IN THE

SUPREME COURT OF TEXAS

No. 02-0982

MARIA MILLAN, INDIVIDUALLY AND AS TRUSTEE FOR JAMES E. MILLAN

Petitioner

v.

DEAN WITTER REYNOLDS, INC.

Respondent

BRIEF *AMICUS CURIAE* FOR THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. (NASAA)

ON ITS OWN BEHALF IN SUPPORT OF THE PETITION FOR REVIEW AND REHEARING

NO FEE HAS BEEN PAID OR WILL BE PAID TO NASAA FOR PREPARATION OF THIS BRIEF

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STATEMENT OF THE CASE

The Petitioner sued her son, stockbroker Miguel Millan, for conversion, fraud, breach of fiduciary duty, unauthorized transactions, negligence, and gross negligence based on the son's theft of funds from her accounts. Respondent Dean Witter Reynolds, Inc. ("Dean Witter"), the brokerage firm that employed the son, was joined as defendant. After Trial Court and Appellate Decisions, the Court of Appeals of Texas, San Antonio, granted Respondent's motion for rehearing *en banc*, withdrew its earlier decision, and issued a revised opinion and judgment. *Millan v. Dean Witter Reynolds, Inc.,* 90 S.W. 3d 760 (Tex.App.-San Antonio 2002).

On the issue of concern to the *amicus curiae* – whether the Respondent should be held vicariously liable under respondeat superior for the theft by its employee – the Court of Appeals looked to whether the employee's actions "fall within the scope of the employee's general authority, are in furtherance of the employer's business, and are for the accomplishment of the object for which the employee was hired." 90 S.W.3d at 767-8 (citations omitted). The Court found that "there was no evidence that Miguel acted within the scope of his authority as a broker at Dean Witter" and ruled there was therefore no evidence to support the submission of the issue of Respondent's vicarious liability for the fraud to the jury. 90 S.W. 3d at 768.

Petitioner is seeking this Court's review.

ISSUES PRESENTED

Whether a stock brokerage firm should be liable for the fraud of an employee against a client, where those acts were foreseeable and were preventable had the firm adhered to applicable legal standards of supervision.

Whether the Court erred in denying the plaintiff an opportunity to demonstrate to a jury that the broker's fraud was within the scope of his employment by showing that the fraud was foreseeable in view of prevention requirements under Texas and federal law.

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The North American Securities Administrators Association, Inc. ("NASAA") is the oldest international organization devoted to the protection of investors in securities. It is a voluntary association organized in 1919 that now has a membership comprised of 66 state, provincial, and territorial securities regulators, including all 50 states and the District of Columbia. State securities regulators are responsible for ensuring that securities are offered and sold only in accordance with state securities laws and regulations, which have been adopted in some form in every state to protect investors from fraud and abuse. NASAA seeks to enhance investor protection, increase uniformity in the interpretation of securities laws, and preserve the stability of capital markets. The Court of Appeals decision would negatively impact the achievement of each of these missions.

I. Protecting Investors

NASAA has an interest in protecting investors in Texas by assuring that brokerage firms are held properly accountable to their customers. In recent years, there have been well-publicized abuses of brokerage firm clients by "rogue" stockbrokers. As a consequence, thousands of investors have lost money. Because such fraudulent actions are clearly foreseeable, preventative measures should be and have been put into effect. Under Federal law and the Texas Securities Act, TEX. REV. CIV. STAT. ANN. art. 581-1 *et seq*. (Vernon 1964 and Supp. 2003) ("Act" or "Texas Act"), brokerage firms must implement specific measures designed to control their employees and prevent just the type of misconduct that occurred in this case. The existence of such requirements is evidence that both regulators and firms regard such employee misconduct as foreseeable and preventable.

The Court of Appeals ruling, if it stands, raises serious questions as to the incentive brokerage firms in Texas will have to implement and enforce supervisory safeguards. The Court should grant the Petitioner's request for review to assure public investors in Texas that brokerage firms must safeguard against such customer abuse or be held liable themselves for frauds of their agents.

