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# Kohl v. Union Insurance Company: Interpretation and Application of the "Arising out of the Use" Clause in an Automobile Liability Insurance Policy

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# *KOHL V. UNION INSURANCE COMPANY:* INTERPRETATION AND APPLICATION OF THE "ARISING OUT OF THE USE" CLAUSE IN AN AUTOMOBILE LIABILITY INSURANCE POLICY

## INTRODUCTION

Few activities in modern society are carried out without the use of an automobile. Although an automobile liability policy is not intended to cover all accidents, auto insurance is frequently the only means of recovery for the plaintiff or the only source of financial insulation for the negligent defendant.[1] As a result, there has been an increase in the volume of litigation regarding the scope of coverage extended by automobile insurance policies.[2]

Among other things, this litigation has focused upon the meaning of the policy terms "arising out of the use" and "using" the insured vehicle.[3] In particular, this language has plagued numerous cases involving the accidental discharge of weapons in or about motor vehicles.[4] The purpose of this article is to discuss the application of the particular facts of *Kohl v. Union Insurance Co.*,[5] to the term "arising out of the use" of a vehicle as contained in the context of the basic automobile insurance agreement, and to explore the logic inherent in the Colorado Supreme Court's decision.

## I. BACKGROUND

### A. *History and Interpretation of the Colorado Auto Accident Reparations Act*

In 1973, the Colorado State General Assembly passed the "Colorado Auto Accident Reparations Act."[6] The General Assembly declared that the purpose of this Act was to "avoid inadequate compensation to victims of automobile accidents; to require registrants of motor vehicles . . . to procure insurance covering legal liability arising out of ownership or use of such vehicles and also providing benefits to persons occupying such vehicles and to persons injured in accidents involving such vehicles."[7] Accordingly, this Act defines the minimal coverage required of

1. Sayre, *Coverage Problems Relating to the Policy Terms "Arising Out Of The Use Of" and "Using" A Vehicle*, 36 INS. COUNS. J. 253 (1969).
2. *Id.*
3. *Id.*
4. Cameron Mutual Ins. Co. v. Ward, 599 S.W.2d 13, 14 (Mo. Ct. App. 1980); *see generally* Annotation, *Automobile Liability Insurance-Risks*, 89 A.L.R.2d 150 (1963) (analyzing cases in which courts have attempted to construe the "arising out of the ownership, maintenance or use" clause to determine whether an accident was within the coverage provision of an automobile liability policy).
5. 731 P.2d 134 (Colo. 1986).
6. Colorado Auto Accident Reparations Act, COLO. REV. STAT. §§ 10-4-701 to -720. (1973 & Supp. 1985).
7. *Id.* at § 10-4-702.

all automobile liability policies. The Act demands that insurers provide coverage for damages "arising out of the use of the motor vehicle."[8] Many automobile insurance policies contain language similar to the "arising out of the use" clause. Consequently, this terminology has become standardized in the automobile insurance industry[9] and insurance contracts should be construed in accordance with this custom or trade usage.[10] Furthermore, when confronted with statutory authority that automobile insurance coverage is extended to accidents "arising out of the ownership, maintenance or use of a motor vehicle," a complying policy must provide for legal liability coverage in light of these statutory requirements.[11] Thus, by operation of law, the minimal statutory requirements must be read into all automobile insurance contracts.[12]

B. *Standard Interpretations Given to the "Arising Out of the Use" Clause*

When the language of an insurance contract is susceptible to different interpretations, a liberal interpretation that favors the insured will be preferred.[13] Consequently, the inherent ambiguity in the phrase "arising out of the use," has been construed to be a broad, comprehensive term meaning "originating from," "growing out of," or "flowing from,"[14] the use of the automobile. This is a more expansive interpretation than the words "caused by."[15] The "arising out of the use" clause, therefore, is intended to afford broad coverage to protect the

8. *Id.* at § 10-4-706(1)(a); *see also* COLO. REV. STAT. § 42-7-413(1)(c) (1973 & Supp. 1985). This statutory provision similarly states: "The policy of liability insurance shall insure every such person on account of the maintenance, use, or operation of the motor vehicle . . . against loss from the liability imposed by law; for damages, . . . arising from such maintenance, use, or operation . . . ."

9. National Merchandise Co. v. United Serv. Auto. Ass'n, 400 So. 2d 526, 531 (Fla. Dist. Ct. App. 1981). In *National*, an automobile insurance policy explicitly provided coverage for "[B]odily injury or property damage for which any covered person becomes legally responsible because of an automobile accident." *Id.* at 529. Acknowledging that the Florida statute dealing with insurance extended automobile liability coverage to accidents "arising out of the ownership, maintenance or use of a motor vehicle," the court stated "[t]he law in existence at the time of the making of a contract forms a part of that contract, as if it were expressly referred to in its terms." *Id.* at 531. Therefore, the court concluded that the term "auto accident" must be construed to provide coverage for accidents "arising out of the ownership, maintenance or use of a motor vehicle." *Id.* at 533.

10. *Id.* at 531; *see also* 13 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 7388 at 189 (1976) which states: "[U]sage of trade which is so well settled and generally known that all persons engaged in such trade may be considered as contracting with reference to it, has been regarded as forming a part of a contract of insurance entered into to protect risks in such trade."

11. *National*, 400 So. 2d at 531; *see* Trinity Universal Ins. Co. v. Hall, 690 P.2d 227, 229 (Colo. 1984).

12. *See supra* notes 8-11 and accompanying text.

13. *E.g.*, American Liberty Ins. Co. v. Soules, 288 Ala. 163, 169, 258 So. 2d 872, 878 (1972). *See generally* 7 AM. JUR. 2D *Automobile Insurance* §§ 1-4 (1980). A basic rule of contracts is that when there is doubt as the meaning of a written agreement, it should be interpreted against the party who has drafted it. *Id.* § 3, at 447.

14. *E.g.*, National Union Fire Ins. Co. v. Bruecks, 179 Neb. 642, 649, 139 N.W.2d 821, 826 (1966); Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 19, 234 S.E.2d 206, 210 (1977).

