Westlaw Today

The essence of the bargain: False Claims Act enforcement after *Kousisis*

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JANUARY 22, 2026

In *Kousisis v. United States*,[1] the Supreme Court unanimously confirmed that liability under the criminal wire fraud statute can extend to misrepresentations even where there is no proof that the victim suffered a net economic loss.

Although *Kousisis* concerned the scope of the wire fraud statute, the case has potentially significant implications for actions under the civil False Claims Act ("FCA").[2] Indeed, the government itself recently admitted that the scope of FCA liability is "somewhat uncertain" following the *Kousisis* decision.[3]

The Kousisis decision and the government's position in the case provide defendants with an opportunity to challenge the government's longstanding positions on the scope of materiality and damages under the FCA.

This article discusses how that decision — as well as the government's own position in the case — may impact the analyses of materiality and damages under the FCA and thereby meaningfully cabin the scope of FCA liability.

The *Kousisis* decision

Kousisis concerned misrepresentations made in obtaining a government contract. Stamatios Kousisis and his company, Alpha Painting and Construction Co. ("Alpha"), were awarded two contracts by the Pennsylvania Department of Transportation (PennDOT), funded in part with federal dollars, to complete bridge painting projects.

The contracts required the awardee to subcontract a portion of the work to a disadvantaged business enterprise ("DBE"). Alpha's bids claimed that it would use a qualifying DBE to supply paint but then used a DBE only as a "pass-through" entity for invoices from non-DBE paint suppliers and made multiple misrepresentations to PennDOT to hide the scheme.

Although the painting contracts were completed to the satisfaction of PennDOT, the government charged Kousisis and Alpha with wire fraud and conspiracy, arguing that PennDOT was induced to award the contracts under materially false pretenses. The Supreme Court ultimately granted certiorari on the question of whether the wire fraud statute requires proof of a net economic loss.

In a 9-0 opinion authored by Justice Barrett, the Court held that a defendant who induces a victim to enter a contract under materially false pretenses may be convicted of fraud regardless of whether the victim suffered a net economic loss.

The Court pointed to the statute's materiality requirement as an adequate safeguard against unduly expansive applications of the law, describing materiality as the "principled basis for distinguishing everyday misstatements from actionable fraud."[4]

Because Alpha and Kousisis did not contest the materiality of their statements, the Court did not need to resolve the parties' disagreement over the correct materiality standard. However, Justices Thomas and Sotomayer filed separate concurrences setting forth their understanding of when fraudulent statements qualify as material, and whether the defendants' statements at issue were, in fact, material.

Implications of *Kousisis* for FCA enforcement

The FCA is the government's primary civil enforcement tool to target alleged frauds against the public fisc. The FCA imposes liability on individuals and entities who knowingly present or cause to be presented a false claim to the federal government for payment. Courts have recognized that the FCA is intended to reach only false or fraudulent claims that are "material" to the government.

Those who are found liable under the FCA are subject to significant monetary consequences in the form of treble

damages and penalties. As described below, both the *Kousisis* decision and the government's position in the case provide defendants with an opportunity to challenge the government's longstanding positions on the scope of materiality and damages under the FCA.

Materiality

In 2016, the Supreme Court's decision in *Universal Health Servs., Inc. v. United States ex rel. Escobar* clarified the "demanding" and "rigorous" nature of the FCA's materiality requirement.[5]

Writing for a unanimous court, Justice Thomas cautioned that "even when a requirement is expressly designated a condition of payment, not every violation of such a requirement gives rise to liability. What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision."[6]

Justice Thomas went on to identify various potential indicia of materiality, including whether "the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement," whether the violation was "minor or insubstantial," and whether the violation "goes to the essence of the bargain."[7]

Since the Supreme Court's decision in *Escobar*, the government has described the materiality inquiry to be whether a "'reasonable person would attach importance' to [the violation] or 'the defendant knew or had reason to know'" that the government attached importance to [the violation]."[8]

According to the government, this standard does not require proof that the government "would *actually* have denied payment had it known of the fraud,"[9] but rather only that the violation had "the capacity … to affect the government decision maker."[10]

The government has argued that courts should answer this question by engaging in a "holistic inquiry" that takes into account the various factors referenced by the Supreme Court in *Escobar*, including but not limited to whether the violation "goes to the 'essence of the bargain.'"[11]

The *Kousisis* case offers defendants several bases to challenge the government's existing position on the application of the FCA's materiality provision post-*Escobar*.

