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## Commercial Transactions

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# COMMERCIAL TRANSACTIONS

by

Vernon O. Teofan\*

**D**URING the survey period, the Uniform Commercial Code, as enacted in Texas, became less uniform; and, while some appellate courts acknowledged its enactment in Texas, none of them were called upon to decide any cases under its provisions. The legislature made significant changes in the Code, and, in addition, adopted a business and commerce code and increased the legal rate of interest chargeable in certain consumer and corporate credit transactions. More than 100 cases involving commercial transactions were decided. The great majority were of a routine nature in which established rules were restated. However, some established principles were expressly overruled or simply not followed and new principles were announced. Some of these will be rendered obsolete by the Uniform Commercial Code; others will survive.

## I. RECENT LEGISLATION

*Uniform Commercial Code.* Effective June 18, 1967, five sections of the Uniform Commercial Code pertaining to the perfection of various security interests were amended.<sup>1</sup>

*Fixtures.* Prior to the amendment, a financing statement covering goods which were or were to become fixtures had to contain, in addition to the standard information, a description of the real estate concerned.<sup>2</sup> The place of filing was in the office where a mortgage on the related real estate would be filed or recorded.<sup>3</sup> Under the amendment, the financing statement now must also contain: (1) the name of the record owner of the real estate, and (2) the statement "Collateral is or include fixtures."<sup>4</sup> The amendment specifically provides that the first additional requirement may be satisfied by using the name supplied by the debtor when the financing statement relates to a purchase money security interest in fixtures having a purchase price not in excess of \$1,500, unless the secured party knows that the name furnished is not that of the record owner. The burden of establishing such knowledge is placed upon the party attacking the effectiveness of the filing. Thus, it would appear that in all other cases the use of the name supplied by the debtor is at the secured party's peril, and in the event of a misnomer the filing may be held ineffective. While the place of filing remains the same, the filing officer is now required to index the statement in a separate book endorsed "Security Interests in Fixtures" and the filing perfects a security interest only in goods which are or are to become fixtures. Therefore, if the financing

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<sup>1</sup> Tex. Laws 1967, ch. 735, §§ 9-302, 9-401, 9-402, 9-403, 10-102, at 1984. See also the excellent Article, Cosway, *Fixtures Under the Uniform Commercial Code*, 21 Sw. L.J. 713 (1967).

<sup>2</sup> Tex. Laws 1965, ch. 721, § 9-402(1), at 170.

<sup>3</sup> *Id.* § 9-401(b), at 170.

<sup>4</sup> Tex. Laws 1967, ch. 735, § 5, at 1985.

statement covers goods which are not or are not to become fixtures, or if there is some doubt as to whether they are or are to become fixtures, a separate non-fixture filing should also be made.

*Crops.* Under the amendment, a financing statement covering crops growing or to be grown also must contain, in addition to the standard information and a description of the real estate concerned, the name of the record owner of the real estate. However, there is no presumption, as exists in the case of fixtures, that the name supplied by the debtor is correct. The requirement that the statement be filed with the County Clerk in the county of the debtor's residence and also with the County Clerk in the county where the land is located remains unchanged, as does the effect of the filing.<sup>5</sup>

*Motor Vehicles.* As originally enacted, the filing provisions of article 9 did not apply to security interests in property subject to a statute which provided for central filing of such interest or required its indication on a certificate of title.<sup>6</sup> Thus excluded were all motor vehicles and trailers subject to the Texas Certificate of Title Act.<sup>7</sup> The amendment now provides that where such goods are held as "inventory," the security interest can be perfected only by complying with the filing provisions of article 9. Where such goods are held other than as "inventory," the security interest is perfected by its indication on a receipt for a duly filed application for a Certificate of Title or Corrected Certificate of Title or on the Certificate of Title or a duplicate thereof by a public official.

*Pre-Code Security Interests.* Prior to the amendment, a pre-Code security interest continued to be governed by the pre-Code law as though such law had not been repealed.<sup>8</sup> Presumably, it could be renewed, extended, continued and assigned as permitted by the repealed law. Therefore, in order to determine whether or not specific collateral is subject to an existing security interest, it is now necessary to search for pre-Code liens as well as for security interests under the Code. To eventually eliminate the necessity for this dual search, the amendment provides that after December 31, 1967, no further filings may be made under pre-Code law other than those in the nature of a release and establishes a cut-off date of July 1, 1971, on or before which pre-Code security interests will lapse unless perfected under the Code.

