

## CPLR 602: Second Department Allows Consolidation of Action with Special Proceeding

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Besides clarifying the frequently misunderstood distinction between joint trials and consolidations, this decision shows a distinct preference for joint trials over consolidations in most multiple-action situations. Further, it offers a warning to the practitioner to be precise in his use of language; when a joint trial is desired, it should not be referred to haphazardly as a consolidation.

*CPLR 602: Second department allows consolidation of action with special proceeding.*

In *In re Elias*,<sup>72</sup> the plaintiff sought to consolidate a special proceeding to nullify a corporate election with a stockholder's derivative action. Such a consolidation was prohibited under the CPA, which provided only for consolidations of two actions or two special proceedings.<sup>73</sup> Supporting case law was provided by the appellate division, second department, which held in *In re Big W Construction Corp.*<sup>74</sup> that lack of specific statutory authorization barred any cross-consolidations of actions with special proceedings.

The parallel CPLR provision<sup>75</sup> when viewed alone appears to be even more restrictive, since it speaks only of the consolidation of "actions." However, this section must be read in conjunction with the definition of an action in the CPLR, *i.e.*, any form of litigation including both traditional actions and special proceedings.<sup>76</sup> On the basis of this rationale, the CPLR has been construed by the first department,<sup>77</sup> and now, in the instant case, by the second department, to allow consolidation of actions with special proceedings. No logical reason was found to continue to disallow<sup>78</sup> cross-consolidations where common questions of fact and law exist.

It should be noted that an additional reason supporting the second department's decision lies in the fact that the CPLR permits a court to change the form of a civil proceeding.<sup>79</sup>

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<sup>72</sup> 29 App. Div. 2d 118, 286 N.Y.S.2d 371 (2d Dep't 1967).

<sup>73</sup> CPA 96.

<sup>74</sup> 278 App. Div. 977, 105 N.Y.S.2d 827 (2d Dep't 1951).

<sup>75</sup> CPLR 602.

<sup>76</sup> CPLR 105(b).

<sup>77</sup> *Schuster v. 490 West End Corp.*, 26 App. Div. 2d 535, 271 N.Y.S.2d 171 (1st Dep't 1966) (mem.).

<sup>78</sup> In *Hanft v. Hanft*, 46 Misc. 2d 548, 260 N.Y.S.2d 104 (Sup. Ct. Bronx County 1965), the court, prior to the *Schuster* decision, chose to follow *Big W*, and refused to allow cross-consolidation.

<sup>79</sup> CPLR 103(c); 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 602.18 (1968).