15. *E.g.*, *Reliance*, 33 N.C. App. at 19, 234 S.E.2d at 210; Note, *Construction of the Clause "Arising Out of the Use of" in an Automobile Liability Insurance Policy*, 45 NEB. L. REV. 811 (1966) [hereinafter Note, *Construction*].

insured against liability for damages resulting from acts done "in connection with," or "incident to" the use of a vehicle.[16] There must, however, be some degree of causal relation or connection between the injury and the use of the vehicle because the parties to an automobile liability policy do not contemplate a general liability contract.[17]

Generally, "but for" causation is enough to establish the required degree of causal relation or connection.[18] Because coverage is extended if an accident would not have occurred but for the use of the vehicle,[19] the "arising out of the use" clause does not require the vehicle to be, in the strict legal sense, a proximate cause of the injury.[20] Rather, the events giving rise to the claim must merely "arise out of," and be "related to," the vehicle's use.[21] Such "use" of the automobile must arise out of the inherent nature of the vehicle,[22] and the "use" may not be one which is foreign to the vehicle's inherent purpose.[23] An injury arises out of the use of the automobile if it flows from a natural and reasonable consequence of the use of the vehicle, even if the use is not foreseen or expected.[24] The injury does not arise out of the use of an automobile if it was directly caused by some independent act totally remote from the use of the vehicle.[25]

Unlike the "arising out of the use" clause, the specific term "use" has defied precise construction and definition.[26] Due to its inherent ambiguity, it has been described as a general catch-all term.[27] Use has

16. Note, *Construction, supra* note 15, at 811.

17. Sayre, *supra* note 1, at 253. *See generally* 12 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 45:56 (1981) (describing the necessity of a causal relationship).

18. *E.g.*, Norgaard v. Nodak Mut. Ins. Co., 201 N.W.2d 871, 875 (N.D. 1972) (quoting 1 R. LONG, LAW OF LIABILITY INSURANCE § 1.22, at 1-57 (1987)).

19. *See id.*

20. *See, e.g.*, Titan Constr. Co. v. Nolf, 183 Colo. 188, 194, 515 P.2d 1123, 1126 (1973). The court explained:

> The question is not one in the field of torts of proximate cause of the accident, but one in the field of contracts of coverage under the wording of an insurance contract. While there must be a causal relationship between the insured use, . . . and the accident, the question is not whether the insured [vehicle] was the cause of the accident.

*Id.* (quoting from St. Paul Mercury Ins. Co. v. Huitt, 336 F.2d 37 (6th Cir. 1964)). *See generally* 1 R. LONG, *supra* note 18, at § 1.24 (denoting the effect of the "arising out of the ownership, maintenance or use" phrase).

21. *E.g.*, Sayre, *supra* note 1, at 254. *See generally* 7 AM. JUR. 2D, *supra* note 13, § 194, at 700-04 (illustrating what are accidents or injuries "arising out of" ownership, maintenance, or use of the insured automobile).

22. *E.g.*, Azar v. Employers Casualty Co., 178 Colo. 58, 61, 495 P.2d 554, 555 (1972).

23. *Id.* at 61, 495 P.2d at 555. *See generally* 6B J. APPLEMAN, *supra* note 10, § 4316, at 341 (describing the general construction of the specific term "use").

24. Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 19, 234 S.E.2d 206, 210-11 (1977).

25. For example, in Raines v. Insurance Co., 9 N.C. App. 27, 175 S.E.2d 299 (1970), an occupant, while sitting inside the parked vehicle, was playing with a firearm which accidentally discharged, killing the victim who was also sitting within the vehicle. The issue was whether the victims' death was covered by an accident arising out of the use of the parked vehicle. The court held that there was no causal connection between the discharge of the firearm and the "use" of the vehicle. Thus, the shooting was the result of a "cause wholly disassociated" from the use of the vehicle. For further examples of similar holdings, see *infra* notes 39-43 and accompanying text.

26. Annotation, *supra* note 4, § 3, at 153.

27. *E.g.*, Travelers Ins. Co. v. Aetna Casualty & Surety Co., 491 S.W.2d 363, 365

been construed to extend to any utilization of the insured vehicle in a manner intended or contemplated by the insured.[28]

A question frequently arising is whether the "use" of a vehicle includes the physical process of loading and unloading property from the automobile absent any provision or exclusion in the automobile insurance policy. When the insurance contract specifically defines "use" as including loading and unloading, the policy is understood to provide indemnification for accidents or injuries that occur during loading and unloading.[29] Furthermore, when a policy specifically fails to mention loading and unloading, "use" has been given a broad interpretation that includes these terms.[30]

When interpreting the "loading and unloading" clause, courts have developed doctrines which define the scope of coverage.[31] The majority of jurisdictions, including Colorado,[32] have adopted the "completed operation" doctrine.[33] This test contemplates that "loading commences when the items to be transported leave their original location, and, conversely, that unloading does not cease until they have actually reached their final destination."[34] Consequently, this doctrine embraces all activities necessary to effect a completed delivery.[35] Thus, an accident may "arise out of the use" of a vehicle when the accident occurred as a result of activities related to the loading or unloading of the vehicle.[36]

Although there has been general agreement regarding the interpretation given to the "arising out of the use" clause, a problem arises in its

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(Tenn. 1973). *See generally* Annotation, *supra* note 4, § 9(h), at 171 (citing cases holding that the term "use" in the "ownership, maintenance or use" clause included the activity of unloading the vehicle).

28. *Travelers*, 491 S.W.2d at 365. *See generally* Annotation, *supra* note 4, § 9(h), at 171.

29. *E.g.*, Morari v. Atlantic Mut. Fire Ins. Co., 105 Ariz. 537, 538, 468 P.2d 564, 565 (1970); Sayre, *supra* note 1, at 256.