II. Promoting Uniformity

Granting the Petition for Review would allow the Court the opportunity to reconsider a decision that separates Texas from other states in a uniform system of regulation. Brokerage firms are widely held to be responsible for foreseeable

frauds of their employees. The Court of Appeals decision places Texas out of step with the law as it is commonly understood at both the state and federal levels.

Uniformity is important for another reason. It helps ensure that the citizens of a particular state are not prime targets for financial fraud. If it is held that brokerage firms in Texas are not responsible for their employees' frauds, then Texas citizens may be victimized to a greater degree than in other states whose courts enforce higher standards of conduct. The Court should not allow a gap to develop in Texas protections.

III. Preserving Stable Capital Markets

North America in general, and the United States in particular, have the most efficient and stable capital markets in the world. Companies have ready access to these markets to obtain the financing necessary to start or expand their operations. One of the reasons for this is the acceptance by the general public of the integrity and stability of the marketplace.

The number of individuals investing in stocks has grown steadily over the past 50 years, with the result that the breadth of securities ownership is the greatest ever.[1] This breadth has meant a higher percentage of inexperienced, unsophisticated and less knowledgeable investors have entered the market.[2] U.S. citizens are comfortable investing in part because of the safeguards that exist. While they may be subject to the volatility of the market, they rightly expect that

[1] *See* U.S. Congress, Joint Economic Committee, *The Roots of Broadened Stock Ownership*, Apr. 2002, http://www.house.gov/jec/tax/stock/stock.htm.

[2] *See generally* James A. Fanto, *We're all Capitalists Now: The Importance, Nature, Provision and Regulation of Investor Protection*, 49 CASE L. REV. 105 (1998).

they will not be defrauded by the regulated enterprises to which they have entrusted their funds, or if they are, there will be adequate legal recourse.

Even "a few unscrupulous brokers can cause serious financial harm to investors and have the potential to damage public confidence in the securities industry."[3] The Court of Appeals decision stands for the premise that the brokerage firms, which investors expect to act in their best interests, are neither responsible for, nor obligated to protect them from, the intentional fraud of the firms' own employees. NASAA's interest in supporting review of this decision is to correct this error and maintain investor confidence in the marketplace.

STATEMENT OF FACTS

As detailed in the Court of Appeals opinion, Miguel Millan, a stockbroker employed by Respondent Dean Witter, systematically looted brokerage accounts opened by his client and mother, Petitioner Maria Millan, of $287,000. Miguel Millan effectuated this fraud by opening an additional account in his mother's name and by forging her signature. The forged account had check-writing and credit card privileges. He covered his tracks by opening a post office box in her name to which actual Dean Witter statements were sent. His mother received false account statements that he created. The firm failed to observe a number of policies and procedures addressing many specific acts Millan committed to

[3] U.S. General Accounting Office, *Securities Markets: Actions Needed to Better Protect Investors Against Unscrupulous Brokers*, No. GAO/GCD-34-208, Sept. 14, 1994.

implement his fraudulent scheme. Had the firm abided by those policies, the fraud likely would have been uncovered and thwarted.

SUMMARY OF THE ARGUMENT

A brokerage firm should be liable pursuant to respondeat superior for the foreseeable frauds of an employee under its direct control.

Texas and federal law mandate that brokerage firms must adequately supervise the activities of their employees and implement procedures designed to protect clients from fraud committed by those employees. The existence of these mandates is evidence that fraudulent conduct of an employee is foreseeable and preventable. In determining a firm's vicarious liability for fraud by one of its employees, a jury should be able to consider evidence of whether the firm's failure to follow these mandates contributed to a client's loss.

ARGUMENT

I. A Brokerage Firm Should be Liable Pursuant to Respondeat Superior for the Foreseeable Frauds of an Employee Under its Direct Control

Restatement (Second) of Agency, § 219, expresses the principle of respondeat superior as follows: "A master is subject to liability for the torts of his servants while acting in the scope of their employment." *Restatement (Second) of Agency* § 219 (1965). It is a "judicially created vehicle" for enforcing remedies for wrongs committed. Justified on public policy grounds, it represents "a deliberate allocation of risk." *Dutcher v. Owens*, 647 S.W.2d 948, 950-51 (Tex.

