



# *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, although Native American and female farmers also filed suit in *Keepseagle v. Vilsack* and *Love v. Vilsack*, respectively.

In addition, a group of Hispanic farmers filed a similar lawsuit against USDA in October 2000. The case, *Garcia v. Vilsack*, involved 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 claimed that USDA violated the ECOA and the APA by systematically failing to investigate complaints of discrimination, as required by USDA regulations. After nearly a decade of litigation and numerous rulings on procedural and substantive issues, the *Garcia* plaintiffs exhausted their final avenue of appeal to have their claims heard as a class action. As a result, the *Garcia* plaintiffs who wish to pursue their available claims in court must do so individually, or they and other eligible Hispanic farmers may participate in a settlement process established by USDA. Settlement claims must be filed by March 25, 2013.

In addition to an analysis of the *Garcia* lawsuit, this report also discusses several possible options for Congress to consider if it wishes to respond to the *Garcia* dispute.

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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 Assistant Secretary for Civil Rights.<sup>1</sup> 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).<sup>2</sup> *Pigford v. Glickman*,<sup>3</sup> filed on behalf of African-American farmers, is probably the most widely known, although Native American and female farmers also filed suit in *Keepseagle v. Vilsack* and *Love v. Vilsack*, respectively.<sup>4</sup>

In addition, a group of Hispanic farmers filed a similar lawsuit against USDA in October 2000. The case, *Garcia v. Vilsack*,<sup>5</sup> involved 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 claimed that USDA violated the ECOA and the APA by systematically failing to investigate complaints of discrimination, as required by USDA regulations. After nearly a decade of litigation and numerous rulings on procedural and substantive issues, the *Garcia* plaintiffs exhausted their final avenue of appeal to have their claims heard as a class action. As a result, the *Garcia* plaintiffs who wish to pursue their available claims in court must do so individually, or they and other eligible Hispanic farmers may participate in a settlement process established by USDA.

A detailed analysis of the legal rulings and settlement process 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 or provide additional assistance that goes beyond the current settlement.

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<sup>1</sup>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.

<sup>2</sup> 15 U.S.C. §§1691 et seq; 5 U.S.C. §§551 et seq.

<sup>3</sup> *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 Cases: USDA Settlement of Discrimination Suits by Black Farmers*, by Tadlock Cowan and Jody Feder.

<sup>4</sup> *Keepseagle v. Veneman*, 2001 U.S. Dist. LEXIS 25220 (D.D.C. December 11, 2001); *Love v. Connor*, 525 F. Supp. 2d 155 (D.D.C. 2007).

<sup>5</sup> *Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1138 (2010).

## 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*.

### 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.<sup>6</sup> 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.<sup>7</sup> 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.”<sup>8</sup> 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.

#### 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.

<sup>6</sup> USDA, *Civil Rights at the United States Department of Agriculture: A Report by Civil Rights Action Team*, February, 1997.

<sup>7</sup> 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 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.”

<sup>8</sup> 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.

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, 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.<sup>9</sup>

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.<sup>10</sup> 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."<sup>11</sup>

## **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-

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<sup>9</sup> USDA. *Civil Rights at the United States Department of Agriculture: A Report by Civil Rights Action Team*, February, 1997.

<sup>10</sup> 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.

<sup>11</sup> 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.

sized farms who are unable to obtain credit from commercial banks or other lenders.<sup>12</sup> FSA is the lender of last resort, meaning that a borrower must be denied credit by a commercial lender to be 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 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.

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<sup>12</sup> See CRS Report R40179, *Farm Service Agency: State Executive Directors, and State and County/Area Committees*, by Carol Canada.

<sup>13</sup> P.L. 74-46, 16 U.S.C. §590h(b)(5).

<sup>14</sup> P.L. 103-354.

<sup>15</sup> USDA, *Civil Rights at the United States Department of Agriculture: A Report by Civil Rights Action Team*, February, 1997.

## ***Garcia v. Vilsack***

As noted above, the *Garcia v. Vilsack* lawsuit involved 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, alleged that USDA discriminated against the plaintiffs with respect to credit transactions and disaster benefits in violation of the ECOA,<sup>16</sup> 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 claimed that USDA violated the ECOA and the APA<sup>17</sup> by systematically failing to investigate complaints of discrimination, as required by USDA regulations.

