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I. COURT HOLDS USE OF LEASE/PURCHASE AGREEMENTS TO FINANCE BUILDING OF PUBLIC SCHOOL NOT VIOLATIVE OF CONSTITUTIONAL LIMIT ON LONG TERM DEBT

The South Carolina Supreme Court's decision in *Caddell v. Lexington County School District No. 1*[1] legitimized the use of lease/purchase agreements as an alternative to incurring general obligation debt.[2] Previously, the only method available to government entities to finance large projects beyond the scope of current revenues was to issue general obligation bonds. The South Carolina Constitution, however, limits a school district's general obligation debt to 8 percent of the district's assessed property value, unless the district's electorate approves the excess.[3] Nonetheless, state school boards must provide children with free public education[4] in suitable schoolhouses,[5] without regard for cost. When voters refuse to approve additional debt, school boards are caught between conflicting mandates.

Lexington County School District No. 1 faced such a dilemma. Enrollment exceeded permanent classroom capacity by 33 percent, with overflow housed in portable classrooms. Furthermore, the parties stipulated that 5 percent per year future growth was anticipated.[6] Despite the need for an increase in school capacity,[7] the District's voters turned

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1. 296 S.C. 397, 373 S.E.2d 598 (1988).

2. Recent opinions issued by the South Carolina Attorney General's office have concluded that case law existed to support the legality of lease/purchase agreements. 1986 Op. S.C. Att'y Gen. 265; 1985 Op. S.C. Att'y Gen. 385. *But see*, 1971 Op. S.C. Att'y Gen. 158. *Caddell* is the first case in which the supreme court has addressed the issue.

3. *See* S.C. CONST. art. X, § 15 (1875, amended 1977).

4. *Id.* art. XI, § 3.

5. S.C. CODE ANN. § 59-19-90(1) (Law. Co-op. 1976).

6. Record at 14.

7. The stipulated facts showed that unless larger permanent facilities were constructed, the District would have to spend approximately $800,000 on new portable units within two years. Portables are more expensive due to higher utility and maintenance costs and a shorter useful life. Also, it is hard to attract teachers to work in portables because of poor acoustics. Record at 15-16. The increased student population in portables created serious overcrowding of core facilities such as restrooms, cafeterias, and libraries. Parents complained that children were not getting access to restrooms during breaks. Record at 18. One school was forced to serve lunch in eight shifts. Record at 17. Furthermore, the parties stipulated that renovations were seriously needed to replace heating, plumbing, and electrical systems worn out from over thirty years of use. Record at 7. Finally, it was stipulated that unless new and expanded permanent facilities were

down three bond referendums to finance renovations and new construction.[8]

The District's Board of Trustees (Board) planned to acquire the needed facilities by entering into a lease/purchase agreement, thereby avoiding the 8 percent debt ceiling.[9] The agreement called for the District to execute leases (Base Leases) for land and some existing school facilities scheduled for improvement, to a private corporation (Corporation) at one dollar a year.[10] The Corporation planned to use its leasehold interest in the Base Leases and its leases back to the District (Project Leases) as collateral. Using the collateral as security, the Corporation would finance the improvements through the sale of certificates of participation in the Project Leases (Certificates) to investors.[11] The District would direct all work on the projects.[12] When the construction was complete, the facilities would be leased back to the District under successive one-year leases for an agreed number of years.[13] The annual rent would be set at the amount required to amortize the principal and interest owed on the Certificates and the Corporation's related expenses.[14]

The agreement would specifically limit the District's liability. It would expressly state that the full faith and credit of the District was not pledged and the Certificates to be issued by the Corporation would specify the limit of the District's liability.[15] Additionally, the District never would be obligated to more than one year's rental at any time. The limitation of liability to one year's rental would be accomplished by a non-appropriation clause in the lease/purchase agreement. The non-appropriation clause would allow the District the option, without penalty, to forego renewing a lease simply by not appropriating the funds for the year's rental. Should the District exercise this option, the Corporation would retain the property for the balance of the Base Lease.[16] At the end of a Base Lease period, however, the property with

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available within five years, the District would have to adopt extreme measures to serve the growing enrollment, such as year-round class schedules and eventually dual sessions, with some children leaving home as early as 5:00 a.m. and others not returning home until 9:00 p.m. *See* Record at 20-21.

8. *See* Record at 22-A.

9. *Caddell*, 296 S.C. at 399, 373 S.E.2d at 598.

10. Record at 4. The private corporation would be set up expressly for this purpose and would operate independently of the Board with separate directors. Record at 22-C.

11. Record at 24.

12. *Id.* at 27.

13. *Id.* at 24.

