

Understanding the Loss of Use Application on Utility Damage Claims

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Abstract

Loss of use damages are claimed when an owner has suffered the loss of their property due to someone's negligence. In the telecommunications industry, this loss could be the result of a damaged or severed facility, disrupting communications. In a loss with negligence, the owner is entitled to loss of use dollars which, in the telecommunications industry, could be calculated by the replacement facility rental costs for full capacity, provided by prevailing rate structures for like facilities. This ability to seek loss of use damages is based on the following U. S. tort law:

Restatement (Second) of Torts #931, comment (b) p. 552 (1979)

The owner of the subject matter is entitled to recover as damages for the loss of the value of the use, at least the rental value of the chattel or land during the period of deprivation. This is true even though the owner in fact has suffered no harm through the deprivation, as where he was not using the subject matter at the time or had a substitute that he used without additional expense to him.

Introduction

Since I introduced the loss of use theory to the telecommunications industry for use in utility damage claims, I have been asked many questions about applying and collecting loss of use damage dollars. It is important know why loss of use damages were established and how they were meant to be applied to facility damage claims. In the following paper I have attempted to clarify the foundation of the damage claim application of loss of use damages in general, in the utility industry, and specifically in the telecommunications industry.

Understanding the Loss of Use Application on Utility Damage Claims

It is essential to understand that the application for loss of use damages was introduced to the utility industry in the early 90's as a response to the lack of priority given to utility damage claims by damagers and their representing insurance companies. Prior to that introduction, damage claims were viewed as minor and any settlements on repair expenses seldom exceeded fifty percent, even with clear liability on the part of the damager. The burden was placed on the utility owner to not only make the critical repairs but to also pay for them. It was apparent that the lack of concern on the part of the insurance company was based on the certainty that the repair expenses for these damage events were considered low dollar and that the utility owners would not spend additional dollars to pursue the recovery repair costs from their insured. To counter this situation, the utility industry applied the loss of use theory and incorporated loss of use expense

dollars in their damage claims. It was anticipated that utilizing loss of use would increase the potential to collect one hundred percent of the damage repair expenses from the appropriate damaging party. Since that time, loss of use has been successful in recovering full damage repair expenses and in heightening the priority of utility damages within the insurance and construction industries.

With the success of the inclusion of loss of use on utility damage claims to promote awareness as well as equitable recoveries, there has also been controversy and perceived misuse of the loss of use application. This perceived misuse has at times been referred to as the “Dark Side of Loss of Use”. As with any successful endeavor, there are extremes, which may be considered within the law but are actually unreasonable in reality. An occurrence of where the application of loss of use may be considered by some in the industry to be unreasonable is in the comparison of the actual damage repair expense to the billed loss of use dollar amount, on a billed claim. As an example, when a telecommunication damage claim has a total repair expense of \$40,000.00 and the loss of use is \$20,000.00, it could be considered reasonable. However, if the same claim has a loss of use of \$1,000,000.00, it could then be considered unreasonable. It may sound incredible that an amount of loss of use can be so high, but similar loss of use amounts have been calculated and billed on facility damage claims.

To better understand the methodology behind the loss of use calculations, you must start with a basic explanation of how it is applied. There are three fundamental components to the proper application of loss of use dollars to the damage claim. Each of these components is critical to a successful damage claim collection effort.

The first component is the “Establishment of Negligence” on the part of the damager. The owner of the damaged property must have conclusive proof that the damager’s negligence was the cause of the damage to the facility or property. An investigation must be done at the damage site and should include photos, written statements, and all critical documentation. One noteworthy example of conclusive proof in the utility industry would be the lack of a valid State one call dig ticket. Doing a complete investigation and establishing who the negligent party is can also eliminate billing an innocent participant and the retort of a counter claim. It can not be stressed enough that the damager’s proven negligence is the first order of business on a damage claim. Without establishing clear negligence it would be inappropriate to include loss of use damages.

