

Jacobs Law Group News

Business Lawyers and Litigators

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How Can You Get Discovery Before you File Your Lawsuit?

Clients often ask us if they can compel others to turn over documents and information before filing a lawsuit. Typically, no. But this reality is a Catch-22: How can you have all the fact needed to sue someone if you don't know what they know? Are you sure that you are suing the right person or company? If you are wrong, you could be sued for malicious prosecution, right?

The Pennsylvania Supreme Court has issued new guidelines in a recent case named *McNeil v. Jordan* to resolve some, but not all, of the problems this Catch-22 raises. McNeil and his three siblings were poised to inherit \$650 million from their mother, Lois Fernley McNeil. Their father, who died in 1983, was the president of the former Tylenol-maker McNeil Laboratories Inc. He left the bulk of his estate to his wife and their children's mother, Lois McNeil. She had a general power of appointment over the entire trust and could change its details. And she did. After she died, one son sued a sister, claiming that the sister intentionally interfered with his inheritance. The sister responded by filing preliminary objections which argued that, accepting all of the her brother's allegations as true, he had failed to allege enough facts to permit him to proceed to trial. The trial judge agreed and dismissed the suit.

Here's where the Catch-22 rears up: the son then sought permission to take discovery that he claimed would allow him to state a proper suit in a new and amended complaint. The sister responded that her brother was looking to go on an unlawful fishing expedition in her personal affairs. The trial court agreed with the sister and held that the brother was not entitled to take pre-complaint discovery since he had not been able to state even the most basic elements of a suit for intentionally interfering with his inheritance. The Pennsylvania Supreme Court found this wrong.

"Such a plaintiff finds himself on the horns of an intractable dilemma: He must show a prima facie case [in order] to take pre-complaint discovery, yet he needs pre-complaint discovery to show a prima facie case," the lead opinion states.

As a result, while plaintiffs are not entitled to "unconfined pre-complaint discovery," potential plaintiffs are entitled to conduct pre-complaint discovery if they have "probable cause to support the underlying suit." Of course, Pennsylvania's trial courts will still rule on pre-complaint discovery requests on a case-by-case basis even though the newly

announced standard is the more easily shown standard of good faith/probable cause.

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