### **Litigation History**

During the lengthy course of litigation in the *Garcia* case, 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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> More recently, the Supreme Court declined to review the D.C. Circuit's decision.<sup>21</sup> 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.<sup>22</sup>

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,

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<sup>16</sup> 15 U.S.C. §§1691 et seq.

<sup>17</sup> 5 U.S.C. §§551 et seq.

<sup>18</sup> *Garcia v. Veneman*, 211 F.R.D. 15 (D.D.C. 2002).

<sup>19</sup> *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006).

<sup>20</sup> *Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009).

<sup>21</sup> *Garcia v. Vilsack*, 130 S. Ct. 1138 (2010).

<sup>22</sup> Fed. R. Civ. P. 23(a).



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.<sup>23</sup>

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.

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.<sup>24</sup> 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."<sup>25</sup> 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.<sup>26</sup> 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,<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> In February 2011, however, USDA, in conjunction with DOJ, established a process to settle the

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<sup>23</sup> *Garcia v. Veneman*, 211 F.R.D. 15, 17 (D.D.C. 2002).

<sup>24</sup> *Id.* at 19.

<sup>25</sup> *Id.* at 22.

<sup>26</sup> *Garcia v. Veneman*, 224 F.R.D. 8 (D.D.C. 2004).

<sup>27</sup> *Garcia*, 211 F.R.D. at 19.

<sup>28</sup> 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.

<sup>29</sup> Elaine Ayala, "Fighting to Bring Back South Texas Family Farm," *San Antonio Express-News*, October 6, 2009, p. 1A.

lawsuits filed by both Hispanic and female farmers for \$1.33 billion.<sup>30</sup> This settlement process is described in greater detail below.

In 2006, meanwhile, the D.C. Circuit affirmed the district court's denial of class certification to the Hispanic farmers.<sup>31</sup> 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.<sup>32</sup> In particular, the fact that 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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup>

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."<sup>36</sup> 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."<sup>37</sup> 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.<sup>38</sup> The farmers who were party to the

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<sup>30</sup> Press Release, United States Department of Agriculture, Agriculture Secretary Vilsack and Assistant Attorney General West Announce Process to Resolve Discrimination Claims of Hispanic and Women Farmers (February 25, 2011).

<sup>31</sup> *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006).

<sup>32</sup> *Id.* at 632-36.

<sup>33</sup> *Garcia v. Veneman*, No. 00-2445 (D.D.C. March 20, 2002) (relying on *Love v. Veneman*, 2001 U.S. Dist. LEXIS 25201, No. 00-2502 (D.D.C. December 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).

<sup>34</sup> *Garcia*, 444 F.3d at 637.

<sup>35</sup> *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).

<sup>36</sup> 5 U.S.C. §704.

<sup>37</sup> *Garcia*, 563 F.3d at 520.

<sup>38</sup> 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).

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.<sup>39</sup>

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.<sup>40</sup> 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.<sup>41</sup> As a result, the plaintiffs' final avenue of appeal with respect to the sole remaining credit transaction discrimination claim has been exhausted.<sup>42</sup> 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 agreements DOJ entered into with Native American farmers in *Keepseagle* and with a second group of black farmers in the case commonly referred to as *Pigford II*, and DOJ eventually 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. This settlement offer, as well as the discrimination lawsuits filed against USDA by other groups of farmers, is discussed in the following sections.

## ***Garcia* Settlement**

As noted above, USDA, in conjunction with DOJ, established a voluntary process to settle the claims of Hispanic and female farmers in 2011.<sup>43</sup> Under the settlement, \$1.33 billion is available to compensate eligible farmers for their discrimination claims, as well as an additional \$160 million in debt relief. Awards of up to \$50,000 or \$250,000 are available, depending on the type of claim and evidence submitted, and successful claimants may also be eligible for tax relief and loan forgiveness. The deadline for filing claims is March 25, 2013. Information about how to file a claim is available on the official website at <http://www.farmerclaims.gov>. It is important to note that the *Garcia* and *Love* settlement process is voluntary. Thus, qualifying Hispanic and female farmers may choose whether they wish to pursue their claims individually in court or via the settlement process.

