CLIENT ALERTS & INSIGHTS

Fraud by Omission? How Thompson v. United States Could Narrow the Reach of the Federal Wire, Mail, and Bank Fraud Statutes

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The vast majority of federal white-collar fraud enforcement actions are prosecuted under the wire, mail, or bank fraud statutes. 18 U.S.C. §§ 1341, 1343, and 1344. The Supreme Court's recent decision in Thompson v. United States, 604 U.S. ----, --- S.Ct. ---- (2025) concerned interpretation of the statute criminalizing false statements made for the purpose of influencing the FDIC, among other institutions, 18 U.S.C. § 1014. The Thompson decision may in practical effect lead other courts to finally answer outstanding questions regarding the scope of the federal fraud statutes insofar as whether acts of omissions and concealment can constitute fraud.

All three of the fraud statutes require the fraud to be committed by "means of false or fraudulent pretenses, representations, or promises." Notice that the plain language of the statutes appears to require an affirmative misrepresentation to qualify. However, nearly every Circuit has endorsed a "fraud by omission" theory at least in some contexts, typically arguing that "fraudulent pretenses" includes omitting or concealing material information.

The Seventh Circuit Pattern Jury Instruction Committee has recognized the apparent limitation in the statutory text: "[t]he mail and wire fraud statutes do not include the words 'omission' or 'concealment." *See* William Bauer Seventh Circuit Pattern Jury Instructions 2023 ed., Definition of "Scheme to Defraud," cmt. p. 615. Nonetheless, the Seventh Circuit has repeatedly held that omissions or concealment of material information may constitute money/property fraud, even without proof of a duty to disclose the information pursuant to a specific statute or regulation. *See United States v. Powell*, 576 F.3d 482, 490, 492 (7th Cir. 2009); *United States v. Stephens*, 421 F.3d 503, 507 (7th Cir. 2005); *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 868 (7th Cir. 1998); *United States v. Biesiadecki*, 933 F.2d 539, 543 (7th Cir. 1991); *United States v. Keplinger*, 776 F.2d 678, 697-98 (7th Cir. 1985).

Likewise, the Ninth Circuit's pattern instructions state that "to convict a defendant of mail fraud based on omissions of material facts, you must find that a defendant had a duty to disclose the omitted fact arising out of a relationship of trust." *See* Ninth Circuit Manual of Model Criminal Jury Instructions, No. 15.32, Scheme to Defraud to Obtain Money or Property by False Promises, *available at* https://tinyurl.com/4waecwz8 (last accessed Mar. 30, 2025).

The issue persists, at least in part, because these cases do not make clear whether an omission by itself is sufficient to comprise a scheme to defraud. Most of the cases cited involved more than just an omission; their facts also included other misrepresentations or affirmative acts of concealment.

Some cases state the proposition in a way that suggests that an omission-based fraud scheme must include an act of concealment. *See, e.g., Powell*, 576 F.3d at 491 ("a failure to disclose information may constitute fraud if the 'omission [is] accompanied by acts of concealment'") (citation omitted). In others, even though convictions were upheld, they were fact-specific scenarios in which the defendant's omissions or acts of concealment were sufficiently akin to "knowingly participating in a scheme to defraud," while acting with "the intent to defraud."

The *Thompson* opinion may provide an impetus for federal courts to finally reconsider whether the fraud statutes in fact reach omissions and acts of concealment. Patrick Daley Thompson is a former Chicago Alderman, and the grandson of one of the most influential mayors in Chicago history, Richard J. Daley, and nephew to his son, former mayor Richard M. Daley. Thompson took out three loans totaling $219,000 from a bank in the Bridgeport neighborhood, where the Daleys have long held power and influence. After the bank failed, the Federal Deposit Insurance Corporation (FDIC) became responsible for collecting the outstanding loans. During a call with the FDIC's loan servicer, Thompson disputed the $269,120.58 balance shown on his invoice (which consisted of the $219,000 Thompson had borrowed plus interest), stating that he had "no idea where the 269 number comes from" and that he "borrowed . . . $110,000." Thompson made similar statements in a later call with FDIC contractors. Thompson was later charged with violating 18 U.S.C. §1014, which prohibits "knowingly mak[ing] any false statement" to influence the FDIC's action on any loan. He was also charged with several tax crimes.

A jury found Thompson guilty of all counts, and he moved for acquittal on the false statement counts, arguing that his statements were not false because he had in fact borrowed $110,000, even though he later borrowed more. The district court and Seventh Circuit rejected this argument, and Thompson took his case to the Supreme Court. The Supreme Court reversed, holding that Section 1014, which prohibits "knowingly mak[ing] any false statement," does not criminalize statements that are misleading but not false. In reaching that holding, the Supreme Court noted that while "many statutes criminalize misleading statements," 1014 was not one of them. *See*, *e.g.*, 18 U. S. C. §1038(a) ("convey false or misleading information"); §1365(b) ("renders materially false or misleading the labeling of . . . a consumer product"); §1515(b) ("making a false or misleading statement").

The open question remains how the *Thompson* decision will affect the "fraud by omission" theory of mail/wire/bank fraud. As with Section 1014, none of those statutes criminalize "misleading" statements. However, the government may continue to beat its drum that omissions or misleading statements fall with the fraud statutes' "fraudulent pretenses" catchall. Given the renewed focus on the statutory language of fraud statutes from the highest court in the land, federal courts may very well be ready to reconsider.

As law and policy for fraud and white-collar crime generally continues to evolve, Benesch is here to help navigate any issue you or your business may encounter. If you have questions regarding white collar prosecutions and enforcement, fraud, or government investigations related thereto, the White Collar Practice Group at Benesch is here to help.

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