

November 12, 2018

CLC PRESENTATION ON SUBAQUEOUS BORES

- I. Overview of Chapter 558 – The Underground Facility Damage Prevention and Safety Act, passed in 1993, establishes the Sunshine State One-Call of Florida, Inc.
- II. Select terms and concepts
 - a. Members
 - b. Excavators
 - c. Locates: methods vary and are evolving
 - d. Types of Locate Ticket
 - 1. Normal Ticket – dig site on dry land and valid for 30 days
 - 2. Underwater Ticket – dig site is entirely underwater and valid for 30 days.
 - 3. Emergency Ticket
 - 4. Design Ticket
 - e. Time period for Utility to do the locate: Normal ticket two full business days
 - f. Updating locates
 - g. Locate markings
 - 1. Take photos or videos of the marks (not required but good practice)
 - 2. Sunshine 811 App (see sunshine811.com) (800-852-8057)
 - h. Tolerance zone – normally 24 inches from the outer edge of either side of the exterior surface of a marked underground utility Section 556.102 (12)
 - i. Right of way utilization permit – typically require the utility to furnish the public body with a survey showing the exact locations of all facilities to be installed pursuant to this permit, said survey to be sufficiently detailed to allow location of said installation by reference thereto. Upon completion of installation, if field adjustments are made, an as-built drawing will have to be submitted.
 - j. The following typical plan note addresses locating utilities:
"The indicated location of underground utilities, structures and facilities is approximate and reflects the best information available from surveys and records. The contractor shall verify the actual location and extent of underground facilities prior to proceeding with any construction activity which may affect such facilities."
 - k. American Public Works Association Color Codes

- III. Liability – when bill was initially considered in 1993 it provided for strict liability.
 - a. Section 556.106(2)(a) (2007) provides that if a contractor violates Chapter 556.105 and damages a utility, the contractor is rebuttably presumed to be negligent.
 - b. Section 556.106(2)(d), *Florida Statutes*, provides excavators could still be liable regardless of its compliance with Section 556.105(1), if it performed the excavation in a negligent manner.
- IV. Special procedures relating to subaqueous bores – There are different rules with respect to the locate process for subaqueous (underground utilities located "beneath the waters of the state") conduits.
 - a. Typically directional bores
 - b. Time period for Utility to do the locate – The utility is required to identify the estimated horizontal route of the underground facility within ten business days, using marking buoys or other suitable devices.
 - c. No Tolerance zone provided by Chapter 556 for Subaqueous locates.
 - d. ASTM F1962-11 Standard Guide for Use of Maxi-Horizontal Directional Drilling for Placement of Polyethylene Pipe or Conduit under Obstacles, including River Crossings
- V. Recent trial on subaqueous bore case – shared bore by two utilities
 - a. Utility needs to provide all of the data it has.
 - b. Utility should consider risks not only from its lines, but also the lines of any other utility sharing the bore.
 - c. Utility is responsible for considering not only the planned construction, but also the reasonably anticipated means and methods a contractor will use during construction.
 - d. Utility may not avoid responsibility based on the independent contractor rule for non-delegable duties.
- VI. Applicable common law principles
 - a. Proximate cause – the issue of proximate cause is generally a question of fact concerned with whether and to what extent a defendant's conduct foreseeably and substantially caused the specific injury that actually occurred. *Lindsey v. Bell South Telecoms, Inc.*, 943 So. 2d 963, 965 (Fla. 4th DCA 2006). Harm is proximate if prudent human insight would lead one to expect that similar harm is likely to be substantially caused by the specific act or omission in question. *McCain v. Florida Power Corp.*, 593 So. 2d 500, 503 (Fla. 1992)(in reversing Second District's reversal and direction that a directed verdict be entered for the power company in connection with a locate, the Florida Supreme held that even if the injury was the first to occur when a power cable was severed, there was a

reasonable inference that the plaintiff's injury was foreseeable). "It is immaterial that the defendant could not foresee the precise manner in which the injury occurred or to its exact extent." *Id.* Likewise, "[o]ne who is negligent is not absolved of liability when his conduct 'sets in motion' a chain of events resulting in injury to the plaintiff." *Lindsey* at 965. (internal citations omitted).

- b. Independent Contractor rule – the independent contractor general rule has several important exceptions, including: (1) where the principal has specifically undertaken, pursuant to a contract, to do something for another (a nondelegable duty). *Athley v. First Union Bank of Florida*, 576 So. 2d 340 (Fla 5th DCA 1991); *City of Coral Gables v. Prats*, 502 So. 2d 969 (Fla. 3d DCA 1987); and (2) where the activity is inherently dangerous. *Midyette v. Madison*, 559 So. 2d 1126 (Fla. 1990).
- c. Non-delegable duty – a nondelegable duty arises in situations in which, for policy reasons, the principal is not permitted to shift the responsibility for the proper conduct of the work to the contractor. *Carasquillo v. Holiday Carpet Service, Inc.*, 615 So. 2d 862,863 (Fla. 3d DCA 1993). Where there is a nondelegable duty, the principal is liable "for the negligence of the independent contractor, irrespective of whether the employer has himself been at fault." *Id.* Although the duty to perform may be delegated to the independent contractor, the liability for malfeasance cannot be avoided by the principal. *Atchley*, 576 So. 2d at 344. *See also City of Coral Gables v. Prats*, 502 So. 2d 969, 971 (Fla. 3d DCA 1987) (where Right of Way Permit between DOT and City imposed on City a nondelegable duty to protect the public from any "trip and fall" hazards during construction, City was liable for performance of independent contractor); and *Smyth v. Infrastructure Corp. of America*, 113 So. 3d 904, 912 - 913 (Fla. 2d DCA 2013)(one who is under a duty to construct or maintain a highway in reasonably safe condition for use of the public is liable for the negligent failure of its contractor.)

