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Housing—Mobile Homes—Some Legal Questions

Because of the increasing use of the mobile home as a form of housing, practitioners will be handling an ever-increasing number of cases dealing with the problems of the mobile home resident. The four major areas of investigation of mobile home law dealt with here are taxation, zoning, warranties, and fixtures. The purpose of the article is not to reveal any particular deficiencies in West Virginia's mobile home law, but rather to investigate and synthesize the law in a comprehensive review. While there are certain areas where the need for reform has been suggested, compiling the law as a research guide for the practitioner has been the main goal.

I. Taxation

In 1932 when the Tax Limitation Amendment was ratified, mobile homes were not a widely used form of housing. It is not surprising, therefore, that a problem of property tax classification of mobile homes within the legislation authorized by TLA has arisen. TLA requires the formation of four classes of taxable property, with a maximum aggregate tax rate permissible for each class. The four classes may be characterized as:

1. W. VA. CONST. art. X, § 1 [hereinafter referred to as TLA].
2. It should be noted at the outset that this article deals only with mobile homes as opposed to trailers or campers. One commentator has defined a mobile home as:

   The modern house trailer, more appropriately known as a mobile home, is a large, compact, completely equipped apartment on wheels. It includes sleeping, cooking, washing and sanitation facilities. It is a unit independent of outside facilities except for water, gas and electric supply and sewage disposal. The mobile home is 10 or 12 feet wide, usually 50 or 55 feet in length, and can be moved only by special equipment.


3. There were only 55,000 mobile homes manufactured in the United States in 1936. The number in use had increased to 1,200,000 by 1959. Note, Toward an Equitable and Workable Program of Mobile Home Taxation, 71 YALE L.J. 702, 703 & n.8 (1962).


[Except that the aggregate of taxes assessed in any one year upon personal property employed exclusively in agriculture, including horticulture and grazing, products of agriculture as above defined, including livestock, while owned by the producer, and money, notes, bonds, bills and accounts receivable, stocks and other similar intangible personal property shall not exceed fifty cents on each one hundred dollars of value thereon and upon all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona-fide tenants one

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I—Agricultural personal property, products of agriculture and other intangible personal property;

II—Residential property and real property used in farming;

III—Other real and personal property situated outside municipalities; and

IV—Other real and personal property situated inside municipalities.\(^5\)

The present difficulty in the classification of mobile homes\(^6\) apparently results from a misreading of the specific language defining the classes of property. Class II property is, "[a]ll property owned, used and occupied by the owner exclusively for residential purposes . . . ."\(^7\) A survey of the county assessors in West Virginia showed that, of the forty-three counties responding, thirty-five of them classify only those mobile homes occupied by the owner and situated on his own land in Class II.\(^8\) Mobile homes occupied by the owner and situated on leased land are generally treated as Class III or IV property. The consequences of this practice and its possible solution will be the subject of this article.

A. The Present Practice: A Statutory Misinterpretation

A mobile home, occupied by its owner but situated on leased land falls within one of the statutory definitions of personal property,

\(^5\) W. VA. CODE ch. 11, art. 8, \$ 5 (Michie 1966):

For the purpose of levies, property shall be classified as follows:

Class I. All tangible personal property employed exclusively in agriculture, including horticulture and grazing;

All products of agriculture (including livestock) while owned by the producer;

All notes, bonds, bills and accounts receivable, stocks and any other intangible personal property;

Class II. All property owned, used and occupied by the owner exclusively for residential purposes;

All farms, including land used for horticulture and grazing, occupied and cultivated by their owners or bona fide tenants;

Class III. All real and personal property situated outside of municipalities, exclusive of Classes I and II;

Class IV. All real and personal property situated inside of municipalities, exclusive of Classes I and II.

\(^6\) A survey of the county assessors in West Virginia revealed that at least three different methods of classification are presently being used. The results of the survey are in Appendix I.

\(^7\) W. VA. CODE ch. 11, art. 8, \$ 5 (Michie 1966).

\(^8\) Survey, Appendix I. See note 6, supra.
which is, "all fixtures attached to land, if not included in the valuation of such land entered in the proper land book . . . ." The State Tax Commissioner has instructed the county assessors to treat buildings placed on land by a lessee that are, "not of a permanent character or not attached to the real estate as a permanent improvement" as the personal property of the lessee. Characterizing mobile homes on leased property as personal property is not, however, the reason for the current classification problem. It arises from an apparent misreading of the Class II definition as excluding personal property. The statute, however, explicitly states that Class II includes, "[a]ll property . . . ." A mobile home that is personal property would, therefore, fall within the category of "[a]ll property." It also can be, "owned, used and occupied by the owner exclusively for residential purposes" even though it is situated on leased land. A mobile home on leased property thus meets all the definitional requirements of Class II property. A further indication that Class II can include personal as well as real property is found in the language defining Classes III and IV as, "[a]ll real and personal property . . . exclusive of Classes I and II." This shows that the legislature contemplated that both real and personal property could be included in Class II.

There are, however, historical reasons for reading the statute as excluding personal property from Class II. First, in the 1930's it would have been difficult to imagine a widely used form of personal property that could be used exclusively for residential purposes. Since the purpose of the statute was to give tax relief to homeowners and farmers during the depression, and since few people lived in mobile homes at that time, the natural result was that only real estate was taxed in Class II. With the startling increase in the

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9 W. VA. Code ch. 11, art. 5, § 3 (Michie 1966).
10 Tax Commissioner's Instructions to Assessors, Nov. 18, 1937 [reprinted in 1 CCH State Tax Rep., W. VA. ¶ 22-112.55]
11 W. VA. Code ch. 11, art. 8, § 5 (Michie 1966) (emphasis added).
12 Id. (emphasis added).
13 W. VA. Code ch. 11, art. 8, § 5 (Michie 1966) (emphasis added).
14 It could be argued that the legislature felt that only personal property would be included in Class I and only real property would be included in Class II, but the "[a]ll property" wording of Class II is a strong indication that it includes both types of property if they meet the other definitional requirements.
16 Note, Toward an Equitable and Workable Program of Mobile Home Taxation, supra note 3.
number of people living in mobile homes, they were treated, when placed on leased land, as other tangible personal property and taxed in Class III or IV.

A second reason for the prevalent taxing practice in West Virginia may be found in the directives from the State Tax Commissioner to the county assessors. The Tax Commissioner has the power to furnish forms and instructions to the county assessors. One of these instructions establishes the guidelines for taxation of buildings owned by a lessee, stating that they are to be taxed as personal property if under the terms of the lease agreement they may be removed by him. The West Virginia report form for personal property and real estate provides no space for the declaration of Class II personal property. This, coupled with the Tax Commissioner's instruction, would appear to leave the county assessor little choice but to place an owner-occupied mobile home on leased property in the traditional personal property classes, III and IV. The same logic does not require placing mobile homes occupied by the owner of the land in Classes III or IV since they are assessable as a part of the real estate and can easily fit into the framework of the tax forms now in use. Thus, while the prevailing method of classification in West Virginia is contrary to express statutory language, it is not historically illogical or unpredictable.

B. The Present Practice: Practical Consequences

The most widely used methods of taxing mobile homes in West Virginia may be grouped into three categories. They are: (1) Placement of all owner-occupied mobile homes whether on leased or owned land in Class II; (2) placement of owner-occupied mobile homes situated on leased land in Class III or IV and assessing them at the same value as Class II mobile homes; and (3) placement of owner-occupied mobile homes on leased land in Class III or IV but assessing them at one-half the value of Class II mobile homes. Each of these methods and its practical consequences will be discussed separately.

17 Id. Mobile homes now account for 75% of the sales of homes costing less than $13,000. Bartke & Gage, Mobile Homes: Zoning and Taxation, 55 Cornell L. Rev. 491 n.23 (1970).
19 Tax Commissioner's Instructions, supra note 10.
21 Survey, Appendix I.
Seven of the forty-three counties responding to the survey assess mobile homes in Class II as long as they are owner-occupied. These seven counties have independently interpreted the statute and arrived at the correct method of assessment. By doing so, they avoid the problems inherent in the other methods of assessing mobile homes.

Although many of the assessors responding to the survey did not specifically indicate their practice in assessment valuation, one assessor did say that he assessed mobile homes on leased land placed in Class III or IV at the same value as Class II mobile homes. It is possible that forty-one other counties may also do this. This method of assessment denies some mobile home owners the benefit of the lower tax rate in Class II and also results in many taxpayers paying twice as much tax for living in the same kind of housing. The inequity of this procedure can be easily illustrated. Taxpayer A owns a mobile home worth $5000.00 and lives in it on land owned by Taxpayer B. B lives next door in an identical mobile home located on his own land. County X places A's mobile home in Class IV and values it at 50% of its appraised value. This produces an assessed valuation of $2500.00. His maximum tax rate is $2.00 per $100.00 assessed valuation. A's tax bill is $50.00. B, on the other hand, has his home valued at $2500.00 but pays only $1.00 per $100.00 assessed valuation since his home is Class II property. B's tax bill is $25.00 or one-half that of A. The unfairness that results from using this method could easily be eliminated by giving all mobile home owners the benefits of Class II.

Six of the forty-three assessors answering the survey said that they cut the assessment valuation of mobile homes placed in Class III or IV to equalize the tax burden. The rationale for doing so is

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22 Survey, Appendix I. One of the seven counties requires the owner of the mobile home to furnish the assessor with a copy of a one year or longer contract or lease for the land before the mobile home is placed in Class II.

23 Survey, Appendix I, Pocahontas County.

24 Twenty-nine of the thirty-five counties that place mobile homes on leased land in Class III or IV did not indicate which method of assessment valuation they use. It is possible that they, as well as the twelve counties who did not respond to the survey, could use this method.


26 Id.

27 An argument might also be made that this practice also violates the "equal protection" clause of the fourteenth amendment to the United States Constitution. See note 34, infra.

28 Survey, Appendix I. It should be noted that the assessors in Marion and Monongalia counties did not respond to the survey but were personally interviewed and indicated that they use this method. Thus, eight counties are actually known to be taxing mobile homes in this manner, but for purposes of docu-
that all mobile home dwellers live in the same kind of housing, and it is unfair for them to pay a different amount in taxes. Assessors, therefore, cut the assessment valuation rate for mobile homes in Class IV by 50%, causing taxes to equal those paid by the Class II taxpayer. Thus, taxpayer A in the previous illustration would now have his mobile home valued at 25% of its appraised value or $1250.00. His taxes would be $25.00, or the same as those of taxpayer B. Although this method successfully relieves any tax inequity, it would appear to be unconstitutional.

