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Florida High Court Makes It Harder to Challenge Bond Validations

by Shelly Sigo
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BRADENTON, Fla. — In validating $700 million of clean energy bonds, the Florida Supreme Court overturned 60 years of case law and made it harder to challenge future bond validations.

The Florida justices overturned a 1955 precedent set in the case Meyers v. City of St. Cloud.

The Meyers case held that a party that does not appear in a bond validation proceeding in circuit court, where the cases are initiated, still had the right to appeal from the trial court's decision directly to the state Supreme Court.

From now on, litigants must appear in the initial circuit court validation case to preserve their right to appeal, the justices said in an Oct. 1 ruling.

The decision benefits issuers and bond attorneys because it can speed up the validation of bonds in Florida, a legal process that insulates the debt from future legal challenges, experts said.

Bob Jarvis, a professor at Nova Southeastern University's Shepard Broad College of Law, said justices got it wrong in 1955.

"If you want to challenge a case at the Florida Supreme Court, you'd better get involved at the trial court level and make sure you have standing," he said.

The new ruling is a major change in state law that has benefitted litigants who disagreed with an issuer's decision to issue debt or who simply used the fast-tracked appeal process to point out a procedural or constitutional deficiency, said a Florida attorney who asked not to be identified.

"It's not good public policy," the attorney said. "If someone broke the law, you should be able to simply take the record and appeal."

The court ruled last week on two bond validation cases, affirming them both but remanding both for some changes. They were brought under a Florida bill passed in 2010 establishing a property assessed clean energy program.

Under the PACE law, local governments can issue revenue bonds to provide financing for residents and businesses that voluntarily agree to make energy conservation, renewable energy,

and wind resistance improvements, and have non-ad valorem assessments placed on their property tax bills to repay the debt.

In the case that overturned the 1955 precedent, the justices confirmed the circuit court's validation of up to $200 million of commercial PACE revenue bonds for the Leon County Energy Improvement District in north Florida.

In a second ruling, the court validated up to $500 million of bonds for the Clean Energy Coastal Corridor, a PACE program established by the village of Biscayne Park and the towns of Bay Harbor Islands and Surfside in Miami-Dade County.

In Florida, bond validation appeals go directly to the state Supreme Court "so as to provide assurance of the marketability of the bonds," according to the ruling.

Litigants appealing both validation cases argued that the financing agreements for the PACE programs included the unlawful use of judicial foreclosure if the assessments could not be collected.

The Supreme Court agreed, and ordered the judicial foreclosure language struck from the financing agreements.

The appellant in the Leon County case failed to appear in the circuit court validation case, and lacked standing to appeal, the justices wrote.

Their ruling backtracked from six decades of Florida case law established in the Meyers case and three other bond validation cases since then based on Meyers.

"Under the plain terms of the statute, any person wishing to participate in bond validation proceedings must appear in the circuit court," the justices wrote.

The ruling provides clarity to the bond validation process going forward, Jarvis said.

"You have to be personally affected by the court's decision and therefore you have skin in the game," Jarvis said, explaining why it is appropriate for parties to appear in the lower court case.

Jarvis also said the new ruling could potentially increase costs for litigants, if they choose to hire attorneys when the validation case begins before the circuit court.

If an issuer makes a mistake preparing bond documents, a citizen is now precluded from taking the record from the circuit court validation proceeding and pursuing an appeal, said the attorney who asked to remain anonymous.

The attorney said he would want appeal options open to ensure that bond validations are complete, and that bond documents are prepared properly.

Since a Florida validation case also involves the local state attorney as a participant, Holland & Knight partner and bond attorney Michael Wiener said his firm typically waits to close on a bond issue until after the 30-day appeal period ends.

The new Supreme Court ruling limits the universe of potential appellants, Weiner said.

"You would have some certainty that during the 30-day period no other parties could appear to appeal the decision," he said.

The decision to validate Leon County's bonds and overturn the standing law was hailed by Elizabeth Neiberger, an appellate attorney with Bryant Miller Olive PA who represented the county.

"I think the court did reach the correct decision on both points," she said.

The ruling is a big win for commercial property owners in Florida and a major victory for the state's environment, she added.

"In Leon County where I live there is a lot of redevelopment and a lot people are interested in taking advantage of this [PACE] program," Neiberger said.

While the justices ordered Leon County to remove judicial foreclosure from bond documents, Neiberger said the court's order clears up any ambiguity in the paperwork even though the county did not intend to use foreclosure unless it was allowed by law.

"We got the remedy we asked for," she said. "This doesn't have to go back to another bond validation hearing."

Neiberger also said the court's prior determination about standing ran counter to Florida law, basic principles of litigation, and appellate review.

"It's incredible as an appellate attorney to see a case where somebody doesn't have to show up at the trial court and can tie things up in an appeal, especially one that goes directly to the Supreme Court," she said.

Several attorneys, including Neiberger, said the Supreme Court's decision last week to validate the clean energy bond issues tends to support Florida's 2010 PACE law – though the law itself was not at issue in either case.

The constitutionality of the 2010 PACE law, however, is pending before the Florida Supreme Court in a separate case.

The Florida Bankers Association has appealed the validation of $2 billion of PACE bonds sought by the Florida Development Finance Corp.

The FBA has argued that the PACE law is unconstitutional because it gives the special assessment on a tax bill a lien that supersedes the payment of a mortgage on the property.

Oral arguments in the FDFC case were heard in May.

PACE-related bonds have already been validated in Florida, including a $2 billion court-approved authorization for the Florida PACE Funding Agency in 2011 that is believed to be the first of its kind for the Sunshine state.

The ruling in the Leon County case overturning the Meyers precedent came on a 6-to-1 vote, with Charles Canady, who agreed with the majority's reasoning on Meyers, dissenting only because he believed the entire case should have been dismissed. The justices ruled unanimously in upholding the Clean Energy Coastal Corridor validation.