

Attention Shoppers: Politicking in Aisle One?

BY ALAN NOCHUMSON

Special to the Legal

With Election Day fast approaching, political campaigns are increasing their efforts to distribute leaflets to potential voters. Since many people want to avoid spending their time brushing aside aggressive campaign workers, mall owners often restrict pamphleteering activities on mall premises.

Although the Federal Constitution may not protect freedom of speech rights in privately owned malls, some states have extended freedom of speech protections under their respective state constitutions. The states extending such protection have done so under the "public function" doctrine. Under this doctrine, the court determines whether the shopping mall is the functional equivalent of a downtown business district. If so, then the court may find the state-action requirement satisfied and the political speech protected under the state constitution.

MALL OWNERS

In the seminal case of *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Insurance Company*, the Pennsylvania Supreme Court considered whether under the Pennsylvania Constitution a mall owner could prohibit an individual from soliciting signatures to qualify a candidate for an election ballot. The mall had a strict policy against any political solicitation.

The court first rejected the contention that the shopping mall was a public forum. The court concluded that the shopping mall simply was not the legal equivalent of a town. In reaching its conclusion, the court pointed out that although a shopping mall may duplicate some of the commercial functions of a town, it does not provide housing or public services such as roads, education or transportation.



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Notably, the court's decision did not entirely close the door on future challenges to mall regulations against political solicitations. Indeed, the court noted that constitutional restraints may apply to malls if a symbiotic relationship or sufficient nexus is proven to exist between the mall and government. In this specific case, however, the pamphleteers failed to establish the existence of such a relationship or nexus. The court, accordingly, concluded the free speech protections contained in the Pennsylvania Constitution were inapplicable.

Unlike *Western Pennsylvania*, the Colorado Supreme Court in *Block v. Westminster Mall Company* found the existence of state action based on the symbiotic relationship between the mall owner and several governmental entities. In *Block*, the court concluded the following constituted governmental involvement in the operation of the mall: \$2 million worth of improvements by the city government to adjacent streets and drainage systems; placement of a police substation in the mall; presence of recruiters for the armed services; and voter registration drives by the county government.

Thus, if the individual attempting to gain access to the mall can establish a symbiotic relationship or a sufficient nexus between the mall and the government, a Pennsylvania court may very well limit the mall owner's discretion in restricting the right of persons

to hand out fliers and solicit signatures in support of a candidate's nomination for public office on mall premises.

NEW JERSEY REGULATIONS

Although no Pennsylvania court has placed constitutional limits on privately owned malls, mall owners in New Jersey are not quite so fortunate. In *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corporation*, the New Jersey Supreme

Court held its state constitution protected free speech activities in privately owned shopping malls. In so holding, the court focused its inquiry on the following factors: the normal uses of the property, the extent of the invitation and the purpose of the free speech in relation to the property's use.

Applying the factors to the case at hand, the court concluded the mall owners' attempts to restrict free speech on the mall premises were

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Home Finance of America 800-358-5626	5.25/0	4.75/0	2.88/0	5.63/0	No
Madison Mortgage Services 888-897-0200	5.38/0	4.88/0	3.75/0	5.75/0	No
Madison First Financial 888-516-4666	5.25/0	4.63/0	N/A	5.75/0	No
Turnstone Mortgage 800-757-7514	5.50/0	4.88/0	3.00/0	5.75/0	No
East Coast Financial 800-353-9440	5.75/0	5.00/0	N/A	6.00/0	No
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subject to the protections imposed by the state constitution. The court observed that the mall owners had effectively transformed their malls into a mirror image of a downtown business district. The court noted, “[W]ithin and without the enclosures are not only stores of every kind and size, but large open spaces available to the public and suitable for numerous uses. There is space to roam, to sit down and to talk.”

Moreover, the court pointed out that each of the malls permitted and encouraged non-retail, non-commercial activities on the premises. The mall owners, for example, authorized issue-oriented speech at community desks and booths as well as voter registration drives and — in one mall — leased space to a governmental entity. The court also found that leafleting, the free speech activity at issue, was compatible with the use of the mall, highlighting the fact that such political activity has been associated with downtown streets for centuries.

