

5 | 31 | 2011

[Delaware Chancery Court Considers Whether a Reverse Triangular Merger Constitutes an Assignment by Operation of Law](#)

In *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, C.A. No. 5589-VCP (Del. Ch. Apr. 8, 2011), the Delaware Court of Chancery denied a motion to dismiss a breach of contract claim, holding that a reverse triangular merger may constitute an assignment by operation of law. In the first Delaware case to address this issue, the Court found plausible plaintiff's argument that an assignment "by operation of law" covers mergers that effectively operate like an assignment. The Court held that Delaware's stock acquisition jurisprudence is not controlling with respect to reverse triangular mergers. In its decision, the Court indicated that the actions a buyer takes after a reverse triangular merger with respect to the target company are relevant to whether an anti-assignment clause is triggered.

In 2007, Roche Holdings Ltd. acquired BioVeris Corporation through a reverse triangular merger whereby a wholly-owned subsidiary of Roche merged with and into BioVeris, with BioVeris as the surviving entity. At the time of the merger, Roche and BioVeris were parties to an agreement with Meso Scale Diagnostics, LLC and Meso Scale Technologies, LLC (Meso Scale) pertaining to intellectual property rights, which contained the following anti-assignment clause:

Neither this Agreement nor any of the rights, interests or obligations under [it] shall be assigned, in whole or in part, by operation of law or otherwise by any of the parties without the prior written consent of the other parties.

Within a few months after the merger, Roche terminated all BioVeris employees, shut down its facilities and discontinued its product lines, effectively turning it into an intellectual property holding company. Meso Scale thereafter filed a breach of contract claim against Roche and BioVeris alleging, among other things, that the defendants breached the anti-assignment clause by not obtaining Meso Scale's consent to the merger.

Roche moved to dismiss the claim, arguing that Meso Scale's consent to the transaction was not required because no assignment (by operation of law or otherwise) occurred. Specifically, Roche argued that a reverse triangular merger has the same result as a stock sale, i.e., it merely changes the ownership of the target entity, which Delaware courts have ruled is not an assignment. The Court noted that the effect of a reverse triangular merger is closer to a stock acquisition than a forward triangular merger, where the target company disappears, because

in a reverse triangular merger the target company emerges from the transaction as the surviving entity “with the same contractual rights and obligations as it had before the transaction.” However, the Court ultimately held that stock acquisitions, while similar to reverse triangular mergers, are not the same, and thus do not control.

The Court also noted that it appears that more than a "mere change in ownership" occurred and found plausible plaintiff's argument that the phrase "by operation of law" was intended to cover mergers that effectively operated like an assignment.

Although the Court has not decided this case on the merits, this decision implies that a reverse triangular merger followed by a conversion of the target company into a shell corporation may require consent pursuant to an anti-assignment provision, particularly if such provision includes the language “by operation of law.” Since it is unclear how the court will ultimately decide this issue, companies entering into reverse triangular mergers may want to minimize their risk by obtaining consent to contracts governed by Delaware law, particularly in situations where such contracts contain anti-assignment provisions with “by operation of law” language. The final disposition of this case will likely clarify whether and when reverse triangular mergers trigger anti-assignment provisions under Delaware law.

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