

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 790 (Quirk-Silva)
Version: April 26, 2021
Hearing Date: June 15, 2021
Fiscal: No
Urgency: No
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SUBJECT

Consumer Legal Remedies Act

DIGEST

This bill makes clear that the Consumer Legal Remedies Act's prohibition on certain home solicitations of senior citizens applies to Property Assessed Clean Energy (PACE) assessments that are part of a pattern or practice in violation of PACE regulations.

EXECUTIVE SUMMARY

Property Assessed Clean Energy (PACE) financing exists to provide a way for homeowners and small business owners to finance certain voluntary property improvements, including energy and water efficiency, clean energy, and wildfire resilience and safety improvements. The financing is secured by voluntary contractual assessments or special taxes on property. Residential PACE programs result in a super-priority lien on consumer's homes, risking foreclosure and escalating interest rates once a consumer is delinquent in payment. Existing law regulates the operation of PACE programs in the state.

The Consumer Legal Remedies Act (CLRA) prohibits unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer. One of the prohibited practices is home solicitations of senior citizens that result in a loan secured by the senior citizen's primary residence to pay for home improvements that are in violation of federal consumer protection laws, specifically the Truth in Lending Act (TILA) and the Home Ownership Equity Protection Act (HOEPA).

This bill amends the CLRA home solicitation prohibition to ensure it applies to PACE financing that is carried out as part of a pattern or practice in violation of applicable PACE regulations in the Financial and Streets and Highway Codes.

This bill is co-sponsored by the California Low-Income Consumer Coalition and the National Consumer Law Center. It is supported by various legal services organizations and financial institution trade associations. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the Consumer Legal Remedies Act (CLRA), which prohibits unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer. (Civ. Code § 1750 et seq.)
- 2) Provides that any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 of the Civil Code may bring an action against that person to recover or obtain any of the following:
 - a) actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars (\$1,000);
 - b) an order enjoining the methods, acts, or practices;
 - c) restitution of property;
 - d) punitive damages;
 - e) court costs and attorney's fees to a prevailing plaintiff. However, reasonable attorney's fees may be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith; and
 - f) any other relief that the court deems proper. (Civ. Code § 1780(a), (e).)
- 3) Authorizes consumers who are senior citizens or disabled persons, as defined, to additionally seek and be awarded, in addition to the remedies specified above, up to \$5,000 where the trier of fact does all of the following:
 - a) finds that the consumer has suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct;
 - b) makes an affirmative finding in regard to one or more of the following factors:
 - i. the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons;
 - ii. the defendant's conduct caused one or more senior citizens or disabled persons to suffer: loss or encumbrance of a primary residence, principal employment, or source of income; substantial loss of property set aside for retirement, or for personal or family care and maintenance; or substantial loss of payments received under a pension or retirement plan or a government benefits

- program, or assets essential to the health or welfare of the senior citizen or disabled person; or
- iii. one or more senior citizens or disabled persons are substantially more vulnerable than other members of the public to the defendant's conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct; and
- c) finds that an additional award is appropriate. (Civ. Code § 1780(b)(1).)
- 4) Provides that judgment in a class action by senior citizens or disabled persons under Section 1781 of the CLRA may award each class member the additional award if the trier of fact has made the foregoing findings. (Civ. Code § 1780(b)(2).)
 - 5) Defines "senior citizen" under the CLRA as a person who is 65 years of age or older. (Civ. Code § 1761(f).)
 - 6) Defines "home solicitation" under the CLRA as a transaction made at the consumer's primary residence. Exempts from this definition transactions that a consumer initiates, including responding to advertisements. (Civ. Code § 1761(h).)
 - 7) Makes unlawful, pursuant to the CLRA, the home solicitation of a senior citizen consumer where a loan secured by the senior citizen's primary residence is made to pay for home improvements, and the transaction is part of a pattern or practice in violation of federal law, specifically the Truth in Lending Act (TILA) and the Home Ownership Equity Protection Act (HOEPA). (Civ. Code § 1770(a)(23)(A).)
 - 8) Exempts third parties from the above CLRA liability unless an agency relationship existed between the third party and the party who engaged in the home solicitation; or the third party had actual knowledge of, or participated in, the unfair or deceptive transaction. Third parties who are holders in due course under a home solicitation transaction are exempt. (Civ. Code § 1770 (a)(23)(B).)
 - 9) Establishes PACE financing as a means of funding energy efficiency, water efficiency, and clean energy improvements, as well as wildfire resilience and safety improvements. (Pub. Res. Code §§ 26050-26082; Sts. & Hy. Code §§ 5898.20; 5899, and 5899.4.)
 - 10) Defines "PACE program" as a program in which financing is provided for the installation of efficiency improvements on real property and funded through the use of property assessments. (Fin. Code § 22016.)

