IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

UNITED STATES OF AMERICA,	]	
Plaintiff,	]	
	]	
v.	]	**CV 09-BE-2423-E**
	]	
JAMES J. STRICKER; et al,	]	
Defendants.	]	

MEMORANDUM OPINION & ORDER

This matter is before the court on Plaintiff "United States' Motion to Reconsider the Court's Order Granting Certain Defendants' Motions to Dismiss and Denying Plaintiffs' Motion for Summary Judgment and Accompanying Memorandum Opinion Granting Certain Defendants' Motions to Dismiss [Corrected]" (doc. 114) pursuant to Fed. R. Civ. P. 54(b)[1] filed on October 29, 2010. The motion presents five arguments for reconsideration: the first challenges the court's holding concerning the applicability of the three-year statute of limitations against the corporate defendants and their liability insurers; the second and third challenge the court's holdings as to the dates of accrual for the Government's MSP claims against the two categories of defendants set out in the Memorandum Opinion (doc. 109); the fourth challenges the court's dismissal of Count VI in the Plaintiff's Complaint; and the fifth challenges the court's holding and analysis regarding tolling. The court has fully considered Plaintiff's arguments and for the reasons set forth in this memorandum opinion and order, the court DENIES the motion as to the first three arguments raised, GRANTS the

[1] "[A]ny order . . . that adjudicates fewer than all the claims . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b).

motion as to the fourth argument, and RESERVES RULING on the fifth argument. Additionally, the court will set a briefing schedule of fourteen days as to the last two issues.

Reconsideration is an *extraordinary* remedy that should be employed sparingly in the interests of finality and conservation of scarce judicial resources. *Reuter v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 440 F. Supp. 2d 1256, 1267 (N.D. Ala. 2006). Motions for reconsideration should not be a "'knee-jerk reaction to an adverse ruling.'" *Id.* at 1268 (quoting *Summit Med. Ctr. of Ala., Inc. v. Riley,* 284 F. Supp. 2d 1350, 1355 (M.D. Ala. 2003)). Neither should they be "a platform to relitigate arguments previously considered and rejected." *Reuter*, 440 F. Supp. 2d at 1268 n.9. Rather, courts have recognized only three grounds justifying reconsideration of an order: (1) an intervening change in controlling law, (2) the availability of substantial new evidence, and (3) the need to correct a clear error that would work a manifest injustice. *See, e.g., White v. Murtha,* 377 F.2d 428, 432 (5th Cir. 1967) (motions to reconsider unavailable "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice");[2] *Alabama v. Ctrs. for Medicare & Medicaid Servs.*, 2010 WL 2271460 (M.D. Ala. June 2010); *Summit Med. Ctr. Of Ala., Inc. v. Riley,* 284 F. Supp. 2d 1350, 1355 (M.D. Ala. 2003); 18B Charles Alan Wright et al., Federal Practice and Procedure § 4478 (2d ed. 2002) ("Both parts of the formula are likely to be required, demanding both a showing of clear error and a finding that failure to correct the error would cause manifest injustice."); *see also Arizona v. California,* 460 U.S. 605, 618 n. 8 (1983) ("[I]t is not improper for a court to depart from a prior holding if convinced that it

[2] In *Bonner v. City of Prichard, Ala.,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

is clearly erroneous and would work a manifest injustice." (citation omitted)).

Moreover, the decision to alter or amend a judgment is committed to the *sound discretion* of the district judge. *Am. Home Assur. Co. v. Glenn Estess & Assoc.*, 763 F.2d 1237, 1238-39 (11th Cir. 1985) (citing *Futures Trading Comm'n v. Am. Commodities Grp.*, 753 F.2d 862, 866 (11th Cir. 1984); *see also* Fed. R. Civ. P. 54(b) ("[A]ny order . . . that adjudicates fewer than all the claims . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."). Motions to reconsider "must demonstrate why the court should reconsider its prior decision and 'set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.'" *Fidelity & Deposit of Maryland v. Am. Consertech, Inc.*, 2008 WL 4080270, at *1 (S.D. Ala. Aug. 28, 2008) (quoting *Cover v. Wal-Mart Stores, Inc.*, 148 F.R.D. 294 (M.D. Fla. 1993)).

Applying these standards here, Plaintiff does not appear to present any new evidence that was unavailable at the time of the decision. Nor does Plaintiff point to any intervening change in controlling law from the U.S. Supreme Court, the Eleventh Circuit, or the MSP Act itself. Instead, Plaintiff's arguments are grounded in allegations that the court committed legal error in reaching its conclusions; therefore, the court will evaluate the motion to reconsider in view of whether the court committed any *clear error* that would work manifest injustice. The court observes that Plaintiff does not raise any arguments it did not or *could not* have raised initially, and a motion to reconsider is not the elixir to cure the classic case of "brief writer's remorse."

As to the first issue raised for reconsideration, Plaintiff expends seven pages arguing that the court erred in applying 28 U.S.C. § 2415(a), the three-year statute of limitations of applicable to recovery actions "founded upon a tort," rather than the six-year statute of limitations "founded upon

any contract express or implied in law or fact" under § 2415(b). Plaintiff still cites to no case from the U.S. Supreme Court or the Eleventh Circuit that directly answers the question of which statute of limitations applies to the fact scenario presented, where the Government sues entities under the Medicare Secondary Payer Act ("MSPA") whose reimbursement liability arises from their status as defendants in private mass tort litigation. Instead, Plaintiff re-asserts many of the same arguments as to statutory interpretation and application that have been previously raised and litigated to the full.[3] In this regard, Plaintiff's motion appears to be the classic attempt to obtain a second bite at the proverbial judicial apple.

