

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

April 9, 2015

1:07 p.m.

MEMBERS PRESENT

Representative Gabrielle LeDoux, Chair
Representative Wes Keller, Vice Chair
Representative Bob Lynn
Representative Max Gruenberg
Representative Neal Foster
Representative Charisse Millett
Representative Matt Claman

MEMBERS ABSENT

Representative Kurt Olson (alternate)

OTHER MEMBERS IN ATTENDANCE

Representative Jim Colver

COMMITTEE CALENDAR

CS FOR SENATE BILL NO. 43(JUD)

"An Act relating to immunity for a fire department and employees or members of a fire department."

- HEARD & HELD

HOUSE BILL NO. 125

"An Act relating to the sale of products containing dextromethorphan; relating to the regulation of dextromethorphan by municipalities; and providing for an effective date."

- MOVED HB 125 OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

BILL: SB 43

SHORT TITLE: IMMUNITY FOR FIRE DEPT. & MEMBERS

SPONSOR(s): SENATOR(s) COGHILL

02/06/15	(S)	READ THE FIRST TIME - REFERRALS
02/06/15	(S)	CRA, JUD
02/17/15	(S)	CRA AT 3:30 PM BELTZ 105 (TSBldg)

02/17/15 (S) Heard & Held
02/17/15 (S) MINUTE(CRA)
03/05/15 (S) CRA AT 3:30 PM BELTZ 105 (TSBldg)
03/05/15 (S) Moved CSSB 43(CRA) Out of Committee
03/05/15 (S) MINUTE(CRA)
03/06/15 (S) CRA RPT CS 3DP SAME TITLE
03/06/15 (S) DP: BISHOP, EGAN, MACKINNON
03/16/15 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
03/16/15 (S) Scheduled but Not Heard
03/18/15 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
03/18/15 (S) Heard & Held
03/18/15 (S) MINUTE(JUD)
03/20/15 (S) JUD AT 1:30 PM BUTROVICH 205
03/20/15 (S) Moved CSSB 43(JUD) Out of Committee
03/20/15 (S) MINUTE(JUD)
03/23/15 (S) JUD RPT CS 4DP SAME TITLE
03/23/15 (S) DP: MCGUIRE, COGHILL, COSTELLO,
WIELECHOWSKI
04/01/15 (S) TRANSMITTED TO (H)
04/01/15 (S) VERSION: CSSB 43(JUD)
04/02/15 (H) READ THE FIRST TIME - REFERRALS
04/02/15 (H) CRA, JUD
04/06/15 (H) CRA REFERRAL REMOVED
04/09/15 (H) JUD AT 1:00 PM CAPITOL 120

BILL: HB 125

SHORT TITLE: RESTRICTIONS ON SALE OF DEXTROMETHORPHAN

SPONSOR(s): REPRESENTATIVE(s) MILLETT

02/25/15 (H) READ THE FIRST TIME - REFERRALS
02/25/15 (H) JUD
04/09/15 (H) JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

JORDAN SHILLING, Staff
Senator John Coghill
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Presented CSSB 43 on behalf of Senator Coghill, prime sponsor.

MITCH FLYNN, Fire Chief
Steese Volunteer Fire Department
Fairbanks, Alaska

POSITION STATEMENT: During the hearing on CSSB 43, expressed concern regarding lack of immunity for the Steese Volunteer Fire Department.

DOUG SCHRAGE, Fire Chief
Fairbanks University of Alaska Fire Department
Alaska Fire Chiefs Association
Fairbanks, Alaska

POSITION STATEMENT: During the hearing on CSSB 43, offered support for SB 43.

JILL DOLAN, Assistant Borough Attorney
Fairbanks Northstar Borough
Fairbanks, Alaska

POSITION STATEMENT: During the hearing on CSSB 43, answered questions.

GRACE ABBOTT, Staff
Representative Charisse Millett
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Presented HB 125, on behalf of Representative Millett, prime sponsor.

KACI SCHROEDER, Assistant Attorney General
Criminal Division
Department of Law
Juneau, Alaska

POSITION STATEMENT: Answered questions during the hearing on HB 125.

SEAN MOORE
Consumer Healthcare Products Association (CHPA)
Washington D.C.

POSITION STATEMENT: Testified and answered questions during the hearing on HB 125.

ACTION NARRATIVE

[1:07:19 PM](#)

CHAIR GABRIELLE LEDOUX called the House Judiciary Standing Committee meeting to order at 1:07 p.m. Representatives Lynn, Gruenberg, Keller, and LeDoux were present at the call to order. Representatives Millett, Claman, and Foster arrived as the meeting was in progress. Also in attendance was Representative Colver.

