

## STRAWN'S RESPONSE TO FARMERS' MERITS BRIEF

Plaintiffs submit this response to Farmers' Brief on the Merits.

### I.

#### **Farmers argues issues that either were not presented in its petition to this court or were not preserved below or both.**

Throughout its brief, Farmers repeatedly emphasizes the 2003 amendments to the PIP statute. However, the "questions presented" in Farmers' Petition for Review do not mention the trial court's ruling excluding the 2003 legislation.<sup>1</sup> The defendant in *Parrott v. Carr Chevrolet, Inc.*, 331 Or 537, 17 P3d 473 (2001), made a similar effort to broaden the issues on review, and this Court rejected it, stating:

In its brief on the merits, defendant asks this court to reverse the Court of Appeals on that issue and to "restore the trial court's award of attorney fees." Defendant, however, did not raise that issue in its petition for review. Because of that omission, we decline to consider the issue and express no opinion on its merits. See ORAP 9.17(2)(b)(i) (brief on merits may not raise additional questions or change substance of questions already presented in petition for review); ORAP 9.20(2) (Supreme Court **may** review issue raised in Court of Appeals but not presented on review). See, e.g., *Stupek v. Wyle Laboratories Corp.*, 327 Or 433, 437, 963 P2d 678 (1998) ("Although, under ORAP 9.20(2), this court may review an issue that properly was raised on appeal and preserved, but not presented on review, we ordinarily will not do so unless the issue requires resolution.").

331 Or at 541 n. 3.

Farmers did exactly the same in the Court of Appeals. The ruling was not the focus of any assignment of error; it was only mentioned as one of several trial court

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<sup>1</sup> In Farmers' Petition, the ruling regarding the 2003 legislation is only mentioned as an inapposite conclusion to Farmers' argument regarding the exclusion of write-offs and third party recoveries, and referred to as "additional evidentiary error bear[ing] on the punitive damages issue." Farmers' Petition at 12.

rulings Farmers argued in an assignment<sup>2</sup> about which the Court of Appeals had this to say:

Farmers' failure to comply with ORAP 5.45 is not simply a technical error. The section of the brief concerning preservation of error and the accompanying argument address multiple rulings that involve different legal issues and different preservation concerns. Thus, we are unable to determine what rulings are being challenged in Farmers' fifth claim of error and whether the bases for those challenges were preserved below. Accordingly, to the extent that Farmers' assignment encompasses something other than the instructional error previously discussed, we also decline to reach those claims of error because they are not adequately framed under our rules of appellate procedure.

228 Or App at 475.

Farmers does not even tell this Court that the Court of Appeals refused to address this question because it was not properly presented. Thus Farmers also has violated the rule that requires a petitioner on review to tell this Court whether a legal issue on which it seeks review “is properly preserved” and free of “procedural obstacles that might prevent” this Court from reaching it. ORAP 9.07(7).

Furthermore, in the Court of Appeals Farmers mentioned only the trial court’s pretrial ruling on plaintiffs’ Motion in Limine No. 10. That ruling was tentative (“at this point, there has not been a sufficient showing that it would be relevant”), and the

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<sup>2</sup> Farmers’ fifth assignment complained that the trial court erred when it allowed the jury to determine whether it had violated the PIP statutes. App Br at 39. Under the heading “preservation of error,” Farmers identified multiple rulings on evidence and instructions – but made no mention of the ruling foreclosing evidence of the 2003 legislation. Four pages into its argument, Farmers mentioned the 2003 amendment (*Id.* p. 43, 44); on the sixth page of that argument it first complained of the trial court’s ruling excluding the 2003 amendment. *Id.*, p. 46. This is almost exactly what it did in this Court in its Petition for Review. See footnote 1, *supra*.

court stated it would revisit the issue when the defense presented its case. Tr 78-9, ER 67. Neither in the opening brief in the Court of Appeals nor in its Reply Brief did Farmers ever establish that it had asked the trial court to revisit the issue, or discuss why the trial court abused its discretion in concluding, under ORE 403, that other considerations outweighed the probative value of the evidence.<sup>3</sup> Tentative pretrial rulings are not a basis for reversible error<sup>4</sup> and, as the Court of Appeals noted, it was impossible to tell from Farmers' briefing whether the multiple issues it had mentioned, including this one, were in fact preserved.

And yet a pretrial ruling that was never clearly assigned as error, and was barely mentioned in its petition for review, is what Farmers repeatedly parades here in an effort to convince this Court that the jury's verdict is "tainted" (a descriptive term that Farmers also likes to repeat). Farmers Merits Br at 2, 3.

Unfortunately, that's not the only time that Farmers ignores the rules and injects into its merits brief questions that it failed properly to preserve and present. For instance, Farmers suggests that because of the trial court's evidentiary rulings, "the jury never learned that Farmers actually overrode RC40/B2 recommended reductions, paying submitted medical charges in full, in numerous individual cases." There was no error assigned to any such ruling in the Court of Appeals, and for a very

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<sup>3</sup> Farmers stated that the standard of review for its Assignment No. 5 was error of law. It did not mention the abuse of discretion standard applied to the review of decisions made under ORE 403. *State v. Cunningham*, 337 Or 528, 536, 99 P3d 271 (2004)(so stating)

<sup>4</sup> *State v. Mayoral*, 231 Or App 603, 615, 220 P3d 761 (2009)(trial court ruling not reviewable when not final and left open for future consideration)

good reason. There was no such ruling. The jury heard extensive evidence of overrides. *See* discussion *infra*.

Farmers complains in its merits brief (at 11, 27-28) that plaintiffs did not plead an actionable fraud claim; it did not preserve this issue in the trial court, the Court of Appeals rejected it as unpreserved (228 Or App at 468), and Farmers once again did not mention this question in its petition for review.

And in its conclusion to its merits brief, Farmers for the first time asks this Court for “decertification of the class.” Yet Farmers failed to seek review of any of the issues that provided the basis for its Motion to Decertify in the trial court.

Farmers cannot seem to confine its arguments to questions it presented in its petition and preserved in the courts below. Plaintiffs urge this Court to restrict its review to those issues properly before it.

## II.

### Farmers’ Questions Presented and Proposed Rules

Farmers’ statements of the questions presented – and its proposed rules of law -- vary in significant ways from the versions it offered in its petition.

In its petition for review, **Question No. 1** focused on the trial court’s purported exclusion of Farmers’ proffered evidence that the submitted charges were not reasonable and its procedures for handling them were. Farmers has added “and necessary” to “reasonable,” and asserts for the first time that its presentation to the jury was hamstrung because it was not allowed to prove that the billed charges were not necessarily incurred. ORAP 9.17(2)(b) warns that “while the phrasing of the

questions need not be identical with any statement of questions presented in the petition for review,” a party “may not raise additional questions or change the substance of the questions already presented.” Farmers violates this rule.

As to **Question No. 2**, Farmers has also rephrased an issue. Farmers complained in its petition that plaintiffs hadn’t proven “individual reliance.” Now Farmers says that reliance was “presumed.” Farmers fails to distinguish between inferences and “presumptions,” and has changed the question.

