83 Am. Bankr. L.J. 549

American Bankruptcy Law Journal
Fall, 2009

Article

*549 RESPONSE TO "ROUTINE ILLEGALITY IN BANKRUPTCY COURT, BIG-CASE FEE PRACTICES"

Martin J. Bienenstock, Sarah L. Trum, Jeffrey Chubak, Tevia Jeffries [a1]

I. INTRODUCTION

Lynn M. LoPucki and Joseph W. Doherty have recently published an article entitled *Routine Illegality in Bankruptcy Court, Big-Case Fee Practices*, [1] in which they brand as 'illegal' three fee practices common in big Chapter 11 cases. The article's title astutely bundles things most people love to hate: illegality, bankruptcy, and fees. As a preponderance of 'big cases' is filed in Delaware and New York, *Routine Illegality* openly targets those jurisdictions and a few others, [2] and specifically their courts and professionals, the authors of this article included.

From the outset, [3] *Routine Illegality* restates a premise originally asserted in *Courting Failure*, [4] a book by Professor LoPucki in which he alleges that the New York and Delaware courts engage in wrongful acts to compete for big Chapter 11 cases, and are corrupt. *Routine Illegality* attempts to corroborate this premise by contending that the courts "abandoned the effort to control *550 fees" [5] by engaging in 'illegal' fee practices to compete for big cases. [6] This article first tests the premise by examining the Enron case, a chapter 11 case to which the author of *Courting Failure* refers as a primary manifestation of wrongful court competition. Second, we apply a dispassionate, clinical analysis of applicable bankruptcy law to determine whether the targeted big case bankruptcy fee practices are "illegal."

II. DOES *COURTING FAILURE* IDENTIFY BANKRUPTCY COURT CORRUPTION AND COMPETITION BASED ON FACT OR CUNNING FICTION?

Using the Enron Chapter 11 case as an example, *Courting Failure* asserts that bankruptcy court competition exists in New York and Delaware where bankruptcy judges reward "case placers" [7] by (a) removing "any limits on incumbent managers' pay, authority, or job security," [8] (b) removing "limits on pay, conflict-of-interest restrictions, or liability releases of bankruptcy lawyers and investment bankers," [9] (c) facilitating "sales of companies that enable managers and their new investors to make a quick profit by externalizing costs to employees, the Pension Benefit Guaranty Corporation, local governments, and customers," [10] and (d) protecting the "case placers from investigations by criminal prosecutors, the Securities and Exchange Commission, other regulatory agencies, class action lawyers, and anyone else who threatens them." [11] *Routine Illegality* further pursues this theme, by attempting to show that bankruptcy court practices in New York and Delaware illegally compensate the debtor's and other professionals to induce them to file cases in New York and Delaware. [12]

In large part, *Courting Failure* deduces the existence of such wrongful bankruptcy court competition from the following allegations it propounds about the Enron case:

> ***551** The bankruptcy court competition contributed to the corporate scandals of 2001 and 2002. When Houston-based Enron filed its bankruptcy in New York, the New York court retained the case over the objection of some of Enron's major creditors. The court allowed Kenneth Lay, the apparent perpetrator of one of the biggest frauds in history, to remain as CEO long enough to choose a successor who flatly refused to take action against him. Ignoring a motion for appointment of a trustee filed by major creditors, the New York court left unindicted members of Enron's corrupt management in control through the crucial stages of the case. [13]

These hard hitting, no holds barred contentions form *Courting Failure's* premise. *Courting Failure* concedes its contentions are only inferences in some instances. [14] Let's test each contention: [15]

1. "[T]he New York court retained the case over the objection of some of Enron's major creditors:"
a. As stated in the Enron court's unappealed venue decision: "the Debtors' largest creditors--the banks (holding debt in their own name and serving as Indenture Trustees for publicly traded notes and bonds for more than twenty-five indentures, both foreign and domestic) oppose transfer of venue in these cases." [16] Additionally, "Counsel for the [Creditors'] Committee has indicated the Committee's strong opposition to a transfer of the bankruptcy case." [17] Nine of the committee's fifteen members were located outside New York, with three located in Texas. [18]

***552** b. In short, the New York court sided with Enron's major creditors while *Courting Failure* advances the opposite impression by stating adroitly the court "retained the case over the objection *of some of* Enron's major creditors." [19]

2. "The court allowed Kenneth Lay, the apparent perpetrator of one of the biggest frauds in history, to remain as CEO long enough to choose a successor who flatly refused to take action against him."
a. Ken Lay did not choose a successor. The Enron statutory creditors' committee named two potential successors, neither of whom Ken Lay knew, and Enron's attorneys selected Stephen F. Cooper from that list. We have personal knowledge of that fact because the committee's lead attorneys communicated its selections directly to Martin Bienenstock, an author of this article. Additionally, the entire Enron board resigned, except for Ray Troubh who had been a director for only a few months during which he led an investigation of management. The board was replaced with new directors selected by the Official Committee of Unsecured Creditors. Thus, Ken Lay had zero influence on selecting his successor at Enron, as debtor-in-possession, and exited in the first two months of the Chapter 11 case.

b. Courting Failure erroneously guesses that Enron's management arranged Cooper's candidacy and vetted him, and that Lay had input: "On January 24--the day after Lay's resignation--the *Wall Street Journal* had the Cooper story by press time. Considering that Enron's management MUST HAVE arranged Cooper's candidacy and vetted him before setting the appointment with the board reported in the *Journal*, IT IS A REASONABLE INFERENCE that Ken Lay at least participated in choosing Cooper." [20] Enron's management did not arrange Cooper's candidacy and did not vet him. Lay had no input whatsoever. The foregoing quotation shows that *Courting Failure* guesses that Enron's management "must have arranged Cooper's candidacy" and admits it inferred that Lay had input. It guessed and inferred the wrong answers.

c. Many weeks before Stephen F. Cooper succeeded Ken Lay as chief executive officer of Enron, Ken Lay and Martin ***553** Bienenstock gave the statutory creditors' committee full control of all actions against Ken Lay and all other Enron insiders. They did this in front of over 1,000 witnesses at the organizational meeting called by the United States Trustee to select the statutory creditors' committee. They did this to make crystal clear that creditors would be in control of actions against insiders, and that Enron, as debtor in possession, would not use any of its powers to influence the investigation and prosecution of insiders. To say that Stephen Cooper refused to sue Ken Lay suggests that Ken Lay was being

protected, whereas the opposite was true. At the organizational meeting, Lay knowingly relinquished any protection and the appearance of protection by the debtor in possession. Stephen Cooper could not investigate or prosecute Lay because that power was transferred to the statutory creditors' committee before Cooper arrived at Enron.

d. One of the most important lessons of Enron was that the values of Enron's many businesses could be maximized, over 20,000 jobs could be saved, and many creditors could collect over 85 cents on the dollar if they held Enron Corp. guarantees, by having the chief executive officer solely operate the businesses, while the employees were investigated and prosecuted by entities outside the company (the examiners, the statutory creditors' committee, and state and federal governments). The employees were able to work with Stephen Cooper because they knew he was not communicating with them for the purpose of prosecution. This was far superior to having a Chapter 11 trustee try to work with the same employees against whom he sought a criminal indictment. It took no imagination to figure out that creditors were going to receive maximum returns in the billions of dollars by maximizing the value of the businesses, and not by collecting from a $250 million directors' and officers' liability policy.

e. After two and a half years of intense investigation by the Enron Task Force of the United States Department of Justice, the indictment [21] of Ken Lay did not allege any crime by Lay in connection with any Enron business transaction. ***554** Andrew S. Fastow, [22] Jeffrey Skilling and Richard Causey were indicted for such transactions. [23] Ken Lay was indicted for having made untrue positive statements about Enron's overall financial condition during the last few months before its Chapter 11 case and for having violated banking laws in respect of personal loans. [24] Lay was trying to retain as much of his Enron stock as his lenders would let him retain.

3. "Ignoring a motion for appointment of a trustee filed by major creditors, the New York court left unindicted members of Enron's corrupt management in control through the crucial stages of the case ...."
a. The reader can draw her own conclusions about *Courting Failure's* notion that the bankruptcy judge could or would ignore a trustee motion filed by anyone, let alone major creditors in what was then the largest Chapter 11 case in United States history and one that became a constant topic on television news.

b. In fact, the United States Securities and Exchange Commission, the creditors who filed the trustee motion, and the creditors who supported it, all determined they were better off separating the chief executive officer function from the investigatory function. Accordingly, with the cooperation of Enron's new board of directors, they formulated a proposed order that required the appointment of an examiner, provided for waivers of Enron's attorney-client privilege in aid of the examiner and class action attorneys, provided for coordination among Enron, the creditors' committee and the examiner, and protected shareholder interests as requested by the Securities and Exchange Commission. [25]

c. As shown above, contrary to *Courting Failure's* erroneous guesses and inferences, (i) Ken Lay and all insiders were immediately rendered subject to investigation and prosecution by the statutory creditors' committee, (ii) the Enron board of directors was replaced, and (iii) the creditors' committee chose Stephen F. Cooper as the new chief executive ***555** officer with no input or influence by Ken Lay or any other management or director.

