

# SUPREME COURT COPY

Case No. S156598

## IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BROWN, WINFIELD & CANZONERI, INC.

Petitioner,

v.

THE SUPERIOR COURT OF LOS  
ANGELES COUNTY,

Respondent,

GREAT AMERICAN INSURANCE  
COMPANY,

Real Party in Interest/Petitioner.

SUPREME COURT  
FILED

FEB 11 2008

Frederick K. Oninich Clerk

DEPUTY

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### OPENING BRIEF ON THE MERITS

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After Orders Filed August 28, 2007, and September 12, 2007, in the Court of  
Appeal Second Appellate District, Division Three, Case No. B201396  
(Los Angeles County Superior Court Case No. BC331601)

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## I.

### ISSUES GRANTED REVIEW

1. May a Court of Appeal issue a “suggestive” Palma notice (see *Palma v. U.S. Industrial Fasteners* (1984) 36 Cal.3d 171) - that is, a notice that discusses the merits of a writ petition with citation to authority, determines that the trial court ruling was “erroneous,” and gives the trial court the “power and jurisdiction” to change its order?
2. If such an order is proper, absent exceptional circumstances, may it be issued without giving the real party in interest an opportunity to file opposition?

## II.

### INTRODUCTION AND SUMMARY OF ARGUMENT

#### A. The Second District's Improper Use Of The *Palma* Notice Procedure Denied Great American Insurance Company Its Right To Due Process

A *Palma* notice should be just that - a notice that the Court is considering the issuance of a peremptory writ in the first instance **and nothing more**. This Court intended that notices such as these be issued in rare circumstances. (*Palma, supra*, 36 Cal.3d 171, 180.) “Even in those limited situations where the procedure is appropriate, *Palma* requires that a peremptory writ of mandate not issue in the first instance without due process.” (*Kernes v. Superior Court* (2000) 77 Cal.App.4th 525, 530.) Issuance of a peremptory writ in the first instance without notice and opportunity to respond is void as violating due process. (*Palma, supra*, at p. 180.)

In this case, the Second District improperly expanded the function and scope of a *Palma* notice into something akin to an “advisory” order. This resulted in the superior court immediately reversing itself within 24 hours of receiving the “suggestive” *Palma* notice<sup>1</sup> - a tragic denial of due

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<sup>1</sup> In its Petition for Review, GAIC described the Second District's August 28, 2007 Order as a “speaking” *Palma* notice. In the Order Granting Review, this Court

process to Great American Insurance Company (“GAIC”), the real party in interest, who did not have a meaningful opportunity to submit an opposition.

In response to a writ petition filed by Brown Winfield & Canzoneri, Inc. (“BWC”), the Second District issued an order that although dressed-up as a *Palma* notice, in fact decided the merits of the issue raised in the writ petition. (See Exhibit A to Petition for Review.) The Second District’s *Palma* notice characterized the trial court’s decision as “erroneous” and strongly encouraged the superior court “to change and correct its erroneous order and to enter a new order in accord with the views expressed herein.” Given that language, it is not surprising that *within 24 hours* of the filing of the Second District’s suggestive *Palma* notice, the superior court reversed itself. GAIC did not have enough time to submit *any* type of opposition before the relief requested by BWC was granted.<sup>2</sup>

In *Palma*, this Court stated that issuing a peremptory writ in the first instance should be a “rarity.” (*Palma, supra*, 36 Cal.3d 171, 179.) This

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used the term “suggestive” *Palma* notice. For purposes of this Brief, GAIC will adopt this Court’s terminology and refer to the subject order as a “suggestive” *Palma* notice.

<sup>2</sup> The Second District’s *Palma* order allowed GAIC to file opposition only if the superior court did not reverse itself. Because the superior court reversed itself within 24 hours of the *Palma* notice, GAIC was effectively prevented from opposing the writ petition before it was de facto granted.



Court further emphasized that this type of procedure is reserved for exceptional cases. (*Id.*, at p. 180.)