[1:08:27 PM](#)

SB 43-IMMUNITY FOR FIRE DEPT. & MEMBERS

CHAIR LEDOUX announced that the first order of business would be SENATE BILL NO. 43, "An Act relating to immunity for a fire department and employees or members of a fire department."

[1:08:39 PM](#)

JORDAN SHILLING, Staff, Senator John Coghill, Alaska State Legislature, said SB 43 relates to contract fire departments and affects the fire departments of Fairbanks, Anchorage, Chugiak and Girdwood. He offered that government creates immunities for itself in different areas which is fairly common especially when it comes to public safety and fire departments in particular. He advised that most states have statutes that protects the fire departments themselves and its employees. He referred to AS 09.65.070, and conveyed that it provides immunity except to contract departments. He offered that he researched the legislative history of AS 09.65.070, and noted it was established in the mid-1970s, and is not clear whether contract fire departments were in existence, and that the language was crafted from a statute in Delaware.

[1:10:21 PM](#)

CHAIR LEDOUX asked whether contract fire departments are considered volunteer fire departments.

MR. SHILLING answered that these are .501(C)(3), non-profits and are mostly volunteer based although the chief will generally be paid.

[1:10:48 PM](#)

MR. SHILLING continued his presentation and stated that because the Municipality of Anchorage and the Fairbanks Northstar Borough contract with these fire departments and utilize their services even though the statute doesn't cover those fire departments, fire fighters, and volunteers. In that regard, they are exposed to extra liability that others are not and this bill extends that immunity to those departments. He advised that initially the bill was introduced with full immunity. He further advised that concerns were expressed in creating a blanket immunity so the fairly common carve out exception of

gross negligence and willful acts of misconduct was added. He pointed out that the second change to the bill was as a result of Representative Seaton's suggestion to ensure that this immunity does not somehow apply to a contractor of a private entity.

[1:12:10 PM](#)

CHAIR LEDOUX questioned "does not apply to ..."

[1:12:12 PM](#)

MR. SHILLING offered the example of a village having a relationship with a contract department, and that department had a subsequent contract with a private entity, the change was to ensure that this bill did not somehow protect the private entity.

[1:12:37 PM](#)

CHAIR LEDOUX asked whether this only covers contracts with .501(C) organizations.

MR. SHILLING responded that Chair LeDoux was correct in that these are mostly structured in that manner.

[1:12:57 PM](#)

REPRESENTATIVE GRUENBERG referred to a 3/16/15, letter from Fire Chief John Fullenwider, Municipality of Anchorage, which read: "These bill, if enacted, will protect residents by reducing the risk of liability and frivolous tort claims against municipal and non-profit fire agencies." He asked what the bill does to change the liability of the municipality itself.

MR. SHILLING answered that municipally operated departments, such as the Anchorage Fire Department already has protections in statutes and this bill does not affect those and if anything extends its protections, but certainly does not reduce it.

REPRESENTATIVE GRUENBERG said a bill is forthcoming related to the issue of retroactivity. He surmised that this bill is not retroactive and will only apply to claims arising on or after the effective date of this Act.

MR. SHILLING replied "that is correct, there is not an applicability section here so it would apply."

REPRESENTATIVE GRUENBERG highlighted that he is serving notice he may offer an applicability section to state that this applies to claims arising on or after the effective date of this Act. Although, he realizes he may have violated the 24-hour rule, but it is important to make it clear.

[1:15:48 PM](#)

MR. SHILLING opined that the drafter of the bill may be on the line to determine whether this is a necessary change as it may be that this inherently only applies to claims on or after.

REPRESENTATIVE GRUENBERG offered that routinely within criminal law it includes the language, but this issue has not been before the House Judiciary Standing Committee this year on the civil side.

CHAIR LEDOUX opened public testimony.

[1:17:34 PM](#)

MITCH FLYNN, Fire Chief, Steese Volunteer Fire Department, said the Steese Volunteer Fire Department, a non-profit organization in Fairbanks, provides fire and EMS services through a contract with the Fairbanks Northstar Borough. He noted that last year the legal team at the Fairbanks Northstar Borough pointed out his department's lack of immunity protection and vulnerability to lawsuits. He requested a change in the Alaska Statutes that provides the same immunity protections as offered to municipalities. He explained there are approximately seven non-profit fire departments statewide contracting with a municipal government and providing the services of fire and EMS, and noted that the population base is approximately 100,000 residents. He highlighted his concern that the lack of immunity protection may have a negative impact on recruitment and retention of volunteers in the future. On a good note, he stated, by passing this legislation it may help identify costs and annual premiums for general liability insurance that is paid out. He described the irony of the situation in that his department may respond to a Fairbanks Northstar Borough call and yet incur a liability claim of which affects the taxpayer. He remarked it is the desire of his department to offer fire and EMS services safely and to the best of its ability without the fear of lawsuits and unwanted claims.

