No. S 156598

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BROWN, WINFIELD & CANZONERI, INC.

Petitioner/Respondent,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

GREAT AMERICAN INSURANCE COMPANY, a corporation,

Real Party in Interest/Petitioner.

Court of Appeal Case No. B 201396

Superior Court Case No. BC 331601
(The Hon. Elihu M. Berle)

ANSWER TO PETITION FOR REVIEW

After Orders Filed August 28, 2007, and September 12, 2007,
in the Court of Appeal, Second Appellate District, Division Three

Bruce A. Friedman (No. 65862)
Kenneth S. Meyers (No. 99959)
Gina M. Simas (No. 205367)
BINGHAM McCUTCHEN LLP
The Water Garden - 1620 26th Street
Fourth Floor, North Tower
Santa Monica, CA 90404-4060
Telephone: (310) 907-1000
Facsimile: (310) 907-2000

Attorneys for Respondent
Brown, Winfield & Canzoneri, Inc.

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Santa Monica, CA 90404-4060
Telephone: (310) 907-1000
Facsimile: (310) 907-2000

Attorneys for Respondent
Brown, Winfield & Canzoneri, Inc.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This action, Great American Insurance Company v Brown, Winfield & Canzoneri, Inc., is an insurance coverage declaratory relief action brought by Petitioner Great American Insurance Company ("Great American"), seeking a declaration that Great American has no duty to defend or indemnify Respondent Brown, Winfield & Canzoneri, Inc. ("BWC") in connection with claims asserted against BWC in an underlying legal malpractice action entitled Azusa Pacific University v. Brown, Winfield & Canzoneri, Inc., et al., Los Angeles Superior Court Case No. BC 331055 (the "Malpractice Action"). (Exh. 1, App. 1-7.)[1] Great American's Petition for Review arises out of actions taken by the Court of Appeal and the Superior Court in response to a Petition for Writ of Mandate, Prohibition or Other Appropriate Relief brought by BWC (the "Writ Petition"), requesting that the Court of Appeal issue a writ to the Superior Court requiring the Superior Court to reinstate a stay in this action pending the conclusion of the Malpractice Action.

In response to the Writ Petition, the Court of Appeal issued an order that in form and substance constituted a simple alternative writ - the Court of Appeal stated its intent to issue a writ as requested by BWC in its Writ Petition, offered the Superior Court the opportunity to correct its own prior order and reinstate the stay of this action, and provided a briefing schedule in the event that the Superior Court did not do so. (*See* Petition for Review, Exh. A.) The Superior Court responded to the Court of

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[1] References to "Exh. __, App. __" are to the exhibit numbers and page numbers in the Appendix of Exhibits filed in support of BWC's Petition for Writ of Mandate, Prohibition or Other Appropriate Relief.

Appeal's order by correcting its prior order and reinstating the stay. (*See* Petition for Review, Exh. B.) The Court of Appeal then dismissed the Writ Petition as moot. (*See* Petition for Review, Exh. C.)

Notwithstanding this entirely ordinary series of actions by the Court of Appeal and the Superior Court in response to BWC's Writ Petition, Great American has filed a Petition for Review, seeking review of two issues. First, Great American seeks review of the issue of whether the form of the Court of Appeal's order constituted an improper "speaking *Palma* notice" (seemingly a term coined by Great American's counsel) that violated the notice requirements for peremptory writs set forth by this Court in *Palma v U.S. Industrial Fasteners, Inc.*, 36 Cal.3d 171 (1984) and deprived Great American of due process. Second, Great American asks this Court to review an issue that was not even directly raised below: In considering whether to lift a stay previously imposed in an insurance coverage declaratory relief action pursuant to *Montrose Chemical Corp. v. Superior Court*, 6 Cal.4th 287 (1993) ("*Montrose I*"), may a trial court include as a factor in that consideration any delay in prosecution of the underlying action.

Neither of these issues satisfies the standards for review of an underlying decision by this Court. The review sought by Great American is not necessary to secure uniformity of decision nor to settle any important question of law. Great American does not, and cannot, cite to any decisions with which the Court of Appeal's order conflicts, nor is the Court of Appeal's order even a published decision. Nor do Great American's issues present any important questions of law - while the issues as to which Great

American seeks review may be important to Great American, they are not of particular significance to other litigants or the legal community in general.

