

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

**IN RE GENETICALLY MODIFIED RICE
LITIGATION**

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4:06 MD 1811 CDP

**TRIAL COMMENCING
JANUARY 18, 2011**

**THE BAYER DEFENDANTS' PROPOSED
JURY INSTRUCTIONS**

The Bayer Defendants respectfully submit the following proposed jury instructions.

INTRODUCTORY INSTRUCTIONS

INSTRUCTION NO. __

Members of the Jury: I will take a few moments now to give you some initial instructions about this case and about your duties as jurors. At the end of the trial, I will give you further instructions. I may also give you instructions during the trial. Unless I specifically tell you otherwise, all such instructions—both those I give you now and those I give you later—are equally binding on you and must be followed.

This is a civil case brought by the plaintiffs against the defendants. I may refer to them as the “Mississippi plaintiffs.”

Plaintiffs contend that they suffered losses and incurred additional costs after two types of Bayer’s genetically modified rice—which had not been approved for commercial sale or human consumption—were found in the commercial rice supply. Plaintiffs contend that this happened because defendants were negligent, and plaintiffs contend that defendants unreasonably interfered with plaintiffs’ use of their land. Defendants deny those allegations, and contend that they were not negligent, but rather acted reasonably and with appropriate care in their development and field testing of the genetically modified rice, and contend that they did not unreasonably interfere with plaintiffs’ use of their land. Defendants also dispute the losses that plaintiffs claim. It will be your duty to decide from the evidence whether the plaintiffs are entitled to a verdict against defendants.

From the evidence you will decide what the facts are. You are entitled to consider that evidence in the light of your own observations and experiences in the affairs of life. You will then apply those facts to the law which I give you in these and in my other instructions, and in that way reach your verdict. You are the sole judges of the facts; but you must follow the law as stated in my instructions, whether you agree with it or not.

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness says, or only part of it, or none of it.

In deciding what testimony to believe, consider the witnesses’ intelligence, their opportunity to have seen or heard the things they testify about, their memories, any motives they may have for testifying a certain way, their manner while testifying, whether they said something different at an earlier time, the general reasonableness of their testimony, and the extent to which their testimony is consistent with other evidence that you believe.

Source: *Bell et al. v. Bayer CropScience LP, et al.*, Initial Instruction No. 1; 8th Cir. Civil Jury Instr. § 1.01.

Submitted by Bayer

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

You should not take anything I may say or do during the trial as indicating what I think of the evidence or what I think your verdict should be.

INSTRUCTION NO. __

I have mentioned the word “evidence.” “Evidence” includes the testimony of witnesses; documents and other things received as exhibits; any facts that have been stipulated—that is, formally agreed to by the parties; and any facts that have been judicially noticed—that is facts which I say you must accept as true.

Certain things are not evidence. I will list those things for you now:

1. Statements, arguments, questions and comments by lawyers are not evidence.
2. Exhibits that are identified by a party but not offered or received in evidence are not evidence.
3. Objections are not evidence. Lawyers have a right and sometimes an obligation to object when they believe something is improper. You should not be influenced by the objection. If I sustain an objection to a question or an exhibit, you must ignore the question or the exhibit and must not try to guess what the information might have been.
4. Testimony and exhibits that I strike from the record, or tell you to disregard, are not evidence and must not be considered.
5. Anything you see or hear about this case outside the courtroom is not evidence, unless I tell you otherwise during the trial.

Furthermore, a particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose, and not for any other purpose. I will tell you when that occurs, and instruct you on the purposes for which the item can and cannot be used. You should also pay particularly close attention to such an instruction, because it may not be available to you in writing later in the jury room.

Some of you may have heard the terms “direct evidence” and “circumstantial evidence.” You are instructed that you should not be concerned with those terms, since the law makes no distinction between the weight to be given to direct and circumstantial evidence.

Source: *Bell et al. v. Bayer CropScience LP, et al.*, Initial Instruction No. 2; 8th Cir. Civil Jury Instr. § 1.02.

