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“No Harm, No Foul”: Who Will Referee Future White-Collar Prosecutions?

Update

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On December 9, the US Supreme Court heard oral argument in *Kousisis v. United States*, a case that has significant potential ramifications for white-collar prosecutions on the federal level.

Stamatios Kousisis was a project manager for Alpha Painting & Construction (Alpha), which had won a multimillion-dollar contract with the Pennsylvania Department of Transportation (PennDOT) to make repairs to the Schuylkill River bridge and to the 30th Street train station in Philadelphia. One condition of the contract was the company teaming up with a disadvantaged minority business for a small percentage of the work to increase diversity in contracting. Alpha satisfactorily completed the contracted for repair work, but without ever using the services of the minority business. The federal government prosecuted the company and some of its employees for wire fraud. Kousisis was convicted and sentenced to 70 months in prison.

In any other term, Kousisis’s case would have been rubber-stamped for affirmance by the Supreme Court. As Justice Ketanji Brown Jackson asked at argument: “Why isn’t this a classic scheme to obtain property under false pretenses?” It certainly seemed to be. But the winds of change were in the air on this blustery December morning when Kousisis’s attorney responded: “If there’s no harm that occurs in those transactions, there is no fraud.”

It has never been the law that a scheme to defraud is only actionable if tangible harm results. Under years of federal white collar prosecution precedents, the “scheme” itself has always been recognized as the “harm” that triggers application of the federal fraud statutes. But the Court has been struggling with the breadth of these statutes in one-off fact patterns for many years now,[1] and a number of the conservative justices apparently see the *Kousisis* case as a potential springboard for a more dramatic paring back of such federal prosecutions. While Chief Justice John Roberts suggested at argument that

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"such crimes were better handled by state prosecutors," Justice Samuel Alito took that suggestion to a whole different level saying: "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."

The "federalization of white-collar prosecutions" has long been a topic of discussion in academic circles.[2] It can be considered a subset of the more general "states' rights" debates that seem to attend so many issues in today's society. Will Kousisis's otherwise garden-variety scheme to defraud case become the vehicle for a seismic shift in the landscape of white-collar prosecutions from the federal government to the states? The warning signs are certainly there. If that happens, companies would be wise to start paying as much attention to the state laws and regulations that govern their conduct as they presently do to the applicable federal laws and regulations. This will not be easy given the sheer multiplicity of the state and local jurisdictions that might be pushed to the front lines of enforcement by such a ruling, but it will have to be done. Building up more local compliance systems and government relations capabilities will be necessary to stay ahead of the game. There may be no better time than now, if the conservative justices have their way, for companies to start working with experienced counsel on such efforts.

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[1] *See Skilling v. United States*, 561 U.S. 358 (2010).

[2] *See* O'Sullivan, Federal White Collar Crime, Chapter 1, Section B2, "Overcriminalization, Federalization" (7th Ed. 2007).