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The California Supreme Court Approves Of "Suggestive" *Palma* Notices

Recently, the California Supreme Court ruled on an important writ practice issue in a sharply divided 4-3 opinion. In *Brown, Winfield & Canzoneri, Inc. v. Superior Court*, 47 Cal. 4th 1233 (2010), the California Supreme Court held that Courts of Appeal may issue "suggestive" *Palma* notices in writ proceedings. The impact of this decision is still yet to be seen, but all writ practitioners need to be aware of the potential implications of this recent decision.

Civil Writs

This case only can be understood by having a basic grasp of writ procedure, including what has become known as a "*Palma* notice." When a writ petition is filed seeking a writ commanding the respondent superior court to act in a certain manner, an appellate court may (1) summarily deny the petition; (2) issue an alternative writ or an order to show cause pursuant to California Civil Procedure Code section 1087; or (3) issue a peremptory writ in the first instance pursuant to California Civil Procedure Code section 1088.

A peremptory writ of mandate in the first instance is an accelerated procedure that dispenses with the issuance of an alternative writ and with the requirement that the Court of Appeal afford an opportunity for formal briefing and oral argument before ordering that a peremptory writ issue. The California Supreme Court's decision in *Brown, Winfield & Canzoneri, Inc. v. Superior Court*, 47 Cal. 4th 1233 (2010), involves the procedures related to peremptory writs in the first instance.

The Majority Decision

Writing for the majority, Chief Justice Ronald M. George begins the decision by explaining that in *Palma v. U.S. Industrial Fasteners, Inc.*, 36 Cal. 3d 171 (1984), the Court "held that, at a minimum, a peremptory writ of mandate or prohibition may not issue in the first instance without notice that the issuance of the writ in the first instance is being sought or considered." *Brown, Winfield & Canzoneri, Inc.*, 47 Cal. 4th at 1238. *Palma* further held that 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 or parties adversely affected. *Id.* Under *Palma,* before ordering issuance of a peremptory writ in the first instance, Courts of Appeal provide notice that such a writ may issue, and invite formal opposition. *Id.* These orders are called "*Palma* notices." The *Palma* decision stands for the proposition that a peremptory writ in the first instance normally requires both notice and an opportunity to file an opposition before the writ can issue.

The majority decision explains that in contrast to the regular *Palma* notice, a "suggestive" *Palma* notice typically contains the following: "notice that the Court of Appeal intends to issue a

peremptory writ in the first instance granting the relief requested by the petitioner; a discussion of the merits of the writ petition, with a suggestion that the trial court erred in the manner claimed by the petitioner; a specific grant to the trial court of 'power and jurisdiction' to change the disputed interim order and enter in its place a new order consistent with the views of the appellate court, in which event the writ petition will be vacated as moot; and a solicitation of opposition to the issuance of a peremptory writ in the first instance, should the trial court elect not to follow the appellate court's recommendation." *Id.* Of course, when a trial court receives a suggestive *Palma* notice, it will often quickly vacate or modify the challenged order before the party opposing the writ has had the opportunity to file any papers in opposition to the suggestive *Palma* notice. When that happens, the Court of Appeal dismisses the writ petition as moot. Thus, the suggestive *Palma* notice can create a strange and rapid reversal of fortune for the litigants.

In *Brown*, a majority of the California Supreme Court holds "that it is not improper for an appellate court to issue a suggestive *Palma* notice, and that it may do so without first having received or solicited opposition from the real party in interest." *Id.* However, if the trial court decides on its own motion to revisit its interim ruling in response to a suggestive *Palma* notice, that court must inform the parties of its intent to do so, and provide them with an opportunity to be heard. *Id.* at 1239. The majority reasons that a suggestive *Palma* notice is not a peremptory writ in the first instance because it does not command the lower court to follow the course of action suggested by the appellate court. *Id.* at 1238. The majority further reasons that "a suggestive *Palma* notice is analogous to a tentative ruling, in that it sets forth the appellate court's preliminary conclusions with respect to the merits of the writ petition – conclusions that, similar to those reflected in a tentative ruling, are not binding upon either the trial court or the appellate court." *Id.*

The Dissent

In dissent, Justice Kathryn Mickle Werdegar argues that the "the original *Palma* procedure was not broken; it did not need fixing." *Id.* at 1256. The dissent explains that suggestive *Palma* notices deprive the litigant of a meaningful opportunity to be heard by the true decisionmaker – the Court of Appeal. The dissent also identifies the practical consequences of the majority's approval of the suggestive *Palma* notice: "Before today, attorneys could safely advise their clients that doing nothing, or filing a preliminary opposition limited solely to the petitioner's failure to establish the essential procedural prerequisites for writ relief, would not cost their clients the opportunity to be heard on the merits by the court with ultimate decisionmaking power in the matter. . . . If any significant number of attorneys *perceive* being returned to the trial court with the deck stacked against them is a risk and less desirable than remaining in the Court of Appeal with an opportunity to brief why relief should be denied, or simply wish to insulate themselves from client criticism such a turn of events might entail, the Courts of Appeal can expect to see a rise in the number of full-blown preliminary opposition briefs addressing the merits of a writ petition." *Id.* at 1255 (emphasis in the original).

The Ramifications Of The *Brown* Decision On Writ Practice

Does the *Brown* decision mean that a preliminary opposition should be filed in response to every writ petition? Although approximately 94 percent of all writ petitions filed in the Courts of Appeal are summarily denied, the risk that the Court of Appeal may issue a suggestive *Palma* notice – and the trial court follow the appellate court's suggestion – is very real. The majority opinion acknowledges the dilemma that the litigant opposing a writ petition faces: "On the one hand, counsel do not wish to waste their clients' resources by responding immediately and fully to every writ petition, particularly in light of the circumstance that an overwhelming majority of such petitions are summarily denied. On the other hand, counsel face a risk, albeit a small one, that the appellate court may issue a *Palma* notice and, in response, the trial court may reconsider its ruling, without counsel having vigorously represented their client's interests in the appellate court." *Brown*, 47 Cal. 4th at 1248. The majority suggests that "in order to help alleviate this practical dilemma we strongly encourage appellate courts to inform the parties – and invite preliminary opposition – in the event the appellate court anticipates taking any action other than summarily denying the writ petition." *Id.* Of course, it is too early to know whether appellate courts will follow this recommendation from the Supreme Court.

In conclusion, appellate practitioners need to carefully advise their clients regarding all of the potential outcomes of a writ proceeding. The recommendation of whether or not to file a preliminary opposition to a writ petition must take into account those potential outcomes, including the risk that the appellate court issues a suggestive *Palma* notice – and the trial court heeds the suggestion.

Peg Carew Toledo is a partner at Mennemeier, Glassman & Stroud LLP, a Sacramento civil litigation boutique. She is certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. Toledo can be reached at (916) 551-2592 or toledo@mgslaw.com.

C. Athena Roussos contributed to this article. Roussos is an attorney in Elk Grove, California, and is also certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. Roussos can be reached at (916) 670-7901 or athena@athenaroussoslaw.com.