The three general requirements governing property taxation in the West Virginia constitution are: (1) That all taxes be "equal and uniform"; (2) that property be "taxed in proportion to its value"; and (3) that "[n]o one species of property be taxed higher than any other species of property of equal value . . . ."29 For a tax to be "equal and uniform" there must be uniformity in both the rate and the mode of assessments.30 The West Virginia Supreme Court of Appeals in Re: Stock Kanawha Valley Bank,31 interpreted the "no one species" provision of the constitution as prohibiting the fixing of the value of property by "an arbitrarily unequal assessment."32 The court concluded that, "[w]hether one taxpayer is taxed twice as much as the other by virtue of the imposition of a rate twice as high as the other, or by an assessment twice as high as the other, it is forbidden by Section 1, Article X, of the Constitution."33 A cutting of the

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29 W. VA. CONST. art. X, § 1.
31 144 W. Va. 346, 109 S.E.2d 649 (1959). The Kanawha Valley Bank appealed from a decision of the Circuit Court of Kanawha County that lowered the value of the shares of bank stock but did not lower the assessor's percentage of true and actual value for assessment purposes. Kanawha Valley Bank's stock had been assessed at 100% of its true and actual value. The West Virginia Supreme Court of Appeals considered evidence that other property in Class I, such as accounts receivable and notes receivable, were assessed at only 60% of their true and actual value. Evidence that property in other classes was not assessed at 100% of its true and actual value was essential to the decision.
32 Id. at 388, 109 S.E.2d at 673.
33 Id. at 388, 109 S.E.2d at 672. For the constitutional provision to be violated, Kanawha Valley Bank requires that there be the imposition of a higher rate of assessment valuation on property of different classes and also that it be done systematically. This position is made clear in syllabus point three, where the court said:

A banking institution, whose shares of stock are assessed at one hundred per centum of true and actual value, while other property in the taxing unit is systematically assessed at a lower percentage of its true and actual value, is entitled to have its assessment reduced to
assessment rate on Class III or Class IV mobile homes to equalize tax burdens falls within the area of constitutional prohibition enunciated in Kanawha Valley Bank.\textsuperscript{34}

C. Placing all Owner-Occupied Mobile Homes in Class II. Is This the Ultimate Solution to Mobile Home Taxation Problems in West Virginia?

Assessing all owner-occupied mobile homes as Class II property would solve three problems now existing in West Virginia: (1) Explicit statutory language would no longer be ignored; (2) mobile home owners would no longer be taxed differently for living in the same type of housing; and (3) any constitutional objections to present methods of mobile home taxation would be avoided. Still, any inquiry into mobile home taxation would be incomplete without revealing that several other problems would not be solved if all mobile homes were taxed in Class II.

Since the argument for placing all owner-occupied mobile homes in Class II is predicated on the theory that personal property can fit within the definition of Class II, mobile homes under the present statutory scheme, would still be personal property. The tax collector

\textsuperscript{34}In Kanawha Valley Bank, the argument was advanced that the assessment practice also violated the "equal protection" clause of the fourteenth amendment to the United States Constitution and the "equal and uniform" clause of the West Virginia constitution. The court considered a number of West Virginia cases, which had been decided on the basis of the "equal and uniform" clause, that allowed discrimination in assessment valuation rates between classes of property. It distinguished these cases from Kanawha Valley Bank and said that it was not bound by stare decisis because none of them had interpreted the application of the "no one species" clause. In doing so, the court seemed to equate the state "equal and uniform" clause with the federal "equal protection" clause by saying that "[i]t is only when the taxpayer is discriminated against within his own class that he may successfully invoke the protection of the XIV Amendment." Id. at 386, 109 S.E.2d at 671. The court then said that the state "equal and uniform" clause applies much the same standard to the levying of all taxes in West Virginia. It, however, added that the "all property shall be taxed in proportion to its value" clause and the "no one species" clause of the West Virginia constitution impose a much stricter standard for equality of taxation of property in this state than either the "equal protection" or "equal and uniform" clauses do. The decision in Kanawha Valley Bank, therefore, requires equality in assessment valuation between, as well as within, classes of property. Because of the nature of the decision, it is difficult to predict whether an approach to a case of this type could be successful merely on the basis of the "equal protection" or the "equal and uniform" clauses, but it appears that the court might well have reached an opposite conclusion in Kanawha Valley Bank if the "no one species" clause had not been the basis for the appeal. Id. at 386, 109 S.E.2d at 671.
is thus deprived of two significant advantages that he has when dealing with real estate as opposed to personal property. First, taxes are a lien upon property.35 Second, real property may be sold for taxes.36 Personal property taxes, on the other hand, are a debt personally owed by the taxpayer.37 To collect any delinquent personal property taxes, either the person or some of his property must be within the county to which they are owed. It has traditionally been argued that since mobile homes are moveable and mobile home dwellers are transitory, all one must do to avoid paying his taxes is move to another county or state and take his mobile home with him.38 In spite of increasing evidence that mobile home dwellers are no longer a migratory group,39 it is still logical that owners of mobile homes should not be given preferred status as Class II taxpayers while the state is deprived of the traditional methods of collecting tax on real estate. Any solution to the mobile home taxation problem must, therefore, provide for a workable method of tax collection.

The current trend in mobile home taxation in other states is to treat mobile homes as realty.40 In many instances this means that all mobile homes are taxed to the owner of the land.41 This does not, however, result in overtaxation of the landowner since it is relatively easy for him to pass along the increase in taxes to the mobile home owner as rent.42 Administratively, the problems of tax collection and tax liens are eliminated by assessing all taxes to the landowner. Unfortunately, this taxation scheme could not be used in West Virginia without major statutory revisions. West Virginia requires property taxes to be paid by the party in possession of the property.43 As long as mobile homes remain personal property, the taxes must be paid by the owner of the mobile home rather than the owner of the land. Furthermore, the landowner who leases land to mobile home owners

38 Note, Toward an Equitable and Workable Program of Mobile Home Taxation, supra note 3, at 714-15.
39 Bartke & Gage, supra note 17, at 521; Note, Toward an Equitable and Workable Program of Mobile Home Taxation, supra note 3, at 703-05.
40 Bartke & Gage, supra note 17, at 520. See the survey of current statutes dealing with mobile home taxation in other states in Appendix II.
42 Bartke & Gage, supra note 17, at 524; Toward an Equitable and Workable Program of Mobile Home Taxation, supra note 3, at 715.
does not use that land “exclusively for residential purposes.”\textsuperscript{44} It is only the owner of the mobile home whose property is used for residential purposes. The argument for giving all mobile home owners the advantages of Class II taxation would, therefore, become irrelevant in West Virginia if all taxes were assessed to the owner of the land because he would not be entitled to Class II treatment. While taxing all mobile homes as realty to the landowner would require major statutory as well as constitutional revision, there is an alternative scheme that could effectively solve the tax collection problem in West Virginia; it would not require a major statutory change.

As an adjunct to placing all owner-occupied mobile homes in Class II, the legislature could implement a program of registration of mobile homes as a pre-requisite to moving them on West Virginia’s highways.\textsuperscript{45} This program could include: (1) A requirement that application to move a mobile home must be made with the State Department of Motor Vehicles; (2) such application would have to include whether the mobile home is being permanently moved from the county in which it is presently located; (3) payment of all outstanding taxes would be a precondition to the issuance of a permit to move a mobile home; (4) a copy of the application for a moving permit would be sent by the Commissioner of Motor Vehicles to the assessor in the county in which the mobile home is presently located (and to the assessor in the county in which the mobile home is to be relocated if the application indicates that that county is within West Virginia); (5) a small fee could be charged for the permit and a decal to be displayed prominently on the mobile home while in transit; and (6) the state police should be given the power to enforce the act. Such an act would be in harmony with the present taxation statutes in West Virginia and would definitely be an asset in discovery and collection of mobile home taxes.

The solution to mobile home taxation problems in West Virginia will be arrived at by balancing the optimum taxation scheme with the method most practicable in view of the present state of the law in West Virginia. In this context, a workable solution could be achieved by requiring all owner-occupied mobile homes to be assessed as Class II property and enacting a scheme of licensing permits as suggested above. This would eliminate any tax inequities that now exist. It would also solve tax collection problems without requiring

\textsuperscript{44} W. VA. CODE ch. 11, art. 8, § 5 (Michie 1966).
\textsuperscript{45} An example of such a plan presently in use can be found in Kan. St. Ann. § 8-143 (Supp. 1972).
the legislature to upset the present tax structure and thus create uncertainty as to the taxation of other forms of property.

West Virginia is one of the few states having no specific statutory provisions on taxation of mobile homes. The problems that exist because of attempts to fit mobile homes into our present tax structure have been explored. It is now time for the legislature to act to correct both the present inequities in mobile home taxation and the tax collection problems. Mobile homes are too widely used as a form of housing to be ignored any longer.

II. REGULATION AND ZONING

With the tremendous increase in the sales of mobile homes in the last several years, their regulation, as well as the problems inherent in this regulation, have become increasingly important. Attempted regulation varies from piecemeal legislation dealing specifically with mobile homes to comprehensive zoning plans that only incidentally deal with them.

A survey of several West Virginia municipalities was taken to ascertain the various methods of dealing with mobile home regulation. Several general hypotheses may be drawn from the survey information: (1) Most municipalities have adopted comprehensive plans to regulate land use within their jurisdictions; (2) most of the municipalities, even those without comprehensive plans, have regulations specifically dealing with mobile homes; (3) most municipalities do not allow single mobile homes on private lots; (4) most municipalities allow mobile parks, but establish harsh zoning requirements that effectively exclude them; and, (5) the municipalities that do allow mobile homes on private lots restrict them to areas that are not primarily residential.

Since the primary means of regulation adopted by most of the responding municipalities was zoning, this part of the article will be directed essentially to that type of regulation.

46 Appendix II.
47 In 1953, 100,000 units valued at $100,000,000 were produced. In 1968, 350,000 units valued at $3,000,000,000 were produced. Bartke & Gage, supra note 17, at 494.
48 Most of the information was supplied in response to questionnaires sent on January 18, 1973, to the larger municipal units within West Virginia. Fourteen of the twenty cities asked responded to the survey.
A. The Power To Zone

The power to zone is inherent as a police power of the state to protect the health, safety, morals, and general welfare of its citizens.49 Since the power exists only in the state government, it must be delegated to the local governing units before they may exercise it.50 The West Virginia legislature has given municipal bodies this power.51 This general grant of the police power by the state to the municipalities includes the power to zone. There is also specific authority for municipalities to pass ordinances concerning zoning and planning.52 These provisions must be in the form of an ordinance passed according to the provisions of the municipal charter.53 The municipalities were also given the power to regulate the erection, construction, repair, or alteration of structures within the corporate limits.54 Any of these sources of authority may give the municipal bodies the power to regulate mobile homes within their jurisdictions.