30. *E.g.*, Allstate Ins. Co. v. Truck Exch., 63 Wis. 2d 148, 153, 216 N.W.2d 205, 210 (1974). *See generally* 7 AM. JUR. 2D, *supra* note 13, § 130, at 606-07 (the absence of specific modifiers such as "loading and unloading" does not restrict what constitutes "use" of a vehicle, rather, this absence demonstrates the broad interpretation given to the term "use"). *But see* Kurdziel v. Pittsburgh Tube Co., 416 F.2d 882 (6th Cir. 1969) (the Sixth Circuit Court of Appeals acknowledged that the Ohio Supreme Court had adopted an opposing position by not recognizing the act of loading and unloading as part of "using").

31. *E.g.*, Recent Decisions, *Insurance - "Loading" Clause Of Auto Liability Policy Covers Death By Accidental Discharge Of Shotgun*, 21 MD. L. REV. 270, 271 (1961).

32. Titan Constr. Co. v. Nolf, 183 Colo. 188, 515 P.2d 1123 (1973); Colorado Farm Bureau Mut. Ins. Co. v. West Am. Ins. Co., 35 Colo. App. 380, 540 P.2d 1112 (1975).

33. *E.g.*, Recent Decisions, *supra* note 31, at 271.

34. *Id.* The "completed operation" view therefore omits any distinction between "loading" and preparatory activities or "unloading" and "delivery."

35. *See, e.g.*, Unigard Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 466 F.2d 865, 867 (10th Cir. 1972) (where the temporary placing of a rifle on the tailgate of a camper did not serve to terminate the unloading procedure and did not provide a basis for holding that the policy did not provide coverage for an injury which occurred as a result of the accidental discharge of the rifle).

36. *Id.* at 867. A second and more restrictive view is represented by the "coming to rest" doctrine. This suggests that "loading" commences when the article has left its resting place and is in the process of being carried to or placed in the vehicle. Conversely, "unloading" terminates after the item is physically lifted from the vehicle and has actually reached its first resting place. *See* Recent Decisions, *supra* note 31, at 271.

application[37] in situations involving the accidental discharge of firearms. The difficulty centers around the determination of whether the facts of the particular case are sufficient to support the required degree of causal connection between the accident or injury and the "use" of the vehicle as contemplated by the parties to the insurance contract.[38]

C. *Colorado Cases: The Application of the "Arising Out of the Use" Clause*

The earliest Colorado case dealing with the accidental discharge of a firearm inside the insured motor vehicle is *Mason v. Celina Mutual Insurance Co.*[39] In *Mason*, teenagers were sitting in a car waiting for the insured driver to return from a class. While "toying with a pistol," it accidentally discharged, killing one of the teenagers. The court held that the accident did not arise out of a covered use of the automobile and that there was not a causal connection between the discharge of the pistol and the parked vehicle.[40]

The next case dealing with the discharge of a firearm within an insured automobile is *Azar v. Employers Casualty Co.*[41] In this case, the parties were hunting rabbits along a public highway. The driver prepared to fire a shotgun through the car window, but when another car approached, he brought the shotgun back into the vehicle where it accidentally discharged, injuring the passenger. The supreme court held that the automobile liability policy provided no coverage because the injury did not "originate from," "grow out of," or "flow from" the use of the vehicle.[42] The court concluded that the act of hunting from inside a moving vehicle was not an inherent use of an automobile and therefore that the injury "originated from," "grew out of," or "flowed from" the independent use of the firearm.[43]

In the following year, the supreme court had another opportunity to interpret the "arising out of the use" clause in the landmark case of *Titan Construction Co. v. Nolf.*[44] Although this case did not involve the accidental discharge of a firearm, it does provide guidance concerning what constitutes "use" of a motor vehicle for insurance purposes. In *Titan*, the Colorado Supreme Court adopted the "but for" test of causation with regard to interpreting the coverage clauses of Colorado motor vehicle liability policies.[45] The court held that an insurer was liable to a

37. *See generally* Annotation, *supra* note 4, at 150-73 (citing cases illustrating the difficulty of applying the "arising out of the use" clause to varying fact patterns).

38. *Id.* § 2, at 153.

39. 161 Colo. 442, 423 P.2d 24 (1967).

40. *Id.* at 444, 423 P.2d at 25 (although the victim was sitting in the car at the time of the accidental discharge, this was not a "use" of the vehicle as contemplated by the parties to the insurance agreement).

41. 178 Colo. 58, 495 P.2d 554 (1972).

42. *Id.* at 61, 495 P.2d,at 555.

43. *Id.* The court determined that even though the vehicle was being "used" while hunting, the primary item being "used" at the time of the discharge was the firearm itself. The firearm was being handled for the primary purpose of hunting. Therefore, the "use" of the vehicle was merely incidental to the use of the firearm.

44. 183 Colo. 188, 515 P.2d 1123 (1973).

45. *Id.* at 194, 515 P.2d at 1126. *See supra* notes 18-21 and accompanying text.

worker injured by a falling brick. The brick was dislodged from the roof of a building under construction by a pipe connected to a cement truck.[46] The conclusion in *Titan* illustrates the broad coverage provided by applying the "but for" test of causation. Although the truck appeared to only have a small degree of causal connection with the resulting injury, coverage was afforded because the accident would not have occurred but for the unloading of the truck.[47]

The most recent Colorado case, prior to *Kohl*, which involved the accidental discharge of a firearm in an automobile, was *Colorado Farm Bureau Mutual Insurance Co. v. West American Insurance Co.*[48] In this case, the driver had placed his rifle on the front seat of the vehicle in preparation for travel from one hunting location to another. While reaching either into the back seat for a pair of binoculars or reaching across the front seat to unlock the passenger door, he lifted the rifle and it discharged, injuring another passenger. Acknowledging that "[t]he rifle and the binoculars had been . . . [placed in the vehicle] and the victim was waiting to load' or enter it," the court reasoned that "the accident occurred between the time of commencement and conclusion of the loading and unloading of the insured vehicle, and the accident would not have occurred but for' that operation."[49] The court concluded that the driver's continued involvement in the "loading" process constituted a "use" of the automobile and thus coverage was afforded under the insured's automobile liability policy.[50]

In 1977, the Colorado Supreme Court considered the concept of "use" of a motor vehicle in the case of *Dairyland Insurance Co. v. Drum*.[51] Although not a gun discharge case, *Dairyland* sets forth general guidelines to be followed in coverage cases.[52] The supreme court extended the coverage of matters "arising out of the use" of a vehicle beyond the court of appeals' restrictive interpretation of the term "use", by holding that the driver of a vehicle towing another vehicle is "using" the towed vehicle for purposes of insurance coverage.[53] The supreme court based their decision on the principle that a "use" of the insured vehicle is found where "the vehicle was dealt with in a manner that created or had

46. *Titan*, 183 Colo. at 194, 515 P.2d at 1126.

