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NOTE

DIRTY DIRT, CLEAN HANDS, AND THE MURKY WATERS OF LIABILITY UNDER ARTICLE 12 OF THE NEW YORK NAVIGATION LAW

I. INTRODUCTION

Article 12 of the New York Navigation Law ("Navigation Law"), commonly known as the Oil Spill Act, was enacted in 1977 "to ensure a clean environment and healthy economy for the state by preventing the unregulated discharge of petroleum which may result in damage to lands, waters or natural resources." The statute achieves this purpose by imposing strict liability on any person, "without regard to fault, for all cleanup and removal costs . . . no matter by whom sustained." The Navigation Law’s net of strict liability sweeps broad and wide. Finding a responsible party on which to impose liability would seem remarkably easy, given the statute’s expansive language. However, as the words of Judge Kaye of the New York Court of Appeals affirm, disputes arising under the Navigation Law are less about who is liable and more about who pays. This is not a new concept for businessmen anticipating a costly litigation with an even costlier potential damage award, but the imposition of liability under the Navigation Law is uncharted terrain for many.

2. See, e.g., State v. Pawtucket Mut. Ins., 532 N.Y.S.2d 335, 336-37 (Sup. Ct. 1988) ("If the Legislature wanted to exclude homeowners from the class of persons made strictly liable under the Oil Spill Act, it would have used precise language to do so . . . .").
4. N.Y. NAV. LAW § 171.
5. "Person" is defined as any "public or private corporations, companies, associations, societies, firms, partnerships, joint stock companies, individuals, the United States, the state of New York and any of its political subdivisions or agents." Id. § 172(14).
6. Id. § 181(1).
Although the Navigation Law was enacted in 1977, amendments in 1991, recent federal legislation requiring that old underground storage tanks be upgraded by a certain deadline, and the aging nature of service stations in New York have injected new life into an old law. As compliance with the federal regulatory deadline continues, many owners of old underground storage tanks will likely uncover petroleum plumes and contaminated soil from leaky tanks. The exorbitant clean up costs will then drive many landowners to the courts as they seek compensatory damages from tank manufacturers and contractors involved in the installation and maintenance of these old tank systems. As more New York contractors are involved in disputes arising under the Navigation Law (which itself is still an unfamiliar title for most), an examination of how this statute affects contractor and landowner liability is in order.

Since the law's inception in 1977, New York's highest court has rarely considered Navigation Law claims. As a result, the Appellate Division has been left to tread through the murky language of the statute. In examining Navigation Law liability, this Note attempts to bring some clarity to an otherwise obscure area.

Part II of this Note first discusses how parties can be held liable under the Navigation Law as discharger or for failure to report contamination. Each basis of liability is discussed, and recent decisions are analyzed. Then, the ramifications of liability are discussed including the likely consequences of common discharges. Part III discusses ways that contractors have avoided liability in recent disputes and how both landowners and contractors can position themselves to avoid being the party left with the bill. Finally, Part IV concludes by reiterating the risks posed by the statute to all parties involved and recommends ways these parties and New York courts can take action to clarify these risks and their consequences.

II. BASES OF LIABILITY

Contractors are susceptible to the same type of strict liability under the Navigation Law as are property owners. However, in addition to actions by the New York State Department of Environmental Conservation (the "DEC") and persons living near a spill, contractors can also incur liability at the hand of property owners who hire them to perform work on their land.

Using language from the Navigation Law and various judicial interpretations of it, this Part discusses how contractor liability is imposed, for instance, as discharger or for failing to report contamination. This Part also looks at the possible repercussions of such liability.

A. Liability as Discharger

A discharge under the Navigation Law includes any act or failure to act that results in the spilling of petroleum into the waters of the state. A contractor's accountability usually arises from the Navigation Law's liability of any "person" who discharges oil. However, the breadth and ambiguity of this language has resulted in varied interpretations by New York courts. Some opinions dispose of such Navigation Law claims with little or no explanation. Others describe liability under the statute as

12. See N.Y. NAV. LAW § 181(1) (McKinney 1989). "Any person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs . . . no matter by whom sustained . . . ." Id.


14. See N.Y. NAV. LAW § 172(8). Discharge is defined as:

[A]ny intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters, or into waters outside the jurisdiction of the state when damage may result to the lands, waters or natural resources within the jurisdiction of the state.

Id.

15. See supra note 5 and accompanying text (defining "person" under the Navigation Law).

16. Although the Navigation Law does not expressly define "discharger," recent decisions provide some guidance as to the meaning of this term. These decisions are discussed infra Parts II.A.1-3.

17. See, e.g., Leone v. Leewood Serv. Station, Inc., 624 N.Y.S.2d 610, 612 (App. Div. 1995) (disposing of a homeowner's Navigation Law claim in one swift sentence stating that the defendant was liable because he was the owner of the underground storage tanks from which a discharge originated).
something resembling a causation analysis. Although the courts do not formally categorize these varied analyses, they seem to fall within three major channels of reasoning. Part II.A examines three analytical tools courts have used to find a responsible party, and demonstrates how they sometimes fail to bring the actual discharger to justice. Then, a fourth mode of reasoning is proposed as a way courts can find the responsible party or actual discharger.

1. Status Analysis

Some courts have imposed liability under the Navigation Law based on a person’s status. The most common example is the imposition of liability on a property owner who is deemed a discharger solely by ownership of a contaminated property. This method is often used by the DEC in imposing the initial liability on a property owner before an investigation into what actually caused the spill. Although the most direct threat of liability using this analysis would seem to befall the property owner, suits against contractors and petroleum equipment manufacturers are likely to arise from landowners seeking indemnification from their liability under this theory. Also, there have been instances when contractors have been held liable based on their status as the handler of the discharging instrumentality.

In *Domermuth Petroleum Equipment & Maintenance Corp. v. Herzog & Hopkins, Inc.*, the court did not require proof of a specific wrongful act by a contractor that directly caused the spill to impose liability. The court found that the contractor, by repairing a leaking tank, set in motion events that resulted in the discharge.

18. See, e.g., State v. Tarrytown Corporate Ctr., II, 617 N.Y.S.2d 383 (App. Div. 1994) (refusing to find a contractor liable as a discharger because the cause of the leak was unknown).

