

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

IN RE GENETICALLY MODIFIED RICE) 4:06 MD 1811 CDP
LITIGATION)

This filing relates to the following case:

Farmers Rice Milling Co., Inc.
v. Bayer CropScience, LP

Case No. 4:07-cv-01780-CDP

**BAYER DEFENDANTS’ MEMORANDUM IN SUPPORT OF
CONSOLIDATED MOTION FOR SUMMARY JUDGMENT
ON CLAIMS OF FARMERS MILLING’S RICE MILLING CO.**

INTRODUCTION

Farmers Rice Milling Company (“Farmers Milling”) is a sophisticated Louisiana business engaged in milling and marketing rice. Farmers Milling has pleaded a number of theories of liability against a number of the Bayer Defendants,¹ seeking compensation for having to compete more vigorously after *other rice millers* allegedly lost customers. Such indirect economic losses are not cognizable under Louisiana law. Further, Farmers Milling’s Negligence *Per Se* and Trespass causes of action should be dismissed. The Bayer Defendants file this memorandum in support of their consolidated motion for summary judgment on Farmers Milling’s claims.

¹ Farmers Milling 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 Farmers Milling’s Damages Claims

Louisiana law’s “legal cause” doctrine does not allow recovery for the type of indirect economic losses asserted in this case. This Court upheld the negligence claims of Louisiana rice farmers because “the first individuals to be affected” by any escape of LLRICE “would naturally be rice farmers.” Mem. & Order at 6, June 7, 2010, D.E. 2981 (“Louisiana MDL Order”). The damage claims of Farmers Milling are different, however, and warrant a different result.

Farmers Milling never sold any rice into Europe prior to the announcement that LLRICE was present in commercial rice. *See* The Bayer Defendants’ Statement of Undisputed Facts (“SOF”) ¶1. Farmers Milling actually started selling rice to Europe only *after* the USDA announcement. *Id.* ¶2. Farmers Milling nonetheless asserts over \$25.5 million in margin-squeeze² and reduced-production damages based on the fact that *other mills’* lost customers in Europe. *See* SOF ¶3. James Warshaw, CEO of Farmers Milling described these damages as due to “competition [that came] into markets that we traditionally sold that we hadn’t seen historically because the European market was lost.” SOF ¶4.

Claims for this type of indirect economic harms are not cognizable under Louisiana law. Tort law in Louisiana simply does not protect businesses from increased competition when *another entity* loses customers. Bayer’s conduct is not the “legal cause” of such injuries.

A. Louisiana Law on “Legal Cause” Bars Recovery in Negligence for Indirect Economic Losses

Louisiana Civil Code Article 2315(A) provides that “[e]very act whatever of man that

² Farmers Milling’s margin squeeze damages are based on the assertion that its profit margins on every sale of milled rice after August 18, 2006 and continuing to 2014 were or will be squeezed due to the increased competition Farmers allegedly faces in every market where it sells rice due to increased competition from rice mills that allegedly lost customers due to the presence of LLRICE in U.S. commercial rice. Farmer’s margin squeeze damages account for \$25.5 million of its claim.

causes damage to another obliges him by whose fault it happened to repair it.” *See generally Langlois v. Allied Chem. Corp.*, 249 So.2d 133, 136-37 (La. 1971). Included within Article 2315’s ambit are a variety of “delictual” (or tort) actions founded on different forms of fault, “namely, negligence or intentional misconduct, including abuse of rights.” *Hero Lands Co. v. Texaco, Inc.*, 310 So.2d 93, 97 (La. 1975).

For liability to attach on a claim of negligence under Article 2315(A), a plaintiff must prove each of five separate elements under Louisiana’s “duty/risk” analysis:

- (1) the defendant had a duty to conform his or her conduct to a specific standard of care (the duty element);
- (2) the defendant failed to conform his or her conduct to the appropriate standard (the breach of duty element);
- (3) the defendant’s substandard conduct was a cause-in-fact of the plaintiff’s injuries (the cause-in-fact element);
- (4) the defendant’s substandard conduct was a legal cause of the plaintiff’s injuries (the scope of liability or scope of protection element); and,
- (5) actual damages (the damages element).

Mathieu v. Imperial Toy Corp., 646 So.2d 318, 322 (La. 1994); *see also Joseph v. Dickerson*, 754 So.2d 912, 916 (La. 2000).

