



# Court News and Views

THE UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF ALABAMA

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## Clerk's Corner Brian J. Suckman

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I want to thank you for taking the time to read our latest newsletter. We have some great information and several practice pointers from the Court, U.S. Attorney's Office, BA, and Chapter 13 Trustee.

**Case Numbers:** Our case numbers continue to grow. Through the end of September, we are up 7.7% over the year-to-date numbers in 2023. We are still down about 25% from our case filings in 2019.

**New Clerk of Court:** As JC announced in the April volume, he retired from the Court after almost 15 years of service. During that time, he had a lengthy list of accomplishments and helped establish the Court as one of the best small courts in the country. He left a lasting legacy with those who know him and had the opportunity to work with him. We all wish him well on his new endeavors.

In May, I was honored to be named the new Clerk of Court. Thank you for working alongside me to keep the office moving forward as we transition to the new local rules. The road has not always been smooth, but I appreciate your patience as we worked through issues. I believe we have found a good steady state now, but there will always be room for improvement and welcome your feedback.

**New Chief Deputy:** I'm proud to announce Jessica Trotman as our new Chief Deputy Clerk. She brings a wealth of knowledge to the Court as a former practicing attorney. In her short time in the Office, she has become an invaluable member of the team and has integrated herself into all aspects of court operations.

**New Information Systems Manager:** I'm proud to announce that Tony Nolen has taken over as the new Information Systems Manager. He is a 24-year veteran of the judiciary and has managed our network and servers for many years. He brings a wealth of knowledge on computer operations and IT security that will help keep the court functioning safely and efficiently.

As Walt Disney said, "We keep moving forward..." and that has never been truer for the Clerk's Office this year with all of the changes and challenges we have faced. I look forward to seeing you at our annual attorney forums this November!

**Feedback:** as always, please continue to reach out to us with any questions or feedback. You can call us directly at (334) 954-3800 or email us at [feedback@almb.uscourts.gov](mailto:feedback@almb.uscourts.gov).

# Streamlining the Presentation of Evidence in Contested Matters

Christopher Hawkins, U.S. Bankruptcy Judge  
Richmond Maddox<sup>1</sup>

The pace in bankruptcy court is brisk, often necessitated by financial distress affecting the parties in interest. Because of the need for prompt disposition, pleadings are filed, objected to, set, and heard in short order. However, this pace does not excuse practitioners from supporting each pleading with the necessary evidentiary basis. To balance the need for speed with evidentiary requirements and the resources of necessary witnesses, it is worthwhile to consider alternatives to live witness testimony via direct examination.

## **Affidavits and Unsworn Declarations under Penalty of Perjury**

The bankruptcy court requires evidence in support of even relatively routine motions, such as motions for relief from stay under 11 U.S.C. § 362(d) and motions to extend or impose the automatic stay under 11 U.S.C. §§ 362(c) (3) and (c)(4), respectively. While live direct testimony from the movant (or the movant's representative) certainly is acceptable, a factually sufficient affidavit in support of the motion can achieve the same result while also conserving the resources of the parties and the court.

Affidavits usually are considered hearsay, rendering them inadmissible. However, an exception exists for affidavits “[w]hen [the] motion is based on facts not appearing of record.” Courts have confirmed that affidavits in support of motions in bankruptcy court fall within the exception to the hearsay rule. Affidavits can be used as a substitute for live testimony, but only if the facts described in the affidavit are sufficient to meet the evidentiary burden associated with the relief requested. For example, on a motion to extend the automatic stay, the debtor must overcome by clear and convincing evidence the presumption that the new case was not filed in good faith. Accordingly, the affidavit must contain a sufficient explanation as to why the prior case was dismissed and a detailed description of the change in circumstances (financial or otherwise) that will increase the debtor's likelihood of success in the pending case.

