

**United States House of Representatives
Committee on the Judiciary
"Foreclosed Justice: Causes and Effects of the Foreclosure Crisis — Part II"
December 15, 2010
Statement of Senator Sheldon Whitehouse**

Chairman Conyers, Ranking Member Smith, Members of the Committee, thank you for the opportunity to testify here today. Sadly, the foreclosure crisis remains unabated in my state of Rhode Island and many other parts of the country. I very much appreciate you convening this hearing in the final days of the 111th Congress and look forward to working with you on legislation next year.

In my capacity as Chairman of the Senate Judiciary Subcommittee on Administrative Oversight and the Courts, I have chaired several hearings on the foreclosure crisis, most recently in late October. At that hearing, a constituent of mine – Larry Britt from Riverside, Rhode Island – told a story that is probably familiar to this Committee. Larry had applied with his mortgage servicer for a mortgage modification under the Obama Administration’s Home Affordable Modification Program (HAMP), and shepherding that request had become for him a full-time job. Time and again, over a nineteen-month period, the mortgage servicer asked Larry to submit and resubmit and resubmit document after document. Despite Fed Ex and facsimile records proving his submissions, the bank consistently alleged that Larry failed to send in necessary paperwork. When he tried to clear things up over the phone, he was punted from department to department, never once during his many calls reaching anyone who appeared to have any authority to make a decision.

After nineteen months of this paperwork nightmare, the bank finally approved Larry for a mortgage modification. The modification papers came to him via Fed Ex just one day after a bank representative had told him that he didn’t qualify for a modification. While cautiously optimistic, he still isn’t certain that the bank won’t change its mind yet again.

Larry’s story, and thousands more like it, get to a story of bureaucracy run amok at the very heart of the foreclosure crisis: mortgage companies unwilling or unable to efficiently evaluate modification requests; homeowners and mortgage investors in limbo suffering the consequences. When the paperwork run-around leads to foreclosure, a family loses its home, neighbors lose property value, and communities lose tax revenue. Investors, who purchased the right to the mortgage payments, may lose out too. Often the foreclosure is not necessary. I met with a group of Rhode Island realtors and every one had had a short sale nailed down, only to have the deal interrupted by a foreclosure notice, with a worse outcome for the homeowner, and the investors, from a worse price in foreclosure. In the age of securitization, the servicer merely serves as processing agent and may not work in the interests of the people who actually own the mortgage, and in the age of corporate bureaucracy, the left hand may not know what the right hand is doing.

While the program was well-intentioned, the poor performance of the HAMP has demonstrated that cash incentives alone won't get the banks to operate in good faith: a different mechanism is needed to ensure compliance.

In the past, I had focused on proposals 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. While I have long believed this to be the most efficient and least costly way to keep families in their homes, and many observers agree, the large banks have fought against it with their full lobbying might. Despite House passage of "cramdown" legislation in March of 2009, I'm sorry to say we have been unable to overcome filibusters in the Senate.

Given these political realities, I decided to add to the focus of my subcommittee a different approach, already underway in several bankruptcy courts.

Under programs adopted in bankruptcy courts in Rhode Island, New York, Florida, and Vermont, the court may order the homeowner and mortgage servicer to negotiate in good faith a settlement that is preferable to foreclosure for all parties. While judges have the ability under the programs to appoint a formal mediator, it is not necessary in the vast majority of cases. For most homeowners, the mere chance to speak directly with their mortgage company is enough to lead to an agreement.

Under the bankruptcy loss mitigation programs, the power of the court to compel good faith talks breaks through the bureaucratic maze of the voluntary modification programs. The court does not have the power to force a settlement, but it can force the parties to try to talk to each other, and that can avoid a costly foreclosure that will benefit no one.

The programs in Rhode Island and the other states were designed with the input of creditors and homeowners and have been successful to date. I believe that the courts have appropriately implemented these programs under their Section 105(d) authority to convene pre-trial status conferences. Unfortunately, one servicer has challenged the authority of the bankruptcy court in Rhode Island to require it to negotiate under the program. I have no doubt that the court's authority will be upheld eventually, but it could be years of appeals before the parties have a final answer. In the meantime, other judges around the country may be reluctant to adopt a program that may be challenged.

I have proposed a legislative fix that would clarify that bankruptcy courts can run foreclosure loss mitigation programs, and make the parties talk with each other before someone's home gets taken away. I hope that this committee will help me to pass it in to law early next year. The American people are tired of taxpayer bailouts for banks, and we owe it to them to support a sensible program that comes with zero cost to the taxpayer. Bankruptcy will not be the answer for every homeowner, but the loss mitigation programs can help homeowners like Larry cut short a stalled application process and finally get an answer to their modification request. In Rhode Island, bankruptcy court loss mitigation has already saved 100 homes, and it has the potential to help save thousands more across the country. I believe that makes it worth supporting.

Once again, thank you for the opportunity to take part in this hearing, and I commend your good work.