

**IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF ALABAMA
 SOUTHERN DIVISION**

UNITED STATES OF AMERICA; ex rel., et al.,)

Plaintiffs,)

v.)

ASERACARE INC, et al.)

Defendants.)

**CIVIL ACTION NO:
 2:12-CV-245-KOB**

MEMORANDUM OPINION

This matter comes before the court on the “United States’ Motion for Reconsideration.” (Doc. 308). On April 22, 2015, Defendants (AseraCare) filed a motion to bifurcate trial. (Doc. 288). After extensive briefing and careful consideration by the court, the court granted AsaraCare’s motion to bifurcate the trial. (Doc. 298). The court bifurcated the trial into two phases: one phase on the “falsity” element of the United States of America’s False Claims Act Claim, and a second phase on the other elements of the United States’ FCA claim and all other claims. (Doc. 298). On May 25, 2015, the United States of America filed a motion for clarification and requested the court clarify the order bifurcating the trial. (Doc. 300). The court addressed the issues raised in United States’ motion for clarification in the May 26, 2015 status conference, and denied the United States’s motion as moot. (Doc. 302). Pursuant to Federal Rule of Civil Procedure 60(b), the United States objects to the bifurcation of the trial and requests that the court reconsider its prior order bifurcating trial.

For the reasons discussed below, the court DENIES the United States' Motion for Reconsideration.

I. Standard of Review

A motion for reconsideration may be brought pursuant to Rule 59(e) or Rule 60(b) of the Federal Rules of Civil Procedure. Whether to grant a motion to reconsider under Federal Rule of Civil Procedure 59(e) or 60(b) is within the trial court's discretion. *See Smith v. Casey*, 741 F.3d 1236, 1241 (11th Cir. 2014). A motion 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)).

Generally, three grounds justify reconsideration of an order: (1) an intervening change in the law, (2) the availability of new evidence, or (3) the need to correct a clear error or manifest injustice. *See, e.g., Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689, 694 (M.D. Fla. 1994). Reconsideration is an *extraordinary* remedy that should be employed sparingly in the interests of finality and conservation of scarce judicial resources. *Sonnier v. Computer Programs & Systems, Inc.*, 168 F. Supp. 2d 1322, 1336 (S.D. Ala. 2001).

II. Analysis

One May, 20, 2015, the court granted AsaraCare's motion to bifurcate trial. Phase one of the trial would address "falsity" element of the United States' FCA claim, and the second phase would address the other elements United States' FCA claim and all other claims. The United States objects to the court's bifurcation of the trial. The United States argues that bifurcation is inappropriate because no district court has ever bifurcated the elements of a FCA claim,

bifurcation will cause confusion and duplication at trial, and that trial in one single phase would not unfairly prejudice AseraCare.

The court has explained that no FCA liability exists without a false claim. *See U.S. ex rel. Clausen v. Lab Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002) (“the submission of a claim is . . . the sin qua non of a False Claims Act violation”). Accordingly, the court determined that subjecting AseraCare to evidence about its general corporate policies related to whether AseraCare *knew* it was submitting false claims before first determining whether AseraCare actually submitted “false” claims would unduly prejudice AseraCare, confuse the jury, and lead to a longer and more expensive trial. (Doc. 298 at 5).

According to the United States, no federal district court has ever bifurcated the elements of a False Claims Act case. Although the United States argues that no district court has ever bifurcated the elements of false claims liability because they are not “‘so distinct and separable’ that they may be tried without injustice,” the court notes that no district court has held a trial in a case involving facts such as these. The parties have not directed the court to any other False Claims Act trial involving a medicare hospice benefit, and the court knows of none. As a consequence, the court is not persuaded that bifurcation is inappropriate in this case simply because it has never been done before. Just because a trial technique has never been done does not preclude the court from using its discretion to do so. *Harrington v. Cleburne Cnty. Bd. of Educ.*, 251 F.3d 935, 983 (11th Cir. 2001)(“Fed. R. Civ. P. 42(b) confers broad discretion on the district court in [the area of bifurcation], permitting bifurcation merely ‘in furtherance of convenience’”).

The United States directs much of its argument in opposition to bifurcation to concerns that bifurcation would lead to juror confusion and lead to duplication of evidence at trial. The

United States argues that “a sizable portion” of its evidence is probative in both phases of trial. The United States contends that, during phase one of the trial, witnesses would not be able to testify about Defendant’s “knowledge of falsity” and that the court cannot enforce its bifurcation order without a document-by-document, or line-by-line, review of each piece of evidence. Additionally, the United States contends that it would be required to call many of the same witnesses and use many of the same documents during both phases of trial, creating unnecessary delay and duplication.

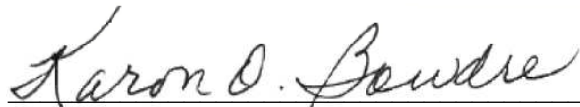
Much of the United States argument appears to seek an “advisory opinion” regarding the admissibility of specific evidence in phase one. While explaining the parameters, the court will not pre-judge admissibility of specific evidence in a vacuum. The court addressed the United States’ concerns in its order bifurcating trial and during the May 26, 2015 status conference. The court previously noted that evidence of general corporate practice that is unrelated to information provided to physicians and unrelated to the 233 patient sample is not relevant to whether a *specific claim* was false. However, during the status conference, the court clarified as to what “general practice evidence” might be relevant during the falsity phase. To use that evidence during the first phase to support the United States’ contention that a claim is false, the court requires a “time and place” connection between the “general practice evidence” and a specific claim or group of claims from the 134 allegedly false claims. The court has made clear that evidence of general practices does not have to precisely relate to a specific claim; instead, the evidence must have time and place connection to the alleged false claim to be admissible in phase one. (Doc. 304 at 4-5). This time and place requirement will not lead to a “line-by-line” analysis of every piece of evidence to determine whether each piece of evidence is admissible during phase one of trial.

Finally, the United States suggests that bifurcation is unnecessary because the presentation of evidence regarding AseraCare's knowledge of falsity is not prejudicial or confusing to the jury. The United States asserts evidence of AseraCare's practices is highly probative to rebut AseraCare's falsity defense that every AseraCare patient was eligible because a physician certified each patient as terminally ill. The court notes, however, that evidence of general practices from various locations, unrelated to the information provided to physicians, and unrelated to the 233 patient sample is not relevant to the issue of whether a particular claim is false. (Doc. 298 at 3). Just as the court noted in its order bifurcating trial, a claim is either false or not without evidence of corporate practices related to that claim. Once again, the court finds that bifurcation is necessary to avoid undue prejudice to the Defendants and will further the timely resolution of the case because after the jury's verdict the parties will know the parameters of the claims.

III. Conclusion

The United States has not set forth facts or law to persuade the court to reverse its prior order granting AseraCare's motion for bifurcation. Therefore, the court **DENIES** the United States' Motion for Reconsideration.

DONE and **ORDERED** this 25th day of June, 2015.


KARON OWEN BOWDRE
CHIEF UNITED STATES DISTRICT JUDGE