Finally, plaintiffs do not accept Farmers’ reference in **Question No. 3** to a *de novo* standard for review for punitive damages. Plaintiffs discuss Farmers’ invocation of this standard in their response to Farmers’ arguments on punitive damages.

### **III.**

#### **Farmers’ Preliminary Statement and Nature of the Action**

Farmers’ “preliminary statement” is full of hyperbole: the trial was “tainted by erroneous exclusions of evidence” (p. 2) or “tainted by numerous reversible errors” (p. 3); the punitive damages award was “wildly inflated” (p. 2) or “stunning” (p. 3). But portions of it go beyond rhetorical flourish, and even beyond Farmers’ persistent failure to summarize evidence heard by the jury in the light most favorable to the plaintiff, who prevailed. *Taylor v. Ramsay-Gerding Construction Co.*, 345 Or 403, 406, 196 P3d 332 (2008). On occasion, Farmers flatly misrepresents the record.

In the first clause of the “preliminary statement,” Farmers states that “this class action arise[s] from the defendant insurer’s effort to identify unreasonable medical bills.” Farmers’ Merits Br at 2. Not so. This action “arises” from Farmers’ efforts to

increase its surplus and its profits. *See* Resp Br at 8-9.

Farmers states that application of the reduction was merely a “recommendation.” Farmers’ Merits Br at 3,5. At trial, its own personnel contradicted that argument. *See* Resp Br at 12-13.

Farmers states that “the court’s evidentiary rulings denied Farmers the opportunity to” prove that the submitted charges were unreasonable and its payments reasonable. Farmers’ Merits Br at 3. That is just plain false. Plaintiffs summarize below the quantity of evidence Farmers offered on that question.

In describing the nature of this action, Farmers states that the RC40/B2 codes were “assigned by an independent bill reviewer” (and reiterates that they were merely “a recommendation”), completely ignoring plaintiff’s evidence that Farmers determined what reductions were to be applied. Farmers Merits Br at 5. Farmers says that the charges were “presumed ‘reasonable’” under the statute “even though Farmers had timely denied portions” of the charges. *Id.* The trial court held that there was no “timely denial,” and the Court of Appeals concluded the presumption applied at the time Farmers applied its reduction code. 228 Or App at 466, 473.

Farmers complains about the post-verdict claims administration (evidence “rejected for non-meritorious reasons” and “unreasonable deadlines,” Farmers Merits Br at 6) but has never assigned error to any part of that process. And Farmers exaggerates when it claims that trial court reduced the compensatory damages by 40% as a result of the evidence that was excluded at trial. *Id.* As set forth in plaintiffs’ Opening Brief on the Merits, the amount of the judgment after claims administration

was approximately \$150,000 less than the jury's award of compensatory damages, with almost half that sum attributable to class members' failure to return claim forms. Most of the remaining reductions occurred because of subsequent overrides, evidence Farmers was free to offer at trial.

#### **IV. Farmers' Factual Summary**

Farmers makes no attempt to state the evidence in the light most favorable to the verdict and the prevailing party. *Taylor v. Ramsay-Gerding, supra*. For an overview of the case, plaintiffs refer the Court to the Statement of Facts in their Respondents' Brief, pp. 6-16.

A few of Farmers' assertions require response. Farmers says that "public policy" requires "reasonable limits on medical charges," and states (without citation): "Reasonable policy limits result in lower premiums and greater availability of insurance coverage." Farmers Merits Br at 7. The jury was not convened in this case to determine public policy; public policy had been set by the legislature, and the jury concluded that Farmers' conduct was inconsistent with it. In any event, at trial, Farmers called an actuary who testified that in 2000 PIP premium rates fell by a mere 8 cents per policy as a result of the RC40/B2 reductions. Tr 3622.

Farmers states that it "notified the manager of compliance for the Oregon Department of Insurance (DOI) that it planned" to cut off provider payments at the 80<sup>th</sup> percentile, "and received no objection." Farmers Merits Br at 8. This is misleading and disingenuous. The compliance officer, Culbertson, places that

conversation in May 1999, approximately 16 months after the program was implemented, not when it was being “planned.” Tr 2733-34. Regardless, Farmers’ notes indicate that Culbertson “knows there is no support for use of a percentile in the PIP statute.” Ex. 100.

Farmers admits that all insureds received and submitted applications for PIP benefits. Farmers Merits Br at 9. However, that application did not, as Farmers contends, tell the insured that the benefits may be “limited to an amount charged by the majority of similar providers.” *Id.*; *see* Ex. 3. Although that statement appears in some correspondence to some insureds (*see* Ex. 1025), it did not appear in the letter which went to Mark Strawn (Ex. 4). The statement itself is an inaccurate summary of Farmers’ reduction program, which counted and compared provider billings not providers.

## V.

### **Farmers’ First Question: The Evidentiary Rulings**

In its Assignment No. 3, Farmers challenged three, and only three, evidentiary rulings by the trial court. App Br at 31-34. Two of those rulings granted plaintiffs’ Motions in Limine No. 11 (write-offs), and No. 12 (third-party claims). The third ruling barred Farmers from introducing evidence at trial that one of Strawn’s medical bills should never have been paid at all for a reason that never appeared on the 1999 Explanation of Benefits (EOB) form and that Farmers never before asserted. The Court of Appeals addressed all three of these rulings in its opinion, and affirmed the trial court. 228 Or App at 472-73.

As previously set forth, the trial court also tentatively granted plaintiff's Motion in Limine No. 10, prohibiting reference to the 2003 amendments to the PIP statute. As already summarized, Farmers attacked that ruling in the midst of arguing its Assignment No. 5. App Br at 45-46. The Court of Appeals declined to consider that issue. 228 Or App at 475.

**(1) The trial court's evidentiary rulings were narrow, precise, and well within its discretion.**

**(a) Write-offs and third party settlements**

Contrary to Farmers' bombast, these evidentiary rulings were both narrow and initially provisional. Plaintiffs' Motions in Limine Nos. 11 and 12 sought to bar Farmers from arguing that evidence of medical provider write-offs or class members' third-party settlements with tortfeasors would constitute either an admission that the original bill amount was unreasonable or an offset against Plaintiffs' potential damages recovery against Farmers. ER 20. Applying ORE 402 and 403, the court preliminarily concluded that any probative value of evidence regarding write-offs and third-party settlements was substantially outweighed by the danger of unfair prejudice, confusion of issues, and misleading the jury. *Id.* at 76-7, ER 70. The trial court reserved any final ruling on specific evidence of write-offs and third-party settlements "until I look at this evidence more closely in a Rule 104 hearing," and invited Farmers to renew its request when it presented its case. *Id.* at 75, ER 70. These two evidentiary rulings certainly did not address, much less bar, evidence of "overrides;" did not bar evidence of lack of PIP coverage; did not bar evidence of

exhaustion of PIP benefits; and did not bar evidence that Farmers had not paid a provider's bill based on other valid defenses.

Both parties offered evidence of write-offs.<sup>5</sup> The trial court allowed Farmers to ask class witnesses whether their providers had written off their unpaid balances. However, the court ruled that Farmers could not argue that a provider's decision to forbear collection was an "offset for damages." Tr 1155, ER 77.

