SCCA
SOUTHERN CALIFORNIA CONTRACTORS ASSOCIATION

Dig Alert Proposed Legislation

Assembly Bill 2334

By Gerald W. Mouzis

SCCA often lends support or opposition to pending legislation in Sacramento, but rarely sponsors state bills. When the Association does sponsor a bill, it is because issues of safety, equity, and fairness are typically in play. So, while the state, country and the world address health issues raised by the COVID-19 virus, the state legislature will be addressing Assembly Bill 2334 when it returns to normal operations. AB 2334, the so-called Dig Alert legislation sponsored by SCCA, addresses an award of attorneys' fees and costs to a prevailing party in court and arbitration proceedings between a utility operator and excavator when utilities are damaged. The bill has been introduced by Assemblyman Marc Levine (D-San Rafael) and should be considered soon by the Judiciary Committee.

The Policy Question

The bill was conceived to address an overriding policy question: how can policymakers force publicly traded investor-owned utility companies to increase the accuracy of locate and mark programs, and thus increase safety? Recently, one major investor-owned utility was fined $110 million by the Public Utilities Commission for intentionally falsifying 135,000 locate and mark tickets. During the PUC investigation, one of the managers of a utility's locate and mark program testified under oath that, when circumstances are presented that both parties share some culpability, the utility would always lean in

the direction that it was not their fault, but the excavator's fault. This testimony was provided even though the utility's internal investigation revealed that 20% to 40% of their markings had problems.

A Common Occurrence

SCCA member contractors have often experienced these circumstances first-hand. As just one example, one SCCA member damaged an Edison electrical line during an underground excavation. The line was clearly mismarked. Thankfully, no one was injured or killed. The job was completed and accepted. Several months after completing the job, however, the contractor was sued by Edison for $5,000 in costs allegedly incurred to repair the line. Incidentally, such damage claims often involve not just the cost of repairs at the area where localized damage occurred, but also claimed costs associated with the replacement of several hundred feet of line and even vault repair or replacement not affected by the localized damage. In any event, the member contractor claimed he was not at fault, and disputed the claim. He prevailed at trial. The problem? It cost him five times the amount of the claimed damages in attorneys' fees to prove Edison wrong.

These suits are not uncommon and are not limited to Edison. Investor-owned utilities often employ several hundred attorneys in-house as employees to prepare and file such suits. As evidenced in the public hearings referenced above, consideration is not given to the fault or responsibility of the parties. Suits are often just filed knowing that the contractor/excavator will very often just pay the claim rather than incur far more in legal expenses to defend and beat the claim. Fairness, fault and

justice are not factored into the equation. In this context, the filing of these suits serves simply as an additional revenue source for a utility operator.

The Bill

AB 2334 would amend California Government Code, section 4216.7. It adds language to the statute that, in a civil action (court or arbitration proceedings) between the utility operator and the excavator arising from the excavation and resulting in property damage necessitating repair or replacement of all or a portion of the subsurface installation, a court or arbitrator shall award attorneys' and experts' fees to the "prevailing party." The term "prevailing party" is a term of art in the law. In its simplest form, it is the party who obtains a "net monetary recovery" in an action. "Net monetary recovery" has also been addressed by statute.

Code of Civil Procedure, section 998 permits a party to serve an offer to compromise the litigation. If a party invokes this procedure and does better than the amount of the offer, that party is considered to be the "prevailing party" for an award of attorneys' fees, even if that party is paying a portion of the award.

For example, a plaintiff demands $75,000 which is rejected by a defendant. The plaintiff achieves a result of $100,000. The plaintiff is the prevailing party. More significantly, a defendant offers $50,000 to resolve a dispute. The offer is rejected by the plaintiff. The award is $40,000. Even though the defendant is to pay $40,000 with a "net monetary recovery" going to the plaintiff, the defendant is actually the "prevailing party" entitled to attorneys' fees as the defendant did better than what that

party was willing to pay before trial. In the example above, if the award is $60,000 (between the two 998 offers), neither party is the "prevailing party." The policy behind section 998 is obviously to promote settlements. AB 2334 mandates that section 998 is applicable to the civil action arising from this section.

Moreover, the court or arbitrator would not be limited to reviewing offers of settlement made pursuant to the formal 998 procedure. AB 2334 also includes a provision that the court or arbitrator, in the exercise of discretion, may also consider all offers of settlement exchanged between the parties prior to a trial or arbitration, whether or not they were made by utilizing the formal 998 procedure.

Lastly, the amendment only applies to civil actions or arbitrations between the utility operator of a subsurface installation and the excavator for property damage. The amendment does not apply to third-party claims brought against the utility operator of a subsurface installation or the excavator.

The Effect of the Bill

The underlying purpose of the bill is to promote safety, *i.e.,* to reduce the number and frequency of mismarked utilities. How? If the utility operators know that they cannot just file suits *carte blanche* against excavators without any assessment of fault or responsibility but merely to obtain settlements based on anticipated litigation costs, they may hesitate to file suit at all. In other words, the bill levels the playing field when it comes to litigation costs. A utility operator will have to assess fault before a civil action is filed. Once a civil action is filed, the parties on both sides will be forced to make an early assessment of fault or face the possibility of paying the opposing party's attorneys' fees. When

this additional litigation revenue stream lessens for the utility operators, upper management will likely employ additional procedures and measures to assure more accurate marking of subsurface installations, thus ultimately resulting in added safety and health of construction workers and, in turn, the public.

Conclusion

Todd Bloomstine, SCCA's legislative representative in Sacramento, is actively promoting passage of AB 2334. Gerald Mouzis, SCCA Board Member and Legislative Committee Member, and Patrick Hartnett, Legislative Committee Member, who are both practicing attorneys in Orange County and who co-authored the language to AB 2334, are also actively involved in promoting the passage of AB 2334.