

Black Farmers V. The Department of Agriculture

By David Pitts

In April 1999, a federal judge approved a settlement in the most significant civil rights case ever to go to mediation. It involved a group of black farmers who alleged that the U.S. Department of Agriculture (USDA) had discriminated against them for more than a decade. Contributing Editor David Pitts traces the origins of this landmark mediation that may set a precedent for avoiding long and costly court proceedings in civil rights and other civil cases in the future. (The announcement on November 19 that the U.S. government's [antitrust case](#) against Microsoft Corporation would be subjected to mediation highlights this potential.)

John Newkirt's roots in the land of rural Georgia run deep. He inherited his 347-acre farm in Garfield -- about 40 miles north of Savannah -- from his father and later added 147 acres of his own. He says his troubles began in 1984 when local USDA officials denied him a loan to run his farm for reasons he feels were discriminatory. In 1990, he lost his own land completely after the government foreclosed on him. He says he has been able to buy it back, but now rents it out rather than farming it himself. "My land was taken from me," he says. "I will always have the memory of the pain and suffering that caused."



John Newkirt on his farm in Garfield, Georgia

James Beverly of Burkeville, Virginia has an even sadder story to tell. He lost his livelihood 15 years ago and is now working as a counselor in a federal prison in Petersburg not far from the farm he used to own. "I was wiped out because I couldn't get help," he says. "I got a loan to buy breeding hogs, but was denied a loan for farrowing houses for them after I had already bought the animals. To settle my debt with the government for the livestock loan, I had to sell off my property and go out of the farming business altogether."

The experience of John Newkirt and James Beverly is far from unique. There has been a marked decrease in the number of farms owned and operated by African Americans generally over the decades. In 1920, there were 925,000 black-owned farms in the United States. By 1992, according to USDA statistics, the number had plummeted to fewer than 18,000 -- from 14 percent of the total down to one percent, most of them located in the South. Why this happened is a subject of much debate, but most observers agree that discrimination by USDA was a key factor, especially over the last two decades. One of the salutary effects of the ultimate resolution was a renewed commitment to eradicate any vestiges of racism in USDA's programs.

USDA's own investigation confirms the problem. An internal audit found that in several Southern states, including Georgia, local offices took an average of three times as long to process loan applications from black farmers compared with white farmers. The Associated Press reports that between 1980 and 1992, for every dollar loaned to white farmers, black farmers received just 51 cents. And in 1982 the U.S. Civil Rights Commission, a government entity, reported that "unless government policies of neglect and discrimination are changed, there may be no black farmers by the year 2000."

By the late 1990s, African American farmers decided to act. In December 1997, they filed what became the largest civil rights class action lawsuit in U.S. history. The suit alleged systematic discrimination by USDA in delaying loans, denying loans outright, and withholding technical assistance crucial to the farmers' livelihoods. The suit also alleged that many black farmers were impoverished by USDA neglect and discrimination, while others lost their farms and sometimes their land completely.

The Case Goes to Mediation

But the case did not go to trial. The parties agreed to mediation at the urging of U.S. District Judge Paul Friedman. "It is not unusual for many civil rights cases, indeed many civil disputes, to go to mediation," says Michael Lewis, a pioneer in alternative dispute resolution (ADR), who was selected by the parties to mediate the dispute. "The question is," he asks, "what is the best way to resolve these cases? Mediation takes less time than going to court, especially if there are appeals, which would have been likely in this case. It also is less costly, and you avoid the possibility of losing completely."

"The farmers agreed to mediate because there had been a history of discrimination dating back 20 years," says Alexander Pires, chief counsel for the plaintiffs. "It had been a long process and they wanted it resolved." Michael Sitcov, the lead attorney for the government, declined to comment. But Andrew Solomon, a spokesperson for USDA, says, "I think it is obvious why we agreed to mediate. There was clearly a problem with discrimination. We wanted to deal with it and move forward." Lewis agrees. USDA wanted "a bad chapter" in its relationship with black farmers to be over with, he says.

President Bill Clinton also weighed in on the issue. In a meeting with black farmers at the White House, which was attended by USDA Secretary Dan Glickman, Clinton made it clear that he wanted the claim on an agency in his own executive branch of government to be brought to a speedy and satisfactory conclusion. "I will do everything I can within my legal authority to accelerate the settlement of these outstanding cases," he remarked. "I will do everything I can do to bring moral and political pressure to bear

when possible."

