



## HANDLING SHOPLIFTERS

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Facts, Probable Cause, Detention & Arrest, Use of Excessive Force

Loss Control for the  
Retail Grocer

## Shoplifting and the Public

When someone steals merchandise offered for sale in a retail store it is generically called shoplifting. To commit shoplifting one must "intend" to permanently deprive the merchant of the value of the merchandise. Shoplifting most often occurs by concealing merchandise in a purse, pocket or bag but can occur by a variety of methods. Most shoplifters are amateurs. However, there are growing numbers of people who make their living by stealing from retail stores. Amateur shoplifter can be highly skilled, and some steal almost every day, but don't do it to make a living. Most amateurs are opportunistic, crude in their methods, and are detected more often than others. Professional shoplifters run the gamut from being highly skilled to thug-like. Some professionals work in teams or use elaborate distraction scenarios. The crude professionals sometimes use force and fear much like gang intimidation and often commit grab-and-run thefts. Being a professional means that they steal merchandise for a living and like other trades, practice makes perfect. Thoughtful professionals are very difficult to stop in a society where retail stores openly display their merchandise.

Shoplifters come in all shapes and sizes, ages and sexes, and vary in ethnic background, education, and economic status. Some shoplifters steal for the excitement, some steal out of desire, some steal for need, some steal out of peer pressure, and some steal because it is simply a business transaction to them. Some shoplifters are compulsive, some opportunistic, and some are mentally ill and don't know any better. Some shoplifters are desperate from drug addiction, alcoholism or from living on the street. Children and elderly persons sometime steal without realizing they are committing a crime. In urban cities, it is not unusual to find a network of "fences" who send out teams of shoplifters into specific retail stores to shoplift specific items, much like filling an order for a customer. The fences only pay 10-20 cents on the dollar to the thieves and sometimes pay their room, board, and provide training on how to steal and defeat the anti-theft technology. Some fences have been known to bail their workers out of jail when caught or provide for their legal defense. This creates a kind of strange street loyalty much like the tale of Oliver Twist.

Theft from stores, including employee and vendor theft, cost retailers many billions of dollars per year. Independent retail studies\* have estimated theft from retail stores costs the American public 33.21 billion dollars per year. Depending on the type of retail store, retail inventory shrinkage ranges from .7% - 2.2% of gross sales with the average falling around 1.70%. Whole retail store chains have gone out of business due to their inability to control retail theft losses. And worse yet, the costs of these losses are passed on to us...the consumer.

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Shoplifting losses will vary by store type, but can account for about one-third of the total inventory shrinkage. It is estimated that shoplifting occurs 330 - 440 million times per year at a loss of \$10 - \$13 billion dollars. Nationwide, that equates to 1.0 - 1.2 million shoplift incidents everyday at a loss rate of \$19,000 - \$25,300 dollars stolen per minute. When you factor in employee and vendor theft, this sum skyrockets to an estimate of over \$33 billion dollars stolen per year.

To combat these losses, merchants have had to take sometimes extreme measures to control shoplifting. Most large retailers employ plain-clothes floor detectives to observe customers as they shop. Many shoplifters are detained and arrested for their indiscretions. See our web pages on Shoplifting -- Detention and Arrest. Plain-clothes floor detectives alone are not enough of a deterrent because they are seemingly invisible. Many stores use video surveillance cameras and electronic article surveillance (EAS) devices attached to their products that cause alarms to go off if not deactivated by the cashier. Others secure expensive and high theft items like small leather items, perfume, cosmetics, tools, liquor, or cigarettes in locked enclosures. Other retailers use cables or hanger locks that require the assistance of a sales associate to unlock the expensive item of clothing before you can inspect it.

It is important for us to know these facts and be patient with stores that try to control their losses due to theft. It can be annoying when a store sales associate has to first count your items before you enter and after you exit the dressing room. It can be annoying when the item you wish to try on has an electronic security device attached to it and sometimes spoils the look of the item. It can be annoying when a sales associate appears to be dogging you within the department, seeming to watch your every move. If any or all of these tactics make you feel uncomfortable, imagine how the shoplifter feels. Shoplifters want privacy and prefer stores with few anti-theft methods in place. It is unfortunate but anti-theft procedures sometimes affect the shopping experience for all of us, especially if applied thoughtlessly.

Attempts to physically detain and arrest shoplifters are not without risk. Besides the physical contact that is sometimes necessary to stop an aggressive shoplifter, a merchant has the legal risk of being sued for doing it incorrectly. In America, customers get outraged when they feel they are being watched or if they are questioned about a suspicious transaction. Many merchants have been sued by their former customers for allegations of false arrest, false imprisonment, malicious prosecution, excessive use of force, and assault.

