FILED
United States Court of Appeals
Tenth Circuit

APR 25 1990

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNIFIED SCHOOL DISTRICT #501, Shawnee County, State of Kansas,

Plaintiff-Appellant,

v.

CONTINENTAL CASUALTY COMPANY,

Defendant-Appellee.

No. 89-3097
(D.C. No. 1083-5)
(Dist. of Kansas)

ORDER AND JUDGMENT*

Before **BRORBY and BARRETT,** Circuit Judges, and **WEST***, District Judge.

The Honorable Lee R. West, United States District Judge for the District of Western Oklahoma, sitting by designation.

Unified School District No. 501, Shawnee County, Kansas (School District)), the insured, seeks a declaratory judgment that Continental Casualty Company (Continental), the insurer, has a duty to reimburse the School District for the losses incurred defending against specific claims made in 1979 by the Intervenors in Brown v. Board of Education, Case No. T-316 (Brown). This

* This Order and Judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

alleged duty is predicated upon the contract of insurance entered into between the parties (Policy). The parties filed cross-motions for summary judgment and on March 29, 1989, the district court entered judgment in favor of Continental.

In granting Continental's motion for summary judgment, the district court concluded that Endorsement No. 3 to the Policy was unambiguous and excluded coverage for losses sustained as a consequence of the Intervenors' action. Endorsement No. 3 provides as follows:

> COVERAGE SHALL EXCLUDE ANY LOSS ARISING OUT OF PRIOR OR OUTSTANDING LITIGATION OR ACTS WHICH GAVE RISE THERETO.

(R., Vol. 1, Doc. 1 Ex. 1, Insurance Policy) (Emphasis in original).

The district court concluded that the Intervenors' action "arose out" of the Brown lawsuit which was outstanding litigation at the time the motion to intervene was filed. Thus, Endorsement No. 3 precluded coverage under the Policy.

FACTS

On February 28, 1951, Oliver Brown brought a class action on behalf of all black children attending elementary schools in the Topeka School district. In the 1951 complaint, the Brown plaintiffs alleged that the opportunities provided to children attending all black schools were inferior to those provided to children attending all white schools, including the physical facilities, curricula, teaching resources, and student personnel services, as well as other services. In addition to these factors, they alleged that segregation itself resulted in an inferior education for blacks and thus violated the Fourteenth

Amendment to the United States Constitution. The Brown plaintiffs sought a permanent injunction restraining the enforcement, operation and execution of a state statute that provided for segregation of schools for the education of black children and white children below the high school level. Further, these plaintiffs sought a declaratory judgment declaring unconstitutional the state statute and the segregation scheme set up thereunder by the school authorities of the City of Topeka.

The district court held for the defendants finding that the doctrine of "separate but equal" in the school systems did not violate the constitutional guarantees of due process of law. That court further found that the physical facilities, the curricula, the courses of study, and the qualifications and quality of teachers, as well as other educational facilities in the two sets of schools, were comparable. Brown v. Board of Education, 98 F. Supp. 797 (D. Kan. 1951).

On May 17, 1954, the United States Supreme Court reversed the district court. In finding for the plaintiffs, the Supreme Court held that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." Brown v. Board of Education, 347 U.S. 483, 495 (1954) (Brown I).

In Brown I, the Court invited the parties to submit briefs on the question of the appropriate remedy for the constitutional violation. In Brown v. Board of Education, 349 U.S. 294 (1955) (Brown II), the Court concluded that the local federal district court should monitor the School District's actions in implementing the constitutional principles set forth in Brown I.

On remand, the district court held a full hearing to determine whether the School District's plan for desegregation complied with the Supreme Court's mandate. On October 28, 1955, the district court entered an order finding that the plans submitted by the School District constituted a good faith beginning towards compliance with the Supreme Court's order. The district court stated as follows:

> There are a number of respects in which we feel that the plan does not constitute full compliance with the mandate of the Supreme Court, but that mandate implies that some time will be required to bring that about. The elements that we feel do not constitute full compliance are mostly of a minor nature but since this is not a final decree no useful purpose would be served by setting them out herein.
>
> ***
>
> It is the conclusion of the court that while complete desegregation has not been accomplished in the Topeka School System, a good faith effort toward that end has been made and that, therefore, the plan adopted by the Board of Education of the City of Topeka be approved as a good faith beginning to bring about complete desegregation. Jurisdiction of the cause for the purpose of entering the final decree is retained until such time as the Court feels there has been full compliance with the mandate of the Supreme Court.

Brown v. Board of Education, 139 F. Supp. 468, 468-469 (D. Kan. 1955).

On August 22, 1979, the Intervenors filed their "Motion For An Order Commanding Compliance With The Supreme Court Mandate To Desegregate The Schools In The Case of Brown v. Board of Education of Topeka, 349 U.S. 294." The Intervenors presented their motion as follows:

Come now the intervening plaintiffs and move the Court to issue an order commanding Unified School District #501 of Topeka, Kansas to desegregate the schools operated by said school district and establish a racially integrated and unitary school system as ordered by the United States Supreme Court in Brown v. Board of Education of Topeka, supra. (Emphasis added).

In support of this Motion, the intervening plaintiffs state:

1. That they are Black Americans who reside in Topeka, Kansas.

2. That the adult plaintiffs are parents of the minor children plaintiffs who attend public schools within Unified School District #501 of Topeka, Kansas.

3. That United School District #501 is the successor to the Board of Education of Topeka, Shawnee County, Kansas, defendant in Brown v. Board of Education of Topeka.

4 Defendant school district is required by the law of the State of Kansas to maintain and operate a system of public schools in Unified School district #501 in Shawnee County, Kansas and defendant school district is presently operating such public schools in said county and State.

5. The the United States Supreme Court in Brown v. Board of Education of Topeka, supra ordered the Board of Education of Topeka to adopt and implement a plan to desegregate the schools operated by said Board of Education and establish a unitary and integrated school system "with all deliberate speed."

6. The United State Supreme court in Brown further ordered that the United States District Court for the District of Kansas retain jurisdiction over the Brown case until the Board of Education of Topeka achieved full compliance with its mandate. (Emphasis added).

7. That notwithstanding the Supreme court's mandate, the former Board of Education of Topeka and the current Unified School district #501 have both failed to desegregate the schools and establish a unitary and integrated school system. (Emphasis added).

(R., Vol. I, Doc. 1, Ex. 3, Motion for an Order Commanding Compliance With the Supreme Court Mandate to Desegregate the Schools in the Case of Brown v. Board of Education of Topeka).

The motion to intervene was granted on November 29, 1979, and the Brown lawsuit subsequently proceeded to trial. On April 9, 1987, the district court entered a final judgment finding that the School District had fully complied with the Supreme Court's mandate in Brown I and Brown II. Brown v. Board of Education, 671 F. Supp. 1290 (D. Kan. 1987). On January 29, 1990, this court reversed in part the 1987 order and held that the School District did not meet its burden of establishing a lack of causal connection between the current conditions of segregation and the prior de jure system. Further, this court held that the Topeka school system was not unitary under constitutional standards and was therefore in violation of Title VI of the 1964 Civil Rights Act. Brown v. Board of Education, 892 F.2d, 851 (10th Cir. 1990) (Baldock, Circuit Judge, dissenting).

