



Richard H.C. Clay

Of Counsel
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Dick currently serves as president and C.E.O. of the Filson Historical Society in Louisville. He is of counsel at Dinsmore and has practiced in the areas of business and fiduciary litigation, appellate practice, and administrative law. He has represented corporate clients and individuals in distributorship purchases and disputes, negligent investment/sub-par appreciation claims, trust interpretation issues and disputes, breach of fiduciary duty claims, will contests, board governance issues, regulatory issues and appeals at the state and federal level, federal and state constitutional issues, class actions, defamation actions, business and contract disputes, trademark infringements, business interruption and interference, enforcement of non-competition agreements, lender liability actions, Equal Credit Opportunity Act actions, Fair Credit Reporting Act actions, and civil rights actions.

He has represented a major national church foundation with its own trust company, having served previously on its board and as its interim CEO. He has tried more than 80 jury trials in state and federal court and has argued more than 35 appeals in the United States Court of Appeals for the Sixth Circuit, the Kentucky Supreme Court, and the Kentucky Court of Appeals.

He has also served as Kentucky counsel for major pharmaceutical companies, manufacturers and retailers confronting nation wide claims.

Additionally, Dick has served as the firm's Kentucky ethics partner.

Services

- Litigation
- Education Industry
- Beer, Wine & Spirits Industry

- Antitrust & Trade Regulation
- Appellate
- Class Action
- Government Relations
- Nonprofit Organizations
- ESOPs
- Mass Tort
- Product Liability
- Corporate Taxation
- Tort
- Pharmaceutical & Medical Devices
- Insurance Industry
- Transportation Industry
- Municipal & Government

Education

- University of Kentucky College of Law (J.D., 1977)
 - Kentucky Law Journal, managing editor
- Yale University Divinity School (Rockefeller Brothers Foundation Fellowship, 1974)
- Davidson College (B.A., 1973)
 - Economics

Bar Admissions

- Kentucky

Court Admissions

- Kentucky Supreme Court
- U.S. Court of Appeals for the Sixth Circuit

Affiliations/Memberships

- Kentucky Bar Association
 - President (1999)
 - Board of Governors (1992 - 2000)
 - Annual Convention, chair (1991)
- Sixth Circuit Judicial Conference, life member
- International Society of Barristers, fellow

- Litigation Counsel of America, fellow emeritus
- Kentucky Bar Foundation, fellow
- American Bar Foundation, fellow
- The Speed Art Museum,
 - Board of Trustees (2003 - 2009, 2011 - 2019), chair (2007 - 2009)
 - Trustee emeritus
 - Co-chair of \$60 million capital campaign for the museum's expansion
- The Norton Foundation, Inc., trustee emeritus
- Kentucky Country Day School
 - Trustee (2003 - 2009, 2016 - 2019)
 - Co-chair of \$10.5 million capital campaign for new performing arts center
- Louisville Second Presbyterian Church
 - Elder
 - Chair of \$4 million capital campaign for church expansion and renovation
- Presbyterian Church (U.S.A) Foundation
 - Interim president and CEO (2009)
 - Trustee (1998 - 2004)

Distinctions

- Peer Review Rated AV in *Martindale-Hubbell*
- *Best Lawyers*®
 - "Lawyer of the Year" in Louisville for Litigation - Trusts and Estates (2018)
 - Commercial Litigation, Litigation - Trusts and Estates, Personal Injury and Product Liability Litigation - Defendants
- Kentucky *Super Lawyers*®
 - Kentucky
 - Top 50 lawyers for Kentucky
- *Chambers USA*®: *America's Leading Lawyers for Business*, Litigation: General Commercial
- Davidson College Alumni Service Award
- Kentucky Country Day Distinguished Service Award
- "Top Lawyers" by *Louisville Magazine* (2016)

Experience

Published Cases

United States Court Of Appeals

Worldwide Equipment, Inc. v. United States of America, 605 F.3d 319 (6th Cir. 2010) (We were asked by Mack Trucks, Inc. to file an amicus brief in the Sixth Circuit supporting the position of one of its distributors of heavy trucks specially designed for off-highway use in the coal mining industry The IRS claimed excise taxes of over 1.25 million dollars on the basis that the trucks could sometimes be operated on highways. The United States Court of Appeals for the Sixth Circuit, in a case of first impression, adopted Mack's position that the test for taxability under the Internal Revenue Code's excise tax provisions, 26 U.S.C. 4051(a) and the accompanying regulations, was the primary design of the vehicle—not the primary use. The off-highway exception was applied, and the Court ruled that no excise taxes were owed by Mack's distributor.)

