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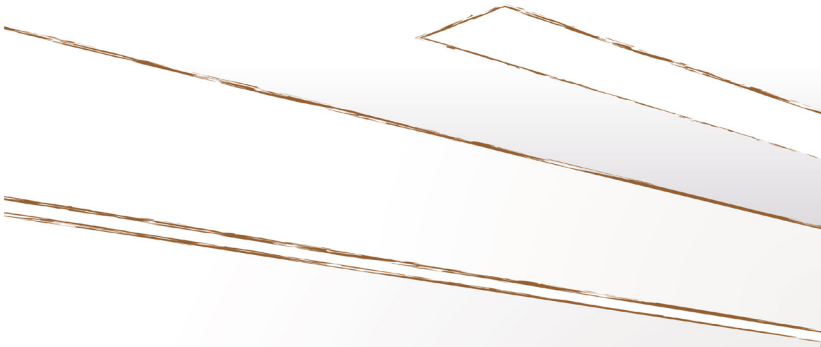

**BY HON. ANDREW JACOBS, HON. ERIK THORSON & ERIC M. FRASER**

# 7 Things to Know About the New Rules of Procedure for Special Actions

In Arizona procedure, there are few things more mysterious than the special action. Are they really appeals? (Well, most of them are appellate, but not nearly all are.) Why does an appellate court choose to take jurisdiction of some special actions but not others? (The prior rules didn't say.) Can the superior court influence an appellate court to cause it to take jurisdiction? (Maybe, but the prior rules don't help there either.)

As most attorneys would agree, unlike in dinner theater, mystery is not usually an advantage in procedural law. For that reason, we all should applaud the Arizona Supreme Court's decision to revisit the 1970s-era Rules of Special Action Procedure and replace them with a modern set of rules. The new rules tell you why an appellate court is more likely or less likely to take your special action. The revised rules even provide a pathway for a superior court judge to help get your special action reviewed by the Court of Appeals.

The new rules take effect on January 1, 2025. Here's a brief tour of seven highlights from those brand-new special action rules.

## 1 Original special actions have procedures and rules that differ from those governing appellate special actions.

The new rules distinguish between two fundamentally different types of special actions. As New Rule 2 says, original special actions begin a case in court, such as in a public records challenge.[1] Original special actions typically get filed in superior court, and jurisdiction is almost always mandatory—particularly in statutory special actions—meaning the superior court does not have discretion over whether to take the case.

By contrast, appellate special actions request review of earlier decisions of lower courts. They're interlocutory appeals. Appellate special actions are typically filed in the Court of Appeals, and jurisdiction is almost always discretionary, which means the appellate courts have discretion over whether to take the appeal.

The prior rules did not distinguish between these types of actions. But what was once only implicit in the rule set and had to be gleaned from case law is now explicit: Original special actions diverge from the outset from appellate special actions. One might think of the common house cat versus *Smilodon fatalis*. (They're named the same, but they're truly different cats.)

The new rules have a complete set of procedures (Part II, which contains Rules 6 through 10) that address only original special actions. They progress as ordered in the life of a case from venue provisions (new Rule 6); procedures for original special actions (new Rule 7); filing fees, filing documents, and distribution of the same (new Rule 8); stays in original special actions (new Rule 9); and judgments in the same (new Rule 10). If there is a mammoth procedural rule to attend to any longer, it is new Rule 7, though we humbly submit that its 10 subparts are more helpful as a roadmap than the seven subparts in prior Rule 4.

## 2 The new procedural rule emphasizes the heightened urgency of original special actions.

Under new Rule 7(f), the court must hold (not just schedule, but hold) a return hearing within 30 days after an answer or other response to a special action complaint. The new rules also address discovery for those rare original special actions where it is necessary.

If you have had a special action case, as a practitioner or judge, where a question regarding discovery and disclosure arose, you know the old rules provided little quarter regarding case management.

The prior rules had a sole oblique reference to court-ordered disclosure in the pleadings portion of the monster procedure rule (prior Rule 4, simply called "Procedure") and a passing note on "special orders concerning discovery." Those breadcrumbs do little to indicate the fulsome body of appellate case law that tells us, "[O]nly in rare situations will discovery be justified in special action proceedings in the superior court," where most but not quite all original special actions will be first filed.[2]

The comment to prior Rule 4(e) cites no case law for this sound guidance: "Discovery in special action proceedings may be necessary in particular circumstances, though it will certainly not be routinely required, and will never be used in an appellate court since no trials will occur there. The Rule gives necessary latitude to allow discovery in those rare instances when it is necessary." To remedy a comment that contained information that should be in the rule, and after considered discussions, the Task Force built the following into Rule 7(g): "Discovery is not routinely permitted in special actions."

The Task Force also saw fit to populate the comment to new Rule 7(g) with case law citations centered on the rare nature of discovery in special actions. After all, a special action is "a unique remedy designed for an unusual set of circumstances where the speedy determination of the issue is of prime consideration. To allow a wide range of discovery, attendant with the delays involved, would tend to defeat the very purpose of a special action."[3]

## 3 The rules now specify the factors appellate courts consider when deciding whether to accept jurisdiction.

The new rules (in Part III, Rules 11-20) address appellate special actions. In a major



change, the rules finally explain the factors that support accepting or declining jurisdiction. This needed reform takes much of the mystery out of appellate special action.

