

IN THE CIRCUIT COURT OF LINCOLN COUNTY, WEST VIRGINIA

JACKIE LUCAS, JANICE LUCAS, JACK OVERBAUGH, CHARLOTTE OVERBAUGH, DALE MICHAELSON, PANSY MICHAELSON, and ANGELA KENNEDY, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CIVIL ACTION NO. 03-C-2

FAIRBANKS CAPITAL CORP., a corporation, and R. VANCE GOLDEN, III,

Defendants.

COMPLAINT

INTRODUCTION

This action arises out the practice known as predatory lending,¹ whereby the home-equity lenders and their servicers pursue unsophisticated borrowers in exploitive home equity loans, and charge illegal and exploitive fees, refuse to credit payments, and then pursue foreclosure.

Summary of Fairbanks Illegal Practices

Acquisition of Account and Late Fees. Defendant Fairbanks Capital Corp. ("Fairbanks") has a consistent method of operation designed to extract illegal charges and reap profits from forced foreclosure. This highly sophisticated operation begins with Fairbanks acquiring the ownership of or servicing rights to a home secured loans on property in which the consumers have a high equity position. In the first month, Fairbanks receives and deposits the consumer's payments, but does not

¹ See HUD-TREASURY NATIONAL PREDATORY LENDING TASK FORCE, JOINT REPORT: CURBING PREDATORY HOME MORTGAGE LENDING, (visited September 21, 2001) <<http://www.hud.gov/library/bookshelf18/pressrel/pr00-142.html>>.

post them promptly or adds an unpermissible fee. Once an unpermissible fee is then posted to the account, even if it is disputed by the consumer, the loan is “in default” under Fairbanks’ practices. In the second month or a subsequent month, Fairbanks receives and deposits the mortgagor’s payment, but then (1) posts it as a partial payment because of the late fees, or (2) does not post it; instead the payment is held in a “suspense account.” These practices are then repeated several times over the ensuing months.

Adding of illegal charges. Fairbanks, over the ensuing months adds impermissible fees, such as attorneys fees or inspection fees. These charges are illegal under West Virginia law: West Virginia law makes clear that no charges may be added that are not authorized by Chapter 46A. See West Virginia Code section 46A-2-115. In addition, expressly prohibited are collection costs and attorneys fees. See West Virginia Code sections 46A-2-127(g) & -128(c). Thus it is very clear that the types of fees added by defendants, referred to as “attorneys advances,” “property preservation fees,” “speed pay fees,” “F/C and B/R expenses” are illegal. In addition, the delay of posting a payment in order to exact a late fee is illegal.

Threatened foreclosure and more charges. Next, Fairbanks puts the foreclosure wheels in motion. The company contacts the consumer and claims that hundreds or thousands (usually \$2,000 to \$4,000) must be paid immediately or the consumer’s home will be sold. Many victims pay the extortionate charges to save their homes, but the fraudulent pattern simply begins again in the next payment cycle. During the period of the pre-foreclosure dispute, Fairbanks illegally adds anywhere from hundreds to a couple thousand dollars to the actual amount due. Fairbanks adds amounts never contemplated by the original loan documents and illegal under state law. When the consumer requests a written accounting of her or his payments and charges, Fairbanks eventually sends the victim a document called an “activity statement.” These statements are incomprehensible and even Fairbanks’ own employees explain them differently each time.

New demands; forbearance agreements. Regardless of how much money the victimized consumer sends to Fairbanks, the outcome is almost always the same. Fairbanks cashes the checks and then makes new and additional demands under threat of foreclosure. Well into the fraud in some cases, Fairbanks mails a “forbearance agreement” to the victimized consumer. That document offers to allow the consumer to “pay late fees and other fees” under an “extended payment plan.” Included in the “plan” is a paragraph that absolves Fairbanks of any and all claims that the consumer may have “now or in the future.” Many unsophisticated homeowners - under duress and desperate to save the homes that they, their children, or even their elderly parents reside in - sign the adhesive document. Often, within days Fairbanks declares the “forbearance agreement” to be in default, even though it is not.

