

## Crowdsourcing (Bankruptcy) Fee Control

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## INTRODUCTION

Corporate bankruptcy cases<sup>1</sup> are expensive.<sup>2</sup> Perhaps even *too* expensive.<sup>3</sup> Empirical evidence suggests that cases may be so expensive because some bankruptcy professionals overcharge their clients.<sup>4</sup> Although chapter 11 has an elaborate fee control system designed to prevent professional overcharging, the system is inadequate. Chapter 11's fee control system appears to be failing for at least two reasons.

First, chapter 11's fee control system suffers from information deficits. Information deficits arise because creditors and other parties to bankruptcy cases often fail to object to instances of potential overcharging. Without objections to highlight potential instances of professional overcharging, bankruptcy judges must often fail to reduce

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<sup>1</sup> The phrase "corporate bankruptcy cases" is used to refer to cases brought under chapter 11 of the United States Bankruptcy Code, notwithstanding that individuals may also file chapter 11 cases. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C.) [hereinafter Bankruptcy Code or Code]. Individual chapter 11 cases are not the subject of this Article.

<sup>2</sup> After all, professional fees in the Lehman cases have already exceeded several billion dollars. See James O'Toole, *Five Years Later, Lehman Bankruptcy Fees Hit \$2.2 Billion*, CNN MONEY (Sept. 13, 2013, 6:24 AM), <http://money.cnn.com/2013/09/13/news/companies/lehman-bankruptcy-fees/>.

<sup>3</sup> See Stephen Lubben, *The Costs of Corporate Bankruptcy: How Little We Know* (June 5, 2014) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2446663](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2446663) [hereinafter Lubben, *The Costs of Corporate Bankruptcy*]; see also Troy A. McKenzie, *Bankruptcy and the Future of Aggregate Litigation: The Past as Prologue?*, 90 WASH. U. L. REV. 839, 845 (2013). Cf. Stephen Lubben, *The Direct Costs of Corporate Reorganization: An Empirical Examination of Professional Fees in Large Chapter 11 Cases*, 74 AM. BANKR. L.J. 509, 512 (2000) [hereinafter Lubben, *Direct Costs*] ("Chapter 11 is substantially less expensive than other significant corporate transactions."). But cf. Stephen J. Lubben, *The Microeconomics of Chapter 11—Part 2*, 4 INT'L CORP. RESCUE 87, 91 (2007) [hereinafter Lubben, *The Microeconomics of Chapter 11*] (arguing that if "the direct costs of chapter 11 are in line with other large corporate transactions[,] chapter 11 is not too expensive). The core idea of chapter 11 is that it may be possible to reorganize a company, pay related expenses, and leave creditors *better off* than they would have been if the company was not reorganized. See 11 U.S.C. § 1129(a)(7) (2011) (legislative statements) (setting forth the "best interests" test, and requiring that each creditor or interest holder receive as much under a chapter 11 plan as they would have received in a chapter 7 liquidation).

<sup>4</sup> See *infra* Part I.B.

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fees and expenses even when they should be reduced. By contrast, if bankruptcy judges were alerted to possible problems, they could investigate and reduce fees and expenses, as appropriate.<sup>5</sup> Therefore, improving chapter 11's fee control system likely requires that bankruptcy courts receive better information about instances of potential overbilling, whether through objections or otherwise.

Second, chapter 11's fee control system is challenging, tedious, and, in many of the largest cases, potentially overwhelming. A single mega-bankruptcy case can necessitate the review of thousands of pages of time and expense entries over the life of that case.<sup>6</sup> In order to prevent professional overcharging, these entries must be carefully reviewed to identify patterns, compared against relevant local rules or fee application guidelines, and cross-checked across professionals. Fee Controllers—those tasked with preventing professional overcharging in bankruptcy cases—need additional assistance to do this job well.<sup>7</sup> In other words, chapter 11's fee control system needs a greater ability to scale up the number of fee reviewers and to ensure that the information received by the fee control system is efficiently processed and utilized.<sup>8</sup>

Crowdsourcing—broadly conceived as solving problems by drawing on the contributions of many people—can help Fee Controllers both to obtain better information and to better utilize the

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<sup>5</sup> In many cases, those with the best information about instances of potential professional overcharging will be other professionals involved in a particular case. Individual creditors, particularly those who frequently participate in corporate bankruptcy cases, such as banks, may also be attuned to instances of potential overcharging.

<sup>6</sup> Lois R. Lupica & Nancy B. Rapoport, *Best Practices for Working with Fee Examiners*, 32 AM. BANKR. INST. J. 20, 20–21 (June 2013). Of course, not every court requires a fee application to be “the size of a boring victorian novel” but a conservative approach explains the voluminous nature of many fee applications, particularly when the estate also pays for those applications to be prepared. See *In re Hotel Assocs.*, 15 B.R. 487, 488 (Bankr. E.D. Pa. 1981).

<sup>7</sup> This Article uses the term “Fee Controllers” to refer to the bankruptcy judge and Assistant United States Trustee involved in a particular case. In certain instances, other parties-in-interest and, where appointed, fee examiners may also be considered Fee Controllers. Other parties to the case, however, infrequently participate in fee control, and fee examiners are infrequently appointed, except in the largest cases. In bankruptcy mega-cases, where fee examiners and committees are appointed more routinely, even their assistance seems to be unable to turn the tide. See Lupica & Rapoport, *supra* note 6, at 20.

<sup>8</sup> Fee examiners, fee committees and auditors already serve this role in certain cases. But, as discussed *infra*, crowdsourcing can be more effective and less expensive. With appropriate incentives, creditors might also be willing to be more active participants in bankruptcy cases, just as Congress appeared to imagine that they would be.

information they receive. First, crowdsourcing can help produce better information, both about general market conditions and about specific instances of potential overcharging.<sup>9</sup> Crowdsourcing's usefulness as an information-gathering tool has been long recognized.<sup>10</sup> Market economies, which allocate goods and services by using the wisdom of crowds to set prices, are an example of how crowdsourcing can produce useful information.<sup>11</sup> In every bankruptcy case, there exists a coterie of bankruptcy professionals who have the information and judgment necessary to help improve the fee control system. A crowdsourced fee control system could tap into this expertise. In addition, crowdsourcing could allow other parties, even non-bankruptcy experts, to supply information about their relevant experiences to improve chapter 11's fee control system.<sup>12</sup>

A crowdsourced fee control system could also help improve the usefulness of information received by enlisting the general public in reviewing fee applications and related disclosures by professionals, as well as any additional information produced by other members of the

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<sup>9</sup> See *infra* Part III.A.i.

<sup>10</sup> See, e.g., AUDOBON.ORG, <http://www.audubon.org/conservation/science/christmas-bird-count> (discussing how the Audubon Society crowdsources its annual Western Hemisphere bird count); *Top 5: Oldest Examples of Crowdsourcing*, ARTICLE ONE PARTNERS (Sept. 16, 2011), <http://info.articleonepartners.com/top-5-oldest-examples-of-crowdsourcing/> (describing the crowdsourcing of “[a]ncient Babylonian [h]ealth [c]are” as when “the family of the sick person would leave him or her out in the middle of town. There, ‘passers-by come up to him, and if they have ever had his disease themselves or have known any one who has suffered from it, they give him advice.”). See Ines Mergel et al., *The Challenges of Challenge.Gov: Adopting Private Sector Business Innovations in the Federal Government*, 2014 47th HAW. INT’L CONF. ON SYS. SCI. 2073, 2076 (2014), <http://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=6758860> (suggesting that crowdsourcing is best for solving problems related to “research, information and information managing applications”).

<sup>11</sup> See generally ADAM SMITH, *THE WEALTH OF NATIONS* (London, W. Strahan and T. Cadell 1776); cf. Lee Anne Fennell, *Crowdsourcing Land Use*, 78 BROOK. L. REV. 385 (2013).

<sup>12</sup> One question that must be addressed when designing a crowdsourcing system is who should be part of the crowd. Some studies suggest casting the widest possible net, but others suggest a more limited crowd may be appropriate. See, e.g., Daren C. Brabham, *Crowdsourcing the Public Participation Process for Planning Projects*, 8 PLAN. THEORY 242, 245 (2009) [hereinafter Brabham, *Crowdsourcing the Public Participation Process*] (noting that unrestrained public participation may not be an unmitigated good); see also Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1466 (2011) (noting that larger crowds produce more information but that each piece of information is, on average, of lesser quality when the crowds are larger). The distinction between studies seems to boil down to two related inquiries: how many responses will be generated and will the volume of those responses overwhelm the person(s) responsible for sorting through them. While addressed to some degree in this Article, this issue will be explored in greater detail in a planned follow-up article. See also *infra* note 280 and Part III.B.i.

crowd. Crowdsourcing allows large and/or tedious projects to be broken into small, discrete problems that can then be outsourced to potential problem-solvers.<sup>13</sup> Because bankruptcy fee applications already report time in increments as small as six minutes, the task of reviewing fee applications seems well-suited to being crowdsourced.<sup>14</sup> In addition, crowdsourcing may be able to introduce greater innovation into the fee control process. And finally, because a crowdsourced system can supplement (and need not displace) the existing fee control infrastructure, there is little downside risk to crowdsourcing fee control.

It is time to apply crowdsourcing principles to solve chapter 11's fee control problems, and this Article suggests how crowdsourcing might do so. In Part I, this Article explains the design of chapter 11's fee control system and describes the empirical evidence suggesting that professional overcharging is a significant and widespread problem. This part will also discuss why chapter 11's fee control system currently results in sub-optimal fee review and the essential elements of an effective fee audit. Part II defines crowdsourcing, explains how it works, and provides three examples that demonstrate crowdsourcing's advantages in solving chapter 11's fee control problem. Finally, Part III explains both how crowdsourcing can help deter or prevent professional overcharging in chapter 11 cases and provides some preliminary thoughts about the optimal design of a crowdsourced fee control system.

### I. THE CHAPTER 11 FEE CONTROL SYSTEM

Corporate bankruptcy cases have long been viewed as excessively expensive.<sup>15</sup> In recent years, one of the primary drivers of that expense—professional representation—has substantially outpaced

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<sup>13</sup> See *infra* Part II.

<sup>14</sup> See FED. R. BANKR. P. 2016(a) (requiring that professionals wishing to receive compensation from the estate submit a formal fee application setting forth, among other information, “a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested”); see also James B. Hirsch, Note, *Bankruptcy Fee Applications: Compensable Service or Cost of Doing Business?*, 58 FORDHAM L. REV. 1327, 1327 (1990) (These disclosures are essential because they allow bankruptcy courts to make the necessary factual determinations “as to whether the fees requested are reasonable.”).

<sup>15</sup> See Lubben, *The Costs of Corporate Bankruptcy*, *supra* note 3 (dating concerns about bankruptcy costs to the first national bankruptcy laws); see also McKenzie, *supra* note 3, at 845 (“Commentators—both scholarly and popular—remain critical of the large fees garnered by lawyers in bankruptcy cases.”). Arguably, however, bankruptcy cases are not excessively expensive. Lubben, *The Microeconomics of Chapter 11*, *supra* note 3.

inflation.<sup>16</sup> One reason for this rapid run-up may be that the bankruptcy system lacks robust controls to ensure bankruptcy professionals do not overcharge their clients.<sup>17</sup> It appears that chapter 11's fee control system fails to sufficiently deter or prevent bankruptcy professionals from "padding" their bills by charging for work they never performed, "milking" client files by doing unnecessary work or otherwise aggressively billing for inefficient work, or treating their bills as the opening bid in a negotiation over their fees rather than a record of time reasonably spent.<sup>18</sup>

Even though the available empirical evidence suggests that professional overcharging is a frequent and widespread problem,<sup>19</sup>

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<sup>16</sup> More than five times as fast as the rate of inflation according to one study. See Lynn M. LoPucki & Joseph W. Doherty, *Professional Overcharging in Large Bankruptcy Reorganization Cases*, 5 J. EMPIRICAL LEGAL STUD. 983, 985 (2008) [hereinafter, LoPucki & Doherty, *Professional Overcharging*] (reporting that professional fees and expenses in large, public company bankruptcy cases increased by 71% over the six-year period of the study compared to a 14% rise in consumer prices). See also Robert M. Lawless & Stephen P. Ferris, *Direct Costs in Chapter 11 Bankruptcies*, 61 U. PITT. L. REV. 629 (2000) (providing some empirical information on the cost of chapter 11's direct costs, including professional fees).

<sup>17</sup> Some commentators have wondered if bankruptcy courts should be involved in policing the fees paid to bankruptcy professionals at all. After all, if the person paying the bill does not care, then why should anyone else? See Cynthia Baker, *Other People's Money: The Problem of Professional Fees in Bankruptcy*, 38 ARIZ. L. REV. 35, 41-69 (1996). Others have suggested a role for the court is appropriate because there is "a significant conflict of interest between client and attorney" once the work is done and the attorney seeks money that would otherwise inure to the estate or to the creditors. See Third Cir. Task Force, *Court Awarded Attorney Fees*, 108 FED. RULES DECISIONS 237, 266 (1986).

<sup>18</sup> See AM. BANKR. INST., CHAPTER 11 FEE STUDY: MOVING FORWARD ANALYSIS 931, 943-44 (2008) [hereinafter MOVING FORWARD] (material provided at ABI's 13th Annual Southeast Bankruptcy Workshop, July 16-19, 2008) (Professionals are not supposed to be compensated "for either inefficiency or for spending time on projects that are not beneficial to the estate."); Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911, 914 (1996) (indicting a "significant segment of the bar" for "routinely and patently pad[ding] bills and defraud[ing] clients"); Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171, 190 (2005) (noting the incentive to "overwork" files created by high billable hour requirements); Christine Parker & David Ruschena, *The Pressures of Billable Hours: Lessons from a Survey of Billing Practices Inside Law Firms*, 9 U. ST. THOMAS L.J. 619, 619 (2011) (reporting results from a survey of Australian lawyers that suggest lawyers were more likely to engage "in unethical behavior when they believe that such behavior is necessary" to meet certain performance standards, such as high billable hour requirements).

<sup>19</sup> See *infra* Part I.B.i.; see also Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under United States Code by Attorneys in Larger Chapter 11 Cases, 78 Fed. Reg. 36248 (June 17, 2013), [http://www.justice.gov/sites/default/files/ust/legacy/2013/06/28/Fee\\_Guidelines.pdf](http://www.justice.gov/sites/default/files/ust/legacy/2013/06/28/Fee_Guidelines.pdf) [hereinafter Fee Guidelines] (The promulgation of new guidelines for reviewing professional fee applications by the United States Trustee's office is an apparent acknowledgement of the problems that have long existed with the fee control

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professional overcharging need not and should not occur.<sup>20</sup> The following section explains how chapter 11's fee control system works and why it is currently unable to prevent professional overcharging.

A. *How Chapter 11's Fee Control System Works*

In an effort to control the cost of professional representation in bankruptcy cases, Congress created chapter 11's fee control system. This system imposes numerous obligations on bankruptcy professionals. These obligations arise both prior and subsequent to providing services. For example, in bankruptcy cases, the bankruptcy court must review and approve each professional person's or firm's employment and the estate may not pay a professional's fees without court approval.<sup>21</sup> Section 327(a) of the Bankruptcy Code sets forth the standard governing the employment of most<sup>22</sup> professional persons working for the debtor-in-possession<sup>23</sup> or the trustee,<sup>24</sup> and it provides

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process.). *But cf.* Lubben, *The Microeconomics of Chapter 11*, *supra* note 3, at 87 (suggesting that professional overcharging is not more prevalent inside of bankruptcy than outside of bankruptcy).

<sup>20</sup> Some have argued that professional overcharging will remain impossible to prevent until all bankruptcy professionals adopt a value-based billing model. *See, e.g.*, Steven J. Harper, Opinion, *The Tyranny of the Billable Hour*, N.Y. TIMES (Mar. 28, 2013), [http://www.nytimes.com/2013/03/29/opinion/the-case-against-the-law-firm-billable-hour.html?\\_r=0](http://www.nytimes.com/2013/03/29/opinion/the-case-against-the-law-firm-billable-hour.html?_r=0). While this may be true, there appears to be no bankruptcy-specific reason why bankruptcy professionals who bill by the hour outside of bankruptcy should be forced to adopt an alternative billing method inside of bankruptcy. *Cf. Butnerv.* United States, 440 U.S. 48 (1979). Instead, this Article takes as a starting point that some bankruptcy professionals, particularly attorneys, bill by the hour and offers a solution for sorting reasonable and necessary fees expenses from unreasonable and unnecessary fees and expenses. *See* William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1, 19 (1991) (noting that "most private practitioners seem relatively satisfied with time-based billing" and concluding, therefore, that "changes in billing procedures are likely to occur only if corporate counsel or clients demand them").

<sup>21</sup> 11 U.S.C. § 330 (2011). *See* Nancy Rapoport, *The Case for Value Billing in Chapter 11*, 7 J. BUS. & TECH. L. 117, 121 (2012) [hereinafter Rapoport, *Value Billing*]; *see also* Kenneth A. Rosen & Barry Z. Bazian, *Court's Broad Power to Approve Appointment of Estate Professionals*, 34 AM. BANKR. INST. J. 44, 44 (Mar. 2015) (describing the requirement of bankruptcy court approval as "unusual" because "in most other areas of law, a party has total freedom to choose its professionals and court approval is not required").

<sup>22</sup> Section 327(a) governs the employment of professionals doing bankruptcy-related work, but other sections govern the employment of professionals for other purposes. 11 U.S.C. § 327(a). *See* Rapoport, *Value Billing*, *supra* note 21, at 122; *see also* § 327(e).

<sup>23</sup> And perhaps for official committees as well. *See* Rapoport, *Value Billing*, *supra* note 21, at 123 n.34.

<sup>24</sup> In many Bankruptcy Code sections, references to the trustee are generally understood to also include the debtor-in-possession because the debtor-in-possession enjoys most of the rights and duties of the trustee where the debtor-in-possession has not been displaced by a trustee. *See* 11 U.S.C. § 1107(a) (2009); *see also* Rapoport, *Value*

that:

[T]he trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.<sup>25</sup>

Professionals must file retention applications in order to determine whether they are "disinterested" and whether they "hold or represent" interests adverse to the estate.<sup>26</sup> While the vast majority of professionals are retained by the debtor-in-possession, other parties-in-interest are also entitled to have the bankruptcy estate pay for their professional representation.<sup>27</sup> For example, the estate pays the professional representatives of any official committees.<sup>28</sup> Bankruptcy judges have broad discretion in determining whether to allow a professionals' retention and, although most retention applications are uncontested,<sup>29</sup> the judges may deny retention *sua sponte*.<sup>30</sup>

Once a professional's employment is approved, that professional's fees may be paid by the debtor's estate as an administrative expense, pursuant to § 330.<sup>31</sup> Section 330 provides that professionals may earn "reasonable compensation for actual, necessary services rendered."<sup>32</sup> This means that professionals may not charge an

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*Billing*, *supra* note 21, at 121; Philip A. Schovanec, *Bankruptcy: The Sale of Property Under Section 363: The Validity of Sales Conducted Without Proper Notice*, 46 OKLA. L. REV. 489, 490-91 (1993).

<sup>25</sup> 11 U.S.C. § 327(a).

<sup>26</sup> §§ 327, 330.

<sup>27</sup> § 327(a); see Lynn M. LoPucki & Joseph W. Doherty, *Rise of the Financial Advisors: An Empirical Study of the Division of Professional Fees in Large Bankruptcies*, 82 AM. BANKR. L.J. 141, 142 (2008) (noting that approximately 80% of fees are paid to the debtors' professionals, 19% of fees are paid to representatives of unsecured creditors, and only approximately 1% to professionals advising all other parties).

<sup>28</sup> Section 1103 is relevant to the employment of professionals working for official committees. In relevant part, § 1103 provides that official committees "may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee." 11 U.S.C. § 1103 (2010).

<sup>29</sup> MOVING FORWARD, *supra* note 18, at 934 (noting that "[o]bjections to proposed retention of professionals in chapter 11 cases are fairly rare" with between 16.5-34% objection rates, depending on case size).

