Protecting the Integrity of the Entity-Specific Contract. Contractually Reinforcing the Statutory Liability Seal

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“Entity-Specific Contract” means any contract to which one of the parties is a limited-liability entity owned by a corporate parent or by an individual or group of individuals or other limited-liability entities, but where neither the parent entity nor any other owners or affiliates of the named entity party are signatories or have otherwise contractually obligated themselves to become liable pursuant to a guaranty or otherwise.
Disappointed counterparties to entity-specific contracts seek to impose the obligations and liabilities of the specified entity party upon affiliates of that entity party through equitable and tort-based theories whenever the bargained-for contractual remedies are deemed insufficient.
III. Assumed Contract and Corporate Fundamentals

- **Bedrock Principles of Corporate Law:**
  - “[T]he corporate entity normally insulates its shareholders, directors, and officers from individual liability for the debts and obligations of that corporate entity.”
  - “Forming an entity specifically for the purpose of protecting its owners from personal liability is legally recognized as a legitimate purpose for forming such an entity.”
  - “Many wholly-owned subsidiaries and closely-held corporations are not factually distinct from their owners. Many are in fact controlled and operated in close concert with the interests of their owners, and do not have a distinct factual existence. …Such conduct is perfectly natural and proper and provides no basis for ignoring legal independence.”
Fundamental Principles of Contract Law

- “A contract only imposes obligations on the persons who actually agreed to become parties to, or otherwise guarantee obligations of a party to, that contract;”
- “parties to a contract are generally free to include whatever terms they wish in their voluntarily made agreements provided they do not violate public policy;” and
- “an agent for a disclosed principal – like an officer of a named corporate party – does not become personally liable on that contract merely by executing the contract on behalf of the disclosed principal as the named party to the contract, as long as the agent or officer clearly indicates his or her representative capacity in the signature block.”
Despite our modern assumptions, well into the early 20th century, some states did not grant statutory limited liability; instead some state statutes and the charters of some corporations actually imposed personal liability on shareholders and directors.

As a result, business lawyers created their own contractual limited-liability regimes within the contractual undertakings entered into by their corporate clients, i.e., they created the “no recourse” clause.
“It is advisable always to include in the bond a waiver of liability of officers, directors and stockholders, …Indeed, comparatively recently the Supreme Court of the United States has held that a corporation formed in a State without stockholder liability, but intended for business in a State with such liability, may by carrying on such business bring its members under the liability law of the latter State.” Francis Lynde Stetson, New York (1917)
“It is well settled that the creditor of a corporation may, by express contract at the time the debt is incurred, waive his right to collect from the stockholders debts which the corporation may fail to pay.” 

United States v. Stanford, 70 F. 346, 363 (9th Cir. 1895), aff’d 161 U.S. 412 (1896).

No recourse provisions became standard fare in late 19th and early 20th century bond indentures to avoid the statutory imposition of liability from some of the state corporate regimes that did not fully embrace limited liability.
In the early part of the 20th century, case law was virtually uniform in upholding these no recourse provisions under freedom of contract principles against any statutes and charters that would have otherwise imposed personal liability.

But, the modern threats to limited liability were not yet fully developed during this period.
A fairly typical “no recourse” clause in the early 20th century read as follows:

No recourse under or upon any obligation, covenant, or agreement of this indenture, or of any purchase-money bond or coupon, or because of the creation of any indebtedness hereby secured, shall be had against any incorporator, stockholder, officer, or director of the company or any successor corporation, either directly or through the company, by the enforcement of any assessment or by any legal or equitable proceeding by virtue of any statute or otherwise. This indenture and the purchase money bonds are solely corporate obligations, and no personal liability whatever shall attach to or be incurred by the incorporators, stockholders, officers, or directors of the company, or any successor corporation, or any of them, because of the incurring of the indebtedness hereby authorized, or under or by reason of any of the obligations, covenants, or agreements contained in this indenture, or in any of the purchase-money bonds or coupons, and any and all personal liability either at common law or in equity, or by statute or Constitution, of every such stockholder, officer, or director, is released and waived as a condition of and as part of the consideration for the execution of this indenture and the issue of the purchase-money bonds.

