

No. 11-

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**In the Supreme Court of the United States**

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MICHAEL SEGAL,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition for a Writ of Certiorari to  
the United States Court of Appeals for the  
Seventh Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

1. Whether the intent to defraud, under the mail and wire fraud statutes, requires an intent to cause harm.

2. Whether mail and wire fraud may be premised on misstatements to parties other than the alleged victims of the fraud, without evidence that the victims knew of the misstatements or would have found them material.

3. Whether the breach of a fiduciary or legal duty imposed by state law can form the basis for a federal mail or wire fraud prosecution.

**RULE 14.1(B) STATEMENT**

Daniel E. Watkins and Near North Insurance Brokerage, Inc., were also defendants in the case in the district court. Petitioner Michael Segal was the only party before the Seventh Circuit in its decision for which review is sought.

**RULE 29.6 STATEMENT**

Near North Insurance Brokerage, Inc., also a defendant in the district court, is owned by Near North National Group. No public corporation owns more than 10% of either company's stock.

**TABLE OF CONTENTS**

	<b>Page</b>
QUESTIONS PRESENTED .....	i
RULE 14.1(B) STATEMENT .....	ii
RULE 29.6 STATEMENT .....	ii
TABLE OF AUTHORITIES.....	vi
OPINIONS BELOW .....	1
JURISDICTION .....	1
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED .....	1
STATEMENT .....	2
A. Factual Background .....	3
B. Indictment And Trial.....	4
C. Post-Trial Proceedings And Appeals .....	6
REASONS FOR GRANTING THE PETITION .....	8
I. THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO THE INTENT REQUIRED TO ESTABLISH A SCHEME TO DEFRAUD UNDER THE MAIL AND WIRE FRAUD STATUTES.....	8
A. The Circuits Are Divided As To What The Intent To Defraud Entails And, Specifically, Whether It Requires Intent To Cause Injury To The Victim.....	9
B. The Seventh Circuit’s Opinion Misinterprets The Significance Of This Court’s Opinion In <i>Neder v. United</i> <i>States</i> .....	15

**TABLE OF CONTENTS—continued**

	<b>Page</b>
C. The Scope Of The Mail And Wire Fraud Statutes Is A Significant And Recurring Question Of Federal Law On Which Uniformity Is Important..	17
II. THE COURT SHOULD RESOLVE THE CONFLICT AMONG CIRCUITS AS TO WHETHER A MAIL OR WIRE FRAUD CONVICTION CAN REST ON A MISREPRESENTATION DIRECTED AT A PERSON OTHER THAN THE INTENDED VICTIM OF THE SCHEME.....	19
III. THE SEVENTH CIRCUIT’S HOLDING THAT A VIOLATION OF A STATE REGULATION CAN CONSTITUTE A DEPRIVATION OF MONEY OR PROPERTY UNDER THE FEDERAL MAIL AND WIRE FRAUD STATUTES DEFIES THIS COURT’S PRECEDENTS HOLDING THAT STATE LAW SHOULD NOT GIVE CONTENT TO FEDERAL CRIMINAL LAW. ....	24
A. Segal’s Conviction For Money Or Property Fraud Was Predicated On A Property Right Purportedly Created By The Illinois Insurance Code. ....	24
B. The Seventh Circuit’s Holding Contravenes The Uniformity Principle Set Forth In <i>Skilling</i> . ....	26
C. The Seventh Circuit’s Holding Defies The Clear-Statement Rule Articulated In <i>Jerome v. United States</i> . ....	28

**TABLE OF CONTENTS—continued**

	<b>Page</b>
D. The Seventh Circuit’s Holding Raises Precisely The Federalism Concerns Expressed In <i>Cleveland v. United States</i> .....	30
CONCLUSION .....	32
APPENDIX A – Opinion of May 3, 2011 .....	1a
APPENDIX B – Final Judgment .....	8a
APPENDIX C – Order on Petition for Rehearing .....	9a
APPENDIX D – Opinion of Aug. 2, 2007 .....	11a
APPENDIX E – Jury Instruction Excerpt .....	34a

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>Cleveland v. United States</i> , 531 U.S. 12 (2000).....	18, 30, 31, 32
<i>Jerome v. United States</i> , 318 U.S. 101 (1943).....	28, 29, 30
<i>Jones v. United States</i> , 529 U.S. 848 (2000).....	31
<i>McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.</i> , 904 F.2d 786 (1st Cir. 1990) ....	21, 22
<i>McNally v. United States</i> , 483 U.S. 350 (1987).....	18
<i>Miss. Band of Choctaw Indians v. Holyfield</i> , 490 U.S. 30 (1989).....	29
<i>Nationwide Mut. Ins. Co. v. Darden</i> , 503 U.S. 318 (1992).....	15
<i>Neder v. United States</i> , 527 U.S. 1 (1999).....	8, 15, 16, 17
<i>NLRB v. Hearst Publ'ns, Inc.</i> , 322 U.S. 111 (1944).....	29
<i>NLRB v. Natural Gas Util. Dist.</i> , 402 U.S. 600 (1971).....	29
<i>Pasquantino v. United States</i> , 544 U.S. 349 (2005).....	16, 17
<i>Segal v. Ill. Dep't of Ins.</i> , No. 1-09-2214 (Ill. Ct. App. Oct. 19, 2010).....	31
<i>Skilling v. United States</i> , 130 S. Ct. 2896 (2010).....	7, 26, 27, 28
<i>Taylor v. United States</i> , 495 U.S. 575 (1990).....	29

## TABLE OF AUTHORITIES—continued

	Page(s)
<i>United States v. Ali</i> , 620 F.3d 1062 (9th Cir. 2010).....	22
<i>United States v. Bass</i> , 404 U.S. 336 (1971).....	31
<i>United States v. Benny</i> , 786 F.2d 1410 (9th Cir. 1986).....	13
<i>United States v. Blumeyer</i> , 114 F.3d 758 (8th Cir. 1997).....	20
<i>United States v. Carlo</i> , 507 F.3d 799 (2d Cir. 2007) .....	13
<i>United States v. Christopher</i> , 142 F.3d 46 (1st Cir. 1998) .....	22
<i>United States v. Cosentino</i> , 869 F.2d 301 (7th Cir. 1989).....	20
<i>United States v. Daniel</i> , 329 F.3d 480 (6th Cir. 2003).....	13
<i>United States v. Edelmann</i> , 458 F.3d 791 (8th Cir. 2006).....	13
<i>United States v. Evans</i> , 844 F.2d 36 (2d Cir. 1988) .....	21
<i>United States v. Frost</i> , 125 F.3d 346 (6th Cir. 1997).....	<i>passim</i>
<i>United States v. Hamilton</i> , 499 F.3d 734 (7th Cir. 2007).....	12
<i>United States v. Jain</i> , 93 F.3d 436 (8th Cir. 1996).....	12
<i>United States v. Kenrick</i> , 221 F.3d 19 (1st Cir. 2000) .....	14, 16

**TABLE OF AUTHORITIES—continued**

	<b>Page(s)</b>
<i>United States v. Leahy</i> , 445 F.3d 634 (3d Cir. 2006) .....	14
<i>United States v. Lew</i> , 875 F.2d 219 (9th Cir. 1989).....	21, 22
<i>United States v. Maze</i> , 414 U.S. 395 (1974).....	17, 18
<i>United States v. McMillan</i> , 600 F.3d 434 (5th Cir. 2010).....	21
<i>United States v. Nardello</i> , 393 U.S. 286 (1969).....	29
<i>United States v. Novak</i> , 443 F.3d 150 (2d Cir. 2006) .....	10, 11, 15
<i>United States v. Sawyer</i> , 85 F.3d 713 (1st Cir. 1996) .....	21, 22
<i>United States v. Starr</i> , 816 F.2d 94 (2d Cir. 1987) .....	10, 11, 15
<i>United States v. Treadwell</i> , 593 F.3d 990 (9th Cir. 2010).....	14
<i>United States v. Turley</i> , 352 U.S. 407 (1957).....	29
<i>United States v. Welch</i> , 327 F.3d 1081 (10th Cir. 2003).....	14
<b>STATUTES AND REGULATIONS</b>	
12 U.S.C. § 588b .....	28
15 U.S.C. § 1011 .....	32
18 U.S.C. § 1033 .....	6
18 U.S.C. § 1341 .....	1, 9, 30
18 U.S.C. § 1343 .....	2, 13

**TABLE OF AUTHORITIES—continued**

	<b>Page(s)</b>
18 U.S.C. § 1344 .....	14, 16
18 U.S.C. § 1346 .....	2, 24, 26
28 U.S.C. § 1254 .....	1
50 Ill. Admin. Code § 3113.40 .....	3, 25
<b>OTHER AUTHORITIES</b>	
Elkan Abramowitz & Barry A. Bohrer, The Meaning of ‘Property’ Under Federal Mail, Wire Fraud Statutes, N.Y. Law J. (Mar. 2, 2004) .....	18
Brief for Albert W. Alschuler as Amicus Cu- riae, at 28-29, <i>Weyhrauch v. United States</i> , 130 S. Ct. 2971 (2010) (No. 08-1196), 2009 WL 3052480 .....	26, 31
Elizabeth Wagner Pittman, Mail and Wire Fraud, 47 Am. Crim. L. Rev. 797 (2010) .....	18
Jed S. Rakoff, The Federal Mail Fraud Statute (Part I), 18 Duquesne L. Rev. 771 (1980) .....	18

## PETITION FOR A WRIT OF CERTIORARI

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Michael Segal respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App., *infra*, 1a) is reported at 644 F.3d 364. That court's previous decision, affirming petitioner's convictions and sentence in part and reversing in part (App., *infra*, 11a), is reported at 495 F.3d 826.

### JURISDICTION

This court's jurisdiction rests on 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on May 3, 2011. Segal's timely petition for rehearing was denied on June 9, 2011 (App., *infra*, 9a). On September 2, 2011, the Chief Justice extended the time for filing a petition for a writ of certiorari to September 16, 2011.

### CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. 18 U.S.C. § 1341 provides in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, \* \* \* for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by

the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, \* \* \* shall be fined under this title or imprisoned not more than 20 years, or both.

2. 18 U.S.C. § 1343 provides in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

3. 18 U.S.C. § 1346 provides:

For the purposes of this chapter, the term “scheme or artifice to defraud” includes a scheme or artifice to deprive another of the intangible right of honest services.

### **STATEMENT**

In this case the Seventh Circuit held that a violation of an Illinois insurance regulation amounted to a deprivation of property punishable as mail and wire fraud. In so holding, the court stretched the law of fraud beyond the breaking point, sustaining a conviction despite the absence of every element of traditional common law fraud. There was no evidence of promises to the alleged victims of the scheme, no

evidence of materiality, and no evidence of intent to deprive the victims of money or property, even temporarily. The Seventh Circuit’s legal rulings conflict with those of this Court and of other circuits, and will have lasting adverse consequences if not corrected.

### **A. Factual Background**

In the years that Michael Segal owned Near North Insurance Brokerage (“NNIB”), he grew the company from a small enterprise with a handful of employees to the fifth largest insurance broker in the nation, with offices across the country providing jobs to hundreds. Insurance brokers work to connect insurance carriers with potential customers. When a customer decided to purchase insurance from one of NNIB’s insurance carriers, NNIB would collect the customer’s insurance premium payments and in due course forward those payments on to the carrier. However, as a matter of practice throughout the insurance industry, these premiums are not immediately due to the insurance carrier upon collection. Rather, the broker holds those premiums for a “float” period, the length of which varies by carrier.

Some states, Illinois among them, require brokers to keep collected premiums in a specific account, called a premium fund trust account (“PFTA”). 50 Ill. Admin. Code § 3113.40(a). In essence a PFTA is simply a bank account in which a specified minimum balance is supposed to be maintained. A broker is permitted to commingle funds, and can unilaterally withdraw commissions and other funds. *Id.* § 3113.40(f).

The indictment charged that NNIB failed to maintain the balance in the PFTA that Illinois law

required, instead using funds from the account to expand its business and to cover some of Segal's personal expenses. The impact of that failure to satisfy Illinois insurance regulations was zero: NNIB clients always had insurance coverage, and NNIB insurance carriers always received their premiums. Nevertheless, the prosecution in this case used NNIB's failure to maintain the PFTA balance required by Illinois law as the foundation of an indictment charging Segal and NNIB with, among other things, federal mail and wire fraud.

### **B. Indictment And Trial**

The indictment identified both the insureds and the carriers as victims of the alleged fraud, Fourth Superseding Indictment ¶ 3, and outlined theories of both honest services fraud and money/property fraud. See *id.* ¶ 15.

At trial, the government made no attempt to establish that Segal or NNIB ever promised or represented to the alleged victims of his scheme—NNIB's customers and the insurers whose policies NNIB sold—that the premium payments would be held in a segregated account. Nor did the government proffer any evidence that the existence of a trust account was material to any of them. The government similarly presented no evidence that any NNIB customer or insurer lost anything as a result of Segal's actions, or that Segal ever intended to deprive these groups of money or property.

Instead, at trial the government portrayed the case as one of "honest services fraud," arguing:

[T]his no loss, no customer, no carrier issue, it's not an issue. It's not an issue. It's not what we charged in terms of the nature of

the loss that's at issue in this case \* \* \* [Segal] didn't give the people he owed a fiduciary duty what he promised to give them.

Tr. 5706. Indeed, the government never presented evidence from any identified victim. *See* Tr. 5687 (“[W]e don't have to prove any single victim, which is why you didn't hear any single victim because this is a fiduciary accounting fraud case. \* \* \* It's a fiduciary fraud case, an accounting fraud case.”).

Most significantly for present purposes, the government produced no evidence that Segal intended to defraud the alleged victims. Rather, it argued to the jury that “the government does not have to prove the defendants contemplated actual or foreseeable harm to the victims of the scheme.” Tr. 5297. And the court instructed the jury to the same effect: “In order to prove a scheme to defraud, the government does not have to prove that the defendants contemplated actual or foreseeable harm to victims of the scheme.” Tr. 5819-20.

In keeping with its theory that the alleged victims were largely irrelevant, the government also introduced no evidence that Segal made any misrepresentations to NNIB's clients or carriers that premium payments would be kept in a segregated account. The only alleged misrepresentations that the government identified were contained in Segal's brokerage license renewal applications to the Illinois Department of Insurance (“IDI”). As part of these applications, Segal stated that collected premiums were kept in a PFTA to the extent required by law. These were the only false statements that the government presented to the jury. *See* Tr. 5207 (“[Segal] made material false statements to the Department of Insurance”); Tr. 5208 (“[Segal] falsely told the Illinois

Department of Insurance” that the [PFTA] was in good shape”). The jury convicted Segal on all counts.<sup>1</sup>

### C. Post-Trial Proceedings And Appeals

The district court’s factual findings at sentencing confirmed the tenuous factual posture of the government’s “honest services fraud” case. No customer and no insurance company lost any money. See PSR 22 (“[Segal] was always able to pay the insurance premiums.”); Sent. Tr. 15:10-12 (“Mr. Segal’s misconduct with the premium fund trust account \* \* \* did not result in a loss to his clients.”).<sup>2</sup> Moreover although the indictment referred to NNIB’s clients and carriers as the victims of the fraud, the court found that “there is no evidence [Segal] intended to defraud either the insurance clients or the insurance companies” by his management of the PFTA. *Ibid.* Nonetheless, the Sentencing Guidelines were high, and the district court sentenced Segal to 121 months imprisonment and ordered him to forfeit both \$30 million (the alleged PFTA shortfall) and his interest in NNIB.

