

Kang v. PF Chang's, Inc.: Reasonable Consumer Deception, or Just a “Crabby” Plaintiff?

Publications

February 11, 2021

By: Alexander M. Smith

On February 9, 2021, the Ninth Circuit—in a split decision with a spirited dissent—reversed the dismissal of a consumer class action challenging P.F. Chang's's use of the phrase “krab mix” to describe sushi rolls that contain no real crab. Although *Kang* is an unpublished case and breaks little new legal ground, the two opinions offer a useful glimpse into how both defendants and plaintiffs frame their positions in false advertising lawsuits, and they highlight how easily judges can come to radically different conclusions in consumer class actions, even when faced with the same facts and law.

In *Kang*, the plaintiff alleged that P.F. Chang's's sushi rolls were deceptively labeled because they purported to contain “krab mix,” but did not include any crab at all. Judge Anderson of the Central District of California dismissed the plaintiff's lawsuit, holding that no reasonable consumer would be deceived into believing that “krab mix” contained crab. The Ninth Circuit reversed. Judge Friedland and Judge Watford—writing for the panel majority—emphasized that “determining whether reasonable consumers are likely to be deceived will usually be a question of fact not appropriate on a motion to dismiss.” Applying this standard, the panel majority concluded that the plaintiff had plausibly alleged that the “inclusion of the term ‘krab mix’ in the ingredient list for certain of its sushi rolls is likely to deceive reasonable consumers into thinking that the sushi rolls contain at least some real crab meat when in fact they contain none.” Although P.F. Chang's offered several reasons that this interpretation was implausible, the panel majority rejected them all:

- The panel majority rejected P.F. Chang's's argument that the “fanciful” term “krab mix” suggested the absence of real crab. Although the panel majority agreed 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,” it nonetheless concluded that the plaintiff had plausibly alleged that the term “krab mix” suggests that the product contains “a mixture of imitation and real crab.” In contrast to cases where the challenged term has a specific, widely-understood meaning (such as “diet” soft drinks), the panel majority held that “there is no prevailing understanding that listing ‘krab mix’ as an ingredient in a sushi roll signifies that the

item contains no real crab meat.” And in contrast to a case where the “fanciful” term appears in the name of the product (such as “Froot Loops”), the panel majority concluded that the term was at least plausibly misleading because it appeared in the ingredient list.

- The panel majority rejected P.F. Chang’s’s argument that the relatively low price of the sushi rolls suggested that they contained no real crab, and it found that this issue was not susceptible to resolution on a motion to dismiss.
- The panel majority rejected P.F. Chang’s’s argument that a reasonable consumer would not be misled by the use of the term “krab mix” because other menu items included “crab” in the ingredients list. Much as a reasonable consumer should not be expected to look at the ingredient list on the packaging of a food to correct a misrepresentation elsewhere on the packaging, the panel majority concluded that “we cannot assume that reasonable consumers would necessarily look past the term ‘krab mix’ in the item they were ordering to notice that ‘crab’ appeared as an ingredient in other items on the same menu.” For similar reasons, the panel majority rejected P.F. Chang’s’s argument that the use of the term “crab” elsewhere on the menu served as “qualifying language” that corrected the alleged misimpression arising from the term “krab mix”—particularly since “that language does not appear immediately next to the representation that it purportedly qualifies.”

Judge Bennett vigorously dissented. The first paragraph of his opinion struck a dramatically different tone than the panel majority:

Class representative Chansue Kang bought sushi rolls on April 12, 2019, according to his opening brief. His complaint contends he bought the appetizer because he read and relied on the “false and misleading” menu description “krab mix.” Kang claims that he believed he was getting crab. He further claims that he wouldn’t have bought the “krab” had he known “krab” wasn’t crab. Thus, he tells us he was “deceived.” His complaint states that on April 29, 2019, he gave pre-suit notice by certified mail. 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!

