JOHNSON & WEAVER LLP

THE MONITOR

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Johnson & Weaver Obtains $19 Million and Corporate Governance Reforms for HCA

Johnson & Weaver recently achieved a monumental recovery for the benefit of HCA Holdings, Inc. in a case pending in Tennessee state court.

More than four years after HCA stockholders stepped into the shoes of HCA to pursue claims against certain officers and directors of the company in a derivative capacity, the parties reached a settlement. The settlement was reached through hard-fought, arm's-length bargaining following numerous written settlement exchanges, after two in-person mediations with a well-respected retired federal judge.

On April 12, 2016, after notice was sent to HCA stockholders, the judge approved the settlement, which provided major monetary and non-monetary relief, including:

- A $19 million payment to HCA in settlement of the plaintiffs' claims that HCA was damaged as a result of alleged breaches of fiduciary duty, representing one of the largest monetary recoveries ever obtained in a shareholder derivative action in Tennessee.
- A prohibition on the use of HCA funds to settle a related securities class action absent a majority vote of independent directors of HCA, after consulting with outside counsel.
- The implementation (and maintenance for five years) of robust corporate governance reforms designed to address the alleged misconduct and corporate governance faults leading to the action.

HCA and its board of directors agreed that Johnson & Weaver's efforts "were a material factor in the Company's ability to extinguish a potential $1 billion exposure" and "in the Company's decision to adopt and/or implement the Improvements."

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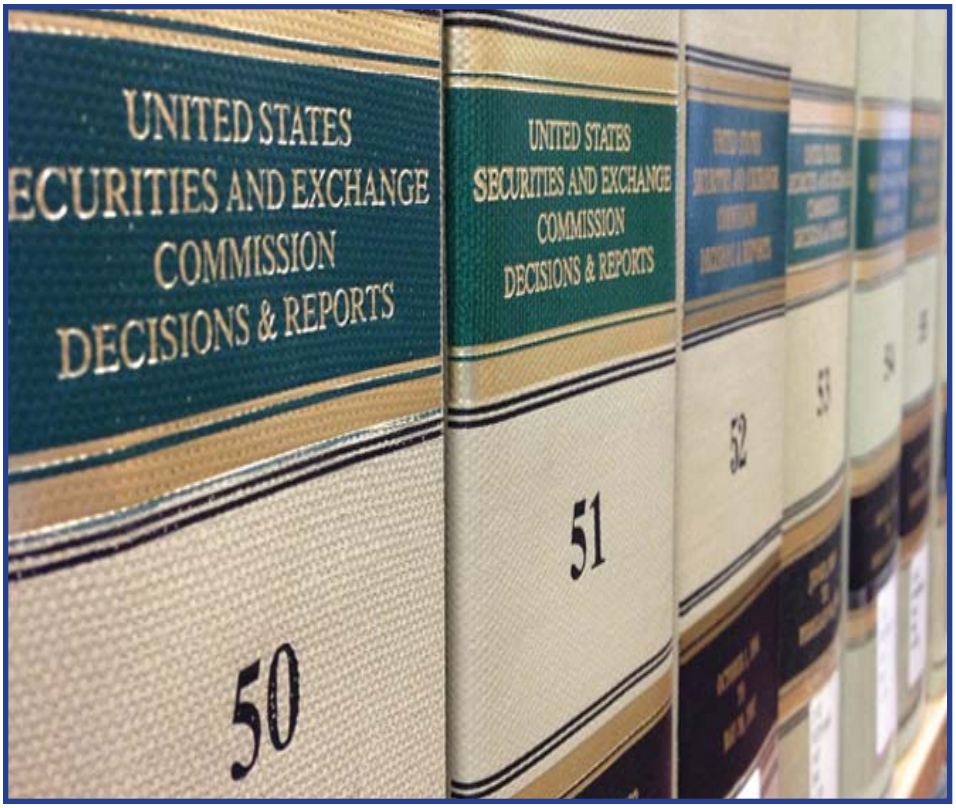
In addition, HCA stated that the $19 million "would not have been obtained for the Company but for Plaintiffs' efforts in the Action."

The mediator, retired federal judge Layn R. Phillips, also opined on the value of the settlement. "Having mediated hundreds of derivative actions over the past 20 years, I can say with confidence that such a monetary payment is an exceptional result for the benefit of HCA and Plaintiffs."

