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COURT OF APPEALS

STATE OF NEW YORK

BIOTRONIK, A.G.,

Appellant,

-against-

No. 8

CONOR MEDSYSTEMS IRELAND, LTD., ET AL.,

Respondents.

20 Eagle Street
Albany, New York 12207
January 07, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 8, Biotronik.
2 Counselor, would you like any rebuttal
3 time?

4 MR. RAUCHBERG: Yes, I would, Your Honor.
5 Two minutes, please.

6 CHIEF JUDGE LIPPMAN: Two minutes. Sure,
7 go ahead.

8 MR. RAUCHBERG: Thank you. My name is
9 Ronald Rauchberg. I represent the plaintiff-
10 appellant, Biotronik. Good afternoon, Your Honors.

11 The - - - the core of the error below was
12 in the failure to deal with what contract terms were
13 actually at issue here. The Appellate Division and
14 the Supreme Court did not consider what this contract
15 provided and the consequences of a breach of this - -
16 -

17 CHIEF JUDGE LIPPMAN: Counsel - - -

18 MR. RAUCHBERG: - - - particular contract.

19 CHIEF JUDGE LIPPMAN: - - - counselor, why
20 are you entitled to lost profits under the contract,
21 where the contract specifically says no consequential
22 damages?

23 MR. RAUCHBERG: Because lost profits here
24 are the most natural, most probable, and most direct
25 consequent of a breach.

1 CHIEF JUDGE LIPPMAN: As - - -

2 JUDGE GRAFFEO: How do you determine what
3 falls under the category of general contractual
4 damages and what is consequential damages - - -

5 MR. RAUCHBERG: Well - - -

6 JUDGE GRAFFEO: - - - in the context of a
7 distribution agreement like this?

8 MR. RAUCHBERG: - - - well, in a distri - -
9 - in a distribution agreement like this one, where
10 the manufacturer was looking for distribution, where
11 the manufacturer needed someone to resell, where the
12 contract requires Biotronik, the distributor, to
13 resell, where the manufacturer gets paid a percentage
14 of the monies that Biotronik realizes when it makes
15 it sales - - - Biotronik remits sixty-one percent in
16 the case of direct sales to the manufacturer; it
17 keeps the other thirty-nine percent - - -

18 JUDGE GRAFFEO: There's - - - there's not a
19 specific quantity or a particular price. How does
20 that - - -

21 MR. RAUCHBERG: Well, it's done - - -

22 JUDGE GRAFFEO: - - - how does that play
23 into the dichotomy between the two categories of
24 damages?

25 MR. RAUCHBERG: Well, if anything here, the

1 pricing mechanism reinforces the conclusion that the
2 lost profits are direct damages. Not only is
3 Biotronik obligated to resell, it's obligated to
4 enter into these contracts with third parties to
5 resell, it's obligated to use its best efforts to
6 distribute the product, whatever profits - - - excuse
7 me - - - whatever monies it receives from those
8 resales, it shares with the manufacturer - - -

9 CHIEF JUDGE LIPPMAN: How did you try to
10 cover your losses?

11 MR. RAUCHBERG: I'm sorry?

12 CHIEF JUDGE LIPPMAN: How did you try to
13 cover your losses, or did you try to cover your
14 losses?

15 MR. RAUCHBERG: Well, let me say
16 preliminarily that there's never been an assertion by
17 the defendant that we could have, should have
18 covered. The - - - the - - -

19 CHIEF JUDGE LIPPMAN: Did you try to cover?

20 MR. RAUCHBERG: Yes, we did try to cover.
21 But we're dealing with medical - - -

22 CHIEF JUDGE LIPPMAN: In what way? How did
23 you try to cover?

24 MR. RAUCHBERG: Well, we tried to develop
25 our own stent through our own efforts. And we talked

1 to other manufacturers about the possibility of
2 acquiring a stent. But these are devices that take
3 years, if not a decade to develop, years of testing
4 before they get approved by the medical authorities
5 that pass on them before there's any marketing.

6 JUDGE PIGOTT: They're not fungible?

7 MR. RAUCHBERG: They're certainly not
8 fungible. The - - - this particular device was
9 unique. Had we gotten another stent, there would
10 have been an issue of whether it was a substitute.
11 But we didn't find another stent, and there was - - -
12 there's no issue in this case. It's never been
13 contended. There's no issue in this case that the
14 damages could have been eliminated through cover.
15 It's never been argued.

