

Delaware Chancery Court Rules That A Reverse Triangular Merger Does Not Constitute An “Assignment By Operation Of Law”

BY THADDEUS J. MALIK, JILL R. SHEIMAN & ERIC M. JONES

The Delaware Court of Chancery (the “Court”) recently ruled in *Meso Scale Diagnostics LLC v. Roche Diagnostics GMBH*, 2013 WL 655021 (Del. Ch. Feb. 22, 2013), that a reverse triangular merger does not constitute an assignment by operation of law. This ruling validates the long-held belief among deal lawyers that a reverse triangular merger, like a stock purchase, does not involve an assignment of the target company’s assets and, therefore, does not trigger anti-assignment provisions in the target company’s contracts that restrict an “assignment by operation of law.” Importantly, it also reverses an April 2011 ruling, 2011 WL 1348438 (Del. Ch. Apr. 8, 2011), by the Court in the same case that concluded that there was ambiguity regarding whether an “assignment by operation of law” provision should apply in the context of a reverse triangular merger.

Background

Meso Scale Diagnostics LLC v. Roche Diagnostics GMBH involved a non-exclusive limited field license (the “Roche License”) granted by IGEN International, Inc. (“IGEN”) to Roche Diagnostics Ltd. (“Roche”) in 2003 to use electrochemiluminescence (“ECL”) technology, which is used to detect and measure the presence of specific molecules in a test sample, such as blood. Meso Scale Diagnostics, LLC (“MSD”) and Meso Scale Technologies, LLC (“MST”) held *exclusive* licenses from IGEN to use the same technology, which licenses had been granted prior to the grant of the Roche License. In 2003, given MSD’s and MST’s pre-existing license rights, Roche, IGEN, MSD and MST entered into a Global Consent pursuant to which the parties consented to the grant of the non-exclusive license to Roche, and, at the same time, BioVeris Corporation (“BioVeris”) acquired all of IGEN’s intellectual property rights, including the ECL technology (thereby becoming the successor to IGEN under the ECL licenses to Roche, MSD and MST).

In 2007, BioVeris alleged that Roche violated the Roche License, and, in response to such allegation and in order to acquire BioVeris’s intellectual property rights (including the ECL technology), Roche acquired BioVeris through a reverse triangular merger, with BioVeris as the surviving entity and the BioVeris stockholders receiving cash for their shares. MSD and MST brought a breach of contract claim against Roche for breach of the anti-assignment provision in the Global Consent, which reads as follows:

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 . . .

In its April 2011 decision on defendants' motion to dismiss, the Court distinguished reverse triangular mergers from stock acquisitions and forward triangular mergers and held that cases involving stock acquisitions and forward triangular mergers were, therefore, not controlling. In the absence of controlling precedent, the Court found that both parties' arguments were reasonable interpretations of the term "by operation of law," and denied defendants' motion to dismiss, ruling that a decision regarding this ambiguity was not appropriate at that stage of the case.

The Court's April 2011 ruling surprised deal lawyers. Almost two years of uncertainty passed before the same Court definitively ruled on the issue in motion for summary judgment proceedings.

Court's Analysis of Anti-Assignment Provisions

In ruling on defendant's recent motion for summary judgment, the Court held that "[g]enerally, mergers do not result in an assignment by operation of law of assets that began as property of the surviving entity and continued to be such after the merger." The Court cited Section 259 of the Delaware General Corporation Law (the "DGCL"), as well as precedent cases from the Delaware Supreme Court, the United States District Court for the District of Delaware and the United States Court of Appeals for the Third Circuit to support its conclusion that the non-surviving corporation's rights and obligations are transferred to the surviving corporation in a merger, but that no such transfer or assignment of the surviving corporation's rights and obligations occurs in a merger. Del. Code Ann. tit. 8, § 259 (2013); *see Levitt v. Bouvier*, 287 A.2d 671 (Del. 1972); *Heit v. Tenneco, Inc.*, 319 F. Supp. 884 (D. Del. 1970); *Koppers Coal & Transport Co. v. United States*, 107 F.2d 706 (3d Cir. 1939). It followed logically from this conclusion that, with respect to a surviving corporation, generally, and with respect to BioVeris in this specific case, a reverse triangular merger is not an assignment by operation of law or otherwise.

