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General Civil Definitions

States of Mind

(a) States of Mind - Introduction

As I've said, PLF must prove that DFT acted *[intentionally, knowingly, maliciously, etc.*].

<*If defendant is an entity*> The DFT in this case is a (corporation, partnership, limited liability company, ect.). For the purpose of determining the state of mind of the (corporation, partnership, limited liability company, ect.), a [*corporation, partnership, limited liability company, etc.*] knows all the facts that its [*officers, partners, board members, managers, employees, agents, etc.*] know while they are acting in the course of doing their jobs and within the scope of their particular authority for the [*corporation, LLC, partnership, etc.*].

<*Insert instruction for specific state of mind from § (b), below.*>

<*Insert when there is no direct evidence of state of mind.*> If there is no direct evidence of DFT's [intent, state of mind, knowledge, etc.], PLF may prove DFT's [intent, state of mind, knowledge, etc.] by indirect evidence. It is obviously impossible to look directly into a person's mind. But, in our everyday activities, we often must decide a person's state of mind from what they do and don't do. You should look at all of the circumstances including what DFT did and said at the time, as well as what DFT did and said before and after the event. You may also consider what DFT did <u>not</u> do and say. Keep in mind, however, that you must determine what DFT actually [intended, did or did not know, etc.] at the time, and not what a reasonable person would have [intended, known] at the time.

(b) Specific States of Mind

(1) Intent / Intentionally

"Intent" means a person's purpose or goal. A person acts "intentionally" when s/he/it acts purposely, not by mistake or by accident, and wants the general type of the result to happen or knows that the result is very likely to happen.[1]

In general, you may decide that a person who does an act on purpose ordinarily intends the usual and likely result of the act.

<*Add if defendant is an entity*.> As I've said, a [corporation, partnership, limited liability company, etc.] knows all the facts that its [officers, partners, board members, managers, employees, agents, etc.] know while they are acting in the course of doing their jobs and within the scope of their particular authority for the [corporation, LLC, partnership, etc.]. But, in order to prove DFT acted with the intent to [induce reliance, interfere with someone's rights, cause injury, etc.], PLF must show that at least one of DFT's [officers, partners, board members, managers, employees, agents, etc.] intended to [insert conduct at issue; e.g., induce reliance, interfere with someone's rights, cause injury, etc.].[2]

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[1] Restatement of the Law, Torts 2d, § 8A; see also *Still* v. *Commissioner of Empl. & Training*, 423 Mass. 805, 812 n.7 (1996) ("'The word 'intent' is used . . . to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.'") (quoting Restatement of Torts (Second) § 8A); *Breault* v. *Chairman of Bd. of Fire Comm'rs*, 401 Mass. 26, 36 n.12 (1987) ("'intentional' in the tort sense [is when] 'the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.'"); *Guzman* v. *Pring-Wilson*, 81 Mass. App. Ct. 430, 435 – 436 (2012) (noting that, when comparing negligence and intentional conduct, "If the actor intended the act, and the consequences, although unintended, were reasonably foreseeable, then liability for negligent conduct results. . . . If the actor intended the act and also intended consequences of at least the general type that followed, then liability for intentional, not negligent, conduct will follow.") (citations omitted).

[2] See *Commonwealth* v. *Life Care Ctrs. of Am., Inc.*, 456 Mass. 826, 835 (2010) ("reject[ing] the proposition that a mental state may be imputed to a corporation by aggregating the actions of employees where no one employee possessed that mental state."); *Commonwealth* v. *Springfield Terminal Ry. Co.*, 80 Mass. App. Ct. 22, 33 (2011) ("where civil liability requires a

(2) Knowingly

A person acts "knowingly" when s/he/it acts intentionally while being aware of the likely consequences of her/his/its conduct.[3] [4] So, for PLF to prove DFT knowingly [*insert conduct at issue*], PLF must show DFT acted intentionally, not by mistake or by accident, and DFT was aware what would likely happen as a result.

<***If applicable: ignorance of the law***> However, PLF does not have to prove that DFT knew that his/her/its conduct was unlawful, because ignorance of the law is not an excuse for violating the law.