[1:20:47 PM](#)

DOUG SCHRAGE, Fire Chief, Fairbanks University of Alaska Fire Department, Alaska Fire Chiefs Association, said that the Alaska Fire Chief Association represents most of the fire and emergency service leaders throughout the state. He said he joins with Chief Flynn, local colleagues, and those of the Alaska Fire Chiefs Association in support of SB 43. He explained that the University Fire Department, the Steese Fire Department, and several others are student based, non-profit fire departments providing fire protection to the Fairbanks Northstar Borough on a contractual basis. As such, he explained, it is not a municipal fire department and would benefit from the immunity this bill affords. He noted that of particular concern is that it is a workforce development program responsible for providing many of Alaska's municipal fire departments with experienced and training fire fighters. He pointed out that in this current fiscal environment, at the University, concern over the liability this bill addresses could be a factor in the future of its program. For those reasons, he stated, he joined his colleagues in supporting SB 43.

[1:22:52 PM](#)

REPRESENTATIVE CLAMAN asked what it would look like for a non-municipal fire department in terms of where there would and would not be potential liability, should SB 43 pass.

CHIEF SCHRAGE responded that this bill extends to fire departments such as his in extending immunity from liability essentially under the Doctrine of Sovereign Immunity to non-municipal fire departments. He described the department as contractors and therefore independent of the municipal or borough government those immunities do not extend to the departments or employees. He described its exposure to general liability as enormous in terms of nonfeasance or failure to provide service all the way to injury to his employees, and noted it may be a failure to protect the citizens that pay taxes. He opined that this bill would specifically address those sorts of immunities.

REPRESENTATIVE CLAMAN offered that currently municipalities have greater protections as it has the protection of the sovereign. Whereas, he continued, a volunteer fire department could be exposed to negligence and liability for the work they are performing rather than the gross negligence protection currently afforded municipalities in the same setting.

CHIEF SCHRAGE offered "that is my understanding."

[1:25:06 PM](#)

CHIEF SCHRAGE responded to Representative Gruenberg that on an elementary level he is familiar with the legalities of this bill, but is not intimately familiar with the nuances and effects of the various substitute versions and amendments.

[1:28:03 PM](#)

The committee took an at-ease from 1:28 to 1:30 p.m.

[1:30:19 PM](#)

REPRESENTATIVE GRUENBERG referred to current law and the House Judiciary Standing Committee CS, and then referred to [Section 1], AS 09.65.070(c), [page 1, lines 5-8], which read:

(c) An action for tort or breach of a contractual duty based on the act or omission of an employee or member of a fire department in the execution of a function for which the department is established may not be maintained against an employee or member of a fire department ...

REPRESENTATIVE GRUENBERG highlighted that the first sentence is essentially the same as current law except more elegantly drafted.

[1:31:11 PM](#)

JILL DOLAN, Assistant Borough Attorney, Fairbanks Northstar Borough, agreed with Representative Gruenberg and noted that the substantial change is the definition of fire department that begins on page 1, lines 13-24 ...

REPRESENTATIVE GRUENBERG interjected that before anticipating his questions, to refer to the second sentence, [page 1, lines 8-23], which read:

An action for tort or breach of a contractual duty based on the act or omission of an employee or member of a fire department in the execution of a function for which the department is established may not be maintained against a fire department unless the action alleges intentional misconduct or gross negligence or

is based on the act or omission of an employee or member of a fire department in the execution of a duty under contract with a private entity.

REPRESENTATIVE GRUENBERG described the sentence as re-establishing the liability of ... the first sentence deals with an action, on line 6, "or omission of an employee ..." He offered that in other words, if a person sues a fireman because he dropped a person and said "burn, burn," that's what it applies. In the event a person sues the fire department, which is where the second sentence comes in, on lines 10-11, "may not be maintained against a fire department." He opined that is the essential difference between the first sentence and the second sentence. Whereas, he pointed out, the first sentence is an action against an employee, and the second sentence is an action against a fire department.

[1:32:47 PM](#)

MS. DOLAN answered that Representative Gruenberg was correct with the additional qualification that if the action is against a fire department, a person can still have an action if it alleges intentional misconduct or gross negligence.

REPRESENTATIVE GRUENBERG offered that Ms. Dolan was one step ahead of him as under current law a person can sue a fire department for negligence. He said that "this" immunizes the fire department itself, whether or not it is volunteer. A person can no longer sue it unless the action alleges intentional misconduct or gross negligence, he reiterated.