Interactive Digital Software Association v. St. Louis County, Missouri, 329 F.3d 954 (8th Cir. 2003) (amicus brief for Id Software, Inc.) (First Amendment applied to protect video game industry in a claim that video games have the potential to incite violent behavior)

James v. Meow Media, Inc., 300 F.3d 683 (6th Cir. 2002) (*cert. denied*, 2003) (negligence, strict liability, First Amendment applied to protect video game industry in a claim that video games incited violent behavior arising from the Paducah, Kentucky high school shootings) (briefed)

Morales v. American Honda Motor Co., Inc., 151 F.3d 500 (6th Cir. 1998) (Child dart-out case involving product liability claims of improper design and warnings—motor cycle)

Morales v. American Honda Motor Co., Inc., 71 F.3d 531 (6th Cir. 1995) (Child dart-out case involving product liability claims of improper design and warnings—motor cycle)

Barstow v. The Kroger Co., 730 F.2d 1058 (6th Cir. 1984) (negligence—retail store premises liability)

Brewer v. American National Insurance Co., 636 F.2d 150 (1980), retried, then appealed (6th Cir. slip opinion 1981) (defamation-qualified privilege rule applied to discussions about an employee within the corporate chain)

United States District Court

Schurman v. Reed Elsevier, Inc., 2012 W.L. 2522430 (W.D. Ky. 2012) Motion to compel arbitration denied in internet domain dispute).

Sierra v. Morgan Stanley Trust N.A., et al, 784 F. Supp 2d774 (W.D. Ky. 2011) (Attorney not to be paid by Trust during pendency of action where there are allegations of mismanagement against Trustee, but can be awarded at conclusion of case if merited).

Smith v. Wyeth, Inc., 2008 WL 2677051 (W.D. Ky. 2008), 657 F.3d 420 (6th Cir. 2011), *cert. denied*, 132 S.Ct. 2103 (2012) (summary judgment in favor of original manufacturers and distributors of metoclopramide (Reglan) on theory that name brand manufacturer can not be held liable for injuries allegedly caused by generic manufacturers)

Wilson v. Wyeth, Inc., 2008 WL 2677049 (W.D. Ky. 2008), 657 F.3d 420 (6th Cir. 2011), cert. denied, 132 S.Ct. 2103 (2012) (summary judgment in favor of original manufacturers and distributors of metoclopramide (Reglan) on theory that name brand manufacturer can not be held liable for injuries allegedly caused by generic manufacturers)

Morris v. Wyeth, Inc., 2008 WL 2677048 (W.D. Ky. 2008), 657 F.3d 420 (6th Cir. 2011), cert. denied, 132 S.Ct. 2103 (2012) (summary judgment in favor of original manufacturers and distributors of metoclopramide (Reglan) on theory that name brand manufacturer can not be held liable for injuries allegedly caused by generic manufacturers)

Smith v. Wyeth, Inc., 488 F. Supp. 2d 625 (W.D. Ky. 2007), (removal under federal diversity jurisdiction upheld with application of Kentucky Middleman Statute to nondiverse pharmacy defendants)

Kruse v. AFLAC, 458 F. Supp. 2d 375 (E.D. Ky. 2006) (dismissal of case brought by terminated independent contractor and enforcement of contractual arbitration clause)

Isaka Investments, Ltd. v. Xino Corp., 2006 WL 1980172 (W.D. Ky. 2006) (dismissing shareholder's derivative action for lack of personal jurisdiction)

Adams v. Wyeth, 2004 WL 3103778 (E.D. Ky. 2004) (fraudulent joinder of physicians in pharmaceutical litigation)

Burns v. Wyeth, 352 F. Supp. 2d 773 (E.D. Ky. 2004) (finding of fraudulent joinder of pharmaceutical representative in diversity case)

In re Diet Drugs, 352 F.Supp.2d 533 (E.D.Pa. 2004) (product liability)

James v. Meow Media, Inc., et al., 90 F.Supp. 2d 798 (W.D. Ky. 2000) (negligence, strict liability, Motion to dismiss granted and First Amendment applied to protect video game industry in a claim that video games incited violent behavior arising from the Paducah, Kentucky high school shootings)

McAnly v. Hub Frankel Co., et al., 77 F.Supp. 2d 810 (W.D. Ky. 1999), *implicitly overruled in TRW, Inc. v. Andrews*, 534 U.S. 19 (2001) (Fair Credit Reporting Act's Statute of Limitation construed)

