

Recent Developments in Protection of Free Speech Activities at Retail Centers

By Steven P. Heller, Esq.
and M. Rosie Rees, Esq.

In 1980, in *Robins v. Pruneyard Shopping Center*, the California Supreme Court held that the California Constitution protects speech and petitioning, reasonably exercised, in privately owned shopping centers because the modern shopping center is a “public forum.” Large retail malls, it reasoned, are the modern-day equivalent of town squares, and owners of such facilities cannot both invite the public and exclude those who wish to communicate with them.

The *Pruneyard* decision, however, does not stand for the blanket proposition that every large retail establishment must permit unregulated expressive activity on its property. The *Pruneyard* court itself limited the obligations of shopping center owners, and subsequent California cases have further trimmed back the *Pruneyard* holding.

The *Pruneyard* court specified that owners of “modest real estate establishments” that were not performing the “quasi-town square” function would not need to permit such expressive activity. In addition, it made clear that property owners may reasonably regulate expressive activity as to time, place, and manner. Subsequent decisions have further defined and narrowed the original *Pruneyard* ruling.

Limiting Free Speech Rights

In 1999, in *Trader Joe’s Co. v. Progressive Campaigns, Inc.*, a California appellate court held that an 11,000 square foot Trader Joe’s store did not constitute a public forum that required Trader Joe’s to permit solicitation of signatures from customers and employees without Trade Joe’s consent. This Trader Joe’s was a stand-alone structure that was not part of a shopping center and did not share property with any other retailer. The store had a parking lot containing 68 spaces for the exclusive use of Trader Joe’s patrons and employees.

Using the balancing test cited in *Pruneyard*, the appellate court held that Trader Joe’s constitutionally protected property interests outweighed the public’s interest in using the grocery store as a forum for free speech and petitioning activity. The court determined that Trader Joe’s invitation to the public to visit its store was more limited than the invitation made by a large, regional shopping center. Trader Joe’s invited people to come and shop for food and food-related items, not to meet friends, to eat, to rest or to be entertained, or to congregate. It contained no plazas, walkways or central courtyard where patrons could congregate and spend time together. Further, because the store

was a stand-alone structure, there could be no contention that its relationship to other establishments transformed it into a public forum. The court determined that Trader Joe’s was not a public meeting place, and society had no special interest in using it as such.

Similarly, in *Costco Cos. v. Gallant (2002)*, the California appellate court determined that the public was invited to Costco’s stand-alone stores solely for the purpose of purchasing goods and services and, unlike customers of a large regional shopping center, Costco customers did not come to its stores with the expectation they will meet friends, be entertained, dine or congregate. Accordingly, because Costco’s stand-alone stores were not essential forums for the general exercise of free speech, the court upheld a prohibition on expressive activity at Costco’s stand-alone stores.

This public-purposes approach was made even more clear in *Albertson’s, Inc.*

Continued



Steven P. Heller is a partner at Gilchrist & Rutter in Santa Monica, Calif. His practice focuses on commercial real estate and business transactions. Contact him at sheller@gilchristutter.com.

v. Young (2003), in which the court held that the walkway at the entrance to Albertson's grocery store was not a public forum requiring Albertson's to permit expressive activity, even though Albertson's grocery store contained 44,237 square feet, had a large parking lot in front of its store, and was part of a shopping center that contained 10 retail stores (including a 37,000 square foot hardware store), five restaurants and five service businesses (including a travel agency, photo store, video library and mail box rental). The court's reasoning was that, despite the store's size and setting in a large shopping center, the store was a single structure, single-use grocery store that contained no plazas, walkways, or courtyards for congregating. Further, the physical layout of the center was not under unified ownership and had no common areas that would invite the public to meet, congregate, or engage in other activities typical of a public forum that would distinguish the Albertson's store from an ordinary stand-alone grocery store.

Reasonable Regulation of Expressive Activity

Even where privately-owned retail establishments may be required to permit expressive activity, California courts have also upheld reasonable regulations for limiting the time, place and manner of that activity.

In the *Costco* case, the court determined that Costco could impose the following

regulations at its stores that share a parking lot with other retailers: (a) no expressive activities on 34 of Costco's busiest days during the year, (b) no individual or organization may use Costco property for expressive activity on more than five days within any 30 day period, (c) no individual or group may use Costco facilities on consecutive weekends, (d) expressive activities may occur only within designated areas in front of Costco stores, (e) only three participants may engage in expressive activity at any one time, after identifying themselves, and (f) individuals or groups must complete an application at least three days in advance of any expressive activity.

The court found that these regulations were narrowly tailored to protect Costco's substantial interests in the smooth operation of its stores. Because the 34-day ban was content neutral, such days were during times when Costco had legitimate reasons to wish to avoid disruption, and more than 300 other days remained in the calendar year in which expressive activity was permitted, the court was satisfied the requirements were a valid regulation of time, place and manner. In addition, the court permitted Costco to enforce its 5 days out of 30 restriction so long as such enforcement was performed on a uniform basis or on the basis of some objective, content-neutral standards.

Likewise, in *Lushbaugh v. Home Depot* (2003) the California appellate court

upheld Home Depot's written policy guidelines allowing non-commercial speech activities in a designated area, on a first-come, first-served basis and upon written application to store management, concluding that such regulations complied with any duty it may have had to provide public access by enforcing reasonable time, place and manner rules.

The emerging trend from these cases is that the crucial element in balancing private property rights against free speech rights is the nature of the premises and the extent to which they have been opened up to the public for congregation and other public purposes, as opposed to strictly directed commercial purposes. In each of these cases, the retailers did not create an environment that encouraged the public to gather for any purpose other than to purchase goods. However, these cases leave open the question as to how the courts might treat other retail settings that do invite the public to congregate for purposes other than just to buy merchandise or services, as, for example, a large bookstore that (along with its bookselling) invites people to gather and meet in, and even offers performance space in, its cafe.

Steven P. Heller, Esq. is a partner at Gilchrist & Rutter in Santa Monica, California.

M. Rosie Rees, Esq. is a partner at Pircher, Nichols & Meeks in Los Angeles, California.

This article was originally published in California Centers Magazine, No. 61.