Submitted by Bayer

INSTRUCTION NO. __

During the trial it may be necessary for me to speak with the lawyers out of your hearing, either by having a bench conference here while you are present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is to decide how certain evidence is to be treated under the rules of evidence which govern the trial, and to avoid confusion and error. We will, of course, do what we can to keep the number and length of these conferences to a minimum.

Source: *Bell et al. v. Bayer CropScience LP, et al.*, Initial Instruction No. 3; 8th Cir. Civil Jury Instr. § 1.03.

Submitted by Bayer

INSTRUCTION NO. __

At the end of the trial you must make your decision based on what you recall of the evidence. You will not have a written transcript to consult. You must therefore pay close attention to the testimony as it is given.

If you wish, you may take notes to help you remember what witnesses said. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. And do not let note-taking distract you so that you do not hear other answers by the witness. The Clerk will provide each of you with a pad of paper and a pen or pencil. When you go to deliberate on your verdict, you will take your notes with you, but until that time you must leave them in the courtroom. At each recess, you should leave them on your chairs. When you leave at night, your notes will be secured and not read by anyone.

Source: *Bell et al. v. Bayer CropScience LP, et al.*, Initial Instruction No. 4; 8th Cir. Civil Jury Instr. § 1.04.

Submitted by Bayer

INSTRUCTION NO. __

To ensure fairness, you as jurors must obey the following rules:

First, do not talk among yourselves about this case, or about anyone involved with it, until the end of the case when you go to the jury room to decide on your verdict.

Second, do not talk or communicate in any way—including over the Internet—with anyone else about this case, or about anyone involved with it, until the trial has ended and you have been discharged as jurors.

Third, when you are outside the courtroom, do not let anyone tell you anything about the case, or about anyone involved with it, until the trial has ended and your verdict has been accepted by me. If someone should try to talk to or communicate with you about the case during the trial, please report it to me.

Fourth, during the trial you should not talk with or speak to any of the parties, lawyers or witnesses involved in this case—you should not even pass the time of day with any of them. It is important not only that you do justice in this case, but that you also give the appearance of doing justice. If a person from one side of the lawsuit sees you talking to a person from the other side—even if it is simply to pass the time of day—an unwarranted and unnecessary suspicion about your fairness might be aroused. If any lawyer, party or witness does not speak to you when you pass in the hall, ride the elevator or the like, remember it is because they are not supposed to talk or visit with you either.

Fifth, do not read any news stories or articles about the case, or about anyone involved with it, or listen to any radio, television or Internet reports about the case or about anyone involved with it.

Sixth, do not do any research or make any investigation on your own about any matter involved in this case. By way of examples, that means you must not consult a dictionary, textbook, or encyclopedia, or talk with a person you consider knowledgeable, or go to the Internet for information about some issue or person in this case. In fairness, you must learn about this case from the evidence you receive here at the trial and apply it to the law as I give it to you.

Seventh, do not make up your mind during the trial about what the verdict should be. Keep an open mind until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence.

Source: *Bell et al. v. Bayer CropScience LP, et al.*, Initial Instruction No. 5; 8th Cir. Civil Jury Instr. § 1.05.

Submitted by Bayer

INSTRUCTION NO. __

The trial will proceed in the following manner:

First, the plaintiffs' attorney may make an opening statement. Next, the defendants' attorney may make an opening statement. An opening statement is not evidence but is simply a summary of what the attorney expects the evidence to be.

The plaintiffs will then present evidence and counsel for the defendants may cross-examine. Following the plaintiffs' case, the defendants may present evidence and the plaintiffs' counsel may cross-examine.

After the presentation of the evidence is completed, the attorneys will make their closing arguments to summarize and interpret the evidence for you. As with opening statements, closing arguments are not evidence. The court will instruct you further on the law. After that you will retire to deliberate on your verdict.

Source: *Bell et al. v. Bayer CropScience LP, et al.*, Initial Instruction No. 6; 8th Cir. Civil Jury Instr. § 1.06.

Submitted by Bayer

INSTRUCTIONS DURING TRIAL

INSTRUCTION NO. __

Starlink Incident

You have just heard evidence concerning an incident involving Starlink corn that took place in the summer of 2000. You are instructed that the Starlink incident is not evidence that Bayer negligently handled LLRICE, but you may consider this evidence to help you decide what Bayer knew about the risk that GM crops might contaminate non-GM crops.

