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Opinion No. 10-41

Funding Unemployment Benefit Claims

QUESTIONS

Article II, Section 24, of the Tennessee Constitution provides in relevant part that, "No debt obligation, except as shall be repaid within the fiscal year of issuance, shall be authorized for the current operation of any state service or program, nor shall the proceeds of any debt obligation be expended for a purpose other than that for which it was authorized." (the "Borrowing Limit"). Under 42 U.S.C. § 1321 and Tenn. Code Ann. § 50-7-504(b), the State is authorized to receive a federal advance to pay unemployment benefit claims.

1. Does the Borrowing Limit require the State to repay any funds it withdraws as an advance from the federal government under 42 U.S.C. § 1321 within the same fiscal year that it receives them?

2. Would the Borrowing Limit require the State to repay any bonds or notes it issues to cover unemployment benefit claims within the fiscal year that it issues them?

OPINIONS

1. The answer to this question depends on whether advances under this statute are a "debt obligation" within the meaning of the Borrowing Limit. While the applicable statutes provide that a State "may" repay the principal on advances, it imposes no penalty directly on the state if it fails to do so. Instead, the federal government recoups outstanding advances by collecting additional taxes from state employers. For this reason, it is not clear whether a Tennessee court would find that advances under 42 U.S.C. § 1321 are a "debt obligation" that the State must repay in the same fiscal year it receives them.

Advances under the statute would be for the "current operation" of a "state service or program" within the meaning of the Borrowing Limit. If a court finds that the advance is a "debt obligation" within the meaning of the Borrowing Limit, then the State would be required to repay before the end of the fiscal year that it receives it.

This opinion does not address the circumstances under which the State could incur long-term debt to fund short-term emergency or extraordinary expenses. Any such borrowing would have to be expressly authorized by a narrowly drafted statute to ensure that it does not undermine the prohibition in the Borrowing Limit. We have found no case where an increase in program

expenses caused by an economic downturn was an "emergency" or extraordinary expense justifying long-term borrowing.

2. The Borrowing Limit would require the State to repay any bonds or notes it issues to cover unemployment benefit claims within the fiscal year that it issues them.

ANALYSIS

INTRODUCTION

This opinion concerns state efforts to meet anticipated claims for unemployment benefits. Specifically, the request refers to advances from the federal government to the State's account in the unemployment trust fund established and maintained by the Secretary of the Treasury of the United States under 42 U.S.C. § 1104.

The unemployment trust fund is a part of the Unemployment Compensation Program. This program originates in the federal Social Security Act of 1935. Currently, the federal government levies an unemployment tax on employers but does not use the proceeds to fund a program on the federal level. Instead, the federal government gives a credit of up to ninety percent of the federal tax to employers who pay unemployment taxes levied by a state that has established a federally approved unemployment compensation program. While federal law establishes many of the requirements governing the unemployment compensation program, each state must design its own program within the federal framework. State law generally sets up the structure of benefits payable to workers, such as the amount of benefits, eligibility for benefits, and the state tax structure that will fund the benefit payments. Each state collects taxes levied to support the program and pays benefits to eligible employees.

The Tennessee Employment Security Law is codified at Tenn. Code Ann. §§ 50-7-101, *et seq.* Under Tenn. Code Ann. §§ 50-7-401, *et seq.*, employers in the state generally pay unemployment insurance premiums. These premiums are intended to be creditable against unemployment taxes imposed by federal law. Tenn. Code Ann. § 50-7-104. The premiums are the first source used to pay benefits to unemployed workers for a period of time. Currently, the federal government also provides money to pay extended or other unemployment benefits. *See, e.g.*, Tenn. Code Ann. § 50-7-305 (extended benefits program).

The Tennessee statutory scheme must be construed in *pari materia* with applicable federal law. Tenn. Code Ann. § 50-7-104(b). In administering the program, the Tennessee Commissioner of Labor and Workforce Development is authorized and required to cooperate with the United States Department of Labor. Tenn. Code Ann. § 50-7-705.

Tenn. Code Ann. § 50-7-501(a) establishes an unemployment compensation fund in the state treasury. The fund includes unemployment insurance premiums collected from employers along with fund earnings. In addition, the fund includes money credited to the account of Tennessee in the unemployment trust fund under 42 U.S.C. § 1103; money received from employers who choose to reimburse the fund for benefits paid and chargeable to them instead of

paying premiums under Tenn. Code Ann. § 50-7-403(h) and (i); and money received from the federal government pursuant to § 204 of the Federal-State Extended Unemployment Compensation Act of 1970.

