COURT OF APPEAL FOR ONTARIO

CITATION: Onex Corporation v. American Home Assurance Company, 2013 ONCA 117
DATE: 20130225
DOCKET: C54076, C54123, C55034

O'Connor A.C.J.O., Rosenberg and Simmons JJ.A.

BETWEEN

Onex Corporation, Gerald W. Schwartz, Christopher A. Govan, Mark Hilson and Nigel Wright

Plaintiffs/Defendants by Counterclaim

(Respondents/Cross-Appellants)

and

American Home Assurance Company, Brit Syndicates Ltd. (Lloyd's Syndicate 2987), Heritage Managing Agency Limited (Lloyd's Syndicate 3245), XL Insurance Company Limited, Liberty Mutual Insurance Company, Lloyd's Underwriters Syndicates No. 2623, 0623, 0033 and AIG Europe (UK) Limited, and Houston Casualty Company

Defendants/Plaintiff by Counterclaim American Home

(Respondents/Appellant/Respondent on Cross-Appeal)

Geoffrey D. E. Adair, Q.C. and Alexa Sulzenko, for the respondents/cross-appellants

Glenn A. Smith, Rory Gillis and Marcus B. Snowden, for the appellant and respondent on cross-appeal, American Home Assurance Company

Alan L. W. D'Silva, Mark E. Walli and Ellen M. Snow, for the respondents Brit Syndicates Ltd. (Lloyd's Syndicate 2987), Heritage Managing Agency Limited (Lloyd's Syndicate 3245) and XL Insurance Company Limited

Heard: June 20, 2012

On appeal and cross-appeal from the judgment of Justice Laurence A. Pattillo of the Superior Court of Justice, dated June 30, 2011, with reasons reported at 2011 ONSC 1142, 98 C.C.L.I. (4th) 228, with supplementary reasons dated August 4, 2011, and on appeal from the judgment of Justice Laurence A. Pattillo of the Superior Court of Justice, dated January 20, 2012.

O'Connor A.C.J.O. and Simmons J.A.:

A. OVERVIEW

[1] The main issues before this court concern whether Onex Corporation is entitled to reimbursement for defence and settlement costs ("defence costs") under various directors' and officers' ("D&O") liability insurance policies.

[2] In 2005, Onex, four of its directors and officers – Gerald W. Schwartz, Christopher A. Govan, Mark Hilson and Nigel Wright (the "personal defendants") - and others were sued in the state of Georgia by the Trustee of the Magnatrax Litigation Trust (the "Georgia Action").

[3] The Georgia Action arose out of bankruptcy proceedings involving Magnatrax Corporation under Chapter 11 of the United States Bankruptcy Code. Magnatrax was a former subsidiary of Onex. The Magnatrax Litigation Trust was established during the Chapter 11 proceedings to pursue claims on behalf of the unsecured creditors of Magnatrax and its subsidiaries.

[4] In the Georgia Action, the Trustee of the Magnatrax Litigation Trust alleged that Onex and the personal defendants used their control of Magnatrax to enrich

themselves at the expense of Magnatrax and ultimately caused Magnatrax and its subsidiaries to become insolvent.

[5] The Georgia Action eventually settled for US$9.25 million. In the course of defending the Georgia Action on behalf of itself and the personal defendants, Onex incurred close to US$35 million.

[6] Like many corporations, Onex regularly purchased D&O liability insurance and excess D&O liability insurance to protect both its own directors and officers, and also the directors and officers of its subsidiaries, from claims arising from their actions while acting in their capacity as directors and officers.

[7] In 2008, Onex and the personal defendants commenced this action (the "Onex Action") against American Home Assurance Company[1] and various excess insurers ("Excess Insurers"). Onex and the personal defendants claimed they were entitled to reimbursement for defence costs incurred in the Georgia Action under a US$15 million 2004-2005 American Home D&O policy (the "Onex 2004-2005 Policy") and under various excess D&O policies purchased for the

[1] Now known as Chartis Insurance Company of Canada.

2004-2005 policy year (the "2004-2005 Excess Policies").[2]

[8] In the alternative, Onex and the personal defendants claimed they were entitled to reimbursement under a US$15 million 2002-2003 American Home D&O policy (the "Onex 2002-2003 Policy").

[9] While serving as directors and officers of Onex, the personal defendants, Wright and Hilson, were also directors and officers of Magnatrax. In the Georgia Action, it was alleged that the personal defendants, Schwartz and Govan, acted as *de facto* directors and officers of Magnatrax.

[10] Before Onex and the personal defendants commenced the Onex Action, American Home paid out US$15 million – the full limit of liability – under a D&O policy issued to Magnatrax (the "Magnatrax Run-Off Policy") to defray the Georgia Action defence costs of the personal defendants and two other directors and officers of Magnatrax.

[11] The Magnatrax Run-Off Policy was issued on May 12, 2003 – on the eve of Magnatrax's insolvency. It was issued in anticipation of Magnatrax ceasing to

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[2] As will be further discussed below, the personal defendants' claim for defence costs was based on the Executive Liability section of the applicable D&O policies. Onex's coverage under the applicable D&O policies was limited to reimbursement for defence costs that it incurred on behalf of the personal defendants.

be an Onex subsidiary and therefore ceasing to be covered under the Onex 2002-2003 Policy.[3]

[12] In defending the Onex Action, American Home and the Excess Insurers claimed that Onex learned about the possibility of the Georgia Action in August 2003 and gave notice to American Home of that possibility (the "notice of circumstances") in compliance with clause 7(c) of the Onex 2002-2003 Policy, as well as clause 7(c) of the Magnatrax Run-Off Policy. Accordingly, under clause 4(d) of the Onex 2004-2005 Policy, if Onex was entitled to any coverage for defence costs in connection with the Georgia Action under its American Home D&O policies, it could only be under the Onex 2002-2003 Policy and not under the Onex 2004-2005 Policy or the 2004-2005 Excess Policies.

[13] Further, American Home relied on Endorsement #14 of the Onex 2002-2003 Policy, which was added effective on the date the Magnatrax Run-Off Policy was issued. American Home denied coverage under the Onex 2002-2003

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[3] It is not clear from the record when Magnatrax in fact ceased to be an Onex subsidiary. The motion judge stated that Magnatrax ceased to be an Onex subsidiary on November 17, 2003, which was the date the U.S. Bankruptcy Court approved the Magnatrax Plan of Reorganization. In their appeal facta, the parties suggest different dates for when Magnatrax ceased to be an Onex subsidiary. Onex and the Excess Insurers indicate that Magnatrax ceased to be an Onex subsidiary when it emerged from Chapter 11 protection on January 20, 2004, whereas American Home indicates that Magnatrax ceased to be an Onex subsidiary when it declared bankruptcy, which was May 12, 2003. We need not resolve this issue because Endorsement #14 of the Onex 2002-2003 Policy provides that the definition of subsidiary shall not include Magnatrax Corporation as of May 12, 2003, which is the date that Endorsement #14 became effective and is the inception date of the Magnatrax Run-Off Policy.

Policy based on its position that Endorsement #14 of that policy excludes any Magnatrax-related claims from coverage.

[14] On competing motions for summary judgment, Pattillo J. accepted American Home's argument that Onex gave notice of circumstances under clause 7(c) of the Onex 2002-2003 Policy. Therefore, under clause 4(d) of the Onex 2004-2005 Policy, Onex and the personal defendants were not entitled to reimbursement for defence costs in connection with the Georgia Action. It followed that the Excess Insurers, who had agreed to follow the form of the Onex 2004-2005 Policy, were also excluded from liability under the 2004-2005 Excess Policies for any loss in respect of the Georgia Action. The motion judge accordingly dismissed Onex's action against the Excess Insurers in reasons dated June 30, 2011 and reported at 2011 ONSC 1142, 98 C.C.L.I. (4th) 228 (the "reported reasons").

[15] However, in his reported reasons, the motion judge rejected American Home's argument that Endorsement #14 of the Onex 2002-2003 Policy excluded Onex's claim for reimbursement of defence costs in connection with the Georgia Action. He concluded that Endorsement #14 does not exclude "any claim by a third party against Onex's directors and officers in their capacity as such for their wrongful acts in relation to Magnatrax."

[16] The motion judge therefore ordered American Home to pay Onex US$15 million on behalf of the personal defendants for defence costs in connection with the Georgia Action under the Onex 2002-2003 Policy.

[17] Following the original summary judgment motions, American Home moved to amend its pleadings to further particularize its claim for legal or equitable set-off of amounts that it paid under the Magnatrax Run-Off Policy against amounts owing under the Onex 2002-2003 Policy. American Home also moved for summary judgment on its amended counterclaim. In unreported reasons dated January 20, 2012 (the "unreported reasons"), the motion judge permitted American Home to amend its pleadings, but went on to dismiss the motion for summary judgment on the claim as amended.

[18] American Home appeals from the motion judge's judgments requiring that it pay US$15 million to Onex and the personal defendants under the Onex 2002-2003 Policy and dismissing its claim for set-off.

[19] Onex and the personal defendants cross-appeal from that part of the motion judge's judgment dismissing their action for indemnification under the Onex 2004-2005 Policy and the 2004-2005 Excess Policies. They also cross-appeal from the motion judge's judgment granting American Home leave to amend its pleadings to plead set-off (collectively, the "Onex cross-appeal").

[20] For the reasons that follow, we would allow American Home's appeal, set aside the decision of the motion judge and return the matter to the Superior Court. In addition, we would dismiss the Onex cross-appeal.

B. FACTS

(i) Onex and Magnatrax

[21] Onex is an Ontario corporation that regularly acquires operating businesses with a view to creating value and subsequently either retaining them or disposing of them.

[22] To the knowledge of its D&O insurers, Onex's directors and officers often serve in a dual capacity as directors and officers of its subsidiaries while they remain directors and officers of Onex.

[23] Onex incorporated Magnatrax in Delaware in 1999. Between May 1999 and March 2000, Magnatrax and/or its subsidiaries purchased several U.S. and Canadian manufacturing companies. Three of these transactions were the subject matter of the allegations against Onex and the personal defendants in the Georgia Action.

(ii) Aon Reed Stenhouse

[24] Aon Reed Stenhouse is an insurance broker who acted as agent and broker for both Onex and Magnatrax in obtaining and negotiating the various policies of insurance at issue.

(iii) Onex's D&O Coverage

[25] As we have said, Onex regularly purchased D&O liability insurance to protect both its own directors and officers and also the directors and officers of its subsidiaries from claims arising from their actions while acting in their capacity as directors and officers. These policies were generally "claims made and reported policies", meaning they provide coverage for claims first made against an insured party during the policy period and reported to the insurer within a time frame defined in the policy.

[26] The specific language of all relevant policy provisions referred to in these reasons is set out in the Appendix.

(iv) Onex 2002-2003 Policy

[27] In 2002, American Home, which is a member of the American International Group ("AIG"), issued the Onex 2002-2003 Policy. The policy covered the period from November 29, 2002 to November 29, 2003 and had a US$15 million limit of liability.