1983). Making employers vicariously liable for acts of their agents or employees in the scope of their employment is "well established." *See Meyer v. Holley*, 123 S. Ct. 824, 829 (2003), citing *Burlington Industries, Inc v. Ellerth*, 524 U.S. 742, 756 (1998), *New Orleans, M., & C.R. Co. v. Hanning*, 15 Wall. 649, 657, 21 L.Ed. 220 (1873), and *Rosenthal & Co. v. Commodity Futures Trading Comm'n*, 802 F2d 963, 967 (7th Cir. 1986). Respondeat superior also is accepted law in Texas. *See Millan v. Dean Witter Reynolds, Inc.*, 90 S.W.3d 760, 767-68 (Tex. App.-San Antonio 2001), citations omitted.

Professionals (or those engaged in a skilled trade) are duty-bound to exercise a professional standard of care – meaning they must observe industry standards. *Restatement (Second) of Torts* § 299A (1965). Setting industry standards has enormous consequences under state law principles. Thus, special duties have been found for real estate professionals (*Menzel v. Morse*, 362 N.W. 2d 465 (Iowa 1985)), nurses (*Avey v. St. Francis Hosp. & Sch. of Nursing, Inc.*, 442 P. 2d 1013 (Kan. 1968)), and hospital administrators (*Darling v. Charleston Cmty. Me. Hosp.*, 211 N.E. 2d 253 (Ill. 1965)). Courts have imposed these higher standards upon professionals specifically "because the higher standards of care imposed on them by their profession and by … licensing requirements engenders trust in them by clients that is not the norm of the marketplace." *Hosp. Computer Sys., Inc. v. State Island Hosp*. 788 F. Supp. 1351, 1361 (N.D. N.J. 1992).

Similarly, a brokerage firm's duty to supervise is greater than that of other businesses because it holds customer funds and because it bears an affirmative

duty of self-regulation. *Zweig v. Hearst Corporation*, 521 F.2d 1129, 1135 (9th Cir. 1975), *cert. denied*, 423 U.S. 1025 (1975). While the volume of litigation of investors' claims against brokerage firms is limited because of the near universality of arbitration agreements, courts – including the Fifth Circuit - have recognized a cause of action for the negligent failure to supervise, and have held brokerage firms liable for the acts of their registered representatives under respondeat superior. *Lewis v. Walston & Co., Inc.*, 487 F.2d 617 (5th Cir. 1973); *see also* other circuits cited in *Rolf v. Blyth Eastman Dillon & Co., Inc.*, 424 F. Supp. 1021, 1036 (S.D.N.Y. 1977).

Citing *Baptist Mem'l Hosp. Sys. v. Sampson*, 969 S.W.2d 945 (Tex. 1998) and other cases, the Court of Appeals focused on whether Miguel Millan acted within the general scope of his authority as a broker at Dean Witter. Without citing any authority, the Court held that he did not. *Millan, supra*, at 768. As the dissent points out, however, there is a strong public policy rationale for holding a brokerage firm liable for the fraudulent acts of its representatives. *Id.* at 769, citing *Paul F. Newton & Co. v. Tex. Commerce Bank*, 630 F. 2d 111, 118-19 (5th Cir. 1980).

The Respondent's brief asserts that the Court's opinion in *Minyard Food Stores, Inc. v. Goodman*, 80 S.W. 3d 573 (Tex. 2002) supports its position. That is not the case. A grocery store manager's defamation of a co-worker deviates from his grocery duties. In the present case, not only does a broker owe a higher duty to a client that a grocer to a co-worker, but Miguel Millan's acts unquestionably go

to the heart of his duties as a stockbroker. Among his actions in advancing the fraud were opening an account, depositing funds, establishing check-writing and credit card privileges, changing a client's address, and sending statements. *Millan*, 90 S.W.3d 763, 765-6.

