The *Pigford* Cases: USDA Settlement of Discrimination Suits by Black Farmers

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Summary

On April 14, 1999, Judge Paul L. Friedman of the U.S. District Court for the District of Columbia approved a settlement agreement and consent decree in *Pigford v. Glickman*, a class action discrimination suit 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. Cumulative data show that as of December 31, 2011, 15,645 (69%) of the 22,721 eligible class members had final adjudications approved under the Track A process, and 104 (62%) prevailed in the Track B process for a total cost of approximately $1.06 billion in cash relief, tax payments, and debt relief.

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 who had submitted a late-filing request under *Pigford* and who had not previously obtained a determination on the merits of his or her claim to petition in federal court to obtain such a determination. A maximum of $100 million in mandatory spending was made available for payment of these claims, and the multiple claims that were subsequently filed were consolidated into a single case, *In re Black Farmers Discrimination Litigation* (commonly referred to as *Pigford II*).

On February 18, 2010, Attorney General Holder and Secretary of Agriculture Vilsack announced a $1.25 billion settlement of these *Pigford II* claims. However, because only $100 million was made available in the 2008 farm bill, the *Pigford II* settlement was contingent upon congressional approval of an additional $1.15 billion in funding. After a series of failed attempts to appropriate funds for the settlement agreement, the Senate passed the Claims Resolution Act of 2010 (H.R. 4783) to provide the $1.15 billion appropriation by unanimous consent on November 19, 2010. The Senate bill was then passed by the House on November 30 and signed by the President on December 8 (P.L. 111-291).

Like the original *Pigford* case, the *Pigford II* settlement provides both a fast-track settlement process (Track A) and higher payments to potential claimants who go through a more rigorous review and documentation process (Track B). A moratorium on foreclosures of most claimants' farms will remain in place until after claimants have gone through the claims process. On October 27, 2011, the U.S. District Court for the District of Columbia granted final approval of the settlement agreement. Under the terms of the court order, claims could be submitted beginning on November 14, 2011, with a deadline for filing claims of May 11, 2012. Approximately 89,000 claim forms were mailed out. Nearly 40,000 of them ultimately were filed. Of those, approximately 34,000 were deemed complete and timely. A determination of the validity of the claims is expected to be completed in June/July 2013, after which the claims administrator will begin distributing payments to successful claimants. Preliminary estimates from the claims administrator suggest that 17,000-19,000 claims will be positively adjudicated under *Pigford II*, a lower proportion of successful claims than under *Pigford I*.

This report highlights some of the events that led up to the original *Pigford* class action suit and the subsequent *Pigford II* settlement. The report also outlines the structure of both the original consent decree in *Pigford* and the settlement agreement in *Pigford II*. In addition, the report discusses the number of claims reviewed, denied, and awarded under *Pigford*, as well as some of the issues raised by various parties under both lawsuits. It will be updated periodically.

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Introduction

In 1999, a federal district court judge approved a settlement agreement and consent decree in *Pigford v. Glickman*,[1] a class action discrimination suit between the U.S. Department of Agriculture (USDA) and black farmers. Due to concerns about the large number of applicants who did not obtain a determination on the merits of their claims under the original *Pigford* settlement, Congress enacted legislation in 2008 that permitted any claimant who had submitted a late-filing request under *Pigford* and who had not previously obtained a determination on the merits of his or her claim to petition in federal court to obtain such a determination. The multiple claims that were subsequently filed were consolidated into a single case, *In re Black Farmers Discrimination Litigation* (commonly referred to as *Pigford II*),[2] and an agreement was reached to settle these claims. This report discusses both the original *Pigford* consent decree and the subsequent *Pigford II* settlement. Before turning to the main discussion regarding the litigation in these cases, it is useful to understand the historical background leading up to the litigation, as well as some of the studies that have examined USDA's treatment of minority farmers during this period.[3]

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.

Background

Litigation against the U.S. Department of Agriculture (USDA) for discrimination against African American farmers began in August 1997 with two suits brought by black farmers—*Pigford v. Glickman* and *Brewington v. Glickman*—but its origins go back much further.[4] 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,

[1] 185 F.R.D. 82 (D.D.C. 1999).

[2] Order, In re Black Farmers Discrimination Litigation, No. 08-mc-0511 (D.D.C. filed August 8, 2008), available at http://blackfarmercase.com/sites/default/files/2008.08.08%20-%20PLF%20Consolidation%20Order_0.pdf.