Segal appealed his conviction and the forfeiture order to the Seventh Circuit. Segal argued that the jury instructions on honest services fraud were defective because, among other things, they imported state insurance regulations. The Seventh Circuit af-

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<sup>1</sup> The district court granted Segal judgment of acquittal on the seven counts under 18 U.S.C. § 1033 of false statements to the IDI. As relevant here, Segal was convicted on thirteen counts of mail fraud, one count of wire fraud, and racketeering based on those acts.

<sup>2</sup> The district court adopted the PSR’s findings on this point at sentencing. See Sent. Tr. at 7.

firmed his conviction, but recognized that much of the money borrowed from the PFTA was reinvested in NNIB and that therefore forfeiture of the entire \$30 million along with Segal's interest in NNIB would constitute double-counting. The case was remanded to the district court for reconsideration of the forfeiture amount. After the district court reduced the forfeiture amount to \$15 million, both Segal and the government appealed.

During the pendency of that appeal, this Court decided *Skilling v. United States*, 130 S. Ct. 2896 (2010), vindicating Segal's previous arguments to the Seventh Circuit. In light of *Skilling*, it was undisputed that the honest services theory was improperly submitted to the jury. The parties submitted supplemental briefing on the impact of this error.

Despite the government's focus at trial on honest services fraud, the Seventh Circuit found the instructional error harmless. The court reasoned that because the honest services violation consisted of a failure to keep enough money in the PFTA account, it necessarily was also a money/property fraud: "The jury could not have found Segal guilty for failing to maintain the funds in trust without concluding that Segal *was taking the money*." App., *infra*, 4a. The court did not explain what it meant by "taking the money," or whose money was supposedly "taken."

The court also had to overcome the undisputed finding that "[t]here is no evidence [Segal] intended to defraud either the insurance clients or the insurance companies." PSR 22. Departing from the considered decisions of several other courts of appeals, see *infra*, Section I.A, the Seventh Circuit held that conviction of mail or wire fraud does not require proof of an intent to harm. App., *infra*, 5a.

The Seventh Circuit’s cursory opinion also effectively dispensed with the need to prove other common-law elements of fraud—a false statement to the victim and materiality. The only false statements identified by the government were contained in Segal’s insurance brokerage license applications to the Illinois Department of Insurance, which was not alleged to have been a victim of the fraud. And the government produced no evidence that any client or carrier knew of these statements, let alone would have considered them material. Indeed, the court acknowledged that *Neder v. United States*, 527 U.S. 1 (1999), establishes that materiality must be shown, App., *infra*, 5a, but it never addressed the total lack of evidence that any insurance carrier or customer regarded Segal’s compliance with PFTA regulations as material. Despite these significant evidentiary gaps, the Seventh Circuit’s discussion of the government’s alternative theory of money/property fraud included the brand new determination, without analysis, citation, or support, that “Segal fraudulently represented to the insureds and insurance carriers that he would hold the insurance premiums in trust.” App., *infra*, 4a.

Segal’s petition for rehearing pointing out these errors and omissions was denied. (App., *infra*, 9a).

#### **REASONS FOR GRANTING THE PETITION**

##### **I. THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO THE INTENT REQUIRED TO ESTABLISH A SCHEME TO DEFRAUD UNDER THE MAIL AND WIRE FRAUD STATUTES.**

Under the federal mail and wire fraud statutes, any person who uses the mails or wires to carry out a

“scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises” is guilty of a felony. 18 U.S.C. § 1341; *id.* § 1343. The circuits are in agreement that an essential element of a scheme or artifice to defraud, under both statutes, is an intent to defraud. There is widespread confusion, however, over what this element means and, specifically, whether it requires an intent to cause injury.

**A. The Circuits Are Divided As To What The Intent To Defraud Entails And, Specifically, Whether It Requires Intent To Cause Injury To The Victim.**

The jury in this case was instructed that “the government does not have to prove that the defendants contemplated actual or foreseeable harm to victims of the scheme.” Tr. 5820. Consistent with that instruction, the Seventh Circuit held that a scheme to defraud, under the mail and wire fraud statutes, does not require “a specific intent to cause injury” to the victims of the alleged scheme. App., *infra*, 5a. This broad holding was essential to affirming Segal’s convictions, because the district court had found that “there [wa]s no evidence [Segal] intended to defraud either the insurance clients or the insurance companies by his illegal use of the PFTA,” nor was there any evidence that his conduct caused an actual loss to any client or insurance company. Sent. Tr. 15:10-12; PSR 22. The court of appeals identified these “insurance carriers and/or customers” of NNIB as Segal’s “victims” (App., *infra*, 5a) and affirmed his conviction notwithstanding the absence of any evidence of actual or intended loss.

The Seventh Circuit’s conclusion that intent to cause injury is not required conflicts with the deci-

sions of other circuits, which have held that an intent to cause injury to the victim of the alleged fraud is a necessary element of a scheme or artifice to defraud. In particular, the Seventh Circuit’s opinion is squarely at odds with decisions of the Second and Sixth Circuits holding that the requisite intent to defraud is lacking when the defendant completes a transaction “dishonestly” but without intending to or actually depriving the would-be victim of an essential object of the parties’ bargain.

In cases with important similarities to this one, the Second Circuit has twice invalidated convictions on the ground that the evidence did not show that the defendant intended to injure the victims of his alleged fraud. See *United States v. Novak*, 443 F.3d 150, 156 (2d Cir. 2006); *United States v. Starr*, 816 F.2d 94, 98-100 (2d Cir. 1987). Interpreting the “scheme or artifice to defraud” language of the mail fraud statute, that court has said: “While this language does not require the government to prove that the victims of the fraud were *actually* injured, the government ‘must, at a minimum, prove that defendants *contemplated* some actual harm or injury to their victims.’ \* \* \* Indeed, ‘[o]nly a showing of intended harm will satisfy the element of fraudulent intent.’” *Novak*, 443 F.3d at 156 (quoting *Starr*, 816 F.2d at 98).

Both *Novak* and *Starr*—like this case—involved allegations of fraud in the performance of a service contract. The Second Circuit—in sharp contrast to the Seventh—held that “[a]n intent to harm a party to a transaction cannot be found where the evidence merely indicates that the services contracted for were dishonestly completed.” *Novak*, 443 F.3d at 159. “To support a mail fraud claim, ‘the harm con-

templated [in a scheme to defraud] must affect the very nature of the bargain itself. Such harm is apparent where there exists a discrepancy between benefits reasonably anticipated because of the misleading representations and the actual benefits which the defendant delivered, or intended to deliver.” *Id.* at 159 (alteration in original) (quoting *Starr*, 816 F.2d at 98).

The defendant in *Novak* was a union official who gave certain union members preferential treatment in allocating work, in exchange for kickbacks of portions of the pay they received from union contractors. 443 F.3d at 154. The Second Circuit reversed *Novak*’s conviction, because his alleged victims, the contractors, “received all they bargained for.” *Id.* at 159. The defendants in *Starr* were convicted of defrauding customers of their postal mailing business, by “burying” higher-rate mailings in lower-cost bulk mailings to save postage costs and pocketing the savings for themselves. See 816 F.2d at 95-96. The Second Circuit overturned the conviction, holding that the evidence showed no intent to defraud the customers, because they “received exactly what they paid for.” *Id.* at 99; see also *id.* at 100 (“The misappropriation of funds simply has no relevance to the object of the contract; namely, the delivery of mail to the appropriate destination in a timely fashion.”).

The Sixth Circuit has similarly held that intent to cause injury is a necessary element of a scheme to defraud and that dishonesty or nondisclosure in the performance of a contract that does not affect the substance of the bargain does not satisfy this requirement. *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997), involved a “degrees for contracts” scheme in which university professors assisted government

employees in obtaining advanced degrees in exchange for the latter's assistance in securing government contracts for a research institute run by one of the professors. The court overturned the mail fraud convictions arising out of a NASA contract obtained pursuant to the scheme, because there was no evidence that the defendant who procured the contract "intended to inflict a tangible injury upon NASA," the alleged victim. *Id.* at 361. Although the defendant concealed the fact that he had agreed to obtain this contract in exchange for his dissertation, there was "no evidence \* \* \* that NASA would have had to pay less money or would have received more services" if this fact had been disclosed. *Ibid.* Absent any evidence that the defendant "intended that the government would not receive in return a necessary service, performed adequately and for a fair price," there was insufficient evidence of intent to defraud. *Id.* at 362.

The Eighth Circuit has also held that intent to harm is required in the honest services fraud context. See *United States v. Jain*, 93 F.3d 436, 441-42 (8th Cir. 1996) (reversing mail fraud conviction of psychiatrist who received kickbacks for referring patients to a psychiatric hospital, because "there was no evidence that any patient suffered tangible harm," and observing that "[t]he essence of a scheme to defraud is an intent to harm the victim").

The Seventh Circuit correctly noted that an intent to return or repay misappropriated funds is not a defense to intent to defraud, and there is no dispute about that rule. Petition for Rehearing at 11 n.7 ("[Segal] recognizes that specific intent to cause a loss of property, even a temporary loss, is sufficient."). See, e.g., *United States v. Hamilton*, 499

F.3d 734, 736 (7th Cir. 2007); *United States v. Edelmann*, 458 F.3d 791, 812 (8th Cir. 2006); *United States v. Benny*, 786 F.2d 1410, 1417 (9th Cir. 1986). But in this case there was no evidence that Segal intended even a *temporary* deprivation of money or property of any victim. See PSR ¶ 22 (“there is no evidence [Segal] intended to defraud either the insurance clients or the insurance companies” by his management of the PFTA). Nor was there any evidence that Segal *actually* deprived any customer or carrier of any money or property for any period of time. See PSR 22 (“[Segal] was always able to pay the insurance premiums”); Sent. Tr. 15:10-12 (Segal’s actions “did not result in a loss to his clients”); see also Tr. 5687 (the jury “didn’t hear any single victim”). To the extent that Segal “took the money deposited in the PFTA,” as the Seventh Circuit concluded (App., *infra*, 4a), he temporarily deprived only his company and co-defendant’s trust account of funds. But as the trial court in this case found, a bank account such as the PFTA is not a legal entity and cannot be the victim of a scheme to defraud. Tr. 5047-48, 5054-55, 5083, 5116, 5122.

To require proof of intent to injure or harm “is no more than to say that the intent must be to deprive the victim of money or property.” *United States v. Daniel*, 329 F.3d 480, 488 (6th Cir. 2003) (holding that intent to deprive victim “of money in the short term” sufficed to establish intent to defraud, not withstanding defendant’s claimed subjective intention to repay the money); see also *United States v. Carlo*, 507 F.3d 799, 801 (2d Cir. 2007) (per curiam) (“To sustain a conviction for wire fraud under 18 U.S.C. § 1343 \* \* \* the government must prove that the defendant acted with specific intent to obtain money or property by means of a fraudulent scheme

that contemplated harm to the property interests of the victim.”).<sup>3</sup>

The Seventh Circuit has now gone so far as to hold that the defendant can carry out a scheme to defraud without a showing of harm or intended harm to the victims of his alleged fraud.<sup>4</sup> Moreover, even

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<sup>3</sup> Relatedly, the Ninth Circuit, in *United States v. Treadwell*, 593 F.3d 990 (9th Cir.), cert. denied, 131 S. Ct. 488 (2010), recently acknowledged the disagreement among the circuits as to whether a scheme to defraud in violation of the wire fraud statute requires an intent to harm, but declined to answer that question directly. See 593 F.3d at 997. Instead, the court held that even if an intent to harm was required, the defendants were wrong that “harm” means “pecuniary loss.” *Ibid.* The court explained that “[t]he intent to induce one’s victim to give up his or her property on the basis of an intentional misrepresentation causes ‘harm’ by depriving the victim of the opportunity to weigh the true benefits and risks of the transaction, regardless of whether or not the victim will suffer the permanent loss of money or property.” *Ibid.* There was no proof of any such deprivation here.

<sup>4</sup> The disarray among the circuits runs even deeper. At least one other circuit has held in the honest services fraud context that intent to harm is not required. See *United States v. Welch*, 327 F.3d 1081, 1104-05 (10th Cir. 2003) (“The notion of harm in a mail or wire fraud prosecution is important only in the sense that proof of contemplated or actual harm to the victim or others is one means of establishing the necessary intent to defraud.”). And two circuits have said that intent to defraud is not required under the bank fraud statute, 18 U.S.C. § 1344, which prohibits any scheme or artifice “to defraud a financial institution.” See *United States v. Leahy*, 445 F.3d 634, 646 (3d Cir. 2006) (holding that intent to harm the bank or cause a loss is not required as long as “the fraudulent scheme targets the bank”); *United States v. Kenrick*, 221 F.3d 19, 29 (1st Cir. 2000) (en banc) (“[T]he intent element of bank fraud \* \* \* is an intent to deceive the bank in order to obtain from it money or other property. ‘Intent to harm’ is not required.” (footnote omitted)).

if the Seventh Circuit had not rejected the element of intent to harm, its holding cements the circuit conflict by interpreting that requirement so expansively as to hold that a fraud can occur where—as here—the putative victims undisputedly have, as the defendant intended and expected, received precisely what they bargained for (insurance coverage, in the case of the insureds, and premium payments, in the case of the carriers). The Seventh Circuit’s conclusion that Segal’s mismanagement of the PFTA satisfies the element of intent to defraud conflicts with the Second Circuit’s holdings in *Novak* and *Starr* and the Sixth Circuit’s holding in *Frost*. This conflict is ripe for resolution.

**B. The Seventh Circuit’s Opinion Misinterprets The Significance Of This Court’s Opinion In *Neder v. United States*.**

In holding that intent to harm is not an element of a scheme or artifice to defraud, the Seventh Circuit rejected Segal’s argument that this Court’s decision in *Neder v. United States*, 527 U.S. 1 (1999), incorporates common law elements of fraud, including intent to defraud, into the mail and wire fraud statutes. The Seventh Circuit read *Neder*’s holding as limited to the element of materiality. See App., *infra*, 5a (“*Neder* focused on and reached a conclusion as to only one element of fraud at common law: materiality.”). This Court’s opinion, however, was broader than that, reciting the “well-established rule of construction that ‘[w]here Congress uses terms that have accumulated settled meaning under \* \* \* the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.’” 527 U.S. at 21 (alterations in original) (quoting *Na-*

*tionwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)). Confirming that this holding was broader than the Seventh Circuit read it to be, this Court has subsequently turned to the common law to inform other aspects of the mail and wire fraud statutes, invoking *Neder*. See *Pasquantino v. United States*, 544 U.S. 349, 359-60 (2005) (citing *Neder*).