While the above statutes deal with the general authority of a municipality to regulate or zone, there exist provisions in West Virginia for the creation of a local planning commission by governing bodies of either municipalities or counties.55 When a local unit wishes to establish such a planning commission, a strict statutory procedure must be followed.56 The planning commission may then adopt and


50 It has been held that the police power of the municipality to regulate building codes had to be delegated by the state, and by analogy it may be inferred that the police power to zone must be delegated. State ex rel. Ammerman v. City of Phillipi, 136 W. Va. 120, 65 S.E.2d 713 (1951). The charter or subsequent enabling acts should be consulted in the locality where the desired information is sought. The West Virginia law concerning municipalities can be found in W. VA. CODE ch. 8 (Michie 1969 replacement volume). It may be argued that the broad, general language of this chapter is sufficient to vest the municipalities with the power to zone without specific enabling statutes. For further discussion concerning this argument in other jurisdictions see B. HODES & G. ROBERSON, THE LAW OF MOBILE HOMES 155 (2d ed. 1964).

51 W. VA. CODE ch. 8, art. 12, § 5(44) (Michie 1969 replacement volume).
52 W. VA. CODE ch. 8, art. 11, § 3 (Michie 1969 replacement volume).
53 Id.
54 W. VA. CODE ch. 8, art. 12, § 13 (Michie 1969 replacement volume).
55 W. VA. CODE ch. 8, art. 24 (Michie 1969 replacement volume).
56 The planning commission is created by ordinance of the governing unit. Id. § 1. In a municipality a commission must consist of from five to fifteen
send to the local governing body a comprehensive plan. The adoption and amendment process used by the planning commission must also be strictly followed. The creation of the comprehensive plan does not affect the validity of any zoning ordinance passed prior to its enactment. They continue in effect until specifically repealed by the governing unit. Several municipalities have availed themselves of the above sections and have adopted comprehensive plans. The members appointed by the governing unit, and they must be residents of the municipality. Three-fifths of the commissioners must have been residents of the municipality at least ten years before their appointment. One member from both the administrative and governing bodies of the municipality must serve unless an alternate is chosen each year. The requirements are the same for the county planning commission, except a county court member must sit on the commission unless an alternate is chosen each year. If a municipality is located in a county that also has a commission, then a member of the county planning commission must sit on the municipal commission as an advisory member. If so designated by both governing bodies, one planning commission may serve for both the municipality and the county in which it is located.

The Code provides:

1. Each comprehensive plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the area which will, in accordance with present and future needs and resources, best promote the health, safety, morals, order, convenience, prosperity or general welfare of the inhabitants, as well as efficiency and economy in the process of development, including, among other things, such distribution of population and of the uses of land for urbanization, trade, industry, habitation, recreation, agriculture, forestry and other purposes as will tend:
   1. To create conditions favorable to health, safety, transportation, prosperity, civic activities and recreational, educational and cultural opportunities;
   2. To reduce the wastes of physical, financial or human resources which result from either excessive congestion or excessive scattering of population; and
   3. Toward the efficient and economic utilization, conservation and production of the supply of food and water of drainage, sanitary and other facilities and resources.

The planning commission must hold a public hearing before adoption of the plan, and a thirty day notice of this hearing must be given in the local newspaper. After the hearing the commission may then adopt the plan and submit it to the governing unit for passage. At the first meeting of the governing unit after the plan has been adopted by the commission, it is presented for certification. If passed it becomes effective. An amendment to the plan must follow the same procedure as its adoption, except that only a fifteen day public notice of a hearing is required. Within sixty days of the adoption of the plan, a petition may be presented calling for repeal of the plan before the voters. The petition must be signed by at least 15% of the qualified voters residing within the jurisdiction determined by the number of votes for governor at the last general election. The majority vote shall prevail.

In the survey conducted for this article, twelve municipal officials stated that they did have comprehensive plans. These West Virginia municipalities are as follows: Beckley, Bluefield, Charleston, Clarksburg, Dunbar, Huntington, Martinsburg, Morgantown, Pt. Pleasant, St. Albans, South Charleston, and
localities that do not have such a comprehensive plan may still regulate land use by other methods.61

B. Mobile Homes on Private Lots

The major limitation placed on mobile homes in most localities is the prohibition of their use on single lots. Generally, placement of mobile homes is restricted to established mobile home parks. Charleston had allowed mobile homes in certain residential areas by means of a "special use" permit, but because of the number of complaints from surrounding property owners, it has now restricted mobile homes solely to parks.62 This had been the course of action previously taken by several municipalities in West Virginia.63 Other municipalities have varied procedures restricting mobile homes on single lots. A common procedure is to allow only "dwellings" in certain areas and then specifically exclude mobile homes from the definition of a "dwelling."64 For this reason, the definitions of a zoning ordinance are most important.

While several municipalities allow the placement of mobile homes on private lots, they nevertheless place restrictions on them. Beckley allows mobile homes to be placed on private lots only after a "special use permit" has been obtained.65 The permit is good for only six months and then must be renewed. To secure the permit, a public hearing must be held, and the applicant must show compliance

Wheeling, Madison and Weston reported that they did not have such a plan. These municipal officials also were asked if their county had such a plan. Only Kanawha County has a plan, but Mason and Mineral counties are in the process of adopting plans. The counties of Boone, Cabell, Harrison, Mercer, Monongalia, and Ohio do not have such county plans.

While the municipalities of Madison and Weston do not have comprehensive plans to regulate the use of land, both have ordinances specifically concerning mobile home locations.

62 Charleston, W. Va., Ordinance 1279, Nov. 6, 1972, revising CHARLESTON, W. VA., REV. ZONING ORDINANCES art. II, § 2.02; art. IV, § 4.06.03(4); art. VIII, § 8.09.01 (1971).
63 BLUEFIELD, W. VA., CODE pt. 11, ch. 7, art. 34, § 2 (1958); DUNBAR, W. VA., ZONING ORDINANCE art. VIII, §§ 1303, 1304 (19—); HUNTINGTON, W. VA., ZONING ORDINANCE § 9 (1970); MARTINSBURG, W. VA., CODE § 625.1 (19—). While not citing a specific municipal ordinance, the responses from Pt. Pleasant and St. Albans indicated that they do not allow mobile homes on private lots. Although South Charleston does not have a specific prohibition, their response to the survey indicates they do not allow them on private lots by not stating where and how they may be parked.
64 This was the approach adopted by the City of Clarksburg in September, 1969, when it amended its definition section to exclude mobile homes as a "dwelling." Clarksburg, W. Va., Ordinance —, Sept. —, 1969. Charleston also adopted this approach by excluding mobile homes from the definition of "industrialized housing." Charleston, W. Va., Ordinance 1279, Nov. 6, 1972.
65 BECKLEY, W. VA., ZONING ORDINANCE § 9(E) (19—).
with certain sanitary requirements. In all other instances mobile homes are permitted only in proper mobile home parks. Although Madison does not have a zoning ordinance, it does have a specific ordinance dealing with mobile homes. At least five days prior to installation, a detailed plan must be submitted to the city for review and approval. If approved the city will then issue a permit. For the mobile home to be allowed for more than thirty days, it must be enclosed between the ground and floor with stone or metal to reduce the possibility of fire. Weston allows mobile homes only in non-residential areas of the city. When a person wishes to locate a mobile home in a non-residential area, he must submit the written approval of seventy-five percent of the owners of real property within three hundred feet of his boundary line in every direction. Wheeling allows the placement of mobile homes in certain designated zones within the city.

These regulations and prohibitions tend to make mobile homes located on private lots within municipalities rare. Placement is either entirely prohibited or is restricted to such an extent that compliance is impractical.

C. Mobile Home Park Regulation

Since the placement of mobile homes on private lots has been nearly eliminated in most intrastate jurisdictions, mobile home park regulation has become a primary concern. The regulations, in most instances, are prohibitive in nature. Many require mobile home parks to have a minimum acreage requirement which, coupled with sewage and other requirements, cannot be met in most areas of the municipalities. Where mobile home parks are allowed, they are usually in the least desirable areas of the municipality. This factor, as well as

66 Id.
67 MADISON, W. VA., MOBILE HOME ORDINANCE § 4.2 (1972).
68 Id.
69 Weston defines a residential area as “any block or area in the city which has fifty percent or more of its buildings occupied and used for residential or dwelling purposes, or any vacant land which has been platted or laid off for residential subdivision purposes, or which adjoins a residential area.” WESTON, W. VA., CODE ch. 15, § 2 (1970).
70 Id. § 6.
71 These zones include “I-1,” which is the light industry zone, and “R-4,” a residential zone. WHEELING, W. VA., ZONING ORDINANCE arts. 1333.04, 1333.10 (19—).
72 Interestingly, zones where mobile homes are allowed are almost always those limited to business, commerce, or industry. Several noted authors on the subject of mobile homes have pointed out that from both the sociological and public interest standpoints it is wrong to relegate the four million mobile home
limits on the yard space per unit, is not a conducive environment for raising a family.

While the regulation of mobile home parks is generally a local concern, there are state-wide regulations. The most encompassing state regulatory program was set forth by the West Virginia State Department of Health, which has established the minimum requirements for setting up a mobile home park.73 These regulations apply only to mobile home parks and developments and not to single mobile homes on private property. The regulations define a mobile home as a "manufactured relocatable living unit designed and intended for year round occupancy."74 A mobile home park is:

Any site, area, tract or parcel of land upon which two or more mobile homes used or occupied for dwelling purposes are parked either free of charge or for monetary consideration and shall include any roadway, building, structure, installation, enclosure, or vehicle used or intended for use as a part of the facilities of said mobile home park.75

A mobile home development is a "contiguous parcel of land subdivided into individual lots, each lot individually owned and intended or utilized as the site for placement of a mobile home and its facilities."76 The regulations encompass a comprehensive list of subjects including such items as water supply;77 sewage systems;78 management buildings and other community service facilities;79 electrical distribu-

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73 These regulations were adopted under the power granted to the Board of Public Health in W. Va. Code ch. 16, art. 1 (Michie 1969 replacement volume). Section 3 states:

It shall have the power to inspect, and to make and enforce, for the protection of the general public health, reasonable rules and regulations to control the sanitary condition of . . . tourist camps, all other places open to the general public and inviting public patronage or public assembly . . . ."


