Humpty Dumpty would be impressed.

Two years ago, Arizona Attorney General Mark Brnovich filed a lawsuit against the Volkswagen Group for allegedly defrauding over 11,000 Arizonans between 2009 and 2016 by falsely advertising, selling, and leasing thousands of cars it marketed as “clean diesels.” The complaint asserts that Volkswagen purposely deceived Arizona consumers for years into buying its diesel cars instead of competitors’ hybrids and other low-emission vehicles by publicly proclaiming that it had successfully “resolved the inherent conflict between environmental responsibility, torque, and fuel economy—an enticing package that the VW Group knew American consumers were unlikely to ignore.”

The AG’s complaint details how Volkswagen’s “clean diesel” claim was a chimera deliberately conjured to fool consumers into purchasing its diesel vehicles. As proof, the AG pointed to the manufacturer admitting that it knowingly used a software algorithmic “cheat device” to meet mandated pollution emission control standards. This cheat device, he emphasized, allowed Volkswagen’s diesel cars to achieve both high fuel mileage and sporty performance that wouldn’t be possible otherwise.

At first glance, it seems pretty clear-cut that Volkswagen made claims about its diesel automobiles that could only be met by resorting to deception. The company’s lawyers, however, responded last autumn to the Arizona AG’s
complaint by arguing that the fraud charges are erroneous and should be summarily dismissed. Yes, the lawyers conceded, Volkswagen did advertise its diesel cars as “clean,” and yes, it did use a cheat device to meet certain pollution standards. Nevertheless, the term “clean” was nothing more than promotional puffery, as it has no objective legal meaning in terms of the level of nitrogen oxide pollutants emitted by diesel cars. In no way, the lawyers argued, was Volkswagen implying or promising anything of material value to consumers by using the word “clean” in conjunction with the word “diesel,” since “clean” doesn’t denote anything measurable.

In making their point, Volkswagen’s lawyers asked the court to “consider how one perceives how immaculate different ‘clean’ locations are: a ‘clean’ bedroom, a ‘clean’ locker room, a ‘clean’ operating room, and a ‘clean’ semiconductor fabrication facility. Each conveys different degrees of cleanliness—driven not by the word ‘clean’ but by the location ‘clean’ describes.” Any reasonable consumer would understand that, the lawyers contended, and therefore wouldn’t be swayed to buy Volkswagen’s diesel vehicles by use of the expression “clean diesel” in the company’s advertising.

On the face of it, the lawyers’ arguments sound absurdly Humpty Dumpty-esque, where the word “clean” means just what one chooses it to mean—neither more nor less. However, Volkswagen is on solid legal ground, as the promotional puffery defense isn’t only common but, more importantly, very often successful. It has been estimated that some 70 percent of lawsuits charging misrepresentation and other types of securities fraud are dismissed by the courts for puffery-related reasons.

In the aftermath of major IT project failures, aggrieved customers who seek damages from their vendors frequently find they have a losing case because they likewise allowed themselves to be bamboozled by the vendors’ puffery. One customer that learned this the hard way was Marin County, California.

**MARIN COUNTY’S $30 MILLION LESSON IN THE ART OF PUFFERY**

In January 2013, Marin County announced it was settling its lawsuits against Deloitte Consulting, SAP America, and a former employee for “fraud, misconduct and misrepresent... tion” in relation to a botched SAP ERP implementation called the MERIT (Marin Enterprise Resource Integrated Technology) project. MERIT was supposed to cost around $11 million for labor and software license costs, but Marin County claimed it ended up costing more than $30 million and would require millions more to replace.

The Marin County lawsuits trace their beginnings to 2004, when the county’s Board of Supervisors (BOS) decided that it was time for its outdated and fragmented legacy financial management, payroll, and human resources (HR) systems to be replaced. In April, the county sent out a request for proposal (RFP) seeking a replacement system in the form of a unified enterprise resource planning system (ERP). In April 2005, based on the strength of its responses to the county’s RFP, Deloitte Consulting was contracted to be the systems integrator of an SAP-based ERP solution.

