

## Who's On First? (Another Chapter on the Issue of Agency/Advertiser Liability)

**Dear Friends:**

Summer certainly went by quickly this year, it seems. I hope that isn't a sign of age.

In mid-September, I was able to get away from my debtors and visit with my brother Nick and his wife Pat, who live in Kodiak, Alaska. The silver salmon fishing and ptarmigan hunting was terrific — as was flying into some really pristine areas.

My younger brother Robin and I have been invited to speak at the BCCA conference in October. I will serve on a "liability" panel and Robin will be on a "sales and credit" panel. We both hope to see some of you there.

Meanwhile, I hope you all had a terrific Labor Day weekend.

Best wishes,



Pete Szabo, President  
Szabo Associates, Inc.

*The following feature is based upon an article contributed by Raoul Roth, an attorney at law in Los Angeles, California. We would like to express our appreciation to Mr. Roth for his contribution to this newsletter.*

The question of agency and/or advertiser liability continues to be a topic of discussion and concern among members of the media industry. Earlier this year, the American Association of Advertising Agencies (Four A's) issued a statement on the issue of liability, clearly defining what it called "sequential liability": "The agency shall be solely liable for payment of all media invoices if the agency has been paid for those invoices by the advertiser. Prior to payment to the agency, the advertiser shall be solely liable." (See "Szabo's Forecast," "Collective Wisdom," March 31, 1991.)

Many in our industry question the Four A's process in reaching such a conclusion.

A very basic principle of English Common Law, still applicable in modern society, states that when you deal with a person, you have a right to expect payment from the person with whom you are dealing.

In our industry, this simple tenet is complicated by the fact that the entity with which the media deals is called an "agency," and the name of the entity for whose benefit the advertising is placed is always disclosed.

The courts have generally ruled that unless something more than mere disclosure of the name of the advertiser is made, responsibility for payment rests with the person with whom the seller is dealing. The seller has the right to expect payment from that person and must look only to that person for payment.

The best illustration of this principle is the purchase of wedding invitations. The father of the bride goes to the stationery store, orders the invitations and puts down a deposit. The store then contracts a printing company to print the invitations. After the invitations are printed, the wedding is called off. The father of the bride refuses to pay the balance since the invitations are now worthless to him.

Does the store have the right to say to the printer, "I don't have to pay because the father of the

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bride didn't pay?" Does the store have the right to ask the former fiance and fiancee for money because the father in his shame went to Tahiti? Can the printer ask the fiance and fiancee for payment?

Common business sense tells us that in this illustration, each party must seek redress from the person with whom it dealt. The stationery store must seek payment from the father of the bride. The printer, in turn, must look to the stationery store for payment. The reasoning does not change when applied to our industry.

But suppose the father of the bride obtains the invitations from the stationery store but did not pay for them. The stationery store then goes out of business without having paid the printer for the invitations. Since the father of the bride received the benefit of the invitations, he would be responsible to pay the printer for the reasonable value of the invitations he received.

In this illustration, redress is sought on the theory of "quantum merit"; that is, payment for the value of that which was requested and received. Similarly, the media may make claim against the advertiser, alleging that the advertiser must pay someone for services it requested.

The defense of the advertiser to the quantum merit redress is prior payment to the agency. If the advertiser has already paid the agency, the advertiser is off the hook unless the advertiser

knew that payment to the agency would not result in the media being paid.

It is also a very basic principle of common law that an entity can be represented by an agent in its dealings with the public, and barring other considerations, that agent can bind the entity by its dealings just as the entity can bind itself.

A person who acts as an agent for a disclosed principal is not liable for the contract debts of the disclosed principal. The key to

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# True Collections

*The following story is true. The names, places, and dates have been changed to protect the persons involved.*

## Pennies from Heaven

My first important lesson in this business came one Monday morning following Super Bowl

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"Collector's Corner" is our readers' forum for suggestions, comments, and idea swapping. If you have information to share or input on how our newsletter can better serve you, please write or call. We want to hear from you!

**Question:** My station received a broadcast order from one of our advertising agencies. The agency operates with the new American Association of Advertising Agencies' recommended clause of sequential liability. My station's contract is joint and several. What can I do to insure that my contract is enforced?

**R.A., Lubbock, TX**

**Answer:** Send notification in written form to both the agency and advertiser stating the terms and conditions of your contract: that both agency and advertiser are responsible for payment until you are paid. In this written notification to both parties, state also that agreement with the station's terms by both parties is assumed unless your station is notified otherwise prior to the running of the schedule.

The recommended clause for the joint and several liability clause is as follows:

"Notwithstanding to whom bills are rendered, advertiser, agency and service, jointly and severally shall remain obligated to pay the station (cable system, network) the amount of bills rendered by station within the time specified and until payment in full is received by station. Payment by advertiser to agency or to service shall NOT constitute payment to station."





