



How to Reduce Liability and the Risk of Being Sued.

BY JIM PROSZEK

Potential liability for damage to underground utilities is an everyday reality. However, there are steps companies can take to reduce that exposure.

There are three key steps to reduce liability and lessen the likelihood of being sued: 1) preparation of a damage prevention program; 2) implementation of the program; and 3) documentation of the implementation of that program. These steps begin long before a particular project is even conceived and continue through all phases of the project. Failure to do so is a sure recipe for a very uncomfortable, and expensive, time in depositions and trial!

I. BEFORE THE PROJECT IS CONCEIVED

Reducing liability begins with preparation of a training program covering the types of activities and projects in which the company expects to engage. The training program should cover the requirements of One Call laws and applicable regulations in all the states in which the company will be working. Company personnel should be particularly aware of the amount of time they must wait to

begin after providing notice to the One Call Center, the width of the tolerance zone, the meaning of the utility marks (i.e., a single cable or a duct bank) and how that impacts the tolerance zone, and any additional requirements for excavation which is to take place within the tolerance zone.

Compliance with the letter of the law, however, is only the beginning. A claim for negligence, the most common theory of liability in a utility damage case, is based on what a reasonably prudent person would do in similar circumstances. If accepted industry standards and practices contain additional precautions beyond what the law specifically requires, mere compliance with the law will not preclude liability. A training program should therefore include industry standards and practices applicable to the work to be performed.

Training should also cover the use and calibration of any equipment that will be used. This should include the specific operating manuals for that equipment which often include warnings that the equipment operator should read the manual and should not operate the equipment until he has done so.

Simply having a training program is not enough. The company should also implement that program by making sure not only that the training and training materials are available to its employees, but also that the employees actually participate in the training and read the materials. All too often testimony from the company's safety director regarding the detailed and comprehensive nature of the company's training program and materials is completely undermined by testimony from employees that they never received the training or the training materials.

Finally, training provided to employees should be documented. It does little good to have a comprehensive training program if the company cannot prove that the employees actually received that training.

II. PRE-EXCAVATION ACTIVITIES

Preparation for a specific job begins long before any earth is actually moved. The company should review all plans and specifications for a job, paying particular attention to references to, or depictions of, underground utilities and any specific requirements for protection of those

utilities or communications with the operators. Plans oftentimes contain warnings that the failure to follow such requirements can result in damage to underground utilities. The company should make sure that the plans and specifications have been made available to supervisory personnel and to employees who will be responsible for performing the work in the field and should document the manner in which that was done.

Upon arrival at the jobsite, the company should compare the actual conditions in the field with those shown on the plans. Any discrepancies or omissions should be documented in writing and called to the project owner's attention.

Once notice has been provided to the One Call Center, the company should verify that all underground utilities have been marked. This verification should include a comparison of the marks observed in the field to utilities shown on the plans and listed in the dig ticket the company receives from the One Call Center. It should also include an inspection of the excavation area for any indication of unmarked utilities such as permanent warning signs, risers and manhole covers.

The results of the notice and verification should be documented. The company should maintain copies of the dig tickets. The company should also photograph the utility markings in the excavation area before beginning any work. These photographs are particularly important when issues arise as to whether a particular underground utility facility was marked and/or accurately marked.

III. THE EXCAVATION

The company should have a plan for implementing all safety precautions required during the actual excavation. The company should also make sure not only that there is a plan, but that all employees on the jobsite are knowledgeable about that plan and capable of carrying it out. Both are essential. Answering "no" to the question of whether the company had a safety plan is bad. Answering "yes" to that question, but then having to admit it was not followed, is equally bad.

The plan, and the implementation of that plan, should include proper calibration and setup of all equipment used in the work. It should include potholing or exposing all utilities by hand-digging or other non-invasive forms of excavation before excavating with mechanized or power-driven

equipment within the tolerance zone. It should include proper protection and support for utilities once they have been exposed. If potholing within the tolerance zone fails to reveal the underground utilities that have supposedly been marked, the company should contact the operator or the One Call Center, notify them of the discrepancy, and wait for a response before excavating further. The company should also pothole to the full depth of the intended excavation. Many a company has learned to its dismay that stopping the pothole after uncovering the first underground line resulted in hitting the one beneath it which had not been found.

There will be times when a company cannot, due to depth or ground conditions, pothole all existing utilities. In such circumstances, the company should contact the utility owner for additional assistance in locating the facilities.

Once again, however, planning and implementation can be all for naught if the company cannot later prove that this has been done. The company should therefore document the calibration of the equipment and photograph and/or prepare logs of the pothole activity. The company should also keep records of any notices to utility owners and One Call Centers regarding discrepancies between the utility marks and the results of the potholing and of the utility owners' responses, or lack thereof, to requests for additional assistance in locating their facilities.

IV. IF AND WHEN A DAMAGE OCCURS

Despite best efforts at preparation and prevention, damage to underground utilities can still occur. The company should therefore have a plan of action for when an underground facility is damaged.

The first part of this plan is the safety of its workers and to the general population in the area. For example, in the event of damage to a gas line, the company should immediately move its employees and any other individuals away from the damage and notify the first responders. The company should also notify the One Call Center and the facility owners and keep records of how and when the notifications were made.

Once it is safe to do so, the company should attempt to determine the cause of the damage. Was the utility marked? If not, are there any indications in the area that should have put the excavator on notice of unmarked underground utilities? If the damaged utility was marked, were the marks accurate? Did the company

employ the proper precautions when excavating within the tolerance zone?

Photographs are particularly important in documenting the answers to these questions. The critical element of such photographs is a ruler or some other measuring device to put everything into perspective. A photograph of a utility mark and the point where the damage occurred with nothing to show the distance between the mark and the damage can be nearly as useless as no photographs at all.

The photographs should likewise be taken from a distance at which the measurement can be seen. A series of photos in which the measurement cannot be seen is little better than photos without a measurement at all.

Finally, the company should be aware that it is not the only entity investigating the incident. The company should have a person designated in advance to be responsible for communications with the authorities and with the investigators for, and employees of, the facility owners. The company's employees should be instructed not to answer questions, but rather to refer all questions and any questioners to the person responsible for such communications. The company should also document all such communications either with actual recordings or in written form.

CONCLUSION

Given the plethora of underground utilities, particularly in urban areas, damage to underground facilities will inevitably occur. A company's best chance to reduce liability and prevent being sued is thus to prepare a damage prevention plan, to implement that plan, and to document its implementation of that plan. **ESG**

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