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Supreme Court of Texas.
Farmers Group, Inc., et al., Petitioners
v.
Jan Lubin, Gilberto Villaneuva, and Michael Paladino, Respondents.
No. 05-0169.

January 25, 2007

Appearances:

Marcy Hogan Greer, Fulbright & Jaworski, L.L.P., Austin, TX, for Farmers Underwriters Association, Fire Underwriters Association, Farmers Insurance Exchange, Texas Farmers Insurance Company, Mid-Century Insurance Company of Texas, Mid-Century Insurance Company, Truck Insurance Exchange, Truck Underwriters Association, and Farmers Texas County Mutual Insurance Company, for petitioner.

David C. Mattax, Chief Financial Litigation, Austin, TX, for state.

Russell S. Post, Law Offices of Joe K. Longley, Austin, TX, for Jan Lubin, for respondent.

Before:

Scott A. Brister, Dale Wainwright, David M. Medina, Paul W. Green, and Phil Johnson, Justices.

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JUSTICE: Docket-- and the order of their appearance, they are Docket Number 05-0169, Farmers Group, Inc., et al., Jan Lubin, Gilbert Villaneuva and Michael Paladino from the Travis County, and the Third Court of Appeals District. Justice Willet is not sitting in that [inaudible] and involved the policy of Justice Erick O'neil is sitting but could not be present argued [inaudible]. And Docket Number 06-0868 National Union Fire Insurance Company of Pittsburgh, Pennsylvania versus Beatrice Crocker, which is here on the certified questions from the United States Court of Appeal with the Fifth Circuit. In each case, the court has allotted 20 minutes per side and we will took-- take a brief recess between the arguments. These proceedings are being recorded and the link of the argument could be posted on the court website by the end of the day, today. The court is now ready to hear argument in 05-0169, the Farmers Group versus Jan Lubin and others.

COURT MARSHALL: May it please the Court. Mr. David Mattax will present the argument for the petitioners. Petitioners have reserved eight minutes for rebuttal.

ORAL ARGUMENT OF DAVID C. MATTAX ON BEHALF OF THE RESPONDENT

MR. MATTAX: May it please the Court. The legislature empowered the Commission of Insurance to enforced the consumer protection laws, didn't against the Insurance Company's field varieties of majors, including providing that the class action could be filed to recover damages for policyholders caused by insurers deceptible and be rush. This grant of authority did not, as the intervenors argued from the Court of Appeal decided. Attorney's Attorney General, the state's chief legal officer into a private class action of right. Rather, it authorized the use of the class action procedure to refer the goals of the legislature to make the insurance market place free from fraudulent and accept the practices and to provide compensation of policyholders not available at common law. The content and structure of H.B.417 and simple logic demonstrate the legislature intended that the Attorney General prosecuted the class action for unfair or deceptive trait and practices as the Chief Legal Officer of the State of Texas. Not as a private class action lawyer require to solicit a private citizen to serve as a class representative. First, H.B.417 shows the legislature period of consumer protections statute, that it would force separate types of causes of actions distinct from and addition to have all ...

JUSTICE: Have you get in to this parens, parens tripe-- parens patriae argument on the-- but as I understand the word in the statute supposed to be, this term was ever mentioned that you, that you want to proceed under this theory. So how does it work in to your argument?

MR. MATTAX: With respect to the parens patriae prior on this, it's been a historical context, how would it happening in the cases like a-- Hawaii and Freedelay which have been indicated that ...

JUSTICE: Based from the U.S. Supreme Court, how, how differently an Hawaii case and a theory to trial to push forward before here?

MR. MATTAX: What the court held there was, it said that "Without a legislative grant of authority for a, a cause of action for damages then the-- a case couldn't be brought for cause of action for damages." And that's the position that Section 17 provides that.

JUSTICE: But they treated a class action is different from parens patriae.

MR. MATTAX: True they did, but the question resolves around whether or not there was a statutory grant of authorities such as there is-- here in Section 17. What Section 17 does is empowers the Attorney General to recover damages.

JUSTICE: I understand that argument. I'm just confused on what Judge Medina nerves about any legal doctrine I can't pronounce. What is the parens patriae here? Why do you need it? Why do you bring it is? Not an statute. What, what are you trying to do with it?

MR. MATTAX: Well, I think what that is trying to focus the court's attention on is what was legistrite-- legislature is trying to create. Was it trying to create a situation when the Court of Appeal said, "Which merely authorized the Attorney General to act like a private lawyer." It's our position that certainly wasn't what the legislature intended.

JUSTICE: So your-- you just-- are you, are you bringing? Are you asserting the parens patriae action? Are you using it just as a-- an adjective to described what do you think an Attorney General class action is?

MR. MATTAX: I think the answer to that is both because we're bringing next a Section 17 of the insurance code class action was authorized by the legislature, that the Commissioner of Insurance as

part of his regulatory right of things he could do, included that administrative class action he could do himself. Or he can ask the Attorney General to bring a class action.

JUSTICE: I understand all that.

