

**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:

Kennedy Rice Dryers, LLC
v. Bayer CropScience, LP

Case No. 4:07-cv-01773-CDP

**THE BAYER DEFENDANTS’ RESPONSE TO KENNEDY RICE DRYERS’ MOTION
FOR SUMMARY JUDGMENT ON DEFENDANTS’
AFFIRMATIVE DEFENSE 4**

INTRODUCTION

Kennedy Rice Dryers, LLC (“Kennedy”) has moved for Summary Judgment on the Bayer Defendants’ Affirmative Defense 4, which asserts that the Bayer Defendants are not liable because independent causes intervened to cause Kennedy’s losses. Kennedy has simply incorporated the summary judgment briefs and statement of undisputed facts of rice farmers from the MDL.¹ Although this court has stricken this affirmative defense for prior trials involving different plaintiffs and different claims,² there are fact-specific aspects of Kennedy’s damages claims which, along with this Court’s most recent rulings on the agency status of LSU,

¹ The Bayer Defendants hereby incorporate their responses to the Missouri and Louisiana Bellwether Plaintiffs’ Motions for Summary Judgment on Defendants’ Affirmative Defenses 4 and 14, D.E. 1506 and 2821.

² This Court has for prior trials stricken both affirmative defenses but held that the Bayer Defendants may present evidence going to the issue of proximate cause and to the issue of compliance with industry standards. *See, e.g.*, Oct. 9, 2009 Mem. & Order, D.E. 1604 (“Oct. 9 Order”); Dec. 9, 2009 Mem. & Order, D.E. 2075 (“Dec. 9 Order”); June 7, 2010 Mem. & Order, D.E. 2981 (“June 7 Order”); Oct. 4, 2010 Mem. & Order, D.E. 3495 (“Oct. 4 Order”).

preclude summary judgment on the intervening cause defense in this case. Furthermore, substantial questions relating to acts by third parties, such as other mills shipping rice to Europe, are disputed.

Even after exhaustive discovery and the employment of multiple experts, Kennedy has failed to produce direct evidence showing how the Bayer Defendants' genetically modified rice became commingled with the conventional rice supply, or proving that a specific act by the Bayer Defendants was the cause. Absent direct evidence of negligence and causation, the Bayer Defendants' compliance with industry standards and the unforeseen actions of third-parties will be important factors for the jury to consider in determining whether the Bayer Defendants breached any duty or proximately caused any injury.

ARGUMENT

Under Louisiana law, a defendant is shielded from negligence liability by the occurrence of an independent intervening cause. "A tortfeasor is only liable for damages caused by his negligent act; he is not liable for damages caused by separate, independent or intervening causes of damage." *Laurent v. Jolly-Wright*, 950 So. 2d 47, 49 (La. Ct. App. 2007), *writ denied*, 951 So. 2d 1108 (La. 2007); *see also Pickett v. RTS Helicopter*, 128 F.3d 925, 929 (5th Cir. 1997). A plaintiff therefore bears the burden of proving that it was the defendant's conduct that was the cause-in-fact of his injury, and whether a plaintiff has carried that burden is a question of fact. *Laurent*, 950 So.2d at 49. "The question of whether the defendant's conduct is a cause in fact is a factual inquiry to be determined by the trier of fact, be it judge or jury." *Hutzler v. Cole*, 633 So. 2d 1319, 1325 (La. Ct. App. 1994), *writ denied*, 637 So. 2d 1070 (La. 1994). The question is "usually left for the factfinder." *Scramuzza v. River Oaks, Inc.*, 871 So. 2d 522, 529 (La. Ct. App. 2004) (citing *Lasyone v. Kan. City S. R.R.*, 786 So. 2d 682 (La. 2001)), *writ denied*, 876 So. 2d 839 (La. 2004).

Extensive evidence shows that acts of third parties caused or contributed to Kennedy's own injuries. First, as one example, fact disputes exist as to whether Kennedy's lost-production claims were independently caused by rice farmers' decisions to plant other crops. Kennedy claims that it made less money drying rice because rice farmers in Louisiana planted less rice in 2007 and 2008 due to the presence of LLRICE in commercial rice. Bayer Defs.' Resp. Statement of Undisputed Facts ¶1 ("Response SOF"). Any decline in acreage planted, however, has to do with the intervening decisions of rice farmers to plant what they deem economically advantageous. Response SOF ¶2. Such decisions depend on a number of factors that are independent of the presence of LLRICE in commercial rice—including fuel costs, fertilizer costs, the price of wheat, the skyrocketing price of corn due to ethanol, and residual effects of saltwater from hurricanes on the fertility of farmland. Response SOF ¶3. At the very least fact disputes exist as to whether such decisions constitute intervening and superseding causes of Kennedy's claimed damages.

