

CLASS ACTION IN COMPETITION LAW: THE PROBLEMS OF COUNSELS FOR PLAINTIFF*

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ABSTRACT

It is widely known that the concept of class action in competition law was later on promoted in various legal systems of different countries including the United States of America and European countries where ‘class action’ has been most commonly practiced. One of the most well-known and significant class actions was the lawsuit against Microsoft which not only resulted in recoveries for all parties including the plaintiffs, the defendant and other involved persons but also contributed great benefits to the economy of the country.

A trade competition case in the form of a class action in Thailand is practicable since Thai law on class action is part of the amendment of the Civil Procedure Code of Thailand B.E.2558. Nevertheless, it still lacks specific proceedings to effectively regulate the legal measures in class action in competition law, and there has been few cases based on class action law. The class action law introduced new legal proceedings and an innovative way to litigate competition cases in Thailand. The drawback to this new law is its lack of precedent and unclear application of laws.

The significant problem is the person representing the plaintiff because they play a crucial role in the commencement of class action proceedings. According to Section 222/1 of the Civil Procedure Code, only “injured persons” are entitled to file a class action lawsuit against the defendant. Thus, it is not clear whether the Consumer Protection Board and public prosecutors shall be regarded as “Class” or “Plaintiff’s Lawyer” pursuant to Section 222/12(5) since they are not the injured person. Consequently, the compensation for Consumer Protection Board and public prosecutors can also raise conflict of interest issue because Section 222/37 of the Civil Procedure Code allows the plaintiff’s lawyer to receive up to 30 percent of the total award received by the plaintiff and its members. However, the governmental officers cannot receive extra compensation other than their salary.

Additionally, the author is also concerned whether Thai legal culture would be able to cope with the influence of the American legal culture of the class action because class action proceedings work best when the individuals involved in the lawsuit are well-equipped with the knowledge and resources necessary for initiating a class action in competition law.

This article will focus on the issues of legal standing of the Consumer Protection Board, the legal standing of Public Prosecutors, and Representation of the Plaintiff by Private Lawyer; and the proposal for solution for those problems to deliver its utmost benefit.

Keywords: Competition law, Class action, group litigation, Counsel for the plaintiff, Plaintiff’s lawyer

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บทคัดย่อ

เป็นที่รู้กันโดยทั่วไปว่า แนวความคิดการดำเนินคดีกลุ่มในกฎหมายแข่งขันทางการค้าได้มีการแพร่หลายในระบบกฎหมายหลายประเทศ รวมทั้งประเทศสหรัฐอเมริกาและประเทศในกลุ่มประเทศอื่นๆ ซึ่งประเทศดังกล่าวมีการใช้วิธีการดำเนินคดีกลุ่มเสมือนวิธีการดำเนินคดีทั่วไป คดีที่เป็นที่รู้จักและเป็นคดีตัวอย่างสำคัญของการดำเนินคดีกลุ่มในการคดีแข่งขันทางการค้า คือ คดีพิพาทระหว่างบริษัทไมโครซอฟท์กับผู้เสียหาย ผลของคดีนี้ไม่เพียงแต่เยียวยาความเสียหายต่างๆแก่ผู้เสียหาย, โจทก์ และจำเลยในคดี รวมทั้งผู้เสียหายอื่นๆที่ไม่ได้เข้ามาเป็นคู่ความแต่แรก แต่ยังมีส่วนสนับสนุนให้ผลประโยชน์มหาศาลที่ได้รับในคดีนี้มีผลต่อระบบเศรษฐกิจของประเทศด้วย

ในประเทศไทยนั้น วิธีการดำเนินคดีในคดีกลุ่มในกฎหมายแข่งขันทางการค้ามีผลในทางปฏิบัติตั้งแต่เมื่อมีการแก้ไขเพิ่มเติมประมวลกฎหมายวิธีพิจารณาความแพ่งในปี พ.ศ. ๒๕๕๘ แต่อย่างไรก็ตาม บทกฎหมายเกี่ยวกับการดำเนินคดีแบบกลุ่มนี้ยังขาดกระบวนการเฉพาะเพื่อให้มีการบังคับใช้มาตรการทางกฎหมายในการดำเนินคดีให้มีประสิทธิภาพ นอกจากนี้การฟ้องร้องคดีโดยวิธีการดำเนินคดีแบบกลุ่มนี้ยังไม่เป็นที่แพร่หลาย เห็นได้จากตั้งแต่มีการบังคับใช้กฎหมายดังกล่าวมีเพียงไม่กี่คดีที่ใช้การดำเนินคดีแบบกลุ่ม เพราะวิธีการดำเนินคดีแบบกลุ่มนี้เป็นการวิธีดำเนินคดีแบบใหม่ที่เกิดขึ้นในประเทศไทย เนื่องหลักการต่างจากวิธีดำเนินคดีแบบปกติและยังมีสาเหตุอื่น ได้แก่ ตัวบทกฎหมายที่ไม่ชัดเจนรวมทั้งยังไม่มีหลักคำพิพากษาที่ชัดเจน

