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Legal Sidebar

Kousisis v. United States and the Reach of Federal Fraud Statutes

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In May 2025, the Supreme Court held in *Kousisis v. United States* that the federal wire fraud statute, 18 U.S.C. § 1343, prohibits schemes to defraud even where the scheme is not intended to and does not cause economic loss. These "fraudulent inducement" schemes involve convincing someone to enter a transaction based on false pretenses. In such schemes, victims may nominally get their money's worth—the injury they suffer is the fact that they spent the money in reliance on lies. This Legal Sidebar summarizes the opinions in *Kousisis* and examines its implications for the potential applicability of the wire fraud statute and its companion mail fraud statute (hereinafter "the fraud statutes") moving forward.

Background

The fraud statutes prohibit using the mail or "wire, radio, or television communication" to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Internet communications can be "wires" for purposes of the wire fraud statute. A person who violates these laws is subject to a fine and a term of imprisonment of up to twenty years (or more in certain situations).

The Supreme Court has established that the fraud statutes apply to schemes targeting "money or property" rather than intangible interests such as the public's right to "loyal service and honest government" or a state's regulatory power. The federal circuit courts were divided on the question of whether a "scheme to defraud" necessarily involves intent to cause net economic loss. The U.S. Courts of Appeals for the Second, Sixth, Ninth, Eleventh, and D.C. Circuits said yes. The Third, Seventh, Eighth, and Tenth Circuits, by contrast, had held that the fraud statutes applied regardless of whether the defendant's scheme was intended to cause a net economic loss. The Supreme Court took up *Kousisis* "to resolve the split."

Kousisis v. United States

Stamatios Kousisis and his company, Alpha Painting and Construction Co. (Alpha), were charged with wire fraud and conspiracy to commit wire fraud under 18 U.S.C. §§ 1343 and 1349, among other things, in connection with their bids for two government contracts for painting projects in Philadelphia. Projects

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receiving U.S. Department of Transportation funds must comply with federal regulations requiring participation by "disadvantaged business enterprises" (DBEs), defined as small businesses majority owned and controlled by "socially and economically disadvantaged individuals." Kousisis submitted bids representing that Alpha would acquire painting supplies from Markias, a pre-qualified DBE. The Pennsylvania Department of Transportation (PennDOT) awarded Alpha the contracts, but Alpha did not actually obtain supplies from Markias. Instead, Alpha purchased the supplies from another supplier, which created invoices billed to Markias. Markias then inflated the invoices and forwarded them to Alpha. This use of Markias as a "pass-through" did not satisfy the regulatory requirement that the DBE "perform a commercially useful function." Markias's markup amounted to approximately $170,000 over the course of the scheme, while Alpha profited over $20 million on the projects.

Prosecutors alleged in the indictment that Kousisis and Alpha had committed wire fraud by devising a scheme to obtain money and property from PennDOT and various federal agencies "by means of false and fraudulent pretenses, representations, and promises" and by using an online portal to submit the bids that falsely represented the role Markias would play in the projects. That is, they had fraudulently induced the state to award them the contract. Ultimately, though, PennDOT considered the painting itself to be satisfactory, and none of the agencies alleged to have been defrauded had suffered any economic loss as a consequence of the pass-through scheme. The question presented by the case was whether this fact—that PennDOT suffered no net pecuniary loss—required acquittal on the wire fraud charge.

The Court's Opinion

The Supreme Court unanimously upheld the convictions. Justice Barrett wrote for the majority, Justice Thomas concurred in full, Justice Gorsuch concurred in part and in the judgment, and Justice Sotomayor concurred in the judgment.

The majority began by analyzing the plain text of 18 U.S.C. § 1343 and finding no basis therein for an economic loss requirement. Basing her opinion on the "statutory elements" of (1) a scheme, (2) a goal of obtaining money or property, and (3) the use of false pretenses, Justice Barrett wrote that "[n]o matter how long we stare at it, the broad, generic language of §1343 leaves us struggling to see any basis for excluding a fraudulent-inducement scheme."

While the defendants argued that a scheme cannot be wire fraud where the defendant provides something in return for what it gets, the Court rejected that theory on the basis that the wire fraud statute simply says "obtain"—and "a thing is no less 'obtained' because something else is simultaneously given in return."

The Court next addressed the defendants' argument that the common law understanding of fraud required economic loss and cited the general presumption that "[w]hen Congress uses a term with origins in the common law, ... the term 'brings the old soil with it,'" meaning that courts will continue to look to common law interpretations of the term. The Court acknowledged that it had often interpreted the definition of fraud "by reference to its common-law pedigree" but noted that the "old-soil principle applies, however, only to the extent that a common-law term has 'accumulated [a] settled meaning.'" In this instance, the Court held that economic loss would not have been "widely accepted" as an element of common law fraud when Congress wrote the fraud statutes.

