IN THE SUPREME COURT OF THE STATE OF OREGON

ALLIANZ GLOBAL RISKS US INSURANCE COMPANY and ALLIANZ UNDERWRITERS INSURANCE COMPANY,

Plaintiffs-Appellants,
Petitioners on Review,

v.

ACE PROPERTY & CASUALTY INSURANCE COMPANY, as Successor to Aetna Insurance Company; CERTAIN UNDERWRITERS AT LLOYD'S LONDON; CERTAIN LONDON MARKET INSURANCE COMPANIES; GENERAL INSURANCE COMPANY and WESTPORT INSURANCE CORPORATION, as Successor to Puritan Insurance Company,

Defendants-Respondents,
Respondents on Review,

and

CON-WAY, INC., as Successor to Consolidated Freightways, Inc.,

Intervenor-Respondent,
Respondent on Review,

and

ALLSTATE INSURANCE COMPANY, as Successor to Northbrook Excess and Surplus Insurance Company f/k/a Northbrook Insurance Company, et al.,

Defendants,

Multnomah County Circuit Court
Case No. 120404552

CA A159758 (Control)
CA A159858

SC S067017

April 2020

ALLIANZ GLOBAL RISKS US INSURANCE COMPANY and ALLIANZ UNDERWRITERS INSURANCE COMPANY,

Plaintiffs-Respondents,
Petitioners on Review,

v.

ACE PROPERTY & CASUALTY INSURANCE COMPANY, as Successor to Aetna Insurance Company; GENERAL INSURANCE COMPANY and WESTPORT INSURANCE CORPORATION, as Successor to Puritan Insurance Company,

Defendants-Respondents,
Respondents on Review,

and

AMERICAN HOME ASSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S LONDON; CERTAIN LONDON MARKET INSURANCE COMPANIES; CONTINENTAL CASUALTY COMPANY; LEXINGTON INSURANCE COMPANY; NORTHERN ASSURANCE COMPANY OF AMERICA,

Defendants-Appellants,
Respondents on Review,

and

CON-WAY, INC., as Successor to Consolidated Freightways, Inc.,

Intervenor-Respondent,
Respondent on Review,

and

April 2020

ALLSTATE INSURANCE COMPANY, as Successor to Northbrook Excess and Surplus Insurance Company f/k/a Northbrook Insurance Company, et al.,

Defendants.

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I. INTRODUCTION AND INTERESTS OF *AMICUS*

Since 2010, Plaintiffs-Appellants Allianz Global Risks US Insurance Company and Allianz Underwriters Insurance Company (collectively, "Allianz") have been defending and paying claims against non-party Daimler Trucks North America LLC ("Daimler"), successor to Freightliner Corporation ("Freightliner"), including federal, state and natural resources damages claims relating to the Portland Harbor and more than 1,500 asbestos-related personal injury cases. Allianz filed this inter-insurer contribution case against Defendants-Respondents ("Defendants") and other insurers not parties to this appeal seeking equitable and statutory contribution. From 1952 until one year after Freightliner's liquidation into Daimler began in 1981, Defendants and those other insurers sold liability insurance to Freightliner. Thus far, Defendants and those other insurers have refused to defend or indemnify Daimler and have refused to contribute to Allianz's payments, which Daimler anticipates may continue for another 20 years or more.

A central issue in this case is whether non-party Daimler assumed, either expressly or impliedly, Freightliner's contingent liabilities, thereby allowing Allianz to seek contribution from Freightliner's historical liability insurers. In a 2014 trial, a Multnomah County jury found that Daimler assumed Freightliner's liabilities through express and/or implied assumption. However, the Court of Appeals reversed the jury's finding, holding that Daimler never assumed

Freightliner's contingent liabilities and that the trial court erred in denying Defendants' motion for a directed verdict on that ground. *Allianz Global Risks US Ins. Co. v. ACE Prop. & Cas. Ins. Co.*, 297 Or App 434, 445, 442 P3d 212 (2019), *rev allowed*, 366 Or 205 (2020).

