Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
"Foreclosure Mediation Programs: Can Bankruptcy Courts Limit Homeowner And Investor Losses?"
Senate Judiciary Committee
February 1, 2011

I thank Senator Whitehouse for chairing today's hearing. Our Nation's foreclosure crisis is severe and continuing. Millions of Americans have lost their homes or are in the foreclosure process. This crisis has devastated individual families, entire communities, and our economy. Today's hearing will examine the way in which some bankruptcy judges are trying to ensure fairness in their courts by demanding accuracy in the documentation used in foreclosures. Last Congress, Senator Whitehouse took one of our subcommittees to Rhode Island to discuss innovations in the bankruptcy courts there related to the foreclosure crisis. I am glad he has continued to focus on this important issue with today's hearing.

Several bankruptcy courts have implemented loss mitigation programs that are intended to alleviate the losses to both homeowners and lenders as the result of foreclosure. These programs facilitate mediation and communication between the parties. Bankruptcy judges in Rhode Island and New York have developed mediation programs to encourage a voluntary resolution between a lender and homeowner, and in lieu of foreclosure. These programs are within the bankruptcy court's statutory and inherent authority. The Rhode Island bankruptcy court just recently upheld that authority in rejecting a litigation challenge to the court's loss mitigation program. Nonetheless, Senator Whitehouse has introduced legislation to clarify and reinforce this authority for the bankruptcy courts.

From what I understand, these programs require the good faith participation of the homeowner and creditor in a meeting to discuss whether a mutually beneficial agreement can be reached in lieu of foreclosure. The programs do not compel any preordained result. And though results so far are relatively modest, I understand that these programs are working to the benefit of homeowners and lenders.

These loss mitigation programs also serve to ensure that the documentation underlying a foreclosure is accurate and truthful. Proponents of these programs note that they promote transparency and accountability between homeowner and creditor in the foreclosure process. This is a good thing in light of the many judicial opinions from both state and bankruptcy courts that have highlighted in great detail severe evidentiary problems related to foreclosures.

The courts are not alone in their concerns about faulty foreclosure documentation. Former Senator Ted Kaufman, now Chairman of the Congressional Oversight Panel, discussed in his November 2010 Oversight Report the very serious implications that widespread documentation problems hold for homeowners in foreclosure, the broader housing market, and our economic recovery. And many attorneys and scholars have cautioned that pervasive foreclosure documentation problems pose the threat of significant injustice for homeowners and potential widespread fraud on the bankruptcy and state courts.

I share the concerns Senator Kaufman and others have expressed. Where an unprecedented number of individuals and families are experiencing such profound upheaval, at the very least they deserve a fair and lawful foreclosure process. And where the bankruptcy courts can help alleviate these problems and promote fairness and the chance at a mutually beneficial resolution between a homeowner and a lender, we should be encouraging and supporting them.

In addition to the bankruptcy courts in New York and Rhode Island that are taking these positive steps, I want to commend the Vermont legislature, Vermont's Attorney General, and Vermont Legal Aid for their work in drafting and enacting state legislation to implement a foreclosure mediation program. The Vermont legislature acted quickly on behalf of Vermonters, and I am proud of what they accomplished.

I also want to recognize Chief Judge Colleen Brown of the Vermont Bankruptcy Court for the way in which she has adapted her court's procedures for those who enter bankruptcy while involved in Vermont's foreclosure mediation program. In addition to supporting Vermont's foreclosure mediation process, she has been responsive to foreclosure documentation problems and has worked to ensure that Vermonters are treated fairly and honestly, and that all parties are accountable for the representations they make in court.

I am encouraged to see the Federal Bankruptcy Courts working to ensure that there is not a fraud on the courts. These "best practices" deserve the praise of Senators on both sides of the aisle. I also hope that, where appropriate, the United States Bankruptcy Trustee encourages and promotes this sensible approach, along with others to ensure that fraud is not committee in our bankruptcy courts. I look forward to receiving the testimony of the witnesses before the Committee today and I thank Senator Whitehouse for his commitment to this issue.

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