Grisham v. Wal-Mart Stores, Inc., 929 F.Supp. 1054 (E.D. Ky. 1996), *aff'd* 89 F.3d 833 (6th Cir. 1996) (negligence/foreseeability of criminal acts theories applied to protect retailer)

Stump v. Wal-Mart Stores, Inc., 946 F.Supp. 492 (E.D. Ky. 1996), *aff'd* 103 F.3d 131 (6th Cir. 1996) (negligence—retail store premises liability)

Kentucky Supreme Court

Fluke Corporation v. Lemaster, 306 S.W.3rd 55 (Ky. 2010) (equitable estoppel held not to bar product manufacturer's statute of limitations defense because of manufacturer's alleged concealment of product defects)

from government regulatory agencies; and discovery rule not extended to cases not involving latent injuries or illnesses, or professional malpractice)

Wood v. Wyeth-Ayerst Laboratories, 82 S.W.3rd 849 (Ky. 2002) (Kentucky Supreme Court unanimously held that medical monitoring class action not a cause of action in Kentucky in absence of demonstrable manifestation of injury)

Wal-Mart Stores, Inc. v. Benjamin L. Dickinson, Judge, Barren Circuit Court, 29 S.W. 3rd 796 (Ky. 2000) (writ of prohibition/attorney client privilege and work product doctrine applied to protect paralegals and to provide limitations on inspections of corporate offices)

Hawkins v. Sunmark Industries, Inc., 727 S.W.2d 397 (Ky. 1986) (*reh. denied* 1987) (negligence/fireman's rule applied to protect property owner)

Reda Pump Company, a division of TRW, Inc. v. Finck, 713 S.W.2d 818 (Ky. 1986) (briefed only) (product liability on behalf of pump manufacturer/negligence of plaintiff as a defense)

Kentucky Court Of Appeals

Bailey v. Endeavor Energy Resources, LP, Case 2012CA001584 (Ky.App.2013), *discretionary review denied* (Ky. 2014) (affirming trial court summary judgment in favor of Endeavor in a claim for environmental destruction, nuisance and fraud).

Conley v. American Motors Corporation, 769 S.W.2d 75 (Ky. App. 1989) (*discretionary review denied*) (product liability on behalf of Jeep CJ-5 manufacturer/plaintiff's negligence as a defense)

Haynes v. Mitch McConnell, personally and in his capacity as County Judge, 642 S.W.2d 902 (Ky. App. 1982) (defamation/expression of opinion applied to protect then-County Judge, now U.S. Senate Majority Leader)

American Interinsurance Exchange v. Norton, 631 S.W.2d 851 (Ky. App. 1982) (insurance coverage issue)

Representation of International Malt Beverage Manufacturer

Representation of client over last 20 plus years on issues pertaining to distributors, distributorship acquisitions, advertising, employment and labor-related issues, antitrust (Kentucky tied house issues), and regulatory issues governed by Kentucky Department of Alcohol Beverage Control

Negligent Investment Claims

Plaintiffs are two purported beneficiaries of an \$80 Million Trust. They assert claims of breach of fiduciary duty against the Trustee, an investment management firm, based on allegedly improper investment management by the Trust's investment manager. The Trustee filed a third-party complaint seeking indemnity and apportionment from our client. Dinsmore has defended the client against the third-party complaint and has asserted all available defenses against the Plaintiffs as well. Dinsmore has taken the lead in deposing the Plaintiffs, one of whom is himself a senior partner in a well established Kentucky law firm. The case has involved substantial expert

discovery from leading regional experts in investment management, on issues such as portfolio diversification, concentration, and capital gains taxes.

Breach of Fiduciary Duties Relating to Life Insurance Policies

We brought this case on behalf of a Trust against a broker and the financial services company employing the broker. Our client claimed that the broker and the company had breached multiple duties in advising the Trust to surrender millions of dollars in life insurance policies. The case took place in FINRA arbitration. After substantial document and witness discovery, including expert witnesses on the duties of broker-dealers, the duties of insurance agents, and handwriting analysis, we were able to obtain a very favorable monetary settlement for our client.

Representation of Major National/Regional Bank

Representation in trust and estate disputes, will contests, beneficiary relationship issues and lender liability issues

Representation of Major National Investment Banks

Representation in fraud claims, FINRA broker/dealer actions and negligent trustee claims

Representation of Denominational Foundation and Trust Company

Representation of 200-year old, \$1.6 billion denominational foundation, with wholly-owned trust company on issues pertaining to structure, governance, trust, endowments, charitable gift annuities, mutual funds, registered investment adviser issues, and employment matters

Natural Gas Exploration

Regional representation of large privately controlled natural gas exploration company in contract, real estate and environmental actions in Kentucky, Ohio, West Virginia and Pennsylvania.