MR. MATTAX: Right.

JUSTICE: You know, I'm wondered what, what does parens patriae haves?

MR. MATTAX: Well, I think what it has is in the predated historical context, they constitutes that. That is the Attorney General who is bring the class actions. It's the Attorney General who is representin the interest of the policyholders. And one does not, therefore, need an individual policyholders to serve as an individual person and in that-- in stead.

JUSTICE: So who does the defendant and insurance company deposed?

MR. MATTAX: Well, the first, what, what would happen is the, the Commissioner of Insurance would determine if there were a violation of the insurance code provisions, as the statutory provisions not to common law. So with respect to the claim the cause of action, it would be-- they were deposed the investigators, they would deposed the-- whatever complainants who bound the Department of Insurance had found with respect to what the underlying claim work.

JUSTICE: That's not-- I mean, if you're going to deposed policyholders, that's just the same as having a name of class representative, ain't it?

MR. MATTAX: No. I would disagree. In this case, the legislature had indicated that the cause of action would be brought up the instance of a Commissioner of the Insurance. Not at the instance of the private policyholder. And that's the, the fundamental distinction we're talking about. Clearly as a matter of fact, what the question's going to be is, did this the insurance company and it's practices - whatever that insurance practice maybe - violate a statutory prohibitions? It can, the Commissioner of Insurance therefore sanctioned that insurance company. And part of that sanction, is the [inaudible] administrative for class action it could be fines, it could be simply orders to change business, cease and deceased orders. Or it could be an actions to make sure that policyholders were made whole through a class action.

JUSTICE: It couldn't be emotional language.

MR. MATTAX: I'm sorry, your Honor.

JUSTICE: No. It couldn't be any kind of emotional language, I mean, the intervenors if they want to bring a class action that includes emotional language to someone you can get such class certified without any named representative, you couldn't make such a claim. The commissioner couldn't make such a claim.

MR. MATTAX: Well, I think that the commissioner if I understand the court's question correctly, I think the commissioner is making the determination that an insurance company violated the insurance code. And as-- and that determination there would have to be adjudicated in the court. What a private class action would do is basically act in the stead, and the sort of goes back in the insurer formation of class actions. Is when an individual wants to enforce a state law, as opposed to a common law right of action, then they're acting as in affect a private Attorney General. And in this case, the legislature didn't have to grant that Private Attorney General status. He could have simply made this a legis-- I mean, a regulatory statute and, and then provide the Section 14 which is the administrative class action, Section 15 which is the Attorney General action. But it also provides Section 16 an action for damages. And then through 17, it allowed for-- what I

would-- if, if the court will, a public class action brought by the Commissioner of Insurance and prosecuted by the Attorney General and a private class action. And in that's stead, what is happening is the individual plaintiff is acting as a private Attorney General. And what the Court of Appeals's done as worth of turn that out on it's head. And you start with the notion that this-- the legislature can authorize the individual citizen to act as a private Attorney General. And the Court of Appeals has said "In this case, the real Attorney General has to act like a private citizen."

JUSTICE: I'm, I'm unclear, whether do you think the preponderance superiority notice and other provisions of, of the statute apply to a class action brought by the Attorney General.

MR. MATTAX: Well, I think that in-- the nature of, of the-- I think to-- the answer to your question is, that the court-- the statute can be interpreted in two ways. The first interpretation would be, that if you look at to the express language of 18 Act, did not applies to individual person. They cannot talk about a representative member of the group. If you look at 18(b) then the question becomes, is that apply to the Attorney General or because it's reference is back to 18(a), but it doesn't. I think in, in this cites of cases, we have to recognized their statutorily create a causes of action. The insurance company determines if there is a violation of the insurance code. And by that jury nature, that type of a claim is going to be not a unique claim. It's going to be a claim that applies to everyone who had an insurance policy of that insurance company. Even the insurance company violated the provision of the insurance code or it didn't violated the provision of the insurance, insurance code. If they did, then I think, those two factors will in fact be met. So I think that in let-- looking at that Section, the court can conclude it's not necessary in the Attorney General class action context because once the Commissioner of Insurance had made the determination of a violation occurs, and then once the court makes that same determination, that those were the allegation and then in fact on 18(b) is met. So I think and ...

JUSTICE: There's an argument that, in cases that the class action has at barred of potential effect on other plaintiff's res judicata or federal statute. How do you think that place into-- of action brought by the Attorney General?

MR. MATTAX: Well, I think that in the context of the statute, we need to go back to Section 14 as well which is the administrative class action where the Commissioner of Insurance could make a determination that is sanctionable offense was occurred and then the order to refund a premiums. And that is in fact what have that same preclusion of the fact. And he gave-- in fact, of Section 17 it says, if the Commissioner of Insurance has brought such a administrative class action, then another procedure--a, a class action procedure in 17 can be followed. But I think the reality is, is that yes, if in fact the court determines-- I mean the Solomon or a trial that a violation of the code occurred and that compensation should be provided to the policyholders and that would have res judicata effect. I think that's the intent of the statute and, and then-- this particular situation by the legislature granting the Attorney General this various eras and the clever and the Commission of Insurance it's various eras and the clever. The intend to that was primarily as the, the Attorney General held to brought the bill to the, to the house said, "Was to impart the Attorney General to take here, the insurance practices that cannot be addressed that common law." And then so doing the-- what legislature created a regulatory structure allowed the Commissioner of Insurance to

make that determination. And then if necessary to provide compensation to policyholders. And that's ...