VII. Special ADR Process – Section 556.115

VIII. Indemnity – *See Peoples Gas Sys. v. Posen Constr., Inc.*, 2018 U.S. Dist. LEXIS 106427 (M.D. Fla. 2018)

IX. FDUPTA issues – A violation of the Underground Facility Damage Prevention and Safety Act, F.S. § 556.106(2)(a), can also be a violation of FDUTPA. *James D. Hinson Electrical Contracting Co. v. BellSouth Telecommunications, Inc.*, 642 F.Supp.2d 1318 (M.D. Fla. 2009). In *Hinson*, an excavator severed an underground cable owned by BellSouth, following which BellSouth sent a damage claim invoice. The invoice contained charges for "Corporate Overhead" and "Claims Processing" expenses. After making payment on the invoices, Hinson brought suit seeking reimbursement of the overcharges and alleging violation of FDUTPA. BellSouth filed a Motion for Summary Judgment on the FDUTPA claim on the basis that the events complained of

did not meet the definition of “trade and commerce”. The Middle District of Florida disagreed and denied BellSouth’s Motion for Summary Judgment. The Court also found that the Underground Facility Damage Prevention and Safety Act did not provide any additional remedies other than those available at Florida common law, and therefore the “Corporate Overhead” and “Claims Processing” expenses were improper. *Id.* at 1328.

X. Closing Comments

CHAPTER 556

UNDERGROUND FACILITY DAMAGE PREVENTION AND SAFETY

- 556.101 Short title; legislative intent.
- 556.102 Definitions.
- 556.103 Creation of the corporation; establishment of the board of directors; authority of the board; annual report.
- 556.104 Free-access notification system.
- 556.105 Procedures.
- 556.106 Liability of the member operator, excavator, and system.
- 556.107 Violations.
- 556.108 Exemptions.
- 556.109 Emergency excavations or demolitions attempted; exception.
- 556.110 Costs assessed among member operators.
- 556.111 Applicability to existing law.
- 556.112 Design services.
- 556.113 Sunshine State One-Call of Florida, Inc.; public records exemption.
- 556.114 Low-impact marking practices.
- 556.115 Alternative dispute resolution.
- 556.116 High-priority subsurface installations; special procedures.

556.101 Short title; legislative intent.—

(1) This chapter may be cited as the "Underground Facility Damage Prevention and Safety Act."

(2) It is the intent of the Legislature to provide access for excavating contractors and the public to provide notification to the system of their intent to engage in excavation or demolition. This notification system shall provide the member operators an opportunity to identify and locate their underground facilities. Under this notification system, Sunshine State One-Call of Florida, Inc., is not required or permitted to locate or mark underground facilities.

(3) It is the purpose of this chapter to:

(a) Aid the public by preventing injury to persons or property and the interruption of services resulting from damage to an underground facility caused by excavation or demolition operations.

(b) Create a not-for-profit corporation comprised of operators of underground facilities in this state to administer this chapter.

(c) Fund the cost of administration through contributions from the member operators for services provided to the member operators and from charges made to others for services requested and provided, such as record searches, education or training, and damage prevention activities.

(d) Reserve to the state the power to regulate any subject matter specifically addressed in this chapter. Municipalities, counties, districts, or other local governments may not adopt or enforce ordinances or rules that conflict with this chapter or that prescribe any of the following:

- 1. Require operators of underground facilities to obtain permits from local governments in order to identify underground facilities.
- 2. Require premarking or marking.

3. Specify the types of paint or other marking devices that are used to identify underground facilities.

4. Require removal of marks.

(e) Permit any local law enforcement officer, local government code inspector, or code enforcement officer to enforce this chapter without the need to incorporate the provisions of this chapter into any local code or ordinance.

(f) Foster the awareness of federal laws and regulations that promote safety with respect to underground facilities, including, but not limited to, the Federal Pipeline Safety Act of 1968, as amended, the Pipeline Safety Improvement Act of 2002, OSHA Standard 1926.651, and the National Electric Safety Code, ANSI C-2, by requiring and facilitating the advance notice of activities by those who engage in excavation or demolition operations.

(4) It is not the purpose of this chapter to amend or void any permit issued by a state agency for placement or maintenance of facilities in its right-of-way.

History.—s. 1, ch. 93-240; s. 1, ch. 97-306; s. 1, ch. 2002-234; s. 1, ch. 2006-138; s. 1, ch. 2010-100.

556.102 Definitions.—As used in this act:

(1) "Business days" means Monday through Friday, excluding the following holidays: New Year's Day, Birthday of Dr. Martin Luther King, Jr., Memorial Day, Independence Day, Labor Day, Thanksgiving Day and the following Friday, Christmas Eve, and Christmas Day. Any such holiday that falls on a Saturday shall be observed on the preceding Friday. Any such holiday that falls on a Sunday shall be observed on the following Monday.

(2) "Business hours" means the hours of a day during which the system is open for business.

(3) "Damage" means any impact upon or contact with, including, without limitation, penetrating, striking, scraping, displacing, or denting, however slight, the protective coating, housing, or other protective devices of any underground facility, or the removal or weakening of any lateral or vertical support from any underground facility, or the severance, partial or complete, of any underground facility.

(4) "Demolish" or "demolition" means any operation by which a structure or mass of material is wrecked, razed, rended, moved, or removed by means of any tool, equipment, or discharge of explosives, or any disturbance of the earth in any manner on public or private lands which could damage any underground facility.

(5) "Design services" means services that may be provided by a member operator to a design engineer, architect, surveyor, or planner, if the presence of underground facilities is known to a member operator, upon payment of a fee to the member operator, which services may be based on:

(a) Information obtained solely from a review of utility records.

(b) Information to augment utility records, such as topographic surveying of above-ground utility features.

(c) Information obtained through the use of designating technologies to obtain horizontal underground facility locations.

(d) Information obtained from physically exposing underground facilities.

(6) "Excavate" or "excavation" means any man-made cut, cavity, trench, or depression in the earth's surface, formed by removal of earth, intended to change the grade or level of land, or intended to penetrate or disturb the surface of the earth, including land beneath the waters of the state, as defined in s. 373.019(22), and the term includes pipe bursting and directional drilling or boring from one point to another point beneath the surface of the earth, or other trenchless technologies.

