

IN THE SUPREME COURT OF THE STATE OF OREGON

MARK STRAWN, on his own behalf
and as representative of a class of
similarly situated persons,

Plaintiff-Respondent,
Respondent on Review

v.

FARMERS INSURANCE COMPANY
OF OREGON, an Oregon stock
insurance company; MID-CENTURY
INSURANCE COMPANY, a foreign
corporation; and TRUCK INSURANCE
EXCHANGE, a foreign corporation,

Defendants-Appellants,
Petitioners on Review,

and

FARMERS INSURANCE GROUP INC.,

Defendant.

Supreme Court
No. S _____

Court of Appeals
No. A131605

Multnomah County Circuit Court
No. 9908-09080

**Petitioners Will File Brief on the Merits
if Review is Allowed**

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BLUMSTEIN LLP
JUL 23 2009

PETITION FOR REVIEW

Review of the Opinion of the Court of Appeals on appeal
from the Multnomah County Circuit Court
Hon. Jerome E. LaBarre, Judge

Date of Opinion: May 20, 2009
Author of Opinion: Sercombe, J.
Joined by: Edmonds, P.J.; Wollheim, J.

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July, 2009

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PETITION FOR REVIEW

Defendants-Appellants (collectively “defendants” or “Farmers”), petition this Court for review and reversal or modification of the Court of Appeals’ opinion. *See Strawn v. Farmers Ins. Co.*, 228 Or App 454, 209 P3d 357 (May 20, 2009).

FACTS RELEVANT TO REVIEW

The key issue in this class action is whether Farmers, which provided personal injury protection (“PIP”) auto liability coverage to class members, paid the “reasonable” amounts for the class members’ PIP claims when it paid less than the full billed medical charges. The class raised that core issue in an action for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, and declaratory judgment.

Farmers did not receive a fair trial, because the trial court, while instructing the jury that claimed medical expenses were presumed reasonable, excluded Farmers’ evidence to the contrary at the liability phase and thereby effectively applied an irrebuttable presumption against Farmers. Although the law provides that Farmers must pay “reasonable” expenses and upon presentment of a medical bill and should conduct a “reasonable investigation,” the trial court precluded Farmers from presenting any evidence that its investigations were reasonable or that the amount it actually paid on the medical bills of individual class members constituted a “reasonable” amount.¹ As described below, the exclusion of that evidence directly contravened this Court’s instruction in *Ivanov v. Farmers Ins. Co.*, 344 Or 421, 185 P3d 417 (2008).

¹ A partial list of that evidence appears below at page 11.

Based upon this incomplete factual record, the jury awarded Plaintiff compensatory damages of \$1.5 million and punitive damages of \$8,000,000. After a post-verdict claims administrative process (*see* ORCP 32 F(2)), the compensatory damages were reduced by nearly 60 percent, to \$898,000. The trial court then granted attorney fees and other costs in excess of \$3 million in a supplemental judgment under ORS 742.061.

The trial court incorrectly excluded Farmers' proffered evidence of critical facts from which the jury could have concluded that Farmers' investigations into and payment of the class members' medical bills were reasonable. The Court of Appeals then declined even to address this error on its merits, speculating that there was "no basis" on which to conclude that the trial court's evidentiary exclusion, if wrong, "substantially affected" Farmers' rights, 228 Or App at 457-461, even though the outcome of the post-verdict administrative claims process itself provided an obvious example of such harm. Indeed, after Farmers actually had the opportunity (albeit truncated by the trial court) to present its evidence about individual claims in the post-verdict process – evidence that the jury determining liability and ultimately imposing \$8 million in punitive damages was not permitted to see – the original compensatory award was greatly reduced.

In addition, the trial court did not understand the role of reliance as an element of fraud separate from the representation or omission itself. It and the Court of Appeals have applied a *post hoc ergo propter hoc* approach (the jury can infer reliance from the representations or omissions alone) that eliminates the need for proof of that separate element.