<sup>30</sup> See Rosen & Bazian, *supra* note 21.

<sup>31</sup> Parties-in-interest are entitled to notice and the opportunity for a hearing before a retention application may be approved. See 11 U.S.C. §§ 330(b), 503 (2011); see also Rapoport, *Value Billing*, *supra* note 21, at 124-25.

<sup>32</sup> Under § 330, attorneys' fees are reviewed for their reasonableness after the representation has concluded. See § 330(a)(1)(A).



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unreasonable rate, and that professionals may only charge for services that were necessary to perform.<sup>33</sup> The Bankruptcy Code provides additional guidance and prohibits 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.”<sup>34</sup> To aid courts in making these determinations, § 330 provides a list of factors for courts to consider when reviewing the fees of bankruptcy professionals, including but not limited to:

(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.<sup>35</sup>

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<sup>33</sup> A reasonable rate may still be a facially large hourly rate. For example, partners at some of the most prominent bankruptcy law firms earn in excess of \$1000 per hour. See David Lat, *Legal Fee Voyeurism: American Airlines’ Big-Time Bankruptcy Bills*, ABOVE THE LAW (Oct. 12, 2010, 2:03 PM), <http://abovethelaw.com/2012/10/legal-fee-voyeurism-american-airlines-big-time-bankruptcy-bills/> (reporting that at least twelve Weil Gotshal attorneys in the American Airlines bankruptcy case billed \$1000 per hour or more); see also Ashby Jones, *On Billing Over \$1,000 an Hour: ‘If You Can Get It, Get It,’* WALL ST. J. (Feb. 23, 2011, 9:27 AM), <http://blogs.wsj.com/law/2011/02/23/on-billing-over-1000-an-hour-if-you-can-get-it-get-it/>; Nelson D. Schwartz & Julie Creswell, *Who Knew Bankruptcy Paid So Well?*, N.Y. TIMES (May 1, 2010), <http://www.nytimes.com/2010/05/02/business/02workout.html?pagewanted=all> (“At several firms, including Weil and Milbank, Tweed, Hadley & McCloy, partners now charge \$1,000 an hour or more for their bankruptcy services.”); Debra Cassens Weiss, *More Top Lawyers Break Through \$1,000 Hourly Billing Barrier*, A.B.A. J. (Feb. 23, 2011, 12:50 PM), [http://www.abajournal.com/news/article/more\\_top\\_lawyers\\_break\\_through\\_1000\\_hourly\\_billing\\_barrier/](http://www.abajournal.com/news/article/more_top_lawyers_break_through_1000_hourly_billing_barrier/). In addition, investment bankers are commonly paid hundreds of thousands of dollars per month and can also qualify for liberally defined “success fees” that exceed millions of dollars at the conclusion of a case. See, e.g., Rapoport, *Value Billing*, *supra* note 21, at 120 n.20 (discussing the proposed retention application for debtors’ financial advisors in *In re Energy Partners, Ltd.*, No. 09-32957, 2009 WL 2970393, at \*1 (Bankr. S.D. Tex. Sept. 15, 2009)). Other professionals may be similarly well-compensated.

<sup>34</sup> See § 330(a)(4)(A).

<sup>35</sup> See § 330(a)(3); see also *In re Channel Master Holdings, Inc.*, 309 B.R. 855, 861 (Bankr. D. Del. 2004).

To facilitate judicial review of the reasonableness and appropriateness of their fees,<sup>36</sup> professionals typically file so-called fee applications. Fee applications should “contain sufficient information about the case and the applicant so that the court, the creditors, and the United States Trustee can review it without searching for relevant information in other documents.”<sup>37</sup> Fee Controllers should approve all of the compensation requested in a fee application only if professionals accurately and adequately describe the services they rendered, and only request “reasonable compensation for actual, necessary services rendered.”<sup>38</sup> By contrast, if professionals seek unreasonable compensation or compensation for services not actually rendered or necessary for the estate, Fee Controllers should not approve the requested compensation.<sup>39</sup> In order to make these determinations, chapter 11’s fee control system depends primarily on Fee Controllers to review professional fee applications and thereby catch and prevent any overcharging.

Apparently, Congress also expected that the estate’s creditors would assist with the fee control process by reviewing the professional fee applications and objecting to professional overcharging.<sup>40</sup> That expectation, however, appears unsatisfied, as creditors and other parties-in-interest object to fee applications relatively infrequently.<sup>41</sup> At least three reasons may explain the limited participation in chapter

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<sup>36</sup> And to comply with guidelines promulgated by the office of the United States Trustee and adopted in many bankruptcy courts. See Rapoport, *Value Billing*, *supra* note 21, at 126; see also Fee Guidelines, *supra* note 19.

<sup>37</sup> Regulations Relating to the Bankruptcy Reform Acts of 1978 and 1994, 28 C.F.R. § 58, app. A(a) (2010); see Rapoport, *Value Billing*, *supra* note 21, at 126 (citing 28 C.F.R. § 58).

<sup>38</sup> § 330(a)(1)(A).

<sup>39</sup> See, e.g., MOVING FORWARD, *supra* note 18, at 946 (noting that a professional’s fees, if retained under 11 U.S.C. § 328, can only be reconsidered after they have been incurred, if the “terms and conditions of the fee structure prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.”) (quoting § 328(a)).

<sup>40</sup> See Charles J. Tabb, *The Future of Chapter 11*, 44 S.C. L. REV. 791, 798 (1993) (“The problem of excessive professional fees” has captured Congressional attention.).

<sup>41</sup> See LYNN M. LOPUCKI & JOSEPH W. DOHERTY, PROFESSIONAL FEES IN CORPORATE BANKRUPTCIES: DATA, ANALYSIS, AND EVALUATION 170 (2011) [hereinafter LOPUCKI & DOHERTY, PROFESSIONAL FEES] (reporting that approximately only 20% of fee applications receive any objections, and the vast majority of those objections are filed by the United States Trustee and involve small dollar sums); see also MOVING FORWARD, *supra* note 18, at 934 (noting that, in a random sample, only 10% of fee applications filed by debtor’s lead counsel received a formal objection). But see G. RAY WARNER & KEITH J. SHAPIRO, AMERICAN BANKRUPTCY INSTITUTE NATIONAL REPORT ON PROFESSIONAL COMPENSATION IN BANKRUPTCY CASES 57 (1991) (“[F]ee applications are being subjected to substantial scrutiny.”).

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11's fee control system. First, objections are expensive to prepare and prosecute. Even worse, these costs are borne by the objecting party, but successful objections do not necessarily inure to their benefit.<sup>42</sup> Second, parties may be concerned that an objection will derail unrelated negotiations.<sup>43</sup> Third, some have alleged that a "conspiracy of silence" exists among bankruptcy professionals.<sup>44</sup> In short, this third reason argues that the existence of repeat players in corporate bankruptcy cases creates incentives that span individual cases, encouraging parties-in-interest (and their professionals) not to object to each other's fees in any one particular case because of concerns about future retribution.<sup>45</sup>

Without the participation of creditors, the burden of scrutinizing and, where appropriate, objecting to fee applications tends to fall to the Assistant United States Trustee assigned to a particular case.<sup>46</sup> Objections by United States Trustees' offices tend to involve violations of narrow, technical rules rather than a substantive second-guessing of the work done by bankruptcy professionals.<sup>47</sup> Thus, courts are largely left to review the work of bankruptcy professionals without the assistance Congress expected would be rendered by creditors, and with only limited assistance from United States Trustees' offices.<sup>48</sup> Without

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<sup>42</sup> Baker, *supra* note 17, at 57–58.

<sup>43</sup> Corporate bankruptcy cases often involve extensive negotiations among professionals. Unfortunately, "attacking a fee application can be a bit of an atom bomb, when you want a low caliber pistol." *See id.* at 58 (quoting Robert Levine, Partner at Davis Polk & Wardwell (quoted in Barbara Franklin, *Passing Fee Inspection: Bankruptcy Bar Adjusts to Reduce Costs*, N.Y. L.J., May 14, 1992, at 5)).

<sup>44</sup> *See* LOPUCKI & DOHERTY, PROFESSIONAL FEES, *supra* note 41, at xx-xxi; *see also* Baker, *supra* note 17, at 58 ("[C]ourts often bemoan the lack of participation in the fee process."); McKenzie, *supra* note 3, at 882 (referring to a "ring" of closely knit lawyers who wielded excessive control at the expense of creditors" in a bankruptcy case) (citing Susan Block-Lieb, *What Congress Had to Say: Legislative History as a Rehearsal of Congressional Responses to Stern v. Marshall*, 86 AM. BANKR. L.J. 55, 62–63 (2012)).

<sup>45</sup> *See* McKenzie, *supra* note 3, at 882, 883–84 (discussing the perception of self-dealing by bankruptcy lawyers and suggesting that "the hint of corruption that attached to the process" helped retard the prompt development of a more expansive bankruptcy law); *see also* SOL STEIN, BANKRUPTCY: A FEAST FOR LAWYERS 60 (1999); Nancy B. Rapoport, *Rethinking Professional Fees in Chapter 11 Cases*, 5 J. BUS. & TECH. L. 263, 269 (2010) (noting the possibility of a "conspiracy of silence" among professionals who regularly appear in chapter 11 cases to avoid challenging each other's fees); Schwartz & Creswell, *supra* note 33 ("Lawyers were reluctant to challenge their peers, fearing retaliation.").

<sup>46</sup> *See* McKenzie, *supra* note 3, at 883 (referring to the United States Trustee as a Congressionally-appointed "watchdog in bankruptcy cases").

<sup>47</sup> *See* LOPUCKI & DOHERTY, PROFESSIONAL FEES, *supra* note 41, at 131; *see also* MOVING FORWARD, *supra* note 18, at 934 (the United States Trustee objected in about 3% of all cases in one study and more than 13% in the largest cases).

<sup>48</sup> Most bankruptcy judges will also have the assistance of one or more law clerks.

a robust pool of insightful objections to focus their attention on instances of potential professional overcharging, Fee Controllers are unlikely to effectively review professional fee applications.<sup>49</sup> Unsurprisingly, reductions in professional fee applications tend to involve small dollar amounts, if any reductions are made at all.<sup>50</sup>

Even with objections to focus Fee Controllers' attention, fee review would often be an enormous task; without them, it may be an impossible one.<sup>51</sup> In a large corporate bankruptcy case, a bankruptcy court typically receives fee applications from twelve to sixteen professional firms every three months,<sup>52</sup> and fee applications are usually thirty or more pages.<sup>53</sup> Assuming there are twelve professional firms each filing a thirty-page application every three months for two years, Fee Controllers must closely scrutinize 2880 pages of "single-spaced, small font lines of time entries and expense details" over the course of the case.<sup>54</sup> Add only four more professional firms, and Fee

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<sup>49</sup> At least three reasons have been put forward to explain why parties do not participate in chapter 11's fee control system. *See supra* text accompanying notes 42–45.

<sup>50</sup> *See* Lynn M. LoPucki & Joseph W. Doherty, *The Determinants of Professional Fees in Large Bankruptcy Reorganization Cases*, 1 J. OF EMPIRICAL LEGAL STUD. 111, 135 (2004) [hereinafter LoPucki & Doherty, *Determinants*].

<sup>51</sup> Impossibility becomes a more serious proposition in bankruptcy mega-cases even though fee examiners, committees, or auditors are appointed in many of these cases. Even with this additional assistance, however, fee applications in mega-cases are not reduced significantly. *See* LOPUCKI & DOHERTY, PROFESSIONAL FEES, *supra* note 41, at xx; *cf.* Lupica & Rapoport, *supra* note 6 (describing the differences between fee examiners, committees and auditors). Although fee examiners might be expected to have a deterrent effect, empirical evidence suggests that cases involving fee examiners tend to have higher than expected fees. LOPUCKI & DOHERTY, PROFESSIONAL FEES, *supra* note 41, at xx.

<sup>52</sup> *See, e.g., Amended Guidelines for Fees and Disbursements for Professionals in the Southern District of New York*, U.S. BANKR. CT. S.D.N.Y. (June 17, 2013), <http://www.nysb.uscourts.gov/sites/default/files/2016-1-a-Guidelines.pdf>; *see also* Zolfo, Cooper & Co. v. Sunbeam-Oster Co., 50 F.3d 253, 255–56 (3d Cir. 1995) (Seventeen legal, financial and accounting firms were each submitting *monthly* fee applications for the court's review and approval.); LoPucki & Doherty, *Professional Overcharging*, *supra* note 16, at xx (reporting an average of twelve professionals per case in large corporate reorganization cases with plans confirmed between 1998 and 2003, with the twenty-six most recent cases averaging more than sixteen professionals per case); Rapoport, *Value Billing*, *supra* note 21 (naming the professionals normally hired in every large chapter 11 case); *Procedures for Monthly Compensation and Reimbursement of Expenses*, U.S. BANKR. CT. S.D.N.Y. (Apr. 11, 2013), <http://www.nysb.uscourts.gov/sites/default/files/2016-1-c-procedures.pdf>.

<sup>53</sup> *See In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 601 n.1 (3d Cir. 1984) (Becker, J., concurring) (noting the "massive set of fee applications, which, if stacked in one pile, would amount to a pillar of paper 27 feet high"); *see also* FED. R. BANKR. P. 2016(a); *In re Robinson*, 368 B.R. 492, 498 (Bankr. E.D. Va. 2007).

<sup>54</sup> Rapoport, *Value Billing*, *supra* note 21, at 128; *see also* Clifford J. White III & Walter W. Theus, Jr., *Professional Fees Under the Bankruptcy Code: Where Have We Been, and*

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Controllers will have to scrutinize 3840 pages (and hundreds of thousands of lines of time and expense entries) instead. And in the largest cases, there may be “tens of thousands of pages of fee applications.”<sup>55</sup>

Fee control is challenging because Fee Controllers must analyze these thousands of pages very closely. Mere skimming is not likely to be sufficient. To uncover instances of overcharging, Fee Controllers must review these fee applications to look for patterns, double-check the fees and expenses against any relevant local rules or guidelines, cross-check time entries across billers and across professionals, and then follow up with professionals to discuss facially excessive or unreasonable charges.<sup>56</sup> Some of this work could likely be automated, but Fee Controllers do not appear to have the tools at their disposal to do so.<sup>57</sup> In addition, some aspects of fee review may require a Fee Controllers’ informed judgment in order to determine if the fees and expenses that have been requested are appropriate.<sup>58</sup>

Fee control would be a challenging task for a small group of Fee Controllers even assuming every bankruptcy professional was scrupulous in their billing practices.<sup>59</sup> But, as discussed in the next section, evidence suggests that bankruptcy professionals do not always exercise appropriate billing judgment.<sup>60</sup> Instead, some bankruptcy

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*Where Are We Going?*, 29 AM. BANKR. INST. J. 22, 22 (Jan. 2010).

<sup>55</sup> White & Theus Jr., *supra* note 54.

<sup>56</sup> Brief for the Neutral Fee Examiners in Support of Neither Party as Amicus Curiae at 18, *Baker Botts L.L.P. v. ASARCO, L.L.C.*, 135 S. Ct. 2158 (2015) (No. 14-103), <http://www.scotusblog.com/case-files/cases/baker-botts-ll-p-v-asarco-ll-c/> [hereinafter Brief for the Neutral Fee Examiners]; *see also* Lupica & Rapoport, *supra* note 6 (discussing the various methods that fee examiners use for doing this work on behalf of the court and the estate).

<sup>57</sup> Some fee auditors do have specialized software to automate this work, but they are not hired in every case. *See* Lupica & Rapoport, *supra* note 6.

<sup>58</sup> *But see* Bernstein et al., *infra* note 264, at 314 (discussing how a Find-Fix-Verify system can allow non-experts to produce expert-quality answers).

<sup>59</sup> *See, e.g., In re Jefsaba, Inc.*, 172 B.R. 786, 799 (Bankr. E.D. Pa. 1994) (expecting that “unproductive time will be written off”); *In re Wildman*, 72 B.R. 700, 707 (Bankr. N.D. Ill. 1987) (“[B]efore performing any service . . . [professionals must] first scrupulously weigh and assess the necessity and propriety of each task for which he will be seeking compensation.”); *see also* James P. Schratz, *Billing Guidelines and Fee Disputes: A Case Law Review*, 18 TRIAL DIPLOMACY J. 159, 161 (1995), [http://jimschratz.com/Billing\\_Guidelines\\_article.pdf](http://jimschratz.com/Billing_Guidelines_article.pdf).

<sup>60</sup> By “billing judgment,” bankruptcy courts seem to mean that they expect professionals will “writ[e] off unproductive research time, duplicative services, redundant costs precipitated by overstaffing, or other expenses with regard to which the professional generally assumes the cost as overhead in corresponding non-bankruptcy matters, or for which analogous non-bankruptcy clients typically decline to pay.” *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 856 (3d Cir. 1994). *See also In re Jefsaba, Inc.*, 172 B.R. at 799; *Hensley v. Eckerhort*, 461 U.S. 424, 434 (1983) (stating

professionals may occasionally bill the estate inappropriately. Unfortunately, it may be that no one catches this overcharging.

*B. An Overcharged Estate and Sub-Optimal Fee Review*

i. Empirical Evidence Suggests Professional Overcharging  
May Be Pervasive

Chapter 11's fee control system is intended to do two things: (i) prevent professional firms from being paid for more than the cost of their reasonable and necessary services, and (ii) deter bankruptcy professionals from performing services that are unlikely to benefit the estate.<sup>61</sup> To accomplish these goals, Fee Controllers should pay particular attention to two issues. First, Fee Controllers must identify services that were unreasonable or unnecessary to perform. Second, Fee Controllers must identify when necessary services were performed but have been billed at unreasonable rates.<sup>62</sup> If the Fee Controllers can prevent professionals from being compensated for these types of non-compensable services, bankruptcy professionals will be more likely to self-regulate in future cases. Unfortunately, Fee Controllers generally do not prevent either type of overcharging and therefore professionals do not, by their own admissions, adequately self-regulate.

Empirical research suggests that bankruptcy professionals routinely overcharge their clients.<sup>63</sup> To be clear, fraud, abuse, or malfeasance should not be assumed every time a professional's fees or expenses are disallowed.<sup>64</sup> Fees and expenses may be disallowed because of legitimate disagreements between professional firms and Fee Controllers over appropriate staffing models,<sup>65</sup> the appropriate

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lawyers are expected to "make a good faith effort to exclude from a fee request hours that are excessive, redundant or otherwise unnecessary"); Schratz, *supra* note 59.

<sup>61</sup> See MOVING FORWARD, *supra* note 18, at 945 (counsel are expected to note in their fee applications what time has been written off "in order to demonstrate the proper use of billing judgment").

<sup>62</sup> See 11 U.S.C. § 330(a)(4) (2011).

<sup>63</sup> See, e.g., Ross, *supra* note 20, at 15; see also Bogus, *supra* note 18; Fortney, *supra* note 18; Parker & Ruschena, *supra* note 18; cf. LoPucki & Doherty, *Determinants*, *supra* note 50 (focusing on the largest public company bankruptcy cases); LoPucki & Doherty, *Professional Overcharging*, *supra* note 16 (same). But see Lubben, *The Microeconomics of Chapter 11*, *supra* note 3, at 90 (suggesting that staffing patterns at law firms raise potential issues but because those issues appear similar inside and outside of bankruptcy, this article claims that nothing is particularly wrong in bankruptcy).

<sup>64</sup> Parker & Ruschena, *supra* note 18, at 621 (noting that "[e]ven in the absence of fraud, clients run the risk of paying for inefficient lawyering, costs incurred in training junior lawyers, turnover, and aggressive time recording"); see also Schwartz & Creswell, *supra* note 33.

<sup>65</sup> See Lubben, *The Microeconomics of Chapter 11*, *supra* note 3, at 90.

