

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

**IN RE GENETICALLY MODIFIED RICE
LITIGATION**

4:06 MD 1811 CDP

This filing relates to the following case:

Gulf Pacific Rice Co., Inc., et al.
v. Bayer CropScience LP, et al.

Case No. 4:08-cv-01545-CDP

**BAYER DEFENDANTS’ MEMORANDUM IN SUPPORT OF
CONSOLIDATED MOTION FOR SUMMARY JUDGMENT
ON CLAIMS OF GULF PACIFIC RICE**

INTRODUCTION

Gulf Pacific Rice Co., Inc., Gulf Rice Milling, Inc., and Harvest Rice, Inc. (collectively “Gulf Pacific”) are sophisticated entities that are engaged in milling and marketing rice. Gulf Pacific claims damages against a number of the Bayer Defendants¹ for economic losses related to an interruption of foreign trade. Gulf Pacific’s claims for such indirect economic losses are not cognizable under the economic loss doctrine or proximate cause rules of Texas law. This memorandum is provided in support of the Bayer Defendants’ consolidated motion for summary judgment.

¹ Gulf Pacific has alleged claims against Bayer CropScience LP; Bayer CropScience Inc.; Bayer CropScience Holding, Inc.; Bayer CropScience LLC; Bayer Corporation, Stoneville Pedigreed Seed Company; Bayer BioScience, NV; Bayer CropScience Holding SA; Bayer CropScience AG; and Bayer AG. Collectively, these defendants will be referred to as “the Bayer Defendants.”

I. The Bayer Defendants Are Entitled to Summary Judgment on Gulf Pacific's Negligence Claims Under the Economic Loss Doctrine

Gulf Pacific contends that it suffered economic losses as a result of the presence of LLRICE in long grain rice supplies. *See* First Am. Compl. ¶80, 4:08-cv-01545 D.E. 18. These economic losses consist of lost margins on Gulf Pacific's sales of milled rice ("margin-squeeze"), decreased milling production due to the loss of export markets ("lost-volume"), testing costs, costs incurred due to the closing of certain offices, and losses due to product returns. The Bayer Defendants' Statement of Undisputed Facts ("SOF") ¶1. Gulf Pacific may also try to pursue a claim for lost profits on sales of instant rice that has not been quantified at this time. SOF ¶2. All of these claimed damages are economic. SOF ¶3.

The margin-squeeze damages that Gulf Pacific claims, which account for over \$16 million of Gulf Pacific's \$20 million damages claim, are based on the allegation that all rice sold by mills after August 18, 2006, and until at least 2014, was sold at a lower price than it would have been absent the LLRICE incident. *See* SOF ¶4. These margin-squeeze damages are not the result of Gulf Pacific's own lost sales volume, nor do they depend on whether any particular rice contained LLRICE. SOF ¶5. Gulf Pacific's margin-squeeze damages are instead calculated by Dr. Merrill Bateman based on the contention that, following Europe's curtailment of U.S. rice imports, Gulf Pacific faced increased competition in markets that continued to buy U.S. long grain rice. *See* SOF ¶6.

Gulf Pacific's damages claims are thus dependent on the notion that Gulf Pacific has a legal right to be protected from increased competition in the market for U.S. long-grain rice. Such indirect harms are far too remote from any negligence on the part of Bayer, and are therefore barred both by the economic loss doctrine and for lack of proximate cause under Texas

and Arkansas law.² Although Gulf Pacific generally asserts that it suffered property damage, Gulf Pacific's property was not physically damaged as Texas or Arkansas law would require in order to sustain such a claim.³

A. Texas Law Precludes Claims for Pure Economic Loss

Texas law could not be more explicit: "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). The economic loss doctrine is broadly applied in tort suits where a plaintiff suffers no physical injury to his person or tangible injury to his own physical property. *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 308-309 (1927); *Restatement (Second) of Torts* § 766C (1979) (positing rule of non-recovery for purely economic losses absent physical harm to person or property of plaintiff).

In other words, "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.*,

² Gulf Pacific Rice and Gulf Rice Milling are domiciled in and operate out of Texas. SOF ¶7. Harvest Rice is an Arkansas corporation with operations in Arkansas, but all of its executives and its headquarters are located in Texas. SOF ¶8. Gulf Pacific attributes approximately \$2.8 million of Gulf Pacific's \$20 million in alleged losses to Harvest Rice's operations in Arkansas. SOF ¶9.

