STATE OF ALASKA CONSTRUCTION COMPENDIUM OF LAW

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The following is an overview of Alaska construction law. It is intended to provide a general outline of Alaska construction law and should serve only as a resource for general information. Alaska law frequently changes as case law develops. Therefore, the reader should follow up with specific legal advice on particular topics of interest and consult with counsel knowledgeable about Alaska law.[1]

I. Breach of Contract

Alaska recognizes a standard breach of contract claim, such as one based on the contract between the builder and the seller, or the builder and buyer. *Philbin v. Matanuska-Susitna Borough*, 991 P.2d 1263 (Alaska 1999).

There is also an implied contract that work will be conducted in a workmanlike manner. This principle is based on the holding that an agreement to perform a contract necessarily implies an obligation to perform it in a proper manner. *Lewis v. Anchorage Asphalt Paving Co*., 535 P.2d 1188, 1196 (Alaska 1975)(in building or construction contracts whenever someone holds himself out to be qualified to do a particular type of work, there is an implied warranty that the work will be done in a workmanlike manner, and that the resulting building, product, etc. will be reasonably fit for its intended use).

Promises set forth in a contract must be enforced by an action on that contract, and not in tort. There are exceptions, however. Where the duty breached is one imposed by law, such as a traditional tort law duty furthering social policy, an action between contracting parties may sound in tort. *Alaska Pacific Assur. Co. v. Collins*, 794 P.2d 936, 946 (Alaska 1990). For example, there is a duty imposed by law on professionals, such as architects, to assure the accuracy of their designs that is enforceable in tort. Thus, a project owner may sue a design professional in tort for economic losses arising from the professional's malpractice, despite the existence of a contractual relationship between the parties. *State, Dep't of Nat. Res. v. Transamerica Premier Ins. Co.*, 856 P.2d 766, 772 (Alaska 1993). But the same duty is not necessarily imposed on project owners. *Id.* The law similarly imposes a duty, enforceable in tort, on skilled trades, such as electricians, carpenters and plumbers, to perform their work non-negligently. *John's Heating Service v. Lamb*, 46 P.3d 1024, 1037 (Alaska 2002). Whether the gravamen of the claim is a personal injury claim, as opposed to a claim for pure economic loss (particularly in cases involving no threat of personal injury or property damages) may affect the statute of limitations, however. *Pedersen v. Flannery*, 863 P.2d 856, 857-58 (Alaska 1993); *State, Dep't of Natural Res. v. Transamerica Premier Ins. Co.*, 856 P.2d 766, 772 (Alaska 1993); *Lee Houston & Associates, Ltd. v. Racine*, 806 P.2d 848, 855 (Alaska 1991).

[1] This overview was compiled by Marc Wilhelm and Ken Gutsch at Richmond & Quinn, P.C., Anchorage, Alaska. Additional information about various features of Alaska law, as well as a litigation overview of Alaska tort law, can be found at Richmond & Quinn's website, at www.richmondquinn.com.

II. Negligence

Alaska, like other states, also recognizes a cause of action for negligence, for example, where negligent work causes personal injury or property damage. Thus, in appropriate cases, there can be a claim for negligent workmanship, supervision, or design. To establish negligence, a party must prove duty, breach of duty, causation, and harm. *Silvers v. Silvers*, 999 P.2d 786, 793 (Alaska 2000). The jury is required to weigh actions of a person charged with negligence against the standard of conduct of a reasonable person in the same circumstances. *Lyons v. Midnight Sun Transportation Services, Inc.*, 928 P.2d 1202 (Alaska 1996); *Wilson v. Sibert*, 535 P.2d 1034, 1036-37 (Alaska 1975). Negligence can arise out of a failure to act, as well as an act. Liability for inaction will exist if there is a duty to act and a reasonably prudent person would have foreseen the probability of harm resulting from the failure to act. *State v. Guinn*, 555 P.2d 530, 536 (Alaska 1976).

As discussed in the prior section, a claim against a non-professional for purely economic loss generally sounds in contract, not tort. *See Wright Schuchart, Inc. v. Cooper Industries, Inc.*, 40 F.3d 1247 (9th Cir. 1994); *State v. Tyonek Timber, Inc.*, 680 P.3d 1148 (Alaska 1984).

III. Breach of Warranty

It is likely the court will apply the warranty of habitability to the sale of new homes. While the Alaska court has not been called upon to adopt the warranty of habitability, the court has spoken approvingly of the implied warranty of habitability in several cases. *Stormont v. Astoria Ltd.*, 889 P.2d 1059, 1063 n.5 (Alaska 1995); *Cousineau v. Walker*, 613 P.2d 608, 614 (Alaska 1980); *see also Alaska Pacific Assur. Co. v. Collins*, 794 P.2d 936, 939 (Alaska 1990)(trial court applied warranty of habitability).

The Uniform Commercial Code (UCC) creates warranties when there is a sale of goods, such as building supplies and components. In Alaska, the UCC also applies to mobile homes. *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 286-87 (Alaska 1976). Breach of warranty claims for sale of goods are governed by Alaska's Uniform Commercial Code. *See* Alaska Statutes ch. 45.02. Breach of an express warranty requires proof of the existence of the warranty, breach, loss proximately caused by breach, and the failure to perform in accordance with warranty terms. *Universal Motors, Inc. v. Waldrock*, 719 P.2d 254 (Alaska 1986). Alaska also recognizes the implied warranty of merchantability and the warranty of fitness for intended purpose. Damages will be reduced based on the plaintiff's comparative negligence.

IV. Misrepresentation and Fraud

Alaska recognizes claims for negligent misrepresentation and fraud.