The Court of Appeals, like the trial court, considered and squarely rejected Farmers' argument that plaintiffs had not "incurred" medical expenses, *i.e.*, had suffered no damage, until they actually paid them. First, the court noted that ORS 742.524(1)(a) requires Farmers to pay all of a PIP claimant's reasonable medical expenses "incurred within one year after the date of the person's injury." The statute neither anticipated nor required a PIP claimant to have paid the providers' bills. Second, Plaintiffs' evidence showed that providers typically require their patients to remain "responsible for payment of the fee."<sup>6</sup> Tr 666-67. Ultimately, Farmers

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<sup>5</sup> Plaintiffs introduced testimony of provider write-offs to explain the effect of Farmers' unilateral percentile reductions. Tr 1243-47, 1251. Ms. Shirley Haag, an OHSU administrator, testified that OHSU generally wrote off balance billings of less than \$100 because it was not cost-effective to pursue such claims. Tr 1239, 1251; Ex 598. Richard Katz of Therapeutic Associates, a physical therapy and rehabilitation services company with 65 offices, testified that his company chose not to pursue unpaid balances of less than \$10.00. Class members and providers also testified how the RC40/B2 reductions interfered with doctor/patient relations. Tr 775; 1117-19; 1179-81; 2000; 1266, 1269-73.

<sup>6</sup> Several providers affected by Farmers' reductions testified that they required their patients to agree to pay the entire bill before any services are rendered. Tr 1239, 1265; Ex. 598. Even Farmers' claims manager (Heatherington) stated: "Most of you, when you go to see a doctor \* \* \* sign a form that says I agree to pay whatever you charge regardless of what the insurance company pays." Ex. 629, p. 13.

conceded in the Court of Appeals that the decision in *White v. Jubitz Corp.*, 219 Or App 62, 182 P3d 215, *aff'd* 347 Or 212, 219 P3d 566 (2009), resolved this issue against them. 228 Or at 472, n. 11.

With respect to the third party settlements, Farmers made an offer of proof in an attempt to show that Strawn (and other class members) had already been fully compensated by a recovery from a third-party tortfeasor.<sup>7</sup> Those offers established at best that some class members had reached a negotiated settlement with their third-party tortfeasor for amounts that were less than they had sought to recover. Farmers offered no proof that any third-party settlements paid 100% of the member's medical bills, and the trial court adhered to its decision to exclude that evidence.

In the post-verdict claims process, class members were required to state under penalty of perjury whether they had been released by their provider from liability for unpaid services or had been fully paid for their medical expenses by any third-party recovery. SER 90-91 (Statement of Claim Form – Class Member). Farmers acknowledges that it was free to raise these and other defenses to individual claims during the claims administration process. If Farmers established a defense to a particular PIP balance owed, the class member's recovery from the common fund was reduced or barred. Accordingly, Farmers was not "estopped" from offering

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<sup>7</sup> Farmers conceded, however, that: (1) Strawn had paid his providers the amounts by which Farmers had reduced the bills; (2) Strawn's third-party recovery was the result of a negotiated settlement for less than he had sought to recover; (3) Farmers had applied code RC40 and reduced payments to Strawn's providers by a total of \$427, and (4) Farmers had never paid the providers the \$427. Tr 1603-05. Farmers made similar offers of proof through several other class members who testified at trial. Tr 1145-46, ER 74-5 (Lackey); 1202-03, ER 76-77 (Palmer).

individualized defenses to individual class members' claims, and plaintiffs received no windfall from write-offs or third-party recoveries.

The Court of Appeals noted that Farmers raised defenses during the claims administration process (that may or may not have included write-offs and third-party settlements) which resulted in a reduction of Plaintiffs' damages.<sup>8</sup> It then continued:

Farmers has not explained on appeal – either in its opening or in reply – how the judgment would have been different (*i.e.*, reduced further than it was) had Farmers been allowed to offer evidence of write-offs at an earlier stage of the proceedings. On this record, we have no basis to conclude that the claimed error regarding write-offs and third-party recoveries, if it was error, substantially affected Farmers' rights.

228 Or App at 472.

The Court of Appeals is right. Farmers never even tried to prove what portion, if any, of the claims-process reductions related to write-offs and third-party settlements. Thus, Farmers failed to show that the exclusion of such evidence at trial “substantially affected” its rights, a chore that would be difficult with write-offs in view of their admission.

Farmers now attempts to finesse the void identified by the Court of Appeals by making new arguments to this Court that evidence of write-offs and third-party settlements was relevant to the jury's determination of the amount of punitive damages. Farmers' Merits Br at 22-24. It is too late to make that argument now.

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<sup>8</sup> The Court of Appeals appears to believe that Farmers' defenses reduced Plaintiffs' damages by about \$150,000. In fact, Plaintiffs' Brief on the Merits, p. 42, n. 16, demonstrates that nearly \$70,000 of this reduction resulted from the failure of class members to file claims. Under the non-fluid recovery of Oregon's class action rule, unclaimed damages revert to the defendant Farmers.

**(b) The trial court properly rejected evidence questioning the “necessity” of one of Strawn’s bills.**

Farmers offered testimony that one of Strawn’s bills should have been denied entirely as “unnecessary,” rather than merely reduced under RC40. However, its EOB form did not purport to deny it as unnecessary, Farmers had paid the claim (after taking the RC40/B2 reduction) as though it were necessary, and Farmers had spent the prior four years in this litigation without ever making that argument. Indeed, Farmers had stipulated that this case challenged only Farmers’ alleged failure “to pay all reasonable medical expenses required of it under Oregon law or its automobile insurance policy.” ER 80, p. 2034, ll. 18-20; SER 16 (Stipulated Statement of the Case, p. 3). For those reasons, the trial court rejected Farmers’ proffered evidence.<sup>9</sup>

Farmers inflates the trial court’s exclusion of this single piece of evidence into a generalized prohibition, “a blanket exclusion of [all] such individualized evidence.”<sup>10</sup> Merits Br at 14 n. 1. From this one ruling, Farmers’ asserts it was barred from introducing (1) any evidence that an invoice reduced by RC40/B2 had also been denied entirely based under a Reason Code different from that asserted on

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<sup>9</sup> Farmers misrepresents the record when it suggests that plaintiffs were able to recover RC40/B2 reductions for services that had already been denied or reduced on the EOB for a different code that identified the services as unnecessary. Plaintiffs’ evidence of damages already excluded such invoices from their potential recovery by showing “\$0” in damages in such instances. *See* Tr 1812-21; Ex 605, pp. 60-64; Ex 612. Where a claim had been denied as unnecessary, the RC40/B2 reductions had already been eliminated from the damages computation that went to the jury.

<sup>10</sup> Farmers’ Brief (at 14, n. 1) says that Farmers made other offers of proof that certain other bills of class members for medical services were also unnecessary, citing to “ER 74-77, 100-102, and 103-107; Farmers’ Opening Brief p. 31 (citing multiple offers of proof).” None of these citations reflect offers of proof challenging the “necessity” of a service; they all involve third party settlements.

the EOB, such as lack of necessity, and (2) any evidence of a later override. The trial court's ruling did no such thing. The ruling was neither a blanket exclusion nor based on a misreading of insurance case law as Farmers now argues at length. *See* Farmers' Merits Brief, pp. 15-20.<sup>11</sup> It was a fact-specific ruling tied to a surprise argument about one single bill that Farmers first made two weeks into trial.

