

Dear Friends:

It has been two years since BCFM/BCCA issued its clause on joint and several liability. Since that time, an increasing number of media companies have embraced this liability position, which Szabo Associates recommends as the most advantageous liability position currently used by the industry.

This issue's feature article takes a look at some "real life" implementations of joint and several liability from the point of view of several media credit managers across the country; specifically, how they are integrating their liability position with credit policy in the time-compressed environment of media sales.

Upcoming calendar events include the Advertising Media Credit Executives convention, October 10th through 12th in Asheville, N.C. and the Texas Association of Broadcasters, October 22nd through 24th in Fort Worth.

And don't forget to mark your calendars for the annual Szabo Christmas Party, December 4th at the Hellenic Center in Atlanta! We promise good food, good music, good company, and a great time for all!

Best wishes,



Pete Szabo, President
Szabo Associates, Inc.

Joint and Several Liability – Real Life Implementation

In the beginning (and the last half of this century, in particular), there was the advertising agency. Agencies seemed to benefit everyone: the media researched the agency, the agency researched the advertiser, the advertiser paid the agency, the agency received a 15% commission from the media.

It was in these "good old days" that the position of "sole liability" was created, in which agencies were primarily, if not solely, liable for the cost of advertising. Beginning about 1930, the Four A's used a contract that had a sole liability clause in it.

While the sole liability clause provided media with the advantages of simplicity and speed, these advantages were compromised by the 1970's. Many agencies, such as Lennen and Newell, and U.S. Media, began to go belly-up, leaving media high and dry.

In 1974, BCFM/BCCA responded to the changing economic climate with a compromise liability clause. The clause adhered to agency sole liability, but it also provided an alternative by which media could be paid in the event of the agency's insolvency. Its deficiency from the media's perspective was that payment could be demanded from the advertiser only for sums not already paid to the agency or for sums paid to the agency after the

advertiser had knowledge of the agency's inability to pay.

In early 1991, the Four A's announced its new position on liability to the media. The Association, which had for many years endorsed the concept of agency sole liability, issued the following statement regarding "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."

In response to this statement and after much review, the BCCA/BCFM Boards of Directors that same year rescinded its long-standing compromise liability clause and adopted in its place the following recommended joint and several liability clause: "Notwithstanding to whom bills are rendered, Advertiser, Agency and Service, jointly and severally, shall remain obligated to pay to station (cable system, network) the amount of any 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, or payment by Agency to Service, shall not constitute payment to station."

Since BCCA/BCFM's 1991 position statement, joint and several liability

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has become a growing trend among the nation's media. Prior to adopting this new position, many media companies approached liability issues on a case-by-case basis or with vague guidelines. Now, joint and several liability has given them the opportunity to review and strengthen their traditional tools and methods for the purpose of more effectively enforcing their position.

Kathy Dining, Controller for WAOK-AM/WVEE-FM Radio in Atlanta, believes that a carefully worded credit application is crucial for effective implementation of joint and several liability. "The timing of radio buys is such that getting signed contracts is almost nonexistent for us," says Dining. "A rep firm representing an agency which in turn represents an advertiser buys time from us and wants it the next day. To wait for signed contracts would mean losing the sale. For that reason, the credit application is the single most important piece of paper we have."

Dining is looking at ways to make her station's credit application a more powerful tool for enforcing joint and several liability. "We now see many insertion orders from buying services that contain a clause disclaiming liability," she says. "The joint and several liability clause on our contracts encompasses the liability of buying services, and we are now working on also incorporating wording in our credit application to overcome this kind of obstacle."

As the liability question becomes increasingly complex, Dining sees a need for presenting a consistent message of her station's position on liability. "If we show all our clients that we intend to enforce

joint and several liability, we strengthen our position," she says, "and any legal angle we can come from is useful."

Judy Schaaf, Credit and Collections Director for KFAN-AM/KEEY-FM Radio in St. Paul, also sees value in strengthening the credit application. "I would like our credit application to include the terms of the contract and also to state that, should litigation result from nonpayment, the agency must come here for trial."

Jennifer Brooks, Ad Sales Billing and Collections Analyst for E! Entertainment Cable Network in Los Angeles, procures credit applications on both the agency and advertiser, and finds media references most useful in determining credit-worthiness.

"Most of the problems we have are with 'direct response' clients, which probably constitute about 90% of our credit work," she says. "In order to minimize potential problems, we send a letter that states whether credit is denied or approved, what the credit limit is if approved, and also our policy on joint and several liability." Although the company has not yet had its joint and several liability position

tested in court, Brooks feels that the policy is serving them well.

The realization that media may seek payment from an agency's client if the agency fails to pay can be a powerful incentive to comply with credit policy.

Kathy Koenig, Accounts Receivable Credit Collection Manager for Adlink in Los Angeles, has used her company's joint and several liability position to contact an agency's client. "Last year we had a case in which the advertiser had paid the agency, but the agency didn't pay us. We did tell the advertiser that it was responsible for payment." (As it ultimately turned out, Koenig explained, the agency asked for a meeting of creditors, and a creditors committee was formed. The agency asked for a moratorium on the debt until a plan for repayment could be worked out.)

Debra Niermeier, Credit and Accounts Receivable for KFOR-TV in Oklahoma City, recalls about five cases in which she threatened to notify an advertiser of the agency's failure to pay. "In four of the five cases," she says, "the agency paid before I contacted the advertiser. Our joint and several liability clause

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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: What is a "Limited Liability Company"?