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charges for reasonable and necessary work, or whether work was reasonable or necessary to perform at all. But in surveys of non-bankruptcy attorneys,<sup>66</sup> many lawyers readily admit to personally overcharging their clients, with some admitting outright fraud and others simply admitting to inefficiency.<sup>67</sup> An even larger percentage of those surveyed believe that their fellow attorneys overcharge their own clients even more regularly.<sup>68</sup> For example, one survey found that a majority of lawyers believed that, occasionally or frequently, “lawyers deliberately ‘pad’ their hours to bill clients for work that they do not actually perform.”<sup>69</sup> Almost two-thirds of this survey’s participants (64.5%) admitted specific knowledge of lawyers padding their hours by charging for work they did not perform.<sup>70</sup> Of course, “padding” often seems to be just a euphemism for fraud.

In addition to “padding” their bills, this same survey found that law firm staffing models contributed to bills that would appear higher than appropriate. In this survey, 29% of lawyers agreed that they or other lawyers were regularly billing clients at attorney rates for work that could have been done by secretaries or paralegals.<sup>71</sup> Although this is less egregious than charging for work that was never performed, it is still unlikely to be compensable under § 330.<sup>72</sup> Professor Stephen

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<sup>66</sup> There is no reason to suspect that a survey of bankruptcy attorneys would return different results. The results may also be generalizable to all bankruptcy professionals. Moreover, a lot of work done in bankruptcy cases is not bankruptcy-specific work. As a result, it seems entirely appropriate to extrapolate from surveys of non-bankruptcy lawyers.

<sup>67</sup> Parker & Ruschena, *supra* note 18, at 642 (finding that 23% of survey participants claimed to have actually observed instances of “padding” bills for work never performed); *see also* Ross, *supra* note 20, at 15 (fraudulently inflating hours is “especially common”); *cf.* Lisa Lerman, *A Double Standard for Lawyer Dishonesty: Billing Fraud Versus Misappropriation*, 34 HOFSTRA L. REV. 847, 882 (1999) (calling it “commonplace” when lawyers pad their hours).

<sup>68</sup> Ross, *supra* note 20, at 16; *see also* Parker & Ruschena, *supra* note 18, at 642 (noting that 34% of attorneys surveyed reported concerns about the billing practices of other members of their law firm).

<sup>69</sup> Ross, *supra* note 20, at 93.

<sup>70</sup> *Id.* at 16.

<sup>71</sup> *Id.* at 94 app. A (The results under question 18 show that 29% of work currently performed by lawyers could, to a “moderate” or “substantial” degree, be replaced by work performed by secretaries or paralegals.). Ensuring the appropriate professional does a particular task is also something that Fee Controllers must monitor. *See, e.g., In re Jefsaba, Inc.*, 172 B.R. 786, 796 (Bankr. E.D. Pa. 1994) (stating that court should investigate whether the “appropriate professional or paraprofessional is assigned to the various tasks performed”); *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 593 (3d Cir. 1984) (finding that more than 5000 hours of partner time should have been assigned to associates and refusing to approve the requested fees as a result). *Cf. Lubben, The Microeconomics of Chapter 11*, *supra* note 3, at 34.

<sup>72</sup> Section 330(a)(3)(B) requires bankruptcy courts to consider “the rates charged

Lubben's empirical work also supports the contention that law firm staffing models could be contributing to unnecessarily high legal bills.<sup>73</sup> In his work, Lubben notes that much of the expense in bankruptcy cases is based on the billings of mid-level attorneys, potentially suggesting that firms "lacked sufficient junior attorneys and assigned the work to mid-level associates" instead.<sup>74</sup>

At a minimum, this evidence suggests that some law firms are not overly concerned with limiting their costs and discounting their bills when they fail to do so. But it may also support the more sweeping indictment leveled by some commentators that "many attorneys who bill by the hour have turned to engaging in deceptive billing practices."<sup>75</sup> Particularly because it seems reasonable to suspect that the surveyed professionals were *under-reporting* instances of overcharging.<sup>76</sup>

Additional studies, case law, and anecdotal evidence support the contention that legal professionals sometimes overcharge their clients.<sup>77</sup> For example, Professors LoPucki and Doherty claimed that some professionals in mega-bankruptcy cases may not always exercise appropriate billing judgment, and that professionals' "billing opportunity" could explain much of the apparent professional overcharging they observed in their study.<sup>78</sup> Their argument, which aligns with the views of at least some judges, is that professionals should voluntarily reduce their fees when, for example, the firm engages in unnecessary research.<sup>79</sup> This does not appear to be happening,

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for such services" when determining whether to approve professional compensation requests. This seems to require that firms use the least expensive service provider. 11 U.S.C. § 330(a)(3)(B) (2011).

<sup>73</sup> Lubben, *The Microeconomics of Chapter 11*, *supra* note 3, at 90.

<sup>74</sup> *Id.*

<sup>75</sup> *Hourly Billing for Lawyers' Time: The Legal Profession's "Not So Hidden Shame"?*, LEGAL BILL AUDIT BLOG (June 27, 2014), <http://legalbillaudit.com/hourly-billing-lawyers-time-legal-professions-hidden-shame/>; *see also* AM. BAR ASS'N, ABA COMMISSION ON BILLABLE HOURS REPORT 2001-2002 1, 43 (2002), [http://ilta.personifycloud.com/webfiles/productfiles/914311/FMPG4\\_ABABillableHours2002.pdf](http://ilta.personifycloud.com/webfiles/productfiles/914311/FMPG4_ABABillableHours2002.pdf) (The hourly billing model encourages questionable billing practices, including billing for unnecessary research or even outright padding. "These are not imaginary fears.").

<sup>76</sup> *See* Bogus, *supra* note 18, at 927 n.148 (exploring various reasons—all related to Ross's survey methodology—why his results likely under-reported instances of padding).

<sup>77</sup> *See* Ross, *supra* note 20, at 15 (anecdotal examples of fraud or otherwise inflated bills).

<sup>78</sup> *See* LoPucki & Doherty, *Professional Overcharging*, *supra* note 16. *Cf.* Lubben, *Direct Costs*, *supra* note 3 (finding that big cases cost more, but acknowledging that size could be a proxy for case complexity).

<sup>79</sup> *See, e.g., In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 855-56 (3d Cir. 1994); *see also In re Jefsaba, Inc.*, 172 B.R. 786, 799 (Bankr. E.D. Pa. 1994) (court expects that



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particularly in the largest cases. Instead, professional firms appear to overbill the estate for unnecessary services.<sup>80</sup> In their view, overcharging may be more pronounced in the largest bankruptcy cases because there are more opportunities to perform unnecessary work.<sup>81</sup> In other words, professionals may charge more in large cases simply because there are more opportunities to do work related to a case, even though that additional work is not necessary to perform.<sup>82</sup> Professor LoPucki, however, has noted that the existence of billing opportunities does not necessarily suggest that firms are acting opportunistically, but it does create the possibility for opportunism.<sup>83</sup>

A few notable decisions also exist in which judges have trimmed excessive professional fees while colorfully describing the deplorable behavior of particular bankruptcy professionals.<sup>84</sup> For example, one

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“unproductive time will be written off”).

<sup>80</sup> See LoPucki & Doherty, *Professional Overcharging*, *supra* note 16, at 1012; see also Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 231 (1999) (suggesting that when lawyers are servicing large clients and expect to deliver them large bills, making “small modifications in time sheets or expense vouchers [can] seem insignificant or permissible”).

<sup>81</sup> Compare LoPucki & Doherty, *Professional Overcharging*, *supra* note 16, at 1012 (noting evidence of billing opportunities for professional firms in the largest corporate bankruptcy cases), with Hirsch, *supra* note 14, at 1334 n.39 (citing cases cutting professional fees for duplicating work, performing unreasonable work, or for billing time that was “ill spent”).

<sup>82</sup> See Lerman, *supra* note 80, at 231, 245 (suggesting that a lot of overcharging is not simply a failure of judgment but reflects “shameless, pre-meditated chronic thievery”); see generally Ross, *supra* note 20 (discussing survey results about the “rich opportunities for unscrupulous attorneys to overcharge clients, since the amount of time that needs to be spent on [various tasks] is highly subjective”). But see Lupica & Rapoport, *supra* note 6 (suggesting that the authors operate on the presumption that professionals do not intend to overcharge the estate); Claire Hamner Maturro, *Auditing Attorneys’ Bills: Legal and Ethical Pitfalls of a Growing Trend*, 78 FLA. BAR J., May 1999, at 14 (claiming that “[c]ommentators have noted that the majority of attorneys are ethical in their billing practices”).

<sup>83</sup> Private correspondence with Lynn M. LoPucki, Professor of Law, UCLA Law School (on file with Author).

<sup>84</sup> See, e.g., *Lederman Enters., Inc. v. U.S. Trustee*, 997 F.2d 1321, 1323–24 (10th Cir. 1993); see also *Keate v. Miller*, 95 F.3d 713, 715 (8th Cir. 1996) (denying attorney’s fees for work that counsel should have realized could not benefit the estate); *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 572–73 (3d Cir. 1984) (noting that the bankruptcy court reduced fee applications by approximately 80% because it found that the fee petitions were “grossly excessive on their face” and that attorneys “wasted hours on useless tasks,” duplicated efforts, and masked “outright padding”); *In re Bank of New England Corp.*, 142 B.R. 584, 585–86 (D. Mass. 1992) (reducing fees by 42% despite noting problems with less than 2% of the relevant time entries because “courts should not spend . . . nonexistent Court resources to track down every entry, correlate them against other fee applications, and . . . delete those entries insufficiently substantiated”) (second alternation in original); *Real v. The Continental Grp., Inc.* 653 F. Supp. 736, 741 (N.D. Cal. 1987) (court reduced fees by 40% because of, among

court refused to approve certain professional fee requests because those professionals treated the debtor like a “cash cow to be milked to death.”<sup>85</sup> Other courts have labeled professionals as “hogs” that ought to be slaughtered.<sup>86</sup> While these cases suggest that chapter 11’s fee control system does work occasionally, courts may fail to catch many instances of professional overcharging.<sup>87</sup> But even in those cases where some meaningful review does occur and fees are trimmed, fees are rarely trimmed significantly. In LoPucki and Doherty’s sample, they found that the median fee cut was less than 4%, which seems too small, given the survey results about professional overcharging.

The evidence seems indisputable that some professionals engage in outright fraud; others do not defraud their clients, but nor do they exercise the degree of billing judgment, including writing off unproductive time that the Code, commentators, and courts expect.<sup>88</sup> One instance where lawyers seem particularly likely to overcharge their clients is when they are repurposing work done for a former client for use by a new client.<sup>89</sup> For example, assume that two secured creditors retain a law firm on an hourly basis in a chapter 11 case, and that both clients want to file objections to the debtor’s plan of reorganization. Client A retains the law firm first and pays \$10,000 for the work, based

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other things, “inflated billing”); *In re Patronek*, 121 B.R. 728, 734 (Bankr. E.D. Penn. 1990) (reviewing and disallowing fees because the bill was “clearly inflated” and the work was likely “concluded in a matter of seconds”).

<sup>85</sup> *In re Chas A. Stevens & Co.*, 105 B.R. 866, 871–72 (Bankr. N.D. Ill. 1989); *see also In re Energy Partners, Ltd.*, 409 B.R. 211, 237 (Bankr. S.D. Tex. 2009).

<sup>86</sup> *In re Energy Partners, Ltd.*, 409 B.R. at 237. “The underlying principle is, if you can get it, get it.” Jones, *supra* note 33 (quoting famed bankruptcy lawyer Harvey Miller on billing rates). *See also* McKenzie, *supra* note 3, at 858–59 (discussing criticism of fee awards in bankruptcy cases).

<sup>87</sup> *See* Ross, *supra* note 20, at 28 (“Attorneys currently engage in a number of practices which waste time and therefore unnecessarily inflate client bills.”); Schratz, *supra* note 59, at 159 (“[There] can be little doubt that deceptive attorney billing is a significant problem.”). Professor (and sometimes fee examiner) Nancy Rapoport has suggested that bankruptcy firms will sometimes “send eight people to a hearing because there is an outside chance they might have to speak at that hearing” and if a firm did this for a non-bankruptcy client, that client would “go ballistic.” Schwartz & Creswell, *supra* note 33.

<sup>88</sup> *See id.* *See also* Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 253 (2000) (noting an absence of written guidelines within law firms on billing practices, and suggesting this absence can “lead to questionable billing practices by some associates”).

<sup>89</sup> Parker & Ruschena, *supra* note 18, at 626 (discussing the practice of recycling previously completed work for new clients and the impulse to bill the second client in excess of the hours expended to complete that work); *see also* Fortney, *supra* note 88, at 257 (discussing ABA Formal Ethics Op. 93-379 and its condemnation of recycling work).

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on the firm's hourly rates multiplied by the number of hours expended.<sup>90</sup> If the law firm then “recycles” the work it did for Client A when preparing Client B's objection, it now faces a choice. Should it charge Client B \$10,000 or should it charge Client B only for those hours reasonably expended in modifying Client A's objection to suit Client B's needs? Although it is widely agreed that the former option is likely both unethical and fraudulent,<sup>91</sup> approximately one quarter of surveyed lawyers suggested that it is either ethical to charge Client B a premium or that they would do so notwithstanding the ethical issues presented.<sup>92</sup> If recycling Client A's work product for Client B resulted in time savings, that time savings must be passed along to Client B under an hourly fee arrangement. Fee Controllers are charged with ensuring this happens.

To sum up, empirical evidence suggests that some professionals charge clients for work never performed (i.e., “padding” their bills) or unnecessary work performed (i.e., “milking” client files), or charge higher-than-appropriate rates because they are not using the lowest-cost provider for that work.<sup>93</sup> The next section will explore why chapter 11's fee system cannot be expected to deter or prevent more of this professional overcharging without being overhauled.

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<sup>90</sup> This is known as the “lodestar” method of computing appropriate professional fee requests. *See, e.g.*, *Blum v. Stensen*, 465 U.S. 886, 888 (1984); *Stalaker v. DLC Ltd.*, 376 F.3d 819, 825 (8th Cir. 2004) (“The lodestar method, calculated as the number of hours reasonably expended multiplied by a reasonable hourly rate, is the appropriate calculation of fees [under 11 U.S.C. § 330].”).

<sup>91</sup> And certainly a violation of 11 U.S.C. § 330 (2011). The ABA also condemns the practice. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379 (1993), [http://www.americanbar.org/content/dam/aba/migrated/genpractice/resources/costrecovery/ABA\\_CommEthics\\_Opinion.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/genpractice/resources/costrecovery/ABA_CommEthics_Opinion.authcheckdam.pdf); *see also* Fortney, *supra* note 88, at 257.

<sup>92</sup> Parker & Ruschena, *supra* note 18, at 648–50; Ross, *supra* note 20, at 58. *See also* Fortney, *supra* note 88, at 258–59 (noting the percentage of survey respondents who admitted to double-billing for recycled work varies with firm size).

<sup>93</sup> Not only did 20–25% of surveyed lawyers freely admit to “padding” their bills, but approximately two-thirds suggested that attorneys regularly charge for work completed by persons more senior (and thus more expensive) than was required by the task. In addition an overwhelming majority (64.5%) claimed to “know some” or “know many” lawyers who “pad” their hours to bill clients for work that they do not actually perform.” *See* Ross, *supra* note 20, at 15. *See also* MOVING FORWARD, *supra* note 18, at 943 (noting that whether a matter is one that should be performed by attorneys or by paraprofessionals remains subject to “a great deal of discussion”); Parker & Ruschena, *supra* note 18, at 650.

## ii. Sub-Optimal Fee Review Is the Norm in Chapter 11

The potential for professional overcharging arises because chapter 11's fee control system is not as effective as it ought to be, nor as effective as it could be. An effective fee control system should be able to regularly identify inappropriate professional bills and, where appropriate, reduce the fees and expenses of estate-paid professionals.<sup>94</sup> Yet, chapter 11's fee control system appears to neither sufficiently control nor deter professional overcharging.<sup>95</sup> For example, one study found that approximately 96% of fees requested were approved in forty-three of the forty-eight mega-bankruptcy cases examined.<sup>96</sup> This same study found that the median reduction in fees in Delaware—where many of the largest bankruptcy cases are filed—was less than one percent.<sup>97</sup> To the extent that professional overcharging is a widespread problem, the lack of fee reductions suggests the flawed nature of chapter 11's fee control system.<sup>98</sup> This may help explain why the cost of professional representation in the largest corporate bankruptcy cases has grown at more than five times

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<sup>94</sup> Some scholars have argued that the opposite may be true and that bankruptcy professionals have a greater ability to bill opportunistically and may therefore engage in more, rather than less, inappropriate billing. See LoPucki & Doherty, *Professional Overcharging*, *supra* note 16. In large law firms, attorneys are generally expected to bill their clients for more than 2000 hours a year and, in the face of such expectations, "there are bound to be temptations to exaggerate the hours actually put in." William H. Rehnquist, C.J., *Dedicatory Address: The Legal Profession*, 62 IND. L.J. 151, 155 (1987); see also Bogus, *supra* note 18, at 925 (describing lawyers reported annual billings as "quite literally, incredible"). See generally AM. BAR ASS'N, *supra* note 75; Fortney, *supra* note 18; Parker & Ruschena, *supra* note 18; Milton C. Regan, *Corporate Norms and Contemporary Law Firm Practice*, 70 GEO. WASH. L. REV. 931 (2002).

<sup>95</sup> LoPucki & Doherty, *Professional Overcharging*, *supra* note 16 (suggesting that chapter 11's fee control system does not successfully control the cost of professional services).

<sup>96</sup> It is possible that a less-than 4% reduction (or 1% in Delaware) adequately captures all of the unreasonable or excessive bills that the survey data alludes to. See LoPucki & Doherty, *Determinants*, *supra* note 50, at 114, 135. This hypothesis, however, seems unlikely. Rather, it seems more likely that our current fee control system is failing to identify instances of professional overcharging and therefore failing to adequately control it by cutting fee requests. See *supra* text accompanying notes 66–75.

<sup>97</sup> See LoPucki & Doherty, *Determinants*, *supra* note 50, at 114, 135.

<sup>98</sup> The promulgation of new fee review guidelines by the U.S. Trustees' office supports the view that the fee control system has been broken. See generally *Fee Guidelines*, U.S. DEPT. OF JUSTICE, <http://www.justice.gov/ust/fee-guidelines> (last visited Nov. 29, 2015); see also Schwartz & Creswell, *supra* note 33 ("There's clearly pressure on people to create more revenue," says Robert White, a former bankruptcy partner at O'Melveny & Myers who retired in 2006 after practicing for 35 years.); Rapoport, *Value Billing*, *supra* note 21, at 128; White & Theus Jr., *supra* note 54. But see Hirsch, *supra* note 14, at 1334 (claiming that "bankruptcy courts routinely slash requested fees").

the rate of inflation in recent years.<sup>99</sup>

To fix chapter 11's fee control system, one must understand why Fee Controllers do not adequately control professional overcharging. Outside of bankruptcy, clients are expected to take the laboring oar in controlling the cost of their professional assistants and ensuring the appropriateness of any fees charged. For example, before hiring a law firm, the client may host a so-called "beauty contest" where it can try to ensure that it is hiring a professional firm with the right expertise to address its needs and negotiate billing rates.<sup>100</sup> After a bill for professional services arrives, clients outside of bankruptcy will often scrutinize that bill carefully, sometimes with the help of a fee auditor, and may question potentially inappropriate or especially large entries.<sup>101</sup> Outside of bankruptcy, if the client does not control these costs, no court or other third party is likely to interfere with its decision to overpay for professional services.<sup>102</sup>

In bankruptcy cases, clients evidence less concern with professional fees than their non-bankruptcy counterparts.<sup>103</sup> They appear less careful in their initial hiring decisions, and less aggressive when negotiating for discounts or scrutinizing the bills of their professionals and pushing back against large or questionable charges. A variety of reasons for these differences have been advanced,<sup>104</sup>

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<sup>99</sup> LoPucki & Doherty, *Professional Overcharging*, *supra* note 16. Of course, some portion of this increase may relate to an increase in legitimate work. Cases are—undoubtedly—larger and more complex than ever before.