Note that an unsworn declaration under penalty of perjury may be used as a substitute for an affidavit for relief requested under the Bankruptcy Code, provided that the declaration meets certain statutory requirements.<sup>7</sup> Without limitation, if the declaration is executed within the United States, it must include the following:

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)<sup>8</sup>

## **Proffers**

Another alternative to live testimony is the use of proffers. The Federal Rules of Bankruptcy Procedure do not include a specific provision regarding proffers, but general support for proffers can be found in Rule 43(a) of the Federal Rules of Civil Procedure, as made applicable in contested matters by Rule 9017 of the Federal Rules of Bankruptcy Procedure. A proffer is an attorney's offer of the witness's testimony as a substitute for the witness taking the stand and testifying on direct examination. The witness is present in court for the attorney's proffer. After the proffer, the court may ask the witness to affirm the testimony, and the witness is made available for cross-examination.

An effective proffer promotes efficiency by allowing the attorney to present an organized summary of witness testimony to meet the evidentiary requirements for the relief requested. A proffer also eases the anxiety of a witness that may be nervous about being in a courtroom setting. Proffers are particularly useful in contested matters where any disputes are likely based on legal – rather than factual – issues, including: motions to extend the automatic stay; first day motions in Chapter 11 cases; confirmation hearings in Chapter 11 cases; motions to use cash collateral; and motions to sell free and clear of interests. When used effectively, proffers allow a contested matter to proceed more quickly and efficiently to its conclusion.

# Streamlining the Presentation of Evidence in Contested Matters (Continued)

## Stipulations

Stipulations are another form of introducing facts to the court without requiring witness testimony. Stipulations are more commonly utilized in adversary proceedings, but there is no prohibition against incorporating stipulations into contested matters. A stipulation simply is a party's acknowledgment that certain facts are not in dispute, eliminating the need for evidence by way of testimony or otherwise. When attorneys confer to determine what they can and cannot stipulate to, they become better prepared for their hearings. They are forcing themselves to organize their efforts around the factual disputes that must be decided by the court, which sharpens their strategies. The attorneys' focus on the key factual disputes also promotes efficiency, allowing the court to attend only to the issues that require factual determinations, which ultimately speeds up the decision-making process.

## Conclusion

Affidavits, unsworn declarations under penalty of perjury, proffers, and stipulations require careful, thoughtful work by the attorneys for the parties bearing an evidentiary burden. However, they can significantly benefit the parties and the court by providing a more efficient presentation of evidence and sometimes obviating the need for a witness to travel to court. Attorneys can rest assured that their careful, thoughtful work on legally sufficient affidavits, unsworn declarations under penalty of perjury, proffers, and stipulations does not go unnoticed – and is much appreciated – by the courts.

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<sup>1</sup> Richmond Maddox is in his third year at Cumberland School of Law at Samford University and currently serves a judicial extern to Judge Hawkins.

<sup>2</sup> FED. R. EVID. 802.

<sup>3</sup> FED R. CIV. P. 43(e).

<sup>4</sup> See *In re Garner*, 246 B.R. 617, 625-26 (B.A.P. 9th Cir 2000); *In re Centennial Healthcare Corp.*, No. 02-74974, 2005 WL 6349835 at \*3 (N.D. Ga. Dec. 28, 2005).

<sup>5</sup> 11 U.S.C. § 362(c)(3).

<sup>6</sup> See generally [CLH Chambers Procedures with sample affidavit 111623.pdf \(uscourts.gov\)](#).

<sup>7</sup> 28 U.S.C. § 1746.

<sup>8</sup> *Id.*

<sup>9</sup> Fed. R. Bankr. P. 9017; FED R. CIV. P. 43(a) ("At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise.")

## Chapter 13 Trustee Updates

### Sabrina L. McKinney, Chapter 13 and Chapter 12 Trustee

On April 1, 2024, the Court implemented new local rules for the District. The Trustee's Office is seeing an increase in order issues with the implementation of Amended Rule 9007-1 and 3007-1. As provided by the new Rules, the Trustee's Office is only to be made party to orders being submitted to the Court if there is an objection in the case and the order represents a compromise, settlement, or Court ruling on the objection and the Court has directed the moving party to submit the order for consideration and entry. The issues seem to be in those cases where no objection is filed, and an order is submitted to the Court for consideration that has not been reviewed by the Trustee's office.

Two points for consideration when you are submitting an order for entry.

