

NO. 09-0563

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IN THE  
SUPREME COURT OF TEXAS  
AUSTIN, TEXAS

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DR. ARTHUR HADLEY  
Petitioner

V.

WYETH LABORATORIES, INC.  
Respondent

On appeal from the Fourteenth Court of Appeals, Houston, Texas  
On appeal from the 269<sup>th</sup> Judicial District Court, Harris County, Houston, Texas

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DR. ARTHUR HADLEY'S  
REPLY BRIEF ON THE MERITS

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Dr. Arthur Hadley (“Hadley”) respectfully files this Reply Brief on the Merits urging that this Court reverse the Fourteenth Court of Appeals and find that Hadley as a prescribing physician is a statutory seller under Chapter 82 of the Texas Civil Practice and Remedies Code and entitled to indemnification from Wyeth as a result of being sued in a products liability action over the diet drugs Pondimin and Redux.

### **SUMMARY OF THE REPLY**

Hadley contends that he is a statutory “seller” of the diet drugs at issue under the plain language of Chapter 82 of the Texas Civil Practice and Remedies Code.

Wyeth’s entire argument can be distilled down to the following: because the common law of products liability was reluctant to hold physicians liable as product sellers, physicians cannot be statutory sellers for purposes of indemnity under Chapter 82. Wyeth’s premise depends on this Court finding that Chapter 82 is nothing more than a codification of the common law of products liability - an argument that this Court has previously rejected.

The Texas Legislature and this Court have clearly evidenced an intent to broaden the scope of persons entitled to indemnity beyond the narrow class of persons liable under the common law in a products liability action.

Under the common law, a person was a seller of a product if they were engaged in the business of selling such a product. Under Chapter 82, all who are engaged in “otherwise” placing a product into the stream of commerce for any commercial purpose are entitled to

indemnity.

The broader definition of “seller” under the statute is not at odds with the legislative purpose of the statute. Much as an insurer’s duty to defend an insured is broader than its duty to indemnify, so the definition of those persons qualifying for statutory indemnity is broader than those who may be liable in products cases.

The Texas Insurance Code need not conflict with Chapter 74 or Chapter 82 of the Texas Civil Practice and Remedies Code. However, Wyeth’s interpretation of Chapter 82 would result in a conflict between otherwise consistent statutes.

It is entirely proper that Wyeth be required to indemnify a physician like Dr. Hadley who was sued over a defective product through no independent negligence of his own. It would be inconsistent with legislative intent to deny Dr. Hadley indemnity under these facts.

The underlying Lawsuit was, without question, a products liability action. There is no authority that the legislature intended to segregate a single lawsuit into separate actions in order to determine if the indemnity obligations of a manufacturer apply.

## **ARGUMENT AND AUTHORITIES IN REPLY**

### **Wyeth Misstates the “Issue Presented”**

Wyeth begins its Response by mischaracterizing the issue presented to the Court. Wyeth paints the entire underlying action as a medical malpractice lawsuit arising out of substandard medical treatment. Wyeth’s statement could not be further from the truth. At the core of the underlying action is a defective prescription medication that, when taken as

intended, resulted in a range of heart defects. That is a products liability claim under any definition.

Further, Wyeth's restated "issue" conveniently omits the historical underpinning of the nationwide diet drug litigation which gave life to this suit. But for the settlement of the nationwide diet drug litigation, as set forth in Hadley's Brief on the Merits (Hadley Br. at 1-2), this suit would never have been brought.

The underlying suit is not solely a medical malpractice action, but is a products liability action that also included claims of medical negligence against Hadley and other physicians.(Hadley Br. at 21-24). Wyeth's efforts to isolate the claims against Hadley from the whole of the underlying action is not only disingenuous, but is at odds with the statute.

The issue before the Court is whether a physician who issues a prescription for medication is a "seller" for purposes of Chapter 82's indemnification scheme when the physician is sued in a products liability action concerning the prescribed medication.

Wyeth's Response consists of two main points. First, it maintains that doctors are not sellers under the common law, and therefore they cannot be indemnified even under the broader language of Chapter 82. Second, it asserts that the underlying action is not a products liability action, and therefore Chapter 82 does not apply. As set forth in Hadley's Brief on the Merits and this Reply, Wyeth's arguments are not supported by the law.

