

## The Payment Liability War Drags On ... Is It Time to Rethink Policy?

Dear Friends:

It's been a long, hot summer, in more ways than one. Carmaker bankruptcies, the still-flagging economy, new advertiser demands on payment terms, and new agency demands regarding payment liability have been extremely troubling for the media industry. The events of this year have brought into focus a serious problem that has plagued media for close to two decades—payment liability. In this issue, we propose an approach to help bring us closer to resolution, which must happen for the industry to realize its potential for efficiency and growth.

Our fall and early winter calendar includes celebrating Division Manager Nolan Childers' 25th anniversary at Szabo on November 12; the MFM/BCCA Regional Seminar and the National Media Credit Group Conference, November 17, in New York City; and our annual Szabo Holiday Party, December 12, here in Atlanta.

Best wishes for a wonderful fall season,



Robin Szabo, President  
Szabo Associates, Inc.

Eighteen years ago, we reported a change in payment liability policy by the American Association of Advertising Agencies. (See *Collective Wisdom*, September 1991.) The association's endorsement of a sole liability position, variations of which had been used in the industry for approximately 60 years, was supplanted in 1991 by a new "sequential" liability position, designed to protect agencies from payment responsibility to media in the event that advertising clients failed to pay them. The announcement prompted a swift response by the BCFM/BCCA (now MFM/BCCA) Boards of Directors, who encouraged media to adopt a "joint and several" or "dual" liability position, which held both agencies and advertisers liable for payment until media received payment in full.

In the nearly two decades since those announcements were made, neither the agencies nor media have budged from their stated positions. Although most media properties have by now adopted the joint and several liability position, enforcement problems continue to plague the industry. Those properties whose implementation processes were flawed have suffered the most; however, all have encountered problems because of the ongoing absence of an industry custom and practice when it comes to payment liability.

To make matters even more difficult, the current recession has compelled many advertisers to begin dictating payment terms to

their suppliers. Advertisers are asking their advertising agencies and media to assume some of the burden of their credit problems by accepting longer payment terms. Two of the more headline-grabbing cases this year were Anheuser-Busch's notification to media that their invoices would now be subject to net 120 days, and General Motors' demand for 70-day payment terms. (See *Collective Wisdom*, June 2009.)

In the wake of Chrysler's bankruptcy filing, agency BBDO sent its suppliers new letter agreements that revised its payment liability position. According to Chrysler's filing, BBDO, whose parent company is Omnicom, was owed \$58 million, making it the automaker's second-largest unsecured creditor. While an Omnicom representative characterized the letter agreement as a reiteration of existing policy, the language in the letter imposed the possibility of greater risk for media. BBDO's new agreements would have bound any media outlet signing it to sequential liability terms for all past and future obligations by Chrysler. Mary Collins, president and CEO of the Media Financial Management Association (MFM) noted in the association's advisory to media that the language of the agreements was particularly troubling because the new language would create "sequential liability that went forward and backward" for any media doing busi-

—continued on page 2

## *Time to Rethink—*

*—continued from page 1*

ness with Chrysler. The MFM's advisory also alerted media to language in the letter agreement that might have bound all locations and subsidiaries of a media company to the terms, even if only one outlet or location signed it.

After receiving pushback by production shops in the U.K. and media outlets in the U.S., BBDO backed off of its new demands. PHD, the in-house buying service for Omnicom/BBDO, subsequently sent out checks to media suppliers totaling approximately 98% of the amount owed by Chrysler prior to its filing. Even so, the checks sent to media represented only those amounts that Chrysler paid BBDO for media purchases. Additionally, the agency's attempt to impose new agreements on media reflects the increasing concern of agencies that they will be left "holding the bag" when bankrupt advertisers fail to pay.

Understandably, agency CFOs and counsel continue to explore ways to minimize risk, from inserting language on check stubs that seek to provide legal protection should the client fail to pay its bills, to formulating new agreements with media that reinforce and broaden the terms of their sequential liability position.

In fairness, agencies and media outlets share many of the same problems and complaints. Agencies have long borne in silence the resentment that some clients use them as banks rather than strategic partners. Like many media outlets, agencies are reluctant to demand that clients, especially long-standing ones and especially in a difficult economic climate, pay in advance for services. Clients also resist the idea of paying in advance, seeking not only to

minimize their own cash flow problems but also to protect themselves in case the product or service delivered is not to their liking. In this uncomfortable business climate, many agencies feel they have no choice but to seek protections wherever possible and transfer risk down the line.

Likewise, media outlets feel pressure to bankroll customers' media investments. And even though their joint and several liability position makes all parties liable for payment until they are paid, media, too, are reluctant to go after agencies who have not been paid by advertisers, or to go after advertisers who have paid agencies that subsequently fail to pay media.