The fourth required element for a claim of negligence under Louisiana law—“legal cause”—is a pure question of law for the Court to decide. *See Todd v. State ex rel. Dep’t of Soc. Servs.*, 699 So.2d 35, 39 (La. 1997). This element limits, as a matter of public policy, the potential scope of liability for negligence: Louisiana standards of care are designed only to “protect *some* persons under *some* circumstances, against *some* risks.” *David v. Guidry*, 645 So.2d 1234, 1237 (La. Ct. App. 1994), *writ denied*, 649 So.2d 393 (La. 1995). “Policy considerations determine the reach of the rule, and there must be an ease of association between the rule of conduct, the risk of

injury, and the loss sought to be recovered.” *PPG Indus., Inc. v. Bean Dredging*, 447 So.2d 1058 (La. 1984).

The “ease of association” analysis focuses on far more than only the foreseeability of the alleged harm—“[f]oreseeability is not the only criterion for determining whether there was a duty-risk relationship” sufficient to establish liability between a particular plaintiff and a particular defendant. *David*, 645 So.2d at 1237. In addition to prohibiting recovery for unforeseeable damages, the “ease of association test” precludes recovery for claims of *indirect* economic loss.

In *PPG Industries*, for example, the Louisiana Supreme Court held that PPG Industries could not seek damages in tort for diminished business expectations stemming from the defendant’s negligent destruction of a third party’s natural gas pipeline. The Court held that because the plaintiff’s losses flowed most directly from its contractual relationship with Texaco (the owner of the pipeline), the defendant’s negligence could not be the legal cause of the plaintiff’s injury. The Court reasoned, “It is highly unlikely that the moral, social and economic considerations underlying the imposition of a duty not to negligently injure property encompass the risk that a third party who has contracted with the owner of the injured property will thereby suffer an economic loss.” 447 So.2d at 1061. As the Louisiana Supreme Court explained:

imposition of responsibility on the tortfeasor for such damages could create liability in an indeterminate amount for an indeterminate time to an indeterminate class. . . . Because the list of possible victims and the extent of economic damages might be expanded indefinitely, the court necessarily makes a policy decision on the limitation of recovery of damages.

Id. at 1061-62 (internal citation and quotation marks omitted).

The *PPG Industries* Court relied for its holding on the policy considerations articulated by the United States Supreme Court in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). In *Robins*, the Court held that charterers of a ship could not sue a party that negligently

damaged a ship they had chartered because they did not have a property interest in the vessel. *Id.* at 308. The Court held that any loss sustained by the charterers “arose only through their contract with the owners” and could not be recovered from the tort-feasor. *Id.* Louisiana courts have repeatedly followed this rule to find that liability in negligence “does not encompass the particular risk of injury of indirect economic loss.” *Peterson v. W. World Ins. Co.*, 491 So.2d 78, 80 (La. Ct. App. 1986) (rejecting claim for economic losses resulting from injury to a company’s president).

Louisiana courts have applied the *Robins Dry Dock* rule to cases involving diminished business expectations in agricultural products. In *Desormeaux v. Cent. Indus., Inc.*, 333 So.2d 431 (La. Ct. App. 1976), *writ denied* 337 So.2d 225 (La. 1976), the court held that a rice farmer who had contracted with his father for water could not sue a contractor for negligently damaging the culvert through which the water was to flow. The Court of Appeals held that the plaintiff did not have a cause of action in negligence because “the negligent act of defendant caused no direct damage to the crop. The damage to the crop was caused by the inability of plaintiff’s father to perform his contract to supply plaintiff with water.” *Id.* at 435. It did not matter that the damage to the plaintiffs’ crops may have been “foreseeable,” because the rule from *Robins Dry Dock* barring recovery for indirect economic losses “has been adopted by our Louisiana Supreme Court and is still the law of this state.” *Id.*

Louisiana law also requires that the plaintiff have a proprietary interest in property that was damaged before they may sue for economic losses due to such injury. In *Louisiana Crawfish Producers Ass’n - West v. Amerada Hess Corp.*, 935 So.2d 380 (La. Ct. App. 2006), *writ denied*, 943 So.2d 1094 (La. 2006), plaintiffs were commercial fisherman who claimed damages from the alleged destruction of fishing areas due to defendant’s oilfield activities. The

Court applied *Robins*, which it described as ““a pragmatic limitation imposed by the Court upon the tort doctrine of foreseeability”” to hold that plaintiffs could not sue in tort because they had no proprietary interest in the property allegedly damaged, *id.* at 382-84.