First, do not ask that a claim be "disallowed" when money has already been paid on the claim prior to the objection to claim filing. At the time the creditor received the funds (prior to the objection), the claim was an "allowed" claim and the creditor was entitled to the funds when they were paid. If the claim is "disallowed" after funds are paid on the claim, this results in a negative balance on the claim where the Trustee seeks to recover a refund of the payment made to the creditor prior to the entry of the order disallowing the claim. The Trustee would respectfully request that all parties – debtor and creditor attorneys – take this into account when dealing with objections to claim under negative notice.

Second, it is incumbent upon the moving party to submit to the Court an order which sets out the relief that was sought in the objection. The Trustee has received some orders recently which do not match the objection's relief sought, or do not set out what relief is being ordered by the Court. Some specificity is appreciated so long as it matches the relief sought in the objection.

As you all may be aware, the Trustee's Office has been fortunate to invite into the Trustee family two new staff attorneys in the past year. As such, we thought it would be a good idea to introduce you all to all the staff attorneys at the Trustee's Office.

Tina Hayes has worked as a staff attorney for the Office of the Chapter 13 Trustee, under the leadership of two Trustees, for the past seventeen years. She and is married to her high school sweetheart and together they have one son, who is pursuing the STEM Path to the MBA at the University of Alabama. Tina graduated from Auburn University at Montgomery with a paralegal certificate and a Bachelor of Science degree in Justice and Public Safety. After college, Tina worked full time as a paralegal for a local law firm while pursuing her law degree from Thomas Goode Jones School of Law. In her free time, Tina enjoys reading, fishing, cooking, and traveling.

Shavon Richardson has worked as a staff attorney at the Trustee's Office for the past four years. She hails from Coosa County where she lives with her husband and two sons. Shavon received her undergraduate degree from Alabama State University with a BS in Criminal Justice. She received her JD from the University of Alabama School of Law. In her free time, Shavon enjoys spending time with family and friends and loves to craft.

Mark Wheeler is originally from Grand Rapids, Michigan, where he graduated from Aquinas College before attending The Thomas M. Cooley Law School in Lansing, Michigan. He attended law school full time at night while working full time in the Michigan House of Representatives for the Honorable Kenneth Sikkema, who went on to become the Senate Majority Leader. He packed up a U Haul truck two days after graduating from law school and embarked on a 32-year career as a practicing attorney in downtown Chicago, Illinois. He brings a wealth of experience to the Middle District of Alabama having represented four chapter 13 trustees over the course of 21 years in Chicago. Mark regards the opportunity to practice in Alabama late in his career as a true blessing that arrived when it was needed the most. Mark has been with the Trustee's Office in Alabama since January 2024, and in his free time enjoys riding his motorcycle when the weather permits and spending time with his parti-standard poodles, Chester and Burley.

## Chapter 13 Trustee Updates (Continued)

Connor Lunney recently joined the Chapter 13 Trustee's office after clerking for two years under Chief Bankruptcy Judge Bess M. Parrish Creswell. He hails from Mandeville, Louisiana, and graduated from Loyola University New Orleans with a Bachelor of Accountancy. He finished law school at The University of Alabama School of Law, graduating with a Juris Doctor, and is excited to make a difference through his work in bankruptcy here in the Middle District of Alabama. He lives locally with his fiancée, whom he met in law school, and their two cats. His interests include cheering for the New Orleans Saints, playing chess, and cooking tasty meals.

Please join me in welcoming our newest members to the Trustee's family team!

Our next article will focus on other topics of interest from the new Local Rules. As always, if you have any questions, feel free to reach out to me at any time. Here's hoping you all have a joyous holiday season. Thank you.

## Bankruptcy Administrator

### Help Small Businesses Succeed: Become a Subchapter V Trustee!

The Bankruptcy Administrator for the Middle District of Alabama invites resumes from individuals interested in serving as Subchapter V case trustees under the Small Business Reorganization Act of 2019. Trustees will be appointed on a case-by-case basis in the United States Bankruptcy Court for the Middle District of Alabama, covering Dothan, Montgomery, and Opelika.