Subsection (b) of this statute divides the fund into three separate accounts: a clearing account, an unemployment trust fund account, and a benefit account.

i. Clearing Account

Under Tenn. Code Ann. § 50-7-501(b)(2), all money payable to the fund must be deposited in the clearing account. Funds in the clearing account may be used to refund overpayments of employer premiums as authorized under Tenn. Code Ann. § 50-7-404.

ii Unemployment Trust Fund Account

Under Tenn. Code Ann. § 50-7-501(b)(3), all other collected funds in the clearing account must be immediately transferred to and deposited with the Secretary of the Treasury of the United States. Thus, these funds are placed in the United States Treasury. The United States Treasury maintains an account for the State of Tennessee in an unemployment trust fund governed by 42 U.S.C. § 1104. Monies transferred from the clearing account to the United States Treasury are credited to the State of Tennessee's account in this unemployment trust fund. While state law purports to establish this fund, therefore, it is effectively maintained in the United States Treasury.

iii. Benefit Account

The last sentence of Tenn. Code Ann. § 50-7-501(b)(3) states that "[t]he benefit account shall consist of all moneys requisitioned from this state's account in the unemployment trust fund." Tenn. Code Ann. § 50-7-501(c) describes the process by which the State withdraws funds from its account in the Unites States Treasury. This statute provides in relevant part: :

> The administrator [the Director of the Division of Employment Security of the Tennessee Department of Labor and Workforce Development] shall, from time to time, requisition from the unemployment trust fund amounts, not exceeding the amounts standing to this state's account in the fund, the administrator deems necessary for the payment of benefits for a reasonable future period, the limits of which shall be specified by the administrator. Upon receipt of the moneys, the state treasurer shall deposit the moneys in the benefit account and all warrants for the payment of benefits shall be issued in the manner prescribed in this section and shall be payable by the state treasurer solely from the benefit account. Expenditures of the moneys in the benefit account and refunds from the clearing account shall not be subject to any law requiring specific appropriations or other formal release by state officers of money in their custody. All warrants for the payment of benefits and refunds shall originate in the office of the administrator and shall be approved by the commissioner or a duly designated agent and shall

> be countersigned by the state treasurer. Any balance of moneys requisitioned from the unemployment trust fund that remains unclaimed or unpaid in the benefit account after the expiration of the period for which the sums were requisitioned shall either be deducted from estimates for, and may be utilized for the payment of, benefits during succeeding periods, or, in the discretion of the administrator, shall be redeposited with the secretary of the treasury of the United States, to the credit of this state's account in the unemployment trust fund, as provided in subsection (b).

Under this statute, the state administrator must determine the amount necessary for the payment of unemployment benefits for a "reasonable future period." The amount may not be greater than the money in the State's account. The administrator withdraws this amount from the State's account in the unemployment trust fund in the United States Treasury. The State Treasurer is required to deposit these funds into the benefit fund. State warrants for the payment of unemployment benefits are payable solely from money in the benefit account. Funds in the benefit account must be used to pay unemployment benefits.

1. Advances from the Federal Government.

The State is concerned that the amount now credited to its account in the State Treasury will not be enough to cover claims for a "reasonable future period." To cover the shortfall, the Tennessee Department of Labor and Workforce Development is considering seeking an advance of up to twenty million dollars from the United States Unemployment Trust Fund. The advance is available under the terms of 42 U.S.C. § 1321(a). The Department states that the federal funds advanced would be deposited in the State's unemployment trust account and requisitioned and disbursed in the normal course of the Department's business without any necessary appropriation in the State's annual Appropriations Act.[1] The request indicates that the State would use the funds so advanced to "stabilize" the fund during the first quarter of the year, and possibly next year as well. We assume the term "stabilize" means that the State would use the funds so advanced to pay unemployment benefit claims anticipated during these periods.

The State's fiscal year ends June 30, 2010. The State anticipates repaying federal advances shortly after it receives premium taxes from the month of April. Federal advances are available interest-free this calendar year if repaid by December 31, 2010.