Second, evidence exists from which a jury could find that the acts of third parties contributed to cause the initial presence of LLRICE in commercial rice. Discovery has shown that it is almost certain that LL601 was introduced into the seed supply in Cheniere Breeder Seed grown by Dr. Steve Linscombe at LSU. Response SOF ¶¶ 8-9. No evidence has established how that initial introduction occurred. Response SOF ¶¶4-6. And while LSU was a cooperator for the Bayer Defendants in conducting field trials, LSU acted entirely independent of Bayer with respect to its for-profit conventional seed breeding activities. Response SOF ¶7.

There is ample evidence from which a jury could conclude that that the actions of LSU and Dr. Linscombe, outside the scope of any agency relationship with the Bayer Defendants, caused the Cheniere seed supply to become commingled with LL601. Response SOF ¶¶7-8.

That is especially true given this Court's most recent rulings holding that fact disputes prevent summary judgment on the agency status of Linscombe and LSU. *See, e.g.*, June 7 Order at 15-16; Oct. 4 Order at 10.³ Kennedy has agreed this court's prior denial of summary judgment on agency applies at this stage of the trial. *See* Joint Mot. Incorporating Prior Briefs at 2, D.E. 4197.

Furthermore, once the commingling occurred, seed growers multiplied the impacted Cheniere Foundation seed without testing for the presence of genetically modified material. Response SOF ¶9. Seed dealers then sold certified pure seed to rice farmers without testing. Then millers, exporters, and others in the wholesale rice industry moved rice towards ultimate retail sale, all without testing for the presence of genetically modified material. Response SOF ¶10. Moreover, Riceland discovered the commingling in January 2006, months before any rice seed was planted for the 2006 rice crop. Response SOF ¶11. Riceland did not inform Bayer of its discovery until June 2006, after all 2006 rice was planted. *Id.* Whether the role played by any of these actors was sufficient to become the proximate cause of some, or all, of Kennedy's alleged injuries is a disputed question of fact for the jury.

The picture is even more cloudy regarding the proximate cause for trace amounts of GM rice found in Clearfield 131 rice. Kennedy's expert Dr. Rutger states that he "can't even speculate" on the source of LLRICE in Clearfield 131. Response SOF ¶12. The jury is entitled to hear evidence about the involvement of Horizon AG, BASF, and LSU with Clearfield 131 in determining negligence. Because there is no consensus as to how LLRICE became commingled with the commercial rice supply, the question of proximate cause is left to the jury, as is required under Louisiana law.

³ The Bayer Defendants hereby incorporate their Response to the Louisiana Bellwether Plaintiffs' Motion for Summary Judgment on LSU Agency and Vicarious Liability, D.E. 2826.

The briefs that Kennedy has incorporated refer extensively to the Bayer Defendants' responses to interrogatories served by farmer plaintiffs. But interrogatory answers related to farmer plaintiffs' damages are not applicable to whether an independent cause exists with respect to Kennedy's *different* damage claims. Kennedy never served any discovery on the Bayer Defendants seeking the basis for the defenses asserted in response to Kennedy's complaint. *See* Response SOF ¶13. Kennedy cannot now rely on interrogatory responses related to defenses to different damages claims.⁴

Under Louisiana law, the jury should be allowed to consider all possible causes of Kennedy's claimed damages, and whether Kennedy, the Bayer Defendants, or others, should bear responsibility for them. For that reason, the Court should deny Kennedy's motion.

CONCLUSION

For the foregoing reasons, the Bayer Defendants respectfully request that the Court deny Kennedy's motion for summary judgment as to the Bayer Defendants' Affirmative Defense No. 4.

⁴ Whereas the rice farmer plaintiffs were seeking damages for decreased prices on rough rice, Kennedy asserts (among other things) that it lost drying volume because rice farmers grew less rice. Because Kennedy's damages claims are materially different from those asserted in the Class Action Complaint under which the prior interrogatories were filed, additional discovery on Bayer's intervening cause defense to Kennedy's damages claims would not have been "duplicative" under Case Management Order 4. *See* Case Management Order 4, D.E. 371 at ¶3. If Kennedy wanted interrogatory responses on Bayer's intervening cause defense with respect to its damages, Kennedy needed to serve independent discovery.

Dated: July 19, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 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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