due to a software migration, despite multiple warnings from the EEOC. Resulted in adverse inference despite absence of bad faith.
Christou v. Beatport, LLC, Civil Action No. 10-cv-02912-RBJ-KMT, 2013 U.S. Dist. LEXIS 9034 (D. Colo. Jan. 23, 2013)	Commercial case where defendant failed to take steps to preserve text messages, and due to loss of the phone, there were subsequently unable to produce requested messages during discovery. Citing that the duty to preserve had attached, the court found negligence and provided a rebuttable inference at trial.
Haskins et al v First American Title, No. 10-5044 (D. NJ)	Insurance fraud case where plaintiff filed a motion to compel preservation of ESI held by third-parties (agents). Court found ESI was in defendant's "possession, custody or control" and ordered issuance of litigation hold and request for production.

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Scentsy Inc. v. B.R. Chase LLC, No. 1:11-cv-00249-BLW, 2012 WL 4523112 (D. Idaho Oct. 2, 2012)	Copyright infringement case where defendant filed a motion to compel forensic examination. Court concluded plaintiff's litigation hold and document retention policies were "clearly unacceptable" (lack of written legal hold; timing of verbal hold coinciding with filing complaint; routine email disposition after 6 months). Court ordered additional depositions (along with potential for additional sanctions if spoliation found to have occurred).
Hynix Semiconductor, Inc. v Rambus, Inc. No. C-00-20905 RMW (N.D. Cal. Sept. 21, 2012)	Upon appeal, two federal court cases (Hynix v Rambus and Micron Tech v Rambus) were remanded after finding differing conclusions regarding spoliation claims with nearly identical underlying facts. Originally, in Hynix, the court determined that Rambus did not spoliates documents. The Federal Circuit court concluded that the court had "applied too narrow a standard of foreseeability." Following reconsideration, the court concluded the earlier trigger date and that Rambus had therefore committed spoliation.
Apple v Samsung Elecs. C. Ltd. No. C 11-1846 LHK (PSG) (N.D. Cal. July 25, 2012)	In this patent infringement case, court agreed with Apple in seeking an adverse inference for data spoliation due to failure to suspend automated deletion of email protocol (and lack of email being produced from 14 key fact witnesses for relevant time period)
Chin v Port Authority of New York New Jersey Nos. 10-1904-cv(L), 10-2031-cv(XAP), 2d Cir., July 10, 2012	In this Second Circuit Court of Appeals employment discrimination opinion, Chin sought a spoliation sanction for Port Authority's purported gross negligence for failure to issue a written legal hold; court rejected SDNY "per se" gross negligence argument, finding that in this case there was no prejudice suffered due to ample evidence being produced by the Port.
Omogbehin v. Cino 2012 U.S. App. LEXIS 12545, (3d Cir. N.J. June 20, 2012)	Employment discrimination suit where plaintiff filed a motion alleging spoliation; court concluded that plaintiff had failed to prove that supposed emails had in fact existed (an no allegation of faulty legal hold processes)
In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010 E.D.La., MDL No. 2179	Former BP drilling engineer indicted on charges he deleted text messages relevant to the ongoing lawsuit (obstruction of justice)
GenOn Mid-Atlantic LLC v. Stone & Webster Inc., No. 11 Civ. 1299(HB)(FM) (S.D.N.Y. Apr. 20, 2012)	In this contract dispute, defendant alleged spoliation by data held by a third-party; court found that the duty to preserve did extend to data under "practical control" of the party, but denied sanctions due to lack of prejudice shown.

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BYU v. Pfizer Inc. (D. Utah, April 16, 2012)	BYU alleged that 1) Pfizer's initial inquiry for legal advice following its withdrawal from the research arrangement was a preservation "triggering" event and 2) that Pfizer's 1994 litigation "sensitized" it to the possibility that additional interested parties might come forward. Court denied that the duty to preserve had attached 12 years prior to filing complaint.
Danny Lynn Electrical v. Veolia ES Solid Waste No. 2:09CV 192-MHT, 2012 U.S. Dist. LEXIS 31685, (M.D. Ala. March 9, 2012)	In denying a motion for sanctions late in the case, the court concluded that the defendant had not acted in bad faith, that an effective litigation hold process was in place, and the degree of prejudice suffered was minimal.