Daimler files this brief as *amicus curiae* to offer additional background to the court regarding Daimler's express assumption of Freightliner's liabilities, including the circumstances and tax implications that led Daimler to assume Freightliner's contingent liabilities in the manner laid out in the operative agreements. In reaching its holding, the Court of Appeals analyzed a series of liquidation agreements between Freightliner and Daimler from August 14, 1981. In an agreement titled "Assumption," Daimler assumed all of Freightliner's liabilities. In a separate "Transfer and Assignment," Freightliner assigned nearly all of its assets to Daimler. These agreements and a contemporaneous "Plan of Liquidation" were tax-planning mechanisms, as explained below. The effect of these three agreements is that on August 14, 1981, Daimler assumed all of Freightliner's liabilities, without exception, and Freightliner transferred nearly all of its assets, including its insurance assets, to Daimler. The Court of Appeals' analysis of those documents contradicts the documents' plain wording, which unambiguously provide that Daimler expressly assumed all of Freightliner's liabilities, including its contingent liabilities, consistent with the jury's finding on assumption.

Daimler also appears as *amicus* to explain the business purpose for which these liquidating agreements were prepared, which was to create certain federal tax benefits for Daimler and Freightliner. The agreements transferred and assigned Freightliner's assets to Daimler, which entitled Daimler to a stepped-up tax basis in those assets. The agreements also allowed Freightliner to take deductions unavailable to Daimler when Freightliner paid certain of its contingent liabilities as they accrued after its liquidation began but before its dissolution approximately three years later. This evidence was properly before the jury, which found that Daimler assumed Freightliner's liabilities.

Daimler also provides a discussion regarding Daimler's conduct since the 1981 agreements, which validates the jury's special verdict determination that Daimler expressly and/or impliedly assumed Freightliner's liabilities. The Court of Appeals' decision fails to acknowledge the jury's finding that Daimler expressly or impliedly assumed Freightliner's liabilities, a finding wholly supported by the evidence before the jury. On the issue of implied assumption, the jury heard uncontroverted testimony from Daimler and Freightliner witnesses confirming that Daimler always has satisfied Freightliner's liabilities, beginning in 1981 and continuing today. The jury heard that Daimler is doing so at the Portland Harbor and in numerous asbestos-related personal injury cases against Daimler around the country. The jury's verdict on assumption reflects its reasoned assessment and understanding of that evidence. In this

context, it was error to hold that Defendants were entitled to a directed verdict on assumption.

Finally, Daimler offers a brief description of how the Court of Appeals' erroneous opinion, should it be affirmed, would greatly harm Daimler and its Oregon-based community in the future. The Court of Appeals' errors unfairly penalize Daimler and Allianz by reducing by tens of millions of dollars the amount of insurance coverage available to Daimler for pending and future claims. Daimler also expects that Freightliner's insurers will rely on the Court of Appeals' decision to continue to reject their contribution obligations, potentially complicating any insurance claims that Daimler may make against those insurers in the future. These effects may put Daimler's insurance rights at risk, should pending and future liabilities eventually exceed Allianz's limits.

For these reasons, Daimler urges the court to reverse the Court of Appeals and affirm the jury's finding that Daimler assumed Freightliner's contingent liabilities.

II. STATEMENT OF FACTS

Daimler accepts the statement of facts set forth in Allianz's Opening Brief.

III. ARGUMENT

This inter-insurer contribution case resulted in a jury trial in which the jury, among other findings, answered "yes" to the special interrogatory, "Is

Daimler Trucks the successor to the liabilities of Freightliner Corporation which was incorporated in Delaware in 1959 by reason of * * * [e]xpress or *implied* assumption of all liabilities?" ER 10 (emphasis added). The Court of Appeals overturned this finding and concluded that the trial court instead should have granted a directed verdict to all defendants. The Court of Appeals' decision hinged on its erroneous conclusion that three liquidation agreements between Freightliner and Daimler from August 14, 1981 conclusively establish "that Freightliner has not transferred, and *Daimler has not assumed*, Freightliner's contingent liabilities." *Allianz*, 297 Or App at 444-45 (emphasis added). In its decision, the Court of Appeals did not address whether Daimler had impliedly assumed Freightliner's contingent liabilities.