<***Add if defendant is an entity***> As I've said, a [*corporation, partnership, limited liability company, etc.*] knows all the facts that its [*officers, partners, board members, managers, employees, agents, etc.*] know while they are acting in the course of doing their jobs and within the scope of their particular authority for the [*corporation, LLC, partnership, etc.*]. But, in order to prove DFT knowingly [*insert conduct at issue*], PLF must show that at least one of DFT's [*officers, partners, board members, managers, employees, agents, etc.*] acted intentionally, not by mistake or by accident, while being aware of the likely consequences of his/her conduct.[5]

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showing of specific intent or another mens rea other than mere knowledge, the plaintiff cannot meet its burden by aggregating the intent of the corporate defendant's agents or employees.").

[3] *Still* v. *Commissioner of Empl. & Training*, 423 Mass. 805, 812 – 813 (1996) (citations omitted).

[4] The word "knowingly" is used differently in the criminal context. "When the word 'knowingly' is used in a criminal statute, it 'commonly imports a perception of the facts requisite to make up the crime.'" *Commonwealth* v. *Fondakowski*, 62 Mass. App. Ct. 939, 940 (2005) (citation omitted).

[5] See *Commonwealth* v. *Life Care Ctrs. of Am., Inc.*, 456 Mass. 826, 835 (2010) ("reject[ing] the proposition that a mental state may be imputed to a corporation by aggregating the actions of employees where no one employee possessed that mental state."); *Commonwealth* v. *Springfield Terminal Ry. Co.*, 80 Mass. App. Ct. 22, 33 (2011) ("where civil liability requires a showing of specific intent or another mens rea other than mere knowledge, the plaintiff cannot meet its burden by aggregating the intent of the corporate defendant's agents or employees.").

(3) Knowing Violation

A person commits a "knowing violation" when s/he/it acts intentionally while being aware that her/his/its actions violate [*insert the rule or law at issue*].[6] So, for PLF to prove DFT knowingly violated [*insert the rule or law at issue*], PLF must show DFT acted intentionally, not by mistake or by accident, while being aware his/her/its conduct violated [*insert the rule or law at issue*].

<*Add if defendant is an entity*> As I've said, a [corporation, partnership, limited liability company, etc.] knows all the facts that its [officers, partners, board members, managers, employees, agents, etc.] know while they are acting in the course of doing their jobs and within the scope of their particular authority for the [corporation, LLC, partnership, etc.]. But, in order to prove DFT knowingly violated [insert the rule or law at issue], PLF must show that at least one of DFT's [officers, partners, board members, managers, employees, agents, etc.] acted intentionally, not by mistake or by accident, while being aware his/her conduct violated [insert the rule or law at issue].[7]

(4) Knowledge

"Knowledge" means the awareness of something. A person acts with "knowledge" when s/he/it is aware of what s/he/it is doing.

<*If applicable: ignorance of the law*> However, PLF does not have to prove that DFT knew that his/her/its actions were unlawful, because ignorance of the law is not an excuse for violating the law.

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[6] *Still* v. *Commissioner of Empl. & Training*, 423 Mass. 805, 812 – 814 (1996) (citations omitted).

[7] See *Commonwealth* v. *Life Care Ctrs. of Am., Inc.*, 456 Mass. 826, 835 (2010) ("reject[ing] the proposition that a mental state may be imputed to a corporation by aggregating the actions of employees where no one employee possessed that mental state."); *Commonwealth* v. *Springfield Terminal Ry. Co.*, 80 Mass. App. Ct. 22, 33 (2011) ("where civil liability requires a showing of specific intent or another mens rea other than mere knowledge, the plaintiff cannot meet its burden by aggregating the intent of the corporate defendant's agents or employees.").