MS. DOLAN responded that currently in AS 09.65.070(d) there is, for municipal fire departments, discretionary function immunity for damages. Therefore, she explained, currently a person cannot maintain an action for damages against a municipal fire department if it is based on a discretionary function. She further explained that the same immunity does not apply to the contracted fire department, such as what Chief Flynn and Chief Schrage were discussing, as they are contracted fire departments. She related that the intent was to incorporate a similar immunity and to Subsection (c) for those fire departments.

[1:34:18 PM](#)

CHAIR LEDOUX remarked that discretionary immunity means that a fire department can't be sued because it decided not to exercise

a function. For example, the Department of Transportation (DOT), if a division does not put up a guard rail, the state cannot be sued. In the event DOT puts up a guard rail and does not maintain the guard rail, the state can be sued. She noted that the first example is discretionary and a government cannot be sued for not doing something which is discretionary. The government can be sued for negligence in something the government decides to undertake.

MS. DOLAN stated that Chair LeDoux "is absolutely correct," as discretionary functions are generally aspects involving allocation of financial resources. She agrees that once a duty is undertaken it generally cannot be taken in a non-negligent manner, but there are certain on-the-scene decisions in firefighting that could be discretionary because it entails resource allocation and those decisions are vested in the fire chief in charge. She offered that the courts have extended some discretionary function immunity in the context of fire that would include on-the-scene decisions.

[1:35:54 PM](#)

REPRESENTATIVE GRUENBERG surmised that discretionary actions are immunized and the issue here is regarding non-discretionary. He read that under current law, if a person sues a fire department itself rather than the individual, for non-discretionary the standard is negligence. He referred to line 11, "... intentional or gross negligence ..." He stated that is now the standard and opined it was added and was not in the original bill. He described it as significantly raising the standard for suing a fire department involved in a non-discretionary function.

[1:37:00 PM](#)

MS. DOLAN replied that it changes the standard for the non-discretionary function. The intent, she explained, was that because contracted fire departments cannot enjoy discretionary function immunity to leave subsection (d) intact and allow municipalities to continue to enjoy the immunity. Instead, in the context of looking at fire departments in general, extend an immunity that is not a full and complete immunity and limit it, she highlighted. She further highlighted that the intentional misconduct or gross negligence language is intended to limit how far that immunity could extend, and while listening to the hearing with the committee substitute noted it is not intended to expand the immunity.

REPRESENTATIVE GRUENBERG opined that he intends to look at the bill because it appears to go as far as it can go.

CHAIR LEDOUX announced she would hold the bill as it appears this bill may go farther than the original intent of the sponsor.

[1:38:20 PM](#)

MR. SHILLING advised that upon introduction of the bill, the non-discretionary immunity was to non-discretionary activities for fire departments. He stated the only action the Senate Community and Regional Affairs Standing Committee performed was the carve out for intentional misconduct or gross negligence. He noted the intention all along was to expand that immunity.

REPRESENTATIVE GRUENBERG opined that the committee should look at the bill and ascertain that it does what was intended.

CHAIR LEDOUX closed public testimony after ascertaining no one further wished to testify, and announced SB 43 is held over.

HB 125-RESTRICTIONS ON SALE OF DEXTROMETHORPHAN

[1:40:13 PM](#)

CHAIR LEDOUX announced that the final order of business would be HOUSE BILL NO. 125, "An Act relating to the sale of products containing dextromethorphan; relating to the regulation of dextromethorphan by municipalities; and providing for an effective date."

[1:40:28 PM](#)

GRACE ABBOTT, Staff, Representative Charisse Millett, Alaska State Legislature, said that HB 125 deals with dextromethorphan (DXM), and for decades families have been using over the counter cough medicine to treat coughs and colds. She described the cough medicines as containing DXM which when used correctly is safe and effective in soothing symptoms. However, she explained, when taken in high doses these medicines can produce hallucinations, confusion, blurred vision, nausea, excessive fatigue, and loss of motor control. She noted that, unfortunately according to a 2013 study, four percent of teenagers have intentionally taken exceedingly large amount of cough medicine containing DXM to get high. She expressed that

Alaskans take substance abuse issues very seriously and the abuse of DXM should be no exception. She described HB 125 as seeking to assist in combating this problem by prohibiting the sale of DXM to Alaskans under the age of 18. The step in asking for proof of age prior to sale would maintain access to effective over-the-counter cough medicines for [Alaskans] who use them to treat cough symptoms associated with colds and flu while limiting access to the small yet notably significant number of adolescents who might abuse them, she related. The penalty to those who sell to minors begins at \$150 and escalate to \$250 for the second and any future violations, she pointed out.

[1:42:41 PM](#)

REPRESENTATIVE FOSTER advised that he bought Sudafed and noted there are two kinds that can be bought at the front counter and behind the counter. He asked how this would fit into HB 125.