#### Qualifications:

- Strong administrative, financial, and interpersonal skills
- Preferred: Business, managerial, consulting, mediation, or operational experience
- Preference given to attorneys with bankruptcy experience residing or practicing in the Middle District or adjacent areas

Successful applicants will undergo a background check and must qualify for bonding. Please note that Subchapter V trustees are not federal employees and will receive compensation per 11 U.S.C. § 330.

**Application Process:** Submit your resume to [ba@almb.uscourts.gov](mailto:ba@almb.uscourts.gov) by Friday, November 22, 2024. A complete position description can be found [here](#) under News & Announcements. Selected candidates will be interviewed in Montgomery, AL, following the application period.

## Chapter 13 Trustee: Conduit for Post-Petition Home Mortgage Payments

The Court requests the Bar's questions and feedback on the possibility of having the Chapter 13 Trustee serve as a conduit for post-petition home mortgage payments. While nothing currently prevents debtors from proposing plans in which the Chapter 13 Trustee would serve as a conduit, the Court seeks questions and feedback on the possibility of requiring conduit payments in all Chapter 13 cases, or – in the alternative – under certain circumstances, such as: when the loan is greater than two months delinquent as of the petition date; when the loan becomes delinquent post-petition, but pre-confirmation; when the loan becomes more than two months delinquent post-confirmation; or when the creditor's rights under the loan were affected by a prior bankruptcy case that was dismissed within the prior year.

We really do want to hear from you on the topic, and we plan to have a more detailed discussion, based in large part on what we receive through the feedback process, at the attorney forums next month. Your questions and feedback can be sent to [feedback@almb.uscourts.gov](mailto:feedback@almb.uscourts.gov).



# Student Loan Discharges

Audrey L. Willis, Assistant United States Attorney

Student loan discharge case filings have exploded this year. At this time last year, our district had two student loan discharge adversary proceedings filed under the new guidance issued by the Department of Justice, effective November 17, 2022. As of October 1, 2024, our district has had approximately fifty cases filed in total. And the number increases daily. This increase is due, in large part, to Administrative Order 2024-01, Compensation of Debtor's Attorney in Student Loan Dischargeability Actions, issued on March 12, 2024. This Order provides a mechanism for attorneys to be compensated in a bankruptcy case for an uncontested student loan AP, while also setting clear guidance on what is expected of the attorney to earn his/her fee. For a more in-depth understanding of the Administrative Order, see the Chapter 13 Trustee's article in *Court News and Views*, Volume 25, April 2024, p. 3 – 4.

At our annual Bankruptcy at the Beach Conference, Judge Tamara O. Mitchell, bankruptcy judge in the Northern District of Alabama, and I presented on the new student loan guidance, in a step-by-step format. For those of you who were unable to attend the conference this year, I have consolidated the information below. As always, please do not hesitate to reach out to me if you have any questions.

## Step 1: Determine who Qualifies

On November 17, 2022, the Department of Justice issued guidance for Department Attorneys regarding student loan bankruptcy litigation. The objectives of the guidance are threefold: (1) Set clear, transparent, and consistent expectations for debtors; (2) reduce burdens by simplifying the fact-gathering process through a form attestation; and (3) identify proceedings where the government may stipulate to facts demonstrating undue hardship. Importantly, this guidance did not change the legal standard under 11 U.S.C. § 523(a)(8); *Brunner* is still the law. See *In re Acosta-Conniff*, 686 F. App'x 647, 648 (11th Cir. 2017); *In re Cox*, 338 F.3d 1238, 1240 (11th Cir. 2003). The guidance merely seeks to simplify the process by which we evaluate and determine "undue hardship."

In determining whether a debtor is a good candidate for a student loan dischargeability action, the attorney should review the debtor's tax returns for the last several years, Schedules I/J, the means test, and creditor reports and/or loan history from the servicer to determine the types of educational loan(s) and the amounts. The attorney should also review whether the debtor has an option outside of bankruptcy, through an administrative discharge. Here is a link with more information: [Link](#)

## Step 2: File the Adversary Proceeding

Ultimately, determining the "best" time to file the AP, particularly in a Chapter 13 case, is left to the discretion of the filing attorney. However, the attorney needs to be mindful of whether the case is ripe for the AP. For example, the attorney should consider whether the Chapter 13 case has even been confirmed yet, and for a Chapter 7, whether the case has "passed" the § 341 Meeting of Creditors without issue. We have all been at a § 341 where a debtor has mistakenly omitted telling his/her attorney about a piece of unencumbered real property that completely alters the best interest of creditors test.