Source: *Bell et al. v. Bayer CropScience LP, et al.*, Instruction No. 17; *see also* 8th Cir. Civil Jury Instr. § 2.08B.

Submitted by Bayer

Final Instructions

INSTRUCTION NO. __

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of trial are not repeated here.

The instructions I am about to give you now as well as those I gave you earlier are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

Source: *Bell et al. v. Bayer CropScience LP, et al.*, Instruction No. 1; 8th Cir. Civil Jury Instr. § 3.01.

Submitted by Bayer

INSTRUCTION NO. __

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdicts should be.

Source: *Bell et al. v. Bayer CropScience LP, et al.*, Instruction No. 2; 8th Cir. Civil Jury Instr. § 3.02.

Submitted by Bayer

INSTRUCTION NO. __

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, you may consider a witness' intelligence, the opportunity a witness had to see or hear the things testified about, a witness' memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any other evidence that you believe.

Source: *Bell et al. v. Bayer CropScience LP, et al.*, Instruction No. 3; 8th Cir. Civil Jury Instr. § 3.03.

Submitted by Bayer

INSTRUCTION NO. __

Burden of Proof

A party who has the burden of proof on a proposition must establish it by a preponderance of the evidence. “Preponderance of the evidence” means the greater weight of the evidence. The greater weight of evidence is not necessarily established by the greater number of witnesses testifying to any fact or state of facts. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any issue in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party who has the burden of proving it.

Source: Miss. MJI Civ. §§ 1:25-26; 8th Cir. Civil Jury Instr. § 3.04.

Submitted by Bayer

INSTRUCTION NO. __

Redacted Documents

During the trial you saw certain documents that have had portions removed or blanked out. You should understand that this has been done to remove irrelevant matter and should not be considered by you in any way. The fact that this material has been removed does not reflect one way or another on the issues you are to determine.

Source: *Bell et al. v. Bayer CropScience LP, et al.*, Instruction No. 5.

Submitted by Bayer

INSTRUCTION NO. __

Four verdict forms are submitted to you with these instructions. Your decision on any issue listed on the verdict forms must be unanimous in order for you to return any verdict. Use Verdict Form A to record your verdict on the claims of the Penn plaintiffs. Use Verdict Form B to record your verdict on the claims of plaintiff Jerry Catt. Use Verdict Form C to record your verdict on the claims of the Mississippi Plaintiffs. If you find in favor of any one or more of the plaintiffs in either Verdict Form A, Verdict Form B, or Verdict Form C, you must answer a set of questions contained in Verdict Form D.

Source: *Bell et al. v. Bayer CropScience LP, et al.*, Instruction No. 7.

Submitted by Bayer

INSTRUCTION NO. __

The phrase “Byrd plaintiffs” as used in these instructions means:

1. Plaintiff Brian Byrd, and
2. Plaintiff Judy Byrd, and
3. Plaintiff Jarett Byrd, and
4. Plaintiff Jeremy Byrd, and
5. Plaintiff Bryd Farms Partnership.

Source: *Bell et al. v. Bayer CropScience LP, et al.*, Instruction No. 8 (modified to reflect new plaintiffs).

Submitted by Bayer

INSTRUCTION NO. __

The phrase “Dulaney Plaintiffs” as used in these instructions means:

1. Plaintiff Peter H. Dulaney, and
2. Plaintiff Virginia V. Dulaney, and
3. Plaintiff Peter Dulaney Farms.

Source: *Bell et al. v. Bayer CropScience LP, et al.*, Instruction No. 8 (modified to reflect new plaintiffs).

Submitted by Bayer

INSTRUCTION NO. __

The phrase “Pongetti Plaintiffs” as used in these instructions means:

1. Plaintiff Gary Pongetti, and
2. Plaintiff Pongetti Farms, Inc., and
3. Plaintiff EBP, Inc.

Source: *Bell et al. v. Bayer CropScience LP, et al.*, Instruction No. 8 (modified to reflect new plaintiffs).