*Business and Commerce Code.* This Code,<sup>9</sup> which became effective on September 1, 1967, constitutes a formal, as distinguished from a substantive, revision of approximately 125 Texas statutes of a commercial nature. These statutes are restated in modern English and reorganized into a uniform format. Brought forward, without change in legislative purpose, are the first nine chapters of the Uniform Commercial Code and statutes relating to monopolies, trusts and conspiracies in restraint of trade, trade-

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<sup>5</sup> Tex. Laws 1965, ch. 721, § 9-401(1)(a), at 169.

<sup>6</sup> *Id.* § 9-302(3), at 161.

<sup>7</sup> TEX. PEN. CODE ANN. art. 1436-1 (Supp. 1967).

<sup>8</sup> Tex. Laws 1965, ch. 721, § 10-102(2), at 179.

<sup>9</sup> Tex. Laws 1967, ch. 785, at 2095.

marks, deceptive trade practices, assignments for the benefit of creditors, fraudulent transfers, property under lien, the statute of frauds, fraud, fiduciary security transfers, principal and surety and various miscellaneous commercial transactions.

*Corporations—Interest Rate.* As of May 25, 1967, domestic and foreign corporations, when contracting to borrow \$5,000 or more, may agree to pay interest up to one and one-half per cent per month, and in such instances, unless they are charitable or religious corporations, they are prohibited from interposing the defense of usury.<sup>10</sup>

*Consumer Credit Code.* This Code<sup>11</sup> provides for the comprehensive regulation of practically all types of consumer credit transactions. Within its coverage fall loans of \$2,500 or less, installment loans made by banks, savings and loan associations and credit unions, secondary mortgage loans, retail installment sales and motor vehicle installment sales. Limitations are placed on the charges which may be imposed in connection with such transactions, but interest well in excess of ten per cent per annum is authorized. The Code also establishes the office of Consumer Credit Commissioner, provides for consumer education and debt counseling on a non-profit basis, prohibits certain deceptive trade practices and provides penalties for usury and other prohibited acts. This Code became effective at midnight on September 30, 1967, with the exception of the chapters on retail installment sales and motor vehicle installment sales, which became effective at midnight on December 31, 1967.

## II. COURT DECISIONS

*Bulk Sales—Nature of Remedy Available.* When the Bulk Sales Act<sup>12</sup> was repealed and the subject matter brought forward in the Uniform Commercial Code,<sup>13</sup> the language making the transferee a receiver and accountable to the transferor's creditors for the goods transferred was not carried over. However, the Code does provide that a bulk transfer which does not comply with its provisions is "ineffective" against any creditor of the transferor<sup>14</sup> and it is believed that the pre-Code remedies remain available.<sup>15</sup> The nature and extent of the pre-Code remedy was discussed in two civil appeals cases.

In the first case,<sup>16</sup> the plaintiff, an open account creditor of the transferor, alleged that a violation of the Bulk Sales Act occurred and that the defendant transferee had become a receiver of the inventory acquired. However, the only relief prayed for was judgment for the amount of the

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<sup>10</sup> *Id.* ch. 296, at 713.

<sup>11</sup> *Id.* ch. 274, at 608.

<sup>12</sup> TEX. REV. CIV. STAT. ANN. arts. 4001-03 (1966).

<sup>13</sup> Tex. Laws 1965, ch. 721, art. 6, at 109.

<sup>14</sup> *Id.* § 6-104, at 110.

<sup>15</sup> See Larson, *Article 6 of the Uniform Commercial Code: Bulk Transfers*, 44 TEXAS L. REV. 661, 667 (1966).

