IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY C. PIGFORD, et al., Plaintiffs, v. ANNE VENEMAN, SECRETARY, THE UNITED STATES DEPARTMENT OF AGRICULTURE, Defendant.	Civil Action No. 97-1978 (PLF)
CECIL BREWINGTON, et al., Plaintiffs, v. ANNE VENEMAN, Defendant.	Civil Action No. 98-1693 (PLF)

FILED
NOV 13 2001
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

ARBITRATOR'S REPORT ON THE LATE-CLAIM PETITION PROCESS

On December 20, 1999, and again on July 14, 2000, the Court delegated to the Arbitrator the review of late claim petitions filed pursuant to ¶5 (g) of the Consent Decree. There has been no public report on the late claim process. Given the thousands of farmers who have filed late claim affidavits, the implementation of this portion of the Decree has assumed an importance no one expected when the Court's delegations were made. The report below details progress on the review of late-claims.

Let this be filed.

PLF

552

PAUL L. FRIEDMAN
United States District Judge

DATE: 11/14/01

Background

On April 14, 1999, the Court approved the Consent Decree in the above-captioned case. The Consent Decree required that in order for class members to obtain relief under the decree, they must have submitted completed claim packages within 180 days of the date of entry of the Consent Decree. Consent Decree, Paragraph 5(c). As a result, October 12, 1999 became the last date a claim could be postmarked to be considered timely.

Potential relief from the October 12, 1999 deadline was provided by Paragraph 5(g) of the Consent Decree.[1] If "extraordinary circumstances" beyond a claimant's control prevented him from meeting the October 12, 1999 deadline, the claimant could petition the Court to permit him to file after the October 12, 1999 deadline.[2] On December 20, 1999, the Court determined that it would be more "efficient and expeditious" for the Arbitrator[3] to decide several hundred expected petitions to file late claims and delegated its authority under Paragraph 5(g) to the Arbitrator. The Court's

[1] On October 21, 1999, the Court declined to grant potential claimants an extension of time beyond the October 12, 1999 deadline to submit their claims. The Court further expected the parties and movants to "devise a means by which individual farmers or discrete, defined groups of farmers will be required to provide adequate, documented justification for an extension of time as required by the Consent decree."

[2] Paragraph 5(g) of the Consent Decree states:

> A claimant who satisfies the definition of the class in ¶ 2(a), above, but who fails to submit a completed claim package within 180 days of entry of this Consent Decree may petition the Court to permit him to nonetheless participate in the claims resolution procedures provided in ¶¶ 9 & 10, below. The Court shall grant such a petition only where the claimant demonstrates that his failure to submit a timely claim was due to extraordinary circumstances beyond his control.

[3] The Consent Decree names Michael K. Lewis of ADR Associates as the "Arbitrator". See Consent Decree, Paragraph 1(b).

order established a deadline for filing such petitions of January 30, 2000.[4] By Stipulation and Order of July 14, 2000, the parties and the Court permitted potential claimants who had not previously sent in petitions to file late claims by January 31, 2000, to do so by September 15, 2000. In that stipulation, the Court continued to delegate the Court's authority under Paragraph 5(g) to the Arbitrator.[5]

Processes and Procedures

Forms & Filing

Acting pursuant to the Court's October 21, 1999 order, the parties and the Arbitrator developed a form captioned, Affidavit in Support of Petition to File a Late Claim, to be executed under penalty of perjury as required by 28 U.S.C. § 1746. The form established three categories to justify an extension of time: (1) "Hurricane Floyd", which permitted petitioners to indicate that they "resid[ed] and/or farm[ed] in one of the

[4] Specifically, the Court stated:

> The Court has been advised by class counsel that several hundred putative class members who did not submit completed claim forms that were post-marked by October 12, 1999 intend to utilize the ¶ 5(g) process. The Court has determined that it would be more efficient and expeditious for the Arbitrator to determine, on a case-by-case basis, whether these putative class members can demonstrate that their failure to submit timely claim forms "was due to extraordinary circumstances beyond [their] control" than if this Court were to make each of those determinations. According, it hereby is
>
> ORDERED that the Court's authority to determine whether a class member's petition under ¶ 5(g) of the Consent Decree shall be granted is hereby delegated to the Arbitrator. It further is
>
> ORDERED that all petitions under ¶ 5(g) of the Consent Decree shall be postmarked not later than January 30, 2000 and submitted directly to the Arbitrator (and without copies to the Court)[.]