[28] Among other things, the Onex 2002-2003 Policy provided “Executive Liability Insurance” and “Organization Insurance”. Put briefly, “Executive Liability Insurance” coverage requires an insurer to pay defence costs incurred by directors and officers of a corporation arising from a proceeding against them based on their wrongful conduct as directors and officers of the corporation. “Organization Insurance” entitles a corporation to be reimbursed by the insurer for defence costs it pays on behalf of its directors and officers for such proceedings.

[29] More specifically, the Onex 2002-2003 Policy’s Executive Liability Insurance coverage provision provides that American Home would pay the “Loss” of any “Insured Person” arising from a “Claim” made against the “Insured Person” for any “Wrongful Act” of the “Insured Person”. The Organization Insurance coverage provision provides that American Home would pay the “Organization” for such loss only to the extent that the Organization has indemnified such “Insured Person”.

[30] In the definition section of the Onex 2002-2003 Policy, “Loss” is defined to include “Defence Costs”. “Insured Person” is defined to include any Executive of Onex or its subsidiaries. “Executive” is defined to include directors and officers, and *de facto* directors and officers, of a corporation, which would include Onex and its subsidiaries.

[31] The definitions of “Claim” and “Wrongful Act” are important for the purposes of this appeal. The relevant portions of these definitions read as follows:

> “Claim” means:
>
> (1) a written demand for monetary, non-monetary or injunctive relief;
>
> (2) a civil … proceeding for monetary, non-monetary or injunctive relief which is commenced by: (i) service of a Writ of Summons, Statement of Claim or similar originating legal document; …
>
> …
>
> “Wrongful Act” means:
>
> (1) any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act …:
>
> > (i) with respect to any Executive of an Organization, by such Executive in his or her capacity as such or any matter claimed against such Executive solely by reason of his or her status as such;
>
> ...

[32] Clause 7(c) of the Onex 2002-2003 Policy permits an Insured to give written notice to the Insurer “of any circumstance which may reasonably be expected to give rise to a Claim” to enable the insured to obtain coverage for a Claim during the policy period even though the Claim is not advanced until after the expiry of the policy period.

[33] Endorsement #10 of the Onex 2002-2003 Policy excludes coverage under the policy for "Loss in connection with any Claim made against any Insured in any bankruptcy proceeding by or against an Organization, when such Claim is brought by the examiner, trustee, receiver, creditors' committee, trust, liquidator or rehabilitator (or any assignee thereof) of such Organization."

[34] In addition to the Onex 2002-2003 Policy, Onex also obtained US$45 million in excess "follow form" D&O insurance for the 2002-2003 coverage period from various excess insurers other than those involved in these proceedings. Onex renewed its D&O policies in each policy year between 2002 and 2005. The level of excess coverage increased over this time frame.

(v) The Magnatrax Run-Off Policy and Changes to the Onex 2002-2003 Policy

[35] In January 2003, Onex contemplated selling Magnatrax to a third party. The proposed sale would have ended Magnatrax's status as an Onex subsidiary. This, in turn, would have removed Magnatrax and its executives from coverage under the Onex 2002-2003 Policy.

[36] In the face of this possibility, Aon on Onex's behalf, requested a quote from American Home for a "run-off" D&O policy. The proposed run-off policy would protect Magnatrax and its executives for a period of six years against claims commenced after Magnatrax ceased to be an Onex subsidiary (and

therefore ceased to be protected under Onex's D&O policies), but which claims related to the executives' conduct or status before Magnatrax ceased to be an Onex subsidiary.

[37] As noted by the motion judge, American Home's quote proposed a number of endorsements to the run-off policy, including #13 – Non-Pyramiding of Limits; and #14 – Absolute Onex Corporation Exclusion – Carve-out for co-defendant with Onex Corporation. Underneath the listed exclusions, the following appeared:

> NOTE: Endorsements to be added to Onex Corporation Policy
>
> 1. Absolute Exclusion from Magnatrax Corporation;
>
> 2. Non-Pyramiding of Limits.

[38] The motion judge found that Aon had concerns about American Home's quote. However, the contemplated sale of Magnatrax was abandoned before the concerns were fully resolved.

[39] On May 11, 2003, Aon was advised by the Magnatrax board of directors that Magnatrax was intending to file for bankruptcy protection. Aon asked American Home to bind coverage for a run-off D&O policy for Magnatrax on an urgent basis. On May 12, 2003, American Home issued a Temporary and Conditional Binder of Insurance ("Binder") that described the coverages and endorsements to be included in the US$15 million Magnatrax Run-Off Policy.

[40] As noted by the motion judge, 13 endorsements were listed in the Binder. In particular, Endorsements #12 and #13 were: “12. Non-pyramiding of Limits (To Be Manuscripted) and 13. Absolute Onex Corporation Exclusion – Carve-put (sic) for co-defendant with Onex Corporation (To Be Manuscripted)”. “To Be Manuscripted” means that the wording of these endorsements had not yet been finalized.

[41] The Binder also indicated that two endorsements were to be added to the Onex 2002-2003 Policy. The following language appeared under the listed exclusions:

> NOTE: Endorsements to be added to Onex Corporation Policy
>
> 1. Non-pyramiding of Limits (To Be Manuscripted)
>
> 2. Absolute Exclusion from Magnatrax Corporation (To Be Manuscripted)

[42] Although the Binder indicated that two endorsements were to be manuscripted for the Magnatrax Run-Off Policy and two endorsements were to be manuscripted and added to the Onex 2002-2003 Policy, ultimately Endorsements #16 and #4 were added to the Magnatrax Run-Off Policy and only one endorsement was added to the Onex 2002-2003 Policy, namely, Endorsement #14. All of these endorsements are significant for the purposes of this appeal.

[43] Endorsement #16 of the Magnatrax Run-Off Policy deals with coordinating the limits of liability between the Magnatrax Run-Off Policy and other American Home or AIG policies. The relevant portions of Endorsement #16 read as follows:

> ENDORSEMENT #16
>
> …
>
> COORDINATION OF AIG LIMITS
>
> In consideration of the premium charged, it is hereby understood and agreed that, with respect to any Claim under this policy for which coverage is provided by one or more other policies issued by the Insurer or any other member of the American International Group (AIG), … the Limit of Liability provided by virtue of this policy shall be reduced by the limit of liability provided by said other AIG policy.

[44] Endorsement #4 of the Magnatrax Run-Off Policy is important because it provides coverage for Onex Executives in certain circumstances:

> ENDORSEMENT #4
>
> …
>
> DEFINITION OF ORGANIZATION AMENDED TO INCLUDE ENTITY
>
> (CO-DEFENDANT ONLY)
>
> In consideration of the premium charged, it is hereby understood and agreed that the term "Organization" is amended to include the following entity, subject to the terms, conditions and limitations of this endorsement and this policy.

> ENTITY
>
> Onex Corporation
>
> Coverage as is afforded under this policy with respect to a Claim made against Onex Corporation or any Insured Persons thereof shall only apply if: (1) such Claim relates to a Wrongful Act committed by an Insured (other than Onex Corporation or an Insured Person thereof); and (2) an Insured (other than Onex Corporation or an Insured Person thereof) is and remains a defendant in the Claim along with Onex Corporation or any Insured Person thereof.
>
> In all events coverage as is afforded under this policy with respect to a Claim made against Onex Corporation or any Insured Person thereof shall only apply to Wrongful Acts committed or allegedly committed prior to May 12, 2003.

[45] Neither Onex nor Magnatrax obtained excess insurance for the Magnatrax Run-Off Policy.

(vi) Endorsement #14 to the Onex 2002-2003 Policy

[46] Endorsement #14 is central to the issues on appeal. It was added to the Onex 2002-2003 Policy as part of finalizing the terms of the Magnatrax Run-Off Policy. It is a “Specific Entity/Subsidiary Exclusion”, which excludes continuing coverage under the policy for certain Magnatrax-related losses:

ENDORSEMENT #14

SPECIFIC ENTITY/SUBSIDIARY EXCLUSION

(Claims brought by or made against)

In consideration of the premium charged, it is hereby understood and agreed that the Insurer shall not be liable for any Loss alleging, arising out of, based upon or attributable to or in connection with any Claim brought by or made against the Entity listed below and/or any Insureds thereof.

1. MAGNATRAX Corporation (including any subsidiary or affiliate thereof)

It is further understood and agreed that the Definition of Subsidiary shall not include MAGNATRAX Corporation. Further, the Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured alleging, arising out of, based upon or attributable to any breach of duty, act, error or omission of MAGNATRAX Corporation, or any director, officer, member of the board of managers or employee thereof.

(vii) Magnatrax's Chapter 11 Bankruptcy Proceedings

[47] Magnatrax sought Chapter 11 bankruptcy protection on May 12, 2003. A Creditors' Committee was formed on May 22, 2003. The Creditors' Committee selected the law firm of Foley & Lardner to act as its counsel.

[48] On August 19, 2003, the Creditors' Committee reached an agreement with Magnatrax and its subsidiaries on a plan of reorganization. The Magnatrax Plan of Reorganization was subsequently confirmed by the U.S. Bankruptcy Court on November 17, 2003. Magnatrax emerged from Chapter 11 protection on January

20, 2004. After that date, Onex no longer had any ownership interest in Magnatrax.

(viii) Notice of Circumstances – The Foley Letter

[49] On August 1, 2003, Foley and Lardner, counsel for the Magnatrax Creditors' Committee, wrote a letter to counsel for Magnatrax asserting that the Creditors' Committee believed that Magnatrax had various claims against Onex and its affiliates, and the officers and directors of Onex and Magnatrax.

[50] As described in the Foley Letter, the purported claims were against "those parties involved in the May 1999, September 1999, and March 2000 transactions, as well as the credit facilities and related agreements supporting those transactions". The letter refers to numerous claims, including breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unjust enrichment, preference claims "and possibly other claims yet to be identified".

[51] The Foley Letter requested confirmation that Magnatrax would prosecute all of these claims or, in the alternative, sought confirmation that the Committee could pursue the claims on Magnatrax's behalf.

[52] After receiving the Foley Letter, counsel for Magnatrax forwarded it to Aon on August 7, 2003 and inquired about what notice should be sent to Magnatrax's insurers.

[53] On November 28, 2003, the day before the Onex 2002-2003 Policy was to expire, Aon faxed the Foley Letter to American Home. In doing so, Aon referenced both the Onex 2002-2003 Policy and the Magnatrax Run-Off Policy and stated that the Foley Letter "contains information on a situation which could in future give rise to a claim under [those] polic[ies]".

(ix) Onex's 2004-2005 D&O Coverage

[54] Onex renewed its US$15 million D&O coverage with American Home in 2003-2004 and in 2004-2005. As it had done in other years, Onex also obtained excess "follow form" D&O coverage for 2004-2005.

[55] The coverage provisions under the Onex 2004-2005 Policy are the same as the coverage provisions under the Onex 2002-2003 Policy.

[56] Clause 4(d) of the Onex 2004-2005 Policy is significant to this appeal. It creates an exclusion from coverage where a Claim is covered under a prior policy:

> 4. EXCLUSIONS
>
> The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured:
>
> ...
>
> (d) alleging, arising out of, based upon or attributable to the facts alleged, or to the same or related Wrongful Acts alleged or

> contained in any Claim which has been reported, or in any circumstances of which notice has been given, under any policy of which this policy is a renewal or replacement or which it may succeed in time;
>
> ...