- 11) Requires a program administrator to use commercially reasonable and available methods to verify the following criteria before an assessment contract can be executed, a home improvement contract financed by the assessment can be executed, and work can commence under the home improvement contract:
 - a) all property taxes must be current;
 - b) no involuntary liens for more than \$1,000 can be recorded against the property;
 - c) no current notices of default can be recorded against the property;
 - d) the property owner cannot have been a party to a bankruptcy proceeding within the last four years, subject to certain qualifications;
 - e) the property owner must be current on all mortgage debt on the property, and have made no more than one late payment (which cannot have been more than 30 days late) in the last six months;
 - f) the property must be within the geographical boundaries of the applicable PACE program;
 - g) the home improvements to be made must be eligible for financing under the terms of the applicable PACE program;
 - h) the total amount of PACE financing cannot exceed 15 percent of the first \$700,000 of the property value, and 10 percent of any remaining property value above \$700,000;
 - i) the total mortgage debt plus the total PACE assessments on the property cannot exceed 97 percent of the property's market value;
 - j) the term of the assessment contract cannot exceed the estimated useful life of the measure to which the greatest portion of funds disbursed under the assessment contract is attributable;
 - k) the program administrator must verify whether other PACE assessments have been recorded against the property, and ask whether the property owner has authorized additional PACE assessments that have not yet been recorded;
 - l) the assessment contract may not contain a penalty for early repayment; and
 - m) the property is not subject to a reverse mortgage. (Fin. Code § 22684.)
- 12) Establishes acceptable methods for determining the value of property that may be subject to a PACE assessment. The program administrator is required to disclose the determination of market value to the property owner prior to signing the assessment contract. (Fin. Code § 22685.)
- 13) Requires a program administrator to make a reasonable good faith determination that the property owner has a reasonable ability to pay the annual payment obligation for the PACE assessment. (Fin. Code § 22686.)
- 14) Sets forth factors that a program administrator must rely on in determining that a property owner has a reasonable ability to pay the annual payment obligations

for the PACE assessment, based on the property owner's income, assets, and current debt obligations. (Fin. Code § 22687.)

- 15) Prohibits a public agency from permitting a property owner to participate in a PACE program unless certain criteria are satisfied. This includes a requirement that the property owner be given a "right to cancel" document before being allowed to participate in PACE; seniors have five days to exercise this right, all other consumers have three days. (Sts. & Hy. Code § 5898.16.)
- 16) Specifies a disclosure form that must be completed and delivered to the property owner prior to execution of a contractual assessment. (Sts. & Hy. Code § 5898.17.)
- 17) Requires a program administrator to make an oral disclosure and confirmation of specified information with the property owner prior to execution of the assessment contract. (Sts. & Hy. Code § 5913.)
- 18) Prohibits a program administrator from allowing contractors or other third parties to advertise the availability of PACE financing administered by that program administrator, or to solicit property owners on behalf of the program administrator, unless both of the following requirements are met:
 - a) the contractor or third party maintains a license in good standing with the Contractors' State Licensing Board, as well as any other permits, licenses, or registrations required, and any required bond and insurance coverage;
 - b) the program administrator obtains the contractor's or third party's written agreement that it will act in accordance with all applicable laws, including advertising and marketing laws and regulations. (Sts. & Hy. Code § 5922.)
- 19) Prohibits a program administrator from providing any direct or indirect cash payment or other thing of material value to a contractor, third party, or the property owner, in connection with an assessment contract, as specified. (Sts. & Hy. Code § 5923.)
- 20) Prohibits program administrators, contractors, or third parties from making representations regarding the tax deductibility of an assessment contract unless the representation is consistent with representations, statements, or opinions of the Internal Revenue Service or applicable state tax agency with regard to the tax treatment of PACE assessments. (Sts. & Hy. Code § 5924.)
- 21) Prohibits a program administrator from providing a contractor or third party engaged in soliciting assessment contracts on its behalf any information that discloses the amount of funds for which a property owner is eligible or the amount of equity in a property. (Sts. & Hy. Code § 5925.)