B. The *Robins Dry Dock* Rule and Louisiana Law Bar Indirect Economic Loss Claims Even in the Absence of a Contractual Remedy

This Court held with respect to farmer-plaintiff claims that the rule followed by Louisiana courts bars only claims by parties who have contracted with the injured party. *See* Louisiana MDL Order at 7 n.6. Respectfully, however, the Louisiana law cited above applies to bar the claims of Farmers Milling even in the absence of a contract claim.

Louisiana courts have repeatedly held that the *Robins Dry Dock* principle bars tort claims—even when no contract was involved—when the injury was “based solely on *harm to the interest of business expectancy.*” *Harp v. Pine Bluff Sand & Gravel Co.*, 750 So.2d 226, 230 (La. Ct. App. 1999) (emphasis added). In similarly denying claims under Louisiana law for economic losses stemming from a closed interstate, the Western District of Louisiana surveyed Louisiana law and noted that “there has been a trend among both Louisiana state and federal courts not to permit the recovery of indirect economic losses caused by a negligent injury to property, both in maritime and non-maritime contexts, and *in contractual and non-contractual settings.*” *TS & C Invs., L.L.C. v. Beusa Energy, Inc.*, 637 F. Supp. 2d 370, 379 (W.D. La. 2009) (emphasis added), *aff’d* 344 F. App’x. 907 (5th Cir. 2009). Many other cases barring claims for indirect economic loss in Louisiana do not involve contractual relationships between the claimant and the owner of the injured property. *See Conoco, Inc. v. Halter-Calcasieu L.L.C.*, 865 So.2d 813 (La. Ct. App. 2003), *writ denied* 869 So.2d 822 (La. 2004) (barring claims for economic losses caused by a dry dock that blocked commerce in the Calcasieu River); *Robinson v. Cheetah Transp.*, No.06-0005, 2007 U.S. Dist. LEXIS 13579 (W.D. La. Feb. 28, 2007)

(holding claim for economic damages due to a bridge closure barred because there was no legal cause); *La. Swabbing Serv. v. Enter. Prods. Co.*, 784 So.2d 862 (La. Ct. App. 2001), *writ denied*, 796 So.2d 684 (La. 2001) (rejecting plaintiff's claim for increased worker's compensation premiums from benefits to four workers injured by an automobile collision).

Other courts have recognized that the *Robins Dry Dock* rule does not require a contract for an economic loss claim to be barred. 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 refuse to allow recovery for the purely economic losses that flow from such accidents. *Rardin v. T&D Mach. Handling, Inc.*, 890 F.2d 24, 28 (7th Cir. 1989); *see also Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 52 (1st Cir. 1985). Louisiana law applies similarly to bar Farmer's Milling's claims here.

C. All of Farmers Milling's Claimed Losses Are Indirect Losses To Business Expectations That Cannot Be Recovered.

Under the law set forth above, Bayer's conduct was not the legal cause of any of Farmers Milling's claims. Indeed, Farmers Milling's losses are significantly more attenuated than the claims involved in *PPG Industries* and *Desourmeax*. In those cases, the value of the contracts those claimants had were diminished because a third party negligently interfered with the contracting parties' ability to perform. Farmers Milling's claims are analogous and at least three contractual steps removed from the relationships in that case. The damage Farmers Milling claims is due to (1) the alleged inability of *other mills* to contract for GM-free rice, which (2) allegedly disrupted those mills' ability to enter into new contracts with some of their European customers, allegedly causing (3) increased competition in Farmers Milling's historical markets, leading to (4) an alleged decrease in the value of Farmers Milling's prospective contracts. It

does not matter whether the damage to Farmers Milling was “foreseeable”—recovery of such damages is barred under Louisiana’s legal cause doctrine. *Desormeaux*, 333 So.2d at 435.

There cannot be an “ease of association” between the presence of LLRice in commercial rice and damages by one mill due to the fact that *other mills* lost customers. Farmers’ claims create “liability in an indeterminate amount for an indeterminate time to an indeterminate class.” *PPG Indus.*, 447 So.2d at 1061.

The Louisiana cases denying the right to recover in negligence based upon damage to the instrumentalities of commerce (such as bridges and highways) are directly on point. *Harp*, 750 So.2d at 230; *TS & C Invs.*, 637 F. Supp. 2d at 379; *Robinson*, 2007 U.S. Dist. LEXIS 13579 at *5-6. The plaintiffs in those cases alleged that someone else’s negligence caused a trade disruption and they subsequently lost *their own customers*. It follows that a business cannot recover damages when *someone else* lost customers due to a trade disruption, and that the loss of those customers cause increased competition elsewhere.