ประเด็นสำคัญของปัญหาดังกล่าว คือ บุคคลที่ทำหน้าที่เป็นโจทก์ในคดี เพราะบุคคลเหล่านั้นเป็นผู้มีบทบาทอย่างมากในการเริ่มต้นวิธีการดำเนินคดีแบบกลุ่มแทนผู้เสียหายอื่นๆ เนื่องจากตามกฎหมายวิธีพิจารณาความแพ่ง มาตรา ๒๒๒/๑ และมาตรา ๒๒๒/๑๒(๑๕) กำหนดให้เฉพาะผู้เสียหายเท่านั้นที่มีสิทธิฟ้องคดีต่อศาลเพื่อขอให้ศาลอนุญาตให้การดำเนินคดีกลุ่ม ดังนั้น บทกฎหมายดังกล่าวจึงก่อให้เกิดปัญหาว่าองค์กรของรัฐหรือเจ้าหน้าที่ของรัฐ เช่น ในกฎหมายแข่งขันทางการค้านั้น ได้แก่ คณะกรรมการคุ้มครองผู้บริโภค หรือ พนักงานอัยการซึ่งมิใช่ผู้เสียหายโดยตรงในคดีมีสิทธิเริ่มต้นดำเนินคดีแบบกลุ่มแทนผู้เสียหายได้หรือไม่ นอกจากนี้หากอนุญาตให้คณะกรรมการคุ้มครองผู้บริโภค หรือ พนักงานอัยการเริ่มต้นการดำเนินคดีแบบกลุ่มแล้ว ค่ารางวัลทนายความในคดีที่ศาลต้องสั่งให้แก่ทนายโจทก์นั้นจะก่อให้เกิดความไม่เหมาะสมหรือการขัดกันแห่งผลประโยชน์หรือไม่ เนื่องจากว่าองค์กรของรัฐหรือเจ้าหน้าที่ของรัฐไม่ควรได้รับเงินอย่างอื่นนอกจากเงินเดือนของตนเองตามหน้าที่

นอกจากนั้น ผู้เขียนยังมีความเห็นต่อไปว่า วิธีการดำเนินคดีแบบกลุ่มในประเทศไทยนั้นได้รับแนวคิดมาจากวัฒนธรรมของกฎหมายประเทศสหรัฐอเมริกา เมื่อนำมาใช้กับวัฒนธรรมกฎหมายของประเทศไทยย่อมทำให้เกิดความเปลี่ยนแปลงทางวัฒนธรรมกฎหมาย ดังนั้นบุคคลที่เกี่ยวข้องกับวิธีการดำเนินคดีแบบกลุ่มนี้จำเป็นต้องมีความรู้และความรู้เท่าทันเพียงพอที่จะเริ่มการดำเนินคดีแบบกลุ่ม โดยเฉพาะกฎหมายแข่งขันทางการค้าที่เกี่ยวข้องกับผลประโยชน์ทางเศรษฐกิจของประเทศ

บทความนี้จะวิเคราะห์ถึงประเด็นของบทบาทของคณะกรรมการคุ้มครองผู้บริโภค, บทบาทของพนักงานอัยการ และ บทบาทของทนายเอกชน ในฐานะทนายของฝ่ายโจทก์ในการเริ่มต้นการดำเนินคดีแบบกลุ่มแทนผู้เสียหายในคดี รวมทั้งข้อเสนอแนะของปัญหาเพื่อที่จะอำนวยความสะดวกสูงสุดเพื่อให้การดำเนินคดีกลุ่มนั้นเกิดประสิทธิผลมากที่สุด

