collective wisdom®

SZABO ASSOCIATES, INC. VOLUME 16, ISSUE 2, JUNE 30, 2001

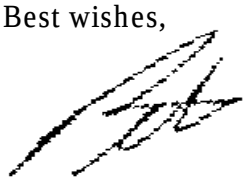
Dear Friends:

This year marks the 30th anniversary of Szabo Associates, Inc. Who imagined back in 1971, when the company began with one phone in a small Atlanta office, that we would grow to represent thousands of clients, many of whom do business in industry areas that were not even imagined 30 years ago. On this important anniversary, we thank all of you who have helped us prosper and grow, and we renew our commitment to work tirelessly to promote media interests as our industry continues to evolve.

Speaking of promoting media interests, one organization that has done much in this regard since its inception in 1961 is the Broadcast Cable Financial Management Association. I just returned from attending BCFM's annual conference in Toronto, where I was presented the organization's Jack Zwaska Career Achievement Award. It is indeed an honor to have received this recognition and an honor to have been associated for many years with this fine organization.

We hope you all have a glorious summer season!

Best wishes,



Pete Szabo, President
Szabo Associates, Inc.

Parties Continue to Clash Over Liability

Why does the issue of liability continue to plague the media industry? Why does it continue to be so difficult to reach agreement among all parties involved as to who is responsible for payment to media for advertising? The simple answer is, of course, that each party involved understandably would prefer to be the recipient of the most protection—or to put it another way, the recipient of the least exposure to risk—available by law if something goes awry.

In May of last year, the American Association of Advertising Agencies (AAAA) released a position paper on sequential liability. The paper not only provides an update of the association's 1991 position that advertisers and their agencies are "sequentially liable" for the payment of media costs, but also goes one significant step further. It includes advice to the AAAA membership on countermeasures to consider if media takes a joint and several liability position.

The wording for the sequential liability clause adopted by the AAAA Board of Directors and used in AAAA standard media contract forms is as follows: *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.*

The reasons the AAAA chose to take this position are clearly stated in this recent position paper. The association maintains that a position of "dual" or "joint and several" liability is illogical in the sense that "you cannot hold everyone simultaneously liable for payment." The association further maintains that sequential liability is fair to the agency, which is liable to media only if it has been paid, and fair to the client, which is no longer liable once it has paid. Emphasizing the benefit of sequential liability to advertisers who, in order to service their particular advertising needs, contract a variety of firms, some of which may be in a questionable financial condition, AAAA noted that under dual liability the advertiser could face having to pay twice if a firm suffers financially.

In the May 2000 release, the association also noted that thinly capitalized companies were increasingly the source of marketing and advertising expenditures, and that their questionable viability and/or under-capitalization were reasons for all parties involved to try to mitigate or eliminate their credit exposure. Certainly no one would disagree with this assessment, especially in the wake of the demise of so many dot coms and start-ups since the release was issued.

We have published a num-

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Clash Over Liability —

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ber of articles in this newsletter over the years about the liability issue. (The September 2000 issue of *Collective Wisdom* is the most recent article devoted to liability, although we have touched on the subject in many others.) While we acknowledge that proponents of different positions on the matter have made some valid arguments in support of their positions, Szabo Associates has been a vocal proponent of joint and several liability because we believe it fairly protects the interests of media properties.

In a simpler and more perfect world, each party would receive payment from the party with whom it directly dealt. In the world of media, as we all know, where signed contracts sometimes do not exist and numerous parties are involved in a buy, unforeseen circumstances can create havoc with what should have been a simple exchange of money for services rendered.

If an agency goes out of business after having been paid by an advertiser for media services that have benefited the advertiser, should media not expect to seek redress from the party who received the benefits from the services? If the advertiser has not paid its agency, should the advertiser have the right to say to media, "Why should I talk to you when my agreement is with the agency?" And should the agency have the right to say to media, "What business have you to call my client for money?" These questions, and many more, continue to vex media properties as the debate rages on.

