# IN THE SUPREME COURT OF TEXAS

NO. 05-0169

FARMERS GROUP, INC., ET AL., PETITIONERS

v.

JAN LUBIN, GILBERTO VILLANEUVA, AND MICHAEL PALADINO, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

**Argued January 25, 2007**

JUSTICE HECHT, concurring in part and dissenting in part.

The Texas Insurance Code provides:

> If a member of the insurance buying public has been damaged by an unlawful method, act, or practice defined . . . as an unlawful deceptive trade practice, the department [of insurance] may request the attorney general to bring a class action or the individual damaged may bring an action on the individual's own behalf and on behalf of others similarly situated to recover damages and obtain relief as provided by this subchapter.[1]

Thus, two types of class actions are authorized, one brought by a damaged individual on behalf of others similarly situated, the other by the Attorney General. The Code then adds:

> The court shall permit one or more members of a class to sue or be sued as representative parties on behalf of the class only if:
>
> (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

[1] TEX. INS. CODE § 541.251(a) (formerly art. 21.21, § 17(a)).

(4) the representative parties will fairly and adequately protect the interests of the class.[2]

These four prerequisites apply when a class member is suing or being sued as a class representative. When the Attorney General sues at the behest of the Department of Insurance, it is not as a class member or representative party but as a state officer. By the plain statutory text, the four prerequisites do not apply to as class action brought by the Attorney General. The Court reaches the opposite conclusion for three reasons. I disagree.

First, the Court argues that because the statutory language is taken verbatim from Rule 23 of the Federal Rules of Civil Procedure, which applies to all class actions in federal courts, the Legislature must have intended that it apply to all class actions in state courts, especially since "the Insurance Code specifically mandates that 'the courts of Texas shall be guided by the decisions of the federal courts interpreting Rule 23'".[3] The argument suffers not only from a flaw in logic (why must the Legislature's intent track federal lawmakers'?) but also from an incorrect premise. Federal courts have refused to apply Rule 23's requirements to enforcement actions brought by federal agencies simply because the remedies sought may affect classes or groups of individuals.[4] Another analogue in the federal system is a *parens patriae* action, brought by a state or its attorney general

[2] *Id.* § 541.256 (formerly art. 21.21, § 18(a)).

[3] *Ante* at ___ (quoting TEX. INS. CODE § 541.257 (formerly art. 21.21, § 18(c))).

[4] *See General Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 324 (1980) (EEOC suing under Title VII); *In re Bemis Co.*, 279 F.3d 419, 422 (7th Cir. 2002) (same); *NLRB v. Plumbers & Pipefitters Local Union No. 403*, 710 F.2d 1418, 1420 (9th Cir. 1983) (NLRB suing under NLRA); *Donovan v. University of Tex. at El Paso*, 643 F.2d 1201, 1208 (5th Cir. 1981) (Secretary of Labor suing under FLSA).

on behalf of state residents,[5] to which Rule 23 does not apply.[6] So to the extent that Rule 23's coverage is instructive, it argues against the Court's position, not for it. Of course, when a class action is brought by a private person and thus is one to which the four prerequisites borrowed from Rule 23 would apply, federal case decisions provide guidance.

Second, the Court points to the provision following the four prerequisites quoted above that authorizes a class action "if the[se] prerequisites . . . are satisfied" in addition to others.[7] The Court explains simply that "[i]t is hard to see why the Legislature would require the prerequisites to be 'satisfied' if it really intended them to be inapplicable."[8] But it makes perfect sense for the Legislature to have intended that the four prerequisites must be satisfied *when* they apply — when a class action is brought by "one or more members of a class" — not when they don't — when a class action is brought by the Attorney General. And, of course, that is what the plain text says.

