YLD
Allegheny County Bar Association

Point of Law

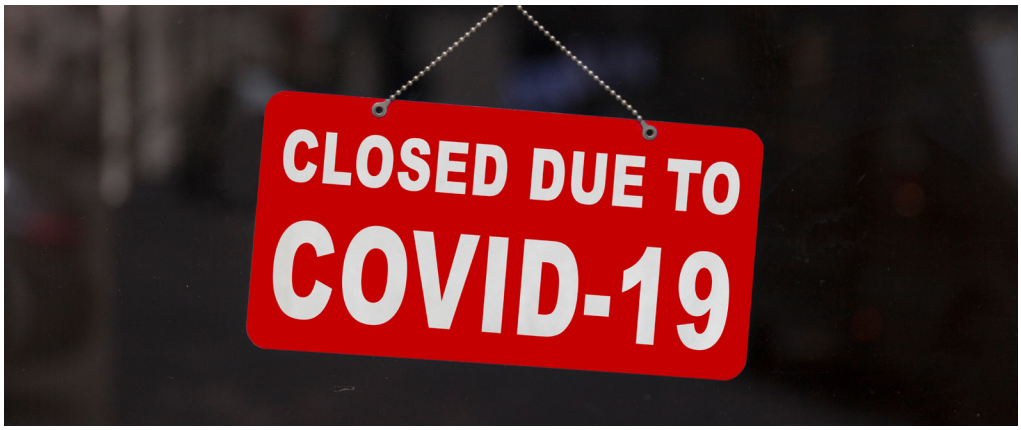
The E-Newsletter of the Young Lawyers Division of the Allegheny County Bar Association

Summer 2020

Business, Interrupted:

Shutdowns Cause Businesses to Seek Coverage Under Existing Policies

By Thomas Cocchi



Following the declaration of a National Emergency concerning the outbreak of a Novel Coronavirus Disease (COVID-19) in the United States, states across America have implemented a variety of measures in an attempt to insulate their residents against the wide-spread effect of the disease. Many states and municipalities have gone so far as to issue stay-at-home orders, and nearly all states have placed restrictions on the type and character of businesses which are permitted to remain open during the pendency of the emergency situation. As a result, doors are shuttered on businesses of all sizes throughout the country, effecting customers, employees, business owners, and the businesses themselves.

Pennsylvania Governor Thomas Wolf proclaimed a disaster emergency due to COVID-19 on March 6, 2020. Pennsylvania further restricted the operations of non-essential businesses on March 19th and commenced enforcement actions against businesses which did not close their physical locations starting on March 21st. A spreadsheet designating businesses as either life-sustaining or non-life sustaining was published and updated with additional guidance on various occasions. A stay-at-home order was issued on April 1st, and was later extended through May 8th.

Still later, Governor Wolf announced a three-tier system for re-opening in which individual counties were classified as red, yellow, or green. While red counties remained under the Pennsylvania stay-at-home order through at least June 4th, yellow counties could re-open under particularized circumstances, and green counties could fully re-open provided they remained in compliance with CDC and Pennsylvania Health Department guidelines. Additional guidance was given regarding the policies and procedures for counties to move from red, to yellow, and eventually to green.

Despite the waiver system implemented in Pennsylvania in March, and the burgeoning prevalence of work-from-home arrangements in nearly every industry, many businesses

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The Americans with Disabilities Act and Website Accessibility: An Update

By Sarah Steers

In the Winter 2019 issue of *Point of Law,* I briefly explained the relationship between the definition of public accommodations in the Americans with Disabilities Act ("ADA") and website accessibility litigation. In short, Title III of the ADA bars discrimination against disabled persons in places of "public accommodation;" this typically refers to businesses. 28 CFR §§ 36.102, 36.104 (2017). Because public accommodations must offer assistance to ". . . ensure effective communication with individuals with disabilities," and because most businesses host websites to supplement brick-and-mortar operations, a tidal wave of ADA Title III lawsuits have recently hit the courts, arguing that websites and apps fail to accommodate disabled people. 28 CFR §36.303(c)(1) (2017).