In *Lewis v. Superior Court*, this Court amplified on *Palma* by stating that even in cases of apparently clear trial court error, unless there is a real emergency, the court of appeal should refrain from granting a peremptory writ in the first instance **without affording the real party in interest a meaningful opportunity to respond**. (Emphasis added.) (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1236, 1261.)

In the present action, the Second District violated these cases and the important due process principles upon which they are based.<sup>3</sup> This case has been pending for years and there was no emergency at the time the Second District issued its “suggestive” *Palma* order. In effect, then, the Second District issued a writ without ever affording real party in interest a meaningful opportunity to respond.

**B. Great American Insurance Company Should Have Been Given A Meaningful Opportunity To Submit An Opposition**

The peremptory writ in the first instance is subject to severe restrictions. As the exception to the rule, the procedure may only be used in

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<sup>3</sup> In analyzing the writ, there is a presumption that the trial court’s ruling was correct. The victory for GAIC should not have been set aside by an appellate court (or by a trial court in response to a “suggestive” *Palma* notice) without at least permitting the prior winner an opportunity to show why it deserved to win.

the limited situation where “entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue.” (*Lewis, supra*, 19 Cal.4th 1232, 1241, citing *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1223; quoting *Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.) Moreover, on those rare occasions where a reviewing court resorts to use of a peremptory writ in the first instance, it is constrained to comply with the procedural safeguards of *Palma* - - **that is, to receive or solicit opposition before directing issuance of the writ.** (Emphasis added.) (*Lewis, supra*, 19 Cal.4th at p. 1239.)

Opposition from the party adversely affected will determine whether the reviewing court issues a peremptory writ in the first instance or follows the standard operating procedure of using the alternative writ or order to show cause.

“If the opposition presents any reasonable argument that the applicable law is unsettled or does not govern the precise issue presented in light of the particular undisputed facts, or if the application of legal principles set forth in various sources of law might lead to different results, and there is no compelling need for an expedited decision, the court must follow the usual writ procedure and issue an alternative writ or order to show cause.” (*Lewis, supra*, 19 Cal.4th at p. 1261.)

Instead of issuing the “suggestive” *Palma* notice that triggered the trial court to act immediately, there were other options available to the Second District that would have safeguarded GAIC’s due process rights.

For example, the Fourth District, Division One, has a written policy that the court will not issue a peremptory writ in the first instance unless “a response has been requested or filed and the parties have been notified by telephone, and then in writing, of the possibility” of the writ being issued in the first instance. (4<sup>th</sup> App.Dist., Div. 1, Int.Op. Prac. & Proc. § V.)

Moreover, the Second District could have issued an immediate stay to maintain the status quo of the declaratory relief action while GAIC was given an opportunity to submit opposition. This would have protected against any potential harm in the declaratory relief action while, at the same time, ensuring that GAIC had an opportunity to file an opposition. Even though there was no “emergency,” the Second District chose to use an expedited procedure that unfairly denied GAIC a chance to oppose the writ petition.

Accordingly, the Second Appellate District’s orders in this case should be overturned because:

- (1) GAIC was denied due process when the Second District issued its “suggestive” *Palma* notice on August 28, 2007, and the trial court followed the Second District’s order immediately thereafter and vacated its prior July 3, 2007, order without affording GAIC a meaningful opportunity to respond.
- (2) The Second District did not avail itself of procedures that would have safeguarded GAIC’s due process rights in being afforded the opportunity to respond to the writ petition.

### III.

#### FACTUAL AND PROCEDURAL BACKGROUND

##### A. **BWC's Representation Of Azusa In The Mt. San Jacinto Litigation**

In October 2000, Mt. San Jacinto Community College District (“Mt. San Jacinto”) commenced an eminent domain proceeding against Azusa Pacific University (“Azusa”), a private educational corporation, seeking to condemn approximately 30 acres of vacant land owned by Azusa in the Menifee area of Riverside County. The action was entitled *Mt. San Jacinto Community College District v. Azusa Pacific University* (Riverside County Superior Court Case No. RIC 349900.) (Also referred to herein as “the eminent domain proceeding.”) (Appendix of Exhibits in Support of BWC’s Petition for Writ of Mandate, Prohibition or Other Appropriate Relief (“Appx.”) 79.)