In its opinion, the Court of Appeals determined also that the punitive damage award exceeded the amount allowed by the Due Process Clause of the United States Constitution, vacated the judgment and supplemental judgment, and remanded with instructions to the trial court to grant Farmers' motion for a new trial limited to punitive damages, unless plaintiff agreed to a remittitur. 228 Or App at 488. However, the Court of Appeals allowed an excessive punitive damages ratio for a non-exceptional case involving economic injury only, contrary to this Court's opinion in *Goddard v. Farmers Insurance Co.*, 344 Or 232, 179 P3d 645 (2007), and the clear guidance of the United States Supreme Court.

QUESTIONS PRESENTED ON REVIEW

1. Exclusion of Evidence in PIP-Related Class Actions. ORS 742.524(1) creates a rebuttable presumption that PIP provider charges, once submitted to the insurer, are "reasonable" in amount. ORS 746.230(1) then requires a PIP insurer to make a "reasonable investigation based on all available information" before reducing or denying a PIP claim. No presumption attaches regarding the reasonableness of the investigation. However, the trial court applied an effectively irrebuttable presumption that every charge to which reductions had been recommended was "reasonable" as billed, denying Farmers the right to put on evidence not only as to reasonableness of individual charges (or even about what recommended reductions were not applied), but also as to reasonableness of its *investigation* of claims. Did the trial court err in excluding that evidence?

2. Proof of Fraud in Class Action. Reasonable reliance is a required element of a fraud claim. The plaintiff in this class action matter provided no evidence of individual

class members' reliance and no evidence of damages traceable to reliance. Did the trial court err in refusing to grant a directed verdict in defendants' favor on the fraud claim?

3. Review of Punitive Damage Awards. In *Goddard v. Farmers Insurance Co.*, this Court ruled that under the Due Process Clause of the United States Constitution, 4:1 is a maximum allowable ratio of punitive to compensatory damages in cases of economic injury only, and that that ratio should be reserved for exceptional cases. In *Exxon Shipping Co. v. Baker*, 544 US ___, 128 S Ct 2605, 171 L Ed 2d 570 (2008), the United States Supreme Court allowed only a 1:1 ratio. In light of the trend to limit punitive damage awards, did the Court of Appeals err by adopting a 4:1 ratio as a presumptive norm for all cases without physical injury?

PROPOSED RULES OF LAW

1. Oregon statutory PIP law creates, at most, a *rebuttable* presumption as to reasonableness of submitted medical charges. In *Ivanov*, 344 Or 421, 185 P3d 417 (2008), this Court made clear that a trial court must allow a PIP class action defendant to demonstrate its investigation was reasonable by showing how it treated individual claims. Precluding that evidence (1) artificially skews the evidence toward a finding of class-wide liability and, (2) in cases where a punitive damage award is sought, deprives defendants of constitutional Due Process by skewing jurors' assessment of reprehensibility.

2. To survive a directed verdict motion, a claim of fraud in a class action requires evidence of reasonable individual reliance beyond mere speculation, and proof of reliance-based damage distinct from that for any associated contract claim. Absent a

“fraud on the market” claim (not present here), class-wide reliance cannot be inferred from representations or omissions alone.

3. Four-to-one is the maximum allowable ratio of punitive damages absent physical harm, awardable only in the most egregious case. One-to-one is a common-law benchmark for punitive damages in a case where no physical injury has occurred. In a case such as this, where the Oregon Legislature now requires the very sort of claim analysis that Farmers applied and upon which punitive damages against it were based, the lack of reprehensible conduct should place the punitive damage ratio close to 1:1.

IMPORTANCE OF THE ISSUES TO THE SUPREME COURT

The criteria of ORAP 9.07 for granting review are well satisfied in this case with respect to each of the Questions Presented.