JUSTICE: Okay. What would prevent if-- of course 2121's every time anybody has an insurance question or dispute they throw in 2121 claim, what would prevent in a single home owner taken, "I didn't get my claim paid fast enough." What would prevent the Attorney General - if you don't have to make the 18(a) requirements - what would prevent the Attorney General from filing a class action against the insurance company 'cause they didn't-- they won policyholder fasted up.

MR. MATTAX: Well, but with respect to that type of the claim or was an individualized claim then it would not be a situation where the Commission of Insurance had determined that that was a grading practice violation. In other words, has to be a violation of under 2121, one of this specific statute, and so the Commission of Insurance ...

JUSTICE: People but-- pick individual policyholders all the time, and almost every fight with their insurers that you violated 2121. You can be the, the non-fair settlement practice-- or unfair insurance practice. What would prevent the Attorney General picking and choosing a thousand independent cases around the country had-- all have and nothing to do with one another and filing a class action by the Attorney General. One case at a time.

MR. MATTAX: Well, I think the answer to that lies in structure of statute which is the Attorney General brings the class action after the Commission of Insurance has made the determination that already in practice. So finally ...

JUSTICE: Okay. So, so, so you say, well, you know-- the turn-- the attack of the Attorney General to the Commission of the Insurance. But I mean, what, what is the-- if the-- supposed the Commission of Insurance, it wants to get, you know, make insurers pay, so you got few friends here and there? And or-- decide-- he refers all this case to Attorney General. Was-- I mean if your-- you're basically saying you can have a class action or won.

MR. MATTAX: Well, I've-- I think that ultimately you have accorded wealth in this situation and, and, and, and ...

JUSTICE: So I'm the judge and I don't want the Attorney General messing up my simple contract dispute. Under your theory, how do I kicked you out if 18(a) is not required?

MR. MATTAX: Why-- again, I don't think the statute applies the simple contract disputes. But it applies to violations of the, the procedures and for the step to the unfair insurance practice.

JUSTICE: You're, you're new to insurance, you're, you're new to simple practice of insurance dispute, aren't you? Because every, every insurance policy dispute has an unfair-- I mean they claimed it to everyone, a hundred percent.

MR. MATTAX: I understand individual citizens do that.

JUSTICE: So I want to know how the Attorney General gets involved it-- all this cases? How can a trial judge tools you out, 'cause it's in the class action. It's a-- as you tried to tell me, a simple insurance dispute and maybe a subsequent attorney general says, "Yeah," but it's an Attorney General class action.

MR. MATTAX: Well, I think that under 18(d)-- Section 18(d), the, the trial court asked the authority to make a determination of the class action appropriate than the circumstance you've described. But I think the trial court would have the authority to say, "I'm, I'm not going to proceed on the class action."

JUSTICE: Well, are you sharing time? Is that correct?

MR. MATTAX: Yes.

JUSTICE: Well, your time has expired and-- I mean you-- Justice Brister ...

JUSTICE: No. I just-- I've tried four times.

COURT MARSHALL: May it please the Court. Mr. Russell Post for the Attorney General.

MR. POST: May it please the Court.

JUSTICE: Mr. Post.

MR. POST: Yeah.

JUSTICE: Forgive me to argue. This a-- actually a question I wanted to ask on the other side. So we're talking about an historical context. We were asking by this parens patriae doctrine. As I understand it, it's been historically used quasi- so-- sent-- sovereign interest. What would be the state's quasi-sovereign interest in this matter. And, and Manuel Tuason indicate that it also been used for injunctive and equitable relief. So how is that doctrine implied to this -

MR. POST: Well, your Honor -

JUSTICE: - if it does it all?

MR. POST: The answer principally is that it doesn't apply here. The parens patriae doctrine is historically used for an injunctive and equitable relief to enforced the state interest as the sovereign. And the Supreme Court is made a claim that if the state is asserting the individual claims of particular citizens, that is not within the scope of what is known as quasi-sovereign interest which of the classic test for parens patriae standard. Now, the state officer has an appropriate police power interest in enforcing it's laws and that is classic parens patriae authority to bring his injunctive actions to regulate the enforcement of the law. And that is what Section 15 of the statute authorized of the Attorney General to do. But it is not authorized him to do is the act as a parens patriae and to bring and to release the damage of claims of individual citizens. That would go step beyond what parens patriae doctrine has historical did not understood to do. And in answer to the questions that the court is ask as of, where the parens patriae doctrine this year in face of the statute that makes no records parens patriae on it's face. The answer is that the petitioners are trying to used the philosophy of parens patriae to rewrite a statute that says, "The Attorney General was authorized to bring a class action because they have not complied with the basic requirement for a class action."

