quinn emanuel trial lawyers
quinn emanuel urquhart & sullivan, llp

Questions Clients Are Asking About COVID-19

U.S. Outlook: Top Questions About Commercial Leases & Rent Obligations Amid Coronavirus Outbreak

March 31, 2020

Andrew Rossman
andrewrossman@quinnemanuel.com
Phone: +1 212 849 7282

Christopher Kercher
christopherkercher@quinnemanuel.com
Phone: +1 212 849 7263

Rollo Baker
rollobaker@quinnemanuel.com
Phone: +1 212 849 7513

Donald Reinhard
donaldreinhard@quinnemanuel.com
Phone: +1 212 849 7314

Alex Loomis
alexloomis@quinnemanuel.com
Phone: +1 617 712 7120

* * *

Recent press reports have highlighted the profound economic impact COVID-19 is having on companies both large and small around the United States—and the ramifications on commercial leases. Across the country, state and local governments are issuing orders that close "non-essential" business altogether,[1] implement curfews, and/or drastically limit the number of consumers who can

gather in a single location.[2] As a result, consumer-facing companies of all stripes may find themselves unable to operate at all, unable to operate all aspects of their business at their leased space, or facing a moderate-to-severe decline in revenues as economic activity has come grinding to a halt.

Because of these sudden events, many commercial tenants have found themselves without funds to pay rent. This situation is not limited to small businesses that operate individual locations. For instance, on March 18, 2020, national restaurant chain The Cheesecake Factory sent notice to all of its landlords around the country warning that it would be unable to pay rent due beginning April 1st.[3] Other national retail and restaurant chains, including H&M, Mattress Firm and Subway Restaurants, have sent similar notices to landlords across the country.[4] In sum, inability to pay rent is a major issue for commercial tenants all over the country from small businesses to Fortune 500 companies

In order to alleviate some of the hardship caused by COVID-19 related economic disruption and closures, the United States Congress, as well as state and local governments, have moved to swiftly pass legislation funding businesses or delaying the negative consequences that missed rent payments portend. At the federal level, on March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act, which provides $350 billion in small business loans that may be used to pay rents and other payment obligations coming due.[5] Around the country, some states (including New York) have issued moratoriums on commercial (and residential) evictions,[6] and issued orders requiring that state-regulated financial institutions grant 90-day forbearance relief to qualifying borrowers financially impacted by the COVID-19 pandemic.[7] Similarly, in many courts around the country there is a halt or substantial delay on court proceedings necessary to evict a tenant.[8] In New York, which has been particularly hard hit by the COVID-19 pandemic, the State Senate is currently considering a bill that would provide greater relief to Small Businesses with less than 100 employees by suspending rent obligations for a period of 90 days.[9]

Despite these measures, many commercial tenants across the country still face a dual threat from the COVID-19 pandemic: (1) government ordered closure of their businesses eliminates or substantially reduces revenues; and (2) rent payments are coming due that tenants cannot pay. Landlords who do not receive rent payments may suffer economically as well, particularly where they are unable to pay mortgage or other debt obligations and fail to obtain relief from their lenders or banks.

These hardships have led to questions from commercial tenants and landlords about potential liability, default, termination, and related issues arising under commercials leases which, if not addressed by legislative action, are likely to lead to substantial litigation. This Alert addresses the questions and issues that Quinn Emanuel's clients are asking about. Of course, these are only some of the myriad issues about commercial leased potentially raised by the spread of the novel coronavirus. If you have any questions about the issues addressed in this memorandum or otherwise, please do not hesitate to reach out to us.

1) Could the doctrines of *Force Majeure* or Frustration of Purpose have application to commercial leases?

a. ***Force Majeure***

Parties to commercial leases who are dealing with COVID-19 related business closures or revenue shortfalls may be inclined, in the first instance, to turn to the much-discussed body of law pertaining to *force majeure* events. Quinn Emanuel has written a detailed primer on the issues this doctrine is designed to cover, which can be accessed at the firm's COVID-19 Resource Center.[10]

For example, a valid *force majeure* clause may relieve both tenants and landlords of certain non-monetary obligations under their leases. For example, where a tenant's operation of its business is now prohibited by law, that tenant may be excused from satisfying otherwise valid lease terms, such as operating covenants requiring them to operate for a certain number of hours or days per week. Landlords may likewise be excused from obligations to grant access and use of the leased premises for currently prohibited business purposes. Tenants and landlords will need to assess the specific language of their *force majeure* clauses as they assess potential defenses and risk.[11]

b. Frustration of Purpose

Historically, the common law doctrine of "frustration of purpose"[12] has been successful in limited circumstances. However, frustration of purpose has been a recognized defense to alleged contract breach for more than a century in the United States. The Restatement (Second) of Contracts summarizes the doctrine as:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.[13]

Generally speaking, a contractual obligation is discharged due to frustration of purpose if three conditions are met:

> (1) the purpose that is frustrated must have been a principal purpose of that party in making the contract;
> (2) the frustration must be substantial; and
> (3) the nonoccurrence of the frustrating event must have been a basic assumption on which the contract was made.[14]

Put another way: frustration of purpose applies when unforeseen supervening events, the nonoccurrence of which were a basic assumption of the contracting parties, deprives a party of all contractual benefit, utterly defeating the purpose of performance.[15] To satisfy this requirement "[t]he frustration must be so severe that it is not fairly to be regarded as within the risks [the obligor] assumed under the contract."[16]

In commercial leases, it may reasonably be argued that the fundamental "purpose" of any lease, from the tenant's point of view, is the use of leased space to operate their business. During the COVID-19 pandemic, tenants who are unable to operate their businesses out of shuttered locations, or who are only able to operate on a limited basis, may attempt to invoke the frustration of purpose doctrine in order to excuse or reduce their obligation to pay rent. Although case law squarely addressing this issue is extremely limited, at least two theories may apply.

