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ENFORCING CONTRACTUAL WAIVERS OF A CLAIM FOR FRAUD IN THE INDUCEMENT

I. INTRODUCTION

Under existing California law, any party to a contract may bring a cause of action for fraud in the inducement, even if the contract is integrated. Parol evidence is admissible to help prove a fraud cause of action. This comment argues that a merger clause in a contract between business parties who are represented by counsel during the negotiation, drafting, and execution of the contract should preclude a claim for fraud in the inducement.

Because a suit filed for fraud in the inducement continues to be a future possibility under current law, two business parties may not, with certainty, avoid by contract the possibility of a claim of fraud in the inducement. The ability to do so with certainty is a must. Contracting parties must man-
age the risk inherent in any business or commercial transaction between sophisticated business parties. For example, the market price upon which the agreement was based may change, or there may no longer be a market for the particular product. Parties entering transactions know these risks must be borne.

Those who choose to enter into contracts must be willing to accept the possibility of a loss along with the potential for a gain. They should be free to take the risk, if they so desire, that they have been fraudulently induced to enter into the transaction. In other words, they should be free to contract and allowed to "make [their] own bed and lie in it." Freedom of contract is a recognized principle; however, freedom from contract, in the sense of allowing individuals to free themselves from the contractual obligations to which they consented, for example by claiming fraud, must cease to be the automatic flip-side of that notion.

The benefits of rectifying this lack of contractual freedom are twofold. First, as courts and litigation consume valuable resources, the resulting decrease in claims for fraud in the inducement will be judicially economical. Second, legal certainty will be injected into business related contractual issues.

The California trial court and First District Court of Appeal were recently at odds concerning the validity of waivers in contracts in *Ron Greenspan Volkswagen, Inc. v. Ford*
Motor Land Development Corp. This comment will examine Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Development Corp. It will also introduce and explore the Second District case of Banco Do Brasil, S.A. v. Latian, Inc., where the court reached the opposite conclusion from Greenspan. After providing an in-depth analysis of the validity of waivers and concluding that the approach in Banco better suits the needs of both the legal and non-legal communities, this comment will propose a solution to the waiver question raised in Greenspan. The public policy concerns regarding such a proposal, as addressed in other jurisdictions, will be examined, as well as the benefits derived from the proposal, namely more certainty in contractual relations and a positive effect on judicial economy.

II. BACKGROUND

A. The Parol Evidence Rule and Recovery for Fraud

The parol evidence rule provides that where parties to a contract have set forth the terms of their agreement in a writing which they intend as the final and complete expression of their understanding, the writing is deemed integrated and may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. Whether or not result from an express agreement or be inferred from circumstances." BARRON'S LAW DICTIONARY 524 (3d ed. 1991).

16. Id.
18. See infra Part IV.A.
19. See infra Part V.
21. See infra Parts IV.E-F.
22. In California, the parol evidence rule is defined in the Code of Civil Procedure § 1856. It provides:

(a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.

(b) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement.
parol evidence\textsuperscript{23} is introduced is a question of law to be determined by the court.\textsuperscript{24}

Application of the parol evidence rule involves a two part analysis. First, was the writing intended to be an integration, in other words, a complete and final expression of the parties' agreement, precluding any evidence of collateral agreements? Second, is the agreement susceptible of the meaning contended for by the party offering the evidence.\textsuperscript{25} In determining whether the parties intended the written agreement to be integrated, the instrument itself is scrutinized.\textsuperscript{26} The intention of the parties to nullify any previous understandings or agreements may be expressed in a clause stating that there are no prior understandings or agreements not contained in the writing, and thus express the parties' intention to negate any prior understandings or agreements.\textsuperscript{27}

In addition to looking at the agreement itself, the surrounding circumstances, and the prior negotiations between the parties, the court must also look at two policy considera-

\begin{itemize}
\item[c] The terms set forth in a writing described in subdivision (a) may be explained or supplemented by course of dealing or usage of trade or by course of performance.
\item[d] The court shall determine whether the writing is intended by the parties as a final expression of their agreement with respect to such terms as are included therein and whether the writing is intended also as a complete and exclusive statement of the terms of the agreement.
\item[e] Where a mistake or imperfection of the writing is put in issue by the pleadings, this section does not exclude evidence relevant to that issue.
\item[f] Where the validity of the agreement is the fact in dispute, this section does not exclude evidence relevant to that issue.
\item[g] This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud.
\item[h] As used in this section, the term agreement includes deeds and wills, as well as contracts between parties.
\end{itemize}

\textsuperscript{23} See supra note 3.

\textsuperscript{24} See supra note 22, part (d).


\textsuperscript{26} Id.; \textit{Corbin on Contracts} § 578 (1960).

\textsuperscript{27} \textit{Banco}, 285 Cal. Rptr. at 898.
First, human memory lacks the accuracy of written evidence. Excluding parol evidence which directly conflicts with the writing can serve this policy. Second, it is feared that “fraud or unintentional invention by witnesses interested in the outcome of the litigation will mislead the finder of facts.” Indicia of credibility can alleviate this fear.

Two such indicia are, first, if the court chooses a formulation based on the Restatement Second of Contracts, “an oral agreement is credible if it might naturally have been made as a separate agreement by parties similarly situated.” Second, based on Uniform Commercial Code section 2-202, which applies to transactions in goods, an oral agreement is also “credible unless it can be said with certainty that the parties would have included the oral agreement in the writing.”

A classic exception to the parol evidence rule arises in the area of fraud. In order to recover for fraud, five factors must be proven: (1) misrepresentation (including a “promise” made without intent to perform); (2) knowledge of the representation’s falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damage. Despite an integration clause, parol evidence is admissible to help prove fraud in the inducement.

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28. Id. at 899.
29. Id.
30. Id.
31. Id.
32. Id.
35. Banco, 285 Cal. Rptr. at 873; U.C.C. § 2-202 (1992). In summary, the Banco court stated:

We perceive that an analysis based on the examination of four questions is appropriate: (1) does the written agreement appear on its face to be a complete agreement; obviously, the presence of an ‘integration’ clause will be very persuasive, if not controlling, on this issue; (2) does the alleged oral agreement directly contradict the written instrument; (3) can it be said that the oral agreement might naturally have been made as a separate agreement or, to put it another way, if the oral agreement had been actually agreed to, would it certainly have been included in the written instrument; and (4) would evidence of the oral agreement be likely to mislead the trier of fact.

Banco, 285 Cal. Rptr. at 899-900.
37. See supra note 3.
38. See supra note 1 and note 22, part (g).
B. California Civil Code Section 1542

California courts hold contractual language invalid not only under the parol evidence rule in a fraud action, but also under section 1542 of the California Civil Code. Section 1542 states: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing a release, which if known by him must have materially affected his settlement with the debtor." Although this section generally applies to personal injury releases, it has also been held to negate contractual waivers.