- 22) Prohibits a contractor from providing a different price for a project financed by a PACE assessment than if paid in cash. (Sts. & Hy. Code § 5926.)
- 23) Declares it unlawful to commence work if the property owner is either not approved for PACE financing or exercises the owner's statutory right to cancel the assessment contract, though these requirements may be waived to make emergency or immediately necessary repairs to protect persons or real or personal property. (Sts. & Hy. Code § 5940.)

This bill makes unlawful, pursuant to the CLRA, a home solicitation of a consumer who is a senior citizen where a loan is made encumbering the primary residence of that consumer for purposes of paying for home improvements and where the transaction is part of a pattern or practice in violation of Section 22684, 22685, 22686, or 22687 of the Financial Code; or Section 5898.16, 5898.17, 5913, 5922, 5923, 5924, 5925, 5926, or 5940 of the Streets and Highways Code.

COMMENTS

1. Utilizing the legal remedies of the CLRA to combat SOCE

The Legislature has long considered consumer protection to be a matter of high importance. State law is replete with statutes aimed at protecting California consumers from unfair, dishonest, or harmful market practices. The CLRA was enacted "to protect the statute's beneficiaries from deceptive and unfair business practices," and to provide aggrieved consumers with "strong remedial provisions for violations of the statute." (*Am. Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 11.)

Generally speaking, the CLRA is intended "to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." (Civ. Code Sec. 1760.) Among other things, it prohibits merchants from "representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law," or representing that goods "are of a particular standard, quality, or grade" when they are of another. (Civ. Code Sec. 1770.) Consumers who are harmed by unlawful practices specified in the Act have a right of action under the CLRA to recover damages and other remedies, including actual damages; an order to enjoin the unlawful act; restitution; punitive damages; or any other relief that the court deems proper. (Civ. Code Sec. 1780.) Additionally, the statute authorizes courts to award attorney's fees to prevailing plaintiffs, and contains mechanisms for securing remedies on a class wide basis. (Civ. Code Secs. 1780, 1781.) Consumers who are over the age of 65 are eligible to additionally seek and be awarded, in addition to the above remedies, up to \$5,000 where the trier of fact finds certain circumstances are met.

2. Unlawful home solicitations under the CLRA

One provision of the CLRA makes unlawful certain “home solicitations,” which are transactions made at the consumer’s primary residence, excluding transactions that a consumer initiates, including responding to advertisements. (Civ. Code § 1761(h).) Such solicitations are unlawful where the consumer is a senior citizen and the loan is secured by the senior citizen’s primary residence in order to pay for home improvements, and the transaction is part of a pattern or practice in violation of certain provisions of HOEPA (15 U.S.C. §1639(h), (i)) or specified TILA regulations (12 C.F.R. § 226.34(a)(1), (2), (4)). (Civ. Code § 1770(a)(23)(A).)

The relevant sections of HOEPA prohibit a creditor from engaging in a pattern or practice of extending credit to consumers under certain mortgages “based on the consumers’ collateral without regard to the consumers’ repayment ability, including the consumers’ current and expected income, current obligations, and employment.” (15 U.S.C. § 1639(h).) It also prohibits a creditor from making a payment to a contractor under a home improvement contract from amounts extended as credit under specified mortgages other than as specified. (15 U.S.C. § 1639(i).)

The TILA regulations prohibit certain acts or practices in connection with mortgage credit unless certain conditions or notices are provided to property owners. This includes a prohibition on extending credit to a consumer based on the value of the consumer’s collateral without regard to the consumer’s repayment ability.

The concern identified by the author and sponsors is that although violations of these provisions involve similar elements and misconduct as exists in connection with fraudulent and predatory PACE financing, it is not entirely clear that such circumstances are actionable under the CLRA.