First, in the commercial leasing context, courts have considered whether frustration of purpose applies "*where premises are leased for a specified or contemplated use or for a use to which the property is peculiarly adapted* and, subsequently, some chance circumstance, such as prohibition of law or change of economic conditions, deprives that property of its expected value to the tenant."[17] For example, in one case under New York law the court held that performance under a contract was frustrated when a city condemned property which had been leased for operation as a supermarket.[18] Similarly, under California law, if a commercial lease provides for a specific purpose or use of the leased premises and restricts the use of the premises to that specified purpose, the tenant may retain the right to terminate the lease under the doctrine of "commercial frustration" if the commercial tenant cannot use the premises for that purpose.[19]

Courts have also applied the frustration of purpose doctrine to excuse a tenant's performance obligations under a commercial lease in circumstances where a tenant was unable to obtain a license, permit, or charter required for the tenant's business.[20]

By comparison, supervening events making performance for the tenant unprofitable, less profitable or more difficult, may not be enough to establish an excuse for the tenant not to fulfill the lease requirements.[21] Additionally, a tenant may not be excused under the commercial frustration doctrine if another purpose under the lease remains available.[22]

During the COVID-19 pandemic, Government-mandated closures of "non-essential" businesses, and operational limits on those businesses that are permitted to remain open, may "deprive th[e] property of its expected value to the tenant"[23]—at least for the time period in which a tenant is prohibited from operating. Tenants may argue that as a result, they should be excused from (at least temporarily) paying rent under the frustration of purpose doctrine. This argument may be stronger for a tenant whose lease defines and permits only a specific use (e.g., to operate a clothing store), and applicable government orders have defined that use as "non-essential," meaning that for the duration of the applicable government order, the tenant cannot use the leased premises for the purpose they contracted for.[24] In the event that a tenant can successfully invoke the frustration of purpose doctrine, courts may also allow recovery of payments of rent made in advance for some or all of the lease term.[25]

Second, tenants (including those who are permitted to run some or all of their business) may be able to argue that the *purpose* of their leases is to earn revenues from sales occurring at the leased premises, and thus to pay rent from those revenues. Although there is limited case law accepting this approach, some courts have excused payment obligations under real property-related contracts where both parties understood that payment was linked to a particular source of funds that later became unavailable. For example, in *D & A Structural Contractors v. Unger*, a homeowner contracted for home renovation services and the parties' agreement provided that the renovation work would be done according to a payment schedule with payment provided upon settlement of an insurance claim assigned to the contractor's affiliate.[26] When a separate court issued a restraining order barring the homeowner from transferring her assets (including the insurance proceeds) and the homeowner

became unable to pay the contractor, the contractor ceased work and sued the homeowner for breach. The Court found that the homeowner was excused from her payment obligations because both parties understood that the use of particular funds to pay the contractor was a substantial purpose of the contract.[27] Likewise, a U.S. district court denied a motion to dismiss a complaint seeking to rescind a commercial lease under the frustration of purpose doctrine where "Defendants [] alleged that a principal purpose of the Lease Agreement was to make a profit, and that this purpose was frustrated by the 'Economic Circumstances.'"[28]

As mentioned above, commercial leases may also contain operating covenants requiring that the premises be used for a stated purpose for a certain number of days per week and hours per day. In connection with operating covenants, commercial leases may also contain percentage rent clauses, which together are designed to maximize the landlords' revenue from percentage rent by ensuring that the tenant operates its business on an agreed-upon schedule. The presence of these provisions—tying the lease to a specific intended use of the premises—may strengthen the tenant's argument that the temporary closure of the business as a result of COVID-19 has frustrated the fundamental purpose of the lease: for the tenant to earn revenues from the specific business at the premises and to use part of those revenues to pay rent.

In short, case law in this area is under-developed and applied only sparingly. The question of whether the frustration of purpose doctrine excuses payment of rent for commercial tenants who cannot operate and/or cannot afford to pay rent because of the COVID-19 pandemic will present a significant issue for many courts across the country. However, it has been said that "the recognition that tenants should have relief indicates a gravitation of the law toward this principle: fortuitous destruction of the value of performance, by a circumstance wholly outside the contemplation of the parties, may excuse a tenant."[29] Tenants may argue that the value of commercial leases comes from the ability to run a business in the leased space, and the COVID-19 pandemic has destroyed that value.

2) My lease has a provision stating that the lease is terminated or rent may be abated upon "eminent domain" of the premises. Could that excuse performance?

