Knoxville Bar Association

THE CONSIGLIERE

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Let us know your ideas and suggestions for *THE CONSIGLIERE:*

- Call or email Paul E. Wehmeier at 546-7000 or pwehmeier@adhknox.com

  Marsha Wilson at 522-6522 or mwilson@knoxbar.org.
- Submit an article for consideration.
- Give us your feedback on this newsletter.
- Tell us about CLE topics or networking events you would like the Section to sponsor.

FROM THE CO-CHAIRS

By: David Headrick
LandAir Surveying Company, Inc.

The World Cup topic may now be passé. However, as I write this letter, the nation is still reeling from the loss to Belgium. It is front-page news on Sports Illustrated and Sports Center. Every other post I see on Facebook lately has something to do with our "futbol" matches. I've also heard that live streaming video of the games during work hours has been causing the IT version of a nuclear disaster scenarios across the nation.

There are few better experiences than when America can get behind a good, clean cause. What could be better than being patriotic while watching a sporting event? Perhaps that's why everybody gets stoked during the Star-Spangled Banner before everything from Major League Baseball to your local 5K run.

I am certainly interested, because I played soccer from kindergarten through high school. Now that I think about it, I cannot believe that I'm writing a soccer-based Letter from the Co-Chair before my Co-Chair Marcia Kilby. She is a raving soccer fan that will go to a bar at four in the morning just to see her favorite club play.

At any rate, I've drawn some parallels to life from this exciting series. In no particular order, here are some life lessons I've learned from the World Cup:

"I believe that we will win!" It's worth remembering periodically that the power of positive thinking will transform you. Upon announcement, the world was skeptical about our chances to make it past the "Group of Death," but that's just what we did. Life lesson: Convince yourself that you will win and your battle will be half won.

Set pieces. Have you noticed how well the US played corner kicks? These type plays are "set pieces," when the ball is put in play after it goes out of bounds. It is truly art in motion when a ball is kicked from the corner and then headed in by a forward surrounded by multiple defenders. In fact, it looks nearly impossible.

However, the US concentrated heavily on this scenario, giving them just above an impossible chance on every corner kick.

What are your set pieces in life? It could be a trial; it could be your next tennis match; it could be the next time you decide to play Julia Childs in your kitchen. A little thought beforehand along with a lot of practice will improve your odds of success and enjoyment. Life lesson: Practice your set pieces.

Wins are wins. The US lost its final match of the Group of Death to Germany by a score of 0-1. The US also had a win against Portugal stolen in the final minutes. Thanks to Facebook, I discovered that most of my 4,187,000 closest friends considered these to be unbearable losses. However, the US still advanced to the next round. Advancing was the goal, not winning every game.

Although "winning" is not as clearly defined in life, there is certainly an analogy here. You do not have to stay up all night before every deposition. Every party you throw doesn't have to be worthy of mention in the Great Gatsby. It may have not been your fastest time, but simply completing your next run, swim, and or bike is a worthy accomplishment. Life lesson: It's not a race; it's a marathon. You don't have to win every battle.

Biting. I have never thought that biting would have a place in sports, despite Mike Tyson or even Man Versus Food. When I found out that Luis Suarez had bitten a player on the field for the third time now, I knew he was not normal. The roots of this primal instinct must be related to the desire to shoot up schools and maybe even to drive slowly in the left-hand lane. He just received a nine-game suspension from international matches (i.e., playing for Uruguay) and four-month ban from anything soccer related. Life lesson: Distance yourself from the crazies as quickly as possible.

On a more serious note, please remember to attend our annual half-day CLE on August 21. It is always a worthy event and will get you most if not all of the ethics credits you need for the year.

UPCOMING SECTION EVENTS

Please watch for more information about the Corporate Counsel Sections upcoming half-day CLE on August 21, 2014 and future social/CLE opportunities anticipated for November 2014.

TAX TIDBIT: NET INCOME TAX UPDATE.

TAX TIDBIT

NET INVESTMENT INCOME TAX UPDATE.