1. This Case Presents Significant Issues of Law, and Issues of First Impression.

a. This case requires interpretation of a statute of wide application, and the issue is cleanly presented. In *Ivanov*, a closely-divided Court made first-impression statements about ORS 746.230(1) (reasonable investigation of PIP claims) and its evidentiary aspect, in summary judgment proceedings. 344 Or at 430-431. *Ivanov* did not address a defendant’s opportunity to present competent evidence, especially in a class action context, to rebut the presumption in ORS 742.524(1)(a) that submitted PIP claims are reasonable. *Ivanov did* conclude that under the separate statute regarding investigations (ORS 746.230(1)), a defendant’s evidence of a reasonable investigation would be important. *Ivanov*, 344 Or at 431-432. Here, the trial court precluded Farmers from introducing any evidence at the liability phase of the proceedings, to rebut the

presumption of reasonableness of individual submitted medical charges, to show some recommended reductions were not applied, or to demonstrate that investigations of individual claims were reasonable. It is a matter of first impression for this Court whether such decisions deprive a class action defendant of fundamental jury trial rights.

b. The trial court pushed the evidence of Farmers' handling of individual claims into the post-verdict claim determination phase, in violation of Farmers' constitutional right to a jury trial. The trial court's mismanagement of an ORCP 32 class action, involving as it does "the use or effect of a rule of trial court procedure" (ORAP 9.07(1)(e)), points to the need for this Court's intervention.

c. This case also requires the Court to decide whether the exclusion of the evidence described above violates a defendant's rights under the Due Process Clause of the United States Constitution, because the exclusion prejudices the jury's ability to evaluate punitive damages fairly as to both liability and amount.

2. These Issues Arise Often, and Many People Are Affected by Them. Class action plaintiffs commonly append fraud claims to contract claims, partly to add punitive damage exposure to the mix for settlement or, as is the case here, to enhance what is fundamentally a statutory award on a contract claim. The trial court and Court of Appeals glossed over an important element of the fraud claim by failing to require plaintiff to submit evidence of reliance. The Court of Appeals indulged in speculation about whether plaintiff met that burden with class-wide inferential evidence, (228 Or App at 470-471), speculations not based on anything presented at trial.

It is common for lower courts to lose focus on the element of reliance, and that deficiency is particularly significant in light of the ongoing nationwide debate surrounding management of class action fraud claims. *See, e.g.*, Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 Harv J on Legis 1 (2006) (analyzing statutes and cases from many states, and discussing the policy underpinnings of “reliance” in a class action context). This Court’s consideration of that issue could rectify an often-repeated problem and have broader implications for the current national dialogue.

3. This Court’s Guidance Is Needed on the Punitive Damage Issues Raised Here.

This case presents a prime opportunity for the Court to advise the Court of Appeals in the application of this Court’s own decisions on the subject. The Court of Appeals decision in this case has strayed away from this Court’s guidance in *Goddard*, which instructs that where injury is to economic interests only, a 4:1 ratio of punitive to compensatory damages is a *ceiling*, reserved for the *worst* imaginable cases.¹ Indeed, at the same time the Court of Appeals acknowledged that Farmers’ conduct here is “in no way comparable” to more egregious cases (228 Or App at 479), it identified this Court’s *maximum* 4:1 ratio from *Goddard* as “the presumptive permissible ratio” (228 Or App at 480), from which it may choose to depart upwardly. That analysis is a serious distortion and misapplication of this Court’s rule. The 4:1 ratio proposed by the *Goddard* court is

¹ This Court’s assessment in *Goddard*: “There may be possible courses of behavior in the area of economic wrong that would be even worse, but none leaps to mind.” 344 Or at 276.

intended to be a maximum, and where the relevant conduct is less reprehensible, as in this case, the ratio should be lower.