In addition, Dean Witter presumably benefited from fees generated by Miguel's actions "in furtherance of the employer's business, and for the accomplishment of the objective for which the employee was employed." *Minyard, supra*, 80 S.W.3d at 579. At a minimum, the jury should have been given an opportunity to consider evidence to this effect.

The Court of Appeals also did not consider another critical factor cited in *Baptist Mem'l Hosp. Sys. v. Sampson*, *supra.* "The most frequently proffered justification for imposing [vicarious] liability is that the principal or employer has the right to control the means and methods of the agent or employee's work." 969 S.W.2d at 947. Similarly, though in a contractual employment situation:

> [T]here are a number of factors affecting whether and when vicarious liability is appropriate. Paramount among those factors, however, is whether the person being held responsible can be said to have had a right to control the activities of the wrongdoer. This is best illustrated by the imposition of vicarious liability in the context of the employer-employee or master-servant context.

St. Joseph Hospital v. Wolff, 93 S.W. 3d 513, 541 (Tex. 2002); s*ee also Newspapers, Inc. v. Love*, 380 S.W.2d 582, 589 (Tex. 1964). In *Soranno v. New York Life Ins. Co.*, while the court held that liability is foreclosed if the controlling person acted in good faith and did not directly or indirectly induce acts

constituting a violation, it was noted that a lack of supervision over the employee, while his actions were providing income to the defendant, could be viewed by a jury as recklessness. 2000 WL 748142 (N.D. Ill. 2000).

II. Federal and Texas Law Directly Impose a Control Requirement on Brokerage Firms in the Form of a Duty to Supervise Employees

After the 1929 market crash, among Congress's objectives in passing the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78a *et seq*., and creating the Securities and Exchange Commission ("SEC"), was "to insure honest securities markets and thereby promote investor confidence." *United States v. O'Hagan*, 521 U.S. 642, 648 (1997); s*ee also SEC v. Zandford*, 535 U.S. 813, 816 (2002); *United States v. Naftalin*, 441 U.S. 768, 775 (1979).

Section 15(b)(4)(E) of the Exchange Act authorizes the SEC to impose sanctions on a broker-dealer or any of its associated persons if the entity or person has "failed reasonably to supervise, with a view to preventing violations of [certain provisions of the securities laws] another person who commits such a violation." 15 U.S.C. § 78o(b)(4)(E). The rule also offers a safe harbor if there is proven to exist "established procedures, a system for applying such procedures, which would reasonably be expected to prevent and detect" violations. The firm or supervisor also must have "reasonably discharged the duties and obligations" imposed by the procedures. 15 U.S.C. § 78o(b)(4)(E)(i) and (ii).

The stock exchanges and the National Association of Securities Dealers are self-regulatory organizations ("SROs") granted authority under federal law. They too impose a duty to reasonably supervise employees on all member firms.[4]

State securities laws parallel, but predate federal securities laws. State regulators share jurisdiction over brokerage firms with their federal and SRO counterparts. As under federal law, Texas has imposed supervision requirements on brokerage firms in the form of a duty to supervise. State Securities Board (the "Board") Rules require that: "Each dealer shall establish and maintain a system to supervise the activities of its agents that is reasonably designed to achieve compliance with the Texas Securities Act and Board rules." State Sec. Bd., 7 TEX. ADMIN CODE § 115.10(a). Written procedures must be maintained, transactions and correspondence reviewed, and internal inspections conducted. *Id.* at 115.10(b)-(d).