In *Fisher v. Pennsylvania Life Co.*, the plaintiff sold two businesses to the defendant. When the defendant breached the agreement, the plaintiff threatened to sue. After negotiations, in which plaintiff was represented by counsel, the parties entered into a settlement agreement. Clause six of the agreement released the defendant from all claims, whether the claims were "now known or unknown (Fisher and Shrotman, . . . are expressly contracting as to unknown claims), and Fisher and Shrotman . . . hereby waive the provisions of section 1542 of the California Civil Code, and any other similar law of any jurisdiction other than California." Clause thirteen of the settlement agreement contained a merger clause stating that "Fisher and Shrotman . . . hereby acknowledge that neither Fisher nor Shrotman . . . has made and entered into this Agreement in reliance upon any warranty or representation by any person or entity whatever except for warranties or representations specifically set forth herein." The *Fisher* court held that the plaintiff could not base its fraud claim on alleged misrepresentations, since both the plaintiff and defendant expressly agreed that they were

40. See infra Part IV.G.
42. Id. at 182.
43. Id. at 184.
44. Id. at 182-83.
45. See supra Part II.B.
47. Id.
entering the agreement in reliance only on the representa-
tions set forth in the agreement.48

D. The "No Representations" Clause Struck Down in Ron
Greenspan Volkswagen, Inc. v. Ford Motor Land
Development Corp.

In Ron Greenspan Volkswagen, Inc. v. Ford Motor Land
Development Corp.,49 the issue was not a section 1542 re-
lease,50 but whether a contract clause51 stating that the par-
ties relied only on representations contained in the contract
establishes, as a matter of law, that there was no reasonable
reliance on representations not contained in the contract by a
party claiming fraud.52 In the failed commercial transaction,
plaintiff conditioned the purchase of a dealership from de-
fendant on the completion of a real property exchange.53 The
trial court held that the plaintiff Greenspan did not reason-
ably rely as a matter of law on alleged misrepresentations not
included in the parties' written agreement. The merger
clause was effectively considered a waiver of plaintiff's right
to sue for fraud in the inducement.54

In reaching its decision, the trial court relied upon the
earlier case of Fisher v. Pennsylvania Life Co.,55 which estab-
lished, in the Greenspan trial court's view, that a "no repre-
sentations clause," such as that contained in the Greenspan
agreement, "made any reliance on alleged representations
unjustifiable as a matter of law."56

48. Id. at 184. See also infra note 56.
49. 38 Cal. Rptr. 2d 783 (Ct. App. 1995), rev. denied, 1995 Cal. LEXIS 3383
50. See supra Part II.B.
51. The clause in the actual agreement stated:

11.9 Sole Agreement. This agreement constitutes the sole agreement
among the parties, and supersedes any and all prior oral or written
agreements or understandings among them, pertaining to the transac-
tions contemplated in this Agreement. No express or implied represen-
tations, warranties, or inducements have been made by any party to
any other party except as set forth in this Agreement.

Greenspan, 38 Cal. Rptr. 2d at 785.
52. Id. at 784.
53. Id. The contemplated transaction was an exchange of real property be-
tween Leasco and HSA; the defendant was a general partner of HSA. Id. HSA
was to transfer title of its Howard Street property to Leasco, who would then
rent it back to the defendant at a favorable rate. Id.
54. Id.
56. Greenspan, 38 Cal. Rptr. 2d at 785. The Fisher court stated:
The Greenspan court of appeal held that the trial court erred in granting summary judgment as to the plaintiff's fraud claims, and it reversed the judgment.\textsuperscript{57} The court reversed the summary judgment on two grounds.\textsuperscript{58} First, the court argued that the Fisher ruling relied upon by the Greenspan trial court was not supported by the authority upon which it relied.\textsuperscript{59} Second, the court asserted that the Fisher ruling was inconsistent with a line of California cases allowing the admission of parol evidence to prove fraud in the inducement, even when the contract contained an integration clause.\textsuperscript{60}


The Greenspan court of appeal stated that the Casey decision did not support the Fisher holding and was not directly relevant to Fisher because it involved a general release pertaining to tort liability, not a representation clause in a con-

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Plaintiff here relies on cases that hold that, where an agreement is obtained by fraud, it may be rescinded in spite of provisions therein purporting to waive fraud. But those cases are inapposite to this case. Here, plaintiff had agreed that he (and Shrotman) had entered into the 1971 agreement in reliance only on the representations set forth in that agreement. Such an agreement amounts to a statement, now binding on plaintiff, that any other representations previously made to him were not material inducements to his execution of the 1971 agreement. Since he thus, in 1971, agreed that he had not relied on the representations on which he now seeks recovery, he cannot now claim otherwise.

\textit{Fisher}, 138 Cal. Rptr. at 184.

\textsuperscript{57} \textit{Greenspan}, 38 Cal. Rptr. 2d at 784.

\textsuperscript{58} Id. at 786.

\textsuperscript{59} Id. The Fisher court supported its position with \textit{Casey v. Proctor}, 378 P.2d 579 (Cal. 1963) and \textit{Kronsberg v. Milton J. Wershow Co.}, 47 Cal. Rptr. 592 (Ct. App. 1965). In its holding, the \textit{Casey} court stated that, under § 1542, whether a general release extends to unknown injuries is a question of fact to be determined by evidence of intent independent of the actual language in the release. \textit{Casey}, 378 P.2d at 586. The \textit{Kronsberg} court rejected the admission of parol evidence to prove the alleged fraud. \textit{Kronsberg}, 47 Cal. Rptr. at 596. The court stated, “a party having agreed in writing to do a certain thing may not stultify his written agreement by claiming that, in fact, he relied upon the other party’s oral promise that the terms of the agreement should not be complied with.” \textit{Id}.

\textsuperscript{60} \textit{Kronsberg}, 47 Cal. Rptr. at 596.
tact.\textsuperscript{61} Also, the \textit{Greenspan} court argued that \textit{Casey} did not support the idea that a no representations clause "made any reliance on alleged representations unjustifiable as a matter of law," as stated in \textit{Fisher}, but rather stood for the notion that "‘boilerplate’ language in agreements is not always conclusive."\textsuperscript{62}

Further, according to the \textit{Greenspan} court, \textit{Kronsberg} failed to support the \textit{Fisher} court's conclusion.\textsuperscript{63} In \textit{Kronsberg}, the plaintiff’s property was sold at auction by the defendant corporation, and the plaintiff alleged fraud in the inducement of the auction agreement.\textsuperscript{64} The \textit{Kronsberg} court denied admission of parol evidence to prove the alleged fraud.\textsuperscript{65} The \textit{Greenspan} court argued that \textit{Kronsberg} did not support the \textit{Fisher} holding because, unlike the \textit{Kronsberg} court, the \textit{Fisher} court did not rely on the parol evidence rule to support its holding.\textsuperscript{66}