คำสำคัญ: กฎหมายแข่งขันทางการค้า, การดำเนินคดีกลุ่ม, ทนายโจทก์

1. BACKGROUND OF CLASS ACTION IN COMPETITION LAW

With respect to the characteristics of a competition law case, wrongful actions in the cases often result in several injured parties at issue. In addition, disputes in competition law share the same grounds and evidence from the same wrongful cause of action by the same person. Hence, a class action is available for competition law cases in many countries. A class action is used as a procedural alternative to ensure efficient, rapid and fair proceedings to all persons involved.¹

In Thailand, the law on class action is a part of an amendment in the Civil Procedure Code of Thailand B.E.2558, Section 222/1-222/49. These provisions provide for new proceedings which allow an individual to file a lawsuit to protect his rights as well as those of others in the case where their claims are based on the same facts and the same provision of law, with no requirement of the power of attorney or prior consent from all plaintiffs. The specific provision which permits class action for competition law case is Section 222/8 of the Civil Procedure Code. The most influential element to class action regulation in Thailand can be found in the fundamental principles of class action litigation in the United States which are prescribed in the Federal Rule of Civil Procedure (Fed. R. Civ. P. 23) Rule 23 which governs civil procedure in United States district (federal) courts².

In comparison, in ordinary litigation each injured party is required to bring a claim before the Courts separately. The traditional proceedings consume a lot of time and resources because the courts must hear witnesses, facts and concerned parties for each case separately. Moreover, if there are any inconsistencies in the judgment between cases involving the same common interests, such inconsistencies can distort the standard of the whole justice system.³

However, there has only been a few class action lawsuits based on this class action law due to the lack of specific proceedings to regulate the competition class action lawsuit effectively. The existing proceedings, either from the language of the provisions or in practice, are ambiguous for the injured persons or associations to avail themselves to such proceedings because the nature of the class action is to allow only private attorney to act as the lead plaintiff in the lawsuits.

2. LEGAL PROBLEMS CONCERNING COUNSELS FOR THE PLAINTIFF

Counsel of the plaintiff, the person representing the plaintiff, plays a crucial role in the commencement of a class action proceedings because they are the one gathering evidence, arguing before the court and ensuring that the plaintiffs' rights are protected throughout the entire litigation and after the judgement.⁴

Under the amended Civil Procedure Code, a group of individuals injured by an unfair trade practice is entitled to set up a class action. Pursuant to Section 222/1 and Section 222/8, this group of individuals is regarded as a 'class representative' who has the rights and is authorized to initiate a class action. The roles of these class representatives are very important because they must protect the benefit of all class members. Therefore, it is important to study

¹ Judge Vichai Ariyanuntaka. 'The analysis on class action in Thailand purposed to Thai Council of state' p.42

² Judge Eearn Kunkaew, Class action and Writ of certiorari (Winyuchon, 2016) p. 6

³ Namtae Meeboonsalang, 'Class action in environment cases' (Master degree, Chulalongkorn University 2004) p.72

⁴ Ardawat Ingkaranuwat, 'The role of lead counsel for the plaintiff in class action' (Master degree, Durakij Bundit University 2006) p.66

and understand their roles. In Thailand's class action in competition law case, representation could potentially be done by the Consumer Protection Board, public prosecutors or private attorneys.

Before the amendment of the Civil Procedure Code, the laws allowed the injured person to initiate an action against the defendant for compensation, but it was not efficient. Furthermore, the scope of duties of the Consumer Protection Board and Public Prosecutor were not clearly prescribed. It was unclear whether the Commission and Public Prosecutor were eligible to bring an action against the defendant on behalf of other parties who are injured but have not assigned their authority for any legal proceedings.

The other issue for consideration is whether Thai private attorneys are equipped with the knowledge, skills and experience to handle class action lawsuits which are typically cases with profound implications to various groups of persons. Since the prospect of class action litigation will lead to an out-of-court settlement, this form of litigation is also deemed to be a way to evolve our law system to be more 'American-style-mass-tort litigation'.⁵ Thereby, it may still be difficult to find a sufficiently qualified and experienced lawyer to take class action cases because this type of proceeding is relatively new to most Thai lawyers. Despite the contingent fees incentive of up to 30% of the awarded compensation provided for by the Civil Procedure Code, it is still not able to solve this problem.

Besides, the lawyer's fee awards under Section 222/37 of the Civil Procedure Code, which can be as high as 30% of the award, is intended to incentivize private lawyers to litigate class action lawsuits for a large number of plaintiffs. Therefore, collusion possible and conflict of interest may arise.

3. FOREIGN LAWS CONCERNING CLASS ACTION LITIGATION AND LAWSUITS

The concept of class action in competition law is widely promoted in various legal systems in different countries, including the United States of America and Germany where class action is a common practice.