47. *Titan* also established that Colorado adopted the "completed operation" doctrine with respect to interpreting "loading and unloading" provisions contained in an automobile liability policy.

48. 35 Colo. App. 380, 540 P.2d 1112 (1975).

49. *Id.* at 384, 540 P.2d at 1114.

50. *Id.* The court followed precedent adopted in *Titan* which firmly established that Colorado adopted both the "but for" test of causation and the "completed operation" doctrine with respect to determining coverage in automobile liability policies.

51. 193 Colo. 519, 568 P.2d 459 (1977).

52. *See infra* notes 54-56 and accompanying text.

53. Dairyland Ins. Co. v. Drum, 37 Colo. App. 222, 546 P.2d 1283 (1975), *rev'd*, 193 Colo. 519, 568 P.2d 459 (1977). In *Dairyland*, a vehicle being towed was temporarily positioned in the center of a highway as a result of the towing vehicle's attempt to make a U-turn. Consequently, a third automobile collided with the towed vehicle injuring the driver and two other passengers of the third automobile. The supreme court reversed the court of appeals' decision which held that the driver of the towing vehicle was solely "using" his own vehicle for purposes of determining liability.

the potential of creating an unreasonably dangerous situation."[54] The *Dairyland* opinion adopted the reasoning of *Baudin v. Traders General Insurance Co.*[55] by applying the same set of tests to determine whether a motor vehicle was "used" for purposes of liability coverage.[56] The tests set forth in *Dairyland* further exemplify Colorado's adoption of the "but for" test when determining the extent of coverage under automobile insurance policies.[57]

A final Colorado case which illustrates the broad coverage provided by applying the "but for" test is the case of *Trinity Universal Insurance Co. v. Hall*.[58] In *Trinity*, a woman was injured when a side awning attached to a truck, being used as a refreshment stand, collapsed. The court held that the injury "arose out of the use" of the vehicle reasoning that the injury would not have occurred but for the use of the truck for the sale of refreshments.[59] In discussing the "use" being made of the truck, the court stated the "use" of a motor vehicle as contemplated in an insurance policy depends upon the factual context of each case.[60]

### D. *Decisions From Other Jurisdictions Applying the "Arising Out of the Use" Clause to Cases Involving the Discharge of a Firearm*

The judicial application of the "arising out of the use" clause has not produced a clear cut pattern of interpretation. However, a close examination of the factual distinctions that exist between cases involving the discharge of a firearm will reveal that some degree of uniformity has evolved.[61] The cases are categorized according to their underlying facts.

The first category of cases illustrates fact patterns in which the acci-

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54. *Dairyland*, 193 Colo. at 522, 568 P.2d at 462.

55. 201 So. 2d 379 (La. Ct. App. 1967), *rev'd*, 423 So. 2d 1080 (La. 1982).

56. The court adopted the following tests to determine "use" for purposes of liability coverage:

> (1) The dangerous situation causing injury must have its source in the use of the automobile; (2) The chain of events resulting in the accident must originate in the use of the automobile and be unbroken by the intervention of any event which has no direct or substantial relation to the use of the vehicle; (3) The accident must be a natural and reasonable incident or consequence of the use of the vehicle for the purposes contemplated by the policy, although not necessarily foreseen or expected; (4) The accident must be one which can be "immediately" identified with the use of the automobile as contemplated by the parties to the policy; (5) The accident must be of a type reasonably associated with the use of the automobile as contemplated by the contracting parties; (6) The accident must be one which would not have happened "but for" the use of the automobile.

*Dairyland*, 193 Colo. at 522, 568 P.2d at 462.

57. The Colorado Supreme Court stated its agreement with the reasoning employed by the *Baudin* court which included the application of the "but for" test. Thus, the Colorado Supreme Court essentially reinforced the application of the "but for" test adopted in *Titan*. *Id.*

58. 690 P.2d 227 (Colo. 1984).

59. *Id.* at 231.

60. *Id.* at 228.

61. *See* Cameron Mut. Ins. Co. v. Ward, 599 S.W.2d 13 (Mo. Ct. App. 1980) (creating five principal categories for purposes of illustrating the factual distinctions between vehicle-gun discharge cases which determine the existence or nonexistence of coverage under automobile insurance policies).

dental discharge of the firearm occurred while an occupant of the vehicle was either "toying" with the weapon or was "handling" the weapon while in the act of hunting. The previously discussed Colorado cases of *Mason*[62] and *Azar*[63] typify this fact pattern. These cases[64] uniformly hold that no coverage exists under the "arising out of the use" clause because no causal connection exists between the accidental discharge of the firearms and the inherent use of the vehicles.[65]

The second category encompasses situations where the discharge occurred during the process of placing or removing the firearm into or from the vehicle. For example, in *Viani v. Aetna Insurance Co.*,[66] the owner of an insured pickup truck was injured by the discharge of a concealed loaded pistol while unloading camping gear from his vehicle. The Idaho Supreme Court reasoned that the "loading and unloading" provision in the insured's automobile liability policy was an extension of the term "use," and that the policy provided coverage for the injury which occurred during the process of unloading the truck.[67] Cases involving similar fact patterns consistently hold that coverage exists because the term "use" includes the process of "loading" and "unloading" the vehicles.[68]

The third category involves fact patterns in which a physical portion of the vehicle is used as a "gun rest." These cases do not reveal uniform results. For example, in *Fidelity & Casualty Co. v. Lott*,[69] the Fifth Circuit Court of Appeals found a causal connection between the use of the vehicle as a gun rest and the resulting injury to a passenger after the gun was fired.[70] In the factually similar case of *Norgaard v. Nodak Mutual Insurance Co.*,[71] the North Dakota Supreme Court reached a contrary result on the theory that the use of the rifle constituted an independent and intervening cause of the injury.[72]

The fourth category consists of fact patterns in which the firearm discharged as it was being positioned in or removed from a gun rack attached to the vehicle. In *Reliance Insurance Co. v. Walker*,[73] the North

62. *See supra* notes 39-40 and accompanying text.