Some commercial tenants or landlords may also query whether any of the recent restrictions on businesses qualify as "takings" under the U.S. Constitution's Fifth Amendment (or state law equivalents), and if so, (1) whether they are entitled to compensation for lost business, or (2) where the parties' lease is voidable in the event of a taking, whether tenants (or landlords) may invoke such clause to void the lease or, in the case of a tenant, refuse to pay rent (or to pay reduced rent).

While it is fairly clear that a true taking would excuse a tenant from rent payment obligations[30], we suspect that any such takings challenges tied to the COVID-19 pandemic may be challenging. While it is clear that the government's physical intrusion on or possession of private property triggers the Takings Clause, governmental regulations undermining the property's economic value have only been recognized as governmental takings in rare circumstances. The courts' so-called "regulatory takings jurisprudence ... is characterized by essentially ad hoc, factual inquiries designed to allow careful examination and weighing of all the relevant circumstances."[31] Given this latitude, courts may be reluctant to characterize pandemic regulations as "takings" for fear of second-guessing public health measures. Perhaps for this reason, some courts have even held that physical destruction of property to prevent pandemics do not qualify as takings, but instead are exercises of the government's police

power.[32] Finally, governments may argue that the Fifth Amendment does not entitle businesses to compensation for consequential damages flowing from lost business opportunities.[33]

Property owners may face fewer obstacles if they bring takings claims under state constitutions and state statutes, which can be more protective of property rights.[34] For example, some states courts have diverged from federal precedents and held that quarantines destroying vegetation to stop disease are takings, requiring just compensation.[35] Some state courts have also held, citing U.S. Supreme Court dissents, that temporarily denying people the right to access their property constitutes a "regulatory taking" under their own state constitutions.[36] State courts, of course, may prove disinclined to second-guess public health decisions in the midst of a pandemic. But any property owners interested in bringing a takings claim should strongly consider bringing a claim under state law as well, as this would at minimum offer a second bite at the apple.

It is not clear whether "condemnation clauses" allowing for termination of leases or rent abatement in the event of government takings would cover COVID-19 related property regulations either. There is little to no case law on whether regulatory takings, or regulations depriving property of substantial economic value, trigger these clauses. Much will likely turn on the precise wording of individual leases—as well as the body of the case law discussed above.

3) My lease refers to the covenant of quiet enjoyment. If I am barred from my property (in whole or part) by a government shutdown order, does that provision have any application?

Commercial tenants who are barred from use of their leased premises sometimes have a viable claim for breach of the covenant of quiet enjoyment, and/or constructive eviction. In many jurisdictions, all commercial leases contain an implied covenant of quiet enjoyment[37], and many commercial leases contain clauses explicitly granting the covenant.

However, case law indicates that in order for a tenant to have a cognizable claim, the cause of the interference with the tenant's use and enjoyment of the premises must be "shown to have been the act of the lessor, or of persons claiming through or under him."[38] Thus, where COVID-19 related government orders bar commercial tenants from use of their leased premises, such tenants may have a difficult time claiming breach of the covenant of quiet enjoyment or constructive eviction against a landlord who is merely abiding by government order—and, in fact, many commercial leases may state that both tenants and landlords agree to abide by such laws and ordinances.

For commercial tenants who are still permitted under law to operate their business entirely or in part, landlords may subject themselves to potential claims for breach of the covenant of quiet enjoyment if they fail to maintain shared space and utilities in a proper manner, or otherwise take actions that deprive tenants from using their leased premises.

Further, where a tenant would otherwise have a potential claim for breach of the covenant of quiet enjoyment, commercial leases often condition the tenant's right to quiet enjoyment on its payment of rent. For example, in 1955, a New York tenant sought to claim that its landlord's breach of the covenant of quiet enjoyment amounted to a partial constructive eviction; but the Court refused to even reach the issue because "plaintiff failed to perform the conditions precedent, i.e., the payment

of rent."[39] Tenants who continue to operate their businesses, then, may be wise to continue paying rent even if they believe they have a valid claim for breach of the covenant of quiet enjoyment.

4) If I am the landlord and want to give my tenants a break, but bank lenders are demanding payment, do I have any potential claims? Any other means of relief?

To start, governmental action might encourage banking institutions to grant forbearance on debt obligations. For example, on Saturday, March 21, 2020, Governor Andrew M. Cuomo of the State of New York released Executive Order No. 202.9 to address banking laws in light of COVID-19 concerns.[40] The executive order provides that "it shall be deemed an *unsafe and unsound business practice* if, in response to the COVID-19 pandemic, any bank which is subject to the jurisdiction of the [Department of Financial Services] shall not grant a forbearance to any person or business who has a financial hardship as a result of the COVID-19 pandemic." Other states may implement similar orders, which may provide some relief to landlords facing mortgage obligations.

