

## **Policy Considerations for Implementing Gun Liability Insurance in North Carolina**

Prepared for: North Carolinians Against Gun Violence

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## EXECUTIVE SUMMARY

### Policy Question

Would a gun liability insurance requirement reduce gun violence in North Carolina and ensure compensation for victims of gun violence? Specifically, how would a liability insurance requirement for concealed carry permit holders reduce gun violence and provide compensation for shooting victims?

### Problem (p. 3)

Gun violence in the United States has declined in the last 20 years, but is still unacceptably high. In 2011 alone, over 32,000 people died as a result of firearms. That same year, over 3,500 North Carolinians were injured or killed in gun-related assaults and accidents.

In response to the tragic events at Newtown, Connecticut, that resulted in the death of twenty children and six school personnel, several proposals were introduced in legislatures across the nation to curb gun violence. Among them was the proposal to require gun owners to purchase gun liability insurance.

To date, nine states have considered mandatory gun liability insurance legislation. The primary goal of such legislation is to compensate victims of gun violence. Financial compensation for harm done is a well-established principle of our insurance law system. For decades, lawmakers have required drivers in their states to purchase automobile insurance to provide compensation for any damage or bodily injury their vehicles may cause. Gun liability insurance would work in a similar fashion.

Firearms, even in the hands of responsible and law-abiding gun owners, increase the risk of serious injury to others. An insurance mandate for firearms would help shift the economic costs of gun violence away from victims and taxpayers and onto those who possess firearms. Currently, some victims of gun violence have access to monetary compensation, such as the tort system, victims compensation programs, homeowners insurance, automobile insurance, and National Rifle Association (NRA) sponsored insurance. However, these programs are inadequate, as some do not cover intentional acts of gun violence while others provide minimal and insufficient compensation. In any event, in most cases, there is no compensation because the shooter is unknown, or if known, is judgment proof.

A secondary goal of a gun liability insurance mandate would be to reduce gun violence. By requiring gun owners to purchase liability insurance for their firearms, some high-risk people may be deterred from possessing an arsenal of dangerous weapons.

### Alternatives (p. 18)

Lawmakers must consider the following policy options when considering a gun liability insurance mandate:

- Should the mandate cover injuries and deaths resulting from (1) unintentional shootings only or (2) intentional and unintentional shootings?
- Should the mandate apply to (1) concealed carry permit holders only or (2) to all gun owners in North Carolina?
- Should the mandate apply to (1) new firearms purchased after the mandate is enacted or (2) to all firearms?

### **Criteria (p. 21)**

- Cost-Benefit Analysis (Maximize compensation for victims and reduce gun violence, and minimize costs to insurers and gun owners)
- Maximize Political Feasibility
- Ensure Constitutionality

### **Analysis (p. 22)**

The analysis seeks to balance compensation for victims and costs, political feasibility, and constitutionality of each policy option. All policy options will likely be deemed constitutional since neither of the alternatives restricts an individual's right to possess a firearm for lawful purposes.

- Alternative 1: Should the mandate cover injuries and deaths resulting from (1) unintentional shootings only or (2) intentional and unintentional shootings?

In 2011, there were six times as many assaults as there were accidental shootings. The 20 unintentional firearm deaths accounted for only 1.1 percent of all manners and methods of violent death in North Carolina, whereas the 519 homicides accounted for nearly 29 percent. Thus, providing coverage for both intentional and unintentional shootings would maximize compensation for victims and would be most likely to reduce gun violence. Although the costs to insurers and gun owners would be higher under this option, they are likely to be small in comparison to the value of lives saved and the value of compensating innocent people injured by the misuse of firearms.

A mandate that covers injuries and deaths resulting from intentional injuries is not going to be popular among insurers and lawmakers. Insurance companies have vocally opposed any scheme that would provide coverage for intentional acts. Insurers fear that insuring intentional acts would give individuals an incentive to commit violent acts. However, because it is unlikely that a shooter would use his own resources to compensate a victim, insuring intentional acts would not raise a moral hazard problem.

- Alternative 2: Should the mandate apply to (1) concealed carry permit holders only or (2) to all gun owners in North Carolina?

By the end of 2011, there were more than 240,000 concealed carry permit holders in North Carolina. Although the precise number of gun owners in North Carolina is unknown, estimates indicate that, at a minimum, North Carolina has about 1.2 million gun owners.

Evidence also suggests that a significant number of gun-related assaults are committed by gun owners who do not possess a concealed carry permit. Although a mandate that applies to all gun owners would provide coverage for a greater number of gun violence victims, the costs of providing coverage to all gun owners would be higher than providing coverage for concealed carry permit holders alone. Since gun owners who do not possess a concealed carry permit commit a greater number of weapons-related assaults, insurers would likely have fewer claims to pay out if the mandate only applied to concealed carry permit holders.

Concealed carry permit holders are already regulated by the state. Thus, mandating liability insurance for concealed carry permit holders is far more feasible than mandating insurance for all gun owners.

- Alternative 3: Should the mandate apply to (1) new firearms purchased after the mandate is enacted or (2) to all firearms?

A significantly small portion of gun injuries and deaths would be covered if the mandate were to apply to firearms purchased after the insurance scheme were implemented. The costs generated by insurers and gun owners would, however, be higher if the mandate applied to all firearms since insurance companies would be required to pay out significantly more claims.

If the mandate only applied to new purchases, fewer gun owners would be implicated. Thus, an insurance scheme that applies to guns purchased after the date of enactment is likely to be more feasible.

### **Recommendation (p. 30)**

I recommend that the gun liability insurance scheme (1) cover injuries and deaths from intentional and unintentional shootings, (2) apply to concealed carry permit holders only, and (3) apply to all firearms, purchased before and after the date of enactment.

### **Moving Forward (p. 31)**

Before any gun liability scheme can be implemented in North Carolina, several more issues need to be resolved. For example, should the mandate provide compensation for pain and suffering, or merely medical expenses and funeral costs? What factors should insurance providers take into account when setting premiums? Should the mandate be modeled after victims compensation programs or the tort system?

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## INTRODUCTION

On December 14, 2012, Adam Lanza, a 20-year old resident of Newtown, Connecticut shot and killed twenty children and six staff members at Sandy Hook Elementary School. It was the second-deadliest mass shooting by a single person in American history. The shooting renewed the debate about gun control and prompted a series of measures to reduce gun violence.

Some states proposed banning assault weapons and high-capacity ammunition, while others recommended more stringent background checks for purchasing firearms. Following the Newtown shooting, several states proposed a market-based approach to reducing gun deaths and compensating victims of gun violence—mandatory gun liability insurance.

The toll gun violence takes on our communities is massive. Firearms are responsible for over 30,000 deaths in the United States annually. In 2011 alone, 1,133 North Carolinians died as a result of firearms. The economic costs of gun violence are also vast. The average hospitalization charge for the treatment of nonfatal and fatal firearm injuries runs upwards of \$40,000. The costs of treating these victims are borne by victims, victims' families, and taxpayers, and not the gun owners responsible for causing the injury.

Gun liability insurance would hold gun owners accountable for the social costs of gun ownership by making them liable for any damage their firearms cause. Our tort system provides some financial remedy for victims of gun violence. For example, someone injured from the accidental discharge of a firearm can pursue civil action against the negligent party. Alternatively, if a neighbor is injured by a firearm on an individual's private property, that individual's homeowners insurance policy would compensate the victim for any reasonable medical expenses and provide coverage for legal damages. Additionally, states across the country also provide financial compensation for victims of gun-related assaults. Although these programs and methods of compensation provide some financial relief to victims of gun violence and their families, they do not provide adequate monetary reparations.

For example the medical payments coverage of homeowners insurance policies do not apply to injuries sustained by the policyholder or anyone that resides in the household. Over 40 percent of North Carolinian households reported having a firearm. Households with guns in the home are at an elevated risk of homicide, suicide, and unintentional shootings. However, victims who belong to the same household as the policyholder would be precluded from obtaining financial compensation through the policyholder's homeowners insurance policy.

Although homeowners insurance policies cover incidents that occur outside the homeowners property, only accidental shootings are covered. Thus, any victim who is injured or fatally killed as a result of a gun-related assault would automatically be disqualified from receiving compensation through the perpetrator's homeowners insurance policy. Given that far more individuals are killed and injured as a result of intentional shootings rather than unintentional shootings, a large number of victims would be unable to obtain any compensation through homeowners insurance.

And while state victims compensation programs do offer financial assistance to victims of gun-related assaults and homicide victims, compensation is limited. The North Carolina Victims Compensation Services Division awards, \$3,500 on average, and to crime victims only. This award is insufficient, given that the average hospitalization charge in North Carolina for firearm-related injuries is more than \$40,000.

It is evident that a sizeable gap in financial compensation exists for victims of intentional shootings and victims who belong in the same household as policyholder. (See Appendix A). A gun liability insurance mandate would fill this gap in coverage and would shift the costs of gun ownership from the victims to gun owners.

This paper addresses key policy considerations for implementing a gun liability insurance scheme in North Carolina. First, should the mandate cover unintentional shootings or both unintentional and intentional shootings? Second, should the mandate apply to all gun owners or concealed carry permit holders only? Lastly, should the mandate apply to firearms purchased after the liability insurance requirement has been implemented or to all firearms in circulation? The following three criteria were useful in determining which policy options should to be implemented: (1) maximize compensation to victims and reduce gun violence, and minimize costs to insurers and gun owners; (2) maximize political feasibility; and (3) maintain constitutionality.

The policy analysis I conducted indicates that a gun liability insurance mandate should cover unintentional and intention shootings, affect concealed carry permit holders only, and apply to all firearms in circulation.

The report is organized into ten sections: (I) Policy Question, (II) Defining the Problem, (III) Liability for Incidents Involving Firearms, (IV) Compensation for Victims of Gun Violence, (V) Regulating Insurance in North Carolina, (VI) Alternatives, (VII) Criteria, (VIII) Analysis, (IX) Recommendation, and (X) Moving Forward. In the first two sections, I introduce the policy issue and discuss the specific nature and scope of the problem. The third section discusses the numerous situations in which a person could be held financially liable for misusing a firearm. The fourth section summarizes the various means through which a gun violence victim could obtain financial compensation for injuries sustained. The fifth section briefly discusses how insurance is regulated in North Carolina. The sixth and seventh sections discuss policy options and relevant criteria. In the eighth and ninth sections, I conduct my policy analysis, by applying the criteria to each of the policy options, and offer a recommendation. The tenth and final section poses additional considerations for implementing a gun liability insurance scheme.

## I. POLICY QUESTION

Would a gun liability insurance requirement reduce gun violence in North Carolina and ensure compensation for victims of gun violence? Specifically, how would a liability insurance requirement reduce gun violence and provide compensation for shooting victims?

## II. DEFINING THE PROBLEM

### a. Gun Violence

Violent death from firearms is a major public health issue in the United States. The United States is unique among developed nations in its immense civilian gun ownership. Indeed, the United States has the highest rate of civilian gun ownership compared to other developed nations.<sup>1</sup> Indeed, between 35 and 39 percent of U.S. households have a firearm.<sup>2</sup> Though the majority of the 262 million firearms<sup>3</sup> available to the civilian population are used for legitimate reasons, such as hunting and target shooting,<sup>4</sup> a sizeable portion of firearms are used against individuals in assaults, suicides, and accidents.

Although many Americans are killed each year by guns, even more are non-fatally injured, with the exception of suicides. In 2010, there were 19,392 fatal suicides and 4,643 non-fatal suicide attempts involving firearms the United States. (See Table 1). That same year, 11,078 Americans were victims of homicide by firearm; 53,738 individuals were assaulted with firearms and survived. Over 600 Americans were unintentionally killed with firearms; 14,161 individuals were accidentally shot and survived.

