collective wisdom®

SZABO ASSOCIATES, INC. VOLUME 12, ISSUE 3, SEPTEMBER 30, 1997

Dear Friends:

You haven't been paid by an advertiser or its agency. You've done everything you can to collect, without success. Should you sue?

Szabo Associates interviewed attorney Ronald B. Rich to discuss the issues you should consider before taking that important step. We hope you'll find the feature article to be informative and useful.

On our calendar of upcoming events is the Advertising Media Credit Executives Association convention, October 12th through 15th in Oklahoma City, Oklahoma. And we hope many of our friends will join us to celebrate another great year for media and Szabo Associates at the Szabo Christmas Party in Atlanta on December 6th.

Best wishes,

Pete Szabo, President
Szabo Associates, Inc.

To Sue or Not to Sue ...

When all attempts by both your company and a third party collection agency fail to collect on an overdue account, should you sue? That was the central question posed in a recent interview Szabo Associates conducted with Ronald B. Rich, attorney-at-law with Ronald B. Rich & Associates in Farmington Hills, Michigan. A specialization of Mr. Rich is litigating commercial collection cases.

S.A.: What should a creditor consider when trying to determine the strength of a potential lawsuit and the wisdom of pursuing one?
R.R.: First, learning the characteristics of the debtor will help you know what you're getting into. Seek answers to the following questions:

1. Is the debtor still in business?
2. What is the size of the company?
3. Has the debtor been sued before? What was the outcome?
4. Does the debtor currently have other lawsuits against it pending?

Second, evaluate your documentation. Basically, if the debtor is still in business and able to pay the debt, and if you have adequate documentation or evidence to support your case, then you have a very strong chance of collecting the entire debt.

S.A.: As an attorney, what kind of documentation do you expect from a creditor?
R.R.: I always like to say, "the more, the merrier"—signed contracts, invoices, statements, letters of correspondence, and anything in writing that proves that the advertising was indeed placed or aired, such as tear sheets or computer-generated documents that detail when a spot was broadcast. Written documentation of this sort helps create a very strong case.

S.A.: A reality of this industry is that often, no signed contract exists. What then?
R.R.: Try to establish what is called a "course of dealings." In other words, as a creditor, how have you historically conducted business with the debtor? The more long-term the business relationship, the better your chance of establishing a pattern and subsequently collecting based on the course of dealings.

S.A.: Can we explore a little further the situation in which no signed contract exists? How would you advise a creditor to address the defenses that are likely to be raised by the defendant in such a situation?
R.R.: Let's look at a few that sometimes happen.
1. "The person who said to run the advertising was not properly authorized to do so."
This defense can be overcome by testimony regarding the usual practice between the parties. Specifically, what are the position and duties of the person who authorized the advertising? Was he or she regularly authorizing advertising to run? The fact that the advertising ran and was not cancelled can also help to overcome this obstacle.
2. "The advertising was

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cancelled by phone."
This defense can best be dismantled if you already have a few simple rules and procedures firmly in place. Advise your switchboard and clerks that they have no authority to speak to anyone on the subject of ad cancellations. Make sure you have a good recordkeeping system. Let your advertisers know that every cancellation must be in writing.
3. "Our ad ran in the wrong issue of the magazine," or "We wanted our commercial to air at drive time, and it didn't."
Testimony by the salesperson who personally worked with the advertiser or agency on the agreement regarding insertions or times should successfully overcome this obstacle.
4. "We (agency) will not pay because our client, the advertiser, did not pay us. We are simply the agent for a disclosed principal."
I would establish a "course of dealings" using strong witnesses who convey an attitude of professionalism and who can testify regarding the agreement between media and the agency. Any documentation that supports the existence of the business agreement, even simple faxed confirmations of orders, will be helpful. If you (media) regularly contract with the agency, the burden of proof *should* shift to the agency to prove that the advertiser agreed to pay media directly. In reality, however, the outcome of such a case is largely dependent on the inclinations of the particular judge and jurisdiction.

S.A.: Speaking of liability for payment, a particularly troublesome scenario is one in which the agency sends an advertising tape to a station along with an order that includes the agency's statement of its sequential liability position. The station replies by fax that its liability position is "joint and several," then airs the ad. The agency does not pay, claiming that the advertiser failed to pay it and that the agency never agreed to the station's liability position.
R.R.: When the agency sends the order, immediately fax the agency a confirmation which includes a statement like this: "Our station has adopted a joint and several liability position. Unless we hear otherwise from you within 24 hours, we will assume that you agree to abide by the terms of our joint and several liability clause." This fax will be admissible in court if the agency fails to pay.

S.A.: How can a creditor estimate the likelihood that a debtor will fight a lawsuit "tooth and nail"?
R.R.: The creditor's own credit department will probably have talked to the debtor enough to have a good idea if that is a likelihood. Also, if there is a substantial volume of written correspondence surrounding the situation, particularly with an attorney's involvement, then a fight is likely to occur. I give less credence to verbal communication than to written, even when the debtor states verbally, "We're not going to pay, go ahead and sue, and we'll fight this." A fight is certainly inconvenient; however, if the debtor is still in business and there is no valid dispute regarding the debt, I would suggest that a creditor sue immediately for the full amount.

S.A.: What is a summary judgment and what are a creditor's chances of getting one?

collector's corner

"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!

