

[Securities Regulation Daily Wrap Up, MERGERS AND ACQUISITIONS—Del. Ch.: Choice of law provision did not trigger Delaware blue sky law, \(Feb. 23, 2016\)](#)

Securities Regulation Daily Wrap Up

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By [John M. Jascob, J.D., LL.M.](#)

A Delaware choice of law provision in a merger agreement did not trigger the application of the Delaware Securities Act to the transaction. The Chancery Court reasoned that adopting this interpretation would lead to the "bizarre result" of converting a blue sky statute intended to regulate intrastate securities transactions into one that would regulate interstate transactions. As the buyer did not establish the requisite factual nexus between the merger and Delaware to trigger application of the statute, the securities claim was dismissed ([FdG Logistics LLC v. A&R Logistics Holdings, Inc.](#), February 23, 2016, Bouchard, A.).

Merger transaction. The dispute arose out of the 2012 purchase of a trucking company, A&R Logistics, Inc., by a subsidiary of Milwaukee-based private equity firm Mason Wells. Acting as the representative of the selling securityholders, FdG Logistics filed a complaint asserting a single claim against the buyer for breach of the merger agreement for failing to remit to them a 2012 tax refund as required under the contract. In response, the buyer asserted counterclaims for fraud under the Delaware Securities Act and the common law. The buyer alleged, among other things, that the trucking company's drivers systematically falsified their logs; that one of the company's facilities discharged industrial wastewater in violation of environmental laws; and that two other facilities were badly impaired structurally, requiring over \$2 million in repair costs for each.

Delaware Securities Act. The Chancery Court began by observing that Delaware precedent holds that the Delaware Securities Act only applies where there is a sufficient nexus between Delaware and the transaction at issue. The buyer, however, did not assert that it was solicited to purchase the securities in Delaware, or that any of the negotiations over the merger agreement occurred in Delaware. Instead, the buyer argued that the Delaware Securities Act applied because the agreement's choice of law provision stated that all issues concerning the transaction documents would be governed by Delaware law. In an effort to distinguish the Chancery Court's previous rejection of this argument in *Eurofins Panlabs, Inc. v. Ricerca Biosciences, LLC* (Del. Ch. 2014), the buyer attempted to invoke 6 Del. C. § 2708, which provides that a Delaware choice of law provision may be construed to encompass not only the contract law of Delaware to interpret the contract, but also Delaware's tort law for purposes of determining the enforceability of the contract.

Chancellor Bouchard declined to construe Section 2708 in such a broad manner, stating this interpretation would transform the statute into a "mechanism for the wholesale importation of every provision of Delaware statutory law into the commercial relationship of contracting parties." The court noted that such a construction would lead to bizarre results, such as triggering application of the Delaware tax code to a merger where it otherwise would not apply, or requiring companies incorporated outside of Delaware to be bound by the Delaware General Corporation Law's requirements for stockholder approval of the merger, contrary to the internal affairs doctrine.

More importantly, Chancellor Bouchard continued, construing a choice of law provision in this manner would lead to the bizarre result of allowing contractual parties to convert a blue sky law that was intended to regulate intrastate commerce into one that would apply to interstate commerce. This outcome not only would be inconsistent with the legislative intent of the Delaware Securities Act, but also would implicate issues of federal preemption. As the sole connection that the buyer could draw to Delaware—that the merger parties were incorporated here—was insufficient to demonstrate the required transactional nexus, the buyer's claim under the Delaware Securities Act was dismissed.

The case is [C.A. No. 9706-CB](#).

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Companies: FdG Logistics LLC; A&R Logistics Holdings Inc.

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