

OBTAINING SOMETHING OF VALUE WITH A CREDIT CARD BY FRAUDULENT MISREPRESENTATION

G.L. c. 266, § 37B(g)

The defendant is charged with obtaining (money) (goods) (services) (anything of value) by fraudulently misrepresenting that they were the holder of a credit card. To prove the defendant guilty of this offense, the Commonwealth must prove four things beyond a reasonable doubt:

***First*, that the defendant used a credit card to obtain (money) (goods) (services) (anything of value);**

***Second*, that the defendant did so by representing that they were the holder of the card (by representing that they are the holder of a card where such card has not in fact been issued);**

***Third*, that the defendant did so (without the cardholder's consent) (knowing that the card had not in fact been issued); and**

***Fourth*, that the defendant engaged in this conduct with the intent to defraud.**

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant obtained (money)

(goods) (services) (anything of value) by using a credit card. A credit card is a device that enables the cardholder to obtain money, goods, services, or anything else of value on credit without immediate payment or by debit from a cash account.¹

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the defendant falsely claimed to be the cardholder. The cardholder is the (person) (entity) named on the face of the credit card to whom or for whose benefit the credit card was issued. A claim of being a cardholder can be made orally, in writing, or by conduct.

[Alternative 1] To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant falsely claimed to be the cardholder without the actual cardholder's consent. Consent is permission given by a person who has the authority to give permission, in this case the cardholder. Consent may be

¹ Section 1 of G.L. c. 266, § 37, provides a more expansive definition of a credit card than the one provided in this instruction: A credit card is "an instrument or device, whether known as a credit card, credit plate or other name, or the code of number used to identify that instrument or device or an account of credit or cash accessed by that instrument or device, issued with or without a fee by an issuer for the use of the cardholder in obtaining money, goods, services or anything else of value on credit or by debit from a cash account."

express or implied, and it may be oral or written. Either way, the Commonwealth must prove beyond a reasonable doubt that consent was not given.

[Alternative 2] To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant falsely claimed to be the cardholder knowing that the card had not in fact been issued. This requires you to make a decision about the defendant's state of mind at that time. You may examine any evidence regarding the defendant's actions or words, all of the surrounding circumstances, and any reasonable inferences you draw from that evidence to help you determine whether the defendant acted knowing that the card had not been issued.

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that the defendant engaged in this conduct with the intent to defraud. To act with an intent to defraud means to act knowingly with the aim of deceiving or cheating another. The purpose is often to bring about gain or benefit either for oneself

or for another person or entity.¹ Again, you may examine the evidence in the case, all of the surrounding circumstances, and any reasonable inferences you draw from that evidence, to help you determine whether the defendant intended to defraud.

See *Commonwealth v. O'Connell*, 438 Mass. 658, 664 (2003) (Commonwealth need not show intent to defraud particular person, but sufficient that defendant "intended to injure or defraud someone"; proof of intent to defraud may be inferred from the circumstances).

If the Commonwealth has proven all four elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of these elements beyond a reasonable doubt, you must find the defendant not guilty.

NOTES

1. **Value \$1200 or under; misdemeanor.** General Laws c. 266, § 37B(g) provides: "... where the value of money, goods or services obtained in violation of this section is not in excess of \$1,200 [shall be punished] . . .". See G.L. c. 266, § 37C (g); if value exceeds twelve hundred dollars, it is a felony.

2. **"Anything else of value"**. The term "anything else of value" is limited to that which can be exchanged for a financial payment. See *Commonwealth v. Escobar*, 479 Mass. 225, 229 (2018) (interpreting the term "anything of value" as it appears in G.L. c. 266, § 37E.) As in the identity fraud statute, the term "anything else of value" should be "interpreted to mean only those things that share the characteristics of the terms that appear before it, here, "money, ... goods, [or] services... all [which] refer to that which has a market or monetary value." *Id.*

² See *United States v. Phath*, 144 F.3d 146, 149 (1st Cir. 1998); *United States v. Leahy*, 445 F.3d 634, 644 (3d Cir. 2006).