Non-party affiliates can be exposed to potential liability for the obligations of the specified entity party to a entity-specific contract based on:

- “the various equitable theories that fall under the category of ‘piercing the veil’;”
- “the various tort theories that impose liability on non-parties to a contract for their participation in some tortious activity related to entering into or performing that contract;”
- “the few remaining statutory exceptions that provide third parties with a right to impose personal liability on directors, officers, or equity holders for a limited-liability entity’s contractual obligations.”
A. Piercing the Veil

- Piercing the Veil
  - Equitable doctrine whereby courts disregard the separate legal existence of a corporation in certain circumstances and impose liability on the corporation’s shareholders or directors.
  - Doctrine “appears to be premised on the faulty assumption that corporations are mere ‘artificial aggregations of individuals’ that differ from a general partnership only on the basis of the statutory grant of limited liability.”
Professor Wormser appears to have been responsible for popularizing the veil piercing theory in 1912 in a *Columbia Law Review* article.

“When the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, or advertise or perpetuate a monopoly, or to protect knavery or crime, the courts will draw aside the web of entity, will regard the corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons.” I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 Colum. L. Rev. 496, 517 (1912).
A. Piercing the Veil (cont.)

“[D]espite Professor Wormser’s early delineation of certain ‘bad acts’ that would justify piercing, many modern courts allow a jury to decide the issue based on instructions that would permit piercing in virtually any parent-subsidiary relationship.”

A corporate veil may be pierced, and an entity affiliated with a corporation may be liable for the corporation’s breach of contract, either where the officers and employees of the affiliated entity exercise control over the daily operations of the corporation and act as the true prime movers behind the corporation’s action, or on the theory that the affiliated entity conducts business through the corporation, which exists solely to serve the affiliated entity.

A. Piercing the Veil (cont.)

**Piercing Q & A:**

- True or False: Most successful piercing cases involving a parent-subsidiary relationship are brought by individual plaintiffs.

- What percentage of piercing cases of all types have been successful at the appellate court level across the United States according to a recent survey? (a) 15%, (b) 20%, (c) 30%, or (d) 50%

- True or False: A piercing claim is much more likely to be successful in a case involving a tort claim than in a case based solely upon a contractual relationship?
A. Piercing the Veil (cont.)

Answers:

- **FALSE**: Successful plaintiffs are most often another corporation, not an individual. Entity plaintiffs are twice as likely to pierce the veil of another entity than are individual plaintiffs.

- A recent survey suggests that 50% of all piercing cases decided by the appellate courts are successful. Another survey puts that number at 32% (but results vary based on years included).
  - In New York and Texas, approximately 21% and 23.5%, respectively, of all reported appellate decisions involving parentsubsidiary piercing claims are successful.

- **FALSE**: There are almost as many successful piercing cases overall in the contract context as there are in the tort context.
  - Shockingly, in a recent survey limited to parentsubsidiary piercing claims, courts were found to be 3 times more likely to pierce in a contract case than a tort case.

“[A]lthough it has been said that a successful piercing-the-veil claim, [l]ike [being struck by] lightning, …is rare, severe, and unprincipled,” these surveys seem to suggest that, while the success of such claims may remain “severe” and “unprincipled,” they are less “rare” than may have been thought.”

So, how are we to advise our clients about the efficacy of a special purpose limited-liability vehicle employed to enter into an entity-specific contract?
A. Piercing the Veil (cont.)

Question - True or False:

To hold an officer, director or shareholder personally liable for a corporation’s contractual obligations, it is necessary first to pierce the corporate veil.
Answer: FALSE
“Officers and other corporate representatives that participate in the alleged tortious conduct in connection with a contract can have direct personal liability, even if their activities were solely on behalf of the contracting entity and even if they carefully signed the contract only in a representative capacity.”
B. Tort Theories

**Tort Q&A:**

- Assuming you can otherwise establish a material representation was made to you that was false when made and upon which you justifiably relied to your detriment, which of the following mental states are required in the person making the representation to constitute fraud?
  - the person who made the representation knew it was false when he made it.
  - the person who made the representation suspected it may be false when he made it.
  - the person who made the statement had no idea whether the statement was true or false when he made it.
  - the person believed the statement to be true, but he had only limited information upon which to base his belief.
  - the person believed the statement to be true and had substantial information upon which to base his belief.
**Answer**: Depending on the state, it could be any or all of the above. See Everett B Morris, *Liability for Innocent Misrepresentation*, 64 U.S. L. Rev. 121 (1930). Recklessness could exist in any of the situations other than the first; and even truly innocent misrepresentation is a recognized tort in a number of states—including Delaware. Innocent misrepresentation is also referred to as “equitable fraud.” Addy v. Piedmont, No. 3571-VCP, 2009 WL 707641, at *18 (Del. Ch. 2009) (“[I]nnocent or negligent misrepresentations or omissions suffice to prove equitable fraud.”)