[3] Other minority farmers, including Hispanic, Native American, and female farmers, have filed similar discrimination lawsuits against USDA. For more information, see CRS Report R40988, *Garcia v. Vilsack: A Policy and Legal Analysis of a USDA Discrimination Case*, by Jody Feder and Tadlock Cowan.

[4] As the current USDA Secretary, Tom Vilsack is the named defendant in the class action suit at this time.

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.

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 (1) the largest USDA loans (top 1%) went to corporations (65%) and white male farmers (25%); (2) loans to black males averaged $4,000 (or 25%) less than those given to white males; and (3) 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.

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.

The Original *Pigford* Settlement

This section discusses the *Pigford* lawsuit and the subsequent settlement approved by the court in the consent decree, as well as current statistics regarding the resolution of *Pigford* claims.

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.[5] 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.[6] A complicating factor throughout the period, however, was a two-year statute of limitations in the Equal Credit Opportunity Act (ECOA),[7] 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.[8]

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.[9] Review of the claims began almost immediately, and the initial disbursement of checks to qualifying farmers began on November 9, 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 1, 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.[10]

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

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

[6] *Id*. at 342.

[7] The ECOA prohibits discrimination against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age, or source of income. 15 U.S.C. §§1691 et seq.

[8] P.L. 105-277, §741.

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

[10] 31 U.S.C. §1304.

- the claimant owned or leased, or attempted to own or lease, farm land;
- the 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 claims are valid). The documentation to support such a claim and the amount of relief were 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.[11] Finally, plaintiffs were permitted to withdraw from the class and pursue their individual cases in federal court or through the USDA administrative process.[12]

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, 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[13]) 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.[14] 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.

[11] 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) and §10708 (governing the composition of county, area, or local committees to encourage greater representation of minority and women farmers).

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

[13] *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).

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

Current Status

In general, there seems to be a consensus that many of the issues surrounding the implementation of *Pigford I* can be attributed to the gross underestimation of the number of claims that would actually be filed.[15] 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 (69%) 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.[16] **Table 1** shows the Court Monitor cumulative statistics for Track A claims as of December 30, 2011. As of that date, there were also 169 eligible Track B claimants (1% of the total eligible class members).[17] These data are the final data reported by the Court Monitor.

More alarming to many, however, was the large percentage of farmers who did not have their cases heard on the merits because they filed late—those now eligible to file under *Pigford II*, as described below. Approximately 73,800 *Pigford II* petitions (66,000 before the September 15, 2000, late filing deadline) were filed under the late filing procedure, of which 2,116 were ultimately allowed to proceed under the *Pigford I* process.[18] Many claimants who were initially denied relief under the late filing procedures subsequently 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.[19] Many argued that the large number of late filings indicated that the notice was "ineffective or defective."[20] Others countered these claims by arguing that the *Pigford* notice program was designed, in part, to promote awareness and could not *make* someone file.[21] 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.[22] 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."[23]

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[15] 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).

[16] 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).

[17] Office of the Monitor, at http://www.dcd.uscourts.gov/pigfordmonitor/ .

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

[19] Ibid.

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

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

[22] 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.

[23] *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).

Table 1. Track A Statistics as of February 16, 2012 (Final)

Track A	Totals
Track A Decisions	22,551
Final Track A Adjudications Approved	15,645 (69%)
Final Track A Adjudications Denied	6,906 (31%)
$50,000 Cash Awards	$770,050,000[a]
$3,000 Non-Credit Awards	$1,656,000
Debt Relief	$43,715,385
IRS Payments for Title A Claimants	$192,512,500
IRS Payments for Debt Relief	$7,793,610
Total Track A Relief	**$1,015,727,495**

Source: Office of the Monitor, http://www.dcd.uscourts.gov/pigfordmonitor/.

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

Judge Friedman also declared that he was "surprised and disappoint[ed]" that 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."[24] 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 against the USDA on behalf of roughly 25,000 farmers for alleged racial discriminatory practices against black farmers between January 1997 and August 2004. This lawsuit, however, was dismissed in March 2005 because BFAA failed to show it had standing to bring the suit.[25]

Cumulative Data

The cumulative data for Pigford I were reported December 31, 2011 in the final Court Monitor Report published April 1, 2012.[26] These data include both Track A and Track B claimants, and are summarized below:

- Approximately 22,721 claimants were found eligible to participate in the claims process.[27]
- Approximately 22,552 claimants chose to resolve their claims through Track A. Approximately 15,645 (69%) prevailed in the Track A claims process.[28]

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

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

[26] Final Court Monitor Report is available at http://www.dcd.uscourts.gov/pigfordmonitor/reports/Rpt20120331_final.pdf.

