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Will Big Drugmakers Mimic Purdue On Opioid Marketing?

By **Emily Field and Jeff Overley**

Law360 (February 12, 2018, 9:50 PM EST) -- Purdue Pharma's decision to scale back its opioid marketing amid an onslaught of litigation will force many big drugmakers to consider similar moves, potentially marking a seminal moment in the nation's brutal opioid epidemic.

Purdue announced over the weekend that it cut its sales force in half and stopped sending opioid promoters to physician offices "effective immediately." The decision comes as Purdue and other opioid sellers are embroiled in multidistrict litigation in Ohio federal court, where U.S. District Judge Dan Polster is hoping for a quick settlement that would sharply cut the number of narcotic painkillers in circulation.

Experts say that Purdue's move puts other opioid makers in the uneasy position of weighing the financial blow in lost sales against the reputational hit and litigation risks of continuing to promote opioids.

"Purdue took a bold step with this decision, and anyone who doesn't follow Purdue is going to be asked why they didn't, especially now that so much is known about opioids," Blackwell Burke PA partner Peter Goss said.

Hunter Shkolnik of Napoli Shkolnik PLLC, who represents plaintiffs in the MDL, said that at this point in the epidemic — which caused average U.S. life expectancy to drop in 2015 and 2016, according to federal researchers — no company will want to be the one that keeps marketing opioids directly to physicians.

"I think we're entering a new phase, and hopefully we're rolling the clock back to 20-some years ago, when doctors thought twice about ever using an opioid," Shkolnik said.

But despite concerns about appearances, other companies are only likely to curtail opioid marketing if it makes financial sense, said Michael Carome, director of Public Citizen's health research group.

"If they think that doing the same thing might help their bottom line, they would do it," Carome said.

One likely part of Purdue's calculus — and something that other drugmakers will likely consider — is whether proactive limits on opioid promotion will help when negotiating legal settlements.

"To the extent they can portray themselves as being a reformed corporate wrongdoer, maybe they hope to get more favorable treatment in those negotiations," Carome said.

Trade group Pharmaceutical Research and Manufacturers of America did not respond on Monday to a request for comment on its take on Purdue's move and whether it anticipates that its other members will follow suit.

Attorneys saw Purdue's decision as one driven by a constellation of factors: bad press the company has received for marketing OxyContin, the tsunami of opioid litigation swamping the company, and pressure from Judge Polster to quickly reach a settlement.

“They seem like such villains now, and if a case ever went the jury, they’d probably [get] hammered,” said Richard Ausness, a professor at the University of Kentucky College of Law who has written about the opioid litigation. “So if they can maybe overcome a little of that and improve their reputation with the public, I could see where they might be willing to do that.”

Preliminary settlement talks were held two weeks ago, unusually early for an MDL. Judge Polster is maneuvering to avoid prolonged litigation and to broker settlements that fund addiction treatment and dial back opioid prescribing.

The MDL involves more than 300 lawsuits targeting various drugmakers, including Endo Pharmaceuticals Inc., Johnson & Johnson and Mallinckrodt PLC. The plaintiffs — mostly local governments — are seeking billions of dollars in damages.

“It seems to me like what they’re trying to do is position the case in a way takes [away] the incentive for states to continue to go after them,” said Nicholas Harbist of Blank Rome LLP. “'To the extent that we were doing things that you think were inappropriate ... we’re not doing it anymore, so really all [that's] left is if there is any damage that we caused that we owe you for.'”

In interviews on Monday, plaintiffs attorneys welcomed Purdue's action, but cautioned that it doesn't come close to making their clients whole.

“Hopefully this will be beneficial for the future ... but it doesn't do anything for the folks who are already in trouble,” said Paul J. Hanly Jr. of Simmons Hanly Conroy LLC, a lead plaintiffs attorney in the MDL.

OxyContin is so widely known and prescribed that Purdue may have decided that it wouldn’t lose very much money if it laid off half of its sales representatives, Harbist said.

There’s also the possibility that Purdue may rely on other forms of marketing, Ausness said, noting that the face-to-face approach is expensive and has fallen out of favor with a new generation of doctors.

“The younger doctors don’t seem to care for that as much as they like PowerPoint presentations and continuing medical education things, so it may be that they’re just shifting to those kinds of methods of communication,” Ausness said.

Purdue is a privately held company. OxyContin has reportedly generated $35 billion in sales since its debut in 1995; annual sales of OxyContin peaked at $3.1 billion in 2010 and have since declined slightly, according to the Los Angeles Times.

Purdue’s move does raise questions of timing, attorneys said, noting the company **resolved a criminal case** with the U.S. Department of Justice a decade ago for $600 million over its marketing of OxyContin.

“It’s a positive, good step, but it’s just a little too late,” Shkolnik said. “You would have thought $600 million in fines, indictments, would have stopped this 10 years ago, but it didn’t.”

Purdue's changes probably give it ammunition at a possible trial to tell juries what it has done to combat the opioid crisis. At the same time, those changes won't wash away all questions about the company's conduct.

“It’s a bold, proactive move by Purdue,” Goss said. “The risk is the next question: ‘Why didn’t you do it sooner?’”

--Editing by Pamela Wilkinson and Mark Lebetkin.