The West Coast PACE litigation party appears to have ended. After favorable rulings from the California Northern District Court for PACE backers, the Ninth Circuit today dismissed the case outright.

As background, Property Assessed Clean Energy (PACE) programs allow municipal governments to finance residential and commercial energy improvements, with property owners repaying the governments via property tax assessments. The program was just taking off in states across the country when in 2010 the Federal Housing Finance Agency (FHFA) decided to stop insuring residential mortgages on properties with PACE assessments (commercial properties were unaffected).

Lots of lawsuits were filed, but the West Coast version went the farthest. Judge Claudia Wilken ordered FHFA in 2012 to begin a rule-making process to justify the agency's action, although she allowed the present policy to stay in place (Jayni wrote about Berkeley Law's comments submitted in this process).

Today the Ninth Circuit ruled that the courts have no jurisdiction to interfere with FHFA's decision because the agency acted as a "conservator" of Fannie and Freddie, rather than as a regulator. The conservator role has been well established in the context of the FDIC and private banks, but not for FHFA and Freddie and Frannie, which are government-sponsored entities. Plaintiffs had argued that 1) FHFA never invoked the "conservator" role when they issued the original 2010 policy directives and that 2) the agency's PACE policy involved substantive regulations not fit for the more limited statutory powers of a conservator. The court disagreed, finding that the policy was meant to shield taxpayers from liability over losses from foreclosed homes: in the event of a foreclosure, municipal governments would get paid back on their PACE assessments before Fannie and Freddie.

This ruling has the unfortunate outcome of hindering an important municipal financing program for residential properties that will benefit the environment and economy (reduced utility bills and residential construction/retrofit jobs). And the scope of the conservator role, as the ninth circuit has now defined it (and as the Second and Eleventh Circuits also ruled in their PACE cases), allows FHFA to make almost any decision it wants without public input or judicial review, as long as FHFA can document that the policy saves the agency money and therefore fits its role as a "conservator."

The immediate question for PACE backers will be whether of not FHFA continues its rule-making process that began in 2012 in response to the now-dismissed lawsuit. Legally, it can now abandon that effort, but it may be more difficult politically to do so. Otherwise, PACE backers will either have to hope for congressional action to overturn the FHFA policy or for

the Obama Administration to make a change at FHFA. Either option would be welcome, given this decision today.