

DRAFTING HOAX ANTHRAX LEGISLATION
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The United States has seen a proliferation of hoax anthrax scares since September 11, 2001. The cost of responding to such hoaxes, both in financial and emotional terms, is staggering. A statute criminalizing anthrax hoaxes can be a powerful deterrent. A well-drafted statute criminalizing anthrax hoaxes is a useful weapon in the war against terrorism.¹ This article is an attempt to characterize pertinent elements for inclusion in a state statute criminalizing anthrax hoaxes.

As of the writing of this article, statutes prohibiting anthrax hoaxes exist in Florida², Michigan³, Georgia⁴, Kentucky⁵ and South Carolina.⁶ Legislation has been proposed in New York⁷, North Carolina⁸ and West Virginia⁹. Several other states have

¹ This paper is limited to state legislation pertaining to hoax anthrax scares. It does not address other legislation, such as false threats or terroristic threats, communications regarding anthrax threats or other hoax situations.

²“Any person who, without lawful authority, manufactures, possesses, sells, delivers, displays, uses, threatens to use, attempts to use, or conspires to use, or who makes readily accessible to others, a hoax weapon of mass destruction with the intent to deceive or otherwise mislead another person into believing that the hoax weapon of mass destruction will cause terror, bodily harm, or property damage commits a felony of the second degree. . .” Florida Statute 790.166 (2000).

³“A person shall not manufacture, deliver, possess, transport, place, use, or release for an unlawful purpose. . . an imitation harmful substance or device.” MCL 750.200j (enacted October 23, 2001).

⁴“It shall be unlawful for any person to manufacture, possess, transport, distribute, or use a hoax device or replica of a destructive device or detonator with the intent to cause another to believe that such hoax device or replica is a destructive device or detonator.” O.C.G.A. @ 16-7-85 (2000).

⁵ “A person is guilty of terroristic threatening in the first degree when he or she: . . . intentionally and without lawful authority, places a counterfeit weapon of mass destruction at any location or on any object specified in paragraph (a) of this subsection.” K.R.S. 508(1)(b). “A person is guilty of terroristic threatening in the second degree when, other than as provided in Section 1 of this Act, he or she intentionally . . . without lawful authority places a counterfeit weapon of mass destruction at any location other than one specified in Section 1 of this Act.” K.R.S. 508(1)(c).

⁶“A person who knowingly manufactures, possesses, transports, distributes, uses or aids, or counsels or conspires with another in the use of a hoax device or replica of a destructive device or detonator which causes any person reasonably to believe that the hoax device or replica is a destructive device or detonator is guilty of a misdemeanor and, upon conviction, must be imprisoned for not more than one year or fined not more than ten thousand dollars, or both.” S.C. 16-23-730.

⁷“A person is guilty of dissemination of a false substance when, with the intent to annoy, harass, inconvenience, or alarm another or others, he or she disseminates or causes to be disseminated a false

announced their intent to formulate legislation addressing anthrax hoaxes.¹⁰

Additionally, the federal government is in the process of drafting such legislation.¹¹

Historically, statutes criminalizing anthrax hoaxes have included between two and four elements. First, all state statutes have defined the prohibited action. Next, all statutes have defined the object which is the subject of the hoax. The descriptions have ranged from very specific to very broad. Third, several states have chosen to require proof of *mens rea*. Finally, some states have chosen to require proof of a result.

The first element, the required action, has been defined fairly consistently by all of the states that have enacted or proposed hoax legislation. Generally, the statutes state that a person may not, “manufacture, possess, sell, deliver, transport, place, display, use, threaten to use, attempt to use, conspire to use, release for any unlawful purpose, disseminate, cause to be disseminated, conceal, or make readily accessible to others” the object of the hoax. States have chosen any combination of the aforesaid actions to prohibit. Florida has added the qualification, “without lawful authority”.

substance.” “False substance shall mean a substance or combination of substances that are intended to reasonably appear to be a biological warfare agent”. Proposed 240.64(2) from S.B. 5809 which was introduced and sent to the New York Senate’s Rules Committee on October 15, 2001.

⁸ “Any person who, with intent to perpetrate a hoax, conceals, places, or displays any device, object, machine, instrument, or artifact, so as to cause any person reasonably to believe the same to be a nuclear, biological, or chemical weapon of mass destruction is guilty of a class D felony.” Proposed 14-288.24 from North Carolina H.B. 1468/S.B.1108. (The House and Senate bills have the same bill text.) The bill passed the House and was sent to the Senate’s Committee on the Judiciary I on October 18, 2001.