<sup>100</sup> "The law firm beauty contest is an orchestrated interviewing process. The company is the buyer. The law firm is the seller. The process allows each to take the measure of the other before becoming engaged." Wendeen H. Eolis, *Beauty Pageants*, EOLIS, <http://eolis.com/content/beauty-pageants> (last visited Nov. 22, 2015); *see also* Lerman, *supra* note 80, at 222 ("Corporate clients that once each had a deep and stable relationship with a single firm now solicit bids from law firms for various chunks of legal work.").

<sup>101</sup> *See, e.g.*, Rapoport, *Value Billing*, *supra* note 21, at 130–31.

<sup>102</sup> *See* Baker, *supra* note 17 (suggesting that if the person paying the bill doesn't care, no one else should either); *see also* Schratz, *supra* note 59, at 164 (citing *In re Associated Grocers of Colorado, Inc.*, 137 B.R. 413 (Bankr. D. Colo. 1990)); *cf.* Third Cir. Task Force, *supra* note 17 (stating that the court has a role in fee control because there is "a significant conflict of interest between client and attorney" once the work is done and the attorney seeks money that would otherwise inure to the estate or to the creditors).

<sup>103</sup> *But see* Lubben, *The Microeconomics of Chapter 11*, *supra* note 3 (suggesting that the cost of bankruptcy transactions compared well to the cost of comparable non-bankruptcy transactions).

<sup>104</sup> *See In re Ginji Corp.*, 117 B.R. 983, 988 (Bankr. D. Nev. 1990); *see also In re Saturley*, 131 B.R. 509, 516 (Bankr. D. Me. 1991) (suggesting that excessive fees result from "foreknowledge that the assets so expended will be surrendered in any event, by the debtor's unwillingness to 'strain his relationship with his life-rope, his attorney,' and by the timidity of other counsel who, although adverse, may expect payment from

including agency issues—clients tend to spend someone else’s money<sup>105</sup>—and the client’s fear of alienating its professional advisors.<sup>106</sup> There are also time pressures inherent in many bankruptcy cases that are not present outside of bankruptcy.<sup>107</sup> Another reason, not often discussed, is that even generally sophisticated clients may not be sophisticated consumers of professional corporate bankruptcy services.<sup>108</sup> This may be a particular problem with debtors, who represent the single largest consumer of professional representation in chapter 11 cases.<sup>109</sup> Although some companies file for bankruptcy under chapters 22 or 33, most companies will never spend time in bankruptcy, and those that do will usually make only one trip through the system.<sup>110</sup> Without a substantial prospect of repeat business, professionals may lack a sufficient incentive for professionals to write off unproductive time. Whatever the reason(s), bankruptcy clients appear unwilling to meaningfully contribute to the success of chapter 11’s fee control system relative to their non-bankruptcy peers.<sup>111</sup>

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the estate, as well”) (citation omitted); Rapoport, *Value Billing*, *supra* note 21, at 131.

<sup>105</sup> See Baker, *supra* note 17; see also LoPUCKI & DOHERTY, PROFESSIONAL FEES, *supra* note 41, at xv (suggesting that corporate bankruptcy cases tend to cost far more than expected).

<sup>106</sup> Rapoport, *Value Billing*, *supra* note 21, at 131.

<sup>107</sup> See Matthew A. Bruckner, *Improving Bankruptcy Sales by Raising the Bar: Imposing a Preliminary Injunction Standard for Objections to Section 363 Sales*, 62 CATH. U. L. REV. 1 (2012) (discussing the frequent assertion by debtors that bankruptcy sales must be hastily approved or their assets will melt away like an ice cube); Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862 (2014) (same); see also STEIN, *supra* note 45, at 45 (noting that many CEOs are in a hurry to hire bankruptcy professionals and have neither the time nor the capacity to determine whether potential hires are a good match).

<sup>108</sup> See STEIN, *supra* note 45, at 44 (comparing the CEO of a troubled company to a newborn baby when it comes to bankruptcy matters).

<sup>109</sup> See LoPucki & Doherty, *supra* note 27 (finding that approximately 80% of professional fees are incurred “for representation of, or advice to, the debtor-in-possession”); see also Rapoport, *Value Billing*, *supra* note 21, at 139–40.

<sup>110</sup> Chapter 22 is the colloquial phrase sometimes used when a company files for chapter 11 bankruptcy for the second time. See *What is Chapter 22 Bankruptcy? Do Any Prominent Examples Come to Mind?*, BERNSTEIN-BUCKLEY, P.C., <http://bernsteinlaw.com/faq-list/chapter-22-bankruptcy-creditors-rights-questions-and-answers/> (last visited Nov. 22, 2015). Similarly, Chapter 33 is the phrase for the far less common occurrence of a company taking a third trip into chapter 11 bankruptcy. See Scott Fearon, *Dex Media: A Rare ‘Chapter 33’ Bankruptcy in the Making*, SEEKING ALPHA (Sept. 26, 2013, 7:30 AM), <http://seekingalpha.com/article/1714422-dex-media-a-rare-chapter-33-bankruptcy-in-the-making>.

<sup>111</sup> Clients who feel ill-equipped to decide which professionals will do the best job for their company may feel compelled to hire the most expensive professional representatives that they can because they may view price as a proxy for competence. See, e.g., STEIN, *supra* note 45, at 48 (The author, a former CEO, complains in this book that the only bankruptcy counsel his company could afford was “a half-price lawyer.”).

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Given the numerous potential problems with a client-centered fee control system in bankruptcy, Congress unsurprisingly imposed an external check on fees awarded to bankruptcy professionals in chapter 11 cases.<sup>112</sup> Congress' external check required that Fee Controllers review both retention and fee applications.<sup>113</sup> But its solution has not proved to be effective, and fee control obligations seem to overwhelm even the most diligent Fee Controllers.<sup>114</sup> It could hardly be otherwise, considering that in a single mega-bankruptcy case Fee Controllers are expected to review a "massive" volume of fee applications, which "if stacked in one pile, would amount to a pillar of paper 27 feet high."<sup>115</sup> But professionals will almost surely be overpaid if Fee Controllers decide not to put on their green eyeshades and audit every fee application because Fee Controllers are the last line of defense in chapter 11's fee control process.<sup>116</sup> Nevertheless, professional overcharging may remain inevitable under the system's current design because it is not clear that Fee Controllers have the necessary resources to deter or prevent most professional overcharging even if they make a good faith effort.<sup>117</sup> Therefore, it is appropriate to consider how to redesign the fee control system.

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<sup>112</sup> See LOPUCKI & DOHERTY, PROFESSIONAL FEES, *supra* note 41, at 132; see also Hirsch, *supra* note 14, at 1327 n.4 (stating that bankruptcy courts have "an affirmative duty to make an independent evaluation of reasonableness of all professional fees") (citing *In re Bilgutay*, 108 B.R. 333, 336 n.2 (Bankr. M.D. Fla. 1989)).

<sup>113</sup> Judges are charged with second guessing the debtors-in-possession because debtors-in-possession are not "real fiduciaries." LOPUCKI & DOHERTY, PROFESSIONAL FEES, *supra* note 41, at 132 (judges have been seen as necessary to prevent abuse because there "may be little incentive for parties in interest, and especially for the debtor, to monitor and object to excessive fee requests"); see also Baker, *supra* note 17, at 59 ("Because of the lack of stakeholder participation, the system has adopted administrative controls— independent review by bankruptcy courts or review by the U.S. Trustee—to fill the gap."); Hirsch, *supra* note 14, at 1330 n.17 ("[T]he Code's compensation scheme clearly envisions a large degree of court involvement in the employment and compensation of bankruptcy professionals . . .").

<sup>114</sup> But see Lubben, *The Microeconomics of Chapter 11*, *supra* note 3 (arguing that if "the direct costs of chapter 11 are in line with other large corporate transactions . . . general improvements in the market for professional services, rather than any bankruptcy-specific innovation" is the appropriate way to reduce chapter 11 costs).

<sup>115</sup> *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 601 n.1 (3d Cir. 1984) (Becker, J., concurring).

<sup>116</sup> *Green Eyeshade*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Green\\_eyeshade](http://en.wikipedia.org/wiki/Green_eyeshade) (last visited Nov. 22, 2015).

<sup>117</sup> Evidence suggests that they have not been terribly effective so far. See LoPucki & Doherty, *Determinants*, *supra* note 50, at 114, 135 (finding that the average fee cut was less than 4% in forty-three of the forty-eight cases in authors' database).

iii. Fee Controllers Cannot Effectively Control Professional Overcharging Without Additional Assistance

Having Fee Controllers act as surrogates for the estate supposedly ensures that bankruptcy professionals do not overcharge their clients and deprive the estate of assets. Although Fee Controllers are generally more willing than clients to control professional overcharging in chapter 11 cases, they too are generally ineffective.<sup>118</sup> Excluding potential deterrent effects, which LoPucki and Doherty's work suggests are illusory (at least in the largest cases), chapter 11's fee control system reduces fees by very little, and costs more to operate than it saves.<sup>119</sup> Some bankruptcy scholars have proposed scrapping chapter 11's entire fee control system and redesigning it from the bottom up.<sup>120</sup> With appropriate crowdsourcing enhancements, however, that ought to be unnecessary.

1. *Effective Fee Reviews Require Three Things Fee Controllers Struggle With*

Evidence suggests that professional fees are too high, in part, because the statutorily mandated fee reviews in chapter 11 cases are ineffective.<sup>121</sup> An effective fee review requires that Fee Controllers do at least three things well. First, they must know every estate-paid professional.<sup>122</sup> Second, Fee Controllers must be familiar with all of the work produced in a case and paid for by the estate.<sup>123</sup> Finally, Fee

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<sup>118</sup> See *supra* notes 94–98.

<sup>119</sup> See LOPUCKI & DOHERTY, PROFESSIONAL FEES, *supra* note 41, at 165 (claiming that our current fee control system costs approximately four times as much as it saves); see also WARNER & SHAPIRO, *supra* note 41, at 1 (“Few areas of bankruptcy practice are more publicly controversial or less consistently administered than the determination of reasonable compensation for the trustees and professionals who are essential to an efficient and well-managed bankruptcy process.”).

<sup>120</sup> See, e.g., LOPUCKI & DOHERTY, PROFESSIONAL FEES, *supra* note 41, at 165. But see Hon. Roger M. Whelan et al., *Professional Compensation Reform: New Ideas or Old Failings?*, 1 AM. BANKR. INST. L. REV. 407, 407 (1993) (“[J]ust as one does not cut down the tree because a few apples have worms, the entire bankruptcy compensation scheme devised by Congress does not need to be scrapped to cure the excesses of what is only a minority of cavalier and greedy players in a few well-heralded cases.”).

<sup>121</sup> See *supra* notes 94–98.

<sup>122</sup> Although how well Fee Controllers must know the professionals in order to make the appropriate determinations is not clear, it seems that the bar is set fairly high by § 330. It seems that Fee Controllers must know the professionals either through personal interactions or by otherwise acquiring sufficient information about these professionals to make the appropriate determinations.

<sup>123</sup> As matters currently stand, it is not economical for Fee Controllers to review every piece of written work produced in a case. In the interests of cost efficiency and the need for triage, some Fee Controllers are presumably left only reviewing the largest charges. See Lupica & Rapoport, *supra* note 6 (noting the likely tendency of fee



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Controllers must compare the work produced to the charges incurred for its production. But, as described immediately below, Fee Controllers struggle with each task and would benefit from crowdsourcing some aspects of the process. As a result, they do not perform effective fee reviews, and professional overcharging goes largely unchecked.

a. Know the Professionals

The first requirement for an effective fee review is to know the estate-paid professionals well enough to make the § 330 determinations.<sup>124</sup> Section 330 appears to require that Fee Controllers be intimately familiar with the professionals in the particular case at bar and with “comparably skilled practitioners.” But there are often dozens (and there can be hundreds or even thousands) of estate-paid professionals involved in any given case.<sup>125</sup> Thus, Fee Controllers may not possess sufficient familiarity with many bankruptcy professionals, particularly the newer ones, to make these determinations.<sup>126</sup> This is true despite the presence of some repeat players.<sup>127</sup> Fee Controllers need to obtain better information from outside sources, and could probably also use help reviewing the information received—particularly in the largest cases.

Section 330 requires that Fee Controllers know the estate-paid professionals well enough to make a series of informed decisions about their competence, skill, and experience, but it provides few tools for obtaining this information. Existing information-acquisition methods appear limited to two options: (i) Fee Controllers’ first-hand knowledge of that professional and (ii) disclosure obligations imposed on the professionals. Both of these methods seem insufficient for

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examiners to review only big ticket work items).

<sup>124</sup> See *supra* text accompanying note 35.

<sup>125</sup> See Brief for the Neutral Fee Examiners, *supra* note 56 (noting that approximately 5300 timekeepers sought compensation in the Lehman Brothers’ cases and 2200 timekeepers sought compensation in the American Airlines’ cases).

<sup>126</sup> In many firms, mid-level professionals take the laboring oar on many tasks in a bankruptcy case. See Lubben, *The Microeconomics of Chapter 11*, *supra* note 3, at 89–90. These mid-level professionals are unlikely to have encountered Fee Controllers often enough for Fee Controllers to have a personal impression of them. Although Fee Controllers can request additional information about these professionals, it is unclear that is sufficient. Cf. Third Cir. Task Force, *supra* note 17, at 262 (Judges may find that it is “difficult, indeed, in most instances, impossible, to police these matters by looking over the shoulders of lawyers to monitor the way they handle their cases. To impose that obligation on the Bench is unrealistic, unduly time-consuming and typically will amount to little more than an exercise in hindsight.”).

<sup>127</sup> See Lubben, *Direct Costs*, *supra* note 3, at 531 (contesting the claim that there are as many repeat players as is commonly thought).

obtaining the type of information necessary to prevent professional overcharging, particularly in large bankruptcy cases where thousands of professionals will seek compensation from the estate.

Whether a bankruptcy case involves a dozen estate-paid professionals or thousands, the very structure of chapter 11 cases makes it difficult for Fee Controllers to personally know each professional well enough to make the requisite § 330 determinations. It is the nature of chapter 11 cases that negotiations often occur between different parties-in-interest concurrently and that some estate-paid professionals are actively engaged while others are much more passive. Fee Controllers do not know the estate-paid professionals personally because many firms send only a small cadre of professionals to court, which is where most Fee Controllers would interact with and get to know the relevant professionals.<sup>128</sup> Instead, most firms' professionals will labor totally in the background (at least to the eyes of Fee Controllers). As a result, Fee Controllers lack sufficient personal familiarity with some (potentially large) portion of the estate-paid professionals, making an effective fee review difficult if the professionals' disclosures are not sufficient.<sup>129</sup>

Fee Controllers are expected not only to know the bankruptcy professionals in the case at bar, but also to obtain information about "comparably skilled practitioners."<sup>130</sup> Given that Fee Controllers lack sufficient personal contact with the bankruptcy professionals who appear in bankruptcy matters, it is surely true that Fee Controllers will have even less information about comparably skilled non-bankruptcy professionals. Obviously, some non-bankruptcy professionals appear in bankruptcy cases from time to time, but this does not seem to be a robust source of information about the market rates for non-bankruptcy professional services. In short, as bankruptcy professionals themselves, Fee Controllers' first-hand knowledge of non-bankruptcy fees is necessarily limited.

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<sup>128</sup> Until professionals are sufficiently senior to appear in court, it is unclear where many Fee Controllers would become personally acquainted with those professionals. To the extent that firms continue to employ an "up or out" model, this suggests that most professionals working on a case will be virtually unknown to Fee Controllers. *See Up or Out*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Up\\_or\\_out](http://en.wikipedia.org/wiki/Up_or_out) (last visited Oct. 24, 2015).

<sup>129</sup> To the extent Fee Controllers believe they know professionals involved in a case, it is likely because that professional has appeared in a prior bankruptcy case. Since Fee Controllers know the professionals who are repeat players, this means that they know the older and more experienced bankruptcy professionals. Thus, they may know the more skilled professionals, which can skew their perceptions of the aggregate body of all professionals toward a more favorable perception.

<sup>130</sup> 11 U.S.C. § 330(a)(3)(F) (2011).

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Even though Fee Controllers lack sufficient first-hand information about both bankruptcy professionals and their comparably skilled non-bankruptcy brethren, Fee Controllers have an alternative method for obtaining this information. Bankruptcy professionals are required to file fee applications that, among other things, must “contain sufficient information about the case and the applicant so that the court, the creditors, and the United States Trustee can review it without searching for relevant information in other documents.”<sup>131</sup> In addition, the United States Trustees’ Office recently promulgated new Fee Guidelines covering professional disclosures in mega-bankruptcy cases.<sup>132</sup> Among other things, bankruptcy professionals in mega-bankruptcy cases now have comparable compensation disclosure obligations. Unfortunately, these Guidelines are both too new to have a sufficient track record to judge their efficacy, and apply in only a limited subset of bankruptcy cases.<sup>133</sup> As a result, legitimate concerns remain about where Fee Controllers will obtain the necessary information to make the § 330 determinations they are required to make.<sup>134</sup>

Although the mandatory disclosures are better than nothing, these disclosures also suffer from limitations. First, the disclosures related to each professional’s skill and bankruptcy experience tend to be very limited. For example, in Weil, Gotshal & Manges LLP’s fee applications in the Lehman Brothers cases, the law firm<sup>135</sup> disclosed only the year each associate was admitted to the bar and their practice group at the firm.<sup>136</sup> Although professionals attest that, where possible,

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<sup>131</sup> 28 C.F.R. § 58, app. A(a) (2010); see Rapoport, *Value Billing*, *supra* note 21, at 126.

<sup>132</sup> Fee Guidelines, *supra* note 19. The new Fee Guidelines have some requirements that only apply to cases of a certain size.

<sup>133</sup> See, e.g., Comment Letter from the N.Y.C. Bar Comm. on Bankr. & Corp. Reorg. to the Exec. Office for U.S. Trustees at 4–5 (Jan. 27, 2012), <http://www2.nycbar.org/pdf/report/uploads/20072236-CommentLetterontheProposedUSTrusteeGuidelinesforReviewingCompensationReimbursementGuidelines.pdf> (suggesting that the threshold for mega-bankruptcy cases should be increased so that even fewer cases are covered by the Fee Guidelines); cf. Fennell, *supra* note 11, at 408.

<sup>134</sup> The Guidelines do represent a clear step forward and the United States Trustees’ office should be commended for its effort.

<sup>135</sup> This Article highlights Weil’s fee application because they are one of the most prominent and successful bankruptcy firms, not to suggest that they are—in any way—acting less appropriately than other firms. By contrast, in Author’s personal interactions, they have always acted appropriately. See, e.g., MOVING FORWARD, *supra* note 18, at 935 (noting that when Weil served as debtors’ lead counsel, fees were not higher than when Skadden Arps served as lead counsel).

<sup>136</sup> This is the standard practice. All professional fee applications are available through the Electronic Case Filing system, but are also available at

they use skilled junior associates and paralegals, these limited disclosures are insufficient to allow Fee Controllers to determine the validity of these attestations. Similarly, determining whether a professional spent a reasonable amount of time on a particular task requires much more specific information about that particular professional's skill and experience. Rough proxies, such as class year, are not sufficient to make these determinations accurately in most instances.

Of course, if more substantial disclosures were made—particularly in the largest bankruptcy cases—Fee Controllers would need assistance in making good use of that information.<sup>137</sup> Under the current system, Fee Controllers appear overwhelmed by the quantity of information they must review in the largest cases. Strengthening chapter 11's fee control system, therefore, requires both better information and the ability to make efficient use of that information. As discussed below, crowdsourcing is well situated to strengthen chapter 11's fee control system in precisely these two ways.<sup>138</sup>

b. Know the Professionals' Work

The second requirement for an effective fee review is for Fee Controllers to be intimately familiar with all of the services provided and work product produced for the case and billed to the estate. The Code requires Fee Controllers to evaluate whether the professional services rendered are “reasonably likely to benefit the estate” and “necessary to the administration of the case.”<sup>139</sup> In making these determinations, Fee Controllers must also determine “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.”<sup>140</sup> If these criteria are not met, then Fee Controllers may not authorize the estate to pay the professionals. Here, Fee Controllers are likely to have sufficient information but may not have the ability to efficiently sort through that information to make the necessary determinations. This is particularly true in the largest chapter 11 cases.