63. *See supra* notes 41-43 and accompanying text.

64. *See, e.g.*, Brenner v. Aetna Ins. Co., 8 Ariz. App. 272, 445 P.2d 474 (1968); State Farm Mut. Auto. Ins. Co. v. Centennial Ins. Co., 14 Wash. App. 541, 543 P.2d 645 (1975).

65. *Cameron*, 559 S.W.2d at 15. Courts have reasoned that the automobiles are simply the "locus" of the resulting injuries.

66. 95 Idaho 22, 501 P.2d 706 (1972).

67. *Id.* at 32, 501 P.2d at 716.

68. *See, e.g.*, Allstate Ins. Co. v. Valdez, 190 F. Supp. 893 (E.D. Mich. 1961) (insured's shotgun accidentally discharged while he was ejecting shells from it in preparation for its entry into the trunk of his vehicle); Morari v. Atlantic Mut. Fire Ins. Co., 105 Ariz. 537, 468 P.2d 564 (1970) (owner of the insured vehicle reached into his car for his loaded gun which accidentally discharged causing injury to another passenger).

69. 273 F.2d 500 (5th Cir. 1960).

70. *Id.* (the roof of the vehicle was used as a gun rest).

71. 201 N.W.2d 871 (N.D. 1972).

72. *Norgaard*, 201 N.W.2d at 876; *see also* National Farmers Union & Casualty Co. v. Gibbons, 338 F. Supp. 430 (D. N.D. 1972) (use of the vehicle as a gun rest was foreign to the vehicle's inherent purpose and therefore, coverage was denied).

73. 33 N.C. App. 15, 234 S.E.2d 206 (1977).

Carolina Court of Appeals noted that the presence of the gun rack established that the truck may be used for the transportation of guns. Thus, the court concluded that "the shooting was a 'natural and reasonable incident or consequence of the use' of the truck and was not the result of something 'wholly disassociated from, independent of, and remote from' the truck's normal use."[74] Cases involving these fact patterns "appear to pivot on the rationale that the presence of permanently attached gun racks in vehicles establishes a significant causal connection between the use of such vehicles and the accidental discharge of weapons carried therein, hence affording coverage . . . for any resultant injuries . . . ."[75]

The final category highlights fact patterns where the discharge of the firearm occurred inside the vehicle as a result of the movement or operation of the vehicle. In *Southeastern Fidelity Insurance Co. v. Stevens*,[76] a pistol accidentally discharged and killed a passenger when the vehicle turned onto a bumpy, unpaved road. In accordance with decisions of other jurisdictions,[77] the Georgia court found a causal connection between the accidental discharge of the firearm and the movement, i.e. use, of the vehicle.[78]

These factual distinctions display the importance of examining the totality of circumstances surrounding an accident in order to determine if the accident "arose out of the use" of a vehicle. By analyzing the specific role of the automobile in the entire episode, courts are able to establish whether coverage is afforded under the respective automobile liability policy.[79] Each case must be determined upon its own facts according to the part the vehicle played in the entire occurrence.[80]

## II. *KOHL v. UNION INSURANCE COMPANY*

### A. Facts

On October 12, 1980, Carol Ray Weaver, Phyllip Connelly, Terry Clear, Rex Kohl, and Tony Martino, residents of Canon City, were returning from a hunting trip in the mountains of Colorado. At this point in time, the parties did not intend to engage in any further hunting.[81]

74. *Id.* at 20, 234 S.E.2d at 211; *see also* Transamerica Ins. Group v. United Pac. Ins. Co., 92 Wash. 2d 21, 593 P.2d 156 (1979) (the court stated that in similar fact patterns the vehicle has been considered more than the mere "situs" of the injury and thus the "arising out of the use" clause should afford coverage).

75. Cameron Mut. Ins. Co. v. Ward, 599 S.W.2d 13, 16 (Mo. Ct. App. 1980).

76. 142 Ga. App. 562, 236 S.E.2d 550 (1977).

77. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Partridge, 10 Cal. 3d 94, 109 Cal. Rptr. 811, 514 P.2d 123 (1973) (a pistol with a "hair trigger" accidentally discharged and injured a passenger when the vehicle hit a bump).

78. *Stevens*, 142 Ga. App. at 564, 236 S.E.2d at 551.

79. United States Fidelity & Guar. Co. v. Burris, 240 So. 2d 408, 409-10 (La. Ct. App. 1970).

80. *Id.*

81. Brief for Appellants Kohl and Martino at 2, Union Ins. Co. v. Connelly, 694 P.2d 354 (Colo. App. 1984) (No. 82-0683), *rev'd sub nom.* Kohl v. Union Ins. Co., 731 P.2d 134 (Colo. 1986) [hereinafter Brief for Appellants].

On the trip home, Weaver was riding alone in his jeep while the other four were divided between two other cars. Weaver's hunting rifle was positioned in a gun rack mounted above the dashboard of his jeep. Weaver had installed the gun rack for the purpose of transporting his rifle.[82]

Two hours into the trip, they stopped for refreshments at a store in Cotopaxi, Colorado. When Weaver arrived at the store, his companions were conversing in the parking lot. Weaver parked his jeep and then joined the group in the parking lot. After a short conversation, Weaver returned to his jeep intending to remove the keys from the ignition in order to open a spare gas can. While reaching inside the jeep, Weaver noticed his rifle and decided that he would "put it away."[83] Weaver intended to remove his gun from the gun rack, unload it and place it in its scabbard for the remainder of the trip home.[84] While positioned in the gun rack, the loaded rifle was pointed toward the passenger side of the jeep. As Weaver was removing the weapon from the gun rack, the rifle discharged. Kohl and Martino were seriously injured and Connelly was killed. Although Weaver states that it was possible for the rifle to have bumped or touched something besides his hand, he cannot recall whether that actually happened.[85]

B. *Initiation of the Action*

Kohl, Martino, and the estate of Connelly filed claims with Weaver's automobile insurance carrier, Union Insurance Company (Union). In response, Union filed an action for declaratory judgment to determine whether the accident was covered by Weaver's automobile insurance. Weaver's insurance policy provided that Union "will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident."[86] All parties filed motions for summary judgment in the Jefferson County District Court. On April 26, 1982, the district court granted Union's motion for summary judgment, concluding that there was no causal connection between the "use" of the automobile and the injuries, and therefore, no insurance coverage under the policy.[87] From that ruling, Kohl, Martino, and the estate of Connelly, appealed.

