The Pigford Case: USDA Settlement of a Discrimination Suit by Black Farmers

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Summary

On April 14, 1999, Federal District Court Judge Paul L. Friedman approved a settlement agreement and consent decree resolving a class action discrimination suit (commonly known as the *Pigford* case) between the U.S. Department of Agriculture (USDA) and black farmers. The suit claimed that the agency had discriminated against black farmers on the basis of race and failed to investigate or properly respond to complaints from 1983 to 1997. The deadline for submitting a claim as a class member was September 12, 2000. Many voiced concern over the structure of the settlement agreement, the large number of applicants who filed late, and reported deficiencies in representation by class counsel. A provision in the 2008 farm bill (P.L. 110-246) permitted any claimant in the *Pigford* decision who had not previously obtained a determination on the merits of a *Pigford* claim to petition in civil court to obtain such a determination. A maximum of $100 million dollars was also authorized for new claims settlements.

On February 18, 2010, Attorney General Holder and Secretary of Agriculture Vilsack announced a $1.25 billion settlement of these so-called *Pigford II* claims. The Administration included $1.15 billion in its FY2010 supplemental budget request for settlement costs. An amendment (S.Amdt. 3407) to H.R. 4213, the Tax Extenders Act of 2009, to authorize the funding failed on March 10, 2010. A provision in the settlement permitted the plaintiffs to void the settlement if Congress did not appropriate the $1.15 billion by March 31, 2010. Appropriators did not meet that deadline, although USDA Secretary Tom Vilsack sent letters in March to congressional leaders asking them to appropriate money for the settlement, saying that resolving cases of discrimination is a department priority. Because the settlement is clearly a priority of both the USDA and the White House, plaintiffs are unlikely to exercise their right to void the settlement in the near term. Unlike the original *Pigford* decision, the *Pigford II* settlement does not include a suggested settlement amount, although it does provide for higher payments to claimants who go through a more rigorous review process. A moratorium on foreclosures of most claimants' farms will be in place until after claimants have gone through the claims process. Payments to successful claimants may begin in the middle of 2011.

This report highlights some of the events that led up to the *Pigford* class action suit and outlines the structure of the original settlement agreement. It also discusses the number of claims reviewed, denied, and awarded, and some of the issues raised by various parties. It will be updated periodically.

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Background

Litigation against the U.S. Department of Agriculture (USDA) for discrimination against African-American farmers began in August 1997 with two discrimination suits brought by black farmers—*Pigford v. Glickman*, No. 97-1978 (D.D.C. 1997) and *Brewington v. Glickman*, No. 98-1693 (D.D.C. 1997)—but its origins go back much further.[1] For many years, black farmers had complained that they were not receiving fair treatment when they applied to local county committees (which make the decisions) for farm loans or assistance. These farmers alleged that they were being denied USDA farm loans or forced to wait longer for loan approval than were non-minority farmers. Many black farmers contended that they were facing foreclosure and financial ruin because the USDA denied them timely loans and debt restructuring. Moreover, many claimed that the USDA was not responsive to discrimination complaints. A huge agency backlog of unresolved complaints began to build after the USDA's Civil Rights Office was closed in 1983.

Demographics

The 2007 Census of Agriculture reported that 2.20 million farms operated in the United States. Of this total, 32,938, or approximately 1.5% of all farms, were operated by African-Americans.

Over 74% (24,466) of African-American farmers in the United States reside in Texas, Mississippi, North and South Carolina, Alabama, Georgia, Virginia and Louisiana.

Average annual market value for farms operated by African-American farmers in 2007 was $30,829. The national average for white U.S. farmers was $140,521.

Overall, the number of farms operated in the United States increased by 3.2% between 2002 and 2007. Farms operated by African Americans increased from 29,090 to 32,938, an 11.7% increase over the five-year period.

In 2007, 348 (757 in 2002) African-American farmers received Commodity Credit Corporation (CCC) loans amounting to a total of $9.9 million. This averaged $28,408 per participating African-American farmer, about 32% of the national average ($87,917). Average CCC loan value to white farmers was $88,379.

Other federal farm payments to African-American operated farms averaged $4,260, half the national average government farm payment of $9,518. About 31% of all African-American farmers received some government payment compared to 50% of white farmers.

Source: 2007 Census of Agriculture, NASS.

USDA-Commissioned Study

In 1994, the USDA commissioned D. J. Miller & Associates, a consulting firm, to analyze the treatment of minorities and women in Farm Service Agency (FSA) programs and payments. The study examined conditions from 1990 to 1995 and looked primarily at crop payments and disaster payment programs and Commodity Credit Corporation (CCC) loans. The final report found that from 1990 to 1995, minority participation in FSA programs was very low and minorities received less than their fair share of USDA money for crop payments, disaster payments, and loans.

According to the commissioned study, few appeals were made by minority complainants because of the slowness of the process, the lack of confidence in the decision makers, the lack of knowledge about the rules, and the significant bureaucracy involved in the process. Other findings showed that (a) the largest USDA loans (top 1%) went to corporations (65%) and white male farmers (25%); (b) loans to black males averaged $4,000 (or 25%) less than those given to white males; and (c) 97% of disaster payments went to white farmers, while less than 1% went to black farmers. The study reported that the reasons for discrepancies in treatment between black and white farmers could not be easily determined due to "gross deficiencies" in USDA data collection and handling.

[1] USDA Secretary Tom Vilsack is now the defendant in the class action suit.

In December 1996, Secretary of Agriculture Dan Glickman ordered a suspension of government farm foreclosures across the country pending the outcome of an investigation into racial discrimination in the agency's loan program and later announced the appointment of a USDA Civil Rights Task Force. On February 28, 1997, the Civil Rights Task Force recommended 92 changes to address racial bias at the USDA, as part of a USDA Civil Rights Action Plan. While the action plan acknowledged past problems and offered solutions for future improvements, it did not satisfy those seeking redress of past wrongs and compensation for losses suffered. In August 1997, a proposed class action suit was filed by Timothy Pigford (and later by Cecil Brewington) in the U.S. District Court for the District of Columbia on behalf of black farmers against the USDA. The suit alleged that the USDA had discriminated against black farmers from 1983 to 1997 when they applied for federal financial help and again by failing to investigate allegations of discrimination.

Class Action Suit

Following the August 1997 filing for class action status, the attorneys for the black farmers requested blanket mediation to cover all of the then-estimated 2,000 farmers who may have suffered from discrimination by the USDA. In mid-November 1997, the government agreed to mediation and to explore a settlement in *Pigford*. The following month, the parties agreed to stay the case for six months while mediation was pursued and settlement discussions took place. Although the USDA had acknowledged past discrimination, the Justice Department opposed blanket mediation, arguing that each case had to be investigated separately.

When it became apparent that the USDA would not be able to resolve the significant backlog of individual complaints from minority farmers, and that the government would not yield on its objections to class relief, plaintiffs' counsel requested that the stay be lifted and a trial date be set. On March 16, 1998, the court lifted the stay and set a trial date of February 1, 1999. On October 9, 1998, the court issued a ruling certifying as a class black farmers who filed discrimination complaints against the USDA between January 1983 and February 21, 1997.[2] In his ruling, Judge Friedman concluded that the class action vehicle was "the most appropriate mechanism for resolving the issue of liability" in the case.[3] A complicating factor throughout the period, however, was a two-year statute of limitations in the Equal Credit Opportunity Act (ECOA), the basis for the suit. Congress, accordingly, passed a measure in the FY1999 omnibus funding law that waived the statute of limitations on civil rights cases for complaints made against the USDA between 1981 and December 31, 1996.[4]

As the court date approached, the parties reached a settlement agreement and filed motions consolidating the *Pigford* and *Brewington* cases, redefining the certified class and requesting preliminary approval of a proposed consent decree. On April 14, 1999, the court approved the consent decree, setting forth a revised settlement agreement of all claims raised by the class members.[5] Review of the claims began almost immediately, and the initial disbursement of checks to qualifying farmers began on November 9, 1999.