Suggesting the inability of Fee Controllers to do this job efficiently is not meant to critique hard-working bankruptcy judges and Assistant United States Trustees. Instead, this observation is meant to critique a

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<http://dm.epiq11.com/LBH/Project#>.

<sup>137</sup> See *infra* Part III.A.ii.

<sup>138</sup> See *infra* Part III.A.i.

<sup>139</sup> 11 U.S.C. § 330(a)(4)(A) (2011).

<sup>140</sup> § 330(a)(3)(D).

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system that imposes exceedingly difficult obligations on Fee Controllers. It is difficult to imagine how one or two people (e.g., a bankruptcy judge and an Assistant United States Trustee) can efficiently review all of the professional services provided in a large bankruptcy case.<sup>141</sup> As a result, many Fee Controllers likely rely on their (considerable) experience with chapter 11 cases to determine—in a general way—what is appropriate in an average case, and then extrapolate from that experience to a particular case. But § 330 appears to require more particularized determinations of reasonableness.

Fee Controllers must rely on disclosures made by estate-paid professionals in their fee applications to understand what services were provided in a particular case.<sup>142</sup> Unlike the disclosures related to the skill and experience of the estate-paid professionals, these disclosures are very robust. For example, in Weil, Gotshal & Manges LLP's tenth interim fee application in the Lehman Brothers cases, the firm provided approximately twenty pages describing, in narrative form, all of the work it provided to the estate and thereby sought to justify the almost forty-one million dollars in compensation it requested.<sup>143</sup> In addition to the interim fee applications, firms often file a monthly fee application listing all of the work performed by each professional in increments of time as small as six minutes.<sup>144</sup> If Fee Controllers were

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<sup>141</sup> Or even in a host of small cases and even with the help of the judges' law clerks.

<sup>142</sup> Fee Controllers are not personally familiar with all of the services provided to parties-in-interest and billed to the estate because most of the activity in large chapter 11 cases happens outside of court, particularly for the non-legal professionals. In the largest chapter 11 cases, estate-paid professionals will request hundreds of millions of dollars in compensation for work that takes place outside the watchful gaze of Fee Controllers. But even in smaller cases, a large percentage of work will not occur in court. Therefore, while the dollar figures will be smaller, it will remain difficult for Fee Controllers to be personally familiar with all of the work that the estate is being asked to pay for.

Because most professional compensation is earned for out-of-court work, it is inherently difficult for Fee Controllers to know if every person present at every meeting performed services "reasonably likely to benefit the estate" or "necessary to the administration of the case." § 330(a)(4)(A); *see also In re Fleming Cos.*, 304 B.R. 85, 91 (Bankr. D. Del. 2003) (requiring "all professionals attending a hearing to have a role. [Therefore,] [i]f two or more professionals are billing time, they each should make a contribution.") (quoting *In re Jefsaba*, 172 B.R. 786, 809–10 (Bankr. E.D. Pa. 1994)); Schratz, *supra* note 59, at 169 (collecting cases where courts cut fees across-the-board even though all attorneys were prepared for and participated in hearings because those courts found that the professionals had duplicated efforts).

<sup>143</sup> Once again, Weil is highlighted because it is one of the most prominent bankruptcy firms and not to reproach it.

<sup>144</sup> *See, e.g., Procedures for Monthly Compensation and Reimbursement of Expenses*, U.S. BANKR. CT. S.D.N.Y. (Apr. 11, 2013), <http://www.nysb.uscourts.gov/sites/default/files/2016-1-c-procedures.pdf>.

able to closely review these enormously detailed fee disclosures, they could gain a more complete understanding of all the work performed in the case. But, particularly in the largest cases, the volume of these disclosures must often be overwhelming.<sup>145</sup> As a result, Fee Controllers may often lack the ability to review every time and expense entry and to confirm that each professional's billing records align with those of other professionals.

In order to make efficient use of the information being disclosed by the professionals, Fee Controllers need additional assistance to both identify work that was potentially unnecessary, duplicative, or wasteful, and to review that work product to aid in finally determining whether the work is compensable. As explained below, crowdsourcing can provide this assistance.<sup>146</sup>

c. Compare the Professionals' Work to the Charges for That Work

The third aspect of an effective fee review requires that Fee Controllers compare the work product produced or services rendered to the charges billed for those services.<sup>147</sup> This is time-consuming work, because it may require a close reading of the work product and the astute mind of a professional reviewer to determine if the work product was appropriate to draft and, if appropriate, to determine if the work product was produced efficiently.<sup>148</sup> In addition, bankruptcy judges can only approve the requested compensation if they have considered the time spent as compared to the "complexity, importance, and nature of the problem, issue, or task addressed."<sup>149</sup> Although many Fee Controllers are very experienced with reviewing fee applications and making these determinations, the sheer volume of fee applications in a large chapter 11 case makes this an onerous (if not impossible) task.<sup>150</sup> And when coupled with the issues noted above—not knowing the professionals' billing time to the estate and not having a chance to review much of the work product—fee review becomes exceedingly difficult to do well under the current system.

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<sup>145</sup> See *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 601 n.1 (3d Cir. 1984) (Becker, J., concurring).

<sup>146</sup> See *infra* Part III.

<sup>147</sup> See Harold Lavien, *Fees as Seen from the Bankruptcy Bench*, 89 COM. L.J. 136, 136 (1984).

<sup>148</sup> Although innovative solutions, including the use of specialized computer software, could alleviate the burden on Fee Controllers to do this work, this work continues to—generally—be done by Fee Controllers and by hand.

<sup>149</sup> See 11 U.S.C. § 330(a)(3)(D) (2011); see also *supra* Part II.A.

<sup>150</sup> See *supra* notes 94–98.

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In sum, Fee Controllers must review the professional fees charged to the estate in every chapter 11 case to ensure that estate-paid professionals are not benefitting at creditors' expense.<sup>151</sup> Yet Fee Controllers are not properly equipped (and are sometimes unwilling)<sup>152</sup> to adequately complete an effective fee review without additional assistance.

2. *This Difficult Task Engenders Seemingly Inaccurate Assumptions*

Given the “grinding” nature of an effective fee audit, Fee Controllers may understandably be disinclined to thoroughly review every fee application filed, even in small and medium-sized chapter 11 cases.<sup>153</sup> In fact, some courts have acknowledged that they examine only a subset of fee and expense entries, and then extrapolate from that sample. For example, in *In re Maruko, Inc.*, the bankruptcy court sampled a discrete number of time entries and then ordered a 30% across-the-board reduction because it determined that the professional had billed the estate for some unnecessary or unreasonable work in the sampled time entries.<sup>154</sup> The court merely sampled the fee applications instead of doing a full review of every time and expense entry because a full review would have been too onerous.<sup>155</sup> While this approach has much to offer (under the demands of the current fee control system), it appears at odds with congressional demands, particularly if courts are not well-versed in statistical sampling methods.

Other courts appear disinclined to perform a fee audit, assuming that their oversight role is either unnecessary or a waste of time. As a result, some courts assume that (i) bankruptcy professionals exercise

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<sup>151</sup> See, e.g., *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833 (3d Cir. 1994).

<sup>152</sup> Although some judges have very publicly acknowledged their disdain for fee control, this Article presumes that most Fee Controller wish to do the best job possible. *Id.* at 845 n.12 (“[I]t [does] not befit[] the stature of a federal bankruptcy judge to spend *wasteful* hours poring over fee applications . . . .”) (emphasis added); cf. Christine Simmons, *Fee Auditors Rare in Bankruptcies: In Four Years of Examining, Only One Auditor Turns Up*, MO. LAW. WKLY. (Mar. 14, 2011), [www.legalcost.com/press/press\\_55.pdf](http://www.legalcost.com/press/press_55.pdf) (stating that “auditing a fee application is a grind”).

<sup>153</sup> Simmons, *supra* note 152.

<sup>154</sup> *In re Maruko, Inc.* 160 B.R. 633, 641 (Bankr. S.D. Cal. 1993).

<sup>155</sup> *Id.*; see also *In re Bank of New England Corp.*, 142 B.R. 584, 586 (D. Mass. 1992) (“[C]ourts should not spend [] nonexistent Court resources to track down every entry, correlate them against other fee applications, and . . . delete those entries insufficiently substantiated . . . .”) (all except the first alteration in original) (citations omitted).

billing judgment,<sup>156</sup> (ii) the market for chapter 11 professional services will discipline overcharging professionals,<sup>157</sup> and (iii) that “[i]t is almost impossible to ‘second guess’ the proper amount of time that counsel should have spent on a particular matter.”<sup>158</sup> By making these assumptions, Fee Controllers may feel justified in declining to don their green eyeshades and dig through towering stacks of fee applications. All three of these assumptions, however, appear incorrect, and none appear to justify a court’s failure to take seriously its fee review obligations.

Not only do the aforementioned assumptions fail to justify abdicating judicial responsibility for fee control, but they also seem to be at odds with modern chapter 11 billing practices.<sup>159</sup> The assumption regarding billing judgment has been thoroughly discussed above and those arguments will not be retread here.<sup>160</sup> Instead, this Article begins with the second assumption—that professional compensation in chapter 11 is market-driven. This assumption also appears to be erroneous. Professional services providers in bankruptcy cases are not subject to the same market pressures as firms outside of bankruptcy.<sup>161</sup> Once the bankruptcy court approves a professional firm’s retention, there are incentives to charge the estate as much as possible. As such, professional firms may treat their fee applications as the opening bid in a negotiation, a bid that Fee Controllers can disapprove.<sup>162</sup> Without price pressure from clients, objections from other parties-in-interest, or a close examination by Fee Controllers, professional service providers are simply not constrained by a functioning market or anything approximating one.<sup>163</sup> As a result, it should be no surprise

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<sup>156</sup> See *In re Jefsaba, Inc.*, 172 B.R. 786, 798 (Bankr. E.D. Pa. 1994) (court expects that “unproductive time will be written off”); see also Schratz, *supra* note 59.

<sup>157</sup> See, e.g., *In re Jefsaba, Inc.*, 172 B.R. at 797 (citing *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833 (3d Cir. 1994)); *In re Patronek*, 121 B.R. 728, 731 (Bankr. E.D. Pa. 1990).

<sup>158</sup> *In re Consol. Bancshares, Inc.*, 49 B.R. 467, 472 (Bankr. N.D. Tex. 1985) (commenting on the difficulty in proving “that an issue was illusory, irrelevant or frivolous or that too many facts and transcript references had been marshaled”).

<sup>159</sup> See generally Fortney, *supra* note 88.

<sup>160</sup> See *supra* text accompanying note 78; see also Fortney, *supra* note 88.

<sup>161</sup> See *supra* text accompanying notes 104–11.

<sup>162</sup> Hirsch, *supra* note 14, at 1348 (describing why professionals may “hedge” their fee requests when they know they “may be subject to disallowance or discounting by the court upon review”); see also MOVING FORWARD, *supra* note 18, at 936 (reporting on “the apparent lack of impact which the appointment of a fee examiner has on professional fees in chapter 11 cases”).

<sup>163</sup> See David Orozco, *Democratizing the Law: Legal Crowdsourcing (‘Lawsourcing’) as a Means to Achieve Legal, Regulatory, and Policy Objectives*, 53 AM. BUS. L.J. (forthcoming 2016) (manuscript available at <http://ssrn.com/abstract=2520515>) (stating that a



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when chapter 11's fee control system fails to rein in unreasonably high fees.

Clients may also be complicit in this overcharging. As noted above,<sup>164</sup> courts review professional fees because clients do not.<sup>165</sup> After all, most or all of that cost is likely to be borne by someone else.<sup>166</sup> Thus, when the bankruptcy court in *In re Patronek*, suggested that "the proper measure of what fee is reasonable in any context is ascertainment of what an informed client and an informed attorney would agree should be paid for certain services," it missed the mark.<sup>167</sup> Using informed clients as a benchmark is difficult because informed clients may be willing to pay almost anything for the best possible representation and their professionals are likely willing to bill the estate for any services that might be remotely useful for their client, if they think the estate will reimburse them.<sup>168</sup> With no party able to create effective price pressure on professional firms, the cost of professional representation in bankruptcy cases has unsurprisingly risen at five times the rate of inflation recently.<sup>169</sup>

The third assumption Fee Controllers make is that second-guessing a bankruptcy professional's billing judgment is impossible.<sup>170</sup> But it may only be impossible because of the current design of chapter 11's fee control system. In the absence of routine objections to professional fee applications,<sup>171</sup> it is difficult for Fee Controllers to focus their attention on instances of potential abuse.<sup>172</sup> Because the fee

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functional market is expected to put strong price pressure on law firms and should result in a reticence to pay for associates' time if those associated are overused). Although Stephen Lubben argues that the bankruptcy market works no worse than the non-bankruptcy market, it is not clear whether this is an indictment of legal billing generally or contrary evidence suggesting that bankruptcy bills are like the temperature of baby bear's soup in Goldilocks. That is, they are "just right." TOM ROBERTS, GOLDLOCKS AND THE THREE BEARS (1990); Lubben, *The Microeconomics of Chapter 11*, *supra* note 3.

<sup>164</sup> See *supra* note 113 and accompanying text.

<sup>165</sup> Even if clients *do* review fees, when they uncover apparent professional overcharging, the objective evidence suggests that they do not share this information with Fee Controllers. Perhaps this is because the existing financial incentives are poorly aligned to encourage information-sharing. By contrast, a crowdsourced fee control system would enable Fee Controllers to take advantage of the varying incentives that might drive creditors (or other information holders) to disclose to Fee Controllers when they identify potentially inappropriate professional fees or expenses.

<sup>166</sup> See LOPUCKI & DOHERTY, PROFESSIONAL FEES, *supra* note 41, at 137.

<sup>167</sup> 121 B.R. 728, 731 (Bankr. E.D. Pa. 1990).

<sup>168</sup> See *supra* note 107.

<sup>169</sup> See *supra* note 16.

<sup>170</sup> See, e.g., *In re Consol. Bancshares, Inc.*, 49 B.R. 467, 472 (Bankr. N.D. Tex. 1985).

<sup>171</sup> See *supra* note 41 and accompanying text.

<sup>172</sup> See LOPUCKI & DOHERTY, PROFESSIONAL FEES, *supra* note 41, at 131 (claiming that

application and review process “provides the one real opportunity to control professional costs under the current system,” it is important to strengthen chapter 11’s fee control system.<sup>173</sup>

The current fee control system often results in ineffective fee reviews. As a result, courts seldom make substantial cuts to the fees requested,<sup>174</sup> despite evidence (and the widespread belief) that a large number of bankruptcy professionals perform unnecessary work.<sup>175</sup> In Part II, this Article introduces crowdsourcing and provides three examples of how companies have used crowdsourcing to solve similar problems as those faced by Fee Controllers. In other words, crowdsourcing may offer solutions to chapter 11’s fee control problem, including the need for better information-gathering, information-processing, coordination tools, and harnessing the wisdom of crowds to develop innovative solutions.

## II. WHAT IS CROWDSOURCING?

Offering a simple definition for crowdsourcing is harder than one might expect because the word lacks a widely agreed-upon definition.<sup>176</sup> Jeff Howe, who is widely credited with coining the term, defined crowdsourcing as a process by which employees and suppliers are replaced by an undefined, but generally large group of individuals identified via an open call on the Internet.<sup>177</sup> By contrast, Wikipedia—often described as an example of a successful crowdsourcing project<sup>178</sup>—defines crowdsourcing as “the process of obtaining needed

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only approximately 20% of all fee applications receive any objection, and that most of those objections are brought by the United States Trustee for violations of narrow, technical rules that involve only small dollar amounts); *see also* Whelan et al., *supra* note 120, at 408 (claiming that chapter 11’s professional compensation scheme “is subject to abuses”).

<sup>173</sup> Baker, *supra* note 17, at 57–58.

<sup>174</sup> *See* Lavien, *supra* note 147, at 137; *see also* LOPUCKI & DOHERTY, PROFESSIONAL FEES, *supra* note 41, at 257 (suggesting that corporate bankruptcy cases tend to cost far more than we would expect).

<sup>175</sup> *See* Ross, *supra* note 20, at 3.

<sup>176</sup> Enrique Estellés-Arolas & Fernando González-Ladrón-de-Guevara, *Towards an Integrated Crowdsourcing Definition*, 38 J. INFO. SCI. 189 (2012).

<sup>177</sup> Jeff Howe, *The Rise of Crowdsourcing*, WIRED (June 1, 2006, 12:00 PM), <http://archive.wired.com/wired/archive/14.06/crowds.html>. *See also* Orozco, *supra* note 163.

<sup>178</sup> A distinction is sometimes drawn between crowdsourcing, where the benefits of the crowd’s wisdom accrue to the person or entity positing the problem to be solved, and open source, where the benefits are returned to the crowd itself. *See, e.g.*, Daren C. Brabham, *Crowdsourcing as a Model for Problem Solving: An Introduction and Cases*, 14 CONVERGENCE 75, 81–82 (2008) [hereinafter Brabham, *Crowdsourcing as a Model*]. This Article accepts this sensible distinction between open source and crowdsourcing, and thus would consider Wikipedia to be an open-source project and not a crowdsourced

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services, ideas, or content by soliciting contributions from a large group of people, and especially from an online community, rather than from traditional employees or suppliers.”<sup>179</sup> This Article will use a definition similar to Wikipedia’s, and defines crowdsourcing as any problem-solving method that generates solutions by drawing on the wisdom of crowds.<sup>180</sup>

To help illustrate what crowdsourcing is and how it can work, the next section provides three examples of how crowdsourcing has been used to solve some problems relevant to fixing chapter 11’s fee control system. The first two examples are examples of how companies have embraced crowdsourcing as a solution to information gaps and the need for contingent workers, among other problems. The final example discusses a crowdsourcing platform that can be used by any company or individual with a problem to solve, particularly if they have a tedious but divisible problem. Among other things, these examples demonstrate that crowdsourcing: (i) is a useful tool for information gathering, including information about complex problems requiring specialized knowledge; (ii) can help divide large, tedious tasks into digestible chunks that can be solved by interested members of the crowd; (iii) allows the participation of non-experts, who often develop innovative solutions that bankruptcy professionals might never consider; and (iv) can be vastly cheaper than paying bankruptcy professionals for the same work. These four benefits explain crowdsourcing’s intuitive appeal for enhancing (and not displacing) chapter 11’s fee control system.

#### A. *The Goldcorp Challenge*

In 2000, a troubled Canadian gold mining company, Goldcorp, Inc., turned to crowdsourcing to solve its problems. Goldcorp was

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project because Wikipedia’s entries are “free content.” *Wikipedia: FAQ/Overview*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Wikipedia:FAQ/Overview#WHO> (last visited Nov. 22, 2015). As so defined, the solution offered in this Article may include aspects of both crowdsourcing and open sourcing, but this Article uses the crowdsourcing nomenclature nonetheless.

<sup>179</sup> *Crowdsourcing*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Crowdsourcing> (last visited Oct. 25, 2015) (quoting *Crowdsourcing*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/crowdsourcing> (retrieved Feb. 3, 2014)).

<sup>180</sup> “[U]nder the right circumstances, groups are remarkably intelligent, and are often smarter than the smartest people in them.” See JAMES SUROWIECKI, *THE WISDOM OF CROWDS* xiii (2004); see also Brabham, *Crowdsourcing the Public Participation Process*, *supra* note 12, at 250; see generally Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 2009 J. LEGAL ANALYSIS 1 (2009) (suggesting that many minds are better than one because they more efficiently aggregate information, but only in some circumstances).

