8.11A ATTORNEY MALPRACTICE – CASE WITHIN CASE (CIVIL) – AFFIRMATIVE DEFENSE OF COLLECTIBILITY

The plaintiff claims that [he] [she] would have received a judgment [in a higher amount] in the prior case if the defendant had not been negligent. The defendant denies liability on the ground that even if the plaintiff had received a judgment [in a higher amount], the plaintiff would not have been able to collect some or all of the [additional] money that was awarded.

You must decide whether it is more likely true than not true that the plaintiff would have been unable to collect some or all of the [additional] money that [he] [she] claims should have been awarded. Your award to the plaintiff must be limited to the [additional] money that the plaintiff could have collected.

# Use Note

This instruction sets out the defense of collectibility for use in an attorney malpractice action where the plaintiff contends that he or she would have received a more favorable result in the prior action in the absence of defendant’s negligence, i.e., either a judgment for the plaintiff where there was a defense verdict, or a higher judgment for the plaintiff. It should be used with Instruction 8.11.

# Comment

## Power Constructors, Inc. v. Taylor & Hintze, 960 P.2d 20, 32 (Alaska 1998), held that the trial court erred in instructing the jury that the plaintiff in a malpractice action has the burden of proving that the judgment that the plaintiff contended should have been awarded in the underlying action was collectable. Instead, the court held that collectibility is available to the defendant as an affirmative defense. Id. The court reasoned that since the need to determine collectibility is caused by professional negligence, the malpracticing attorney should bear the inherent risks and uncertainties of proving collectibility. Id. at 31.

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