\section{2. Fisher is Inconsistent with California Law}

In addition to arguing that the \textit{Fisher} court's cited authority did not support its position, the \textit{Greenspan} court of appeal also claimed that \textit{Fisher} failed to follow a line of California cases holding that a merger clause does not bar an action for fraud.\textsuperscript{67} This line of California cases includes \textit{Simmons v. Ratterree Land Co.},\textsuperscript{68} \textit{Herzog v. Capital Co.},\textsuperscript{69} \textit{Vai v. Bank of America},\textsuperscript{70} and \textit{Buist v. C. Dudley DeVelbiss Corp.}.\textsuperscript{71}

\subsection{a. Simmons v. Ratterree Land Co.}

In \textit{Simmons}, a purchaser of real property was granted a rescission on the basis of fraud.\textsuperscript{72} The defendant admitted

\begin{itemize}
\item \textsuperscript{61} \textit{Greenspan}, 38 Cal. Rptr. 2d at 787. In \textit{Casey v. Proctor}, the court held that plaintiff's personal injury claim (unknown to him at the time he signed a release deriving from his property damage claims) was not barred by a general release because, under Civil Code § 1542, plaintiff could avoid the release even though it specifically included "unknown . . . injuries." \textit{Casey}, 378 P.2d at 589.
\item \textsuperscript{62} \textit{Greenspan}, 38 Cal. Rptr. 2d at 787.
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} \textit{Id.}
\item \textsuperscript{65} \textit{Id.} at 790.
\item \textsuperscript{66} \textit{Id.}
\item \textsuperscript{67} \textit{Id.} at 788.
\item \textsuperscript{68} 17 P.2d 727 (Cal. 1932).
\item \textsuperscript{69} 164 P.2d 8 (Cal. 1961).
\item \textsuperscript{70} 364 P.2d 247 (Cal. 1961).
\item \textsuperscript{71} 6 Cal. Rptr. 259 (Ct. App. 1960).
\item \textsuperscript{72} \textit{Simmons}, 17 P.2d at 727, 730.
\end{itemize}
the misrepresentations, but argued it was relieved from lia-
ibility.\textsuperscript{73} Defendant relied on a contract provision stating that
the plaintiff had inspected the property and did not rely on
any representations of the seller or its agents except those
stated in the contract, and that all representations inducing
the buyer to enter into the contract were contained therein.\textsuperscript{74}

The Simmons court rejected the defendant's argument,
holding that it is well settled law "that a seller cannot escape
liability for his own fraud or false representations by the in-
sertion of provisions such as are embodied in the contract of
sale herein."\textsuperscript{75}


Like Simmons, the Herzog court held that a "no repre-
sentations clause" in a contract did not insulate a principal
from being held liable for his own fraudulent conduct.\textsuperscript{76} The
court stated that a principal, under a positive duty to dis-
close, could not relieve itself of any liability for failure to dis-
close by placing a clause in a contract to the effect that there
are no representations outside of the written agreement.\textsuperscript{77}

c. Vai v. Bank of America

The Vai case concerned an agreement dividing commu-
nity property.\textsuperscript{78} The agreement contained a clause stating
that the contract was entered into voluntarily and based only
on promises contained therein.\textsuperscript{79} The court held that the
plaintiff was not estopped from asserting fraud, because
when an agreement is procured by fraud, none of its provi-
sions are legally binding.\textsuperscript{80} As in Herzog, the Vai court did
not consider the representations clause as a waiver of the
plaintiff's right to sue for fraud.\textsuperscript{81}

\begin{thebibliography}{9}
\bibitem{73} Id. at 728.
\bibitem{74} Id.
\bibitem{75} Id.
\bibitem{76} Herzog v. Capital Co., 164 P.2d 8, 9 (Cal. 1945).
\bibitem{77} Id. at 10.
\bibitem{79} Id. at 256.
\bibitem{80} Id.
\bibitem{81} Id.
\end{thebibliography}
d. Buist v. C. Dudley DeVelbiss Corp.

The Simmons, Herzog, and Vai decisions were followed by Buist. In Buist, the plaintiff was granted judgment in a fraud action arising out of the plaintiff's purchase of real property. The court rejected the defendant's argument that the merger clause contained in the contract established that the alleged misrepresentations were not made. The court cast aside this argument, reasoning that there is an exception to the parol evidence rule for evidence of fraudulent representations inducing the execution of a contract. In addition, the court argued that a party may not avoid liability for failure to meet its duty to disclose by relying on a merger clause in a contract.

3. The Greenspan Reversal

The Greenspan court of appeal argued that the above case law, stating that a merger clause does not bar an action for fraud, was ignored by Fisher and was in direct conflict with the holding in that case. In addition, the court pointed out that Fisher has consistently been ignored by California courts and commentators. Instead, the rule that a merger clause, such as that in Fisher, does not bar an action for fraud has been applied.

Finally, the court noted that although Fisher did not discuss the parol evidence rule, its holding was "inconsistent
with the well-settled rule that parol evidence is admissible to prove fraud in the inducement 'even though the contract recites that all conditions and representations are embodied therein.' With the above reasoning, the Greenspan court reversed the summary judgment granted by the trial court, because, in its opinion, the defendants had not "established an absence of triable issues entitling them to summary judgment."

E. Banco Do Brasil, S.A. v. Latian, Inc.

In Banco Do Brasil, S.A. v. Latian, Inc., the court of appeal, in reversing the trial court's holding, stated that the parol evidence rule barred admission of evidence of the alleged oral agreement to alter the terms of the written guaranty, since that written instrument was intended to reflect the parties' entire agreement, and the oral agreement was not needed to add in any necessary terms or to explain any ambiguities.

In Banco, the plaintiff bank filed suit against the defendant guarantor of a company's debts, which were secured by the guarantor's purchase of inventory. The defendant filed a cross-complaint against the bank, claiming the bank failed to honor an oral promise to extend a $2 million line of credit

90. Greenspan, 38 Cal. Rptr. 2d at 789 (quoting Ferguson v. Koch, 268 P. 342, 345 (Cal. 1928)); Mooney v. Cyriacks, 185 Cal. 70, 80-81 (Ct. App. 1921) (holding contract provision which recites that all conditions and representations are embodied therein will not prevent plaintiff from introducing parol evidence that sale was induced by fraud); Morris v. Harbor Boat Bldg. Co., 247 P.2d 589, 593 (Ct. App. 1952) ("It was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud... even though the contract recites that all conditions and representations are embodied therein."); Oak Indus., Inc. v. Foxboro Co., 596 F. Supp. 601, 607 (S.D. Cal. 1984) (holding under California law, extrinsic evidence is admissible to prove fraud in the inducement, notwithstanding a contract provision that no representations have been made other than those stated in the agreement); Applications Inc. v. Hewlett Packard Co., 501 F. Supp. 129, 134 (S.D.N.Y. 1980), aff'd, 672 F.2d 1076 (2d Cir. 1982) (holding under California law, parol evidence is admissible to prove fraud despite contract provision waiving representations not stated in the agreement).