MS. ABBOTT opined that she is not quite as familiar with the manner Sudafed is regulated, but not only is Sudafed behind the counter but it also requires that identification be scanned and usually the information is put into a data base. She further opined that this effort was undertaken to track and regulate the production of methamphetamines. However, she said, unlike Sudafed what would happen with DXM containing medicines is that these medicines would still be available over-the-counter as a cashier upon purchase would check identification or note that the person may be over the age of 25.

REPRESENTATIVE FOSTER advised he had to sign a log book, but with this bill there is no log book and just the identification requirement.

MS. ABBOTT answered that it is just the identity check and is still available to people under the age of 18 with a prescription from a doctor, as well as people over the age of 18 who would have to do nothing except possibly show identification upon purchase.

[1:44:26 PM](#)

REPRESENTATIVE LYNN referred to Sec. 1, [AS 11.76.150(a)(1), page 1], lines 8-9, which read:

(1) the seller, retailer, or vendor checks a government-issued photo identification and determines the person is 18 years of age or older;

REPRESENTATIVE LYNN surmised a photo identification is required to buy cough syrup but not for voting.

MS. ABBOTT answered "As best I understand it, yes."

[1:45:07 PM](#)

REPRESENTATIVE KELLER surmised that the problem is consumption rather than something being refined and therefore a more potent detrimental drug.

MS. ABBOTT responded that as best she understands, although she is not an expert regarding the manufacture of drugs. She explained that DXM is being consumed as one would a cough syrup and in excessive amounts.

CHAIR LEDOUX assumed it is not made into concentrates.

MS. ABBOTT answered "I don't believe they do."

[1:45:59 PM](#)

REPRESENTATIVE MILLETT offered that the most common activities with DXM and [teen-agers], in speaking with police officers, is that teens are taking the cough syrup, mixing it with soda, and drinking it, which is called "Robo tripping." She explained that large quantities are consumed with health effects detrimental to these young kids whose bodies and minds are forming who are looking for a quick high which sometimes turns into more than a quick high.

[1:46:39 PM](#)

REPRESENTATIVE GRUENBERG referred to Section 2, [AS 29.10.149, page 2, line 6], which read:

(65) AS 29.35.149 (regulation of dextromethorphan)

REPRESENTATIVE GRUENBERG advised the bill drafting style only sets out subsection 65, as it does not set out the complete section. He stated, "it apparently is limitation of home rule powers. Only the following provisions of this title apply to home rule municipalities as prohibition on acting otherwise than

provided ..." In other words, he explained, that they can do anything they want except for "stuff" that is listed here, and now there is a new section 65. He read, "These provisions supersede existing and prohibit future home rule enactments that provide otherwise." He stated they have now added to the other 64 provisions this "new little" provision in Section 3, which says that home rule municipalities cannot regulate DXM.

MS. ABBOTT replied "You are correct," and when looking at Section 3, it provides that for other municipalities as well.

[1:48:30 PM](#)

REPRESENTATIVE GRUENBERG referred to Section 1, [AS 11.76.150(a)(2), page 1], lines 10-11, which read:

(2) from the person's outward appearance, the seller, retailer, or vendor would reasonably presume the person to be 25 years of age or older; or

REPRESENTATIVE GRUENBERG remarked that Section 1, requires a government issued photo identification. He stated that Section 2, indicates that the clerk behind the counter can sell [DXM] to a person if the person's outward appearance the clerk would reasonably presume the customer is 25 years of age or older. He described the language as unusual which puts an unusual burden on the clerk and asked why that language is in the bill.

MS. ABBOTT responded that if a customer notably looks older than 25 it would be an acceptable manner of selling DXM to the customer and not card them at the register.

REPRESENTATIVE GRUENBERG said that with regard to subsection (2), he would like to hear from the people in the industry in protecting the employee.

[1:50:55 PM](#)

MS. ABBOTT noted she could not cite the specific statute, but that this is common place in the adopted business practices of major retailers in Alaska.

REPRESENTATIVE GRUENBERG asked whether there is language similar in other statutes so there is not one requirement for this one drug.

[1:51:58 PM](#)

KACI SCHROEDER, Assistant Attorney General, Criminal Division, Department of Law, advised she has not researched that particular language, but there used to be a rule that an establishment had to card someone attempting to buy alcohol if they looked under 35 years of age. She stated she does not know if that was just practice or whether it was in statute. She noted that the looks of someone in determining age is not uncommon.

REPRESENTATIVE GRUENBERG opined that it used to be that way and then it became too dicey and the decision was to card everyone. He stated he does not want to see a clerk have to pay \$150.

