Expert Analysis:

High Court Ruling in *Kousisis* Bucks Trend of Narrowing Fraud Theories

By Brook Dooley, Sara Fitzpatrick and Britta Kajimura

Law360 (June 5, 2025)

Brook Dooley

Sarah Fitzpatrick

Britta Kajimura

On May 22, the U.S. Supreme Court issued its opinion in Kousisis v. U.S., a case addressing the so-called fraudulent inducement theory of mail and wire fraud under Title 18 of the U.S. Code, Sections 1341 and 1343.

Stamatios Kousisis and his company were convicted in 2018 of wire fraud for misrepresenting that they had properly subcontracted with disadvantaged business entities as required by the terms of a government contract.

The court affirmed those convictions, holding that a defendant can be found guilty of mail and wire fraud when they use falsehoods to induce a victim to enter into a transaction, even if the victim suffers no economic harm.

This decision is at odds with the broader trend of recent Supreme Court cases that have narrowed the reach of federal fraud statutes, and in particular, made it more difficult to prosecute public fraud and corruption cases.

With several justices penning separate concurrences expressing concerns over the breadth of the court's majority opinion, the Kousisis decision also sets the stage for the next battle over the application of the wire fraud statute.

Background

The federal wire and mail fraud statutes criminalize schemes to "obtain[] money or property by means of false or fraudulent pretenses."[1]

The petitioners, Kousisis and Alpha Painting & Construction Co., are contractors who bid for bridge-repair projects paid for by the Pennsylvania Department of Transportation, or PennDOT, using federal funds. As part of their successful bid, the petitioners agreed to spend a percentage of the funds received on

subcontractors classified as disadvantaged business enterprises, or DBEs.

Instead of purchasing supplies from a DBE, the petitioners used a non-DBE supplier and paid a 2.25% markup on each invoice to a shell entity, Markias, to make it appear as though they were complying with the DBE requirement.

The government brought federal wire charges under a fraudulent inducement theory, alleging that the petitioners made false promises to obtain the bridge repair contracts.

After their conviction, the petitioners appealed to the U.S. Court of Appeals for the Third Circuit, arguing that the government failed to prove that the object of their scheme was to deprive the government of any property, as federal law requires. Relying on the Supreme Court's 1987 decision in McNally v. U.S., the petitioners contended that the DBE requirement was an "intangible interest" that is not protected by the wire fraud statute, and that because they otherwise performed the contract, there was no harm to any property or pecuniary interest of PennDOT.

The Third Circuit disagreed in 2023, ruling that "obtaining the government's ... property was precisely the object of [the petitioners'] fraudulent scheme," because they would not have received the government's infrastructure funds without the misrepresentation about DBEs.[2]

The petitioners then appealed to the Supreme Court, and the court granted certiorari to resolve a circuit split on the viability of the fraudulent inducement theory of mail and wire fraud.

The Arguments

In their brief, the petitioners argued that the Third Circuit's theory of harm was inconsistent with the wire fraud statute's text and history. Focusing on the term "defraud" in the statute, they asserted that the mail and wire fraud statutes have always required a showing of monetary or property loss, stretching back to the 1872 enactment of the mail fraud statute.[3]

The petitioners also argued that the government's theory was contrary to the court's recent decisions limiting the scope of the mail and wire fraud statutes. Just two terms ago, in Ciminelli v. U.S., the Supreme Court considered a similar argument in a case concerning a party that manipulated the bid process to get preference for government contracts.[4] In its 2023 decision in Ciminelli, the court unanimously ruled that the mail and wire fraud statutes cannot be used to prosecute fraudulent conduct where the only harm is to an intangible interest, like the right to potentially valuable economic information.[5]

The petitioners pointed out that the Ciminelli holding is consistent with a line of cases, including McNally and the court's 2010 decision in Skilling v. U.S., in which the court rejected similar schemes that did not involve property loss.[6]

The petitioners argued that the government's fraudulent inducement theory was an attempt to revive the theories of liability rejected in cases like Ciminelli. Accepting the theory would give the federal government a tool to prosecute a variety of "run-of-the-mill contract and tort cases."[7]

In response, the government insisted that the petitioners did harm the government's property through their scheme to obtain the infrastructure funds. The funds themselves, the government argued, constituted "money or property in PennDOT's hands," and thus implicated a traditional property interest covered by the statute.[8]

The government argued that this case was different from Ciminelli and other recent precedent because none of those cases specifically addressed a situation in which a victim was fraudulently induced "to part with money for a product or service fundamentally different from the one it wanted."[9]

The government also pointed out that the court has upheld other theories of harm in the fraud context that do not strictly involve a net monetary loss — such as when defendants enter into a contract that they do not intend to perform, or when they deprive a party of "exclusive use of ... information" in their possession.[10]

This, the government argued, affirmed that the wire fraud statute "encompasses fraudulent inducement to enter a transaction," regardless of whether the complaining party suffers monetary loss.[11]

Oral Argument

At oral argument, the court appeared split. The justices' questioning focused on whether different hypotheticals would result in criminal liability under each party's theory.

For example, Justice Elena Kagan seemed troubled that the petitioner's theory would exclude liability for a seller who promised $1 million worth of gold bars, but instead delivered $1 million worth of coal.

Several justices probed whether the government's theory would result in criminal liability for a babysitter who lied to potential clients about her religion or her plans for the proceeds of her babysitting.

