DISCOVERY STRATEGIES FOR A CREDITOR IN A BANKRUPTCY CASE

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This article explains the rights of a creditor, whether an equipment financier or otherwise, to pursue examinations of a debtor in bankruptcy in order to obtain sworn testimony and information that may be helpful to the creditor.

What Is a Meeting of Creditors?
Pursuant to Section 341(a) of the Bankruptcy Code, "Within a reasonable period of time after the order for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors." (Referenced hereinafter as "341(a) Meeting"). Bankruptcy Code § 343 states that "The debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title. Creditors, any indenture trustee, any trustee or examiner in the case, or the United States trustee may examine the debtor. The United States trustee may administer the oath required under this section."

The bankruptcy judge does not appear at the 341(a) Meeting. This is a meeting where the United States Trustee (UST) in a Chapter 11 case or a Chapter 7 Trustee or 13 Trustee in a case filed under those chapters of the Bankruptcy Code puts the debtor or its representative under oath and elicits testimony. For purposes of this article, unless we need to make a distinction between them, we will collectively call these officers the "Trustee." Questions may touch on the debtor's assets and liabilities, why the debtor filed bankruptcy, and the debtor's intention or plan in the bankruptcy case, among other issues. After the Trustee has asked some questions, it generally turns the meeting over to creditors' representatives to further examine the debtor under oath.

In the majority of cases, there is no reason to ask questions or even attend the 341(a) Meeting. However, if a creditor has concerns, questioning a debtor who is under oath can be a handy tool.

Areas of Questioning and Limitations Imposed By the UST or Trustees
In most cases, very little time is allocated for 341(a) Meetings in cases under Chapters 7 and 13 due to the bulk of cases scheduled in the time allocated. There is more time allocated for Chapter 11 cases, but the UST who handles those meetings will likely remind attendees that there is a finite time and that this is a meeting and not a judicial proceeding. If the questioning gets too far into a particular dispute between the debtor and a creditor, a Trustee may stop the questioning and tell the creditor to pursue a 2004 Exam (see below) of the debtor.

The Transcript or Record Of a 341(a) Meeting
The Trustee records the debtor's testimony at a 341(a) Meeting. As a creditor or party in interest, whether or not you appeared at the meeting, you may request a copy of the recorded 341(a) Meeting by contacting the UST's office. Generally you will need to provide the date and time of the meeting, the chapter and case number, the location of the meeting, and the name of the Trustee who conducted the meeting. In most cases, you also need to provide a writable disk or a thumb drive, and a self-addressed pre-paid envelope.

Useful Strategies for Creditors at a 341(a) Meeting
It is essential that a creditor study the Schedules and Statement of Financial Affairs ahead of the 341(a) Meeting, since most questions emanate from those filings. If, for some reason, these documents were filed in insufficient time for study (or they were not filed) you may be able to convince the Trustee to continue the meeting to another date. Know what you are going to ask at the meeting. Zero in on gaps in information or on areas where you need more elaboration. For instance, if the value of collateral is an issue, you may want to know how the debtor came to the value of the collateral. You may want to confirm that the equipment is insured. You may also want to establish that the debtor does not have the volume of business necessary to keep the collateral or leased equipment. The key thing to remember is this is not a trial, but an information-

gathering session. If you go into the meeting with that mindset, you will likely obtain a great deal of information that will assist you when/if the subsequent proceedings turn more adversarial.

If you know that collateral will be surrendered or that a lease will certainly be rejected, you may consider bringing your draft motion and proposed order for lifting the stay to the meeting so you can efficiently obtain agreements from the debtor and the Trustee when all are present.

What Is the Evidentiary Effect of the 341(a) Meeting Record?
The debtor's testimony during a 341(a) Meeting can be very useful in seeking dismissal of a case, prosecuting avoidance actions, or seeking to have one or more debts (or all debts) declared non-dischargeable, or in discharge revocation litigation.

Bankruptcy Rule 9017 makes the Federal Rules of Evidence applicable to bankruptcy cases. On the other hand, Section 341(c) dictates that "the court may not preside at, and may not attend, any meeting under this section … " Can one use a record of a non-judicial proceeding as evidence in a subsequent hearing or trial under the Bankruptcy Code? While the cases considering the evidentiary effect of the debtor's testimony at a 341(a) Meeting are scant, the rule appears to be that a debtor's testimony in that meeting is admissible in a subsequent judicial proceeding. *See Key Bank of Maine v. Jost* (*In re Jost*), 136 F.3d 1455 (11th Cir. 1998). Although the 341(a) Meeting is not held in the presence of a judge, the testimony is given under oath and is recorded. As long as the testimony meets the standards of relevancy, since the testimony is of a party (the debtor), it is not deemed hearsay under Federal Rule of Evidence 801(d)(2)(A).

There is a caveat in that some courts have questioned whether a court can take judicial notice of a record in a 341(a) Meeting as substantive, as opposed to rebuttal or impeachment evidence, because it is not a judicial proceeding, and there is "no opportunity to offer defenses or to cross examine or present witnesses in an attempt to explain or clarify the direct testimony of the debtor." *In re Hardy*, 319 B.R. 5, 6 (Bankr. M.D. Fla. 2004).

It has been our experience that a court may admit recorded or transcribed testimony of a 341(a) Meeting (especially as impeachment or rebuttal evidence) as long as there is proper authentication of the record and it accurately portrays what transpired in the meeting. However, due regard must be given to nature of the proceedings and the particular testimony sought to be offered.