In November 2000, Azusa hired the law firm of BWC to defend the eminent domain proceeding and represent Azusa in connection with the potential development of the real property that was the subject of the eminent domain proceeding. (Appx. 78, 86-89.) The eminent domain action led to a companion inverse condemnation action which became the subject of this Court’s opinion in *Mt. San Jacinto Community College District v. Superior Court* ((2007) 40 Cal.4th 648). BWC’s representation

of Azusa ceased in approximately April of 2004 when it was replaced with another law firm. (Appx. 83.)

**B. BWC Tenders A Claim to GAIC in 2004**

On or about June 21, 2004, BWC tendered the defense and indemnification of a “claim” made by Azusa to GAIC under Policy Number LPL 540-5563-04 (“the subject insurance policy”). After an investigation and careful consideration, GAIC subsequently issued a reservation of rights letter to BWC under the subject insurance policy for the claims made by Azusa. (Appx. 72.)

**C. The Subject GAIC Insurance Policy**

GAIC issued the subject insurance policy to BWC for the policy period of February 1, 2004 to February 1, 2005. The policy provided BWC with professional liability insurance under a “claims made and reported” form, meaning that the claim must be made during the policy period and reported in writing to GAIC during the same policy period. (Appx. 72.)

**D. The Legal Malpractice Action (Azusa Pacific University v. BWC)**

On March 29, 2005, Azusa filed a Complaint for legal malpractice and breach of contract against BWC. The action was entitled *Azusa Pacific University v. Brown, Winfield & Canzoneri, Inc., et al.* (Los Angeles County Superior Court Case No. BC331055.) (Also referred to herein as

“the legal malpractice action.”) (Appx. 77-89.)

**E. The Declaratory Relief Action (GAIC v. BWC)**

**1. Allegations of the Complaint**

On April 8, 2005, GAIC filed the subject declaratory relief action against BWC. GAIC alleged that it does not, and never had, a duty to defend or indemnify BWC under the subject insurance policy against the claims made by Azusa related to BWC’s representation of Azusa in the Eminent Domain Proceeding. The thrust of GAIC’s position is that Azusa made a claim against BWC as early as 2002 (outside the subject policy period) and that BWC failed to timely report said claim. (Appx. 2-6.)

**2. BWC’s Motion to Stay is Granted**

On or about June 7, 2005, BWC filed a Motion to Stay in the instant action. (Appx. 11-55.) GAIC filed an Opposition to the motion on or about June 17, 2005. (Appx. 56-102.) On July 11, 2005, the trial court granted the motion. (Appx. 115.)

**3. June 11, 2007 Status Conference**

At a status conference in the declaratory relief action on June 11, 2007, the trial court scheduled another status conference for July 3, 2007. The court also scheduled an Order to Show Cause hearing for the same date regarding the status of the stay and requested further briefing on the issue of whether the stay should be lifted. (Appx. 116.)

#### **4. July 3, 2007 OSC Hearing**

On June 27, 2007, GAIC submitted briefing in support of its position that the stay should be lifted. (Appx. 223-282.) Similarly, on June 27, 2007, BWC filed its own brief in support of the contrary position that the stay should not be lifted. (Appx. 117-222.)

On July 3, 2007, the trial court conducted the Order to Show Cause hearing and ordered that the stay in the declaratory relief action be lifted. A trial date of January 14, 2008, was also set. (Appx. 283.)

#### **5. GAIC Propounds Discovery To BWC**

On August 1, 2007, GAIC propounded written discovery to BWC and noticed three depositions in the case. (Appx. 292-316.)