(x) Removal of the Specific Entity/Subsidiary Exclusion Endorsement

[57] The policy wording for the Onex 2004-2005 Policy was not sent to Aon for review until May 10, 2005. After receiving the policy language, Aon requested that American Home delete the endorsement containing the Specific Entity/Subsidiary Exclusion, which was Endorsement #14 in the Onex 2002-2003 Policy and Endorsement #13 in the Onex 2003-2004 Policy, and replace it with a Prior Acts Exclusion to provide coverage under the Onex 2004-2005 Policy for wrongful acts committed by Magnatrax directors and officers during the period May 12, 2003 to January 20, 2004 when Magnatrax and its subsidiaries were in Chapter 11 protection.

[58] The Onex 2004-2005 Policy was later re-issued with the Prior Acts Exclusion replacing the Specific Entity Exclusion. The Prior Acts Exclusion appears in the 2004-2005 Policy as Endorsement #13, which states in part:

> PRIOR ACTS EXCLUSION FOR LISTED ENTITIES
>
> …
>
> In consideration of the premium charged, it is hereby understood and agreed that the term Subsidiary is

> amended to include the entity(ies) listed below, but only for Wrongful Acts committed by such entity(ies) and/or any Insureds thereof which occurred subsequent to such entity's respective acquisition/creation date listed below and prior to the time the Named Entity no longer maintains Management Control of such entity(ies), respectively, either directly, or indirectly through one or more other Subsidiaries. Loss arising from the same or related Wrongful Act shall be deemed to arise from the first such same or related Wrongful Act.
>
> ENTITIES ACQUISITION/CREATION DATE
>
> Magnatrax Corporation […] May 12, 2003

[59] Significantly, the Excess Insurers never agreed to this change in the policy provisions.

(xi) The Georgia Action

[60] On May 10, 2005, the Trustee of the Magnatrax Litigation Trust commenced the Georgia Action.

[61] The Magnatrax Litigation Trust was established under s. 4.21 of the Magnatrax Plan of Reorganization, which was approved by the U.S. Bankruptcy Court, to pursue causes of action on behalf of the Litigation Trust beneficiaries, who are defined as unsecured creditors of Magnatrax.

[62] Of the 19 counts asserted in the Georgia Action, four are asserted against the personal defendants, as well as against two directors of Magnatrax: i) breach of fiduciary duty; ii) aiding and abetting breach of fiduciary duty; iii) civil

conspiracy; and iv) unjust enrichment. These four counts were also asserted against Onex and various Onex-related companies. The remaining 15 counts in the Georgia Action are pleaded only against Onex and Onex affiliates.

[63] The breach of fiduciary duty count alleges that Onex was the *de facto* board and *alter ego* of Magnatrax and its subsidiaries. The count further alleges that the defendants exploited their positions as directors and officers of Magnatrax, as *de facto* directors and officers of Magnatrax, or as the *alter ego* to the board of Magnatrax, to further their own benefit and in breach of their duties owed to the "Debtors" ("Debtors" refers to Magnatrax and Magnatrax-related companies).

[64] The aiding and abetting breach of fiduciary duty count alleges that each of the defendants knowingly induced, participated in and substantially assisted the other defendants' breaches of fiduciary duty owed to the Debtors.

[65] The civil conspiracy count alleges that the defendants wilfully conspired to embark on a scheme to divert value from the Debtors to themselves; to fraudulently transfer assets and value from the Debtors to the benefit of themselves; and to breach fiduciary duties.

[66] The unjust enrichment count alleges that the defendants used their "complete domination and control of the Debtors" to receive a "benefit from their

management of the Debtors, and this benefit inured to the detriment of both the Debtors and the Debtors' creditors."

(xii) Notice of the Georgia Action to American Home and the Coverage Provided by American Home

[67] On July 4, 2005, Aon sent on Onex's behalf a copy of the complaint in the Georgia Action to American Home as notice of a Claim under the Onex 2004-2005 Policy.

[68] On September 15, 2005, American Home denied coverage under that policy because the allegations in the Georgia Action pre-dated May 12, 2003. According to American Home, the Prior Acts Exclusion in Endorsement #13 of the Onex 2004-2005 Policy limited coverage to Wrongful Acts committed after May 12, 2003.

[69] American Home also contended that the Claim is excluded because the allegations relate to the personal defendants' actions in a capacity other than as an Executive of Onex and subsidiaries of Onex. Finally, American Home raised the possibility that coverage was not available because the allegations in the Georgia Action involved intentional acts that are excluded from coverage by clauses 4(a) and (c) of the Onex 2004-2005 Policy.

[70] Initially, American Home also denied coverage under the Magnatrax Run-Off Policy. However, on August 28, 2006, American Home's counsel indicated

that coverage would be available for the personal defendants under that policy based on Endorsement #4. In counsel's view, this co-defendant endorsement afforded coverage with respect to a Claim against Onex Executives provided an Insured under the policy remained as a co-defendant in the Claim along with Onex or an Insured Person of Onex.

[71] As we have said, Onex and the personal defendants were jointly represented by counsel throughout the Georgia Action and incurred defence costs totalling approximately US$35 million and settlement costs of over US$9 million. American Home paid out US$15 million – the limit of liability under the Magnatrax Run-Off Policy – to reimburse the personal defendants and two other Magnatrax directors and officers for their defence costs. Of this US$15 million, US$13,881,991.90 was paid to reimburse the personal defendants and the remaining US$1,118,008.10 was paid to reimburse the two other Magnatrax directors and officers. As noted, Onex and Magnatrax did not obtain excess insurance for the Magnatrax Run-Off Policy.

(xiii) The Onex Action Against American Home and the Excess Insurers

[72] Onex and the personal defendants commenced this action in 2008 against American Home and the various Excess Insurers seeking coverage under the Onex 2004-2005 Policy and under the 2004-2005 Excess Policies. In the alternative, the plaintiffs sought coverage under the Onex 2002-2003 Policy.

American Home and the Excess Insurers defended and also counterclaimed for declarations that they had no obligation to provide coverage.

[73] Onex and the personal defendants, American Home and the Excess Insurers brought competing motions for summary judgment.[4]

C. MOTION JUDGE'S REASONS

[74] In his reported reasons dated June 30, 2011, the motion judge held as follows:

- The Foley Letter constituted notice of circumstances under clause 7(c) of the Onex 2002-2003 Policy with respect to the Georgia Action.
- Clause 4(d) of the Onex 2004-2005 Policy operates to exclude American Home from having to pay any defence costs in connection with the Georgia Action under the Onex 2004-2005 Policy. The follow-form 2004-2005 Excess Policies also excluded the Excess Insurers from any liability in respect of the Georgia Action.

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[4] The motion judge was advised by the parties that as a result of the settlement of the Georgia Action, the total amount of Onex and the personal defendants' claim in the action would not impact the third and fifth excess layers of D&O coverage insured by excess D&O policies issued by the defendants Liberty Mutual Insurance Company and Houston Casualty Company for the 2004-2005 period. The parties agreed that the action should be dismissed against these defendants on consent.

- Endorsement #14 of the Onex 2002-2003 Policy does not exclude coverage for any claim by a third party against Onex's directors and officers in their capacity as such for their wrongful acts in relation to Magnatrax, and thus, under the Onex 2002-2003 Policy, American Home is required to indemnify Onex and the personal defendants for defence costs incurred in in relation to the Georgia Action.

[75] In reaching these conclusions, the motion judge found, at para. 97, that the terms of the D&O policies in issue are clear and unambiguous and that evidence of intention adduced by the various parties was inadmissible.

[76] After receiving the motion judge's decision, American Home brought a motion to amend its counterclaim to have the monies owing under the Onex 2002-2003 Policy set-off against the US$13,881,991.90 already paid to the personal defendants under the Magnatrax Run-Off Policy. American Home also moved for summary judgment on the set-off issue.

[77] The motion judge granted American Home leave to amend. However, on the motion for summary judgment, he dismissed American Home's counterclaim. In his unreported reasons dated January 20, 2012, he found that Endorsement #16 of the Magnatrax Run-Off Policy does not reduce the limit of liability of the Magnatrax Run-Off Policy, and thus American Home was not entitled to repayment of amounts previously paid to the personal defendants under the

Magnatrax Run-Off Policy. Given his conclusion that American Home was not entitled to repayment, he did not consider American Home's claim for set-off.

D. ISSUES

The Appeal by American Home

[78] American Home raises two issues on the appeal:

> (1) Did the motion judge err in concluding that Endorsement #14 of the Onex 2002-2003 Policy does not exclude coverage for defence costs of the personal defendants in connection with the Georgia Action?
>
> (2) Did the motion judge err in concluding that Endorsement #16 of the Magnatrax Run-Off Policy does not entitle American Home to set-off amounts owing under the Onex 2002-2003 Policy against payments made under the Magnatrax Run-Off Policy?

[79] It is worth noting that American Home accepts that, but for Endorsement #14, it would be liable to pay the personal defendants the amounts claimed under the Onex 2002-2003 Policy. Thus, American Home accepts that the coverage provisions in that policy include the payment of defence costs of the personal defendants arising from the Georgia Action.

The Onex Cross-Appeal

[80] On the cross-appeal, two issues need to be considered:

> (1) Did the motion judge err in concluding that the Foley Letter complied with the requirements of clause 7(c) of the Onex 2002-2003 Policy?

(2) Did the motion judge err in granting American Home leave to amend its Amended Amended Statement of Defence and Counterclaim?

[81] We will deal with the Onex cross-appeal first.

E. THE ONEX CROSS-APPEAL

(1) The Foley Letter and clause 7(c) of the Onex 2002-2003 Policy

[82] On its cross-appeal, Onex argues that the motion judge erred in concluding that the Onex 2004-2005 Policy and the 2004-2005 Excess Policies did not provide coverage because Onex had previously given notice of the circumstances that gave rise to the Georgia Action pursuant to the Onex 2002-2003 Policy.[5]

[83] The Onex 2002-2003 Policy and the Onex 2004-2005 Policy are claims made and reported policies. Losses resulting from a Claim are eligible for coverage under a policy if the Claim is made and reported during the policy period.

[84] Clause 7(c) of the Onex 2002-2003 Policy provides that the period of coverage can be extended beyond the Policy Period if an insured party provides

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[5] The Onex 2004-2005 Policy does not contain the exclusion found in Endorsement #14 in the Onex 2002-2003 Policy.

notice during the Policy Period of circumstances that may lead to a future Claim. Clause 7(c) states in relevant part:

> If during the Policy Period ... an Organization or an Insured shall become aware of any circumstances which may reasonably be expected to give rise to a Claim being made against an Insured and shall give written notice to the Insurer of the circumstances, the Wrongful Act allegations anticipated and the reasons for anticipating such a Claim, with full particulars as to dates, persons and entities involved, then a Claim which is subsequently made against such Insured and reported to the Insurer alleging, arising out of, based upon or attributable to such circumstances or alleging any Wrongful Act which is the same as or related to any Wrongful Act alleged or contained in such circumstances, shall be considered made at the time such notice of such circumstances was given.