JUSTICE: Can they? Can they?

MR. POST: Yes, your Honor, they could because the Attorney General is authorize through Section 17 and Section 18 to bring a class action provided he represent a class representative. [inaudible]

JUSTICE: Okay, I'll ask you. How can they do that?

MR. POST: Well, there are two areas in which he could do that. First, your Honor, there are political subdivisions of the state which have to take insurance and which could have proprietary standing to assert this claims. They could be proffered as potential class representatives. Second, the witnesses before the state testify that the class certification hearing, and I quote, the Commissioner of Insurance has received thousands and thousands and thousands of complaints about this practices. That at by federal courts record at page 77, all of those claimants would be potential class representatives.

JUSTICE: Have they came across?

MR. POST: I think that's not correct, your Honor. I think that the better reading of Section 17 and 18 that formalizes all the provisions

of the statute, is that the Attorney General is authorized to represent a class representative in this context. That's what the legislature means when it's says, "You may bring a class action." And in Section 18(b) he says, "A class action is may take by an individual member of the class." The ...

JUSTICE: But the Attorney General becomes a private lawyer in affect under the statute.

MR. POST: Your Honor, the Attorney General becomes the lawyer for the state as he always is. But he become the lawyer by then these instances authorized to represents a class representative withstanding to bring the claims that are adequate and typical -

JUSTICE: - typical class for plaintiff party?

MR. POST: Can the class representative party? The class representative can terminate the attorney-client relationship and in that instance, if he has another class representative, then he can come forward again. Now, Justice Brister that speaks to one of the questions that you asked Mr. Mattax. I think you said, "four times and couldn't get an answer which is, what is the device if the trial court wishes to refused this theory of the class action?" The reason you can't get an answer is because the petitioner's don't have an answer. They're understanding of how Section 18 is to be construed. List them with the a colloquial which they are no rules. Doesn't regulate and acting ...

JUSTICE: Why don't the patterns that superiority and those provisions applies to separate opinions case?

MR. POST: Well, your Honor, because by the petitioner's reading of the statute by definition, those requirements do not apply.

JUSTICE: Well, I don't understand that because A is extremely different from the B. A says, "The court should permit one on one amendment of a class suit or B serve as follows," so that applies only if there's an individual representative. But B doesn't say that. It says that-- an action maybe maintained if A had met, well I would apply if there was not an individual representative. And in addition, and then you have all of the rest of the requirements.

MR. POST: I think, two problems with that readings, petitioner's suppose, your Honor. The first is that the firewall to be itself says, "An action can be maintained if the requirements of A were satisfied and the B element would satisfied." Second, it misconceives what the statute is referring to when it says, "One or more member of the class in Section B," that is not in any sense of distinction between the Attorney General and a private litigant. That is nothing more than a corporative for paid up. The Texas Federal Rule 23, the federal class action rule, which all parties authority was the purpose of the legislature when it an activates the statute. And if you like, this statute down beside the Federal Rule 23, you will say that language is nothing more than a corporative what the federal rule had said. And to suggest from that, that the legislature intended implicitly to draw a distinction between an Attorney General class action and a class action brought by an individual. And thereby to-- in affect create an exemption for the Attorney General from all of the due process requirements to the court has recognized that are necessary in a settlement class action would be a statutory construction that is simply untenable.

JUSTICE: Well, I just don't see why they're all have to be splendor by, by the same talking. If adequacy is the requirement and essentially the Attorney General can't bring a class action.

MR. POST: I think that's not correct, your Honor. I think that the Attorney General can bring a class action.

JUSTICE: Except to-- on behalf of state agency.

MR. POST: Well, ...

JUSTICE: If that will bring a class action on behalf of the-- for damages policyholders of the insurance company.

MR. POST: It's not included in the best trivia. If he has a class representative whose claims are adequate and typical and can satisfy the due process requirement of class action want, then he can bring a class action and to the degree that a state subdivision has a proprietary interest that gives it's standing to bring the claim that he can bring class action. But argument that's made here that you want to exalt the Attorney General and give him an exemption from this due process elements. Simply because it might make a part of the independent claim, really wants to countered to the last decade of this Court's doctrine in class action law and what the U.S. Supreme Court said.

JUSTICE: Well, the law to constrain a legislative policy that seems to permit the AG to represent the, the, the State of Texas of policyholders consumer as a whole.

MR. POST: Well, that's right, your Honor.

JUSTICE: You're trying to reconcile them.

MR. POST: And, and we have to look at the entire statute and context because important to recall that Section 15, which is the classic provision that the Attorney General has used, to enforce the statute authorized of the Attorney General to suit in the name of the state in order to secure an injunctive relief to enforce the statute. And that monetary relief can be accorded to caught identifiable persons in an injunctive action brought under that provision. The state did not need a class action in order to get the relief that it was asserted here.