Foreclosure sale. Absent competent legal representation, the consumer’s property is sold in a non-judicial sale process. Fairbanks or their associates are the only bidders on the property, and all of the equity ultimately accrues to Fairbanks and their “REO” (Real Estate Owned) partners. The numbers speak for themselves; states that allow non-judicial foreclosures like West Virginia are the prime hunting grounds for Fairbanks. Upon foreclosure, Fairbanks collects ridiculously exorbitant legal fees, “property-preservation” fees, late-fees, broker fees, appraisal fees, “pre-payment-penalty” fees, and any other illegal fees they can invent to help assure that in excess of the entire amount of the mortgagor’s equity is taken. Fairbanks then often launders the property through a series of REO portfolios that they own or control, in an effort to create the appearance that Fairbanks actually “lost thousands-of dollars” on the foreclosure. Fairbanks, then, in states that allow it, bills the victimized homeowner with a “deficiency.”

Fairbanks is now the third largest “sub-prime-mortgage servicer” in the nation, having taken over the accounts of notorious predatory lenders, Conti Mortgage, IMC and EquiCredit.

Participating Foreclosure Attorney

In West Virginia and other non-judicial foreclosure states, Fairbanks has a foreclosure attorney who participates in the scheme. In West Virginia, this is the defendant R. Vance Golden, III. The participating foreclosure attorney does not review the account to determine if illegal charges have been added, but simply takes Fairbanks demand of amount due, demands it from the homeowner, and if the homeowner does not pay, forecloses and take the consumer's home. In those few cases when the consumer has legal representation that points out the illegal fees, the foreclosure attorney, and Golden in particular, backs off temporarily, but otherwise continues to pursue the illegal practices.

PARTIES

1. (a) The plaintiffs Jackie Lucas and Janice Lucas are residents of Green Shoals Road, Harts, Lincoln County, West Virginia and all damages accrued to them in this county. They are unsophisticated in financial matters.

(b) The plaintiffs, Jack and Charlotte Overbaugh, are residents of Kanawha County, West Virginia. They are unsophisticated in financial matters.

(c) The plaintiffs, Dale and Pansy Michaelson, are residents of Kanawha County, West Virginia. They are unsophisticated in financial matters.

(d) The plaintiff, Angela Kennedy, is a resident of Harrison County, West Virginia. She is single and disabled from a workplace injury. She is unsophisticated in financial matters.

2. The defendant Fairbanks Capital Corp. (hereinafter "Fairbanks") is a corporation licensed to do business in West Virginia with its principal place of business at 3815 S. West Temple, P.O. Box 65250, Salt Lake City, Utah 84165-0250, and is responsible for all collection practices alleged.

3. The defendant R. Vance Golden, III is a West Virginia resident doing business at 543 Fifth Street, Parkersburg, West Virginia 26101 and collecting for the defendant Fairbanks.

FACTUAL ALLEGATIONS

A. Plaintiffs Lucas

4. In or about April, 2002, the servicing of the plaintiffs Lucas's home equity loan was transferred from Equicredit to the defendant Fairbanks.

5. The Lucas made their payments on time. Because certain payments were not credited timely and charges were added, the defendants routinely began charging plaintiffs bogus late fees.

6. In the ensuing months, the defendant Fairbanks charged the Lucas a range of fees not authorized by agreement and law, specifically attorneys fees, property preservation fees, and other illegal fees, and collected those in lieu of crediting payments. E.g.,

(a)	2/4/02	5.00	suspense
(b)	3/8/02	10.00	suspense
(c)	4/10/02	11.35	property preservation
(d)	5/30/02	10.35	property preservation
(e)	6/4/02	11.35	property preservation
(f)	6/5/02	45.00	suspense
(g)	6/5/02	15.00	speed pay fee
(h)	7/30/02	455.10	suspense
(i)	8/12/02	350.00	attorney advances
(j)	8/16/02	10.00	property preservation
(k)	9/3/02	1,224.01	suspense
(l)	9/3/02	107.09	suspense
(m)	9/20/02	10.35	property preservation
(n)	11/20/02	10.35	property preservation

(o) 12/4/02 10.35 property preservation

7. In addition, the defendant charged hundreds in late fees that would not have been charged if defendant had regularly credited their payments.

(a) On July 11, 2002, defendant told the Lucases by telephone that they had amounts due, that they were in foreclosure, that significant lawyers' fees were owned, and they had to wire \$1,261 by July 30, 2002. On August 31, 2002, plaintiffs forwarded the amount of \$1,266.11 and called back to verify the wiring.

