



support of a legal right to be protected from price competition, even if that increased competition can be linked to one business's negligence. Further, Texana's allegations of harm do not constitute property damage sufficient to escape the economic loss doctrine. Texana's claims must be dismissed.

## ARGUMENT

### I. Under Texas Law, the Economic Loss Doctrine Precludes Texana's Claims of Damages

Texana's claims are clearly barred because "economic damages are not recoverable" under Texas law "unless they are accompanied by actual physical injury or property damage." *City of Alton v. Sharyland Water Supply Corp.*, 277 S.W.3d 132, 152-153 (Tex. App. 2009).

#### A. The Economic Loss Doctrine is Not Limited to Cases Involving Contracts

Texana concedes that Texas courts have applied the doctrine to bar recovery of pure economic damages in tort where there is no contractual privity or third-party beneficiary status between the parties. Texana, however, tries to limit these holdings to say that (at most) the economic loss doctrine bars claims *only* when a plaintiff could recover for the injury under contractual or quasi-contractual theories or when a plaintiff could have contractually allocated the risk of one party's negligence. Texana's arguments are without merit.

As discussed in Bayer's opening brief, the Texas appellate courts do not limit the economic loss doctrine to situations where the plaintiff could have negotiated for protection from a given loss. The Texas Court of Appeals has indeed held—without reservation—that "Texas law prohibits the recovery of purely economic damages," even "when the parties are contractual strangers." *Coastal Conduit & Ditching Inc. v. Noram Energy Corp.*, 29 S.W.3d 282, 283-84 (Tex. App. 2000). Texana does not dispute that half of the plaintiff's claims of negligence in *Coastal Conduit*—the allegations that Entex negligently marked certain gas lines—had nothing

to do with whether the defendant adequately performed contractual duties. *Id.* at 284. *Coastal Conduit*'s holding—that economic losses cannot be recovered for negligence claims—thus governs this case.

Texana tries to distinguish *Coastal Conduit* on the ground that the plaintiff there theoretically could have allocated the risk of the defendant's negligence in contracts with someone other than the defendant. *See* Texana's Mem. in Opp'n at 6 ("Response"). This distinction fails. It is not at all clear whether *Coastal Conduit* could have contractually allocated the risk of loss related to Entex's negligence. The court never mentions the subject because it was not important to its holding. If hypothetical opportunities to allocate risk are all that matter, then Texana could also have allocated the risks that GM-rice would be found in commercial rice with its suppliers and customers—by insisting upon indemnification from its suppliers or long-term contracts with its customers. Texana also could have obtained insurance to cover the possibility that GM material would be found in the long-grain rice supply. More fundamentally, the potential for contractual allocation of risk was utterly irrelevant to the court of appeals, which held that the economic loss doctrine applied because "[t]he foreseeability of economic loss . . . is a standard that sweeps too broadly in a professional or commercial context, portending liability that is socially harmful in its potential scope and uncertainty." *Coastal Conduit*, 29 S.W.3d at 288 (citation omitted).

Nor would it have made sense for the court in *Coastal Conduit* to limit the economic loss rule to cases involving contracts. The Fifth Circuit (in the same opinion that it recognized Texas's economic loss rule) explained that that the rule cannot be reasonably limited to situations where a party could recover under a contract: "[I]f a plaintiff connected to the damaged chattels by contract cannot recover, others more remotely situated are foreclosed *a fortiori*." *La. ex rel.*

*Guste v. M/V Testbank*, 752 F.2d 1019, 1024 (5th Cir. 1985); *see also id.* at 1027 (recognizing that Texas law has “consistently denied recovery for economic losses negligently inflicted where there was no physical damage to a proprietary interest”); *see also Wiltz v. Bayer CropScience, Ltd. P’ship*, \_\_\_ F.3d \_\_\_, No. 10-30516, 2011 WL 2535552, at \*4, 8 (5th Cir. June 28, 2011) (examining *Testbank*’s holding and rationale as it applied to Louisiana law). This court should accordingly abandon any such distinction.

