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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON et al., Plaintiffs, Cross-defendants and Respondents, v. BP AMERICA, INC., et al., Defendants, Cross-complainants and Appellants.	A132298 (San Francisco City & County Super. Ct. No. CGC-06-452062)

On June 30, 2000, the parties executed a confidential settlement agreement and release (2000 Agreement), pursuant to which respondents London Market Insurers[1] obtained a release of all rights under pre-1993 insurance policies they had subscribed in favor of appellant BP America, Inc. (BPA), and its subsidiaries (as defined therein). However, 10 weeks prior, BPA's corporate parent, then called BP Amoco p.l.c., purchased appellant Atlantic Richfield Company (ARCO) and, unbeknownst to the party representatives negotiating the 2000 Agreement, that same day transferred all its shares to BPA.

Several years later, London Market Insurers learned for the first time that ARCO was a subsidiary of BPA and had been a subsidiary on the effective date of the 2000

[1] Respondents London Market Insurers consist of Certain Underwriters at Lloyd's of London; Certain London Market Companies and North River Insurance Company, and Certain Additional London Market Companies.

Agreement. The underlying lawsuit for declaratory relief under the 2000 Agreement ensued, followed by a cross-complaint of BPA and ARCO for declaratory relief, reformation of the 2000 Agreement, and declaratory relief with respect to a separate settlement agreement entered into in 2003 between ARCO and London Market Insurers (2003 Agreement). The trial court granted summary adjudication of BPA's and ARCO's causes of action for reformation of the 2000 Agreement and for declaratory relief under the 2003 Agreement, and ultimately construed the 2000 Agreement as including ARCO within the release of insurance policies of BPA and its subsidiaries.

On appeal, BPA and ARCO attack all the trial court rulings. We affirm the judgment.

I. FACTUAL BACKGROUND

A. *The BP Parties*

In 1987, the British oil company now known as BP p.l.c. (BP) purchased Standard Oil of Ohio (Sohio) and subsequently formed a subsidiary, BPA, comprised of 90 percent of Sohio and 10 percent of assets from other small operations in North America. Sohio in turn owned various subsidiaries.

BP merged with Amoco Corporation in 1998. With a $50 billion purchase price, this was the "largest ever industrial acquisition." In April 2000, BP transferred Amoco to BPA for tax purposes.

BP acquired Atlantic Richfield Company (ARCO) on April 18, 2000. That same day it transferred ARCO to BPA, again for tax reasons.

B. *The London Insurance Market; Shift to "Finality" and Policy Buybacks*

The London insurance market is comprised of syndicates doing business at Lloyd's of London (hereafter, Underwriters or Underwriters at Lloyd's), as well as individual insurance companies doing business outside of Lloyd's of London (Companies or Company). London is a subscription market. Typically, an insurance policy is placed in the London market by a London broker and is subscribed by participating Underwriters and Companies for a stated percentage of the total limit and coverage period.

In the early 1990's, the London insurance market was undergoing massive turmoil due to substantial pollution, asbestos and health hazards claims originating from the United States, and there was concern that the market might not survive. Underwriters at Lloyd's were not able to close their annual accounts because of rising potential reserves; many of the Companies became insolvent. Around this time the British Department of Trade and Industry approved a restructuring plan whereby Lloyd's of London split into an "Old Lloyd's," responsible for past claims under pre-1993 policies, and a "New Lloyd's," which would absorb ongoing business starting in 1993.

To this end in 1994 Underwriters at Lloyd's carved out a specialist claims unit to settle asbestos, pollution and health hazard claims on behalf of all the syndicates. In September 1996, they formed Equitas Limited (Equitas), which subsumed the specialist claims unit and also absorbed a broader range of pre-1993 claims. The Equitas charter called for "finality," the goal being to terminate absolutely any potential exposure against the pre-1993 insurance policies. To achieve "finality," Equitas would pay the insured to buy back all its coverage. Over the years London insurers had developed a standard policy buyback document, with various iterations. Once Equitas was formed with its charter of finality, the buyback form was the only type of settlement Equitas offered.

Many Companies, too, were in a "runoff" situation, meaning their liabilities exceeded assets, they could no longer write insurance business, and instead used their reserves to pay out, or "run off" claims coming in.

James Teff was head of the specialist claims unit and the original claims director at Equitas. While at the specialist claims unit and Equitas between 1994 and 2002, he headed up negotiations for many policy buyback settlements in the approximate range of between $35 million and $500 million. Teff participated in two London market insurance settlements with ARCO. The first, in 1992, involved a cost-sharing agreement pertaining to defense costs for lead paint claims. The second, in 1995, involved buying back ARCO's environmental coverage. This deal specifically excluded product liability claims, including claims arising out of lead-based pigments. Teff placed little value on

these claims, but the lead negotiator for ARCO believed they posed significant potential liability, although their value was uncertain.[2]

Teff explained that generally, a specialist settlement counsel would initiate settlement buyback discussions on the part of the policyholder. Richard Fields was one such specialist settlement counsel. As of the year 2000, Fields had participated in approximately 20 settlements with Underwriters at Lloyd's on behalf of various policyholders, including a 1997 settlement and release representing Amoco Corporation. During that timeframe, Lloyd's was discussing and negotiating finality in their agreements.