(b) On July 24, 2002, the defendant Fairbanks returned the Lucas' monthly payments of \$861.01 saying it was less than the full amount.

(c) On August 1, 2002, the defendant Fairbanks sent a DEMAND LETTER - "YOU COULD LOSE YOUR HOUSE" demanding \$1,357.17 and stating that they had to pay all late charges, attorneys fees, trustees fees, expenses or foreclosure proceedings would be instituted.

(d) On September 18, 2002, the defendant Fairbanks sent a DEMAND LETTER - "YOU COULD LOSE YOUR HOUSE" demanding \$1,414.92 and stating that they had to pay all late charges, attorneys fees, trustees fees, expenses or foreclosure proceedings would be instituted.

(e) On August 31, 2002, Lucas made the payment of \$1,266.11 plus a service charge of \$12.95.

(f) On October 8, 2002, the defendant Fairbanks sent a DEMAND LETTER - "YOU COULD LOSE YOUR HOUSE" demanding \$1,430.27 and stating that they had to pay all late charges, attorneys fees, trustees fees, expenses or foreclosure proceedings would be instituted.

8. The fees charged and collected were illegal - they are not authorized by agreement and law.

B. Plaintiffs Overbaugh

9. In or about January 1999, the plaintiffs Overbaugh were solicited by phone by a broker indicating to the plaintiffs that they would lower the payments. On February 25, 1999, Crystal Mortgage came to Overbaughs' residence and had them to sign a series of papers without any opportunity to review them, and without providing them any copies. The loan contract was assigned to Conti Mortgage for servicing in or about July, 2000.

10. Beginning August 1, 2000, the defendant Fairbanks took assignment and servicing rights involving the Overbaughs' loan. The notice of assignment was received a day or two after the August payment was mailed.

11. In the ensuing months, the defendant Fairbanks charged the Overbaughs a range of fees not authorized by agreement and law, specifically attorneys fees, property inspection fees, and other illegal fees, and collected those in lieu of crediting payments. E.g.,

(a) On January 5, 2002, the defendant added \$97.35 payment into an account labeled "suspense."

(b) On April 4, 2002, \$9.85 for Misc F/C and B/R Expenses.

(c) On May 7, 2002, \$9.85 for Misc F/C and B/R Expenses.

(d) On July 11, 2002, \$730 payment - "suspense".

(e) Late charges were added at different times on account of the defendants not having credited the money to plaintiffs' account.

12. The Overbaughs' check was mailed on August 2, 2002, in the amount of \$500 and was deposited by defendant Fairbanks and thereafter that was returned to the plaintiff stating that the account was in default status and that they would not accept the check.

13. (a) On August 12th, the defendant's agent, Golden, forwarded to the plaintiff a demand for payment insisting \$4,016.42, stating that this includes \$3,610.60 in payments, \$280.00 in late fees and \$125.82 in miscellaneous fees. In fact, prior payments had gone to illegal fees

(b) On August 28, 2002, defendant Fairbanks telephoned the Overbaughs at their home and ask them if they wanted to redeem the house. Plaintiff, Jack Overbaugh, explained that he did not owe \$4,000 and the defendant merely stated that they needed to move out of the house by September 24, 2002.

(c) In response thereto, on the 29th day of August, 2002, the Overbaughs requested from both defendant Fairbanks and its agent, Golden, a copy of the account records and directing all further communications in the account to plaintiffs' counsel.

(d) Each of the defendants received the correspondence on September 3, 2002.

14. (a) Notwithstanding the receipt of the correspondence, defendant Fairbanks sent a representative to plaintiffs' house on September 9, 2002, and left a message that plaintiff call Fairbanks Capital Corporation seeking to collect a debt.

(b) On September 27, 2002, the plaintiff received another call from defendant Fairbanks indicating that they owed \$4,000 prior to the July payment of \$730. Plaintiff explained that he did not owe \$4,000. Defendant stated that he needed to pay the \$4,000 plus payments of June, July, August and September. The plaintiff again directed her to her counsel and she hung up the phone. Defendant's agent refused to provide her name.

