www.eluls.org

THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

Vol. XXXIII, No. 1
September 2011

• Martha M. Collins, Chair • Jeffrey A. Collier, Co-Editor • Anthony J. Cotter, Co-Editor

Update On Pace One Year Later: Litigation, Legislation and New Initiatives

by Erin L. Deady, Herb Thiele, Ed Steinmeyer & Chad Friedman[1]

I. PACE UPDATE IN A NUTSHELL

In last year's ELULS Reporter, we provided an update on one of Harvard Business Review's "Breakthrough Ideas for 2010." Property assessed clean energy ("PACE") programs began forming in various states across the U.S. and then the Federal Housing and Finance Agency ("FHFA" a federal agency of the U.S. government), Fannie Mae ("Fannie") and Freddie Mac ("Freddie") threw cold water on the concept. A second federal bill has been introduced (H.R. 2599) to resolve the concerns raised by FHFA, Fannie and Freddie about the seniority of PACE liens, but in the interim, federal litigation continues. All is not lost though because while the legal issues remain a clear conflict between federal and state law, several Florida local governments continue efforts to begin forming various types of energy financing programs across the state.

Recall that in PACE programs, local government non ad-valorem assessments are attached to a property tax bill voluntarily through a lien to fund energy efficiency or renewable energy improvements. This approach overcomes the largest hurdle in energy financing, the needed upfront infusion of cash to actually complete the improvements. The state or local government provides the financing for energy projects to real property owners (residences or businesses) and that financing is then collected

See "Pace Update," page 21

From the Chair

by Martha Collins

I have been with the Section for eleven years and this is my first article in the Section Reporter. I was not going to miss this opportunity to write everyone as incoming Chair. First and foremost, I want to thank Joe Richards who leaves us as outgoing Chair, and thank him for all of his work with the Section. He will be missed. To kick start the new year, Section leadership held their annual retreat in Melbourne Beach, FL. To keep in mind the diversity of the Section, the economy, and our environmental and land use interests, we held the retreat at the Archie Carr Wildlife Refuge and stayed in three local motels. We were provided an ocean front classroom at the refuge during the day where we held our meetings, and at night were treated to a private tour of the refuge to watch endangered sea turtles nest on the beach. We had our largest participation in years for the retreat and got a great start in planning for the upcoming year.

Our goal is to always keep in mind our Section member's needs, provide them with valuable services, and continue to grow and make our Section stronger. Along those lines, we look forward to continuing with our four substantive committees while also adding a fifth one on Energy. Our webinars have proven to be very

See "Chair's Message," page 2

INSIDE:

An Overview of Florida Fisheries Management 3
Florida Case Law Update 6
On Appeal 8
Department of Community Affairs Update ... 9
ELULS Affiliate Update 10
Law School Liaisons
Barry University School of Law 11
FIU College of Law Welcomes New Faculty and Grows Its Public Interest Environmental Law Clinic 12
A Summer 2011 Update on the Florida State University College of Law's Environmental and Land Use Program 12
St. Thomas Law: LL.M. - Environmental Sustainability 13
University of Florida Levin College of Law: Transitions in the Environmental and Land Use Law Program, Professors Angelo, Klein Assume Leadership Roles 14
Agriculture Law Update - Brochure 16
Practice Before D.O.A.H. - Brochure 18
Section Financials 20

through property tax assessments similar to a water or wastewater assessment. The scope of the improvements depends upon state law and can include water efficiency improvements under some programs. Under Florida law (Section 163.08, F.S.) hurricane "hardening" projects are also authorized to reduce a property's exposure to wind damage from storm events.

Fannie and Freddie, who own or guarantee a significant portion of residential mortgages across the U.S. are now controlled and regulated by the FHFA. All three (3) entities have raised concerns over the seniority of routine local government levied assessments central to PACE programs. They simply have argued that assessments for PACE programs are a "risk" to mortgage lenders, and to minimize that perceived risk, they have acted to prevent these types of property-based assessments.

II. THE GENESIS OF PACE

California leads the way in creating PACE programs and had the first such local government to do so (Berkley-FIRST launched in 2008).[2] Presently, 27 states plus the District of Columbia have enabling legislation providing the ability to create PACE programs. Most programs include specific criteria to ensure that the risk to the property owner and the property's existing mortgage holder is minimized. Many of these attributes are found in the Department of Energy's (DOE)"Best Practice Guidelines" to assist state and local governments in the creation and maintenance of PACE programs.[3]

Frustrating the issues, the DOE has encouraged the development and growth of PACE programs nationally and use of its grant programs to seek funding for doing so.[4] DOE remains interested in the creation of mechanisms to deploy financing for energy efficiency and renewable energy project implementation at the individual property level.