C. *The 2000 Agreement*

1. *Negotiating the Agreement*

At some point prior to February 1999, Fields approached Teff with information that his client, BPA, was interested in negotiating a buyback policy agreement. Fields described BPA as the holding company for the United States operations of the British parent, BP.

Settlement negotiations began in February 1999, and continued until shortly before June 30, 2000. Four settlement meetings involving a full complement of principals took place in London during this time, and 14 drafts of the agreement were exchanged. Teff acted on behalf of Underwriters, and various Company leaders participated in the negotiations on behalf of the Company market.

Graham Evans, a senior executive with BPA, was the project director of what the company referred to as its "insurance recovery project." This project aimed at quantifying the remediation costs of environmental claims related to sites used by Sohio and its various subsidiaries, and ultimately negotiating and settling those claims. Evans represented BPA in negotiating the 2000 Agreement. He reported to two BP executives in London: David Watson, treasurer and then vice-president of finance, and through

[2] A number of lead paint cases were pending against ARCO as of June 30, 2000, but as of that date, ARCO had never lost such a case.

Watson to John Buchanan, chief financial officer and board member. Evans sent finance memoranda relating to the insurance recovery project to Watson and Buchanan.

The first settlement meeting took place in April 1999. BPA presented an opening demand of $359 million for an environmental release of BPA and its subsidiaries. Teff made the point that a release for pollution claims only would not be acceptable; Equitas was looking for "a BP Worldwide release." BPA presented a chart depicting BPA as the sole direct North American subsidiary of the parent, BP.

At the second meeting in July 1999, Teff delivered to BPA the standard buyback form and countered with $10 million for a full policy buyback pursuant to the terms of the form. BPA came back with a $337 million claim for an environmental, asbestos and health release. The first draft settlement agreement using the standard form was circulated in September 1999. Therein BPA defined itself as including subsidiaries where there was 50 percent ownership or greater, and included carveouts for Okonite Company and other entities.

The third meeting took place in November 1999. BPA made a presentation on carveouts. It was Teff's understanding that if a company was not specifically carved out, it would be part of the release. Underwriters at Lloyd's increased its offer to $20 million and BPA decreased its demand to $175 million.

At the January 2000 meeting, Teff put forth $75 million as a placeholder for a buyback covering all North American claims. Teff had become aware that "Amoco had been taken over by BP," and pressed for a representation that there were "no current subsidiaries" of the British parent BP in the United States or Canada other than BP Amoco Corporation.

During the first quarter of 2000, Teff also participated in more limited meetings with Fields and others.

The breadth of the release remained a live issue right up to the signing of the 2000 Agreement. On March 30, 2000, Stephen Marcus, attorney for Underwriters at Lloyd's, wrote to Peri Mahaley, attorney for BPA with Fields's law firm, attesting that his clients "want to achieve a settlement whereby there will be no future claims in North America

by BP America or its parent BP . . . ." To this end Marcus asked for a representation from BP that "all of the subsidiaries that do business in North America have been identified in the settlement agreement . . . ." Mahaley reported on April 6, 2000, that BP could not make this representation, but also volunteered the existence of BP Amoco Corporation as an example of a North American subsidiary that was not included in the definition of "BP America." However, Mahaley did not mention anything about ARCO.

Teff testified that at various times he asked BPA and BP for a list of subsidiaries, but was told such a list could not be produced. Evans attempted to compile a list of BPA subsidiaries, but was unable to do so. Daniel Pinkert, assistant general counsel for BPA, could have provided information on BPA subsidiaries through his office; the information was not public at that time.

The 2000 Agreement was executed on June 30, 2000. Evans signed for BPA, Buchanan signed for BP Amoco, and Marcus signed for Underwriters as well as Companies.

BPA allocated the settlement proceeds under the 2000 Agreement to the various operating units of BPA "in terms of upstream/downstream operations, chemicals . . . [a]nd . . . retail gasoline distribution." The residual portion went to an account dealing with prior divestments of Sohio and its subsidiaries. No settlement proceeds were allocated to ARCO. The London Market Insurers did not allocate any portion of the settlement amount to any ARCO insurance policy.