Great American's "speaking *Palma* notice" issue is based on a faulty premise - that the Court of Appeal's order affording the trial court the opportunity to reverse its prior action somehow differs from "the normal alternative writ procedure that would require further briefing and oral argument before the Court of Appeal" before any action was taken. (Petition, at 27.) However, the "normal alternative writ procedure" in fact contemplates exactly what occurred here - a Court of Appeal

> "may, 'upon ascertaining that the petition is in proper form and states a basis for relief, issue an alternative writ which commands the respondent to act in conformity with the prayer of the petition or, alternatively, show cause before the Court of Appeal why it should not be ordered to so act. The respondent may choose to act in conformity with the prayer, in which case the petition becomes moot."

Kowis v. Howard, 3 Cal.4th 888, 893 (1992), quoting *Palma*, 36 Cal.3d at 177-178.

The sequence of events described by this Court in *Kowis* is exactly what happened here. Thus, the Court of Appeal did not "effectively issue a writ in 24 hours." (Petition, at 25.) The Court of Appeal did not issue a writ at all, it just followed the established procedures for alternative

writs. Nor does the Court of Appeal's action conflict with this Court's decision in *Palma*; that case was concerned with appropriate notice procedures and due process in cases where the Court of Appeal actually issues a peremptory writ. *Palma* does not purport to govern, let alone change, the standard alternative writ procedures that occurred in this action.

The second issue raised by Great American also does not present an important question of law. The claimed importance of the second issue is undermined by the fact that in the 14 years that have passed since the decision in *Montrose I* this issue has never been raised in a single published decision. Moreover, Great American premises its argument in support of this issue on a clearly inadequate and misleading statement of the relevant facts. In arguing that delay should be a factor for consideration where "there is no clear overlap in the facts between [the] declaratory relief action and its underlying liability action" (Petition, at 32-33), Great American simply ignores facts that demonstrate the existence of such a "clear overlap" here. For example, Great American expressly represented to the trial court that it intended to conduct discovery into the "content of the communications between Azusa [the Malpractice Action plaintiff] and BWC in 2002 and thereafter." (Exh. 6, App. 68, lines 2-3.) Per *Montrose I*, a stay is proper where the coverage questions "turn[] on facts to be litigated in the underlying action." (Emphasis added.) *Montrose I*, 6 Cal.4th at 301. These communications between attorney and client related to the attorneys' representation of the client are necessarily also at issue in the Malpractice Action. Great American's utter failure in its Petition for Review to acknowledge this factual overlap is a sufficient ground for this

Court to deny the Petition.

A final reason why Great American's Petition for Review should be denied is that the issues will almost certainly become moot before the time that this Court addresses the merits of the Petition if review is granted. The trial in the Malpractice Action is scheduled for February 25, 2008. Once that action is concluded, the stay in this Coverage Action will expire under its own terms. This Court should not waste its limited resources on this case.

Great American has not made any showing that the issues it raises in its Petition for Review satisfy this Court's standards for review. The Court of Appeal's unpublished order does not conflict with any other decisions, nor does it implicate any important questions of law. The Petition for Review should be denied.

II. STATEMENT OF RELEVANT FACTS

This action, Great American Insurance Company v Brown, Winfield & Canzoneri, Inc., Los Angeles Superior Court No. BC 331601 (the "Coverage Action") is an insurance coverage declaratory relief action brought by Petitioner Great American Insurance Company ("Great American"), seeking a declaration that Great American has no duty to defend or indemnify Respondent Brown, Winfield & Canzoneri, Inc. ("BWC") in connection with claims asserted against BWC in an underlying legal malpractice action entitled, Azusa Pacific University v. Brown, Winfield & Canzoneri, Inc., et al., Los Angeles Superior Court No. BC 331055 (the "Malpractice Action"). Great American's Petition for Review

arises out of actions taken by the Court of Appeal and the Superior Court in response to a Petition for Writ of Mandate, Prohibition or Other Appropriate Relief brought by BWC (the "Writ Petition"), which requested that the Court of Appeal issue a writ to the Superior Court requiring the Superior Court to reinstate a stay of the Coverage Action pending the conclusion of the Malpractice Action.