C. *Decision of the Colorado Court of Appeals*

Affirming the trial court, the Colorado Court of Appeals concluded that Weaver's automobile insurance policy did not provide coverage for

82. *Id.* at 1.
83. *Id.* at 3.
84. *Id.*
85. *Id.*
86. *Id.* at 5. By operation of law, the term "auto accident" must be interpreted to mean and given the same effect as the required statutory language "arising out of the use" of the motor vehicle. *See supra* notes 9-12 and accompanying text.
87. Union Ins. Co. v. Connelly, 694 P.2d 354, 356 (Colo. App. 1984), *rev'd sub nom.* Kohl v. Union Ins. Co., 731 P.2d 134 (Colo. 1986).

the injuries sustained by the victims resulting from the accidental discharge of Weaver's rifle. The court reasoned that the unloading of a rifle inside a jeep is not within the inherent purpose for which a jeep is used. Furthermore, the court agreed with the trial court that the defendants failed to establish the requisite causal connection between the discharge of the weapon and the parked automobile. Considering Weaver's statement that to his knowledge nothing other than his hand was touching the rifle at the time it discharged, the court of appeals concluded that the vehicle did not contribute in any way to the discharge of the rifle. Based upon this finding, the court determined that the injuries arose out of the use of the rifle, rather than out of the use of the automobile.[88]

D. *Decision of the Colorado Supreme Court*

Not persuaded by the court of appeals' reasoning, the Colorado Supreme Court concluded that the accidental discharge of the rifle "grew out of" the use of Weaver's vehicle for purposes of coverage under his automobile insurance policy.[89] The court held that Weaver's use of his jeep to transport his rifle for the purpose of hunting was a conceivable use of his vehicle which was not foreign to its inherent purpose. The court reasoned that the transportation of hunters and their weapons is a conceivable use of a four-wheel drive vehicle. Weaver had installed a gun rack in his vehicle to facilitate that use.[90] The supreme court felt that Weaver's action in lifting the rifle out of the gun rack was intimately related to his use of the vehicle as transportation for himself and his rifle. Therefore, the court determined that the victims' injuries were causally related to Weaver's use of his vehicle.[91]

E. *The Dissenting Opinion*

Justice Rovira, in a lengthy dissenting opinion,[92] asserted that the majority reached its decision by applying an incorrect analysis and consequently rendered a decision contrary to prior case law. Although the dissent maintained that there must be a causal relation or connection between the vehicle and the accident, the minority asserted that merely satisfying the "but for" test of causation was not sufficient to establish that the injuries sustained "arose out of the use" of the vehicle. The dissent firmly contended that there must be a stronger causal relation or connection between the vehicle and the accident.[93] The dissent stated that the "use" of the jeep did not contribute in any way to the accident.[94] The only relationship between the vehicle and the accident was the presence of the tortfeasor and the victims around the automobile at

88. *Connelly*, 694 P.2d at 356.
89. *Kohl*, 731 P.2d at 136.
90. *Id.*
91. *Id.* at 137.
92. *Id.* at 138 (Rovira, J., dissenting).
93. *Id.* (Rovira, J., dissenting).
94. *Id.* at 139 (Rovira, J., dissenting).

the time of the accidental discharge. Explicit in the dissent's reasoning was the notion that unloading a rifle, regardless of where it occurs, is an inherently dangerous act.[95] Thus, the dissent concluded that the resulting injuries did not arise out of the use of the *jeep*, but rather, out of the use of the *rifle*.[96]

## III. ANALYSIS

The difficulty in applying the "arising out of the use" clause presents two issues. First, a court must determine whether the insured was "using" the automobile within the terms of the insurance policy. Second, the court must also determine if the injuries sustained by the plaintiff "arose out of that use."[97] The Colorado Supreme Court, in a well-reasoned analysis, resolved these issues by applying the correct legal construction of the "arising out of the use" clause to the present factual situation. In order to fully understand this ruling, it is necessary to analyze carefully each argument developed by the majority as well as each counter-argument raised by the dissent.

### A. *Was the Insured "Using" the Automobile Within the Terms of the Policy?*

The supreme court correctly concluded that Weaver's use of his jeep for the carriage and transportation of his rifle for hunting purposes was covered under his automobile policy since the use was not foreign to the vehicle's inherent purpose.[98] Because of the broad interpretation which must be given to the term "use," it must be construed to include the use of a vehicle as a means of transporting not only persons but also their property.[99] The use of a vehicle to transport a rifle on a hunting trip is an entirely reasonable and foreseeable use of a vehicle, especially a four-wheel drive jeep which is designed to perform on rough terrain frequently associated with hunting areas.[100] Based upon this reasoning, the majority concluded that the transportation of hunters and their weapons was a foreseeable use of a vehicle of this kind. Holding that Weaver's "use" was covered under his respective insurance policy, the majority had to further establish some causal connection between the resulting injuries and the "use" of the vehicle.