In analyzing the applicability of common law fraud principles to the facts of the case, the Court reasoned that PennDOT would have had three potential options at common law if it had discovered the fraud early in the scheme: on the civil side, (1) seeking to rescind the contracts or (2) pursuing damages in a tort action; or on the criminal side, (3) referring the case for prosecution under the crime of false pretenses. On the contracts front, the Court noted that many courts applying the common law of contracts would not have required economic loss in order to justify rescission. Instead, they "would have awarded the equitable remedy of rescission simply because Alpha and Kousisis had tricked PennDOT into a bargain materially different from the one they had promised." Turning to tort, the Court recognized that the "tort of deceit" historically did have an economic loss requirement. Nonetheless, the Court found the analysis to be "largely inapposite," because the tort of deceit, like most tort claims, "'sounded in damage' and thus was designed to compensate a plaintiff for her economic loss."

With respect to the common law crime of false pretenses, the Court cited a number of cases and treatises going back to the 19th century in support of its conclusion that the offense historically had no requirement of pecuniary loss. The Court distinguished loss from injury. Acknowledging its 1839 holding "that a fraud occurs only when the victim 'has been actually misled to his injury,'" the Court explained that injury at common law (and implicitly in its own 19th-century holding) was not confined to economic loss and that "it was the deception-induced deprivation of property—not economic loss—that common-law courts generally deemed injurious."

While this broad understanding of injury could theoretically make the fraud statutes applicable to a wide range of relatively benign deceptions, the Court noted that another implicit element of the wire fraud offense—namely, materiality—distinguished "everyday misstatements from actionable fraud." *Materiality* generally refers to the extent to which a falsehood influences a decisionmaker. The Court noted several possible formulations of a materiality test. In one formulation, a false statement is material if "a reasonable person would attach importance to it in deciding how to proceed, or if the defendant knew (or should have known) that the recipient would likely deem it important." In another formulation, a false statement is material if it "goes to the very essence of the parties' bargain." The Court declined to adopt one or the other for purposes of the fraud statutes, because Kousisis and Alpha conceded that their falsehoods were material to PennDOT's decision to enter into the contracts. The Court further reiterated that, despite the language of the wire fraud statute being "undeniably broad," the Court's holding on economic loss would not unduly broaden the federal criminalization of frauds because of the "demanding materiality requirement."

Concurrences

Justice Thomas wrote separately to suggest that the DBE requirements were not material to the contracts at issue. Justice Sotomayor concurred only in the judgment. She disagreed with Justice Thomas and opined that the DBE requirements were a material contract requirement. She also took issue with the Court's choosing "to opine on a class of fraudulent-inducement cases distinct from this one: those in which a defendant provides exactly the goods or services that they promised to deliver, but lies in other ways to induce the transaction." Justice Gorsuch, concurring in part and in the judgment, took up a question similar to that which Justice Sotomayor encouraged the Court to forsake: "What is the difference between a lie and a criminal fraud?" Offering the example of a babysitter who lies about her criminal record to get hired but nonetheless takes excellent care of the children and is paid for it, Justice Gorsuch wrote that the Court's approach to the injury component of fraud would render the babysitter subject to federal fraud charges. He argued that "contrary to what the Court suggests," common law fraud required not just that the victim be deprived of money or property but that the victim be deprived of "what he bargained for." Absent this "traditional benefit of the bargain injury rule," he continued, prosecutors and courts could become "morality police with a commission to prosecute and punish harmless lies." The Court majority responded to Justice Gorsuch that "to reject that pecuniary loss is an element of fraud is to accept—as common-law courts long have—that a fraud is complete when the defendant has induced the deprivation of money or property under materially false pretenses."

Implications and Congressional Considerations

The Supreme Court's holding in *Kousisis* appears at first blush to be simple: The fraud statutes do not say anything about economic loss, and thus they do not require it. The injury of being deprived of money or property under false pretenses is enough to establish fraud. The holding nonetheless raises several questions about the Court's approach to interpreting the fraud statutes and what conduct those statutes reach under the current state of the law.

"Right-to-Control" Following *Kousisis*

The defendants in *Kousisis* argued that the fraudulent inducement theory would contravene the Court's holding in the 2023 case *Ciminelli v. United States*, in which the Court rejected a theory of wire fraud based on depriving the victim of information. The defendant in *Ciminelli* was a developer who conspired with a board member of a nonprofit organization administering an upstate New York development initiative. The scheme involved generating requests for proposals (RFPs) that would uniquely favor the defendant's company, virtually ensuring that the nonprofit would select the company for development contracts. The government alleged that the defendant and the board member's use of rigged RFPs had defrauded the nonprofit of "the right to control its assets by depriving it of information necessary to make discretionary economic decisions." The Court rejected the right-to-control theory, stating that the circuit court "could cite no authority that established 'potentially valuable economic information' as a traditionally recognized property interest."