Tracy v. NVR Inc., 04-cv-6541L (WDNY)	In this FLSA class-action lawsuit, plaintiffs moved to compel production of litigation hold notices and list of recipients, based on preliminary showing of spoliation of potentially similarly situated opt-in plaintiffs (despite ordinary protection that hold notices are protected by privilege). The motion was denied on the grounds that the plaintiffs failed to demonstrate that the duty to preserve extended to potential opt-in plaintiffs, nor that spoliation had occurred. In contrast, the court did grant NVR's motion for spoliation against one of the opt-in plaintiffs.
State National Insurance Co. v. County of Camden 08-cv-5128 (D.N.J. March 21, 2012)	Finding the County's efforts severely lacking ("including a failure to institute a legal hold after the trigger event, suspend auto-deletion of email, or retain copies of any back-up tapes"), the Court ordered monetary sanctions despite finding no actual spoliation
Pouncil v. Branch Law Firm Case No. 10-1314-JTM-DJW (D. Kan. Mar. 7, 2012)	In this malpractice product liability case, motion to compel defendant for failing to take proper steps to preserve ESI (including court-ordered litigation hold, additional discovery and monetary sanctions for costs)
915 Broadway Associates, LLC, v. Paul, Hastings, Janofsky & Walker, LLP 2012 NY Slip. Op. 50285U (N.Y. Sup. February 16, 2012)	In this malpractice real estate transaction case, the court agreed with motion for spoliation sanctions and dismissal of the claim with prejudice due to a failure to take adequate steps to preserve potentially relevant evidence (including failure to implement an effective litigation hold process, suspend automated destruction of email, decommission and discarding of an integral email server)
Pippins v. KPMG LLP 279 F.R.D. 245 (February 3, 2012)	During the stay of discovery in this FLSA class-action lawsuit, KPMG sought a protective order limiting the scope of preservation efforts due to the burden imposed by preserving hard drives for thousands of former employees that might fall within a potential FLSA collective. After failing to resolve the dispute, the court concluded that it would be premature to limit scope of preservation.

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Voom HD Holdings LLC v. EchoStar Satellite LLC 2012 NY Slip Op 00658 (January 31, 2012)	Contract dispute, confirming lower court sanctions due to EchoStar failed to issue a legal hold once litigation could be “reasonably anticipated” and failed to suspend automatic email deletion until four months after the suit was filed resulting in a loss of relevant emails.
Perez v. Vezer Industrial Professionals, Inc. 2011 WL 5975854 (E.D. Cal. Nov. 29 2011)	Personal injury case where no litigation hold was implemented and "minimal, if any, efforts were made to preserve relevant documents and ESI"; small monetary sanction awarded to plaintiff (due to lack of gross negligence and minimal prejudice suffered)
NACCO Materials Handling Group, Inc. v. Lilly Co. (No. 11-2415 AV, 2011 WL 5986649, W.D. Tenn. Nov. 16, 2011)	In this case involving improper access to secure dealer website, Lilly failed to take reasonable steps to preserve (e.g., failure to issue company-wide litigation hold due to scope of allegations, to suspend auto-delete and routine overwriting features, or to collect ESI), resulting in court-imposed preservation actions and monetary sanctions.
N.V.E., Inc. v. Jesus J. Palmeroni, et al. Civil Action No. 06-5455 (ES), 2011 U.S. Dist. LEXIS 107600 (D.N.J., September 21, 2011)	Wrongful termination case where defendant admits to not issuing a legal hold and found to be "was grossly negligent in failing to preserve" records (e.g., destroying ESI from a computer system that was subsequently upgraded)
E.I. Du Pont De Nemours & Co. v. Kolon Indus., Inc. No. 3:09cv58, 2011 WL 2966862 (E.D. Va. July 21, 2011)	In this countersuit, Kolon was found to have failed to implement an effective legal hold process and key players indicating intentional destruction of relevant documents; adverse inference in lieu of default judgment (citing efforts in issuing litigation holds and subsequent efforts to preserve files)
Haraburda v. Arcelor Mittal USA, Inc. No. 2:11 cv 93, 2011 WL 2600756 (N.D. Ind. June 28, 2011)	Employment discrimination case where defendant chose to defer issuing a litigation hold or implement a process to preserve evidence until after the Rule 26(f) conference; court agreed with motion to compel and ordered placing an appropriate litigation hold
Gaalla v. Citizens Medical Ctr. 2011 WL 2115670 (S.D. Tex. May 27, 2011)	Plaintiffs sought sanctions in response to the defendant’s failure to preserve disaster recovery backup tapes. The court ruled against sanctions, finding preservation efforts that were undertaken were reasonable, including issuing a timely litigation hold, making timely snapshots of relevant email accounts and instituting journaling.