**(c) Farmers has forfeited any challenge to the exclusion of the 2003 amendments.**

Farmers also argues that a new trial on all claims is mandated by the trial court's grant of Motion in Limine No. 10, excluding evidence of the 2003 amendments to the PIP statutes. Farmers' challenge should be rejected.

First, this issue is not properly before this Court, for the reasons set forth at the beginning of this brief. Even if this Court were to consider this argument, Farmers' position has no merit. Farmers invokes a 2003 amendment to the PIP statute that first took effect on January 1, 2004, four years after Farmers had ended its percentile reduction program. 2003 Or Laws Ch 813 § 3. Farmers argues that the Oregon legislature has now defined reasonableness at a percentile less generous than the one Farmers selected, and that this is "tantamount to a legislative declaration" of the meaning of the term "reasonable" under the prior statute. App Br at 44; Farmers Merits Br at 46.

Farmers' argument lacks both logic and support in precedent. This lawsuit

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<sup>11</sup> Farmers' cases regarding estoppel in the construction and application of insurance contracts are inapposite. Farmers Merits Br at 17-20. In those cases, the pleadings framed an estoppel that was at the heart of the litigation. Here, Farmers simply laid a last-minute trial ambush on an issue that was beyond the scope of the pleadings.

challenged Farmers' conduct from January 26, 1998 to July 21, 1999. What the Oregon legislature did four years later says nothing about the propriety of Farmers' prior practice under the PIP statutes at issue. The new law applies prospectively only, to policies issued or renewed on or after January 1, 2004. 2003 Or Laws Ch 813 § 5. In any event, ORS 742.525 does not purport to define the term "reasonable" as used in ORS 742.524(1)(a); it simply adds a new section capping amounts that providers may charge a PIP insured, regardless of the reasonableness of their usual and customary charges.<sup>12</sup>

The trial court ruled that the marginal relevance of this subsequent legislation was outweighed by considerations of time and the potential for confusion and prejudice, a balance not challenged in the Court of Appeals. 10/29/03 Tr at 79.

**(2) Farmers was permitted to and did offer evidence that its program was reasonable, including evidence of overrides and write-offs.**

The trial court did not "deny[] Farmers the opportunity to present evidence" that its handling of these PIP claims was reasonable. Farmers Merits Br at 13.

Farmers' witnesses repeatedly testified that Farmers' use of the 80<sup>th</sup> percentile was reasonable. Farmers' expert, Dr. Samuel Friedman, also utilized a computer database in his business to determine how much of a medical bill should be paid. Tr 1980, 1984-85. He testified that Farmers' use of the 80<sup>th</sup> percentile was reasonable,<sup>13</sup>

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<sup>12</sup> Plaintiffs point out that in 2001 the legislature rejected a proposal to mandate the 80<sup>th</sup> percentile as a cap for PIP medical bills. HB 3785, 71<sup>st</sup> Or Leg Assembly 2001

<sup>13</sup> Dr. Friedman explains:

It attempts to pay doctors what their work is worth via consensus of all doctors

that Farmers' appeal process was effective (Tr 1995-1996), and that two of Strawn's provider bills had been reduced to an appropriate and reasonable amount. Tr 1997-99.

Farmers called Colin McCrae, a lawyer and insurance company consultant who testified that both the 80<sup>th</sup> percentile and Farmers bill payment appeal process were reasonable. Tr 2650-51, 2653-54. Dr. Charles Simpson testified about chiropractors' billing practices, about the different reimbursement rates under various government programs and private insurance plans, and that Farmers' bill reduction to a particular class member's medical bill was in line with what he charged. Tr 2711-17, 2719-20. Dr. Allen Dotson, a health care economist, and Cindy Watts, a professor of health economics and health policy at the University of Washington, both testified that Farmers' 80<sup>th</sup> percentile reductions were reasonable, in part because they affect only a small percentage of providers who were responsible for a large majority of the total dollar reductions. Tr 3273-3277, 3312-15.

Farmers bemoans its asserted inability to show the jury that it "frequently overrode RC40/B2 recommended reductions and paid claims in full." Farmers Merits Br at 22. The trial court permitted Farmers to introduce that evidence. McCrae

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and all their charges of a similar parallel nature, and it attempts to identify and not pay for those things that were higher than what a reasonable consensus of all those procedures would be.

There's obviously no basis for paying the highest number for a doctor and other – you know, therapists and chiropractors need to be paid fairly for what is done. The 80<sup>th</sup> percentile is actually a higher number than many of the numbers that are actually applied. Tr 1994-95.

explained that Farmers initially asked him to review 67 individual PIP files for recommended reduction overrides, and that he found 35-36 files with at least one. Tr 2640, 2643-4. Mr. McCrae conceded that he did not know how the 67 files were selected for his review.<sup>14</sup> Tr 2640, 2658-59. Doug Heatherington, the Farmers' claims manager who selected and implemented the percentile reduction program in Oregon, estimated that overrides occurred "much less than 10% of the time." Tr 1962.<sup>15</sup>

The trial court's evidentiary ruling only prevented Farmers from arguing that a write-off was an "offset for damages," because those unpaid balances had been "incurred" as defined by ORS 742.524(1)(a). Tr 1152-59, ER 77. That ruling, as already noted, is consistent with *White v. Jubitz, supra*.

In summary, Farmers' argument that the trial court's evidentiary rulings barred it from presenting individualized evidence of reasonableness, overrides, and write-offs is a sham. Both Farmers and plaintiffs could and did offer that evidence.

### **(3) What Farmers chose not to prove.**

Farmers chose not to use a variety of available means to present relevant evidence regarding the dollar amount or frequency of overrides.

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<sup>14</sup> McCrae also acknowledged on cross-examination that (1) Farmers might have cherry-picked the files it gave him; (2) he did not determine the total number of RC40/B2 reductions in any file he reviewed; and (3) as a result, he could not conclude Farmers had a meaningful review process of RC40/B2 reductions. Tr 2672-73.

Farmers never did offer testimony to explain the source of the files reviewed by Mr. McCrae, or their method of selection.

<sup>15</sup> Plaintiffs presented evidence that the overrides occurred approximately 1% of the time. Ex 613.

Farmers had produced during discovery a database of RC40/B2 reductions as well as documents evidencing its overrides of RC40/B2 reductions. During that process, Farmers disclosed that it had conducted a survey on the overrides. It had retained two insurance consultants as experts to review a random sample (over 600) of those files, asking them to identify those files containing an RC40/B2 override.

From a properly conducted survey, Farmers could have extrapolated the total number of files with overrides, the percentage of RC40/B2 reduced bills that Farmers later overrode, or even the total dollar amount of overrides paid after the initial RC40/B2 reduction. Such evidence could have been introduced not only as evidence of the alleged reasonableness of Farmers' practices but also to reduce the potential amount of plaintiffs' compensatory damages.