Landlords may also attempt to insist on forbearance from their lenders (and tenants from their landlords) under the doctrine of temporary impracticability. When performance under a contract becomes temporarily impracticable, an obligor's duty to perform is temporarily suspended, until it becomes possible to perform.[41] To invoke this defense, as *Willison on Contracts* explains, a promisor must show "the unanticipated circumstance has made a performance of the promise vitally different from what was reasonably to be expected" when the contract was formed.[42] For this defense to succeed, the debtor should try to demonstrate that performance under the original contract would impose significant hardship.[43]

Courts may be inclined to accept this defense because this doctrine is uniquely tailored to government emergency regulations. The Restatement (Second) of Contract's first illustration, for example, states that a contractor is temporarily excused from building a power plant during a war due to "a shortage of materials."[44] Landlords may analogize this to government restrictions that deprive tenants of business and thus, effectively, prevent tenants from paying rent—and this analogy may prove even stronger if states prohibit landlords from collecting rent.[45]

This defense may have challenges, however. Creditors may argue, for example, that "a party's duty to perform under a contract was not excused because of economic impracticability caused by governmental regulation."[46] Arguably, though, coronavirus restrictions do not compare because there is a much tighter causal link between prohibitions on nonessential business, nonpayment of rent, and performance under mortgage contracts.[47] There are also some century-old cases arising out of the 1918 Influenza Pandemic holding that a school is obligated to pay teachers when schools are closed due to quarantine.[48] But these cases may reflect the now-outdated common-law rule that "supervening impossibility of performance ... is not a defense."[49] Finally, debtors should consult their underlying contracts and mortgages, as many include "hell or high water" clauses, or similar provisions, guaranteeing payments notwithstanding future impracticability.[50]

To avoid these potential challenges, debtors may be most successful if they emphasize that they are seeking only *temporary* relief. Courts may be more inclined to sympathize with a party seeking only forbearance during an emergency.

* * *

Finally, it is worth noting that many states give a private right of action to businesses harmed by "unfair trade practices" in the course of business or commerce.[51] These remedies are somewhat limited in some larger markets, like New York and California, which tend to proscribe mostly "deceptive," "unlawful," or "anticompetitive" practices, at least for business plaintiffs.[52] But some states have defined unfair trade practices more expansively. Here, we focus on two such states: Massachusetts and Connecticut.

We are unaware of any specific precedents under these statutes relating to commercial lease arrangements in times of pandemics, but the meaning of "unfair trade practice" can often be ambiguous. Massachusetts and Connecticut courts have, for example, at times relied on a 1964 FTC regulation stating that a practice is unfair if it (1) "is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) ... is immoral, unethical, oppressive, or unscrupulous; (3) ... causes substantial injury [to] ... competitors or other businessmen."[53]

The absence of clear precedent here could help plaintiffs, as many courts consider the "unfairness" of a trade practice to be a question of fact.[54] Landlords and tenants may want to consider being cautious before leveraging punitive lease terms, like eviction and acceleration clauses, to extract concessions from one another. Courts have held that "commercial extortion"—where one party "refuse[s] to continue performance under the contract until [extra] charges are paid"—is an unfair trade practices if the party lacks justification for insisting on extra charges.[55] To be sure, even states with capacious tests have reined in unfair trade practices claims at the pleadings phase.[56] But a well-drafted complaint calling attention to particularly egregious or bad faith conduct in the leasing market might well survive dismissal and even proceed to trial.[57]

Beyond taking care that their behavior cannot be painted as "egregious" or "bad faith," landlords and tenants should consult their own states' unfair trade practices jurisprudence to protect their rights and limit their potential exposure.

Regardless of what specific issues arise for individual landlords and tenants, as we have discussed in detail in another firm memorandum[58], the COVID-19 outbreak has led to various court closures and limitations on the filing of new lawsuits. Landlords, tenants, and their counsel would therefore be wise to visit court websites for the most up to date information on how and when to file suit.

---

[1] *See, e.g.*, New York State on Pause, *available at* https://coronavirus.health.ny.gov/new-york-state-pause (closing all "non-essential" businesses statewide).

[2] As of March 31, 2020, California, Connecticut, Colorado, Illinois, New Jersey, New York, Ohio, Virginia, Washington, D.C., as well as numerous large cities and counties around the United States, have all issued "shelter in place" orders for their residents—permitting the operation of only "essential" businesses. *See* S. Mervosh, D. Lu, and V. Swales, *See Which States and Cities Have Told Resident to Stay at Home*, New York Times, *available at* https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html. "By [March 27], about half of the states and the Navajo Nation had told their residents to stay at home as much as possible, with many cities and counties joining in . . ., mean[ing] at least 228 million people in at

least 25 states, 74 counties, 14 cities and one territory are being urged to stay home," and can only "generally still leave their home for necessities." *Id.* Many other states and cities have banned public gatherings of a certain size, barred the operation of restaurants and/or bars after 10 p.m., and otherwise limited economic activity. *See id.*

[3] *See* M. Kang, *The Cheesecake Factory Tells Landlords Across the Country It Won't Be Able to Pay Rent on April 1*, Eater Los Angeles (March 25, 2020), *available at* https://la.eater.com/2020/3/25/21194144/cheesecake-factory-rent-strike-chain-restaurant.

[4] *See* L. Coleman-Lochner, N. Wong, and E. Ludlow, *U.S. Retailers Plan to Stop Paying Rent to Offset Virus*, Bloomberg News (March 24, 2020), available *at* https://www.bloomberg.com/news/articles/2020-03-24/u-s-retailers-plan-to-stop-paying-rent-to-offset-virus-closures.

[5] H.R. 748 (March 27, 2020), *available at* https://www.congress.gov/bill/116th-congress/house-bill/748.