A. The Claims In The Malpractice Action

On March 29, 2005, Azusa Pacific University ("Azusa") filed a complaint for legal malpractice against, *inter alia*, BWC with respect to BWC's representation of Azusa in an eminent domain proceeding and related inverse condemnation action. Azusa alleges in its complaint in the Malpractice Action that BWC failed to use the skill and care that reasonably careful attorneys handling similar matters in the community would have used in the circumstances in representing Azusa in the eminent domain proceeding. (Exh. 8, App. 77-90.)

B. Great American Files This Declaratory Relief Action

On April 8, 2005, Great American filed its complaint in this Coverage Action, seeking a declaration that there is no coverage owed to BWC for the claims asserted against BWC in the Malpractice Action. (Exh. 1, App. 1-7.) In its complaint, Great American recounts the allegations in the Malpractice Action concerning BWC's representation of Azusa in the eminent domain proceeding and inverse condemnation action. (Exh. 1, App. 2-3, ¶¶ 5-10.) Among the defenses to coverage alleged by Great American is that coverage is precluded because prior to applying for

the Policy BWC had a reasonable basis to believe that a professional duty had been breached or that a Claim would be made. (Exh. 1, App. 4, ¶16.)

C. BWC's June 2005 Motion To Stay The Coverage Action

On June 8, 2005, BWC filed a motion to stay the Coverage Action, requesting that the Superior Court stay the action pending conclusion of the Malpractice Action. (Exhs. 3-5, App. 11-55.) In its motion to stay, BWC argued that the Coverage Action should be stayed because facts to be litigated in the Coverage Action would also be litigated in the underlying Malpractice Action.

Great American opposed the June 2005 motion to stay. In its opposition, Great American contended that the Coverage Action included, *inter alia*, the following issues:

> "Does exclusion (6) of the subject ... insurance policy apply, which excludes coverage for claim (sic) in which the insured had prior knowledge of the claim?" (Exh. 6, App. 65-66.)[2]

> "Discovery in the declaratory relief action will

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[2] Although not relevant to the issues before the Court on this Petition, BWC contends that Great American issued a single policy for the period of November 2001 through February 2005, such that the "claim" was reported within the policy period of that single policy even if a "claim" had been made in August 2002 (which it was not). (Exh. 3, App. 24, lines 26-28.) BWC also contends that Great American is barred from enforcing any purported claims made requirements by reason of its violation of California Insurance Code Section 11580.01 (Exh. 8, App. 100, lines 22-27.)

be focused on the date and content of the communications between Azusa and BWC in 2002 and thereafter." (Emphasis added.) (Exh. 6, App. 68, lines 2-3.)

"The facts that [Great American] will pursue will be the manner and content of the communications from Azusa to BWC to advise BWC that Azusa was displeased with BWC's legal services." (Exh. 6, App. 68, lines 21-22.)

"[A] claim was made as early as August 2002, when BWC agreed to provide its services in the inverse condemnation action at no cost to its client." (Exh. 6, App. 59, lines 21-23.)

These statements by Great American in its opposition to the motion to stay highlight the factual overlap between the Coverage Action and the Malpractice Action. Great American will rely on the content of communications between BWC and Azusa to support Great American's assertion that BWC was aware of a potential claim prior to inception of the Policy. Great American will also assert that BWC's agreement to provide its services in the inverse condemnation action at no cost to Azusa was in response to an expression of displeasure by Azusa with BWC's services. This assertion parallels Azusa's assertion in the Malpractice Action that the

same representation constituted a "tacit admission" by BWC of its breach of duty. (Exh. 8, App. 81, ¶19.) Notwithstanding Great American's contention that there is no overlap between the two actions, it is clear from these statements that the issues that Great American intends to litigate in the Coverage Action encompass facts that are central to the issues being litigated in the Malpractice Action. In attempting to establish facts in support of its defenses to coverage, Great American will also be attempting to establish facts that will inure directly to the benefit of Azusa in the Malpractice Action.

On July 11, 2005, the Superior Court, the Honorable Elihu M. Berle, presiding, granted BWC's motion to stay and ordered the Coverage Action "stayed until the completion of the underlying [Malpractice Action]." (Exh. 10, App. 115.)

