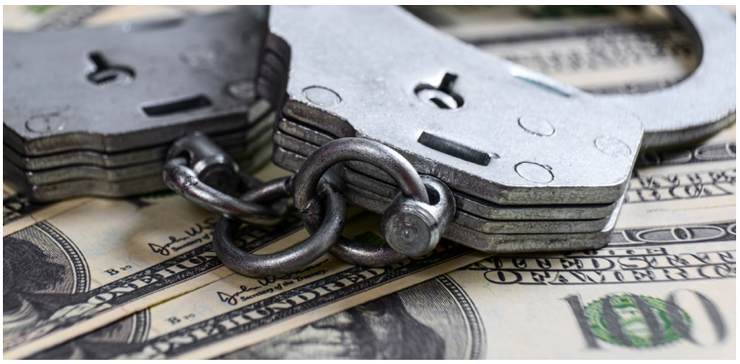
Featured Blogs of the Month

Blogs selected for this column are published through the State Bar of Wisconsin's section blogs as well as WisLawNOW, the State Bar's aggregated community of Wisconsin legal bloggers.

Cash Bail Amendment Penalizes Those in Poverty

BY KALEI KELL



Updated from original publication. Voters passed a constitutional amendment on cash bail in April. Law student Kalei Kell explains the amendment and its potential effects moving forward.

In April, Wisconsin voters approved a constitutional amendment related to the cash bail system in Wisconsin, but what does this entail?

Previously, Wisconsin pretrial release law allowed defendants to be released under reasonable conditions designed to ensure their appearance in court, to protect members of the community, and to prevent intimidation of witnesses. In addition, financial conditions were limited to the amount that is necessary to ensure appearance of the defendant.[1]

The question on the April ballot that voters approved stated the following:

Question 2: Cash bail before conviction. Shall section 8 (2) of article I of the constitution be amended to allow a court to impose cash bail on a person accused of a violent crime based on the totality of the circumstances, including the accused's previous convictions for a violent crime, the probability that the accused will fail to appear, the need to protect the community from serious harm and prevent witness intimidation, and potential affirmative defenses?

Prior to this amendment, the state constitution authorized judges to consider whether "there is a reasonable basis to believe that the conditions are necessary to assure appearance in court" when they consider cash bail.

The amendment now enables additional use of cash bail, which penalizes those who cannot afford to pay their way out of jail. This will punish those in poverty who may not be able to post bail even on a misdemeanor while others with a large bail for a felony may be able to post it because they have the funds to do so.

Cash bail is an unsuccessful way of measuring safety in society – it is only a way of measuring poverty.

What Wisconsin should do is follow the lead of states that have eliminated cash bail as a measure of risk. States that have eliminated the use of cash bail include New Jersey and Alaska.[2] These states now use a system where they give defendants supervised release or continued detention.

Illinois and New York have also begun to implement change in this area, with New York declaring that wealth shouldn't determine liberty. Instead, to examine risk, these states use a risk assessment that allows the courts to determine whether the defendant is a flight risk.

They use this information to decide if supervised release is advisable or if detention is necessary.[3] However, it is just a tool, and judges retain discretion to consider the violence of the crime.

Wisconsin should take the position that many other states have taken: to get rid of the cash bail system and implement a bail reform that is based on the actual risk for the individual, and not their financial situation. But that will be more difficult now that this amendment has passed.

Kalei Kell, is a second-year student at Marquette University Law School. This article first appeared on the State Bar of Wisconsin's Criminal Law Section Blog. The views stated in this blog post are those of the author and do not necessarily reflect those of the Criminal Law Section or its board. Visit the State Bar sections or the Criminal Law Section webpages to learn more about the benefits of section membership.

ENDNOTES

[1]Anya van Wagtendonk, *Lawmakers Debate Constitutional Change to Cash Bail*, Wis. Pub. Radio (Jan. 11, 2023), www.wpr.org/lawmakers-debate-constitutional-change-cash-bail.