Courting Failure purports to prove that because debtors can choose venue, bankruptcy courts engage in competition to help entrench and insulate management to the detriment of creditors. In truth, this position was based on guesses, inferences, and incorrect factual allegations. The actual facts show that the bankruptcy court for the Southern District of New York presided over the replacement of the Enron board and management with creditor nominees in the first two months of the case, and that the case maximized returns to creditors and saved 20,000 jobs. The New York bankruptcy court was clearly not the management safe haven that *Courting Failure* posited as its premise.

III. AFTER *COURTING FAILURE*, PROFESSORS WHITE AND LUBBEN DISAGREE WITH ITS PROGENY

After the publication of *Courting Failure*, its author co-wrote other articles to support its premise. In *Bankruptcy Fire Sales*, [26] Professors LoPucki and Dougherty contend that sales of businesses under Bankruptcy Code § 363 yield creditors 35% of book value, while reorganizations of such businesses in Chapter 11 plans yield 91% of book value. They further assert that with the help of Bankruptcy Courts in the Southern District of New York and in Delaware, professionals work to consummate § 363 sales for wrongful reasons emanating from court competition. Professor James J. White at University of Michigan Law School describes their thesis as follows:

> So if you leave bankruptcy through the side door, you reap 35% of book value, but if you leave through the front door, you get as much as 91%. These are astounding numbers. If they are accurate, why would anyone, a creditor, a judge, or even the debtor or the debtor's lawyer, choose a 363 sale over reorganization? Professor LoPucki finds that most of the actors on the bankruptcy stage have malign motives--to bring more cases to their courts (the judges), to earn payments from third parties who buy their companies (the managers), or to ingratiate themselves with future clients (the investment bankers). It goes without saying that Messrs. LoPucki and Doherty doubt the auction market's ability to produce fair value. [27]

After analyzing the data and determining that LoPucki and Dougherty ***556** used bad valuation techniques, Professor White reached the following conclusion, inclusive of determining that *Bankruptcy Fire Sales* makes assertions and insinuations unsupported by its evidence:

Messrs. LoPucki and Doherty argue that the price of firms sold out of Chapter 11 through section 363 is dramatically lower than the return that would have been earned by a full-fledged reorganization of those firms. According to them, this happens because of the endemic misbehavior of the bankruptcy actors.

I believe that their analysis of the numbers in their sample of sixty firms is wrong. But even if their analysis is correct, I do not believe that their data show that reorganizations bring larger returns than section 363 sales. Finally, even if their analysis were right, their assertions and insinuation about bankruptcy actors' deceit and misbehavior are not justified by their evidence. [28]

The authors of *Courting Failure* also supported its thesis by specifically targeting the Delaware bankruptcy court and alleging court competition in *The Determinants of Professional Fees in Large Bankruptcy Reorganization Cases*: [29]
Controlling for firm size, case duration, and the number of professional firms working, fees were 32 percent higher in Delaware cases. Controlling only for firm size, the difference was not significant. [30]

When Professor Stephen J. Lubben of Seton Hall University School of Law studied fee data and undertook to explain Chapter 11 professional fees by testing factors indicating differing complexities of reorganization cases, Delaware no longer had any significant effect on fees and New York cases showed decreased costs:

> ***557** First, once we control for the very large cases in the sample, by inclusion of the hourly rate and first day papers, Delaware's influence is no longer significant. And upon controlling for these same factors, filing in the Southern District of New York is now associated with a substantial decrease in professional costs. [31]

IV. ARE THE TARGETED BIG CASE FEE PRACTICES ILLEGAL?

Stage one of the analysis--identification of the three actual practices stamped illegal by *Routine Illegality*--yields surprising results. *Routine Illegality* concedes the three practices, even if actually illegal, require the most minor tweaks to become legal. [32] The three practices branded 'illegal' are:

1. *The Prior Payment Disclosure Illegality: Routine Illegality* contends that Bankruptcy Rule 2016(a) requires attorneys to disclose in their final fee applications the amounts they received before bankruptcy in connection with the case, but that most debtors' attorneys illegally fail to do so. Instead, they provide the data in the debtor's statement of financial affairs or in their § 329 disclosures; [33]

2. *The Disburse First Illegality: Routine Illegality* contends that even though fee applications are normally reduced by approximately one percent, [34] courts authorize an illegal payment of fees when they allow debtors to pay professionals eighty percent of the undisputed portions of the sums requested on their detailed monthly invoices. Professors LoPucki and Dougherty find illegality because interim payments are made without (i) applications containing all information required by Bankruptcy Rule 2016 (the detailed invoices do not generally include statements concerning any sharing of fees and prior fees, which statements are separately filed), and (ii) allowance orders required by Bankruptcy Code § 331, even though the portions paid are not ***558** objected to by the United States Trustee or any party in interest on the service list, and are subject to quarterly fee applications to be determined on notice and hearing; [35] and

3. *The Ordinary Course Professionals Illegality: Routine Illegality* contends that by allowing the debtor's ordinary course attorneys to receive payment based on detailed invoices up to fixed amounts per month (usually $25,000 to $35,000) for non-bankruptcy services, courts illegally sanction payment without the filing of fee applications containing data required by Bankruptcy Rule 2016 and without court orders allowing fees, [36] but any such illegalities can be cured through a few simple procedures: (i) by filing with the court the same detailed invoices with affidavits specifying sharing arrangements and amounts paid before bankruptcy in connection with the case; (ii) by the United States Trustees checking a "small percentage" of the filings; and (iii) with the court approving the fees in a single omnibus order applied for by the debtor and issued after opportunity for greater review whenever a party raises a dispute. [37]

In sum and substance, in respect of the Prior Payment Disclosure practice, *Routine Illegality* asserts that the disclosures it believes should be included in fee applications are instead often included in other bankruptcy court filings. In respect of the Disburse First practice, *Routine Illegality* asserts (a) in the absence of any dispute there still needs to be a monthly order allowing undisputed portions of fees, and (b) the Rule 2016 disclosures provided in the quarterly fee applications covering 3 months must be provided in each of the 3 months. In respect of the Ordinary Course Professionals practice, *Routine Illegality* asserts that the detailed invoices already provided to the debtor and sometimes to other parties in interest should be filed by the debtor with cover affidavits containing Rule 2016 data so the court can approve them monthly in an omnibus order with knowledge that the United States Trustee may only review a sampling of them.

If *Routine Illegality* had asserted these illegalities in a vacuum, we would be quite perplexed; not about how to analyze them, but about why a 58 page article would be written about them with a striking title impugning the courts and professionals involved when the alleged deviations from legality are both slight and highly unlikely to impact the fees awarded. All the big cases have large hedge funds as creditors and have statutory creditors' committees. ***559** These committees enjoy the assistance of financial advisors and accountants who can scrutinize all material estate expenditures. They, among any other debt holders, know how to maximize returns and to litigate disputes. And yet, there are virtually no decisions of district courts and circuit courts that have overturned fees resulting from these practices or that have ordered the termination of the practices that *Routine Illegality* finds illegal.

The acceptance of these fee practices is not surprising because the practices allow any creditor to challenge the amount of any professional's fees for any reason. Moreover, statutory creditors' committees and their members, attorneys, and accountants have full access to all fee invoices in the case for all professionals paid by the estate. Thus, batching three months' of invoices into quarterly applications, filing prepetition payment data in documents other than the fee application, allowing undisputed fees to be paid monthly up to 80% or 90% of their undisputed amounts, and invoicing fees for nonbankruptcy services only to the debtor, do not protect fees that should be disallowed.

Routine Illegality, however, is not written in a vacuum. As explained above, *Routine Illegality* expressly volunteers [38] that it supports its co-author's contention in *Courting Failure* [39] that bankruptcy venue statutes must change to stop wrongful "bankruptcy court competition." [40] *Routine Illegality* states that bankruptcy judges permit the Ordinary-Course-Professionals Practice, the Prior-Payment-Disclosure Practice, and the Disburse-First Practice to continue because "it is not in the interests of the competing courts to control fees. A court that succeeded at fee control would no longer get large cases. Other courts would welcome those cases, and continue the illegal practices." [41] *Routine Illegality* concludes: "Competition for large cases has played a major role in making illegal fee practices routine." [42]

V. THE PRIOR-PAYMENT-DISCLOSURE PRACTICE

Routine Illegality contends that the amount of prepetition fees must be disclosed in final fee applications for postpetition fees pursuant to Rule 2016(a), [43] and that the award and reasonableness of postpetition fees should be based, at least in part, on the amount of prepetition fees. [44] ***560** Bankruptcy Code § 329(a) expressly requires debtors' attorneys to disclose compensation paid or agreed to be paid to them within the year prior to commencement of the title 11 case. [45] Section 329(b) provides for return of excessive fees. [46] To carry out § 329(a), Bankruptcy Rule 2016(b) specifies the timing, content, and recipients of the disclosure. In particular, Rule 2016(b) provides that the disclosure should be "within 15 days after the order for relief, or at another time as the court may direct." [47] Thus, the rule expressly requires the disclosure in the first 15 days of the case. But, *Routine Illegality* contends the disclosure should be in the final fee application, which is filed at the end of the case. Indeed, the lead debtors' attorneys in several of the recent, large Chapter 11 cases in the Southern District of New York and Delaware have made the required § 329 disclosures in their retention applications. [48]

***561** Sections 330 and 331 of the Bankruptcy Code control the award of postpetition fees. Neither of these sections mentions or requires disclosure of fees paid prior to commencement of a bankruptcy case. Rather, §§ 330 [49] and ***562** 331 [50] provide the substantive standards for awarding final and interim fees. Pursuant to 28 U.S.C. § 2075, [51] the Bankruptcy Rules may not alter the statute's substantive or procedural standards.