16 JUDGE READ: But what is the - - - what's
17 the problem with the Tractebel rule which talks about
18 how you make a distinction between the general
19 damages and the consequential damages? And I believe
20 under that rule, these would be consequential
21 damages.

22 MR. RAUCHBERG: No, I don't - - - I don't
23 think they would be. Under Tractebel, by the way,
24 where the damages were recovered - - -

25 JUDGE READ: Yeah.

1 THE COURT: - - - so - - - so the facts are
2 distinguishable, there's a general rule in Tractebel
3 that says in effect, damages on collateral
4 arrangements are consequential damages.

5 JUDGE READ: Why isn't this arrangement - -
6 -

7 MR. RAUCHBERG: And we don't - - -

8 JUDGE READ: - - - collateral?

9 MR. RAUCHBERG: - - - we don't disagree
10 with that. This is - - -

11 JUDGE READ: But you say this is - - - you
12 say this is not collateral?

13 MR. RAUCHBERG: That's correct. They - - -
14 the dictionary in the library next door has a
15 definition of "collateral". It's - - - it means
16 extrinsic, secondary to the main purpose, off the
17 point.

18 Here, these contracts of resale were the
19 point.

20 JUDGE SMITH: You would agree that most
21 contracts of resale are collateral?

22 MR. RAUCHBERG: Well - - -

23 JUDGE SMITH: I mean, in most situations,
24 when the - - - typical agreement between a buyer and
25 a seller, the seller resells the goods, that's a

1 collateral arrangement?

2 MR. RAUCHBERG: Yes, in most situations - -
3 -

4 JUDGE SMITH: The buyer resells the - - -

5 MR. RAUCHBERG: - - - yes, in most - - - we
6 give an example in our brief of an owner of a Picasso
7 painting and selling it. The seller doesn't care
8 what the buyer does with it. The buyer would want
9 the painting for itself; it could be planning on
10 resell.

11 JUDGE READ: Well, explain to me why this -
12 - -

13 MR. RAUCHBERG: But here - - - here the
14 sales were made to us, from the seller's perspective,
15 for the purpose of having us make resales. That's
16 what they asked us to do. That's what they bargained
17 for us to do.

18 JUDGE ABDUS-SALAAM: Aren't all
19 distribution agreements the - - - what you just
20 explained? And would that mean that you could never
21 have consequential damages equivalent to lost profits
22 in such a distribution arrangement?

23 MR. RAUCHBERG: Most dis - - - yes, in most
24 distribution arrangements, the distributor is
25 required to distribute the product. And this court

1 held in the Orester case that in such contracts, the
2 damages are not consequential, they are direct.

3 JUDGE SMITH: So you're asking for a rule
4 that would govern most - - - most distributor
5 termination cases?

6 MR. RAUCHBERG: I think you have - - - you
7 do have to look at the specifics of the contract.
8 But - - -

9 JUDGE GRAFFEO: Well, the commodity - - -

10 MR. RAUCHBERG: - - - yes, Your Honor, it
11 would - - -

12 JUDGE GRAFFEO: - - - the commodity - - -
13 the type of commodity would be important, right? I
14 mean, if it's easy to go out and substitute a
15 different kind of product, then you might have a
16 different result?

17 MR. RAUCHBERG: Yes, you - - - then you
18 wouldn't have the dam - - - yes, that's correct, Your
19 Honor.

20 JUDGE GRAFFEO: So you want us to follow
21 more like what the Biovail Pharmacy case, that Eli -
22 - -

23 MR. RAUCHBERG: Biovail against Eli Lilly.

24 JUDGE GRAFFEO: - - - Eli Lilly case. Is
25 that the rationale - - -

1 MR. RAUCHBERG: Absolutely - - -

2 JUDGE GRAFFEO: - - - that you feel we
3 should - - -

4 MR. RAUCHBERG: - - - the - - - the - - -

5 JUDGE GRAFFEO: - - - adopt?

6 MR. RAUCHBERG: - - - the UCC cases are
7 unanimous in coming to the outcome that we seek here.
8 And this is a UCC case. And there is no UCC case
9 that comes out the other way.