(c) The defendant Fairbanks forwarded plaintiffs a copy of the payment history but refused to direct communications to plaintiffs' counsel.

C. Plaintiffs Michaelson

15. On April 1, 2002, the Michaelsons' loan servicing was transferred from Equicredit to defendant Fairbanks.

16. During the ensuing months, the defendant charged the plaintiffs Michaelsons the following fees not authorized by agreement and law:

(a) 4/24/02 - \$9/85 F/C & B/R Expenses;

- (b) 5/02/02 - \$5.00 Speed pay fee;
- (c) 5/02/02 - \$9.85 F/C & B/R Expenses;
- (d) 5/20/02 - \$5.00 late fee;
- (e) 6/05/02 - \$10.00 property preservation fee;
- (f) 6/7/02 - \$10.00 property preservation fee;
- (g) 6/18/02 - \$5.00 late charge;
- (h) 6/27/02 - \$35.00 late charge;
- (i) 6/27/02 - \$177.54 interest on advances;
- (j) 7/1/02 - \$164.15 payment - suspense;
- (k) 7/1/02 - \$15.00 speed pay fee;
- (l) 7/1/02 - \$9.85 Misc F/C & B/R Expense;
- (m) 7/8/02 - \$114.45 payment - suspense;
- (n) 7/8/02 - \$736.21 payment - suspense;
- (o) 7/8/02 - \$9.85 - Demand Assessment;
- (p) 7/8/02 - \$15.00 - speed pay fee;
- (q) 7/8/02 - \$7.50 - speed pay fee;
- (r) 7/9/02 - \$100 - attorney advances;
- (s) 7/12/02 - \$641 payment - suspense;
- (t) 7/12/02 - \$15.00 - speed pay fee;
- (u) 7/29/02 - \$10.00 inspection;
- (v) 8/7/02 - \$10.00 inspection;
- (w) 10/11/02 - \$10.00 inspection.

17. During this time period, defendant Fairbanks did not timely credit payments to their account but rather took them for fees.

18. A payoff quote November 22, 2002, seeks \$1,437.90 in “Unpaid Other Fees,” \$129.55 in “Funds Advanced on Borrower’s Behalf,” \$6.00 in “Recording Fee,” \$1,100 in “Estimated Legal Fees,” and \$12.44 in “Interest on Advances.”

D. Plaintiff Kennedy

19. The Plaintiff entered into a home equity loan with North American Mortgage Company on October 26, 1998. The servicing rights to the loan were immediately assigned to Conti Mortgage.

20. Thereafter, the servicing rights to the Plaintiff’s loan were assigned to Fairbanks in or around July or August, 2000. Kennedy never received a Notice of Assignment of Servicing Rights and was not aware that her servicing rights had been assigned until she received a “Mortgage Loan Statement” from Fairbanks dated August 17, 2000, but requiring payment due by July 1, 2000.

21. Immediately after taking over servicing of the Plaintiff’s loan, Fairbanks began assessing illegal fees and charges. E.g.,

(a) On statements Fairbanks asserted that the Plaintiff had a “New Unapplied Balance,” which at first was \$50.94 and fluctuated inexplicably between \$0 and \$212.06.

(b) Fairbanks immediately started assessing “Total Late Charges Due” balance, which did not relate to any late charges actually do. This amount started at \$39.06 and fluctuated inexplicably between \$37.18 and \$108.30.

(c) By letter dated October 22, 2000, Fairbanks asserted the Plaintiff owed a Corporate Advance Balance of \$117.10.

22. Fairbanks refused to timely and appropriately credit the Plaintiff’s account for payments made. E.g.,

(a) On March 6, 2002, the Plaintiff Kennedy submitted a separate check for \$64.30, which was to pay off the Total Late Charges Due balance asserted by Fairbanks. However,

the Total Late Charge Due balance was never credited after the payment was made.

(b) Kennedy would receive multiple statements in some months, and the statements were unclear as to the status of her account.

(c) In addition to the statements, Fairbanks would send Telewire or Western Union transmittals stating the Plaintiff's loan payments were late. Most often the grace period had not expired for the Plaintiff to make a payment without a late charge.

(d) Additionally the Plaintiff received frequent demand notices. As a result, in certain months the Plaintiff would received up to six different pieces of correspondence from Fairbanks, most of which was contradictory, confusing, and may or may not have represented the true nature of the Plaintiff's account.

