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NOTES

A SECOND LOOK AT CLEARING FIRM LIABILITY*

INTRODUCTION

Within the securities industry, the notion of clearing firm liability is an anathema. Nevertheless, "[t]he role of [a] clearing broker [ ] is about to change[!]") In March 1998,

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1 Serving a vital role within the securities industry, clearing firms provide necessary services and capital typically needed by small brokerage houses to complete a securities transaction. "Clearing" involves delivering securities to the purchasing broker-dealer and making money payments to the seller broker-dealer. Clearing services include: maintaining the books and records of customer accounts, sending confirmations and monthly statements to customers, and clearing and executing trades. NORMAN S. POSER, BROKER-DEALER LAW & REGULATION § 2.04[B] (3d ed. 2000); see infra Part II discussing the role and responsibilities of clearing firms.

2 Some commentators have suggested that claims against clearing firms typically arise as a result of unsuccessful claims against introducing firms. Usually, suits against introducing firms are unsuccessful because the introducing firm is insolvent or investor funds have already been absconded, thereby affording no adequate remedy for the investor. In those circumstances where the introducing firm cannot provide an adequate remedy, the clearing firm is an investor's only avenue for vindicating his or her claims. Ultimately, the financial burden will fall on either the investor or clearing firm. As a practical matter, the introducing firm is often out of the picture. See Comment, The "Know Your Customer" Rule of the NYSE: Liability of Broker-Dealers Under the UCC and Federal Securities Laws, 2 DUKE L.J. 489, 493-94 (1973) [hereinafter "Know Your Customer"]; Thus, "[b]ecause clearing firms are relatively well capitalized, they become 'deep [] pocket' litigation targets " Henry F. Minnerop, The Role and Regulation of Clearing Brokers, 48 BUS. LAW. 841 (1993).

former Chairman of the Securities and Exchange Commission ("SEC") Arthur Levitt forewarned that future SEC proposals may require clearing firms to oversee the activities of the introducing firm with whom they contract and even terminate those relationships where the introducing firm is engaging in fraudulent practices.\footnote{Paul Beckett, \textit{Levitt Wants SEC & Justice Agency to Work Together Against Bad Brokers}, \textit{WALL ST. J.}, Mar. 27, 1998, at A3.} Then, in 1999, the New York Stock Exchange ("NYSE") and National Association of Securities Dealers ("NASD") amended their rules requiring clearing firms to more closely monitor the acts of introducing firms with whom they contract. As a result, clearing firms may no longer maintain "complete immunity from liability"\footnote{POSER, \textit{supra} note 1, at § 2.04[B].} for investor losses.

Until recently, the regulation of clearing firms by the SEC, NYSE, NASD, and other regulatory agencies has been sparse. Such agencies have been reluctant to enact stricter regulations (which may impose liability when not properly carried out) because of the vital financial and administrative roles that clearing firms serve within the securities industry. The combination of a pro-business regulatory environment and the strong bargaining power of the clearing firm explains the reluctance of regulatory agencies to assign liability\footnote{Clearing services are performed by small number of firms. In 1993, there existed a ratio of approximately one clearing firm for every five introducing firms. \textit{See} Aidikoff et al., \textit{supra} note 3, at 117; Gerald B. Kline \& Raymond L. Moss, \textit{Liability of Clearing Firms; Traditional and Developing Perspectives}, 1062 PLI/CORP. 139, 144 (1998) ("Recent industry statistics reflect that approximately one hundred twenty NYSE clearing firms serve the needs of more than four thousand introducing brokers."); Minnerop, \textit{supra} note 2.} Part I of this Note defines the clearing function and discusses the important role that clearing firms play within the securities industry.

When it comes to settling disputes between customers and their introducing broker-dealers, clearing firms have traditionally asserted an independent status. In fact, clearing firms such as Bear Stearns Securities Corp. ("Bear Stearns") have emphatically claimed "complete immunity" from any responsibility to entertain or investigate complaints, or to settle disputes involving the alleged fraudulent practices of an
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introducing firm. This claim of immunity stems primarily from the contractual allocation of responsibilities and corresponding liabilities within the clearing/carrying agreement and the lack of a fiduciary relationship between the clearing firms and the customer/investor. Part II of this Note outlines the legal frameworks for establishing clearing firm liability and reviews the traditional view of clearing firm liability for claims arising under Section 10(b) of the Securities Exchange Act of 1934.

A recent shift in the attitude of the courts and self-regulatory organizations ("SROs") such as the NYSE and the NASD indicate that clearing firms do retain some responsibilities when performing clearing functions for the introducing firm and the customer/investor. In July of 1999, the SEC approved amendments to NYSE Rule 382 and NASD Rule 3230 which govern carrying agreements. The purpose of these amendments is to allocate certain regulatory responsibilities between the clearing firm and the introducing firm. Although limited, these new regulatory responsibilities may evolve into new claims and theories of liability against a clearing firm. New rules may give the courts the statutory flexibility needed to establish liability for a clearing firm's involvement in fraud originating at the introducing firm. Nevertheless, the extent of involvement required to establish liability remains unclear. Part II-D of this Note discusses the role self-regulatory organizations play in establishing liability

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7 Introducing firms, typically small brokerages which lack sufficient capital, technology, and personnel to self clear, enter into relationships with clearing firms to outsource clearing services. See infra Part II for description of clearing services.

8 A carrying or clearing agreement is a contract between a clearing firm and introducing firm. Within the carrying agreement, the clearing firm agrees to perform certain enumerated services on behalf of the introducing firm and the investor. See discussion infra Part II.


10 See supra note 1 and discussion infra Part II.


12 See Kline & Moss, supra note 6, at 156.
and explains recent amendments to SRO rules governing the clearing relationship.

In the wake of the August 1999 settlement between Bear Stearns and the SEC, the responsibility and corresponding liability of clearing firms are being questioned anew. The settlement was precipitated by New York County District Attorney Morgenthau's successful prosecution of the introducing firm A.R. Baron & Co. ("Baron") and thirteen of its employees for securities fraud involving over $75 million of investor funds. The SEC stated in a press release that Bear Stearns caused and aided and abetted securities fraud violations as well as violated Commission rules governing the clearing process. Part III of this Note discusses the August 1999 settlement between the SEC and Bear Stearns.

With the emergence of renewed interest in clearing firm liability, some commentators have speculated that clearing firms will be held responsible for "policing trading activities" at the introducing firm, a role they are not willing to or capable of undertaking. As the title of one New York Times article asks, "Should a clearing firm be its broker's keeper?" Opponents of increased responsibility on the part of a clearing firm claim that imposing stricter standards will increase a clearing firm's exposure to risk, resulting in an increase in the cost of services or even a clearing firm's decision not to perform clearing services at all. According to this view, a proposal aimed at increasing clearing firm liability may have a negative economic

13 Cf. Shannon, supra note 3, at 701 (suggesting that the effect of the Bear Stearns settlement on the future success of claims against clearing firms are minimal since there is no adjudicated result and since the facts were extremely unique).


15 Bear Press Release, supra note 13, at 3.


effect on Wall Street. Of course, advocates of stricter regulatory standards claim to hold the public interest in mind—with the ultimate goal of curbing securities fraud and ensuring the integrity of the securities market.

In general, this Note examines whether a clearing firm shall be held liable as a primary violator or an aider or abettor under Section 10b-5 of the Securities Exchange Act of 1934 for violations in connection with its actions pursuant to the clearing agreement. This Note examines questions that are at the heart of the issue of liability, namely: (1) whether a clearing firm has knowledge of fraud occurring at the introducing firm; (2) whether the clearing firm assists or participates in the fraud, and to what extent; and (3) whether a fiduciary relationship exists between the customer and the clearing firm. These limiting factors are the primary bar against investor relief for securities fraud violations.

This Note does not claim that clearing firms should be per se liable for the fraudulent acts of the introducing firms for whom they clear; nor does this Note claim that clearing firms should be per se immune from liability based on legal precedents which are outdated and inappropriate to the present situation. Instead, regulators and the courts must strive to find a middle ground that is equitable and efficient, and that preserves the economic and social community for all parties involved. Certainly, a clearing firm is held liable for causing or directly participating in securities violations with the introducing firm. Liability may also be imposed for certain involvement—including failure to investigate or reverse questionable trades, non-disclosure of fraudulent activity occurring at the introducing firm, and even failure to terminate contractual relations with fraudulent introducing brokers—which perpetuate securities violations originating at the introducing firm. In Part IV this Note proposes new theories of liability, even in the absence of regulatory change, that would hold clearing firms liable for these acts. In this section, the following traditional legal assumptions concerning clearing firm liability are questioned: (1) that “clearing” is an administrative function which is routine and neutral; (2) that the clearing firm’s knowledge of the fraud does not taint the clearing function; and (3) that the clearing firm owes no fiduciary duty to the investor.
I. THE ROLE OF THE CLEARING FIRM

At the center of the securities industry, clearing firms provide the necessary services and capital typically needed by small brokerage houses to complete a securities transaction, most importantly, the clearing function.\(^{19}\) For regulatory, as well as for technical reasons, clearing is capital intensive and requires significant technology as well as large numbers of personnel. Small brokerage firms, commonly referred to as "introducing firms," typically lack sufficient capital, back office technology and personnel\(^{20}\) to "self-clear."\(^{21}\) As a result, they enter into "carrying agreements" with clearing firms to outsource clearing and other services. By contracting with clearing firms, introducing firms save considerable "costs associated with the initiation and maintenance of" these services.\(^{22}\) Even firms that have sufficient capital to self-clear find it more efficient to outsource clearing services.\(^{23}\)

A clearing firm clears trades, i.e., completes transactions by delivering securities to the purchasing broker-dealer and by making money payments to the selling broker-dealer.\(^{24}\) Clearing responsibilities include: "receiving or delivering funds from or to the customer; maintaining records that reflect the transaction; and safeguarding the funds in the customer's account."\(^{25}\) A clearing firm is also responsible for maintaining records of all trades made by the customer, including sending confirmations, monthly statements, and dividends to the customer/investor.\(^{26}\) The courts have traditionally characterized these services as administrative, in that the clearing firm performs purely ministerial or "back office" functions.\(^{27}\)

\(^{19}\) See infra Part II, discussing the role of clearing firms.
\(^{20}\) Minnerop, supra note 2, at 842.
\(^{21}\) See infra Part II for a brief description of "clearing."
\(^{22}\) Fitzpatrick & Carman, supra note 17, at 48.
\(^{23}\) Minnerop, supra note 2, at 843 ("Clearing arrangements are classic examples of divisions of labor.").
\(^{24}\) Id.
\(^{25}\) Id. at 842.
\(^{26}\) Fitzpatrick & Carman, supra note 18; Minnerop, supra note 2.
Additional clearing services include the extension of credit for the purchase of securities on margin. In a typical clearing arrangement, the clearing firm loans money to the introducing firm which is collateralized by securities owned by the introducing firm. If the value of the collateral falls below the minimum required, the clearing firm will issue a margin call—a demand to put additional money into the margin account to meet the minimum margin level. In this capacity, the clearing firm acts as creditor to both the customer and the introducing firm. It does so by committing to pay for customer trades, advancing the funds for those trades when the customer or introducing firm is delinquent, and then financing trades on margin. In its role as creditor, the clearing firm maintains daily records of the investor’s accounts on margin including: the name and amount of shares of each stock held, its current selling price, the total market value, the equity on deposit, and the account’s credit balance.