The Court of Appeals' decision contradicts the agreements' plain language, the evidence presented to the jury that Daimler always has satisfied Freightliner's liabilities, and the jury's special verdict on the question whether Daimler expressly or impliedly assumed Freightliner's liabilities. The decision, if left uncorrected, could threaten Daimler's insurance recovery rights going forward. For these reasons, Daimler urges the court to reverse the Court of Appeals' decision and reinstate the jury's finding that Daimler expressly and/or impliedly assumed Freightliner's liabilities.

A. Daimler Expressly Assumed Freightliner's Contingent Liabilities, as Evidenced by the Plain Language of the Liquidation Agreements and the Purposes for Which They Were Written.

1. The Court of Appeals' Holding Conflicts With the Plain Language of the Liquidation Agreements.

Daimler expressly assumed all of Freightliner's liabilities, including its contingent liabilities. This is evident from the three succession agreements between Daimler and Freightliner at issue, each dated August 14, 1981: the Agreement and Plan of Liquidation ("Plan"); the Assumption; and the Transfer and Assignment, including its Schedule A exception ("Transfer"). Ex 02292-0022 to 23 (Plan); Ex 02292-0028 (Assumption); SER 7 (Transfer); Ex 02292-0026 (Schedule A).

The first of those agreements, the Plan, provided for Freightliner's liquidation over a three-year period and Daimler's assumption of all of Freightliner's liabilities. Its wording unambiguously describes that assumption:

> "[Daimler] hereby expressly assumes and agrees unconditionally to pay and discharge any and all liabilities and debts of [Freightliner] * * * . [Daimler] shall deliver to [Freightliner] an instrument of assumption, under the terms of which [Daimler] shall expressly assume and undertake to pay, perform, fulfill and discharge all such liabilities and obligations of [Freightliner], accrued to or existing at the time of transfer, whether absolute or contingent, and of whatever nature[.]"

The Plan also states that Freightliner would be dissolved when it had no further assets, or no more than approximately three years after the taxable year in which the Plan was executed.

The second agreement, the Assumption, unambiguously provided for Daimler's "express" assumption of "all" of Freightliner's liabilities:

> "[Daimler] hereby expressly assumes and undertakes to pay, perform, fulfill and discharge all liabilities and debts of Freightliner[.]"

In the third agreement, the Transfer, Freightliner transferred to Daimler all of its real property and other assets, except for limited cash reserves related to specific contingent liabilities "for which reserves have previously been established," as described in an attached Schedule A. The Transfer was confirmed by letter agreement several weeks later.[1] SER 9.

Neither the Transfer nor the related letter agreement addresses the assumption of liabilities; instead, they address the transfer of assets. The Plan and the Assumption, which are the only Daimler/Freightliner agreements that address assumption, provide for the assumption of all of Freightliner's liabilities, without exception. Thus, the contingent liabilities referred to in Schedule A became liabilities of both Daimler and Freightliner as of August 14, 1981, by virtue of the Assumption and the Transfer.

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[1]The letter agreement, dated September 1, 1981, "confirm[ed]" that the Transfer "was intended to transfer all properties and assets of Freightliner of every kind and nature other than the liabilities of Freightliner referred to in Schedule A and an amount of assets retained sufficient to satisfy such liabilities[.]" Put differently, Freightliner transferred all of its assets to Daimler, except for certain of Freightliner's cash reserves for known contingent liabilities.

The Court of Appeals erred in at least three ways by concluding that the three liquidation agreements and the letter agreement unambiguously showed that Freightliner had not transferred, and Daimler had not assumed, Freightliner's contingent liabilities.[2] First, the Court of Appeals misconstrued the Transfer and the letter agreement to create conflict with the Plan and the Assumption where none exists. *See Allianz*, 297 Or App at 444 ("The 'Agreement and Plan of Liquidation' and the 'Assumption' agreement state that Daimler assumes all liabilities, * * * but the 'Transfer and Assignment Agreement' explicitly states that the transfer does not include Freightliner's contingent liabilities."). The agreements' plain language show that the Plan and the Assumption address the assumption of liabilities, whereas the Transfer and subsequent letter agreement relate to assets. As a result, the three agreements and the letter are not in conflict, and the court erred by concluding otherwise.

