

# National Journal

## PEOPLE

Lawyers in USDA Cases Press On As Years Go By

by Mike Magner

Thursday, December 16, 2010 | 10:00 p.m.

For veteran Washington lawyer Marc Fleischaker, the discrimination case against the Agriculture Department he has been handling for thousands of female farmers since 2001 has been “a little like Sisyphus from the very beginning.” Each time a settlement seems within reach, the deal falls apart because something isn’t right.

Stephen S. Hill, another longtime litigator who represents Hispanic farmers in a related discrimination case that is similarly stalled, shares Fleischaker’s frustrations. But neither attorney has any intention of letting up on the USDA or the Justice Department.

“It’s not in my DNA to get discouraged,” Hill said. “I continue to hope a light will come on, and they will see the error of their ways.”

The government offered to settle the two lawsuits in May in hopes of closing the books on long-standing charges by black, Native American, Hispanic, and female farmers that the USDA discriminated against them for decades in farm credit and payment programs. The class-action suits filed by black and Native American farmers have already reached settlements, and Congress, in a section of the 2008 farm bill, had urged the government to do the same for Hispanic and female farmers, many of whom had to quit because they could not get USDA loans or support payments.

But when Fleischaker and Hill read the details of the proposed settlement in May, they found it not only would provide less money for women and Hispanics than had been offered to black and Native American farmers, but it had provisions making it difficult for farmers to seek settlement payouts.[web:230299:article](#)

In late November, Congress provided the final \$1.15 billion needed to settle with black farmers, bringing their total payments to \$2.25 billion, and Native American farmers were provided a total of \$680 million in a separate settlement approved by the U.S. District Court in Washington. Women and Hispanic farmers were offered a combined settlement of \$1.33 billion, with a \$50,000 cap on individual payments.

The problem, according to Fleischaker and Hill, is that there are at least 12 times as many female and Hispanic farmers as there are black and Native American farmers, so there would

be far less money for each operator if all of the estimated 306,000 female farmers and 55,570 Hispanic farmers sought payments.

An even bigger problem, the two attorneys said, is the obstacle course the government wants to include in the settlement fund. "Our biggest concern is making sure the program is not set up in a way that would discourage applicants," Fleischaker said. "They have included three requirements that we believe would do that," he said, including a demand that any applicant for settlement funds must file a lawsuit against the USDA and pay a \$350 to \$400 fee for doing so, depending on the state.

Hill said the requirement reminded him of taxing blacks to discourage them from voting in southern states. "It's the old poll tax on steroids," he said. "That was a \$5 to \$10 fee for blacks to register to vote. This is a \$350 filing fee to participate in a settlement."

Agriculture Secretary Tom Vilsack said after a court hearing on the cases this month that because the suits filed by female and Hispanic farmers have not been certified by a judge for class action, the USDA and Justice Department must treat each applicant for a settlement as individuals with their own lawsuits.

Fleischaker and Hill argued that the case filed by Native American farmers was never certified for class action yet was treated as such. "There is absolutely no reason whatsoever they can't settle with us on terms that are basically in parity with what the black farmers and Native American farmers received," Hill said.

Fleischaker said he believes Vilsack sincerely wants to settle the lawsuits, but is being pressured by career attorneys at Justice and USDA who argue that since the cases were never certified for class action, the government does not have to settle. "I think Vilsack is a person of good faith ... and serious about wanting to come up with a resolution," Fleischaker said, "but lots of people in government are resistant."

Fleischaker is chairman emeritus of Arent Fox, the Washington law firm he joined in 1971 not long after getting his law degree at George Washington University. As chairman of the Arent Fox Nonprofit Initiative, he has handled a number of discrimination cases, including successful lawsuits filed by black and female employees of the Library of Congress and the Government Accountability Office, but he said he has never had a case with this many eligible plaintiffs.

Hill, a native Washingtonian and Harvard Law School graduate, said the Hispanic farmers' suit is one of his largest and most rewarding cases.

"This is probably, in 34 years of practice, the most meaningful and fulfilling case I've had," he said. "I've gone out into the fields and met with people who want nothing more than fair treatment. The odds are really stacked against them, yet their resilience and faith in the process is humbling."