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MANDATORY MEDIATION PROGRAMS: CAN BANKRUPTCY COURTS HELP END THE FORECLOSURE CRISIS?

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

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MANDATORY MEDIATION PROGRAMS: CAN BANKRUPTCY COURTS HELP END THE FORECLOSURE CRISIS?

THURSDAY, OCTOBER 28, 2010

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE
OVERSIGHT AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:02 a.m., at Rhode Island Housing, 44 Washington Street, Providence, Rhode Island, Hon. Sheldon Whitehouse, Chairman of the Subcommittee, presiding.

Present: Senator Whitehouse.

Also present: Senator Reed.

OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Chairman WHITEHOUSE. All right. I will call the hearing to order. And before we get to it, let me thank Rhode Island Housing, Richard Godfrey and his wonderful team, for hosting this official field hearing of the U.S. Senate Judiciary Subcommittee on Administrative Oversight and the Courts, a panel which I have the privilege of chairing. I would also like to welcome all the Rhode Island Housing staffers and the other housing advocates who have joined us here today. And there are two elected officials here who I particularly want to recognize: Senator Harold Metts and Councilman Luis Aponte. I appreciate very much their interest in this. It is a significant issue in their communities, and it is to their credit that they have taken the trouble to come and listen to this hearing.

Last summer, I convened a hearing actually in this very room to examine the foreclosure crisis in Rhode Island and to discuss a proposal to give bankruptcy court judges the power to reduce the principal on primary residence mortgages, the way they can on essentially every other loan, including loans on vacation homes or cars or boats. This has long appeared to be the most efficient and least costly way to keep families in their homes, but the large banks, of course, have fought against it with their full lobbying might, and we have been unable to overcome the big-bank-generated filibusters in the Senate.

Over the year since our hearing on bankruptcy modifications, the foreclosure crisis has not relented in Rhode Island or across the Nation. The administration's Home Affordable Modification Pro-

gram, while well intentioned, has not succeeded in producing enough modifications to stem the tide of foreclosures. We have known for some time that the large loan servicers play all sorts of games to slow down and derail the modification process, and earlier this month we learned that they are playing fast and loose with the foreclosure process and documents themselves.

A process that may leave a family homeless has been now relegated to "foreclosure mills" and "robo-signers." Forget a modification. Many of these servicers are not even providing a human being to confirm that the foreclosure is warranted and the documents are in order.

How did it come to this? As a result of the securitization of home mortgages, the relationship between the homeowner and the lender was fractured, and the foreclosure process and system became dysfunctional. Decisions that make no economic sense overall get made because the fracturing has created perverse incentives within the system, because it is virtually impossible for a homeowner to find a human with authority to resolve their problem, and from sheer remorseless bureaucratic inertia.

Ann Sabbagh is here, a realtor who has shared the suffering of numerous clients, and when she came to visit me about this problem, she memorably put the question that she hears so often this way: "Why is it that the bank wants to foreclose on my home, throw me out, and sell it to someone who will pay less than I am willing and able to pay right now?" Until we answer that question, we have a continuing problem ahead of us.

I have called on Fannie Mae, Freddie Mac, and the Federal Reserve to use their powers to institute a national foreclosure moratorium. I believe we should freeze foreclosures until the loan servicers can demonstrate that they have new systems in place to properly evaluate homeowners for modifications and, if modification is not financially possible, to provide homeowners with an orderly, humane, and logical foreclosure process. That would seem to be a minimum standard. I hope that my colleagues in Washington will consider this when we return after the midterm elections.

This Subcommittee has jurisdiction over the courts, and today we will examine whether the court-supervised mediations add common sense to an out-of-control foreclosure process and perhaps help families stay in their homes. The bankruptcy court here in Rhode Island under Judge Votolato is one of only a handful of bankruptcy courts nationwide that offer pre-trial foreclosure mediation. Today we will hear from Judge Martin Glenn of the bankruptcy court in the Southern District of New York, one of the creators of the first such mediation program, and John Rao and Chris Lefebvre, two attorneys familiar with the Rhode Island program.

For families in Rhode Island and across the country snarled in the foreclosure nightmare, it is vital that we find a way to address this growing crisis. Today's hearing will help us determine whether bankruptcy mediation programs can serve that purpose and whether Federal legislation might be useful in replicating the Rhode Island and New York programs nationwide.

Before I conclude my opening remarks, I want to acknowledge the hard work of my senior Senator, Jack Reed, in preserving and creating affordable housing in Rhode Island and across the country.

It is a privilege for me to work alongside such a champion of accessible housing and fair mortgage practices—something everyone here at Rhode Island Housing knows very well. Senator Reed plans to make a statement later in the hearing, and when he arrives, with the indulgence of the witnesses, I will stop their testimony and allow the Senator to make his statement.

I am now privileged to introduce our distinguished panel of witnesses.

Robert Cardullo is the father of three young children and a homeowner from Johnston, Rhode Island. Mr. Cardullo will tell the story of his efforts to receive a mortgage modification, an ongoing process which began in February of 2009.

Larry Britt is a teacher and homeowner from Riverside, Rhode Island. He will discuss his struggles over the past 19 months in getting a mortgage modification from his loan servicer.

Judge Martin Glenn has been a bankruptcy judge in the Southern District of New York since 2006. Prior to his appointment to the bench, Judge Glenn practiced law at the national firm of O'Melveny & Myers in Los Angles and New York. He has a Bachelor of Science from Cornell University and a Juris Doctor from Rutgers Law School.

John Rao of Newport is an attorney with the National Consumer Law Center in Boston, where he focuses on consumer credit and bankruptcy issues. The National Consumer Law Center performs research and trains attorneys who serve low-income consumers. Mr. Rao was appointed by Chief Justice Roberts to serve on the Federal Judicial Conference Advisory Committee on Bankruptcy Rules. Mr. Rao earned his degrees from Boston University and the University of California Hastings College of Law.

Chris Lefebvre practices family, bankruptcy, and consumer protection law in Pawtucket, Rhode Island, and is a member of the debtor/creditor Committee of the Rhode Island Bar Association. Mr. Lefebvre has a B.S. from Boston College and a Juris Doctor from Suffolk University Law School.

I am delighted to have this panel with us, and I turn the hearing over to you, Mr. Cardullo. Please proceed.

STATEMENT OF ROBERT E. CARDULLO, HOMEOWNER, JOHNSTON, RHODE ISLAND

Mr. CARDULLO. Good morning. Senator Whitehouse, thank you for inviting me here today to tell my story.

My name is Rob Cardullo, and I have three young children. Sophie is 8 years, Georgiana is 5 years, and Andrew is two-and-a-half. I have been employed by Taco Bell for the last 12 years, and I am currently running their Johnston restaurant.

In December of 2008, I discovered that my wife of 9–1/2 years was no longer interested in being married to me, and because of that fact and other details that have come up, I decided to bring a divorce action against my wife. The circumstances surrounding the divorce are such that the judge ruled in my favor, giving me the right to retain my home and the residence for my children.

However, in order for me to continue to meet my mortgage payments on my salary alone, it was necessary for me to ask for a loan modification through my bank, which is Chase. Since February of

2009, I have been negotiating with Chase, sending them updates on my financial situation monthly. Rhode Island Housing also assisted me in this endeavor, for which I am very grateful.

In September of 2009, after being put on hold when I tried to reach the individuals handling my application and after repeated submissions of documents, Chase informed me that they were denying my request based on the fact that I had too much liquid assets. The liquid assets they were referring to were the savings account of $2,200 and my 401(k) plan of $14,000. Evidently they expected me to apply my $2,200 to pay my mortgage, leaving me with nothing—leaving me with nothing at all in case of any kind of emergency. Evidently they expected me to borrow against my 401(k) to pay my mortgage. This, however, would have been impossible for me to do—even if I wanted to—as the terms of my 401(k) stipulate that I must be in a state of foreclosure in order to borrow against my retirement funds. And if that was possible and I did have to borrow it, once the money ran out, would I still have my house? And then I have a loan to pay against my 401(k) plan after that.

On the advice of Rhode Island Housing and my attorney, I resubmitted all of my materials and began the process all over again. Following several months of frustrating negotiations with Chase, going through reams of paper, and shedding many tears, they finally in May 2010 approved me for a loan modification with a reduction of my mortgage payment from $3,000 a month to $1,986 a month. The agreement was that I pay the reduced amount for 4 months, and after the fourth payment, the loan modification became permanent.

But this is just the beginning of my story.

In August of 2010, 1 week before my fourth payment, I received a letter from Lenders Business Process Servicers, saying that Chase had sold my mortgage to them and that they were going to foreclose on my house because I was behind in my payments. When I explained to them that I was in a loan modification agreement with Chase, LBPS told me that they would not honor the loan modification, that they had bought over 9,000 loans, and they could not focus on just one. I should point here that the loan modification was government-backed by Fannie Mae and that these banks are not honoring them. LBPS said that if I wanted to be considered for a loan modification, I would have to begin the process all over again with them.

I, therefore, have gone ahead and re-filed all of my documents with LBPS again. Yet they still continue to harass me and, as recently as last week, threatened to foreclose on me and bring legal action against me. I have contacted my lawyer, and again I am contemplating whether to bring legal action against LBPS.

The recent financial crisis has had an impact on my own finances, and many individuals, too. Yet in the 4 years I have owned my house, I have never missed or been late with a mortgage payment. The divorce has added a further strain on my finances, making it absolutely necessary for me to have a loan modification in order for me to meet my mortgage payments and any other bills in a timely manner.

I do not want to end up in foreclosure or go bankrupt. Is this what I am facing? I have heard all this reassurance for more than a year that I am going to get stimulus money to help me get my loan modification in place. I am not asking for a handout—just a loan modification to enable me to keep my house.

I am going to continue with my quest for a loan modification, but based on my experience with Chase and now a repeat of the same frustration with LBPS, my hopes are diminished, and I am not optimistic about the outcome.

If LBPS denies my application for a loan modification, I will have no option but to foreclose or short-sell my house or face bankruptcy, all of which I would like to avoid. I cannot understand why Chase—I am sorry—or LBPS would not want to help someone out who has never missed a mortgage payment. It seems that they would rather take the house than work out a reasonable payment plan with me. I would like to point out that through all of this I have complied with everything, every requirement on schedule, time after time again, and yet the documents are never-ending.

I have turned to Senator Whitehouse from the beginning of this loan modification nightmare for his assistance, and if it was not for the support from his office, I would be fighting this battle alone.

Thank you very much for listening, and I am happy to answer any questions.

[The prepared statement of Mr. Cardullo appears as a submission for the record.]

Chairman WHITEHOUSE. Thank you very much, Mr. Cardullo.

I think what we might do is allow Mr. Britt to testify and then maybe ask a few questions of the two of you as consumers, and then move on to the other witnesses who are in different parts of the process.

So, Mr. Britt, would you proceed with your testimony?

STATEMENT OF LARRY G. BRITT, HOMEOWNER, RIVERSIDE, RHODE ISLAND

Mr. BRITT. Sure. Thank you, Senator Whitehouse, for initiating this important hearing. I would also like to thank Rhode Island Housing as well for hosting the hearing and providing support through my 19-month ordeal with Bank of America's mortgage modification process.

My name is Larry Britt, and I have owned my home in Riverside, Rhode Island, since 2003. I bought my home as a permanent residence in which to spend my final working and future retirement years. My home purchase was not an attempt to get in on the crazy real estate boom of the times. I work here in metro Providence as an adult educator, as the Senator said.

Ironically, my saga began 19 months ago in this building with Linda Tavares, a very helpful Rhode Island Housing counselor.

When I started the process in March of 2009, I had never been late paying any bills to any creditors—including Bank of America—and my credit score was near perfect. Since entering into a modification process with BofA, the bank has ruined my credit rating and has been a major contributor to the uncertainty about my future. My credit score has dropped 160 points as a consequence of improper credit reporting by BofA. My credit score monitoring serv-

ice sends me weekly e-mail notifications of continuing negative impacts to my credit score. So far, two creditors have closed my accounts, and three have lowered my credit limits. BofA tells me that I was told my credit score would be adversely impacted, but they cannot provide me with any documentation that proves I was told of this consequence.

As I have said, I am not a deadbeat. I have always paid all of my bills on time. But because of legitimate financial hardships that I have documented, I entered into BofA's mortgage modification program hoping I could avoid prospective financial problems. For the past 19 months, I have immediately replied to any of Bank of America's inquires and requests for documentation. Before entering into the BofA process, I was considered a good credit risk. Now, simply by having applied for a program that I am well qualified for, my history as someone who pays their bills has been permanently damaged. Equally, I am concerned about rescinded and denied credit that my elderly mother and other family members have suffered as a consequence of their financial relationships with me.

I have a detailed chronology that you will be happy that I am going to summarize.

[Laughter.]

Mr. BRITT. Because it is the same thing over and over again. There are four events that happen over and over again. The bank contacts you. You provide documentation. They say they do not have the documentation. You provide it again. You are approved, you are denied. It is just the same script over and over again.

But the summary is it is about my interactions that I have had with Bank of America in the Treasury Department's home modification center, known as HAMP.

Chairman WHITEHOUSE. Mr. Britt, feel free to go through in the detail that you provide in your testimony because, frankly, the impact of this I think is——

Mr. BRITT. OK. I am happy to do that, but I intentionally took it out.

Chairman WHITEHOUSE. The way your wrote it, your testimony is worth going through. It is really pretty shocking.

Mr. BRITT. OK. In March 2009, as advised by news reports, I went to Rhode Island Housing and submitted an application for mortgage modification. This allowed Rhode Island Housing to act as my agent for mortgage modification with Bank of America. At this time I was not behind on my mortgage or other debt obligations. I have already told you that I was anticipating financial problems.

Next, in March 2009, as required, I met with Money Management International, an approved credit-counseling agency. This organization determined that I was managing all of my finances correctly and that my only issue was my large monthly mortgage payment and underwater mortgage.

In March 2009, I provided copies of all the required documentation to Rhode Island Housing for forwarding to Bank of America.

From March 2009 to October 2009, I called Rhode Island Housing biweekly to check the status of my modification. Each time I called, I was told that there was a backlog and I should wait to hear something.

In October 2009, I was informed by Rhode Island Housing that Bank of America did not accept me into the loan modification program because I was not late or behind on my mortgage payments. Rhode Island Housing informed me to visit a Bank of America branch so that I could apply for a refinance of my mortgage.

So a few days later, I went to a Bank of America branch and formally applied to refinance my loan. The refinance was denied that day on the phone in the branch. As I found out, the refinance step was a formality I needed to go through before I could apply for yet another mortgage modification with BofA.

About a week later, I received a notice that I had been accepted into BofA's trial modification program, and I was a given a new monthly payment amount for the trial period.

A few days after that, I mailed all the requested documentation to Bank of America.

Then from November 2009 to May 2010, I paid Bank of America my new monthly payment on or before the due date.

From October 24, 2009, to February 2010, I checked the status of my modification on a weekly basis to be sure the company had received my documentation. I was repeatedly assured that Bank of America had received all information that had been requested of me.

In February 2010, I received a letter from Bank of America requesting that I mail them all of the documentation that I had already provided twice before.

On that day, I FedEx'd all the required documentation again.

Then from February 2010 to May 2010, I called Bank of America weekly to check the status of my modification and to be sure that the bank had all of my required documentation. Each time I was assured that all the requested documents had been received by Bank of America and that the modification was "being reviewed."

In April of 2010, I received a "Notification of Default and Mortgagees Right of Foreclosure" from Bank of America.

The next day I called Bank of America, and the customer service representative told me to ignore the letter, continue paying my modified payments, and that I will continue to receive these default notices during the modification process.

In May of 2010, I received a letter from Bank of America stating that I had been denied a mortgage modification because all requested documentation had not been received by the bank.

The next day, I called Bank of America, and I was told to disregard that letter. The customer service representative said that, according to Bank of America, "all documentation was complete and received as of March 29, 2010." So this is May 2010. They are saying as of March everything was good.

So last month, I started to work on filing forms with all three credit report agencies in an attempt to get my modified payments to Bank of America classified, as they appropriately should be, as modified payments rather than delinquent payments. That has been the hit to my credit report. It is these delinquent payments that brought my credit score way down.

So the credit report forms encourage you to contact the creditor before you file any complaint. So I called Bank of America, and the following occurred: The representative, I asked him to review my

account and confirm that I had made all the modified payments that I had agreed to.

The representative told me that my mortgage was in default as of May 7, 2010, and that I had been sent a letter saying I was not eligible for the modification program because I did not provide BofA with requested documentation. He also said that I had been sent a letter requesting the documentation. I never received this letter. So I explained the past chronology that you have all had to listen to to this representative.

Finally, after really getting nowhere with this representative, I asked to speak to his supervisor, and she told me that I lied, that the conversations that I told her I had had with Bank of America never occurred and that she had the phone records to prove it. However, my personal phone records would prove her wrong.

Finally, the supervisor told me that she did not have time to waste on me and hung up on me. And this was not the first hang-up from Bank of America.

So that is the chronology. Even more has happened, but, Senator, you asked for it.

[Laughter.]

Mr. BRITT. Okay. Shall I continue?

Chairman WHITEHOUSE. Please.

Mr. BRITT. Let's see. Finally, in May 2010, I have already told you I got a denial letter from Bank of America. At that time, I contacted your office and gratefully got an immediate response from Karen Bradbury, a caseworker in the Senators Providence office. Karen's efforts resulted in a connection for me with the HAMP Solution Center. At first, my HAMP caseworker sounded like the answer to my ongoing problem. The HAMP representative told me that he would be an advocate for me with Bank of America. He told that he had learned from Bank of America that I was "under review for the Making Home Affordable Second Look" program. Throughout July and August 2010, I contacted the HAMP Solution Center seven times. Each time, the representative there told me that his updates directly from Bank of America said that my modification was still under review and that I had complied with all requests for documentation as well as honored my agreement to make on-time modified monthly payments.

Honestly, after a few months with HAMP, I felt like they were reading from the same script as the banks. When I checked in with them, there were never any updates; there were never any outstanding bank requests for documentation from me. Yet once a month or so over this same period, I received additional requests from the bank for more documentation, a repeat of what I had sent three or four times before.

So last month, as I told you, I started to work on my credit reporting, again in the chronology, and when I found out that I was in default, as I told you in the chronology, I panicked at the prospect of losing my home. So I reconnected with Linda here at Rhode Island Housing, and on October 18th, this month, Linda determined from Bank of America that I was not eligible for any modifications. On the same day, when I went home, I received a mail notification from Bank of America saying, as I understood it, that late fees, penalties, and interest were accumulating on my mort-

gage balance and that, regardless of my outcome with the modification program, I would be liable for these charges.

On the next day, I received a modification approval from Bank of America. So I guess I should be happy, and I really am grateful to the Senator's office and to Rhode Island Housing and even the HAMP Solution Center for what I hope is a final resolution. However, given the last 19 months of misinformation, can I be sure that Bank of America's "approval" is for real? Does another Bank of America division have me slated for foreclosure? I cannot be sure, and the 19-month process has forced me into deeper financial trouble and a lot of emotional distress, just like my co-witness here.

So I know this story is hard to follow. It is all in the written record. The bottom line is that although I have worked with Bank of America since March 2009 and the HAMP Solution Center since June 2010, I am still not really sure I will be OK. Last week, within a 2-day period, Bank of America has told me that I am both ineligible and approved for a mortgage modification.

So, last, I just want to say that despite all of this, I want you to know that I have continued to pay all of my bills in full on time, and as my financial history shows, I am a guy who figures out what sacrifices I need to make in order to meet my financial obligations. I always have.

So if needed, I can document anything that I have spoken about—activities, phone calls, documents. And I thank you for your time and am open to any questions that you might have.

[The prepared statement of Mr. Britt appears as a submission for the record.]

Chairman WHITEHOUSE. Thank you, Mr. Britt.

I said that we would break into the hearing after the homeowners had their chance to testify, and Senator Reed's timing is pretty well perfect. He came in just at this moment, so I would now like to call on him to add a few words. And then I think we may both have a few questions for Mr. Britt and Mr. Cardullo.

OPENING STATEMENT OF HON. JACK REED, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator REED. Well, first let me thank Senator Whitehouse for convening this hearing. The foreclosure issue is not only a drag on the economy, but as Mr. Britt indicated, and Mr. Cardullo also in his testimony, it is a source of exasperation, anxiety, anger, frustration, and much more for families trying to deal with it. And so we have an obligation, I think, not only at the national level to get the economy moving, but at the homeowner level to give people a chance to get their lives in order and move forward again.

I particularly want to thank Mr. Cardullo and Mr. Britt. Listening to your testimony, Mr. Britt, and reading yours, Mr. Cardullo, no one should be forced to go through the permutations and other operations that you have had to go through.

Senator Whitehouse has really been at the forefront not just in helping our constituents, but also nationally. We both have joined together supporting legislation to try to find a solution in the bankruptcy courts. I think that is an issue that we will consider again today. Just as importantly, together we have brought about $105 million here through the Neighborhood Stabilization Program and

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the Hardest-Hit fund. Rhode Island Housing has done a remarkable job trying to help people. But we have to do much, much more. Unless we successfully deal with this issue of foreclosure, the economy will not expand as it should, and people's lives will not return to at least close to normal. So that is our challenge.

We have to think creatively. Obviously, one major benefit of this hearing, and, again, another tribute to Senator Whitehouse's insights, is to listen to people who deal with these issues on a daily basis and get the advice we need to make sound policy in Washington. I just find it—"ironic" is too mild a term. You know, 5 years ago, you could get a mortgage in 24 hours without any paperwork, no problem finding the files, no problem getting you signed up, no problem doing anything. And now, to get it correct it is a saga of years and pain. You know, if these companies—no company in particular, but if they are that efficient in giving mortgages, I would like to see them be that efficient in making modifications when they are appropriately required by the financial situation.

Thank you.

Chairman WHITEHOUSE. Thank you, Jack.

One of recurring themes in your testimony and one of the recurring themes that comes out of all of our constituent work, working with those who are trapped in this bureaucratic nightmare, is the repeated requests for the same documentation. Both of you have alluded to it. Could you flesh out a little bit how many times various things have had to be produced by each of you? It is not just once or twice or three times any longer, is it?

Mr. CARDULLO. I was told by Chase that my bank accounts and my check stubs are only good for 30 days, and then at the 30 days, you need to start sending all your information back in again. So I have a ream, I have a stack—it is about 40 pages that I faxed in every month to Chase when I was going through the loan modification with them.

Chairman WHITEHOUSE. So you have been faxing in information 10, 12 times at this point.

Mr. CARDULLO. Yes, and now I am doing the same thing with LBPS all over again.

Chairman WHITEHOUSE. And are they telling you that they have lost it? Did you hear that?

Mr. CARDULLO. Yes. They have a 405—I think it is a 405T, which is basically all our debts that we have. They never get that. They are always missing that. That is one of the big things. And so I fax it in again, and, "Nope, we never got it." I say, "I have the records of faxing." "Nope, never got it."

Chairman WHITEHOUSE. What are the penalties to you for failing to provide——

Mr. CARDULLO. They can drop me——

Chairman WHITEHOUSE.—the requested information?

Mr. CARDULLO. They can drop me from the loan modification program.

Chairman WHITEHOUSE. So as best you understand it, if you are the bank, if you are demanding unreasonable, constant, repetitive amounts of information asking for the same thing over and over again, pretending that you never received it, there is a benefit for you in doing that because if you fail at any time in providing that

stuff, even if all they are doing when they get it is—if their fax machine is attached to their shredder, as Mr. Lefebvre said in his testimony, and they are just shredding it right through and not even looking at it as it comes, you make one mistake and you are out of the program.

Mr. CARDULLO. Correct.

Chairman WHITEHOUSE. And that is a burden of their backs from your point of view.

Mr. CARDULLO. Correct.

Chairman WHITEHOUSE. Did you get the feeling that they are kind of testing your resolve to see if——

Mr. CARDULLO. Oh, they have tested me.

[Laughter.]

Mr. CARDULLO. They definitely tested me.

Chairman WHITEHOUSE. Mr. Britt.

Mr. BRITT. I feel the same. You know, it is this—some of it is just making the issue confusing and kind of making us jump through hoops. But also, with each of—as I understand it—and I am not clear about it. I was in four different programs. Each time the new representative wanted all new documentation. And as my co-witness said, every time you start the process over, they want new—they want current documentation.

The other thing about faxing is it does not fax into a shredder. At least at Bank of America, I finally found out—because I have a home fax, and a woman claimed that—one of the reps claimed that I did not fax something. And I had a record of that day faxing from my home exactly what she wanted and of asking her, "Are you in the office? I will fax it immediately." And she said, "Yes, I am here."

Well, when I finally confronted her with this, she told me, "Oh, that is not the way faxes work. They go into an electronic system, and then another department electronically distributes the documents." Which I understand. I am all in favor of electronic documents. But, again, it is a lie and, you know, yet another delay and a way to—I do not know—just keep me jumping through hoops.

Chairman WHITEHOUSE. In the hopes that perhaps you will miss one.

Mr. BRITT. Yes.

Chairman WHITEHOUSE. Let me turn to Senator Reed, but let me ask you one last question. During the time that you indicated that you had your credit rating ruined by the bank, you were meeting all of the terms that they had demanded of you, not the original terms but the modification terms.

Mr. BRITT. Absolutely.

Chairman WHITEHOUSE. But you were in full compliance with their program, and yet it ruined your credit rating.

Mr. BRITT. Yes. And they were the only ones reporting negatively about me. However, other creditors, on receiving this information about me being a bad risk, immediately lowered all credit lines to whatever my balance was, and several canceled my accounts.

Chairman WHITEHOUSE. Jack.

Senator REED. Just to follow up, to both Mr. Cardullo and Mr. Britt, in the course of these numerous conversations, at any point did representatives of the banks or the servicers kind of go offline,

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if you will, and just sort of tell you what was really going on? Or was this—I mean, I am trying to get a sense of whether these are just colossally inefficient organizations or, as Senator Whitehouse suggests, there are somehow implicit incentives for these people to just make it so hard that you either go away or you fail.

You have been at the receiving end of this, and so just any sort of sense you have in these dealings, whether it is one or the other or both.

Mr. CARDULLO. I just think it is more the fact that they are not organized. You start by talking to a representative. Then they send you over to loss mitigation. And then they just keep on bouncing you back and forth, and the one hand does not know what the other hand is doing. And that is just one of the biggest issues. If I had a representative who was dealing with my file and I talked to that person and that was the way it was working, I am sure that—I am being positive with this saying that there probably would not have been a different income or, you know, 8 or 10 months of not dealing with this, you know, if I was talking to a person versus a mega bank.

Senator REED. Right, a better system, yes.

Mr. BRITT. I would echo what Mr. Cardullo said. I would also add the reps that I worked with sounded really overworked. And I do not want to judge them. It is their tone of voice on the phone. But they certainly did not seem to care.

Senator REED. Yes.

Mr. CARDULLO. I would add that I have told the rep that I have gone through the loan mod, and they have said, "That is not my problem. You owe my company money, and we will take your house." I said, "OK, go ahead. I will contact my lawyer."