This Court monitors and reviews punitive damage awards in light of federal constitutional standards and precedents. *See Goddard*, 344 Or at 251-256 (analyzing recent U.S. Supreme Court jurisprudence). In *Exxon Shipping Company v. Baker*, the United States Supreme Court recently expanded its analysis of state and federal court punitive damage award ratios. *See* 128 S Ct at 2624-2634, in particular the study cited at 2624 fn. 14. In holding that a 1:1 ratio is the appropriate metric for punitive damages absent physical injury, the Supreme Court's decision in *Exxon Shipping* embraces the recent trend to limit the amount of punitive damages in all but extreme cases. This Court should take the opportunity to consider the circumstances of this case in light of that recent decision and to exercise its responsibility to guide Oregon courts in their analysis of punitive damage awards.

This Court should allow review here to rectify the mistaken Court of Appeals rulings and to incorporate an analysis of the *Exxon Shipping* decision into Oregon punitive damages jurisprudence.

BRIEF ARGUMENT ON QUESTIONS PRESENTED ON REVIEW

1. This Court Should Give Guidance Regarding Permissible Evidence of "Reasonable Investigation."

Plaintiff alleged contract and fraud claims based on Farmers' alleged failure to pay "reasonable" amounts on class members' PIP claims in violation of the ORS 742.524(1) directive that PIP benefits "shall consist of * * * all reasonable and necessary [medical]

expenses.”² As this Court explained in *Ivanov*, that statute supplies a rebuttable presumption that the medical bills a PIP claimant submits are “reasonable.” Yet, the trial court barred Farmers from introducing evidence to rebut that presumption, including evidence showing that recommended reductions on submitted medical bills were not applied in certain individual cases, had no effect where individual claimants were not entitled to PIP benefits for other reasons, or, when applied, had the effect of reducing an individual bill to a “reasonable” amount. In addition, although this Court said in *Ivanov* that an insurer can rebut the presumption of reasonableness by showing it performed reasonable investigations of individual PIP claims, the trial court also precluded Farmers from offering such evidence.

The manner in which the Court of Appeals opinion framed the issues when affirming the trial court makes that exclusion of evidence even more critical to Farmers’ case. The Court of Appeals found the trial court erred in determining that plaintiff’s claims were challenging a wrongful *result* (denial or reduction of medical bills by Farmers). Instead, the Court of Appeals ruled that the claims were meant to challenge a

² Third Amended Complaint ¶¶ 14, 24, 33, 39 (ER 25, 28, 30-31); Jury Instructions, 18 Tr 4483, 4487-88, 4491, 4492 (ER 122-124). In presenting evidence for liability and for the measure of compensatory damage, plaintiff made no distinction between the contract and fraud claims.

wrongful *process* by Farmers.³ If the process is the issue, Farmers' case-by-case claim investigation (and Farmers' evidence that the investigations were reasonable) takes center stage. That is the type of evidence the trial court refused to let the jury see or hear. It is the very evidence that this Court understands is necessary to the resolution of such claims:

“The issues * * * include whether, in using the different protocols, bill review processes, computer programs, or other grounds upon which Farmers denied PIP claims, Farmers violated its obligation under ORS 746.230(1)(d) not to deny claims except upon reasonable investigation.”

Ivanov, 344 Or at 443 (Balmer, J., concurring and dissenting).

On *any* theory of liability, but especially if it is investigation-related, Farmers was denied its right to persuade the jury that its treatment of class members' individual claims was reasonable and that it paid a reasonable amount on individual medical bills. The trial court did not allow Farmers to present such evidence or evidence of the Oregon Legislature's adoption of a “reasonable” medical expense standard more stringent than what Farmers had applied.

The Court of Appeals did not deny that these exclusions are incorrect as a matter of law but instead assumed too glibly that it had no basis to conclude any such error

³ *Strawn*, 228 Or App at 464-465. The Court of Appeals' *Ivanov*-based process was an entirely new ground for deciding the case. The record here simply does not support affirmance of the judgment on the alternative ground the Court of Appeals has used. See *Outdoor Media Dimensions v. State*, 331 Or 634, 659-660, 20 P3d 180 (2001) (discussing requirements of “right for the wrong reason” affirmance). ORS 746.230(1), the “reasonable investigation” requirement, was not mentioned, nor were the words “reasonable investigation” spoken, during the two-week trial of this case. Nor was the jury instructed on the issue.

substantially affected Farmers' rights. Yet this Court must ask how such a sweeping evidentiary exclusion, effectively tying Farmers' hands in front of the jury, could *not* inflict serious prejudice. Farmers had no chance to explain how its evaluation of individual class members' claims made its overall conduct reasonable.