19. See, e.g., *Leone*, 624 N.Y.S.2d at 612 (finding property owner liable based solely on his status as the owner of a contaminated site); *Domermuth Petroleum Equip. & Maint. Corp. v. Herzog & Hopkins, Inc.*, 490 N.Y.S.2d 54, 56 (App. Div. 1985) (holding that a specific wrongful act was not required to impose liability).

20. See *Leone*, 624 N.Y.S.2d at 612.

21. The New York Environmental Protection and Spill Compensation Fund (the “Fund”) is strictly liable for cleanup costs related to petroleum discharges. See *N.Y. NAV. LAW § 181(2)* (McKinney 1989). However, after the Fund has incurred such costs, an environmental lien shall attach to the property affected. See id. § 181-a(1) (McKinney Supp. 2000). Such lien can remain in effect until the Fund is reimbursed. See id. § 181-a(3).

22. See, e.g., *Domermuth Petroleum Equip.*, 490 N.Y.S.2d at 56 (holding that a specific wrongful act of a contractor was not required to impose liability).

23. See id.


25. See id. at 56.

26. See id.
in *Domennuth* was a fuel oil company that delivered fuel oil and serviced the oil tanks to which it delivered the fuel. The suit arose when a tank in one of its customer's homes ruptured and discharged its contents shortly after delivery. Although the fuel oil contractor argued that it was not responsible since the cause of the spill was unclear, New York's Second Department concluded otherwise. The court responded with a short holding that "no proof is required of a specific wrongful act or omission which directly caused the spill in order to impose liability ... as the deliverer of the oil and the repairer of the tank, [the contractor,] set in motion the events which resulted in the discharge." The court seems to have reached its conclusion not through factual findings relating to the contractor's activities leading up to the spill, but rather, because the contractor was the deliverer of the oil.

In *Leone v. Leewood Service Station, Inc.*, a property owner was held liable for a petroleum discharge based solely on the company's ownership of the tank despite the fact that another entity maintained an underground storage tank. The defendant, a gasoline station owner, was sued after gasoline leaked from the station's underground storage tanks, seeped into the water table, and contaminated the adjacent property owner's soil. The court disposed of the Navigation Law claim in one swift sentence stating that the defendant "was liable under the Navigation Law as the owner of the underground [storage] tanks." Again, the court reached its conclusion not through an extensive fact-finding process, but rather, by making assumptions based on the defendant's status.

The holdings in *Domennuth* and *Leone* beg for some kind of explanation. The status analysis sweeps so broadly that failing to provide some reasoning for these decisions makes it nearly impossible for parties to plan future activities without a high degree of uncertainty. The status analysis promotes the most rapid clean up of a discharge by quickly finding a responsible party in accordance with the underlying policy of

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27. See id. at 55.
28. See id.
29. See id. at 56.
30. Id.
31. See id.
33. See id. at 612.
34. See id. at 611.
35. Id. at 612.
36. See id.
the Navigation Law. However, in all its swiftness and efficiency, this approach will often fail to find the responsible party. Although the person responsible for the discharge is sometimes the one whose status is at issue, such a game of chance seems hardly appropriate in a court of law. What this analysis gains from a swift gavel, it loses in providing an easy escape for the responsible party.

2. Control Analysis

Other New York courts look to the degree of control potential dischargers had over the instrumentality that yielded the discharge. While this scheme increases the likelihood of the court finding the responsible party, it still sweeps with unreasonable breadth. Under this theory, a contractor that seemingly has some degree of control over a site where a spill occurs may be held liable as a discharger.

In Huntington Hospital v. Anron Heating & Air Conditioning, Inc., a general contractor's responsibility for supervising a number of subcontractors on a project, which included the installation of underground storage tanks subjected it to potential liability under the statute. The defendant was the manager of a construction project to expand a hospital facility. Part of this project included the installation of two underground storage tanks. Approximately twelve years after the construction, the plaintiff discovered that one underground storage tank was cracked and the other had collapsed, resulting in a significant discharge of oil into the surrounding area. The plaintiff argued that the

37. See N.Y. NAV. LAW § 170 (McKinney 1989). Section 170 states in part:

The legislature intends by the passage of this article to... provide liability for damage sustained within this state as a result of the discharge of... petroleum[,] requiring prompt cleanup and removal of such pollution and petroleum, and to provide a fund for swift and adequate compensation to... persons damaged by such discharge.

38. See, e.g., Leone, 624 N.Y.S.2d at 612 (imposing liability on a property owner despite another party's assumption of responsibility for maintaining the service station and equipment from which the discharge originated).


40. See, e.g., Huntington Hosp., 673 N.Y.S.2d at 457 (finding Navigation Law liability in a general contractor charged with the overall supervision of a construction project that included the installation of underground storage tanks).


42. See id. at 457.

43. See id.

44. See id.

45. See id.
defendant-general contractor was responsible, as it was charged with the "'oversight and management of the construction project, including the design, specification, selection, acquisition and installation of the U[nderground] S[orage] T[ank] system.'" The court agreed with the plaintiff and concluded that the defendant's status as a general contractor, responsible for overall supervision of the project, may subject it to liability as a discharger. The court made this determination without assessing the fault of the subcontractor that was charged with the actual installation of the tanks. Also, the court reached its conclusion despite the fact that the general contractor's work was done twelve years prior to the discovery of the discharge. This decision suggests that one need not be in control at the actual time of the discharge, but rather one may be liable as a discharger if one was in control at any time.

In State v. Montayne, strict liability under the Navigation Law was found to exist in a party because it was in a position to prevent the discharge or conduct an immediate cleanup. This case involved a spill that occurred after the defendant oil delivery contractor made a drop-off. The state sought reimbursement after the New York State Environmental Protection and Spill Compensation Fund (the "Fund") spent over $400,000 to clean up the spill. The oil delivery contractor was found liable without discussion of how the spill occurred, simply because it was "in a position to halt the discharge, to effect an immediate cleanup or to prevent the discharge in the first place." As a deliverer of the petroleum product, responsibility for selecting the manner and means of delivery was solely in the defendant's hands. Therefore, the contractor was liable for the cleanup costs.