As this court has stated, a corporation may "sell[] or otherwise transfer[] all of its assets to another corporation" without making the purchaser liable for the debts and liabilities of the transferor. *Erickson v. Grande Ronde Lumber Co.*, 162 Or 556, 568, 92 P2d 170 (1939). Yet if "the purchaser [of a corporation] expressly or impliedly agrees to assume" the debts and liabilities

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[2]*See Allianz*, 297 Or App at 444 (undertaking the "familiar three-step [contract] analysis described in *Yogman v. Parrott*, 325 Or 358, 361, 937 P2d 1019 (1997)" by first reviewing the text and context of the agreements).

of the transferor, the general rule that the purchaser is not liable for such debts does not apply. *Erickson*, 162 Or at 568. It is clear from this court's holding in *Erickson* that the *transfer of assets* and the *assumption of liabilities* are separate processes. By conflating Daimler's assumption of liabilities with Freightliner's transfer of assets, the Court of Appeals erroneously found that the Plan and the Assumption were inconsistent with the Transfer when, in fact, no conflict exists on the face of the agreements, including the subsequent letter. Rather, the Plan and the Assumption address the assumption of liabilities, without addressing the transfer of assets, while the Transfer addresses the transfer of assets without addressing the assumption of liabilities. It is possible for all three agreements to co-exist without conflict.

Second, the Court of Appeals misread the letter agreement when it concluded that the letter agreement "unequivocally and unambiguously states that Freightliner has not transferred, and *Daimler has not assumed*, Freightliner's contingent liabilities." *Allianz*, 297 Or App at 444-45 (emphasis added). That is incorrect. The letter agreement does not address assumption of liabilities. It refers only to the Transfer, but nowhere refers to the Assumption or the related provisions of the Plan. It cannot, therefore, have the meaning that the Court of Appeals erroneously ascribed to it.

Third, even if the Transfer and letter agreement can be read to limit the liabilities assumed by Daimler, which Daimler disputes based on the plain

language of the Assumption and Plan, the Court of Appeals misconstrued the Transfer's Schedule A exception. Schedule A only exempts from transfer cash reserves for contingent liabilities "for which reserves have previously been established," or, as Defendants contend, those contingent liabilities themselves. As a threshold matter, Schedule A is an exception to an asset transfer. Practically speaking, it makes little sense to except certain liabilities from what assets were transferred and assigned in the Transfer.

Even if this court were to agree with the Defendants' reading, however, the asbestos and environmental liabilities giving rise to this case do not fall within Schedule A. Those liabilities were not such contingent liabilities for which reserves previously had been established: instead, according to uncontroverted evidence at trial, as of 1981, Daimler and Freightliner had no knowledge of the asbestos and environmental liabilities that Daimler now faces arising out of Freightliner's historical operations. Brief on the Merits of Petitioners Allianz Global Risks US Insurance Company and Allianz Underwriters Insurance Company, at 28 (citing uncontroverted trial testimony). Because Daimler and Freightliner did not know then about the liabilities that Daimler faces now, reserves for those liabilities did not exist in 1981 and Schedule A is irrelevant. This is confirmed by Freightliner's 1981 tax return, which lists its contingent liabilities for which it had cash reserves, but nowhere mentions any of the environmental or asbestos liabilities giving rise to this case.

Ex 3387 at 5. As a result, even if this court gives Schedule A the meaning Defendants ascribe to it, Schedule A is irrelevant because the contingent liabilities referenced therein have nothing to do with those at issue in this case and, therefore, could not affect Allianz's contribution claims.

The text and context of the three liquidation agreements described above, including the unambiguous Plan and Assumption, definitively show that Daimler expressly assumed all of Freightliner's liabilities. The jury was correct in so finding. And, as explained below, that finding is consistent with the purpose of the structure of Freightliner's liquidation and with Daimler's conduct since 1981.