A brokerage firm's "duty to supervise" is a key element of the coordinated system of securities regulation. State and federal rules anticipate that each of the 8,000-plus firms (with 90,000+ branch offices) will develop and implement its own system of supervision based on the nature of a firm's business.[5] Specifically,

[4] Section 6 of the Exchange Act (15 U.S.C. §78f) subjects the efforts of exchanges such as the New York Stock Exchange ("NYSE") in governing their members to the regulatory framework of the Exchange Act. The Exchange Act also provides for the creation of associations of members to assume a regulatory role like that of the exchanges. 15 U.S.C. § 78o-3. The NASD is the only association that has registered with the SEC. The SEC also reviews SRO disciplinary proceedings and approves SRO rules. § 19 of the Exchange Act, 15 U.S.C. § 78s.

[5] S*ee* Testimony of Lori Richards, Director of SEC's Office of Compliance, Inspections and Examinations, Before the Subcommittee on Oversight and Investigations, Financial Services Committee, U.S. House of Representatives, regarding *Issues Raised by the Frank D. Gruttadauria Matter*, May 23, 2002, available at http://www.sec.gov/news/testimony/052302tslar.htm.

a brokerage firm's supervisory structure, policies, and procedures must meet the requirements of SRO rules governing supervision.[6] Texas has long incorporated violations of NASD rules as violations of its own rules. *In the Matter of Stephen Hugh Gunnels*, Order No. LR 866, 1990 WL 118305 (Tex. St Sec. Bd.).

These rules generally require that brokerage firms establish, maintain, and enforce written procedures to supervise the activities of the firm and its registered personnel, and to prevent violations of various securities laws and rules. Broker-dealers are required to designate qualified personnel, including registered principals, to carry out the firm's supervisory obligations, to have adequate controls in place to identify sales practice abuses, and to conduct a review of firm activities on a periodic basis through the internal inspection of its various office locations. Senior management must ensure that adequate procedures are in place, that sufficient resources be devoted to implementation of supervision rules, and that supervisory responsibilities be reassessed in light of changes in a firm's business operations.[7]

Common procedures firms must have in place to help them prevent and detect theft by brokers are as follows:

- *Verify changes of address with the customer;*
- *Review changes of address and changes to customer account information;*
- *Give special attention to P.O. boxes and addresses other-than-home addresses;*

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[6] *See* NASD Rule 3010 and NYSE Rule 342. The NASD provided an explanation of Rule 3010 and guidelines on the basic elements of supervisory procedures in Notice to Members 99-45. *NASD Notice to Members 99-45*, 1999 WL 33176539 (National/Federal), June 1999.

[7] Testimony of Lori Richards, *supra* n. 5.

- *Confirm customer authorization to transfer funds;*
- *Review for unusual activity;*
- *Investigate unusual activity;*
- *Conduct independent supervision and review of activity by producing managers;*
- *Exercise control over account statements, letterhead and mail facilities;*
- *Provide customers with account information on-line;*
- *Supervise employees' use of personal electronic devices;*
- *Routinely review compliance with policies and procedures.*[8]

The SEC has been particularly active in taking action against brokerage firms where they have failed to carry out their duties of supervision under 15 U.S.C. § 78o(b)(6). For example, in *In re Paine Webber, Inc.*, Exchange Act Release No. 34-31889 (Feb. 1993), the firm was found to have violated antifraud and proper supervision requirements relating to salesmen trading index options in customer accounts.

In a case involving the Respondent, the SEC stated:

> There must be adequate follow-up and review when a firm's own procedures detect irregularities or unusual trading activity in a branch office … . A firm must have adequate procedures to assure that trading restrictions issued by its Compliance Department are not ignored by the branch managers or other personnel.

In re Dean Witter Reynolds, Inc., Exchange Act Rel. No. 34-26144 (Sept. 1988).

The Texas State Securities Board also has taken enforcement action when controls have failed. For example, in 1996 the Board announced a settlement in principle with PaineWebber, Incorporated resulting from misconduct of its sales force in the State. The action centered on the failure of PaineWebber to supervise

[8] Testimony of Lori Richards, *supra* n. 5.

the fraudulent sales practices in the sale of limited partnership investments in oil and gas interests, equipment, and real estate. Commissioner Denise Voigt Crawford stated in connection with the settlement:

> This is a very serious matter… . PaineWebber failed to perform its duty to supervise the conduct of its sales force. Today, the firm is paying the price for its inattention.