A contractor was found not to be liable as a discharger in State v. Tarrytown Corporate Center, II, due in part to the fact that the contractor was not in control of the premises at the time of the spill.
This action to recover the cleanup costs of an oil spill arose from a landowner's assertion that the discharge was caused by a contractor's negligent installation of underground storage tanks. In fact, the cause of the leak was unknown. Due to the speculative nature of the spill's origin, the court found the contractor not liable. The court reasoned that its decision was based on the contractor's lack of control of the premises when the contamination was discovered, and that there could have been intervening events causing the leak. This holding demonstrates the best use of the control analysis because it considers the possibility of intervening events from the time the contractor's control ceased until the time of the discharge. This is in stark contrast to the result in Huntington Hospital where the court blindly relied on the contractor's responsibility for overall supervision of the project to support its holding, without considering intervening events.

The consideration of intervening events is crucial in developing a credible mode of reasoning for finding Navigation Law liability. Although a contractor may have been in control of an instrumentality, intervening events tend to break the chain of causation and beg for the blame to be placed on the intervening party. A major drawback of the control analysis is that responsibility seems to attach to one with apparent control without regard to who was actually in control when the spill occurred. Control should be ascertained not by the general contractor label, but by the grip of the hands that embrace the instrumentality of the discharge at the time of the spill. Despite the apparent flaws in control analysis, this approach seems more likely to find the responsible party than the status analysis. As courts look more to actual conduct, they seem to come closer to finding the true culpable party.

3. Conduct Analysis

New York courts also seem to base their decisions on the parties' conduct before, during, and after the spill. This often involves an examination of whether a defendant's acts or omissions contributed to a

59. See id. at 384.
60. See id. at 385.
61. See id.
62. See id.
63. See id.
65. See discussion supra Part II.A.1.
Although this seems to be the most effective mode of reasoning devised by courts to find the actual discharger thus far, courts employing it still seem reluctant to give sufficient reasoning for their decisions.

In *Mendler v. Federal Insurance Co.*, for example, a contracting company was held to be a discharger when its actions were found to have contributed to causing a discharge. Here, a fuel oil tank began to leak two months after it was installed, contaminating the surrounding ground water. The plaintiff-homeowner alleged that the contractor failed to connect properly the tank to the dwelling, and failed to conduct tests to make sure the system was sealed. Although the contractor claimed it was not responsible for the discharge, the court found that the contractor could be held liable. The court reasoned that dischargers include parties whose actions or omissions have contributed, in any manner, toward causing the discharge.

In *Barclays Bank v. Tank Specialists, Inc.*, a contractor was held liable under the statute after finding that a faulty tank installation may have contributed to a discharge. The oil spill at issue occurred after a contractor failed to install a tank liner at the time of the underground storage tank installation. The court found that this omission "may" have contributed to the spill such that the contractor "could" be a discharger. This decision took a very loose conduct approach, as the court imposed liability despite rampant speculation as to what actually caused the spill.

In each of these cases, it appears the court has held the contractor responsible when it breached its duty to prevent a discharge, and such breach caused the damages at issue. This reasoning resembles the

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66. *See, e.g.*, *Barclays Bank v. Tank Specialists, Inc.*, 654 N.Y.S.2d 673, 674 (App. Div. 1997) (finding that the defendant may be a discharger, as its omissions may have contributed to the discharge); *Mendler v. Fed. Ins. Co.*, 607 N.Y.S.2d 1000, 1004 (Sup. Ct. 1993) (finding a discharger to be any party whose actions "contributed in causing the discharge").


68. *See id.* at 1004.

69. *See id.* at 1002.

70. *See id.*

71. *See id.* at 1004.

72. *See id.*


74. *See id.* at 674.

75. *See id.* Federal regulation often requires the use of tank liners to contain leakage in ruptured storage tanks. *See 40 C.F.R. § 280.21(b)(1) (1999).*

76. *See Barclays Bank, 654 N.Y.S.2d at 674.*

77. *See id.*
analysis found in a common law negligence case\textsuperscript{78} rather than a Navigation Law claim. Such an analysis seems to favor contractors, as they will only be responsible for discharges they cause. Landowners similarly benefit because the reasoning seems to direct the court’s attention beyond status and more to actions. Since contractors’ actions are more likely to cause a spill, landowners are in a position to avoid liability. The benefits realized by contractors and landowners seem to run to the detriment of the Fund as it will have to expend greater resources to find the party responsible for the discharge.

4. A Recommended Approach

Although each approach discussed above has its strengths, the rationale underlying each decision discussed has been scant to nonexistent. This makes for hollow judgments and a general failure to demonstrate the underlying policy of the statute.

A better approach to Navigation Law claims would entail a balancing of several factors applicable in varied settings. This fact-sensitive approach takes favored portions of the “Conduct”\textsuperscript{79} and “Control”\textsuperscript{80} analyses to assign blame to the actual party at fault (the responsible party). This approach looks to the source of the discharge,\textsuperscript{81} the degree of control a party had over the source,\textsuperscript{82} when the party last had such control,\textsuperscript{83} the likelihood of intervening events,\textsuperscript{84} and the extent to which the plaintiff could have mitigated damages. This framework is based on the assumption that someone must have caused the discharge.\textsuperscript{85}

\textsuperscript{78} See generally RESTATEMENT (SECOND) OF TORTS § 281 (1965). The negligence cause of action includes a duty recognized by law, a breach of that duty, a close causal connection between the act and the injury, and an actual loss or damage resulting therefrom. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984).

\textsuperscript{79} See discussion supra Part II.A.3.

\textsuperscript{80} See discussion supra Part II.A.2.

\textsuperscript{81} Although the reported New York appellate decisions in this area focused only on questions of law, discovery and other fact-finding methods would most likely be employed at the trial court level to ascertain the source of the discharge. See, e.g., Mendler v. Fed. Ins. Co., 607 N.Y.S.2d 1000, 1004 (Sup. Ct. 1993) (recognizing the impossibility of determining who is responsible for a discharge in the absence of discovery).


\textsuperscript{83} See N.Y. NAV. LAW § 182 (McKinney 1989) (setting forth the statute of limitations for Navigation Law claims).