For the common law countries, the author chooses to do a comparative study of the US law and Thai law because the concept of class action in Thailand is influenced by the Federal Rules of the United State Rule 23. Furthermore, the United States of America is considered a model for many other countries in extensively enacting a law for class action.⁶ The United States of America successfully exercises the law on class action, since there are numerous cases that created an economic value in the country and built an approach to lawsuits made by the private sector which is extremely beneficial to many victims at once.

There were well-known and significant class action lawsuits against Microsoft which not only resulted in recoveries for all parties including the plaintiff, the defendant and other involved persons but also contributed great benefits to the economy of the country.

In *United States v. Microsoft Corporation* (2001), the plaintiff accused Microsoft of abusing its monopoly powers on operating system and web browser sales of Intel-based personal computers. The company was accused of disallowing competition in the web browsers' market as it used the technique of combining its web browser (Internet Explorer)

⁵ Judge Vichai Ariyanuntaka(n1) p.41

⁶ Gene R. Shreve and Peter Raven-Hansen, *Understanding Civil Procedure* (Second Edition, Legal Text Series, Times Mirror Books 2004) p.110

with its software which was installed in all of Windows products.⁷ Microsoft was found to violate Sections 1 and 2 of the Sherman Antitrust Act. This was followed by the ‘remedy’ through the court ordering a breakup of Microsoft into two separate units – one to produce the operating system and another for producing software components. According to the settlement, Microsoft had to distribute \$1.1 billion in the coupon to eligible consumers and businesses in which they could redeem after purchasing computers (or similar types of electronics) made by any manufacturer.⁸ Since then, class action lawsuits have been litigated in competition law. Three Floridian men filed a class action case against Microsoft claiming that it had “coerced” them into “unintentional” upgrades to Windows 10 and that this update damaged their PCs resulting in loss of time and money which violated laws regarding unsolicited electronic advertisements as well as Federal Trade Commission prohibitions on deceptive and unfair practices.

For the civil law countries, the author had studied German class action law. Germany does not have any general law that allows for class action; i.e. class action can only be litigated under certain specific law.⁹ However, Germany is notable for having a legal measure that can protect several persons whose rights have been infringed from the same set of facts or laws. Consequently, civil class action lawsuits can be initiated by an organization for the public interest, such as the Chamber of Industry, trade associations, consumer associations, etc. These organizations can initiate the class action lawsuit on behalf of the injured individual, which will be considered as class action lawsuits made by state agencies.

For example, the case between European Commission (2004) and (2007) vs Microsoft Corp. The Commission found that Microsoft refusing to supply competitors in the work group server operating system market interface information necessary for their product. Also, Microsoft harmed competitors by making Windows Media Player and Windows PC operating system inseparable. For this matter, Microsoft distributed € 497 million for violating its market power in the European countries.¹⁰

4. ANALYSIS ON THE PROBLEMS OF CLASS ACTION IN COMPETITION LAW IN THAILAND

The nature of the competition law’s class action is that a single wrongful act can affect a large number of people and cause economic and social damage. The use of a class action in competition law cases in other jurisdictions tends to lead to changes in several aspects. A concrete analysis of the use of class action proceedings in competition law would greatly benefit Thailand. Since there is no clear provision empowering the public agencies to initiate a class action, the question is whether it is appropriate for public agencies to be involved and represent the plaintiff in class actions.¹¹ The person representing the plaintiff plays a crucial role in the commencement of class action proceedings. In Thailand’s case, representation for class action in competition law could potentially be done by the Consumer Protection Board, public prosecutors or private lawyers.

⁷ ‘U.S V.S Microsoft : the overview; U.S. judges says Microsoft violated antitrust laws with predatory behavior’ (The New York time, 4 April 2000) < <http://www.nytimes.com/2000/04/04/business/us-vs-microsoft-overview-us-judge-says-microsoft-violated-antitrust-laws-with.html> > accessd 21 October 2016

⁸ Ibid

⁹ Harald Koch, Group and Representative Action in West German Civil Procedure (Erik Jayme. Ed 1990) p.232

¹⁰ European Commission, Legal service document (2007)
<http://ec.europa.eu/dgs/legal_service/arrets/04t201_en.pdf/>

¹¹ Ardhatwat Ingkaranuwat(n4) p.130

4.1 Legal standing of the Consumer Protection Board

The Consumer Protection Board or associations responsible for public enforcement in this area of law is under Section 40 paragraph 2 of Trade Competition Act B.E. 2542, this gives them legal standing to bring a claim on behalf of a consumer or member of such associations.¹²

However, class action is a process whereby one representative of a group of individuals, who claims and shares the same set of facts and points of law, brings a case before the court. Insofar as competition law cases may be proceeded by class action proceedings, there is still ambiguity as to who can be a representative in class action in competition law cases as the Competition Act grants legal standing to both private persons and public bodies such as the Consumer Protection Board and associations.