And rest assured, it is a tidal wave. The ADA Title III blog, hosted by law firm Seyfarth Shaw, calculates the number of federal Title III lawsuits filed each calendar year. Check out these numbers: 7,663 suits were filed in 2017; 10,163 were filed in 2018; 11,053 were filed in 2019. *See ADA Title III Lawsuits Increase by 16% in 2017 Due Largely to Website Access Lawsuits; Physical Accessibility Legislative Reform Efforts Continue,* ADA TITLE III NEWS AND INSIGHTS (May 18, 2020), *shorturl.at/dBHLW*; *Number of ADA Title III Lawsuits Filed in 2018 Tops 10,000,* ADA TITLE III NEWS AND INSIGHTS (May 18, 2020), *shorturl.at/bfy16;* and *2019 Was Another Record-Breaking Year for Federal ADA Title III Lawsuits,* ADA TITLE III NEWS AND INSIGHTS (May 18, 2020), *shorturl.at/aefsD.* Few of these cases have reached the federal appellate level, and the U.S. Supreme Court has not yet spoken on this issue. One could argue that the proliferation of federal Title III lawsuits indicates a need for Executive Branch guidance (though cynics might argue a different interpretation).

But guidance could soon be forthcoming. In 2016, Guillermo Robles filed suit against Domino's Pizza. Robles, a blind man from California, alleged that both the Domino's website and app were not compatible with his screen reader, and he was thus unable to place an order. While the federal trial court determined that Title III of the ADA applied to the Domino's website and app, it also found that Domino's didn't have fair notice of the need to comply with the ADA and dismissed Roble's suit. *Robles v. Domino's Pizza LLC,* No. CV1606599SJOSPX, 2017 WL 1330216 (C.D. Cal. Mar. 20, 2017).

Robles appealed. The U.S. Court of Appeals for the Ninth Circuit affirmed the lower court's decision that Domino's pizza franchise locations are places of public accommodation and that Title III of the ADA applies to both the website and app. *Robles v. Domino's Pizza, LLC,* 913 F.3d 898 (9th Cir.

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Networking 101: Who You Need To Connect With

By Sarah J. Simkin

Networking is the second most important thing for career success: the first being "be good at your job..." (but honestly that won't get you as far as you'd hope without the networking bit).

When you think "networking," you may instantly conjure up those cocktail events where you try to awkwardly wedge into a circle with a bunch of strangers… and you're not wrong. That can be important. But that isn't all of networking! If you don't excel at that, it doesn't mean networking isn't for you or that you can just opt out of it. Every time you make a connection with another human in a community, that's adding a link to your network. That can be serving on a committee or playing in a sports rec league: it isn't just events with nametags. It isn't necessarily a quantity game either: a half dozen real, ongoing connections will assist your career far better than a rolodex of business cards for people you barely know.

Let's start with who you want to meet: there are three kinds of people you want to network with.

The first kind you're most familiar with: someone who can get you a job, or who can get you in front of someone making a hiring decision. You will find these people at those awkward cocktail events, but you'll also find them on committees in the local legal community, volunteering at nonprofits, teaching courses at law schools. The most ideal timing to meet this kind of person is when you can make a good impression on someone who then is hiring in the near future, but no connection is wasted. They may be hiring in the future, or connected to someone else who is.

No one ever told me about the second kind of person I needed to build connections with: informational resources. This person may be someone with hiring power, but they could be at any stage of their career. What's important is that they know about something you are interested in. Whether that's a practice area or the experience of working in a certain environment, they can give you a first-hand perspective on what their job is actually like to help you figure out if it's a good fit for you, as well as advice on how to get there. I have learned a critical secret about these people: they, like all humans, love talking about themselves. It can feel uncomfortable to ask for someone's time, but virtually everyone is flattered when someone says, "I'm intrigued by your career path, could you tell me about it?"