State law expressly authorizes the Commissioner of Labor and Workforce Development to secure an advance of federal funds to pay unemployment benefits. Tenn. Code Ann. § 50-7-504 provides:

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[1] Tenn. Code Ann. § 50-7-102(c) provides in relevant part that "[E]xpenditures of the moneys in the benefit account and refunds from the clearing account shall not be subject to any law requiring specific appropriations or other formal release by state officers of money in their custody." This sentence appears to be a continuing appropriation of funds in the benefit account.

> (a) Benefits shall be deemed to be due and payable under this chapter only to the extent provided in this chapter and to the extent that moneys are available for the benefits to the credit of the unemployment compensation fund, and neither the state nor the commissioner shall be liable for any amount in excess of those sums.
>
> (b) However, for the purpose of continuing the payment of benefits provided by this chapter, ***the commissioner is authorized to secure an advance of funds from the federal government, pursuant to and subject to the terms of the Social Security Act, Title XII, compiled in 42 U.S.C. § 1321 et seq., and/or 26 U.S.C. § 3302, or related acts when and if the commissioner deems the trust fund is insufficient to pay the benefits provided in this chapter for the ensuing six (6) months.***

(emphasis added). 42 U.S.C. § 1321(a)(1) provides:

> Advances shall be made to the States from the Federal unemployment account in the Unemployment Trust Fund as provided in this section, and shall be repayable, with ***interest to the extent provided in section 1322(b) of this title, in the manner provided in sections 1101(d)(1), 1103(b)(2), and 1322 of this title.***

(emphasis added). Subsection (b) of this statute provides:

> The Secretary of the Treasury shall, prior to audit or settlement by the Government Accountability Office, transfer in monthly installments from the Federal unemployment account to the account of the State in the Unemployment Trust Fund the amount certified under subsection (a) of this section by the Secretary of Labor (but not exceeding that portion of the balance in the Federal unemployment account at the time of the transfer which is not restricted as to use pursuant to section 1103(b)(1) of this title). The amount of any monthly installment so transferred shall not exceed the amount estimated by the State to be required for the payment of compensation for the month with respect to which such installment is made.

Interest on federal advances under 42 U.S.C. § 1321 is payable as provided in subsection (b) of 42 U.S.C. § 1322. Federal law provides for three different methods by which the principal of advances under this statute may be repaid. First, under 42 U.S.C. § 1322(a), the Governor of a State "may" request that funds be transferred from the State's Unemployment Trust Account in the United States Treasury to the Federal Unemployment Account to repay these advances. Second, where an advance is not repaid within statutory time limits, federal tax law reduces tax credits against the federal employment tax that employers in the state receive. 26 U.S.C. § 3302(c). Funds generated by this reduction are paid into the Federal Unemployment Account and credited against the State's outstanding balance of advances. 42 U.S.C. § 1101(d)(1). Finally, funds in the federal extended unemployment compensation account, where available, may be allocated among all the states and applied to reduce the outstanding balance of advances of a state. 42 U.S.C. § 1103(b)(2).

The first question is whether the State must, constitutionally, repay any advance it secures in the spring before the end of the current fiscal year.[2] The answer to this question depends on whether an advance under these statutes is subject to Article II, Section 24, of the Tennessee Constitution, which provides in relevant part:

> No public money shall be expended except pursuant to appropriations made by law. Expenditures for any fiscal year shall not exceed the state's revenues and reserves, including the proceeds of any debt obligation, for that year. *No debt obligation, except as shall be repaid within the fiscal year of issuance, shall be authorized for the current operation of any state service or program, nor shall the proceeds of any debt obligation be expended for a purpose other than that for which it was authorized.*

Tenn. Const. Art. II, § 24 (emphasis added). This opinion will refer to the restrictions in the italicized sentence as the "Borrowing Limit."

a. "debt obligation"

The first issue is whether an advance under these statutes is a "debt obligation" within the meaning of the Borrowing Limit. Research has found no case law defining this term. Under Tennessee law, "debts" are obligations for payment of money founded upon contract, express or implied. *Scott v. Travelers Indemnity Company,* 215 Tenn. 173, 384 S.W.2d 38 (1964). When construing a constitutional provision, Tennessee courts must give effect to the intent of the people who adopted it. *Cleveland Surgery Center, L.P. v. Bradley County Memorial Hospital,* 30 S.W.3d 278 (Tenn. 2010). Unless the context requires otherwise, the terms used in a constitution must be given their ordinary and inherent meaning. *Id.* citing *Gaskin v. Collins,* 661 S.W.2d 865, 867 (Tenn. 1983). The term "debt obligation" is broader than the term "bond." But the Borrowing Limit also requires a debt obligation to which it applies to be repaid "within the fiscal year of issuance." Ordinarily, the term "issuance" refers to a bond, note, or other financial instrument. While the term "issuance" creates some ambiguity, however, we have found no authority for the argument that its use in the Borrowing Limit limits the term "debt obligation" to bonds or notes.

