

# Class Actions in Thailand – Predicting the Impact on Your Business

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## THE AMERICAN EXPERIENCE

The thought of class action litigation strikes fear in the heart of every consumer-facing business as well as their suppliers and service providers. Images of billion dollar awards keep business managers awake at night wondering when, not if, lightning will strike.

The most common view of class actions is through the lens of the American experience, where the legendary attorney fee awards have spawned a highly creative breed of lawyer and a cottage industry in identifying lucrative class action claims. Gone are the days when class actions were only brought for automobile defects and environmental disasters.

In the pastoral hills of the Kansai region of Japan, two breeds of four-legged delicacies graze alongside one another in lush green pastures: Kobe and Wagyu. Massaged and marbled, their cuts traverse the globe to satiate the palates of dignitaries and discerning foodies. But can anyone truly tell the difference?

Apparently, yes. A high-end steakhouse recently settled a class action brought against it for the egregious harm of titling a menu item “Kobe” when the beef they served was Wagyu. The cost: a potential exposure of USD 15, in the form

of a cash voucher, for each class member. USD 15 isn’t worth litigating over, you say – or is it? After how many multiples does USD 15 start to hurt? 10? 100? 1,000? 100,000? 1,000,000? Herein lies the power and the risk of class actions.

Class actions are a numbers game where a group of plaintiffs suffering from even a small amount of harm can justify litigation, if there are enough of them. Classes of hundreds were surpassed by thousands and now we’re well into the millions of class member plaintiffs in a single lawsuit. Where are these numbers of plaintiffs coming from? These days, they’re coming from data, technology, and mass media.

Looking back, we should have seen that the collision of technology and class action was no less inevitable or preventable than the impending collision of our own Milky Way and the Andromeda Galaxy in a great cosmic ballet.

## PREDICTING THE THAILAND EXPERIENCE

But let’s plant our feet back onto terra firma – Thailand, to be precise. Is the sky falling? Will class actions cause entire industries to pull up their stakes and run for the hills? The answer is that it depends. The analysis doesn’t end there; we shouldn’t resign ourselves

blindly to fate, like so many Wagyu to the slaughter.

Our first indications as to the impact of class actions in Thailand won’t come until early December this year, when the law goes into effect. Prior to that, the Supreme Court will likely issue more detailed procedural rules, which will enhance our predictive capabilities. We can also make some informed assumptions about how class actions will affect Thailand on the basis of the impact of class actions in other jurisdictions.

- Assumption No. 1 – Damage awards will be lower, on average, per class member, in Thailand than in the United States. To sum up this assumption in a word: jury. Thailand does not have a jury system – instead, the judges determine the facts and apply the law to assess damages. In addition, Thailand generally does not allow for punitive damages, emotional damages, and indirect damages. While some exceptions exist (e.g., product liability), Thai courts tend to be conservative in their awards.
- Assumption No. 2 – Thai Courts will award substantially lower legal fee awards to plaintiffs’ attorneys than their American counterparts. A significant driver of class actions in the United States is legal fee awards to plaintiffs’ lawyers. While the new class action provisions allow for up to 30 percent of the total damages for attorney fees, this is still less – proportionally – than in the United States, where the fees start at 33 1/3 percent and go up from there. In addition, Thai courts have been reluctant to award much in the way of attorney fees to either plaintiffs or defendants, with typical awards for large claim amount

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cases being less than 1 percent of the total claim amount.

If these two assumptions hold, the impact of class actions will be limited in terms of incentives to bring the claims and direct financial impact to the defendants. It is important to note that financial damages are not the only remedies available to plaintiffs – product recalls, halting of sales, and other non-monetary remedies are a possibility.

Even with these assumptions in place, there is no question that the risk of litigation will increase for all. And with increased risk come increased insurance rates and other costs of doing business.

### **PREDICTING THE IMPACT UPON YOUR BUSINESS**

Not all businesses face the same risks. In fact, not all businesses in a particular industry face the same risks. A review of your operations, markets, employment

practices, labeling and instructions, sales and marketing materials, compliance, and other areas will allow you to better predict how your business will be affected. This information has real value for investors, suppliers, customers, and – most importantly – management.

It is important for you to undertake an individualized analysis of the risk your business faces. The class action provisions specifically list the following types of actions eligible for class actions:

1. Labor
2. Environment
3. Consumer Protection
4. Product Liability
5. Securities
6. Contract
7. Torts (Negligence)

But this is not an exhaustive or exclusive list, so you must determine what laws apply to your operation now and in the future. Looking forward, laws regarding

the promotion of the Digital Economy are in the pipeline and all drafts include provisions for the protection of data. Most businesses collect customer data and store it in a digital format. If the trends in the United States are any indication of the types of lawsuits, we can expect this to be an additional source of potential cases.

### **CONCLUSION**

No one can know the precise impact that class actions will have in Thailand until the first few waves of cases wind their way through the system. This doesn't mean that we should bury our heads in the sand and hope we never end up as defendants. We are surrounded by information that will allow us to make a prediction to measure, then manage, this new source of business risk. ■

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