Jones v. Bremen High School Dist. 228 2010 WL 2106640 (N.D. Ill. May 25, 2010)	Wrongful termination where defendant failed to issue a litigation hold until well after trigger event, lack of meaningful guidance to key players, and continued automatic destruction of ESI (including backup tapes for email); finding gross negligence, sanctions included cost shifting and additional depositions

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Surowiec v. Capital Title Agency, Inc. 2011 WL 1671925 (D. Ariz. May 4, 2011)	Finding gross negligence for inadequate preservation efforts and discovery misconduct, including failing to issue a timely litigation hold and suspend routine document destruction when the defendant should have reasonably anticipated litigation, the court imposed monetary sanctions and an adverse inference instruction.
E.I. du Pont de Nemours and Co. v. Kolon Indus., Inc. 2011 WL 1597528 (E.D. Va. Apr. 27, 2011)	Despite a claim by the plaintiff that critical information was lost, the court denied sanctions for willful spoliation, citing that a defendant's duty to preserve is not absolute, but must only be reasonable and proportional to the circumstances.
Steuben Foods, Inc. v. Country Gourmet Foods LLC WL 1549450, W.D.N.Y. April 21, 2011	Breach of contract case where defendant asserted plaintiff's reliance on a verbal legal litigation hold and failure to produce at least three emails warranted spoliation sanctions; court found no evidence of spoliation or resulting prejudice
Star Direct Telecom, Inc. v. Global Crossing Bandwidth, Inc. 2011 WL 1125493 (W.D.N.Y. Mar. 21, 2011)	Among numerous discovery disputes, plaintiff sought spoliation sanctions for destruction of emails; court concluded that duty to preserve arose when complaint was filed (not earlier as contended by Star Direct); however, failing to issue a litigation hold nor take adequate steps to preserve amounted to gross negligence and imposition monetary sanctions
Green v. Blitz U.S.A., Inc. 2011 U.S. Dist. LEXIS 20353 (E.D. Tex. Mar. 1, 2011)	Product liability case where court found defendant failed to preserve ESI (and even encouraging deletion in line with records policies); monetary sanction and order to provide Memorandum to opposing counsel in every lawsuit for forthcoming five years
Philips Electronics North America Corp., et al. v BC Technical No. 2:08-CV-639-CW-SA, 2011 WL 677462 (D. Utah Feb. 16, 2011)	Copyright infringement and misappropriation of trade secrets; failure to issue timely litigation hold while key players "wantonly destroyed incriminating evidence", resulting in sanctions and summary judgment for plaintiff
United States v. Halliburton Co. 2011 WL 208301 (D.D.C. Jan. 24, 2011)	Plaintiff requested additional production of emails from an expanded list of custodians, despite significant production that had already been completed. The court determined that the plaintiff had failed to demonstrate that missing emails were crucial, and that additional discovery was not warranted.
Orbit One Communications, Inc. v. Numerex Corp. 2010 WL 4615547 (S.D.N.Y., Oct. 26, 2010)	Despite the failure to "engage in model preservation," the court denied a motion for spoliation due to insufficient evidence that any lost ESI was relevant to the case (rejecting notion that failing to issue a written legal hold is "per se" gross negligence).