BY: Jonathan Martin

As most are well aware, on December 5, 2012, the IRS issued the Net Investment Income ("NII") proposed regulations effective for tax years beginning after December 31, 2012. Later, in November 2013, the IRS issued final regulations to clarify many unanswered questions and also issued new proposed regulations to address concerns over the application of the tax to certain items of income.

Among other items of income, NII includes gross income from interest, rents, dividends, annuities, royalties, and rents, other than such income that is derived in the ordinary course of a trade or business other than a passive activity or a financial instrument or commodities trade or business. The initial proposed regulations did not adopt a definition of what qualifies as a trade or business. However, the final regulations adopt the definition of a trade or business as used in Section 162 of the Internal Revenue Code. In the context of Section 162, case law is the predominant resource for determining what constitutes a trade or business. The Supreme Court has explained that "to be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and…the taxpayer's primary purpose for engaging in the activity must be for income or profit. A sporadic activity, a hobby, or an amusement diversion does not qualify."

Taxpayers also voiced concern over the omission of a provision dealing with self-charged rental income. Prior to the final regulations, income from so-called "self-rentals" was subject to the tax. Often, taxpayers that own an active business also own real property which may be held in a separate entity, through an LLC for example. The active business then rents the real property from the separate entity. Under the initial proposed regulations, this income would be subject to the NII tax because it is income from rents not derived in the ordinary course of a trade or business and is a passive activity. The final regulations remedy that issue and generally provide that self-rental income is deemed to be derived in the ordinary course of a trade or business and excluded from the NII tax if the property is rented to a business in which the taxpayer materially participates. Said differently, if real property owned by a separate entity is rented to a taxpayer's business and the taxpayer materially participates in such business, then the rental income will not be NII.

At the same time the IRS issued the final regulations, it also issue new proposed regulations to address items that were not covered in the initial proposed regulations. The most notable provision included in the new proposed regulations addresses partnership payments. The initial proposed regulations and final regulations did not include a provision addressing whether items such as guaranteed payments and distributions to liquidate a partner's interest were subject to the NII tax. Guaranteed payments are payments made by a partnership to a partner, often for services rendered, that are determined without regard to the partnership's income. The proposed regulations provide that NII does not include payments classified as guaranteed payments and, thus, that such income is not subject to the NII tax. However, payments received for the use of capital are considered NII and are subject to the tax.

The NII tax is an area of tax law that is constantly evolving due to the limited guidance surrounding what exactly constitutes NII and when the tax applies. Additionally, the initial proposed regulations left many questions unanswered. While the final regulations and new proposed regulations address some taxpayer concerns, it would be prudent to continue monitoring the NII tax for future developments.

EMPLOYEE BENEFITS

NEW COBRA MODEL NOTICES AND ACA IMPLICATIONS.

EMPLOYEE BENEFITS: NEW COBRA MODEL NOTICES.

By: Al Holifield
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On May 7, 2014, the U.S. Department of Labor ("DOL") issued new proposed rules that will revise an employer's notification requirements under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") to align them with the Affordable Care Act ("ACA") provisions. In these proposed rules, the DOL published new model COBRA notices. Although the rules are not finalized or effective, the DOL has stated that it will consider use of the newly revised model notices as good faith compliance with any COBRA notice content requirements (in case future changes are made). Therefore, it is a good idea for plan administrators to immediately implement use of these revised model notices. It is also important to remember that the model notices are drafted to protect the employee. Consequently, employers should customize the model notices to fit the employer's group health plan requirements.

The new Model General Notice includes an instruction page for administrators, as well as new language regarding the insurance exchange under the ACA and potential tax credits an individual may be eligible for by purchasing coverage through the exchange. The new Model Election Notice includes more detailed information regarding the insurance exchange under the ACA. The Model Election Notice also provides clarification on how the exchanges provide an alternative to COBRA. In particular, pages 3, 4 and 5 can be helpful for plan administrators who might be asked by participants to explain how to evaluate exchange options. Both model notices are available for download on the DOL's website at http://www.dol.gov/ebsa/cobra.html.