Gulf Pacific and the Bayer Defendants agree that Texas choice of law principles would lead to the application of Arkansas law to the claims of Harvest Rice and the application of Texas law to the other two Gulf Pacific entities' claims. The Bayer Defendants believe that the differences in Arkansas and Texas law require the claims of Harvest Rice to be tried separately from the other two Gulf Pacific entities. The parties are considering a stipulation that one state's law would apply to all of the entities' claims. This would obviate the need for a motion for separate trials. In the event the parties so stipulate, the discussion of Arkansas law in this brief would apply to all of Gulf Pacific's claims. This Court will be informed during responsive briefing if such an agreement is reached.

³ Although the Court has addressed the economic loss doctrine in the context of claims asserted by rice farmers and Riviana, Gulf Pacific's claims for damages are different and more attenuated from any negligence on the part of Bayer. Riviana and its affiliates' claims were limited to claims of lost sales and certain expenses; Riviana did not allege margin-squeeze claims such as those asserted by Gulf Pacific. See SOF ¶10.

Inc., 82 S.W.3d 691, 695 (Tex. Ct. App. 2002). To constitute “property damage” under Texas law, a plaintiff must demonstrate actual “*physical destruction of tangible property.*” *City of Alton*, 277 S.W.3d at 154 (emphasis added).

Among the policy reasons supporting this rule is “the difficulty, if not impossibility, of placing a reasonable limit on a defendant’s liability to those who suffer solely economic damages caused by a negligent action.” *Express One Int’l v. Steinbeck*, 53 S.W.3d 895, 899 (Tex. Ct. Appl. 2001). Additionally, “[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 & Ditching Inc. v. Noram Energy Corp.*, 29 S.W.3d 282, 288 (Tex. Ct. App. 2000) (citation omitted).

The economic loss doctrine has been broadly applied in Texas to a variety of tort claims, including product liability, strict liability, negligent misrepresentation, negligence per se, gross negligence, and ordinary negligence claims. *See, e.g., Sterling Chems. Inc. v. Texaco Inc.*, 259 S.W.3d 793, 797 (Tex. Ct. App. 2007) (negligent misrepresentation); *Pugh v. Gen. Terrazzo Supplies, Inc.*, 243 S.W.3d 84, 90 (Tex. Ct. App. 2007) (negligence and strict liability); *Coastal Conduit & Ditching*, 29 S.W.3d at 290 (negligence, negligence per se, and gross negligence). Texas courts have “consistently applied the economic loss rule to negligence claims between parties who were not in privity.” *Sterling Chems.*, 259 S.W.3d at 799.

B. Arkansas Law Also Precludes Claims for Pure Economic Loss In Negligence Cases

Arkansas has also never recognized a right to recover in tort for economic loss under facts remotely similar to the facts in this case. “Conduct becomes negligent only as it gives rise to appreciable risk of injury to others” *Dollins v. Hartford Accident & Indem. Co.*, 477 S.W.2d 179, 183 (Ark. 1972). The “harm” and “injury” referred to in the Arkansas case law are

limited to physical harm or injury to persons or property. Outside of some special relationship between the parties (such as in a professional malpractice action), no Arkansas court has ever recognized a duty to guard against foreseeable risks of harm entirely distinct from physical injury. For example, Arkansas does not recognize the tort of negligent infliction of emotional distress. *See, e.g., FMC Corp. v. Helton*, 202 S.W.3d 490, 502 (Ark. 2005).

The Arkansas Supreme Court, indeed, has squarely held that Arkansas law does not permit recovery for negligent interference with contractual relations or business expectancy. *K.C. Props. of N.W. Ark., Inc. v. Lowell Inv. Partners, LLC*, 280 S.W.3d 1, 11-12 (Ark. 2008); *Farm Bureau Ins. Co. of Ark. v. Running M Farms, Inc.*, 237 S.W.3d 32, 42 (Ark. 2006); *A&A Enters., Inc. v. Great Am. Ins. Co.*, 978 F. Supp. 1229, 1231-32 (E.D. Ark. 1997). These cases have substantial overlap with the rule that there is no duty to protect against economic loss, as “every claim of economic injury rests in some measure on an interference with contract or prospective advantage.” *La. ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1022-24 (5th Cir. 1985).