Therefore, never, never, agree to a general “fraud” carve-out from your exclusive remedies or damage limitations provisions. Specify “knowing, intentional fraud” if you must have a carve-out. See Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc., No. 02 Civ. 7689, 2005 WL 832050, at *3 (S.D.N.Y. April 12, 2005); Ameristar Casinos, Inc. v. Resorts Int’l Holdings, LLC, C.A. No. 3685-VCS (Del. Ch. May 11, 2010).
B. Tort Theories (cont.)

Principles of Tort Law that can “contort” your entity-specific contract and make ineffective the statutory limited liability seal:

- Fraud and other tort-based claims against nonparty affiliates can be premised solely upon representations and warranties included in an entity-specific contract.

- “The term ‘fraud’ encompasses more than intentional lies; it can also include reckless misrepresentation and, in some cases, even innocent misrepresentation (the so-called doctrine of ‘equitable fraud’).”
“Negligent misrepresentation is a broad catch-all tort category that can cover almost every situation where a contractual representation, which was designed as a contractual risk allocation device, turns out to have been wrong.”

“While tort principles are imposed by law, not contractually consented to, most states provide means for sophisticated parties to avoid contractually tort intrusions into their contractual relationship.”
Facts:

- After a corporate borrower failed to repay certain loans, plaintiffs (Lenders) alleged that the parents of the defendant borrower defrauded plaintiffs into making such loans by presenting plaintiffs with financial statements that were false and misleading and making false contractual representations regarding such financial statements.

- Lenders had obtained representations and warranties from the borrower in the loan agreement that nothing in the financial statements were materially misleading. The case does not suggest that there were any direct representations made by affiliates of the borrower.
Synopsis of Relevant Holding:

- “[A] party to an agreement with a corporation is not unjustified in assuming that the corporation’s controlling affiliates ‘would not knowingly cause a company they controlled to make a false representations in a loan agreement’ entered into solely by that corporation.” 931, N. E. 2d 87, 93 (N.Y. 2010).

- Virtually any representation/warranty made in a contract that later proves to be false could be turned into a potential fraud claim against nonparty affiliates; and such fraud claim would automatically survive summary judgment and be sent to the jury to determine the state of the nonparty affiliates knowledge.
C. Statutory Imposition of Liability

- “In New York, the ten largest shareholders of a privately held New York corporation are jointly and severally liable for unpaid wage claims owing by the corporation.” N.Y. Bus. Corp. Law Sec. 630 (McKinney 2003)

- In a few states, the directors of a corporation that approve any contract while the corporation is delinquent in the payment of its franchise taxes automatically become guarantors of that contract if the corporation’s qualification to do business is subsequently forfeited. See e.g., Taylor v. First Cmty. Credit Union, 316 S.W.3d 863, 866-70 (Tex App. 2010) (holding a director of a Georgia corporation, authorized to do business in Texas, individually liable for debts of the corporation incurred after corporation failed to pay franchise taxes).
VI. Proposal: A More Expanded Use of a More Expanded “No Recourse” Clause

- **Purpose**

  - Limits the parties who can be held liable for obligations under the contract.

  - Protects affiliates (shareholders, members, partners) of the contracting parties and officers and directors of the contracting parties.
Because of the uniform recognition of limited liability in the corporate law regimes of all 50 states by the late 1930s, there appears to have been a reduced focus on the no recourse clause.

Indeed, in 1965 the American Bar Foundation’s Corporate Debt Financing Project completed its Commentaries on Model Indenture Provisions and declared that although the "no recourse" provision remained a common feature of indentures, the provision was "unnecessary" because "[u]nder modern law,…‘the limited liability afforded by the corporate form is carefully protected."
VI. The No Recourse Provision (cont.)

