S156598

IN THE SUPREME COURT OF CALIFORNIA

BROWN, WINFIELD & CANZONERI, INC.,

Petitioner,

vs.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,

Respondent.

GREAT AMERICAN INSURANCE COMPANY,

Real Party In Interest.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT,
DIVISION THREE, CASE NO. B201396

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE CALIFORNIA ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF GREAT AMERICAN INSURANCE COMPANY

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APPLICATION TO FILE BRIEF OF AMICUS CURIAE CALIFORNIA ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF GREAT AMERICAN INSURANCE COMPANY

The California Academy of Appellate Lawyers (the Academy), a statewide organization of experienced appellate practitioners, respectfully applies for leave to file the accompanying amicus curiae brief in support of Great American Insurance Company pursuant to rule 8.520(f) of the California Rules of Court. The Academy is familiar with the content of the parties' briefs.

The Academy members' common goals include promoting and encouraging sound appellate procedures designed to ensure proper and

effective representation of appellate litigants, efficient administration of justice at the appellate level, and improvements in the law affecting appellate litigation. The Academy seeks to file this brief out of concern over the appellate courts' recent use of procedural short-cuts in writ procedure, such as the one the Court of Appeal used in the present case, which in the Academy's view causes unnecessary expense to litigants and threatens the integrity of the appellate process. The Academy itself has no interest in or connection with any of the parties in this case.

The Academy believes its views will assist the court in resolving this case by addressing the propriety of the procedure at issue here from the perspective of appellate practitioners and their clients.

Dated: August 8, 2008

Respectfully submitted,

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BRIEF OF AMICUS CURIAE CALIFORNIA ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF GREAT AMERICAN INSURANCE COMPANY

INTRODUCTION

The members of the California Academy of Appellate Lawyers (the Academy) are experienced appellate practitioners who are familiar with appellate writ procedure statewide – not just the California Rules of Court and local appellate court rules, but also the unwritten practices followed by the various appellate districts and divisions of the Courts of Appeal. The Academy's members share a deep concern for fairness and statewide uniformity in writ procedure, both of which have recently become threatened by the rise of new short-cuts in writ procedure being used by some appellate panels.

In the present case, the Court of Appeal used one of those procedural short-cuts to effectively decide the merits of a writ petition without ever having solicited or received opposition from the adversely-affected party. This brief explains, from the perspective of appellate practitioners and their clients, why such procedures are bad for litigants and bad for the judicial process, and why this court should put a stop to them.

LEGAL DISCUSSION

I.
THE PROCEDURE.

A. Creeping short-cuts in writ procedure.

In *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171 (*Palma*), this court approved an accelerated procedure for granting writ relief – the *peremptory writ in the first instance*, or "*Palma* writ" – whereby, upon prior notice that such relief is being considered, the Court of Appeal may order immediate issuance of a peremptory writ without first issuing an alternative writ. Such notice is now commonly called "*Palma* notice."

In cases since *Palma*, this court has repeatedly admonished the Courts of Appeal that issuance of *Palma* writs should be rare. In *Ng v. Superior Court* (1992) 4 Cal.4th 29, the court explained that "the accelerated *Palma* procedure 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." (*Id.* at p. 35.) In *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, which held that oral argument is not required before issuance of a *Palma* writ, the court reiterated that "the accelerated *Palma* procedure is reserved for *truly exceptional cases* – primarily those in which a compelling temporal urgency requires an immediate decision. Denying plenary consideration where the petitioner's entitlement to relief is 'obvious' and 'entirely clear" under 'well-

settled principles of law and undisputed facts' [citation] is permitted only in *extremely narrow circumstances*." (*Id.* at p. 1261, italics added.)

Nevertheless, with increasing frequency during the past few years, some Courts of Appeal, by unwritten practice, have been using procedural short-cuts that effectively decide the merits of a writ petition without plenary review or issuance of a peremptory writ.

