

Fairbanks Reaches Settlement with FTC and Private Class

Fairbanks Capital recently has undergone intense media scrutiny of its mortgage servicing practices. Faced with numerous individual and class lawsuits and FTC and HUD enforcement actions, Fairbanks has entered into a global settlement, with a private settlement agreement and FTC Order negotiated contemporaneously and cooperatively.¹ *Curry v. Fairbanks Capital Corp.*, filed in the District of Massachusetts, consolidates and settles 37 separate lawsuits, and the FTC consent order was filed in a related action in the same court.²

Settlement Class Description and Scope of Release

The opt-out class consists of all persons with loans serviced by Fairbanks between January 1, 1999 and December 10, 2003 who:

- Were in default or treated as being in default by Fairbanks and incurred or were assessed late fees or default-related fees, including “corporate advances”;
- Were affected by default-related conduct;
- Incurred or were assessed certain prepayment penalties in violation of law or contract; or
- Were otherwise affected, or whose loans were otherwise affected, by one of the “Covered Practices.”³

The private class settlement releases class members’ claims and defenses relating to (a) the transactions alleged in the Consolidated Class Action Complaint; and (b) the acts or omissions of Fairbanks or of any Fairbanks-related party in connection with the servicing of class members’ loans. However, all class members who benefit under the settlement may pursue “reserved claims and defenses.” Under this exception to the release, class members are permitted to assert:

- Any claims or defenses, either affirmatively or defensively, in an effort to defeat any pending or future foreclosure action (whether judicial or non-judicial).⁴

¹ The Class Settlement provides: “This Settlement and the FTC Agreement are intended to jointly comprise a global settlement providing for consumer redress throughout the United States. The two settlements were negotiated simultaneously, and are inextricably intertwined.”

² NCLC is co-counsel to the plaintiff class in *Curry v. Fairbanks Capital Corp.* The FTC Order was filed on November 12, 2003, and the private class Settlement Agreement was filed on November 14, 2003. Copies of the Consolidated Complaint, Settlement Agreement and Release, FTC Order, and related documents are available on the NCLC website at www.nclc.org.

³ “Covered Practices” include: a) assessment of excess or improper force-placed hazard insurance premiums; b) payment or assessment of property tax penalties or excess interest on property taxes despite a valid and timely paid escrow account maintained by Fairbanks to cover property tax obligations; c) assessment of broker’s price opinion charges and/or inspection fees for work that was not completed; d) assessment of interest at the time of loan payoffs that was not then due; or e) assessment of interest due on corporate advances on the basis of improper rounding.

- Any claim arising from alleged violations of RESPA, 11 U.S.C. § 2605, but only as to “requests” made after December 10, 2003.

There are several other substantive limits on the release. Since the release only covers liabilities related to Fairbanks’ servicing activities, and no party other than Fairbanks is released for its own conduct, claims relating to the origination of mortgage loans will not be released.

\$47 Million Settlement Includes \$35 Million Redress Fund

The settlements require Fairbanks to provide approximately \$47 million in monetary relief to class members, falling into three categories. First, Fairbanks will fund a \$35 million redress fund that the FTC will administer. Class members must submit a claim to get paid out of this fund. Each consumer’s payment will be calibrated to the amount of fees and charges paid by or assessed to that borrower. The entire \$35 million redress fund will be paid out to consumers on a *pro rata* basis based upon the number of claims filed; no part of the fund will revert to Fairbanks.⁵

\$5 Million Foreclosure Redress Fund

Fairbanks will fund a \$5 million redress fund devoted to consumers who allege they lost their homes because of a wrongful foreclosure.⁶ The amount received will depend on the number of claims submitted. As stated on the Claim Form, class members who believe they have substantial losses from an improper foreclosure may wish to opt out of the settlement. No part of this fund will revert to Fairbanks.

Reverse and Reimburse Program

Fairbanks will reimburse in full or reverse certain charges outstanding on a borrower’s account. Reimbursement will be in cash whether the loan is still serviced by Fairbanks and whether the account is open, paid off, charged off, or is in bankruptcy. The “reverse or reimburse” program will apply to:

- Force placed insurance charges imposed when the customer had an existing policy of hazard insurance at the time of the force placement. “Follow on” charges, such as late payment fees and other delinquency-related fees that resulted from the force placed insurance charges will also be refunded or credited;
- Tax penalties and/or interest and follow on charges resulting from Fairbanks’ failure to make timely tax payments from escrowed funds;
- Fees for brokers price opinions (BPO) and property inspections that were not completed due to reinstatement or payoff (estimated to be 90,000 accounts);

⁴ This exception does not apply if the claim or defense is raised in a class action.