<sup>16</sup> *Nichols v. Acers Co.*, 415 S.W.2d 683 (Tex. Civ. App. 1967) *error ref. n.r.e.*

account. The court of civil appeals held the petition insufficient to require the trial court to proceed with a remedy under the statute, but concluded that even if the Bulk Sales Act was violated, the plaintiff would be entitled to recover only the value of his merchandise transferred to the defendant and that in the absence of any evidence that any of the merchandise he sold to the transferor was included in the inventory transferred, he was not entitled to any relief under the Act.

In the second case,<sup>17</sup> the court held that a landlord who had been paid rental through August 31, 1965, the date of the bulk transfer, under a lease effective until August 1969, but who was not paid rental due thereafter, was a creditor entitled to relief under the Bulk Sales Act. The court further held that the transferee occupies the status of a receiver and is accountable to the seller's creditors on a pro-rata basis only to the extent of the value of the property and has no personal liability at all unless he converts property to his own use or places it beyond the reach of the creditors.

The opinion in the latter case is more in keeping with the purpose of and decisions under the Bulk Sales Act.<sup>18</sup> Creditors generally extend credit on the strength of the transferor's total assets and not just the inventory which they sell him. The narrow concept of the remedy expressed in the first case would limit relief to merchandise creditors and then only to the extent of the value of their merchandise which was transferred in bulk. Other general creditors would be excluded and the way would be open for fraudulent transfers to avoid their obligations. Under the Uniform Commercial Code, creditors holding claims based on transactions or events occurring before the bulk transfer are protected.<sup>19</sup>

#### *Bills and Notes.*

*Failure of Consideration.* In *S & H Supply Company v. Hamilton*,<sup>20</sup> an apartment builder found, after the apartment was completed, that he was unable to pay all construction costs or obtain a permanent loan. Thereupon he entered into a contract with the defendants which provided that he would transfer the apartment to them and they in turn would assume the construction debts. The interim lender had to be paid, but before the transaction for the permanent loan could be closed, proof that all construction bills were paid had to be furnished. One of the debts due and unpaid was that of a plumbing contractor. Under these circumstances, the defendants dealt directly with the contractor, paid him some cash and delivered to him their installment note for the balance. They then signed an affidavit that all bills were paid and the permanent loan was granted. Thereafter, the builder refused to deliver the deed to the apartment to the defendants. The note was not paid, and suit was filed to enforce its col-

<sup>17</sup> *B & H Auto Supply, Inc. v. Andrews*, 417 S.W.2d 341 (Tex. Civ. App. 1967).

<sup>18</sup> See *Southwestern Drug Corp. v. McKesson & Robbins*, 141 Tex. 284, 172 S.W.2d 485 (1943); *Settegast v. Second Nat'l Bank*, 126 Tex. 330, 87 S.W.2d 1070 (1935); *Gardner v. Goodner Wholesale Grocery Co.*, 247 S.W. 291 (Tex. Civ. App. 1922).

<sup>19</sup> TEX. BUS. & COM. CODE § 6.109 (1967).

<sup>20</sup> 418 S.W.2d 489 (Tex. 1967).

lection. The sole defense was that the consideration for the note failed because a deed to the apartment was never delivered to the defendants. The trial court found that the note was supported by new consideration which did not fail. The court of civil appeals disagreed, but a divided supreme court affirmed the judgment of the trial court. The majority of the court was of the opinion that the consideration for the note was the plumbing contractor's relinquishment of his right to an immediate suit and that the defendants obtained what they had bargained for in giving the note, the ability to close the transaction for the permanent loan. The dissenting judges were of the opinion that the note was but a small part of, grew out of and was in conformance with, the larger assumption agreement and that the defenses available in a suit on that agreement should also be available in a suit on the note.

*Time Payable.* In a civil appeals case<sup>21</sup> the defendant had executed and delivered a demand note to the plaintiff's husband in the early 1950's. The date of the note was left blank. In May 1963, the plaintiff's husband, when on his deathbed, wrote in the date "May 6, 1963." The defendant, among other things, urged that the note was barred by limitations. The court of civil appeals, in affirming the trial court's judgment for the plaintiff, held that there was evidence from which the trial court could have found that the act of the husband in writing in the date was within the authority granted him by the maker and that, therefore, the note did not become due until after May 6, 1963.

