**24.08E AFFIRMATIVE DEFENSE — MISREPRESENTATION**

[Defendant] [plaintiff] claims that the [describe the relevant contract or agreement] is void and not enforceable because of a misrepresentation by the [plaintiff] [defendant].

The agreement is void and unenforceable due to misrepresentation if you decide that all four of the following requirements are more likely true than not true:

1. [Plaintiff] [defendant] made a misrepresentation;
2. The misrepresentation was either fraudulent or it was material;
3. The misrepresentation was a substantial factor in the [defendant’s] [plaintiff’s] decision to enter into the agreement; and
4. The [defendant's] [plaintiff's] reliance on the misrepresentation was justified.

I will now explain what the terms “misrepresentation,” “fraudulent,” “material,” and “justified” mean in this instruction.

A misrepresentation is an assertion by words or conduct that is inconsistent with the facts.

A misrepresentation is “fraudulent” if it is both knowingly false and intended to mislead.

A misrepresentation is “material” if it would lead a reasonable person to enter into the agreement, or if [plaintiff] [defendant] knew that the misrepresentation was likely to cause the [defendant] [plaintiff] to enter into the agreement.

The [defendant] [plaintiff] was “justified” in relying upon the misrepresentation unless it was only incidentally important to the contract, or unless the misrepresentation would not reasonably be expected to be taken seriously.

If you decide that all four of the requirements that I identified a moment ago are more likely true than not true, then the agreement is void and unenforceable, [and you must return a verdict for defendant.] [unless you decide that [plaintiff] [defendant] demonstrated [his her its] intention to continue with the agreement despite the misrepresentation. I will explain how to decide this in a moment].

If you do not decide that all four of the requirements are more likely true than not true, the agreement is valid and enforceable, and you must decide additional issues that I will explain to you [the defendant [plaintiff] is not excused (for this reason)].

**Use Note**

This instruction should be used when a party claims that the contract is void because of misrepresentation that induced the party’s agreement to the contract.

A party loses the power to avoid a contract for misrepresentation if, after the party knows or has reason to know of a misrepresentation, the party manifests to the other party an intention to affirm the contract, or fails to manifest an intention to avoid the contract within a reasonable time. *See Thorstenson v. ARCO Alaska, Inc*., 780 P. 2d 371, 374 (Alaska 1989); *Bering Straits Native Corp. v. Birklid*, 739 P.2d 767, 768 (Alaska 1987); *see also* Restatement (Second) of Contracts §§ 380(2), 381(2) (1981). If a party raises this response to a misrepresentation defense, the second alternative in the next‑to‑last paragraph of this instruction should be used, along with Instruction 24.08F (Ratification).

Depending on the facts, it may be appropriate to instruct the jury on variations on the definition of misrepresentation, including misrepresentations through conduct, half-truths, concealment and nondisclosure. *See generally* Restatement (Second) §§ 159, 160 and 161. It may also be appropriate to instruct the jury regarding the law that governs statements of opinion. *See* Restatement (Second) §§ 160, cmt. d, 168 and 169.

**Comment**

The Alaska Supreme Court has adopted the four-element test set out in the Restatement (Second) § 164, comment a (1981). *Industrial Commercial Electric, Inc. v. McLees*, 101 P.3d 593, 598 (Alaska 2004).

Misrepresentations may be the basis for rescinding a contract if the misrepresentations are *either* fraudulent *or* material. In contrast, in tort law, a misrepresentation does not give rise to liability for fraudulent misrepresentation unless it is *both* fraudulent *and* material. *See* *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1094 (Alaska 2008).

The Restatement (Second) § 159 (1981) defines a misrepresentation as “an assertion that is not in accord with the facts.” *See also Smith v. CSK Auto, Inc*., 204 P.3d 1001, 1008 (Alaska 2009).

An assertion may be inferred from conduct other than words.According to the Restatement, concealment “is always equivalent to a misrepresentation,” Restatement (Second) § 160 comment a, and non‑disclosure without concealment may be equivalent to a misrepresentation. *Id*. § 161.

The Restatement defines “fraudulent” as follows:

(1) A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker

(a) knows or believes that the assertion is not in accord with the facts, or

(b) does not have the confidence that he states or implies in the truth of the assertion, or

(c) knows that he does not have the basis that he states or implies for the assertion.

*Id*. at § 162 (a). A misrepresentation is fraudulent if it is consciously false and intended to mislead another. *McLees*, 101 P.3d at 600 (quoting Restatement (Second) § 162), comment a). “Consequences are intended if a person either acts with the desire to cause them or acts believing that they are substantially certain to result.” Restatement (Second) § 162 comment a.

In *Cousineau v. Walker*, 613 P.2d 608, 613 (Alaska 1980), the Alaska Supreme Court defined materiality objectively, in terms of a reasonable person standard. *Id*. at 613. *See also McLees*, 101 P.3d at 601.

The Restatement's definition of materiality includes either an objective or a subjective element:

[A] misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it will be likely to induce the recipient to do so.

Restatement (Second) § 162(2) (1981). Under the subjective part of this definition, the materiality of a misrepresentation is determined from the viewpoint of the maker. In such circumstances, a misrepresentation is material if the maker knows that the misrepresentation is likely to induce the particular recipient to manifest his or her assent. “There may be personal considerations that the recipient regards as important even though they would notbe expected to affect others in his situation, and if the maker is aware of this the misrepresentation may be material even though it would not be expected to induce a reasonable person to make the proposed contract.” *Id.* § 162 comment c.

A fraudulent misrepresentation, even if relied upon, has no legal effect unless the recipient's reliance is justified. *Id*. § 164. Reliance on a fraudulent misrepresentation is usually justified unless the misrepresentation is of only peripheral importance to the transaction orwould not be expected to be taken seriously. *Id.* § 164 comment d. However, reliance may not be justified if the misrepresentation involves an assertion of opinion, a matter of law, or intention. *Id*. §§ 168, 169, 170, 171.

A misrepresentation induces a party to enter into a contract “if it substantially contributes” to the party’s decision. Restatement (Second) § 167. Element 3 states this concept using the terminology “substantial factor.”