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Supreme Court Upholds Fraudulent Inducement Theory in Kousisis

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We have been taught for many years, at least in the Second Circuit, that a mail/wire fraud scheme requires proof that a defendant intended to cause financial harm to a victim; making false statements, or deceit, is not enough. See, *e.g.*, *United States v. Regent Off. Supply Co.*, 421 F.2d 1174, 1181 (2d Cir. 1970).

This requirement of proving intended financial harm was not settled, however, and a split in the circuits developed.

This split was reflected in different approaches to the "fraudulent inducement" theory of mail/wire fraud.

Under that theory, a defendant who uses false statements to induce someone to turn over money or property commits an offense—regardless of whether the defendant "seeks to cause the victim *net* pecuniary loss." *Kousisis v. United States*, 145 S. Ct. 1382, 1388 (2025) (emphasis in original).

Courtesy photos

Elkan Abramowitz, left, and Jonathan Sack.

Four circuits upheld convictions based on the theory; the Second Circuit and four other circuits did not.

In *Kousisis,* the Supreme Court adopted the minority view and held that a defendant may be convicted of wire fraud for inducing someone to pay for something based on false representations, even though the defendants did not cause, or intend to cause, "economic loss" to the victim.

While the court was unanimous in upholding this "fraudulent inducement" theory, the case generated concurring opinions from Supreme Court Justices Clarence Thomas, Neil Gorsuch and Sonya Sotomayor.

Below we summarize the case against Stamatios Kousisis and the company he helped manage, Alpha Painting and Construction Co. (Alpha), and then turn to the court's opinion, which viewed from a distance seems to depart from the court's recent tendency to interpret the mail/wire fraud statutes narrowly.

However, viewed more closely, the opinion reflects the court's textualist approach to interpreting statutes. We then discuss the concerns expressed in the concurring opinions that the court's opinion seems to cast the net of criminal liability too widely.

Prosecution

Kousisis and Alpha were indicted for wire fraud and other charges based on false representations made in bids for contracts to renovate the Girard Point Bridge and the 30th Street Station in Philadelphia.

In the bidding process, Kousisis represented to the Pennsylvania Department of Transportation (PennDOT) that Alpha would buy about $6.4 million in paint supplies from Markias, Inc., a "disadvantaged business enterprise" (DBE).

The U.S. Department of Transportation, which funded a large portion of the work, required DBE participation. Kousisis and Alpha did satisfactory work under their contracts.

Contrary to its representations to PennDOT, Alpha did not obtain supplies from Markias. In fact, Markias was a "pass-through" entity. Kousisis arranged for the actual paint suppliers to bill Markias, which would then add a fee before forwarding invoices to Kousisis.

The defendants' use of Markias to fool PennDOT violated the requirement that DBEs perform a "commercially useful function," and was contrary to representations made to PennDOT. Defendants submitted false certifications to cover up the scheme. PennDOT did not suffer financial harm.

The government charged wire fraud under a fraudulent-inducement theory – namely, that Kousisis and Alpha had induced PennDOT to award them painting contracts based on false representations that it would secure over $6 million in paint supplies from a DBE.

A jury convicted Kousisis and Alpha of wire fraud, among other charges. The defendants appealed and argued that the government had failed to prove an intent to cause net economic harm to PennDOT. The Third Circuit affirmed the defendants' convictions.

In the Supreme Court, defendants argued that a federal fraud conviction may not be sustained unless the government proves that the defendant "sought to hurt the victim's bottom line."

In the defense's view, PennDOT got the full economic benefit of its bargain, and the defendants' failure to satisfy regulatory and policy interests in DBE participation did not amount to deprivation of property under Supreme Court case law.

The Supreme Court granted certiorari, and many practitioners predicted that the court would reject the fraudulent inducement theory in line with recent rulings that have limited the scope of mail/wire fraud. *See*, *e.g.*, *Ciminelli v. United States*, 598 U.S. 306 (2023).

Supreme Court

In an opinion written by Justice Amy Coney Barrett, the court affirmed the convictions, rejecting defendants' contention that wire fraud requires proof of an intention to inflict net economic harm.

Barrett began with a reading of the statutory text and then explained that the court's interpretation is consistent with the historical meaning of fraud at common law, and with Supreme Court precedent.

As for the text, the court found the statute to be "agnostic" about economic loss; "[t]he statute does not so much as mention loss, let alone require it." Instead, the law requires only that a defendant "devised" or "intend[ed] to devise" a scheme to "obtain[] money or property" through "false or fraudulent pretenses, representations, or promises."

The court also said that the word "obtain" encompasses a defendant's receipt of money or property, even if the victim also receives something of value and does not suffer economic loss.

In the present case, the court held that because Alpha and Kousisis made material misrepresentations for the purpose of obtaining money—they "had money in mind," as the court wrote—that sufficed to sustain their fraud convictions.

The court rejected defendants' argument that the government's fraudulent inducement theory is inconsistent with the elements of fraud at common law. The defense relied on the principle that "[w]hen Congress uses a term with origins in the common law, we generally presume that the term 'brings the old soil with it.'"

According to the defense, a claim of fraud at common law requires proof of economic injury. The court disagreed, finding that common law courts "did not uniformly condition an action sounding in fraud on the plaintiff's ability to prove economic loss," as in the case of an equitable remedy of rescission and a prosecution for false pretenses.