Our intent here at Szabo Associates is certainly not to disparage the AAAA because of its position or to disregard the merits of opposing viewpoints on this extremely complicated issue. We respect the association's involvement in protecting the interests of its membership, whose creditworthiness and stability continue to make our clients' jobs easier. Rather, what we propose is that credit departments of media properties—regardless of their liability positions—increase their due diligence in determining exactly who is responsible for payment as well as making sure their liability position is clearly stated and properly communicated *to all parties involved*. Media properties also should be aware of the AAAA's advice to its membership regarding countermeasures to media's joint and several liability position. In the face of such visible and vocal opposition in principle that the organization has expressed, media should be extremely attentive to all communications received by other parties to the agreement in order to effectively address alterations in the agreement prior to any payment problems. *We strongly suggest that you enlist your company attorney to assist you in evaluating your options and developing procedures.*

It is very important to carefully review the wording of your liability clause in your company's contracts and documents and to compare it with the wording in contracts and documents originating from other parties. For example, is there a discrepancy between the language contained in your own contract and the language contained in a rep firm's national sales contracts that are sent to agencies and buying services? Insist that your liability clause be included in these contracts.

Media credit applications usually include a clause which sets forth a joint and several liability position (media properties with a joint and several liability position should submit credit applications for signature to <u>both</u> the agency and the advertiser!), while media contract forms originating from agencies often include a sequential liability statement. The AAAA advises that member agencies receiving credit applications with a joint and several liability clause from media may choose to amend the form by striking the dual liability phrase, substituting the sequential liability clause, and initialing the revision.

If your position is one of dual liability and you receive such a revision, you might choose to either reject the order altogether or reject the amendment, annotate the document with your liability clause, and return it to the agency. It is advisable, if you do this, to accompany the document with a letter explaining your action, and to copy other parties involved. Under these circumstances, options available to the agency and/or advertiser, according to the AAAA, are 1) the advertiser can choose to cancel the order, 2) the agency can send the medium a written statement that it rejects any liability language different from its proposed language, or 3) the agency and advertiser can ignore the annotation and allow the courts to decide which liability clause is enforceable if problems occur. If the agency chooses option #2, your attorney may advise you to respond immediately with a letter to both the agency and advertiser reaffirming your position and stating that your position is not subject to negotiation. In the case of both options #2 and #3, restatement of your liability

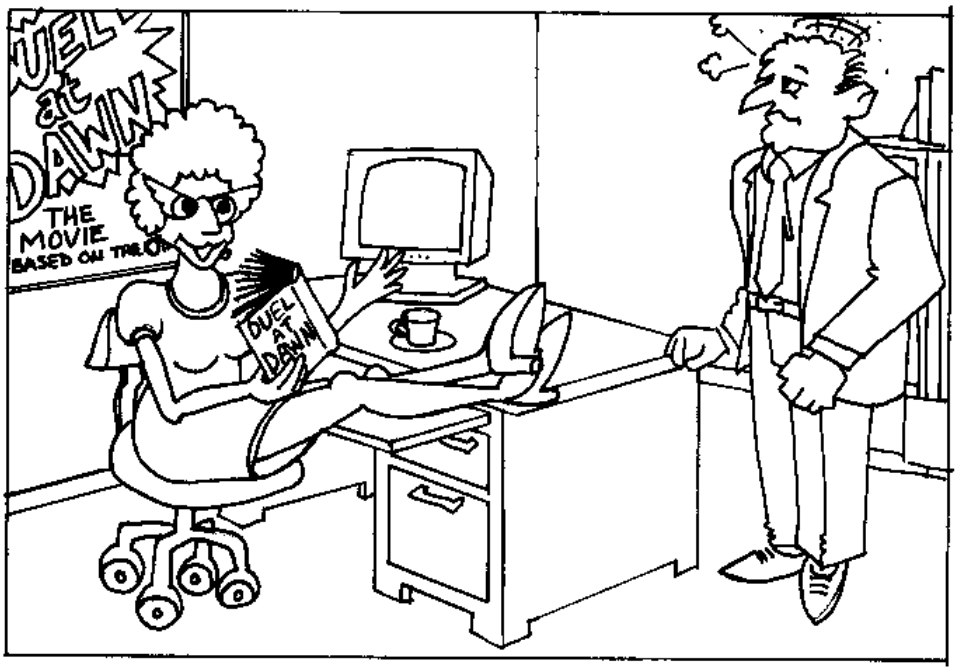
clause on all appropriate correspondence, such as invoices, letters attached to contracts, and rate cards will help support your position if the matter ultimately ends up in a judge's hands.