Recent Noteworthy Decisions

- ***In re American Realty Capital Properties, Inc. Litigation*, 1:15-mc-00040-AKH (S.D.N.Y. Aug. 8, 2016):** Judge Hellerstein sustained the vast majority of claims alleged against more than 40 individual and entity defendants in a class action lawsuit alleging violations of the Securities Act of 1933 and the Securities Exchange Act of 1934. The case will now proceed into discovery.
- ***In re Appraisal of DFC Global Corporation*, C.A. No. 10107-CB (Del. Ch. July 8, 2016):** Chancellor Andre G. Bouchard issued a lengthy written opinion following trial in an appraisal action. The opinion provides substantial detail into granular considerations affecting valuation analyses, and the court also attributed one-third weight to the negotiated deal price.
- ***In re Barclays Bank PLC Securities Litigation*, No. 1:09-cv-01989-PAC (S.D.N.Y. June 9, 2016):** Judge Crotty certified a class of investors in a case alleging that Barclays and various underwriters misled the market about Barclays' risk management practices in offering documents for four offerings Barclays completed between April 2006 and April 2008 and failed to adequately disclose the bank's exposure to credit markets. This case had been previously dismissed in 2011, but the dismissal was successfully appealed to the United States Court of Appeals for the Second Circuit which, in 2013, reversed the district court's decision in substantial part and remanded the case to the district court for further proceedings.
- ***In re Volcano Corp. Stockholder Litigation*, C.A. No. 10485-VCMR (Del. Ch. June 30, 2016):** Vice Chancellor Montgomery-Reeves dismissed the plaintiffs' claims, finding that the irrebutable business judgment rule applies to claims challenging a consummated 8 Del. C. § 251(h) two-step merger where (i) there has been no coercion and (ii) the tender offer was fully informed. This matter is currently on appeal to the Delaware Supreme Court.
- ***In re Wal-Mart Stores, Inc. Delaware Derivative Litigation*, C.A. No. 7455-CB (Del. Ch. May 13, 2016), and *Laborers District Council Construction Industry Pension Fund v. Bensoussan*, C.A. No. 11293-CB (Del. Ch. June 14, 2016):** These two cases were derivative actions brought on behalf of Wal-Mart Stores, Inc. and lululemon athletica inc., respectively, following successful prosecution of books and records actions brought under Section 220 of the Delaware General Corporate Law. In each of the later derivative cases, however, Chancellor Bouchard held that the previous dismissal of related derivative action in another court—Arkansas federal court, for Wal-Mart, and New York federal court for Lululemon—precluded the two Delaware cases, even though the non-Delaware plaintiffs had failed to avail themselves of making a books and records demand under Section 220.
- ***Johnson v. Driscoll*, C.A. No. 11721-VCL (Del. Ch. Feb. 3, 2015):** In a case challenging the acquisition of Diamond Foods, Vice Chancellor J. Travis Laster of the Delaware Court of Chancery opined that stockholders seeking to challenge a merger could obtain documents to investigate the viability of a post-close damages claim and, significantly, that the required showing would be less than that required on a motion to expedite.
- ***KBC Asset Management NV v. 3D Systems Corporation, et al.*, No. 0:15-cv-02393-MGL (D.S.C. July 25, 2016):** Judge Lewis denied defendants' motion to dismiss in its entirety in a case against 3D Systems Corporation, a manufacturer and seller of 3D printing products and services, and its former CEO Abraham N. Reichental and former CFOs Damon J. Gregoire and Ted Hull. The complaint alleges that defendants violated the Securities Exchange Act of 1934 by misrepresenting the true financial and operational state of the company during a rapid, ill-fated expansion strategy they had undertaken. The complaint further alleges that defendants Reichental and Gregoire took advantage of these misrepresentations by selling their own shares of company stock for total proceeds of over $17 million.



Books and Records Under Section 220 of the Delaware General Counsel Corporate Law: Whether to Use the "Tools at Hand" to Gain Information Before Commencing Litigation

Recent Delaware decisions have hampered the use and utility of "books and records" requests under Section 220 of the Delaware General Corporate Law. These developments could have major long-term effects on stockholder litigation.