D. The Superior Court Lifts The Stay In July 2007

At a June 11, 2007 status conference in the Coverage Action, the Superior Court issued an Order to Show Cause regarding the status of the stay and set a further status conference and hearing on the Order to Show Cause for July 3, 2007. (Exh. 11, App. 116.)

On June 27, 2007, BWC filed its Brief in Response to Order to Show Cause re Continuation of Stay of Litigation. (Exh. 12, App. 117-222.) In that brief, BWC reiterated the arguments that had been made in support of the 2005 motion to stay, and asserted that the facts supporting that stay had not changed as the Malpractice Action had not yet come to a conclusion. Great American also filed a brief in response to the Order to Show Cause, essentially repeating the arguments it previously made in

2005 in opposition to the motion to stay. (Exhs. 13 and 14, App. 223-282.)

On July 3, 2007, the Superior Court issued its order lifting the stay of this action and setting the action for trial on January 14, 2008. (Exh. 15, App. 283.) As reflected in both the Superior Court's Minute Order and the Reporter's Transcript of the July 3, 2007 proceedings (Exh. 16, App. 284-291.), the Superior Court apparently was less concerned with whether there remained common facts at issue in both actions and more concerned that the Malpractice Action had not yet been set for trial. Thus, at the hearing on the Order to Show Cause, the Superior Court suggested that its setting of a trial date in this action might "encourage the setting of the trial in the other department" (referring to the Malpractice Action). (Exh. 16, App. 287, lines 15-16.)

E. BWC Files A Petition For Writ Of Mandate, Prohibition Or Other Appropriate Relief, Seeking To Have The Stay Reinstated

On August 17, 2007, BWC filed its Writ Petition, seeking a writ from the Court of Appeal directing the Superior Court to reverse its July 3, 2007 order and to reinstate the stay of the Coverage Action pending the conclusion of the Malpractice Action. BWC also requested an immediate stay of discovery and the impending trial date in the Coverage Action. BWC's Writ Petition also included a "*Palma* notice," notifying Great American that BWC was requesting peremptory relief in the first instance.

F. The Court Of Appeal's August 28, 2007 Order

On August 28, 2007, the Court of Appeal issued the order at

issue in this Petition for Review. (*See* Petition for Review, Exh. A.) In its order, the Court of Appeal: (1) issued a temporary stay of proceedings in the Superior Court; (2) stated that it was considering the issuance of a peremptory writ of mandate in the first instance directing the Superior Court to reinstate the stay; (3) conferred on the Superior Court the power and jurisdiction to change and correct its prior order and to reinstate the stay; and (4) set a briefing schedule for any opposition to the Writ Petition in the event that the Superior Court declined to accept the Court of Appeal's offer of the opportunity to correct its prior order.

The Superior Court responded to the Court of Appeal's order by reversing its prior order and reinstating the stay of the Coverage Action. (*See* Petition for Review, Exh. B.) The Court of Appeal then dismissed the Writ Petition as moot. (*See* Petition for Review, Exh. C.)

III. ARGUMENT

A. Neither Issue Raised By Great American In Its Petition Meets This Court's Standards For Review

Rule 8.500(b) of the California Rules of Court identifies the grounds upon which this Court may grant review of a Court of Appeal decision. The only grounds from Rule 8.500(b) relied upon by Great American in its Petition for Review are that review is purportedly necessary "to secure uniformity of decision and to settle important questions of law ... ." (Petition, at 7 and 10-11.) However, Great American utterly fails to demonstrate that the issues as to which it seeks review satisfy either of

those standards.

1. Review Is Not Necessary To Secure Uniformity Of Decision

Although Great American references securing uniformity of decision as one of the bases on which it seeks review, Great American makes no showing of the existence of any conflicts in the decisions concerning the identified issues. In fact, there is no such conflict. As to Great American's first issue - the purported improper use of "speaking *Palma* notices" - Great American complains only that the Second District Court of Appeal has a practice of issuing such notices, not that there is any conflict in the decisions regarding the propriety of that practice. Similarly, Great American's second issue - whether delay in prosecution of the underlying action should be a factor considered in the determination of whether a stay imposed under *Montrose I* should remain in effect - has never been the subject of a reported decision in the 14 years that have passed since this Court's decision in *Montrose I*.