The Court further noted that defendants' interpretation of the subject anti-assignment provision was more consistent with the reasonable expectations of the parties than plaintiffs' interpretation. The "objective theory" of contract interpretation, which is followed in Delaware and was employed by the Court in its analysis, requires that a court interpret a contract in a manner that satisfies the "reasonable expectations of the parties at the time they entered into the contract." *The Liquor Exchange, Inc. v. Tsaganos*, 2004 WL 2694912 (Del. Ch. Nov. 16, 2004). The Court found that "[t]he vast majority of commentary discussing reverse triangular mergers indicates that a reverse triangular merger does not constitute an assignment by operation of law as to the nonsurviving entity," and, therefore, it is "unlikely that the parties would have expected a clause covering assignments by operation of law to have applied to reverse triangular mergers."

In challenging defendant's motion for summary judgment, plaintiffs asserted that (1) the acquisition of BioVeris by Roche was nothing more than the assignment of BioVeris's intellectual property rights to Roche; (2) Delaware case law regarding forward triangular mergers should apply to all mergers; and (3) the Court should adopt a California federal court's holding with respect to the applicability of anti-assignment provisions to reverse triangular mergers. The Court rejected each of plaintiffs' arguments in turn.

- First, the Court held that plaintiffs' first argument inappropriately ignored the doctrine of independent legal significance, which provides that actions taken in accordance with different sections of the DGCL are acts of independent legal significance even though the end result may be the same under different sections. The Court found that the fact that Roche would be prevented from acquiring the intellectual property rights under the Roche License via a direct assignment of such rights was irrelevant in determining whether such an acquisition would be permitted via a reverse triangular merger;
- Second, the Court rejected comparisons to cases involving forward triangular mergers, noting the obvious differences between forward and reverse triangular mergers (*i.e.*, that the target company is not the surviving entity in forward triangular mergers but is in reverse triangular mergers). Further, unlike the cited forward triangular merger cases, the Court found no ambiguities in the anti-assignment language in the Global Consent that would necessitate a departure from the Court's stated principle that a reverse triangular merger is not an assignment by operation of law; and
- Finally, the Court refused to adopt a California federal court's holding that an assignment results from a change in the legal form of a business (whether via a stock acquisition or reverse triangular merger) if it affects the interests of the parties protected by the anti-assignment provision. *See SQL Solutions, Inc. v. Oracle Corp.*, 1991 WL 626458 (N.D. Cal. Dec. 18, 1991). In the Court's view, "[b]oth stock acquisitions and reverse triangular mergers involve changes in legal ownership, and the law should reflect parallel results." Given this proposition, Delaware could not follow the California court's holding, because doing so would conflict with Delaware's already well-established position that stock acquisitions, by themselves, do not result in an assignment by operation of law.

Conclusion

Meso Scale Diagnostics LLC v. Roche Diagnostics GMBH affirmed the widely held view that reverse triangular mergers do not trigger anti-assignment provisions restricting assignments "by operation of law" in contracts governed by Delaware law. Although anti-assignment provisions are often overlooked as "boilerplate" provisions, careful consideration should be given to the intended restrictions on assignment when drafting and negotiating contracts. Deal lawyers should remember (and take as advice) the Court's comment that the plaintiffs "could have negotiated for a 'change of control provision.'" Accordingly, in contracts governed by Delaware law, reliance should no longer be placed on anti-assignment provisions to prevent assignments effectuated by reverse triangular mergers. Instead, a "change of control" provision should be utilized if such protection is intended.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Chicago lawyers:

Thaddeus J. Malik
1.312.499.6020
thaddeusmalik@paulhastings.com

Jill R. Sheiman
1.312.499.6035
jillsheiman@paulhastings.com