\textsuperscript{85} However, in cases where the discharge is the result of factors beyond anyone’s control, the least-cost avoider should be held responsible. See, e.g., Huntington Hosp., 673 N.Y.S.2d at 457 (finding Navigation Law liability over the party with the greatest likelihood of preventing a spill); Tarrytown Corporate Ctr., II, 617 N.Y.S.2d at 385 (same); State v. Montayne, 604 N.Y.S.2d 978, 979 (App. Div. 1993) (same).
Rather than finding liability based on one's status or solely on one's degree of control in the distant past, this framework will assign blame where it belongs. Furthermore, this analysis calls for the court to state some sort of rationale for assigning what are often huge damage awards (instead of resolving cases with limited discussion of the rationale for its holdings).

First, through the fact-finding process, the specific source of the discharge must be ascertained. Although this seems to be a very basic and logical place to begin, courts may gloss over this as they assume a likely source and move on. The source is important because, for example, an oil leak could originate from an underground storage tank, the pipe connecting the tank to a structure, or a fuel pump nozzle that was not properly replaced after the filling up of an automobile's tank. The former two would most likely result from a contractor's or tank manufacturer's wrongdoing, whereas the latter could result from the negligence of a gasoline station attendant. The source of the spill is a crucial step toward assigning blame.

Second, the degree of control a party had over the source of the spill is a significant consideration. The court in Huntington Hospital v. Anron Heating & Air Conditioning, Inc. properly considered control in its decision. However, this factor should do more than blindly assign liability to the general contractor. Rather, the duties of both the subcontractor and manufacturer (of the tank or pipe) should be ascertained, and the degree of control each has had over their respective parts of a job should be determined. This statute needs to assign the blame to those whom actually have the means to prevent oil spills in the future. While a general contractor theoretically is responsible for its subcontractors, it has little power over the day-to-day activities of, for instance, the specialized tank and piping contractors (who most likely will have more control over preventing a discharge). Therefore, these specialized contractors need to be held accountable in the same way that the court held the general contractor accountable in Huntington Hospital.

86. See, e.g., Leone v. Leewood Serv. Station, Inc., 624 N.Y.S.2d 610, 612 (App. Div. 1995) (disposing of a homeowner's Navigation Law claim in one swift sentence, stating that the defendant was liable because he was the owner of the underground storage tanks from which a discharge originated).


88. See id. at 457.

89. But if the subcontractors were unavailable, assigning blame in this manner certainly would be an appropriate way to compensate the Fund.

90. See Huntington Hosp., 673 N.Y.S.2d at 457.
Third, the court should consider when a party last had such control over the source of the discharge. The court in *Huntington Hospital*, for example, assigned blame despite the fact that the general contracting company had completed its work twelve years before the spill. Although the Navigation Law places a well-defined time limit on these claims, New York courts can better assign blame by imposing a reasonableness standard on those claims within the statutory period. For example, a court should have the discretion to deem it unreasonable for a contractor to guarantee its work for more than eight years after completion of a job. By allowing courts to weigh the time of the spill in relation to when the contractor completed its work, along with any other relevant facts, courts can compress the lengthy statute of limitations when it is fair and reasonable to do so. However, claims filed beyond this discretionary period would be time-barred by the statute and would remain beyond the court’s discretion.

Fourth, the court should consider any and all intervening events. Contractors other than the original construction contractor may be retained to maintain petroleum tanks and piping. Although this type of maintenance should be encouraged, those that perform such maintenance should be accountable for discharges resulting from their failures. A fair assignment of blame must provide an opportunity for the original installing contractor to be insulated from liability if some subsequent event caused the discharge.

After the court has determined that a defendant is responsible for a discharge, determining the degree to which a plaintiff could have mitigated the extent of the damage will be necessary. Additional damages occurring as a result of a plaintiff’s failure to notice and act on a discharge for a period of time should not accrue to a defendant. A landowner or other occupier of land should have a duty to minimize the damage caused by the discharge. For example, a contractor would appropriately be at fault for improperly sealing underground piping, but a service station operator who fails to repair a faulty leak alarm and will

91. See id.
92. See N.Y. NAV. LAW § 182 (McKinney 1989) (requiring claims arising from discharges of petroleum to be filed within three years of discovery of the discharge and within ten years of the incident that caused the discharge); see also discussion infra Part III.C (discussing the statute of limitations).
93. The court should hold a contractor responsible if, depending on the circumstances of the particular case, it last had control of the instrumentality within a reasonable time.
94. For example, after a construction contractor installs tanks and erects the building at a service station, separate maintenance contractors often perform routine maintenance and repairs on gasoline pumps, dispensers, and leak alarms.
thereby, be unaware of the discharge until months or years later should share the cleanup costs. This factor will encourage operators to closely monitor their petroleum systems' performance and report discharges more promptly in accordance with the Navigation Law's stated purpose.95

Overall, this approach provides a framework that preserves the urgency of the Oil Spill Act,96 while being careful to properly assign the blame. Additionally, since a party can be liable despite being careful, the strict liability nature of the statute97 is upheld. The main purpose of this analysis is to ensure that the broad sweep of the statute does not find a blameless party liable. Instead, those responsible for discharges will be held accountable for their actions or inaction, and future dischargers will be effectively warned of situations for which they can expect to be held liable. This will lend credibility to the statute and to the tribunal applying its provisions.

B. Failure to Report Contamination

The statute also imposes liability on those responsible for failure to report a discharge.98 At least one recent decision indicates that responsible persons include contractors, consultants, and even the property owner's attorney, all of whom have an obligation under the Navigation Law to report a discharge.99 This duty was imposed to ensure the most rapid cleanup of any contamination, in accordance with the legislature's stated purpose in enacting this law.100

In State v. Super Value, Inc.,101 the court found that a service station owner's failure to report that its gasoline storage tanks were leaking supported the imposition of a statutory penalty under the Navigation

95. See N.Y. NAV. LAw § 171. Section 171 states in part that "[i]t is the purpose of this article to . . . respond quickly to . . . discharges and effect prompt cleanup and removal of such discharges."

96. See supra note 4 and accompanying text.

97. See N.Y. NAV. LAw § 181(1) (stating that "[a]ny person who has discharged petroleum shall be strictly liable, without regard to fault").

98. See id. § 175. Section 175 states in part that "[a]ny person responsible for causing a discharge shall immediately notify the [New York State Department of Environmental Conservation] pursuant to rules and regulations established by the [New York State Department of Environmental Conservation], but in no case later than two hours after the discharge."