In addition to performing clearing functions, on occasion, the clearing firm executes transactions, thereby limiting the role of the introducing broker to simply soliciting investor sales. The clearing firm also provides name recognition for the introducing firm, frequently inflating the image of a small, unknown introducing firm. The name Bear Stearns, for example, lends credibility, stability, business savvy, and expertise to unknown introducing firms.


28 Minnerop, supra note 2.


31 Id.

32 Id.

33 Minnerop, supra note 2.

34 See Gretchen Morgenson, Sleazy Doings on Wall Street, FORBES, Feb 24, 1997, at 114. Such association leads many customers to believe that the clearing firm and introducing firm are intimately affiliated. In an effort to reduce this association, many clearing firms are not named by their parent, but are known under a different name.
The carrying agreement is a contract in which the clearing/carrying firm agrees to perform clearing services on behalf of the introducing firm and its clients. Generally, the clearing firm agrees to perform certain enumerated services for the introducing firm according to the introducing firm’s needs which, in turn, are based on the introducing firm’s size and capitalization.

Within the clearing agreement, the introducing firm accepts “all sales practice and related compliance responsibilities.” According to the clearing department of Bear Stearns, the acceptance of these responsibilities eliminates any reason for the clearing firm to contact or communicate with the customer. The customer agreement mandates that the clearing firm accepts all sales transactions from the introducing firm “without inquiry or investigation,” and that it “will have no responsibility or liability [to the customer] for any acts or omissions of the [introducing firm], its officers, employees or agents.” Thus, when confronted with customer complaints of unauthorized trading by the introducing firm, in addition to refusing to reverse the trade, the clearing firm defers all customer correspondence to the introducing firm. It is the introducing firm’s sole responsibility to maintain customer accounts.

Although the investor is typically not a party to the contract, the carrying agreement is binding on the customer. Wells Submission, supra note 30, at 7.

Minnerop, supra note 2, at 843; Fitzpatrick & Carman, supra note 18. Two types of carrying agreements exist: fully disclosed agreements and omnibus agreements. As the name suggests, a fully disclosed agreement discloses to the carrying firm the identity of the introducing firm’s customers and any relevant account information. In contrast, an omnibus agreement discloses only the name of the introducing firm with whom the carrying firm maintains an account. Notwithstanding the type of agreement, the customer deals solely with the introducing firm. Fitzpatrick & Carman, supra note 18.

Wells Submission, supra note 30 (citing to the clearing agreement).

Id. at 6.

Id. at 5 (quoting from the customer agreement).

Id.

Note that the 1997 amendments involving the handling of customer complaints speak to this. With NYSE Rule 382 and NASD Rule 3230, clearing firms are required to acknowledge to the customer, to the introducing firm, and to the proper self regulatory organizations, the receipt of all customer complaints.

Minnerop, supra note 2, at 843. By shifting all liability to the introducing firm, the clearing agent eliminates the need for customer contact. See discussion infra Part II. As such, it may be unreasonable to propose that clearing firms be held liable for investor losses due to inappropriate investment advice. “Knowing your customer” is
contractual allocation of responsibilities within the carrying agreement has been looked to by the courts to decide liability issues.\textsuperscript{43}

Although primarily a matter of contract between the parties, that allocation of responsibilities is also governed by rules promulgated by self-regulatory organizations.\textsuperscript{44} Specifically, the 1982 amendments—to NYSE Rules 382 and 405 and NASD Rule 3220—allow both parties to agree on their respective functions and responsibilities as long as they are disclosed within the carrying agreement.\textsuperscript{45} Additionally, "[u]nder [amended NYSE] Rule 382, all Rule 405 type responsibilities (e.g. "know your customer" rule) may be allocated exclusively to introducing firms."\textsuperscript{46}

To the advantage of clearing firms, both the clearing and customer agreements have created substantial roadblocks for establishing liability. Additionally, the customer agreement also stipulates that a clearing firm may act on behalf of the

\textsuperscript{43} See Schwartz v. Bear Stearns & Co., 1998 WL 672708 (N.Y. Sup. Ct. Aug. 24, 1998) (The introducing firm may "accept orders [from the introducing firm] 'without any inquiry or investigation' and without any 'responsibility or liability to [plaintiff] for any acts or omissions of [the introducing firm]'" See also Penser, supra note 1, at 81.

\textsuperscript{44} As a matter of contract between the parties, the (contractual) allocation of responsibilities may be altered through rules promulgated by the self regulatory organizations. Two attempts at altering the responsibilities were made in 1982 and again in 1997.

\textsuperscript{45} New York Stock Exchange, Inc., Order Approving Proposed Rule Change, Exchange Release No. 18,497, 47 Fed. Reg. 8284 (Feb. 19, 1982) [hereinafter NYSE Amends Rule 382]. NYSE Rule 382: "All clearing and carrying agreements shall specify the respective functions and responsibilities of each party to the agreement and shall, at a minimum, specify the responsibility of each party with respect to each of the following matters." Except in regard to the handling of customer complaints, specific responsibilities are not relegated to either party under NYSE Rule 382. Under NYSE Rule 382, the clearing agreement must specify the party responsible for the following:

(1) the opening, approving, and monitoring of accounts; (2) the extension of credit; (3) the maintenance of books and records; (4) the receipt and delivery of funds and securities; (5) the safeguarding of funds and securities; (6) the [sending of customer] confirmations and statements; and (7) the acceptance of orders and transactions.


\textsuperscript{46} NYSE 1999 Amendments, supra note 11; see also Minnerop, supra note 2, at 849.
introducing firm, but safeguards against any liability to the investor.

II. THE TRADITIONAL VIEW OF A CLEARING FIRM'S LIABILITY

Private actors may bring claims for violations under the anti-fraud provisions of the Securities Exchange Act of 1934 (Section 10(b) and Rule 10b-5), state common law claims for fraud and for breach of fiduciary duty, and for violations of the rules of self-regulatory organizations. Traditionally, courts have accepted four possible liability theories: primary, controlling person, aiding and abetting, and contractual liability. But most claims have arisen under liability either as a primary violator or as an aider and abettor. Between these two theories, the courts have been more sympathetic to claims for aiding and abetting in as much as the theory does not require the clearing firm to have actual control over the actions of the introducing firm.47 However, in the landmark case of Central Bank of Denver v. First Interstate Bank of Denver, the Supreme Court precluded private plaintiffs from bringing an action for aiding and abetting a Rule 10b-5 violation.48 By restricting aiding and abetting liability claims, the Central Bank decision requires private plaintiffs to allege that the clearing firm is a primary violator, a more stringent standard to prove than secondary liability. Nevertheless, all secondary liability has not been eliminated by Central Bank.49 Aiding and

47 Minnerop, supra note 2, at 852.
48 511 U.S. 164 (1994). By restricting aiding and abetting liability claims by investors, the effects of the Central Bank decision will be increased attempts to expand the scope of primary liability. See In re Blech Sec. Litig., 961 F Supp. 569, 583 (S.D.N.Y. 1997) [hereinafter Blech II]. The courts have approached these attempts with caution. POSER, supra note 1, at § 6.02, 6-27; see Sec. Inv. Prot. Corp. v. Holmes, 76 F.3d 388 (9th Cir. 1996) (holding that the defendant is neither liable under aiding and abetting nor primary liability). Indeed, the effect of Central Bank is that it may be harder to find clearing firms liable.
abetting claims may still be brought under SEC enforcement actions.

Primary liability under Rule 10b-5 is imposed for misstatements, omissions, and fraudulent schemes in connection with the purchase or sale of securities. To find a viable primary liability claim, the plaintiff must allege that the clearing firm "intentionally or recklessly misrepresented or failed to disclose a material fact in connection with the purchase or sale of securities." For liability based on an omission, the clearing firm must show that it owed a direct duty to the customer and that this duty was breached. There is also a scienter requirement; any omission, misrepresentation, or fraudulent scheme must be made with an "actual intent to deceive."

Secondary liability claims for aiding and abetting require the claimant to allege: (1) a primary violation by someone other than the aider and abettor; (2) substantial knowledge of the violation (scienter); and (3) substantial assistance of the violation by the aider and/or abettor. Therefore, a clearing firm's knowledgeable assistance or participation in the fraudulent acts of the introducing firm may give rise to aider and abettor liability. Non-disclosure, however, may not be a basis for secondary liability unless there is an independent duty to disclose on the part of the clearing firm.

The issue of clearing firm liability is a paradox. In order to prove primary liability based on an omission, it must be shown that the clearing firm has a fiduciary relationship to the investor. However, by shifting (in the carrying contract) all authority to the introducing firm, the clearing agent eliminates the need for customer contact. Then, as a matter of law, absent direct communications between the investor and the clearing firm, no fiduciary relationship is established. And absent a fiduciary relationship, a clearing firm that performs

50 Securities Exchange Act § 10b.
51 Antinoph, 703 F Supp. at 1187.
52 Id. at 1187-88.
53 Connolly, 763 F Supp. at 11.
54 Id.
56 Wells Submission, supra note 30.
clearing services does not have a duty to investigate or disclose possible fraud at the introducing firm. In order to prove secondary liability, it must be shown that the clearing firm, with knowledge, substantially assisted in securities violations which originated at the introducing firm. However, the mere performance of clearing services does not constitute direct participation or substantial assistance.

The following subsections will explore in detail these possible barriers to liability: (1) the lack of a fiduciary relationship between the investor and the clearing firm; (2) insufficient knowledge or insight into fraud occurring at the introducing firm by the clearing firm; and (3) the classification of services performed by the clearing firm as routine and administrative. This section will also discuss liability theories under the rules of self-regulatory organizations.

A. Fiduciary Duties

The lack of a fiduciary relationship between the clearing firm and the customer has been a boilerplate defense against all primary and most secondary liability claims. Absent a fiduciary duty to the investor, mere knowledge of the fraud, without actual participation, is not actionable against the clearing firm, and the clearing firm has no duty to disclose, or even investigate, suspicions of fraud occurring at the introducing firm. Therefore, unless the parties are in a fiduciary relationship, silence is not actionable. A duty to disclose arises only "when there is a fiduciary relationship or some relationship of confidence or trust."

A fiduciary has the "duty to act for the benefit of another." The fiduciary duty serves as an accountability mechanism over persons who are in control of actions that

57 See POSER, supra note 1.
58 Id.
59 "Mere bystanders, even if aware of the fraud, cannot be held liable for inaction since they do not associate themselves with the venture or participate in it as something they wish to bring about." Antinoph, 703 F. Supp. at 1187.
60 Id.
benefit another. Moreover, fiduciary duties are pertinent to any liability scheme for omissions or inaction since the law is reluctant to impose liability for non-disclosure without a special duty to act. Underlying the necessity of a fiduciary relationship is the rationale that "[m]ere bystanders, even if aware of the fraud, cannot be held liable for inaction since they do not associate themselves with the venture or participate in it as something they wish to bring about."63

Fiduciary duties arise from agency relationships.64 "Agency is a legal relation created by contract, whereby one party, called the agent, is authorized to represent the other party, called the principal, in business dealings with third persons, and is usually empowered to bring the principal into contractual relations with such persons."65 Essential to an agency relationship is the element of control; "there can be no agency relationship where the alleged principal holds no right of control over the [alleged] agent."66 An agency relationship may result from the "manifestation of consent by one person to another that the other shall act on his behalf."67 Even if the parties do not intend to create an agency relationship within the contract, it may be implied. However, mere trust and confidence in another may not, in itself, create a fiduciary duty.68 The relationship must be consensual; the other party must accept, either implicitly or explicitly, the responsibilities associated with being a fiduciary.