Senator REED. Yes. I mean, one of the things that we have been trying to do is to incentivize, one way to describe it, a much more proactive, much more focused can-do attitude on the service of the banks to get it done. And we have received publicly at hearings assurances that that is what they are going to do, that they are going to take charge. In fact, I would think financially in many cases—and you might reflect on this—by modifying a loan, the bank salvages something more than they would in a messy foreclosure and loss of your home. Certainly you would be able to stabilize your life. So it seems to be a win-win by modifying, yet it is just still this big machine that is rolling along and is indifferent to their own well-being as well as the customer's. I do not want to put words in your mouth, but is that something you are——

Mr. CARDULLO. Yes. It is very frustrating. I mean, I do not—I want to keep my house. I want to make the payments. It is just I do not understand why they would rather have a house sitting there for whatever it is and not collecting any money on it at all and so it goes into foreclosure or a short sale or bankruptcy. It does not make any sense. But they think it is rather those are my terms, we are not taking care of the loan mod, and you signed it, get done.

Mr. BRITT. I feel the same way. I am willing to pay off a mortgage on a house that is valued at significantly less than my mortgage balance. I do not understand why the bank will not go for that

deal. It is a win for them. If they take my house, they are going to lose significantly on the asset.

Chairman WHITEHOUSE. Well, Mr. Britt, that is a perfect segue to Judge Glenn's testimony because the program that he initiated does the simplest of all possible things, and that is, require the homeowner and the lender to sit down and look each other in the face with an authorized person for the lender and the homeowner right there and actually have a human discussion about the problem. And that I think, first of all, solves the problem that you all have experienced that you cannot find anybody with authority. You are always grasping at people who will not give you their last name, who do not have the authority, who do not have the information, that you are speaking to for the first time. And it is a nightmare, and I understand that. And then you have got the problem that very often the servicing company has an incentive, a financial incentive to foreclose, even if there is a better deal for the bank, for you the homeowner, and for the public at large. Their incentive is mismatched. It is a market failure. And the bankruptcy court has the ability to say, "Wait a minute, that is a stupid notion," and push back against really dumb ideas that are propagated through the system.

So, without further ado, and with much appreciation for taking the trouble to come here, Judge Glenn.

STATEMENT OF HON. MARTIN GLENN, UNITED STATES BANKRUPTCY JUDGE, SOUTHERN DISTRICT OF NEW YORK

Judge GLENN. Chairman Whitehouse, Senator Reed, thank you for inviting me to speak before the Subcommittee on the role that bankruptcy courts can play in helping to alleviate the mortgage foreclosure crisis. I am one of 11 bankruptcy judges in the Southern District of New York. We have nine judges in Manhattan, one in Poughkeepsie, and one in White Plains. And I will discuss the program that became effective in our court in January 2009. And I have attached to my written testimony copies of the program documents that are currently in use, and they are all available on the court's public website. I will also provide some data on the use and results of the program from its inception in January 2009. The last date we have collected information is October 21, 2010.

Let me first give you some background on how the program was developed. As the national foreclosure crisis unfolded, bankruptcy courts across the country have faced substantially increased consumer bankruptcy filings, many of those filings on the eve of foreclosure sale after a borrower had seemingly exhausted consensual or State court efforts to avoid foreclosure.

During 2008, after speaking with a few lawyers representing creditors—those are the lenders and loan servicers—my colleague Judge Cecilia Morris and I began exploring whether the bankruptcy court could develop a program to better address the problems of both debtors and lenders. And in adopting our loss mitigation program, we think we were the first bankruptcy court in the country to do that with a formal program to help alleviate the mortgage foreclosure crisis. And our adoption of the Loss Mitigation Program roughly coincided with U.S. Treasury's creation of the

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HAMP program. Changes in HAMP since it was first created have also made it easier for bankruptcy debtors to make use of HAMP.

HAMP eligibility requirements still exclude many debtors from obtaining a HAMP loan modification, but increasingly, we are seeing that lenders and loan servicers are willing to consider non-HAMP modifications as well. And in our program at least, bankruptcy debtors have experienced far fewer problems with HAMP of the type experienced by Mr. Cardullo and Mr. Britt probably because of the judicial supervision that we are able to provide.

After additional meetings with groups of lawyers, we drafted the program. The court then published documents for public comment. And after the comments were received, we made a few changes, and our board of judges adopted the Loss Mitigation Program, effective in January 2009. And the program applies to any individual debtor in a case filed under chapters 7, 11, 12, or 13 of the Bankruptcy Code, and it applies to any real property or cooperative apartment—we have a lot of co-ops in Manhattan—that are used as a principal residence in which the debtor holds an interest.

While loan modification is one of the goals of our Loss Mitigation Program, our procedures make clear, and let me quote from it: "Loss mitigation commonly consists of the following general types of agreements, or a combination of them: loan modification, loan refinance, forbearance, short sale, or surrender of the property in full satisfaction." I will end the quote there.

Debtors and their lawyers have often recognized, after they finally have someone they can really negotiate with with authority, that it is unrealistic for the debtor to keep the home in their circumstances. There can still be benefits to the debtor and the lender to agree upon a short sale or surrender of the property in full satisfaction with the debt. The longer a debtor keeps an unaffordable home, the more liability the debtor continues to face for property taxes, insurance premiums, homeowner assessments, zoning violations and other things of that type.

Our results to date have been modest but, nevertheless, helpful in allowing homeowners to remain in their homes and lenders to avoid additional foreclosures. Chapter 13 of the Bankruptcy Code is designed for debtors with regular income. If a debtor is unemployed and has no other source of regular income, chapter 13 is unlikely to help. And a loan modification is unlikely if a debtor has no income to make mortgage payments.

Now, what are some of the results? Since the inception of the program in January of 2009, our court has received approximately 1,450 requests for loan modification. And of these, about 1,000 were filed in chapter 13 cases, 25 in chapter 11 cases, and 425 in chapter 7 cases. And approximately 1,250 orders have been entered that start the loss mitigation period when these negotiations and discussions take place. There have only 55 orders denying loss mitigation requests after the court heard and sustained objections by the lender or loan servicers. These numbers are a good indication how infrequently a loan servicer or lender objects to going into the loss mitigation period. And the objections have usually been filed in cases of serial or abusive bankruptcy filers, with little or no income and no prospects of a successful outcome.

The best data we have on outcomes is for our court in Poughkeepsie. That is where Judge Morris sits. Loss mitigation requests were made in approximately 900 cases in Poughkeepsie during the period I have spoken about, and loan modifications have been approved so far in 220 cases; another 450 loan modification requests are still pending; and approximately 230 requests have been denied or withdrawn.

To put that in context, in Poughkeepsie, loss mitigation was requested in about 40 percent of the chapter 13 cases that were filed in that court. Successful loan modifications have resulted in reductions in monthly mortgage payments in the range of $100 a month to $1,000 a month. I have heard of some larger amounts than that. And in a few cases, substantial principal reductions resulted. Judge Morris recently had one with a $120,000 principal reduction. You know, for a debtor living at the edge of financial collapse, reductions in monthly mortgage payments in this range can mean the difference between remaining in a family home, with children enrolled in local schools and neighborhood stability maintained, or having your life totally disrupted in searching for new housing and schools, assuming they can be found with the money available to a debtor.

Anecdotally, over the last 6 months, my colleagues and I have seen increased willingness by lenders and loan servicers favorably to consider loan modifications. I think they are beginning to understand that there is a benefit for the lender economically if they modify the loan and keep somebody in their house.

Now, let me emphasize a few other points. Each loss mitigation party must have a person with full settlement authority present during the mitigation session. This has been one of the keys to the success of our program. And while our procedures also provide that a debtor creditor or the bankruptcy court can order an independent mediator, that has only come up a few times. What we hear from lawyers is: Once we have somebody to negotiate who has authority, must have authority, we do not need a mediator; we just need somebody to sit down and talk with with authority to make a modification.

Generally speaking, the granting of a loss mitigation request does slow down case administration. And in chapter 13 cases, confirmation of cases is usually delayed until after loss mitigation and any trial period has been concluded. And a debtor's ability to confirm a chapter 13 plan often depends on the ability to negotiate a loan modification. But I think an important point is a successful loan modification will also affect the amount of disposable income that a debtor has available to pay other creditors. So unsecured creditors benefit as well when a loan modification is reached. So the time it takes to do that really can benefit everybody.

The judges of our court have concluded that the delays in administering cases in which loss mitigation has been ordered are justified by the clarity that loss mitigation can bring, whether the result is a modification, a short sale, a surrender, or no change at all. And while cases remain open and active on the court's docket for a longer time, that usually does not expand the work of the judge.

Finally, I am aware that a very similar loss mitigation program was adopted by the bankruptcy court in Rhode Island. In fact, Judge Votolato came to one of our meetings with lawyers in Poughkeepsie when we were reviewing results of our own program. The issues raised in the challenge will have to be decided by the Federal courts in Rhode Island.

However, I want to emphasize that our judges considered our authority to adopt our loss mitigation program before it became effective in January 2009. It was the view of our judges then and now that our unquestioned authority to adopt mediation programs and procedures—that have long been in place in our court and courts all across the country—applies equally to our loss mitigation program which is modeled on our district's mediation program. We do require that the parties negotiate loss mitigation in good faith, as we do in any mediation. But that does not compel a procedure or result contrary to any provision of the Bankruptcy Code.

Chairman Whitehouse, Senator Reed, I would be happy to answer any questions you have. Thank you for the opportunity to appear before the Subcommittee.

[The prepared statement of Judge Glenn appears as a submission for the record.]

Chairman WHITEHOUSE. Thank you very much, Judge Glenn.

I think what I would like to do is actually ask a question or two now before we go on to the attorneys.

This business of securitizing mortgages had a cascade of foreseeable effects that were not really planned for. One of them is a lot of outside interests in the loan between the servicing company and the homeowner. So even though you have the servicing company in the room with authority and the homeowner, there is still sort of a shadow over that proceeding that is cast by investors who could be in foreign countries, who could be anywhere, who may feel that they have a claim as a result of the inadequate effort by the servicer to defend their financial interests.

It strikes me that there is a pretty powerful value to finality at that point. Could you just describe briefly what happened when all this is concluded? Do we end up with an order that is final and binding on everybody, including other investors, so that everybody's affairs are settled and the servicer can go forward knowing that they are not going to face a lawsuit in the future over having settled the case?

Judge GLENN. The conclusion of a successful loan modification in our court usually results in two documents: one is a written agreement generally between the loan servicer and the borrower, and then an order of the court approving it.

When we first were designing the program, we heard from many lawyers that, because of securitization, the loan servicers argued that they did not have the authority to enter into a loan modification. One of the things we have discovered since then is that typically the loan servicers take the position that they do have the authority to negotiate a loan modification if it is in the context of a court process. Those who say they cannot do it outside of a court process voluntarily say, yes, if we are in a court process, as in bankruptcy, we can do it. So as the program has evolved, we really

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have not had a lot of pushback where loan servicers say, "We cannot do this because there are investors whom we cannot identify."

Chairman WHITEHOUSE. Thank you.

Senator Reed.

Senator REED. Just a quick question, Your Honor. In this workout, I would presume that on a future sale of the property the mortgage lender could benefit. That is one of the terms you can write into the agreement; i.e., if there is a reduction of principal and then 5 years from now it is sold and there is a profit, is that something you do?

Judge GLENN. We have not seen any agreements where in a loan modification the lender or loan servicer has provided for shared appreciation. Certainly in discussions we have heard that, in discussions about the issues about cramdown, whether a legislative solution should include some provision that if there is a reduction in principal, there can be a recapture of some of it in the future.

So the loan modifications we have been seeing, there have only been a handful that have included reductions in principal. But so far those have not included shared appreciation.

Senator REED. Thank you, Your Honor.

Thank you, Mr. Chairman.

Chairman WHITEHOUSE. Mr. Rao, we will have you and Mr. Lefebvre now give your testimony, and we will ask you questions as a pair and as a panel.

STATEMENT OF JOHN RAO, ATTORNEY, NATIONAL CONSUMER LAW CENTER, BOSTON, MASSACHUSETTS

Mr. RAO. Chairman Whitehouse, thank you for holding this hearing and for inviting me, and, Senator Reed, thank you for participating in the hearing.

When I was asked to testify last year at a hearing held by you, Senator Whitehouse, I began my testimony by saying that the Nation is in the worst foreclosure crisis since the Great Depression. Sadly, very little has changed over the past year.

The recordkeeping that has been going on in terms of the numbers of loans in this Nation and homeowners who are in foreclosure or seriously delinquent that are recorded by the Mortgage Bankers Association continues to be record numbers. They have never had numbers like this since they began recording them.

There are very credible estimates that as many as 13 million homeowners will be in a foreclosure by the end of the year 2014 from the beginning of the crisis. The problem is even worse here in Rhode Island than in many other states. Close to 10 percent of Rhode Island homeowners are seriously delinquent, which puts Rhode Island at the highest level of the New England States, an unfortunate recognition we have received, but helpful, nonetheless, is that Rhode Island is one of the 10 States in the Nation that is receiving the hardest-hit funds which Rhode Island Housing is administering.

So how has the Federal Government responded to date to this crisis? The primary program which has been initiated is the HAMP program. This is a program whose primary goal is to provide loan modifications to homeowners who are in default or are in threat of

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being in default. And the record so far has been not substantial enough to meet the need.

So far, as of the report from last month, less than 500,000 homeowners have received permanent modifications. Treasury had projected by this time that it would have been over a million, so it is lagging far behind. And the most recent report is interesting because the number of modifications started in September is actually declining, which is not a good sign.

The other most recent development, and a very sad development, is what I like to refer to as the "HAMP aftermath," which is an even larger number of homeowners, close to 700,000 homeowners nationwide, have been put on trial modifications, like Mr. Britt, where they start a trial program, and then they have been canceled from that trial program and not put on permanent modifications. Essentially they are worse off. They now have this huge arrearage on their mortgage that they need to catch up on. Their credit reports have been seriously dinged, like Mr. Britt, making it very difficult for them to refinance if they could. And then foreclosure begins again. And that situation is likely to get worse.

The other real sort of problem is that there has not been an enforcement mechanism that Treasury has put in place to try to get the servicers to administer the program in a way that it should, and all the problems we have heard about. The HAMP Solution Center has really—Mr. Britt's experience is not unusual. It has been ineffective in providing that enforcement mechanism that is so needed.

So our discussion today is whether the bankruptcy courts can have a role in this to try to actually provide in some ways an enforcement mechanism for these loss mitigation programs to work. So I would like to briefly talk about a few ways in which I think the bankruptcy court mediation programs can be ideally suited to address that concern.

The first issue—and we have heard so much of it today—is sort of breaking through this bureaucratic barrier. There is the nightmare of the homeowner, as both Mr. Britt and Mr. Cardullo have experienced, of submitting documents repeatedly and getting nowhere. The advantage of a formal court mediation program or loss mitigation program is, as Judge Glenn mentioned, that the servicer needs to designate someone who will be there to have—a designated person for the exchange of documents. And, most importantly, there is an order that is entered that sets time deadlines for that exchange of information to occur, and really critical, if it does not happen, there is someone to go to to try to enforce it. There is the ability for the homeowner, through counsel especially, to approach a judge with a motion and say, Listen, the order has not been complied with, the exchange of information has not occurred.

The second item is the issue of just negotiating in good faith. An essential element of any program like this is that both parties have to negotiate in good faith. Judge Glenn mentioned that the servicer needs to designate someone with full settlement authority and the possibility that a mediator can be important.

I have to say that this is critically important for the majority of States in this country like Rhode Island which are non-judicial

foreclosure States. In Rhode Island, like over 30 or more States in this country, there is no judge overseeing the foreclosure process. So there really is no one to turn to if the modification program or process breaks down. If it is incorporated into a court system, there is that ability to be in front of a judge and try to get some compliance.

The other issue that is of a benefit for these programs is what I would like to basically say is just providing due process. One of the huge problems with the HAMP program is that homeowners are denied permanent modifications and they are not told why. Even though Treasury has now imposed requirements that they provide more information for the reason for denial, still many homeowners are given a simple denial letter with basically no information. And the formal programs within a court system have that ability to both require, as both Rhode Island and the New York programs do, an exchange of information about the reasons why there would be a denial and, importantly, to be able to see a judge if that is not provided.

Another issue is that these programs, especially in bankruptcy, can provide protection from foreclosure while the process is going on. Mr. Britt's example is a perfect example of one unit within the servicing shop not talking to the other unit. The loss mitigation folks are processing the applications, and the foreclosure department is processing the foreclosure, and they often do not talk to each other. And so the homeowner gets a letter saying they have been approved for a temporary modification, and the foreclosure department is sending a letter saying there is going to be a foreclosure sale in a month. And one is saying ignore that letter.

There have been a number of cases nationwide where while this process is going on, the home actually has been sold at a foreclosure sale. There have been cases where homeowners have had their homes sold on 1 day, and then the next day or a week later, they get a letter saying they have been approved for a modification.

The advantage of a program within a bankruptcy court system is that the automatic stay that is issued as soon as the case begins protects the homeowner and no foreclosure proceedings proceed at that point. Everything grinds to a halt. And that is a very helpful provision.

Three other quick things. We are hearing a lot in the press today—and Senator Whitehouse mentioned the issue of the false affidavits being filed in these foreclosure processes, robo-signers. Bankruptcy courts have been dealing with this for years. They have been imposing sanctions where these kinds of things have been discovered in these cases. They know how to deal with it. And they also—and part of this issue of the false affidavits is trying to find out, for example, who the real owner of the mortgage is. And Senator Whitehouse asked the question about, you know, who has authority really to enter into a binding modification. Again, the bankruptcy court would be well suited to be able to root out and to determine that issue through the court proceedings as to who the true mortgage holder is.

Two final points. Second mortgages continue to be a huge problem. Treasury indicates that at least as many as 50 percent of homeowners who are at risk of foreclosure have more than one

mortgage. They have a second mortgage on the property. These modification programs—the HAMP program has been hampered by that problem. You know, there is a reluctance of one servicer who is dealing with the first mortgage to enter into a mortgage modification if the second mortgage holder will not agree to do something with their mortgage. Bankruptcy is perfectly suited for this. It is a process that deals with all of the mortgages on the property. And, in fact, in a chapter 13 proceeding, if that mortgage, like many of them are in Rhode Island, is completely under-secured, completely underwater, that can be treated differently and more favorably for the consumer and helpful to avoid foreclosure.

The final point is so many homeowners who are in foreclosure right now get modifications, even by Treasury's own statistics; that many who get permanent modifications, when you look at their total debt picture, all of their other debts—their credit card debts, their medical bills, that back-end debt-to-income ratio, as it is referred to—they still after entering into a permanent modification have a 63-percent back-end DTI. This means that it is going to be very hard for them to succeed with that modification because they have got this other debt burden that they are dealing with. Bankruptcy, again, is perfectly suited for dealing with that. It deals with the whole picture for the homeowner, and they can resolve all of their debts at one time.

The recommendations, Senator Whitehouse, that I would like to make are two. One is that the Executive Office of the United States Trustee's Office which administers the bankruptcy court system really ought to be playing a more active role in promoting these programs like that in New York and Rhode Island, and we would hope that they would do that. There are a lot of steps that they could take to try to——

Chairman WHITEHOUSE. We are pursuing that discussion.

Mr. RAO. Thank you, Senator Whitehouse.

The second and final point is, while I agree with Judge Glenn that the authority for the bankruptcy courts to set up these programs is very clear—at least I think the authority exists currently in the law—nevertheless, there is reluctance, I think, on the part of some judges in other courts who may not feel that that authority is rock solid. And one possibility would be a clarifying amendment to Section 105 of the Bankruptcy Code that would just explicitly say that these kind of loss mitigation programs are within the court's authority.

Chairman WHITEHOUSE. It is our hope that we could generate such a provision on a bipartisan basis. In the Judiciary Committee we are exploring that.

Mr. RAO. Thank you, Senator Whitehouse. That concludes my remarks.

[The prepared statement of Mr. Rao appears as a submission for the record.]

Chairman WHITEHOUSE. Thank you.

Attorney Lefebvre.

STATEMENT OF CHRISTOPHER M. LEFEBVRE, ATTORNEY, PAWTUCKET, RHODE ISLAND

Mr. LEFEBVRE. Good morning. Thank you, Senator Whitehouse and Senator Reed, for inviting me.

I am not really the academic. I am the practitioner. I have been practicing consumer law for 23 years. I can tell you, if I had to describe what it is like in the trenches, it can be best described as a "circus" as it pertains to loan modifications. The system is not working. When I listened to these two gentlemen tell their story, for a moment I had to look closely. I thought they were the clients that I saw Monday, Tuesday, last month, and for the last 2 years. Their stories are typical of Rhode Islanders, this merry-go-round of—you know, I think I was quoted as suggesting that there was a fax to the shredder. Maybe it is not really a shredder. Maybe it is to the bucket next to the shredder. I am not quite sure. But the whole process is broken. It is not working. And it is very frustrating.

The good news, though, the positive thing is that thankfully the Rhode Island bankruptcy court adopted a program similar to the program in New York, and I can tell you that it is working. There are homeowners in the State of Rhode Island who would be homeless today, no doubt in my mind, if it was not for the program that has been in effect for the past year in the Rhode Island bankruptcy court. The program is practical, it brings parties together, and it is effective. And I think the main reason we eliminate all of these problems is because we have judicial oversight.

It is amazing. I often chuckle when I am in court when a lender will say, "Well, we did not get this package," and the debtor's lawyer will say, "We did send it." It is amazing when the judge says, "Gee, we will have a hearing next Tuesday. Why don't you have someone from Bank of America come to 380 Westminster Street, and we will have a hearing and find out what is going on." Within an hour, the package has been found. A half-hour thereafter, the modification has been approved.

So judicial oversight is the key. It works. It does work. It is not a perfect system. There are many people who simply cannot qualify. But it is amazing when a Federal judge sets deadlines, you know, the recalcitrance of one or two parties—the borrower and the lender—it disappears. And scheduling hearings and requiring parties—servicers, investors, the person with authority—to have to travel to Rhode Island stimulates and moves the loan modification process. We have had excellent results in the program. We have had many interest rate reductions. We have had terms extended, payments lowered. In many of these chapter 13 cases, as a result of the lower mortgage payment, unsecured creditors are getting a better dividend. So I would think the unsecured creditor body—Visa, MasterCard—should be supportive of all of these programs. It would put more money in their pocket in the chapter 13 arena.

The one thing the program does not do—does not do—is we are not seeing any principal reduction, and I know, Senator Whitehouse, trying to get that bill introduced about giving the bankruptcy courts the ability to cram down mortgages, I think if that ever did happen, those bankruptcy courts that have loss mitigation would see their success rates just grow exponentially because, still,

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people are emerging—as John Rao mentioned, they are getting a loan mod, but still many of them have homes that are grossly underwater, and that burden is sometimes counterproductive, and I think emotionally may affect the long-term success. You know, yes, you get a loan modification. Yes, the payment is lower. But you also know that you have a house that is worth $120,000 that you owe $350,000 on. I think based on experience and meeting with people that can have a negative effect on the long-term success.

But the program is great in Rhode Island. It is working and we are seeing real positive results.

Thank you.

[The prepared statement of Mr. Lefebvre appears as a submission for the record.]

Chairman WHITEHOUSE. Thank you very much.

First of all, Senator Reed during his comments mentioned the hardest-hit program, and I am hoping that that will be helpful for some folks. I know that Richard Godfrey and the Rhode Island Housing team is working very hard to get that up and operating and helping. I just want to point out that when the first five States were designated for that program and Rhode Island was not on them, what I can only politely describe as a very high and energetic level of activity was generated out of Senator Reed's office and mine that was heard throughout Washington—Treasury, White House, everywhere. And very shortly a second tranche was allowed, and Rhode Island was in that; and then a second back-up on that was allowed, and more money is now coming to Rhode Island. And although, I think, we were equally vociferous, Senator Reed's status as the senior Senator, Senator Reed's status on the Banking Committee, which has a lot to do with housing, made us a particularly convincing team on that subject. So I want to give Jack great credit for the success of that.

Let me ask Mr. Cardullo and Mr. Britt a question. Mr. Cardullo, you have been going through this process for a little over a year at this point. In the course of that year, how many times do you believe you were talking to a person who had some authority to negotiate with you and conclude an agreement?

Mr. CARDULLO. I will let you know when I get one.

[Laughter.]

Chairman WHITEHOUSE. Zero so far.

Mr. CARDULLO. Yes.

Chairman WHITEHOUSE. Mr. Britt, it has been 19 months plus for you now. During that time period how often do you believe you were dealing with a human being who had any authority to enter into any kind of an agreement with you?

Mr. BRITT. Never.

Chairman WHITEHOUSE. Not once?

Mr. BRITT. Not once, no. When I tried to move my way up the ladder within the organization, generally I was discouraged from doing that. I was hung up on. So I do feel the people I spoke to were not able to make decisions and were preventing me from going forward.

Chairman WHITEHOUSE. And sometimes they would not even give you their last names.

Mr. BRITT. Exactly.

Chairman WHITEHOUSE. You did not know who you were talking to.

Mr. BRITT. Yes. I have lots of first names.

Chairman WHITEHOUSE. Judge Glenn, to me one of the most compelling features of your testimony, you are here providing testimony to Congress. You are a sitting United States Federal bankruptcy judge, and you say just as plain as day that lenders increasingly recognize that they are better off economically by agreeing to a loan modification than by foreclosing on property. Why do you think it is that that fact so rarely is able to work itself through the process, outside of your court process, before they get to your court, to a loan modification? If it is in the bank's interest and if it is in Mr. Britt's and Mr. Cardullo's interest, why are those two parties of common interest not able to bring home and propose a reasonable deal?

Judge GLENN. In many cases, there is the third important party, which is the loan servicer, and the economic interests of the loan servicer are not necessarily aligned with that of the owner of the loan, if you can figure out who the owner of the loan is. So that is certainly a problem.

Chairman WHITEHOUSE. And could you be a little bit more specific about that?

Judge GLENN. Sure. Because of securitization of loans, typically there is a loan servicer designated early—once the loan is sold into a securitization trust, a loan servicer is designated. Frequently what happens when a debtor goes into default, most loan servicers, they are perfectly happy to take the monthly payments as long as they are regular monthly payments. But when the borrower defaults, frequently the loan servicing rights are transferred.

I think whether the situation is improving or not remains to be seen, but I think at the outset, the loan servicers just were not equipped with staffing and computer systems to deal with the number of distressed loans there were. And the other major problem is the economic interests.

HAMP, the Treasury program, tried to incentivize loan servicers with some payments for approving loan modifications. I am not sure that that has done it, but——

Chairman WHITEHOUSE. It does not appear to have.

Mr. Rao, what is your thought on whether that worked?

Mr. RAO. I think, you know, the major problem with HAMP is that it is a voluntary program, and so Treasury, therefore, has had to structure it in a way which there are carrots provided to the servicer and no sticks. The incentives, it appears at this point, have not been sufficient enough, and I think as Judge Glenn mentions, it is not so—I do not know that the servicer itself, since they are just handling essentially the collection and payments, can really appreciate the value that the owner of the mortgage might have in modifying it, having to ensure that there is a stream of payments that are coming on the loan versus foreclosure. The servicer does not have that direct recognition of that benefit. And, in fact, it might be even actually a counter-benefit because under the agreements that they have with the owners of the mortgage, they are required to advance payments to the owners of the mortgage, to make the payments for the homeowner if the homeowner does not

make them. And that is something that they do not like to do. And in some cases, it is easier for them to resolve the problem by foreclosing and to not have to incur the cost of advancing the payments to the owner of the mortgage during this period when there is a payment problem.

Chairman WHITEHOUSE. And the fee arrangements that compensate them for their servicing are often structured in a way that favors foreclosure from the point of view of just the pure fee structure that they are looking at, in addition to any obligation to pay they might have.

Mr. RAO. I would not say, though, that that is true in all cases, but certainly under at least a lot of these so-called pooling and servicing agreements and the fee structures that servicers have themselves, in some cases it does appear that it can be more profitable through the servicer to just proceed with foreclosure.