There have long been consumer protection concerns with PACE programs in California and their negative impacts on homeowners. Residential PACE financing is a relatively safe loan for those soliciting such contracts because it involves priority assessments against the consumer’s residence and therefore any equity can be accessed first should the consumer become delinquent on payments and ultimately foreclose on the home. Older consumers who may be more vulnerable to predatory in-person practices are also more likely to have built up equity in their homes and therefore are attractive targets for unscrupulous PACE program administrators, salespeople, and home contractors.

Concerns with the program have been well-documented, including in a recent report put out by the Environmental Law Clinic at the University of California, Berkeley School of Law.¹ It describes the program as “a creatively conceived program to finance

¹ Claudia Polsky, et al., *The Dark Side of the Sun: How PACE Financing Has Under-Delivered Green Benefits & Harmed Low-Income Homeowners* (February 2021) U.C. Berkeley School of Law, Environmental Law Clinic,

solar energy and energy efficiency that has gone wrong in implementation in the residential sector. Hundreds of low-income California homeowners now face steep property tax debt and potential home foreclosure as a result of liens placed on their homes through PACE programs.” Regarding PACE lawsuits, it states:

The facts almost always involve a contractor selling upgrades to a client that do not make sense for our senior clients. In almost every case, our clients do not understand what they are being sold and what their obligations will be. Usually our clients have been told falsehoods, such as that the solar panels will not cost anything. And in almost every case they learn of their liability [only] when their property tax bill arrives.

Often they cannot afford to pay their tax bill because it has gone up by thousands of dollars. PACE lending has been weaponized. It has become a predatory lending instrument that is used to victimize seniors and others.

There are a variety of laws on the books that try to check the abuses in the programs. These include requirements that operators must assess consumers’ ability to repay these assessments rather than rely solely on the equity of the homes involved. There are also numerous requirements requiring notice and disclosures that work to ensure homeowners fully comprehend the obligations involved. However, these have failed to curb PACE fraud alone.

Therefore, this bill fortifies these consumer protection laws by making a systematic violation of them unlawful and therefore actionable under the CLRA when a senior citizen consumer is involved. The bill lists out thirteen statutes in the Financial and Streets and Highways Codes that govern PACE in California and that violation of which now serves as a predicate for a CLRA action. Given the strong remedies, and enhanced penalties for senior citizens, the CLRA mechanism will arguably make a strong tool to combat PACE misconduct.

The existing provision being amended by this bill targeting home solicitations serves to prevent high-pressure door-to-door sales tactics that pressure seniors into making rushed and under-informed financial decisions. SB 320 (Petris, Ch. 255, Stats. 1995) enacted this provision. This Committee’s analysis of SB 320 explains the reasoning:

SB 320 is intended to provide a safeguard for a growing number of homeowners, mostly elderly and minority, targeted by unscrupulous contractors and loan brokers who convince the homeowner to purchase needed repairs or services by taking a loan on their home. Unknown to

the homeowner, many of the loans have balloon payment clauses which the homeowner cannot pay and must default.

In one common scheme, a contractor suggests to the homeowner that he could make much needed repairs to the homeowner's property which the homeowner could pay for by obtaining a loan on the home. In some cases, the contractor carries his own paper and makes a home improvement loan to the homeowner, securing the debt with a lien of the property. In other cases, a loan broker working with the contractor contacts the homeowner to make the loan.

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This bill seeks to eliminate the potential for contractors, loan brokers, and investors to conspire to defraud senior citizen homeowners in home improvement loan scams.

The changes made by this bill serve these same purposes and target eerily similar misconduct. By explicitly adding improper PACE financing to the list of unlawful home solicitations of seniors in the CLRA, this bill upholds the Legislature's longstanding policy of providing strong consumer remedies for victims of unfair and deceptive business practices.

3. Stakeholder positions

According to the author:

The Property Assessed Clean Energy or PACE program provides a form of financing homeowners may use to finance clean-energy improvements to their homes. The program is commonly marketed to older homeowners and unfortunately seniors are the most frequent targets of door-to-door scams. We must do more to protect our seniors and to ensure they do not fall predatory to home improvement financing scams or abusive lending practices.

The National Consumer Law Center, a co-sponsor of this bill, writes:

The California Consumer Legal Remedies Act (CLRA) currently makes it an unfair or deceptive business practice to make a home solicitation to a senior citizen to sell financing for home improvements when that financing would encumber a residence, and where the transaction would violate the federal Truth in Lending Act (TILA) or other federal laws. Under the current state of the law, it is not clear that PACE financing falls within the ambit of the CLRA. It is clear, however, that door-to-door sales of home-secured financing like PACE are exactly what the home solicitation provision of the CLRA was written to protect against – a home

solicitation to a senior for a loan that pays for home improvements and encumbers the home.