[1:52:59 PM](#)

REPRESENTATIVE KELLER questioned whether Ms. Schroeder is aware of laws on the books that have dosages related to them. He asked if the bill would be starting something that is very different ... the exception was made for drugs that were being refined but there are a lot of items in the local grocery store that have a recommended dosage and what kind of criteria is the legislature going to use for deciding to card for "that" one.

MS. SCHROEDER answered that this is a bit of a new thing but as long as the legislature has a rational basis for doing this ... the record has clearly established a rational basis and it would be fine.

[1:54:17 PM](#)

CHAIR LEDOUX surmised that Representative Keller might be pointing out that it is not necessarily unconstitutional where the rational basis would be applied, but rather exactly where is the legislature going. She asked whether it would become something in the area of a person looking overweight shouldn't be sold ice cream and questioned whether the committee is going down that path.

MR. SCHROEDER advised that should the legislature go down that path is solely within the purview of the legislature. She opined that other states have tried to limit access to soda, for instance, and the issue has been before other legislatures.

[1:54:56 PM](#)

REPRESENTATIVE MILLETT stated that the point here is that the sponsor is trying to protect children under 18 who can walk into a store and buy something that will severely harm them in large doses because they are attempting to get high. She pointed out that there is a section of kids using this in a profoundly harmful manner.

[1:55:44 PM](#)

REPRESENTATIVE KELLER responded that he has no doubt of the honorable intentions of the sponsor. His said his concern is the unintended consequences that may be there with this kind of legislation. He asked whether the sponsor had researched whether there is a possibility of a competing drug company winning [a lawsuit] due to this legislation, and he would like to follow the money. He requested testimony from vendors of the product.

CHAIR LEDOUX opened public testimony.

[1:57:27 PM](#)

SEAN MOORE, Consumer Healthcare Products Association (CHPA), said he was testifying on behalf of the Consumer Healthcare Products Association (CHPA). He said that essentially HB 125 prohibits the sale of over-the-counter cough medicine containing dextromethorphan (DXM) to those under the age of 18. He stated that CHPA is the premier trade association representing manufacturers and marketers for over-the-counter medicine. He described DXM as the most widely used cough depressant on the market and was developed in the 1950s as a non-narcotic alternative to codeine cough medicine. He described a small but significant amount of teens use DXM to get high by ingesting 25-50 times the recommended dose. He pointed out that 25 doses is approximately 1.5, 5 ounce bottles of cough syrup. He advised that a few years ago the U.S. Food and Drug Industry (FDA) came to the industry and strongly encouraged it to help reduce the rate of abuse otherwise the federal government would consider more restrictive action. He said that asking an individual to sign a log book when purchasing Sudafed is an effort to prevent having to go down that road for cough medicine DXM, maintaining access for millions of Americans that use this medicine responsibly and controlling it, and keeping it out of the hands of kids who are seeking to intentionally abuse it. He expressed that this is something CHPA members take very seriously and are engaged in a multi-pronged effort to reduce the number of teens abusing its products. He offered that in addition, CHPA is

putting legislation such as this and groups specializing in drug abuse prevention such as, the partnership of DrugFree.org, and the Community Anti-drug Coalitions of America that maintains StopMedicineAbuse.org dedicated to raise awareness and teaching parents to spot signs of abuse. He remarked that to date eight other states have adopted age 18 restrictions and a handful of additional states are considering doing so this year. He highlighted that most national retailers are already voluntarily restricting sales to children so it is about leveling the playing field and providing a statewide policy to give parents greater control over the medicines to which their children have access. He urged the committee's support for HB 125.

[2:00:34 PM](#)

REPRESENTATIVE GRUENBERG requested written testimony.

MR. MOORE said he would submit written testimony and advised that CHPA is represented locally by Mr. Eldon Mulder.

REPRESENTATIVE GRUENBERG asked whether the language in the bill is model language he supplied, and whether it is enforced in any other state.

MR. MOORE replied that he worked with Representative Millett and Legislative Legal and Research to craft the language to fit into Alaska's statutes. He reiterated that this policy has been adopted in eight other states.

REPRESENTATIVE GRUENBERG referred Mr. Moore to page 1, lines 10-11, and asked whether the language on the "25 years of age or older" is in any other states.

MR. MOORE answered "Yes," it is generally to provide some relief for people who appear over the age of 25 not having to dig through their wallet or through their purse so they can purchase the product, and are clearly over the age of 18. He opined that most states use the "appearing to be over the age of 25."

[2:02:33 PM](#)

REPRESENTATIVE GRUENBERG referred to the manner in which Alaska's alcohol law have evolved over a long period of time, the trend has been to go the other way and have a bright line procedure. He noted there are significant penalties against the company and the employee if there is a violation. He asked

whether that alternative approach has been considered in these other states in attempting to protect the employees.

