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Ninth Circuit: divided panel revives "krab mix" false advertising class action

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Takeaway: Context matters in false advertising class actions. Factors such as how an allegedly false representation is displayed, where it is displayed, and what else is disclosed on the label or advertisement all can impact the plausibility of the false advertising claim. Given the context-specific question of deception, it can be difficult to draw the line between a plausible misrepresentation of fact, on the one hand, and an implausible theory of deception, on the other. The Ninth Circuit's recent decision in *Kang v. P.F. Chang's China Bistro, Inc.* , --- Fed. App'x ---, No. 20-55138, 2021 WL 463443 (9th Cir. Feb. 9, 2021), illustrates how differing perspectives on context can impact this line-drawing, as two judges (the reversed district court judge and the dissenting judge on appeal) concluded that the theory of deception was implausible, while the two appellate judges in the majority concluded otherwise.

Chansue Kang filed suit against P.F. Chang's China Bistro, alleging that he was deceived when he bought sushi rolls described on a menu as containing "krab mix." But that same menu also used the term "crab" to describe real crab meat in other dishes. According to Mr. Kang, as a "reasonable consumer" he had been misled into believing that the sushi rolls contained a *mixture* of real crab and other ingredients, when, in fact, the sushi rolls contained no real crab meat. Seeking to represent a putative class, he asserted claims against P.F. Chang's for violations of California's Unfair Competition Law (UCL), False Advertising Law (FLA), and Consumer Legal Remedies Act (CLRA).

The Central District of California concluded that Mr. Kang's allegations were facially implausible and granted P.F. Chang's motion to dismiss. But the Ninth Circuit – in a split decision pitting two Obama appointees (Judges Watford and Friedland) against one Trump appointee (Judge Bennett) – reversed and remanded.

The majority recognized that a plaintiff asserting UCL, FLA, and CLRA claims must plausibly allege that a reasonable consumer is likely to be deceived by an alleged misrepresentation, but it also observed that this question is typically one of fact. The panel concluded: "We certainly agree with defendant that reasonable consumers confronted with the fanciful spelling of 'krab' on the menu would not assume they were purchasing a sushi roll with 100% real crab meat. But the menu uses the term 'krab mix,' and Kang's allegation is that reasonable consumers would understand that term to mean the item contains a mixture of imitation and real crab. Because the term 'krab mix' lacks any commonly understood contrary meaning, we cannot say, in the absence of evidence bearing on the issue, that Kang's allegation is implausible on its face." 2021 WL 463443, at *1.

Judge Bennett teed off on the majority's reasoning, concluding (as did the district court) that the use of "krab" should have been "a dead giveaway," and that UCL, FLA, and CLRA claims are not governed by a "least sophisticated" or "most gullible" consumer standard. *Id*. at *2 (Bennett, J., dissenting). Moreover, given that Mr. Kang's pre-suit letter was dated only 17 days after his P.F. Chang's dining experience,

Judge Bennett (reasonably) intimated that he purchased the rolls for the very purpose of filing suit: "So, in a seventeen-day period: (1) Plaintiff was unfairly bamboozled by P.F. Chang's into thinking 'krab' was crab; (2) Plaintiff discovered the horrible truth that 'krab' wasn't crab; (3) Plaintiff found a crusading attorney; (4) that attorney somehow confirmed the horrible truth; and (5) that attorney drafted and mailed a pre-suit letter. Remarkable diligence!" *Id.* According to Judge Bennett, "[t]he real harm here comes from allowing such implausible claims as Plaintiffs' to proceed, which will increase costs to all consumers." *Id.* at *4. Accordingly, while Mr. Kang's claims may have cleared the low bar of pleading a plausible claim, Judge Bennett already has lent plausibility to a likely future challenge to his adequacy as a class representative.