Submitted by Bayer

INSTRUCTION NO. __

The phrase “Rizzo Plaintiffs” as used in these instructions means:

1. Plaintiff Phillip E. Rizzo, and
2. Plaintiff Phillip A. Rizzo, and
3. Plaintiff Paul R. Rizzo, and
4. John Micheal Rizzo, and
5. Kimball Lake, Inc., and
6. Snake Creek, Inc., and
7. Bogue, Inc., and
8. Rizzo Farms Joint Venture.

Source: *Bell et al. v. Bayer CropScience LP, et al.*, Instruction No. 8 (modified to reflect new plaintiffs).

Submitted by Bayer

INSTRUCTION NO. __

Required Proof for Claim Based on Negligence

The plaintiffs in this case claim damages from defendants on the ground that defendants were negligent. In order to prevail on this claim, plaintiffs have the burden of proving each of three essential propositions by the greater weight of the evidence:

First, that they sustained damages;

Second, that the defendants were negligent;

And third, that such negligence was a proximate cause of the plaintiffs' damages.

If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for the plaintiffs. But if, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for defendants.

Source: Miss. MJI Civ. §§ 1:25-26; § 15:1-2.

Submitted by Bayer

INSTRUCTION NO. __

Negligence

When I use the word “negligence” in these instructions, I mean the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence in this case. It is for you to decide how a reasonably careful person would act under those circumstances. To constitute negligence, an act must be one from which a reasonably careful person would foresee such an appreciable risk of harm to others as to cause him/her not to do the act, or to do it in a more careful manner.

Source: Miss. MJI Civ. § 15:1.

Submitted by Bayer

INSTRUCTION NO. __

Evidence of Industry Practice

In deciding whether the defendants were negligent, you may consider whether they complied with industry practices or standards at the time in question.

Source: *See S. Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 841 (8th Cir. 2003) (“[I]ndustry practice or standards may often be relevant in cases like the present one.”).

Submitted by Bayer

INSTRUCTION NO. __

Right to Assume Others Will Use Ordinary Care and Obey the Law

Every person using ordinary care has a right to assume, until the contrary is or reasonably should be apparent, that every other person will use ordinary care. To act on that assumption is not negligence.

Source: Miss. MJI Civ. § 15:15.

Submitted by Bayer

INSTRUCTION NO. __

No Presumption of Fault from Happening of Injury

The fact that an accident occurred is not, of itself, evidence of negligence on the part of anyone.

Source: Miss. MJI Civ. § 15:14.

Submitted by Bayer

INSTRUCTION NO. __

Starlink Incident

You have heard evidence concerning an incident involving Starlink corn that took place in the summer of 2000. You are instructed that the Starlink incident is not evidence that Bayer negligently handled LLRICE, but you may consider this evidence to help you decide what Bayer knew about the risk that GM crops might contaminate non-GM crops.

Source: *Bell et al. v. Bayer CropScience LP, et al.*, Instruction No. 17.

Submitted by Bayer

This instruction is identical to an instruction requested to be given at trial. Bayer requests that the instruction be given when Starlink is first mentioned and then again in the final instructions.

INSTRUCTION NO. __

Proximate Cause

You are instructed that the defendants are not liable for all injuries that flow from their negligence, if any, but rather only for those that could have been reasonably foreseen and anticipated. The injuries suffered by the plaintiffs must result from a chain of a natural and unbroken sequence from defendants' negligent act. However, the defendants are not liable for damages which are remote or collateral, or which result from a remote, improbable or extraordinary occurrence, although such occurrence is within the range of possibilities flowing from defendants' or negligent act.

Source: Miss. MJI Civ. § 15:2.

Submitted by Bayer

INSTRUCTION NO. __

Proximate Cause

In order to be a proximate cause, the negligence of defendants must be a substantial factor in producing plaintiffs' injury. If the plaintiffs would have been injured even if the defendants had not been negligent, the defendants' negligence is not a substantial factor and not a proximate cause.

Source: Miss. MJI Civ. § 15:4.