Victor Stanley, Inc. v. Creative Pipe, Inc., et al. D.MD, Sept.	Copyright and patent infringement, unfair competition involving purposeful destruction and overwriting of files in order to obfuscate incriminating evidence, resulting in sizable monetary sanctions and

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9, 2010	default judgment on copyright infringement
Medcorp, Inc. v. Pinpoint Tech., Inc. 2010 WL 2500301 (D. Colo. June 15, 2010)	Case involving intentional destruction of 43 hard drives containing relevant information; finding negligence, court issued monetary sanctions and adverse inference instruction against Medcorp
Passlogix, Inc.v.2FA Technology LLC, et al. 2010 WL 1702216 (SDNY Apr. 27, 2010)	Breach of contract case involving 2FA's failure to issue a legal hold (despite being a small company) and intentional bad-faith spoliation resulting in prejudice; monetary sanction designed to punish bad actors directly
Merck Eprova AG v. Gnosis S.p.A. et al. 07 Civ. 5898 (SDNY Apr. 20, 2010)	Mislabeling of a nutritional agreement involving inadequate preservation efforts (lack of litigation hold, failure to suspend automatic email deletion and inadequate supervision of custodian search; finding of gross negligence and monetary sanctions and additional deposition
Crown Castle USA, Inc. v. Fred A. Nudd Corp. 2010 U.S. Dist. LEXIS 32982, (WDNY Mar. 31, 2010)	Product liability case involving gross negligence due to a failure to monitor the approach used to determine where and what to look for in terms of responsive documents; failure to suspend auto-delete of emails; and failure to issue legal hold (rejecting adverse inference due to lack of bad faith and prejudice)
Rimkus Consulting Group Inc. v. Nickie G. Cammarata, et al., 07-cv-00405 (SDTX Feb. 19, 2010)	Non-compete and misappropriation of secrets; lack of written hold and willful destruction of evidence by the defendants after the duty to preserve had attached, resulting in monetary sanctions and adverse inference instruction
Pension Comm. v. Banc of America Sec., LLC 685 F. Supp. 2d 456 (S.D.N.Y. 2010)	Complex litigation case where several plaintiffs were found to have failed to implement reasonable preservation efforts, including failure to issue written legal holds and other shortcomings resulting in finding of gross negligence
Einstein v. 357 604199/07 (N.Y. Sup. Ct. November 4, 2009)	Construction defect; plaintiff filed motion to compel discovery and misrepresentations; failure to implement any legal hold, make any attempt to investigate relevant data sources, and failure to preserve (e.g., due to email quota restrictions) deemed grossly negligent; monetary sanction and adverse inference
Scalera v. Electrograph Sys., Inc., 2009 WL 3126637 (E.D.N.Y. Sept. 29, 2009)	In this employment discrimination case, plaintiff moved for sanctions due to loss of allegedly relevant emails caused by failing to issue a litigation hold notice nor take other steps to preserve ESI; despite finding negligence for such missteps, the court denied request for an adverse inference due to lack of proving relevance.

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Swofford v. Eslinger, 671 F. Supp. 2d 1274 (M.D. Fla. 2009)	In this personal injury suit, plaintiff sought sanctions for intentional destruction of ESI; the court agreed, finding bad faith and imposed both attorney fees and an adverse inference against the defendant.
Major Tours v. Colorel, 2009 U.S. Dist. LEXIS 68128 (DNJ Aug. 4, 2009)	Discrimination case where plaintiffs sought production of litigation hold letters; after concluding likelihood that spoliation had occurred due to delayed recognition of a triggering event and 30(b)(6) testimony provided, court agreed and ordered hold letters be produced
Pinstripe, Inc. d/b/a Acctknowledge v. Manpower, Inc., 2009 U.S. Dist. LEXIS 66422 (ND Okla. Jul. 28, 2009)	The key takeaway from this case is the need to communicate, communicate and do some more communication when implementing a litigation / legal hold. A quick phone call confirming the steps being taken to implement the litigation hold would have saved over \$30,000.00 in this case.
Phillip M. Adams & Associates, L.L.C., v. Dell, Inc. 2009 WL 910801 (D.Utah March 30, 2009)	Infringement case, moving for terminating sanctions due to spoliation; discussion of when trigger event occurred, with reasonable anticipation being based on multiple lawsuits arising out of the same issue (floppy disk errors) some five years earlier when industry was "sensitized to the issue" in the case)
Synventive Molding Solutions v. Husky Injection Molding Systems, 2009 U.S. Dist. LEXIS 105306 (D. Vt. Mar. 13, 2009)	Patent infringement lawsuit in which the Court ultimately orders plaintiff to implement a litigation hold as to personnel likely to possess discoverable information. The court also orders plaintiff to file a sworn declaration, including, among other things, a description of the "nature and extent of the litigation hold put in place in response to this Order, including the individual personnel affected by the hold."
Acorn v. County of Nassau 2009 WL 605859 (E.D.N.Y. Mar 9, 2009)	Employment discrimination case where plaintiff sought actions against the county for failure to implement a timely hold nor adequately search for ESI (formal litigation hold issued 15 months after trigger event); finding of gross negligence and monetary sanction (but no prejudice; therefore no adverse inference)
Keithley v. TheHomeStore.com 2008 U.S. Dist. LEXIS 61741 (Aug 12, 2008)	Intellectual property infringement case; plaintiff filed motion claiming spoliation and discovery misconduct; court agreed that the "...failure to have an adequate litigation hold in place and the failure to issue reminders to employees regarding the duty to preserve evidence was at least grossly negligent" and resulted in spoliation of relevant ESI; \$1.4M monetary sanctions and adverse inference