



AMERICAN
BANKRUPTCY
INSTITUTE

Northeast Bankruptcy Conference and Consumer Forum

Business Track

Navigating the Limits of Bankruptcy's Broad Discovery Tool

Emily Abate

Verdolino & Lowey, PC | Foxborough, Mass.

Patrick R. Linsey

Neubert, Pepe & Monteith, PC | New Haven, Conn.

Hanna J. Redd

Troutman Pepper Locke | Boston

Hon. James J. Tancredi

U.S. Bankruptcy Court (D. Conn.) | Hartford



Casting a Net or Trolling for Trouble?

Navigating the Limits of Bankruptcy's Broad Discovery Tool



- Traditional Discovery Tools in Bankruptcy
 - Starts with the § 341 Meeting
 - Creditors have some opportunity to ask questions of debtor
 - Rule 2004 Examinations
 - Flexible “fishing expedition” tool
 - Some typical issues and objections
 - Proportionality, relevance, abuse
 - Can be issued to Debtors and third parties



- How can Rule 2004 be used?
 - Summary Judgment for Admissions
 - But, not always admissible
 - *St. Clair v. Cadles of Grassy Meadows II, LLC*, 550 B.R. 655, 668–69 (E.D.N.Y. 2016)
 - Determine whether cause exists to take action against the estate
 - Appoint Trustee
 - Convert a case
 - Limit powers of Debtor-in-Possession
 - Determine whether creditor can raise derivatively or in an adversary
 - Non-dischargeability
 - Lien avoidance
 - Turnover
 - Fraudulent transfer & preferences



- What can Rule 2004 be used to obtain?
 - Identification of assets and any prepetition asset transfers
 - Locate documents or information that could support specific claims against the debtor
 - Third Party documents
 - Particularly helpful if Debtor's records are unreliable



The Boundaries of the Fishing Expedition



- Typical objections include proportionality, relevance, abuse
 - Cannot abuse or harass
 - Scope is broad, but must be relevant
- What is actually needed vs. harassment
 - Depends on the type of case
 - Also differs if and when there are allegations of wrongdoing
 - *In re Kossoff, PLLC*, Case No. 21-10699 (DSJ) (Bankr. S.D.N.Y. Apr. 13, 2021)
 - Depends on movant's role in the case
 - Trustee vs. creditor vs. debtor in possession



- The Pending Proceeding Rule
 - Intended to protect against using Rule 2004 to circumvent stringent Federal Rules of Civil Procedure
 - Challenge balancing broad or overlapping issues
 - What if discovery in Bankruptcy is unrelated to pending proceeding?
 - *In re Oklahoma Automatic Door, Co.*, 599 B.R. 167 (Bankr. W.D. Okla. 2019)
 - Examining third-party witnesses involved in pending litigation
 - Automatic stay applied to pending proceeding creates additional issues
 - Could the cross-over discovery impact the administration of the estate?



- Rule 2004 vs. Contested Matter Discovery
 - Discovery in a contested matter is subject to the protections provided in the Rules of Civil Procedure
 - Scope and burdensome limitations
 - Rule 26(c) Protective Orders
 - Privilege assertions
 - What happens when Rule 2004 Exam is pending, but then a related contested matter is filed?
 - *In re Washington Mut., Inc.*, 408 B.R. 45 (Bankr. D. Del. 2009)



- Consider who to examine when the subject of the Rule 2004 is a corporation
 - Incorporating Civil Rule 30(b)(6) procedures in a Rule 2004 examination
 - Examiner identifies corporate designee to examine
 - Apex Doctrine
 - Limiting depositions on high-level executives as a form of harassment
 - *Apple Inc. v. Samsung Elecs. Co., Ltd*, 282 F.R.D. 259, 263 (N.D. Cal. 2012)



Controversies around Rule 2004 Exams



- The impact of artificial intelligence in discovery
 - “Garbage in, garbage out.”
 - Can AI capture deceptions of an untrustworthy examinee?
 - Can minimize amount of time and effort used in reviewing document productions, but need to be able to trust results.
- Post-confirmation Rule 2004 Exams
 - Related to the issue of bankruptcy court’s limited jurisdiction following plan confirmation
 - Needs to be legitimate request
 - Directly tailored to post-confirmation administration of the estate



- Local Rules vary over jurisdictions
 - Some require a motion, some allow a subpoena by agreement
 - i.e. Motion required in Massachusetts, subpoena permitted by agreement in Connecticut
 - Some local rules are aimed at resolving discovery disputes before involving the Court
 - i.e. Maine requires consultation with examinee to reach agreement
 - Routine granting of motions
 - Could impact the need for a protective order or objections