Submitted by Bayer

INSTRUCTION NO. __

Required Proof for Private Nuisance Claim

The plaintiffs in this case also claim damages on the ground that Bayer created a private nuisance. In order to prevail on their claim for private nuisance, plaintiffs have the burden of proving each of three essential propositions by the greater weight of the evidence:

First, that the defendants used their land in a manner that unreasonably interfered with plaintiffs' use of nearby property; and

Second, that this interference substantially impaired plaintiffs' use of their land; and

Third, that it resulted in actual harm, as distinguished from unfounded fear of harm, which is certain, substantial, and beyond speculation and conjecture.

If plaintiffs have proven all of these things, then your verdict on plaintiffs' private nuisance claim should be for plaintiffs. If plaintiffs have failed to prove any of these things, then your verdict on plaintiffs' private nuisance claim must be for defendants.

Source: *Comet Delta, Inc. v. Pate Stevedore Co. of Pascagoula, Inc.*, 521 So.2d 857, 859-60 (Miss. 1988)

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Submitted by Bayer

INSTRUCTION NO. __

Agency

One of the questions for you to decide is whether at the time of the occurrence, Louisiana State University (LSU) and its employees were agents of defendants, or whether LSU was an independent contractor. An agent is a person who, by agreement with another called the principal, acts for the principal and is subject to his/her control. The agreement may be oral or written or implied from the conduct of the parties and may be with or without compensation. If one person has the right to control the actions of another at a given time, the relationship of principal and agent may exist at that time, even though the right to control may not actually have been exercised. An independent contractor is one who, in the course of his/her independent occupation, is responsible for the performance of certain work, uses his/her own methods to accomplish it, and is subject to the control of the employer only as to the result of his/her work. Any negligence of, or nuisance caused by, an agent while acting in the scope of his/her authority is charged to his/her principal. On the other hand, any negligence of, or nuisance caused by, an independent contractor is not charged to his/her employer.

Source: Miss. MJI Civ. §§ 4:12-4:14.

Submitted by Bayer

INSTRUCTION NO. __

Scope of Authority—Definition

I have used the term “scope of authority” in these instructions. An agent is acting within the scope of his/her authority if he/she is engaged in the transaction of business which has been assigned to him/her by his/her principal or if he/she is doing anything which may reasonably be said to have been contemplated part of his/her authority and is in furtherance of his/her principal’s interests, even though it was not expressly authorized and may have been specifically forbidden.

Source: Miss. MJI Civ. § 4:4.

Submitted by Bayer

INSTRUCTION NO. __

Joint Ventures

In order for a business enterprise to constitute a joint venture, the following elements must be present:

- (1) two or more persons combine in a joint enterprise for their mutual benefit;
- (2) right of mutual control or management of the venture; and
- (3) an expressed or implied understanding that they are to share in the profits or losses of the venture.

A joint venture is a relationship founded entirely upon contract, and, when a contract between corporations exists, that document will be controlling as to what was the parties' intention.

Source: Miss. MJI Civ. § 4:15 (“A joint adventure exists when two or more persons combine in a single business enterprise, expressed or implied, for their mutual benefit, with the understanding that each is to share in its profits or losses, and that each is to have a voice in its control and management.”); *see also Alpha Janitorial & Paper Co. v. Crawford*, 924 So.2d 547, 550 (Miss. Ct. App. 2005) (holding that there was no joint venture where lease agreement specifically said that there was no partnership or joint venture created by the contract); *Hults v. Tillman*, 480 So.2d 1134, 1143 (Miss. 1985) (“A joint venture is a form of contract, and governed by contract law.”).

Submitted by Bayer

INSTRUCTION NO. __

When a Parent Corporation Is Liable for Actions of its Subsidiary

Two corporations are generally to be regarded as separate and wholly distinct legal entities, even if the stock of one is owned partly or entirely by the other. Likewise, a parent corporation is not responsible for the actions of its subsidiary, except where the subsidiary is acting solely as an agent of the parent.

To establish that a parent corporation is liable for the actions of its subsidiary, it must be proven that the parent corporation exercised such dominion and control over the subsidiary that the controlled corporation had no separate mind, will or existence of its own and was but a business conduit for the parent corporation.