2. The Court of Appeals' Holding Is Inconsistent With the Tax Purposes of Freightliner's Liquidation.

After Daimler acquired Freightliner on July 31, 1981, Daimler and its wholly-owned subsidiary, Freightliner, executed the liquidation agreements at issue on August 14, 1981. *Allianz*, 297 Or App at 440-41. As shown by evidence presented to the jury, Daimler and Freightliner chose to liquidate Freightliner for specific tax reasons. *See, e.g.*, Ex 02292-0007 (Freightliner Board minutes dated August 7, 1981, resolving that "this Corporation should be completely liquidated so as to qualify under Section 332 and Section 334(b)(2) of the Internal Revenue Code"); Tr (Oct 27, 2014) 2210:14-2225:15 (expert testimony explaining the liquidation's tax rationale and related facts).

This evidence shows that two tax considerations were at issue in Daimler's decision to liquidate Freightliner. These tax considerations explain the Transfer's treatment of Freightliner's assets and the Transfer's Schedule A reference to contingent liabilities for which Freightliner had previously established reserves. First, through the Transfer, Freightliner transferred all of its assets to Daimler, except as stated in Schedule A, so that Daimler would receive a step-up in its tax basis in those assets. *See generally* 26 USC § 334(b)(2) (1976) (as of 1981, providing that a corporation that acquired the stock of another and, within two years thereafter liquidated it, could realize a tax basis step-up in its assets); *see also* Ex 02292-0007 (Freightliner Board minutes dated Aug 7, 1981, referring to 26 USC § 334(b)(2)).

Second, the Transfer refers to certain contingent liabilities identified in Schedule A because those liabilities could not be deducted if satisfied by the acquiring corporation (here, Daimler) but were deductible if paid by the liquidating entity (here, Freightliner) before Freightliner's dissolution. *See generally* 26 USC § 162(a) (allowing for tax deductions for business expenses); *see also* William L. Morrison, Tax Problems in Corporate Acquisitions Other than Reorganizations—From the Buyer's Point of View, 52 Taxes 843, 861 (1974) ("[i]f the acquired corporation has significant contingent liabilities and the Buyer's reimbursement by the selling stockholders for any ultimate exposure is not practical, deferral of the acquired corporation's liquidation until

the liabilities become fixed will preserve their deductibility"). In other words, by leaving sufficient cash in Freightliner so that it could pay its known contingent liabilities for which it previously had established reserves, Freightliner could use those cash reserves to pay liabilities that accrued after its liquidation commenced but before it dissolved, resulting in a tax deduction Daimler would not have received had it paid those liabilities itself.

This evidence establishes that because of the tax benefits, Daimler structured the transaction with two ends in mind: (1) to immediately transfer nearly all of Freightliner's assets to Daimler, but (2) leave some cash in the Freightliner shell for three years to pay contingent liabilities for which reserves previously had been established as those contingent liabilities accrued and became payable. These tax purposes are consistent with the three liquidation agreements' plain language, which, again, contemplates an assumption of all liabilities and a transfer of all assets, except for cash for previously reserved contingent liabilities. Nothing about this legitimate tax structure affects Daimler's unqualified assumption of Freightliner's liabilities in the Plan and the Assumption. Once those documents (and the Transfer) were executed, the contingent Freightliner liabilities outlined in Schedule A became the liabilities of both corporations. At trial, even defendants' expert acknowledged this point. *See* Tr 3223:12-3224:10 (testimony of defendants' expert, Bernard Black, acknowledging that Freightliner's contingent liabilities could have been held by

both Freightliner and Daimler). Any liabilities that Freightliner did not satisfy out of its set-aside cash reserves before it dissolved remained the liability of Daimler, per the Assumption.

If the court concludes that the Daimler/Freightliner liquidation agreements are ambiguous on the question whether Daimler assumed Freightliner's liabilities, the liquidation's tax purposes resolve the ambiguity and remove any question as to why Schedule A refers to contingent liabilities. But even if the agreements were ambiguous, which Daimler disputes, a directed verdict for Defendants would have been improper. Those ambiguities were for the jury to resolve, as it did when it issued a special verdict confirming that Daimler had expressly or impliedly assumed all of Freightliner's liabilities. *See Yogman v. Parrott*, 325 Or 358, 363, 937 P2d 1019 (1997) ("If a contract is ambiguous, the trier of fact will ascertain the intent of the parties and construe the contract consistent with the intent of the parties." (citations omitted)).