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<sup>39</sup> *Garcia*, 563 F.3d at 523-24.

<sup>40</sup> *Garcia v. Vilsack*, No. 08-5110 (D.C. Cir. June 18, 2009).

<sup>41</sup> *Garcia v. Vilsack*, 130 S. Ct. 1138 (2010).

<sup>42</sup> 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.

<sup>43</sup> Press Release, United States Department of Agriculture, Agriculture Secretary Vilsack and Assistant Attorney General West Announce Process to Resolve Discrimination Claims of Hispanic and Women Farmers (February 25, 2011).

Despite this apparent resolution to the dispute, some Hispanic farmers remain unsatisfied with the settlement offer, due in part to the lower award amount. Instead of participating in the settlement process, some of these farmers filed a separate lawsuit alleging that the settlement offer unconstitutionally discriminates against Hispanic farmers in violation of the equal protection clause of the Fifth Amendment, but a federal district court recently dismissed this claim.<sup>44</sup> In its ruling in *Cantu v. United States*, the court noted that federal judges may not coerce a party into settling. As a result, the court stated that it lacked the authority to issue the requested injunction, which would have ordered DOJ to provide to the plaintiffs a settlement comparable to the one in *Pigford*. Therefore, held the court, the plaintiffs lack standing to sue, in part because the court did not have the authority to redress the plaintiffs' alleged injuries. The *Cantu* plaintiffs have filed an appeal in the case.<sup>45</sup>

## 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.<sup>46</sup> 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 response to said application, believed that they were discriminated against on the basis of race, and subsequently filed a written discrimination complaint with USDA.”<sup>47</sup> 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

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<sup>44</sup> Memorandum Opinion, *Cantu v. United States*, No. 1:11-cv-00541-RBW (D.D.C. December 11, 2012).

<sup>45</sup> Notice of Appeal, *Cantu v. United States*, No. 13-5044 (D.C. Cir. February 8, 2013).

<sup>46</sup> *Pigford v. Glickman*, 182 F.R.D. 341 (D.D.C. 1998).

<sup>47</sup> *Id.* at 345.

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.”<sup>48</sup> Indeed, the court distinguished the *Pigford* plaintiffs’ claims from those in *Williams v. Glickman*,<sup>49</sup> 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.<sup>50</sup>

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.<sup>51</sup> Overall, 22,551 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, 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.<sup>52</sup> A maximum of \$100 million was also authorized for new claims settlements, 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*).<sup>53</sup>

On February 18, 2010, Attorney General Holder and Secretary of Agriculture Vilsack announced a \$1.25 billion settlement of these *Pigford II* claims.<sup>54</sup> 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, Congress approved the Claims Resolution Act of 2010 to provide the \$1.15 billion appropriation.<sup>55</sup>

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

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<sup>48</sup> Id. at 349.

<sup>49</sup> 1997 U.S. Dist. LEXIS 1683 (D.D.C. February 14, 1997).

<sup>50</sup> *Pigford*, 182 F.R.D. at 344-45.

<sup>51</sup> *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999).

<sup>52</sup> P.L. 110-246, §14012.

<sup>53</sup> 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](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.

<sup>54</sup> Settlement Agreement, *In re Black Farmers Discrimination Litigation*, No. 08-mc-0511 (February 18, 2010).

<sup>55</sup> P.L. 111-291.

## *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.<sup>56</sup>

In October 2010, a \$760 million settlement in *Keepseagle* was reached. Like the *Pigford* settlements, the *Keepseagle* agreement provided both a “fast-track” adjudication process and a track for higher payments to claimants who went through a more rigorous review and documentation process. Potential claimants could seek the fast-track payments of up to \$50,000 or choose the longer process for damages of up to \$250,000. In addition, up to \$80 million was available for debt relief. The funds to pay the costs of the settlement came from the Judgment Fund operated by the Department of the Treasury.<sup>57</sup> After a federal district court granted final approval of the settlement,<sup>58</sup> claimants had until December 27, 2011 to file a claim. At this time, final determinations have been made with respect to all *Keepseagle* claims.<sup>59</sup>

## *Love v. Vilsack*

The plaintiffs in *Love v. Vilsack* alleged 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.<sup>60</sup> 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,<sup>61</sup> and, in 2004, the court issued an order denying class certification.<sup>62</sup> 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.<sup>63</sup> Subsequently, the district court dismissed the plaintiffs’ APA failure-to-investigate claim,<sup>64</sup> 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

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<sup>56</sup> *Keepseagle v. Veneman*, 2001 U.S. Dist. LEXIS 25220 (D.D.C. December 11, 2001).