Source: Oct. 9, 2009 Mem. & Order 35, D.E. 1604 (“Oct. Order”); *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 957 So.2d 969, 978 (Miss. 2007) (corporate form not to be disregarded “*unless* it is shown that one corporation is a mere instrumentality or agency or adjunct in that sense, or as a sham or is used in fraud, by the dominant corporation.”) (quotation omitted).

Submitted by Bayer

INSTRUCTION NO. __

Damages

I will now instruct you on the measure of damages that you are to apply in the event that you find any of the defendants liable for either negligence or private nuisance. You should understand that the fact that I am instructing you on this point does not indicate any view on my part as to whether or not you should find liability. That determination is for you and you alone, based on the evidence and the instructions I have given you previously. As with the other elements of their claims, plaintiffs bear the burden of proving their damages by the greater weight of the evidence.

Negligence

You are instructed that, should you find for the plaintiffs on their negligence claim in this case, you must confine your verdict to reasonable compensation for the injuries actually sustained, if any, by the plaintiffs as a result of the defendants' negligence. Plaintiffs' reasonable compensation, if any, does not include attorney's fees, nor does it allow a monetary award which constitutes a penalty against the defendant, nor are you limited by the estimates of damages made by the attorneys representing the parties to this lawsuit.

Private Nuisance

If you find in favor of plaintiffs on their claim for private nuisance, then you may award plaintiffs damages in the amount equal to the diminution in rental or useable value of the impaired property during the continuance of the injury that plaintiffs sustained, if any, but only to the extent you find that such damages were proximately caused by the defendants' conduct.

If you find for plaintiffs on both their private nuisance and negligence claims, you may not grant damages on both theories for the same injury. Such double recovery is not allowed.

Source:

Negligence: Miss. MJI Civ. § 11:4.

Private Nuisance: *City of Oxford v. Spears*, 87 So.2d 914, 916 (Miss. 1956)

The rule is well settled by the authorities generally that [in a nuisance case] . . . the measure of damages of the owner of the land is the diminution of the market value of the property if the injury is of a permanent nature, or the diminution in the rental or usable value if the injury is of a temporary nature.

Double Recovery: *R.K. v. J.K.*, 946 So.2d 764, 777 (Miss. 2007).

Submitted by Bayer

INSTRUCTION NO. __

Lost Profit Damages

When awarding damages for lost profits, you may not award any damages if the plaintiffs' proof has not removed the question of profits from the realm of speculation and conjecture. Furthermore, you may only award the value of any profits actually lost and the present value of any profits to be lost in the future that the plaintiffs have proved to a reasonable degree of certainty.

Source: Miss. MJI Civ. § 11:1; *Wall v. Swilley*, 562 So.2d 1252, 1256 (Miss. 1990) (“Whatever the measure of damages, they may be recovered only where and to the extent that the evidence removes their quantum from the realm of speculation and conjecture and transports it through the twilight zone and into the daylight of reasonable certainty.”)

Submitted by Bayer

INSTRUCTION NO. __

Present Value of Future Damages

If you find that plaintiffs have proved entitlement to reasonably certain future damages, you may only award the present value of such damages. This simply means that you must take into consideration the fact that money recovered will earn interest, if invested, until the time in the future when these losses will actually occur. Therefore, you must reduce any award of such damages to compensate for the reasonable earning power of money.

Source: *Louisville & N.R. Co. v. Garnett*, 93 So. 241, 242-43 (Miss. 1922) (damages for lost earnings from wrongful death is present value of earnings minus costs of living).

Submitted by Bayer

INSTRUCTION NO. __

You should understand that the fact that I am instructing you on the measure of damages does not indicate any view on my part as to whether or not you should find defendants liable.

Source: *Bell et al. v. Bayer CropScience LP, et al.*, Instruction No. 14.

Submitted by Bayer

INSTRUCTION NO. __

There is no claim for emotional distress damages in this case.

Source: *Bell et al. v. Bayer CropScience LP, et al.*, Instruction No. 15.

