

Defending Utility Damage Claims “When the Excavator is Not-At-Fault”

/ BY WAYNE JENSEN



Editor's Note: Wayne Jensen is the Director of Safety for Stahl & Associates Insurance and the Chairman of the Tampa Bay Excavation Task Force, which he founded in 2008. Wayne has served on the Board of NUCA and currently serves on the Board of the Sun-coast Utility Contractors Association.

We invite opinion and dialog from all stakeholders. Please submit your comments to Jeff Bistodeau: jeff@emailir.com.

If ever there is a utility damage, it is critical to make as many preemptive strikes to prevent the claim from ever being issued. Here are some things to consider.

1. What the excavator does immediately after a damage is extremely critical and the following actions should be considered:

- Call the locator out to the site and take their statement -- good, bad or otherwise, get the statement. Very often, the locator will admit guilt or admit to making bad locate, but

that typically does not get captured. Get signatures and if they refuse, note the refusal.

- After meeting with the locator, call the utility and get statements made by them with the locator present about the damage not being the fault of the excavator. Ask for an affidavit stating that the excavator is not at fault if that is indeed the case. Or, at least make a note in the Daily Diary and ask the locator to sign it. If they won't provide verification that you are not at fault begin calling "up the chain of command" at the utility and locating organization.

- It is terribly critical to document every aspect of the damage immediately after the damage and before repairs are made. It is rare, but we have seen locators come back out and paint marks on the ground to make it look like the locate was correct. Document the proximity of the locate marks to the damage with "precision." The best practice of all is to have a surveyor document the marks and the location of the damage; photographic documentation is rarely good enough unless you use "Rhino Kits" to show distances with photography.

- It is critical to record every aspect of the repair process in great detail. Ask for names of repair people, tag numbers of vehicles, times repair people arrive at the site and time leaving, the amount of time they take breaks, what material they use (photograph), and what equipment they use. The more information, the better.

2. The excavator must always understand that it is the practice of a very limited number of utilities to bill for damage, whether or not they believe they were at fault or if there was a bad locate. They may send a bill six months after the damage when the excavator rarely can "prove" they were not at fault. So, they generally collect at least 50% of their claim because insurance companies will pay when they do not have enough excavator documentation that proves their excavator was not at fault:

- It can be so bad that it is important for excavators working in any given area to take note of any damage that occurred with anyone else working in the same area, even if it is across the street. We have seen excavators billed for the damages of others numerous times.

- We must defend against this tactic by taking the measures suggested above or at least calling the utility whose facility you know was damaged and note who did the damage to protect your company.

- You can report damage with the One Call System as well, so the word gets back to the utility. And, sometimes, the error on the part of the utility is just that... an error.

3. Billing the utility for excavator downtime can be a powerful preemptive strike:

- The excavator is unlikely to collect because of the amount of aggravation and cost, but it is worth sending a bill. If nothing else, it will flush out their "wrongful" damage claim. Then you will have all the necessary documentation to defend against their claim should it be issued.

- If the excavator is working for a public owner, it is usually helpful to involve them in doing their own verification that you were not at fault. If there is a contractual obligation of the utility to the public owner, there may be an opportunity for cost recovery through the contract.

4. Air grievances against a utility in the public forum:

- All utilities participate in utility coordinating groups that excavators can attend and you can air your issues there.

- Notify the One Call system of the grievance to be aired.

5. Ask the locator to document compliance with all of the "Locator Best Practices" that are found in documentation by the Common Ground Alliance:

- You can take a print-out of the Locator Best Practices, go over them with the locator and simply ask "Do you do this?" Just record yes or no. If they give you honest answers, you win. If they do not answer, you still win. I promise you they have many failures in their own practices that impact locating.

- Conduct a "Root Cause Analysis" for locators based on their compliance/or lack of compliance with best practices. While unlikely, they will provide the answers that can be recovered if you need them later

6. Document all of your "Excavator Best Practices" that were used to prevent damage in any particular case and in general:

- The hardest approach for a utility to break is "Excavator Best Practices" when they are done. Ask yourself the "Do we do this?" questions with regard to the Excavator Best Practices. Every time you have a "yes we do this" answer, you are much more difficult to beat in a wrongful damage claim and much less likely to have a damage in the first place.

- Always explore your own "root causes for excavator damage" when you are at fault. While you may be at fault, you may not be "totally" at fault and if the utility shares responsibility that always means a reduction in claim value.

- It is always important for excavators to conduct self-critical analysis of their internal practices that may allow at-fault damages to occur. All excavators whose "intent is to prevent" damage will eliminate both internal and external "excuses" for damage.


7. Best Practices for excavators, especially if you know fiber optic or phone facilities are in the space. It is critical to make the following requests of the utility and their locators and document their answers during an on-site meet:





- Ask the utility to verify locate accuracy by hand digging enough points to be certain the excavator can rely on accuracy, especially in fiber optic cases which have vulnerability to damage while potholing.
- Ask them about the techniques and equipment they will be using to locate the area.
- Ask them of their concerns about the accuracy of their locating. There is a long list of locating problems that all locators have.
- Ask them for the “quality of data” they are using for locating. Most locating today is done with quality level “D” As-Built data, with quality level “A” data being data recovered by a surveyor who dug it up and confirmed its location with survey accuracy.
- Ask to be present when they are locating.
- Show the locators the position of utilities represented on the construction drawings so they can compare them to their as-built information.
- Document the position of locate markings using photography and ask the locators to document as well.
- Ask locators to be present when you are digging. Utilities and their locators may refuse to do some of these things, but it is important to document your requests and ask for written answers for why they can’t or won’t.

It absolutely makes no sense to be forced to pay a damage claim when, as an excavator, you are not at fault. By collecting the documentation to win a damage claim on the “day of the damage” you are much more likely to have the information necessary to defend a claim when it is billed six months later. The rule always applies: “He who has the thickest file usually wins.” This rule was learned by spending a lot of years defending utility damage claims.

Now, here is a bit of good news! As an excavator, if you put these systems in place to “defend damage claims,” your vulnerability for being responsible for damage decreases dramatically. And, when you do have damage for which you are not at fault, the likelihood for being billed decreases as well. In the final analysis, the best way to defend a damage claim is to “not have damage.” 

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