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Are Municipal Advisor Rules Unconstitutional?

WASHINGTON — A challenge to the constitutionality of the municipal advisor regulatory regime could be a last stand defense for MAs facing career-ending enforcement actions.

The theory of is the brainchild of Rick Weber, who is of counsel at Norton Rose Fulbright in Houston. The bond lawyer published a piece on the subject in the spring issue of The Bond Lawyer, the newsletter of the National Association of Bond Lawyers. In that piece and in a separate interview with The Bond Buyer, Weber explained that he believes that the Supreme Court's May decision in Murphy v. National Collegiate Athletic Association could pave the way for an argument against the muni advisor rules.

Weber said most public finance lawyers are interested in constitutional law, though they typically encounter it in the context of state constitutions.

"I've always had an interest in constitutional issues," Weber said.

The Murphy decision overturned a federal law, the Professional and Amateur Sports Protection Act, which banned states from sanctioning gambling on competitive sporting events. The court held that the law violated the "anti-commandeering" principle derived in part from the Tenth Amendment to the U.S. Constitution, which states that rights not given to the federal government in the Constitution are reserved to the states and to the people.

"The Court held that the act unconstitutionally `commandeered' state governments to serve the federal government," Weber wrote in his published piece. "Applying the same anti-commandeering principle, the Supreme Court had previously struck federal laws that compelled states to act, unless the laws applied to non-state actors as well. For the first time, Murphy v. NCAA applied the principle to strike a law that merely forbade the states to act. This extension of the anti-commandeering principle raises credible doubts about whether the federal government may lawfully regulate municipal advisors."

Weber told The Bond Buyer that the implication of the NCAA decision is that the federal government could not, for example, stop a state from hiring a municipal financial advisor who was not licensed by the federal government, unless it applied the same restriction to nongovernmental corporate issuers.

"That now is absolutely clear," he said.

Weber said the most likely avenue for a challenge along these lines would be in an enforcement context, probably raised by a muni advisor facing a bar from the industry unless he or she could convince the SEC or a court that the municipal advisor regulations are invalid.

The constitutionality of part of the muni advisor regime was previously challenged by the Tennessee Republican Party, Georgia Republican Party, and New York Republican State Committee. The groups claimed in a lawsuit that the Municipal Securities Rulemaking Board's Rule G-37 on political

contributions, amended in 2016 to apply to municipal advisors as well as broker-dealers, unconstitutionally forces MA and dealer employees to choose between doing their jobs and exercising their right to support political candidates.

A federal appeals court dismissed the challenge last year, saying the groups lacked standing to bring the case.

Jason Torchinsky, a partner at Holtzman Vogel Josefiak Torchinsky who represented the Republican groups, said Weber's theory is an interesting consideration for members of the public finance community, though he said it touched upon areas beyond the scope of his practice. Torchinsky said it was not clear to him that a muni advisor would have standing to challenge the constitutionality of the MA regime on the anti-commandeering grounds because they are not state and local governments. Converesely, Torchinsky said, state and local governments might be hesitant to expend the resources needed to bring such a challenge on this issue.

"I could see someone facing an enforcement action raising it as a defense," said Torchinsky.

By Kyle Glazier

BY SOURCEMEDIA | MUNICIPAL | 10/22/18 07:05 PM EDT