91. Greenspan, 38 Cal. Rptr. 2d at 790.


93. Id. at 887. The court also held that even if the parol evidence of the alleged oral agreement were admissible, that evidence was inadequate to establish the presence of an oral agreement or fraud. Id. at 891.

94. Id. at 873.
to the guarantors when they purchased the inventory, and that the bank committed fraud in making this false promise and in misrepresenting the financial standing of the company. The trial court entered judgment for the guarantors on their cross-complaint and against the bank, which the court of appeal reversed.

In discussing the nature of the parol evidence rule, the court made it clear that regardless of its persuasiveness, evidence of any oral understandings is legally irrelevant and the parties' integrated written agreement is their exclusive and binding contract. "[I]t is a rule of substantive law making the integrated written agreement of the parties their exclusive and binding contract no matter how persuasive the evidence of additional oral understandings. Such evidence is legally irrelevant and cannot support a judgment." In addition, the court asserted that it would decide the issue of whether the guaranty agreement was integrated and whether the parol evidence rule applied to exclude any evidence of a collateral agreement de novo, as it is a question of law to be determined by the court.

The Banco court applied the parol evidence rule. It determined that the guaranty agreement was indeed integrated, finding it was intended by the parties to be the complete expression of their understanding. The agreement appeared on its face to fully describe the relationship between the parties, and "most importantly . . . it [contained] an express 'integration' clause. This provision, which the respondents concede they read, understood and discussed with their attorneys," clearly made the agreement integrated. In

95. Id. at 884.
96. Id. at 872-73.
97. See supra Part II.A.
98. Banco, 285 Cal. Rptr. at 885.
99. The purpose of applying the parol evidence rule is to discourage interested parties or witnesses to a contract from committing fraud, perjury, or unintentional invention by stating that the contract did not actually represent the agreement of the parties. In addition, the parol evidence rule controls the tendency of sympathetic juries to release parties from their bad bargains. Id. at 887 (citing Masterson v. Sine, 436 P.2d 561 (Cal. 1968)).
100. Id. at 885-86.
101. Id. at 870.
102. Id. at 887.
103. Id. (emphasis added).
104. Banco, 285 Cal. Rptr. at 887. The integration clause provided that the agreement "embodies the entire agreement and understanding among the par-
fact, the court found it difficult to imagine a clearer method for expressing the intent to make the written agreement a full and complete expression of the parties' relationship.\textsuperscript{105}

In looking at the entire transaction, the court placed special emphasis on the surrounding circumstances, the background of the transaction, and the fact that the respondents "were sophisticated and experienced businessmen who were \textit{at all times}, from the very outset of their involvement \ldots \textit{advised, counseled and assisted by attorneys of their own choosing}. \ldots [R]espondents were both cautious and deliberate with respect to their negotiations and agreements in this matter."\textsuperscript{106} In reversing the trial court, the court of appeal reasoned that the alleged oral, collateral agreement would not naturally be part of a separate agreement.\textsuperscript{107}

Despite the fact that an allegedly primary factor in the agreement was the $2 million line of credit over a six month period from Banco, there was no mention of it in the agreement itself, nor in any other contemporaneous writings.\textsuperscript{108} Respondents argued that there were some negotiations, or some pending negotiations, regarding the possible future extension of a $2 million line of credit, but that did not convince the court that the agreement was not integrated.\textsuperscript{109} If instead of incomplete discussions, a prior binding assurance had been negotiated, it would have been illogical for the parties to have omitted such a credit arrangement in the written agreement, which claimed to embody the total agreement between the parties.\textsuperscript{110} In fact, when called as a witness, their own attorney conceded that he understood that any credit line agreement would have been spelled out in writing.\textsuperscript{111}

The \textit{Banco} court concluded its discussion with a general comment.\textsuperscript{112} The court stated its view that parties to a contract in California are, and should be seen by the courts as

\textit{ties hereto and \textit{supersedes all prior agreements and understandings} relating to the subject matter hereof." \textit{Id.}}

\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id. at 888} (emphasis added). The guaranty agreement, which was a major debt restructuring sought by plaintiffs, was negotiated by plaintiffs with the repeated aid of their counsel. \textit{Id. at 880.}
\textsuperscript{107} \textit{Id. at 888.}
\textsuperscript{108} \textit{Id. at 889.}
\textsuperscript{109} \textit{Id. at 896.}
\textsuperscript{110} \textit{Banco, 285 Cal. Rptr. at 877-84.}
\textsuperscript{111} \textit{Id. at 876-77 n.12, 890.}
\textsuperscript{112} \textit{Id. at 893.}
being, "capable of drafting a written instrument which will fully and completely define a particular legal relationship." In addition, the court argued that at the very center of the judicial function is the task of providing "legal certainty and reasonable predictability" in the affairs of its people; its function does not include making such certainty unattainable.

Further, addressing the rights and obligations of parties to a contract, the court expressed its view that "[p]arties to a business or commercial transaction, such as those in this case, should be able to clearly express their intent as to the nature and scope of their legal relationship and then be able to rely on that expression." The court stated that in cases such as the one at hand, where both parties agree that their entire relationship is clearly defined in a particular written instrument, both parties are "entitled and required to live with the agreed terms." In its final clause concluding the court's discussion of the applicability of the parol evidence rule, the Banco court stated in no uncertain terms its conviction that "[t]he courts simply cannot permit clear and unambiguous integrated agreements . . . to be rendered meaningless by the oral revisionist claims of a party who, at the end of the game, does not care for the result."

F. "Sophisticated Business Parties"

The Banco court argued that "sophisticated business parties" should live by the terms of their agreement. There is currently no precise description of what it means to be a "sophisticated business party." However, the Uniform Commercial Code can be of some assistance in formulating a definition. The Uniform Commercial Code defines a "merchant" and "between merchants" under Article 2 by stating:

"Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or

113. Id; see infra Part III.
115. Id.
116. Id. (emphasis added).
117. Id.
118. See supra Part II.E.
broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.\textsuperscript{120} “Between merchants” means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.\textsuperscript{121}

\textit{Wisconsin Knife Works v. National Metal Crafters}\textsuperscript{122} states that “between merchants” is a term of art in the Uniform Commercial Code. It means between commercially sophisticated parties.\textsuperscript{123} While Article 2 of the Uniform Commercial Code applies specifically to transactions in goods,\textsuperscript{124} a similar definition would apply to specify instances in which courts would uphold a merger clause waiving the right to sue for fraud in the inducement.\textsuperscript{125}

G. Public Policy in California and Other Jurisdictions

There is ample policy justification for allowing parol evidence to show fraud.\textsuperscript{126} This line of cases includes \textit{Foreman & Clark Corp. v. Fallon},\textsuperscript{127} \textit{Guido v. Koopman},\textsuperscript{128} \textit{Sabo v. Delman},\textsuperscript{129} and \textit{Danann Realty Corp. v. Harris}.\textsuperscript{130} However, allowing a waiver of the right to sue for fraud in the inducement when the contract is between two sophisticated business parties carves out a narrow exception to this general policy.\textsuperscript{131} Such a waiver is justified, because “[t]o hold otherwise would be to say that it is impossible for two businessmen dealing at arm’s length to agree that the buyer is not buying in reliance on any representations of the seller as to a particular fact.”\textsuperscript{132} Allowing a waiver of the right to sue for fraud in the inducement would provide the necessary certainty in contractual relations between business parties.\textsuperscript{133}

