

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 930 (Levine)
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Hearing Date: July 6, 2021
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Subsurface installations: attorney's fees and costs

DIGEST

This bill provides that, in a dispute regarding damage to a subsurface installation between the installation's operator and the excavator, the excavator is entitled to reasonable attorney fees and costs if (1) the finder of fact determines that the damage was the result of the operator's inaccurate markings, or (2) the excavator made an offer to settle that is not accepted and the operator fails to obtain a more favorable judgment or award.

EXECUTIVE SUMMARY

Current law provides a comprehensive set of safety measures designed to prevent excavators from inadvertently coming into contact with, or damaging, subsurface installations. These installations – which include underground gas lines – are costly to repair and can require service interruptions. When an excavator damages a subsurface installation in the course of an excavation, the law authorizes the operator to seek damages for the damaged installation, unless the damage resulted from the operator's or the operator's agent's own inaccurate marking of the installation's location.

This bill would award attorney fees and costs to an excavator in a lawsuit or arbitration arising from damage to an operator's subsurface installation in two circumstances: (1) when the court determines that the damage was the result of the operator's inaccurate marking of the location, or (2) the excavator made a settlement offer that the operator rejected, and the operator did not obtain a more favorable result at trial or the arbitration.

This bill is sponsored by the Southern California Contractors Association and supported by American Subcontractors Association of America. There is no known

opposition. This bill passed out of the Senate Business, Professions and Economic Development Committee with a vote of 13-0.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the “Dig Safe Act of 2016” (the Act) which, among other things, regulates subsurface excavation safety through a system of regional notification centers (RNCs) and requires operators to take certain safety precautions. (*See* Gov. Code, tit. 1, div. 5, ch. 3.1, art. 2, §§ 4216 et seq.) The Act includes the following relevant definitions:
 - a) “Excavation” is any operation in which earth, rock, or other material in the ground is moved, removed, or otherwise displaced by means of tools, equipment, or explosives in any of the following ways: grading, trenching, digging, ditching, drilling, augering, tunneling, scraping, cable or pipe plowing and driving, or any other way. (Gov. Code, § 4216(g).)
 - b) “Excavator” is any person, firm, contractor or subcontractor, owner, operator, utility, association, corporation, partnership, business trust, public agency, or other entity that, with their own employees or equipment, performs any excavation. (Gov. Code, § 4216(h).) The definition excludes certain owners and lessors of real property who are not engaged as a contractor or subcontractor and do not require a permit for the excavation project. (*Ibid.*; *id.*, § 4216.8.)
 - c) “Operator” is any person, corporation, partnership, business trust, public agency, or other entity that owns, operates, or maintains a subsurface installation, but for purposes of membership in a regional notification center, does not include an owner of real property where subsurface installations are exclusively located if they are used exclusively to furnish services on that property and the subsurface facilities are under the operation and control of that owner. (Gov. Code, § 4216(o).) State and local agencies that own and operate subsurface installations are subject to the Act’s requirements. (*Id.*, § 4216.5.)
 - d) “Subsurface installation” is any underground pipeline, conduit, duct, wire, or other structure, except nonpressurized sewerlines, nonpressurized storm drains, or other nonpressurized drain lines. (Gov. Code, § 4216(s).)
- 2) Requires every operator of a subsurface installation, except the Department of Transportation, to become a member of, participate in, and share in the costs of, an RNC. (Gov. Code, § 4216.1.)
- 3) Requires an excavator planning to conduct an excavation to notify the appropriate RNC of the excavator’s intent to excavate at least two working days, and not more than 14 calendar days, before beginning that excavation; the date of the notification

does not count as part of the two-working-day notice. If an excavator gives less notice than the legal excavation start date and time and the excavation is not an emergency, the RNC will take the information and provide a ticket, but an operator has until the legal excavation start date and time to respond. (Gov. Code, § 4216.2.)