⁵ Class members who submit claims based on payment of an improper prepayment penalty will receive at least \$200 (or the amount paid if the penalty was less than \$200).

⁶ Class members who have lost their homes to foreclosure may make a claim against both redress funds.

- Excess interest collected at payoff and not previously refunded (estimated to be 160,000 accounts);
- Excess interest on corporate advances collected due to rounding of interest up to the nearest penny (estimated to be 160,000 accounts).

Fairbanks estimates the refunds and credits under the “reverse or reimburse” program at \$7 million, but there is no cap. Class members will receive separate notice if eligible for these benefits and will not need to submit a claim form.⁷

Claims Procedure

Class notices and claim forms were to be mailed to class members at the end of February, 2004. There are three separate claim forms: “Late Fees/Default Related Fees”, “Prepayment Penalty”, and “Foreclosure.” Class members must submit claim forms postmarked by April 24, 2004. The opt-out deadline is April 9, 2004. A hearing on final approval of the class settlement will be held in Boston on May 12, 2004. The Claims Administrator is Gilardi & Co.

Injunctive Relief and Practice Changes

The class settlement and the FTC Order require Fairbanks to adopt significant practice changes, as set out in the private Settlement Appendix 1 – “Default Resolution Program” (DRP) and Appendix 2 – “Operational Practices Agreement” (OP). Both of these programs are to remain in effect for a minimum of 5 years. Significantly, Fairbanks’ customers can raise as a defense to foreclosure Fairbanks’ failure to comply with these obligations. The FTC Order also provides for specific injunctive relief, with many of the provisions applying for periods of either 5 or 10 years. The following chart provides a summary of the various provisions in the agreements:

	Class Settlement	FTC Order
Partial Payments	Mortgage payments that singly or in aggregate are short \$25 or less of scheduled P&I amount shall be applied and shortage amount advanced on behalf of borrower. (OP ¶ 8.1).	All amounts paid less than amount due (<i>i.e.</i> , partial payments) shall be credited, except for loans that have been referred to foreclosure. (¶ I.B).
Application of Payments	Payments shall be credited based on date received, not date posted. (OP ¶	All amounts paid on loan shall be accepted and credited as of date of

⁷ If Fairbanks does not have records to establish any improper charges for force placed insurance or untimely tax payments, class members will be allowed an opportunity to submit proof that they did have insurance coverage or that tax penalties were improperly incurred.

	8.6).	receipt against interest and principal due. ⁸ (§ I.B).
Response to Qualified Written Requests	Response to be provided without charge to borrower within timeframes permitted under § 2605(e), but will seek in most cases to respond within 30 days. Return call shall be made if issue not resolved in borrower’s favor. (OP ¶ 2.6). Upon receipt of written dispute from borrower, all collection and foreclosure activity based on the matter in dispute shall stop until dispute resolved. (OP ¶ 11.1).	Response shall be made in timely manner in accordance with 12 U.S.C. § 2605(e). (§ IX.A).
Response to Disputes⁹	All oral or written disputes about fact or amount of deficiency shall be investigated in good faith. Specific statement of reasons to be provided in writing if dispute denied. (DRP ¶ II.B). Pending dispute resolution, no late fees and foreclosure related charges shall be assessed, no foreclosure affected by the dispute shall proceed, and no reporting of borrower as delinquent. (DRP ¶ II.C). Borrower shall be informed by telephone and by written letter if dispute about a delinquency resolved against borrower (including specific statement of reasons for denial), and shall be provided information about availability of workout programs. (DRP ¶ II.D).	Any dispute shall be acknowledged in writing within 20 calendar days, unless an oral dispute that has been investigated and resolved within the 20-day period and written or electronic records of the handling of such oral disputes are maintained. (§ X.B). Investigation shall be completed within 60 calendar days, unless through use of reasonable procedures unable to resolve dispute in that period, in which event may take an additional 30 calendar days to resolve the dispute if borrower notified in writing. (§ X.C). Borrower shall be advised promptly and in writing of investigation results unless oral dispute that has been investigated and resolved within 20-day period as above. (§ X.D).
Assessment of Fees (General Provisions)		No fees may be assessed or collected unless services actually rendered and a) expressly authorized and conspicuously disclosed by loan instruments and not prohibited by law; b) expressly permitted by law and not prohibited by loan instruments; or c) reasonable fee for service requested by borrower only after conspicuous disclosure of fee and explicit consent obtained and such fee not prohibited by law or loan

⁸ For loans using uniform loan instruments with a “revision date” prior to March 1999, Fairbanks may apply payments received in accordance with loan documents.