[6] *See* March 15, 2020 Memorandum of State of New York Unified Court System Chief Administration Judge Lawrence K. Marks, *available at* https://www.nycourts.gov/whatsnew/pdf/Updated-Protocol-AttachmentA2.pdf.

[7] *See, e.g.*, New York State Executive Order Number 202.9, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, *available at* https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.9.pdf.

[8] For an overview of the ways in which courts at the federal and state levels have reduced in-person proceedings and non-essential functions, *see* Quinn Emanuel's Firm Memorandum, *U.S. Outlook: Top Questions About Civil Litigation Amid Coronavirus Outbreak* (March 24, 2020), *available at* https://www.quinnemanuel.com/media/1419980/20200324-final-client-alert-civil-litigation-questions-amid-covid.pdf.

[9] Draft N.Y. Senate Bill 8125—A (March 23, 2020), *available at* https://legislation.nysenate.gov/pdf/bills/2019/S8125A. The bill would also suspend mortgage obligations for landlords who do not receive rents, on a proportionate basis. *See id.*

[10] *See* Quinn Emanuel's Firm Memorandum, *U.S. Outlook: Novel Legal Challenges from the New Coronavirus*, *available at* https://www.quinnemanuel.com/media/1419958/client-alert-us-outlook-novel-legal-challenges-from-the-new-coronavirus.pdf. This Memorandum and many others concerning COVID-19 related legal issues are available at Quinn Emanuel's Coronavirus (COVID-19) Resource Center, *available at* https://www.quinnemanuel.com/covid-center.

[11] Typical *force majeure* clauses in commercial leases may not excuse a tenant from payment of lease obligations. First, commercial leases often include clauses explicitly stating that the rent payment obligation is not excused by a *force majeure* event. Further, even where a lease does not explicitly carve out the obligation to pay rent, it may be difficult to successfully invoke *force majeure* to excuse rent payments because, although it may be economically disastrous to pay the rent due, some courts have held that where a party owes a payment and it is physically possible to make that payment, it is not excused by *force majeure* for its failure to pay. *See* Quinn Emanuel, *U.S. Outlook: Novel Legal Challenges from the New Coronavirus*, at 2-5 (collecting cases). *But see Whole Foods Mkt. v. Wical Ltd.*, 2019 WL 5395739, at *5 (D.D.C. Oct. 22, 2019) (ruling that it was a question of fact whether a force majeure provision excused non-payment of rents after a rodent infestation forced Whole Foods to close and remediate).

[12] This doctrine is also often referred to as the defense of "impractability."

[13] Restatement (Second) of Contracts, § 265. In 1921, the United States Supreme Court acknowledged this doctrine and declared that, "[w]here parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to an implied condition that, if before the time for performance and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it." *Texas Co. v. Hogarth Shipping Co.,* 256 U.S. 619, 629–30 (1921). Although subsequent authority and case law has focused on the underlying *purpose* of contracts, rather than the existence of an implied condition, the relevant analysis is much the same.

[14] 30 Williston on Contracts § 77:94 (4th ed.); *see also* Restatement (Second) of Contracts, § 265.

[15] *Id.*; *see also Krell v. Henry*, 2 KB 740 (1903) (canonical case holding that a man who had rented a premise overlooking the route for King Edward VII's coronation procession was excused from future performance after procession was cancelled).

[16] Comment a, § 265 of Restatement (Second) of Contracts. Where commercial leases shift the burden of compliance with applicable laws, government rules, regulations or requirements to tenants, a court may ultimately deem the parties to have allocated the risk of government ordinances shuttering businesses due to COVID-19 to the tenant, or may determine that such a clause shows the potential inability to operate within the leased space was *not* "unforeseeable."

[17] 30 Williston on Contracts § 77:97 (4th ed.) (emphasis added); *see also id.* ("[A]n argument could be made that the rent under the lease was fixed on the vital assumption that the intended business use of the property would continue to be legal; thus, where illegality might foreclose the use of the premises for the sole intended purpose permitted under the lease, the tenant might claim impracticability if the legal constraints cannot be eliminated and are beyond the tenant's control."); *see also* Restatement (Second) of Contracts § 265 illustration 4 (1981) ("A leases neon sign installations to B for three years to advertise and illuminate B's place of business. After one year, a government regulation prohibits the lighting of such signs. B refuses to make further payments of rent. B's duty to pay rent is discharged, and B is not liable to A for breach of contract."); 14 Corbin on Contracts § 77.1 (2019) ("In the typical [frustration of purpose] scenario, the party is perfectly capable of performing (e.g., paying money to rent a building), but the party's reason for doing so longer exists.").

[18] *2814 Food Corp. v. Hub Bar Bldg. Corp.*, 297 N.Y.S.2d 762 (N.Y. Sup. Ct., N.Y. Cnty. 1969), *rev'd on other grounds*, 35 A.D.2d 277 (1970); *see also, e.g.*, *Gardiner Properties v. Samuel Leider & Son*, 279 A.D. 470 (N.Y. App. Div. 1st Dep't 1952) (holding that an indefinite prohibition imposed an emergency presidential order would frustrate the purpose of a 99-year lease so long as the tenant sought and was denied an exemption); *Hizington v. Eldred Refining Co. of N.Y.*, 235 A.D. 486 (N.Y. App. Div., 4th Dep't 1932) (subsequent adoption of regulations by City Commissioner of Public Safety regulating handling and sale of gasoline which rendered occupancy of leased premises unlawful, excused tenant lease obligations)

[19] *See Industrial Development & Land Co. v. Goldschmidt*, 56 Cal. App. 507, 511 (1922). This doctrine has been held to apply in situations where performance under the lease would create an extreme hardship for the tenant and there is present a complete, or nearly complete, destruction of the purpose stated in the commercial lease. *Lloyd v. Murphy*, 25 Cal. 2d 48 (1944).

