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Supreme Court's *Oneida* Decision Holds State Law Favoring Public Sector Interests at the Expense of Private Commerce Is Constitutional; Kentucky Municipal Bond Case Remains Unresolved

The U.S. Supreme Court today released its decision in *United Haulers v. Oneida-Herkimer Solid Waste Management Authority*. As described in our March 22, 2007 advisory, the Court's decision on the pending petition by the State of Kentucky for review by the Court of the closely watched case of *Davis v. Kentucky Dep't of Revenue of the Finance and Admin. Cabinet*, 97 S.W.3d 557 (2006) has been deferred pending the *Oneida* decision. One can now expect the Court to act soon on the *Davis v. Kentucky* certiorari petition, and we will provide more extensive analysis when the Court makes that decision. In the meantime, a few observations about the *Oneida* decision:

- The *Oneida* case holds that flow control ordinances that favor a public entity engaged in a traditional governmental activity (waste disposal) but do not discriminate among private entities do not "discriminate against interstate commerce" for purposes of the dormant Commerce Clause. However, no single rationale for the result mustered a majority of the justices. A plurality of the justices (Breyer, Souter, Ginsburg and Scalia) rooted their opinion on the proposition that a law that does not favor particular private-sector enterprises is both nondiscriminatory and outside the scope of the dormant Commerce Clause. Chief Justice Roberts did not exempt such laws from Commerce Clause scrutiny entirely, but agreed that the flow control ordinance was nondiscriminatory and survived a more relaxed level of scrutiny (the so-called *Pike*

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balancing test) applicable to dormant Commerce Clause review of nondiscriminatory statutes. Justice Thomas concurred in the result on the basis that he would discard the Court's entire dormant Commerce Clause jurisprudence. Three Justices (Alito, Stevens and Kennedy) dissented, indicating that they saw no difference for dormant Commerce Clause purposes between state laws discriminating in favor of public sector entities and state laws discriminating in favor of private-sector enterprises.

- *Oneida* stands for the proposition that at least under certain circumstances, the Court will treat state laws that favor traditional government activities performed by public-sector entities less stringently under the dormant Commerce Clause than similar laws that favor in-state private enterprise at the expense of out-of-state actors. State borrowings under municipal bond statutes would appear to qualify as "traditional government activities," favor the applicable state's own public sector and do not appear to discriminate among private enterprises. In that respect, the *Oneida* decision may be interpreted as favorable to Kentucky's position that its municipal bond statutes favoring its in-state public issuers do not violate the dormant Commerce Clause.

- *Oneida* is not expressly dispositive of the *Davis v. Kentucky* case because the outcome hinges on five justices' conclusions that the flow control ordinance at issue is nondiscriminatory. It is unclear from the opinions, however, whether by "nondiscriminatory" the applicable justices meant that the flow control ordinance did not expressly discriminate against any parties involved in commerce (even though it may have had an adverse effect on commerce conducted by private parties), or whether they meant that only a statute that discriminates in favor of in-state private interests at the expense of out-of-state private interests is "discriminatory" for dormant Commerce Clause purposes. In other words, *Oneida* did not expressly address whether a statute that expressly disfavors out-of-state *public* actors (i.e. municipal bond statutes that tax municipal bonds of out-of-state public issuers but expressly exempt municipal bonds of in-state public issuers) is "discriminatory" or "nondiscriminatory" for dormant Commerce Clause purposes. This question is central to the outcome of *Davis*, as the plurality and Justice Roberts reiterated that "[d]iscriminatory laws motivated by 'simple economic protectionism' are subject to a 'virtually *per se* rule of invalidity.'"

- Those favoring the existing landscape of state taxation of

municipal bonds should derive comfort from the *Oneida* outcome in that it suggests that six current justices on the Court are sympathetic, for a variety of reasons, to the proposition that public sector actors differ from private sector actors for purposes of dormant Commerce Clause analysis. This may suggest that in the long run the U.S. Supreme Court is more likely to uphold the ability of a state to use state tax policy to favor its own issuers than it is to uphold the Kentucky state court's holding of unconstitutionality. However, those favoring a relatively prompt nationwide resolution of the constitutionality of different state tax treatment of in-state and out-of-state municipal bonds should hope that the Court will recognize that *Oneida* is not clearly dispositive of that issue and that the municipal market needs clarity and uniformity, and will now decide to grant certiorari in *Davis* and address the issue squarely. Otherwise, uncertainty could linger for quite some time.

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If you wish to discuss the contents of this advisory, or for assistance with issues raised by the legal developments that are the subject of this advisory, please contact the Mintz Levin lawyers listed below or any other member of Mintz Levin's Public Finance section.

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