75 Id. § 2.6.
76 Id. § 2.7.
77 Id. § 7.0.
78 Id. § 8.0.
79 Id. § 9.0.
tion systems;\textsuperscript{80} solid waste handling;\textsuperscript{81} registration of occupants;\textsuperscript{82} and permits, hearings, notices and orders.\textsuperscript{83} One of the more stringent requirements calls for a minimum of three thousand square feet for each mobile home space.\textsuperscript{84}

To receive a permit from the Department of Health to build a mobile home park, the applicant must file specific plans and specifications at least forty-five days prior to the date the permit is desired.\textsuperscript{85} Although these regulations do not apply to mobile home parks existing at the time the regulations were promulgated, they do apply to any "construction or installation" occurring after the effective date.\textsuperscript{86}

To supplement the regulations of the Department of Health, most municipalities also have their own regulations for mobile home parks. Exercising its statutory authority, Beckley has established an "R-4" zone, which is called a "mobile home district" within which mobile home parks may be developed. The ordinance sets forth specific requirements that must be met before the development will be permitted.\textsuperscript{87} In Bluefield, the "business districts" are the only areas where mobile home parks are allowed.\textsuperscript{88} It also sets requirements for the size and general character of lots within each park.\textsuperscript{89} The "B-2" zone, a business district, and the "I-1" and "I-2" zones, industrial districts, are the zones where mobile home parks are allowed in Clarksburg.\textsuperscript{90} Dunbar allows the parks to be developed only within their "R-2" districts as a "special exception" with specific area requirements.\textsuperscript{91} Charleston has some of the most comprehensive and

\textsuperscript{80} Id. § 10.0.
\textsuperscript{81} Id. § 11.0.
\textsuperscript{82} Id. § 16.0.
\textsuperscript{83} Id. § 4.0.
\textsuperscript{84} Id. § 6.2.1.1.
\textsuperscript{85} Id. § 4.13.
\textsuperscript{86} Id. § 4.2.6. While the Department of Health does regulate mobile home parks in a most inclusive manner, there are other states agencies involved, e.g., the state fire marshal administers certain regulations that could affect mobile home developments.
\textsuperscript{87} In Beckley, West Virginia, there is a minimum size requirement of six acres with no more than eight mobile homes per acre. There are also requirements as to foundations, access, and plumbing. Beckley, W. Va., Zoning Ordinance § 9 (19-—).
\textsuperscript{88} Bluefield, W. Va., Ordinance to Amend Bluefield, W. Va., Code pt. 11, ch. 7, art. 34, § 1 (1958), Jan. 9, 1973.
\textsuperscript{89} In Bluefield, West Virginia, each space must be at least four thousand square feet, with at least a twenty foot open space between trailers. Bluefield, W. Va., Code pt. 11, ch. 7, art. 34, § 9 (1958).
\textsuperscript{90} In Clarksburg, West Virginia, at least five acres with 2500 square feet per stand is required. The mobile home park must be convenient to major highways and have adequate sewage. Clarksburg, W. Va., Zoning Ordinance, Special Exception Section (1961).
\textsuperscript{91} In Dunbar, West Virginia, a minimum of two acres with a three thou-
prohibitive restrictions existing in the state. Two residential zones, two business zones and the three industrial zones are allowed to be developed for mobile homes in Huntington, West Virginia, as "a special exception." The "special exception" method is the means adopted by Martinsburg in deciding which areas are allowed to have mobile home parks. All plans must be submitted to the planning commission before a permit will be issued. Wheeling has a "planned residential zone" where mobile home parks may be located. Most other jurisdictions in West Virginia also regulate mobile home parks. These regulations must meet the minimum standards set by the West Virginia Department of Health, and if there are conflicts, the Department's regulations will prevail.

D. Enforcement and Appeals

The municipality has several statutory remedies against violators of the comprehensive plans. Any violation is considered a misdemeanor subject to a fine of not less than ten dollars nor more than three hundred dollars. Any buildings erected in violation of such plans are considered nuisances, and the owner is liable for maintaining a common nuisance. The planning commission, the board of zoning appeals, or "any designated enforcement official" may seek an injunction in the circuit court to restrain any violation of a zoning ordinance adopted under these provisions. They may also seek a mandatory injunction directing that any structures in violation be removed.

sand square foot per trailer space is required. There are specific set-back and parking spaces per unit requirements. DUNBAR, W. VA., ZONING ORDINANCE art. XII, § 1305 (19—). CHARLESTON, W. VA., REVISED ZONING ORDINANCE art. VIII (1971). The minimum acreage for any development is eight acres. To begin operation, a minimum of fifty spaces must be ready for occupancy. Standards set by the Health Director must be met for sanitary facilities and water supply. A minimum occupancy period of thirty days must be met by each resident. Id.

HUNTINGTON, W. VA., ZONING ORDINANCE § 20 (1970). The requirements are set forth in great detail, including a minimum of two acres and twenty-five hundred square feet per space. This ordinance is an example of regulations used effectively to exclude mobile homes. It would be extremely difficult, if not impossible, to find a two acre site that would meet the other requirements of the section. Interview with Gary L. Bunn, Planning Director, Huntington City Planning Comm'n, in Huntington, W. Va., Jan. 2, 1973.

The requirements in Martinsburg, West Virginia, include a minimum of five acres with twenty-four hundred square feet per space. MARTINSBURG, W. VA., ZONING ORDINANCE § 625 (19—). A detailed procedure is set forth to obtain a permit. WHEELING, W. VA., ZONING ORDINANCE § 1333.05 (1970).

There is a procedure for granting special exceptions to non-conforming uses. The board of zoning appeals was established to handle appeals from administrative decisions of the planning body and to grant exceptions from the zoning ordinances. In the circuit court of the county where the property is located a further appeal may be taken. Any person aggrieved by "any decision or order" of the board of zoning appeals may seek review by certiorari. The presiding judge may call witnesses or decide the case on the evidence and facts in the petition. Under no circumstances will a trial de novo be granted. As in all other civil cases, findings may be appealed to the West Virginia Supreme Court of Appeals.

There is little case law concerning matters of zoning in general, and there is none concerning zoning of mobile homes. As previously stated, West Virginia accepts the principle that municipalities, with proper enabling legislation, have the right to zone within their police powers.

Based upon the police power theory, the West Virginia court has stated a reluctance to review zoning ordinances for reasonableness and has held that there is a presumption in their favor. The "fairly debatable" rule was adopted as the standard to measure the validity of zoning ordinances. The rule states that "if the decision of the zoning authorities is fairly debatable the courts will not interfere with such decision." This standard indicates that if the city is able to

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100 The municipal or county comprehensive plan may not prevent a situation that was present when the ordinance became effective. Therefore all mobile homes in existence when the ordinance became effective are permitted. Id. § 50. The term "non-conforming use" refers to an activity or type of dwelling that is not authorized for that particular zone.

101 W. VA. Code ch. 8, art. 24, §§ 51, 55 (Michie 1969 replacement volume). Section 55 states:

In exercising its powers and authority, the board of zoning appeals may reverse or affirm, in whole or in part, or may modify the order, requirement, decision or determination appealed from, as in its opinion ought to be done in the premises, and to this and shall have all the powers and authority of the official or board from whom or which the appeal is taken.

102 Every decision or order of the board of zoning appeals shall be subject to review by certiorari. Id. § 59. This section does not authorize certiorari to review the adoption of a zoning ordinance by a municipal governing body, Garrison v. City of Fairmont, 150 W. Va. 498, 147 S.E.2d 397 (1966).

103 W. VA. Code ch. 8, art. 24, § 64 (Michie 1969 replacement volume).

104 Id. § 65.

105 See the text accompanying notes 49 and 50 supra.

106 The enactment of a zoning ordinance of a municipality being a legislative function, all reasonable presumptions should be indulged in favor of its validity." G-M Realty, Inc. v. City of Wheeling, 146 W. Va. 360, 361, 120 S.E.2d 249, 250 (1961).

raise any question or any type of justification for the ordinance, the court will not review its validity. This places a tremendous burden on the party seeking to challenge the ordinance.

Charges that a zoning ordinance is discriminatory or arbitrary have not met with much success in West Virginia. In *G-M Realty, Inc. v. City of Wheeling*, the court held that if a particular property owner was treated no differently from other property owners and if the ordinance in question bore a substantial relation to the health, safety, morals, and general welfare of the people, it would not be considered discriminatory or arbitrary. This position was reaffirmed five years later in *Anderson v. City of Wheeling*. These cases give the impression that a comprehensive zoning scheme is valid if not invidiously applied.

The seemingly appealing arguments in *G-M Realty, Inc.*, were that the property value had been decreased and that the owner was denied the free and independent use of the property. These arguments were not given much support; the court felt that the municipal police power superceded these property rights. The court balanced the interests to reach its conclusion.

Several novel approaches have been successful in other jurisdictions for allowing mobile homes on single lots even though they have been specifically excluded by some regulation. In *Douglas Township v. Badman* an ordinance excluded mobile homes from private lots. The Pennsylvania court stated that by removing its wheels and placing it on a foundation, a mobile home became a single-family dwelling which would be allowed under the ordinance. The Washington court, in *State v. Work*, went even further. In *Work*, the relevant statute stated that any "form of vehicle even though immobilized" was excepted from the definition of a "building." The owner had removed the tongue, axles, and wheels and had placed it on a block foundation. The court held that it had all the characteristics of a

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112 75 Wash. 2d 212, 449 P.2d 806 (1964).

113 Id. at 214, 449 P.2d at 808. See also City of Sioux Falls v. Cleveland, 75 S.D. 584, 70 N.W.2d 62 (1955); In re Willey, 120 Vt. 352, 140 A.2d 11 (1958).
single family dwelling and, therefore, would be allowed. The permanence of the structure was the issue in Bowman v. Holsopple. The Indiana court allowed a mobile home to be installed in a district even though there was a zoning ordinance specifically excluding them. The other extreme of this semantic game is exemplified by the position taken in Massachusetts. Regardless of alterations that make the mobile home permanent, it will always be considered mobile and will never conform to the definition of a dwelling.

E. Pros and Cons of Mobile Homes

Owing to their construction, a great many mobile homes can be placed within a minimum amount of space. This could cause the overloading of sewer and other public utilities, neighborhood schools, and streets. Still, large apartment complexes create the same problems and are allowed to exist in certain residential areas. Although the mobile home, with its box-like appearance, may offend the aesthetic configuration of certain areas, it could improve the appearance of the more run-down areas of many municipalities. The arguments presented against mobile homes are solid ones for regulation but not for complete prohibition.

With the growing importance of the mobile home in the housing industry, it is imperative that the municipalities take another look at the ideas and philosophies behind their zoning ordinances and change them to mirror the existing needs of the population. Zoning ordinances should be concerned with regulation of mobile homes rather than prohibition. In West Virginia, this change will have to be initiated by the local governing units since the courts have shown a reluctance to interfere with local regulations.

III. Warranties

In addition to the questions of taxation and zoning, other common legal problems arise in the mobile home field. These disputes are usually resolved by the application of common law principles, statutes, or the Uniform Commercial Code [hereinafter referred to as the UCC]. For example, if a warranty problem exists, the attorney

116 For a discussion of the various legal problems that arise in mobile home living, see B. Hodges & G. Robertson, supra note 50, at 201-61.
117 Presently, every state except Louisiana has adopted the Uniform Com-
will apply the same UCC rules that are used for other personal property. The mobile home buyer may recover from the dealer for a breach of any express or implied warranties, including a warranty of merchantability and of reasonable fitness for a particular purpose. Some illustrations are pertinent. Two examples of recovery by mobile home buyers based on warranties of merchantability are Nettles v. Imperial Distributors, Inc. and George v. Willman. In Nettles, the plaintiffs recovered from the seller for property damage and personal injuries when the gas cooking stove in their mobile home exploded. The written contract of sale contained no express warranties. However, the court found a breach of an implied warranty of merchantability because the stove lacked an adaptor. It further found that a normal examination of the mobile home by the buyer prior to the sale would not have revealed the defect.

commercial Code [hereinafter referred to as the UCC]. West Virginia's provisions may be found in the W. Va. Code ch. 46 (Michie 1966).