As Rule 12 explains, if the superior court designates the question at issue in your case for review (more on this below), that factor supports jurisdiction. If the question is one of privilege or immunity from suit, that too supports jurisdiction. Questions of first impression or statewide importance likewise do, as do questions that evade review or that may become moot before an appeal. Finally, if resolving your case's issue would advance the efficient management of your case, and it is not merely a special action of a garden-variety dispositive motion, that too is a factor that favors jurisdiction.

The factors tending to defeat jurisdiction are simple. Appellate special actions are not for issues of fact or matters that settled law clearly resolves. Nor are they for resolving issues that do not advance the efficient management of your case. If the special action questions a ruling under Civil Rules 12(b)(6), 12(c) or 56, or a ruling under Family Rules 29(a)(6) or 79, that is a factor that tends to defeat jurisdiction. Ultimately, the rules now provide that if a matter is equally appropriate to address by appeal, it should not be taken as a special action.

These factors are, for the most part, those the appellate courts have long considered when evaluating whether to exercise discretion to take a special action, but which were only set out in case law. Putting those secret menu items on the face of the rules will help all users in their special actions.

## 4 Superior court judges may now designate issues for interlocutory appeal via a special action.

With the new special action rules, Arizona joins the ranks of other states (such as Alabama, Colorado, Georgia, Hawaii, Kansas, North Carolina and Virginia) that allow what amounts to certification of questions for interlocutory review. New Rule 13 allows a trial court judge to designate a question for special action review. New Rule 12 in turn specifies that an issue designated via this process is a factor that supports, but does not require, the appellate court to take the special action.

There is hope that involving the trial court in deciding what merits review will make special action practice less adversarial. The prior rules said little more about how to obtain review, other than suggesting the demonstration of an eye-catching error helps. As a result, it is often very fraught deciding to file a special action because of the potential for overemphasizing the important or severe nature of an alleged error and alienating a trial judge who likely does not agree it was wrong at all.

Under the new practice, the emphasis is on whether the issue in the case presents one or more of the factors in the new rule. Imagine discussing a close but difficult issue with a superior court judge and being able to guide the discussion toward the novelty and closeness of the issue, and to questions of whether it would be efficient for the court of appeals to address it. That more cooperative, less confrontational atmosphere is one anticipated benefit of the new rules.

## 5 The caption no longer names the superior court judge as a respondent.

This next change should likewise lower the temperature of special action practice. Under the prior rules, a petitioner seeking special action seeking relief from a decision of a superior court judge had to identify the superior court judge as the respondent. This put the judge on the other side of the "*v.*" from the petitioner, which led to confusion and was sometimes unnecessarily awkward, adversarial and even a bit personal. After all, the respondent judge would typically continue to hear the case during and after the special-action process. Despite being named as a respondent, the judge almost never did—or even could—participate in the special action. Instead, the caption designated the party who typically defended the judge's action as the "real party in interest."

**We all should applaud the Arizona Supreme Court's decision to revisit and modernize the 1970s-era Rules of Special Action Procedure.**

Under the new rules, the caption of an appellate special action includes only the petitioner and respondent. The petitioner no longer names the superior court judge at all (RPSA 5(b)(2)). Together with enabling the superior court judge to designate issues for interlocutory appeal, excising the judge from the caption may lower the temperature involved in bringing appellate special actions.

In a related change, the new rules (RPSA 5(b)(2)) clarify whom to designate as a respondent in the caption: "all other parties in the case." In a multi-plaintiff or multi-defendant case, even "friendly" parties get labeled as respondents, so long as they do not join as petitioners. The petitioner therefore no longer must exercise judgment about which parties to include.

## 6 If an appellate court accepts jurisdiction, it must issue a reasoned decision.

If an appellate court accepts jurisdiction of a special action, the new rules require the court to issue a decision "in writing" that "states the grounds for the decision," regardless of whether the court grants or denies relief, per RPSA 18(b).

This new requirement will end the occasional practice of appellate courts accepting jurisdiction but summarily denying relief without explanation. This prior practice



faced criticism from practitioners because once an appellate court accepted jurisdiction, its ruling became law of the case. This meant that the superior court had to follow the ruling and no party could challenge the ruling later via direct appeal, even though no one knew why the appellate court denied relief.

The new rule does not require full opinions or even the type of fully reasoned memorandum decision typically issued by the Court of Appeals in direct appeals. A few paragraphs can suffice, so long as they state the grounds for the decision.

The rules still do not require the court to provide any reasons for declining jurisdiction. This is consistent with the discretionary nature of special action review, which would be compromised if the court had to explain why it did not affirmatively exercise its discretion. Moreover, declining jurisdiction lacks the same law-of-the-case consequences that flow from exercising jurisdiction. One-line orders declining jurisdiction therefore may continue, but orders accepting jurisdiction must provide reasons.

## 7 Appellate special actions now end in a termination letter.

Finally, the new rules have a practice under which special actions terminate in a manner akin to mandates at the end of conventional appeals. Under new Rule 18, when the special action ends, unless the court makes its decision immediately effective, the appellate special action decision does not become effective until the appellate court issues a termination letter. The appellate court will not issue that letter until the time for a petition for review expires (or, if a petition is filed, then after review is declined or the case is reviewed and decided). In short, this is a practice that mimics the mandate process in conventional appeals. This change too adds needed uniformity.

### endnotes

1. A.R.S. § 39-121.02.
2. *See Lewis v. Arizona Dep't of Econ. Sec.*, 186 Ariz. 610, 616 (Ct. App. 1996).
3. *Id.* (*quoting Riggins v. Graham*, 20 Ariz. App. 196, 198 (1973)).