A. Negligent Misrepresentation

Alaska allows for recovery of economic loss arising out of a negligent misrepresentation. Alaska follows the definition of negligent misrepresentation contained in the Restatement (Second) of Torts § 552. First, the party accused of the misrepresentation must have made the statement in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest. Second, the representation must supply false information. Third, there must be justifiable reliance on the false information supplied. Fourth, the accused party must have failed to exercise reasonable care or competence in obtaining or communicating the information. *Willard v. Khotol Services Corp.*, 171 P.3d 108, 118-19 (Alaska 2007); *Reeves v. Alyeska Pipeline Service Co.*, 56 P.3d 660, 670-71 (Alaska 2002).

For a representation to be actionable, the representation must be false when made. *Bubbel v. Wien Air Alaska, Inc.*, 682 P.2d 374, 381 (Alaska 1984). A statement made as to future intentions and actions is not a misrepresentation if it is accurate when it is made, even if future events render it inaccurate. *Valdez Fisheries Development Ass'n v. Alyeska Pipeline Service Co.*, 45 P.3d 657, 672 (Alaska 2002). Moreover, the misrepresentation must proximately cause the loss, i.e., the claimant must suffer pecuniary loss or incur liability as a result of the misrepresentation. *Bubbel*, 682 P.2d at 381.

Not every misrepresentation is actionable. The misrepresentation must be material to the transaction, because an immaterial representation cannot induce justifiable reliance. *Diblik v. Marcy*, 166 P.3d 23, 28 (Alaska 2007). A "material fact" is one "to which a reasonable man might be expected to attach importance in making his choice of action. It is a fact which could reasonably be expected to influence someone's judgment or conduct concerning a transaction." *Id*. Similarly, where a purchaser has an independent duty to investigate, reliance on the seller's statements will not be justifiable. *Wasser & Winters Co. v. Ritchie Bros. Auctioneers (America), Inc.*, 185 P.3d 73, 82 (Alaska 2008).

B. Misrepresentation by Omission

Negligent misrepresentation can also occur as a result of the failure to disclose material information. Alaska has adopted the standard of the Restatement (Second) of Torts § 551 regarding misrepresentation by omission. One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability as for an affirmative misrepresentation if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter. *Arctic Tug & Barge, Inc. v. Raleigh, Schwarz & Powell*, 956 P.2d 1199, 1202 (Alaska 1998).

C. Fraud

Fraudulent misrepresentation requires proof that the maker knew of the untrue character of his or her representation. *Willard v. Khotol Services Corp.*, 171 P.3d 108, 118-19 (Alaska 2007); Restatement (Second) of Torts § 530, comment (b). The elements of a fraud claim are (1) a misrepresentation of fact or intention, (2) made fraudulently (that is, with "scienter"), (3) for the purpose or with the expectation of inducing another to act in reliance, (4) with justifiable reliance

by the recipient, (5) causing loss. *Lightle v. State, Real Estate Comm'n*, 146 P.3d 980, 983 (Alaska 2006). A misrepresentation is fraudulent if it is "consciously false" and "intended to mislead another." *Industrial Commercial Elec., Inc. v. McLees*, 101 P.3d 593, 600 (Alaska 2004). However, fraud does not require the maker of a false statement to act with the specific "intent to deceive." Rather, it requires the maker to have reason to expect that the other's conduct will be influenced by the statement. *Lightle*, 146 P.3d at 984.

The circumstances under which the elements of scienter are met are set forth in the Restatement (Second) of Torts § 526. A misrepresentation can be fraudulent if the maker (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies. *Bubbel v. Wien Air Alaska, Inc.*, 682 P.2d 374, 381 (Alaska 1984).

V. Strict Liability Claims

Under the doctrine of strict liability, a person can be found liable without a finding of negligence. The Alaska Supreme Court has not applied strict liability to the sale of a home or real estate, but has applied strict liability to sales of a mobile home and building products. *Heritage v. Pioneer Brokerage & Sales, Inc.*, 604 P.2d 1059, 1061 (Alaska 1979); *D.G. Shelter Products Co. v. Moduline Industries, Inc.,* 684 P.2d 839 (Alaska 1984).

A product may be defective due to defective design, manufacturing defect, or the failure to contain adequate warnings. *Shanks v. Upjohn Co.*, 835 P.2d 1189 (Alaska 1992). Plaintiff must prove that the defect proximately caused plaintiff's injury. *Prince v. Parachutes, Inc.*, 685 P.2d 83 (Alaska 1984).

Alaska has adopted the Restatement (Second) of Torts § 402A, with some exceptions and applies strict liability to the sale of a product, but not to the provision of a service. *Saddler v. Alaska Marine Lines, Inc.*, 856 P.2d 784, 787 (Alaska 1993). One exception is that Alaska has rejected the requirement that the product be unreasonably dangerous. *Id.* Alaska applies strict products liability to sellers, manufacturers, wholesalers, retailers and distributors. *Id*. However, strict liability does not apply to the provision of services. *Id.*

As explained below, strict liability does not apply in all cases of purely economic loss to the product itself. The rule in Alaska is: "When a defective product creates a situation potentially dangerous to persons or other property, and loss occurs as a result of that danger, strict liability in tort is an appropriate theory of recovery, even though the damage is confined to the product itself. In order to recover on such a theory plaintiff must show (1) that the loss was a proximate result of the dangerous defect and (2) that the loss occurred under the kind of circumstances that made the product a basis for strict liability." *Pratt & Whitney Canada, Inc. v. Sheehan*, 852 P.2d 1173, 1177 (Alaska 1993).

VI. Indemnity Claims

A. Express Indemnity

In the commercial context, Alaska courts enforce written indemnity agreements, regardless of the comparative fault of the parties. In other words, the parties to a contract can agree that one party or the other will be responsible for damages arising out of the performance of the contract. The Alaska courts will enforce an indemnity clause as reasonably construed. There is no requirement that the agreement contain a provision specifically stating that the indemnitee is entitled to recover for liability resulting from its own negligence. If the reasonable construction dictates that the clause provides coverage for the indemnitee's own negligence, it is irrelevant whether or not the indemnitor was also negligent. *Duty Free Shoppers Group Ltd. v. State*, 777 P.2d 649, 652 (Alaska 1989).

