



## Misrepresentation or Mere "Puffery"

02.01.2016

*Note: This article was originally published in the February 2016 issue of Hampton Roads REALTOR® magazine. Read the issue [here](#).*

A condominium developer in Northern Virginia avoided liability for fraud under common law and the Virginia Consumer Protection Act by engaging in "puffery" rather than misrepresentation of facts. That was the conclusion of the United States District Court for the Eastern District of Virginia in the case of Devine v. Pulte Home Corporation, decided on December 4, 2015.

Patrick Devine purchased a condominium located in the Potomac Yard Development in Alexandria, Virginia from Pulte Home Corporation. Devine apparently settled for the unit he purchased because the model home unit he really wanted was not for sale when he began looking for a home in the Potomac Yard Development in the fall of 2012. Rather than wait for the model unit to be put up for sale, Devine discussed the purchase of a similar unit with Pulte's sales agent, Doug Richards. The unit Devine discussed with Richards was not located on Main Line Boulevard like the model unit that interested Devine, but instead was located on Route 1, the Jefferson Davis Highway. Devine initially expressed disinterest in a unit on Route 1 because of his concern about traffic noise, but Richards assured him that the units on Route 1 would be of "airport quality" in blocking out the traffic noise. Pulte also advertised that all of the units in the Potomac Yard Development were "luxury" units, no matter which street they were located on. On the same day that Richards made the "airport quality" soundproofing statement, Devine signed a contract to purchase the Route 1 unit.

The contract explicitly stated that the unit would be built to meet or exceed all applicable sound and vibration regulations, but condominium living is more susceptible to the transmission of noise and vibration from adjoining units. The contract also stated that the applicable building code did not require the unit to be soundproof, and it was not. Finally, the contract advised Devine that the unit was located near Reagan National Airport, active railroad tracks and major highways. As a result, the unit was subject to noise generated by aircraft overflights and the nearby transportation facilities.

Devine and his wife closed on the condominium in September of 2013, paid the purchase price of \$560,105 and moved into the unit. Shortly thereafter, Devine and his wife noticed that they could hear traffic noise while in their unit, and even the conversations of passersby on Route 1. Devine complained that the noise from Route 1 impaired his ability to sleep in either of the unit's upstairs bedrooms

overlooking Route 1. In addition, he was bothered by noise from the condominium unit above his, including footsteps every night at approximately 11:00 p.m. while he was in the master bedroom with the television turned on. Devine complained about the noise to Pulte's construction manager and warranty service manager. Both of them conducted sound tests on the unit and indicated that the unit had passed.

Dissatisfied with those results, Devine filed suit against Pulte in the Circuit Court for the City of Alexandria, and Pulte had the case removed to federal court. Devine based his suit on common law fraud and the Virginia Consumer Protection Act. He claimed that Pulte's representation of the units as "luxury" and Richards' assurance that soundproofing would be "airport quality" were false and induced him to purchase the unit to his detriment. The Court noted that in order to prevail, Devine would need to prove that Pulte and its agent, Richards, had made false representations of a material fact intentionally and knowingly, with the intent to mislead, on which he relied and which resulted in damage to him.

Based on that standard, the Court quickly disposed of the advertisements describing the condominiums as "luxury" or "luxurious". Those statements were "classic puffery" according to the Court, and not misrepresentation of a fact. The Court was not as quick to dismiss the description of the soundproofing as "airport quality" as puffery, however.

Virginia law provides that, in distinguishing between mere puffery or opinion and a misrepresentation of a fact, each statement must be evaluated on a case by case basis, taking into consideration the nature of the representation and the meaning of the language used as applied to the subject matter and interpreted by the surrounding circumstances. The mere expression of an opinion, however strong and positive the language may be, is not fraud. When a statement has involved only a subjective value judgment it has generally been held to be an opinion or puffery. A statement of fact, on the other hand, generally is capable of being objectively verified or disproven.

In this case, "airport quality" was not a meaningful standard for soundproofing that could be proven or disproven. The term "airport quality" may have brought to mind a certain level of soundproofing, but it was no more definite than saying "excellent quality" or "luxurious quality". That lack of verifiability, when combined with the explicit warnings in the contract concerning noise, caused the Court to conclude that the "airport quality" statement was puffery.

Because Pulte's and Richard's statements were mere puffery rather than statements of fact, Devine's Virginia Consumer Protection Act claim also failed. The very first requirement for a claim under that statute is that a fraudulent misrepresentation of fact must be alleged. Again, because "luxury" and "airport quality" were statements of opinion rather than fact, Devine could not satisfy the first element of the Virginia Consumer Protection Act claim.

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