In cases brought under EU competition law, class actions may be brought by the European Commission, which is a public body. The idea of allowing one individual to become a representative in civil law proceedings for a dispute which affects the general public or a large number of people and which concerns the public interests, is not native to the civil law tradition where it is viewed that it is more suitable for the state to handle such cases than private individuals, usually by establishing a body whose objective is to act for the benefit of the public. Accordingly, the Consumer Protection Board is empowered by European regulations to act as the representative to bring cases on behalf of consumers or its associated members.¹³

Nevertheless, there are aspects of Thai class action proceedings which differ from the class action under EU law as follows.

(1) the Origin of Thai class action proceedings

Thai class action proceedings are based on the class action proceedings under the Federal Rule of Civil Procedure of the US, the jurisdiction which is acknowledged by countries of both civil and common law traditions as the model for private enforcement in class action litigation and the main influence for Thai class action law.¹⁴

(2) The definition of 'class' in the Civil Procedure Code

Section 222/1 defines 'class' as persons who have the same rights on the basis of the same facts and points of law. The lead plaintiff or class representative is the class member in whose name the case is brought before the court and who represents all members of the class in a class action.¹⁵

(3) No clear provision empowering the Consumer Protection Board or associations to initiate a class action

The class action provisions in the Civil Procedure Code do not mention the Consumer Protection Board or associations under consumer protection law, which are bodies granted

¹² Section 40 paragraph 2 of Trade Competition Act B.E. 2542, In bringing an action for damages pursuant to paragraph one, the Consumer Protection Board or associations recognised under the law on consumer protection shall be entitled to bring an action for damages on behalf of consumers or members of the associations, as the case may be.

¹³ Christian Ahlborn* David S. Evans 'The Microsoft Judgment and its Implications for Competition Policy towards Dominant Firms in Europe' (2004)
<http://ist-socrates.berkeley.edu/~scotch/DigitalAntitrust/Ahlborn_Evans.pdf>

¹⁴ Rachata Boonsinsuk, 'The class action in civil law and common law system' (Master degree, Chulalongkorn university 2002) p.37

¹⁵ Korraevee Sungvoravongsa, 'Class action for Initial Public Offering of Securities' (Master degree, Durakij Bundit University 1999) p.88

standing to bring an action on behalf of a consumer or member of association pursuant to section 40 of the Competition Act B.E.2542.¹⁶

For this issue, the author views that the Consumer Protection Board should be allowed to act as the lead plaintiff in class actions in competition law matters because the wrongful act in disputes in this area of law tends to directly affect the rights of a large number of injured persons and have impact on consumers generally and the country as a whole¹⁷. Such a state agency as the Consumer Protection Board should be able to participate in these actions in competition law, because their functions include powers to act in competition lawsuits under Section 40 of the Competition Act B.E. 2542, even though the involvement of the state in class actions may not be compatible with the purpose of class actions.

In addition, the Consumer Protection Board should get involved and support class action lawsuits from the beginning since the practice is still relatively new to Thailand and its concept and procedures are different from procedures for other cases. Public and private sectors with the capability, strength and knowledge should contribute to the society and economy. Therefore, the Board and associations should be able to pursue actions without requiring power of attorney from all injured persons of the class.

Class action lawsuits prosecuted by the Consumer Protection Board is time-consuming and expensive. Therefore, it should be appropriate for the court to determine the lawyers' fee awards by taking into account the duty of the organization, as well as the cost spent in prosecuting the case in order to return the appropriate amount to the government by amending the Civil Procedure Code or issuing the Supreme Court's regulation of the class action. For example, "In case the plaintiff or the plaintiff's lawyer is a state agency, in determining the award of the lawyer fees, the court shall take into account the role of such state agencies or state officials and the cost of the proceeding, in which the government has to pay. Then order reimbursement to the government for such appropriate amount".