10 JUDGE SMITH: What about the UCC comment
11 that seems to say that damages on resale are
12 consequential?

13 MR. RAUCHBERG: Dam - - - because - - -
14 that comment deals with circumstances extrinsic to
15 the contract, circumstances that are known to the
16 seller, that are not evident from the contract itself
17 and provide for the recovery of consequential damages
18 because of facts the seller is aware of, outside of
19 the contract. That does not apply in cases like
20 Biovail and this case, Biotronik - - -

21 JUDGE SMITH: Well, is it - - - I mean, is
22 it - - - I mean, I guess - - - I mean, is the UCC
23 essentially just assuming that usually the resale is
24 consequential, the profits on resale are
25 consequential?

1 MR. RAUCHBERG: Well, the UCC expects cover
2 to be the usual remedy. In the typical case of a
3 breach of - - - of sales obligation by the seller,
4 the UCC expects there to be coverage.

5 JUDGE SMITH: If this were a - - - if this
6 were a million bushels of beans, you'd go looking for
7 a million bushels of beans somewhere else?

8 MR. RAUCHBERG: And if we had to pay a
9 little bit more, that would be our damages. But in
10 this kind of a case, that's not possible. So - - -

11 JUDGE READ: And that's because - - -

12 JUDGE GRAFFEO: Can you give us the rule -
13 - -

14 JUDGE READ: - - - and that's because it's
15 - - -

16 JUDGE GRAFFEO: - - - what it is you'd like
17 us to say?

18 MR. RAUCHBERG: The - - - well, the rule -
19 - -

20 JUDGE GRAFFEO: Somehow, the unique nature
21 of product here, the unique nature of the stent, has
22 to somehow be part of this, isn't it?

23 MR. RAUCHBERG: It is - - - it is part of
24 it. But the rule - - - the rule is simply one of
25 distinguishing between the natural and probable

1 consequences of a breach that are evident from the
2 contract itself and those kinds of damages that
3 depend on other circumstances and character - - -

4 JUDGE SMITH: So is it essentially a
5 question of degree?

6 MR. RAUCHBERG: - - - of the product. I
7 think it is essentially a question of degree.

8 JUDGE SMITH: I mean, if it's - - - it's
9 the - - - you have to gauge the closeness of the
10 relationship between the contract and the - - - and
11 the particular result that you're complaining of?

12 MR. RAUCHBERG: Yes. And you have to gauge
13 whether the facts that lead to the damage, the facts
14 that make for the damage, are they evident from the
15 face of the contract or do they require knowledge off
16 the face of the contract.

17 JUDGE ABDUS-SALAAM: Do we know what the -
18 - - the language of the contract was in Biovail as
19 opposed to the language here where we know what the
20 contract says?

21 MR. RAUCHBERG: The decision in the Biovail
22 case does not set forth the exact language of the
23 contract, but Biovail was distributing for Lilly, a
24 unique patented pharmaceutical product.

25 JUDGE GRAFFEO: It had an exclusion for

1 consequential damages - - -

2 MR. RAUCHBERG: It was a - - -

3 JUDGE GRAFFEO: - - - though, didn't it?

4 MR. RAUCHBERG: It had an exclusion for
5 consequential damages. And the same argument was
6 made by Lilly that was - - - that is made by Conor
7 here. And the court distinguished cases like
8 Tractebel by saying that the - - - none of those
9 cases involved the breach of a supply obligation by a
10 distributor in a distribution contract.

11 CHIEF JUDGE LIPPMAN: Okay, counselor.
12 You'll have your rebuttal time.

13 MR. RAUCHBERG: Thank you.

14 MR. WEINBERGER: Good afternoon, Your
15 Honors. Harold Weinberger, representing the
16 defendants.

17 It's not just the Tractebel rule. It's the
18 American List rule that this court set down a couple
19 of decades ago, that clearly draws the line. And the
20 line - - -

21 CHIEF JUDGE LIPPMAN: What's the line?

22 MR. WEINBERGER: - - - the line is lost
23 profits are general damages when they're monies paid
24 by the defendant to the plaintiff under the contract.
25 But when the lost profits that are sought are derived

1 from a second contract, and here they have to be,
2 because they're resales of this product to third
3 parties, they're not recoverable.