Chairman WHITEHOUSE. And, Mr. Lefebvre, you see this happening. As you said, you are the practitioner; you see this day to day; you see the nightmare; you see that it does not even make sense for the lender to have this going on. And yet it goes on and on and on until finally they get to the bankruptcy court and things begin to settle out, begin to make sense. Finally there is somebody in the room, and finally there is some judicial oversight to kind of sort through some of the fabrications and some of the stonewalling.

What is your practical sense of why the program in Rhode Island is being legally challenged? I believe it is being challenged by Deutsche Bank, correct?

Mr. LEFEBVRE. Right. Probably it is being challenged by one of the servicers that is not always the most cooperative and consumer-friendly. So I am not surprised that they might want to challenge the ability of a Federal judge to interfere with their exclusive domain. In Rhode Island especially, we are a non-judicial foreclosure State, so I think for the cost of certified mail, $4.85, you can take someone's home, even if they do not even sign the letter. I mean, they have to advertise. It is a very informal process.

I do not know why they are challenging it. Statistically, there are not many objections to the loss mitigation in Rhode Island. Fortunately, today there is a group from the Rhode Island bankruptcy court here who, you know, I am sure has many of the statistics. But I was looking at some of the statistics provided on the website. I think 80 percent plus of the loss mitigation requests go through unopposed. Perhaps there——

Chairman WHITEHOUSE. And your experience, if I could just interrupt for a second.

Mr. LEFEBVRE. Yes.

Chairman WHITEHOUSE. Your experience is similar with Judge Glenn's whose testimony was that out of 1,250 orders that have been entered, there were only 55 objections, or less than—what is that?—5 percent. For 95 percent, the banks are fine with it, they go ahead. In most cases, parties have negotiated directly without mediators. The banks do not even need a mediator once they have got somebody, a human being in the room who can break through the bureaucracy. So not only are there not objections; they do not even need mediators once they sit down with two human beings and can have a chance to make some sense.

Mr. LEFEBVRE. And in Rhode Island, what is happening practically is there very few law firms that probably deal with 99 percent of the foreclosures. So there are five or six law firms that deal with all of the foreclosures, so what ends up happening in the bankruptcy system, they have to—the servicer has to provide a contact person. But a lot of times it is the lawyers together with the servicer, the contact, and they were able to quickly resolve the issues.

I can tell you in the last year—I collect the data for my clients; the HAMP programs compile it. I scan it once, and I have never been asked to scan it again. I can tell you my clients outside of bankruptcy have proof that they have scanned it one, two, three, four, five, six, and seven times. So all that game playing stops once we get into the bankruptcy process. It is really a great, great, great program.

Chairman WHITEHOUSE. One last question, and then I will turn to Senator Reed. Have you seen in, again, your practical experience clients who have failed to jump through those hoops, to provide those documents the fifth, sixth, or seventh time, and then suffered an adverse consequence in the foreclosure process as a result of doing that when they get to you?

Mr. LEFEBVRE. Well, absolutely. I had a gentleman last evening, Bank of America, had brought the documentation very organized with his paperwork, and he received a letter about 9 months ago telling him he had been eligible for a loan modification. And he brought in—and I personally looked at his checks and his bank statements, and he had been making every single payment for the modified payment through September. Then in the middle of September he gets a letter saying, oh, your loan modification is not going to be approved. The next day he gets a foreclosure notice. And the reason why his loan modification was denied is because he did not make the payments which I had right in front of me. That is what we deal with in the trenches. That is the frustration of this homeowner who happens to have a job, who could afford the home, and you have got the bank giving him documentation for a loan mod, telling him to make his payments, accepting his payments for 10 months. Then you have the Boston law firm sending out notices to foreclose, and the consumer comes in totally confused, has no idea what to do. Then I take over. And there are some ways outside of bankruptcy, but the most effective way to deal with competing interests is to bring it into the bankruptcy arena, a judicially supervised process, and I think it very effectively balances the rights of homeowners, consumers, and the rights of lenders to protect their collateral and get non-performing loans to be performing and keep people in their homes and keep neighborhoods still alive and vibrant.

Chairman WHITEHOUSE. Senator Reed.

Senator REED. Well, thank you.

Just to the attorneys at the table, Rhode Island is a State, as you all point out, where simply you have to send a certified letter and notify the paper and then the sale, et cetera. There is no judicial intervention. Do we have any experience—and perhaps, Judge Glenn, you might—in judicially supervised foreclosure States,

whether they have a better record of modifications? Or is that data that we just do not have? Or perhaps John.

Mr. RAO. It is a good question, Senator Reed, and it is something that I do not think has been looked at yet. I know I actually have recently been trying to parse through the Treasury reports to see the number of permanent modifications that have been granted in States to see whether there is a correlation between a higher amount in judicial foreclosure States. Just quickly looking at them, I thought that that was the case, but I actually have not started to go through that process, and I do not know that anyone has done that.

There are a number of judicial foreclosure States that have mediation programs similar to the bankruptcy programs in Rhode Island and New York. And depending upon how they are structured, they also have very good results. But not all of them are equal, as you might guess, and the ones that actually have had the best records that we have been observing at my office have been ones that have that requirement of appointing someone with full settlement authority, and Vermont, Maine, and—actually, the one example of a program in a non-judicial foreclosure State has been Nevada, and that has actually had some success. And it is a non-judicial foreclosure State. The court system in that State created a mediation program even though it is not a judicial foreclosure State. It is actually quite interesting.

Senator REED. Just a comment more than anything else. And, again, let me, before I do that, commend Senator Whitehouse because this is such an issue that is central to the families of Rhode Island and to devote the focus, and a very technical focus, that you need is something that is extraordinarily commendable. So thank you for leading this effort, Sheldon.

Chairman WHITEHOUSE. Thank you.

Senator REED. But it strikes me, stepping back, that because of national policies, Federal Reserve policies, we have lowered the effective interest rates for banks dramatically, and it is reflected in current mortgage rates now. But you have borrowers who signed up 2, 3, or 4 years ago, and unless we have a corrective mechanism, one side is getting the benefit of extraordinarily low interest rates, and the other side is paying the high interest rates, relatively high interest rates of 5, 6 years ago. That strikes me as not only unfair but terribly inefficient, because the point of a lot of the macroeconomic policy has been to lower interest rates, get everybody going again, let business go out and refinance at 2 percent, not at 7 percent. And I think, again, if we can get a program like you have suggested—and I concur with the notion there has to be a referee with authority, and there have to be people participating who are empowered to cut a deal. And if you have that—and fortunately in the country we do not have to re-create this system, it exists in the bankruptcy courts—it is an efficient, effective way to do a lot of things.

So, again, I think this was an extraordinarily useful hearing, and I thank Senator Whitehouse for leading the charge, not only here but, more importantly, in Washington, because when he goes back, he is going to go to the Judiciary Committee and see if we can pull together an effective response.

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Let me thank you also. I notice that my colleagues Harold Metts and Luis Aponte are here, who are just superbly gifted public servants. Thank you, gentlemen.

Thank you, Senator Whitehouse.

Chairman WHITEHOUSE. Thank you, Senator Reed.

This has been, I think, a very helpful hearing, and I want to say some particular thank you's, first to Mr. Cardullo and Mr. Britt. I think a great number of Americans have experienced the frustration of being on the phone with people who will not give you their name, will not connect you with their supervisor, do not make any sense, forward you to a different number or a new person who will not give you their last name and will not connect you with their supervisor and will not make any sense. That annoys you some more until they refer you to another person who will not give you their name and will not let you talk to their supervisor and will not make any sense. And it is just a particularly acute and painful type of frustration when it is your home that is at stake.

In America, our home is our castle. We think of homeowners as—it is the value that we protect by making mortgages deductible against our income. You know, home is home. And the notion that that is at risk, particularly for people with children, because there is no harder discussion than the one you have with your younger children talking about packing up their bedrooms and clearing out. And the idea that that is what is at stake, that a father is going to have to tell his daughter, "Sweetheart, you are not going to have your bedroom any longer. We are going to have to move. I do not know what the problem. The bank is going to take our home away." And then on the other end, you have got people who will not even give you somebody who has authority to negotiate with you like a grown-up human being, and instead you are dealing with, you know, Brynita, I think was the name you mentioned. Again, it is no last name, no responsibility, will not let you talk to their supervisor, hang up on you if you get frustrated, and move you to somebody else who also does not know anything. The contrast between that stake and that harm that you are at the edge of and the irresponsible, cavalier way, bureaucratic way in which it is being handled is something that is just—the fact that you have been able to come in here and testify about it as effectively as you did and as calmly as you did and as thoughtfully as you did, the fact that you were able to marshal all of this history into—you know, it took some time to sit down and sort your way through this and get it all done for us. And I just cannot tell you how much I appreciate it. It gives Senator Reed and me real leverage in Washington to be able to do this.

One of the interesting things about the Senate, which is a relatively small body, is that we can come in with statistics and talk to each other until we are blue in the face. But when you sit down with a colleague and say, Look, I had a constituent who came in and this is what is happening to him, that comes through in a very, very real way. So the effort that you have undertaken to come in here and to do that is really valuable for us, and I just want you to know how very, very much I appreciate it.

Judge Glenn, what you have done in your court, your leadership on this, is really remarkable. I want to commend Judge Votolato

for following that lead. I am sure that he would have wanted to be here, but because Deutsche Bank decided that the best use of their resources was not to try to help homeowners but to try to sabotage this program by challenging it in court, and because it is pending in litigation, he is in a difficult position to come in and testify. So it is not for lack of interest in his program. It is not for lack of concern about Rhode Island. It is not for any other reason other than that he is on the receiving end of Deutsche Bank's lawsuit that he is not a suitable witness. And your taking the trouble to come from New York to explain it is really commendable, and I think the simple, clear message that you bring us, which is that it is actually usually in the bank's interest to get this settled, and it is as easy as getting two human beings in a room together as long as the bank's person has authority and there is a little watchfulness to make sure they are not up to nonsense, which is something that judges do every minute in every courtroom in the land, is enough, that that is basically enough. And that is a very important message because people try to complicate all of this in a lot of ways, and certainly you have seen how the banks complicate it for you. But that was a very significant message, and you delivered it very clearly and effectively, and I appreciate it.

John and Chris, thank you both so much for what you do. John, you are like a laser for focusing passion through expertise at this problem, and it really is—you have been a great resource to my office, and you continue to fight very hard to try to unsnarl this mess. And you see it, as does Chris, every day in your daily practices. I do not know how you put up with it. I get upset hearing about it, and I do not do it all day every day. You do it all day every day, and it must just drive you nuts, what this is doing to your clients. So I thank you very much for your work, and I thank you very much for coming in and sharing your experience today.

I will give everybody the chance to make a closing remark or observation, if they feel there is anything we have not covered. And I want to put into the record of this proceeding a statement by Chairman Leahy, the Chairman of the Senate Judiciary Committee, which I will not read the entire thing but it thanks us for holding this hearing, thanks the witnesses for being here and sharing their testimony, expresses his grave concern about the document subversion in the foreclosure process, and expresses a keen interest in pursuing real law enforcement consequences for this.

Certainly if the banks were getting papers from a private homeowner that were as poorly prepared, perhaps even fraudulent, as the papers the banks themselves, or at least their robo-signers and their affidavit signers appear to be filing, they would be turning around in a heartbeat to say, "You are a malefactor, you are a criminal, we cannot deal with you." And I think it is time that an equally bright spotlight was cast on them, and if law enforcement is appropriate and prosecution is appropriate, Chairman Leahy wishes very much to see that that takes place.

He points out that he has written to Attorney General to ask him if he needs more help from Congress to investigate and prosecute fraud and misconduct in the foreclosure process.

He also commends bankruptcy courts in several districts, including your Southern District of New York, Judge Glenn, for the loss

mitigation programs that have been put in place so far and commends the work of State legislators who are beginning to try to work through this as well.

So I appreciate very much the Chairman's interest. We have been in touch with him about this hearing. Because he is actually on the ballot in Vermont—very safely, I happily add—on November 2nd, he cannot be with us today. But he is very interested in pursuing this issue in Washington with a full Judiciary Committee hearing, and we look forward to that, and I want to thank him very much for his support, and without objection, his statement will be made a part of the record.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Chairman WHITEHOUSE. I will give each one of you a chance to make any last observation you may care to make, and then we will conclude the hearing. Anything to add, Mr. Cardullo?

Mr. CARDULLO. No. Just thank you very much for your time today.

Chairman WHITEHOUSE. Thank you very much.

Mr. BRITT. Thank you as well, and I just want to add that I think it is important to bring to the forefront homeowners like myself and Mr. Cardullo, because there is a perception out there that people are trying to beat the system or trying to get something for nothing. That is not our objective. You know, we are not flipping real estate and playing the system. You know, we are involved in legitimate financial hardship. We have applied for a program that seems suited for us. And yet I think the public perception is that we are looking for a handout or something. I think hearings like this help to bring people like Mr. Cardullo and myself to the forefront.

Chairman WHITEHOUSE. You are not trying to beat the system. You are getting beaten by the system.

Mr. BRITT. Thank you. Yes.

Chairman WHITEHOUSE. Judge Glenn.

Judge GLENN. I just appreciate the opportunity to appear before the Subcommittee today and explain our program in New York.

Chairman WHITEHOUSE. I very much thank you for coming.

Mr. RAO. Thank you, Senator, for holding the hearing.

Mr. LEFEBVRE. Thank you very much for inviting me to participate today.

Chairman WHITEHOUSE. I appreciate it very much. I want to particularly thank Senator Reed for——

Senator REED. Well, I am not on the Committee so I am sort of sitting in strictly at the courtesy of the Chairman. So thank you, Mr. Chairman.

Chairman WHITEHOUSE. All right. Under the rules of the Subcommittee, there is an additional week that the record of this hearing will remain open, and if anybody wishes to add anything to the record, all they have to do is send it to my office before that week concludes. Senator Metts was here earlier; he had to leave. Councilman Aponte is still here. Obviously, we would welcome any thoughts or comments they might care to add.

Again, I open with your question that you raised when you came to my office to express the frustration of your clients. As you said

the question: "Why is it that the bank wants to take away my home and throw me out of it and sell it to someone else who will pay the bank less than I am willing and able to pay right now?" And I think anything you would like to add or anybody else would like to add would be helpful. It will be open for a week.

And with that, the gavel.

Senator REED. Thank you.

Chairman WHITEHOUSE. Thank you very much, Jack.

[Whereupon, at 10:43 a.m., the Subcommittee was adjourned.]

[Submissions for the record follow.]

November 2010

SUBMISSIONS FOR THE RECORD

"MANDATORY MEDIATION PROGRAMS: CAN BANKRUPTCY COURTS HELP END THE FORECLOSURE CRISIS?"

SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

FIELD HEARING
OCTOBER 28, 2010

STATEMENT OF
THE AMERICAN BANKERS ASSOCIATION
SUBMITTED FOR THE RECORD

The American Bankers Association (ABA) respectfully submits this statement for the record for the Field Hearing held by the Senate Judiciary Committee on October 21, 2010, in Providence, Rhode Island on "Mandatory Mediation Programs: Can Bankruptcy Courts Help End the Foreclosure Crisis." The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its two million employees.

As set forth below, the ABA has serious concerns about compulsory mediation in the context of bankruptcy cases and urges caution when policy makers consider any effort, by legislation or otherwise, to encourage or create an across-the-board mandatory "Loss Mitigation Program" (LMP) in bankruptcy courts across the country. Witnesses at the hearing who supported LMPs conceded that they could provide no conclusive statistical evidence regarding the success of such programs. They also noted that many LMPs did not result in loan modifications but were resolved in other ways such as through short sales or by surrender in satisfaction of the loan.

ABA member banks are highly sensitive to the consequences of foreclosure for bank customers and have supported efforts to foster voluntary work outs and loan modifications between home owners and lenders. For instance, the ABA has supported the Home Affordable Modification Program (HAMP). This government program makes available $75 billion in funding to help homeowners at risk for foreclosure stay in their homes. HAMP allows eligible mortgagees to lower their monthly payments to 31 percent of their pre-tax income, or lower, through a loan modification. The adjustments are introduced on a temporary basis but are made permanent after the homeowner makes three on-time payments.

While HAMP was slow to start and could be improved by reducing complexity, the ABA believes that the HAMP program has been nonetheless been valuable. According to Treasury Department statistics, 3.63 million borrowers have received restructured mortgages under HAMP. Nearly 490,000 borrowers have received permanent modifications of their mortgages, which reduce monthly payments for a five year period, as result of HAMP. In addition, through August 2010, there were an additional 874,000 private loan modifications.

For borrowers who have had their mortgages modified under HAMP, the percentage unable to make their payments is extraordinarily low. According to a UPI press report, for permanent HAMP loan modifications the re-default rate for loans 90 or more days delinquent is less than 2 percent.[1]

ABA is very concerned that a mandatory LMP would undermine the HAMP program and other voluntary loan modification efforts. We are particularly concerned, as evidenced in testimony during the Field Hearing, that LMPs in bankruptcy court could require home mortgage loan modifications (including reduction of principal balance, known as "cramdown"), even when the borrower/debtor would be ineligible for a modification under the Obama Administration's own criteria.

[1] See "Success of HAMP Loan Modifications Stuns Experts," July 21, 2010, Steve Cook for Real Estate Economy Watch.

Bankruptcy courts should not become a venue in which such borrowers "shop around" for a forced loan modification or a mortgage cramdown. This would undermine HAMP as borrowers skip the HAMP process, or just go through the motions, as they seek a more favorable LMP modification, thereby creating a powerful new incentive to file for bankruptcy. Incenting new categories of bankruptcy filing, and placing additional obstacles and delays in the path of the foreclosure process – just as the economy is emerging from a deep and severe recession – will impose additional economic costs that will slow recovery. Congress should also consider the additional burden on the bankruptcy court system if hundreds of thousands of additional cases are filed annually by borrowers who are ineligible for a HAMP modification or are otherwise unable to maintain acceptable payments on their mortgages.

While it is true that mandatory mediation programs do not legally require creditors to surrender bargained for contractual rights, the reality in bankruptcy court proceedings can be quite different. Creditors may well be pressured to agree to concessions to satisfy local bankruptcy courts if a borrower/debtor subjectively believes a creditor has not negotiated in "good faith," even when such concessions are not in the best interests of creditors and could not be obtained in a neutral legal proceeding. In fact, in its written statement in support of LMPs the National Consumer Law Center specifically lauded this informal pressure as a reason for putting LMPs in place.

Moreover, the ABA believes there is substantial doubt about whether the Bankruptcy Code (specifically 11 U.S.C. 105) provides the legal basis for LMPs. Section 105 is limited in scope and does not authorize bankruptcy courts "to act as roving commissions to do equity."[2] Importantly, it is well-established that Section 105 cannot be used to repeal substantive rights guaranteed under the Bankruptcy Code. In fact, an LMP program in Rhode Island is currently being challenged in court on that very basis.

The authority granted by Section 105 for a bankruptcy court to issue orders in the context of a status conference – such as an order for the parties to engage in a LMP – is limited by the caveat "unless inconsistent with another provision of this title." In our view, court-ordered LMPs appear to be inconsistent with:

- Section 521, which limits a debtor's option for retaining secured property to redemption or reaffirmation,
- Section 362, which provides a secured creditor with the right to have a motion to lift the automatic stay heard and decided within a set time period, and
- Section 1322, which prohibits a Chapter 13 plan from modifying the rights of creditors secured only by an interest in real property that is the debtor's principal residence.

The LMPs described at the Field Hearing could potentially create a one-sided program for forcing creditors to surrender their contractual and statutory rights. However, a bankruptcy court

[2] In re Southmark Corp., 49 F.3d 1111, 1116 (5th Cir. 1995).

is a court of equity and a debtor is seeking extraordinary, equitable relief. It is therefore highly inappropriate and inconsistent with time-honored principles of equity for the federal judiciary or Congress to approve a dispute resolution process that allows debtors to unfairly pressure creditors. A court of equity should not condone the use of inequitable methods by a party seeking equitable relief.

Aside from the legal deficiencies associated with LMPs, the ABA believes a general bankruptcy requirement that lenders be required to "meet and confer" with borrowers who have defaulted on any loan, including a home mortgage loan subject to foreclosure proceedings in state court, will only add cost and delay to a legal process that is already too expensive and inefficient. This extra layer level of cost could easily harm the fragile American economy. Such delay would be tantamount to a judicially enforced foreclosure moratorium of unspecified duration.

An important component to a sustained economic recovery rests on a rebound in the housing market. Many thoughtful commentators contend that delaying foreclosures could exacerbate weakness in the housing market and therefore delay a more general economic recovery. For instance, Third Way, a centrist Democratic think tank, recently issued a report opposing efforts to create a foreclosure moratorium on the grounds that delaying foreclosures will push housing prices lower and slow an economic recovery. Third Way argues persuasively that a general policy slowing all foreclosures would "only prolong" our economic crisis.[3] The LMPs adopted by various bankruptcy courts are, in reality, a thinly disguised foreclosure moratorium and as such suffer from the defects identified by Third Way.

LMPs adopted by local court rules, or even on the whim of individual judges, also impose a maze of conflicting procedures and varying standards on a national housing finance market. Congress and the federal judiciary should be wary of enacting new regulatory hurdles that merely delay a much-needed correction in the economy while introducing further turmoil and uncertainty into the housing marketplace.

In conclusion, LMPs could threaten the economic recovery, force mortgage cramdowns, constitute an open-ended judicial foreclosure moratorium, appear to be inconsistent with multiple Code provisions, and fly in the face of time honored principles of equity in proceedings before the bankruptcy courts. It would be unwise to create an alternative process to HAMP that undermines the Obama Administration's effort to promote loan modifications for at-risk homeowners, many of whom have no wish to file in bankruptcy. ABA therefore urges the Committee to reject efforts to encourage or create across-the-board mandatory LMPs in the bankruptcy courts.

[3] See "The Case Against a Foreclosure Moratorium," http://thirdway.org/publications/342.

Testimony of Larry Britt
Hearing before the Senate Judiciary Committee Subcommittee on Administrative Oversight and the Courts
October 28, 2010

Thank you Senator Whitehouse for initiating this important hearing. I'd also like to thank Rhode Island Housing for hosting this hearing as well as providing support through my 19 month ordeal with Bank of America's mortgage modification process.

My name is Larry Britt and I have owned my home in Riverside, Rhode Island since 2003. I bought the home as a permanent residence in which to spend my final working and future retirement years. My home purchase wasn't an attempt to get in on the crazy real estate boom of the times. I work in metro Providence for the library based Rhode Island Family Literacy Initiative. I am an adult educator who teaches, workplace readiness, English proficiency, and US Citizenship Preparation skills.

Ironically, my saga began 19 months ago in this very building with Linda Tavares, a helpful Rhode Island Housing counselor.

When I started the process in March of 2009, I had never been late paying any bills to any creditors (including Bank of America) and my credit score was near perfect. Since entering into a modification process with BofA, the bank has ruined my credit rating and has been the major contributor of uncertainty about my future. My credit score has dropped 160 points as a consequence of improper credit payment reporting by BofA. I have subscribed to a credit score monitoring service and I am now receiving weekly e-mail notifications of continuing negative impacts to my credit score. So far, two creditors have closed my accounts and three have lowered my available credit limits. BofA tells me that I was told my credit score would be adversely impacted but cannot provide documentation that proves I was told of this consequence.

As I've said, I am not a deadbeat. I have always paid all of my bills on time. Because of legitimate financial hardships that I have documented, I entered into BofA's Mortgage Modification program hoping I could avoid prospective financial problems. In the past 19 months I have immediately replied to any BofA inquires and requests for documentation. Before entering the BofA process, I was considered a good credit risk. Now, simply by having applied for a program that I am well qualified for, my history as someone who pays his bills has been permanently damaged. Equally, I'm concerned about rescinded and denied credit that my elderly mother and other family members have suffered as a consequence of their financial relationships with me.

I'd like to highlight the most important details of a chronology of my interactions with Bank of America since March 2009. .

- In March 2009 – As advised by news reports, I went to Rhode Island Housing and submitted an application for mortgage modification. This allowed RI Housing to act as my agent for mortgage modification with BofA. At this time I was not behind on my mortgage or other debt obligations. I entered the program knowing that it would be difficult for me to continue making payments at this level. I thought I was doing the responsible thing to avoid problems down the road.

- Next in March 2009 – As required, I met with Money Management International, an approved credit-counseling agency. This organization determined that I was managing all of my finances correctly and that my only issue was my large monthly mortgage payment and under water mortgage.

- In late March 2009 – I provided copies of all required documents to RI Housing for forwarding to BofA.

- From March 2009 to October 2009 - I called RI Housing biweekly to check the status of my modification. Each time I called, I was told that there was a backlog and I should wait to hear something.

- On October 5, 2009 – I was informed by RI Housing that BofA did not accept me into the loan modification program because I was not late or behind on my mortgage payments. RI Housing informed me to visit a BofA branch so that I could apply for a refinance of my mortgage.

- On October 8, 2009 – I went to a BofA branch and as advised, formally applied to refinance my loan. The refinance was denied that day. As I found out, the refinance step was a formality I needed to go through before I could apply for a mortgage modification with BofA a second time.

- On October 20, 2009 – I received notice that I had been accepted into BofA's Trial Modification program and I was a given a new monthly payment amount for the trial period.

- On October 24, 2009 – I mailed all requested documentation to BofA.

- From November 2009 to May 2010 – I paid BofA my new monthly payment on or before the due date.

- From October 24, 2009 to February 22, 2010 – I checked the status of my modification on a weekly basis to be sure the company had received my documentation. I was repeatedly assured that BofA had received all information that had been requested of me.

- February 23, 2010 – I received a letter from BofA requesting that I mail them all of the same documentation that I had already provided twice before.

- February 23, 2010 – I sent via FedEx and FAXED every requested piece of documentation that BofA wanted.

- From February 24, 2010 to May 7, 2010 – I called BofA weekly to check the status of my modification and to be sure that the bank had all of my required documentation. Each time I was assured that all requested documents had been received by BofA and that the modification was "being reviewed".

- On April 14, 2010 – I received a "Notification of Default and Mortgagees Right of Foreclosure" from BofA.

- On April 15, 2010 – I called BofA and the Customer Service Representative told me to ignore the letter, continue my modified payments and that I will continue to receive notices like this during the Modification Review process.

- On May 7, 2010 – I received a letter from BofA stating that I had been denied a mortgage modification because all requested documentation had not been received by the bank.

- On May 8, 2010 – I called BofA and was told to disregard the letter dated May 7. The Customer Service Representative stated that according to BofA records "all documentation was complete and received as of March 29, 2010".

At that time, I became truly frightened at the prospect of losing my home. I had mailings from BofA stating that I was about to go into foreclosure and that I was not eligible for mortgage modification. Two BofA Customer Service Representatives had told me to ignore the letters, yet I had nothing in writing from them that assured my case was still under review.

That's when I contacted the senator's office and gratefully got an immediate response from Karen Bradbury, a case worker in the senator's Providence office.

Karen's efforts resulted in a connection for me with the Department of Treasury's HAMP Solution Center. At first, my HAMP case worker(s) sounded like the answer to my ongoing problem. The HAMP representative told me that he would be an advocate for me with BofA. On that day, the HAMP representative told me that he had learned from BofA that I was "under review for the Making Home Affordable Second Look" program. Throughout July and August 2010, I contacted the HAMP Solution Center 7 times. Each time, the HAMP Solutions representative told me that his updates directly from BofA said that my modification was still under review and that I had complied with all requests for documentation as well as honored my agreement to make on-time modified monthly payments.