[27] This number includes claimants who filed claim packages on or before the October 12, 1999 deadline and claimants who received permission from the Arbitrator to file a "late claim" after the October 12,1999 claims filing deadline. The 22,721 eligible claimants include those found eligible by the Facilitator in initial screening decisions and those found eligible by the Facilitator on reexamination of the eligibility screening decision.

[28] This number includes claimants who initially elected Track B, but who switched to Track A with the consent of the Government. The 15,645 claims approved by the Adjudicator as of the end of 2011 include both initial Adjudicator decisions and Adjudicator decisions on reexamination.

- Approximately 169 claimants chose to resolve their claims through Track B. Approximately 104 (62%) prevailed in the Track B claims process[29] or settled their Track B claims and received a cash payment.
- Approximately 5,848 claims were the subject of a petition for reexamination of a decision by the Facilitator (eligibility), Adjudicator (Track A), or Arbitrator (Track B). The Monitor directed reexamination of approximately 2,941 (50%) of the claims.
- The federal government provided a total of approximately $1.06 billion ($1,058,577,198) in cash relief, estimated tax payments, and debt relief to prevailing claimants (Track A and Track B).

In re Black Farmers Discrimination Litigation (*Pigford II*)

Due to concerns about the large number of applicants who did not obtain a determination on the merits of their claims under the original *Pigford* settlement, Congress included a provision in the 2008 farm bill that permitted any claimant who had submitted a late-filing request under *Pigford* and who had not previously obtained a determination on the merits of his or her claim to petition in federal court to obtain such a determination.[30] This provision did not reopen the previous *Pigford* litigation, but rather provided such farmers with a new right to sue. Ultimately, multiple separate lawsuits were filed, and these claims were consolidated into a single case, *In re Black Farmers Discrimination Litigation* (commonly referred to as *Pigford II*).[31]

On February 18, 2010, Attorney General Holder and Secretary of Agriculture Vilsack announced a $1.25 billion settlement of these *Pigford II* claims.[32] Normally, funding for the costs of such settlements would be paid out of the Judgment Fund, which is a permanent, indefinite appropriation for the payment of final judgments and "compromise settlements" for which "payment is not otherwise provided."[33] However, because $100 million was made available for payment of *Pigford II* claims in the 2008 farm bill, meaning that payment was otherwise provided

[29] This number includes both initial Arbitrator decisions and Arbitrator decisions on reexamination. A petition for Monitor review was filed in 2012 for one of the prevailing Track B claims. An additional 41 claimants who initially elected Track B prevailed in the Track A claims process after they switched to Track A with the consent of the Government. As of the end of 2011, there was one pending claim in which the Government agreed that a claimant who initially elected Track B could switch to Track A. As of the end of 2011, the claimant's Track A claim remained pending a final Track A decision. The Adjudicator issued a decision in this claim in 2012.

[30] P.L. 110-246, §14012.

[31] Order, In re Black Farmers Discrimination Litigation, No. 08-mc-0511 (D.D.C. filed August 8, 2008), available at http://blackfarmercase.com/sites/default/files/2008.08.08%20-%20PLF%20Consolidation%20Order_0.pdf. For more information, see http://blackfarmercase.com/. The court overseeing the *Pigford II* litigation authorized the law firms representing the plaintiffs to establish the website for information purposes. Case Management Order No. 1, In re Black Farmers Discrimination Litigation, No. 08-mc-0511 (D.D.C. filed December 15, 2008), available at https://www.blackfarmercase.com//Documents/2008.12.15%20Signed%20CMO%20No.%201%20re%20website%20and%20phone%20bank_0.pdf.

[32] Settlement Agreement, In re Black Farmers Discrimination Litigation, No. 08-mc-0511 (February 18, 2010, revised and executed as of May 13, 2011), available at https://www.blackfarmercase.com//Documents/SettlementAgreement.pdf.

[33] 31 U.S.C. §1304.

for, the *Pigford II* settlement was contingent upon congressional approval of an additional $1.15 billion in funding.

After a series of failed attempts to appropriate funds for the settlement agreement (see "Legislative Action" section below), the Senate passed the Claims Resolution Act of 2010 (H.R. 4783) to provide the $1.15 billion appropriation by unanimous consent on November 19, 2010. In addition to the funding, the legislation contains several measures that appear to be designed to combat potential fraud during the settlement process. The Senate bill was passed by the House on November 30, 2010, and signed by the President on December 8, 2010.[34] Relevant provisions in the act have been incorporated into the settlement agreement, which was revised as of May 13, 2011.