14. *Id.* at 25.

15. *Id.* at 28.

16. *Id.* at 26. The Project Lease periods would be shorter than the Base Lease periods. *See id.*

improvements would revert to the District. If all annual payments were made, the Base Lease property and improvements would revert to the District at the end of the Project Lease period.[17]

To avoid exceeding long term debt limits, many South Carolina public entities have used various applications of lease/purchase agreements and leases with options to purchase.[18] The South Carolina Supreme Court in *Caddell* followed the majority rule that lease/purchase agreements that do not create a future obligation do not result in general obligation debt.[19] South Carolina's case law also supports the *Caddell* decision.[20]

Maintaining that the agreement would pledge the District's credit

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17. *Id.* at 26.

18. For example, the Swearingen Engineering Center at the University of South Carolina and the Koger Performing Arts Center, both in Columbia, are financed through lease/purchase agreements. Similarly, a computer center at Clemson University and a county office building in Spartanburg are financed through comparable arrangements. The Item, Dec. 7, 1987, at 2A.

19. *Caddell*, 296 S.C. at 400, 373 S.E.2d at 599.

Twenty-five states have found various lease agreements do not create long-term debt. *See* Opinion of the Justices No. 183, 278 Ala. 298, 178 So. 2d 76 (1965) (non-appropriation clause lease); Dean v. Kuchel, 35 Cal. 2d 444, 218 P.2d 521 (1950); Gude v. City of Lakewood, 636 P.2d 691 (Colo. 1981) (non-appropriation clause lease); Corhran v. Mayor of Middletown, 14 Del. Ch. 295, 125 A. 459 (1924) (non-appropriation clause lease); State v. Florida Dev. Comm'n, 211 So. 2d 8 (Fla. 1968); City of Pocatello v. Peterson, 93 Idaho 774, 473 P.2d 644 (1970); Loomis v. Keehn, 400 Ill. 337, 80 N.E.2d 368 (1948) (non-appropriation clause lease); Steup v. Indiana Hous. Fin. Auth., 273 Ind. 72, 402 N.E.2d 1215 (1980) (non-appropriation clause lease); State *ex rel.* Fatzer v. Kansas Armory Bd., 174 Kan. 369, 256 P.2d 143 (1953) (non-appropriation clause lease); State Property & Bldgs. Comm'n v. Hays, 346 S.W.2d 3 (Ky. 1961) (non-appropriation clause lease); Edgerly v. Honeywell Information Sys., Inc., 377 A.2d 104 (Me. 1977) (non-appropriation clause lease); Eberhart v. Mayor of Baltimore, 291 Md. 92, 433 A.2d 1118 (1981); Ambrozich v. City of Eveleth, 200 Minn. 473, 274 N.W. 635 (1937); Saint Charles City—County Library Dist. v. Saint Charles Library Bldg. Corp., 627 S.W.2d 64 (Mo. Ct. App. 1981) (non-appropriation clause lease); Ruge v. State, 201 Neb. 391, 267 N.W.2d 748 (1978) (non-appropriation clause lease); Enourato v. New Jersey Bldg. Auth., 182 N.J. Super. 58, 440 A.2d 42 (App. Div. 1981), *aff'd*, 90 N.J. 396, 448 A.2d 449 (1982) (non-appropriation clause lease); *In re* Oklahoma Capitol Improvement Auth., 355 P.2d 1028 (Okla. 1960) (non-appropriation clause lease); Greenhalgh v. Woolworth, 361 Pa. 543, 64 A.2d 659 (1949); Opinion to the Governor, 112 R.I. 151, 308 A.2d 809 (1973); McFarland v. Barron, 83 S.D. 639, 164 N.W.2d 607 (1969) (non-appropriation clause lease); Texas Pub. Bldg. Auth. v. Mattox, 686 S.W.2d 924 (Tex. 1985) (non-appropriation clause lease); Municipal Bldg. Auth. v. Lowder, 711 P.2d 273 (Utah 1985) (non-appropriation clause lease); Baliles v. Mazur, 224 Va. 462, 297 S.E.2d 695 (1982) (non-appropriation clause lease); State *ex rel.* West Virginia Resource Recovery -Solid Waste Disposal Auth. v. Gill, 323 S.E.2d 590 (W. Va. 1984); State *ex rel.* Thomson v. Giessel, 271 Wis. 15, 72 N.W.2d 577 (1955). *But see*, State *ex rel.* Nevada Bldg. Auth. v. Hancock, 86 Nev. 310, 468 P.2d 333 (1970); McKinley v. Alamogordo Mun. School Dist. Auth., 81 N.M. 196, 465 P.2d 79 (1969).