The programs remain attractive to local governments because they provide significant (and documented) ancillary public benefits, including: reducing a community's carbon footprint; better terms for incurring the financing for the energy projects; transfers of the assessments with changeover in ownership; lowered utility bills; tax benefits; reduced transaction costs; job creation; and positive publicity.

III. PACE IN FLORIDA

Florida passed HB 7179 in the 2010 legislative session, which clarified supplemental authority for local governments to create the PACE programs, even though many have opined that PACE probably could have been implemented anyway under existing Florida law. The bill defined a "qualifying improvement" which is generally an energy efficiency, renewable energy or wind resistance project affixed to the existing structure on a property. The authority builds upon Florida county and municipal home rule powers granted in the Florida Constitution.

Akin to these powers, Florida has a long history of creating special districts with over 1,620 special districts existing in Florida. Under state law, their assessments take priority over all other obligations on a property, including purchase money mortgages, and subordinate and secondary mortgage obligations which is where FHFA, Fannie and Freddie have cried foul.[5]

In HB 7179, the Florida Legislature clarified the process and public purpose aspects of PACE programs, finding that all energy-consuming-improved properties that are not using energy conservation strategies contribute to the burden affecting all improved property from fossil fuel production, and improved property that has been retrofitted with energy-related qualifying improvements receives a "special benefit" reducing the property's energy consumption."[6] The Florida Legislature also found that "there is a compelling state interest" in the voluntary participation of property owners in the programs.[7] Pursuant to HB 7179, a local government may incur debt to provide financing for the programs[8] and levy non-ad valorem assessments to fund the programs.[9] In addition, local governments can also partner with one or more other local governments for the purpose of providing upfront financing for the improvements.

IV. ACTIONS GIVING RISE TO THE PACE LAWSUITS

The FHFA, Fannie and Freddie, have made determinations regarding the seniority of PACE liens in relation to a mortgage. Several state and local governments have challenged the actions of FHFA, Fannie and Freddie in Federal court including Leon County in the Northern District of Florida. Interestingly, the position of FHFA, Fannie and Freddie changed from the initial development of the programs. On September 18, 2009 Fannie Mae directed lenders to treat PACE assessments as any other tax assessments.[10] However, a little less than a year later they reversed their earlier directions regarding PACE assessments.[11]

On May 5, 2010, Fannie and Freddie issued advice letters to lending institutions stating that PACE assessments acquiring a "priority lien" over existing mortgages pose risk and are key alterations to traditional mortgage lending practice.[12] Additionally, they characterized the PACE assessments as "loans" rather than assessments.[13] These determinations were upheld by the FHFA.[14] Throughout the summer and fall of 2010 the FHFA, Fannie and Freddie continued to issue statements hostile to PACE programs.[15] The impact remains significant. These actions have prohibited mortgage holders from entering into PACE programs and have had a chilling effect on numerous PACE programs because they control, at some point, upwards of up to 90 percent of mortgages underwritten.

V. THE FEDERAL PACE LAWSUITS

As a result of these actions, 8 complaints[16] involving 16 parties[17] were filed in federal courts in California, Florida and New York. On July 14, 2010, the State of California launched its legal efforts by filing a Complaint for Declaratory and Equitable Relief, Unfair Business Practices and Violation of the National Environmental Policy Act against the FHFA, Fannie and Freddie.[18] Almost simultaneously with the California Complaint, the Sierra Club also filed for Declaratory and Equitable Relief, Violations of the Administrative Procedure Act and Violation of the National Environmental Policy Act.[19] Sonoma County, California filed a similar Complaint for Declaratory and Equitable Relief[20] and Placer County moved to intervene in the Sonoma County case on September 23, 2010. The City of Palm Desert, California also filed a Complaint on October 4, 2010. The Natural

continued...