(7) "Excavator" or "excavating contractor" means any person performing excavation or demolition operations.

(8) "Member operator" means any person who furnishes or transports materials or services by means of an underground facility.

(9) "Person" means any individual, firm, joint venture, partnership, corporation, association, municipality, or other political subdivision, governmental unit, department, or agency, and includes any trustee, receiver, assignee, or personal representative of a person.

(10) "Positive response" means the communications among member operators, excavators, and the system concerning the status of locating an underground facility.

(11) "Premark" means to delineate the general scope of the excavation on the surface of the ground using white paint, white stakes, or other similar white markings.

(12) "Tolerance zone" means 24 inches from the outer edge of either side of the exterior surface of a marked underground facility.

(13) "Underground facility" means any public or private personal property which is buried, placed below ground, or submerged on any member operator's right-of-way, easement, or permitted use which is being used or will be used in connection with the storage or conveyance of water; sewage; electronic, telephonic, or telegraphic communication; electric energy; oil; petroleum products; natural gas; optical signals; or other substances, and includes, but is not limited to, pipelines, pipes, sewers, conduits, cables, valves, and lines. For purposes of this act, a liquefied petroleum gas line regulated under chapter 527 is not an underground facility unless such line is subject to the requirements of Title 49 C.F.R. adopted by the Department of Agriculture and Consumer Services, provided there is no encroachment on any member operator's right-of-way, easement, or permitted use. Petroleum storage systems subject to regulation pursuant to chapter 376 are not considered underground facilities for the purposes of this act unless the storage system is located on a member operator's right-of-way or easement. Storm drainage systems are not considered underground facilities.

(14) "System" means a free-access notification system established by the corporation as provided in this act.

History.—s. 2, ch. 93-240; s. 2, ch. 94-132; s. 5, ch. 95-317; s. 2, ch. 97-306; s. 2, ch. 2002-234; s. 67, ch. 2006-1; s. 2, ch. 2006-138; s. 7, ch. 2012-150.

556.103 Creation of the corporation; establishment of the board of directors; authority of the board; annual report.—

(1) The "Sunshine State One-Call of Florida, Inc.," is created as a not-for-profit corporation. Each operator of an underground facility in this state shall be a member of the corporation and shall use and participate in the system. The corporation shall administer the provisions of this chapter. The corporation shall exercise its powers through a board of directors established pursuant to this section.

(2) The membership of the corporation shall elect a board of directors to administer the system.

(3) The corporation, through the board of directors, shall have the authority to assess the member operators to fund the system.

(4) The board of directors shall file with the Governor, not later than 60 days before the convening of each regular session of the Legislature, an annual progress report on the operation of the system, which must include a summary of the reports to the system from the clerks of court.

(5) The board of directors shall submit to the President of the Senate, the Speaker of the House of Representatives, and the Governor, not later than 60 days before the convening of each regular session of the Legislature, an annual progress report on the participation by municipalities and counties in the one-call notification system created by this chapter. The report must include a summary of the reports to the system from the clerks of court, a summary of the damage reporting data received by the system under s. 556.105(12) for the preceding year, and any analysis of the data by the board of directors.

History.—s. 3, ch. 93-240; s. 3, ch. 97-306; s. 3, ch. 2006-138; s. 2, ch. 2010-100; s. 1, ch. 2017-102.

556.104 Free-access notification system.—The corporation shall maintain a free-access notification system. Any person who furnishes or transports materials or services by means of an underground facility in this state shall participate as a member operator of the system. The purpose of the system is to receive notification of planned excavation or demolition activities and to notify member operators of the planned excavation or demolition activities. The system shall provide a single toll-free telephone number within this state which excavators can use to notify member operators of planned excavation or demolition activities, and the system may also provide additional modes of access at no cost to the user.

History.—s. 4, ch. 93-240; s. 4, ch. 97-306; s. 3, ch. 2002-234; s. 4, ch. 2006-138.

556.105 Procedures.—

(1)(a) Not less than 2 full business days before beginning any excavation or demolition that is not beneath the waters of the state, and not less than 10 full business days before beginning any excavation or demolition that is beneath the waters of the state, an excavator shall provide the following information through the system:

1. The name of the individual who provided notification and the name, address, including the street

address, city, state, zip code, and telephone number of her or his employer.

2. The name and telephone number of the representative for the excavator, and a valid electronic address to facilitate a positive response by the system should be provided, if available.

3. The county, the city or closest city, and the street address or the closest street, road, or intersection to the location where the excavation or demolition is to be performed, and the construction limits of the excavation or demolition.

4. The commencement date and anticipated duration of the excavation or demolition.

5. Whether machinery will be used for the excavation or demolition.

6. The person or entity for whom the work is to be done.

7. The type of work to be done.

8. The approximate depth of the excavation.

(b) The excavator shall provide the information by notifying the system through its free-access notification system during business hours, as determined by the corporation, or by such other method as authorized by the corporation. Any notification received by the system at any time other than during business hours shall be considered to be received at the beginning of the next business day.

(c) Information provided by an excavator is valid for 30 calendar days after the date such information is provided to the system. In computing the period for which information furnished is valid, the date the notice is provided is not counted, but the last day of the period shall be counted unless it is a Saturday, Sunday, or a legal holiday, in which event, the period runs until the end of the next day that is not a Saturday, Sunday, or a legal holiday.

(d) Member operators shall use the information provided to the system by other member operators only for the purposes stated in this chapter and not for sales or marketing purposes.

(2) Each notification by means of the system shall be recorded to document compliance with this chapter. Such record may be made by means of electronic, mechanical, or any other method of all incoming and outgoing wire and oral communications concerning location requests in compliance with chapter 934. The records shall be kept for 5 years and, upon written request, shall be available to the excavator making the request, the member operator intended to receive the request, and their agents. However, custody of the records may not be transferred from the system except under subpoena.

(3) The system shall provide the person who provided notification with the names of the member operators who shall be advised of the notification and a notification number that specifies the date and time of the notification.