- 4) Provides that an operator must do one of the following prior to the legal excavation start date and time:
 - a) Locate and field mark within the area delineated for excavation and, where multiple subsurface installations of the same type are known to exist together, mark the number of subsurface installations;
 - b) To the extent and degree of accuracy that the information is available, provide information to an excavator where the operator's active or inactive subsurface installations are located; or
 - c) Advise the excavator it operates no subsurface installations in the area delineated for excavation. (Gov. Code, § 4216.3(a).)
- 5) Requires an excavator, if the field marks are no longer reasonably visible, to renotify the RNC with a request for remarks that can be visible for all or a portion of the excavation. Excavation shall cease in the area to be remarked. If the delineation markings are no longer reasonably visible, the excavator shall redelineate the area to be remarked. If remarks are requested, the operator shall have two working days, not including the date of request, to remark the subsurface installation. If the area to be remarked is not the full extent of the original excavation, the excavator shall delineate the portion to be remarked and provide a description of the area requested to be remarked on the ticket. The excavator shall provide a description for the area to be remarked that falls within the area of the original location request. (Gov. Code, § 4216.3(b).)
- 6) Requires that, where an excavation will come within a certain distance of a subsurface installation (the "tolerance zone"), the excavator must take the following precautions:
 - a) Determine the exact location of the subsurface installation with hand tools before using any power tools within the tolerance zone; except that the excavator may use vacuum excavation to expose the subsurface installation where the operator has agreed, and the RNC has been notified. (Gov. Code, § 4216.4(a).)
 - b) If the exact location cannot be determined by hand excavation, the excavator must request the operator to provide additional information to the excavator provide additional information, to the extent possible, regarding the location of the subsurface installation. The RNC shall provide the contact telephone number of the subsurface installation operator for purposes of obtaining this information. (Gov. Code, § 4216.4(b).)

- 7) Provides that in lieu of the notification and marking requirements above, an excavator is permitted to contact an RNC to request a continual excavation ticket for an area of continual excavation; the RNC must provide a ticket to the person who contacts the center pursuant to this section and shall notify any member, if known, who has a subsurface installation in the area of continual excavation. The ticket provided to the excavator must include the contact information for notified operators. (Gov. Code, § 4216.10.)
- 8) Provides the following relating to liability for damages as between excavators and operators:¹
 - a) If a subsurface installation is damaged by an excavator as a result of failing to comply with the notice, marking, remarking, or location requirements, or as a result of failing to comply with the operator's requests to protect the subsurface installation as specified by the operator before the start of excavation, the excavator shall be liable to the operator of the subsurface installation for resulting damages, costs, and expenses to the extent the damages, costs, and expenses were proximately caused by the excavator's failure to comply. (Gov. Code, § 4216.7(a).)
 - b) If an operator of a subsurface installation, without a reasonable basis, as determined by a court of competent jurisdiction, has failed to comply with the requirements to provide certain information regarding subsurface installations under its control, the operator shall be liable for damages to the excavator who has complied with specified Act requirements, including for liquidated damages, liability, losses, costs, and expenses, actually incurred by the excavator, resulting from the operator's failure to comply with these specified requirements to the extent the damages, costs, and expenses were proximately caused by the operator's failure to comply. (Gov. Code, § 4216.7(c).)
 - c) Provides that an excavator who damages a subsurface installation due to an inaccurate field mark, as defined, by an operator, or by a third party under contract to perform field marking for the operator, shall not be liable for damages, replacement costs, or other expenses arising from damages to the subsurface installation if the excavator complied with the notification, marking, and locating requirements. (Gov. Code, § 4216.7(d) & (e).)
- 9) Provides that, not fewer than 10 days prior to commencement of trial or arbitration of a dispute to be resolved by arbitration, any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time. The written offer must include a statement of the offer, containing the terms and conditions of

¹ The Act also provides civil penalties for operators or excavators who violate provisions of the Act, which are not relevant here. (See Gov. Code, § 4216.6.)

the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted.

- a) Any acceptance of the offer must be in writing and shall be signed by counsel for the accepting party or, if not represented by counsel, by the accepting party.
- b) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff cannot recover their postoffer costs and must pay the defendant's costs from the time of the offer. In addition, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant. (Code Civ. Proc., § 998.)

This bill:

- 1) Provides that, in an action between an excavator and an operator arising from damage to a subsurface installation, a court or arbitrator shall award reasonable attorney fees and costs, including expert witness fees, to an excavator under the following circumstances:
 - a) The court or arbitrator determines that the excavator is not liable to the operator due to an inaccurate mark by an operator, or by a third party under contract to perform field marking for the operator; or
 - b) The defendant excavator makes an offer to settle the matter that is not accepted and the plaintiff operator fails to obtain a more favorable judgment or award at the conclusion of litigation or arbitration.
- 2) Makes other nonsubstantive technical and conforming changes.

COMMENTS

1. Author's comment

According to the author:

AB 930 authorizes attorney fees and costs to the excavator who is found to not be at fault for damaging a subsurface installation due to errors on the part of the operator who owns and is responsible for labeling the location of the subsurface installation.

The bill is intended to have a dual role. First and foremost it will increase the safety in excavation practices by providing downward pressure from utility company management to those individuals in the field locating and marking

underground utility. This is accomplished by potentially increasing litigation costs for utility companies. With the potential to pay for another party's attorney fees at risk, utility companies will increase their diligence when locating and marking underground utilities and how they excavate around them. This heightened level of excavation also increases the public's safety.

