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**High Court May Limit the Reach of the Wire Fraud Statute – Part 1**

On Dec. 9, 2024, the Supreme Court will hear argument in *Koussisis v. United States*, a case that will again review the reach of the federal mail and wire fraud statutes. At issue this time is the so-called “fraudulent inducement” theory of property fraud – namely, whether deception to induce a commercial exchange can constitute mail or wire fraud, even if the infliction of economic harm on the alleged victim was not the object of the scheme.

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On Dec. 9, 2024, the Supreme Court will hear argument in *Koussisis v. United States*, O.T. 2024, No. 23-909, a case that will again review the reach of the federal mail and wire fraud statutes. These “property fraud” statutes have long been among the favorite tools of federal prosecutors investigating white-collar crime and have also been the subject of repeated limitation by the Supreme Court. At issue this time is the so-called “fraudulent inducement” theory of property fraud - namely, whether deception to induce a commercial exchange can constitute mail or wire fraud, even if the infliction of economic harm on the alleged victim was not the object of the scheme. The Court’s grant of certiorari in a case from the Third Circuit that affirmed a conviction based on this theory suggests that it may reverse, continuing its decade-long trend of narrowing the scope of broadly worded criminal statutes (like wire fraud), and reining in the prosecutorial discretion that comes with them.

**Decade-Long Pushback Against Overcriminalization**

The Supreme Court’s pushback against overcriminalization dates back at least as far as 2014, when the Court declined to interpret the Chemical Weapons Convention Implementation Act of 1998 to cover “an amateur attempt by a jilted wife to injure her husband’s lover” by putting lab chemicals on a doorknob, reasoning that a holding to the contrary would “convert an astonishing amount of traditionally local criminal conduct into a matter for federal enforcement,” *Bond v. United States*, 572 U.S. 844, 852, 862 (2014).

In 2015, the Court applied similar reasoning in *Yates v. United States*, when it rejected the argument that throwing undersized fish off a boat, which had previously been caught in violation of federal conservation regulations, amounted to the destruction of a “record, document, or tangible object” under the Sarbanes-Oxley Act, reasoning that such a reading would “cut [the statute] loose from its financial-fraud mooring.” 574 U.S. 528, 531-52 (2015). Even the dissenting judges, led by Justice Kagan, acknowledged that the case presented “the real issue [ of] overcriminalization and excessive punishment in the U.S. Code,” and criticized the statute as “too broad and undifferentiated, with too-high maximum penalties,” making it “not an outlier, but an

emblem of a deeper pathology in the federal criminal code." *Id.* at 569-70 (Kagan, J., dissenting).

This trend continued in 2018, when the Court limited the scope of the tax obstruction statute by requiring the government to prove, among other things, that the defendant's obstructive conduct had a "nexus" to a particular proceeding. *Marinello v. United States*, 584 U.S. 1, 13 (2018). The Court reasoned that a broader reading would transform misdemeanors under the Internal Revenue Code, such as "pay[ing] a babysitter \$41 per week in cash without withholding taxes" into a federal crime, *id.* at 9-10, and "place[] great power in the hands of the prosecutor ... , which could result in the nonuniform execution of that power across time and geographic location," *id.* at 11.

In 2021, the Court limited the scope of the Computer Fraud and Abuse Act, to reach only those "who obtain information from particular areas in the computer ... to which their computer does not extend." *Van Buren v. United States*, 593 U.S. 374, 378 (2021). The Court explained that the government's preferred interpretation - which sought to punish a defendant with "improper motives for obtaining information that is otherwise available to them" - would "criminalize everything from embellishing an online-dating profile to using a pseudonym on Facebook[.]" *Id.* at 394.

This broad trend has extended into the interpretation of the mail and wire fraud statutes. For example, the Court cabined the scope of the wire fraud statute and reversed the convictions in the so-called "Bridgagate" scandal, reasoning that the scheme was not "directed at the [government's] property" because the traffic lane reduction was "a quintessential exercise of regulatory power," and "a scheme to alter such a regulatory choice is not one to appropriate the government's property." *Kelly v. United States*, 590 U.S. 391, 400 (2020). The Court continued that to hold otherwise would be "a sweeping expansion of federal criminal jurisdiction." *Id.* at 404. Most recently, the Court further narrowed the scope of the wire fraud statute in *Ciminelli v. United States*, when it rejected the "right to control" theory of liability, under which the government sought to hold the defendant liable for depriving a nonprofit of "potentially valuable economic information necessary to make discretionary decisions" during their bidding process. 598 U.S. 306, 310, 316 (2023). The Court reasoned that the "right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest," based on the structure and history of the statute, and explained that embracing such a theory would "vastly expand federal jurisdiction without statutory authorization," and "make[] a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law." *Id.* at 315. Throughout all of these cases, common themes emerge. First, the Court will not adhere to a literal, plain text meaning of a criminal statute when the results of such an interpretation are unworkable. Second, the Court is mindful of federalism concerns, seeking to avoid a broad federalization of all criminal law. Third, the Court is concerned about entrusting prosecutors with the authority to decide which prosecutions are fair. Fourth, with respect to the wire fraud statute, the Court looks to traditional principles of fraud law, focusing on whether the object of the scheme is harm to another individual's property, rather than something less than this.

Kousisis now presents the Court with another opportunity to limit overcriminalization and also to define the metes and bounds of the mail and wire fraud statutes.

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