First, although the majority in *Kousisis* did not resolve the substantive standard for establishing materiality under the wire fraud statute, it discussed the materiality standard adopted by the Supreme Court in *Escobar*.

It highlighted *Escobar*'s statement that a misrepresentation may be material "if a reasonable person would attach importance to it in deciding how to proceed, or if the defendant knew (or should have known) that the recipient would likely deem it important."[12]

But the *Kousisis* Court described this "demanding" materiality requirement as "[r]esembling a but-for standard" that "asks whether the misrepresentation 'constitut[ed] an inducement or motive' to enter into a transaction."[13]

Defendants thus can argue that *Kousisis* rejected the governments' view that its burden of proof under *Escobar* is merely to show that the defendant's misrepresentation had the capacity to affect the government decision maker and instead requires the government to show that the misrepresentation *actually* affected the government's payment decision.

Kousisis provides FCA defendants with added support for arguing that even where the government may have been a victim of a fraudulent representation in violation of the FCA, it does not mean the government necessarily suffered a loss.

Second, the government's own articulation in *Kousisis* of what it must demonstrate to meet its burden of proof under *Escobar* appears to reflect a sharp departure from its previously articulated view of materiality. As noted, following *Escobar*, the government has consistently argued in FCA cases that materiality is a multi-factor inquiry, with no single factor being dispositive.

In *Kousisis*, however, the government repeatedly described *Escobar* as adopting an "essence of the bargain standard" for materiality, which it characterized "as fraud law's principal tool … for identifying actionable fraud in this context.[14] The government argued that this essence of the bargain test was equally applicable to the wire fraud statute and thus resolved any concerns about overbreadth.[15]

Under the government's description of *Escobar* in *Kousisis*, proof that the defendant's fraud went to the essence of the parties' bargain appears to be a necessary rather than an alternative factor in assessing materiality. This view of *Escobar* not only differs from the government's previous descriptions of the case but may also provide defendants with an additional basis to challenge the government's efforts to use the FCA to enforce some of its recent priorities.

In May 2025, for example, DOJ announced a new Civil Rights Fraud Initiative (https://bit.ly/4sFOR96) designed to use the FCA to pursue recipients of federal funds that "knowingly violate[] federal civil rights laws," including by "promot[ing] divisive DEI policies."

DOJ has already reportedly issued CIDs to a number of companies to investigate such policies. The government may

have difficulty in these cases, however, demonstrating that the DEI policies in question went to the "essence of the bargain" that the government struck with the defendants, when the federal contract or grant involved the provision of goods or services entirely unrelated to these policies.

Justice Thomas's concurrence in *Kousisis* underscores the challenge that the government may face in using the FCA to pursue DEI or other civil rights allegations. Justice Thomas appeared to agree with the government's revised view that under *Escobar* "for a contract term to be material, it must go to "'the very essence of the bargain.'"[16]

He went on to explain that under such a test materiality "does not rest solely on a contract's labels,"[17] and expressed skepticism that the DBE requirements at issue went to the essence of the parties' bargain, given that "the contracts in [Kousisis] were for bridge repairs, not minority hiring."[18]

Defendants may be able to analogize any alleged civil rights violations to the DBE requirements at issue in *Kousisis*, and to argue that such violations are similarly too attenuated from the core purposes of their government contracts or grants to qualify as material, no matter how the government has labeled such violations in Executive Orders, Justice Department memos, or contractor certifications.

The government may also have difficulty meeting an essence of the bargain standard beyond just cases involving DEI or other civil rights violations.

For example, in healthcare cases premised on kickbacks or other infractions where there is no basis for the government to challenge the reasonableness or necessity of the care that was provided, defendants may have a basis to contend that any violations were not material.[19]

Similarly, legitimate questions about materiality may arise in cases involving alleged violations of other program eligibility or contract requirements that have a limited connection to the goods or services at the core of the parties' bargain.[20]

Damages

The *Kousisis* decision also raises interesting issues related to the presence of damages under the FCA. The *Kousisis* Court recognized that liability can exist for violations of the wire fraud statute on a theory of fraudulent inducement, even where the government has suffered no pecuniary damages.