Do not overlook the third kind of networking contact: peer support. This person can't hire you, and may not know much more about the field than you do, but they are intimately acquainted with something critical: your experience as a newer attorney. They may become a legitimate personal friend who can support you through the highs and lows of this profession, or they may just be someone you see around the community but whom you can text when you don't know where to park near an outlying county's courthouse. The careers of your fellow young lawyers are going to grow alongside yours; one day they may become either of the first two types of networking contacts, or refer you business. There is a lot of value in that.

The bar association is a tremendous avenue to meet all three types of people. Coming to events is terrific, but joining a committee or division with regular meetings is even better. I highly recommend becoming involved in some facet of YLD as well as at least one other division or committee, so

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remained shuttered as the weeks and months dragged on. On the federal level, business loans were made available to businesses effected by the COVID-19 shutdowns in the CARES act, but many businesses have found those loans difficult to obtain. Meanwhile, companies both large and small saw cash reserves depleted to cover overhead for shuttered store-fronts, and payroll for employees who could not work. In seeking some way to stay afloat, some businesses sought to invoke a formerly inconspicuous type of insurance coverage for businesses, Business Interruption Coverage.

> As noted by Investopedia:
>
> Business interruption insurance is insurance coverage that replaces business income lost in a disaster. Qualifying events could be, for example, a fire or a natural disaster. Business interruption insurance is not sold as a separate policy but is typically added to a property/casualty policy or included in a comprehensive package policy as an add-on or rider.
>
> *https://www.investopedia.com/terms/b/business-interruption-insurance.asp* accessed April 21, 2020.

While the coverage is intended to replace income lost by a qualifying event, it also covers losses that are less direct such as taxes, payroll, and other overhead expenses.

Businesses across the state and around the country have attempted to file claims with their insurers for losses suffered as a result of the shutdowns related to COVID-19. However, as of the writing of this piece, insurers have largely rejected such claims.

On April 17th, a company doing business as "Siebs Pub" in Pittsburgh filed a class-action suit against Erie Insurance Exchange claiming that the Insurer wrongfully denied coverage to the named Plaintiff, and similarly situated businesses, when it denied its insureds' claims under an "Ultrapack Plus Commercial General Liability" policy. The policy referenced in the suit provided various lines of coverage including inter alia civil authority, contamination, and business income coverage.

Issues which will be important to this type of litigation will include the specific policy exclusions and/or endorsements, in whose favor courts determine ambiguous policy language, and whether the shutdowns are interpreted to have been related to an actual or physical loss. In most cases, the law will require that a contaminant be present on the premises and that it render the property unusable/uninhabitable to find an actual or physical loss. Generally, courts have held that government-ordered closures, are not sufficient to satisfy the physical damage/loss requirement.

Some states and municipalities, including New York City, seemingly anticipating some of the issues regarding business interruption coverage, have included statements in their stay-at-home orders indicating that the virus caused a "physical loss." It remains to be seen what, if any effect, the nominal classification as "physical" by executive branches will have on litigation regarding business interruption claims.

Aside from litigation efforts like that from Siebs Pub, legislatures have also made some efforts to force insurance companies to provide interruption coverage. Pennsylvania House Bill 2372 would require an insurer to cover and indemnify insureds suffering business interruption arising from the ongoing COVID-19 pandemic, "subject to the broadest or greatest limit and lowest deductible afforded to the business interruption coverage under the insurance policy." The text of the bill attempts to make it retroactive to before the business shutdowns and stay-at-home orders were initially made in Pennsylvania. The constitutionality of legislation like this is in question, and no such bill has been passed by a state legislature at the time of writing. However, advocates for insurers point to these proposed bills as evidence that business interruption coverage does not extend to businesses absent explicit action by state governments to amend their policies.

