

Non-Party Disclosure / *Norwich Pharmacal* Application

A non-party disclosure (or *Norwich Pharmacal*) application is a means to obtain documentation/information that may be vital to understand your legal position, identify wrongdoers and potential remedies.

WHAT IS A NON-PARTY DISCLOSURE / NORWICH PHARMACAL APPLICATION?

A non-party disclosure (or *Norwich Pharmacal*) order (“NPO”) is used to obtain documentation/information from a third party, who is innocently or otherwise caught up in the wrongdoing by the potential defendant. Without obtaining this documentation/information, the defendant would not be able to be identified. Once the defendant is identified, a claim can then be brought against them.

WHEN IS AN NPO USED?

A typical example of seeking to make an NPO is when a fraudulent third party has deceived an innocent party to transfer a sum(s) of money to their bank account. This often occurs where an email phishing scam has duped an innocent party into making an authorised push payment. Whilst the innocent party will be able to see the bank account details, they are blind as to who created the account. An NPO, amongst other things, would seek to obtain permission from the court to order the bank to provide the details of the account holder.

WHEN CAN AN NPO BE SOUGHT?

Before an NPO can be sought from the court, certain criteria must be satisfied including:

- There is no civil procedure rule that would provide appropriate relief.
- The third party (respondent) is likely to have relevant documentation or information.
- There is a good arguable case that there has been wrongdoing.
- The “mere witness” rule is not infringed (the entity will not be required to provide witness evidence in the future)
- The third party is involved in the wrongdoing.
- The order is necessary in the interests of justice and is not sought for an improper use.
- The applicant is able to substantiate a cross-undertaking damages.

Even if all of the above is satisfied, it is still at the courts discretion to award an NPO.

CAN AN NPO BE CHALLENGED?

The entity against whom the NPO is sought can challenge the application on a number of grounds. These include, but are not limited to:

- material non-disclosure; or
- the right against self-incrimination - the third party can refuse to answer any questions or provide documentation if doing so would expose them to proceedings for a criminal offence.

PROCESS FOR MAKING AN NPO

In the first instance, it is good practice that a letter should be sent to the innocent third party explaining what has occurred, how the third party is involved in the wrongdoing and the documentation/information required. As the documentation/information required is normally sensitive in nature (such as data protection), it is common practice for the third party to refuse to voluntarily provide the documentation/information sought and instead insist on a court order. Before the NPO is sought, it is good practice to liaise with the third party to understand the extent of the documentation/information held and whether it would agree to a draft order to be approved by the court.

Regardless of whether there is an active claim or not, in order to make an application to court, a witness statement and draft order is required. The witness statement will set out all of the relevant facts, the law and why the information/documentation should be provided. A draft order will set out what is being asked of the third party i.e. the documentation/information that is sought. It is for this reason that, if possible, it is advantageous to work with the third party to understand any limitations that may exist.

An NPO can be sought either “*on notice*” (meaning the third party is aware of the application being made) or “*without notice*” (meaning they are not). If the NPO is sought “*on notice*” and the third-party consents, it is possible that the court can deal with the application on paper and a hearing is not required. If it is made “*without notice*” or consent is not provided, it is likely a hearing will be scheduled. If a hearing is required, a barrister and a solicitor will normally attend on your behalf.

If necessary, an NPO may include a “*gagging*” order which means that the third party must not, for a specified period of time, inform anyone about the application or about the fact the documentation/information is being provided to the applicant.

If the NPO is approved, from the date it is served, the third party will have a set period of time (normally 21 days) to comply with the order and provide the documentation/information sought.

POINTS TO CONSIDER

1. An NPO can be obtained at any point during the life of a claim, however it is commonly utilised at the outset. An NPO may not only identify the correct defendant but also allow you to understand further the merits of your case.
2. If you are making the NPO application to court, you are under a duty to provide full and frank disclosure of all material facts - in other words, you must be open about everything you know.
3. If you are successful in obtaining an NPO, it is likely that you will be ordered to pay the third party's reasonable costs in abiding by the court order.
4. A cross undertaking in damages is required to be provided to the court, including an undertaking in damages. This means that you will have to prove that you have the financial means, if necessary, to cover any losses the third party may incur should it be found the NPO should not have been awarded.
5. Any documentation/information obtained as a result of the NPO can normally only be used for the purpose of the proceedings they have been disclosed for.

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