What Is a 2004 Examination?
There are instances where a creditor or party in interest may need to propound additional questions to a debtor, or may not have been involved in the case when the 341(a) Meeting took place. In such instances, a party in interest can examine the debtor pursuant to Bankruptcy Rule 2004 ("2004 Exam"). While we generally think of it as an examination of a debtor, technically Rule2004 (a) refers to an examination of "any entity," and this can include questions addressed to a Trustee (but not a UST) or another creditor.

With some exceptions as noted in a particular jurisdiction's local bankruptcy rules, a party seeking to conduct a 2004 Exam is required to file a motion and bears the burden to show good cause for the discovery it seeks. In addition, "relief lies within the sound discretion of the bankruptcy court." *See Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC.*, 2014 Bankr. LEXIS 4603 at *7 (Bankr. S.D.N.Y. Oct. 30, 2014). "In determining whether good cause exists, bankruptcy courts must 'balance the competing interests of the parties, weighing the relevance of and necessity of the information sought by examination.'" *In re Drexel Burnham Lambert Grp., Inc.*, 123 B.R. 702, 712 (Bankr. S.D.N.Y. 1991); *see also In re SunEdison, Inc.*, 562 B.R. 243, 250 (Bankr. S.D.N.Y. 2017).

It is important to consult the local bankruptcy rules before seeking an order for a 2004 Exam. Many jurisdictions require a certificate from the moving attorney that he/she has consulted with counsel for the party whose testimony is requested and they have not been able to agree on a time, place or scope of the testimony. Some courts will require any opposition to be filed on an expedited basis, while others simply default to the usual notice and opportunity to be heard in that jurisdiction (usually 14-21 days). Some court rules go so far as to make the movant specify the documents the creditor or party in interest seeks to have

produced in conjunction with the testimony. Simply put, you need a court order and each judicial district treats the process a little differently.

Generally, one may not take a 2004 Exam if the subject matter of the questioning involves issues in dispute in a contested matter under Bankruptcy Rule 9014(c). In those cases, the courts follow the discovery section of the Bankruptcy Rules (Rules 7026, *et seq*.) although some local rules provide for an expedited discovery process.

2004 Exams are not without limits. Rule 2004(b) provides that "[t]he examination of an entity under this rule or of the debtor under § 343 of the 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, … 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 therefore, and any other matter relevant to the case or the formulation of a plan."

A bankruptcy court has authority with respect to a 2004 Exam that it does not have with respect to a 341(a) Meeting. For example, Rule 2004(c) provides that attendance and production of documents may be compelled as provided in Bankruptcy Rule 9016. Moreover, Bankruptcy Rule 2004(d) states that the court may, for cause shown, order a debtor to be examined under Rule 2004 at any time or place it desires either in the district where the bankruptcy case is pending or outside that district.

"Bankruptcy Rule 2004 is a discovery tool unique to bankruptcy practice." *In re: Martelli*, 2017 Bankr. LEXIS 2015, * 9-10 (Bankr. W.D. N.Y. July 20, 2017). "It is a pre-litigation device to determine whether there are grounds to bring an action to determine a debtor's right to discharge a particular debt." *Id*. at *10; *In re Spoto*, 2015 Bankr. LEXIS 1711 at *5 (Bankr. W.D.N.Y. May 21, 2015) (quoting *In re Corso*, 328 B.R. 375, 383 (E.D.N.Y. 2005); *In re Bennett Funding Grp., Inc.*, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996). "No such creature exists under the Federal Rules of Civil Procedure." *In re Martelli* at *10.

"However vigorous and broad discovery may be under a Rule 2004 examination, there are well established limits even to this free-and-easy practice. The case law is replete with holdings that resort to Rule 2004 cannot include discovery conducted in bad faith or for improper purposes." *In re Dura- tech Industries, Inc.*, 241 B.R. 291, 296 (Bankr. E.D.N.Y. 1999). Consequently, "[e]xaminations cannot be used to harass or oppress the party." *See Snyder v. Soc. Bank of Ann Arbor* (*In Re Snyder*), 1995 U.S. App. LEXIS 43005, *3 (5th Cir., April 12, 1995). "Examination under Rule 2004 should not be used to obtain information for use in an unrelated case or proceeding pending before another tribunal." *Id*.

Bankruptcy Rule 2004 As Distinguished from Discovery Pursuant to Rule 7026

The prior sections of this article have generally addressed a creditor's discovery prior to the commencement of an adversary proceeding, as defined in Bankruptcy Rule 7001. An adversary proceeding involves the filing of a complaint, and is akin to other litigation. Once such a proceeding is commenced, Bankruptcy Rules 7001 *et seq*. control. Therefore, Bankruptcy Rule 2004 is not the vehicle to obtain discovery. Instead, Bankruptcy Rules 7026-7037 are applicable. These rules mirror the respective Federal Rules of Civil Procedure.

Conclusion

As you can see, questioning a debtor, either at a 341(a) Meeting or at a 2004 Exam, can be useful to obtain sworn testimony. This type of discovery is distinct from discovery you may obtain in litigation between your creditor client and the debtor or Trustee, and is broader in scope. It is not without its traps, however, so careful attention must be paid to the national and local rules in order to pursue successful bankruptcy discovery.