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Product Liability—Innocent Bystanders

Mrs. Elmore was traveling about 45 miles per hour when her new car suddenly began "fishtailing," went out of control, crossed to the wrong side of the road and struck the vehicle of plaintiff Waters. The car had been driven 2,751 miles before the accident, and had been serviced after 1,500 miles by the dealer, defendant Mission Rambler Company. Evidence indicated that the drive shaft became unfastened from the forward universal joint, fell to and gouged into the pavement, causing the car to "fishtail" and go out of control. *Held*, automobile dealer and manufacturer are liable to both consumer—user and bystander for injuries caused by a defective product. *Elmore v. American Motors Corporation*, 451 P.2d 84 (Calif. 1969).

For some time California courts have followed a doctrine that imposes strict liability in tort on both the manufacturer and the automobile dealer for injuries caused by defects which existed in the car at the time of the sale. There was ample precedent for finding the defendants liable for the injuries of plaintiff Elmore, the user of the car, but plaintiff Waters was neither consumer nor user—merely a bystander. There was no precedent for finding a manufacturer or dealer liable to a bystander for injuries caused by a defective product.

The court made it clear that the doctrine under which Mrs. Elmore could recover does not rest upon a theory of privity of contract, but instead is "based upon the existence of a defective product which caused injury to a human being." Earlier cases relied upon in this decision used language applicable to human beings generally rather than being restricted to protection of consumers and users. So in finding strict liability in tort extending from both manufacturer and dealer to a bystander, the court merely extended the protection of strict liability to another group of potential victims. The court felt that consumers and users had the opportunity to inspect for defects and to purchase articles manufactured and sold by reputable firms, while bystanders could have no such opportunity. So, if there is to be a distinction between the duty owed by manufacturers and dealers to consumers and users and the duty owed to bystanders, this court would extend greater protection to bystanders. The two most recent West Virginia decisions in this area, *Payne v. Valley Motors*, 146 W. Va. 1083, 124 S.E.2d 622 (1962), and *William v. Chrysler Corp.*, 148 W. Va. 655, 137 S.E.2d 225 (1964), indicate

that an express warranty limiting a manufacturer's liability to replacement of defective parts, and providing that such warranty is in lieu of all other warranties, express or implied, precludes recovery by a consumer or user against a manufacturer for injuries caused by a defective product. This type of warranty has been in general use by automobile dealers and manufacturers for many years.

The California doctrine imposing strict liability on dealers and manufacturers is based upon policy considerations. It is eminently logical to hold responsible for injuries caused by defective products those parties responsible for the defective products being on the market. It is only realistic to recognize that manufacturers and dealers are in the best position to distribute the cost of injuries caused by defective products. The recent West Virginia decisions, apparently based upon privity of contract, limit a customer's or a user's recovery for injuries caused by defective products to the terms of the express warranty.

However, *William* and *Payne* were decided prior to adoption of the Uniform Commercial Code, and no cases have been decided in this area since its enactment. The West Virginia Supreme Court of Appeals indicated in *Williams*, its most recent decision concerning automobile sales contract disclaimers, that the Code brings with it policy implications extending beyond its express provisions. Perhaps adoption of the Uniform Commercial Code has opened the door to modification of West Virginia's rather harsh position in the area of product liability law.

**Tax — Accrual Taxpayer Must Include In Gross Income
In Year of Receipt Unconditional Advance Payments
Received From Customers**

Taxpayer was a corporate manufacturer of advertising signs. Many of its customers, needing a continuous supply, made a practice of estimating their requirements and placing blanket orders covering periods of one to three years. Taxpayer commenced manufacture when the blanket order was received but did not complete a sign until later shipping instructions were received. Some customers, on their own initiative, elected to pay for all or part of these blanket orders prior to delivery. These funds were commingled with taxpayer's other receipts without restriction as to use or disposition. Taxpayer was on an accrual method of accounting. On the federal