There is a statutory exception to the above rule in the area of construction contracts, however. Where there is a construction contract, any contractual provision that has the effect of indemnifying a person for that person's sole negligent or willful misconduct is against public policy and void. AS 45.45.900; *Hoffman Const. Co. of Alaska v. U.S. Fabrication & Erection, Inc.*, 32 P.3d 346, 354 (Alaska 2001)(requires that such clauses not be enforced if they serve to indemnify the indemnitee from its own sole negligence or willful misconduct). Alaska also recognizes an exception to the enforceability of an indemnity clause where it would exculpate the indemnitor of its duty to the general public. *State v. Korean Air Lines Co.*, 776 P.2d 315 (Alaska 1989).

B. Implied Indemnity/Implied Contribution

Even where there is not an express indemnity agreement, a party that is not at fault can recover damages it has paid from another party who is at fault under the doctrine of implied indemnity. Alaska allows implied indemnity by a non-negligent party against the party primarily responsible, for example, in a product liability action. *Koehring Mfg. Co. v. Earthmovers of Fairbanks, Inc.*, 763 P.2d 499 (Alaska 1988); *Ross Laboratories v. Thies*, 725 P.2d 1076 (Alaska 1986). The Alaska court allows claims for implied contractual indemnity where the indemnitee (a) was not liable except vicariously for the tort of the indemnitor, or (b) was not liable except as a seller of a product supplied by the indemnitor and the indemnitee was not independently culpable. The indemnitor must also have secured the release of the indemnitee. *AVCP Regional Housing Authority v. R.A. Vranckaert Co*., 47 P.3d 650 (Alaska 2002).

For example, a retailer of a mobile home who was not negligent can obtain indemnity from the manufacturer of the home. As one court stated, "the general rule of implied indemnity in Alaska is that an innocent supplier of a defective product who is liable on a theory of strict liability is entitled to indemnity from the manufacturer of the defective product." *Palmer G. Lewis Co. v. ARCO Chemical Co.*, 904 P.2d 1221, 1224 (Alaska 1995).

Contribution allows a party who is partially at fault, and has paid a judgment or settlement, to recover part of that payment from another party who was at fault, but has not paid or settled. In Alaska, there is a common law implied contribution action by a tortfeasor against another, non-settling tortfeasor. *McLaughlin v. Lougee*, 137 P.3d 267 (Alaska 2006). *See also Oakly Enterprises, LLC v. NPI, LLC, 354 P.3d 1073, 1080 (Alaska 2015)*(recognizing common law contribution remedy); *Petrolane Inc. v. Robles*, 154 P.3d 1014, 1022 (Alaska 2007)(*McLaughlin* recognized common law contribution action because it furthered the goal of apportioning tort losses in accordance with each responsible person's percentage of fault). This cause of action appears to apply to post-1989 torts, which is the date that Alaska's prior contribution statute was repealed. It is likely Alaska will follow the Restatement (Third) of Torts: Apportionment of Liability, § 23. *McLaughlin,* 137 P.3d at 279 & n.64. Thus, "[w]hen two or more persons are or may be liable for the same harm and one of them discharges the liability of another by settlement or discharge of judgment, the person discharging the liability is entitled to recover contribution from the other, unless the other previously had a valid settlement and release from the plaintiff." *Id.* (quoting Restatement (Third) of Torts: Apportionment of Liability, § 23(a)).

Although there is a cause of action for implied contribution between negligent tortfeasors, there is no implied indemnity among concurrently negligent tortfeasors. *Vertecs Corp. v. Reichhold Chemicals, Inc.*, 671 P.2d 1273 (Alaska 1983).

C. Contribution

Alaska has no contribution statute. As discussed above, the Alaska court has recognized a common law action for implied contribution.

D. Third-Party Beneficiary

Alaska recognizes the right of a third-party to enforce a contract upon a showing that the parties to the contract intended that at least one purpose of the contract was to benefit the third party. *Smallwood v. Central Peninsula General Hosp.*, 151 P.3d 319, 324 (Alaska 2006). Thus, a beneficiary of a promise is an intended beneficiary and can enforce the promise if recognition of a right to performance in the beneficiary will effectuate the intention of the parties and the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. Restatement (2d) Contracts § 302.

The third-party beneficiary doctrine has been applied to construction contracts. Thus, in one case the court held that the insurance provisions of a contract were not enforceable by an injured employee, for whose benefit the insurance was to be purchased. *Howell v. Ketchikan Pulp Co.*, 943 P.2d 1205 (Alaska 1997)(pipe-fitter was not third-party beneficiary of contractor's contract with premises owner to repair boilers which provided liability coverage for injuries sustained by contractor's employees).

VII. Prelitigation Procedures

Like the majority of states, Alaska has a Notice and Opportunity to Repair statute. *See* AS 09.45.881, *et seq*. Alaska's statute applies to claims against construction professionals, for defect in design, construction, or remodeling of a dwelling. AS 09.45.881. Construction professionals include registered contractors, architects, and engineers. Dwellings include single-family homes, duplexes, and multi-family housing units. AS 09.45.899 (definitions).

The statute requires that a written notice of claim be served on the design professional at least 90 days before filing an action. In general, the statute is designed to provide an opportunity for the professional to respond to the claim and inspect, repair or settle the claim. The statute should be referred to for the details of the process.

VIII. Statute of Limitations/Statute of Repose

A. Tort/Negligence

The statute of limitation for tort and negligence claims is two years. AS 09.10.070. Alaska has adopted the "discovery" rule, which provides that the statute of limitation begins to run when a plaintiff discovers or should have discovered that a claim may have existed. *John's Heating Service v. Lamb*, 46 P.3d 1024, 1031-32 (Alaska 2002); *Hanebuth v. Bell Helicopter, Int'l*, 694 P.2d 143, 144 (Alaska 1984); *Pedersen v. Zielski*, 822 P.2d 903 (Alaska 1991)(statute starts to run on date plaintiff discovers or should reasonably have discovered all elements of his or her cause of action).