23. (a) In or around September, 2002, the Plaintiff was unable to make her monthly payment.

(b) The Plaintiff received two statements dated October 11, 2002. The two statements provided different amounts owed for late charges and New Applied Balance.

(c) On or around October 31, 2002, the Plaintiff mailed in a payment for one month's payment plus \$10 late fee.

24. (a) In or around November, 2002, the Plaintiff received a letter from defendant Golden stating that she needed to tender approximately \$778 to reinstate her account or she would face foreclosure. This amount was false.

(b) After receiving the notice, the Plaintiff contacted Fairbanks and the representative from Fairbanks stated, "Throw away that letter [from the debt collection lawyer]. They work for us, and they don't know what they are talking about."

(c) The representative from Fairbanks proceeded to inform the Plaintiff that she actually owed approximately \$1400 to reinstate.

(d) Fairbank's agent stated that included in this amount was approximately \$450 in attorney's fees.

(e) Fairbank's agent told the Plaintiff that she must pay \$954 immediately and then make payments of \$386 for the next three months or face foreclosure.

E. Plaintiff Class

25. Plaintiffs bring this action on their own behalf and on behalf of all other similarly situated individuals, pursuant to Rule 23 of the *West Virginia Rules of Civil Procedure*. The class consists of all consumer borrowers whose loans were/are serviced by the defendant anytime after that date four years immediately preceding the filing of this action.

26. The requirements of Rule 23 are satisfied as follows:

- (a) The class is so numerous joinder of all members is impracticable;
- (b) There are questions of law and fact common to all members of the class; and
- (c) The named plaintiffs' claims are typical of those of the class as a whole.

27. The plaintiffs have displayed an interest in vindicating the rights of the class members, will fairly and adequately protect and represent the interests of the class, and are represented by skillful and knowledgeable counsel. The relief sought by the named plaintiffs will inure to the benefit of the class generally.

28. The defendants have acted or refused to act on grounds generally applicable to the entire class, thereby making final injunctive, declaratory and other relief appropriate for the class as a whole.

29. The defendants have charged illegal fees to all members of the class.

30. The defendants have foreclosed upon members of the class who did not pay illegal fees and against whom they were otherwise not entitled to foreclose.

COUNT I – BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

31. The plaintiffs incorporate paragraphs one through thirty by reference.

32. The Defendant Fairbanks has breached its duty of good faith and fair dealing implied every contract that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of their contract.

33. Defendant Fairbanks, as a matter of intentional and planned business practices, breaches its duty by:

- (a) refusing to timely credit to the consumers so as to create late fees and a deficiency and after creating a large deficiency, moving to foreclose on the consumer's home; and
- (b) assessing unauthorized charges;
- (c) illegally accelerating notes; and
- (d) pursuing foreclosure in lieu of other legal remedies.

WHEREFORE, plaintiffs on behalf of themselves and all others similarly situated, respectfully pray for the following relief:

(a) That the Court enter declaratory judgment that the defendants have breached their legal duty by adding fees to loans not authorized by agreement and law, by not properly crediting payments made, and by foreclosing on bogus amounts due;

(b) That the defendant Fairbanks be enjoined from pursuit of the illegal practices as alleged;

(c) That the defendant Fairbanks be enjoined from nonjudicial foreclosure in the State of West Virginia; that in order to initiate foreclosure it must first initiate civil action and demonstrate to the court (i) pursuit of alternative remedies of specific performance or judgment for a sum certain and collection thereon; (ii) a schedule of when payments were received and credited; and (iii) a listing of each charge added to the account, the date and justification therefor;

- (d) Actual and punitive damages; and
- (e) Attorney fees and such other relief as the Court may deem reasonable and just.

COUNT II – BREACH OF FIDUCIARY DUTY OF TRUSTEE

34. The plaintiffs incorporate paragraphs one through thirty by reference.

35. The plaintiffs allege that the defendant Golden as a trustee or substitute trustee owes a fiduciary duty to the borrowers and creditor and yet routinely pursues foreclosure without ascertaining that the amount claimed due by the creditor is in fact due.

