

**BOARD OF TAX APPEALS  
STATE OF LOUISIANA  
LOCAL TAX DIVISION**

**FRESENIUS MEDICAL CARE  
LAKE FOREST, LLC**

**VERSUS**

**BEVERLY GARIEPY, IN HER CAPACITY  
AS DIRECTOR OF DEPARTMENT OF  
FINANCE; CITY OF NEW ORLEANS  
DEPARTMENT OF FINANCE, BUREAU  
OF REVENUE**

**B.T.A. DOCKET NOS. L00814  
and L00823**

**FRESENIUS MEDICAL CARE  
LAKE FOREST, LLC**

**VERSUS**

**NORMAN WHITE, IN HIS CAPACITY  
AS DIRECTOR OF DEPARTMENT OF  
FINANCE; CITY OF NEW ORLEANS  
DEPARTMENT OF FINANCE, BUREAU  
OF REVENUE**

**B.T.A. DOCKET NOS. L00838,  
L00851,L00870, L00889, L00911,  
L00922,L00930, L00944, L00955,  
L00966,L00979, L00997, L01011,  
L01024,L01044, L01058, L01092,  
L01103, L01112, L01135, L01148,  
L01172,L01183, L01184, L01235,  
L01245,L01255, L01294, L01313,  
L01347,L01382, L01422, L01434,  
L01459,L01486, L01507, L01529,  
L01549,L01572, L01594, L01615,  
L01646,L01678, L01726, L01750**

**FRESENIUS MEDICAL CARE  
CAPITAL CITY, LLC**

**VERSUS**

**NORMAN FOSTER, IN HIS CAPACITY  
AS DIRECTOR OF DEPARTMENT OF  
FINANCE; CITY OF NEW ORLEANS  
DEPARTMENT OF FINANCE, BUREAU  
OF REVENUE**

**B.T.A. DOCKET NOS. L00402,  
L00413 AND L00434**

**FRESENIUS MEDICAL CARE  
CAPITAL CITY, LLC**

**VERSUS**

**B.T.A. DOCKET NOS. L00444,  
L00455, L00469, L00497, L00519,  
L00532, L00536, L00555, L00569,  
L00596, L00625, L00645, L00657,  
L00671, L00683, L00696, L00719,  
L00734, L00759, L00771, L00784  
and L00802**

**BEVERLY GARIEPY, IN HER CAPACITY  
AS DIRECTOR OF DEPARTMENT OF  
FINANCE; CITY OF NEW ORLEANS  
DEPARTMENT OF FINANCE, BUREAU  
OF REVENUE**

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**ORDER AND REASONS**  
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On May 29, 2024, this matter came before the Board for hearing on the *Motion for Partial Summary Judgment* filed by Fresenius Medical Care Lake Forest, LLC (“FMCLF”). Presiding at the hearing was Local Tax Judge Cade R. Cole. Appearing before the Board were Jesse R. Adams, III, attorney for Fresenius and James M. Roquemore, attorney for the Norman White, in his capacity as Director of the Department of Finance; and the City of New Orleans, Department of Finance, Bureau of Revenue (collectively, the “City”). At the conclusion of the hearing, the Board took the matter under advisement. The Board now rules as follows:

**Background**

FMCLF operates a Medicare-certified dialysis clinic in Orleans Parish. FMCLF orders prescription drugs for dialysis treatments through Fresenius Medical Care Holdings, Inc. d/b/a Fresenius Medical Care North America’s (“FMC”)<sup>1</sup> procurement system. FMC also makes centralized purchases of drugs to fulfill clinic

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<sup>1</sup> FMCLF is an affiliate of FMC.

orders as needed.<sup>2</sup> The transaction detail for both types of purchases is stored in FMC's accounts payable system and includes information by clinic on the drugs purchased and their total cost.

AmerisourceBergen Drug Corporation ("ABC") sold prescription drugs to FMC through ABC's specialty drug distribution unit, ASD Healthcare ("ASD"). For every month during the tax periods May 1, 2017, through December 31, 2021 (collectively, the "Tax Periods"), ASD provided reports including the purchasing clinic, the drugs purchased, the cost per unit of each drug, the quantity of each drug purchased, and the total cost of each drug purchased.

The Center for Medicare and the Center for Medicaid Services (collectively, "CMS") are the federal bureaus that manage the Medicare and Medicaid programs. CMS develops regulations for minimum health, safety, and patient care standards for the operation of End-Stage Renal Dialysis ("ESRD") clinics. These regulations are known as Conditions for Coverage ("CfC's"). FMCLF must comply with CfC's to participate in the Medicare program. The CfC's govern many aspects of patient care and the operation of an ESRD clinic (such as FMCLF), but they do not impose any direct requirements on the transactions between FMCLF and prescription drug vendors. In addition, neither Medicare nor CMS are party to FMCLF's purchases of prescription drugs.

