# **24.04B DEFENDANT’S ANTICIPATORY BREACH BY REPUDIATION—FAILURE TO GIVE ADEQUATE ASSURANCES**

[Plaintiff] claims that [defendant] breached the contract because [defendant] failed to give [plaintiff] adequate assurance that [defendant] would perform [his her its] obligations under the contract. [Defendant] denies this claim.

For [plaintiff] to win on this claim, you must decide that it is more likely true than not true:

1. That [plaintiff] had reasonable grounds to believe that [defendant] would not or could not perform [his her its] obligations under the contract; and
2. That [plaintiff] made a reasonable effort to get assurances from [defendant] that [he she it] would perform as agreed; and
3. That under the circumstances, [defendant] failed to give adequate assurances to [plaintiff] within a reasonable time.

If each of these things is more likely true than not true, then you must [return a verdict for [plaintiff] and decide the amount of [his her its] damages] [decide whether [defendant] is excused for indicating that the promise would not be kept]. I will tell you how to do this in a moment.

Otherwise, you must return a verdict for the defendant on this claim.

**Use Note**

This instruction should be used when the plaintiff claims that the defendant breached the contract, because 1) plaintiff had reasonable grounds to seek adequate assurance of the defendant’s performance, and 2) defendant failed to give adequate assurance within a reasonable time.

Where the plaintiff does not assert that he or she requested assurances of performance, Instruction 24.04A should be used instead of this instruction. If the plaintiff asserts that he or she requested assurances, but the request was unnecessary because the repudiation was so clear, Instructions 24.04A and 24.04Bshould both be given, and a special verdict form should be used.

The last bracketed clause should be used if the defendant is asserting affirmative defenses.

**Comment**

Alaska follows the Restatement (Second) of Contracts § 251, which provides:

(1) Where reasonable grounds arise to believe that the obligor will commit a breach by nonperformance that would of itself give the obligee a claim for damages for total breach . . . the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.

(2) The obligee may treat as a repudiation the obligor’s failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case.

*Drake v. Wickwire*, 795 P.2d 195, 198 (Alaska 1990). *See also Martin v. Maldonado*, 572 P.2d 763, 770 (Alaska 1977); AS 45.02.609 (U.C.C. 2-609).