<sup>57</sup> 31 U.S.C. §1304.

<sup>58</sup> Order on Plaintiffs’ Motion for Final Approval of Settlement, *Keepseagle v. Vilsack*, No. 99-3119 (D.D.C. filed April 28, 2011).

<sup>59</sup> For more information, see <https://www.indianfarmclass.com/Default.aspx>.

<sup>60</sup> National Agriculture Statistics Service. [http://www.agcensus.usda.gov/Publications/2007/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/st99\\_1\\_050\\_050.pdf](http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_1_US/st99_1_050_050.pdf).

<sup>61</sup> *Love v. Veneman*, 2001 U.S. Dist. LEXIS 25201 (D.D.C. December 13, 2001).

<sup>62</sup> *Love v. Veneman*, 224 F.R.D. 240 (D.D.C. 2004).

<sup>63</sup> *Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006).

<sup>64</sup> *Love v. Connor*, 525 F. Supp. 2d 155 (D.D.C. 2007).

ruling.<sup>65</sup> 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.<sup>66</sup>

Although DOJ initially declined to enter into a class-wide settlement in *Love*, USDA, in conjunction with DOJ, eventually established a process to settle the lawsuits filed by both Hispanic and female farmers for \$1.33 billion.<sup>67</sup> This settlement process is described in greater detail above.

## Congressional Response

Congress has, in the past, legislatively responded to discrimination issues at USDA and could 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,<sup>68</sup> 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.<sup>69</sup>

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.<sup>70</sup> 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.<sup>71</sup> 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, 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.<sup>72</sup> 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

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<sup>65</sup> *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.

<sup>66</sup> *Garcia v. Vilsack*, 130 S. Ct. 1138 (2010).

<sup>67</sup> Press Release, United States Department of Agriculture, Agriculture Secretary Vilsack and Assistant Attorney General West Announce Process to Resolve Discrimination Claims of Hispanic and Women Farmers (February 25, 2011).

<sup>68</sup> P.L. 107-171.

<sup>69</sup> 7 U.S.C. §6918(d).

<sup>70</sup> P.L. 110-246, §14002.

<sup>71</sup> 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>.

<sup>72</sup> P.L. 110-246, §14011.

on racial, ethnic, or gender discrimination in farm program participation should be resolved in an expeditious and just manner.

In addition, when final approval for the settlement in *Pigford II* became contingent on congressional action, Congress approved the Claims Resolution Act of 2010 to provide the \$1.15 billion appropriation to fund the settlement agreement.<sup>73</sup>

## Other Possible Congressional Responses

There are several other possible options for 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."<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup> Although Congress was not involved

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<sup>73</sup> P.L. 111-291.

<sup>74</sup> See CRS Report RL33927, *Selected Federal Compensation Programs for Physical Injury or Death*, coordinated by Sarah A. Lister and C. Stephen Redhead.

<sup>75</sup> For more details on the two-track system, see CRS Report RS20430, *The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers*, by Tadlock Cowan and Jody Feder.

<sup>76</sup> 31 U.S.C. §1304.



in the creation of the compensation system established under the *Pigford* consent decree, Congress did make \$100 million available in the 2008 farm bill and an additional \$1.15 billion available in the Claims Resolution Act of 2010 to settle *Pigford II* claims.<sup>77</sup>

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*.<sup>78</sup>

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.<sup>79</sup> In general, these reports are made pursuant to procedures set forth in statute and by court regulations.<sup>80</sup>

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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<sup>77</sup> P.L. 110-246, §14012; P.L. 111-291.

<sup>78</sup> P.L. 105-277, §741.

<sup>79</sup> 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, 107<sup>th</sup> Cong., 1<sup>st</sup> 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.

<sup>80</sup> 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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