Because the jury found for Allianz on assumption, the Court of Appeals erred by failing to consider all the evidence in the record before overturning the jury's findings. Article VII (Amended), section 3 of the Oregon Constitution prohibits this outcome. *See* Or Const, Art VII (Amended), § 3 ("[N]o fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict."). Oregon courts consistently have upheld "the sanctity guaranteed to the verdict

of a jury by section 3 of article 7 of the Constitution of this state," *Bank of Kenton v. Sun Dial Ranch*, 69 Or 128, 131, 138 P 455 (1914). As the court explained in *Zobrist v. Estes*, 65 Or 573, 576-77, 133 P 644 (1913):

> "The plaintiff's contention is in effect that the court should retry the facts that have been passed upon by the jury. Under section 3, art. 7, of the Constitution, the court is not permitted to do so. That organic law provides that no fact tried by a jury shall be otherwise re-examined in any court of this state unless the court can affirmatively say there is no evidence to support the verdict. Where there is testimony on both sides as to the material issues, and the jury has weighed the evidence and found for one party and against the other, the court is not authorized to disturb the verdict."

See also Mayor v. Dowsett, 240 Or 196, 219, 400 P2d 234 (1965) ("[o]n a motion for a directed verdict all the evidence, whether introduced by the plaintiff or the defendant, is to be considered and, of course, conflicting evidence is disregarded and the plaintiff is entitled to the benefit of every legitimate inference which may be drawn from the evidence").

For these reasons, Daimler urges the court to conclude that the Court of Appeals erred when it held that Daimler did not expressly assume Freightliner's contingent liabilities, reverse the Court of Appeals, and uphold the jury's finding on assumption.

B. Daimler Impliedly Assumed All of Freightliner's Liabilities.

The Court of Appeals' opinion does not address the jury's determination that Daimler expressly *and/or* impliedly assumed Freightliner's liability. In response to a special interrogatory, the jury was specifically asked and

answered “yes” to the question whether Daimler is Freightliner’s successor by reason of express or *implied* assumption. ER 10. The jury’s finding was consistent with the applicable law. *See Erickson*, 162 Or at 568 (purchaser may impliedly assume the debts and obligations of transferor). Thus, even if the liquidation documents were ambiguous (and Daimler contends they are not), the Court of Appeals erred in reversing the jury’s verdict without considering additional evidence in the trial court record on implied assumption. Or Const, Art VII (Amended), § 3; *see also Shoup v. Wal-Mart Stores, Inc.*, 335 Or 164, 173, 61 P3d 928 (2003) (holding that error must cause something more than the “possibility” of a different result to be reversible).

Since 1981, Daimler has never sought to avoid Freightliner’s liabilities. Rather, the trial record contains extensive evidence concerning implied assumption, including uncontroverted evidence that Daimler does not contest, and never has contested, its responsibility for Freightliner’s liabilities. *See Erickson*, 162 Or at 569 (considering subsequent conduct of the parties in determining whether one party impliedly assumed the debts and obligations of another). For example, at trial, Daimler’s current Associate General Counsel and its past Treasurer and Director of Financing both testified that Daimler never has contested its responsibility for Freightliner’s debts or obligations, including its pre-1981 asbestos-related product liabilities. Tr 587:16-19 (Oct 9, 2014) (testimony of Daimler Associate General Counsel, Daniel W. Howard,

that Daimler has never contested its responsibility for Freightliner's pre-1981 asbestos products liabilities); Tr 1644:18-1645:17 (Oct 23, 2014) (testimony of Daimler's former Director of Financing and Treasurer, William Gordon, that, during his employment from 1981 through 2006, Daimler never contested liability for Freightliner's debts or obligations).

The Court of Appeals erred by failing to consider this evidence of implied assumption, and Daimler urges the court to reverse the Court of Appeals on this issue.

C. If the Court of Appeals' Decision Is Allowed to Stand, the Interests of Daimler and Its Oregon-Based Community Will Be Significantly Harmed.

Along with offering background and context to the court regarding Daimler's express and implied assumption of Freightliner's liabilities, Daimler also appears as *amicus* to explain three harmful effects the Court of Appeals' decision would have on Daimler and its Oregon-based community should that decision be allowed to stand.