JUSTICE: Well, may not. What the legislature gave it's something.

MR. POST: Your Honor, the legislature ...

JUSTICE: Something more than what I had in Section 15.

MR. POST: That's right. The legislature gave in Section 15, the power to bring the injunctive case and this is your restitution.

JUSTICE: But this not just apparently no.

MR. POST: No, that is right ...

JUSTICE: That is something else.

MR. POST: That's correct, your Honor, but in respecting what's it policy on, it adds to the ability to bring the damage claim, if the Attorney General can meet the requirements for a class action. There has been no instance in which the Attorney General has ever before tried to release the claims of individual citizens.

JUSTICE: Let me ask you this is on a, on a-- from the statement of facts, the procedural posturing, how did this-- the Attorney General's office get involved here maybe? Does it matter that they, from what appears to me, hang on to Copetel and Seria. Well, we know we want to get involve now and we were going to intervene to settle this case. Doesn't matter if they initiated the action or, or doesn't matter, or, or why is that [inaudible] -

MR. POST: No, your Honor. I don't -

JUSTICE: - is it the first thing which you put in your statement of facts.

MR. POST: - I, I don't believe it matters who initiated the action and in fact, there were distinct actions and the first action is filed that are implicated here were actions by policyholders Villaneuva and Paladino that are raised certain allegations. The state independently brought a Section 15 text for injunctive relief and restitution. That

did not seek a class action, did not seek to have the power to release the claims of policyholders. They revenge interventions that brought the actions together. Here is what's critically important until the settlement deal was strong between the state and farmers. There was no class action pleaded. The record is truly uncontested that the state agreed to abort it's case in the class action solely at the demand of farmers, and solely for the purpose of allowing farmers to secure or release of the absent class members claim.

JUSTICE: Well, but that is a reason why this is not a superior of way proceeding. And it's a reason why the class shouldn't be certified or settle but it's-- it is still openly difficult to see why it is reason that the Attorney General has to go file a private citizen bring the action.

MR. POST: No, your Honor. I respectfully disagree. Isn't a reason why if the Attorney General wishes to convert his classic enforcement proceeding into a class action, he should be required to undergo the same regular scrutiny that this Court require that they will read the class action.

JUSTICE: Well, I don't that, that-- but with respect to superiority and preponderance I, I think you're wrong. But with respect to adequacy of representation, I just don't understand why the trial court have any interest in going to the Attorney General's office to make sure they were going to be able to represent the class.

MR. POST: Well, your Honor, this falls into exactly what the U.S. Supreme Court has warned about in settlement classic generally. And the importance of having a real class representative who can save for the due process interest. The class action law is designed to accomplished and, and if I may I quote what Justice Ginsburg said about this problem in the Amchem case, she said, "It's important to requires Strickland plans with all of this requirements including adequacy of representation in order to avoid an appraisal by Court," unquote, that chancellor's split kind, which is the class certification dependent only on court's gestalt judgment or overwriting impression of the fairness of the settlement. And that an essence is what the Attorney General persuaded the trial court to do. Because the Attorney General says, "They are not required to bring forward a class representative against to the adequacy and to the Calvey determination can be made." And the course of all, of a real judicial review, this suppose settlement class has been subjected to just that type of chancellor's split analysis. Blowing out itself ...

JUSTICE: Now, a minutes, a minutes-- it's not before as whether there's a good settlement or good idea for police officer [inaudible]

MR. POST: That's correct, your Honor.

JUSTICE: - your not worried about that some other day. But I'm, I'm concerned, if you got to get a private citizen-- I mean, there, there no question regardless of the reality of how class action actually work. And there's no question as a legal matter. The class representative runs the case, it makes the decisions not the class counsel. That's the way it has to be. Which means that Attorney General's got to obey whatever-- you know, complaint to [inaudible] they're allowed to speak or to complain were and that is at least to problematic.

MR. POST: Well, your Honor, the premise that it's problematic assumes that they wouldn't any way inhibit the Attorney General's lawful ability to enforce Article 2121.

JUSTICE: Well, I mean, what, what if the class representative say, "Look, we don't care. If all the insurers in Texas lead the state

'cause it's not-- and we want our [inaudible] we want it now." Now, what is-- that's a problem.

MR. POST: Your Honor again, its a problem only ...

JUSTICE: I don't care about all those-- we want Maja Monalee house state for and I don't care if the rest-- you know, all the people with funny houses that may burned down next year and could have any insurance. That's a problem.

MR. POST: It is a problem only if you believe the Attorney General needs the ability to litigate a class action in order to secure enforcement with the statute. Section 15 doesn't require that. It is only a requirement ...

JUSTICE: Section 17 ...

JUSTICE: But, but it allows. Seventeen allows.

MR. POST: Seventeen allows you to bring a class action ...

JUSTICE: So it's no answer to say, "Well, they can do something else." You just, you know, we just to ignore this one thing that's legislature said, "They could do.".

