



Legislative and Judicial Developments Affecting Public Access to Court Electronic Records (PACER)

December 20, 2021

The [Public Access to Court Electronic Records \(PACER\)](#) system is the U.S. Court’s web-based service that gives registered users electronic access to documents filed in the U.S. Courts via the online Case Management/Electronic Case Files system, known as [CM/ECF](#). The [Administrative Office of the United States Courts](#) (the “AO”), the federal judicial entity responsible for maintaining PACER, [currently charges](#) users ten cents per PACER search as well as 10 cents per page accessed using the system (with a ceiling of \$3 per document). The judiciary waives fees on accounts incurring \$30 or less in any given quarter. With most users not exceeding this \$30 threshold, 25% of PACER users [reportedly](#) pay fees in a given quarter. Individuals or groups may prospectively [petition for a fee exemption](#) to conduct their PACER searches for specified research projects. This Legal Sidebar discusses recent legislative proposals and litigation that may affect the cost of public access to PACER.

Legislative Efforts to Increase Access to PACER

On December 9, 2021, the Senate Judiciary Committee favorably ordered reported the Open Courts Act of 2021, S. 2614. At the [markup](#) session, the committee ordered reported, by voice vote, the bill with an [amendment](#) in the nature of a substitute. This bipartisan legislation is one of [two legislative proposals](#) introduced this Congress to eliminate the U.S. Courts’ current user fee structure for searching and accessing federal court filings on PACER. While S. 2614, as amended in committee, would make PACER free for the general public, each federal agency would be charged an annual fee equal to the total PACER fees paid by the agency in 2021 (adjusted for inflation).

In addition to removing PACER user fees for the general public, both the Senate Judiciary Committee and House-introduced versions of the Open Courts Act of 2021 (S. 2614 and H.R. 5844) require the AO to modernize PACER’s technical functionality, including the additions of full-text search capabilities and “widely accepted common data elements.” Meanwhile, the AO has been independently weighing

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LSB10672

[recommendations](#) of 18F—the U.S. government technology and design consultant group—to improve functionalities of the public-facing PACER and underlying CM/ECF systems.

A number of legislative proposals similar to the Open Courts Act of 2021 have been introduced in previous congresses. At least four such bills were introduced in the 116th Congress—including the Open Courts Act of 2020 (H.R. 8235), the Twenty-First Century Courts Act (H.R. 6017), and the Electronic Court Records Reform Act of 2019 (H.R. 1164 and S. 2064). In the 116th Congress, the House passed H.R. 8235; the Senate did not act on the bill. The [Judicial Conference](#) expressed [some opposition](#) to that proposal due to financial and operational impact on the judiciary.

Class Action Litigation

The collection and spending of PACER user fees have been the focus of an ongoing—but currently stayed—[class action lawsuit](#) filed in 2016 in the U.S. District Court for the District of Columbia. In the case *National Veterans Legal Services Program v. United States*, three nonprofits [filed a class action lawsuit](#) on behalf of PACER users, alleging the federal judiciary’s collection and use of the approximately [\\$920 million in PACER fees](#) collected between 2010 and 2016 exceeded the authority granted by Congress pursuant to [28 U.S.C. § 1913 note](#) (enacted as section 404 of the [Judiciary Appropriations Act, 1991](#) and amended by section 205(e) of the [E-Government Act of 2002](#)). Plaintiffs [demanded](#) a refund on behalf of PACER users pursuant to the [Little Tucker Act](#).

There is no mention of PACER by name in 28 U.S.C. § 1913 note, as the program was unnamed when the [statutory note](#) at issue was added in 1990. Instead, the Act authorizes the Judicial Conference, “only to the extent necessary,” to prescribe reasonable fees for the courts to collect for access to information available through “automatic data processing equipment.” It further requires the Director of the AO to “prescribe a schedule of reasonable fees for electronic access to information which the Director is required to maintain and make available to the public.”

Following [class certification](#) and a [failed motion to dismiss](#), the parties filed cross-motions for summary judgment in 2017. The plaintiffs [argued](#) 28 U.S.C. § 1913 note limited the federal judiciary to collect only those amounts “necessary to recoup the total marginal cost of operating PACER.” Conversely, the judiciary [argued](#) it could collect and use PACER user fees for any project associated with providing access to information through electronic means.

In a [2018 opinion](#), the district court rejected both arguments. Instead, the court, relying on [the plain language and legislative history](#) of 28 U.S.C. § 1913 note, various congressional appropriations, and committee reports, ruled that the judiciary may recoup expenses beyond the cost of operating PACER but only so long as those costs are incurred to make court records electronically available to the public. The court concluded that the judiciary properly used PACER user fees to cover costs associated with systems other than PACER that enhance public access to court filings, such as CM/ECF and the Electronic Bankruptcy Noticing system. However, the district court also found that the federal judiciary had overstepped congressional authority in spending PACER fees on projects that did not enhance public access to court records. The district court found that Congress had not approved the specific use of PACER fees ([totaling](#) approximately \$198 million between 2010 and 2016) for (1) courtroom technology improvements ([\\$185 million](#)), (2) E-Juror software to allow jurors to access electronic copies of court documents ([\\$9.4 million](#)), (3) a pilot program for using PACER software for state courts in Mississippi ([\\$120,998](#)), and (4) the Crime Victims Notification System ([\\$3.7 million](#)). [The court found](#) that these expenditures all lacked an adequate nexus to supporting electronic access to court filings by the public.

In August 2020 on interlocutory appeal, the D.C. Circuit [affirmed](#), concluding “the district court got it just right. . . . [Section] 1913 Note limits PACER fees to the amount needed to cover expenses incurred in services providing public access to federal court electronic docketing information.” However, the circuit court left it up to the discretion of the district court, on remand, to determine “whether all of the costs of

maintaining CM/ECF . . . were incurred in providing public access to federal court electronic docketing information.”

The litigation has been [stayed](#) throughout much of 2021 to allow for [ongoing settlement negotiations](#). In November 2021, the parties [reported](#) that they had “reached [a settlement] agreement in principle,” but the terms of the settlement have not yet been released. The court has extended the [stay](#) of the litigation through January 27, 2022, with the parties’ next status report due on January 20, 2022.

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