LARCENY BY CHECK

The defendant is charged with larceny by check. Larceny by check involves obtaining goods or services by writing a check with knowledge of insufficient funds and with intent to defraud. Section 37 of chapter 266 of our General Laws provides as follows:

> **"Whoever, with intent to defraud,**
>
> **makes, draws, utters or delivers**
>
> **any check, draft or order for the payment of money**
>
> **upon any bank or other depository,**
>
> **with knowledge that the maker or drawer has not sufficient funds or credit at such bank or other depository for the payment of such instrument, although no express representation is made in reference thereto . . .**
>
> **if money or property or services are obtained thereby**
>
> **shall be guilty of larceny."**

In order to prove the defendant guilty of this offense, the Commonwealth must prove four things beyond a reasonable doubt:

First: **That the defendant (wrote a check) (cashed a check drawn)**

(passed a check drawn) (delivered a check drawn) upon an account at the _____ Bank;

Second: **That by doing so the defendant obtained money, property or services;**

Third: **That when the defendant (wrote) (cashed) (passed) (delivered) the check, he (she) knew that he (she) (the person who wrote the check) did not have sufficient funds or credit at the bank on which the check was drawn to cover the check; and**

Fourth: **That the defendant did so with the intent to defraud the bank or someone who received the check.**

If relevant to the evidence. **The word "credit" means an arrangement or understanding with the bank to pay the check, such as a line of credit.**

General Laws c. 266, § 37 also applies to larceny by means of a "draft, or order for the payment of money," includes reference to "other depositor[ies]" as well as banks, and permits conviction of attempted larceny if no money, property or services are obtained. The model instruction may be adapted as appropriate.

Commonwealth v. Klein, 400 Mass. 309, 312-313, 509 N.E.2d 265, 267 (1987) (definition of offense; statute is not unconstitutionally vague or overbroad); *Commonwealth v. Dunnington,* 390 Mass. 472, 474-476, 457 N.E.2d 1109, 1111-1112 (1987) (defendant who ordered secretary to make out check was "drawer"; overdrawn account before and after check presented, and repeated unfulfilled promises to cover it, supported inference of fraudulent intent); *Commonwealth v. Solari,* 12 Mass. App. Ct. 993, 993, 429 N.E.2d 61, 61-62 (1981) (same); *Commonwealth v. Ohanian,* 373 Mass. 839, 842-843, 370

N.E.2d 695, 697 (1977) (defendant who signed depositor's name with his consent was "drawer"; intent to repay money later not a defense; statute refers to drawee bank, not bank at which cashed).

SUPPLEMENTAL INSTRUCTION

Failure to respond within two days to notice of dishonor. **There has been some evidence in this case suggesting that the defendant failed to make good on this check within two days after he (she) was notified that the bank had refused payment because of insufficient funds. If you find that to have been proved, it may be relevant to the issues of the defendant's knowledge and intent.**

If the defendant failed to make good on a check within two days after being notified that it had bounced, you are permitted to infer two other things: that at the time when the defendant originally wrote the check, he (she) knew that there were insufficient funds or a line of credit to cover it at the bank, and also that he (she) wrote the check with the intent to defraud. You are not required to draw such an inference of knowledge and intent, but you may.

Even if there has been contrary evidence, you may still consider a failure to make good on the check within two days of notice as some evidence on the questions of knowledge and intent, and you may weigh it in your deliberations along with all the rest of the evidence on those two issues.

See Instruction 3.260 (Prima Facie Evidence).

"As against the maker or drawer thereof, the making, drawing, uttering or delivery of such a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, such bank or other depository, unless the maker or drawer shall have paid the holder thereof the amount due thereon, together with all costs and protest fees, within two days after receiving notice that such check, draft or order has not been paid by the drawee." G.L. c. 266, § 37.

Failure to pay within two days after notice of dishonor is not an element of the offense, but only a trigger for the statutory prima facie effect. *Klein,* 400 Mass. at 312-313, 509 N.E.2d at 267. Note that the prima facie provision is available only against the "maker or drawer" of a check. Oral notice of dishonor is sufficient, including notice communicated through the other depositor to a joint account. *Ohanian, supra.*

Two justices of the Supreme Judicial Court have indicated their opinion that the statutory prima facie provision is constitutionally invalid as a sole basis for finding scienter, on the grounds that failure to make good on a check within two days could not satisfy a rational trier of fact that the check had been issued dishonestly. *Klein,* 400 Mass. at 316-320, 509 N.E.2d at 269-271 (O'Connor and Liacos, JJ., dissenting). In the *Klein* case, the majority did not reach that issue, since the trial judge had instructed that the permissive inference of scienter lasted only until opposing evidence was introduced, despite the traditional rule that a prima facie effect is "the kind of inference that does not disappear on the introduction of evidence to the contrary; it remains evidence throughout the trial." *Klein,* 400 Mass. at 314, 509 N.E.2d at 268.

Each judge faced with this issue must consider whether it is appropriate, in order to avoid the constitutional issue, to modify the last paragraph of the model instruction so as to limit application of the prima facie provision to situations where there is no competing evidence about scienter, like the charge given in *Klein.*

NOTE:

Civil penalties. General Laws c. 93, § 40A permits, "in addition to any criminal penalties," a civil suit to recover the face amount of a bounced check "and for additional damages, as determined by the court, but in no event . . . less than one hundred nor more than five hundred dollars" if a specified form of written demand goes unanswered for 30 days.