The Alaska court has applied the three-year contract statute of limitations where there is a breach of duties implied in a professional services contract, leading to economic loss, as such claims "arise out of contract." *See Hutton v. Realty Executives, Inc.*, 14 P.3d 977 (Alaska 2000); *Breck v. Moore*, 910 P.2d 599 (Alaska 1996).

B. Property Damage

The 1997 Tort Reform Act decreased the statute of limitation for personal property actions accruing after August 7, 1997 to two years. AS 09.10.070. For personal property actions accruing prior to August 7, 1997, the applicable statute of limitation is six years.

Damage to real property, including to a residence, remains under the six-year statute of limitation for trespass. *State Farm Fire & Cas. Co. v. White-Rodgers Corp.*, 77 P.3d 729, 731 (Alaska 2003). Nuisance claims also fall under the six-year statute of limitations for trespass, AS 09.10.050. *Fernandes v. Portwine*, 56 P.3d 1, 6 (Alaska 2002).

C. Breach of Contract

The 1997 Tort Reform Act decreased the statute of limitation for contract claims accruing after August 7, 1997 to three years. AS 09.10.053; *Silvers v. Silvers*, 999 P.2d 786 (Alaska 2000). For contract actions arising before August 7, 1997, the statute of limitations is six years. There is a separate four-year statute of limitations for contracts involving the sale of goods. AS 45.02.725; *Ranes & Shine, LLC v. MacDonald Miller Alaska, Inc.*, 355 P.3d 503, 509 n.13 (Alaska 2015). In the absence of a statute directing a contrary rule, the discovery rule is applicable to common law contract causes of action. *Bauman v. Day*, 892 P.2d 817, 828 (Alaska 1995).

D. Breach of Warranty

Unlike claims for negligence, warranty claims under the Uniform Commercial Code are governed by the statute of limitation contained in the Code. AS 45.02.725. Under this statute, warranty claims are governed by a four-year statute of limitation. The statute usually begins to run at the time the product is sold. *Sinka v. Northern Commercial Co.*, 491 P.2d 116 (Alaska 1971). When a product warranty "explicitly extends to future performance," the four-year statute of limitation begins to run from the date of injury rather than the date of sale, however. *Armour v. Alaska Power Authority*, 765 P.2d 1372 (Alaska 1988). The discovery rule does not apply to claims governed by this statute. *Id*.

E. Fraud/Misrepresentation

Misrepresentation and fraud are tort concepts, and the two-year statute of limitation respecting torts governs these claims. *Austin v. Fulton Ins. Co.*, 444 P.2d 536, 539 (Alaska 1969). *See also Hutton v. Realty Executives, Inc.*, 14 P.3d 977, 979-80 (Alaska 2000)(in a complaint alleging breach of professional duty, claim of negligent misrepresentation is a tort claim subject to a two-year statute of limitation); *Alaska Tae Woong Venture, Inc. v. Westward Seafoods, Inc.*, 963 P.2d 1055, 1064 (Alaska 1998)(claims for fraud and misrepresentation are tort claims, not contract, and subject to two-year statute of limitations).

F. Tolling of the Statute

If a plaintiff is either incompetent or a minor at the time the cause of action accrues, the statute of limitation is tolled until two years after the disability ceases. AS 09.10.140(a); AS 09.10.180; *Yurioff v. American Honda Motor Co.*, 803 P.2d 386 (Alaska 1990). The general test for mental incompetency is "whether a person could know or understand his legal rights sufficiently well to manage his personal affairs." *Richardson v. Municipality of Anchorage*, 360 P.3d 79, 87 (Alaska 2015).

While the 1997 Tort Reform Act created an exception to the tolling rule for plaintiffs who were under the age of eight at the time the injury occurred, that portion of the statute has been found unconstitutional. *Sands ex rel. Sands v. Green*, 156 P.3d 1130, 1136 (Alaska 2007).

G. Statute of Repose

The 1997 Alaska Tort Reform statute created a ten-year statute of repose. This statute establishes that a person may not bring an action for personal injury, death, or property damages unless the action is commenced within "10 years of the earlier of . . . (1) substantial completion of the construction" or "within 10 years of the last act alleged to have caused the personal injury, death or property damage." AS 09.10.055(a)(1), (2). This ten-year statute of repose applies to causes of action accruing on or after August 7, 1997.

The statute of repose is intended to bar claims based on conduct which occurred over ten years in the past. It applies even where the plaintiff is under the age of majority or under a disability at the time of injury. *See* AS 09.10.055(a).

There are a significant number of exceptions to the statute. For example, the statute does not apply where:

> (1) the personal injury, death or property damage was caused by (A) prolonged exposure to hazardous waste; (B) an intentional act or gross negligence; (C) fraud or misrepresentation; (D) breach of an express warranty or guarantee; (E) a defective product; (F) breach of trust or fiduciary duty; (2) the facts that would give notice of a potential cause of action are intentionally concealed; (3) a shorter period of time for bringing the action is imposed under another provision of law; (4) the provisions of this section are waived by contract; or (5) the facts that would constitute accrual of a cause of action of a minor are not discoverable in the exercise of reasonable care by the minor's parent or guardian.

AS 09.10.055(b).

It should be noted that a prior Alaska statute of repose was declared unconstitutional by the Alaska Supreme Court. *Turner Construction Co. v. Scales*, 752 P.2d 467 (Alaska 1988). The current statute of repose has been found to be facially constitutional. *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1068 (Alaska 2002). But the constitutionality of the statute as applied to minors remains in doubt because of due process concerns. *See Sands ex rel. Sands v. Green*, 156 P.3d 1130, 1136 (Alaska 2007).

IX. Economic Loss Doctrine

Strict liability in tort does not apply to economic loss to the product itself incurred without potential danger of personal injury. *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1976). A plaintiff may recover economic loss in strict liability if the loss arises from a situation "potentially dangerous" to persons or other property, and the loss occurs as a result of the potential danger. *Pratt & Whitney Canada, Inc. v. Sheehan*, 852 P.2d 1173 (Alaska 1993).

