


In That Case: *Koussisis v. United States* and *Thompson v. United States*

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In That Case: Koussi...

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In the Public Interest is excited to continue In That Case, its third annual miniseries examining notable decisions recently issued by the United States Supreme Court. In this episode, guest host [Tom Saunders](#) speaks with [Amanda Masselam Strachan](#), a WilmerHale partner and member of the firm's white-collar defense and investigations practice, about two fraud cases that were decided this term.

While *Koussisis* concerns if there needs to be economic harm done during a commercial exchange for a perpetrator to be convicted of wire fraud, *Thompson* is centered on whether misleading but true statements are criminalized as false statements under the mortgage fraud statute. Masselam Strachan breaks down the specifics of both cases, and in comparing them with one another, explains the impact these decisions have on federal fraud claims.

Related Resources

- [SCOTUSblog: *Koussisis v. United States*](#)
 - [Supreme Court Rejects Economic-Loss Requirement for Wire Fraud but Underscores Materiality as a Limiting Element of Federal Fraud Statutes](#)
- [SCOTUSblog: *Thompson v. United States*](#)
 - [Merely misleading statements aren't illegal under false statements law, Supreme](#)

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Episode Transcript

Transcript

Felicia Ellsworth: Welcome to *In the Public Interest*, a podcast from WilmerHale. My name is Felicia Ellsworth, and I'm a partner at WilmerHale, an international law firm that works at the intersection of government, technology, and business. Today's episode is the latest installment of our Supreme Court miniseries, where we dive into the most hotly contested decisions coming out of the Supreme Court this term and discuss the implications of the Court's rulings going forward. Today, I am joined by my WilmerHale colleague and fellow appellate attorney, Tom Saunders, who will be discussing the Court's recent decisions in *Kousisis v. United States* and *Thompson v. United States*. These cases concern what constitutes fraud under federal

mortgage fraud and wire fraud statutes. In *Kousisis*, the issue was whether a victim who is deceived into a commercial exchange needs to suffer economic harm for the deceiver to be convicted of wire fraud. In *Thompson*, the Court was asked to clarify the meaning of false statements in the mortgage fraud statute, in particular, whether misleading but true statements are criminalized as false statements under the statute. Joining Tom to discuss these cases is Amanda Masselam Strachan, a partner in WilmerHale's Boston office. As a member of the firm's White Collar Defense and Investigations Practice, Amanda leverages her many years of experience as a federal prosecutor. Amanda previously worked at the U.S. Attorney's Office for the District of Massachusetts, where she served as both the criminal chief and the chief of the Healthcare Fraud Unit.

Tom Saunders: Thank you so much, Amanda, for joining us on this episode of our Supreme Court miniseries.

Amanda Masselam Strachan: Thank you for having me. I'm looking forward to the discussion.

Tom Saunders: Let's begin by talking briefly about *Kousisis*. This was an appeal of a conviction under the federal wire fraud statute. What was the conduct that was considered criminal in this case?

Amanda Masselam Strachan: In this case, a construction company, Alpha, and its manager, Kousisis, won two government contracts totaling over \$80 million for a painting project through the Pennsylvania Department of Transportation that required subcontracting a percentage of the contracts to a disadvantaged business enterprise, or DBE. And a DBE is usually a minority or female-owned business. Now, in the bid, Kousisis represented that his company would acquire millions of the dollars in painting supplies from a pre-qualified DBE. It turned out in this case that the DBE was just a pass-through entity. It funneled checks and invoices to and from Kousisis's actual suppliers for a fee, counter to the representation made by Kousisis to win the bid. Alpha submitted false certifications to hide the scheme. Ultimately, the painting repair work satisfied the contractor who paid for the work, but did not know about the lies and misrepresentations regarding the pass-through participation of the DBE. Eventually, the scheme was discovered, Kousisis was charged and convicted of conspiracy to commit wire fraud under 18 U.S.C. 1343 and 1349. Kousisis appealed, arguing that he did not obtain money or property by means of fraud because his company still completed the paintwork according to expectations under the contract. So, Pennsylvania Department of Transportation received the full benefit of the contract.

Tom Saunders: So this fight was all about the federal wire fraud statute. Can you give us some more background on that statute? What is it? How does it work?

