

The logo for Astrachan Gunst Thomas features a stylized, swirling graphic in shades of blue and grey to the left of the firm's name. The name "astrachan gunst thomas" is written in a lowercase, sans-serif font, with "astrachan" and "gunst" in a lighter blue and "thomas" in a darker blue.

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Do You Know What Your Agents Are Doing?

By: Jim Astrachan

Brobback was in the business of selling long distance telephone services directly to consumers. Although much smaller, it was in direct competition with AT&T who also sold its long distance services to consumers and to resellers like Broback.

Brobback was financially successful because its business model employed no employees and as a result it had very low direct costs. In fact, the only costs Broback incurred were the cost of the services it bought from AT&T and re-sold at a nice profit, and the commissions it paid to a network of sales reps. It engaged the services of 50 different marketing agencies who in turn employed or contracted with scores of persons who made telephone sales calls on Broback's behalf. A typical sales call might start with, "Hi. I'm calling from Broback to make you a long distance offer you won't refuse." These reps worked out of their own offices or homes and received no supplies, equipment or office space from Broback, nor did Broback exercise any control over their activities. In other words, Broback's reps were clearly independent contractors and not employees. They earned commissions and were under no minimum obligations to sell – they sold what they wanted when they wanted and they represented other sellers. Still, it was the misrepresentations made by the members of this network of independent contactors that caused Broback to be held vicariously liable for unfair competition under the federal Lanham Act. Here's what happened.

Brobback was sued by AT&T and a federal judge ruled that Broback's sales reps had, **without** Broback's authorization, made representations that lead consumers to falsely believe that Broback was a subsidiary of AT&T. Broback defended on the grounds that it had not authorized this conduct. In fact, it was able to prove at trial that on many occasions AT&T had notified it that its sales force was making these false statements and it had reprimanded and disciplined the sale reps. "How", Broback argued, "could it be liable for the misrepresentations of people who are merely independent contractors?"

Broback might be considered liable for the acts of its independent contractors under two legal theories, often applied to tortious conduct: contributory infringement and vicarious liability.

The appellate court held Broback was not a contributory infringer because each time it was notified of bad conduct it took some action. The court held, however, "If the doctrine of contributory infringement were the sole means of imposing liability for indirect conduct, AT&T, would be without a section 43(a) remedy in this case." And AT&T did indeed have a remedy; the court ruled that Broback was a vicarious infringer.

Indirect liability is a legitimate basis, the court ruled, for Broback's liability under the federal unfair competition statute. The basis for this finding was the courts' conclusion that the Lanham Act is the federal codification of the common law tort of unfair competition. It followed, then, that courts will examine tort law in general and apply tort principals to determine who might be liable for the tort, here being the numerous false and misleading communications about the source of the services offered by Broback's reps.

The trial and appellate courts each found that the sales reps were independent contractors and were instrumental to Broback's success. Without them, there would be no Broback. Still, Broback had only minimal control over how its reps performed their jobs, and no control over whether the reps choose to market Broback's services among the many other companies they represented.

Necessary to a holding that Broback would be vicariously liable for the acts of its contractors was a finding that the reps were "agent – independent contractors" and not "non-agent-independent" contractors. This is so because principals are generally not liable for the acts of their independent contractors, but the appellate court noted there were numerous exceptions:

There is a range of tortious conduct on the part of an agency that may bind the principal and subject him to liability even where the agent is not a servant, where the act was done in the manner authorized or directed by the principal, and where the result was not authorized or intended by the principal.

Broback, the court concluded, could be held accountable to AT&T for the commercial lies of its independent contractors if the principal could reasonably expect that its contractor might make misrepresentations and if the consumers do not know that the agents' representations are not authorized.

So here's the rule that can hang-up a company like Broback, that does business through independent contractors: When a principal authorizes its independent

contractor-agents to transact business on its behalf with third persons and the principal benefits financially from the contracts made on behalf of the principal by its agent, the principal may be liable in an action brought under the Lanham Act for unfair competition if the agent's bad acts are reasonably foreseeable, the consumer does not know that the agent is not authorized to make the misrepresentations, and reliance on the misrepresentation by the customer is reasonable.

To avoid a finding that the misrepresentations are not foreseeable, the court held, Broback should have gone to "great lengths to ensure that the agents knew not to make certain representations." But when Broback apparently gave its reps *carte blanche* to hold themselves out as Broback the misrepresentations may be foreseeable even if Broback tried to police the acts of its reps. "The point of course", wrote the court, "is to hold the principal liable when it is just to do so, but still to encourage the principal to police the agents enough to avoid liability."

Do you know what your agents are doing? Do you know what they're saying?

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