TWO COURTS OF APPEAL ISSUE CONFLICTING OPINIONS ON FEDERAL TAX SUBSIDIES UNDER THE AFFORDABLE CARE ACT.

Today two federal courts issued opinions on the same issue – whether a regulation issued by the Internal Revenue Service authorizing a federal tax subsidy to individuals purchasing insurance on the federal exchange is inconsistent with the language of the Affordable Care Act ("ACA"). *Halbig v. Burwell*, No. 14-5018 (D.C. Cir.) and *King v. Burwell*, No. 14-1158 (4th Cir.). Specifically, the appellants in each case argued that the regulation conflicts with the plain language of Section 36B of the ACA, which provides for tax credits to subsidize the purchase of insurance on an "exchange established by the State under section 1311 of the [ACA]." The appellants in each case were residents of states in which the health insurance exchange is run by the federal government, not by the state. In fact, one of the appellants in the *Halbig* case is a resident of Tennessee. The cases address a key feature of the ACA – tax subsidies from the federal government to individuals purchasing health insurance. Penalties under both the individual mandate and the employer mandate hinge on the availability of these subsidies.

In a 2-1 decision, the Court of Appeals for the District of Columbia Circuit held that the regulation was in conflict with the plain meaning of Section 36B of the ACA – that subsidies are only available to individuals who purchase insurance through a state-run exchange. The Court rejected claims by the government that disallowing the regulation goes against the overall purposes

of the ACA and renders other provisions of the ACA absurd. While the Court recognized the magnitude of its decision and its effect on "millions of individuals," it stated that it must defer to the Court's limited role when interpreting statutes enacted by Congress – "to ascertain the meaning of the words of the statute."

The Court of Appeals for the Fourth Circuit addressed the identical question but came to the opposite result. In a unanimous opinion of the three judge panel issued just hours after the decision in *Halbig*, the Court found the language of Section 36B of the ACA "ambiguous and subject to multiple interpretations." In ruling to affirm the judgment of the lower court, the Court of Appeals deferred to the Internal Revenue Service and upheld the regulation "as a permissible exercise of the agency's discretion."

The full implications of these decisions remain to be seen. The decisions were issued by a three judge panel, a common practice in which a panel comprised of less than all the judges which make up a Court of Appeals issues an opinion in a particular case. The losing parties have the option to request a ruling by the entire panel of judges (known as an "en banc" ruling) or to appeal directly to the United States Supreme Court. The government has already announced that it will request an en banc ruling in the *Halbig* case. Given the conflicting opinions, most experts agree that these decisions will be appealed and will probably be resolved by the U.S. Supreme Court. Given that the current term of the U.S. Supreme Court has closed, the Supreme Court will not be able to address these cases until next year. Until the time for appeals has expired and all appeals have been ruled upon, the decisions will have no effect on the availability of ACA subsidies.