(4) The notification number provided to the excavator under this section shall be provided to any law enforcement officer, government code inspector, or code enforcement officer upon request.

(5) All member operators within the defined area of a proposed excavation or demolition shall be promptly

notified through the system, except that member operators with state-owned underground facilities located within the right-of-way of a state highway need not be notified of excavation or demolition activities and are under no obligation to mark or locate the facilities.

(a) If a member operator determines that a proposed excavation or demolition is in proximity to or in conflict with an underground facility of the member operator, except a facility beneath the waters of the state, which is governed by paragraph (b), the member operator shall identify the horizontal route by marking to within 24 inches from the outer edge of either side of the underground facility by the use of stakes, paint, flags, or other suitable means within 2 full business days after the time the notification is received under subsection (1). If the member operator is unable to respond within such time, the member operator shall communicate with the person making the request and negotiate a new schedule and time that is agreeable to, and should not unreasonably delay, the excavator.

(b) If a member operator determines that a proposed excavation is in proximity to or in conflict with an underground facility of the member operator beneath the waters of the state, the member operator shall identify the estimated horizontal route of the underground facility, within 10 business days, using marking buoys or other suitable devices, unless directed otherwise by an agency having jurisdiction over the waters of the state under which the member operator's underground facility is located.

(c) When excavation is to take place within a tolerance zone, an excavator shall use increased caution to protect underground facilities. The protection requires hand digging, pot holing, soft digging, vacuum excavation methods, or other similar procedures to identify underground facilities. Any use of mechanized equipment within the tolerance zone must be supervised by the excavator.

(6)(a) An excavator shall avoid excavation in the area described in the notice given under subsection (1) until each member operator underground facility has been marked and located or until the excavator has been notified that no member operator has underground facilities in the area described in the notice, or for the time allowed for markings set forth in paragraphs (5)(a) and (b), whichever occurs first. If a member operator has not located and marked its underground facilities within the time allowed for marking set forth in paragraphs (5)(a) and (b), the excavator may proceed with the excavation, if the excavator does so with reasonable care and if detection equipment or other acceptable means to locate underground facilities are used.

(b) An excavator may not demolish in the area described in the notice given under subsection (1) until all member operator underground facilities have been marked and located or removed.

(7)(a) A member operator that states that it does not have accurate information concerning the exact location of its underground facilities is exempt from the requirements of paragraphs (5)(a) and (b), but shall provide the best available information to the excavator in order to comply with the requirements of this section. An excavator is not liable for any damage to an

underground facility under the exemption in this subsection if the excavation or demolition is performed with reasonable care and detection equipment or other acceptable means to locate underground facilities are used.

(b) A member operator may not exercise the exemption provided by this subsection if the member operator has underground facilities that have not been taken out of service and that are locatable using available designating technologies to locate underground facilities.

(8)(a) If extraordinary circumstances exist, a member operator shall notify the system of the member operator's inability to comply with this section. For the purposes of this section, the term "extraordinary circumstances" means circumstances other than normal operating conditions that exist and make it impractical for a member operator to comply with this chapter. After the system has received notification of a member operator's inability to comply, the system shall make that information known to excavators who subsequently notify the system of an intent to excavate. The member operator is relieved of responsibility for compliance under the law during the period that the extraordinary circumstances exist and shall promptly notify the system when the extraordinary circumstances cease to exist.

(b) During the period when extraordinary circumstances exist, the system shall remain available during business hours to provide information to governmental agencies, member operators affected by the extraordinary circumstances, and member operators who can provide relief to the affected parties, unless the system itself has been adversely affected by extraordinary circumstances.

(9)(a) After receiving notification from the system, a member operator shall provide a positive response to the system within 2 full business days, or 10 such days for an underwater excavation or demolition, indicating the status of operations to protect the facility.

(b) The system shall establish and maintain a process to facilitate a positive-response communication between member operators and excavators. The system is exempt from any requirement to initiate a positive response to an excavator when an excavator does not provide a valid electronic address to facilitate a positive response by the system.

(c) An excavator shall verify the system's positive responses before beginning excavation. If an excavator knows that an existing underground facility of a member operator is in the area, the excavator must contact the member operator if the facility is not marked and a positive response has not been received by the system.

(10) A member operator shall use the "Uniform Color Code for Utilities" of the American Public Works Association when marking the horizontal route of any underground facility of the operator.

(11) Before or during excavation or demolition, if the marking of the horizontal route of any facility is removed or is no longer visible, or, in the case of an underwater facility, is inadequately documented, the excavator shall stop excavation or demolition activities in the vicinity of the facility and shall notify the system to have the route

remarked or adequately documented by a member operator or in a manner approved by the member operator.

(12)(a) If any contact with or damage to any pipe, cable or its protective covering, or any other underground facility occurs, the excavator causing the contact or damage shall immediately notify the member operator. If contact with or damage to an underground pipe or any other underground facility results in the escape of any natural gas or other hazardous substance or material regulated by the Pipeline and Hazardous Materials Safety Administration of the United States Department of Transportation, the excavator must immediately report the contact or damage by calling the 911 emergency telephone number. Upon receiving notice, the member operator shall send personnel to the location as soon as possible to effect temporary or permanent repair of the contact or damage. Until such time as the contact or damage has been repaired, the excavator shall cease excavation or demolition activities that may cause further damage to such underground facility.

(b) If an event damages any pipe, cable or its protective covering, or other underground facility, the member operator receiving the notice shall file a report with the system. Reports must be submitted annually to the system, no later than March 31 for the prior calendar year, or more frequently at the option and sole discretion of the member operator. Each report must describe, if known, the cause, nature, and location of the damage. The system shall establish and maintain a process to facilitate submission of reports by member operators.

(13) Any costs or expenses associated with compliance by an excavator with the requirements in this section applicable to excavators shall not be charged to any member operator. Any costs or expenses associated with compliance by a member operator with the requirements in this section applicable to member operators shall not be charged to any excavator. No person shall charge the costs or expenses prohibited by this subsection after the effective date of this act. This subsection shall not excuse a member operator or excavator from liability for any damage or injury for which it would be responsible under applicable law.