The general rule is that limitations run from the date of a note payable on demand.<sup>22</sup> However, if the court's conclusion is correct, the effect of the statute of limitations can easily be avoided by inserting a provision in an undated demand note to the effect that the holder has the authority to select and fill in the date. In effect, the note would be payable on demand because it could be dated at any time, and limitations would not begin to run until it was dated.

*Banks and Banking.* The time in which a claimant must take action with relation to a bank's error was considered by the supreme court in two cases.

*Late Return of Dishonored Item.* In *Exchange Bank & Trust Co. v. Pure Ice & Cold Storage Co.*,<sup>23</sup> the defendant payor bank failed to make return of a dishonored check before midnight of the banking day after the day of its presentment. Under the Bank Collection Code,<sup>24</sup> which was then in effect, the bank, at the election of the payee, could be deemed to have accepted the check and could be held liable for its amount. It was undisputed that the check had not been timely returned, and that the plaintiff payee had not notified the bank of its election to hold the bank liable until approximately two years later when it filed suit. The jury

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<sup>21</sup> *Scaman v. Scaman*, 417 S.W.2d 86 (Tex. Civ. App. 1967) error granted.

<sup>22</sup> 37 TEX. JUR. 2d *Limitations* § 60 (1962).

<sup>23</sup> 415 S.W.2d 897 (Tex. 1967).

<sup>24</sup> TEX. REV. CIV. STAT. ANN. art. 342-704 (1959).

found that the payee had not waived its right to hold the bank liable. The trial court held that the payee, as a matter of law, had failed to exercise the election and entered judgment for the bank. The court of civil appeals reversed and rendered judgment for the payee, holding that it exercised the election by filing suit against the bank. The supreme court, after reviewing the procedure under which provisional credit is given by each bank handling the check as it makes its way through banking channels to the payor bank, which credit is settled when the check is accepted by the payor bank, but revoked when it is dishonored, held that the very nature of the banking transaction required the payee to exercise its election with reasonable promptness. Otherwise, the court concluded, these provisional credits would remain unsettled until an action against the payor bank was barred by limitations and many recorded balances would be so uncertain as to be meaningless for long periods of time. Accordingly, the judgment of the court of civil appeals was reversed and that of the trial court affirmed.

The responsibility of a payor bank for the late return of an item is now governed by the Uniform Commercial Code which does not require any election. In the absence of a valid defense, the payor bank is responsible for the amount of an item if it is not timely settled, paid or returned or if timely notice of dishonor is not sent.<sup>25</sup>

*Payment of Forged Check.* In *Hillcrest State Bank v. Elvis-Southwest, Inc.*,<sup>26</sup> the supreme court, in refusing the bank's application for writ of error, no reversible error, specifically pointed out that it was neither approving nor disapproving the court of civil appeals' holding that under the Texas Banking Code the customer was given a one-year period during which he was under no duty to examine his cancelled checks and would not be negligent in failing to discover forgeries. The court of civil appeals' opinion was discussed in last year's *Survey*.<sup>27</sup>

Under the Uniform Commercial Code, the customer now has the duty to exercise reasonable care and promptness in examining his statement and cancelled checks and to notify the bank of unauthorized signatures or alterations. His failure to do so may excuse the bank from liability for subsequent items forged or altered by the same wrong-doer unless the customer establishes lack of ordinary care on the part of the bank in paying the item. A limitation period of one year is declared with respect to unauthorized signatures and alterations and of three years as to unauthorized endorsements.<sup>28</sup>

*Sales—Implied Warranty of Suitableness.* More than a dozen cases were decided by the appellate courts in this field, including four by the Texas Supreme Court. The doctrine of implied warranty in the absence of privity of contract announced in *Jacob E. Decker & Sons v. Capps*,<sup>29</sup>

<sup>25</sup> TEX. BUS. & COM. CODE § 4.302 (1967).

<sup>26</sup> 409 S.W.2d 841 (Tex. 1966).

<sup>27</sup> Larson, *Commercial Transactions, Annual Survey of Texas Law*, 21 Sw. L.J. 124, 125 (1967).

<sup>28</sup> TEX. BUS. & COM. CODE § 4.407 (1967).