[5] Specifically, the Stipulation and Order stated:

> 2. All putative class members who seek relief under ¶ 5(g) of the Consent Decree shall submit written requests for such relief to the Facilitator – without a Claim Sheet and Election Form – postmarked no later than September 15, 2000. No extensions of that deadline will be granted for any reason.
>
> 3. Michael K. Lewis, the Decree's Arbitrator, is hereby delegated this Court's authority to determine whether requests for relief under ¶ 5(g) of the Consent Decree that were filed after January 31, 2000 and before September 15, 2000 satisfy the requirements of that provision.

North Carolina counties declared by the federal government to be a disaster area as a result of Hurricane Floyd" and that they were "unable to submit [their] claim before the October 12, 1999 deadline because of this disaster;"[6] (2) "Homebound", which permitted petitioners to indicate that they "became homebound due to illness and/or physical disability, and remained homebound, during the time-period beginning on August 12, 1999, and ending on October 12, 1999;" and (3) "Other Extraordinary Circumstances Beyond Your Control", which served as a catch-all category. For this third category, petitioners were required to provide details about the circumstances preventing them from filing a timely claim. The form provided some guidance to putative petitioners for this third category, advising that "'extraordinary circumstances' do not include 'I did not know about the case' or 'I did not know about the deadline.' It means you were prevented from completing the forms on time by unique circumstances over which you had no authority."[7]

A second form was developed in response to the Stipulation and Order of July 14, 2000. This form provided information about the late-claim petition process, but did not identify any specific categories. It also advised petitioners to provide detailed information and documentation which could help convince the Arbitrator that

[6] On September 16, 1999, then President Clinton declared that certain portions of North Carolina warranted designation as federal disaster areas as a result of the damage caused by Hurricane Floyd on September 15, 1999. That same day, James L. Witt, Director of the Federal Emergency Management Agency listed 66 counties as the areas adversely affected by the disaster. See FEMA-1292-DR.

[7] In the Court's opinion of April 14, 1999 in which it entered the Consent Decree, the Court concluded that "class members have received more than adequate notice...[and] the timing and breadth of notice of the class settlement was sufficient" with the possible exception of the U.S. Virgin Islands. 185 F.R.D. 82, 101-102.

circumstances beyond their control prevented them from filing a timely claim. This form also required execution pursuant to 28 U.S.C. § 1746.

Putative claimants were instructed to send their affidavits to the Claims Facilitator. Most did, although some petitioners sent affidavits directly to the Arbitrator or to Class Counsel. All affidavits were forwarded to the Claims Facilitator for processing. The Facilitator entered all late claim petitions into its database for tracking purposes and subsequent mailings, and, beginning with petitions received in response to the July 14, 2000 order, assigned each petition a unique identifying number. The Facilitator then forwarded information relating to the petition to the Arbitrator's office.

In response to the Court's order of December 20, 1999, approximately 2300 petitions to file late claims were filed by January 30, 2000. Approximately 61,000 petitions were filed by the September 15, 2000 deadline. An additional 7500 putative claimants filed petitions postmarked after the September 15, 2000 deadline.

Categorization & Research

To facilitate review of the affidavits, the Arbitrator collaborated with staff of the Claims Facilitator to develop a series of categories into which late claim affidavits could be sorted. These categories, based on the justifications put forward by petitioners to establish the extraordinary circumstances surrounding their failure to file a claim by October 12, 1999, included, in addition to the "Hurricane Floyd" and "Homebound"

justifications provided in the first form, such categories as "Misplaced papers or forgot about deadline date", "Unaware of lawsuit," "Unaware of deadline," "Unaware that they qualified," "Unaware of need to request claim form," "Did not understand the form or how to file" and "Lawyer unavailable," among others.

