**24.09D OWNER’S DAMAGES FOR BREACH OF CONSTRUCTION CONTRACT BY INCOMPLETE OR DEFECTIVE PERFORMANCE**

Alternative A

*(Alternative A should be used if the parties agree that the proper measure of damages is the cost of completion or repair.)*

If you find in favor of the plaintiff, you must then decide how much money, if any, would fairly compensate the plaintiff for the defendant's failure to keep [his her its promise. In order to fairly compensate the plaintiff, you must compute the reasonable cost of putting the [insert subject matter of the agreement] in the same condition it would have been in if the defendant had kept [his her its] promise. From this amount you must subtract any payments plaintiff still owes on the contract price. If the amount of money which plaintiff owes is greater than the cost of completion or repair, then you must award the plaintiff only nominal damages of $1.00.

Alternative B

*(Alternative B should be used if the parties cannot agree whether the proper measure of damages is the cost of completion or repair or the diminution of value because of incomplete or defective performance.)*

If you find in favor of the plaintiff, you must then decide how much money, if any, would fairly compensate the plaintiff for the defendant's failure to keep [his her its] promise. There are two different methods which can be used to decide the amount of plaintiff's claimed damages.

The usual way to decide what damages to award the plaintiff is to give [his her it] the reasonable cost of putting the [insert subject matter of the agreement] in the same condition it would have been in if the defendant had kept [his her its] promise.

However, if you find that it is impractical and unreasonably wasteful, in proportion to the benefit to be gained, to put the [insert subject matter of the contract] in its promised condition, then you should not use this first method unless you find it is more likely true than not true that:

1. The [insert subject matter of the contract] has a special significance to the plaintiff or the [insert subject matter of the contract] as is creates a dangerous condition; and
2. The plaintiff will demolish and rebuild the [insert subject matter of the contract].

If you find it would be impractical and unreasonably wasteful and (1) and (2) do not apply, you should use the following method to calculate damages. First, determine the value of the [insert subject matter of the contract] if the defendant had performed as promised. From that amount, subtract the value of the [insert subject matter of the contract] as a result of defendant's incomplete performance.

Whatever measure of damages you use, you should subtract from the award any payments plaintiff still owes on the contract price. If the amount of money plaintiff owes is greater than the damages that you find, then you must award to the plaintiff only nominal damages of $1.00.

**Use Note**

Alternative A should be used when there is no dispute between the parties that the cost of completion or repair is the proper measure of damages or where there is no evidence of loss of value. Alternative B should be used when there is a dispute as to the proper measure of damages or when there is a mix of defects for which the cost of repair method or the comparative value method is the more reasonable choice.

# **Comment**

There are two distinct measures of damages that may be used when a building contractor breaches a construction contract by incomplete or defective performance, cost of completion or repair and diminution in value, also referred to as comparative value. The Alaska Supreme Court has stated that the preferred method of calculating damages is the cost of completion or repair in accordance with the contract specifications. *Advanced, Inc. v. Wilks*, 711 P.2d 524, 526 (Alaska 1985); *Anchorage Asphalt Paving Co. v. Lewis*, 629 P.2d 65, 68 (Alaska 1981); *Davis v. McCall*, 568 P.2d 956, 959 (Alaska 1977). Quoting from Professor Dobbs in the *Advanced* case, the court stated that “this measure ‘gives the landowner the ability to get, with the damages awarded, a performance equivalent to what he has contracted for. This is a strong and worthy policy and naturally commends itself.’” 711 P. 2d at 526 (citations omitted). The court then stated that “[t]he diminution in value method is to be used only when necessary to avoid unreasonable waste (as where a house would have to be torn down to replace plumbing that deviated only in a minor way from contract specifications).” *Id*. This approach was reaffirmed in *Hancock v. Northcutt*, 808 P.2d 251 (Alaska 1991).

In *Advanced*, the court also ruled that an owner's recovery is not necessarily limited to diminution in value whenever that figure is less than the cost of repair, citing to Restatement (Second) Contracts § 348 comment c (1981). *Advanced*,711 P.2d at 527. In *Hancock*, the court elaborated on this principle by noting that the Restatement comment “makes it clear that while a cost of repair figure somewhat in excess of damages under the comparative value approach may be tolerated because of proof difficulties, a gross excess will not be.” *Hancock*,808 P.2d at 255. This reasoning is also consistent with the well-established rule that contract damages be established with reasonable certainty. *See State v. Northwestern Construction Inc*., 741 P.2d 235 (Alaska 1987). The court has, however, recognized an exception to the principle that cost of repair damages substantially in excess of those determined by the comparative value method may not be awarded. Specifically, what is required are assurances that the injured party will effect a cure for legally sufficient reasons—either because the building has special significance to the plaintiff or it has been left by the defendant in a dangerous condition. *Hancock*, 808 P.2d at 256; *see also* J. Calamari & J. Perillo, *Treatise on Contracts* § 14‑29 at 636 (1987); Note, *Breach of a Covenant to Restore*, 39 So.Cal.L.Rev. 309, 315 (1966). According to the court, the fact finder is in the best position to determine whether the owner will actually complete performance or whether he is only interested in obtaining the best immediate economic position he can. *Advanced*, 711 P.2d at 527.

Where the measure of damage is disputed, that is, where the contractor believes that the cost of repairs is an unreasonable measure of damages given what it believes is the relatively small decrease in value resulting from the breach, it is the contractor's burden to present evidence from which the jury can find the diminution in value. *Advanced*, 711 P.2d at 526.

In a footnote in *Wallace Construction Co. v. Rude*, 535 P.2d 1218, 1219 n.3 (Alaska 1977), the Alaska Supreme Court stated that "[i]t appears that an owner cannot recover damages for defective performance and also retain the contract price where defective construction can be repaired." The well recognized goal of contract damages is to put the plaintiff in as good a position as the plaintiff would have been in had the defendant kept defendant's promise. *See* Comment to Article 24.09. Thus, if the owner is to be compensated so as to put the object of a contract in the condition it would have been had the contractor performed, the owner must also have incurred the expense the owner would have incurred. The pattern instruction contains optional language to require an offset where the plaintiff did not make all payments that would have been due under the contract.