FMCLF nevertheless argues that it purchased prescription drugs for administration to Medicare patients under the provisions of Medicare. In its Motion for Partial Summary Judgment, FMCLF attempts to prove that it can connect a prescription drug purchase to the administration of that drug to a Medicare patient. FMCLF claims to be guided by decisions from this Board and Louisiana courts outlining what evidence is needed to prove its entitlement to a refund.

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<sup>2</sup> FMC, through its subsidiaries, provides various administrative services to FMCLF, including, but not limited to, operational, accounting, financial, billing, collection, procurement, payroll, and recordkeeping services.

FMCLF collected patient and drug administration data through terminals located adjacent to chairs where patients received treatment. The chairside terminals tracked data including: the types of services provided; the number of distinct individual patients; each patient's insurance coverage; the types of drugs administered to each patient; and the dosage of each drug administered to each patient. This data was recorded in patient electronic medical records and FMC's recordkeeping systems.

FMC used the patient data to prepare Drug Utilization Reports ("DUR's").<sup>3</sup> The DUR's show procedures administered to patients segregated by the patient's insurance coverage type: Medicaid; Medicare; Commercial; or Other. The DUR's also show the number of distinct patients and the count of administrations of each procedure for each coverage category. Each procedure is tied to a Medication Procedure Code that shows what prescription drugs were administered in the treatment. The DUR's show the drug dosages used in standardized units of measure. The units of measure that are employed depend on the drug and include: milliliters; milligrams; micrograms; and other "units." FMC used the DUR's to calculate a monthly percentage of doses of each drug administered to Medicare patients over the total doses of each drug administered to all patients.

FMC prepared a Microsoft Access database report that includes the monthly population of drugs purchased for use at FMCLF's clinic.<sup>4</sup> This report was prepared using: (1) drug sales provided by ASD; (2) data downloaded from FMC's financial accounting system for purchases of ASD prescription drugs; and (3) FMC's accounts payable data for prescription drugs acquired from non-ASD/ABC suppliers. Using this data, FMC determined the number of doses of each drug purchased for each month, and the price paid per dose for that month.

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<sup>3</sup> Exhibit A to the Affidavit of Christina Lazo. Ms. Lazo is a Senior Manager of FMC's Accounting Department.

<sup>4</sup> The Microsoft Access database report was provided to the Board on a thumb drive attached to the Affidavit of Lisa Ibarra.

FMC's consultant, Mr. Morty Steindler, multiplied the cost of purchasing each prescription drug in a given month by the percentage of doses of that drug that were administered to Medicare patients in the same month. Mr. Steindler performed this calculation separately for different order quantities. In other words, for a drug sometimes purchased in single units and sometimes purchased in bulk, Mr. Steindler would multiply the ratio by sum of the bulk purchases separately from multiplying the ratio by the sum of the individual purchases. Mr. Steindler added the products of these multiplications together to arrive at an aggregate proportion of the price paid for each drug attributable to the doses of that drug administered to Medicare patients. Mr. Steindler then multiplied this Medicare portion by the applicable sales tax rate to calculate a refund amount, minus vendor's compensation, for each month in the Tax Periods.<sup>5</sup>

FMCLF argues that the end result of the calculations shown in its summary judgment evidence are close enough to the amounts actually paid under protest to justify a full refund. Notably, the payment under protest amount was calculated under the assumption that every purchase of prescription drugs from ABC was exempt. For example, for the period of October 2018, FMCLF remitted \$1,981.69 under protest according to the Petition filed for that Tax Period (BTA Docket No. L00671). However, in the example calculations provided in support of the instant Motion for *Partial Summary Judgment*, Mr. Steindler's method determined the refund amount to be \$1,871.95, \$109.74 less than the payment under protest.

### Discussion

The question presented is whether FMCLF's refund calculation is based on a sufficiently convincing and reliable methodology, and if so,

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<sup>5</sup> Exhibit 15 to the Affidavit of Morty Steindler. Mr. Steindler is a Senior Manager of State Tax Services, LLC ("STS"). FMC contracted with STS to provide analytical support in calculating refunds of sales and use tax associated with the purchase of prescription drugs that were administered to Medicare patients receiving dialysis treatment at FMCLF.



the amount of the refund to which they are entitled, if any. La. R.S.