Great American's actual argument is that the Court of Appeal misapplied settled law (as to the first issue) or that settled law should be changed (as to the second issue). Those are not appropriate bases for review. The fact that the Court of Appeal's order is not a published decision further supports the conclusion that review is not necessary to secure uniformity of decision.

2. Review Is Not Necessary To Settle Any Important Question Of Law

Absent any conflicting decisions, the only potential basis for

review is that the issues identified by Great American present important issues of law. However, not only has Great American failed to demonstrate that its issues satisfy this ground for review, its arguments in support of review are based on a mischaracterization of the Court of Appeal's actions and an incomplete and misleading recitation of the relevant facts.

a. The Court Of Appeal's Order Is Consistent With *Palma* And Does Not Implicate Any Due Process Concerns

Great American's primary complaint raised in its Petition for Review is that the Court of Appeal's August 28 order constituted a "speaking *Palma* notice" that violated Great American's due process rights, because the Superior Court reversed its prior order and reinstated the stay before Great American had an opportunity to submit any opposition. However, this argument is based on several faulty premises.

First, the Court of Appeal's order was far from extraordinary. In form and substance it was merely an alternative writ - commanding the respondent Superior Court to either act in conformity with the prayer of BWC's Writ Petition or, alternatively, to show cause before the Court of Appeal why it should not be ordered to so act. As often occurs in such situations, the respondent court chose to act in conformity with the prayer of the Writ Petition, rendering the Writ Petition moot. This Court has expressly acknowledged the possibility of such a sequence of events, identifying this exact scenario as one possible outcome of the filing of a petition for a writ of mandate. A Court of Appeal

> "may, upon ascertaining that the petition is in proper form and states a basis for relief, issue an alternative

> writ which commands the respondent to act in conformity with the prayer of the petition or, alternatively, show cause before the Court of Appeal why it should not be ordered to so act. ([CCP] §1087.) The respondent may choose to act in conformity with the prayer, in which case the petition becomes moot; otherwise, the respondent and/or the real party in interest may file a written return setting forth the factual and legal bases which justify the respondent's refusal to do so. ([CCP] §1089; Cal. Rules of Court, [former] rule 56(c).)"

Palma, 36 Cal.3d at 177-178. *See also Kowis,* 3 Cal.4th at 893.

Neither the Court of Appeal's issuance of an alternative writ nor the Superior Court's decision to reverse its prior order in response to that alternative writ are out of the ordinary, nor do they implicate any due process concerns. The entirely ordinary actions taken by the Court of Appeal and the Superior Court do not present any important issues of law.

Also, contrary to Great American's arguments, the Court of Appeal's order is not in conflict with *Palma. Palma* was concerned with a Court of Appeal's issuance of a peremptory writ in the first instance without allowing the respondent or real party in interest sufficient opportunity to submit opposition to issuance of the writ. 36 Cal.3d at 180. Here, however, the Court of Appeal did not issue a peremptory writ, it merely issued an order indicating its intent to issue such a writ in the future. Again, such an action is entirely ordinary. *See* CRC Rule 8.490(h)(1),

contemplating the possibility that the Court of Appeal may "notif[y] the parties that it is considering issuing a peremptory writ in the first instance ... ." Moreover, Great American was provided with sufficient notice of the possibility that a peremptory writ might issue - BWC's Writ Petition expressly requested such relief. Great American could have filed a preliminary opposition to the Writ Petition prior to the Court of Appeal's issuance of its order (which was issued 11 days after the filing of the Writ Petition). That opportunity to oppose the Writ Petition satisfied the due process requirements of notice and an opportunity to be heard, such that the Court of Appeal could have properly issued a peremptory writ in the first instance without violating Great American's due process rights. Of course, because the Court of Appeal did not actually issue a peremptory writ, the due process issues are moot here.

Finally, it should be pointed out that the "evidence" cited by Great American in support of its argument that "speaking *Palma* notices" in the Second District are a significant problem does not actually provide any support for that assertion. Great American argues that this purported misuse of *Palma* was not an isolated occurrence, citing to four unpublished opinions from the Second District as "evidence" that this practice is common. (Petition, at 3-4 and 28.) However, four unpublished decisions decided over a period of more than five years hardly qualifies as evidence of a common practice. Nor does Great American's statistical evidence related to the ratio of fully briefed appeals to total appeals (Petition, at 27 and n. 7) demonstrate anything of relevance to the issue of the propriety of the Court of Appeal's actions in response to petitions for writs of mandate.

