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Expert Analysis

Lost Profit Damages Three Years After 'Biotronik'

By **Elizabeth A. Edmondson**

And **Jenna E. Ross**

In March 2014, the New York Court of Appeals issued a 4-3 decision in *Biotronik, A.G. v. Conor Medsys. Ireland*, 22 N.Y.3d 799 (2014), that—according to the dissent and considerable commentary—threatened to upend previously settled New York damages law. By holding that lost profits on third-party transactions are not always consequential damages, *Biotronik* seemed to call into question the scope of many contractual limitations of liability. Three years later, however, no sea change in the New York law of lost profit damages appears to have occurred.

'Biotronik' Itself

The facts in *Biotronik* were as follows: Biotronik, a distributor of medical devices, entered into an exclusive distribution agreement with Conor Medsystems, a manufacturer of coronary stents. The agreement barred recovery of consequential damages. Conor recalled its stent, and Biotronik sued for breach of contract, seeking the lost profits from the stents' resale. Conor moved for summary judgment on damages, contending that any lost profits from the resale constituted unrecoverable consequential damages.

The trial court concluded that the lost profits were consequential, as did a unanimous First Department panel. Lost profits, the First Department held, "only constitute general damages where the nonbreaching party seeks to recover money owed directly by the breaching party under the parties' contract." *Biotronik, A.G. v. Conor Medsys. Ireland*, 95 A.D.3d 724, 726 (1st Dep't 2012).

The Court of Appeals disagreed. It concluded that the "bright-line rule" applied by the First Department "violates the case-specific approach we have used to distinguish general damages from consequential damages." *Biotronik*, 22 N.Y.3d at 808. It rejected the idea that "lost resale profits can never be general damages simply because they involve a third-party transaction." Id. Instead, lost profits, including those from third-party transactions, may constitute general damages where the "non-breaching party bargained for such profits and they are 'the direct and immediate fruits of the contract.'" Id. at 806.

In determining that Biotronik's lost resale profits were general damages, the court relied heavily on factors unique to the parties' agreement. First, the agreement was not a "simple resale contract" where one party buys a product at a set price to re-sell at market price; instead, the parties' relationship resembled a "quasi-joint venture" where the parties shared both risk and reward. Id. at 803, 809-10 & n.7. Second, the agreement's pricing formula incorporated Biotronik's net resales from previous quarters and required Biotronik to pay a percentage of its net resales to Conor. Id. Thus, the Court of Appeals concluded that Biotronik's claimed damages were in some measure governed by, and flowed directly from, the breached contract. Id. at 808-10.

> So far, 'Biotronik' has not proved as disruptive as commentators feared (or plaintiffs hoped)—at least in the federal courts.

Initial Commentary

Biotronik drew criticism from the start. The lengthy dissent led the way, remarking that the majority's creative interpretation was "no boon in the commercial world, 'where reliance, definiteness, and predictability are such important goals of the law itself, designed so

ELIZABETH EDMONDSON *is a partner and* JENNA ROSS *is an associate at Jenner & Block.* LORI B. DAY, DANIEL JOHNSON *and* GRETCHEN O. STERTZ *assisted in the preparation of this article.*

that parties may intelligently negotiate and order their rights and duties.'" Id. at 823 (Read, J., dissenting).

Many commentators shared the dissent's concern that *Biotronik* introduced uncertainty into the settled interpretation of contracts governed by New York law—a category, of course, that extends to many international contracts. Law review articles discussed Biotronik's departures from prior precedent, and in industry publications and law firm alerts, practitioners criticized the case-specific approach, instead of a bright-line rule.[1] Some suggested that transactional lawyers revisit boilerplate limitation of liability provisions in light of the decision, including by inserting their own definitions of consequential damages.[2]

The Application

So far, *Biotronik* has not proved as disruptive as commentators feared (or plaintiffs hoped)—at least in the federal courts. In none of the seven federal decisions meaningfully addressing the line drawn in *Biotronik* has a court concluded that lost profits on a third-party transaction are direct contract damages.