The UCC should always be checked first to see if its provisions are applicable. General principles of law and equity are used to supplement the UCC unless they are displaced by a particular provision. UCC § 1-103. For example, UCC § 9-315 leaves the definition of a fixture to pre-UCC law.

UCC § 2-313.

UCC § 2-314 provides:

(1) Unless excluded or modified ... a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. ... (2) Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and ... (c) are fit for the ordinary purposes for which such goods are used ... .

UCC § 2-315 provides: Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section [§ 2-316] an implied warranty that the goods shall be fit for such purpose.

UCC § 2-315, Comment 2, explains the difference between this section and the implied warranty of merchantability in UCC § 2-314:

A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.


124 Although the provisions of the UCC were not applicable to this case (the sale was made prior to West Virginia's adoption of the UCC), the result under § 2-316(3)(b) would have been the same: [When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to
In George, the buyer recovered damages for a fire caused by loose fuel fittings located near the furnace in his mobile home. This defect existed at the time of sale. Again, the primary issue was whether a reasonable inspection by the buyer would have revealed the defect. These cases and the UCC\textsuperscript{125} indicate that a prospective buyer should make a careful examination of the mobile home before entering into a sales contract.

In Cabana Homes, Inc. v. Coward\textsuperscript{126} and Dougherty v. Petreiro,\textsuperscript{127} the courts decided that a warranty of fitness for habitation\textsuperscript{128} was applicable to mobile homes. Cabana held that a buyer is not required to examine the roof of a mobile home to make certain it is properly built. Testimony that during the fifty-two days of occupancy the trailer roof leaked on six different occasions and caused extensive damages was sufficient to sustain a finding of breach of warranty.

This same warranty of fitness was applied to the sale of a second-hand mobile home in Dougherty, a case decided in Louisiana where the UCC has not been adopted. The implied warranty of merchantability would arise under the UCC only where the seller is a "merchant with respects to goods of that kind." Thus, a buyer who purchases a second-hand mobile home from a private individual would have no such warranty of merchantability.\textsuperscript{129} However, the official comments point out that a non-merchant seller has a duty to disclose any material and hidden defects which are within his knowledge.\textsuperscript{130}

One of the most common defenses to an action based on breach defects which an examination ought in the circumstances to have revealed to him.

West Virginia's position prior to the UCC was that no implied warranty of merchantability could exist if the buyer had an opportunity to inspect and the seller was neither a grower or manufacturer. Neiles was distinguished by the court since it involved a missing part and not a defective part. See 70 W. Va. L. Rev. 467 (1968).

\textsuperscript{125}UCC § 2-316(3)(b).

\textsuperscript{126}472 S.W.2d 709 (Ark. 1971).

\textsuperscript{127}240 La. 287, 123 So. 2d 60 (1960).

\textsuperscript{128}UCC § 2-314(2)(c) provides that merchantable goods must be fit to be used for their ordinary purposes, which in the case of a mobile home would be habitation. A growing number of jurisdictions have relaxed or completely abandoned the doctrine of caveat emptor in the sale of a new house. The vendor of a new dwelling may be liable for damages caused by the defective condition of the house on the theory of breach of an implied warranty of habitability. 71 W. Va. L. Rev. 87 (1968). This warranty has not been applied to mobile homes. Although a mobile home may be a dwelling, it is nonetheless considered to be personality and is governed by the UCC.

\textsuperscript{129}UCC § 2-314, Comment 3, provides: "A person making an isolated sale of goods is not a 'merchant' within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply . . . ."

\textsuperscript{130}Id.
of warranty is the vendor’s disclaimer of warranty. An attempt by a dealer to disclaim all warranties must include a provision that specifically refers to implied warranties.131 The UCC provides definite requirements that are helpful in drafting a binding disclaimer.132 In Stryker v. Rusch,133 the defendant dealer alleged that all warranties were expressly excluded from the contract by the following provision: “This writing . . . constitutes the entire agreement between the parties hereto, there being no warranties or representations by the seller except as set forth herein.”134 The court held that this language applied only to previous consensual arrangements between the parties, such as express warranties. Implied warranties were not the subject of negotiation or agreement and, therefore, were not revoked. The same result would have been reached under UCC section 2-316(2)135 because merchantability was not mentioned in the disclaimer. The contract in Stryker would have been effective under the UCC only to exclude all implied warranties of fitness for a particular purpose.136

Liability for breach of warranty was long held to require privity of contract between the parties, and recovery against the manufacturer by a sub-vendee was permitted only for negligence.137 However, a growing number of courts have abandoned this concept, and the trend of decisions is away from the requirement of privity.138 Except for the limited effect of section 2-318,139 the UCC does not alter the

132 UCC § 2-316(2), provides:

[T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “there are no warranties which extend beyond the description on the face hereof.”
134 Id. at 664, 8 App. Div. 2d at 245.
135 Cases cited note 131 supra.
136 Id. See also Lorensen, Product Liability and Disclaimers in West Virginia, 67 W. Va. L. Rev. 291 (1965).
137 In Smith v. Squire Homes, Inc., 329 N.Y.S.2d 243, 38 App. Div. 2d 879 (1972), the owner of a mobile home that was destroyed by fire was not allowed to recover from the maker of the defective furnace on the theory of breach of implied warranty. Since the owner was not in privity with the furnace maker, the proper theory would have been negligence.
138 Berry v. American Cynamid Co., 341 F.2d 14 (6th Cir. 1965) (defendant's defective oral polio vaccine administered to plaintiff by his physician); Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670 (1959) (manufacturer assumed direct contractual obligations toward the mobile home buyer by its warranty policy).
139 UCC § 2-318, provides:
requirement of privity. The official UCC comment declares that a neutral position is taken on this point. Whether privity is required is to be determined by the law of the state where the sale is made, rather than by the law of the state where subsequent damages are incurred.

In addition to the remedy based on breach of warranty for damages, the aggrieved mobile home owner may have an alternative recourse. Upon breach of warranty by a mobile home dealer, the buyer may rescind the contract and be restored to his former position or affirm the contract and recover damages. Since only one redress can be obtained, the buyer must be careful to elect the remedy he desires to pursue. An example of the consequences of improper election is Shreve v. Casto Trailer Sales, Inc. In Shreve, the buyer elected to rescind his purchase contract after living in the mobile home for five months. He was denied relief because he failed to act within a reasonable time after his discovery of the defect. The court also noted that a clear and timely notice to rescind the contract of sale must be given to the seller before a valid rescission can be granted. Both of these requirements are also included in the UCC.

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

UCC § 2-318, Comment 3, provides:
This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.

The West Virginia position as to the privity requirement is unclear. Dicta in Burgess v. Sanitary Meat Mkt., 121 W. Va. 605, 5 S.E.2d 785 (1939), indicates that privity is required. However, Kyle v. Swift & Co., 229 F.2d 887 (4th Cir. 1956), implies that the absence of privity is no bar to an action based on breach of warranty in West Virginia. For a more complete discussion of the problem, see 68 W. Va. L. Rev. 95 (1965).


Rescission and damages are inconsistent remedies. A suit for damages assumes that the contract is still in existence and can therefore be sued upon. In suing for rescission, the plaintiff is alleging that he is justified in avoiding or terminating the contract and demanding the return of his payments. 12 S. Williston, supra note 143; RESTATEMENT OF CONTRACTS § 381 (1933).


UCC § 2-601 (1), provides: "Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller."
The buyer's proper action would have been a damage suit for breach of warranty. 147

In Eggen v. M. & K. Trailers & Mobile Home Brokers, Inc., 148 however, although the buyer had lived in the mobile home for seven months, his letter notifying the dealer of rescission was held timely. The facts in Shreve were essentially analogous to those in Eggen. The only reasonable explanation for the difference in these cases is the problem of interpreting the term "reasonable time." Therefore, the only safe advice for a mobile home owner who desires to rescind his purchase contract is to notify the seller of this election immediately.

It should be reiterated that contractual problems concerning mobile homes are usually very similar to those involving other personal property. The attorney should find the appropriate UCC provision, if there is one, and supplement it with any necessary principles of law or equity. Trailer warranties present no unusual problems in this regard.

IV. Fixtures

One of the problems in the area of mobile home living concerns whether a mobile home is to be considered a fixture. 149 This determination becomes important with regard to the sale of land, priority of competing security interests, landlord and tenant relations, homestead rights, and insurance contracts, among other things. 150 Unfortunately, the various states differ greatly as to what constitutes a fixture. The leading American fixture case of Teaff v. Hewitt 151 rejected the harsh English attachment rule 152 and based its decision as to when a chattel becomes realty upon "the intention of the party making the

147 12 S. Williston, supra note 143.
149 A fixture is an article of personal property that, while retaining its separate physical identity, is brought upon and annexed to real property. The term implies something having possible existence apart from reality, but which by annexation is assimilated into reality. See generally 5 American Law of Property § 19 (A. J. Casner ed. 1952); L. Brown, Personal Property §§ 137-57 (2d ed. 1955); 5 R. Powell, Real Property §§ 651-60 (1971); 1 G. Thompson, Real Property §§ 55-81 (1964); 2 H. Tiffany, Real Property §§ 606-26 (3rd ed. 1939).
150 The determination may also be important in the assessment of ad valorem property taxes. See text accompanying note 9.
151 1 Ohio St. 511 (1853).
152 The English courts generally held that anything connected to the freehold was realty, regardless of the parties' intention. See Niles, The Rationale of the Law of Fixtures: English Cases, 11 N.Y.U.L.Q. Rev. 560 (1934).
annexation. 153 Modern courts have extended the standard so that now the usual criteria include: (1) Actual physical annexation to the realty; (2) application or adaptation to the use or purpose to which the realty is devoted; and (3) an intention on the part of the person making the annexation to make a permanent accession to the freehold. 154 The actual intention of the parties is usually the controlling consideration when the matter is litigated. 155 West Virginia has adopted this test in determining whether a particular item is to be deemed a fixture. 156

The distinction between a fixture and other kinds of property becomes important with regard to the purchase or sale of land. The problem usually revolves around whether a mobile home situated on the property in question is to be included in the buy-sell agreement. In resolving this question, an important factor to be considered in conjunction with the above tests 157 is whether the mobile home owner also owns the land. For example, in Gomez v. Dykes, 158 the mobile home in question was owned by an employee of the vendor. The mobile home was temporarily attached to a house on a ranch when the ranch was sold. Due to the employment relationship, the court found no intent by the employee to make a permanent accession to the freehold. 159 Accordingly, the court held that the mobile home was not a fixture and did not pass with the land to the vendee. 160