The unfortunate reality for both agencies and media is that advertisers, especially those with size and clout, can and will pretty much demand what they want, and vendors will pretty much accommodate those demands. Media may be one step beyond agencies in the payment food chain; however, at the end of the day, both rely on the advertiser for revenue.

After almost two decades of engaging in the "payment liability wars," perhaps it is time to consider a new approach to increasing the likelihood of getting paid, in full and on time. While Szabo is not advocating media's abandonment of the joint and several liability position, we recognize the difficulty of enforcing a position that too often is ignored or challenged.

When all goes well—that is, when advertisers and agencies remain solvent, and all parties deliver the products or services as promised—sequential liability works well and fairly. The problems arise when one or more parties fail to deliver, and media are left with the difficult decision of whether or not to pursue one or all parties involved in order to get paid. So, what can be done to reduce the chances of having to make that decision? Are there

ways to make employment of media's joint and several liability clause a rare occurrence?

By doing everything possible to make sequential liability work, media are in a better position to enforce their joint and several liability clause should the advertiser or agency fail to meet its part of the bargain. We might call this approach a "hybrid" of both positions since it employs basically the same implementation tools as joint and several, and it retains the joint and several clause as the fallback if the situation goes awry. The essential elements of the approach are as follows:

**Cooperation.** The major pitfalls of sequential liability exist because the advertiser and media do not engage each other in the media buying process. For the system to work well, all three parties—advertisers, agencies, and media—must cooperate with each other. Simply put, everyone needs to know what is going on. The cooperative effort begins with each party recognizing that all parties stand to benefit from working together. The effort needs to be viewed not as an unwelcome intrusion but as an opportunity to strengthen relationships and create a better outcome for all.

Advertisers should understand that it is in their best interests for media to be acquainted with their business and with their agreements with agencies. Advertisers who are willing for media suppliers to have such information and who pay their agencies in accordance with their agreements reduce the likelihood that they will be pursued by media for payment should the agency fail to pay. If the agency fails to pay media on time, the media supplier will know that the problem lies with the agency and will know to pursue payment

with the agency before it goes bankrupt. Additionally, advertisers need to insist on written verification from the agency that it has honored its fiduciary responsibility by paying media the money the advertiser has paid the agency for media purchases.

Agencies also should understand that it is in their best interests to share information with media about themselves and their customers. If the media company knows and approves the advertiser and the advertiser then fails to pay, the agency may recognize that media is an ally willing to help resolve the problem.

**Disclosure.** Since the agency is the party with whom the advertiser contracted, the agency should be the primary source of information on the advertiser. The agency must be willing to perform a thorough credit check on its customer, to share the results with media, and to answer media's questions regarding its agreement with the advertiser and its pro-

cedures for dealing with delinquent accounts.

What credit investigations has the agency done on the advertiser? What are the terms of payment? Agencies are now agreeing to longer payment terms with advertisers, and media are often left unaware of these new terms until months later, when their own invoices have become delinquent. Is the advertiser billed on estimates prior to the run or after? When do internal collection efforts begin? Is the agency willing to demand payment in advance from advertisers with questionable creditworthiness? Are there any additional parties, such as buying services, involved in the sequential liability chain? At what point will the agency revoke credit privileges on past due accounts?

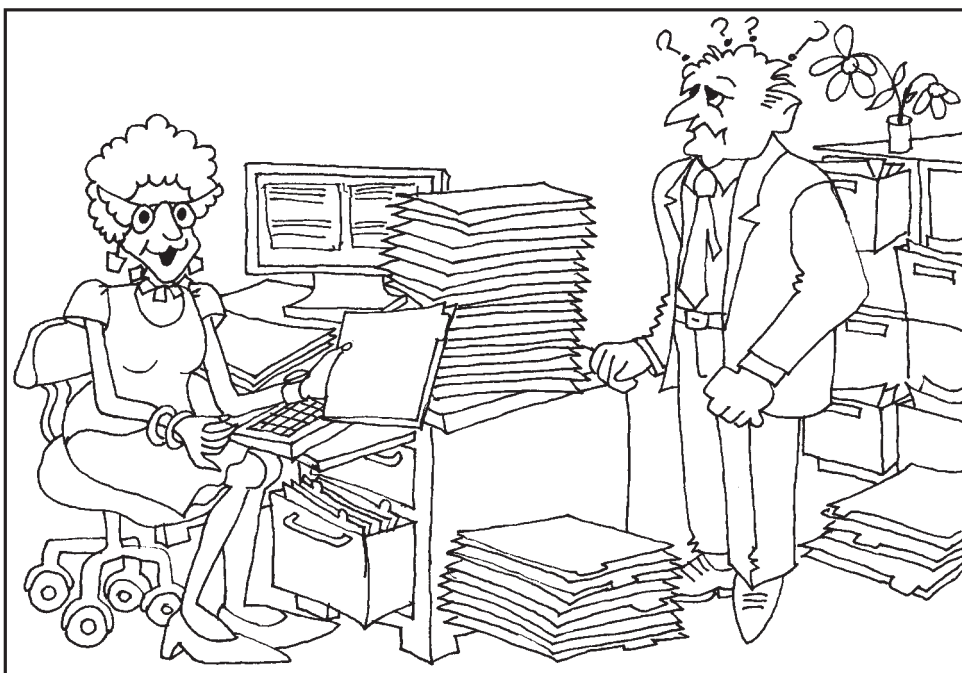
By knowing the agency's timetable as well as its payment terms with the advertiser, media can establish their own timetable for payment by the agency. The agency should also agree to inform media of payment delinquency and factors that might be affecting the advertiser's ability to pay.