B. Coercive *Palma* notices.

One such short-cut is the so-called "speaking" or "suggestive" *Palma* notice – what the Academy calls a "coercive" *Palma* notice. The coercive *Palma* notice (1) makes clear in a short discussion (which may not even include legal citations) that the Court of Appeal believes the superior court erred, (2) advises that if the superior court changes its order, the Court of Appeal will summarily deny the petition as moot, and (3) sometimes expressly gives the superior court jurisdiction to change its order.

For example, in the present case, the Court of Appeal's *Palma* notice stated in pertinent part:

> Having reviewed the record, it appears the trial court erred in lifting the stay . . . prior to determination of the underlying action. . . . [¶] . . . The trial court's concern about delays in resolution of the underlying malpractice case *cannot* serve as a basis for lifting the stay. . . . [¶] We confer upon the respondent 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.

(Original italics, citations omitted.)

The Academy calls these sorts of *Palma* notices "coercive" because the Court of Appeal has made it obvious that the court has pretty much decided the merits of the case, believes that the superior court erred, and encourages the superior court to reverse itself. Superior court judges usually take the hint.

C. Coercive alternative writs.

Another short-cut is the "speaking" or "suggestive" alternative writ, where the Court of Appeal issues an order that not only grants an alternative writ but also (1) makes clear in a short discussion that the Court of Appeal believes the superior court erred, (2) directs the petitioner to inform the Court of Appeal by a subsequent specified date whether the superior court has complied with the alternative writ, and (3) advises that, if the superior court complies, the Court of Appeal will summarily deny the petition as moot. The denouement – compliance by the superior court – is predictable.

Again, the Court of Appeal has made it obvious that the court has pretty much decided the petition on the merits and has concluded that the superior court should promptly comply with the alternative writ, which is thus coercive.

II.
THE PROBLEM.

A. Coerced full-scale opposition.

Because of the increasing use of coercive *Palma* notices and coercive alternative writs, appellate practitioners these days are facing the loss of a valuable tool in writ practice – the "preliminary opposition" to a writ petition.

Upon the filing of a petition for an extraordinary writ, the real party in interest has an immediate decision to make: whether to file preliminary opposition to the petition. Any such opposition is due within 10 days after the petition is filed. (Cal. Rules of Court, rule 8.490(g)(1).) One court has characterized the preliminary opposition as an "unsolicited informal response that every real party in interest has a right to make." (*Nguyen v. Superior Court* (2007) 150 Cal.App.4th 1006, 1013, fn. 2.)

Before an appellate court will address the merits of a writ petition, the petitioner must first establish two threshold requirements for writ review: the absence of an adequate remedy by appeal, and the threat of irreparable injury to the petitioner absent writ relief. (See, e.g., *Phelan v. Superior Court* (1950) 35 Cal.2d 363, 366-370.) Experienced appellate practitioners have commonly used preliminary oppositions to address those threshold requirements for writ review (and sometimes to address misstatements in the petition or omissions from exhibits) – but not the merits of the petition. (See *Nguyen v. Superior Court, supra,* 150 Cal.App.4th at p. 1013, fn. 2.)

The advantage of such a preliminary opposition is not just strategic, but also economic: A preliminary opposition that addresses only the threshold requirements for writ relief costs the real party less in attorneys fees than does a full-scale opposition that also addresses the merits. As this court said in *Palma* itself, "[b]y eliminating the necessity for full scale response where such a response is unnecessary, such a practice helps to reduce the cost of litigation to the parties; and by encouraging opposition when the court is about to act affirmatively on a petition, it helps to conserve judicial resources as well." (*Palma, supra,* 36 Cal.3d at p. 180.)

Until recently, members of the Academy faced with petitions for extraordinary writs have commonly assured their clients that they could safely file a preliminary opposition addressing only the threshold requirements for

writ review – or file no preliminary opposition at all – without fear of losing on the merits. This court's holdings and pronouncements in *Palma*, *Ng* and *Lewis* have provided counsel with the assurance that, except in the most extraordinary cases demanding almost instantaneous judicial action, there would always be an opportunity to file a full-scale opposition on the merits if the Court of Appeal issued an alternative writ (which is rare) or *Palma* notice (which is, or at least should be, even rarer). If the Court of Appeal summarily denied the writ petition – which happens about 90 percent of the time – then the real party would have incurred only modest attorney's fees (if a preliminary opposition was filed) or none at all (if no opposition was filed).