47:337.9(F) provides in pertinent part:

Notwithstanding any provision of law to the contrary, prescription drugs purchased through or pursuant to a Medicare Part B and D plan shall be exempt from the sales and use taxes imposed by any local governmental subdivision, school board, or other political subdivision whose boundaries are not coterminous with the state. [emphasis added].

The City argues that the foregoing statutes can never apply to purchases of supplies or drugs by a medical care provider from a wholesaler. Thus, in the City's view, none of the three provisions above can apply to any purchase of prescription drugs by Fresenius from ABC. *Crowe v. Bio-Med. Application of Louisiana, LLC*, 2014-0917 (La. App. 1 Cir. 6/3/16), 208 So.3d 473, *adhered to on reh'g*, 2014-0917 (La. App. 1 Cir. 2/17/11), 241 So.3d 328, and writ denied, 2017-0502 (La. 5/12/17), 219 So.3d 1106 addressed similar issues. La. R.S. 47:337.9(F) provides an exemption for sales of prescription drugs purchased through or pursuant to a Medicare Part B plan.

In *Crowe*, the First Circuit held that La. R.S. 47:337.9(F) is clearly-worded and could not apply to:

[B]ulk drug sales between a dialysis clinic and pharmaceutical vendor (sales in which the provisions of Medicare play no part in determining which drugs are purchased, which vendor is used, what price is paid, or whether sales tax is charged) to supply the entire population of the clinic's ESRD dialysis patients, including both Medicare and non-Medicare patients. Given that these drugs undisputedly are purchased for administration to all patients of the Franklinton clinic and that the purchases are not made through any Medicare Part B or D plan and are not paid by Medicare, we likewise agree with the district court that BioMedical is not entitled to a sales tax exemption ....

*Crowe*, 2014-0917, p. 26, 208 So.3d at 490- 91 [emphasis in original]. Under *Crowe*, La. R.S. 47:337.9(F) applies only to sales of prescription drugs to a Medicare patient. Transactions of that nature are covered by Medicare Part D. However, the exemption must be broader than that, or it can never apply to a sale of prescription drugs purchased through or pursuant to a Medicare Part B plan. Medicare Part B applies to medically necessary doctor services, delivered either on an in-patient or an out-patient basis, as well as other outpatient care. Medicare Part B covers institutional dialysis services and supplies furnished in an approved ESRD facility. This coverage extends to all services, items, supplies, and equipment necessary to perform dialysis,

as well as drugs medically necessary for the treatment of an ESRD patient, routine dialysis monitoring tests, routine diagnostic tests, and "Epoetin (EPO)" and its administration. 42 C.F.R. § 410.50. The only way that Medicare Part B can be implicated in any sale of prescription drugs is when the medical provider purchases them from a dealer. *Crowe* was a three-way split decision and hopelessly confused approach. This Court simply cannot reconcile the rationale advanced by the City with the clear text of La. R.S. 47: 47:337.9(F)'s exemption for purchases made under the provisions of Medicare Part B.

**Summary Judgment Standard:**

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B); *Beteta v. City of New Orleans*, 06-0972 (La. App. 4 Cir. 1110/07), 950 So.2d 862, 865. A party is permitted move for summary judgment on a part of the relief prayed for. La. C.C.P. art. 966(A)(1). Partial summary judgment may be granted as to a particular issue, theory of recovery, cause of action, defense, or party. La. C.C.P. art. 966(E). Normally, the party moving for summary judgment bears the burden of proving that no genuine issue of material fact exists. La. C.C.P. art. 966(D)(1). A material fact is one that ensures or precludes recovery, bears on a party's ultimate success, or is determinative of the legal dispute. *Hines v. Garrett*, 04-0803, p. 1 (La. 6/25/04), 876 So.2d 764, 765. A genuine issue is one upon which reasonable persons could disagree. *Larson v. XYZ Ins. Co.*, 16-0745, pp. 6-7 (La. 5/3/ 17), 226 So.3d 412, 416.

As the Board stated in in its reasons for denying the City's *Motion for Summary Judgment*, "La. R.S. 47:337.9(F) provides an exemption for sales of prescription drugs purchased through or pursuant to a Medicare Part B plan." *Fresenius Medical Care Lake Forest, LLC v. Gariepy*, B.T.A. Docket No. L01825 (La. Bd. Tax App. 5/2/24) 2024 WL 2034945, at \*4. For the exemption to apply to a medical provider's purchases of prescription drugs from a supplier, the provider must connect

the purchase of the drug to the administration of the drug to a Medicare patient. *Id.* at \*5 (quoting *Iasis Glenwood Regional Medical Center, LP v. City of Monroe*, Docket No. L00033 (La. Bd. Tax App. 12/1/20), 2020 WL 8473317 (ruling on the merits)). Moreover, because the claimant is seeking a refund, they must prove the amount to which they are entitled.