Although BP had acquired ARCO on April 18, 2000, and transferred the ARCO shares to BPA that same day, no one "from the BP negotiating team" informed Teff about these transactions. Notwithstanding that Teff did not know about the ARCO purchase and transfer at the time, assuming that ARCO was a 99.7 percent owned subsidiary of BPA, it was his intent to buy back all North American claims "for the BP group, and if that included ARCO, then we would be buying that back." As well, Kevin Connolly, a principal negotiating on behalf of the Company market, did not know what companies were BPA subsidiaries, but if a company owned by BPA was not excluded, it was included in the release.

Ten days after the ARCO acquisition, Mahaley corresponded with Marcus stating, with reference to assurances of finality for North American-based claims, that "[t]he London Market is fully protected by the 'all known and unknown insurance policies' language" in the agreement. Nothing was mentioned about ARCO at that time or ever during negotiations.

2. *Terms of the 2000 Agreement*

The 2000 Agreement defines "BP America" as follows: "(i) BP America Inc., . . . ; [¶] (ii) [Sohio]; [¶] (iii) any predecessors and successors of (i) and (ii); [¶] (iv) the past and present subsidiaries, partnerships, joint ventures and other entities in which the entities described in (i) and (ii) above currently have or in the past have had at least 50 percent ownership interest and any other entities that have been acquired by, merged into, or combined with (i) or (ii) above, including but not limited to Carborundum Company, Kennecott Copper Corporation . . . , Kennecott Corporation . . . , Dorr-Oliver, Inc., Pfaudler, Inc., Chase Brass & Copper Company and Old Ben Coal; and [¶] . . . [¶] (vi) . . . notwithstanding anything in the foregoing to the contrary, the term 'BP America' does not include Okonite. [¶] (vii) . . . the term 'BP America' does not include . . . 'New Kennecott' . . . [¶] (viii) . . . the term 'BP America' does not include . . . 'Phelps Dodge' . . . . [¶] (ix) BP America does not include its parent entity BP Amoco p.l.c., Anglo-Persian Oil Company, Ltd., Anglo-Iranian Oil Company Ltd., The British Petroleum Company, Ltd. or The British Petroleum Company, p.l.c."

The 2000 Agreement defines "Subject Insurance Policies" to include "(i) all liability insurance policies listed in Attachment A hereto; and [¶] (ii) all known and unknown insurance policies issued by one or more of the London Market Insurers to BP America prior to January 1, 1993, whether or not listed in Attachment A . . . ."

Further, the 2000 Agreement provides for a gross settlement payment to BPA of $83,485,353.18 (the Settlement Amount). Attachment D sets forth the several shares of each settling insurer. In return, upon BPA's receipt of the Settlement Amount, the 2000 Agreement states that "any and all rights, duties, responsibilities and obligations of [the] settling Insurers created by or in connection with the Subject Insurance Policies . . . are

hereby terminated as to BP America. . . . This release is intended to operate, as among the Parties, as though each Insurer that pays its allocated several share of the Settlement Amount had never subscribed to the Subject Insurance Policies."

As well, as part of the release, BPA expressly assumed "the risk that acts, omissions, matters, causes or things may have occurred that it does not know or does not suspect to exist. BP America hereby waives the terms and provisions of any statute, rule or doctrine of common law that either (i) narrowly construes releases purporting by their terms to release claims in whole or in part based upon, arising from or related to such unknown or unsuspected acts, omissions, matters, causes or things; or (ii) restricts or prohibits the releasing of such claims."

The 2000 Agreement provides that it is to be construed and governed in accordance with Ohio law. It further includes a standard integration clause.

D. *ARCO Acquisition; Subsequent Developments*

After BP purchased the Amoco shares in 1998, the company began planning a consolidation of United States operations. At that point there were two entities for United States tax purposes: Amoco and BPA. When an offer had been made for ARCO, the concept of consolidation expanded to include the three entities. The idea was that the parent, BP, would hold shares in one United States company—BPA—and that company would directly own Amoco and ARCO as subsidiaries.

Correspondence exchanges with the British treasury department and the Board of Inland Revenue about the restructuring began in November 1999, and continued through March 2000. Watson and Buchanan signed off on a structure and finance memorandum dated March 1, 2000, signifying approval for the internal restructuring.

BP and ARCO reached an agreement to combine on March 31, 1999, although the transaction was not final until April 18, 2000. ARCO shares were transferred to BPA that same day. The next day Buchanan, under penalty of perjury, signed a notice of nonrecognition transfer sent to the Internal Revenue Service describing the transfer of ARCO stock to BPA.

Buchanan indicated there was an effort to restrict the number of people involved in the acquisition of ARCO by BPA. Thus information was disseminated only on a "need to know" or "necessary to know" basis. He offered that if the acquisition of ARCO by BPA "impacted on anything [the people working with the insurance recovery project] were doing of corporate import, it would have been the duty of one party to find out and the duty of the other party to inform them."