An agency relationship exists between the introducing firm and the clearing firm as well as between the introducing firm and the investor. A clearing firm is an agent of an introducing firm but not vice versa; the introducing firm is not the agent of the clearing firm because the clearing broker acts on behalf of the introducing broker, which has control over the

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63 Antinoph, 703 F Supp. at 1187. (citing Intl Inv. Trust v. Cornfeld, 619 F.2d 909, 927 (2d Cir. 1980)).
64 Fitzpatrick & Carman, supra note 18, at 53. See also RESTATEMENT (SECOND) OF AGENCY (1957) (hereinafter RESTATEMENT).
67 Fitzpatrick & Carman, supra note 18, at 53.
68 Id. at 63.
actions of the clearing firm.\textsuperscript{69} Under the clearing agreement, the introducing firm consents to and retains all control over the acts that the clearing broker performs on its behalf. In exchange, the clearing firm accepts all orders and instructions from the introducing firm "without inquiry or investigation."\textsuperscript{70}

If the introducing firm directs the clearing firm to "buy," the clearing firm buys. If the introducing broker directs the clearing firm to "sell," the clearing firm sells. If the clearing broker clears a purchase, it agrees to pay the counterparty to the transaction no matter what anybody says about the trade.\textsuperscript{71}

In order for the "[clearing] system to work," states Bear Stearns, clearing firms must blindly accept the orders of the introducing firm.\textsuperscript{72}

Under the standard customer agreement, the introducing firm is the investor's agent.\textsuperscript{73} As an agent, the introducing firm buys and sells securities for its customers on a commission basis. By virtue of the authorities outlined in the customer agreement, the customer grants the introducing broker ultimate power to act on its behalf, who then grants the clearing broker ultimate power to act on its behalf.\textsuperscript{74}

As agents, it is undisputed that introducing brokers owe special fiduciary duties to their customers.\textsuperscript{75} At a minimum, it is the introducing broker who is responsible for providing investors with genuine investment advice and determining the suitability of investments. As a result, the introducing firm has certain disclosure obligations in addition to obligations of due care and loyalty.\textsuperscript{76} These responsibilities remain exclusive to

\textsuperscript{69} See Katz v. Fin. Clearing Serv. Corp., 794 F Supp. 88 (S.D.N.Y. 1992) (holding that an introducing firm is not an agent of the clearing broker); Kyung Sup Ahn, 624 F Supp. at 370 (no agency relationship existed because clearing firm held no right of control over introducing broker); Fitzpatrick & Carman, supra note 18.

\textsuperscript{70} Wells Submission, supra note 30, at 5.

\textsuperscript{71} Id.

\textsuperscript{72} Id.

\textsuperscript{73} Id.

\textsuperscript{74} Id.


\textsuperscript{76} According to the majority rule, a cause of action under the federal securities laws is not created unless the fiduciary violation is accompanied by fraud. Richard A. Booth, The Suitability Rule, Investor Diversification, and Using Spread to Measure Risk, 54 BUS. LAW. 1599, 1602 (1999). See also Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 410 F.2d 135, 141-43 (7th Cir. 1969).
the introducing broker and are not deemed to be the responsibility of the clearing firm. That these obligations belong to the introducing firm is reinforced by NYSE Rule 405—the “know your customer” rule—requiring the introducing firm to use due diligence when opening and maintaining all customer accounts. Absent a familiarization and acquaintance with the customer, the introducing firm has no ability to offer suitable advice.

In contrast, no court has found that the clearing firm is a fiduciary to the investor. Underlying the courts’ reasoning is the lack of an agency relationship between the clearing firm and the investor. The standard rebuttal heralds that the clearing firm’s performance of routine “bookkeeping functions” does not create any “duty to investors whose contact and relationship was solely with the introducing broker.” Clearing firms also argue that no trust relation exists with the customer because the clearing firm’s responsibilities are contractually limited to bookkeeping and other administrative duties. Additionally, the clearing firm is relieved of the suitability obligations under the “know your customer” rule. In sum, the courts have concluded that the clearing firms’ contracted for responsibilities are wholly independent of the investor.

77 NYSE Rule 405.
78 Carlson v. Bear Stearns & Co., 906 F.2d 315 (7th Cir. 1990) (clearing firm not liable for “aiding” or “participating” in introducing firm’s sale of unregistered securities under Illinois Security Statute); In re Alder Coleman Clearing Corp., 198 B.R. 70 (Bankr. S.D.N.Y. 1996) (clearing broker not agent of introducing broker and owes no fiduciary duty to introducing broker’s customers); Connolly, 763 F. Supp. at 10-11 (clearing broker owes no fiduciary duty to client and not liable for aiding or abetting introductory broker’s fraud by providing normal services); Faturik, 442 F. Supp. at 946 (clearing broker liable for churning customer account under NYSE “know your customer” rule); Mars v. Wedbush Morgan Sec., Inc., 283 Cal. Rptr. 238 (Cal Ct. App. 1991) (clearing broker owed customer no other duty then that it undertook to perform as clearing broker); Stuart A. Smith Corp. v. Paine, Webber, Jackson & Curtis, Inc., No. 86-95-S (D. Mass. Nov. 12, 1986) (Paine Webber acting as clearing broker had no duty to investigate suitability of transactions directed by investment adviser); Denson v. Bear Stearns Sec. Corp., 682 So. 2d 69 (Ala. 1996) (clearing broker duties are ministerial—not liable for actions of introducing broker or its agents), Riggs v. Schappel, 939 F. Supp. 321 (D.N.J. 1996) (clearing broker owes no duty to supervise introducing broker and is not liable under agency or negligence theory).
79 Dillon, 731 F Supp. at 639.
80 Wells Submission, supra note 30, at 3.
81 NYSE Rule 405; See also Fitzpatrick & Carman, supra note 18; Minnerop, supra note 2.
B. Scienter

A second required element of both primary and secondary liability claims is scienter—knowing or intentional conduct. Absent a fiduciary duty between the clearing firm and the investor, the scienter requirement is heightened; it must be shown that the clearing broker acted with actual knowledge of the fraud or an intent to deceive.82 Thus, the claim that the clearing firm should have known of the fraud is not sufficient.83 Because of this extremely high standard, many Rule 10b-5 claims are dismissed in their preliminary stages for failure to state a claim. If the clearing firm stands as a fiduciary to the investor, then a recklessness standard is sufficient to constitute scienter.84 Recklessness is the "extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it."85

The courts have held that a clearing broker, acting solely in its clearing capacity, may not have actual knowledge

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82 Connolly, 763 F Supp. at 10.
83 In Ernst & Ernst v. Hochfelder, the Supreme Court changed the law holding that an actual intent to deceive is a required element of a 10b-5 case. 425 U.S. 185, 193 (1976). See Connolly, 763 F Supp. at 9 (rejecting the claim that "in the exercise of reasonable diligence," the clearing broker should have known of fraud at the introducing firm); Stander v. Fin. Clearing & Serv. Corp., 730 F Supp. 1282 (S.D.N.Y. 1990) (dismissing aiding and abetting claim against clearing firm for reckless disregard of possible fraudulent activity at the introducing firm). In early liability cases prior to Ernst & Ernst, constructive knowledge was held to satisfy the scienter requirement of Rule 10b-5. See Butttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 410 F.2d 135 (7th Cir.); SEC v. First Sec. Corp., 463 F.2d 981 (7th Cir. 1972). In Butttrey, it was found that the clearing broker should have known about illegal trading activities at the introducing firm because of his obligations under the "know your customer" rule, Rule 405 of the NYSE. In First Securities, the court held that "liability predicated on aiding and abetting may be founded on less than actual knowledge" of the illegal activity. 463 F.2d at 987 (emphasis added). Thus, these early cases demonstrate that if the activity of the primary violator is so "egregious or reckless," knowledge of the violation will be imputed on the clearing broker. "Know Your Customer," supra note 2, at 533. Therefore, under earlier case law, the scienter requirement was satisfied when the clearing firm had either actual knowledge of the fraud or was so reckless that knowledge was deemed imputed.
85 Id. (citing the definition first announced in Sundstrand Corp. v Sun Chem. Corp., 553 F.2d 1033, 1044-45 (7th Cir. 1977).
of any illegal activities occurring at the introducing firm. In other words, "clearing" alone does not provide the clearing firm with the necessary insight to reveal fraud at the introducing firm. Additional factors are necessary in order to prove scienter. For example, when the introducing and clearing firms enjoy a "close working relationship," it may be found that the clearing firm had sufficient knowledge of the underlying fraud to sustain a claim for aiding and abetting. In the seminal case of In re Blech Securities ("Blech II"), the plaintiff established that the clearing firm, Bear Stearns, had actual knowledge of the fraud because of: (1) daily contact with high ranking officers at the introducing firm; (2) an "intimate knowledge" of the securities held by the introducing firm and the "value and liquidity of those securities", (3) "information from daily analysis of key accounts" held by the introducing firm; and (4) past knowledge of sham trading at the introducing firm. Under these facts, the plaintiffs alleged that Bear Stearns displayed an intent to deceive.

Many investors, albeit unsuccessfully, have claimed that certain clearing activities go beyond administrative and that a clearing firm may detect an "overall pattern" of securities violations through the performance of these activities. Through its clearing responsibilities, including

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86 See Connolly, 763 F. Supp. at 9 (acting as clearing broker for the introducing firm does not establish that the clearing broker "knew, or in the exercise of reasonable diligence should have known" about illegal activities at the introducing firm) (citing the complaint, p. 164.). See Stander, 730 F. Supp. at 1286 (alleging that clearing firm, through its "clearing activities," knew or should have known of fraudulent activity by the introducing firm.).

87 Faturik, 442 F. Supp. at 945 (holding that clearing firm had sufficient knowledge of underlying fraud where clearing firm had offices in the same building and on the same floor as the introducing firm).


89 Id. at 583.

90 Aidikoff et al., supra note 3, at 132; Antinoph v. Laverell Sec., Inc., 703 F Supp. 1185 (E.D. Pa. 1989). Microcap stocks are low priced stocks issued by the smallest of companies. See http://www.sec.gov/consumer/microbro.htm. Microcap companies are typically thinly capitalized and maintain minimal filing requirements with the SEC. Within the Microcap securities industry, fraud is more prevalent since a small number of brokers control the market and public information is limited. See http://www.sec.gov/news/extra/microcap.htm. Fraud within the microcap securities industry usually involves a scheme called "pump and dump." Using high pressure sales tactics, customers are solicited to buy certain "preferred" stock in which the brokerage firm makes a market. As the "preferred" stock is promoted or "pumped" and market prices rise, company insiders sell stock realizing substantial profits at the
monitoring margin accounts and executing trades, customers have alleged that a clearing firm may identify "no net sale" policies, market price manipulation, undisclosed mark-ups, and excessive commissions, all of which are violations of the securities laws. Most courts, however, have rejected these claims.