Gulf Pacific’s claims are, in essence, that Bayer negligently deprived Harvest Rice of milling contracts they expected to be able to make. Disallowing recovery in negligence for this class of purely economic injuries accomplishes the same goal as denying recovery in for interference with business expectancy. Plaintiffs are not allowed to circumvent the bar on claims for negligent interference with business expectancy by pursuing simple negligence claims.

Sound policies underlie this doctrine: The number of individuals who suffer financial harm in a typical accident “is likely to be far greater than those who suffer traditional (recoverable) physical harm.” *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 54 (1st Cir. 1985). The resulting potential for “vast, cumulative and inherently unknowable” liability is thus

often disproportionate to the conduct at issue and “could create incentives that are perverse.” *Id.* at 55. In this case, the Bayer Defendants face enormous potential liability based on mills’ need to compete more vigorously in markets that were still purchasing U.S. rice. Such liability creates a perverse incentive to avoid engaging in U.S. field trials of safe genetically modified crops—plainly a “perverse” outcome given the government’s consistent efforts to promote such crops and the benefit such crops create for farmers.

The Arkansas Supreme Court, to be sure, has allowed recovery for economic loss in product liability cases. But those cases—which involve property damage—are inapplicable here. For example, in *Farm Bureau Ins. Co. v. Case Corp.*, 878 S.W.2d 741, 743 (Ark. 1994), the court held the plaintiff could recover for economic loss caused by an unreasonably dangerous tractor under Arkansas’s strict liability statute, even though the only damage was to the product itself. *Id.* These cases do not support recovery for pure economic loss in common law tort claims where, as here, there was no dangerous product, no damage to any property, and no relationship between the parties. In such cases, Arkansas does not recognize such claims for purely economic loss.

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

In ruling on the Bayer Defendants’ motion on the Economic Loss Doctrine with respect to Riviana (another rice miller), the Court stated that Texas law only bars economic loss claims “resulting from the failure of a party to perform under a contract.” Mem. & Order at 8, Mar. 18, 2010, D.E. 2656 (“Riviana Order”) (quoting *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242, S.W.3d 1, 12 (Tex. 2007)). Respectfully, this ruling is not in keeping with Texas or Arkansas law, properly applied to the facts of this case.

Although the economic loss doctrine certainly does bar tort claims for damages that could be recovered in contract, the doctrine is not limited to such claims. 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).

In *Coastal Conduit*, the Texas Court of Appeals specifically held that the economic loss doctrine bars claims of negligence for which there was no apparent contract governing the actions. 29 S.W.3d at 288. In that case, Coastal Conduit sued Entex (a company that installs gas lines) for increased expenses, alleging that Entex improperly buried gas lines and mismarked their location prior to Coastal Conduit's digging operations. *Id.* at 284. Part of Coastal Conduit's suit had to do with Entex's performance of a contract with a third party (the burying of the gas lines), but the other part apparently did not (the proper marking of the gas lines). The court categorically held that purely economic losses are not recoverable in tort, even if foreseeable, because the minority rule "sweeps too broadly in a professional or commercial context, portending liability that is socially harmful in its potential scope and uncertainty." *Id.* at 288 (quotation and citation omitted).

Rather than focus on the contracts governing Entex's work, the court examined Texas law and the law of other jurisdictions to determine "whether Texas law prohibits the recovery of purely economic damages . . . where the parties are contractual strangers." *Id.* at 283-84 (emphasis added). The court categorically held that Texas law does bar such recovery, and applied that holding to both Entex's performance of contractual and (apparently) noncontractual duties. See *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 doctrine is "applicable to contractual strangers"). Consistent with this authority, the existence of a contract is not a prerequisite to the economic loss doctrine under Texas or Arkansas law.

Numerous courts across the country agree that the economic loss doctrine “does not . . . turn so much on the existence of a formal contract as on the existence of limitations upon tort recovery for financial injury.” *Barber Lines*, 764 F.2d at 51. As such, the economic loss rule bars negligence claims even when no contract governs the allegedly negligent conduct. *See 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) (refusing recovery of economic losses despite the absence of a contractual relationship); Restatement (Third) Torts: Product Liability, § 21 cmt. 1 (1998). For instance, if “a negligent accident in the Holland Tunnel backs up traffic for hours, imposing cumulatively enormous and readily monetizable costs of delay,” no one waiting in that traffic has a contractual claim; yet courts nonetheless consistently refuse to allow recovery for the purely economic losses that flow from such accidents. *Rardin*, 890 F.2d at 28; *see also Barber Lines*, 764 F.2d at 52.