### B. *Did a Causal Connection Exist Between the Injuries and the Use of the Vehicle?*

The majority's careful analysis of the facts and circumstances surrounding the instant case clearly indicates that they understood how to apply the legal construction given to the "arising out of the use" clause

95. *Id.* at 140 (Rovira, J., dissenting).
96. *Id.* at 141 (Rovira, J., dissenting).
97. *See* Note, *Construction*, *supra* note 15, at 811.
98. *Kohl*, 731 P.2d at 136.
99. Brief for Appellants, *supra* note 81, at 19.
100. *Kohl*, 731 P.2d at 136. The supreme court also noted that Weaver had installed a gun rack in his vehicle to facilitate that use of his jeep.

to determine whether an injury was causally related to the use of the vehicle. Recognizing that the court of appeals failed to apply appropriate contract principles of causation, the supreme court followed the guidelines announced in *Titan*[101] for determining whether such "causal connection" exists. In this process, the majority correctly distinguished tort rules of proximate cause from insurance contract principles of causation.[102] Consequently, the majority rejected the narrow "actual use" test in which the "use" of the vehicle must be the efficient, predominating, or even proximate cause of the accident,[103] and applied the "but for" test announced in *Titan* which requires a minimal causal connection between the use of the vehicle and the accident.[104] The use of the "but for" test to establish the existence of a causal relation is consistent with the broad and comprehensive interpretation given to the "arising out of the use" clause.[105]

Applying this test to the instant case, this accident would not have occurred but for the fact that the jeep was parked immediately adjacent to the victims so that the loaded rifle resting in the gun rack was pointing in their direction.[106] Furthermore, but for the fact that Weaver engaged in an unsuccessful attempt to secure the rifle for its continued transportation, this accident would not have occurred.[107] The dissent suggests that accidental discharge of firearms occurs regularly, and therefore, this accident could have happened anywhere.[108] This reasoning ignores that this particular accident would not have occurred at this time and place but for the transportation of the loaded rifle in the gun rack of the jeep. Therefore, the majority appropriately applied the "but for" test to determine that a causal connection exists.

Justice Rovira's dissent pointed out that, although the Colorado Supreme Court adopted the "but for" test in *Titan*, the *Titan* court also stated that this test should not apply when there is a lack of relationship between the vehicle and the accident.[109] Rovira then asserted that in *Trinity*, the court held that this relationship must be a "causal connection."[110] Applying *Trinity*, Justice Rovira argued that "merely satisfying the extremely broad 'but for' test is not enough; there must be a causal

101. *See supra* notes 44-47 and accompanying text.

102. For a more thorough discussion regarding the application of these principles to the facts of the instant case, see Petition Brief for Appellants Kohl and Martino, Union Ins. Co. v. Connelly, 694 P.2d 354 (Colo. App. 1984) (No. 84-381), *rev'd sub nom.* Kohl v. Union Ins. Co., 731 P.2d 134 (Colo. 1986) [hereinafter Petition Brief].

103. Titan Construction Co. v. Nolf, 183 Colo. 188, 191, 515 P.2d 1123, 1126 (1973) (citing Continental Casualty Co. v. Fireman's Fund Insurance Co., 403 F.2d 291 (10th Cir. 1968)).

104. *Id.*

105. *See supra* notes 14-15 and accompanying text.

106. Petition Brief, *supra* note 102, at 5.

107. *Id.*

108. *Kohl*, 731 P.2d at 138 (Rovira, J., dissenting).

109. *Id.* (Rovira, J., dissenting) (citing Titan Construction Co. v. Nolf, 183 Colo. 188, 195, 515 P.2d 1123, 1126 (1973)).

110. *Id.* (Rovira, J., dissenting) (citing Trinity Universal Ins. Co. v. Hall, 690 P.2d 227 (Colo. 1984)).

connection between the vehicle and the accident."[111] Based upon this interpretation, the dissent, like the court of appeals, required a more rigorous standard of causation than that required by the *Titan* precedent. Consequently, Justice Rovira asserted that the injuries arose out of the use of the rifle, rather than the use of the vehicle,[112] erroneously relying on the previous Colorado cases of *Mason* and *Azar*. By failing to fully acknowledge all the factual distinctions between those cases and the instant case,[113] the dissent ignored the obvious causal connection between Weaver's "use" of his jeep and the resulting injuries.

By analyzing the "totality of the circumstances" surrounding the instant case, it is evident that the predominant purpose, at the time of the discharge, was vehicular transport of the rifle and Weaver himself. It is important to understand that Weaver was not "using" the rifle at the time it discharged for any purpose inherent in its being a rifle. In other words, Weaver was not in the act of "hunting" per se, nor was he intending to "hunt" at the time he lifted the rifle out of the gun rack. Furthermore, Weaver was not "toying" with the rifle. The sole reason for removing the rifle was to provide for its safer transportation in his jeep. Therefore, the discharge of the rifle in this situation, unlike other firearm cases, related solely to the purpose of the rifle's continued transportation.[114]

Clearly, this accident "arose" from the transportation of the rifle, therefore, the resulting injuries were causally related to the "use" of the insured vehicle. It may also be contemplated that the "use" of the jeep may have combined with other causes in contributing to the occurrence of this accident.[115] Even this combination of causes clearly satisfies the *Titan* test which holds that the alleged cause need not be the predominant or proximate cause of the injuries.[116]

The majority could have further supported its conclusion by applying the set of tests adopted in *Dairyland*.[117] Although the majority stated that these tests were inconsistent with their opinion,[118] applying the criteria of the tests to the facts of the present case results in the conclusion that this accident was causally related to the use of the vehicle.[119] This result is apparent by examining the following factors.

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111. *Kohl*, 731 P.2d at 138 (Rovira, J., dissenting).

112. *Id.* at 141 (Rovira, J., dissenting).

113. *See supra* notes 39-43 and accompanying text. Unlike *Mason* and *Azar*, the *Kohl* case was not a "hunting accident," nor was the accident the result of someone "toying" with the gun. The totality of circumstances surrounding the *Kohl* case are factually different and establish that the injuries were not merely coincidental to the use of the automobile.

114. Reply Brief for Appellants Kohl and Martino at 9, Union Ins. Co. v. Connelly, 694 P.2d 354 (Colo. App. 1984) (No. 82-0683), *rev'd sub nom.* Kohl v. Union Ins. Co., 731 P.2d 134 (Colo. 1986).

115. Petition Brief, *supra* note 102, at 6.

116. *Id.* (citing Titan Construction Co. v. Nolf, 183 Colo. 188, 195, 515 P.2d 1123, 1126 (1973)).

