No. 02-0982

In the Supreme Court of Texas

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

v.

DEAN WITTER REYNOLDS, INC.,
Respondent.

On Petition for Review from the Fourth Court of Appeals Sitting En Banc
Cause No. 04-00-00608-CV, 90 S.W.3d 760

Amicus Curiae Brief of Public Investors Arbitration Bar Association ("PIABA") In Support of Petition For Review

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Interest and Identity of *Amicus Curiae*

Public Investors Arbitration Bar Association, Inc., ("PIABA") is a non-profit corporation with it principal place of business located at 2241 W. Lindsey Street, Suite 500, Norman, Oklahoma 73069. It was established in 1990 and its members are licensed attorneys who regularly represent investors in securities arbitration matters. As of March 18, 2003 PIABA had 591 attorney members. The purposes and objectives of PIABA set forth in the Articles of Incorporation are to assist in protecting the rights of the investing public.

PIABA is governed by a Board of Directors elected by the membership. The current Officers and Directors of PIABA are:

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No fee will be paid in connection with the preparation and filing of this Amicus Curiae brief.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CITATIONS

RULES AND NOTICES

Statement of Issues Presented

Whether Miguel was within the course and scope of his employment as a broker when he stole money out of his mother's account and intercepted money sent for deposit.

Summary of Argument

The Court of Appeal ignored established precedent in refusing to submit the question of whether Miguel was acting within the scope and course of his employment as a broker for Dean Witter to the jury. The decision poses a great harm to investors if not corrected.

Argument

I. The Decision of the San Antonio Court of Appeals Involves Questions of Great Importance

By holding that there was no evidence that Miguel acted within the scope of his authority as a broker, and that consequently Dean Witter is not liable under *Respondeat Superior* for the loss, the Court of Appeals has placed investors at risk. Texans have more brokerage accounts then ever before.

In recent years the line between banks and brokerage firms has become blurred. Brokerage firms offer accounts with check writing privileges and charge cards. Banks offer depositors an array of investments, including, stocks, bonds and mutual funds.

The Court of Appeals decision also threatens a more broader harm by significantly narrowing the range of conduct that falls of a broker that within the scope of employment. The only reason that Miguel was able to steal the money was because his mother opened an account at Dean Witter for which he was the broker. Miguel stole money intended for deposit into a customer's account and manipulated Dean Witter's system in order to divert money out of her account. It is hard to see how

Miguel's actions could be any more closely related to the scope of his general authority as a broker, did anything other then further the employer's business, and accomplish the object for which he was hired. Yet the Court of Appeals, without explanation concludes that none of these acts were within Miguel's scope of authority. If the ***Millan*** decision is allowed to stand as written, then what the dissent forecasts will come true; an employer can escape liability by claiming ignorance of the employee's actions, and asserting that the employee was only authorized to perform lawful acts.

Finally, the decision will undermine efforts to hold brokerage firms responsible for rogue brokers before arbitration panels. Arbitration panels frequently consult state and federal decisions for guidance in deciding cases. Rules adopted by the National Association of Securities Dealers impose a duty on securities brokers to supervise their employees.[1] This duty will ring hollow if brokerage firms can escape liability for broker misconduct in cases such as this.

II. The Court Of Appeals Decision Ignores Established Precedent

In Texas, an employer is generally vicariously liable for its employee's torts, even though the employee's tort is intentional, when the act, although not specifically authorized by the employer, is closely connected with the servants' authorized duties. ***GTE Southwest Incorporated v. Bruce***, 998 S.W.2d 605,617 (Tex. 1999). An employer may be liable for exemplary damages for actions of its management-level employees even when performing a non-management task. ***Ramos v. Frito-Lay, Inc.,*** 784 S.W. 2d 667 (Tex. 1990). See also ***Royal Globe Insurance Company, v. Bar Consultants, Inc.,*** 577 S.W. 2d 688, 694 (Tex. 1979) ("Though it may be harsh to hold a principal liable for the deceptive acts of his agents where he does not authorize or have knowledge that they

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[1] NASD Conduct Rule 3010 requires that members establish a supervisory system and develop and maintain written supervisory procedures. *See* NASD Notice to Members 99-45 Guidance on Supervisory Responsibilities.

occurred, such result is clearly called for by the legislature's enactment of the DTPA."); citing ***Woods v. Littleton,*** 554 S.W. 2d 662, 669-71 (Tex. 1977).