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## Prevention

In an effort to prevent thieves from walking out the door without paying for merchandise, sometimes it becomes necessary to detain and arrest those suspected of shoplifting. Retailers sometimes employ plain-clothes loss prevention agents specially trained to detect, apprehend, and arrest shoplifters. Some believe that arresting shoplifters is the greatest deterrent as the word gets out to employees and out on the street. If a detention and arrest policy is desirable, it is critical for the merchant to understand the local laws of arrest before confronting anyone. Remember that the laws of the state will differ from store policy.

## The Decision

The decision to approach and confront someone suspected of committing theft should not be taken lightly. It's critical to provide special training to anyone charged with the responsibility of apprehending shoplifters. Some states have "Merchant Statutes" that give the store operator some limited liability protection if they approach a suspected shoplifter in good faith and the stop is based on a reasonable belief that shoplifting had occurred. A merchant statute gives the store operator the right to "detain" someone temporarily either for the purpose of recovering their merchandise and/or for summoning the police. To detain someone, under the statute, means that they are not technically under arrest, but merely being temporarily investigated. The detention process can evolve into an arrest if the suspected shoplifter is taken into custody for the purpose of arrest. The definition of custody means not being free to leave, i.e. like while handcuffed. In jurisdictions that do not have the protection of a merchant's statute, a store operator must make a citizens arrest without any liability protection. In most states, to make a citizens arrest, you must see the crime (misdemeanor) committed in your presence or in the case of a felony be sure that the crime actually occurred outside your presence.

## The Approach

To approach a person suspected of shoplifting will necessarily involve a confrontation. This confrontation can go smooth and professional or become hostile and aggressive. It is a good policy to have extra personnel involved for back-up and for witness purposes. A good rule is to outnumber the suspected shoplifter by a least one. The extra personnel usually prevent the

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suspect from fighting or attempting to flee. A female back-up is best if a female suspect is being detained.

The approach should always occur from the front, if possible. The store representative should immediately and clearly identify themselves and it is helpful to have some form of identification such as a uniform, or name tag to avoid confusion over who you are or what authority you possess. Plain-clothes loss prevention agents should have an authentic-looking ID card or badge in a wallet to present during the confrontation so not to be confused with a mugger. The presentation of credentials should occur simultaneously with the words "I'm with ACME Stores, and I would like to talk with you about the 'two bottles of ACME wine' in your bag."

You should listen for spontaneous utterances like, "Oh, I forgot to pay for it" to help prove culpability while still outside of the store. The shoplifter should also be asked to return the items while still outside the store, if possible, to further validate the suspicion of theft before return to the store interior.

### The Detention

The detention process starts when the customer is initially confronted. However, an unproductive stop can and should be terminated while still outside, along with a sincere apology for the confusion. If the suspected shoplifter has unpaid merchandise at the time of the detention, ask them to, "please return to the store so we can clear up this matter." If you act professional and with back-up, ninety-eight percent of the time the shoplifter will comply and go anywhere you direct, without fanfare.

When escorting a shoplifter back inside the store, care must be taken to see that the thief does not try to run. Customers and store employees could be at risk if a scared shoplifter decides to escape by running through the aisles of the store towards another exit. To prevent this from occurring, at least two loss prevention agents should walk very close to the suspect while speaking in a calm manner. If the risk flight appears high, the loss prevention agents should consider using holding force to guide the shoplifter or simply hang on to a belt loop. Chasing a shoplifter is not a good policy, especially if you already retrieved your merchandise. Chasing a shoplifter off the property or in a car is never a good idea and can be dangerous.

### Excessive Force

Excessive force should never be used when apprehending a shoplifter. Initially, holding force should be all that is required to retrieve your merchandise and direct the suspected shoplifter back to a private office. If the customer is cooperative and is either very young or very old or very frail, no force should be necessary. Professional loss prevention agents may use handcuffs to restrain violent or aggressive shoplifters when employee or customer safety is a REAL possibility. Handcuffs should be used with discretion, because all shoplifters do not need to be cuffed. Loss prevention agents must be properly trained to carry handcuffs and know when and how to apply handcuffs. Handcuffs should always be "double-locked" when it is safe to do so.