[2]ACLU of New York, *The Facts on Bail Reform*, https://www.nyclu.org/en/campaigns/facts-bail-reform (last visited Apr. 14, 2023).

[3]NCSL – National Conference of State Legislatures, *Pretrial Release: Risk Assessment Tools*, www.ncsl.org/civil-and-criminal-justice/pretrial-release-risk-assessment-tools (updated June 30, 2022). **WL**

Implications of the EPA's Proposed Rule Designating PFAS as Hazardous Substances

BY DEREK J. PUNCHES

The EPA's proposed rule designating certain PFAS as "hazardous substances" provides tools to identify and address releases of PFAS into the environment, but it also raises unresolved questions. Derek Punches discusses the implications of the proposed rule and recent developments.

The recent proposal by the Environmental Protection Agency (EPA) to designate two per- and polyfluoroalkyl substances (PFAS) as "hazardous substances" under the federal Comprehensive Environmental Response, Contamination, and Liability Act (CERCLA or "Superfund") promises to provide greater information concerning the release of PFAS into the environment, as well as powerful tools to require the cleanup and recovery costs for such releases.

However, because of the ubiquity of these so-called forever chemicals, the proposed designation also raises several questions and concerns that remain unresolved. Affected stakeholders require further clarity on the scope and impact of the proposed rule before it becomes effective.

Background: CERCLA

Enacted in 1980, CERCLA provides the federal government with the authority to respond to actual or potential releases of certain hazardous substances into the environment. Unlike many state and federal environmental permitting programs, the law is primarily designed to be remedial in application.

In addition to notification requirements and funding mechanisms, CERCLA includes a liability allocation scheme that is intentionally broad. The law imposes strict, and often joint and several, liability for restitution of response costs incurred by the government or a private party as a result of the actual or potential release of hazardous substances into the environment.[1]

CERCLA extends liability for costs and damages associated with the cleanup to four classes of potentially responsible parties:

- the current owner or operator of a facility;
- any person who owned or operated the facility at the time of disposal of the hazardous substance;
- any person who arranged for disposal or treatment, or arranged for transport for disposal or treatment, of hazardous substances at the facility; and
- any person who accepts or accepted hazardous substances for transport to sites selected by such person.

The Proposed Rule

Last fall, the EPA published its proposal to designate two per- and polyfluoroalkyl substances as "hazardous substances" under CERCLA.[2] Although there are hundreds of different PFAS chemicals, the proposed rule focuses exclusively on two of the most widely used substances — perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), including their salts and structural isomers.

The proposed listing of PFOA and PFOS is an important and historic step for the agency. As previously noted, CERCLA provides authority for response and recovery actions for releases of "hazardous substances" into the environment.

The definition of "hazardous substance" incorporates by reference hundreds of compounds and chemicals separately regulated under specified environmental statutes, including the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act.[3]

In addition to those incorporated by reference, the EPA has the authority to designate a substance as a "hazardous substance" if, when released into the environment, that substance "may present substantial danger to the public health or welfare or the environment."[4]

The proposed listing represents the first time that the EPA has exercised its authority under this section to designate a new CERCLA hazardous substance. Considering the untested nature of this provision, the manner of this proposed designation could be one major hurdle for the agency.

Importantly, the proposed rule includes updated notification requirements for the release of PFOA and PFOS into the environment. CERCLA assigns a default reportable quantity (RQ) of 1 pound to each hazardous substance and authorizes the EPA to promulgate rules to revise that statutory RQ.[5] Under the rule, the designation of PFOA and PFOS as hazardous substances would require that any person in charge of a vessel or facility report releases of PFOA and PFOS of this statutory RQ of 1 pound or more within a 24-hour period.

Given the minimal threshold amounts of PFAS present in other regulations, it should be expected that the EPA will seek to reduce the default RQ in the future.