Watson and Buchanan did not tell Evans about the ARCO transfer into BPA. Evans testified that if he had been informed, "it would have avoided a lot of confusion." Evans explained that at the time the 2000 Agreement was executed, there was a mistake in the definition of BPA and its subsidiaries, because he was not aware that ARCO and Amoco were part of BPA as of June 30, 2000. Although Evans, BPA's in-house attorney David Bell, and Mahaley knew that BP had acquired ARCO on April 18, 2000, they were not aware of the subsequent transfer to BPA. Bell, who had oversight responsibility in drafting the agreement, offered that "it was a mistake for us not to check on the ownership of Atlantic Richfield at the time we signed it."

In March 2002, ARCO sued its insurers for declaratory relief and breach of contract, seeking to affirm insurance coverage for the lead-pigment litigation and to revitalize the 1992 defense cost-sharing agreement. The ARCO complaint mistakenly described ARCO as a wholly owned subsidiary of BP Amoco Corporation. At the time, William Noble, the lead in-house lawyer for ARCO's lead pigment litigation, did not know that ARCO was owned by BPA.

The action was resolved through settlement agreements with several principal insurers, defense funding agreements for ongoing defenses costs, and a dismissal without prejudice as to liability coverage, as there was yet no liability to cover. London Market Insurers were the first to settle, entering into a defense cost-sharing agreement on December 23, 2003, pursuant to which they agreed to pay about $2.6 million of ARCO's defense cost, with no admission of liability for indemnity. The 2003 Agreement provided that it would not be admissible in future litigation.

As of the time of the 2003 Agreement, the London Market Insurers still did not know that ARCO was owned by BPA.

In 2005, Simon Wright, joint head of direct claims for Equitas, supervised an investigation into Underwriters' potential exposure for lead paint claims. During the course of the investigation, Wright learned that ARCO was a subsidiary of BPA. He was the first person at Equitas to learn this fact. Subsequently, Wright satisfied himself that Equitas had a buyback of outstanding ARCO coverage and recommended that the company file suit.

E. *Litigation*

In 2006, Underwriters at Lloyds filed a complaint against appellants BPA and ARCO for declaratory relief under the 2000 Agreement. Certain London Market Companies and North River Insurance Company intervened and BPA and ARCO cross-complained for declaratory relief under the 2000 Agreement, reformation of the 2000 Agreement, and declaratory relief under the 2003 Agreement. Certain Additional London Market Companies cross-complained as well.

London Market Insurers moved for summary judgment or alternatively for summary adjudication of all causes of action. Appellants moved for summary adjudication of their claims for declaratory relief under the 2000 Agreement. Judge Harold E. Kahn heard the motions, granting summary adjudication in favor of respondents on appellants' causes of action for reformation of the 2000 Agreement and for declaratory relief under the 2003 Agreement. The trial court ruled that reformation was not available where the asserted mistake concerned a mistake of extrinsic fact as opposed to an error in preparing the written instrument. Further, the court determined there was no live controversy concerning the 2003 Agreement.

Denying the parties' declaratory relief claims, the trial court held that while the 2000 Agreement was facially unambiguous, it became ambiguous when considered in light of the circumstances surrounding the transaction, most notably the fact that ARCO, "an oil giant which had many insurance policies issued to it by" London Market Insurers, was not mentioned in the Agreement. Ordering the matter to proceed to trial, the court

directed that the trier of fact evaluate the agreement "and all of the admissible extrinsic evidence to determine whether the omission of ARCO and the policies issued to it by [London Market Insurers] favors defendants' interpretation that the parties did not intend to include ARCO or [London Market Insurers'] interpretation that the parties intended to include all subsidiaries of BP America who were not expressly excluded."

Following a bench trial before Judge Curtis E.A. Karnow, the court rejected Judge Kahn's ultimate conclusion that the objective extrinsic evidence created an ambiguity or special meaning, holding that the surrounding circumstances did not create an ambiguity with respect to the key terms "BP America" and "Subject Insurance Policies." In addition, even if the Agreement were ambiguous, the court found that the parties had a general intent to include all subsidiaries of BPA, and to include all eligible policies as subject insurance policies, unless specifically excluded. There was no evidence that ARCO was specifically excluded, and thus it was encompassed by the term BPA and its policies were released. This appeal followed entry of judgment.

II. DISCUSSION

A. *The Trial Court Correctly Ruled That the 2000 Agreement Encompassed ARCO*

BPA and ARCO contend the trial court erred in determining the Agreement was facially unambiguous, and further erred in ruling that extrinsic evidence of surrounding circumstances did not render the Agreement ambiguous.