[20] *See generally* 89 A.L.R.3d 329 (Originally published in 1979) (collecting cases). Courts have on occasion similarly canceled lease obligations even where a government ordinance prohibiting the use contemplated under the lease arose *prior to* lease execution, under the doctrine of mutual mistake. *See, e.g.*, *Nelms v. Cox,* 327 S.W.2d 785, 787 (Tex. Civ. App. 1959) (cancelling lease under doctrine of mutual mistake where pre-existing city ordinance unknown to the parties prohibited intended use of leased premises as a dance hall). *But see Hoff v. Sander*, 497 S.W.2d 651 (Mo. Ct. App. 1973) (holding that, as a matter of law, a tenant is charged with knowledge of applicable zoning restrictions and that rescission of a lease may not be based, in such a circumstance, on mutual mistake of fact even though the only use contemplated under the lease, facilities for horses, dogs, and other pets, was prohibited by applicable zoning restriction).

[21] *See Lloyd v. Murphy*, 25 Cal. 2d at 55.

[22] *Lloyd*, 25 Cal. 2d at 55; *see also Glenn R. Sewell Sheet Metal, Inc. v. Loverde*, 70 Cal. 2d 666, 676 (1969). Similarly, "[a] number of courts have ruled that if a zoning ordinance does not completely prohibit the use of the premises contemplated by the lease, the lease will be upheld." 5 Rathkopf's The Law of Zoning and Planning § 80:4 (4th ed.) (collecting cases).

[23] 30 Williston on Contracts § 77:97 (4th ed.).

[24] Tenants who wish to shift their business focus to conduct operations deemed "essential" may also face difficulty if their landlord refuses to permit the use and it is prohibited under the lease. For example, during the Prohibition Era, the Supreme Court of Errors of Connecticut ruled that a tenant who leased space solely for use as a bar could either (1) use the property as a bar (despite the operation being illegal), or (2) or terminate the tenancy—the tenant could not operate a shoe repair shop in the leased space without breaching the terms of the lease. *Goldberg v. Callender Bros.*, 113 A. 170 (Conn. 1921). In *Goldberg*, the Court relied in its ruling on a clause in the lease acknowledging that use of the premises as a saloon might become unlawful (specifically if the city or county denied or revoked the tenant's liquor license), and making the lease "void at the option of [the tenant]" if so, to narrowly define the remedies available to the tenant.

[25] *See generally* 30 Williston on Contracts § 77:94 (4th ed.).

[26] *D & A Structural Contractors v. Unger*, 901 N.Y.S.2d 898 (N.Y. Sup. Ct. Nassau Cnty. 2009).

[27] *Id.*

[28] *Waikiki Trader Corp. v. Rip Squeak Inc.*, No. CV 09-00344 ACK-BMK, 2010 WL 11530615, at *12 (D. Haw. Apr. 15, 2010).

[29] 30 Williston on Contracts § 77:97 (4th ed.). During World War II, the Second Circuit approvingly quoted the following commentary on expansion of the common law doctrine of impossibility to deal with the realities of a wartime economy: "courts are free to regard the problems arising out of governmental interference in wartime as to a large degree *sui generis*, and [] they need not adhere strictly in cases of this sort to the precedents which have been established in the law of impossibility of performance in general, but are at liberty to reach the results most consistent with justice and public policy, as long as these results can be attained with due regard to the more fundamental principles of the law of contracts." *L. N. Jackson & Co. v. Royal Norwegian Gov't*, 177 F.2d 694, 697 (2d Cir. 1949) (quoting E. Merrick Dodd, *Impossibility of Performance of Contracts Due to War-Time Regulations*, 32 Harv. L. Rev. 789, 791 (1919)).

[30] *See 2814 Food Corp. v. Hub Bar Bldg. Corp.*, 297 N.Y.S.2d 762, 768 (N.Y. Sup. Ct., N.Y. Cnty. 1969), 969, *rev'd on other grounds*, 35 A.D.2d 277 (N.Y. App. Div. 1st Dep't 1970).

[31] *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (internal citations omitted).

[32] *See Miller v. Schoene*, 276 U.S. 272, 279 (1928) (holding that a state may destroy infected cedar trees without compensation to prevent the spread of a disease infecting other trees); *see also, e.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 490 (1987) (reaffirming *Miller*); *In re Prop. Located at 14255 53rd Ave., S., Tukwila, King Cty., Washington*, 86 P.3d 222, 229 (Wash. Ct. App. 2004) ("the government will not have a constitutional obligation to compensate for property damage, if the damage is necessary to contain or abate a public calamity"); *Empire Kosher Poultry, Inc. v. Hallowell*, 816 F.2d 907, 915 (3d Cir. 1987) ("a government could even require the slaughter of infected poultry without compensation"). *But see Yancey v. United States*, 915 F.2d 1534, 1542 (Fed. Cir. 1990) (holding that quarantine order placed on poultry flock was a Fifth Amendment taking).

