24.12B BREACHING PLAINTIFF’S CLAIM FOR RESTITUTION

Even [if/though] [plaintiff] breached [his her its] contract with [defendant], [plaintiff] claims that [defendant] should be required to pay [plaintiff] for the benefit that [defendant] received through [plaintiff’s] [describe plaintiff’s activity alleged to benefit defendant].

In order to find that [plaintiff] is entitled to payment on this basis, you must find that it is more likely true than not true that:

1. [Plaintiff]’s [*describe activity*] benefitted [defendant]; and
2. The monetary value of this benefit exceeded any financial loss that [defendant] sustained as a result of [plaintiff]'s breach of the contract. I will tell you in a moment how to determine the amount of [defendant]'s loss.

If you find that both of these elements are more likely true than not true, you may award [plaintiff] the amount by which the value of the benefit to [defendant] from [plaintiff]’s [describe activity] exceeded any financial loss sustained by [defendant] as a result of [plaintiff]’s breach of the contract. However, you may not award [plaintiff] an amount that is greater than the amount that [plaintiff] would have received under the contract if [plaintiff] had fully performed the contract.

[Plaintiff] must establish the amount claimed as damages with reasonable certainty. An award of damages must be based on evidence, and not on speculation, guesswork or conjecture.

**Use Note**

This instruction should be given when a breaching party to a construction contract or to a contract for the sale of land seeks restitution damages.

For restitution remedies available under the Uniform Commercial Code, see AS 45.02.718 (b)‑(d).

In the bracket in the first line of the instruction, choose “if” when the plaintiff’s breach is disputed, and “though” when the plaintiff’s breach is not disputed.

**Comment**

The doctrine of restitution is used by the majority of courts to allow recovery by a plaintiff who has not substantially performed the plaintiff’s promises under a contract, but whose partial performance is of net benefit to the defendant. In *Ben Lomond, Inc. v. Allen*, 758 P.2d 92 (Alaska 1988), the Alaska Supreme Court held that restitution was available to a defaulting home purchaser for payments made in excess of the seller’s damages. In that case, the court, citing the Restatement (Second) of Contracts § 374 (1981), stated:

Restitution is available to a defaulting party to a contract to the extent that the benefit retained by the nonbreaching party exceeds the amount of damages incurred by the same party as a result of the breach.

758 P.2d at 94-95. Previously in *Nordin Construction Co. v. City of Nome,* 489 P.2d 455, 466-67 (Alaska 1971), the court indicated that a contractor in default could recover damages to the extent that the benefit conferred on the owner exceeded the injury caused by the contractor’s breach.

In *Ben Lomond*, the court adopted the majority rule which places the burden of proof on the breaching party to prove the amount by which the benefits retained by the defendant exceed the defendant’s damages. *Ben Lomond*, 758 P.2d at 95 *citing* 1 G. Palmer, *The Law of Restitution* § 5.4 (1978)); *see also Nordin,* 489 P.2d at 455. Under this rule, the defaulting party has the burden to prove the value of the benefit conferred and the amount of the nonbreaching party’s damages. Merely proving that some benefit was transferred to the nonbreaching party is insufficient. The result of placing the burden of proof on the defaulting party is that the nonbreaching party will derive the benefit of doubt if the plaintiff fails in its burden of proof. *Ben Lomond*, 758 P.2d at 95 n.4.

As recognized in comment b to the Restatement (Second) of Contracts § 384 (1981), if the party in breach seeks restitution of money paid, no problem arises in measuring the benefit to the other party. Measurement is, however, more difficult if recovery is sought for the benefit of services rendered. The value of services can be measured in several ways. The Restatement (Second) of Contracts states that the benefit to the nonbreaching party should be measured by the lesser of: (a) the reasonable value to the nonbreaching party of what was received in terms of what it would have cost to obtain it from a person in the claimant’s position or (b) the extent to which the other party’s property has been increased in value or other interests advanced. Restatement (Second) of Contracts §§ 371, 374. Under the Restatement rule, the contract price is evidence of the benefit, but it is not conclusive.

The Restatement further provides that the party in breach cannot be allowed to recover more than a ratable portion of the total contract price where such a portion can be determined. Restatement (Second) of Contracts) § 374 comment b. In *Ben Lomond,* the court, citing the Restatement (Second) of Contracts)*,* recognized that the stated contract amount is not determinative of the value of the benefit conferred, but it is at least evidence of the value. *Ben Lomond*, 758 P.2d at 96 n.8. Compare *Fairbanks N. Star Borough v. Kandik Constr. Inc.,* 795 P.2d 793 (Alaska 1990) in which the supreme court held that for goods and services within a contract, the contact price cannot be exceeded using a restitution (quantum meruit) measure of damages.

Because the Alaska Supreme Court has not indicated how the benefit of services rendered should be measured, no definitive instruction is offered above. However, a sample instruction following the Restatement (Second) approach is offered:

Restitution damages are measured by the value of the services conferred on the defendant less the damages incurred by the defendant as a result of the plaintiff’s breach. To calculate this amount, you must first determine the value to the defendant of the plaintiff’s services. The plaintiff has the burden to prove the value of the services conferred on the defendant. The benefit conferred on the defendant is measured by the lesser of

(a) The reasonable value to the nonbreaching party of what was received determined by what it would have cost to obtain it from a person in the plaintiff’s position, or

(b) the extent to which the nonbreaching party’s property has increased in value.

In determining the value, if any, of the benefit conferred, you may, but are not required to, consider the value of the services as stated in the contract. After determining the amount of the benefit, if any, conferred on the defendant, you must subtract from that amount the amount of loss, if any, incurred by the defendant as a result of the plaintiff’s breach. However, you may not award the plaintiff more than the full contract price or more than a ratable portion of the total contract price where such a portion can be determined. I will tell you in a moment how to determine the amount of the loss, if any, incurred by the defendant as a result of the plaintiff’s breach.