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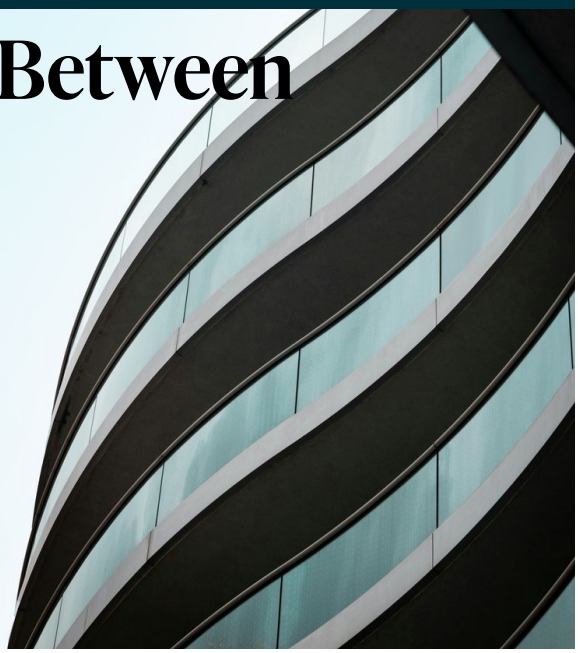
Crossing the Blurred Line Between Brands and Generics



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Clients often ask if a law firm can represent both brand and generic drug manufacturers. It's a reasonable question, particularly when the popular perception is that potential conflicts pigeonhole law firms, forcing them to "pick a side" and represent *either* brands or generics. But the reality is that firms can and do represent both "sides" of the brand-generic divide, especially given the recent consolidations among companies.

Increased consolidation in the pharmaceutical industry has produced an ecosystem in which many companies manufacture both brand and generic drugs. Because some brand manufacturers have their own generic subsidiaries and others are permitted to sell generic versions of their own brand drugs, the brand-generic divide is more blurry than popular perception might suggest. As the industry continues more than a decade of sustained consolidation, it may be time to retire the "pick a side" paradigm in pharmaceutical patent litigation.

Regardless of industry consolidation, hiring firms that have represented the other "side" (or both "sides") of the brand-generic divide can be advantageous for any pharmaceutical manufacturer. A traditionally generic-sided firm representing a brand manufacturer (or vice-versa) would likely have special insight into its opposing counsel's litigation strategy. A firm that crossed the divide could also be valuable for its relationships with opposing counsel. For instance, a brand client of a traditionally generic-side firm could benefit from the firm's good

working relationship with other generic-side firms, some of whom may have worked with the firm representing co-defendants in previous litigations. When patent litigation ensues, a pharmaceutical manufacturer may deprive itself of uniquely capable counsel by sticking to its own "side" of the divide.

So, can a "brand firm" or "generic firm" cross the perceived divide and represent parties on the "other side" in pharmaceutical patent litigation? Certainly. The line between brands and generics has blurred in the modern landscape of business consolidations, and a firm with brand *and* generic experience may be more than the sum of its parts. The question is whether pharmaceutical companies will let the aging trope of a divided Hatch-Waxman bar prevent them from obtaining the most competent legal representation available.

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