At an ORE 104 hearing regarding Farmers' survey, the trial court found, *inter alia*, that the two experts had merged their results but had not used the same definitions of terms or methodologies in conducting their separate file reviews.<sup>16</sup> The experts could not identify the specific documents from the PIP files on which they had relied in determining whether there had been an RC40/B2 override, or even agree on what data was needed to establish an override.<sup>17</sup> 9/3/03 Tr 230-237; Rec 243 (Order). The court excluded the testimony and associated exhibits. 9/26/03 Tr 6-10. Farmers

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<sup>16</sup> Farmers' survey also recorded only whether a PIP file contained one RC40/B2 override. The PIP file might still have 25 other RC40/B2 reductions of other bills that were not overridden. For some unexplained reason, Farmers opted not to conduct its survey on the basis of the number of bills reduced under RC40/B2.

<sup>17</sup> At the close of this hearing, Plaintiffs' counsel made clear that Farmers was still free to offer testimony from adjusters that they sometimes override RC40/B2 reductions. *Id.* at 237.

then stated that it intended to perform a new survey, and the court set ground rules for future discovery. *Id.* at 29. No such survey was done, and Farmers instead offered the testimony of Colin McCrae, summarized above.

It should be apparent from the forgoing narrative that Farmers had, and knew it had, a variety of ways to demonstrate that its program worked reasonably (if it in fact did) and to challenge Plaintiffs' measure of compensatory damages (*i.e.*, the total dollar amount of RC40/B2 reductions). Farmers could have presented summary data, either from a review of all PIP files with RC40/B2 reductions or from a valid statistical sample of those files, to show the percentage of PIP files containing at least one RC40/B2 override. It chose not to. We can infer from that decision that such evidence that it did not help Farmers' defense.

Farmers could have computed the total amount paid in overrides and moved the court to have plaintiffs' potential compensatory damages (the total dollar amount of RC40/B2 reductions) reduced by that amount. Farmers also could have argued to the jury from specific evidence that Plaintiffs had overstated their damages. Instead, Farmers saved this proof of the amount of its overrides for the post-trial claims administration process. The trial court's ruling did not compel that result.

## VI

### **Farmers' Second Question: Reliance was Proven, not Presumed**

In Farmers' Petition for Review, this second question specifically referred to Farmers' motion for directed verdict. Petition at 2-4. In its merits brief, Farmers is somewhat less clear, but still directs its primary argument at the disposition of its

directed verdict motion, and the asserted absence of proof of reliance. Merits Br at 1, 29. However, Farmers once again lards its argument with issues that are not properly preserved below or presented to this Court. Plaintiffs start by pointing out what issues are not before this Court, then summarize the evidence that dictated denial of Farmers' motion, and conclude with a brief commentary on the legal authorities to which Farmers has recourse.

**(1) Farmers never preserved a pleading issue, and no question about certification is before this court.**

Farmers starts with an argument, not about plaintiffs' proof, but about plaintiffs' pleading. Farmers Merits Br at 27. The Court of Appeals correctly determined that Farmers had failed to preserve its argument that plaintiffs' fraud claim alleged only a breach of an insurance policy and sounded in contract, not in tort. 228 Or App at 468. Farmers' directed verdict motion never took issue with plaintiffs' pleadings.

Farmers salts its argument with language that suits a class certification question (the need to prove "class reliance," Merits Br at 30; the need for "evidence common to the class," Merits Br at 29); it cites to cases only involving class certification issues (Merits Br at 33); and it even asks for decertification in its conclusion. No question involving certification or decertification of this class is properly before this Court. Farmers never assigned error on appeal to the certification of the class; its petition for review didn't raise any question about the Court of Appeals disposition of its motion to decertify the class. And perhaps most fatal, in the

trial court Farmers never linked class decertification either to plaintiffs' claim for deceit or to plaintiffs' proof of individualized reliance by class members. Rec. 309.<sup>18</sup>

The question presented regarding Farmers' motion for a directed verdict for an asserted insufficiency of proof should not become a back door for entertaining arguments about whether the trial court abused its discretion when it failed to decertify the class.<sup>19</sup>

**(2) Plaintiffs agree: it is necessary to prove reliance.**

Plaintiffs never contended that it was not necessary to prove reliance in a class action based upon fraud. But proof need not be direct; an element of a claim can be inferred from circumstances. *Conzelman v. Northwest Poultry & Dairy Products Co.*, 190 Or 332, 350, 225 P2d 757 (Or 1950) (“It is not necessary that [fraud] be established by direct evidence, for in many cases that would be impossible, and it may be proved by circumstantial evidence of a clear and satisfactory character.”). The Court of Appeals observed that Farmers failed to provide any authority “that requires *direct* evidence of reliance in a fraud claim.” 228 Or App at 470.

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<sup>18</sup> Only the first page of this motion is attached in Farmers Excerpt of Record, ER 35. The motion asked the trial court to decertify the class across the board, with no alternative argument requesting that specific claims be considered for decertification. Nothing in the motion singles out any aspect of the fraud claim or even addresses it. The motion only sought decertification on the basis of a purported requirement that plaintiffs prove either the reasonableness of each and every medical bill submitted by class members or that each and every class member suffered out-of-pocket losses.

<sup>19</sup> “In reviewing the trial court’s determination that a proceeding shall or shall not be conducted as a class action, it must be remembered that this is largely a decision of judicial administration, that is, how the trial court shall proceed. In making such decisions the trial court is customarily granted wide latitude.” *Newman v. Tualatin Development Co., Inc.*, 287 Or 47, 51, 597 P2d 800 (1979).

In *Vasquez v. San Juan County*, 4 Cal 3d 800, 814, 94 Cal Rptr 796, 484 P2d 964, 971 (1971),<sup>20</sup> the California Supreme Court held:

The fact of reliance upon alleged false representations may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party defrauded to enter into the contract than his direct testimony to the same effect.

An “inference” is not the equivalent of a “presumption,” although sometimes the words are used as if they were interchangeable. See *Bunnell v. Parelius*, 166 Or 174, 186-94, 111 P2d 88 (1941)(Rossman, J., concurring), for a discussion of the distinction in the context of a directed verdict motion. See also *Mick v. Level Propane Gases, Inc.*, 203 FRD 324 (2001)(in class proceeding with predominant issue being defendant’s conduct of misleading and deceptive sales practices, reliance may be inferred); *Sargent County Bank v. Wentworth*, 500 NW 2d 862, 875 (ND 1993) (foreclosure action, action on promissory notes, counterclaims of fraud: inducement and reliance may be inferred when there is nondisclosure of a material fact); *Edens v. Goodyear Tire & Rubber Co.*, 858 F2d 198, 206-07 (4<sup>th</sup> Cir 1988)(“[D]irect proof of reliance on the concealment was not required for it was practically impossible to prove, by direct evidence, reliance on that which had been intentionally concealed.”).

Farmers chides the Court of Appeals for its supposed “reliance” on contract law:

The court cited only two authorities – *Williston on Contracts* and the

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<sup>20</sup> It is not true, as Farmers says (Merits Br at 31), that the Court of Appeals cited only two authorities for its approach, *Williston on Contracts* and the *Restatement (Second) of Contracts*. The Court also cited and relied on the rationale stated in *Vasquez*. 228 Or at 470 fn 9.