117. Dairyland Ins. Co. v. Drum, 193 Colo. 519, 568 P.2d 459 (1977).

118. Kohl v. Union Ins. Co., 731 P.2d 134, 135 n.2 (Colo. 1984).

119. Each of the tests adopted in *Dairyland* for determining "use" is consistent with the facts of the instant case. *See supra* note 56 and accompanying text.

First, not only was the jeep used to transport a loaded rifle, but it was also parked in a position in which the rifle's muzzle was pointed in the vicinity of the defendants. Therefore, the dangerous situation causing the injuries has its source in the use of Weaver's vehicle. Second, the chain of events resulting in this accident originated in the use of the automobile and were unbroken by the intervention of any event which had no direct or substantial relation to the use of the jeep. All of the actions leading up to the time of the rifle's discharge were directly and substantially related to Weaver's use of his vehicle for the continued transportation of his rifle.

Third, this accident was a natural and reasonable incident of the use of the vehicle for the purposes contemplated by the policy although not necessarily foreseen or expected. It is reasonable to expect that a jeep may be used for hunting expeditions and that the transportation of weapons and ammunition is a reasonable consequence of such use. Therefore, the accidental discharge from Weaver's rifle was a natural and reasonable incident of the use of his jeep to transport his rifle on a trip.

Fourth, this accident can be "immediately identified" with the use of the vehicle because the injuries sustained by the victims were very closely associated with the use of the jeep as a means of transporting the rifle. Fifth, this is a type of accident which one could clearly contemplate when insuring a vehicle which may foreseeably be used for hunting expeditions. Finally, as discussed previously, this accident and the resulting injuries would not have occurred "but for" the use of the jeep to transport the loaded rifle.[120]

The dissent points out that *Dairyland* also stands for the proposition that a "use" of a vehicle could be established "where the *vehicle* was dealt with in a manner that created or had the potential of creating an unreasonably dangerous situation."[121] Addressing this proposition, the dissent argues that the rifle, not the vehicle, was dealt with in an unsafe manner.[122] This argument totally ignores the fact that Weaver was "using" his jeep for the primary and exclusive purpose of transporting himself and his loaded rifle which had been placed in a gun rack with its

120. For a detailed discussion concerning the satisfaction of these tests as they apply to the instant case, see Brief for Appellants, *supra* note 81, at 8-12.

121. *Kohl*, 731 P.2d at 140 (Rovira, J., dissenting) (quoting *Dairyland*, 193 Colo. at 522, 568 P.2d at 462).

122. *Kohl*, 731 P.2d at 140 (Rovira, J., dissenting). Noting that it is a crime to carry a loaded rifle in an automobile, the dissent pointed out that if Weaver would have unloaded his rifle prior to transporting it, this accident would not have occurred inside the vehicle. Therefore, the dissent concluded that the use of the jeep was by no means causally related to the resulting injuries. *Id.* This argument failed to acknowledge that:

> [T]he mere fact that a vehicle may have been used unlawfully or an unlawful event may have occurred during its use, considered alone, does not relieve an insurer from liability if the accident is otherwise covered under the "ownership, maintenance or use" provision of the automobile insurance contract. If the rule was otherwise, policy coverage would be invalidated if one ran a stop sign, was guilty of speeding, or operating with defective equipment.

Transamerica Ins. Group v. United Pac. Ins. Co., 92 Wash. 2d 21, 25, 593 P.2d 156, 160 (1979).

muzzle pointed toward the passenger door. Consequently, the use of his jeep in this manner created the unreasonably dangerous situation which resulted in the injuries.[123]

There are two additional principles of law which support the conclusion reached by the supreme court. First, there is the general rule that the "use" of a vehicle includes its loading and unloading, even absent express language in the insurance policy.[124] Hence, the majority's opinion is supported by Colorado's adoption of the "completed operation" doctrine,[125] which has been defined to include in its coverage all activities required to effect a completed delivery.[126] Finally, it is well settled that injuries resulting from the adjustment of cargo are causally related to a proper "use" of the vehicle.[127] The *Kohl* holding is consistent with these established principles of law.[128]

The arguments set forth in the above analysis establish that the injuries sustained by Kohl, Martino, and Connelly "arose from," "grew out of," and "flowed from" the insured's use of the vehicle, and therefore, Union Insurance Company was liable for the resulting damages. The Colorado Supreme Court's careful analysis of the totality of circumstances surrounding the instant case clearly justify this conclusion.

## CONCLUSION

The opinion in *Kohl v. Union Insurance Co.* reaffirms important principles regarding the interpretation and application of the basic automobile insurance agreement. First, it recognizes that the "arising out of the use" clause demands a broad and comprehensive construction due to its inherent ambiguity. Second, it illustrates that the court has been liberal in finding the "but for" relationship and in allowing recovery against automobile insurance companies. Finally, it emphasizes the importance of examining the totality of circumstances surrounding or leading up to an accident or injury when determining whether such accident or injury arose out of the use of the insured automobile within the meaning of the liability policy.

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123. *See* Brief for Appellants, *supra* note 81, at 19.

124. *See supra* note 30 and accompanying text.

125. *See supra* note 32 and accompanying text.

126. *See supra* notes 32-35 and accompanying text for a review concerning the scope of coverage provided by the "completed operation" doctrine. This principle of law may be applied to *Kohl* by reasoning that Weaver was merely engaged in additional activities which were necessary in order to make a safe and completed delivery of the rifle.

127. *See, e.g.*, Oklahoma Farm Bureau Mut. Ins. Co. v. Mouse, 268 P.2d 886 (Okla. 1953) (the court held that a driver who fell from his truck, while adjusting cargo, was injured as a result of the "ownership, maintenance or use" of the vehicle). *See generally* 12 G. COUCH, *supra* note 17, § 45:69, at 308-09.

128. *Kohl*, 731 P.2d at 137 n.4 (the majority stated: "Our conclusion is consistent with the settled rule that injuries resulting from the adjustment of cargo and the loading and unloading of vehicles are causally related to a proper use.")