"The Assessment and Impact of Donald Trump's Lawsuit Against Ann Selzer, et al."

By:

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President-elect Donald J. Trump's lawsuit against J. Ann Selzer, Selzer & Company, the Des Moines Register, and Gannett Co., Inc., is an extraordinary case that seeks to challenge the accuracy and integrity of public opinion polling through the lens of consumer fraud law. https://www.documentcloud.org/documents/25460086-trumpselzersuit121624/

Filed under the Iowa Consumer Fraud Act (ICFA), Trump's complaint alleges that the defendants deliberately published a misleading poll that showed Kamala Harris actually leading in Iowa just days before the November 5, 2024, Presidential Election. President-Elect Trump contends that the Selzer poll was designed to interfere with the election, mislead voters, and force his campaign to redirect resources unnecessarily. The lawsuit demands damages, injunctive relief, and a court order compelling the disclosure of the data underlying the poll.

Specifically, the lawsuit hinges on Iowa Code § 714H.3(1), which prohibits deceptive acts or practices in connection with the advertisement, sale, or lease of consumer merchandise. To prevail, the plaintiff must satisfy three elements: (1) a deceptive act or omission involving misrepresentation, concealment, or suppression of a material fact; (2) intent to induce reliance on the deceptive act or omission; and (3) a direct causal connection between the deceptive act and actual damages.

The plaintiff's allegations rest on the argument that the poll at issue was materially false and intentionally misleading.

By contrast, the defendants' primary defense is likely to be that polling is inherently uncertain and that their methodology adhered to accepted industry standards, negating any claim of deception or intent to mislead.

I. <u>Elements of President-Elect Trump's Claim under Iowa Code § 714H.3(1)</u>

A. Deceptive Act or Omission

To establish a deceptive act under the ICFA, the plaintiff must show that the defendants made a false representation or concealed a material fact. The plaintiff alleges that the poll misrepresented the state of the Iowa race, creating a false narrative of Harris's momentum. However, polling results are probabilistic by nature and cannot be equated, *ipso facto*, to absolute, forgone conclusions. To that point, courts have consistently held that predictions, opinions, and estimates do not constitute actionable misrepresentations unless there is evidence of intentional falsification.

B. Intent to Induce Reliance

The plaintiff's assertion that the defendants intended to mislead voters and manipulate campaign resource allocation faces significant evidentiary hurdles. Intent is a critical element under the ICFA

and requires proof of a deliberate effort to deceive. The complaint does not provide direct evidence of such intent, relying instead on circumstantial arguments, such as the poll's proximity to the election and its divergence from other lowa polls.

Without internal communications or documents demonstrating a deliberate plan to fabricate results, fundamentally, the President-Elect's case rests on conjecture. Selzer's long-standing reputation for accuracy and adherence to methodological rigor further undermines claims of intentional wrongdoing.

C. Causation and Actual Damages

Causation is another significant challenge for the plaintiff. To establish damages under the ICFA, the plaintiff must show that the alleged deception caused a direct and ascertainable loss. Trump's claim that the poll at issue forced his campaign to redirect resources is speculative at best. Campaign strategy decisions are influenced by numerous factors, including internal polling, voter turnout projections, and media coverage. Establishing a direct link between the poll and specific resource allocation decisions is highly unlikely.

Furthermore, Trump's decisive victory in Iowa undermines any argument that the poll caused tangible harm. Courts will be inclined to dismiss claims based on speculative or hypothetical injuries.

II. Selzer, et al. Potential Legal Defenses.

A. First Amendment Protections

The strongest defense in this case is rooted in the First Amendment, which protects speech and expression, including public opinion polling. Public opinion polling plays a critical role in democratic discourse, and subjecting pollsters to litigation based on the accuracy of their predictions would have a chilling effect on free expression. One measure that mitigates against this are the so-called Anti-Strategic Lawsuits Against Public Participation (Anti-SLAPP) laws which limit the ability of plaintiffs to bring lawsuits that are designed to quash freedom of public expression. While some thirty-four (34) states and the District of Columbia codify such protections under various anti-SLAPP laws, lowa, unsurprisingly, given Trump's lawsuit, is not one of these states.