Honestly, after a few months with HAMP, I felt like they were reading from the same script as the banks. When I checked in with them, there was never any update and there were never any outstanding bank requests for documentation from me. Yet, once a month or so over this same period, I received additional requests from the bank for repeat documentation.

I continued to make on-time mortgage modification payments, and the bank continued to report me as delinquent on payments. Consequently, my credit score and available credit continued to go down.

Last month, I started to work on filing forms with all 3 credit reporting agencies in an attempt to get my BofA modified payments re-classified as modified payments rather than delinquencies. The credit reporting forms strongly encouraged trying to get the creditor in question to correct the problem. So on 10/04/2010, I called BofA's Making Home Affordable Modification Program and the following occurred:

- I asked the BofA representative, Mr. Marquis, to review at my account and confirm that I have made all of the modified payments that I agreed to.

- Mr. Marquis told me that my mortgage was in default as of May 07, 2010 and that I had been sent a letter saying I was not eligible for the Making Home Affordable Modification program because I did not provide BofA with requested documents. Mr. Marquis also said that I had been sent a letter requesting the documentation. I never received this letter. I explained the following to Mr. Marquis:

- When I received the notice announcing my ineligibility for the program on May 10, 2010, I called the customer service number on the denial letter immediately. The BofA representative, "Brynita" looked up my account and told me that I was still in "modification status" and that I "should disregard the letter of denial and continue making my previously agreed upon modified payments": Brynita also told me that "all requested documents had been received by BofA as March 29, 2010. Brynita would not give me her last name.

- I recounted to Mr. Marquis at BofA's Making Home Affordable Modification that indeed I had received

the letter of ineligibility from BofA but was instructed by phone by "Brynita" on May, 10, 2010 to disregard the letter and continue with my modified payments.

- Mr. Marquis told me he could be of no further help because I was in default.

- I asked to speak to Mr. Marquis' supervisor. I was so upset, I didn't get her name, but I explained the entire situation again. She told me that she had my phone records and she sees no call from me on the day I was told to continue with my modified payments. My personal phone records would prove her wrong. Next, Mr. Marquis' supervisor told me that she didn't have time to waste on me and hung up on me.

- So again, panicked about the prospect of losing my home, I reconnected with Linda at RI Housing.

- On October 18, 2010, Linda determined from BofA that I was not eligible for any modifications. On the same day, I received mail notification from BofA stating, as I understood it, that late fees, penalties, and interest were accumulating on my mortgage balance and that regardless of my outcome with the modification program, I would be liable for these charges.
- On the following day, October 19, I received a Modification approval from BofA via FedEx. I guess I should be happy and I am truly grateful to the senator's office, RI housing, and even the HAMP Solutions Center for what I hope is a final resolution. However, given the past 19 months of misinformation, can I be sure that BofA's "approval" is for real? Does another BofA division have me slated for foreclosure? I just can't be sure and the 19 month process has forced me into deeper financial trouble and emotional distress.

I know this story may be hard to follow. The bottom line is that although I have worked with BofA since March 2009 and the HAMP solutions center since June 2010, recently, BofA has told me within a 2-day period that I am both ineligible AND approved for a mortgage modification.

If needed, I can document all of my activities, phone calls, documents sent, and the names of customer service representatives.

Thank you again for your time and consideration. I would be happy to answer any questions or elaborate on any points that I've made.

October 28, 2010
Statement of Robert Cardullo

Senator Whitehouse, thank you for inviting me here today to tell my story.

My name is Rob Cardullo, and I have three young children—Sophie, 8 years, Georgiana, 5 years, and Andrew, 2 ½ years. I have been employed by Taco Bell for twelve years and am currently the general manager of their Johnston Restaurant.

In December 2008 I discovered that my wife of 9 ½ years was no longer interested in remaining married to me. Because of this fact and other details which I learned in the weeks that followed that discovery, I decided to bring a divorce action against my wife. The circumstances surrounding the divorce are such that the judge ruled in my favor, giving me the right to retain our home as my residence and the primary address of the children.

However, in order for me to continue to meet the mortgage payments on my salary alone, it was necessary for me to request my mortgage company, Chase Bank, to consider me for a loan modification, which would result in a reduction of my monthly mortgage payment to an amount that I could afford. Since February 2009 I have been negotiating with Chase, sending them updates on my financial situation monthly. Rhode Island Housing also assisted me in this endeavor, for which I am very grateful.

In September 2009, after months of being put on "hold" when I tried to reach the individuals handling my application and after repeated submissions of documents, Chase informed me that they were denying my request based on the fact that I had too much in "liquid assets." The liquid assets they were referring to were (1) my savings account of $2,200 and (2) my 401(k) of $14,000. Evidently they expected me to apply the $2,200 to pay my mortgage, leaving me with nothing in the event of an unexpected emergency. Evidently they expected me to borrow against my 401(k) to pay my mortgage. This, however, would have been impossible for me to do (even if I wanted to) as the terms of my 401(k) stipulate that I must be in a state of foreclosure in order to borrow against my retirement funds. And even if it were possible and I did borrow against it, once the money ran out, do I then still end up in foreclosure? And additionally have a loan to repay on my 401(k)?

On the advice of Rhode Island Housing and my attorney, I resubmitted all of my materials and began the process all over again. Following several months of frustrating negotiations with Chase, going through reams of paper, and shedding many tears, they finally, in May 2010, approved me for a loan modification with a reduction of my mortgage payment from $3,000 a month to $1,986 a month. The agreement was that I pay the reduced amount for four months. After the fourth payment, the loan modification would become permanent.

This is just the beginning of my story:

In August 2010—one week before the fourth payment—I received a letter from Lenders Business Process Servicers, saying that Chase had sold my mortgage to them and that they were going to foreclose on my house because I was behind in my payments. When I explained that I was in a loan modification agreement with Chase, LBPS said they would not honor that loan modification, that they had bought over 9,000 loans and could not focus on every one of them! I should point here that the loan modification was government-backed by FannieMae and that these banks are not honoring it. LBPS then said that, if I wanted to be considered for a loan modification, I WOULD HAVE TO BEGIN THE PROCESS ALL OVER AGAIN WITH THEM.

I therefore have gone ahead and re-filed all of my documents again with LBPS. Yet they still continue to harass me, and as recently as last week, threatened to foreclose on me and to bring other legal action against me. I have contacted my lawyer again and am contemplating whether to bring legal action against LBPS.

The recent financial crisis has had an impact on my own finances, as it has had on many individuals. Yet, in the four years I have owned the house, I have never missed or been late with a mortgage payment. The divorce has added a further strain on my finances, making it absolutely necessary for me to have a loan modification to meet my mortgage payments and any other bills in a timely manner.

I do not want to end up in foreclosure or go bankrupt. Is this what I am facing? Is all the reassurance I have heard for more than a year from our government about stimulus money being available to assist American people facing possible foreclosures just talk? Please be assured—I am not asking for a handout—just a loan modification to enable me to keep my house.

Not only would a loan modification help me and my children to remain in our home, but most importantly, it would provide my children with much-needed stability and eliminate any further upheaval right now in their young lives.

I am going to continue with my quest for a loan modification, but based on my experience with Chase and now a repeat of the same frustration with LBPS, my hopes are diminished, and I am not optimistic about the outcome.

If LBPS denies my application for a loan modification, I will have no option but to foreclose or short-sell the house or face bankruptcy, all of which I would like to avoid. I cannot understand why Chase or LBPS would not want to help someone who never was remiss in a mortgage payment to hold onto their house. It seems they would rather take the house than work out a reasonable payment plan. I would like to point out that through all of these negotiations, I have complied explicitly with all of their requirements on schedule, time after time again, and yet the request for documents is never-ending.

I have turned to Senator Whitehouse from the beginning of this loan modification nightmare for his assistance, and if it were not for the support his office has given me, I would be fighting this battle alone.

Thank you for listening and I'm happy to answer any questions.

WRITTEN TESTIMONY OF HON. MARTIN GLENN
United States Bankruptcy Court for the Southern District of New York

"Mandatory Mediation Programs: Can Bankruptcy Courts Help End the Foreclosure Crisis?"

Hearing of the Senate Judiciary Committee's Subcommittee on Administrative Oversight and the Courts

October 28, 2010

Chairman Whitehouse, thank you for inviting me to speak before the Subcommittee on the role that bankruptcy courts can play in helping to alleviate the mortgage foreclosure crisis.

I am one of 11 bankruptcy judges in the Southern District of New York, with nine judges in Manhattan, one judge in Poughkeepsie and one judge in White Plains. I will discuss the program that became effective in our court in January 2009. I have attached to my written testimony copies of program documents currently in use, including procedures, commencement instructions, form of notice and form of order. All of these documents are available on the court's public website at www.nysb.uscourts.gov under the "Forms" tab.[1]

I will also provide some data on the use and results of the program from its inception in January 2009 through October 21, 2010.

Let me first give you some background on how the program was developed. As the national foreclosure crisis unfolded, bankruptcy courts across the country have faced substantially increased consumer bankruptcy filings. New consumer bankruptcy cases—particularly under chapter 13 of the Bankruptcy Code—are often filed on the eve of a foreclosure

[1] As described in the text below, our court, with the assistance of several committees of debtors' and creditors' lawyers, has reviewed the program and the current documents. Some changes will be made to the program documents within the next few weeks, but none of these changes will make any major substantive changes in the existing program.

sale, after a borrower has seemingly exhausted consensual or state court efforts to avoid foreclosure. During 2008, after speaking with a few lawyers representing creditors (loan servicers and lenders), several of my colleagues and I began exploring whether the bankruptcy court could develop a program to better address the problems of both debtors and lenders. Bankruptcy judges, of course, must provide equal justice to debtors and creditors. We endeavored to create a program to ameliorate the effects of the foreclosure crisis on borrowers and lenders alike, consistent with existing provisions of the Bankruptcy Code. In adopting our Loss Mitigation Program, we were among the first bankruptcy courts to develop a formal program to help alleviate the mortgage foreclosure crisis.

Our adoption of the Loss Mitigation Program coincided with U.S. Treasury's creation of the HAMP program, which provides incentives for lenders and loan servicers to negotiate loan modifications with borrowers. Changes to the HAMP program since it was first created have also made it easier for bankruptcy debtors to make use of the HAMP program. HAMP eligibility requirements still exclude many debtors from obtaining a HAMP loan modification, but increasingly lenders and loan servicers are willing to consider non-HAMP modifications.

After receiving encouragement from individual lawyers representing debtors and creditors, we arranged several larger meetings with debtors' and creditors' lawyers to flesh out the elements of a possible program. The most encouraging thing about these meetings was that there was no significant divide between debtors' and creditors' lawyers on the major issues: all of the lawyers with whom we met supported developing a program that would provide a means for lenders and borrowers to reach agreements to avoid foreclosure, if possible, or to find other consensual solutions. Following these meetings, we prepared a draft of the loss mitigation program, circulated the draft to the judges on our court and to the lawyers with whom we met.

We then made some changes in response to comments we received. The court then published the program documents on the court's website for public comment. After the public comment period, with only a few small changes, our board of judges adopted the Loss Mitigation Program, effective in early January 2009.

The program applies to any individual debtor in a case filed under chapters 7, 11, 12 or 13 of the Bankruptcy Code, including joint debtors. It applies to any real property or cooperative apartment used as a principal residence in which an eligible debtor holds an interest. The program applies to all loans, whether considered subprime or nontraditional, whether or not the property was in foreclosure prior to bankruptcy, whether the loan is a first or junior mortgage or a lien on the property, and whether or not the loan was pooled, securitized and assigned to a loan servicer or to a trustee.

While loan modification is one of the goals of the Loss Mitigation Program, our program procedures make clear that loan modification is not the only successful outcome. Our program procedures state that "Loss mitigation commonly consists of the following general types of agreements, or a combination of them: loan modification, loan refinance, forbearance, short sale, or surrender of the property in full satisfaction. The terms of a loss mitigation solution will vary in each case according to the particular needs and goals of the parties." Debtors and their lawyers have often recognized after having a lender or loan servicer representative with whom to negotiate that keeping a home is an unrealistic option. There can still be benefits to the debtor and the lender to agree upon a short sale or surrender of the property in full satisfaction (avoiding a potential deficiency judgment). The longer a debtor keeps an unaffordable home, the more liability the debtor continues to face for property taxes, insurance premiums, home owner assessments, zoning violations and others.

Let me be clear at the outset that our results to date have been modest, but nevertheless helpful, in allowing homeowners to remain in their homes and lenders to avoid additional foreclosures. Chapter 13 of the Bankruptcy Code is designed for debtors with regular income. If a debtor is unemployed and has no other source of regular income, chapter 13 is unlikely to help. A loan modification is unlikely if a debtor has no income to make mortgage payments.

Because of the way data has been captured by our court in the past with respect to loss mitigation, there are limitations in the information I am able to report. These numbers are based on the best information available to the court at the present time. We are in the process of reconfiguring our data collection methods to provide better data in the future.

Since the inception of the program (through October 21, 2010) our court has received approximately 1450 requests for loss mitigation. Of these, about 1000 requests were filed in chapter 13 cases; 25 in chapter 11 cases; and 425 in chapter 7 cases.

Our Clerk's office reports that approximately 1250 orders have been entered granting loss mitigation requests.[2] This means that the debtor and the lender or loan servicer commenced a period to discuss loss mitigation; it does not mean that a successful outcome was achieved. Only 55 orders have been entered denying loss mitigation requests, after the court heard and sustained objections by the lender or loan servicer. These numbers are a good indication how infrequently a lender or loan servicer objects to entering into loss mitigation negotiations. The objections

[2] Because a debtor may and often does have more than one mortgage on a property, the number of orders entered granting or denying loss mitigation does not necessarily correspond to the number of cases in which loss mitigation has been requested.

have usually been filed in cases of serial or abusive bankruptcy filers, with little or no income, and no prospects for any successful outcome in loss mitigation.[3]

"Outcomes" data—the final results of loss mitigation in particular cases—are harder to come by. Until recently, our Clerk's office did not capture outcomes data, but a manual review of docket records has been performed for our court in Poughkeepsie where the largest numbers of loss mitigation requests were filed. Additionally, until recently, HAMP loan modifications required a 90-day trial period before a borrower could receive a permanent loan modification. It is not clear whether our data set has captured all trial modifications, or, for that matter, all final modifications.

Loss mitigation requests were made in approximately 900 cases in Poughkeepsie; loan modifications were approved in approximately 220 cases; approximately 450 loan modification requests are still pending; and approximately 230 requests have been denied or withdrawn. Successful loan modifications have resulted in reductions in monthly mortgage payments in the range of $100-$1,000 per month. In a few cases, substantial principal reductions also resulted (including, a $120,000 principal reduction in one case). For a debtor living at the edge of financial collapse reductions in monthly mortgage payments in this range can mean the difference between remaining in a family home, with children enrolled in local schools and neighborhood stability maintained, or having family life totally disrupted in searching for new housing and schools, assuming they can be found with the funds available to a debtor.

Anecdotally, over the last six months my colleagues and I have seen increased willingness by lenders and loan servicers favorably to consider loan modification requests. This

[3] There have been approximately 150 cases in which loss mitigation requests were made, but the debtor's counsel did not follow through with the additional steps required to trigger loss mitigation, such as submitting the loss mitigation order for entry by the court.

appears to be driven by a number of factors: lenders increasingly recognize that they are better off economically by agreeing to a loan modification than by foreclosing on property; lenders are not anxious to own additional property, and buyers at foreclosure sales at reasonable prices are scarce; experience and familiarity with our loss mitigation program has demonstrated that outcomes favorable to debtors and lenders can be achieved at lower costs than with litigation alternatives.

Our loss mitigation procedures require the parties to negotiate in good faith. A party that fails to participate in loss mitigation in good faith may be subject to sanctions. Each loss mitigation party must have a person with full settlement authority present during a loss mitigation session. One or more loss mitigation sessions may be conducted in person, telephonically or via video conference. Our procedures also provide that a debtor or creditor participating in the loss mitigation program may request, or the bankruptcy court may order, the appointment of an independent mediator from our court's register of mediators. Requests for appointment of mediators have only occurred in a few cases, and the court has been able to select pro bono mediators acceptable to the parties. In most cases, the parties have negotiated directly without mediators. Indeed, this highlights one of the most frequent favorable comments I have heard from attorneys about our program—namely, that requiring the parties to identify a person with settlement authority with whom to discuss loss mitigation provides the best chance for a favorable outcome. Many lawyers representing debtors have advised that before filing for bankruptcy their clients were unable to engage in meaningful loan modification discussions with a person with any authority to act on behalf of the lender.

After the entry of a loss-mitigation order a lender is authorized to contact the debtor directly without violating the automatic stay. A lender or loan servicer may not file a lift-stay

motion during the loss mitigation period, except where necessary to prevent irreparable injury, loss or damage. Any lift-stay motion filed prior to entry of the loss-mitigation order is adjourned to the last day of the loss mitigation period and the court's time to resolve a lift-stay motion is extended pursuant to section 362(e) of the Bankruptcy Code (ordinarily terminating the stay 30 days after the lift-stay motion is filed unless the court, after notice and a hearing, orders the stay continued). In a chapter 13 case, the deadline by which the creditor must object to confirmation of the chapter 11 plan is extended to permit the creditor an additional 14 days after the termination of loss mitigation.

At any time during the loss mitigation period, a loss mitigation party may request a settlement conference or status conference with the bankruptcy court. Our judges regularly request status reports with respect to loss mitigation during any hearing scheduled in the case during the loss mitigation period.

While a loss-mitigation order may be tailored to the specifics of each case, the suggested time frames are as follows: (1) each party shall designate contact persons and contact information within seven days after the entry of the order; (2) a creditor in loss mitigation shall contact the debtor within 14 days after the entry of the order; (3) each loss mitigation party must make any request for information within 14 days after the entry of the order; (4) each loss mitigation party shall respond to a request for information within 14 days after the request is made, or seven days prior to the loss mitigation session, whichever is earlier; (5) the loss mitigation session shall be scheduled within 35 days after the date of the order; (6) the loss mitigation period shall usually end within 42 days after the entry of the order, unless extended as provided in the loss mitigation procedures. Experience has shown that some of these suggested or required time periods need to be lengthened, and such changes are being considered at the

present time. Because lenders have usually required a 90-day trial period before agreeing to a final loan modification, confirmation hearings have usually been adjourned until the trial period has concluded and a decision by the lender or loan servicer on a final modification has been made.

Generally speaking, the granting of a loss mitigation request slows down case administration. In chapter 13 cases, confirmation of a case is usually delayed until after loss mitigation and any trial period has been concluded. A debtor's ability to confirm a chapter 13 plan often depends on whether the debtor can negotiate a loan modification. A successful loan modification will also affect the amount of disposable income available to pay other creditors. The judges on our court have concluded that the delays in administering cases in which loss mitigation has been ordered are justified by the clarity that loss mitigation can bring, whether the result of loss mitigation is a loan modification, short sale of property, surrender of property or no change at all.[4]

About one year after the Loss Mitigation Program became effective, several of our judges met with many of the same debtors' and creditors' attorneys to review the program and ask for suggestions about modifications or improvements. With the judges' approval, the lawyers formed several subcommittees to review different aspects of the program. Each subcommittee included both debtors' and creditors' attorneys. The subcommittees reported back with several suggestions for program improvements. The most significant change will require the parties to

[4] In discussing our loss mitigation program with judges on other bankruptcy courts, some judges have raised concerns about the impact on their already overcrowded calendars. In many districts around the country bankruptcy judges handle extraordinarily large dockets of chapter 13 cases. Those judges' concerns about the impact of loss mitigation on their dockets are certainly real. However, my experience has been that very little additional court time has been required by our loss mitigation program. Most of the activity occurs outside of court between the loss mitigation parties. While cases may remain open and active on the court's docket for a longer time, that usually does not expand the work of the judge.

specify early in the process and under oath the information requested by each party and the information actually provided. This should expedite the loss mitigation process and limit the circumstances when one party or another asserts that it did not receive information necessary to evaluate a loan modification request.

Finally, I am aware that a very similar loss mitigation program adopted by the bankruptcy court in Rhode Island is currently the subject of a constitutional challenge. The issues raised in the challenge will obviously need to be decided by the federal courts in Rhode Island. However, I want to emphasize that our judges considered our authority to adopt our loss mitigation program before it became effective in January 2009. It was the view of our judges then and now that our unquestioned authority to adopt mediation programs and procedures—long in place in our court and courts elsewhere in the country—applies equally to our loss mitigation program which is modeled on our district's mediation program. We may require parties in a contested dispute to meet and confer, directly or with a mediator, in an effort to resolve the issues between them, without the court imposing any particular result. Any party objecting to loss mitigation may present its objection to the court, and the court has indeed denied loss mitigation requests where the circumstances justify that result. We do require that the parties negotiate loss mitigation in good faith, as we do in any mediation, but that does not compel a procedure or result contrary to any provision of the Bankruptcy Code.

Chairman Whitehouse, I would be happy to answer any questions you may have. Thank you again for the opportunity to appear before the subcommittee.

ATTACHMENT A

LOSS MITIGATION PROGRAM PROCEDURES

I. PURPOSE

The Loss Mitigation Program is designed to function as a forum for debtors and lenders to reach consensual resolution whenever a debtor's residential property is at risk of foreclosure. The Loss Mitigation Program aims to facilitate resolution by opening the lines of communication between the debtors' and lenders' decision-makers. While the Loss Mitigation Program stays certain bankruptcy deadlines that might interfere with the negotiations or increase costs to the loss mitigation parties, the Loss Mitigation Program also encourages the parties to finalize any agreement under bankruptcy court protection, instead of seeking dismissal of the bankruptcy case.

II. LOSS MITIGATION DEFINED

The term "loss mitigation" is intended to describe the full range of solutions that may avert either the loss of a debtor's property to foreclosure, increased costs to the lender, or both. Loss mitigation commonly consists of the following general types of agreements, or a combination of them: loan modification, loan refinance, forbearance, short sale, or surrender of the property in full satisfaction. The terms of a loss mitigation solution will vary in each case according to the particular needs and goals of the parties.

III. ELIGIBILITY

The following definitions are used to describe the types of parties, properties and loans that are eligible for participation in the Loss Mitigation Program:

A. DEBTOR

The term "Debtor" means any individual debtor in a case filed under Chapter 7, 11, 12 or 13 of the Bankruptcy Code, including joint debtors.

B. PROPERTY

The term "Property" means any real property or cooperative apartment used as a principal residence in which an eligible Debtor holds an interest.

C. LOAN

The term "Loan" means any mortgage, lien or extension of money or credit secured by eligible Property or stock shares in a residential cooperative, regardless of whether or not the Loan (1) is considered to be "subprime" or "non-traditional," (2) was in foreclosure prior to the bankruptcy filing, (3) is the first or junior mortgage or lien on the Property, or (4) has been "pooled," "securitized," or assigned to a servicer or to a trustee.

D. CREDITOR

The term "Creditor" refers to any holder, mortgage servicer or trustee of an eligible Loan.

ATTACHMENT A

IV. ADDITIONAL PARTIES

A. OTHER CREDITORS

Where it may be necessary or desirable to obtain a global resolution, any party may request, or the bankruptcy court may direct, that multiple Creditors participate in loss mitigation.

B. CO-DEBTORS AND THIRD PARTIES

Where the participation of a co-debtor or other third party may be necessary or desirable, any party may request, or the bankruptcy court may direct, that such party participate in loss mitigation, to the extent that the bankruptcy court has jurisdiction over the party, or if the party consents to participation in loss mitigation.

C. CHAPTER 13 TRUSTEE

The Chapter 13 Trustee has the duty in Section 1302(b)(4) of the Bankruptcy Code to "advise, other than on legal matters, and assist the debtor in performance under the plan." Any party may request, or the bankruptcy court may direct, the Chapter 13 Trustee to participate in loss mitigation to the extent that such participation would be consistent with the Chapter 13 Trustee's duty under the Bankruptcy Code.

D. MEDIATOR

At any time, a Debtor or Creditor participating in the Loss Mitigation Program may request, or the bankruptcy court may order, the appointment of an independent mediator from the United States Bankruptcy Court for the Southern District of New York's Register of Mediators, which may be viewed at http://www.nysb.uscourts.gov/mediators.html. A mediator will assist in loss mitigation in accordance with these Procedures and with the United States Bankruptcy Court of the Southern District of New York Amended General Order for the Adoption of Procedures Governing Mediation of Matters in Bankruptcy Cases and Adversary Proceedings dated January 17, 1995 (General Order M-143), as amended on October 20, 1999 (General Order M-211).

V. COMMENCEMENT OF LOSS MITIGATION

Parties are encouraged to request loss mitigation as early in the case as possible, but loss mitigation may be initiated at any time, by any of the following methods:

A. BY THE DEBTOR

1. In Section C of the Model Chapter 13 Plan, a Chapter 13 Debtor may indicate an interest in discussing loss mitigation with a particular Creditor The Creditor shall have 21 days to object. If no objection is filed, the bankruptcy court may enter an order (a "Loss Mitigation Order").
2. A Debtor may file a request for loss mitigation with a particular Creditor. The Creditor shall have 14 days to object. If no objection is filed, the bankruptcy court may enter a Loss Mitigation Order.

3. If a Creditor has filed a motion requesting relief from the automatic stay pursuant to Section 362 of the Bankruptcy Code (a "Lift-Stay Motion"), at any time prior to the conclusion of the hearing on the Lift-Stay Motion, the Debtor may file a request for loss mitigation. The Debtor and Creditor shall appear at the scheduled hearing on the Lift-Stay Motion, and the bankruptcy court will consider the loss mitigation request and any opposition by the Creditor.

B. BY A CREDITOR

A Creditor may file a request for loss mitigation. The Debtor shall have 7 days to object. If no objection is filed, the bankruptcy court may enter a Loss Mitigation Order.

C. BY THE BANKRUPTCY COURT

The bankruptcy court may enter a Loss Mitigation Order at any time, provided that the parties that will be bound by the Loss Mitigation Order (the "Loss Mitigation Parties") have had notice and an opportunity to object.

D. OPPORTUNITY TO OBJECT

Where any party files an objection, a Loss Mitigation Order shall not be entered until the bankruptcy court has held a hearing to consider the objection. At the hearing, a party objecting to loss mitigation must present specific reasons why it believes that loss mitigation would not be successful. If a party objects on the grounds that loss mitigation has been requested in bad faith, the assertion must be supported by objective reasons.

ATTACHMENT A

VI. LOSS MITIGATION ORDER

A. DEADLINES

A Loss Mitigation Order shall contain deadlines for all of the following:

1. The date by which the Loss Mitigation Parties shall designate contact persons and disclose contact information, if this information has not been previously provided.
2. The date by which each Creditor must initially contact the Debtor.
3. The date by which each Creditor must transmit any information request to the Debtor.
4. The date by which the Debtor must transmit any information request to each Creditor.
5. The date by which a written report must be filed or the date and time set for a status conference at which a verbal report must be provided. Whenever possible, in a Chapter 13 case the status conference will coincide with the first date set for confirmation of the Chapter 13 plan, or an adjourned confirmation hearing. Where a written report is required, it should generally be filed not later than 7 days after the conclusion of the initial loss mitigation session.
6. The date when the loss mitigation period will terminate, unless extended.