In *Ross v. Bolton*, the plaintiff alleged that the clearing firm, by clearing transactions on margin, aided and abetted a market manipulation promulgated by the introducing firm. Plaintiff claimed that the clearing firm "cancelled a number of trades in which [the introducing firm] was purchasing securities but continued to execute transactions in which [the introducing firm] was the seller." This tactic allegedly reduced the amount of money owed to the clearing firm, while increasing the amount of investor debt. Therefore, by holding a margin account, the plaintiff alleged that "Bear Stearns must have scrutinized the account more closely than it otherwise would have," and therefore knew that fraud was occurring at the introducing firm. The court held that when executing trades on margin, the clearing firm did not have actual or constructive knowledge of the fraud when it cleared a large number of transactions in a particular security and the price of that security was steadily rising, or when trades were selectively executed in order to reduce the amount owed.

Many investors have also brought claims alleging that the clearing firm should have known that trading done in their accounts was perpetuated by fraud. However, most courts have rejected these theories under the rationale that the customer’s broker is the introducing firm and that no fiduciary relation exists between the clearing firm and the investor. In *Stander v.*

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expense of public investors. Once large blocks of shares are sold, stock prices usually drop dramatically, leaving investors empty pocketed. As part of the "pump and dump" scheme, brokerage firms employ the following fraudulent business practices: "no net sales" policies, unauthorized trades, churning of accounts, and using "bait and switch" tactics. Under a "no net sale" policy, sales of stock are not permitted unless it is accompanied by a "crossing order—an order from another customer to purchase the same position." *Bear Stearns Settlement*, supra note 14.

91 Aidikoff et al., supra note 3, at 132.
92 Ross, 639 F Supp. at 325.
93 Id.
94 Id.
95 Id. at 327.
Financial Clearing & Services Corp. ("FiCS"), petitioners alleged that the clearing firm knew or should have known of fraudulent activity by the introducing firm through its clearing activities. The court dismissed plaintiff's claim that NYSE Rule 405 imposed a fiduciary duty upon FiCS since the clearing agreement shifts any and all trading responsibilities to the introducing broker. Indeed, clearing brokers (such as Bear Stearns) claim that due to the sheer volume of trades and their limited contact with customers, a clearing firm is not capable of overseeing the appropriateness of the investments and the trades that they clear. Finally, even if trades are risky or are inappropriate for a specific investor, the clearing firm, within the customer agreement, has full authority to accept trades from the introducing firm, limiting any affirmative duty to question the trades ordered. The Stander court held that even if trades made in a customer's account are "risky" or occur despite "unsatisfied margin calls," this is not sufficient to establish that the clearing firm had actual knowledge of fraudulent activity since all trading is done pursuant to a standard option agreement, clearly authorizing the introducing firm to act as the customer's agent and to trade on the customer's account. Within that context, all investment decisions are solely between the customer and the introducing firm and all investment advice and supervision of trading rests solely with the introducing firm. Unless FiCS "knew [the trading] authorization to be fraudulent or improper," the clearing broker could not be found to have actual knowledge of fraudulent trading in its customers' accounts.

These decisions suggest two things. First, the courts do not distinguish between a clearing firm's responsibilities when clearing trades on margin and those responsibilities required for traditional trading. Or, even if the responsibilities that evolve from each vary, neither meets the high threshold of the

96 Stander, 730 F Supp. at 1286.
97 Id. at 1287.
98 Prior to the initiation of any trading on the customer's account, he or she is required to sign a standard option agreement with the introducing firm and a customer agreement with the clearing firm. Both the standard option agreement and the customer agreement establish the legal relationships among the parties involved. Antinoph, 703 F. Supp. at 1186.
99 Stander, 730 F Supp. at 1286.
100 Id. at 1287.
scienter requirement. In other words, even when executing trades on margin, the clearing firm may not gain greater insight into possible fraud by the introducing firm than when clearing traditional trades. Second, even if fraud is at the heart of the matter, the clearing firm will accept and process all trades ordered by the introducing firm, no matter how risky. Note that this reasoning seems to indicate that a clearing firm may look away (because of the authority granted to the clearing firm in the customer agreement, there is no reason to investigate), but it does not disprove that clearing may not provide insight into fraud at the introducing firm. A clearing firm may have knowledge of the fraud, but, as discussed above, the contractual arrangements among the parties allow the clearing firm to escape liability. And a "clearing broker cannot be held liable simply because it performed its contracted-for services." Viewed in a broader context, what appears to be intentional may not be.

C. Direct Participation and Substantial Assistance

Under both primary and secondary claims, liability ultimately turns on the clearing firm's involvement in the fraud and the extent of that involvement. Liability will not attach unless the clearing firm participated in the fraud (directly or indirectly), even if it is shown that the clearing firm knew or should have known of fraud occurring at the introducing firm. Under primary liability, it is alleged that the clearing firm participates directly in the fraud by either performing routine clearing services with knowledge of fraud, failing to disclose to the investor fraudulent behavior by the introducing firm, or even failing to prevent the fraud from continuing. To find liability under aiding and abetting liability, the clearing firm must "substantially participate" in the fraud. Substantial participation is also alleged through the

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101 Id. at 1288.
102 Blech II, 961 F Supp. at 584.
103 Antinoph, 703 F Supp. at 1187; See Minnerop, supra note 2, at 851.
104 See Minnerop, supra note 2.
routine performance of clearing services with knowledge of fraud and non-disclosure of material facts.\textsuperscript{105}

A clear definition of what constitutes participation by the clearing firm does not emerge from the case law. Instead, courts have consistently and adamantly concluded what does not constitute participation: under either liability theory, the performance of routine clearing constitutes neither direct participation nor substantial assistance, even in the face of knowledge of fraudulent activity\textsuperscript{106} Thus, the “act of clearing sham trades is not equivalent to causing or directing sham trades.”\textsuperscript{107} Also, the courts do not distinguish between clearing trades on margin and traditional clearing; both do not constitute direct or substantial participation in the fraud by the clearing firm.\textsuperscript{108}

Absent a fiduciary relationship, any liability based on an omission will not qualify as direct participation or substantial assistance.\footnote{109} Even if the clearing firm has actual or constructive knowledge of the fraud, “awareness and approval, standing alone” will not create liability\textsuperscript{110} In other words, mere knowledge of the fraud, absent actual participation, is not actionable against a clearing firm who is not in a fiduciary relationship to the investor. A clearing firm may be liable for inaction “only where there is a conscious or reckless violation of an independent duty to act.”\textsuperscript{111} Therefore, except in limited circumstances, the clearing firm has no duty

\textsuperscript{105} Id.
\textsuperscript{106} Connolly, 763 F Supp. at 10 (stating that routine performance of clearing services does not constitute substantial assistance).
\textsuperscript{107} Blech II, 961 F. Supp. at 584.
\textsuperscript{108} In Stander, the court held that “continuing to execute and record trades in [plaintiff’s] account despite [plaintiff’s] failure to meet margin calls” does not constitute substantial assistance. 730 F. Supp. at 1287.
\textsuperscript{109} Connolly, 763 F Supp. at 11.
\textsuperscript{110} Ross, 639 F. Supp. at 327 (citing Armstrong v. McAlpin, 699 F.2d 79, 92 (2d Cir. 1983)).
\textsuperscript{111} Stander, 703 F. Supp. at 1287 (citing IIT v. Cornfeld, 619 F.2d 909, 927 (2d Cir. 1980)); see Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, 410 F.2d 135 (7th Cir. 1969) (failing to use due diligence over customer accounts pursuant to NYSE Rule 405 constituted inactivity for which the clearing firm was held liable as an aider or abettor). Buttrey, however, is the minority view. See infra note 121. Moreover, the responsibilities under NYSE Rule 405 have been shifted from the clearing firm to the introducing firm.
to disclose or investigate possible fraud at the introducing firm under either primary or secondary liability.\footnote{Stander, 730 F. Supp. at 1286-87.}

In \textit{Stander}, the court held that the only duty between the clearing firm and the customer under the clearing agreement was to "report on the activity of the [customer's] account."\footnote{Id. at 1287.} The complaint alleged that FiCS substantially assisted in the fraud "by continuing to execute and record trades in Stander's account despite Stander's failure to meet margin calls, and despite FiCS' alleged knowledge of Stander's initial conservative investment goals."\footnote{Id. at 1287.} The court held that to the extent the responsibilities of the parties are outlined in the carrying agreement, and the introducing firm was "acting under [the] actual authority" of the investor, and the clearing firm fulfilled its single duty of reporting account activity to the customer, the clearing firm had no duty to disclose or investigate risky trades.\footnote{Id.} The \textit{Stander} court stated the following to support its decision not to impose liability:

\begin{quote}
It would be an unfortunate stretch of liability to hold that a clearing broker, whose only privity-created obligation to an investor is a reporting one, must undertake the obligation of insuring that the investor, who has signed customer agreements outlining the broker's responsibilities, fully understand the reports provided, and that the investor acts on them in the most prudent manner. Such would be taking paternalism to an extreme.\footnote{Id.}
\end{quote}

In the case of \textit{Blech II},\footnote{961 F. Supp. 569 (S.D.N.Y. 1997). The initial complaint was denied with leave to amend. In re Blech Sec. Litig., 928 F. Supp. 1279 (S.D.N.Y. 1996) [hereinafter \textit{Blech I}]. In \textit{Blech I}, the court granted Bear Stearns' motion to dismiss even though the clearing firm "knew but failed to disclose" information pertaining to fraudulent conduct by the introducing firm because "as a matter of law, a clearing broker owes no duty of disclosure to the clients of an introducing broker." Id. at 1295-96.} a federal district court in the Second Circuit was the first court to decide what acts may expose a clearing firm to liability. The court held that a clearing firm may be held primarily liable only when it "directly and knowingly participate[s]" in the fraud.\footnote{Blech II, 961 F. Supp. at 582.}
Interpreted as the "Blech Exception," the court held that allegations of pressure exerted by a clearing firm to reduce the introducing firm's debt balance, coupled with knowledge of "sham trading" (at the introducing firm) and the clearance of those trades, went beyond a clearing firm's routine clearing functions and were sufficient to survive a motion to dismiss. Thus, even when participating in the sale of securities in its "traditional market role," a clearing firm may be held liable for "initiating," "directing," and "contriving" fraudulent trades. The court stated that this "case illustrates the fact-intensive battle between litigants in clearing firm cases and [ably] demonstrates that clearing firms are not always immune from liability exposure."

Because aiding and abetting claims under Section 10(b) of the Exchange Act are restricted in private suits, the court's discussion focused on whether the acts of the clearing firm, Bear Stearns, were "more than aiding and abetting" and therefore constituted primary liability. Reiterating the prevailing standard, the court stated that even with knowledge of the fraud, "conduct that is no more than the performance of routine clearing functions" cannot constitute primary liability; therefore, "the act of clearing sham trades is not equivalent to causing or directing sham trades. " Such conduct, stated the court, amounts to "no more than a non-existent claim of aiding and abetting" under Central Bank.