Texana also fails to take its case out from under the holdings of other courts barring recovery of economic losses caused by disruptions in commerce. *See Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 51 (1st Cir. 1985) (Breyer, J.); *Rardin v. T&D Mach. Handling, Inc.*, 890 F.2d 24, 26-28 (7th Cir. 1989); *Petition of Kinsman Transit Co.*, 388 F.2d 821 (2d Cir. 1968). Contrary to Texana’s contention, those cases are not simply about unforeseeable injuries as Texana claims. *See* Response at 11-12. Harm to commerce on the Mississippi due to destruction of a bridge would have been more foreseeable than Texana’s claimed damages to competition extending years into the future, but the Second Circuit held such claims barred. *Petition of Kinsman Transit Co.*, 388 F.2d at 824-25. Then-Judge Breyer also recognized that disruption to commerce due to an oil spill in a harbor was foreseeable, but the First Circuit applied the clear rule that a plaintiff “cannot recover damages from a negligent defendant, whether or not the financial loss is foreseeable.” *Barber Lines A/S*, 764 F.2d at 52.

Texana tries to limit the *holdings* from multiple courts and instead relies on dicta from Texas Supreme Court cases that did present the question of whether the economic loss doctrine extends to bar negligence claims for lost business expectancies in the absence of physical injury. *Lamar Homes, Inc. v. Mid-Continent Casualty Co.* is an insurance coverage case in which the Court says only that the rule “generally precludes recovery in tort for economic losses resulting

from the failure of a party to perform under a contract.” 242 S.W.3d 1, 12 (Tex. 2007) (emphasis added). Likewise, *Equistar Chemicals L.P. v. Dresser-Rand Co.*, 240 S.W.3d 864, 867 (Tex. 2007), involved a claim related to a purchased product and discussed the economic loss rule in *dicta* in one paragraph before moving on to the preservation issue on which the case was decided. Similarly, in *Medical City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 61-62 (Tex. 2008), the issue was whether attorney’s fees are recoverable in a warranty claim. The economic loss rule again was mentioned in general terms in one paragraph in the discussion of whether the claim sounded in contract. *Id.* These cases only discuss certain circumstances in which claims are barred. The Texas Supreme Court notably never concluded that the economic loss doctrine does not apply in the absence of a contract.

Texana relies on a quote from *Nobility Homes* to conclude that the Texas Supreme Court rejected the privity rule. See *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77, 83 (Tex. 1977). This very quote has been rejected by both courts and commentators as *dicta* and is recognized as being rejected by a later Texas Supreme Court case. In *Coastal Conduit*, the court held that this quote was *dicta* as the issue was not challenged on appeal. This same conclusion has been reached by commentators who have also concluded that “[a]ny confusion about the meaning of [the] *Nobility Homes* [quote] has been laid to rest by *Jim Walter Homes*.” 29 S.W.3d at 286 (citing William Powers, Jr. & Margaret Niver, *Negligence, Breach of Contract, and the “Economic Loss” Rule*, 23 Tex. Tech. L. Rev. 477, 486-87 (1992)). In *Jim Walter Homes*, the Texas Supreme Court clearly stated that an economic loss injury sounds in contract alone. *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986) (the issue in *Nobility Homes* was whether a claim existed under the UCC for the economic losses suffered by the plaintiffs).

Texana cites three federal district court cases that are inapplicable because they address

the question in the context of a remand motion. As this Court is well aware, in deciding whether a cause of action exists for purposes of remand, federal courts do not employ an *Erie* standard. Instead, the courts strictly construe the removal statute to resolve all doubts in favor of the plaintiff's ability to state a claim. *Crawford Pharmacies v. AmerisourceBergen Drug Corp.*, No. C-08-12, 2008 U.S. Dist. LEXIS 18666, at \*11 (S.D. Tex. Mar. 11, 2008) (quoting *Gasch v. Hartford Accident & Indem. Co.*, 491 F.3d 278, 281-82 (5th Cir. 2007)) (remanding case finding no fraudulent joinder because plaintiffs may be able to state a claim); *Elk Corp. of Tex. v. Valmet Sandy-Hill, Inc.*, No. 3:99-CV-2298-G, 2000 U.S. Dist. LEXIS 3586, at \*9 (N.D. Tex. Mar. 22, 2000) (same). Thus, these cases are inapplicable to the issue of how to apply the Texas economic loss rule.<sup>1</sup>

Texana also argues that Bayer assumed responsibility for all economic losses stemming from a release of LLRICE—no matter how remote and attenuated—by testing LLRICE under the Plant Protection Act and by telling the rice industry about their intention not to commercialize LLRICE and the confinement measures that Bayer was implementing. Neither the cited testimony nor the Plant Protection Act, however, changes the fact that “a duty in tort does not lie under the economic loss rule when the only injury claimed is one for economic damages.” *Trans-Gulf Corp. v. Performance Aircraft Servs., Inc.*, 82 S.W.3d 691, 695 (Tex. App. 2002). None of Bayer's statements to the rice industry assumed the risk of all losses that would be sustained if LLRICE was released despite the containment measures that were put in place.

