

## David B. Esau

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## Overview

David Esau is an experienced litigator and trial lawyer whose practice focuses on worldwide complex antitrust litigation and counseling. David defends companies facing antitrust, unfair competition, and consumer class action claims and government investigations, and leads the firm's antitrust cartel recovery practice, assisting corporate clients to recover damages from national and international antitrust cartels. David regularly handles matters at both the trial and appellate levels in federal and state courts throughout the country. In addition, he has served as national coordinating counsel on several matters, and has represented clients before administrative agencies, grand juries, congressional committees, arbitration panels, and other ADR proceedings.

## Experience

**Antitrust Litigation, Counseling, and Cartel Recovery**

- Defended insurance brokerage firm in federal multidistrict commercial litigation (and tag-along cases) arising out of government investigation regarding contingent commissions and alleged price-fixing; obtained dismissal with prejudice of Sherman Act and RICO claims in MDL proceeding (*In re Insurance Brokerage Antitrust Litig.*, MDL No. 1663 (D.N.J.)); obtained dismissal with prejudice or settlement in multiple tag-along cases across the country, including in Illinois, California, Connecticut, New York, and Florida.
- Represented several computer manufacturers and a major telecommunications company as direct action opt-out plaintiffs in multidistrict commercial litigation to recover damages from an international price-fixing cartel in the flat-panel liquid-crystal display market (*In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827 (N.D. Cal.)); appointed as liaison counsel for dozens of “direct action plaintiffs;” recovered tens of millions of dollars for clients through confidential settlements.
- Defended large health care conglomerate in commercial litigation alleging monopolization, group boycott, exclusive dealing, and merger-challenge claims brought by alleged competitor (*N. Brevard Cty. Hosp. Dist. v. Health First, Inc.*, No. 15-cv-39908, Brevard County, Florida).
- Represented several computer manufacturers as direct action opt-out plaintiffs in multidistrict commercial litigation to recover damages from an international bid-rigging and price-fixing cartel in the optical disk drive market (*In re Optical Disk Drive Prods. Antitrust Litig.*, No. 3:10-md-02143 (N.D. Cal.)), and various related appellate issues in the Ninth Circuit Court of Appeals, 801 F.3d 1072 (9th Cir. 2015) (affirming order in clients’ favor requiring production of FBI tapes and establishing Ninth Circuit standard under Criminal Rule of Civil Procedure 6(e)).
- Represented international appliance manufacturer in its acquisition of competing vacuum business, including premerger notification compliance under the Hart-Scott-Rodino Act; defended multiple challenges by, and obtained approval from, federal and state enforcement authorities.
- Defended international photographic media manufacturer in California indirect purchaser antitrust class action alleging conspiracy to exclude competitor and price-fixing; negotiated and obtained court approval of class action settlement (*Franz Inc. v. Quantum Corp.*, No. CGC-03-422301 (Superior Court, San Francisco, California)).
- Represented several telecommunications carriers in prosecution of unfair competition, federal trademark infringement, and gray-market fraud cases before federal courts and arbitration panels across the country, including in New York, Texas, Illinois, Kansas, Georgia, New Jersey, Florida, and California; obtained several multimillion-dollar judgments and permanent injunctions (see *AT&T Mobility LLC v. S&D Cellular, Inc.*, No. 2:09-cv-00805, 2009 WL 3233814 (C.D. Cal. Sept. 23, 2009) (entering \$5 million judgment and permanent injunction in client's favor)).