Nevertheless, the court held that plaintiffs alleged sufficient facts to establish the requisite elements of scienter and direct participation that are required to state a claim for primary liability against the defendant, Bear Stearns. Through knowledgeable participation "at both the initiation and clearing stages" of several fraudulent transactions, Bear

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120 Blech II, 961 F. Supp. at 584.
122 Kline & Moss, supra note 6, at 145.
123 Blech II, 961 F. Supp. at 583.
124 Id. at 584.
125 Id.
126 Id.
127 Id.
Stearns was held to be a direct participant in the fraud. Recognizing a difference between clearing cash and margin trades, the court stated that Bear Stearns had the power to "deny or extend margin credit" to the introducing broker, and thereby used its power to influence fraudulent activity "[B]y demanding that Blech reduce its debit balance with knowledge of Blech's history of sham trading," Bear Stearns directed certain fraudulent transactions by Blech.

This course of conduct by Bear Stearns—the instigation of trading that Bear Stearns knew or should have known would result in fraudulent trades that would artificially inflate the price of Blech securities, and the subsequent clearing of the resultant fraudulent trades for its own pecuniary benefit—constitutes an attempt to affect the price of Blech securities. The pressure exerted by Bear Stearns on Blech to reduce his debit balance, when combined with Bear Stearns' knowledge of Blech's sham trading and its clearing of such trades, does not reflect the standard practice of [a] clearing broker.

The court concluded the "complaint crossed the line dividing secondary liability from primary liability when it claimed that Bear Stearns 'directed' or 'contrived' certain allegedly fraudulent trades."

Presumably altering previous case law, the court distinguished the conduct of a normal clearing broker extending loans on margin with the conduct of a broker who, with knowledge of past sham trading, extends loans on margin. Therefore, the court implies that clearing trades on margin, with knowledge of past sham trading at the introducing firm, will alter the characterization of the clearing function—causing it to become no longer routine. As a financial lender, the clearing broker has a vested interest in the financial stability of the introducing firm, and in order to

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128 Blech II, 961 F Supp. at 585.
129 Id. at 583.
130 Id. at 584.
131 Id. at 584-85.
132 Id. at 584.
133 Blech II, 961 F Supp. at 585 ("These allegations stand on grounds different from those presented in Ross v. Bolton [where] plaintiff's only alleged the conduct of a normal clearing broker that extends loans on margin to its clients.").
134 Id. at 585.
decrease its own risk, Bear Stearns was motivated to maintain the price of Blech securities because those securities were collateral for margin loans extended to Blech.\textsuperscript{135} It is this pressure exerted by the clearing firm, their instigation of trades, and their knowledge of sham trading which distinguishes fraudulent conduct from the normal functions of a clearing broker extending loans on margin.

In subsequent cases, \textit{Blech II} has been interpreted narrowly. In \textit{Scone Investments v. American Third Market Corp.}, plaintiff, Scone Investments, alleged that the defendant, Standard Bank Investment Corp. (Jersey) Ltd. ("Standard Bank" or "Bank"), directed a market manipulation scheme aimed at artificially inflating the price of securities.\textsuperscript{136} Similar to the complaint in \textit{Blech II}, the plaintiff alleged that Standard Bank directed the liquidation of certain securities in order to reduce the defendant's credit line and corresponding risk of default. Despite these similar allegations, the court failed to find Standard Bank primarily liable. Although it was alleged that Standard Bank directed the sale of securities, it was not alleged that the "sale be effectuated by way of fraudulent misrepresentation."\textsuperscript{137} The court found that "[t]he Bank's liquidation demand is a far cry from the 'intimate' 'hands-on involvement' and participation in 'key decisions' about the details of the sale which would render it a primary violator."\textsuperscript{138} The court held that Standard Bank's initial financing of the purchase of the securities at issue and the subsequent release of those securities from inventory for trading was indirect and "amount[ed] to nothing more than the routine functioning of a lending institution."\textsuperscript{139} Although Standard Bank may have initiated the sale of securities by demanding that defendants reduce its credit line, the court held that it did not \textit{directly} participate in the execution of the fraudulent transaction, and thus cannot be held primarily liable.\textsuperscript{140} Standard Bank's

\textsuperscript{135} \textit{Id.} at 583.
\textsuperscript{136} \textit{Scone Invs.}, 1998 WL 205338, at *1.
\textsuperscript{137} \textit{Id.} at *8.
\textsuperscript{138} \textit{Id.} (citing SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1460-61 (2d Cir. 1996)).
\textsuperscript{140} \textit{Scone Invs.}, 1998 WL 205338, at *9.
alleged participation may be characterized as *indirect* and liability for such acts would constitute aiding and abetting liability, a claim which no longer exists for private plaintiffs after *Central Bank*.

In *Goldberger v. Bear Stearns & Co.*, a class action suit, the plaintiff class alleged that the clearing firm knowingly participated in the manipulation of the price of stocks.\(^\text{141}\) Distinguishing the allegations sustained in *Blech II*, the court dismissed the claims since there were no allegations that the clearing firm

instigated trading that it "knew or should have known would result in fraudulent trades that would artificially inflate the price" of manipulated securities. Nor are there allegations that Bear Stearns "asserted control over trading operations by placing Bear Stearns' employees at offices to observe trading activities, approving or declining to execute trades, imposing restrictions on inventory, and loaning funds."\(^\text{142}\)

Therefore, absent a clearing firm's knowledge that the securities involved were being manipulated and direct control over those securities, the "Blech exception" will not apply.

D  **Violations of the Rules of Self-Regulatory Organizations**

Through their rule making responsibilities, self-regulatory organizations play a fundamental role in the development of the law governing the clearing relationship. Most importantly, SRO rules dictate the terms of the carrying agreement between the introducing firm and clearing firm. A clearing firm could have supervisory responsibilities over the introducing firm if such terms were mandated by a SRO rule and inserted in the clearing arrangement. If the clearing firm did not fulfill those supervisory responsibilities in limited circumstances, a violation of a SRO rule could create a cause of action under the federal securities laws. Currently, there is a


\(^\text{142}\) *Id.* at *5.*
split among the federal courts as to whether a violation of a SRO rule creates a federal cause of action.143

In 1969, representing the minority view, Buttrey v. Merrill Lynch, Pierce, Fenner & Smith was the first case to find a private federal cause of action for the violation of NYSE Rule 405—the "know your customer" rule144—requiring "every member firm [to] [u]se due diligence to learn the essential facts relative to every customer, order, cash or margin account"145. Defendants, who were acting in a manner typically

143 Compare Cook v. Goldman, Sachs & Co., 726 F Supp. 151, 156 (S.D. Tex. 1989) (holding that a private cause of action exists for violations of NYSE rule 405); Rolf v. Blyth Eastman Dillon & Co., 424 F Supp. 1021, 1041 (S.D.N.Y. 1977) (holding that a private cause of action exists for violations of the "know your customer" rule), aff'd in part, remanded on other grounds, 579 F.2d 38 (2d Cir. 1978); and Faturik, 442 F Supp. at 946 (holding that a NYSE Rule 405 violation can create a private claim for relief in some circumstances); with VeriFone Secs. Litig., 11 F.3d 865, 870 (9th Cir. 1993) (holding that a private cause of action does not exit for a violation of the NYSE rule); Craighead v. E.F. Hutton & Co., 899 F.2d 485, 493 (6th Cir. 1990) (holding that NYSE Rule 405 does not imply a private federal cause of action); Miley v. Oppenheimer & Co., 637 F.2d 318, 333 (5th Cir. 1981) (holding that NYSE Rule 405 does not imply a private federal cause of action); Jablon v. Dean Witter & Co., 614 F.2d 677, 680 (9th Cir. 1980) (holding that NYSE Rule 405 does not imply a private federal cause of action); Birotte v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 468 F Supp. 1172, 1180 (D.N.J. 1979) (holding that NYSE Rule 405 does not imply a private federal cause of action); and Piper, Jaffray & Hopwood, Inc. v. Ladin, 399 F Supp. 292, 297 (S.D. Iowa 1975) (holding that NYSE Rule 405 does not imply a private federal cause of action).

144 "Know Your Customer," supra note 2, at 493; NYSE Rules 405 and 382 were amended in 1982 to allow clearing firms to shift the burden of the "know your customer" rule to the introducing broker. As a result of these amendments, clearing firms maintain that they are no longer liable for the failure to investigate or inquire into the acts of the introducing firm which may be fraudulent. Aidikoff et al., supra note 3, at 122.

145 New York Stock Exchange Rule 405 provides the following:

Every member organization is required through a general partner or an officer who is a holder of voting stock to (1) Use due diligence to learn the essential facts relative to every customer, every order, every cash or margin account accepted or carried by such organization and every person holding power of attorney over any account accepted or carried by such organization. (2) Supervise diligently all accounts handled by registered representatives of the organization. (3) Specifically approve the opening of an account prior to or promptly after the completion of any transaction for the account of or with a customer, provided, however, that in the case of branch offices, the opening of an account for a customer may be approved by the manager of such branch office but the action of such branch office manager shall within a reasonable time be approved by a general partner or an officer who is a holder of voting stock in the organization. The member, general partner or officer approving the opening of the account shall, prior to giving his approval, be personally informed as
assigned to clearing brokers, and who knew or should have
known that the brokers for whom they were executing trades
were converting their customer's property, were held to have
shown a "callous disregard" for the "know your customer"
rule. In determining whether to permit a suit for the
violation of an Exchange rule, the court considered the "nature
of the particular rule and its place in the regulatory scheme,
with the party urging the implication of a federal liability
carrying a considerably heavier burden of persuasion than
when the violation is of the statute or an SEC regulation."

The court held that violation of Rule 405 was actionable since
the rule is integral to the SEC's regulation of Exchanges and
was designed for the protection of investors.

Although Buttrey did not hold that a violation of Rule
405 was per se actionable, subsequent violations of the "know
your customer" rule were "recognized judicially only in factual
situations where a broker's failure to investigate a customer
[was] tantamount to actual fraud or reckless indifference." A
second action for violation of NYSE Rule 405 was sustained in
1977 in Faturik v. Woodmere. The court held that defendant
Bear Stearns had a duty to inquire into their customers' situation under Rule 405 since the complaint alleged
"irregularities or suspicious circumstances putting Bear
Stearns on notice" of possible fraudulent activity. However,
absent "irregularity or suspicious circumstances," the court
held that a clearing broker had "no duty to look beyond its
primary customer 


to the essential facts relative to the customer and to the nature of the
proposed account and shall indicate his approval in writing on a
document which is a part of the permanent records of his office or
organization.

Id.

147 Buttrey, 410 F.2d at 142 (citing Colonial Realty Corp. v. Bache & Co., 358 F.2d at 178, 182 (2d Cir. 1966)).
148 Id.
149 "Know Your Customer," supra note 2, at 493.
151 Id.
152 Id. at 946.
Since the 1970s, the rules governing the clearing relationship have undergone two revisions. First, in 1982, the clearing industry lobbied for reform of regulatory rules governing carrying agreements and the NYSE amended Rules 382 and 405, both governing carrying agreements. The 1982 amendments allow the clearing firm to shift any and all liability to the introducing firm and to "shift the burden of the 'know your customer rule' to their introducing counterpart." The SEC noted that the proposed amendments are aimed to "clarify the relationship and responsibilities" between the clearing and introducing firms "while also recognizing the nature of the contractual relationship" between the parties. Following the 1982 amendments, courts have used the contractual agreement as a shield against liability.

Since then, however, as the number of introducing firms have steadily increased, the resources needed to monitor and regulate those firms have "stretched thin." Recent amendments have been aimed at improving the monitoring efforts at both introducing and clearing firms. These amendments were part of a reaction to a rise in questionable, and potentially fraudulent, activity on the part of introducing firms.