### **Bankruptcy Procedures.**

This year's bankruptcy filings are having a staggering effect on agencies and media properties. The amounts that agencies are owed by bankrupt advertisers include many millions in unpaid invoices from local and national media outlets. Court documents reveal that GM owes nearly \$167 million to advertising giants Publicis and Interpublic. Taking the biggest hit was Publicis' Starcom MediaVest, which buys advertising for GM; the carmaker's sixth-largest unsecured creditor is owed \$121.5 million. It remains to be seen when and how much, if any, money owed to media will be paid.

Procedures for dealing with advertiser bankruptcies should be agreed upon by the agency and media supplier. If an advertiser files for bankruptcy, the agency and media supplier should immediately be made aware of claims and motions by either party as well as any demands by the bankruptcy trustee for preference payments. (See *Collective Wisdom*, December 2004.)

Because payments on prepetition claims are often long in coming and are a fraction of what is owed creditors by the bankrupt debtor, many unsecured creditors file a first-day motion seeking "critical vendor" status. Simply defined, critical vendors are those vendors or suppliers identified by the debtor as essential to its continued existence. Usually, the debtor (or trustee) urges the bankruptcy judge to approve payment of prepetition claims of these vendors. In return, the vendor is expected to continue to sell services, postpetition, to the debtor under the same or better terms. Suppliers awarded this status by the court often hold a substantial unsecured claim on the filing. While critical vendor status is enviable, it does not mean that the debtor will be



"I started to pull together all the files on payment liability disputes over the past ten years, Boss. I quit when it started to look like a bill coming out of Congress."

—continued on page 4

## Time to Rethink—

—continued from page 3

able to pay. Additionally, the status can be revoked by a higher court. (See *Collective Wisdom*, March 2005.)

Both Chrysler's and GM's principal advertising agencies, hoping to continue doing business with the reorganized companies and have their unpaid invoices paid, filed for critical vendor status with the respective bankruptcy courts. The court approved Chrysler agency BBDO for critical vendor status, indicating that the court viewed advertising as important to the car company's recovery. It has not yet been determined which, if any, agencies and media suppliers will make it onto GM's critical vendor list. GM has many more suppliers than Chrysler, which may make it more difficult to get awarded special status.

Agencies that request critical vendor status from the bankruptcy court should be willing to inform media if and when that status is granted and the terms of the negotiation. How much of the prepetition debt is the agency getting paid and when? How long is the agency committed to postpetition trade? What are the postpetition credit terms? What will the agency do if the advertiser defaults on postpetition invoices? Will the agency's postpetition credit exceed the prepetition debt?

**Dispute Resolution.** All parties should agree on a clear policy for resolving liability disputes. If the agency refuses to pay after media's attempts to collect fail, will media inform the agency that they intend to notify the advertiser of the nonpayment? If the agency claims it has not been paid by the advertiser, will media contact the advertiser to

investigate the problem, and when will they do so?

**Moving Forward.** It has become abundantly clear that agencies, rather than accepting media's joint and several liability position, are continuing to insist on and even broaden their sequential liability position. This impasse is costly to all parties, not only in terms of revenues delayed or lost because of liability disputes, but also in terms of the industry's inability to evolve its processes. Without an agreement on liability, it is impossible to move to industry-wide electronic ordering, which would greatly improve efficiencies and improve cash flow. Now is the time for media associations, the 4A's, and advertisers' associations to form a committee to evaluate options and develop procedures to help bridge the divide and move the media industry forward. ♦



Collective Wisdom® is a publication of  
Media Collection Professionals,  
3355 Lenox Rd., Suite 945, Atlanta, Georgia 30326  
Tel: 404/266-2464, Fax: 404/266-2165  
Web site: www.szabo.com  
e-mail: info@szabo.com

©Szabo Associates, Inc. 2009. All rights reserved. Materials may not be reproduced or transmitted without written permission.

PRESORTED  
STANDARD  
U.S. Postage  
PAID  
Atlanta, GA  
Permit No. 747