[33] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428 (1982) (holding that "government action outside the owner's property that causes consequential damages" is not a taking); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 380 (1945) ("damage to those rights of ownership does not include losses to his business or other consequential damage"); *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1215 (Fed. Cir. 2005) (similar); *Brakke v. Iowa Dep't of Nat. Res.*, 897 N.W.2d 522, 549–50 (Iowa 2017) ("consequential damages are not recoverable in takings cases").

[34] *See* John Martinez, *Government Takings* § 2:36 (Oct. 2019) (surveying state takings law); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 Yale L.J. 203, 269 (2004) (explaining ways in which state takings law is more protective of property rights than federal law).

[35] *See, e.g.*, *Conner v. Reed Bros.*, 567 So. 2d 515, 519 (Fla. 2d DCA 1990) (applying a balancing test).

[36] *See Eberle v. Dane Cnty. Bd. of Adjustment*, 595 N.W.2d 730, 740 (Wis. 1999) ("The Eberles claim that the Board's improper denial of the special exception permit temporarily deprived them of the ability to access their property by way of Timber Lane, the only legal means of access. Certainly, under the circumstances of this case, a complete lack of legal access to a piece of land constitutes a deprivation of 'all or substantially all practical uses' of that land.").

[37] *See generally* 41 A.L.R.2d 1414, "Breach of Covenant of Quiet Enjoyment," (Originally published in 1955) (collecting cases).

[38] *See id.*

[39] *Dave Herstein Co. v. Columbia Pictures Corp.*, 149 N.E.2d 328 (N.Y. 1958).

[40] New York State Executive Order Number 202.9, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, *available at* https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.9.pdf. Section 39 of the Banking Law provides that "[w]henever it shall appear to the superintendent that any banking organization, bank holding company, registered mortgage broker, licensed mortgage banker, licensed student loan servicer, registered mortgage loan servicer, licensed mortgage loan originator, licensed lender, licensed casher of checks, licensed sales finance company, licensed insurance premium finance agency, licensed transmitter of money, licensed budget planner, out-of-state state bank that maintains a branch or branches or representative or other offices in this state, or foreign banking corporation licensed by the superintendent to do business in this state is conducting business in an unauthorized or unsafe and unsound manner, he or she may, in his or her discretion, issue an order directing the discontinuance of such unauthorized or unsafe and unsound practices, and fixing a time and place at which such banking organization, bank holding company, registered mortgage broker, licensed

mortgage banker, licensed student loan servicer, registered mortgage loan servicer, licensed mortgage loan originator, licensed lender, licensed casher of checks, licensed sales finance company, licensed insurance premium finance agency, licensed transmitter of money, licensed budget planner, out-of-state state bank that maintains a branch or branches or representative or other offices in this state, or foreign banking corporation may voluntarily appear before him or her to present any explanation in defense of the practices directed in said order to be discontinued."

[41] Restatement (Second) of Contracts § 269 (1981); *id.* cmt. a ("When the circumstances giving rise to the impracticability or frustration cease to exist, he must then perform."); 30 Williston on Contracts § 77:104 (4th ed.) ("When a temporary impracticability interferes with performance, prudence and equity dictate that the nonperforming party be given notice of its default and a reasonable time to resume its contractual obligation."); *Maudlin v. Pac. Decision Scis. Corp.*, 137 Cal. App. 4th 1001, 1017 (Ct. App. 2006) ("California law on temporary impossibility mirrors the Restatement Second of Contracts, section 269....").

[42] 30 Williston on Contracts § 77:15 (4th ed.).

[43] 14 Corbin on Contracts § 76.3 (2019) ("If, in spite of government requisition, it is possible for the contractor to perform substantially by using reasonable efforts, the contractor is bound to do so. A comparatively small increase in cost or difficult resulting from the requisition is no discharge. The distinction is a matter of degree." (footnotes omitted)); *see also, e.g.*, Dodd, *supra* note 29 at 805 ("[P]erformance should not be required by the courts of a defendant who had disregarded his contractual obligations because of administrative regulations ... which would ... have interfered with the defendant's business so drastically as to constitute what could fairly be called administrative coercion.").

[44] Restatement (Second) of Contracts § 269, illustration 1 (1981); *see also* 3 Cal. Affirmative Def. § 60:9 (2d ed.) (Government regulations that create "short-term shortage[s] of supplies essential to performance" are grounds for temporary impracticability.); 14 Corbin on Contracts § 75.6 (2019) ("Producers who contract to manufacture goods at a specific factory, for sale and delivery to a buyer, may be discharged by the destruction of the factory without fault. ... Even parties who contract to procure and deliver goods from *any* source of supply can be discharged if the procurement is made impossible ... by the destruction of the entire supply without fault. The risk of not get getting the profits of performance rests upon both parties alike." (footnotes omitted)).

[45] *Cf. Consumers Power Co. v. Nuclear Fuel Servs., Inc.*, 509 F. Supp. 201, 209 (W.D.N.Y. 1981) (ruling that a regulation that significantly raised the cost of performing a service contract might excuse performance).