## Step 3: Submit Supporting Documentation

Once you have filed the AP, contact the AUSA and provide the AP case number and the completed attestation, and any other information you believe will be helpful. A Word and PDF version of the most updated attestation is on our Bankruptcy Court's website. Emailing the AUSA the AP case number and the completed attestation does not constitute proper service on a government agency. The attorney still needs to serve the Attorney General of the United States, the United States Attorney for the Middle District of Alabama, and the notice address for the government agency. See Fed. R. Bankr. P. 7004.

## Student Loan Discharges (Continued)

### Step 3: Submit Supporting Documentation (continued)

Although one of the purposes of the guidance is to reduce the burdens of litigation, which includes discovery, the AUSA may need additional information. This additional information, as well as the attestation should not be filed with the court. It is confidential information that the AUSA and the Department of Education reviews. Whether the debtor shares the attestation and additional supporting documentation with a private student loan holder that is involved in the case is left solely to discretion of the debtor and the attorney.

### Step 4: File Fee Application and Amended Disclosure (if applicable)

On March 12, 2024, our court issued Administrative Order 2024-01, Compensation of Debtor's Attorney in Student Loan Dischargeability Actions. This Order provided a mechanism for attorneys to be compensated in a bankruptcy case, while also setting clear guidance on what is expected of the attorney to earn his/her fee. Recall that the fee announced in the Order is a *presumptive* fee, meaning the attorney—or the court—may increase or decrease the fee, depending on the circumstances. If the debtor will be paying the additional fee through the Chapter 13 plan, the attorney may need to amend or modify the plan to adjust feasibility for the needed increase in plan payments.

### Step 5: AUSA Reviews and Consults with the Department of Education

Once the attorney provides the signed attestation and any additional supporting documentation to the AUSA, the AUSA reviews it, along with the bankruptcy schedules and loan history, and makes a recommendation to the Department of Education. This is where we see those longer wait times. There is no set time on how long it will take to hear back on the AUSA's recommendation. However, some districts have issued guidance staying deadlines for 120 days during the attestation review process. See Guidelines for Adversary Proceeding under 11 U.S.C. § 523(a) (8) in which the United States is a Defendant, Bankr. N.D. Cal. In some cases, the Department of Education, after reviewing the attestation, may request additional information.

### Step 6: Stipulation or Trial

If the parties agree to a discharge of some or all of the loan(s), the debtor and the United States will enter into a joint stipulation, making findings of fact, and a consent order. If the debtor has completed his/her bankruptcy case and received a discharge, the consent order will provide that certain student loans are *discharged* and that the AP is dismissed. If the debtor has not completed the bankruptcy case yet, the consent order will provide that the student loans are *dischargeable* upon the debtor receiving a discharge in the underlying bankruptcy case.

In some cases, the debtor may receive a partial discharge of his/her student loans. This is where the debtor has satisfied the undue hardship elements when the full debt amount is considered but has demonstrated some ability to make partial payments on the loan. It often arises when the debtor has significant assets (remember that unencumbered piece of real property that came up at the § 341) or disposable income to pay part of the loan(s). Partial discharges are *not* a method for “settling” the case.

If the parties are unable to agree on the dischargeability of the loans, the guidance no longer applies. At this point, the debtor's options are to either move forward with litigation or dismiss the AP.

**A final word:** Remember, this is only guidance; it is not a federal statute. With this being an election year, this guidance may change or be eliminated with the next administration. Although *Brunner* is the law, the process by which we evaluate *Brunner*—and the efficiencies of that process—may change.