Categorization guided the decision-making process. For example, those petitioners who documented in their petition that they fell into the "Hurricane Floyd" and "Homebound" categories were approved on the basis of the paperwork submitted with their petition to file a late claim. Conversely, those whose affidavits clearly demonstrated that they belonged in the "Unaware of lawsuit" category, without any mitigating factors, were rejected. Categorization helped to decide which petitioners had demonstrated that extraordinary circumstances prevented them from filing a timely claim, which ones had failed to demonstrate that extraordinary circumstances caused them not to file timely, and which petitions required further information before a decision could be made.

In order to gather further information about late-claim petitions, the Arbitrator hired a cadre of law school students and graduates. This staff contacts petitioners by telephone to conduct structured interviews based upon the categories into which each undecided petition falls. The interviewers record the information collected from the petitioners and maintain a log of the persons contacted. They also maintain a log of who they have been unable to reach by telephone. Those petitioners who cannot be reached

by telephone are sent a letter requesting that they provide current contact information. To date, approximately 500 petitioners have been sent such letters. If petitioners respond that they cannot be reached by telephone, they are mailed a detailed questionnaire based upon the category of their affidavit.

Five interviewers were hired to contact petitioners for late claim affidavits received pursuant to the January 30, 2000 deadline. That number has increased to a staff of twenty. Affidavits are assigned to interviewers in batches of one hundred. At any given time, over two thousand petitions are being investigated by the interviewers.

Based on the Arbitrator's criteria for late claim affidavits, as well as the discovery of new types of standard explanations for missing the October 12, 1999 filing deadline (e.g. "Slave Reparations"), the Facilitator developed a late claim affidavit categorization list. Following an agreement on the categorization list with the Arbitrator, the Facilitator used the list in sorting late claim petitions.

Internally, the Facilitator created a document to help guide the categorizations, which fully described the categories, and assigned a two letter code for database entry. The Facilitator then categorized every late-claim petition which had not previously been forwarded to the Arbitrator for decision. The Facilitator completed sorting the petitions into categories in May 2001.

Following completion of the categorization process, members of the Arbitrator's staff traveled to the Facilitator's offices in Portland, Oregon to review the results. Following this review, all petitions falling solely into one of the following categories were rejected: EG (Not Eligible), FO (Unsure on How to Fill Out Claim), NL (Case Not Legitimate), SR (Slave Reparations), & TX (Tax Forms ("Back Tax Lawsuit")), and those in the UL (Unaware of Lawsuit/Deadline) & RQ (Unaware of Need to Request Claim) categories who had not requested a claim package prior to October 12, 1999.

Rejections based upon the categories above were sent at the end of June and during July 2001. At the same time, letters were sent to those petitioners whose affidavits were postmarked after September 15, 2000 that their petitions would not be considered. A number of farmers who filed a late claim affidavit following the Court's December 20, 1999 order attempted to file a second affidavit following the issuance of the Court's July 14, 2000 order. These farmers have been reminded of the decision already made on their initial affidavit. To date, approximately 33,000 petitions to file late claims have been denied, 1100 approved, with 27,000 remaining to be decided. The vast majority of approvals have come from petitioners who filed their petitions before January 30, 2000.

Reconsideration

Persons whose petitions are denied initially, may make a written request for reconsideration. Many of those who have requested reconsideration of a denial of their

late claim appeal directly to the Arbitrator upon receiving their rejection letter. Others request reconsideration following telephone calls to the Arbitrator or to the Facilitator asking what steps may be taken in the wake of a denial. The late-claim process continues to generate a high volume of telephone calls. The Facilitator fields most of those calls.

Other petitioners have submitted what is essentially a *de facto* request for reconsideration; that is, although they did not explicitly request a reconsideration of the decision to deny their petition, they have submitted a second petition to file a late claim (prior to September 15, 2000) after they received a letter denying their right to participate. This last group is almost completely comprised of persons who had initially petitioned by January 30, 2000, had their petitions denied, and who submitted the second standardized form in response to the Court's July 14, 2000 order. Several petitioners have made multiple requests for reconsideration.