20. See *supra* note 2.

and therefore violate the constitutional limit on general obligation debt, Marvin Caddell, a taxpayer in Lexington School District No. 1, challenged the Board's plan.[21] His complaint set forth six grounds on which he challenged the legality of lease/purchase agreements. The trial court resolved all but one in favor of the District.[22] Thus, its decision in favor of Caddell rested on its holding that the agreement amounted to an implied promise by the District to pay all of the annual rental payments. The trial court held that the agreement constituted general obligation debt involving a pledge of the District's credit.[23]

On appeal, the District raised all six issues presented in the plaintiff's complaint. The supreme court, however, focused on only two issues and alluded to a third.[24] The court first addressed the issue of what constitutes "long term" or "general obligation debt."[25] The South Carolina Constitution defines general obligation debt as "any indebtedness of the school district which shall be secured in whole or in part by a pledge of its full faith, credit and taxing power."[26] Historically, South Carolina has considered general obligation debt to be "that which is 'ultimately secured by taxes on the property within the political entity.' "[27] Because a governmental entity is not required to impose property taxes for the payment of its yearly expenses or contingent liabilities, neither can be said to be within the meaning of general obligation

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21. *See Caddell*, 296 S.C. at 401, 373 S.E.2d at 599.

22. *See* Record at 7-10.

23. Record at 7. In reversing the lower court on this point, the supreme court did not address the practical problem of how the District could freely exercise its non-appropriation option when doing so in this situation would result in the loss of its use of certain utility systems and renovated core facilities in existing schools. A possible solution to the problem might lie in the fact that presumably the District simply could negotiate yearly leases covering these items.

24. By not addressing the following three issues, the supreme court has left room for continued uncertainty. First, the circuit court said the alter ego theory does not apply to the relationship between the Board and the Corporation. It reasoned the Corporation would "be a separate and distinct legal entity, directed exclusively by its board of directors pursuant to its articles and bylaws." Record at 7-8. Second, relying on Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967), the lower court found that the Corporation's pledge of the Base Lease would involve no pledge of credit by the District because it would create no pecuniary liability for the District. Record at 8-9. Third, the lower court examined the question of illegal delegation of power. It found that the possibility that a private entity would enjoy public property for a period of time if the District exercised the non-appropriation clause would not create an illegal delegation of power. Record at 8.

25. *Caddell*, 296 S.C. at 399-400, 373 S.E.2d at 599.

26. S.C. CONST. art. X, § 15(2) (1875, amended 1977).

27. *Caddell*, 296 S.C. at 400, 373 S.E.2d at 599 (quoting City of Beaufort v. Griffin, 275 S.C. 603, 605, 274 S.E.2d 301, 303 (1981)).

debt.[28]

A review of other states' decisions on similar agreements reveals the significance of the South Carolina court's focus on the nature of the District's future obligation under the challenged agreement. The Colorado Supreme Court, focusing on the difference between pledges of current and future revenues, upheld an agreement it considered in *Gude v. City of Lakewood*.[29] The Colorado court stated that "discretionary or contingent obligations are not constitutional debt. 'To constitute a debt in the constitutional sense, one legislature, in effect, must obligate a future legislature to appropriate funds to discharge the debt created by the first legislature.' "[30]

Based on the same rationale, the Nevada Supreme Court invalidated an agreement in *State ex rel. Nevada Building Authority v. Hancock*[31] because the agreement pledged payment of *all* the annual rentals called for in the contract. Thus, the agreement constituted a commitment of future revenues. The court rejected the argument that the contract was merely executory until the consideration for each year's rental had been furnished.[32] The *Hancock* court's goal was to further the state's constitutional aim "to limit commitment of future revenues."[33] The court said to hold otherwise would have exalted form over substance.[34] With regard to *Caddell*, it is significant that the Nevada court distinguished the agreement in *Hancock* from the one at issue in *Walla Walla City v. Walla Walla Water Co.*[35]

In *Walla Walla* the United States Supreme Court recognized the concept of the executory contract when no express promise for the future appropriation of money has been made. The Court clearly indicated that had the town of Walla Walla created an absolute debt for the future, the executory contract concept would not have applied. Instead, a future obligation would have been created.[36] The South Carolina Supreme Court found that the *Caddell* agreement, with its nonappropriation clause, did not constitute an express or implied promise for the future.[37]

Justice Finney's dissent in *Caddell* argued that it is not necessary

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28. *See id.*

29. 636 P.2d 691 (Colo. 1981).

30. *Id.* at 699 (quoting *In re* Interrogatories, 193 Colo. 298, 305, 566 P.2d 350, 355 (1977)).

