ALM Law Journal Newsletters
Business Crimes Bulletin

High Court Expands the Reach of the Wire Fraud Statute (Part III)

By Harry Sandick and Caitlyn Wigler
July 7, 2025

On May 22, 2025, the Supreme Court endorsed the "fraudulent inducement" theory of wire fraud in *Kousisis v. United States*, departing from its recent trend of narrowing the scope of broadly worded criminal statutes, including the wire fraud statute. This decision appears to allow the government to obtain a conviction even where the defendant did not intend to cause economic harm to their counterparty, so long as the defendant made material false statements in order to obtain property from another. In future decisions, the Supreme Court will need to harmonize this decision with its other recent wire fraud decisions, as discussed below.

BACKGROUND

We previously wrote about the *Kousisis* litigation in December 2024, including the oral argument on December 9, 2024. In *Kousisis*, Petitioners Kousisis and Alpha Paint and Construction Co, Inc. were awarded two federally-funded contracts from the Pennsylvania Department of Transportation (PennDOT) after submitting the lowest bids. *United States v. Kousisis*, 82 F.4th 230, 234 (3d Cir. 2023). To comply with the disadvantaged business enterprise (DBE) requirements in these contracts, Petitioners represented that they would engage a DBE-certified paint supplier. *Id*. This certification was false: the DBE-paint supplier they engaged did not perform any commercially useful function as required. It merely served as a passthrough, giving the false appearance of compliance with the DBE requirement. *Id*. at 235.

Petitioners were convicted at trial of wire fraud and conspiracy to commit wire fraud. *Id*. These convictions were premised on the theory that Petitioners fraudulently induced PennDOT to award them contracts (*i.e*., obtained PennDOT's "money or property") under materially false pretenses. It was not disputed that the services they provided were satisfactory and otherwise in compliance with the contracts. *Id*. at 236. Nor was it disputed that under the terms of the relevant contract, a failure to comply with the DBE regulations would be a material breach. *Id*. at 234.

On appeal, Petitioners focused on their satisfactory performance, arguing that the government received the full economic benefit of its bargain, and therefore could not prove a scheme to defraud PennDOT of "money or property" as required under the wire fraud statute. *Id*. at 236. The Court of Appeals for the Third Circuit rejected these arguments and affirmed, leaning on the broadlyworded text of the mail and wire fraud statutes, *id*. at 241-42, which criminalize "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" that uses mail or wires, 18 U.S.C. §§1341, 1343. On June 17, 2024, the Supreme Court granted certiorari.

OPINION

The Supreme Court affirmed the Third Circuit's decision and endorsed the "fraudulent inducement" theory of wire fraud, which previously had not been accepted in several Circuits, including the Second Circuit, where, for over 50 years, "the government c[ould] [not] escape the burden of showing that some actual harm or injury was contemplated by the schemer." *United States v. Regent Office Supply Co., Inc*., 421 F.2d 1174, 1180 (2d Cir. 1970).

In an opinion by Justice Barrett, the Supreme Court held that a defendant who induces a victim to enter into a transaction under materially false pretenses may be convicted of wire fraud, regardless of whether the defendant sought to cause the victim economic loss. *Kousisis v. United States*, 145 S. Ct. 1382, 1391 (2025). The core of the Court's reasoning had three points. First, the Court rejected Petitioners' argument that a scheme cannot constitute wire fraud where the defendant has provided something of equal value under the agreement. The text of the wire fraud statute "does not mention economic loss, let alone require it," and requires only that the scheme be devised to "obtain[n] money" — here, millions from PennDOT through false representations about compliance with the DBE requirement. *Id*. at 1385, 1391-92. Second, the Court held that the common law of fraud "did not establish a general rule requiring economic loss in all fraud cases[.]" *Id*. at 1385. Rather, "fraud" was a term with expansive reach, and in some instances, economic loss was required, while in others, "it was the deception-induced deprivation of property — not economic loss — that common law courts generally deemed injurious." *Id*. at 1392-95. Third, Petitioners proposed a "unique qualities" exception to the common law requirement for economic loss that would allow a fraud claim to be brought even in the absence of an intent to cause economic loss, so long as the subject of the transaction was a specific piece of property. The Court rejected this argument as lacking in authoritative support and said it would swallow the economic harm rule, given that "anything can be described as 'unique' or 'different from' something else" "[a]t the right level of specificity," *id*. at 1385, 1395-96.

