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INSIGHT: The Limits of Debarment Authority



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Federal Acquisition Regulation Subpart 9.406-3(d) is commonly understood as affording Suspending and Debarring Officials (SDOs) the ability to use convictions or civil judgments as establishing the basis for debarment because of the difference in language between FAR 9.406-3(d)(1) and FAR 9.406-3(d)(3). But that understanding may conflict with the regulations, and there are judicially imposed limits to that authority.

FAR 9.406-3(d)(1) provides that, in the case of convictions or civil judgments, the SDO shall make a decision on the basis of all the information in the record. In cases not based on convictions or civil judgments, FAR 9.406-3(d)(3) provides that the SDO must establish the cause for debarment by a preponderance of evidence. This juxtaposition has sometimes caused the SDO community to proceed as if it had final authority to debar following *any* conviction or civil judgment. While that interpretation certainly makes SDOs' jobs easier, it may not be in accordance with the regulations.

Suspension and debarment history shows that SDOs rarely convene fact-finding hearings, despite hearings being expressly provided for in the regulations. FAR 9.406-3(d)(2) provides for a hearing in cases ''where additional proceedings are necessary as to disputed material facts.'' Unlike (d)(1) and (d)(3), the provision at (d)(2) could be viewed as ambiguous as to whether it applies in cases of criminal convictions and civil judgments or otherwise. Given the ambiguity, one could argue that it applies in both instances. Fact-finding hearings may be particularly useful following a settlement where the contractor neither admits nor denies misconduct. Settlements to avoid litigation expense where the defendant neither admits nor denies misconduct are relatively common in government contracting, and those situations likely fit into the requirements of FAR 9.406-2(d)(2).

Settlement Agreements Additionally, SDOs must understand that their decision to rely solely on a settlement where the contractor neither admits nor denies misconduct might be second-guessed in federal district court. Indeed, a body of persuasive authority instructs that such settlement agreements—where the contractor neither admits nor denies misconduct —are *inadmissible* in federal district court. That would mean the debarment action based solely on a neither-admits-nor-denies settlement would have no factual predicate, and therefore would be overturned. Some limited examples of judicial reasoning follow.

In *United States v. Cook*, 557 F.2d 1149 (5th Cir. 1977), the Fifth Circuit held that admission of consent injunctions in a prosecution for securities violations was reversible error. In the consent decree, the defendant, ''without either admitting or denying the allegations in plaintiff's complaint, and for the purpose of this action and this action only, consent[ed] to the entry of the foregoing order preliminarily enjoining him from violations'' of securities laws. The court found that the neither-admits-nor-denies aspect of the consent decree was evidence only that the defendant consented to entry of the injunctions. But consenting to the entry of in-

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junctions did not constitute a crime, a wrong, or an act that could be sanctioned in the proceeding under appeal.

Another example is *Mishkin v. Ensminger (In re Alder, Coleman Clearing Corp.)*, No. 95-08203 (JLG), 1998 WL 160036 (Bankr. S.D.N.Y. Apr. 3, 1998), wherein the court excluded from evidence a consent decree settling administrative proceedings initiated by the Securities and Exchange Commission (SEC) because the defendant neither admitted nor denied findings. The court held that, ''[w]e exclude the NASD [National Association of Securities Dealers] Decision and the SEC Admin. Rel. because the affected Hanover Brokers neither admitted nor denied the findings made therein. A consent decree expressly disclaiming guilt or liability is inadmissible as evidence of prior fraudulent or improper acts under Rule 404(b). . .Because the Hanover Brokers referred to in those Exhibits neither admitted nor denied the findings made by the NASD Market Regulation Committee and the SEC in accepting their offers of settlement, those documents *cannot be admitted to show that they actually engaged in the conduct alleged.*'' (emphasis added.)

Only Allegations Similarly, in *Polk v. KV Pharm.* Co., No. 4:09-CV-00588 SNLJ, 2011 WL 6257466 (E.D. Mo. Dec. 15, 2011), the court refused to admit evidence of a consent decree in which defendant neither admitted nor denied the Federal Drug Administration's (FDA) allegations of noncompliance with good manufacturing practices in a subsequent class action suit against the defendant. Because the consent decree contained only allegations that were neither admitted nor denied by the defendants, as well as the express denial of liability by the defendants, it was inadmissible. Again, the court found that the agreement was only evidence that a settlement was reached between the defendants and the FDA.

And, in *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887 (2d Cir. 1976), the Second Circuit struck a consent judgment from the pleadings of a subsequent civil action between a defendant corporation and another party. Importantly, the court reasoned that both consent decrees and pleas of nolo contendere are not true adjudications of the underlying issues; a prior judgment can only be introduced in a later trial for collateral estoppel purposes if the issues sought to be precluded were actually adjudicated in the prior trial. In addition to applying to civil judgments, this line of reasoning may also be applied to criminal cases where the defendant pleads nolo contendere (or, perhaps, enters an *Alford* plea.)

These topics are ripe for a federal district court to decide in the context of a debarment case. Until such a decision issues, contractors are well advised to continue bringing judicial actions—however they are resolved—to the attention of SDOs on a proactive basis to avoid suspension and debarment consideration. But contractors that are proposed for debarment following a settlement where the company neither admits nor denies wrongdoing have more options available to them than just pressing for an administrative agreement. When those agreements are not forthcoming, or contain terms that the business cannot live with, judicial recourse is an option.

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