Rule 2004: How This Unusual Discovery Device Can Affect Your Corporate Practice

By Penny Reid, Charles Persons, Jeri Leigh Miller and Juliana Hoffman

Rule 2004 is a broad bankruptcy rule that allows the court to order the examination of any entity upon the motion of a party in interest.[1] Though it has many uses, Rule 2004 is frequently utilized by creditors in bankruptcies to gain information concerning a debtor's prepetition financial and business affairs. Or, as court have said, one purpose of a Rule 2004 examination is "to show the condition of the estate and to enable the Court to discover its extent and whereabouts, and to come into possession of it, that the rights of the creditor may be preserved."[2] Rule 2004 discovery has been coined the "basic discovery device in bankruptcy cases,"[3] and often leads to information that serves as the basis for filing contested matters or adversary proceedings.

For many non-bankruptcy lawyers, however, it is likely an unfamiliar tool. But a basic understanding of Rule 2004 discovery—its broad scope and particular limitations—is valuable knowledge for corporate counsel in their general practice. Given the toll the COVID-19 pandemic has taken on businesses and the economy, this basic understanding may prove to be particularly relevant.

II. Rule 2004 Exams: Overview and Procedure

A. Statutory Basis and Use

The authority for Rule 2004 discovery stems from the Federal Rules of Bankruptcy Procedure, which allows any party in interest to move the court for an order authorizing an examination of any entity, including third parties not connected to the bankruptcy case.[4] The scope of the examination is broad; intended to allow discovery of any matter that may affect the administration of the debtor's estate.

Specifically, Rule 2004 provides in relevant part:

> (a) Examination on Motion. On motion of any party in interest, the court may order the examination of any entity.

---

[1] Fed. R. Bankr. P. 2004 ("Rule 2004").

[2] *In re Express One Intern., Inc*., 217 B.R. 215, 216 (Bankr. E.D. Tex. 1998) (citing *In re Coffee Cupboard, Inc*., 128 B.R. 509, 514 (Bankr. E.D.N.Y. 1991)).

[3] *In re Correra*, 589 B.R. 76, 108 (N.D. Tex. 2018).

[4] Fed. R. Bankr. P. 2004(a).

> (b) Scope of Examination. The examination of an entity under this rule or of the debtor under § 343 of the [Bankruptcy] Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In a family farmer's debt adjustment case under chapter 12, an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.
>
> (c) Compelling Attendance and Production of Documents. The attendance of an entity for examination and for the production of documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held if the attorney is admitted to practice in that court or in the court in which the case is pending.[5]

On its face, Rule 2004 permits "examination of any entity."[6] "Entity" is defined in the Bankruptcy Code to include "person, estate, trust, governmental unit, and United States trustee"[7] thereby making it a beneficial tool for *both* debtors and creditors.

---

[5] *Id.*

[6] *Id.*

[7] 11 U.S.C. § 101(15).

To properly invoke Rule 2004, the party in interest must make a motion to the court for authorization to take the requested examination, which can (and often does) occur on an *ex parte* basis. The purported examinee may object or, if the motion has already been granted, move to quash, but the ultimate decision lies with the court, which is given significant discretion in determining whether a proposed Rule 2004 examination is appropriate. Examination under Rule 2004 may involve compelling attendance of a witness in a deposition, the production of documents through issuance of subpoenas, or both.

B. Comparison with the Discovery under the Federal Rules of Civil Procedure

A Rule 2004 examination is a unique tool, and while it may facially appear similar to a more classic civil litigation deposition, it differs from discovery under the Federal Rules of Civil Procedure in multiple, significant respects. Perhaps most significant is the extremely broad and unfettered scope of Rule 2004 discovery as compared to the more restrictive nature of discovery under the Federal Rules of Civil Procedure. Rule 2004 discovery allows inquiry into a party's actions, conduct, or financial affairs and is intended to assist in the determination of the nature and extent of the debtor's estate and assets. An examination of a third party is appropriate so long as that third party has knowledge of those topics. Indeed, courts often refer to Rule 2004 discovery as a lawful "fishing expedition."[8] In comparison, courts often limit discovery under the Federal Rules of Civil Procedure on the grounds that the discovery sought is an "*impermissible* fishing expedition."[9]

Further, the text of Rule 2004 does not specifically provide for the type of paper discovery allowed under the Federal Rules of Civil Procedure *per se—e.g.*, interrogatories, requests for production, and requests for admission. However, subsection (c) of Rule 2004 does provide that Bankruptcy Rule 9016[10] may be used to compel the "the production of documents" in connection with an oral examination, and thus the Rule indirectly allows for interrogatories or requests for production and the like. Likewise, the temporal limitations in Federal Rules of Civil Procedure 30 and 34 (30 days to produce) do not apply to a request for production in connection with a notice of examination under Rule 2004.

