15 speaking

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 72,361

E. F. HUTTON & COMPANY, INC.,

Defendant-Appellant,

v.

CHRIST M. ROUSSEFF,

Plaintiff-Appellee.

CERTIFICATION FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE, STATE OF FLORIDA, EX REL. GERALD LEWIS, COMPTROLLER OF FLORIDA.

FLORIDA DEPARTMENT OF BANKING
AND FINANCE

CHARLES L. STUTTS, General Counsel
R. MICHAEL UNDERWOOD, Deputy
General Counsel
Office of the Comptroller
The Capitol, Legal Section
Tallahassee, FL 32399-0350
(904) 488-9896

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution

STATEMENT OF THE CASE

The following question was certified to this Court by the Eleventh Circuit United States Court of Appeals in Rousseff v. E. F. Hutton Co., 843 F.2d 1324 (11th Cir. 1988):

> In an action under the Florida Securities and Investor Protection Act, Fla. Stat. §§ 517.301, 517.211, is the claimant required to prove that his loss was proximately caused by the defendant's fraud?

SUMMARY OF ARGUMENT

Speaking with authority derived from his role as the principal regulator of Florida's securities industry, the Florida Comptroller adopts the argument of the Appellee Rousseff that Florida law does not require a defrauded investor to prove that the defendant broker's fraud caused the investor's loss in order to rescind the purchase of securities fraudulently sold. To hold otherwise would offend legislative policy (indicated by enactments in 1984, 1986, and 1988) to remove technical defenses in actions for securities fraud and to enforce strict standards of conduct for securities dealers.

ARGUMENT AND CITATIONS OF AUTHORITY

THE QUESTION CERTIFIED TO THIS COURT SHOULD BE ANSWERED IN THE NEGATIVE IN ORDER NOT TO FRUSTRATE THE STATE'S POLICY OF STRICT ENFORCEMENT OF ITS LAWS AGAINST SECURITIES AND INVESTMENT FRAUD.

By the terms of Section 20.12(1), Florida Statutes, the Comptroller of Florida is head of the Florida Department of Banking and Finance ("the Department") and in his capacity is directed by the Legislature to administer and enforce the Florida Securities and Investor Protection Act, Chapter 517, Florida Statutes. The Comptroller is, therefore, the ranking state officer required to implement state policy on both the regulation of securities transactions and the standards of conduct for registrants with the Department, like the Appellant, E. F. Hutton & Company, Inc. This brief is submitted on behalf of the State of Florida to assist the Court to discern these policies.

The facts of this case, stated by the Eleventh Circuit U.S. Court of Appeals in Rousseff v. E. F. Hutton Co, 843 F.2d 1326 (11th Cir. 1988), reveal serious misconduct by E. F. Hutton in its failure to disclose information in its possession that was clearly material to its customer's evaluation of the venture Hutton was trying to sell. Presumably, this information was not disclosed for fear that the investor might choose not to make the two million dollar investment that Hutton obtained if all the facts

were known. For the private remedies provided by state and federal securities statutes to have any deterrent effect against this type of conduct, the defrauded investor should recover in this case. Since federal law is evidently inadequate to provide such deterrence, it is important that this Court assure the availability of Florida law to plaintiffs in this circumstance. To hold otherwise would create a new defense for persons charged with defrauding investors. This would certainly disrupt private civil actions and may harm regulatory enforcement actions and criminal prosecutions as well. Creation of the defense advocated by E. F. Hutton in this case is contrary to legislative intent in enactment of Florida's investor protection laws and inconsistent with sound public policy.

The Department is confident that this Court will recognize the legal argument of the Appellee Rousseff as wholly superior to that advanced by E. F. Hutton on the issues in this case. Rather than restate Rousseff's able presentation, the Department's argument asks the Court to consider the history of Chapter 517 as a further demonstration that E. F. Hutton's position in this case is untenable. In this regard, the Court's attention is called to the Committee Substitute for Senate Bill 618 which was passed in the just-concluded session of the Florida Legislature and appears as Appendix I to this brief. CS/SB 618

was presented to Governor Martinez on June 16, 1988, and by its terms is effective upon becoming law. Under the construction of Article III, Section 8(a) of the Florida Constitution by this Court in Florida Society of Ophthalmology v. Florida Optometric Association, 489 So.2d 1118 (Fla. 1986), CS/SB 618 has become law as of July 1, 1988, the service date of this brief. Section 3 of the bill is an explicit statement of legislative intent provided to guide the Courts in construction of Chapter 517, Florida Statutes. It is relevant to this case in at least three respects. First, it restates the often-recognized purpose of Chapter 517 as the protection of investors in "securities offerings and other investment transactions." See, e.g., Nichols v. Yandre, 151 Fla. 87, 9 So.2d 157 (1942); McElfresh v. State, 151 Fla. 140, 9 So.2d 277 (1942); State by Knott v. Minge, 119 Fla. 515, 160 So. 670 (1935); Rudd v. State, 386 So.2d 1216 (Fla. 5th DCA 1980); O'Neill v. State, 366 So.2d 699 (Fla. 4th DCA 1976); Edwards v. Trulis, 212 So.2d 893 (Fla. 1st DCA 1968) and Leithauser v. Harrison, 168 So.2d 95 (Fla. 2nd DCA 1964). Second, the bill contains explicit direction to the Courts that the provisions of Chapter 517 are to be construed to require full and fair disclosure of all matters material to an investor's evaluation of a securities offer-ing or other investment transaction. Finally, the bill directs

construction of Chapter 517 "to impose the standards provided by law on all those seeking to participate in the state's securities industry through registration as securities dealers, investment advisors, or their associated persons."