While the model notices provide employees with more information on the insurance exchange, the notices do not address the special enrollment periods of the federal and state insurance exchanges, allowing individuals to enroll in the coverage on the exchange other than during the annual fall enrollment. Recent guidance issued by the Center for Medicare and Medicaid Services ("CMS") indicates that an individual may enroll in coverage on the exchange during two special enrollment periods - when they are first eligible for COBRA coverage or when they have exhausted all of their COBRA coverage. Essentially, if an individual elects COBRA coverage and subsequently drops it before using all of their COBRA coverage, they must wait until the next annual enrollment period to purchase coverage through the exchanges. Employers may want to include some additional language in the COBRA notices addressing these limitations or refer the individuals to a resource maintained by the state or federal insurance exchange that better explains the availability and limitations of enrolling in coverage.

INTELLECTUAL PROPERTY

INTELLECTUAL PROPERTY: PATENT REFORM UPDATE.

Patent Law in the News: Updates on Reform and Supreme Court Decisions

By: Steven F. Owens
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Earlier this year, the landscape of patent law was poised for dramatic change as sweeping legislation to curb so-called "patent troll litigation" had made its way through the U.S. House of Representatives while enjoying bi-partisan support. The Senate Judiciary Committee was considering several proposed bills targeting different aspects of patent litigation and there was a widespread belief that patent reform offered one of the few opportunities for Congress and President

Obama to come together during this Congressional term.

However, the Senate Judiciary Committee placed patent reform on an indefinite hold on May 21, 2014. Senator Patrick Leahy announced that industry leaders had failed to reach a compromise on key issues. Although putting an end to troll litigation had been championed by many in the tech industry and healthcare, reform was strongly opposed by academics, independent inventors, legal practitioners, research institutes and universities, who insisted that this legislation would harm the patent system.

One of the more outspoken critics of the proposed reform was Randall Rader, then Chief Judge of the U.S. Court of Appeals for the Federal Circuit.[1] Judge Rader called for legislative restraint and maintained that the judiciary already possessed the necessary tools to achieve the end envisioned by law makers.

A major component of the proposed reform bills was to make it easier for parties accused of patent infringement to recover their legal fees upon prevailing in court. Perhaps coincidentally, the U.S. Supreme Court in April rendered its decision in *Octane Fitness v. Icon Health*, 134 S. Ct. 981 (2014), which vastly reduced the hurdles for awarding attorney fees in "exceptional" patent cases. The Court overturned the Federal Circuit's stringent standard handed down nine years earlier[2], and gave district court judges broad discretion in determining exceptionality.

Even one patent law case is rare for a normal term in the nation's highest court, but the Supreme Court has now decided four cases since last October. In addition to *Octane Fitness*, the Court reaffirmed in *Limelight Networks v. Akamai Tech.*, 134 S. Ct. -- (2014), that an entity can only be liable for inducing infringement when another practices each and every element of a patent's claim. And in *Nautilus v. Biosig*, 134 S. Ct. 2120 (2014), it ruled that a patent claim is indefinite if a person of ordinary skill in the art cannot determine its scope with reasonable certainty, again relaxing a prior Federal Circuit standard. Some industry practitioners speculate that the softening of the indefiniteness standard will make it easier to invalidate dubious patents asserted by so-called "patent trolls."

CLS Bank v. Alice Corp., -- S. Ct. -- (2014) is, perhaps, the most critical patent case argued before the justices this term. That case presented the issue of patentable subject matter in the context of computerized business method claims. In its opinion, the Court repeated many of the principles from previous decisions on subject matter eligibility, including the rule excluding abstract ideas from patent protection. The Court concluded that the claims in *CLS Bank,* which were directed to a method of mitigating settlement risk with an intermediary, are ineligible as being directed to an abstract idea. Further, the Court found that the claims do not contain an inventive concept that transforms it into a patent eligible claim. The Court concluded that the mere recitation of a generic computer or

"specific hardware" will not transform a patent-ineligible abstract idea into a patent-eligible invention, unless the hardware "offers a meaningful limitation beyond generally linking 'the use of the [method] to a particular technological environment,' that is, implementation via computers."

In sum, although Congress has been unable to advance patent reform legislation, the Supreme Court has decided several recent cases that will significantly impact the future of patent law.