# Helpful Tips from the Clerk's Office

## From the Courtroom Deputies

- ◆ With the implementation of the new local rules, attorneys are now responsible for submitting an increased number of orders on a regular basis. It is crucial these orders contain the correct information to prevent rejection of the order or the setting of a status hearing. Common mistakes include referencing the wrong motion, misspellings, and improper noticing. Submitting accurately prepared orders will ensure timely issuance.
- ◆ When special counsel attorneys file their Declaration in Support of Entry of Order event for 9007-1(f) motions, please do not select that you are the debtor's bankruptcy attorney. Please follow these docketing events to avoid adding yourself as the main bankruptcy attorney: Bankruptcy > Filings > Miscellaneous/Other > Declaration in Support of Entry of Order (Local Form 5) > Select Special Counsel name > Select Special Counsel name here too.
- ◆ During telephone dockets, please remember to mute your phone when you are not speaking and do not use speakerphone. The Court is monitoring these dockets and if you fail to mute your phone or otherwise cause a disruption, you will be muted. If the Court mutes you, you will have to press \*6 to unmute yourself.

## From the Case Administrators

- ◆ Please do not forget to carefully read the submission error – it specifies what needs to be done to correct the error.
- ◆ If the Rule 9007-1 negative notice language is on the document, the event should be Motions/Applications > Rule 9007-1 Motion. A notice of withdrawal of document can be filed if you intend to withdraw the originally filed motion. If you receive a submission error, remember that the pleading you file to correct the submission error is now "Amended" and should be filed as such.
- ◆ Reminder: With all the changes in forms and procedures the past few months, the Court's website (<https://www.almb.uscourts.gov>) has updated forms, attorney resources, and much more. If you ever have any questions before filing, please give us a call. When amending schedules D and E/F, please remember to type in the names of the creditors being added to the case.
- ◆ When filing income records, make sure the name on the income records matches one of the names listed on the case.
- ◆ When filing amended Schedules A-J, remember to include a cover sheet addressing the changes and a certificate of service
- ◆ When filing a motion and coversheet, you must include a signature on the motion, coversheet, and the certificate of service. Your signature block must also be included on one section of the filing.
- ◆ When opening a new case please do not capitalize the debtors full name and street address.
- ◆ When you file a motion to excuse plan payments, you must include an amended plan.
- ◆ Do not list LLC or Corp. as an alias/dba on an individual petition.
- ◆ 341 Notices – Attorneys, please make sure you are listing the correct date and location. There have been several notices that are not accurate – wrong date and listing the location at the courthouse. Please see the Bankruptcy Administrator's website at [Zoom for Government Resources | Middle District of Alabama | United States Bankruptcy Administrator \(uscourts.gov\)](https://www.uscourts.gov) for the required location of 341 hearings. Incorrect notices will get a submission error and require refiling and re-noticing.



## Personnel Changes in Chambers

Bachittar Singh is a California native, and a recent graduate of the University of Alabama School of Law. In addition to his J.D., he also obtained the Certificate in Governmental Affairs and the Certificate in Public Interest Law at Alabama Law. During law school, he served as President of the Middle Eastern/South Asian Law Students Association and J.D. Admissions Student Ambassador. He also served as a Judicial Extern for the Hon. Myron H. Thompson, U.S. District Judge for the Middle District of Alabama during his 2L (2022-2023). Prior to attending law school, Bachittar lived in London, U.K. while working as the Program Director for a non-profit organization documenting unlawful disappearances and crimes against humanity in India. Having recently moved to Montgomery, he is looking forward to playing rugby with the Montgomery Yellowhammers, perhaps attending a Biscuits game, and learning more about the City of Montgomery and its fascinating history.



Hayden Hall is a 2020 graduate of Amherst College and 2024 graduate of Emory University School of Law. While at Emory, he worked for the U.S. Trustee and served as editor for the Emory Bankruptcy Developments Journal. In his free time, he enjoys cheering on the Clemson Tigers, playing pickleball, and trying new restaurants.





# Save the Date!

ALMB will host its 2024 attorney forums as listed below. Please save the date so you and members of your staff can attend one of these meetings. One hour of CLE will be awarded for attendance.

**Wednesday, November 6 - Dothan**, after the docket in the Bankruptcy Hearing Room

**Wednesday, November 13 - Opelika**, after the docket in the Bankruptcy Court Room

**Thursday, November 14, Montgomery**, after the docket in Courtroom 4D