History.—s. 5, ch. 93-240; s. 1, ch. 96-172; s. 1176, ch. 97-103; s. 5, ch. 97-306; s. 4, ch. 2002-234; s. 5, ch. 2006-138; s. 1, ch. 2008-230; s. 115, ch. 2010-5; s. 3, ch. 2010-100; s. 2, ch. 2017-102.

556.106 Liability of the member operator, excavator, and system.—

(1) There is no liability on the part of, and no cause of action of any nature shall arise against, the board members of the corporation in their capacity as administrators of the system.

(2)(a) If a person violates s. 556.105(1) or (6), and subsequently, whether by himself or herself or through the person's employees, contractors, subcontractors, or agents, performs an excavation or demolition that damages an underground facility of a member operator, it is rebuttably presumed that the person was negligent. The person, if found liable, is liable for the total sum of the losses to all member operators involved as those costs are normally computed. Any damage for loss of revenue and loss of use may not exceed \$500,000 per

affected underground facility, except that revenues lost by a governmental member operator whose revenues are used to support payments on principal and interest on bonds may not be limited.

(b) If any excavator fails to discharge a duty imposed by this chapter, the excavator, if found liable, is liable for the total sum of the losses to all parties involved as those costs are normally computed. Any damage for loss of revenue and loss of use may not exceed \$500,000 per affected underground facility, except that revenues lost by a governmental member operator whose revenues are used to support payments on principal and interest on bonds may not be limited.

(c) Obtaining information as to the location of an underground facility from the member operator as required by this chapter does not excuse any excavator from performing an excavation or demolition in a careful and prudent manner, based on accepted engineering and construction practices, and it does not excuse the excavator from liability for any damage or injury resulting from any excavation or demolition.

(3) If, after receiving proper notice, a member operator fails to discharge a duty imposed by this act and an underground facility of a member operator is damaged by an excavator who has complied with this act, as a proximate result of the member operator's failure to discharge such duty, the excavator is not liable for such damage and the member operator, if found liable, is liable to such person for the total cost of any loss or injury to any person or damage to equipment resulting from the member operator's failure to comply with this act. Any damage for loss of revenue and loss of use shall not exceed \$500,000 per affected underground facility, except that revenues lost by a governmental member operator, which revenues are used to support payments on principal and interest on bonds, shall not be limited.

(4) If an owner of an underground facility fails to become a member of the corporation in order to use and participate in the system, as required by this act, and that failure is a cause of damage to that underground facility caused by an excavator who has complied with this act and has exercised reasonable care in the performance of the excavation that has caused damage to the underground facility, the owner has no right of recovery against the excavator for the damage to that underground facility.

(5) If, after receiving proper notification, the system fails to discharge its duties, resulting in damage to an underground facility, the system, if found liable, shall be liable to all parties, as defined in this act. Any damage for loss of revenue and loss of use shall not exceed \$500,000 per affected underground facility, except that revenues lost by a governmental member operator, which revenues are used to support payments on principal and interest on bonds, shall not be limited.

(6) The system does not have a duty to mark or locate underground facilities and may not do so, and a right of recovery does not exist against the system for failing to mark or locate underground facilities. The system is not liable for the failure of a member operator to comply with the requirements of this chapter.

(7) An excavator or a member operator who performs any excavation with hand tools under s. 556.108(4)(c) or (5) is liable for any damage to any operator's underground facilities damaged during such excavation.

(8) Any liability of the state, its agencies, or its subdivisions which arises out of this chapter is subject to the provisions of s. 768.28.

History.—s. 6, ch. 93-240; s. 810, ch. 97-103; s. 1, ch. 97-231; s. 6, ch. 97-306; s. 5, ch. 2002-234; s. 6, ch. 2006-138; s. 4, ch. 2010-100.

556.107 Violations.—

(1) NONCRIMINAL INFRACTIONS.—

(a) Violations of the following provisions are non-criminal infractions:

1. Section 556.105(1), relating to providing required information.
2. Section 556.105(6), relating to the avoidance of excavation.
3. Section 556.105(11), relating to the need to stop excavation or demolition because marks are no longer visible, or, in the case of underwater facilities, are inadequately documented.
4. Section 556.105(12), relating to the need to cease excavation or demolition activities because of contact or damage to an underground facility.
5. Section 556.105(5)(a) and (b), relating to identification of underground facilities, if a member operator does not mark an underground facility, but not if a member operator marks an underground facility incorrectly.
6. Section 556.109(2), relating to falsely notifying the system of an emergency situation or condition.
7. Section 556.114(1), (2), (3), and (4), relating to a failure to follow low-impact marking practices, as defined therein.

(b) Any excavator or member operator who commits a noncriminal infraction under paragraph (a) may be issued a citation by any local or state law enforcement officer, government code inspector, or code enforcement officer, and the issuer of a citation may require an excavator to cease work on any excavation or not start a proposed excavation until there has been compliance with the provisions of this chapter. Citations shall be hand delivered to any employee of the excavator or member operator who is involved in the noncriminal infraction. The citation shall be issued in the name of the excavator or member operator, whichever is applicable.

(c) Any excavator or member operator who commits a noncriminal infraction under paragraph (a) may be required to pay a civil penalty for each infraction, which is \$500 plus court costs. If a citation is issued by a state law enforcement officer, a local law enforcement officer, a local government code inspector, or a code enforcement officer, 80 percent of the civil penalty collected by the clerk of the court shall be distributed to the governmental entity whose employee issued the citation and 20 percent of the penalty shall be retained by the clerk to cover administrative costs, in addition to other court costs. Any person who fails to properly respond to a citation issued pursuant to paragraph (b) shall, in addition to the citation, be charged with the offense of failing to respond to the citation and, upon

conviction, commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. A written warning to this effect must be provided at the time any citation is issued pursuant to paragraph (b).

(d) Any person cited for an infraction under paragraph (a) may post a bond, which shall be equal in amount to the applicable civil penalty plus court costs.