Bankruptcy Rule 2016 is entitled "Compensation for Services Rendered and Reimbursement of Expenses." Specifying the procedural requirements for awards of postpetition fees consistent with §§ 330 and 331, Rule 2016(a) requires "a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested." Next, Rule 2016(a) provides that "[a]n application for compensation shall include a statement as to what payments have theretofore been made ... to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with ***563** the case ...." [52] The latter requirement is commonly interpreted to mean that the applicant should disclose (a) any retainer received for postpetition services and (b) all prior payments authorized by the court for postpetition services.

If the latter quoted portion of Rule 2016(a) were meant to require disclosure of prepetition payments for prepetition services, for purposes of assessing the award of postpetition fees, then Rule 2016(a) would, but does not, require statements of prepetition services rendered, prepetition time expended, and prepetition expenses incurred. Otherwise, disclosure of the amount without the underlying detail would provide no information as to whether the requested

postpetition fees were more or less expensive than or duplicative of the prepetition fees. Accordingly, to interpret Rule 2016(a) to require disclosure of prepetition payments would (a) render Rule 2016(a) illogical because it requires underlying details for requested postpetition fees, but not prepetition fees, (b) duplicate needlessly Bankruptcy Code § 329 and Bankruptcy Rule 2016(b), and (c) run afoul of 28 U.S.C. § 2075.

In an earlier article, the authors of *Routine Illegality* suggested an additional reason why prepetition payment disclosure is the exclusive province of Bankruptcy Code § 329 and not Bankruptcy Rule 2016(b). They have acknowledged that the meaning of "in connection with the case" in Rule 2016(a) is ambiguous in the context of determining which prepetition payments would be disclosed. Thus, in *The Determinants of Professional Fees in Large Bankruptcy Reorganization Cases*, LoPucki and Dougherty write:

The phrase ... 'in connection with the [bankruptcy] case' [is] ambiguous and may be interpreted differently in different legal cultures .... As an example ... fees incurred prepetition for the negotiation, preparation, and approval by creditors of a prepackaged plan of reorganization may or may not be considered to have been incurred "in connection with the case." [53]

Notably, *Routine Illegality* labels the Prior-Payment-Disclosure and other practices "legally indefensible," even though its authors acknowledge the ambiguity of the relevant Bankruptcy Rules and cite authority contrary to some of their own positions. [54]

Given that Bankruptcy Code § 329 requires disclosure of all payments "in contemplation of or in connection with the case," we can more logically ***564** conclude that the disclosure of prepetition payments is to be governed by the expansive disclosure of § 329, rather than the more restrictive and ambiguous requirement of Rule 2016(a).

In sum, *Routine Illegality* admits that most retention applications and statements of financial affairs will satisfy the disclosure requirements of § 329. [55] Lopucki and Dougherty further admit that the terminology of Rule 2016(a) is ambiguous. Thus, *Routine Illegality* engages in exceptional legal gymnastics to brand 'illegal' the Prior Payment Disclosure Practice.

VI. DISBURSE-FIRST PRACTICE

A. THE PROCEDURES IN INTERIM COMPENSATION ORDERS DO NOT CONSTITUTE PAYMENT WITHOUT APPLICATION

Routine Illegality's first criticism of interim compensation orders providing for monthly compensation is that they permit payment without application. It points to § 331 of the Bankruptcy Code, which only permits compensation to "applicants," and to Bankruptcy Rule 2016(a), which states, in pertinent part, that an "application" must be filed with the court and include "a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested." [56]

Contrary to the assertions made by Professors LoPucki and Dougherty, the procedures approved in interim compensation orders comply with § 331 of the Bankruptcy Code and Bankruptcy Rule 2016(a). The submission of monthly statements by professionals pursuant to interim compensation orders is the making of "applications." Paragraph (b) of Amended General Order M-219 (the "*General Order*"), [57] the model interim compensation order for the Bankruptcy Court for the Southern District of New York, does not require the filing of the monthly statements with the court. Bankruptcy judges in the Southern District of New York, however, will generally modify this form to require that the monthly statements be filed with the court. [58] For instance, in *General Growth Properties*, the bankruptcy court required a modification to paragraph B of the General Order to "give not just notice parties, but any party an

opportunity to be heard on the monthly filings, if they wish ***565** to be heard." [59] In addition, in *Chrysler*, the court stated the following in respect of paragraph B of the General Order:

[T]his court, in all but one bankruptcy case since the adoption of general order ... 219 has required a modification to paragraph B. Specifically, the court has required that paragraph B be modified to provide for the filing of monthly statements with the Court .... [T]he only case in which the modification was not made was the Dairy Mart case which the Court believes that the proposed order was entered instead of the modified order .... The first case in which the Court required a modification to the general order was the *Sunbeam* case filed in February 2001. Thereafter, similar modifications were required in *Enron* and *WorldCom* and the other Chapter 11 cases that have sought the authority under this general order.

Although this Court believes that there is ... sufficient legal authority to follow the procedures set forth in a general order without the need to modify paragraph B, the Court concludes that the filing of the statement provides a broader notice and an opportunity for any party to raise a concern with the Court prior to any payment being made under the general order. In addition, it allows the court to address any concern it may have prior to any payment being made under the general order. [60]

Recently, in the *Lehman Brothers* and *General Motors* cases, the bankruptcy court issued interim compensation orders that did not require the monthly statements to be filed with the court, [61] and there is no record of any party in interest requesting either court to modify paragraph B. *Routine Illegality* fails to mention, however, that the *Lehman* [62] court created a special fee ***566** committee to scrutinize fee applications, [63] which is above and beyond any bankruptcy law requirement. Indeed, the same practice was adopted in the Enron Chapter 11 case.

The submission of monthly statements in Chapter 11 mega-cases complies with the application requirement in Bankruptcy Rule 2016(a). Such statements also contain the detailed information required by that rule. In particular, the interim compensation orders entered in most Chapter 11 mega-cases in the Southern District of New York are based on the General Order:

> Each monthly fee statement must contain a list of the individuals and their respective titles (*e.g.* attorney, accountant, or paralegal) who provided services during the statement period, their respective billing rates, the aggregate hours spent by each individual, a reasonably detailed breakdown of the disbursements incurred and contemporaneously maintained time entries for each individual in increments of tenths (1/10) of an hour. [64]

The foregoing paragraph does not contain the information required by Rule 2016(a) in respect of prior payments and any agreements to share compensation, which information is included in every quarterly fee application. Any notion that attorneys could represent every three months that they have no sharing arrangements for all compensation requested, but that such representations would not apply to prior months is a virtual impossibility. Conversely, such representations could be appended to each monthly statement. The presence or absence of such representations from the interim monthly statements is of no consequence, except insofar as it is used by *Routine Illegality* to establish an "illegality." [65]

***567** The interim compensation orders entered by the bankruptcy courts in Delaware and other jurisdictions require a similar level of detail with respect to monthly statements. [66] Such monthly statements clearly satisfy Rule 2016(a)'s requirements in that they provide a detailed statement of services rendered, time expended, expenses incurred, and amounts requested. Thus, *Routine Illegality* takes issue with interim compensation orders that actually do require an application with all the required detail about the underlying request for fees and reimbursements.

B. THE DISBURSE-FIRST PRACTICE IS NOT DISBURSEMENT BEFORE ALLOWANCE

Section 331 of the Bankruptcy Code[67] provides that a court "may allow and disburse" compensation and reimbursement. *Routine Illegality's* next criticism of the Disburse-First Practice is that it violates this section by permitting disbursement of fees before their allowance.[68] The simple response is that the Disburse-First Practice only provides for payment of fees not subject to objection or dispute, and that such fees can therefore be allowed and disbursed after notice and without a hearing pursuant to Bankruptcy Code § 102(1). Nonetheless, *Routine Illegality* pronounces that while a hearing may not be required to disburse undisputed fee requests, a prior order must still approve their allowance. Asserting that the debtor would otherwise provide attorneys with an illegal retainer, *Routine Illegality* implicitly argues that the initial order allowing the monthly payment of undisputed fee requests does not count as the required allowance order.[69] *Routine Illegality* is both knowingly and demonstrably wrong in respect of each contention. After conceding that Bankruptcy Code § 102(1) authorizes the allowance and ***568** disbursement of undisputed fees without a hearing,[70] *Routine Illegality* clings to its notion that another allowance order is required before disbursement notwithstanding that it cites no authority supporting that proposition, but acknowledges authority to the contrary.[71]

Additionally, Bankruptcy Code § 328(a) expressly allows professionals for the debtor and statutory committees to be retained "on any reasonable terms and conditions of employment, including on a retainer ...."[72] In proposing now to disregard the express language of § 328(a), *Routine Illegality* argues that under state law, a retainer would not be usable by the attorneys before the entry of an order allowing those fees.[73] *Routine Illegality's* position (a) defies the Bankruptcy Code's express permission to retain attorneys on "any reasonable terms," (b) defies the bankruptcy court's power to authorize attorneys to use retainers, and (c) purports to impose and elevate state law governing use of special retainers[74] over a federal court's power to define how it wants retainers to be used in funding federal Chapter 11 reorganizations.

