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OPINION

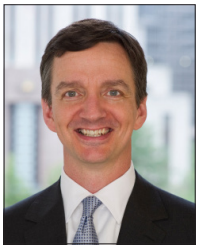
GLOVSKY V. ROCHE BROS.

SJC Extends Constitutional Protection For Signature Collection To Private Property

Decision May Have Expansive Ramifications For Property Owners

BY MICHAEL T. SULLIVAN
SPECIAL TO BANKER & TRADESMAN

In the recent case of *Glovsky v. Roche Brothers Supermarkets*, the Massachusetts Supreme Judicial Court considered whether the state constitution entitles political candidates to solicit nomination signatures outside a stand-alone supermarket on private property. Previously, in the case of *Batchelder v. Allied Stores International*, the SJC held that signatures may be obtained in the common area of a large shopping mall, but only unobtrusively and subject to reasonable restrictions imposed by the mall owner, because such areas replicate the "downtown" public areas where signatures may have been obtained in days of yore. In a 6-1 decision, the *Glovsky* court extended *Batchelder* to the supermarket context, creating future dilemmas for the owners of these – and potentially other – properties.


MICHAEL SULLIVAN

After deciding to run for Governor's Council, Glovsky visited Roche Bros. in Westwood, seeking to obtain the signatures necessary to get on the ballot. After informing the staff that he would be soliciting signatures outside the store's entrance, Glovsky was told that Roche Bros. had a policy against such activity. Glovsky went on his way, but he later sued Roche Bros. in Superior Court, alleging that his rights under the state's constitution and Civil Rights Act had been violated. The trial court dismissed his complaint, finding no violation of these rights.

On appeal, the SJC found that Roche Bros. did not violate the Civil Rights Act, because no "threats, intimidation or coercion" had occurred. But the court did find that Glovsky's *constitutional* rights may have been violated, while declining to reinstate his complaint because the election had come and gone. (Glovsky obtained the necessary signatures, but lost the election.) The SJC disagreed with Roche Bros.' argument that Glovsky had no right to obtain signatures on any private property except the common area of a large shopping mall or another "functional equivalent" of yesterday's downtown area: "Functional equivalence to a traditional public forum is not the test for determining whether [the constitution] protects signature solicitation on private property."

Rather, the court found, functional equivalence is one of many factors in a "balancing test" that also considers the nature and extent of other public activities at the property; the nature and extent of the services offered at the property; the prominence and popularity of the property; whether the candidate would have a good chance of obtaining his signatures elsewhere; and whether the solicitation unduly would burden the property owner. For instance, the SJC found it compelling that the property in question allegedly housed the only supermarket in Westwood, as well as a bakery, a bank, a florist and a restaurant.

Justice Robert J. Cordy vigorously dissented, noting the differences between the common area of a large shopping mall, which resembles the old "Main Street," and the entrance to a supermarket, which does not. He warned that by rejecting the "functional equivalence" test invited by Roche Bros. and adopted in other jurisdictions, the court was "vastly expanding the realm of private properties" on which solicitations may be conducted and creating "a burdensome and unnavigable standard for property owners." He expressed particular concern that, if property owners were to misjudge the court's balancing test, and reasonably but wrongly restrict solicitations, they could be held liable for money damages

under the Civil Rights Act.

The true impact of the decision remains to be seen, because the court found merely that Glovsky's complaint should not have been dismissed at the outset; that his constitutional rights "plausibly" may have been violated; and that his dispute with Roche Bros. warranted deeper factual exploration. But this is the very problem noted by Cordy. Before, there was a fairly bright-line rule covering large shopping malls. Now, with the SJC inclined to extend the rule, on a case-by-case basis, not only to prominent supermarkets, but perhaps also to other locations (e.g., Fenway Park or a small town's only gas station), the road is significantly more potholed.

As suggested by Cordy, the owners of any potentially affected properties would be well-advised to play it safe, assume they fall within the new protections, and impose careful solicitation restrictions that hopefully would be deemed reasonable in a later court proceeding. ■

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