This activity just got a bit harder to finance

Many moons ago, I blogged about the saga of the PACE (Property Assessed Clean Energy) financing program and the lawsuits to preserve it. As a quick review, PACE allows municipal governments to use funds from the bond market to help property owners finance energy efficiency retrofits and renewable energy arrays on their property. The property owners then repay the local governments, which in turn repay the bondholders, via assessments on their property tax bills over a set period of time. Presumably, the owner's energy savings will be greater than the semiannual payouts. The program originated in Berkeley in 2008, went viral across many states, and was widely touted (including by the White House) as an effective program to help homeowners and commercial customers save money on their energy bills, reduce air pollution, and create local construction jobs.

Because PACE involves local government assessments, these municipalities have lien priority over other creditors in the event of foreclosure, thus allowing for lower borrowing costs due to the higher certainty of repayment. It was this lien priority feature that freaked out the Federal Housing Finance Administration (FHFA), prompting them to halt federal guarantees of loans on residential properties with PACE assessments (commercial properties were unaffected). This action effectively killed PACE across the country, resulting in a number of lawsuits, including from our own beloved Attorney General's office here in California.

Now the judicial results are starting to trickle in, and it's not looking good for PACE advocates. Last month, Judge Scheindlin of the US Federal District Court in the Southern District of New York tossed out one of the East Coast versions of the lawsuit, filed by NRDC. The decision is not available on-line, but the court dismissed NRDC on standing grounds, concluding that NRDC did not make a proper showing that a favorable decision in the lawsuit would actually redress the injury. In other words, according to the court, there is no guarantee that local governments would actually resume their PACE programs once FHFA rescinded the policy. Essentially the court needs more guarantee that a verdict for the plaintiffs will actually achieve the desired result and won't simply be moot.

To counter this argument, NRDC had provided declarations from local government officials saying that they would restart their PACE programs once FHFA resumed guarantees for mortgages on PACE properties. But that wasn't enough for Judge Scheindlin, who also wanted the national banks to swear that they would begin lending again to PACE property owners. The court believes that local government decisions to resurrect the program would

still be contingent upon national banks' willingness to lend.

The court's decision places an excessive evidentiary burden on the plaintiffs. PACE was humming along fine with national bank support and was only stopped cold in its tracks by the single event of FHFA's new PACE policy. The banks clearly stopped lending because the federal government would no longer underwrite those loans. Why assume there was any other reason, given the obvious timing of events? And why also assume that somehow those same national banks may have learned something new in the past year, when most of the programs were on hold, and now won't be willing to lend to PACE properties even if FHFA changes course?

But beyond the history here, it also seems highly unlikely that PACE advocates could actually get national bank representatives to swear in court that their institutions will resume lending once FHFA reverses course. I doubt that any bank would want to commit itself in court to a lending policy one way or the other unless there's a clear and finite profit motive for them to do so. And while PACE has many safeguards to protect banks from loss, it's hard to say quite yet that PACE will certainly help banks profit (although improving homes through retrofits and especially new solar panels has been documented to increase home prices). So my guess is that this decision presents a very challenging evidentiary barrier for PACE advocates to overcome.

Meanwhile, a judge in the Eastern District of New York tossed out the second East Coast lawsuit by the town of Babylon, New York. Like Judge Scheindlin, Judge Wexler concluded that Babylon failed to meet the redressability requirement. But the court also declared that FHFA was acting as a conservator for the bankrupt Fannie Mae and Freddie Mac lending institutions and was therefore protected from judicial review. Under the statute enabling FHFA, Congress specifically limits judicial review of the actions of conservators, so any actions taken by FHFA since conservatorship began in September 2008 are not regulatory in nature and therefore not subject to review, according to the court. Plaintiffs disputed that FHFA actually took a conservator role, but the bottom line is an equally harsh dismissal.

These cases create bad precedent for the west coast lawsuit, which is spearheaded by the California AG. Even if the West Coast group gets a favorable decision, the results in New York guarantee a split on the standing issue that would have to go up on appeal to resolve nationally. So it's looking like the courts will not be a favorable place for the PACE program after all, at least in the medium term.

The next logical place to resolve the situation is the US Congress. I hear rumblings that perhaps some Tea Party conservatives may be interested in resurrecting PACE, which after

all should be near and dear to any true conservative's heart (no government money, local control, good local jobs, and savings for property owners). So perhaps we'll soon see some surprising congressional bedfellows on an important environmental and economic issue. Otherwise, PACE may be largely out of luck, thanks to the Empire State.