The overall effect of the court’s decision in *New Jersey Coalition*, however, may be limited to large shopping malls. In *New Jersey Coalition*, the New Jersey Supreme Court explicitly refused to extend the scope of its holding beyond regional shopping centers, which attract large groups of people.

In California, for example, although the courts have found constitutional free-speech protections present in large shopping malls, they have consistently refused to recognize a free speech right to those seeking to engage in expressive activities on private sidewalks or private parking lots in stand-alone super-

markets. In *Albertson’s v. Young*, a California appellate court reasoned that a supermarket and its private surroundings could not be equated with a public forum because there were no enclosed walkways, plazas, courtyards, picnic areas, gardens or other areas that might invite the public to congregate. Instead, the California court highlighted the fact that individuals came to the supermarket for the single purpose of buying groceries.

Based on the California cases, New Jersey courts may not protect free speech rights in smaller privately owned commercial establishments that do not assume the characteristics commonly associated with a town center. The more a mall becomes identified as part of the town center, however, the greater difficulty the mall owner likely will confront in enforcing limitations on speech.

PERMISSIBLE MALL REGULATIONS

Even if states protect free speech in privately owned malls, mall owners may still place content-neutral reasonable time, place and manner restrictions on free speech activities. Indeed, most shopping malls contain written rules and regulations prescribing the activities and conduct allowed on the mall premises.

In New Jersey, for example, the reasonableness of such regulations is judged on a sliding scale. The more a property owner opens up the property for use by the general public, the more the property owner’s rights become trumped by state constitutional rights of others. In striking the balance, New Jersey courts consider the nature of the affected constitutional right, the extent to which the mall’s restriction intrudes upon it, and the mall owner’s need for the restriction. The more important the constitutional right sought to be

exercised, the greater the burden upon the mall owner to justify interfering with that right. The means chosen by the mall owner should be designed to achieve the mall’s legitimate purpose, but preserving the expressive rights of the pamphleteers.

Courts generally allow mall owners a reasonable period of time to investigate and determine whether to permit free speech activities in the mall. The courts understand that mall owners are entitled to know who, what, where, when, how and why the free speech activity will be conducted on the mall premises. In a recent decision, a California appellate court stated that “[t]he amount of time reasonably necessary to evaluate each application will vary with such circumstances as the nature of the activity, the number of persons involved, the subject or issue involved, the reputation of the person or entity involved for conducting the activities in a safe and orderly manner, and the past experience of the mall owner with the person or entity, if any.” Mall owners, however, should not prolong the approval process unnecessarily.

Mall regulations restricting the time and place of the political activity also have come under court scrutiny. Since there is no constitutional right requiring mall owners to grant access to the entire shopping mall to those seeking to communicate with mall patrons, courts generally look at whether the pamphleteers were given the opportunity to communicate with a substantial portion of the patrons. Limiting political activities to the mall’s food court, for example, may be considered constitutionally permissible because the mall owner could reasonably argue that a substantial portion of the patrons congregate at that location.

Courts also have reviewed the constitutionality of mall regulations conferring discretion

upon mall owners to condition access of the mall premises upon the purchase of special insurance protecting against possible loss or injury caused by their activities. In *Green Party of New Jersey v. Hartz Mountain Industries Inc.*, for example, members of the Green Party sought ballot signatures on its nominating petition for its gubernatorial candidate. The Green Party intended to use fliers while collecting signatures at the shopping mall. The mall regulations required the Green Party, as a non-profit organization, to obtain a \$1 million insurance policy. The Green Party challenged the constitutionality of this requirement.

The New Jersey Supreme Court determined the mall owner failed to provide objective reasons for refusing access to the mall premises absent the insurance. The court highlighted the absence of any showing the political activity actually imposed an economic burden on the mall such that the Green Party should be required to pay a fairly allocated fee objectively related to the risk it might create.

LESSONS LEARNED

As more people move to the suburbs, shopping malls have become a primary place to meet large groups of people face to face. Not surprisingly, the malls are becoming new grounds for “grass-roots” politics. The ability of a mall owner to protect patrons from annoyance and harassment may sometimes be forced to yield in the face of constitutional considerations. Unlike New Jersey and other states recognizing free speech rights in privately owned shopping malls, Pennsylvania mall owners presently have the ability to limit political activities on mall premises.