NO. 09-0563

IN THE

SUPREME COURT OF TEXAS

AUSTIN, TEXAS

DR. ARTHUR HADLEY

Petitioner

V.

WYETH LABORATORIES, INC.

Respondent

On appeal from the Fourteenth Court of Appeals, Houston, Texas

On appeal from the 269th Judicial District Court, Harris County, Houston, Texas

PETITIONER'S MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

COMES NOW, DR. ARTHUR HADLEY, ("Petitioner"), and files this, his Motion for Rehearing of Petitioner's Petition for Review and in support thereof would respectfully show unto the Court the following:

Reasons to Reconsider

The question presented in this case is whether physicians are entitled to statutory indemnification for their legal expenses and other costs incurred as a result of being sued in products liability lawsuits concerning defective prescription medication. This Court has never decided this issue. The Fourteenth Court of Appeals incorrectly held physicians are not entitled to statutory indemnification in such cases. Unless corrected by this Court, the opinion below will lead to higher medical malpractice insurance premiums. This result will thwart the legislature's policy choice to foster lower premiums for physicians. Second, this Court must correct this misstatement of law or it will condone a state of confusion in Texas law.

Insurance Premiums to Increase

A primary objective of the legislature's medical malpractice reform package of several years ago will be frustrated if the Court of Appeals' decision is allowed to stand. In particular, the legislature sought to lower the cost of healthcare liability insurance in adopting the reform package. If medical liability insurance companies are prohibited from shifting defense and indemnity costs to the manufacturer - as the legislature surely intended in enacting Chapter 82 – insurance premiums will surely rise.

Second, it is very likely that medical manufacturers will cease to carry vendor's insurance endorsements since those endorsements, under the Insurance Code, statutorily apply to medical providers. Currently, medical manufacturers may voluntarily choose to indemnify physicians sued in products cases due to the previously unsettled state of Texas law as to whether physicians are entitled to statutory indemnity. Indeed, Hadley himself was indemnified in the first wave of diet drug litigation by Wyeth. Such indemnity was provided by Wyeth gratuitously and at Wyeth's sole discretion. However, in this case and in other cases, Wyeth arbitrarily refused to indemnify Dr. Hadley for reasons that are not clear.

Unless reversed by this Court, there is little doubt that cost conscious medical manufacturers will cease to provide gratuitous indemnity for medical providers since there will be no legal obligation to do so. As a result, the costs and expenses of defending physicians will pass directly to the physician's insurance carriers. Without the ability to recoup these expenses from the manufacturers, the increased costs will pass to medical providers in the form of higher insurance premiums. Texas physicians will no doubt see their insurance premiums increase as the number of manufacturers providing gratuitous indemnity dries up. The increases have the potential to undo the benefits of recent medical malpractice reforms on physicians' insurance premiums. Whatever savings medical providers have enjoyed in insurance premiums as a result of medical malpractice reform are in danger of being eroded or lost by the elimination of manufacturer provided indemnification.

Expressed Legislative Intent at Risk of Frustration

As noted in Petitioner's Brief on the Merits, the Texas Legislature has mandated that medical providers are vendors or sellers for purposes of coverage under a vendor's endorsement of a manufacturer's general liability or product's liability insurance policy. Tex. Ins. Code § 1902.002. However, the Fourteenth Court of Appeals held that medical providers are not "sellers" under Civil Practice & Remedies Code § 82.001. This directly contradicts and offends the legislature's intent regarding Chapter 82 and further, adds confusion to the state of Texas law. The legislature intended that the two legislative provisions would have the same effect---coverage and indemnification for physicians and lower insurance costs for them as a result.

This Court Should Rehear and Provide Clarity to the Issues Raised

Significant consequences will flow from the establishment of new law by the Fourteenth Court of Appeals on this matter. However, such pronouncements should be made by *this* Court after careful consideration of the facts, law and policy issues raised by Dr. Hadley's question herein. Even if the Court is inclined to affirm the Court of Appeals on this issue, this Court could address the policy concerns raised by the issue and clarify the confusion between the Insurance Code and the Civil Practice and Remedies Code created by the 14th Court of Appeals.

PRAYER

For these reasons, Petitioner respectfully request that the Court grant Petitioner's Motion for Rehearing and grant Petitioner's Petition for Review and for such other and

further relief to which he may be entitled.

Respectfully submitted,

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By: ______________________________

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CERTIFICATE OF CONFERENCE

As required by Texas Rule of Appellate Procedure 10.1(a)(5), I certify that I have conferred, or made a reasonable attempt to confer, with the other parties - which are listed below - about the merits of this motion with the following results:

Leslie A. Benitez
Counsel for Respondent

X	opposes motion
______	does not oppose motion
_____	agrees with motion
_____	would not say whether motion is opposed
_____	did not return my message regarding the motion

David P. Andis

CERTIFICATE OF SERVICE

As required by Texas Rule of Appellate Procedure 6.3 and 9.5(b), (d), and (e), I certify that I have served this document on all other parties which are listed below on this the 18th day of August, 2010 as follows.

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