### **Wyeth's Reliance on the Common Law has Been Rejected by this Court**

This Court has previously addressed, and squarely rejected, Wyeth's argument on the

common law's applicability to the statutory definition of "seller". In *Fitzgerald v. Advanced Spine Sys., Inc.*, 996 S.W.2d 864 (Tex. 1999), the medical device manufacturer argued:

[t]hat the common law did not permit an innocent seller to recover indemnity, that the Legislature sought to codify the common law with only a few explicit changes, and that the definition of "seller" does not explicitly alter the common law.

*Id.* at 867.

The Court expressly rejected the manufacturer's common law argument.

Even if the common law were clear on this issue, the manufacturer's claim that the Legislature intended to adopt the common law is not supported by the statute's legislative history and is contradicted by the statute itself. The Legislature must have been aware it was creating a new duty, not codifying existing law, because the statute says that the duty to indemnify under this section "is in addition to any duty to indemnify established by law, contract, or otherwise." *Thus, the state of the common law sheds little light on what the Legislature intended when it defined "seller" in section 82.001(3), and required manufacturers to indemnify sellers in section 82.002(a).*

Nonetheless, the manufacturer uses its reading of prior case law to speculate on the goals the Legislature intended to accomplish. The manufacturer argues that in light of the common law, the Legislature must have meant to codify some but change other aspects of the common law. It is just as likely that the Legislature's purpose was to pass on the costs of products litigation from an innocent seller to the manufacturer, "without regard to the manner in which the action is concluded." The Legislature's goal in crafting this statute cannot be known except as revealed in its text.

*Id.* at 868 (emphasis added)

Wyeth cites *Owens & Minor, Inc. v. Ansell Healthcare Prods., Inc.*, 251 S.W.3d 481 (Tex. 2008) to support its contention that the Court has not completely rejected the common

law when construing Chapter 82. (Resp. at 25-26). However, *Owens & Minor* did not concern construction of the term “seller” as set forth in the statute.

Moreover, in *Fitzgerald* the Court expressly addressed the definition and application of “seller” under Chapter 82 and has rejected that the common law was codified by the Legislature. As such, the Court has made it clear that the common law has no place in construing the scope of the term “seller” as set forth in Chapter 82.

### **“Seller” and the Legislature’s Broad Reach**

Under the common law a “seller” for strict liability purposes is a person who  
is engaged in the business of *selling such a product*

Section 402A of the Restatement (2d) of Torts. (emphasis added)

Under Chapter 82 a “seller” is a person who

is engaged in the business of *distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof.*

§ 82.001(3) Tex. Civ. Prac. & Rem. Code. App. at 3. (emphasis added)

It is readily apparent that the Legislature did not merely use the same terms or codify the common law of strict products liability when it passed Chapter 82.

*Fitzgerald* further demonstrates the breadth of the term “seller” as well as the Legislature’s intent to liberally protect innocent sellers sued over defective products. However, *Wyeth*, citing the court of appeals, attempts to claw back to protections afforded innocent sellers by limiting the applicability of the provision to only those who are “engaged

in the business’ [sic] of distributing or placing the product in the stream of commerce and the purpose of doing so must be a commercial purpose”. (Wyeth Resp. at 9). Yet the statute is not so limited.

The Legislature specifically broadened the reach of who was a statutory seller by adding the words “otherwise” and “any”, as in “or *otherwise* placing, for *any* commercial purpose”. Section 82.001(3) (emphasis added). These are broad terms expressing a clear intent of casting a wide indemnity net around all persons in the stream of commerce sued over a defective product. There is simply no support for Wyeth’s narrow construction of such a broadly worded statute.<sup>1</sup>

Wyeth further attempts to rewrite the statute by contending that Hadley’s focus on “otherwise placing” is at the exclusion of “these other express eligibility requirements.” (Wyeth Resp. at 10). To a degree, the statute is exclusionary and not every element has to be satisfied. For example, the Legislature uses the disjunctive “or” three times in the definition. Therefore, a person does not have to distribute *and* otherwise place, for any commercial purpose, in the stream of commerce for use *and* consumption a product *and* any component part thereof. It is sufficient that a person distribute *or* otherwise place, for *any* commercial purpose, in the stream of commerce for use *or* consumption a product *or* any component part thereof. More concisely, a person is a statutory seller if he engages in the

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<sup>1</sup> Even the word “use” is broad in its reach, further underscoring that the Legislature intends that “seller” be sufficiently broad to encompass all manner of persons participating in a product’s journey from the manufacturer to the end user.

business of otherwise placing a product, for any commercial purpose, in the stream of commerce for consumption.