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Excessive force is unnecessary and unlawful and can create exposure to civil liability for negligence. This negligence would include choking, punching, kicking, improper handcuffing, hog-ties, and the intentional application of pain compliance techniques. Extreme foul language, ethnic slurs, and verbal threats of harm will all be considered excessive when a shoplifter is in custody. When handcuffs are applied, the loss prevention agent is responsible for the shoplifter's safety from trips and falls, adequate blood circulation to the hands, and their ability to breath.

### Processing

Once you make it to a private office the shoplifter must be processed within a reasonable time period and in a reasonable manner. Sometimes the timing is delayed by slow response time of local law enforcement. There should always be at least two store representatives present at all times and one should be the same sex as the shoplifter for obvious reasons. One of the first steps is to make sure the setting is safe and the shoplifter is not carrying accessible weapons. This is accomplished by a simple external "pat down" or by separating handbags, packages, and other containers from the immediate grasp of the shoplifter. A pat down is not a license for a search and should be conducted by a person of the same sex. Searching pockets and handbags might be illegal in your state, so leave that job for the police upon arrest.

After the safety issues are resolved, you should ask the shoplifter to voluntarily retrieve and return all the stolen merchandise. Depending on your jurisdiction, you may be allowed to question the shoplifter in others you might be required to call the police before questioning. In most States, you are allowed to ask the shoplifter for identification, and complete a written report to help you determine if you will prosecute or not. Most shoplifters will cooperate and hope to be released. In the case of young children, the elderly, or those with diminished mentally capacity, you may wish to release the shoplifter to relatives instead of the police. Check with your company policy and legal department for precise instructions in this area.

Simple requests should be honored for those held in custody, if safe to do so. Handicapped persons should be accommodated because of stairs or footpath issues. If safe, shoplifters can be offered water, prescription medication or restroom access if your merchandise has been recovered. Smoking is not a valid or safe request. Shoplifters can call their attorneys on their own time or from jail. Emergencies of all types should take priority and handled immediately by calling 911. With the exception of very young juveniles, elderly, or obviously ill persons, telephone requests should be delayed until processing has been completed or after the police have been called to eliminate disruption by irate parents, spouses, or friends. If a shoplifter was violent call the police immediately. The shoplifter can make any necessary calls from jail. You may wish to call the parents for juvenile shoplifters. Never release juveniles without being picked up by a capable guardian or the police.

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## **Documentation**

If the store policy is to make detentions and arrests, then written reports are required to record the shoplifting event. These reports will be vital for use later on in both criminal and civil courts. Reports usually include an in-house loss prevention report that captures all the important identification data like name address, date of birth, social security number of the shoplifter. The report will provide a narrative of the facts that establishes the probable cause elements, itemizes all stolen merchandise, lists all witnesses, and includes any contemporaneous statements made by the shoplifter. All reports including the police report or case number, if any, should be kept in a secure file cabinet for a least two years or until the local statute of limitations runs for both criminal and civil filings.

All evidence should be photographed and itemized and either stored in a secure cabinet or returned to stock, if local courts allow for it. If an arrest is warranted, the shoplifter should also be photographed for identification later on and in court. All evidence should be entered into a separate log book and assigned a case number for tracking purposes. You will need these stored items for court. Be sure to bring them along for each court appearance.

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## Determining Probable Cause

To establish a solid base for probable cause, and prevent false arrest claims, there are six universally accepted steps that a merchant should follow before detaining someone suspected of shoplifting:

- 1. You must see the shoplifter approach your merchandise
- 2. You must see the shoplifter select your merchandise
- 3. You must see the shoplifter conceal, carry away or convert your merchandise
- 4. You must maintain continuous observation the shoplifter
- 5. You must see the shoplifter fail to pay for the merchandise
- 6. You must approach the shoplifter outside of the store

### STEP 1:

You must see a shoplifter either when they enter your store or approach a display and that he/she does not have any merchandise in their hand or that they haven't retrieved a item from their own purse, bag or pocket. This step prevents a common mistake that occurs when a customer brings an item back to the store for a return and does not check in at the return desk first. If you detain someone after seeing them replace their own merchandise into their pocket or bag, you could be subject to a false arrest claim although it is a seemingly honest mistake. Many false arrest claims are filed because retailers missed this important, but basic, first step.

### STEP 2:

You must see the shoplifter select the merchandise. Store employees can misunderstand when they see a customer innocently put an item into their pocket or purse and not realize that the customer had brought the item into the store with them for comparison purposes. If you can positively and honestly state that you saw the shoplifter remove your merchandise from your display prior to concealing it, then you have a strong foundation for proof of shoplifting.

