

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

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**IN RE GENETICALLY MODIFIED RICE  
LITIGATION**

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**4:06 MD 1811 CDP**

This filing relates to the following case:

Texana Rice Mill, Ltd.  
v. Bayer CropScience LP

Case No. 4:07-cv-0416-CDP

**BAYER DEFENDANTS’ MEMORANDUM IN SUPPORT OF MOTION  
FOR SUMMARY JUDGMENT ON TEXANA’S CLAIMS BASED ON  
ECONOMIC LOSS DOCTRINE AND PROXIMATE CAUSE**

**INTRODUCTION**

Texana asserts a number of legal theories against a number of the Bayer Defendants<sup>1</sup> for economic losses related to an interruption of foreign trade. Texana’s claims for such indirect economic losses are not cognizable under Texas law.

Texana Rice Mill Ltd. and Texana Rice, Inc. (collectively “Texana”) operated as a rice milling business from 2000 until 2006, when they went out of business. The Bayer Defendants’ Statement of Undisputed Facts (“SOF”) ¶1. In early 2006, Texana realized that it was under-capitalized and under-financed, but its efforts to get additional funding fell through. SOF ¶2. Texana was ultimately unable to stay in business because it lacked sufficient capital to continue

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<sup>1</sup> Texana 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.”

operating. SOF ¶3.

Even though Texana has not operated as a functional rice mill since 2006, Texana claims damages against Bayer for lost margins on milled rice from 2006 through 2014. SOF ¶4.

Europe had never been one of Texana's primary markets. SOF ¶5. But Texana nonetheless claims that it would have been able to stay in business had the LLRICE announcement never occurred. SOF ¶6. Texana's damages claim is based on the premise that, when Europe stopped buying U.S. Rice, *other rice mills* started dumping rice into markets Texana was hoping to sell into, and Texana was unable to stay in business long enough to weather the storm. SOF ¶7.

Texana's economic expert, Dr. Merrill Bateman has quantified \$13.8 million in lost margins Texana would have allegedly made on sales of milled rice from August 2006 to July 2014. SOF ¶8. These claimed damages are purely economic. SOF ¶9. Dr. Bateman has calculated Texana's lost margins not only by hypothesizing a certain volume of sales, but hypothesizing higher prices on milled rice that would have existed in the absence of LLRICE. SOF ¶10.

The alleged higher prices for milled rice that Dr. Bateman calculates are based on the allegation that following Europe's curtailment of U.S. rice imports, rice mills faced increased competition in markets that continued to buy U.S. long grain rice. *See* SOF ¶11.

All of Texana's damages claims are thus dependent on the notion that Texana 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. Although Texana generally asserts that it suffered property damage, Texana's property was not physically

damaged as Texas law would require in order to sustain such a claim.<sup>2</sup>

**I. Texana’s Claims are Barred by the Economic Loss Doctrine**

**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., 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. App. 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

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<sup>2</sup> Although the Court has addressed the economic loss doctrine in the context of claims asserted by rice farmers and Riviana, Texana’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 Texana. See SOF ¶12.

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. 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 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 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 A/S v. M/V Donau Maru*, 764 F.2d 50, 51 (1st Cir. 1985) (Breyer, J.). 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 Texana, which are tied explicitly to a disruption in trade to Europe and select other markets. *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. Texana’s damages claim is that it would have would not have gone out of business and would have made sales for higher prices in the future had contracting parties in Cuba, Haiti, and other speculative markets been willing and able to buy rice from them. SOF ¶13. These damages claims are built on the *speculation* of future contracts and sales. The threat of such liability is the precise reason the economic loss doctrine exists.

Texana’s theory of liability 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—even if the corporation involved has gone out of business and it is uncertain whether *any* sales would have occurred. 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).

**C. Texana Cannot Recover Because it Has Suffered No Personal Injury or Property Damage**

With the economic loss doctrine properly applied here, Texana has no claim because it has not suffered the kind of personal injury or property damage required under Texas 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).

Texana has no evidence of any property damage that meets this standard. Texana’s only claim of damage are the margins that allegedly would have been obtained on sales that did not occur. *See* SOF ¶8. These do not qualify as property damage sufficient to circumvent the economic loss rule. The alleged presence of GM material in rice Texana purchased is simply not “physical destruction of tangible property.” *City of Alton*, 277 S.W.3d at 154; *see also Coastal*

*Conduit & Ditching*, 29 S.W.3d at 290 (barring recovery of increased costs of digging ditches). Texana has failed to prove property damage, and Texana's claims are barred by Texas' economic loss doctrine.

## **II. Alternatively, Texana's Claims Are Barred for Lack of Proximate Cause**

In the alternative, Texana's claims for lost profits based on increased competition in unaffected markets must be dismissed because they 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).

Courts in Texas have held as a matter of law that negligence is not the cause in fact 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.*

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. Texana's claims are solely based on the allegation that other mills started competing more vigorously in markets Texana wanted to sell into—hardly a true injury and not the kind of cost that tort law should be used to redress.

Quite simply, Texana'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 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 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. Texana's claims of hypothetical rice sales and hypothetical rice prices it would have obtained had there not been increased

competition are difficult to ascertain concretely. And there is no reason to think that limiting claims to those alleging more direct harm would lead to inadequate enforcement of Texas's negligence standards. For all these reasons, summary judgment should be entered in favor of the Bayer Defendants on Texana's claims.

### **CONCLUSION**

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

Dated: June 14, 2011

Respectfully submitted,

/s/ John M. Hughes

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**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

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