Further, the Legislature's use of "*any* commercial purpose" emphasizes the word "any" over the phrase "commercial purpose". Although "commercial purpose" is not defined in the statute, by indicating its intent that "any commercial purpose" is sufficient, the Legislature clearly indicated a desire that whatever connection a person had to a commercial purpose, such would be sufficient.

Narrowing the scope of who is a statutory "seller" is clearly contrary to the legislative intent and this Court's prior construction of the statute. In contrast, construing "seller" to include prescribing physicians is not only consistent with legislative intent and this Court's prior opinions, it also avoids opening the door to fact-based exclusions that will result in increased litigation over whether a person is a statutory seller and frustrate the intent of the Legislature to extend indemnity to innocent persons in the stream of commerce.

**Engaging in the Business of Selling is not the Same as  
Engaging in the Business of Otherwise Placing**

Wyeth's repeated appeals to the common law have no relevance or precedential authority in construing "seller" under Chapter 82 or applying its provisions to physicians who write prescriptions for products that are ultimately found to be defective. *All of Wyeth's cases cited in its support* concern common law liability, not statutory indemnity.

However, in Texas, the common law is now limited to the *liability* of a person in the products context. The Legislature has excluded *indemnity* from the common law arena and

provided a new and distinct statutory framework to govern a manufacturer's indemnity duty.

As admitted by Wyeth, the common law has never universally held that medical providers are exempted from product liability. Instead, prior to the passage of Article 4590i, Texas courts undertook a fact intensive case-by-case approach when confronted with allegations of defective products and medical care. As such, and as set forth in greater detail in its Brief on the Merits, the concept of physician liability was evaluated based on a physician's relationship to the defective product and the medical services rendered by the physician. The critical distinction being, did the physician sell the product (as is required under 402A) or did the physician sell the medical services and the product was ancillary to those services. That analysis is largely superceded by Chapter 74 of the Texas Civil Practice and remedies Code.

However, for indemnity purposes, it does not appear to matter *how* the product reached the consumer, but rather the focus is on the person's *presence* in the stream of commerce. Suffice it to say that the Legislature desired to extend indemnity to any person who played a role, no matter how large or small, in a product reaching the consumer.

The words "otherwise," "any" and "use" are so broad as to defeat Wyeth's attempts to restrict or limit their meaning.

Accordingly, even were the common law's categorization of physicians as being "engaged in the business of providing medical services" carried forward into the statutory framework, for purposes of being a statutory seller, it cannot be reasonably disputed that such

“business” includes otherwise placing prescription medications in the stream of commerce for any commercial purposes for his patient’s use or consumption. This is a marked departure from the common law’s narrow requirement that the physician’s “business” be “selling such a product.”

### **Indemnity Broader Than Liability**

Wyeth cannot grasp the concept that the statutory duty to indemnify a physician can be broader in scope than any duty to the plaintiff under the common law of products liability. Despite the clear and obvious differences in the language used by 402A and Chapter 82, Wyeth argues that a seller is a seller whether it is under the common law or Chapter 82..

Much as an insurer’s duty to defend an insured is broader than its duty to indemnify that same insured with respect to the same claim, so is a manufacturer’s duty to indemnify a person as a seller broader than the same person’s potential exposure as a seller under liability law. *See Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 491 (Tex. 2008).

Wyeth argues that Hadley seeks to expand the scope of physician liability in Texas. Hadley proposes nothing of the sort. Rather, Hadley merely, and candidly, notes the limits of Texas jurisprudence as it has worked to resolve the issue of physician liability in Texas. Further, Hadley does not advocate for the expansion of liability for physicians and there is no risk that any such expansion could occur by including physicians in the class of statutory sellers entitled to indemnity.

This Court does not need to address physician liability in Texas when it considers

Chapter 82. By expanding Chapter 82's indemnity scheme to innocent physicians, the Court does not alter or impact the common law of products liability concerning medical providers. Chapter 82 (and the Insurance Code) govern physician indemnity. Chapter 74 governs physician liability. To the extent a products case involving a physician arises in which Chapter 74 does not apply, the common law, which admittedly remains unresolved, would govern. By construing Chapter 82 to apply to Texas physicians, the Court does not alter or otherwise change the landscape concerning physician liability in Texas over a defective product.<sup>2</sup>

In summary, the Legislature created a broad duty of indemnity in Texas. That duty encompasses a larger class of persons than those who may be exposed to products liability under the common law.