Not until the jury was long gone was Farmers permitted to point out, in the ORCP 32 F post-verdict claim determination phase, (1) that in more than 900 documented instances, Farmers investigators overrode the RC40 reduction,⁴ (2) that several claim reductions were reversed after providers responded to Farmers investigators' questions, (3) that some class members' claims were never reduced in the first place, (4) that many claimants' policies contained no PIP coverage, (5) that policy limits were already exhausted in several cases, and (6) that many claimants' policies were expired. The fact that presentation of such evidence at the post-verdict process was instrumental to a nearly 60 percent reduction of the compensatory award demonstrates the significant impact such evidence could have had at the liability phase of the trial. The evidentiary exclusions ordered by the trial court are all the more problematic and prejudicial to Farmers' defense because they were concealed from a jury also charged with evaluating the existence and amount of a punitive damage award against Farmers.

⁴ The prejudicial absence of this evidence from the record allowed the Court of Appeals to find that "the 'recommendation' was, as a practical matter, the final determination of reasonableness." 228 Or App at 460. Without this and other similarly excluded evidence before it, the jury lacked information necessary to develop a clear view of Farmers' conduct.

Prejudicial exclusion of evidence requires a new trial. Since this evidence relates to all of plaintiff's claims, a new trial on all claims is necessary. This is particularly so regarding the fraud claim and its related punitive damage award. Reversal on this issue will also vacate plaintiff's attorney fee award.

Additional evidentiary error bears on the punitive damages issue. Missing from the jury's view, because the trial court excluded it, was evidence that the 2003 Legislative Assembly (2003 Or Laws, ch 813, § 4) amended ORS 742.525 to cap PIP providers' charges at a percentage level below what the Farmers claim investigation process had used. Where the legislature has *required* a more stringent version of the very standard on which Farmers conducted its investigations, jurors who consider punitive damage liability for that conduct ought to be informed of the legislative requirement. A reviewing court also should weigh that factor in its "reprehensibility" and "equivalent civil penalty" analysis of the size of a punitive damage award.

2. The Court Should Consider and Explain the Reliance Element of Class Action Fraud Claims and the Proof Required to Support Such Claims.

This Court has only once (and not since *Bernard v. First Nat'l Bank*, 275 Or 145, 550 P2d 1203 (1976)) discussed the parameters of "reliance" in a class action. In *Bernard*, the inquiry did not extend to requirements of proof at trial, because the Court reversed certification of the class. 275 Or at 169. Here, the Court of Appeals made the questionable and unsubstantiated assumption that a trial court may dispense with the requirement for evidence of reliance in a class action fraud claim. 228 Or App at 470. The trial court should never be allowed to relieve a plaintiff of its burden to proffer

evidence on all elements of a claim. The Court of Appeals also mistakenly speculated that the jury could have relied in a *fraud* claim upon promises made in insurance *contracts*, where the parties do not have a fiduciary “special relationship.” 228 Or App at 471. The treatment is both superficial and mistaken.

Farmers submits that at a minimum, class action plaintiffs should be required to present evidence as to individual reliance of class members. Farmers’ brief on the merits will provide further analysis to assist the Court in formulating appropriate guidance for what evidence may and should be required.

Dismissal on review of the fraud claim, and with it the punitive damage award, will not result in a new trial. However, it will require a remand to the trial court for recalculation of plaintiff’s attorney fee award.