On the other hand, when the land and the mobile home attached to it are owned by the same person, the mobile home becomes a fixture if the owner considers it a permanent accession to the freehold. Such a situation arose in George v. Commercial Credit Corp., 161 where a trustee in bankruptcy attacked the rights of the holder of a real estate mortgage. The trustee claimed that a mobile home on the land was

153 The court held that this intention could be "inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made." 1 Ohio St. at 530.
154 George v. Commercial Credit Corp., 440 F.2d 551 (7th Cir. 1971).
155 Id.
156 "If the first two of these elements concur, that is, its attachment to the real estate and its adaptability to the purposes for which the real estate is being used, it will be presumed that the party attaching it intended that it should be a part of the real estate, unless a contrary intention appears from the conduct of the parties in relation to it." Snuffer v. Spangler, 79 W. Va. 628, 638, 92 S.E. 106, 110 (1917).
157 See text following note 153.
159 Id. at 175, 359 P.2d at 763.
160 Id. at 177, 359 P.2d at 764.
161 440 F.2d 551 (7th Cir. 1971).
personalty and that the mortgagee had no interest in it. The court held for the mortgagee, finding that the bankrupt's actual intention was to affix the mobile home to the land as a permanent residence. Besides considering concurrent ownership of the mobile home and land, the court noted that the bankrupt had applied for a building permit that required the erection of a concrete slab foundation within one year. In addition to purchasing a homeowner's insurance policy and requesting the seller to remove the wheels, he had never moved the trailer from his five-acre plot.\textsuperscript{162}

A more difficult situation arises when the intention of the mobile home owner is not clear, even though he may also own the land. \textit{Clifford v. Epsten}\textsuperscript{163} involved a mobile home that doubled as a temporary office for a mobile home park and a home for the manager-owner. When the mobile home park was sold, the vendor removed the trailer from the premises. Although the test of adaptability for use\textsuperscript{164} was satisfied, the court had some difficulty with the tests of attachment\textsuperscript{165} and intention.\textsuperscript{166} In fact, the court inferred a lack of intention from the nature of the attachment.\textsuperscript{167} Additionally, the vendor testified that he never intended the trailer to be a part of the realty and that it had been for sale at all times. He further testified that had he sold the trailer, he intended to convert a building on the premises into an office. Using the inference of lack of intention to corroborate the vendor's testimony, the court refused to grant a rescission of the contract for sale of the park.\textsuperscript{168}

It is clear that a prospective land purchaser who expects the contract of sale to include a mobile home on the land should take special precautions. If there is any doubt about the specificity of the contract, the buyer should include the mobile home in the list of property covered. Thus, the buyer avoids ever having to determine whether the mobile home was a fixture.

More complex problems arise in the area of security interests in mobile homes. Since the mobile home often becomes a fixture, the creditor may have to cope with the UCC provisions relating to fix-

\textsuperscript{162} Id. at 554.
\textsuperscript{163} 106 Cal. App. 2d 221, 234 P.2d 687 (1951).
\textsuperscript{164} See text after note 153.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} The mobile home was attached to the land only by plumbing and electrical connections, consisting of hose and tubing, which were detachable in two minutes. There were no permanent plumbing fixtures. 106 Cal. App. 2d at 224, 234 P.2d at 689.
\textsuperscript{168} Id. at 226, 234 P.2d at 690.
Apartment from protecting a security interest in a mobile home, a creditor may be more concerned with obtaining priority over a competing security interest in the same mobile home. If the mobile home will not become a fixture under law, UCC § 9-312(4) provides that the seller, in order to protect himself, must file a financing statement.

169 UCC § 9-313, notes 170, 175 and 193, infra.
170 UCC § 9-313(1): The rules of this section do not apply to goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal, work and the like and no security interest in them exists under this Article unless the structure remains personal property under applicable law. The law of this state other than this Act determines whether and when other goods become fixtures. This Act does not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate.
171 See text accompanying note 182.
172 UCC § 9-401(1)(a).
173 See text following note 177.
174 It will be helpful at this point to review the terminology used by the UCC in article 9. A security agreement is entered into between the secured party (creditor) and the debtor. The security agreement may take many forms, including a conditional sale contract or chattel mortgage, but whatever form it takes, the UCC provisions relating to a security agreement apply. The security agreement creates a security interest in the collateral, which, for our purposes, will be a mobile home.

This security interest is said to attach to the collateral when three things have occurred: (1) There is an agreement that it attach (security agreement); (2) the secured party has given value; and (3) the debtor has rights in the collateral, UCC § 9-204(1). The time of attachment becomes important in determining whether subsection 2 or 3 of § 9-313 applies. See note 175 infra.

Usually the security interest must be perfected to make it enforceable against third parties. This is done in one of three ways: (1) By taking possession of the collateral; (2) by filing a notice in the public office(s) as required by the UCC; or (3) by doing nothing if the security agreement arises from the sale of the mobile home. This third means of perfection is valid against everyone but a secondhand purchaser who buys the mobile home without knowledge of the security interest, for value and for his own personal, family or household purposes. UCC § 9-307(2). The secured party must file a financing statement to protect his security interest from such a person.

A financing statement is the notice that is filed to inform the public that a lien might exist. It must be signed by both the debtor and the secured party, it must give their addresses, and it must contain a description of the collateral. UCC § 9-402(1). Usually the security agreement itself can be adapted to this use.
within ten days after the debtor takes possession. However, if the mobile home does become a fixture, UCC § 9-313 is important in determining the priorities of competing security interests.\textsuperscript{175} Subsection 2 applies to a security interest that attaches to goods before they become fixtures. For example, in the usual situation the sale of a mobile home is made pursuant to a conditional sale contract. The house trailer is then set up on the land where it is to be used. If it becomes a fixture, subsection 2 gives the seller priority over the claims of all persons who have an existing interest in the real estate. Suppose a bank has a recorded mortgage on both the land and any existing or after-acquired personalty located thereon. If the mobile home was brought onto the land as a fixture, the seller’s security interest would automatically have priority over the bank’s then-existing mortgage under subsection 2.

Subsection 3 applies to a security interest that attaches to goods after they become fixtures. This situation can arise if a mobile home already affixed to the land is used as collateral for a loan. To have a valid security interest against any person with an interest in the real estate, the creditor must obtain from such person written consent\textsuperscript{176} to the security interest or a disclaimer\textsuperscript{177} of an interest in the mobile home as a fixture. However, these precautions may not protect a secured party if there is a prior unrecorded mortgage on the land. If the se-

\textsuperscript{175} The pertinent text of UCC § 9-313 is as follows:

\begin{quote}
\begin{itemize}
\item (2) A security interest which attaches to goods before they become fixtures takes priority as to the goods over the claims of all persons who have an interest in the real estate except as stated in subsection (4).
\item (3) A security interest which attaches to goods after they become fixtures is valid against all persons subsequently acquiring interests in the real estate except as stated in subsection (4) but is invalid against any person with an interest in the real estate at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as fixtures.
\item (4) The security interests described in subsections (2) and (3) do not take priority over
\begin{itemize}
\item (a) a subsequent purchaser for value of any interest in the real estate; or
\item (b) a creditor with a lien on the real estate subsequently obtained by judicial proceedings; or
\item (c) a creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances
\end{itemize}
if the subsequent purchase is made, the lien by judicial proceedings is obtained, or the subsequent advance under the prior encumbrance is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the real estate at a foreclosure sale other than an encumbrancer purchasing at his own foreclosure sale is a subsequent purchaser within this section.
\end{itemize}
\end{quote}

\textsuperscript{176} UCC § 9-313(3).

\textsuperscript{177} Id.
secured party is unaware of this mortgage, he obviously will not seek to secure a disclaimer. Subsection 3 says that the security interest in a fixture is invalid as to any person who had an interest in the real estate when it attached. There is no requirement that the prior interest in the land be recorded.\textsuperscript{178} A better means of protection is provided by a second mortgage on the whole of the real estate.\textsuperscript{179} Such a mortgage, once recorded, prevails over prior unrecorded mortgages. It also provides a wider base of collateral for the secured party.

In applying subsections 2 and 3, the key distinction is the time when the security interest attaches.\textsuperscript{180} If there is any doubt whether the security interest will attach before or after the mobile home is affixed to the real estate, subsection 3 precautions (consent or disclaimer) should be taken to insure maximum protection.

The secured party must also protect himself from subsequent claims against the mobile home.\textsuperscript{181} Subsection 4 requires him to perfect\textsuperscript{182} his security interest in order to take priority over (1) a subsequent purchaser for value; (2) a lien subsequently obtained by judicial proceedings; or (3) subsequent advances made or contracted for by a prior encumbrancer of record. The secured party will prevail, however, if any of these three parties have actual knowledge of the security interest in the mobile home.

To perfect his fixture security interest, the secured party must comply with the filing provisions of the UCC; Section 9-401(1) provides:

The proper place to file in order to perfect a security interest is as follows: . . . (b) when the collateral is goods which at the time the security interest attaches are or are to become fixtures, then in the office where a mortgage on the real estate concerned would be filed or recorded.

Section 9-402(1) adds: "When the financing statement covers . . . goods which are or are to become fixtures, the statement must also

\textsuperscript{178} Id.
\textsuperscript{179} UCC § 9-313(1) allows fixture-secured parties to be governed by real estate principles.
\textsuperscript{180} See note 174, supra.
\textsuperscript{181} There has been some disagreement among the authorities as to what the term "subsequent" means in subsection 4. Does it mean subsequent only to attachment, or subsequent to attachment and affixation? For a discussion of differing views see 2 P. Coogan, Secured Transactions Under the UCC 1791 n.18 (1963); G. Gilmore, Security Interests in Personal Property 827 (1965).
\textsuperscript{182} See note 174, supra.
contain a description of the real estate concerned. . . ." In a typical situation, the mobile home dealer moves a house trailer, which has been sold under a conditional sales contract, to its permanent location where it becomes a fixture. In order to perfect his interest and protect himself from a subsequent purchaser, the dealer must file a financing statement\(^{183}\) describing the real estate to which the trailer is affixed. It must be filed in the county where the trailer is located.

