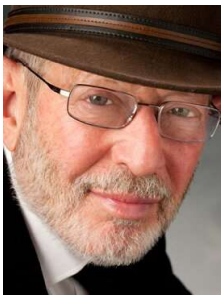
Ex-Chicago Politician's Case May Further Curb Fraud Theories

By **Mark Allenbaugh and Alan Ellis** (October 29, 2024)

Mark Allenbaugh



Alan Ellis

On Oct. 4, the U.S. Supreme Court granted certiorari in Thompson v. U.S.[1] to determine whether a statement that is misleading but not false could still violate federal criminal law.

The specific law at issue is Title 18 of the U.S. Code, Section 1014, which criminalizes making "any false statement ... upon any [loan] application."

The U.S. Courts of Appeals for the First, Sixth and Eleventh Circuits hold that only actually false statements violate Section 1014. In contrast, the U.S. Courts of Appeals for the Fifth, Seventh, Eighth and Tenth Circuits hold that merely misleading statements that omit material information, but are otherwise true, can still violate the statute.

The exact question presented to the court is "[w]hether 18 U.S.C. § 1014, which prohibits making a 'false statement' for the purpose of influencing certain financial institutions and federal agencies, also prohibits making a statement that is misleading but not false."[2]

Should the court side with the petitioner and hold that only actually false statements violate Section 1014, the implications for not only the prosecution of federal economic offenses, but sentencing for such offenses, could be considerable.

Additionally, for those recently convicted of a Section 1014 offense, Thompson could serve as a ground for relief under Title 28 of the U.S. Code, Section 2255.

Background

In the underlying case, ex-Chicago Alderman Patrick Daley Thompson — the grandson of former Chicago Mayor Richard J. Daley and nephew of former Chicago Mayor Richard M. Daley — initially borrowed $110,000 from an FDIC-insured bank, Washington Federal Bank for Savings, signing a promissory note.

Later, he borrowed an additional $20,000 and another $89,000 from the same bank, but this time without any paperwork on either of these loans. Thus, he owed the bank a total principal of $219,000 over the three loans.

The bank subsequently failed and went into receivership overseen by the FDIC.

The FDIC sought to collect from Thompson the principal amount of $219,000, plus an additional $50,000 in interest. Thompson disputed that he owed this amount claiming that he only owed $110,000. However, he eventually settled with the FDIC for $219,000, and did not have to pay any interest or penalties.

Despite the settlement, Thompson was subsequently charged in April 2021 with two counts of violating Title 18 of the U.S. Code, Section 1014.

Count One of the indictment alleged that Thompson falsely stated to a loan servicer hired by the FDIC that he owed only $110,000 to the bank "and that any higher amount was incorrect." Count Two alleged that "Thompson made the same false statement to the FDIC, and that he also falsely stated that he took out the first loan to fund home improvements."[3]

In February 2022, Thompson was convicted of both counts after a jury trial, and then appealed his conviction to the U.S. Court of Appeals for the Seventh Circuit.

According to the Seventh Circuit, "[a]s Thompson sees it, he never outright lied. For example, rather than stating that he owed only $110,000, he just said that he borrowed $110,000 — which is true even if he later borrowed more."[4]

Thompson also argued that "Congress has separately criminalized misleading statements and false statements in other fraud statutes."[5]

In affirming Thompson's conviction in January of this year, the Seventh Circuit found itself bound to its precedent, which held that Congress "passed the [Section 1014] statute to protect federally insured institutions from 'false statements or misrepresentations that mislead.'"[6]

Nevertheless, it did acknowledge that its holding was at odds with the U.S. Court of Appeals for the Sixth Circuit.

In U.S. v. Kurlemann,[7] the Sixth Circuit in 2013 held that

> a "false statement" must be that — a statement, a "factual assertion" capable of confirmation or contradiction. ... An omission, concealment or the silent part of a half-truth, is not an assertion. Quite the opposite. Omissions are failures to speak. Half-truths, in which the speaker makes truthful assertions but conceals unfavorable facts, amount to one type of omission. Concealment, in which the speaker says nothing at all but has a duty to speak, amount to another. No doubt, both types of omissions hold the potential to mislead and deceive. But § 1014 covers 'false statements.' It does not cover misleading statements, false pretenses, schemes, trickery, fraud or other types of deception.[8]

Supreme Court's Curtailing of Fraud Theories

As Justice Ketanji Brown Jackson held in her 2023 dissent in U.S. v. Hansen, "In its role as prosecutor, the Government often stakes out a maximalist position, only later to concede limits when the statute upon which it relies might be struck down entirely and the Government finds itself on its back foot."[9]

Over the last few years, the government has often found itself on the defensive as the Supreme Court has continued to rein in the scope of conduct that federal criminal statutes encompass.

For example, in Ciminelli v. U.S., the court in May 2023 invalidated the right-to-control theory of fraud.[10] On the same day, also in the context of fraud, the court held in Percoco v. U.S. that private citizens do not owe a duty to render honest services to the government.[11]

The following month, in Dubin v. U.S., the court held, in the context of aggravated identify theft, that a misuse of another's means of identification must go to the crux of what makes the underlying offense criminal.[12]

More recently, the court held on June 26 in Snyder v. U.S. that Title 18 of the U.S. Code, Section 666 does not criminalize gratuities, only bribes.[13]

And finally, in Fischer v. U.S., the court held on June 28 that obstruction of justice under Title 18 of the U.S. Code, Section 1512(c)(2) is limited to the impairment of records, documents or other tangible evidence.[14]

What This Portends for Thompson

In light of the court's recent holdings, it is probable that the court will side with the petitioner in Thompson, finding that violations of Section 1014 are limited to only those instances where actual false statements are made, as opposed to merely misleading statements or omissions.

