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Bankruptcy Courts Prepare For Possible Government Shutdown

Eric Morath | 28 February 2011

The administrators of the federal court system are making preparations for a possible government shutdown that could have a wide-ranging impact on bankruptcy attorneys.

If a budget impasse in Congress results in a federal government shutdown, which could happen as soon as Friday, the court system will be among a wide swath of government functions potentially affected.

The result for bankruptcy attorneys could range from a minor inconvenience, such as delayed hearings and slower processing of filings, to a major disruption—possibly including the closure of courts and the shutdown of the electronic document-filing system known as Pacer.

Officials at the Administrative Office of the U.S. Courts, the agency that support the operations of federal courts, held a meeting last week to ready contingencies in case there is a government shutdown.

To be sure, negotiations on Capitol Hill continue this week, and Democrats and Republicans appear to be closing in on a compromise that could extend funding for the government until March 18.

The agency is making plans to allow the courts to continue "critical operations" for some period of time but is preparing for the possibility that funds may run out to pay court clerks, technical staff, security guards and other court employees.

"We know that we could weather at least a few days of a shutdown," agency spokeswoman Karen Redmond said in an interview last week. "It may be premature to ask what would go first."

The good news for the federal judicial system, unlike some other government entities, is that court fees generate a separate stream of funds outside of what Congress appropriates.

When the federal government shut down for two stints in the mid-1990s, the court system was able to continue critical operations for two weeks using those funds, Redmond said. The courts are evaluating tapping those funds again, in which case a shutdown of a few days would have little or no impact on bankruptcy courts.

A prolonged shutdown, however, would certainly have an effect.

Courts may cut staff in an effort to stretch dollars and, if fee funds ultimately run dry, federal employees in the courts would not be allowed to work.

Ultimately, in a long shutdown, the Administrative Office's director would need to evaluate Pacer and other court services to determine when and in which order they would be shut, Redmond said.

Judge Randall L. Dunn of the U.S. Bankruptcy Court in Portland, Ore., said in an interview last week he and others on the bench are discussing the possibility of a federal shutdown.

"The problem is we don't know exactly what the impact would be," said Dunn, the president of the National Conference of Bankruptcy Judges.

The bankruptcy courts—and specifically the substantial fees they collect—could help keep the entire court system open. Dunn said that in the last federal shutdown, bankruptcy fees were largely responsible for funding all courts.

In the event of a shutdown this year, he hopes the courts can remain open.

"We provide a service to many people in need," he said. "So if we can keep providing those services, we're going to do it."

The 1995 and 1996 shutdowns did have some impact on bankruptcy courts. More than 3,500 bankruptcy cases were suspended during that time, according to a recent Congressional Research Service report. Still, that is just a small fraction of all cases. In 1995, for example, about 77,000 bankruptcies were filed each month.

Robert Lawless, a bankruptcy law professor at the University of Illinois, said it's difficult to predict how a prolonged shutdown would affect the courts. He said that looking back to previous budget impasses may not be a reliable guide.

Electronic court filings "barely existed the last time there was a federal shutdown," he said. "Things move much more quickly in today's bankruptcy courts, with companies and creditors often demanding quick action."

That could lead some peculiar situations, he said, such as companies tracking down judges at their homes or elsewhere to submit a bankruptcy petition.

"It would definitely be uncharted territory," Lawless said.

Veteran bankruptcy attorney Ted Berkowitz, a partner at Farrell Fritz, said he is confident that bankruptcy judges and court employees would do all they could to allow the system to operate as normally as possible in the event of a government shutdown.

And if he and other lawyers had to go without modern electronic conveniences, it might not be such a bad thing.

"We did practice bankruptcy law before Pacer, and it was a kinder, gentler day because we actually all knew each other," he said.

Donald Workman, a Washington bankruptcy attorney who said his practice was unaffected by the last government shutdown, isn't concerned about the possibility of another.

"The business of going out of business must continue," said Workman, a partner with Baker & Hostetler.