And Chief Justice John Roberts expressed skepticism over what he characterized as the government's intent to "federalize every jot and tittle in a large contract."

The petitioners tried to tie the government's argument to cases like Ciminelli, arguing that "there might be lots of deceit and untoward behavior out in the world," but federal fraud must be limited to circumstances "where there's actually injury that follows."

Meanwhile, the government argued that common law was on its side, and that the petitioner's theory "would cut out … charity fraud, co-religionist fraud, veterans'

preference fraud, or basically any fraud that preys on a victim's idiosyncratic preferences." It asserted that a ruling in its favor would not result in overcriminalization, because fraud must still be material and relate to the "essence of the bargain."

Opinion

In an opinion authored by Justice Amy Coney Barrett, the Supreme Court unanimously affirmed the Third Circuit, with all nine justices either joining Justice Barrett's opinion or concurring in the judgment. The court held that economic loss is not required to establish fraudulent inducement.

As Justice Sonia Sotomayor put it in her concurrence, "A Yankees fan deceived into buying Mets tickets is no less defrauded simply because the Mets tickets happen to be worth the same amount as the promised Yankees ones."

The court reasoned that the statute has no explicit economic loss requirement, and that the common law also contained no such requirement for fraud. Moreover, the court explained, it had already rejected economic loss theories in Carpenter v. U.S., decided in 1987,[12] and Shaw v. U.S., decided in 2016.[13] And the court emphasized that the false representation must still be material, cabining the government's prosecutions for fraudulent inducement.

While all the justices agreed that the petitioners' convictions should stand, Justices Clarence Thomas, Neil Gorsuch and Sotomayor wrote separately.

Justice Thomas noted that, while materiality was not at issue here, similar prosecutions might fail because the DBE requirement at issue is not material to the contract; he even suggested the program might be unconstitutional.

Justices Gorsuch and Sotomayor agreed with the majority's determination that economic loss was not required by the statute, but they each argued that the court went too far in deciding that any misrepresentation that leads an entity to part with its property can be the basis of a federal criminal fraud prosecution, so long as a jury finds that it was material.

Takeaways

As Justice Sotomayor herself notes in her concurrence, white collar practitioners should keep a close watch on future fraud cases that will require the court to define the contours of the materiality element more precisely.

Both Justices Sotomayor and Gorsuch expressed concern over the overcriminalization of everyday fibs, highlighting the example of a babysitter who lies about her criminal record in order to obtain a babysitting job. Without more guardrails around the materiality standard, these justices note that the babysitter could be subject to federal prosecution for such conduct.

The court's decision is a departure from its recent trend of curbing white collar prosecutions and, in particular, prosecutions of public fraud cases. Indeed, this change opens a door that seemed firmly shut just two years ago after the court decided Ciminelli.

In Ciminelli, the court overturned the conviction of a defendant who engaged in a scheme to tailor government bid preferences to his company, thus obtaining priority for government contracts. The prosecution argued that this scheme deprived the government of valuable information.

The Ciminelli court warned that such prosecutions would "criminalize[] traditionally civil matters and federalize[] traditionally state matters." But if Ciminelli were brought today — under a theory that the defendant deprived the government of money obtained through those same contracts — the prosecution would likely stand.

Indeed, the Kousisis court pointed out that the government could have brought such a theory in Ciminelli in the first instance, but failed to do so.[14] The difference between the two cases thus may not be in the underlying conduct, but in the government's description of the property rights at issue.

The court's decision could lead to mail and wire fraud convictions for a wide variety of contractual misrepresentations. Such a broadening of the scope of the mail and wire fraud statute could have serious implications for contracting parties, given that the statute carries a maximum 20-year sentence.

While the scheme at issue in the Kousisis case certainly had indicia of fraud, including the use of a shell company and false receipts, the same theory could be used against other contracting parties that make any misrepresentation that is deemed material.

Indeed, the next likely battlefront of wire fraud cases will be the materiality requirement. Although the parties in this case did not dispute materiality, future cases will almost certainly hinge on whether contractual misrepresentations like this one are sufficiently material to lead to liability under the statute.

Such cases will give the court an opportunity to pull back from the possibility — warned against in Ciminelli and by Justice Roberts at oral arguments in the Kousisis case — that the wire fraud statute will become a federal prosecutorial tool for breach-of-contract cases.

Beyond the fraudulent inducement theory itself, it remains to be seen if the court's willingness to endorse a broad prosecutorial theory in the Kousisis case is an outlier, or if it marks a change in the court's outlook on white collar prosecutions.

Brook Dooley is a partner, and Sara R. Fitzpatrick and Britta S. Kajimura are associates, at Keker Van Nest & Peters LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] 18 U.S.C. §§ 1341, 1343.

[2] United States v. Kousisis , 82 F.4th 230, 240 (3d Cir. 2023).

[3] Petr. Brief, 17, 19-23.

[4] Ciminelli v. United States , 598 U.S. 306 (2023).

[5] Id. at 308; Petr. Brief, 30.

[6] Petr. Brief, 27-29.

[7] Id. at 39-40.

[8] Gov. Brief, 13-15.

[9] Id. at 46-47.

[10] Id. at 22-25.

[11] Id. at 22.

[12] 484 U.S. 19 (1987).

[13] 580 U. S. 63 (2016).

[14] 145 S. Ct. at 1398.