In *Kousisis*, the parties agreed that the fraudulent inducement theory "supports liability for federal fraud anytime a defendant 'us[es] falsehoods to induce a victim to enter into a transaction.'" This standard overlaps with the "right-to-control" theory of liability for depriving a victim of "information that affects the victim's assessment of the benefits or burdens of a transaction"—both involve depriving victims of relevant information as they decide how to spend their money. Nonetheless, the *Kousisis* Court rejected the defendants' arguments that the fraudulent inducement theory was a mere repackaging of the right-to-control theory rejected in *Ciminelli*. The *Kousisis* Court wrote that, "[u]nlike the right-to-control theory, fraudulent inducement does not treat 'mere information as the protected interest.' Rather, it protects money and property. And nothing we said in *Ciminelli* is at odds with our holding here." The *Kousisis* Court further noted that *Ciminelli* did not rule out the applicability of the fraudulent inducement theory to the bid-rigging scheme at issue in that case, instead declining to rule on the question because it had not been presented to the jury.

In so noting, the *Kousisis* Court may have been implicitly allowing that, at least with respect to the facts at issue in these two cases, the distinction between fraudulent inducement and right-to-control may be primarily a theoretical one: Right-to-control is simply one step too far removed from the transaction, casting the information—rather than the money to which that information would pertain—as the property at stake. Had prosecutors in *Ciminelli* focused on what was at stake—money—rather than how the defendants went about getting it—withholding relevant information from the nonprofit organization overseeing the contract awards—the convictions might have been upheld. In other words, whether a fraud conviction is upheld under fraudulent inducement or struck down under right-to-control may not always hinge on factual distinctions, but rather on the framing of the activities giving rise to criminal liability and the jury instructions in each case.

Another potential distinction between "right-to-control" and fraudulent inducement is the character of the "scheme" and whether it involves affirmative lies, material omissions, or less significant withholding of information. The *Ciminelli* Court was concerned that the right-to-control theory gave the fraud statutes a problematically broad reach and that "[b]ecause the theory treats mere information as the protected interest, almost any deceptive act could be criminal." The Court in *Ciminelli* offered as an example of such overreach a right-to-control fraud conviction in the Second Circuit based on "an employee's undisclosed conflict of interest." In that case, a vice president (VP) in charge of real estate management for Dick's Sporting Goods (Dick's) engaged in a "kickback scheme" with a real estate broker friend in which the VP received a portion of the fees that Dick's, via the VP, paid to the broker (sometimes for no real services rendered).

The Court's holding in *Ciminelli* foreclosed the theory that the VP defrauded Dick's of economically material information. But what if the government had instead alleged that the VP had induced Dick's to pay the broker under false pretenses based on the VP's concealment of his own relationship to the broker and the fact that he would be receiving kickbacks? The *Ciminelli* Court did not address this hypothetical, but the reasoning of *Kousisis* suggests that, assuming that Dick's would not have employed the broker but for the VP's concealment of the relationship, the government could have cast the VP's actions as material omissions intended to induce Dick's into the transactions. It remains to be seen whether this type of fraud charge would be upheld under *Kousisis*.

In sum, where the facts bear out an allegation that someone was induced to part with money or property under materially false pretenses, *Kousisis* may offer prosecutors a path to fraud convictions that *Ciminelli* previously appeared to have foreclosed.

Scope of Federal Statutes: When Is a Lie a Crime?

Justice Sotomayor noted in her *Kousisis* concurrence that the wire fraud statute potentially covers "a wide variety of everyday transactional conduct" in which monetary transactions are induced by false statements. As in *Ciminelli*, concern over this breadth of application was an animating force in Justice Gorsuch's concurrence in *Kousisis*, in which he warned of turning "victimless lies like our babysitter's into federal felonies." The *Kousisis* majority, however, appeared less concerned with overbreadth, relying heavily on the materiality requirement to preclude the federal criminal prosecution of "everyday misstatements." The Court left open what materiality standard applies in prosecutions under the fraud statutes, so it is unclear whether false statements are material if a reasonable person would attach importance to them in deciding how to proceed, or whether they are material only if they go to the very essence of the bargain.

Prosecutors wield substantial discretion in their use of the fraud statutes. While the courts will likely continue to refine the scope of those statutes' applicability, the *Kousisis* majority made clear that the "'language of the wire fraud statute' is undeniably 'broad'" and concluded its opinion with the observation that "Congress enacted the wire fraud statute, and it is up to Congress—if it so chooses—to change it." Should Congress seek to narrow the scope and applicability of the fraud statutes, it has the option to add or make explicit elements that are currently absent or that courts have implied based on the common law roots of fraud. For example, if Congress sought to preclude application of the fraud statutes to cases where victims did not suffer pecuniary loss, it could specify economic harm as an element of the offense. Alternatively, if Congress sought to maintain the statutes' applicability to fraudulent inducement schemes but nonetheless narrow the universe of potential defendants, Congress could adopt a strict materiality requirement, establish a minimum dollar value for transactions to which the fraud statutes could apply, articulate particular types of false representations that could constitute the basis for fraudulent inducement, or all of the above.

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