While business interruption coverage has been a part of business insurance policies for a long time, how it is interpreted and implemented in light of the (at this time ongoing) COVID-19 pandemic, legislation, and litigation will shape this area of insurance practice for many years to come. Lawyers who commonly represent business or their insurers should familiarize themselves with this type of coverage and endeavor to stay up to date on the litigation and legislation efforts surrounding it so that they can address the questions and concerns likely to be raised by their clients. ■

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Improving Your Practice With the Freedom of Information Act and the Right-to-Know-Law

By Zachary N. Gordon

The Freedom of Information Act ("FOIA") and Pennsylvania's Right-to-Know Law ("RTKL") vastly improved the public's ability to monitor government agencies. A working knowledge of how these open records laws function is one additional tool attorneys can use to serve their clients.

Requesting records under the RTKL and FOIA is relatively straightforward. Typically, most requests can be done via email or electronically as directed on the government agency's website. Once a request is submitted, the agency then will process and respond to the request. Under the RTKL this usually ranges from a week to a month. 65 P.S. §§ 67.901, 67.902. FOIA responses usually take longer. 5 U.S.C. § 552(a)(6)(C)(i).

Both FOIA and the RTKL have different procedures for appealing if the agency denies the request or never responds. Under the RTKL an appeal is usually filed with the Office of Open Records ("OOR"), and the appeal must be decided within 30 days. 65 P.S. § 67.1101(b). A RTKL request can usually be resolved within two-three months at the administrative level. FOIA appeals are not resolved by a central agency. Instead, appeals are resolved by another official in the agency where the request was made and typically takes longer than RTKL appeals.

It is relatively inexpensive to pursue records at the administrative level under FOIA and the RTKL. Usually it involves filling out forms with basic information about the person making the request and describing what records are sought. Drafting a request and finding the correct person to send it to can be completed in minutes for basic requests.

Appealing the denial of a request can also be pursued cost-effectively. An appeal usually requires a basic form with the ability to attach additional supporting materials. In many cases, state and local agencies that do not respond to an initial RTKL request will provide documents upon the filing of an appeal. According to the OOR's final determination database on its website, in 2019, over 70 appeals were resolved by the agency providing records after an appeal was filed. While clients may have to wait a few months during the open records process, there is likely only a few hours' worth of attorney work needed, which makes the process cost-effective. Agencies, however, do usually charge copying costs and some other fees.

Beyond the ease of submitting and pursuing open records requests, another benefit is that requests can be submitted at any time. Pre-complaint discovery is normally restricted. Pa. R.C.P. No. 4003.8. Certain civil rights claims require averments of a government policy or procedure in the complaint. The RTKL and FOIA could be used to request the policy or other information that might help a complaint survive a motion to dismiss.

Another reason to use a RTKL or FOIA request is that the scope of what is accessible differs greatly from what is accessible in discovery. The Commonwealth Court has explained:

> Under the RTKL, the requester is empowered by the legislature – within explicit, enacted constraints – to go fishing, an exercise that is strictly prohibited even under the broad scope of the discovery rules and the liberal history of discovery in this Commonwealth.

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The Americans with Disabilities Act

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2019). The Ninth Circuit reversed the lower court's decision regarding fair notice, and remanded back to the circuit court. *Id.* The Ninth Circuit's opinion refused to assess whether the Domino's website or app complied with the ADA, leaving that determination for the lower court. *Id.* Domino's appealed to the U.S. Supreme Court, which denied cert. *Domino's Pizza, LLC v. Robles,* 140 S. Ct. 122 (2019).

Now we wait.