4 JUDGE PIGOTT: So is there any - - - is
5 there any damage if you breach your contract?

6 MR. WEINBERGER: Well, in this case, there
7 was a substantial payment made to the defendant for
8 the costs of recalling the product, plus their
9 expenses - - -

10 JUDGE SMITH: But what's - - - but what's -
11 - - on your - - -

12 JUDGE GRAFFEO: But that was a different
13 provision of the contract there, right?

14 MR. WEINBERGER: Yeah, yeah.

15 JUDGE SMITH: What's - - -

16 MR. WEINBERGER: And - - -

17 JUDGE GRAFFEO: But if you didn't have that
18 provision 10 or whatever it was that they made the
19 payment under, what generally, in a distribution
20 contract of this nature, then, would be the general
21 damages?

22 MR. WEINBERGER: Well, I think Your Honor
23 pointed it out. It would be the cost - - - the
24 difference between the cost of obtaining substitute
25 product. And that may have been a practical problem

1 here. But these are not babes in the woods. These
2 are sophisticated parties that agreed to this with -
3 - -

4 JUDGE SMITH: Well, but they - - - but
5 what's the point? This was a distributorship for a
6 fixed term. What benefit did they get out of the
7 fixed term? What's - - - what's the difference
8 between this and a terminable-at-will contract?

9 MR. WEINBERGER: Well, the difference is
10 that, first of all, this wasn't simply an arbitrary
11 termination of the agreement. There was a very good
12 reason why this supply was - - -

13 JUDGE SMITH: Okay, but that goes to
14 liability.

15 MR. WEINBERGER: Okay.

16 JUDGE SMITH: But suppo - - - but suppose
17 you had decided arbitrarily to terminate it, it
18 wouldn't have co - - - under the decisions of the
19 law, it wouldn't have cost you a cent, right, except
20 - - -

21 MR. WEINBERGER: Well, I think - - -

22 JUDGE SMITH: - - - what you did pay them?

23 MR. WEINBERGER: Yeah, I think, Your Honor,
24 that the cases have held that these clauses are
25 enforceable, and the parties can agree as to how they

1 want to - - -

2 JUDGE PIGOTT: But why wouldn't - - - what
3 you paid them, it sounds to me like consequential
4 damages.

5 MR. WEINBERGER: What we paid them? No.
6 It wasn't consequential. It was out-of-pocket.

7 JUDGE PIGOTT: Yeah, it's - - - it's the -
8 - - pardon me?

9 MR. WEINBERGER: No, what we paid them, was
10 not consequential damages. It was the cost of
11 recalling the product. We brought the product back
12 from them that they - - -

13 JUDGE PIGOTT: That - - - well - - -

14 MR. WEINBERGER: - - - purchased from us.

15 JUDGE PIGOTT: - - - I guess what I'm
16 suggesting is, if you've got a distributor out there
17 who's selling this stuff nationwide, and he makes all
18 kinds of airplane reservations and hotel rooms and
19 does whatever else he does in terms of what he - - -
20 what it costs him to do that, that's consequential
21 damages.

22 MR. WEINBERGER: No, those are - - - those
23 are not. Those are - - -

24 JUDGE PIGOTT: What is direct damages is
25 the fact that he says I can sell these things at a

1 hundred dollars apiece profit to me, and you're not
2 letting me do it. You breached. I'm entitled to a
3 hundred dollars for each and every one of these
4 products that I could have sold. Why is that not a
5 direct cost?

6 MR. WEINBERGER: With all due respect, I
7 think you've got it backwards, Your Honor. I think
8 what you described as out-of-pocket damages are
9 direct damages. And what you've described as the
10 cost of resale are consequential damages. And I
11 think the cases make that clear. I - - -

12 JUDGE GRAFFEO: So you think the Biovail
13 case is - - -

14 MR. WEINBERGER: Wrong.

15 JUDGE GRAFFEO: - - - wrong?

16 MR. WEINBERGER: And it's wrong because
17 they've got the UCC all wrong. The UCC very clearly
18 says - - - 713 says that damages for breach are
19 direct damages, which is the cover, plus out-of-
20 pocket, plus consequential damages. And then they're
21 defined, consequential damages, in 715, where - - -
22 as exactly this is defined as consequential damages.
23 And it goes on to say is where the - - - where the
24 seller is aware that the goods are going to be
25 resold, the buy - - - the supplier is aware that

1 those are recoverable, unless - - - unless there's a
2 provision that waives consequential damages, which
3 UCC 719 recognizes is enforceable.