#### **Insurance Code Consistent with Civil Practice and Remedies Code**

The 2003 Legislature's amendment of the Insurance Code<sup>3</sup> to clarify that physicians are "vendors" under an insurance policy vendor's endorsement is consistent with including physicians as "sellers" for statutory indemnity purposes. Wyeth argues that the Insurance Code and Chapter 82 are not compatible and that it would take a new act of the Legislature

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<sup>2</sup> Hadley's citation of the development of physician liability in products in Missouri is not an endorsement of Missouri law or an implicit advocacy of expanding tort liability in Texas. Instead, had Wyeth read Hadley's Brief it would have noted that Missouri, unlike Texas, statutorily foreclosed the possibility of medical provider liability under 402A. Until the Texas Legislature or this Court expressly mandates otherwise, the issue has not been resolved in Texas jurisprudence.

<sup>3</sup>Tex. Ins. Code § 1902.002.

to bring physicians within the provisions of Chapter 82. Wyeth essentially is inviting this Court to create a conflict where none exists.

Wyeth's position might have merit if the Legislature specifically excluded physicians from Chapter 82's protections or if Chapter 82 was a mere codification of the common law. But this is not the case. Instead, the Legislature created a new duty, expanded on the prior obligation of indemnification, and sought to include all non-negligent sellers in its indemnity scheme.

This Court can read the clear provisions of Chapter 82 to conclude that physicians are "sellers" for purposes of statutory indemnity just as they are "vendors" for purposes of insurance indemnity. Wyeth would have this Court create conflicting and contradicting scenarios involving physicians and indemnity in products cases.

For example, physicians sued in a products case would be considered sellers of allegedly defective products in the regular course of their business for purposes of indemnification under a vendor's endorsement. However, if the manufacturer carried no such insurance, the same physician would not be a seller for purposes of statutory indemnity. Not only would this create numerous unnecessary issues for physicians<sup>4</sup> but it is inconsistent with the language of Chapter 82, Texas caselaw interpreting Chapter 82, and the Legislative

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<sup>4</sup> For example manufacturers whose products are prescribed or used by physicians may stop carrying vendor's insurance because, under Wyeth's reading of the Code, they would not then be liable to indemnify the physicians in any products case, thus thwarting Legislative intent.

intent behind the enactment of Chapter 82.

This Court should decline Wyeth's invitation to create a conflict between two statutes. Instead the better, more consistent approach is to read both Chapter 82 and the Insurance Code as providing indemnification to physicians sued in a products liability action, regardless of whether insurance is obtained or not.

**Hadley's Involvement in The Diet Drug Litigation is the Very Definition of Unfair**

Wyeth raises a "fairness" issue in a further attempt to narrow legislative intent and exclude physicians such as Hadley. Wyeth admits that the legislative intent was to remedy the fundamental unfairness inherent in a strict liability scheme that holds an innocent seller liable for defective products. (Wyeth Resp. At 331-32). However, the statute does not require that a person be found liable - or even be potentially liable - for a defective product before indemnification is extended to that person.

Further, there is no risk that classifying physicians as statutory sellers would expose them to liability under the common law. Any such suggestion by Wyeth is a disservice to the Court's grasp of the issue, the implications of any opinion it renders, and the Court's appreciation for its importance in Texas jurisprudence.

**Any Commercial Purpose is Sufficient**

As acknowledged by Wyeth, the term "any commercial purpose" is not defined in the statute. Further, this Court has not opined on its meaning. However, the issue is not material to this matter.

First, Wyeth has never argued that “commercial purpose” was an issue at any time in this case. Second, as noted herein, the Legislature’s use of the phrase as qualified by the word “any” indicates a liberal and expansive application such that the emphasis is on finding that any commercial purposes is sufficient for purposes of the statute. That is, commercial purposes is not intended to limit the scope of the statute but to expand its scope to virtually any business enterprise or purpose.

