



PACER Fee Battle Pits Nonprofits, Supporters Against Government

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Three nonprofits will ask the Federal Circuit next week to consider a Goldilocks question: whether fees the government charges to access court records are too high, too low, or just right.

The nonprofits say the fees violate federal law because they're higher than what's needed to operate the system. They represent a certified class of 1.4 million users of the federal judiciary's Public Access to Court Records (PACER) system.

The federal court system has come under fire for how it operates PACER, which processed more than 500 million requests for case information last fiscal year. Critics argue the pay system reduces transparency and erodes public trust in the courts.

The government argues it's authorized to charge fees that exceed the cost of operating PACER and use the money for other court access projects.

A lower court said PACER fees should be "just right," in that they should cover services that provide public access to electronic court information, but not pay for other court technology projects. Both sides appealed to the Federal Circuit.

Fees for downloading a copy of a filing run 10 cents per page, up to \$3 per document. The Administrative Office of the U.S. Courts collected more than \$145 million in fees in 2014 alone, according to the complaint.

Use of Funds

Under the E-Government Act of 2002, the Administrative Office can set PACER fees "as a charge for services rendered."

The National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice sued the government in 2016, arguing the government charges "excessive" fees that exceed the cost of providing the service.

The costs of providing electronic records "have decreased exponentially even as fees have risen," the groups allege.

“High fees thwart equal access to justice, impose often insuperable barriers for low-income and pro se litigants, discourage academic research and journalism, and thereby inhibit public understanding of the courts,” they argued in their brief.

But the government said it can use PACER fee revenue for any program that provides the public with access to information available through automatic data processing equipment.

Federal law “doesn’t establish a ‘correct’ fee for any particular PACER user or download, so no class member can show that ‘the value sued for was improperly paid,’” the government said in its brief.

The U.S. District Court for the District of Columbia ruled the government can’t use PACER revenues for non-PACER projects, including a new jury management system and a study of document access in Mississippi. It put off ruling on damages while the parties appealed.

Amici: Fees Too High

The case has attracted the attention of more than 50 parties that have signed on to five amicus briefs, all supporting the nonprofits’ argument that PACER fees are too high.

Seven retired federal judges, including former Seventh Circuit judge Richard Posner and former Southern District of New York judge Shira Scheindlin, wrote to argue the system should be free.

“The tragedy of PACER’s paywall is that the courts appear less legitimate, that neither the judiciary nor outside researchers can effectively identify or address certain systemic problems in our justice system, and that pro se litigants are disadvantaged,” the retired judges said.

Former U.S. Sen. Joe Lieberman of Connecticut, who sponsored the E-Government Act, wrote in a brief that charging fees greater than the cost of making the documents accessible “is at odds with the text, history, and purpose of the E-Government Act of 2002.”

The Reporters Committee for Freedom of the Press and 27 media organizations filed a brief pointing to their “strong interest in ensuring that the press and the public can easily and affordably access court documents.”

Eleven legal research platforms argued that the fees restrict public access to information and stifle the growth of new legal tools.

The American Civil Liberties Union, joined by the American Association of Law Libraries, the American Library Association, the Cato Institute, and the Knight First Amendment Institute at Columbia University, wrote that the public’s right to access court documents is protected by the First Amendment.

Gupta Wessler PLLC and Motley Rice LLP represent NVLSP.

Tyler Mills, a team leader in Bloomberg Law’s Litigation Content group, serves on an advisory panel that provides advice and feedback to the Administrative Office of the U.S. Courts on electronic public access services provided by the federal judiciary, including PACER. Bloomberg Law’s Litigation Content group is separate from the news division.

The case is Nat'l Veterans Legal Servs. Program v. United States, Fed. Cir., No. 19-1081, argument 2/3/20.