Under Section 220, a stockholder is entitled to examine a company's "books and records" in furtherance of a "proper purpose." What constitutes a proper purpose depends upon the circumstances, but in any event it must be reasonably related to the person's status as a stockholder. Moreover, if a stockholder advances multiple purposes, only one must be deemed proper in order for the stockholder to be able to inspect the specified documents. Once a proper purpose is established—and the Delaware courts have recognized numerous proper purposes—the stockholder may obtain documents in the company's possession reasonably related to the stated purpose.

Procedurally, the stockholder first makes a written demand for the books and records. The stockholder and the company often resolve the books and records demand at this stage without any further proceedings. However, if the demand is refused, in whole or in part, the stockholder may bring a lawsuit to acquire the documents. These proceedings are typically relatively brief, compared to broader, full-blown litigation. What happens next depends upon the purpose of the Section 220 demand as well as the results of the stockholder's review of any documents produced.

Traditionally, one of the most compelling reasons to request

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Upcoming Lead Plaintiff Deadlines

Johnson & Weaver is investigating many potential cases arising under the federal securities laws. If you would like more information, or if you wish to participate in an action, please contact us as soon as possible to ensure that your rights are fully protected. Listed below are matters that the firm is investigating and the applicable deadlines for filing a motion with the court to be appointed as a "lead plaintiff" under the Private Securities Litigation Reform Act of 1995.

COMPANY	DEADLINE
Ambac Financial Group, Inc. (NASDAQ: AMBC)	August 29, 2016
Halyard Health, Inc. (NYSE: HYH)	August 29, 2016
Hatteras Financial Corp. (NYSE: HTS)	August 29, 2016
Lipocine Inc. (NASDAQ: LPCN)	August 30, 2016
Stericycle, Inc. (NASDAQ: SRCL)	September 12, 2016
Juno Therapeutics, Inc. (NASDAQ: JUNO)	September 12, 2016
Insmed Inc. (NASDAQ: INSM)	September 13, 2016
Emergent Biosolutions, Inc. (NYSE: EBS)	September 19, 2016
K12, Inc. (NYSE: LRN)	September 19, 2016
CytRX Corp. (NASDAQ: CYTR)	September 23, 2016
Eaton Corp. plc (NYSE: ETN)	September 23, 2016
RiT Technologies Ltd. (NASDAQ: RITT)	September 26, 2016
Fiat Chrysler Auto. N.V. (NYSE: FCAU)	September 27, 2016
Tokai Pharmaceuticals, Inc. (NASDAQ: TKAI)	September 30, 2016
Keryx Biopharma., Inc. (NASDAQ: KERX)	October 3, 2016
The Hain Celestial Group, Inc. (NASDAQ: HAIN)	October 16, 2016

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books and records has been to investigate potential wrongdoing that could give rise to stockholder derivative litigation, in which a stockholder may act on the company's behalf because its board of directors is unable to do so, generally due to some conflict of interest or lack of independence. In order to maintain a derivative suit, however, the stockholder must first establish the board's incapacity to act disinterestedly and independently. Because of the difficulty in making this showing, Delaware's courts have urged stockholders to use the "tools at hand" by requesting documents pursuant to Section 220. This is especially so in so-called *Caremark* cases (named after a Delaware Supreme Court decision involving that company), which allege that inadequate board oversight led to serious company problems.

Although it is certainly possible to bring a successful derivative suit solely in reliance upon publicly available information, certain Delaware judges have admonished plaintiffs whose pleadings were found inadequate for failing to pursue books and records under Section 220. The courts in those instances have sometimes posited that the cases might have survived initial scrutiny if the plaintiffs had acquired books and records to bolster allegations against the directors. Thus, the prevailing view for many years was that, in order to bring a *Caremark* case as well as certain other types of derivative cases, a plaintiff must first obtain books and records under Section 220.

Yet, recent developments have plagued even those litigants who diligently pursued books and records using the "tools at hand."

In late 2011, Wal-Mart Stores, Inc. disclosed in its annual report that the company had launched an internal investigation into potential instances of bribery relating to its operations in Mexico. In the spring of 2012, *The New York Times* published a lengthy article revealing extensive information about both the investigation and the underlying misconduct. Shortly thereafter, several Wal-Mart stockholders commenced stockholder derivative lawsuits in Arkansas, where the company is headquartered, and at least one institutional stockholder pursued books and records under Section 220. The Arkansas litigation was eventually dismissed because the complaint did not contain enough information about the board's interestedness or lack of independence.