Resource Defense Council, Inc. filed a Complaint on October 6, 2010, in the Southern District of New York against the same parties,[21] but included John G. Walsh, as acting Comptroller of the Office of the Comptroller of the Currency, which has also weighed in on the issues.[22] On October 8th, 2010, Leon County, Florida filed a Complaint in the Northern District of Florida, alleging violations of the Administrative Procedures Act, Tenth Amendment to the U.S. Constitution and the Florida Deceptive and Unfair Trade Practices Act (hereinafter "FDUTPA"), Section 501.204, F.S.[23] Finally, The Town of Babylon, New York filed its Complaint on October 26, 2010.

VI. THE PACE SUPPORTERS

The Plaintiffs argue that state and local governments have legitimate interests in: (1) not being denied the ability to preserve home rule and assessment powers; (2) pursuing energy conservation and greenhouse gas emissions reductions strategies; (3) protecting the health and welfare of their citizens; (4) protecting the economic interests of their residents in financing the improvements and from unfair trade practices or an unfair competitive advantage by Fannie and Freddie in prohibiting senior liens for assessments; and (6) receiving federal monies earmarked for these purposes.

The Tenth Amendment to the United States Constitution reserves to the states all powers except those limited powers granted to the federal government and ensures the division of powers between the states and federal government. The Plaintiffs argue that by statute, Fannie and Freddie have purchased and guaranteed mortgages subject to government assessment liens which already have a statutory priority over any underlying mortgage obligation. But, now the defendants cannot pick and choose which assessment liens have priority over mortgage obligations and which do not. The designation of a PACE assessment as either a loan or an assessment, and its lien status, is critical to the outcome of the lawsuits filed by the Plaintiffs because the terms of the Fannie /Freddie Uniform Security Instruments only prohibit loans, not liens, which have senior status to a mortgage. Finally, a state legislature may, by statute, alter prospectively the priority of liens arising under state law so as to give priority to a public charge.[24] Additionally, state statutes give certain assessment liens, including PACE liens an automatic priority equal to that of liens for general taxes and superior to all other liens.[25] The plaintiffs also argue that the actions of FHFA are arbitrary and capricious under the Administrative Procedure Act and are rules subject to the typical rulemaking and notice procedures for these types of agency statements. Finally, Plaintiffs argue the unfair trade practices of Fannie and Freddie giving them an unfair competitive advantage in obtaining a senior lien status for mortgages and are in violation of various state laws.

Most Plaintiffs are seeking a finding that the assessments are liens, not loans; the assessments do not pose risk and do not alter traditional lending practices; the assessments constitute a lien of equal dignity to county taxes and assessments; and the assessments do not contravene Fannie or Freddie's Uniform Security Instruments prohibiting loans that have senior lien status to a mortgage. Injunctive relief sought is to prevent adverse actions against any mortgagee who is participating in a program.

VII. THE DEFENDANTS' RESPONSE

The Defendants argue that PACE liens are a serious financial risk and they engaged with state and local authorities regarding their concerns, sought changes to the programs (including necessary consumer protections and energy retrofit standards) and ultimately directed the Fannie and Freddie to take reasonable and prudential actions to protect against that risk. FHFA argues that, in a conservatorship role over Fannie and Freddie, they did what their federal charters authorized and what safe and sound financial practice dictates under the Housing and Economic Recovery Act of 2008.[26]

FHFA argues that courts cannot even review their actions[27] and the state-law claims for unfair competition are pre-empted by federal law. FHFA asserts that the claims for a declaratory judgment that PACE programs involve "assessments" and not "loans" is non-justiciable because it's a matter of semantics. They also argue they have acted within the scope of their authority and the Plaintiffs' claims that FHFA's actions contravene the Administrative Procedure Act fail because they are not in the zone of interests protected by the statute under which FHFA acted, and because FHFA has not issued any rule or regulation subject to notice and comment under the APA.

VIII. FLORIDA PROGRAM STATUS

Notwithstanding the federal issues and litigation discussed above, there are several local governments around the state that are considering or finalizing a PACE program. Leon County was the first in the state to form their program known as the Leon Energy Assistance Program or "LEAP." The County adopted its ordinance in April 2010 before HB 7179 was even adopted and late made some small amendments to the Ordinance to be consistent with the recently passed state law. LEAP focuses on energy efficiency retrofits capping its program at $7,000 to assure energy savings offset the cost of financing. The County is currently working through issues related to energy audits and program development. But for the Fannie-Freddie issues, the County would likely be in full launch mode.