X. Recovery of Investigative Costs

In general, costs of protecting one's legal claim or preparing for litigation are unrecoverable as damages. *Sisters of Providence in Washington v. A.A. Pain Clinic, Inc.*, 81 P.3d 989, 1008 (Alaska 2003); *Sykes v. Melba Creek Mining, Inc.*, 952 P.2d 1164, 1172 (Alaska 1998). Thus, overhead costs pertaining to risk management or claims processing are not recoverable because they are similar to expenses incurred in preparing for litigation. Routine administrative overhead costs relating to repair of damages sustained are recoverable if they are a fair and reasonable allocation of actual repair costs, even though the costs are indirect. *Golden Valley Elec. Ass'n, Inc. v. Revel*, 719 P.2d 263, 264-265 (Alaska 1986); *Curt's Trucking Co. v. City of Anchorage*, 578 P.2d 975, 979 (Alaska 1978).

There is an exception to this rule, however. While expenses incurred in protecting, developing, or asserting a claim against a party who has inflicted tortious harm are ordinarily not recoverable as damages in an action against the party who inflicted the harm, when the negligent party embroils the injured party in litigation with a third party, the injured party is entitled to recover from the negligent party all costs of the third-party litigation. *Power Constructors, Inc. v. Taylor & Hintze*, 960 P.2d 20, 40 (Alaska 1998).

XI. Economic Waste

The Alaska Supreme Court disfavors remedies that would lead to economic waste and deems that parties to a contract intend to avoid a remedy that would result in economic waste, for example, where physical reconstruction and completion in accordance with the contract would involve unreasonable destruction of usable property. *North Pacific Processors, Inc. v. City and Borough of Yakutat*, 113 P.3d 575 (Alaska 2005). Likewise, the Alaska court disfavors a remedy where the cost of remedying the defect would involve unjust enrichment of the owner, such as in a case where the owner might simply pocket the cost to cure the defect and would not undertake to remedy the defect. Economic waste is therefore viewed as a criterion by which the jury can assess whether or not the owner reasonably would remedy the defect or would utilize the building in its defective state. Another criterion is whether the owner's purpose is to gratify personal taste and fancy. If so, he may be entitled to damages measured by the cost of completion, even if it involves economic waste. *Hancock v. Northcutt*, 808 P.2d 251, 255 (Alaska 1991). Thus, restoration costs exceeding diminished market value may be awarded only to the extent that restoration costs are objectively reasonable in light of the property owner's reason personal and the diminution in value of the property. *Wiersum v. Harder*, 316 P.3d 557, 569 (Alaska 2013).

XII. Delay Damages

Liquidated damages for delay are recoverable if (1) the liquidated amount is a reasonable forecast of compensation for the harm caused by the breach, and (2) the harm caused is difficult to assess accurately. *Southeast Alaska Const. Co. v. State, Dep't of Transp. & Pub. Facilities*, 791

P.2d 339, 343 (Alaska 1990). An owner may not recover liquidated damages for delay caused by the owner's insistence that the contractor perform work outside the scope of the original contract. *Id*. However, where a party to a construction contract exercises its right to terminate the contract and let out the remainder of the contract to another contractor, it may only recover the excess costs involved and not the liquidated damages. *Arctic Contractors v. State,* 564 P.2d 30, 49-50 (Alaska 1977).

XIII. Recoverable Damages

A. Direct

In construction claims, Alaska allows recovery based on either the actual cost method, in which each element of extra expense incurred because of the alleged breach is added up for a total claimed amount; or, in the alternative, based on a variant of the actual cost method, in which the contractor may present less direct evidence of the cost of additional work, including any actual cost data, accounting records, estimates by law and expert witnesses, and calculations from similar projects. *K & K Recycling, Inc. v. Alaska Gold Co.*, 80 P.3d 702, 722 (Alaska 2003). The latter method reflects the principle that a contractor need not prove damages with mathematical precision, but may only recover those damages which it proves with reasonable certainty. *Id*.

B. Stigma Damages

Alaska courts have not addressed the issue of "stigma damages." However, in property damage cases, the Alaska courts have approved jury instructions that allow for an award of the lesser of two figures: (1) the reasonable expense of necessary repair of the property, plus the difference between the fair market value of the property immediately before it was damaged and the fair market value of the property after it was repaired; or (2) the difference between the fair market value of the property immediately before it was damaged and the fair market value of the unrepaired property immediately after it was damaged. *Era Helicopters, Inc. v. Digicon Alaska, Inc.*, 518 P.2d 1057, 1061 (Alaska 1974). Thus, where repairs have not restored damaged property to its original value, recovery has been allowed for both cost of repairs and the difference in market value before the damage and after the repair. *Willett v. State*, 826 P.2d 1142, 1145 (Alaska App. 1992).

C. Loss of Use

Alaska courts will allow for loss of use damages, where appropriate. *Era Helicopters, Inc. v. Digicon Alaska, Inc.*, 518 P.2d 1057, 1062 (Alaska 1974) (when a long period of repair will be required, the cost of renting a replacement unit is to be included in the cost of the repair).

D. Punitive Damages

Alaska's 1997 Tort Reform statute holds that a fact finder may make an award of punitive damages if the defendant's conduct was (1) "outrageous, including acts done with malice or bad motives," or (2) "evidenced reckless indifference to the interest of another person." AS 09.17.020(b). Punitive damages must be established by clear and convincing evidence. AS 09.17.020(b).

