**24.05B FAILURE OF CONDITION PRECEDENT**

[Plaintiff] and [defendant] agree that [defendant] was not required to perform its obligations under the contract unless [describe condition precedent]. [Plaintiff] claims that this event occurred, and therefore [defendant] was required to perform its contractual obligations. [Defendant] claims that this event did not occur, and therefore [defendant] was not required to perform its contractual obligations.

If you decide it is more likely true than not true that [describe event] occurred,

[you must return a verdict for [plaintiff] and decide the amount of [plaintiff’s] damages]

[OR]

[defendant was required to perform [his her its] contractual obligations unless [defendant] is excused for a reason that I will explain in a moment].

If you decide that is more likely true than not true that [describe event] did not occur, [defendant] was not required to perform [his her its] obligations under the contract, and you must return a verdict for [defendant].

**Use Note**

This instruction should be used when it is established that there was a condition precedent to the defendant's performance, but the occurrenceof that condition is disputed.

Where plaintiff's substantial performance was a condition precedent to the defendant's performance and the defendant is asserting that there was no substantial performance, this instruction should not be given. The substantial performance instruction (Instruction 24.06) should be given instead, with such modifications as are necessary to fit the situation.

In the second paragraph of this instruction, use the first bracketed phrase if there are no affirmative defenses. Use the second bracketed phrase if the jury must consider affirmative defenses.

## **Comment**

When a party's performance is subject to a condition precedent, that party's duty to perform arises only if the condition is met or excused. *Klondike Indus. Corp. v. Gibson*, 741 P.2d 1161, 1165 (Alaska 1987).

If the obligor accepts partial performance despite nonoccurrence of the condition, notice is necessary to reinstate a condition on the obligor's duty to perform. *Howard S. Lease Constr. Co. v. Holly*, 725 P.2d 712, 717 (Alaska 1986) (citing Restatement (Second) of Contracts § 247). Alaska has also adopted Restatement (Second) of Contracts § 245, which provides that a condition is excused if the other party's breach "contributes materially" to the nonoccurrence of the condition. *Klondike Indus. Corp. v. Gibson*, 741 P.2d 1161, 1167 (Alaska 1987).

In the complaint, the plaintiff need only aver generally that all conditions precedent have been performed or have occurred. To assert failure of a condition precedent, the defendant's answer must deny performance or occurrence of a condition precedent "specifically and with particularity." Alaska R. Civ. P. 9(c). However, Rule 9(c) is not intended to shift the burden of proof. When the defendant's answer raises the nonoccurrence of a condition precedent as a defense, the general rule is that the plaintiff bears the burden of affirmatively proving the performance or occurrence of the condition precedent. 2 Moore’s Federal Practice § 9.04[4] (3d ed); 5A Wright, Miller & Spencer, Federal Practice and Procedure § 1304 (4th ed. 2018).