At issue in this action is the insurance agreement entered into between Continental and the School District with an effective policy period from October 15, 1976, to October 15, 1979. This Policy was thereafter renewed and continued in effect from October 15, 1979, until on or about October 18, 1984, when Continental canceled the policy.

This Policy is a "reimbursement policy" wherein Continental agreed that if a claim was brought against the School District for a "wrongful act" occurring during the Policy period then, provided that no exclusions were applicable, Continental would pay the

School District for any "losses" which the School District became legally obligated to pay. Wrongful Act is defined in Section III(c) of the Policy to include, among other things, any "act or omission or neglect or breach of duty by the Assureds in the discharge of their duties." (R., Vol. I, Doc. 1, Ex. 1, Insurance Policy). Loss is defined in Section III(d) of the Policy and encompasses any amount which the School district is "legally obligated to pay" including damages, judgments, and "cost of investigation and defense of legal actions. . . ." Id.

Also included in the Policy is a Prior Wrongful Act Endorsement, which states as follows:

> The coverage afforded by this endorsement shall not apply to any claim, suit, action or proceeding pending at the effective date of this endorsement or to any Wrongful Act if, at the inception date of this endorsement, the School District or an Assured could reasonably have expected that a claim, suit, action or proceeding would result therefrom.

Id. As stated before, the Policy also provided that:

> COVERAGE SHALL EXCLUDE ANY LOSS ARISING OUT OF PRIOR OR OUTSTANDING LITIGATION OR ACTS WHICH GAVE RISE THERETO.

Id.

By letter dated December 6, 1979, the School District notified Continental of the 1979 claims made against it by the intervening plaintiffs. Continental then notified the School District on May 16, 1980, that it was denying any liability in connection with the 1979 Brown claims made against the School District, and denied that the Policy afforded any coverage to the School District in connection with the claims of the Intervenors.

Continental denied coverage based upon Endorsements No. 2 and No. 3 of the Policy.

A second amended complaint was filed by the Intervenors on May 27, 1986. This complaint added a new claim for relief pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Continental still refused to pay the School District for the losses incurred in defending against the Intervenors in Brown.

On March 23, 1989, the district court granted Continental's motion for summary judgment and denied the School District's summary judgment motion. In holding for Continental, the district court concluded that Endorsement No. 3 was not ambiguous and that, therefore, the words would have to be applied according to their plain, ordinary and popular sense. Because that Endorsement specifically excluded from coverage any loss arising out of outstanding litigation, the School District's motion was denied. The district court held that the intervening plaintiffs' case was simply a continuation of the Brown case. "In fact, the intervening plaintiffs' case ultimately determined whether Topeka had finally complied with the original mandate resulting from the earlier litigation in this case." (R., Vol. I, Doc. 48, Memorandum and Order at p. 6). Thus, the intervening plaintiffs' case ended the ongoing Brown litigation. Id.

The School District is now appealing the district court's order concerning Continental's liability to the School District under the Policy.

ISSUES

The School District posits the following issues for review:

I. Whether the district court erred in denying plaintiff School District's motion for partial summary judgment.

A. Whether the district court erred in determining that the exclusionary clause was unambiguous.

B. Whether the district court erred in failing to construe the exclusionary clause narrowly.

C. Whether the "loss" suffered by the School District as a result of the claims made against it in 1979 arose out of prior or outstanding litigation.

D. Whether the district court erred in failing to consider prior actions of the defendant.

II. Whether the district court erred in granting defendant's motion for summary judgment.

DISCUSSION

I

A.

The School District argues that because Endorsement No. 3 is susceptible of more than one meaning, it is ambiguous and must be construed against Continental, the insurer. According to the School District, Endorsement No. 3 is ambiguous because: (1) the phrase "arising out of" is ambiguous; (2) the phrase "prior or outstanding litigation" is ambiguous; and (3) the differences between the clause "acts which gave rise thereto" and the previous clause "prior or outstanding litigation" is unclear.

Continental argues that the foregoing Endorsements are not ambiguous and should be enforced according to their plain, ordinary and popular meaning. Further, since the Policy is clear and unambiguous there is no need for judicial interpretation or the application of rules of liberal construction; the court's function is to enforce the contract according to its terms.

The general rule concerning ambiguities in insurance contracts is that if the terms of a policy are ambiguous, uncertain, conflicting or susceptible to more than one construction, the policy should be construed most favorably to the insured. Wing Mah v. United States Fire Insurance Company, 545 P.2d 366 (Kan. 1976). "If, however, the contract is clear and unambiguous, the words are to be taken and understood in their plain, ordinary and popular sense, and there is no need for judicial interpretation or the application of rules of liberal construction. . . ." Goforth v. Franklin Life Insurance Company, 449 P.2d 477, 481 (Kan. 1969).

> 'When an insurance contract is not ambiguous, the court may not make another contract for the parties. Its function is to enforce the contract as made. . . . To be ambiguous the contract must contain provisions or language of doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language. . . . Ambiguity in a written contract does not appear until the application of pertinent rules of interpretation to the face of the instrument leaves it genuinely uncertain which one of two or more meanings is the proper meaning.'

Wing Mah, 545 P.2d at 369 (quoting Clark v. Prudential Ins. Co., 464 P.2d 253, 256 (Kan. 1970)). See also Missouri Pacific Railroad Company v. Kansas Gas & Electric Company, 862 F.2d 796, 799 (10th Cir. 1988) (citing Brown v. Lang, 675 P.2d 842, 846 (Kan. 1984)) ('When the intent of the parties to a contract is clearly ascertainable by construing the document from its four corners it is not considered ambiguous; although some terms may be conflicting, extrinsic evidence is inadmissible and rules of construction applicable to ambiguous contracts do not apply.').

Endorsement No. 3 does not contain "language of doubtful or conflicting meaning." Further, there is no genuine uncertainty as to its meaning. Thus, as the district court properly concluded, Endorsement No. 3 is not ambiguous.

The School District directs us to two state court decisions that allegedly held that the phrase "arising out of" is ambiguous. In Dora Township v. Indiana Insurance Company, 400 N.E.2d 921 (Ill. 1980), a wrongful death action was brought against the Township for failure to properly maintain a stop sign, which was not clearly visible to travelers on County Road North. The Township presented a claim for coverage to the Indiana Insurance Company pursuant to the terms of its comprehensive liability policy. Indiana rejected the claim on the ground that the occurrence fell within an exclusionary endorsement in the policy of insurance. That clause provided: "in consideration of the premium for which this policy is issued, it is agreed the policy does not apply to any loss or claim arising out of the existence of any highways, roads, streets, sidewalks, culverts or bridges, owned, maintained, repaired or controlled by the named insured." Id. (Emphasis added).

In Dora Township, the Illinois Supreme Court did not hold that the phrase "arising out of" was ambiguous as a matter of course, but instead found that the foregoing endorsement was ambiguous as a whole. The court therefore found for the Township. The state court did not definitively hold that the phrase "arising out of" was ambiguous in all situations, on the contrary it applied the general rules of construction to the facts of that case; where language in an insurance policy is subject to different interpretations such ambiguity is to be construed in favor of the insured, and not the insurance company.