4 I wanted - - -

5 JUDGE SMITH: So of course, 2-713, on its
6 face, can't apply to this situation, because they say
7 the measure of damages is the difference between
8 market price and contract price. And there is no
9 market price here.

10 MR. WEINBERGER: That - - - plus out-of-
11 pocket, plus consequential damages, if they are
12 recoverable.

13 JUDGE SMITH: So - - -

14 MR. WEINBERGER: If they are recoverable.

15 JUDGE SMITH: - - - so you're saying that a
16 clause that says no consequential damages is in
17 practical effect, very much a clause that says no
18 damages?

19 MR. WEINBERGER: It may in this case. It
20 may be in some cases. It depends.

21 JUDGE SMITH: Why would - - - why would
22 anyone sign a one- or two-year - - - whatever it is -
23 - - distributorship agreement, with a clause in it
24 that says you can terminate whenever you want and
25 there are no damages?

1 MR. WEINBERGER: Well, I don't think that's
2 what it says, Your Honor. I think it says - - - I
3 think it says that if you can't prove anything but
4 consequential damages, then you're not entitled to
5 them. And they're - - -

6 JUDGE SMITH: But in this transaction, it's
7 really very hard to prove any significant - - - and
8 it was foreseeably very hard to prove anything except
9 what you call consequential damages.

10 MR. WEINBERGER: Well, no. I think, Your
11 Honor, if the agreement, for example, hadn't
12 explicitly stated that we would pay them the cost in
13 the event of a recall, that we would pay them for
14 that, that we would pay them. And it didn't actually
15 - - -

16 JUDGE SMITH: Well, assume hypothetically a
17 case where there's no recall, where you're just - - -
18 where you're just - - - you're sick of looking at
19 their faces and you want another distributor and you
20 fire them.

21 MR. WEINBERGER: Well, I - - - you know,
22 that's a hypothetical I think that's possible, and I
23 - - -

24 JUDGE SMITH: Their damages, on your
25 theory, would be zero?

1 MR. WEINBERGER: I think if they - - - if
2 they waive consequential damages, and those are the
3 only damages they were seeking, the answer to that
4 question is yes.

5 JUDGE SMITH: What about Orester?

6 MR. WEINBERGER: First of all, Orester
7 doesn't deal with a waiver of consequential damages
8 clause. Ore - - -

9 JUDGE SMITH: But it does - - - but it does
10 say these damages aren't consequential.

11 MR. WEINBERGER: Well, it really doesn't.
12 It really - - - really, offhand, in a sentence says
13 we can't - - - there's no cover here, so - - - so
14 we're going to move on to see if those damages are
15 foreseeable. Foreseeability is not an issue here,
16 because that only becomes an issue if consequential
17 damages are recoverable. So that case is not really
18 dealing with the same issue.

19 JUDGE SMITH: "We are not" - - - yeah. "We
20 are not concerned with collateral engagements or
21 consequential damages."

22 MR. WEINBERGER: Right. I understand that.

23 JUDGE SMITH: That's - - - okay. You say
24 basically that was - - - that was an offhand dictum
25 and it's wrong.

1 MR. WEINBERGER: I think that's right. I
2 think it's wrong, also, because it predates the UCC,
3 it predates by decades these - - - this court's
4 decision in American - - -

5 JUDGE SMITH: Do you have - - -

6 MR. WEINBERGER: - - - List.

7 JUDGE SMITH: - - - I mean, on the other
8 hand, Orestes is - - - is close on its facts to this
9 - - - I mean, the transaction there was rather like
10 the transaction here?

11 MR. WEINBERGER: The transaction was, but
12 the waiver of consequential damages isn't.

13 JUDGE SMITH: Do you have a case that does
14 your way on a transaction that's that close?

15 MR. WEINBERGER: Yes, the Pepsi case that
16 we cited from the Southern District of New York is a
17 distribution agreement.