But might the implications be far larger than for just Section 1014 prosecutions? After all, most of the more common statutes the government uses to prosecute fraud do not expressly criminalize misleading statements or omissions.

For example, while Title 18 of the U.S. Code, Sections 1001(a)(2) and1001(a)(3) criminalize the making of "any materially false, fictitious, or fraudulent statement or representation," and the making or using of "any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry," respectively, nowhere are the words "misleading" or "omission" to be found.

The same holds true for the mail fraud statute under Title 18 of the U.S. Code, Section 1341, and wire fraud under Title 18 of the U.S. Code, Section 1343.

In contrast, Title 18 of the U.S. Code, Sections 1365(b), 1038(a)(1) and 1515(b) all specifically criminalize misleading statements, while Title 18 of the U.S. Code, Section 1027 criminalizes the "fail[ure] to disclose any fact the disclosure of which is ... necessary to verify ... for accuracy and completeness any report."

The same holds true for Title 15 of the U.S. Code, Section 77q(a)(2), which criminalizes the making of "any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading."

Of course, the U.S. Court of Appeals for the Ninth Circuit held in its 2013 v. Harkonen decision that "[s]tatements are fraudulent if 'misleading or deceptive' and need not be 'literally false.'"[15] But Thompson may now change that, at least for those statutes that do not expressly criminalize misleading statements or omissions.

What This Portends for Sentencing

Should Thompson ultimately result in limiting mail and wire fraud prosecutions to only those matters involving literally false statements, that could have a significant impact not only on the prosecution of mail and wire fraud cases generally, but also on their sentencing. This is significant when considering that over 95% of federal fraud sentences are the result of guilty pleas.[16]

Under the U.S. sentencing guidelines, the main factor driving the calculation of the advisory sentencing range is the loss amount, i.e. "the reasonably foreseeable pecuniary harm that resulted from the offense" or "the pecuniary harm that the defendant purposely sought to inflict."[17]

But such pecuniary harm is limited to actual criminal conduct[18] and does not encompass just any conduct. Thus, if violations of the relevant fraud statute are limited to actually false statements, then only pecuniary harm flowing from such statements could constitute loss under the guidelines. Pecuniary harm from merely misleading statements, half-truths and omissions would necessarily be excluded from any calculation of the advisory sentencing range.

As a result, sentences could be expected to be shorter — perhaps substantially so.

Conclusion

For the past few years, the Supreme Court has consistently reined in the federal government's expansive prosecution of various forms of federal fraud and other offenses. The Thompson case may herald the largest check yet.

If Section 1014 prosecutions are limited only to instances of actually false statements, as opposed to those that are merely misleading by way of omission, the same may be the case for mail and wire fraud prosecutions, as well.

Moreover, Thompson may also signal a significant limitation to how loss is calculated under the guidelines.

The merits briefs have yet to be filed in Thompson, nor has the oral argument date been set, but a decision is expected by June 2025. We urge counsel to read the case and briefs, and consider preserving the matter where appropriate.

Mark H. Allenbaugh is a co-founder, president and chief research officer at SentencingStats.com Inc., and a sentencing and mitigation consultant at the Law Offices of Alan Ellis. He previously served as a staff attorney at the U.S. Sentencing Commission. He is a co-editor of "Sentencing, Sanctions, and Corrections: Federal and State Law, Policy, and Practice" (2nd ed., Foundation Press, 2002).

Alan Ellis is a criminal defense lawyer at the Law Offices of Alan Ellis. He previously served as president of the National Association of Criminal Defense Lawyers. He is a Fulbright Award recipient, and the co-author of "Federal Prison Guidebook: Sentencing and Post Conviction Remedies."

[1] The case below is United States v. Thompson, 89 F.4th 1010 (7th Cir. 2024).

[2] https://www.supremecourt.gov/qp/23-01095qp.pdf.

[3] Id. at 1015.

[4] 89 F.4th at 1016.

[5] See, e.g., 18 U.S.C. §§ 1001(a), 1027, 1035, 1341, 1343, 1344, 1347, 1348.

[6] Id. at 1017 (emphasis in original).

[7] 736 F.3d 439 (6th Cir. 2013).

[8] Id. at 445 (citing inter alia Williams v. United States, 458 U.S. 279, 284 (1982)).

[9] United States v. Hansen, 599 U.S. 762, 810 (2023) (Jackson, J., dissenting).

[10] Ciminelli v. United States, 598 U.S. 306 (2023).

[11] Percoco v. United States, 598 U.S. 319 (2023).

[12] Dubin v. United States, 599 U.S.110 (2023).

[13] Snyder v. United States, 144 S. Ct. 1947 (2024).

[14] Fischer v. United States, 144 S. Ct. 2176 (2024).

[15] United States v. Harkonen, 510 Fed. Appx. 633, 637 (9th Cir. 2013) (citing United States v. Woods, 335 F.3d 993 (9th Cir. 2003)).

[16] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Table12.pdf.

[17] USSG §2B1.1, comment. (n.3(A)).

[18] United States v. Dickler, 64 F.3d 818, 830 (3d Cir. 1995) (joining other circuit courts of appeals to hold that loss is limited to "criminal conduct").