#### **F. BWC's Petition for Writ of Mandate**

On August 17, 2007, BWC filed a Petition for Writ of Mandate, Prohibition or Other Appropriate Relief with the Second District. In the Petition, BWC requested that the Court of Appeal issue an immediate stay of all proceedings in the trial court, including vacation of the trial date and a stay of all discovery, pending the final determination of the Petition. BWC further requested that a peremptory writ of mandate issue in the first instance or, in the alternative, that the Court issue an alternative writ of mandate, prohibition or other appropriate relief directing the trial court to set aside the July 3, 2007 order lifting the stay and to enter a new and

different order vacating the trial date and staying all other activity until after conclusion of the malpractice action. (BWC's Petition, p. 11.)

**G. The Court Of Appeal's Order Dated August 28, 2007**

On August 28, 2007, without the guidance of any opposition to the writ petition, the Court of Appeal committed itself to a strong position in writing and issued a three-page order with citations to authority and directions to the trial court. In the Order, the Court of Appeal notified the trial court and the parties of the Court's intention to issue a peremptory writ of mandate in the first instance pursuant to *Palma*, directing the trial court to vacate the July 3, 2007, order and to enter an order staying all proceedings pending resolution of the underlying malpractice case.

(Exhibit A to Petition for Review.)

The Order further conferred upon the trial court:

“the power and jurisdiction to change and correct its erroneous order, and to enter in its place a new order in accord with the views expressed herein. If the respondent court vacates the order at issue here and enters an order in compliance with the requirement for a stay of such related actions, a copy of the new order should immediately be forwarded to this court. Upon receipt of the new order, this petition will be dismissed.” (Exhibit A, p. 3.)

The Order further stated that if the trial court failed to comply with the directive set forth herein, any opposition to the issuance of a peremptory writ of mandate in the first instance compelling it to do so may be filed on or before September 10, 2007. (Emphasis added.) (Exhibit A, p. 3.)



#### **H. The Trial Court's August 29, 2007 Order**

On August 29, 2007, following the Court of Appeal's Order from the day before, the trial court vacated its July 3, 2007, order and entered a new order reinstating the stay of the declaratory relief action pending resolution of the underlying malpractice action.<sup>4</sup> (Exhibit B to Petition for Review.) Therefore, the trial court complied with the Court of Appeal's August 28, 2007, order within 24 hours, and GAIC did not have an opportunity to submit written Opposition to BWC's Petition for Writ of Mandate. As of August 29, 2007, the trial court had already complied with the Court of Appeal's directive.

#### **I. The Court Of Appeal's Order Dismissing The Petition**

On September 12, 2007, after having received the trial court's August 29, 2007, order providing BWC with the relief requested, the Court of Appeal dismissed BWC's Petition as "moot." (Exhibit C to Petition for Review.)

#### **J. GAIC's Petition for Review**

On September 21, 2007, GAIC filed a Petition for Review of the Court of Appeal's Orders dated August 28, 2007, and September 12, 2007.

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<sup>4</sup> According to the Court of Appeal's website, the trial court's August 29, 2007 Order was received by the Court of Appeal on August 29, 2007, the same day the trial court's order was issued.

This Court granted limited review on December 12, 2007.

**K. Status Of The Legal Malpractice Action**

The trial date in the legal malpractice action is currently scheduled for February 25, 2008.<sup>5</sup>

**IV.**

**DISCUSSION**

**A. The Traditional *Palma* Procedure**

In *Palma*, this Court outlined the procedure under which a court may issue a peremptory writ of mandate in the first instance (Code of Civil Procedure § 1088) in lieu of the usual alternative writ procedure. This Court noted that CCP § 1088:

“requires, at a minimum, that a peremptory writ of mandate of prohibition not issue in the first instance unless the parties adversely affected by the writ have received notice, from the petitioner or from the court, that the issuance of such a writ in the first instance is being sought or considered. In addition, an appellate court, **absent exceptional circumstances, should not issue a peremptory writ in the first instance without having received, or solicited, opposition from the party of parties adversely affected.**” (Emphasis added.) (*Palma, supra*, 36 Cal.3d 171, 180.)

