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January 29, 2025

### SCOTUS Seems Torn in Tangling With Fraudulent Inducement Theory of Federal Fraud Statutes



On December 9, 2024, the Supreme Court of the United States heard oral argument in [Kousisis v. United States](#). The case squarely assesses the validity of the “fraudulent inducement” theory of mail and wire fraud under federal law, which is currently the subject of a 6-5 circuit split. The Court’s grant of certiorari in *Kousisis* signaled that it intended to resolve the circuit split and decide whether the theory is valid. But if December’s oral argument is any indication, observers may not receive the clarity they want.

#### **Background**

The defendants in [Kousisis](#) were convicted of wire fraud and conspiracy for manipulating a Pennsylvania state program meant to assist “disadvantaged businesses enterprises” (DBEs). The defendants won a bid for two bridge-repair contracts from the Pennsylvania Department of Transportation (PennDOT) after representing to PennDOT that they would purchase significant quantities of paint supplies for their work from a qualifying DBE. But the defendants did not include the DBE in their work as promised to PennDOT. Instead, the defendants had merely paid the DBE to use its name in their bid. The U.S. Court of Appeals for the Third Circuit affirmed the defendants’ convictions consistent with the “fraudulent inducement” theory. The court held that even though PennDOT did not suffer a net economic loss—it received the work it expected at the price it agreed to pay—the defendants’ fraudulent inducement of PennDOT to contract with them—by lying about DBE participation in their bid—supported their wire fraud convictions.

The *Kousisis* defendants and, more broadly, the defense bar see the “fraudulent inducement” theory as reaching too far. Under that view, where someone parts with money in a commercial exchange that they were duped into entering, there is no harm to their property interest (and thus no violation of the federal fraud statutes) if in return they receive the goods or services they had expected to receive (*i.e.*, the full economic value of the bargain). The government, on the other hand, has maintained that harm to a victim’s property interest occurs whenever money changes hands as a result of a defendant’s deception; economic loss is not necessary to support a conviction.

## The Supreme Court Oral Argument

Before the oral argument in *Kousisis*, many people expected the Court to side decidedly with the defendants. In its recent jurisprudence, each time the Court has considered the scope of a federal fraud statute, it has ruled against the government and narrowed the statute. See, for example, the Court's decisions in [Skilling v. United States](#) (2010, honest services fraud); [Kelly v. United States](#) (2020, federal program fraud and wire fraud); and [Ciminelli v. United States](#) (2023, wire fraud). Moreover, *Kelly* and *Ciminelli* were unanimous decisions. But based on the justices' questioning during oral argument in *Kousisis*, the Court appears to be more torn this time around.

The defendants argued that the "fraudulent inducement" theory flouts the Court's precedents, clashes with the common law understanding of fraud (which the mail and wire fraud statutes incorporate), and criminalizes a limitless number of common commercial exchanges. The defendants emphasized that a victim's "subjective disappointment" does not amount to fraud if the victim otherwise received the full economic value of their bargain. The government argued that the defendants' desired "intent to cause financial loss" requirement does not exist in the text of the mail and wire fraud statutes, the requirement has already been rejected by the Court in previous cases, and the statutes' materiality element provides appropriate limits on the statutes' reach.

During the oral argument, the liberal wing of the Court—Justices Sotomayor, Kagan, and Jackson—largely posed difficult questions to the defendants' counsel and lobbed easier inquiries to the government's counsel. For instance, Justice Sotomayor stated that "this [case] is not fraudulent inducement" because PennDOT's DBE requirement was an express term in the contract at issue. In another example, when defendants' counsel pointed to two state Supreme Court decisions, Justice Jackson challenged counsel by asking facetiously, "What about this Court ... we've never interpreted the wire fraud statute?" As such, the liberal justices seemed more swayed by the government's arguments.

Conversely, several members of the conservative wing of the Court—Chief Justice Roberts and Justices Thomas, Kavanaugh, and Barrett—largely asked challenging questions to the government's counsel and posed easier ones to the defendants' counsel. Chief Justice Roberts, for example, stated to the government's counsel "that a lot of these things could be dealt with under state law, and you don't have to federalize every jot and tittle ... in a large contract." And when the government's counsel could not answer how many "fraudulent inducement" prosecutions the government brings, Justice Kavanaugh responded, "Well, if you can't give a number, how could [defendants' theory] be highly destabilizing[?]" As such, these justices seemed more swayed by the defendants' arguments.

Justice Gorsuch and Justice Alito's positions were more ambiguous. But to the extent they revealed leanings, each signaled—somewhat unexpectedly, given the positions of the other conservative justices and the Court's recent decisions—that they are more likely to vote for the government. At one point while questioning the government's counsel, Justice Alito described the Court's recent decisions that have narrowed the federal fraud statutes as "hanging over this case like a cloud or a fog." However, Justice Alito did not appear to be implying that the Court should follow those decisions and once again limit the reach of a federal fraud statute. Rather, it seemed that Justice Alito wanted to allow the government to explain why the Court *should not* follow the "amorphous sentiment" expressed by those decisions, in the words of counsel.

## Likely Outcome and Impact on White-Collar Prosecutions

Even if the Supreme Court does buck its recent trend of decisively ruling against the government and constricting the scope of federal fraud statutes in *Kousisis*, the Court may choose to simply punt on the "fraudulent inducement" theory and provide a narrow decision that does not resolve the issue. During oral argument, several justices—including Justices Barrett, Gorsuch, and Alito—inquired whether they could decide

the case on the ground that PennDOT purportedly paid a higher amount for DBE participation, meaning PennDOT *did* suffer an economic injury.

Neither the defendants nor the government want a narrow decision in this case. The government's counsel "urge[d] the Court just to decide" the validity of the "fraudulent inducement" theory, noting that if the justices do not decide the issue now, "it's going to keep being ... raised." The defendants, of course, do not want to have their convictions affirmed.

Should the Court issue a narrow decision, that will leave things as they were before *Kousisis*: a 6-5 circuit split as to whether fraudulent inducement can give rise to convictions under the federal mail and wire fraud statutes. Until the Court speaks definitively, future fraud prosecutions will continue to hang in the balance.

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