

# THIRD WAY “SOLUTION” TO FORECLOSURE FRAUD? LIMITS ON RULE OF LAW

The Third Way has just released a response to the US Bank v. Ibanez decision that purports to offer a solution to the foreclosure problem.

I’m sure others will point out other problems with this document: its embrace of the “strategic default” myth, its focus on the Uniform Commercial Code rather than the Pooling and Servicing Agreements that govern securitization, its confusion of the dual track problem with the robo-signer problem, its apparent ignorance of other problems in foreclosure fraud, such as insufficient notice to homeowners, even though that, too was an issue in Ibanez.

But I wanted to point out something about the first step in its purported remedy, in which it describes how to protect injured homeowners. It includes among its injured homeowners:

- Those who were current on their mortgage payments but who were foreclosed on anyway
- Those who were robo-signer foreclosed via on while awaiting a modification decision
- Those who were robo-signer foreclosed while in the process of short-selling their home
- Those who had made a payment on delinquent mortgage but

were foreclosed “because of a faulty process that failed to take that payment into account”

Note how carefully this paper avoids admitting the improper payments that servicers often use to force people into foreclosure, which are a separate problem from robo-signing?

In any case, here’s the remedy the Third Way advocates:

These aggrieved borrowers should be entitled to four things: (1) the immediate suspension of foreclosure proceedings; (2) **the right to sue for actual damages caused by a wrongful signed foreclosure**; (3) access to a 30-day expedited application process for loan modification if they have an application pending (but without a guarantee the modification will be granted); and (4) a refund of any fees and charges assessed by the bank, as well as protection from any deficiency judgments (if a borrowers was seeking a modification or short sale). [my emphasis]

It goes on to suggest that banks should be in charge of points 1, 3, and 4. That is, while elsewhere it espouses putting the Consumer Finance Protection Board in charge of standardizing servicing, it does not want the government involved in the process of “protecting injured homeowners.” Maybe that’s so it can retain for the banks—as it does later in the paper—sole discretion whether or how to modify loans. That is, even while the paper admits Ibanez shows that the banks still have a shitpile problem, it doesn’t want banks to take the hit for the fact that they don’t have legal standing to foreclose on the loans they’re foreclosing on. Nor does it really provide a solution for what to do with truly delinquent

loans on which banks do not have legal standing to foreclose. Nor does it say what happens when people are denied a modification by a bank that doesn't have the legal right to foreclose.

Meanwhile, the paper remains silent on who should be in charge of point 2.

You know, the right to sue, that right protected by the Constitution?

But of course, point 2 is not actually a protection. Rather, it is a limitation on their protection. Rather than admit that property owners have the right to sue in this country, the Third Way thinks that we can best protect them by limiting their right to sue to actual damages.

And the Third Way supported limit to rule of law goes further. It calls for Congress to bail out the banks holding shitpile by:

- Eliminating foreclosure challenges on vacant or abandoned homes
- Eliminating foreclosure challenges on borrowers who defaulted 18 months ago who have not cured the default
- Instituting 12-month statutes of limitation on "paperwork-related" lawsuits

To begin with, their envisioned bailout doesn't account for many realities: homeowners who were harassed into leaving their home, homeowners who are only in default because of the often-undisclosed and exorbitant fees banks slap onto late payments, and homeowners who did not get proper notice of the foreclosure. The Third Way wants to take away the right to sue of all these people, even though they have a legitimate grievance.

But don't worry, Third Way says, this does not

amount to letting banksters avoid any consequences for their actions:

What it emphatically does not do is shield bad actors from the consequences of their behavior. A safe harbor and statute of limitations will do nothing to protect banks and their lawyers from the investigations currently underway by state attorneys' general across the country.<sup>15</sup> Nor will it prevent disbarment and other consequences that are likely to be suffered by lawyers at the "foreclosure mills" at the heart of the robo-signing scandal. The now infamous firm headed by David J. Stern in Florida, for example, "has seen its fortunes plummet, with major clients, like Fannie Mae, Freddie Mac, and Citigroup, cutting ties to Stern. Stern's operation has also laid off hundreds of employees in recent weeks."

The consequences the Third Way believes are adequate for bankster trying to take property they don't have legal standing to take, resorting to legal fraud to do so, involves an Attorney Generals' investigation that itself says will include no criminal charges, disbarment no one expects to happen, and the loss of business.

But nowhere does the Third Way envision the banksters will have to take a financial hit on the value of these loans, much less any legal consequences for fraud. Now, ultimately, the former may well be negotiated by the Attorneys General. But the Bill Daley-connected Third Way seems to see the Ibanez decision as a moment to offer pseudo-solutions that are not only inadequate, but stop short of what would otherwise come out of the Attorneys General "investigation."

In short, this seems like an admission by the Third Way that the shitpile remains a serious problem. But also an attempt to preempt

processes already underway to solve the  
shitpile. Not to mention eliminate legal  
recourse for many of the people who have been  
wronged here.

Update: The more I think about this paper, the  
more it seems like Third Way is saying,  
"Congress, we've had a major setback in the  
courts. Can you please make sure to 1) limit  
access to the courts and 2) preventing any more  
of these judgments that will reveal just how  
deep the shitpile really is?"