“[b]esieged by strikes, lingering debts, and an exceedingly high cost of production.”<sup>181</sup> To make matters worse, the gold market was contracting.<sup>182</sup> The company’s troubles were so severe that it had ceased its mining operations.<sup>183</sup> Although Goldcorp’s CEO, Rob McEwen, believed the company owned valuable property, the company’s in-house geological team had not been able to reliably locate gold veins nor to estimate the amount of gold they would find in any particular vein.<sup>184</sup> In response, McEwen took an unprecedented step for his industry and published his company’s confidential and proprietary geological data on the Internet. In addition, the company offered more than half a million dollars in prize money to the team(s) that submitted the best estimates of where the company should mine and how much gold particular mines would contain.<sup>185</sup> The results were nothing short of miraculous, and it seems fair to say that crowdsourcing solved the company’s financial woes.

Crowdsourcing produced results for Goldcorp that were so stunning that they nearly caused the CEO to fall out of his chair when he saw them.<sup>186</sup> News spread fast that the company had put “400 megabytes worth of data about the 55,000 acre site . . . on the company’s website.”<sup>187</sup> Within only a few weeks, submissions poured in. Eventually, more than 1000 “virtual prospectors” from fifty countries reviewed the company’s data.<sup>188</sup> In addition to an army of geologists, the company received submissions applying solutions from fields as diverse as “math, advanced physics, intelligent systems,

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<sup>181</sup> Don Tapscott & Anthony D. Williams, *Innovation in the Age of Mass Collaboration*, BLOOMBERG (Feb. 1, 2007), <http://www.bloomberg.com/bw/stories/2007-02-01/innovation-in-the-age-of-mass-collaborationbusinessweek-business-news-stock-market-and-financial-advice>.

<sup>182</sup> The contraction was so severe that the price of an ounce of gold fell below Goldcorp’s extraction costs. *The GoldCorp Challenge and the Beginning of Crowdsourced Analytics*, COMPETITIVE ADVANTAGE VIA QUANTITATIVE METHODS (Feb. 22, 2012), <http://cavqm.blogspot.com/2012/02/goldcorp-challenge-and-beginning-of.html> [hereinafter COMPETITIVE ADVANTAGE].

<sup>183</sup> With the price of gold falling below Goldcorp’s extraction costs, if they had continued to mine, they would have lost money with each ounce of gold they extracted from the ground. See Tapscott & Williams, *supra* note 181.

<sup>184</sup> *Id.*

<sup>185</sup> *Open Innovation: Goldcorp Challenge*, IDEA CONNECTION, <http://www.ideaconnection.com/open-innovation-success/Open-Innovation-Goldcorp-Challenge-00031.html> (last visited Nov. 22, 2015) [hereinafter *Open Innovation*].

<sup>186</sup> See Tapscott & Williams, *supra* note 181.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*; see Linda Tischler, *He Struck Gold on the Net (Really)*, FAST COMPANY (May 31, 2002, 5:00 AM), <http://www.fastcompany.com/44917/he-struck-gold-net-really> (putting the number at more than 1400 participants).

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computer graphics, and organic solutions.”<sup>189</sup> Many of the virtual prospectors employed methods that had never before been used in the mining industry, and the results were impressive.<sup>190</sup>

The prize-winning entry resulted from collaboration between two Australian groups, Fractal Graphics and Taylor Wall & Associates, and employed a novel technological solution.<sup>191</sup> Together, these companies developed a 3-D map of the mining site that enabled Goldcorp to see the potential in one of its primary assets.<sup>192</sup> The Australian prospectors identified more than 110 sites, half of which the company’s in-house team had not previously identified. In addition, the Australian prospectors were accurate, uncovering “significant gold reserves” in more than 80% of their targets.<sup>193</sup> Notably, these firms reportedly earned less in prize money than they normally charged for their services; perhaps acting in pursuit of publicity for their efforts.<sup>194</sup>

Goldcorp’s crowdsourcing experiment yielded phenomenal results. The company saved years of exploration time and increased its production by 851%.<sup>195</sup> It also reduced its per-ounce extraction costs by approximately 84%, going from \$360 per ounce to \$59 per ounce.<sup>196</sup> In the end, it successfully mined over six billion dollars in gold as a result of the challenge.<sup>197</sup> For an approximately half-million dollar investment, Goldcorp was catapulted from an “under-performing \$100 million company into a \$9 billion juggernaut while transforming a backwards mining site in Northern Ontario into one of the most innovative and profitable properties in the industry.”<sup>198</sup>

Several lessons can be drawn from this example. First, crowdsourcing need not be limited to small, simple problems but can be used to develop solutions to complex challenges. Second and related, crowds can bring specialized knowledge to bear. Third, the crowd may offer interesting and unexpected perspectives on problems, such as a 3-D map, that may be surprisingly effective. Fourth, crowdsourcing may be cheaper than the existing alternatives because

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<sup>189</sup> See Tapscott & Williams, *supra* note 181.

<sup>190</sup> *See id.*

<sup>191</sup> *See id.*; *see also* Tischler, *supra* note 188.

<sup>192</sup> *See* Tischler, *supra* note 188.

<sup>193</sup> *Open Innovation*, *supra* note 185.

<sup>194</sup> *See The Goldcorp Challenge—Who Has Replicated It Successfully?*, QUORA, <http://www.quora.com/The-Goldcorp-Challenge-who-has-replicated-it-successfully> (last visited Nov. 22, 2015).

<sup>195</sup> *See* COMPETITIVE ADVANTAGE, *supra* note 182.

<sup>196</sup> *See id.*; *see also* Tischler, *supra* note 188.

<sup>197</sup> *Open Innovation*, *supra* note 185.

<sup>198</sup> *See* Tapscott & Williams, *supra* note 181.

members of the crowd may be incentivized by non-monetary rewards.<sup>199</sup>

#### B. *Proctor and Gamble Crowdsources Research and Development*

For more than a decade, Proctor and Gamble (“P&G”) has enthusiastically embraced crowdsourcing.<sup>200</sup> P&G is a leading consumer goods company,<sup>201</sup> a company whose brands are household staples such as Pantene shampoo, Crest toothpaste, Tide laundry detergent, and Pampers diapers.<sup>202</sup> The company sells its products in almost every country in the world.<sup>203</sup> In 2014, P&G sold more than eighty-four billion dollars in goods and delivered more than eleven billion dollars in profits.<sup>204</sup> But, despite its global reach and robustly funded in-house research and development (“R&D”) team, P&G decided to share its “R&D, consumer understanding, marketing expertise, and brand equity” in order to bring “great innovations to market and into the lives of consumers faster.”<sup>205</sup> As a result of the company’s “open innovation strategy,” it has established “more than 2,000 successful agreements with innovation partners around the world.”<sup>206</sup> In short, P&G has embraced crowdsourcing and crowdsourcing has produced valuable results.

P&G turned to crowdsourcing only after its own internal innovation program had stopped being particularly innovative, causing its share price to fall.<sup>207</sup> R&D had long been at the core of the company’s success, but its R&D department’s performance had slipped.<sup>208</sup> New product launches were no longer as successful as they had been in the past. Despite an already large R&D budget, P&G tried

<sup>199</sup> *The GoldCorp Challenge*, *supra* note 194.

<sup>200</sup> See *Connect + Develop*, P&G CONNECT + DEVELOP, <http://www.pgconnectdevelop.com/> (last visited Nov. 22, 2015) [hereinafter *Connect + Develop*] (“This site has been created to help external innovators and companies learn how to submit innovations to P&G’s Connect + Develop. Connect + Develop is P&G’s program for encouraging open innovation, also known as crowdsourcing.”).

<sup>201</sup> *Proctor & Gamble*, FORTUNE 500, <http://fortune.com/fortune500/procter-gamble-32/> (last visited Nov. 22, 2015) [hereinafter P&G Fortune 500].

<sup>202</sup> See *P&G Connect+Develop Launches New Open Innovation Website*, P&G CONNECT + DEVELOP (Feb. 7, 2013), <http://www.pgconnectdevelop.com/home/stories/cd-stories/20130207-pg-connectdevelop-launches-new-open-innovation-website.html>.

<sup>203</sup> *Connect + Develop*, *supra* note 200 (noting that P&G has “more than 300 brands in more than 180 countries”).

<sup>204</sup> P&G Fortune 500, *supra* note 201.

<sup>205</sup> *Connect + Develop*, *supra* note 200.

<sup>206</sup> *Id.*

<sup>207</sup> Tim Kastle, *Proctor & Gamble as an Open Innovation Case Study*, CROWDSOURCING.ORG (June 7, 2012, 5:26 PM), <http://www.crowdsourcing.org/editorial/procter-gamble-as-an-open-innovation-case-study/15445>.

<sup>208</sup> *Id.*

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to fix the problem by increasing that budget further. After several years of trying to re-ignite its internal R&D team's innovative fire with additional resources, P&G decided to try crowdsourcing.<sup>209</sup>

By embracing crowdsourcing, P&G has been able to turn itself around. It has entered into a wide array of deals with external innovators, including academic partnerships, joint ventures, trademark-licensing agreements, patent-licensing arrangements, and more.<sup>210</sup> By leveraging crowd wisdom,<sup>211</sup> the company has begun innovating again, has successfully launched many new products,<sup>212</sup> and has better monetized its patent portfolio.<sup>213</sup> Because the company embraced crowdsourcing, it has emerged as one of the world's most innovative companies and reclaimed its status as a leading consumer products company.<sup>214</sup>

As with the Goldcorp Challenge, access to a diverse pool of potential problem-solvers has been a key to P&G's successful turnaround. Notably, P&G does not crowdsource only through its own website, but has partnered with other companies that help crowdsource solutions, such as InnoCentive.<sup>215</sup> InnoCentive also draws from a very diverse group of potential "solvers." Although some "solvers" have formal expertise in areas related to the problems they attempt to solve, others are merely hobbyists "working from their proverbial garage."<sup>216</sup> Perhaps counter-intuitively, a study of InnoCentive found that "the odds of a solver's success increased in fields in which they had no formal expertise."<sup>217</sup> This example clearly demonstrates the value of non-expert problem-solvers.

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<sup>209</sup> *Id.*

<sup>210</sup> See, e.g., *Open Innovation Stories*, P&G CONNECT + DEVELOP, <http://www.pgconnectdevelop.com/home/stories/in-out-licensing/20130108-bounce-fabric-softener.html> (last visited Nov. 22, 2015).

<sup>211</sup> "Critical components of more than 35 percent of the company's initiatives were generated outside P&G." Howe, *supra* note 177.

<sup>212</sup> Successful product launches occur more than one-half of the time now instead of only one-third of the time. Kastle, *supra* note 207.

<sup>213</sup> Going from less than 10% of patents in use in products to more than 50%. *Id.*

<sup>214</sup> Katie Jacobs, *How to Build an Innovative Company*, HR (Jan. 21, 2013), <http://www.hrmagazine.co.uk/hr/features/1075996/how-build-innovative-company>.

<sup>215</sup> InnoCentive is a platform for crowdsourcing solutions to complex problems. The "seekers" pay "solvers" anywhere from \$10,000 to \$100,000 per solution, and its solvers have cracked more than 30% of the problems posted on the site, "which is 30 percent more than would have been solved using a traditional, in-house approach." Howe, *supra* note 177.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* (citing Karim R. Lakhani et al., *The Value of Openness in Scientific Problem Solving*, (Harv. Bus. Sch., Working Paper No. 07-050, 2006), <http://www.hbs.edu/faculty/Publication%20Files/07-050.pdf>).

Once again, there are some larger lessons to be learned from P&G's example. First, P&G's in-house team was already very large (9000 people), but crowdsourcing gave the company access to a significantly larger (1.5 million) pool of contingent workers.<sup>218</sup> Second, these contingent problem-solvers came from a diverse background and devised more creative solutions to P&G's problems than its in-house R&D team. Third, P&G was able to leverage the ideas of others to re-establish itself as the preeminent consumer products company (i.e., much of crowdsourcing's benefits inured to P&G's benefit instead of the crowd). Fourth, the crowd workers were able to handle complex jobs, and do so at a price that is a mere fraction of the value of their ideas.<sup>219</sup>

### C. Amazon Mechanical Turk and "Microtasking"

Introduced in 2005,<sup>220</sup> Amazon Mechanical Turk ("mTurk") is a crowdsourcing platform intended to "give businesses and developers access to an on-demand, scalable workforce" and to allow workers to work on appealing projects at times that are convenient for them.<sup>221</sup> MTurk coordinates "the use of human intelligence to perform tasks that computers are currently unable to do."<sup>222</sup> This crowdsourcing platform allows companies and individuals ("Requestors") to post Human Intelligence Tasks ("HITs") that they would like accomplished. HITs are "typically simple enough to require only a few minutes to be completed" and payments for such tasks can be as low as one cent.<sup>223</sup> While HITs can be more complicated, take longer, and

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<sup>218</sup> *Id.* (quoting Larry Huston, Procter & Gamble's vice president of innovation and knowledge, as saying: "We have 9,000 people on our R&D staff and up to 1.5 million researchers working through our external networks.").

<sup>219</sup> The wages paid to crowdworkers is a contentious issue. *See, e.g.,* Karën Fort et al., *Amazon Mechanical Turk: Gold Mine or Coal Mine?*, 37 COMPUTATIONAL LINGUISTICS 413 (2011), [http://www.mitpressjournals.org/doi/pdf/10.1162/COLI\\_a\\_00057](http://www.mitpressjournals.org/doi/pdf/10.1162/COLI_a_00057).

<sup>220</sup> *Id.* at 414.

<sup>221</sup> *Mechanical Turk Is a Market Place for Work*, AMAZON MECHANICAL TURK, <https://www.mturk.com/mturk/welcome> (last visited Nov. 22, 2015).

<sup>222</sup> In short, most HITs require the decision-maker to make judgment calls that computers are not currently well equipped to make. *Amazon Mechanical Turk*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Amazon\\_Mechanical\\_Turk](http://en.wikipedia.org/wiki/Amazon_Mechanical_Turk) (last visited Nov. 22, 2015). Incidentally, this is also where the name comes from; the original Mechanical Turk was an "18<sup>th</sup> century chess playing 'automaton' that was in fact operated by a concealed person." Gabriele Paolacci et al., *Running Experiments on Amazon Mechanical Turk*, 5 JUDGMENT & DECISION MAKING 411, 411 (2010).

<sup>223</sup> Some HITs are listed as paying nothing at all, though many of these seem to be test HITs. *See All HITs*, AMAZON MECHANICAL TURK, <https://www.mturk.com/mturk/findhits?match=false!> (last visited Nov. 22, 2015).



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pay more, they still rarely pay more than one dollar.<sup>224</sup> Sample tasks might include translating a single English language sentence into Urdu, annotating documents, tagging images or audio transcriptions, or completing a survey.<sup>225</sup>

For Requestors, mTurk offers several challenges and benefits. The primary challenges are to divide complex tasks into basic steps, to fix an appropriate (and usually very low) reward, and to define successful completion.<sup>226</sup> Quality control is also a potential challenge,<sup>227</sup> but it is a seemingly surmountable one.<sup>228</sup> Among other techniques, Requestors can require that workers (usually referred to as “Turkers”) pre-qualify before accepting any HITs, which seems to improve the quality of responses.<sup>229</sup> Requestors are also free to accept or reject any work done by a Turker, although mTurk tracks this data and a high rejection rate makes it harder to attract Turkers to the Requestor’s future HITs.<sup>230</sup> Finally, Turkers are classified as independent contractors and thus are not subject to certain labor law obligations that would arise if Turkers were classified as employees.<sup>231</sup>

<sup>224</sup> For example, on January 23, 2015, mTurk listed 277,871 HITs available and only 409 of those HITs paid more than one dollar. HIT Search Results (Jan. 23, 2015) (on file with Author). Some of those HITs, however, paid more than fifty dollars each. *Id.*; see also Aniket Kittur et al., *CrowdForge: Crowdsourcing Complex Work*, PROC. 24TH ANN. ACM SYMP. ON USER INTERFACE SOFTWARE & TECH. 2011, at 43, <http://ra.adm.cs.cmu.edu/anon/anon/hcii/CMU-HCII-11-100.pdf> (reporting that the modal HIT in this study paid three cents).

<sup>225</sup> Fort et al., *supra* note 219 (Urdu and annotation examples); Paolacci et al., *supra* note 222, at 412 (tagging and survey examples); see also *Episode 600: The People Inside Your Machine*, PLANET MONEY (Mar. 31, 2015, 11:13 AM), <http://www.npr.org/blogs/money/2015/01/30/382657657/episode-600-the-people-inside-your-machine>.

<sup>226</sup> Fort et al., *supra* note 219, at 414.

<sup>227</sup> *Id.* at 415.

<sup>228</sup> Requestors have used a variety of techniques to ensure quality results, including: (i) providing above-average payments; (ii) incorporating some sort of reputation score for Turkers; (iii) building the Requestor’s reputation with Turkers; (iv) identifying intrinsically motivated people; and (v) having the Requestor directly verify a sample of the results. Catherine E. Schmitt-Sands & Richard J. Smith, *Prospects for Online Crowdsourcing of Social Science Research Tasks: A Case Study Using Amazon Mechanical Turk* (Jan. 9, 2014) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2377016](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2377016); see also Julie S. Downs et al., *Are Your Participants Gaming the System? Screening Mechanical Turk Workers*, PROC. SIGCHI CONF. ON HUM. FACTORS COMPUTING SYS., 2010, at 2399, <http://lorrie.cranor.org/pubs/note1552-downs.pdf> (discussing screening workers in advance as a quality-control technique).

<sup>229</sup> *Amazon Mechanical Turk*, *supra* note 222. See also Schmitt-Sands & Smith, *supra* note 228.

<sup>230</sup> *Amazon Mechanical Turk*, *supra* note 222. See also Schmitt-Sands & Smith, *supra* note 228 (finding that the Requestor’s reputation was an important determinant in worker quality).

<sup>231</sup> See Fort et al., *supra* note 219, at 414 (labeling mTurk as “an unregulated labor

Despite some concerns about the service facilitating a “digital sweatshop,” mTurk has been successful in a variety of applications.<sup>232</sup> These successful applications include: (i) conducting experimental research;<sup>233</sup> (ii) writing articles;<sup>234</sup> (iii) identifying duplicate entries and verifying the details of item entries;<sup>235</sup> and (iv) collecting information.<sup>236</sup> These latter two applications are particularly relevant to fee control. Chapter 11’s fee control system is less effective than it could be because Fee Controllers lack the best information available regarding, among other things, instances of potential overcharging. Also, the system’s enforcers need assistance reviewing the information that they do receive, and would benefit from outsourcing some aspects of the fee control process to workers who could quickly, inexpensively, and accurately review fee applications.

These examples were intended to help explain what crowdsourcing is and what it can do. They have also hinted at crowdsourcing’s potential in the bankruptcy realm. With that, this Article will now provide a deeper look into how crowdsourcing can improve chapter 11’s fee control system in several specific ways. The following part of this Article will also discuss some core issues that would need to be addressed before fully implementing a crowdsourced fee control system.

### III. CROWDSOURCING FEE CONTROL

Our current fee control system is ineffective because it burdens Fee Controllers with the task of deterring and preventing unreasonable or unnecessary professional fees without providing them with adequate tools to make that burden bearable.<sup>237</sup> Fee Controllers could do a better job of fee control if they had additional assistance in at least three areas: (i) information-gathering; (ii) information-

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marketplace: a system which deliberately does not pay fair wages, does not pay due taxes, and provides no protections for workers”).

<sup>232</sup> See, e.g., Ellen Cushing, *Amazon Mechanical Turk: The Digital Sweatshop*, UTNE (Jan./Feb. 2013), <http://www.utne.com/science-and-technology/amazonmechanical-turk-zm0z13jfzlin.aspx#ixzz3PgZ2MnIC>.

<sup>233</sup> See Paolacci et al., *supra* note 222, at 413.

<sup>234</sup> See Kittur et al., *supra* note 224 (finding that article writing went “surprisingly well”).

<sup>235</sup> *Amazon Mechanical Turk*, *supra* note 222 (describing how mTurk can be used to find duplicative listing in yellow pages directories, identify duplicate entries in online product catalogs, and verify details of restaurants, such as hours of operation).

<sup>236</sup> *Id.* (describing how mTurk can be used to collect information, such as by searching “data elements or specific fields in large government and legal documents”).