<b>Method of Death</b>	<b>Deaths</b>	<b>Nonfatal Injuries</b>	<b>Total</b>	<b>Case Fatality Rates</b>
<b>Suicides</b>	19,392	4,643	24,045	81%
<b>Homicides</b>	11,078	53,738	64,816	17%
<b>Accidental Shooting</b>	606	14,161	14,767	4%

Source: National Center for Injury Prevention and Control: Data & Statistics, 2010 (WISQARS), CDC

North Carolina has some of the highest rates of gun violence in the United States. In fact, between 1999 and 2010, firearms were responsible for 13,272 deaths in North Carolina alone—an annual rate of 12.69/100,000.<sup>5</sup> During that time period, the national firearm death rate was 10.3/100,000. That rate is roughly 20 percent higher than the national average. More than twice as many North Carolinians were killed with guns than killed in combat in the Iraq and Afghanistan wars.<sup>6</sup>

In 2011, 1,819 people in North Carolina died as a result of violence.<sup>7</sup> Firearms accounted for nearly 63 percent of all violent deaths in the state that year.<sup>8</sup>

i. Suicides in North Carolina

The North Carolina Department of Health and Human Services defines suicide as “a death resulting from the intentional use of force against oneself.”<sup>9</sup> In 2011, a total of 1,202 violent deaths were caused by self-inflicted injuries.<sup>10</sup> Firearms accounted for 60.5 percent of all suicides—a handgun was the most common firearm used.<sup>11</sup>

The North Carolina Health and Human Services does not maintain data for nonfatal violent injuries. To calculate the total number of North Carolinians who attempted suicide, I divided the reported number of violent deaths caused by self-inflicted injuries with firearms with the percentage of suicides involving firearms that are fatal. (See Table 2). After determining the total number of suicide attempts, I subtracted from it the reported number of suicide fatalities. Using this calculation, I determined that in 2011, approximately 282 North Carolinians attempted suicide and survived.<sup>1</sup>

ii. Assaults in North Carolina

As of 2010, North Carolina had the 16th highest gun murder rate in the country, nearly 10 percent higher than the national average.<sup>12</sup> North Carolina experienced 519 homicides in 2011; nearly 72 percent of these homicides were committed using a firearm.<sup>13</sup> The majority of homicide victims were killed in or around their house or apartment (60.7 percent).<sup>14</sup> Additionally, over 18 percent of all homicides between 2004 and 2011 were committed between partners, parents, children, or other relatives.<sup>15</sup>

To calculate the total number of nonfatal assaults involving firearms in North Carolina, I divided the reported number of homicides involving firearms with the percentage of firearm assaults that are fatal. After determining the total number of firearm assault attempts, I subtracted from it the reported number of homicides involving firearms. Using this calculation, I determined that in 2011, there were approximately 2,534 nonfatal assaults involving firearms in North Carolina.<sup>ii</sup>

iii. Accidental Shootings in North Carolina

Deaths from accidental shootings are far less common than homicides and suicides. An unintentional firearm death is defined as “a death resulting from a penetrating injury or gunshot wound from a weapon that uses a powder charge to fire a projectile and for which a

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<sup>i</sup> Number of nonfatal suicides in North Carolina involving firearms = Number of suicide attempts in North Carolina involving firearms – Number of reported suicide deaths in North Carolina involving firearms = (Number of reported suicide deaths in North Carolina involving firearms ÷ National fatal suicide rate involving firearms) – Number of reported suicide deaths in North Carolina involving firearms =  $(1202 \div .81) - 1202 = 282$ . Thus, in 2011 in North Carolina, about 282 individuals attempted suicide with a firearm and survived.

<sup>ii</sup> Number of nonfatal assaults in North Carolina involving firearms = Number of assault attempts in North Carolina involving firearms – Number of reported homicides in North Carolina involving firearms = (Number of reported homicides in North Carolina involving firearms ÷ National fatal homicide rate involving firearms) – Number of reported homicides in North Carolina involving firearms =  $(519 \div .17) - 519 = 2,534$ . Thus, in 2011 in North Carolina, about 2,534 individuals were assaulted with firearms and survived.

preponderance of evidence indicates that the shooting was not directed intentionally at the decedent.”<sup>16</sup> In 2011, 20 North Carolinians died from a firearm injury sustained in a shooting not intentionally directed at the victim, accounting for 1.1 percent of all violent deaths.<sup>17</sup>

Unintentional firearm death can occur during hunting and target shooting, while cleaning a gun, playing with a gun, loading/unloading a gun, unintentionally pulling the trigger, and a ricocheting bullet. Indeed, the most common circumstances surrounding unintentional firearm injuries resulting in death was the shooter unintentionally pulling the trigger (13 cases).<sup>18</sup> In 7 of unintentional firearm death cases, the shooting occurred while the victim was playing with the gun.<sup>19</sup> Other circumstances where injury occurred included: the shooter was loading or unloading the gun (1 case); the gun discharged when it was dropped (2 cases); the shooter thought the gun was unloaded or for some other unspecified reason (1 case); the gun had a defect or it malfunctioned (5.0%); the injury occurred while cleaning the gun (1 case); the injury occurred while hunting (7 cases); and the gun was mistaken for a toy (1 case).<sup>20</sup>

Additionally, among the unintentional firearm deaths reported nationally, 47 percent were inflicted by family members and 43 percent by friends.<sup>21</sup> According to the CDC, “unintentional firearm deaths disproportionately affect children, with 16% of unintentional deaths occurring among youth under age 20.”<sup>22</sup> These injuries are often caused when children play with firearms in the home with easy access to firearms and with little to no adult supervision.<sup>23</sup> Among the 20 unintentional firearm deaths in North Carolina in 2011, 10 involved individuals under the age of 20.<sup>24</sup>

To calculate the total number of nonfatal accidental shooting victims in North Carolina, I divided the reported number of accidental shooting fatalities with the percentage of accidental shootings that were fatal. After determining the total number of accidental shootings, I subtracted from it the reported number of accidental shooting fatalities. Using this calculation, I determined that in 2011, there were approximately 480 nonfatal accidental shootings involving firearms in North Carolina.<sup>iii</sup>

**Table 2: North Carolina Firearm Fatality Profile, 2011 Estimates**

<b>Method of Death</b>	<b>Fatal</b>	<b>Nonfatal Injuries (Estimates)</b>	<b>Total</b>
<b>Suicide</b>	1,202	282	1,484
<b>Assault</b>	519	2,534	3,053
<b>Accidental Shooting</b>	20	480	500

Source: North Carolina Violent Data Reporting System, Annual Report 2011, North Carolina Injury & Violence Prevention Branch, Division of Public Health; National Center for Injury Prevention and Control: Data & Statistics, 2010 (WISQARS), CDC

<sup>iii</sup> Number of nonfatal accidental shootings in North Carolina = Number of accidental shootings in North Carolina – Number of fatal accidental shootings in North Carolina = (Number of reported accidental shooting fatalities in North Carolina ÷ National accidental shooting fatality rate) – Number of reported accidental shootings fatalities = (20 ÷ .04) – 20 = 480. Thus, in 2011 in North Carolina, 480 individuals were accidentally shot and survived.

## **b. Presence of Firearms in the Home**

In a 2004 North Carolina Behavioral Risk Factor Surveillance Survey, 40.9 percent of respondents reported having a firearm.<sup>25</sup> One study indicated that people who lived in households with firearms were between two and three times more likely to be killed from suicide and murder compared to those who lived in homes without guns.<sup>26</sup>

Many children and adolescents are able to access household firearms because of unsafe gun storage. Researchers have found a significant association between the percentage of gunshot wounds occurring in the home and the percentage of American households containing any firearms, loaded firearms, and unlocked loaded firearms.<sup>27</sup> Over 56,000 children, ages 18 and under, were hospitalized for the treatment of injuries sustained from firearms between 2001 and 2012.<sup>28</sup>

Studies have also shown that “the majority of firearms used in youth suicides and unintentional deaths were acquired from either the youth’s home or the home of a friend or relative.”<sup>29</sup> Estimates suggest that as many as 85 percent of the firearms used in youth firearm suicides were obtained from the home of the victim, a relative, or a friend.<sup>30</sup>

And while nearly every North Carolina household reports having at least one smoke detector, only 57 percent lock away firearms in a place where children cannot access them.<sup>31</sup> Even more disturbing is that among homes with firearms and children under the age of 18, 43 percent of parents reported having at least one gun unlocked, loaded, or both.<sup>32</sup>

## **c. Economic Costs of Gun Violence**

While the human toll from gun violence is vast, the cost of treating injuries from firearms poses an economic burden on society. A 2010 study calculated the economic cost of gun violence to be \$174 billion<sup>33</sup>, which roughly amounts to an annual firearm injury cost averaging \$645 per gun.<sup>34</sup> This figure includes medical and mental health care costs, lost wages, criminal justice costs, and the value of pain, suffering, and lost quality of life.<sup>35</sup>

In 2012, nearly 81,400 individuals were treated in emergency departments for non-fatal gun shot wounds.<sup>36</sup> Between 2004 and 2007, North Carolina emergency departments reported over 4,000 hospitalizations for the treatment of firearm injuries.<sup>37</sup> The fatal and nonfatal injuries resulted in 28,421 days of hospitalization, resulting in a total hospitalization charge of nearly \$162 million.<sup>38</sup> This grand sum only included medical and hospital costs—it did not include costs related to disability, pain and suffering, lost quality of life, lost wages, or subsequent related medical care.<sup>39</sup>

American taxpayers shouldered about 49 percent of the cost of treating gun violence victims in 1994.<sup>40</sup> In 2010, the average cost of hospital treatment for a gun violence victim was approximately \$14,000 more than that of an average hospital visit.<sup>41</sup> A trip to the emergency room for a shooting victim can be costly—the care and treatment of a gun violence victim generally involves a team of medical personnel, including a “trauma surgeon, emergency room attendant, at least two nurses, three or more medical residents, a radiologist, a radiologist

technician, a respiratory therapist, an anesthesiologist, three EMS workers, a blood-bank worker, two techs or certified nursing assistants and a social works.”<sup>42</sup>

Although health care costs vary case by case, some charges, like surgery, use of the emergency room, overnight stays in the hospital, and costs associated with laboratory work and pharmacy, are fairly common.

### III. LIABILITY FOR INCIDENTS INVOLVING FIREARMS

An individual who is injured as a result of the intentional or negligent mishandling of a firearm has several potential remedies, the most common of which is a tort action against the individual who misused the firearm.

#### a. Intentional Tort

An assailant may be held liable for intentionally causing injury to another under North Carolina’s tort law. Typically, “if a person is violating the law by shooting a weapon, he is civilly liable for an injury, even an accidental injury, inflicted by him with such weapon.”<sup>43</sup> A defendant’s motive in discharging a firearm is irrelevant where his act is illegal. Tort law recognizes a broad rule of liability in cases involving physical injury or harm. Accordingly, in tort law “the line between intent and negligence is much less significant than is the same line within the criminal law.”