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[2] *Pigford v. Glickman*, 182 F.R.D. 341 (D.D.C. 1998).

[3] Id. at 342.

[4] P.L. 105-277, §741.

[5] *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999).

Terms of the Consent Decree

Under the consent decree, an eligible recipient is an African American who (1) farmed or attempted to farm between January 1981 and December 31, 1996, (2) applied to USDA for farm credit or program benefits and believes that he or she was discriminated against by the USDA on the basis of race, and (3) made a complaint against the USDA on or before July 1, 1997. The consent decree set up a system for notice, claims submission, consideration, and review that involved a facilitator, arbitrator, adjudicator, and monitor, all with assigned responsibilities. The funds to pay the costs of the settlement (including legal fees) come from the Judgment Fund operated by the Department of the Treasury, not from USDA accounts or appropriations.[6]

The *Pigford* consent decree basically establishes a two-track dispute resolution mechanism for those seeking relief. The most widely-used option—*Track A*—provides a monetary settlement of $50,000 plus relief in the form of loan forgiveness and offsets of tax liability. Track A claimants had to present *substantial evidence* (i.e., a reasonable basis for finding that discrimination happened) that

- claimant owned or leased, or attempted to own or lease, farm land;
- claimant applied for a specific credit transaction at a USDA county office during the applicable period;
- the loan was denied, provided late, approved for a lesser amount than requested, encumbered by restrictive conditions, or USDA failed to provide appropriate loan service, and such treatment was less favorable than that accorded specifically identified, similarly situated white farmers; and
- the USDA's treatment of the loan application led to economic damage to the class member.

Alternatively, class participants could seek a larger, tailored payment by showing evidence of greater damages under a *Track B* claim. Track B claimants had to prove their claims and actual damages by a *preponderance of the evidence* (i.e., it is more likely than not that their claim is valid). The documentation to support such a claim and the amount of relief are reviewed by a third party arbitrator, who makes a binding decision. The consent decree also provided injunctive relief, primarily in the form of priority consideration for loans and purchases, and technical assistance in filling out forms.[7] Finally, plaintiffs were permitted to withdraw from the class and pursue their individual cases in federal court or through the USDA administrative process.[8]

Under the original consent decree, claimants were to file their claim with the facilitator (Poorman-Douglas Corporation) within 180 days of the consent decree, or no later than October 12, 1999. For those determined to be eligible class members, the facilitator forwarded the claim to the adjudicator (JAMS-Endispute, Inc.), if a Track A claim, or to the arbitrator (Michael Lewis,

[6] 31 U.S.C. §1304.

[7] See also P.L. 107-171 (2002 farm bill) § 10707 (mandating that the USDA carry out an outreach and technical assistance program to assist "socially disadvantaged farmers" in owning farms and participating in USDA programs); §10708 (governing the composition of county, area, or local committees to encourage greater representation of minority and women farmers).

[8] USDA news release, July 11, 2002.

ADR Associates), if a Track B claim. If the facilitator determined that the claimant was *not* a class member, the claimant could seek review by the monitor (Randi Roth). If the facilitator (and later by court order, the arbitrator[9]) ruled that the claim was filed after the initial deadline, the adversely affected party could request permission to file a late claim under a process subsequently ordered by the court.

Late filing claimants were directed to request permission to submit a late claim to the arbitrator by no later than September 15, 2000.[10] The arbitrator was to determine if the reason for the late filing reflected *extraordinary circumstances* (e.g., Hurricane Floyd, a person being homebound, or a failure of the postal system). Since there reportedly had been extensive and widespread notice of the settlement agreement and process—including local meetings and advertisements in radio, television, newspapers and periodicals across the nation and in heavily populated black minority farmer areas—*lack of notice* was ruled an unacceptable reason for late filing.

Current Status

In general, there seems to be a consensus that many of the issues surrounding the implementation of *Pigford* can be attributed to the gross underestimation of the number of claims that would actually be filed.[11] At the same time, many in Congress and those closely associated with the settlement agreement have voiced much concern over the large percentage of denials, especially under Track A—the "virtually automatic" cash payment. Interest groups have suggested that the relatively poor approval percentages (59%) can be attributed to the consent decree requirement that claimants show that their treatment was "less favorable than that accorded specifically identified, similarly situated white farmers," which was exacerbated by poor access to USDA files.[12] **Table 1** shows statistics for Track A claims as of January 12, 2010. As of that date, there were 172 eligible Track B claimants (1% of the total eligible class members).[13]

More alarming to many, however, is the large percentage of farmers who did not have their cases heard on the merits because they filed late—so-called *Pigford II* claimants. Approximately 73,800 *Pigford II* petitions (66,000 before September 15, 2000 late filing deadline) were filed under the late filing procedure, of which 2,116 were allowed to proceed.[14] Many claimants who were initially denied relief under the late filing procedures requested a reconsideration of their petitions. Out of the approximately 20,700 timely requests for reconsideration, 17,279 requests had been decided; 113 had been allowed to proceed by the end of 2005, according to the most recent compilation of individual case data.[15] Many argued that the large number of late filings

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[9] *Pigford v. Glickman*, No. 97-1978 and No. 98-1693 (D.D.C. December 20, 1999) (order delegating the authority to make decisions on late claims to the arbitrator).

[10] *Pigford v. Glickman*, No. 97-1978 and No. 98-1693 (D.D.C. July 14, 2000).

[11] See *Status of the Implementation of the Pigford v. Glickman Settlement*, hearing Before the House Committee on the Judiciary, Subcommittee on the Constitution, 108th Cong. at 1595 (2004) (letter from Michael K. Lewis, Arbitrator).

[12] Environmental Working Group, *Obstruction of Justice, USDA Undermines Historic Civil Rights Settlement with Black Farmers*, Part 4 (July 2004) available at http://www.ewg.org/reports/blackfarmers/execsumm.php (hereinafter EWG Report).

[13] Office of the Monitor, at http://www.pigfordmonitor.org/stats/.

[14] Arbitrator's Ninth Report on the Late-Claim Petition Process (November 30, 2005).

[15] Ibid.

indicated that the notice was "ineffective or defective."[16] Others countered these claims by arguing that the *Pigford* notice program was designed, in part, to promote awareness and could not *make* someone file.[17] Some also suggested—including many of the claimants—that the class counsel was responsible for the inadequate notice and overall mismanagement of the settlement agreement.[18] Judge Friedman, for example, cautioned the farmers' lawyers for their failure to meet deadlines and described their representation, at one point, as "border[ing] on legal malpractice."[19]

Table 1. Track A Statistics as of April 7, 2010

Track A	Totals
Track A Decisions	22,549
Final Track A Adjudications Approved	15,638 (69%)
Final Track A Adjudications Denied	6,911 (31%)
$50,000 Cash Awards	$767,450,000[a]
$3,000 Non-Credit Awards	$1,512,000
Debt Relief	$38,923,651
IRS Payments for Title A Claimants	$191,862,500
IRS Payments for Debt Relief	$6,656,111
Total Track A Relief	**$1,006,404,262**

Source: Office of the Monitor, http://www.pigfordmonitor.org/stats/.

a. This number may reflect payments actually made thus far.

Judge Friedman also declared that he was "surprised and disappoint[ed]" that the USDA did not want to include in the consent decree a sentence that in the future the USDA would exert "best efforts to ensure compliance with all applicable statutes and regulations prohibiting discrimination."[20] The judge's statements apparently did not go unnoticed, as the Black Farmers and Agriculturalists Association (BFAA) filed a $20.5 billion class action lawsuit in September 2004 on behalf of roughly 25,000 farmers against the USDA for alleged racial discriminatory practices against black farmers between January 1997 and August 2004. The lawsuit, however, was dismissed in March 2005 because BFAA failed to show it had standing to bring the suit.[21]

In the 110th Congress, the *Pigford Claims Remedy Act of 2007* (H.R. 899; S. 515) and the *African-American Farmers Benefits Relief Act of 2007* (H.R. 558) were introduced to provide relief to many of these claimants who failed to have their petitions considered on the merits. The provisions of these bills were incorporated into the 2008 farm bill (P.L. 110-246, Section 14012),

[16] *Notice Hearing*, 1-4. See also EWG Report, at Part 3.