Restatement (Second) of Contracts – and, significantly, both deal not with torts but with contracts, showing again that this is, in truth, a contract claim. Farmers’ Merits Br at 31

Farmers neglects to mention that the court’s citations are specifically directed to the contract defense of misrepresentation, a defense clearly related to the tort of deceit. For instance, Restatement (Second) of Contracts, Section 167, entitled “When a Misrepresentation Is an Inducing Cause,” states:

A misrepresentation induces a party’s manifestation of assent if it substantially contributes to his decision to manifest his assent.

Comment *a* to Section 167 explains:

*Scope.* The rule states in this Section determines whether a misrepresentation in fact induced a party’s actual or apparent manifestation of assent, as required under §§ 163, 164 and 166. A misrepresentation is not a cause of a party’s making a contract unless he relied on the misrepresentation in manifesting his assent. His reliance will usually consist of his acceptance, an affirmative act, but may also consist of his refraining from revoking an outstanding offer. \* \* \* It is not necessary that this reliance have been the sole or even the predominant factor in influencing his conduct. It is not even necessary that he would not have acted as he did had he not relied on the assertion. It is enough that the manifestation substantially contributed to his decision to make the contract. It is, therefore, immaterial that he may also have been influenced by other considerations. (Emphasis added.)

If this sounds like the “stuff” of tort, indeed it is. The Reporter’s Notes to Section 167 states “This Section is based on Restatement, Second, Torts § 546.”

**(3) Plaintiffs proved reliance.**

Farmers’ directed verdict motion against plaintiffs’ fraud claim, a single three-sentence paragraph, conceded that all class members who had testified at trial had

presented evidence of reliance.<sup>21</sup> Farmers argued, however, that “there is no evidence common to the class which establishes that the *absent class members* relied upon any material misrepresentation or omission of the defendants.” *Id.* (emphasis added).

The Court of Appeals referred to evidence common to all class members that could support an inference of reliance, and focused primarily on representations in the Farmers policies, Farmers selection of the arbitrary percentile, and Farmers continued acceptance of premiums without disclosing “that it had decided not to pay all reasonable and necessary expenses. 228 Or App at 470-71.

Farmers’ misrepresentations and failures to disclose were not limited to their insurance policies, but were also at the heart of their claims handling process. In response to a report of an injury accident, Farmers sent applications to class members, accompanied by a letter that stated:

The policy provides benefits for only those medical services which are reasonable and necessary[.] Ex. 4; Ex. 1025.<sup>22</sup>

Class members then applied for benefits, their medical bills were submitted, and Farmers applied the RC40/B2 codes to reduce their payments. From these circumstances, a jury could infer that each and every class member submitted PIP benefit applications and medical bills for payment in reliance on Farmers’ representation that it would pay those reasonable charges. Thus, each and every class

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<sup>21</sup> “Several class members testified about their expectations and understanding of the insurance policy and information received from Farmers about the claims process.” SER 27.

<sup>22</sup> Ex. 4 was sent to Strawn. Ex. 1025 was a later version sent to another class member. While the two versions were somewhat different, they both contained this sentence.

member was a casualty of Farmers' profit-recovery scheme. Most (virtually all) class members were policyholders who paid premiums based on their understanding that Farmers would pay their reasonable medical bills in the event of an accident; but all class members received applications for PIP benefits and the accompanying representation that Farmers would pay for "reasonable and necessary services." All class members submitted those applications and all submitted medical bills for payment. Thus, contrary to Farmers' assertion in its motion, there was indeed "evidence common to the class."

The Court of Appeals applied the correct standard in reviewing the trial court's denial of Farmers' directed verdict motion: viewed in a light most favorable to the plaintiffs, there was evidence from which the jury could infer that the class relied to their damage on Farmers misrepresentations or omissions. 228 Or App at 471.

**(4) Farmers refuses to acknowledge that this is a validly certified class action.**

Farmers' reiterated references to a lack of proof regarding "each and every class member," and its apparent assumption that such proof must be direct, reflects its fundamental misunderstanding of a class action. A class properly certified under ORCP 32 may sue in a representative capacity "*on behalf of all*" class members (ORCP 32A); and class actions may be maintained in this representative capacity so long as a class action remains superior to other available methods for adjudicating the claims in controversy (ORCP 32B). The trial court properly certified this class in its

June 12, 2000 order. Rec 60.<sup>23</sup> The trial court found eleven common questions of law and fact, including “whether Farmers represented that it would pay under its PIP coverage all reasonable and necessary medical expenses to the policy limits, and whether such representation was false and, if so whether such falsity was intentional and negligent.” *Id.*, Rec 60 (Class Cert Order). Accordingly, what was at issue in this case was Farmers’ misconduct directed toward a precisely defined class. As this court has observed, a class

should be defined upon the basis of the manner in which the defendant acted toward an ascertainable group of persons. The necessity for defining the class with absolute particularity does not arise however until entry of judgment when it is necessary to describe those persons whom the judgment will bind.

*Bernard v. First Nat’l Bank of Oregon*, 275 Or 145, 550 P2d 1203 (1976).

On appeal, Farmers never assigned error to the trial court’s original certification. It assigned error only to the denial of its mid-trial motion to decertify the class, and submitted a combined argument on that assignment and the assignment contesting the denial of its motion for directed verdict.<sup>24</sup> App Br pp. 20-31. As already pointed out, its motion to decertify said nothing about proof of reliance; and in its opening brief, Farmers said nothing about ORCP 32 or class certification. Nor did it acknowledge the standard of review appropriate to class certification issues, and

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<sup>23</sup> Farmers’ excerpt of record (ER 1, Rec 44) contains an earlier Order that the trial court withdrew and replaced with the June 12, 2000 Order.

<sup>24</sup> Farmers never argued in that purportedly “combined argument” any issue pertaining to its notion to decertify the class. Accordingly, that issue is waived. Resp. Br., p. 26.

distinguish that abuse of discretion standard from the error of law standard appropriate to review of the directed verdict motion. *See Newman v. Tualatin Development Co., supra*, fn 11. And neither Farmers' petition for review nor its brief on the merits challenge the class certification order or the denial of the motion to decertify.

This Court should decline Farmers' invitation to blur the analytic distinctions between assessing the propriety of class certification and assessing the propriety of denying a directed verdict motion. Farmers' current argument regarding plaintiffs' proof of fraud must be reviewed under the standard applicable to the only motion that raised that issue, the denial of which is properly before this court: the question is whether, viewing the record in a light most favorable to plaintiffs, there was "any evidence" of reliance. *Sisters of St. Joseph of Peace, Health and Hosp. Service v. Russell*, 318 or 370, 376, 867 P2d 1377 (1994). There was, and the Court of Appeals correctly disposed of this issue.

**(5) The cases Farmers cites do not assist its argument.**

Farmers' failure to distinguish between its directed verdict motion and its motion to decertify becomes very apparent in its choice of citations to support its arguments. All involve class certification questions, none involve an evidentiary burden at trial, and all point to evidence in the record which established significant differences among class members such that a class action could not be maintained.