The BOS decided to have the project managed by the county auditor (CA) rather than the county’s IT department because the software functionality mainly impacted its activities. The CA in turn appointed the assistant CA to be MERIT’s program manager (PM). Additionally, the BOS deliberately kept the county’s IT department out of the project to avoid “joint leadership” on project tasks. This decision gave Deloitte nearly carte blanche to lead the project, and made the county’s PM a nominal figure at best.

Furthermore, the BOS instructed the CA to “buy the best ERP system possible.” This led Deloitte to suggest early in the project that the county should become an SAP “ramp-up” customer and purchase SAP’s not-yet-released beta-version ERP 2005 product. Deloitte claimed that this version, though still under development, would let the county achieve greater “flexibility and scalability” in the future than they could with the ERP 2004 version originally licensed by the county.

MERIT was to be rolled out in two phases, starting with the financial management system functionality in July 2006 and the more complex payroll and HR functions in January 2007. The first release went live as scheduled, but the software immediately experienced numerous grievous errors that made it nearly impossible for the county to do even basic financial accounting, tracking, and reporting. There was no going back to the old system because it had been turned...
off. Even with a growing list of software problems, Deloitte (with the PM’s concurrence) insisted on pressing forward. The second release also went live as planned, but again, major software defects occurred. Payroll errors alone reached five times the number of the legacy payroll system, for example.

In response, the county implemented a “Get Well” plan to try to stabilize the MERIT system that now involved the county’s IT department. The county extended Deloitte’s contract at the recommendation of the PM by another $2.8 million to correct the errors but, thoroughly displeased with its work, decided to fire Deloitte in late 2007. The project cost now exceeded $15.8 million.8

Marin County spent another $19 million and three years trying to fix its MERIT system using outside consultants and its own IT department. While the county finally achieved a stabilized system, it only had some 50 percent of the functionality the county required, which would need an estimated $18 million more to implement.

MERIT was also expensive to maintain. In early 2010, the BOS decided it would begin looking for a replacement system with an initial go-live date around 2016.

In May 2010, the county filed lawsuits against Deloitte, SAP, and the county’s now ex-PM for fraud, misrepresentation, and other misconduct.9

The lawsuits asked for $30 million for actual and compensatory damages along with treble that amount in punitive damages. Among numerous allegations of wrong-doing, the county accused SAP of not warning it that Deloitte’s SAP design was risky and deficient, and that the former PM, who had left in 2007 to work for SAP as a salesperson, had colluded with SAP and Deloitte to conceal project risks and problems from county executives.

The central accusation was that Deloitte deliberately misrepresented its skills and expertise during the RFP process to induce the BOS to select and contract with the company to implement MERIT.10 The county claimed that Deloitte stated in its written proposals and oral presentations that it was “uniquely qualified,” had “deep experience with SAP implementations,” had “assembled a highly skilled and experienced” team to work on the project, was committed to dedicating “our best resources” to the effort, and was “absolutely committed to the success of the project,” among other self-affirmative statements.

As far as SAP not warning Marin County about Deloitte’s risky and deficient design, perhaps the county should have paid more attention to SAP’s report at the project’s start.

The county, however, alleged that instead of its best resources, Deloitte provided a legion of neophyte consultants to work on the project. Many, it claimed, lacked even a basic understanding of SAP, which directly resulted in a poorly tested, defective system. The county further claimed that, in reality, it was merely a guinea pig for Deloitte from which to learn about SAP’s latest ERP offering. Deloitte conducted a fraudulent “bait and switch” scheme for which it needed to be held accountable, the county argued.

SORRY, BEING NAIVE AND GULLIBLE ISN’T YOUR VENDOR’S PROBLEM

The legal machinations surrounding MERIT rolled on through 2010 and well into 2011 with Deloitte, SAP, and the ex-PM denying the accusations and filing lawsuits of their own against Marin County. Finally, in December 2011, a US district court ruled that the county’s case wasn’t very strong. It stated that Deloitte’s various RFP representations, for instance, were “highly subjective, generalized statements of the superiority of Deloitte’s qualifications made in a sales context.”11 Therefore, the court ruled, they were mere puffery and not quantifiable, actionable statements that Marin County could hold (or expect) Deloitte to satisfy. The court also noted that Marin County engaged in detailed negotiations with Deloitte after selecting it; therefore, the county had more information to assess the suitability of Deloitte than just the information provided in its RFP response.

