**24.08A AFFIRMATIVE DEFENSE — GENERALLY**

[Withdrawn 1994]

Use Note

Where the defendant is pleading more than one affirmative defense, the trial judge should deliver a preliminary instruction briefly listing the defenses and telling the jury that the existence of any single defense warrants a verdict for the defendant. Such an instruction might be:

The defendant claims that [his][her][its] failure to keep [his][her][its] promise was excused for three reasons:

(1) because the act that the defendant promised to perform became impracticable;

(2) because the defendant made the promise as a result of a misrepresentation by the plaintiff; and

(3) because the plaintiff waived the defendant's performance.

In a moment I will explain each of these reasons to you. If you decide that any one of these reasons exists, then you must return a verdict for the defendant.

Instructions for six specific affirmative defenses follow this instruction.

Comment

The Alaska Supreme Court defines an affirmative defense generally as a new matter, not set forth in the complaint, which constitutes a defense; or assuming the complaint to be true, a new matter which is a defense to it. Rollins v. Leibold, 512 P.2d 937, 940 (Alaska 1973). The party raising the affirmative defense usually bears the burden of proof as to that issue. Morrow v. New Moon Homes, Inc., 548 P.2d 279, 294 (Alaska 1976). See Alaska R. Civ. P. 8(c) (listing certain recognized affirmative defenses and "any other matter constituting avoidance or affirmative defense").

Each affirmative defense is composed of particular elements; all of the elements must be shown to exist.