31. 86 Nev. 310, 468 P.2d 333 (1970).

32. *Id.* at 315-16, 468 P.2d at 337.

33. *Id.* at 316, 468 P.2d at 338.

34. *Id.*

35. 172 U.S. 1 (1898).

36. *Id.* at 20.

37. *Caddell*, 296 S.C. at 400, 373 S.E.2d at 599.

to invoke the District's taxing power to create general obligation debt.[38] Instead, Justice Finney stated that the Corporation's use of the Base Leases as collateral constituted a "pledge of credit" by the District.[39]

Relying on *Nichols v. South Carolina Research Authority*,[40] the majority rejected this argument. In *Nichols* the court held that the South Carolina Research Authority may mortgage land deeded to it by the state to secure debts of private corporations that locate in the Authority's industrial parks.[41] If a corporation was to default on a loan, the Authority would stand to lose the mortgaged land. Conversely, the Base Lease property would be lost for only a period of years if the District exercised its non-appropriation option. The *Nichols* court stated that a requirement to raise revenues to meet an obligation is a pledge of the state's credit.[42] The court concluded, however, that the pledge of "a known, quantifiable asset impos[es] no potential taxpayer liability, now or in the future."[43] Since the Base Lease property was a "known, quantifiable asset," no potential taxpayer liability existed. Thus, no pledge of credit was involved.

The *Caddell* majority's interpretation of *Nichols* logically equated general obligation debt to the imposition of future taxpayer liability. The use or commitment of current revenues to secure needed materials or services does not constitute general obligation debt.[44] Thus, an asset of the District arguably should be treated like current revenues and the District should be able to use its assets in the same manner as it is permitted to use its current revenues.

The court clearly was persuaded by the fact that the agreement's non-appropriation clause provided the crucial "opt-out" provision that avoids future taxpayer liability. The clause makes future lease payments contingent on the Board's optional appropriation of money for the rental each year. The Supreme Court of Maine, which adheres to the majority rule espoused in *Caddell*, has called this a "chicken out" provision.[45] The Wisconsin Supreme Court, which also adheres to the majority rule, declared in *State ex rel. Thompson v. Giessel*[46] "that no state debt is created where payments are to be made solely at the

38. *Id.* at 404, 373 S.E.2d at 601 (Finney, J., dissenting).
39. *Id.*
40. 290 S.C. 415, 351 S.E.2d 155 (1986).
41. *Id.* at 429, 351 S.E.2d at 163.
42. *Id.* at 419, 351 S.E.2d at 157.
43. *Id.* at 420, 351 S.E.2d at 158.
44. *See, e.g.*, Carll v. South Carolina Jobs—Economic Dev. Auth., 284 S.C. 438, 327 S.E.2d 331 (1985).
45. *See* Edgerly v. Honeywell Information Sys., Inc., 377 A.2d 104, 108 (Me. 1977).
46. 271 Wis. 15, 72 N.W.2d 577 (1955).

state's option."[47]

The South Carolina Supreme Court also focused on the legality of the District's use of an alternate method of financing to avoid the constitutional limit on long term debt. It relied on the Colorado Supreme Court's reasoning in *Gude v. City of Lakewood*,[48] finding no subterfuge in the District's plan. The court in *Gude* found a constitutionally significant difference between the creation of general obligation debt, which requires voter approval, and the construction of a city hall, which, in and of itself, does not.[49]

The South Carolina Supreme Court's approval of lease/purchase agreements is also supported by *Giessel*. The *Giessel* court stated, " '[I]t must be kept in mind that the purpose of a debt limitation is not to prevent the municipality from acquiring buildings or public works, but to place a limitation on the extent to which it may pledge its credit and hence burden the taxpayers.' "[50] That court also noted that " '[i]t is never an illegal evasion to accomplish a desired result, lawful in itself, by discovering a legal way to do it.' "[51]

Finally, the *Caddell* court concluded that nothing in the South Carolina Constitution or South Carolina Code precludes the District's use of the lease/purchase agreements.[52] By so concluding, the court alluded to the District's existing authority to lease its property to private parties as well as to lease property for its own needs.[53] The court then stated that the other issues concern public policy and should be left to the legislature.[54]

The *Caddell* decision provides the opportunity for government to implement better fiscal management, but also poses the potential for abuse. Ideally, however, freed from constitutional constraints on long-term debt that limit capital expenditures, state entities will discharge their duties in the most cost efficient manner possible and temporary measures will no longer be necessary when long-term solutions that require financing would be more cost efficient.

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47. *Id.* at 40, 72 N.W.2d at 590.