Yielding to the continued practice of including such a clause despite it being “unnecessary,” in the 1983 and 2000 revisions to the Commentaries, the suggested no recourse provision was shortened to read: “A director, officer, employee or stockholder, as such, of the Company shall not have any liability for any obligations of the Company under the Securities or the Indenture or for any claim based on, in respect of or by reason of such obligations or their creation.”
A fairly standard no recourse clause from a modern indenture reads:

A director, officer, employee or stockholder, as such, of the Company, Guarantor or the Trustee shall not have any liability for any obligations of the Company, the Guarantor or the Trustee under the Securities or this Indenture or for any claim based on, in respect of or by reason of such obligation or their creation. By accepting a Security, each Securityholder shall waive and release all such liability. The waiver and release shall be part of the consideration for the Issue of the Securities.
VI. The No Recourse Provision (cont.)

- How have these standard no recourse clauses fared in the modern era as defenses to and
- How have modern business lawyers adapted these ancient provisions to the modern threats from:
  - Piercing claims?
  - tort claims?
  - statutory claims?
VI. The No Recourse Provision (cont.)

Answer:

TERRIBLY and Not That Well
Delaware courts construing standard no recourse provisions in bond indentures have consistently held that such provisions are ineffective with respect to tort-based or equitable claims, including piercing-the-veil claims. Instead, such clauses are limited to defeating contract-based claims or statutorily imposed claims such as the liability a general partner has for a limited partnership’s debt.

Other courts construing such clauses outside the bond indenture space have been more kind:

A no recourse clause “does not conflict with any public policy interest but is instead the result of a private, voluntary transaction in which [the employee] simply agreed to look to [the corporate employer] to shoulder a risk [for a tort-based defamation claim] that might otherwise have fallen on its officers, directors and shareholders.”

VI. The No Recourse Provision (cont.)

- **Language matters**

  Examples:

  - [Landlord will] “look solely to [the] New Tenant for the performance of the Tenant’s obligations hereunder.”

- **No Recourse Against Others.** No past, present or future director, officer, employee, incorporator, member, partner or stockholder of the Guaranteeing Subsidiary (other than the Issuer and the Guarantors) shall have any liability for any obligations of the Issuer or the Guarantors (including the Guaranteeing Subsidiary) under the Notes, any Guarantees, the Indenture or this Supplemental Indenture or for any claim based on, in respect of, or by reason of, such obligations or their creation. Each Holder by accepting Notes waives and releases all such liability. The waiver and release are part of the consideration for issuance of the Notes.
### VI. The No Recourse Provision (cont.)