(e) A person charged with a noncriminal infraction under paragraph (a) may pay the civil penalty plus court costs, by mail or in person, within 30 days after the date of receiving the citation. If the person cited pays the civil penalty, she or he is deemed to have admitted to committing the infraction and to have waived the right to a hearing on the issue of commission of the infraction. The admission may be used as evidence in any other proceeding under this chapter.

(f) Any person may elect to appear before the county court and if so electing is deemed to have waived the limitations on the civil penalty specified in paragraph (c). The court, after a hearing, shall make a determination as to whether an infraction has been committed. If the commission of an infraction has been proven, the court may impose a civil penalty not to exceed \$5,000 plus court costs. In determining the amount of the civil penalty, the court may consider previous noncriminal infractions committed.

(g) At a court hearing under this chapter, the commission of a charged infraction must be proven by a preponderance of the evidence.

(h) If a person is found by a judge or hearing official to have committed an infraction, the person may appeal that finding to the circuit court.

(i) Sunshine State One-Call of Florida, Inc., may, at its own cost, retain an attorney to assist in the presentation of relevant facts and law in the county court proceeding pertaining to the citation issued under this section. The corporation may also appear in any case appealed to the circuit court if a county court judge finds that an infraction of the chapter was committed. An appellant in the circuit court proceeding shall timely notify the corporation of any appeal under this section.

(2) **REPORT OF INFRACTIONS.**—By March 31 of each year, each clerk of court shall submit a report to Sunshine State One-Call of Florida, Inc., listing each violation notice written under paragraph (1)(a) which has been filed in that county during the preceding calendar year. The report must state the name and address of the member or excavator who committed each infraction and indicate whether or not the civil penalty for the infraction was paid.

(3) **MISDEMEANORS.**—Any person who knowingly and willfully removes or otherwise destroys the valid stakes or other valid physical markings described in s. 556.105(5)(a) and (b) used to mark the horizontal route of an underground facility commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. For purposes of this subsection, stakes or other nonpermanent physical markings are considered valid for 30 calendar days after information is provided to the system under s. 556.105(1)(a).

History.—s. 7, ch. 93-240; s. 2, ch. 96-172; s. 1177, ch. 97-103; s. 6, ch. 2002-234; s. 7, ch. 2006-138; s. 5, ch. 2010-100; s. 3, ch. 2017-102.

556.108 Exemptions.—The notification requirements provided in s. 556.105(1) do not apply to:

(1) Any excavation or demolition performed by the owner of a single-family residential property, not including property that is subdivided or is to be subdivided into more than one single-family residential property; or for such owner by a member operator or an agent of a member operator when such excavation or demolition is made entirely on such land, and only up to a depth of 10 inches; provided due care is used and there is no encroachment on any member operator's right-of-way, easement, or permitted use.

(2) Any excavation or demolition associated with normal agricultural or railroad activities, provided such activities are not performed on any operator's marked right-of-way, easement, or permitted use.

(3) Any excavation or demolition that occurs as the result of normal industrial activities, provided such activities are confined to the immediate secured property of the facility and the activities are not performed on any operator's marked right-of-way, easement, or permitted use. For the purposes of this act, the industrial activities are limited to the following list of Standard Industrial Classifications: Industry Group Numbers 141, 206, 242, 243, and 491, and Major Group Numbers 13, 26, 28, and 29, as published by the United States Office of Management and Budget in 1987.

(4) Any excavation of 18 inches or less for:

(a) Surveying public or private property by surveyors or mappers as defined in chapter 472 and services performed by a pest control licensee under chapter 482, excluding marked rights-of-way, marked easements, or permitted uses where marked, if mechanized equipment is not used in the process of such surveying or pest control services and the surveying or pest control services are performed in accordance with the practice rules established under s. 472.027 or s. 482.051, respectively;

(b) Maintenance activities performed by a state agency and its employees when such activities are within the right-of-way of a public road; however, if a member operator has permanently marked facilities on such right-of-way, mechanized equipment may not be used without first providing notification; or

(c) Locating, repairing, connecting, adjusting, or routine maintenance of a private or public underground utility facility by an excavator, if the excavator is performing such work for the current owner or future owner of the underground facility and if mechanized equipment is not used.

(5)(a) Any excavation with hand tools by a member operator or an agent of a member operator for:

1. Locating, repairing, connecting, or protecting, or routine maintenance of, the member operator's underground facilities; or

2. The extension of a member operator's underground facilities onto the property of a person to be served by such facilities.

(b) The exemption provided in this subsection is limited to excavations to a depth of 30 inches if the right-of-way has permanently marked facilities of a company

other than the member operator or its agents performing the excavation.

History.—s. 8, ch. 93-240; s. 3, ch. 94-132; s. 3, ch. 96-172; s. 2, ch. 97-231; s. 39, ch. 2000-164; s. 8, ch. 2006-138.

556.109 Emergency excavations or demolitions attempted; exception.—

(1) This act does not apply to making an excavation or demolition during an emergency if the system or the member operator was notified at the earliest opportunity and all reasonable precautions had been taken to protect any underground facility. For the purposes of this act, "emergency" means any condition constituting a clear and present danger to life or property; a situation caused by the escape of any substance transported by means of an underground facility; any interruption of vital public service or communication caused by any break or defect in a member operator's underground facility; or, in the case of the State Highway System or streets or roads maintained by a political subdivision or underground facilities owned, operated, or maintained by a political subdivision, if the use of such highways, streets, roads, or underground facilities is, in the sole judgment of the Department of Highway Safety and Motor Vehicles, the Department of Transportation, or such political subdivision, impaired by an unforeseen occurrence that necessitates repair beginning immediately after such occurrence.

(2) An excavator shall not notify the system that there is an emergency unless the excavator reasonably believes that the intended excavation or demolition is due to a situation or condition as defined in subsection (1).

History.—s. 9, ch. 93-240; s. 4, ch. 96-172; s. 6, ch. 2010-100.

556.110 Costs assessed among member operators.—Member operators shall proportionately share in the cost of operating the system through monthly assessments made upon each member operator.