With respect to the notice requirement in § 331, the interim compensation orders entered by the Bankruptcy Courts in the Southern District of New York and Delaware require that the monthly compensation statements be filed with the court and served on many parties in interest, especially those positioned to object, including the debtor, the United States Trustee, all statutory committees, and other parties that the court specifies.[75] Service ***569** of monthly fee statements in such fashion complies with Bankruptcy Rules 2002(a)(6) and 2002(i).

As acknowledged by *Routine Illegality*,[76] an actual hearing need not occur to satisfy the "after notice and a hearing" requirement of Bankruptcy Code § 331. Section 102(1) of the Bankruptcy Code establishes a rule of construction to the effect that the phrase "after notice and a hearing" does not require a hearing, if appropriate notice is given and there are no objections.[77] Indeed, the legislative history to § 102(1) of the Bankruptcy Code indicates that "a hearing will not be necessary in every instance" and "[i]f there is no objection to the proposed action, the action may go ahead without court action."[78] For example, in the Southern District of New York, if no one objects to their monthly statement, professionals can receive 80 percent of fees identified in that statement without the need for a hearing and subsequent order.[79] If an objection is received, payment of the disputed portion of the fees is withheld,[80] and a hearing is held to consider the objection.[81]

Thus, the procedures set forth in the interim compensation orders under attack satisfy the requirements of § 331. *Routine Illegality* acknowledges[82] that the Delaware bankruptcy court reached this conclusion in *In re Mariner Post-Acute Network, Inc.*,[83] a case that followed a similar holding by the Bankruptcy Court for Colorado.[84] In trying to demonstrate that such interim compensation procedures are impermissible, *Routine Illegality* relies on *In re Haven Eldercare, LLC*.[85] Although asserting that "there exists no statutory authority permitting compensation to be

'advanced' without court approval," this decision concedes such advancement would be permitted in Chapter 11 mega-cases. [86]

***570** For argument's sake, let us assume *Routine Illegality* were correct in contending that even in the absence of objection, a new court order must approve undisputed, requested fees before they can be paid in whole or part. How must the Disburse-First Practice be changed to comply with *Routine Illegality's* interpretation of Bankruptcy Code § 331? The court would merely sign a new fee allowance order each month, an exercise which *Routine Illegality* concedes can be done without a hearing. [87] The new order would state that the court really meant what it originally ordered, namely that undisputed fees are allowed monthly on an interim basis. For lack of this redundant monthly order reaffirming the original order, *Routine Illegality* brands the practice 'illegal.'

Although as unnecessary as belt and suspenders, the bankruptcy court could also invoke its estimation power to allow and disburse interim and final fees. [88]

Notably, *Routine Illegality* fails to address the Congressional intent and ***571** public policy underlying the fee practices it attempts to ostracize. Rather, the article quotes from and relies on legislative history in 1963, [89] with respect to legislation the Bankruptcy Code superseded. The policy underlying § 330 of the Bankruptcy Code seeks to ensure that bankruptcy professionals are compensated in a manner similar to their non-bankruptcy counterparts, [90] which in the business world means normal monthly payments. This was a sea change from the policy underlying the Bankruptcy Act of 1898, as amended (the "Bankruptcy Act") governing cases filed on or before September 30, 1979. As a consequence of this policy and statutory change, the bankruptcy bar has evolved into high caliber firms comparable to those handling the most sophisticated mergers and acquisitions and complex commercial litigation. *Routine Illegality* harks back to legislative history about excessive fees under the Bankruptcy Act, [91] notwithstanding that Congress enacted Bankruptcy Code § 330 to overrule "cases that require fees to be determined based on notions of conservation of the estate and economy of administration. If that case [*Beverly Crest* [92] were allowed to stand, attorneys that could earn much higher incomes in other fields would leave the bankruptcy arena. Bankruptcy specialists who enable the system to operate smoothly, efficiently, and expeditiously, would be driven elsewhere ...." [93]

When Congress indicates that fee determinations should not be based on notions of conservation of the estate and economy of administration, it is obviously not intending to invite attorneys' fees for the sake of attorneys' fees. Rather, it is making a far more critical point. Although fees can be minimized by minimizing use of attorneys, the minimizing of professional fees by limiting their use is no more an intelligent goal than minimizing taxes by earning no income. Professionals render services that can add value and that can not be viewed only as an expense. For example, the services of a bankruptcy attorney can enhance creditor recovery, such as when attorneys pursue successful avoidance actions. In enacting the Bankruptcy Code, Congress recognized the need for bankruptcy specialists who would enable the system to operate efficiently. [94] As one example, Enron was beleaguered by thousands of proofs of claim to recover damages for fraud. These claims were not amenable to simple resolutions based on the books and records of the ***572** company. Still, their liquidation was needed to allow computations of meaningful distributions to thousands of creditors. Enron's bankruptcy attorneys developed a novel application of Bankruptcy Code § 502(c) to provide for an extremely expeditious but comprehensive estimation of such claims. Although some claimants ridiculed the concept, the court granted Enron's estimation motion, [95] and the estimation technique saved the estate and its creditors years of litigation that would have cost tens of millions of dollars. *Routine Illegality* and *Courting Failure* speak volumes about professional fee expenses reducing money for creditors, without any consideration of the value they add for creditors. [96]

In *Busy Beaver*, the United States Court of Appeals for the Third Circuit reviewed the legislative history of § 330 and emphasized the value added by professionals:

The unambiguous policy inspiring § 330(a) ... is that professionals and paraprofessionals in bankruptcy cases should earn the same income as their non-bankruptcy counterparts. The history ... repeatedly refers to the billing practices of nonbankruptcy professionals, justified by the goal of retaining competent legal representation for the debtor. Congress rather clearly intended to 'provid[e] sufficient economic incentive [to lure competent bankruptcy specialists] to practice in the bankruptcy courts.' Congress determined, it appears, that on average the gain to the estate of employing able, experienced, expert counsel would outweigh the expense to the estate of doing so, and that unless the estate paid competitive sums it could not retain such counsel on a regular basis. [97]

***573** Consistent with this policy, the procedures in place for the compensation of attorneys and other professionals in bankruptcy are designed in the main to provide compensation similar to that collected outside bankruptcy, with certain important distinctions.

To guard against insolvent debtors failing to protect creditors by scrutinizing professional fees with the same prudence solvent companies apply outside bankruptcy to protect shareholders, Congress has granted oversight authority to the court and other parties in interest, and has imposed oversight duties on the United States trustee. [98] Local rules and United States trustee guidelines commonly require that time records be kept in tenths of hours. Although not required by statute or rule, many courts in many cases require holdbacks so that professionals are paid 80 or 90 percent of their invoiced fees until junctures at which the courts can determine whether the full amounts were earned. In some extraordinarily large cases, courts create 'fee committees' comprised of outside experts to scrutinize fees and report on them to the courts. While *Routine Illegality* attempts to show how New York and Delaware courts engage in illegal conduct to award fees without required scrutiny, it nowhere mentions the extra scrutiny through special fee committees those courts sometimes impose over professional fees.

To defend its conclusion that the Disburse First Practice is illegal, *Routine Illegality* asserts that a majority of twenty five decisions to address the issue "suggest that they would not approve" it. [99] Tellingly, of those twenty five, *Routine Illegality* admits that twelve approve the practice and six approve it if the firms would suffer hardship and can repay any overpayment. [100] Any firm devoting the resources required to represent a large debtor would suffer hardship if not paid regularly. Thus, eighteen of twenty five decisions disprove *Routine Illegality*'s position. *Routine Illegality* asserts that seven decisions "held the practice illegal," or "clearly stated in dicta that the practice is illegal." [101] But as used by the authors of *Routine Illegality*, this notion of illegality means only that "'the court wants to emphasize that if payment of fees prior to approval of the fees is ever allowed, it ought to be on a finely tuned basis that assures that counsel's incentive to apply for fees is not materially diminished.'" [102] Only by combining the six decisions that actually would allow the practice based on hardship and the ability to repay, with the seven decisions that *Routine Illegality* contends oppose the practice in holdings or dicta, does *Routine Illegality* amass a majority. Moreover, counting ***574** reported decisions has dubious meaning given that many judges will not sit down to write a decision following a local rule and will not have any need to do so.

VII. THE ORDINARY-COURSE-PROFESSIONALS PRACTICE

"Ordinary course professionals" are professionals paid less than a fixed amount in a given month and with whom debtors frequently have prepetition, sometimes quite long-standing relationships for services unrelated to the debtor's Chapter 11 case. For example, a motion to authorize the retention and compensation of ordinary course professionals may seek to approve the retention of a law firm that provided patent advice to a debtor over a prepetition period. The debtor and the professional have an established business relationship and the debtor knows how much the professional has billed for similar services in the past.