This Court also made clear in *Palma* that a peremptory writ in the first instance should not issue unless “it appears that the petition and

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<sup>5</sup> If the malpractice case commences as scheduled and/or is tried prior to the resolution of this Petition, GAIC recognizes that its ultimate goal in lifting the stay of the declaratory relief action will likely be moot.

opposing papers on file adequately address the issues raised by the petition, that no factual dispute exists, and that the additional briefing that would follow issuance of an alternative writ is unnecessary to disposition of the petition.” (*Id.*, at p. 178.) This procedure was deemed by this Court as a “rarity.” (*Id.*, at p. 179.)

More recently, in *Ng v. Superior Court*, this Court cautioned that the accelerated procedure authorized in Code of Civil Procedure section 1088, and described in *Palma*:

“ . . . is the exception; **it should not become routine.** Generally, that procedure should be adopted only when petitioner’s entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue - for example, when such entitlement is conceded or when there has been clear error under well-settled principles of law and undisputed facts - or when there is an unusual urgency requiring acceleration of the normal process. **If there is no compelling temporal urgency, and if the law and facts mandating the relief are not entirely clear, the normal writ procedure, including issuance of an alternative writ . . . should be followed.**” (Emphasis added.) (*Ng v. Superior Court, supra*, 4 Cal.4th at p. 35.)

In *Alexander v. Superior Court*, this Court addressed the issue of whether the “rare” procedure of using a peremptory writ of mandate in the first instance was appropriate. (*Alexander v. Superior Court, supra*, 5 Cal.4th 1218).<sup>6</sup> The plaintiffs in *Alexander*, alleging medial malpractice,

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<sup>6</sup> Disapproved on other grounds in *Hassan v. Mercy American River Hosp.* ((2003) 31 Cal.4th 709.)

sought to discover defendant physicians' applications and reapplications for staff privileges at defendant hospital. The trial court declined to order discovery, but the Court of Appeal issued a peremptory writ of mandamus in the first instance, directing the trial court to order discovery. (*Id.*, at pp. 1221-1222.)

This Court reversed the court of appeal because none of the requirements referred to in *Ng* were met. The record did not suggest any "unusual urgency" justifying expedited resolution of the writ application, and plaintiffs' entitlement to relief was not so obvious that no purpose could reasonably be served by plenary consideration of the issue, or that the matter involved clear error under well-settled principles of law. (*Id.*, at p. 1223.)

This case concerns an insurance declaratory relief action that had been pending for more than two years. The record in this case did not suggest any "unusual urgency" justifying expedited resolution of the subject writ application. Along the same lines, the Court of Appeal did not cite to any such circumstances as a reason for issuing its August 28, 2007, order. Therefore, the harsh course of action taken by the Second District was unnecessary.

**B. By Using A “Suggestive” *Palma* Notice Encouraging The Trial Court To Take Action, The Court Of Appeal Effectively Issued The Writ In 24 Hours - With No Meaningful Opportunity For GAIC To Respond**

The Court of Appeal in the present action did not issue a peremptory writ of mandate in the first instance typical to the procedure contemplated in *Palma*. Here, the Court of Appeal issued an order citing to *Palma* that *suggested* to the trial court that the Court of Appeal was considering the issuance of a peremptory writ of mandate in the first instance. (Exhibit A to Petition for Review, p. 1.)

By signaling the trial court of its intentions (but not actually granting the writ petition and, instead, “encouraging” the trial court to comply with the directive), the Court of Appeal effectively deleted the important step of soliciting or receiving Opposition from GAIC. (*Palma, supra*, at p. 180.) The Court of Appeal only requested Opposition if the trial court did not comply with the directive. (Exhibit A to Petition for Review.) Yet, here, the trial court in this case *did* comply with the directive and immediately vacated its July 3, 2007, order and entered a new order within 24 hours of the “suggestive” *Palma* notice. (Exhibit B to Petition for Review.)