18 JUDGE SMITH: Say it again?

19 JUDGE GRAFFEO: Compania?

20 MR. WEINBERGER: It's Compania Embo - - -

21 JUDGE SMITH: Judge Rakoff's case?

22 MR. WEINBERGER: Judge Rakoff's case. It's
23 pretty much right on point. The only distinction
24 that Mr. Rauchberg has made is that the nature of the
25 breach was different, that in that case, the - - -

1 the supplier allowed someone else to come into the
2 territory. But the nature of the breach really has
3 nothing to do with whether the remedy is
4 consequential damages or not.

5 JUDGE ABDUS-SALAAM: Does the nature of the
6 product - - -

7 JUDGE SMITH: Well, the - - -

8 JUDGE ABDUS-SALAAM: - - - have anything to
9 do with it? Does it have to be that the product is
10 unique? Pepsi might be in competition with Coca
11 Cola, but they're still colas, right?

12 MR. WEINBERGER: Yeah, I don't see anything
13 in the law that says the question of whether lost
14 profits on collateral agreements are consequential -
15 - -

16 JUDGE SMITH: Well, wait a minute. Doesn't
17 the nature of the breach have to make a difference?
18 I mean, obviously, if they had not - - - I mean, he -
19 - - if all - - - if you had breached some remote
20 covenant in the agreement, he wouldn't be saying lost
21 profits were - - -

22 MR. WEINBERGER: Well, this wasn't a remote
23 covenant. This was some - - -

24 JUDGE SMITH: Okay, okay. But I - - - but
25 how can - - - how can you decide whether something is

1 cons - - - is consequential or direct, without
2 looking at the breach of which it's a consequence?

3 MR. WEINBERGER: Because the issue - - -
4 the issue, Your Honor, is not whether it's
5 foreseeable. The issue is whether it is something
6 that is derived directly from this contract or the
7 profits they're seeking are from sales they would
8 have made to third parties.

9 JUDGE SMITH: Isn't - - - but aren't - - -
10 I mean, can you really separate directness from
11 foreseeability? Obviously, it all has to be
12 foreseeable, or you can't recover anything,
13 consequential or not. But isn't the degree of
14 foreseeability relevant when you draw that
15 distinction - - -

16 MR. WEINBERGER: No, I don't think - - -

17 JUDGE SMITH: - - - between - - -

18 MR. WEINBERGER: - - - so. I - - -

19 JUDGE SMITH: - - - consequential and
20 direct?

21 MR. WEINBERGER: - - - don't think so. I
22 think the line is a very clear line.

23 JUDGE SMITH: And they say - - - when
24 people - - when they define direct damages, they use
25 words like "natural" and "probable". That sounds

1 like foreseeable to me.

2 MR. WEINBERGER: I understand that. But I
3 think there's a very clear line that's been drawn,
4 and the line is, are these monies that are payable -
5 - - where you're talking about lost profits, that's
6 what we're talking about - - - are these monies that
7 are payable by the defendant to the plaintiff under
8 the contract, or are they monies that would have been
9 earned from sales to third parties. That's where the
10 line - - -

11 JUDGE SMITH: But what - - -

12 MR. WEINBERGER: - - - is.

13 JUDGE SMITH: - - - what about the fact
14 that the sales to third parties were, as he says, the
15 purpose of the deal, and in fact, the price that he
16 paid you was only determined - - -

17 MR. WEINBERGER: I'd like to address that,
18 because I think - - - I think that's been
19 mischaracterized. What happened here - - - there's
20 no requirement that you have to sell any specified
21 number of stents. There's no requirement about the
22 price. This was a mechanism to set the price of the
23 stents. That's all it was.

24 You set a minimum. At the end of the
25 quarter, you go back and you look, not - - - not at

1 how much you sold, not at how much profit you made,
2 what was your average price per unit. So if you sold
3 one unit for ten dollars, it's ten dollars. If you
4 sold a million units, you divide - - - you still
5 divide it by the price that you got - - -

6 JUDGE SMITH: In some of the cases - - -

7 MR. WEINBERGER: - - - and you adjust it.

8 JUDGE SMITH: - - - I think - - -

9 MR. WEINBERGER: That's all it is.

10 JUDGE SMITH: - - - maybe in Tractebel,
11 they say things like the test of direct or
12 consequential is whether it's the very thing that you
13 bargained for. Why wasn't the opportunity to resell
14 this the very thing that a distributor bargained for?