Routine Illegality charges that ordinary course professionals (a) file their Bankruptcy Rule 2014(a) disclosures after they are retained instead of prior to retention (ignoring the court's power to grant *post facto* retention applications), (b) fail to file with the court in accordance with Bankruptcy Rule 2016(a) their detailed statements of services and sharing arrangements, if any, and (c) fail to file fee applications. [103] As its poster child, *Routine Illegality* cites the Pacific Gas and Electric Company Chapter 11 case to show an instance where an ordinary course firm received $29 million in fees. [104] But *Routine Illegality* also divulges in a footnote that the firm's fees were formally awarded pursuant to a final fee application. [105] Moreover, although not mentioned, Pacific Gas and Electric Company paid all its creditors full principal and interest, [106] contrary to *Routine Illegality's* mantra that fees "reduce creditor recoveries," [107] based on its implicit assumption that attorneys do not add value for what they are paid. Thus, Pacific Gas and Electric Company had ***575** the same incentive in Chapter 11 to scrutinize legal bills for the benefit of its shareholders as it did outside Chapter 11.

To cure the asserted illegalities when ordinary course firms do not file their own fee applications, *Routine Illegality* opines that the debtor, on behalf of all its ordinary course professionals, could simply attach each firm's affidavit containing Bankruptcy Rule 2016(a) data to its detailed invoice and file them in one omnibus fee application for all such professionals. [108] *Routine Illegality* acknowledges that the statute only requires the United States Trustee to review fee applications "whenever the United States Trustee considers it to be appropriate," [109] and "[c]hecking only a small percentage of ordinarycourse applications would probably provide the greatest benefit per hour of United States trustee time." [110]

In the *Semcrude* and *Washington Mutual* Chapter 11 cases, the debtors were required to file with the court and serve on interested parties quarterly statements disclosing payments made and a description of services performed by ordinary course professionals. [111] This enables any party in interest to object to the fees of any professional.

Several conclusions emerge. First, because debtors are familiar with the legal services provided by their ordinary course law firms, the interests of creditors and shareholders can be easily protected when the debtor reviews its ordinary course law firms' invoices. Second, any notion that payments to ordinary course firms can escape review are unfounded because the statutory creditors' committee with its financial advisors and accountants are always given access to the debtors' payments to all parties. Third, while it likely has no impact on the amounts of fees paid, the attachment of Bankruptcy Rule 2016(a) declarations to each law firm's detailed invoice and the filing of same would constitute valid interim and final fee applications which the court could adjudicate in an omnibus order, as suggested by *Routine Illegality*, to eliminate the failure in certain cases to observe the requirements of Bankruptcy Code §§ 330 and 331 for ordinary course professionals.

Fairness, the appearance of fairness, and integrity are critical to the bankruptcy system. For this reason, considerations of economy will not excuse ***576** the failure to provide the disclosures required by the Bankruptcy Rules or to make any fee applications. Because the plethora of ordinary course firms and their uncontroversial fee and retention applications can easily generate more expense than creditors and shareholders could possibly save by scrutinizing them, the courts are certainly justified and mandated to apply Bankruptcy Rule 1001 to minimize such expense to the estate as long as the process incorporates all required disclosures and applications, which may be made in the most efficient and streamlined methods available. As was explained above in the context of the Disburse-First Practice, the bankruptcy courts can certainly invoke § 502(c) to estimate interim and final fees for ordinary course firms based on review of detailed invoices by the debtor and creditors' committee or by a fee committee. The need for such streamlined procedure is demonstrated by *Chrysler LLC*, where the Second Amended Ordinary Course Professional List contains approximately 390 professionals. [112] Moreover, this approach is consistent with the proposition that our bankruptcy system works because Bankruptcy Courts are required "to administer the estate in an efficient and equitable manner, and to protect the assets of the estate from depletion." [113] Bankruptcy Rule 1001 provides that "[t]hese rules shall be construed to secure

the just, speedy, and inexpensive determination of every case and proceeding." Courts have relied on Bankruptcy Rule 1001 to justify a broad interpretation of the term "application" in Bankruptcy Rule 2016(a). [114]

VIII. CONCLUSION

Routine Illegality is not a standalone article. It is an extension of *Courting Failure*, whose author formulated his theory that certain bankruptcy courts wrongfully compete for big Chapter 11 cases. This theory, however, is based on bad guesses, wrong inferences, and clearly erroneous facts. The authors ***577** invoke their defective theory to support their proposal to change bankruptcy venue rules to steer cases away from New York and Delaware. To corroborate their theory, the authors first contended that fees in Delaware were 32% higher than elsewhere. [115] But Professor Lubben has shown that when appropriate variables are used to account for case complexity, Delaware does not impact fees and New York actually lessens them. [116] Second, the author of *Courting Failure* contended that § 363 sales, which were prevalent in New York and Delaware, yielded creditors small fractions of what they could receive under confirmed Chapter 11 reorganization plans. [117] Professor White showed, however, that aside from the frontal implausibility that commercial creditors would stand for such a result, such diminution of recovery has simply not been proven.

In *Routine Illegality*, the author of *Courting Failure* attempts for the third time to corroborate his theory by contending that the New York and Delaware bankruptcy courts engage in 'illegal' fee practices in furtherance of corrupt court competition. As shown above, the practices are not illegal under a fair interpretation of the plain words of the statutes and rules. In its attempt to demonstrate illegality, *Routine Illegality* instead uses strained legal contortions that run contrary even to the authorities that its authors are compelled to acknowledge in footnotes. Curiously, *Routine Illegality* proposes corrective steps that require only *de minimis* change from the practices it brands illegal, such as attaching certain disclosures to a final fee application that are already made in a retention application. That *Routine Illegality* strains mightily to establish "illegalities," suggests that it was written primarily for its politically catchy sound bite title. Similar to Professor White's disbelief that creditors would accept a § 363 sale if they could get almost three times as much under a Chapter 11 plan, [118] it is far more impossible to believe that the bankruptcy judges in New York and Delaware would do anything illegal, let alone to pay extra money to attorneys. They are public servants who are giving back to the profession after successful careers at law firms or in public service. They work tirelessly to enable companies to save employees' jobs, to maximize reorganization value, and to reorganize. They get no additional compensation for taking on an extra case or working nights and weekends ***578** which they frequently do, especially in the "big cases." Associating them with illegal practices is cruel and unjustified, especially when done to support a cause based on a theory having no valid foundation.

Footnotes

a1 Martin J. Bienenstock is the chairman of the Business Solutions and Governance Department at Dewey & LeBoeuf, LLP, and teaches Corporate Reorganization at Harvard Law School and University of Michigan Law School. Mr. Bienenstock has led reorganizations of many large debtors including Enron Corporation and Capmark Financial Group Inc. Sarah L. Trum, Jeffrey Chubak and Tevia Jeffries are associates in the Business Solutions and Governance Department at Dewey & LeBoeuf, LLP. The authors wish to thank Albert Togut of Togut, Segal & Segal, LLP for his insights and comments. Mr. Togut and his firm also represented Enron Corporation.

1 Lynn M. LoPucki and Joseph W. Doherty, *Routine Illegality in Bankruptcy Court, Big-Case Fee Practices*, 83 AM. BANKR. L.J. 423 (2009) [hereinafter "*Routine Illegality*"].

2 *Routine Illegality* at 426.

3 *Routine Illegality* at 425.

4 LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2005) [hereinafter "*Courting Failure*"], Chapter 6 ("Corruption") at p. 141 ("... so the competing bankruptcy courts offer high fees to bribe the lawyers to bring them cases."); *id.* at p. 140 ("In all, the direction of change favored the case placers. The remainder of this Chapter explains why each of these seven changes is corruption rather than mere evolution.")

5 *Routine Illegality* at 426.

6 *Routine Illegality* at 425 ("'The failure of the fee regulation system is just one of many problems resulting from the bankruptcy courts' bizarre competition for large, public company cases."); *id.* at 474 ("Competition for large cases has played a major role in making illegal fee practices routine .... The only way to assure the integrity of the bankruptcy courts is to end the competition." (footnote omitted)).

7 *Courting Failure* at 17 (describing "case placers" as "[t]he lawyers, corporate executives, banks, and investment bankers who chose the courts for their cases ....."

8 *Courting Failure* at 250.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Routine Illegality*, at 474 ("The failure of the fee regulation system is just one of many problems resulting from the bankruptcy courts' bizarre competition for large, public company cases"), and at 427 ("Courts may compete by bending or breaking the law. We think that is now happening with respect to bankruptcy court big-case fee practices."). *Routine Illegality's* assumption that professionals choose venue as opposed to their debtor clients is itself often inaccurate.

13 *Courting Failure* at 256. *Routine Illegality* assumes without proffering evidence that its targeted fee practices were adopted to compete for big cases, as opposed to the big cases causing the adoption of such fee practices. Logically, professionals in the big cases would be more likely to request the efficiencies of the targeted fee practices and the courts would be more likely to need those efficiencies. Accordingly, *Routine Illegality's* assumption that the fee practices are first developed by the courts to attract the big cases is not a safe assumption. *Routine Illegality* also asserts a bankruptcy judge was not reappointed due to adverse comment about his practice of capping fees at $200 per hour when the New York court was approving $400 per hour. *Routine Illegality* at 426 n.18. *Routine Illegality* volunteers that the failure to attract cases by approving higher fees was probably not the "sole root cause" of the no-reappointment decision, but does not mention that the failure to approve market rates was a direct violation of the law in the judge's circuit for the preceding eight years. See *In re*Busy Beaver Bldg. Centers, Inc., 19 F.3d 833, 850-852 (3d Cir. 1994).