After the August 29, 2007, order from the trial court was issued, GAIC did not file an Opposition to BWC’s Petition because BWC had

already obtained the relief that it had sought and the Court of Appeal had already stated that it would be dismissing the Petition as moot. (Exhibit A to Petition for Review.)

GAIC did not have a meaningful opportunity to oppose the Petition - its due process rights were violated because the Court of Appeal did not solicit an Opposition. The Court of Appeal failed to comply with the procedural safeguard of affording the real party in interest a meaningful opportunity to respond before effectively directing the issuance of the peremptory writ of mandate.

**C. Due Process Should Not Be Sacrificed For Efficiency's Sake**

“Efficiency cannot be favored over justice.” (*Estate of Meeker* (1993) 13 Cal.App.4th 1099, 1106.)

By issuing a “notice of intention to grant a peremptory writ in the first instance” without soliciting opposition or, in other words, issuing a *Palma* notice that “suggests” to the trial court, the Court of Appeal afforded the trial court the chance to reverse itself on its own without the normal alternative writ procedure that would require further briefing and oral argument before the Court of Appeal. If the trial court acts quickly and follows the Court of Appeal’s directive, as it did here, the real party in interest does not have a meaningful opportunity to respond. Moreover, when the trial court complies with the suggestive *Palma* notice, the Court of

Appeal is able to dismiss the Petition for Writ of Mandate as “moot” (as the Court of Appeal did here).

By issuing a three-page advisory order without soliciting or receiving opposition, the Court of Appeal was able to circumvent the normal alternative writ procedure that might congest the appellate court’s docket and take time away from pending appeals.

It was not the intent of the *Palma* Court for the type of procedure employed in this case to become routine. It was only intended to be a “rarity” in exceptional circumstances. While this procedure might lessen the Court of Appeal’s workload, it produces the potential effect of denying the real party in interest its due process right to be heard.

**D. The Option Of Filing A “Preliminary Opposition” Prior To The Issuance Of A *Palma* Notice Is Not A Meaningful Opportunity To Respond To A Writ Petition**

BWC’s writ petition was filed on August 17, 2007. The Second District issued its suggestive *Palma* notice on August 28, 2007. Even though California Rule of Court, Rule 8.490(g) gives a party a right to file “preliminary opposition” within ten (10) days after the petition is filed, such an opposition is permissive, not mandatory. Simply because GAIC *could have* filed a “preliminary opposition” in response to BWC’s writ petition does not mean that GAIC had a meaningful opportunity to respond.

In fact, there are strategic reasons not to file a “preliminary opposition” in response to a writ petition - the Court of Appeal could consider the “preliminary opposition” to be the opposition needed to allow the court to issue a peremptory writ of mandate in the first instance. Additionally, filing a preliminary opposition risks dignifying the merits of the writ petition in the eyes of the appellate court.

Moreover, if this Court were to conclude that the suggestive *Palma* notice is appropriate because GAIC had an opportunity to file “preliminary opposition” under Rule 8.490(g), then the practical effect would be to require the filing of a preliminary opposition in all writ cases. This would place an enormous burden on the courts of appeal to manage the influx of oppositions not to mention a significant financial burden on real parties in interest who do not want to risk getting a suggestive *Palma* notice in the manner that GAIC did.<sup>7</sup>

Accordingly, the lapse of eleven days between the filing of the writ petition and the issuance of the suggestive *Palma* notice did not give GAIC a meaningful opportunity to respond. Any opposition filed during that time period would have been permissive and somewhat risky.

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<sup>7</sup> If real parties in interest were forced to file preliminary oppositions in all writ cases, it would be a totally unnecessary burden and expense because the writ petition would be summarily denied in over 90% of the cases.



**E. Even If The Second District’s Order Was Proper, Absent Exceptional Circumstances, It Should Not Have Been Issued Without Giving Great American Insurance Company An Opportunity To File Opposition**

In the Fourth District, Division One, there is an effective policy not to take any action on a writ without calling the lawyer for the real party in interest and requesting opposition. That Division’s written policy is that the court will not issue a peremptory writ in the first instance unless “a response has been requested or filed and the parties have been notified by telephone, and then in writing, of the possibility” of the writ being issued in the first instance. (4<sup>th</sup> App.Dist., Div. 1, Int.Op. Prac. & Proc. § V.)