The following "Collector's Corner" question was addressed by our feature article interviewer to Ronald B. Rich, attorney-at-law, Ronald B. Rich & Associates in Farmington Hills, Michigan.

Question: What can a creditor do to minimize the chances that he will have to use your services to collect an overdue account?

Answer: First, prior to extending credit, get a detailed, completed credit application. Check references, particularly other media references. Ask for financial statements. If a client is "iffy," ask for a personal guarantee.

If you do extend credit and the customer exceeds credit terms, make sure all proper in-house collection processes have been accomplished—phone calls, letters, regular contact to find out the nature of the problem. Analyze your history with the customer to determine whether or not this is an isolated problem. If the customer is an agency that claims it has not been paid by the advertiser, ask the agency if you might contact the advertiser to discuss the problem. If that fails, refer the account to a good third-party collection agency.

R.R.: The plaintiff or plaintiff's attorney files suit, processes a motion for summary judgment, goes to court, and tells the judge that the defendant has no defense or that the defense posed is frivolous. The judge is requested to find the case in the plaintiff's favor without proceeding to trial.

Although, generally speaking, judges do not like to issue summary judgments because they believe defendants should have the opportunity to have their "day in court," they often do grant summary judgments in media cases. The reason is that media cases are very often "open and shut" cases in which the defendant has simply not paid what is clearly owed.

Very often the reason given for nonpayment is that the advertising did not bring the results the defendant expected. Unlike the manufacturer of a product, media does not and cannot guarantee results. Media simply places the advertising that is given to them. If an advertiser doesn't get the expected result, that dispute is between the advertiser and whoever created the advertising.

It should be noted, however, that signed documentation is usually required to get a summary judgment. Verbal agreements will not suffice.

S.A.: What weakens a lawsuit?
R.R.: 1. Lack of proper documentation.
2. Lack of appropriate witnesses who can testify about what happened when you don't have the documentation.

S.A.: Who should those witnesses be?
R.R.: The credit manager would be the best witness for cases in which there is no dispute. When there is a dispute, the sales representative is the appropriate choice to testify about the nature of the business relationship, the sequence of events, and his or her interpretation of them.

S.A.: Is there a dollar amount that you consider too small to sue for?
R.R.: I believe that in the media industry it is important to show that you mean business, not only to the advertiser but also to the advertising community. For that reason, it is sometimes advisable to sue for as little as $1,000, even though you may only break even after costs. We sue often for $1,000 or $2,000; however, to sue for less than that amount is probably prohibitively costly.

S.A.: And what if that $1,000 case is out-of-state?
R.R.: Even so, a creditor might choose to sue. Creditors should know that 95% of these cases never go to trial. One reason is that judges will often force such cases to be resolved during the pre-trial period because they don't want to try small cases. Another reason is that as soon as a suit is filed, the plaintiff's attorney will immediately start putting pressure on the debtor by sending out discovery requests—interrogatories, admissions, requests for production of documents. As soon as defendants have to start paying their attorneys money for their time, they often realize it is better and cheaper to pay the creditor all that is owed.

Even if the case does go to trial and the creditor ends up having to fly a witness to another state to testify, there is merit in letting people know you're serious about collecting your debts, wherever they originate and regardless of their size.

S.A.: Any final words of advice?
R.R.: First, know your customers well. That knowledge will help you determine how to deal with a nonpayment situation long before you need to consider a lawsuit as well as whether or not you should sue if all else fails.

Second, get documentation for every communication you

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have with the customer. Sometimes it takes so little time and effort to create, yet it can save you so much time, effort, and money in the long run. The documentation can be very simple. For example, if an advertiser or its agency makes a last-minute request to extend advertising, immediately confirm the request in writing with a one-sentence fax to the person who authorized it. All it needs to contain is the date of the conversation and what you were authorized to do. That little document is admissible in court.

And third, if after exhausting all remedies to collect a debt from a customer who clearly owes the money and has the ability to pay it, sue!

Szabo Associates, Inc. would like to thank Ronald B. Rich, Ronald B. Rich & Associates, for his contribution to our newsletter. ♦

The Szabo Difference: Collective Experience

Szabo clients reap a lot of benefits from the fact that we specialize in one field. One of those benefits is that every one of our representatives can call on a wealth of experience right down the hall.

Our three dozen collection representatives average 15 years in the collection business and seven here at Szabo.

Here's what that means to you. No matter how bizarre or difficult your collections problem may seem, someone under our roof has probably already handled one like it.

We have not only experience in each of the different media, but also experience with different kinds of advertisers—and different kinds of excuses for not paying.

Someone in our place has gained first-hand knowledge that can help us understand almost any advertiser's business. And someone has discovered the best ways to negotiate a collection.

We put this information into our formal training sessions, but it's also important every day—in conversations at the water cooler, the coffee pot, the lunchroom downstairs. It's a share-the-wealth system in which the wealth is experience.

We don't know of any other collection service anywhere that can offer this kind of added value to media clients.

Yet it's at your disposal from the moment you pick up the phone to call a Szabo representative.

So if somewhere there's a florist who refuses to pay for his radio time because his greenhouse was trampled by runaway circus elephants, it doesn't take us by surprise.

Someone in our place has an answer to it. ♦

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