\textsuperscript{120} Id. § 2-104(1).
\textsuperscript{121} Id. § 2-104(3).
\textsuperscript{122} 781 F.2d 1280 (7th Cir. 1986).
\textsuperscript{123} Id. at 1284.
\textsuperscript{124} U.C.C. § 2-102 (1992).
\textsuperscript{125} See infra Part V.
\textsuperscript{126} See infra notes 127-30.
\textsuperscript{127} 479 P.2d 362 (Cal. 1971).
\textsuperscript{129} 143 N.E.2d 906 (N.Y. 1957).
\textsuperscript{130} 157 N.E.2d 597 (N.Y. 1959).
\textsuperscript{131} See infra Part V.
\textsuperscript{132} Danann, 157 N.E.2d at 600.
1. Legal Representation

In Foreman & Clark Corp. v. Fallon, the plaintiff sought damages for breach of a lease agreement between itself and defendants.\(^\text{134}\) During negotiations, the defendants were represented by Norris, an attorney with thirty-three years of experience.\(^\text{135}\) The court noted the fact that this attorney took part in the drafting of the agreement and allowed the inclusion of the merger clause.\(^\text{136}\) Also, the court emphasized that had one of the alleged misrepresentations been material and relied upon by defendants in executing the lease, an attorney with the experience of Norris would have insisted upon including those representations in the written lease.\(^\text{137}\)

In Guido v. Koopman,\(^\text{138}\) the appellant sought reversal of a judgment freeing respondent from all liability for appellant's horseback riding accident.\(^\text{139}\) Before starting lessons at respondent's horseback riding academy, appellant signed a release.\(^\text{140}\) Appellant argued that the release should not be upheld, because it was allegedly executed in reliance on respondent's misrepresentation that it would not be enforced.\(^\text{141}\) The court noted that the appellant was an attorney, was familiar with releases, and in fact used them in her own practice.\(^\text{142}\) Because of this legal knowledge, the appellant could not claim to have executed the written release, without having read it, in reliance on statements made by the defendant that the release was unenforceable.\(^\text{143}\)

2. The General Public

In the New York case of Sabo v. Delman, the plaintiff sued to rescind a contract on the basis of fraud.\(^\text{144}\) The court ruled that the merger clause in the contract would not prevent the introduction of evidence of fraudulent representa-

\(^{134}\) Foreman & Clark Corp. v. Fallon, 479 P.2d 362, 364 (Cal. 1971).
\(^{135}\) Id. at 366.
\(^{136}\) Id.
\(^{137}\) Id.
\(^{139}\) Id. at 438.
\(^{140}\) Id.
\(^{141}\) Id. at 439.
\(^{142}\) Id.
\(^{143}\) Id.
The court reasoned that otherwise, defendants would easily be able to perpetrate fraud and be free from liability if they included a merger clause in the agreement.\textsuperscript{146} In \textit{Danann Realty Corp. v. Harris}, also a New York case, the plaintiff claimed fraud in the inducement.\textsuperscript{147} The plaintiff argued that defendants made false representations to the plaintiff, which induced the plaintiff to purchase a contract of sale for a building lease.\textsuperscript{148} The contract included both a merger clause and a disclaimer as to specific representations.\textsuperscript{149} The \textit{Danann} court denied the plaintiff's cause of action for fraud and refused to allow the plaintiff to avoid the bad bargain.\textsuperscript{150} The court reasoned that if it allowed the cause of action for fraud, businesspeople would be unable to draft a contract free from any reliance on representations.\textsuperscript{151}

III. Identification of the Problem

At present, parties freely entering a contract are unable to make it completely reliable because the right to sue for fraud in the inducement\textsuperscript{152} remains a viable option for either party if they dislike the outcome of the contract. This choice is available even if the contract is integrated and the parties are businesspeople.\textsuperscript{153} Retaining such a rule is detrimental because, as stated in \textit{Banco}:

\begin{quote}
It is the essence of the judicial function to contribute to legal certainty and reasonable predictability in the affairs of our citizens rather than to suggest that such goals are not attainable. Parties to a business or commercial transaction... should be able to clearly express their intent as to the nature and scope of their legal relationship and then be able to rely on that expression.\textsuperscript{154}
\end{quote}

\begin{footnotes}
\item[145] \textit{Id.} at 909.
\item[146] \textit{Id.}
\item[147] \textit{Danann Realty Corp. v. Harris}, 157 N.E.2d 597 (N.Y. 1959).
\item[148] \textit{Id.}
\item[149] \textit{Id.} at 599.
\item[150] \textit{Id.}
\item[151] \textit{Id.} at 600.
\item[152] \textit{See supra} note 1.
\item[153] \textit{See supra} Part II.F.
\end{footnotes}
Sophisticated business parties must have "legal certainty and reasonable predictability" in contractual relations.\(^{155}\) Such certainty is necessary to uphold the integrity of the contracting process and provide incentives for business parties to continue entering into contracts.\(^{156}\) Sophisticated parties require assurance that each party must abide by the written contract terms.\(^{157}\)

IV. Analysis

A. The Banco Approach is Superior

The view expressed by the court of appeal in Banco is essentially that expressed by the trial court in Greenspan.\(^{158}\) Parties to a business or commercial transaction, such as the failed property exchange in Greenspan or the guaranty agreement in Banco, should be able to draft a written agreement which clearly sets forth the legal relationship between the two parties.\(^{159}\) In addition, the parties must be able to rely on the validity of that contract.\(^{160}\)

Courts play an essential role in allowing parties to rely upon business or commercial transactions; to be able to rely on the words embodied in the contract, sophisticated business parties must be assured that the contents of such agreements will be upheld in court.\(^{161}\) Courts must sustain the intended meaning of unambiguous integrated agreements and not allow these contracts to be augmented by parties who, in the end, are unhappy with the result of their freely negotiated contract.\(^{162}\) Without such court action, disgruntled parties will continue to seek to avoid the written contract and revise its original, intended meaning by claiming oral promises were made that induced them to sign the contract.\(^{163}\)

\(^{155}\) Id.

\(^{156}\) Baird, supra note 9, at 584.

\(^{157}\) See supra notes 113-17 and accompanying text.


\(^{159}\) Banco, 285 Cal. Rptr. at 908.

\(^{160}\) Id.

\(^{161}\) Id.

\(^{162}\) Id.