MR. MOORE opined that he did not believe CHPA does has a position on that being included, as it is attempting to craft this legislation with as little burden as possible for an ordinary consumer. Although, he related, if it is the will of the committee to remove that provision and make it a black and white card everyone, CHPA would not be opposed.

2:04:01 PM

REPRESENTATIVE MILLETT referred to [Sec. 1, AS 11.76.150(b)], page 1, line 14, and page 2, lines 1-4, which read:

(b) A seller, retailer, or vendor or an employee of a seller, retailer, or vendor who knowingly or willfully violates this section is guilty of a violation and is punishable by a fine of

- (1) \$150 for the first violation; and
- (2) for the second and subsequent violation.

REPRESENTATIVE MILLETT opined that there is no intent ...

REPRESENTATIVE GRUENBERG interjected "No absolute liability."

REPRESENTATIVE MILLETT reiterated that there is no absolute liability and she would not mind taking it out as she does not want to kill the bill due to this issue. She opined that the disclaimer appears on page 2, line 1, which sets the bar less than Representative Gruenberg's thinking on the bright line.

REPRESENTATIVE GRUENBERG said the issue could be dealt with.

2:04:55 PM

REPRESENTATIVE CLAMAN remarked that recently he was in a sister-state and bought a bottle of wine yet the clerk did not request his identification wherein Alaska cards everyone. He asked whether other states may be more relaxed in terms of alcohol and giving the clerk authority to make a judgement call.

MR. MOORE advised he is not familiar with tobacco or alcohol statutes of other states. He advised that in Washington, D.C., he recalls seeing signs at the register wherein someone under the age of 35 will be carded.

2:06:50 PM

REPRESENTATIVE KELLER noted that he was asked if he wanted a senior citizen discount. He questioned whether part of the motivation for this in the other states is the threat of federal action, and questioned the source of that threat.

MR. MOORE submitted that the FDA monitored the "future study" which is conducted annually by the National Institute on Drug Abuse. He said the numbers in 2008-2009 of teens abusing cough medicine intentionally to get high were alarming to the FDA, and the numbers suggested the trend was increasing. In 2010, the FDA held a hearing on the matter and during that time considered requiring a prescription for DXM and other measures such as putting it behind the counter, or sign a log book, and the industry was opposed to those measures. The industry committed to working to bring those abuse rates down and, he noted, the FDA strongly encouraged the industry to bring those numbers down. He pointed out that this is one of the parts of its strategy including reaching out to parents, partnering with a number of organizations whose full mission is to reduce substance abuse across the country. The industry has seen some success as the numbers are coming down as a number of states are adopting the age 18 restrictions. He remarked that the industry would like to think it is due also to how it ramped up its educational efforts in bringing the numbers down. He believes the industry is on to something and it is the right strategy. He added to his prior testimony that not only does cough medicine contains DXM, but it also contains acetaminophen. In that case, he related, if an individual is taking 25 times the recommended dose, the individual is receiving 25 times the recommended dose which is incredibly harmful to the liver and potentially lethal. He noted that its unintended consequences is what caught the FDA's attention.

2:10:27 PM

REPRESENTATIVE GRUENBERG stated his hang up is just on subsection (2), as the legal standard is on page 2, line 1, "knowingly or willfully." He said he does not know how a person can be willful if they don't know and the language should read only "knowingly." In the event, the seller knows the person is under the age of [18], they can be tagged with a violation. Although, the standard on subsection (2), he said is "from the person's outward appearance a person would reasonably presume." He described a scenario where a person reasonably presumed to be under the age of 25, but couldn't be tagged with a violation

unless the person actually knew it. There is a difference in standard there and he has seen 14-year old who look pretty old.

2:12:14 PM

REPRESENTATIVE MILLETT remarked that she would like a friendly amendment from Representative Gruenberg at the appropriate time during the hearing.

REPRESENTATIVE GRUENBERG questioned whether Mr. Moore's legal team knows whether the defense of age supposed to be on the defendant, or who would have the burden of proof on that issue. He asked how that is interpreted in the other states with the same statute.

MR. MOORE responded that he is not a lawyer and does not have the expertise in that field, but could ask his legal team to provide the committee a letter at a later date.

2:13:32 PM

CHAIR LEDOUX quiered whether most of the misuse an issue with 8th grade kids through 16-years of age. She imagined that at about 16 the teens start moving into other things rather than cough medicine. She asked about an 18-year old with a driver's license with a cough who can't buy cough syrup.