Cases denying claims for losses due to disruption in commerce are directly analogous to those presented by *Gulf Pacific*, which are tied explicitly to a disruption in trade to Europe. *See, e.g., Petition of Kinsman Transit Co.*, 388 F.2d 821 (denying lost profit claims related to a bridge accident disrupting access to the Mississippi river). Such claims for trade disruption, even if foreseeable, are not recoverable under Texas’ economic loss rule.

The policy reasons for barring recovery of purely economic losses related to contracts are even stronger for claims of lost profits when no contract governs the underlying conduct. The absence of contracts connecting the parties generally makes economic losses that can be claimed *more* attenuated, unpredictable, and expansive, not less so. *Gulf Pacific*’s theory of liability—based on an asserted right to be free from negligently caused price competition—is so expansive, it would extend to any damages caused by any realignment in international trade, as far into the

future as an expert might estimate harm that is linked to negligence. It is even more “difficult[], if not impossib[le]” to place “a reasonable limit on a defendant’s liability” in such circumstances. *Express One Int’l*, 53 S.W.3d at 899. Furthermore, allowing recovery of incidental economic losses related to research and development (likely a major portion of non-contractual economic losses) invites speculative damage awards and over-deterrence of economically beneficial activity. Such liability “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).

D. Gulf Pacific Cannot Recover Because it Has Suffered No Personal Injury or Property Damage

With the economic loss doctrine properly applied here, Gulf Pacific has no claim because it has not suffered the kind of personal injury or property damage required under Texas or Arkansas law. In *City of Alton*, the court applied the economic loss doctrine where the plaintiff’s allegations of property damage were limited to “cost associated with protecting, maintaining, and repairing its waterlines” based on the defendant’s negligence. *City of Alton*, 277 S.W.2d at 155. In addressing the definition of property damage, the court stated: “[I]t is clear that property damage cannot consist merely of damage to an intangible asset or increased operational costs. Instead, some *physical destruction of tangible property* must occur.” *Id.* at 154 (emphasis added).

Gulf Pacific has no evidence of any property damage that meets this standard. Gulf Pacific indeed has admitted that none of its damages “relate to any of Gulf Pacific’s property being physically harmed.” SOF ¶11. None of Gulf Pacific’s alleged quantified injuries, moreover, qualify as property damage sufficient to circumvent the economic loss rule.

The alleged presence of GM material in rice Gulf Pacific purchased is simply not

“physical destruction of tangible property.” *City of Alton*, 277 S.W.3d at 154. Likewise, Gulf Pacific’s claims for testing costs, return of certain shipments, and closures of certain offices “consist merely of . . . increased operational costs.” *Id.* at 154; *see also Coastal Conduit & Ditching*, 29 S.W.3d at 290 (barring recovery of increased costs of digging ditches). Gulf Pacific has failed to prove property damage, and all of Gulf Pacific’s purely economic claims are barred by Texas and Arkansas’ economic loss doctrine.

Even if the economic loss rule is limited to damages claims involve the subject of a contract between the claimant and another injured party, some of Gulf Pacific’s claims meet that standard. Gulf Pacific’s claims for returned shipments of rice, for example, are based on Gulf Pacific’s failure to contract for GM-free rice from its suppliers. And Gulf Pacific’s (at this point unquantified) claim for damages based on instant rice sales, is “based on Gulf Pacific’s inability to perform under [a] contract after Liberty Link.” SOF ¶ 12. At the very least these claims are barred by the economic loss rule.

II. Alternatively, Gulf Pacific’s Claims Are Barred for Lack of Proximate Cause

In the alternative, Gulf Pacific’s claims for lost profits based on increased competition in unaffected markets must be dismissed because these claims were not proximately caused by Bayer’s negligence.

Proximate cause has two elements under Texas law: cause in fact and foreseeability. *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 551 (Tex. 2005). Not all but-for causes of foreseeable injuries are actionable in negligence. “The test for cause in fact is whether the act or omission was a substantial factor in causing the injury” *Id.* Under Texas law, “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). Proximate cause under Arkansas law is defined as “that cause

which in natural and continuous sequence, produces damage.” *Wilson v. Evans*, 679 S.W.2d 205, 206 (Ark. 1984) (quotation and citation omitted).