---

[8] *See, e.g., In re Enron Corp.*, 281 B.R. 836, 840 (S.D.N.Y. 2002) (recognizing that courts hold "Rule 2004 examinations are broad and unfettered and in the nature of fishing expeditions).

[9] *See, e.g., Pub. Serv. Elec. & Gas Co. v. Newport Assoc. Dev. Co.*, No. 16-8445 (KM), 2019 WL 4010780, at *5 (D.N.J. Aug. 26, 2019).

[10] Bankruptcy Rule 9016 provides: "Rule 45 Fed. R. Civ. P. applies in cases under the Code."

This is not to say that Rule 2004 discovery is entirely without bounds. The movant must show "good cause" for the examination; however, this test is ordinarily met so long as the movant establishes the examination is necessary to establish a claim or that denial of the examination would cause undue hardship or injustice.[11] And when faced with motions for Rule 2004 discovery, courts are expected to balance the competing interests of the movant and the proposed examinee with the relevance and necessity of the requested information.[12] That being said, Rule 2004 discovery is understood to be and is accepted as an "open-air" inquiry with a much broader scope than provided for in the Federal Rules of Civil Procedure.[13]

Given the permissibly broad scope of Rule 2004 discovery, the examinations do not offer many of the procedural safeguards automatically available under the Federal Rules of Civil Procedure. What is arguably the most basic right typically afforded to witnesses: the right to counsel. Surprisingly, a Rule 2004 examinee does not have an automatic right to be represented by counsel. Courts have also recognized that there is no general right to object to questions asked of the examinee and no general right to cross examination.[14] In fact, the authorization to conduct Rule 2004 discovery is unilateral: it belongs exclusively to the movant. The examinee has no right to make discovery demands of his or her own—though they can of course move for their own Rule 2004 discovery.

Yet another significant difference is timing. In stark contrast to the Federal Rules of Civil Procedure, Rule 2004 is a pre-litigation, investigatory discovery tool; its purpose is to assist with the discovery of assets, examination of transactions, and determination of whether wrongdoing has occurred.[15] It allows parties in interest to investigate potential claims that may benefit the bankruptcy estate and is often used by a party in interest as a device to determine what claims to pursue in the first instance. In order for a party in interest to invoke Rule 2004 discovery, there need

---

[11] *In re Millennium Lab Holdings II, LLC*, 562 B.R. 614, 627–28 (D. Del.) (finding good cause for Rule 2004 examinations of third parties with knowledge of circumstances surrounding the debtors' financial collapse requested by a trustee of creditor and lender trusts where the trustee established the examinations were necessary to enable him to "determine the scope of viable claims that may exist on behalf of the . . . trusts against potential third parties that may be culpable for causing such harm to the Debtors," notwithstanding the fact that the trustee had access to certain documents and information of the debtors).

[12] *In re Drexel Burnham Lambert Group, Inc.*, 123 B.R. 702, 712 (S.D.N.Y. 1991).

[13] *Matter of M4 Enterprises, Inc.*, 190 B.R. 471, 476 (N.D. Ga. 1995). For example, under the Federal Rules of Civil Procedure, discovery is generally limited to information which is relevant to the claims asserted or is likely to lead to the discovery of relevant information. *See* Fed. R. Civ. P. 26(b)(1).

[14] *See In re Dinubilo*, 177 B.R. 932, 939-940 (E.D. Cal. 1993) (recognizing that Rule 2004 examinations do not offer the procedural safeguards available under the Federal Rules of Civil Procedure); *see* also *In re McLaren*, 158 B.R. 655, 658 (N.D. Ohio 1992).

[15] *In re Correra*, 589 B.R. at 109.

only be a pending bankruptcy case. Unlike discovery under the Federal Rules of Civil Procedure, the examination does not need to be tied to specific factual allegations set forth in a complaint, adversary proceeding, or contested matter. Indeed, for reasons discussed below, there will not even be an adversary proceeding or contested matter pending. Because of this, Rule 2004 discovery is often a cheaper and quicker discovery tool.

But there are also aspects of Rule 2004 discovery that are more restrictive than discovery under the Federal Rules of Civil Procedure. For example, under the Federal Rules of Civil Procedure, once a civil proceeding is commenced, the right to conduct discovery is automatically available to all parties to the action. While that discovery must be tailored to the allegation set forth in the complaint and must be completed within a certain time frame, the basic right to conduct such discovery is not dependent on the order of a court. Rule 2004 discovery, however, always requires authorization from the court, and it is within the court's discretion whether to authorize such an examination in the first place.