15 MR. WEINBERGER: Well, I think Tractebel
16 says more than that, Your Honor. I think it says
17 when the nonbreaching party seeks only to recover
18 money that the breaching party agreed to pay under
19 the contract, it's not consequential.

20 JUDGE SMITH: Okay. I - - - whoever said
21 it, why wasn't this the very thing that they
22 bargained for?

23 MR. WEINBERGER: Well, they bargained to
24 get stents from us. That's true. That's not the
25 issue. The issue is - - -

1 JUDGE SMITH: They bargained - - - they
2 bargained to distribute your stents. Didn't - - -

3 MR. WEINBERGER: They also - - - but - - -
4 but we also bargained for an exclusion of
5 consequential damages, which they agreed to.

6 JUDGE RIVERA: But you couldn't - - - you
7 could not sell those stents. That's why you entered
8 this agreement with them. Is that correct - - -
9 that's what the exclusive nature of it that way too,
10 because you were - - -

11 MR. WEINBERGER: We were not - - -

12 JUDGE RIVERA: - - - not able to do it
13 yourself?

14 MR. WEINBERGER: - - - we were not
15 permitted as a - - - under an exclusive - - -

16 JUDGE RIVERA: Correct.

17 MR. WEINBERGER: - - - distributorship to
18 sell these stents, during the period, in that
19 territory.

20 JUDGE RIVERA: Um-hum. So it's certainly
21 to your benefit, the more they sell?

22 MR. WEINBERGER: Yeah - - -

23 JUDGE RIVERA: Correct? Because you had no
24 access to his market?

25 MR. WEINBERGER: Well, act - - -

1 JUDGE RIVERA: They were your entree to the
2 market, or am I misunderstanding?

3 MR. WEINBERGER: - - - actually, Your
4 Honor, they had an obligation to buy a minimum
5 quantity of stents from us, no matter how many they
6 sold. So we - - - they, like all distributors, they
7 agreed to use their best efforts.

8 JUDGE RIVERA: So it's a minimum purchase
9 from you and you didn't care if you resold it?

10 MR. WEINBERGER: Well, I'm not - - -

11 JUDGE RIVERA: You gained no benefit - - -

12 MR. WEINBERGER: - - - I don't - - -

13 JUDGE RIVERA: - - - from the resale?

14 MR. WEINBERGER: - - - no, I'm not - - -
15 well, no, I'm not suggesting that. Obviously - - -

16 JUDGE RIVERA: Or advantage?

17 MR. WEINBERGER: - - - obviously, to the
18 extent they sold more than they were obligated to
19 purchase from us, they would come back and purchase
20 more. That's obviously true.

21 JUDGE RIVERA: Wouldn't that - - - wouldn't
22 it improve your position in the market, the sale of
23 these - - -

24 MR. WEINBERGER: Yeah.

25 JUDGE RIVERA: - - - the resale of these

1 things? I mean, you're seeking to pierce this
2 market, are you not? Am I misunderstanding
3 something?

4 MR. WEINBERGER: Yeah. I don't - - - I
5 don't think there's any doubt about the fact that we
6 wanted to have this agreement and so did they. I
7 don't think there's any question about it, or else we
8 wouldn't have done it. On the other hand, both
9 parties agreed to a waiver of consequential damages.

10 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
11 you, counselor.

12 Counselor, rebuttal?

13 MR. RAUCHBERG: Yes, thank you.

14 The defendant is arguing for a bright line.
15 If there's a third-party contract and monies to come
16 from the third party, then, says the defendant, you
17 don't have to think anymore, you're done, it's
18 consequential damages.