36. The defendant Golden with knowledge that Fairbanks routinely pursues these practices, continues to pursue foreclosure on its behalf knowing that the amounts claimed due are not due and without reviewing account records prior to pursuing foreclosure.

WHEREFORE, plaintiffs on behalf of themselves and all others similarly situated, respectfully pray for the following relief:

- (a) That the Court enter declaratory judgment that the defendant Golden has breached his fiduciary duty as a trustee;
- (b) That the defendant Fairbanks be enjoined from pursuit of the illegal practices as alleged;
- (c) Actual and punitive damages; and
- (d) Attorney fees and such other relief as the Court may deem reasonable and just.

COUNT III – ILLEGAL PURSUIT OF FORFEITURE

37. The plaintiffs incorporate paragraphs one through thirty by reference.

38. The defendants as a matter of routine seek to pursue forfeiture of the equity of a borrower's home without pursuing remedies at law and for non existent or minor amounts due.

39. This procedure and practice is in violation of the basic principal of law which prohibits the pursuit of forfeiture only as a last resort.

WHEREFORE, plaintiffs on behalf of themselves and all others similarly situated pray for

declaratory relief that defendant Fairbanks may only pursue forfeiture and that the defendant Fairbanks be enjoined from nonjudicial foreclosure in the State of West Virginia; that in order to initiate foreclosure it must first initiate civil action and demonstrate to the court (i) pursuit of alternative remedies of specific performance or judgment for a sum certain and collection thereon; (ii) a schedule of when payments were received and credited; and (iii) a listing of each charge added to the account, the date and justification therefor.

COUNT IV – UNAUTHORIZED CHARGES

40. The plaintiffs incorporate paragraphs one through thirty by reference.

41. Defendant Fairbanks, in the course of attempting to collect an alleged claims from the plaintiff class routinely assesses additional charges that are not authorized by agreement or law, in violation of West Virginia Code sections 46A-2-127(g) & -128(c).

42. Defendant Fairbanks threatened to add fees and charges, in violation of West Virginia Code sections 46A-2-127(g) & -124(f).

WHEREFORE, plaintiffs on behalf of themselves and all others similarly situated, respectfully pray that the Court enter judgment in their favor and against the defendants as follows:

(a) The Court enter a declaratory judgment that defendant is charging unauthorized charges.

(b) Civil penalties of \$3,700 for each violation pursuant to West Virginia Code sections 46A-5-101(1) & -106.

(c) Attorney fees and such other relief as the Court may deem reasonable and just; and

COUNT V – ILLEGAL DEBT COLLECTION

43. The plaintiffs incorporate paragraphs one through thirty by reference.

44. The defendant refused to credit payments to the plaintiffs' account and then demanded monies that were not due.

45. The defendants employed unfair and unconscionable collection tactics in violation of

West Virginia code section 46A-2-127(d).

WHEREFORE, plaintiffs on behalf of themselves and all others similarly situated, respectfully pray for judgment against the defendant:

(a) The Court enter a declaratory judgment that defendant is charging unauthorized charges.

(b) Civil penalties of \$3,700 for each violation pursuant to West Virginia Code sections 46A-5-101(1) & 106.

(c) Attorney fees and such other relief as the Court may deem reasonable and just; and

THE PLAINTIFFS DEMAND TRIAL BY JURY ON ALL ISSUES SO TRIABLE.

**JACKIE LUCAS, JANICE LUCAS,
JACK OVERBAUGH and
CHARLOTTE OVERBAUGH,
DALE MICHAELSON, PANSY
MICHAELSON, and ANGELA
KENNEDY, individually and on behalf of
all others similarly situated,
By Counsel.**

Daniel F. Hedges (State Bar ID No. 1660)
Bren J. Pomponio (State Bar ID No. 7774)
Mountain State Justice, Inc.
922 Quarrier St., Ste. 525
Charleston, WV 25301
(304) 344-3144
(304) 344-3145 (fax)
COUNSEL FOR PLAINTIFFS OVERBAUGH
AND KENNEDY

William W. Pepper (State Bar ID No. 2857)
Daniel F. Hedges (State Bar ID No. 1660)
8 Hale Street
Charleston, WV 25301
(304) 346-0361
COUNSEL FOR PLAINTIFFS LUCAS
AND MICHAELSON