The court in Johns v. State Farm Fire & Casualty Company, 349 So. 2d 481 (La. App. 1977), also did not find that the phrase "arising out of" in an insurance policy was ambiguous. In that case, the court reversed the lower court's decision and remanded the lawsuit for a determination of what the exclusionary clause in the insurance policy meant. The exclusionary clause contained in the insurance policy issued by State Farm provided that the policy did not cover any injury or property damage arising out of the ownership, maintenance, operation or use of any motor vehicle owned or operated by the insured. Id. The plaintiff had instituted the action to recover damages for personal injuries, medical expenses, and loss of earnings all sustained when a safety rope, one end of which was attached around plaintiff's waist and the other end secured to an operating vehicle, broke causing plaintiff to fall some 30 feet. The trial court had dismissed plaintiff's action and granted State Farm's motion for summary judgment finding that the exclusionary clause was applicable. The appellate court disagreed with the trial court's grant of summary judgment and remanded the lawsuit for further proceedings to determine whether the exclusionary clause applied. The court was careful to point out that it was making no determination as to whether the exclusionary clause in the policy applied.

Contrary to the School District's contentions that the phrase "arising out of" is inherently ambiguous, this court has held that it is not. In Missouri Pac. R. Co. v. Kansas Gas & Elec. Co., 862 F.2d 796 (10th Cir. 1988), this court, applying Kansas law, found that KG & E's agreement to indemnify MoPac for damages "arising out of" the failure of KG & E to comply with certain safety provisions was plain and unambiguous. According to Paragraph three of the agreement entered into between Kansas Gas and Missouri Pacific,

> [s]hipper [KG & E] assumes full responsibility for, and shall defend, indemnify and save harmless the Carrier [MoPac] from and against, any and all liability, suits, claims, damages, costs, . . . losses, outlays and expenses in any manner caused by, arising out of or connected with the failure or refusal of Shipper to comply with, observe or perform any of the provisions of this Paragraph 3. . . . (Emphasis added).

Id. at 797.

This court discussed the meaning of Paragraph three as follows:

> KG & E's assertion that MoPac must show something akin to proximate cause before it is entitled to indemnification simply is not supported by the language of paragraph three. KG & E agreed to indemnify MoPac for any claim 'in any manner caused by, arising out of or connected with' the failure of KG & E to keep the track clear of obstructions. See Pestock v. State Farm Auto. Ins. Co., 9 Kan.App.2d 188, 674 P.2d 1062, 1063 (1984) (phrase 'arising out of' imparts a more liberal concept of causation than proximate cause); Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1214 (5th Cir. 1986) (language 'arising in connection herewith' contained in indemnity agreement unambiguously encompasses all activities reasonably incident to or anticipated by principal activity of contract). (Emphasis added)

Id. at 799.

In Farm Bureau Mutual Ins. Co. v. Evans, 637 P.2d 491, 494 (Kan. App. 1981), the court interpreted the phrase "arising out of" as follows:

> The general rule in other jurisdictions is that 'arising out of the use' of a vehicle requires the finding of some causal connection or relation between the use of the vehicle and the injury. (Citations omitted). Stated another way, an injury does not arise out of the 'use' of a vehicle within the meaning of the coverage clause of an automobile liability policy if it is caused by some intervening cause not identifiable with normal ownership, maintenance and use of the insured vehicle and the injury complained of. (Citations omitted). The provision, however, imparts a more liberal concept of a causation than 'proximate cause' in its traditional, legal sense.

See also Pestock v. State Farm Auto. Ins. Co., 674 P.2d 1062, 1063 (Kan. App. 1984) ("The phrase 'arising out of the . . . use of' imparts a more liberal concept of causation than 'proximate cause.' (Citations omitted). Thus it is not necessary to find that the injury was directly and proximately caused by the use of a vehicle to impart liability. . . .").

Thus, not only is the phrase "arising out of" unambiguous, but has a well-settled meaning requiring "some causal connection or relation between." "Arising out of" imparts a more liberal concept of causation than "proximate cause." Therefore, as defined by the courts, including this court, the phrase "arising out of" as used in the insurance policy does not require Continental to establish that the Intervenors' action was "proximately caused" by the original Brown complaint. Continental must merely prove that the Intervenors' lawsuit arose out of the original Brown action. As will be discussed more fully below, Continental has proven its case.

The School District further argues that the phrase "prior or outstanding litigation" is ambiguous for two reasons. According to the School District's contentions:

> [t]he phrase 'prior or outstanding litigation' is ambiguous because it is unclear as to whether the prior or outstanding litigation must have identity of parties and/or identity of issues (neither of which is present here). Also unclear and, thefore [sic], ambiguous is the significance of use of the term 'pending litigation in Endorsement No. 2 and 'prior or outstanding litigation' in Endorsement No. 3.

(Appellant's Brief, at pp. 16-17). These summary conclusions by the School District do not create an ambiguity in Endorsement No. 3. Endorsement No. 3 does not require identity of parties and/or identity of issues. It is interesting, however, to note that in the 1951 Brown complaint, as well as in the 1979 Intervenors' action, the plaintiff class for both lawsuits was defined as black children attending Topeka schools. In addition, the 1951 class included future members, such as the Intervenors, in the action. Brown v. Board of Education, 84 F.R.D. 383, 394 (D. Kan. 1979) ("From the relief ordered, it seems obvious that the class consisted of Black students attending elementary schools in the Topeka school district. In light of the prospective nature of the relief ordered, it is further obvious that the class definition included future members of the class."). Furthermore, the School District is the successor to the Topeka Board of Education in

FILED
United States Court of Appeals
Tenth Circuit

APR 25 1990

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNIFIED SCHOOL DISTRICT #501, Shawnee County, State of Kansas, Plaintiff-Appellant, v. CONTINENTAL CASUALTY COMPANY, Defendant-Appellee.	No. 89-3097 (D.C. No. 1083-5) (Dist. of Kansas)

ORDER AND JUDGMENT*

Before **BRORBY and BARRETT**, Circuit Judges, and **WEST***, District Judge.

The Honorable Lee R. West, United States District Judge for the District of Western Oklahoma, sitting by designation.

Unified School District No. 501, Shawnee County, Kansas (School District)), the insured, seeks a declaratory judgment that Continental Casualty Company (Continental), the insurer, has a duty to reimburse the School District for the losses incurred defending against specific claims made in 1979 by the Intervenors in Brown v. Board of Education, Case No. T-316 (Brown). This

* This Order and Judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

alleged duty ~~is~~ predicated upon the contract of insurance entered into between the parties (Policy). The parties filed cross-motions for summary judgment and on March 29, 1989, the district court entered judgment in favor of Continental.

In granting Continental's motion for summary judgment, the district court concluded that Endorsement No. 3 to the Policy was unambiguous and excluded coverage for losses sustained as a consequence of the Intervenors' action. Endorsement No. 3 provides as follows:

> COVERAGE SHALL EXCLUDE ANY LOSS ARISING OUT OF PRIOR OR OUTSTANDING LITIGATION OR ACTS WHICH GAVE RISE THERETO.

(R., Vol. 1, Doc. 1 Ex. 1, Insurance Policy) (Emphasis in original).

The district court concluded that the Intervenors' action "arose out" of the Brown lawsuit which was outstanding litigation at the time the motion to intervene was filed. Thus, Endorsement No. 3 precluded coverage under the Policy.