<*If applicable: Collective Knowledge of an entity*> A [corporation, partnership, limited liability company, partnership, etc.], such as DFT, has the collective knowledge of all of its [officers, board members, partners, managers, employees, agents, etc]. So, PLF may show DFT's knowledge by adding together things that its [officers, board members, partners, managers, employees, agents, etc.] knew while they were acting in the course of doing their jobs and within the scope of their particular authority for the [corporation, LLC, partnership, etc.].[8]

(5) Willful / Willfully

The word "willful" means intentional. A person acts "willfully" when s/he/it acts intentionally, rather than by accident or by mistake. Willful conduct does not require the actor to have an evil intent or cruel purpose.[9]
<*The judge may elaborate by adding the definition of "intentional"*>

(6) Reckless / Recklessly[10]

"Reckless" conduct is intentional conduct that involves a high risk that significant harm to [*others, property, etc.*] will happen, which the actor

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[8] "It is well established that, for purposes of civil liability that requires a plaintiff to show a corporation's mere knowledge, a plaintiff can make such a showing based on the collective knowledge of the corporation's agents or employees." *Commonwealth* v. *Springfield Terminal Ry. Co.*, 80 Mass. App. Ct. 22, 33 (2011) (citations omitted).

[9] The modern definition of willful conduct means intentional conduct (as opposed to accidental), without any reference to any improper motive. *Commonwealth* v. *Luna*, 418 Mass. 749, 753 (1994); see also *Commonwealth* v. *Pfeiffer*, 482 Mass. 110, 116 (2019) ("At its core, [willful] 'means intentional and by design in contrast to that which is thoughtless or accidental.'") (citation omitted); *Commonwealth* v. *Brennan*, 481 Mass. 146, 154 (2018) ("'Wilful conduct is that which is intentional rather than accidental; it requires no evil intent, ill will, or malevolence.'") (quotations and citations omitted); *Commonwealth* v. *Welansky*, 316 Mass. 383, 397 (1944) ("Wilful means intentional."); but see *Still* v. *Commissioner of Empl. & Training*, 423 Mass. 805, 812 – 813 (1996) (observing that "decisions construing the multiple damages provisions of G. L. c. 93A [ ] have imposed such damages for 'wilful' or 'knowing' violations, equating the former with reckless conduct and the latter with intentional acts.").

[10] A more comprehensive instruction for "recklessness" is available in the separate model instruction for Recklessness, which may be warranted in certain cases, such as: wrongful death cases under G.L. c. 229, § 2; cases applying the Recreational Use Statute at G.L. c. 21, § 17C; cases against landowners by adult trespassers.

ignores.[11] It involves acting or failing to act while intentionally or unreasonably ignoring a high risk that significant harm to [*others, property, etc.*] will happen.

A person acts "recklessly" when s/he intentionally acts, or fails to act, and knows or should know that a high risk of significant harm to [*others, property, etc.*] will happen. [12]

(7) Wanton / Wantonly

"Wanton" conduct is intentional conduct by a person who does not care about, or ignores, the likely consequences of the conduct. [13] A person acts "wantonly" when s/he intentionally acts while ignoring, or not caring about, the likely consequences of his/her conduct.

(8) Maliciously

A person acts "maliciously" when s/he acts intentionally and out of cruelty, hostility, or revenge.[14]

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[11] *Rafferty* v. *Merck & Co.*., 479 Mass. 141, 157 - 158 (2018).

[12] *R afferty* v. *Merck & Co.*, 479 Mass. 141, 157 - 158 (2018); *Commonwealth* v. *Pugh*, 462 Mass. 482, 496 (2012) (citations omitted).

[13] "The words 'wanton' and 'reckless' are practically synonymous in this connection, although the word 'wanton' may contain a suggestion of arrogance or insolence or heartlessness that is lacking in the word 'reckless.'" *Commonwealth* v. *Welansky*, 316 Mass. 383, 398 (1944); see also *Commonwealth* v. *Armand*, 411 Mass. 167, 171 (1991) ("[W]anton destruction [of property] requires only a showing that the actor's conduct was indifferent to, or in disregard of, probable consequences.").

[14] See, e.g., *Commonwealth* v. *Chambers*, 90 Mass. App. Ct. 137, 143 (2016) (for the crime of malicious destruction of property "[u]nder G.L. c. 266, § 127, the Commonwealth must prove that the act was done with malice, that is, in 'a state of mind of cruelty, hostility or revenge.'") (citations omitted).

Other General Definitions

(a) Duress

"Duress" is misconduct, such as threats of violence, done to make another person [*insert conduct at issue, e.g., do something, refrain from doing something, etc.*] against his or her will.

