

Residential Property Assessed Clean Energy (PACE) Loans

Andrew G. Pizor, National Consumer Law Center
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About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.



Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S.

NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitative practices, help financially stressed families build and retain wealth, and advance economic fairness.

Agenda

- Introduction & Overview of PACE
- Some Examples—Client Stories
- Problems with PACE
- Tips for Helping Seniors

Introduction

- This is a survey of PACE. It is not state specific.
- *But* most of what everyone knows about PACE so far comes from California, because they were the first and remain the biggest PACE market.
- Focusing on experience of seniors and low-income homeowners.
- For state-specific information, call NCLC so we can help you find the appropriate contact in your state.

What is PACE?

- **Property Assessed Clean Energy:** A financing mechanism to help people pay for home improvements that increase a home's energy efficiency or achieves other public goals (water efficiency, storm resistance, etc.)
- It's a loan and a property tax assessment, with a tax lien
- Funded by municipal bonds and Wall St. securitization
- Authorized by state law, opt-in by local governments
- Most privately run by contractors, minimal government oversight

A close-up photograph of a light-colored dog, possibly a Weimaraner, looking out of the open window of a white car. The dog's head is resting on the window frame, and its eyes are looking towards the right. The background shows a blurred outdoor scene with trees and a bright sky.

**Home improvement
financing that is simple
and stress free.**

That's our favorite part.

[GET STARTED](#)

No Money Down. 100% Financing.

Home Improvement Financing For Energy Efficiency Upgrades

Improve your family's comfort, health and safety, and you may save big on your monthly energy bills and boost the value of your most important investment. Enjoy no payments for up to 17 months*

*Based on date of funding; subject to underwriting guidelines and approval.

AGENCY	AGENCY PHONE NO.	RATE	AMOUNT
GENERAL TAX LEVY ALL AGENCIES		1.000000 \$	2,252.74
VOTED INDEBTEDNESS			
CITY-L.A. SANTA		.021297 \$	47.98
METRO WATER DIST		.003500	7.88
COMMNTY COLLEGE		.035956	81.00
UNIFIED SCHOOLS		.131096	295.32
DIRECT ASSESSMENTS			
FLOOD CONTROL	(626) 458-5165	\$	37.96
LACO VECTR CNTRL	(800) 273-5167		8.97
CITY LT MAINT	(213) 847-1363		42.45
COUNTY PARK DIST	(213) 738-2983		12.86
LA HERO	(800) 969-4382		6,994.64
CAFIRST	(949) 955-1500		5,295.85
LACITY PARK DIST	(213) 847-4722		33.96
TRAUMA/EMERG SRV	(866) 587-2862		69.53
LA STORMWATER	(213) 485-7422		30.26

Before: \$2,920.81

After: \$15,211.30 (over 40% of the household's gross income)

Authorizing PACE

- 1. A state adopts enabling legislation.
 - 33 states so far—mostly commercial or inactive
 - Active in California, Missouri, Florida
 - Pending in various states
- 2. A local government (city, county or joint powers authority) decides to create a PACE program and contracts with a PACE “administrator”
- The PACE Administrator can be a public agency but is usually a private company
 - The administrator acts like the origination department of a mortgage bank.
 - The local government is the source of the loan money (normally from municipal bond sales).
 - Home improvement contractors are like the brokers or sales force for the loans.

PACE Administrators



Rapid Growth

- Since 2008, more than 132,000 loans have been made totaling approximately \$3.3 billion, with \$2.85 billion originated in the last two years.
- PACE industry forecasts that the current \$3.3 billion in PACE financing will double within the next year, making it fastest-growing form of financing.

These Are High-Cost Loans

- **Borrowers pay:**
 - Interest rates average from 6 to 9%, with APRs over 10%.
 - Prime rate for 30-yr fixed-rate mortgages is currently ~4%.
- Plus points and fees of at least 5%
- Annual administrative fee of about \$35/yr
- Steep pre-payment penalties.
- Loans are 10-20 years
- Almost anyone who can afford credit can get better terms elsewhere.
 - Only helpful to persons with poor credit and just the right amount of income.