MR. POST: Your Honor, respectfully I think it is an answer because the Attorney General has never before thought that in court to try and litigate a class action under Section 17. This is the first time in 30 years, the Attorney General ever suggested they needed this power. They bargain for it solely in order to have to release the policy member.

JUSTICE: But that-- to have, to have the all the, the home insurers ever threatened to led state court. I've used the first time we need it.

MR. POST: Well, your Honor it maybe the first time and they wont ever thought of it. I will invite the court to ask farmers' counsel when she argues what the else they think of this power. The next time we have a pro se Attorney General and the LA who [inaudible] -

JUSTICE: [inaudible].

MR. POST: - who says, "I don't want to aggravate all of these private citizens claims, I'm going to pursue these insurers to the policy extend of a law and I have a big stead." Now, because I don't have to comply with the standard class action requirement. I respectfully suggest that is not of rule that auto-control the class action litigation for any litigant in Texas. And It's not necessary to read Article 2121 to give that kind of extraordinary power.

JUSTICE: Can your client up doubt to pursue their claims individually?

MR. POST: Your Honor, they cannot doubt and-- yes go ahead. Down to center court have another question?

JUSTICE: So all the parties, the other two parties agreed to the settlement and we're here because your client's intervention.

MR. POST: That is correct, your Honor. And two answers that are important there. Number one, the court consistently said that "The ability of a party to au-- out of the settlement does not exalt in the-- for regular scrutiny of the class certification office." And second, its not a surprise that farmers and the Attorney General agreed to the settlement. It did not affect their interest at all. The Attorney General secured relief in the settlement, that is fully support by this pleadings under Section 15. The deputy assistant Attorney General Jeff Howard, he testify about the settlement negotiations. Admitted the request for release the conversion of class action and release came up at the end of the settlement negotiations simply because farmers wanted the ability to buy it's fees on the absent policyholders claims. And the Attorney General who was getting in the benefit of the bargain settlement of the states claim said, "That's fine, I'll agree," he has

no interest in the policyholders claim. Look at what to release, there was a pending federal class action phase, on behalf of policyholders, a asserting violations of the Fair Credit Reporting Act act at the time this settlement was negotiated. This settlement agreement on behalf of absentee class members not represented by the Attorney General releases that claim.

JUSTICE: But the Attorney General have a right to bring this action and those problems still be going.

MR. POST: If the Attorney General had the right to bring this action, construing the statute to require a class representative, then you would have real judicial review as to whether that class representative was an adequate representative of the interest to policyholders when compared to the claims that being sacrifice. We haven't had any judicial hearing.

JUSTICE: And there, there's some argument made in, in the briefs said, "The Attorney General himself is a class member, an adequate class member to pursue this."

MR. POST: Well, his certainly not a class member and I don't believe the Attorney General will even suggest that he is and then the certification were makes clear. There is no class representative. The Attorney General's appointed class counsel but there is no class representative. And there is no way under of the statute as the Attorney General and petitioner would read it to impose any kind of scrutiny [inaudible].

JUSTICE: On behalf-- But you could raised all your question and an objection that he's not an adequate representative, in fact he have.

MR. POST: Your Honor, we have argued on the alternative theory that the petitioners suggest that the statute can be construed in this matter. We have argued that in that instance, that the Attorney General's representation is not adequate. But I've pointed out that, that assumption the way they read the statute depends on cuts or in the adequacy determination that is in the statutory provision for review of an ultimate approval of the fairness of the settlement. And there once directly in the face of what the court said in Cortez that "Fairness of the settlement is no substitute for regular state hearing to the class certification requirements." And the point is, they have to jury member the statute that the pick and choose certain elements of Section 18 that they found attracted but non others in order to make that distinction one.

JUSTICE: But you could, if, if A in fraud, you could. Trial court could asked the Attorney General about your claim to find out that if claims being prosecuted by the Attorney General are typical of the classes claims. And whether attorney knows going to adequate represent those claims even if there was no class representative. Couldn't you?

MR. POST: Are you asking in theory, your Honor, or under the statute?

JUSTICE: Just, just, just in theory. In theory, one could-- you know, the attorney ...

MR. POST: I think, your Honor, that kind of an analysis, well could theoretically be made. Once contrary to the very premise of judicial review that you need a particular right litigant against to these issues can be tested and again, Justice Bent for a possible [inaudible]

JUSTICE: Protect your standing. That's standing question. There's no quest-- there's no question that legislature gave Attorney General standing.

MR. POST: Standing to prosecute the injunctive action, that's

right. And standing to bring a class action which and well class representative.

JUSTICE: Standings and bring a class action. No, if that's not in the statute, is it?

MR. POST: Your Honor, I respectfully disagree [inaudible].

JUSTICE: Where, where and show me the words, word says that "Attorney General to bring a class action with the name of representative."