Submitted by Bayer

INSTRUCTION NO. __

Damages Based Upon Deregulated Events

You may award plaintiffs damages only to the extent they were caused by the presence of LLRICE 601 in commercial rice prior to its deregulation by the United States Department of Agriculture on November 24, 2006, or caused by the presence of LLRICE 604 in commercial rice. You may not award any damages based on the presence of LLRICE 62 in commercial rice or based on the presence of LLRICE 601 in commercial rice after LLRICE 601 was de-regulated by USDA.

Source: Importation, Interstate Movement, and Release Into the Environment of Certain Genetically Engineered Organisms, 73 Fed. Reg. 60,008, 60,009 (Oct. 9, 2008) (a determination of nonregulated status allows “[t]he GE plant [to] be used . . . in agriculture just like other plant lines.”); 7 U.S.C. § 7756 (a) (Plant Protection Act preemption provision).

Submitted by Bayer

INSTRUCTION NO. __

Federal Regulations

You have heard evidence concerning federal regulations applicable to the development, field testing, and introduction of genetically modified crops. You are instructed that the regulations do not provide a standard of care for purposes of determining whether defendants acted negligently. Rather, the standard of ordinary care will be determined based upon my instructions to you.

Source: Oct. Order 21-22. In granting Bayer summary judgment on negligence *per se*, the Court explains,

This is *because the performance standards do not provide a standard of care*. Although the regulations are not ambiguous, they also are not sufficiently precise about what a person must do to comply, and there is no evidence that Congress or APHIS intended to create strict liability or a private right of action for every violation.

Id. (emphasis added). *See also* Dec. 9, 2009 Mem. & Order 9, D.E. 2075 (Dec. Order) (“As discussed in more detail in the October 9, 2009 order, the APHIS regulations cannot provide a basis for a negligence *per se* claim because those performance standards do not provide a standard of care.”)

Submitted by Bayer

INSTRUCTION NO. __

“Responsible Party”

You have heard evidence during the trial that one or more of the Bayer entities was listed as the “responsible party” in certain regulatory filings with the United States Department of Agriculture.

The fact that these entities were listed as the responsible party or parties in such filings does not mean that they are liable to the plaintiffs in this case.

It is for you to determine whether any of the defendants acted negligently under the instructions I give you.

Source: Oct. Order 29; Dec. Order 14.

Submitted by Bayer

INSTRUCTION NO. __

**Election of Foreperson; Duty to Deliberate; Communications with Court; Cautionary;
Unanimous Verdict; Verdict Form**

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or bailiff, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdicts, your foreperson will fill in the form, sign and date it, and advise the marshal or bailiff that you are ready to return to the courtroom.

[If more than one form was furnished, you will bring the unused forms in with you.]

Source: 8th Cir. Civil Jury Instr. § 3.06.

Submitted by Bayer

INSTRUCTION NO. __

Punitive Damages

In addition to compensatory damages for any actual loss that plaintiffs may have sustained, plaintiffs ask for punitive damages from certain defendants. Punitive damages may be imposed to punish a wrongdoer and to deter the wrongdoer and others from similar conduct. In order to recover punitive damages from these defendants, plaintiffs have the burden of proving by clear and convincing evidence either:

First: That the defendants knew or ought to have known, in the light of the surrounding circumstances, that their conduct would naturally and probably result in injury and that they continued such conduct with malice or in reckless disregard of the consequences from which malice may be inferred; or

Second: That the defendants intentionally pursued a course of conduct for the purpose of causing injury.

In arriving at the amount of punitive damages, you may consider the financial condition of the defendants, as shown by the evidence.

“Clear and convincing evidence” is proof that enables you without hesitation to reach a firm conviction that the allegation is true. This is a higher standard of proof than the “greater weight of the evidence” standard applicable to plaintiffs’ other claims.

You are not required to assess punitive damages against any defendant but you may do so if justified by the evidence. You may consider an award of punitive damages only if you found that plaintiffs are entitled to recover compensatory damages.

Source: Miss. MJI Civ. § 11:15.

Submitted by Bayer

The Bayer Defendants object to the submission to the jury of plaintiffs’ punitive damages claims. In the event punitive damages are submitted to the jury, the Bayer Defendants propose the above instruction.