History.—s. 10, ch. 93-240; s. 7, ch. 97-306; s. 7, ch. 2010-100.

556.111 Applicability to existing law.—Nothing in this act shall be construed to:

(1) Constitute the establishment or enlargement of any rights to the use of real property or create an interest therein for the placement, construction, repair, maintenance, relocation, or excavation or demolition of any underground facility;

(2) Waive any right of a party having an interest in real property to charge any fee for the use regarding such property; or

(3) Preempt a governmental member operator from reasonable regulation of its right-of-way. This subsection does not exempt a municipality, county, district, or other local governmental member operator from the provisions of this chapter that apply to the member operator.

History.—s. 11, ch. 93-240; s. 9, ch. 2006-138.

556.112 Design services.—

(1) Each member operator shall provide to the system annually, and shall thereafter keep current, the contact names and telephone numbers of individuals who may be contacted by design engineers,

architects, surveyors, and planners for the purpose of responding to requests for design services.

(2) Each member operator shall provide to the system annually, and shall thereafter keep current, a list of fees applicable to each type of design service that each member operator chooses to offer to design engineers, architects, surveyors, and planners.

(3) Each member operator, within 20 business days after receipt of the fee provided for in subsection (2), shall either respond to a request for design services, if the member operator chooses to provide the services requested, or shall notify the party requesting services that the services will not be provided.

(4) This section shall not apply to any state agency, municipality, or county, or contractors, consultants, agents, or persons or firms acting under their authority, in the planning, preparing, or performance of work in their right-of-way. This section shall not limit or expand any existing law governing the process a state agency, municipality, or county uses to request design services from member operators or the responsibility for providing or paying for such services.

History.—s. 7, ch. 2002-234; s. 108, ch. 2005-2.

556.113 Sunshine State One-Call of Florida, Inc.; public records exemption.—

(1) As used in this section, the term "proprietary confidential business information" means information provided by:

(a) A member operator which is a map, plan, facility location diagram, internal damage investigation report or analysis, dispatch methodology, or trade secret as defined in s. 688.002, or which describes the exact location of a utility underground facility or the protection, repair, or restoration thereof; and:

1. Is intended to be and is treated by the member operator as confidential;

2. The disclosure of which would likely be used by a competitor to harm the business interests of the member operator or could be used for the purpose of inflicting damage on underground facilities; and

3. Is not otherwise readily ascertainable or publicly available by proper means by other persons from another source in the same configuration as provided to Sunshine State One-Call of Florida, Inc.

(b) An excavator in an internal damage investigation report or analysis relating to damage to underground utility facilities, and:

1. Is intended to be and is treated by the excavator as confidential;

2. The disclosure of which would be reasonably likely to be used by a competitor to harm the business interests of the excavator or could be used for the purpose of inflicting damage on underground facilities; and

3. Is not otherwise readily ascertainable or publicly available by proper means by other persons from another source in the same configuration as provided to Sunshine State One-Call of Florida, Inc.

(2) Proprietary confidential business information held by Sunshine State One-Call of Florida, Inc., for the purpose of describing the extent and root cause of damage to an underground facility or using the member

ticket management software system is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.
History.—s. 1, ch. 2007-101; s. 1, ch. 2012-221.

556.114 Low-impact marking practices.—

(1) An excavator providing notice under s. 556.105(1)(a) shall identify in its notice only the area that will be excavated during the period that the information in such notice is considered valid under s. 556.105(1)(c).

(2) When an excavator has not completed an excavation noticed under s. 556.105(1)(a) within the period that the information in the notice is considered valid under s. 556.105(1)(c), the excavator must provide a subsequent notice to the system under s. 556.105(1)(a) to continue with the excavation, and such subsequent notice shall identify only the remaining area to be excavated.

(3) When an excavation site cannot be described in information provided under s. 556.105(1)(a) with sufficient particularity to enable the member operator to ascertain the excavation site, and if the excavator and member operator have not mutually agreed otherwise, the excavator shall premark the proposed area of the excavation before a member operator is required to identify the horizontal route of its underground facilities in the proximity of any excavation. However, premarking is not required when the premarking could reasonably interfere with traffic or pedestrian control.

(4) A member operator shall identify the horizontal route of its underground facilities as set forth in s. 556.105(5)(a) and (b), and excavators shall premark an excavation site as set forth in subsection (3) using flags or stakes or temporary, nonpermanent paint or other industry-accepted low-impact marking practices.

(5) Any horizontal route-identification marker must be in a color identified in the Uniform Color Code for Utilities.

(6) Sunshine State One-Call of Florida, Inc., shall establish an educational program for the purpose of informing excavators and member operators about low-impact marking practices.

History.—s. 8, ch. 2010-100.

556.115 Alternative dispute resolution.—

(1) Sunshine State One-Call of Florida, Inc., shall create a voluntary alternative dispute resolution program. The program shall be available to all member operators, excavators, and other stakeholders, such as locators, utility service users, and governmental or quasi-governmental entities, for purposes of resolving disputes arising from excavation activities, including, but not limited to, loss of services, down time, delays, loss of use of facilities during restoration or replacement, and similar economic disruptions, exclusive of penalties imposed under other provisions of this act.

(2) The alternative dispute resolution program created by Sunshine State One-Call of Florida, Inc., shall include mediation, arbitration, or other appropriate processes, including the use of the services of the Division of Administrative Hearings.

(3) The costs of using the program shall be borne by the voluntary users, and the voluntary users shall

choose the form of alternative dispute resolution to be used. If arbitration is used, the users shall decide whether the arbitration will be binding.

(4) Unless binding arbitration is the chosen method of alternative dispute resolution, the users or any one of such users may end the process at any time and exercise the right to proceed in a court of competent jurisdiction or before the Division of Administrative Hearings.

(5) This section does not change the basis for civil liability for damages.

History.—s. 9, ch. 2010-100.

556.116 High-priority subsurface installations; special procedures.—

(1) As used in this section, the term:

(a) "Division" means the Division of Administrative Hearings.