<sup>29</sup> 139 Tex. 609, 164 S.W.2d 828 (1942).

under which a non-negligent manufacturer of contaminated food was held liable for physical harm caused to its consumer, was extended by the supreme court in *McKisson v. Sales Affiliates, Inc.*,<sup>30</sup> and *Franklin Serum Company v. C. A. Hoover & Son*,<sup>31</sup> two cases in which a defective product caused physical harm to the user or caused damage to his property. While the plaintiff need not prove privity, he still must establish that the injury or damage was caused by a defect in the product existing at the time it was delivered by the seller.<sup>32</sup>

In *Shamrock Fuel & Oil Co. v. Tunks*<sup>33</sup> and *McKisson v. Sales Affiliates, Inc.*,<sup>34</sup> the Texas Supreme Court further held that contributory negligence consisting merely of a failure to discover the defect in the product or to guard against the possibility of its existence is not a defense to a suit based upon strict liability under an implied warranty of suitability, but indicated that improper use or a voluntary persistence in use after discovery of the defect and danger would be a defense.

The Uniform Commercial Code, as adopted in Texas, is neutral on the question of third party beneficiaries of warranties of quality and on the requirement of privity of contract, leaving these matters to the courts for their determination.<sup>35</sup> In a civil appeals case,<sup>36</sup> a patient who suffered eye damage allegedly resulting from improperly fitted contact lenses sued the defendant optical company for breach of an implied warranty that the contact lenses were reasonably fit for the use intended. The court denied recovery, holding that only a strained view of the professional relationship between the optometrist and the patient could class the optometrist as a salesman of lenses. And, in another case<sup>37</sup> in which the plaintiff's house was damaged by a fire allegedly caused by a defective fireplace, the court denied any recovery against the seller of the house who had it built by some independent contractors under a theory of breach of an implied warranty of merchantability and fitness for use. It should be noted that the supreme court has granted applications for writ of error in both of the above cases and that a more definitive statement of the *Decker* doctrine might be anticipated.

Express and implied warranties, including implied warranties of fitness for a particular use or purpose are dealt with in detail in the Uniform Commercial Code.<sup>38</sup>

*Recovery of Reasonable Attorney's Fees.* In most lawsuits involving commercial transactions, the plaintiff sues to recover attorney's fees in addition

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<sup>30</sup> 416 S.W.2d 787 (Tex. 1967). For further discussion, see Keeton, *Torts*, this *Survey*, at footnote 1.

<sup>31</sup> 418 S.W.2d 482 (Tex. 1967).

<sup>32</sup> *Jack Roach-Bissonnet, Inc. v. Puskar*, 417 S.W.2d 262 (Tex. 1967). See also Comment, *Strict Products Liability—Its Application and Meaning*, 21 Sw. L.J. 629 (1967).

<sup>33</sup> 416 S.W.2d 779 (Tex. 1967). For further discussion, see Keeton, *Torts*, this *Survey*, at footnote 3. See also *Shamrock Fuel & Oil Sales Co. v. Tunks*, 406 S.W.2d 783 (Tex. Civ. App. 1966).

<sup>34</sup> 416 S.W.2d 787 (Tex. 1967).

<sup>35</sup> TEX. BUS. & COM. CODE § 2.318 (1967).

<sup>36</sup> *Texas State Optical, Inc. v. Barbee*, 417 S.W.2d 750 (Tex. Civ. App. 1967) error granted.

<sup>37</sup> *Humber v. Morton*, 414 S.W.2d 765 (Tex. Civ. App. 1967) error granted.

<sup>38</sup> TEX. BUS. & COM. CODE §§ 2.312-2.317 (1967).

to his claim and costs. In some cases recovery is authorized by the terms of the note or contract sued upon and in others by the terms of a statute. In those cases where the claim is for personal services rendered, labor done, material furnished or suits founded upon a sworn account, the recovery of reasonable attorney's fees is authorized by article 2226.<sup>39</sup> During the survey period, the awarding of reasonable attorney's fees was carefully scrutinized by the courts and limitations were placed on their recovery.

