

## Hagan Drops Political Ad Lawsuit

### Digital Media and Data Privacy Law Blog

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In a prior post, we reported upon the institution of legal actions in the midst of two high-profile U.S. Senate campaigns. There were important developments in both matters yesterday.

As we reported, Kay Hagan instituted an action over a political ad run by North Carolina incumbent Elizabeth Dole. Hagan, who ultimately won the race, filed a document in North Carolina state court contending that Dole's ad contained defamatory statements about her. Yesterday, Hagan filed papers with the court dismissing her claim.

In Minnesota, incumbent Norm Coleman filed suit over a political ad run by his challenger, Al Franken. The race for Coleman's seat remains uncalled, with Coleman maintaining a razor-thin 206 vote lead as the recount process begins. Yesterday, an administrative law judge in Minnesota entered an order dismissing Coleman's complaint, a decision she reached after conducting a probable cause hearing on November 7, 2008.

In the order, the judge ultimately concluded that there "is not probable cause to believe [Franken] violated Minn. Stat. s. 211B.06," which prohibits a person from disseminating a false political advertisement that the person knows is false or is reckless as to its truth. The decision examined a statement in the ad that Coleman had been "ranked the fourth most corrupt Senator in Washington" by an organization called the "Center for Responsibility and Ethics in Government," (The administrative law judge had previously concluded that another statement Coleman challenged, that he is "living almost rent free in a million dollar home of a Washington insider," fell outside the purview of the statute because it constituted opinion and could not be proved true or false).

The statement at issue was drawn from report prepared by the organization that named "the 20 most corrupt members of Congress." The report also named four "dishonorable mentions," a list that included Coleman. The list of twenty included three Senators, and Coleman was the only Senator among the "dishonorable mentions." Neither list included numerals or any numbering scheme. Coleman contended the statement in the ad that he was the "fourth most corrupt Senator" was false because he was not included on the organization's list of "20 most corrupt" members of Congress. Coleman also pointed to a statement from the executive director of the organization that her group does not actually rank the persons on the list. In response, Franken contended the statement was true because, as the executive director acknowledged, "96 other

senators did not make the list at all." Coleman also challenged the ad's characterization of the organization as a "bipartisan watchdog group," contending the group instead was "liberal leaning."

In concluding that Coleman had failed to establish probable cause of a statutory violation, the judge found the statement in the ad to be "substantially accurate, if not literally true in every detail." According to the judge

[B]ased on the reference in CREW's Executive Summary to the 'list of 24,' there is an objective basis for the inference drawn in the Franken advertisement that Senator Coleman was the fourth Senator on the overall list of 24.

The judge also rejected Coleman's claim with respect to the characterization of CREW as a "bipartisan watchdog organization" on the grounds that it did not relate to the personal or political character of Coleman and, in any event, it constituted a non-actionable statement of opinion. Given her conclusion that Coleman had failed to demonstrate the ad contained an actionably false statement about Coleman, it was unnecessary for her to address whether Franken acted recklessly or with knowledge of falsity.

Coleman has the right to seek reconsideration of the decision.