Discussions of the Borrowing Limit by the Constitutional Convention that adopted it provide no clear guidance on this issue. While the debates indicate that the term "debt obligation" was carefully chosen, members use the term in conjunction with the word "borrow" or "borrowing." If there should be doubt as to the language in the Constitution, it is the first obligation of the court to go to the proceedings of the Constitutional Convention that adopted such provision and see from such proceedings what the framers of such resolution intended it to mean. *Shelby County v. Hale,* 292 S.W.2d 743 (Tenn. 1956). All of the language that now

[2] The request indicates that the State, at the latest, would repay principal advances by December, 2010, before interest accrues. This opinion, therefore, will not address whether interest on the advances is a "debt obligation" within the meaning of the Borrowing Limit.

appears after the first sentence in Article II, Section 24, of the Tennessee Constitution was added by an amendment adopted by the 1977 Constitutional Convention and subsequently approved by the voters. These amendments, including the Borrowing Limit, were drafted by the Limitation on State Spending Committee of the 1977 Constitutional Convention. The Chairman of that Committee introduced the Committee's Majority Report to the Convention on November 15, 1977. The first two sentences of the report included the language that is now the Borrowing Limit. The Chairman provided the following explanation.

> Chairman Burson: The first two sentences of the Majority Report read, "No money shall be expended except pursuant to appropriations made by law, and expenditures for any fiscal year shall not exceed the State's revenues or reserves including the proceeds of any debt obligation for that year. No debt obligation except as shall be repaid within the fiscal year of issuance shall be authorized for the current operation of any state service or program; nor shall the proceeds of any debt obligation be expended for a purpose other than that for which it was authorized.
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> These sentences provide (1) that only the Legislature can make appropriations; (2) that the state must have a balanced budget; *(3) that the state incur no debt to fund operations of state government except for day to day borrowing*; (4) that long term debt obligations for capital expenditures are allowed; (5) that the proceeds from debt obligations may not be diverted for purposes other than those for which authorized.

2 *Journal of the Debates of the Limited Constitutional Convention of 1977*, at 1110 (emphasis added).

The debates indicate that the term "debt obligation" was carefully chosen. Chairman Burson and another member had the following exchange:

> MR. BERNSTEIN: Just one semantic or word item; why do you use the phrase "debt obligation" rather than "debt" or "obligation"?
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> MR. BURSON: Again, Delegate Bernstein, this was gone over with excruciating pain with the Comptroller and with his Bond Coun[sel]. We kicked this around; the use of just no debt, debt obligation, debt obligation when the full faith and credit of the state is pledged, general obligation bond. We kicked all of those around. This is the language which they recommended and which the Bond Coun[sel] recommended as accomplishing the purpose which we wanted to accomplish without in any way jeopardizing the state's bond position.

2 *Journal of the Debates of the Limited Constitutional Convention of 1977*, at 1131. During the same meeting, the Chairman of the Committee had the following discussion with another convention member.

> MR. FOSTER: Chairman Burson, as I understand the second sentence in the first paragraph, what it is saying is that the state cannot borrow long-term for current operating funds; is that correct?
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> MR. BURSON: That is correct.

2 *Journal of the Debates of the Limited Constitutional Convention of 1977*, at 1123.

The term "debt obligation" as used in the Borrowing Limit, therefore, includes any debt or obligation to pay, not just bond issues. But it is not clear whether advances to the State's account in the unemployment trust fund give rise to a "debt obligation" within the meaning of the Borrowing Limit. As discussed above, under the federal statutes, a state "may" repay advances made under this statute. 42 U.S.C. § 1322(a). The same statute refers to advances as a "loan." 42 U.S.C. § 1322(b) and (c). But the federal statutes do not clearly provide that the State is directly and unconditionally liable to repay the advances. If a state does not repay the advances within a certain time, federal law reduces the federal tax credit that state employers receive for their state unemployment taxes. 26 U.S.C. § 3302(c). Funds generated by this reduction are paid into the Federal Unemployment Account and credited against the State's outstanding balance of advances. 42 U.S.C. § 1101(d)(1). But the statutes impose no penalty directly against the State if it fails to repay the principal.