Had the above procedure been employed in this case, GAIC would have had an opportunity to respond to the writ petition. Absent exceptional circumstances, **both sides** should be heard by the Court of Appeal. It may be that the preliminary opposition shows that the petition totally misstated the facts or the law, and the court will then summarily dismiss the petition. Or, if the preliminary opposition shows that there really is clear error (akin to a concession), then the Court of Appeal could issue a peremptory writ in the first instance.

In the present action, even if there was clear trial court error and the issuance of a *Palma* notice was appropriate, there were no exceptional

circumstances that required immediate attention. As such, the Second District could have also stayed the trial court proceedings pending the solicitation and receipt of GAIC's opposition and a decision following the briefing. This would have protected against any potential harm in the declaratory relief action while, at the same time, ensuring that GAIC had an opportunity to file an opposition.

Despite the above-mentioned options available to it, the Second District elected to issue a suggestive *Palma* notice which had the effect of issuing a writ. This resulted in the unfair deprivation of GAIC's due process rights.

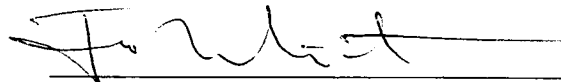
V.

### CONCLUSION

For the foregoing reasons, Great American Insurance Company respectfully requests that this Court overturn the Court of Appeal's August 28, 2007 and September 12, 2007, Orders and direct the lower court to receive or solicit opposition from GAIC before deciding the writ petition filed by BWC on August 17, 2007.

Dated: February 11, 2008

**THOMPSON & ALESSIO, LLP**



Kris P. Thompson  
Jeffrey K. Miyamoto  
Attorneys for Petitioner  
Great American Insurance Company

## WORD COUNT CERTIFICATE

I certify that this Petition for Review contains 4,633 words, including footnotes, as calculated by the WordPerfect application used to create this document.

Dated: February 11, 2008

A handwritten signature in black ink, appearing to read "Jeffrey K. Miyamoto", written over a horizontal line.

Jeffrey K. Miyamoto

**Great American Insurance Company v. Brown, Winfield & Canzoneri, Inc.**  
**SUPREME COURT OF CALIFORNIA NO. S156598**  
**Los Angeles Superior Court No: BC 331601**  
**2<sup>nd</sup> Dist. Court of Appeal No.: B201396**

**PROOF OF SERVICE**

I, the undersigned, declare as follows:

I am over the age of eighteen years and not a party to the case. I am employed in the County of San Diego, State of California, where the mailing occurs; and my business address is 2550 Fifth Avenue, Suite 600, San Diego, CA 92103.

On February 11, 2008, the foregoing document(s) were served as follows:

**1. OPENING BRIEF ON THE MERITS**

on the interested party(ies) in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Michael Bidart  
**SHERNOFF BIDART & DARRAS LLP**  
600 S. Indian Hill Blvd.,  
Claremont, CA 91711 **VIA FedEx**

**Attorneys for Brown Winfield, et al**  
Phone: (909) 621-4935  
Fax:

Clerk of the Court **Courtesy Copy by Mail**  
Second Appellate District, Division Three  
300 S. Spring Street, Floor 2, North Tower  
Los Angeles, CA 90013-1213

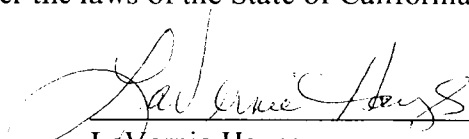
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BY OVERNIGHT DELIVERY. I caused said document(s) to be deposited in a box or other facility regularly maintained by the express service carrier (Federal Express) providing overnight delivery pursuant to Code of Civil Procedure §1013(c).

Executed on February 11, 2008, at San Diego, California.

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

  
\_\_\_\_\_  
LaVernie Hayes