MR. POST: Your Honor, Section A says, "The Attorney General may bring a class action." Section B says, "Here are the elements require of the class action." Class action is a, a term of art in American law, that is uniformly understood to require a class representative. This Court in Nova at the urging of Attorney General formed and said, "The essential premise of every class action is a class representing withstanding to suit." If you try an invasion, adequacy or to the colony analysis and the abstract without a real litigant, you lose the coursable of review. That's the heart of these due processes and that's exactly what and can talks about and if what plead.

JUSTICE: Cha-- well, we're running out of time. What would be unconstitutional and your-- I didn't really calling your unconstitutional argument brief. What would be unconstitutional about in saying that Attorney General can bring this and we'll look at the kinds of claims his bringing to see or she is bringing to see if their typical adequate except. What would be unconstitutional?

MR. POST: Your Honor, simply stated, we read in Canan Ortiz to require an actual class representative for an adequacy into the California view in the particular person of the particular claim as a due process requirement. The U.S. Supreme Court has never indicated that there is any exception to that requirement for public official and to hold the contrary on this statute were defend the due process clause of the Fourteenth Amendment. There are no further question?

JUSTICE: Even, even if the class members had a right to upheld?

MR. POST: Yes, your Honor, because it is well settled that the right to upheld is not exalt the court of the neutral regular scrutiny of class certification requirements in every test.

JUSTICE: Just said, [inaudible]. Thank you.

MR. POST: Thank you, your Honor.

COURT MARSHALL: May it please the Court. Ms. Marcy Greer for present the rebuttal petitioner.

ORAL ARGUMENT OF MARCY HOGAN GREER ON BEHALF OF THE PETITIONER

MS. GREER: If I may, I'd like to go back to Justice Medina's question about the distinction between parens patriae and statutory according to Section 17, because if we have lead this Court to believe that the authority is an any right depending upon common law doctrine, then we over messed. This is a purely statutory cause of action. The whole purpose of our parens patriae historical context is to show the problem that the Supreme Court identified in Hawaii and discussed in Freedelay that can only be affects by legislative response. And they involved the Texas Attorney General first proffered Martin being an amicus curiae in Hawaii. And then John Hill the successor and going to the Texas Legislature and saying, "We have a problem, we need enforcement authority." We need better ways for us to be able to

vindicate -

JUSTICE: So that ...

MS. GREER: - the lost.

JUSTICE: Attorney General's office said, they are bringing both the parens patriae and the class action.

MS. GREER: I don't ...

JUSTICE: I think they can do both or just one.

MS. GREER: They're not seeking to bring a common law a parens patriae. They, they were seeking the statutory authority to fill in the two gaps missing at common law. One being the-- and the common law, you got to show cause of actions.

JUSTICE: But so do-- would you agree that parens patriae is merely used as an adjective ,or you using it merely as an adjective to describe the kind of class action Attorney Generals can bring?

MS. GREER: Absolutely. And perhaps, public class action would have been more appropriate term as we've don't intent ...

JUSTICE: I can pronounce that.

JUSTICE: Do you agree in both ...

MS. GREER: They're not.

JUSTICE: I'm unclear about whether you will think the preponderance and superiority in notice in other provisions of O Section 18 apply?

MS. GREER: Yes sir, I do. I think they apply very, very clearly and that provides ...

JUSTICE: And do you think that the, the troubles or aspects of protensive effects of the judgment can't be as a fully evaluated under those rights.

MS. GREER: I, I do, your Honor, and here's one because the predominance inquiry in effectively takes care of commonality. This Court talks about that all of the time. You can't get to predominance unless you have common questions. The TDI has to make that determination in requesting the class action. So that is fulfilled. And then of course, there's in-- in this discussion about conflicts of interest and ...

JUSTICE: Would you can get around that. I mean, there's four different types to maintainable. Predominance is one of it. Do you-- I mean, you all have entered these suits by individual policyholders right?

MS. GREER: Absolutely.

JUSTICE: All of them make 2121 insurance code violations in him, right?

MS. GREER: They do.

00:38:54.063JUSTICE: And so what-- when the Attorney General this one or future. I'm starts intervening that all those and saying, "This is a class action of one because you have a post or acting on a ground generally applicable to this class, which is one person the, plaintiff." How you're going to kick them out?

MS. GREER: Well, the I way I would do it is to suggest that the TDI has abused it's administrative discretion and in bringing this as a class action. If there's only one member and the class action is not be apparently be it form under Section 17.

JUSTICE: Why?

MS. GREER: Section 18 ...

JUSTICE: A debating A(1)-- a-- 18(a) then apply once the class action of one brawled out.

MS. GREER: Because the common issues will not predominated, and, and ...

JUSTICE: That's only one of the four maintainable grounds. You do, three others. I wanted the Attorney General bring to class action to one for an injunction without that, matter about communality and predominance.

MS. GREER: You're focusing on the numerosity requirement nor the communality. And the numerosity requirement is presumptively implied whenever we-- you used a term "class action." There were be no reason to she can write ...

JUSTICE: So parts of 18(a) really do apply to the Attorney General.