Attorneys General in other states addressing whether an advance under 42 U.S.C. § 1321 is a "debt" subject to state constitutional limits have come to different conclusions. The Wisconsin Attorney General examined the entire federal repayment scheme and concluded that these advances are not a "debt" subject to constitutional limitations because, if the state does not voluntarily transfer funds to repay them, repayment will come from federal taxes on state employers or from other federal funds. Op. Wis. Att'y Gen. 28-82 (March 17, 1982). As a result, the opinion reasons, the advances are not a "legally enforceable obligation on the part of the state" subject to the state constitutional limits on "debt." On the other hand, Attorneys General in three states concluded that such an advance is a debt subject to constitutional limitations. These opinions do not discuss the federal statutes governing repayment. Op. Neb. Att'y Gen. 97051 (October 1, 1997); Op. Okla. Att'y Gen. 83-99 (June 8, 1983); Op. Ga. Att'y Gen. 82-35 (May 26, 1982). By contrast, the Texas Attorney General concluded that such advances fall outside the constitutional limit on "debt" under a judicially created exception for obligations that run current with revenues. Op. Tex. Att'y Gen. MW-512 (September 2, 1982). Similarly, the California Attorney General found that the obligation to repay the principal of an advance was not subject to the constitutional limit on debt because it was payable solely from the state's employment fund. Op. Cal. Att'y Gen. 82-403 (August 6, 1982). No basis in exists in Tennesse law for finding a similar exception to the Borrowing Limit.

We also note that the Supreme Court of Appeals of West Virginia found that advances authorized under 42 U.S.C. § 1321 are not subject to challenge under the state constitution because of the United States Supremacy Clause. *State ex rel. Department of Employment Security of the State of West Virginia v. Manchin*, 178 W.Va. 509, 361 S.E.2d 474 (1987). This conclusion is largely based on the reasoning that the federal statutory scheme, while permissive

in its terms, coerces the states to participate in the unemployment compensation program. But a state is not required by federal law to seek an advance under 42 U.S.C. § 1321. We think the reasoning in that opinion, therefore, would not prevent the Borrowing Limit from applying to these advances.

For all these reasons, it is not clear whether a Tennessee court would find that advances under 42 U.S.C. § 1321 are a "debt obligation" that the State must repay in the same fiscal year it receives them.

b. Current Operation of Any State Service or Program

If a court concludes that advances are a "debt obligation" within the meaning of the Borrowing Limit, it must then address whether the Unemployment Program is a "state service or program" within the meaning of the Borrowing Limit. The convention debates support the conclusion that the term "state service or program" was intended to be broadly defined. Chairman Burson and another member had the following exchange.

> MR. FOSTER: The language that limits what the long-term debt obligation can be used for, well, I am stating it backwards. What I am looking at is the statement where the current operation of any state service or program... *in your opinion, are those two terms, "state service or program," all inclusive so as to really provide a restraint on the entire operation of state government which is what I understand the intent of the sentence to be?*
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> MR. BURSON: *Yes, sir, the intent is to provide that there shall be no long-term debt for the current operation of any part of a state program*, that we should not be using long-term debt to fund the operation. This was one of the primary concerns of the committee, and it was felt that this was one of the ways in which New York City got into its morass; it began to use long-term debt to fund current operations. *That language is intended to get to any operation of state government.*

2 *Journal of the Debates of the Limited Constitutional Convention of 1977*, at 1123 (emphasis added). While the unemployment program originates in federal law, Tennessee statutes define the amount and other conditions governing payment of benefits. The Tennessee Department of Labor and Workforce Development is responsible for administering the benefits. Further, Tennessee statutes levy taxes used to pay benefits. For these reasons, the unemployment program is a "state service or program" subject to the Borrowing Limit.

The last issue is whether meeting unemployment claims is the "current operation" of a state service or program within the meaning of the Borrowing Limit. When considering the Borrowing Limit, Chairman Burson and another member had the following discussion.

