



## Alerts

### Description of "Client" in Outside Counsel Guidelines Prohibits Representation Adverse to Affiliates of Firm's Current Client

March 21, 2019

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*Falk Pharma GMBH v. Generico, LLC*, Nos. 2017-2312, 2017-2636, 2018-1320, 2018-2097, 2019 U.S. App. LEXIS 4859 (Fed. Cir. Feb. 8, 2019)

#### Brief Summary

The U.S. Court of Appeals for the Federal Circuit has ruled that a law firm must withdraw from representing a company in patent appeals because the law firm had an ongoing attorney-client relationship with an affiliate of adverse parties in the litigation. The court found that the affiliate's Outside Counsel Guidelines, incorporated by reference in the engagement letter, created an attorney-client relationship with the adverse parties in the patent appeals, which required disqualification.

#### Complete Summary

This matter came before the U.S. Court of Appeals for the Federal Circuit on motions to disqualify Katten Muchin Rosenman LLP ("Katten") as counsel for Mylan Pharmaceuticals Inc. ("Mylan") in three appeals: Valeant Pharmaceuticals International, Inc. ("Valeant-CA") and Salix Pharmaceuticals, Inc. ("Salix") moved to disqualify in *Valeant Pharmaceuticals International, Inc. v. Mylan Pharmaceuticals Inc.*, No. 2018-2097 ("*Valeant II*"); Salix moved to disqualify in *Salix Pharmaceuticals, Inc. v. Mylan Pharmaceuticals Inc.*, Nos. 2017-2636, 2018-1320 ("*Salix II*"); and Valeant-CA and Salix moved to disqualify in *Dr. Falk Pharma GmbH v. GeneriCo, LLC*, No. 2017-2312 ("*Dr. Falk II*"). The attorneys from Katten who represented Mylan were lateral partners of Katten who had commenced the representation while partners at Alston & Bird LLP.

Katten currently represented Bausch & Lomb, a corporate affiliate of Valeant-CA and Salix, in trademark litigation. Valeant-CA and Salix asserted that Katten should be disqualified from representing Mylan in these appeals because it had an attorney-client relationship with Valeant-CA and Salix as a consequence of its representation of Bausch & Lomb, creating a concurrent conflict of interest.

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#### Service Areas

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Katten had signed an engagement letter with Bausch & Lomb that governed "the overall relationship between [Katten] and Valeant Pharmaceuticals International, Inc."—i.e., Valeant-CA. This engagement letter referenced Valeant's Outside Counsel Guidelines ("Guidelines"). The Guidelines stated they "govern the relationship between Valeant Pharmaceuticals International [i.e., Valeant DE], its subsidiaries and affiliates ... and outside counsel." The Guidelines did not define "conflict of interest," but stated that "Valeant expects its firms to adhere to local rules and ethics rules relating to conflict of interest and client representation."

In analyzing the issue of whether Katten should be disqualified from representing Mylan, the Federal Circuit applied regional circuit law. The relevant regional circuits in all three appeals apply the Model Rules of Professional Conduct, and thus, all three motions alleged violations of the same rule—Rule 1.7(a) of the Model Rules of Professional Conduct.

The court ultimately held that Katten had an ongoing attorney-client relationship with Valeant-CA and its subsidiaries, including Salix, based on the language of the engagement letter and the Guidelines. Further, the court concluded that Katten's representation of Mylan in the three subject appeals created concurrent conflicts of interest as Mylan was adverse to Valeant-CA and Salix. Therefore, the circuit granted the motions to disqualify.

## Significance of Decision

A broadly worded description of the attorney-client relationship in an engagement letter *or* Outside Counsel Guidelines may create an unintended attorney-client relationship with entities a firm does not represent. Law firms should use caution when considering engagement agreements which incorporate Outside Counsel Guidelines that may include a client's affiliates. Firms should also continuously update their conflicts database to reflect changes to corporate families, and vet potential lateral hires for similar issues.

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The court also found that Valeant-CA, Salix and Bausch & Lomb were sufficiently interrelated to give rise to a corporate affiliate conflict, adopting the reasoning of *GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.*, 618 F.3d 204 (2d Cir. 2010).