19 But there's not a single case that says
20 that. And every case that comes up in a distribution
21 context, every distribution agreement where the lost
22 profit damages depend on contracts with third
23 parties, contracts of resale by the distributor,
24 every one of those cases, three UCC cases outside of
25 New York, the Orestor case in the Court of Appeals in

1 New York, they all come out in favor of the
2 distributor in allowing the damages as direct - - -

3 JUDGE PIGOTT: But there's a reason - - -

4 MR. RAUCHBERG: - - - natural, probable.

5 JUDGE PIGOTT: - - - there's a reason, it
6 seems to me, for the - - - let's assume - - - get out
7 of this business, but maybe you can stay in this
8 business. But you have known customers. Assume
9 you're selling valves, and you've got NASA, and
10 you've got General Dynamics, and you know every month
11 they're going to call you up and they're going to
12 want somewhere between thirty and forty-five valves.
13 You're the distributor for the valve company. You -
14 - - you know, you call them up and say how many you
15 need this month? They tell you. You make your
16 profit. It's about as easygoing as it can possibly
17 be.

18 Now, they want to move on to somebody else
19 or they want to move on to a different process. Can
20 you say, well, listen, I was making - - - you know, I
21 was making this amount of money, because you put me
22 in touch with these - - - with these customers of
23 yours, and all I had to do is pick up the phone and
24 do it. I want a profit on all the ones going forward
25 that would have - - - that I would have made a profit

1 on because of our deal?

2 MR. RAUCHBERG: Absolutely. There's - - -
3 there's - - - this contract had a specific term. And
4 for that term, we were entitled to buy the stents and
5 resell them. We had - - -

6 JUDGE PIGOTT: Unless - - -

7 MR. RAUCHBERG: - - - we had a track
8 record. We had profits that we had made in the past.
9 Those show the average prices we were able to
10 achieve. On that basis, for the remainder of the
11 term of the contract, we're entitled to the profits
12 we would have made, but for the wrongful refusal on
13 their part to supply.

14 JUDGE GRAFFEO: And what's your response to
15 the Pepsi case?

16 MR. RAUCHBERG: The Pepsi case - - - the
17 response is the same response that was made in the
18 Biovail case when Eli Lilly made the same argument.
19 Biovail - - - as Judge Smith said, you can't analyze
20 what the natural and probable consequence of a breach
21 is without knowing what was the breach. In Pepsi,
22 the breach was a failure to prevent transshipping by
23 competitors. That's not a breach of the supply
24 obligation in a distribution agreement.

25 Biovail said we want cases that deal - - -

1 JUDGE SMITH: You say the case would have
2 come out the other way, if they just refused to ship
3 the product? Or it should have, anyway?

4 MR. RAUCHBERG: Well, yes, it should have.
5 Whether Pepsi was right or wrong, I don't know. It
6 was - - - it is distinguishable. The other thing
7 about Pepsi, is that Judge Rakoff found that the
8 obligation to prevent transshipping was not in the
9 contract. It didn't exist, and couldn't be fairly
10 implied - - -

11 JUDGE SMITH: So - - -

12 MR. RAUCHBERG: - - - for many - - -

13 JUDGE SMITH: - - - so but he - - - but
14 then he had the alternative holding. It was an
15 alternative holding?

16 MR. RAUCHBERG: Well, it's all very
17 ephemeral to talk about what is the natural and
18 probable consequence of an obligation that doesn't
19 exist.

20 JUDGE ABDUS-SALAAM: Counsel, what's wrong
21 with a bright-line rule? Doesn't the UCC provide
22 such a rule?

23 MR. RAUCHBERG: No, it doesn't. The UCC
24 does not define consequential damages. In Section
25 1-106 in the official comments, it says that - - - it

1 says explicitly, we're not defining consequential
2 damages. It means whatever the leading cases say it
3 means.

4 Judge Cardozo, in an opinion in the 1920s,
5 Kerr Steamship, said what are special in one case
6 could be general in another and vice versa. That
7 language is quoted often in modern cases, recent
8 cases, because it's not - - - it's not a matter of a
9 category, it's a matter of understanding what is the
10 contract you have at issue and what naturally flows
11 from a breach - - -

12 CHIEF JUDGE LIPPMAN: Okay - - -

13 MR. RAUCHBERG: - - - of that contract.

14 CHIEF JUDGE LIPPMAN: - - - counselor.

15 Thank you. Thank you both.

16 MR. RAUCHBERG: Thank you.

17 MR. WEINBERGER: Thank you, Your Honor.

18 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Biotronik, A.G. v. Conor Medsystems Ireland, Ltd., et al., No. 8 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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