[17] *Notice Hearing*, at 10 (statement of Jeanne C. Finegan, consultant to Poorman-Douglas).

[18] Tom Burrell, President, Black Farmers and Agriculturalists Association, Inc., *Tom Burrell Lays out the Case of why Al Pires, Class Counsel, Must be Fired!*, available at http://www.bfaa.net/case_layout.pdf; see also EWG Report, at Part 3.

[19] *Pigford v. Glickman*, No. 97-1978 and No. 98-1693 (D.D.C. April 27, 2001); see also *Pigford v. Veneman*, 292 F.3d 918, 922 (D.C. Cir. 2002).

[20] *Pigford v. Glickman*, 185 F.R.D. 82, 112 (D.D.C. 1999).

[21] *Black Farmers and Agriculturalists Assoc. v. Veneman*, 2005 U.S. Dist. LEXIS 5417 (D.D.C. March 29, 2005).

providing up to $100 million for potential settlement costs. The Administration requested an additional $1.15 billion for these potential settlement costs in its FY2010 budget. Appropriators did not provide additional funding in the FY2010 appropriations bill (P.L. 111-80). On May 5, 2009, Senator Charles Grassley and Senator Kay Hagan introduced S. 972, a bill that would amend the 2008 farm bill to allow access to an unlimited judgment fund at the Department of Treasury to pay successful claims.[22] The legislation also allows for legal fees to be paid from the fund in addition to anti-fraud protection regarding claims. The bill was referred to the Committee on Agriculture, Nutrition, and Forestry. A related bill in the House (H.R. 3623) was introduced by Representative Artur Davis on September 9, 2009, and referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties on October 19, 2009.

On February 18, 2010, Attorney General Holder and Secretary of Agriculture Vilsack announced a $1.25 billion settlement of the *Pigford II* claims.[23] The Administration requested $1.15 billion in an emergency appropriation, to remain available until expended, for the *Pigford II* claimants. When combined with the $100 million authorized in the 2008 farm bill (P.L. 110-246, Section 14012), this appropriation, if authorized by Congress, would make $1.25 billion available to settle the *Pigford II* claims.

Senator Inouye introduced an amendment (S.Amdt. 3407) to H.R. 4213, the Tax Extenders Act of 2009, to provide the requested $1.15 billion. On March 10, 2010, the Senate voted 66-34 to invoke cloture on the bill and limit debate on the substitute being considered for amendment purposes. The vote blocked S.Amdt. 3407 as non-germane. No funding has yet been appropriated.

The *Pigford II* settlement is final and may not be appealed. A provision of the settlement permits the claimants to void the settlement should Congress not make the $1.15 billion appropriation by March 31, 2010. Congress did not make this deadline before leaving for the Easter recess. The settlement is clearly a priority of both the USDA and the White House, suggesting that the plaintiffs are unlikely to exercise the right to void the settlement in the near term. Unlike the original *Pigford* decision, the *Pigford II* settlement does not include a suggested settlement amount for individual claimants, although it does provide for higher payments to claimants who go through a more rigorous review process. Claimants can seek fast-track payments of up to $50,000 plus debt relief, or choose a longer process for damages of up to $250,000. Payments to successful claimants could begin in the middle of 2011.

The 2008 farm bill provision also mandated a moratorium on all loan acceleration and foreclosure proceedings where there is a pending claim of discrimination against USDA related to a loan acceleration or foreclosure. This provision also waives any interest and offsets that might accrue on all loans under this title for which loan and foreclosure proceedings have been instituted for the period of the moratorium. If a farmer or rancher ultimately does not prevail on her claim of discrimination, then the farmer or rancher will be liable for any interest and offsets that accrued during the period that the loan was in abeyance. The moratorium terminates on either the date the Secretary of Agriculture resolves the discrimination claim or the date the court renders a final decision on the claim, whichever is earlier. The *Pigford II* settlement reiterates these provisions.

[22] The U.S. Treasury fund is established under 31 U.S.C. 1304.

[23] *In Re Black Farmers Discrimination Litigation*, Case Number 08-mc-00511 in the United States District Court for the District of Columbia.

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Garcia v. Vilsack: A Policy and Legal Analysis of a USDA Discrimination Case

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Summary

The U.S. Department of Agriculture (USDA) has long been accused of unlawfully discriminating against minority and female farmers in the management of its various programs, particularly in its Farm Service Agency loan programs. While USDA has taken concrete steps to address these allegations of discrimination, the results of these efforts have been criticized by some. Meanwhile, some minority and female farmers who have alleged discrimination by USDA have filed various lawsuits under the Equal Credit Opportunity Act (ECOA) and the Administrative Procedure Act (APA). *Pigford v. Glickman*, filed on behalf of African-American farmers, is probably the most widely known.

In October 2000, a group of Hispanic farmers filed a similar lawsuit against USDA. The case, *Garcia v. Vilsack*, involves allegations that USDA unlawfully discriminated against all similarly situated Hispanic farmers with respect to credit transactions and disaster benefits in violation of the ECOA, which prohibits, among other things, race, color, and national origin discrimination against credit applicants. The suit further claims that USDA violated the ECOA and the APA by systematically failing to investigate complaints of discrimination, as required by USDA regulations. Because the *Garcia* case has been tied up in litigation for nine years, there has been no decision on the merits of certain claims, nor has any compensation been paid to any of the plaintiffs. During the lengthy course of litigation, however, there have been numerous rulings on procedural and substantive issues that are discussed in detail in this report.

There are several possible options for Congress to consider if it wishes to respond to the *Garcia* dispute. On the one hand, Congress could choose not to intervene in the *Garcia* case, leaving the ECOA as the standing legislative remedy. On the other hand, Congress could create a specific fund to aid farmers who are deemed to have been victims of USDA. Such a response would be similar to other compensation programs established by Congress to assist victims of certain specific circumstances (e.g., negligence, terrorism, and "acts of God"). Congress might also choose to adopt the model used in the consent decree in the *Pigford* case, which defined eligible claimants and established a system of notice, claims submission, consideration, and review. Although Congress was not involved in the creation of the compensation system established under the consent decree, Congress did make an additional $100 million available in the 2008 farm bill (P.L. 110-246) to settle claims of class participants who did not receive a decision on the merits of their claims against USDA. Congress could also choose to have the *Garcia* case considered by the U.S. Court of Federal Claims as a non-binding congressional reference case.

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Introduction

The U.S. Department of Agriculture (USDA) has long been accused of unlawfully discriminating against minority and female farmers in the management of its various programs, particularly in its Farm Service Agency loan programs. While USDA has taken concrete steps to address these allegations of discrimination, the results of these efforts have been criticized by some, and in 2008 and 2009, the Government Accountability Office (GAO) issued reports that documented managerial and procedural failures, especially in USDA's Office of the Undersecretary for Civil Rights.[1] Meanwhile, some minority and female farmers who have alleged discrimination by USDA have filed various lawsuits under the Equal Credit Opportunity Act (ECOA) and the Administrative Procedure Act (APA).[2] *Pigford v. Glickman*,[3] filed on behalf of African-American farmers, is probably the most widely known.