Secondly, it eliminates the disparity in legal resources by authorizing the [excavator to recover attorney fees in certain circumstances]. Construction contractors, the vast majority of which do not have attorneys on staff, will be able to consider defending claims against them rather than being forced into either paying or settling a claim outright.

2. California subsurface excavation laws, designed to protect subsurface utility infrastructure, authorizes the operator of a subsurface installation to seek damages from a contractor who damages the installation during construction

Significant portions of California's critical utility infrastructure are located underground, frequently along public rights-of-way. This infrastructure, referred to as subsurface installations, includes underground pipelines, conduits, ducts, and wires. Many of these subsurface installations, when damaged, can cause disruptions to utility service, are costly to replace, and pose significant risks to public safety.² Accordingly, California's Regional Notification Center System was created to ensure that persons conducting work that involved digging or other activities below the ground were informed of the location of critical infrastructure. Accordingly, excavators must contact the local RNC between two and 14 days prior to beginning digging work.³ Once the excavator notifies the RNC, the operator of the subsurface installation (e.g., the power or utility company) is then tasked with going to the construction site to locate and field mark the location of all subsurface installations, and to re-mark them as necessary.⁴

Despite the extensive protective regime put in place for excavation around subsurface installations, there is still a problem in the state with excavators and operators not complying or properly marking subsurface installations. Sometimes the error is on the part of the excavator, who fails to call the RNC or wait until the subsurface installations have been properly marked.⁵ But sometimes the fault lies with the operator, who fails to properly mark the locations of subsurface installations. In a 2018 investigation, the California Public Utilities Commission instituted an investigation into allegations that

² E.g., Shalby & Karlamangla, *Explosion in Murrieta neighborhood kills one, injures 15*, Los Angeles Times (Jul. 15, 2019), <https://www.latimes.com/local/lanow/la-me-house-explosion-murrieta-20190715-story.html> [last visited Jul. 2, 2021].

³ Gov. Code, § 4216.2.

⁴ Gov. Code, §§ 4216.3, 4216.4, 4216.10.

⁵ E.g., Shalby & Karlamangla, *Fatal gas line explosion in Murrieta a warning for home contractors*, Los Angeles Times (Jul. 16, 2019), <https://www.latimes.com/california/story/2019-07-16/murrieta-explosion-gas-line-1-dead-15-injured> [last visited Jul. 2, 2021].

PG&E routinely falsified subsurface installation markings and/or was habitually late in providing the required markings;⁶ the investigation concluded with a settlement in which PG&E agreed to pay a penalty of \$110 million and undertake certain reforms at shareholder expense.⁷

In recognition of the fact that excavation damage to a subsurface installation can be the responsibility of either the excavator or the operator, the Act authorizes an operator to recover damages from an excavator who damages an installation during an excavation due to failure to comply with the notification and marking requirements, except where the excavator can show the damage was the result of the operator, or the operator's agent, inaccurately marking the subsurface installation.⁸ The statute does not currently provide for prevailing party attorney fees or costs.

3. This bill awards reasonable attorney fees and costs to an excavator in a suit filed by an operator in specified circumstances

According to the author and the supporters, the current provisions allowing an operator to sue an excavator for damage to a subsurface installation do not adequately disincentivize meritless suits. Specifically, they state that, too often, operators will sue excavators for damages that the operators themselves were responsible for – typically by incorrectly marking the location of a subsurface installation, so that the excavator had no way of knowing that they were digging in the wrong place.

This bill is intended to discourage operators from filing baseless lawsuits for damages to subsurface installations, and from refusing reasonable settlement offers, by increasing operators' potential downsides for doing so. The bill would require a court or arbitrator to award reasonable attorney fees and costs to an excavator in a suit filed by an operator to recover for the excavator's damages to a subsurface installation where (1) the court or arbitrator determines that the excavator is not liable for the damages because the operator erroneously marked the location of the installation, or (2) the excavator makes an offer to settle, the operator does not accept the offer, and the operator fails to obtain a more favorable judgment or award. The first provision essentially awards fees to the excavator when it prevails on the merits of the case, i.e., by proving that the operator's own error was the cause of the damage. The second provision is similar to the Code of Civil Procedure section 998, which shifts responsibility for certain costs and fees when a defendant or a plaintiff fails to accept a settlement offer and then fails to obtain a more favorable result at trial.⁹

⁶ Cal. Pub. Util. Comm., Order Instituting Investigation and Order to Show Cause, Investigation 18-12-007 (Dec. 13, 2018).

⁷ Cal. Pub. Util. Comm., Presiding Officer's Decision, Investigation 18-12-007 (Feb. 20, 2020).

⁸ Gov. Code, § 4216.7.