(b) "High-priority subsurface installation" means an underground gas transmission or gas distribution pipeline, an underground pipeline used to transport gasoline, jet fuel, or any other refined petroleum product or hazardous or highly volatile liquid, such as anhydrous ammonia or carbon dioxide, if the pipeline is deemed to be critical by the operator of the pipeline and is identified as a high-priority subsurface installation to an excavator who has provided a notice of intent to excavate pursuant to s. 556.105(1), or would have been identified as a high-priority subsurface installation except for the excavator's failure to give proper notice of intent to excavate.

(c) "Incident" means an event that involves damage to a high-priority subsurface installation that has been identified as such by the operator according to the notification procedures set forth in subsection (2) and that:

1. Results in death or serious bodily injury requiring inpatient hospitalization.

2. Results in property damage, including service-restoration costs, in an amount in excess of \$50,000 or interruption of service to 2,500 or more customers.

(2) When an excavator proposes to excavate or demolish within 15 feet of the horizontal route of an underground facility that has been identified as a high-priority subsurface installation by the operator of the facility, the operator shall, in addition to identifying the horizontal route of its facility as set forth in s. 556.105(5)(a) and (b), and within the time period set forth in s. 556.105(9)(a) for a positive response, notify the excavator that the facility is a high-priority subsurface installation. If the member operator provides such timely notice of the existence of a high-priority subsurface installation, an excavator shall notify the operator of the planned excavation start date and time before beginning excavation. If the member operator does not provide timely notice, the excavator may proceed, after waiting the prescribed time period set forth in s. 556.105(9)(a), to excavate without notifying the member operator of the excavation start date and time. The exemptions stated in s. 556.108 apply to the notification requirements in this subsection.

(3)(a) An alleged commission of an infraction listed in s. 556.107(1) which results in an incident must be

reported to the system by a member operator or an excavator within 24 hours after learning of the alleged occurrence of an incident.

(b) Upon receipt of an allegation that an incident has occurred, the system shall transmit an incident report to the division and contract with the division so that the division may conduct a hearing to determine whether an incident has occurred, and, if so, whether a violation of s. 556.107(1)(a) was a proximate cause of the incident. The contract for services to be performed by the division must include provisions for the system to reimburse the division for any costs incurred by the division for court reporters, transcript preparation, travel, facility rental, and other customary hearing costs, in the manner set forth in s. 120.65(9).

(c) The division has jurisdiction in a proceeding under this section to determine the facts and law concerning an alleged incident. The division may impose a fine against a violator in an amount not to exceed \$50,000 if the person violated a provision of s. 556.107(1)(a) and that violation was a proximate cause of the incident. However, if a state agency or political subdivision caused the incident, the state agency or political subdivision may not be fined in an amount in excess of \$10,000.

(d) A fine imposed by the division is in addition to any amount payable as a result of a citation relating to the incident under s. 556.107(1)(a).

(e) A fine against an excavator or a member operator imposed under this subsection shall be paid to the system, which shall use the collected fines to satisfy the costs incurred by the system for any proceedings under this section. To the extent there are any funds remaining, the system may use the funds exclusively for damage-prevention education.

(f) This section does not change the basis for civil liability. The findings and results of a hearing under this section may not be used as evidence of liability in any civil action.

(4)(a) The division shall issue and serve on all original parties an initial order that assigns the case to a specific administrative law judge and requests information regarding scheduling the final hearing within 5 business days after the division receives a petition or request for hearing. The original parties in the proceeding include all excavators and member operators identified by the system as being involved in the alleged incident. The final hearing must be conducted within 60 days after the date the petition or the request for a hearing is filed with the division.

(b) Unless the parties otherwise agree, venue for the hearing shall be in the county in which the underground facility is located.

(c) An intervenor in the proceeding must file a petition to intervene no later than 15 days before the final hearing. A person who has a substantial interest in the proceeding may intervene.

(5) The following procedures apply:

(a) Motions shall be limited to the following:

1. A motion in opposition to the petition.
2. A motion requesting discovery beyond the informal exchange of documents and witness lists

described in paragraph (c). Upon a showing of necessity, additional discovery may be permitted in the discretion of the administrative law judge, but only if the discovery can be completed no later than 5 days before the final hearing.

3. A motion for continuance of the final hearing date.

(b) All parties shall attend a prehearing conference for the purpose of identifying the legal and factual issues to be considered at the final hearing, the names and addresses of witnesses who may be called to testify at the final hearing, documentary evidence that will be offered at the final hearing, the range of penalties that may be imposed, and any other matter that would expedite resolution of the proceeding. The prehearing conference may be held by telephone conference call.

(c) Not later than 5 days before the final hearing, the parties shall furnish to each other copies of documentary evidence and lists of witnesses who may testify at the final hearing.

(d) All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, and to be represented by counsel or other qualified representative.

(e) The record shall consist only of:

1. All notices, pleadings, motions, and intermediate rulings.
2. Evidence received during the final hearing.
3. A statement of matters officially recognized.
4. Proffers of proof and objections and rulings thereon.

5. Matters placed on the record after an ex parte communication.

6. The written final order of the administrative law judge presiding at the final hearing.

7. The official transcript of the final hearing.

(f) The division shall accurately and completely preserve all testimony in the proceeding and, upon request by any party, shall make a full or partial transcript available at no more than actual cost.

(g) The administrative law judge shall issue a final order within 30 days after the final hearing or the filing of the transcript thereof, whichever is later. The final order of the administrative law judge must include:

1. Findings of fact based exclusively on the evidence of record and matters officially recognized.
2. Conclusions of law. In determining whether a party has committed an infraction of s. 556.107(1)(a), and whether the infraction was a proximate cause of an incident, the commission of an infraction must be proven by a preponderance of the evidence.
3. Imposition of a fine, if applicable.
4. Any other information required by law or rule to be contained in a final order.

The final order of the administrative law judge constitutes final agency action subject to judicial review pursuant to s. 120.68.

History.—s. 10, ch. 2010-100; s. 126, ch. 2013-18.