B. EFFECT

Whenever a Loss Mitigation Order is entered, the following shall apply to the Loss Mitigation Parties:

1. Each Creditor is authorized to contact the Debtor directly. It shall be presumed that such communications do not violate the automatic stay.
2. Except where necessary to prevent irreparable injury, loss or damage, a Creditor shall not file a Lift-Stay Motion during the loss mitigation period. Any Lift-Stay Motion filed by the Creditor prior to the entry of the Loss Mitigation Order shall be adjourned to a date after the last day of the loss mitigation period, and the stay shall be extended pursuant to Section 362(e) of the Bankruptcy Code.
3. In a Chapter 13 case, the deadline by which a Creditor must object to confirmation of the Chapter 13 plan shall be extended to permit the Creditor an additional 14 days after the termination of loss mitigation, including any extension of the loss mitigation period.
4. All communications and information exchanged by the Loss Mitigation Parties during loss mitigation will be inadmissible in any subsequent proceeding pursuant to Federal Rule of Evidence 408.

ATTACHMENT A

VII. DUTIES UPON COMMENCEMENT OF LOSS MITIGATION

Upon entry of a Loss Mitigation Order, the Loss Mitigation Parties shall have the following duties:

A. GOOD FAITH

The Loss Mitigation Parties shall negotiate in good faith. A party that fails to participate in loss mitigation in good faith may be subject to sanctions.

B. CONTACT INFORMATION

1. The Debtor: Unless the Debtor has already done so in the Chapter 13 plan or as part of a request for loss mitigation, the Debtor shall provide written notice to each Creditor, indicating the manner in which the Creditor should contact the Debtor.
2. The Creditor: Unless a Creditor has already done so as part of a request for loss mitigation, each Creditor shall provide written notice to the Debtor, identifying the name, address and direct telephone number of the contact person who has full settlement authority.

C. STATUS REPORT

The Loss Mitigation Parties shall provide either a written or verbal report to the bankruptcy court regarding the status of loss mitigation within the time set by the bankruptcy court in the Loss Mitigation Order. The status report shall state whether one or more loss mitigation sessions have been conducted, whether a resolution was reached, and whether one or more of the Loss Mitigation Parties believe that additional loss mitigation sessions would be likely to result in either a partial or complete resolution. A status report may include a request for an extension of the loss mitigation period.

D. BANKRUPTCY COURT APPROVAL

The Loss Mitigation Parties shall seek bankruptcy court approval of any resolution or settlement reached during loss mitigation.

VIII. LOSS MITIGATION PROCESS

A. INITIAL CONTACT

Following entry of a loss mitigation order, the contact person designated by each Creditor shall contact the Debtor and any other Loss Mitigation Party within the time set by the bankruptcy court. The Debtor may contact any other Loss Mitigation Party at any time. The purpose of the initial contact is to create a framework for the discussion at the loss mitigation session and to ensure that each of the Loss Mitigation Parties will be prepared to participate in the loss mitigation session – it is not intended to limit additional issues or proposals that may arise during the session. During the initial contact phase, the Loss Mitigation Parties should discuss the following:

1. The time and method for conducting the loss mitigation sessions.
2. The types of loss mitigation solutions under consideration by each party.

3. A plan for the exchange of required information prior to the loss mitigation session, including the due date for the Debtor to complete and return any information request or other loss mitigation paperwork that each Creditor may require. ***All information should be provided at least 7 days prior to the loss mitigation session.***

B. LOSS MITIGATION SESSIONS

Loss mitigation sessions may be conducted in person, telephonically or via video conference. At the conclusion of each loss mitigation session, the Loss Mitigation Parties should discuss whether additional sessions are necessary and set the time and method for conducting any additional sessions, including a schedule for the exchange of any further information or documentation that may be required.

C. BANKRUPTCY COURT ASSISTANCE

At any time during the loss-mitigation period, a Loss Mitigation Party may request a settlement conference or status conference with the bankruptcy court.

D. SETTLEMENT AUTHORITY

Each Loss Mitigation Party must have a person with full settlement authority present during a loss mitigation session. During a status conference or settlement conference with the bankruptcy court, the person with full settlement authority must either attend the conference in person or be available by telephone or video conference beginning 30 minutes prior to the start of the conference.

IX. DURATION, EXTENSION AND EARLY TERMINATION

A. INITIAL PERIOD

The initial loss mitigation period shall be set by the bankruptcy court in the Loss Mitigation Order.

B. EXTENSION

1. Agreement: The Loss Mitigation Parties may agree to an extension of the loss mitigation period. The Loss Mitigation Parties shall request an extension in writing, filed on the docket in the main bankruptcy case and served on all parties in interest, who shall have three days to object to a request for extension of the loss mitigation period. The bankruptcy court may grant a request for extension of the loss mitigation period for cause.
2. No Agreement: Where a Loss Mitigation Party does not consent to the request for an extension of the loss mitigation period, the bankruptcy court shall schedule a hearing to consider whether further loss mitigation sessions are likely to be successful. The bankruptcy court may order a reasonable extension if it appears that (1) a further loss mitigation session is likely to result in a complete or partial resolution that will provide a substantial benefit to a Loss Mitigation Party, (2) the party opposing the extension has not participated in good faith or has failed in a material way to comply with these Procedures, or (3) the party opposing the extension would not be prejudiced.

C. EARLY TERMINATION

1. Upon Request of a Loss Mitigation Party: A Loss Mitigation Party may request that the loss mitigation period be terminated and shall state the reasons for the request. Except where immediate termination is necessary to prevent irreparable injury, loss or damage, the request shall be made on notice to all other Loss Mitigation Parties, and the bankruptcy court may schedule a hearing to consider the termination request.
2. Dismissal of the Bankruptcy Case:
    a. Other than at the request of a Chapter 13 Debtor, or the motion of the United States Trustee or Trustee for failure to comply with requirements under the Bankruptcy Code: Except where a Chapter 13 Debtor requests voluntary dismissal, or upon motion, a case shall not be dismissed during the loss mitigation period unless the Loss Mitigation Parties have provided the bankruptcy court with a status report that is satisfactory to the court. The bankruptcy court may schedule a further status conference with the Loss Mitigation Parties prior to dismissal of the case.
    b. Upon the request of a Chapter 13 Debtor: **A Debtor is not required to request dismissal of the bankruptcy case as part of any resolution or settlement that is offered or agreed to during the loss mitigation period.** Where a Chapter 13 Debtor requests voluntary dismissal of the bankruptcy case during the loss mitigation period, the Debtor's dismissal request shall indicate whether the Debtor agreed to any settlement or resolution from a Loss Mitigation Party during the loss mitigation period or intends to accept an offer of settlement made by a Loss Mitigation Party during the loss mitigation period.
    c. Notice: If a bankruptcy case is dismissed for any reason during the loss-mitigation period, the Clerk of the Court shall file a notice on the docket indicating that loss mitigation efforts were ongoing at the time the bankruptcy case was dismissed.

X. SETTLEMENT

The bankruptcy court will consider any agreement or resolution reached during loss mitigation (a "Settlement") and may approve the Settlement, subject to the following provisions:

1. Implementation: A Settlement may be noticed and implemented in any manner permitted by the Bankruptcy Code and Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules"), including, but not limited to, a stipulation, sale, plan of reorganization or amended plan of reorganization.
2. Fees, Costs or Charges: If a Settlement provides for a Creditor to receive payment or reimbursement of any fee, cost or charge that arose from loss mitigation, such fees, costs or charges shall be disclosed to the Debtor and to the bankruptcy court prior to approval of the Settlement.

3. Signatures: Consent to the Settlement shall be acknowledged in writing by (1) the Creditor representative who participated in loss mitigation, (2) the Debtor, and (3) the Debtor's attorney, if applicable.

4. Hearing: Where a Debtor is represented by counsel, a Settlement may be approved by the bankruptcy court without further notice, or upon such notice as the bankruptcy court directs, unless additional notice or a hearing is required by the Bankruptcy Code or Bankruptcy Rules. Where a Debtor is not represented by counsel, a Settlement shall not be approved until after the bankruptcy court has conducted a hearing at which the Debtor shall appear in person.

5. Dismissal Not Required: **A Debtor is not required to request dismissal of the bankruptcy case in order to effectuate a Settlement.** In order to ensure that the Settlement is enforceable, the Loss Mitigation Parties should seek bankruptcy court approval of the Settlement. Where the Debtor requests or consents to dismissal of the bankruptcy case as part of the Settlement, the bankruptcy court may approve the Settlement as a "structured dismissal," if such relief complies with the Bankruptcy Code and Bankruptcy Rules.

XI. COORDINATION WITH OTHER PROGRAMS

[Provision may be added in the future to provide for coordination with other loss mitigation programs, including programs in the New York State Unified Court System.]

ATTACHMENT A

INSTRUCTIONS FOR COMMENCEMENT OF LOSS MITIGATION

WHERE DEBTOR REQUESTS LOSS MITIGATION IN CHAPTER 13 PLAN:

The debtor must file and serve the *Notice of Loss-Mitigation Request* on the creditor and must file an affidavit of service (attorneys should do so electronically on the Court's ECF system). The *Notice of Loss-Mitigation Request* form is available on the Court's website.

The creditor has **21 days** to object from the date of mailing (service) of the notice.

If no objection is filed, the debtor shall submit an order as soon as possible. The order may be submitted: 1) after the expiration of the 21 days or 2) with the *Notice of Loss-Mitigation Request* on Notice of Presentment on the 22nd day.

DEBTOR'S REQUEST FOR LOSS MITIGATION:

Where a debtor does not make the request in a chapter 13 plan but does so separately, the debtor must file and serve the request, *Loss -Mitigation Request – By the Debtor*, on the creditor and must file an affidavit of service (attorneys should do so electronically on the Court's ECF system). The form for making the request is available on the Court's website [please use the form, *Loss -Mitigation Request – By the Debtor*].

The creditor has **14 days** to object from the date of mailing (service) of the notice.

If no objection is filed, the debtor shall submit an order as soon as possible. The order may be submitted: 1) after the expiration of the 14 days or 2) with the request [*Loss -Mitigation Request – By the Debtor*] on Notice of Presentment on the 15th day.

WHERE DEBTOR REQUESTS LOSS MITIGATION DURING PENDENCY OF SECTION 362 MOTION FOR RELIEF FROM THE AUTOMATIC STAY:

Where the debtor's request for loss mitigation is related to a pending section 362 motion (for relief from the automatic stay), the debtor must file and serve the request, *Loss -Mitigation Request – By the Debtor*, on the creditor and must file an affidavit of service (attorneys should do so electronically on the Court's ECF system). The form for making the request is available on the Court's website [please use the form, *Loss -Mitigation Request – By the Debtor*].

The debtor and creditor must appear at the hearing on the Lift-Stay Motion and the court will consider the loss mitigation request and any opposition thereto by the creditor. If the court approves the request, the debtor shall submit an order as soon as possible.

CREDITOR'S REQUEST FOR LOSS MITIGATION:

The creditor must file and serve the request, *Loss -Mitigation Request – By the Creditor*, on the debtor and debtor's attorney and must file an affidavit of service (attorneys and those with limited-access passwords to the Court's ECF system should do so electronically). The form for making the request is available on the Court's website [please use the form, *Loss -Mitigation Request – By the Creditor*].

The debtor has **7 days** to object from the date of mailing (service) of the notice.

If no objection is filed, the creditor shall submit an order as soon as possible. The order may be submitted: 1) after the expiration of the 7 days or 2) with the request [*Loss -Mitigation Request – By the Creditor*] on Notice of Presentment on the 8th day.

ATTACHMENT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

In re: Chapter 13

_____

Case No. _____-_____ (_____)

Debtor(s).

----------x

NOTICE OF LOSS-MITIGATION REQUEST

I am a Debtor in this case. On _____ *[date]* I requested loss mitigation in my Chapter 13 Plan with respect to *[Identify the property, loan and creditor(s) for which you are requesting loss mitigation]*:

_____

Date of this Notice: _____

DEBTOR INFORMATION

Name: _____

Mailing Address: _____

Telephone Number: _____

E-mail address (if any): _____

Attorney Information (if any):

Name: _____

Address: _____

Telephone Number: _____

Fax Number: _____

E-mail address: _____

ATTACHMENT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

In re: Chapter _____

_____

Case No. _____-_____ (_____)

Debtor(s).

----------x

LOSS-MITIGATION REQUEST – BY THE DEBTOR

I am a Debtor in this case. I hereby request loss mitigation with respect to *[Identify the property, loan and creditor(s) for which you are requesting loss mitigation]*:

_____

SIGNATURE

I understand that if the Court orders loss mitigation in this case, I will be expected to comply with the Loss Mitigation Procedures. I agree to comply with the Loss Mitigation Procedures, and I will participate in loss mitigation in good faith. I understand that loss mitigation is voluntary for all parties, and that I am not required to enter into any agreement or settlement with any other party as part of this loss mitigation. I also understand that no other party is required to enter into any agreement or settlement with me. I understand that **I am not required to request dismissal of this case** as part of any resolution or settlement that is offered or agreed to during the loss mitigation period.

Sign: _____ Date: _____, 20_____

Print Name: _____

Telephone Number: _____

E-mail address (if any): _____

ATTACHMENT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
In re: Chapter _____

_____

Case No. _____-_____ (_____)

Debtor(s).
----------x

LOSS-MITIGATION REQUEST – BY A CREDITOR

I am a creditor (including a holder, servicer or trustee of a mortgage or lien secured by property used by the Debtor as a principal residence) of the Debtor in this case. I hereby request loss mitigation with respect to *[Identify the property, loan and creditor(s) for which you are requesting loss mitigation]*:

_____

SIGNATURE

I have reviewed the Loss Mitigation Procedures, and I understand that if the Court orders loss mitigation in this case, I will be bound by the Loss Mitigation Procedures. I agree to comply with the Loss Mitigation Procedures, and I will participate in loss mitigation in good faith. If loss mitigation is ordered, I agree to provide the Court with a written or verbal status report stating whether or not the parties participated in one or more loss mitigation sessions, whether or not a settlement was reached, and whether negotiations are ongoing. I agree that **I will not require the Debtor to request or cause dismissal of this case** as part of any resolution or settlement that is offered or agreed to during the loss mitigation period.

Sign:_____ Date: _____, 20_____

Print Name: _____

Title: _____

Firm or Company: _____

Telephone Number: _____

E-mail address (if any): _____

ATTACHMENT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

In re: Chapter _____

_____

Case No. _____-_____ (_____)

Debtor(s).

----------x

LOSS-MITIGATION ORDER

☐ A Loss Mitigation Request[1] was filed by the debtor on *[Date]* _____, 20_____.

☐ A Loss Mitigation Request was filed by a creditor on *[Date]* _____, 20_____.

☐ The Court raised the possibility of loss mitigation, and the parties have had notice and an opportunity to object.

Upon the foregoing, it is hereby

ORDERED, that the following parties (collectively, the "Loss Mitigation Parties") are directed to participate in loss mitigation:

1. The Debtor
2. _____, the Creditor with respect to

   _____ *[describe Loan and/or Property]*.
3. *[Additional parties, if any]*

   _____

It is further **ORDERED**, that the Loss Mitigation Parties shall comply with the Loss Mitigation Procedures annexed to this Order; and it is further

ORDERED, that the Loss Mitigation Parties shall observe the following deadlines:

1. Each Loss Mitigation Party shall designate contact persons and disclose contact information by _____ *[suggested time is 7 days]*, unless this information has been previously provided. As part of this obligation, **a Creditor shall furnish each Loss Mitigation Party with written notice of the name, address and direct telephone number of the person who has full settlement authority**.
2. Each Creditor that is a Loss Mitigation Party shall contact the Debtor within **14 days of the date of this Order**.
3. Each Loss Mitigation Party must make their information request, if any, within **14 days of the date of this Order**.
4. Each Loss Mitigation Party shall respond to an information request within **14 days after an information request is made, or 7 days prior to the Loss Mitigation Session, whichever is earlier.**

---

[1] All capitalized terms have the meanings defined in the Loss Mitigation Procedures.

ATTACHMENT A

5. The Loss Mitigation Session shall be scheduled not later than _____ *[suggested time is within 35 days of the date of the order]*.

6. The loss mitigation period shall terminate on _____ *[suggested time is within 42 days of the date of the order]*, unless extended as provided in the Loss Mitigation Procedures.

It is further **ORDERED**, that a status conference will be held in this case on _____ *[suggested time is within 42 days of the date of the order]* (the "Status Conference"). The Loss Mitigation Parties shall appear at the Status Conference and provide the Court with a verbal Status Report unless a written Status Report that is satisfactory to the Court has been filed not later than 7 days prior to the date of the Status Conference and requests that the Status Conference be adjourned or cancelled; and it is further

ORDERED, that at the Status Conference, the Court may consider a Settlement reached by the Loss Mitigation Parties, or may adjourn the Status Conference if necessary to allow for adequate notice of a request for approval of a Settlement; and it is further

ORDERED, that any matters that are currently pending between the Loss Mitigation Parties (such as motions or applications, and any objection, opposition or response thereto) are hereby adjourned to the date of the Status Conference to the extent those matters concern (1) relief from the automatic stay, (2) objection to the allowance of a proof of claim, (3) reduction, reclassification or avoidance of a lien, (4) valuation of a Loan or Property, or (5) objection to confirmation of a plan of reorganization; and it is further.

ORDERED, that the time for each Creditor that is a Loss Mitigation Party in this case to file an objection to a plan of reorganization in this case shall be extended until 14 days after the termination of the loss mitigation period, including any extension of the Loss Mitigation period.

Dated: _____, New York
_____, 20_____

BY THE COURT

_____
United States Bankruptcy Judge

ATTACHMENT B

UNITED STATES BANKRUPTCY COURT
District of Rhode Island

REPORT ON LOSS MITIGATION STATISTICS

NOVEMBER 1, 2009 – SEPTEMBER 30, 2010

The Loss Mitigation Program commenced on November 1, 2009, and has now been in effect for 11 months. During this time, 4,857 new bankruptcy cases were filed, and a total of 550 requests for loss mitigation were filed. **This represents approximately 11.3% of the filing caseload** (the actual percentage may be slightly lower as some of the requests were filed in cases already pending before November 1, 2009).

1. **Statistics related to Loss Mitigation Requests (November 1, 2009 - September 30, 2010)**

LM Requests	No Objection Filed	% of Total	Objection Filed	% of Total	LM w/ Unexpired Obj DDL pending	% of Total
550	**443**	**80.5%**	**90**	**16.4%**	**17**	**3.0%**

2. Statistics related to Granting, Denial, Withdrawal, Termination or Approval (November 1, 2009 – September 30, 2010) – see attached Charts

LM Requests	Granted (469)	Denied (8)	LM Withdrawn (26)	Order Terminating or Vacating (116)	Case Dismissed or LM Stricken (24)	Order to Approve LM Agreement (88)
550	**85.2%**	**1.4%**	**4.7%**	**21%**	**4.3%**	**16%**

Based on the above statistics, of those cases that have completed the loss mitigation mediation process (262 cases), **174 cases were denied, withdrawn, terminated, vacated or dismissed (66.4%), compared with 88 cases (approximately 33.6%) with a successful approved loan modification**. Together, these 262 cases represent 47.6% of the total loss mitigation requests filed to date. Please note that the amount of **cases** with a successful approved loan modification agreement is 88; however, 6 cases have more than one Loan Modification Agreement (i.e. second mortgage or second property). There have been 94 Loan Modification Agreements approved through September 30, 2010.

Completed (or failed to complete) LM Program	LM Denied (8)	LM Withdrawn (26)	LM Terminated or Vacated (116)	Cases Dismissed[1] (24)	Combined Cases: Denied, Withdrawn, Terminated, Vacated or Dismissed (174)	Successful Loan Modifications (88)
262	**3%**	**9.9%**	**44.2%**	**9.1%**	**66.4%**	**33.6%**

[1] It is not known whether these dismissals were related to the loss mitigation program.

3. Statistics related to Loan Modification Agreements (November 1, 2009 – September 30, 2010) – see attached Charts.

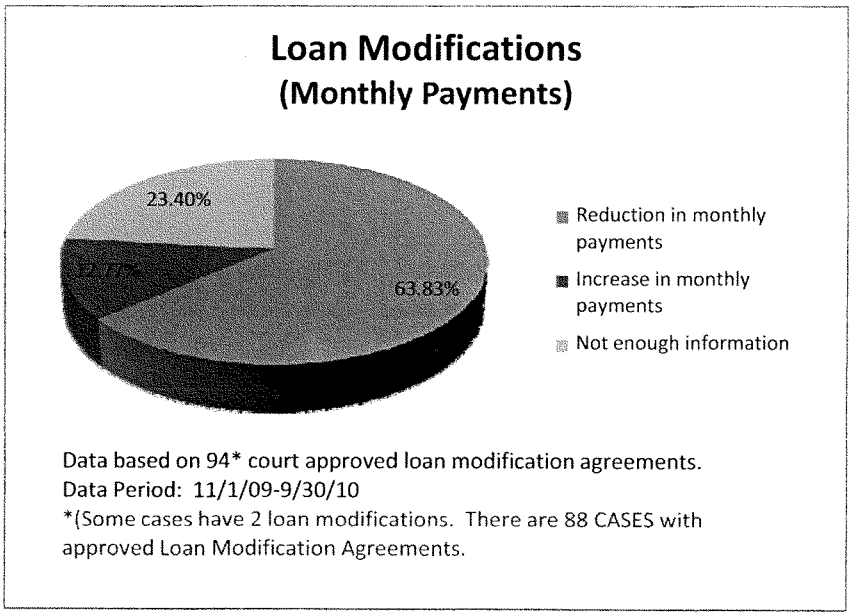
Of the 469 cases where participation in Loss Mitigation was granted, to date, 88 cases (94 Agreements) have an Order approving a Loan Modification, or **18.8%**. The majority of the agreements result in an interest rate reduction and/or a term extension, or both. Depending on the amount of the arrearage the debtor adds to the existing principal, it may or may not result in a payment reduction, although 50% have. See figures below and attached charts.

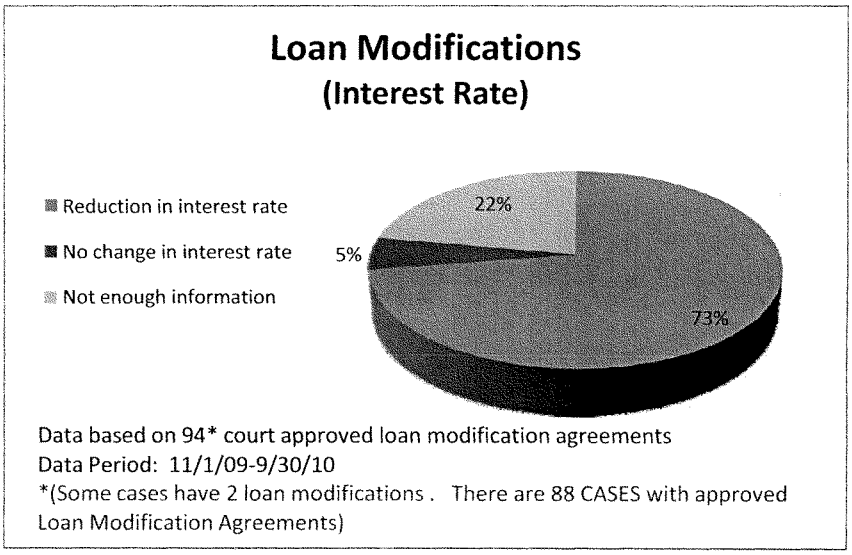
Approved Loan Modification Agreements (94)	Reduction in Monthly Payments (60)	Increase in Payment (arrearage added to principal) (12)	Not enough information (22)
94	**63.8%**	**12.8%**	**23.4%**

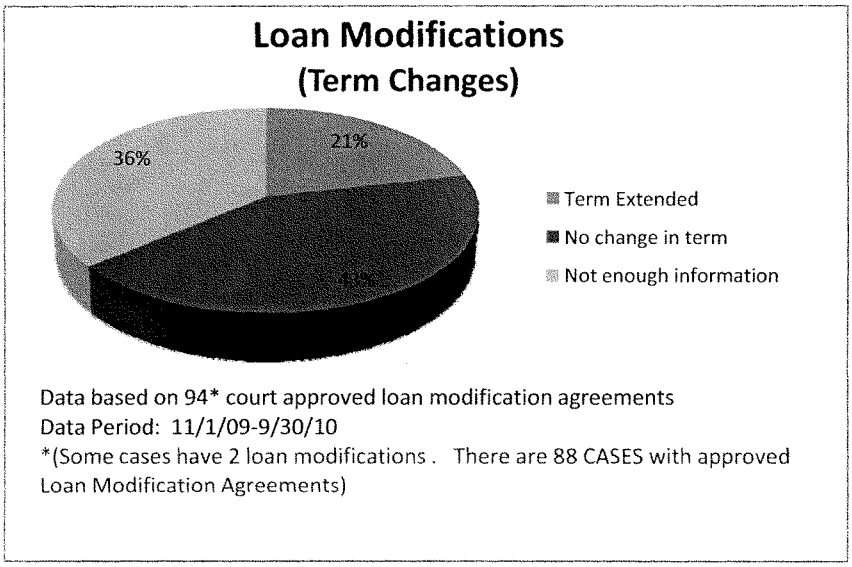
Approved Loan Modification Agreements (94)	Reduction in Interest Rate (68)	No Change in Interest Rate (5)	Not enough information (21)
94	**72.3%**	**5.3%**	**22.3%**

Approved Loan Modification Agreements (94)	Maturity Date is the Same (40)	Maturity Date Extended (20)	Not enough information (34)
94	**42.6%**	**21.3%**	**36.2%**

Dated: October 8, 2010


Loan Modifications
(Monthly Payments)
23.40%
63.83%
Reduction in monthly payments
Increase in monthly payments
Not enough information
Data based on 94* court approved loan modification agreements.
Data Period: 11/1/09-9/30/10
*(Some cases have 2 loan modifications. There are 88 CASES with approved Loan Modification Agreements.


Loan Modifications
(Interest Rate)
Reduction in interest rate
No change in interest rate
Not enough information
22%
5%
73%
Data based on 94* court approved loan modification agreements
Data Period: 11/1/09-9/30/10
*(Some cases have 2 loan modifications . There are 88 CASES with approved Loan Modification Agreements)


Loan Modifications
(Term Changes)
36%
21%
43%
Term Extended
No change in term
Not enough information
Data based on 94* court approved loan modification agreements
Data Period: 11/1/09-9/30/10
*(Some cases have 2 loan modifications . There are 88 CASES with approved Loan Modification Agreements)

RhodeIslandHousing
working together to bring you home

November 4, 2010

The Honorable Sheldon Whitehouse
U.S. Senate Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Whitehouse,

Thank you for convening a field hearing on "Mandatory Mediation Programs: Can Bankruptcy Courts Help End the Foreclosure Crisis?" and for allowing us to offer our comments. We were privileged to host the hearing in our board room to bring together a panel of experts to discuss the country's foreclosure crisis and examine bankruptcy court mediation programs. We appreciate our partnership with you and the other members of our highly regarded federal delegation on this important issue as Rhode Island foreclosures continue at a pace that is devastating to families and communities.

The witnesses did an exceptional job discussing the challenges that face homeowners in dealing with large bureaucratic lending institutions when seeking to resolve mortgage issues. Most poignant were the first hand statements from two homeowners who have each been struggling with the loan modification process for over a year. Although both homeowners noted the very positive support provided by Rhode Island Housing's HelpCenter in what is otherwise a nightmare process that seems to never end, the treatment that they received from their lender/servicers reflects the experiences of many of the borrowers who come to our HelpCenter. However, Mr. Cardullo and Mr. Britt were financially-competent, effective self-advocates. Most victims of lender/ servicer abuse do not have that level of competency, therefore the outcomes they face are often even worse. Moreover many of those now seeking help in working through mortgage issues were victims of deception at the front end of the mortgage process as well.