\(^{163}\) Id.
B. The Emphasis Placed on Legal Representation

Both the Greenspan and Banco cases concerned business or commercial transactions.\textsuperscript{164} Also, the cases emphasized the fact that both parties were represented by counsel throughout the entire negotiation and transaction.\textsuperscript{165} The presence of legal expertise has been a factor in other cases as well, such as Foreman & Clark Corp. v. Fallon\textsuperscript{166} and Guido v. Koopman.\textsuperscript{167}

1. Foreman & Clark Corp. v. Fallon

In Foreman & Clark Corp. v. Fallon, the plaintiff sought damages for breach of a lease agreement between itself and defendants.\textsuperscript{168} During the lease negotiations, the defendants were represented by an experienced attorney.\textsuperscript{169} The court emphasized that had one of the alleged misrepresentations been material and relied upon by defendants in executing the lease, "such an experienced lawyer would have required the representation to be included in the written lease."\textsuperscript{170}


\textsuperscript{165} The Banco court states, both in the text and in the footnotes, that "[i]t is important to emphasize that the respondents, in all of their dealings with Banco, as well as Kudsy, were advised and assisted by their own counsel." Banco, 285 Cal. Rptr. at 881 n.7.

The Greenspan court declined respondent's suggestion that a new rule be adopted stating that, "under certain circumstances (e.g., when parties are represented by counsel or have some level of business sophistication), a standard representations clause in a contract bars justifiable reliance on certain sorts of alleged misrepresentations, as a matter of law." Greenspan, 38 Cal. Rptr. 2d at 788 n.6. Instead of adopting the solution proposed by the respondents, the Greenspan court chose to adhere to the current rule in California, as summarized in Witkin, that:

A party to a contract who has been guilty of fraud in its inducement cannot absolve himself from the effects of his fraud by any stipulation in the contract, either that no representations have been made, or that any right which might be grounded upon them is waived. Such a stipulation or waiver will be ignored, and parol evidence of misrepresentations will be admitted, for the reason that fraud renders the whole agreement voidable, including the waiver provision.

\textbf{Id.} at 788-89 n.7; \textit{1} \textsc{Bernard E. Witkin, Summary of California Law, Contracts} § 410 (9th ed. 1995).


\textsuperscript{170} \textit{Id.}
2. Guido v. Koopman

The importance the Foreman court placed on the fact the defendant received legal advice from experienced counsel throughout the negotiation, suggests that a heightened standard of proof is required in order for fraud in the inducement to be asserted when a party is represented by counsel. In addition, such a heightened standard appeared in Guido, where the appellant sought reversal of a judgment enforcing respondent's release from all liability for appellant's horseback riding accident. The court focused on the fact that the appellant was an attorney and used releases in her own practice. Thus, the appellant could not claim to have relied on respondent's statements that the release was unenforceable when she executed it without reading it.

The Guido court emphasized the concept that "[i]n determining whether one can reasonably or justifiably rely on an alleged misrepresentation, the knowledge, education and experience of the person claiming reliance must be considered." This notion was not considered by the court of appeal when it handed down its reversal of the trial court's summary judgment ruling in Greenspan. It refused to accept the respondents' argument that it should uphold the trial court's summary judgment.

In part, the Greenspan trial court based its decision on the fact that both parties had superior knowledge, meaning that they were both represented by counsel throughout the entire process of negotiating and drafting the agreement, and thus could not have justifiably relied on alleged misrepresentations which were not reduced to writing. Unlike Guido, the Greenspan court declined to consider "the knowledge, education and experience of the person claiming reliance." Had it done so, the fact that both Greenspan parties were sophisticated business parties would arguably have led the

171. Id.
173. Id.
174. Id.
175. Id.
177. Id. at 785; see also supra note 165.
178. Guido, 2 Cal. Rptr. 2d at 439.
court of appeal to the same conclusion as in Banco, and it would have affirmed the summary judgment for defendants.

C. Resolving the Differences in the Greenspan Decisions: Sophisticated Businesspeople

In order to resolve the difference of opinion between the Greenspan trial court and the court of appeal, emphasis must be placed on the knowledge of the parties entering into the contract, as was done in Foreman & Clark Corp. v. Fallon\textsuperscript{179} and Guido v. Koopman.\textsuperscript{180} Special guidelines must be set to distinguish between instances in which parties should be prevented from claiming fraud in the inducement because the contract contains a merger clause, and those cases in which the current California law, stating that a merger clause should not bar an action for fraud, should be applied.\textsuperscript{181}

The Uniform Commercial Code\textsuperscript{182} provides some guidance in defining those parties to be bound by the merger clauses in their contracts; these specific parties are “sophisticated business parties.”\textsuperscript{183} The Uniform Commercial Code defines a “merchant” as a person who deals in, holds himself or herself out as, or has special knowledge or skill peculiar to the goods involved in the transaction.\textsuperscript{184} In addition, the Commercial Code defines “between merchants” under Article 2 as any transaction in which both parties hold the knowledge or skill of merchants.\textsuperscript{185} Also, Wisconsin Knife v. National Metal Crafters\textsuperscript{186} describes “between merchants” in the Commercial Code as being a term of art meaning “between commercially sophisticated business parties.”\textsuperscript{187} Moreover, using these definitions to identify those parties allowed to waive the right to sue for fraud in the inducement would sufficiently narrow the availability of such a waiver so as to eliminate any harm to members of the general public.

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\textsuperscript{179} Foreman & Clark Corp. v. Fallon, 479 P.2d 363 (Cal. 1971); see supra Part II.G.1.
\textsuperscript{180} Guido, 2 Cal. Rptr. 2d at 437; see supra Part II.G.1.
\textsuperscript{181} See infra Part V.
\textsuperscript{182} U.C.C. (1992).
\textsuperscript{183} See supra Part II.F.
\textsuperscript{184} U.C.C. § 2-104(1) (1992). See also supra Part II.F.
\textsuperscript{185} Id. at § 2-104(3). See also supra Part II.F.
\textsuperscript{186} 781 F.2d 1280 (7th Cir. 1986).
\textsuperscript{187} Id. at 1284.
Part of the *Greenspan* appellate court’s objection to a clause waiving the right to sue for fraud in the inducement when both parties to a contract were represented by counsel during the transactional process was that “the number and delicacy of the lines that would need to be drawn to implement such a rule would be prohibitive.” However, using the definitions of “merchant” and “between merchants” as delineated in *Wisconsin Knife* and asking both parties to initial particular clauses appears to be a reasonable option. The initialed clauses would include those defining their legal relationship and solidifying their decision to waive their right to sue for fraud in the inducement.

D. Contracts Between Non-Sophisticated Business Parties

The court of appeal in *Greenspan* emphasized that *Fisher* failed to follow a line of California cases holding that merger clauses in a contract do not bar an action for fraud. However, factually, the line of cases cited by the *Greenspan* court of appeal varied substantially from *Greenspan* and *Banco*.