14 *Courting Failure* at 146.

15 One of the authors, Martin Bienenstock, was Enron's lead attorney. The instant analysis, however, only uses facts verifiable by independent third parties.

16 *In re*Enron Corp., 274 B.R. 327, 346 (Bankr. S.D.N.Y. 2002).

17 *Id.* at 345-346.

18 *Id.* at 335-336.

19 *Courting Failure* at 256 (emphasis supplied).

20 *Courting Failure* at 146 (footnote omitted)(emphasis supplied).

21 Available at http:// f11.findlaw.com/news.findlaw.com/hdols/enron/usulay70704inl.pdf.

22 Kurt Eichenwald, *Ex-Enron Finance Chief is indicted on 78* Counts, N.Y. TIMES, Nov. 1, 2002, at C2.

23 Kurt Eichenwald, *Enron's Skilling is indicted by U.S. in Fraud Inquiry*, N.Y. TIMES, Feb. 20, 2004, at A1.

24 Simon Romero, *Satisfaction and Sadness at the Sight of Handcuffs*, N.Y. TIMES, July 9, 2004, at C4.

25 Order Directing Appointment of Examiner, *In re* Enron Corp., Case No. 01-16034 (AJG) (Bankr. S.D.N.Y., Apr. 8, 2002).

26 Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 MICH. L. REV. 1, 3-4 (2007).

27 James J. White, *Bankruptcy Noir*, 106 MICH. L. REV. 691, 692 (2008).

28 James J. White, *Bankruptcy Noir*, 106 MICH. L. REV. 691, 710 (2008). Professors Lopucki and Doherty replied to Professor White in Lynn M. LoPucki and Joseph W. Doherty, *Bankruptcy Verite*, Research Paper 07-16, available at SSRN: http:// ssrn.com/abstract=1027701. Professors Lopucki and Doherty claim that Professor White mistakenly deletes accounts payable (non-interest bearing debt) from the valuation of companies, but that ignores the fact that in a § 363 sale the purchaser can pay the payables it wants to pay as a volunteer, while in a Chapter 11 plan the postpetition payables must be paid in full as administrative expenses.

29 Lynn M. LoPucki and Joseph W. Doherty, *The Determinants of Professional Fees in Large Bankruptcy Reorganization Cases*, 1 JOURNAL OF EMPIRICAL LEGAL STUDIES 113 (January 2004). Available at SSRN: http:// ssrn.com/abstract=419280 or DOI: 10.2139/ssrn.419280.

30 *Id.* at 130-131.

31 Lubben, Stephen J., *ABI Chapter 11 Professional Fee Study* (December 1, 2007), Seton Hall Public Law Research Paper No. 1020477. Available at SSRN: http://ssrn.com/abstract=1020477.

32 *Routine Illegality* at 445, 448 (include copy of attorney's § 329 disclosure with fee application); 449, 453-454, 454n. 133 (attach Rule 2016 statement to detailed monthly invoice and request court to issue monthly order allowing partial payment of undisputed amounts); 439-440 (after notice, court can issue one omnibus order granting fees to ordinary course professionals based on applications consisting of affixing a Rule 2016(a) statement to a detailed invoice, and U.S. trustee can spot check small percentage of applications).

33 *Routine Illegality* at 445, 448.

34 *Routine Illegality* at 425.

35 *Routine Illegality* at 449, 453-455.

36 *Routine Illegality* at 432-438.

37 *Routine Illegality* at 438-440.

38 *Routine Illegality* at 425 ("The failure of the fee regulation system is just one of many problems resulting from the bankruptcy courts' bizarre competition for large, public company cases."), at 426-428, and at 472 ("the illegal practices favor the managers and professionals--the people who can bring future cases to the court").

39 *Courting Failure*.

40 *Courting Failure* at 249-250.

41 *Routine Illegality* at 473.

42 *Routine Illegality* at 473.

43 *Routine Illegality* at 443.

44 *Routine Illegality* at 448, 472.

45 11 U.S.C. § 329(a), which provides:

(**a**) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

46 11 U.S.C. § 329(b), which provides:
(**b**) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to--
(**1**) the estate, if the property transferred--
(**A**) would have been property of the estate; or
(**B**) was to be paid by or on behalf of the debtor under a plan under Chapter 11, 12, or 13 of this title; or
(**2**) the entity that made such payment.

47 Bankruptcy Rule 2016(b) provides:
(b) **Disclosure of compensation paid or promised to attorney for debtor.**
Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States Trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States Trustee within 15 days after any payment or agreement not previously disclosed.

48 *See, e.g.*, Debtors' Application Pursuant to Bankruptcy Code Sections 327(a) and 328(a), Bankruptcy Rule 2014(a), and Local Rule 2014-1, for Authorization to Employ and Retain Dewey & LeBoeuf LLP as Attorneys for the Debtors *Nunc Pro Tunc* to the Commencement Date, *In re* Capmark Financial Group Inc., Case No. 09-13684 (CSS) (Bankr. D.Del. November 11, 2009)(Docket No. 212); Application of Debtors and Debtors in Possession, Pursuant to Sections 327(a), 328(a), 329(a) and 364 of the Bankruptcy Code, Bankruptcy Rules 2014(a) and 2016(b) and Local Bankruptcy Rules 2014-1 and 2016-1, For an Order Authorizing Them to Retain and Employ Jones Day as Counsel, *Nunc Pro Tunc* as of the Petition Date, *In re* Old Carco LLC (f/k/a Chrysler LLC), Case No. 09-50002 (ALG) (Bankr. S.D.N.Y. April 30, 2009); Application for an Order Authorizing the Employment and Retention of Sidley Austin LLP as Attorneys for the Debtors and Debtors-in-Possession Pursuant to 11 U.S.C. §§ 327(A) and 1107, Nunc Pro Tunc to the Petition Date, In re *Smurfit-Stone Container Corporation*, et. al, Case No. 09-10235 (BLS) (Bankr. D. Del. February 5, 2009); Declaration of James H.M. Sprayregen, P.C. in Support of Debtors' Application Pursuant to Sections 327(a) and 328(b) of the Bankruptcy Code and Rule 2014(a) of the Federal Rules of Bankruptcy Procedure for Authorization to Employ an Retain Kirkland & Ellis LLP as Co-Attorneys for the Debtors *Nunc Pro Tunc* to the Commencement Date, *In re* General Growth Properties, Inc., Case No. 09-11977 (ALG) (Bankr. S.D.N.Y. April 16, 2009); Declaration of John Fouhey and Disclosure Statement of Davis Polk & Wardwell in Support of the Application of the Debtors to Employ and Retain Davis Polk & Wardwell as Attorneys for the Debtors, In re *Delta Air Lines, Inc.*, Case No. 05-17923 (CGM) (Bankr. S.D.N.Y. September 14, 2005).

49 11 U.S.C. § 330(a), which provides:
(**1**) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103--
(**A**) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and
(**B**) reimbursement for actual, necessary expenses.
(**2**) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.
(**3**) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including--
(**A**) the time spent on such services;

(**B**) the rates charged for such services;
(**C**) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
(**D**) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
(**E**) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
(**F**) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.
(**4**) (**A**) Except as provided in subparagraph (b), the court shall not allow compensation for--
(i) unnecessary duplication of services; or
(ii) services that were not--
(**I**) reasonably likely to benefit the debtor's estate; or
(**II**) necessary to the administration of the case.
(**B**) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.
(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.
(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.
(7) In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326.

50 11 U.S.C. § 331, which provides:
A trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103 of this title may apply to the court not more than once every 120 days after an order for relief in a case under this title, or more often if the court permits, for such compensation for services rendered before the date of such an application or reimbursement for expenses incurred before such date as is provided under section 330 of this title. After notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement.

51 28 U.S.C. § 2075 provides:
The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11.
Such rules shall not abridge, enlarge, or modify any substantive right.
The Supreme Court shall transmit to Congress not later than May 1 of the year in which a rule prescribed under this section is to become effective a copy of the proposed rule. The rule shall take effect no earlier than December 1 of the year in which it is transmitted to Congress unless otherwise provided by law.
The bankruptcy rules promulgated under this section shall prescribe a form for the statement required under section 707 (b)(2)(C) of title 11 and may provide general rules on the content of such statement.

52 Bankruptcy Rule 2016(a).

53 Lynn M. LoPucki and Joseph W. Doherty, *The Determinants of Professional Fees in Large Bankruptcy Reorganization Cases*. 1 JOURNAL OF EMPIRICAL LEGAL STUDIES 113, 117 (January 2004). Available at SSRN: http:// ssrn.com/abstract=419280***or***rDOI:10.2139/ssrn.419280.

54 *Routine Illegality* at 428, 429 n.33, and 454 n.133 and 135.

55 *Routine Illegality* at 445, 448.

56 *Routine Illegality* at 453-454.

57 Amended General Order M-219 (Bankr. S.D.N.Y. Mar. 21, 2008), *available at* http://www.nysb.uscourts.gov (Choose Local Rules/Orders/Guidelines, Administrative Orders, General Orders by Date).