48. 636 P.2d 691 (Colo. 1981).

49. *Id.* at 697, *cited in Caddell*, 296 S.C. at 402, 373 S.E.2d at 600.

50. *Giessel*, 271 Wis. at 36, 72 N.W.2d at 587-88 (quoting Annotation, *Lease of Property by Municipality or Other Political Subdivision, with Option to Purchase Same, as Evasion of Constitutional or Statutory Limitation of Indebtedness*, 71 A.L.R. 1318, 1326 (1931) (emphasis omitted)).

51. *Id.* at 42, 72 N.W.2d at 591 (quoting Tranter v. Allegheny County Auth., 316 Pa. 65, 84, 173 A. 289, 297 (1934)).

52. *Caddell*, 296 S.C. at 402, 373 S.E.2d at 600.

53. *See id.*; *see also* S.C. CODE ANN. § 59-19-250 (Law. Co-op. 1976 & Supp. 1988) (listing general powers of school trustees); S.C. CODE ANN. § 59-19-250 (Law. Co-op. 1976) (defining powers of trustees to sale or lease school property).

54. *Caddell*, 296 S.C. at 402, 373 S.E.2d at 600; *see supra* note 24.

Caddell, however, effectively eliminates the taxpayer's direct veto power over government excess, a power which has existed since 1895.[55] Taxpayer recourse hereafter will be confined to refusing to re-elect officials authorizing unwarranted expenditures. At best, refusal to re-elect is remedial. It does not ensure against the perpetuation of excess spending. Furthermore, in the case of appointed officials, the taxpayer is left virtually powerless.

Also, it is debatable whether lease/purchase agreements are more costly than traditional bond issues. Certificates sold in connection with lease/purchase agreements carry an interest rate .5 percent to .75 percent higher than general obligation bonds.[56] Proponents of the lease/purchase alternative claim this premium is offset by money saved on issuing costs required when issuing general obligation bonds, particularly when a bond referendum must be put to a public vote.[57]

The question now is how the General Assembly will react to the *Caddell* decision. It may take a "wait-and-see" approach, or it may step in and place limitations on lease/purchase agreements. Indeed, it is possible the General Assembly could prohibit them all together. Thus, rather than settling the issue of the legality of lease/purchase agreements, the South Carolina Supreme Court probably has set the stage for further study and debate.

Susan A. Fretwell

II. No Warrant Necessary for OSHA Officials to Inspect Employers' OSHA-Required Records

The Fourth Circuit Court of Appeals in *McLaughlin v. A.B. Chance Co.*[58] unexpectedly determined that an employer has no reasonable expectation of privacy with regard to records kept pursuant to an order by the Occupational Safety and Health Administration (OSHA).[59] The court held that an OSHA official, who is lawfully on the

55. *See* S.C. CONST. art. X, § 5 (1875, amended 1977).

56. Record at 25. If there were a sudden surge in public offerings of Certificates, the marketplace could demand even higher interest rates. Also, the first time the government "chickens out" on a lease/purchase agreement, the impact could be phenomenal.

57. In *Caddell* the proposed work was needed, not merely desired. When voters have turned down a bond referendum on necessary work, the only meaningful cost comparison is between temporary measures and those requiring financing. If lease/purchase agreements are more expensive than bonded indebtedness, however, additional questions about their propriety may surface if they were used without offering voters the less costly option.

58. 842 F.2d 724 (4th Cir. 1988).

59. *Id.* at 727.

premises responding to an employee's complaint, may require production of OSHA forms No. 200[60] and No. 101[61] without a warrant or an administrative subpoena.[62] The court determined that requiring employers to produce these records was not an unreasonable search under the fourth amendment.[63]

An OSHA official who had received a health and safety complaint from an employee of A.B. Chance Company went to the plant to inspect the facility. The official was permitted to examine the machinery cited in the complaint, but was denied access to the two requested forms because he had no search warrant.[64] The compliance officer contacted the company a week later and was again denied permission to examine the documents without a search warrant. The compliance officer subsequently notified A.B. Chance Company that it had violated the Occupational Safety and Health Act.[65]

The Secretary of Labor brought the issue to the attention of the Occupational Safety and Health Review Commission and an administrative law judge determined that A.B. Chance Company had violated the regulation.[66] Reversing this decision, the Commission found the regulation was insufficient to eliminate the warrant requirement.[67] The Fourth Circuit reversed the Commission's finding, apparently determining the regulation did not permit unreasonable searches.[68]

The Fourth Circuit cited the Supreme Court's decision in *See v. City of Seattle*,[69] agreeing that generally commercial property owners have a reasonable expectation of privacy which is protected by the fourth amendment.[70] The court noted, however, several exceptions to the warrant rule in certain industries that have been historically highly regulated.[71] These cases focus on the lack of a reasonable expectation

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60. Form No. 200 is required to be kept by employers under the Code of Federal Regulations. The form requires a description of all occupational illnesses and injuries incurred at the facility. 29 C.F.R. § 1904.2(a) (1987).