Although approximately 800 formal requests for reconsideration have been made, with an additional 500 *de facto* requests for reconsideration as described above, it has become clear that the reconsideration process is not well understood. To address this problem two steps have been taken. First, the standard denial letter has been edited to specifically include information on the reconsideration process. Second, the Facilitator has sent a letter to all previous petitioners who had been denied, and who

have not yet requested that their petitions be reconsidered, informing them of the reconsideration process.[8]

As with the original review of affidavits, decisions on reconsiderations may be made on the record submitted by the petitioner, or the record may be augmented through an information-gathering telephone call or letter. If, in the request for reconsideration itself (and any attached evidence), the petitioner demonstrates that the original denial was in error, the petition is approved. If, in the request for reconsideration, the petitioner presents no information which calls into question the original denial, the petitioner is sent a letter detailing the reasons for the denial. If, however, in the request for reconsideration the petitioner presents information which calls into question the decision to reject the petition, but fails to provide sufficient information to justify an approval, the petitioner may be interviewed or sent a letter requesting further information. This letter provides for a thirty day period in which to supplement the record. Following the thirty day period or the interview, the petition is approved or the petitioner is sent a factually specific, detailed letter explaining the reasons for the denial.

Approximately 340 of the 800 formal requests for reconsideration have been reviewed to date. Of that number, 55 petitions have been approved. The Facilitator is notified of all approvals following reconsideration. All petitioners who request

[8] The original letters of denial, the new letter of denial, and the letter informing petitioners of the reconsideration process are attached.

reconsideration and send such a request through the Facilitator are sent a letter notifying them that their requests for reconsideration may take some time as approximately half of the late claim petitions received have not been reviewed for the first time.

Results to Date

The current status of the late claim review process, as described above, is presented in tabular form below. All figures are approximate.

Number of Petitions to File Late Claims	68,000
Petitions filed by September 15, 2000	61,000
Petitions filed by January 30, 2000	2,300
Petitions Approved	1,100
Petitions Denied	33,000
Petitions assigned to Researchers	6,400
Petitioners sent "No Contact" letters	500
Requests for Reconsideration	1,300
Requests for Reconsideration Decided	340
Petitions Approved upon Reconsideration	55

Conclusion

The Court believed that the review of late claim petitions could be made more efficiently and expeditiously by the Arbitrator than by the Court. When the Court issued the July 14, 2000 order, no one anticipated the high volume of petitions ultimately received in response to the Court's order. All of the parties

associated with implementing the Consent Decree are cognizant of the impact of the late-claim petition process upon the other portions of the Consent Decree. The Arbitrator's intention is to make an initial decision on every petition within the next twelve months. It is not at all clear that all current and forthcoming requests for reconsideration will be resolved in that same time frame. Finally, given the importance of the late claim process to the implementation of the Consent Decree, the Arbitrator intends to report to the Court and to the parties on a semi-annual basis.

Respectfully submitted,

Michael K. Lewis
Arbitrator

Date: NOVEMBER 14, 2001

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Mediation
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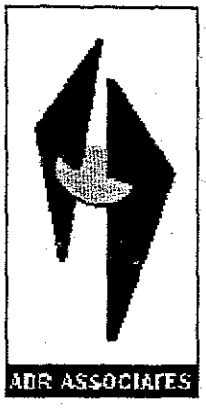
Dispute Systems
Design



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FILED
NOV 13 2001
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U.S. DISTRICT COURT

Re: Pigford et al. v. Glickman - Civil Action No. 97-1978 (PLF)
Brewington et al. v. Glickman - Civil Action No. 98-1693 (PLF)

Dear Claimant:

The deadline for filing a claim in the Black Farmers Settlement against the U.S. Department of Agriculture was October 12, 1999. Paragraph 5(g) of the Consent Decree in this case provides that farmers who missed the October 12, 1999 deadline may petition the Court to permit the farmer to nonetheless participate in the claims resolution procedures set out in the decree.