⁹ Since a written dispute may be a qualified written request under 12 U.S.C. § 2605(e) if it is submitted in writing, these settlement provisions provide rights in addition to those available under RESPA.

		instruments. (¶ III). Nothing in Order shall permit any fee or action to be taken that is prohibited by any state or federal law or regulation or prohibited by loan instruments or other contract with borrower. (¶ VI).
Property Inspections	No assessment permitted while borrower performing on written forbearance agreement. (DRP Ex. A).	Reasonable fee may be imposed if a) borrower's payment more than 45 days late, and b) additional inspections permitted no more frequently than every 30 days only if unable to contact borrower during previous 30-day period or unable to contact the borrower but have determined that property is vacant. (¶ V.B).
Broker Price Opinions (BPO)	No BPO may be ordered sooner than 63 rd day of delinquency, nor re-ordered sooner than 180-day intervals. (OP ¶ 11.2). No assessment permitted while borrower performing on written forbearance agreement. (DRP Ex. A).	Reasonable fee may be imposed if borrower's payment more than 63 days late, and additional inspections permitted no more frequently than every 6 months if account still delinquent. (¶ V.C).
Attorneys' Fees		Reasonable fee may be imposed if: a) necessary to process a foreclosure or otherwise permitted under ¶ III; b) law firm has in fact performed services, c) law firm has in fact charged Fairbanks for the services. (¶ V.D).
Late Fees	No assessment permitted prior to the 17 th day of delinquency, and must conform to note and state law restrictions. (OP ¶ 3.1). No assessment permitted while borrower performing on written forbearance agreement. (DRP Ex. A).	Late fees may not be pyramided (¶ XIII.A), or assessed when loan is in foreclosure status. (¶ XIII.B).
Force Placed Insurance	If lapse in coverage, following steps shall be taken to confirm whether borrower coverage exists: call placed to borrower's agent or insurance carrier within 10 days; first letter sent to borrower at 15 days; second letter sent at 40 days; and first call to borrower made at 50 th day. (OP ¶ 7.1 - 7.1.4). Lender placed policy may issue and certified letter shall be sent to borrower on 60 th day advising of amount of annual premiums. (OP ¶ 7.1.5).	Force placed insurance may not be charged before mailing, at no cost to the borrower, at least 2 written notices detailing procedures by which borrower can demonstrate that coverage exists (2 nd letter to be sent by certified mail no sooner than 30 calendar days before 1 st letter and shall provide additional 20-day for borrower to provide proof of coverage). Any reasonable form of confirmation of existing coverage must be accepted from borrower, including

	Premium shall be billed and new payment notice sent to borrower on days 70 and 80. (OP ¶ 7.1.6). Second call to borrower shall be made before 90 th day. (OP ¶ 7.1.7). Upon proof of borrower insurance coverage, a refund of all premiums during overlapping coverage period shall be processed within 5 days and any related fees or charges removed from account; borrower's payment shall be returned to the original amount within 10 days of the cancellation. (OP ¶ 7.2).	verbal confirmation of policy number along with identity of insurance company or agent. Reasonable actions shall be taken to determine whether insurance is already in place before force placing coverage. All force placed insurance premiums and any related charges paid during overlapping coverage must be refunded within 15 days of receipt of confirmation of existing coverage. Loan may not be placed in default, late fees assessed, or foreclosure initiated solely due to borrower's nonpayment of insurance premiums. (¶ II).
Non-Escrow Tax Payments	Borrower must be informed prior to payment of delinquent taxes on non-escrow accounts; payment to occur 60 days prior to last day to redeem property before tax sale. After payment, borrower must be sent letter stating date and amount of taxes paid (or provided such information on timely monthly statement). (OP ¶ 6.2).	
Transfer of Servicing	During 60-day period following transfer from prior servicer, no late fees or BPOs may be assessed, and foreclosure may not be initiated. (OP ¶ 3.17). For delinquent accounts, validation of debt letters shall be sent and shall include a specific breakdown of all amounts claimed other than P & I, and allow borrower to dispute amounts claimed as owed. (OP ¶ 1.3).	RESPA transfer of servicing requirements shall be complied with in accordance with § 2605(c) and § 2605(d). (¶ IX.C and IX.D).
Timely Payments Out Of Escrow	Taxes and insurance shall be paid timely and accurately to maximize allowable discounts for early payments on escrowed accounts. If taxes and insurance not paid timely, borrower may not be charged for any penalties, interest, or fees. (OP ¶ 6.1, 6.3).	Timely payments shall be made from escrow in accordance with § 2605(g). (¶ IX.F).
Default Status of Pending Loans		For all loans serviced as of date of entry of Order that are delinquent, if borrower has tendered prior payments sufficient to cover scheduled monthly payment (P & I), and delinquency is attributable to non-payment of taxes, insurance or fees,