100. See N.Y. NAV. LAw § 171 (stating that "[i]t is the purpose of this article to . . . respond quickly to . . . discharges and effect prompt cleanup and removal of such discharges").

Law. The defendant's service station manager neglected to report the failure of three underground storage tanks on a routine tank test. One of the tests indicated a leak of almost four gallons of petroleum per hour. Action was not taken until a county health engineer learned of the results of the tests almost one month later. The defendant service station owner's failure to report this leak was, according to the court, a failure to comply with the Navigation Law.

A recent decision by the DEC expanded the duty to report contamination to environmental consultants. In the case, *In re Middleton, Kontokosta Associates,* the DEC fined the owner of underground storage tanks after he failed to report leaks from his tanks. Then the Commissioner found that professionals retained by the property owner, who had knowledge of the spill and failed to report it to the DEC, also could be liable under the Navigation Law.

Such rulings could place a duty to report contamination on contractors. If, while working on a landowner's premises, a contractor notices a leak, the contractor will be obligated to report the discharge immediately. Failure to report the leak could result in fines and Navigation Law liability despite not having caused the discharge. Although this form of liability may still leave the landowner liable, it does provide another channel by which the DEC can recover from the contractor.

C. Damages, Fines, and Penalties

This Section first discusses how damages under Navigation Law claims are generally limited to economic losses. This Section then considers the nature of the fines assessed by the DEC and the instances of personal statutory liability for supposed corporate acts. Although courts have determined that Navigation Law liability is limited to economic loss, the magnitude of such losses, in addition to the

102. See id. at 494.
103. See id. at 493.
104. See id.
105. See id.
106. See id. at 494.
109. See id. at *1.
110. See id. at *2.
111. See id.
possibility of personal liability, hardly makes this seem like much of a limitation.

1. Damages Generally Limited to Economic Loss

The Navigation Law states that dischargers may be liable for both direct and indirect damages resulting from a discharge.\(^{113}\) Although the language of the statute does not expressly limit a plaintiff’s recovery, recent decisions indicate that parties can recover only economic losses attributable to a discharge and not damages for personal injuries.\(^{114}\)

In *Wever Petroleum, Inc. v. Gord’s Ltd.*,\(^{115}\) the Third Department held that the damages a tank contractor would be required to pay were limited to the economic loss of the plaintiff.\(^{116}\) Approximately two weeks later the same court, in *Strand v. Neglia*,\(^{117}\) further limited the type of damages recoverable.\(^{118}\) In *Strand*, a property owner sued an adjoining gasoline service station for personal injuries caused by a petroleum discharge from the storage tanks located at the service station.\(^{119}\) The court held that although the service station operator may have been a discharger under the Navigation Law, and the adjoining property owner may be entitled to resulting direct and indirect damages, the Navigation Law creates no cause of action for personal injuries.\(^{120}\)

Since the listing of damages in the Navigation Law seems to be limited to economic losses, contractors held to be dischargers can expect to indemnify the Environmental Protection and Spill Compensation Fund or property owners for costs related to cleanup, repair or replacement of real or personal property or natural resources, loss of income, and tax revenue or interest on loans arising from the damaged property.\(^{121}\) Despite the economic loss limitation, however, such statutory claims do not replace or diminish a plaintiff’s right to recourse

\(^{113}\) The Navigation Law states in part: “Any person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained, as defined in this section.” N.Y. Navigation Law § 18111 (McKinney 1989).


\(^{116}\) See id. at 728.


\(^{118}\) See id. at 730.

\(^{119}\) See id. at 729-30.

\(^{120}\) See id. at 731.

\(^{121}\) See N.Y. Navigation Law § 181(2) (McKinney 1989).
under the common law. Therefore, while contractors may be shielded from personal injury awards in Navigation Law claims, they may still have to contend with such liability if a common law tort claim is brought against them. However, any common law claim is determined using a negligence standard, rather than a strict liability standard. The statute applies.

2. Fines Imposed by the State

Dischargers can be fined up to $25,000 per day for failure to act toward cleaning up a discharge, in addition to other sanctions. Since the purpose of creating the Fund was to insure a clean environment by promoting the expeditious cleanup of spills, these fines will most likely accrue directly against the property owner. However, property owners will most likely seek indemnification from contractors as part of the property owners’ economic loss.

Despite the threat of very substantial fines, however, the DEC has been slow to impose them in recent years. In April 1998, there were over 40,000 documented petroleum spills on Long Island alone. Given its limited budget, the overburdened DEC has been unable to enforce the cleanup of every spill in New York State. Although the principles behind these fines are sound, they may result in abandoned property which becomes dormant brownfield, an eyesore in the community, and the public’s burden.
Although the possibility of fines from the DEC is a necessary consideration for contractors, many of the issues for which the fines arise are beyond the scope of this Note. Despite the DEC's often sluggish enforcement efforts here, parties should be aware of the DEC's power to impose substantial fines on an unlucky party.

3. Personal Liability

Recently, one court bypassed the corporate form and found shareholders of a corporation personally liable on a Navigation Law claim without even piercing the corporate veil. Since the law holds any "person" liable for discharges, owners participating in the contracting company's work may be subject to liability. In Malin v. Bill Wolf Petroleum Corp., the New York Supreme Court in Nassau County held that a gas station owner was personally liable. Despite the fact that a corporation owned the contaminated property, the individual charged was in complete control of the underground storage tanks and made all decisions with respect to its operation. Therefore, the court found that the individual, and not the corporation, was the actual discharger.

Decisions such as this one should be particularly alarming for smaller contractors and service station operators that may be operating as closely held corporations. In such a scenario, officers, shareholders, and directors may be the same few people who not only own the company, but also manage the day-to-day operations such as installations and maintenance. If a discharge occurs while conducting these day-to-day activities, the possibility of direct liability is a very real threat.