1. *The 2000 Agreement Is Facially Unambiguous*

The parties agree that Ohio law governs the Agreement. Under Ohio law, the purpose of construing a contract is to effect the intent of the parties. That intent, in turn, is presumed to reside in the language the parties chose to use in the agreement. (*State ex rel. v. R.J. Reynolds Tobacco* (Ohio 2004) 820 N.E.2d 910, 915.) The court reads a contract as a whole and the intent of each part is gathered from consideration of the whole. (*Saunders v. Mortensen* (Ohio 2004) 801 N.E.2d 452, 455.) Contractual language is ambiguous if its meaning cannot be ascertained from the four corners of the agreement or if the language is susceptible to more than one reasonable interpretation. (*Covington v. Lucia* (Ohio App. 2003) 784 N.E.2d 186, 190.) Stated a little differently, ambiguity

exists if the contract language "is unclear, indefinite, and reasonably subject to dual interpretations or is of such doubtful meaning that reasonable minds could disagree as to its meaning." (*Beverly v. Parilla* (Ohio App. 2006) 848 N.E.2d 881, 886.)

Appellants argue that the 2000 Agreement is facially ambiguous when interpreted as a whole. Specifically, they maintain that the terms "BP America" and "Subject Insurance Policies" are ambiguous.

Both judges below concluded the 2000 Agreement was facially unambiguous. They correctly read the agreement.

The 2000 Agreement's release operates upon two defined terms, "BP America" and "Subject Insurance Policies." "BP America" is defined to include "the past and present subsidiaries . . . in which [BPA] currently ha[s] or in the past ha[s] had at least 50 percent ownership interest . . . , including but not limited to" Carborundum Company, Kennecott Copper Corporation, Dorr-Oliver, Inc., Pfaudler, Inc., Chase Brass & Copper Company and Old Ben Coal. By definition, "Subject Insurance Policies" include "all liability insurance policies listed in Attachment A hereto; and [¶] . . . all known and unknown insurance policies issued by one or more of the London Market Insurers to BP America prior to January 1, 1993, whether or not listed in Attachment A hereto . . . ." As of the effective date of the Agreement, BPA owned approximately 99 percent of ARCO. Thus, under the plain and clear definition of "BP America," ARCO is included in that definition and the ARCO policies are included in "Subject Insurance Policies."

Nonetheless, BPA and ARCO assert that the trial court incorrectly interpreted the definition as applying to *all* past and present subsidiaries, even though the clause does not contain the word "all." Absent this purported mistake, the court should have applied the *ejusdem generis* canon and limited the subsidiaries not mentioned by name to those of the same nature as the expressly enumerated subsidiaries. This doctrine signifies that when an enumeration of specific things *is followed by* a more general phrase or word, that phrase or word should be held to include only things of the same general nature as the specified items. (*New Market Acquisitions, LTD v. Powerhouse Gym* (S.D. Ohio 2002) 212 F.Supp.2d 763, 773.) In *New Market*, the lease provided that in the event of a

default, the tenant was liable "for all reasonable expenses incurred by the Landlord, 'including, but not limited to, leasing fees, attorneys' fees, renovation costs and any other expenses incurred by Landlord in pursuit of its remedies hereunder.' " (*Id*. at p. 772, italics omitted.) The bankruptcy court held that the tenant's liability was confined to the categories of damages as the same general nature as those specified, and did not include large-scale remodeling costs. (*Id*. at p. 773.) Relying on this doctrine, appellants argue that ARCO, which is not included in the specified list of past or present subsidiaries, is fundamentally different in nature from the enumerated companies which are metals and mining subsidiaries, not an "immense" company like ARCO.

This doctrine does not aid them. The phrase "past and present subsidiaries" is itself defined and limited to those subsidiaries in which BPA currently or previously held at least a 50 percent ownership interest, and precedes, rather than follows, the list of specific companies that are included in the definition of "BP America." In other words, "past and present subsidiaries" *is not* a catchall generality to be defined by the list. Moreover, "past and present subsidiaries" is part of a set of specific items, along with "partnerships" and "joint ventures," *that itself* is followed by the general catchall "other entities."

Appellants do not fare any better in their attempt to cast "Subject Insurance Policies" as ambiguous. They rest their argument primarily on the presence of attachment A, which lists known policies but does not include any ARCO policies. There is no contradiction between attachment A and the definition of "Subject Insurance Policies." That term is defined to include all liability insurance policies listed on attachment A, and all known and unknown policies issued by one or more London Market Insurers to BPA prior to January 1, 1993, whether or not listed on attachment A. Attachment A to the Agreement is titled "**POLICY LIST**." A separate schedule of attachments to the Agreement identifies all the attachments and describes "Attachment A" this way: "List of all known Subject Insurance Policies issued to BP America (as defined herein)." From this description BPA and ARCO argue that because ARCO policies are not listed on attachment A, they cannot be treated as "known" policies

assuming attachment A is an exhaustive list of known policies. Nor can they be treated as "unknown" because London Market Insurers were aware of them.