Another example is the Green Corridor District PACE Program (the "Green Corridor") in Miami-Dade County. The Town of Cutler Bay along with five local governments within Miami-Dade County is now in the final stages of creating the Green Corridor. The Green Corridor will be a separate legal entity created pursuant to Section 163.01, Florida Statutes, and will be governed by a board consisting of one representative from each local government as well as an at large member.

All of the "qualifying improvements" provided for in HB 7179 will be eligible for financing under the program. The Green Corridor will be a turnkey senior lien priority program that will include both residential and nonresidential properties. Since this will be a turnkey program, there will be no cost to the local governments to participate in the Green Corridor. Instead, the costs of the program will be borne by the administrator, which is a private entity that was selected through a competitively bid process.

In order to address the concerns

raised by the FHFA, Fannie and Freddie, the program will include consumer protection regulations to protect and educate the resident or business owner about their investment. In addition, the program will also include the necessary underwriting standards to ensure that the resident or business owner will have the ability to pay the special assessments. It should also be noted, that through successful negotiation with the administrator, the local governments within the Green Corridor are indemnified by the administrator from the federal concerns discussed in this article. Therefore, through the public/private partnership and the leadership of the local governments within the Green Corridor, hopefully this program will be successful and can serve as a model for other local programs around the state.

Another program within the Town of Lantana is currently being formed. The concept will be multi-jurisdictional in nature, following in the footsteps of the Green Corridor, but the program will immediately be focused on commercial properties and will be the first of its kind in the state. Program design will accommodate both residential and commercial properties but financing will be only provided to commercial properties until the federal legislation or the litigation provides more certainty on the residential side. Other models are being explored in Gulfport, Collier County and a statewide financing mechanism.

IX. THE LITIGATION & LEGISLATION TODAY

The attractiveness of the senior lien model is the reduced risk for debt or capital lenders for the program and as such goes directly to the heart of the affordability of the financing rates. A positive ruling in the litigation or a legislative act is necessary to clarify the ability of local governments to provide these programs. Because of the conflict between federal and state law, either the litigation or legislation must clarify the issues. So far, the Plaintiffs have defeated a Motion to Consolidate before the Multi-District Panel on Litigation. The New York Plaintiffs have suffered some recent setbacks with some narrow rulings on the actions of FHFA on whether it was wearing its "conservatorship" or "regulator" role when issuing its various determinations. Motions to Dismiss are still pending in the Florida and California cases as of the writing of this article.

With the increased conflict of federal and state law, and as a result of the lawsuits, certain members of Congress have also sought to clarify the issue with now a second attempt at passing a federal bill clarifying the issues. On July 20, 2011, five days short of one year from the first bill to be introduced, the "PACE Assessment Protection Act of 2011" has been filed with 14 Republican and 11 Democrat co-sponsors which requires underwriting standards consistent with the Guidelines issued by the DOE on May 7, 2010; declares that PACE liens comply with Fannie and Freddie's Uniform Instruments; and declares that PACE liens shall not constitute a mortgage default.

Some models are also exploring residential assessments on properties not encumbered with a Fannie or Freddie mortgage, but these circumstances may be rare in today's mortgage market. Until Congress acts, or the litigation provides a clear result, the likelihood is that residential PACE is on hold for full launch. All is not lost however, as some Florida local governments are continuing to implement and build these programs recognizing the clear benefits to residences and businesses across the state.

Endnotes:

[1] Erin L. Deady and Ed Steinmeyer, Lewis, Longman & Walker, Herb W. Thiele, County Attorney, Leon County. Chad Friedman, Weiss Serota Helfman Pastoriza Cole & Boniske. Lewis, Longman & Walker is representing Leon County in its action against FHFA, Fannie Mae and Freddie Mac. Weiss Serota Helfman Pastoriza Cole & Boniske is representing the Green Corridor PACE Program.