As far as SAP not warning Marin County about Deloitte’s risky and deficient design, perhaps the county should have paid more attention to SAP’s report at the project’s start that “the County is at risk of an improperly designed system which could lead to substantial rework during the Project or a re-implementation after go live.” The county can hardly complain after the fact that the risks turned into problems.

In the case of the ex-PM’s actions, the court found that the accusations of collusion rested on a “thin reed,” but would allow them to be explored further if the county refiled its lawsuit against him, SAP, and Deloitte. But the county, the court warned, needed to provide more convincing evidence.

Marin County did refile lawsuits against all three parties in early 2012, but a judicial judgment in April threw out many of the accusations against. The county initially claimed that it still had a strong case and wasn’t going to give up,12 but during the ensuing year it dropped all of its lawsuits and in January 2013 signed a “strictly confidential” $3.9 million settlement with Deloitte that included no “admission of wrongdoing by either party.”5 The county’s lawsuits amounted to some $5 million, a sum the BOS conveniently couldn’t discuss because of the confidentiality agreement it signed.
PLUCKED BY PUFFERY
To the lay person, puffery seems like a license to lie, which, frankly, isn’t totally wrong. A well-known book on torts by William Prosser and W. Page Keeton stated it this way: “The puffing rule amounts to a seller’s privilege to lie his head off so long as he says nothing specific, on the theory that no reasonable man would believe him or that no reasonable man would be influenced by such talk.” In other words, the courts generally see puffery as “an expression of opinion and not a statement of fact.”

Interestingly, even a specific representation can be adjudged as puffery in a particular context. An infamous example occurred in 1996, when PepsiCo made a tongue-in-cheek offer of a $25 million AV-8 Harrier jet as its top prize in a promotional contest that required some $700,000 worth of points to win. A business student figured that was a good deal, sent PepsiCo a check for the amount, and, when the company didn’t award him the jet, sued PepsiCo for breach of contract, fraud, deceptive and unfair trade practices, as well as misleading advertising. His case was dismissed (including on appeal) when the courts concluded that PepsiCo’s promotion was mere puffery.

The concept of puffery as a legal defense was recognized in English law in the sixteenth century and is rooted in the principle of caveat emptor (let the buyer beware). Although puffery has a long legal history, a universally accepted legal definition of puffery doesn’t exist. Like the old legal adage about pornography, courts tend to know it when they see it. Largely, puffery is found when a representation is:

- so vague that it’s not subject to being either proved or disproved;
- a nonspecific expression of optimism regarding future performance; or
- a future projection stated as an opinion and not as a guarantee, or which is indefinite as to time.

The courts have been very tolerant in ruling various representations as puffery, especially when the words are used in the context of marketing, sales, or advertising situations, when projecting a company’s financial outlook, or during contract negotiations. In fact, optimistic statements, exaggerations, and some level of misrepresentation during negotiations are expected by courts, although material misstatements of facts are illegal. The line between acceptable immaterial lying and illegal material lying is hotly debated among lawyers, and often isn’t resolved until a court decision in a lawsuit.

Puffery doesn’t always prevail. Consider, for instance the suit by UK satellite broadcaster BSkyB against Hewlett-Packard–owned Electronic Data Systems (EDS) for making a hash of its implementation of a £47.6 million customer relation management (CRM) project. BSkyB had hired EDS in 2000 to provide a CRM system by early 2002. However, BSkyB fired EDS in early 2002, accusing it of poor performance. BSkyB then took over the project itself, finishing the system in March 2006 at a cost of £265 million. BSkyB filed suit against EDS in 2004, with the broadcaster eventually seeking £709 million in damages. BSkyB alleged that EDS made fraudulent misrepresentations in its proposal in relation to resources, cost, time, technology, and methodology that led it to select EDS for the project.