In 1999, the SEC approved amendments to NYSE Rule 382 and NASD Rule 3230. The amendments address the handling of customer complaints, specific procedures for issuing "exception-type reports," and procedures involving an introducing firm's ability to issue negotiable documents (e.g.,

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154 Aidikoff et al., supra note 3, at 122.
157 See Minnerop supra note 2, at 850.
159 NASD Rule Amendments, supra note 157; See also NYSE 1999 Amendments, supra note 11. The NYSE and NASD amendments mirror one another.
160 NYSE Rule 382(d); NASD Rule 3230(b).
161 NYSE Rule 382(e); NASD Rule 3230(c). Exception reports help introducing firms maintain supervisory responsibilities. See NASD Rule Amendments, supra note 157, at 63,591.
checks) on their clearing firm's account. These amendments are intended to "enhance [an] introducing organization's ability to supervise activities relating to customer accounts" and to "enhance the ability of the Exchange and other securities self-regulatory organizations to monitor the activities of introducing organizations and their compliance with applicable regulatory requirements."

The change most relevant to liability issues involves an increase in monitoring and reporting of customer complaints. NYSE Rule 382(d) and NASD Rule 3230(b) require the carrying firm to promptly furnish any written customer complaint to the introducing firm and to the introducing firm's Designated Examining Authority ("DEA"). Once complaints are collected, it is the DEA who processes the information and provides the introducing firm with information about a particular complaint or group of complaints. Presumably, a clearing firm could be held liable for the failure to comply with this independent duty to act.

After a customer complaint is received, the amended rules require the clearing firm to provide acknowledgment to the customer of its receipt and to inform the customer that the complaint has been forwarded to the proper regulatory organization in addition to the introducing firm. Written confirmation of the receipt of complaints serves to alert the customer that the clearing firm, introducing broker, and proper regulatory agency have all received and have been made aware

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162 NYSE Rule 382(f); NASD Rule 3230(d).
163 Information Memo Number 99-33, Salvatore Pallante, NYSE Senior Vice President, to all NYSE Members and Member Organizations, July 1, 1999, available at http://www.nyse.com/content/memos/NT000392D6.html. (last visited Feb. 12, 2002) [hereinafter NYSE Memo].
164 Id. at 2.
165 NYSE 1999 Amendments, supra note 11.
166 See NASD Rule Amendments, supra note 157, at 63,591.
167 Amendment to Rule 382(d). This amendment was in response to trends showing introducing firms' disregard for NASD Rule 3070, which requires introducing members to report to the NASD "any written customer complaints against it involving allegations of theft or misappropriation of funds or securities or of forgery." Recognizing the reality of most situations involving fraud, the NASD admits that it does not receive reports in a "timely manner" and is only aware of the customer complaint "long after the fact." See NASD Rule Amendments, supra note 157, at 63,590.
of the complaint.\textsuperscript{168} Additionally, the early collection of complaints by a regulatory body may enhance an organization's regulatory potential for quick action by providing more information about possible fraudulent behavior, at an earlier time.\textsuperscript{169} For example, large numbers of complaints regarding one introducing firm may be indicative of a problem requiring prompt regulatory action.\textsuperscript{170}

The amendments also require the clearing firm to provide the introducing firm with a comprehensive list of all exception-type reports offered as part of its clearing services\textsuperscript{171} and to retain and preserve copies of reports requested by the introducing organization.\textsuperscript{172} In a release, the SEC noted that exception reports allow for early detection of problems or suspicious activity within a firm's trading practices because exception reports may be used to reveal "unusual account activity or possible unauthorized trades."\textsuperscript{173} The underlying premise of the rule is that the issuance of exception reports helps the introducing firm maintain its supervisory responsibilities.\textsuperscript{174}

Under the amended rules, the clearing firm must approve an introducing firm's "supervisory procedures" regarding the issuance of negotiable instruments.\textsuperscript{175} Although the rule does not mandate what types of approval procedures the clearing firm should assume, it implies that some kind of contact with the customer may be necessary. In the NYSE's view the best supervisory practice would require all checks or wires to be accompanied by a notarized letter from the customer authorizing the money transfer.\textsuperscript{176} The SEC believes that these new provisions will require the clearing firm to "reexamine its relationship with the introducing firm" if the introducing firm does not have adequate safeguards in place.\textsuperscript{177}

\textsuperscript{168} \textit{Id.} at 63,591.
\textsuperscript{169} \textit{Id.} at 63,590.
\textsuperscript{170} \textit{Id.}
\textsuperscript{171} NYSE Rule 382(e); NASD Rule 3230(c).
\textsuperscript{172} NYSE Rule 382(e)(i).
\textsuperscript{173} NYSE 1999 Amendments, \textit{supra} note 11, at 5.
\textsuperscript{174} NASD Rule Amendments, \textit{supra} note 157, at 63,591.
\textsuperscript{175} NYSE Rule 382(f); NASD Rule 3230(d).
\textsuperscript{176} NYSE Memo, \textit{supra} note 163 (emphasis added).
\textsuperscript{177} NYSE 1999 Amendments, \textit{supra} note 11, at 5.
III. THE BEAR STEARNS SETTLEMENT

On August 5, 1999, the SEC settled with Bear Stearns in connection with the company's clearing relationship with the now defunct introducing firm A.R. Baron & Co. ("Baron"). The SEC found that Bear Stearns directly caused a fraud on Baron's customers and aided and abetted violations of the Commission's net capital rules, the rules governing the treatment of subscribers' funds in contingency offerings, and the rules governing credit extensions and record keeping. According to the SEC, Bear Stearns' "conduct extended well beyond these routine clearing functions, and included approving and disapproving trades, providing working capital, and at times, preventing Baron from rescinding certain unauthorized trades." Bear Stearns agreed to pay $5 million in civil penalties as well as fund customer claims up to $30 million. This case marks the first time the Commission has found a clearing firm liable for fraud involving its introducing counterpart and shows that clearing firms are no longer absolutely immune from liability.

Until Baron's collapse, Bear Stearns continued to clear trades for Baron, knowing that Baron was engaged in securities violation, and offering significant assistance, that sometimes even causes those violations. From its inception, the value of Baron's house stock began to decline rapidly, which immediately caused the value of Baron's inventory account with Bear Stearns to decline—threatening its ability to meet industry wide net capital requirements, as well as Bear Stearns's own individual requirements for Baron. In order to maintain the price of its house stocks, Baron engaged in high

178 Bear Stearns Settlement, supra note 14. Bear Stearns neither admitted nor denied the findings of the order but consented to them solely for the purposes of the SEC proceedings. Id. The settlement was precipitated by New York County District Attorney Morgenthau's successful prosecution of the introducing firm. Bear Press Release, supra note 14.

179 Bear Stearns Settlement, supra note 14, at 8.

180 Id.

181 Antifraud: Bear Stearns to Pay Another $3.5 Million to Reimburse Cheated A.R. Baron Customers, SECURITIES LAW DAILY (BNA) (Oct. 21, 1999).

182 Adler Coleman, Baron's prior clearing agent, began selling significant shares of Baron's house stock, exerting downward pressure on the price of these thinly traded stocks. Id.
clearing firm liability

pressure sales; readily recognizable were

classic indications of unauthorized trading [such as] a high incidence of failures to pay for trades, excessive trade cancellations, corrections and credit extensions, numerous customer complaints against Baron and a pattern of stock being sold to customers from Baron's inventory and then purchased back into the inventory by Baron close to the settlement at a loss.\footnote{Bear Stearns Settlement, supra note 14, at 9.}

As a result of these tactics, certain customers refused to pay for unauthorized trades. Not surprisingly, additional Bear Stearns staff was needed in order to handle the influx of customer complaints. Also, not surprisingly, Bear Stearns continued to defer all customer complaints back to Baron.

Beginning in September 1995, Bear Stearns initiated several supervisory procedures to ensure the protection of its credit position. Bear Stearns employees were assigned to closely monitor Baron's daily trading activities, including keeping a detailed log of trading patterns and determining whether Baron complied with Bear Stearns's equity requirements.\footnote{Bear Stearns Settlement, supra note 14, at 9.} All inside trades were to be individually approved by Bear Stearns representatives who were present on Baron's premises. Approval was conditioned on "whether the trade increased Bear Stearns's credit exposure by making Baron a net buyer of its house stocks on that day."\footnote{Bear Stearns Settlement, supra note 14, at 14.} If the trade was approved, Bear Stearns still required that Baron gain customer telephone verification through the use of a script provided by Bear Stearns, with Bear Stearns employees monitoring the conversation.\footnote{Bear Stearns Settlement, supra note 14, at 14.}

Although anticipated, Bear Stearns never officially terminated its relationship with Baron. In October 1995, Bear Stearns informed Baron that it planned to terminate their clearing relationship "because the relationship had become too expensive and risky for Bear Stearns."\footnote{Bear Stearns Settlement, supra note 14, at 14.} Nevertheless, plans to terminate fell through with Bear Stearns agreeing to loan Baron additional funds in order to comply with NASD net

\footnotesize{\begin{itemize}
\item[183] Bear Stearns Settlement, supra note 14, at 9.
\item[184] Bear Stearns Settlement, supra note 14, at 9.
\item[185] Bear Stearns Settlement, supra note 14, at 14.
\item[186] Bear Stearns Settlement, supra note 14, at 14.
\item[187] Bear Stearns Settlement, supra note 14, at 14.
\end{itemize}
capital requirements. Again in December 1995, Bear Stearns notified Baron of its plan to terminate their clearing relationship only to revoke its threat of termination on March 16, 1996. On May 29, 1996, the SEC issued a temporary cease and desist order against Baron. Yet, on June 14, 1996, Bear Stearns again loaned Baron $1.5 million in funds in order to meet NASD net capital requirements. On July 3, 1996, in an effort to evade SEC orders, Baron filed for bankruptcy. Finally on August 5, 1999, the SEC settled with Bear Stearns, collecting $5 million in civil penalties and $30 million to fund customer complaints.

The impact of the settlement on the future success of claims against clearing firms is debatable. One commentator has suggested that since the case was a SEC settlement, with no adjudicated result, it holds little, if any, precedential value. In addition, the facts represent an atypical case in which a high ranking executive at the clearing firm personally benefitted and was intimately involved in the fraud.

It is not a case centered on a theme that the clearing firm turned a blind eye to the known misconduct of one of its correspondents. Nor is it a case where the clearing firm, as a corporate entity, "knew or should have known" of the correspondents' misdeeds simply through the firm's computer data and records.

However, these shortcomings may not prove dispositive. It is high level executives who, acting on behalf of the corporate entity, customarily expose the corporation to criminal and civil liabilities. Moreover, the well publicized settlement sparked renewed interest in the case for finding clearing firms liable for investor losses, and, most importantly, spurred regulatory attention to the issue of clearing firm liability.

IV THEORIES OF LIABILITY

Over the past three decades, the courts and self-regulatory organizations have struggled with the issue of
clearing firm liability, leaning toward liability in the early 1970s and away from that position beginning in 1982. As they have done in the past, self-regulatory organizations may change the rules governing the clearing arrangement, making it easier or harder for the clearing firm to escape liability.\textsuperscript{192} Note, here there is an opportunity for change; as a matter of contract between the parties, the (contractual) allocation of responsibilities may be altered through rules promulgated by the self-regulatory organizations.\textsuperscript{193} The 1999 amendments were an attempt, although meager, to reassess and reformulate existing liabilities. The interpretation of these amendments by the courts and their effect on reducing securities fraud is yet to be seen.

