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Court Denies Temporary Restraining Order in San Diego Clinical Laboratory Bidding Case

San Diego - On February 14, 2008, federal court Judge Whelan issued an order denying a temporary restraining order (TRO) to plaintiff laboratories Sharp HealthCare, Scripps Health and Internist Laboratory of Oceanside, in their complaint against the federal Health and Human Services Agency for the government's attempted imposition of a flawed bidding process for clinical laboratory services.

The complaint seeks to halt a competitive bidding process imposed on clinical labs serving Medicare beneficiaries in the San Diego, Carlsbad, and San Marcos communities.

In its order, the court denied the TRO based on papers that were filed by the government two days earlier. In those papers, the government argued that any challenge to the Lab Project was premature because no winners or losers had yet been decided upon and thus no one could have been harmed yet. The government further argued that, in any event, the federal court is precluded from reviewing the legality of the project due to purported jurisdictional and other technical legal impediments that are unique to the Medicare Program.

"The Court has given the plaintiff laboratories additional time to address these arguments in light of the fact that they were not previously given that opportunity due to the lateness of the government's briefing," said plaintiff's attorney Patric Hooper of Hooper, Lundy and Bookman. "I am not particularly surprised given the representations made by the government at the eleventh hour."

Hooper further states that once the plaintiff laboratories are given the opportunity to brief the legal issues raised by the government he is confident, the court will have a clear understanding of why immediate injunctive relief is necessary and why the court is empowered to grant such relief.

Indeed, Mr. Hooper noted that he recently overcame similar arguments advanced by the government in another federal court case involving Medicare payment for Lab services.

The court set a deadline of February 29, 2008 for the plaintiff laboratories to address the jurisdictional issues raised by the government. In the meantime, the bidding process progresses. However, Hooper says he will be asking the court to issue a preliminary injunction prior to the April 11, 2008, date for the Medicare Agency to decide who the winning bidders are.

Background on the Case

The plaintiff laboratories filed suit in federal court against the federal government on January 29, 2008 to halt a Medicare Demonstration Project slated for the San Diego-Carlsbad-San Marcos region. The demonstration project threatens to irreparably harm vital laboratory testing services for thousands of Medicare beneficiaries if it is allowed to move forward as expected on February 15, 2008, according to the complaint.

The three-year Demonstration Project singles-out the San Diego region for testing of a new competitive bidding program that if implemented will force many small community laboratories out of business and will force systems like Sharp HealthCare and Scripps Health to refuse service to non-hospital patients who have come to rely on their labs for ongoing testing, according to Mr. Hooper.

The labs contend that rather than creating competition, the Demonstration Project will result in fewer labs, less competition and increases in Medicare's laboratory expenditures. The ramifications to Medicare beneficiaries, their physicians and the labs that currently serve them could be devastating," he said.

In their complaint, the plaintiff labs argue, in part, that the federal Department of Health and Human Services:

- Failed to follow a legally required rulemaking process by failing to hold appropriate public hearings and failing to allow Medicare recipients, physicians and others to provide input into the process.
- Failed to incorporate protections for small businesses, as required by law. The Demonstration Project requires all labs to perform all 303 tests or obtain the financial and bidding cooperation of reference laboratories, which are now considered competitors.
- Has established a program that "threatens to cause severe and irreparable injury to plaintiffs Internist, Sharp, and Scripps, as well as to their respective employees and patients."
- Has included many policies that are arbitrary.

Internist Laboratory is a family-owned business with eight employees and roughly 65 percent of the company's business is derived from Medicare beneficiary lab tests. If Internist is not chosen as a "winning" laboratory, it is a matter of time before it will close down.

Sharp HealthCare will most likely have to close down some local drawing stations if it is not a "winning" laboratory. This includes the likelihood of sending out its laboratory tests for urgent care patients, potentially causing a significant and dangerous delay in critical testing results. Like Sharp, Scripps Health may be forced to discontinue completely, or significantly decrease, furnishing laboratory services to non-hospital patients.

About Hooper, Lundy & Bookman, Inc.: Hooper, Lundy & Bookman's lawyers are regularly engaged in complex litigation involving hospitals and health systems, laboratories and other health care providers. The firm's regulatory department regularly assists provider clients with litigation, arbitration and mediation services that have resulted in numerous favorable judgments and new case law. With clients in 47 states and offices in Los Angeles, San Francisco and San Diego, the firm is the largest law firm in the country dedicated solely to the representation of health care providers. For more information, visit the firm's website at www.health-law.com.

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