The 1997 Tort Reform statute appears to have codified prior Alaska case law on the subject of punitive damages. The Alaska Supreme Court has previously held that to be entitled to punitive damages, the plaintiff must establish at a minimum that the defendant's conduct amounted to reckless indifference regarding the rights of others, and "conscious action in deliberate disregard of those rights." *Chizmar v. Mackie*, 896 P.2d 196, 210 (Alaska 1995). *See also Pouzanova v. Morton*, 327 P.3d 865, 868 (Alaska 2014)(same). Thus, a court should not allow a claim of punitive damages to go to the jury unless there is evidence that gives rise to an inference of "actual malice or conduct sufficiently outrageous to be deemed equivalent to actual malice." *Chizmar,* 896 P.2d at 210 (quoting *State Farm Mutual Automobile Ins. Co. v. Weiford*, 831 P.2d 1264, 1266 (Alaska 1992)).

Punitive damages are determined in a separate trial only after a jury has determined such damages are appropriate. There is a statutory cap on punitive damages. AS 09.17.020.

Evidence of insurance may be admissible to determine defendant's financial condition under certain circumstances, and thus what is an appropriate level of punitive damages. *Fleegel v. Estate of Boyles*, 61 P.3d 1267 (Alaska 2002).

Punitive damages are not recoverable for breach of contract unless the conduct constituting breach is also a tort for which punitive damages are recoverable. *Reeves v. Alyeska Pipeline Service Co.*, 56 P.3d 660 (Alaska 2002).

Punitive damages are insurable. There is no statutory or public policy prohibiting insuring against punitive damages in Alaska. *See Providence Washington Ins. Co. v. City of Valdez*, 684 P.2d 861 (Alaska 1984); *LeDoux v. Continental Ins. Co.*, 666 F. Supp. 178 (D. Alaska 1987). In the absence of a policy provision excluding punitive damages, punitive damages will be deemed covered. *State Farm Mut. Auto. Ins. Co. v. Lawrence*, 26 P.3d 1074 (Alaska 2001).

E. Emotional Distress

The general rule in Alaska is that there is no recovery for emotional distress unaccompanied by physical injury. *Hancock v. Northcutt*, 808 P.2d 251 (Alaska 1991) (general rule in Alaska is that in the absence of physical injury, there can be no claim for emotional distress); *Kallstrom v. United States*, 43 P.3d 162 (Alaska 2002). The Alaska courts have not addressed the amount of physical injury required to support a claim for emotional distress. One exception to the physical injury

rule is that, where a plaintiff has suffered severe emotional distress as a result of "extreme or outrageous conduct," the plaintiff may have a claim for intentional infliction of emotional distress.

A second exception is that the "physical injury" requirement does not apply to pre-existing duty claims. A plaintiff may recover for emotional distress, without physical injury, where the defendant owed the plaintiff a pre-existing duty and breached that duty. *Chizmar v. Mackie*, 896 P.2d 196 (Alaska 1995). The only contracts that will give rise to this type of duty, however, are contracts highly personal and laden with emotion, such as contracts to marry or conduct a funeral. *Nome Commercial Co. v. National Bank of Alaska*, 948 P.2d 443 (Alaska 1997). A contract for the sale of a home will not support a claim for emotional distress. *Hancock v. Northcutt*, 808 P.2d 251 (Alaska 1991).

In *Hancock*, homeowners sued construction contractors for defective concrete work in the construction of their home, alleging breach of contract and negligent infliction of emotional distress. The court held that a plaintiff may not recover damages for negligently caused emotional distress absent a physical injury, a viable bystander claim, or a breach of contractual duty that, by its nature, "is particularly likely to result in serious emotional disturbance." The court accordingly held the homeowner did not have a claim for emotional distress. 808 P.2d at 257-59. The *Hancock* court held:

> In our view, breach of a house construction contract is not especially likely to result in serious emotional disturbance. Such contracts are not so highly personal and laden with emotion as contracts where emotional damages have typically been allowed to stand on their own. Examples of the latter include contracts to marry, to conduct a funeral, to sell a sealed casket, to conduct a cesarean birth, to surgically rebuild a nose, to provide promised maternity coverage, to provide medical services, and to keep a daughter informed of her mother's health.

Id. at 258-59 (footnotes omitted) (emphasis added).

Similarly, no emotional distress is allowed in a typical misrepresentation case. *Nelson v. Progressive Corp.*, 976 P.2d 859, 867 (Alaska 1999)(the usual rule is that the plaintiff must show pecuniary loss in misrepresentation cases and the damages are limited to such pecuniary loss, with no recovery for emotional distress).

Alaska has allowed claims for negligent infliction of emotional distress, absent physical injury. The Alaska court has held:

> A negligent defendant breaches the standard of care owed to a plaintiff who suffers emotional harm after witnessing physical harm to her loved ones if three conditions are met: (1) the plaintiff was located near the scene of the accident; (2) the emotional harm resulted directly from observing the scene of the accident,

> rather than learning of it later; and (3) the plaintiff and victim were closely related. We have repeatedly held that the plaintiff need not actually witness the accident and that merely witnessing an injured or dead family member at the scene of the accident is sufficient to assert an NIED claim.

Sowinski v. Walker, 198 P.3d 1134, 1162 (Alaska 2008).

F. Interest

Alaska courts award prejudgment interest as a measure of damages. Under Alaska's statute on prejudgment interest, AS 09.30.070, where a contract provides for interest at a specific rate, that rate controls, if the rate does not exceed the legal rate of interest. Where there is no contractual provision, the rate of prejudgment interest is "three percentage points above the Twelfth Federal Reserve District discount rate in effect on January 2 of the year *in which the judgment or decree is entered*." For causes of action accruing after August 7, 1997, the rate of prejudgment interest changes January 1 of every year. For causes of action accruing after August 7, 1997, the rate of prejudgment interest changes January 1 of every year. The rate of prejudgment interest for judgments entered in 2018 is 5%. The current rate can be found at the court's website.[2] The rate of interest for actions accruing prior to August 7, 1997 remains at 10.5%, regardless of when judgment is entered. Prejudgment interest runs from the date of notice that a claim may be brought. AS 09.30.070(b).