North Carolina recognizes the intentional tort of assault and battery. An assault is an “offer to show violence to another without striking him,” whereas a battery is the “carrying of the threat into effect by the infliction of a blow.”<sup>44</sup> For an actor to be liable for assault, he must merely put the other in apprehension of imminent contact—actual physical contact is not necessary.<sup>45</sup> In *Johnson v. Bollinger*, the defendant approached the plaintiff in a hostile and threatening manner, while carrying a firearm.<sup>46</sup> The defendant shook his hand in the plaintiff’s face and proclaimed in a loud voice, “You are a stupid son-of-a-bitch,” “You are a liar,” and stated further “I will get you.”<sup>47</sup> Under those circumstances, the Court of Appeals of North Carolina found that the plaintiff could reasonably expect imminent offensive contact and subsequently denied defendant’s motion to dismiss the action.<sup>48</sup>

Unlike an assault, which is a threat of violence, a battery is carrying the threat into effect by striking another. Thus, a battery occurs when the plaintiff victim is “offensively touched” against the plaintiff’s will. The hostile intent of the defendant assailant is irrelevant; rather, the issue in an action of battery is the *absence of consent* to contact on the part of the victim.<sup>49</sup> Unlike a claim of negligence, the intentional tort of battery is not premised on the existence of a duty between parties.<sup>50</sup> A plaintiff victim is permitted to recover damages for assault and battery for mental anguish and the physical injury.<sup>51</sup> In *Vernon v. Barrow*, after plaintiff customer refused to leave defendant’s lounge, defendant pulled out a firearm and fired several shots into the floor of the lounge near the plaintiff’s feet.<sup>52</sup> One of the bullets ricocheted and struck plaintiff in the left thigh.<sup>53</sup> The Court of Appeals held that defendant’s conduct in firing the gun gave rise to actions for assault and battery.<sup>54</sup>

The Supreme Court of North Carolina recognizes that “if one is injured from the discharge of firearms negligently used or handled by another, the person causing the injury is civilly liable even though the discharge was not intended.”<sup>55</sup> An individual handling or carrying a loaded firearm in the vicinity of others is liable for its discharge, even if the discharge is accidental and unintentional. Because firearms are typically not discharged without the intervention of another, courts presume that when firearms are discharged while in the possession and control of another, “the firing is caused either by design, carelessness, or inadvertence upon his part.”<sup>56</sup>

## **b. Negligence**

Although the Supreme Court has held that an intentional act may not be the basis for a claim in negligence<sup>57</sup>, in certain situations, the evidence presented may raise questions of both assault and battery, and negligence.

In order for a claim of negligence to succeed, the injured party must allege (1) a legal duty, (2) a breach of that duty, (3) actual and proximate causation, and (4) injury. “Actionable negligence is the failure to exercise that degree of care which a reasonable and prudent person would exercise under similar conditions. A defendant is liable for his negligence if the negligence is the proximate cause of injury to a person to whom the defendant is under a duty to use reasonable care.”<sup>58</sup> The Supreme Court recognizes that “utmost caution must be used in [the] care and custody [of firearms], to the end that harm may not come to others from coming in contact with them.”<sup>59</sup>

In *Lynn v. Burnette*, plaintiff was shot in the neck when defendant’s firearm discharged while aimed at plaintiff’s car tire.<sup>60</sup> Although both parties agreed the actions constituted an intentional tort, they disagreed as to whether it gave rise to a negligence claim. Unlike a claim for negligence, which must be brought within three years of the date of the action, a claim for assault and battery must be pursued within one year. Ultimately the court found that the defendant’s conduct gave rise to civil actions for assault and battery, *and negligence*. Because the defendant intended to shoot the vehicle’s tire and not the plaintiff, the plaintiff was permitted to pursue a negligence action, and was thereby not barred from seeking damages under the statute of limitations.

North Carolina is among the few jurisdictions which still adheres to the strict doctrine of contributory negligence. Under this doctrine, if a plaintiff sues another under a theory of negligence, the plaintiff may not recover any damages if his injuries were caused by his own negligence. Contributory negligence acts as a complete bar to a claimant’s recovery.<sup>61</sup> In order for contributory negligence to bar recovery, there must be a finding that the plaintiff acted or failed to act with knowledge and appreciation of the danger of injury which his actions involved.<sup>62</sup> Typically, “when a person deliberately exposes himself to danger of which he is, or in the exercise of reasonable care should be, aware, he is contributorily negligent as a matter of law.”<sup>63</sup> In *Edwards v. Johnson*, the dissent described several hunting cases where contributory negligence was found.<sup>64</sup> For example, if a hunter goes deer hunting wearing only camouflage and no hunter orange, he may be found guilty of contributory negligence if a fellow hunter shoots him, mistaking him for a deer.

### i. Common Law Negligence

Under common law negligence, “the law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm.”<sup>65</sup> A violation of that duty of ordinary care, which is a duty to act reasonably, constitutes negligence. In *Edwards v. Johnson*, the plaintiff sued for personal injuries sustained when the defendant accidentally discharged a shotgun.<sup>66</sup> The defendant, expecting the plaintiff to stop by her home, went to answer the door after plaintiff knocked on the door.<sup>67</sup> As the defendant reached to push the curtains back from the door, with a 16-gauge shotgun in hand, the firearm hit the door and discharged, hitting the plaintiff in the right leg, causing permanent injury.<sup>68</sup> The court found that the defendant had a duty to exercise the utmost care to prevent the unintentional discharge of her firearm. Based on those circumstances, the Supreme Court held that there was sufficient evidence for a jury to decide whether defendant acted negligently.<sup>69</sup>

Similarly, in *Mitchum v. Gaskill*, plaintiff filed a civil suit against the defendant when, during an argument, defendant’s shotgun discharged, wounding plaintiff in his right side. The defendant pled guilty to assault inflicting serious bodily injury. In the civil trial, the jury found that the defendant negligently injured the plaintiff by unintentionally shooting him with the shotgun, and was awarded \$772,700.

### ii. Negligent Supervision of a Minor

A parent may not necessarily be liable for the wrongful acts of their unemancipated minor children by virtue of the parent-child relationship.<sup>70</sup> However, while the parent-child relationship does not automatically make a parent liable for the wrongful acts of the minor child, “a parent who knows or should know of dangerous propensities of his child may be held liable for failing to exercise reasonable control over the child so as to prevent injury to others caused by these dangerous propensities.”<sup>71</sup> Additionally, “a parent may be held liable for the independently negligent act of failing to exercise reasonable control without regard to whether the unemancipated child’s tort is intentional or the result of negligence.”<sup>72</sup> Thus, “the parent of an unemancipated child may be held liable in damages for failing to exercise reasonable control over the child’s behavior if the parent had the ability and the opportunity to control the child and knew or should have known of the necessity for exercising such control.”<sup>73</sup> However, “before it may be found that a parent knew or should have known of the necessity for exercising control over the child, it must be shown that the parent knew or in the exercise of due care should have known of the propensities of the child and could have reasonably foreseen that failure to control those propensities would result in injurious consequences.”<sup>74</sup> For liability to attach for negligent supervision, merely the consequences of a generally injurious nature, and not the particular injury, must have been foreseeable.<sup>75</sup>

In *Patterson v. Weatherspoon*, the minor plaintiff was significantly injured when he was struck in the eye by a golf putter operated by the defendant’s 6-year-old son.<sup>76</sup> The Court of Appeals held that, under the circumstances, there was no evidence to permit a jury to find “that [the] defendant should, by the exercise of due care, have reasonably foreseen that his child was likely to use the golf putter in such a manner as to cause injury and that he, thereafter, failed to exercise reasonable care to restrict or supervise the child’s use thereof.”<sup>77</sup> The Court cited *Lane*

*v. Chatham*, in which the defendant parents' 9-year-old son shot plaintiff in the eye, causing total loss thereof. The *Chatham* court held that the air rifle used was not a dangerous instrumentality, per se.<sup>78</sup> And, because, the father had no knowledge of the child's prior misuse of the air rifle, the evidence was insufficient to support a finding of the father's liability for the minor child's wrongful act. Accordingly, the *Weatherspoon* court concluded that a golf putter was not a dangerous instrumentality and held that "evidence was insufficient to show that the father had failed to exercise reasonable care to restrict son's use of golf putter with which playmate was injured."<sup>79</sup> The court noted that unlike *Chatham*, defendant father in *Weatherspoon* had no reason to believe that his son would use the putter in the presence of others.<sup>80</sup> Unlike air rifles and golf putters, however, firearms are undeniably dangerous instrumentalities.<sup>81</sup> If evidence suggests that a parent was aware that a child would misuse a firearm and gave the child explicit or implicit permission to use the firearm, which subsequently was used to cause injury, a court would likely find that parent liable.

### iii. Negligent Entrustment

The theory of negligent entrustment typically applies to situations involving motor vehicles, where the cause of action arises when the owner of a vehicle "entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver" who is likely to cause harm to others in its use.<sup>82</sup> Indeed, almost all negligent entrustment cases in North Carolina involve motor vehicles. However, negligent entrustment cases can involve instrumentalities other than automobiles.

Entrustment merely requires explicit or implicit consent from the defendant for the third party to use the instrumentality in question. North Carolina courts have yet to decide whether a defendant's mere consent to possession of an instrumentality, alone, gives rise to the level of entrustment. However, in *Hill v. West*, the Court of Appeals concluded that where a defendant did *not* give permission to use the instrumentality in question, he could not be held liable, if the instrumentality was operated without the defendant's knowledge or consent.<sup>83</sup>

In the context of firearms, if there is no evidence that the defendant, expressly or impliedly, entrusted the firearm's operation to the third party assailant, or gave permission to use the firearm, it is a court will likely find that the alleged actions will not rise to the level of entrustment. Additionally, if the defendant cannot reasonably foresee that the entrustment will cause harm or injury, then the defendant owes no duty to protect third parties under a theory of negligent entrustment.

### iv. Child Abuse and Endangerment

N.C. Gen. Stat. § 14-318.2(a) states, "Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child . . . who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse."<sup>84</sup> Although § 14-318.2 is a criminal statute, the Court of Appeals has held that a parent's (or an individual supervising a child) failure to perform "a duty to take every step reasonably possible under the circumstances . . . to prevent harm to their children" is negligence.<sup>85</sup> Although North Carolina courts have yet to hear a civil

case based on this statute, it is possible that a court would find a parent, who creates a substantial risk of physical injury by keeping firearms accessible to children, liable for any injuries that may result.

v. Exception – Negligent Storage of Firearms and Criminal Acts of a Third Party

Although the North Carolina General Assembly has enacted several statutes relating to the proper storage and use of firearms, it has elected not to impose civil liability for the negligent storage of firearms against parties who do not owe a legal duty.

In *Bridges v. Parrish*, a shooting victim brought a negligence action against the assailant’s parents, who owned the firearm used in the shooting.<sup>86</sup> The plaintiff alleged that the defendant parents negligently stored their firearm, which the assailant took from their home and used to shoot and injure the plaintiff. Following the assault, plaintiff filed a civil complaint alleging that the defendants “knew or should have known that [the assailant] posed a risk of serious harm to Plaintiff” and “failed to take reasonable and/or necessary steps to keep [their] guns in a safe and secure place, or otherwise adequately locked and located such that [the assailant] could not get access to and possession of any such guns.”<sup>87</sup> The Supreme Court held that the parents were not liable for the criminal actions of a third party—their 52-year-old son—because the parents owed no legal duty to the plaintiff.<sup>88</sup> When the injury to the plaintiff is not foreseeable and avoidable through due care, no legal duty exists.

Generally, there is no legal duty to protect others from harm that is “only remotely and slightly probable.”<sup>89</sup> Because criminal acts of a third party are generally “unforeseeable and independent,”<sup>90</sup> defendants are absolved of liability. For example, in *Winters v. Lee*, defendant grandmother loaned her car to her grandson, who used the vehicle to drive to plaintiff’s house and stab her 37 times.<sup>91</sup> Although the defendant knew her grandson was intoxicated, emotionally disturbed, and had harmed the plaintiff in the past, the stabbing was an unforeseeable result of the defendant’s conduct.<sup>92</sup> Because the injury was unforeseeable, the defendant had no duty to act upon.

An exception to this rule enables a defendant to be held civilly liable for the criminal acts of a third party—a special relationship exists “when the defendant’s relationship with the plaintiff or the third person justifies making the defendant answerable civilly for the harm to the plaintiff.”<sup>93</sup> No special relationship exists between the defendant and the third person unless, “(1) the defendant knows or should know of the third person’s violent propensities and (2) the defendant has the ability and opportunity to control the third party at the time of the third person’s criminal acts.”<sup>94</sup> Neither the spousal relationship, nor the parent-child relationship gives rise to a duty to protect third parties from actions of a third party.

**c. Negligence Per Se**

A violation of a public safety statute may constitute negligence per se. In North Carolina, “when a statute imposes a duty on a person for the protection of others [the Supreme Court] [has] held that it is a public safety statute and a violation of such a statute is negligence per se *unless*

the statute says otherwise.”<sup>95</sup> For example, N.C. Gen. Stat. § 42-44(d) on residential rental agreements specifically asserts that, “a violation of this Article shall not constitute negligence per se.”<sup>96</sup> Alternatively, statutes pertaining to firearms make no mention that violation of the statute is negligence per se.