M.F., Minneapolis, MN

Answer: A "Limited Liability Company" is an entity that is similar to a corporation in that no personal liability exists. A Limited Liability Company has no officers. Instead, there are members of the management committee, or a sole manager if there is no committee. This relatively new entity has been adopted in approximately 18 states and will likely be adopted eventually by all states.



True Collections

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

The Good Neighbor

I was trying to be helpful. I mean, isn't life hard enough, and then you meet people who just as soon run you over as give you the time of day.

So when I get a call from this guy asking me if I know my next-door neighbor, Joe Hackberry, I say, "Sure, I know Joe. Went to his wedding, just last month. Married a nice girl from Waco. A bit too much make-up and hairspray for my taste but nice all the same. Put his house up for sale and took off for Houston, the two of them, just after the ceremony."

Well, this guy on the phone seemed so grateful for my help, said he'd

been trying real hard to get in touch with Joe, so why shouldn't I go over to Joe's house and write down the phone number off the real estate sign for him? He was happy to just hang there on the phone awhile while I checked it out, and who do I meet in his front yard but Joe himself, pulling up the sign right out of the dirt.

"What's the matter, Joe?" I say, because I notice he's all sweaty in the face and kind of agitated, and he proceeds to tell me that his new and lovely wife Loreen had up and gone back to her folks in Waco when she found out Joe's business had gone in the toilet and worse, that a fair number of people were after him because of some sizeable unpaid bills.

"Joe," I say to him, "as a matter of fact, there's a man on my telephone this very minute, wants to talk to you in the worst way."

Well I never in my 62 years have seen a man cover turf as fast as Joe did right then, like I'd lit a fire under

him. Tore across that yard, into my house, and by the time I caught up with him, the phone cord had been pulled plumb out of the wall socket and as a matter of pure fact, the phone itself was laid out in the front yard with its insides all over my petunia bed. Hadn't even bothered to open the window when he threw it out there either.

Things haven't been the same between Joe and me since. It used to be we'd kind of like to sit out on the porch with an iced tea and talk about life, you know? Since that day, though, I've never seen Joe leave his house. I'm all the time seeing people come up his sidewalk and knock, and sometimes they stick a notice or something on the door.

I can't figure out for the life of me, though, why Joe doesn't want to talk to me anymore. After all, I was just trying to be helpful. ♦

—story contributed by
Colm O'Dulachain of Szabo

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has worked well because the agencies don't want us to contact their clients."

Niermeier also uses an "Agency Authorization Form," which agencies and their clients must sign. The document notifies both agency and advertiser of joint and several liability. Additionally, Niermeier restates the station's joint and several liability clause on every invoice. The clause states, "Advertiser, agency and/or service jointly and severally shall be obligated to pay to KFOR-TV the net amount of this invoice." "This statement on invoices," Niermeier asserts, "supercedes clauses on insertion orders that excuse an agency from liability. In my opinion, such clauses make them a buying service, not an agency."

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"THE WAY I SEE IT, LORETTA, YOU'RE SOLELY LIABLE FOR MARRYING FRED, YOU'RE SEQUENTIALLY LIABLE FOR USING RENT MONEY TO BUY THAT NEW COCKTAIL DRESS, AND YOU AND FRED ARE JOINTLY LIABLE FOR LITTLE BILLY FINGER PAINTING THE NEIGHBOR'S CAT. WHO SAID LIFE WAS EASY?"

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Kathy Morgan, Business Manager for WLYH-TV in Lebanon, Pennsylvania, addresses the problem of working with rep firms on national accounts by instructing rep firms to include the station's joint and several liability clause on national sales contracts that are sent to agencies and buying services. "The joint and several liability clause is put on every local and national contract," she says. "Also, contracts are sent out with a letter which restates our terms. If we fail to receive the signed contract, we have a copy of the letter that proves the client was aware of our liability position."

David Evans, Credit Manager for the Atlanta Journal and Constitution, publishes the newspapers' joint and several liability clause on the rate card. "In the two years we've used it, we've encountered no problems with our position," says Evans. "Additionally, I do try

to get personal guarantees on high-risk clients."

Since the BCCA/BCFM position statement is only two years old, most of the media credit managers interviewed have not experienced a case first-hand in which their joint and several liability position has been tested in court. In the two years that her station has implemented joint and several liability, however, Schaaf recalls one significant case in which her station was prepared for litigation. "The station sued an agency that had made only a partial payment. The payment was the amount that the advertiser paid before going bankrupt. The lawyers on both sides discussed the situation, and the agency agreed to a payment plan. The agency also signed an agreement that if the agency defaulted, the station would have a consent judgment against it."

All of the media credit managers interviewed for this article expressed satisfaction with their companies' joint and several liability position as compared with previous

positions. And while they feel the time constraints imposed by the industry sometimes render their credit approval and notification procedures less than ideal, they are optimistic about the future of joint and several liability.

Says Kathy Koenig of Adlink, "I believe that in the future, particularly after a large test case, that joint and several liability will be widely understood."

Szabo Associates recommends joint and several liability because we believe that of all liability positions currently in use by media, joint and several provides the best protection if either party fails to pay. We also believe that the proper checks and notifications are important in order to maximize your chances of recovery.

In the next issue of "Collective Wisdom," we'll present Szabo tips for strengthening your joint and several liability position. We would like to thank all who participated in interviews for this article for their valuable contributions. ♦

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