Because of the widespread use of PFAS chemicals over the last 70 years, such chemicals can now be found in soils, surface water, and groundwater throughout the country. Because of their limited capacity to degrade, PFAS persist in the environment,

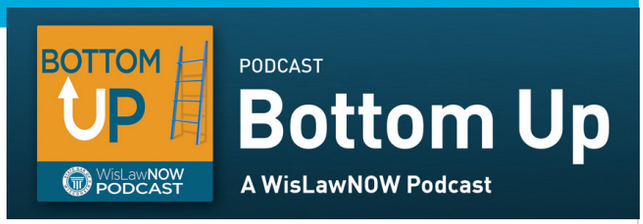
Podcast of the Month

Advocating for the Criminal Justice System

Are you a public defender or prosecutor? A judge? Thinking about criminal law as a career? The State Bar of Wisconsin's Advocacy Team is advocating for you.

In Episode 8 of Bottom Up, a WisLawNOW podcast produced by the State Bar of Wisconsin, guest host Joe Forward speaks with three members of the State Bar's Advocacy Team about the advocacy work they are doing to increase funding for the criminal justice system.

Vacant positions in both prosecutor and public defender offices are putting a crisis-level strain on the criminal justice system, which has experienced chronic underfunding for decades.



Now the system is at a breaking point. Attracting and retaining lawyers in these critical roles is a serious obstacle because of low starting salaries and stagnant pay progression.

In this episode, learn about the Advocacy Team, their role in assisting lawyers and the legal profession, and what they are doing to advocate on criminal justice funding. **WL**

and often migrate with the flow of water. The proposed designation of PFOA and PFOS will not only increase the number of contaminated sites subject to the law, it will also expose a significant number of parties to joint and several liability as potentially responsible parties, including manufacturers, end users, and disposal companies.

Moreover, the proposed listing would likely extend liability to passive receivers, like waste management providers and wastewater treatment plants, who have limited control over the amount of these substances they receive and limited options to dispose of them.

Recent Developments

Soon after the EPA published its proposed rule, the State Bar of Wisconsin held its 34th Annual Environmental Law Update. There, Robert Kaplan, Regional Counsel for EPA Region 5, provided the keynote address and addressed questions related to the agency's proposed PFAS designation. Some may have been glad to hear Kaplan urge patience to the audience. Although he could not comment on the particulars of the proposed rule, Kaplan indicated that the EPA would likely use its enforcement discretion to pursue only the most serious contaminated sites and polluters.

To that end, the EPA hosted listening sessions to gather public input related to concerns about potential liability under CERCLA. The agency has indicated it will consider this input when drafting the agency's enforcement discretion and settlement policy for PFAS.

The stated purpose of this policy is to address stakeholder concerns and clarify when the EPA intends to use its CERCLA enforcement authorities or discretion. The policy, as described on the EPA website, "will take into account various factors, such as EPA's intention to focus enforcement efforts on PFAS manufacturers and other industries whose actions result in the release of significant amounts of PFAS into the environment, and EPA's intention not to focus on pursuing entities where factors do not support taking an enforcement action."[6]

Possible Unintended Consequences

Given the high cost of liability, many await further clarity on how such enforcement actions will be conducted. However, regardless of the EPA's enforcement discretion, the proposed listing could result in third-party contribution and cost-recovery claims for a number of parties, including many who cannot prevent becoming responsible parties.

The final promulgation of the proposed rule is expected this summer.

While the proposed rule has the potential to improve environmental and public health outcomes, absent further clarifications or changes it may also carry unintended consequences.

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ENDNOTES

[1]*See* 42 U.S.C. § 9607(a).
[2]87 Fed. Reg. 54,415 (Sept. 6, 2022).
[3]*See* 42 U.S.C. § 9601(14). A full list of the hazardous substances under CERCLA is provided in the table in 40 C.F.R. § 302.4.
442 U.S.C. § 9602(a).
[5]42 U.S.C. § 9602(b).
[6]U.S. EPA, *EPA Announces Listening Sessions on a Potential CERCLA Enforcement Discretion Policy for Addressing PFAS Contamination at Superfund Sites* (March 2, 2023), https://www.epa.gov/newsreleases/epa-announces-listening-sessions-potential-cercla-enforcement-discretion-policy. **WL**