In October 2000, a group of Hispanic farmers filed a similar lawsuit against USDA. The case, *Garcia v. Vilsack*,[4] involves allegations that USDA unlawfully discriminated against all similarly situated Hispanic farmers with respect to credit transactions and disaster benefits in violation of the ECOA, which prohibits discrimination against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age, or source of income. The suit further claims that USDA violated the ECOA and the APA by systematically failing to investigate complaints of discrimination, as required by USDA regulations. The *Garcia* case has been in litigation for nine years. There has been no decision on the merits of certain claims, nor has any compensation been paid to any of the plaintiffs. During the lengthy course of litigation, however, there have been numerous rulings on procedural and substantive issues.

A detailed analysis of the legal rulings in *Garcia* is set forth below, following a section that provides background information on some of the policy issues surrounding the litigation. This report also contains a brief discussion of some of the other discrimination cases that have been filed against USDA, as well as a section describing some possible options for Congress to consider if it wishes to respond to the *Garcia* dispute.

Policy Background

This section provides background information on some of the policy issues raised by the *Garcia* litigation, including a discussion of the history of civil rights issues at USDA and a description of the Farm Service Agency, the USDA agency whose actions are at issue in *Garcia*.

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[1] U.S. Department of Agriculture: Recommendations and Options Available to the New Administration and Congress to Address Long-Standing Civil Rights Issues GAO-09-650T, April 29, 2009; Government Accountability Office. U.S. Department of Agriculture: Recommendations and Options to Address Management Deficiencies in the Office of the Assistance Secretary for Civil Rights. GAO-09-62, October 22, 2008; U.S. Department of Agriculture: Management of Civil Rights Efforts Continues to Be Deficient Despite Years of Attention, GAO-08-755T, May 14, 2008.

[2] 15 U.S.C. §§ 1691 et seq; 5 U.S.C. §§ 551 et seq.

[3] Pigford v. Glickman, 206 F.3d 1212 (D.C. Cir. 2000) (affirming a consent decree settling the lawsuit). For more information on *Pigford*, see CRS Report RS20430, *The Pigford Case: USDA Settlement of a Discrimination Suit by Black Farmers*, by Tadlock Cowan and Jody Feder.

[4] Garcia v. Vilsack, 563 F.3d 519 (D.C. Cir. 2009), *cert. denied*, 2010 U.S. LEXIS 744 (U.S., Jan. 19, 2010).

Civil Rights Issues at USDA

Allegations of unlawful discrimination against minority farmers in the management of USDA programs have been long-standing and well-documented at USDA, which was one of the last federal agencies to racially integrate and one of the last to include women and minorities in leadership roles.[5] In 1965, the U.S. Commission on Civil Rights found evidence of discrimination in USDA program delivery and in its treatment of minority employees. In the early 1970s, USDA was also regarded by some observers as an agency deliberately working to force minority and socially disadvantaged farmers off their land through its loan practices.[6] A 1982 Civil Rights Commission report stated that the Farmers Home Administration "may be involved in the very kind of racial discrimination that it should be seeking to correct."[7] Despite this evidence of discrimination and a history of class action suits and court orders, such practices continued within the agency and its large field office network.

In 1994, the USDA commissioned D. J. Miller & Associates, a consulting firm, to analyze the treatment of minorities and women in the Farm Service Agency (FSA) programs and payments. The study examined conditions from 1990 to 1995 and looked primarily at crop support payments, disaster payments, and Commodity Credit Corporation (CCC) crop loans. The final report found that from 1990 to 1995, minority participation in FSA programs was very low and minorities received less than their fair share of USDA money. According to the commissioned study, few appeals were made by minority complainants because of the slowness of the process,

Hispanic Farmers

Farms operated by Hispanic farmers comprise 66,671 of the 2.2 million farms in the United States (3%). Over one-third of these farmers were located in Texas. Texas (34.2%), California, (17.0%), New Mexico (10.3%), Florida (5.5%), and Washington (3.2%) together account for 70% of all Hispanic farmers.

The average annual market value for farms operated by Hispanic farmers in 2007 was $191,593. Beef ranching, greenhouse and floriculture production, and fruit and tree nut production are the major production sectors for Hispanic farmers. The national average for white U.S. farmers was $140,526.

Overall, the number of farms operated in the United States increased by 3.2% between 2002 and 2007. Farms where the principal operator was Hispanic increased from 50,592 to 55,570, nearly 9% over the five-year period.

In 2007, 522 Hispanic farmers received Commodity Credit Corporation (CCC) loans amounting to a total of $48.5 million. This averaged $92,865 per participating Hispanic farmer, somewhat higher than the national average of $87,917. Average CCC loan value to white farmers was $88,379.

Other federal farm payments to Hispanic-operated farms averaged $9,279, approximately the national average government farm payment of $9,518. About 19% of all Hispanic farmers received some government payment compared to 50% of white farmers.

Source: 2007 Census of Agriculture, NASS.

[5] USDA. *Civil Rights at the United States Department of Agriculture: A Report by Civil Rights Action Team*, February, 1997.

[6] In April 1971, Secretary of Agriculture Clifford M. Hardin, formed a 15-person Young Executives Committee under the chairmanship of Undersecretary Richard Lyng to propose changes in USDA policies to better reflect the Committee's views of agriculture as an industry that needed to become more efficient. The Committee's report—*New Directions for Agriculture Policy*—while nominally not reflecting official USDA policy, made a series of recommendations based on the 15 members' ideas of what constituted efficient capital allocation in agriculture and what constituted farming efficiency. These recommendations essentially regarded small-scale, less capitalized farmers (who are often minorities) as inefficient producers who should be not be encouraged to remain in farming through receiving federal loans. The complete report was inserted into the Congressional Record by Representative John Melcher for June 21, 1972 (pages 21734-21743) under the heading "Young Executives Plan to Liquidate Farmers."

[7] Cited in USDA, *Civil Rights at the United States Department of Agriculture: A Report by Civil Rights Action Team*, February, 1997. Farmers Home Administration was the precursor agency to the Farm Service Agency.

the lack of confidence in the decision makers, the lack of knowledge about the rules, and the significant bureaucracy involved in the process.

In December 1996, Secretary of Agriculture Daniel R. Glickman suspended government farm foreclosures across the country pending the outcome of an investigation into racial discrimination in the agency's loan program. He subsequently appointed a civil rights commission in USDA's Office of Civil Rights to examine USDA's loan-making process and to make recommendations for ending the alleged discriminatory practices by the USDA and its field office network, most notably the local county committees that provide access to FSA. Through 12 listening sessions across the country, the Civil Rights Action Team documented a long history of USDA's attitudes and practices toward minority and socially disadvantaged farmers and ranchers, including women, Native Americans, Hispanics, and African-Americans.[8]

In October 2008, the Government Accountability Office (GAO) released a report on USDA's Office of the Assistant Secretary for Civil Rights stating that the efforts overseen by the office are marked by "significant deficiencies" and recommended new accountability measures to address the ongoing failures.[9] According to GAO, USDA officials delayed providing information and, in at least some cases, instructed USDA employees not to comply with GAO's investigation. Among its conclusions, the GAO investigative report found that the office had failed to achieve its goal of preventing a backlog of pending civil rights cases and that the office's progress report regarding the extent of resolving complaints was inconsistent. The GAO investigation also found that the reports published by the office regarding minority participation in USDA programs were unreliable and of limited usefulness in large part because of the low reliability of the data collected by USDA. To improve the office's progress, GAO recommended (1) the creation of a statutory performance agreement with measurable goals and expectations; (2) an independent civil rights oversight board responsible for approving and evaluating USDA's civil rights activities; and (3) an ombudsperson capable of conducting "meaningful investigations of USDA actions."[10]

Farm Service Agency County Committees

Because allegations of discrimination by USDA's FSA are the focus of the *Garcia* litigation, it is important to understand the agency's role at USDA. The FSA makes loans to farmers on family-sized farms who are unable to obtain credit from commercial banks or other lenders.[11] FSA is the lender of last resort, meaning that a borrower must be denied credit by a commercial lender to eligible for an FSA loan. For FSA borrowers who become 90 days or more delinquent due to financial difficulties, FSA is required to offer the borrower modified loan servicing options designed to keep the farm viable. Locally elected FSA county committees decide who receives a farm operating loan or a disaster loan from USDA and the terms of the loan. Because of their

[8] USDA. *Civil Rights at the United States Department of Agriculture: A Report by Civil Rights Action Team*, February, 1997.