61. Form No. 101 is required to be kept by employers under the Code of Federal Regulations. The form requires a supplemental summary of each occupational injury or illness. 29 C.F.R. § 1904.4 (1987).

62. *McLaughlin*, 842 F.2d at 726.

63. *Id.*

64. *Id.* at 724-25.

65. *Id.* at 725. The official asserted the company had violated 29 C.F.R. § 1904.7(a), which mandates the production of documents required under §§ 1904.2(a) and 1904.4 upon the request of any representative of the Secretary of Labor.

66. *McLaughlin*, 842 F.2d at 725.

67. *Id.*

68. *Id.* at 726.

69. 387 U.S. 541 (1967).

70. *McLaughlin*, 842 F.2d at 726.

71. *Id.* at 726-27 (citing, *e.g.*, United States v. Biswell, 406 U.S. 311 (1972) (warrantless search of a storeroom in a firearms store was held not to violate the fourth

of privacy when business employers are on notice that they are operating in closely regulated industries and often are required to maintain particular records that are frequently inspected.[72]

In *Bionic Auto Parts & Sales, Inc. v. Fahner*[73] the Seventh Circuit recognized that administrative searches authorized by specific statutes may protect adequately the limited privacy expectations of certain businesses.[74] The Fourth Circuit, however, adopted the Supreme Court's analysis requiring a reasonableness test that hinges on balancing the state's interest in the search against the privacy interest of the business and the degree of the invasion.[75]

In *McLaughlin* the court felt the state had a strong interest in protecting employees from work-related personal injuries.[76] The Occupational Safety and Health Act itself was designed for this purpose.[77] Consequently, the requirement of keeping employment records that explain work-related injuries was deemed reasonable in furtherance of the intent of Congress.[78] The court also found there could not be any reasonable expectation of privacy in forms that are required to be kept and conspicuously posted at the facility.[79] Any invasion occasioned by the search necessarily would be minimal where records are already made and merely need to be handed over.[80]

The court distinguished this case from *Marshall v. Barlow's, Inc.*,[81] in which the Supreme Court determined that an OSHA official

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amendment); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (warrantless inspections of liquor dealers held nonviolative of the fourth amendment); Gallaher v. City of Huntington, 759 F.2d 1155 (4th Cir. 1985) (warrantless search of a precious metal and gem dealer's premises upheld)).

72. *Id.* (citing, *e.g.*, California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974) (warrantless search upheld since under the Bank Secrecy Act of 1970 certain transactions were required to be reported, the industry was on notice of the requirement and there was a strong state interest in the availability of the information); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor dealer held subject to warrantless searches); Gallaher v. City of Huntington, 759 F.2d 1155 (4th Cir. 1985) (precious metal and gem dealer operating in a highly regulated industry held subject to reasonable warrantless searches by regulating authorities); Bionic Auto Parts & Sales, Inc. v. Fahner, 721 F.2d 1072 (7th Cir. 1983) (warrantless search of auto parts dealer upheld as nonviolative where industry was so highly regulated that dealer was constructively on notice of inspection)).

73. 721 F.2d 1072 (7th Cir. 1983).

74. *See id.* at 1078-79.

75. *McLaughlin*, 842 F.2d at 727 (citing Camara v. Municipal Court, 387 U.S. 523 (1967)).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 727-28.

80. *Id.*

81. 436 U.S. 307 (1978).

had too much latitude in the scope of his search and held the search unreasonable.[82] The Fourth Circuit reasoned that in *McLaughlin* the search was narrowly focused on two documents with no risk of the official's discretion enlarging the scope of the search to an unreasonable dimension.[83]

The Fourth Circuit's holding in *McLaughlin* is in direct opposition to rulings in other jurisdictions on similar issues. The most obvious example is the Eleventh Circuit's holding in *Brock v. Emerson Electric Co.*[84] The court in *Brock* dealt with identical issues and held that employers had a protected privacy interest in the same records required to be kept by OSHA regulations.[85] Additionally, to obtain these records OSHA officials were required to produce a subpoena when the search was nonconsensual.[86]

The Fourth Circuit distinguished *Brock* on several grounds. It claimed the Eleventh Circuit failed to analyze adequately the reasonableness of the employer's privacy interest in relation to the balancing of the state's interest.[87] The *Brock* court had reasoned that the company was not involved in a highly regulated industry merely because OSHA monitored its employee injuries.[88] Therefore, the court determined the company would expect that it had the privacy interests normally afforded commercial facilities in a similar position.

