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Supreme Court Declines to Narrow Federal Fraud but Emphasizes Materiality in *Kousisis v. United States*

On May 22, 2025, the Supreme Court issued its decision in *Kousisis v. United States*, holding a conviction for federal wire fraud may be premised upon a defendant's inducement of another to enter into a commercial transaction under materially false pretenses, even if the defendant did not cause economic loss.[1] The court's judgment was unanimous. Seven justices joined the majority opinion.

As indicated in our prior update, *Kousisis* arose out of a contract with the Pennsylvania Department of Transportation (PennDOT), which required that a certain portion of the work be performed by a disadvantaged business enterprise (DBE) and further specified that failure to comply would constitute a material breach. The defendants were alleged to have lied about their compliance by subcontracting with a DBE that acted solely as a "pass-through" and did no actual work on the project. The defendants completed the required work, satisfied all other terms of the contract, and received payment.

The defendants argued that notwithstanding the actual truth of their relationship with the DBE, they had not defrauded PennDOT out of **property**, as required by the federal wire fraud statute, because they had fully discharged their contractual obligations, and PennDOT had not suffered any economic harm. Like the appeals court below, the Supreme Court rejected that argument. The majority opinion reasoned that PennDOT paid the defendants millions of dollars they would not have received but for the defendants' misrepresentations, and that neither the wire fraud statute's "money or property" requirement, nor the common law, nor the court's prior precedent require a showing of economic loss.

While declining to impose an economic loss requirement on federal wire fraud, the court's majority opinion emphasized that the "demanding" materiality requirement will serve as a guardrail against overzealous prosecutions by substantially narrowing the universe of actionable misrepresentations. The defendants did not contest the element of materiality, so the court's majority opinion did not define the precise contours of materiality in the context of federal wire fraud. However, Justice Thomas in a concurring opinion expressed skepticism that the defendants' alleged misrepresentations were material, particularly under the government's "essence of the bargain" formulation for materiality.

Justice Gorsuch concurred as well but wrote separately to raise concerns about the logical limits of the court's decision and reasoned that criminal fraud should not arise unless a defendant deprives the victim of the essence of what he bargained for.

The concurring opinions illuminate the debate about where the lines are drawn between mere lies and criminal fraud. The court's decision **not** to impose an economic loss requirement pauses what had been perceived as a potential trend toward narrowing the scope of federal criminal fraud, as reflected in the recent decision in *Ciminelli v. United States*, 598 U.S. 306 (2023). There, in a unanimous decision, 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.

What this means to you

The *Kousisis* decision impacts federal prosecutions for wire fraud and other fraud offenses, which are frequently charged both individually and as predicate crimes for other offenses. The court's discussion of materiality is consistent with its emphasis on this requirement in other contexts, most notably the federal False Claims Act. Future cases may yet define the outer limits of federal criminal fraud, including whether a misrepresentation is material "only if it goes to the very essence of the parties' bargain."

Contact us

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

[1] *Kousisis v. United States*, No. 23-909, 605 U. S. ____ (2025).