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<sup>1</sup> Texana also cites *Held v. Mitsubishi Aircraft Int'l, Inc.*, 672 F. Supp. 369, 377 (D. Minn. 1987), which relies on the dicta from *Nobility Homes* that has since been disavowed. Further, *Held* is irrelevant because it involved claims for wrongful death (injury to person) in addition to damage to the plane.

Further, nothing in the Plant Protection Act, 7 U.S.C. § 7701, or associated regulations means that Bayer undertook any duty to protect Plaintiffs from economic losses or indicates any intent by Congress or the USDA to alter Texas rules of liability. Far from it. The portions of the Plant Protection Act addressing civil liability indeed *add* protection for companies like Bayer who seek to develop genetically modified crops. Among other things, the Plant Protection Act expressly preempts claims that seek to “regulate in foreign commerce any article . . . in order [to] . . . prevent the introduction or dissemination of a . . . plant pest.” 7 U.S.C. §7756(a). Absent a “clear indication from Congress” state rules of liability and duty are not affected by federal regulations. *Bourg v. Texaco Oil Co., Inc.*, 578 F.2d 1117, 1121 (5th Cir. 1978) (holding that the Outer Continental Shelf Lands Act (OCSLA) did not affect state-law rules on agency). Texana cannot rely on the Plant Protection Act to create a duty or a remedy under Texas law that does not exist.

In the absence of a ruling from a state’s highest court, the federal courts are directed to “defer to intermediate state appellate court decisions.” *Mem’l Hermann Healthcare Sys., Inc. v. Eurocopter Deutschland, GmbH*, 524 F.3d 676, 678 (5th Cir. 2008). The only on-point cases from Texas courts hold that claims for purely economic losses are barred—even between contractual strangers and even when the claims are not all related to the defendants’ performance of a contract. *Coastal Conduit*, 29 S.W.3d at 288. Texana cites no Texas court that has rejected the economic loss doctrine for negligence cases that do not involve contracts. *Coastal Conduit* thus governs this case under Texas law.

**B. Texana Has Not Suffered the Requisite Property Damage To Recover Economic Losses**

Under Texas law, Texana has failed to establish the requisite injury to property to escape the economic loss rule. Texana claims that it suffered property damage, but it only cites

examples where milled rice tested positive for GM rice and calculations about GM rice on *rice farmers'* land. Even if Texana incurred "costs to clean the mill," Response at 13, such damages would consist merely of "increased operational costs" which are insufficient to qualify for an exception to the economic loss rule, *City of Alton*, 277 S.W.3d at 152-53. Texas law requires "some physical destruction of tangible property" before economic losses can be recovered. *Id.* There has been no evidence presented by Texana or the scientific community indicating that the commingling of non-GM rice and GM rice physically destroys the non-GM rice as required to constitute property damage under Texas law. Texana's attempt to show such damage must be rejected.

## **II. Proximate Cause**

Texana's claims also fail for lack of proximate cause. Texas courts are adamant that "the conduct of the defendant may be too attenuated from the resulting injuries to the plaintiff to be a substantial factor in bringing about the harm." *IHS Cedars Treatment Ctr. of DeSoto Texas, Inc. v. Mason*, 143 S.W.3d 794, 799 (Tex. 2004).

Texana ostensibly recognizes that not all but-for causes of an injury are causes-in-fact under Texas law. But Texana backtracks and says that proximate cause extends as long as "the effects of Bayer's negligence have come to rest at the time of the plaintiff's alleged injury." Texana Response at 14. Texana's recitation of the law is wrong. Texas law cannot allow recovery for *all* lasting effects into the future. *IHS Cedars Treatment Ctr.* 143 S.W.3d at 799.

Texana's only ground for saying that Bayer's development of LLRICE was a "substantial factor" in causing its injuries is the effect that the presence of LLRICE is having on overall export statistics. *See* Texana Response at 16-17. But Texana cannot rely on alleged continuing effects on other participants in the rice industry to say that its claims of harm (based on increased competition) are not attenuated from the initial negligence.

