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PERSPECTIVE

Open Courts Act of 2020: the impact on bankruptcy and beyond

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In an effort to create open and free access to electronic federal court records, the Open Courts Act of 2020 was introduced and passed in the House of Representatives late last year and its fate is now in the hands of the Senate Judiciary Committee. This legislation, which is the third attempt in as many years to increase access to court records through the PACER system (the Public Access to Court Electronic Records), has been met with both resistance and support from opposing sides of the many issues surrounding free access to PACER as well as an overhaul of the judiciary's case management and electronic filing system.

With bipartisan support and sponsored by Rep. Hank Johnson, D-Ga., and Rep. Doug Collins, R-Ga., the act would eliminate fees charged for accessing documents and searches using PACER in addition to revamping the entire system over the next four to five years. To fund the development of a new system, the Judicial Conference would be mandated to put in place a progressive schedule of additional fees for yet-to-be defined high-volume users of the system not including governmental agencies. The Judicial Conference would also collect an annual fee from federal agencies, to be determined by the fees paid by them in 2018, to fund the operations of the new system. Furthermore, the Judicial Conference would be given authority to establish filing fees based on the user's purpose and interests as well as other factors.

According to the bill's proponents, PACER fees place undue burdens on pro-se litigants, journalists and academics who are engaged in legal matters or reporting and examining the

efficiency of the majority of the PACER revenue, argues that the legislation would be devastating to its branch's operations and budget. If passed, the act would substantially reduce PACER's annual rev-

ences raises concerns that the proposed overhaul to the PACER system could be costly and disruptive to judicial operations.

Previous legislation proposing free access to PACER was faced

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courts' actions. New users of the system also have struggled with unintended costs while learning to use the system and/or lock-outs due to billing issues. Critics have voiced that PACER's revenue should have been reinvested in upgrading and improving the system over the years rather than being spent elsewhere which would have prevented the need for legislation to address updates and upgrades.

In Rep. Hank Johnson's words, the legislation would "remove a 'keep-out' sign for the little guy" by eliminating the cost of 10 cents per page, maximum \$3 per document, as well as fees incurred in doing searches. Many feel this legislation is especially pertinent to today's increasing focus on socioeconomic equality as well as reducing economic hardships caused by the COVID-19 pandemic and ensuring equal access to the court system, regardless of ability to pay.

Conversely, one of the bill's primary opponents, the Judicial Conference of the United States, the federal judiciary's policymaking body and the current ben-

eficiary of the majority of the PACER revenue, argues that the legislation would be devastating to its branch's operations and budget. If passed, the act would substantially reduce PACER's annual revenue which has been estimated to be approximately \$150 million by the nonprofit Free Law Project which according to PACER is "used to support the ongoing operations, development, and maintenance costs associated with the electronic case management system and other systems, such as the PACER Case Locator, a service used by federal courts throughout the country." The Judicial Confer-

with similar concerns and was not passed. The Twenty-First Century Courts Act was introduced in February 2020 to require that the Administrative Office of the U.S. Courts establish a single system for federal court public records that must be accessible to the public at no cost, however after it was introduced to the House and referred to the House Committee on the Judiciary, it did not

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receive a vote. In 2019, the Electronic Courts Records Reform Act of 2019 proposed free, public access to Federal Court electronic records via PACER and the consolidation of the United States Courts' case management and electronic case files system into one platform. After its introduction in the House, it was referred to the House Committee on the Judiciary and then to the Subcommittee on Courts, Intellectual Property, and the Internet, but did not progress.

While the legal and bankruptcy community awaits the outcome of the act, some experts have fore-

casted its anticipated financial impact. If passed and the Judicial Council loses PACER revenue, legal and bankruptcy professionals may feel the negative impact of budget cuts that could compromise court services and access to the courts.

Some also view the act as "fee-shifting legislation"—shifting the financial burden to the professionals and heavy users and giving the benefit to pro-se debtors, those in the education field, the government and press. They believe that if fees are shifted to professionals, the proposed legislation will just penalize those who

are fortunate enough to be able to retain an attorney who may pass on the higher costs. The legislation could also be seen as discriminating again against attorneys and other professionals with access to PACER who cannot pass along the increased costs to a client. On the other hand, many hope that the legislation would enable pro-se litigants greater access to the PACER system potentially allowing greater access to bankruptcy for those who need it in these challenging times and are knowledgeable enough to undertake their own filings and proceedings.

Another potential concern raised by some professionals is that if anyone can access PACER, it could potentially lead to more fraud and hijacking of cases through data breaches and cyberattacks.

As concerns on both sides of the issue persist, we are likely to see the debate continue as well as legislative efforts to resolve them on one side or the other. Whether or not the Open Records Act passes, it can serve to bring pertinent issues to the forefront for discussion as another step towards finding future solutions. ■