

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

\_\_\_\_\_  
**IN RE GENETICALLY MODIFIED RICE  
LITIGATION**  
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This filing relates to the following case:

Beaumont Rice Mills, Inc.  
v. Bayer CropScience LP

Case No. 4:07-cv-0524-CDP

**THE BAYER DEFENDANTS’ REPLY IN SUPPORT OF ITS  
CONSOLIDATED MOTION FOR SUMMARY JUDGMENT  
ON CLAIMS OF BEAUMONT RICE MILLS**

Beaumont Rice Mills’ claims of damage must be dismissed under the economic loss doctrine and for lack of proximate cause. Beaumont admits that it has suffered no property damage and that all of its claimed damages are based on the notion that Beaumont has a legal right to be protected from price competition in one market when a defendant’s alleged negligence caused another market to close.<sup>1</sup> The economically detrimental effects of allowing tort liability to remedy such expansive and speculative claimed damages are the reason for the economic loss doctrine and limits on proximate cause. None of Beaumont’s arguments to the contrary have merit. Beaumont’s claims must be dismissed.

**ARGUMENT**

**I. Under Texas Law, the Economic Loss Doctrine Precludes Beaumont’s Claims of Damages**

Beaumont admits that it suffered no property damage, and its claims must fail under

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<sup>1</sup> Beaumont filed no response to the Bayer Defendant’s Statement of Undisputed Facts and has thereby admitted the facts asserted there.

Texas law because “economic damages are not recoverable 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. Ct. App. 2009).

Beaumont concedes that Texas courts have applied the doctrine to bar recovery of pure economic damages in tort claims where there is no contractual privity or third-party beneficiary status between the parties. *See* Beaumont Rice Mills’ Resp. Mem. at 2-3 (“Response”). But Beaumont is wrong when it asserts that the economic loss doctrine under Texas law bars claims *only* when a plaintiff could recover for the injury under contractual or quasi-contractual theories. *Id.* As discussed in Bayer’s opening brief, Texas law bars recovery even where the plaintiff has no contractual remedy against *anyone*. *See Hininger v. Case Corp.*, 23 F.3d 124, 125 (5th Cir. 1994) (noting the inadequate recovery implicit in the economic loss rule).

The Fifth Circuit has made clear that Texas law has “consistently denied recovery for economic losses negligently inflicted where there was no physical damage to a proprietary interest.” *La. ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1027 (5th Cir. 1985). The Court also explained that that the economic loss 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*.” *Id.* at 1024; *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 *Testabnk*’s holding and rationale as it applied to Louisiana law).

The Texas Court of Appeals has indeed squarely held that “Texas law prohibits the recovery of purely economic damages,” even “when the parties are contractual strangers” and where no contractual remedy was apparently available. *Coastal Conduit & Ditching, Inc. v.*

*Noram Energy Corp.*, 29 S.W.3d 282, 283-84 (Tex. App. 2000). This holding was based on policy reasons articulated by courts throughout the country, holding that “[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.” *Id.* at 288; *see also Eastman Chem. Co. v. Niro, Inc.*, 80 F. Supp. 2d 712, 716 n.2 (S.D. Tex. 2000) (noting that the economic loss doctrine is “applicable to contractual strangers”); *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). Beaumont’s expansive and speculative claims of economic harm—which would extend liability to any damages caused by any realignment in international trade—are precisely the reason the limitation on recovery of economic loss exists.

Beaumont ignores *Coastal Conduit* and does not dispute that its holding would bar Beaumont’s claims.

The Texas Supreme Court has never held that the economic loss doctrine is not applicable in cases where no contractual remedy is available. The cases that Beaumont cites are inapposite because neither hold nor even suggest that the economic loss doctrine is *limited* to cases involving contracts. *Lamar Homes, Inc. v. Mid-Continent Casualty Co.* is an insurance coverage case in which the Court’s discussion of the economic loss rule begins with a statement that the rule is inapplicable in insurance coverage cases and ends with a statement (in dicta) 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). Which is of course true. *Lamar Homes* does not say that the economic loss doctrine does not apply in some cases in the absence of a contractual remedy. The Court of Appeals case Beaumont cites

held that a plaintiff could not pursue a tort claim that overlapped with a contractual claim. It does not mention in dicta, much less hold, that the economic loss doctrine is *only* applicable in such circumstances or that it does not bar claims not involving contracts. *See Sterling Chems., Inc. v. Texaco, Inc.*, 259 S.W.3d 793, 797 (Tex. App. 2007).

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). Beaumont cites no Texas court that has rejected the economic loss doctrine for cases that do not involve contracts, and the Bayer Defendants are aware of none. *Coastal Conduit* thus governs this case. The economic loss doctrine bars recovery of Beaumont’s claims because Beaumont has neither alleged nor offered any evidence that it suffered property damage under Texas law.

## **II. Proximate Cause**

Beaumont’s claims also fail for lack of proximate cause. Beaumont’s damages—admittedly based on increased competition in markets that continued to purchase U.S. rice after the LLRICE announcement—are too attenuated and indirect for a jury to reasonably find that Bayer’s negligence was a substantial factor in causing Beaumont’s injuries.

Beaumont recognizes that not all but-for causes of an injury can be considered proximate causes. But Beaumont’s only ground for saying that Bayer’s development of LLRICE was a “substantial factor” in causing its injuries is that such development was a but-for cause. Response at 4 (noting only that absent LLRICE “there would have been no resulting damage”). Beaumont says by *ipse dixit* that the presence of LLRICE in commercial rice “led directly to the plaintiff’s injuries.” Response at 5. But all of Beaumont’s claimed injuries are many, many steps away from the Bayer Defendants’ alleged negligence: (1) Beaumont claims that 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. Such attenuated damage claims are not recoverable because they were not directly caused by the initial admixture or cross-pollination that caused LLRICE to be present in commercial rice.

The Supreme Court's holding in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), is based on the same proximate cause principles that Texas courts enforce on a daily basis. *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"). It does not matter that *Anza* was a Rico case—the principle 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. of DeSoto Texas, Inc. v. Mason*, 143 S.W.3d 794, 799 (Tex. 2004). Beaumont does not point to any case under Texas law where a plaintiff was allowed to recover for such alleged indirect competitive injuries. That is because Texas law bars such claims under the economic loss doctrine and proximate cause principles. "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.

Beaumont makes much of the fact that proximate cause is often a jury question. Indeed it is. But Texas Courts have not hesitated to rule that proximate cause is absent as a matter of law when alleged injuries occur multiple steps along the causal chain from any initial negligence. *See, e.g., Union Pump Co. v. Allbritton*, 898 S.W.2d 773 (Tex. 1995), *abrogated on other*

*grounds by Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 45-46 & n.46 (Tex. 2007). Here, where Beaumont seeks compensation for alleged economic damages due to increased competition—injuries that are significantly attenuated from any underlying negligence—summary judgment is appropriate. Beaumont’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.

Dated: August 2, 2011

Respectfully submitted,

/s/ John M. Hughes

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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.

/s/ John M. Hughes

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