As Mark Twain once said: "There are three kinds of lies: lies, damned lies, and statistics." Great American attempts to use inapt statistics to demonstrate the existence of a non-existent problem.

b. Great American's Desire To Overturn The Stay In This Action Does Not Present Any Important Issue Of Law

Great American's second issue for review also fails to satisfy the "important issue of law" standard for review. The issue as defined by Great American is limited to situations where a stay has already been imposed and there has thereafter been a delay in prosecution of the underlying tort action. Great American further limits that issue by asking this Court to change the rule only in situations "where there is no clear overlap in the facts between a declaratory relief action and its underlying liability action ... ." (Petition, at 32.)

As with its first issue, Great American bases its argument on this issue on a false premise - that there is no clear factual overlap between the Coverage Action and the Malpractice Action. In fact, and as the Court of Appeal correctly found, there is a significant factual overlap between the two actions. Moreover, Great American fails to make any showing that this issue presents an important issue of law - it may be important to Great American in this case, but there is no indication that this issue has arisen in any other cases since this Court's decision in *Montrose I* more than 14 years ago.

The law is well established in California that an insurer's action seeking a declaration of non-coverage should be stayed where, as here, the coverage issue is or may be dependent upon facts that are at issue

in the underlying action.

> "To eliminate the risk of inconsistent factual determinations that could prejudice the insured, a stay of the declaratory relief action pending resolution of the third party suit is appropriate when the coverage question turns on facts to be litigated in the underlying action."

Montrose I, 6 Cal.4th at 301.

This rule of law is not subject to dispute by Great American. Rather, Great American argued in response to the Superior Court's Order to Show Cause that the stay of this Coverage Action should be lifted because this action does not implicate facts at issue in the underlying Malpractice Action. In its Petition for Review, Great American has slightly shifted its focus, arguing that in situations where there is (1) no factual overlap, and (2) a delay in reaching a conclusion of the underlying litigation, a trial court should be able to consider that delay in determining whether a previously-imposed stay should remain in effect. This slight shift in focus does not, however, turn what is essentially a fact-based dispute concerning the overlap between the Coverage Action and the Malpractice Action into an "important question of law." The "importance" of Great American's issue is further undermined by the fact that Great American's argument in support of this issue is dependent on an incomplete and misleading statement of the relevant facts.

As is clear from Great American's own statements in its opposition to the 2005 motion to stay, Great American's defenses to

coverage are dependent, in large part, on facts related to BWC's legal services, state of mind, and conduct in connection with the eminent domain proceedings and the inverse condemnation action. The communications between BWC and Azusa, including BWC's advice concerning compensation for improvements and Azusa's conduct in light of that advice, are at issue in both actions. In the Malpractice Action, those communications are relevant to the central issue of whether BWC breached a professional duty to Azusa. In this Coverage Action, the same communications, and Azusa's response to BWC's advice, are relevant to the issue of whether BWC had a reasonable basis to anticipate a claim by Azusa prior to the date that Great American contends the policy of insurance incepted.

The circumstances of BWC's representation of Azusa in the inverse condemnation action are also at issue in both actions. Great American asserts that BWC's agreement to represent Azusa in the inverse condemnation action was in response to a purported claim or "expression of displeasure" asserted by Azusa; Azusa contends that the same agreement constituted a "tacit admission" that BWC breached a professional duty to Azusa in connection with BWC's representation of Azusa in the eminent domain proceedings. Great American's attempt to prove the existence of a purported claim will inure directly to the benefit of Azusa in its assertion that BWC tacitly admitted that there had been a breach of professional duties owed to Azusa. At the very least, it is clear that the same evidence would be relevant to both issues.

