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Who is Not Affected:

- "Big-Box/Power" Center Managers and Owners
- Stand-Alone Retail Managers and Owners
- "Big-Box" and Stand-Alone Retail Tenants



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Legal Alert

California Supreme Court Expands State Constitutional Protection of Free Speech

On December 24, 2007, by a narrow 4-to-3 decision, the California Supreme Court handed down *Fashion Valley Mall, LLC v. National Labor Relations Board*, 42 Cal. 4th 850 (Cal. 2007), wherein the Court held that the right to free speech under the California Constitution includes the right of protestors to encourage patrons inside a private shopping center to boycott specific businesses located within the shopping center.

Information in this Alert Directly Affects:

- Shopping Center Owners
- Shopping Center Managers
- Shopping Center Tenants

What Happened?

In *Fashion Valley*, Fashion Valley Mall ("Mall") implemented rules that, among other things, required individuals to obtain permits from the Mall prior to engaging in protests or other expressive activity on Mall property and expressly prohibited protestors from conduct urging boycotts of Mall tenants "in any manner." The Mall argued that the "no-boycott" rule was a reasonable time, place and manner restriction that was necessary to prevent interference with the normal business operations of the Mall, including the Mall's legitimate interest in maximizing the profits of its merchants and, therefore, was permitted by the California Constitution.

The California Supreme Court rejected the Mall's assertion and affirmed the lower court's decision that while the Mall's permit requirement passed constitutional muster, the "no-boycott" rule did not because the "Mall's purpose to maximize the profits of its merchants is not compelling compared to the [protestors'] right to free expression." As a result, the majority in *Fashion Valley* slightly extended the constitutional protection of free speech in California by creating the right of individuals to urge primary or secondary boycotts of stores in privately owned shopping malls.

How Can A Shopping Center Owner Protect Its Property?

In the nearly thirty years and dozens of lawsuits since the landmark decision by the United States Supreme Court in *Robins v. Pruneyard Shopping Center*, 447 U.S. 74 (1980), involving free speech rights on private shopping centers in California, shopping center owners and managers have struggled to comply with the Court's mandate to permit free speech in common areas, while at the same time

protecting their interests through the enforcement of reasonable time, place and manner regulations. Although *Fashion Valley* makes it clear that such owners and managers may not implement outright bans on the boycotting of shopping center tenants, other rules that are drafted for the purpose of protecting the commercial interests of shopping center owners are still likely to be enforceable if such guidelines are specific, objectively drafted and narrowly tailored so as to not unduly or unreasonably restrict free speech or violate the "content-neutral" limitation.

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Acceptable criteria include:

- Require a content-neutral application from people wishing to use the common areas of the shopping center for non-commercial purposes;
- Restrict the timing of activity, including imposing consecutive day limitations, particular shopping center hours limitations, and prohibiting activities during "peak traffic days;"
- Designate an Approved Area and make the Approved Area available to the applicant on a "first-come first-served basis;"
- Impose reasonable limitations on the number of people participating and require the applicant to identify all individuals who will be participating in the activity;
- Implement a reasonable sign program, which may include the prohibition of obscenities, pornography, grisly or gruesome displays or highly inflammatory slogans likely to provoke a disturbance;
- Impose reasonable restrictions on light and noise levels, including prohibitions on yelling or "hawking", lights, loudspeakers; displays, visual aids, device having moving parts which might expose the public or the shopping center's businesses to danger or injury, or which threatens the health and safety of those present in the shopping center;
- Ban all sales and solicitation by non-tenants of material and/or services for which money is received or credit is extended (including, books, pamphlets, tickets, and fund raising items such as Girl Scout cookies);
- Reserve a right to place a sign on the applicant's table, or within the applicant's Approved Area, stating the shopping center is not affiliated with the applicant's activity;
- Reserve the right to warn and then terminate or cancel a non-compliant applicant's rights on the actual day of the activity if necessary;
- In appropriate cases, require proof of insurance in form and substance reasonably acceptable to the ownership of the shopping center;
- Require the applicant to comply with the reasonable requests of shopping center management and security; and
- Retain the continuing right to alter, modify, or amend the rules in order to adapt to new or changing circumstances.

The Final Word...

The decision in *Fashion Valley* is somewhat troubling because it appears to contradict prior case law, wherein the Court stated that *reasonable* regulations "assure that [expressive] activities do not interfere with normal business operations." If advocating a boycott of specific stores within a private shopping mall is not interfering with "normal business operations," it begs the obvious question—what is? However, under *Fashion Valley*, shopping center owners and managers may still impose regulations regarding non-commercial expressive activity on their private property in order to control those activities, but such owners and managers should understand how this case limits the extent to which they may exercise such control.

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For additional information on acceptable criteria, please visit the link below.



[Shopping Malls—The "Not-So-Private" Private Property \(Full Article\)](#)

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