<sup>237</sup> See *supra* notes 94–98. *But see* Hirsch, *supra* note 14.

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processing; and (iii) innovation. First, Fee Controllers need better information about bankruptcy professionals and their work product to improve their § 330 determinations. They would also benefit if others would help highlight specific instances of potential professional overcharging. Second, Fee Controllers need additional resources to make efficient use of this information. Without the ability to efficiently process the information they receive, additional information (even if it is better information) will not improve chapter 11's fee control system. Finally, chapter 11's fee control system would benefit from innovation. Without changes in these three areas, chapter 11's fee control system is likely to remain unable to control certain types of professional overcharging.<sup>238</sup>

As suggested by the three examples from the previous section of this Article, crowdsourcing can help fix chapter 11's broken fee control system by offering solutions in each of its three problem areas. It also bears repeating that crowdsourcing can simply be an additional tool to improve chapter 11's fee control system. For example, in P&G's case, the company already had a well-established R&D department, but it turned to crowdsourcing because it allowed the company to do better than it could do otherwise. Similarly, there is a role for crowdsourcing in chapter 11's fee control system to support bankruptcy judges, Assistant United States Trustees and fee examiners, who already perform many fee control tasks. Crowdsourcing need not displace Fee Controllers, but could serve to supplement their efforts to control the cost of corporate bankruptcy cases.

In essence, determining the appropriate fees in a bankruptcy case is predicated on solving the following problem: how to solicit the optimal amount of professional services without overpaying for those services. This problem—like any problem that can be clearly framed and where the relevant data can be made available to interested problem-solvers—can be crowdsourced.<sup>239</sup> The complexity of the problem<sup>240</sup> and the need for some specialized knowledge<sup>241</sup> are not

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<sup>238</sup> See LOPUCKI & DOHERTY, PROFESSIONAL FEES, *supra* note 41, at 180 (noting that too few objections are made for “billing too many hours for the task” because our fee control “system has no defense against that kind of overcharge”).

<sup>239</sup> See Brabham, *Crowdsourcing the Public Participation Process*, *supra* note 12, at 252.

<sup>240</sup> William D. Eggers & Rob Hamill, *Five Ways Crowdsourcing Can Transform the Public Sphere*, GOVERNING (May 23, 2012), <http://www.governing.com/columns/mgmt-insights/col-government-crowdsourcing-five-models.html> (discussing how to crowdsource complex problems that require creative solutions, such as how the city of Santa Cruz, California effectively crowdsourced solutions to its budget deficit); *see also* Brabham, *Crowdsourcing the Public Participation Process*, *supra* note 12, at 252.

<sup>241</sup> Stephen M. Wolfson & Matthew Lease, *Look Before You Leap: Legal Pitfalls of Crowdsourcing*, 48 PROC. AM. SOC'Y FOR INFO. SCI. AND TECH. 1, 2 (2011) (discussing

barriers to crowdsourcing a solution, as the Goldcorp and P&G examples help illustrate. If history is any guide, crowdsourcing fee control ought to result in greater fee reductions because more eyes will be on professional fee applications.

A. *How Crowdsourcing Can Help Fix Chapter 11's Fee Control System*

i. Information Gathering

In a crowdsourced fee control system, additional information ought to become available to Fee Controllers.<sup>242</sup> Currently, information comes from two primary sources: (i) disclosures by the professionals seeking to have their initial retention applications or subsequent fee applications approved; and (ii) objections to retention and fee applications. Given the evidence of professional overcharging provided above and how infrequent and modest reductions are, it seems evident that these sources of information are inadequate. In other words, this Article assumes that the reason why fee applications are not cut more regularly and more deeply is Fee Controllers' inability to identify many instances of professional overcharging. The evidence suggests that Fee Controllers could deter or prevent a larger share of professional overcharging if they had better information.<sup>243</sup>

This additional information could come from a variety of sources, including (i) parties-in-interest to the current case, including bankruptcy professionals;<sup>244</sup> (ii) other bankruptcy professionals (i.e.,

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crowdsourcing problems that require "specialized skills and a significant time commitment from the workers").

<sup>242</sup> Eggers & Hamill, *supra* note 240; *see also* Michael J. Franklin et al., *CrowdDB: Answering Queries with Crowdsourcing*, PROC. 2011 ACM SIGMOD INT'L CONF. ON MGMT. DATA, 2011, at 61 (noting that dividing a larger task into "microtasks" allows the participation of people who have no special training and does not require a lot of their time); Stephen K. Ichatha, *The Role of Empowerment in Crowdsourced Customer Service* (May 11, 2013) (unpublished Exec. D.B.A. dissertation, Georgia State University), [http://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1022&context=bus\\_admin\\_diss](http://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1022&context=bus_admin_diss).

<sup>243</sup> *See* LOPUCKI & DOHERTY, PROFESSIONAL FEES, *supra* note 41, at 189 (fee applications that are subject to objection tend to be cut more often and more deeply than those that are not).

<sup>244</sup> Attorneys may not be able to receive a monetary reward for assisting Fee Controllers if they must disclose confidential information about their client in order to do so. *See* Jennifer M. Pacella, *Advocate or Adversary? When Attorneys Act as Whistleblowers*, 28 GEO. J. LEGAL ETHICS 1027, 1046 (2015) (noting that, among others, the New York County Lawyers' Association ("NYCLA") has determined that New York lawyers may not ethically participate in certain whistleblower bounty programs if they must reveal confidential client information to receive the bounty). In addition, given fears of potential retaliation, perhaps it would create a conflict of interest for an attorney to ever seek a bounty at the same time he or she was representing a client in

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those not involved in the current case);<sup>245</sup> (iii) non-bankruptcy professionals; (iv) persons (professional or otherwise) that have, in previous cases, interacted with the professionals seeking compensation in the current case;<sup>246</sup> and (v) members of the general public with no prior involvement in the case or with the professionals.<sup>247</sup> Under the current fee control system, only the first category of people—parties-in-interest to the current case—is invited to participate in the fee control process. Yet, by and large, these persons do not participate. In addition, the remaining four categories of people are not entitled to participate, even if they have information that could help identify instances of professional overcharging or assist Fee Controllers with making certain § 330 determinations.

Greater participation in the fee control process, whether via formal objection or otherwise, is likely to help reduce professional overcharging.<sup>248</sup> With appropriate incentives,<sup>249</sup> parties might share a host of information relevant to the fee control process. For example, crowdsourcing can help reduce professional overcharging by incorporating feedback from colleagues and past clients about a particular professional's prior billing practices.<sup>250</sup> Colleagues and clients can inform Fee Controllers that this professional has, on previous occasions, had his or her fees reduced because the judge found that they had overbilled their clients.<sup>251</sup> While clearly not

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the current matter. *Id.* at 1048.

<sup>245</sup> Apparently the American Bar Association has expressed a general concern that “whistleblower awards for attorneys threaten the client right to effective counsel” by inhibiting the “free flow of information between client attorney and the quality of the attorney’s representation to the client.” *Id.* at 1049–50 (citing Letter from Stephen N. Zack, President of Am. Bar Ass’n to Sec. & Exch. Comm’n (May 20, 2011), <http://www.sec.gov/comments/s7-33-10/s73310-315.pdf>).

<sup>246</sup> The NYCLA has also noted ethical concerns if a lawyer used confidential information gleaned during a prior representation to his or her client’s detriment in the future. *Id.*

<sup>247</sup> Although somewhat counterintuitive, research suggests that even non-experts can be a very valuable source of information, often solving problems that stump the experts. Brabham, *Crowdsourcing the Public Participation Process*, *supra* note 12, at 244. In addition, a lot of work that happens in a bankruptcy case is not “bankruptcy” work at all. See Lubben, *The Microeconomics of Chapter 11*, *supra* note 3, at 23 (highlighting that non-bankruptcy attorneys are significant contributors to chapter 11 cases).

<sup>248</sup> See LOPUCKI & DOHERTY, PROFESSIONAL FEES, *supra* note 41, at 189.

<sup>249</sup> How to appropriately incentivize parties to participate in the fee control process is addressed *infra* Part III.B.ii.

<sup>250</sup> Cf. T. Michael Mather, *Twelve Most Common Mistakes by Beginning Attorneys*, 26 TEMPLE J. SCI., TECH. & ENVTL. L. 43, 49 (2007) (noting that attorneys’ reputations are regularly discussed informally by their fellow attorneys).

<sup>251</sup> It is not very common for professionals to be called out for their over-billing, but it does happen. See, e.g., Ronald D. Rotunda, *The Problem of Inflating Billable Hours*,

dispositive, a robust record of prior fee reductions may encourage Fee Controllers to take a closer look at that professional's fee requests in the current case.<sup>252</sup> Furthermore, the additional scrutiny may deter future overbilling by putting professionals on notice that their actions in prior cases may be relevant in the current case.

Non-bankruptcy professionals could play an important role in providing Fee Controllers information about whether the compensation requested by estate-paid professionals "is reasonable based on the customary compensation charged by comparably skilled practitioners" in non-bankruptcy cases.<sup>253</sup> This information relating to customary non-bankruptcy compensation is clearly conducive to crowdsourcing.<sup>254</sup> Consumers of bankruptcy services (i.e., clients) might be willing to reveal the discounts they received on their bills or the hourly rates they were charged, which would help Fee Controllers distinguish between the headline rates advertised and the fees actually charged to clients. In addition, non-bankruptcy professionals might be willing to disclose similar information. In other contexts, consumers regularly volunteer enormous amounts of information about their experiences for no apparent personal gain.<sup>255</sup> For example, millions of people voluntarily complete product reviews on Amazon.com for reasons that are not clear.<sup>256</sup> Perhaps consumers of

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VERDICT (Nov. 17, 2014), <http://verdict.justia.com/2014/11/17/problem-inflating-billable-hours> (describing several cases).

<sup>252</sup> Cf. Rosen & Bazian, *supra* note 21, at 44–45 (noting that a party's prior practices are highly relevant to certain determinations in the current case) (citing *In re Complaint of Judicial Misconduct (In re Complaint)*, 761 F.3d 1097 (9th Cir. 2014)). In *In re Complaint*, the Ninth Circuit held that a firm's prior refusal to adhere to certain court-mandated billing practices was a sufficient basis for denying that firm's retention in future cases. The firm's alleged improprieties came to light because the bankruptcy judge whose orders were ignored was called upon to approve the firm's retention in a new case. Having established that a firm's shoddy work in previous cases is sufficient to deny retention in a new case, it is not clear why bankruptcy courts should be the only parties empowered to bring this information to light, or, if a firm is retained, why previous impropriety—particularly financial impropriety—should not also be grounds to take a closer look at a firm's fee applications in a new case. See Rosen & Bazian, *supra* note 21, at 45 (noting that estate-paid professionals may need a reminder "that their conduct and the quality of their work might have repercussions well beyond those for the case in which they are currently employed").

<sup>253</sup> 11 U.S.C. § 330(a)(3)(F) (2011).

<sup>254</sup> Cf. Eggers & Hamill, *supra* note 240 (discussing how crowdsourcing allows decision-makers to harness "on-the-ground knowledge from the people who know a problem intimately").

<sup>255</sup> Fennell, *supra* note 11, at 392–93.

<sup>256</sup> "No doubt developing a reputation for being a top reviewer is a motivation for some people." But other reasons are "not at all obvious." Steven D. Levitt, *Why Do People Post Reviews on Amazon?*, FREAKONOMICS (July 22, 2005, 10:05 PM), <http://freakonomics.com/2005/07/22/why-do-people-post-reviews-on-amazon/>.

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bankruptcy and comparable professional services could be induced to act similarly. A crowdsourced fee control system could create “a set of conditions that both enable and motivate people who possess the relevant information to reveal it” in order to generate useful information for Fee Controllers.<sup>257</sup>

Perhaps most obviously, bankruptcy professionals are likely to have valuable information that would benefit Fee Controllers. For example, some bankruptcy professionals involved in the current matter are likely to have an informed view about whether other estate-paid professionals are requesting excessive compensation, given the tasks they allegedly completed, either because the tasks took far longer than appropriate or because the task was unnecessary to perform. These professionals are likely to develop informed views on these matters in the course of their work for their own clients. This is because many estate-paid professionals routinely review the work produced by other estate-paid professionals in their role as professional representatives of the estate’s creditors and interest holders. If, for example, the official committee for the unsecured creditors files a motion for summary judgment, a variety of estate-paid professionals, including debtor’s counsel, will review that motion. Now imagine that those other estate-paid professionals believe that the motion was improvidently filed due to obviously contested material facts.<sup>258</sup> If those professionals shared that view with the Fee Controllers, the Fee Controllers might more closely review the relevant fee application to ensure that the estate does not pay for preparing and prosecuting a potentially unnecessary or unreasonable summary judgment motion. In this way, crowdsourcing can piggy-back on the work already being done by estate-paid professionals to efficiently evaluate the fee applications of other professionals involved in a particular bankruptcy case.<sup>259</sup>

## ii. Information Processing

In some cases, Fee Controllers are unable to deter or prevent professional overcharging because they lack sufficient information, but in other cases, the problem seems to be that Fee Controllers are

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<sup>257</sup> Fennell, *supra* note 11, at 393.

<sup>258</sup> *Cf.* Brief for the Neutral Fee Examiners, *supra* note 56.

<sup>259</sup> This piggy-backing quality also helps explain why a crowdsourced fee control system may be less expensive than the current system, which relies on wholly disinterested parties such as fee examiners who must review all of the work produced as part of their fee control duties.

presented with too much information.<sup>260</sup> In such cases, Fee Controllers may inadvertently ignore useful information because they cannot sort the useful information from the useless information. Crowdsourcing should be able to assist Fee Controllers with processing the information they receive in order to identify instances of professional overcharging. One advantage of crowdsourcing, as suggested by the examples above, is that crowdsourcing provides access to a large pool of contingent workers who can be gainfully employed in reviewing the information that seems to overwhelm Fee Controllers.

Fee application review would seem to be a nearly ideal project for a crowdsourced solution. The new Fee Guidelines already require estate-paid professionals in mega-bankruptcy cases to keep contemporaneous time entries “in time periods of tenths of an hour,” that services “be noted in detail and not combined or ‘lumped’ together, with each service showing a separate time entry,” and that time entries “give sufficient detail” to identify the nature of the service provided.<sup>261</sup> In short, professional fee applications are already divided into the type of discrete chunks of information that separate individuals could review asynchronously and on which those individuals can provide feedback. And because no special expertise is required, the pool of people who could potentially serve as adjunct fee controllers is enormous.<sup>262</sup>

A crowdsourced fee control system should devolve the initial review of professional fee applications to the crowd. The crowd could initially review the time and expense entries in fee applications to look for patterns, double-check the fees and expenses against any relevant local rules or guidelines, and cross-check time entries across billers and across professionals. The value of crowdsourcing is particularly evident when considering the type of cross-referencing that must be part of a detailed fee review. One point of cross-referencing professional fee applications is to verify the accuracy of the requested compensation. For example, when multiple professionals attend the same meeting, cross-referencing their fee applications helps to ensure that no professional is requesting compensation for more time than others at the same meeting. The crowd should be able to identify every professional billing time for attending the same meeting and then flag for Fee Controllers if one or more professionals billed—perhaps

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<sup>260</sup> Cf. *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 601 n.1 (3d Cir. 1984) (Becker, J., concurring).

<sup>261</sup> Fee Guidelines, *supra* note 19; see, e.g., Rapoport, *Value Billing*, *supra* note 21, at 126 (quoting the U.S. Trustee Guidelines, 28 C.F.R. § 58, app. A(a) (2010)).

<sup>262</sup> Eggers & Hamill, *supra* note 240; see also Franklin et al., *supra* note 242.



inadvertently—more time than the rest of the professionals at that meeting. In that case, Fee Controllers (rather than the crowd) can follow up with the relevant professional.<sup>263</sup> Where, like this example, a task can be clearly defined and the crowd can be appropriately incentivized, much of the tedious work of reviewing fee applications could be effectively crowdsourced. Moreover, these adjunct fee controllers might be able to bring innovative solutions to bear from other fields to, among other things, mine this data more effectively than currently occurs.

A crowdsourced fee control system can be expected to produce even more information than the current system does. A critical feature of any crowdsourced fee control system must include a method of sorting the useful information from the useless information.<sup>264</sup> A variety of solutions to this sorting problem appear to be available. Borrowing from a method already used by fee examiners, one solution is to focus first on big-ticket items.<sup>265</sup> Information produced by the crowd could be input, by the crowd, into a sortable database. This could allow Fee Controllers to focus on information related to the most egregious instances of potential professional overcharging first.

Another solution is to utilize the crowd to “bubble up” information.<sup>266</sup> Once members of the crowd have identified instances of potential overbilling by professionals, those instances could be resubmitted to the crowd, which can itself provide a quality-control function by confirming that the highlighted entries do, in fact,

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<sup>263</sup> If the crowd finds potential issues, it could bring these issues to the attention of Fee Controllers, much as Congress assumed that creditors would do in corporate bankruptcy cases. *See supra* note 8.

<sup>264</sup> Crowdsourcing may be even more useful in vetting information produced by others than producing the original information itself. *See also* Michael S. Bernstein et al., *Soylent: A Word Processor with a Crowd Inside*, PROC. 23RD ANN. ACM SYMP. ON USER INTERFACE SOFTWARE & TECH, 2010, at 313, <http://courses.cse.tamu.edu/caverlee/csce438/readings/soylent.pdf>.

<sup>265</sup> *See* Lupica & Rapoport, *supra* note 6 (noting the tendency of fee examiners to review only big-ticket work items).

<sup>266</sup> At least one study has found that requiring at least five members of the crowd to identify the same issue can help to achieve expert-quality results. *See* Chris Callison-Burch, *Fast, Cheap, and Creative: Evaluating Translation Quality Using Amazon’s Mechanical Turk*, PROC. 2009 CONF. ON EMPIRICAL METHODS IN NAT. LANGUAGE PROCESSING, 2009, at 286, 293, <https://www.aclweb.org/anthology/D/D09/D09-1030.pdf>. In essence, crowdsourcing allows brute force solutions to problems. *See* Jeffrey M. Rzeszotarski & Aniket Kittur, *Instrumenting the Crowd: Using Implicit Behavioral Measures to Predict Task Performance*, PROC. 24TH ANN. ACM SYMP. ON USER INTERFACE SOFTWARE & TECH, 2011, at 13, <http://jeffrz.com/wp-content/uploads/2011/10/fp359-rzeszotarski.pdf> (discussing the value of multiple redundant worker judgments as a quality-control mechanism).

concern instances of overcharging.<sup>267</sup> By employing a two-step crowdsourced process (information-production and information-verification), some studies have found that, under certain conditions, a crowd of novices can produce near-expert results.<sup>268</sup>

Still another solution would be to task fee examiners or the United States Trustees' office with evaluating the responses of the crowd instead of doing the initial work of identifying instances of potential overbilling.<sup>269</sup> Given the rates charged by fee examiners, redeploying them in an information-verification role instead of an information-production role could produce substantial cost savings without any decrease in the quality of fee control. Finally, the bankruptcy court would remain the ultimate arbiter of whether a particular fee or expense was appropriate or not. Crowdsourcing can merely help highlight the most potentially problematic bills so that the court can review them.

### iii. Innovation

Crowdsourcing also promises to help fix chapter 11's flawed fee control system by unleashing innovation. In other contexts, crowdsourcing has resulted in creative solutions to problems that previously stumped experts in those fields. For example, Netflix created a prize to improve the company's algorithm for movie recommendations after the company's own engineers likely ran out of ideas.<sup>270</sup> Similarly, crowdsourcing generated innovative solutions for locating rich veins of gold for Goldcorp to mine after the company's in-house geological team proved unsuccessful.<sup>271</sup> Crowdsourcing also allowed P&G to recapture its place as a top consumer products company by allowing the company to find innovative partners who

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<sup>267</sup> See Aniket Kittur et al., *Crowdsourcing User Studies with Mechanical Turk*, PROC. SIGCHI CONF. ON HUM. FACTORS COMPUTING SYS., 2008, at 453, 455, <http://www-users.cs.umn.edu/~echi/papers/2008-CHI2008/2008-02-mech-turk-online-experiments-chi1049-kittur.pdf> (finding that when there are "explicitly verifiable questions as part of the task," the crowd is able to provide work that is near expert quality, despite the crowd representing "a more novice perspective").