[9] Government Accountability Office. U.S. Department of Agriculture: Recommendations and Options to Address Management Deficiencies in the Office of the Assistance Secretary for Civil Rights. GAO-09-62, October 2008.

[10] On April 8, 2009, the House Agriculture Committee's Subcommittee on Department Operations, Oversight, Nutrition, and Forestry held an oversight hearing to review the USDA's Office of the Assistant Secretary for Civil Rights and the findings of the GAO report.

[11] See CRS Report R40179, *Farm Service Agency: State Executive Directors, and State and County/Area Committees*, by Carol Canada.

authority to make decisions regarding the extension or denial of credit, it is possible for loan officers at county committees to reduce competition for favored groups and individuals. Thus, to favor certain groups and deny other individuals on the basis of group attributes, county committees could, over time, indirectly dispossess minority and other disfavored farmers of their land and equipment.

FSA state, county, and community committees were authorized by Section 8(b)(5)(a) of the Soil Conservation and Domestic Allotment Act of 1935.[12] Community committees were dropped from the official structure of the county committee system by the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994.[13] Area committees came into being more recently when some county offices were closed and consolidated with other county offices into an "area" office. State, county, and area committees share responsibility and work together to administer FSA programs.

Nationwide, more than 8,000 county committee members serve more than 2,400 FSA offices. The 1997 USDA Civil Rights report observed that these committees are disproportionately comprised of white men, noting that, in 1994, 94% of the county farm loan committees included no women or minorities.[14] Committees are responsible for agricultural conservation programs, the production adjustment and price support programs, livestock programs, and other programs as assigned. Their duties consist of selecting the county executive director; reviewing, approving, and certifying applications, forms, reports, and documents; recommending and reviewing local administrative area boundaries; informing farmers and the public about FSA programs; providing committee data to other government agencies upon request; informing state committees and others in FSA about suggestions to programs made by farmers; and conducting hearings as directed by state committees.

Congress addressed the composition of FSA county, area, and local committees in the past two omnibus farm bills. In the 2002 farm bill (P.L. 107-171), Section 10708(b) requires that the composition of committees be "representative of the agricultural producers within the area covered by the county, area, or local committee." In making nominations for election to these committees, the provision also requires the solicitation and acceptance of nominations from organizations representing the interests of socially disadvantaged groups. With increasing consolidation of some FSA offices, the 2008 farm bill (P.L. 110-246, Section 1615), requires consolidating county or area committees to develop procedures to maintain representation of socially disadvantaged farmers and ranchers on combined or consolidated committees.

Garcia v. Vilsack

As noted above, the *Garcia v. Vilsack* lawsuit involves allegations that USDA unlawfully discriminated against Hispanic farmers. Specifically, the lawsuit, which was filed in the U.S. District Court for the District of Columbia in 2000 on behalf of all similarly situated Hispanic farmers across the country, alleges that USDA discriminated against the plaintiffs with respect to credit transactions and disaster benefits in violation of the Equal Credit Opportunity Act

[12] P.L. 74-46, 16 U.S.C. § 590h(b)(5).

[13] P.L. 103-354.

[14] USDA, *Civil Rights at the United States Department of Agriculture: A Report by Civil Rights Action Team*, February, 1997.

(ECOA),[15] which prohibits discrimination against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age, or source of income. The suit further claims that USDA violated the ECOA and the Administrative Procedure Act (APA)[16] by systematically failing to investigate complaints of discrimination, as required by USDA regulations.

Thus far, there has been no decision on the merits of certain claims, nor has compensation been paid to any of the plaintiffs. During the lengthy course of litigation, however, there have been numerous rulings on procedural and substantive issues. Several decisions in particular stand out. In one significant ruling in 2002, the district court denied class certification to the Hispanic farmers who had filed the claim.[17] Subsequently, in a 2006 decision, the Court of Appeals for the District of Columbia Circuit (D.C. Circuit) affirmed the district court's denial of class certification.[18] In another significant ruling in 2009, the D.C. Circuit affirmed the district court's dismissal of the plaintiffs' claim that USDA failed for years to investigate the civil rights complaints filed by Hispanic farmers.[19] More recently, the Supreme Court declined to review the D.C. Circuit's decision.[20] These rulings are described in greater detail below.

In the 2002 ruling, the district court considered the Hispanic farmers' motion for class action status. The Federal Rules of Civil Procedure authorize class action lawsuits, in which one or more individuals are allowed to sue on behalf of all members of a class under certain circumstances. Motions for class action status are reviewed by the courts, and parties seeking class certification must show, among other things, that:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[21]

Ultimately, the district court in *Garcia* denied the Hispanic farmers' motion for certification of a class consisting of

> [a]ll Hispanic farmers and ranchers who farmed or ranched or attempted to do so and who were discriminated against on the basis of national origin or ethnicity in obtaining loans, including the servicing and continuation of loans, or in participating in disaster benefit programs administered in the United States Department of Agriculture, during the period from January 1, 1981 through December 31, 1996, and timely complained about such treatment, or who experienced such discrimination from the period of October 13, 1998 through the present.[22]

Although the plaintiffs easily established numerosity and adequacy of representation, the court held that they did not make the required showing that there were questions of law or fact common to the class or that the claims were typical of the class.

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[15] 15 U.S.C. §§ 1691 et seq.

[16] 5 U.S.C. §§ 551 et seq.

[17] Garcia v. Veneman, 211 F.R.D. 15 (D.D.C. 2002).

[18] Garcia v. Johanns, 444 F.3d 625 (D.C. Cir. 2006).

[19] Garcia v. Vilsack, 563 F.3d 519 (D.C. Cir. 2009).

[20] Garcia v. Vilsack, 2010 U.S. LEXIS 744 (U.S., Jan. 19, 2010).

[21] Fed. R. Civ. P. 23(a).

[22] Garcia v. Veneman, 211 F.R.D. 15, 17 (D.D.C. 2002).

Originally, part of the basis of the Hispanic farmers' lawsuit was that USDA had failed to properly investigate discrimination complaints. However, the court had, in a previous ruling, determined that such a claim was not available under the ECOA or the APA, thus leading the court to conclude that the failure-to-investigate claim could not serve as the common issue of fact for purposes of class certification. As a result, the only remaining ground for establishing commonality was the plaintiffs' allegation that USDA's subjective decision-making process had led to discriminatory results.[23] Ultimately, the court held that "[c]ommonality is defeated—not only by plaintiffs' inability to correlate the discrimination they allege with subjective loan qualification criteria—but also by the large numbers and geographic dispersion of the decision-makers."[24] After the district court issued its decision in *Garcia*, the Hispanic farmers conducted additional discovery and submitted a supplemental brief on the question of commonality, which the court treated as a renewed motion for class certification.[25] Nevertheless, the court once again determined that the plaintiffs had failed to establish commonality and denied class certification.

