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Battle in protection for labor picketing continues

Local attorneys analyze latest statutes

By **SYDNIE MOORE**
 Special to *The Daily Transcript*

The right to picket has played a key role in the lives of many California workers over the years, but the legal battle over picketing rights in this state continues.

Fueling the ongoing controversy, a recent ruling by the California Courts of Appeal for the Fifth Appellate District declared two state statutes protecting labor picketing on private property unconstitutional and in violation of free speech protections.

The ruling is the second appeals court decision to hold that California Code of Civil Procedure Sec. 527.3 — known as the Moscone Act — and Labor Code Sec. 1138.1 are not constitutional. Currently, the Moscone Act states that California courts may not issue a restraining order or injunction prohibiting labor picketing — even if picketing occurs on private property.

The current case, *Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8*, dates back to initial attempts by Ralphs in 2008 to restrict union activities outside its Foods Co, a non-union warehouse store in Fresno.

On January 27 of this year, attorneys for Ralphs secured a reversal of a lower court ruling that denied Ralphs' motion for a preliminary injunction against the union.

San Diego attorneys have disparate viewpoints on the ramifications of this reversal and its potential impact on local business.

According to Jay Rosenlieb, a partner with **Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, LLP**, which has offices in Bakersfield, Fresno and San Diego, trial courts and law enforcement agencies have historically been uncomfortable with the task of applying special "free speech rules" that the state law protecting labor activity created.

"Unless there was 'blood on the floor,' the statute made it very difficult for either side to obtain a restraining order for disruptive conduct by the other," Rosenlieb said.



Photo: Andrew T. Malana/Bloomberg News

In this file photo, shoppers coming out of an Albertsons' grocery store in Chula Vista walk past striking United Food and Commercial Workers Union members in 2003. The union was recently involved with a battle against Ralphs Grocery Company regarding protection for labor picketing, which the California Courts of Appeal ruled is unconstitutional.

The decision by the appeals court in the Ralphs case could change the playing field. David Monks, a partner at **Fisher & Phillips LLP**, explains that the ruling, if upheld, will allow supermarkets and other businesses in smaller shopping centers to seek and obtain injunctions against picketing activity with which they disagree.

"The question remains whether it will impact businesses like hospitals and owners of office buildings, and at construction sites, locations where in recent years workers have often been picketing and/or striking to protest what they perceived

as unfair working conditions," Monks said. "Arguably, privately owned hospitals and office buildings are more similar to Ralphs than they are to large malls."

This is the second appellate court decision within the past year to reach this conclusion. Last September, the California Supreme Court agreed to review an earlier decision from the Third Appellate District that invalidated the two statutes — a case that also involved Ralphs and the same union.

"Not surprisingly, the state

See **Picketing** on 2



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Encryption — Picketing

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(databanks) because it takes up space,” he added.

Roth, of Littler Mendelson, said it’s not a bad idea for employers to be proactive and offer to pay for a credit monitoring subscription for employees, which would alert them if someone tries to use their credit information.

He also said it’s also important to clean hard drives of extraneous private information, much like using a paper shredder to dispose of documents containing personal information that’s no longer needed.

“It’s important to have written policy,” Roth added, “saying this is how we treat private and secure data, and make people aware of it.”

Serwin said organizational training is key, as well, to prevent future breaches and show the FTC that an effort is being made to protect private data.

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Supreme Court has just granted review of the decision by the Fifth Appellate District Court of Appeal and will hold that case pending the court’s decision in the earlier ruling by the Third Appellate District,” Monks said. “The Court of Appeal rulings are no longer authoritative, so the statutes remain valid for now, at least until the California Supreme Court issues its ruling.”

According to Monks, the majority focused on the fact that the statutes gave protection to a particular type of speech – speech involving labor disputes, and wanted to strike down the laws because they allowed labor picketing – and no other type of picketing – on private property.

The union contended the statutes were lawful because they did not prohibit constitutionally protected speech in any way (that is, they did not “burden” anyone’s right of free speech, the usual focus of free-speech challenges). But the majority saw the issue differently: It found that the state improperly established a priority, or preference, for certain speech – labor picketing – based on its content.

George Howard, partner at the San Diego office of **Jones Day**, believes that content discrimination is a strong argument for the employers.

“The recent rulings agree you can’t elevate union speech over others. Can unions have more protection than, say, animal rights activists? This is the key question,” Howard said. “These statutes don’t exempt

anyone but union picketers – and essentially say union speech is better and should be protected – which we agree is unconstitutional.”

Josh Gruenberg, an attorney who represents employees, said the decision “fails to consider hallmark rulings in area.”

As an example, he cited the Pruneyard decision (*Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899 (1979)), which has protected free speech for more than 30 years, and requires the owner of a shopping center to permit picketing and other forms of expressive activity in the common areas of the facility.

Because of the Pruneyard decision, in California shopping malls are typically considered public forums. “Today’s shopping malls, although they are technically on private property, are really the equivalent of the Main Streets of the past,” Gruenberg said. “If you are a shopping center, you have to subject yourself to ordinary free speech.”

Monks noted that many grocery stores are stand-alone or situated in smaller malls. No such free-speech rights are constitutionally protected on “stand-alone” stores and stores located in small shopping centers – as grocery stores often are – and herein lies the controversy.

The prevailing issue, Rosenlieb said, is “where does the public square end and private property begin?”

Moore is a San Diego-based freelance writer.

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