⁹ Code Civ. Proc., § 998.

The bill's cost-and-fee-shifting provisions run in only one direction: they can shift responsibility for the excavator's fees to the operator, but not from the operator to the excavator if the operator prevails or if the excavator rejects a settlement offer and fails to obtain a more favorable result at trial. According to the author and sponsor, this one-way shifting mechanism is warranted in light of the disparity that generally exists between excavators and operators. According to the author and sponsor, operators are often able to expend significantly more resources on litigation costs than excavators, who are often contractors or local governments. As such, providing a two-way attorney fee provision could cause outsized financial harm to excavators who cannot afford the high cost of the operator's legal fees. Additionally, a two-way fee provision could actually incentivize operators to bring more lawsuits by providing the possibility of fee recovery – the opposite of the stated purpose of the bill. There is no similar risk of increased lawsuits from excavators, because they cannot file lawsuits under the statute that would award them attorney fees.

4. Arguments in support

According to bill sponsor Southern California Contractors Association (SCCA):

Regrettably, SCCA members have received claims for damaged infrastructure from utility companies despite following the law. In fact, a recent California Public Utility Commission (PUC) investigation reported that one particular utility company filed claims against contractors knowing the utility was liable for the damage. This particular investigation, in one instance, found the utility filed claims even though it mis-marked the underground utility by ten feet. The person being interviewed in the investigation admitted that 20 to 40 percent of its damaged infrastructure is the utility's fault. Yet still it filed claims against the excavating contractor...

AB 930's intent is, as is similar in other areas of the law, to strengthen the underlying public policy contained in Government Code 4216. Specifically, the bill's intent is to increase the reliability and accuracy of those working to locate and mark underground utilities. By increasing the potential litigation costs on a party that does not prevail in a claim arising from damaged underground infrastructure, AB 930 will assist in increasing the accuracy of underground utility markings so that damage claims will not have to be filed in the first place.

SUPPORT

Southern California Contractors Association (sponsor)

American Subcontractors Association of America

OPPOSITION

None known¹⁰

RELATED LEGISLATION

Pending Legislation:

SB 297 (Durazo, 2021) adds a civil penalty of up to \$100,000 for an excavator who, by failing to follow certain safety requirements relating to subsurface installations, damages a subsurface installation, when the excavator is found to be a repeat violator of those safety requirements. SB 297 is pending on the Assembly floor.

Prior Legislation:

SB 1198 (Durazo, 2020) would have added the same enhanced civil penalty as SB 297, and also would have added requirements relating to gas corporations. SB 1198 was held in the Senate Energy, Utilities and Communications Committee due to COVID-19-related bill restrictions.

SB 865 (Hill, Ch. 307, Stats. 2020) renamed the California Underground Facilities Safe Excavation Board as the “Dig Safe Board” and will move the Dig Safe Board to the Office of Energy Infrastructure Safety within the Natural Resources Agency as of January 1, 2022. SB 865 also added a requirement that, starting in 2023, certain new subsurface installations be mapped using a geographic information system and be maintained as permanent records of the operator, and added the requirement that an excavator notify the RNC within 48 hours of causing damage to certain subsurface installations.

AB 2334 (Levine, 2020) AB 2334 was substantially similar to this bill and would have awarded attorney fees and costs in disputes between the operator of a subsurface installation and an excavator, arising from an excavation that results in property damage necessitating repair or replacement of the subsurface installation. AB 2334 was held in the Assembly Judiciary Committee.

AB 1166 (Levine, Ch. 453, Stats 2019) delayed the start date of the requirement that every operator supply an RNC with an electronic positive response prior to the commencement of an excavation, from 2018 to 2021; and authorized the California Underground Facilities Safe Excavation Board to enact related regulations.

AB 1914 (Flora, Ch. 708, Stats. 2018) permitted, as of January 1, 2020, an excavator to use power-operated or boring equipment, as determined by the California Underground

¹⁰ Western States Petroleum Association opposed prior versions of the bill, but formally withdrew its opposition following the amendments taken in the Assembly Judiciary Committee.

Facilities Safe Excavation Board, prior to determining the exact location of subsurface installations.

SB 661 (Hill, Ch. 809, Stats. 2016) established the Dig Safe Act of 2016, which replaced the existing safety regime for excavating around subsurface installations and established the governing body, the California Underground Facilities Safe Excavation Board, under the Office of the State Fire Marshal.

PRIOR VOTES:

Senate Business, Professions and Economic Development Committee (Ayes 13, Noes 0)

Assembly Floor (Ayes 51, Noes 19)

Assembly Appropriations Committee (Ayes 12, Noes 4)

Assembly Judiciary Committee (Ayes 8, Noes 1)
