

FAILURE TO FURNISH ITEMS PURCHASED BY CREDIT CARD

G.L. c. 266, § 37B(i)

The defendant is charged with failing to furnish (an item) (items) purchased with a credit card with the intent to defraud. To prove the defendant guilty of this offense, the Commonwealth must prove five things beyond a reasonable doubt:

***First*, that the defendant (or an agent or employee) was authorized by the issuer of a credit card to furnish (money) (goods) (services) (anything of value) upon presentation of a credit card by the (cardholder) (cardholder's agent);**

***Second*, that the defendant represented in writing to the card's issuer that the defendant had furnished the requested (money) (goods) (services) (thing of value);**

***Third*, that the defendant did not furnish the requested (money) (goods) (services) (anything of value);**

***Fourth*, that the defendant knew they did not furnish the requested (money) (goods) (services) (anything of value); and**

***Fifth*, that the defendant had the intent to defraud (the issuer) (the cardholder) (the purchaser) (an authorized agent) when making that representation.**

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant was authorized by the issuer of a credit card to furnish (money) (goods) (services) (anything of value) upon presentation of a credit card by the (cardholder) (cardholder's agent). A credit card is a device that enables the cardholder to obtain money, services, or things on credit without immediate payment or by debit from a cash account.¹ The issuer is the bank or company that issued the credit card. The cardholder is the (person) (entity) named on the face of the card to whom or for whose benefit the card was issued.

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the defendant represented in writing

¹ General Laws c. 266, § 37A 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."

that the requested (money) (goods) (services) (anything of value) had been delivered. The writing may be written physically as when one uses a pen, pencil or electronic device.

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant did not furnish the requested (money) (goods) (services) (thing of value). Providing items of a lesser value or amount than requested may constitute not furnishing the requested items.

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that they did not furnish the requested (money) (goods) (services) (anything of value). 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 knew they did not furnish the requested (money) (goods) (services) (anything of value).

To prove the fifth 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.² 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); *Commonwealth v. Segee*, 218 Mass. 501, 504 (1914) ("The false making or alteration with intent to defraud is the gist of the offense.").

If the Commonwealth has proven all five 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(i) 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 (i); if value exceeds twelve hundred dollars, it is a felony.

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).

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.*