It should be noted at this point that the filing provisions of article 9 do not apply when the mobile home is required to be titled under a motor vehicle statute.\(^{184}\) Such a requirement would be created if the mobile home was to be moved by its owner on the public highways.\(^{185}\) In such a situation perfection is obtained by a notation of the security interest on the face of the certificate of title.\(^{186}\)

In many instances the purchaser sets up his mobile home on a rented lot. Since he does not intend to make it a part of the realty, the trailer keeps its status as personalty and cannot be perfected as a fixture.\(^{187}\) When the trailer is moved to the lot by the dealer, no certificate of title is required to be issued.\(^{188}\) In this situation, the dealer's interest is automatically perfected when it attaches,\(^{189}\) giving him priority over everyone except a subsequent purchaser who buys the mobile home for use as his residence.\(^{190}\) This lone exception can be guarded against by filing a financing statement in the county where the debtor resides.\(^{191}\) As mentioned at the outset of this discussion, the safest way to obtain full protection is to file both as a fixture and as a chattel.\(^{192}\)

\(^{183}\) Id.
\(^{184}\) UCC § 9-302(3)(b) and (4). West Virginia's motor vehicle statute is found in W. VA. CODE ch. 17A (Michie 1966).
\(^{185}\) See W. VA. CODE ch. 17A, art. 1, § 1(j) in conjunction with ch. 17A, art. 3, § 2 (Michie 1966).
\(^{186}\) W. VA. CODE ch. 17A, art. 4A, § 1 (Michie 1966).
\(^{187}\) See text following note 153.
\(^{188}\) W. VA. CODE ch. 17A, art. 6, § 1 (Michie 1966).
\(^{189}\) UCC § 9-302(1)(d).
\(^{190}\) UCC § 9-307(2).
\(^{191}\) UCC § 9-401(1) provides:

The proper place to file in order to perfect a security interest is as follows: (a) When the collateral is . . . consumer goods, then in the office of the county clerk in the county of the debtor's residence or if the debtor is not a resident of this State then in the office of the county clerk in the county where the goods are kept . . .

\(^{192}\) See text following note 170. In West Virginia, the relatively few financing statements involving fixtures are filed together with the vast number of financing statements involving personalty. They are indexed together in the same set of books. An undue burden is thus placed on the attorney making a land title search. Most attorneys in Kanawha County take the risk of not examining this set of books when searching titles. Address by John T. Copen-
If the debtor defaults, a secured party who has priority over all other claims may remove the mobile home from the real estate, an action usually known as repossession. However, the secured party must reimburse anyone with an interest in the real estate for any physical injury done to the land when the fixture is removed. The secured party may even be forced to give security for this obligation before he is allowed to remove the mobile home. Usually this will be of little concern to the dealer, since a mobile home can be removed with little or no damage to the real estate.

When a mobile home resident defaults in the payment of his lot rental, the park owner may assert a lien on the mobile home. In such a situation, the mobile home is usually burdened with a chattel mortgage to secure its purchase price. Who will prevail between these conflicting interests? It must be noted that article 9 of the UCC does not apply to a landlord’s lien. Statutes that create a lien for landlords usually protect prior lien-holders. Some states have even passed specific legislation that gives liens on the property of tenants to mobile home park operators. However, since priorities differ under these statutes, each prospective lien-holder should look to the controlling law in his state in determining the safest course of action.

In West Virginia, if the property is subject to a lien that was valid against the tenant’s creditors when brought onto the premises, only the tenant’s interest in the property is liable for distress. Even if the lien is not recorded, actual knowledge of such lien by the landlord before

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193 UCC § 9-313(5) provides:

When under subsections (2) or (3) and (4) a secured party has priority over the claims of all persons who have interests in the real estate, he may, on default, subject to the provisions of Part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

194 Id.
195 Id.
197 UCC § 9-104(b).
198 See B. HODES & G. ROBERSON, supra note 196, at 229 n.37.
199 W. VA. CODE ch. 37, art. 6, § 13 (Michie 1966).
the property is moved on the premises would give the prior lien-holder priority over the landlord's lien for rent.\textsuperscript{200} Since the landlord's lien attaches at the moment the property reaches the premises,\textsuperscript{201} the West Virginia landlord has priority over any creditor who subsequently perfects his lien on such property.\textsuperscript{202} The only exception is a conditional seller who records the conditional sale contract within ten days after the sale is made.\textsuperscript{203} Thus, the mobile home dealer in West Virginia is protected from the landlord's lien if he files his financing statement within ten days of the purchase.\textsuperscript{204}

A person who is financing the purchase of a mobile home should be aware of the problems created by homestead exemptions. Most states have statutes that allow this exemption from creditors' claims. Their purpose is to secure a place of residence for the family. The amounts of these exemptions vary widely from state to state,\textsuperscript{205} but the concept remains basically the same. Whether these exemptions apply to mobile home residents is sometimes a difficult question. Although the standards of qualification for the homestead exemption vary, a mobile home generally must be affixed to the realty and its owner must have a sufficient interest in the realty.\textsuperscript{206} For example, when the mobile home is used as the permanent residence of its owner and has become a fixture on his land, there is no question that it should qualify as a "homestead." At the other extreme, if the mobile home is being moved on the highways it is no longer affixed to the land and would not qualify for the exemption under most homestead statutes.

Problems arise when the mobile home is used as a residence upon a leased lot. Does the resident have a sufficient interest in the land?

\textsuperscript{201} Prior to State ex rel. Payne v. Walden, the West Virginia landlord usually enforced his lien through distress for rent proceedings. W. Va. Code ch. 37, art. 6, §§ 12, 13 (Michie 1966). The Payne decision struck down these provisions as unconstitutional on the ground of lack of due process. See 74 W. Va. L. Rev. 170 (1972).
\textsuperscript{203} For a more complete discussion of secured transactions and the West Virginia landlord's lien see 65 W. Va. L. Rev. 40 (1962).
\textsuperscript{204} The western states usually allow a larger exemption than those in the east. Compare West Virginia's $1,000 homestead exemption allowance, one of the lowest in the nation, W. Va. Code ch. 38, art. 9, §§ 1-5 (Michie 1966), with the $5,000 exemption permitted by Texas, Tex. Civ. Stat. Ann. art. 3833 (Vernon 1966).
\textsuperscript{205} In West Virginia, the requirements of a homestead are obscure. Included in the homestead is the land "together with the premises and appurtenances thereunto belonging." W. Va. Code ch. 38, art. 9, § 2 (Michie 1966). It seems reasonable that a mobile home would qualify as an appurtenance.
Cases in Texas\textsuperscript{207} and Nebraska\textsuperscript{208} have held that a tenancy from month to month in the real estate is a sufficient interest to support the homestead claim. A more difficult question for the courts has been the degree of affixation necessary. Texas cases have considered this question, but the answers have been inconsistent. In \textit{Clark v. Vitz},\textsuperscript{209} a mobile home was attached to the owner’s house and used as an extra room. The court held that it was not a legal fixture, but found that it was sufficiently affixed to the land to qualify as part of the homestead. This policy was seemingly reversed in \textit{Gann v. Montgomery}.\textsuperscript{210} The court held that the Texas homestead statute did not apply unless the place of residence had “the characteristics of a permanent fixture attached to the realty.”\textsuperscript{211} In the most recent Texas decision on this issue, \textit{Capitol Aggregates, Inc. v. Walker},\textsuperscript{212} the court established a fixture standard to determine whether the house trailer was “affixed” to the land.\textsuperscript{213} Regarding the issue of intention, however, the court seemed to adopt a different test than that used in the determination of a fixture. The court was satisfied that the mobile home had been affixed to the land “with the intention to enhance the usability of said leasehold estate in said land as the plaintiffs’ home.”\textsuperscript{214}

The case indicates an abandonment of the strict fixture test of \textit{Gann} and an attempt to give effect to the plain intent of the Homestead Act — to secure for the family a place of residence. This same philosophy with respect to mobile homes has been adopted in at least two other jurisdictions.\textsuperscript{215}

It is clear from the foregoing that a seller or other creditor with a security interest in a mobile home should protect himself from the homestead exemption. Real estate mortgages often contain a clause that waives the right to a homestead exemption. A similar clause can be inserted into the mobile home security agreement to provide the desired protection. Such action by the seller would probably not be

\textsuperscript{208} \textit{In re Foley}, 97 F. Supp. 843 (D.C. Neb. 1951).
\textsuperscript{209} 190 S.W.2d 736 (Tex. Civ. App. 1945).
\textsuperscript{210} 210 S.W.2d 255 (Tex. Civ. App. 1948).
\textsuperscript{211} \textit{Id.} at 260.
\textsuperscript{212} 448 S.W.2d 830 (Tex. Civ. App. 1969).
\textsuperscript{213} The following tests were used: (1) Actual physical annexation to the realty; (2) application or adaptation to the use or purpose to which the realty is devoted; and (3) an intention on the part of the person making the annexation to make a permanent accession to the freehold. \textit{Id.} at 834. See text following note 153.
\textsuperscript{214} 448 S.W.2d at 832 (emphasis added).
necessary in West Virginia. The homestead statute in West Virginia allows no exemption for debts incurred for the “purchase money” of or the “erection of permanent improvements” on the real estate. A debtor can hardly argue that his mobile home is part of his homestead but is neither realty nor an improvement thereon. A subsequent lien creditor need not obtain a waiver of an unrecorded homestead exemption in West Virginia, since the homestead is not exempted from debts contracted before the declaration of the exemption is recorded. Thus, in practice, West Virginia’s homestead exemption offers very little protection for the debtor.

The status of a mobile home as personalty or fixture may be important in determining the liability of an insurer. When a fire loss has occurred, “valued policy” statutes in many states make the measure of damages the same as the amount of fire insurance written into the policy. This rule usually applies only to realty and improvements on realty. If personal property is lost in a fire, the measure of damages is simply the value of that property.

In Farmers Mutual Insurance Co. v. Denniston, the court had to decide whether a house trailer had lost its identity as “personal property” within the valued policy law. The fixture test was used, and the trailer was found not to be a part of the realty. Although the trailer was insured for $7,500, plaintiff Denniston recovered only $3,550, the approximate value of the trailer. The fixture distinction was thus worth approximately $4,000 to the litigants.

217 W. Va. Code ch. 38, art. 9, § 2 (Michie 1966). The exemption declaration must include a description of the land, together with the premises and any appurtenances. Hence, a mobile home would have to be either realty or an improvement thereon (appurtenance) to qualify under the homestead exemption in the first place.
219 The “valued policy law” in West Virginia is in W. Va. Code ch. 33, art. 17, § 9 (Michie 1966). In case of a total loss, the insurer is liable for the face amount of the policy. A total loss occurs when a prudent owner who had no insurance would build a new building instead of trying to repair the damaged one. Nicholas v. Granite State Fire Ins. Co., 125 W. Va. 349, 24 S.E.2d 280 (1943).
221 237 Ark. 768, 376 S.W.2d 252 (1964).
222 See note 203, supra.
223 The mobile home was located on land not belonging to its owner, the wheels and tires remained attached, and the owner testified that he would take it off the property unless he sold it. 237 Ark. at 776, 376 S.W.2d at 256.
The same issue was decided in Meccage v. Spartan Insurance Co.,\textsuperscript{224} the court holding that a mobile home was an "improvement on real property"\textsuperscript{225} within the valued policy statute. No fixture standard was used, although the trailer home would probably have qualified as a fixture under the threefold test.\textsuperscript{226} The court stated that the trailer was "clearly affixed to the land"\textsuperscript{227} since it was connected to a sewer and rested upon a permanent foundation. The plaintiff recovered $3,000, the amount of the policy, instead of the trailer's estimated value of $1,500.

