



High Court Leaves Liability Jurisdiction Foggy For Foreign Cos.

By **Greg Ryan**

Law360, New York (October 09, 2012, 10:24 PM ET) -- In refusing Monday to take up a case over foreign manufacturers' exposure to lawsuits in the U.S. over allegedly defective products, the U.S. Supreme Court doomed distributors to years, if not decades, of confusion over whether they share liability for such claims, experts say.

The high court denied a petition for certiorari from Canadian watercraft maker Bombardier Inc., which had sought to hold a Canadian unit of Dow Chemical Co. accountable for an explosion allegedly caused by a faulty fuel tank it had manufactured.

A California appeals court ruled in December that since it hadn't marketed or sold its products in California or kept an office in the state, Dow had never revealed an intent to fall under the umbrella of California law. Thus, the state's courts lacked jurisdiction over the company, it said.

Bombardier argued to the Supreme Court that because Dow had been certain its products would end up in California, it should have been subject to California courts' jurisdiction. But the high court likely rejected the petition because it deemed the case similar to one it decided last year, *J. McIntyre Machinery Ltd. v. Nicastro*, experts said. There, the court ruled New Jersey could not maintain specific jurisdiction over a U.K.-based company whose metal-cutting machine, sold through an exclusive U.S. distributor, allegedly injured a scrap metal employee.

But unfortunately for litigants, the McIntyre decision left long-standing questions about personal jurisdiction over foreign manufacturers foggy, according to experts. The ruling was split into a four-judge plurality opinion, a two-judge concurring opinion, and a three-judge dissenting opinion.

"Even if you were to make an argument that the law is clear if you were to follow the plurality, the underlying rationale is pretty unclear itself," Brooklyn Law School professor Robin Efron said.

The plurality, led by Justice Anthony Kennedy, explored the issue of jurisdiction from several angles, "so it's hard to know exactly what was motivating the court in what way," according to Effron.

The lack of clarity gives lower courts enough room to decide jurisdictional questions in different ways, experts said. One jurisdiction might find a foreign manufacturer intended to conduct business there, while its neighbor might draw the opposite conclusion, even under identical factual circumstances, they said.

"What's going to happen is you're going to have judges who test the limit," said Carl Schaerf, a partner at Schnader Harrison Segal & Lewis LLP.

And Supreme Court clarification may be slow to arrive, experts said. Before *McIntyre*, the last time the court addressed this question in a major way was in the 1987 case *Asahi Metal Industry Co. Ltd. v. Superior Court of California*. Then, too, the court was split, with one group of justices holding that a company's mere awareness a product could wind up in a state was sufficient to establish jurisdiction there, and the other holding that companies must purposefully direct products toward a state to warrant jurisdiction.

The factor preventing the current court from definitively tackling the personal jurisdiction doctrine could be Justice Stephen Breyer, according to Effron. In *McIntyre*, Justice Breyer said he wished to refrain from "refashion[ing] basic jurisdictional rules" until presented with a case involving "modern concerns" such as e-commerce. The justice likely did not see the *Bombardier* case as addressing those concerns, Effron said. Even if the justices had granted *Bombardier* certiorari, Justice Breyer might have wanted to decide the case on limited grounds, she said.

"They're not going to take any more personal jurisdiction cases until Breyer signals he thinks it's an appropriate case for setting a broad jurisdictional rule," Effron said.

Meanwhile, product liability cases involving foreign manufacturers will remain fraught with uncertainty for plaintiffs and defendants — particularly the latter, according to Schaerf.

"Plaintiffs are not going to be left without a remedy," Schaerf said. "The buck is going to stop at the last party after a product crossed the water."

An attorney for *Bombardier*, Jules Zeman of Haight Brown & Bonesteel LLP, said he was disappointed with the high court's denial of certiorari because of the uncertainty surrounding the jurisdictional issue.

"There's definitely a need for the Supreme Court to take up a personal jurisdiction case with a more complex set of facts than existed in the *McIntyre* case," Zeman said.

An attorney for Dow declined comment on the high court's decision.

Bombardier's petition, filed in July, wasn't the first time the case appeared before the Supreme Court. It granted a petition for certiorari from Dow in June 2011 and nixed the California appeals court's original judgment, which had denied Dow's request that it order a lower court to kill a service of summons.

Bombardier is represented by Jules Zeman, William Martin Jr. and R. Bryan Martin of Haight Brown & Bonesteel LLP.

Dow is represented by Paul Johnson of King & Spalding LLP.

The case is Bombardier Inc. et al. v. Dow Chemical Canada ULC et al., case number 12-83, in the U.S. Supreme Court.

--Additional reporting by Sean McLernon and Allison Grande. Editing by Kat Laskowski and Richard McVay.

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