130. Piercing the corporate veil refers to a "judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for the corporation's wrongful acts." BLACK'S LAW DICTIONARY 1168 (7th ed. 1999). "[S]hareholder liability is an exceptional remedy... based on two factors: first, 'a substantial identity of interest and ownership' between the corporation and the shareholder, and secondly, 'the danger that the corporate form is being used or will be used to achieve an inequitable result.'" Robert W. Hamilton, The Corporate Entity, 49 TEX. L. REV. 979, 983 (1971) (discussing the doctrine of piercing the corporate veil) (footnote omitted) (quoting Pellitier, Corporations—Annual Survey of Texas Law, 21 SW. L.J. 134, 141-42 (1967)).
132. See, e.g., Malin, No. 21438/96 (bypassing the corporate form after determining that the owner of the corporation participated in activities leading to a discharge of petroleum to such an extent that he could be directly liable as a discharger).
134. See id. at 16.
135. See id. at 15.
136. See id. at 15-16.
To avoid direct liability or corporate veil piercing, companies should adhere to corporate formalities, and avoid undercapitalization. By adhering to the formalities, the day-to-day activities of owners of a contracting company or service station should be protected by the corporate entity, thereby limiting the owners' liability to their investment in the company. By ensuring that the company remains solvent, the court will be less likely to pierce the corporate veil and a claimant will be less likely to seek personal liability since any judgments would be satisfied by the party's corporate assets.

III. AVOIDING LIABILITY

Although the breadth of the Navigation Law places a seemingly inescapable black cloud over a contractor's activities, and an easy route to indemnification for the landowner, a number of defensive measures may help turn the tables for either party to elude statutory liability. This Part discusses a few of these measures including the use of insurance coverage, statutory technicalities, the statute of limitations, and indemnification agreements.

A. Insurance Coverage

An in depth discussion of insurance coverage issues is beyond the scope of this Note, but its utility and pitfalls deserve at least minimal consideration. Contractors and owners may purchase insurance policies that contain an absolute pollution exclusion clause. These policies may provide a false sense of security for the unsuspecting party who fails to read the fine print. Pollution exclusion clauses provide a means for insurance companies to avoid paying judgments on the insured's behalf in a variety of environmental claims. The legitimacy of these clauses has withstood Navigation Law claims.

137. See Hamilton, supra note 130, at 985. Courts often emphasize insufficient capitalization and the intermingling of shareholder and corporate matters as determinative factors for ascertaining whether shareholders will be responsible for claims against the company. See id.
138. See id. at 988.
139. See N.Y. NAV. LAW § 181(1) (McKinney 1989).
In *State v. Capital Mutual Insurance Co.*,\(^1\) for example, a court held that a pollution exclusion clause precluding coverage for a discharge of pollutants onto a homeowner’s land unambiguously precluded coverage for an oil spill.\(^4\) Similarly, in *Cortland Pump & Equipment, Inc. v. Firemen’s Insurance Co.*,\(^2\) a contractor’s insurance policy was found not to cover damages resulting from the negligent repair of a gasoline pump causing a petroleum leak based on an absolute pollution exclusion.\(^6\) In both cases, the insurer was not obligated to defend or indemnify the insured from Navigation Law claims.\(^7\)

As courts continue to uphold these pollution exclusion clauses, contractors and owners will often be left to their own defenses. In these cases, despite having insurance, they will be faced with the possibility of incurring tremendous legal fees to protect their assets and livelihoods.

Besides a situation that does not quite fall in the realm of the pollution exclusion clause, the only way to maintain an action against the insurance company is for the insured to negotiate for expanded coverage by eliminating the pollution exclusion clause or other provisions designed to preclude coverage. However, negotiating such provisions could prove costly as they enhance the insurer’s vulnerability to a host of environmental claims, including those brought under the Navigation Law. In fact, such policies may be so costly that they become an impractical option for most. Therefore, potentially liable parties can probably seek more efficient defensive measures elsewhere.

**B. Discharger Actions Against Other Dischargers**

According to the Navigation Law, those responsible for discharges\(^3\) cannot sue other potential dischargers.\(^4\) However, a recent New York Court of Appeals decision held that potential dischargers

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\(^1\) *See id.* at 661.


\(^3\) The New York Court of Appeals has suggested that the one responsible for a discharge is a party that has caused or contributed to a discharge. *See White v. Long, 650 N.E.2d 836, 838 (N.Y. 1995).*

\(^4\) *See N.Y. NAV. LAW § 172(3) (McKinney Supp. 2000) (defining a claim as “any claim of the fund or any claim by an injured person, who is not responsible for the discharge, seeking compensation for cleanup and removal costs incurred or damages sustained as a result of a petroleum discharge”).*
other than those actually responsible for the discharge can sue other potential dischargers.\(^{150}\) The Court of Appeals reasoned that the purpose of the Navigation Law is better served by allowing dischargers to sue these parties.\(^{151}\) However, in *Race Oil Corp. v. Eastman*,\(^ {152}\) the court held that the owner of a service station was responsible for a discharge, and therefore, could not assert a private right of action against another discharger.\(^ {153}\)

The nearly simultaneous opinions of the Court of Appeals and the Third Department are consistent in that they both uphold the Navigation Law’s prohibition against allowing responsible parties to evade their liability.\(^ {154}\) These decisions create a crucial distinction between a potential discharger and one responsible for a discharge. The former has a private right of action against other potential dischargers, while the latter does not. Therefore, the difference between one responsible for a discharge and a discharger becomes the prevalent question.

Although the cases do not provide a clear answer, the Court of Appeals suggested that one responsible for a discharge is a party who has “caused or contributed” to the discharge.\(^ {155}\) No decision has since defined what “caused or contributed” means. This leaves a significant gap in the law’s characterization of dischargers, and a viable defense for those sued under the Navigation Law.

Therefore, a plaintiff who may have “caused or contributed”\(^ {156}\) to a discharge may be vulnerable to this defense. Navigation Law claimants may be able to claim that the defendant-contractor is responsible for the discharge and avoid this defense; but, until the courts further define this terminology, their success will be questionable.

### C. Statute of Limitations

The Navigation Law requires claims arising from discharges of petroleum be filed within three years of discovery of the discharge and

\(^{150}\) *See White*, 650 N.E.2d at 838.

\(^{151}\) *See id.* (noting that to preclude reimbursement in a situation where a discharger had the opportunity to sue another potential discharger would significantly diminish the reach of the Navigation Law).


\(^{153}\) *See id.* at 965.

\(^{154}\) *See supra* notes 150-53 and accompanying text.

\(^{155}\) *See White*, 650 N.E.2d at 838.

