

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

IN RE GENETICALLY MODIFIED RICE LITIGATION)))))	4:06 MD 1811 CDP
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This filing relates to the following case:

Beaumont Rice Mills, Inc.
v. Bayer CropScience LP

Case No. 4:07-cv-0524-CDP

**BEAUMONT DEFENDANTS’ MEMORANDUM IN SUPPORT OF
CONSOLIDATED MOTION FOR SUMMARY JUDGMENT
ON CLAIMS OF BEAUMONT RICE MILLS**

INTRODUCTION

Beaumont Rice Mills, Inc. (“Beaumont”) is a sophisticated Texas business engaged in milling and marketing rice. Beaumont seeks recovery in negligence against a number of the Bayer Defendants¹ for economic losses related to an interruption of foreign trade. Beaumont’s claims for such indirect economic losses are not cognizable under Texas law and are preempted by the Plant Protection Act. Further, the Court should dismiss Beaumont’s claims for punitive damages. This memorandum is provided in support of the Bayer Defendant’s consolidated motion for summary judgment on these grounds.

I. The Bayer Defendants Are Entitled to Summary Judgment on Beaumont’s Negligence Claims

Beaumont contends that it suffered economic losses as a result of the presence of

¹ Beaumont has alleged claims against Bayer CropScience LP; Bayer CropScience Holding, Inc.; and Bayer Corporation. Collectively, these defendants will be referred to as “the Bayer Defendants.”

LLRICE in long grain rice supplies. *See* Compl. at 9-11, 4:07-cv-00524, D.E. 1-2. Beaumont's claimed damages consist of alleged lost margin ("margin-squeeze") on its sales of milled rice, decreased milling production allegedly due to the loss of export markets, and certain other operational expenses incurred. *See* The Bayer Defendants' Statement of Undisputed Facts ("SOF") ¶1. These claimed damages are purely economic. *See* SOF ¶2.

The margin-squeeze damages that Beaumont claims from Bayer 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 ¶3. These damages are not the result of Beaumont's lost sales volume, nor do they depend on whether any particular rice contained LLRICE. SOF ¶4. Beaumont'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, Beaumont faced increased competition in markets that continued to buy U.S. long grain rice. *See* SOF ¶5. Beaumont's claim for diminished production is similarly based on the contention that Beaumont "had fewer markets, and . . . so you had a lot more competition." SOF ¶ 6.² Dr. Bateman has not calculated any lost sales to any specific market. SOF ¶7.

Beaumont's damages claims are dependent on the notion that Beaumont 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 Beaumont generally asserts that it suffered property damage, Beaumont's property was not physically damaged as Texas law would require in order to sustain such a

² Beaumont's "margin-squeeze" damages account for \$12.9 million of its \$15.5 million claim. Its lost production damages account for all but \$21,500 of the remainder.

claim.

Texas law bars Beaumont's claim for such limitless and attenuated economic losses.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., 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

³ Although the Court has addressed the economic loss doctrine in the context of claims asserted by rice farmers and Riviana, Beaumont'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 Beaumont. See SOF ¶8.

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. 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 *Beaumont*, 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. *Beaumont*’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. 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. Beaumont Cannot Recover Because it Has Suffered No Personal Injury or Property Damage

With the economic loss doctrine properly applied here, Beaumont 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).

Beaumont has no evidence of any property damage that meets this standard. Beaumont’s complaint alleges property damage only as it relates to the costs associated with “testing growing, storing, transporting and disposal of LL Rice 601.” Compl. at 10; *see also* SOF ¶1. None of these alleged injuries, let alone the more limited categories of testing injuries Dr. Bateman has calculated, qualify as property damage sufficient to circumvent the economic loss rule.

The alleged presence of GM material in rice Beaumont purchased is simply not “physical destruction of tangible property.” *City of Alton*, 277 S.W.3d at 154. Likewise, Beaumont’s claims for testing costs “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). Beaumont has failed to prove property damage, and Beaumont’s claims are barred by Texas’ economic loss doctrine.

D. Alternatively, Beaumont's Claims Are Barred for Lack of Proximate Cause

In the alternative, Beaumont'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. The fact is that Beaumont's damages are not related to particular lost sales, or even to the presence of LLRICE in its rice. Their claims are solely based on the allegation that other mills started competing more vigorously in markets Beaumont sells

into—hardly a true injury and not the kind of cost that tort law should be used to redress.

Quite simply, Beaumont’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. Beaumont’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 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 Beaumont's margin-squeeze and lost production claims.