FACTS

On February 28, 1951, Oliver Brown brought a class action on behalf of all black children attending elementary schools in the Topeka School district. In the 1951 complaint, the Brown plaintiffs alleged that the opportunities provided to children attending all black schools were inferior to those provided to children attending all white schools, including the physical facilities, curricula, teaching resources, and student personnel services, as well as other services. In addition to these factors, they alleged that segregation itself resulted in an inferior education for blacks and thus violated the Fourteenth

Amendment to the United States Constitution. The Brown plaintiffs sought a permanent injunction restraining the enforcement, operation and execution of a state statute that provided for segregation of schools for the education of black children and white children below the high school level. Further, these plaintiffs sought a declaratory judgment declaring unconstitutional the state statute and the segregation scheme set up thereunder by the school authorities of the City of Topeka.

The district court held for the defendants finding that the doctrine of "separate but equal" in the school systems did not violate the constitutional guarantees of due process of law. That court further found that the physical facilities, the curricula, the courses of study, and the qualifications and quality of teachers, as well as other educational facilities in the two sets of schools, were comparable. Brown v. Board of Education, 98 F. Supp. 797 (D. Kan. 1951).

On May 17, 1954, the United States Supreme Court reversed the district court. In finding for the plaintiffs, the Supreme Court held that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." Brown v. Board of Education, 347 U.S. 483, 495 (1954) (Brown I).

In Brown I, the Court invited the parties to submit briefs on the question of the appropriate remedy for the constitutional violation. In Brown v. Board of Education, 349 U.S. 294 (1955) (Brown II), the Court concluded that the local federal district court should monitor the School District's actions in implementing the constitutional principles set forth in Brown I.

On remand, the district court held a full hearing to determine whether the School District's plan for desegregation complied with the Supreme Court's mandate. On October 28, 1955, the district court entered an order finding that the plans submitted by the School District constituted a good faith beginning towards compliance with the Supreme Court's order. The district court stated as follows:

> There are a number of respects in which we feel that the plan does not constitute full compliance with the mandate of the Supreme Court, but that mandate implies that some time will be required to bring that about. The elements that we feel do not constitute full compliance are mostly of a minor nature but since this is not a final decree no useful purpose would be served by setting them out herein.
>
> ***
>
> It is the conclusion of the court that while complete desegregation has not been accomplished in the Topeka School System, a good faith effort toward that end has been made and that, therefore, the plan adopted by the Board of Education of the City of Topeka be approved as a good faith beginning to bring about complete desegregation. Jurisdiction of the cause for the purpose of entering the final decree is retained until such time as the Court feels there has been full compliance with the mandate of the Supreme Court.

Brown v. Board of Education, 139 F. Supp. 468, 468-469 (D. Kan. 1955).

On August 22, 1979, the Intervenors filed their "Motion For An Order Commanding Compliance With The Supreme Court Mandate To Desegregate The Schools In The Case of Brown v. Board of Education of Topeka, 349 U.S. 294." The Intervenors presented their motion as follows:

Come now the intervening plaintiffs and move the Court to issue an order commanding Unified School District #501 of Topeka, Kansas to desegregate the schools operated by said school district and establish a racially integrated and unitary school system as ordered by the United States Supreme Court in Brown v. Board of Education of Topeka, supra. (Emphasis added).

In support of this Motion, the intervening plaintiffs state:

1. That they are Black Americans who reside in Topeka, Kansas.

2. That the adult plaintiffs are parents of the minor children plaintiffs who attend public schools within Unified School District #501 of Topeka, Kansas.

3. That United School District #501 is the successor to the Board of Education of Topeka, Shawnee County, Kansas, defendant in Brown v. Board of Education of Topeka.

4 Defendant school district is required by the law of the State of Kansas to maintain and operate a system of public schools in Unified School district #501 in Shawnee County, Kansas and defendant school district is presently operating such public schools in said county and State.

5. The the United States Supreme Court in Brown v. Board of Education of Topeka, supra ordered the Board of Education of Topeka to adopt and implement a plan to desegregate the schools operated by said Board of Education and establish a unitary and integrated school system "with all deliberate speed."

6. The United State Supreme court in Brown further ordered that the United States District Court for the District of Kansas retain jurisdiction over the Brown case until the Board of Education of Topeka achieved full compliance with its mandate. (Emphasis added).

7. That notwithstanding the Supreme court's mandate, the former Board of Education of Topeka and the current Unified School district #501 have both failed to desegregate the schools and establish a unitary and integrated school system. (Emphasis added).

(R., Vol. I, Doc. 1, Ex. 3, Motion for an Order Commanding Compliance With the Supreme Court Mandate to Desegregate the Schools in the Case of Brown v. Board of Education of Topeka).

The motion to intervene was granted on November 29, 1979, and the Brown lawsuit subsequently proceeded to trial. On April 9, 1987, the district court entered a final judgment finding that the School District had fully complied with the Supreme Court's mandate in Brown I and Brown II. Brown v. Board of Education, 671 F. Supp. 1290 (D. Kan. 1987). On January 29, 1990, this court reversed in part the 1987 order and held that the School District did not meet its burden of establishing a lack of causal connection between the current conditions of segregation and the prior de jure system. Further, this court held that the Topeka school system was not unitary under constitutional standards and was therefore in violation of Title VI of the 1964 Civil Rights Act. Brown v. Board of Education, 892 F.2d, 851 (10th Cir. 1990) (Baldock, Circuit Judge, dissenting).

At issue in this action is the insurance agreement entered into between Continental and the School District with an effective policy period from October 15, 1976, to October 15, 1979. This Policy was thereafter renewed and continued in effect from October 15, 1979, until on or about October 18, 1984, when Continental canceled the policy.

This Policy is a "reimbursement policy" wherein Continental agreed that if a claim was brought against the School District for a "wrongful act" occurring during the Policy period then, provided that no exclusions were applicable, Continental would pay the

School District for any "losses" which the School District became legally obligated to pay. Wrongful Act is defined in Section III(c) of the Policy to include, among other things, any "act or omission or neglect or breach of duty by the Assureds in the discharge of their duties." (R., Vol. I, Doc. 1, Ex. 1, Insurance Policy). Loss is defined in Section III(d) of the Policy and encompasses any amount which the School district is "legally obligated to pay" including damages, judgments, and "cost of investigation and defense of legal actions. . . ." Id.

Also included in the Policy is a Prior Wrongful Act Endorsement, which states as follows:

> The coverage afforded by this endorsement shall not apply to any claim, suit, action or proceeding pending at the effective date of this endorsement or to any Wrongful Act if, at the inception date of this endorsement, the School District or an Assured could reasonably have expected that a claim, suit, action or proceeding would result therefrom.

Id. As stated before, the Policy also provided that:

> COVERAGE SHALL EXCLUDE ANY LOSS ARISING OUT OF PRIOR OR OUTSTANDING LITIGATION OR ACTS WHICH GAVE RISE THERETO.

Id.

By letter dated December 6, 1979, the School District notified Continental of the 1979 claims made against it by the intervening plaintiffs. Continental then notified the School District on May 16, 1980, that it was denying any liability in connection with the 1979 Brown claims made against the School District, and denied that the Policy afforded any coverage to the School District in connection with the claims of the Intervenors.

Continental denied coverage based upon Endorsements No. 2 and No. 3 of the Policy.

A second amended complaint was filed by the Intervenors on May 27, 1986. This complaint added a new claim for relief pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Continental still refused to pay the School District for the losses incurred in defending against the Intervenors in Brown.