Nonetheless, the Ninth Circuit's opinion can be considered a victory – even if small. It defined the connection between public accommodations and web-based access to said businesses. *Robles v. Domino's Pizza, LLC,* 913 F.3d 898, 905–06 (9th Cir. 2019) (". . . the ADA applies to Domino's website and app, which connect customers to the goods and services of Domino's physical restaurants. . . ."). It also explained that the lack of specific federal website accessibility regulations doesn't eliminate a public accommodation's duty to meet the ADA. *Id.* at 908–09. Moreover, parties to other ADA Title III suits should pay close attention to the Ninth Circuit's distinction between businesses with physical locations and those that operate solely on the internet: the ". . . nexus between Domino's website and app and physical restaurants – which Domino's does not contest – is critical to our analysis." *Id.* at 905.

Following the *Robles* remand back to circuit court, many experts anticipated fewer federal ADA Title III lawsuits in 2020. *ADA Title III Litigation: A 2019 Review and Hot Trends for 2020,* ADA TITLE III NEWS AND INSIGHTS (May 18, 2020), *shorturl.at/qzWX9.* But with the long-term shelter-in-place orders necessitated by the global COVID-19 emergency, many people are turning to online shopping for even the most mundane items. It seems likely that individuals with disabilities will encounter snags in the ordering processes. Time will tell not only if this results in increased litigation – but whether other federal trial and appellate courts follow the Ninth Circuit's analysis. ■

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Networking 101: Who You Need To Connect With

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you can balance peer connections and mentors/sponsors.

I will close with my top three tips:

Tips:

1. When the world reopens, only have a drink or a plate of food at a time, never both: that way you can always shake hands (or bump elbows).

2. Stay in touch! A single good conversation isn't enough to cement a networking contact. Send an email when you see an article that made you think of them, ask for coffee a few weeks later, stay engaged.

3. Don't assume people will think of you, or that the fact that they didn't think of you means they don't want you: if you see a job posting where one of your contacts works, reach out to them. ■

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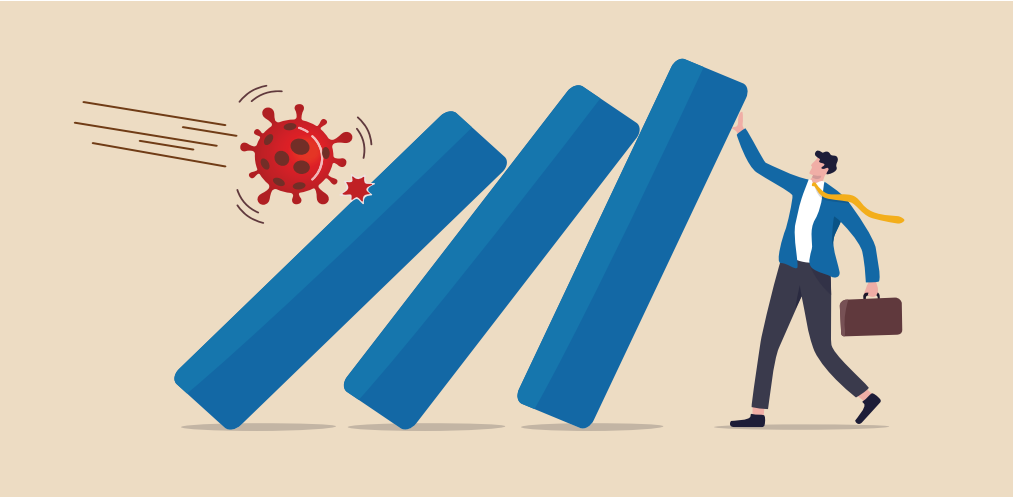
Submit an article for Point of Law, the YLD's ABA award-winning newsletter

YLD members are encouraged to write about the practice of law or any substantive legal issue of interest. Additionally, writers are encouraged to write responses to any article appearing in this issue. Featured authors will have their article – up to 1,000 words long – published along with a brief bio. Articles and inquiries may be submitted to *YLDCommunications@gmail.com.*

How the Coronavirus Affects Contracts with Force Majeure Clauses in Pennsylvania Courts

By Corey A. Bauer



The Coronavirus, medically labeled as COVID-19, has now directly impacted the personal lives of every American citizen. Additionally, to an extent not yet completely known, it is affecting business relationships across the United States. Workers across the globe are contracting the virus, leaving them unable to perform their jobs. Business owners are being forced to shut their doors and reevaluate their finances to determine if they can weather this historic global catastrophe. As the implications of this virus evolve and take form, businesses and municipalities are going to be required to analyze their current contracts to determine whether or not they have a legal remedy for their inability, or the other party's inability, to perform the existing c ontractual obligations.