Representation of Supplemental Insurance and Benefits Company

Kentucky representation of major supplemental insurance and benefits company, including regulatory work, arbitrations, advertising issues and defense of lawsuits

Advice regarding Establishment and Operation of Natural Gas utility (Gas/Water/Sewage)

We are currently assisting a large, municipal water and sewage utility in Kentucky with respect to its plans to enter the natural gas business in order to spur economic development in the region. We are advising the client on all aspects on the statutory and regulatory issues implicated by this new venture, as well as the related issues implicated by its status as a municipal instrumentality. In addition to helping the client navigate these issues, we have also been retained to assist with negotiations regarding gas purchase agreements, transmission and distribution issues, eminent domain issues, and all aspects of the project – “from A to Z” - that will help them secure the supply of gas and deliver it to customers.

Representation of Institution of Higher Education

Representation of theological institution and institution's board on major contract, corporate and senior management issues

Pharmaceutical Litigation

Managed statewide defense of original manufacturer's diet drug litigation over a 10-year period, managed ongoing statewide defense of original manufacturer of Fosamax (oral bisphosphonates), and managed ongoing statewide defense of original manufacturer of Reglan (metoclopramide).

Video Games Litigation

Successful defense of creator/manufacturer of video games in which the parents of decedents of a high school shooting claimed that the students were shot by a young man who was addicted to violence by video games and movies.

Representation of Manufacturer of Utility Vehicles

State wide defense over a 12-year period of manufacturer of CJ 5 and CJ 7 Jeep vehicles against allegations of vehicle instability, with directive to dramatically reduce claims

Representation of Manufacturer of ATVs and Motorcycles

State wide defense over a 10-year period of manufacturer of ATVs and motorcycles against allegations of vehicle instability, with directive to dramatically reduce claims

Representation of Large Retailer

Represented client on state-wide basis with directive to dramatically reduce claims. Tried 8 to 10 jury trials a year for 7 year period, with 90% rate of success.

Diet Drug Litigation

This multi-year representation included defense of a proposed statewide class action, and dismissal of a proposed medical monitoring class affirmed by the Kentucky Supreme Court. Significant experience in MDL practice and the interplay between state court cases and MDL cases.

Breach of Fiduciary Duties Relating to Large Revocable Trust

We defended a national financial services firm against allegations of breach of fiduciary duty relating to a large revocable trust that became irrevocable at the grantor's death. Our client served as the corporate trustee for the trust. The co-defendant was an individual co-trustee who had power of attorney for the disabled grantor during her lifetime and was her nephew. The suit was brought by the deceased grantor's daughter and granddaughter, alleging breach of fiduciary duty relating to the grantor's disability and competency to make testamentary dispositions – which were in favor of the nephew and other members of his family. We have taken or attended more than 20 depositions, filed motions to disqualify the plaintiff's experts, and worked with our experts on the grantor's disability and the fiduciary duties of the corporate co-trustee.

Metoclopramide Litigation

Lead Kentucky counsel in metoclopramide litigation from 2006 through present.

Oral Bisphosphonates (Fosamax) Litigation

We are currently serving as lead Kentucky counsel in oral bisphosphonates (Fosamax) litigation, which has arisen from allegations that the product causes osteonecrosis.

Product Liability Litigation

The Kentucky Supreme Court in a unanimous opinion held that the doctrine of equitable estoppel did not bar a product manufacturer's statute of limitations defense because of the manufacturer's alleged concealment of

product defects from governmental regulatory agencies. The Court also held that the discovery rule would not be extended to cases not involving latent injuries or illnesses, or professional malpractice.

Tax Litigation

Amicus representation in United States Court of Appeals for the Sixth Circuit concerning whether the IRS appropriately charged heavy truck excise taxes on heavy-truck chassis, when the vehicles were specially designed for off-highway use, even though they could be operated on highways.

Publications

March 1, 2017

Chapter 13 – Written Discovery of the Kentucky Civil Practice Before Trial Handbooks

UK/CLE

January 1, 2015

A Month in the Life of an Ethics Partner

September 10, 2013

Uncharted Jurisprudential Waters: Attorney-Client Privilege and In-House Communications

June 1, 2013

Provisions of Joint-Defense Agreements Can Have Significant Impact

The Professional Lawyer

October 4, 2012

Provisions of Joint-Defense Agreements Can Have Significant Impact

Bar Briefs, Louisville Bar Association

August 31, 2012

Starting Competing Enterprise While Employed Can Mean Trouble