*Neder* noted that two elements of common law fraud—justifiable reliance and damages—“have no place in the federal fraud statutes,” which prohibit “the ‘scheme to defraud,’ rather than the completed fraud.” 544 U.S. at 25. But the Court reached no such conclusion as to intent, nor is there any statutory indication that Congress meant to exclude the common law element of intent from the federal fraud statutes. Indeed, at least one court of appeals has read *Neder* as specifically incorporating the common law element of intent. The First Circuit, in *United States v. Kenrick*, 221 F.3d 19 (1st Cir. 2000) (en banc), held that “*Neder* \* \* \* requires that we look to the common-law meaning of fraud in examining the intent element of a ‘scheme or artifice to defraud’ in violation of § 1344(1).” *Id.* at 28.

The First Circuit, assimilating common law authorities, concluded that common-law fraud “requires an intent to induce action by the plaintiff in reliance on the defendant’s misrepresentation.” *Kenrick*, 221 F.3d at 28. The court declined to adopt an “additional ‘intent to harm’ requirement” (*ibid.*) but, notwithstanding its choice of terminology, it made clear that “an intent to deceive the bank in order to obtain from it money or other property” is required. *Id.* at 29.

Regardless of whether the intent element is properly described as an “intent to harm,” two points are important. First, the Seventh Circuit construed

*Neder* too narrowly and created a conflict with its sister circuit when it declined to read a common law intent to defraud into the mail and wire fraud statutes. Second, whether or not the terminology of “intent to harm” carries the day, Segal lacked the fraudulent intent required at common law. Segal made no misrepresentation intended to induce any customer or carrier into parting with money or property. Indeed, as the trial court concluded, “[t]here [wa]s no evidence [Segal] intended to defraud either the insurance clients or the insurance companies.” PSR 22. The Seventh Circuit’s affirmance of Segal’s conviction on this record contravenes both *Neder* and the precedents of other circuits.

**C. The Scope Of The Mail And Wire Fraud Statutes Is A Significant And Recurring Question Of Federal Law On Which Uniformity Is Important.**

This Court has repeatedly remarked upon the “broad reach” of the federal mail and wire fraud statutes. *Pasquantino v. United States*, 544 U.S. 349, 360 (2005); see also, *e.g.*, *United States v. Maze*, 414 U.S. 395, 405 n.10 (1974) (“the mail fraud statute remains a strong and useful weapon to combat those evils which are within the broad reach of its language”). A preeminent scholar of these statutes has recounted their expansive applications:

First enacted in 1872, the mail fraud statute, together with its lineal descendant, the wire fraud statute, has been characterized as the “first line of defense” against virtually every new area of fraud to develop in the United States in the past century. Its applications, too numerous to catalog, cover not only the full range of consumer frauds, stock frauds,

land frauds, bank frauds, insurance frauds, and commodity stock frauds, but have extended even to such areas as blackmail, counterfeiting, election fraud, and bribery.

Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 *Duq. L. Rev.* 771, 772 (1980) (footnotes omitted); see also Elkan Abramowitz & Barry A. Bohrer, *The Meaning of “Property” Under Federal Mail, Wire Fraud Statutes*, *N.Y. Law J.* (Mar. 2, 2004) (“Mail fraud and wire fraud are among the most frequently charged federal crimes.”); Elizabeth Wagner Pittman, *Mail and Wire Fraud*, 47 *Am. Crim. L. Rev.* 797, 797-99 (2010) (noting that these statutes are also used as money laundering and RICO predicates).

However, the flexibility of the mail and wire fraud statutes also renders them vulnerable to abusive application, and the Court has taken care to rein in anomalous or overreaching interpretations of both past and present incarnations of the statutes. See, e.g., *Cleveland v. United States*, 531 U.S. 12, 34-35 (2000); *McNally v. United States*, 483 U.S. 350, 360 (1987); *Maze*, 414 U.S. at 404. These decisions have served to facilitate consistent application of these powerful prosecutorial tools and to promote the uniform application of federal criminal law. The same scrutiny is required here, where the Seventh Circuit has embraced an aberrant and unsupportable view of what the prosecution need (or need not) prove in order to obtain a mail or wire fraud conviction.

**II. THE COURT SHOULD RESOLVE THE CONFLICT AMONG CIRCUITS AS TO WHETHER A MAIL OR WIRE FRAUD CONVICTION CAN REST ON A MISREPRESENTATION DIRECTED AT A PERSON OTHER THAN THE INTENDED VICTIM OF THE SCHEME.**

The Seventh Circuit's decision in this case deepens an existing conflict among the circuits over whether a misrepresentation directed at a person other than the intended victim of a scheme to defraud can support a mail or wire fraud conviction.

The Seventh Circuit held that a misrepresentation made to the Illinois Department of Insurance sufficed to support Segal's convictions for devising a scheme to defraud the customers and insurance carriers that did business with NNIB. No evidence or argument was presented that Segal made any direct representations to his customers or carriers concerning his or NNIB's maintenance of a PFTA. The only misrepresentation alleged was Segal's certification to IDI, in an application to renew his brokerage license, that he was properly maintaining premium funds in a PFTA as required by Illinois law. See Fourth Superseding Indictment 13-26. On appeal, the government argued that this misrepresentation sufficed to support Segal's conviction for scheming to defraud his customers and carriers, because it enabled him to maintain NNIB's brokerage license, which, in turn, "assured the customers and carriers that he was in compliance" and facilitated his alleged scheme. Gov't Supp. Br. 4, 10, 12-13. The Seventh Circuit apparently adopted the government's theory of indirect misrepresentation. It concluded that "Segal fraudulently represented to the insureds and insurance car-

riers that he would hold the insurance premiums in trust, but instead took the money on a shopping spree”—thereby committing “monetary fraud”—notwithstanding the absence of any direct misrepresentation to an insured or carrier. App., *infra*, 4a.

The Seventh Circuit’s affirmance of Segal’s conviction for scheming to defraud customers and carriers, based on a misrepresentation to the IDI, comports with an earlier decision of the Seventh Circuit and with the view of the Fifth and Eighth Circuits that a misrepresentation need not be directed at the intended victim to support a scheme to defraud. In *United States v. Cosentino*, 869 F.2d 301 (7th Cir. 1989), the Seventh Circuit affirmed the defendants’ convictions for mail fraud based on false representations to the IDI that enabled them to continue depriving their insurance company and policyholders of money. *Id.* at 307. The Eighth Circuit, in *United States v. Blumeyer*, 114 F.3d 758, 766-768 (8th Cir. 1997), similarly held that misrepresentations to a state insurance regulator to obtain a license supported a conviction for a scheme to defraud policyholders and brokers. The court observed that “[w]hether a defendant may be convicted of mail fraud or wire fraud for making false representations only to persons other than the intended victims of the scheme is a difficult question, and one on which the case law does not admit of easy reconciliation.” *Id.* at 767. Describing the conflict among circuits, the court adopted the Seventh Circuit’s reasoning in *Cosentino*, holding that “a defendant who makes false representations to a regulatory agency in order to forestall regulatory action that threatens to impede the defendant’s scheme to obtain money or property from others is guilty of” mail fraud. *Id.* at 768. The Fifth Circuit has recently agreed with the

Eighth, adopting *Blumeyer*'s holding that “the deception of regulatory agencies for the purpose of allowing victimization of third parties is a cognizable mail fraud offense.” *United States v. McMillan*, 600 F.3d 434, 450 (5th Cir.), cert. denied, 131 S. Ct. 504 (2010).

The view of the Fifth, Seventh, and Eighth Circuits squarely conflicts with decisions of the First and Ninth Circuits. In *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786 (1st Cir. 1990), the First Circuit held that misrepresentations made to regulatory bodies to secure approval of a contract could not form the basis of a scheme to defraud a third party harmed by the deceptively obtained contract. The court reasoned that “securing the regulatory associations’ approval by devious means \* \* \* did not mislead, trick or deceive McEvoy [the claimed victim] so as to defraud it.” *Id.* at 793. “While deceiving [the regulatory bodies] may have been part of a larger plan having an adverse impact upon McEvoy, this fact did not make McEvoy the object of an act of mail or wire fraud.” *Id.* at 794. And because “the only parties deceived—the [regulatory bodies]—were not deprived of money or property,” there was no scheme to defraud. *Ibid.* (citing *United States v. Evans*, 844 F.2d 36, 39 (2d Cir. 1988) (“If a scheme to defraud must involve the deceptive obtaining of property, the conclusion seems logical that the deceived party must lose some money or property.”)); see also *United States v. Sawyer*, 85 F.3d 713, 734 n.18 (1st Cir. 1996) (extending *McEvoy*'s holding to honest services fraud).

In *United States v. Lew*, 875 F.2d 219, 221 (9th Cir. 1989), the Ninth Circuit similarly held that misrepresentations to a federal agency did not support

a conviction for scheming to defraud an affected third party. The defendant was an immigration attorney who submitted false employment paperwork to the Department of Labor to assist his clients in obtaining permanent resident status. The court held that misstatements to the Department of Labor were insufficient to support Lew’s convictions for mail fraud based on a scheme to defraud his clients. See *id.* at 221-222. Although Lew “did obtain money in connection with the wrongdoing toward the government,” it was “not received from the party deceived—the government.” *Id.* at 221. Absent any support for the government’s contention “that misrepresentations were made to Lew’s clients” as well, there was no scheme to defraud. *Id.* at 222; see also *United States v. Ali*, 620 F.3d 1062, 1070-71 (9th Cir. 2010) (applying the rule in *Lew* in affirming mail and wire fraud convictions), petition for cert. filed, Nos. 10-9544, 10-9545, 10-9583 (U.S. Mar. 11, 2011).

Alternatively, some courts have framed the issue in terms of causation, holding that what is required is a causal relationship between the defendant’s misrepresentation and the victim’s loss. The First Circuit, in *United States v. Christopher*, 142 F.3d 46 (1st Cir. 1998), explained its earlier opinions in *McEvoy* and *Sawyer* in these terms. See *id.* at 53 (describing *McEvoy* as “simply making the point that the deception must in fact cause the loss”). The requirement that the defendant’s misrepresentation cause the victim’s loss, the court said, did not represent “an invariable requirement that the person deceived be the same person deprived of the money or property by the fraud.” *Id.* at 54. Relatedly, in *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997), the Sixth Circuit observed “that the federal circuits are split as to whether a defendant may be convicted of mail fraud

for deceiving only persons other than the intended victims of a scheme,” but found no need to resolve the question because in the case before it the deceit of the third party was not even causally related to the scheme to obtain property from the victim. *Id.* at 360.

Under either formulation, the Seventh Circuit’s holding is unsupportable. As the Seventh Circuit appears to acknowledge, Segal’s purported victims suffered no loss (App., *infra*, 5a)—let alone a loss fairly attributable to Segal’s misrepresentations to the IDI. The government’s theory was that Segal lied to the IDI to obtain a renewed brokerage license, which “was integral to the scheme,” because “[w]ithout a license, [Segal] and NNIB could not broker insurance, and the scheme would come to a halt.” Gov’t Supp. Br. 12-13. There was no evidence that any insured or carrier knew (or cared) about Segal’s representation to the IDI in his license renewal application; that absent the misrepresentation, the IDI would have declined to renew Segal’s license; that without a license renewal, Segal would have ceased to broker insurance; or that Segal’s representation to the IDI otherwise bore any causal relationship to a deprivation of any victim’s money or property. In fact, when the IDI learned of the PFTA shortfall, it agreed to a remediation plan that allowed NNIB to continue to operate (see Tr. 2670-71), rather than shuttering it.

Adoption of such a strained and unsupported theory of causation has placed the Seventh Circuit in conflict with other courts of appeals. In the First and Ninth Circuits, Segal’s misrepresentation to the IDI would not suffice to establish a scheme to defraud his

customers and insurance carriers. In the Seventh Circuit it did. This Court should resolve the conflict.

**III. THE SEVENTH CIRCUIT'S HOLDING THAT A VIOLATION OF A STATE REGULATION CAN CONSTITUTE A DEPRIVATION OF MONEY OR PROPERTY UNDER THE FEDERAL MAIL AND WIRE FRAUD STATUTES DEFIES THIS COURT'S PRECEDENTS HOLDING THAT STATE LAW SHOULD NOT GIVE CONTENT TO FEDERAL CRIMINAL LAW.**

The Seventh Circuit, in Segal's first appeal, acknowledged that Segal was "convicted of fraud for depriving another of the 'intangible right to honest services' pursuant to 18 U.S.C. § 1346." App., *infra*, 20a. On Segal's post-*Skilling* appeal, the court held that his conviction could also be supported on a money or property theory of mail and wire fraud. App., *infra*, 4a-5a. Segal's offense, as the court characterized it, was "failing to maintain the [premium] funds in trust." App., *infra*, 4a. This failure amounted not only to a deprivation of honest services under the now-defunct theory, but also to "monetary fraud," because Segal took money out of the trust account where it should have been maintained. App., *infra*, 5a. As the Seventh Circuit put it, "[t]he deposits were supposed to sit in the PFTA until it came time to pay the carriers." App., *infra*, 3a-4a.

**A. Segal's Conviction For Money Or Property Fraud Was Predicated On A Property Right Purportedly Created By The Illinois Insurance Code.**

The court's holding—that failing to maintain premium funds in a trust account amounts to a de-

privation of money or property under the mail and wire fraud statutes—was predicated on a money or property right that existed (if at all) only by creation of the Illinois Insurance Code. Section 3113.40 of the Illinois Insurance Code—not any provision of federal law or any agreement between the parties—imposed the requirement of maintaining premium funds in a trust account. See App., *infra*, 12a (explaining that “Illinois law, as set out in 50 Ill. Admin. Code § 3113.40(a), required insurance brokers to maintain a premium fund trust account (PFTA) into which all premiums were to be deposited and held in a fiduciary capacity until the carriers demanded the premium payments”). Illinois imposed its own regulatory and criminal penalties for misuse of a PFTA as well: “Failure to properly maintain a PFTA was grounds for suspension or revocation of a broker’s license. Conversion of more than \$150 was a felony.” App., *infra*, 12a.

The jury was expressly instructed to consider this section of the Illinois Insurance Code in determining the “existence, the scope, and the nature and the scope of [Segal’s] legal and fiduciary duties in this case.” App., *infra*, 41a-42a. Indeed, the trial court’s instructions on Illinois insurance regulation consumed 18 transcript pages. App., *infra*, 41a-57a.

Importantly, the trust requirement imposed by Illinois regulation is not universal. The requirements for handling premium funds vary widely from state to state. Nearly half of all states do not require premium payments to be deposited in a trust account or treated in a fiduciary capacity before they come due to the carrier. See Nat’l Ass’n of Ins. Comm’rs, NAIC Compendium of State Laws on Insurance Topics, I-PA-60, 2006 WL 2663840 (May 2009).

**B. The Seventh Circuit’s Holding Contravenes The Uniformity Principle Set Forth In *Skilling*.**

This Court’s holding in *Skilling* reflected an effort to restore consistency to the application of the federal fraud statutes, which are among the most widely enforced provisions of federal criminal law. See *supra*, Section I.C. Observing “considerable disarray” among the lower courts’ interpretations of the honest services theory of mail and wire fraud (130 S. Ct. at 2929)—including as to “whether § 1346 prosecutions must be based on a violation of state law” (*id.* at 2928 & n.38)—the Court construed § 1346 to “establish[] a uniform national standard.” *Id.* at 2933 (quoting Brief for Albert W. Alschuler as Amicus Curiae, at 28-29, *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010) (No. 08-1196), 2009 WL 3052480 [hereinafter, “Alschuler Amicus”]). In holding that § 1346 draws its content from federal case law and from other federal statutes (see *id.* at 2933-34), the Court effectively eliminated state law as a basis for a mail or wire fraud conviction under the honest services theory.