Texana tries to run from how attenuated and indirect its damages are, but its cited testimony only further highlight the space between Bayer's negligence and the damages figure Dr. Bateman has calculated for Texana. Texana never actually disputes with facts that it went out of business because it had insufficient capital to continue operating, or that its claims are based in significant part on increased competition in markets like Haiti and Cuba due to trade realignments. *See* cited testimony in Response SOF ¶¶ 3, 4, 7, 11. In response, Texana primarily cites testimony saying that it also went out of business because one domestic rice mill—Gulf Pacific—allegedly cancelled contracts to purchase rice because of the LLRICE announcement. *See* Texana Ex. 2, Read Dep. 60:5-11, July 21, 2010. But such testimony does not help Texana. That testimony further shows that Texana's claims are based on claims that it would have stayed in business and received even higher prices for its rice had *other mills* not lost their customers for rice in the EU and other affected markets. Texana also quibbles with the assertion that Texana's claims of lost sales in the future are hypothetical, instead preferring to call such hypothetical sales the "expected output" for the period of time Texana was out of business. *See* Response SOF ¶10. Regardless of semantics, Texana seeks to recover not only "expected" lost sales but "expected" prices on those sales, which are higher than other mills (who remained in business) actually received. Such claims are too attenuated and indirect for a jury to reasonably find that Bayer's negligence was a substantial factor in causing Texana's injuries.

Even if the Court were to accept that Texana should be allowed to recover damages for some lost sales after it went out of business, Texana's margin squeeze claims should not be recoverable because any drop in the margins for milled rice was not directly caused by the initial admixture or cross-pollination that caused LLRICE to be present in commercial rice. The

margin-squeeze aspect of Texana's claimed damages depend on the following set of transactions and decisions: (1) Texana claims that primarily Europeans stopped buying rice because of the presence of LLRICE in commercial rice; (2) mills began selling into different markets; (3) the shift in international trade allegedly caused more competition in these markets; and (4) the price of rice allegedly dropped due to this increased competition. The Bayer Defendants' negligence cannot be deemed a "substantial factor" in causing such indirect alleged injuries in a business context.

Texana does not address *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), even though that case is based on the same proximate cause principles that Texas courts regularly enforce. *Id.* at 458-59; *see also Hawkins v. Walvoord*, 25 S.W.3d 882, 892 (Tex. App. 2000) (noting that the "cause in fact" principle of Texas law is "also required in a civil RICO action"). *Anza's* holding that indirect competitive harms in a business environment are not recoverable is a straightforward application of the principle that "the conduct of the defendant may be too attenuated from the resulting injuries to the plaintiff to be a substantial factor in bringing about the harm." *IHS Cedars Treatment Ctr.*, 143 S.W.3d at 799.

Texana does not point to a single case under Texas law where a plaintiff was allowed to recover for such alleged indirect competitive injuries in negligence—let alone such economic losses years after the company went out of business for lack of capital. That is because Texas law bars such claims for good reason. "Businesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of [a plaintiff's] lost sales were the product of" the defendant's behavior. *Anza*, 547 U.S. at 459.

Instead of citing any cases allowing recovery of such indirect harms to competition, Texana relies on cases such as *J. Wigglesworth Co. v. Peebles*, 985 S.W.2d 659 (Tex. App.

1999), where the alleged negligence and the relevant injury occurred together in a matter of minutes. Such cases are not at all similar to Texana's situation.

Texana's characterization of *Union Pump v. Allbritton*, 898 S.W.2d 773 (Tex. 1995), moreover, is incorrect. The fire in that case did more than just "dr[a]w the plaintiff to the scene of the accident." Response at 14. The fire both caused the plaintiff to be at the scene of the fire *and* caused the water upon which the plaintiff slipped to be present. *Union Pump*, 898 S.W.2d at 774. The effects of the defendant's negligence were thus still ongoing, but the Court held that the injuries could not be recovered because the "forces generated by the fire had come to rest," making the "circumstances surrounding her injuries . . . too remotely connected with Union Pump's conduct." *Id.* at 776.<sup>2</sup> The vast majority of Texana's claimed injuries are even more steps away from the Bayer Defendants' alleged negligence than the injury in *Union Pump*.

Here, where Texana seeks compensation for alleged economic damages after it went out of business due to increased competition—injuries that are significantly attenuated from any underlying negligence—summary judgment is appropriate. Texana's claims should be dismissed for lack of proximate cause.

## CONCLUSION

For the foregoing reasons, the Bayer Defendants' motions for summary judgment should be granted.

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<sup>2</sup> The description of *Union Pump* in *Hunt v. Killeen Imports*, No. 03-99-00093, 1999 WL 1201689 (Tex. App. Dec. 16, 1999), is similarly incorrect. *Hunt* is unpublished and therefore has no precedential value.

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 2, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

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