Third, the Court insists that the four prerequisites quoted above must apply to any class action, even one brought by the Attorney General, because "they define what a class action is."[9] In

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[5] *E.g.*, 15 U.S.C. § 15c (authorizing a state attorney general to sue on behalf of state residents for Sherman Act violations); *id*. § 6103 (authorizing a state to sue on behalf of its residents regarding telemarketing practices); *id.* § 6309(c) (authorizing a state to sue on behalf of its residents regarding boxing practices); *id*. § 6504 (authorizing a state to sue on behalf of its residents regarding children's online privacy protection); *id*. § 7706(f) (authorizing a state attorney general and other state officials to sue on behalf of state residents regarding pornography); 18 U.S.C. § 248(c)(3) (authorizing a state attorney general to sue on behalf of state residents to protect access to clinics providing reproductive health services and to places of worship); 49 U.S.C. § 14711 (authorizing a state to sue on behalf of its residents to enforce certain consumer protection provisions that apply to individual shippers).

[6] *See, e.g.*, *Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 573 n.29 (1983) ("Congress focused on the difficulty of achieving class certification of [Sherman Act] consumer actions under Rule 23 of the Federal Rules of Civil Procedure and the complexity of measuring and distributing damages in such cases. See generally H. R. Rep. No. 94-499, *supra* n. 23, at 3-8; S. Rep. No. 94-803, *supra* n. 18, at 6-7, 39-40. To remedy these problems, the 1976 statute permits state attorneys general the right to institute *parens patriae* suits on behalf of state residents, 15 U.S.C. § 15c; exempts such suits from the class action requirements of Rule 23, § 15c(a); and allows damages in these suits to be computed through aggregation techniques, § 15d.").

[7] TEX. INS. CODE § 541.257(a) ("An action may be maintained as a class action under this subchapter if the prerequisites of Section 541.256 are satisfied, and in addition [one of three other conditions is met].") (formerly art. 21.21, § 18(b)).

[8] *Ante* at ___.

[9] *Ante* at ___.

other words, the Legislature had no choice but to impose these prerequisites on a class action by the Attorney General because a class action cannot exist otherwise. But a class action brought by the Attorney General is already an unusual creature, as the Court recognizes, and having provided for it, the Legislature was not obliged to structure the procedure to satisfy the Court's idea of what a class action should be.

Having determined that the prerequisites quoted above apply to a class action brought by the Attorney General, the Court ought to say *how*, since their application to a non-representative litigant like the Attorney General is not immediately apparent. The Court begins by saying that these prerequisites need not "apply in precisely the same way as in other class actions",[10] then offers that they "must be applied to the damage claims asserted by an attorney general, rather than to that official personally."[11] Perhaps this works for the prerequisites of numerosity and commonality. The trial court must find that the Attorney General's claims affect numerous persons and share common issues of law or fact. But how can the trial court determine that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" when there are no representative parties? And since the Attorney General does not act as a representative party or counsel for the class or any person, but rather as "the chief legal officer of the State, [with] broad discretionary power in conducting his legal duty and responsibility to represent the State",[12] determining that "the representative parties will fairly and adequately protect the interests of the class" is impossible. The Court states that an Attorney General's "conflicts [may be] so serious the adequacy requirement is not met", although his "public duties to all Texans cannot alone create such

[10] *Ante* at ___.

[11] *Ante* at ___.

[12] *Terrazas v. Ramirez*, 829 S.W.2d 712, 721 (Tex. 1992).

a conflict".[13] It is hard even to imagine what the Court has in mind, but the seriousness of the Court's suggestion cannot be ignored.

I would hold that the four prerequisites quoted above do not apply, by the plain text of the statute, to a class action brought by the Attorney General. That is not to say that such a class action is also excused from the other requirements of the statute, or that judicial supervision of the class vehicle, including the settlement reached in this case, should in any way be relaxed. I agree that the case should be returned to the court of appeals for consideration of the numerous other issues respondents have raised.

Nathan L. Hecht
Justice

Opinion delivered: April 27, 2007

[13] *Ante* at ___.