The federal courts interpreting *Biotronik* have not construed it as marking a meaningful shift in the New York law of consequential damages. To the contrary, they have taken *Biotronik* at its word, that it simply embodied an extension of existing principles, albeit under a "rare" set of facts.[3] That is, the federal courts have interpreted *Biotronik* as describing the contours of the exceptional case, and identified two key elements—a quasi-joint venture relationship and dynamic contractual pricing tied directly to the reseller's profits—that they conclude are required to determine that lost profits on third-party transactions constitute general damages.[4] Where those attributes are not present, the federal courts have characterized the damages on third-party transactions as consequential,[5] while permitting the recovery of lost profits on the business transaction underlying the contract (i.e., allowing a seller/supplier to recover lost profits generated by the contract itself).[6]

The record in New York state court is less clear. In a case soon after *Biotronik*, the New York Supreme Court refused to grant a motion to dismiss on the ground that the damages sought were consequential. In that case, the circumstances arguably would have satisfied the test offered by the federal courts—a quasi-joint venture relationship and express profit-sharing, as the plaintiff had alleged that it entered into a joint venture, shared a joint bank account with defendant and agreed to a 50 percent profit share on future property transactions. *JCMC Flatiron, v. Princeton Holdings*, 998 N.Y.S.2d 306, 2014 WL 4937854, at *2 (N.Y. Sup. 2014). Thus, the court concluded that the damages were arguably "bargained for" and were the "direct and immediate fruits of the contract." Id. at *6. Other New York state decisions citing *Biotronik*, including those by the New York appellate courts, have offered little to no substantive analysis, so it is difficult to glean if they are taking a different approach than the federal courts.[7] But, as in the federal courts, New York courts still permit the recovery of lost profits under the contract itself as direct damages.[8]

1. See, e.g., Christopher M. Caparelli, "All Is Not Lost: A Consequential Damages Exclusion May Not Preclude Lost Profits under New York Law," 30 BANKING & FIN. L. REV. 155, 155 (2014) (emphasizing that *Biotronik* marked "only the second time—and the first since 1920—that the Court of Appeals concluded that a buyer's lost profits constituted a claim for general, not consequential, damages").

2. See, e.g., Rick Robinson & Glen Banks, "Consequential Damages Clause At Heart Of $100M Dispute," Law360 (April 14, 2014), (suggesting new approaches in limitations of liability clauses); Glen Banks, "Clarifying Distinction Between General and Consequential Damages," 251 N.Y.L.J. 3 (May 27, 2014) (same).

3. See, e.g., *First Niagara Bank N.A. v. Mortg. Builder Software*, 2016 WL 2962817, at *7-9 (W.D.N.Y. May 22, 2016) (noting that damages that are "'one step removed from the naked performance promised by the defendant'" are consequential and that Biotronik was the "rare" case where the plaintiff's lost profits on a third-party transaction were clearly contemplated by the parties' contract); *PNC Bank, Nat. Ass'n v. Wolters Kluwer Fin. Servs.*, 73 F. Supp. 3d 358, 373-74 (S.D.N.Y. 2014) (same).

4. *First Niagara*, 2016 WL 2962817, at *8-9 (W.D.N.Y. May 22, 2016) (finding defendant's lost profits claim to be barred by a consequential damages waiver where the agreement was "not akin to a 'joint venture,' and there was no link between the payments [plaintiff] had agreed to pay" under the contract and "any third-party payments"); *In re ADI Liquidation*, 555 B.R. 423, 432-34 (Bankr. D. Del. 2016) (applying New York law); *PNC Bank*, 73 F. Supp. 3d 358, 373-74 (S.D.N.Y. 2014).

5. Id.; see also *Solidfx v. Jeppesen Sanderson*, 841 F.3d 827, 840-41 (10th Cir. 2016) (distinguishing *Biotronik*); *Int'l Cards Co. v. MasterCard Int'l*, 2016 WL 7009016, at *3 (S.D.N.Y. Nov. 29, 2016).

6. *Design Partners v. Five Star Elec.*, 2017 WL 818364, at *15 (E.D.N.Y. March 1, 2017); *Nielsen Co. (U.S.) v. Success Sys.*, 112 F. Supp. 3d 83, 102-03 (S.D.N.Y. 2015) (permitting the recovery of direct lost profit damages under the contract even though the parties agreed that neither would be liable for consequential damages "including but not limited to . . . lost profits" because the enumeration of "lost profits" in the limitation provision merely served as an example of consequential damages).

7. See, e.g., *Carbures Europe, S.A. v. Emerging Mkts. Intrinsic Cayman*, 49 N.Y.S.3d 103, 104 (1st Dep't 2017); *Harmit Realties v. 835 Ave. of Americas, L.P.*, 9 N.Y.S.3d 42, 43 (1st Dep't 2015).

8. See, e.g., *Coniber v. Ctr. Point Transfer Station*, 27 N.Y.S.3d 763, 766 (4th Dep't 2016) ("[T]he lost profits sought in this action are general, not consequential, damages inasmuch as plaintiff 'seeks only to recover money that the breaching party agreed to pay under the contract'" less the cost of plaintiff's performance.).