- **No Recourse.** Except as otherwise expressly provided herein, by its acceptance of the benefits of this Guarantee, the Company acknowledges and agrees that no Person other than the Guarantor has any obligations hereunder and that *no recourse shall be had hereunder, or for any claim based on, in respect of, or by reason of, such obligations or their creation, against, and no personal liability shall attach to*, the Guarantor or any Non-Recourse Party, whether by or through attempted piercing of the corporate veil, by or through a claim by or on behalf of the Company against the Guarantor or any Non-Recourse Party, by the enforcement of any assessment *or by any legal or equitable proceeding, by virtue of any statute, regulation or applicable Law, or otherwise*, except for the Company’s rights against the Guarantor under this Guarantee, for Parents, Merger Sub’s and the Company’s rights under the Equity Financing Letter, and for the Company’s rights against Parent or Merger Sub under the Merger Agreement. Recourse against the Guarantor pursuant to and expressly subject to the terms and conditions of this Guarantee and the Equity Financing Letter, and against Parent or Merger Sub under the Merger Agreement and the Equity Financing Letter, shall be the sole and exclusive remedies of the Company against the Guarantor, Parent, or Merger Sub in respect of any liabilities or obligations arising under, or in connection with, the Merger Agreement, the Equity Financing Letter or the transactions contemplated thereby.
No Recourse Against Nonparty Affiliates. All claims, obligations, liabilities, or causes of action (whether in contract or in tort, in law or in equity, or granted by statute) that may be based upon, in respect of, arise under, out or by reason of, be connected with, or relate in any manner to this Agreement, or the negotiation, execution, or performance of this Agreement (including any representation or warranty made in, in connection with, or as an inducement to, this Agreement), may be made only against (and are expressly limited to) the entities that are expressly identified as parties in the preamble to this Agreement (“Contracting Parties”). No Person who is not a Contracting Party, including without limitation any director, officer, employee, incorporator, member, partner, manager, stockholder, Affiliate, agent, attorney, or representative of, and any financial advisor or lender to, any Contracting Party, or any director, officer, employee, incorporator, member, partner, manager, stockholder, Affiliate, agent, attorney, or representative of, and any financial advisor or lender to, any of the foregoing (“Nonparty Affiliates”), shall have any liability (whether in contract or in tort, in law or in equity, or granted by statute) for any claims, causes of action, obligations, or liabilities arising under, out of, in connection with, or related in any manner to this Agreement or based on in respect of or by reason of this Agreement or its negotiation, execution, performance, or breach; and, to the maximum extent permitted by law, each Contracting Party hereby waives and releases all such liabilities, claims, causes of action, and obligations against any such Nonparty Affiliates. Without limiting the foregoing, to the maximum extent permitted by law, (a) each Contracting Party hereby waives and releases any and all rights, claims, demands, or causes of action that may otherwise be available at law or in equity, or granted by statute, to avoid or disregard the entity form of a Contracting Party or otherwise impose liability of a Contracting Party on any Nonparty Affiliate, whether granted by statute or based on theories of equity, agency, control, instrumentality, alter ego, domination, sham, single business enterprise, piercing the veil, unfairness, undercapitalization, or otherwise; and (b) each Contracting Party disclaims any reliance upon any Nonparty Affiliates with respect to the performance of this Agreement or any representation or warranty made in, in connection with, or as an inducement to this Agreement.
Use of the revised No Recourse provision can assist corporate counsel in shielding the parent company and its investors from subsidiary obligations.

But the No Recourse clause works best when used as part of a comprehensive approach to contract drafting that considers all potential intrusions into the contractual arrangement from tort law. See Glenn D. West and W. Benton Lewis, Jr., Contracting to Avoid Extra-Contractual Liability—Can Your Contractual Deal Ever Really be the “Entire” Deal?, 64 Bus. Law. 999 (2009).
Deal dynamics and market forces, of course, may limit the amount of innovation that is possible in deal documentation notwithstanding the noted risks of failing to do so. But the risks must be understood nonetheless.
Even without the “no recourse” clause, one way to avoid extra-contractual liability is a “no reliance” clause or a merger clause.

Following are a few examples of clauses in recent cases.

Do you think these clauses were deemed effective by the courts?
14.18 Representations. Tenant acknowledges that neither Landlord nor Landlord’s agents, employees or contractors have made any representations or promises with respect to the Site, the Shopping Center or this Lease except as expressly set forth herein.

14.21 Entire Agreement. This lease constitutes the entire agreement between the parties hereto with respect to the subject matter hereof, and no subsequent amendment or agreement shall be binding upon either party unless it is signed by each party....

Do you think this clause was effective?
NO

Section 5.2 Document Review.

(d) No Representation or Warranty by Seller. Purchaser hereby acknowledges that, except as otherwise specifically set forth in this Agreement, Seller has not made and does not make any warranty or representation regarding the truth, accuracy, or completeness of the Documents or the source(s) thereof, and that Seller has not undertaken any independent investigation as to the truth, accuracy, or completeness of the Documents and is providing the Documents solely as an accommodation to Purchaser. Except with respect to any express warranties made in this Agreement, Seller expressly disclaims and Purchaser waives any and all liability for representations and warranties, express or implied, statements of fact, and other matters contained in the Documents, or for any omissions from the Documents, or in any other written or oral communication transmitted or made available to Purchaser. Except with respect to any express warranties made in this Agreement, Purchaser shall rely solely upon its own investigation with respect to the Property, including without limitation, the Property’s physical, environmental, or economic condition, compliance or lack of compliance with any ordinance, order, permit, or regulation or any other attribute or matter relating thereto.

Section 5.5, “Property Conveyed “AS IS.”

Section 11.1 Entire Agreement.

This Agreement contains the entire agreement of the parties hereto. There are no other agreements, oral or written, and this Agreement can be amended only by written agreement signed by the parties hereto, and by reference, made a part hereof.