A public safety statute is one that imposes upon the defendant a “specific duty for the protection of others.”<sup>97</sup> However, even when a defendant has been found to violate a public safety statute, the plaintiff may not receive any damages unless the plaintiff belongs to “the class [of persons] intended to be protected by [the] statute,” and the statutory violation is “a proximate cause of [the plaintiff’s] injury.”<sup>98</sup>

In *Taylor v. Stewart*, a father habitually permitted his son to operate his automobile since the child was 10-years-old.<sup>99</sup> The father had also allowed his son to drive others in the vehicle.<sup>100</sup> The plaintiff sued to recover for the death of his child, who was run over and killed by the vehicle belonging to the defendant.<sup>101</sup> The driver of the automobile was the defendant’s 13-year-old son.<sup>102</sup> The Supreme Court held that where a parent permits his minor child to operate a vehicle in violation of a statute regulating operation of motor vehicle, the parent is negligent and is, therefore, responsible for those injuries which are the result of such violations.<sup>103</sup> Although *Stewart* was decided nearly a century ago, it has not been overturned and remains valid law.

One could plausibly argue that all statutes pertaining to firearms are public safety statutes. The transfer, ownership, and use of firearms in North Carolina is extensively regulated by the state. For example, N.C. Gen. Stat. § 14-315.1 was enacted to prevent minors from obtaining firearms. Arguably, the statute is designed to protect the public from minors who are unaware of the potential dangers of weapons such as firearms. Under the statute, “Any person who resides in the same premises as a minor, owns or possesses a firearm, and stores or leaves the firearm (i) in a condition that the firearm can be discharged and (ii) in a manner that the person knew or should have known that an unsupervised minor would be able to gain access to the firearm is guilty of a Class 1 misdemeanor” if a minor “[c]auses personal injury or death with it not in self defense” or “[u]ses it in the commission of a crime.”<sup>104</sup> Moreover, it is important to note that a homeowner does not have criminal responsibility for failing to secure any firearms if the minor’s parents or guardian granted the minor lawful permission to obtain the firearm or the firearm was procured by the unlawful entry into the owner’s residence.<sup>105</sup> To prevail on a claim of negligence per se, a plaintiff must demonstrate, “(1) a duty created by a statute or ordinance; (2) that the statute or ordinance was enacted to protect a class of persons which includes the plaintiff; (3) the breach of statutory duty; (4) that the injury sustained was suffered by interest which the statute protected; (5) that the injury was of nature contemplated in statute; and (6) that the violation of the statute proximately caused the injury.”<sup>106</sup> Additionally, “when a statute imposes a duty on a person for the protection of others, it is a public safety statute and a violation of such a statute is negligence per se.”<sup>107</sup> Thus, a plaintiff would likely prevail on a claim of negligence per se for the violation of N.C. Gen. Stat. § 14-315.1 because the statute places a duty upon dwellers to keep homes safe and free from danger for the protection of minors.

#### **IV. COMPENSATION FOR VICTIMS OF GUN VIOLENCE**

Medical treatment for victims of gun violence is costly, and is a financial burden not just to victims, but to taxpayers as well. Given that gun violence disproportionately affects urban and poor communities, many victims lack the financial resources to pay their medical bills. For this reason, states have established crime compensation programs to help offset some of the costs. In 1987, the North Carolina Victims Compensation Services was established to “reimburse citizens who suffer medical expenses and lost wages as a result of being an innocent victim of a crime committed in North Carolina.”<sup>108</sup> Victims of assault and families of homicide victims are eligible to apply for financial aid.<sup>109</sup> Victims of accidental shootings are ineligible to receive compensation. The state offers compensation for financial losses not covered by other sources, such as health insurance, auto or disability insurance, public funds, workers compensation, or restitution paid by the offender.<sup>110</sup> The program also does not compensate victims for damaged property or pain and suffering. Further, compensation is capped at \$30,000 for medical expenses and \$5,000 for funeral expenses.<sup>111</sup> Many shooting victims’ medical expenses exceed \$30,000, and thus cannot afford to pay the entirety of their treatment and hospitalization costs.

From July 1, 2011 till February 27, 2012, the Victim Compensation Services Division awarded 1,676 claims totaling \$5,327,627.<sup>112</sup> From the crime victims fund payments, medical and dental expenses accounted for over 75 percent and burial expenses for 18 percent.<sup>113</sup> The program has been largely successful as nearly 68 percent of the 4,549 claims filed between July 1, 2008 and February 28, 2010 were issued awards.<sup>114</sup> The average amount of each award was \$3,550.<sup>115</sup>

Although NCVCS provides some financial relief, the amount awarded to each successful claimant is minimal as it barely covers the average cost of an inpatient visit for a firearm assault injury.

##### **a. Homeowners Insurance**

In many instances, the primary compensation for a shooting victim is through the assailant’s homeowner’s insurance policy.<sup>116</sup> Homeowners insurance is designed to cover events that cause damage to property and to protect the homeowners against liability for accidents that injure other people or damage their property.<sup>117</sup> Specifically, homeowners insurance provides personal liability coverage in the event a policyholder or a member of the policyholder’s household is legally responsible for injuring another and covers medical expenses for individuals accidentally injured on the homeowner’s property.<sup>118</sup> For example, if a neighbor’s child is injured while playing with a firearm in the home, the homeowners’ insurance may pay for the necessary medical expenses. Some homeowners policies include “firearms clauses” that specifically provide liability coverage for death or bodily injury or damage to property caused by the accidental discharge of firearms.<sup>119</sup>

However, many restrictions apply to this type of coverage. Homeowner’s insurance does not apply to injuries sustained by the homeowner or those that reside in the household.<sup>120</sup> Thus, if the policyholder’s child is injured by the accidental discharge of a firearm, homeowner’s insurance would not cover necessary medical expenses. Additionally and not surprisingly,

homeowner's insurance policies exclude coverage of intentional acts.<sup>121</sup> Therefore, if a policyholder intentionally shoots and injures a guest, damages and medical payments will not be covered by the insurance company.<sup>122</sup> In North Carolina, a homeowner insurance policy will typically cover the *accidental discharge* of a firearm causing injury, but will not cover the *intentional* shooting of a guest.<sup>123</sup>

The Court of Appeals of North Carolina has addressed insurance coverage of intentional acts on several occasions. In *North Carolina Farm Bureau Mutual Insurance Company v. Allen*, the court found that intentionally firing a handgun at the defendant, in close proximity, "was sufficiently certain to cause injury that [the policy holder] should have expected such injury to occur."<sup>124</sup> The insurance policy specifically excluded coverage for injury or property damage "which [was] intended by or which may reasonably be expected to result from intentional acts . . ."<sup>125</sup> Accordingly, Farm Bureau Insurance was not required to compensate the injured party.<sup>126</sup>

Generally, for the exclusion to apply, the intentional act *and* the resulting injury must be intentional. Thus, an unintended injury resulting from an intentional act is a covered "occurrence" or "accident" under homeowners insurance policies.<sup>127</sup> In *North Carolina Farm Bureau Mutual Insurance Company v. Stox*, the court concluded that "where the term "accident" is not specifically defined in an insurance policy, that term *does* include injury resulting from an intentional act, if the injury is not intentional or substantially certain to be the result of the intentional act."<sup>128</sup> In *Stox*, the injured party, Louise Stox, was pushed by Gordon Owens, who was covered by a policy of homeowners liability insurance issued by Farm Bureau. As a result of the fall, Stox suffered from a severely fractured arm. The policy provided coverage for "bodily injury . . . caused by an occurrence."<sup>129</sup> While "occurrence" was defined as "an accident, including exposure to conditions, which results, during the policy period, in . . . bodily injury," the term "accident" was not defined anywhere in the policy.<sup>130</sup> The court found that, while Owens' intentionally pushed Stox, the resulting injuries were unintended, and therefore were covered under the policy as an "occurrence" or "accident."<sup>131</sup> The likely conclusion is that a policyholder's homeowners insurance policy will cover unintended injuries resulting from the intentional firing of a gun. Indeed, in *Miller v. Nationwide Mutual Insurance Company*, the Court of Appeals addressed this very issue. In *Miller*, the policyholder—Madison Powell—fired a gun at a stop sign near the plaintiffs' home.<sup>132</sup> Although the bullet missed the stop sign, it went through the plaintiff children's upstairs bedroom, breaking an overhead light fixture and causing plaintiff to suffer from post-traumatic stress disorder.<sup>133</sup> The court in *Miller* cited *Stox*, concluding that because Powell did not intend to shoot at the plaintiffs' home or cause damage to the home or injury to the plaintiffs, the incident constituted an accident covered by Powell's homeowner's policy.<sup>134</sup>

Additionally, in North Carolina, homeowners personal liability insurance typically covers injuries whether they occur at or away from the home. Thus, if a homeowner accidentally shoots a firearm, away from the home, thereby causing injury to another or damage to real or personal property, the incident would be covered by the homeowner's policy. In *Miller v. Mutual Insurance Company*, the policyholder, aiming at a stop sign, fired a shot into plaintiff's daughter's room.<sup>135</sup> The Court of Appeals viewed the incident as an "accident" and was thereby covered under the insured's homeowner's liability insurance policy.<sup>136</sup> Similarly, in *State Capital Insurance v. Nationwide Mutual Insurance Company*, the question before the North

Carolina Supreme Court was whether liability for injuries sustained by a third party, when a rifle that accidentally discharged while being removed from a motor vehicle by the policy holder, was covered by the insured's homeowners liability insurance policy.<sup>137</sup> As in *Miller*, the court held that coverage was provided by the policyholder's homeowners liability insurance policy.<sup>138</sup>

## **b. Automobile Insurance**

Automobile insurance may also provide coverage for injuries resulting from the misuse of firearms. For automobile liability insurance to provide coverage for injuries resulting from shootings, (1) "the vehicle must have been regularly used to transport the firearm" and (2) "the discharge of the firearm must have been the result of negligent, unintentional conduct."<sup>139</sup>

In *State Capital Insurance Company v. Nationwide Mutual Insurance Company*, the policyholder, Howard Anderson, accidentally injured Milton McKinnon when Anderson's rifle misfired as Anderson attempted to take it out of his vehicle.<sup>140</sup> A typical automobile liability policy insures the policyholder against loss from the liability imposed by law "for damages arising out of the ownership, maintenance or use of such motor vehicle."<sup>141</sup> "The test for determining whether a liability policy provides coverage for an accident is not whether the automobile was a proximate cause of the accident. Instead, the test is whether there is a causal connection between the use of the automobile and the accident."<sup>142</sup> In *State Capital*, the court concluded that a causal connection did exist between the use of the automobile, the truck, and injuries to McKinnon.<sup>143</sup> Because cars are often used to transport firearms and to unload and load items, the injury causing the incident was a consequence of the use of the vehicle.

