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Do 'Special Answers' Make a Sound?

By Dan Jacobson

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If a statute is enacted but not used, does it make a sound? This philosophical, late-night dorm room talk question comes to mind when considering Code of Civil Procedure Section 428.70. Operative since 1972, Section 428.70 allows a third-party cross-defendant to assert defenses against the *plaintiff's* complaint. That's a pretty nifty device because by definition, a third-party cross-defendant has not been sued by the plaintiff, yet such a third party can defend against the plaintiff; and, that defense does not constitute a general appearance in the plaintiff's portion of the case.

Even so, a search of California cases shows only one reported case involving Section 428.70 (*Administrative Management Services Inc. v. Fidelity and Deposit Company of Maryland* (1982) 129 Cal.App.3d 484;). Having defended cross-defendants in complex cases for well over a decade and a half, I can't remember ever seeing a special answer, except for those filed by me or my law firm.

The utility for the special answer is suggested by Section 428.70's legislative history. "The special answer provided by Section 428.70 is designed primarily to meet the problem that arises where a plaintiff sues a defendant and the defendant cross-complains against a third party for indemnity." (10 Cal. Law Revision Com. Rep., p. 555.) While in such a scenario the cross-defendant has not been sued by the plaintiff, the cross-defendant's interest in the plaintiff's case is keen. If the plaintiff does not prevail, there's no indemnity - there's nothing for which the defendant/cross-complainant need to be, or even could be indemnified. (Except see *Crawford v. Weathershield* 44 Cal.4th 581 (2008) re indemnification for attorney fees pursuant to contract.)

The legislative history goes on, "To protect himself from the defendant's failure or neglect to assert a proper defense to the plaintiff's action, through collusion or otherwise, the *cross-defendant* is allowed to assert any defenses available to the original defendant directly against the plaintiff." (10 Cal. Law Revision Com. Rep., p. 555.) One can easily foresee a situation suggested by the legislative history, wherein the plaintiff and the defendant/cross-complainant collude to go after the cross-defendant. "You know, the cross-defendant has the bigger insurance policy; so, I (the defendant/cross-complainant) will lay off the defenses that I have against you (the plaintiff), so long as you and I blame the cross-defendant for everything. I'll then get reimbursed for whatever money judgment that is entered against me, because the cross-defendant will owe me that money in

indemnity."

More commonly, a non-collusive situation will present itself. Take construction defect cases for example. Typically in such cases the developer is sued by a group of homeowners. The developer then sues all of the subcontractors for indemnity. It is usually in the developer's interest to keep all of the subcontractors in the case, and "on the hook" so that the developer can gather a pot of subcontractor money to settle the case. That way the developer is able to get out of the case using as little of its own money as possible.

There are varying statutes of limitations for construction defect matters, depending on the type of defect alleged. (See e.g., Code of Civil Procedure Section 337.1 *four years for patent defects*, Code of Civil Procedure Section 337.15 *10 years for latent defects*, Civil Code Section 896 *various time limits, depending type of defective construction alleged, effective for homes sold after Jan. 1, 2003*, and Civil Code Section 941(a) *10 years general statute for residences, effective for homes sold after Jan. 1, 2003*.) The statute of limitations for failure of "[i]rrigation systems [sprinklers]... [to] operate... so as not to damage landscaping or other external improvements" is two years. (Civil Code Â§ 896(g)(7).)

A developer who has been sued for issues related to the entirety of the houses involved in the lawsuit, and is thus likely generally subject to Civil Code Section 941(a)'s 10 year statute, is probably not going to be interested in pursuing the two years statute of limitations for the sprinklers. Even if there's nothing wrong with the sprinklers, the developer may want to hold onto the subcontractor that installed the sprinklers to get money out of that subcontractor to pay for defects that actually exist. The sprinkler installer subcontractor's insurance company may make an economic "cost of defense" decision to put in the general settlement pot.

If the sprinkler installing subcontractor, which has been sued for indemnity by the developer but has not been sued by the plaintiff, doesn't file a special answer, then that subcontractor is wholly dependent on the developer to enforce the two year statute - something that the developer probably won't do. Thus, the sprinkler installer has a lovely two year statute of limitations that will never be enforced.

In complex cases, often time the plaintiff and the developer settle "around" the cross-defendants. As part of the plaintiff and defendant/cross-complainant settlement agreement, the plaintiff will usually receive all of the defendant/cross-complainant rights against the cross-defendants. With the defendant out of the picture, there are no affirmative defenses alleged against plaintiff. Under this scenario, all guns face the cross-defendants, and no guns face the plaintiff, or at least any guns that face the plaintiff lay idle, completely unmanned - except in that rare case where a cross-defendant has filed a special answer under Section 428.70.

The one reported case involving Section 428.70, *Administrative Management Services Inc. v. Fidelity and Deposit Company of Maryland* (1982) 129 Cal. App. 3d 484, involved a statute of limitations. In that case the plaintiff sued Fidelity and Deposit Company of Maryland (F&D), which in turn cross-complained against Cartright. F&D failed to raise a statute of limitations defense to the plaintiff's complaint. In fact, the trial court ruled that F&D had waived the statute as a defense.

But, Cartright filed a special answer pursuant to Section 428.70; that special answer apparently contained one defense - that the statute of limitations imposed by Code of Civil Procedure Section 337(1) barred the plaintiff's suit. The trial court struck that special answer, apparently succumbing to the plaintiff's argument that the statute defense was not available to the cross-defendant because it was not available to F&D (which had waived it).

The Court of Appeal reversed. The court said, "This is precisely the kind of case for which... section [428.70] was intended. It enables Cartwright '[to] protect himself from [F&D's] failure or neglect to assert a proper defense to... [the plaintiff's] action.' (Law Revision Rep., p. 555.)" So, a statute of limitations defense was born where none had existed before.

Getting back to the late-night dorm discussion - if a statute is enacted but not used, does it make a sound? Certainly on those few occasions when Section 428.70 has been used, it has the potential for making noise; in fact, it can make a thunderous sound. In *Administrative Management* it birthed a statute of limitations defense that had not existed. So, it can have a huge impact; sometimes an outcome determinative impact. But Section 428.7 just stays in the books, where it's been since 1972 - silently waiting for someone to use it.

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