

THOUGHT LEADERSHIP

LEGAL UPDATES

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Service

False Claims Act

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Federal Fraud Charges Under Scrutiny in *Kousisis v. United States*

On December 9, 2024, the Supreme Court heard oral argument in *Kousisis v. United States*, a case that has the potential to limit the scope of federal criminal fraud charges.^[1]

Kousisis involves allegations that a defendant deceptively induced a commercial exchange. At oral argument, the petitioners urged the court to adopt a “no harm, no foul” approach—arguing that the federal wire fraud statute is not implicated unless a defendant intends to, or does, cause net pecuniary harm.

The case involves a contract with the Pennsylvania Department of Transportation (PennDOT). The contract required that a certain portion of the work be performed by a disadvantaged business enterprise (DBE) and specified that failure to comply with this requirement would constitute a material breach. The petitioners were alleged to have lied about their compliance, subcontracting with a DBE that acted solely as a “pass-through” and that did no actual work on the project. The petitioners completed the required work, satisfied all other terms of the contract, and received payment.

The petitioners argued that they had not defrauded PennDOT out of *property*, as required by the federal wire fraud statute, specifically that they had fully discharged their contractual obligations and PennDOT suffered no economic harm. The appeals court below rejected their arguments, ruling PennDOT had paid them millions of dollars that they would not have received but for their misrepresentations, and that partial performance was not a valid defense to criminal prosecution.

At oral argument Justice Jackson asked why the facts did not amount to a “classic fraudulent scheme to obtain property under false pretenses”. Other justices appeared troubled by the logical limits of the position. Justice Gorsuch

raised a hypothetical about a babysitter who lies to a prospective client about what she will do with her babysitting money if she is hired and forced the government to concede that under its view of the statute, the babysitter *could* face a wire fraud conviction, albeit with a low sentencing guidelines range.

Ultimately, the debate illuminates the tension between whether a fraudulent misrepresentation causes the victim to give more or receive less than bargained for; or whether a misrepresentation causes the victim to do business with the perpetrator in the first place. And the case highlights concerns about whether such cases are appropriate candidates for *federal* prosecution in the first place. Justice Alito observed that the court “really doesn’t like the federalization of white collar prosecutions and wants that to be done in state court and is really hostile to this whole enterprise.” Chief Justice Roberts likewise suggested that “you don’t have to federalize every jot and tittle” and asked about the availability of alternative remedies, such as under state tort and contract law.

Should a majority decide that the federal wire and mail fraud statutes only encompass schemes to defraud that, if completed, would result in actual economic harm to the victim, the outcome might signal further narrowing of the scope of federal criminal fraud that aligns with the recent decision in *Ciminelli v. United States*, 598 U.S. 306 (2023). There, the court did away with the “right to control theory” of wire fraud, which had been used to obtain convictions involving schemes to deprive a victim of “potentially valuable economic information,” rather than a traditional property interest. However, see *Shaw v. United States*, 580 U.S. 63, 67 (2016) (unanimous) (bank fraud conviction under 18 U.S.C. § 1344(1) “demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss”).

The colloquy at oral argument implies a third possible outcome: one that demands a link between misrepresentations and the “essence of the bargain” for a finding of criminal culpability.

What this means to you

The result in *Kousisis* could have significant ramifications for federal prosecutions for wire fraud and mail fraud, which are frequently charged both individually and as predicate crimes for other charged offenses. The court’s decision is one to watch in 2025.

Contact us

If you have any questions about the *Kousisis* decision, please contact Jody Rudman, Abraham Souza, Sydney Sznajder, or your Husch Blackwell attorney.

[1] *Kousisis v. United States*, 82 F.4th 230 (3d Cir. 2023), cert. granted, 144 S. Ct. 2655 (2024).