**21.04 NEGLIGENT BAILMENT – AFFIRMATIVE DEFENSES**

The defendant is not liable for [damage to] [loss of] the [bailed property] if it is more likely true than not true that:

[The plaintiff agreed to obtain insurance covering the risk of loss or damage to the [bailed property] while it was in the defendant’s possession] [.] [; or]

[The plaintiff agreed to assume responsibility for loss or damage to the [bailed property] while it was in the defendant’s possession] [.] [; or]

[The defendant surrendered the [bailed property] on the demand of or seizure by a law enforcement officer] [.] [; or]

[The plaintiff gave the [bailed property] to the defendant for use in [his][her] business and the [bailed property] was lost or damaged by normal use] [.]

**Use Note**

This instruction should be given when the defendant asserts one or more of the affirmative defenses shown.

**Comment**

Decisions of the Alaska Supreme Court provide a basis for several defenses to a claim based on loss or damage to bailed goods. Instruction 21.04 sets forth these defenses.

Liability for risk of loss of or damage to bailed goods can be allocated as the parties chose, so long as the agreement is not unconscionable. *See* *Gillen v. Holland*, 797 P.2d 646, 649-50 (Alaska 1990)(bailee liable for loss of property where it agreed to procure insurance to cover risk of loss for mutual benefit of bailor and bailee)*; Dresser Industries, Inc. v. Foss Launch & Tug Co.*, 560 P.2d 393, 395 (Alaska 1977)(bailee remains liable for damage to bailed goods even though contract required bailor to obtain insurance because it did not specifically require insurance against bailee’s own negligence). The first bracketed paragraph recognizes that where a plaintiff agrees to procure insurance to cover the risk of loss for the mutual benefit of the parties, that party becomes responsible for the risk of loss. *Id.*

The second bracketed paragraph provides that the bailor and bailee may allocate responsibility between them for loss or damage to the bailed property by contract. *See* *C.J.M. Const., Inc. v. Chandler Plumbing & Heating, Inc*., 708 P.2d 60, 63 (Alaska 1985); *Dresser Industries, Inc.,* 560 P.2d at 395.

A bailee is not liable for loss of bailed property when the property was turned over on demand of or seized by a law enforcement officer. *Thompson v. Anderson*, 824 P.2d 712, 715 (Alaska 1992)(postal worker not liable for package seized by police officer in response to worker’s tip). The third bracketed provision provides for this defense.

When property is bailed for use in a business, where it will be subject to normal wear and tear, the bailee is not liable for loss or damage stemming from normal use. *Burgess Const. Co. v. Hancock*, 514 P.2d 236, 240 n.17 (Alaska 1973). The fourth bracketed paragraph provides for this defense.