C. Limitations and Pitfalls of Rule 2004

Because it can function as a lawful "fishing expedition," Rule 2004 can be a powerful and disconcerting tool when directed against your client, but it can also be an effective weapon to wield if you find yourself a creditor in a bankruptcy case. It does, however, contain certain pitfalls for the unwary, which can remove discovery from its extensive reach and thrust you back within the more limited scope of the Federal Rules of Civil Procedure. These pitfalls include (1) understanding and avoiding the "pending proceedings rule"; (2) tailoring your discovery to avoid allegations of abuse, harassment, or use in unrelated cases or proceedings before another tribunal; (3) avoiding "oppressive or undue burden" arguments; and (4) understanding that the rules surrounding the specifics of a Rule 2004 examination may vary by court and researching such court's local rules and requirements prior to filing.

1. Pending Proceeding Rule

Probably the most well-known exception to Rule 2004 examination, the pending proceeding rule, provides that if an adversary proceeding or contested matter is pending, then the parties to that proceeding or matter may no longer use Rule 2004, but instead are confined to the more restrictive discovery tools set forth

in the Federal Rules of Civil Procedure, as adopted in the Bankruptcy Rules.[16] As explained by Judge Walrath in *In re Washington Mutual, Inc.*, the basis for this restriction is twofold. First, the normal discovery rules set forth in the Federal Rules of Civil Procedure, as adopted by the Bankruptcy Rules, apply in both adversary proceedings and other contested matters, making Rule 2004 unnecessary and duplicative.[17] Second, Rule 2004 examinations do not provide the same procedural safeguards as the Federal Rules of Civil Procedure, which would effectively allow parties to use this procedure to create a back door around the limitations and protections of the Federal Rules of Civil Procedure.[18]

Notwithstanding the above, the pending proceeding rule is based in case law and not the statute itself, meaning that it too has judicially-created exceptions and limitations that may apply. For instance, the pending proceeding rule only prevents Rule 2004 from being used to discover evidence *related* to the pending proceeding or other contested matter; *unrelated* discovery will not be subject to the more restrictive Federal Rules of Civil Procedure even if the discovery sought is from the counterparty to the proceeding.[19] Additionally, Rule 2004 may be used for the discovery of relevant evidence in the pending proceeding if the examination is directed at entities who are not parties to or affected by the pending proceeding or matter.[20] Finally, at least one court has permitted a Rule 2004 examination to go forward where an adversary proceeding had been filed that may involve the parties to the Rule 2004 examination, but a response to the complaint was not yet due.[21] Accordingly, counsel should carefully consider both the timing and scope of any Rule 2004 examination to ensure that its discovery requests are not constrained to the more restrictive provisions in the Federal Rules of Civil Procedure on the basis of the pending proceeding rule.

---

[16] *See, e.g., In re Wash. Mut., Inc.*, 408 B.R. 45, 50 (Bankr. D. Del. 2009); *In re Enron Corp.*, 281 B.R. 836 (Bankr.S.D.N.Y. 2002); *In re Bennett Funding Grp., Inc.*, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996); *Intercontinental Enters., Inc. v. Keller (In re Blinder, Robinson & Co., Inc.)*, 127 B.R. 267, 274 (D. Colo. 1991).

[17] *In re Wash. Mut., Inc.*, 408 B.R. at 50.

[18] *Id.*; *see also In re Bennett Funding Grp., Inc.*, 203 B.R. at 30.

[19] *In re Wash. Mut., Inc.*, 408 B.R. at 51; *In re Bennett Funding Grp., Inc.*, 203 B.R. at 29.

[20] *In re Wash. Mut., Inc.*, 408 B.R. at 51; *In re Buick*, 174 B.R. 299, 305 (Bankr. D. Colo. 1994); *see also In re Blinder, Robinson & Co., Inc.*, 127 B.R. at 275 (holding that "[e]ntities not affected by the adversary proceeding do not require the greater protections afforded under the Federal Rules" and parties should thus be allowed to examine them under Rule 2004).

[21] *In re Sun Med. Mgmt., Inc.*, 104 B.R. 522, 524 (Bankr. M.D. Ga. 1989); *see also In re Kelton*, 389 B.R. 812, 820 (Bankr. S.D. Ga. 2008) (citing *In re Sun Med. Mgmt., Inc.* as an exception to the pending proceeding rule); *In re Mirant Corp.*, 326 B.R. 354, 356 (Bankr. N.D. Tex. 2005) (stating *In re Sun Med. Mgmt., Inc.* for the proposition that some courts allow discovery under Rule 2004 even when it is in aid of pending litigation).