The Seventh Circuit’s holding unravels *Skilling* by shoehorning into money or property fraud the conduct that can no longer be punished as honest services fraud. Here, the trial court expressly instructed the jury to consider Illinois insurance law “in determining the existence, the scope, and the nature” of Segal’s legal duties (App., *infra*, 41a-42a), and the Seventh Circuit held that these state-created obligations gave rise to federally actionable money or property rights. Under this approach, failing to maintain premium funds in a trust account would supply the basis for a federal fraud conviction in

some states but not others. And determining whether a crime was committed would require a close examination and analysis of state law—a task with which the jury was charged here. This lack of uniformity arising from predicating a federal prosecution on a violation of state law (or, here, state regulation) is precisely what *Skilling* intended to eradicate.

At bottom, the conduct charged here is classic honest services fraud under the now-invalid theory. The hallmark of traditional money or property fraud, as this Court described it in *Skilling*, is that “the victim’s loss of money or property supplie[s] the defendant’s gain, with one the mirror image of the other.” 130 S. Ct. at 2926. Thus, “the honest-services theory targeted corruption that lacked similar symmetry.” *Ibid.* The element of symmetry that defines money or property fraud is plainly lacking here, where “the betrayed party suffered no deprivation of money or property,” actual or intended. *Ibid.* The “fraud,” then, can only be of the honest services variety, wherein the “actionable harm l[ies] in the denial of [the victim’s] right to the offender’s ‘honest services.’” *Ibid.* The Seventh Circuit stretched and strained to make out a money or property right implicated by Segal’s conduct, but the inescapable fact of the matter is that what he did wrong was failing to satisfy a fiduciary duty under Illinois law to maintain premium funds received by his insurance business in trust. That is not money or property fraud. And it is not the type of fraud that can be punished under the honest services theory after *Skilling*. The Seventh Circuit’s reasoning is a thinly veiled end run around that decision.

**C. The Seventh Circuit's Holding Defies  
The Clear-Statement Rule Articulated  
In *Jerome v. United States*.**

This Court's holding in *Skilling* was consistent with its earlier decision in *Jerome v. United States*, 318 U.S. 101 (1943), which adopted a strong presumption against allowing state law to give content to federal criminal statutes. The defendant in *Jerome* was convicted under § 2(a) of the Federal Bank Robbery Act, which provided in pertinent part that "whoever shall enter or attempt to enter any bank \* \* \* with intent to commit in such bank \* \* \* any felony or larceny, shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both." *Id.* at 101-02 (quoting 12 U.S.C. § 588b). The "felony" underpinning Jerome's conviction was an offense created by Vermont law. The Court overturned the conviction, holding that "'felony' as used in § 2(a)" does not "incorporate[] state law." *Id.* at 104.

The Court explained:

[W]e must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide and at times on the fact that the federal program would be impaired if state law were to control. When it comes to federal criminal laws such as the present one, there is a consideration in addition to the desirability of uniformity in application which supports the general principle. Since there is no common law offense against the United States, the administration of

criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress. We should be mindful of that tradition in determining the scope of federal statutes defining offenses which duplicate or build upon state law. In that connection it should be noted that the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained. That consideration gives additional weight to the view that where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute.

*Id.* at 104-05 (citations omitted).

This Court has repeatedly invoked *Jerome's* clear-statement rule to resist using state law to supply content to federal statutes, both criminal and civil. See, e.g., *Taylor v. United States*, 495 U.S. 575, 590-92 (1990); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43-46 (1989); *NLRB v. Natural Gas Util. Dist.*, 402 U.S. 600, 602-03 (1971); *United States v. Nardello*, 393 U.S. 286, 293-94 (1969); *United States v. Turley*, 352 U.S. 407, 410-11 (1957); *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 123-24 (1944).

The Seventh Circuit's holding that state insurance regulations can give content to the words "money" and "property" as used in the federal mail and wire statutes—absent any clear directive from Congress—defies the clear-statement rule set forth in

*Jerome*. Employing an approach that would criminalize conduct in half the states but permit precisely the same conduct in the rest, the Seventh Circuit disregarded *Jerome*'s admonition that "the application of federal legislation is nationwide," and "uniformity in application" should therefore be the norm. 318 U.S. at 104-05.

**D. The Seventh Circuit's Holding Raises Precisely The Federalism Concerns Expressed In *Cleveland v. United States*.**

In *Cleveland v. United States*, 531 U.S. 12 (2000), the Court held that making false statements to state regulatory authorities in an application for a video poker license did not support a conviction for mail fraud because the licenses did not constitute "property" within the meaning of § 1341. The Court reasoned that the state's principal interest in its licensing scheme was regulatory. *Id.* at 20-23. Treating a state regulatory scheme as creating federally enforceable property rights would pose significant federalism concerns:

We reject the Government's theories of property rights not simply because they stray from traditional concepts of property. We resist the Government's reading of § 1341 as well because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress. Equating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities. We note in this regard that Louisiana's video poker statute typically and unambiguously imposes crimi-

nal penalties for making false statements on license applications. As we reiterated last Term, “unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance’ in the prosecution of crimes.” *Jones v. United States*, 529 U.S. 848, 858 (2000) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

*Id.* at 24-25 (citation omitted); see also *id.* at 23 (“Such regulations are paradigmatic exercises of the States’ traditional police powers.”).

Here, as in *Cleveland*, the claimed property right is uniquely the creation of a state regulatory scheme. Illinois’ regulatory scheme, like Louisiana’s, “unambiguously imposes” its own civil and criminal penalties for violating the applicable regulations. *Id.* at 24. The State of Illinois in fact assessed its own penalties for Segal’s conduct that is the subject of this prosecution. See *Segal v. Ill. Dep’t of Ins.*, No. 1-09-2214 (Ill. Ct. App. Oct. 19, 2010). Elevating a regulatory infraction subject to state enforcement to the level of a federal crime encroaches upon traditional state police powers and alters the federal-state balance in the prosecution of crimes, without any clear directive from Congress. See *Alschuler Amicus*, at 19 (“When a federal district court effectively substitutes itself for [a state regulatory body], when it effectively tries state officials for regulatory violations and state crimes in the federal courts, and when it punishes these state violations much more severely than the state legislature and state administrative authorities consider appropriate, it deprives the state of the ability to govern itself.”).

This is particularly so in the context of insurance regulation, for which Congress has expressly entrusted principal responsibility to the states under the McCarran-Ferguson Act. See 15 U.S.C. § 1011 (“Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest \* \* \*”). The Act expressly prohibits the construction of any federal statute of general application “to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance.” *Id.* § 1012. The Seventh Circuit’s incorporation of Illinois insurance regulations into the federal mail and wire fraud statutes effectively superseded the regulatory and penalty structure adopted by the State of Illinois.

Accordingly, the Seventh Circuit’s holding that Segal’s violation of an Illinois insurance regulation amounted to a deprivation of property punishable as mail and wire fraud conflicts with this Court’s holding in *Cleveland* and with important principles of federalism.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2011

## **APPENDICES**

**APPENDIX A**

In the United States Court of Appeals  
For the Seventh Circuit  
Nos. 09-3403 & 09-3684

UNITED STATES OF AMERICA,  
Plaintiff-Appellee/  
Cross-Appellant,  
v.  
MICHAEL SEGAL,  
Defendant-Appellant/  
Cross-Appellee.

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Appeals from the United States District Court  
for the Northern District of Illinois, Eastern Division.  
No. 1:02-cr-00112—**Ruben Castillo**, *Judge*.

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ARGUED JANUARY 13, 2011—DECIDED MAY  
3, 2011

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Before RIPPLE, EVANS, and SYKES, Circuit  
Judges.

EVANS, *Circuit Judge*. Michael Segal is here again—for the third time. He was originally indicted in 2002. The indictment was superseded several times, with a fourth version returned in 2004. In its fourth reincarnation, the indictment charged Segal and his company, Near North Insurance Brokerage (NNIB), with a bevy of counts including racketeering, mail and wire fraud, embezzlement, false statements, and conspiracy to impede the Internal Revenue Service.

Following a trial, a jury found Segal guilty on all charged counts except one that the government dismissed during the trial. Subsequently, during post-trial proceedings, the district court knocked out seven counts. At the end of the day, 19 counts were left standing. NNIB was also convicted. Segal was sentenced to serve a 121-month term, pay \$841,527.96 in restitution, and forfeit \$30 million plus his interest in the racketeering enterprise (i.e., NNIB). Segal and NNIB appealed.

Before the appeal was heard, we resolved a somewhat-related appeal filed by Segal growing out of an action by a trustee appointed by the court to manage the affairs of NNIB and a related entity. Segal came out on the short end of that appeal. *See United States v. Segal*, 432 F.3d 767 (7th Cir. 2005). Segal fared marginally better on his appeal from the criminal trial: we affirmed his conviction, but remanded the case to the district court for further proceedings regarding the forfeiture issue. *See United States v. Segal*, 495 F.3d 826 (7th Cir. 2007).

Back in the district court, the forfeiture was cut to \$15 million. Both sides were unhappy. Both appealed. The government claimed the amount should have stayed at \$30 million; Segal claimed \$1.5 million (“at the most”) was the right figure. Before the new appeal was resolved, Segal received what we suspect he must have viewed as a ticket to a do-over of the whole shebang—the Supreme Court issued its opinion in *Skilling v. United States*, 130 S. Ct. 2896 (2010). Why is that? Well, the alleged scheme that ran through the indictment against him claimed that Segal was involved in money/property fraud along with fraud involving the deprivation of his “honest services.” In *Skilling*, the Supreme Court trimmed

the theory of honest services fraud so it only applies to a defendant involved in either bribery or a kickback scheme. We asked the parties to submit supplemental briefs regarding *Skilling* and they have done so.

The evidence fails to suggest that Segal was involved in either bribery or a kickback scheme. So the instructions given to the jury regarding honest services fraud were wrong. However, *Skilling* holds that an error such as occurred here does not require the reversal of a conviction if it is shown to be harmless beyond a reasonable doubt. This is so because a general verdict may be supported by an alternative, and valid, legal theory such as money/property fraud alleged in the indictment against Segal. That's the route we followed in affirming, in part, the conviction of the defendant in *United States v. Black*, 625 F.3d. 386 (7th Cir. 2010).

So the issue here boils down to this: would the jury have still convicted Segal had it not been told that in addition to the valid money/property fraud allegations, an allegation of honest services fraud could also be taken into consideration? We conclude that the jury would—and most certainly did—convict Segal for money/property fraud, irrespective of the honest services charge. This is because even if the jury concluded that there was an honest services violation, that violation had to be premised on money/property fraud. That is, to the extent Segal was depriving others of his honest services, it was because he was taking their money.

NNIB was required to use a premium fund trust account (PFTA) to hold, as a fiduciary, premium deposits from insureds. The deposits were supposed to sit in the PFTA until it came time to pay the carri-

ers. The government charged and presented evidence of a fraudulent scheme whereby Segal took the money deposited in the PFTA and used it to expand his business by purchasing and investing in other insurance brokerages and companies.

The jury was instructed that the mail and wire fraud counts required that the government prove either a scheme to 1) defraud, 2) obtain money, or 3) deprive others of “honest services in the operation of Near North Insurance Brokerage *and* the maintenance of Near North Insurance Brokerage’s Premium Fund Trust Account” (emphasis added). Accordingly, any honest services violation had to be based on the PFTA. This requirement was repeated in the jury instructions’ explanation of a “scheme” and a “scheme to defraud another of a right to honest services.”

If the jury convicted Segal of honest services fraud for failing to maintain the PFTA, it raises the question *how* did Segal fail to maintain the PFTA? Under the evidence presented, there is one overwhelming answer. He failed to maintain the PFTA by taking out the funds that were supposed to go the insurance carriers. That is, Segal fraudulently represented to the insureds and insurance carriers that he would hold the insurance premiums in trust, but instead took the money on a shopping spree—at one point the PFTA was short \$30 million. This is monetary fraud. If the jury found an honest services violation, it was only because of this underlying fraud. The jury could not have found Segal guilty for failing to maintain the funds in trust without concluding that Segal *was taking the money*.

So that leaves us with two possible conclusions, neither of which help Segal. The jury convicted Segal based on an honest services theory which, under the

evidence presented, required that the jury conclude that Segal was guilty of monetary fraud. Or the jury dumped the honest services theory and simply relied on monetary fraud. Either way, a conviction for monetary fraud is left standing.

Segal's arguments to the contrary get him nowhere. First, he argues there was no victim. But that is not correct, the jury instructions specifically name "insurance carriers and/or customers" as the victims. Nor does it matter, as Segal appears to contend, if the victim suffered no loss. Loss is not required to prove fraud, whether monetary or otherwise. See *United States v. Sorich*, 523 F.3d 702, 709-10, 712-13 (7th Cir. 2008); *United States v. Hamilton*, 499 F.3d 734, 736-37 (7th Cir. 2007).

Segal also argues that in *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court held that "defraud," as used in the mail and wire fraud statutes, means fraud as it was understood at common law, and here the elements of common law fraud were not met. But *Neder* focused on and reached a conclusion as to only one element of fraud at common law: materiality. *Neder*, 527 U.S. at 22-25 ("we hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes"). *Neder* was silent, for instance, on intent to cause harm. Regardless, Segal would have us construe *Neder* as requiring a specific intent to cause injury. We reject this request. Not only because *Neder* does not contain any such holding, but because we have already held that this is not the case. See *Hamilton*, 499 F.3d at 736 (if you obtain money by fraud "you are not excused just because you had an honest intention of replacing the money"); *United States v. Davuluri*, 239 F.3d 902, 906 (7th Cir. 2001) ("Expos-

ing the victim to a substantial risk of loss of which the victim is unaware can satisfy the intent requirement. That Davuluri sincerely intended his scheme to generate a profit is irrelevant”) (citations omitted). We decline to read into *Neder* conclusions it did not reach.

Contrary to Segal’s assertion that this case was presented as one primarily resting on an honest services violation, the case, and the government’s presentation, were about the money. Even the government noted when discussing honest services during its closing argument that the honest services violation was premised on Segal’s taking money. The term “honest services” does not appear in Segal’s closing argument and is mentioned only once in the government’s rebuttal. Segal’s attempt to equate the government’s references to “fiduciary” in its closing as equivalent to mentioning “honest services” fails. They are not the same thing and even Segal’s counsel admitted at argument that he was unsure how “fiduciary” was used in the context of “fiduciary fraud.” The parties just didn’t emphasize honest services during the trial as strongly as Segal now contends.

In sum, Segal’s convictions stand. Even so, resentencing is required because the district court may have thought that Segal committed honest services fraud *and* money and property fraud, and increased the sentence accordingly. *Black*, 625 F.3d at 388-89.