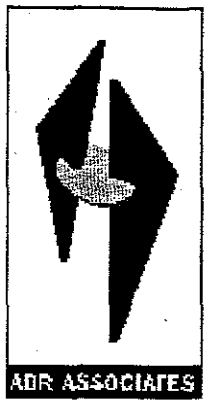
The Consent Decree also establishes a high standard for the review of late claims in that the farmer must demonstrate that his failure to submit a timely claim was due to extraordinary circumstances beyond his control. On December 20, 1999, Judge Friedman delegated to me the review of all late-filed claims.

After a thorough review of your late claim affidavit and supporting documentation, I have concluded that you have not met the high standard contained in paragraph 5(g). Thus, your request to be permitted to participate in the settlement is denied.

Sincerely,

Michael K. Lewis

Mediation
Arbitration
Training &
Dispute Systems
Design



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Sincerely,

Michael K. Lewis

Black Farmers' Settlement
P.O. Box 4390
Portland, OR 97208-4390
1-800-646-2873

Re: Pigford et al. v. Veneman - Civil Action No. 97-1978 (PLF)
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Sincerely,

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Arbitrator

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P.O. Box 4390
Portland, OR 97208-4390
1-800-646-2873

November 14, 2001

«Name_of_Client_First_Middle_Last»
«Address_1»
«Address_2»
«City», «St» «Zip_Code»

Claim # «Claim_»
Tracking # «Tracking_»

RE: Pigford et al. v. Veneman - Civil Action No. 97-1978 (PLF)
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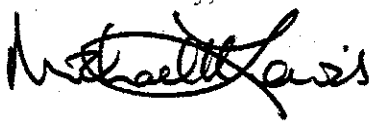
On December 20, 1999, Judge Friedman delegated to me the review of all late-filed claims. After a thorough review of your late claim affidavit and supporting documentation, I have concluded that you have not met the high standard contained in paragraph 5(g). Thus, your request to be permitted to participate in the settlement is denied.

There is a process for me to reconsider your application. Such a request must be in writing to the address above, postmarked within 60 days of the date of this letter. Before you make a request for reconsideration, I ask that you think about any circumstances that make stronger your argument that you should be permitted to participate in the settlement. As I have said above, the standard established in the consent decree is that only circumstances beyond the control of the claimant should be considered. Only information or documents I do not already have will convince me to change my decision.

All written information must be accompanied by a cover letter signed by the claimant. The following sentence must be written above the claimant's signature: "I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT."

As you may be aware, there were thousands of people who petitioned to file late claims. Although you have received a decision from me, many others have not. Fairness dictates that before I review your petition for a second time, I must decide the petitions of those who have not heard from me once. In time, I will review your petition if you send me a request for reconsideration, but please be advised that it may be as much as a year before you hear from me again.

Sincerely,



Michael K. Lewis
Arbitrator

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1-800-646-2873

November 14, 2001

«Name_of_Client_First_Middle_Last»
«Address_1»
«Address_2»
«City», «St» «Zip_Code»

Tracking # «Tracking_»

RE: Pigford et al. v. Veneman - Civil Action No. 97-1978 (PLF)
Brewington et al. v. Veneman - Civil Action No. 98-1693 (PLF)

Dear Claimant,

As you know, you previously received a letter from me that denied your petition to file a late claim in the Black Farmers' Settlement. This letter is to inform you that there is a process for me to reconsider your application. Such a request must be in writing to the address above, postmarked within 60 days of the date of this letter. If you previously have requested reconsideration, you do not need to respond to this letter.

Before you make a request for reconsideration, I ask that you think about any circumstances that make stronger your argument that you should be permitted to participate in the settlement. As I said in my first letter to you, the standard established in the consent decree is that only circumstances beyond the control of the claimant should be considered. Only information or documents I do not already have will convince me to change my decision.

All written information must be accompanied by a cover letter signed by the potential claimant. The following sentence must be written above the claimant's signature: "I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT."

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