[85] Clause 7(c) dovetails with clause 4(d) of the standard exclusions in American Home's D&O policies, including the Onex 2004-2005 Policy. Clause 4(d) excludes from coverage under the present policy Loss from any Claim arising out of Wrongful Acts of which notice has been given under a previous policy.

[86] The cross-appeal turns on whether Onex provided American Home with notice of circumstances during the policy period for the Onex 2002-2003 Policy that complied with clause 7(c) of that policy. If it did, then coverage under the Onex 2004-2005 Policy is excluded pursuant to clause 4(d) and, consequently,

coverage under the excess insurance follow-form policies would also be excluded.

[87] As we have said at paras. 49-53, on August 1, 2003, Foley and Lardner, counsel for the Magnatrax Creditors' Committee, wrote a letter to counsel for Magnatrax asserting that Magnatrax had claims against Onex, the directors and officers of Onex, and the directors and officers of Magnatrax. These claims were said to arise from "the May 1999, September 1999, and March 2000 transactions, as well as the credit facilities and related agreements supporting those transactions." The letter refers to numerous claims, including breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unjust enrichment, "and possibly other claims yet to be identified".

[88] On November 28, 2003, the day before the Onex 2002-2003 Policy was to expire, Aon faxed the Foley Letter to American Home. In doing so, Aon referred to both the Onex 2002-2003 Policy and the Magnatrax Run-Off Policy and stated that the Foley Letter "contains information on a situation which could in future give rise to a claim under [those] polic[ies]".

[89] Onex argues that the Foley Letter does not satisfy the specificity requirements of clause 7(c) of the Onex 2002-2003 Policy in that it does not set out full particulars as to dates, persons and entities involved. Onex contends that the letter did not describe the nature of the commercial transactions or Onex's

role in them, did not specify any wrongful act that might be alleged, nor did it set out the names of the directors and officers who were involved in the transactions.

[90] The motion judge rejected these same arguments. In his reported reasons, he indicated that he was in agreement with U.S. cases holding that, in determining whether a notice by an insured to an insurer is sufficient, an objective test should be applied having regard to the wording of the policy. He held, at para. 136: "The test is whether the insured objectively complied with the notice provision in the Policy", citing *Continental Insurance Co. v. Superior Court Los Angeles County*, 37 Cal. App. 4th 69, 80 (1995) and *McCullough v. Fidelity & Deposit Co.*, 2 F.3d 110, 113 (5th Cir. 1993).

[91] We see no reason to interfere with the motion judge's finding that the Foley Letter contains sufficient particulars to meet the requirements of clause 7(c). We agree with the motion judge's conclusion, at para. 150, that "it sets out the specific transactions and agreement involved, the dates of the transactions, the claims which are alleged to exist and the entities and individuals involved." What is important here is that Onex, through Aon, provided American Home with the specifics of the threatened litigation as those specifics were provided to it. It was not necessary for the insured to speculate about the names of the individual directors or officers who might be named in the threatened litigation. As found by the motion judge, when viewed objectively as a whole, the Foley Letter contains

sufficient particulars of the dates, persons and entities involved to comply with clause 7(c) of the Onex 2002-2003 Policy.

[92] We share the motion judge's view that the claims being advanced in the Georgia Action are "the same as or related to" the claims asserted in the Foley Letter. The Foley Letter referred to claims arising out of transactions in May 1999, September 1999 and March 2000. The Georgia Action is based on corporate acquisitions by Magnatrax of American Buildings Company in May 1999, Republic Builders Products in August 1999, and Jannock Limited in March 2000.

[93] Further, the claims asserted in the Georgia Action against the personal defendants are breach of fiduciary duty, aiding and abetting breach of fiduciary duty, civil conspiracy and unjust enrichment. The Foley Letter sets out a number of claims, including breach of fiduciary duty, aiding and abetting breach of fiduciary duty and unjust enrichment. Thus, the Foley Letter alleges the same or related claims against Onex and the personal defendants as were alleged in the Georgia Action.

[94] We therefore agree with the motion judge that the Foley Letter meets the requirement of clause 7(c) of the Onex 2002-2003 Policy such that the Georgia Action constitutes a Claim made during the Policy Period of the Onex 2002-2003 Policy.

[95] As a result of clause 4(d) of the Onex 2004-2005 Policy, coverage is excluded under that policy. Coverage is also excluded under the 2004-2005 Excess Policies.

(2) Leave to Amend American Home's Pleadings

[96] Onex cross-appeals the motion judge's order granting American Home leave to amend its Amended Amended Statement of Defence and Counterclaim and to further particularize its claim for legal or equitable set-off. Onex submits that the motion judge erred in failing to find that the set-off issue raised by American Home was *res judicata*. On appeal, Onex advances the same arguments that were made to the motion judge on the issue of *res judicata*. Onex also submits, as it did on the motion, that permitting the amendment would result in non-compensable prejudice because American Home was effectively allowed to bolster arguments that had already been considered and rejected by the motion judge.

[97] The motion judge dealt with these arguments at para. 30 of his unreported January 20, 2012 reasons:

> In my view, *res judicata* does not apply to American Home's proposed amendments. Cause of action estoppel is not applicable. Nor, in my view, is issue estoppel. The issues of whether the limits of the Magnatrax Policy were reduced by the limits of the 2002-2003 D&O Policy and whether American Home was entitled to a refund of amounts paid under the

> Magnatrax Policy were not decided by me. The former issue was pleaded but not argued. The latter issue is a corollary which arises only on a determination of the first issue. The Action, and specifically the counterclaim has not been concluded.

[98] We see no reason to interfere with the motion judge's exercise of discretion permitting American Home to amend its pleadings. The motion judge had not yet decided whether the limits of the Magnatrax Run-Off Policy were reduced by the Onex 2002-2003 Policy, nor the corollary issue of whether American Home was entitled to a refund of amounts paid under the Magnatrax Run-Off Policy. We fail to see how Onex was prejudiced by the permitted amendments.

[99] For the foregoing reasons, we would dismiss the Onex cross-appeal.

F. AMERICAN HOME'S APPEAL

(1) Legal Principles

[100] The issues raised by American Home relate to the proper interpretation of certain endorsements in the Onex 2002-2003 Policy and the Magnatrax Run-Off Policy. American Home does not argue that the motion judge erred in setting out the legal principles for interpreting the terms of an insurance policy. However, we include a summary of these principles because they inform our analysis of the issues raised by American Home's appeal.

[101] The Supreme Court of Canada has canvassed the principles of insurance policy interpretation on several occasions: see *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, at paras. 21-24; *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605, at paras. 20-28; *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at paras. 27-30; *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at paras. 67-71; and *Brissette Estate v. Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87, at pp. 92-93.

[102] The primary interpretative principle is that when language of the policy is unambiguous, the court should give effect to the clear language, reading the contract as a whole: *Scalera*, at para. 71. The terms of the policy must be examined "in light of the surrounding circumstances, in order to determine the intent of the parties and the scope of their understanding": *Jesuit Fathers*, at para. 27.

[103] In *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.*, 114 O.A.C. 357, at para. 25, this court referred to the need to examine the language of a contract in light of the surrounding circumstances: "While the task of interpretation must begin with the words of the document and their ordinary meaning, the general context that gave birth to the document or its 'factual

matrix' will also provide the court with useful assistance." In cases of insurance contracts, the evidence of the factual matrix may be of more assistance when the contract is an individually negotiated contract rather than a standard form contract resulting from a routine purchase of an insurance policy.

[104] Be that as it may, before reaching a finding that a contractual provision is ambiguous, the court must assess the words of a contract in light of the factual matrix in which the agreement was written. As Doherty J.A. stated in *Dumbrell v. The Regional Group of Companies Inc.*, 2007 ONCA 59, 85 O.R. (3d) 616, at para. 54:

> A consideration of the context in which the written agreement was made is an integral part of the interpretative process and is not something that is resorted to only where the words viewed in isolation suggest some ambiguity. To find ambiguity, one must come to certain conclusions as to the meaning of the words used. A conclusion as to the meaning of words used in a written contract can only be properly reached if the contract is considered in the context in which it was made: see McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 710-11.

[105] It is important to distinguish what is meant by the factual matrix from extrinsic evidence that is admissible to resolve an ambiguity. The factual matrix is gleaned from the context of the transaction. Doherty J.A. explained in *Dumbrell*, at para. 55, that the factual matrix "clearly extends to the genesis of the

agreement, its purpose, and the commercial context in which the agreement was made".

[106] Where the language of an insurance policy is found to be ambiguous, the court will rely on general rules of contract construction. As explained in *Progressive Homes*, at para. 23:

> For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties (*Gibbens*, at para. 26; *Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901 [*Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888]), so long as such an interpretation can be supported by the text of the policy. Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded (*Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901). Courts should also strive to ensure that similar insurance policies are construed consistently (*Gibbens*, at para. 27). These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.

[107] In *Lombard Canada Ltd. v. Zurich Insurance Co*., 2010 ONCA 292, 101 O.R. (3d) 371, at para. 33, this court held that, where there is ambiguity in the sense that a phrase is capable of bearing two equally reasonable interpretations, the court may consider extrinsic evidence and the applicability of the *contra proferentem* rule.

[108] However, the admission of extrinsic evidence does not mean that the parties' subjective views of what was intended by the agreement will be used to resolve the ambiguity. On the contrary, the court should adopt the interpretation that gives effect to the reasonable expectations or intentions of the parties: *Scalera*, at para. 71; *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252, at p. 269; *Dunn v. Chubb Insurance Co. of Canada*, 2009 ONCA 538, 266 O.A.C. 1, at para. 35.

[109] We turn now to the arguments with respect to the interpretation of Endorsement #14 of the Onex 2002-2003 Policy.

(2) Endorsement #14 of the Onex 2002-2003 Policy

[110] American Home argues that the motion judge erred in finding that Endorsement #14 of the Onex 2002-2003 Policy does not exclude coverage for the personal defendants' claims for defence costs arising from the Georgia Action. According to American Home, under the plain meaning of Endorsement #14, the personal defendants' losses in the form of defence costs fall into each of the following three exclusions in Endorsement #14:

> (i) the Georgia Action is a Claim made against Magnatrax or its Executives;
>
> (ii) the Georgia Action is a Claim brought by Magnatrax; and

> (iii) the Georgia Action is a Claim based on an act or omission of Magnatrax Executives.

[111] Before turning to the specific arguments, it is important to note that Endorsement #14 to the Onex 2002-2003 Policy is one part of an individually negotiated set of insurance arrangements between Onex, American Home and Magnatrax. Those arrangements resulted from a number of discussions and email exchanges. Those arrangements also included the issuance of the Magnatrax Run-Off Policy. The origin of those arrangements goes back to the discussions between the parties in January 2003 when Onex was contemplating a sale of Magnatrax. The parties added Endorsement #14 to the Onex 2002-2003 Policy as a result of a negotiated set of contractual arrangements.