MS. ABBOTT responded that the bill does not restrict all types of cough syrup which appears to be an occasional sticking point with this bill. The bill exclusively puts the onerous on cough syrup containing DXM, with incredible sedative qualities.

CHAIR LEDOUX reiterated that she was asking how much of a real problem is there with kids 16-years of age and older because this problem seems to be with really young teen-agers. She opined that at 16 and older they are trying to get booze rather than cough medicine.

MS. ABBOTT deferred to Mr. Moore and stated that the studies she reviewed had an age range including kids over age 16 using the medicine as a high. However, the age range was with 8-12 graders, including 18-year olds. She stated she could not speak to whether it stops at any point.

MR. MOORE responded that in monitoring the "future studies" he referred to earlier it covers teens in grades between 8th-12th grades. He pointed out that in 2014, 12th graders were actually

twice as likely to abuse DXM as an 8th grade student. He stated they are seeing it in older teens of which is a potential gateway to abusing additional substances down the road. He reiterated that they are seeing a higher rate of abuse in 16-18 year olds.

CHAIR LEDOUX closed public testimony after ascertaining no one further wished to testify.

[2:17:42 PM](#)

CHAIR LEDOUX commented with respect to Representative Gruenberg's concerns about the clerk who may not tag someone 18-20, is that it would be easier for the clerk. She pointed out that a store could say that everyone is tagged and ask for everyone's identification. She pointed out that when someone is clearly over a certain age, why do they have to go through that hassle. She stated she would leave the language the way it is in the bill.

[2:18:35 PM](#)

REPRESENTATIVE MILLETT opined it makes it easier for retail stores and pointed out that "knowingly and willfully" is in the statutes, and that the language is fine as it is.

CHAIR LEDOUX said she would look at the phrase "knowingly and willfully," in that it does not say it is an affirmative defense. She highlighted that the laws generally say when something is an affirmative defense it is set out in the statute. She evaluated that it is a burden on law enforcement to show that someone "knowingly and willfully" violated the statute and is not overly onerous on the vendor. She remarked that she is not thrilled with the committee making one more thing not quite illegal, but on the hand she is not thrilled with the alternative which looks like it is going to go the way of Sudafed and be behind the counter. She pointed out that she hates to accede to the will of the federal government, sometimes there is the reality.

[2:20:30 PM](#)

REPRESENTATIVE KELLER referred to a statement that there are a large number of products containing DXM, and "you" say it's not onerous but the store has to sort these things out and set them aside because otherwise the clerk will not be reading the fine

print just because a kid is underage. He questioned how many products the bill speaking to, and what about the labeling.

CHAIR LEDOUX remarked that Representative Keller has a good point.

[2:21:11 PM](#)

REPRESENTATIVE MILLETT stated that [cash registers] can be keyed to alert the cashier that identification is required, such as tobacco or magazines. She offered that stores can code products with DXM which alerts the cashier.

CHAIR LEDOUX asked if the bill has been in other committees.

REPRESENTATIVE MILLETT replied "No."

REPRESENTATIVE MILLETT answered Chair LeDoux that it is next going to the floor.

[2:21:58 PM](#)

REPRESENTATIVE MILLETT responded to Chair LeDoux that she will check with the retailer's association to determine whether it is overly burdensome for them and get back to her before it goes to the floor.

CHAIR LEDOUX answered that she would like Representative Millett to do that.

[2:22:13 PM](#)

REPRESENTATIVE MILLETT responded to Representative Keller that she will also ask the National Federation of Independent Businesses (NFIB) to see if they have a position on the bill.

[2:22:24 PM](#)

REPRESENTATIVE CLAMAN commented that he broadly agrees with Chair LeDoux in that the notion it will start shifting into everyone being carded does become onerous for a business. He advised he googled the ingredients for Robitussin Cold & Cough medicine which includes Pseudoephedrine and DXM all in the same drug. He noted that the concept of shifting into more drugs the public will be carded for is a challenge for retailers and the public. Yet, he remarked, at the same time this is a real concern as there are kids abusing these medications and there is

no easy solution. He opined the bill is well intended but eventually there may be 15 different cough medicines going behind the counter.

[2:24:26 PM](#)

REPRESENTATIVE MILLETT advised that Mr. Moore is a retailer representative also and that Fred Meyers and Carrs/Safeway Alaska Operations are already doing this for DXM. She opined that if it is onerous there would not voluntary compliance as possibly they saw the writing on the wall. She advised she will check with NFIB.

[2:24:59 PM](#)

REPRESENTATIVE KELLER moved to report HB 125, labelled 29-LS0544\A out of committee with individual recommendations and the accompanying fiscal notes. There being no objection HB 125 moved out of the House Judiciary Standing Committee.

[2:25:29 PM](#)

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:25 P.M.