With the recent rise of coercive *Palma* notices and coercive alternative writs, however, such advice has become dangerous. The increasing threat that the Court of Appeal will use one of these procedural short-cuts makes it risky to forego a preliminary opposition, or to file one that addresses only the threshold requirements for writ review, because the next step in the judicial process could be a coercive *Palma* notice or coercive alternative writ that effectively decides the merits of the petition without the real party ever having been heard. The real party's safest course of action is to *immediately* file a so-called "preliminary" opposition that fully addresses the merits of the petition, with all the attendant expense of a full-scale opposition, before the Court of Appeal has time to issue a coercive *Palma* notice or coercive alternative writ.

The regrettable consequence is obvious: Despite the very slight odds that the Court of Appeal will grant the petition, counsel must spend time, for which the client must pay, to prepare a full-scale opposition that, 90 percent of the time, is completely unnecessary. This is exactly what this court sought to avoid in *Palma* – a situation where "the real party may feel obliged to respond with a full scale barrage of legal armament under circumstances in

which a narrowly targeted argument, or perhaps no argument at all, would suffice." (*Palma, supra,* 36 Cal.3d at p. 180.)

The Academy believes that litigants should retain the options of foregoing preliminary opposition or filing a true preliminary opposition that addresses only the threshold requirements for writ review. The recent rise of coercive *Palma* notices and coercive alternative writs threatens to foreclose those options.

B. Short-shrift decision-making.

Coercive *Palma* notices and coercive alternative writs do more harm to the judicial process than exacerbating its cost to the litigants – they threaten the integrity of the process with an increasing dependency on a sort of semi-adjudication. What does it mean when an appellate court tells a litigant, as happened here, that it "appears" the trial court erred? This seems to be decision-making based on the notion of "close enough." The public is entitled to better. The rough justice of coercive *Palma* notices and coercive alternative writs impairs the integrity of the judicial process and diminishes public respect for the judiciary by sending the wrong message – that the courts just don't care enough to do the work necessary to get it right, and that the parties' input is valueless.

C. The law-of-the-case conundrum.

A thorny question is whether orders giving coercive *Palma* notice or granting coercive alternative writs will have law-of-the-case effect.

On the one hand, one might plausibly argue that such orders should not have law-of-the-case effect because they are usually preliminary in nature and

are not fully considered – as in "it appears" the trial court erred. Law-of-the-case effect generally requires that the point be *expressly decided.* (See, e.g., *Olson v. Cory* (1983) 35 Cal.3d 390, 399.) An observation that it "appears" the trial court erred, while *effectively* a decision on the merits, is not *expressly* a decision on the merits. (Cf. *Building Industry Assn. v. City of Oceanside* (1994) 27 Cal.App.4th 744, 761-762 [no law-of-the-case effect where conclusions in prior appellate opinion upon review of summary judgment denial were "preliminary"].)

On the other hand, a plausible argument can also be made that, by effectively deciding the merits, coercive *Palma* notices and coercive alternative writs decide a "cause" within the meaning of article VI, section 14 of the California Constitution – which means the decision must be "in writing with reasons stated." (*Ibid.*) As such, the order might be said to take on the attributes of law-of-the-case.

Even if this conundrum could somehow be resolved, the Academy urges this court to avoid it entirely by disapproving coercive *Palma* notices and coercive alternative writs.

D. The resurgence of routine *Palma* notices.

Finally, we note that, during the past few years, some appellate panels (most notably in the First and Second Appellate Districts) have been routinely including *Palma* notices in requests for preliminary opposition. In the Academy's view, this is an ominous trend, for two reasons. First, it erodes the extraordinary nature of *Palma* relief, contrary to the admonitions in *Ng* and *Lewis*. Second, the routine *Palma* notice, like the coercive *Palma* notice, compels the filing of a full-scale opposition – for fear that the next word from

the court could be a *Palma* decision on the merits – where cost or tactical considerations might have dictated otherwise.