Both *Newman, supra*, and *Bernard, supra*, the two Oregon cases cited by Farmers, were class actions involving breach of contract or express warranty claims,

and each was an appeal from an order certifying a class. This Court determined that common questions of law or fact do not predominate over individualized issues either when *there is evidence in the record* that class members varied on their actual knowledge of and assent to a promised term in their contracts, or when it plainly appears that the complained-of promise likely was immaterial to class members' subsequent decision to purchase a home. *Bernard* (sophisticated commercial loan borrowers likely assented to interest computation term in their loans and understood the bank's interest computation practices);<sup>25</sup> *Newman* (promise of copper pipe plumbing likely immaterial to home purchase decision where sales brochure listed a multitude of townhome features).

The *Newman* court rejects the notion that a reliance issue will necessarily defeat a class action. In *Newman*, purchasers of townhouses in a subdivision brought an action alleging, among other claims, that the builder had expressly warranted in sales brochures that the structures would have copper plumbing throughout; in fact, the homes were built with a combination of copper and galvanized plumbing, and the latter was deteriorating in class members' homes. 287 Or at 49, 53-4. This Court determined that the class had been properly certified on all claims but the express warranty claim. *Id.* at 54. That is so because this Court determined that builders had made statements about many features of the townhouses, various

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<sup>25</sup> *Bernard*, in any event, carries no weight. It was decided under the former ORS 13.220(2)(c); the premise for its holding was eliminated when the Council on Court Procedures adopted the current version of ORCP 32 in 1992, in which the question of whether common issues "predominate" over individual issues is only one of eight matters pertinent to the "superiority" element necessary for maintaining a class action.

floor plans, vaulted ceilings, color-matched kitchen appliances, brick-enclosed courtyards, etc. The water pipes and their composition is a relatively minor component.

We do not hold that an express warranty is never an appropriate subject or a class action adjudication or that the issue of reliance always requires individual determination. However, here, the alleged express warranty is such a small part of the item purchased and the representation is interspersed with many other descriptive statements.

*Id.*

In other words, given the multiplicity of statements, no inference was possible that all purchasers had relied on the particular statement in question. There is no such impediment here.

The federal class action cases Farmers cites (Merits Br at 33) are even less germane.<sup>26</sup> In some cases there was evidence of multitudinous representations that made it difficult to ascertain which class members were exposed to what representation and with what effect. *Gartin v. S & M NuTec LLC*, 245 FRD 429 (C. D. Cal 2007)(multitude of representations about dog treats); *Estate of Mahoney v. R.J. Reynolds Tobacco Co.*, 204 FRD 150 (2001)(tobacco company's deceptive advertising campaign); *Morgan v. Markerdowne Corp.*, 201 FRD 341 (D.NJ 2001) (oral promises and various forms of promotional literature).

In other cases proposed class members had testified that they would have made the same decisions regardless of the complained-of representations or omissions. *Howards Rexall Stores, Inc. v. Aetna U.S. Healthcare, Inc.*, 2001 WL 501055 (D.Me.

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<sup>26</sup> As the Court of Appeals pointed out, ORCP 32 and FRCP 23 (the federal rule governing class certification) apply fundamentally different standards to class certification. 228 Or App at 471, n. 10.

2001)(class members testified they would still contract with defendant even with knowledge of the less than favorable prescription price terms); *Ford Motor Co. Vehicle Paint Litigation*, 182 FRD 214 (1998) (car buyers bought cars even after paint defects had been widely publicized); and *Mahoney, supra* (plaintiffs testified that they would keep smoking even had they been warned of the dangers to their health).

Lastly, certain cases turned on inferences reasonably drawn from the record that many class members could not have suffered the injury as alleged by plaintiff. *Thorogood v. Sears, Roebuck & Co.*, 547 F3d 742 (2009) (not all proposed class members shared plaintiffs' view that rust stains were a hazard of clothes dryers and that defendant's stainless steel dryer tub promised no rust); and *Morgan, supra* (not all proposed class members believed as plaintiff did that matriculation from school program guaranteed a lifetime of gainful employment).

What is noteworthy is that each of these cases involved, at best, a kind of evidence not presented here and that is not at issue here – evidence that defeated a finding that common questions of law and fact predominated over individual issues. Those cases have nothing to do with any proof of reliance at trial.

In this case, all class members received documents (policies and/or letters) containing Farmers' promise to pay their reasonable medical expenses. All class members completed and submitted PIP applications to secure those benefits, and submitted their medical bills for payment. This is indeed the case, described by *Newman*, where reliance can properly be inferred and direct individual evidence, from "each and every class member," is not required.

Farmers' motion for directed verdict was properly denied.

## VII Farmers Third Question: Punitive Damages

Beginning with their Respondents' Brief, plaintiffs have contended that the due process question is not properly before the appellate courts. Because Farmers failed to assign error to the trial court's alternative bases for denying its challenge to punitive damages, there is an adequate state law ground for refusing to reach the federal constitutional question. This court should therefore reverse the Court of Appeals and affirm the trial court without addressing the due process issue. *See Strawn's Opening Br*, pp. 8-14.

Farmers' discussion of punitive damages does not provide any reasonable analysis of the evidence in the case, finds support for a 1:1 ratio from a US Supreme Court opinion that specifies it is setting a more rigorous standard than due process requires, and repeatedly relies on the 2003 statutory amendment that had nothing to do with percentiles or determining reasonable charges.

### (1) **Farmers' standard of review.**

In its third Question Presented, Farmers seems to assume the application of a *de novo* standard of review. That's not the term Oregon courts use for the question presented by a due process challenge to a punitive damages award. That challenge presents a question of law. And this Court has been extremely careful to make clear that a reviewing court should not re-examine the evidence to make its own determinations of historical fact. *Goddard*, 344 Or at 262.

Plaintiffs believe that Farmers' recourse to the federal court's *de novo* terminology is deliberate. In Oregon, the term is still linked to equity cases, which the appellate courts tried "anew upon the record." See ORS 19.415(3);<sup>27</sup> *Goldsmith v. Elwert*, 31 Or 539, 50 P 867 (1897)(An equity case "being tried here *de novo* on the evidence submitted in the court below, this court will draw its own conclusions[.]"). Such a re-examination of historical fact, one that *Goddard* foreclosed, is exactly what Farmers offers when it reviews the evidence in the light most favorable to itself, and it's what Farmers wants this Court to do when it assesses whether this punitive damages award was proportional to Farmers' offense.

**(2) Plaintiffs and Farmers agree: 4:1 should not be the "presumptive" ratio of punitive damages to harm caused.**

Plaintiffs believe that the Court of Appeals erred when it read this Court's opinion in *Goddard* to compel it to "presume that the maximum constitutionally permissible" award bears a 4:1 ratio to the actual or potential harm caused. Strawn's Opening Br at 31. Defendant believes that the Court of Appeals erred when it "mistakenly believed" that 4:1 was "the presumptively reasonable" ratio. Farmers' Merits Br at 12. On the surface, the parties appear to agree: a "presumptive" application of a 4:1 ratio is wrong.

Of course, this apparent congruence is only superficial, and goes no deeper than the similar phrasing. Farmers reads *Goddard* as establishing the absolute maximum, the ceiling, in a case where only economic damages are claimed (what it

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<sup>27</sup> "Upon an appeal from a judgment in an equitable proceeding, the Court of Appeals shall try the cause anew upon the record."

calls “economic harm only”), completely ignoring this Court’s acknowledgment that “narrow circumstances” could justify a higher ratio and its characterization of 4:1 as a “very general rule of thumb.” *Goddard*, 344 Or at 260, 270. Plaintiffs refer the Court to the discussion in their Opening Brief on the Merits, pp. 31-38.