- Represented several computer manufacturers, mobile handset manufacturers, power tool companies, medical device manufacturers, and telecommunications carriers as direct action opt-out plaintiffs in multidistrict commercial litigation to recover damages from an international price-fixing cartel in the lithium-ion battery market (*In re Lithium Ion Batteries Antitrust Litig.*, No. 4:13-md-02420 (N.D. Cal.)).
- Defended large telecommunications carrier in commercial litigation alleging Sherman Act and Kansas unfair competition claims on behalf of a nationwide putative class; obtained orders dismissing antitrust and unfair competition claims with prejudice and denying class certification in its entirety (*Sprint Nextel Corp. v. Middle Man, Inc.*, No. 2:12-cv-02159, 2013 WL 1197137, 2013 WL 3819938, and 2015 WL 363957 (D. Kan.)).
- Represented several computer manufacturers, mobile handset manufacturers, and electronic manufacturing service companies as direct action opt-out claimants in multidistrict commercial litigation to recover damages from an international price-fixing cartel in the electrolytic capacitor market (*In re Capacitors Antitrust Litig.*, No. 3:13-cv-03264 (N.D. Cal.)).
- Represented health care company in its acquisition of a large oncology center; defended challenges by federal competition enforcement authorities and private plaintiffs.
- Defended several financial service companies in multiple putative nationwide federal class actions alleging unfair competition, improper kickbacks, and excessive coverage amounts relating to lender (aka “force”) placed insurance practices, including in Arkansas and Florida; obtained order denying class certification in its entirety (*Kunzelmann v. Wells Fargo Bank, N.A.*, No. 9:11-cv-81373, 2013 WL 139913 (S.D. Fla. Jan. 10, 2013)); negotiated and obtained court approval of several class action settlements (*Mahan v. Regions Fin. Corp.*, No. 4:14-cv-00321 (E.D. Ark.); *Ziwczyn v. Regions Bank*, No. 1:15-cv-24558 (S.D. Fla.)).
- Represented clients in various other nonpublic antitrust and competition law issues, including defense and counseling on mergers, acquisitions, joint ventures, business structure and distribution agreements, such as resale price maintenance and similar issues, antitrust compliance program design and implementation, government investigations, and other corporate cartel recovery matters.

### **Financial Services and Class Action Litigation**

- Defended institutional lender in complex multiparty commercial litigation alleging breach of fiduciary duty, fraud, and other business torts in connection with a multi-hundred-million-dollar commercial foreclosure action in parallel proceedings in New York and Florida; obtained dismissal of all claims against client in both venues before remainder of case proceeded to the U.S. Supreme Court (*Philips S. Beach v. NYLIM Real Estate Mezzanine Fund*, No. 652995/2011 (N.Y. Sup. Ct.), and *JPMMC v. Philips S. Beach v. NYLIM Real Estate Mezzanine Fund*, No. 10-61128 (Fla. Cir. Ct.)).

- Defended "Big Four" accounting firm in federal and state civil litigation brought by investors in alleged tax shelters; obtained dismissal with prejudice or settlement in dozens of individual opt-out cases in numerous states, including California, New York, Colorado, New Jersey, Florida, Georgia, and Texas; negotiated and obtained court approval of class action settlement (*Simon v. KPMG LLP*, No. 2:05-cv-03189 (D.N.J.)).
- Defended national bank in federal putative class action seeking to quiet title to thousands of properties and void valid and enforceable notes and mortgages; obtained dismissal with prejudice of all claims (*Diaz v. Deutsche Bank Nat'l Trust Co.*, No. 1:14-cv-22583, 2014 WL 4351411 (S.D. Fla. Sept. 2, 2014)).
- Defended national bank in federal litigation alleging high-pressure sales tactics and mortgage fraud; obtained order dismissing case with prejudice (*Brake v. Wells Fargo Fin. Sys. Fla., Inc.*, No. 8:10-cv-00338, 2011 WL 6412430 (M.D. Fla. Dec. 21, 2011)).
- Defended regional bank in federal putative class action alleging violations of the notice provisions of the Electronic Fund Transfer Act; obtained dismissal of all claims (*Daubin v. Iberiabank*, No. 4:09-cv-10115 (S.D. Fla.)).
- Defended mortgage servicer in putative nationwide class action alleging unfair trade practices relating to the alleged improper retention of insurance proceeds; obtained dismissal of all claims (*Pereira v. PHH Mortg. Corp.*, No. 1:14-cv-20112 (S.D. Fla.)).
- Defended lender in federal court putative class action alleging improper debt collection activities; obtained dismissal of all claims (*Hood v. HSBC Bank*, No. 5:10-cv-00165 (M.D. Fla.)).
- Prosecuted numerous multimillion-dollar commercial foreclosure lawsuits and related matters, including appointments of receivers, attachments, assignments for the benefit of creditors, and enforcement of guaranty agreements.
- Defended numerous other class actions/unfair business practice cases against mortgage bankers in state and federal courts, including loan origination, servicing, and payoff issues arising under state and federal laws and including claims such as wrongful foreclosure, force-placed insurance, TILA, RESPA, FDCPA, FCRA, FCCPA, and mortgage fraud claims.

### **Other Representative Matters**

- Defended major consumer retailer in criminal investigation and civil RICO class action regarding alleged mail fraud, money laundering, and labor issues; obtained dismissal with prejudice of all RICO-related claims (*Zavala v. Wal-Mart Stores, Inc.*, 447 F. Supp. 2d 379 (D.N.J. 2006)).
- Defended major automotive services retailer in multiple class actions alleging violations of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA); obtained multiple dismissal orders.
- Defended several telecommunications carriers and third-party content providers in multiple putative nationwide class actions involving alleged mobile content cramming; obtained multiple dismissal orders.