II. Beaumont's Claims Are Preempted by the Plant Protection Act

The Plant Protection Act, 7 U.S.C. § 7756(a) (2008), preempts Beaumont's claims alleging the interruption of foreign commerce due to the presence of LLRICE in commercial rice. The Bayer Defendants recognize that this Court has already considered this issue and denied the Bayer Defendants' prior motions as it relates to claims asserted by farmers, but Beaumont's claims bring the purpose of the preemption doctrine to the fore.

Under the express preemption provision of the Plant Protection Act, common law claims are preempted to the extent those claims (1) seek to "regulate in foreign commerce", (2) a "plant, . . . plant pest, [or] noxious weed," and (3) the purpose of the attempt to regulate is to "control a plant pest or noxious weed" or to "prevent the introduction or dissemination of a . . . plant pest or noxious weed." 7 U.S.C. § 7756 (a). Beaumont's claims clearly attempt to regulate LLRICE in foreign commerce because they are based on—and all their alleged damages flow from—the loss of export markets for U.S. long grain rice due to the presence of LLRICE. *See, e.g.*, Compl. at 9 ("as a result of the fact that LL RICE 601 has been found in rice destined for export markets, confidence in the integrity and safety of America's rice crops has evaporated in those markets"); SOF ¶¶ 1-4. The Bayer Defendants are entitled to summary judgment on Beaumont's claims by virtue of express preemption, and they incorporate the arguments and prior briefs on the subject.⁴

⁴ Bayer CropScience LP's Mot. for Partial Summ. J. Based on Express Federal Preemption, D.E. 1053; Bayer CropScience LP's Reply Br. in Supp. of Its Mot. for Partial Summ. J., D.E. 1165; The Bayer Defs.' Br. in Support of Their Mot. for Summ. J. Based on Express Federal Preemption, D.E. 2147 (*Riviana* trial); Bayer's Reply in Supp. of Its Mot. for Summ. J. Based on Express Federal Preemption, D.E. 2550 (*Riviana* trial).

III. Beaumont is Not Entitled to Punitive Damages

Beaumont's complaint asserts a claim for punitive damages against the Bayer Defendants. Texas law allows punitive damages only in extreme cases. *Minix v. Unit Major Up Haynes*, No. G-03-115, 2009 U.S. Dist. LEXIS 25546, at *22 (S.D. Tex. Mar. 26, 2009) ("To warrant punitive damages, plaintiff must allege facts showing that defendants' conduct was egregious or reprehensible"). In Texas, punitive damages are only allowed "where a claimant proves by clear and convincing evidence that the harm suffered resulted from fraud, malice, or gross negligence." *UMLIC VP LLC v. T&M Sales & Env'tl. Sys., Inc.*, 176 S.W.3d 595, 616 (Tex. Ct. App. 2005), *citing* Tex. Civ. Prac. & Rem. Code Ann. § 41.003(a).

While Beaumont alleges a host of inadequacies in the Bayer Defendants' efforts to prevent LLRICE from entering the U.S. commercial rice supply, none support a punitive damages award. *See* Bayer Defs.' Br. in Supp. of Summ. J. on Punitive Damages 2-7, D.E. 1435-4 ("First Brief on Punitive Damages"); Bayer Defs.' Br. in Supp. of Summ. J. Against Black Dog Planting Co. on Punitive Damages, D.E. 1687 ("Second Brief on Punitive Damages"). There is no evidence from which a reasonable jury could conclude that the Bayer Defendants acted with fraud, malice, or gross negligence towards Beaumont.

The Court has already considered, and denied, the Bayer Defendants' Motion for Summary Judgment on Punitive Damages as to Riviana and to MDL farmer Plaintiffs under Texas law. Rather than reiterate facts and arguments with which the Court is familiar, the Bayer Defendants incorporate by reference the factual discussion set out in their First and Second Briefs on Punitive Damages, as well as the legal arguments with respect to Texas law in their briefs related to Riviana and the Texas MDL plaintiffs.⁵

⁵ The Bayer Defs.' Br. in Supp. of Summ. J. on Punitive Damages, D.E. 3224; The Bayer

CONCLUSION

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

Defs.' Reply in Supp. of Summ. J. on Punitive Damages, D.E. 3351; The Bayer Defs.' Br. in Supp. of Mot. for Summ. J. on Riviana's Claim for Punitive Damages, D.E. 2148; The Bayer Defs.' Reply in Supp. of Summ. J. on Riviana's Claim for Punitive Damages, D.E. 2542.

Dated: June 14, 2011

Respectfully submitted,

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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

John M. Hughes