Wyeth implies that a medical purpose is not a commercial purpose and that Hadley did not make a profit off prescribing the diet drugs. There is no authority to support Wyeth’s contention. The practice of medicine may be a calling, but it is also a commercial endeavor, and the prescribing of medication is an integral part of that endeavor. Indeed, prescription drugs can only enter the stream of commerce and reach the ultimate user through the actions of a prescribing physician such as Hadley. Further, there is no requirement under Chapter 82 that a seller make a profit off of the particular transaction at issue in order to qualify as “any commercial purpose”.

Hadley’s prescribing of the diet drugs to Plaintiff was an arms length, legal, business transaction between a physician and his patient. Clearly there is a commercial purposes in that transaction, and any commercial purposes is sufficient under the statute.

### **Wyeth’s No Evidence Motion Cannot Be Basis of Trial Court’s Actions**

Both parties moved for summary judgment on the same issue - whether Hadley was a seller under Chapter 82. Wyeth also filed a no evidence summary judgment on the grounds

that Hadley was not a seller under Chapter 82. CR vol. III at 1051. Hadley responded to both motions with evidence and authorities in support CR vol. III at 698, 1097 (Hadley incorporated by reference his Motion for Partial Summary Judgment and exhibits in his Response).

A no-evidence motion must state the elements as to which there is no evidence and must be specific in challenging the evidentiary support for a claim or defense; rule 166a(i) does not authorize conclusory motions or general no-evidence challenges to an opponent's case. Tex.R.Civ.P.166a(i) & cmt. A no-evidence challenge that only generally challenges the sufficiency of the nonmovant's case and fails to state specific elements is fundamentally defective and insufficient to support summary judgment as a matter of law. *Mott v. Red's Safe & Lock Servs., Inc.*, 249 S.W.3d 90, 98 (Tex.App.--Houston[1st Dist.] 2007, no pet.).

Wyeth's motion, which was not styled as a "No Evidence Motion for Summary Judgment", broadly and in a conclusory manner alleged that there was no evidence that Hadley was a "seller" under Chapter 82. Wyeth also alleged that Hadley had no evidence that he supplied Plaintiff with any diet drugs at all. On one hand, Wyeth's no evidence motion for summary judgment was impermissibly vague and did not satisfy the requirements of Texas law for no evidence motions as Wyeth failed to specify the specific elements at issue in its motion. *Callaghan Ranch, Ltd. v. Killam*, 53 S.W.3d 1, 3 (Tex.App.--San Antonio 2000, pet. denied).

On the other, as it concerned evidence of prescribing the diet drugs, the deposition

transcript of Plaintiff made it clear that Hadley, a physician, prescribed the diet drug medication to Plaintiff, and was sued for that act.

Further, at issue in Wyeth's "No Evidence Motion for Summary Judgment" was a purely legal issue: are physicians sellers under Chapter 82? At least one court of appeals has found that purely legal issues cannot be the subject of a no evidence summary judgment. *Harrill v. A.J.'s Wrecker Serv.*, 27 S.W.3d 191, 154 (Tex.App.--Dallas 2000, pet. dismissed w.o.j.).

Accordingly, Wyeth's no evidence motion for summary judgment was improper and, to the extent the trial court granted Wyeth's no evidence motion, such should be reversed by this court.

### **The Underlying Products Liability Action**

"Products liability action" means any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product *whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories.*

§ 82.001(2) Tex. Civ. Prac. & Rem. Code (emphasis added)

Wyeth argues that the underlying matter was not a products liability action against Hadley because the plaintiff did not allege any products liability claims against Hadley, although Wyeth admits the plaintiff alleged products liability claims against it.

First, Wyeth fails to completely and accurately recite the facts in its statement of facts.

In particular, Wyeth omits certain of the Plaintiff's product's liability allegations concerning Hadley. Plaintiff alleged that Hadley

- \* failed to adequately and properly warn the Plaintiff(s) about the possible side effects and dangers associated with taking the drugs in questions...;
- \* failed to adequately and properly warn Plaintiff(s) about the possible side effect and dangers associated with taking the drugs in question:
- \* failed to inform Plaintiff(s) that the prescribing information advised that the long term effects of Pondimin and Redux on the morbidity and mortality associated with obesity had not been established; and
- \* failed to inform Plaintiff(s) that any weight loss from the drug products was likely to be temporary ; and Plaintiff(s) would likely regain weight lost as a result of the drug (if any) when he/she stopped using the drug.

Wyeth Resp. App at 45 (¶ 62, 63a-c).

