

OPINION NO. 78-005**Syllabus:**

1. State liquor store cash and merchandise shortages determined by means of an interim departmental audit are not claims due and payable to the state subject to the provisions of R.C. 115.10. Cash and merchandise shortages not collected by the Department of Liquor Control should be recovered by means of a civil action instituted pursuant to R.C. 117.10.
2. Pursuant to R.C. 4301.16, the Department of Liquor Control may write-off unintentional merchandise shortages to the extent that the amount credited to each store annually does not exceed one-fortieth of one percent of each store's yearly gross sales. There is no statutory authority for the department to write-off intentional merchandise shortages or cash shortages of any kind.

To: Clifford E. Reich, Dept. of Liquor Control, Columbus, Ohio
By: William J. Brown, Attorney General, February 7, 1978

I have before me your request for my opinion regarding the following two questions:

- 1.) Which, if any, of the state liquor store cash and merchandise shortages, shown by audits for periods of less than one year, should legally be submitted to the

Auditor as claims pursuant to Section 115.10 of the Ohio Revised Code?

2.) How and when is it legally proper for the department to write off cash and merchandise shortages for state liquor stores?

You indicate in your letter that these questions have arisen because R.C. 4301.16 allows a credit for merchandise shortages to each state liquor store of one-fortieth of one percent of the store's yearly gross sales and because of the appellate court decisions in Weiner v. Crouch, 120 Ohio App. 49 (1963) and In the Matter of Drain, 28 Ohio App. 2d 102 (1970), which held that a state liquor store manager may not be held liable for shortages unless negligence is proven.

Initially you inquire if liquor store shortages determined by means of an interim departmental audit can be considered a claim due and payable the state for the purposes of R.C. 115.10. R.C. 115.10, which requires that state officers and agents report claims in favor of the State to the Auditor of State, provides as follows:

When an officer or agent of the state comes into possession of a claim due and payable to the state, he shall demand payment thereof, and on payment shall have the amount certified into the state treasury. If he fails to collect such claim within thirty days after it comes into his possession, he shall certify it to the auditor of state, specifying the transaction out of which it arose, the amount due, the date of maturity, and the time when payment was demanded. The auditor of state shall not issue his warrant on the treasurer of state for the salary of any such officer or agent of the state until this section is complied with.

The term, a claim due and payable the state, is not expressly defined for the purposes of R.C. 115.10. A "claim" in its ordinary sense, however, "imports the assertion, demand, or challenge, of something as a right, or it means the thing thus demanded or challenged." Fordyce v. Godman, 20 Ohio St. 1, 4 (1870). Thus, the statute presupposes the existence of an identifiable claim of a certain amount arising out of a specific transaction. The requirements of the statute, however, also presuppose the existence of an identifiable party against whom the claim can be asserted. In other words, before a claim due and payable the state can arise there must be an identifiable party responsible for payment. In order to determine if this last requirement is met with respect to liquor store shortages, it is necessary to consider the duties and liabilities of the various parties responsible for the management of the stores.

R.C. 4301.12 provides that "[t]he department of liquor control shall by regulation provide for the custody, safekeeping and deposit of all moneys received by it or any of its employees or agents . . ." In order to protect public funds within the control of the department, R.C. 4301.08, which requires the department's officers and employees to be bonded, provides in part as follows:

Each member of the liquor control commission shall give bond to the state in the amount of ten thousand dollars, and the director of liquor control shall give bond to the state in the amount of one hundred thousand dollars . . . The director may require any employee of the department of liquor control to give like bond in such amount as the commission prescribes . . . The premium on any bond required or authorized by this section may be paid from the moneys received for the use of the department under Chapters 4301. and 4303. of the Revised Code or from appropriations made by the General Assembly.

Prior to the appellate court decisions in Weiner v. Crouch, 120 Ohio App. 49 (1963) and In Re Matter of Drain, 28 Ohio App. 2d 102 (1970), the Department of Liquor Control's right to assert claims for store shortages was based on Department of Liquor Control, Regulation IV, B5, which provided that a store manager was personally liable for all monies received by the store. On the basis of this regulation, the Director of Liquor Control required all stores managers to pay to the State an amount equal to any shortages found by an auditor less the statutory allowance for breakage. Thus, under this regulation, any shortage could immediately result in an identifiable, assertable claim against a known party responsible for payment. The Franklin County Court of Appeals in Weiner, supra, and the Montgomery County Court of Appeals in Drain, supra, have held, however, that a manager of a state liquor store is not a public officer and is not, therefore, responsible for cash or merchandise shortages without proof of complicity or guilt. In view of these appellate court decisions, it is my opinion that a cash or merchandise shortage shown by means of a bi-monthly departmental audit does not automatically give rise to a claim due and payable the state subject to the provisions of R.C. 115.10, since, without further investigation and an adjudication of the liability of the various parties responsible for the care and custody of liquor store funds and property, the department cannot assert a claim for the recovery of the shortage as a matter of right.