Alternatively, in *Nationwide Mutual Insurance Company v. Knight*, the Court of Appeals also ruled that an injury caused by shots fired from the policyholder's moving vehicle did *not* constitute an accident arising out the ownership, maintenance, or use of the vehicle.<sup>144</sup> In *Knight*, a three-year-old child was severely injured when he was shot at by the driver of another vehicle.<sup>145</sup> Because there was no causal relationship between the ownership, maintenance and use of the policyholder's moving vehicle, and the injury sustained by the child as a result of gunshots fired from that moving automobile, the insurer was not required to indemnify the policyholder.<sup>146</sup>

In situations where the automobile itself was used as a dangerous instrumentality, courts typically find the insurer liable. When a policy holder is "intentionally injured or killed by another, and the mishap is, as to him, unforeseen and not the result of his own misconduct, the general rule is that the injury or death is accidentally sustained within the meaning of the ordinary accident insurance policy, and the insurer is liable therefore [sic] in the absence of a policy provision excluding such liability."<sup>147</sup> Despite this explicit rule, courts have differed in its application. Whether an assault is an "accident" within the purview of automobile liability insurance policies depends upon "whether the court looked at the occurrence from the viewpoint of the aggressor or from that of the injured party."<sup>148</sup> The Supreme Court has acknowledged that the primary purpose of mandatory automobile liability insurance is to compensate victims who have been injured by careless motorists.<sup>149</sup> Accordingly, the court has noted that the victim's recovery should *not* depend upon "whether the conduct of its insured was intentional or negligent."<sup>150</sup> In *Nationwide Mutual Insurance Company v. Roberts*, the Supreme Court stated that to accomplish the goal of the law, "the perspective . . . must be that of the victim and not that

of the aggressor.”<sup>151</sup> The court concluded that injuries intentionally inflicted by the use of a motor vehicle are covered under automobile liability insurance policies.<sup>152</sup>

### **c. NRA Insurance**

All National Rifle Association (NRA) members are eligible to receive \$2,500 ArmsCare Firearm Insurance at no cost.<sup>153</sup> Under this insurance plan, guns and accessories are protected from direct physical loss, damage, fire, and theft.<sup>154</sup> Members, whose firearms and accessories exceed the \$2,500 coverage limit, can purchase additional firearms insurance; rates for this plan start at \$65 per year.<sup>155</sup> Members can also purchase additional liability protection for an additional cost. NRA’s Personal Firearms Liability Insurance protects members against liability suits up to \$1 million for any injuries and property damage that member unintentionally causes.<sup>156</sup> However, coverage is limited to incidents that occur while hunting, trapping, at shooting competitions, or at private shooting ranges.<sup>157</sup> The premiums for NRA-endorsed liability insurance are fairly reasonable—premiums range from a \$47 annual fee for suits up to \$100,000 to a \$200 annual fee for suits up to \$1 million.<sup>158</sup>

Neither homeowners insurance, automobile insurance, nor NRA-endorsed insurance provide coverage for personal injury and property damage caused by *intentional* acts. For families of victims who were intentionally gunned down, limited recourse is available for financial compensation. A state sponsored mandatory liability insurance scheme could potentially fill this gap in coverage. Such a scheme would enable victims of gun violence who were intentionally injured to receive compensation for medical expenses, lost wages, and pain and suffering.

## **V. REGULATING INSURANCE IN NORTH CAROLINA**

The regulation of insurance is a function of the state rather than the federal government. The North Carolina Department of Insurance (DOI) is responsible for the licensing and supervision of insurance companies, and is charged by the General Assembly with the execution of laws relating to insurance.<sup>159</sup> The chief officer of the DOI, the Commissioner of Insurance (Commissioner), is responsible for ensuring that the insurance laws are faithfully executed.<sup>160</sup> To that end, the Commissioner is also authorized to adopt rules to enforce insurance laws.<sup>161</sup>

Before a domestic insurance company can issue policies, the Commissioner must have found the insurer to have complied with North Carolina laws and issued a certificate authorizing the insurer to issue policies.<sup>162</sup> Only certain kinds of insurance may be offered in North Carolina; those that may be authorized in the state, include, among others, personal injury liability insurance, motor vehicle liability insurance, and miscellaneous insurance, defined as “insurance against any other casualty authorized by the charter of the company . . . which is a proper subject of insurance.”<sup>163</sup>

### **a. Regulating Automobile Insurance in North Carolina**

North Carolina law requires proof of financial responsibility as a prerequisite to owning and operating a motor vehicle in the state. The Financial Responsibility Act is written into every motor vehicle policy and it requires all automobiles in the state to be covered by an automobile

liability insurance policy.<sup>164</sup> It was designed to compensate innocent motorists for property losses and personal injuries. Policyholders may also opt for coverage for physical damage to the motor vehicle, medical payments for injuries sustained while occupying the covered automobile, and uninsured and underinsured motorists.<sup>165</sup>

Motor vehicle insurance rates are determined by several parties. The North Carolina Rate Bureau, a state agency independent of DOI, begins the rate-setting process by proposing rates for automobile, personal property and workers compensation.<sup>166</sup> The Rate Bureau establishes a rate plan that all insurance companies must use as the basis for their rates. The Rate Bureau and the Commissioner often use the services of out-of-state statistical organizations that collect and furnish loss or expense statistics in an advisory capacity. Four other parties play major roles in setting North Carolina's automobile rates: the Commissioner, the court system, the Reinsurance Facility, and private insurers. Once the Rate Bureau develops a rate plan, taking into account driving history, type and use of automobile, and geographic location, the insurance Commissioner reviews it. The Commissioner is charged with determining whether the premium rates charged are "excessive, inadequate, unfairly discriminatory or are otherwise not in the public interest."<sup>167</sup> If the Commissioner requests changes to the rate plan, as is most often the case, he or she then holds public hearings, unless the Commissioner settles with the members of the Rate Bureau before the hearings take place.<sup>168</sup> If, after the hearings, the Rate Bureau does not like the decision of the Commissioner, it can appeal the decision to the North Carolina Court of Appeals.<sup>169</sup> Settlements between the Commissioner and the Rate Bureau, conducted without public involvement, largely create the rate plan ultimately approved.<sup>170</sup> However, even these settlements do not result in the final rates. The rates that policyholders actually pay come from "rate deviations" that insurance providers file.<sup>171</sup> While insurers can charge *less* than the recommended rates by the Bureau, the Commissioner has yet to approve of upward deviations that would result in a higher rate than that assigned by the Bureau.<sup>172</sup>

The North Carolina Reinsurance Facility (Facility) is another key player in determining motor vehicle insurance rates for high-risk policyholders. All fifty states and the District of Columbia have residual market laws to provide insurance coverage for high-risk drivers unable to secure insurance in the private market. North Carolina has the largest state reinsurance facility in the nation.<sup>173</sup> In North Carolina, every insurance company licensed to write motor vehicle insurance in the state is required to participate in the Reinsurance Facility—"a statutory reinsurance pool for the high-risk driver of motor vehicles."<sup>174</sup> The Facility allows any insurance company with doubts about the profitability of any policy to transfer it to the Facility, where the rates, on average, are 35 percent higher than voluntary rates offered by private insurers. The cost to fund this insurance pool is borne by other North Carolina drivers—every insured driver in the state pays a hidden tax of about 6 percent.<sup>175</sup> The Facility uses the tax to subsidize car insurance policies for high-risk drivers.<sup>176</sup> Thus, the tax paid by North Carolinians is used to make up the difference between the subsidized rate and the amount that the risky drivers should pay.<sup>177</sup>

#### **b. Authority of the Commissioner of Insurance**

Article 2 of Chapter 58 of the North Carolina General Statute lays out the powers and duties of the commissioner of insurance. Once the General Assembly has enacted legislation pertaining to the regulation of a particular insurance scheme, the Commissioner is authorized to adopt rules in order to "enforce, carry out and make effective the provisions of those laws." The

Commissioner has rulemaking authority in the execution of a specific law if its provisions are vague or otherwise unclear.<sup>178</sup> The General Assembly may vest broad review powers in the Commissioner of Insurance.<sup>179</sup> For example, the only power the Commissioner has to fix insurance rates is that which the General Assembly delegated to him. The General Assembly vested broad review powers in the Commissioner to ensure that rates not be “unreasonable, inadequate, unfairly discriminatory nor harmful to the public interest.”<sup>180</sup>

Any issue as to the existence of authority in the Department of Insurance is one of statutory construction.<sup>181</sup> Thus, the General Assembly may confer upon the Commissioner additional powers for the regulation of gun liability insurance. Alternatively, the General Assembly, itself, may choose to enact detailed rules for the implementation of an insurance requirement, thereby diminishing the Commissioners’ rulemaking authority.

The Department of Insurance may interpret gun liability insurance legislation to include intentional acts by the insured, but only if a statute or some other law “specifically authorizes the agency to do so.”<sup>182</sup> The more likely scenario is for the legislature to specify which acts are and are not covered under a particular insurance scheme.

However, while the General Assembly is allowed to specify which acts ought to be covered under a certain scheme, it is not permitted to compel insurance companies to offer gun liability insurance to its policyholders; insurance providers may not be penalized for refusing to offer specific types of insurance. In 1975, the General Assembly passed “An Act to Establish a Health Care Liability Reinsurance Exchange,” (“Act”) which required all insurers licensed in the state to issue general liability policies to supply health care liability insurance at their own risk.<sup>183</sup> The Commissioner of Insurance issued several orders to enforce the provisions of the Act.<sup>184</sup> Insurers in North Carolina brought forth several proceedings against the Commissioner, demanding judicial review of the Commissioner’s orders and that the Act be declared unconstitutional and void.<sup>185</sup> In *Hartford Accident & Indemnity Company v. Ingram*, the Supreme Court of North Carolina found the Act to be unconstitutional.<sup>186</sup> The court held that the General Assembly did not have the power to require insurance companies to offer health care liability insurance or to require companies to “engage in such a business as a condition to its right to continue to carry on an entirely different business for which it is duly licensed by the state and in which it wants to be, and is, engaged.”<sup>187</sup> In holding that the Act violated the due process clause of the Fourteenth Amendment and a state constitutional provision that “no person shall be deprived of his liberty by law of the land,” the Court found that to compel an insurance company, “against its will, to write health care insurance liability insurance for whatever health care provider may see fit to apply to it therefor would subject the company to a risk of a financial disaster.”<sup>188</sup> Thus, while the General Assembly may enact a law mandating that insurers write gun liability insurance, neither the General Assembly nor the Commissioner may enforce it against insurers who choose not to offer it.

## VI. ALTERNATIVES

I analyzed three important policy considerations: (1) whether the insurance mandate should apply to unintentional shootings or unintentional and intentional shootings, (2) whether the insurance mandate should apply to all gun owners or just concealed carry permit holders, and

(3) whether the insurance mandate should apply to all firearms or merely those purchased after the mandate has been enacted.

**a. Insurance Scheme Applies to Unintentional Shootings (Excluding Suicide) v. Unintentional and Intentional Shootings (Excluding Suicide)**

The proposed insurance scheme could cover injuries and deaths resulting from (1) only unintentional shootings or (2) unintentional and intentional shootings.

Under (1), only victims of unintentional shootings will be entitled to benefits. Language commonly found in insurance policies exclude bodily injury or property damage caused intentionally by the insured party. This exclusionary language supports public policy interests against shielding a person from the financial and criminal consequences of intentional acts he or she commits.<sup>189</sup> By placing financial responsibility on the party responsible rather than on the insurance company, “the public partially achieves its interests of punishing and deterring those acting against societal interests.”<sup>190</sup> Other, albeit less important, public policy goals are also met by limiting liability insurance to unintentional acts. Exclusionary language in liability insurance policies “puts insureds on notice that an otherwise compensable loss will not be covered if the insured intentionally commits an act that causes injury.”<sup>191</sup>

Under (2), eligibility of benefits will not depend on the nature of the occurrence where the victim was injured or killed. If a victim is injured or killed by any means other than suicide, he or she will be covered.

Though exclusionary language in liability insurance policies satisfies some public policy goals, others are not met. By denying coverage for intentional acts, victims may never be compensated for their injuries, especially if the policyholder lacks adequate personal financial resources. Additionally, “the goal of spreading the risk and cost of injuries to all insurance policyholders is not realized by excluding intentional acts from insurance coverage.”<sup>192</sup>

Currently, the only methods by which victims of intentional acts may receive compensation are through victims compensation programs or by initiating a civil suit against the perpetrator. (See Appendix A). An insurance mandate that provides coverage for unintentional *and* intentional acts would provide victims of intentional acts additional means to obtain compensation.

In 2011, the 20 unintentional firearm deaths accounted for only 1.1 percent of all manners and methods of violent death in North Carolina.<sup>193</sup> That same year, there were 519 homicides, accounting for nearly 29 percent of all manners and methods of violent death in North Carolina.<sup>194</sup> The relative difference in the rate of homicide and accidental shootings is somewhat smaller for nonfatal injuries, but still large. Thus, a much greater portion of gun violence victims would be covered under a gun liability scheme that provides coverage for both unintentional and assault injuries and deaths than for unintentional shootings alone. Hence, public policy goals supporting coverage for intentional acts may outweigh policy interests in excluding coverage.