58 *See, e.g.*, Order, Pursuant to Sections 105(a) and 331 of the Bankruptcy Code. Bankruptcy Rule 2016(a) and Local Bankruptcy Rule 2016-1, Establishing Procedures for Interim Monthly Compensation for Professionals, *In re* Old Carco LLC (f/k/a Chrysler LLC), Case No. 09-50002 (AJG) (Bankr. S.D.N.Y. May 20, 2009); Order Pursuant to Sections 105(a) and 331 of the Bankruptcy Code and Bankruptcy Rule 2016(a) Establishing Procedures for Interim Monthly Compensation and Reimbursement of Expenses of Professionals, *In re* General Growth Properties, Inc., Case No. 09-11977 (ALG) (Bankr. S.D.N.Y. May 27, 2009).

59 Transcript at 12, *In re* General Growth Properties, Inc., Case No. 09-11977 (ALG) (Bankr. S.D.N.Y. May 27, 2009).

60 Transcript at 31-32, *In re* Old Carco LLC (f/k/a Chrysler LLC), Case No. 09-50002 (AJG) (Bankr. S.D.N.Y. May 20, 2009, filed May 22, 2009) (Docket No. 2024).

61 *See, e.g.*, Order Pursuant to 11 U.S.C. §§ 105(a) and 331 Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals, *In re* Motors Liquidation Company (f/k/a General Motors Corp.), Case No. 09-50026 (REG) (Bankr. S.D.N.Y. Aug. 7, 2009); Order Pursuant to Sections 105(a) and 331 of the Bankruptcy Code and Bankruptcy Rule 2016(a) Establishing Procedures for Interim Monthly Compensation and Reimbursement of Expenses of Professionals, *In re* Lehman Brothers Holdings Inc., Case No. 08-13555 (JMP) (Bankr. S.D.N.Y. Nov. 5, 2008).

62 For more than the first year of the Lehman cases, time records of the lead attorneys for the debtor were not publicly filed, but the bankruptcy court was not requested to rule on that practice which could have impinged on the fairness, appearance of fairness, and integrity of the bankruptcy system, but the United States trustee assured access to such records for all parties in interest requesting it. Although the special fee committee presumably sees all the time records, the statutory right of every party in interest pursuant to Bankruptcy Code § 1109 to review and take positions on fees paid from bankruptcy estate funds is prejudiced if the time records are unavailable. Likewise, some debtors file monthly operating reports containing *one line* per debtor providing beginning and ending cash and various adjustments, which reports provide no transparency to creditors in contrast to the monthly operating report required by the Operating Guidelines and Reporting Requirements for Debtors in Possession and Trustees issued by the Office of the United States Trustee for Region 2 as revised February 1, 2008, available at http://www.justice.gov/ust/r02/docs/chapt11/general/Region2_Operating_ Guidelines.pdf. But, the United States trustee or the court enforce the local guidelines if and when requested.

63 Order Appointing Fee Committee and Approving Fee Protocol, *In re* Lehman Brothers Holding, *Inc.*, Case No. 08-13555 (JMP) (Bankr. S.D.N.Y., May 26, 2009)(Docket No. 3651).

64 General Order ¶ (c).

65 *Routine Illegality* at 145 ("But none of the twenty-two required that the document contain ALL of the information required by Bankruptcy Rule 2016. Thus, all twenty-two authorized disbursement of fees to professionals without a Rule 2016 application. In doing so, they authorized an illegal practice." (emphasis supplied)).

66 *See, e.g.*, Amended Administrative Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals, *In re* Washington Mutual, Case No. 08-12229 (MFW) (Bankr. D. Del., filed Nov. 17, 2008) (Docket No. 302); Administrative Order Establishing Procedures for Interim Compensation of Expenses of Professionals, *In re* SemCrude, L.P., Case No. 08-11525 (Bankr. D. Del. Aug. 18, 2008); Administrative Order Pursuant to 11 U.S.C. §§ 105, 328 and 331 Establishing Procedures for Interim Compensation and Reimbursement of Professionals, *In re* Thornburg Mortgage, Inc., Case No. 09-17787 (DWK) (Bankr. D. Md. May 14, 2009) (Docket No. 85); and Order Pursuant to Sections 105(a) and 331 of the Bankruptcy Code Establishing Procedures for Interim Compensation and Reimbursement of Expenses for Professionals and Committee Members, *In re* UAL Corp., Case No. 02-48191 (ERW) (Bankr. N.D. Ill. Dec. 11, 2002).

67 11 U.S.C. § 331, which provides: "After notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement." *Routine Illegality*. at 454 ("'Allow and disburse' is unambiguous as to the act contemplated: entry of the standard order stating that the compensation sought is awarded and that the debtor is authorized and directed

to pay it from the estate. Thus, the Disburse-First Practice is illegal because the Practice authorizes the disbursement of fees without allowing them")(citations deleted).

68 *Routine Illegality* at 453-454.

69 *Routine Illegality* at 454.

70 *Routine Illegality* at 454 n.133.

71 *Routine Illegality* at 454 n.133.

72 11 U.S.C. § 328(a).

73 *Routine Illegality* at 454 n. 133, 157.

74 *Routine Illegality* at 458 n. 157 cites two decisions (*In re*Bressman, 214 B.R. 131 (Bankr. D.N.J. 1997) and *In re*Chapel Gate Apartments, Ltd., 64 B.R. 569 (Bankr. N.D. Tex. 1986)) in which debtors' attorneys attempted postpetition to use retainers furnished them prepetition for postpetition services, without court authorization. That has nothing to do with the issue here, namely the payment of a retainer postpetition with bankruptcy court authorization for use by the attorneys. Indeed, one of the two decisions contradicts *Routine Illegality* by providing that another court order allowing use of the prepetition retainer would be unnecessary. *In re*Chapel Gate Apartments, Ltd., 64 B.R. 569, 572 (Bankr. N.D. Tex. 1986)("The emphasis of the order is disclosure; paraphrased, the order requires only that an attorney disclose the amount and source of a retainer and obtain a hearing before drawing against the retainer. The Court contemplates a fairly informal proceeding, without need for preparation of further applications or entry of further orders, involving mere oral explanation to the Court and any parties sufficiently interested to attend, after notice to those parties typically playing a watchdog role in reorganization proceedings.").

75 *See, e.g.*, Administrative Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals, *In re* Washington Mutual, Inc., Case No. 08-12229 (MFW) (Bankr. D. Del. Oct. 31, 2008); Administrative Order Establishing Procedures for Interim Compensation of Expenses of Professionals, *In re* SemCrude, L.P., Case No. 08-11525 (Bankr. D. Del. Aug. 18, 2008); Administrative Order Pursuant to 11 U.S.C. §§ 105, 328 and 331 Establishing Procedures for Interim Compensation and Reimbursement of Professionals, *In re* Thornburg Mortgage, Inc., Case No. 09-17787 (DWK) (Bankr. D. Md. May 14, 2009); and Order Pursuant to Sections 105(a) and 331 of the Bankruptcy Code Establishing Procedures for Interim Compensation and Reimbursement of Expenses for Professionals and Committee Members, *In re* UAL Corp., Case No. 02-48191 (ERW) (Bankr. N.D. Ill. Dec. 11, 2002).

76 *Routine Illegality* at 454 n.133.

77 11 U.S.C. § 102(1), which provides:
"after notice and a hearing", or a similar phrase--
(**A**) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but
(**B**) authorizes an act without an actual hearing if such notice is given properly and if--
(i) such a hearing is not requested timely by a party in interest; or
(ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act;

78 H.R. Rep. No. 95-595 to accompany H. R. 8200, 95th Cong. 1st Sess. (1977), p. 315-316.

79 *See, e.g.*, General Order ¶ (e).

80 *See, e.g.*, General Order ¶ (f).

81 *See, e.g.*, General Order ¶ (h).

82 *Routine Illegality* at 454 n.133.

83 257 B.R. 723, 728-29 (Bankr. D. Del. 2000).

84 *In re*Kaiser Steel Corp., 74 B.R. 885, 892 (Bankr. D. Colo. 1987).

85 382 B.R. 180, 184 (Bankr. D. Conn. 2008) (observes that advancement would be permitted in "one of the 'rare' cases in which an advance payment scheme may be implemented").

86 *Id.* at 184.

87 *Routine Illegality* at 454 n.133.