The second component is “Calculating the Loss of Use Amount” to be included on the bill to the damager. In most loss of use legal documents, loss of use can be established by finding out the fair rental value of a similar property. An example of this is when your personal car is damaged as a result of someone else’s proven negligence; you are entitled to the following compensation dependant on State case law:

- Medical expenses to the doctor or medical facility
- Repair expenses to the automobile repair shop
- Rental car expenses to the rental car company
- Loss of use dollars for the loss of your personal car during the time of repair to you

To calculate the loss of use value of your personal car, you would multiply the daily rental dollar amount for a similar car in value to your own times the number of days it was in the repair shop and unavailable to you. In other words, you lost the use of your car during the time to repair it because of the damager's negligence and you should be compensated for that time. In all claims that feature loss of use, it is the responsibility of the owner of the damaged property to establish a dollar value of the damaged property in order to calculate the proper loss of use dollar amount to be billed. It is in this component that the owner has to make the judgment call on how fair and reasonable the calculated loss of use dollar amount is. The owner must also consider the additional expenditure that may be needed to collect an exceptionally high loss of use dollar amount. Conversely, if the loss of use dollar amount is fair and reasonable, then the chances of obtaining a timely and equitable recovery are increased.

In the telecommunications industry, the loss of use value of large physical facility or cable damaged or severed is calculated on the physical facility's or cable's capacity for an industry standard service. This industry standard service is the least expensive service offered and approved by the Federal Communications Commission (FCC). The capacity is then multiplied times the FCC rate and then multiplied by the time to repair. It is important to note at this point that each utility owner can calculate their loss of use differently by employing one time charges, utilizing technology that increases capacity, employ divisions that minimize the time element to reflect the actual repair time vs. the actual required rental period, etc. These differences in calculating can either minimize or maximize the final loss of use dollar amount. As a result, some in the industry make the argument that technology should not be used to maximize the capacity, because it represents what is being transmitted over the facility and not the value of the actual facility. In addition, the inclusion of one time or non-recurring installation charges, which can be argued that they have already been paid by the utility owner's customers, can also increase the amount. To summarize, discretion is paramount at this point. It is the sole responsibility of the owner and their representatives administering the claim to bill a fair and reasonable amount of loss of use.

The third component of the loss of use application is the "Defense and Collection" of the direct damages, fees, and loss of use expenses billed. This could be the most manageable of the three components if the first two components are completed professionally and with integrity. If the proof of the damager's negligence is conclusive, then the damager's liability for the expenses can be established and defended without contention. If the loss of use is a fair and reasonable calculated amount, then the chances of collecting one hundred percent of the repair expenses are real and the defense of the right to bill and collect loss of use dollars can be upheld. There are many legal documents that discuss and support the loss of use theory and the owner's right to pursue loss of use compensation. In addition, if the first two components are again completed professionally and with integrity, the chances of incurring addition legal expenses will be minimized or unnecessary and the property owner's budget can truly be made whole without extra claim defense expenses or manpower requirements.

In conclusion, if the three components of loss of use i.e. "Establishment of negligence," "Calculating the loss of use amount," "Defense and collection," are

administered correctly and reasonably, then the most economical claim collection can be achieved for the owner of the damaged property. It is not necessary in most claims to incur additional and costly legal expenses to defend a damage claim if the amount billed is accurate and calculated fairly. This, in essence, would be staying away from the “Dark Side of Loss of Use”. It is essential to remember that the loss of use theory has been around for quite some time. To illustrate, a ferry line owner in New York sued for loss of use damages in 1872 and won. The tort law is very definitive in an owner’s rights for recovery when his property is damaged through negligence. Within the telecommunication industry, the loss of use theory has been effective in increasing the number of one hundred percent repair expense (direct damages) recoveries when it is applied professionally and justly. This, in reality, can be considered the “Bright Side of Loss of Use.”