Example

- Ms. C. got a \$39,676 PACE loan for solar panels
 - 8.95 % rate, APR of 10.32 %
 - Total of payments on 20-year loan is \$84,393
 - Annual assessment is \$4,219.66
 - Her mortgage payment after escrow adjustment increased from \$990 to \$1,500 per month



The Finance Side

- PACE is a goldmine:
 - Inflated prices
 - Minimal underwriting costs
 - Minimal servicing costs, no loss mitigation
 - **ZERO RISK** because of superpriority status
 - Yet interest rates are twice that of conventional for-profit lenders
- Financed through public bonds, which are then securitized.

Collection

- Biggest threats:
 - Reverse mortgages – nonpayment of property taxes
 - mortgage escrow payment (impoundment) – shortage, cushion, payment shock
- Bond-holder can foreclose
- Tax lien sale
 - Steep penalties for delinquent taxes apply.
 - Usually takes several years to foreclose.
 - California's reserve fund protects pre-existing lienholders, *not* the homeowner.

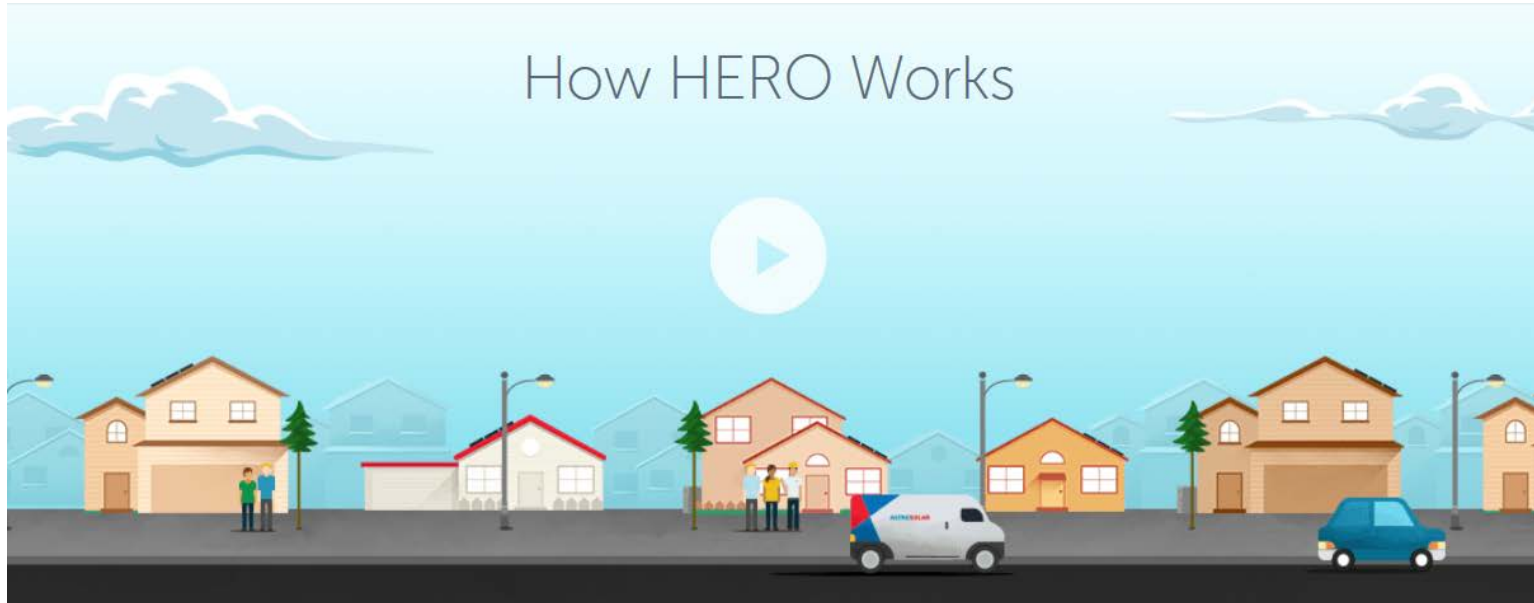
Client Stories

- Two PACE liens for the exact same work (which is not done).
- Telling a senior with dementia that her home would be red-tagged.
- Signing the contract and the completion certificate the same day.
- Offering non-efficient improvements to coerce homeowners to sign-up, but only billing PACE admin for authorized items.
- Claiming that energy bills will not only be eliminated, but DWP will pay the homeowner for extra energy generated.