First, the Court of Appeals' errors threaten to reduce by tens of millions of dollars Daimler's primary and excess coverage otherwise available for the asbestos and environmental claims at issue in this case. Should these liabilities exceed Allianz's policy limits, the amount of insurance assets available for Daimler's Portland Harbor, asbestos, and other environmental liabilities could be greatly reduced. For costly, decades-long environmental liabilities such as

these, Daimler should be entitled to all of the insurance assets Freightliner transferred and assigned to it in 1981, and costs should be shared by all of the insurers to ensure full remediation.

Second, unless the Court of Appeals' ruling is reversed, Daimler expects that Defendants may rely on that decision to disclaim their coverage obligations for future claims Daimler may make against them, whether relating to the Portland Harbor or asbestos liabilities at issue in this case, or arising from other liabilities attributable to Freightliner's operations. In either scenario, the Court of Appeals' error will have created an unnecessary, and perhaps unintended, obstacle to Daimler's insurance recovery rights against all of Freightliner's insurers, including Defendants, again potentially reducing the funds available to cover such claims. The Court of Appeals' interpretation of Daimler's agreements was made in a case in which Daimler is not even a party. And this decision, if allowed to stand, is to the potential detriment of Daimler, which could not have possibly known in 1981 that these agreements would be misinterpreted decades later.

Third, the Court of Appeals' holding should be reversed so that Allianz can recover contribution from Defendants and Freightliner's other insurers. Each dollar Allianz recovers through this case replenishes the limits of its policies, creating another dollar of insurance Daimler can recover from Allianz. Because Allianz is the only insurer honoring its obligation to pay "all sums,"

Allianz is entitled to contribution. *See, e.g.*, ORS 465.480(3)(a) (an insurer with a duty to pay "all sums" for an environmental claim "must pay all defense or indemnity costs," regardless of the existence of other liable insurers); ORS 465.480(4)(a) (a paying insurer may seek contribution for environmental claims from other insurers that have not entered into good faith settlements with the insured). Likewise, as the paying insurer, Allianz is entitled to contribution as a matter of equity. *Carolina Cas. Ins. Co. v. Or. Auto. Ins. Co.*, 242 Or 407, 417, 408 P2d 198 (1965) (holding that a paying insurer's equitable contribution right "arises out of the equitable doctrine which holds that one who pays money for the benefit of another is entitled to be reimburse[d]."). These "all sums" and contribution rights benefit Oregon businesses by ensuring that insurers like Allianz, who are called upon to pay, do so and then take on the burden and expense of contribution litigation against nonpaying insurers.

Daimler therefore urges the court to take these issues into consideration in its analysis.

IV. CONCLUSION

The text and tax purposes of the liquidation agreements make it clear that Daimler expressly assumed all of Freightliner's liabilities, without exception, on August 14, 1981. The contemporaneous asset transfer and subsequent letter to which it relates do not pertain to the assumption of liabilities and nowhere refer to, let alone modify, the Assumption or related provisions in the Plan. In

addition, at all times since 1981, Daimler has honored its obligation to satisfy Freightliner's liabilities, as the jury heard during trial.

Allowing the Court of Appeals' decision to stand will have potentially injurious effects on Daimler, a non-party to this litigation. Doing so will minimize the insurance available to pay Daimler's environmental and asbestos liabilities, reducing funds available for the Portland Harbor cleanup. This court also should reverse the Court of Appeals to ensure that Allianz can spread its costs to the other insurers that have refused to perform, and to increase the funds available to cover Daimler's existing and potential future liabilities.

For these reasons, Daimler urges this court to reverse the Court of Appeals and reinstate the jury's verdict that Daimler assumed Freightliner's liabilities.

DATED this 16th day of April, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation in ORAP 5.05, which word count is 4,503.

I certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and footnotes.

DATED this 16th day of April, 2020.

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CERTIFICATE OF FILING AND SERVICE

I certify that on April 16, 2020, I caused to be electronically filed the foregoing **BRIEF OF *AMICUS CURIAE* DAIMLER TRUCKS NORTH AMERICA LLC** with the Supreme Court Administrator by using the eFiling system. I further certify that the following are participants in the court's ECF filing system and will be served using the court's eFiling system.

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