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).

NOTES:

Prima facie evidence. In *Commonwealth v. Littles*, 477 Mass. 382 (2017), the Supreme Judicial Court held unconstitutional the statutory designation in the fraudulent check statute, G.L. c. 266, § 37, that failure to make the required payment on a bad check within two days of notice constitutes prima facie evidence of the defendant's intent and knowledge. The Court held that the statute is unconstitutional as it impermissibly lowers the Commonwealth's burden of proof.

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.