> MR BERNSTEIN: Mr. Burson, I hope I do not ask you questions that you have answered. I had an emergency and I was out for a little bit. Apparently, the State

> of Tennessee has followed a tradition of not engaging in deficit spending. If that tradition is true, why do you think you ought to change it at this time?
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> MR.BURSON: One of the reasons expressed in the committee was that for some while now the State of Tennessee, in fact, I think it was used by our Governor in the last session or the session before, the State of Tennessee felt that it was constitutionally prohibited to engage in deficit spending. This was the testimony before our committee; they are not constitutionally prohibited. It was the feeling of the committee, now that that has been brought to light, that it should go in, and the second thing is, just because it has not been done in the past does not mean, unless there is a constitutional provision, that it will not be done in the future. That problem is of such magnitude that it should be put into the Constitution.
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> MR. BERNSTIN: Did your committee consider that there might be times when the state ought to engage in deficit spending?
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> MR. BURSON: *The committee considered that, but what we have done is say that there can be deficit spending more or less for long-term projects.* The committee felt very strongly that at no time should there be deficit spending in the form of long-term debt obligations for the current operation of the government. It was the committee's opinion that that should be constitutionally prohibited.
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> MR. BERNSTEIN: How do you define current operations of government?
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> MR. BURSON: We have checked this again with the Comptroller and the current operation *has a very specific accounting meaning* which is accepted by the bond houses as well as by state government. *For instance, clear examples of it, if you use long-term debt obligations to pay salaries of state employees, that would be a current operation of state government. If you use it to run the Performing Arts Theater, that would be a current operation of government*. I will say that this does not prohibit necessarily casual borrowing, day to day borrowing, that the state needs to cover its revenues and participatory revenues from day to day.
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> MR. BERNSTEIN: What about the floating of a bond issue to meet disaster relief or economic welfare program or things of that kind; where would they be?
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> MR. BURSON: *In terms of economic relief, that was considered in the committee and when we were just going to restrict it to capital improvements [pursuant to prior draft language], that was included. It was left out when we went to the current operation of state projects.*

2 *Journal of the Debates of the Limited Constitutional Convention of 1977*, at 1130-1131 (emphasis added). This discussion does not directly define the term "current operation." But the Chairman's explanation makes several points about the term. First, the term "current operation" does not include "long-term projects." Second, the term "current operation" has a specific

meaning under accounting principles. Third, the term "current operation" includes paying state employees' salaries and operating a state facility. Finally, it appears that the term "current operation" does not include paying expenses to provide "capital improvements," or "economic relief."

We can find no definition of the term "current operation" in the *Codification of Governmental Accounting and Financial Reporting Standards* (2007). But this publication provides the following distinction:

> Expenditures should be further classified by character, that is, on the basis of the fiscal period they are presumed to benefit. The major character classifications of expenditures are "Current Expenditures," which benefit the current fiscal period; "Capital Outlays," which are presumed to benefit both the present and future fiscal periods; and "Debt Service," which presumably benefits prior fiscal periods as well as current and future periods.[3]

Codification of Governmental Accounting and Financial Reporting Standards § 1800.120 (2007).

Under these principles, a "current expenditure" benefits the current fiscal period, while "capital outlays" benefit the present and future fiscal periods, and "debt service" benefits past, present, and future fiscal periods. Other authorities reflect a similar approach in defining analogous terms. *Black's Law Dictionary* defines the term "operating expense" as "[a]n expense incurred in running a business and producing output.—Also termed *current expense.*" *Black's Law Dictionary* 618 (2004) (emphasis in original). In *Richardson v. City of Chattanooga,* 214 Tenn. 384, 381 S.W2d 1, 3-4 (1964), the Tennessee Supreme Court considered the scope of a statute requiring that counties apportion "all school funds for current operation maintenance purposes collected by any county" except transportation taxes among county, city, and special school districts. The Court found that taxes levied to provide teachers' pension, social security taxes, and fire insurance on county buildings were taxes levied for "current operation and maintenance" within the meaning of the statute.

Under the South Dakota Constitution, an appropriations act for "ordinary expenses of the executive, legislative and judicial departments of the state, the current expenses of state institutions, interest on the public debt, and for common schools" may be passed by a legislative majority. S.D. Const. Art. XII, § 2. All other appropriations must be passed by a two-thirds vote of all the members of each legislative house. The South Dakota Supreme Court addressed the meaning of the term "current expenses" as follows:

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[3] The next sentence of this paragraph notes, "'Intergovernmental,' a fourth character classification, is appropriate where one governmental unit transfers resources to another, such as when states transfer 'shared revenues' to local governments or act as an intermediary in federally financed programs." While the advance in question would be made from federal funds to the State, however, the State will be responsible for repaying it and the unemployment program is paid for in large part by state unemployment insurance taxes.