“It’s a Free Government Program”

- There are legitimate free government programs that low-income homeowners often know about.
- Even where there is no direct misrepresentation, the government affiliation inspires trust, including as to pricing.
 - Participating in a program is different from negotiating a contract.
- Other key misrepresentations:
 - Rebates
 - Tax benefits
 - Energy savings

“Affordable” Government “Partnerships”



By partnering with local governments, we've made energy and water efficiency upgrades more affordable for homeowners like you.

Up to 25-year terms • Borrow up to 15% of home's value • Competitive, fixed rates

SEE HOW MUCH YOU QUALIFY FOR

Not Helping the Environment

- Contractors do not perform energy audits.
- Homeowners' energy usage does not decrease.
 - Most projects have no benefit
 - Partial exception for solar panels
 - No projects pay for themselves, as recommended by the Department of Energy
- Contractors perform non-qualifying work.

Contractors as Loan Brokers

- Do *they* understand how PACE works?
- Door-to-door solicitation
 - “I’m here to talk to you about a County program;”
 - Not “I’m here from ABC Contractors... do you need financing”
- Robo-calls
 - “We’ll do an *assessment* on your house to see what your house needs”
 - “The City wants to reward you for paying you property taxes”
 - They refuse to give a business name, and hang up

Brokering E-Contracts

- The finance application and assessment contract are presented on a tablet with e-signatures.
- There may be a phone call to verify basic terms.
- Contractors set up email accounts for seniors. The senior may not know how to access it, but the contractor does.
- Paper copies are rarely sent (even if there is no email listed on the contract).

Prices Are Out of Control

COOL LIFE PAINT 2800 sqft \$23,150.00

17 WINDOWS PLY GEM \$23,000.00

Special Instructions

Lifetime warranty on all wood and stucco apply
Contract on all wood and stucco warranty is transferable
to next home owner. Repair all stucco and wood
flaking. All trash related to job project
install out of around house were needed.
Reduce both security doors and front wood door

Work Excluded From This Contract:

Terms and Conditions:

- A. Approval and Acceptance: Owner/Buyer understands that this document is an offer to contract for the services of Contractor and is not binding upon Contractor until accepted by the corporate office of Contractors. Once accepted by contractor in writing or by commencement of work, this document shall become a valid and binding contract.
- B. Cancellation Fee: A Cancellation Fee of fifty percent (50%) of total contract price will be charged for cancellation after expiration of the three day period as set forth in the notice of Cancellation.
- C. Product Specifics: All Contractors' lifetime warranties are in addition to the manufacturer warranty but are subject to the assumption of responsibility of the manufacturer under its warranty.
- D. If commencement date of project is delayed due to customer, the progress payment is payable and due 30 days after contract date.

Payment Total Contract price to be: \$ 27650

Credit Card: Visa, Master Card, American Express, Discover

- Unsophisticated homeowners are targeted
- Sense of trust because it's a "program"
- Homeowners think it's free
- Homeowners never see the paperwork

Language & Race

- Documents are only provided in English
 - E-signing amplifies this problem, with the homeowner fully relying on the representations made by the contractor
- Targeting?
 - One study says not targeting low-income
 - Others suggest targeting neighborhoods of color
 - Anecdotal evidence of targeting seniors

Waivers, Arbitration, Lack of Remedies

- By structuring PACE loans as tax assessments, PACE lenders seek to evade consumer protection laws (TILA, RESPA, FTC Holder rule, etc.)
- Original state enabling statutes lack any remedies or protections
 - New Cal. protections effective Jan. and Apr. 2017
 - Other states considering protections
- Assessment contracts include jury trial waiver, forced arbitration clause, and a class action waiver
- Contracts also include broad releases of virtually all claims related to the transaction

Example of PACE Eligibility (Cal.)

