



David S. Flugman

Partner
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David S. Flugman is a seasoned litigator and counselor who has successfully represented clients in a wide array of matters in federal and state courts and arbitral panels across the United States and in cross-border litigations in Europe, South America, and the Caribbean.

David has been recognized as a “Trailblazer in Political Activism and First Amendment Rights” by the *National Law Journal*, named to *Crain’s New York Business’* competitive “40 Under 40” list, honored as one of the “500 Leading Lawyers in America” by *Lawdragon*, and named one of the “Best LGBT Lawyers Under the Age of 40” by the LGBTQ+ Bar Association.

David’s clients span a broad range of industries and sectors, including private equity, hedge funds, consulting, telecommunications, insurance, food & beverage, pharmaceuticals, and retail. He has extensive experience handling insolvency, corporate, securities, complex commercial, and business tort disputes. He also speaks fluent Spanish and regularly counsels Spanish-speaking clients in their primary language.

Representative Matters

Bankruptcy and Insolvency

- Representing **Assured Investment Management** and several of its managed funds in a chapter 15 adversary proceeding in Bankruptcy Court for the Southern District of New York arising from the International Investment Group fraud, involving fraudulent transfer and aiding and abetting fraud and breach of fiduciary duty claims brought under New York and Cayman Islands law.
- Representing Chilean businessman Álvaro Saieh Bendeck, **Chairman of Corp Group**, and several of his family members and business associates in a cross-border dispute over claims brought by creditors of a subsidiary in a Chilean court that violated a permanent injunction ordered by a Delaware bankruptcy court. The Delaware court granted our motion for injunctive relief and ordered the recovery of 100% of our clients’ attorney fees associated with bringing the action.
- Advising **an ad hoc group of noteholders** of an oil and gas company currently in bankruptcy in the Southern District of Texas in connection with potential claims against the collateral trustee.
- **Drivetrain** as trustee for the Commonwealth Avoidance Actions Trust, seeking, among other things, recovery of hundreds of millions of dollars of underwriting fees and swap termination fees from 13 major Wall Street banks for their role in deepening Puerto Rico’s debt crisis.
- Represented the Joint Official Liquidators of **Fairfield Sentry Limited** and two affiliated funds in Chapter 15 proceedings in Bankruptcy Court for the Southern District of New York, and before the U.S. District Court on appeal, asserting foreign avoidance, common law, and breach of contract claims, seeking to recover about \$6 billion in redemption payments from hundreds of entities arising out of the Madoff Ponzi scheme.

- Representing **Herald Fund SPC**, one of the largest “net loser” feeder fund victims of the Bernard L. Madoff Investment Securities Ponzi scheme. In the bankruptcy and district courts in New York, David led a group of similarly-situated funds in novel litigation on, among other things, application of safe harbor and good faith defenses, and the import of *Stern v. Marshall* in the Madoff claw-back cases before negotiating a precedent-setting settlement with the Madoff Trustee resulting in an unencumbered allowed customer claim in excess of \$1.6 billion. Currently advising the fund’s Joint Official Liquidators on U.S. securities and insolvency issues in connection with ongoing proceedings in the Cayman Islands and Luxembourg.
- Represented **McKinsey & Co.**, the world’s largest management consulting firm, in litigation brought by Mar-Bow Value Partners, LLC, an affiliate of Jay Alix, founder of AlixPartners LLP, to reopen the *Alpha Natural Resources* case in bankruptcy court in Richmond, Virginia. Defeated Alix’s attempt to pursue claims that McKinsey’s restructuring affiliate had committed a fraud on the court in connection with its service to the chapter 11 debtor.
- Represented **McKinsey & Co.** in a bench trial in bankruptcy court in Houston, Texas, in which Jay Alix, through Mar-Bow Value Partners, objected to the debtors’ application to retain McKinsey on the basis that McKinsey’s Bankruptcy Rule 2014 disclosures were noncompliant and that McKinsey was not disinterested. The case, *In re Westmoreland Coal Co., Inc.*, was dismissed after eight days of trial testimony after McKinsey reached a comprehensive settlement regarding future bankruptcy disclosures with the U.S. Trustee.
- Represented **Nexstar Inc.**, the nation’s largest owner and operator of television stations, in litigation in the bankruptcy court in Houston, Texas involving breach of contract, fraudulent transfer, turnover, and fraud claims asserted by a former “sidecar” operator of three U.S. television stations. Successfully obtained dismissal of several fraud and contract-based claims and defeated summary judgment on the turnover claim before settling both cases for a small fraction of the amount in dispute.
- Represented **The Blackstone Group**, the former chapter 11 restructuring advisor to Winstar Communications, Inc., in defending against \$300 million in fraud claims brought by IDT Corp., who had acquired all of the debtor’s assets in a Section 363 bankruptcy sale. After successfully removing the case from state court in New York and having it transferred back to the Delaware bankruptcy court which oversaw the Winstar bankruptcy, obtained a full dismissal of the suit on statute of limitations grounds and successfully defended the dismissal in the district court, the Third Circuit, and the U.S. Supreme Court.