In contrast to this ruling in *Garcia*, it is important to note that the court in *Pigford* had not yet ruled on the merits of the plaintiffs' failure-to-investigate claim when it considered the black farmers' motion for class certification. In *Pigford*, the failure-to-investigate claim ultimately played a central role in the court's decision to grant class-action status to the black farmers,[26] as described in greater detail below. In turn, the approval of class certification in *Pigford* appears to have been a critical factor in the decision by the Department of Justice (DOJ) to enter into a settlement with the black farmers.[27] Because class actions usually involve large numbers of plaintiffs, a defendant's potential liability is significantly higher than it would be when faced with an individual suit, thus providing strong incentives to settle in a class action. In addition, there may have been other factors, such as the relative strength of the parties' evidence, that led DOJ to pursue litigation in the *Garcia* case. Whatever the reason, DOJ initially declined to enter into a class-wide settlement in *Garcia*, although it had been open to settling individual claims.[28] According to recent press reports, however, DOJ has offered to settle the lawsuits filed by both Hispanic and female farmers for $1.3 billion.[29]

In 2006, meanwhile, the D.C. Circuit affirmed the district court's denial of class certification to the Hispanic farmers.[30] Specifically, the appellate court agreed that the farmers had failed to make the required showing of commonality because they had failed to demonstrate that the class had suffered from a centralized, uniform policy of discrimination, nor had the plaintiffs identified a common facially neutral policy that resulted in a disparate impact.[31] In particular, the fact that

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[23] Id. at 19.

[24] Id. at 22.

[25] Garcia v. Veneman, 224 F.R.D. 8 (D.D.C. 2004).

[26] Garcia, 211 F.R.D. at 19.

[27] Although the Secretary of USDA is named as the defendant in these lawsuits, the agency does not have the authority to make decisions regarding litigation strategy. Rather, that authority belongs to DOJ, whose Federal Programs Branch of the Civil Division is responsible for, among other things, defending federal agencies from lawsuits. The attorneys in that branch generally have broad prosecutorial discretion to make decisions regarding litigation strategy, including the decision whether to settle or to proceed in the courts.

[28] Elaine Ayala, "Fighting to Bring Back South Texas Family Farm," *San Antonio Express-News*, October 6, 2009, p. 1A.

[29] Associated Press, "$1.3 Billion Offered in Case of USDA Bias," *Washington Post*, May 26, 2010, p. A4.

[30] Garcia v. Johanns, 444 F.3d 625 (D.C. Cir. 2006).

[31] Id. at 632-36.

multiple USDA employees in multiple jurisdictions were responsible for making eligibility decisions made it difficult for the farmers to establish that there was a common policy of discrimination, while the fact that USDA had a variety of reasons for denying loans, including credit information and farming experience, meant that the farmers could not point to a common facially neutral USDA policy that had led to a statistically relevant racial imbalance in the denial of loans.

In the same ruling, the D.C. Circuit also considered the Hispanic farmers' appeal of a different district court ruling that dismissed the farmers' failure-to-investigate claim.[32] Ultimately, the appeals court upheld the district court's decision to dismiss the farmers' failure-to-investigate claim under the ECOA because the investigation of a discrimination complaint is not a "credit transaction" within the meaning of that statute. However, the D.C. Circuit did remand the farmers' failure-to-investigate claim under the APA for further development in the district court.[33] The district court subsequently dismissed the farmers' allegation that USDA's failure to investigate their discrimination claims as provided in the agency's regulations violated the APA, and the D.C. Circuit upheld this ruling in a decision issued in April 2009.[34]

Under the APA, "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."[35] Relying on this provision, the D.C. Circuit rejected the farmers' failure-to-investigate claim "[b]ecause appellants fail to show they lack an adequate remedy in court."[36] In its analysis, the court noted that Congress enacted legislation specifically designed to provide several remedies to farmers who allegedly experienced discriminatory treatment by USDA. Under this legislation, the farmers had a choice of filing an ECOA claim in federal court or renewing their administrative complaints with USDA, with the latter option subject to judicial review.[37] The farmers who were party to the litigation chose the first option, and the D.C. Circuit concluded that the farmers had chosen to forgo the adequate remedy provided by Congress when it extended the statute of limitations for filing administrative complaints. Moreover, the court held, the farmers also had an adequate remedy under the ECOA for their failure-to-investigate claims.[38]

In response, attorneys for the plaintiffs filed a petition requesting en banc review by a larger panel of judges on the D.C. Circuit regarding the failure-to-investigate claim. The en banc D.C. Circuit, however, denied the petition.[39] The plaintiffs subsequently filed a motion seeking Supreme Court review, but, in an order issued on January 19, 2010, the Court declined to hear the appeal.[40] As a result, the plaintiffs' final avenue of appeal with respect to the sole remaining credit transaction

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[32] Garcia v. Veneman, No. 00-2445 (D.D.C. Mar. 20, 2002) (relying on *Love v. Veneman*, 2001 U.S. Dist. LEXIS 25201, No. 00-2502 (D.D.C. Dec. 13, 2001), to conclude that the appellants failed to state a claim under the ECOA because the investigation of a discrimination complaint is not a "credit transaction" within the meaning of the ECOA).

[33] Garcia, 444 F.3d at 637.

[34] Garcia v. Vilsack, 563 F.3d 519 (D.C. Cir. 2009). This case also addressed the failure-to-investigate claims made by female farmers in *Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006).

[35] 5 U.S.C. § 704.

[36] Garcia, 563 F.3d at 520.

[37] Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, P.L. 105-277, § 741(e), 112 Stat. 2681-31 (codified at 7 U.S.C. § 2279 Note).

[38] Garcia, 563 F.3d at 523-24.

[39] Garcia v. Vilsack, No. 08-5110 (D.C. Cir. June 18, 2009).

[40] Garcia v. Vilsack, 2010 U.S. LEXIS 744 (U.S., Jan. 19, 2010).

discrimination claim has been exhausted.[41] This means that any *Garcia* plaintiffs who wish to pursue their available ECOA claims must do so individually. Because many of the claimants may not have the means to pursue litigation on their own and because other Hispanic farmers who were not a party to the litigation but who may have been victims of discrimination might have missed the statute of limitations for filing under the ECOA, some of these farmers have also pressed members of the executive and legislative branches to help them resolve the case and secure compensation. Such efforts intensified in the wake of the settlement agreement DOJ recently entered into with a second group of black farmers in the case commonly referred to as *Pigford II*, particularly in light of the fact that Secretary of Agriculture Tom Vilsack has indicated support for resolving the litigation.[42] Indeed, DOJ recently made a settlement offer in the *Garcia* case. This offer may mollify USDA's critics, including Hispanic farmers who have explicitly argued that different judicial rulings regarding class certification in the various lawsuits against USDA have had the unfair effect of making settlement more likely for some groups of farmers than others. A brief description of these other cases, as well as a discussion of the role that the legislative branch may play, appear below.

Other Discrimination Cases Against USDA

As noted above, *Garcia* is not the only discrimination lawsuit that has been filed against USDA. Although *Pigford*, the lawsuit filed by black farmers, is the first and perhaps most well-known case, Native American farmers and female farmers also have filed lawsuits based on similar claims. These cases are described below.

Pigford v. Vilsack

In 1997, a proposed class action suit was filed against USDA on behalf of black farmers. The suit alleged that USDA had violated the ECOA by discriminating against black farmers from 1983 to 1997 when they applied for federal financial help and by failing to investigate allegations of discrimination.[43] Attorneys for the black farmers subsequently requested blanket mediation to cover all of the then-estimated 2,000 farmers who may have suffered from discrimination by USDA. Although the government initially agreed to mediation and to explore a settlement, DOJ opposed blanket mediation, arguing that each case had to be investigated separately. When it became apparent that USDA would not be able to resolve the significant backlog of individual complaints from minority farmers and that the government would not yield on its objections to class relief, settlement negotiations ended.

Subsequently, a federal district court ruled that the plaintiffs had met the requirements for class certification, with the class defined as "[a]ll African-American farmers who (1) farmed between January 1, 1983, and February 21, 1997; and (2) applied, during that time period, for participation in a federal farm program with USDA, and as a direct result of a determination by USDA in

[41] According to the D.C. Circuit, however, the district court's dismissal did not address the Garcia farmers' non-credit claims relating to the provision of disaster benefits; that claim is on remand in the district court. Garcia, 563 F.3d at 526-27.

[42] Krissah Thompson, "USDA Chief Details Agency Efforts to Improve Record on Civil Rights," *Washington Post*, February 16, 2010, p. A11.