4.2 Legal standing of Public Prosecutors

The main influence for class action proceedings in Thailand comes from the United States class action. In the United States, representation is done by private lawyers in accordance with the Federal Rules of Civil Procedure (FRCP). These private lawyers receive a huge sum of remuneration from the class members. The question is whether it is appropriate for public prosecutors who are public officials to be involved and represent the plaintiff in class actions.

There are two opposing views on this issue. The first view considers that public prosecutors should not be permitted to sue on behalf of the plaintiff in class action cases as it would not be consistent with the purpose of class action proceedings and the role of public prosecutors, taking into account the lucrative remuneration of up to 30% of the compensation paid to the class members for plaintiff's attorneys. The rationale for high fees in class action cases is based on the idea that it would provide an incentive for private attorneys to take the case.¹⁸

To support this opinion, according to *United States v. Microsoft Corporation*, the counsel of plaintiff who is a private attorney makes an investment to bring civil action to the Court. The expenses also includes witness and court fee incentives to class action litigations that are attorney's fee and the alarming expense of class action damages which would be worth 'investing' for the plaintiff.

¹⁶ Judge Vichai Ariyanuntaka(n.1) p.73

¹⁷ Korraevee Sungvoravongsa(n15) p.47

¹⁸ Ardhatwat Ingkaranuwat(n4)p.132

On the other hand, the second view holds that public prosecutors should be permitted to the class action. Thai public prosecutors' role is to provide assistance to citizens and recent developments in their role include involvement in civil proceedings, either as the plaintiff on behalf of the state or on behalf of the injured private citizens.¹⁹

Especially since Thai public prosecutors now have legal standing to bring a case before the court in the areas of consumer protection, environmental law and competition law. In the area of consumer protection law, public prosecutors are consumer protection officials pursuant under Public Prosecution Organization and Public Prosecutors Act and the Consumer Protection Act B.E. 2522; accordingly, private attorneys are not required to be appointed in these proceedings²⁰

The class actions against Trump University are recent United States examples which lend support to this view. In those cases, the attorney general was appointed to represent the plaintiffs and this differed from the typical class action case where the plaintiffs are represented by private attorneys. There are reasons to support the participation of public prosecutors in class actions as the main objective of their functions is to protect the public interest. As regards the issue of contingency fees, it is possible for public prosecutors to waive their fees in class action cases. In Trump University cases, the defendant, Donald Trump, agreed to settle the three class action suits, one in New York and two in California, with \$25 million compensation for the plaintiffs.²¹

For this argument, the author views that Thai legal culture and class action litigation are different from the proceedings of the normal litigation. For the same reason, Thai public prosecutors can act in consumer protection cases to protect the public interests. The participation of public prosecutor does not necessarily entail any amendment to the Competition Act B.E. 2542 or insertion of the definition of 'Plaintiff's Attorney including the public prosecutor who performs the duty in the provisions on class action proceedings in the Civil Procedure Code because the existing wording in the latter refers to which would be sufficient.²²

However, the issue of contingent fee prosecution by public prosecutors should be specified in the legislation as the attorney's fees since it is inappropriate for public prosecutors to profit from this reward as it is their duty to protect the public's interest. For this reason, the Public Prosecution Organization and Public Prosecutors Act B.E. 2553 should provide public prosecutors with specific powers and duties in relation to class action proceedings and should require them to waive any contingency fees.

Additionally, although the prosecution of class action lawsuits by prosecutor aids and protects the public interest, the cost of such prosecution is very high, thus costing the lawyer's money and time. To combat this problem, the Civil Procedure Code should be amended, or the Supreme Court's regulation should be enacted to clearly state as follow:

"In case the plaintiff or the plaintiff's lawyer is a state agency, in determining the award of the lawyer fees, the court shall take into account the role of such state agencies or state officials and the cost of the proceeding, in which the government has to pay. Then order reimbursement to the government for such appropriate amount".

¹⁹ Watcharee Sutarai. Public 'prosecutor in the capacity of lead counsel for the plaintiff in class action : a study in consumer protection law and environmental law', (Master degree, Durakij Bundit University, 2009) p.133

²⁰ Nisakorn nisitteeraard, 'New approach of case management regarding environmental issues : class action' (Master degree, Thammasat University 2010) p.57

²¹ Trump settles Trump university lawsuits for \$25M' (BBC news, 19 Nov 2016)
<<http://www.bbc.com/news/world-us-canada-38021820>> accessd 1 December 2016

²² Watcharee Sutarai(n19)p.152

This amendment of the Civil Procedure Code or issuance of the Supreme Court's regulation will create fairness to both public prosecutors and other state agencies, who must represent the plaintiff in the class action, which affects the public sector.