2. Abuse, Harassment, or Use in Unrelated Proceedings

Another potential pitfall in crafting a Rule 2004 examination is ensuring that it is not used for the purposes of abuse or harassment or to seek information on matters unrelated to the basic inquiry of the examination.[22] Although no court has clearly defined what constitutes abuse or harassment, examples of motions denied on this basis include where the movant had previously admitted to stealing business records, customer lists, and other business equipment from the proposed examinee and where the information sought could be used to further the movant's state court case.[23] In the latter case, avoiding the pitfall may be as simple as identifying a primary motivation for the Rule 2004 examination that relates to something other than the state court action. So long as any benefit to the state court action is incidental, abuse or harassment is unlikely to be found.[24]

3. Oppressive or Undue Burden

A court may also quash a Rule 2004 examination or enter a protective order limiting the examination if the examinee can show that the examination is oppressive and causes undue burden.[25] An examination may be oppressive or unduly burdensome if the examinee can prove that the cost or disruption of the examination far outweighs any benefits to the movant.[26] Along the same lines, a court may deny a Rule 2004 examination where the discovery sought concerns matters already barred by the principles of *res judicata*[27] or where the discovery request does not allow reasonable time to comply, requires a non-party to travel excessively, or requires the disclosure of privileged material.[28] Notably, the party moving to quash the examination or seeking entry of a protective order limiting discovery bears the

---

[22] *See, e.g.*, *In re Enron Corp.*, 281 B.R. at 840; *Snyder v. Society Bank*, 181 B.R. 40, 42 (S.D. Tex. 1994), *aff'd sub nom.*, *In re Snyder*, 52 F.3d 1067 (5th Cir. 1995) (mem.); *In re Mittco, Inc.*, 44 B.R. 35, 36 (Bankr. E.D. Wisc. 1984).

[23] *See In re Duratech Indus., Inc.*, 241 B.R. 283, 289 (E.D.N.Y. 1999) (denying motion on the basis of admitted prior theft combined with movant's lack of showing why such information would be necessary now); *Synder v. Society Bank*, 181 B.R. at 42 (stating "[t]he use of Rule 2004 to further [a party's] case in state court constitutes an abuse of Rule 2004").

[24] *See In re Wash. Mut., Inc.*, 408 B.R. at 50 (characterizing *Synder* as preventing Rule 2004 examination where the movant's *primary motivation* was to use the materials in a state court action against the examinee) (emphasis added).

[25] *In re Comm. Fin. Servs., Inc.*, 247 B.R. 828, 842 (Bankr. N.D. Okla. 2000) (recognizing right to protective order where Rule 2004 examination is unduly burdensome or costly); *Official Comm. of Unsecured Creditors v. Eagle-Picher Indus. (In re Eagle-Picher Indus.)*, 169 B.R. 130, 134 (Bankr. S.D. Ohio 1994) (recognizing general rule that "examination should not be so broad as to be more disruptive and costly to the debtor than beneficial to the creditor") (internal citations omitted).

[26] *See, e.g.*, *In re Comm. Fin. Servs., Inc.*, 247 B.R. at 842; *In re Eagle-Picher Indus.*, 169 B.R. at 134.

[27] *In re Wilcher*, 56 B.R. 428, 440 (Bankr. N.D. Ill. 1985).

[28] *In re Parikh*, 397 B.R. 518, 526 (Bankr. E.D.N.Y. 2008) (citing Fed. R. Civ. P. 45(c)(3)(A)).

burden of proof.[29] As such, denial or limitation of a 2004 examination on this ground can be more difficult than obtaining a denial of or limitation on discovery under the pending proceeding rule or the abuse, harassment, or unrelated proceedings standard.

4. Local Rules and Requirements

Finally, counsel should be aware that the specific requirements governing Rule 2004 examinations may vary from jurisdiction to jurisdiction. For example, some jurisdictions permit the movant to issue a notice of proposed examination without first going before the court for an order permitting the same.[30] In such instances, examination may occur as quickly as fourteen days following written notice of the proposed examination.[31] Other jurisdictions do not require the issuance of a subpoena for attendance at the hearing or that the Rule 2004 notice include a description of the recording method to be used.[32] Finally, at least one court has found that Rule 2004 does not require the examinations to be transcribed or transcripts to be filed.[33] Counsel should carefully examine the local rules and existing case law in the applicable jurisdiction to ensure that they are not caught unaware by unusual foot faults such as those described above.