- Basic PACE Eligibility Requirements

1. Loan (original SB 77 (2010) language; AB 2597 (2014) changed to financing) recipients are legal owners
2. Recipients are current on mortgage and property tax payments
3. Recipients are not in default or in bankruptcy proceedings
4. Financing for less than 15% of the value of the property up to \$700,000, then 10% of the value above \$700,000
5. The property is within the PACE program area

California Streets and Highways Code § 5898.16(a)(2), referencing California Public Resources Code § 26063(a)

PACE Eligibility (cont.)

- Basic PACE Eligibility Requirements (continued)

6. The program finances energy or water efficient improvements
7. Products follow energy efficiency retrofit work standards
8. Total mortgage-related debt and PACE financing do not exceed the value of the property

California Streets and Highways Code § 5898.16(a)(2)

- Annual property taxes and assessments cannot exceed five percent of the property value

California Streets and Highways Code § 5898.16(a)(1)

The Future of PACE

- PACE administrators claiming victory—will the legislation allow PACE to expand without critical protections in place?
- Significant consumer protection gaps remain, leaving vulnerable homeowners at risk
- PACE is spreading to other states

Litigation Strategies

Recent decisions in class cases

In re Hero Litigation

Smith v. Ygrene

Individual litigation

Elder abuse

Breach of contract & negligent supervision

Agency issues

Defending mechanic's lien cases

Other claims & considerations

In re Hero Loan Litigation

- Three class actions, in three counties, challenging excessive fees, the calculation of interest and prepayment penalties.
- Claims under TILA, HOEPA and California's UPAP statute.
- “Because California's PACE assessments are tax assessments, because the CFPB has stated that tax assessments are not credit, and because this CFPB opinion as applied to PACE assessments is not demonstrably irrational, PACE assessments are not credit so they are not subject to regulation by TILA or HOEPA.”
 - *In re Hero Loan Litig.*, 2017 U.S. Dist. LEXIS 111771 (C.D. Cal. July 17, 2017)

Smith v. Ygrene

- California's Consumer Legal Remedies Act does not apply to intangible financial services.

Impact for representing homeowners:

- Need to show that PACE Administrators have roles beyond that of lenders.
 - Choosing what products qualify for financing
 - Ensuring that only those products are installed
 - Excellent fit with Civ. Code § 1770(a)(5)
 - *Smith v. Ygrene Energy Fund, Inc.*, No. 17-CV-01258-LB, 2017 WL 3168519 (N.D. Cal. July 26, 2017)

These Two Cases

In re Hero Loan Litigation

- “It isn’t a loan so TILA and HOEPA don’t apply”

Smith v. Ygrene

- “It’s a loan so the Consumer Legal Remedies Act doesn’t apply.”

Financial Elder Abuse

- Cal. Welf. & Inst. Code § 15600 et seq.
- Taking or assisting in taking the property of an elder
- If you know or should have known the taking was likely to harm the elder
- “Taking” includes any impairment of a property interest
 - See *Bounds v. Superior Court*, 229 Cal. App. 4th 468 (2014).
 - PACE Administrators “take” their own fees,
 - They assist homeowners in “taking” the remainder.
- **Section 15657.5 does not require fraud. Section 15657.6 does not require any wrongful intent**
- Three potential claims: § 15657.5, § 15657.6, Prob. Code § 859. See also Civ. Code §§ 39, 3345

Contracts & Negligence

(COUNTY)



**PACE
ADMINISTRATOR**



CONTRACTORS

- Each of these contracts likely contains consumer protections.
- Third party beneficiary claims under each contract.
- Negligent supervision against (County) for failure to supervise PACE Admins?
 - Check state immunity statute(s)
 - *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 682 (9th Cir. 2009)
- Negligent supervision against PACE Admin for failure to supervise contractors.