The Settlement Agreement and Claims Review Process

Under the terms of the *Pigford II* settlement agreement, an eligible claimant is any individual who submitted a late-filing request under Section 5(g) of the original *Pigford* consent decree after October 12, 1999, and before June 19, 2008, but who has not obtained a determination on the merits of his or her discrimination complaint. Like the original *Pigford* decision, the *Pigford II* settlement provides both a "fast-track" adjudication process and a track for higher payments to claimants who go through a more rigorous review and documentation process. Potential claimants could seek the fast-track payments of up to $50,000 plus debt relief, or choose the longer process for damages of up to $250,000.

On October 27, 2011, the U.S. District Court for the District of Columbia granted final approval of the settlement agreement.[35] Under the terms of the court order, claims could be submitted beginning on November 14, 2011. Both the settlement agreement and the order and opinion approving the agreement set forth detailed requirements regarding claims submission procedures. The deadline for submitting claims was May 11, 2012. The court overseeing the *Pigford II* litigation also authorized the law firms representing the plaintiffs to establish a website for information purposes (http://blackfarmercase.com/), through which interested parties could find information about the claims process, request a claims form, and monitor the progress of the review process.[36]

According to the third-party information management firm overseeing the claims process, approximately 89,000 claim forms were mailed out. Nearly 40,000 of them ultimately were filed. Of those, approximately 34,000 were deemed complete, timely, and eligible. The claims administrator developed an internal control design to identify and deny any invalid claims. Hearing officers—retired judges and lawyers with no involvement in the case—were approved by the court, sworn in, and trained in the elements of the claims. Each claim went through four to five reviews. Statistical reviews of the behavior of individual hearing officers were also

[34] P.L. 111-291.

[35] Order and Judgment, In re Black Farmers Discrimination Litigation, No. 08-mc-0511 (D.D.C. filed October 27, 2011), available at https://www.blackfarmercase.com//Documents/OrderApproving%20Settlement.pdf. See also, Opinion, In re Black Farmers Discrimination Litigation, No. 08-mc-0511 (D.D.C. filed October 27, 2011), available at https://www.blackfarmercase.com//Documents/Opinion%20Approving%20Settlement.pdf.

[36] Case Management Order No. 1, In re Black Farmers Discrimination Litigation, No. 08-mc-0511 (D.D.C. filed December 15, 2008), available at https://www.blackfarmercase.com//Documents/2008.12.15%20Signed%20CMO%20No.%201%20re%20website%20and%20phone%20bank_0.pdf.

conducted to further ensure that each claim was subjected to a fair and consistent review process. Ongoing monitoring by the Government Accountability Office (GAO) and USDA's Office of the Inspector General added further auditing and data standardization to the claims review process.[37]

The Claims Resolution Act of 2010 (P.L. 111-291), which provided the funds for the *Pigford II* settlement, mandated that GAO evaluate the internal controls for the *Pigford II* review process and report twice on the review process. In December 2012, GAO published a report on its first evaluation of the review process.[38] GAO concluded that "the internal control design provides reasonable assurance that fraudulent or otherwise invalid claims could be identified and denied; however, certain weaknesses in the control design could expose the claims process to risk of improper determinations." Some of the weaknesses GAO identified were a result of constraints imposed by the settlement agreement itself, and, in some cases, originated in the *Pigford I* settlement. GAO recognized that these weaknesses could not be modified by the parties implementing *Pigford II*. GAO also identified weakness in the internal control design that could be modified. GAO noted in its report (1) that the internal controls could be improved to identify and prevent claimants who obtained prior judgments on their discrimination complaints (e.g., claims under *Pigford I*); and (2) that the internal control design needed to be fully implemented, including measures that could prevent duplicate claims submitted on behalf of the same farming operation or the same class member.

Under the settlement, no claims will be paid until the merits of all claims have been determined. A determination of the validity of the claims is expected to be completed in June /July 2013, after which the claims administrator will begin distributing payments to successful claimants. A final judicial review of the claims review process will occur before final settlement. Preliminary estimates from the Claims Administrator suggest that 17,000-19,000 Track A claims are likely to be positively adjudicated under *Pigford II*, a rate of approximately 50%-56%. Under *Pigford I*, approximately 69% of Track A claims were successful.

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 reiterated these provisions.

Census Enumeration of Black Farmers

Questions have been raised about the number of black farmers who were or are eligible for a settlement under *Pigford* or *Pigford II*. Determining the number of African American farm operators who farmed during the period of January 1, 1981, and December 31, 1996, is difficult because of the way in which the Census of Agriculture defined farm operator. Prior to the 2002

[37] Information on the *Pigford II* review process was provided by Class Counsel and the claims adjudication management firms at a House briefing on May 10, 2013.