As with life insurance policies, the proposed gun liability scheme will not provide coverage for injuries, fatal or nonfatal, that are self-inflicted. Permitting beneficiaries to collect

insurance benefits after a policyholder's suicide or attempted suicide encourages suicide and is thus contrary to the public interest.

**b. Insurance Scheme Applies to Carry Conceal Permit Holders v. All Gun Owners**

The proposed gun liability insurance scheme could be applied either to (1) concealed carry permit holders or (2) all gun owners. Under (1), only concealed-carry permit holders would be required to obtain liability insurance for their firearms.

Between December 1, 1995 and June 30, 2011, sheriffs across North Carolina issued 228,072 concealed carry permits.<sup>195</sup> Concealed permit holders are permitted to take their weapons into public places. As of October 1, 2013, North Carolina permit holders are also allowed to bring their handguns into bars and restaurants, and public parks.<sup>196</sup> As the areas where permit holders can bring their firearms expand, the risks to the community increase. For example, permit holders often need to leave their firearms in cars or other less protected areas (when entering a place or building that prohibits firearms) thereby encouraging theft and potential misuse.<sup>197</sup> Concealed weapons create an environment where more innocent bystanders could get shot during altercations. Unlike individuals who acquire firearms for home-defense or for sport, concealed carry holders expose a greater number of people to the dangers of firearms.

Alternatively, instead of requiring merely concealed carry permit holders to acquire liability insurance, all firearm owners in North Carolina could be required to obtain insurance for their weapons. Although a precise estimate of how many gun owners reside in North Carolina is unknown, the National Instant Criminal Background Check System conducted 574,662 firearm background checks in North Carolina in 2013 alone.<sup>198</sup> Because federal law does not require background checks for private gun sales, it is likely that far more firearms are in circulation than NICS indicates.

**c. Insurance Scheme Applies to Gun Purchases After Date of Enactment v. All Guns**

The proposed gun liability insurance scheme could be applied either to (1) all gun purchases after the scheme is enacted or (2) to all firearms. Under (1), firearm owners would be required to show proof of insurance at the time of sale. If a potential buyer fails to demonstrate proof of gun liability insurance, he or she will be prohibited from purchasing the firearm. Firearms purchased before the date of enactment would not be required to be insured.

Alternatively, under (2), the insurance scheme would apply retroactively. North Carolina gun owners would be required to maintain insurance for all firearms purchased before and after the date of enactment. A penalty would be imposed on gun owners who fail to acquire liability insurance for their firearms.

## VII. CRITERIA

### **a. Cost benefit analysis: Maximize compensation to victims of gun violence and reduce gun violence and minimize administrative costs of the insurance mandate.**

One of the primary goals of gun liability insurance is to provide financial protection against bodily injury and death sustained by firearms and against any liability that could also arise therefrom. Although victims of gun violence currently have some means for compensation, such as homeowners insurance and victims compensations programs, they are insufficient. Thus, the insurance scheme should attempt to expand monetary compensation for victims of gun violence and their families.

A secondary goal of mandatory gun liability insurance is to reduce the risks accompanied with firearms. On the one hand, the cost of acquiring insurance could deter some individuals from purchasing firearms. At the very least, high-risk firearm owners could be deterred as premiums would presumably increase for individuals who own multiple firearms or fail to properly store their firearms.

The administrative costs to insurers and the costs to gun owners must also be taken into consideration before this mandate can be implemented. A policy option will meet this criterion if the benefits associated with maximizing compensation to gun violence victims and reducing gun violence is greater than the costs to insurers and gun owners.

### **b. Maximize political feasibility**

Any policy change involving firearms is likely to generate some resistance from gun owners. Proposals to implement gun liability schemes have been introduced in several states; however, all bills have failed to progress. (See Table 3). Political feasibility in this case refers to the extent to which policymakers, insurance companies, and the general public would be willing to accept and support gun liability insurance. Any successful mandate must be palatable enough to be passed by the North Carolina General Assembly and approved by the Governor and general public. Because Republicans have control of both houses in the North Carolina General Assembly and the governorship, a successful proposal must have some Republican support.

### **c. Constitutionality**

In *District of Columbia v. Heller*, the Supreme Court ruled that the Second Amendment confers an individual right to possess a firearm for traditionally lawful purposes, such as self-defense within the home.<sup>199</sup> In *Heller*, the Court asserted that total ban on handguns in the home was unconstitutional. However, the Court also explicitly noted that the right to bear arms is not unlimited: “[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”<sup>200</sup> By calling these public safety exceptions as “presumptively lawful,”<sup>201</sup> the Court in *Heller* appeared to reject strict scrutiny, which presumes that challenged laws are unconstitutional.<sup>202</sup>

Despite the failure of the Supreme Court to provide adequate guidance to lower courts on resolving gun control controversies, lower courts have almost always upheld the constitutionality of gun laws. Since *Heller*, federal and state courts have ruled on Second Amendment challenges in over 500 cases, with the government successfully defending gun regulations in nearly every case.<sup>203</sup> Lower federal courts have attempted to provide a framework for evaluating the constitutionality of firearm regulations:

Some regulations, primarily those that are “longstanding,” are presumed not to infringe the right protected by the Second Amendment. Regulations that severely restrict the core right of self defense are subject to “strict scrutiny,” meaning that they will not be upheld unless they are narrowly tailored to promote public safety without putting unnecessary burdens on individual citizens. Regulations that do not severely restrict the core right of self-defense are subject to “intermediate scrutiny,” meaning that the government must demonstrate that the regulation is well suited to advance the public interest in preventing the misuse of guns.<sup>204</sup>

In the wake of the *Heller* decision, the District of Columbia applied a form of intermediate scrutiny that was “highly deferential to legislative determinations”<sup>205</sup> and upheld several provisions, including detailed registration requirements, which mandated applicants to submit to fingerprinting, firearms training, and a vision test.<sup>206</sup> Indeed, the emerging trend is toward intermediate scrutiny, especially for cases where the challenged law falls outside of the core right identified in *Heller*.

Thus, at the minimum, any gun liability insurance proposal should “advance the public interest in preventing the misuse of guns,”<sup>207</sup> thereby minimizing the possibility of infringement on individuals’ Second Amendment right to possess a firearm.

## VIII. ANALYSIS

This section evaluates the strength of each of the policy options discussed in Part VI under each of the criteria in Part VII.

### **a. Insurance Scheme Applies to Unintentional Shootings (Excluding Suicide) v. Unintentional and Intentional Shootings (Excluding Suicide)**

#### **i. Cost-Benefit Analysis**

Unintentional shootings comprise a statistically small fraction of all firearm related injuries and deaths. In 2011, there were roughly 3,053 victims of gun-related assaults and homicides and 500 victims of accidental shootings. (See Table 2). Substantially more gun violence victims would be eligible for compensation if the insurance mandate provided coverage for both intentional and unintentional shootings. (See Appendix A).

As previously discussed, standard homeowners insurance policies typically cover accidental injuries or property damage resulting from firearms. However, injuries sustained by the insured or anyone in the insured’s household are not covered under homeowners insurance policies. (See Appendix A). And, given that nearly 47 percent (national average) of all

unintentional shooting victims are family members,<sup>208</sup> a substantial portion of these victims will not be covered under homeowners insurance since they are likely part of the policyholder's household.

For intentional injuries there is a significantly larger gap in coverage. Unlike unintentional shootings, injuries or property damage sustained by the intentional use of a firearm are not covered under standard homeowners insurance policies. Under homeowners insurance policies, there was no financial recourse for the 3,053 victims of gun-related assaults and homicides in 2011. (See Table 2). Although some victims may have received some monetary relief through the North Carolina Victims Compensations Services, the assistance would have been nominal.

The basic administrative costs of implementing a gun liability insurance scheme include staff costs (e.g. salaries, training), buildings and equipment, information technology maintenance, and utility charges and other operational expenses (e.g., paper, printing material).<sup>209</sup> Insurers generate costs in calculating premiums, processing applications and verifying and investigating claims. It is likely that administrative costs will be higher if both unintentional and intentional shootings are covered, than if only unintentional shootings are covered. The total number of claims, and thus the total incurred losses to insurers (which will be passed onto policyholders) is likely to be larger if the mandate provides coverage for unintentional and intentional shootings, suggesting that administrative costs will be higher under a mandate that covers both types of incidents.

Additionally, the average premium a North Carolina gun owner would have to pay would be higher if the mandate covered unintentional and intentional injuries and deaths. If the same loss to premium ratio for automobile insurance is applied to gun liability insurance (.642),<sup>210</sup> with an average insurance claim of \$30,000 for non-fatal injuries and \$200,000 for fatal injuries, the approximately 1,198,449 North Carolina gun owners would pay \$23.91 if only unintentional injuries and fatalities were covered,<sup>iv</sup> and \$257.62 if both unintentional and intentional injuries and fatalities were covered.<sup>v</sup>

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<sup>iv</sup> To calculate the average premium for gun owners (for unintentional injuries), I first had to estimate the total amount of claims that would be made. A \$30,000 payout for non-fatal injuries and a \$200,000 payout for fatal injuries would result in total insurance claims of \$18,400,000 (((\$200,000 x annual number of fatal unintentional injuries resulting from firearms) + (\$30,000 x annual number of nonfatal injuries resulting from firearms) = (\$200,000 x 20 fatal unintentional injuries resulting from firearms) + (\$30,000 x 480 nonfatal unintentional injuries) = \$18,400,000. If the same loss to premium ratio that is applied to automobile insurance (.642) is applied to gun liability insurance, the premiums for unintentional injuries would total \$28,660,000 (total premiums = total claims ÷ loss to premium ratio = \$18,400,000 ÷ .62 = \$28,660,000). To calculate the average premium for each gun owner, I divided the total amount collected in premiums by the estimated number of gun owners (\$28,660,000 ÷ 1,198,449 = \$23.91).

<sup>v</sup> To calculate the average premium for gun owners (for unintentional and intentional injuries), I first had to estimate the total amount of claims that would be made. A \$30,000 payout for non-fatal injuries and a \$200,000 payout for fatal injuries would result in total insurance claims of \$198,220,000 (((\$200,000 x annual number of fatal intentional and unintentional injuries resulting from firearms) + (\$30,000 x annual number of nonfatal intentional and unintentional injuries resulting from firearms) = (\$200,000 x 539 fatal intentional and unintentional injuries resulting from firearms) + (\$30,000 x 3,014) = \$198,220,000. If the same loss to premium ratio that is applied to automobile insurance (.642) is applied to gun liability insurance, the premiums for intentional and unintentional injuries would total \$308,753,000 (total premiums = total claims ÷ loss to premium ratio = \$198,220,000 ÷ .62 =

To maximize coverage for gun violence victims, the mandate should provide coverage for both unintentional and intentional shooting victims. However, this type of coverage would be significantly more expensive for gun owners than if only unintentional shootings were covered.

ii. Maximize Political Feasibility

Gun liability insurance bills are not popular. Bills requiring firearm liability insurance for gun owners have been introduced in several states, but have faced an uphill battle. (See Table 3). Despite repeated attempts, a gun liability insurance mandate has yet to pass in any state. According to the National Council of State Legislatures, in the past decade, approximately 20 such bills have been turned down at the state level.<sup>211</sup>

<b>Table 3: State Survey, Gun Liability Insurance</b>		
<b>State</b>	<b>Type of Act Covered</b>	<b>Status</b>
<b>Massachusetts</b>	Accidental	Pending
<b>Maryland</b>	Accidental	Died in Judicial Proceedings Committee
<b>New York</b>	Intentional or Accidental	Referred to Insurance Committee
<b>Illinois</b>	Negligent or Willful	Re-referred to Rules Committee
<b>Connecticut</b>	Intentional or Accidental	Died in Insurance Committee
<b>Pennsylvania</b>	Intentional or Negligent, but not Unlawful	Referred to Judiciary Committee
<b>Washington, DC</b>	Negligent or Willful	Referred to the Committee on the Judiciary and Public Safety
<b>North Carolina</b>	Negligent or Willful	Referred to Committee on Rules, Calendar, and Operations

Source: Young Ha and Don Jergler, Gun Liability Insurance Measures Facing Uphill Battle in State Legislatures, Insurance Journal (Apr. 12, 2013), <http://www.insurancejournal.com/news/national/2013/04/12/287975.htm>; H.B. 976, Session 2013 (Nc. 2013), <http://www.ncleg.net/Sessions/2013/Bills/House/PDF/H976v1.pdf>.