On March 23, 1989, the district court granted Continental's motion for summary judgment and denied the School District's summary judgment motion. In holding for Continental, the district court concluded that Endorsement No. 3 was not ambiguous and that, therefore, the words would have to be applied according to their plain, ordinary and popular sense. Because that Endorsement specifically excluded from coverage any loss arising out of outstanding litigation, the School District's motion was denied. The district court held that the intervening plaintiffs' case was simply a continuation of the Brown case. "In fact, the intervening plaintiffs' case ultimately determined whether Topeka had finally complied with the original mandate resulting from the earlier litigation in this case." (R., Vol. I, Doc. 48, Memorandum and Order at p. 6). Thus, the intervening plaintiffs' case ended the ongoing Brown litigation. Id.

The School District is now appealing the district court's order concerning Continental's liability to the School District under the Policy.

ISSUES

The School District posits the following issues for review:

I. Whether the district court erred in denying plaintiff School District's motion for partial summary judgment.

A. Whether the district court erred in determining that the exclusionary clause was unambiguous.

B. Whether the district court erred in failing to construe the exclusionary clause narrowly.

C. Whether the "loss" suffered by the School District as a result of the claims made against it in 1979 arose out of prior or outstanding litigation.

D. Whether the district court erred in failing to consider prior actions of the defendant.

II. Whether the district court erred in granting defendant's motion for summary judgment.

DISCUSSION

I

A.

The School District argues that because Endorsement No. 3 is susceptible of more than one meaning, it is ambiguous and must be construed against Continental, the insurer. According to the School District, Endorsement No. 3 is ambiguous because: (1) the phrase "arising out of" is ambiguous; (2) the phrase "prior or outstanding litigation" is ambiguous; and (3) the differences between the clause "acts which gave rise thereto" and the previous clause "prior or outstanding litigation" is unclear.

Continental argues that the foregoing Endorsements are not ambiguous and should be enforced according to their plain, ordinary and popular meaning. Further, since the Policy is clear and unambiguous there is no need for judicial interpretation or the application of rules of liberal construction; the court's function is to enforce the contract according to its terms.

The general rule concerning ambiguities in insurance contracts is that if the terms of a policy are ambiguous, uncertain, conflicting or susceptible to more than one construction, the policy should be construed most favorably to the insured. Wing Mah v. United States Fire Insurance Company, 545 P.2d 366 (Kan. 1976). "If, however, the contract is clear and unambiguous, the words are to be taken and understood in their plain, ordinary and popular sense, and there is no need for judicial interpretation or the application of rules of liberal construction. . . ." Goforth v. Franklin Life Insurance Company, 449 P.2d 477, 481 (Kan. 1969).

> 'When an insurance contract is not ambiguous, the court may not make another contract for the parties. Its function is to enforce the contract as made. . . . To be ambiguous the contract must contain provisions or language of doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language. . . . Ambiguity in a written contract does not appear until the application of pertinent rules of interpretation to the face of the instrument leaves it genuinely uncertain which one of two or more meanings is the proper meaning.'

Wing Mah, 545 P.2d at 369 (quoting Clark v. Prudential Ins. Co., 464 P.2d 253, 256 (Kan. 1970)). See also Missouri Pacific Railroad Company v. Kansas Gas & Electric Company, 862 F.2d 796, 799 (10th Cir. 1988) (citing Brown v. Lang, 675 P.2d 842, 846 (Kan. 1984)) ('When the intent of the parties to a contract is clearly ascertainable by construing the document from its four corners it is not considered ambiguous; although some terms may be conflicting, extrinsic evidence is inadmissible and rules of construction applicable to ambiguous contracts do not apply.').

Endorsement No. 3 does not contain "language of doubtful or conflicting meaning." Further, there is no genuine uncertainty as to its meaning. Thus, as the district court properly concluded, Endorsement No. 3 is not ambiguous.

The School District directs us to two state court decisions that allegedly held that the phrase "arising out of" is ambiguous. In Dora Township v. Indiana Insurance Company, 400 N.E.2d 921 (Ill. 1980), a wrongful death action was brought against the Township for failure to properly maintain a stop sign, which was not clearly visible to travelers on County Road North. The Township presented a claim for coverage to the Indiana Insurance Company pursuant to the terms of its comprehensive liability policy. Indiana rejected the claim on the ground that the occurrence fell within an exclusionary endorsement in the policy of insurance. That clause provided: "in consideration of the premium for which this policy is issued, it is agreed the policy does not apply to any loss or claim arising out of the existence of any highways, roads, streets, sidewalks, culverts or bridges, owned, maintained, repaired or controlled by the named insured." Id. (Emphasis added).

In Dora Township, the Illinois Supreme Court did not hold that the phrase "arising out of" was ambiguous as a matter of course, but instead found that the foregoing endorsement was ambiguous as a whole. The court therefore found for the Township. The state court did not definitively hold that the phrase "arising out of" was ambiguous in all situations, on the contrary it applied the general rules of construction to the facts of that case; where language in an insurance policy is subject to different interpretations such ambiguity is to be construed in favor of the insured, and not the insurance company.

The court in Johns v. State Farm Fire & Casualty Company, 349 So. 2d 481 (La. App. 1977), also did not find that the phrase "arising out of" in an insurance policy was ambiguous. In that case, the court reversed the lower court's decision and remanded the lawsuit for a determination of what the exclusionary clause in the insurance policy meant. The exclusionary clause contained in the insurance policy issued by State Farm provided that the policy did not cover any injury or property damage arising out of the ownership, maintenance, operation or use of any motor vehicle owned or operated by the insured. Id. The plaintiff had instituted the action to recover damages for personal injuries, medical expenses, and loss of earnings all sustained when a safety rope, one end of which was attached around plaintiff's waist and the other end secured to an operating vehicle, broke causing plaintiff to fall some 30 feet. The trial court had dismissed plaintiff's action and granted State Farm's motion for summary judgment finding that the exclusionary clause was applicable. The appellate court disagreed with the trial court's grant of summary judgment and remanded the lawsuit for further proceedings to determine whether the exclusionary clause applied. The court was careful to point out that it was making no determination as to whether the exclusionary clause in the policy applied.

Contrary to the School District's contentions that the phrase "arising out of" is inherently ambiguous, this court has held that it is not. In Missouri Pac. R. Co. v. Kansas Gas & Elec. Co., 862 F.2d 796 (10th Cir. 1988), this court, applying Kansas law, found that KG & E's agreement to indemnify MoPac for damages "arising out of" the failure of KG & E to comply with certain safety provisions was plain and unambiguous. According to Paragraph three of the agreement entered into between Kansas Gas and Missouri Pacific,

> [s]hipper [KG & E] assumes full responsibility for, and shall defend, indemnify and save harmless the Carrier [MoPac] from and against, any and all liability, suits, claims, damages, costs, . . . losses, outlays and expenses in any manner caused by, arising out of or connected with the failure or refusal of Shipper to comply with, observe or perform any of the provisions of this Paragraph 3. . . . (Emphasis added).

Id. at 797.

This court discussed the meaning of Paragraph three as follows:

> KG & E's assertion that MoPac must show something akin to proximate cause before it is entitled to indemnification simply is not supported by the language of paragraph three. KG & E agreed to indemnify MoPac for any claim 'in any manner caused by, arising out of or connected with' the failure of KG & E to keep the track clear of obstructions. See Pestock v. State Farm Auto. Ins. Co., 9 Kan.App.2d 188, 674 P.2d 1062, 1063 (1984) (phrase 'arising out of' imparts a more liberal concept of causation than proximate cause); Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1214 (5th Cir. 1986) (language 'arising in connection herewith' contained in indemnity agreement unambiguously encompasses all activities reasonably incident to or anticipated by principal activity of contract). (Emphasis added)

Id. at 799.