Prejudgment interest may not be awarded for future economic losses, future non-economic losses, or punitive damages. AS 09.30.070(c); *McConkey v. Hart*, 930 P.2d 402 (Alaska 1996); *Anderson v. Edwards*, 625 P.2d 282 (Alaska 1981). Prejudgment interest is simple interest, not compound interest. *Alyeska Pipeline Service Co. v. Anderson*, 669 P.2d 956 (Alaska 1983). A different prejudgment interest rate may be applied if founded on a contract in writing. Also, prejudgment interest should not be awarded where funds have been paid in advance for past damages. *Liimatta v. Vest*, 45 P.3d 310, 322 (Alaska 2002).

Alaska awards post-judgment interest on judgments at the same rate as prejudgment interest. *See* AS 09.30.070. The interest rate is based on the year judgment is entered, and changes January 1 of each year, based on the federal discount rate in effect January 1. As with prejudgment interest, a higher or lower rate may be negotiated in contract cases, so long as the rate is specified within the contract.

[2] The current rate can be found at the Alaska court system website at https://public.courts.alaska.gov/web/forms/docs/adm-505.pdf.

G. Attorney Fees

Unlike other jurisdictions, Alaska routinely allows partial reimbursement of attorney fees to the prevailing party by both statute and court rule. *See* AS 09.60.010; Alaska R. Civ. P. 82. There is extensive Alaska case law explaining which party qualifies as the "prevailing party," but generally, the term "prevailing party" refers to the party in whose favor the decision or verdict is rendered and in whose favor judgment is entered. *See Cooper v. Carlson*, 511 P.2d 1305, 1308 (Alaska 1973).

The purpose of the Alaska R. Civ. P. 82 is to partially reimburse the prevailing party for attorney fees. In cases where money is recovered, Alaska R. Civ. P. 82 sets a schedule detailing the amount of attorney fees allowed. In cases in which the prevailing party does not recover a money judgment, the presumption is that the prevailing party is entitled to 30% of the prevailing party's attorney fees if a case goes to trial, and 20% of attorney fees in other cases. Alaska R. Civ. P. 82(b)(2).

H. Damages under the Consumer Protection Act

Alaska's Consumer Protection Act, AS 45.50.471 *et seq.*, broadly applies to the conduct of trade and commerce, and thus applies to the sale of goods and services. It prohibits both unfair and deceptive sales practices. It allows for full attorney's fees and treble damages if a claimant establishes a violation of the statute. It does not apply to transactions involving real estate or real property. *Western Star Trucks, Inc. v. Big Iron Equipment Service, Inc.*, 101 P.3d 1047 (Alaska 2004). It does apply to transactions between businesses. *Id*. In particular, it applies to the business relation between attorneys and their clients. *Merdes & Merdes, P.C. v. Leisnoi, Inc.*, 410 P.3d 398 (Alaska 2017), reh'g denied (Feb. 22, 2018).

XIV. Allocation of Fault/Comparative Negligence

Alaska is a pure comparative fault state and allows the apportionment of fault to plaintiffs and all other parties to the action in warranty and tort-based actions. AS 09.17.060, .080; .900. A defendant's share of financial responsibility for the judgment is reduced according to the percentage of fault apportioned to the other parties. *Id*. Fault is broadly defined to include negligent, reckless or intentional misconduct, breach of warranty, misuse of a product, unreasonable failure to avoid an injury, or failure to mitigate damages. AS 09.17.900.

Prior to the Tort Reform Act of 1997, a defendant who wished to allocate fault to a non-party was required to join the party to the action. *Benner v. Wichman*, 874 P.2d 949 (Alaska 1994) (fault may not be allocated to individuals who may have been at fault, but who were not properly joined as parties). Under the 1997 Tort Reform Act, it is no longer necessary for a defendant to join a party in order to allocate fault in all situations. Fault may now be apportioned to non-parties if the parties did not have "sufficient opportunity to join" the absent party. The statute holds there is not "sufficient opportunity to join" if the party is outside the jurisdiction of the

court, is not reasonably locatable, or where joinder is precluded by law. Where a party to an action has sufficient opportunity to join a party, but chooses not to do so, fault still cannot be allocated to the absent party. AS 09.17.080.

XV. Insurance Coverage for Construction Claims

A. Trigger of Coverage

The general rule appears to be that any policy in effect when damages occur will be held to provide coverage. Alaska case law on trigger of coverage is sparse, however. In *Makarka v. Great American Insurance Co.*, 14 P.3d 964 (Alaska 2000), the court addressed when coverage would be triggered when there was a delayed injury. The court held that coverage should be based on the date of injury, not the date of the negligent act. In *Mapco Alaska Petroleum, Inc. v. Central National Insurance Company of Omaha*, 795 F. Supp. 941 (D. Alaska 1991), a case involving ground water contamination, the court rejected the "manifestation trigger of coverage" theory, and held that coverage should be triggered at the time the damage actually occurred, i.e., when the ground water was exposed to contaminants. *See* 795 F. Supp. at 948. *See also USAA v. Neary*, 307 P.3d 907, 913 (Alaska 2013)(policy is triggered when damages occur, and not at time of the negligent act). In cases of continuing damage, each policy in effect during the time which damages occur will likely be required to respond.

B. Duty to Defend and Indemnify

Alaska law concerning an insurer's duty to defend and indemnify is relatively conventional. There are some unique wrinkles concerning the duty to defend when an insurer defends under a reservation of rights, however.

The Alaska Supreme Court described the insurer's defense obligation in *Fejes v. Alaska Insurance Company,* 984 P.2d 519, 522 (Alaska 1999):

> The duty to defend arises 'if the complaint on its face alleges facts which, standing alone, give rise to a possible finding of liability covered by the policy.' Even if the complaint does not contain such allegations, the insurer has a duty to defend if facts underlying the complaint are within, or potentially within, the policy coverage and are known or reasonably ascertainable by the insurer.