Amanda Masselam Strachan: Wire fraud is a serious federal crime that is almost as old as electronic communication itself. It was formally defined as a federal crime in 1952, where it was established that using electronic communications to facilitate fraud across state lines or internationally was a federal offense. Over time, the statute has become broader to incorporate new technology, such as communications through the internet. To be charged with wire fraud,

the defendant needs to intentionally deceive someone to obtain money, property, or honest services through electronic communication, which is never hard to find these days. The question here is whether the victim needed to have actually lost money or property because of the fraud for a party to violate the wire fraud statutes.

Tom Saunders: And on that last issue, Kousisis asserted that economic loss is part of the common law understanding of fraud that provided the backdrop for the statute. So, his scheme needed to economically harm the government in order for him to be convicted. Why did that argument fail?

Amanda Masselam Strachan: When Congress uses a term with origins in common law, the term brings with it settled legal meaning. And the Court here found that an economic loss requirement was not widely accepted as part of the settled meaning of fraud in common law. And so, while it's true economic loss was sometimes discussed in common law fraud cases, the Court here was not convinced—and this is all nine justices, by the way—that it was a requirement in all cases of common law fraud. So Kousisis's attempt to read an economic fraud requirement into the wire fraud statute using the old-soil principle failed here.

Tom Saunders: The Court's reasoning also focused a lot on the fraudulent inducement theory. What does that mean and what does that type of theory do for prosecutors?

Amanda Masselam Strachan: In essence, the fraudulent inducement theory means that a federal fraud conviction can be sustained when someone makes a material misstatement that induces a victim to turn over their money or their property. In other words, as the Court said here, a fraud is complete when the defendant has induced the deprivation of money or property under materially false pretenses. It doesn't matter whether the victim experiences economic loss as a result of the deceit. That is what the Court here found. What matters is that a misrepresentation constitutes an inducement or motive for the victim to turn over their property or money, and that the victim did not, in fact, receive what they bargained for in return, that the victim did not get the benefit of the bargain. And in this case, the government, in its contracts, required that a certain percentage of it be allocated to a disadvantaged business enterprise. And thus, the government was induced by the misrepresentation that Kousisis was using a DBE, when in fact he was not, and that the Pennsylvania Department of Transportation essentially entered into this contract under a false understanding that that was going to happen. The case really stands for the commonsense proposition that the federal government has the right to get what it paid for. In this case, that includes who will provide the services and not just the actual services themselves, because there was no dispute that the painting or the work had been done to the satisfaction of the Penn DOT. I thought that Justice Sotomayor had a great analogy in her concurrence, where she says that a Yankees fan who's tricked into buying Mets tickets is no less defrauded simply because the Mets tickets might have had the same economic value as the Yankee ones. Obviously, that Yankees fan did not get what they thought they were getting, and that is a fraud, as Justice Sotomayor points out in that concurrence.

Tom Saunders: Were there other disagreements about the breadth of the fraudulent inducement theory or any of the propositions that were endorsed by the majority here?

Amanda Masselam Strachan: Yes, both Justices Gorsuch and Sotomayor articulated that concern. Justice Gorsuch wrote that such a conclusion would give prosecutors and courts, quote, a commission to prosecute and punish harmless lies. He asked if a victim of the fraud got exactly what they paid for, how exactly is that person a victim at all? Likewise, Justice Sotomayor worried that under this fraudulent inducement theory, there could be a wide array of everyday conduct that might constitute wire fraud. These are concerns that the Court has expressed over time about a broadening of the fraud statutes, and I think that's why there was a lot of surprise, especially since it was a 9-0 decision that the Court reached this conclusion despite, even in concurrence here, articulating concern that the wire fraud statute might be being used more broadly than it was intended. And I think there is a concern in the Court—and practitioners in this area should be aware—that federal prosecutors may be emboldened by this decision to bring more cases under a fraudulent inducement theory. They have the green light to do that now. And the fact that it was 9-0 will not dissuade that emboldening.

Tom Saunders: The primary limit the justices seemed to leave in place was the requirement that the misrepresentation be material. So, what would make a representation material?

