Does a Reverse Triangular Merger Constitute An Assignment by Operation of Law?

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In a Delaware Court of Chancery decision dated February 22, 2013, Vice Chancellor Parsons held that a reverse triangular merger does not constitute an assignment by operation of law under Delaware law. The decision, *Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, C.A. No. 5589-VCP (Del. Ch. 2013) helped to clarify some uncertainty created by the same court in an earlier decision involving the same parties. As a result of the decision, M&A practitioners should feel more comfortable that Delaware courts will find that a reverse triangular merger will not be considered an assignment by operation of law when interpreting a contract.

A reverse triangular merger is a transaction whereby the acquiring party forms a subsidiary and then merges the subsidiary into the target company with the target company being the surviving entity and a wholly-owned subsidiary of the acquiring party. At issue in theMeso Scale case was whether the reverse triangular merger structure triggered the anti-assignment language in a license agreement being acquired by the acquiring party. The anti-assignment provision in the license agreement provided 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 an earlier decision involving this matter, Vice Chancellor Parsons had declined to hold that the reverse triangular merger did not result in an assignment of the license agreement at issue. In the summary judgment proceeding, Roche argued that because the target in a reverse triangular merger survives and continues to own its assets, no assignment took place (the rights and obligations of the target are not transferred, assumed or impacted as a result of the structure of the transaction). The plaintiffs argued that mergers, including a reverse triangular merger, as a general proposition, result in an assignment by operation of law.

The Chancery Court concluded that a reverse triangular merger does not trigger the anti-assignment provision based on Delaware corporate law (and in particular Section 259 of the Delaware General Corporation Law) and since it does not result in the transfer of the rights and obligations of the non-surviving corporation to the surviving corporation.

The decision of Vice Chancellor Parsons confirms what most M&A lawyers have believed — that by using the reverse triangular merger structure, parties can avoid triggering anti-assignment clauses in licenses, contracts or other assets. The decision clarifies the state of the law in Delaware. As long as the parties structure the acquisition as a reverse triangular merger, they should not be required to obtain consents from third parties to a contract which contains a standard anti-assignment provision such as the one referenced above. It should be noted that if the anti-assignment provision at issue contains change of control or change of ownership language, this ruling will likely not be applicable. In addition, the ruling of the Chancery Court

only addresses Delaware law. Other jurisdictions including California and New Jersey have held that in certain cases a reverse triangular merger does constitute an assignment by operation of law (requiring parties to obtain consents to assignments from third parties).

To discuss the potential benefits of a reverse triangular merger structure, please contact the author **Joseph C. Marrow**.