Farmers Milling’s suit is also barred because Farmers Milling did not have any proprietary interest in the rice allegedly damaged at the time the release occurred. *See Louisiana Crawfish Producers*, 935 So.2d at 382-84. To the extent that Bayer’s LLRICE damaged any property, it was the foundation or breeder seed for Cheniere and CL-131 which initially became mixed with Bayer’s genetic material. Farmers Milling had no title to either of these varieties of rice at the time any admixture or cross-pollination occurred. *See* SOF ¶ 6. Millers such as Farmers Milling did not obtain any rice containing LLRICE until several commercial transactions later (seed dealers purchasing foundation seed, farmers purchasing certified seed, rice farmers selling their rice, etc.). Each of these transactions significantly attenuates any negligence on the part of Bayer from any property interest of Farmers Milling.

Different panels of Louisiana's Third Circuit Court of Appeals have disagreed on whether the "proprietary interest" requirement is categorical or whether it must be applied in the context of the broader "duty-risk" analysis. Compare *Phillips v. G & H Seed Co.*, 10 So.3d 339 (La. Ct. App. 2009), writ denied, 21 So.3d 284 (La. 2009), with *Phillips v. G & H Seed Co., Inc.*, No. 10-1405, 2011 WL 1773269 (La. Ct. App. May 11, 2011). The litigation in *Phillips* had to do with claims brought by processors and marketers of crawfish for losses related to the death of crawfish grown by farmers. The Court of Appeals initially held that plaintiffs could not recover because they did not have a proprietary interest in the crawfish. 10 So.3d at 344. A different panel recently held (without conclusively deciding) that such plaintiffs might be able to recover under the duty-risk analysis because they had a "special interest in or relationship with the damaged property." 2011 WL 1773269, at *7. The first *Phillips* panel had the better view of Louisiana law, but the conflict does not affect the result here.

In this case it is undisputed that Farmers Milling had no special interest in any rice that was contaminated at the time of the release, no special interest in rice to be planted years after the USDA announcement, and no special connection with the commercial relationships *other mills* had in Europe. Farmers Milling's attenuated claims of indirect economic harm thus fail under *PPG Industries* regardless of whether the "duty-risk" analysis incorporates a strict requirement that there be some proprietary interest in damaged property before economic losses can be recovered. At the very least, all of the Louisiana courts' analysis shows that there is a heavy thumb on the scales against finding "legal cause" in cases where there is no proprietary interest in damaged property.

All of the policy reasons discussed in *PPG Industries* for declining to extend liability are applicable here. The "moral, social and economic considerations" underlying any duty in this

case do not extend so far as to indemnify sophisticated rice mills from price competition for nine years when their competitors lose other customers. The Louisiana Supreme Court held that liability for damage to *current* contractual relationships was too attenuated because “imposition of responsibility on the tortfeasor for such damages could create liability in an indeterminate amount for an indeterminate time to an indeterminate class.” 447 So.2d at 1061-62 (internal quotation and citation omitted). But the liability Farmers Milling seeks to impose on Bayer is far more indeterminate and expansive. Farmers Milling’s theory of liability would extend to any damages caused by any realignment in international trade, as far into the future as an expert might estimate harm. Louisiana tort law does not extend that far.

The expansiveness of Farmers Milling’s theory shows in particularly stark fashion why the “legal cause” rule in Louisiana should not be limited to claims of plaintiffs who contracted with the party most directly injured. A rule so limited would bar Farmers Milling from bringing a claim if its damage claims were based on the presence of LLRICE in Farmers Milling’s own rice (because of the contracts with the people Farmers Milling buys rice from). But because Farmers Milling’s alleged injuries are even more attenuated (occurring only through lower prices due to increased competition arising from other rice mills’ loss of other markets), Farmers Milling’s claims would not be barred under that version of the law. The existence of a contract generally makes economic harm *more* direct, not less so. Louisiana law does not support the conclusion that claims are less likely to be barred the more indirect the economic damages become. Louisiana law in fact provides the opposite. *See PPG Indus.*, 447 So.2d at 1061.

D. At a Minimum Bayer’s Actions Are Not the Legal Cause of Plaintiffs’ Claimed Damages For Rice Sold After the 2006-2007 Marketing Year.