Agency Issues

Find the right contractor, right away.

Finding the right contractor is no small task, so we make the search easy for you. We have a network of experienced local contractors to choose from, all of whom:

- Maintain good standing with HERO
- Adhere to our consumer safeguards
- Are paid only after you sign off on the project



Verified Contractors

Our network of home improvement contractors are licensed, verified, and are required to adhere to our consumer protection policies.

7. How do I explain the HERO Program?

“You are very fortunate because of where you live. Western Riverside County really wants you to be energy efficient, so they’ve made low cost financing available through their HERO Program.”

✘ DON'T SAY

HERO will save you money.

HERO provides “free government money” that does not need to be paid back.

HERO payments are transferable to a new owner if you sell.

HERO interest rates are “low” or “affordable.”

HERO upgrades will increase your home’s property value.

HERO is tax-deductible.

HERO is a government-sponsored, a government-incentive program OR the government can help you pay for the improvement.

HERO is the best borrowing option for homeowners.

You are pre-approved or pre-qualified.

Beneficial Relationship

- Concentrate on agency as to the loan origination
 - Not the home improvements
- Agency relationship tests will vary state by state
- Tell the story of the practical advantages to the Admins:
 - Introducing the product
 - Putting people on the phone
 - Presenting documents electronically for signature, etc.
 - “Appellant not only relies, but in fact depends on the teachers to act as its conduit to the students ... [and] is thus exploiting or enjoying the benefit of California’s schools and employees to obtain sales.”
 - *Scholastic Book Clubs, Inc. v. State Bd. Of Equalization*, 207 Cal. App. 3d 734 (1989).

Defending Mechanic's Lien Cases

- Bring counterclaims
- Name the Admin
- Check the HIC contract
- Get the Admin's copy of the HIC contracts

(NAME AND ADDRESS OF CONSTRUCTION FUND HOLDER)
DESCRIPTION OF THE PROJECT AND DESCRIPTION OF THE SIGNIFICANT MATERIALS TO BE USED AND EQUIPMENT TO BE INSTALLED: Direct Contractor will furnish all labor and materials to construct and complete in a good, workmanlike and substantial manner a: _____

INSULATED FA HOUSE ALL TO
BE ENERGY EFFICIENT - R-38

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INSULATED FA HOUSE ALL TO
BE ENERGY EFFICIENT - R-38
ENERGY EFFICIENT WINDOWS

Other Theories & Considerations

- UDAP
- Taxpayer waste
- Delegation claims
- Home solicitation statutes
- Contractor laws
- Phone banks:
 - TCPA, TSR
 - RICO
- Experts
 - Ask your Mortgage Bankers Association
 - Try to find an energy expert
 - Pay for an energy audit?

PACE Resources

- National Consumer Law Center
 - PACE webpage: www.nclc.org/issues/pace-loans.html
 - PACE listserv: <http://lists.nclc.org/subscribe/>
- Energy Programs Consortium
 - Residential Property Assessed Clean Energy (R-PACE) -- A Primer for State and Local Energy Officials (June 2017)
 - Assessment of Low Income Homeowner Participation in the Property Assessed Clean Energy (PACE) Program in California (November 2017)
 - <http://www.energyprograms.org/programs/pace/>
- PACENation (industry)
 - <http://pacenation.us>
- Department of Energy [Best Practice Guidelines](https://energy.gov/sites/prod/files/2016/11/f34/best-practice-guidelines-RPACE.pdf) for Residential PACE Financing Programs (voluntary): <https://energy.gov/sites/prod/files/2016/11/f34/best-practice-guidelines-RPACE.pdf>

Other Steps

- Send NCLC examples of consumer abuses and PACE projects that are not cost-effective.
- Ask clients to submit complaints to the CFPB and their state regulator.
- Monitor changes to state law and local program requirements.

Case Consultations

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.