But we still have the issue of the \$15 million forfeiture order—the only issue at play until *Skilling* arrived on the scene. As we noted earlier, both sides argue the district court got it wrong. We disagree.

We remanded the case to the district court in 2007 to determine if there was any double-counting when Segal was forced to forfeit his enterprise and \$30 million—some of which Segal may have reinvested in his enterprise. We asked the district court to determine what part of the \$30 million was not reinvested in the enterprise, but rather went to benefit Segal personally and should therefore be subject to forfeiture. This is a question of fact. Therefore, we review the court’s decision on remand only for clear error. *United States v. Swanson*, 394 F.3d 520, 528 (7th Cir. 2005).

Not surprisingly, Segal did not leave detailed records of his crimes. As originally noted by the district court back in 2004, Segal’s “lackluster accounting system, which was a deliberate attempt to conceal his fraudulent conduct, preclude[s] such a detailed accounting.” *United States v. Segal*, 339 F. Supp. 2d 1039, 1049 (N.D.Ill. 2004). On remand, the district court did exactly what we asked of it. Using the evidence that was available, it cogently explained the amount of money that Segal took for personal use. None of the shortcomings alleged by the government or Segal rise to the level of clear error. Setting a restitution figure in a case like this is akin to hitting a zone rather than a point. The zone the district court ended up in seems eminently reasonable to us.

We REMAND this case to the district court so that the court can consider resentencing Segal in the event that any honest services conviction affected his sentence. Of course, if the court would have imposed the same sentence irrespective of any honest services fraud, no resentencing is necessary. The judgment of the district court is otherwise AFFIRMED.

**APPENDIX B**

**UNITED STATES COURT OF APPEALS FOR  
THE SEVENTH CIRCUIT**

**FINAL JUDGMENT**

May 3, 2011

**BEFORE: KENNETH F. RIPPLE, Circuit Judge  
TERENCE T. EVANS, Circuit Judge  
DIANE S. SYKES, Circuit Judge**

**UNITED STATES OF AMERICA,  
Plaintiff-Appellee, Cross-Appellant,  
Nos.: 09-3403 and 09-3684**

**v.**

**MICHAEL SEGAL,  
Defendant-Appellant  
Cross-Appellee.**

Appeals from the United States District Court for the  
Northern District of Illinois, Eastern Division  
No.: 1:02-cr-00112  
Ruben Castillo, Judge.

We REMAND this case to the district court so that the court can consider resentencing Segal in the event that any honest services conviction affected his sentence. The judgment of the district court is otherwise AFFIRMED. The above is in accordance with the decision of this court entered on this date.

9a

**APPENDIX C**

**UNITED STATES COURT OF APPEALS  
For the Seventh Circuit  
Chicago, Illinois 60604**

June 9, 2011

**Before**

KENNETH F. RIPPLE, Circuit Judge  
TERENCE T. EVANS, Circuit Judge  
DIANE S. SYKES, Circuit Judge

Nos. 09-3403 & 09-3684

UNITED STATES OF AMERICA,  
Plaintiff-Appellee/  
Cross-Appellant,  
v.  
MICHAEL SEGAL,  
Defendant-Appellant/  
Cross-Appellee.

Appeal from the United States District Court for  
the Northern District of Illinois, Eastern Division.

No. 1:02-cr-00112

Ruben Castillo, Judge.

**ORDER**

On May 17, 2011, the defendant-appellant filed a  
petition for rehearing and for rehearing en banc. All

of the judges on the panel have voted to deny rehearing, and no judge in active service has requested a vote on the petition for rehearing en banc. It is therefore ORDERED that the petition for rehearing and for rehearing en banc is DENIED.

**APPENDIX D**

**UNITED STATES COURT OF APPEALS**

Seventh Circuit

UNITED STATES of America, Plaintiff-Appellee,

v.

Michael SEGAL and Near North Insurance Bro-  
kerage, Inc., Defendants-Appellants.

Nos. 05-4601, 05-4756.

Argued April 12, 2007.

Decided Aug. 2, 2007.

Before RIPPLE, EVANS, and SYKES, Circuit  
Judges.

EVANS, Circuit Judge.

Michael Segal and Near North Insurance Bro-  
kerage (NNIB) were charged in 27 counts of a 28-  
count fourth superseding indictment: Segal with  
racketeering, mail and wire fraud, false statements,  
embezzlement, and conspiring to impede the Internal  
Revenue Service; NNIB with mail and wire fraud,  
false statements, and embezzlement. A jury returned  
guilty verdicts on all counts (except one which the  
government dismissed), but the district court (Judge  
Ruben Castillo) granted a judgment of acquittal on 7,  
leaving a grand total of 19 standing at the end of the  
day. NNIB was ordered to pay a \$1.4 million fine and  
pay restitution totaling \$841,517.96. Segal was sen-  
tenced to 121 months imprisonment, ordered to pay  
\$841,527.96 in restitution, and forfeit \$30 million  
and his interest in the racketeering enterprise.

Segal was a licensed attorney, a CPA, and an in-  
surance broker who began working for NNIB in 1964

when it was owned by George Dunne, a prominent politician and president, for 21 years, of the Cook County Board. By the early 1990s Segal was the owner and sole shareholder of the company. He then formed NNNB, a holding company, to be the corporate parent of NNIB and many of his other financial interests. During the 1990s NNIB was earning close to \$50 million annually.

During the period covered by the indictment-1990-2002-Illinois law, as set out in 50 Ill. Admin. Code § 3113.40(a), required insurance brokers to maintain a premium fund trust account (PFTA) into which all premiums were to be deposited and held in a fiduciary capacity until the carriers demanded the premium payments. The time between a broker's receipt of premium payments and the carrier's demand-called the "float"-varied with the carrier. Commissions, interest, credit, and other nonpremium money could be withdrawn, but brokers were required to maintain PFTAs in trust with sufficient funds to pay premiums. The accounts could not be used as operating accounts. Failure to properly maintain a PFTA was grounds for suspension or revocation of a broker's license. Conversion of more than \$150 was a felony.

NNIB maintained both a PFTA and an operating account, but everything was deposited in the PFTA, and the operating account was maintained with a zero balance. Funds were transferred to the operating account from the PFTA to pay expenses, but after those payments were made everything was transferred back to the PFTA. The chief financial officer of NNIB from 1990 to 1998, Norman Pater, considered this practice to be a violation of the regulations, as

did his successor, Donald Kendeigh, and, in turn, his successor, Thomas McNichols.

Nevertheless, Segal expanded his business, purchasing brokerages in New York, California, Texas, and Florida. In addition, he purchased several other companies, ranging from a fire suppression device manufacturer to a software maker. The acquisition of these entities was funded by NNIB's PFTA. Most of the companies were losing money, so there were regular wire transfers from the PFTA to keep them solvent. By the end of 1989 the PFTA was over \$7 million out of trust. At the end of 1995 it was \$10 million short, and by August 2001 the deficit had grown to \$30 million. Evidence shows that Segal knew he was converting PFTA money to fund expansion and for other unauthorized purposes. Auditors regularly told him so. Segal contended it was no big deal. He told McNichols that every insurance company operates the way he did. In the face of this sort of operation, the auditing firm McGladrey & Pullen resigned, as had an earlier firm, Deloitte & Touche.

The cash shortfall in the PFTA was so bad in January 2001 that Segal had the head of the NNIB branch in Los Angeles wire \$3 million to cover payments which were due to carriers. Reluctantly he wired the money on January 16; on the 22nd, \$2.4 million was wired back to Los Angeles.

In April 2001, McNichols drafted a letter to Segal outlining an NNIB Management Operations Plan. Its purpose was to bring NNIB into compliance with the law. The plan proposed putting control of NNIB into an executive committee that would report to Segal but be free to act without his approval. The plan called for selling off money-losing affiliates, segregating PFTA from operating funds, and obtaining an

outside audit. The letter noted that the PFTA was \$17 million in deficit but that for years Segal had shown no interest in balancing it, that outside auditors had quit because of the deficit, that Segal's wife said Segal's ties to the governor would protect him, and that Segal was intentionally committing a felony. Segal rejected the plan. But he retained Hales & Company, financial consultants, to evaluate NNIB's prospects of raising capital by attracting new investors. Soon after Hales was retained, its chief executive officer received a phone call from Segal saying that an anonymous letter had been sent to the Illinois Department of Insurance (IDOI) reporting the PFTA deficit. The Hales vice-president in charge of the account concluded that the PFTA was out of trust by \$24 million-even after Segal put \$10 million from a mortgage on his home into the account. Hales secured loans for NNIB, and the situation was finally corrected when Firemen's Fund and AIG each loaned NNIB \$10 million. The loans, however, came with restrictions on Segal's ability to dispose of assets, effectively taking control of NNIB out of his hands.

A less dramatic aspect of the situation involved petty cash. Dan Watkins, an employee in NNIB's accounting department, maintained a petty cash account of \$20,000. A ledger was kept with strict accounting of even small withdrawals for NNIB expenses. In contrast, every week, thousands were put in an envelope for Segal. Watkins eventually pled guilty to embezzlement for his part in the transactions.

NNIB often paid Segal's personal credit card bills-to the tune of \$36,000 for the years 1999-2001. Employees of NNIB also performed personal services for him and his family. Evidence showed that be-

tween 1999 and 2001 Segal had \$667,000 in unreported income for the value of services rendered.

In addition, Segal had employees make political contributions with personal checks. NNIB then reimbursed them. Segal also provided discounts on insurance premiums for political figures.

One influential person helpful to Segal was Nathaniel Shapo. Shapo's first job out of college was interning for Illinois' then-lieutenant governor, George Ryan. Shapo next worked for Ryan when Ryan was the Illinois secretary of state. After Shapo graduated from law school he worked on Ryan's gubernatorial campaign. Ryan was elected and appointed Shapo, who was then six months out of law school with no insurance background, as director of the Illinois Department of Insurance. Homer Ryan, the governor's son, introduced Segal to Shapo. When the previously mentioned anonymous tipster informed the IDOI of NNIB's PFTA deficit, IDOI began an investigation. Fortuitously for Segal, at that time he had a meeting scheduled with Shapo. Before the meeting, Governor Ryan called Shapo to say he hoped things would go well for NNIB, and after, called to ask how the meeting had gone. Shapo told Ryan that IDOI would not do an official examination of NNIB because it would kill a \$20 million deal Segal had in the works.

Segal was also involved in providing insurance for the Chicago Transit Authority's reconstruction project on its Blue Line, a contract which NNIB was awarded. The contract was fee-based; no commissions were to be paid to the broker. However, before the contract was signed, Segal arranged to have one of NNIB's subsidiaries broker some of the coverages and earn a commission of \$370,000, an arrangement not revealed to the CTA.

Finally, in what seems-in the context of this case-to be almost a minor infraction, NNIB had a policy of writing off customer credits. After a credit owed to a customer had been carried on the books for a while without a payment demand, the credit was simply written off. Account executives were trained not to notify customers that they were owed credits. Segal personally approved of these write-offs, and in the judgment against him he was ordered to pay \$471,000 in restitution to the victims.

Segal and NNIB have raised a number of issues on appeal. We begin with their claim that they were the targets of vindictive prosecution. They contend that additional charges were leveled against Segal and charges were brought against NNIB in retaliation for their pursuit of civil remedies against former NNIB executives who were cooperating with the government.

Before the present criminal case began, Segal and NNIB filed suit in state court against former NNIB executives Matt Walsh and Dana Berry, alleging that they violated noncompete clauses in their contracts with NNIB. After that-but not because of it-the government charged Segal with one count of fraud; at that time no charges were filed against NNIB. Then Segal and NNIB prepared a draft amended complaint in their civil case and showed it to the prosecutors in the criminal case. The amendment alleged that Walsh and Berry illegally acquired proprietary information from a former NNIB information technologist, who had hacked into the company's computer system. When shown the amended complaint, the prosecutor protested that the allegations were not made in good faith and were intended to harass and intimidate Walsh and Berry, who were

expected to be government witnesses. The prosecutor said that if the amended complaint was filed, the government would take it into account in deciding whether to bring charges against NNIB and to charge Segal under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962 *et seq.* (RICO). The amended complaint was filed and the grand jury returned superseding indictments doing just that. Claiming that the additional charges were the result of vindictive prosecution, Segal and NNIB moved to dismiss the indictment. The district judge denied the motion without a hearing.

On a claim of vindictive prosecution, we review the district court's legal conclusions *de novo* and its findings of fact for clear error. *United States v. Falcon*, 347 F.3d 1000 (7th Cir.2003); *United States v. Jarrett*, 447 F.3d 520 (7th Cir.2006).

The Constitution prohibits initiating a prosecution based *solely* on vindictiveness. “[F]or an agent of the [United States] to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights” is “a due process violation of the most basic sort....” *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978); *Jarrett*, 447 F.3d at 525. After a trial, in very limited circumstances, courts have applied a burden-shifting presumption of vindictiveness where prosecutors have pursued enhanced charges after a defendant successfully challenged a conviction and was awarded a new trial. But we stated in *Jarrett* that our precedents do not provide for the application of such a presumption before trial. It remains a fact that a pretrial claim of vindictive prosecution is extraordinarily difficult to prove. To prevail on this sort of claim, *Jarrett* holds that a defendant must af-

firmatively show that the prosecutor was motivated by animus, “such as a personal stake in the outcome of the case or an attempt to seek self-vindication.” *Id.* And it must be recognized, in reviewing a claim of vindictiveness before trial, that prosecutors have “wide discretion over whether, how, and when to bring a case.” *Id.* As the Supreme Court has said, “A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. As we made clear in *Bordenkircher*, the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.” *United States v. Goodwin*, 457 U.S. 368, 382, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982).

That the initial charges may not reflect the extent of a defendant's wrongdoing is clearly illustrated by the evidence in this case. It is hard to imagine that any prosecutor would fail to find NNIB a proper defendant or fail to conclude that Segal's wrongdoing extended far beyond one fraud count. The evidence supports the indictment, and Segal and NNIB have not made a showing of vindictiveness. What they point to in an attempt to support the claim is a statement by a prosecutor that if the defendants filed the amended complaint, that would be taken into account in deciding on RICO charges and charges against NNIB. The prosecutor's statement was based, however, on the belief that the allegations in the amended civil complaint were not made in good faith but, to the contrary, were intended to harass and intimidate government witnesses. A prosecutor cannot be said to act vindictively by taking into account a defendant's perceived efforts to intimidate witnesses. In short, defendants have not made out a

claim for vindictive prosecution, nor have they shown sufficient evidence to warrant a hearing on the claim.

Next, the defendants claim that there was a fatal variance between the indictment and the proof at trial. This claim fares no better. Specifically, they argue that the evidence showed multiple schemes to defraud rather than the single scheme charged in the indictment. We treat such a claim as an attack on the sufficiency of the evidence, and we review the evidence in the light most favorable to the government. *United States v. Olson*, 450 F.3d 655 (7th Cir.2006).