Enter: the *Force Majeure* clause. *Force Majeure* clauses are contract provisions that may excuse a party to the contract for their inability to perform its contractual obligations if an unforeseeable event prevents them from doing so. A typical example is a natural disaster that negatively affects a seller's ability to deliver goods to a buyer. If a contract does not contain a *Force Majeure* clause, a court's decision of whether to excuse the impacted party's performance depends upon foreseeability and causation.

If a contract does include this clause, the key consideration is whether it explicitly includes the event preventing the performance. Both Commonwealth and federal courts have strictly focused on the language of the *Force Majeure* clause itself in determining whether a party was excused from performance. Indeed, the entire purpose of these provisions is to define the scope of events beyond a party's control that excuse non-performance.

Catch-all language, such as "Acts of God," may not always cover the natural disaster or, in the case of the Coronavirus, the pandemic that is affecting performance. In 2017, a Commonwealth Court judge rejected the "Polar Vortex" as an Act of God, which made transportation impossible. Pennsylvania courts have even rejected hurricanes as an Act of God, where the clause did not specifically identify that as a reason for non-performance, and the language was ambiguous as to whether hurricanes were intended to be an Act of God. In short, relying upon the Coronavirus to be considered an Act of God by the courts is a dubious proposition at best.

"Government Action" is an often used and included phrase in *Force Majeure* clauses. However, it depends upon whether the clause specifies what degree government action must impact performance before the clause applies. This is important because generally acts of third parties making performance impossible do not qualify as a *Force Majeure* event if the acts were foreseeable.

When it comes to foreseeability, the Coronavirus leaves us with a moving target. When was it that a business could have foreseen this massive shutdown? When was it that a reasonable business owner could have foreseen that her ability to perform specific contracts were to be hindered by this virus? These are questions that the courts are going to be tasked with answering in the not-so-distant future.

Clients facing these issues should consider four key factors:

1) The precise language of the clause (if there is one);

2) Whether they have evidence that the Coronavirus was unforeseeable to them at the time of the contract being executed;

3) Whether they have proof of causation between the coronavirus pandemic and the resultant non-performance; and

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Office of the Dist. Attorney of Philadelphia v. Bagwell, 155 A.3d 1119, 1138 (Pa. Cmwlth. Ct. 2017), reconsideration denied (Apr. 12, 2017). The requester's purpose for making the request does not matter. 65 P.S. § 67.703.

The RTKL and FOIA only require that a record not be prohibited from release by an exemption or other law. In contrast, the discovery rules limit document requests using concepts of relevance and proportionality. Under the RTKL, the government agency has the burden to prove that a specific exemption applies to prohibit access. 65 P.S. § 67.708(a). FOIA also places the burden on the government agency to prove the exemption applies.

The ability to request records at any time also helps attorneys pursue the case if discovery is stayed for any reason, such as a pending motion to dismiss or settlement discussions. Since making a request is easy and fast, a request could be submitted at the beginning of the stay period and records might be provided during the stay. The Commonwealth Court has acknowledged that a government agency may still have to respond to a RTKL request even if it would not have to respond to a similar discovery request. *Bagwell,* 155 A.3d 1119, 1135-38. Since the RTKL and FOIA are an independent source of access, nothing prevents attorneys from using the RTKL or FOIA, even if those records may otherwise be discoverable.