An insurer, therefore, should not allow its policy coverage to exceed greatly the value of a mobile home that has become a fixture, at least in those states that have a "valued policy" statute. Conversely, an insured whose mobile home is not a fixture should realize that his recovery may be limited to the value of the home instead of the face amount of the policy and may want to adjust the amount of his coverage accordingly.

\textit{Mark Summers}
\textit{Frederick D. Fahrenz}
\textit{David C. Shepler}\textsuperscript{*}

\textsuperscript{224}156 Mont. 135, 477 P.2d 115 (1970).
\textsuperscript{225}Id. at 139, 477 P.2d at 117.
\textsuperscript{226}Id. at 136, 477 P.2d at 116.
\textsuperscript{227}Id. at 138, 477 P.2d at 117. The court used the definition of an "improvement on real property" found in the Montana property tax statute that required affixation to the land.

\textsuperscript{*}Mr. Summers prepared part I, Mr. Fahrenz prepared part II, and Mr. Shepler prepared parts III and IV of this article.
APPENDIX I

SURVEY OF THE COUNTY ASSESSORS OF WEST VIRGINIA ON PROCEDURES USED IN TAXING MOBILE HOMES

<table>
<thead>
<tr>
<th>County</th>
<th>Class in which Mobile Home is Placed when situated on:</th>
<th>Time Cty. Has Followed Procedure</th>
<th>Rationale</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Owned Land</td>
<td>Leased Land</td>
<td>Other</td>
</tr>
<tr>
<td>1. Barbour</td>
<td>II</td>
<td>II</td>
<td>—</td>
</tr>
<tr>
<td>5. Calhoun</td>
<td>II</td>
<td>III-IV</td>
<td>20 yrs.</td>
</tr>
<tr>
<td>6. Clay</td>
<td>II</td>
<td>III-IV</td>
<td>20 yrs.</td>
</tr>
<tr>
<td>7. Doddridge</td>
<td>II</td>
<td>IV</td>
<td>—</td>
</tr>
<tr>
<td>8. Fayette</td>
<td>II</td>
<td>III</td>
<td>7 yrs.</td>
</tr>
<tr>
<td>9. Gilmer</td>
<td>II</td>
<td>III-IV</td>
<td>10 yrs.</td>
</tr>
<tr>
<td>10. Grant</td>
<td>II</td>
<td>III-IV</td>
<td>Always</td>
</tr>
<tr>
<td>11. Hampshire</td>
<td>II</td>
<td>III-IV</td>
<td>10 yrs.</td>
</tr>
<tr>
<td>12. Hancock</td>
<td>II</td>
<td>III-IV</td>
<td>5 yrs.</td>
</tr>
<tr>
<td>13. Hardy</td>
<td>II</td>
<td>III-IV</td>
<td>—</td>
</tr>
<tr>
<td>15. Kanawha</td>
<td>II</td>
<td>II</td>
<td>3 yrs.</td>
</tr>
<tr>
<td>16. Lewis</td>
<td>II</td>
<td>III-IV</td>
<td>Always</td>
</tr>
<tr>
<td>18. Mason</td>
<td>II</td>
<td>III-IV</td>
<td>—</td>
</tr>
<tr>
<td>19. Mercer</td>
<td>II</td>
<td>III-IV</td>
<td>—</td>
</tr>
<tr>
<td>21. Morgan</td>
<td>II</td>
<td>III</td>
<td>6 yrs.</td>
</tr>
<tr>
<td>22. Ohio</td>
<td>II</td>
<td>II</td>
<td>2 yrs.</td>
</tr>
</tbody>
</table>

Comments:

1. Those marked with an asterisk (*) are the counties which reduce the assessed valuation of mobile homes on leased land to equalize the taxes between Class II and Classes III and IV.

2. Some of the assessors responding to the survey did not want to include their name or the name of their county so they have been designated as "Name Unknown."
### STUDENT NOTES

*(Appendix I continued.)*

<table>
<thead>
<tr>
<th>County</th>
<th>Class in which Mobile Home is Placed when situated on:</th>
<th>Time Cty. Has Followed Procedure</th>
<th>Rationale</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Owned Land</td>
<td>Leased Land</td>
<td>Other</td>
</tr>
<tr>
<td>23. Pendleton</td>
<td>II</td>
<td>III</td>
<td>—</td>
</tr>
<tr>
<td>24. Pocahontas</td>
<td>II</td>
<td>III-IV</td>
<td>—</td>
</tr>
</tbody>
</table>
| 25. Putnam  | II       | III-IV     | —     | 1 yr.                           | Class II — 50%*  
Class III-IV — 25% |
| 26. Summers | II       | II         | —     | 2 yrs.                          | On leased land gets II only by furnishing 1 yr. lease or contract |
| 27. Taylor  | II       | III-IV     | —     | Always                          | —          |
| 28. Tucker  | II       | III-IV     | —     | Always                          | If in III or IV,*  
Valued at 2/3 of II. |
| 29. Union   | II       | III-IV     | —     | 6 yrs.                          | —          |
| 30. Upshur  | II       | II         | —     | 12 yrs.                         | —          |
| 31. Webster | II       | III-IV     | —     | 15 yrs.                         | —          |
| 32. Wetzel  | II       | III-IV     | —     | —                               | Classes III and IV are Pers. Prop. |
| 33. Wood    | II-IV    | III-IV     | —     | 5 yrs.                          | On owned, Taxpayer can choose whether he wants Class II or IV |
| 34. Name Unknown | II    | III-IV     | —     | 4 yrs.                          | Rec. by State Tax Commissioner |
| 35. Name Unknown | II    | III        | —     | 2 yrs.                          | —          |
| 36. Name Unknown | II    | III-IV     | —     | 10 yrs.                         | Taxed at 50% of trailer value after depreciation |
| 37. Name Unknown | II    | III-IV     | —     | 8 yrs.                          | State Schedule |
| 38. Name Unknown | II    | III-IV     | —     | 18 yrs.                         | Class II is Real Estate, III and IV are Pers. Prop. |
| 39. Name Unknown | II    | III        | —     | Sev. yrs.                        | Entitled to II because used as residence |
| 40. Name Unknown | II    | III        | —     | 2 yrs.                          | —          |
| 41. Name Unknown | II    | III-IV     | —     | 10 yrs.                         | Treats owner-occupied as other taxpayers |
| 42. Name Unknown | II    | III-IV     | —     | Always                          | Must own land to qualify for II |
| 43. Name Unknown | II    | III        | —     | 3 yrs.                          | Reduce value on those* on leased land so taxes equal those in Class II. |

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SURVEY OF THE LAWS OF THE 50 STATES PERTAINING TO
TAXATION OF MOBILE HOMES

I. States that tax Mobile Homes as Realty

1. ALAS. CODE § 29.53.040 (1972) (Realty if attached and not expressly
taxed as personalty by local ordinance).
3. KAN. STAT. ANN. § 8-143 (Supp. 1972) (Realty if owner of mobile
home owns land and mobile home permanently attached, otherwise
registered under motor vehicle code).
4. KY. REV. STAT. § 132.750 (1971) (Treated as realty if wheels removed
and rests on permanent foundation).
5. MD. ANN. CODE art. 81, § 19 (1969) (Realty if used for residential
purpose and permanently attached).
6. MICH. STAT. ANN. § 7.2(1) (1971) (When located on land assessable
as real property and used for habitation whether or not permanently
affixed).
7. MISS. CODE ANN. §§ 10007-73 to 88 (Supp. 1971) (Personalty if not on
mobile home owner's land. If on mobile home Owner's land, taxpayer
has option of declaring whether real or personal property at the time of
registration.).
8. NEB. REV. STAT. § 77-103 (1971) (Mobile home is real estate if "per-
manently attached").
10. N.Y. CODE REAL PROP. TAX § 102(12)(g) (McKinney 1972) (Real
property if located in boundaries of assessing unit for 60 days; the value
of the trailer is included in the assessment value of the land).
11. ORE. REV. STAT. § 308.875 (1971) (If the land and the mobile home are
owned by the same person, the mobile home is real property. If the
land and mobile home are owned by different people, the mobile home
is personalty. The fact that a mobile home is real property doesn't exempt
it from licensing and registration as a motor vehicle.).
12. PA. STAT. ANN. tit. 72, § 5020-201 (1968) (Mobile home is real property
if permanently attached).
13. TEX. CODE CIVIL STATS. art. 7146 (Supp. 1972-73) (Real property if
within boundary of assessing unit for 60 days. Value of mobile home is
included in the value of the land if owned by the same person, if not
owned by the same person, assessed in the name of the mobile home
owner. The land is only subject to execution for non-payment of taxes
if the land and mobile home are owned by the same person.).
14. WASH. REV. CODE ANN. § 84.04.090 (Supp. 1972) (Real estate whether
on owned or leased land if it substantially loses its identity as a mobile
unit by being placed on permanent foundation and attached to utilities).

II. States that Treat Mobile Homes as Personalty

2. MINN. STAT. § 168.012(9) (1960).

III. States that Treat Mobile Homes as Motor Vehicles

1. ALA. CODE tit. 51, § 704(1) & (2) (Supp. 1971) (Exempt if taxed as
part of realty).
5. OKLA. STAT. ANN. tit. 47, § 22.5m (Supp. 1972-73) (Taxed as motor
vehicle except when wheels have been removed and it becomes a per-
manent improvement on land).
6. IOWA CODE ANN. § 135d.22 (1972).
STUDENT NOTES

7. TENN. CODE ANN. § 59-105(d) (Supp. 1972) (Taxable as motor vehicle whether or not attached to the land).
8. WYO. STATS. § 31-16(h) (Supp. 1971) (Requires registration under the motor vehicle code but does not specifically exempt from taxation as real or personal property).

IV. States that Tax Mobile Homes by a License Fee System
2. CONN. GEN. STAT. REV. § 12-63a (1958) (Municipalities can provide for monthly license fee in lieu of property tax).
3. FLA. CONST. art. VII, § 1(b). (Mobile homes are subject to a license fee and exempt from ad valorem taxation).
7. MASS. GEN. LAWS ANN. ch. 140, § 32G (1972) (Mobile home park operator collects monthly fees from occupants which he pays to the municipality).
10. N.D. CENT. CODE § 57-55-05 (1972) (Tax decal obtained from county auditor in lieu of property tax).
12. WIS. STAT. ANN. § 66.058 (Supp. 1973) & § 70.112(7) (1969). (Mobile homes are exempted from general property tax and municipal units are empowered to enact “trailer park ordinances”).

V. States that Have No Specific Statutes on Taxation (This does not, however, mean that mobile homes are not taxed in these states.)
1. Arkansas
2. District of Columbia
3. Georgia
4. Hawaii
5. Idaho
6. Louisiana
7. Maine
8. North Carolina
9. Rhode Island
10. Utah
11. West Virginia