David also counsels noteholders, liquidators, creditors, and equity insiders in connection with bankruptcy proceedings and U.S. aspects of foreign insolvency proceedings.

M&A, Corporate, and Securities Litigation

- Representing **Albertsons Companies, Inc.** in a merger dispute against Kroger in the Delaware Court of Chancery, alleging that Kroger materially breached the Merger Agreement by failing to undertake efforts required under the specific terms of that agreement to secure regulatory approval and, additionally, by failing to pay the termination fee. Albertsons seeks in excess of \$6 billion.
- Representing **Trifecta Multimedia Holdings**, a pharma-services technology company, and its founder Dave Young as plaintiffs in Delaware Court of Chancery, asserting claims for fraud and breach of the implied covenant of good faith and fair dealing against WCG Clinical arising from a series of missed earnout payments valued at over \$60 million.
- Represented affiliates of **Warburg Pincus** and obtained a total dismissal of all claims in securities and breach of contract litigation arising from the acquisition of FSNS, LLC, a food safety and testing company, in the federal district court in Delaware.

- Represented **Team Health Holdings** in appraisal litigation in Delaware Court of Chancery following the company's acquisition by the Blackstone Group for \$6.1 billion, successfully settling the case at the close of discovery.
- Represented **Chobani**, the yogurt manufacturer, **and its founder and CEO** Hamdi Ulukaya, in purported shareholder derivative litigation in the Commercial Division of the New York Supreme Court. After successfully obtaining bifurcation on the threshold issue of plaintiff's status as a shareholder, achieved successful settlement at the close of discovery.
- Represented **Idearc, Inc.** in ERISA breach of fiduciary duty litigation in district court in Dallas, Texas and the Fifth Circuit brought by retirement plan participants who chose to invest in company stock. Obtained dismissal at motion to dismiss stage.
- Represented **Herald Fund SPC** and its then-directors in securities and breach of fiduciary duty litigation brought by foreign investors arising from losses in the Madoff Ponzi scheme. Obtained dismissal at motion to dismiss stage of all claims on basis of *forum non conveniens* in the district court in New York, and successfully defended the dismissal in the Second Circuit.

David also has extensive experience litigating and counseling clients about all manner of corporate matters including M&A shareholder cases, corporate governance disputes, and Section 220 books & records demands. He has represented private equity firms including ABRY Partners, Apax Partners, Vista Equity Partners, Greenbriar Equity Partners, Avista Capital Partners, and the Blackstone Group, and publicly-traded companies such as Bristol-Myers Squibb, in corporate matters within and outside Delaware.