The Eleventh Circuit did not discuss specifically the balance of state interests. In *See v. City of Seattle*,[89] however, the Supreme Court stated that "[t]he agency's particular demand for access will of course be measured . . . against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved."[90] The Eleventh Circuit, which quoted *See* in support of its holding, apparently did not feel the public need for enforcement of the OSHA regulations would be hindered if a warrant requirement were enforced. *See* explicitly stated that reasonable inspections of documents kept pursuant to regulations is permissible, but that the inspections must be accomplished through the proper warrant procedures.[91]

The Sixth Circuit consistently has held that administrative

82. *Id.* at 323-25.
83. *McLaughlin*, 842 F.2d at 728.
84. 834 F.2d 994 (11th Cir. 1987).
85. *Id.* at 996.
86. *Id.* at 997.
87. *McLaughlin*, 842 F.2d at 728.
88. *Brock*, 834 F.2d at 996.
89. 387 U.S. 541 (1967).
90. *Id.* at 545.
91. *Id.* at 544.

searches are not immune to the warrant requirement of the fourth amendment.[92] Upon facts nearly identical to those in *Brock* and *McLaughlin*, the Sixth Circuit agreed with the Eleventh Circuit that a recognizable privacy interest in required records may exist. Furthermore, it stated that nonconsensual searches of an employer's business pursuant to the Act are unreasonable without a warrant.[93]

An unusual aspect of the case is the fact that the Occupational Safety and Health Review Commission consistently has found warrantless searches conducted by the Secretary to be violative of the fourth amendment and the Commission has vacated orders of administrative law judges who ruled to the contrary.[94] The Commission, which was created to enforce and examine OSHA activities, obviously believes administrative searches in non-highly-regulated industries may be made only pursuant to an appropriate warrant.

The fourth amendment, with its limitations on searches and seizures, protects privacy interests through a reasonableness standard.[95] Since there has been no argument regarding the necessity for expediency in the production of the OSHA documents for emergency or protective purposes, it seems reasonable that officials seeking the documents be required to obtain a warrant or an administrative subpoena. The Secretary of Labor has not argued that time was a factor. Currently, the circuits are split in diametric opposition. The simplest solution, and the one that would avoid even potential violations of the fourth amendment, is to require OSHA officials to obtain a valid warrant when the official receives a complaint that will require an investigation necessitating inspection of the employer's records.

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III. COURT AVOIDS DECISION ON CONSTITUTIONALITY OF LEGISLATORS' MEMBERSHIP ON SOUTH CAROLINA COASTAL COUNCIL

The South Carolina Supreme Court continues to avoid addressing

92. *See* McLaughlin v. Kings Island, 849 F.2d 990 (6th Cir. 1988) (warrant requirement could not be overcome by regulations promoted by OSHA); Allinder v. Ohio, 808 F.2d 1180 (6th Cir.) (Ohio Department of Agriculture not permitted to conduct warrantless searches of apiaries), *appeal dismissed*, 481 U.S. 1065 (1987); J.L. Foti Constr. Co. v. Donovan, 786 F.2d 714 (6th Cir. 1986) (although OSHA does not require a warrant to search employer premises, the fourth amendment imposes a constitutional requirement of a valid warrant pursuant to any such search).

93. *Kings Island*, 849 F.2d at 997.

94. *See id.* at 990; *see also McLaughlin*, 842 F.2d 724; Brock v. Emerson Elec. Co., 834 F.2d 994 (11th Cir. 1987); Donovan v. Sarasota Concrete Co., 693 F.2d 1061 (11th Cir. 1982).

95. *See* Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

the constitutionality of four legislators' participation on the South Carolina Coastal Council. South Carolina Code section 48-39-40(A)[96] places four members of the General Assembly on the South Carolina Coastal Council and gives them the power to select six additional members.[97] Because the South Carolina Constitution mandates a separation of powers among the three branches of government, the composition of the Council arguably is unconstitutional.[98] A 1982 Attorney General's Opinion concluded that section 48-39-40(A) violates the separation of powers doctrine.[99] Nonetheless, in both *Energy Research Foundation v. Waddell*[100] and *South Carolina Wildlife Federation v. South Carolina Coastal Council*,[101] the supreme court refused to rule on this important question.

