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Contractor's SCOTUS Case Likely to Limit Federal Fraud Statutes

By Holly Barker 2024-06-18T13:22:29000-04:00

- Contractor lied about involvement of disadvantaged business
- Petitioners say fraud wasn't about deprivation of property

The US Supreme Court's decision to [hear a case](#) dealing with the validity of the "fraudulent inducement" theory of mail and wire fraud signals its intent to limit, yet again, the reach of federal fraud statutes.

The high court hasn't generally taken criminal fraud and corruption cases to affirm defendants' convictions. In the most high-profile cases on the topic in the past 15 years, the high court has reversed convictions and narrowed the scope of the federal statutes, said [Brandon Essig](#), a white collar partner at Lightfoot, Franklin & White LLC in Birmingham, Ala.

Those cases include 2010's [Skilling v. United States](#), against the former CEO of Enron, which narrowed honest services wire fraud to schemes involving bribery and kickbacks, and 2016's [McDonnell v. United States](#), a public corruption case involving the former Virginia governor, which narrowed the application of the honest services fraud statute to "official acts."

There was also 2020's [Kelly v. United States](#) and 2023's [Ciminelli v. United States](#), reinforcing limits on scope of the federal mail and wire fraud statutes to tangible property interests—that is, fraud targeting money or property.

Each case was unanimous. "Think about that for a second," Essig said.

"The court has been very strong in its skepticism of DOJ's creative application of federal criminal statutes," he said. "With that in mind, I don't like the government's chances."

Dollars and Cents

In the latest case— [Kousisis v. United States](#) , appealed from the Third Circuit—the government alleged Alpha Painting & Construction Co. and its former project manager, Stamatios Kousisis, conspired to defraud the the US Department of Transportation and the Pennsylvania Department of Transportation “to obtain money and property from them” by falsely claiming that a subcontractor would and did work as a disadvantaged business enterprise.

At trial, the government acknowledged that the scheme involved PennDOT paying less than it otherwise would have, meaning PennDOT suffered no financial harm, but argued the case wasn't about “dollars and cents.” Rather, it said the case was about the defendants' violation of a contractual “non-financial obligation” related to the DBE program.

The jury ultimately convicted Alpha and Kousisis of wire fraud conspiracy, wire fraud, and false statements, but acquitted them on two substantive wire fraud counts.

Although *Ciminelli* was decided after the US Court of Appeals for the Third Circuit affirmed the *Kousisis* convictions, the circuit court added a footnote acknowledging the intervening decision. The Third Circuit said its holding was still consistent with *Ciminelli* because the basis of the fraud conviction wasn't PennDOT's “frustrated interest in DBE participation,” but “the actual money paid as a result of the fraudulent scheme.”

The key question presented is whether deception to induce a commercial exchange can be mail or wire fraud, even where inflicting economic harm on the alleged victim isn't the object of the scheme.

Line Drawing

The high court has been saying, again and again, that federal fraud statutes were meant to root out traditional concepts of fraud and bribery, like false account statements and cash kickbacks, said [Carrie Cohen](#), co-chair of the investigations and white collar practice group at Morrison & Foerster LLP in New York.

The court has expressed concerns about vagueness when they view prosecutors as trying to use the fraud statutes in novel ways to reach conduct not obviously within their ambit, she said.

It isn't that the court has found the statutes are unconstitutionally vague, but the application of those

laws to certain conduct has resulted in overturning convictions, Cohen said.

Jackie Jacobson, a white collar defense attorney with Monico & Spevack in Chicago, said she thinks the *Kousisis* case presents a closer question than previous property interest cases.

The court has been clear that the fraud statutes are about property, not intangible interests, she said. But it could decide an interest isn't intangible if it goes to the heart of a bargain, she said.

The implications of the case will depend on where the justices draw the line, she said. If the court allows fraudulent inducement theories to survive when a misrepresentation goes to the heart of a bargain, it's going to generate a lot of litigation.

Nuance

What sets *Kousisis* apart from the recent Supreme Court cases dealing with property interests is that the facts presented are a bit more like traditional theories of fraud, Essig said.

In *Kelly*, there was no money obtained at all, and in *Ciminelli*, the alleged fraud was underlying undisclosed corruption, he said.

Here, one party to the contract, PennDOT, set terms—the use of DBE contractors—that were a prerequisite to payment.

According to the Third Circuit, Kousisis and his company only got the contract and the payment of substantial sums of public money because they lied about that prerequisite, Essig said.

Even so, there are problems that parallell the weaknesses of other cases that were overturned, he said. PennDOT got the core of what it contracted and paid the defendants to do—two major bridge construction projects in Philadelphia.

He also noted that some contract requirements seem more aspirational than tangible, which is “exactly the kind of vague government interest that the court has been reluctant to affirm as the basis for a criminal fraud conviction,” Essig said.

Kousisis and Alpha are represented by [Lisa Mathewson](#) of Philadelphia.

The case is Kousisis v. United States, U.S., No. 23-909, certiorari granted 6/17/24 .

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