Do you think this clause was effective?
NO

Paragraph 3: “Independent Investigation” provides that (1) Allen based his decision to sell on his independent due diligence expertise and the advice of his own engineering and economic consultants; (2) the Phalon appraisal and the Haas reserve analysis were estimates and other professionals might provide different estimates; (3) events subsequent to the reports might “have a positive or negative impact on the value” of Chief; (4) Allen was given the opportunity to discuss the reports and obtain any additional information from Chief’s employees as well as Phalon and Haas; and (5) the redemption price was based on the Phalon and Haas reports regardless of whether those reports reflected the actual value and regardless of any subsequent change in value since the reports. The Independent Investigation paragraph also includes mutual releases “from any claims that might arise as a result of any determination that the value of [Chief] ... was more or less than” the agreed redemption price at the time of the closing.

Paragraph 8, entitled “Mutual Releases,” each party releases the other from all claims that “they had or have arising from, based upon, relating to, or in connection with the formation, operation, management, dissolution and liquidation of [Chief] or the redemption of” Allen’s interest in Chief, except for claims for breach of the redemption agreement or breach of the note associated with the redemption agreement.

Paragraph twelve's merger clause provides that the redemption agreement “supersedes all prior agreements and undertakings, whether oral or written, between the parties with respect to the subject matter hereof.”

Do you think this clause was effective?
9. LIMITATIONS OF SELLER'S REPRESENTATIONS & WARRANTIES: EXCEPT AS OTHERWISE SPECIFICALLY STATED IN THIS CONTRACT, SELLER HEREBY SPECIFICALLY DISCLAIMS ANY WARRANTY, GUARANTY OR REPRESENTATION, ORAL OR WRITTEN, PAST, PRESENT OR FUTURE, OF, AS TO, OR CONCERNING (I) THE NATURE AND CONDITION OF THE PROPERTY, INCLUDING WITHOUT LIMITATION, THE WATER, SOIL AND GEOLOGY, AND THE SUITABILITY THEREOF AND OF THE PROPERTY FOR ANY AND ALL ACTIVITIES AND USES WHICH BUYER MAY ELECT TO CONDUCT THEREON, AND THE EXISTENCE OF ANY ENVIRONMENTAL HAZARDS OR CONDITIONS THEREON (INCLUDING THE PRESENCE OF ASBESTOS) OR COMPLIANCE WITH ALL APPLICABLE LAWS, RULES OR REGULATIONS; (II) EXCEPT FOR ANY WARRANTIES CONTAINED IN THE DEED TO BE DELIVERED BY SELLER AT THE CLOSING, THE NATURE AND EXTENT OF ANY RIGHT–OF–WAY, LEASE, POSSESSION, LIEN, ENCUMBRANCE, LICENSE, RESERVATION, CONDITION OR OTHERWISE; AND (III) THE COMPLIANCE OF THE PROPERTY OR ITS OPERATION WITH ANY LAWS, ORDINANCES OR REGULATIONS OF ANY GOVERNMENT OR OTHER BODY.

11 BUYER ACKNOWLEDGES THAT IT WILL INSPECT THE PROPERTY AND WILL RELY SOLELY ON ITS OWN INVESTIGATION OF THE PROPERTY AND NOT ON ANY INFORMATION PROVIDED OR TO BE PROVIDED BY SELLER. BUYER FURTHER ACKNOWLEDGES THAT THE INFORMATION PROVIDED AND TO BE PROVIDED WITH RESPECT TO THE PROPERTY WAS OBTAINED FROM A VARIETY OF SOURCES AND SELLER (I) HAS NOT MADE ANY INDEPENDENT INVESTIGATION OR VERIFICATION OF SUCH INFORMATION; AND (II) DOES NOT MAKE ANY REPRESENTATIONS AS TO THE ACCURACY OR COMPLETENESS OF SUCH INFORMATION. THE SALE OF THE PROPERTY AS PROVIDED FOR HEREIN IS MADE ON AN “AS IS” BASIS, AND BUYER EXPRESSLY ACKNOWLEDGES THAT, IN CONSIDERATION OF THE AGREEMENTS OF SELLER HEREIN, EXCEPT AS OTHERWISE SPECIFIED HEREIN, SELLER MAKES NO WARRANTY OR REPRESENTATION, EXPRESS OR IMPLIED, OR ARISING BY OPERATION OF LAW, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTY OF CONDITION, HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, IN RESPECT OF THE PROPERTY. [Emphasis added.]