Nevertheless, as the presence of clearing firms within the market strengthens, their lobbying efforts to curb any expansion of the law will continue. As illustrated by the 1982 amendments to NYSE Rule 405, self-regulatory organizations are “reluctant to promulgate rules for the protection of investors if there will be a presumption of civil liability in the event of their breach.”\textsuperscript{194} Therefore, it is unlikely that self-regulatory organizations will impose affirmative responsibilities on clearing firms within the carrying agreement absent external pressures. Future efforts to influence the imposition of clearing firm liability may include pressure from the SEC on self-regulatory organizations, such as the NYSE and NASD, to amend their own rules governing carrying agreements. Those organizations may also have their own incentives to adopt stricter regulations which may contribute to and improve the organizations’ overall institutional integrity. In addition, the SEC may promulgate its own rules. Finally, it is also up to the courts to reformulate and restructure their thinking about the basic tenets of the clearing process and the relationship that exists among the introducing firm, clearing firm, and customer. As long as the courts refuse to recognize any legal relationship between the clearing firm and investor, the clearing firm will always escape

\textsuperscript{192} The SEC can require self-regulatory organizations to adopt such rules. See Securities and Exchange Act, §19(c).
\textsuperscript{193} See POSER, supra note 1, at 81.
\textsuperscript{194} "Know Your Customer," supra note 2, at 561.
liability under the premise that there exists no fiduciary duty between the two parties.

A. Establishing a Fiduciary Relationship Under Agency Law

The fiduciary duty is fundamental when it comes to protecting investors; it should be regulated, not contracted away. The fiduciary duty is necessary to ensure the accountability of those who are in control. The need for establishing fiduciary duties among business partners is magnified, especially in clearing situations, where one party, the investor, has no real bargaining power over the terms of the contract.

Nevertheless, in the clearing context, the implications of finding a fiduciary duty should be limited. Liability should not be imposed for the performance of routine clearing functions, absent a clearing firm’s knowledge of the fraud. Otherwise, similar to respondeat superior liabilities under tort law, liability would be imposed automatically upon the clearing firm. That standard is too high. Under such high standards, the clearing firm’s role would be to “police” the actions of the introducing firm, a position most parties do not want to invoke.

Overwhelmingly, courts have rejected the notion that there is any fiduciary relationship between a clearing firm and an investor. As such, the lack of a fiduciary duty has created substantial roadblocks for imposing even minimal liability upon the clearing firm. Absent a fiduciary duty, the clearing firm has no duty to disclose knowledge of potential fraud. Courts have recognized that the clearing firm acts as an agent of the introducing firm, and that the introducing firm is the agent of the customer, with both relationships invoking fiduciary obligations. But the analysis has stopped there. Therefore, this analysis implies that no, or at most a minimal,

195 Absent any fiduciary duty, the scienter requirement under § 10(b) is heightened. Therefore, in the absence of any fiduciary duty, the clearing firm would not be liable even if it knew of fraudulent activity on the part of the introducing firm. In the absence of any fiduciary relationship, there is also no duty on the part of the clearing firm to inquire into or disclose the actions of the introducing firm.

196 See Fitzpatrick & Carman, supra note 18.
relationship exists between the clearing firm and the customer.\textsuperscript{197}

One reason that the courts have failed to find clearing firms liable for investor losses is that they have confused the relationship among the introducing firm, clearing firm, and investor. The clearing firm not only maintains a relationship with the introducing firm, it also maintains a relationship with the customer. As such, under agency law, the clearing firm is an agent to the introducing firm \textit{as well as} a "subagent" to the customer.\textsuperscript{198} The subagent (clearing firm) is both the agent of the principal (investor) and an agent of the appointing agent (introducing firm). Therefore, a clearing broker’s disavowal of any responsibility (to the customer) or liability for the acts of the introducing firm does not preclude an agency relationship.

A subagent is "a person appointed by an agent \ldots to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible."\textsuperscript{199} The prefix "sub" is meant to indicate that the party appointed to perform functions for the agent is itself an agent of the appointing party; e.g., a clearing firm (subagent), appointed to perform functions undertaken by an introducing firm on behalf of a customer, is an agent of the introducing firm (appointed party).\textsuperscript{200} Stated alternatively, the subagent is the agent of the one from whom he derived his authority.\textsuperscript{201}

In addition, the subagent is an agent of the principal.\textsuperscript{202} Accordingly, the clearing firm is the agent of the investor. Recognizing that the "purpose of the entire arrangement is to carry out the purpose of the first principal" (the customer), the Restatement on Agency establishes the relationship as follows. The appointed party is the "agent of two principals, one of whom is subordinate to another."\textsuperscript{203} Thus, the clearing firm is

\textsuperscript{197} Id. at 63.
\textsuperscript{198} See Restatement, supra note 64, § 5.
\textsuperscript{199} Id. § 5, ch. 26.
\textsuperscript{200} Fitzpatrick & Carman, supra note 18, at 53.
\textsuperscript{201} Restatement, supra note 64, § 5, ch. 1.
\textsuperscript{202} Id. § 5, chs. 1, 24.
\textsuperscript{203} Note the following illustration: A person employs a real estate broker to sell a tract of land, with the understanding that the real estate broker is to use his own instrumentalities, including subordinates who are to be responsible to the real estate broker for what they do and who are to receive their compensation from him. The
the agent of both the introducing firm as well as the investor, with the introducing firm subordinate to the investor. Moreover, the clearing firm must be the agent of the investor because the clearing firm binds the investor while acting on his or her behalf.\(^\text{204}\) Finally, as an agent of the principal, the clearing firm stands in a fiduciary relationship to the principal.\(^\text{205}\)

It is well established that agents owe fiduciary duties to their principals. The same is true with subagents. Although the subagent is not contractually liable to the principal because the principal generally has a contract only with the agent, the subagent shall be responsible for any violation of a fiduciary duty\(^\text{206}\) As the Restatement of Agency explains:

The subagent is subject to a duty, as is the agent, not to act contrary to what he knows to be the principal's orders. Although he has a duty of loyalty and obedience to the agent who is his immediate principal, the subagent is subject to liability to the ultimate principal for participating in a breach of duty by the agent to the principal if he has notice that the agent's conduct constitutes a breach of duty\(^\text{207}\)

Therefore, under agency law, the subagent (clearing firm) owes fiduciary duties to the principal (customer) as well as the agent (introducing firm).

Under the above analysis, as a fiduciary, a clearing firm is subject to liability for participating in any breach of duty by the introducing firm. If the clearing firm is on notice of fraudulent activity by the introducing firm, then the clearing firm will be subject to liability to the investor for participating in the fraud. Presumably, any activity by the clearing firm after having notice of fraud—e.g., continuing to clear trades or

broker's salesman is employed to execute a contract for the principal and is liable to the broker for any failure of performance. Notwithstanding, the salesman thus employed to sell Blackacre does so on behalf of the owner. If this were not true he could not bind the seller. "With reference to the owner, [the salesman] is as much an agent in the transaction as if he had been employed directly"\(^\text{204} Id. \S 5, \text{ch.1 & \$ 428, ch. 13.}\)

\(^{\text{205}}\) Id. \S 5, cmt. d.

\(^{\text{206}}\) RESTATEMENT, supra note 64, \S 5, cmt. d; see also Licari v Blackwelder, 539 A.2d 609, 613 (Conn. App. Ct. 1988) (secondary broker "under the same duty as the primary broker to act in the utmost of good faith").

\(^{\text{207}}\) RESTATEMENT, supra note 64, \S 428, ch. 13.
offering additional credit—would be a breach of the clearing firm's fiduciary duties. Additionally, as a fiduciary, a clearing firm is subject to a duty to not act contrary to what he knows to be the principal's orders. Therefore, a clearing firm would be held to violate its fiduciary duties if it refused to accept or recognize customer demands to stop or cancel unauthorized trades.

The ramifications of finding a fiduciary relationship between the clearing firm and investor are great. As a fiduciary, a clearing firm would have a duty to disclose possible fraud at the introducing firm. Moreover, if a fiduciary relationship between the clearing firm and investor is found, a recklessness standard will be enough to establish scienter. Therefore, finding a fiduciary relationship would make it easier for investors to bring complaints against clearing firms, especially as primary violators.208

B. Knowledge of the Fraud

The 1999 amendments to NYSE and NASD rules and recent legal decisions, namely Blech II, may make it more difficult for clearing firms to claim ignorance of securities fraud violations occurring at the introducing firm. The 1999 amendments require the clearing firm to acknowledge receipt of customer complaints.209 Customer complaints made directly to the clearing firm regarding unauthorized trades may alert a clearing firm to fraudulent activities occurring at the introducing firm. Presumably, a clearing firm who receives written customer complaints cannot deny actual notice.210 Even if the clearing firm does not have actual knowledge of fraud,

208 Presumably, liability based on agency principles has not been singled out by Central Bank. See Pollack v. Laidlaw Holdings, Inc., No. 90 CIV 5788, 1995 WL 261518 (S.D.N.Y. May 3, 1995) (holding that liability based on agency principles is not limited by Central Bank). See also AT&T v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1432 (3d Cir. 1994) (holding that “Central Bank’s discussion of aiding and abetting should not be transplanted into the more settled realm of agency law”); Seolas v. Bilzerian, 951 F. Supp. 978, 983 (D. Utah 1997) (holding that even though Rule 10b-5 “does not specifically mention agency or respondeat superior,” these claims are not precluded under Central Bank).

209 Aidikoff et al., supra note 3, at 132.

210 Id.
adequate suspicion that the introducing firm is partaking in manipulative schemes to defraud investors may be inferred.

When monitoring margin trading, a clearing firm may also have sufficient insight and knowledge into possible fraudulent schemes originating at the introducing firm. When monitoring margin accounts, the clearing firm focuses on the amount of equity in the clearing firm’s account.\(^2\) "[T]he carrying firm is particularly concerned with the credit worthiness of the introducing firm and its customers and will monitor closely potential credit exposure for its own protection."\(^2\) It is these safeguards which may lead the clearing firm to uncover fraudulent practices at the introducing firm.

C. Participation

Liability is not imposed for performing routine clearing functions.\(^2\) The traditional legal standard has been that a clearing firm will not be held liable for the fraudulent acts of the introducing firm unless it actively and knowingly participates in the fraud. Therefore, neither the inadvertent, nor purposeful clearing of fraudulent trades are actionable against the clearing firm. The underlying rationales are that clearing is purely an administrative, routine, and neutral activity and that knowledge of the fraud does not taint the action. Moreover, this theory assumes that when clearing sham transactions, the actions of a clearing broker are no different than when the broker clears legitimate transactions.

\(^{211}\) Minnerop, supra note 2, at 845.
\(^{212}\) Fitzpatrick & Carman, supra note 18, at 49.
\(^{213}\) Blech II, 961 F. Supp. at 584

When plaintiffs allege mere clearing conduct against Bear Stearns, such allegations amount to no more than a non existent claim of aiding and abetting because, at most, they allege only that Bear Stearns knowingly and substantially assisted Blech by clearing the fraudulent trades. However, the complaint crosses the line dividing secondary liability from primary liability when it claims that Bear Stearns “directed” or "contrived" certain allegedly fraudulent trades.