[2] California enacted Assembly Bill 811 and Assembly Bill 474 providing financial resources for property owners who lack financing to implement measures to be more responsible water users. Assemb. B. 811, 2009–2010 Cal. Assemb., Reg. Sess. (Cal. 2009) (amending CAL. STS. AND HIGHWAY CODE §§ 5898.12, 20, .22, .30 (West 2007) and creating CAL. STS. AND HIGHWAY CODE §§ 5898.14, .21 (West 2009)); Assemb. B. 474, 2009–2010 Cal. Assemb., Reg. Sess. (Cal. 2009); *see also* CAL. STS. AND HIGHWAY CODE §§ 5898.12(b), .14(b), .20(a)(1), for supporting text in statutes. Colorado enacted House Bill 08-1350 modifying chapters 29, 30, 31, and 40 of the *Colorado Revised Statutes*, permitting assessments to real property to fund energy projects. H.B. 08-1350, 66th Gen. Assemb., 2d Reg. Sess. (Colo. 2008); *see also* COLO. REV. STAT. §§ 30-20-601.5, 604 (2010), for language in statute permitting the assessments. Florida enacted House Bill 7179 creating section 163.08 of the *Florida Statutes*. H.B. 7179, 112th Leg., Reg. Sess. (Fla. 2010) (creating FLA. STAT. § 163.08 (2009)). Illinois enacted Senate Bill 583 allowing contractual assessments to finance energy projects. S.B. 583, 96th Gen. Assemb., Reg. Sess. (Ill. 2009) (creating 65 ILL. COMP. STAT. 5/1-1-11 (2009)); *see also* 65 ILL. COMP. STAT. 5/1-1-11 (2010), for language in the statute. Louisiana enacted Senate Bill 224 creating special financing districts for solar and energy efficient projects. S.B. 224, 2009 Leg., Reg. Sess. (La. 2009) (created LA. REV. STAT. ANN. § 33:130.70–73 (2009), re-designated as La. REV. STAT. ANN. § 33:130.811–814 (2009)); *see also* LA. REV. STAT. ANN. § 33:130.811(A)–(D) (2010), for language in the resulting statute. Maryland enacted House Bill 1567 creating the Clean Energy Loan statute. H.B. 1567, 2009 Md. Gen. Assemb., Reg. Sess. (Md. 2009) (creating MD. CODE ANN., Clean Energy Loans, §§ 9-1501–07 (West 2009)); *see also* MD. CODE ANN., Clean Energy Loans, § 9-1502(a)–(c) (West 2010), for language in the statute authorizing clean energy loans for real property. Nevada enacted Senate Bill 358 which granted authority to create clean energy financing projects. S.B. 358, 75th Leg., Reg. Sess. (Nev. 2009) (amending chapter 271, NEV. REV. STAT. (2009)); *see also* NEV. REV. STAT. § 271.265 (2010), for language in the resulting statute granting authority for creating clean energy financing projects. New Mexico enacted S.B. 647 permitting the establishment of special assessment districts for renewable energy projects. S.B. 647, 49th Leg., 1st Sess. (N.M. 2009) (creating chapter 5, article 18, N.M. STAT. ANN. (2009); *see also* N.M. STAT. ANN. § 5-18-49A) (2010), for language in the statute. New York enacted S.B. 66004, 232d Leg., 2d Special Sess. (N.Y. 2009) (creating N.Y. General Municipal LAW §§ 119-EE–GG (McKinney 2009)). North Carolina enacted S.B. 97 allowing special assessments for renewable energy sources. S.B. 97, 2009 Gen. Assemb, Reg. Sess. (N.C. 2009) (amending chapters 153A, 160A N.C. GEN. STAT.); *see also* N.C. GEN. STAT. § 153A-210.2(a), (c) (2010), for language in the resulting statutes. Ohio enacted H.B. 1 permitting the financing of solar installations. H.B. 1, 128th Gen. Assemb., Reg. Sess. (Ohio 2009) (creating OHIO REV. CODE ANN. § 717.25 (West 2009)); *see also* OHIO REV. CODE ANN. § 717.25(B)(1) (West 2010), for language in the statute. Oklahoma enacted S.B. 668 enabling the creation of a county energy district. S.B. 668, 52d Leg., 1st Reg. Sess. (Okla. 2009) (creating OKLA. STAT. tit. 19, § 460.1–.7 (2009)); *see also* OKLA. STAT. tit. 19, § 460.2, .4–.5 (2010), for the statutory language. Oregon enacted H.B. 2626 creating an energy fund and permitting a property owner to obtain a loan that is secured by a first lien on his property. H.B. 2626, 75th Leg. Assemb., 1st Special Sess. (Or. 2009) (amending chapter 470 OR. REV. STAT. (2005)); *see also* OR. REV. STAT. § 470.130 (2010), for the resulting statutory language; *see also* OR. REV. STAT. § 460.150 (2010), for statement in statute that loan is secured by a first lien on the property. Texas enacted H.B. 1937 permitting assessments for energy efficient improvements at the consent of the property owner. H.B. 1937, 81st Leg., Reg. Sess. (Tex. 2009) (creating chapter 376 TEX. CONTRACTUAL ASSESSMENTS FOR ENERGY EFFICIENT IMPROVEMENTS CODE ANN. (West 2009)); *see also* TEX. CONTRACTUAL ASSESSMENTS FOR ENERGY EFFICIENT IMPROVEMENTS CODE ANN. §§ 376.001, .003 (West 2010), for language in statute indicating assessment is at consent of owner. Vermont enacted H.B. 446. H.B. 446, 2009–2010 Leg. Sess., Reg. Sess., (Vt. 2009) (amending VT. STAT. ANN. tit. 24, §§ 1751, 2291 (2009) and creating VT. STAT. ANN. §§ 3261–69 (2009)). Virginia enacted S.B. 1212