<*If duress is a claim or defense*> To prove duress, [PLF] [DFT] must show, more likely than not, two things are true:

1. That [DFT] [PLF] committed coercive acts or made threats; and
2. That the effect of those acts or threats on [PLF's] [DFT's] mind was so severe that it overcame his/her own free will to [*insert conduct at issue, e.g., file a lawsuit by limitations date; describe other alleged action or inaction, etc.*].

Let me explain these two things in more detail.

First, [PLF] [DFT] must prove [DFT's] [PLF's] coercive acts, such as acts of bullying or intimidation, or threats. S/he does not, however, have to prove [PLF] [DFT] made an explicit threat relating to the [*insert conduct at issue, e.g., filing of a lawsuit, other alleged action or inaction, etc.*].[15] [PLF] [DFT] only has to show that, considering all the circumstances, [DFT's] [PLF's] acts and statements amounted to coercion or a threat against [PLF] [DFT] if s/he [*insert conduct at issue, e.g., filed a lawsuit, other alleged action or inaction, etc.*].

Second, [PLF] [DFT] must show that [DFT's] [PLF's] actions or threats in fact overcame his/her will. S/he does not have to show how s/he overcame [PLF's] [DFT's] will, as long as [DFT's] [PLF's] conduct actually overcame [PLF's] [DFT's] will.[16] On this question, you must consider [PLF's] [DFT's] mind and will in the condition in which [DFT] [PLF] found him/her. It does

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[15] *Pahlavi* v. *Palandjian*, 809 F.2d 938, 942 (1st Cir. 1987), citing *Ross* v. *United States*, 574 F. Supp. 536 (S.D.N.Y. 1983).

[16] *Allen* v. *Plymouth*, 313 Mass. 356, 360 (1943).

not matter whether [DFT's] [PLF's] acts or threats would have overcome the will of a person of ordinary courage and firmness. You must determine whether the acts or threats were sufficient to overcome the will of this particular [PLF] [DFT].[17]

<*If alleged inaction or action resulting from the duress was continuous*> You must also consider how long the duress continued. In order to excuse the [insert conduct at issue, e.g., filing of a complaint more than x years after discovery of PLF's claims, other inaction, etc.], the duress must have operated continuously upon [PLF's] [DFT's] mind.[18] That is, it must have started some time before [insert event at issue, e.g., cause of action accrued, or describe other relevant time period, etc.] and operated continuously from that time until at least [insert event at issue, e.g., commencement of the limitations period, other date, etc.].

<***Verdict slip***> If you find that, more likely than not, [DFT's] [PLF's] threats or acts overcame [PLF's] [DFT's] mind and will to the point where s/he could not [*insert conduct at issue, e.g., file a lawsuit before limitations date; describe act, etc.*], then you would answer question 1 "yes" on the Verdict Slip and then you move on to question 2. If you do not so find, you answer question 1 "no" on the verdict slip and follow the instructions after question 1.

(b) Economic Duress[19]

DFT claims that s/he/it did not [*insert conduct at issue, e.g., agree, waive, etc.*] because PLF forced DFT to [*insert conduct at issue,*] through what we call "economic duress."

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[17] *Omansky* v. *Shain*, 313 Mass. 129, 130 (1943).

[18] See e.g., *Ford* v. *Retirement Bd. of Lawrence*, 315 Mass. 492, 496 (1944) ("If the plaintiffs were victims of coercion, then it was their duty to act seasonably as soon as they were freed of constraint[.]"); *Howe* v. *Palmer*, 80 Mass. App. Ct. 736, 743 (2011).

[19] See also model instructions for Contracts – Defenses.

To prove this defense, DFT must prove that, more likely than not, three things are true:

1. DFT did not voluntarily [*insert action*].
2. DFT [*insert action*] because the circumstances left him/her/it no other feasible alternative.
3. PLF acted unfairly and through coercion to create those circumstances.[20]

Hard bargaining, using unequal bargaining power, or taking advantage of DFT's financial difficulty is not duress. Nor is it enough for DFT to prove economic necessity or other difficulty resulting from mismanagement or poor business judgment. Rather, DFT must prove that her/his/its financial difficulty resulted from PLF's unfair and coercive conduct, which left DFT no feasible alternative but to [*insert action*].