Id.
Moreover, even if a fiduciary relationship exists between the clearing firm and the investor, routine clearing, without knowledge of the fraud, should not be actionable against the clearing firm.\textsuperscript{214} Imposing liability for the performance of routine clearing functions would mean that clearing firms would always be exposed to liability by virtue of their relationship with a defunct broker dealer. Such a standard would be too high; clearing firms would be required to police the functions of the introducing firm.

Until \textit{Blech II}, the court had not defined what actions extend beyond mere clearing services. In \textit{Blech II}, the court held that pressure exerted by a clearing firm to reduce the introducing firm's debt balance, coupled with knowledge of sham transactions (at the introducing firm) and the clearance of those trades, went beyond routine clearing functions.\textsuperscript{215} It is suggested by the \textit{Blech II} court that when a clearing firm has knowledge of fraud, its services extend beyond mere clearing. Therefore, future theories of liability will depend on the characterization of knowledge as a taint.

Clearing functions, that provide the clearing firm with insight into suspicious or fraudulent activity at the introducing firm should be considered participation. Inaction (including a lack of inquiry or disclosure of possible fraud at the introducing firm) in the face of knowledge should also be considered participation. The assumption underlying this theory of interdependence is that the inadvertent clearing of fraudulent trades is no different than the purposeful clearing of fraudulent trades. The axiom that the clearance of sham transactions plays no part in the furtherance of fraud is false and should be dismantled.

When performing clearing services with knowledge of fraudulent activity, especially when clearing trades on margin, the actions of the clearing firm should be distinguished from those actions needed to clear legitimate trades. When acting as a creditor, the clearing firm obligates itself to pay for all executed trades regardless of any default on the part of the

\textsuperscript{214} \textit{Id.} ("Even assuming that Bear Stearns had knowledge of the Blech scheme, primary liability cannot attach when the fraudulent conduct that is alleged is no more than the performance of routine clearing functions.").

\textsuperscript{215} \textit{Id.}
customer. Although, pursuant to the clearing agreement, the introducing firm agrees to indemnify the clearing firm against any loss due to a customer lack of funds, that is not always the case. When the introducing firm can no longer carry the burden or becomes insolvent, it is the clearing firm that ultimately absorbs most, if not all, of the financial loss. Therefore, the clearing firm is on high alert for any activity by the introducing firm that will expose the clearing firm financially. As evidenced by the A.R. Baron case, the clearing firm knows that it cannot rely on the introducing broker to be financially responsible or solvent.

As affirmed in Blech II, when acting as creditor to the introducing firm, clearing calls for the close monitoring of introducing firms. "[C]learing firms monitor the introducing firm’s proprietary margin accounts, focusing on the market value of those accounts and the liquidity and concentration of securities in such accounts." To protect against such risk, clearing firms have veto power over the execution of any trade and may reject the introduction of new accounts. In the past, some clearing firms have even terminated agreements with an introducing firm because of suspicious activity.

When clearing margin trades with knowledge of fraudulent trading at the introducing firm, the clearing broker cannot be said to be a neutral or disinterested party and any inaction on the part of the clearing broker should be actionable by the aggrieved customer. In the face of knowledge of fraudulent activity occurring at the introducing firm, the clearing firm may be seen as an active participator in the fraud. Clearing firms should have the affirmative duty to react to customer complaints, to disclose possible fraudulent activity at the introducing firm, to investigate or reverse questionable trades, and even to terminate relations with fraudulent introducing brokers.

216 Minnerop, supra note 2, at 844.
217 Fitzpatrick & Carman, supra note 18, at n.15 ("[C]onsidering [the introducing firm’s] small net capital there was a substantial likelihood that the clearing brokers would themselves have to bear all or part of any potential losses.").
218 Id.
219 Minnerop, supra note 2, at 844.
220 Id. at 845.
221 Id.
D. **Critique of Regulatory Changes**

The 1999 amendments to the rules of self-regulatory organizations attempt to address sales practice related problems. The rules are pro-active and are meant to reveal "red flags" prior to the time when full-blown fraud becomes apparent. They may even cause clearing firms to act with a greater degree of care when entering into clearing relationships. The amendments are not, however, meant to "alter the fundamental clearing relationship"\(^{222}\) and do not "change or otherwise affect rights, responsibilities, or liabilities of the introducing or clearing firm under law or contract."\(^{223}\) Instead, they are simply meant to "clarify the relationship and responsibilities" between the introducing and clearing firms as outlined in the carrying agreement.\(^{224}\) The amended rules reinforce well-established legal precedent that all regulatory responsibility and corresponding liability lies with the introducing firm rather than the carrying firm—with the carrying firm acting as a blind intermediary.

A fundamental effect of the amendments is that they impose on the clearing firm an independent duty to act. As such, investors may bring novel claims for violations of the amended rules, e.g., failure by a clearing firm to alert the proper SRO of a written customer complaint, or disregard of its responsibilities for ensuring adequate supervisory procedures at the introducing firm.\(^{225}\) It is too early to know how the courts will interpret these new amendments or whether they will echo early cases in which clearing firms were held liable for violations of NYSE Rule 405, the "know your customer" rule.

Admittedly, the rules will increase the potential of self-regulatory organizations to inhibit securities fraud, albeit in an untimely and inefficient manner. The introducing broker is probably the first person to whom a customer directs a complaint. After receiving from an introducing firm an unsatisfactory response, or no response, the customer's next

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222 NYSE Memo, supra note 163, at 4; NASD Rule Amendments, supra note 158, at 63,590.
223 NASD Rule Amendments, supra note 158, at 63,590.
224 NYSE Memo, supra note 163, at 4.
225 Kline & Moss, supra note 6, at 156.
alternative is to contact the clearing firm. But the clearing firm, pursuant to its interpretation of its responsibilities under the carrying agreement, defers all complaints back to the introducing firm! Thus, it may be said that the customer gets the "run around."

The new amendments also require the clearing firm to send all written complaints to the proper DEA and SRO. However, reaction by self-regulatory agencies may occur long after the completion of questionable trades. The reactions of self-regulatory agencies usually occur on a large scale, ultimately identifying magnificent fraud occurring over a long period of time at a particular introducing firm. For the disgruntled investor, re-action by the self regulatory agency comes too late; investor funds have already been lost, fraudulently transferred, or absconded to offshore entities—ever to be found or retrieved.

Finally, the amendments do little more than facilitate the retrieval and collection of customer complaints. Ironically, the clearing firm is not required to act substantively, rather only to act administratively; the rule does not require any action on the part of the clearing firm to prevent fraudulent transactions. The clearing firm is neither required to inquire into nor examine customer complaints. At least one commentator has hypothesized that "the amendments have arguably provided the clearing firm with a more secure safe harbor against many of the claims typically asserted against them by customers of their introducing firms" by allowing clearing firms to wipe their hands clean of any responsibilities early on in the regulatory process.

It is the clearing firm that has the best ability to curb the fraud. By refusing either to clear—or by canceling—a fraudulent trade, the clearing firm has the potential to stop fraud prior to or quickly after a trade is executed. Clearing firms should have the affirmative duty to react to customer complaints, to disclose possible fraudulent activity at the introducing firm, and even to investigate or reverse

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226 Shannon, supra note 3, at 682. The author argues that the new amendments are "hardly a lip service to the problem. Rather, they are a well-balanced and focused solution to the troublesome core questions of the responsibilities of clearing firms and the need for action against misbehaving or fraudulent introducing brokers." Id. at 709.
questionable trades. Instead, read in conjunction with amendments to NYSE Rule 405 ("know your customer" rule), the new amendments can be interpreted as serving the resolve of clearing firms to avoid any liability pertaining to fraudulent transactions in association with the introducing firm.

CONCLUSION

The idea of holding a clearing firm liable for the acts of an introducing firm with whom it contracts goes against the grain of traditional practice within the securities industry. Clearing firms argue that requiring them to monitor the acts of introducing brokers would result in increased compliance and cost burdens. Ultimately, it is argued that the imposition of liability will discourage clearing firms from entering into clearing relationships, or even from renewing existing relationships, with smaller introducing brokers. Some commentators have even claimed that "the system [would] not work if clearing firms are held liable for the sales practice violations of introducing firms." Commentators argue that liability for "basic housekeeping functions" will expose the clearing brokers to even greater risks. From the perspective of the clearing firm, the risk may simply be too high: "Well-capitalized clearing firms like Bear Stearns would be very reluctant, indeed probably unwilling, to enter into clearing agreements with relatively low-capitalized introducing firms; that's the way the economics of the business work."

These can all be seen as self-serving statements by the clearing front. It is this increased responsibility and corresponding risk that would cause clearing brokers to be more discriminating when choosing to contract with small, thinly capitalized introducing firms. If liability is imposed, the degree of care taken by the clearing firm would be substantially heightened—both when clearing for an introducing firm with whom it has already contracted and

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227 Wells Submission, supra note 30, at 17.
228 Henriques & Truell, supra note 17, at D1.
229 Id. (quoting General Counsel and Executive Vice President for Bear Stearns, Mark Lehman: "If they make the clearing firms liable for the sales-practice activities of the introducing firms, they can't pay clearing broker's enough to accept that risk.").
when deciding to enter into new clearing relationships. In addition, the higher the risk the introducing firm poses to the clearing firm, the more expensive it will be for the introducing firm to contract for services, thereby reducing the number of small introducing firms who may be more susceptible to engaging in fraudulent practices.

When clearing for introducing firms that have prior reported dealings involving fraud, clearing firms impose higher risks on themselves. Although clearing firms are aware of the increased risk, they reject the duty and liability that flow from it; they contract that duty away, and with it, accountability. It is the clearing firm that agrees to contract with and perform clearing services for an introducing firm that may not adhere to industry standards. It logically follows that with increased risk comes increased responsibility. When contracting with an introducing firm that has repeatedly failed to meet margin requirements, or has been known to be associated with past fraudulent persons or practices, or has been repeatedly reported by customer complaints, the pattern is all too clear. The clearing firm should certainly be held responsible, and, therefore, liable for directing, causing, or perpetuating fraudulent activity and for failing to disclose or investigate activity which has the potential to be fraudulent.

A clearing firm is one of the limited number of parties who are privy to information about the financial situation of the introducing firm. It is simply not true, as some commentators argue, that the clearing of sham transactions is no different than the clearing of legitimate transactions when the clearing firm is aware of or suspects potential fraud at the introducing firm. Moreover, because the clearing firm is exposed to high risk, it is naive to claim that the clearing firm is a detached and disinterested party. Although it is sometimes economically beneficial to turn a blind eye to short term market manipulation, it is inappropriate not to require affirmative action by the clearing firm to react to customer complaints, investigate or reverse questionable trades, disclose possible fraudulent activity at the introducing firm, and even terminate contractual relations with fraudulent introducing brokers.

In the past, the courts have improperly analyzed the role of clearing firms when performing these functions.
Clearing firms have the capacity to know when alleged fraudulent practices are occurring at the introducing firm. And knowledge of the fraud, coupled with a special duty to the customer, impose on the clearing firm liability for any lack of disclosure. Therefore, non-neutral acts may impose on clearing firms heightened levels of responsibility and, ultimately, yield clearing firm liability.

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