Plaintiffs suggest that the constitutional analysis is impeded rather than assisted by use of “presumption,” both in concept and in terminology.<sup>28</sup> This Court did not, in fact, use the term in *Goddard*, although it has been employed repeatedly by the Court of Appeals. *See* cases cited in Strawn’s Opening Br at 33. In this difficult task of reviewing punitive damages awards under the Due Process clause, it is tempting to turn to abstract standards or templates, most obviously numerical, that can be applied to each case and perhaps achieve consistency as well as convenience. But this obscures the basic principle that a punitive damages award must be analyzed on the specific facts that gave rise to it and the reasonable inferences a rational jury could have drawn from them. A defendant’s due process rights cannot and need not trump the right to a jury trial. Attaching some “presumptive” gloss and effect to particular numerical abstractions, without relating those numbers to the case-specific evidence that led the jury to impose the sanction, gives the one constitutional interest improper precedence over the other.

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<sup>28</sup> Under ORE 308, a “presumption” is a device for shifting the burden of proof, and imposes an evidentiary burden on the party against whom it is directed to prove that the non-existence of the presumed fact is more probable than its existence. With this well-known rule in the background, plaintiffs submit that use of the term “presumption” or “presumptive” creates confusion and is inappropriate.

(3) ***Exxon Shipping v. Baker* has nothing to do with the due process inquiry.**

The overriding constitutional concern is that the sanction be proportionate to the specific conduct and the actual and potential harm from it. **Cite.** *Farmers* does not, however, start with a discussion of the evidence. It starts with its desired end point, a 1:1 ratio. And it finds its primary support in a case that has nothing to do with the constitutional inquiry.

In *Exxon Shipping Co. v. Baker*, 554 US \_\_\_, 128 SCt 2605, 2619 (2008), the Supreme Court stated that it was deciding

an issue of first impression about punitive damages in maritime law, which falls within a federal court’s jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result.

This inquiry was not the same as due process review:

Today's enquiry differs from due process review because the case arises under federal maritime jurisdiction, and we are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process[.] 128 SCt at 2626.

And it was the Court’s decision to choose “more rigorous standards” than the one dictated by due process:

[O]ur better judgment is that eliminating unpredictable outlying punitive awards **by more rigorous standards than the constitutional limit** will probably have to take the form \* \* \* of quantified limits. *Id.* at 2629. (emphasis added)

The Court therefore chose a 1:1 ratio as “a fair upper limit in such maritime cases.” *Id.* at 2633.

By its own terms, *Exxon Shipping* has nothing to say about the constitutional

question before this Court.

**(4) Farmers' version of the facts is self-serving.**

When Farmers does get to the facts, what it says is that its conduct wasn't reprehensible at all. Its program was "a perfectly legitimate and objectively reasonable interpretation" of its statutory obligation; it was doing just what the State of Oregon does in workers compensation cases (it says this twice in the same paragraph); and it used the same approach now mandated by the 2003 amendments to the PIP statutes (which weren't in evidence). Farmers Merits Br at 42. Farmers simply makes no attempt to review the evidence that the jury heard in the light most favorable to the verdict.

Farmers' subheading for this section of its argument says it all: it announces that "Farmers' Conduct Was Not Reprehensible." Of course, if it were true that Farmers' conduct were not reprehensible at all, there would have been no basis in the common law for any punitive award. Farmers ignores the fact that the question has moved beyond exoneration: it's not whether Farmers was reprehensible, but to what degree.

Farmers goes so far as to assert that its conduct didn't involve "trickery or deceit"<sup>29</sup> despite the fraud verdict, and didn't involve "repeated action" despite the thousands of claims and the period of time involved. Farmers Merits Br at 45; *cf.*

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<sup>29</sup> Farmers repeats its earlier contention that it disclosed its reduction program to the insurance division before implementing it. This was its claims manager Heatherington's testimony; the DOI compliance officer placed the conversation much later. *See* discussion *supra*. In any event, Farmers' claims manager also stated that he was told "there was no support for [the reduction program] in the statute." Tr 2396.

*Goddard, supra*, 344 Or at 275 (defendant’s conduct in handling a single liability claim “was not an isolated incident but, instead, was a deliberate pattern and practice,” and “defendant’s acts were repeated”). Farmers’ discussion of reprehensibility simply ignores the record and is not helpful.

**(5) A word about comparable sanctions.**

One of the facts that Farmers completely ignores is the following finding of the jury when it answered “yes” to this question:

Was defendants’ use of the 80<sup>th</sup> and later the 90<sup>th</sup> percentiles for reduction of medical expenses, in conjunction with its review and appeal process, arbitrary and unreasonable? ER 43.

Farmers’ arbitrary and unreasonable procedure for handling PIP claims did not just infringe on a private contractual interest. For 18 months the defendant repeatedly violated a statutory mandate governing its right to sell its policies in this State, by falsely representing that it would pay reasonable charges by medical providers.

There are civil penalties attached to such conduct, as set forth in Strawn’s Opening Brief at 45, and at \$10,000 per violation, these penalties are indeed severe. Farmers states that “[t]here is no evidence that Oregon would actually impose a penalty” for [this] violation.”<sup>30</sup> Neither was there such evidence in *Goddard*, but this

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<sup>30</sup> Farmers suggests that in the absence of such evidence, consideration of the statutory civil penalty would violate the U.S. Supreme Court’s warning against “speculating” in *State Farm v. Campbell*, 538 US 408, 428, 123 SCt 1513 (2003). Farmers Merits Br at 48. But in *State Farm*, the Court issues a warning about criminal penalties, stating that they have less utility than civil penalties because of the heightened protections of a criminal trial, and therefore “the remote possibility of a criminal sanction does not automatically sustain a punitive damage award.” *Id.* *State Farm* does not support Farmers’ casual dismissal of the statutory sanctions.

Court nevertheless pointed out that there were repeated acts, “and the civil penalties could have been imposed for each separate illegal act,” thus suggesting “that due process would permit a relatively high punitive damages award.” 344 Or at 275.

**(6) Farmers’ suggested 1:1 ratio is nonsense.**

Farmers calls this “a non-exceptional case.” One hopes that is not an accurate statement. Perhaps unintentionally, this statement in Farmers’ brief may be a fair indication why a substantial punitive sanction is appropriate in this case. In response to Farmers’ repeated assertion that all this was just “business as usual,” and that it was perfectly reasonable for Farmers to dilute its legal obligation to its insured in order to increase its bottom line, the jury reached a sum that might make Farmers and any other insurer hesitate before engaging in similar conduct – that would make this case, in other words, an exception rather than the norm. This billion-dollar company wants that sanction reduced to a slap on the wrist, the equivalent of a speeding ticket for an individual of median income. It asks for a penalty that might cause a wince but would do nothing to deter.

The court should reject that argument.

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### Conclusion

For the above reasons, the decision of the Court of Appeals should be reversed insofar as it ordered a remittitur of the punitive damages and affirmed in all other respects. The trial court judgment should be affirmed.

Respectfully submitted,

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