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High Court May Limit the Reach of the Wire Fraud Statute – Part 2

On Dec. 9, 2024, the Supreme Court heard oral argument in 'Kousisis v. United States', which considers the viability of the fraudulent inducement theory under which the government argues that deception to induce a commercial exchange can constitute mail or wire fraud, even if inflicting economic harm on the alleged victim was not the object of the scheme.

By Harry Sandick and Caitlyn Wigler
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What You Need to Know

- "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.
- The Court's grant of certiorari in this case is from the Third Circuit, which affirmed a conviction based on the "fraudulent inducement" theory.
- After arguments, the Court appeared divided on the issue.

In our recent article, we reviewed the briefing in *Kousisis v. United States*, O.T. 2024 (No. 23-909), an appeal that considers the viability of the fraudulent inducement theory, under which the government argues that deception to induce a commercial exchange can constitute mail or wire fraud, even if inflicting economic harm on the alleged victim was not the object of the scheme. The defense argued that in the absence of an intent to cause harm to the victim's property, there could be no wire fraud.

On Dec. 9, 2024, the Supreme Court heard oral argument on the case. The Court appeared divided on the issue. Several justices appeared to share the views of Petitioners, emphasizing concerns about federalism and broad prosecutorial discretion — concerns repeatedly expressed by the Court in the context of interpreting other broadly-worded federal criminal statutes.

Justice Alito directed the government to such cases, including *Ciminelli v. United States*, 598 U.S. 306, 310 (2023) and *Kelly v. United States*, 590 U.S. 391 (2020), noting that "what they really stand for is that the Court really doesn't like the federalization of white-collar prosecutions and wants that to be done in state court and is really hostile to this whole enterprise." Chief Justice Roberts similarly flagged that "a lot of these things could be dealt with under state law, [] you don't have to federalize every jot and tittle in a [] large contract," noting that "the federalization of something as simple as nuances of contract law" is a "matter of concern that [the Court] expressed in many precedents." While this premise seemed implicit in a long line of recent decisions, it was still surprising to hear the Court so openly discuss the broad question of whether white-collar crime should be the subject of the federal criminal law.

The government responded that the sentiment of the Court was not "a freestanding reason to carve an exception into the statute," and suggested a ruling for the defense on this basis could "send a signal to the lower courts that it's okay to start making things up in a statute because we disagree with Congress's policy choices about how broad to write federal statutes."

Chief Justice Roberts also asked about the limits of the government's theory, noting that in a 1,100 page contract like the one at issue here, "there are going to be a lot of things in there that they, you know, didn't dot every I or cross every T." The government responded that an essence-of-the bargain materiality requirement would be the primary limit, ensuring the exclusion of "ticky-tack things."

Justice Kavanaugh and Justice Barrett pressed further, with Justice Kavanaugh observing that the materiality standard is "obviously … pretty vague and different juries are going to have very different reactions to something like 'essence of the bargain.'" At one point, Justice Gorsuch pressed on this limit, noting that "materiality has never been that high of a bar." He asked whether, hypothetically, if a family was choosing between babysitters and hired one under the understanding that she would use her proceeds for college, but she later spent that money on a trip to Cancun, that babysitter could be prosecuted under the statute. Reluctantly, the government conceded yes. While this concession by the government may have been a necessary one given the breadth of the government's interpretation of the wire fraud statute, it is hard to imagine that it gave the Court much comfort, given the Court's recent admonitions in *Yates* and *Van Buren* to avoid interpreting criminal statutes in a manner that left prosecutors with considerable discretion.

Other justices were more amenable to the government's position, expressing concern with imposing an economic harm requirement when the statute does not expressly provide for one. "I'm struggling with the idea that there has to be a harm requirement in this context because I don't see it in the statute," said Justice Jackson. Justice Sotomayor expressed similar concerns, emphasizing that PennDOT wanted a DBE to provide the service, and therefore did not get what they paid for.

Given the division at argument, it is hard to predict what the Court will decide. However, the Court has said repeatedly, and most emphatically in *Kelly*, that the wire fraud statute is a property fraud statute, therefore a failure to show economic injury here should be fatal. Likewise, if the Court remains concerned with federalism and the problem of overcriminalization, the convictions likely will be reversed, because as in *Ciminelli*, a decision to the contrary would "make[] a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law." 598 U.S. at 315. Unless we want to leave it to prosecutors to decide whether to indict and convict deceitful babysitters, reversal would be the right decision.

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