Important to this first issue and completely ignored in Plaintiff's motion to reconsider, the court articulated an alternative holding in regard to the statute of limitations. (Mem. Op. at 15, 24.) Applying the six-year statute of limitations Plaintiff now asks for, the court found that *regardless* of which period of limitations applies, the Government's claims were barred as untimely based on the accrual date. Because the court finds no showing of clear error in Plaintiff's motion to reconsider that would affect its ultimate resolution of the case or result in manifest injustice, the court will not revisit its ruling on the statute of limitations issue.

Similarly, as to the second and third issues raised in Plaintiff's motion regarding reconsideration of the court's accrual analysis as to the two categories of defendants, Plaintiff raises no new controlling law that persuades the court to alter its analysis. Instead, Plaintiff fashions an argument of statutory interpretation based on the plain language of provisions in the MSPA and its

[3] Consistent with this court's Memorandum Opinion, Plaintiff acknowledges that interpretation of 28 U.S.C. § 2415(a) and (b) "should be guided by 'logic and reason'" (Mot. to Reconsider at 12 (citing *Cockerham v. Garvin*, 768 F.2d 784, 787 (6th Cir. 1985))—in other words, no rote rule governs application of these provisions. To support its own "reading of § 2145(b)," Plaintiff cites to cases from the Ninth Circuit, Fifth Circuit, and Eastern District of Pennsylvania, none of which are binding on this court. (Mot. to Reconsider at 7-8.) Moreover, the court has fully considered these cases and squarely addressed them in its Memorandum Opinion. (See Mem. Op. at 13-14.)

implementing regulations that have already been considered by the court—provisions that were fully briefed, thoroughly discussed during oral arguments on September 13, 2010, and analyzed in depth in the court's Memorandum Opinion. The court does not find clear error based on the plain language of the statute and regulations concerning the point in time when the Government could have brought an independent action for reimbursement of Medicare conditional payments.[4] Moreover, Plaintiff's motion cites no controlling case law that clarifies interpretation of these provisions beyond their plain language. Therefore, the court finds no grounds upon which to reconsider its accrual analysis.

Specific to the Lawyer Defendants, Plaintiff's motion argues *for the first time* on paper that under the MSPA, "an entity has not 'received payment' when money is held in escrow," (Mot. to Reconsider at 22), and that the court's accrual analysis is, therefore, in error. For support, Plaintiff cites a 1937 Alabama Supreme Court case regarding legal title in escrow. Absent a statutory definition of the term "received" as used in the MSPA, however, or a binding interpretation in the Eleventh Circuit, the court's analysis of "received payment" as encompassing payment received in escrow does not constitute *clear error* to justify alteration of its decision. Accordingly, the court will not grant Plaintiff's motion to reconsider its analysis regarding accrual as to the Lawyer Defendants.

As its fourth ground for reconsideration, Plaintiff argues that the court erred in concluding that the Government inadequately raised a theory of continuing accrual against all defendants concerning the annual $2.5 million payments from 2004 through 2014 contemplated in the *Abernathy* Settlement Agreement. Admittedly, Plaintiff did not address this theory in its responsive briefing to the Defendants' motions to dismiss. At the September 13, 2010 hearing, the court granted

[4] While Plaintiff attempts to draw a distinction between the Government's "administrative recovery procedures" and "the time for initiating a court action" (Mot. to Reconsider at 15), this distinction was not previously articulated to the court. Because the distinction is not supported by case law and the court does not find the distinction obvious on the face of the statute, it does not find clear error upon which to alter its decision on these grounds.

verbal leave for Plaintiff to submit a motion to amend its complaint to more clearly articulate a claim on this issue. For whatever reason, Plaintiff has failed to do so, but argues in its motion to reconsider that it properly pled a theory of continuing accrual in its First Amended Complaint and raised it at the hearing. Though this theory should have been raised and argued in Plaintiff's brief in response to the multiple motions to dismiss filed by Defendants, the court will allow Defendants an opportunity to respond in full to this issue to avoid any ***possible*** clear error. Therefore, the court GRANTS Plaintiff's motion to reconsider as to the issue raised in part D regarding a continuing accrual theory and ORDERS that Defendants have until **Tuesday, November 16, 2010** to respond as to whether the allegations pled in Plaintiff's First Amended Complaint are sufficient to state a claim for a theory of continuing accrual; and if so, whether the court committed clear error in dismissing Count VI of Plaintiff's First Amended Complaint.

Finally, the court RESERVES RULING as to the tolling issue raised in part E of Plaintiff's motion to reconsider. To avoid any ***possible*** clear error and/or manifest injustice, the court will allow Defendants until **Tuesday, November 16, 2010** to respond as to: 1) whether the court should reconsider the issue of tolling; and 2) if the court does, whether it committed clear error in application of the appropriate burden of raising or pleading tolling in this context and in granting the motion to dismiss before discovery had yet occurred.

The court encourages **joint briefing** on these issues to the extent possible.

DONE and ORDERED this 2nd day of November, 2010.

Karon O. Bowdre

KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE