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PERSPECTIVE

## Potential impact of the Electronic Court Records Reform Act

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The Electronic Court Records Reform Act of 2019 (H.R. 1164) was recently introduced in Congress with the goal of mandating free, public access to federal court electronic records via PACER (Public Access to Court Electronic Records) as well as consolidating the United States courts' case management and electronic case files system into one platform. If passed, this legislation would have major implications for the legal community, including pro-se litigants, by requiring that all federal court records be made available free of charge.

Following its introduction in February, the bill was referred to the House Committee on the Judiciary. In March, it was referred to the Subcommittee on Courts, Intellectual Property, and the Internet. Since its introduction, many proponents and adversaries of the legislation have voiced their opinions and concerns.

The act would enable free access to court records for all parties involved in the legal process including pro-se litigants, law firms and others. Proponents advocate that, if passed, the legislation will achieve the goal of creating fair, transparent and equitable access to court documents. Furthermore, it would result in major cost-savings for law firms and legal professionals who spend millions of dollars each year accessing court documents through the PACER system.

Opponents of the bill, however, assert that the loss of revenue to the court system could dramatically impact the courts' budget and allocation of funds and diminish the services the courts provide.

### The Origin and Evolution of PACER Fees

The PACER system was established in the early 1990s, before most computers were connected to the internet and when accessing court

documents required a trip to the courthouse. Over the past three decades PACER access has evolved and with it, its fees have been adjusted to control and manage access to millions of cases and billions of documents.

According to the Free Law Project, PACER fees resulted in revenue of approximately \$145 million in 2015 and, according to a recent published analysis in *The New Republic*, more than \$146 million during the 2016

fiscal year. While this revenue has been criticized by some as excessive, others feel that it is justified as a portion of these funds are used to support the court system and its processes.

The federal judiciary first commenced its Electronic Public Access Program in 1989 with pilot programs to create PACER systems in selected bankruptcy and district courts. In 1990, the Judicial Conference, as directed by Congress, instituted fees of \$1 per minute for public access to electronic information. The funds generated were deposited into a segregated fund and designated to be used for information technology projects.

In 1998, the judiciary developed the new Case Management/ Electronic Case Files (CM/ECF) system so that, for the first time, courts were able to maintain complete electronic case files and a web site for online access to PACER. The Judicial Conference instituted a seven cents per page fee for documents accessed via the Internet from the electronic case files. It also allowed courts to make specific items available at no cost, such as forms, local rules and opinions.

As CM/ECF continued to grow, the Judicial Conference approved

provisions to allow for free access under specific circumstances. It stipulated that attorneys of record and parties involved in a case would be entitled to one free electronic copy of all documents filed if its receipt was legally required or directed by the filer. It also provided fee exemptions for specific individuals and groups.

Over the years, the fee schedule for PACER has gradually increased from seven cents per page to 10 cents per

processes and services — or is running a very costly web site.

Adversaries of the act are concerned that the loss of fee revenue plus the cost of system consolidation would have a dire impact on the courts and PACER program. They voice concerns that complete elimination of the fee would leave a huge hole in the court budgets that would potentially diminish the services and support that the court is able to offer as result of these funds.

Within the bankruptcy community, there is concern among professionals that a budget hole created by the legislation may undermine the court services and funds that help to facilitate the bankruptcy process for trustees, debtors and creditors alike. Regardless of which side of the issue one may take, it is certain that the fallout from the passage of the act will have a significant ripple effect on the court system, legal profession and beyond. ■

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page (with a three dollar per separately filed document maximum), while several other provisions were put into place to manage and allow access to the appropriate parties with exemptions.

In 2016, several legal non-profit groups filed a class action against the federal government for using excess PACER revenue to cover the cost of projects unrelated to its systems. The lawsuit stems from a provision in the E-Government Act of 2002, which states that the judiciary is authorized to levy fees "only to the extent necessary" to provide "access to information available through automatic data processing equipment."

### A Look at Both Sides of the Issue

Proponents of the Electronic Court Records Act say that its implementation would result in technology and system improvements while reducing financial burdens on pro se litigants and other involved parties. They raise concerns regarding the mounting revenue generated by PACER and how it is being allocated. The Free Law Project asserts that PACER is either generating surplus revenue — which it states is deemed illegal by the E-Government Act of 2002, enacted to improve the management of the court's electronic

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