Amanda Masselam Strachan: Yes, that has always been the central question of a fraud prosecution. Now, generally speaking, materiality refers to the extent that a falsehood influences a decision-maker. The Court here did not define what is considered material for federal wire fraud cases because the materiality of the misrepresentations here was not challenged. The defendant did not contest that the misrepresentations around the use of a DBE were material. There are a few formulations that are mentioned in the opinion that might guide a future decision that we can look to. There are traditional materiality tests and the essence of the bargain test. Under traditional materiality, we look at whether the misrepresentation to a reasonable person would attach importance in deciding how to proceed. And if the defendant knew or should have known, that the recipient would likely deem it to be an important fact. Under the essence of the bargain test, on the other hand, materiality depends on whether the misrepresentation affected any of the key reasons that the parties entered into the contract. So, a fine distinction, but there a misrepresentation would be material if it undermined the reasons the parties formed the contract in the first place. And these are questions that federal prosecutors and defense attorneys debate every day as we look at questions of accountability in the white-collar space.

Tom Saunders: Now let's turn to our other fraud case, *Thompson v. United States*. Amanda, can you tell us a little bit about this case?

Amanda Masselam Strachan: Yes, Patrick Daley Thompson had taken out three loans from the Washington Federal Bank for savings. The total amount of the loans was \$219,000. After the bank failed, the FDIC became responsible for collecting the outstanding loans. And during a call with an FDIC loan officer, Thompson disputed the total number that the FDIC was trying to collect, which was over \$269,000, which was the amount of the three loans plus interest. And in those calls, Thompson said he had, quote, no idea where the 269 number comes from, end quote, and that he had borrowed \$110,000. That was the amount of the first loan. And as a

result of saying that he had borrowed \$110,000, he was charged and convicted by a jury with violating 18 U.S.C. 1014, which prohibits knowingly making any false statements to influence the FDIC's action on any loan.

Tom Saunders: So, after the trial, what happened in the lower courts?

Amanda Masselam Strachan: Thompson moves for acquittal and argues that the statements were not false because he had, in fact, borrowed \$110,000, even though he later borrowed more money, which was loans two and three. The jury had been instructed that he had to knowingly make a false statement, and so he argued that his statement was actually not false. Both the district court and the Seventh Circuit concluded that they did not need to determine the falsity of the statement because they read 1014 to also criminalize misleading statements, and Thompson's statements, at a minimum, were misleading. And so, the court upheld the conviction, Seventh Circuit did as well, and did not reach the question of actual falsity because they found that misleading was enough to satisfy the statute.

Tom Saunders: The Seventh Circuit's opinion then went up to the Supreme Court. What did the Supreme Court do?

Amanda Masselam Strachan: In a unanimous decision issued by Chief Justice Roberts in March of 2025, they reversed, 9-0, holding that Section 1014 does not criminalize statements that are misleading but true. And in doing this, the Court cited the law's text, noting that it prohibits making only a false statement, and the text of the statute does not use the word "misleading." A lot of other statutes that criminalize similar conduct do. This one does not. It only uses the word "false," and the Court explained that "false" and "misleading" are two different things. And so, the Court reversed and remanded for the lower court to determine whether or not the statements could be considered false.

Tom Saunders: The government's oral argument in the case had emphasized that falsity must be considered in context. In other words, circumstances can make a statement false, even if it's not false on its face. How is that concept of falsity in context similar to or different from the concept of a statement being misleading?

Amanda Masselam Strachan: So, this goes straight to the crux of the argument here. The government in this case wanted to argue that false and misleading were synonymous because of the substantial overlap between those concepts. And I think this idea of falsity in context is crucial to understanding how the government was blurring these two concepts. The Supreme Court here is not saying there's nothing wrong with the way that Thompson answered these questions and there was no fraud here. The Court declined to determine whether the convictions could stand because the statements were actually false and not just misleading. Instead, the Court remands and instructs the district court to determine whether a reasonable jury could find that Thompson's statements were false. And I think the parties seem to suggest, at least in argument, that the defendant's going to have a tough argument there.

Tom Saunders: The case had some colorful analogies trying to illustrate the line between false statements and misleading statements. Can you take us through one of them?