The success of face-to-face mediation in bankruptcy court, which was highlighted by the testimony of Judge Martin Glenn, has been proven many times over in our own experience under ordinances adopted by the Rhode Island cities of Providence, Warwick and Cranston. These cities require such mediation prior to recording a foreclosure deed and Rhode Island Housing provides those mediation services. While the mediation offer often comes too late in the process to actually reach the homeowners, if the face-to-face meeting occurs, a non-foreclosure solution is generally achieved.

44 Washington St., Providence, RI 02903-1721 • Phone: 401 457-1234 Fax: 401 457-1136 • www.rhodeislandhousing.org

In addition to the assistance we provide to these three cities, Rhode Island Housing continues to provide housing counseling assistance to all Rhode Islanders who are having trouble making their mortgage payment, regardless of their lender, through our HelpCenter. As of the end of September 2010, 8,517 Rhode Island homeowners seeking assistance have contacted our HelpCenter and 4,432 homeowners with a full range of financial challenges have met face-to-face with our counseling staff. Despite the many challenges facing HelpCenter clients, we have been able to help about 43 percent of the clients who have completed counseling stay in their homes.

It is important to remember that most of the horrific servicing stories come from the largest financial institutions. With their marketing and financial clout, the larger institutions often beat out smaller banks, credit unions and local lenders who offer good service when making loans, and when their customers face challenges. In crafting solutions to fix irresponsible servicing practices, we should exercise care not to inflict damage on the responsible but lesser capitalized community lenders.

Fannie Mae and Freddie Mac should be diligent in assuring that their servicers are working in the best interest of investors, homeowners and taxpayers. As was stated at the hearing, servicers may have independent financial incentives for taking actions or in-actions that are contrary to those other vital interests. U.S. taxpayers will pay more than $100 billion because of these government sponsored enterprises that allowed and encouraged high-risk lending practices. The least that the taxpayer should get from these agencies, which held themselves up as the gold standard in lending, is a commitment to investment in and successful performance of the highest levels of customer service and loan management necessary to protect the best interests of our country and citizens.

In searching for a national standard of care that lenders should exercise, we have found that the loss mitigation procedures mandated under the FHA insurance program offers some features that are beneficial such as mandating loss mitigation procedures with consequences if the lender/servicer does not perform and requiring that informational resources be given to assist FHA homeowners facing financial hardship. There are challenges to other aspects of the FHA requirements including the lack of flexibility in some of their loss mitigation programs, that could be improved upon. At Rhode Island Housing we use the FHA standard as a minimum but it still far exceeds the typical servicer response stories that we hear from people who are not our customers.

Thank you again for your leadership on this issue. Please free to contact Amy Rainone, at 457-1256 or by email at arainone@rhodeislandhousing.org with any questions.

Thank you.

Sincerely,

Richard Godfrey
Executive Director

Statement of Chairman Patrick Leahy
"Mandatory Mediation Programs: Can Bankruptcy Courts Help End the Foreclosure Crisis?"
Senate Judiciary Committee
Subcommittee on Administrative Oversight and the Courts
Rhode Island Housing, Providence, Rhode Island October 28, 2010

I thank Senator Whitehouse for chairing today's hearing and I thank the witnesses for their testimony. This is a critical topic in these tough economic times.

Our Nation is facing an unprecedented foreclosure crisis. Recent estimates predict that by the end of 2010, over one million homes will have been lost to foreclosure. This is on top of the 900,000 homes that were lost in 2009. These losses greatly affect hardworking Americans and their families.

To add insult to injury, it is becoming apparent that there are widespread problems relating to the documentation and procedure in many foreclosures. Judges, sheriffs, and State Attorneys General from across the political spectrum are now asking important questions, and are mobilizing on behalf of homeowners. The Attorneys General of all 50 states have begun investigations to determine the extent of these failures and whether banks have acted with incompetence, sloppiness or fraud.

Since the beginning of the housing market collapse, I have sought to provide Federal prosecutors with the tools they need to combat fraud perpetrated on Americans, whether in the mortgage market or elsewhere. I was heartened when the President signed the Fraud Enforcement and Recovery Act, legislation I authored in 2009, and I understand that it is already helping in the fight to protect Americans as we move forward. I also worked with Senator Dodd to ensure that the Wall Street Reform legislation contained appropriate measures to protect whistleblowers and to prevent fraud in the financial markets. I am especially troubled by recent developments related to the foreclosure process for so many Americans. I have written to Attorney General Holder to ask him if he needs more help from Congress to investigate and prosecute fraud and misconduct in the foreclosure process. I know the Attorney General is focused on this crisis and trust that he will tell us if more help is needed.

Officials at the Federal, state, and local level are also working hard and innovating in response to the foreclosure crisis. The state court system in New York is now requiring lenders' attorneys to affirm that foreclosure documentation is accurate and truthful, under penalty of judicial sanction. The Vermont legislature has also taken action to require mediation between the lender and the debtor before foreclosure. Chief Judge Colleen Brown in the Vermont Bankruptcy Court, like the state judiciary in New York, is now carefully scrutinizing the documents and representations put forth by lenders' attorneys involved in foreclosures and requiring more than just unsworn, blanket representations. I commend the Vermont state legislature, Chief Judge Brown in Rutland, the New York state judiciary, and others who are stepping up and demanding accountability.

As this hearing will illuminate, bankruptcy courts in several districts have now implemented mandatory mediation programs between homeowners and lenders as part of the bankruptcy process. Judge Brown's court in the Vermont district, two Federal districts in New York, the district of Rhode Island, and the Central District of Florida have all put in place loss mitigation programs to help homeowners and lenders reach mutually beneficial agreements. I am encouraged by what has been done so far.

From what we have heard, this mediation is working. Every American family that we can help to stay in their home and find a path to financial stability is progress toward an end to the crisis. Every mortgage that continues to perform will only help our national economy. The bankruptcy courts are essential and are playing an active role. The courts that have implemented loss mitigation programs are leading the way in innovating sensible practices to ensure fair dealing, and to encourage the parties to reach to mutually beneficial resolutions.

Law enforcement officers are playing a role as well. In Illinois, Cook County Sheriff Tom Dart has refused to evict anyone being foreclosed on by the three national banks at the heart of the foreclosure scandal until he can be assured that the documentation is sound. I commend Sheriff Dart for demanding accountability of those who seek to evict financially struggling homeowners and accuracy on behalf of the citizens he serves as a law enforcement officer.

State legislatures are also responding to the foreclosure crisis by enacting laws designed to mitigate the effects of widespread foreclosures. In 2009, 33 states and Puerto Rico enacted laws to help citizens cope with the crisis. The states have acted to create safeguards and certainty for citizens facing foreclosure and have enacted laws to try to bring homeowners and lenders together to see if modification is possible. Common sense would suggest that it is more beneficial for a bank to work with a homeowner to reduce interest rates and help the homeowner maintain a manageable payment schedule rather than initiate a foreclosure.

Unfortunately the good ideas of Senators and Representatives that will help Americans swept up in this crisis have been opposed at every turn by the banking industry. In 2008, after a hearing and lengthy debate, the Judiciary Committee reported legislation proposed by Senator Durbin that many bankruptcy judges, economists, academics, and consumer advocates agreed would have a substantial impact on helping financially distressed Americans remain in their homes. The Helping Families Save Their Homes in Bankruptcy Act of 2008 was vehemently opposed by the American Bankers Association and others in the financial industry, and regrettably it failed to pass.

I commend the state legislatures, bankruptcy judges, state attorneys general, and law enforcement officials that are doing what they can, within the law, to provide fairness not just to Americans in need, but to support our broader economy by preventing the havoc that results from a foreclosure. These officials know how devastating this process is for families, communities, and local economies. I commend them and I am pleased that this hearing will shine some light on the thoughtful approach that has been taken in Rhode Island, Vermont, New York, and Florida. I believe Federal lawmakers can learn from these innovations. Where there is success, Congress would be right to do what it can to build upon this success and to support those who are on the front lines dealing with these terrible circumstances.

I look forward to reviewing the testimony of today's witnesses and to working with Senator Whitehouse as Chairman of the Judiciary Committee's Subcommittee on Administrative Oversight and the Courts to find ways the Congress can play a role in helping Americans emerge from this crisis.

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Loan Modification Hearing 10/28/2010

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Thank You Senator Whitehouse for the privilege of being invited to share my experiences regarding this very important housing issue. My name is Christopher M. Lefebvre. I have been a practicing consumer advocate and bankruptcy attorney in Rhode Island for 23 years. Not surprisingly, bankruptcy business is booming in the State of Rhode Island. The exponential growth of Rhode Island bankruptcy filings is clearly related to the devastating economic conditions and their affect on the local housing market. As real estate values plummeted, the ability to take advantage of historically low fixed interest rates to refinance vanished. With massive jobs losses and a wave of adjustable rate mortgage resets, it's not surprising that consumers have flocked to the bankruptcy court seeking refuge from their mortgage creditors. Rhode Island has responded to this crisis in a very unique fashion with it's now one year old Loss Mitigation Procedures. The success of this program is simply staggering. There is absolutely no doubt in my mind that this program has helped many Rhode Island families save their homes from foreclosure.

As a practicing attorney, I am bombarded on a daily basis with complaints from Rhode Island Homeowners that their mortgage lenders and servicers are simply unwilling to work with them to modify mortgages to avoid and or stop foreclosure. Rhode Island homeowners are frustrated with the general non responsiveness to their pleas for help. Many lenders rush to foreclosure rather than working with consumers in a meaningful way to modify loans. Paperwork is consistently lost in the shuffle, documents are resent by consumers ad nauseam, phone calls regarding the status of mitigation efforts go unreturned, and borrowers never get to speak with the same person handling their mortgage file. Then, on the rare occasion when a borrower receives word that they have been accepted for a temporary trial modification, and make trial payments for months, they learn suddenly and without any detailed explanation that a permanent modification has been rejected. Homeowners are immediately thereafter hit with a notice seeking immediate repayment of the unpaid contractual payments that were not made at the request of the lender and or servicer during the trial period. This anomaly causes frustration, anxiety and constant stress for Rhode Island homeowners faced with the possible reality that their home may be lost through foreclosure. Borrowers simply don't understand why all the programs and incentives plastered in the media regarding foreclosure assistance are not available or simply not working.

The Rhode Island Bankruptcy Court Loss Mitigation Procedures eliminates this "merry go round" dysfunction of present modification procedures enacted by many lenders and servicers. The judicial oversight of the process is the key to the programs success. Non responsiveness of lenders and servicers is simply not tolerated. Those choosing to participate in the process are forced to communicate and discuss meaningful modification possibilities within the tightly monitored time frames set by the bankruptcy court. The program is working. Interests rates are being fixed at market rates, arrearages are being recapitalized, loan terms are being extended and reamortized and payments are being substantially reduced. The net result is that many homeowners who have entered the bankruptcy system in Rhode Island emerge with an affordable mortgage payment with their home safe from foreclosure.

Not all individuals seeking to participate in this court annexed mortgage mediation process receive loan modifications. Unfortunately there are simply too many homeowners that are unemployed and without the resources to maintain their residence. These individuals usually do not meet the eligibility requirements of most servicers for loan modifications and accordingly their requests are denied. Nevertheless they are at least acknowledged and heard during the bankruptcy process and treated with dignity and respect, concepts totally foreign to most Rhode Island consumers trying to seek modifications in the non-bankruptcy arena.

The Rhode Island Bankruptcy Court program has helped stabilized the lives of several homeowners who I have represented. For example, in 2009, Mark, a self-employed carpenter from Chepatchet experienced a temporary drastic reduction in income. His mortgage company started the foreclosure process. He filed bankruptcy and through the Loss Mitigation Program has saved his home for himself and three small children. His lender GMAC Mortgage fixed his interest rate at 4.5% and recapitalized arrearages and extended the term so that his payment is now manageable.

There is also Saron from Providence who became temporarily unemployed as a jewelry worker in late 2009 and was forced to file bankruptcy to stop a foreclosure. When her employer rehired her she was to obtain a loan modification with America's Servicing Company, that recapitalized arrearages, extended the term of the loan, fixed the interest rate to 4.5% from a prior 6.875%, resulting in a $500.00 monthly reduction in her payment. Saron is now able to continue to provide a home for her three children at a payment that is affordable. These success stories are tributes to the thoughtful and life altering Rhode island Bankruptcy Court loss mitigation program.

Thank you again for the opportunity to testify. I'm happy to answer any questions.

Statement of the Hon. Cecelia G. Morris, Judge of the United States Bankruptcy Court of the Southern District of New York.

The Legal Basis for the Loss Mitigation Program Procedures for the United States Bankruptcy Court of the Southern District of New York

The following is an excerpt from an article written by the Hon. Cecelia G. Morris, Judge of the United States Bankruptcy Court of the Southern District of New York. The article will be published next year, and discusses the Loss Mitigation Program Procedures for the United States Bankruptcy Court of the Southern District of New York, and surveys the loan modifications that have been achieved.*

A. Legal authority for federal court-annexed mediation programs

Challenges to mandatory, court-annexed alternative dispute resolution programs include allegations of violations of the Seventh Amendment and federal rules of civil procedure. The Seventh Amendment provides that in suits at common law, "the right of trial by jury shall be preserved."[1] Fed. R. Civ. P. 38(a) preserves as "inviolate" the right to a jury trial.[2] Rule 39(a) provides that once a jury trial has been demanded, the action must be designated on the docket as such.[3]

Parties to a lawsuit can hardly be said to enjoy an unqualified right to litigate. Mandatory mediation is just one mechanism a federal court may use to promote efficiency and resolution of cases. The Supreme Court has approved a variety of judicial outcomes not dependent on a jury trial.[4] "It is not 'trial by jury,' but 'the right of trial by jury,' which the [Seventh] Amendment

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* Judge Morris thanks Mary Kate Guccion, her law clerk, and Sheila Thorpe of the Federal Judicial Center for their contributions to this article.

[1] The Seventh Amendment provides in its entirety, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, an no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according the rules of the common law." U.S. Const. amend. VII.

[2] Fed. R. Civ. P. 38(a) provides: "**Right Preserved.** The right of trial by jury as declared by the Seventh Amendment of the Constitution – or as provided by a federal statute – is preserved to the parties inviolate."

[3] Fed. R. Civ. P. 39(a) provides:

> **When a Demand Is Made.** When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless:
>
> (1) The parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or
>
> (2) the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.

[4] *Galloway v. United States*, 319 U.S. 372 (1943) (directed verdicts); *Ex parte Peterson*, 253 U.S. 300 (1920) (auditors); *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899) (justices of the peace).

declares 'shall be preserved.' It does not prescribe at what stage of an action a trial by jury must, if demanded, be had; or what conditions may [be] imposed upon the demand of such a trial, consistently with preserving the right to it."[5] At the time the Supreme Court made these remarks, it determined whether a justice of the peace could preside over a binding jury trial and whether a bond could be required. The Court quoted a decision from a Connecticut court, "It is sufficient, and within the reasonable intendment of that instrument, if the trial by jury be not impaired, although it may be subjected to new modes, and even rendered more expensive, if the public interest demand such alteration."[6] Forty years later, the Court maintained qualifications on the right of jury trial: "[T]he [Seventh] Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details ..."[7]

Today, these principles are applied to support adoption of court-mandated mediation programs. The right to a jury trial is not proscribed by court-mandated mediation; it is merely delayed while the parties discuss settlement options.[8] Mediation is not inconsistent with the federal rules of civil procedure that govern trials.[9] Fed. R. Civ. P. 38 and 39 must be interpreted in accordance to the Supreme Court authority allowing the right to a jury trial to be made subject to preconditions.[10] Indeed, another federal rule, Fed. R. Civ. P. 16, authorizes courts to order parties to mediation.[11] Rule 16 expressly permits federal courts to direct parties to appear for pretrial settlement conferences, and grants federal courts authority to issue sanctions for failure to participate in such a conference in good faith.[12] While Rule 16 is not expressly incorporated

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[5] *Capital Traction Co. v. Hof*, 174 U.S. 1, 23 (1899).

[6] *Id.* at 27-28 (quoting *Beers v. Beers*, 4 Conn. 535 (Conn. 1823)).

[7] *Galloway v. United States*, 319 U.S. 372, 392 (1943) (affirming directed verdict). *Accord, Ex parte Peterson*, 253 U.S. 300, 309-310 (1920) (affirming district court's appointment of auditor to review facts and narrow issues for trial; "New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right").

[8] *See Rhea v. Massey-Ferguson, Inc.*, 767 F.2d 266, 269 (6th Cir. 1985) (upholding local rule that authorizes referral to mediation; "The challenged local rule is not inconsistent with Rule 38(b) merely because it interposes an additional step between the jury demand and trial"); *Kimbrough v. Holiday Inn*, 478 F. Supp. 566 (E.D. Pa. 1979) (ordering parties to schedule arbitration hearing, in experimental program).

[9] *See Rhea, Kimbrough.*

[10] *See Kimbrough*, 478 F. Supp. at 573.

[11] *See Lindgren v. Standard Fire Ins. Co.*, Civ. Action No. 1:06cv564, 2007 U.S. Dist. LEXIS 2415 (S.D. Miss. January 10, 2007); *In re Sargent Farms, Inc.*, 224 B.R. 842 (Bankr. M.D. Fla. 1998); *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1997) (extending judicial immunity to mediator).

[12] Fed. R. Civ. P. 16 provides:

> Pretrial Conferences; Scheduling; Management

into lead bankruptcy cases, Bankruptcy Rule 9014 allows the bankruptcy court to order the application of rules of procedure including Rule 16, made applicable to contested matters in bankruptcy cases by Fed. R. Bankr. P. 7016 and 9014.

Fed. R. Bankr. P. 9029 permits bankruptcy judges to make and amend rules of practice and procedure which are consistent with Acts of Congress. Congress passed the Civil Justice Reform Act of 1990, which required federal courts to establish alternate dispute resolution

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(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

.... and

(5) facilitating settlement.

....

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) Attendance. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) Matters for Consideration. At any pretrial conference, the court may consider and take appropriate action on the following matters:

.... (I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule

....

(f) Sanctions.

(1) In General. On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate--or does not participate in good faith--in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) Imposing Fees and Costs. Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses--including attorney's fees--incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

programs.[13] The Alternative Dispute Resolution Act ("ADRA") was passed in 1998, with the same purpose.[14] The most recent incarnation of the mediation program for the Bankruptcy Court of the Southern District of New York operates pursuant to the ADRA, General Order M-350, and Local Bankruptcy Rule 9019-1.[15] Finally, courts have inherent power to manage their calendars, which extends to requiring litigants to attend settlement conferences.[16]

The principles that sustain mandatory mediation when attacked as unconstitutional apply with equal force to the Loss Mitigation Program, because the goal is to identify risks and values held by the debtor and the secured creditors, and resolve them without motion practice that consumes the most precious assets in any bankruptcy case – post-petition cash and time. When a debtor enters bankruptcy with the purpose of keeping the family home, the Court can expect to decide matters such as whether cause exists to lift the stay, whether a proof of claim is valid, how to surrender a home in a chapter 13 plan, and whether the home may be sold for less than the secured creditor's claim. Loss mitigation provides a flexible way for debtors and creditors to identify their goals and reach accommodation without resort to rigid bankruptcy motion practice. The position of the debtor might be to continue living in the home, or to transfer the house to the lender or mortgagee in some satisfaction of the debt. The position of the mortgagee might be to proceed to foreclosure to recover as much as possible after a substantial default; or, the mortgagee might be willing to capitalize the arrears and allow the debtor a fresh start in paying back a home loan. It is not necessary for a third-party neutral is to be present in the loss mitigation process. The purpose is to identify goals and reach a settlement of the creditor's claim, without adjudicating facts or the substantive rights of either party.[17] The Loss Mitigation Order expressly requires the parties to engage in a loss mitigation session, and to report to the Court at a subsequent status conference. Loss mitigation can help the parties identify their goals and risks early on, and reach accommodation with respect to the house without extensive and expensive motion practice.

B. The mediation program for the United States Bankruptcy Court for the Southern District of New York

The United States Bankruptcy Court, Southern District of New York, adopted a mediation program in 1993. General Order M-211 provides in relevant part:

1.0 Assignment of Matters to Mediation.

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[13] 28 U.S.C.A. §§ 471–482. The CJRA is widely believed to have expired according to a sunset provision on December 1, 1997. The Court's mediation program is authorized in its present incarnation pursuant to the ADRA.

[14] 28 U.S.C. §§ 651-658.

[15] See General Order M-390 and LBR 9019-1. The ADRA provides that courts may review existing ADR programs for conformity with the new statute. *See also In re Sargeant Farms, Inc.*, 224 B.R. 842, 847 (Bankr. M.D. Fla. 1998) ("it is quite apparent the bankruptcy court has the authority and power to promulgate rules associated with court-annexed mediation and, where necessary, to require the parties to participate in same").

[16] *In re Atl. Pipe Corp*, 304 F.3d 135 (1st Cir. 2002).

[17] The Loss Mitigation Program Procedures allow for the appointment of a mediator upon request of the parties.

> 1.1 By Court Order. The court may order assignment of a matter to mediation upon its own motion, or upon a motion by any party in interest or the U.S. Trustee.
>
> .... 3.2 Mediation Conference. A representative of each party shall attend the mediation conference, and must have complete authority to negotiate all disputed amounts and issues. The mediator shall control all procedural aspects of the mediation. The mediator shall also have the discretion to require that the party representative or a non-attorney principal of the party with settlement authority be present at any conference. ... The mediator shall report any willful failure to attend or participate in good faith in the mediation process or conference. Such failure may result in the imposition of sanctions by the court.
>
> .... 5.0 Confidentiality.
>
> 5.1 Confidentiality as to the Court and Third Parties.
>
> [Generally, the substance of the mediation is confidential.] Nothing in this section, however, precludes the mediator from reporting the status (though not content) of the mediation effort to the court orally or in writing, or from complying with the obligation set forth in 3.2 to report failures to attend or to participate in good faith.[18]

It is clear from the foregoing provisions that in the mediation program for the Bankruptcy Court for the Southern District of New York, parties ordered to mediation are required to participate in good faith, because the General Orders provide for the imposition of sanctions when a party fails to participate in good faith. To ensure good faith participation, the mediators are required to report failures to participate in good faith, and they are relieved from rules of confidentiality to the extent necessary to do so.[19] The mediation program was developed to allow flexibility – according to section 1.3, any dispute may be sent to mediation; specific pleadings or other structures are not required by the terms of the General Orders. This design is consistent with the facts that mediation often reveals issues and concerns lurking beneath "the tip of the iceberg," and that mediations often take on lives of their own.

The Court is cognizant that whether a court's mandatory mediation program can require good faith participation is a beloved thesis for myriad academic articles.[20] In the Bankruptcy Court for the Southern District of New York, once the parties are directed to mediation, whether by the litigants' choice or not, good-faith participation is required. The mediation program

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[18] General Order M-211, Amended General Order M-143, *In re: Expansion of General Order M-143 to Include the Use of Early Neutral Evaluation and Mediation/Voluntary Arbitration* (1999), *available at* http://www.nysb.uscourts.gov (emphasis added).

[19] *See A.T. Reynolds & Sons, Inc.*, 424 B.R. 76 (Bankr. S.D.N.Y. 2010) (Morris, Bankr. J.).

[20] *See, e.g.*, Mediation in Texas: Can the Judge Really Make Me Do That? 47 S. Tex. L. Rev. 849 (Summer 2006), by Robert K. Wise (positing, among other things, that a court's requiring good-faith participation in mediation constitutes an abuse of discretion). The Texas ADR Act permits a court to order civil cases to mediation on its own initiative or a party's motion, and without the parties' consent.

provides for sanctions when a party is found not to have participated in the mediation in good faith.

The loss mitigation program for the United States Bankruptcy Court for the Southern District of New York

On December 18, 2008, Chief Judge of the United States Bankruptcy Court for the Southern District of New York, Stuart M. Bernstein, signed an order adopting the Loss Mitigation Program that was approved by the Board of Judges of that court. According to the order, the Loss Mitigation Program is designed to "avoid the need for various types of bankruptcy litigation, reduce costs to debtors and secured creditors, and enable debtors to reorganize or otherwise address their most significant debts and assets under the United States Bankruptcy Code." Bankruptcy Courts in the Southern District of New York have jurisdiction over New York, Bronx, Westchester, Rockland, Orange, Dutchess, Ulster and Sullivan Counties, and concurrent jurisdiction with the Northern District of New York over Greene and Columbia Counties.

The Loss Mitigation Program went into effect January 5, 2009. As of October 19, 2010, more than 1,400 debtors have requested loss mitigation through the program. About 1,200 have pursued the process and received an order allowing the loss mitigation. More than 300 loan modifications have been achieved through the program. About 250 loss mitigation orders have been terminated or withdrawn. The reasons for termination include the debtor's realizing that he cannot afford the house and consenting to allow a foreclosure action to proceed or to surrender the home. The Court might terminate loss mitigation upon the request of a creditor if the creditor shows that the debtor has not supplied the necessary financial information.

The balance of the participants are engaged in negotiations. The loss mitigation process might take several months, because debtors might have to resolve title errors resulting from divorce and estate matters, or avoid judgment liens and second mortgages as part of the bankruptcy process, before the creditor will consider modifying the loan. The creditors' review processes are often lengthy, and debtors will have to supply fresh financial information as the old documents grow stale or the loan is assigned to a new creditor.

"Loss mitigation" is a phrase often used to express the hope that something can be done about the record rate of mortgage foreclosures and the havoc that the lending industry and many homeowners experience as a result of sub-prime and non-traditional mortgages. As the term is used in the Loss Mitigation Program Procedures adopted by the Southern District of New York, "loss mitigation" is intended to describe the full range of solutions that may avert either the loss of a debtor's property to foreclosure, increased costs to the lender, or both. Loss mitigation encompasses many different types of agreements, depending on the circumstances of each case, and the needs and goals of the particular homeowner. Where homeowners wish to remain in their home, the lender might offer a loan modification, refinance or forbearance agreement. An increasingly common loan modification converts the interest rate of the loan from variable to fixed. Loss mitigation is not always aimed at saving a home; sometimes the parties may find common ground in agreeing to a "short sale" (a sale at a prices that is less than the amount due under the mortgage), or surrender of the property.

Loss mitigation programs have sprung up at other levels of government. The Housing and Economic Recovery Act of 2008 is a voluntary program. Although lenders cannot be compelled to agree to loan modifications, they can be required to enter into discussions with borrowers. Lenders approved by the U.S. Department of Housing and Urban Development (HUD) are required to engage in loss mitigation according to HUD guidelines. HUD emphasizes

that most mortgage delinquencies can and should be resolved through early intervention, involving constructive contact with the borrowers. The federal Making Home Affordable Program requires certain lenders to engage in the loan modification process, to bring the monthly housing costs to about one-third of the borrower's income. In 2009, the New York State Unified Court System began a pilot residential foreclosure program, offering a foreclosure conference designed to encourage lender-borrower negotiations prior to the filing of a foreclosure action, and to conduct a court conference as early as possible in each case to explore the possibility of a workout or settlement. The settlement conference brings together a representative from the bank (servicer or lender), homeowner and a judicial officer or referee. In December of 2009, the law was changed in New York to require that all foreclosure cases involving home loans must participate in settlement conferences.