The Court also explained how the fraudulent inducement theory is consistent with the Court's wire fraud precedent, comparing *Kousisis* to several prior decisions. The Court first explained that it has twice rejected the argument that a fraud conviction depends on economic loss. *Id*. at 1396-97 (citing *Carpenter v. United States*, 484 U.S. 19, 26 (1987) (affirming the mail and wire fraud convictions of the defendants — who had repeatedly leaked the contents of a newspaper's investment column — because they deprived the newspaper of its right to "exclusive use," notwithstanding that this scheme did not cause the newspaper "monetary loss"); *Shaw v. United States*, 580 U.S. 63, 67 (2016) (affirming the defendant's conviction under the bank fraud statute, even though the scheme did not intend to cause the bank financial harm and "no bank involved in the scheme ultimately suffered any monetary loss")). The Court then rejected Petitioners' argument that here, as in *Kelly v. United States*, the loss was an "incidental byproduct" of a scheme to manipulate the exercise of regulatory power. *Id*. (citing 590 U.S. 391, 400, 402 (2020) (reversing the convictions in the so-called "Bridgegate" scandal because while the scheme there resulted in some economic loss, the scheme was not "directed at the [government's] property," as 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")).

The Court also took special care to address *United States v. Ciminelli*, in which the Court rejected the right-to-control theory of wire fraud, under which the government could hold the defendant liable for depriving a counterparty of "potentially valuable economic information" "necessary to make discretionary decisions." *Id*. at 1397 (citing 598 U.S. at 1124, 1128). The *Ciminelli* Court held that only property, and not merely information about a transaction, could be the object of a wire fraud scheme. *Ciminelli*, 598 U.S. at 1128. By contrast, Justice Barrett wrote that the fraudulent inducement theory does not treat "mere information as the protected interest," but rather "protects money and property," thereby implicating a traditional property interest. *Kousisis*, 145 S. Ct. at 1398 (citing 598 U.S. at 1124).

Finally, answering concerns about the potential that the fraudulent inducement theory could be used to expand the scope of conduct susceptible to prosecution as wire fraud, the Court stated that the "demanding" materiality requirement would prevent the risk of "turning every misrepresentation designed to induce a transaction into property fraud," *id*. at 1385, 1398, before concluding that "it is up to Congress, if it so chooses," to change the "undeniably broad" language of the wire fraud statute. *Id*. at 1398.

Three of the Justices wrote separately. Justice Thomas raised concerns about materiality, noting that while the materiality element was uncontested here, he has doubts that Petitioners' statements as to the DBE requirement were "material" and therefore actionable under the wire fraud statute in light of the government's proposed "essence of the bargain" theory. *Id*. at 1400.

Justice Gorsuch wrote that while he agrees that the wire fraud statute does not require proof that the victim suffered a "net pecuniary loss," he believes that the majority went too far when it stated that the injury requirement is satisfied "whenever a defendant obtains property that a victim would not otherwise have parted with by means of a material representation." *Id*. at 1405 (citing *id*. at 1394 n.5 (internal quotation marks omitted)). He emphasized the importance of the traditional benefit-of-the bargain rule as a means to prevent frivolous prosecutions and highlighted the hypothetical of a babysitter who lied about her criminal record when interviewing for her position but otherwise provided the services requested — a similar hypothetical to the one that he raised during oral argument. *Id*. at 1405, 1407-08.

Lastly, Justice Sotomayor agreed that "[w]hen a defendant tricks a victim out of their money by promising one thing and delivering something materially different, it is no defense to say that the delivered items are of equal economic value," and gave the example of a Yankees fan who is deceived into buying Mets tickets that happen to be worth the same amount as the promised Yankees tickets to illustrate this point. *Id*. at 1411. But she declined to join the majority opinion to the extent it spoke "more broadly" about the fraudulent inducement theory, expressing similar concerns to those raised by Justice Gorsuch. *Id*. at 1411-12.

COMMENTARY

The Court's ruling was a mild surprise to many who have followed the Court's recent criminal law decisions. *Kousisis* breaks with a string of decisions over the past decade in which the Court narrowed the scope of broadly worded criminal statutes, including wire fraud, and reined in the prosecutorial discretion that comes with them. See, e.g., *Yates v. United States*, 574 U.S. 528

(2015) (obstruction of justice); *Marinello v. United States*, 584 U.S. 1 (2018) (tax obstruction); *Kelly*, 590 U.S. 391 (2020) (wire fraud); *Van Buren v. United States*, 593 U.S. 374 (2021) (Computer Fraud and Abuse Act); *Ciminelli*, 598 U.S. 306 (2023) (wire fraud). In those cases (which we summarized in a prior article), the Court acknowledged the broad language of the statute, while reasoning, in part, that it is needed to cabin the reach of such statutes to avoid overcriminalization. These courts cautioned time and time again not to depend on prosecutors exercising their power in a prudent manner in order to prevent injustice. This line of precedent led many to view *Kousisis* as an opportunity for the Court to further limit the reach of the wire fraud statute — not to expand it.