[43] Pigford v. Glickman, 182 F.R.D. 341 (D.D.C. 1998).

response to said application, believed that they were discriminated against on the basis of race, and subsequently filed a written discrimination complaint with USDA."[44] Specifically, the district court held that the plaintiffs, who named 401 individuals in their complaint, satisfied the requirement for "numerosity," as well as the requirements regarding typicality and adequacy of representation. Perhaps most significantly, the court also concluded that the plaintiffs had established that there were questions of law and fact that were common to the class. Although DOJ argued that the plaintiffs failed to identify a particular USDA practice or policy of discrimination that was common to all class members, the court found that "the unifying pattern of discrimination at issue in this case is the USDA's failure properly to process complaints of discrimination, without regard to the program that triggered the discrimination complaint."[45] Indeed, the court distinguished the *Pigford* plaintiffs' claims from those in *Williams v. Glickman*,[46] an earlier lawsuit in which the court rejected class certification for black and Hispanic farmers alleging discrimination in USDA farm programs. According to the court, the *Williams* plaintiffs alleged discrimination in the granting or servicing of loans or credit—a claim that was far too broad to establish commonality—while the *Pigford* plaintiffs' allegations of discrimination focused more narrowly on USDA's centralized processing of written complaints of discrimination.[47]

In the wake of the class certification ruling, the parties reached a settlement agreement and filed a motion requesting preliminary approval of a proposed consent decree. In 1999, the court approved the consent decree, setting forth a revised settlement agreement of all claims raised by the class members.[48] As of October 2009, 22,547 black farmers have received over $1 billion in compensation, including $50,000 cash awards, debt relief, and tax payments.

Despite the settlement, a significant number of black farmers did not have their cases heard on the merits because they filed late. In response, the 110th Congress included a provision in the 2008 farm bill that permitted any claimant in the *Pigford* decision who had not previously obtained a determination on the merits to petition in civil court to obtain such a determination.[49] A maximum of $100 million was also authorized for new claims settlements.

On February 18, 2010, Attorney General Eric Holder and Secretary of Agriculture Vilsack announced that DOJ had reached a settlement agreement with the plaintiffs who filed these so-called *Pigford II* claims.[50] However, the agreement, which requires court approval, will not become effective until Congress appropriates money to fund the claims. The Obama Administration has requested $1.15 billion in an emergency appropriation, to remain available until expended, for claims under the agreement. When combined with the $100 million authorized in the 2008 farm bill, this appropriation, if authorized by Congress, would make $1.25 billion available to settle the *Pigford II* claims. Several bills that would have appropriated funds for these claims have passed the House of Representatives,[51] but the funding provisions were

[44] Id. at 345.

[45] Id. at 349.

[46] 1997 U.S. Dist. LEXIS 1683 (D.D.C. Feb. 14, 1997).

[47] Pigford, 182 F.R.D. at 344-45.

[48] Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999).

[49] P.L. 110-246, § 14012.

[50] In re Black Farmers Discrimination Litigation, No. 08-mc-0511(D.D.C. Feb. 18, 2010).

[51] *See, e.g.*, H.R. 4213, H.R. 4899.

subsequently dropped from the companion Senate bills. As a result, legislation to fund the *Pigford II* settlement has not yet been enacted in the 111th Congress.

For more detailed information on *Pigford*, see CRS Report RS20430, *The Pigford Case: USDA Settlement of a Discrimination Suit by Black Farmers*, by Tadlock Cowan and Jody Feder.

Keepseagle v. Vilsack

Like black and Hispanic farmers, Native American farmers also have alleged discrimination by USDA. According to the 2007 Census of Agriculture, there are 61,472 Native American farmers, of which over one-half are located in four states: Oklahoma, Arizona, Texas, and New Mexico. In 1999, the plaintiffs in *Keepseagle v. Vilsack* filed a class action lawsuit under the ECOA and the APA seeking compensation for loan discrimination between 1981 and 1999. Relying heavily on the reasoning set forth in *Pigford*, the district court granted class certification in 2001.[52] Although the class was certified for purposes of declaratory and injunctive relief, the district court deferred until the completion of discovery the question of whether it would certify a hybrid class that would permit the plaintiffs to pursue their claims for monetary damages. The discovery process ended in fall 2009, and the plaintiffs recently filed a motion seeking certification for their claims for damages,[53] which an attorney for the plaintiffs alleges could reach up to $1 billion.[54] Meanwhile, the plaintiffs and USDA are reportedly in settlement talks.[55]

Love v. Vilsack

The plaintiffs in *Love v. Vilsack* allege discrimination on the basis of gender in connection with farm loans from USDA. According to the 2007 Census of Agriculture, 306,209 farms are principally operated by a woman.[56] Like the other lawsuits against USDA, the plaintiffs in *Love* sought class action status for the claims they asserted under the ECOA and APA. Both *Garcia* and *Love* were initially heard by the same district court judge and were eventually consolidated on appeal. As a result, the litigation history for the two cases is very similar. In 2001, the district court dismissed the plaintiffs' failure-to-investigate claims under both the ECOA and the APA,[57] and, in 2004, the court issued an order denying class certification.[58] On appeal, the D.C. Circuit affirmed the denial of the motion for class certification and the dismissal of the failure-to-investigate claim under the ECOA but remanded with regard to the dismissal of the failure-to-investigate claim under the APA.[59] Subsequently, the district court dismissed the plaintiffs' APA

[52] Keepseagle v. Veneman, 2001 U.S. Dist. LEXIS 25220 (D.D.C. Dec. 11, 2001).

[53] Memorandum of points and authorities in support of motion for certification of damages claims under Federal Rule of Civil Procedure 23(b)(3), Keepseagle v. Vilsack, No. 1:99CV03119 (D.D.C. Dec. 4, 2009), available at http://turtletalk.files.wordpress.com/2009/12/keepseagle-motion-for-certification-of-damages.pdf.

[54] Kari Lydersen, "Farmers See Ray of Hope in USDA Bias Case," *Washington Post*, September 29, 2009.

[55] "Settlement Talks Set in Indian Farmer Lawsuit," *Associated Press*, December 8, 2009, available at http://www.cmht.com/news.php?NewsID=271.

[56] National Agriculture Statistics Service. http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_1_US/st99_1_050_050.pdf.

[57] Love v. Veneman, 2001 U.S. Dist. LEXIS 25201 (D.D.C. Dec. 13, 2001).

[58] Love v. Veneman, 224 F.R.D. 240 (D.D.C. 2004).

[59] Love v. Johanns, 439 F.3d 723 (D.C. Cir. 2006).

failure-to-investigate claim,[60] and the D.C. Circuit, in a consolidated opinion that also addressed the *Garcia* plaintiffs' APA failure-to-investigate claim, ultimately affirmed the lower court's ruling.[61] As noted above, both the *Garcia* and *Love* plaintiffs appealed this decision to the Supreme Court. On January 19, 2010, the Court declined to hear the appeal.[62]

Although DOJ initially declined to enter into a class-wide settlement in *Love*, recent press reports indicate that DOJ has offered to settle the lawsuits filed by both Hispanic and female farmers for $1.3 billion.[63] It is unclear whether the plaintiffs in *Garcia* and *Love* will accept the offer. In the meantime, legislation that would provide a remedy for the *Love* plaintiffs has been introduced in the 111th Congress. The bill, Equality for Women Farmers Act (H.R. 4264), would create a mechanism for resolving allegations of gender discrimination against USDA by establishing a procedure for submitting and processing claims for damages and by placing a moratorium on foreclosures against farmers who have complained of gender discrimination.

Congressional Response

Congress has, in the past, legislatively responded to discrimination issues at USDA and may decide to intervene again in the future. This section discusses past congressional actions and possible future responses for Congress to consider if it wishes to become involved in USDA-related discrimination issues generally or the *Garcia* dispute specifically.