By contrast, following extensive litigation, the institution obtained many documents after making a demand and then filing a lawsuit under Section 220. The institutional investor then filed a stockholder derivative action in the Delaware Court of Chancery against certain directors and officers of Wal-Mart, alleging breaches of fiduciary duty and incorporating facts learned through the Section 220 process.

Despite the institution's efforts, on May 13, 2016, Chancellor Andre G. Bouchard of the Delaware Court of Chancery ruled that the dismissal of the Arkansas litigation had res judicata (*i.e.*, claim preclusion) effect and, thus, precluded any further litigation on the alleged fiduciary duty breaches. Accordingly, the institution, which had spent considerable time investigating claims before filing suit, was foreclosed from litigating potentially meritorious claims because of the lackluster efforts of the Arkansas plaintiffs. And while Chancellor Bouchard suggested that the Arkansas plaintiffs should have availed themselves of the "tools at hand" under Section 220, their failure to do so did not render them "inadequate" for claim preclusion purposes.

In a similar case involving alleged misconduct at lululemon athletica inc., stockholders similarly pursued books and records in Delaware. However, once the documents had been reviewed and a derivative suit using those documents had been filed in Delaware Court of Chancery, the same Delaware Chancellor who issued the Wal-Mart decision dismissed the Delaware derivative case on the grounds that it was precluded by a related derivative suit New York federal court that was dismissed on demand futility grounds.

The Wal-Mart and lululemon cases are both currently on appeal before the Delaware Supreme Court. Accordingly, they could get reversed, which would restore vitality to the merits of pursuing books and records through Section 220. Nonetheless, they have chilled efforts to pursue books and records under Section 220 to investigate potential wrongdoing that might give rise to a stockholder derivative lawsuit.

The Wal-Mart and lululemon decisions deter stockholders from pursuing books and records when the actions of unrelated, hasty, fast-filing stockholders threaten to scuttle more diligent efforts to present well-researched claims. This will continue unless the decisions are reversed.

Johnson & Weaver's Recent Accomplishments

Many of the firm's attorneys have received acclaim for their expertise and high ethical standards, and the firm has also recently secured major victories in pending litigation and been involved in numerous cases that have yielded substantial settlements. The following is a sample of Johnson & Weaver's recent accolades and achievements.