AB 790 will provide much-needed clarity and strengthen existing protections for senior citizens by preventing PACE lenders from using technical arguments to evade their obligations when a senior whose home has been put at risk because of a PACE loan seeks relief under the CLRA.

A coalition of trade associations, including the California Bankers Association and the California Credit Union League, write in support:

PACE lending relies, in part, on un-solicited door-to-door sales to consumers that may otherwise not be in the market for PACE-related improvements to their real property. Existing law does not currently require a minimum time period between the furnishing of disclosures for a PACE loan and the earliest time when the borrower may execute the PACE loan agreement. The failure to include a minimum time period between furnishing disclosures for a PACE loan and when the borrower may execute the PACE loan agreement may preclude a borrower from carefully reviewing the terms and conditions of the PACE loan outside of the presence of the individual selling the PACE loan and limits the borrower's ability to consult with others.

Given the above, the door-to-door sales methodology and the near immediate requirement to enter into a binding contract that encumbers the real property may create undue pressure for senior citizens.

Therefore, extending the CLRA to senior citizens will provide valuable protections in those circumstances where it can be shown that a pattern or practice of violating PACE laws exists.

SUPPORT

California Low-Income Consumer Coalition (co-sponsor)
National Consumer Law Center (co-sponsor)
Alliance of Californians for Community Empowerment Action
Bet Tzedek Legal Services
California Association of Realtors
California Bankers Association
California Credit Union League
California Land Title Association
California Mortgage Association
National Housing Law Project
Public Counsel

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation:

SB 476 (Min, 2021) prohibits a PACE program administrator from executing an assessment contract unless the associated property has undergone an energy audit, as specified, and prohibits a PACE program administrator from disbursing funds to a PACE solicitor or PACE solicitor agent without specified proof of project completion. This bill is currently in the Assembly Local Government Committee.

AB 874 (Quirk-Silva, 2021) creates a grant program administered by the California Alternative Energy and Advanced Transportation Financing Authority to provide financial assistance to eligible property owners with PACE-related mortgage and tax delinquencies. This bill was held in the Assembly Appropriations Committee.

Prior Legislation:

AB 2471 (Maienschein, Ch. 158, Stats. 2020) extended the period in which senior citizens can exercise their right to cancel many consumer contracts, including PACE assessment contracts, from three business days to five business days after signing.

SB 465 (Jackson, Ch. 837, Stats. 2018) added wildfire safety improvements to the projects eligible to be financed with PACE.

SB 242 (Skinner, Ch. 484, Stats. 2017) established requirements in the Streets and Highways Code for contracts, efficiency improvements, disclosures, and reporting for PACE programs administered by a third-party program administrator.

AB 1284 (Dababneh, Ch. 475, Stats. 2017) renamed the California Finance Lenders Law as the California Financing Law (CFL), as well as created new requirements for the licensure of program administrators, as defined, under CFL. Additionally, this bill established a regulatory scheme for the oversight of Property Assessed Clean Energy (PACE) solicitors and PACE solicitor agents, as defined, while adding a new rule that must be followed before PACE assessments may be recorded, as specified.

AB 2693 (Dababneh, Ch. 618, Stats. 2016) established the PACE Preservation and Consumer Protections Act by adding consumer protections to the PACE program. The bill added existing Sections 5898.16 and 5898.17 to the Streets and Highways Code requiring the provision of a financing estimate and disclosure document and the three-day right to cancel.

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AB 811 (Levine, Ch. 159, Stats. 2008) authorized all cities and counties in California to designate areas within which city officials and willing property owners could enter into contractual assessments to finance the installation of distributed generation renewable energy sources and energy efficiency improvements.

SB 320 (Petris, Ch. 255, Stats. 1995) *See* Comment 2.

PRIOR VOTES:

Assembly Floor (Ayes 74, Noes 0)

Assembly Judiciary Committee (Ayes 11, Noes 0)

Assembly Privacy and Consumer Protection Committee (Ayes 11, Noes 0)