Amanda Masselam Strachan: Yes. They give an example of a boy who steals and eats 12 cookies from the kitchen. And this hits close to home because I have three sons and I'm pretty sure I've lived this. Mother comes into the kitchen and asks him, how many cookies did you eat? There are some replies that could have different levels of falsity to them.

Tom Saunders: So, what would be the clearly false reply to that?

Amanda Masselam Strachan: Clearly false reply would be, I didn't eat any cookies. That is unambiguously false because he ate 12.

Tom Saunders: What would be the example of an answer that might be false in context?

Amanda Masselam Strachan: A statement that would be false in context would be, I ate three cookies, failing to mention, of course, that he ate another nine.

Tom Saunders: And what would be an example of a misleading statement there?

Amanda Masselam Strachan: A misleading statement might be, I don't even like oatmeal cookies and I heard my brother running up the stairs just a second ago. So, that was a statement that would be misleading, but it could still in fact be completely true.

Tom Saunders: How do all these examples map onto the facts of *Thompson* and what might happen on remand?

Amanda Masselam Strachan: When the FDIC is trying to collect three loans totaling \$219,000 plus interest, the loan officer calls, and the answer is, I borrowed \$110,000. Obviously, the purpose for the call is to collect on the full loan, not just the first of three. And the fact that he borrowed more in subsequent loans is clearly important to the FDIC in collecting it. So, on remand, the lower court is going to have to consider the context in which Thompson answered that question.

Tom Saunders: So, taking these two cases together, we have the Court finding no economic harm requirement in *Kousisis*, but insisting on falsity, not just misleading statements in *Thompson*. So, there's one decision cutting each way in terms of expanding and restricting the scope of federal fraud claims. What effect do you think these cases have, taken together?

Amanda Masselam Strachan: Well, that's a great question. As you can imagine, these Supreme Court cases in white-collar enforcement have a cascade of effect on federal enforcement. And it's fascinating that each of these decisions was 9-0. Justice Alito comments in oral argument in *Kousisis*, the fact that there had been a line of cases—*Skilling*, *Simonelli*, *Kelly*, even *McDonnell*—that have limited the ability of federal prosecutors to do their work in their fraud cases. It has cut back on the contours of what federal prosecutors can charge in these white-collar matters. And as a white-collar prosecutor, as I was for 18 years, you felt the effect of these cases. You felt the Supreme Court narrowing what federal prosecutors could go after and what they could do. The toolbox has been diminishing. And that seemed to be the case even in *Thompson* in March. So, when *Kousisis* comes down in May and it is 9-0, it was

very surprising to a lot of people that there had been a real dramatic shift. And it's just interesting that the Court has such unanimity in its view on these matters. The federalization of white-collar prosecutions and what the federal government is allowed to charge as what is criminal and not criminal in this context is something that people have been watching very carefully. And it's interesting to see what has felt like a chipping away at the arsenal of federal prosecutors come to a halt in *Kousisis*. It'll be really interesting to see if this bucking of that trend in this unanimous decision, if we'll see that going forward, or if that was just this case in itself.

Tom Saunders: Thank you so much, Amanda. You have a wealth of experience, both from your time as a prosecutor and in private practice and we really appreciate you speaking with us today about these decisions and how they may impact the prosecutions for fraud going forward.

Amanda Masselam Strachan: Thank you so much for having me.

Felicia Ellsworth: And thank you to our listeners for tuning in to this episode of *In the Public Interest*. We hope you'll join us for our next episode. If you enjoy this podcast, please take a minute to share with a friend and subscribe, rate, and review us wherever you listen to your podcasts. If you have any questions regarding this episode, please email them to us at inthepublicinterest@wilmerhale.com. For all of our WilmerHale alumni in the audience, thank you for listening. We are really proud of our extended community, including alumni in the government, the nonprofit space, academia, other firms, and in leadership positions and corporations around the world. If you haven't already, please join our Alumni Center at alumni.wilmerhale.com so we can stay better connected. Special thank you to the producers of this episode, Arpi Youssoufian, Ben Gardiner, and Conor Gutierrez. Sound engineering and editing by Bryan Benenati. Marketing by Andy Basford and his team, all under the leadership of executive producers Kaylene Khosla, Matt O'Malley, and Jake Brownell. See you next time on *In the Public Interest*.