[112] Next, it is worth noting that the positions of both parties in approaching the interpretation dispute are commercially reasonable. Onex says that it is reasonable that Onex Executives would have wanted to maintain coverage under the more extensive Onex tower of insurance policies in the face of Magnatrax's Chapter 11 filing and the heightened litigation risk associated with that filing. American Home, on the other hand, says it would be reasonable for it to provide no more than one of its policy limits to respond to any "Claim" related to Magnatrax. Both of these positions are commercially reasonable when viewed from the parties' own perspective. Hence, the difficulty.

[113] We first explain why we would not give effect to American Home's argument based on the second exclusion identified by American Home in Endorsement #14 of the Onex 2002-2003 Policy.

(a) The Georgia Action is a Claim Brought By Magnatrax

[114] American Home argues that the Loss arising from the Georgia Action is excluded by Endorsement #14 of the Onex 2002-2003 Policy because the Loss arises out of or in connection with a Claim brought by Magnatrax. We repeat for convenience the language of the first paragraph of Endorsement #14 that relates to this argument:

> [T]he Insurer shall not be liable for any Loss... arising out of … or in connection with any Claim brought *by* … [Magnatrax]" … [Emphasis added.].

[115] The question then becomes whether the Georgia Action, which was brought by the Magnatrax Litigation Trust as plaintiff, and which asserts only causes of action assigned to it under the Magnatrax Plan of Reorganization, is a Claim brought by Magnatrax. If so, the Loss arising therefrom is excluded by Endorsement #14.

[116] The motion judge set out the facts relevant to this argument at paras. 175-77 of his reported reasons. American Home does not dispute the motion judge's summary of the facts.

[117] As we said above, the Georgia Action was brought by the Trustee of the Magnatrax Litigation Trust. The Magnatrax Litigation Trust was established pursuant to s. 4.21 of the Magnatrax Plan of Reorganization, which was approved by the U.S. Bankruptcy Court in the Chapter 11 proceedings. It is clear, however, from both the Foley Letter and the complaint in the Georgia Action that the claims being advanced are claims which, up until their assignment to the Litigation Trust, belonged entirely to Magnatrax and its subsidiaries.

[118] The Foley Letter requested immediate confirmation from Magnatrax and its subsidiaries in bankruptcy that it would pursue the claims identified against the entities and the individuals named, failing which it requested confirmation that the Creditors' Committee could pursue the claims of Magnatrax on their behalf.

[119] American Home argues that the motion judge erred in concluding that the Georgia Action was not brought by Magnatrax so as to come within the second exclusion in Endorsement #14 of the Onex 2002-2003 Policy. The Georgia Action is a derivative action instituted by the Litigation Trust and alleges causes of action originally belonging to Magnatrax. American Home correctly points out that if the Georgia Action had been brought by Magnatrax, it would be clear that Endorsement #14 would have excluded coverage.

[120] American Home also points out that prior to the issuance of Endorsement #14, the exclusion in Endorsement #10 of the Onex 2002-2003 Policy, which

amends clause 4(i) in that Policy, would have excluded coverage for proceedings – including derivative actions – commenced by a trustee established in bankruptcy proceedings of Magnatrax for the benefit of its creditors.

[121] The exclusion in clause 4(i) of the Onex 2002-2003 Policy is a standard "Insured versus Insured" exclusion (see the Appendix for the text of clause 4(i)). This exclusion is designed to protect the insurer from having to provide coverage in relation to a legal proceeding by one insured party against another insured party. The "Insured versus Insured" exclusion is designed to prevent collusive proceedings whereby "an insured company might seek to force its insurer to pay for the poor business decisions of its officers or managers": *Twp. Of Center, Butler County, Pa. v. First Mercury Syndicate, Inc.*, 117 F.3d 115, 119 (3d Cir. 1997).

[122] Paragraph 3 of clause 4(i) provides that the Insured versus Insured exclusion "shall not apply to":

> (3) in any bankruptcy proceeding by or against an Organization, any Claim brought by the examiner, trustee, receiver, receiver manager, liquidator or rehabilitator (or any assignee thereof) of such Organization, if any;

[123] Endorsement #10 deleted subparagraph 3 of clause 4(i). Thus, the "Insured versus Insured" exclusion would apply to exclude coverage for a Claim

brought in bankruptcy proceedings by a trustee of an Organization as defined in the Onex 2002-2003 Policy.

[124] However, the effect of Endorsement #10 was removed insofar as Magnatrax was concerned after the parties agreed upon Endorsement #14. Endorsement #14 provides that Magnatrax is no longer a Subsidiary of Onex. "Organization" is defined to mean each "Subsidiary".

[125] American Home argues that there is no evidence that the parties intended that the amendments to the Onex 2002-2003 Policy resulting from the inclusion of Endorsement #14 should operate to expose it to a form of coverage previously excluded – liability for derivative legal proceedings brought against Onex by a creditors' litigation trust.

[126] The motion judge rejected these arguments. We agree with his conclusion and his reasons, at paras. 178-80 of his reported reasons:

> Notwithstanding that the claims which are asserted against [the personal defendants] in the [Georgia Action] are derivative claims which initially belonged to Magnatrax and its subsidiaries, in my view, they are not brought by Magnatrax. The exclusion in the first paragraph of Endorsement #14 of the [Onex 2002-2003 Policy] is clear. It applies to "any Claim brought by…" Magnatrax or any subsidiary or affiliate thereof. While [the Georgia Action] asserts claims which originally belonged to Magnatrax and its subsidiaries, it is brought by the Trustee on behalf of the Magnatrax Litigation Trust and not Magnatrax.

> As noted earlier, exclusions are to be interpreted narrowly. In the absence of more expansive wording in Endorsement #14 to exclude derivative claims, the words: "any Claim brought by or made against [Magnatrax, its subsidiaries and affiliates]" restrict the application of the exclusion to claims brought by Magnatrax, its subsidiaries and affiliates. As [the Georgia Action] is not such a Claim, Endorsement #14 does not exclude it from coverage.
>
> Nor, in my view, can American Home rely on Endorsement #10 of the [Onex 2002-2003 Policy] which excludes claims against any Insured where the claim is brought in any bankruptcy proceeding by or against an Organization when the claim is brought by, among others, the creditors' committee or trust. Endorsement #14 removed Magnatrax as a subsidiary thereby excluding it from the definition of Organization under the [Onex 2002-2003 Policy].

[127] To those reasons, we would add that the circumstances surrounding the adoption of Endorsement #14 support the motion judge's interpretation of the words in that clause. The reason for the negotiations that resulted in Endorsement #14, as well as Endorsements #4 and #16 to the Magnatrax Run-Off Policy, was the impending bankruptcy of Magnatrax. Although these three endorsements were not, in fact, issued until sometime after the Chapter 11 proceedings involving Magnatrax had commenced, the endorsements were dated May 12, 2003 so as to coincide with the beginning of the Chapter 11 proceedings.

[128] Endorsement #14 had the effect of removing the bankruptcy exclusion in Endorsement #10 as it applied to Magnatrax. It is significant, we suggest, that the

language in Endorsement #14 excludes coverage for Loss arising from a Claim brought by Magnatrax (the insolvent entity) but does not, as Endorsement #10 had, exclude Loss arising from a Claim brought by a trustee, a creditors' committee, or a trust. We do not think that this omission, viewed objectively and reasonably, should be treated as an oversight, particularly when it is considered that Endorsement #14 was drafted in the circumstances of Magnatrax declaring bankruptcy. Rather, given the experience and sophistication of the parties, we conclude, as the motion judge did, that the parties intended the exclusion in Endorsement #14 to apply only to Loss arising from a Claim brought by Magnatrax. Had the parties intended that the exclusion was to apply to Loss arising from a Claim brought by assignees, trustees, or other representatives asserting Magnatrax's claims, they would have specifically said so.

[129] We now consider together the remaining two exclusions identified by American Home.

(b) The Georgia Action is a Claim Made Against Magnatrax or its Executives / The Georgia Action is Claim Based on an Act or Omission of Magnatrax Executives

[130] American Home argues that the defence costs claimed by the personal defendants are excluded from coverage by two additional exclusions in Endorsement #14 of the Onex 2002-2003 Policy: the remaining language in the first paragraph of Endorsement #14 and the second sentence of the second

paragraph of Endorsement #14. We repeat the relevant language for convenience:

> In consideration of the premium charged, it is hereby understood and agreed that *the Insurer shall not be liable for any Loss alleging, arising out of, based upon or attributable to or in connection with any Claim brought by or made against* [Magnatrax Corporation] *and/or any* [Executive] *thereof.*
>
> …
>
> Further, the Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured alleging, arising out of, based upon or attributable to any breach of duty, act, error or omission of MAGNATRAX Corporation, or any director, officer, member of the board of managers or employee thereof. [Emphasis added.]

[131] The motion judge did not accept American Home's arguments based on either the first or second paragraphs of Endorsement #14. He concluded, at para. 169 of his reported reasons, that although Endorsement #14 of the Onex 2002-2003 Policy is an exclusion provision, it does not operate as an "absolute" exclusion in respect of all claims against Onex's directors and officers relating to Magnatrax. He concluded that the language of Endorsement #14 was unambiguous and thus only open to the interpretation he adopted.

[132] We have considered the language of Endorsement #14 of the Onex 2002-2003 Policy in the context of the surrounding circumstances or the factual matrix. In our view, the language viewed in that context is ambiguous. It is open to two

reasonable interpretations: the one urged by American Home and the one adopted by the motion judge.

[133] Because there is ambiguity, it becomes necessary to turn to extrinsic evidence to assist with the interpretative exercise. Before turning to the use of extrinsic evidence, we will set out why we consider both of the competing interpretations to be reasonable.

[134] We start with the motion judge's interpretation.

[135] In the motion judge's view, Endorsement #14 excludes coverage for claims against the personal defendants acting in their capacity as Magnatrax Executives, but it does not exclude from coverage claims against the personal defendants acting in their capacity as Onex Executives. The motion judge drew the distinction between the capacity in which the personal defendants were acting at para. 105 of his reported reasons:

> Further, based on a review of the entire Complaint in the [Georgia] Action and in particular the allegations against [the personal defendants], it is my view that the claims against the [personal defendants] are asserted against them in their capacity both as directors and officers of Onex and as directors (or de facto directors…) and officers of Magnatrax. *The overarching theme of the Complaint* [i.e., the Georgia Action] *is that Onex, as directed by the [personal defendants] in their capacity as Onex directors and officers, engineered the demise of Magnatrax and its subsidiaries for their collective benefit.* [Emphasis added.]

[136] The motion judge went on, at paras. 173-74, to interpret the exclusionary effect of Endorsement #14 as follows:

> Accordingly, when read in its entirety, Endorsement #14 operates to remove Magnatrax (and any subsidiary or affiliate) from coverage under the [Onex 2002-2003 Policy] and exclude any claim against Onex directors and officers by or against Magnatrax or arising out of, based upon or attributable to any act on the part of Magnatrax or its directors and officers. What Endorsement #14 does not exclude, in my view, is any claim by a third party against Onex's directors and officers in their capacity as such for their wrongful acts in relation to Magnatrax.
>
> Based on the above interpretation of Endorsement #14, it is my view that the [Georgia] Action is not excluded from coverage under the [Onex 2002-2003 Policy]. As has been previously discussed, the [Georgia] Action asserts claims against the [personal defendants] in their capacity as directors and/or officers of Onex relating to Magnatrax. The claims are not based upon or attributable to any act on the part of Magnatrax or its directors and officers.