The AAAA also suggests that an agency, in order to properly define its role and to further reduce its exposure in the event of an advertiser's default, include in its client agreement a clause stating that, for media and production purchases, the agency is functioning as an agent for a disclosed principal. By law, a person or entity acting as an agent for a disclosed principal is not liable for the contract debts of the disclosed principal. One protective measure for you to consider in this circumstance might be to send the advertiser an agreement signed by the agency notifying the advertiser that the agency has bound him to the liability. Or, you could develop in-house a document, which would be signed by the advertiser, confirming that the agency is authorized to negotiate and enter into a binding contract on the advertiser's behalf and including a statement that, if the advertiser entrusts the agent with money to pay you, the advertiser will remain liable if the agency fails to pay.

Of course, agencies who choose to do business with advertisers with questionable creditworthiness can also choose to require payment prior to media closing or cancellation dates, an option that the AAAA recommends that its membership consider. Agencies with stability and integrity that make this choice eliminate problems for both themselves and media. When an agency itself has questionable creditworthiness, payment in advance from the agency might be the prudent choice for media regardless of the parties' positions on liability.

It should be noted here that none of the measures discussed in this article can prevent liability disputes with agencies and/or advertisers from ever occurring, nor can they ensure that you will prevail in the courtroom. The only practical way to eliminate disputes over liability issues is to have an agreement in place, which is signed by all authorized parties to the agreement, as to who is responsible for payment to media.

"Who is liable for payment?" is a question that will clearly continue to be asked and argued about by media properties, agencies, advertisers, and attorneys throughout the country. Perhaps somewhere down the road, opposing voices will reach a major compromise agreement that will reduce litigation, preserve an atmosphere of goodwill, and increase the likelihood of a fair outcome for all parties. Until that time, a credit policy that includes a clear statement of your liability position—along with communication procedures to ensure all parties to the agreement are aware of that position—is key to its effective enforcement both in and out of the courtroom. ♦



"DUAL LIABILITY? THAT MEANS IF TWO FELLAS CAN'T AGREE ON WHO SHOULD PAY A BILL, THEY SETTLE IT ONCE AND FOR ALL WITH A PAIR OF PISTOLS!"

To review a complete transcript of the AAAA position paper on sequential liability, log onto the AAAA Web site at www.aaaa.org. Click on "News and Information" at the top of the home page. Click on "News Releases," select "View News Releases for the Year 2000," then select "May." You will see the release dated 5/11/2000 titled "AAAA Launches New Series of Position Papers Addressing Key Industry Issues." Within this release, you can select "first installment," which presents the paper in its entirety.

The Szabo Difference:
Not Just Law Skills—Media Law Skills

It seems like almost every day something happens to remind us that we work in a business like no other.

You could search throughout all of the rest of the business world and never find another relationship quite like that of an advertiser and an advertising agency. For a media company unfortunate enough to need to collect a debt from one or the other, the complexities can be enough to make you throw up your hands. Yet it happens every day.

At Szabo, we take pride in the fact that our collections representatives are specialists in media, so they understand the unique aspects of this business. You've heard us talk about this for years, because it's extremely important. But it's not enough for our representatives to be knowledgeable. They have to be able to rely on support people who understand the media business, too.

So when we're faced with a collections problem that might involve the complex relationship between agency and advertiser, we can often find solutions right down the hall. Szabo representatives have in-house legal specialists who can help them out.

We're one of the only collections services we know who have in-house paralegals with expertise in media law. They have averaged 10 years with Szabo working in just that area. They, in turn, can call upon an international network of attorneys that we've developed over the decades—attorneys who have also gained experience in working with us in media law.

Still, in many cases, the agency-advertiser relationship goes beyond legalities. Every relationship is different. Our representatives recognize this, and we work with it.

Where an inexperienced collections service might blunder into a delicate relationship and alienate both agency and advertiser, our people work with a light, skilled touch to collect your past-due bills. In most cases, we're able to recover your money without disturbing valuable relationships.

There is no substitute for a well-written contract when it comes to collecting past-due accounts. But sometimes you need to know the unwritten laws as well. That's why it pays to talk to a Szabo representative. ♦

SZABO ASSOCIATES INC.

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