First, appellants' argument that ARCO policies were neither known nor unknown ignores the definitional section of the 2000 Agreement which *does exhaust* the universe of policies that do exist, and does not countenance a third category of policies—those that are neither known nor unknown. Second, London Market Insurers' awareness of ARCO policies does not make them "known" policies within the meaning of the 2000 Agreement because only policies *issued to BPA* are relevant to the analysis of what is "known" or "unknown." London Market Insurers were not aware that the ARCO policies were policies issued to BPA as defined in the 2000 Agreement. Third, as the trial court pointed out, the schedule of attachments is not a definition. Rather it is "a purely ministerial phrase" that cannot give meaning to a defined term, or create an ambiguity about a defined term. We do not disagree with appellants that Ohio courts routinely interpret contracts by reference to their attachments. Certainly, attachment A is an integral part of the Agreement. However, the schedule of attachments is not—it is not an attachment, but rather is in the nature of a table of contents or other nonsubstantive list.

2. *The Surrounding Circumstances Do Not Render the Agreement Ambiguous*

Both trial court judges concluded that under Ohio law, some extrinsic evidence is admissible, even where the contract is facially unambiguous. " 'The circumstances under which a writing was made may always be shown. The question the court is seeking to answer is the meaning of the writing at the time and place when the contract was made; and all the surrounding circumstances at that time necessarily throw light upon the meaning of the contract.' " (*Benes v. Hickox Bldg. Co.* (Ohio App. 1952) 112 N.E.2d 553, 556, quoting 3 Williston on Contracts (rev. ed. 1936) § 618(4), at p. 1777.) As Chief Judge Posner has explained, Ohio law recognizes the doctrine of latent ambiguity, which "rests on a recognition that a contract which might appear to be perfectly clear to someone who read it in ignorance of its context might, once context was restored, seem either unclear, or clear the opposite way." (*PMC, Inc. v. Sherwin-Williams Co.* (7th Cir. 1998) 151 F.3d 610, 614.)

This doctrine, of course, can be stretched too far and thus only *objective* extrinsic evidence is admissible to create an ambiguity in a seemingly clear contract. That is to say, the evidence must be such that "an inference about the parties' intentions in making the contract can be drawn with considerably greater confidence than if the parties were merely testifying to their private understandings of what the contract meant but failed to say." (*PMC, Inc. v. Sherwin-Williams Co., supra*, 151 F.3d at p. 614.) A judge who was ignorant of the context, remarked Chief Judge Posner, "would be like a judge who tried to interpret a contract written in French without knowing the French language." (*Ibid.*) Moreover, it is not enough to offer some objective evidence on a contract's meaning. "The evidence must create a sufficient doubt about what the contract means to warrant submitting that meaning to determination by a trial, notwithstanding the apparent clarity of the written word." (*Id*. at pp. 614-615.)

Moreover, Ohio law is clear that "[e]vidence of the circumstances that attend and surround the parties making a contract is competent, not for the purpose of contradicting or varying the instrument, but to place the court in the same situation in which the parties were who made it, to enable the court to interpret the contract in the light in which the parties viewed it, and to give the proper application of the words they have used to the object sought to be attained by it." (*Globe Insurance Co. v. Boyle* (Ohio 1871) 21 Ohio St. 119, 128.) In other words, where " ' "the meaning of the instrument, by itself, is intelligible and certain, extrinsic evidence is admissible to identify its subjects or its objects, or to explain its recitals or its promises, so far, and only so far, as this can be done without any contradiction of, or any departure from, the meaning which is given by a fair and rational interpretation of the words actually used." ' [Citations.]" (*Kern v. Mentor* (Ohio App. 2009) 913 N.E.2d 483, 488.) Thus, where an instrument is to be construed in view of the surrounding circumstances, "this does not mean, as some cases would seem to indicate, that the written instrument is to be supplanted by a new contract evolved by the court from the parol evidence. Attention should be given to what is meant by surrounding circumstances, and it should be remembered that they may not be used to

contradict or vary the terms of the instrument." (*Merchants' Nat. Bank v. Cole* (Ohio 1910) 93 N.E. 465, 467.)

And finally, the court in *Benes v. Hickox Bldg. Co*., *supra*, 112 N.E.2d 553 summed up the rule well, citing numerous authorities, including a California appellate decision, *Central H. Imp. Co. v. Memorial Park*s (1940) 40 Cal.App.2d 591, 608: " 'The trial court admitted, over the objections of appellant, parol and extrinsic evidence consisting of conversations between the parties . . . occurring before, during, and subsequent to the execution of the agreement of April 14th. The rulings were proper. The evidence was admissible, not to vary or modify the terms of the contract . . . [,] but for the purpose of aiding the court in ascertaining the true intent and meaning of the language used there.' [¶] The court points out that this is so, 'not by showing that the parties meant something other *than* what they said, but by showing what they meant *by* what they said.' " (*Benes v. Hickox Bldg. Co.*, *supra*, 112 N.E.2d at p. 556, italics added.)