In *Simmons v. Ratterree Land Co.*, a purchaser of real property was granted a rescission on the ground of fraud, even though the contract signed by the purchaser contained a clause stating that the buyer relied only on those representations specifically stated in the contract. Although the defendant had agents, unlike *Greenspan*, there was no mention that either party was represented by counsel throughout the entire process of negotiating and drafting the sales agreement. This case dealt with members of the general public who did not have any special knowledge or education.

Similarly, there is no evidence that the plaintiff was aided by counsel in the transactional process in *Herzog v. Capital Co.* There, the principal could not avoid liability

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189. Id. at 790; see also supra Part II.D.2.
191. 17 P.2d 727 (Cal. 1932).
192. Id.; see supra Part II.D.2.a.
193. Id.
194. Id.
for his own fraudulent conduct, even with a provision in the contract stating that there were no representations or verbal understandings other than those included in the contract.\textsuperscript{196} There were no grounds for the defendant to argue, as respondents did in \textit{Greenspan}, that the merger clause in the contract should be upheld because the plaintiff had the advantage and superior knowledge of legal representation when the contract was drafted and signed.\textsuperscript{197}

Furthermore, in \textit{Vai v. Bank of America},\textsuperscript{198} which focused on a community property issue,\textsuperscript{199} the plaintiff was allowed to assert fraud regardless of the "no representations" provision in the contract.\textsuperscript{200} Although the plaintiff was represented by an attorney during the property settlement negotiations, this was not a commercial or business transaction between two business persons.\textsuperscript{201} It was a simple case of a member of the general public, not a sophisticated business party, signing a contract containing a merger clause.\textsuperscript{202}

Finally, in \textit{Buist v. C. Dudley DeVelbiss Corp.},\textsuperscript{203} the plaintiff, without the benefit of legal representation, purchased real property.\textsuperscript{204} The plaintiff was granted a judgment for fraud.\textsuperscript{205} The court rejected the defendant's contention that the merger clause in the contract proved that the alleged misrepresentations were not made.\textsuperscript{206}

The above cases cited by the \textit{Greenspan} court of appeal held that the provision in the contract stating that no representations or promises were made other than those contained in the contract was insufficient to bar an action for fraud. However, those cases are significantly different from the case which faced the court of appeal in \textit{Greenspan}.\textsuperscript{207} Both \textit{Greenspan} parties had the advantage of the sophisticated knowl-

\footnotesize{\textsuperscript{196} Herzog v. Capital Co., 164 P.2d 8, 9 (Cal. 1945).
\textsuperscript{197} Id.
\textsuperscript{199} Vai, 364 P.2d at 256.
\textsuperscript{200} Id.
\textsuperscript{201} Id. at 249.
\textsuperscript{202} Id.
\textsuperscript{203} 6 Cal. Rptr. 259 (Ct. App. 1960). See supra Part II.D.2.d.
\textsuperscript{204} Buist v. Dudley DeVellbiss Corp., 6 Cal. Rptr. 259 (Ct. App. 1960).
\textsuperscript{205} Id. at 261.
\textsuperscript{206} Id. at 263.
edge of their legal representation when the agreement was
drafted. They were not simply relying on their own
knowledge.

E. Public Policy Considerations

There is a wide variety of public policy implications that
must be taken into account when looking at the introduction
of a waiver. New York courts, such as those deciding Sabo v.
Delman and Danann Realty Corp. v. Harris, and the
California court deciding Guido v. Koopman highlight such
considerations.

1. Sabo v. Delman

In Sabo, the plaintiff sought rescission of a contract on
the basis of fraud. The court ruled that the merger clause
contained in the contract was ineffectual in excluding evi-
dence of fraudulent representations. The court reasoned
that if the rule were otherwise, a defendant would easily be
able to "perpetrate a fraud with immunity, depriving the vic-
tim of all redress, if he simply has the foresight to include a
merger clause in the agreement . . . [p]ublic policy and moral-
ity are both ignored if such an agreement can be given effect
in a court of justice." As with the cases cited by the Greenspan court of appeal to prove that Fisher was not supported by its cited author-
ity, the plaintiff in Sabo was an ordinary individual who
did not have the advice of counsel during the transactional
process. However, the public policy concerns raised in
Sabo would not be so striking in cases such as Greenspan and
Banco, in which both parties had legal representation. The parties would have the advantage of an attorney clearly
explaining what it would mean to sign the agreement waiv-

208. Id. at 792.
212. Sabo, 143 N.E.2d at 906.
213. Id. at 909.
214. Id.
215. See supra Part II.D.1.
216. Sabo, 143 N.E.2d at 906.
217. Id.
ing the right to sue for fraud in the inducement, and emphasizing that any aspects of the negotiations relied upon by the parties which were not embodied in the written instrument would be given no effect in court.\(^{218}\)

2. Danann Realty Corp. v. Harris

In \textit{Danann}, the plaintiff claimed that the defendants made false representations that induced plaintiff to purchase a contract of sale of a building lease.\(^{219}\) Not only did the contract include a merger clause, it also included a disclaimer as to specific representations.\(^{220}\)

The \textit{Danann} court refused to allow the plaintiff to successfully assert a cause of action for fraud and avoid its bad bargain, stating that "to hold otherwise would be to say that it is impossible for two businessmen dealing at arm's length to agree that the buyer is not buying in reliance on any representations of the seller as to a particular fact."\(^{221}\) The disclaimer as to specific representations, like the proposed clause allowing both sophisticated parties to waive the right to sue for fraud in the inducement, provided certainty in the contractual relations between the parties.\(^{222}\)

Justice Fuld dissented in the \textit{Danann} opinion, arguing that "[i]f a party has actually induced another to enter into a contract by means of fraud . . . language may not be devised to shield him from the consequences."\(^{223}\) Fuld asserted that the public policy issue should outweigh the "advantages of certainty in contractual relations," and that by refusing relief for the plaintiff from such fraud, the court was essentially "opening the doors to a multitude of frauds," which would result in "thwarting the general policy of the law."\(^{224}\)

While Fuld's reasoning supports the general rule today that merger clauses cannot prevent a suit for fraud in the inducement, Fuld's concerns would be addressed by the proposed guidelines, which require the parties to be "sophisti-
cated business parties" and have legal representation. Parties would be able to read the contract, know which representations are not included in the text, and, if they so choose, the parties may request that the contract be amended to include those items.

3. Guido v. Koopman

The appellants in Guido argued that the release freeing the respondent from liability for appellant's horseback riding accident was invalid based on Civil Code section 1668. However, the court found this argument erroneous, because section 1668 "has been interpreted to mean that 'a contract exempting from liability for ordinary negligence is valid where no public interest is involved.'" In determining whether a public interest was involved, the court examined the type of transaction to decide whether it exhibited some of the necessary characteristics. Those qualifications included whether:

[i]t concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection

225. See supra Parts IV.B. and IV.C.
226. Section 1668 provides: "All contracts which have for their object, directly or indirectly, to exempt anyone from [the] responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." Cal. Civ. Code § 1668 (West 1996); see also Guido v. Koopman, 2 Cal. Rptr. 2d 437, 439 (Ct. App. 1991), rev. denied, 1992 Cal. LEXIS 2024 (1992).
227. Guido, 2 Cal. Rptr. 2d at 439; see 1 Bernard E. Witkin, Summary of California Law, Contracts § 631 (9th ed. 1990).
228. Guido, 2 Cal. Rptr. 2d at 439.
against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.  