continued...

The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399-2300

PACE UPDATE

from page 23

permitting property assessments to fund clean energy projects. S.B. 1212, Gen. Assemb., Reg. Sess. (Va. 2009) (creating VA. CODE ANN. § 15.2-958.3 (West 2009)); *see also* VA. CODE ANN. § 15.2-958.3(A)–(C) (West 2010), for language in the resulting statute. Wisconsin enacted Assemb. B. 255 giving authority to local governments to lend money for energy efficient improvements. Assemb. B. 255, 99th Leg., Reg. Sess. (Wis. 2009) (amending WIS. STAT. §§ 66.0627 (2009)); *see also* Wis. Stat. § 66.0627(8) (2010), for language granting that authority.

[3] DEPARTMENT OF ENERGY, GUIDELINES FOR PILOT PACE FINANCING PROGRAMS 1 (May 7, 2010), *available at* http://www1.eere.energy.gov/wip/pdfs/arra_guidelines_for_pilot_pace_programs.pdf. The Department of Energy's Best Practices enacted underwriting standards that were significantly greater than the underwriting standards applied to land secured financing districts and other assessment programs *Id.* at 1. The Best Practices Guidelines included suggestions for state and local governments to implement including: (1) enacting expected saving to investment ratios greater than one; (2) assessments should not exceed the useful life of the improvement; (3) mortgage holder of record receives notice when PACE liens are placed; (4) non-acceleration clauses upon property owner default of a PACE lien; (5) appropriately sized assessments; (6) enact quality assurance and anti-fraud measures; (7) allow PACE financing to be the net of any expected direct cash for rebates and tax credits; (8) require education participation; (9) provide a debt service reserve fund; (10) engage in data collection. *Id.* at 1–5. Additionally, the Department of Energy Best Practices also included assessment underwriting requiring that (1) property ownership be verified; (2) property based debt and property valuation is appropriate; and (3) the obligation to repay the improvement is attached to the property; and (4) other evidence of the property owner's ability to pay, such as he is current on property taxes and has not been late paying property taxes in the past three years or since the purchase of the house. *Id.* at 5–7. Also, property owners that have declared bankruptcy in seven years will be prohibited from PACE liens. *Id.*

[4] "The Department of Energy (DOE) is announcing funding for model PACE projects, which will incorporate this Policy Framework's principles for PACE program design. Under the State Energy Program, DOE has received approximately $80 million of applications for PACE-type programs to provide upfront capital. Additional PACE programs are encouraged through a Funding Opportunity Announcement, released today, for competitive grants under the Energy Efficiency Conservation Block Grant Program." http://www.whitehouse.gov/assets/documents/PACE_Principles.pdf.

[5] *Id.* art. X, §§ 1-2

[6] *See* FLA. STAT. § 163.08(1)(b) (2010).

[7] H.B. 7179; *see also id.* § 163.08(1)(c) (stating "voluntary assessments are reasonable and necessary to serve and achieve a compelling state interest").

[8] H.B. 7179; *see also* FLA. STAT. 163.08(7).

[9] H.B. 7179; *see also* FLA. STAT. 163.08(3).

[10] Marianne E. Sullivan, *Energy Loan Tax Assessment Program*, in FANNIE MAE SINGLE FAMILY SELLING GUIDE, LENDER LETTER LL 07-2009 (Sept. 18, 2009), https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2009/ll0709.pdf.