Complex Commercial and Business Disputes

- Represented aircraft manufacturing company **Archer Aviation Inc.** against The Boeing Company in a California state court lawsuit seeking up to \$1 billion in damages caused by defamatory statements made by Wisk Aero LLC in furtherance of The Boeing Company's joint venture with Kitty Hawk Corporation.
- Represented the owner of a **health insurance claim-editing service** in potential contract dispute with a business partner. The client's claim stemmed from the violation of an exclusivity provision when the business partner acquired a direct competitor. The business partner's acquisition, in turn, led to an antitrust enforcement action prosecuted by the DOJ, where the non-party client retained Selendy Gay to prevent disclosure of confidential material appearing in trial exhibits.
- Represented Daniel Yarur Elsaca, **former Superintendent of the Chilean equivalent of the Securities & Exchange Commission**, in a litigation in the Southern District of New York involving RICO and quantum meruit claims and counseling the client in connection with litigation in Chile and the British Virgin Islands.
- Defended **Lincoln National Life Insurance Co.** against ERISA breach of fiduciary duty claims relating to the company's use of retained asset accounts to pay death benefits. Obtained full dismissal at summary judgment in the Eastern District of Pennsylvania, a result affirmed by the Third Circuit.
- Represented **AOL** in defending \$650 million in claims under the Electronic Communications Privacy Act in two cases—one in the Northern District of California and one in the Eastern District of Virginia—arising from what was then referred to as the "Exxon Valdez" of data breaches. Secured dismissal of the California lawsuit and settled the Virginia lawsuit for pennies on the dollar.
- Represented a **telecommunications giant** in the International Trade Commission in offensive and defensive patent infringement litigation involving smartphones against a European standard essential patentholder. Tried both cases and settled on favorable terms before a decision was rendered.

- Defended **Israel Corporation**, the largest holding company in Israel, against breach of contract and misappropriation of trade secret claims in the Southern District of New York arising from a purported joint venture agreement with an affiliate of Malcolm Bricklin, the developer of the Yugo automobile. Obtained dismissal at summary judgment on personal jurisdiction grounds.

Public Interest Work

David maintains an active public interest practice focused on the advancement of LGBTQ rights and the protection of persons with mental disabilities. His recent work includes:

- Successfully represented Garden State Equality, the largest civil rights organization in New Jersey, in defending New Jersey's ban on so-called "conversion therapy" from First Amendment challenge. After obtaining summary judgment in the District of New Jersey, David argued the case in the Third Circuit, obtaining a unanimous panel decision affirming the law, which remains on the books.
- Represented the Florida Chapter of the American Psychological Association and the Florida Chapter of the American Academy of Pediatrics as *amicus curiae* defending the bans on "conversion therapy" enacted by the City of Boca Raton and Palm Beach County, Florida.
- Represented a class of psychiatric emergency room and in-patients at Kings County Hospital Center, the largest publicly run hospital in Brooklyn, in civil rights litigation challenging the conditions of care. Obtained, along with the Department of Justice, a precedent-setting consent judgment entered by the Eastern District of New York setting new standards that transformed the hospital's psychiatric services.
- Represented Professors Ira Lupu, Frederick Mark Geddis, Robert Tuttle, and William Marshall as *amicus curiae* in *Fulton v. City of Philadelphia*—a major Free Exercise case pending before the U.S. Supreme Court urging the court to reject Catholic Charities' challenge to Philadelphia's nondiscrimination policy in contracting for foster care services and reaffirm the decades-old rule applicable to Free Exercise constitutional claims.
- Represented a server at the iconic Central Park Boathouse Restaurant in sexual harassment and labor litigation that ended in a confidential settlement.

Education & Community Involvement

David obtained his B.A. with distinction in history and music, *magna cum laude*, from Yale University. He received his J.D., *cum laude*, from Harvard Law School.

David is a frequent contributor to publications, with a particular focus on LGBTQ+ rights issues, including "conversion therapy" and the intersection of civil rights and religious liberty. He has spoken on these topics at Harvard, the University of Pennsylvania, and Brooklyn Law Schools.

David is a member of the Founders Council of the Williams Institute at UCLA School of Law, the Judiciary Committee of the Lesbian & Gay Bar Association of Greater New York, and the National Leadership Council of the National Center for Lesbian Rights. He also serves as Advisor to the Development Committee of the Glimmerglass Festival and was a founding board member of the Yale Spizzwinks Alumni Association, the nation's oldest underclassmen collegiate a cappella singing group.

Education

Harvard Law School

(J.D., 2006)

Cum laude

Yale University

(B.A., History and Music, with Distinction, 2003)

Magna cum laude, Phi Beta Kappa

Prior Associations

Kirkland & Ellis LLP

Partner, 2012-2018

Associate, 2006-2012

Admissions

- State Bar of New York
- United States Supreme Court
- United States Courts of Appeals: Second Circuit, Third Circuit, Fifth Circuit, Sixth Circuit, Ninth Circuit, Tenth Circuit, Eleventh Circuit, District of Columbia Circuit
- United States District Courts: Southern District of New York, Eastern District of New York, District of Colorado