Much summarized, the fourth superseding indictment charged the defendants with a single scheme to defraud and to obtain money and things of value from the PFTA (an account they were required to maintain for the benefit of customers and insurance carriers) by creating the false appearance that payments to NNIB would be held in trust for payment of premiums, that credits due customers would be refunded to them, and that the customers would receive honest services. Rather than a single scheme, defendants contend that evidence at trial revealed three separate schemes: failure to maintain sufficient funds in the PFTA; writing off of customer credits; and collection of a commission from the CTA contract for Blue Line renovation. The district court found that the evidence was sufficient for the jury to find that the fraudulent acts were all part of a single scheme. We agree.

As part of their argument on this point, the defendants characterize the misuse of the PFTA account as improper borrowing which did not actually harm anyone or benefit them, certainly a benign in-

terpretation of the facts. And the law is otherwise. The unauthorized use of money from an insurance premium trust account is mail fraud even if the defendant did not gain and the victim did not lose. See *United States v. Vincent*, 416 F.3d 593 (7th Cir.2005). The claim that the carriers were at little risk ignores the facts which show that NNIB was often late in paying carriers and had to hold checks to carriers until it came up with sufficient funds to send them out. By 2001, NNIB had to obtain cash from affiliates to pay premiums and by the end of that year had to borrow \$30 million to meet its obligations. In addition, it is hard to see how the defendants can contend that the credit write-offs were unrelated to the larger scheme. Withholding of credits directly deprived customers of money they were owed and of the honest services of their broker. In addition, it reduced the PFTA deficit, at least to some degree. Proceeds from other acts, such as the CTA fraud, were commingled in the PFTA and used for a variety of unauthorized purposes. Political contributions and premium discounts to influential people provided Segal with cover to prevent discovery of his financial shenanigans. In short, the evidence supports a finding of an overarching scheme involving the misuse of the PFTA account, as alleged in the superseding indictment.

We turn next to the claim that the jury instructions regarding mail and wire fraud were improper. The defendants were convicted of fraud for depriving another of the “intangible right to honest services” pursuant to 18 U.S.C. § 1346. They contend that the jury instructions misstated the law and that there is a likelihood that the instructions confused the jury into thinking the defendants could be convicted for violations of Illinois insurance law. The defendants further contend that state law is always irrelevant

under the statute. Alternatively, they say that if state law is relevant, it was overemphasized in the instructions. We review the instructions as a whole to determine whether they fairly treat the issues. *United States v. Murphy*, 469 F.3d 1130 (7th Cir. 2006).

The argument that state law is always irrelevant in determining the scope of a fiduciary duty, the breach of which may give rise to a deprivation of honest services, is foreclosed by *United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998). Bloom makes clear that state laws are useful for defining the scope of fiduciary duties, and that what distinguishes a mere violation of fiduciary duty from a federal fraud case is the misuse of one's position for private gain.

Our conclusion is not altered by our decision in *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007). Defendants argue that in Thompson we rejected the notion that simple violations of administrative rules provide the basis for a mail fraud conviction. In fact, what we said is that there is a "potential to turn violations of state rules into federal crimes," at which point we explained that our decision in Bloom specifically protects against that danger and remains the governing legal standard. The case against Thompson simply did not measure up.

Georgia Thompson was a state procurement officer who steered a travel contract to the low bidder (who made legal campaign contributions to an incumbent governor) even though other people involved in the selection process rated a rival company more highly. The theory of the prosecution was that she deprived the state of her honest services—that is, her "duty to implement state law the way the administrative code laid it down...." The private gain—the

*Bloom* requirement—was a tiny salary increase of \$1,000 per year and an alleged improvement in her job security for pleasing her superiors who allegedly favored the company she backed. We soundly rejected the government’s theory. First, we found that Thompson already had job security as a civil servant. We then analyzed the case based on the assumption that she received the raise for steering the contract. Even using that assumption, we concluded that “a raise approved through normal civil-service means is not the sort of ‘private gain’ to which *Bloom* refers.” *Thompson* does not change the *Bloom* rules, but merely reinforces them.

Furthermore, this case differs from *Thompson* in both degree and in kind. The difference in degree hardly bears mentioning—a \$30 million fraud versus a \$1,000 per year civil service raise. But, more importantly, it differs in kind. We concluded that Thompson did not act out of private gain, whereas Segal knowingly and intentionally misused the PFTA for his own very significant private gain. *Bloom* remains the law in this circuit and *Thompson* does nothing to change the result in our case today.

As to the instructions, the jury was told that the defendants were charged with violations of various federal laws, including the mail fraud, wire fraud, and racketeering laws. The instructions specifically state that the defendants “are not charged in this case with any state crimes or any violations of state regulations.” The jury was told that it “should consider the following provisions of Illinois law ... in determining the existence, the scope and the nature of defendants’ legal and fiduciary duties in this case.” The instructions also state:

To find defendants guilty of the charged federal offenses, it is not enough to find that one or both of the defendants violated Illinois law or the Illinois Insurance Regulations. Your job is to decide whether the government has proven beyond a reasonable doubt every element of each federal offense charged in the indictment based on the instructions I give you. Even if you believe that the defendants violated Illinois law or Illinois Insurance Regulations, you should return a verdict of not guilty if you also believe that the government has not proven every element of the particular charged federal offense you are considering beyond a reasonable doubt.

The defendants proposed an instruction, which was rejected, that the intent necessary to convict was the intent to defraud, not the intent to violate state law. Even though the defendants' specific proposed instruction was rejected, the jury was instructed that it had to find that the defendants acted knowingly and with intent to defraud. "Scheme to defraud" and "intent to defraud" were defined without any reference to state law. Viewed as a whole, we find the instructions fairly informed the jury that state law was to be used only to determine the nature of the defendants' legal and fiduciary duties.

Segal also contends that the jury was not properly instructed on the "pattern" element of the RICO charge. He does not claim that the instructions which were given were erroneous or that the evidence was insufficient to prove a pattern. But he wanted an instruction that "a multiplicity of mailings or interstate communications may be no indication of the requisite pattern or racketeering activity

because each mailing or wire communication was a separate offense and the number of offenses ‘does not necessarily translate into a pattern of racketeering activity.’” We reject his argument. In this case there are years of false representations in various mail and wire communications. We have upheld convictions in similar circumstances. In *United States v. Genova*, 333 F.3d 750, 759 (7th Cir. 2003), we said that a jury could conclude that the false mailings in that case were integral to the scheme and that “because the scheme extended over several years, a jury also sensibly could find a pattern of racketeering.”

In the final challenge to the convictions, defendants claim that their conviction of insurance fraud under 18 U.S.C. § 1033(b) cannot stand because NNIB was not “engaged in the business of insurance” as required by the statute. NNIB, defendants say, is an insurance broker, not an insurance provider.

The statute defined the “business of insurance” as the writing of insurance or reinsuring of risks “by an insurer, including all acts necessary or incidental to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons [.]” § 1033(f)(1). “Insurer” means “any entity the business activity of which is the writing of insurance or the reinsuring of risks ....” § 1033(f)(2). We have previously said that under Illinois law, an insurance broker, or agent of the insured is:

[o]ne who procures insurance and acts as middleman between the insured and the insurer, and solicits insurance business from the public under no employment from any special company, but, having secured an or-

der, places the insurance with the company selected by the insured, or, in the absence of any selection by him, with the company selected by such broker.

*American Ins. Corp. v. Sederes*, 807 F.2d 1402, 1405 (7th Cir. 1986), quoting *Galiher v. Spates*, 129 Ill. App. 2d 204, 262 N.E.2d 626, 628 (1970). Whether the broker is an agent of the insured or the insurer is a question of fact and “[a]lthough an insurance broker typically represents the insured, the broker may also become the agent of the insurer or both parties.” *Capitol Indemnity Corp. v. Stewart Smith Intermediaries, Inc.*, 229 Ill. App. 3d 119, 593 N.E.2d 872, 876 (1992). Whether an entity is an agent of the company or the insured is determined by its actions. The evidence in this case is sufficient to support a finding that the defendants were engaged in the business of insurance as that term is broadly defined in the statute to include “all acts necessary or incidental to such writing or reinsuring.” § 1033(f)(1).

We now turn to issues involving the forfeiture and restitution orders. Restitution was ordered against both Segal and NNIB in the amount of \$841,527.96. They contend the evidence did not support \$542,291<sup>1</sup> of that amount. The latter amount was attributable to credits-due to customers-which were written off. Of that amount, \$357,079 was alleged to be owed but not paid to Waste Management. Segal presented an affidavit from Waste Management’s risk management director saying that the sum was not owed to his company. But given other

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<sup>1</sup> The uncontested amount is the restitution ordered to be paid to the CTA for the illegal commission on the Blue Line project.

evidence, it was certainly possible that Waste Management didn't know it had credits coming.

We review the district court's calculation of restitution for abuse of discretion. *United States v. Swanson*, 394 F.3d 520, 526 (7th Cir. 2005); *United States v. Danford*, 435 F.3d 682 (7th Cir. 2006). We review the evidence in the light most favorable to the government. *U.S. v. Olson*, 450 F.3d 655 (7th Cir. 2006). The government is required to prove the entitlement to restitution by a preponderance of the evidence. In this case, the credits occurred in 1999, and the findings regarding the victims and the amounts they were owed were based on a report prepared by a government auditor and attached to the government's objections to the presentence report. NNIB CFO McNichols testified about a meeting with Segal in the fall of that year in which old, unclaimed credits were reviewed. Segal gave instructions to write them off. Another witness testified that if a client did not ask for the credit for a period of time, it was written off. Including these unpaid credits in the restitution order cannot be said to have been erroneous.

On the forfeiture issues, an initial matter involves Segal's claim that he was prejudiced by his absence from the hearing at which a preliminary forfeiture order was entered. We review the issue *de novo*, *United States v. Smith*, 31 F.3d 469 (7th Cir. 1994), to determine whether Segal's due process rights were violated. A defendant has a due process right to be present "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (quoting *Snyder v. Massachusetts*, 291 U.S. 97 (1934)). But "the presence of a defendant is a condition of due

process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.” *Snyder*, 291 U.S. at 107-08. The determination is made in light of the record as a whole. *United States v. McCoy*, 8 F.3d 495 (7th Cir. 1993). In this case, the hearing resulted only in a preliminary order; the actual forfeiture was further litigated at a later time. Segal’s counsel was at the hearing and no testimony was taken. When addressing this issue at a later proceeding, District Judge Castillo stated:

I have taken a close look at that particular issue, and I’ve read the pleadings. The record I think is reflected in the pleadings that have been filed very ably and adequately by Mr. Segal’s counsel that reflects that the preliminary forfeiture order was entered without him being here. That was an oversight. As I said at the point in time when the preliminary forfeiture order was entered, if we had all had our thinking caps on, that order should have been entered at the point in time immediately following the return of the verdict, but there was a lot of issues going on, not the least of which was whether or not Mr. Segal would be detained pending sentencing or not.

That being the case, the record will reflect that during the entire period from the point in time that preliminary forfeiture order was entered until Mr. Segal’s attorneys filed their written objection, I think a period of 30 days, no issue was ever brought before this Court by way of any-not even one- or two-paragraph motion saying Mr. Segal should have been present at the preliminary forfei-

ture proceeding. It was never brought. And that the record will reflect.

The record will also reflect that it's this Court's conclusion that Mr. Segal has been more than adequately represented during that period of time and that extensive objections have been filed to the preliminary forfeiture proceeding.

So Judge Castillo concluded that if there was an error, it did not prejudice Segal. We agree with that conclusion. Furthermore, there were almost countless hearings regarding the forfeiture in this case, hearings at which Segal was present unless he voluntarily chose not to attend, as was the case on December 29, 2004. All in all, we are not convinced that Segal's due process rights were violated when the preliminary forfeiture was entered.

Segal also raises issues regarding the forfeitures themselves. 18 U.S.C. § 1963(a) provides that a person convicted of a RICO violation shall forfeit the enterprise "which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962" and "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection...." The judgment against Segal required the forfeiture of both.

As to the enterprise, Segal contends that it was error for the court to set aside the jury verdict. The contention requires some explanation. The "enterprise" in this case was NNIB and related affiliates. Segal was the sole owner of the enterprise. The judge instructed the jury that Segal's interest in the enter-

prise was subject to forfeiture to the extent the enterprise was tainted by racketeering activity. The verdict form asked the jury to reply “yes” or “no” to the question whether Segal held an interest in the enterprise and, if so, what percentage of Segal’s interests were tainted. The jury replied “yes” and answered the latter question 60 percent. However, the judge ordered forfeiture of 100 percent of the enterprise, thus the argument is that the “60 percent verdict” was set aside. The court noted that under § 1963(a), Segal’s interest in the enterprise subjected 100 percent of the enterprise to forfeiture. That is a correct conclusion. The error was in submitting the percentage question to the jury in the first place. The error, however, had no bearing on the case. The fact is that the jury found that Segal had an interest in the enterprise. In fact, Segal owned the enterprise. The evidence at trial to that effect was not simply sufficient, but overwhelming. And § 1963 requires forfeiture of the enterprise.

Segal also objects to the forfeiture of \$30 million in proceeds. He argues that there is a fatal variance between the allegations of the indictment and the theory of forfeiture employed at his trial. He also contends that the evidence is insufficient to support the amount of the forfeiture.

The indictment charges that Segal’s interest subject to forfeiture is

at least \$20,000,000, including but not limited to all salary, bonuses, dividends, pension and profit sharing benefits received by defendant MICHAEL SEGAL, from NNIB and NNNG acquired and maintained during the period 1990 through 2001.

He says that the indictment must be interpreted to mean that only his executive salary of \$120,000 per year, the cash he took from petty cash, and the claims for personal expenses are subject to forfeiture. In addition, he says the government must show what proportion of his executive compensation consisted of racketeering proceeds. We cannot agree.

The items Segal mentions are, indeed, subject to forfeiture, but so is some of the money he stole from the PFTA. There is no requirement that proceeds be in the form of more-or-less legitimate salary payments or shady small reimbursements. While the indictment mentions salaries, bonuses, etc., it also says the forfeiture includes but is not limited to those items and that “at least” \$20,000,000 is subject to forfeiture. In short, the indictment does not limit the forfeiture to the specific items it mentions or the ones Segal acknowledges. Assets forfeited as proceeds in *Genova*, a case on which Segal places considerable reliance, included clearly illegal bribes, as well as seemingly legitimate attorney fees. In fact, the defendant in *Genova* conceded that the bribes he received were subject to forfeiture. Here, the evidence is sufficient to show that money was stolen from the PFTA. It is also sufficient to show what the amount was. The evidence shows a deficit which grew over the years. At the end of 1989 the PFTA was over \$7 million out of trust. At the end of 1995 it was \$10 million short. Dennis Pogenburg of the Hales Groups testified that in the fall of 2001 the deficit was \$24 million-*after* \$10 million in borrowed money had been deposited into the fund. McNichol testified that at the end of April 2001 the PFTA deficit was \$29 million. By the end of 2001, \$30 million was borrowed to meet NNIB's premium obligations.

Segal makes much of the fact that our cases require that proceeds forfeitures be of net, not gross, proceeds and that while restitution is loss based, forfeiture is gain based. He is correct about the legal principles, as *Genova* and *United States v. Masters*, 924 F.2d 1362 (7th Cir. 1991), make clear, but wrong about the application to his case. Here, the amount stolen is equal to the amount of the deficit. The gain is equal to the loss.