4.3 Representation of the Plaintiff by Private Lawyer

The lawyer's fee awards under Section 222/37 of the Civil Procedure Code, which can be as high as 30% of the award, is intended to incentivize private lawyers to litigate class action lawsuits for a large number of plaintiffs.²³ It is shown that class action lawsuits require plaintiff's lawyers that are more skillful than regular lawyers. Also, class action lawsuit incurs many expenses from pre-class action in gathering of evidence, which requires high expertise and perseverance of the plaintiff's lawyers.²⁴

This may raise issues of lawyers' collusion and lawyers trying to get benefit from the lawsuit. The collusion in class action lawsuit is more complicated than the regular cases as there are many key parties involved. For example, group representative, group members' lawyers, unnamed group members, the defendant, defendants' lawyers, persons who refuse to compromise and the court. In this case, the group members' lawyers and defendants' lawyers may agree not to compromise for the utmost benefit of the group members because the defendant wants to pay the compensation as less as possible and the plaintiff lawyers want to receive the highest lawyers' fee.²⁵ Consequently, the group members will only receive a small amount of money from the settlement agreement.

In the United States, when the court concerns about the collusion issue, the court settles the case through "coupon settlement" system instead of a monetary settlement. This is regardless whether the court rules that the lawyers conduct is unethical or not. When the court does not have sufficient information about the group, and cannot efficiently verify the collusion or unethical conduct of the lawyers, the court will not allow monetary settlement. According to the settlement of *United States v. Microsoft Corporation (2001)*, the suffered consumers and businesses will be given coupons worth \$1.1 billion in total by Microsoft to redeem for cash when buying computers, peripheral computer hardware or computer software produced by any company.²⁶

In order to prevent collusion between the plaintiffs' lawyers and the defendant or the defendant's lawyers, one of the most effective methods is to allow the court to examine the settlement between the plaintiff's lawyers and the defendant to ensure equality and fairness to both parties. This includes the content, method and the defendant's payment method regarding the substance, procedure, and payment by the defendant. The court will exercise its power as a representative of the government, which means the court shall have a supervising function from the beginning of the case until post-judgment. For example the court has a

²³ Section 223/37 of the Civil Procedure Code, The Court is to set the amount of money awarded by the defendant to the lawyer for plaintiff in case where the Court's judgement orders defendant to act, omit to act or transfer property. In order to determine the appropriate amount, the Court must take in to account the difficulty of the case, the amount of time taken and work ethics of the lawyer for plaintiff, as well as the cost of class action proceeding. This is not inclusive of the fee that the plaintiff's lawyer has expended. For this purpose, an account of the aforementioned expenses must be submitted to the Court and a copy of it to the defendant at the end of the Court proceedings.

If the Court judgement is for defendant to pay monetary compensation, the Court must consider the criteria as well as calculate the amount that the plaintiff and members of the class action proceeding are entitled to receive in percentage of the monetary compensation amount but the amount of money awarded to the lawyer of plaintiff must not exceed 30% of that amount.

²⁴ Prof. Phiroj Wayuphap, *The explanation on civil procedure (Class action)*, (Siam publishing,2016) p.74

²⁵ Judge Vichai Ariyanuntaka(n1) p.114

²⁶ Paul H. Alvarado, 'Coordination Proceedings Special Title Rule', [2004] Cal. 1550b Super. Lexis 262

discretion whether to certify the class or not, and when the judgment has been made, the court must ensure that the parties perform their duties in accordance with the settlement agreement by issuing notifications at every important step of the process pursuant to Section 222/1 to Section 222/49 of the Civil Procedure Code regarding class action lawsuits empowers the court with supervising authority as if the court is exercising its power in place of the government.²⁷

Apart from the above issues, the author views that to develop legal profession such as lawyers, Judges, Public prosecutors, State agencies and persons is crucial because the introduction of the class action proceedings in the Civil Procedure Code presents Thailand with an opportunity to reshape the legal environment for competition cases, the economy and society as a whole. By providing support and training to private lawyers who will be the key actor in this area, the state would benefit greatly from the potential success of class action cases following a prompt and effective adoption of the new procedure by the concerned parties.

