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## CIVIL RIGHTS

### Handling Protesters/Solicitors at N.J. Shopping Malls

By Cary S. Kvitka and Thomas S. Onder

Your client calls. Their shopping mall parking lot is plastered with fliers from Tea-Party, Green-Peace and NRA groups. The fliers state that each organization plans to solicit or protest this weekend at the mall. Your client asks: *Can we stop these solicitations and protests?*

In N.J., courts grant wide latitude to gather, speak and pass out leaflets about noncommercial issues at shopping malls. A mall owner's right to curtail solicitations and protests is very limited, but there are certain proactive steps to manage the situation. Following is a brief overview of some important case law regarding protesters/solicitors at shopping malls in N.J.

#### N.J. Constitution More Expansive on Free Speech than U.S. Constitution

The federal constitutional right to free speech only protects against unreasonably restrictive or oppressive conduct by the government or its agents. However, the right to free speech under the N.J. Constitution guards against unreasonably restrictive or oppressive

*Kvitka and Onder are attorneys with Stark & Stark, P.C., in Lawrenceville. They represent a number of local and national shopping mall owners throughout N.J.*

conduct of *private property owners*.

Article 1, Par. 18, of the N.J. Constitution provides: "The People have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances."

The N.J. Supreme Court has interpreted that provision to guard against "unreasonably restrictive or oppressive conduct of private parties that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property." *Green Party of N.J. v. Hartz Mountain Indus.*, 164 N.J. 127, 142, quoting *State v. Schmid*, 84 N.J. 535, 560 (1980).

#### Quasi-Public Status of Shopping Malls

A traditional free-speech analysis under the U.S. Constitution includes the analysis of whether speech is abridged in a "public forum," "nonpublic forum" or "private forum." It is significantly harder to enforce a regulation that affects free speech in a public forum (i.e., streets, sidewalks and parks) than it is in a private forum (i.e., a home). Under federal law, shopping malls are considered a private forum because they are privately owned. Therefore, under federal law, shopping mall owners generally have the right to limit speech ac-

tivities in those locations. *Hudgens v. NLRB*, 424 U.S. 507 (1976).

In N.J., privately owned shopping malls have quasi-public status, which provides greater protection for protesters and solicitors. The N.J. Supreme Court specifically recognized that there is no general right to free speech in privately owned shopping malls under the federal Constitution. However, it has nonetheless conferred quasi-public status upon malls under the state Constitution.

The Court noted that N.J. shopping malls have effectively taken over the former downtown business districts, thus attaining an important status as a venue for the exchange of social ideals: "Although the ultimate purpose of these shopping centers is commercial, their normal use is all-embracing, almost without limit, projecting a community image, serving as their own communities, encompassing practically all aspects of a downtown business district, including expressive uses and community events." *N.J. Coalition Against War in the Middle E. v. J.M.B. Realty Corp.*, 138 N.J. 326, 333 (1994).

In *J.M.B. Realty Corp.*, the Court conferred quasi-public status upon shopping malls by holding: "[T]he constitutional right of free speech cannot be determined by title to property alone. Thus, where private ownership of property that is the functional counterpart of the downtown business district has effectively monopolized significant opportunities for free speech, the owners cannot eradicate those opportunities by prohibiting it."

As a result, the curtailment of non-commercial speech by a N.J. mall owner

is evaluated far more onerously than any standards that would be applied under federal law.

#### Leafletting

In the same case, the Court held that the N.J. Constitution requires owners of “regional shopping centers” to permit the distribution of leaflets about societal issues on those properties.

The Court defined a *regional shopping center* as:

one that provides shopping goods . . . in full depth and variety. It is built around [a] full-line department store, with a minimum GLA [gross leasable area] of 100,000 square feet . . . . In theory a regional center has a GLA [ranging] from 300,000 to more than 1,000,000 square feet.