Business or commercial transactions, such as those at issue in *Greenspan* and *Banco*, clearly are not part of the category that section 1668 prevents from releasing itself from liability. Their services are not of "great importance to the public" such that they are truly necessary for some segments of the population, nor are they "suitable for public regulation." In addition, since both parties must be represented by legal counsel throughout the contracting process, the parties would have equal bargaining power. Thus, the public policy concerns addressed by the *Guido* court are provided for by the suggested merger clause waiving the right to sue for fraud in the inducement.

F. Freedom of Contract

A final consideration is the notion of freedom of contract. Freedom of contract consists of two aspects. The first is freedom *from* contract, which refers to the belief that individuals "should not have contractual obligations imposed on them without their consent." The second dimension is freedom *to* contract, meaning that individuals should be able to consent to an alteration of their legal relations if they see it as necessary. The proposed waiver is commensurate with both principles of freedom of contract: it allows sophisticated business parties to consciously alter their legal relations and

229. *Id.* (citation omitted).


233. *Id.*

234. *See supra* Part V.

235. *See supra* Part V.

236. Freedom of contract is defined as "the liberty or ability to enter into agreements with others." *Barron's Law Dictionary* 201 (3d ed. 1991).


238. *Id.*

239. *Id.*
to knowingly consent to the imposition of another contractual obligation.

G. Violation of California Civil Code Section 1542

Allowing a waiver of the right to sue for fraud in the inducement would violate section 1542, as it would clearly keep a contracting party from suing for future claims the party was not aware of at the time the waiver was signed. However, by narrowly defining the instances in which such a waiver would be upheld in court and requiring that the parties be "sophisticated business parties," the policy concerns which led to the drafting of section 1542 would be retained, and the necessary certainty in business relations would also be ensured.

V. Proposal

A workable solution to the problem of uncertainty in legal relations can be obtained by combining three factors: (1) the definitions of "merchant" and "between merchants" as delineated in the applicable sections of the Uniform Commercial Code and in Wisconsin Knife; (2) the concentration on the knowledge or skill held by the parties to a contract, as done in Foreman & Clark Corp. v. Fallon and Guido v. Koopman; and (3) the requirement that both parties be represented by legal counsel throughout the entire process of formulating and signing an agreement containing an unambiguous waiver clause. This combination would confine the allowance of a waiver to specific, qualified parties.

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240. See supra Part II.B.
241. See supra note 39 and accompanying text.
242. See infra Part V.
243. See supra Part II.F and infra Part V.
244. "Civil Code section 1542 was intended by its drafters to preclude the application of a release to unknown claims in the absence of a showing, apart from the words of a release of an intent to include such claims." Casey v. Proctor, 378 P.2d 579, 586 (Cal. 1963).
246. See supra Part II.F.
247. Foreman & Clark Corp. v. Fallon, 479 P.2d 362 (Cal. 1971); see supra Part IV.B.
In order to avoid any ambiguities, the merger clause containing the waiver would be clearly set out in the agreement. In addition, each section of the merger clause would be separately initialed by each party, and their attorneys, so that any court would be certain that both parties, in waiving their right to sue for fraud in the inducement, were advised and informed that they were indeed giving up a right and knew what that right was.

Such a waiver clause would state that each party agrees that they should be considered a sophisticated business party, meaning that they are akin to a "merchant" under the Uniform Commercial Code. Also, the clause would assert that the transaction entered into is indeed a contract "between merchants." Further, both parties would affirm that they have been represented by legal counsel throughout the entire negotiating and contracting process. Moreover, the merger provisions would clearly state that each party was knowingly waiving his or her right to sue for fraud in the inducement, a right they would normally have if they chose not to agree to the waiver. Finally, both parties would declare that they were not relying on any representations which were not contained in the written contract.

Regardless of whether a waiver of the right to sue for fraud in the inducement as proposed is adopted, contractual relations involving the general public would remain untouched. The necessary elements to recover for fraud, the requirements to introduce parol evidence, and sections 1542 and 1668 of the California Civil Code would continue to apply. The public policy determination that individuals should be prevented from perpetrating fraud and relieving themselves of that responsibility by inserting a merger clause in the contract, as discussed in detail by the Greenspan court of appeal, would remain the law. Only the narrowly defined area of business parties represented by counsel would

249. See supra Part II.F.
250. See supra Part II.F.
251. "It is well established that a party to an agreement induced by fraudulent misrepresentations or nondisclosures is entitled to rescind, notwithstanding the existence of purported exculpatory provisions contained in the agreement." Guido, 2 Cal. Rptr. 2d at 440.
252. See supra Parts II.A-B.
have the option to waive the right to sue for fraud in the inducement.

A possible merger clause would state:

MERGER CLAUSE: WAIVER OF THE RIGHT TO SUE FOR FRAUD IN THE INDUCEMENT

By initialing each of the following statements, the parties and their legal representatives agree to waive the right to sue for fraud in the inducement, a right which they would otherwise have:

(a) the parties agree that they fall under the definition of “merchant” in section 2-104(1) of the Uniform Commercial Code. _____
(b) the parties agree that this contract is “between merchants” as defined in section 2-104(3) of the Uniform Commercial Code. _____
(c) the parties acknowledge that they have been represented by legal counsel throughout the negotiation, drafting, and execution of this contract. _____
(d) the parties knowingly waive the right to sue for fraud in the inducement, a right clearly explained by their legal representative. _____
(e) the parties are relying only on the representations contained in this contract, and know that by initialing all parts of this waiver, they will be unable to introduce parol evidence in the future to show they relied upon representations not contained in this contract. _____

VI. Conclusion

Allowing a waiver of the right to sue for fraud in the inducement would uphold the principle that “if you shift risk or limit liability in your contract, you should be stuck with that.” 254 Parties in a contractual setting should be free to define their rights. 255 Parties work together because it is beneficial, and the goal of contract law is to induce such cooperation. 256 Contract law mitigates the risk inherent in cooperation by enforcing the rights of the parties, and some beneficial transactions would not occur without this enforcement. 257 The law has gone through many changes in

254. Farnsworth, supra note 10, at 1034.
255. Friedmann, supra note 10, at 23.
256. Baird, supra note 9, at 584.
257. Id.
the past few decades, resulting, in many cases, in people being relieved of their obligations.\textsuperscript{258} By recognizing the right of sophisticated business parties to include a provision in their contract waiving the right to sue for fraud in the inducement, courts would be providing for the judicial economy and legal certainty necessary in contractual relations.\textsuperscript{259}

\textit{Megan R. Comport}

\footnotesize
\textsuperscript{259} See \textit{supra} Part II.E.