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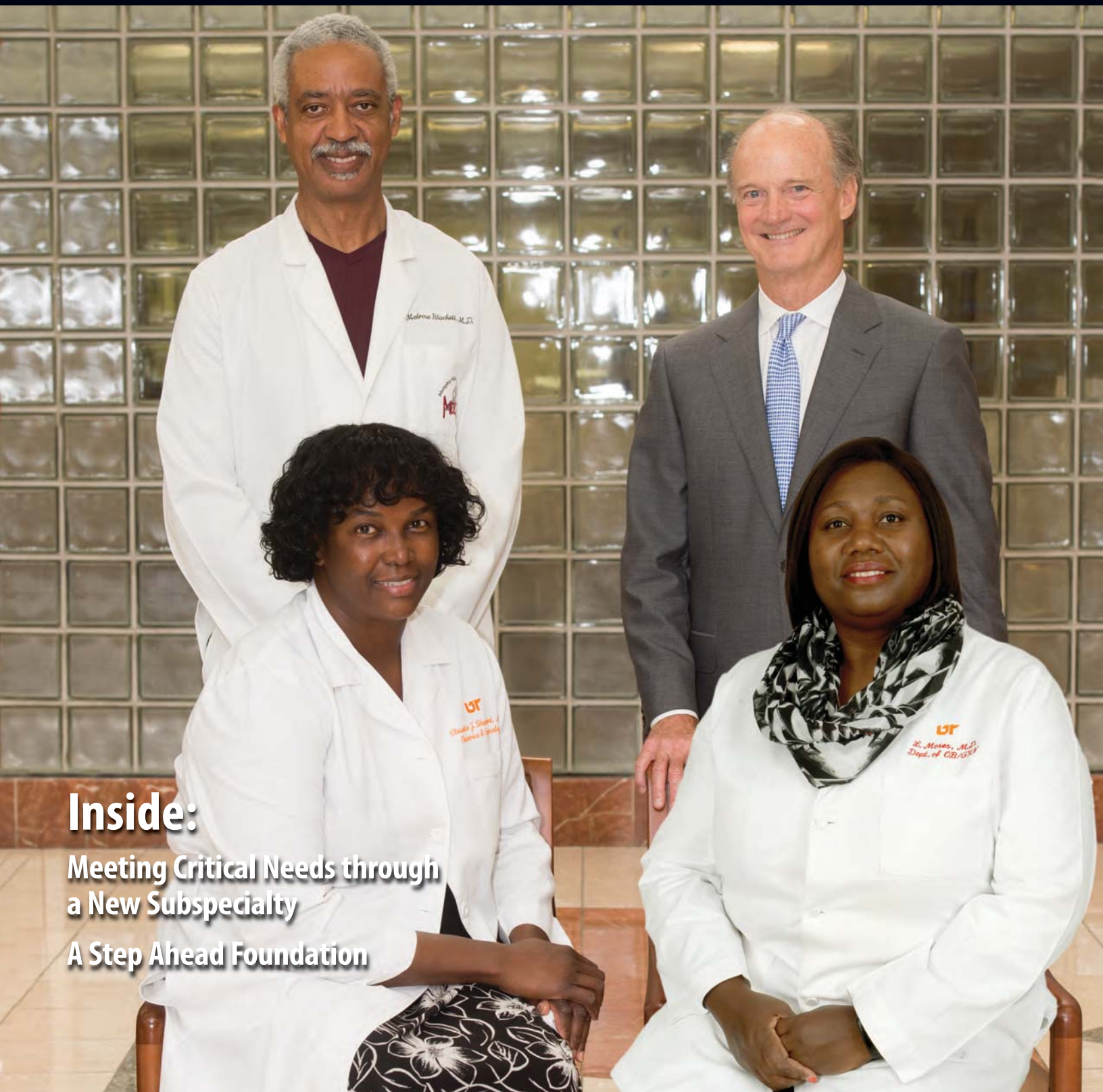

Inside:

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Circuit Courts' Split over Major ACA Issue Will Impact Employers

by: Kathryn R. Gilchrist and Allison T. Jones

Two U.S. Courts of Appeals recently issued conflicting rulings on a major provision of the Affordable Care Act (ACA), and the U.S. Supreme Court is being asked to weigh in. The concern is over the Internal Revenue Service's decision to extend insurance premium subsidies to all Insurance Exchanges regardless of whether they are State-based or Federally-facilitated.

Enacted as part of the ACA, Section 36B of the Internal Revenue Code makes tax credits available as a form of subsidy to individuals who purchase health insurance through Exchanges that are "established by the state under section 1311" of the ACA. In a regulation promulgated on May 23, 2012 (the "IRS Rule"), the IRS interpreted this section to allow credits for insurance purchased on either a State-based or a Federally-facilitated Exchange. The IRS Rule gives the ACA broader effect than it would have if the tax credits were limited to State-based Exchanges.

The ACA uses the threat of penalties to induce large employers to offer health insurance coverage to their employees. Specifically, the ACA penalizes any employer with 50 or more employees that fails to offer affordable health insurance coverage to its full-time employees if one or more of those employees enroll in a qualified health plan with respect to which a tax credit is paid to the employee. Thus, in the absence of a tax credit, there can be no penalty assessed against an employer for failing to offer coverage to its employees. In other words, the employer mandate hinges on the availability of tax credits.

On July 22, 2014, a three-judge panel of the Court of Appeals for the D.C. Circuit held 2-1 in *Halbig v. Burwell* that the IRS had exceeded its authority in issuing the IRS Rule when, on its face, section 36B authorizes tax credits only for insurance purchased on an Exchange "established by the State." The plaintiffs argued that the Federal government is not a "State," and so it has no authority to establish an Exchange under section 1311. The government countered that the ACA establishes complete equivalence between State and Federal Exchanges, such that when the Federal government establishes an Exchange, it does so standing in the State's shoes. However, the Court was persuaded by the plaintiffs' argument. The Court agreed that the plain meaning of section 36B's statutory language unambiguously distinguishes between State and Federal Exchanges. Consequently, the D.C. Circuit held that the tax credits are only available in State-based Exchanges.

Later that day, the Court of Appeals for the Fourth Circuit held unanimously in *King v. Burwell* that tax credits are available in *both* State-based and Federally-facilitated Exchanges. The Fourth Circuit noted that section 1311 of the ACA defines an Exchange as "a governmental agency or nonprofit entity established by the state," and that section 1321 directs the Department of Health and Human Services to establish such an Exchange in any state that fails to do so. Reading sections 1311 and 1321 together in light of the entire context of the ACA, the Court found the language of 36B to be ambiguous. On this basis, the Court looked to agency interpretation of the statute to determine its reasonableness and found that the IRS Rule was an "entirely sensible" interpretation given the broad policies and purpose of the ACA. The Fourth Circuit upheld the IRS Rule.

The government has asked the D.C. Circuit for an en banc rehearing of the *Halbig* case, in hopes that the panel decision will be set aside. Likewise, the plaintiffs in *King* have filed a petition for a writ of certiorari with the U.S. Supreme Court based on the circuit split. If the D.C. Circuit votes to rehear the *Halbig* case and the panel decision is set aside, there will no longer be conflicting circuit court decisions, which could prevent Supreme Court review. As has been the case with much of the ACA's evolution, time will tell.

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