State Securities Board, *Texas Settles with PaineWebber Investors' Claims Fund Created*, (Press Release, Jan. 18, 1996), 1996 WL 21159 (Tex. St. Sec. Bd.).[9] Although these are regulatory enforcement actions, they establish a standard of foreseeability that can be applied to a common law case.[10]

III. The Appellate Court Erred in Sustaining the No Evidence Ruling of Fraud Against Dean Witter

The Court of Appeals affirmed the Trial Court's directed verdict finding no evidence of fraud against Dean Witter because it found "no evidence that Miguel acted within the scope of his authority as a broker at Dean Witter." The majority stated that "Miguel greatly exceeded the scope of his authority when, through a litany of deceitful acts, he stole money from his mother." *Millan*, *supra*, 90 S.W.3d at 768 (emphasis added). The U.S. Supreme Court has recently expressly ruled that theft of funds by a broker from a client constitutes fraud "in connection

[9] More recent State Securities Board supervision cases include: *In the Matter of Lawrence Cheung,* Docket No. 00-022 (2000 WL 428092); *In the Matter of Williams Financial Group*; Docket No. 00-03` (2000 WL 1920814); *In the Manner of First Financial Planners, Inc.*, Docket No. 00-008 (2000 WL 359639); *In the Matter of Travis Nick Duren*, Docket No. 01-31 (2001 WL 1589636); *In the Matter of Daniel Regan Anderson*, Docket No. 01-01 (2001 WL 120530); *In the Matter of Wunderlich Securities*, Docket No. 02-26 (2002 WL 31050751).

[10] While present here, a failure to supervise need not be present in every instance in order to establish respondeat superior liability.

with" the purchase or sale of securities under section 10(b) of the Exchange Act, 15 U.S.C. 78j(b). *SEC v. Zandford*, 535 U.S. 813 (2002). Similarly:

> The registered representative of a broker dealer occupies a unique position in the scheme of securities regulation. Since he as broker is the person who actually trades securities for the investing public, his very employment is "in connection with the purchase and sale of securities." (Rule 10b-5). Indeed, a broker … conducts himself and carries out his daily routine through the instrumentalities of the national security exchanges and the over-the-counter market.

Rolf v. Blyth Eastman, supra, 424 F.Supp. 1021 at 1036. What could be more in the general scope of employment of a stockbroker than the business of purchasing and selling securities?

The Court of Appeals also cited evidence of Dean Witter's violations of its own supervisory procedures in: (1) failing to review employee-related accounts on a monthly basis; (2) failing to verify signatures when accounts were opened; (3) failing to verify with the customer the check payable to "cash" in the amount of $35,000; (4) failing to investigate concerns expressed by the cashier who received the $35,000 check; and (5) failing to verify the change-of address information. The Plaintiff's expert also testified that Dean Witter was negligent in supervising Miguel and that the firm did not follow internal or customary procedures regulating employee-related accounts. 90 S.W.3d at 763, 765. Dean Witter has, and is required to have, procedures of this sort precisely because they recognize that there is a danger that their employees will commit fraud in the course of their employment and an even greater danger when the account is "related" to the employee.

In addition to the failure to follow this litany of written supervisory duties implemented specifically to prevent this type of fraud by an agent, the alleged statement by a co-worker that Miguel Millan had other problems indicates that he may have been a "problem rep" or a "rogue broker." 90 S.W.3d at 766. If this is true, it would create additional compliance obligations for the firm, including establishing heightened supervision procedures, because the probability of his violating the law was more apparent. It is precisely the dereliction of the supervisory duties imposed by federal and state laws that allowed the fraud to proceed in this case. The very existence of these supervisory requirements reflects an understanding that an agent acting in the scope of his authority may commit fraud against his customers.