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[1] Judge Rader has since resigned from the Federal Circuit, effective June 30, after becoming embroiled in an ethics controversy stemming from a congratulatory email he sent to a patent attorney who had appeared before the court.

[2] Knoxville's very-own Brad Brittian, of Merchant & Gould, represented the appellee before the Federal Circuit in that case, *Brooks Furniture, Mfg., Inc. v. Dutailier Int'l, Inc.*, 393 F.3d 1378 (Fed. Cir. 2005).

EMPLOYMENT LAW: EMPLOYEE ONLINE PRIVACY.

EMPLOYMENT LAW

EMPLOYEE ONLINE PRIVACY ACT OF 2014

By: Ben D. Cunningham
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Social media has been a hot topic for several years now and, it is safe to say, is likely not going to go away any time soon. As a matter of fact, for employers it is likely only going to get worse. One recent study showed that, while the percentage of active users of Facebook among 16-24 year olds is falling, the percentage of active users among 35-54 year olds is increasing. What this means for employers is that the majority of your workforce comprises the largest percentage of Facebook users.

For many years, how employers regulated their employees' social media use was largely unregulated. Over time, many states passed laws regulating what employers could and could not do and, on April 29, 2014, Governor Haslam added Tennessee to this list by signing into law Public Chapter No. 826 known as the "Employee Online Privacy Act of 2014."

The Act takes effect January 1, 2015 and provides several things that an employer (defined as a person or entity that employs one or more employees) can and cannot do in regards to an employee's "personal Internet account" (broadly defined as an online account maintained by employees or applicants "exclusively for personal communications unrelated to any business purpose of [an] employer"). Below is a general summary of what employers can and cannot do.

What employers <u>cannot</u> do:

Under the Act, an employer shall <u>not</u>:

1) request or require an employee or an applicant to disclose a password that allows access to the employee's or applicant's personal Internet account;

2) compel an employee or applicant to add the employer to the employee's or applicant's list of contacts associated with a personal Internet account;

3) compel an employee or an applicant to access a personal Internet account in the presence of the employer in a manner that enables the employer to observe the contents of the employee's or applicant's personal Internet account; or

4) take adverse action, fail to hire, or otherwise penalize an employee or applicant because of a failure to take an action specified above.

What employers <u>can</u> do:

Like a majority of states to pass similar statutes, Tennessee's law provides certain exceptions to protect an employer's legitimate business interests. Thus, unless otherwise provided by law, an employer is not prohibited from requesting or requiring an employee to disclose a username or password required only to gain access to:

1) an electronic communications device supplied or paid for wholly or in part by the employer; or

2) an account or service provided by the employer that is obtained by virtue of the employee's employment relationship with the employer, or used for the employer's business purposes.

Additionally, an employer is not prohibited from disciplining or discharging an employee for the unauthorized transfer of the employer's proprietary or confidential information to an employee's personal Internet account. Another important protection afforded employers is that an employer is not prohibited from requiring an employee to cooperate in an investigation if there is specific information on the employee's personal Internet account regarding compliance with applicable laws, regulatory requirements or prohibitions against work-related employee misconduct; including the unauthorized transfer of the employer's proprietary/ confidential information to an employee's personal Internet account. Furthermore, the Act specifically provides that employers who prohibit an employee's access to certain websites while using an employer's device or the employer's network do not violate the Act.

Finally, the Act permits employers to "view, access or use" information about an employee or applicant that can be obtained from "the public domain." Employers must consider, however, that making decisions based on information in the public domain can still subject employers to liability, such as for violating the National Labor Relations Act.

So what happens to an employer who violates the Act? Originally, the Act contained both an individual cause of action and a provision allowing the attorney general to bring a civil action on behalf of an aggrieved resident of Tennessee. Both provisions

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limited the damages that could be collected against the employer to $1,000 for each violation. However, these provisions were removed and, currently, the Act does not allow for the Tennessee Attorney General's office to bring a civil action or cap the amount of damages an aggrieved employee can recover.

In conclusion, employers should read the Act and make any necessary policy changes. These include changes both in their handbook provisions they give to employees and their internal investigation procedures. It is important in light of the Act that employers and HR departments know what they can, and cannot, do in making hiring, investigating and firing decisions.