In 1977 the General Assembly established the Council and gave it broad regulatory authority over public waters, beaches, wetlands, and sand dunes.[102] Under the Act, the Council conducts a broad range of regulatory programs, including certifications, permitting, inspections, monitoring, and management of activities affecting coastal resources.[103] Because these powers and duties are typical of executive branch agencies, the Coastal Council has been recognized as such an agency by the South Carolina Supreme Court.[104]

In *Waddell* six non-profit public interest organizations attempted to challenge the constitutionality of four legislators' presence on the

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96. S.C. CODE ANN. § 48-39-40(A) (Law. Co-op. 1987).

97. *See id.* Section 48-39-40(A) reads:

> There is hereby created the South Carolina Coastal Council which shall consist of eighteen members as follows: Eight members, one from each coastal zone county, to be appointed by the local county governing body; six members, one from each of the congressional districts of the State, to be elected by a majority vote of the members of the House of Representatives and the Senate representing the counties in such district, each such House or Senate member to have one vote; and the following legislative members who shall serve ex officio: Two state Senators, one to be appointed by the President of the Senate and one to be elected by the Senate Fish, Game and Forestry Committee; and two members of the House of Representatives to be appointed by the Speaker of the House. The Council shall elect a chairman, vice-chairman and such other officers as it deems necessary.

Id.

98. *See* S.C. CONST. art. I, § 8. This section reads: "In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." *Id.*

99. *See* 1982 Op. S.C. Att'y Gen. 31.

100. 295 S.C. 100, 367 S.E.2d 419 (1988).

101. 296 S.C. 187, 371 S.E.2d 521 (1988).

102. *See* S.C. CODE ANN. §§ 48-39-40 to -50 (Law. Co-op. 1987).

103. *Id.* § 48-39-50.

104. *See* Guerard v. Whitner, 276 S.C. 521, 280 S.E.2d 539 (1981).

Coastal Council. These groups sought declaratory and injunctive relief to bar the four legislators from further participation on the Council. The legislators moved to dismiss the action for lack of standing. In response, these groups asserted that their members "use and enjoy the natural resources of the coastal zone of South Carolina, which are affected by the decisions of the South Carolina Coastal Council."[105] The court held the groups had no standing to maintain the action since they had not alleged any individualized injury.[106] The use of the South Carolina coastal zone was not deemed a personal interest distinct from that of members of the public.[107] Thus, by disposing of the case on procedural grounds, the supreme court avoided the constitutional question.

In *South Carolina Wildlife Federation* similar non-profit public interest groups also challenged the presence of the four legislators on the Council. *South Carolina Wildlife Federation* involved a dispute over Council certification of a proposed residential development. As an element of the certification challenge, the Wildlife Federation argued that the certification must be declared invalid because of the four legislators on the Council.[108] While the court found the Federation had standing to maintain the action, since it alleged individualized injury resulting from a specific Council decision, it still managed to avoid the separation of powers question by simply declining to address the issue after declaring the certification invalid on other grounds.[109]

The supreme court's refusal to address the separation of powers question has resulted in conflict of opinion with regard to the constitutionality of the presence of legislators on the Coastal Council. As previously noted, the Attorney General stated that the presence of the legislators on the Council violates the separation of powers doctrine.[110] The supreme court, however, in *Tall Towers, Inc. v. South Carolina Procurement Review Panel*,[111] indicated that it might be willing to allow all but the most flagrant incidents of legislative encroachment. The court stated that overlap of authority and legislative encroachment would be tolerated in complex areas of government to a limited degree in order to increase cooperation between the legislative and executive branches.[112]

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105. *Waddell*, 295 S.C. at 102, 367 S.E.2d at 420.

106. *Id.* (citing Sierra Club v. Morton, 405 U.S. 727 (1972)).

107. *Id.*

108. *See* Brief of Appellant at 38-45, *South Carolina Wildlife Fed'n*, 296 S.C. 187, 371 S.E.2d 521.

109. *See South Carolina Wildlife Fed'n*, 296 S.C. at 190, 371 S.E.2d at 523.

110. *See supra* note 99.

111. 294 S.C. 225, 363 S.E.2d 683 (1987).

112. *Id.* at 230, 363 S.E.2d at 685.

Controversy has developed recently over the Council's implementation of newly enacted legislation and other environmental issues.[113] By its refusal to address the important separation of powers question, the supreme court unnecessarily contributes to the controversy over Council authority by leaving open the possibility that Coastal Council action could be subject to constitutional challenge by parties with standing. The supreme court should address the constitutionality of Council membership and resolve the question of Coastal Council authority to act.

James Mauldin Gibson

113. *See Lawsuits Challenge Beach Law*, The State, Oct. 30, 1988, at 1-D, col. 5.