Although R.C. 115.10 is very broad and general, it is not the only procedure for asserting and collecting money due the State. The Department of Liquor Control itself has, pursuant to R.C. 4301.10, the power to investigate store shortages and to bring suit to recover such losses shown by means of an interim audit. R.C. Chapter 117 also provides for the assertion of claims arising from the loss of or failure to account for public funds.

R.C. 117.01, which establishes the Bureau of Inspection and Supervision of Public Offices, provides that the bureau shall inspect and supervise the accounts and reports of all state offices. The test of what constitutes a state office for the purpose of R.C. Chapter 117 is merely that the agency or organization be clothed with some part of the sovereignty of the state. 1954 Op. Atty Gen. No. 4224, p. 460. Moreover, R.C. 117.09, which regulates the time of examinations, expressly provides that the bureau shall examine each public office, department or agency. Since the Department of Liquor Control is enumerated in R.C. 121.02 as one of the departments of state administration, there can be no doubt that it is subject to examination pursuant to R.C. Chapter 117.

R.C. 117.10, which describes the actions to be taken as a result of an examination by the bureau, provides in relevant part as follows:

The report of the examination made by the bureau of inspection and supervision of public offices shall set forth, in such detail as is deemed proper by the bureau, the result of the examination with respect to every matter inquired into. . . .

If the report relates to the expenditure of public money from the state treasury or to the disposition of property belonging to the state, a certified copy shall be filed with the attorney general. . . .

If the report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated, the officer receiving the certified copy of the report, . . . shall within ninety days after the receipt of the certified copy of such report, institute civil actions in the proper court in the name of the political subdivision or taxing district to which the public money is due or the public property belongs for the recovery of

the money or property and shall prosecute such actions to final determination.

. . . .

"Public money" as used in this section includes all money received or collected under color of office, whether in accordance with or under authority of any law, ordinance, order, or otherwise, and all public officials are liable therefor. (Emphasis added.)

Since R.C. 117.10 is expressly made applicable to situations wherein any public money collected has not been accounted for and public property has been converted or misappropriated, it is clearly applicable to liquor store shortages of either cash or merchandise. Moreover, since R.C. 117.10 authorizes the initiation of a civil action, it is particularly well-suited to those situations wherein the recovery for cash or merchandise shortages may require proof of complicity or fault on the part of the store manager or other employee or party.

Thus, it is my opinion that state liquor store cash and merchandise shortages determined by means of an interim departmental audit are not claims due and payable to the state subject to the provisions of R.C. 115.10. Cash and merchandise shortages not collected by the Department of Liquor Control should be recovered by means of a civil action instituted pursuant to R.C. 117.10.

Your second question concerns the department's authority to write-off cash and merchandise shortages. With respect to merchandise shortages, R.C. 4301.16 expressly provides that

[U]pon proof of accidental breakage or unintentional shortage of stock, which proof shall be subject to the final approval of the department of liquor control, the department shall allow yearly credits to each state liquor store not to exceed one-fortieth of one percent of each state liquor store's yearly gross sales, for the moneys required by this section to be paid by such state liquor store to the department of liquor control.
(Emphasis added.)

Thus, the department's authority to write-off merchandise shortages is limited to situations where there is proof of accidental breakage or unintentional shortage and where the amount of the shortage in a store does not exceed one-fortieth of one percent of that store's yearly gross sales.

With respect to cash shortages, R.C. 4301.16 provides that all monies received from the sale of liquor at state liquor stores shall be paid to the department of liquor control and shall be accounted for and paid over by the department to the treasurer of state as custodian. Thus, there is no statutory authority for the department to write-off a cash shortage.

Thus, it is my opinion and you are so advised that:

1. State liquor store cash and merchandise shortages determined by means of an interim departmental audit are not claims due and payable to the state subject to the provisions of R.C. 115.10. Cash and merchandise shortages not collected by the Department of Liquor Control should be recovered by means of a civil action instituted pursuant to R.C. 117.10.
2. Pursuant to R.C. 4301.16, the Department of Liquor Control may write-off unintentional merchandise shortages to the extent that the amount credited to each store annually does not exceed one-fortieth of one percent of each store's yearly gross sales. There is no statutory authority for the department to write-off intentional merchandise shortages or cash shortages of any kind.