At its clinic, FMCLF tracked the type and quantity of drugs administered, the patients to which they are administered, and the patient's insurance provider. FMCLF's data collection occurred contemporaneously with, and adjacent to, the provision of treatment to patients. FMCLF's patient data is also robust enough for the doses administered to be calculated in consistent units of measurement. Likewise, FMC's accounting data shows the amounts of drugs purchased in enough detail to enable FMC to calculate the doses purchased in equally consistent increments. This means that the connection between the purchase and the administration is not just estimable, it is quantifiable. FMCLF's Medicare ratio is derived from doses administered to Medicare patients and applied to the doses purchased. Thus, it meets the criteria that the Board has previously articulated for demonstrating that a provider's purchases of prescription drugs were made under the provisions of Medicare Part B. FMCLF is entitled to a refund. The competent summary judgment evidence supports the refunds calculated by Mr. Steindler and attached to his Affidavit as Exhibit 15.

However, that is not the refund that FMCLF prays for. As stated in its several Petitions and the instant *Motion for Partial Summary Judgment*, FMCLF is asking for a refund of all amounts paid under protest. The payments under protest were calculated as if all prescription drugs purchased from ABC were exempt. That approach results in a larger refund than what FMCLF has proven its entitlement to. Furthermore, whether the two calculations produce similar outcomes, as FMCLF contends, is a toss-up. A greater quantum of evidence than that is required.

The City attached no evidence to its Memorandum in opposition. At the hearing, the City took the position that FMCLF had to produce patient billing



statements. It is true that this Court previously observed on a motion for new trial in *Iasis* that patient billing statements would be an ideal form of evidence to connect drugs to Medicare patients. *Iasis Glenwood Regional Medical Center, LP v. City of Monroe*, Docket No. L00033 (La. Bd. Tax App. 4/7/22), 2022 WL 2168846, at \*6. However, we did not hold and do not find that La. R.S. 47:337.9(F) requires that this information be produced only in the form of a patient billing statements. Rather, the Court has sought to identify the underlying substance of the proof required and stated that “detailed reports available listing the drug name, the amount administered, the charging physician, and the charge amount, and most importantly the type of insurance covering the patient” would be enough to prove that “documented purchases of prescription drugs for Medicare patients” were excluded from taxation. *Fresenius*, 2024 WL 2034945, at \*5.

In this case, both the substance and the form of FMCLF's evidence establishes that it purchased prescription drugs pursuant to a Medicare Part B plan. FMCLF has moreover proved the amount of the refund to which it is entitled under La. R.S. 47:337.9(F). The City has offered no contravening evidence. Consequently, it is a matter of undisputed fact that FMCLF is entitled to a refund in the amounts as calculated in Exhibit 15 to the Steindler Affidavit. FMCLF's Motion for Partial Summary Judgment will be granted to that extent. However, FMCLF did not prove that it is entitled to a full refund of the protested payments, which were originally calculated under a methodology not supported by the evidence. Thus, the motion will be denied to the extent that it prays for refunds in excess of the amounts calculated by Mr. Steindler.

Accordingly, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that FMCLF's *Motion for Partial Summary Judgment* is **GRANTED IN PART**. FMCLF is entitled to the refunds for the Tax Periods May 1, 2017, through December 31, 2021 (collectively, the “Tax Periods”) as calculated in Exhibit 15 to the Steindler Affidavit, along with interest as provided by law.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that FMCLF's *Motion for Partial Summary Judgment* be and is **DENIED IN PART** as to any refund of amounts paid under protest that exceed the refunds as calculated in Exhibit 15 to the Steindler Affidavit.

IT IS FURTHER ORDERED that on or before **July 5, 2025**, the parties shall submit a joint proposed Judgment in accordance with this Order and Reasons reflecting the parties' agreed-upon calculation of the refunds and interest.

IT IS FURTHER ORDERED that if the parties cannot agree on the form of a proposed Judgment, that either party may submit a proposed Judgment and Memoranda on or before **July 10, 2025**. Either party may file a response to the other party's proposed Judgment and Memoranda on or before **July 17, 2025**.

This is a non-final Order and does not constitute an appealable Judgment as contemplated by La. R.S. 47:1410 and La. R.S. 47:1434.

SO ORDERED THIS 5<sup>th</sup> DAY OF JUNE, 2024.

FOR THE BOARD:



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LOCAL TAX JUDGE CADE R. COLE