To appreciate these explicit statements of legislative intent, it is necessary to review some recent revisions of Florida's securities laws that reveal the state's policy. In response to a series of massive investment frauds in Florida in the early 1980's, the Florida Comptroller appointed, in June of 1985, the "Comptroller's Task Force on Securities Regulation." Headed by former Florida Governor Reubin Askew, this panel of industry leaders, law enforcement officials and citizens heard testimony throughout the state from victims of fraud and from experts on securities regulation. In its Report of March 17, 1986, attached as Appendix II, the Task Force concluded that Florida's large elderly population, its proximity to off-shore banks, and the mobility of its population combined to make the state particularly vulnerable to investment fraud. To combat this problem, the Task Force recommended (1) strict enforcement of the Anti-fraud provisions of Chapter 517; (2) improved standards for participants in the state's securities industry and (3) greater public awareness of the danger of investment fraud.

The Task Force made 48 specific recommendations including numerous statutory revisions. These recommendations were adopted by the Legislature as the Securities Industry Standards Act of 1986, Chapter 86-85, Laws of Florida (1986). While that Act did not revise the private right-of-action provisions of Section 517.211, it did revise Section 517.301 and the penalties for its violation in a manner completely inconsistent with the interpretation of that section urged in this case by E. F. Hutton.

Virtually all of the Task Force's recommendations in this area were adopted by the Legislature, making the Task Force Report a strong indication of legislative policy. These recommendations included increasing the criminal penalties for violations of Section 517.301, authorizing administrative fines, and creation of an anti-fraud trust fund to facilitate prosecution of this offense. Perhaps most important for the Court's guidance in this case, the Task Force recommended at Page 27 of its Report that Section 517.301 be revised "to establish a well-defined framework for enforcement of the anti-fraud provisions of Chapter 517" by broadening the definition of "investment." As explained on Pages 70 and 83-84 of the Report, the expansion of Section 517.301 to prohibit fraud in connection with "investments" in addition to "securities" was made by the Legislature in 1984 to remove the technical

defense that a particular investment scheme, though clearly fraudulent, did not involve the sale of a "security." See, e.g., Yeomans v. State, 452 So.2d 1011 (Fla. 3rd DCA 1984). Revisions of Section 517.301 in 1984 and again in 1986 to remove defenses in actions for violation of that section suggest that creation of the defense urged by E. F. Hutton would frustrate rather than effectuate legislative intent.

It is submitted that the policies of the State of Florida with regard to enforcement of its anti-fraud statutes and standards of conduct to be imposed on securities dealers are clear. In light of the state's vulnerability to securities fraud and its enunciated desire to impose strict standards of conduct on its securities industry, Florida law should never interpreted to allow securities dealers to escape the consequences of their failure to disclose material information to investors. It should not trouble the Court that a different rule may apply under federal law. As shown by the "Historical Overview of Securities Regulation in Florida" on Page 67 of the Task Force Report, Florida's regulation of securities offerings dates back to 1913, twenty years before enactment of federal legislation. Congress specifically did not preempt existing state law, providing instead for concurrent regulation of securities transactions under state and federal law. 15 U.S.C. § 77r and 15 U.S.C. § 78bb. This

regulatory framework clearly allows a state to impose stricter regulation than that provided by federal law if the state's policies so require. The example discussed by the Task Force is the "merit review" standard imposed by state and not federal law on the registration of securities offerings. This case merely provides another example. The danger of jury confusion, as with the other policy considerations raised in E. F. Hutton's brief, is simply insufficient justification for departure from the current and active state policy discouraging fraud in securities transactions.

CONCLUSION

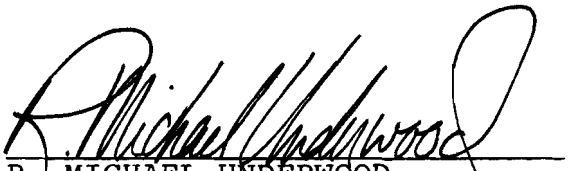
The State of Florida, through its senior official charged to regulate securities transactions in the state, commends to this Honorable Court the argument advanced by the Appellee Rousseff as reflecting the correct application of Florida law to the question certified to this Court by the federal judiciary. It is the State's conclusion, therefore, that Florida law does not require a defrauded plaintiff to prove that securities sold in violation of the anti-fraud provisions of Chapter 517, Florida Statutes, declined in value as a proximate result of the seller's misconduct in order to rescind purchase of the securities.

The Court is strongly urged to answer the certified question in the negative.

Respectfully submitted,

FLORIDA DEPARTMENT OF BANKING AND FINANCE

CHARLES L. STUTTS
General Counsel



R. MICHAEL UNDERWOOD
Deputy General Counsel
Office of the Comptroller
The Capitol, Legal Section
Tallahassee, FL 32399-0350
(904) 488-9896

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of this Brief were provided by U. S. Mail to Jo Lanier Meeks, Kutak, Rock & Campbell, 4400 Georgia-Pacific Center, 133 Peachtree Street, N.E., Atlanta, GA 30303, C. Timothy Corcoran, III, Carlton, Fields, Ward, Emmanuel, Smith & Culter, P.A., One Harbor Place, Tampa, FL 33601, and Martin T. Fletcher, Sr., Rothberg, Gallmeyer, Fruechtenicht & Logan, P. O. Box 11647, Fort Wayne, Indiana 46859-1647, this 1st day of July, 1988.

FLORIDA DEPARTMENT OF BANKING
AND FINANCE

CHARLES L. STUTTS
General Counsel

R. MICHAEL UNDERWOOD
Deputy General Counsel