- **Johnson & Weaver Welcomes Two New Attorneys:** The firm is pleased to announce that Phong L. Tran and Kristen L. O'Connor have joined the San Diego Office as associates. Mr. Tran previously practiced at an internationally acclaimed plaintiffs' firm and has an extensive amount of experience litigating securities cases, consumer actions, and antitrust matters. Additionally, Mr. Tran has spent time working in the public sector as an assistant U.S. attorney and a deputy city attorney for the City of San Diego. Ms. O'Conner recently graduated third in her law school class. She joined the firm from a technology company where she negotiated clinical trial agreements and provided market clearance submission development and support to medtech and pharmaceutical clients.
- **Settlement Approved in *Blue v. Doral Financial Corporation*, No. 3:14-cv-01393-GAG-BJM (D.P.R.):** A $7 million settlement in a securities fraud action against Doral Financial Corporation recently received final approval by a judge sitting in the United States District Court for the District of Puerto Rico. The settlement was reached after extensive litigation. Johnson & Weaver represented two of the three court-appointed lead plaintiffs and assisted lead counsel in prosecuting this matter.
- **Proposed Settlement Reached in *Desrocher v. Covisint Corporation*, No. 14-cv-03878-AKH (S.D.N.Y):** A settlement was reached in an action alleging that there were misrepresentations or omissions in certain securities offering documents filed with the SEC by Covisint. Pursuant to the parties' proposed settlement, which still requires court approval, the defendants agreed to create an $8 million common fund to compensate Covisint stockholders who were harmed by the alleged misrepresentations or omissions. Johnson & Weaver is acting as co-lead counsel in this matter.
- **Settlement Receives Preliminary Approval in *In re Intercept Pharmaceuticals, Inc. Securities Litigation*, No. 14-cv-03878-AKH (S.D.N.Y):** In a securities fraud case pending in New York federal court, the plaintiffs succeeded in securing a $55 million settlement on behalf of shareholders that purchased Intercept stock between January 9, 2014 and January 10, 2014. This represents one of the largest—if not the largest—settlements for a class period of such short duration. The court has already granted preliminary approval of the settlement, and a hearing to consider its final approval is scheduled for September 8, 2016. Johnson & Weaver represents one of the two plaintiffs, who is also a proposed class representative, and is assisting the plaintiffs' lead counsel in prosecuting the case.
- **Johnson & Weaver Appointed Lead Counsel in *Azar v. Blount International Inc.*, No. 3:16-cv-00483-SI (D. Ore.):** In a case arising out of the recent acquisition of Blount International Inc. by a group comprised of two Blount insiders, Blount's largest stockholder, and a private equity firm, Johnson & Weaver was appointed co-lead counsel under the Private Securities Litigation Reform Act of 1995. The plaintiffs allege, among other things, that the proxy statement that Blount disseminated in connection with the deal failed to disclose material information that Blount stockholders needed to have in order to cast an informed vote.
- **Plaintiff Survives Summary Judgment Motion in *Englehart v. Brown*, No. 13-2-33726-6 KNT (Wash. Super. Ct.):** In a case challenging the 2014 acquisition of Flow International Corp. by hedge fund American Industrial Partners, the plaintiff alleged that that the former members of Flow's board of directors, as well as Flow's former chief financial officer, breached their fiduciary duties in connection with the sale of Flow. The defendants moved for summary judgment, but the court denied their motion, holding that the plaintiff had presented enough evidence to defeat the summary judgment motion and proceed to trial against Flow's former CEO and CFO. Johnson & Weaver is acting as co-lead counsel in this matter.
- **Additional Disclosures Secured in *In re XenoPort Inc. Shareholder Litigation*, No. CIV 539069 (Cal. Super. Ct., San Mateo Cnty.):** Johnson & Weaver, serving as co-lead counsel in a case brought on behalf of XenoPort stockholders in connection with the sale of the company to Arbor Pharmaceuticals, sought and received expedited discovery, which enabled the plaintiffs to demand and secure valuable additional disclosures. The plaintiffs believe the disclosures helped XenoPort stockholders make an informed decision whether to tender their shares.

Have You Been Auto-Renewed? Johnson & Weaver Investigates Potential Misconduct

Corporate America is always looking for a way to pad the bottom line at the expense of the unsuspecting consumer, and automatic renewal provisions in service providers' contracts is just one prime example. Over the past several years, however, as subscription-based product and service providers have bloomed in seemingly every sector, so have the popularity of these contractual provisions.

Consumers are now buying goods such as razors, clothing, and baby products, as well as subscrptions to Internet-based services such as cloud-based storage and streaming video or music, along the same lines they used to subscribe to magazines, newspapers, and CDs (remember Columbia House?). Service is perpetuated through automatic renewal. As companies thrive using this setup, more and more companies flock to the auto-renewal model.

While such subscription-based services can benefit consumers by offering time and cost savings, they can also be abused by companies, especially when these policies are not clearly disclosed or when subscriptions are difficult to cancel.

However, consumers are starting to fight back against this lack of transparency and underhanded terms, and have begun filing class action lawsuits pursuant to state and federal laws around the country.

How Do I Know if I Agreed to an Automatic Renewal Contract?

A typical automatic renewal clause may read something like this:

> *Each Term shall automatically renew for subsequent periods of the same length as the initial Term unless either party gives the other written notice of termination at least thirty (30) days prior to expiration of the then-current Term.*

Under this clause, customers would have to notify the provider, in writing, that they did not want to renew the contract at least thirty days before the end of the current contract term. If the customer failed to provide timely written notice, the contract would automatically renew. These types of clauses may be included in various contracts, but are particularly prevalent in service, distribution, and supply contracts. Some leases also include a provision for the lease to automatically renew for another year if the tenant fails to give notice that they do not want to renew by a certain date.