This was particularly true given the similarities between *Kousisis* and *Ciminelli*. Indeed, where, as here, the fair value of an economic exchange was given, but the defendants were still prosecuted for wire fraud because they made misrepresentations about other aspects of the transaction, the fact pattern seems awfully close to what the Court said is not sufficient in *Ciminelli*. Yet the Court did not overrule or limit *Ciminelli*, which Justice Barrett expressly described as good law. *Kousisis*, 145 S.Ct. at 1397-98. The Court instead opted to lean on the wire fraud's "undeniably broad" language here to reason that its hands are tied. *Id*. at 1398 (internal quotation marks and citation omitted).

The economic loss requirement set aside by the Court has been essential to reserving wire fraud prosecution for those cases in which the defendant actually sought to deprive another of the benefit of their bargain. This is not to say that defendants who make contract misrepresentations should be held harmless for their wrongful acts. On the contrary, defendants like those in *Kousisis* can be sued for breach of contract or debarred from future contracting work. The only question in *Kousisis* is whether federal criminal prosecution and resulting imprisonment is appropriate in the absence of economic loss. Justice Gorsuch's concurrence lays out several other examples of unjust prosecutions for wire fraud that might now be permitted: an employee who "fibs on his resume" about a condition of employment but completes the work exactly as promised, or a company that promises to make speedy deliveries using a "high-rate" service but instead makes timely deliveries using a cheaper service. *Kousisis*, 145 S.Ct. at 1407. If the counterparty is not deprived of the benefit of its bargain in these cases, then there is no fraud, and there should be no criminal prosecution.

As a result of this decision, the government may now cast a wider net with fraud prosecutions. Indeed, some prosecutors may view this as a signal to use the wire fraud statute more aggressively, as they now can argue that economic injury is not required. This is a departure from the law that has controlled for many decades in some Circuits. *See, e.g., Regent Office Supply Co., Inc*., 421 F.2d at 1180. In recent submissions by the government, we can already see the government using *Kousisis* to push back on efforts to reverse convictions based on the absence of economic loss. *See, e.g., United States v. Bankman-Fried*, 24-961 (2d Cir.) (Jun. 2, 2025) (urging court to reject argument by defendant that government failed to prove intent to cause loss); *United States v. Lopez*, 23-cr-00055 (D. Nev.) (May 27, 2025) (arguing that *Kousisis* negates "economic loss" argument made by defendant in post-trial motion).

Should prosecutors use the wire fraud statute more aggressively, defendants should respond by trying to distinguish *Kousisis* (and relying on *Ciminelli*) and by pointing to the *Kousisis* Court's

assertion that a "demanding" materiality requirement will limit the government's ability to over-reach and prosecute innocent conduct. This may require courts to adopt a more robust interpretation of materiality than is currently in place. The government itself suggested in *Kousisis* that courts should apply an "essence-of-the-bargain test, under which a misrepresentation is material only if it goes to the very essence of the parties' bargain." *Kousisis*, 145 S.Ct. at 1396 (internal quotation marks and citations omitted). Many misrepresentations will fall short of this standard. Already, some defendants seeking to undo their convictions are asking courts to hold the government to this "demanding" standard. *See, e.g., Lopez, 23-cr-00055* (D. Nev.) (May 30, 2025) (seeking reversal of conviction because of the government's failure to prove materiality).

In short, absent a future decision that revisits the question of economic loss, or some tightening of the materiality standard by the federal courts, Justice Gorsuch is right to say that this decision "risks turning victimless lies like our babysitters' into federal felonies." *Kousisis*, 145 S.Ct. at 1405.

***

Harry Sandick, a member of Business Crimes Bulletin's Board of Editors, is a partner in the Litigation Department of Patterson Belknap Webb & Tyler LLP and a member of the firm's White Collar Defense and Investigations team. He can be reached at hsandick@pbwt.com. **Caitlyn Wigler** is an Associate in the Firm's Litigation Department. She can be reached at cwigler@pbwt.com.