\(^{156}\) *Id.*
within ten years of the incident that caused the discharge.\textsuperscript{157} Beyond this statute of limitations, no Navigation Law action will lie.\textsuperscript{155} This requirement may provide another escape valve for a defendant. Although the statute of limitations provided by the Navigation Law provides the general rule, at least one New York court has allowed parties to negotiate for a shortened statute of limitations in a contract if such shortening is reasonable.\textsuperscript{159}

Contractors acting in good faith, in a reasonable exchange can effectively decrease the chances of incurring liability under the Navigation Law by contracting with an owner for a shortened statute of limitations.\textsuperscript{160} A contractor would most likely find a shortened statute of limitations favorable when contracting with a landowner to do work on an environmentally risky property. Although landowners could seize such an opportunity to obtain a better price from contractors, they may want to consider leaving the statute of limitations intact to keep the contractor from escaping statutory liability at a later date. Although a shorter statute of limitations provides a dose of preventative medicine for the contractor, to further plan an effective defense to a Navigation Law claim, the contractor will most likely want to take additional steps by tailoring the contractor's agreement to shift the risks of working on the threshold of strict statutory liability from themselves to the landowner, regardless of when a discharge occurs.

\section*{D. Avoiding Liability by Contract}

Although some courts seem reluctant to allow one to "contract out" of statutory liability under the Navigation Law,\textsuperscript{161} at least one New York
court has upheld such contractual provisions.\textsuperscript{162} Noting the situations in which these agreements have been upheld will be a useful tool for both contractors and landowners in planning effective contractual provisions to shift the potential for liability.


In \textit{Niagara Frontier Transportation Authority v. Tri-Delta Construction Corp.},\textsuperscript{163} an indemnity clause was upheld because the court found that it was developed at arm’s length between two sophisticated business entities and the intent of the parties was clearly implied from the language.\textsuperscript{164} This action arose when a commercial aircraft rolled into a construction excavation site.\textsuperscript{165} In this declaratory judgment action, the airport that maintained the excavation site sought to ensure that the indemnification provision in the agreement with the contractor was valid and that the airport be held harmless from damages arising from the accident.\textsuperscript{166} Although the court recognized a general hesitation in the law to uphold contracts enabling culpable parties to evade liability, it nonetheless upheld the provision.\textsuperscript{167} The court reasoned that although the language of the clause may not have referred expressly to specific instances where indemnification would occur, the parties’ intent could be clearly inferred.\textsuperscript{168}

In \textit{Southland Corp. v. Ashland Oil, Inc.},\textsuperscript{169} the federal district court held that although private parties were free to enter into agreements to be held harmless by another party, it concluded that the contract before the court was not sufficient to transfer all liabilities.\textsuperscript{170} \textit{Southland} involved the purchaser of a chemical plant who was suing the vendor, seeking a declaration that the vendor was strictly liable for the indemnification of the purchaser under federal environmental statutes.\textsuperscript{171} The court found that simple “as is” provisions in sales contracts preclude only claims for breach of warranty and not statutory liability.\textsuperscript{172} Although this case does

\begin{thebibliography}{9}
\bibitem{164} See \textit{id.} at 430.
\bibitem{165} See \textit{id.} at 429.
\bibitem{166} See \textit{id.}
\bibitem{167} See \textit{id.} at 430.
\bibitem{168} See \textit{id.}
\bibitem{170} See \textit{id.} at 1002.
\bibitem{171} See \textit{id.} at 996-97.
\bibitem{172} See \textit{id.} at 1001.
\end{thebibliography}
not deal with the New York Navigation Law, it illustrates the distinction between disclaiming contractual and statutory duties.

In *State v. Tartan Oil Corp.*, a state action was initiated against a service station operator, alleging strict liability for cleanup costs under the Navigation Law. The defendant brought a third party action for indemnification by the predecessor in interest pursuant to an indemnification provision. The court construed the language of the provision strictly as a notice of the existence of underground storage tanks and a mere contractual indemnity. As a result of the leakage from the tanks, the court refused to find that it was a valid indemnification for statutory liability. Therefore, the New York court recognized the contractual versus statutory indemnification distinction that the federal district court in *Southland Corp.* recognized. These cases highlight the importance of clearly allocating statutory, as well as contractual, responsibilities in indemnification agreements.


Many contractor/landowner agreements from which recent claims have arisen have been silent on environmental liability issues. This silence creates a realm of unpredictability should a discharge occur during or after a contractor has completed its work. This unpredictability arises since the court will most likely decide the environmental liability issue based solely on statutory language and recent precedent, without considering the parties' intent. Given the general swiftness and unpredictability with which courts render judgments against dischargers, both contractors and their opposition assume tremendous risk by litigating this issue. Therefore, it seems prudent for both parties to engage in some private lawmaking that will enable them to craft more predictable results.

The specific allocation of risk in a contract that clearly reflects the parties' intent should be the common goal for which parties strive. Overly simple and broad disclaimers will not achieve this end. Each party must clearly state its expectations with regard to the statutory liability that awaits it upon the occurrence of a petroleum discharge.

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174. See id. at 990.
175. See id. at 990-91.
176. See id. at 991.
177. See discussion supra Part II (discussing a number of these swift judgments).
178. See, e.g., *Tartan Oil Corp.*, 638 N.Y.S.2d at 990-91 (finding that the contractual indemnity did not support the defendant's contention that it was indemnified).
The Model Contractor Agreement provided by the Petroleum Equipment Institute ("PEI") provides a step in the right direction for both contractors and landowners; yet, it still falls far short of providing any real sense of security. The relevant portion of the PEI's suggested contract reads:

Owner agrees to hold Contractor harmless from and defend and indemnify Contractor against any of Contractor’s or Owner’s losses in connection with any property damage, personal injury or death, whether same relates to any claim, penalty, or fine by governmental agency for pollution, environmental damage, clean up, or otherwise, or whether any claim is made by any third party against Contractor or Owner or said damage, personal injury or death is claimed or sustained by Owner or made against Owner or Contractor in connection therewith, including but not limited to damages, costs, expenses, and attorneys’ fees, except to the extent that said damage, personal injury or death is proven to have been caused by Contractor's sole negligence. Where a penalty, fine or claim for pollution damage or cleanup is made against Contractor in connection with installation of materials or equipment, Owner agrees to hold Contractor harmless from and defend and indemnify Contractor against same.