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weekend. You know, when your eyeballs feel like burning orbs circling about in some far distant galaxy, and your stomach is sending you regular telegrams that four six-packs of beer and five dozen jalapeno nachos are grounds for a mucho grando digestive mutiny.

So it was that morning when Leonard Hackberry paid me a visit. I had had as numerous as they were fruitless conversations with Leonard regarding a \$965 balance owed to Able Hardware Store for lumber and chicken wire he purchased to build chinchilla cages. Raising chinchillas was Leonard's latest get-rich-quick scheme, only Leonard had a propensity for bad timing. Just about the time he finished building the cages, a new local chapter of "Fur Flies Over Our Dead Bodies," a regional animal rights group, staged a sit-in on Leonard's front porch. Meanwhile, accord-

ing to the truck driver who was on his way to deliver five pairs of chinchillas to Leonard, the little critters got noisily and intimately acquainted on the long drive south, distracting him just long enough to plow the truck into a telephone pole. The chinchillas scampered off into the woods, which has since been targeted by the "Fur Fliers" as a state wildlife refuge.

Well, Monday morning about nine, just when I had worked up enough energy to drop two Alka-Seltzers into a glass of water (the noise was deafening), Leonard shows up and throws this big bag of something obviously heavy in the middle of my desk. "What's this, Leonard?" I ask, and he says, "It's everything I owe you and everything you deserve."

So I open the bag and dump the contents, which turn out to be \$965 to the penny, or 96,500 pennies, to be specific, which I sat there and counted while Leonard

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"I THOUGHT YOU SAID WE WERE HAVING A 'BEACH' SESSION."

# szabo's

## FORECAST

It has been a challenging year for advertising media sales and collections, and it doesn't appear that things will start to get better until next year.



Pete Szabo, President

In the interim, cash flow should be the number one priority. In most cases, it takes at least five sales dollars to replace each dollar that is written off. One virtually never makes it back.

With this in mind, it makes no sense to wait more than 120 days to place an account for collection. Our recent statistics in this economy have strongly signalled that waiting 180 days or longer to place accounts diminishes potential recovery by 50 percent.♦

### Calendar of Events

Broadcast Cable Credit  
Association  
Chicago, Illinois  
October 14-16

Advertising Media Credit  
Executives Association  
Phoenix, Arizona  
October 13-16

Szabo Associates, Inc.  
Annual Christmas Party  
Hellenic Center  
Atlanta, Georgia  
Evening of December 6

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liability here is not that the name of the advertiser is disclosed, but that the advertiser is disclosed as the principal who is to be held liable for payment.

Ideally, it would be expedient to establish dual liability. With dual liability, if the agency does not pay, the advertiser would be bound.

To establish dual liability, it is necessary to place all parties on notice of the intent to do so. In most instances, this requires a writing that binds the party to be charged. This may be accomplished either by sending the advertiser an agreement signed by the agency notifying the advertiser that his agent has bound him to the liability, or by obtaining a contract with the advertiser requiring the agency to sign a guarantee. Any other procedure not utilizing a signed document is risky at best and depends for resolution on the size of the chancellor's foot. ♦

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sat there grinning, interrupting me three times so I had to start over by telling me how each of those pennies should've been a dollar of profit his first year alone if fate hadn't dealt him such a rotten hand.

All of which brings me to a second incident, which came oddly enough the following Monday, when Lula Mae Benson came striding into my office with a toothless smile as wide as the Mississippi. Lula Mae was a widowed, elderly welfare recipient who had the unfortunate luck to get saddled with a \$16,000 judgment for a debt her husband had incurred three years before he left her with six small kids. My calls to Lula Mae had been more on the order of "Maybe you can send five dollars a month just to show good faith, Lula Mae," rather than asking for something I knew she could never pay in a million years.

Well, Lula Mae opens her big canvas bag, finds a worn out

leather wallet, pulls out a wad of bills as thick as toast, and hands me the money.

"What's this, Lula Mae?" I ask, and she puts her hands on her ample hips and says, "It's the \$16,000 I owe you."

"Well, if you don't mind my asking, just where did you get all this money?"

"I went to the dog track over in Alabama and I won the big one!" she said. And with that she walked out of my office, turning once at the door to ask, "You won't be callin' me no more, will you now?"

"No, I won't be calling, Lula Mae. You take care of yourself."

And so in a single eight-day period, I learned that more times than not, you get what you ask for. Sometimes it's exactly what you requested but not exactly how you thought it would be, sometimes it's more than you thought you'd ever get, and other times it's just a severe case of indigestion. ♦

—story contributed by  
R. Sanders Green and C.T. Heist

# szabo

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