After setting this stage, Judge Bennett then noted that the standard for consumer deception “is not whether the ‘least sophisticated’ or ‘most gullible’ consumer would be misled by the term ‘krab mix,’ but whether a significant portion of ordinary consumers, acting reasonably, would think ‘krab mix’ contains real crab meat.” From his perspective, he noted, the panel majority “fails to give the ordinary California consumer enough (or any) credit.” For example, he noted that “‘Krab’ with a ‘k’ should be a dead giveaway,” as consumers “understand that fanciful spellings materially change the meaning of a word.” Much as a reasonable consumer would not conclude that Froot Loops contain real fruit, that “cavi-art” contains real caviar, or that “tofurky” contains real turkey, an “ordinary consumer” acting with “ordinary common sense” would not conclude that “krab mix” contained real

crab meat. Moreover, because “krab” is indisputably different from “crab,” Judge Bennett reasoned, no reasonable consumer could conclude that “krab mix” contains real crab, as opposed to “a mixture of ‘krab’ and other ingredients.” While “[c]onsumers may be unsure about what exactly those ingredients are,” Judge Bennett explained, “that doesn’t make it reasonable to assume one of those ingredients will be crab.”

“Context matters too,” Judge Bennett then explained, “and it does not support the majority’s conclusion.” In contrast to the panel majority, which placed little stock on the fact that other products featured “crab” in the ingredients list, Judge Bennett found that this fact defeated the plaintiff’s theory of deception: “[W]hen confronted with both ‘krab mix’ and ‘crab’ on the same menu,” Judge Bennett noted, “such a consumer knows that one is not another.” Although Judge Bennett acknowledged that a manufacturer ordinarily cannot use an ingredients list on a box to correct an affirmative misrepresentation on the front of the package, he emphasized that “the ingredient list on product packaging . . . is nothing like a restaurant menu.” While the ingredient list “exists to satisfy regulatory requirements,” “is almost always tucked away on the back or side of the product label,” and “is usually expressed in very small print,” Judge Bennett explained, “[t]he same cannot be said for items or ingredients on a menu that are placed on equal footing with, and on the same page as, the alleged misrepresentation.” Even if a “hasty diner . . . might fixate on sushi rolls with ‘krab mix’ to the exclusion of all other items on the menu,” Judge Bennett concluded that this “approach to ordering food doesn’t bear any resemblance to the real dining experience of consumers.”

Ultimately, the panel majority and Judge Bennett came to diametrically opposed—and incompatible—conclusions. The panel majority, like many plaintiffs in false advertising class actions, focused on the purported difficulty of resolving factual questions about the deceptive effect of the labeling at the pleading stage, and it relied on many of the most common cases cited by plaintiffs in false advertising class actions. Judge Bennett, in turn, relied more on many of the common themes raised by defendants in these cases—including, most importantly, that “context matters” and that reasonable consumers must be expected to apply “common sense.” And while the panel majority did not frame its result in policy terms, Judge Bennett did not hesitate to point out that the decision did not help protect consumers; to the contrary, he explained, “[t]he real harm here comes from allowing such implausible claims as Plaintiffs’ to proceed, which will increase costs to all consumers.”

While *Kang* is hardly groundbreaking, it undoubtedly serves as a microcosm for the issues that recur at the pleading stage in virtually every food labeling case. And just as importantly, it underscores that the decision may depend as much on the judge’s orientation to consumer fraud cases as any other factor.

Related Attorneys



Alexander M. Smith

Partner

asmith@jenner.com

+1 213 239 2262

© 2026 Jenner & Block LLP. Attorney Advertising. Jenner & Block LLP is an Illinois Limited Liability Partnership including professional corporations. This publication, presentation, or event is not intended to provide legal advice but to provide information on legal matters and/or firm news of interest to our clients and colleagues. Readers or attendees should seek specific legal advice before taking any action with respect to matters mentioned in this publication or at this event. The attorney responsible for this communication is Brent E. Kidwell, Jenner & Block LLP, 353 N. Clark Street, Chicago, IL 60654-3456. Prior results do not guarantee a similar outcome. Jenner & Block London LLP, an affiliate of Jenner & Block LLP, is a limited liability partnership established under the laws of the State of Delaware, USA and is authorised and regulated by the Solicitors Regulation Authority with SRA number 615729. Information regarding the data we collect and the rights you have over your data can be found in our Privacy Notice. For further inquiries, please contact dataprotection@jenner.com.

Stay Informed