5. CONCLUSION AND RECOMMENDATIONS

Class action in competition law litigation will help increase the efficiency of the justice system for the people because it could protect a large number of victims in one single lawsuit. This is beneficial especially for those victims who cannot file a lawsuit to seek remedies for themselves or for those victims who suffer from minor injuries. Thus, class actions create opportunities in the society, including cases that have tremendous economic value. Additionally, class action saves time and cost, avoid repetition of cases, prevent conflicts of judgments and effectively reduce the number of cases in the court.

The role of plaintiff's lawyer is crucial for the success of class action lawsuits. However, there is a controversial issue in term of who can initiate the class action lawsuit. For instance, whether or not a class action can be utilized by state agencies or state officials' class action lawsuits since the concept of class action in Thailand is influenced by the Federal Rules of the United State Rule 23. The private sector in the United States is strong and can bring class action lawsuit to the court. In Thailand, organizations or state officials are the ones assisting the public. There are not many private lawyers who have represented a large number of injured persons. Thus, there are problems in applying the American legal concept to the Thai law.

The prospect of class action litigation will lead to an out-of-court settlement. This form of litigation is also deemed to be a way to evolve our legal system to be more American-style-mass-tort litigation. Counsel for the plaintiff who will take this role should have a better understanding of both American and Thai cultures, which can conflict with each other.

The understanding of legal professions' role is the solution for competition laws' class action issues. Especially if the plaintiffs' counsel or the persons representing the plaintiff plays a crucial role in the commencement of class action proceedings. Under Thai legal system, it would be wise to allow the Consumer Protection Board or the public prosecutor to initiate a competition class action and be the lead counsel for the plaintiff. This approach would allow the class action to be an effective measure for the protection of stakeholders' rights. Nevertheless, an amendment to the existing law or issuance of additional rules is also essential for the development of competition class action in Thailand.

²⁷ Judge Eearn Kunkaew(n2) p. 58

The Competition Commission, the Consumer Protection Board or Government Associations is entitled to initiate the case on behalf of consumers or members of the association. pursuant to Section 40 of the Competition Act. Therefore, the power of Consumer Protection Board to initiate a competition class action should also be expressly written in the law.

Public prosecutors can be a part of the class action in competition law since public prosecutors should participate in the prosecution that relates to the state's interests and affect a large number of individuals. There should be no limitation to the public prosecutors' power in this matter.

The lead plaintiff's lawyer is substantially vital since he or she is the person who gathers information for the case based on the same facts and provisions of laws as well as gathering evidence and carrying out the entire litigation process.

In addition to the authority of public agencies or public officials, which should be expressly provided in the law, the waiver of lawyer's' fee awards according to the Civil Procedure Code is also a critical issue which must be expressly specified in the law as well. This is because such high awards are intended to attract private lawyers to represent the groups. As such, the state agencies or state officials whose duties are to protect the benefit of the public sector shall not need to be incentivized by this high lawyer's fee award. It is unreasonable and not transparent if the waiver of this particular fee is not expressly provided in the law and state agencies received this award. The Consumer Protection Board and public prosecutors must also waive the lawyers' fee awards before joining competition class action lawsuits.

However, In filing the class action lawsuit, state agencies ie. Consumer Protection Commission and Public prosecutor must collect evidence, gather members, send notice to the members, implement and enforce the judgment of the court. Therefore, it should propose ideas about monetary award for lawyers and costs for State Organization that is involved with the class action proceeding by to amending the Civil Procedure Code or issuing the Supreme Court's regulation of the class action.

To prevent the problems collusion and out-of-court settlement, class action proceeding should be inspected by the court. According to Section 222/1 to Section 222/49 of the Civil Procedure Code regarding class action, the court considers whether the request of the plaintiff is in accordance with the conditions in order for the court to issue an order to proceed with class action and must send notices and make an announcement to individuals in the group as members of the group immediately. When the final judgment has been made, the process of issuing the notification of the judgment is crucial. The court shall notify the judgment to group members by the same method specified in the notification of the allowance of class action lawsuit made to such group members. Including, announcing such judgment in daily newspaper ubiquitously for three consecutive days. Thus, the authority of the court to govern is as if the court is exercising its power in place of the government.

Other recommendations to deliver class action to its utmost benefit relates to the state continuously improving knowledge, qualifications, professionalism and experience in class action cases to Thai legal profession. This can be done through the methods of promoting courses like complex litigation and class action in law school; imposing the basic qualifications and suitability of a potential lawyer for initiation class action lawsuits; and providing training or raising an awareness and understanding of law users and ordinary individuals about class action lawsuits is also encouraged and shall be supported.

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