[137] The motion judge elaborated on his understanding of the term "Claim" in the Magnatrax Run-Off Policy and the Onex 2002-2003 Policy at paras. 54-55 of his unreported January 20, 2012 reasons:

> The term "Claim" is broadly defined in both the Magnatrax [Run-Off] Policy and the [Onex 2002-2003 Policy] to include, among other things, a written demand for monetary, non-monetary or injunctive relief as well as [a] civil proceeding for monetary, non-monetary or injunctive relief commenced by statement of claim. It is intended to define a triggering event in respect of coverage under the Policies. In my view, however,

> based on the wording of the Policies as a whole, the definition of Claim is broad enough to also encompass multiple individual claims within an action or proceeding as well. It is not restricted to mean solely an action or proceeding.
>
> To define Claim as being limited to a legal action or proceeding makes no sense having regard to the wording of the Policies. The Policies refer to and deal with actions or proceedings which assert multiple claims where some of the claims are covered and some are not. They also provide for claims against insured in actions where there are co-defendants who are not covered. It is the covered claims within an action or proceeding that are covered rather than the entire action.

[138] These reasons indicate that the motion judge was satisfied that the Georgia Action advanced claims against the personal defendants both in their capacities as Executives of Magnatrax and in their capacities as Executives of Onex. American Home does not challenge this finding on appeal.

[139] It is also apparent that the motion judge was satisfied that while the term "Claim" as it is defined in the Onex 2002-2003 Policy refers to a civil proceeding, the term need not necessarily encompass the entirety of the civil proceeding. According to the motion judge, when the wording of the policies is looked at as a whole: "the definition of Claim is broad enough to also encompass multiple individual claims within an action or proceeding as well. It is not restricted to mean solely an action or proceeding": unreported reasons, at para. 54.

[140] We think that the motion judge's view is tenable to the following extent. We agree that when the wording of the policies is looked at as a whole, it is reasonable to interpret the term "Claim" in Endorsement #14 as not necessarily referring to the entirety of a proceeding. The phrase in the first paragraph of Endorsement #14 – "any Claim … made against [Magnatrax or its Executives]" – can be taken as referring to the Georgia Action as advanced against Magnatrax or its Executives, and not as referring to the Georgia Action as advanced against Onex or its Executives acting in their capacity as such.

[141] The following wording of the policies supports this view. Under the terms of the Executive Liability coverage in the Onex 2002-2003 Policy, American Home was responsible to pay the Loss of an Onex Executive arising from a Claim made against the Executive for any "Wrongful Act" of the Executive.

[142] "Wrongful Act" is defined as meaning:

> (1) any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act…
>
> (i) with respect to any Executive of an Organization, by such Executive in his or her capacity as such or any matter claimed against such Executive solely by reason of his or her status as such;

[143] It is apparent from this definition that the capacity in which an Executive is acting when committing a Wrongful Act is a crucial feature of coverage. It is only

when acting in his or her capacity as an Executive of the covered Organization that the Executive is covered.

[144] When the Magnatrax Run-Off Policy was issued and Magnatrax and Magnatrax Executives were removed from coverage under the Onex 2002-2003 Policy, it would be reasonable to interpret these policies as providing that Magnatrax Executives would no longer be covered under the Onex 2002-2003 Policy for a Claim brought against them in their capacity as Magnatrax Executives, but that Onex Executives would continue to be covered under the Onex 2002-2003 Policy for Wrongful Acts committed by them in their capacity as Onex Executives. In other words, it is reasonable to interpret the term “Claim” in Endorsement #14 as referring to a proceeding against a particular Insured acting in the capacity that attracts coverage. Considered in this light, the wording of the first paragraph of Endorsement #14 – “the Insurer shall not be liable for any Loss… arising out of… any Claim… made against [Magnatrax or its Executives]” – could reasonably mean a Claim to the extent that it is advanced against Magnatrax or its Executives in their capacity as such.

[145] On this interpretation of the phrase “any Claim”, the exclusion in the second paragraph of Endorsement #14 could reasonably be interpreted as not excluding all of the defence costs of the Georgia Action from coverage. If a proceeding (in this case a civil action) includes causes of action against an

Insured acting in more than one capacity, it would be necessary to separate the claims based upon the capacities in which the Insured is being sued and to then determine whether or not the Insured is covered or excluded under the provisions of the policy.

[146] In this case, the motion judge found, at para. 105 of his reported reasons, that "[t]he overarching theme of the Complaint [*i.e.*, the Georgia Action] is that Onex, as directed by the [personal defendants] in their capacity as Onex directors and officers, engineered the demise of Magnatrax and its subsidiaries for their collective benefit." At para. 174 of his reported reasons, he held that at least some of the claims were advanced against the personal defendants "in their capacity as directors and/or officers of Onex" and are not "based upon or attributable to any act on the part of Magnatrax or its directors and officers."

[147] At least with respect to the unjust enrichment claim, we agree with the motion judge's characterization. This claim is not "alleging, arising out of, based upon or attributable to any breach of duty, act, error or omission of Magnatrax [or any Magnatrax Executive]". On this view, it would be reasonable to interpret the second paragraph of Endorsement #14 of the Onex 2002-2003 Policy as not excluding the cost of defending the unjust enrichment aspect of the Georgia Action.

[148] Having said that, we are not prepared to find that the motion judge's interpretation of Endorsement #14 of the Onex 2002-2003 Policy is the only reasonably available interpretation. We find that American Home's suggested interpretations of the first paragraph of Endorsement #14 and of the second paragraph of Endorsement #14 are also reasonable ones.

[149] In advancing the argument based on the exclusion in the first paragraph of Endorsement #14, American Home's fundamental position is that the word "Claim" in this clause should be read as it is defined in the Onex 2002-2003 Policy. The definition of "Claim" states:

> "Claim" means:
>
> …
>
> 2) a civil, criminal, administrative, regulatory or arbitration proceeding for monetary, non-monetary or injunctive relief which is commenced by: (i) service of a Writ of Summons, Statement of Claim or similar originating legal document; (ii) return of a summons, information, indictment or similar document (in the case of a criminal proceeding); or (iii) receipt or filing of a notice of charges;

[150] Based on the definition of the term "Claim" as a civil proceeding, American Home contends that the first paragraph of Endorsement #14 clearly excludes the personal defendants' defence costs from coverage for two main reasons.

[151] First, the personal defendants' defence costs constitute Loss arising out of, attributable to or in connection with "a civil proceeding", namely, the Georgia

Action. Second, the Georgia Action is a civil proceeding against Magnatrax Executives, who were named as individual defendants in the Georgia Action. Thus, on a plain reading of the first paragraph of Endorsement #14, the personal defendants' Loss in the form of defence costs arising from the Georgia Action is excluded from coverage.

[152] Similarly, American Home's argument based on the second paragraph of Endorsement #14 is that this language operates to exclude coverage for Loss in connection with any civil proceeding against Onex Executives alleging, arising out of, based upon or attributable to the conduct of Magnatrax Executives. The Georgia Action includes allegations of wrongful acts committed by directors and officers of both Magnatrax and Onex. Thus, the argument goes, the Georgia Action is a "Claim" – that is, a civil proceeding – arising out of acts by Magnatrax Executives. That being the case, the defence costs associated with the Georgia Action are excluded from coverage by the above-quoted language from the second paragraph of Endorsement #14.

[153] On American Home's interpretation, there is no basis in the language of Endorsement #14 or elsewhere in the policy language for assigning a different meaning to the term "Claim" than is provided by the definition in the policy. American Home argues that giving a different meaning to the term "Claim" as it

appears in Endorsement #14 would deviate from the meaning of the term most commonly used in the D&O insurance industry.

[154] We agree with American Home to the extent that we conclude that it is reasonable to interpret the term “Claim” in Endorsement #14 in the way the term is defined in the Onex 2002-2003 Policy, namely, as a civil proceeding. On one reading of the first paragraph of Endorsement #14, the Georgia Action constitutes a civil proceeding brought against Magnatrax Executives, and the Insurer is not liable for “any Loss” in connection with this Claim.

[155] We agree that it is also reasonable to interpret the second paragraph of Endorsement #14 as excluding coverage for the claimed defence costs because these costs arise from a Claim that is based on acts or omissions of Magnatrax Executives. Each of the four counts in the Georgia Action against the individual defendants name both the personal defendants who served as Onex Executives (*i.e.*, Schwartz, Govan, Wright and Hilson), as well as two individual defendants who only served as Magnatrax Executives (*i.e.*, Richard T. Ammerman and Raymond C. Blackmon Jr.). The language of the second paragraph of Endorsement #14 can be read to exclude from coverage the costs of defending the Georgia Action because these costs constitute Loss in connection with a Claim alleging, arising out of, based upon or attributable to the conduct of Magnatrax Executives (*i.e.*, Wright, Hilson, Ammerman and Blackmon).

[156] In assessing the reasonableness of the competing interpretations of the term “Claim” in Endorsement #14, it is necessary to consider if each interpretation is consistent with the use of that term elsewhere in the Onex 2002-2003 Policy. We have reviewed the language of the policy, and in particular have examined Endorsements #5 and #9. American Home contended that the language of these endorsements supports its interpretation of Endorsement #14. We conclude that the way the term “Claim” is used elsewhere in the policy does not assist in determining which interpretation of the use of that term in Endorsement #14 is the correct one. There are reasonable arguments pointing in both directions.

[157] We have also considered the factual matrix in this case, which is set out above in paras. 25-48 above. As we see it, plausible arguments can be made on both sides as to the reasonableness of either interpretation in view of the surrounding circumstances, the provisions of the Magnatrax Run-Off Policy and when viewed objectively, what the parties to the negotiations would have been trying to accomplish.

[158] In reaching the conclusion that Endorsement #14 is ambiguous, we have specifically considered Endorsements #16 and #4 to the Magnatrax Run-Off Policy (see paras. 43 and 44 above). In our view, these endorsements can be

interpreted to sit comfortably with American Home's interpretation of Endorsement #14 in the Onex 2002-2003 Policy.

[159] Using the plain meaning of the definitions provided in the policies, under American Home's interpretation of Endorsement #14 in the Onex 2002-2003 Policy and Endorsement #16 in the Magnatrax Run-Off Policy, coverage is not simultaneously available under the two policies.

[160] According to American Home, Endorsement #4 of the Magnatrax Run-Off Policy would afford coverage with respect to any civil proceeding against Onex or Onex Executives provided that the civil proceeding relates to a Wrongful Act committed by Magnatrax or a Magnatrax Executive if either Magnatrax or a Magnatrax Executive remains as a defendant in the civil proceeding.