In Farm Bureau Mutual Ins. Co. v. Evans, 637 P.2d 491, 494 (Kan. App. 1981), the court interpreted the phrase "arising out of" as follows:

> The general rule in other jurisdictions is that 'arising out of the use' of a vehicle requires the finding of some causal connection or relation between the use of the vehicle and the injury. (Citations omitted). Stated another way, an injury does not arise out of the 'use' of a vehicle within the meaning of the coverage clause of an automobile liability policy if it is caused by some intervening cause not identifiable with normal ownership, maintenance and use of the insured vehicle and the injury complained of. (Citations omitted). The provision, however, imparts a more liberal concept of a causation than 'proximate cause' in its traditional, legal sense.

See also Pestock v. State Farm Auto. Ins. Co., 674 P.2d 1062, 1063 (Kan. App. 1984) ("The phrase 'arising out of the . . . use of' imparts a more liberal concept of causation than 'proximate cause.' (Citations omitted). Thus it is not necessary to find that the injury was directly and proximately caused by the use of a vehicle to impart liability. . . .").

Thus, not only is the phrase "arising out of" unambiguous, but has a well-settled meaning requiring "some causal connection or relation between." "Arising out of" imparts a more liberal concept of causation than "proximate cause." Therefore, as defined by the courts, including this court, the phrase "arising out of" as used in the insurance policy does not require Continental to establish that the Intervenors' action was "proximately caused" by the original Brown complaint. Continental must merely prove that the Intervenors' lawsuit arose out of the original Brown action. As will be discussed more fully below, Continental has proven its case.

The School District further argues that the phrase "prior or outstanding litigation" is ambiguous for two reasons. According to the School District's contentions:

> [t]he phrase 'prior or outstanding litigation' is ambiguous because it is unclear as to whether the prior or outstanding litigation must have identity of parties and/or identity of issues (neither of which is present here). Also unclear and, thefore [sic], ambiguous is the significance of use of the term 'pending litigation in Endorsement No. 2 and 'prior or outstanding litigation' in Endorsement No. 3.

(Appellant's Brief, at pp. 16-17). These summary conclusions by the School District do not create an ambiguity in Endorsement No. 3. Endorsement No. 3 does not require identity of parties and/or identity of issues. It is interesting, however, to note that in the 1951 Brown complaint, as well as in the 1979 Intervenors' action, the plaintiff class for both lawsuits was defined as black children attending Topeka schools. In addition, the 1951 class included future members, such as the Intervenors, in the action. Brown v. Board of Education, 84 F.R.D. 383, 394 (D. Kan. 1979) ("From the relief ordered, it seems obvious that the class consisted of Black students attending elementary schools in the Topeka school district. In light of the prospective nature of the relief ordered, it is further obvious that the class definition included future members of the class."). Furthermore, the School District is the successor to the Topeka Board of Education in place in 1951. Id. at 389. Thus, clearly there is an identity of parties.

Moreover, the issues are the same; the 1951 complaint and the Intervenors' complaint both alleged that the School District maintained racially segregated schools in violation of the Fourteenth Amendment to the United States Constitution. This is evidenced by the fact that the Intervenors in the 1979 action were specifically seeking an "Order Commanding Compliance With The Supreme Court Mandate To Desegregate The Schools In The Case of Brown v. Board Of Education Of Topeka, 349 U.S. 294." Therefore, the issue of whether the School District maintained racially segregated schools was very much involved in both proceedings.

The School District's second reason for finding ambiguity in the phrase "prior or outstanding" litigation is also without merit. Endorsement No. 2 provides:

> IN CONSIDERATION of the additional premium at which this Policy is issued it is agreed that this Policy is extended to provide coverage for Wrongful Acts which occurred prior to the inception date of the Policy provided always however that if during this Policy Period:
>
> (1) The School District or the Assureds, or any of them, shall receive written or oral notice from any party that it is the intention of such party to hold the School District or the Assureds, or any of them, responsible for a Wrongful Act: or
>
> (2) The School District or the Assureds, or any of them, shall become aware of any occurrence which may subsequently give rise to a claim made against the School District or the Assureds, or any of them, for a Wrongful Act:
>
> and shall in either case during the Policy Period give immediate written notice to the Insurer of the receipt of such written or oral notice under Clause (1) or of such occurrence under Clause (2), then any claim which may subsequently be made against the School District or

> the Assureds, or any of them, within the space of twelve months following expiration of this Policy shall, for the purpose of this Policy be treated as a claim made during this Policy Period.
>
> The coverage afforded by this endorsement shall not apply to any claim, suit, action or proceeding pending at the effective date of this endorsement or to any Wrongful Act if, at the inception date of this endorsement, the School District or an Assured could reasonably have expected that a claim, suit, action or proceeding would result therefrom. (Emphasis added).

(R., Vol. I, Doc. 1, Ex. 1, Insurance Policy). Endorsement No. 2 does not contain the phrase "pending litigation." However, giving the School District the benefit of the doubt, we will assume that the School District is concerned with the final sentence of the above Endorsement which states: "The coverage afforded by this endorsement shall not apply to any claim, suit, action or proceeding pending at the effective date of this endorsement. . . ." (Emphasis added).

In comparing the two phrases, no ambiguity is created. Taking these phrases in their plain, ordinary and popular sense, we find it obvious that Continental's purpose behind including them in the Policy was to make it clear that it would not be liable under the Policy for any claim, suit, action or proceeding that was pending or outstanding at the time the insurance contract was entered into between the School District and Continental. Therefore, we are compelled to enforce this contract as written. See Goforth v. Franklin Life Insurance Company, 449 P.2d at 481.

The School district also argues that the exclusionary clause is ambiguous because the difference between the clause "acts which gave rise thereto" and the clause "prior or outstanding litigation" is unclear. The School District's contention is that "the acts giving rise to the original Brown litigation have virtually no connection with the claims raised by the intervenors. Long before the intervening plaintiffs' claims were asserted the four all-black schools which were the subject of the initial Brown litigation had been closed." (Appellant's Brief, at p. 17).

As with the remaining language of the Endorsement, these words have plain and obvious meaning. There is no genuine uncertainty as to the meaning of the Endorsement. Rather, as stated before, it is clear that any loss arising from prior or outstanding litigation is excluded from coverage. Furthermore, the purpose behind the original Brown proceeding was not limited to closing the four all-black schools located in Topeka. The original lawsuit was brought to abrogate segregation. The Intervenors' action was to enforce the desegregation orders entered in Brown I and Brown II.

B.

The School District further contends that the district court failed to correctly apply the basic rule of construction that exclusionary clauses in insurance policies are to be construed against the insurer in favor of coverage. The School District cites Dronge v. Monarch Ins. Co. of Ohio, 511 F. Supp. 1, 4 (D. Kan. 1979) for the following proposition:

> If the insurer intends to restrict or limit coverage provided in the policy, it must use clear and unambiguous language in doing so, employing such language as will clearly and distinctly reveal its stated purpose. (Citations omitted). This rule of construction applies with particular force to provisions which attempt to exclude liability coverage under certain conditions. (Citations omitted). It is a general rule that exceptions, limitations and exclusions to insuring agreements require a narrow construction on

> the theory that the insurer, having affirmatively expressed coverage through broad promises, assumes a duty to define any limitations on that coverage in clear and explicit terms.