Furthermore, the \$30 million is net, not gross, proceeds to Segal. It is true that to collect the funds which went (briefly) into the PFTA, NNIB had expenses-employee salaries, etc. But taking the money once it was there did not cause Segal to incur expenses. He does not say, for instance, that he paid someone to help him make off with the funds. The expenses involved in the acquisition of the \$30 million were borne by NNIB; the defendant from whom the forfeiture is sought is Segal. To him, it was all net proceeds, figuratively, all gravy.

Again, *Genova* may provide a loose analogy. Jerome Genova was the mayor of Calumet City, Illinois. He appointed Lawrence Gulotta as city prosecutor and arranged for Gulotta's law firm to get most of the city's legal business. Gulotta kicked back to Genova about 30 percent of the payments the law firm received from the city. The kickbacks were a cost of doing business and, because we require forfeiture on net proceeds, were deducted from Gulotta's forfeiture of his fees. However, the kickbacks were net proceeds to Genova. In Segal's case, as well, the pilfered funds were net proceeds to him-if not to NNIB.

Segal also argues, though, that he paid the money back, and apparently for that reason he thinks the \$30 million is not subject to forfeiture. We have

trouble seeing why paying the money back means that he did not take it in the first place. More importantly, he did not personally pay it back. He paid it back by borrowing from Firemen's Insurance and AIG in loans, primarily secured by assets of the company.

All of that said, what is not clear from the record is how much of the \$30 million was poured back into the enterprise and how much went to benefit Segal personally. Without that information we cannot determine whether at least part of the \$30 million forfeiture would constitute double billing, given that the amount that went back into the company will be forfeited through the forfeiture of the enterprise. Double billing, as the Court of Appeals for the Third Circuit has said, cannot be the intent of Congress:

We do not believe that Congress intended forfeiture verdicts to double if property forfeitable under section 1963(a)(1) also happened to be forfeitable under section 1963(a)(2). To read the statute to permit such verdict doubling would introduce an arbitrariness into the statute that could not have been contemplated by Congress.

*United States v. Ofchinick*, 883 F.2d 1172, 1182 (3rd Cir. 1989). Accordingly, we will remand the case to the district court for a determination of what portion of the \$30 million was not reinvested in the enterprise, but rather went to benefit Segal personally and is subject to forfeiture as proceeds of the illegal enterprise.

Finally, Segal argues that the forfeiture violates the Excessive Fines Clause of the Constitution. We review constitutional questions *de novo*. *United*

*States v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998).

In *United States v. Bajakajian*, 524 U.S. 321, 334 (1998), the Court held that “a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportionate to the gravity of a defendant's offense.” It is true that the forfeiture is large. It is only excessive, however, if it is disproportional to the offense. We cannot say that it was. This was a massive fraud. When a defendant commits a multimillion-dollar crime, he can be required to forfeit assets also running into the millions.

For all these reasons, the judgment of forfeiture of the proceeds of the racketeering activity is VACATED and REMANDED for further proceedings in the district court. In all other respects, the judgments against Segal and NNIB are AFFIRMED.

**APPENDIX E**

If an agent was acting within his authority, Near North Insurance Brokerage, Inc. is not relieved of its responsibility because the act was illegal, contrary to Near North Insurance Brokerage, Inc.'s instructions, or against its general policies.

You may, however, consider the existence of Near North Insurance Brokerage, Inc.'s policies and instructions and the diligence of its efforts to enforce them in determining whether the agents or employees were acting with intent to benefit Near North Insurance Brokerage, Inc. or within the scope of their employment.

In Counts 1 through 13 and Racketeering Acts 1 through 12 of Count 15, defendant Segal is charged with committing mail fraud. Near North Insurance Brokerage, Inc. is also charged with committing mail fraud in Counts 2 through 8 and 10 through 13.

To sustain each charge of mail fraud, the government must prove the following propositions:

First, that the defendants knowingly devised or participated in a scheme to defraud or to obtain money or property by means of materially false pretenses, representations, promises and material omissions, or to deprive various insurance carriers and/or customers of Near North Insurance Brokerage of a duty to provide honest services in the operation of Near North Insurance Brokerage and the maintenance of Near North Insurance Brokerage's Premium Fund Trust Account as described in Counts 1 through 13 of the indictment and Racketeering Acts 1 through 12 of Count 15 of the indictment.

Second, that the defendants did so knowingly and with intent to defraud.

And, third, that for purpose of carrying out the scheme or attempting to do so, the defendants used or caused the use of the United States mails in the manner charged in Counts 1 through 13 and Racketeering Acts 1 through 12 of Count 15.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendants guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendants not guilty.

In order to prove the mail fraud charges in Counts 1 through 13 and Racketeering Acts 1 through 12 of Count 15, the government must prove that the United States mails were used to carry out the scheme or were incidental to an essential part of the scheme.

In order to use or cause the use of the United States mails, the defendants need not actually intend that use to take place. You must find that the defendants knew this use would actually occur or that the defendants knew that it would occur in the ordinary course of business or that the defendants knew facts from which they could reasonably have been foreseen -- let me just read that again -- or that defendants knew facts from which that use could reasonably have been foreseen. The defendants need not actually or personally use the mail.

Although an item mailed need not itself contain a fraudulent representation or a promise or a request for money, it must further or attempt to further the scheme. Each separate use of the mail in furtherance of the scheme to defraud constitutes a separate offense.

In connection with whether a mailing was made, evidence of the habit of a person or the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. You should consider this evidence in the same manner that you consider all circumstantial evidence.

In Count 14 and Racketeering Acts 13 through 15 of Count 15, defendant Segal is charged with committing wire fraud. To sustain each charge of wire fraud, the government must prove the following propositions:

First, that the defendant knowingly devised or participated in the scheme to defraud or to obtain money or property by means of materially false pretenses, representations, promises and material omissions, or to deprive various insurance carriers and/or customers of Near North Insurance Brokerage of a duty to provide honest services in the operation of Near North Insurance Brokerage and the maintenance of Near North Insurance Brokerage's Premium Fund Trust Account as described in Count 14 and Racketeering Acts 13 through 15 of Count 15 of the indictment.

Second, that the defendant did so knowingly and with the intent to defraud.

And, third, that for purposes of carrying out this scheme or attempting to do so, the defendant used or caused the use of interstate wire communications in the manner charged in Count 14 and Racketeering Acts 12 through 15 of Count 15.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that anyone of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

With respect to the charge against defendant Segal of wire fraud in Count 14 and Racketeering Acts 12 through 15 of Count 15, the government must prove that an interstate wire communication was used to carry out the scheme or was incidental to an essential part of the scheme.

In order to cause an interstate wire communication to take place, a defendant need not actually intend that use to take place. You must find that the defendant knew this use would actually occur or that the defendant knew that it would occur in the ordinary course of business or that the defendant knew facts from which that use could reasonably have been foreseen.

However, the government does not have to prove that the defendant knew that the wire communication was of an interstate nature. The defendant need not actually or personally use the interstate communication facilities.

Although an item communicated interstate need not itself contain a fraudulent representation or a promise or a request for money, it must further or attempt to further the scheme.

Each separate use of the interstate communication facilities in furtherance of the scheme to defraud constitutes a separate offense or Racketeering Act, as that term is used in these instructions.

A wire transfer constitutes a transmission by means of wire communication in interstate commerce within the meaning of the wire fraud statute.

A scheme is a plan or a course of action formed with the intent to accomplish some purpose. In considering whether the government has proven a scheme to defraud or to obtain money or property by means of materially false pretenses, representations, promises or omissions, or to deprive various insurance carriers and the customers of Near North Insurance Brokerage of a duty to provide honest services in the operation of Near North Insurance Brokerage and the maintenance of Near North Insurance Brokerage's Premium Fund Trust Account as described in Counts 1 through 14 of the indictment and Racketeering Acts 1 through 15 of Count 15, it is essential that one or more of the false pretenses, representations, promises, omissions or acts charged in the portion of Count 1 of the indictment describing the scheme; that is to say, the description of the scheme contained in paragraphs 2 through 14 of Count 1, be proved establishing the existence of a scheme beyond a reasonable doubt.

However, the government is not required to prove all of them. You must be unanimous in deciding which specific act or acts of the scheme charged

in the indictment were committed and whether either or both classes of victims of the alleged scheme, i.e., various insurance carriers and/or customers, were victims.

You must also be unanimous in deciding whether the government has proven, No. 1, a scheme to defraud; No. 2, a scheme to obtain money or property by means of false pretenses, representations or promises; or 3, a scheme to deprive insurance carriers and/or customers of honest services, as described in Counts 1 through 14 of the indictment and Racketeering Acts 1 through 15 of Count 15.

A scheme to defraud is a scheme that is intended to deceive or cheat another, or to obtain money or property by means of materially false pretenses, representations, promises or omissions, or cause the potential loss of money or property to another or to deprive another of honest services.

The phrase "intent to defraud" means that the acts charged were done knowingly, with intent to deceive or cheat various insurance carriers and/or customers of Near North Insurance Brokerage in order to cause the gain of money or property to the defendants, or to deprive various insurance carriers and/or customers of Near North Insurance Brokerage of a right to honest services of defendant Segal and Near North Insurance Brokerage, Inc., as described in Counts 1 through 15 -- no, 1 through 14 of the indictment and Racketeering Acts 1 through 15 of Count 15 of the indictment; that is, of defendants' loyal and faithful services in the performance of acts related to the operation of Near North Insurance Brokerage and the Premium Fund Trust Account, as described in Counts 1 through 14 and Racketeering Acts 1 through 15 of Count 15 of the indictment, and

of rights to have the defendants make decisions free from corruption, dishonesty and fraud.

Such intent may be determined from all the facts and circumstances surrounding the case. In order to prove a scheme to defraud, the government does not have to prove that the defendants contemplated actual or foreseeable harm to the victims of the scheme.

When the word “knowingly” is used in these instructions, it means that the defendants realized what the defendant was doing and was aware of the nature of his conduct or its conduct and did not act through ignorance, mistake or accident. Knowledge may be proved by the defendants’ conduct and by all the facts and circumstances surrounding the case.

You may infer knowledge from a combination of suspicion and indifference to the truth. If you find that a person had a strong suspicion that things were not what they seemed or that someone had withheld some important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted knowingly, as I have used that word. You may not conclude that the defendant had knowledge if he was merely negligent in not discovering the truth.

The mail and wire fraud statutes can be violated whether or not there is any loss or damage to the victim of the crime or gain to the defendants. Deprivation of one’s right to honest services is a type of loss in and of itself.

Not every breach of a fiduciary duty constitutes a criminal fraud, and not every act of deceit is a criminal fraud. Neither negligence nor a breach of contract standing alone can form the basis of a scheme

to defraud for purposes of the mail and wire fraud counts.

Good faith on the part of each defendant is inconsistent with intent to defraud, which is an element of the charges. The burden is not on the defendants to prove their good faith. Rather, the government must prove beyond a reasonable doubt that the defendants acted with intent to defraud to commit the crimes charged.

In considering whether a defendant has engaged in a scheme to defraud another of a right to honest services, you must first find that the defendant owed another a fiduciary duty; that is, you must find that the defendant you are considering owed an alleged victim a fiduciary duty to provide honest services in the operation of Near North Insurance Brokerage and the maintenance of Near North Insurance Brokerage's Premium Fund Trust Account as described in Counts 1 through 14 and Racketeering Acts 1 through 15 of Count 15 of the indictment.

A fiduciary has an obligation to act solely for the benefit of those to whom he owes a fiduciary duty and to disclose all material facts to them. It is fraud for a fiduciary to take actions which serve the fiduciary's interests at the material expense of the interests of those on whose behalf the fiduciary has an obligation to act, including misleading them by words, act or silence where there is an obligation of disclosure.

You should consider the following provisions of Illinois law as codified in the Illinois Insurance Code, Article 31, relating to insurance producers and registered firms in determining the existence, the scope,

and the nature of defendants' legal and fiduciary duties in this case:

No. 1, pursuant to Section 491.1 of the Illinois Insurance Code, Illinois law, an insurance producer is an individual who solicits, negotiates, effects, procures, renews, continues, or binds policies of insurance governing -- covering, get that right -- covering property or risks located in Illinois. A license is a document authorizing an individual to act as an insurance producer. A registered firm includes a corporation which transacts the business of insurance as an insurance agency.

No. 2, pursuant to Section 492.2 of the Illinois Insurance Code, no person shall act as or hold himself out to be an insurance producer unless duly licensed.

No. 3, pursuant to Section 499.1 of the Illinois Insurance Code, any corporation transacting insurance business as an insurance agency was required to register with the Director of the Illinois Department of Insurance before transacting insurance business in the State of Illinois. Each such firm was required to appoint one or more licensed insurance producers who were officers or directors to be responsible for the firm's compliance with the insurance laws and the insurance provisions of the Illinois Administrative Code. Such individuals are required to submit to the Director of the Illinois Department of Insurance a registration form.

No. 4, pursuant to Section 505.1 of the Illinois Insurance Code, any license issued under Article 31 may be suspended or revoked, and any application for a license may be denied if the Director finds that the licensee or applicant has willfully violated any

provision of the Illinois Insurance Code or any rule or regulation promulgated by the Director; has intentionally made a material misstatement in his application for a license; has obtained or attempted to obtain a license through misrepresentation or fraud; has misappropriated or converted to his own use or improperly withheld money required to be held in a fiduciary capacity; has in the transaction of business under his license used fraudulent, coercive or dishonest practices or has demonstrated incompetence, untrustworthiness or financial irresponsibility; and, for conduct as an insurance producer occurring after January 1st, 1997, has failed to meet the continuing education requirements of the Code.

No. 5, pursuant to Section 508.1 of the Illinois Insurance Code, any money which an insurance producer or registered firm received for soliciting, negotiating, effecting, procuring, renewing, continuing, or binding policies of insurance was required to be held in a fiduciary capacity and was required not to be misappropriated, converted, or improperly withheld.

You should also consider the following provisions of Illinois law relating to insurance producers and registered firms in determining the existence, the scope, and the nature of defendant' legal and fiduciary duties under Illinois law:

Title 50 of the Illinois Administrative Code pertains to insurance rules and regulations promulgated by the Director of the Illinois Insurance Department. In pertinent part, Part 3113 of Title 50 of the Illinois Administrative Code sets forth the following provisions material to the charges in this case. States as follows under subpart (a): To implement Sections 501.1, 506.1 and 508.1 of Article 31 of the Illinois Insurance Code, failure to adhere to the standards

herein set forth shall subject the offender, in addition to any other penalties or remedies provided by law, to proceedings under Article 31 of the Illinois Insurance Code.

No. 2, to establish minimum standards required of licensees to assure the proper handling of insurance transactions, specifically in regard to premiums and other moneys received from the insurers -- insurers, insured and other licensees or other registered firms.

Part B says this part applies to all persons, resident and non-resident, who are licensed under the Illinois Insurance Code as insurance producers, limited insurance representative, temporary insurance producers, and surplus line licensees and to firms registered pursuant to Article 31 of the Illinois Insurance Code.

Definitions in 3113.20: (A) Financial institution means a federal or state chartered bank or savings and loan institution which is a member of the Federal Deposit Insurance Corporation or the Federal Savings and Loans Insurance Corporation.