Obviously, the reason Wyeth chose to omit these allegations from its Response is because these allegations are classic products liability allegations which are in fact made against Hadley. Plaintiff made similar failure to warn allegations against Wyeth in her petition. *Id.* at 36 (¶40g-i). Wyeth's statement of facts is directly contradicted by the facts in the record.

Second, Wyeth contends Hadley is somehow estopped from contending that the underlying lawsuit was a products liability and that he is a statutory seller because Hadley

prevailed on a summary judgment against Plaintiff based on the Texas statute of limitations.<sup>5</sup> (Wyeth Resp. at 40-42). Wyeth's argument further evidences the risks to medical providers associated with finding that physicians are not statutory sellers.

As referenced in Hadley's Brief, Chapter 74 (formerly known as Article 4590i) of the Texas Civil Practice and Remedies Code ("MLIIA") provides certain protections for Texas medical providers regardless of the causes of actions pled against providers. One such protection is, of course, a very narrow two year statute of limitation. As set forth in his summary judgment, Hadley availed himself of the limitations provisions of Article 4590i.

If, as Wyeth contends, a plaintiff must make specific product liability allegations against the manufacturer *and* seller, medical providers sued over defective products would be placed in between the proverbial rock and a hard spot: either choose the protections of the MLIIA and forego statutory indemnification or give up the protections of the MLIIA in order to benefit from the indemnification scheme of Chapter 82.

It is untenable that innocent medical providers sued over defective medical products should be placed in the position of having to choose which statutory protections to claim when neither provision operates to the exclusion of the other.

There is simply no support for Wyeth's contention that a products liability action

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<sup>5</sup> Hadley has searched in vain to find anything in his Summary Judgment wherein he states that "all of Emig's claims against Hadley are garden-variety malpractice claims." Wyeth's citation for this statement is, in fact, devoid of any such statement. Once again, Wyeth cannot address the facts without distorting or mischaracterizing them.

brought against a manufacturer does not similarly implicate other named parties, regardless of the additional claims or causes of action also alleged against the other parties. Such is clearly within the expressed intent of the Legislature and the plain language of Chapter 82. *See Meritor Automotive, Inc. V. Ruan Leasing Co.*, 44 S.W.3d 86, 88-91 (Tex. 2001).

Plaintiff alleged that Wyeth manufactured defective drugs that injured her and that she received the drugs after Hadley prescribed the drugs to her during an office visit. Plaintiff testified that she sued Hadley only because he prescribed Wyeth's defective product and *claimed no grounds for independent negligence on Hadley's part.* (Hadley Br. at p. 4-6). Such allegations and evidence are sufficient to implicate the provisions of Chapter 82 concerning Wyeth's indemnity obligations to Hadley.

### **CONCLUSION**

There is no logical reason or justifiable basis to exclude medical providers from receiving manufacturer's indemnity under the plain language of Chapter 82. The common law is not instructive or binding on the determination of whether a physician is entitled to statutory indemnity because Chapter 82 represents a new, distinct duty. The allegations against the statutory seller are irrelevant to determining whether the suit is a products liability action. Finally, failure to afford statutory indemnity to physicians subordinates the rights of medical providers to the business judgment of manufacturers and the decision to procure insurance.

Accordingly, the court of appeals improperly narrowed the scope of Chapter 82 to

exclude prescribing physicians sued as the result of a defective product.

**PRAYER**

For the reasons stated herein and in his Brief on the Merits, Dr. Arthur Hadley respectfully requests that this Court grant his Petition for Review and, upon further consideration, find that physicians in general, and Hadley in particular, are sellers as a matter of law under Chapter 82 of the Texas Civil Practice and Remedies Code. Petitioner respectfully requests that this Court reverse the Fourteenth Court of Appeals and remand this matter to the trial court for a determination of the amount of Wyeth's indemnity obligations to Hadley, and for such other and further relief to which he may be entitled.

DATED: March 3, 2010

Respectfully submitted,

**GAUNTT, EARL & BINNEY, L.L.P.**

By  \_\_\_\_\_

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## CERTIFICATE OF SERVICE

Pursuant to Rule 9.5 of the Texas Rules of Appellate Procedure, I hereby certify that on the 3<sup>rd</sup> day of March, 2010, a true and correct copy of the foregoing document was served on the following attorney for Respondent, by certified mail, return receipt requested.

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