**24.08B AFFIRMATIVE DEFENSE-FRUSTRATION OF PURPOSE**

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

[Defendant's] failure to perform [his her its] obligations under the contract is excused if it is more likely true than not true that:

1. After the parties entered into the contract, an event occurred that substantially frustrated a principal purpose of the contract;
2. The parties entered into the contract based on the assumption that this event would not occur;
3. The occurrence of this event was not foreseeable;
4. The event was not [defendant’s] fault.

If you decide that these four things are more likely true than not true, then [defendant] is excused for failing to perform [his her its] obligations under the contract, and you must return a verdict for [defendant].

Otherwise, [defendant] is not excused from performing [his her its] obligations under the contract [for this reason].

**Use Note**

This instruction should be given when a party claims that its failure to perform the contract is excused under the frustration of purpose doctrine, due to an event that occurred after the parties entered into the contract.

It may be possible to replace the references to “the event” with a short description of the event in question.

**Comment**

The frustration of purpose 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 § 265 *with* Restatement (Second) § 266(2).

With respect to the frustration of purpose defense based on a subsequent event, Alaska follows the Restatement (Second) § 265. *Stormont v. Astoria*, *Ltd*., 889 P.2d 1059, 1063 n.7 (Alaska 1995); *U.S. Smelting, Refining & Mining Co. v. Wigger*, 684 P.2d 850, 857 (Alaska 1984).

Section 265 provides:

Where, after a contract is made, a party's principal purpose is substantially frustrated 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 remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

Comment a to section 265 identifies the following requirements:

First, the purpose that is frustrated must have been a principal purpose of that party in making the contract . . . . Second, the frustration must be substantial . . . . The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract. Third, the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made.

Restatement § 265, comment a, quoted in *Stormont*, 889 P.2d at 1063 n. 7.

Under Alaska law, frustration of purpose is not a defense if the event was foreseeable. *U.S. Smelting*, 684 P.2d at 857.

Alaska also follows the Restatement (Second) with respect to the related doctrine of frustration of purpose due to facts that were in existence at the time of contracting, but not known to the parties. *See State v. Carpenter*, 869 P.2d 1181, 1184 (following Restatement § 266) (Alaska 1994); *Currington v. Johnson*, 685 P.2d 73, 78 (Alaska 1984) (same).