Two days after the White House meeting, on December 19, 1997, USDA, and the Justice Department legal team acting in the agency's behalf, agreed to mediate the case. Neither Pires nor Lewis says the president's statement was critical, but it helped. "It was important to the farmers because it said the president is taking their concerns seriously," says Lewis. "But it wasn't a silver bullet and it didn't affect the course of the mediation."

A Year-Long Process

It was agreed that the mediation would last six months. But, in fact, "it took almost a year to the day," says Lewis. "My job was to get them to agreement. The complication was that the lawyers for the farmers were not representing one or two people, but many thousands. It's hard to get a sense of what 10 or 12,000 people want. I think it was very important that the farmers be dealt with not as individuals, but as a group. We had to figure out a way to resolve all their claims together. This was one of the early struggles."



Michael Lewis at his office in Washington, D.C.

"I convened a lot of joint meetings with the two sides and held many separate meetings," Lewis continues. "It was mostly the lawyers for each side that were present. But representatives of the farmers attended some of the meetings; their lawyers had done a very good job of traveling around the country and talking to them about what their needs were," he adds. "The process was difficult at first," recalls Pires. "In the early stages, eight attempts failed. The differences with the government were too wide."

But in the fall of 1998, an event occurred which was crucial in aiding the plaintiffs' case. Congress passed, and President Clinton signed into law, a bill that extended the statute of limitations back 17 years to 1981. "No one in Congress opposed extending the statute of limitations," says Pires. "Who's against farmers?" This was considered critical because, without the extension, more than 90 percent of the plaintiffs would not have been able to receive compensation since the alleged discrimination had occurred too far

in the past.

Lewis agrees the extension of the statute of limitations facilitated a settlement but also stresses the role of the court during the proceedings as well. "The court was very active and held periodic meetings to keep its finger on how things were going. For example, the court decided a very important legal issue -- allowing the farmers' cases to be banded together. Once the court decided that issue, progress was much more swift," he says.

The End of A Painful Chapter

On April 14, 1999, Judge Paul Friedman approved a multi-million dollar, settlement of the case. The USDA engaged in "pervasive discrimination against African American farmers," he said in a 65-page opinion released after the settlement. The denial of credit and technical assistance had a "devastating effect" on black farmers throughout the nation. The judge made it clear that much remains to be done to undo the historical discrimination. "But the Consent Decree represents a significant first step," he noted.

In his opinion, Judge Friedman cited James Beverly's case in Virginia as an example of the injustice that had been done. He did not mince words. "The USDA broke its promise to Mr. James Beverly," he said. "It promised him a loan to build farrowing houses so that he could breed hogs. Because he was African American, he never received that loan. He lost his farm because of the loan that never was. Nothing can completely undo the discrimination of the past or restore lost land or lost opportunities to Mr. Beverly, or to all of the other African American farmers whose representatives came before this Court."

Speaking for the government, USDA Secretary Dan Glickman heralded the settlement conceding that discrimination had indeed been a problem in his agency. "With this approval, USDA can move forward to putting a painful chapter of our history behind us," he said. Glickman told CBS: "There was no question that in a lot of places in the country, minority farmers did not get the loans that non-minority farmers would get." The USDA chief also vowed to eradicate racism in USDA. He had already taken action to re-establish the agency's Office of Civil Rights that had been disbanded in 1983 by the Reagan administration.

The reaction of the lawyers for the plaintiffs was ecstatic. "This is the largest recovery in a civil rights case in the history of the country. There are very few billion-dollar settlements," Pires said at the time. Asked why the government agreed to such a large settlement, he responds, "I think they decided they couldn't win this one in court. Also, I think many government officials knew there had been discrimination, recognized it, wanted to settle and move on."

Representative John Conyers (Democrat-Michigan), the dean of the Congressional Black Caucus, also hailed the agreement calling it a milestone. "I heartily congratulate the black farmers who have labored so arduously and so long for vindication and economic relief," he remarked.

Under the agreement, claimants need only show minimal documentation to be eligible for a \$50,000 tax-free, cash payment plus the forgiveness of debts to USDA -- worth on average between \$75,000 and \$100,000. Farmers can claim more by going to arbitration -- which Michael Lewis also will oversee -- but must provide more

documentation to do so. Asked how the size of the settlement was determined, Lewis says, "the best answer I can give is through negotiation. I think the plaintiffs' lawyers looked at the average debt of the farmers and other relevant factors -- but eventually just through negotiation."

It is understandable that an attorney such as Lewis, one of the founders of ADR Associates, a leading company engaged in providing mediation services, should extol its benefits. But he stresses that mediation is not suitable for all circumstances, even in civil cases. "There are important issues -- important cases -- where you really do need a court to say, 'this is the law of the land.' This was true in the school segregation cases of half a century ago, for example. It was an issue that clearly needed to go to the Supreme Court for final resolution, as it did," he says. "But cases like that are few and far between."