> The term "current expenses of state institutions" … is equivalent to 'running expenses' which includes any usual, regular, and continuing expenditure for the maintenance of property and for conducting the regular and authorized functions of the institution. Costs of land acquisitions, erection of permanent buildings, and similar capital expenditures cannot be considered current expenses. Extraordinary, emergent, and exceptional expenses for any other purpose likewise fall within the category of "All other appropriations."

State of South Dakota ex rel. Oster v. Jorgenson, 81 S.D. 447, 136 N.S.2d 870, 875 (1965). More recently, the same Court summarized the definitions used in *Oster* and other authority as follows:

> *Oster* and *Duxbury* use the following terminology in defining the concept of "ordinary and current expenses of state government"-regular; usual; normal; common; often recurring; according to established order; settled; customary; reasonable; not characterized by peculiar or unusual circumstances; continuing expenditures for maintenance or carrying on an office; current expenses of government; expenses recurring from time to time; expenses reasonably anticipated as likely to occur; expenses incident to officing and maintaining state government; expenses incident to preserving in repair and maintaining state property; expenses recurring with regularity and certainty; running expenses; usual, regular and continuing expenses for maintenance of property and for conducting regular and authorized functions. In contrast, the following terms are used in describing extraordinary expenses: exceptional and extraordinary objects essential to the welfare of the state; extraordinary, emergent and exceptional expenses for any purpose.

Apa v. Butler, 2001 S.D. 147, 638 N.W.2d 57, 67-68 (2001).

The present unemployment act was passed in Tennessee in 1947. The unemployment benefit program, therefore, has been operating in Tennessee for several decades. Thus, payment of claims under the program appears to be an ordinary and recurring expense. Further, unemployment benefits are calculated on a weekly basis. An advance to the State's unemployment account is drawn down monthly. The fact that some of the benefits that the advance will cover will be paid in a later month does not change their nature as current expenses. For these reasons, payment of unemployment benefit claims is the "current operation" of a state program within the meaning of the Borrowing Limit. For these reasons, if a court concludes that advances are a "debt obligation" under the Borrowing Limit, the State must repay any funds it withdraws as an advance from the federal government under 42 U.S.C. § 1321 within the same fiscal year that it receives them.

Based on the authorities discussed above, an argument can be made that extraordinary or unforeseen expenses do not fall within the phrase "current operation of any state service or program" as used in the Borrowing Limit. This opinion does not address the circumstances under which such borrowing might be permissible. Any such borrowing would have to be

expressly authorized by a narrowly drafted statute to ensure that it does not undermine the prohibition in the Borrowing Limit. We have found no case where an increase in program expenses caused by an economic downturn was an "emergency" or extraordinary expense justifying long-term borrowing.

2. Issuance of State Bonds or Notes

The second question is whether the Borrowing Limit would require the State to repay any bonds it issues to cover unemployment benefit claims within the fiscal year that it issues them. State statutes do not presently authorize the issuance of long-term bonds to pay for unemployment benefit claims. Under current bond statutes, bond or note proceeds must be used to pay for goods or services that have a reasonably anticipated lifetime or use equal to or greater than the period of time for which the bonds or notes are issued and during which interest is payable for them. Tenn. Code Ann. § 9-9-113(a). It does not appear that unemployment claims have a reasonably anticipated lifetime that extends beyond the fiscal year in which they are due. Tenn. Code Ann. § 9-10-101 authorizes the issuance and sale of tax revenue anticipation notes. Notes issued under this statute must mature within the fiscal year of their issuance. Tenn. Code Ann. § 9-10-101(a).

The question then becomes whether these statutory limits are mandated by the Borrowing Limit. In this case, we conclude that the Borrowing Limit would require the State to repay any bonds or notes it issues to cover unemployment benefit claims within the fiscal year that it issues them. Bonds or notes are clearly a "debt obligation" within the meaning of the Borrowing Limit. Further, as discussed above, the paying of claims due under the unemployment benefit program is the "current operation" of a "state service or program" within the meaning of the Borrowing Limit. The Borrowing Limit, therefore, would require the State to repay any bonds or notes it issues to cover unemployment benefit claims within the fiscal year that it issues them.

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