[46] 2 A.L.R.7th Art. 3 (Originally published in 2015).

[47] *Cf.* Corp Couns Gd to U.C.C. § 14:6 ("Some causal connection must be present between the triggering event and the impracticability of performance. However, courts are often liberal in application of this principle. As an example, the impracticability doctrine may be applied when a component part of a product is affected by a boycott even though that component part is only one factor in establishing the cost of the finished item.").

[48] *See, e.g.*, *Phelps v. School Dist.*, 134 N.E. 312 (Ill. 1922). *But see Kuhl v. Sch. Dist. No. 76 of Wayne Cty.*, 51 N.W.2d 746, 751 (Neb. 1952) (school closed by injunction was not obligated to pay teachers).

[49] *See* 84 A.L.R.2d 12 (Originally published in 1962) ("The harshness, in some of its applications, of the common-law rule to the effect that supervening impossibility of performance of

the contract, even though fortuitous, is not a defense to an action for damages for nonperformance, has induced many of the courts, in an effort to reach a just result, to develop or apply exceptions to or modifications of the ancient doctrine."); *see also* Edwin W. Patterson, *Temporary Impossibility of Performance of Contract*, 47 Va. L. Rev. 798, 808-09 (1961) (criticizing this line of authority).

[50] *ReliaStar Life Ins. Co. of New York v. Home Depot U.S.A., Inc.*, 570 F.3d 513, 519 (2d Cir. 2009) ("Under New York law, 'hell or high water' clauses are generally enforceable.").

[51] *See, e.g.*, Mass. G.L. ch. 93A, § 11; Conn. Gen. Stat. Ann. § 42-110b(a).

[52] *See, e.g.*, *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 544 (Cal. 1999) ("When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes section 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition."); *Sapan v. Coastal Credit & Debt Ventures LLC*, No. CV 13-1839 PA (RZX), 2013 WL 12113447, at *2 (C.D. Cal. Aug. 15, 2013) ("Despite its name, the UCL is not confined to anti-competitive business practices, but is equally directed toward the right of the public to protection from fraud and deceit." (internal citations omitted)); N.Y. Gen. Bus. Law § 349(a) (creating a cause of action for "[d]eceptive acts or practices").

[53] *In re TJX Companies Retail Sec. Breach Litig.*, 564 F.3d 489, 496 (1st Cir. 2009) (describing Massachusetts law); *Richards v. Direct Energy Servs., LLC*, 915 F.3d 88, 101-02 (2d Cir. 2019) (Connecticut law); *see also* FTC, *Part 408 - Unfair Or Deceptive Advertising And Labeling Of Cigarettes In Relation To The Health Hazards Of Smoking*, 29 Fed. Reg. 8324, 8354 (July 2, 1964).

[54] *See, e.g., ABC Soils, Inc. v. DRS Power Tech., Inc.*, 386 F. Supp. 3d 107, 111 (D. Mass. 2019) (Massachusetts unfair trade practices claims are "decided case-by-case" and "fact-specific" (quoting *Arthur D. Little, Inc. v. Dooyang Corp.*, 147 F.3d 47, 55 (1st Cir. 1998))); *Tallmadge Bros. v. Iroquois Gas Transmission Sys., L.P.*, 746 A.2d 1277, 1292 (Conn. 2000) ("It is well settled that whether a defendant's acts constitute fraudulent misrepresentation, or deceptive or unfair trade practices under CUTPA, is a question of fact for the trier, to which, on appellate review, we accord our customary deference.").

[55] *Hannon v. Original Gunite Aquatech Pools, Inc.*, 434 N.E.2d 611, 613 (Mass. 1982); *Votto v. Am. Car Rental, Inc.*, 871 A.2d 981, 985 (Conn. 2005) (holding that "[a] trade practice that is undertaken to maximize the defendant's profit at the expense of the plaintiff's rights" may be an unfair trade practice); *see also Fredette v. Allied Van Lines, Inc.*, 66 F.3d 369, 376 (1st Cir. 1995) (holding that "trier of fact was entitled to take a [] benign view and regard [] extra demands as ... occasioned by developments that no one had foreseen").

[56] *See, e.g.*, *Crosby Legacy Co., LLC v. TechnipFMC PLC*, No. CV 18-10814-MLW, 2019 WL 5588993, at *12 (D. Mass. Sept. 13, 2019) ("Although whether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact, the boundaries of what may qualify for consideration as a [Chapter] 93A violation is a question of law." (citation omitted)).

[57] *See, e.g.*, *Baker v. Goldman, Sachs & Co.*, 771 F.3d 37, 51 (1st Cir. 2014) (holding that Massachusetts law prohibits "egregious conduct"); *Naples v. Keystone Bldg. & Dev. Corp.*, 990 A.2d 326, 337 (Conn. 2010) (requiring "aggravating unscrupulous" conduct).

[58] *See* Quinn Emanuel's Firm Memorandum, *U.S. Outlook: Top Questions About Civil Litigation Amid Coronavirus Outbreak* (March 24, 2020), *available at*

https://www.quinnemanuel.com/media/1419980/20200324-final-client-alert-civil-litigation-questions-amid-covid.pdf.