Indeed, the Court was faced with the net economic loss question *because* of the clear possibility in the Court's view that there could be a violation without any damages. As the Court explained, in situations involving allegations of fraudulent inducement "the defendant need not — and given the reciprocal nature of most transactions, often will not — aim to inflict economic loss."[21]

Although proof of damages is not an element of FCA liability, the issue of damages is nevertheless of considerable importance to a putative FCA defendant given the statute's treble damages framework.

Kousisis provides FCA defendants with added support for arguing that even where the government may have been a victim of a fraudulent representation in violation of the FCA, it does not mean the government necessarily suffered a loss. Thus, where a defendant can demonstrate that the government received the benefit of its bargain, at a minimum a defendant subject to potential FCA liability may be able to argue that there are no actionable damages.

And while some courts have previously suggested that the government itself must be the recipient of the goods or services in order for a defendant to argue that the government received the benefit of its bargain,[22] there is nothing in the *Kousisis* Court's discussion that appears to support such a distinction, and defendants would appear to have a strong argument that the government suffers no loss when the government bargains on behalf of a third party and the defendant satisfies that bargain.

Even if the government suffers no damages, courts have held that the FCA may entitle the government to recover penalties. But the absence of damages may also provide defendants with constitutional or other arguments for limiting penalties, which underscores the importance of defendants challenging the presence of damages in appropriate cases.

Conclusion

The *Kousisis* decision and briefing highlight some of the legal challenges that the government may face in pursuing some of its new FCA priorities. And as even the government appears to acknowledge, this case may have ramifications for other potential enforcement areas as well.

Notes:

[1] 605 U.S. 114 (2025).

[2] 31 U.S.C. § 3729 *et seq.*

[3] Response in Opposition to Defendant's Motion for Summary Judgment at 10 n.13, *U.S. ex rel. Topasna v. Smith*, (No. 15-CV-00040), 2025 WL 3102222 (Sept. 8, 2025).

[4] 605 U.S. at 116.

[5] 579 U.S. 176, 181, 194 (2016).

[6] *Id.* at 178.

[7] *Id.* at 194 and n.5.

[8] Br. for the United States of America as Amicus Curiae, *U.S. ex rel. Escobar v. United Health Services*, 2016 WL 4506190 at *12-13 (1st Cir) (citing *Escobar*, 597 U.S. at 194-95)).

[9] *Id.* at *14 (emphasis in original).

[10] *Id.* at *9.

[11] *Id.* (citing *Escobar*, 579 U.S. at 194 n.5).

[12] 605 U.S. at 131 (citing *Escobar*, 579 U.S. at 193).

[13] *Id.* at 131.

[14] Brief for Respondent at 43, *Kousisis v. United States*, 605 U.S. 114 (2025); *see also Kousisis*, 605 U.S. at 160 (Sotomayor, J., concurring) ("Counterintuitively, it

is the Government that proposes a more demanding standard. It asserts that misstatements are material only if they go to the very 'essence of the bargain' at issue.").

[15] *See* Brief for Respondent at 44 ("T]he 'essence of the bargain' standard endorsed in *Universal Health Services* ... addresses most of petitioners' various hypotheticals.").

[16] 605 U.S. at 139 (Thomas, J., concurring).

[17] *Id.*

[18] *Id.* at 141; *see also id.* at 140 n.1 ("[T]he Court's reluctance to presume the materiality of every contract provision is particularly appropriate in the context of Government contracting," where "[t]he Government often tries to use monetary incentives to advance political objectives."); *but see id.* at 160–62 (Sotomayor, J., concurring) (arguing that the painting contracts would be material under any standard).

[19] *See, e.g.*, *United States v. Regeneron Pharms., Inc.*, F.4th 324 (1st Cir. 2025).

[20] *See, e.g.*, *United States v. Luce*, 873 F.3d 999 (7th Cir. 2017) (false statement relating to HUD lender's past criminal history); *U.S. ex rel. Int'l Bhd. of Elec. Workers Local Union No. 98 v. Farfield Co.*, 5 F.4th 315 (3rd Cir. 2021) (misclassification of laborers under Davis Bacon Act); *U.S. ex rel. Bid Solve, Inc. v. CWS Marketing Grp., Inc.*, 678 F. Supp. 3d 53 (D.D.C. 2023) (misrepresentation of small business status).

[21] 605 U.S. at 122.

[22] *See, e.g.*, *United States v. Rogan*, 517 F.3d 449, 453 (7th Cir. 2008).

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This article was first published on Westlaw Today on January 22, 2026.