IV. Case Studies for Rule 2004

As noted, Rule 2004 examinations are subject to limitations and the relief thereunder is discretionary.[34] For example, courts frequently deny a request for Rule 2004 discovery when sought to benefit pending litigation outside of the Bankruptcy Court.[35] The court in *In re Cambridge Analytica LLC*[36] denied the motion of a creditor—who was a plaintiff in nonbankruptcy derivative litigation that did not involve the debtor—for an order under Rule 2004 directing the debtor to provide discovery regarding its assets. The court determined that the creditor's purchase of

---

[29] *In re Vantage Petrol. Corp.*, 34 B.R. 650, 652 (Bankr. E.D.N.Y. 1983).

[30] *See* Local Court Rules of the United States Bankruptcy Court for the Western District of Texas, L. Rule 2004-1(c).

[31] *Id.*, L. Rule 2004-1(b).

[32] *See Simon v. FIA Card Servs., N.A.*, 732 F.3d 259, 268 (3d Cir. 2013).

[33] *In re Thow*, 392 B.R. 860, 867 (Bankr. W.D. Wash. 2007).

[34] *See* Fed. R. Bankr. P. 2004(a) (the court "*may* order the examination") (emphasis added); *see also In re Enron*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002); *In re Bd. of Dirs. of Hopewell Int'l Inst. Ltd.*, 258 B.R. 580, 585 (Bankr. S.D.N.Y. 2001).

[35] *See, e.g., In re Enron Corp.*, 281 B.R. at 842; *In re Cambridge Analytica LLC*, 600 B.R. 750 (Bankr. S.D.N.Y. 2019).

[36] 600 B.R. at 752–53.

a nominal claim against the debtor was insufficient to obligate the debtor to comply with the Rule 2004 requests because the creditor had not participated meaningfully in the bankruptcy and was attempting to leverage the Rule 2004 requests for the "improper purpose" of obtaining discovery for use in the derivative action—litigation in which the debtor was not a defendant.[37]

Creditors and secured lenders should also be cognizant of external limitations, including restrictions imposed by contracts, that could preclude their ability to pursue Rule 2004 exams. The bankruptcy court in *In re Argon Credit, LLC*[38] considered whether a subordinated lender could utilize a motion for a Rule 2004 examination when the subordination agreement provided that the subordinated creditor was prohibited, prior to the payment in full of the senior creditor, from foreclosing upon, taking possession of, or otherwise attempting to realize on the collateral, or from proceeding in any way to enforce any claim it had against the obligor. The court viewed the attempt to take discovery of the senior lender as an attempt to enforce its claim, and denied the Rule 2004 motion as prohibited under the terms of the subordination agreement.[39] Similar issues can arise under agreements of which the debtor is not a party, such as intercreditor agreements that may place restrictions on junior creditors' ability to pursue discovery or enforce their claims against a debtor, and counsel should be mindful of future discovery limitations when drafting or negotiating these provisions.

IV. Take-Aways for Corporate Counsel

Practitioners should be mindful of these limitations, but should not hesitate to leverage the specter of a Rule 2004 examination, and any attendant litigation, to obtain voluntary cooperation with document or interview requests when appropriate. Parties frequently prefer to agree on discovery requests and consensually resolve Rule 2004 requests absent court intervention. This makes Rule 2004 examinations a useful and effective forum for obtaining discovery relevant to both the bankruptcy case and any related state court actions so long as counsel's primary purpose in seeking the discovery is related to the bankruptcy case.

Additionally, counsel should be mindful of timing in seeking a Rule 2004 exam. Rule 2004 may be used as a pre-litigation device, allowing practitioners to obtain critical discovery prior to the filing of an adversary proceeding or other contested matter. Requests for Rule 2004 examinations should be made at the

[37] *Id.* at 752, 753.

[38] 596 B.R. 882 (Bankr. N.D. Ill. 2019).

[39] *Id.* at 887.

earliest possible stage, as subsequent adversary proceeding filings or other contested matters may preclude its use under the pending proceedings rule.

Finally, if threatened with a Rule 2004 examination *or* if such an examination may be useful to your case, counsel should consult with an experienced bankruptcy litigation team at the earliest possible date. As a rule enveloped in judicial gloss, it is important the client is advised of all the local authority governing its use so that any Rule 2004 examination sought can be properly handled without stumbling into any of the limitations or pitfalls described, herein.

Penny Reid is a partner in the Commercial Litigation and Disputes practice and Charles Persons is a partner in the Restructuring practice at Sidley Austin LLP. Jeri Leigh Miller and Juliana Hoffman are associates in the Restructuring practice.