

## **CLIENT ALERT**

TO: ALL PERLMAN & PERLMAN CLIENTS

FROM: PERLMAN & PERLMAN

DATE: MAY 6, 2003

RE: UNITED STATES SUPREME COURT'S MADIGAN DECISION

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### **Overview**

Yesterday, the United States Supreme Court decided *Illinois ex rel. Madigan, Attorney General of Illinois v. Telemarketing Associates, Inc., et al.* Many reports have already been published about this decision and the ramifications it may have for the operations of charitable organizations and professional fundraisers. We are issuing this client alert to provide you with our perspective on the meaning of this case and how it may or may not affect you in the future.

Overall, we are encouraged and pleased by the Court's decision because it has upheld and strengthened the most important aspects of a trilogy of prior Supreme Court cases (*Schaumburg, Munson and Riley*) which (i) carved out a Constitutional protection for charitable solicitations and (ii) rejected attempts by the states to place limits on the contractual arrangements between nonprofits and their professional fundraisers. While it is true that the United States Supreme Court reversed the Illinois Supreme Court, it did so only on the fraud question. The decision means that the Illinois Attorney General is permitted to pursue its fraud action against the defendants for certain misrepresentations they may have made to potential donors during their telephone conversations.

### **What Madigan Means for You**

For nonprofit organizations, the important point to take away from the *Madigan* case is that the United States Supreme Court, unanimously, reaffirmed the principles held in *Schaumburg, Munson and Riley*, that (i) charitable solicitations are protected by the First Amendment of the Constitution and (ii) the percentage of fundraising proceeds turned over to a charity may not alone be the basis to prove a fraud, because that percentage is not an accurate measure of the amount of funds used for a charitable purpose and (iii) not offering the fundraising percentage in a solicitation does not in and of itself constitute fraud. As Justice Scalia wrote in his concurring opinion, "since there is such a wide disparity in the legitimate expenses borne by charities, it is not possible to establish a maximum percentage that is reasonable. . . Today's judgment . . . rests upon a 'solid core' of misrepresentations . . . that go well beyond mere commitment of the collected funds to the charitable purpose."

For fundraisers, telemarketers in particular, the outcome of the *Madigan* case is not as positive. However, articles you may read in the general press indicating that this outcome is a severe setback for the telemarketing industry are greatly exaggerated. After this decision, as before it, there is no place for fraud in fundraising. Fraud occurs when a fundraiser purposely

obtains a pledge or contribution from a donor by the use of deception, or fails to correct a false impression which the fundraiser previously created or reinforced. Nothing in the *Madigan* decision changes that and *Madigan*, as the trilogy which came before it, reinforces the principal that it remains unconstitutional for state regulators to require a telemarketer to affirmatively disclose the percentage it has agreed to accept as its fee for fundraising.

### **Important Aspects of the Case**

In considering the positives and negatives resulting from the *Madigan* decision, it is important to understand the facts and the procedural posture of the case. In brief, this case was initially commenced in 1991 by the Illinois Attorney General when it filed a complaint against a small group of Illinois for-profit fundraising corporations and their owner (collectively, the "Telemarketers"). The complaint asserted that the Telemarketers engaged in fraud because their fundraising contracts with VietNow (the charitable beneficiary) provided that 85% percent of the donations received as a result of the telemarketing campaign would be paid to the Telemarketers and the remaining 15% would be distributed to VietNow. The Attorney General submitted with the complaint more than 40 affidavits of VietNow donors, some of which claimed that the Telemarketers had given them inaccurate information regarding how much of their donations would ultimately go towards funding VietNow's charitable programs.

The Telemarketers answered the complaint, denying the accusations. The Telemarketers thereafter made a motion to dismiss the case. The trial court granted the Telemarketers' motion and dismissed the case. The Attorney General appealed from that decision, but the appellate court upheld the dismissal on appeal. The Attorney General then appealed the appellate court's affirmance, but again the dismissal was affirmed, this time by the Illinois Supreme Court.

The Attorney General then petitioned the United States Supreme Court to reverse the dismissal of their case to enable the Attorney General to proceed in trying to prove that there was a fraud perpetrated on the donors by the Telemarketers. The Supreme Court reversed, which will now enable the Attorney General to try to prove its case against the Telemarketers. Proving that case will be no easy feat, as Illinois law requires the Attorney General to show that there was intentional wrongdoing and to prove fraud by the heightened standard of "clear and convincing evidence."

### **Contact Us**

Perlman & Perlman was involved in the preparation of a brief in this case, in support of the continuation of the *Schaumburg/Munson/Riley* principles. All of the attorneys at Perlman & Perlman have reviewed the *Madigan* decision and we have discussed it among ourselves and other professionals in the nonprofit community. If you have any questions, concerns or comments related to the *Madigan* decision, please contact us at (212) 889-0575.