⁹ “It is unlawful for any person to manufacture, deliver, or possess a hoax biological agent, nuclear material, nuclear byproduct material, toxic chemical, toxin or vector with the intent to violate any provision of this article.” H.B. 607F. On October 21, 2001, the bill was sent to the House Committee on the Judiciary. “It is unlawful for any person to use a hoax biological agent, nuclear material, nuclear byproduct material, toxic chemical, toxin or vector with the intent to cause psychological or emotional harm to another person or to cause serious public inconvenience or alarm.” H.B. 607F.

¹⁰ Connecticut, Massachusetts, Mississippi, and New Hampshire have indicated that they are working on the possibility of passing legislation to address hoax anthrax situations. “States Cracking Down on Terrorism Hoaxes,” www1.stateline.org/story.do?storyID=206788 (November 2, 2001). Additionally, other states, including Utah, Hawaii, and Vermont, have announced that they intend to draft hoax anthrax legislation.

¹¹ As of November 16, 2001, Senate Bills 1658, 1665, 1659 and 1666 and House Bill 3209 were under consideration. The federal proposals reference existing statutes which regulate actions with respect to actual biological weapons and weapons of mass destruction.

The next element, the description of the object that is the subject of the hoax, has varied from state to state.¹² Generally, the statutes reference *a biological agent, device or substance*. Michigan precludes the manufacture, delivery, possession, transportation, placement, use or release of an "*imitation harmful substance or device*", which is defined, in pertinent part, as "a substance or device that is designed or intended to represent one or more of the following or that is alleged to be one of the following but that is not any of the following: a harmful biological device or a harmful biological substance".¹³ The South Carolina statute speaks in terms of a *hoax device or replica*, which is defined as "a device or object that has the appearance of a *destructive device*".¹⁴ *Destructive device* is defined, in pertinent part as, "a weapon of mass destruction or a bacteriological weapon or biological weapon".¹⁵ The Georgia statute defines the subject of the hoax as a *hoax device or replica of a destructive device or detonator*,¹⁶ which is also defined, in pertinent part, as, "a bacteriological weapon or biological weapon".¹⁷ West Virginia defines *hoax biological agent* as, "a substance which is not a biological agent. . . but is falsely represented to be a biological agent. . . or a substance which is not a biological agent. . . which is shaped, sized, colored, marked, imprinted, numbered, labeled, packaged, distributed, priced, delivered so as to cause a reasonable person to believe that the substance is a biological agent"¹⁸. The New York proposal is the most specific. It defines *false substance* as "a substance or combination of substances that are intended to reasonably appear to be a *biological warfare agent*". The substances that qualify as

¹² This article specifically addresses anthrax hoaxes. However, the object of the statute may be broadly defined to prohibit chemical, radiological or nuclear hoaxes as well.

¹³ MCL 750.200(h)(k)(i) and (ii) .

¹⁴ S.C. Code Ann. 16-23-710(11).

¹⁵ S.C. Code Ann. 16-23-710(7).

¹⁶ O.C.G.A. @ 16-7-85 (2000).

¹⁷ O.C.G.A. 16-7-80(17).

¹⁸ Proposed 61-6A-2(d) from SB 6000F.

biological warfare agents are specifically defined¹⁹. In Kentucky, *weapon of mass destruction* is defined as “any weapon involving a disease organism”, among other things.²⁰ In North Carolina, the statute does not specifically include false anthrax threats, but it seems broad enough to encompass the situations seen to date. *Weapon of mass destruction* is defined as “any weapon or device that is designed, or has the capability, to cause death or serious injury through the release, dissemination, or impact of . . . a disease organism”. It also includes “any combination of parts either designed or intended for use in converting any device into any . . . biological . . . weapon of mass destruction or from which a . . . biological . . . weapon of mass destruction may be readily assembled.”²¹

The third element that may be included in a statute criminalizing anthrax hoaxes is *mens rea*. The Michigan statute has no intent requirement. South Carolina requires that the prohibited actions be done *knowingly*. In Florida, to prove one guilty in an anthrax hoax, the prosecutor must prove that the defendant had the intent to “deceive or otherwise mislead another person into believing that the hoax weapon of mass destruction