[161] That said, we do not think that the compatibility of Endorsements #16 and #4 of the Magnatrax Run-Off Policy with American Home's interpretation of Endorsement #14 in the Onex 2002-2003 Policy is determinative of the interpretation exercise.

[162] As a starting point, American Home's interpretation of these paragraphs in Endorsement #14 of the Onex 2002-2003 Policy leaves a potential gap in coverage for Onex Executives. On American Home's interpretation, Onex Executives would be covered by the Magnatrax Run-Off Policy for their Wrongful Acts in relation to Magnatrax provided they were sued along with Magnatrax or a

Magnatrax Executive. However, they would not be afforded coverage under either policy if they were sued on their own in their capacity as Onex Executives for the same Wrongful Acts.

[163] Further, Endorsement #16 also can be read in a manner that is consistent with the motion judge's interpretation of Endorsement #14 to the Onex 2002-2003 Policy. If "Claim" as it appears in Endorsement #14 to the Onex 2002-2003 Policy is interpreted as meaning the Georgia Action as advanced against Magnatrax or its Executives, and not as referring to the Georgia Action as advanced against Onex or its Executives acting in their capacity as such, the coverage afforded to Magnatrax Executives under the Magnatrax Run-Off Policy would not trigger Endorsement #16 to the Magnatrax Run-off Policy. Similarly, aspects of the Georgia Action advanced against Onex Executives that do not attract coverage under Endorsement #4 of the Magnatrax Run-Off Policy would not trigger Endorsement #16 of the Magnatrax Run-Off Policy. Viewed in this way, Endorsement #16 of the Magnatrax Run-Off Policy does not make the motion judge's interpretation of Endorsement #14 of the Onex 2002-2003 Policy unreasonable.

[164] Endorsement #4 of the Magnatrax Run-Off Policy may sit less comfortably with the motion judge's interpretation of Endorsement #14 of the Onex 2002-2003 Policy. Arguably, the motion judge's interpretation avoids the potential for a

gap in coverage if a civil proceeding involving Magnatrax named only Onex and Onex Executives as defendants and did not name as defendants Magnatrax or any individuals who served as Magnatrax Executives. That said, it is not entirely clear what effect such an interpretation would have on the coordination of liability limits under Endorsement #16 of the Magnatrax Run-Off Policy.

[165] In our view, however, the difficulty in reconciling the two endorsements from the Magnatrax Run-Off Policy with the motion judge's interpretation of Endorsement #14 of the Onex 2002-2003 Policy does not determine the interpretative exercise. We have concluded that the ambiguity, as discussed above in these reasons, remains. The factual matrix in this case does not resolve which interpretation of Endorsement #14 of the Onex 2002-2003 Policy reflects the parties' reasonable expectations or intentions in putting in place the Magnatrax Run-Off Policy and amending the Onex 2002-2003 Policy by adding Endorsement #14.

[166] Each party advanced an interpretation of Endorsement #14 reflecting their reasonable expectation of coverage. Viewed objectively, either interpretation of Endorsement #14 would produce a commercially sensible result.

[167] In summary, we are of the view that the wording of Endorsement #14 in the Onex 2002-2003 Policy is susceptible of more than one meaning and is therefore ambiguous. Accordingly, we do not agree with the motion judge's

conclusion at para. 169 of his reported reasons that the wording of Endorsement #14 is clear and unambiguous.

[168] Where an ambiguity is first identified on appeal, it must be asked if the appellate court is in a position to resolve the ambiguity *de novo*. Section 134(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, empowers this court to make any order that the motion judge could have made. The parties brought competing motions to decide the personal defendants' action by way of summary judgment. The evidentiary record from the motions was filed electronically in this court with leave.

[169] The governing test for assessing if it is appropriate to exercise the powers conferred by rule 20.01(2.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, on a motion for summary judgment is the full appreciation test from *Combined Air Mechanical v. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1. This court described the test as follows, at para. 50: "can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?"

[170] We have examined the record carefully. Regrettably, we find that we are not in a position to decide the factual issues that need to be determined in order to resolve the interpretative dispute. Having found that Endorsement #14 was

unambiguous, the motion judge did not make findings of fact with respect to the issues we consider relevant to the resolution of the interpretation exercise.

[171] In arguing the appeal, the parties each took the position that the interpretation they urged on the court was unambiguous. That being the case, they paid little attention to the issues that we now find must be determined – what were the reasonable expectations or intentions of the parties in adopting Endorsement #14 of the Onex 2002-2003 Policy?

[172] Given the disposition we would make of this appeal, we will not express an opinion on the body of evidence that may be relevant to determining that issue. Suffice it to say that there is evidence of discussions and correspondence that took place in January 2003 and again at the time of the issuance of the Magnatrax Run-Off Policy and the issuance of Endorsement #14.

[173] We note that it will be open to the Superior Court to decide, if need be, whether Endorsement #16 of the Magnatrax Run-Off Policy entitles American Home to set-off amounts that may be found owing under the Onex 2002-2003 Policy against payments made under the Magnatrax Run-Off Policy.

G. DISPOSITION

[174] In the result, we would dismiss the Onex cross-appeal. We would allow American Home's appeal, set aside the order of the motion judge, and return the matter to the Superior Court. We leave it open to the parties to decide whether

to renew motions for summary judgment or to proceed by way of a trial of the issues that we have identified in these reasons.

[175] The parties may make brief written submissions on costs within a period of 30 days from the release of these reasons.

Released: “DOC” February 25, 2013

“D. O’Connor A.C.J.O.”

“Janet Simmons J.A.”

“I agree M. Rosenberg J.A.”

Appendix

1. Onex 2002-2003 Policy

Coverage A: EXECUTIVE LIABILITY INSURANCE

This policy shall pay the Loss of any Insured Person arising from a Claim (including, but not limited to, an Employment Practices Claim, an Oppressive Conduct Claim, a Canadian pollution Claim and a Statutory Claim) made against such Insured Person for any Wrongful Act of such Insured Person, except when and to the extent that an Organization has indemnified such Insured Person. Coverage A shall not apply to Loss arising from a Claim made against an Outside Entity Executive.

…

2. DEFINITIONS

…

(c) "Claim" means:

(1) a written demand for monetary, non-monetary or injunctive relief,
(2) a civil, criminal, administrative, regulatory or arbitration proceeding for monetary, non-monetary or injunctive relief which is commenced by: (i) service of a Writ of Summons, Statement of Claim or similar originating legal document; (ii) return of a summons, information, indictment or similar document (in the case of a criminal proceeding); or (iii) receipt or filing of a notice of charges; or
(3) a civil, criminal, administrative or regulatory investigation of an Insured Person:
    (i) once such Insured Person is identified in writing by such investigating authority as a person against whom a proceeding described in Definition (c)(2) may be commenced; or
    (ii) in the case of an investigation by any PSC or similar foreign securities authority, after the service of a subpoena upon such Insured Person.

The term "Claim" shall include any Securities Claim, Employment Practices Claim, Oppressive Conduct Claim, Canadian Pollution Claim and Statutory Claim.

…

(h) “Defence Costs” means reasonable and necessary fees, costs and expenses consented to by the Insurer (including premiums for any appeal bond, attachment bond or similar bond arising out of a covered judgment, but without any obligation to apply for or furnish any such bond) resulting solely from the investigation, adjustment, defence and/or appeal of a Claim against an Insured, but excluding any compensation of any Insured Person or any Employee of an Organization.

…

(l) “Executive” means any:

(1) past, present and future duty elected or appointed director, officer, trustee or governor of a corporation, management committee member of a joint venture and member of the management board of a limited liability company (or equivalent position), including a de facto director, officer, trustee, governor, management committee member or member of the management board of such entities;

(2) past, present and future person in a duty elected or appointed position in an entity organized and operated in a Foreign Jurisdiction that is equivalent to an executive position listed in Definition (l)(1); or

(3) past, present and future General Counsel and Risk Manager (or equivalent position) of the Named Entity.

…

(p) “Insured” means any:

(1) Insured Person; or
(2) Organization, but only with respect to a Securities Claim, an Oppressive Conduct Claim or a Canadian Pollution Claim.

(q) “Insured Person” means any:

(1) Executive of an Organization;
(2) Employee of an Organization; or
(3) Outside Entity Executive.

(r) “Loss” means damages (including aggravated damages), settlements, judgments (including pre/post-judgment Interest on a covered judgment), Defence Costs and Crisis Loss; however, “Loss” (other than Defence Costs) shall not include: (1) civil or criminal fines or penalties; (2) taxes; (3) punitive or exemplary damages; (4) multiplied portion of

multiplied damages; (5) any amounts for which an Insured is not financially liable or which are without legal recourse to an Insured; and (6) matters which may be deemed uninsurable under the provincial or state law pursuant to which this policy shall be construed.

…

(w) "Organization" means:

(1) the Named Entity;

…

(dd) "Subsidiary" means: (1) any for-profit entity that is not formed as a partnership of which the Named Entity has Management Control ("Controlled Entity") on or before the inception of the Policy Period either directly or indirectly through one or more other Controlled Entities and (2) a not-for-profit organization as defined in Section 149.1(b) of the Income Tax Act, R.S.C., 1985 (5th Supp.) sponsored exclusively by the Named Entity.

(ee) "Wrongful Act" means:

(1) any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act or any actual or alleged Employment Practices Violation:
   (i) with respect to any Executive of an Organization, by such Executive in his or her capacity as such or any matter claimed against such Executive solely by reason of his or her status as such;
   (ii) with respect to any Employee of an Organization, by such Employee in his or her capacity as such, but solely in regard to any: (a) Securities Claim; or (b) other Claim so long as such other Claim is also made and continuously maintained against an Executive of an Organization; or
   (iii) with respect to any Outside Entity Executive, by such Outside Entity Executive in his or her capacity as such or any matter claimed against such Outside Entity Executive solely by reason of his or her status as such; or

(2) with respect to an Organization, any actual or alleged breach of duty, neglect, error, misstatement, mis-leading statement, omission or act by such Organization, but solely in regard to: (a) any Securities Claim or Oppressive Conduct Claim; or (b) a Canadian Pollution

Claim so long as such Canadian Pollution Claim is also made and continuously maintained against an Executive of an Organization.

…

4. EXCLUSIONS

The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured:

(i) which is brought by or on behalf of an Organization or any Insured Person, other than an Employee of an Organization; or which is brought by any security holder or member of an Organization, whether directly or derivatively, unless such security holder's or member's Claim is instigated and continued totally independent of, and totally without the solicitation of, or assistance of, or active participation of, or intervention of, any Executive of an Organization or any Organization, provided, however, this exclusion shall not apply to:

(1) any Claim brought by an Insured Person in the form of a cross-claim or third-party claim for contribution or indemnity which is part of, and results directly from, a Claim that is covered by this policy;
(2) any Employment Practices Claim brought by an Insured Person, other than an Insured Person who is or was a member of the Board of Directors (or equivalent governing body) of an Organization;
(3) in any bankruptcy proceeding by or against an Organization, any Claim brought by the examiner, trustee, receiver, receiver manager, liquidator or rehabilitator (or any assignee thereof) of such Organization, if any;
(4) any Claim brought by any past Executive of an Organization who has not served as a duty elected or appointed director, officer, trustee, governor, management committee member, member of the management board, General Counsel or Risk Manager (or equivalent position) of or consultant for an Organization for at least four (4) years prior to such Claim being first made against any person; or
(5) any Claim brought by an Executive of an Organization formed and operating in a Foreign Jurisdiction against such Organization or any Executive thereof, provided that such Claim is brought and maintained outside Canada, the United States, or any other common law country (including any territories thereof);

…

7. NOTICE/CLAIM REPORTING PROVISIONS

Notice hereunder shall be given in writing to American Home Assurance Company, 145 Wellington Street West, Toronto, Ontario M5J 1H8: Attention Claims Department. If mailed, the date of mailing shall constitute the date that such notice was given and proof of mailing shall be sufficient proof of notice.