- Special Masters in Bankruptcy
 - Rule 9031 initiative in New Jersey



Strategies, Best Practices, and Considerations



- Concerns regarding ESI search prompts used by parties and lawyers
 - Consider whether they themselves are discoverable
 - [Cite recent decision]
 - Rule 26 cooperation obligations
- Data Rooms
 - Take a production from a data dump to an organized archive
 - Can be efficient, but can also be effective
 - Added cost of additional professionals and administration



- Privilege in the context of Bankruptcy
 - Underlying expectation of full disclosure
 - Privileges limited to confidential or proprietary information
 - Federal law governs whether attorney-client privilege is assertable
 - Could look to state privilege if state law claims are at issue
 - *AH Litigation Trust v. Water Street Healthcare Partners, L.P. (In re Physiotherapy Holdings, Inc.)*, Case No. 13-12965 (KG), Adv. No. 15-51238 (KG) (Bankr. D. Del. Apr. 26, 2018)
 - Answer referring to “advice of counsel” may waive the privilege



- Efficiencies in preparing and responding to Rule 2004 exams
 - Considerations include estate funds, creditor pool, any anticipated recoveries
- Bad behaviors and sanctions
 - Evasive answers, lawyer interruptions, directions not to answer, etc.



THANK YOU

Faculty

Emily Abate is a manager at Verdolino & Lowey, P.C. in Foxborough, Mass. She has been with the firm for more than 11 years, previously serving as a bankruptcy staff accountant. Ms. Abate received her B.S. in accounting from the University of Alabama.

Patrick R. Linsey is a principal with Neubert, Pepe & Monteith, PC in New Haven, Conn., and is an experienced bankruptcy and restructuring attorney and commercial litigator. He advises debtors in all aspects of chapter 11 bankruptcy reorganizations. He also represents creditors, committees, and trustees in bankruptcy cases and in bankruptcy adversary proceedings. Mr. Linsey has represented major stakeholders in many of the most significant bankruptcy matters in the District of Connecticut over the past decade. He also represents clients in out-of-court workouts and restructurings and distressed-asset transactions. Additionally, he regularly prosecutes and defends commercial disputes in federal and state court and in arbitration proceedings. Mr. Linsey is active with state and local bar associations, including the Connecticut Bar Association's Commercial Law & Bankruptcy Section and ABI. He frequently presents on bankruptcy and commercial law topics at continuing legal education seminars and panels. Mr. Linsey received his J.D. with high honors from the University of Connecticut School of Law.

Hanna J. Redd is an associate with Troutman Pepper Locke in Boston, where she represents debtors and creditors in bankruptcy cases, complex financial restructurings, workouts and distressed situations. She has been listed in *Chambers USA* for Bankruptcy/Restructuring in Massachusetts as one of its "Associates to Watch" for 2026, and as one of *The Best Lawyers in America's* Ones to Watch: Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law from 2025-26. Ms. Redd received her B.S. in international business in 2016 from Marist University, and her J.D. in 2019 from Suffolk University Law School, where she served as a managing editor of the *Suffolk University Law Review* and was a Duberstein Moot Court team member and captain.

Hon. James J. Tancredi is a U.S. Bankruptcy Judge for the District of Connecticut in Hartford, sworn in on Sept. 1, 2016. Prior to his appointment to the bench, he was a commercial litigation and business restructuring partner at Day Pitney, LLP (f/k/a Day Berry & Howard), where, as a business litigator and commercial restructuring lawyer, he co-founded the firm's regional and national bankruptcy practice. During his 37-year career at Day Pitney, LLP, Judge Tancredi he represented financial institutions and other major constituents in a broad range of prominent insolvency-related proceedings pending in courts along the Amtrak corridor. He frequently lectured at the University of Connecticut School of Law and at bar association Continuing Legal Education programs on a broad range of commercial, real estate and restructuring issues and strategies. His professional and bar association activities included service as president and director of the Hartford County Bar Association and the Connecticut Turnaround Management Association. Judge Tancredi has been an active member of the Connecticut Bar Association, American Bar Association and American Trial Lawyers Association, and he was a director of the Hartford County Bar Foundation and Connecticut Mental Health Association. He is also a Connecticut Bar Foundation James W. Cooper Fellow. These platforms provided invaluable opportunities for enhanced legal education and service to the bench

and bar and served to drive local community *pro bono* initiatives. Judge Tancredi has written widely about business restructuring issues and co-authored the Connecticut chapter in *Strategic Alternatives for and Against Distressed Businesses* (2016 Edition), published by Thomson Reuters. He received his B.A. *magna cum laude* in urban studies and political science from the College of the Holy Cross in Worcester, Mass., and his J.D. *magna cum laude* from the University of Connecticut School of Law.