While a puffery defense would seem to apply as in the Marin County case, the court instead found for BSkyB. In a nearly 500-page ruling in January 2010, the court found, among other irregularities, that EDS had claimed in its proposal that it had properly analyzed the time needed to do the project and therefore had reasonable grounds for meeting the schedule. Neither, however, was true, which the court concluded was a material fact that would have led BSkyB not to have chosen EDS. The court ordered EDS to make an interim payment of £270 million to BSkyB while it determined a final ruling on damages. EDS and BSkyB soon afterward settled for an amount totaling £318 million.

ARE YOU A REASONABLY RATIONAL CONSUMER?
While there’s no accepted legal definition of puffery, numerous court rulings do seem to agree that, whatever it is, no reasonable or rational person would be taken in by it. Courts assume
The BOS also appeared not to do its routine due diligence to determine whether the representations Deloitte made during the RFP were indeed puffery. Even when it became clear that Deloitte was failing to live up to its promises in the RFP, such as employ experienced people on the project, nothing was done. Most damning was that when the first MERIT release went immediately off the rails, the BOS didn't instantly intervene but let the project continue virtually unchallenged.

It’s difficult to sympathize with any organization that claims foul when so many of its wounds are self-inflicted.

All too often, IT projects are sold internally by pushing its benefits while underselling the costs and risks.

That said, any IT vendor that resorts to puffery must also regarded with great suspicion. While it might be legally entitled to do so, as one court observed it’s also a strong indicator of mismanagement.

PUNCTURING IT PROJECT PUFFERY

Puffery is here to stay. Vendors wouldn’t resort to it if they didn’t think it would work to trap the unwary or naive. It can be deflated, however, if you increase your technical savviness and possess a sharpened language stick.

The first order of business is to become what courts expect you to be: an educated consumer that can recognize puffery. That means everyone involved in an RFP process should be trained by the organization’s legal team to study in detail previous IT project failures that ended in dismissed lawsuits. Look at how vendors in these cases promised that “quality is our top priority,” “we’ll staff the project with our incredibly talented staff,” or “our greatest asset is the trust we earn from our customers.” These are legally meaningless, as are the corporate codes of ethics that vendors claim they live up to. Play puffery-lingo bingo, if necessary, to find empty words and phrases to highlight them in the RFPs.

If possible, pretentious puffery in RFPs should be excised, or your organization’s lawyers should, during the negotiation phase, demand the vendor to materially prove any questionable claims. Better yet, convert the vendor's puffery from immaterial to material representations that can be relied on in a lawsuit—if it comes to that. After all, the contract is the contract: the vendor is only going to do what’s explicitly spelled out, and anything not written down means nothing, as Marin County discovered.

During the project itself, apply the tested maxim of “trust, but verify.” Perform hardnosed, reality-based risk management, not the make-believe kind often practiced, and don’t hesitate to terminate the contract if the vendor doesn’t live up to its obligations. Earlier this year, for instance, Nevada’s Department of Motor Vehicles found itself in a situation similar to that of Marin County and fired its contractor one year into a five-year $144 million modernization effort for failing to do what it promised. The DMV’s only regret, apparently, is that it didn’t fire the vendor sooner.

Puncturing any internally generated puffery is an absolute necessity. All too often, IT projects are sold internally by pushing its benefits while underselling the costs and risks. Once internal project puffery takes hold—often using the same overoptimistic representations that vendors are accused of making—it’s incredibly easy for vendors to then play to that optimism and exploit it to their benefit. As has been pointed out, many if not most major project failures, regardless of industry, can trace their roots to internal delusion coupled with acts of deception. When internal and external puffery meet, they conspire to co-create a major production of “Success Theater,” where any bad news is actively driven out of the project until the day the project, or even the organization, fails.

None of the above guarantee that puffery won’t entrap even the wary, but it should help make it more difficult. IT projects fail for ample reasons already; falling prey to puffery should never be one of them.

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