<sup>268</sup> See *id.*; see also Bernstein et al., *supra* note 264, at 314 (employing a Find-Fix-Verify system to split tasks "into a series of generation and review stages that utilize independent agreement and voting to produce reliable results").

<sup>269</sup> Goldcorp appears to have utilized a panel of expert judges to evaluate submissions in the Goldcorp Challenge. Press Release, Goldcorp, Inc., Exploration at Web Speed Semi-Finalists Earn 1st US\$250,000 in the World's First INTERNET GOLDRUSH (Oct. 26, 2000), <http://www.infomine.com/index/pr/Pa055952.PDF>. Fee control could follow suit.

<sup>270</sup> NETFLIX PRIZE, <http://www.netflixprize.com/> (last visited Nov. 25, 2015).

<sup>271</sup> See *supra* Part II.A.

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reignited the firm's R&D department.<sup>272</sup>

Chapter 11's fee control system could benefit from crowdsourced innovations. Some of those innovations might be the development of entirely new ideas on how to control fees, but other innovations might relate to how to perform existing fee control tasks more efficiently. Crowdsourcing might also serve as a mechanism to implement some of these new ideas.

Commentators have already put forward a host of ideas on how to improve the fee control process. These ideas include, among others, creating a series of benchmarks for the cost of common professional services in chapter 11 cases.<sup>273</sup> Professional fees in bankruptcy cases are a matter of public record and members of the crowd could review the data in prior bankruptcy cases to create these benchmarks.<sup>274</sup> For example, this type of work might reveal that in the last ten megabankruptcy cases, professionals were paid a median fee of \$10,000 to prepare a joint administration motion.<sup>275</sup> If in a new case a professional firm requests \$20,000 to prepare a joint administration motion, Fee Controllers might justifiably require that firm to explain why an upward departure from comparable recent cases is warranted.<sup>276</sup> Similarly, it might be appropriate to safe-harbor compensation requests that fall below that historic norm.

Another innovative solution that the crowd might help implement would be to create a database of bankruptcy professionals and their experience so that Fee Controllers could more easily make the required determinations under § 330(a)(3)(E).<sup>277</sup> With such information, professionals lacking substantial bankruptcy experience might be unable to bill their time at rates comparable to more seasoned bankruptcy professionals. As matters currently stand, most law firms disclose only the class year of associates, which is, at best, a

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<sup>272</sup> See *supra* Part II.B.

<sup>273</sup> See LOPUCKI & DOHERTY, PROFESSIONAL FEES, *supra* note 41.

<sup>274</sup> Another benefit of these benchmarks might be to convince some bankruptcy professionals to more confidently switch from an hourly fee model to a value-billing model, using these benchmarks as a guide.

<sup>275</sup> Bankruptcy cases involving multiple related debtors are often administratively consolidated in order to save money and avoid duplicative effort.

<sup>276</sup> As Professor LoPucki has pointed out to Author in private correspondence, in some instances, the cost of the same motion does and should vary with the size of the case and other variables. As a result, a regression analysis will be necessary to make the data comparable. There seems to be no reason why members of the crowd could not also do this work.

<sup>277</sup> 11 U.S.C. § 330(a)(3)(E) (2011) requires bankruptcy courts to determine, "with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field."

rough proxy of general experience and provides no insight into an associate's bankruptcy experience.<sup>278</sup> If a bankruptcy experience database were created, Fee Controllers could more easily determine the appropriateness of the rates being charged by bankruptcy professionals.

Some commentators have argued that bankruptcy is not the place for innovation to occur.<sup>279</sup> There seems, however, to be no reason why innovative ideas could not spread from bankruptcy to other areas of the law instead of the other way around. And again, crowdsourcing may merely compliment existing forms of information-gathering and information-processing already available to and employed by Fee Controllers. By enhancing chapter 11's top-down system with crowdsourced features, chapter 11 could be improved in some of the ways described in this Article.

#### B. *What Might Crowdsourcing Look Like in Chapter 11?*

Designing an optimal crowdsourcing solution for chapter 11's problems is likely to be complicated and may require an iterative process. A well-designed system will need to determine, among other things: (i) who belongs in the crowd;<sup>280</sup> (ii) how to notify the crowd that a potential problem is available to be solved; (iii) how to incentivize the crowd to participate;<sup>281</sup> (iv) who owns the solutions offered by the

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<sup>278</sup> See Lubben, *The Microeconomics of Chapter 11*, *supra* note 3, at 88.

<sup>279</sup> *Id.* at 91 (arguing that if "the direct costs of chapter 11 are in line with other large corporate transactions . . . general improvements in the market for professional services, rather than any bankruptcy-specific innovation" is the appropriate way to reduce chapter 11 costs).

<sup>280</sup> The appropriate crowd is likely to vary with the type of problem being solved. Although some tasks may benefit from being offered to the largest possible crowd of potential problem-solvers, other tasks might be more effectively solved by limiting the size of the crowd. On the one hand, even when a problem is opened to everyone in the world, the crowd of solvers may be "surprisingly small" at times. Franklin et al., *supra* note 242. On the other hand, it is important to try to prevent over-participation by self-interested parties. Fennell, *supra* note 11, at 404. In addition, too many potential solutions can be worse than too few when all of the solutions need to be filtered through a limited group of people before they can be implemented. See Vermeule, *supra* note 180, at 2 (expressing concern about creating a potential choke-point).

Appropriately defining who should be in the crowd may require some experimentation. While a larger crowd ought to produce better results, it will only do so if Fee Controllers can effectively sort through the unhelpful "assistance" to find the new, useful information provided by the crowd. Different crowdsourcing systems have employed different methods, and it remains to be seen what will be most effective in chapter 11 cases.

<sup>281</sup> Cf. Anthony J. Casey & Anthony Niblett, *Noise Reduction: The Screen Value of Qui Tam*, 91 WASH. U. L. REV. 1169 (2014) (discussing how to construct appropriate

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crowd;<sup>282</sup> (v) whether larger tasks must be divisible into smaller pieces;<sup>283</sup> (vi) whether members of the crowd must be able to build on each other's work;<sup>284</sup> and (vii) whether crowdsourcing must be an online process.<sup>285</sup> Another critical inquiry relates to quality control: how to sort high-quality information from low-quality information.<sup>286</sup> The next three sections of this Article offer some preliminary thoughts on three of the most challenging of these questions, but the precise parameters of a crowdsourced fee control system's design is beyond the Article's scope. These issues will be explored in a planned follow-up.

## i. Who Is in the Crowd?

As originally conceived by Jeff Howe, crowdsourcing involved inviting a crowd to solve a particular problem by issuing an open invitation on the Internet and allowing respondents to self-select

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incentives to encourage parties to disclose high-quality information of potential overcharging but not low-quality information).

<sup>282</sup> Some scholarship has distinguished open-source and crowdsourced solutions based on who retains ownership of the work product. In the former case, the information is typically owned by no one or remains in the public domain. In the latter case, information typically becomes the property of the requesting party. See, e.g., Brabham, *Crowdsourcing as a Model*, *supra* note 178; Orozco, *supra* note 163 (suggesting that, in a crowdsourcing model, the "lion's share of value" is captured by the crowdsourcing company).

<sup>283</sup> Ichatha, *supra* note 242, at 11–12 (divisible projects allow people to work in parallel with each other and also allows those with only a few spare hours to devote to contribute meaningfully to a project where everyone else is similarly a part-time contributor); Stephenson, *supra* note 12, at 1468 (discussing divisibility in the context of information substitutes and compliments). See also Fennell, *supra* note 11, at 405 n.82 (noting that, for some projects, the "modularity" of tasks—the ability to break down the project into chunks—is the greatest challenge for the requesting party) (citations omitted); Franklin et al., *supra* note 242 (dividing a project into microtasks—those taking not more than one minute in the usual cases—allows the participation of people who have no special training and does not require a lot of their time); Wolfson & Lease, *supra* note 241.

<sup>284</sup> See, e.g., Ichatha, *supra* note 242, at 12 (Crowdsourcing's power comes from the ability to engage in a "collaborative community initiative.").

<sup>285</sup> See, e.g., Fennell, *supra* note 11, at 390 (claiming that new technologies, such as the Internet, can lower the cost of acquiring information, which would shift the efficient level of information obtained upward); Mergel et al., *supra* note 10, at 2074 (noting that the Internet has "further enhanced" crowdsourcing).

<sup>286</sup> A lot of the crowdsourcing literature has also addressed this question. See, e.g., Howe, *supra* note 177 (The larger and more diverse the group, the larger number of solutions you may receive that are almost all "complete crap."); see also Fennell, *supra* note 11, at 394; Franklin et al., *supra* note 242 (looking at mTurk's reputation scores); Schmitt-Sands & Smith, *supra* note 228 (suggesting reputation scores, but also adequate cash incentives, screening for intrinsically motivated people, building the Requestor's reputation with the work force, and verifying the crowd's findings directly as a quality-control mechanism); Vermeule, *supra* note 180.

whether they would like to help determine a solution.<sup>287</sup> Subsequently, however, crowdsourcing experimenters have concluded that unconstrained crowds are not universally good. For one, without constraints, it is difficult to prevent self-interested parties from over-participating.<sup>288</sup> Instead, Professor Lee Anne Fennell has argued that the goal should be to “engage participation that is appropriately scaled and representative,” which will typically not mean maximizing participation.<sup>289</sup> In addition to concerns about self-interested behavior, more information tends to be received with larger crowds, resulting in information of a lower average quality.<sup>290</sup>

Some experimentation is likely warranted. Even with an open call, in some cases few people are interested in participating in crowdsourcing exercises. Perhaps fee control issues will prove to be a set of problems that few people are interested in helping to solve.<sup>291</sup> In that case, it may be that inviting anyone who is interested would be the appropriate solution.<sup>292</sup> Alternatively, it may suggest the importance of targeting potential problem solvers and then working to incentivize their participation.<sup>293</sup> In addition, some crowdsourcing scholars, such as Professor Daren Brabham, have suggested that limiting participation is often more useful than realized.<sup>294</sup>

Whether a crowdsourced fee control system should use an open call or not will depend heavily on how many people are interested in participating, whether interested parties engage in self-interested behavior that distorts the process, and how effectively the system can process all of the information that is received. It does seem, however, that if these problems can be adequately addressed, an open call would be appropriate. As discussed above, Fee Controllers would benefit from the information provided by bankruptcy experts and non-experts alike, whether or not those people are involved in a particular bankruptcy case.

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<sup>287</sup> Howe, *supra* note 177.

<sup>288</sup> Fennell, *supra* note 11, at 404.

<sup>289</sup> *Id.* at 408.

<sup>290</sup> Stephenson, *supra* note 12.

<sup>291</sup> See Franklin et al., *supra* note 242.

<sup>292</sup> Ichatha, *supra* note 242, at 14 (arguing that “at least one potential problem-solver in the group needs to be good enough to solve the problem or one of its modules”).

<sup>293</sup> Schmitt-Sands & Smith, *supra* note 228 (discussing the ability to screen workers based on their reputation).

<sup>294</sup> Brabham, *Crowdsourcing the Public Participation Process*, *supra* note 12 (noting that many articles caution against the optimistic view of public participation).

## ii. Incentivizing the Crowd

A crowdsourced fee control system will need to develop appropriate incentives for encouraging the crowd's participation. The current system does not provide appropriate incentives, which is why many parties-in-interest to bankruptcy cases do not already participate in fee control. If a crowdsourced fee control system is to encourage better participation, it is important to consider how to limit the costs of participating and/or how to increase the available rewards (for those who can currently participate) or create appropriate rewards (for those who cannot).

The existing crowdsourcing literature has identified an array of possible incentives for encouraging participation that may be relevant to a crowdsourced fee control system, including: (i) money;<sup>295</sup> (ii) altruism;<sup>296</sup> (iii) reputation;<sup>297</sup> (iv) demonstrating competence, particularly in a new field;<sup>298</sup> (v) creating a sense of belonging or group membership;<sup>299</sup> (vi) entertainment;<sup>300</sup> and (vii) intellectual fulfillment.<sup>301</sup> Importantly, the appropriate incentive for different members of the crowd will likely differ. For some, no incentive—certainly no monetary incentive—is required. Instead, providing the answer is its own reward.<sup>302</sup> This type of incentive is evident in many areas of the Internet, where users volunteer enormous amounts of sometimes very personal information about their lives and experiences.<sup>303</sup> Even where monetary rewards are used to incentivize participation in crowdsourcing projects, crowdsourced labor has frequently proven to be cheaper than using traditional employees.<sup>304</sup> This seems particularly likely to be true in the legal arena, where the hourly rate of some restructuring professionals is substantially higher than the rates paid to Turkers.

In addition, it is not clear that the question of what sort of incentive to offer can be disaggregated from the question of who

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<sup>295</sup> Ichatha, *supra* note 242; Orozco, *supra* note 163, at 6.

<sup>296</sup> Ichatha, *supra* note 242; *see also* Fennell, *supra* note 11, at 405; Orozco, *supra* note 163, at 7.

<sup>297</sup> Ichatha, *supra* note 242.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*; *see also* Brabham, *Crowdsourcing as a Model*, *supra* note 178, at 82 (social capital); Orozco, *supra* note 163, at 7.

<sup>300</sup> Orozco, *supra* note 163, at 7 (Crowdworkers often describe contributions as “a fruitful way to spend extra time.”).

<sup>301</sup> Brabham, *Crowdsourcing as a Model*, *supra* note 178, at 82.

<sup>302</sup> Fennell, *supra* note 11, at 405.

<sup>303</sup> *Id.* at 392–93.

<sup>304</sup> Howe, *supra* note 177.

should be in the crowd. If people are generally disinterested in participating, larger incentives will probably be required. But if interest is robust, smaller incentives ought to be sufficient. In addition, if fee control activities are competing for the attention of Turkers, the incentives can likely be small since HITs tend to pay poorly. By contrast, if fee control activities are competing for the attention of busy lawyers, accountants, and investment bankers, the incentives will likely need to be larger because these professions tend to pay fairly well.<sup>305</sup> Finally, it may also be that a larger incentive is needed at first to overcome initial inertia, but once people get used to participating in fee control activities, the incentives can be altered.<sup>306</sup>

### iii. Quality Control Issues

Quality control has been an issue with crowdsourcing experiments. One television executive who successfully crowdsourced a new program, described most of the non-winning responses as “complete crap.”<sup>307</sup> But even this executive found gold among the dreck. Others too have found that quality control is a surmountable challenge.<sup>308</sup> One possible solution is to limit who may participate in a crowdsourced fee control system in an attempt to generate higher-quality information, at least for certain tasks.<sup>309</sup> Other successfully employed solutions involved creating a reputation score for members of the crowd,<sup>310</sup> spot-checking the results of the crowd,<sup>311</sup> and empowering a small group of decision-makers to judge the suggestions

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<sup>305</sup> It may also be the case, however, that anonymity would be sufficient. It may be that the reason why professionals who are troubled by excessive or inappropriate requests for compensation do not speak up is because they fear retribution. Alternatively, certain lawyers or law firms might attempt to make their reputation as the “honest” lawyers and could bolster that reputation by publicly attacking the unreasonable fee and expense requests of other professionals.

<sup>306</sup> Fennell, *supra* note 11, at 405.

<sup>307</sup> Howe, *supra* note 177 (describing the response of “Michael Hirschorn, executive vice president of original programming and production at VH1 and a creator of the cable channel’s hit show *Web Junk 20*”).

<sup>308</sup> See Schmitt-Sands & Smith, *supra* note 228; see also Julie S. Downs et al., *supra* note 228.

<sup>309</sup> Schmitt-Sands & Smith, *supra* note 228 (noting the benefits of identifying intrinsically motivated participants).

<sup>310</sup> See *id.* (discussing the ability to screen workers based on their reputation); see also Fennell, *supra* note 11, at 394; Michael J. Franklin et al., *supra* note 242 (looking at reputation scores in mTurk).

<sup>311</sup> Schmitt-Sands & Smith, *supra* note 228; see also Krmpot Vera, *The Fight Against Corruption-Crowdsourcing*, 3 INT’L J. ECON. & L. 61, 61 (2013) (suggesting that a “relatively small number of people can be [sic] coordinate the activities of a large number of those who contribute”).



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offered by the crowd.<sup>312</sup>

Once again, time will tell what works best for a crowdsourced fee control system, including issues pertaining to quality control. If the volume of information received is minimal, perhaps the United States Trustee will be best situated to vet the information received and to object where the United State Trustees' office deems appropriate. Alternatively, the crowd—through employing a multi-step process of generating ideas, refining the original suggestions, and verifying the data's accuracy—may be able to ensure the information passed along to judges is of high quality.<sup>313</sup>

## CONCLUSION

As this Article defines crowdsourcing, the process of solving problems by drawing on the contributions of many people, it has been around for as long as humans have worked together to solve problems.<sup>314</sup> The concept has been employed by both non-profit organizations and commercial enterprises for decades, and with great success.<sup>315</sup> This Article offers some preliminary thoughts on how crowdsourcing can be usefully employed in the commercial bankruptcy system.

Crowdsourcing is useful for performing the sort of tasks that plague chapter 11's current fee control system. As described above, crowdsourcing is a process of obtaining needed services, information, ideas, or content by soliciting contributions from a large group of people. It is also a particularly useful strategy for subdividing tedious work, and it is most effective when each participant can perform a discrete portion of the work that must be done. These are exactly the problems chapter 11's fee control system needs to solve. Chapter 11 would benefit if Fee Controllers had additional information about potential overcharging in fee applications, and if they could outsource some of the tedious, detail-oriented work required by a typical fee review. Individually, each member of the crowd could make small but significant contributions to chapter 11's fee control process. Collectively, the crowd can make important and potentially game-changing contributions. Chapter 11's fee control system should be re-examined to determine where crowdsourcing can make the most

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<sup>312</sup> See Vermeule, *supra* note 180, at 1.

<sup>313</sup> See *supra* note 268.

<sup>314</sup> See, e.g., *supra* note 10.

<sup>315</sup> The Audobon Society crowdsources its yearly North American bird count. See AUDOBON.ORG, *supra* note 10; cf. Ichatha, *supra* note 242, at 10–11 (discussing how the British Government crowdsourced a solution to the “Longitude Problem”).

significant impact.

Crowdsourcing holds great promise for fixing chapter 11's flawed fee control system. In other contexts, crowdsourcing has resulted in creative solutions to problems that previously stumped experts in those fields. Crowdsourcing has allowed the National Audubon Society to attempt to count every bird in the Western Hemisphere every year since at least 1900.<sup>316</sup> Pillsbury, considered one of the earliest progenitors of crowdsourcing, has been relying on the wisdom of crowds to produce better baked goods via its "Pillsbury Bake-off" mail-in cooking competition since 1949.<sup>317</sup> Based on these examples and the other examples offered throughout this Article, there is reason to believe that crowdsourcing would result in creative solutions being developed to fix flaws in chapter 11's fee control system.

This Article has sought explain why crowdsourcing might be useful in the fee control context; however, all of the particulars have not been worked out yet and much work remains to be done. Yet this is hopefully the first step in building a better bankruptcy system for the years to come.

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<sup>316</sup> Edgar B. Herwick III, *The Christmas Bird Count: The Original Crowdsourcing*, WGBH (Dec. 18, 2014, 10:57 AM), <http://wgbhnews.org/post/christmas-bird-count-original-crowdsourcing> (describing how approximately 70,000 citizen-scientists collect data each year on bird counts).

<sup>317</sup> Tina Rosenberg, *Crowdsourcing a Better World*, N.Y. TIMES (Mar. 28, 2011, 9:15 PM), [http://opinionator.blogs.nytimes.com/2011/03/28/crowdsourcing-a-better-world/?\\_r=0](http://opinionator.blogs.nytimes.com/2011/03/28/crowdsourcing-a-better-world/?_r=0).