While these open records law can help bolster lawsuits against government agencies, these laws can also help in a variety of other cases. Many entities are regulated by government agencies, which may possess public records regarding that entity. Common helpful items to request could be communications between the entity of interest and the government agency, reports regarding the entity, or contracts with the entity.

One concern for making a request is that in some instances the government agency may notify the entity that a request for records regarding that entity has been made and the entity could participate in the administrative resolution of the open records request. 65 P.S. § 67.1101(c). It is also important to remember that the request itself is also generally considered public.

Another benefit to using the RTKL is that the request can ask for the records to be certified by the government agency. The Commonwealth Court has held that this certification must satisfy the requirements of Pennsylvania Rule of Evidence 902. *Philadelphia District Attorney's Office v. Cwiek,* 169 A.3d 711, (Pa. Cmwlth. Ct. 2017). Thus, the RTKL process may eliminate the need to call a government witness solely for authentication purposes. Due to the additional potential cost to certify records, it may be prudent to ask for certification in a second request. FOIA lacks a similar certification procedure.

While many open record disputes are resolved without the need for litigation, a small percentage of cases are litigated in the courts. The government agency does not have to turn over the records while it litigates whether the records may be withheld. In that case, the only remedy is to prevail litigation.

If the agency's response is unreasonable or in bad faith, counsel fees and sanctions could be awarded as part of the litigation. 65 P.S. §§ 67.1304, 67.1305; 5 U.S.C. § 552 (a)(4)(E). While attorneys are permitted to be requesters on behalf of clients, it is often easier to pursue access and later make claims for fees when the client makes the request or the attorney identifies the request as being brought on behalf of a specific client.

Becoming familiar with these open records laws can help improve an attorney's practice. These laws provide an additional tool to get information for clients when traditional discovery may not be available. To explore more about these laws, a great resource for FOIA is the online encyclopedia created by Reporters Committee for Freedom of the Press *https://en.wikipedia.org/wiki/Reporters_Committee_for_Freedom_of_the_Press.* The OOR's website is a fantastic resource for learning more about the RTKL *https://www.openrecords.pa.gov/index.cfm.* ■

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YLD Family Feud

February 2020

How the Coronavirus Affects Contracts with Force Majeure Clauses

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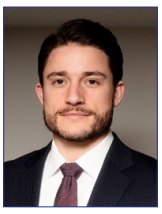
4) Whether they have evidence that the effects of the Coronavirus were so severe that the contractual obligations could not be performed.

If a business or municipality is impacted by the Coronavirus and believes that the *Force Majeure* clause in their contract applies, they must provide notice to the other party of the contract and mitigate and minimize the effects of the Coronavirus on their contractual relationship. For example, an extension or amendment may be made between the parties to avoid litigation.

Business owners and municipalities should also check their insurance policies for "crisis management coverage." This type of policy is intended to cover expenses incurred as a result of an emergency such as the COVID-19 pandemic. This coverage could potentially cover things such as payroll costs for employees who are not allowed to work (or ones who are required to work), costs incurred as a result of interruption of their business, the cost of breached agreements due to impossibility of performance, costs of working remotely, and more. These policies should be reviewed by an attorney, but timing may be crucial, as these coverages often have strict notice provisions.

Many arguments on the use of these clauses will turn on whether "but for" this virus, the breaching party could have performed. Municipalities and businesses seeking to enforce a breached contract may argue that the breaching party's resort to *Force Majeure* is a pretext, and they would not have been able to perform regardless of the pandemic. For this reason, your clients must create a paper trail of their handling of this crisis.

In conclusion, a *Force Majeure* clause can serve as a life preserver to businesses and municipalities faced with adverse impacts of the Coronavirus, or it can be merely a mirage of protection. If the Coronavirus impacted your clients' contractual relations, there are many factors to consider. Nonetheless, starting with the contracts themselves and the insurance policies they hold can provide the attorney with a solid launching point. ■



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YLD at the 150th Gala

March 2020