(c) Should Have Known

[PLF][DFT] should have known a fact if a reasonable person in her/his/its position would have known that fact in the circumstances s/he/it experienced at the time. You must consider any impact that the events in this case would normally have had on someone. Your decision on the issue of whether a reasonable person would have known the fact does not depend upon [PLF's] [DFT's] own capabilities or character at the time.[21]

(d) On Notice

A person is on notice of a [insert particular fact, claim, right, etc., at issue] if s/he knew or should have known about the [insert particular fact, claim,

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[20] "The elements of economic duress have [ ] been described as follows: '(1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party.'" *Cabot Corp* v. *AVX Corp.*, 448 Mass. 629, 637-638 (2007). The following additional cases also discuss economic duress in the contract context: *Boston Med. Ctr. Corp.* v. *Sec'y of the Executive Office of Health & Human Servs.*, 463 Mass. 447, 468-69 (2012); *Int'l Underwater Contractors, Inc.* v. *New Eng. Tel. & Tel. Co.*, 8 Mass. App. Ct. 340, 342 (1979).

[21] *Riley v Presnell*, 409 Mass. 239, 245 (1991) (discovery rule for statute of limitations).

right, etc., at issue].[22] A person is also on notice of a [insert particular fact, claim, right, etc., at issue] if the events made it reasonably likely that s/he would become aware of his/her [insert particular fact, claim, right, etc., at issue] and could investigate the matter.[23]

(e) Discovery Rule - Statute of Limitations[24]

[Insert applicable Statute of Limitations jury instruction pertaining to tort at issue].[25]

As a defense in this action, DFT contends that PLF did not file his/her/its lawsuit within the time set by law. DFT must prove, more likely than not, that the PLF's harm occurred before [insert applicable date].

But, even if DFT proves that PLF's harm occurred before [insert applicable date], PLF still filed this lawsuit on time if PLF proves, more likely than not, that before [insert applicable date three/six years, etc., before action was filed] two things were true:

1. PLF did not know, and could not reasonably have known, that s/he had been harmed; and,
2. PLF did not know, and could not reasonably have known, that DFT's conduct may have caused the harm.

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[22] Notice for purposes of the statute of limitations "is simple knowledge that an injury has occurred." White v. Peabody Constr. Co., 386 Mass. 121, 130 (1982).

[23] *Bowen* v. *Eli Lilly & Co., Inc.*, 408 Mass. 204, 208 (1990) (plaintiff on notice for statute of limitations purposes).

[24] "[R]ecognizing the unfairness of a rule that allows statutes of limitation to run even before a plaintiff knew or reasonably should have known that it may have been harmed, the Supreme Judicial Court has adopted 'a discovery rule for the purpose of determining when a cause of action accrues, and thus when the statute of limitations starts to run.'" *Commonwealth* v. *Tradition (North America) Inc.*, 91 Mass. App. Ct. 63, 70 – 71 (2017) (quoting *Bowen* v. *Eli Lilly & Co.*, 408 Mass. 204, 205 (1990)).

[25] "If a defendant pleads the statute of limitations and demonstrates that the action was commenced more than three years after the date of the plaintiff's injury, the plaintiff has the burden of proving that the facts take the case outside of the statute of limitations." *Williams* v. *Ely*, 423 Mass. 467, 474 (1996).

With respect to the first thing, it is not enough for PLF to prove that s/he/it did not know the full extent of the harm s/he suffered before [*insert applicable date*]. But, PLF must prove that, at the time, s/he could not have reasonably known that she suffered enough harm to put her/him on notice to investigate the cause of her/his harm.[26]

[26] *Bowen* v. *Eli Lilly & Co.*, 408 Mass. 204, 207 (1990) (citation omitted). See also *Harrington* v. *Costello*, 467 Mass. 720, 724 (2014); *AA&D Masonry, LLC* v. *South Street Business Park, LLC*, 93 Mass. App. Ct. 693, 698-699 (2018).