B. Applicability of the ICFA

The defendants may also challenge the applicability of the ICFA to polling results. While the statute covers "services," courts may interpret this narrowly to exclude activities like polling, which are not sold or marketed to consumers in a traditional sense. For example, in State ex rel. Miller v. Pace, 677 N.W.2d 761 (Iowa 2004), the Iowa Supreme Court emphasized that the ICFA is not a catch-all statute and must be interpreted in light of its consumer protection objectives.

C. Procedural Challenges

Fraud claims are subject to heightened pleading standards, requiring particularity of the allegations in the Complaint itself. The plaintiff's reliance on broad assertions and political rhetoric rather than alleging specific facts may very possibly undermine the Complaint's viability. Consequently, the

defendants are likely to file a motion to dismiss arguing, among other things, that the Complaint lacks the particularity and specificity ordinarily required for a fraud claim.

III. Broader Implications

The lawsuit filed by President-Elect Trump raises critical concerns that extend beyond the legal arguments into the broader realm of political discourse, media independence, and the role of public opinion research in democratic societies. While the legal claim under the ICFA appears weak, it is conceivable that the case could survive a motion to dismiss filed by the defendants. If so, that opens the door to the so-called "discovery" process whereby the parties must disclose relevant records (including electronic records such as texts and emails), be available for depositions, etc. If one thing is **predictable** about litigation in the United States of America, it is that it is **unpredictable**.

Layering on top of this, is that the litigation process itself can be weaponized to burden the defendants with onerous requests for data, emails, and internal deliberations. Even if no incriminating evidence emerges, the defendants may face reputational harm simply from the public scrutiny of their practices.

A. The Politicization of Polling and Media

As noted above, the lawsuit exemplifies the increasingly politicized nature of the media overall. Public opinion research has become a battleground for competing narratives, with accusations of bias and manipulation frequently leveled at pollsters. In this context, Trump's lawsuit serves as both a legal action and a political strategy, reinforcing claims of media and institutional bias against his campaign. Indeed, the term "push poll" has, in some instances, gained traction as a critique of polls perceived to serve partisan agendas; this lawsuit filed by President-Elect Trump does appear to tap into that same narrative about the polling environment.

B. The Broader Impact on the Polling Industry

The potential chilling effect on the polling industry cannot be overstated. Polling is an essential tool for understanding voter sentiment, informing campaign strategies, and fostering transparency in elections. However, the specter of litigation may deter pollsters from publishing controversial or unexpected findings, particularly in highly politicized environments. Organizations such as the AAPOR have a critical role to play in this context. For example, public education campaigns to explain the probabilistic nature of polling and the factors that contribute to discrepancies between predictions and outcomes would also help rebuild trust and understanding among voters.

C. What the Polling Industry Should Do in The Meantime to Mitigate Risk

Beyond specific actions by AAPOR, pollsters themselves at an organizational/corporate level can take various steps including: 1) Seek some form of legal indemnification from the sponsors of the research (for example, in Selzer's case before signing the agreement to do the polling for Gannett she would demand/require an indemnification from Gannett with respect to any third party claims); 2) Include more prominent disclaimers and disclosures in connection with the publication of research results; and 3) Now is a timely period for all pollsters to conduct a thorough self-examination and review of their polling and research methodologies not only to identify and rectify any current areas that may

fall short but also to demonstrate to any hostile parties that may scrutinize research approaches that all reasonable steps to maintain high research standards were considered and maintained.

IV. Conclusion

President-Elect Trump's lawsuit under faces formidable legal and constitutional obstacles. The speculative nature of the allegations, combined with existing First Amendment protections, suggests that the case is unlikely to succeed. However, given the unpredictable nature of litigation and its potential impact on the polling industry and democratic discourse overall, necessarily warrants continued, close attention. In the interim, polling enterprises should take pro-active measures (including those recommended herein) to defend the integrity of public opinion research and to ensure that pollsters are not deterred by politically motivated lawsuits.