As stated and discussed in detail above, the Policy in question stated the exclusions and defined the limitations in clear and explicit terms. We hold that the district court narrowly construed the Policy against Continental and arrived at the correct conclusion that the Endorsements and exclusions were unambiguous.

C.

The School District's third argument is that the "loss" suffered by the School District as a result of the claims made by the intervening plaintiffs did not "arise out of prior or outstanding litigation" so as to preclude coverage under the Policy. The School District asserts that since one item of "loss" for which it seeks reimbursement under the Policy is the cost of investigation and defense of the 1979 claims brought by the Intervenors, it could not have arisen out of the 1950's litigation or acts which gave rise thereto. The School District maintains that

> "[i]t is questionable whether defense costs could ever arise out of prior litigation -- they are naturally a result of current litigation. In any event, no reasonable construction permits a finding that defense costs incurred by the School District in defense of claims made for the first time in 1979 arose out of litigation of the 1950's or acts which gave rise thereto."

(Appellant's Brief, at p. 20).

As discussed previously, the phrase "arising out of" imparts a more liberal concept of causation than "proximate cause."

Pestock, 674 P.2d at 1063. Thus, it is not necessary for Continental to prove that the costs associated with the 1979 litigation were directly and proximately caused by the Brown I and Brown II lawsuits. Id. Continental must merely show that the costs of the 1979 action were reasonably incident to the original Brown proceedings. See Missouri Pac. R. Co., 862 F.2d at 799. We conclude that Continental has carried this burden.

The School District further contends that the claims made by the Brown I plaintiffs are distinctly different from the claims made by the Intervenors. The fundamental factual differences asserted by the School District are as follows: (1) the holdings in Brown I and Brown II were limited to the School District's assignment of students in grades K-6 solely on the basis of race, whereas the Intervenors' claims alleged unlawful practices of the School District at the middle and high school levels as well; and (2) student assignment to black and white schools was the only issue in the original Brown actions, whereas the Intervenors took issue not only with school assignment of students, but with the School District's policies with respect to faculty and staff assignment, transportation, extracurricular activities, facilities, open enrollment, and attendance boundaries which they alleged were a failure to integrate.

In granting the motion to intervene, the district court disposed of the School Districts first argument as follows:

> Topeka intentionally segregated elementary schools in 1951. Elementary schools constitute a meaningful portion of the school district. The Keyes presumptions, in light of Topeka's use of a 'feeder' school system, provide a basis for finding that segregation in junior high and high schools, if any, is purposeful. Thus,

> continued supervision of the Topeka schools under the decree in Brown II would naturally have led the Court over the years to turn its attention to the possibility of segregation in the junior and senior high schools, and now to the middle schools which are being adopted in Topeka.
>
> This fact was recognized in the Weinberger case by the defendant [the School District] which argued that the school system was under court supervision in opposition to the government's position that an HEW investigation of the entire system was not barred because this case, as originally filed, involved only elementary schools. (Emphasis in original).

Brown, 84 F.R.D. at 401. Thus, it was the School District that took the position in U.S.D. # 501 v. Weinberger, 74-160-C5, that since the district court in 1955 retained jurisdiction to monitor the School District's actions with regard to desegregating the school system, HEW could not bring a separate action claiming that the schools were still segregated.

In Weinberger, HEW prepared to cut off federal aid to the Topeka schools and scheduled an administrative hearing on the matter after concluding that the School District had failed to desegregate the schools. On August 7, 1974, the School District filed an action to enjoin the cut off of federal funds and to enjoin HEW from holding the administrative hearing. It was the school board's theory that Brown was still an open case and that HEW was thereby precluded from holding an administrative hearing. The School District argued that the district court had exclusive jurisdiction to determine whether the School District was in compliance with the Supreme Court mandate. HEW argued that the case was different because the original plaintiffs in the case were attacking segregation at only the elementary school level, whereas HEW was charged with investigating discrimination in all aspects at all levels of the public school system. The School District in essence claimed that it was irrelevant whether HEW was concerned with all levels of the school system; it argued that the entire case was subject to the jurisdiction of the district court. The district court granted the School District's motion for a preliminary injunction finding that the district court had exclusive jurisdiction to hear matters concerned with the original Brown proceedings. The Weinberger case was eventually dismissed by stipulation of the parties. Brown, 84 F.R.D. at 390. Thus, the School District has previously argued that all matters concerned with the Brown proceedings must be heard by the district court, regardless of whether new issues are injected into the lawsuit.

The Intervenors alleged that in 1979 the School District had not complied with the mandate of the Supreme Court in Brown. In support of this assertion, the Intervenors pointed to the fact that a vast majority of black children attended schools in which the enrollment of black students was disproportionately high and the vast majority of white students attended schools in which the enrollment of white students was disproportionately high. As recognized by the district court, this resulted from the fact that the segregated elementary schools fed into the middle and high schools. Id. Consequently, segregation in these schools was an issue raised by the 1951 complaint.

The Intervenors emphasized that the relief they sought was compliance with the Brown proceedings by the title of their motion; "Motion For An Order Commanding Compliance With The

Supreme Court Mandate To Desegregate The Schools In The Case Of Brown v. Board Of Education Of Topeka, 349 U.S. 294." It is further clear, from the content of the motion, that the Intervenors were alleging that the constitutional violation first asserted in 1951 had not been adequately remedied according to the Supreme Court orders entered in the case. Moreover, a review of the orders entered in the Brown lawsuit shows that the Intervenors' petition for a final judgment in the action was directly and causally linked to the 1951 complaint. In fact, the recent order entered by this court specifically addressed the connection between the segregative practices in 1951 and the current disparities.

> What the school district has done to integrate is crucial in determining whether the causal link between the prior segregation and current disparities has been severed. The district may carry its burden by showing that it has acted affirmatively to desegregate. Absent such proof, the court must presume that current segregation is the result of prior intentional state action. (Emphasis added).

Brown, 892 F.2d at 863.

This court held that the School District has failed to remedy the prior acts of segregation.

> After reviewing the record, we have concluded that there is a current condition of segregation in Topeka. Contrary to the district court, we are convinced that this condition is causally connected to the prior de jure system of segregation. (Emphasis added).

Id. Thus, we hold that the orders entered in the Intervenors' action finding that the Intervenors' proceedings are causally linked to Brown I and Brown II are correct.

The School District also maintains that the Intervenors' action was fundamentally different from the original Brown proceedings in that student assignment to black and white schools was the only issue in the original Brown action. However, the intervening plaintiffs took issue not only with assignment of students, but with the School District's policies with respect to faculty and staff assignment, transportation, extracurricular activities, facilities, open enrollment, attendance boundaries, school annexations, school closings, school construction, and demographic changes which they alleged were a failure to integrate.

In Brown I, the Supreme Court affirmed the constitutional violation alleged in the 1951 complaint and then invited the parties to submit briefs on the question of the appropriate remedy for that constitutional violation. In Brown II, the Court concluded that the local federal district courts should monitor the School District's actions in implementing the constitutional principles set forth in Brown I. The Court remanded the case to the district court with the following instructions:

> While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet

district has complied with the Supreme Court mandate to desegregate schools.