[38] Government Accountability Office. *Additional Actions in Pigford II Claims Process Could Reduce Risk of Improper Determinations.* GAO-13-69R. December 7, 2012.

Census of Agriculture, only principal farm operators were counted. In the 1982 Census of Agriculture, there were 33,250 African American-operated farms; in 1987, 22,954; in 1992, 18,816; and in 1997, 18,451. Essentially, the number of African American farms was treated as synonymous with the number of African American operators.

These statistics, however, failed to recognize that many farms are operated by more than one farm operator. In 2002, the Census of Agriculture collected data for a maximum of three principal operators per farm. The 2002 Census enumerated 29,090 African American farm operators. This statistical change more accurately captured the actual number of operators, that is, those who are actually engaged in farming. For example, a single farm may be operated by four or more operators, each of whom could have conceivably made loan applications to USDA agencies. In addition, a farm operator might operate rented or leased land owned by a principal operator. In such a case, that operator renting or leasing farmland would not have been counted as the operator of that farm. Under the term of the consent decree, however, such a farmer could be an eligible claimant because he or she farmed or tried to farm during the requisite time period. The varying Census definitions of farm, farm operator, and farm owner help explain why the number of initial claimants in the *Pigford* case (approximately 94,000) was higher than the number of farms/farm operators enumerated by the Census of Agriculture between 1982 and 1997 and why the estimated number of potential *Pigford II* claimants may be greater than the number of farms/farm operators enumerated in those or subsequent Census counts.

In addition, it is important to note that there may be other reasons for discrepancies between the number of farmers reflected in farm Census data and the number of claimants under *Pigford* or *Pigford II*. For example, individuals who attempted to farm but who were denied loans or other farm assistance would not be counted as farmers but may have been or may be eligible to file a claim under the terms of the two settlement agreements. Likewise, the estate of a deceased individual who farmed or attempted to farm during the eligibility period may be entitled to relief under either settlement, but such persons would not be counted as farm operators. Finally, due to fraud or mistake, some individuals who are not eligible may have filed or may file claims under *Pigford* or *Pigford II*, but such claims would not be entitled to an award. For example, nearly 7,000 Track A claims in *Pigford* (31%) were denied relief, presumably because such claims lacked merit or had other defects. Thus, the number of claims filed cannot be viewed as an accurate representation of the number of awards that have been or will be made under the two settlements.

Legislative Action

Due to long-standing congressional interest in providing relief to late-filers who did not receive assistance under the original *Pigford* settlement, numerous bills that would provide a remedy to black farmers who were victims of discrimination have been introduced in recent legislative sessions.

For example, 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,[39] providing up to

[39] P.L. 110-246, §14012.

$100 million for potential settlement costs. The Administration requested an additional $1.15 billion for these potential settlement costs in its FY2010 budget, but appropriators did not provide such funding in the FY2010 appropriations bill.[40] Meanwhile, Senator Charles Grassley and Senator Kay Hagan introduced S. 972, a bill that would have amended the 2008 farm bill to allow access to an unlimited Judgment Fund at the Department of the Treasury to pay successful claims. The legislation also would have allowed for legal fees to be paid from the fund in addition to anti-fraud protection regarding claims. A related bill in the House (H.R. 3623) was also introduced by Representative Artur Davis.

During the 111th Congress, Attorney General Holder and Secretary of Agriculture Vilsack announced a settlement of the *Pigford II* claims. The Administration requested $1.15 billion in a 2010 supplemental appropriation (H.R. 4899) for the *Pigford II* settlement. 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. On May 28, 2010, the House passed its version of H.R. 4213 and included the $1.15 billion for the settlement. The Senate version of the bill did not recommend the $1.15 billion, and H.R. 4213 passed without the *Pigford II* funding.

Meanwhile, the House version of H.R. 4899, the supplemental appropriations bill that passed the House on March 24, 2010, also included the funding for *Pigford II*. The Senate version of H.R. 4899, which passed May 27, did not include the funding. Subsequently, the House passed an amended version of H.R. 4899 that included the funding on July 1. However, the Senate objected to the House version, and on July 27, the House passed the Senate's May 27 version of H.R. 4899 that did not include the funding for *Pigford II*.

Finally, on November 19, 2010, by unanimous consent, the Senate passed the Claims Resolution Act of 2010 (H.R. 4783) to provide the $1.15 billion appropriation. The Senate bill was then passed by the House on November 30 and signed by the President on December 8, 2010.[41]

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[40] P.L. 111-80.

[41] P.L. 111-291.