Courts in Texas and Arkansas have held as a matter of law that negligence is not the proximate cause of injuries that occur multiple steps along the causal chain. *See, e.g., Union Pump Co. v. Allbritton*, 898 S.W.2d 773 (Tex. 1995), *abrogated on other grounds by Ford Motor Co. v. Ledsema*, 242 S.W.3d 32, 45-46 & n.46 (Tex. 2007). In *Union Pump*, for example, the Texas Supreme Court held that a plaintiff could not sue for slip-and-fall injuries sustained due to water spilled because a faulty valve caused a fire. 898 S.W.2d at 776. The “forces generated by the fire had come to rest” when the plaintiff suffered her injuries, making the “circumstances surrounding her injuries . . . too remotely connected with Union Pump’s conduct.” *Id*; *see also Wilson*, 679 S.W.2d at 206 (proximate cause lacking when five months intervened between initial accident and a subsequent accident and when the plaintiff made a decision to drive even though he was experiencing black-outs).

So too here. Even if the Bayer Defendants’ actions created the condition for some of the European Union’s rejection of U.S. rice, the forces that caused LLRICE to be present in commercial rice have long ceased. The fact is that Gulf Pacific’s damages are not related to particular lost sales, or even to the presence of LLRICE in its rice. Their claims for margin squeeze and lost-production damages are solely based on the allegation that other mills started competing more vigorously in markets Gulf Pacific sells into—hardly a true injury and not the kind of cost that tort law should be used to redress.

Quite simply, Gulf Pacific’s alleged injuries—based on competitive pricing in markets that continued to purchase rice—are entirely too remote and attenuated to be recoverable in negligence under Texas or Arkansas law.

In *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), the Supreme Court applied the same common law proximate cause principles enshrined in Texas and Arkansas law and held that a business could not sue under RICO for losses due to price competition. *Id.* at 458-59; *see also Hawkins v. Walvoord*, 25 S.W.3d 882, 892 (Tex. Ct. App. 2000) (noting that the “cause in fact” principle of Texas law is “also required in a civil RICO action”). The plaintiff in *Anza* sued because a competitor was able to lower prices by not paying sales taxes. *Anza*, 547 U.S. at 457-58. Noting that the “direct victim of this conduct was the State of New York,” the Court held as a matter of law that such competitive harms, only indirectly caused by the illegal acts, could not be recovered. *Id.* The Court reached this conclusion because of the “difficulty” of “ascertain[ing] the damages caused by some remote action.” *Id.* at 458.

As the Supreme Court explained: “Businesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of Ideal’s lost sales were the product of [Plaintiff’s] decreased prices.” *Id.* at 459. And the Court held that such “attenuated” and “indirect” losses did not need to be actionable because those directly injured would likely pursue their own claims of damage. *Id.*

All of these rationales and policy reasons apply here. Gulf Pacific’s claims of injury due to increased competition in unaffected markets are difficult to ascertain concretely. And there is no reason to think that limiting mill claims to those alleging more direct harm (perhaps specific costs of returned sales) would lead to inadequate enforcement of Texas or Arkansas’s negligence standards. For all these reasons, summary judgment should be entered in favor of the Bayer Defendants on Gulf Pacific’s margin-squeeze and lost production claims.

CONCLUSION

The Bayer Defendants request that their Motion for Summary Judgment be granted.

Dated: June 14, 2011

Respectfully submitted,

/s/ John M. Hughes

John M. Hughes

William F. Goodman, III
Joseph J. Stroble
Elizabeth M. Gates
WATKINS & EAGER
The Emporium Bldg.
400 E. Capitol Street, Suite 300
Post Office Box 650
Jackson, Mississippi 39205-0650

Mark E. Ferguson
**BARTLIT BECK HERMAN PALENCHAR &
SCOTT LLP**
Courthouse Place
54 West Hubbard Street, Suite 300
Chicago, Illinois 60654

Terry Lueckenhoff, #27810MO
FOX GALVIN LLC
One S. Memorial Drive, 12th Floor
St. Louis, Missouri 63102

Glen E. Summers
Lester C. Houtz
Eric R. Olson
John M. Hughes
Jameson R. Jones
**BARTLIT BECK HERMAN PALENCHAR &
SCOTT LLP**
1899 Wynkoop Street, 8th Floor
Denver, Colorado 80202

ATTORNEYS FOR THE BAYER DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 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

John M. Hughes