Past Actions

The ongoing civil rights issues within USDA have led to various legislative responses by Congress. For example, in the 2002 farm bill,[64] Congress created the Office of the Assistant Secretary for Civil Rights, which has the statutory responsibility of ensuring compliance with all civil rights laws and ensuring the incorporation of civil rights components into all strategic planning initiatives of the Department.[65]

Meanwhile, the 2008 farm bill, the Food, Conservation, and Energy Act of 2008, established a moratorium on acceleration and foreclosure proceedings by USDA against any farmer or rancher who has filed a program discrimination claim.[66] Accrual of interest and offsets are also to be waived while a complaint is pending, although if the farmer does not prevail in the discrimination complaint the accrued interest and offsets come due. USDA has issued a notice implementing the farm bill provision.[67] Any borrower who has filed a discrimination complaint that has not yet been resolved should therefore not be subject to acceleration, foreclosure, the accrual of interest,

[60] Love v. Connor, 525 F. Supp. 2d 155 (D.D.C. 2007).

[61] Garcia v. Vilsack, 563 F.3d 519 (D.C. Cir. 2009). For more information about this decision, see *supra* notes 33-39 and accompanying text.

[62] Garcia v. Vilsack, 2010 U.S. LEXIS 744 (U.S., Jan. 19, 2010).

[63] Associated Press, "$1.3 Billion Offered in Case of USDA Bias," *Washington Post*, May 26, 2010, p. A4.

[64] P.L. 107-171.

[65] 7 U.S.C. § 6918(d).

[66] P.L. 110-246, § 14002.

[67] USDA. Farm Service Agency, Implementing the Food, Conservation, and Energy Act of 2008: Loan Servicing Provisions. Notice FLP-508. January 1, 2009. Available at http://www.cmht.com/media/pnc/4/media.614.pdf.

or offsets. In the 2008 farm bill, Congress also inserted a non-binding Sense of Congress regarding claims brought by socially disadvantaged farmers and ranchers.[68] The provision stated that all pending claims and class actions brought against USDA by socially disadvantaged farmers or ranchers including Native American, Hispanic, and female farmers or ranchers, based on racial, ethnic, or gender discrimination in farm program participation should be resolved in an expeditious and just manner.

Possibilities for Future Congressional Responses

There are several possible options for future congressional involvement in the *Garcia* dispute specifically or USDA-related discrimination issues more generally. At one end of the spectrum of options, Congress could simply choose not to intervene, thus remaining neutral, as is typically the case. In general, Congress is not considered to be the institution that is best suited to mediate legal disputes, which is why such situations are resolved by the courts, which have both the means and the expertise to evaluate the merits of legal claims and to provide remedies when appropriate. Indeed, one could argue that Congress already provided a remedy for situations involving discrimination against credit applicants when it enacted the ECOA. Under this view, Congress's involvement could end with the enactment of this legislative remedy, and the application of that remedy would be left to the courts.

At the other end of the spectrum, if Congress decides to become involved in the *Garcia* dispute or related litigation, a number of approaches could be considered. For example, Congress could decide to create a fund to aid Hispanic or other farmers who are deemed to have been victims of discrimination. Indeed, Congress has established a number of programs to compensate or assist victims of certain circumstances, including negligence, terrorism, and "acts of God."[69] Notably, the vast majority of these programs have provided compensation in cases of physical injury or death. Congress could decide whether to create similar compensation funds for farmers who have been victims of discrimination by USDA.

If Congress were to create such a fund, it would likely have to establish the parameters under which the fund would operate, including designating a program administrator, establishing eligibility requirements, determining what types of benefits would be provided, and establishing the means by which the fund would be financed. One possible approach would be for Congress to model such a fund on the terms of the consent decree in the *Pigford* case, which defined eligible claimants and established a system for notice, claims submission, consideration, and review that involved a facilitator, arbitrator, adjudicator, and monitor, all with assigned responsibilities. The *Pigford* consent decree established a two-track dispute resolution mechanism for those seeking relief, including a streamlined process with a lower evidentiary standard for a fixed settlement at a lesser amount and a more detailed process by which class participants could seek a larger, tailored payment by showing evidence of greater damages.[70] The funds to pay the costs of the settlement (including legal fees) come from the Judgment Fund operated by the Department of the Treasury, not from USDA accounts or appropriations.[71] Although Congress was not involved

[68] P.L. 110-246, § 14011.

[69] See CRS Report RL33927, *Selected Federal Compensation Programs for Physical Injury or Death*, coordinated by Sarah A. Lister and C. Stephen Redhead.

[70] For more details on the two-track system, see CRS Report RS20430, *The Pigford Case: USDA Settlement of a Discrimination Suit by Black Farmers*, by Tadlock Cowan and Jody Feder.

[71] 31 U.S.C. §1304.

in the creation of the compensation system established under the *Pigford* consent decree, Congress subsequently made an additional $100 million available to settle the claims of class participants who never received a decision on the merits of their claims because they missed the filing deadline set forth in the consent decree.[72]

Another possible option would be for Congress to change underlying statutory requirements relating to the filing of discrimination claims against USDA. For example, Congress could extend the statute of limitations under the ECOA for Hispanic farmers who are not party to the current litigation and who wish to file a discrimination lawsuit but who missed the two-year deadline for filing claims under the statute. Congress passed a similar measure waiving the statute of limitations under the ECOA on certain civil rights claims against USDA when it became clear that some black farmers would otherwise have been excluded from the class that was certified in *Pigford*.[73]

Yet another option available to Congress would be to have the claims under the *Garcia* case be considered by the United States Court of Federal Claims as a non-binding congressional reference case. A congressional reference case is a request from Congress to the claims court to prepare an advisory report regarding a claim against the United States. Such claims are generally set out in a private bill for compensation, and then the bill is referred to the claims court by a House or Senate resolution in order for the court to consider its merits.[74] In general, these reports are made pursuant to procedures set forth in statute and by court regulations.[75]

It is important to note that the range of options described above is not exhaustive, but merely represents a sample of possibilities for Congress to consider if it wishes to become involved in resolving some of the issues raised by *Garcia* or related disputes involving allegations of discrimination against USDA.

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[72] P.L. 110-246, § 14012.

[73] P.L. 105-277, §741.

[74] To the extent possible, the claims court proceeds in accordance with applicable court rules to determine the facts of the case. The court then prepares findings of fact and conclusions sufficient to inform Congress whether the demand is a legal or equitable claim or a gratuity. Further, the court determines the amount, if any, legally or equitably due from the United States to the claimant. 28 U.S.C. § 2509(c). Such congressional reference cases, however, differ in a number of ways from other court cases, in that Congress may require the claims court to evaluate facts and issues that might not be considered in the course of a regular court case. For instance, it appears that even if the claims court finds that threshold legal issues, such as statute of limitations, would bar a plaintiff's recovery, this is not the end of the case. Id. Thus, a finding that a claim was barred by the statute of limitations would not end the claims court inquiry, as the court would be expected to explore facts which might justify the removal of such a bar. *See, e.g.,* Kanehl v. United States, 38 Fed. Cl. 89 (1997). Further, even if both threshold and substantive legal issues are decided against a plaintiff, the claims court is still required to consider whether compensation is justified. 28 U.S.C. § 2509. It appears that Congress could also specify what threshold issues the court would need to consider, and which it could disregard. *See e.g.*, J.L. Simmons Co. v. United States, 60 Fed. Cl. 388 (2004), referred by S.Res. 83, 107th Cong., 1st Sess. (2001). Consequently, in the instant situation, Congress could provide that the claims court consider a claim by Hispanic farmers regardless of the statute of limitation preclusion. It may also be possible for Congress to require the claims court to consider the case assuming that class certification had been granted.

[75] 28 U.S.C. §§ 1492, 2509; Rules of the United States Court of Federal Claims, Appendix D, Procedure in Congressional Reference Cases, 6.

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