¹⁹ "Biological warfare agent shall mean any substance including, but not limited to: (I) Viruses including the Crimean-Congo Hemorrhagic Fever Virus, Eastern Equine Encephalitis Virus, Ebola Viruses, Equine Morbillivirus, Lassa Fever Virus, Mavirus, Rift Valley Fever Virus, South African Hemorrhagic Fever Viruses (Junin, Machupo, Sabia, Flexal, Guanarito), Tick-Borne Encephalitis Complex Viruses, Variola Major Virus (Smallpox Virus), Venezuelan Equine Encephalitis Virus, Viruses Causing Hantavirus Pulmonary Syndrome, Yellow Fever Virus; (II) Bacteria including Bacillus Anthracis (commonly known as anthrax), Brucella Abortus, Brucella Melitensis, Brucella Suis, Burkholderia (pseudomonas) Mallei, Burkholderia (pseudomonas) Pseudomallei, Clostridium Botulinum, Francisella Tularensis, Yersinia Pestis (commonly known as the plague); (III) Rickettsiae including Coxiella Burnetii, Rickettsia Rowazekii, Rickettsia Rickettsii; (IV) Fungi including Coccidioides Immitis; (V) Any genetically engineered strains of the pathogens referred to in this subdivision; (VI) Toxins including Abrin, Aflatoxins, Botulinum toxins, Clostridium Perfringens Epsilon Toxin, Conotoxins, Diacetoxyscirpenol, Ricin, Saxi Toxin, Shigatoxin, Staphylococcal Enterotoxins, Tetrodotoxin, t-2 toxin; and (VII) Any other substance which is disseminated and which is reasonably expected to cause mass fear." S.B. 5809 was introduced and sent to the New York Senate's Rules Committee on October 15, 2001.

²⁰ KRS527(18)(c).

²¹ Proposed section 14-288.21(c).

will cause terror, bodily harm, or property damage”. Similarly, Georgia has a requirement that the defendant act with the intent to “cause another to believe that such hoax device or replica is a destructive device or detonator”. New York incorporated an intent similar to that found in many terroristic threat statutes. The prosecutor must prove that the defendant disseminated a false substance with the intent to “annoy, harass, inconvenience, or alarm another or others”. West Virginia simply states that the intent required is the “intent to violate the provisions of [the anthrax hoax] article”. North Carolina simply requires that the defendant act “with the intent to perpetrate a hoax”.

A fourth and final element, which is not present in all of the statutes, is the necessity of proving a result. In South Carolina, a prosecutor must prove that the defendant’s actions “caused any person reasonably to believe that the hoax device or replica is a destructive device or detonator”. North Carolina’s proposal contains a similar element. A prosecutor must prove that the defendant’s actions caused “any person to reasonably to believe the same to be a nuclear, biological or chemical weapon of mass destruction”.

It should be noted that alternative means of handling anthrax hoaxes have been devised. For instance, in Michigan, it is illegal to cause another to falsely believe that the individual has been exposed to certain harmful substances²². West Virginia has proposed a statute that would make it illegal to mail a hoax biological agent.²³

²²“A person shall not commit an act with the intent to cause an individual to falsely believe that the individual has been exposed to a harmful biological substance . . . [or] harmful biological device”. MCL 750.2001. "Harmful biological device" means a device designed or intended to release a harmful biological substance. MCL 750.200(h)(e). "Harmful biological substance" means a bacteria, virus, or other microorganism or a toxic substance derived from or produced by an organism that can be used to cause death, injury, or disease in humans, animals, or plants. MCL 750.200(h)(f).

²³“It is unlawful for any person to knowingly and willfully cause to be transported a biological agent . . . or counterfeit biological agent . . . through the use of the United States postal service or other courier or carrier . . .” Proposed 61-6A-5(a) from SB 6002F. “It is unlawful for any person to knowingly and

Finally, regardless of the combination of elements which is chosen in formulating a hoax anthrax statute, states should consider punishment and restitution.²⁴ To insure that the harm done by an anthrax hoax is rectified, some states have specifically included a restitution component may be included, if it is not already in place by virtue of the state's criminal justice system.²⁵

willfully cause to be transported a hoax biological agent . . . through the use of the mail, or other courier or carrier. . . "Proposed 61-6A-5 from SB 6002F.

²⁴ In Florida, the offense is a felony two. In South Carolina, it is a misdemeanor punishable by not more than one year, unless the defendant communicates that the hoax device or replica is a destructive device, in which case the penalty is increased and the offense becomes a felony two punishable by not less than two nor more than fifteen years. In North Carolina, the offense is a class D felony. In Kentucky, the grading depends upon where the object is placed.

²⁵ "The court may order a person convicted under this section to pay restitution, including costs and consequential damages resulting from disruption of the normal activity that would have otherwise occurred but for the hoax, pursuant to Article 81c of Chapter 15a of the general statutes." Proposed 14-288.24 from H.B. 1468/S.B.1108. (The House and Senate bills have the same bill text.) The bill passed the House and was sent to the Senate's Committee on the Judiciary I on October 18, 2001.