"The way the consent decree is written, a monitor responsible to Judge Friedman will be appointed to oversee the implementation of the settlement. That individual has not yet been selected," Lewis says. The cutoff date for the farmers to file applications was October 12, 1999, 180 days since the issuance of the consent decree. According to Pires and sources within USDA, more than 15,000 farmers filed ahead of the deadline - - many more than originally anticipated -- and most have chosen to file under the general settlement provisions, not arbitration. The first settlement checks are expected to be mailed in November.

Most of the farmers are reportedly satisfied with the mediated settlement, but not all. John Boyd and Gary Grant, who lead two of the most influential organizations representing black farmers and who are credited by many with helping to organize their effort, say it did not provide enough money to claimants who chose not to pursue arbitration and did not require enough changes in the loan process at USDA. But Lewis says it is important to understand that no side wins everything in a mediation, that in exchange for avoiding costly and long court proceedings, each side must give a little.

"We Struggled So Long"

James Beverly, who also is the Virginia representative of a national organization for African American farmers, says he is proud Judge Friedman mentioned him in his opinion about the case as an example of what happened to thousands of black farmers. He says he is generally satisfied with the agreement. "We didn't get everything we wanted. But I approve of it." He also says the majority of the farmers in his area have filed under the general settlement provisions and already have received letters of approval.

High Profile Case Goes to Mediation

Mediation is increasingly being used in the U.S. in high profile cases. In late November 1999, a federal judge appointed a mediator to assist Microsoft

and the Department of Justice in finding shared, middle ground. The Justice Department has accused Microsoft of monopolistic practices. The corporation denies the allegation and argues that the degree of innovation and change occurring in the technology field precludes that possibility. Although a final ruling has not been issued by a court in the case, an initial ruling did find Microsoft held a monopoly power over desktop computers and that the company uses this power to punish rivals.

The mediator in the case -- U.S. Circuit Judge Richard Posner -- will have his work cut out for him since the gulf between the U.S. government's position and Microsoft's is very wide. But many American newspapers are saying that if anyone can successfully mediate this case it is Posner, who is held in high regard in U.S. legal circles and is a distinguished federal appeals judge.

Initial press reaction to the move was supportive. The *Washington Post* called it wise. "Though there appears now to be little common ground between the parties, it is a good idea for Judge Jackson (the judge who appointed the mediator) to find out for sure whether settlement is impossible before issuing a ruling that could affect competition in the high-tech area for years to come."

The *Chicago Tribune* reported that both sides warmly greeted the announcement. "It is the strongest sign that both sides may be ready to mediate the case," the newspaper said. Its sources indicated that Posner is widely trusted as fair and impartial with unorthodox view that cannot be easily characterized politically.

The *Boston Globe* said that the appointment of Posner "could raise hopes that a serious effort will be made to settle this matter," and raised the issue of whether Microsoft might face more severe penalties, including a breakup of the company if a settlement is not reached.

Judge Posner can be expected to clearly indicate to both sides the risks involved if an agreement is not reached and the case goes back to the courts for final adjudication, with a lengthy and costly appeals process the likely aftermath of a verdict.

As far as his own situation is concerned, James Beverly says he has chosen to pursue arbitration since he feels the financial loss he incurred through losing his farm was far greater than the general settlement terms provided for. Asked if he feels he will win, he responds, "I feel pretty confident about it." But he wants it known that the most important issue for him is not the money. "It is that we struggled so long for our voice to be heard. At long last, we are being heard."

John Newkirk in Georgia calls the settlement "a very good gesture even though no one is completely satisfied." He says he chose to file under the general settlement provisions

and already has received a letter back from the government, although not yet a check. The Georgia farmer also says that he lost more than he will get in compensation. "But to me the importance of the settlement is not the checks they are mailing to us, but the respect they are now showing us." He adds: "I appreciate the government saying to black farmers. 'You were economically disenfranchised. We recognize that and want to make amends.'"

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Now nearing 70, John Newkirt is proud of his family's contribution to American agriculture and is eager to take a visitor in his two-toned, pickup truck to see the cotton and other crops that grow plentifully on his land. He describes the struggle for a fair shake for black farmers as long and difficult, but it is testimony to the greatness of America, he says, that wrongs can be corrected here and progress can be forged. "This is a country where you can succeed, if given a chance," he says. "We were robbed of our dignity. But now we have it back."