- Represented international electronics manufacturer in connection with an investigation into potential violations of the Foreign Corrupt Practices Act (FCPA); conducted internal investigation and negotiated settlement.
- Defended internet retailer in federal putative class action alleging violations of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) and other claims; obtained transfer of lawsuit to Washington state based on forum selection clause in click-wrap agreement (*Segal v. Amazon.com, Inc.*, 763 F. Supp. 2d 1367 (S.D. Fla. 2011)) and subsequently obtained dismissal of lawsuit in its entirety.
- Defended large audio visual products company in connection with an investigation of accounting irregularities by the Securities and Exchange Commission; negotiated settlement.
- Defended top former officers and directors of public company in multiple federal and state securities class actions and government investigations; obtained dismissals through confidential settlements.
- Prosecuted multimillion-dollar commercial contract dispute on behalf of *Fortune* 500 company; obtained summary judgment, defended appeal, and obtained award of attorneys' fees for client (*Briarwood Shopping Ctr., LLC v. Lowe's Home Ctr., Inc.*, 18 So.3d 1044 (Fla. 2d DCA 2009)).

## Areas of Focus

### Practices

- Litigation and Trials
- Antitrust and Trade Regulation
- Banking, Commercial, and Consumer Finance
- Consumer Finance
- Health Care
- Real Property Litigation
- Telecommunications
- Class Actions

### Industries

- Banking, Commercial, and Consumer Finance
- Health Care
- Telecommunications

## Insights

09.11.2019

New York AG Leads Antitrust Investigation Into Social Media Platform

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05.18.2019

Supreme Court Upholds Ninth Circuit Decision: Antitrust Action Against Apple May Proceed

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03.22.2019

Brokers Beware, Next Antitrust Liability Target: Is Your Brokerage at Risk?

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11.07.2017

Humana Bundles Up; Files Suit to Recover Hundreds of Millions in Risk Corridor Payments From Uncle Sam

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07.08.2014

Mortgage Servicers Face Consumer Lawsuits Under CFPB “Periodic Statement” Final Rule

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12.01.2011

Florida Professional Malpractice Litigation Primer

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12.01.2011

Injunctive Relief Under Section 16 of the Clayton Act

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04.01.2010

Vertical Resale Price Maintenance: Three Years After Leegin

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11.01.2008

Recent Application of the Preemption Provision Under the Securities Litigation Uniform Standards Act

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06.01.2008

Eleventh Circuit Upholds Broad Authority of the District Courts to Grant Equitable Relief for Violations of the Commodity Exchange Act

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06.01.2005

Congress Makes Significant Changes to Rules Governing Class Actions

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07.07.2003

The Growing Exposure of Foreign Companies and Their Directors and Officers to U.S. Securities Laws

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06.10.2002

Joint Regulation of Single Stock Futures: Cause or Result of Regulatory Arbitrage and Interagency Turf Wars

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## Recognition

- AV Rated by Martindale-Hubbell
- Florida Rising Stars, *Super Lawyers Magazine* (2013)
- Third Place Award, Association of Securities and Exchange Commission Alumni National Writing Competition (2001)

## Professional & Community Involvement

- American Bar Association
  - Business Torts Litigation Committee 11th Circuit (2008–present)
  - Editor and Contributor, Civil Practice and Procedure Committee of the Antitrust Law Section (2010–present)
  - Newsletter Editor, Data Privacy and Security Committee of the Antitrust Law Section (2010–present)
- The Florida Bar
  - Speakers Bureau Member

## Credentials

Education

Court Admissions

- Catholic University of America Columbus School of Law (J.D., cum laude, 2003)
- Bucknell University (B.A.)

## Bar Admissions

- District of Columbia
- Florida

- U.S. Supreme Court
- U.S. Court of Appeals, Ninth Circuit
- U.S. Court of Appeals, Eleventh Circuit
- U.S. District Court, Middle District of Florida
- U.S. District Court, Northern District of Florida
- U.S. District Court, Southern District of Florida
- U.S. District Court, Eastern District of Wisconsin
- U.S. District Court, Northern District of Illinois

## Background

- Willkie Farr & Gallagher LLP, Washington, D.C.
- Division of Enforcement, U.S. Securities & Exchange Commission, Washington, D.C.
- Office of General Counsel, U.S. Commodity Futures Trading Commission, Washington, D.C.