In these cases, common law courts found it sufficient that the victim had "'received property of a different character or condition than [it] was promised,' even if of equal value." For the court, under the "old soil" of common law, actions sounding in fraud do not require proof of financial injury.

The court also rejected the defendants' argument that Supreme Court precedent foreclosed a fraudulent inducement theory of fraud. Relying in part on *Carpenter v. United States*, 484 U.S. 19 (1987), which concerned control over confidential information, the court said that its precedent had not limited mail/wire fraud to schemes that intended economic loss.

Further, the court rejected the argument that frustrating an agency's DBE policies was akin to interfering with a state's regulatory powers. *See Cleveland v. United States*, 531 U.S. 12 (2000); *Kelly v. United States*, 590 U.S. 391 (2020).

Lastly, the court declined to view the fraudulent inducement theory as a "repackag[ing]" of the right-to-control theory of fraud rejected in *Ciminelli v. United States*, 598 U.S. 306 (2023). The fraudulent inducement theory requires a deprivation of money or property, whereas the theory of prosecution in *Ciminelli* turned on a deprivation of "mere information."

The court pushed back on defendants' claim that a fraudulent inducement theory would so expand the scope of fraud prosecutions that it would threaten "fair notice" to defendants and "federalism" principles. These considerations have been central to the Supreme Court's mail/wire fraud jurisprudence.

In response to the claim of overbreadth, the court emphasized that in *Kousisis* the defendants had conceded that their misrepresentations had been "material" to the awarding of the contracts and obtaining funds from PennDOT.

The government and the defense did not agree on the correct test of materiality. Because materiality was not challenged in *Kousisis*, the court did not decide the issue.

In the court's view, the materiality requirement, whatever its precise contours, would be sufficient to check "encroachment on states' authority," and provide adequate notice, by "narrow[ing] the universe of actionable misrepresentations."

Concurring Opinions

Justice Thomas expressed skepticism as to whether misrepresentations as to compliance with the DBE provisions would meet the "high bar" of materiality. Here, the defendants had not challenged materiality.

But, in other cases, materiality might be in doubt in light of public reports of widespread fraud, and tolerance of fraud, in the DBE contracting process, and in light of recent challenges to the lawfulness of minority set-aside programs.

On May 28, 2025, the U.S. Department of Transportation moved to end the use of race- and gender-based preferences in DBE contract goals through a proposed consent order.

The government agreed with plaintiffs' position that the program's structure is "unconstitutional." *See* Dkt. No. 82, *Mid-Am. Milling Co., LLC v. U.S. Dep't of Transp.*, Case No. 3:23-cv-72 (E.D. Ky. May 28, 2025).

Ironically, the DBE requirements underlying the *Kousisis* prosecution may thus be a dead letter for the foreseeable future.

Sotomayor and Gorsuch agreed with the court's "bottom-line decision" to affirm but expressed reservations about the court's opinion.

Sotomayor disagreed with the portion of the court's opinion which "proceed[ed] more broadly than necessary" to support treating as criminal a "class" of fraudulent inducement cases "distinct" from the facts in *Kousisis*—cases in which a defendant "provides exactly the goods or services that they promised to deliver, but lies in other ways to induce the transaction," such as a car salesman who closes a deal by falsely claiming another buyer is coming to look at the car but provides all necessary details about the car.

In Sotomayor's view, such a case should be treated differently from *Kousisis*, in which the defendants tricked PennDOT by promising one thing and delivering something materially different. Unlike Thomas, Sotomayor has no doubt that defendants' misrepresentations were material.

Gorsuch took issue with footnote 5 in the majority opinion which, in his view, could be read to mean that even if a victim receives all he was promised -- the full benefit of a bargain -- a defendant could be liable for wire fraud when a misrepresentation led someone to part with money or property.

Gorsuch summarized the facts of *United States v. Starr*, 816 F.2d 94, 99-100 (2d Cir. 1987), which reversed mail and wire fraud charges because, in that case, no "discrepancy [existed] between benefits 'reasonably anticipated' and actual benefits received."

In his view, footnote 5, which he characterized as dicta, is contrary to the injury requirement for fraud at common law; "[l]ies without injury are not fraud."

In sum, Gorsuch fears that the court's broad reading of the mail/wire fraud statutes could do away with the critical distinction "between mere lies and criminal frauds warranting the law's attention."

Conclusion

In *Kousisis*, the defendants "devised" a "scheme" to obtain money from PennDOT by means of materially false representations about meeting DBE requirements, which was an essential element of the parties' deal.

For the court, that was enough to sustain their convictions; an intention to cause economic injury was not required. The court said that a "demanding" materiality requirement would provide the needed check on government misuse of the mail/wire fraud statutes.

The *Kousisis* decision reminds us that textualism is not a one-way street; it can lead to expansive readings of statutes notwithstanding the tendency in recent years for the Supreme Court to limit the scope of federal mail/wire fraud prosecutions.

As the court noted, "[t]he 'language of the wire fraud statute' is undeniably 'broad.' [citation omitted] But Congress enacted the wire fraud statute, and it is up to Congress—if it so chooses—to change it." This principle is often used to support narrow readings, but not always, as we see in *Kousisis*.

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