III.
THE SOLUTION.

A. Put an end to coercive *Palma* notices, coercive alternative writs and routine *Palma* notices.

As we have shown, the rise of coercive *Palma* notices and coercive alternative writs is bad news for the appellate process. It compels the filing of full-scale opposition where preliminary opposition or none at all might do, at considerable expense to litigants. It makes for short-shrift adjudication on the merits. It creates a law-of-the-case conundrum. Add to all this the resurgence of routine *Palma* notices, and we have a budding crisis in writ procedure.

The solution is simple: This court should put an end to coercive *Palma* notices and coercive alternative writs, and should also remind the Courts of Appeal yet again that *Palma* notice is to be extraordinary rather than routine.[1]

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[1] Two commentators have advocated the complete elimination of alternative writs in favor of orders to show cause (which avoid the possibility of mootness by trial court compliance with an alternative writ), arguing that *all* alternative writs (coercive or not) can result in a denial of due process upon trial court compliance without the real party first being heard on the merits. (Gerald Z. Marer & Jonathan M. Eisenberg [not the same person as the signator of this brief], *The Wrongs of Writs*, Daily Journal (Apr. 1, 2001). While that argument is beyond the scope of the issues presented for review in this case, the court might wish to at least make clear that trial court compliance with an alternative writ should be the exception rather than the rule.

B. Put an end to the notion that a writ petition can give sufficient *Palma* notice.

The Academy believes that the answer to the first question presented for this court's review – whether a Court of Appeal may issue a coercive *Palma* notice – should be *no*. That answer moots the second question presented for review – whether, if coercive *Palma* notice is proper, it may be issued without giving the real party an opportunity to file opposition. But if this court reaches the second question, the court will find the answer – *no* – in *Palma* itself, which plainly explained that, because of the "due notice" requirement prescribed by Code of Civil Procedure section 1088 for issuance of a peremptory writ in the first instance, such a writ must not issue unless the real party has been given *Palma* notice and has "either filed a response on the merits *or been given the opportunity to do so*." (*Palma, supra,* 36 Cal.3d at p. 176, italics added.)

Oddly enough, language in this court's *Palma* opinion might be taken to suggest that real party Great American Insurance Company should have known from the writ petition of the need to file full-scale opposition, before the Court of Appeal issued its coercive *Palma* notice, because the writ petition itself included a request for issuance of a peremptory writ in the first instance. In a passage summarizing this court's holding in *Palma*, the *Palma* opinion stated that a *Palma* writ must not issue "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." (*Palma, supra,* 36 Cal.3d at p. 180, italics added.)

This italicized language in *Palma*, read in isolation, would seem to put *Palma* notice in the hands of the *petitioner* as well as the court. That would be unfortunate, for it could enable petitioners to force real parties to file full-

scale opposition – with all the attendant expense and consumption of time – in every case, even though a preliminary opposition or none at all might do: The petitioner need only slip a request for a peremptory writ in the first instance into the petition. Surely this court did not intend in *Palma* to encourage such a tactic, which would be directly contrary to the court's stated desire to "eliminat[e] the necessity for full scale response where such a response is unnecessary." (*Palma, supra,* 36 Cal.3d at p. 180.) Indeed, at the outset of the *Palma* opinion, the court said quite plainly that a *Palma* writ ought not to be issued absent "notice that such a procedure *is being considered*." (*Id.* at p. 176, italics added.) *Palma* notice given solely in the writ petition is not notice that *the court is considering* the *Palma* procedure. It should not be enough in itself to authorize a *Palma* writ.

This court should now clarify this point and put an end to any notion that *Palma* notice may be given solely via the writ petition. Real parties should not have to file full-scale opposition until the court has given notice that it is actually considering the issuance of a peremptory writ.

CONCLUSION

For the foregoing reasons, this court should take the opportunity this case presents to set appellate writ procedure back on the fair course that *Palma* charted nearly 25 year ago.

Dated: August 8, 2008

Respectfully submitted,

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