

Legal analysis to guide the mortgage industry and protect its interests.

## **Can the US Trustee “Go Fishing” for Information in Bankruptcy?**

**by Donald M. Wright**

Rule 2004 of the Federal Rules of Bankruptcy Procedure (R. 2004) allows any party-in-interest in a bankruptcy case to request that it be allowed to conduct a factual examination, much like a deposition, relating 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.” The requesting party-in-interest must file the appropriate motion, and the court must then grant such motion, ordering the conduct of the requested R. 2004 examination. Courts recognize that the scope of a R. 2004 examination is very broad. Commonly, a R. 2004 examination is described as a “fishing expedition,” which is limited generally to the broad topical areas of inquiry described in the requesting motion involving the Debtor’s assets and liability or the administration of the bankruptcy estate. There are many legitimate goals of R. 2004 examinations, including the discovery of assets, the examination of financial transactions, and the determination of whether or not the Debtor has engaged in any wrongdoing.

Creditors have long used R. 2004 examinations to investigate the financial status and historical transactions of Debtors in order to determine whether or not future action is warranted. It is now becoming more common for U.S. Trustees (UST) to seek and conduct R. 2004 examinations in furtherance of their “duty to act as a watchdog to protect the integrity of the bankruptcy system.” In conjunction with a R. 2004 examination, the examining party also can request production, by the party to be examined, of all documents in its possession that are relevant to the assets and liabilities of the Debtor or to the administration of the Debtor’s bankruptcy estate.

Recently, in the United States Bankruptcy Court for the Western District of Tennessee, the UST filed a Motion seeking a R. 2004 examination of a national mortgage servicer, which had filed a secured claim in the Debtor’s Chapter 13 bankruptcy case “as servicer for Bank of America, National Association as successor by merger to LaSalle Bank National Association as Trustee.” The claim in Currin was filed in the amount of \$32,451.28, including a total arrearage of \$12,124.25. The arrearage included property inspection fees, fees related to a broker price opinion, attorneys’ fees/costs, and escrow shortages, in addition to the defaulted contractual payments owed by the Debtor, all of which were itemized in the filed claim. The UST’s Motion for R. 2004 examination in Currin sought to investigate the accounting of the Debtor’s arrearage in the secured claim as filed, any document relied upon by the mortgage servicer in preparing its proof of claim and the “accounting dates, methods of calculation, and reasonableness of various fees listed on Exhibit A of the proof of claim.” The UST identified three topical areas of inquiry for their requested R. 2004 examination of the servicer, and the corresponding document production request listed 14 types of documents that the UST wanted the mortgage servicer to produce. The servicer objected and requested that the Court enter a protective order limiting the scope and extent of the UST’s R. 2004 examination of the servicer, including the related document production requests. The servicer agreed to produce certain documents responsive to the

UST's document production request related to the proof of claim, and agreed to provide a witness to answer certain questions posed by the UST about the Debtor's account. The UST responded that it had

begun a process of carefully reviewing filings by mortgage servicers, including this servicer, in bankruptcy courts across the country. In several cases, the U.S. Trustee has identified issues or serious deficiencies with the proofs of claim filed by this servicer, often including unreasonable or at least unsubstantiated fees and charges.

Thus, the UST has now effectively forewarned all mortgage servicers that it is indeed engaging in a "fishing expedition" for underlying factual information through the conduct of R. 2004 examinations and corresponding document production requests. The UST simply is not now accepting, at face value, the representations of claimants so claimants need to strictly comply with the law, including local policies and procedures.

Whether or not a R. 2004 examination is ordered, upon proper motion, is left to the Court's exercise of its discretionary powers. In Currin, the Court quickly concluded that the UST had demonstrated sufficient "good cause" to order a R. 2004 examination of the servicer. The Currin Court concluded that "the Trustee's need for the information [sought] clearly outweighs the burdens, the exam, and the document request to be placed on [this servicer]." However, the Currin Court placed certain limitations upon the Trustee's R. 2004 inquiry of the servicer. The UST was not allowed to pursue examination of the servicer's business affairs as to any loan or any debtor aside from the debtor in this [bankruptcy] case." The UST in Currin also was prohibited from asking the servicer about the "reasonableness" of the charges to the Debtor's account, but the Court acknowledged that such issue could later arise in the context of an objection to the claim, if such objection were to be filed. Finally, the Court reaffirmed the mortgage servicer's right to exercise a question-by-question or request-by-request assertion of the attorney-client privilege, but the servicer could not exercise that privilege in any blanket manner.

In summary, while R. 2004 provides a legal basis, the conduct of a "fishing expedition" has always been available in the Bankruptcy Code and its related procedural rules. The UST's Office has recently begun aggressively using R. 2004 exams in questioning mortgage servicers who file claims in bankruptcy cases. Mortgage servicers should take R. 2004 exams seriously, although R. 2004 exams will not occur in every bankruptcy case. Whenever a R. 2004 motion is filed, mortgage servicers should follow guidance of local counsel in handling and responding to such inquiries, including defending the mortgage servicer's representative at the R. 2004 examination.

\* In re Currin, Bk # 10-13556 (Feb. 22, 2011). All quotations in this article are direct quotes from the Court's reported decision in Currin.