The Court defined a *community shopping center* as:

smaller than a regional shopping center and lack[ing] the variety of merchandise available at a regional mall. . . . one that includes a wide range of facilities for the sale of soft lines (apparel) and hard lines (hardware, appliances, etc.). . . . It is built around a junior department store, variety store or discount department store . . . . The typical size of a community center [ranges] from 100,000 to 300,000 square feet.

While the holding was limited to require owners of “regional shopping centers” to permit leafletting, the Court also found the “community shopping center” at issue was subject to the same holding. The Court also noted:

[T]he record before us is insufficient to satisfy us that it should apply to *all* community shopping centers . . . and that “more information is necessary before that determination can be made.” It would therefore logically follow that a similar lawsuit versus the owner of a “community shop-

ping center” could have the exact same result.

#### Time, Place and Manner Restrictions

N.J. Courts will allow a mall owner to impose some “time, place and manner restrictions” regarding noncommercial speech. Such restrictions cannot address the subject matter of the speech, but apply equally to all viewpoints and limit the time, place or manner in which such speech is made.

To determine whether such restrictions at malls should be upheld, Courts review the following four factors: (1) nature, purposes and primary use of such private property; (2) extent and nature of the public’s invitation to use that property; (3) purpose of the expressional activity undertaken upon such property; and (4) balancing of expressional rights and private property interests.

The first three factors were developed in *State of N.J. v. Schmid*, 84 N.J. 535 (1980), where the Supreme Court struck down a regulation adopted by Princeton University prohibiting distributing political literature on a private campus. The fourth factor was added by the Court in *Green Party of N.J. v. Hartz Mountain Indus., Inc.*, 164 N.J. 127 (2000).

In that case, the plaintiff sought access to a mall to gather signatures on behalf of a political candidate. The defendant mall owner imposed the following restrictions, before it would allow the plaintiff to solicit: acquire a \$1 million general insurance policy for those activities (the cost of which was only \$665); sign a license agreement to indemnify and hold harmless the defendant from any accident on the premises, or for any action or omission by the plaintiff; and only conduct the activities on one day per year.

The Court applied the four factors listed above and struck down all the restrictions as unconstitutionally abridging the plaintiff’s right to free speech.

For the first three factors, the Court held that: protesting at malls constitutes “normal use”; malls by their nature invite everyone for all purposes; “leafletting continues to be, as it has for generations, one of the few effective means of actually meeting a large number of fellow citizens”; the risk of harm from leafletters is minimal; and it is unfair to charge

leafletters for their expressive activities.

Having made those findings as to the first three factors, the Court ultimately determined that the expressional rights of the plaintiff outweighed the defendant’s commercial interests and struck down the restrictions.

#### Recommendations to Your Mall Owner

Back to the question posed earlier: *Can we stop these solicitations and protests?*

Generally, mall owners may impose restrictions against commercial solicitations (such as prohibiting outside advertisers from placing materials on cars parked in the lots), and restrictions on the time, place and manner of noncommercial speech activities.

However, any commercial restriction should probably be less onerous than the restrictions noted in the cases cited. Further, as a rule of thumb, a mall owner should not adopt any such restrictions unless it can justify that each requirement is necessary to protect the mall owner’s commercial interests.

By way of example, the Court in *Hartz Mountain* invalidated the \$1 million insurance requirement partly because the defendant did not submit adequate proof of how much insurance would actually be necessary. Therefore, if your client chooses to adopt a similar requirement, they may want to first obtain an actuarial analysis and only require the protester to obtain insurance coverage in the amount that the analysis requires.

On the “time, place and manner” restrictions, mall owners should know that the general standard of balancing the commercial interest of the mall with the constitutionally protected interest of public expression, will still open them to liability whether they enforce the same themselves or through a private security force. Further, local police departments probably won’t enforce the mall owner’s restrictions because they are governmental agents.

Still, it does not hurt to call the police if a mall owner is concerned with the safety of its patrons. Unruly protesters, blockages in pedestrian or automobile traffic, harassing or noisy behavior with megaphones are all valid reasons to call the police. ■