Alternatively, even if the Court does not dismiss Farmers Milling’s claims in their entirety, it should dismiss claims for damages for any rice sales beyond the 2006 crop year. For

all subsequent years, Farmers Milling seeks economic losses relating to the sale of rice that Farmers Milling could not have had a vested interest in.

In *Desormeaux*, the plaintiff tried to distinguish *Robins Dry Dock* and the other Louisiana cases on the ground that the plaintiff had a “vested interest in the rice crop.” 333 So.2d at 435. The Court of Appeals rejected that argument, explaining that “at the time the damage occurred to the culvert in November of 1973, plaintiff’s rice crop had not even been planted. *He had no vested interest in it.*” *Id.* (emphasis added). So too here. In 2006, Farmers Milling had no vested interest in the value of future milled rice sales to be made with rice that had not been planted yet. Farmers Milling therefore cannot recover for those losses in negligence.

For the above reasons, legal cause does not extend to the indirect economic harm that Farmers Milling claims in these cases. The Bayer Defendants’ are entitled to summary judgment dismissing Farmers Milling’s negligence claims.

II. This Court Should Dismiss Farmers Milling’s Trespass Claims

Farmers Milling has asserted a claim of trespass, alleging that the presence of LLRICE in commercial rice has “lead to Defendant’s trespass onto Plaintiffs’ property and facility.” *See* Am. Compl. ¶ 125, 4:07-cv-01780, D.E. 10. This Court should dismiss Farmers Milling’s claim of trespass for four independent reasons.

First, trespass claims are not cognizable under Louisiana law absent an intent to invade property that belongs to another. As this Court recognized in its Louisiana Remand Order, “the Louisiana Supreme Court has expressed skepticism regarding the validity of an exception to the intent requirement for a trespass claim.” Mem. & Order at 21 n.6, Feb. 1, 2011, D.E. 3992 (“First Remand Group Order”) (citing *Hogg v. Chevron USA, Inc.*, 45 So.3d 991, 1002 n.11 (La. 2010)). Although the Court previously assumed without deciding that a trespass claim could lie if the invasion was negligently caused, *id.*, the Louisiana Supreme Court was able to do so only

because the plaintiffs' claims in *Hogg* were barred by the statute of limitations under *either* negligence or trespass, 45 So.3d at 1006-07. This Court cannot similarly allow Farmers Milling's trespass claim to be submitted to the jury on the mere assumption that a negligent invasion suffices. The Court should follow the Louisiana Supreme Court's indication that trespass should not lie absent an intentional invasion of Farmers Milling's property. Because Farmers Milling has no evidence of any such intentional invasion, its claims should be dismissed.

Second, Farmers Milling is unable to prove a causal connection between any of its claimed damages and an invasion of its property. Under Louisiana law, "it is incumbent upon plaintiff to show damages based on the result or the consequences of an injury flowing from the act of trespass." *Bell v. Sediment Removers, Inc.*, 479 So.2d 1078, 1081 (La. Ct. App. 1985) *writ denied* 481 So.2d 1350 (La. 1986). All of Farmers Milling's damages have been calculated by their economic expert Dr. Merrill Bateman. SOF ¶8. These damages are limited to a margin squeeze claim (lost profits based on higher competition); a claim for diminished production (decreased milling due to the lost export markets of other mills), and a claim for testing costs. SOF ¶9. Dr. Bateman's calculated damages do not depend at all on whether any particular rice was contaminated or even whether Farmers Milling had LLRICE on its property at all. *See* SOF ¶10. The testing performed by Farmers Milling did not depend on any invasion of Farmers Milling's property—such testing was merely a step taken after the USDA announcement and is "customer driven" as to whether specific tests are run. SOF ¶11. Farmers Milling thus cannot show any damages that are causally related to any invasion of its property.

Third, to the extent that Farmers Milling had LLRICE in its milling operation, Farmers Milling affirmatively purchased the rice, often knowing that it likely contained LLRICE. SOF ¶

12. Farmers Milling cannot sue for trespass when it invited the alleged invasion by purchasing a product from rice farmers knowing that it might have GM content. Any injuries due to the presence of GM in rice Farmers Milling bought is attributable to its failure to contract for GM-free rice—not any invasion of Farmers Milling’s property by Bayer.

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
ATTORNEYS FOR THE BAYER DEFENDANTS

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

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