

A Seductive Playground Indeed— The Federal Sentencing Guidelines Respond

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The internet: “a seductive playground for unscrupulous individuals bent on defrauding innocent victims.” *U.S. v. Perillo*, 255 F.3d 728 (9th Cir. 2001), cert. denied 534 U.S. 1034. At least that is how Judge Trott described it when writing for the majority in *U.S. v. Michael D. Perillo*. The majority explained that the ability to effectuate commerce between hundreds of millions of people makes the internet a valuable tool for both business and fraud. In apparently the first case to address the issue of the “mass marketing” enhancement under the federal sentencing guidelines, the Court found the facts of Michael Perillo’s internet fraud clearly illustrate his dichotomy.

Prior to the *Perillo* matter, in May of 1998, the United States Sentencing Commission submitted proposed sentencing enhancements designed to address some of the more common components of telemarketing fraud. One such proposal was a sentencing enhancement for individuals who

employ “mass marketing” techniques in telemarketing fraud. On June 23, 1998, Congress enacted the Telemarketing Fraud Prevention Act of 1998 which directed the United States Sentencing Commission to “provide an additional appropriate sentencing enhancement,” for offenses including those which employ “sophisticated means” or which “a large number of vulnerable victims” are affected by schemes to defraud. In Request for Public Comment BAC2210-40/2211-01, the Commission clearly stated, “[t]he mass-marketing amendment is intended to apply to persons who engage in a plan to victimize a large number of persons through a fraudulent telemarketing scheme.”

Underlying the enhancement are the federal sentencing guidelines which are allegedly designed to ensure uniformity in sentencing by limiting the court’s discretion to a certain guideline sentencing range. The range, found in the sentencing table, is the combined effect of the offense

level and the criminal history category. The guidelines provide a “base offense level” from which upward and downward departures, and adjustments are made. Ultimately, the “mass-marketing” enhancement found its way to Section 2F1.1(b)(3) of the federal sentencing guidelines and is now located in Section 2B1.1(b)(2)(A).

The “mass-marketing” adjustment builds on the offense level and loss enhancements for fraud and deceit offenses found in Section 2B1.1. Therein as the loss amount increases from less than \$5,000.00 to more than \$100,000,000.00, up to 26 levels are added to the “base offense level” of six. Section 2B1.1(b)(2)(A) provides for a two level enhancement for offenses involving “mass-marketing.” And, (b)(2)(B) enhances the penalty even further where the offenses involves 50 or more victims by increasing the level by four.

Note 3 to Section 2B1.1 defines “mass-marketing” to mean:

[A] plan, program, promotion, or cam-

campaign that is conducted through solicitation by telephone, mail, the Internet or other means to induce a large number of persons to (I) purchase goods or services; (II) participate in a contest or sweepstakes; or (III) invest for financial profit.

The note provides the example where a telemarketing campaign solicits a large number of individuals to purchase fraudulent insurance policies. Nearly the same note accompanied Section 2F1.1 which was applied in the *Pirello* matter.

In *Pirello*, Michael Pirello placed four internet advertisements on "Excite Classifieds" which offered the sale of sale personal computers. While Pirello had no intention of ever delivering the computers, three purchasers negotiated a purchase price with Pirello and delivered payment. Pirello received in excess of \$4,000.00 for the non-existent computers. Despite a nominal loss under the guidelines and over the objection of the defense, the sentencing court applied the two level enhancement for the use of "mass-marketing."

Apparently placing the telemarketing purpose of the enhancement aside, the reviewing court referred to the language of note three and found that posting such advertisements on the internet "clearly constitutes 'solicitation by ... the Internet ... to induce a large number of persons to [] purchase goods.'" (sic) The Court conclusively stated that "under the plain language of the interpretative commentary," such advertisements qualify.

But, as this case appears to be the first to interpret the enhancement, the reasoning of the dissent has value. The dissent focused on the note's use of "solicitation." The dissenting opinion reasoned that because "solicitation" requires "some sort of one-on-one importuning," a simple advertisement is insufficient; had the enhancement been designed for simple advertisements, the note's definition would have referenced other mass media such as television or billboards.

This dispute between the majority and dissent aside, an important practical problem is the probation officers are required to interpret the guidelines during preparation of the pre-sentence report. At the conclusion, counsel for both the defense and prosecution have an opportunity to object to the application, and the probation department

then has the option to revise the report. In a recent case defended by the author, the probation department ignored the telemarketing context and instead focused on the word "internet" and concluded that the enhancement should apply. Despite the lack of any advertising or marketing type activity, the probation department concluded that the use of a website as what could be characterized as a "virtual storefront" for distribution of illegal merchandise amounted to "mass-marketing." The defense argued the contrary and, fortunately, the trial court refused to apply the enhancement. Had the court agreed, the offense level would have increased by two; thereby, increasing the sentencing range from 12-18 months to 18-24 months.

The important practice point being that in light of this new technology to effectuate commerce, routine business crimes and frauds may now find this enhancement despite the lack of telemarketing or a meaningful effort to solicit to a larger number of persons. Moreover, many new businesses exist only in this virtual market place, and as such face the increased risk of the "mass-marketing" enhancement if

charges should ever be filed. Obviously, defense counsel need to recognize this possibility at the earliest possible stage.