3. This Court Should Review the Current Law and Examine Once Again the Proper Standards for Evaluating Punitive Damages.

Judicial review of the size of a punitive damage award is a state court function commanded by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. For more than 15 years, this Court has allowed review and has examined punitive damage awards in light of the developing guidance from the United States Supreme Court.⁵ As an initial matter, this Court should examine and correct the Court of Appeals’ belief that the *Goddard* 4:1 ratio, is a “presumptive norm” rather than a *ceiling* reserved for a case of highest reprehensibility.

⁵ The notable cases include *Oberg v. Honda Motor Co.*, 316 Or 263, 851 P2d 1084 (1993); *Parrott v. Carr Chevrolet, Inc.*, 331 Or 537, 17 P3d 473 (2001); *Williams v. Philip Morris, Inc.*, 340 Or 35, 127 P3d 1165 (2006); and *Goddard*, 344 Or 232 (2007).

Plaintiff has requested this Court's review of the punitive damage award. His petition demonstrates profound unfamiliarity with the courts' independent role in Due Process punitive damage review (*see* plaintiff's "Procedural Obstacle" argument), disregard for this Court's holding in *Goddard*, and ignorance of *Exxon Shipping*'s impact on the fabric of punitive damages in the United States, including Oregon.

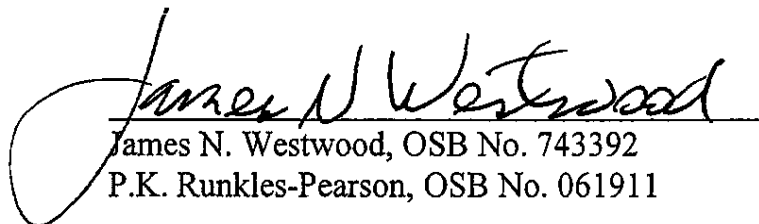
That *Exxon Shipping* is a federal maritime case, and its 1:1 ratio not directly applicable to Fourteenth Amendment cases, is both obvious and beside the point. In *Exxon Shipping*, which postdates this Court's *Goddard* decision, the Supreme Court has provided pointed and meaningful instruction to the states on how they should – uniformly – review the size of punitive damage awards. Farmers' brief on the merits will analyze *Exxon Shipping*, its underpinnings, and its relevance to this Court's jurisprudence.

CONCLUSION

For the reasons given in this Petition for Review, Farmers respectfully requests the Court to allow the Petition and to set the matter down for briefing and oral argument.

Dated July 22, 2009.

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Strawn v. Farmers Ins. Co.

228 Or App 454, 209 P3d 357 (May 20, 2009)

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Mark STRAWN,
on his own behalf
and as representative of a class of
similarly situated persons,
Plaintiff-Respondent,

v.

FARMERS INSURANCE COMPANY OF OREGON,
an Oregon stock insurance company;
Mid-Century Insurance Company,
a foreign corporation;
and Truck Insurance Exchange,
a foreign corporation,
Defendants-Appellants,
and

FARMERS INSURANCE GROUP INC.,
a foreign corporation,
Defendant.

Multnomah County Circuit Court
990809080; A131605

Jerome E. LaBarre, Judge.

Argued and submitted July 28, 2008.

James N. Westwood argued the cause for appellants. With him on the opening brief were Matthew J. Kalmanson and Stoel Rives LLP, and Michael D. Hoffman, Mark Elgin Olmsted and Hoffman Hart & Wagner LLP. With him on the reply brief were P. K. Runkles-Pearson and Stoel Rives LLP, Michael D. Hoffman and Hoffman Hart & Wagner LLP, and Mark Elgin Olmsted and Mark E. Olmsted, P.C.

Kathryn H. Clarke and Richard S. Yugler argued the cause for respondent. With them on the brief were David N. Goulder, Lisa T. Hunt, and Landye Bennett Blumstein LLP.

Before Edmonds, Presiding Judge, and Wollheim, Judge, and Sercombe, Judge.

SERCOMBE, J.