When foreclosure proceedings are underway in state court, some homeowners seek bankruptcy protection. The Bankruptcy Code allows homeowners to propose their own plan for repaying missed mortgage payments over as long as a five-year period, while paying current mortgage payments as they come due. The amounts needed each month to rehabilitate a mortgage are too much for some homeowners to afford, and as currently drafted, the Bankruptcy Code does not permit debtors to reduce or modify mortgages on real property used as their principal residence as they could for most other types of mortgages and liens.[21] This means that homeowners who don't have the income to catch up on their mortgage as it currently exists will soon find themselves back in foreclosure proceedings, unless they can reach agreement with their lenders. The Loss Mitigation Program is meant to facilitate the debtor and the creditor arriving at such an agreement.

Lenders have their own in-house loss mitigation programs. Borrowers have complained that when they call, they are left on hold for hours, can't speak to a live person, or they are passed back and forth between different personnel and departments, leading to a frustrating process of negotiation and re-negotiation where the terms of what is offered may change at any moment. When the homeowner is in bankruptcy, lenders may not to speak to the debtor, in concern of violating the automatic stay, the injunction imposed by the Bankruptcy Code that forbids efforts to collect debts from a person under bankruptcy protection. Some lenders entice homeowners to dismiss the bankruptcy case by offering to negotiate. Dismissal of the bankruptcy case can have major ramifications for the homeowner. Once the debtor is out of bankruptcy, the lender may continue foreclosure proceedings, regardless of what might have been orally promised.

The Bankruptcy Court's Loss Mitigation Program opens the lines of communication in two significant ways. First, it requires the lender to disclose direct contact information for a person with full authority to make a decision. Second, it provides that the lenders will not be liable for violating the automatic stay if they participate in loss mitigation discussions with a homeowner in bankruptcy.

The Loss Mitigation is rooted in the principles of the Court's Mediation Program. The Loss Mitigation Program exists independently of the Mediation Program, because the same federal rules that authorize mediation programs support the Loss Mitigation Program. The programs share several integral components. For example, similar to the Mediation Program, the Loss Mitigation Program expressly requires good-faith participation: "The Loss Mitigation Parties shall negotiate in good faith. A party that fails to participate in loss mitigation in good

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[21] 11 U.S.C. § 1322(b)(2).

faith may be subject to sanctions."[22] Both programs set a structure and timeframe for negotiations; are controlled by Court orders that may be enforced by the Court's power to hold a party in contempt; and fundamentally require the parties to talk together, in the hope that a solution may be reached concerning the parties' rights and responsibilities with regard to the home, the loan, and the mortgage. The programs differ in that there is no third-party neutral to facilitate the parties' reaching a settlement in the Loss Mitigation Program, though one may be appointed upon the parties' request.

The idea behind the Loss Mitigation Program is a simple one – to identify the decision-makers for both the debtor and the lender, to prescribe a period for them to meet and discuss a consensual solution, and to provide a uniform set of guidelines and judicial oversight. Just putting the authorized parties in touch with one another, with the information they need, is an important step. Debtors benefit from having a clear structure as to whom they should be talking, what they have to do, and when they have to do it. The creditors are permitted to speak directly with the debtor and not violate the automatic stay, the powerful bankruptcy injunction invoked at the filing of the bankruptcy petition.

As long as the court authorizes it, the Loss Mitigation Program is available to any individual debtor, under any chapter of the Bankruptcy Code, concerning residential real property or cooperative apartment. A debtor or a creditor can request loss mitigation, or the bankruptcy court can order it after the parties have had an opportunity to object. The court enters an order directing the parties to loss mitigation and setting a schedule for the parties to exchange information and meet telephonically or in person. The process usually takes between two and three months. Once the parties have exchanged information and met as directed, they can ask the bankruptcy court to approve an agreement if one has been reached. If there is no agreement, the parties can ask for an extension of the loss mitigation period, or report that no resolution can be reached and move forward in some other manner. Whether or not they come to a resolution, the parties agree to report to the bankruptcy court and have the ability to request the court's assistance, discouraging aggressive, evasive or bad-faith conduct.

The Loss Mitigation Program also addresses another concern – reducing both parties' court costs by adjourning certain motions and extending some bankruptcy deadlines during the loss mitigation period. This allows the parties to focus their efforts on the loss mitigation discussions and avoid the time and expense of preparing and filing papers and appearing in court.

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[22] Loss Mitigation Program Procedures, United States Bankruptcy Court for the Southern District of New York, Section VII: Duties Upon Commencement of Loss Mitigation. The Loss Mitigation Program Procedures have always required good-faith participation; the present language is from the updated program approved by the bankruptcy judges for the Southern District of New York. The order adopting the updated program procedures shall be entered in the imminent future.

Testimony of John Rao

Attorney,
National Consumer Law Center

Before the United States Senate
Committee on the Judiciary

Field Hearing of the Subcommittee on
Administrative Oversight and the Courts

"Mandatory Mediation Programs: Can Bankruptcy Courts Help End the Foreclosure Crisis?"

October 28, 2010

Chairman Whitehouse, thank you for holding this hearing and for inviting me to testify today concerning the potential role of mandatory mediation and loss mitigation programs in the bankruptcy courts as an effective tool in addressing our foreclosure crisis. I testify here today on behalf of the low income clients of the National Consumer Law Center (NCLC).[1] NCLC provides legal and technical assistance on consumer law issues to legal services, government and private attorneys representing low-income consumers across the country. The clients and constituencies of NCLC collectively encompass a broad range of families and households who have been affected by current foreclosure crisis.

In my work as an attorney at NCLC, I provide training and technical assistance to attorneys and housing counselors across the country representing homeowners who are facing foreclosure. Because of my extensive experience in bankruptcy matters, I often speak at educational programs for bankruptcy attorneys, trustees and judges, and I serve

[1] The National Consumer Law Center, Inc. (NCLC) is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of eighteen practice treatises and annual supplements on consumer credit laws, including *Consumer Bankruptcy Law and Practice* (9th ed. 2009); *Foreclosures* (3d ed. 2010); *Truth In Lending* (6th ed. 2007) and *Cost of Credit: Regulation, Preemption, and Industry Abuses* (4th ed. 2009), as well as bimonthly newsletters on a range of topics related to consumer credit and bankruptcy issues. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low income people, conducted training for thousands of legal services and private attorneys on the law and litigation strategies to deal predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC's attorneys have been closely involved with the enactment of all federal laws affecting consumer credit since the 1970s, and regularly provide extensive comments to the federal agencies on the regulations under these laws. This testimony was written with the assistance of Geoff Walsh, NCLC Staff Attorney.

as a member of the federal Judicial Conference Advisory Committee on Bankruptcy Rules. My testimony is based on this work and over twenty-six years experience representing consumers in debt collection, bankruptcy and foreclosure defense matters, initially as an attorney with Rhode Island Legal Services and head of its Consumer Unit.

HAMP Has Failed to Curb the Foreclosure Crisis

The nation continues to endure the worst foreclosure crisis since the Great Depression. According to the Mortgage Bankers Association National Delinquency Survey for the fourth quarter of 2009, the combined percentage of loans in foreclosure or seriously delinquent was 15.02 percent, the highest ever recorded in the MBA delinquency survey.[2] Goldman Sachs estimates that, starting at the end of the last quarter of 2008 through 2014, 13 million foreclosures will be started.[3]

The situation in Rhode Island is more dire than in most areas of the nation. With over ten percent of home mortgages in the state past due, Rhode Island ranked highest among all New England states in the most recent Mortgage Bankers Association National Delinquency Survey.[4] Nationwide, only seven states had a higher rate of delinquent home loans than Rhode Island. At the end of the First Quarter of 2010 there were 19,869

[2] Mortgage Bankers Association, *National Delinquency Survey Quarter 4 2009* (Feb. 19, 2010).
[3] Goldman Sachs Global ECS Research, *Home Prices and Credit Losses: Projections and Policy Options* (Jan. 13, 2009), at 16; *see also* Rod Dubitsky, Larry Yang, Stevan Stevanovic & Thomas Suehr, Credit Suisse Fixed Income Research, *Foreclosure Update: Over 8 Million Foreclosures Expected* (Dec. 4, 2008) (predicting 9 million foreclosures for the period 2009-2012).
[4] Mortgage Bankers Association, *National Delinquency Survey Quarter 1 2010* (March 31, 2010).

past-due home mortgage loans in the state.[5] With an increase in foreclosures of 123% from the last quarter of 2009 through the first quarter of 2010, Rhode Island led all fifty states in the rate of increase in new foreclosure cases.[6] It is projected that during the years 2009 through 2012, a total of 31,192 homes will proceed to foreclosure in Rhode Island.[7] Not surprisingly, Rhode Island is one of the first ten states designated by the U.S. Treasury Department to receive special foreclosure assistance funds under the "Hardest Hit Fund" states initiative.[8]

The primary government response to the foreclosure crisis has been the Treasury Department's Home Affordable Modification Program (HAMP), announced by President Obama's administration on March 4, 2009. However, HAMP is not providing a sufficient number of permanent loan modifications to homeowners.

Implementation of HAMP by servicers continues to be slow and hampered by administrative problems. While Treasury has made important improvement's to the program's design in the past year, the lack of compliance by servicers and enforcement by Treasury with program guidelines continues to prevent HAMP from reaching its stated goals. The Administration's most recent report on HAMP progress shows that 495,898

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[5] Center for Responsible Lending, *Cost of Bad Lending Fact Sheet: Rhode Island:* http://www.responsiblelending.org/mortgage-lending/tools-resources/factsheets/rhode-island.html.

[6] Mortgage Bankers Association, *National Delinquency Survey Quarter 1 2010* (March 31, 2010).

[7] Center for Responsible Lending, *Cost of Bad Lending Fact Sheet: Rhode Island:* http://www.responsiblelending.org/mortgage-lending/tools-resources/factsheets/rhode-island.html

[8] United States Department of Treasury Press Release March 29, 2010: http://www.ustreas.gov/press/releases/tg618.htm.

permanent loan modifications have been made. [9] Treasury had initially projected that HAMP would modify 3 to 4 million mortgages over a three year period. Assistant Treasury Secretary Herbert Allison, in responding to questioning last year from the Senate Banking Committee, stated that the program would need to do 1 million modifications per year agreed in order to meet Treasury's goals.[10] With less than 500,000 permanent modifications made in its first year and a half in operation, HAMP is significantly lagging behind these early projections. The recent Treasury report also suggests that the number of modifications being made is actually declining, with only 35,297 trial modifications and 27,840 permanent modifications made in September 2010. Moreover, even if HAMP reached its stated goals, the majority of all foreclosures would still be unaddressed.

Another huge problem that has developed in the first year of HAMP is that a large number of homeowners were put on temporary loan modifications and then denied permanent modifications. Treasury's September, 2010 report shows that 699,924 homeowners have had their trial modifications canceled since the start of the program. Although trial modifications are intended to last only for three months, many homeowners have been making payments on trial plans for a year or more before even receiving a decision that their permanent modification has been denied based on some program eligibility requirement. These homeowners are often worse off at this point because they now face renewed foreclosure proceedings and a large arrearage based on

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[9] United States Department of the Treasury, *Making Home Affordable Program Servicer Performance Report Through September 2010, available at* http://www.financialstability.gov/docs/Sept%20MHA%20Public%202010.pdf.

[10] *Preserving Homeownership: Progress Needed to Prevent Foreclosures: Hearing Before the Senate Commi. on Banking, Housing & Urban Affairs*, 111th Cong. (July 16, 2009) (Senator Schumer's question of Assistant Treasury Secretary Herbert Allison).

the difference between their trial plan payment and their regular unmodified mortgage payment. For homeowners who were not in default when they went on the trial modification, they now have negative credit reports that will hurt any chance they may have had to obtain a loan refinancing.

Perhaps the biggest problem with HAMP is that it is effectively the "only game in town." No other national program has been put in place to assist homeowners in foreclosure. To make matters worse, HAMP has relied solely on the voluntary efforts of mortgage servicers to implement the program, and these efforts have been woefully inadequate. Neither Congress nor Treasury has developed an enforcement mechanism to combat servicer noncompliance with HAMP. Treasury has used various incentives to encourage servicer participation, but these carrots have not resulted in servicer compliance with HAMP guidelines. Moreover, Congress' failure to amend the Bankruptcy Code to permit mortgage modifications in bankruptcy court has meant that homeowners have not had an effective stick to leverage modifications both in and outside bankruptcy.

Bankruptcy Court Mediation and Loss Mitigation Programs.

The Loss Mitigation Program for the Bankruptcy Court for the District of Rhode Island was commenced on November 1, 2009, and was implemented by General Order 09-003.[11] The Court's Loss Mitigation Program is similar to a loss mitigation program

[11] Amendments to the Rhode Island Loss Mitigation Program were made by General Orders 10-001 and 10-002, which became effective on January 15, 2010 and April 2, 2010. *See* General Order Adopting Second Amended Loss Mitigation Program and Procedures (Bankr. D. R.I. 2010), 10-002, available at http://www.rib.uscourts.gov/newhome/RulesInfo/generalorders.asp.

implemented by the Bankruptcy Court for the Southern District of New York (and certain judges in the Eastern District of New York).[12] The stated purpose of the Loss Mitigation Program and similar programs is to "bring debtors and secured lenders together, to encourage them to discuss mutually beneficial financial resolution of their home mortgage difficulties, in a climate where both debtors and creditors are at risk of suffering great pecuniary harm even if they were acting prudently." [13] Serving as a case management function, the program is intended to "avoid or reduce unnecessary bankruptcy litigation and cost to debtors and secured creditors." [14]

The bankruptcy court programs are similar to the numerous programs adopted nationwide by state and local courts in response to the foreclosure crisis. These courts have recognized the need for a degree of heightened judicial supervision over foreclosures to help avoid hundreds of thousands of families from losing their homes unnecessarily. County courts serving such large cities as Chicago, Philadelphia, Cleveland, and Pittsburgh have implemented foreclosure conference and mediation programs similar to the Rhode Island and New York Loss Mitigation Programs.[15] Courts

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[12] *See In re* Adoption of Loss Mitigation Program Procedures, GENERAL ORDER #M-364 (Bankr. S.D.N.Y 2009), *available at* www.nysb.uscourts.gov/orders/m364.pdf

[13] *In re* Simarra, 2010 WL 2144150 (Bankr. D.R.I. April 14, 2010).

[14] General Order 09-003.

[15] Chicago, Philadelphia, Cleveland, Pittsburgh Cook County Chicago Court Program: http://cookcountyforeclosurehelp.org/about/; Philadelphia County: http://s98001.gridserver.com/images/pdf/foreclosure_mortgage/foreclosure_med_prog_by_state/pa_philly_pilot_program.pdf; Cuyahoga County (Cleveland): http://s98001.gridserver.com/images/pdf/foreclosure_mortgage/foreclosure_med_prog_by_state/ohio_prgm_summary.pdf; Allegheny County (Pittsburgh): http://s98001.gridserver.com/images/pdf/foreclosure_mortgage/foreclosure_med_prog_by_state/pa_pitts_admin_order.pdf

in smaller cities, as diverse as Santa Fe, New Mexico and Louisville, Kentucky, have followed suit.[16]

In addition to these initiatives from local courts, state supreme courts have implemented similar programs. The New Jersey Supreme Court promulgated rules for a uniform statewide foreclosure mediation program.[17] In Delaware, the president judge of the state's superior courts issued a mediation rule applicable to all the state's superior courts.[18] The Ohio Supreme Court has established a model program which common pleas courts in many of the state's most populous counties have implemented.[19] Most recently, Florida's Supreme Court announced a statewide initiative that requires mediation automatically in all foreclosure cases filed in that state.[20]

In addition to these court-initiated programs, the legislatures in several states have recently enacted statutes which direct state courts to implement various forms of conference and mediation programs for foreclosure cases. These include programs now in effect in Connecticut, Indiana, Maine, New York, and Vermont.[21] In the non-judicial

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[16] Santa Fe First Judicial District Admin Order: http://s98001.gridserver.com/images/pdf/foreclosure_mortgage/foreclosure_med_prog_by_state/nm_admin_order.pdf Jefferson County Kentucky Admin Order: http://s98001.gridserver.com/images/pdf/foreclosure_mortgage/foreclosure_med_prog_by_state/kentucky_admin_order.pdf

[17] http://www.nj.gov/foreclosuremediation/resources.html

[18] http://www.deforeclosurehelp.org/mediation.html

[19] *See:* http://s98001.gridserver.com/images/pdf/foreclosure_mortgage/foreclosure_med_prog_by_state/ohio_prgm_model.pdf . Cities with programs in effect include Cleveland, Cincinnati, Columbus, Toledo, and Akron.

[20] Florida Supreme Court: No. AOSC09-54 *Re: Final Report and recommendations on residential Mortgage Foreclosure Cases* (December 28, 2009) http://www.floridasupremecourt.org/pub_info/documents/AOSC09-54_Foreclosures.pdf.

[21] Connecticut (Conn. Gen. Stat. Ann. § 8-265ee); Indiana (2009 Senate Enrolled Act No. 492); Maine (14 Maine Rev. Stat. Ann. § 6321-A); New York (New York Civil Practice Laws Rule § 3408); Vermont (2010 House Bill 590). The Supreme Court of South

foreclosures states of California, Oregon, Maryland, Michigan, and Nevada the legislatures have enacted forms of conference and mediation requirements for foreclosure cases, with varying degrees of court involvement.[22] Even local Rhode Island municipalities such as the Cities of Providence and Cranston have initiated similar requirements.

All of these programs, including the Rhode Island and New York Bankruptcy Courts' Loss Mitigation Programs, have several features in common. They are designed to bridge the communication gap between loan servicers and homeowners, a gap that has often been cited as the major obstacle to effective loss mitigation. The programs require active participation by a representative of the servicer with full authority to consider all loss mitigation options. They regulate production of documents and facilitate some form of meeting between the homeowner and servicer, either in person or by phone. The courts play a role in supervising and, when necessary, intervening to move the process along. The programs do not require servicers or lenders to implement a particular loss mitigation option. In the bankruptcy context, these programs importantly do not compel a modification of the mortgage creditor's claim and therefore are not in violation of section 1322(b)(2) of the Bankruptcy Code.[23] Instead, they set a standard for transparency and accountability in the foreclosure process that is often lacking without

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Carolina has issued an administrative order that, while not requiring a specific form of conference, requires servicers to certify completion of HAMP-related loss mitigation reviews as a condition to proceeding with a foreclosure in the state. S.C. Administrative Order No. 2009--05-22-01 *Re: Mortgage Foreclosures and the Home Affordable Modification Program (HMP).* *http://www.floridasupremecourt.org/pub_info/documents/AOSC09-54_Foreclosures.pdf.*

[22] California (Cal. Civ. Code § 2923.5 and §§ 2923.52-53); Maryland (2010 House Bill 472 (Chapter 485); Michigan (2009 Enrolled Bills 4453, 4454, 4455); Nevada (2009 Enacted Assembly Bill 149); Oregon (Enrolled Senate Bill 628).

[23] *See In re* Simarra, 2010 WL 2144150 (Bankr. D.R.I. April 14, 2010).

this intervention. The Rhode Island and New York Bankruptcy Courts' Loss Mitigation Programs have all of these attributes and function with procedures modeled after many similar programs in effect in courts around the country.

Bankruptcy Court Mediation Programs Can Make a Difference

Legislation permitting mortgage modifications in chapter 13 bankruptcy cases would have been the most effective way to encourage servicers to modify home mortgages. Even without that authority, however, bankruptcy courts can play an important role in assisting voluntary loan modifications. In many respects, bankruptcy courts are ideally suited to facilitate mortgage modifications through implementation of mediation programs such as those in Rhode Island and New York. These reasons include:

1. **Breaking Through Bureaucratic Barriers.** Homeowners routinely encounter numerous bureaucratic barriers in attempting to obtain HAMP modifications. Homeowners are repeatedly asked to provide documents because they are lost by servicers.[24] Housing counselors report waits of months to hear back on review for a trial modification. The Providence Journal reported that a Rhode Island homeowner mailed 99 pages of financial documentation to her servicer and four months later, still had not been notified that her modification had been approved.[25] In another case, Select Portfolio Services advised counsel for a New York borrower on three separate occasions over six weeks that the necessary broker price opinion had been cancelled due to "system errors"

[24] Peter S. Goodman, *Paper Avalanche Buries Plan to Stem Foreclosures,* N.Y. Times, June 28, 2009.
[25] *See For Struggling R.I. homeowners, federal help is slow to come*, Providence Journal, Aug. 15, 2009.

and a new request would have to be submitted. Many homeowners are not able to endure these burdensome requests and simply give up in their pursuit of a loan modification.

When homeowners facing foreclosure have been unable to obtain a loan modification or other loss mitigation option from their mortgage holders, they have often turned to bankruptcy as a last resort for saving their homes. Unlike most homeowners in the foreclosure process who are not represented by counsel, more than 90% of individuals who file bankruptcy in most judicial districts have an attorney. These attorneys can assist homeowners in navigating through the numerous HAMP document requests. Moreover, mediation and loss mitigation programs such as those in New York and Rhode Island require the homeowner and servicer to designate contact persons for the exchange of information. Importantly, these programs provide for the entry of a Loss Mitigation Order which specifies time deadlines for requests of information by the servicer and responses by homeowners. If a servicer makes unjustified and duplicative requests for information, the homeowner's attorney can seek compliance with the Loss Mitigation Order. Likewise, a servicer can seek to end the process if the homeowner does not comply with valid HAMP document requests.

2. **Negotiating in Good Faith.** Too often homeowners wait for months (and more than a year in some cases) to get a decision on a HAMP modification request. These long delays exist with respect to both decisions on eligibility for trial modifications as well as for permanent modifications. These delays occur despite HAMP guidelines which require servicers to render a decision on a completed HAMP application within 30 calendar days.[26] More troubling than this paralysis in rendering a decision is that

[26] U.S. Treasury Dept. HAMP Supplemental Directives, No. 09-07, p. 7; No. 10-01, p. 3.

homeowners may simply never get a decision at all on a HAMP modification, and are instead offered a "proprietary" modification on less favorable terms than HAMP.

The advantage of mediation programs is that they generally require that each of the participating parties designate a person having authority to resolve the matter. For example, the Rhode Island loss mitigation program requires that each Loss Mitigation Party "must have a designated person with full settlement authority present during the loss mitigation session."[27] Both the Rhode Island and New York loss mitigation programs also require that the parties negotiate in good faith.[28] While these programs do not compel a servicer to provide a loan modification, they ensure that homeowners have a fair opportunity for consideration of their HAMP applications. If a servicer fails to comply with deadlines and other requirements contained in the Loss Mitigation Order, the homeowner may seek an order from the bankruptcy court compelling compliance with the Order.[29] This is critically important for homeowners in non-judicial foreclosure states such as Rhode Island where there is no judge overseeing the foreclosure process.

Since the Rhode Island loss mitigation program began in November 2009, of those cases that have completed the loss mitigation mediation process (262 cases), 174 cases were denied, withdrawn, terminated, vacated or dismissed (66.4%), and 88 cases (approximately 33.6%) resulted in a successful approved loan modification. Because 6 cases had more than one modification agreement due to a second mortgage or second property, there have been a total of 94 Loan Modification Agreements approved through

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[27] *See* Rhode Island General Order Adopting Second Amended Loss Mitigation Program and Procedures, Part VIII, subpart D.
[28] *See* Rhode Island General Order Adopting Second Amended Loss Mitigation Program and Procedures, Part VII, subpart A.
[29] *Id.*

September 30, 2010. While this may seem modest, I believe that many if not most of these modifications would not have occurred if the loss mitigation program was not in place.

3. **Providing Basic Due Process.** A major failing of HAMP is that homeowners are often never told the reason their modification request has been denied. Participating mortgage servicers routinely fail to comply with Treasury Department guidelines that require notice to a borrower of the reason for rejecting a HAMP application. Servicers frequently do not offer homeowners the opportunity for a review of HAMP denial decisions. The Congressional Oversight Panel noted in its April 2010 Report that servicers were reporting reasons for only 31% of disqualified or cancelled HAMP modifications.[30] Much of the data the servicers did report was plainly erroneous. For 71% of denials, servicers gave no valid reason. For modification cancelations servicers provided no reason in 72% of cases.[31]

Under the Rhode Island and New York loss mitigation programs, a servicer who wishes to terminate negotiations for cause must state the reasons for this request in filing

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[30] Congressional Oversight Panel: *Evaluating Progress of TARP Foreclosure Mitigation Programs* (April 14, 2010); see also U.S. Government Accountability Office, *Troubled Asset Relief Program, Further Actions Needed to Fully and Equitably Implement Foreclosure Mitigation Programs* GAO 10-634 (June 2010); *Factors Affecting Implementation of the Home Affordable Modification Program* (March 25, 2010); and U.S. Government Accountability Office: *Troubled Asset Relief Program Home Affordable Modification Program Continues to Face Implementation Challenges* (March 2010).

[31] COP Report, p. 54. The COP Report goes on to state: "[T]he panel is deeply concerned about the unacceptable quality of the denial and cancelation reasons and strongly urges Treasury to take swift action to ensure that homeowners are not denied the opportunity for a modification and shuffled off to foreclosure without a servicer at least accounting for why the modification was denied or cancelled." Among the Panel's specific recommendations in April 2010 were that Treasury impose "meaningful monetary penalties for non-compliance" with the requirement to refrain from foreclosure until the required review is completed.

with the court. In addition, the parties must file a status report with the court within 60 days of the Loss Mitigation Order indicating the outcome of the negotiations. These procedures encourage transparency in the decision-making process and provide an opportunity for homeowners to obtain information that has thus far eluded homeowners.

4. Providing Protection from Foreclosure. HAMP participating servicers are under contractual obligations to consider homeowners for an affordable loan modification before they foreclose. They are required to consider a debtor in an active bankruptcy case for HAMP if a request is made by the debtor, debtor's counsel, or the case trustee.[32] If a homeowner is found eligible under the HAMP program guidelines and placed on a trial plan, servicers must stop the foreclosure and implement the loan modification.[33] However, the HAMP guidelines do not provide this same protection for homeowners while their application is under consideration. Because the foreclosure units within a servicer operation (and the law firms that handle the foreclosures) often do not communicate with the loss mitigation units handling modification requests, a number of homeowners have had their homes foreclosed while their applications have been pending, only to be told after the sale that they were eligible for a modification.

Bankruptcy Courts' mediation programs fulfill a much needed role in ensuring that foreclosures do not proceed without consideration of alternatives if requested by the parties. The automatic stay under section 362 of the Bankruptcy Code protects the homeowner at least until the settlement negotiations can be concluded.

5. Avoiding "Robo-Signer" Abuses by Servicers. There has been considerable press coverage in recent days concerning servicer abuses in the filing of

[32] U.S. Treasury Dept. HAMP Supplemental Directive. No. 10-02, p. 7.
[33] U.S. Treasury Dept. HAMP Supplemental Directive. No. 09-01, pp. 6, 2.

false affidavits in foreclosure court proceedings. These affidavits are presented to verify the amounts owed on the mortgage debt and to confirm that the party filing the foreclosure action has standing and is the real party in interest as the holder and owner of the mortgage and note. Depositions in state foreclosure actions have revealed that these "robo-signers" often sign hundreds of affidavits per day attesting to facts not within their personal knowledge, and that the affidavits have not been properly notarized.