This provision benefits the contractor by shifting more risk to the property owner, who agrees to incur liability for most types of losses on behalf of the contractor. However, it benefits landowners as well because it falls short of accepting responsibility for the contractor’s negligence. If such a provision were upheld in a Navigation Law case, it would effectively change the standard for the contractor from strict liability to negligence.

Despite the broad language in this agreement relating to potential environmental liability, New York courts may be reluctant to uphold this clause. However, a more specific provision may be more effective.

3. A Recommended Approach to Allocating Navigation Law Liability

"[M]any potential disputes over the law . . . [will] never arise because the contract is well drafted, and . . . many actual disputes would

180. Id. (emphasis added).
181. See id. (stating that the owner agrees “to hold Contractor harmless from . . . losses in connection with any property damage, personal injury or death”).
182. See id. (stating that such indemnity applies “to the extent that said damage . . . is proven to have been caused by Contractor’s sole negligence”).
not have arisen had the contract been better drafted.\textsuperscript{183} Building upon the efforts of the PEI, a "better drafted"\textsuperscript{184} agreement would specifically allocate Navigation Law liabilities.

Rather than simply inserting broad boilerplate language, parties should negotiate specific provisions that expressly identify which party will pay for damages resulting from discharges pursuant to the Navigation Law. Unless this statutory liability is expressly allocated, both the contractor and landowner will be at the mercy of the court's interpretation of the statute.\textsuperscript{185} This will subject both parties to unpredictable judgments that have plagued parties in similar disputes over the past few years.\textsuperscript{186} The language needs to be clear to avoid any confusion that the indemnity relates to statutory, and not contractual, liability.\textsuperscript{187}

Given that the potential damage award accruing from a Navigation Law claim can dwarf the amounts resulting from other contractual claims that may arise, the parties would be well-advised to spend just as much, if not more, time negotiating specific indemnification clauses as they would spend negotiating provisions relating to the construction or other work to be performed. Only if a mutually agreeable, well-reasoned, specific indemnification clause is negotiated can parties most effectively determine the course of events following a discharge. Despite these recommended measures and theoretical provisions, the reality of the contractor-landowner relationship can make for a much different scenario.

4. The Reality of the Landowner-Contractor Relationship

In reality, contractors will not think or even attempt to insert indemnification language into their contracts with property owners. The nature of the landowner-contractor relationship is such that the contractor is one of a field of companies competing with each other to perform work for the property owner. As a result, even if the contractor attempted to insert such language, the property owner would be unlikely to agree. Once again the question will be who pays, and it is unlikely that property owners will elect to pay when they can find another

\begin{thebibliography}{9}
\bibitem{183} E. ALLAN FARNSWORTH, CONTRACTS § 7.1, at 426 (3d ed. 1999).
\bibitem{184} Id.
\bibitem{185} See discussion supra Part I.
\bibitem{186} See discussion supra Part II (explaining how courts have been deciding Navigation Law claims with sharp holdings and little reasoning).
\bibitem{187} Courts have strictly construed indemnity provisions and have similarly maintained that contractual indemnities relate only to contractual liability and will not extend to statutory liability. See discussion supra Part III.D.2.
\end{thebibliography}
contractor, who would be willing to assume the risks associated with its work, in order to obtain the job.

In other instances, the landowner may be unsophisticated and unable to understand complex contractual provisions shifting liability for environmental risks. Furthermore, a court may not be as likely to uphold such provisions if the parties had unequal bargaining power or the terms were unreasonably favorable to one party.188

In both instances described, there is an urgent need to get the work done. A broken fuel pump can cost a service station owner significant amounts in lost revenues in a single day. On the other side, contractors will be anxious to get deals signed so that they can move on to other jobs. All too often, the details needed to avoid the possibility of liability from a petroleum discharge will fall far behind the need to pay bills today.

IV. CONCLUSION

Liability under the Navigation Law189 is a real risk to both contractors and landowners. Petroleum equipment manufacturers, service station operators, and other parties involved in petroleum facilities are similarly vulnerable. As a strict liability statute with grave ramifications for corporate and individual owners alike, contractors should note that reasonable prudence and carefulness in performing work may no longer provide protection. Additionally, other parties should be aware of the risks of strict liability that can befall any party associated with a petroleum facility. Parties need contractual provisions that expressly define the scope of their liability.

Given the relative infrequency with which these issues arise, courts have given this statute little attention.190 Many opinions are conclusory and provide little guidance by which parties can plan future actions. The ambiguity and breadth of the statute’s language provide little relief from this uncertainty. There is a need for a sound framework for determining just what a discharger is, and in what situations that discharger will be liable.

New York courts should devote more time to interpreting the expansive language of the Navigation Law. Because of its broad

188. See FARNSWORTH, supra note 183, § 4.28, at 308-09. “[T]he determination of unconscionability is to be made by ‘the court as a matter of law’. . . . [A] court may withhold relief [and] . . . may refuse to enforce the entire contract or it may refuse to enforce or limit the application of the unconscionable clause.” Id.
190. See discussion supra Part I.
delegation of authority, the DEC places significant numbers of unsuspecting parties in the captions of its Navigation Law claims. These parties deserve sound reasons for the imposition of these claims and clear warnings to enable them to plan their future conduct. The policy underlying the statute will not be met as long as landowners, contractors, and service station managers are unaware of the nature of the liability they tread upon each day.

James Clark*

* This Note is dedicated to my father, Edward Clark, a man whose strength, determination, and love has encouraged me to dream big and to strive until those dreams become a reality. The subject matter of this Note was inspired by his experiences in the petroleum industry. I would like to thank the staff and editors of the Hofstra Law Review for their hard work and dedication, and particularly Diane Corrigan-Hancock, Kimberly Gazes, Bradley Luria, Lisa Sconzo, and William Gartland for their efforts in helping to bring this Note to fruition. I would also like to thank Professor William Ginsburg for his time, guidance, and assistance throughout the development of this Note. I would also like to extend my immeasurable gratitude to my mother and father for providing me with every opportunity to succeed through law school and beyond. Finally, I would like to express my deepest appreciation to my wife, Emily. Her love, support, and encouragement from my darkest undergraduate days through the development of the drafts of this Note on the eve of our wedding have given meaning to my every endeavor.