(B) Premium means any amount charged the insured or to be returned to the insured by the insurer for the assumption of liability through the issuance of policies or contracts for the insurance.

(C) Premium Fund Trust Account means a special fiduciary account established and maintained by a licensee into which all premiums collected are to be deposited.

(D) Primary dealer means a financial institution or government securities dealer who reports daily to the Federal Reserve Bank of New York.

(E) Quasi-resident means a non-resident licensee who has a place of business in Illinois or who produces 50 percent or more of his or her premium volume on Illinois property or risk. For purposes of this definition, a place of business means any identification, designation or location in Illinois used by quasi-resident for insurance purposes. Such identification, designation or location may include but not be limited to the use of an Illinois department -- Illinois telephone number, address, post office box or lock box.

50 Illinois Administrative Code 3113-4.40 entitled Premium Fund Trust Account states as follows:

(A) All licensees required to maintain a Premium Fund Trust Account pursuant to 50 Illinois Administrative Code 3113.40(c) shall establish and maintain a Premium Fund Trust Account in a financial institution. All resident and quasi-resident licensees required to maintain a Premium Fund Trust Account pursuant to this section shall maintain such Premium Fund Trust Account with one or more financial institutions located within the State of Illinois and subject to the jurisdiction of the Illinois courts. Licensees are not required to maintain a separate Premium Fund Trust Account for each insurer unless required by the insurers.

(B) All licensees required to maintain a Premium Fund Trust Account pursuant to 50 Illinois Administrative Code 3113.40(c) shall certify at each license extension date that premiums are held in a Premium Fund Trust Account. The account must be designated Premium Fund Trust Account on the bank records, and those words shall be displayed on the face of the checks of that account.

(C) A Premium Fund Trust Account must be established and maintained if a licensee: No. 1, holds any premiums for 15 days or more before remitting to an insurer or other licensee; 2, deposits any collected premiums into a financial institution account or any other account or uses the premiums even though the premiums are remitted within 15 days.

(D) The absence of a Premium Fund Trust Account does not relieve the licensee of the obligation to hold the premiums in a fiduciary capacity, and the premiums shall not be used for other purposes.

(E) All licensees who maintain or are required to maintain a Premium Fund Trust Account must deposit all premiums received into the Premium Fund Trust Account.

(F) Non-premium moneys received by the licensee for soliciting, negotiating, effecting, procuring, renewing, continuing, or binding policies of insurance may be deposited into the Premium Fund Trust Account. Examples of non-premium moneys are service fees, policy fees, late charges, inspection fees and surplus line premium taxes.

(G) All moneys deposited into the Premium Fund Trust Account are considered to be fiduciary funds until lawfully withdrawn.

(H) The following disbursements may be lawfully withdrawn from the Premium Fund Trust Account:

No. 1. Net or gross premiums, remittances due other licensees or insurers. Claims payments or reinsurance premiums when offset at the direction of the insurer may be transferred to another account.

2. Returned premiums due insureds.

3. Commissions due the licensee net of any financial institution fees or service charges or commissions due another licensee only when the commission withdrawal is matched and identified with premiums previously deposited into the Premium Fund Trust Account.

4. Non-premium moneys when matched and identified with prior non-Premium Fund Trust Account deposits.

5. Interest or other revenue which the licensee is authorized to retain.

6. Withdrawals pursuant to Subsections 3113-40(h) (3), (4) and (5) must be payable to the licensee or other licensee.

(I) The Premium Fund Trust Account shall not be used as a general operating account or claim payment account.

(J) The Premium Fund Trust Account balance in the financial institution shall at all times be the amount deposited less lawful withdrawals. If the balance in the financial institution is less than the amount deposited less lawful withdrawals, the licensee shall be deemed to have misappropriated fiduciary funds and to have acted in a financially irresponsible manner.

(K) All licensees must place premium fund trust funds in interest-bearing or income-producing assets and retain the interest or income thereon provided the licensee provides the prior written authorization of the insurer on whose behalf the funds are to be held. The written authorization from the insurer shall be on a form the same as Exhibit A or other

written forms signed and dated by the licensee and the insured.

No investment shall be made which assumes any risk other than the risk that the obligator shall not pay the principal when due. Employing the use of specialized techniques or strategies which incur additional risks to generate higher returns or to extend maturities is not permitted. Such techniques would include, but not be limited to, the following:

Use of financial futures or options, buying on margins, pledging Premium Fund Trust Accounts balances, and when issue trading. In addition to savings and checking accounts in a financial institution, the licensee may invest in the following assets:

No. 1. Direct obligations of the United States of America or U.S. Government agency securities with maturities of not more than one year.

2. Certificates of deposits with a maturity of not more than one year issued by financial institutions which are members of the FDIC or Federal Savings Loan Insurance Corporation.

3. Repurchase agreements with financial institutions or government security dealers recognized as primary dealers by the Federal Reserve system provided that, (a) the value of the repurchase agreement is collateralized with assets which are allowable investments for Premium Fund Trust Accounts; and (b) the collateral has a market value at the time the repurchase agreement is entered into at least equal to the value of the repurchase agreement; and (c) the repurchase agreement does not exceed 30 days.

4. Commercial paper provided the commercial paper is rated at least P1 by Moody's Investor Ser-

vice, Inc. and at least A1 by Standard & Poor's Corporation.

5. Obligations issued by states and possessions of the United States, including Puerto Rico and the District of Columbia and their political subdivisions, agencies and instrumentalities or multi-state agencies or authorities, including general obligation bonds, revenue bonds in short-term notes with maturities of not more than one year and rated at least Aa1, MIG1, VMIG1 or Prime 1 by Moody's Investor Service, Inc. or AASP1 or A1 by Standard & Poor's Corporation. Such obligations must be payable or guaranteed from taxes or revenues or such entities if such entity has not been in default in the payment of principal or interest on any of its direct or guaranteed obligations in the last five months.

6. Money market funds provided that the money market funds invest exclusively in assets which are allowable investments pursuant to Subsections 3113-40(k)(1) 1 through 5.

L. Each investment transaction shall be made in the name of the licensee's Premium Fund Trust Account. The licensee shall maintain evidence of any such investments. Each investment transaction shall flow through the licensee's Premium Fund Trust Account.

50 Illinois Administrative Code 3113-50 has minimum record requirements. (A) Licensees shall maintain books and records which reflect all insurance transactions specifically in regard to premiums and other moneys received and deposited into the Premium Fund Trust Account and lawfully withdrawn from the Premium Fund Trust Account. The preparation, journalizing and posting of such books and

records must be performed no less than every 30 days.

(B) Failure to maintain on a timely basis the minimum books and records pursuant to this part shall be deemed evidence of untrustworthiness, incompetence, and financial irresponsibility. For the purpose of this subsection, timely means not less than every 30 days.

(C) All books and records for a calendar or fiscal year shall be maintained for at least seven years thereafter.

(D) Licensees shall maintain a cash receipts register of all moneys received. The minimum detail required in the register shall be: 1, date moneys received and date deposited; 2, amount received. If the amount received does not agree with the amount billed, the licensee shall prepare a written record of the application of the amount received; 3, name of insured, licensee or insurer making the payment; 4, name of insured, licensee or insurer to whom the amount will be paid; 5, policy number or other description of the receipt. The description shall be in such detail as to permit the department's examiner to identify the source document, substantiating the receipt.

(E) Licensees shall maintain a cash disbursement register of all disbursements. The minimum detail required in the register shall be: 1, date disbursed or endorsed to insured and other licensee, insured or transferred to any other account; and, 2, check number; and, 3, amount disbursed. If the amount disbursed does not agree with the amount billed, the licensee shall prepare a written record as to which policies insured and amounts the disburse-

ment is to apply. The written record shall be sent with the disbursement and a copy maintained by the licensee; and, 4, name of the insurer, licensee, insured or other account pursuant to Section 3113-40(g) to whom the payment or transfer was made; and, 5, policy number or other description of the disbursement. The description shall be in such detail to identify the source document substantiating the purpose of the disbursement; and, 6, if the disbursement represents net premium, the register shall reflect the gross premium; and, 7, if the disbursement is a commission payment to the licensee or other licensee, the disbursement shall be supported by written record of the following:

(A) name of insured; (b) policy number, three – I'm sorry -- (c) gross premium; (d) commission rate; (e) net commission equals the amount of the Premium Fund Trust Account check; (f) check number to which the record -- the written record applies.

8. Commissions may be withdrawn only on premiums deposited into the Premium Fund Trust Account. The relationship between the premium deposited and the commission withdrawal for that premium deposit must be documented in writing.

If the disbursement is for other non-premium moneys previously deposited into the Premium Fund Trust Account, the disbursement description shall reflect the matching non-premium deposit which the withdrawal represents.

(F) All Premium Fund Trust Account journal entries for receipts and disbursements shall be supported by evidential matter as provided in Sections 3113-50(d) and 3113-50(e). The evidential matter

must be referenced in the journal entry so that it may be traced for verification.

(G) Licensees shall prepare and maintain monthly financial institution account reconciliations of the Premium Fund Trust Account.

(H) Licensees shall maintain positive running balances in the Premium Fund Trust Account. The deposited balance shall be reflected in the check stubs or disbursement register after each deposit or disbursement entry.

And all of that that I just read to you as to the record requirements, that pertained to the minimum code requirements for the time period January 1st, 1985 through January 18th, 1990, as will be detailed in these instructions.

From January 1990 on, the Illinois Administrative Code provided as follows:

(A) Licensees shall maintain books and records which reflect all insurance transactions specifically in regard to premiums and other moneys received and deposited into the Premium Fund Trust Account and lawfully withdrawn from the Premium Fund Trust Account. The preparation, journalizing and posting, of such books and records must be performed no less than every 30 days.

(B) Failure to maintain on a timely basis the minimum books and records pursuant to this part shall be deemed evidence of untrustworthiness, incompetence and financial irresponsibility. For the purpose of this subsection, timely means not less than every 30 days.

(C) All books and records for a calendar or fiscal year shall be maintained for at least seven years thereafter.

(D) Licensees shall maintain a cash register -- cash receipts register of all moneys received. The minimum detail required in the register shall be: 1, date moneys received and date deposited. If the licensee records the date of the deposit of each cash receipt elsewhere in his books and records, the date of the deposit is not required in the cash receipts register.

2, amount received. If the amount received does not agree with the amount billed, the licensee shall prepare a written record of the application of the amount received.

3, name of insured, licensee or insurer making the payment.

4, policy number or other description of the receipt. The description shall be in such detail as to permit the department's examiner to identify the source document substantiating the receipt.

(E) Licensees shall maintain a cash disbursement register of all disbursements. The minimum detail required in the register shall be: 1, date disbursed or endorsed to the insurer, other licensees, insured or transferred to another account; and, 2, check number; and, 3, amount disbursed. If the amount disbursed does not agree with the amount billed, the licensee shall prepare a written record as to which policies, insureds and the amounts the disbursement is to apply. The written record shall be sent with the disbursement and a copy maintained by the licensee; and, 4, name of insurer, licensee, insured or other account pursuant to Section 3113-

40(g) to whom the payment or transfer was made; and, 5, policy number or other description of the disbursement. The description shall be in such detail to identify the source document substantiating the purpose of the disbursement; and, 6, if the disbursement is a commission payment to the licensee or other licensee, the disbursement shall be supported by a written record of the following:

(a) name of the insured; (b) policy number; (c) gross premium; (d) commission rate; (e) net commission equals the amount of the Premium Fund Trust Account check; (f) check number to which the written record applies.

7. Commissions may be withdrawn only on premiums deposited into the Premium Fund Trust Account. The relationship between the premium deposited and the commission withdrawal for that premium deposit must be documented in writing.

8. If the disbursement is for other non-premium moneys previously deposited into the Premium Fund Trust Account, the disbursement description shall reflect the matching non-premium deposit which the withdrawal represents.

(F) All Premium Fund Trust Account journal entries for receipts and disbursements shall be supported by evidential matter as provided in Sections 3113(f)(d) and 3113(f)(e). The evidential matter must be referenced in the journal entry so that it may be traced for verification.

(G) Licensees shall prepare and maintain monthly financial institution account reconciliations of the Premium Fund Trust Account.

(H) Licensees shall maintain positive running balances in the Premium Fund Trust Account. The positive balance shall be reflected in the check stubs or disbursement register after each deposit or disbursement entry.

50 Illinois Administrative Code 3113-60 return premium provided as follows from January 1st, 1985 to January 18th, 1990:

(A) Returned premiums must be paid to the insured or credited to the insured's account within 15 days after receipt from the insurer or other licensees. If the returned premium is reflected as a credit on the licensee's billing statement from the insured or other licensee, the licensee must pay the returned premium or credit the insured's account within 15 days subsequent to the payment of the statement. If the returned premium is to be credited to the insured's account, the credit must be shown and applied to the next billing statement sent to the insured.

(B) If the credit is going to be held on the insured's account and the account reflects a credit balance, the licensee must send monthly written verification to the insured which clearly reflects a credit owed to the insured.

From January 19th, 1990 on, the Illinois Administrative Code provided:

(A) Returned premiums must be paid to the insured or credited to the insured's account within 15 days after receipt from the insurer or other licensee. If the returned premium is reflected as a credit on the licensee's billing statement from the insurer or other licensee, the licensee must pay the returned premium or credit the insured's account within 15

days subsequent to payment of the statement or the due date of the statement, whichever is sooner.

If the returned premium is to be credited to the insured's account, the credit must be shown and applied to the next billing statement sent to the insured.

(B) If the credit results in a credit balance on the insured's account, the credit must be returned within 15 days unless the licensee receives written authorization from the insured to retain the credit balance and other developed credit balances for a period of not more than 12 months from the date of authorization. Such authorization must contain a notification to the insured that he has the right to withdraw the authorization in writing, and that the return premium will be refunded within 15 days of the authorization withdrawal. A copy of the authorization must be maintained in the licensee's file and a copy file must be given to the insured at the time the authorization is obtained. If the authorization is obtained, the licensee must send monthly written notification to the insured which clearly reflects a credit owed to the insured.

50 Illinois Code 3113 Exhibit A provides a consent and authorization form which reads as follows: "I, principal, hereby give licensee written permission and authorization to place on deposit with any federal or state chartered bank money which represents premium to be held or held on my behalf pursuant to 50 Illinois Administrative Code 3113 for interest or income-producing purposes. I further waive any right to ownership in any interest or revenue produced from this deposit. I agree and consent to the above." Signed by the principal as well as the licensee and then dated.

In this case, the defendants are charged with violations of various federal laws, including violations of the mail fraud, wire fraud and racketeering laws. The defendants are not charged in this case with any state crimes or violations of state regulations.

To find defendants guilty of the charged federal offenses, it is not enough to find that one or both of the defendants violated Illinois law or the Illinois Insurance Regulations. Your job is to decide whether the government has proven beyond a reasonable doubt every element of each federal offense charged in the indictment based on the instructions I give you. Even if you believe that the defendants violated Illinois law or Illinois Insurance Regulations, you should return a verdict of not guilty if you also believe that the government has not proven every element of the particular charged federal offense you are considering beyond a reasonable doubt.