Appellants assert that the objective extrinsic evidence renders the terms "BP America" and "Subject Insurance Policies" ambiguous and thus whether the parties intended to release ARCO's policies became a factual matter to be resolved by resort to all the extrinsic evidence. Further, they are adamant that the trial court erred in concluding ARCO's policies were released. In essence, as Judge Karnow pointed out, they are asking us to substantially change the definition of "BP America"—which carries over into the definition of "Subject Insurance Policies"—to expressly exclude ARCO. As such "BP America" would now be defined as including the past and present subsidiaries in which BPA has at least 50 percent ownership, " '*except* ARCO, or *except* large entities not specifically excluded.' "

Such an interpretation is contrary to and patently inconsistent with the 2000 Agreement's very detailed and specific definition of "BP America," which already characterizes the term by what is included as well as what is excluded. Such an interpretation would allow the doctrine of extrinsic ambiguity to overwhelm and swallow up the well-established rule that extrinsic evidence is admissible to provide contractual

context to ascertain the parties' intent, but not to contradict or depart from contract terms that are otherwise clear and unambiguous. In short, we will not resort to extrinsic evidence of surrounding circumstances to create an ambiguity that posits a meaning in direct contravention of clearly defined terms. We cannot interpret a contract that is blatantly inconsistent with its clear wording, and therefore reject appellants' assertion that the extrinsic evidence created a legitimate legal ambiguity in the 2000 Agreement.[3]

There is a more fundamental problem with appellants' contract interpretation arguments. Were this court to find the 2000 Agreement ambiguous with respect to the terms "BP America" and "Subject Insurance Policies" and attempt to divine the parties' intent from the extrinsic evidence, because "BP America" is defined both by what is included and what is excluded, we would have to ask two questions: Did the parties intend to include ARCO within the ambit of the covered BPA subsidiaries, and did they intend to exclude ARCO? The answer to both questions is "No," because the parties negotiating the Agreement *were not thinking about* ARCO, *did not know* that it had been absorbed into BPA and therefore held a mistaken belief as to scope of the term "BP America." Thus the parties' intent with respect to ARCO is a wash—they did not intend to include ARCO, nor did they intend to exclude the company. The conundrum created by this mistake cannot effectively be resolved by resort to the tool of contract interpretation.

B. *The Trial Court Properly Entered Summary Adjudication on the Reformation Claim*

Appellants sought reformation of the 2000 Agreement under California Civil Code section 3399[4] under grounds of mutual mistake or unilateral mistake, specifically asking that the definition of "BP America" be reformed "to expressly exclude the Atlantic Richfield [e]ntities."

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[3] Because we conclude the extrinsic evidence cannot create a legal ambiguity in this case, we need not, and therefore decline, to consider appellants' challenge to the trial court's alternative finding that as a matter of fact, ARCO was encompassed by the Agreement.

[4] The Agreement is governed by Ohio law.

Reformation is available under Ohio law "to modify a written instrument so that the face of the writing reflects the actual intent of the parties." (*Faivre v. DEX Corp. Northeast* (Ohio App. 2009) 913 N.E.2d 1029, 1036.) " 'An action for reformation is not to create an obligation but to establish the content of the instrument as intended by the parties.' [Citations.]" (*Ibid*.) That is to say, reformation aims not to make a new agreement, but to give effect to the one the parties actually made but which is not reflected accurately in the written agreement. "Thus, in order to reform a written contract, an underlying agreement between the parties must exist. The court then can reform the written contract so that it matches the terms of that underlying agreement." (*Ibid.*) The *Faivre* court recites an example where the parties orally agreed to set the price of shot rock at $3 a ton. The party who drafted the contract mistakenly entered the price at $3.50 per ton. Since the parties had reached agreement on the price of $3 a ton, the court could modify the written contract to mirror the actual underlying agreement. (*Id.* at pp. 1036-1037.)

Generally, reformation is appropriate to remedy a mutual mistake but not a unilateral one. (*Gen. Tire, Inc. v. Mehlfeldt* (Ohio App. 1997) 691 N.E.2d 1132, 1136.) However, where the mistake is due to one party's drafting error and the other party knew of the error and took advantage of it, a court may reform the contract. (*Faivre v. DEX Corp. Northeast*, *supra*, 913 N.E.2d at p. 1036.)

As explained in section 155 of the Restatement Second of Contracts, "[R]eformation is available when the parties, having reached an agreement and having then attempted to reduce it to writing, fail to express it correctly in the writing. Their mistake is one as to expression—one that relates to the contents or effect of the writing that is intended to express their agreement—and the appropriate remedy is reformation of that writing properly to reflect their agreement." (*Id.*, com. a, p. 406.) The treatise goes on to distinguish reformation from avoidance: "If, however, the parties make a written agreement that they would not otherwise have made because of a mistake other than one as to expression, the court will not reform a writing to reflect the agreement that

it thinks they would have made. The remedy in that case is avoidance." (*Id.*, com. b, p. 408.)