MS. GREER: I think inherently to the extend their carry through in terms of predominance and superiority by definition of class devise would not be superior if there's only one member. It just makes no sense.

JUSTICE: Yes.

MS. GREER: So-- and, and I think I wanted to focus in on where I think the Court of Appeals really messed right now.

JUSTICE: Well, well, Justice Melt speaking the Court of Appeals and Justice Puryear's opinion included that the AG could not represent the class action, but stated not suffered as similar injury.

MS. GREER: That's correct. Or if he-- AG precluded an, an individual to serve as traditional class representative.

JUSTICE: And because his-- because AG's representation was an adequate occurs to that.

MS. GREER: Well, wasn't inadequate-- was not adequate or could not as a matter of law be act but without the identifiable of a class representative, the private policyholder. Where that announces goes wrong? is in starting with Section 18 because this is an authority to an agency question. This Court is written religion's opinions about how that works. If you look to the statute that grants the authority that Section 17. Section 17 is clear standing of one. It's an either or static. There are a disjunctive word in there that's purposely could. Either TDI would request the Attorney General to bring it or a private part of standing and choose of consult another similarly situated brings the class action. See the presumption that the Court of Appeals operated under a new hearing from intervenors, is that theory exist but some plutonic form. A true form of class action and that all other statutes can be moves or design to emulate that in it's perfect sense. That's not the case. And at section 18 is absolutely adopted almost a million from Rule 43 of the federal rules, we know that. That's clear from statute main sector of history. But here is no Section 17 any of the federal rules. It has to mean something more than you can bring a class action. It's there for purpose and that's why the authority lost. Eighteen, cu=ious with the no grant of authority. So you can't start with there to define the court's power. So that-- the whole waited and the Court of Appeals is bring the issue. Look, the very first line of it's opinion, it's says, "Whether the statute permits the Attorney General, TDI, to bring his lawsuit without a complying with Section 18." That is putting the statutory analysis exactly backwards. And I think the regulatory context in what was-- which statute was positive absolutely critical to understand. These are not personal injury to common law of rights that are vested as shows these in action. Why can't him, what know back, like Ortiz, that is a completely different paradigm. These are statutory powers to enforce the insurance laws of this state.

JUSTICE: So, so they would be exempted from all of the other rigorous-- vigorous requirements that private class action required?

MS. GREER: I don't believe so your Honor. I think there's a lot of can-- ability built-in to the statute as written by the law-- by the legislature. We start with-- there has to be an individual agreed by a Section 4 violation.

JUSTICE: And by the seems that you-- your argument that you can pick and choose which one do you wanted to hear to. But it then fit your case and you've been excluded because the statute, under your theory, give you broad power or the Attorney General broad power to do these in your sit pleases.

MS. GREER: I'm, I'm not advocating that, your Honor, I'm certainly not as a regular identity. But I would say that the problem with the Court of Appeal's opinion is that it makes it further for TDI that he was the center piece of the regulatory scheme and mistake to bring a class action to vindicate the insurance code. Then for private citizen you just-- you have -

JUSTICE: But none of the ...

MS. GREER: - and can be opposing one.

JUSTICE: They, they said, "It's unconstitutional." I wondering like a-- of course, I know, to back the cases don't come under the insurance code, but it seem they did. And so the Attorney General would be think to beats to back a cases all the time as he knew the risk and you smoke anyway. And the Attorney General can bring a class action against-- if it was you-- your, your client and the-- say "I don't need any class representative," and you can't say, "I chose to smoke without the Attorney General." I did. There is ...

MS. GREER: No. They can't.

JUSTICE: You raised-- that would be a benefit of due process properly.

MS. GREER: Absolutely. But there's two reasons why that's a very different paradigm. One, does a common law personal injury claims. And two, there's no statutory authority for the Attorney General to bring them.

JUSTICE: SO with that statutory authority here did also allows the policyholders to get a penal language, stuff like that. Attorney General does not going to be able to make a credible claims for penal language. Is he or she?

MS. GREER: Well, he, he had those claims before under Section 15 wasn't been brought. He was-- he is bringing regulatory claims to stop the, the legislature -

JUSTICE: Right.

MS. GREER: - practices under the code. And its part of the remedial belief-- relief to make everybody whole. He has the authority to get but that's turns back. If I could just briefly, I wanted to mention one thing but procedural has fair this case because I think there was a misperception. The Paladino lawsuit is the only harmonious lawsuit but it's unfallible before the Attorney General's suit. It was limited to the extended practice called "credits scoring" and after the lawsuit was filed, nothing happened. It was not until after settlement that, that lawsuit was amended to match the huge cancellation of claims brought by TDI, and the Attorney General and four or five different administrative judicial proceedings. So I think there's a misconception about different person to extend and we need the authority to be able to relied upon our look and deal with TDI's regulators for rate-making practices which is the [inaudible].

JUSTICE: Further, further questions? If not, well, I thank, you Counsel. The case was submitted and the court will take a brief recess.

COURT MARSHALL: All rise.

JUSTICE: [inaudible]. Thank you.

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