[11] Marianne E. Sullivan, *Property Assessed Clean Energy Loans*, in FANNIE MAE SINGLE FAMILY SELLING GUIDE, LENDER LETTER LL 2010-06 (May 5, 2010), https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/ll1006.pdf; *see also* John S. Forlines, *Options for Borrowers with a PACE Loan*, in FANNIE MAE SINGLE FAMILY SELLING GUIDE, ANN. SEL 2010-12 (Aug. 31, 2010), https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/sel1012.pdf.

[12] Letter from Patricia J. McClung, Vice President, Offerings Mgmt., Freddie Mac, to Freddie Mac Seller/Services (May 5, 2010) (on file with Freddie Mac), http://www.freddiemac.com/sell/guide/bulletins/pdf/iltr050510.pdf; *see also*, Marianne E. Sullivan, *supra* note xv.

[13] *Id.*; Sullivan, *supra* note xv.

[14] Statement, Federal Housing Finance Agency, FHFA Statement on Certain Energy Retrofit Loan Programs (July 6, 2010) (on file with Federal Housing Finance Agency) http://www.fhfa.gov/webfiles/15884/PACESTMT7610.pdf.

[15] On July 6, 2010, the FHFA issued a "Statement on Certain Energy Retrofit *Loan* Programs," saying that PACE loans are "unlike routine tax assessments and pose unusual and difficult risk management challenges" and that they "do not have the traditional community benefits associated with taxing initiatives." FHFA Statement on Certain Energy Retrofit Loan Programs, *supra* note xviii. On August 31, 2010, Freddie Mac issued Bulletin Number 2010-20, which provides that financing energy efficient and renewable energy home improvements can be achieved without altering the lien priority status of first Mortgages or other underwriting requirements. *Mortgages Secured by Properties with an Outstanding Property Assessed Clean Energy (PACE) Obligation*, BULL. No. 2010-20 (Freddie Mac, McLean, VA), Aug. 31, 2010 [hereinafter *Freddie Mac Bulletin*], http://www.freddiemac.com/sell/guide/bulletins/pdf/bll1020.pdf. On the same date, Fannie Mae issued a similar announcement in its *Options for Borrowers with a PACE Loan*. John S. Forlines, *Options for Borrowers with a PACE Loan*, in FANNIE MAE SINGLE FAMILY SELLING GUIDE, ANN. SEL 2010-12 (Aug. 31, 2010), https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/sel1012.pdf. Freddie Mac "reminded Seller/Servicers that an energy-related lien may not be senior to any Mortgage delivered to Freddie Mac." *Freddie Mac Bulletin*, *supra* note xxi.

[16] Plaintiffs include the town of Babylon, Placer County, Sierra Club, the Natural Resource Defense Council, Sonoma County, the California Attorney General, City of Palm Dessert and Leon County.

[17] The Defendants include: the FHFA, Fannie, Freddie, Ed Demarco, Charles Haldeman, Michael Williams, the Office of the Comptroller and John J. Walsh.

[18] *See* California v. Fed. Housing Fin. Agency, No. C10-03084 (N.D. Cal. filed July 14, 2010).

[19] Sierra Club v. Fed. Housing Fin. Agency, No. 10-3317 (N.D. Cal. filed July 29, 2010).

[20] The County of Sonoma vs. Fed. Housing Fin. Agency, No. 10-3270 (N.D. Cal. filed July 26, 2010).

[21] The Office of the Comptroller of the Currency is a component of the United States Treasury.

[22] Nat'l Res. Def. Council, Inc. v. Fed. Housing Fin. Agency, No. 10 Civ. 7647 (S.D.N.Y. filed Oct. 5, 2010).

[23] FDUPTA prohibits "unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce."

[24] See Provident Inst. For Savings v. Mayor and Alderman of Jersey City, 113 U.S. 506 (1885); Glisson v. Hancock, 181 So. 379 (Fla. 1938); 51 Am. Jur.2d Liens s. 57 (1970).

[25] *See,* Footnote VI.

[26] As Conservator, FHFA is charged with taking any action "necessary to put the regulated entity into sound and solvent condition" and "appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(D).

[27] Defendants argue three specific statutory provisions — 12 U.S.C. § 4617(f), 12 U.S.C. § 4635(b), and 12 U.S.C. § 4623(d) — expressly preclude jurisdiction over Plaintiffs' claims.