The basic rule is that attorney's fees are not recoverable unless provided for by statute or by contract between the parties. In applying this rule, the Texas Supreme Court in *New Amsterdam Casualty Co. v. Texas Industries, Inc.*<sup>40</sup> overruled the holding in prior civil appeals' decisions<sup>41</sup> that attorney's fees were recoverable in a suit by a laborer or materialman against the surety on a bond under the McGregor Act<sup>42</sup> per force article 2226. The court noted that neither the bond nor the statute provided for the recovery of such fees. Since the material was not furnished to the surety, but rather to the contract-principal, it concluded that as against the surety attorney's fees were not authorized.

One area of confusion regarding the recoverability of attorney's fees under article 2226 exists with relation to those cases where labor is done or materials are furnished pursuant to the terms of a special contract. Recoverability seems to turn on whether the court construes the claim as one for damages for breach of the contract or one to recover for labor done and materials furnished.<sup>43</sup> This difference is not always easily discernible. Thus, during the survey period, civil appeals' decisions held that attorney's fees were recoverable by a concrete company which supplied ready-mix concrete for a highway job under a materials subcontract<sup>44</sup> and by a pipeline contractor where part of the damages sought was for labor and materials furnished prior to the breach of the construction contract by the owner,<sup>45</sup> but were not recoverable by a building contractor where the owner breached the contract after labor and materials were furnished<sup>46</sup> or by a paving contractor which furnished labor and materials in paving two streets<sup>47</sup> or by a manufacturer which made and delivered plastic cases under

<sup>39</sup> Article 2226. Any person having a valid claim against a person or corporation for personal services rendered, labor done, material furnished, overcharges on freight or express, lost or damaged freight or express, or stock killed or injured, or suits founded upon a sworn account or accounts, may present the same to such person or corporation or to any duly authorized agent thereof; and if, at the expiration of thirty (30) days thereafter, the claim has not been paid or satisfied, and he should finally obtain judgment for any amount thereof as presented for payment to such person or corporation, he may also recover, in addition to his claim and costs, a reasonable amount as attorney's fees, if represented by an attorney.

TEX. REV. CIV. STAT. ANN. art. 2226 (1964).

<sup>40</sup> 414 S.W.2d 914 (Tex. 1967).

<sup>41</sup> *Yates v. Industrial Steel Prods. Co.*, 399 S.W.2d 892 (Tex. Civ. App. 1965); *H. Richards Oil Co. v. W. S. Luckie, Inc.*, 391 S.W.2d 135 (Tex. Civ. App. 1965) *error ref. n.r.e.*

<sup>42</sup> TEX. REV. CIV. STAT. ANN. art. 5160 (1962).

<sup>43</sup> *Roby Industries, Inc. v. Maxwell Electronics Corp.*, 409 S.W.2d 559 (Tex. Civ. App. 1966) *error ref. n.r.e.* (dictum); *Delhi Pipeline Corp. v. Lewis, Inc.*, 408 S.W.2d 295 (Tex. Civ. App. 1966).

<sup>44</sup> *Page v. Superior Stone Prods., Inc.*, 412 S.W.2d 660 (Tex. Civ. App. 1967) *error ref. n.r.e.*

<sup>45</sup> *Delhi Pipeline Corp. v. Lewis, Inc.*, 408 S.W.2d 295 (Tex. Civ. App. 1966).

<sup>46</sup> *Latham v. Dement*, 409 S.W.2d 429 (Tex. Civ. App. 1966) *error ref. n.r.e.*

<sup>47</sup> *Ball v. Cooper-Stanley Co.*, 413 S.W.2d 467 (Tex. Civ. App. 1967).

a subcontract providing for a fixed price per unit<sup>48</sup> or by a painting contractor who furnished labor and materials in repainting a hotel.<sup>49</sup>

In the past, in those cases where their recovery was authorized, the trial courts fixed and awarded reasonable attorney's fees as a matter of course in summary judgment proceedings, in non-jury trials, and in granting default judgments, without requiring proof of reasonableness. This was done under an "accepted" line of cases which held that trial and appellate courts could take judicial notice of what would be a reasonable attorney's fee.<sup>50</sup> This is no longer the law. In *Great American Reserve Insurance Co. v. Britton*,<sup>51</sup> the supreme court held that reasonableness of attorney's fees is a question of fact to be determined by the court or jury as any other fact issue and as such is required to be supported by competent evidence and cannot be adjudicated on judicial knowledge.