Thus, Alaska does not follow the "four corners" rule in determining whether there is a duty to defend. As in other states, an insurer's obligations to defend are triggered if the allegations in the plaintiff's complaint allege covered conduct. *E.g.*, *Makarka*, 14 P.3d at 969; *Afcan v. Mutual Fire, Marine and Inland Ins. Co.*, 595 P.2d 638, 645 (Alaska 1979). In addition to considering what is pled, the insurer must also defend the claim if facts known to the insurer, or facts which should be known by the insurer, would bring the claim within its coverage. *Makarka*, 14 P.3d at 969; *Continental Ins. Co. v. United States Fidelity & Guaranty Co.*, 528 P.2d 430, 435 (Alaska 1974).

The Alaska legislature has codified the right of independent counsel in conflict cases in AS 21.96.100. The statute provides that the insurer's defense obligation applies only to those claims for which the insurer acknowledges coverage, or has issued a reservation of rights. The insurer is apparently not responsible for defense of claims for which it properly denies coverage outright. Also, this statute provides that the insured can waive in writing the right to independent counsel.

C. Property Damage

There is little direct law in Alaska as to what qualifies as property damage in a commercial liability or similar policy. It appears, however, that Alaska would hold that deterioration of the insured's own work product would qualify as property damage. A similar issue was addressed in *Fejes v. Alaska Insurance Co.*, 984 P.2d 519 (Alaska 1999), where the insurer argued that the loss – damage to a septic drain field – did not qualify as property damage because it was "loss of bargain damage," not property damages, and that a Commercial General Liability (CGL) policy was not intended to cover the insured's own work product. The court rejected this argument, holding that, when a curtain drain failed causing damage to the remaining septic system, this qualified as property damage. It further stated that it would not agree that a CGL policy, particularly one containing a broad form property damage liability coverage endorsement, would never cover damages to the work of the insured. *Id*. at 524.[3]

Alaska law also appears to side with the line of cases that hold that defective workmanship can qualify as an "occurrence." In *Fejes*, the court held that an "accident" was "anything that begins to be, that happens, or that is a result which is not anticipated and is unforeseen and unexpected." From the insured's point of view, the failure of his product "was neither expected nor intended" and hence an accident. 984 P.2d at 523.

D. Defective Workmanship/Business Risk Exclusions

Alaska case law indicates that the court will enforce the business risk exclusions in a Commercial General Liability (CGL) policy, but will read the exclusions narrowly. The court held the "damage to your work" exclusion barred coverage in *U.S. Fire Insurance Co. v. Colver*, 600 P.2d 1 (Alaska 1979). In *Colver*, claims were made against a builder based on negligent construction of a house. Addressing a similarly worded exclusion, the court held that the insured should have known that property damage arising out of his work or work product or to his work or product would not be covered by the policy. *See* 600 P.2d at 4.

Similarly, in *Alaska Pacific Assurance Co. v. Collins*, 794 P.2d 936 (Alaska 1990), the court held that such an exclusion would bar coverage where there was damage to work performed by the Named Insured arising out of such work, but not for damages caused by external forces. *Id*. at 942-43. The court held that, "where damages are caused by factors beyond the scope of the insured builder's work, coverage for such damages is not defeated by a 'completed work'

[3] The coverage previously provided by the broad form endorsement at issue here has now been incorporated into the general CGL form.

exclusion." Finally, *Fejes v. Alaska Insurance Co.*, 984 P.2d 519 (Alaska 1999), held that the policy was intended to exclude damage caused by the named insured's own work to his work, but that the builder would have coverage for damage arising out of a subcontractor's work.

XVI. Mechanic's Liens

A Mechanic's Lien is a claim against real property for work done or materials supplied for the property. Alaska's Lien Law can be found at AS 34.35.050-.120. The most important aspect of filing a claim for a Mechanic's Lien is notice. If the notice requirements are not met, there will be no recovery.

Alaska law provides for two types of notices. First, a person furnishing labor, material, service, or equipment for a project may give a notice of right of lien. *See* AS 34.35.064-.067. If a notice of right to lien is filed, the owner has the burden of proof to show that the owner did not know of or consent to the furnishing of the labor, material, service, or equipment by the claimant in an action to foreclose the lien.

Second, a lien may be recorded after the completion of the construction project. A contractor or subcontractor has **90 days** to record a claim of lien where the owner has not filed a notice of completion, or where the person has filed a notice of right to lien. Where, however, the owner has recorded a notice of completion and provided notice of the filing of the notice of completion, and the contractor/subcontractor has not filed a notice of right to lien, then the claimant has **15 days** to record his lien. AS 34.35.068. A claim of lien is only enforceable if recorded within the time deadlines of this statute.

The notice must also meet certain substantive criteria pursuant to Alaska Statute 34.35.070. The notice must be verified under oath by a person have knowledge of the facts. An authentication is not sufficient. *H.A.M.S. Co. v. Elec. Contractors of Alaska, Inc.*, 563 P.2d 258 (Alaska 1977). The notice should state:

(1) the real property subject to the lien, with a legal description sufficient for identification;

(2) the name of the owner;

(3) the name and address of the claimant;

(4) the name and address of the person with whom the claimant contracted;

(5) a general description of the labor, materials, services, or equipment furnished for the construction, alteration, or repair, and the contract price of the labor, materials, services, or equipment;

(6) the amount due to the claimant for the labor, materials, services, or equipment; and

(7) the date the last labor, materials, services, or equipment were furnished.

An action to enforce a lien must be brought within **6 months** after the lien is recorded. The statute does allow for the recording of an extension notice. Once an action is brought, notice of pendency of the action should be filed. AS 34.35.080.

The Alaska statute also provides a "stop lending notice" remedy. AS 34.35.062. In addition, the lienor "under a contract" retains the right to utilize his contract remedies regardless of his lien. AS 34.35.045. Alaska's legislative scheme of attachment-type remedies preempts equitable remedies, however. *Donnybrook Building Supply Co. v. Alaska National Bank of the North*, 736 P.2d 1147 (Alaska 1987); *Young v. Embley*, 143 P.3d 936, 947-48 (Alaska 2006).

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.