An insurance mandate that applies only to unintentional shootings has a far greater likelihood of passage in the General Assembly than one that applies to both intentional shootings and unintentional shootings. Injuries and property damage resulting from criminal acts are explicitly excluded from personal liability policies. Traditionally, “recovery for losses caused by intentional acts of the insured has . . . been thought to be inconsistent with public policy.”<sup>212</sup> Insurance experts argue that proposals that would allow recovery for such losses encourage conduct that is “socially undesirable”<sup>213</sup> and “economically wasteful.”<sup>214</sup>

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\$308,753,000). To calculate the average premium for each gun owner, I divided the total amount collected in premiums by the estimated number of gun owners ( $\$308,753,000 \div 1,198,449 = \$23.91$ ).

The insurance industry has vocally opposed liability insurance for intentional acts. Insurance companies fear the “moral hazard” that gun liability insurance for intentional shootings would create: a shooter who knows (1) that he is indemnified for the damages flowing from intentionally shooting another and (2) that the insurer will have to defend him if he is sued, will have a greater incentive to commit violent acts with firearms.<sup>215</sup> This reasoning makes a major assumption: that without insurance, these wrongdoers would tap into their own financial resources to compensate their victims. Insuring intentional assaults are unlikely to raise the moral hazard problem, given that individuals who engage in criminal conduct will be unable to profit from their intentional behavior. In precluding coverage for intentional acts, the insured can shirk his personal responsibility to pay for the victim’s losses.<sup>216</sup> However, in paying the criminal insured, the insurer, “is actually primarily benefitting the injured accident victim and not the criminal insured, who will likely not have sufficient assets to satisfy a judgment in [favor] of the victim.”<sup>217</sup> Because “assuring compensation to victims remains a principal goal of the [insurance] system,” denying coverage for losses incurred as a result of intentional acts is undesirable.<sup>218</sup>

In 2013, Rep. Carolyn Maloney filed the Firearms Risk Protection Act of 2013, which would require gun owners to acquire liability coverage and to show proof of that coverage when they purchase a gun.<sup>219</sup> In response, the American Insurance Association issued a statement asserting that mandatory liability insurance for intentional acts “misunderstand a fundamental principle of insurance—that it is designed to cover fortuitous, or accidental events; not intentional conduct. Property/casualty insurance does not and cannot cover intentional behavior such as criminal acts.”<sup>220</sup> A spokesperson from the Massachusetts Insurance Federation also expressed concern, stating that “. . . the potential may exist that [mandatory gun ownership liability coverage] would unintentionally or inadvertently encourage poor behavior in terms of gun usage.”<sup>221</sup> However, the insurance industry’s concerns are misguided given that some insurance schemes, specifically automobile insurance is designed to cover intentional acts and protect the victim; the intent of the aggressor has been deemed irrelevant.<sup>222</sup> Thus, automobile insurance will likely indemnify a driver who uses his vehicle as a dangerous instrumentality to intentionally run down a pedestrian or another motorist.<sup>223</sup>

The insurance industry is also opposed to liability insurance for unintentional acts, arguing that homeowners’ insurance policies already protect against accidental damages, making a separate insurance mandate unnecessary. Although offering liability insurance for firearms could be profitable for insurers, the insurance industry fears additional government oversight and regulation of prices.<sup>224</sup>

This mandate is also likely to be unpopular in the General Assembly. For the first time in nearly a century, Republicans took control of both the General Assembly and the Governor’s office. Since taking control, the General Assembly has expanded gun rights laws. For example, Session Law 2013-369 expanded the areas where concealed carry permit-holders could carry firearms. Permit holders can now carry their firearms into restaurants and bars that serve alcohol.<sup>225</sup> The measure also allowed permit holders to carry firearms in parks and parades, and to store weapons in locked vehicles on public school grounds.<sup>226</sup> Although this legislation did face some resistance, it passed 74-42.<sup>227</sup>

In April 2013, Democratic representatives in the House introduced the “Gun Safety Act,” which, among other changes, requires gun owners to acquire gun liability insurance.<sup>228</sup> It has remained in the House Committee on Rules, Calendar, and Operations since April 18, 2013.<sup>229</sup> Given the current political climate in North Carolina, it is unlikely that any mandate that requires gun owners to pay an insurance premium for gun ownership would pass the General Assembly.

### iii. Constitutionality

A law that requires gun owners to obtain liability insurance to cover injuries and property damage from unintentional shootings is likely to pass constitutional muster if it is not prohibitively expensive. In *Heller*, the law in question banned gun owners from possessing handguns in the home. In striking down the law, the Court stated that the ban amounted to a “prohibition of an entire class of ‘arms’” in the home, “where the need for defense of self, family, and property is most acute.”<sup>230</sup> The mandate would not bar any law-abiding North Carolinian from possessing a firearm in the home, or otherwise, nor ban any particular type of firearm. In fact, the mandate would not stop anyone from legally possessing as many firearms as they would like. If a person chooses to accumulate a personal arsenal, then he or she will merely have to pay a higher premium.

In some ways, premiums for gun liability insurance resemble taxes on firearms. In 2013, Cook County, Illinois implemented a \$25-per-gun-tax, called a “violence tax” to help defer the costs of treating gun shot victims in Cook County.<sup>231</sup> Other socially prescribed goods and services, like alcohol and tobacco, are taxed by the federal government. However, unlike the right to bear arms, there is no constitutional right that permits a person to smoke or drink alcohol. Gun rights advocates have expressed concern that gun taxes will “[penalize] law-abiding gun owners for exercising a constitutionally protected civil right.”<sup>232</sup>

Additionally, while the General Assembly can pass a law requiring gun owners to possess liability insurance to provide coverage for unintentional and intentional injuries caused by firearm use and misuse, they may not compel insurance providers to offer such insurance. Penalizing gun owners for not obtaining liability insurance, when no insurance company provides such coverage would be problematic, as it would constitute a de facto ban on gun ownership.

Even if insurance providers offered liability insurance for gun owners, the premiums would have to be affordable; courts might conclude that a mandate that makes it prohibitively expensive to own a gun is unduly burdensome and, therefore, unconstitutional.

## **b. Insurance Scheme Applies to Concealed Carry Permit Holders v. All Gun Owners**

### i. Cost-Benefit Analysis

The benefits of the mandate applying to all gun owners would outweigh the benefits of the mandate applying to only concealed carry permit holders. By the close of 2011, there were more than 240,000 gun owners in North Carolina with a permit to carry a concealed weapon.<sup>233</sup>

No one knows with certainty how many of North Carolina's households own guns or how many guns are in circulation in the State. In 2010, the General Social Survey estimated that approximately 32 percent of households in the United States owned at least one firearm.<sup>234</sup> That same year, there were approximately 3,745,155 households in North Carolina.<sup>235</sup> Thus, at the very minimum, there are 1,198,449 gun owners in North Carolina.<sup>vi</sup>

There is much debate over whether laws that permit individuals to carry concealed weapons reduce crime. However, some evidence does suggest that gun owners who own concealed-carry permits are responsible for fewer gun accidents and assaults than gun owners who do not possess a permit. Over the course of five years (2007-2011), roughly 60 concealed carry permit holders committed a weapon-related assault.<sup>236</sup> In 2011 alone, North Carolina witnessed over 3,000 fatal and nonfatal gun assaults. (See Table 2). Based on these statistics, it is evident that a significant number of gun-related assaults are committed by gun owners who do not possess a concealed carry permit. In order to provide coverage for a greater number of gun violence victims, the mandate should apply to all gun owners and not just gun owners who possess a concealed carry permit.

The costs of providing insurance coverage to all gun owners would be higher than providing coverage for concealed carry permit holders alone. The total number of claims and the average administrative cost per claim is likely to be larger if all gun owners are insured than if only concealed carry permit holders are insured. Given that gun owners who do not possess a concealed carry permit commit a greater number of weapons-related assaults, insurance companies will likely have fewer claims to pay out for permit holders. Accordingly, the costs incurred by insurers and, therefore, policyholders, would be lower if only incidents by concealed carry permit holders were covered.

## ii. Maximize Political Feasibility

Mandating gun liability insurance for concealed-carry permit holders is far more politically feasible than mandating insurance for all gun owners. The privacy concerns inherent in acquiring liability insurance are alleviated for permit holders. North Carolina permit holders are registered with state government agencies. N.C. Gen. Stat. § 14-415.17 (b) requires the sheriff to maintain a list, including the identifying information, of all those issued a permit. After the permit is issued, the sheriff must then send a copy of the permit to the State Bureau of Investigation then makes the list available to law enforcement officers and clerks of court on a statewide system. Because permit holders are already registered with the sheriff and the State Bureau of Investigation, there would be no need for an additional registration system.

Prior to obtaining a concealed carry permit, individuals must go undergo a thorough background check. An applicant must provide the sheriff's office with two sets of fingerprints, successfully complete an approved handgun safety course, and not suffer from any physical or mental infirmity that would prevent the safe handling of a firearm.<sup>237</sup> The sheriff must deny an application for a permit under several circumstances, including if the applicant has ever been

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<sup>vi</sup> To calculate the number of households in North Carolina that owned at least one firearm, I multiplied the number of households in North Carolina with the national percentage of American households that reported owning a firearm.

adjudicated guilty of a felony, is an unlawful user of marijuana or any other controlled substance, or has been discharged from the U.S. armed forces under conditions other than honorable.<sup>238</sup>

Given this thorough background check process, permit holders are generally responsible individuals who have demonstrated their willingness to cooperate with government regulation.<sup>239</sup> Accordingly, insurers will find this class of gun owners far more desirable than gun owners who have not taken a handgun safety course or submit to a background check.

### iii. Constitutionality

An insurance scheme that applies to a limited class of gun owners that is already subject to regulation is more likely to pass constitutional muster than one that applies to all gun owners. In *Heller*, the Court characterized several firearms regulations that are “presumptively lawful,” including “prohibitions on carrying concealed weapons” and “prohibitions on the possessions of firearms by felons and the mentally ill.”<sup>240</sup> State and federal courts across the nation that have heard challenges to concealed carry laws have upheld the regulation in every case.<sup>241</sup> For example, the Maryland Court of Appeals upheld a state law that banned the wearing, carrying, or transporting of a handgun without a permit and when outside of one’s home, and definitively rejected any suggestion that *Heller* applied beyond the home.<sup>242</sup> The Fourth Circuit recently noted, “[A]s we move outside the home, firearms rights have always been more limited, because the public safety interests often outweigh the individual interests in self-defense.”<sup>243</sup>

Additionally, Article I, Section 30, of the North Carolina Constitution provides the same general right to bear arms as the Second Amendment but also clarifies that “[n]othing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.”<sup>244</sup> Requiring gun owners to obtain liability insurance to carry a concealed weapon should certainly be upheld if a blanket ban on carrying concealed weapons is deemed constitutional. Indeed, North Carolinians already pay a nominal fee to acquire a concealed carry permit,<sup>245</sup> an insurance premium is effectively a fee paid by concealed carry permit holders.