While it was believed that reasonable attorney's fees could be awarded in summary judgment proceedings if supported by the positive detailed affidavit of the attorney handling the case,<sup>52</sup> such a contention has been specifically rejected by several courts of civil appeals.<sup>53</sup>

In light of these recent opinions, it now appears that where the defendant files a general denial, reasonable attorney's fees can be awarded only after a trial on the merits. Cases which would otherwise have been disposed of summarily must now remain on the already overcrowded trial dockets of the courts. In many cases, a general denial is filed as a matter of course or for the specific purpose of stalling the entry of the judgment. And, in most commercial cases, the passage of time adversely affects collectibility. In an effort to overcome the delay ordinarily incident to a trial on the merits, especially when a jury fee has been paid, some trial courts when setting a case for hearing on a motion for summary judgment will also set it down for trial on the issue of attorney's fees immediately thereafter in the event the summary judgment on the basic claim is granted. In those situations where this practice is not feasible, the issue of reasonable attorney's fees may be severed and a final judgment can be rendered on the claim.<sup>54</sup>

Since these decisions are fairly recent, their long-term effect on the trial dockets of the courts is not yet known. In the event substantial delay in

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<sup>48</sup> *Roby Industries, Inc. v. Maxwell Electronics Corp.*, 409 S.W.2d 559 (Tex. Civ. App. 1966) *error ref. n.r.e.*

<sup>49</sup> *Mercantile Nat'l Bank v. Hudgens*, 412 S.W.2d 364 (Tex. Civ. App. 1967) *error ref. n.r.e.*

<sup>50</sup> *Garner v. City of Houston*, 323 S.W.2d 659 (Tex. Civ. App. 1959); *Ferrous Prods. Co. v. Gulf States Trading Co.*, 323 S.W.2d 292 (Tex. Civ. App. 1959), *aff'd*, 332 S.W.2d 310 (1960); *National Life & Accident Ins. Co. v. Runnels*, 227 S.W.2d 351 (Tex. Civ. App. 1950); *Franklin Life Ins. Co. v. Woodyard*, 206 S.W.2d 93 (Tex. Civ. App. 1947); *C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE* § 207 (2d ed. 1956).

<sup>51</sup> 406 S.W.2d 901 (Tex. 1966) (for further discussion, see Davis, *Insurance Law, this Survey*, at footnote 31); *Schechter v. Folsom*, 417 S.W.2d 180 (Tex. Civ. App. 1967). See also *Reynolds Research & Mfg. Co. v. Scamardo*, 412 S.W.2d 941 (Tex. Civ. App. 1967).

<sup>52</sup> *Leal v. Leal*, 401 S.W.2d 293 (Tex. Civ. App. 1966).

<sup>53</sup> *Akin v. Akin*, 417 S.W.2d 882 (Tex. Civ. App. 1967); *New Amsterdam Cas. Co. v. Texas Industries, Inc.*, 408 S.W.2d 733 (Tex. Civ. App. 1966), *rev'd on other grounds*, 414 S.W.2d 914 (Tex. 1967).

<sup>54</sup> *Great Am. Reserve Ins. Co. v. Britton*, 406 S.W.2d 901 (Tex. 1966); *Rhoades v. Miller*, 414 S.W.2d 942 (Tex. Civ. App. 1967).

the disposition of these cases or of the severed issue of attorney's fees results, it may be that legislation authorizing the trial court to find and fix attorney's fees under a procedure similar to that used by the federal courts in anti-trust cases<sup>55</sup> would be in order.

Although no cases were decided under the Texas version of the Uniform Commercial Code during this past year, it may be anticipated that the Code will have a greater effect on the case law in the near future, especially considering the amendment prohibiting filings under pre-Code law other than those in the nature of a release after December 31, 1967, and a July 1, 1971, cut-off date for the lapsing of pre-Code security interests unless perfected under the Code.

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<sup>55</sup> See *Twentieth Century-Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964).