88 Bankruptcy Code § 502(c) expressly mandates that bankruptcy courts estimate contingent and unliquidated claims when their liquidation "would unduly delay the administration of the case." 11 U.S.C. § 502(c), which provides:
There shall be estimated for purpose of allowance under this section--
(**1**) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or
(**2**) any right to payment arising from a right to an equitable remedy for breach of performance.
Although § 502(c) refers to "claims," which include prepetition and postpetition claims, some courts view § 502 as pertaining to prepetition claims, while agreeing that subsection (c) applies to prepetition claims and postpetition, administrative claims. In re *Adelphia Business Solutions, Inc.*, 341 B.R. 415, 423 (Bankr. S.D.N.Y 2003)("Section 502, on its face, speaks of claims, which arise before the filing of a case, and does not address admin claims. Nevertheless, a fair number of cases have held that estimation can likewise be used for admin claims."); *In re*MacDonald, 128 B.R. 161, 165 (Bankr. W.D. Tex. 1991)("Courts have nonetheless assumed that the estimation process in Section 502(c) may be equally employed for estimating post-petition claims, when necessary to avoid delaying the administration of the bankruptcy case (especially when it comes to the confirmation process). Many courts do not view § 502(c) as applying on its face only to prepetition claims and readily read it to apply to administrative claims. *See, e.g.*, Colorado Mountain Express, Inc. v. Aspen Limousine Services, Inc. (*In re* Aspen Limousine Services, Inc.), 193 B.R. 325, 335 (D. Colo. 1996); Brutoco Engineering & Construction Co. v. Dennis Ponte, Inc. (*In re*Dennis Ponte, Inc.), 61 B.R. 296, 299 (B.A.P. 9th Cir. 1986); *In re*Railway Reorganization Estate, Inc., 133 B.R. 574, 577 (Bankr. D. Del. 1991) ("Therefore, the court exercises its discretion to value CP's contingent administrative expense claim at zero for the purposes of confirmation."); *see* Pizza of Hawaii, Inc. v. Shakey's, Inc. (*In re* Pizza of Hawaii, Inc.), 761 F.2d 1374, 1376, 1381 (9th Cir. 1985). Bankruptcy courts have broad discretion to estimate claims in virtually any manner providing elemental due process. Bittner v. Borne Chemical Co., 691 F.2d 134, 135-37 (3d Cir. 1982); *In* re *Adelphia Business Solutions, Inc.*, 341 B.R. 415, 422 (Bankr. S.D.N.Y 2003)("[I]t has been repeatedly held, including in cases at the Circuit Court of Appeals level, that when estimating claims, Bankruptcy Courts may use whatever method is best suited to the contingencies of the case, so long as the procedure is consistent with the fundamental policy of Chapter 11 that a reorganization 'must be accomplished quickly and efficiently.'"); *see also* Addison v. Langston (*In re*Brints Cotton Mktg., Inc.), 737 F.2d 1338, 1341 (5th Cir.1984). Accordingly, in most circumstances, there can be no tenable reason why a bankruptcy court cannot estimate interim fee claims at their undisputed amounts or a percentage of such amounts, and final claims can similarly be estimated for all purposes.

89 *Routine Illegality* at 424-425.

90 H.R. Rep. No. 95-595, at 329-330 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6286; ZOLFO, COOPER & CO. V. SUNBEAM-OSTER CO., INC., 50 F.3d 253, 259 (3d Cir. 1995) ("The baseline rule is for firms to receive their customary rates" for bankruptcy work).

91 *Routine Illegality* at 424-425.

92 *In re*Beverly Crest Convalescent Hospital, Inc., 548 F.2d 817 (9th Cir. 1976, as amended 1977).

93 H.R. Rep. No. 95-595, at 330 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6286.

94 *Id.*

95 Order, Pursuant to Sections 105(a), 363(b) and 502(c) of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure 3007, 7042, 9013, 9014 and 9019. (1) Establishing Procedures to Estimate Unliquidated and Contingent Claims, (2) Establishing Procedures to Adjudicate Counterclaims, (3) Establishing Procedures to Compromise Claims and Counterclaims and (4) Fixing Notice Procedures and Approving Form and Manner of Notice, *In re* Enron Corp., Case No. 01-16034 (AJG) (Bankr. S.D.N.Y., Feb. 18, 2004).

96 *See, e.g., Routine Illegality* at 423 ("Those [fee] increases reduce creditor recoveries and perhaps the likelihood of successful reorganization."); *Courting Failure* at 140-143.

97 *In re*Busy Beaver Bldg. Centers, Inc., 19 F.3d 833, 849-850 (3d Cir. 1994) (citations omitted); *see also*H.R. Rep. No. 95-595, at 330 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6286. *Routine Illegality* cites *Busy Beaver*, 19 F.3d at 841, at its outset for the propositions that the integrity of the bankruptcy system depends on the bankruptcy judge's review of fee applications *sua sponte* and the public has a right to expect that a court order signifies that the result is proper and justified. *Routine Illegality* at 423. Notably, however, *Busy Beaver* goes on to rule: "the reviewing court need only correct reasonably discernible abuses, not pin down to the nearest dollar the precise the to which the professional is ideally entitled." 19 F.3d at 845.

98 28 U.S.C. § 586(a)(3)(A)(i).

99 *Routine Illegality* at 428

100 *Routine Illegality* at 428-429.

101 *Routine Illegality* at 428-429.

102 *Routine Illegality* at 429 n. 30, quoting *In re*Bread & Chocolate, Inc., 148 B.R. 81, 83 (Bankr. D.D.C. 1992).

103 *Routine Illegality* at 433-435. Significantly, *Routine Illegality* fails to mention the common practice that law firms will commence work for a debtor before filing a retention application so the debtor will not be delayed in obtaining the legal services it needs, and the courts can grant their subsequently filed applications on a *post facto* or *nunc pro tunc* basis. *See, e.g., In re*Jarvis, 53 F.3d 416, 419-420 (1st Cir. 1995)("... In light of the purposefully nonmechanical nature of equity, we think it is appropriate that BANKRUPTCY courts should be permitted to entertain *post facto* applications for professional services under section 327(a). We so hold, thereby joining several of our sister circuits. *See, e.g., Singson*, 41 F.3d at 319-20; *In re Land*, 943 F.2d 1265, 1267-68 (10th Cir. 1991); *In re F/S Airlease II, Inc.*, 844 F.2d 99, 105 (3d Cir.), *cert. denied*, 488 U.S. 852 (1988); *In re THC Fin. Corp.*, 837 F.2d 389, 392 (9th Cir. 1988); *Triangle Chems.*, 697 F.2d at 1289."). Accordingly, it is clear that providing disclosure after commencing work is not illegal and courts have the power to approve it.

104 *Routine Illegality* at 432.

105 *Routine Illegality* at 432 n. 42.

106 Form 10-K for Pacific Gas and Electric Company filed with Securities and Exchange Commission on February 19, 2004 for the year ended December 31, 2003, at p. 1.

107 *Routine Illegality* at 425

108 *Routine Illegality* at 438-439.

109 *Routine Illegality* at 439. *See*28 U.S.C. § 586(a)(3)(A)(ii).

110 *Routine Illegality* at 440.

111 Order Authorizing Debtors and Debtors in Possession to Employ Professionals Used in the Ordinary Course of the Debtors' Business, *In re* SemCrude, L.P., Case No. 08-11525 (Bankr. D. Del., filed Aug. 9, 2008) (BLS) (Docket No. 812); Order Pursuant to Sections 105(a), 327, 328, and 330 of the Bankruptcy Code Authorizing the Debtors to Employ Professionals Used in the Ordinary Course of Business, *In re* Washington Mutual, Inc., Case No. 0812229 (Bankr. D. Del., filed December 3, 2008) (MFW)(Docket No. 381); *see e.g.*, Debtors' Statement of Amounts Paid to Ordinary Course Professionals from July 22, 2008 Through September 30, 2008, *In re* SemCrude, L.P., Case No. 08-11525 (Bankr. D. Del., filed Sept. 30 2008) (Docket No. 1602).

112 Notice of Second Amendment of Nonexclusive List of Ordinary Course Professionals, *In re* Old Carco LLC (f/k/a Chrysler LLC), Case No. 09-50002 (AJG) (Bankr. S.D.N.Y. May 19, 2009) (Docket No. 1252).

113 Blackburn-Bliss Trust v. Hudson Shipbuilders, Inc. (*In re*Hudson Shipbuilders, Inc.), 794 F.2d 1051, 1055 (5th Cir. 1986); *see also*Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995) (bankruptcy courts are intended to "deal efficiently and expeditiously" with the estate) (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)).

114 In *In re*Lewis, 346 B.R. 89, 111 n.30 (Bankr. E.D. Pa. 2006), the Bankruptcy Court for the Eastern District of Pennsylvania held, over the Chapter 13 trustee's objection, that a motion to approve payment of the debtor's counsel for outstanding legal fees could be treated as an application under Bankruptcy Rule 2016(a):
The Trustee is correct that the ... [motion] was procedurally deficient as an application for compensation. Nonetheless, there can be little doubt that the intent expressed in the filing was a request for allowance of compensation ... [Thus,] I consider it appropriate to ... treat the ... [motion] as an application for compensation.

115 Lynn M. LoPucki and Joseph W. Doherty, *The Determinants of Professional Fees in Large Bankruptcy Reorganization Cases*. 1 JOURNAL OF EMPIRICAL LEGAL STUDIES 113, 130-131 (January 2004). Available at SSRN: http:// ssrn.com/ abstract=419280***o***rDOI:10.2139/ssrn.419280.

116 Lubben, Stephen J., *ABI Chapter 11 Professional Fee Study* (December 1, 2007), Seton Hall Public Law Research Paper No. 1020477. Available at SSRN: http://ssrn.com/abstract=1020477.

117 Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 MICH. L. REV. 1 (2007).

118 James J. White, *Bankruptcy Noir*, 106 MICH. L. REV. 691, 692 (2008).

83 AMBKRLJ 549

End of Document