

## TOP STORY

## Widow Not Required to Indemnify Kids' Wrongful Death Suit

By Grant H. Hackley – July 15, 2021

A widow who agreed to indemnify a defendant for injuries sustained by her then-living husband does not have to cover subsequent wrongful death claims brought by her adult children. A federal court found the wrongful death claims to be legally distinct from her own released claims and applied strict rules of construction to find that the widow had not agreed to indemnify the defendant for subsequent third-party claims. Accordingly, [ABA Litigation Section](#) leaders suggest that litigators carefully review release and indemnification agreements in the context of each case to ensure that their clients' interests are protected.

### Indemnification Provision in Settlement Agreement Narrowly Construed

The conflict in [CertainTeed Corp. v. Mayfield](#) began when Dorothy Mayfield and her husband, CJ, brought claims against CertainTeed, alleging that CertainTeed's asbestos products caused Mr. Mayfield's cancer. As part of the Mayfields' ensuing settlement with CertainTeed, the Mayfields agreed to indemnify CertainTeed "from and against any and all claims, demands, causes of action, lawsuits [including Mr. and Mrs. Mayfield's lawsuit] and/or judgments for contribution or indemnity which are or may be related to, or may result from or arise out of, any injuries or losses sustained by CJ Mayfield or Releasors[.]"

After Mr. Mayfield's death, his adult children sued CertainTeed for wrongful death damages. CertainTeed then brought litigation against Mrs. Mayfield, seeking indemnification against her children's claims on the grounds that those claims related to, resulted from, and arose out of the same injuries that previously had been settled and released. Ms. Mayfield and CertainTeed filed cross motions for summary judgment on the question of whether the indemnification provision in the release signed by the Mayfields covered their adult children's wrongful death action.

The [U.S. District Court for the Eastern District of Louisiana](#) entered summary judgment in favor of Mrs. Mayfield, finding that the couple's claims for Mr. Mayfield's injuries were legally distinct from their children's claims for Mr. Mayfield's wrongful death. Construing the indemnity language narrowly, the court also found that the agreement did not unequivocally reflect an obligation by the Mayfields to indemnify against a third-party's wrongful death claims and

dismissed the case with prejudice. As a result, CertainTeed was left to defend the wrongful death claims brought by the children without indemnity from Mrs. Mayfield.

## Careful Crafting Is Important

Releases and indemnification agreements need to be tailored to the particulars of each individual case, according to Litigation Section leaders. “Our usual practice is to make release and indemnity language as broad as possible,” offers [Tonya G. Newman](#), Chicago, IL, cochair of the Section’s [Product Liability Litigation Committee](#). “A form release might be a starting point, but it is critical to look very closely at the release language, the indemnity provision, and any other provisions that impact each case,” she adds. “Attorneys need to think through whether there are any potential claims that can be asserted by anyone not covered by the language,” notes Newman. “Here, the court took issue with the distinction between a tort-based claim and a claim for wrongful death.” She would have modified the release language to cover any claims brought by third parties and upon other legal bases: “you know that the plaintiff has potential heirs who could assert this wrongful death claim.”

“Ideally, specific language that included the future wrongful death claim would have been included in the Mayfield release,” opines [Michelle Molinaro Burke](#), Morristown, NJ, cochair of the Section’s Product Liability Litigation Committee. “However, we recognize that many jurisdictions, including those with robust toxic tort dockets, do not permit the release of a wrongful death claim on behalf of a third party and that opposing counsel may object to this approach. One solution is to identify the living plaintiff’s *potential* heirs and require the potential heirs to release the wrongful death claim,” suggests Burke. Another approach she advises is to “turn the release into an affidavit, identify survivors, and disclaim the elements of damages in a statutory wrongful death claim.” In the end, the attorney’s job is to “look at the big picture and find a way to deter future claims,” she counsels.

## Protect Your Client

According to Burke, it would have been helpful for the court to have engaged in a deep analysis of the purpose underlying indemnity clauses but notes that this particular set of circumstances “practically speaking, are rare except in the case of latent disease.” Nevertheless, “the purpose of indemnification clauses in releases is to prevent a defendant from paying twice for the same injury. Looking at things from this perspective, it would not have been a stretch for the court to have applied the indemnification language to dispose of the wrongful death claim,” she notes.

Section leaders advise that attorneys should discuss the risk of incomplete indemnification with their client. “Talk the client through the kind of risk that creates,” Newman advises. Noting that there is a dollar value associated with the wrongful death claim in this case, “determine whether the client is willing to live with that residual risk. Usually, clients are willing to pay a little bit more to close the books on it,” concludes Newman.

[Grant H. Hackley](#) is a contributing editor for Litigation News.

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**Hashtags:** #indemnity, #releaseagreement, #settlement, #wrongfuldeath

## Related Resources

- Brendon Ishikawa, [Crafting Effective Settlement Agreements: A Guidebook for Attorneys and Mediators](#) (ABA 2018).
- Mark M. Haddad, [“Five Terms to Consider When Negotiating Settlement Agreements,”](#) *The Woman Advocate* (Apr. 28, 2016).