This issue is not new to bankruptcy courts. Long before the recent press coverage involving state court proceedings, bankruptcy courts have exposed false affidavit abuses in proceedings often brought by consumer bankruptcy attorneys and judges in these cases have taken appropriate action in response.[34] If there are concerns that a loan modification

[34] *See, e.g.*, *In re* Lee, 408 B.R. 893 (Bankr. C.D. Cal. 2009) (Rule 9011 sanctions imposed on creditor's attorney for failure to disclose transfer of ownership of note, failure to join true owner in motion for relief from bankruptcy stay, and for submitting copy of note with motion that was not true and correct copy of the original note); *In re* Taylor, 407 B.R. 618 (Bankr.E.D.Pa. 2009)((local law firm violated Rule 9011 by allowing its attorneys to sign off on electronic filings for stay relief motions prepared by non-attorneys working with national computer data base; finding that proofs of claim filed by national firm were prepared by clerks who are not legally trained and are not paralegals, and that attorney for firm reviews only a random sample of 10 per cent of filed claims), *rev'd*, 2010 WL 624909 (E.D. Pa. Feb. 18, 2010) (setting aside bankruptcy court's findings of Rule 9011 violations by specific local counsel, but noting concerns about wider LPS practices that were the subject of lengthy critical analysis by bankruptcy court); *In re* Cabrera-Mejia, 402 B.R. 335 (Bankr. C.D. Cal. 2008) (sanctioning law firm under Rule 9011 and Bankr. Rule 105(a) after it filed twenty-one motions for relief from stay with the court without factual investigation and without properly authenticated documents to support claims). *In re* Haque, 395 B.R. 799 (Bankr. S.D. Fla. 2008)(law firm Florida Default Law Group and creditor Wells Fargo jointly and severally sanctioned $95,130.45 for filing 45 false affidavits related to stay relief motions in which a bogus "penalty interest" fee was charged to debtors); *In re* Prevo, 394 B.R. 847, 851 (Bankr. S.D. Tex. 2008) (reviewing servicers' practices of inflating proofs of claim with undocumented and excessive fees, court concludes, "[b]ased upon hearings in this and other cases, the Court believes that certain members of the mortgage industry are intentionally attempting to game the system by requesting undocumented and potentially excessive fees and then reducing those fees in amended proofs of claim only after being exposed by debtor's counsel."); *In re* Stewart, 391 B.R. 327, 346 (Bankr. E.D. La. 2008)

may be entered into by a servicer who does not have authority to act on behalf of the true owner of the mortgage, or if the homeowner contends that the unpaid amount of the debt listed in the loan modification agreement includes fees and charges not permitted by the mortgage documents or state law, these matters can be resolved by the bankruptcy court as part of the claims allowance process under sections 501 and 502 of the Bankruptcy Code.

6. Dealing with Second Mortgages. A major impediment to loan modifications has been the existence of secondary mortgage loans. Treasury estimates that up to 50 percent of at-risk mortgages have second liens.[35] Many servicers are reluctant to modify a first mortgage if the second mortgage holder does not consent or subordinate its mortgage, and second mortgage holders have not been willing to

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(servicer falsely represented BPO as pass through of a charge of between $90 and $125, when it actually paid $50 for each inspection; servicer also improperly compounded late fees to charge $360.23 over thirteen months for one $554.11 missed payment); *In re* Parsley, 384 B.R. 138 (Bankr. S.D. Tex. 2008) (inaccuracies regarding account arrears alleged in motion not detected in part because national default service firm's engagement letter with local law firm specifically prohibited any communication between local firm and its client, the mortgage servicer); *In re* Osborne, 375 B.R. 216 (Bankr. M.D. La. 2007) (attorney sanctioned for filing affidavit alleging debtor defaulted on agreement despite attorney's lack of personal knowledge); *In re* Ulmer, 363 B.R. 777 (Bankr. D.S.C. 2007) (awarding $33,500 in sanctions and finding that affidavits of default related to motions for relief from stay prepared by out-of-state paralegals were not executed before a notary public and may not have been reviewed and signed by attorney whose signature appeared on the affidavits); *In re* Rivera, 342 B.R. 435 (Bankr. D.N.J. 2006) ($125,000 sanctions imposed on foreclosure law firm for filing default affidavits in 250 stay relief motions using "blanks" that were pre-signed by employee who no longer worked for servicer), *aff'd*, 2007 WL 1946656 (D.N.J. June 29, 2007); *In re* Porcheddu, 338 B.R. 729 (Bankr. S.D. Tex. 2006) (foreclosure law firm sanctioned for filing false fee applications and misrepresenting that fee statements were based on contemporaneous time records); *In re* Brown, 319 B.R. 876 (Bankr. N.D. Ill. 2005) ($10,000 sanction imposed on national mortgage servicer for groundless stay relief motion based on false motion); *In re* Gorshtein, 285 B.R. 118 (Bankr. S.D.N.Y. 2002)(sanctions imposed on mortgage creditors and their attorneys for filing motions for stay relief based upon false certifications that debtors had failed to make postpetition payments).

[35] *See* Dept. of Treasury Making Home Affordable Program Update, April 29, 2009.

cooperate. HAMP attempts to address this problem through its Second Lien Program, but this program has not been successful.

Once again, loan modifications facilitated in a bankruptcy court loss mitigation program may address this problem because all of the liens on the property can be treated by the homeowner at the same time based on a uniform set of laws and valuation standards. If the amount of the second mortgage exceeds the value of the home and the amount of senior mortgages, meaning it is completely "underwater," the homeowner can propose a Chapter 13 plan that would void or "strip off" the lien and treat the second mortgage as an unsecured debt. Many homeowners in this situation are thus able to resolve the problem of junior mortgages by providing for affordable payments on them during a three to five year Chapter 13 plan.

7. **Dealing with the Homeowner's Entire Debt Load.** Finally, another problem not addressed by HAMP is that many homeowners are burdened with debt other than their home mortgages. Unable to refinance their homes, many homeowners are struggling to pay off credit card, medical bills, and other non-mortgage debt. This problem is made more acute by the current unemployment situation, with many homeowners experiencing a loss or reduction in family income. The most recent Treasury report shows that after receiving a HAMP loan modification, homeowners on average still have a back-end debt-to-income ratio of 63.3 per cent.[36] While HAMP requires borrowers whose back-end DTI is 55 percent or greater to obtain credit

[36] *See* http://www.financialstability.gov/docs/Sept%20MHA%20Public%202010.pdf. The back-end DTI is the ratio of total monthly debt payments (including mortgage principal and interest, taxes, insurance, homeowners association and/or condo fees, plus payments on installment debts, junior liens, alimony, car lease payments and investment property payments) to monthly gross income.

counseling, there is no plan to directly assist homeowners in dealing with unmanageable debt. Loan modifications made during a bankruptcy proceeding address this problem because all of the family's financial problems are dealt with under the supervision of a court approved Chapter 13 plan or discharged in a Chapter 7 case. In this way homeowners are far more likely to avoid default on a mortgage modification.

Conclusion

To help facilitate the adoption of bankruptcy court mediation and loss mitigation programs, we would welcome the opportunity to discuss with the Subcommittee the following recommendations:

1. **Promotion by the Executive Office of the United States Trustees.** We believe that the Executive Office of the United States Trustees should take an active role in encouraging local bankruptcy courts to adopt mediation and loss mitigation programs. The EOUST should prepare and make available model local rules or standing orders to implement such programs that courts may use, perhaps based on those already issued by the New York and Rhode Island courts. The EOUST should also release a memorandum which sets forth the legal authority bankruptcy courts have for adopting such programs. Finally, the EOUST can enlist the cooperation of Chapter 7 and 13 trustees in setting up such programs and provide them with materials and training support for their participation in mediation programs. All of these actions are within the EOUST's stated mission of promoting the integrity and efficiency of the bankruptcy system.

2. **Clarifying Bankruptcy Code Amendment.** We firmly believe that bankruptcy courts currently possess authority to adopt mediation and loss mitigation

programs under section 105(d) of the Bankruptcy Code, Bankruptcy Rule 7016, and the inherent authority of the courts themselves. However, to avoid any uncertainty and hesitation on the part of local courts to adopt such programs, Congress should consider enacting a clarifying amendment to section 105(d) of the Bankruptcy Code making clear that the courts have authority to set up programs. This would be similar to what was done in 1994 when Congress added subsection (d) to § 105 in order to clarify that the full range of settlement and conference procedures authorized under F.R. Civ. P. 16 are available in bankruptcy cases.

John Rao is an attorney with the National Consumer Law Center, Inc. Mr. Rao focuses on consumer credit and bankruptcy issues and has served as a panelist and instructor at numerous bankruptcy and consumer law trainings and conferences. He has served as an expert witness in court cases and has testified in Congress on consumer matters. Mr. Rao is a contributing author and editor of NCLC's *Consumer Bankruptcy Law and Practice*; co-author of NCLC's *Bankruptcy Basics*; *Foreclosures*; and *Guide to Surviving Debt*; and contributing author to NCLC's *Student Loan Law*; *Stop Predatory Lending*; and NCLC Reports: *Bankruptcy and Foreclosures Edition*. He is also a contributing author to *Collier on Bankruptcy* and the *Collier Bankruptcy Practice Guide*. Mr. Rao serves as a member of the federal Judicial Conference Advisory Committee on Bankruptcy Rules, appointed by Chief Justice John Roberts in 2006. He is a conferee of the National Bankruptcy Conference, Fellow of the American College of Bankruptcy, secretary for the National Association of Consumer Bankruptcy Attorneys, and former board member for the American Bankruptcy Institute. He is an adjunct faculty member at Boston College School of Law. Before coming to NCLC, Mr. Rao served as a managing attorney of Rhode Island Legal Services and headed the program's Consumer Unit. His practice included a broad range of cases dealing with consumer, bankruptcy and utility issues, requiring representation of low-income clients before federal, state and bankruptcy courts, and before administrative agencies. Mr. Rao is a graduate of Boston University and received his J.D. in 1982 from the University of California (Hastings).

STATEMENT OF LAURIE K. WEATHERFORD[1]

Chapter 13 Standing Trustee
United States Bankruptcy Court
Middle District of Florida
Orlando Division

"MANDATORY MEDIATION PROGRAMS: CAN BANKRUPTCY COURTS HELP END THE FORECLOSURE CRISIS?"

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

PROVIDENCE, RHODE ISLAND

OCTOBER 28, 2010

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MORTGAGE MODIFICATION MEDIATION PROGRAM

OVERVIEW

In April of 2010 the Bankruptcy Court for the Middle District of Florida, Orlando Division, began a mortgage modification mediation program. Mediation was the chosen forum, as the Supreme Court of the State of Florida has ordered mortgage modification mediation in all state court foreclosure proceedings if requested by the borrower

The idea for the Mortgage Modification Mediation Program ("Program") began with a proposal from attorneys for creditors, debtors and the Chapter 13 Trustee, to the Bankruptcy Judges. Both the Court and attorneys were frustrated by the amount of time it was taking to obtain an answer on a request for mortgage modification.

PROCEDURE

The Program procedure provides the debtor (by their attorney) file a motion for referral to mortgage modification mediation (Exhibit A). The debtor pays the mediation fee to the Chapter 13 Trustee. The court then enters an order directing mediation and setting time frames for the exchange of documents, and scheduling of the mediation (Exhibit B).

After the mediation is complete, the mediator files their report (Exhibit C). After this report is filed, the Chapter 13 Trustee disburses the mediator's fee. There is a committee of attorneys for debtors, creditors and mediators and the Chapter 13 Trustee that meet regularly to revise the mediation order and any procedures necessary to facilitate a mortgage modification through mediation.

This program differs from other Loss Mitigation Programs by the addition of a third party mediator selected from mediators approved list by the Bankruptcy Court or those attorney mediators approved by the Florida Supreme Court to handle foreclosure mediations. The mediators agree to two scheduled mediations before declaring an impasse on issues other than income.

The mediators participating in the Program are educated in HAMP and in Chapter 13. Although they are mediators, their education and familiarity with the Program facilitates resolution. See mediator, debtors counsel, and Chapter 13 reports (Exhibit D).

USE OF CHAPTER 13

Once the HAMP directives became applicable to cases pending in the Bankruptcy Court, mortgage modification mediation became an effective tool in Chapter 13.

There are many advantages to requesting a modification while in Chapter 13. Once the debtor files the case, the Chapter 13 plan may be calculated pursuant to the HAMP formula of 31% of the gross income. The debtor may strip from the property any wholly unsecured second or third mortgages. The payments under the Chapter 13 begin approximately 30 days after the filing of the plan, therefore, when a mediation occurs, the representative of the bank can verify the debtor has a history of making the "modified mortgage payments".

In state court mediations, most borrowers are unsuccessful. The income to debt ratio required for the modification cannot be met without the bankruptcy. Once all of the debts and payments are contained in a Chapter 13 plan, income to debt ratios can be met. The lenders are treating the bankruptcy mortgage mediations with respect.

The debtor is making modified mortgage payments to the Trustee. The borrower is showing a commitment, and making a good faith effort to keep their home by making payments, as opposed to the state court mediation where many borrowers are using mediation as a stall tactic.

The attorneys for the debtors are familiar with HAMP and have prepared the paperwork prior to the set mediation. The lenders are reviewing the paperwork prior to the mediation. Although the mediation may be continued, the issues are being resolved.

The Program is statistically more successful every month. The debtors attorneys and Chapter 13 Trustee are providing education. The success is directly related to the quality of the information provided to the banks.

State court practitioners have not seen results in the state court, but find that moving the borrower into Chapter 13 facilitates a modification. Chapter 13 filings have increased by 30% since the start of the Mortgage Modification Mediation Program.

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re: Case No. 6:09-bk-0
Chapter 13

Debtor[s].
_____/

MOTION FOR REFERRAL TO MORTGAGE MODIFICATION MEDIATION

The debtor[s] request entry of an order referring the debtor[s] and [*list creditors with mortgages encumbering the debtor[s]' primary residence*] to mortgage modification mediation, and in support state:

1. The debtor[s] filed this Chapter 13 case in an attempt to retain their primary residence.

2. The debtor[s] would like to modify the terms of the mortgage[s] encumbering their primary residence. The debtor[s]' income will allow them to contribute as much as 31 percent of their current gross income to payment of their modified mortgage debt.

3. Mediation pursuant to Local Rule 9019-2 will assist the parties in negotiation of a modification of the relevant mortgage[s].

4. Debtor[s] will pay the $306 mediation cost to the Chapter 13 Trustee prior to attending any scheduled mediation.

Wherefore, debtor[s] request the entry of an order referring this case to mediation and for such other and further relief as this Court deems just and proper.

DATED: _____

_____
[Attorney Name]
[Name & Address of Firm]

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re: Case No. 6:09-bk-0
Chapter 13

Debtor[s].
_____/

MORTGAGE MODIFICATION MEDIATION ORDER

This case was considered by the Court on the debtor[s]' Motion for Mortgage Modification Mediation (Doc. No. __). Finding that the debtor[s] desire to retain their primary residence and have stated that they have sufficient income to justify mediation with the goal of modifying the current mortgage[s] encumbering their primary residence, it is:

ORDERED:

1. The debtor[s] and [*list creditor[s] with mortgage[s] encumbering the debtor[s]' primary residence*] are ordered to attend mediation to be scheduled within 60 days of the date of this order.

2. Counsel for creditor[s] shall review the debtor[s]' financial information filed in connection with this case and notify the debtor[s] of any additional financial records they must supply to the creditor[s] and to the mediator at least 14 days prior to the scheduled mediation. Debtor[s] shall provide creditor[s]' counsel all reasonably requested additional financial records. If a

debtor is married but the spouse is not a debtor, creditor[s] may request financial information from the non-filing spouse in anticipation of the mediation.

3. Within 14 days of the entry of this order, counsel for creditor[s] shall coordinate the date, time, and place of the mediation at a mutually convenient time working directly with debtor[s]' counsel, or, if unrepresented, the debtor[s].

4. The parties shall select a mediator from this Court's list of approved mediators or one approved by a Florida state court to mediate mortgage foreclosure disputes.

5. If the parties are unable to agree or to secure a mediator within 14 days of the entry of this order, counsel for creditor[s] shall immediately notify the Court, in writing, so that the Court can appoint an acceptable mediator and schedule mediation.

6. A SPECIALIST FROM THE CREDITOR[S]' MORTGAGE MODIFICATION DEPARTMENT WITH FULL AUTHORITY TO SETTLE MUST PARTICIPATE IN THE MEDIATION AND ATTENDANCE OF THE REPRESENTATIVE MUST BE CONTINUOUS THROUGHOUT THE MEDIATION SESSION. Failure of the creditor[s]' representative to attend a scheduled mediation may result in sanctions. Both counsel for the creditor[s] and the creditor[s] representative may participate by telephone, if desired.

7. All parties are directed to comply with the express terms of this order and to engage in the mediation process in good faith. Failure to do so may result in the imposition of damages and sanctions.

8. Within 7 days of the conclusion of the mediation, the mediator is directed to file a written report indicating whether any agreement on a mortgage modification was reached. Parties are directed to promptly seek any necessary court approval for the mortgage modification and to formalize the modification in any needed legal documents.

9. Prior to attending the mediation, the debtor[s] shall pay to the Chapter 13 Trustee the mediation cost of $306.00 for two hours of mediation. The Chapter 13 Trustee is directed to disburse to the mediator this fee promptly upon the mediator filing a report concluding the mediation. The mediator also is entitled to the full $306 fee (and the Chapter 13 Trustee is authorized to disburse the fee) if the debtor[s] fail to timely cancel the mediation session or to attend a scheduled mediation session.

10. Counsel for the creditor[s] are entitled to receive a fee for $300 for all work involved in connection with the mediation, including requesting and reviewing documents, preparing for the mediation, scheduling the mediation, and attending the mediation.

11. All statements made by the parties, attorneys, and other participants at or associated with the mediation shall be privileged and not reported, recorded, or placed into evidence, made known to the Court, or construed for any purposes as an admission. No party shall be bound by any statement made or action taken at the mediation conference unless an agreement is reached.

12. The automatic stay is modified, to the extent necessary, to allow the debtor[s] and creditor[s] to negotiate loan modification terms during the pendency of this case. The parties shall timely submit any agreed loan modifications to the Court for approval.

DONE AND ORDERED in Orlando, Florida, on April __, 2010.

_____
[NAME OF JUDGE]
United States Bankruptcy Judge

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA

In re _____ Case No. _____
Debtors(s) Chapter 13
_____

CONCLUSIVE REPORT TO THE COURT ON MEDIATION CONFERENCE

Pursuant to the Court's order, mediation in the above referenced case was held on the _____ day of _____, 20___. Mediation continued at that time and the parties resolved the matter without the necessity of a continued mediation.

The result of the conference is as follows:

_____ 1. A full and complete settlement was reached. The parties are submitting their agreement to their attorneys, and a final draft will be submitted for the Court's approval.

_____ 2. A partial settlement was reached. The parties are submitting their agreement to their attorneys, and a final draft will be submitted for the Court's approval. Some issues will require Court resolution.

_____ 3. The parties agree to reconvene to continue mediation.

_____ 4. The parties have impassed. All issues require Court intervention.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Mediation Report has been furnished by Electronic Notice or Regular U.S. Mail to:

Debtors, c/o Debtor's Counsel:
Debtor's Counsel:
Chapter 13 Trustee:
Creditor:
Creditor's Counsel:
On _____, 20___.

_____
BY: [Name]

EXHIBIT C

REPORTS OF PARTICIPANTS

The following statistics are provided by three experienced mediators, an experienced debtors counsel, and the Chapter 13 Trustee. It is evident that a successful modification mediation happens with experienced and well educated participants. The Chapter 13 Trustee is facilitating education programs so that this program can be more successful.

MEDIATOR #1 REPORT

Of the 21 mediations since July 28, 2010:

7 resulted in modifications during the first mediation
4 resulted in modifications after two mediations
2 resulted in modifications after the first mediation without the need for a second mediation
5 have attended the first mediation and the second mediation has been scheduled.

Of those, I expect all of them to result in modifications

1 is proceeding to a third mediation
1 impassed but this doesn't count, as the case was dismissed the previous night, and we realized it during mediation
1 the debtor failed to show up and it is now being rescheduled

On average, the mediations are taking the full two hours, mostly due to time spent finalizing the agreement and getting all parties to sign and return the documents.

EXHIBIT D

On average, what is being offered is:

2% fixed for five years;
1% increase per year thereafter until the max of 4.25%-4.375%
Some are requiring temporary payments, and some will proceed straight to a permanent modification.

I have seen where the arrearages are held in forbearance with 0% interest. This is paid as a balloon at the end of term.

EXHIBIT D

MEDIATOR #2 REPORT

I have conducted four bankruptcy mediations so far. Two continued but it looks as though they will be resolved without returning to mediation; and two modifications completed and signed at mediation. In those mediations, there were several lender representatives very high in authority on the phone or in person, with agreements to low fixed rates. I will keep you posted, but all involved provided very positive comments with the process and results.

MEDIATOR #3 REPORT

The first mediation was done on June 30, 2010.

Of the ten completed:

6 were offered modifications, and accepted.
5 have signed off, and
1 is the principal reduction. We are waiting for the documents.
3 were offered privates but rejected by Debtors (DTI too low but still offered deal).

2 was not offered (DTI too low).

Rates went from:

10.6 to 4.875
6.5 to 3.875
8.5 to 3
8.4 to 2 (cap at 4)
6.38 to 3.875

EXHIBIT D

DEBTORS COUNSEL REPORT

Number mediations requested: 18
1 Dismissed
1 Not modified (insufficient income)
Number mediated: 12
Number contested: 2
Number continued – likely settle: 4
Number modified: 7 (Case 7 has not mediated yet – set for next week)

Case 1: Capitalize arrears; 4.875% fixed; 480 months; 25% PITIA: Gross
Case 2: Forbear arrears at 0%; 5% fixed; 283 months; balloon at 5%
Case 3: Capitalize arrears; 3.25%-60 months/1% increase per year until 4.5% fixed; 31% PITIA: Gross
Case 4: Capitalize arrears; 4.375% fixed; 360 months; 23% PITIA: Gross
Case 5: Capitalize arrears; 2%-60 months/1% increase per year until 4.375% fixed late charges waived; 420 months; 31% PITIA: Gross
Case 6: Trial Plan – HAMP mod with 31% (exact terms have not been Disclosed yet)
Case 7: Forbear arrears at 0%; 5.5% fixed; 360 months; principle reduction-$72,677; 21% PITIA: Gross

EXHIBIT D

CHAPTER 13 REPORT

24 have successfully modified their loans.
4 converted to Chapter 7
9 impasse
8 were dismissed for failure to make payments
1 withdrew motion
120 are still in the mediation process

The month of October has been a busy month for mediations – 44 scheduled (7 modified, 2 impasse and 35 pending).

EXHIBIT D

Statement of

The Honorable Sheldon Whitehouse

United States Senator
Rhode Island
October 28, 2010

Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts
Hearing on "Mandatory Mediation Programs: Can Bankruptcy Courts Help End the Foreclosure Crisis?"
October 28, 2010
Statement of Senator Sheldon Whitehouse

The hearing will come to order. Before we begin, I would like to thank Rhode Island Housing for hosting this official field hearing of the United States Senate Judiciary Subcommittee on Administrative Oversight and the Courts, a panel which I am privileged to chair. I'd also like to welcome the Rhode Island Housing staffers and other housing advocates who are in attendance today.

Last summer, I convened a hearing in this room to examine the foreclosure crisis in Rhode Island and to discuss a proposal to give bankruptcy court judges the power to reduce the principal on primary residence mortgages, the same way they can for most other loans including those on vacation homes, cars, and boats. This has long appeared to be the most efficient and least costly way to keep families in their homes, but the large banks have fought against it with their full lobbying might and we have been unable to overcome filibusters in the Senate.

Over the year since our hearing on bankruptcy modifications, the foreclosure crisis has not relented in Rhode Island or across the nation. The Administration's Home Affordable Modification Program, while well-intentioned, has not succeeded in producing enough modifications to stem the tide of foreclosures. We've known for some time that the large loan servicers play all sorts of games to slow down and derail the modification process and earlier this month learned that they are playing fast and loose with the foreclosure process itself.

A process that may leave a family homeless has been relegated to "foreclosure mills" and "robo-signers." Forget a modification, many of these servicers aren't even providing a human being to confirm that the foreclosure is warranted and the documents are in order.

As a result of the securitization of home mortgages, the relationship between homeowner and lender was fractured and the foreclosure system became dysfunctional. Decisions that make no economic sense overall get made, because the fracturing has created perverse incentives within the system, because it's virtually impossible for a homeowner to find a human with authority to

resolve their problem, and from sheer remorseless bureaucratic inertia.

Ann Sabbagh is here, a realtor who shared the suffering of numerous clients, and she memorably put the question this way: "why is it that the bank wants to foreclose on my home, throw me out, and sell it to someone who will pay LESS than I'm willing and able to pay right now?"

I have called on Fannie Mae, Freddie Mac, and the Federal Reserve to use their powers to institute a national foreclosure moratorium. I believe we should freeze foreclosures until the loan servicers can demonstrate that they have new systems in place to properly evaluate homeowners for modifications and, if modification is not financially possible, to provide homeowners with an orderly, humane, and logical foreclosure process. I hope that my colleagues in Washington will consider this when we return after the midterm elections.

This subcommittee has jurisdiction over the courts, and today we will examine whether court-supervised mediations can add common sense to an out-of-control foreclosure process and perhaps help families stay in their homes. The Bankruptcy Court in Rhode Island is one of only a handful of bankruptcy courts nationwide that offers pre-trial foreclosure mediation. Today we will hear from Judge Martin Glenn of the Bankruptcy Court in the Southern District of New York, one of the creators of the first such mediation program, and John Rao and Chris Lefebvre, two attorneys familiar with the Rhode Island program.

For families in Rhode Island and across the country snarled in the foreclosure nightmare, it is vital that we find a way to address the growing crisis. Today's hearing will help us determine whether bankruptcy mediation programs can serve that purpose, and whether federal legislation might be useful in replicating the Rhode Island and New York programs nationwide.

Before I conclude my opening remarks, I want to acknowledge the hard work of my senior Senator, Jack Reed, in preserving and creating affordable housing in Rhode Island and across the country. It is a privilege to work alongside such a champion of accessible housing and fair mortgage practices. Senator Reed plans to make a statement later in the hearing, and when he arrives, we'll pause the testimony to hear from him.

I will now introduce our distinguished panel of witnesses.

Robert Cardullo is the father of three young children and a homeowner from Johnston, Rhode Island. Mr. Cardullo will tell the story of his efforts to receive a mortgage modification, an ongoing process which began back in February of 2009.

Larry Britt, a teacher and homeowner from Riverside, Rhode Island, will discuss his struggles over the past 19 months in getting a mortgage modification from his loan servicer.

Judge Martin Glenn has been a Bankruptcy Judge in the Southern District of New York since 2006. Prior to his appointment to the bench, Judge Glenn practiced law at O'Melveny & Myers in Los Angles and New York. He has a B.S. from Cornell University and a J.D. from Rutgers Law School.

John Rao of Newport is an attorney with the National Consumer Law Center in Boston, where he focuses on consumer credit and bankruptcy issues. The National Consumer Law Center performs research and trains attorneys who serve low income consumers. Mr. Rao was appointed by Chief Justice Roberts to serve on the Federal Judicial Conference Advisory Committee on Bankruptcy Rules. Mr. Rao earned his degrees from Boston University and the University of California Hastings College of Law.

Chris Lefebvre practices family, bankruptcy and consumer protection law in Pawtucket, Rhode Island and is a member of the debtor/creditor committee of the Rhode Island Bar Association. Mr. Lefebvre has a B.S. from Boston College and a J.D. from Suffolk University Law School.