		account shall be reclassified as current and updated reports provided to CRAs. (¶ XIV).
Initiating Foreclosure	No referral for foreclosure shall occur until 92 nd day after delinquency and borrower has failed to make 3 full monthly payments; and there has been compliance with FTC Order. (DRP ¶ III.C). Foreclosure may not be initiated during 60-day period following transfer of servicing from prior servicer. (OP ¶ 3.17).	Foreclosure may not begin until: a) account reviewed to verify borrower has failed to make 3 full monthly payments; b) confirmed that borrower has not been subject to any acts or practices prohibited by Order, loan instruments or law; and c) any disputes have been investigated and borrower informed of results. (¶ XII).
Monthly Statements	Statements to be redesigned to make easier to read and understand; brochure to be provided to borrowers with instructions on reading statements. (OP ¶ 2.11).	Monthly statement (or coupon book) shall be provided at no cost to borrower containing following information: unpaid principal balance; monthly payment due and due date; reason for any changes in monthly payment; and complete itemization for every fee assessed during statement period. Within 6 months of Order, borrowers to be provided statement of total amount due. (¶ XI).
Payoff Statements	Itemization of fees and charges as required on monthly statements pursuant to FTC Order shall be provided on payoff statement; no estimates shall be used for such items as foreclosure attorney fees; all fees and charges must be confirmed prior to payoff quote; prior servicer advances that cannot be itemized and explained shall not be included; shall use best efforts to provide payoff within 5 days of request. (OP ¶ 9.1-9.4).	
Prepayment Penalties	Original notes and riders shall be examined to determine if applicable before including in payoff quote; originator's license status shall be reviewed to determine if lender could include penalty. (OP ¶ 9.2).	
Collection Notices and Contacts	Collectors shall follow certain steps when contacting borrower about delinquency, including attempting to work out repayment plan and authorizing waiver of late fees and other fees if borrower experiencing	No fees may be assessed or collected for sending collection letters or notices to borrower. (¶ V.A).

	hardship. (OP ¶ 3). Borrower shall be provided letter at 45 days of delinquency providing breakdown of delinquent payments, advances, escrow advances and fees needed to reinstate, and information about dispute and workout programs. (DRP ¶ IA).	
Workout Options	Various loan resolution procedures established under Default Resolution Program. ¹⁰ (Appx. 1).	
Forbearance Agreements	No forbearance agreement or other workout plan shall require borrower to waive or release claims (DRP ¶ IV.1). No fee shall be charged for any forbearance or other workout plan (except actual recording fees where such agreements need to be recorded). (DRP ¶ IV.3). No default-related fees shall be assessed during period borrower remains current on forbearance or other workout plan. (DRP ¶ IV.2).	No clause in any forbearance agreement entered in between January 1, 1999 and date of Order that required borrower to waive any claims or defenses, release any rights or waive access to court, shall be enforceable. (¶ XV).
Borrower Bankruptcy	Notice of default shall be sent to borrower's attorney 15 days before any filing for motion for relief initiated. (OP ¶ 10.3). Borrower may voluntarily enter into forbearance plan even if debt has been discharged in chapter 7 and not reaffirmed. (DRP Ex. A). Any prior servicer advances that cannot be itemized and explained shall not be included in proof of claim. (OP ¶ 9.4).	

¹⁰ The Default Resolution Program contains extensive rights and procedures relating to the availability of forbearance and workout options that advocates should review carefully when representing borrowers that Fairbanks claims are in default. *See* Appendix 1 to the Settlement Agreement.