Numerous States Enact Automatic Renewal Laws

To date, at least sixteen states have enacted statutes regulating automatic renewals to varying degrees: California, Connecticut, Florida, Georgia, Illinois, Louisiana, Maryland, New Hampshire, New York, North Carolina, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, and Utah. These statues vary in how strict they are applied, and whether they apply to consumer products and/or services generally, or target abuses in connection with specific goods or services. In general, each requires companies to disclose automatic renewal policies in a clear and conspicuous manner, and some of the statues even require companies to obtain customers' permission before charging a credit card and to disclose how to cancel the subscription to avoid future recurring payments.

It should come as no surprise that consumer-friendly California (where Johnson & Weaver's main office is located) probably has the most strict automatic renewal law on the books. California's automatic renewal law prohibits retailers from charging consumers' credit card, debit card, or bank

account for ongoing orders without their explicit consent.

Further, California requires businesses that automatically renew customers' orders to specifically state the automatic renewal or continuous service offer terms in a "clear and conspicuous" manner before the order is finalized, meaning that the terms of the automatic renewal must be in a larger or contrasting font or type that "clearly calls attention to the language" and that the disclosure must be made before and in immediate proximity to the signature line or online authorization button.

The California statute also requires the company to obtain "affirmative consent" before charging the customer under any renewal policy. Additionally, businesses must provide customers with a copy of their contractual terms, including information on how to cancel the subscription. The California law applies to contracts entered into by any California resident, regardless of where the company is located.

Recently, New York (where Johnson & Weaver maintains an office) introduced legislation similar to the California law, which would require customers' express consent before charging them for a renewal. This new bill would be much stricter than New York's current law regulating automatic renewal offers. Other states with fairly strict statutes include Georgia (Johnson & Weaver also maintains a Georgia office), Connecticut, Oregon, Illinois, and Florida.

Federal Protection for Consumers Against Automatic Renewals

In addition to being subject to state auto-renewal laws, all companies are subject to the Federal Trade Commission Act ("FTC") which requires companies to honestly and clearly disclose their auto-renewal policies. Additionally, Congress enacted the Restore Online Shoppers' Confidence Act ("ROSCA") which provides the FTC and state attorneys general with an additional basis for targeting companies' renewal policies. ROSCA generally prohibits charging online consumers for goods or services through a "negative option feature" to an agreement, meaning that a company cannot treat the customer's silence or failure to cancel the agreement as acceptance of the offer. Stated differently, ROSCA requires companies to obtain consent from customers before signing them up for a free trial that automatically turns into a paid subscription. However, consumers need to be aware that a company may avoid this requirement, but to do so the company must clearly and conspicuously disclose the material terms of the agreement before obtaining the customer's billing information, obtaining the customer's express consent before making the charge, and providing a simple way to stop the recurring charges.

What Are the Penalties for Violating Automatic Renewal Laws?

The penalties for violating state automatic renewal statutes can be serious and can include restitution for the consumers' full subscription payments as damages. Some states allow for even broader potential relief to consumers. For example, California's automatic renewal law allows for liability under other laws, such as California's unfair competition law, and also provides that any goods tendered to a customer pursuant to a noncompliant automatic renewal policy "shall for all purposes be deemed an unconditional gift to the consumer." This provision may subject the offending company to a claim that it must provide restitution to the consumer for 100 percent of gross revenues received pursuant to the automatic renewal, even if the consumer actually wanted or anticipated the renewal.

What Can I Do?

If you suspect that you have been the victim of one of these improper automatic renewals, contact Johnson & Weaver for a free consultation and case evaluation. You may telephone us at (619) 230-0063 or email us at *contactus@johnsonandweaver.com*.

ABOUT THE FIRM

Johnson & Weaver is a firm built on foundational principles of trust, hard work, determination, and integrity. We embrace and embody those ideals in everything we do. Whether we're pursuing damages against a billion-dollar corporation or we're challenging a small transaction, Johnson & Weaver devotes every resource necessary to secure the best result possible. As a result, we have developed the reputation of delivering big-firm results with the personal touch that only a small firm can offer.

Johnson & Weaver's practice areas include securities class actions, shareholder derivative litigation, mergers & acquisitions litigation, labor & employment litigation, and consumer class actions. These cases are handled on a contingency fee basis. Johnson & Weaver also handles complex business and commercial matters on an hourly fee basis.

We believe we are only as good as our people, and Johnson & Weaver is determined to recruit only the best and brightest and most determined candidates possible. Our team includes:

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