24.08C AFFIRMATIVE DEFENSE — IMPRACTICABILITY OF PERFORMANCE

[Defendant] claims that [his her its] failure to perform its obligations under the contract was excused because of what the law calls impracticability of performance.

[Defendant's] failure to perform is excused if it is more likely true than not true that:

1. After the parties entered into the contract, an event occurred that made it impracticable for [defendant] to perform its obligations under the contract. Performance of a contract is impracticable when performance requires excessive and unreasonable difficulty, expense, injury or loss;
2. The parties entered into the contract based on the assumption that this event would not occur; and
3. The event was not [defendant’s] fault.

If you decide that all three of these things are more likely true than not true, then [defendant] is excused for failing to keep [his her its] promise and you must return a verdict for [defendant].

Otherwise, [defendant] is not excused [for this reason].

**Use Note**

This instruction should be given when a party claims that an event occurring after contract formation made the party’s performance impracticable.

**Comment**

The impracticability defense may arise in connection with an event that occurs after the contract is formed, or in connection with facts existing at the time of contracting but unknown to the parties. *Compare* Restatement (Second) of Contracts § 261 *with* Restatement (Second) § 266(1). This instruction addresses the defense based on events that occurred *after* the contract was formed.

This instruction follows the requirements stated in Restatement (Second) § 261:

Where, after a contract is made, a party’s performance is made impracticable 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 duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

This defense is recognized when an event fails to occur which both parties mutually assumed would occur and, as a result, the promisor's performance can only be done at an excessive and unreasonable cost. *Murray E. Gildersleeve Logging Co. v. Northern Timber Corp.,* 670 P.2d 372, 375 (Alaska 1983). *See also* *Northern Corp. v. Chugach Elec. Ass’n*, 518 P.2d 76, 81 (Alaska 1974), *vacated in part*, 523 P.2d 1243 (Alaska 1974); Restatement (Second) § 261 comment d (defining impracticability).

Under Alaska law, whether impracticability of performance is a question of law or fact is undecided. *Murray E. Gildersleeve Logging Co.*, 670 P. 2d at 376.

The Restatement comments indicate that foreseeability is a factor that is considered in determining whether the parties assumed that the event would not occur, but foreseeability alone is not controlling. Restatement (Second) § 261 comment b. *See also* 2 Farnsworth on Contracts § 9.08 (4th ed. 2021). Accordingly, unforeseeability is not stated as an element in this instruction. In contrast, to establish the defense of frustration of purpose, Alaska case law requires that the event must have been unforeseeable. *See* Comment to Instruction 24.08B.

Alaska follows the Restatement (Second) with respect to the related defense of impracticability due to facts that were in existence at the time of contracting, but not known to the parties. *See State of Alaska v. Carpenter*, 869 P.2d 1181, 1184 (Alaska 1994) (following Restatement (Second) § 266(1)).