The Court of Appeal correctly concluded that both actions are

dependent on facts relating to BWC's representation of Azusa in the eminent domain and inverse condemnation actions, making BWC's entitlement to relief "'so obvious that no purpose could reasonably be served by plenary consideration of the issue ... .'" (*See* Petition for Review, Exh. A, page 3.) Great American challenges that conclusion, but it does so only by utterly ignoring the facts that demonstrate the existence of an overlap between the two cases. Inasmuch as Great American has premised its argument in support of this second issue on an incomplete and misleading statement of facts, this Court should decline to consider the Petition for Review.[3]

Not only has Great American premised its second issue for review on an incomplete and biased statement of facts, Great American has also failed to make any showing (other than arguments of its own counsel) that review of this issue will settle any important question of law. Great American has failed to demonstrate that the issue of delay in resolution of underlying liability actions after imposition of stays of declaratory relief actions has arisen in any case other than this one. Great American cites to no cases in which such a delay occurred, nor does Great American cite to any anecdotal evidence of significant issues of delay.

Great American also fails to explain how a trial court could factor delay into the equation - any decision to lift a stay as a result of delay in prosecution of the underlying action would require sacrificing the

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[3] Great American also fails to apprise this Court of the fact that during a significant portion of the "delay," the Malpractice Action was itself subject to a stay pending this Court's determination of a petition for review in the underlying eminent domain action. *See* Exh. 14, App. 260 and 282.

insured's interests in avoiding the prejudice of inconsistent factual determinations. This Court has previously determined that the nature of the insurance relationship requires that the insured's interests be protected in this conflict situation. Great American has provided no compelling reason for this Court to reconsider its decision in *Montrose I*.

B. The Issues Raised By Great American Will Become Moot Before This Court Can Address The Merits Of The Petition For Review

A final reason why review should be denied is that the issues raised in Great American's Petition for Review will almost certainly become moot before this Court can address the merits of the Petition for Review. The trial in the Malpractice Action has now been set for February 25, 2008. (*See* Request for Judicial Notice in Support of Answer to Petition for Review, Exh. 1.) Even if this Court granted review (which it should not), the trial in the Malpractice Action would almost certainly be concluded before this Court has the opportunity to address the merits of Great American's Petition for Review. Upon conclusion of the Malpractice Action, the stay of the Coverage Action will expire under its own terms.

There is no need for this Court to expend its limited time and resources on issues that will become moot before this Court has the opportunity to address them.

IV. CONCLUSION

There is no issue in this case worthy of the Court's review. The Petition for Review should be denied..

DATED: October 11, 2007 BINGHAM McCUTCHEN, LLP

By _____
Kenneth S. Meyers
Attorneys for Respondent,
BROWN, WINFIELD & CANZONERI, INC.

CERTIFICATE OF WORD COUNT

Cal. Rules of Court, Rule 8.204(c)(1)

The text of this Answer to Petition for Review consists of 5294 words, including footnotes, as counted by the word processing program used to generate the brief.

DATED: October 11, 2007 BINGHAM McCUTCHEN LLP

By _____
Kenneth S. Meyers
Attorneys for Respondent,
BROWN, WINFIELD & CANZONERI, INC.

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Bingham McCutchen LLP, The Water Garden, 1620 26th Street, Fourth Floor, North Tower, Santa Monica, California 90404-4060. On this 11th day of October, 2007, I served a true copy of the within document(s):

ANSWER TO PETITION FOR REVIEW

☐	(BY E-MAIL) to the e-mail address listed for the addressee(s) shown below.
☒	(BY MAIL) by causing a true and correct copy of the above to be placed in the United States Mail at Santa Monica, California in sealed envelope(s) with postage prepaid, addressed as set forth below. I am readily familiar with this law firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence is deposited with the United States Postal Service the same day it is left for collection and processing in the ordinary course of business.

Court of Appeal of the State of California
Second Appellate District
2nd Floor - North Tower
300 S. Spring Street
Los Angeles, California 90013

Superior Court of California
County of Los Angeles - Central District
111 N. Hill Street
Los Angeles, California 90012

Counsel for Petitioner
Great American Insurance Company

Kris P. Thompson, Esq. (SBN 154866)
Jeffrey K. Miyamoto, Esq. (SBN 185587)
Thompson & Alessio, LLP
2550 Fifth Avenue, Suite 600
San Diego, California 92103

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

This declaration was executed on October 11, 2007, at Santa Monica, California.

Cheryle Appling