The district court also addressed the contention concerning the School District's policies adopted many years after the original Brown proceedings, such as the open enrollment policy, school construction, and attendance boundaries. The district court held that had the court's retention of jurisdiction since 1955 been an active one, these matters would have come before the court's direct scrutiny because a court must take into account changed circumstances when it has retained jurisdiction to enforce a desegregation order. "[I]t is a court's obligation to monitor actions taken after rendition of judgment which may increase segregation in the school system." (Emphasis added). Id. at 402.

The School District's next argument is that intervening legal developments preclude a finding that the claims asserted by the Intervenors in 1979 arose out of prior or outstanding litigation. In support of this contention, the School District states as follows:

> [O]ver the course of some 20 years (between Brown I and Keyes), desegregation law has undergone a substantive change from merely prohibiting segregation on the basis of race to mandating affirmative duties to accomplish integration in not only student assignment, but also with respect to faculty, staff, transportation, extracurricular activities and facilities.
>
> These substantive and far-reaching legal developments, occurring between the initial Brown litigation and the intervenors' claims for relief, realistically preclude a finding that the intervenors' claims arose out of the litigation of Brown I and Brown II, or acts which gave rise thereto.

(Appellant's Brief, at p. 31-32). We disagree.

In granting the motion to intervene, the Brown court stated:

> [I]n light of the wording of the October 28, 1955 order of the trial court and the fact that no order of compliance has ever been issued, this action, although dormant, has been technically open for the past 24 years. When, as here, a court retains jurisdiction over a school desegregation case in order to enforce its orders, changes in the law must be applied as they occur. (Emphasis added).

Brown, 84 F.R.D. at 401. Thus, the changes in the law since the 1951 Brown complaint do not break the causal connection with the Intervenors' action.

It is undisputed that in monitoring school desegregation pursuant to Brown II, the courts have continuously defined and redefined the remedy for the constitutional violation which occurred because a school system was racially segregated under compulsion of state law. See Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973). The evolution of the desegregation remedy in these cases trace directly back to Brown I and Brown II, however. To the extent that the courts required school districts to take affirmative steps towards desegregation, these steps were deemed necessary to satisfy the requirements of Brown I.

The School District argues that since the Supreme Court in Green v. School Board of New Kent County, 391 U.S. 430 (1968), and Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), imposed an affirmative duty on school districts to desegregate, the Intervenors' action could not have arisen out of the original Brown proceedings. The duty to desegregate discussed in both Green and Swann is the same duty imposed by Brown II.

In Green, the court stated as follows:

In the light of the command of [Brown II], what is

> involved here is the question whether the Board has achieved the 'racially nondiscriminatory school system' Brown II held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former 'white' school to Negro children and of the 'Negro' school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. Brown II was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. (Citations omitted). The constitutional rights of Negro school children articulated in Brown I permit no less than this; and it was to this end that Brown II commanded school boards to bend their efforts. (Emphasis added).

Green, 391 U.S. at 437-438.

Similarly, in Swann, the court recognized that the affirmative duty discussed in Green was previously imposed by Brown I and Brown II. In Swann, the court stated:

> The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by Brown I as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of Brown II. That was the basis for the holding in Green that school authorities are 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'

Swann, 402 U.S. at 15.

Clearly, the evolution of the remedy for segregation does not break the causal connection between the 1951 Brown complaint and the Intervenors' action. On the contrary, the basis for this evolution has been the Brown proceedings. Thus, it is obvious that the Intervenors' action arose out of the Brown lawsuit.

The second amended complaint, filed by the Intervenors on May 27, 1986, added a claim for relief pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. The School District contends that since the Intervenors sought relief pursuant to this federal statute, which had not been enacted at the time the original Brown proceedings were litigated, the loss incurred by the School District in defending the Intervenors' claims under this statute could not have arisen out of the prior Brown litigation. We disagree.

As the district court stated in granting the Intervenors' motion to intervene, "[w]hen, as here, a court retains jurisdiction over a school desegregation case in order to enforce its orders, changes in the law must be applied as they occur." Brown, 84 F.R.D. at 401. We therefore reiterate our conclusion that the changes in the law since the 1951 Brown complaint do not break the causal connection between the original Brown proceedings and the Intervenors' action. The Intervenors still sought a court order enforcing the 1954 and 1955 mandates of the Supreme Court.

D.

The School District maintains that the district court erred in failing to consider Continental's actions in providing coverage for the defense costs in two actions brought against the School District, to wit, Miller v. Board of Education of Topeka, Unified School District No. 501, Case No. 79-1408, and Chapman v. Board of Education of Topeka, Unified School District No. 501, Case No. 79-1478, both of which were filed in the United States District Court for the District of Kansas. Continental reimbursed the School District for its defense costs in both of these actions. The School District contends that since the claims raised by the Intervenors and those raised by the plaintiffs in Miller and Chapman were virtually identical, with the exception that the Chapman plaintiffs requested money damages in addition to injunctive relief, Continental's actions in providing coverage to the School District in the Miller and Chapman cases demonstrated that Continental did not construe the phrase "arising out of" as encompassing claims that the School District had failed to attain a unitary system of education following the Brown II decision. We disagree.

The Policy in question specifically states that coverage shall be excluded for any loss arising out of prior or outstanding litigation. As previously discussed, we hold that the Intervenors' action "arose out of" the prior Brown proceedings. Whether Continental paid the School District for losses which arose in *other* lawsuits is irrelevant to whether Continental is liable to the School District for its losses connected with the Intervenors' lawsuit.

The School District cites Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance, 682 F.2d 12, 17-18 (1st Cir. 1982) for the following proposition:

> Where, however, the policy terms are ambiguous and the coverage issue is reasonably disputed, a court may consider extrinsic evidence of the surrounding circumstances and of the parties' intent. For example,

> evidence of the construction given to the language by the parties and of the customary usage of persons in the same commercial setting is normally admissible. If the meaning of the policy terms remains unclear, the policy is generally construed in favor of the insured in order to promote the policy's objective of providing coverage. (Emphasis added).

However, as the foregoing quote specifically states, the policy terms must be ambiguous before extrinsic evidence is allowed.

> Where the relevant language is unambiguous and the application of the policy to the relevant facts is clear, that intent must be ascertained by the plain and ordinary meaning of the contract language.

Id. The court in Eagle-Picher simply stated the general rule that a court must apply the plain and ordinary meaning of a contract when the terms are unambiguous. We hold that the terms of the policy were just that; unambiguous. We therefore hold that the district court did not err by not considering the prior actions of Continental. Moreover, the plaintiffs in both the Chapman and Miller cases brought their actions separate from the original Brown lawsuits, whereas the Intervenors' action was a continuation of the Brown proceedings.

II

The School District's final argument is that the undisputed facts of this case require that judgment be entered in favor of the School District on the issue of coverage. Alternatively, the School District submits that inferences favorable to the School District can be deduced from the facts and circumstances which make summary judgment in favor of Continental improper. In applying our foregoing analysis and conclusions, we disagree.

Since the intervening plaintiffs' case arose out of and was related to the ongoing Brown litigation, the School District is not entitled to recover the expenses incurred in defending that litigation from Continental. In the present situation, the Endorsement's language was plain and unambiguous with a clear meaning that prohibits the recovery of this loss. Endorsement No. 3 excludes the coverage claimed by the School District. We therefore hold that summary judgment in favor of Continental was proper.

AFFIRMED.

Entered for the Court:

James E. Barrett,
Senior United States
Circuit Judge