Do you think this clause was effective?
The disclaimer provided in pertinent part:  

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<th>The disclaimer provided in pertinent part:</th>
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<td>This [severance agreement] sets forth the entire agreement between the parties hereto and supercedes any and all prior agreements or understandings, written or oral, between the parties pertaining to the subject matter of this [severance agreement]. This [severance agreement] expresses the full terms upon which [Dynegy] and [McLernon] conclude the employment relationship. All obligations or responsibilities of either party under the [employment agreement] are encompassed within or superceded by this [severance agreement]. There are no other representations or terms relating to the employment relationship or the conclusion of that relationship other than those set forth in writing in this [severance agreement]. [McLernon] hereby represents and acknowledges that in executing this [severance agreement], [McLernon] does not rely and has not relied upon any representations or statements made by any of the parties, agents, attorneys, employees, or representatives with regard to the subject matter, basis or effect of this [severance agreement].</td>
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Do you think this clause was effective?
YES

All representations and warranties set forth in this Agreement are contractual in nature only and subject to the sole and exclusive remedies set forth herein. No Person is asserting the truth of any representation and warranty set forth in this Agreement; rather the parties have agreed that should any representations and warranties of any party prove untrue, the other party shall have the specific rights and remedies herein specified as the exclusive remedy therefor, but that no other rights, remedies or causes of action (whether in law or in equity or whether in contract or in tort) are permitted to any party hereto or any other Person as a result of the untruth of any such representation and warranty.
Except for the specific representations and warranties expressly made by the Company or any Selling Stockholder in Article [__] of this Agreement, (1) Buyer acknowledges and agrees that (A) neither the Company nor any Selling Stockholder is making or has made any representation or warranty, expressed or implied, at law or in equity, in respect of the Business, the Company, the Company’s Subsidiaries, or any of the Company’s or its Subsidiaries’ respective businesses, assets, liabilities, operations, prospects, or condition (financial or otherwise), including with respect to merchantability or fitness for any particular purpose of any assets, the nature or extent of any liabilities, the prospects of the Business, the effectiveness or the success of any operations, or the accuracy or completeness of any confidential information memoranda, documents, projections, material or other information (financial or otherwise) regarding the Company or any Company Subsidiary furnished to Buyer or its representatives or made available to Buyer and its representatives in any “data rooms,” “virtual data rooms,” management presentations or in any other form in expectation of, or in connection with, the transactions contemplated hereby, or in respect of any other matter or thing whatsoever,
and (B) no officer, agent, representative or employee of the Selling Stockholder, the Company or any of the Company’s Subsidiaries has any authority, express or implied, to make any representations, warranties or agreements not specifically set forth in this Agreement and subject to the limited remedies herein provided; (2) Buyer specifically disclaims that it is relying upon or has relied upon any such other representations or warranties that may have been made by any Person, and acknowledges and agrees that the Company and the Selling Shareholders have specifically disclaimed and do hereby specifically disclaim any such other representation or warranty made by any Person; (3) Buyer specifically disclaims any obligation or duty by the Seller, the Company or any Selling Stockholder to make any disclosures of fact not required to be disclosed pursuant to the specific representations and warranties set forth in Article [__] of this Agreement; and (4) Buyer is acquiring the Company subject only to the specific representations and warranties set forth in Article [__] of this Agreement as further limited by the specifically bargained-for exclusive remedies as set forth in Article [__].
Glenn D. West & Natalie A. Smeltzer, Protecting the Integrity of the Entity-Specific Contract: The "No Recourse Against Others" Clause—Missing or Ineffective Boilerplate?, 67 Bus. Law. 39 (2011)

Glenn D. West, Contracting to Avoid Extra-Contractual Liability—Can Your Contractual Deal Ever Really Be the "Entire" Deal?, 64 Bus. Law. 999 (2009)

Glenn D. West and Sara G. Duran, Reassessing the “Consequences” of Consequential Damage Waivers in Acquisition Agreements, 63 Bus. Law. 777 (2008)