In the case at hand, the problem is not a drafting error that distorted the content of the settlement terms actually agreed to by the parties when the 2000 Agreement was reduced to writing. There was no mistake as to expression or reduction of a verbal agreement to writing. Rather, as stated above, the parties who negotiated the 2000 Agreement harbored a mistaken assumption of extrinsic fact about the makeup of BPA. Since the negotiators did not know that BPA owned ARCO, they thus did not consider excluding ARCO from the scope of the release, let alone agree on such an exclusion. Thus, the foundation for granting reformation is lacking. The trial court properly entered summary adjudication on the reformation count.

C. *The Trial Court Properly Entered Summary Adjudication on Appellants' Claim for Declaratory Relief under the 2003 Agreement*

In 2003, ARCO and certain London Market Insurers entered into an agreement providing for payment of a portion of ARCO's defense costs in connection with lead-in-paint cases. In their cross-complaint, BPA and ARCO asserted a cause of action for declaratory relief pertaining to the 2003 Agreement. Therein they alleged that London Market Insurers' obligations under the 2003 Agreement were not altered, limited or terminated by the terms of the 2000 Agreement and "the 2003 Agreement embodies the parties' entire understanding with respect to the subjects addressed therein—specifically, certain claims of the Atlantic Richfield Entities for defense expenses incurred in connection with certain Lead Paint Cases—and supersedes any contrary understanding set forth in the [2000] Agreement." BPA and ARCO asserted that London Market Insurers "have taken the position that their obligations under the 2003 Agreement have been extinguished" and prayed for a declaration that "(1) the 2003 Agreement is valid and enforceable; (2) to the extent the [2000] Agreement is contrary to the 2003 Agreement, it is null and void, and is superseded by the 2003 Agreement; and (3) to the extent the [2000] Agreement requires or purports to require indemnification of London

Market Insurers for any claims relating to the Atlantic Richfield Policies, it is null and void, and is superseded by the 2003 Agreement."

In their answer, London Market Insurers admitted that "pursuant to the terms of the 2003 Agreement, the 2003 Participating Insurers are obligated to perform certain duties to [ARCO] . . . in connection with Lead Paint Cases"; that "the obligations of the 2003 participating Insurers under the 2003 Agreement are not altered, limited or terminated by the terms of the 2000 Agreement"; and that "the 2003 Agreement embodies the entire understanding of the parties thereto of the subjects addressed therein." London Market Insurers contended in their summary judgment motion that there was no actual controversy warranting declaratory relief as to the 2003 Agreement. Opposing the motion, BPA and ARCO asserted that London Market Insurers "seek to nullify their defense obligation, and the exclusivity of the 2003 Agreement, by contending that the [2000] Agreement includes ARCO and, under an indemnity provision in that settlement, requires BP to return to the London Insurers any money that the Insurers pay for defense costs under the 2003 Agreement."

At the hearing London Market Insurers affirmed that they were not seeking recovery of money paid under the 2003 Agreement, acknowledged the validity of the 2003 Agreement and stated they were continuing to pay under it. Defense counsel responded that "it's nice to hear of this," but also argued that summary judgment was inappropriate because they had pled the 2003 Agreement superseded the 2000 Agreement in some way. London Market Insurers countered the complaint did not allege anything about one agreement superseding the other.

The trial court concluded there was no dispute between the parties about London Market Insurers' performance of their obligations under the 2003 Agreement and thus no basis to entertain appellants' request for declaratory relief. Further, the court held that appellants' efforts to revive the cause of action "by asserting a controversy over whether the 2003 [Agreement] supersedes the 2000 [Agreement] is not pled and thus is not a basis to deny summary adjudication . . . ."

Although there is language in the cross-complaint about the 2003 Agreement superseding the 2000 Agreement, it is clear that the references go to the issue of the continuing validity of the 2003 Agreement and London Market Insurers' obligations under it. London Market Insurers have not disputed these core issues. Indeed, they have admitted that the 2000 Agreement did not alter, limit or terminate their obligations under the 2003 Agreement and conceded the continuing validity of the 2003 Agreement. Those admissions were enshrined in the court's statement of decision. Since the 2003 Agreement is effective only as to the topics it embraces, and London Market Insurers acknowledge its continuing validity, we fail to see what more appellants would obtain with a declaration. Summary adjudication of a declaratory relief claim is proper where there is no actual controversy between the parties. (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1402-1404.) The trial court did not err in granting summary adjudication of this count.

III. DISPOSITION

We affirm the judgment.

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Reardon, J.

We concur:

_____
Ruvolo, P.J.

_____
Rivera, J.