Article I, § 15 of the Texas Constitution provides: "The right of trial by jury shall remain inviolate." TEX. CONST. ART. I, § 15. This extends to civil proceedings. "Of this right [our people] should not be lightly deprived, but only where the case is clearly one for the court." *Young v. Blain*, 245 S.W. 65 (Tex. Comm'n. App. 1922).

A trial court may decline to submit a relevant issue to the jury only if there is no evidence to support it. *Kindred v. Con/Chem, Inc.*, 650 S.W. 2d 61, 63 (Tex. 1983). The court reviews the evidence, keeping in mind it is the jury's role, not the court's, to judge the credibility of the evidence, to assign the weight to be given to testimony, and to resolve inconsistencies within or conflicts among the witnesses' testimony. *Cain v. Bain,* 709 S.W.2d 175, 176 (Tex. 1986). When

reviewing a "no evidence" point of error, the court must view the evidence in a light that tends to support the finding of the disputed fact and disregard all evidence and inferences to the contrary. *Bradford v. Vento*, 48 S.W.3d 749, 754 (Tex. 2001). A no-evidence issue will be sustained when the record discloses that: (1) there is a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence conclusively establishes the opposite of the vital fact. *Merrell Dow Pharms. v. Havner*, 951 S.W.2d 706, 711 (Tex. 1997). If there is more than a scintilla of evidence to support the finding, the no-evidence challenge fails. *Stafford v. Stafford*, 726 S.W.2d 14, 16 (Tex. 1987). In this case, there was far more than a scintilla of evidence that the acts were within the scope of Miguel Millan's duties.

The law unquestionably imposes a duty of supervision on Respondent Dean Witter. Supervisory procedures are instituted specifically to control against the foreseeable circumstance that an unsupervised stockbroker might succumb to the temptation to defraud his clients. The fact that Dean Witter had supervisory procedures in place which, if followed, would have detected and prevented the fraud is evidence that Dean Witter knew, and had in fact foreseen, that a broker might in the course of conducting business on the firm's behalf commit fraud against a customer. This foreseeability is at the heart of the doctrine of respondeat

superior. Evidence of Dean Witter's disregard of its statutorily prescribed obligations should have been presented to the jury.

To hold as a matter of law that a brokerage firm is not responsible to clients for the fraudulent actions of its stockbrokers would create an incentive for other firms not to supervise, thereby creating great peril for the investing public and a unique predicament in the securities regulatory scheme in Texas.

This Court should instead look to the well-reasoned dissenting opinion and the case law cited therein and determine that the trial court abused it's discretion in refusing to submit to the jury the factual issue as to whether Dean Witter should be held liable for Miguel Millan's fraud. Miguel Millan's acts were within the course and scope of a stockbroker's duties; it was the lack of supervision by the entity purportedly in control that allowed him to abuse the trust placed in him by his clients. To hold that defrauding investors is not foreseeable totally disregards the great body of rules, regulations and decisions that require brokerage firms to develop and follow their own customized, reasonable supervisory procedures. Why, save to control their stockbrokers' baser instincts, do these rules exist?

CONCLUSION

The regulatory framework established by the federal securities laws and the Texas Securities Act establishes a duty on the part of brokerage firms to adequately supervise their employees. Dean Witter recognizes this responsibility and, in fact, had procedures in place that would have detected the fraud. This

constitutes a recognition on their part than an agent, while acting within the scope of his general authority, may, of his own accord, commit fraud against a client. The Court of Appeal's ruling, if allowed to stand, would provide a disincentive for firms to follow their own, very important supervisory procedures in the prevention of fraud against the investing public. Granting review will allow the Court to determine the extent to which this analysis should be applied to the Respondent's conduct and promote investor protection, uniformity of regulation, and stability of capital markets.

PRAYER

For the reasons expressed above, the *amicus curiae* prays that the Court grant the Petition for Review.

Respectfully submitted,

/S/

Royce O. Griffin
Counsel for the Amicus Curiae

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon the following attorneys of record for all parties to the above cause by next-day commercial delivery service, in accordance with the applicable Rules of Procedure, on this the 4th day of April, 2003:

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