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### **STEP 3:**

You must see the shoplifter conceal, carry away or convert the merchandise. This includes concealment in bags, strollers, or on a person. Shoplifting can occur by wearing articles in plain view once the tags are removed. Shoplifting can occur by conversion like when consuming food prior to being purchased. Exceptions are fitting room theft where observation is impossible. Once inside a fitting room store merchandise can be concealed almost anywhere. The important factor is to know what items go into the fitting room and what items don't come out in plain view. Of course, the fitting room must be checked beforehand to see if it is clear of merchandise and after the suspected theft to see that the missing items were not simply discarded.

### **STEP 4:**

You must maintain continuous surveillance of the shoplifter. If your store policy is to detain and apprehend all shoplifters, then you must adhere strictly to this step. Experienced shoplifters will try to dump the concealed merchandise, without your knowledge, if they believe they have been observed. Many states have adopted merchant statutes to protect the retailer against this trick. If you followed steps 1-3 and then lost sight of the shoplifter for several minutes you may be surprised when you detain them and they are no longer holding your merchandise. The best approach, if you lose sight of a shoplifter, is to make your presence known to the shoplifter and give them a chance to dump your merchandise and leave your store without a word being said. Sometimes, loss prevention personnel will walk nearby and turn up their mobile radios to alert the shoplifter that they are plain-clothes security. Another technique is to make a storewide P.A. announcement for security to come to the Children's department, for example, which is where the shoplifter happens to be standing. They will usually dump your merchandise immediately and may never return.

### **STEP 5:**

You must see the shoplifter fail to pay for your merchandise. Typically, a shoplifter will walk out of your store, past all cash registers, without making any attempt to pay for the concealed merchandise. This is an important element to prove "intent" later in court, if necessary. Sometimes, shoplifters will go through the checkout line and pay for other items but not for the concealed item. It is important to observe that the concealed item is not retrieved and paid for at the checkout. It is also important to verbally confirm with the cashier that the concealed item was not paid for either. For example, a shoplifter may get a change of heart and tell the cashier that they consumed a candy bar worth .75 cents and the cashier rings it up. If you don't inquire first, you could detain the shoplifter and have some exposure to litigation. Another example is when you observe a customer removing garment tags and dressing their child in new clothes and place the old clothes into a large bag. When the suspected shoplifter proceeds to the cashier, and without your knowledge, they present all the price tags and pay in full. Another example is when a customer at a grocery store tells the cashier to charge for a carton of cigarettes or a newspaper. After the transaction, the customer leaves the check stand and selects the cigarettes or newspaper from the stand in the lobby and exits, seemingly without paying. Sometimes there is a reasonable explanation

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for removing merchandise, seemingly without paying, so you must be aware of the practices within various retail settings that would allow this to occur. Remember, some shoplifters are clever and will purchase an item, obtain a receipt, and dump it in their car. Next they return to the store to steal the exact same item. If stopped they can produce a receipt and even get the cashier to swear the item was purchased. I've seen the same item stolen five times using this technique until we busted him.

### **STEP 6:**

You must approach the shoplifter outside of the store. Although not technically necessary, following this step eliminates all possibility that the shoplifter still intends to pay for the stolen product. A few courts have held that detaining someone for shoplifting inside a retail store does not establish the criminal intent of theft. However, in several states shoplifters can be detained once they have concealed the merchandise. When approaching a shoplifter outside of the store always have a least one trained employee as a witness. There is safety in numbers and most shoplifters will cooperate if they believe fighting or running is futile. When you approach a shoplifter outside it is important to identify yourself clearly and your authority for stopping them. Plain-clothes loss prevention agents carry badges or official looking ID cards so the shoplifter has no doubt who they are. Most shoplifter apprehensions should be accomplished with no force or if necessary, minimal force like touching or guiding. Professional loss prevention agents sometimes will use handcuffs to take someone into custody, if they are first trained how and when to legally apply them properly.

In almost every jurisdiction if you follow these six steps, you should have no problem with proving criminal intent to shoplift and be able to establish probable cause to detain a shoplifter. You should also be well insulated from civil liability if you followed these six steps correctly. Remember, the steps recommended in this article exceed most state laws and are not always required for successfully prosecuting a shoplifter. However, the steps are designed to provide consistency in procedures and training for loss prevention professionals and reduce civil liability for the retailer.

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## Preventing False Arrest

A retail store makes a choice when it decides to apprehend and arrest those who attempt to steal their merchandise. With that choice comes the legal responsibility of properly hiring, training, and supervising those who make shoplifter apprehensions and arrests. In the retail loss prevention profession, the possibility of detaining and falsely accusing a customer of theft is a business reality that must be addressed.