…

(c) If during the Policy Period or during the Discovery Period (if applicable) an Organization or an Insured shall become aware of any circumstances which may reasonably be expected to give rise to a Claim being made against an Insured and shall give written notice to the Insurer of the circumstances, the Wrongful Act allegations anticipated and the reasons for anticipating such a Claim, with full particulars as to dates, persons and entities involved, then a Claim which is subsequently made against such Insured and reported to the Insurer alleging, arising out of, based upon or attributable to such circumstances or alleging any Wrongful Act which is the same as or related to any Wrongful Act alleged or contained in such circumstances, shall be considered made at the time such notice of such circumstances was given.

ENDORSEMENT #5

…

"NO LIABILITY" PROVISION DELETED AND
SECURITIES CLAIM RETENTION APPLIES TO ALL LOSS

In consideration of the premium charged, it is hereby understood and agreed that the policy is hereby amended as follows:

(1) The Definition of and all provisions referring to "No Liability" are hereby deleted in their entirety.

(2) Clause 6 RETENTION CLAUSE is deleted in its entirety and replaced by the following:

6. RETENTION CLAUSE

For each Claim, the Insurer shall only be liable for the amount of Loss arising from a Claim which is in excess of the applicable Retention amounts stated in Items 4(a) through 4(e) of the Declarations, such Retention amounts to be borne by an Organization and/or the Insured Person and remain uninsured, with regard to all Loss other than Non-Indemnifiable Loss. The Retention amount specified in:

(i) Item 4(a) applies to Loss that arises out of a Securities Claim;
(ii) Item 4(b) applies to Loss that arises out of an Employment Practices Claim; and
(iii) Item 4(c) applies to Loss that arises out of Oppressive Conduct Claim;
(iv) Item 4(d) applies to Loss that arises out of a Canadian Pollution Claim; and
(v) Item 4(e) applies to Loss that arises out of any Claim other than a Claim listed in Clause 6(i) through 6(iv) above.

A single Retention amount shall apply to Loss arising from all Claims alleging the same Wrongful Act or related Wrongful Acts.

In the event a Claim triggers more than one of the Retention amounts stated in Items 4(a) through 4(e) of the Declarations, then, as to that Claim, the highest of such Retention amounts shall be deemed the Retention amount applicable to Loss (to which a Retention is applicable pursuant to the terms of this policy) arising from such Claim.

No Retention amount is applicable to Crisis Loss or Non-Indemnifiable Loss.

…

ENDORSEMENT #9

…

PREDETERMINED ALLOCATION FOR DEFENCE COSTS
OTHER THAN SECURITIES CLAIM OR EMPLOYMENT PRACTICES CLAIM

In consideration of the premium charged, it is hereby understood and agreed that Clause 8 is hereby amended by adding the following at the end thereof:

If a covered Claim other than a Securities Claim(s) or Employment Practices Claim(s) results in Loss which is both covered under the terms and conditions of this policy and uncovered by the terms and conditions of this policy (other than as a result of an exception of the Definition of Loss, the Definition of Defence Costs or the terms, conditions and limitations of this Clause 8), because such Claim includes both covered and uncovered matters or covered or uncovered parties, then the Insurer, the Insureds and the Company agree to allocate Defence Costs incurred in connection with such Claim, as follows:

Eighty percent (80%) shall be deemed to be Loss incurred by the Insureds; however, the Insurer shall only be liable to pay such Loss of the Insureds subject to the policy's application retention amount, limits of liability, and expressed exceptions to the definition of Loss and the other provisions of this Clause 8 and the definition of Defence Costs; and the remainder shall be deemed to be the obligation of the Organization and the Insureds and not insured under this policy. ("Preset Allocation of Defence Costs")

Provided that in all events the Preset Allocation of Defence Costs described above shall not apply to or create any presumption with respect to the allocation of any damages, judgments or settlement in regard to any Claim.

…

ENDORSEMENT #10

BANKRUPTCY TRUSTEE, RECEIVER, LIQUIDATOR
OR REHABILITATOR EXCLUSION

In consideration of the premium charged, it is hereby understood and agreed that the Insurer shall not be liable to make any payment for Loss in connection with any Claim made against any Insured in any bankruptcy proceeding by or against an Organization, when such Claim is brought by the examiner, trustee, receiver, creditors' committee, trust, liquidator or rehabilitator (or any assignee thereof) of such Organization.

It is further understood and agreed that the policy is modified as follows:

1. Clause 4. EXCLUSIONS, Exclusion (i) is hereby amended by deleting subparagraph (3) in its entirety.

…

ENDORSEMENT #14

SPECIFIC ENTITY/SUBSIDIARY EXCLUSION
(Claims brought by or made against)

In consideration of the premium charged, it is hereby understood and agreed that the Insurer shall not be liable for any Loss alleging, arising out of, based upon or attributable to or in connection with any Claim brought by or made against the Entity listed below and/or any Insureds thereof.

1. MAGNATRAX Corporation (Including any subsidiary or affiliate thereof)

It is further understood and agreed that the Definition of Subsidiary shall not include MAGNATRAX Corporation. Further, the Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured alleging, arising out of, based upon or attributable to any breach of duty, act, error or omission of MAGNATRAX Corporation, or any director, officer, member of the board of managers or employee thereof.

2. Magnatrax Run-Off Policy

ENDORSEMENT #4

…

DEFINITION OF ORGANIZATION AMENDED TO INCLUDE ENTITY
(CO-DEFENDANT ONLY)

In consideration of the premium charged, it is hereby understood and agreed that the term “Organization” is amended to include the following entity, subject to the terms, conditions and limitations of this endorsement and this policy.

ENTITY

Onex Corporation

Coverage as is afforded under this policy with respect to a Claim made against Onex Corporation or any Insured Persons thereof shall only apply if: (1) such Claim relates to a Wrongful Act committed by an Insured (other than Onex Corporation or an Insured Person thereof); and (2) an Insured (other than Onex Corporation or an Insured Person thereof) is and remains a defendant in the Claim along with Onex Corporation or any Insured Person thereof.

In all events coverage as is afforded under this policy with respect to a Claim made against Onex Corporation or any Insured Person thereof shall only apply to Wrongful Acts committed or allegedly committed prior to May 12, 2003.

...

ENDORSEMENT #11

…

COVERAGES B(i) DELETED
ALLOCATION ENDORSEMENT

…

DEFENCE COSTS) is deleted in its entirety and replaced with the following:

8. DEFENCE COSTS, SETTLEMENTS, JUDGMENTS (INCLUDING THE ADVANCEMENT OF DEFENCE COSTS)

(a) Under Coverage A, B and C of this policy, except as hereinafter stated, the Insurer shall advance, excess of any applicable retention amount, covered Defense Costs no later than ninety (90) days after the receipt by the Insurer of such defense bills. Such advance payments by the Insurer shall be repaid to the Insurer by each and every Insured Person or Organization, severally according to their respective interests, in the event and to the extent that any such Insured Person or Organization shall not be entitled under this policy to payment of such Loss.

…

(f) In connection with any Claim, other than a Claim that is or includes a Securities Claim, with respect to: (i) Defense Costs jointly incurred by, (ii) any joint settlement entered into by, or (iii) any judgment of joint and several liability against any Organization and any Insured Person, there shall be a fair and equitable allocation as between any such Organization and any such Insured Person, taking into account the relative legal and financial exposures and the relative benefits obtained by any such Insured Person and any such Organization, without any presumption that the coverage afforded to the Insured Person shall in any way reduce the allocation to the Organization which shall not be insured for such allocation. In the event that a determination as to the amount of Defense Costs to be advanced under the policy cannot be agreed to, then the Insurer shall advance Defense Costs excess of any applicable retention amount which the Insurer states to be fair and equitable until a different amount shall be agreed upon or determined pursuant to the provisions of this policy and applicable law.

…

ENDORSEMENT #16

…

COORDINATION OF AIG LIMITS

In consideration of the premium charged, it is hereby understood and agreed that, with respect to any Claim under this policy for which coverage is provided by one or more other policies issued by the Insurer or any other

member of the American International Group (AIG), (or would be provided but for the exhaustion of the limit of liability, the applicability of the retention/deductible amount or coinsurance amount, or the failure of the Insured to submit a notice of a Claim), the Limit of Liability provided by virtue of this policy shall be reduced by the limit of liability provided by said other AIG policy.

Notwithstanding the above, in the event such other AIG policy contains a provision which is similar in intent to the foregoing paragraph, then the foregoing paragraph will not apply, but instead:

(1) the Insurer shall not be liable under this policy for a greater proportion of the Loss than the applicable Limit of Liability under this policy bears to the total limit of liability of all such policies, and

(2) the maximum amount payable under all such policies shall not exceed the limit of liability of the policy that has the highest available limit of liability.

Nothing contained in this endorsement shall be construed to increase the limit of liability of this policy.

3. Onex 2004-2005 Policy

4. EXCLUSIONS

The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured:

…

(d) alleging, arising out of, based upon or attributable to the facts alleged, or to the same or related Wrongful Acts alleged or contained in any Claim which has been reported, or in any circumstances of which notice has been given, under any policy of which this policy is a renewal or replacement or which it may succeed in time;

…

ENDORSEMENT #13

…

PRIOR ACTS EXCLUSION FOR LISTED ENTITIES

In consideration of the premium charged, it is hereby understood and agreed that the term Subsidiary is amended to include the entity(ies) listed below, but only for Wrongful Acts committed by such entity(ies) and/or any Insureds thereof which occurred subsequent to such entity's respective acquisition/creation date listed below and prior to the time the Named Entity no longer maintains Management Control of such entity(ies), respectively, either directly or indirectly through one or more other Subsidiaries. Loss arising from the same or related Wrongful Act shall be deemed to arise from the first such same or related Wrongful Act.

ENTITY(IES)	ACQUISITION/CREATION DATE
1. MAGNATRAX Corporation [...]	May 12, 2003

For the purpose of the applicability of the coverage provided by this endorsement, the entities listed above and the Organization will be conclusively deemed to have indemnified the Insureds of [...] each respective entity to the extent that such entity or the Organization is permitted or required to indemnify such Insureds pursuant to law or contract or the charter, bylaws, operating agreement or similar documents of an Organization. The entity and the Organization hereby agree to indemnify

the Insureds to the fullest extent permitted by law, including the making in good faith of any required application for court approval.