

## **Delaware Court Finds That a Reverse Triangular Merger Does Not Result in an Assignment by Operation of Law**

In *Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, the Delaware Court of Chancery confirmed that a reverse triangular merger did not result in an assignment by operation of law. This affirms the traditional view often taken by practitioners that was called into question by an April 2011 ruling on a motion to dismiss where the Court implied that in some circumstances a reverse triangular merger may violate contractual language prohibiting assignment by operation of law.

### **Reverse Triangular Mergers and Anti-Assignment Language**

Parties to acquisitions often review key contracts of the target company to determine whether the terms of a target's key contracts prohibit the acquisition or require a third-party's consent in connection with the acquisition. The requirement to obtain a waiver or third-party consent can be affected by the acquisition structure.

Practitioners have traditionally taken the view (at least until the first *Meso Scale* ruling in April 2011) that contractual language prohibiting an assignment by operation of law is not triggered by a reverse triangular merger because a reverse triangular merger does not involve a transfer or assignment of a target's contracts, but instead involves a change in ownership of the target. In a reverse triangular merger, an acquiring company forms a subsidiary that is then merged into the target company, which results in the subsidiary formed by the acquiring company disappearing and the target company surviving the merger as a wholly-owned subsidiary of the acquiring company. Because obtaining third-party consents or waivers can be difficult and time-consuming, practitioners often view avoiding the application of contractual requirements or prohibitions regarding assignments as one of the benefits of the reverse triangular merger structure.

### **Background of Meso Scale**

In *Meso Scale v. Roche*, the plaintiffs alleged that the acquisition of BioVeris Corporation ("BioVeris") by Roche Diagnostics GmbH, C.A. ("Roche") via a reverse triangular merger violated the anti-assignment terms of a contract between the plaintiffs and a predecessor to BioVeris. The contract that the plaintiffs alleged was breached by the reverse triangular merger set forth that, "Neither this Agreement nor any of the rights, interests or obligations under this Agreement 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..." The Court, in an April 2011 ruling, denied Roche's motion to dismiss because it noted that there may be circumstances where a reverse triangular merger violates a provision prohibiting assignment by operation by law or otherwise.

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### **Authors**

Byron B. Kirkland  
919.821.6682  
[bkirkland@smithlaw.com](mailto:bkirkland@smithlaw.com)

Rebecca A. Brophy  
919.821.6640  
[rbrophy@smithlaw.com](mailto:rbrophy@smithlaw.com)

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SMITH ANDERSON  
150 Fayetteville Street, Suite 2300  
Raleigh, NC 27601  
919.821.1220  
[www.smithlaw.com](http://www.smithlaw.com)

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## Analysis in Meso Scale

In *Meso Scale v. Roche*, the Court concluded that Section 259(a) of the Delaware General Corporation Law, which provides that the effect of a merger is the transfer of the assets and liabilities of the non-surviving corporation to the surviving corporation, supports the conclusion that a reverse triangular merger is generally not an assignment of the target's contracts by operation of law or otherwise because the target is the surviving corporation.

Further, the Court declined to follow a California case, *SQL Solutions Inc. v. Oracle Corporation*, that held that an anti-assignment provision in a software license agreement similar to the provision in the contract between Roche and BioVeris was triggered by a reverse triangular merger.

Finally, the Court noted that its interpretation of the anti-assignment clause was consistent with a view of the parties' reasonable expectation regarding the contractual term at the time the parties entered into the contract. In doing so, the Court noted that a large majority of commentary and case law discussing reverse triangular mergers indicate that a reverse triangular merger does not constitute an assignment by operation of law with respect to the surviving company's contracts.

## Practical Implications of Meso Scale

There are several practical implications for companies and practitioners to remember as a result of the Court's ruling.

**Greater Certainty for Reverse Triangular Mergers but the Parties' Intent is Still Relevant:** *Meso Scale v. Roche* generally confirms the conclusion that, under Delaware law, a reverse triangular merger does not result in an assignment by operation of law. However, given the Court's reasoning, which included a review of the parties' intent, companies and practitioners should still consider the intent of the contractual parties to the target company's agreements, particularly if the relevant terms are ambiguous and the contract is important.

**Companies Should Carefully Consider "Boilerplate" Language in Key Contracts:** *Meso Scale v. Roche* is a reminder of the potential importance of boilerplate language, particularly in a company's key contracts. In *Meso Scale v. Roche*, the Court noted that the plaintiff could have negotiated for a provision prohibiting a change in control of its counterparty that would have provided the plaintiff with consent rights in connection with a reverse triangular merger, but instead agreed to a term that merely prohibited an assignment of the contract by operation of law or otherwise. In light of this, drafters and negotiators of commercial agreements should carefully consider a contractual party's desired rights and attendant obligations in the event of an acquisition, regardless of the form of the acquisition structure and in order to ensure that the contractual language clearly reflects the parties' intent in this regard.

**Applicable Law is Relevant:** While many jurisdictions view Delaware corporate case law as persuasive, the effect of a reverse triangular merger on anti-assignment language when the applicable law is not Delaware should be confirmed, especially if a contract is important. This is particularly true in light of cases such as *SQL Solutions Inc. v. Oracle Corporation*, where courts in some non-Delaware jurisdictions have indicated that a reverse triangular merger can trigger prohibitions on assignments by operation of law in certain circumstances.