In the United States, citizens value their civil liberties and constitutional rights and don't appreciate submitting to unlawful seizure and search. Because of this, there has been a legal trend of suing the retail store anytime a customer is wrongfully accused of shoplifting. Because of this, the retail security and loss prevention industries have developed six universally accepted steps to minimize the potential for a false arrest claim.

They are:

1. You must see the shoplifter approach the merchandise
2. You must see the shoplifter select the merchandise
3. You must see the shoplifter conceal, convert or carry away the merchandise
4. You must maintain continuous observation of the shoplifter
5. You must observe the shoplifter fail to pay for the merchandise
6. You must apprehend the shoplifter outside the store

If these six steps are followed, false arrest situations and subsequent lawsuits will be almost nonexistent. These six steps were designed to establish a high degree of probable cause for detention and arrest of a person suspected of shoplifting. If one of these steps is skipped, the chance for false arrest increases proportionately. If two or more steps are skipped, the store personnel are acting recklessly towards customers and are exposing the store unnecessarily to liability and false arrest claims. Remember, state law may not require this high degree of care for criminal prosecution.

The word "false arrest" is very distasteful to the retail industry, so it has created several alternate words to describe the event. Words like "non-productive detention," or "unproductive stop," or "investigative detention" all have been used in place of false arrest so not to seemingly admit liability. Whatever the word, if the customer you stop and accuse

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is not holding the merchandise you thought he or she concealed than you have a potential false arrest claim.

Many states have enacted legislation to protect the merchant from such false arrest claims by allowing the store to make "investigative detentions" of a customer suspected of shoplifting. In these jurisdictions, the law allows certain latitude or "merchant's privilege" if the merchant has a reasonable belief that a customer has stolen merchandise. In many jurisdictions, law allows the merchant to detain a customer for a reasonable time, and in a reasonable manner, for the purpose recovering the stolen merchandise or for summoning the police.

The problem with these statutes is that they are vague as to what "reasonable" means and what the word "detain" means. All too often, merchants have overly relied on this statutory language to protect them from lawsuit only to discover that it could not relieve them of liability.

In most jurisdictions, a reasonable belief that someone has shoplifted does not include a stranger's observation and report. Customers are often unreliable in what they report and it is considered unreasonable to detain and accuse someone of theft based solely on a customer observation. Besides, what if the customer and shoplifter are working together to set up the store for a lawsuit?

While detaining someone, you must do so in a reasonable manner. Tackling and injuring a customer in the parking lot over suspected petty theft might seem excessive especially if no other means of detention were attempted first. You must also detain someone only for a reasonable time. Holding someone for three hours while you investigate a check, credit card, coupon or refund fraud attempt is excessive.

The best way to limit false arrest situations is hiring, training, and supervising competent staff. It is usually considered negligent to have a policy of apprehension and arrest of shoplifters if the store personnel have no training on how to do so correctly. It is usually considered negligent if a store employee uses excessive force when apprehending a suspected shoplifter. It requires special training to understand how to routinely apprehend shoplifters while only using minimal force. Tackling, punching, and verbal abuse of shoplifters are never acceptable. Excessive or unreasonable use of handcuffs, leg restraints, or pain compliance holds are also inappropriate when dealing with those suspected of retail theft.

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## **Running the Risk:**

You run the risk of a false arrest claim when you:

- Don't observe the customer approach a display
- Don't observe the merchandise being selected from the display
- Don't see the merchandise being concealed, carried away or converted (i.e. eaten etc)
- Don't maintain continuous observation and the shoplifter dumps the item
- Don't watch the check stand and verify the non-payment of the item
- Don't detain the shoplifter outside the store (or at least past the last register)
- Don't detain only the person directly responsible for the theft

## **To avoid other related claims:**

- Approach from the front (so the shoplifter doesn't think you're a robber)
  - Have at least one witness of the same sex present at all times
  - Have at least one more backup than the number of shoplifters
  - Clearly identify yourself as the store representative or security officer
  - State the reason for the detention and ask for the item back
  - Don't be afraid to immediately disengage and apologize if you make a mistake
  - Listen for spontaneous utterances (i.e. "I forgot to pay for it")
  - Closely escort the shoplifter to a private office
  - Do not chase the shoplifter through the store
  - Always be polite and professional even if the shoplifter is not
  - Do not use excessive force (i.e. double lock handcuffs)
  - Do not make threats or exchange insults
  - Accommodate reasonable medical and handicap requests
  - Process the arrest swiftly according to store policy
  - Save, tag, and photograph the stolen merchandise as evidence
-