The constitutionality of a liability insurance mandate that applies to all gun owners is far less clear. For the mandate to meet an intermediate standard of review, it must be substantially related to an important government interest.<sup>246</sup> The government has a compelling interest in preventing firearm deaths and avoiding serious injuries through an insurance scheme that encourages safe firearm use and discourages risky behavior, such as not storing firearms properly. A mandate that applied to all gun owners could be upheld if the premiums offered to gun owners are not prohibitively expensive so as to effectively make it impossible for individuals to possess firearms without violating the law.

## **c. Insurance Scheme Applies to Gun Purchases After Date of Enactment v. All Guns**

### i. Cost-Benefit Analysis

If the mandate were to apply to firearms purchased after the date of enactment, a significantly small portion of gun injuries and deaths would be covered. Since the goal of the

mandate is to provide compensation to as many gun violence victims as feasible, it should apply to all firearms in circulation in North Carolina. However, insurers are likely to face a greater number of claims, and thus higher costs for processing the claims, under a mandate that provides coverage for all firearms.

## ii. Maximize Political Feasibility

Requiring gun owners to acquire insurance for new firearms purchased after the date of enactment is likely to be more politically feasible than one that requires insurance for all firearms purchased prior to the effective date. Far more individuals will be implicated by this mandate if it applies to all firearms, even those purchased prior to the date of enactment.

In January 2013, SurveyUSA conducted a poll of 500 North Carolina adults. The results indicated that North Carolinians believe that the right of Americans to own firearms (54 percent) is more important than regulating gun ownership (38 percent); widespread gun ownership protects more law abiding citizens from crime (58 percent) than makes society more dangerous (34 percent); stricter enforcement of existing gun control laws (63 percent) is a better way to reduce gun violence than passing stricter laws (32 percent).<sup>247</sup> When asked which one act would be most effective in reducing school shootings, respondents believed that better security (41 percent) and not making guns more difficult to access would be most effective.<sup>248</sup> There was, however, overwhelming support for background checks for gun purchases (94 percent) and the need for the government to offer additional services for mental health problems (81 percent).<sup>249</sup> The poll indicates that although North Carolinians desire some change in the state's gun laws, namely to improve background checks and increased services for the mentally ill, on other issues, they are more resistant to restrictions. Thus, it is unlikely that North Carolinians would support a mandate that would make gun ownership more expensive.

Additionally, it is unlikely that the mandate has the support it needs in the General Assembly. Sen. Phil Berger, the president pro tempore of the Republican-controlled state Senate stated, "I do not see this General Assembly doing anything to impair the rights, the constitutional rights of law-abiding citizens in North Carolina to have access to the things that are guaranteed to them by the Second Amendment."<sup>250</sup> Even if the mandate is deemed to be constitutional, it is unlikely that it will have the political and public support to get passed.

## iii. Constitutionality

An insurance scheme that applies to firearm purchases after date of enactment and one that applies to all firearms would both be deemed constitutional. If the far more restrictive option—a mandate that applies to current firearms—would pass constitutional muster, then a proposal that includes a grandfather clause that exempts current firearms in circulation and applies only to future firearm purchases will surely be constitutional.

Courts have upheld a number of statutes that applied to firearms purchased prior to the date of enactment. For example, on January 15, 2013, New York's Governor, Andrew Cuomo, signed into law the New York Secure Ammunition and Firearms Enforcement Act of 2013 (the SAFE Act).<sup>251</sup> Although New York banned assault weapons in 2000, the SAFE Act expanded the criteria for determining what constitutes an "assault weapon."<sup>252</sup> Subject to certain

exemptions, the possession of such firearms constitutes a Class D felony.<sup>253</sup> While current owners of these weapons were permitted to keep them, they were required to register them, or sell them to firearm dealers or out-of-state buyers.<sup>254</sup> The SAFE Act also made it unlawful to possess all large-capacity magazines that held more than 10 rounds of ammunition, regardless of their date of manufacture.<sup>255</sup> The Act eliminated the “grandfather” clause, which had exempted large-capacity magazines that were manufactured before September 13, 1994.<sup>256</sup> The United States District Court for the Western District of New York upheld both regulations, despite the fact that the regulations applied to current assault weapon owners and large-capacity magazines manufactured years prior to the enactment of the SAFE Act.<sup>257</sup> In applying intermediate scrutiny, the court upheld the regulations and concluded that the provisions did not violate the Second Amendment because there was a substantial link between the SAFE Act’s restrictions on large-capacity magazines and assault weapons, and New York’s compelling interest in public safety.<sup>258</sup>

If the North Carolina General Assembly passed a mandate that would require gun owners to purchase liability insurance for firearms they purchased prior to the date of enactment, it is likely that it would be constitutional. Indeed, this mandate is far less restrictive than the SAFE Act that passed constitutional muster.

## **IX. RECOMMENDATION**

As the analysis indicates, among the criteria discussed, constitutionality is likely the easiest to accomplish. Each policy option would pass constitutional muster since neither option would interfere with an individual’s right to possess firearms for lawful use.

North Carolinians disagree on many of the proposals to regulate gun ownership. Hence, the more expansive policy options—providing coverage for unintentional and intentional shootings, requiring all gun owners to acquire liability insurance, and applying the mandate to all firearms—are likely to generate greater opposition from lawmakers and insurers. Although the narrower, more restrictive options—providing coverage for unintentional shootings only, requiring only concealed carry permit holders to acquire liability insurance, and applying the mandate to firearms purchased after the insurance scheme is enacted—are more politically feasible, they may not necessarily be options that ought to be implemented.

Arguably the most important criterion is whether the benefits of implementing these policy options are greater than the costs. A mandate that provides coverage for a greater number of incidents is preferred, when taking into account injuries and fatalities prevented and victim compensation. The costs to insurers and policyholders are likely to be small in comparison to the value of lives saved and the reduced risks associated with the possibility of losing one’s livelihood as a result of being shot.

Accordingly, I recommend that the gun liability insurance scheme (1) cover injuries and deaths from intentional and unintentional shootings, (2) apply to concealed carry permit holders only, and (3) apply to all firearms, purchased before and after the date of enactment.

## **X. MOVING FORWARD**

The purpose of this paper was to provide a framework to better understand the gap in compensation for gun violence victims and to determine the scope of gun liability insurance. Before any gun liability scheme can be implemented in North Carolina, several more issues need to be resolved. For example, should the mandate provide compensation for pain and suffering, or merely medical expenses and funeral costs? What factors should insurance providers take into account when setting premiums? Should the mandate be modeled after victims compensation programs or the tort system?

## Appendix A

### Methods for Compensation for Victims of Gun Violence

Occurrence	Homeowners Insurance	Motor Vehicle Insurance	NRA Insurance	Civil Liability (Assault & Battery or Negligence)	North Carolina Crimes Victims Compensation	Gun Liability Insurance (Unintentional Injuries and Fatalities)	Gun Liability Insurance (Unintentional and Intentional Injuries and Fatalities)
<b>A accidentally injures B (neighbor) in A's home with a firearm.</b>	Yes	No	No. Liability insurance only covers injuries sustained while hunting, trapping, at shooting competitions, or at private shooting ranges.	Yes	No. The program only provides compensation for victims of criminal acts.	Yes	Yes
<b>A accidentally injures B, a member of A's household, in A's home with a firearm.</b>	No. Injuries sustained by the policyholder or anyone in the policyholder's household are not covered under homeowners insurance.	No	No. Liability insurance only covers injuries sustained while hunting, trapping, at shooting competitions, or at private shooting ranges.	Yes	No. The program only provides compensation for victims of criminal acts.	Yes	Yes
<b>A intentionally shoots and injures B (neighbor) in A's home with a firearm.</b>	No. Intentional acts are not covered under homeowners insurance.	No	No. Liability insurance does not cover intention shootings.	Yes	Yes	No	Yes

<b>A intentionally shoots and injures B, a member of A's household, in A's home with a firearm.</b>	No. Intentional acts are not covered under homeowners insurance. Injuries sustained by the policyholder or anyone in the policyholder's household are not covered under homeowners insurance.	No	No. Liability insurance does not cover intention shootings.	Yes	Yes	No	Yes
<b>A intentionally fires a gun toward B, outside the premises of A's home, not intending to injure B. B is shot and injured.</b>	Yes	No	No. Liability insurance does not cover intention shootings.	Yes	Maybe	Likely. The mandate can be drafted so as to include unintentional injuries caused by intentional acts.	Yes
<b>A accidentally injures B while hunting.</b>	Yes	No	Yes	Yes	No. The program only provides compensation for victims of criminal acts.	Yes	Yes
<b>A intentionally injures B while hunting.</b>	No	No	No. Liability insurance does not cover intention shootings.	Yes	Yes	No	Yes

<b>A's 16-year-old son takes A's rifle and accidentally injures B, while hunting.</b>	Yes	No	No. Liability insurance only applies to the individual who purchased the insurance.	Yes	No. The program only provides compensation for victims of criminal acts.	Yes	Yes
<b>A injures B when rifle accidentally discharges while being removed from A's motor vehicle.</b>	Yes, provided that the use, loading or unloading of the motor vehicle is not the efficient and predominating cause of the injury.	Yes, if the transportation of the firearm was an ordinary and customary use of the motor vehicle.	No. Liability insurance only covers injuries sustained while hunting, trapping, at shooting competitions, or at private shooting ranges.	Yes	No. The program only provides compensation for victims of criminal acts.	Likely. The mandate can be drafted so as to include unintentional injuries caused by intentional acts	Yes

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<sup>2</sup> Andrew Anglemyer et. al., *The Accessibility of Firearms and Risk for Suicide and Homicide Victimization Among Household Members*, 160 ANNALS OF INTERNAL MED. 101, 101 (2014), available at <http://annals.org/article.aspx?articleid=1814426>.

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<sup>5</sup> WISQARS, 2000 – 2010 North Carolina, *Firearm Deaths and Rates per 100,000* (last accessed Apr. 9, 2014).

<sup>6</sup> *Fact Sheet: North Carolina Gun Violence*, CTR. FOR AMERICAN PROGRESS, [http://www.americanprogress.org/wp-content/uploads/2013/03/NC\\_FactSheet.pdf](http://www.americanprogress.org/wp-content/uploads/2013/03/NC_FactSheet.pdf) (last accessed Apr. 3, 2014) (By 2010, 5,187 individuals were killed in combat deaths in the Iraq and Afghanistan wars.).

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*Id.*

<sup>8</sup> *Id.*

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Fact Sheet: North Carolina Gun Violence*, *supra* note 6.

<sup>13</sup> NORTH CAROLINA VIOLENT DEATH REPORTING SYSTEM ANNUAL REPORT 2011, *supra* note 7.

<sup>14</sup> *Id.*

<sup>15</sup> WISQARS, *Compared “2004-2011 NVDRS States: NC; All Victims Death Counts and Rates per 100,000, Abstractor Assigned Mode; Homicide, Spouse/Intimate Partner, Parent, Child, Other Relative; Mechanism: Firearm; All Races, Both Sexes, All Ages” with “2004-2011 NVDRS States: NC; All Victims Death Counts and Rates per 100,000, Abstractor Assigned Mode; Homicide, Mechanism: Firearm; All Races, Both Sexes, All Ages”* (last accessed Apr. 9, 2014).

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

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<sup>95</sup> Hart v. Ivey, 332 N.C. 299, 303, 420 S.E.2d 174, 177 (1992).

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<sup>161</sup> N.C. GEN. STAT. § 58-2-1.

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *State ex rel. Com'r of Ins. v. N. Carolina Rate Bureau*, 300 N.C. 381, 391, 269 S.E.2d 547, 557 (1980).

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Telephone interview with Rose Williams, Legislative Counsel, North Carolina Dep't of Insurance (Mar. 12, 2014).

<sup>179</sup> *State ex rel. Com'r of Ins. v. N. Carolina Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d 547, 561 (1980).

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<sup>181</sup> *Id.* at 399, 269 S.E.2d at 561.

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<sup>183</sup> *Hartford Acc. & Indem. Co. v. Ingram*, 290 N.C. 457, 458, 226 S.E.2d 498, 500 (1976).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 470, 226 S.E.2d at 507.

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