It is up to the trier of fact to determine whether the employee ceased to act as an employee and acted instead upon his own responsibility. ***Durand v. Moore,*** 879 S.W. 2d 196, 199 (Tex. App.–Houston [14th Dist.] 1994, no writ) (citing ***Houston Transit Co. v. Felder,*** 146 Tex. 428, 208 S.W.2d 880,882 (1948)). The test is whether the employees actions were a misuse of his authority as an employee or were utterly unrelated to his duties. ***Ana, Inc. v. Lowry,*** 31 S.W.3d 765, 770 (Tex. App.–Houston[1st Dist.] 2000, no pet.). It is not a defense to liability to claim that an agent was authorized only to do those acts that would be lawful. ***Arterbury v. Am. Bank & Trust Co.,*** 553 S.W.2d 943, 949 (Tex. Civ. App.–Texarkana 1977, no writ).

A brokerage firm has a higher duty to its customer then it would have to a member of the general public. The relationship between a brokerage firm and that of its customer is that of principal and agent. ***Rauscher Pierce Refsnes, Inc., v. Great Southwest Savings, F.A.,*** 923 S.W. 2d 112, 115 (Ct. App.- Houston [14th] 1996); citing ***Magnum Corp. v. Lehman Brothers Kuhn Loeb, Inc.,*** 794 F.2d 198, 200 (5th Cir. 1986).

As a result, a broker owes the same duty to its customer that a agent owes to his principal. A broker is a special agent and has the same duty toward his employer as a special agent has to his principal. ***Barnsdall Oil Co. v. Willis,*** 152 F.2d 824, 828 (5th Cir. 1946), motion for reh'g overruled, 153 F.2d 784. Under the common law of most jurisdictions including Texas, agency is also a special relationship that gives rise to a fiduciary duty. ***Johnson v. Brewer & Pritchard,*** P.C. 73 S.W.3d 193,200 (Tex. 2002).

Miguel was hired by Dean Witter as a broker. Brokers generally assist persons with managing and investing money. They open accounts, provide investment advice, purchase and sell securities, assist in taking money into the account and withdrawing money from the account. Many brokerage accounts today are indistinguishable from bank accounts. They offer check writing privileges and charge cards.

The Rules of Fair Practice adopted by the National Association of Securities Dealers require brokers to "know the customer." Regulatory rules require brokers to use reasonable efforts to obtain information concerning a customer's financial and tax status, investment objectives and such other information used or considered in making recommendations to their customers. A broker may only recommend investments that he believes to be suitable under the circumstances.[2] This puts brokers in a unique position of knowledge with respect to their customers' financial affairs. It also makes it much easier to swindle someone out of their hard earned money.

There are numerous acts by Miguel, described in the Court of Appeal's decision, that if properly done would fall within his scope of his employment, such as depositing his mother's checks, opening an account, reviewing and sending her monthly account statements. The other acts of Miguel discussed by the Court of Appeals such as stealing checks on the account from his mother's bathroom drawer were closely related to his scope of employment and appear to be possible only by the fact that Miguel convinced her to open an account at Dean Witter in the first place. In short, there was sufficient evidence to warrant submitting the matter to a jury.

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[2] NASD Rule 2310(a) states that " In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holding and as to his financial situation and needs."

Conclusion

The Court of Appeals decision ignores prior case law and imperils the interests of investors. The Court of Appeals holds that as a matter of law, Miguel's actions are beyond the scope of his general brokerage duties and that there is no evidence to support submission of the issue of vicarious liability to the jury. It is not a defense to liability to claim that an agent is only authorized to perform acts that would be lawful. The Court of Appeal's decision should be reversed to help protect investors in similar cases. For the reasons stated, this Court should grant the petition.

Respectfully submitted,

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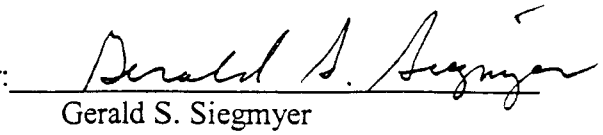
By: 
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been forwarded to the following counsel of record via U.S. Certified Mail, Return Receipt Requested, on this the 26th day of March, 2003.

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