This class action arises out of defendants' claims handling process with respect to the payment of personal injury protection (PIP) benefits to their insureds. In short, defendants Farmers Insurance Company of Oregon, Mid-Century Insurance Company, and Truck Insurance Exchange (collectively, "Farmers") used cost-containment software to evaluate their insureds' medical expenses in relation to other bills for the same procedure in a given region. If Farmers determined that the charge submitted by an insured's provider exceeded a certain percentage of the range of the charges in those other bills, Farmers refused to pay the excess on the ground that it was "unreasonable." Plaintiff is the representative of a class of insureds who alleged that Farmers' review process set an arbitrarily low percentage (initially, 80 percent) that resulted in the denial of claims for reasonable medical expenses, thereby increasing Farmers' profits at the expense of PIP claimants and medical providers.

On behalf of the class, plaintiff brought claims for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, and declaratory relief. The first three of those claims were tried to a jury, which found in plaintiffs' favor and awarded \$1.5 million in compensatory damages and prejudgment interest, and \$8 million in punitive damages on the fraud claim. Based on the jury's answer to a special interrogatory, the court ruled in plaintiffs' favor on the request for declaratory relief. After a post-verdict claims administration process, the court entered judgment for plaintiffs in the amount of \$898,323.80 for compensatory damages and prejudgment interest, \$8 million in punitive damages, and more than \$2.6 million in attorney fees. Farmers appeals that judgment and a supplemental judgment that awarded additional attorney fees. For the reasons that follow, we conclude that the jury's punitive damages award must be reduced but otherwise affirm.

I. BACKGROUND

Because the jury found in favor of plaintiffs, we state the facts in the light most favorable to them. *Taylor v. Ramsay-Gerding Construction Co.*, 345 Or 403, 406, 196 P3d

in 1980 for workers' compensation purposes.² For Oregon, the federal government identified two PSRO areas: (1) the Portland-metro area and (2) the rest of the state.

The software allowed MMO's clients (mostly insurance companies and state agencies) to determine whether a bill from a medical provider was more expensive than a given percentage of the range of charges in other bills for the same CPT code in the provider's designated geographic area. Clients were able to select any percentile that they wished, and MMO then evaluated the bills that it received from the client to determine whether the bills exceeded that percentile. If a bill exceeded the preselected percentile, MMO generated an Explanation of Benefits (EOB) form that reduced payment with reference to "reason code" "RC40."³ The EOB explained the code as follows:

"RC40: This procedure was reduced because the charges exceeded an amount that would appear reasonable when the charges are compared to the charges of other providers within the same geographic area."

The software was promoted as reducing medical provider payments by 26 percent.

Beginning in January 1998, Farmers implemented its new PIP handling process through MMO—a process that, in Heatherington's words, represented "a significant change in the way we handle our bills." Farmers selected the eightieth percentile as the cutoff point for "reasonable" expenses. That is, Farmers determined that any bills that exceeded the eightieth percentile in the MMO database would be deemed to exceed the "reasonable" charge and would be "reduced" to that eightieth percentile. The program worked as follows: After Farmers' insureds were treated for their injuries, their medical providers sent their bills directly to Farmers.

² The federal government no longer uses the PSRO designations.

³ A different code, "B2," was used if there were not enough data to determine the percentile for a particular region. The database reverted to a different formula in that instance. In a footnote in the recitation of facts in its opening brief, Farmers contends that plaintiffs did not distinguish between reductions based on B2 codes and those based on RC40, thereby "impermissibly expand[ing] the 'class' beyond the scope of the pleaded claims." Farmers does not develop that argument, and we do not discuss it further.

May 21, 1999, Farmers raised the cutoff point to the ninetieth percentile. Three weeks before this class action case was filed, Farmers increased the cap to the ninety-ninth percentile. Reinhart reported to corporate headquarters that this was the right tack to take “while the litigation is pending.”

Plaintiff Strawn initiated this class action against Farmers in August 1999. In May 2000, the trial court issued an order that granted plaintiffs’ motion for class certification, and the case was tried as a class action in November 2003 on plaintiffs’ third amended complaint. That complaint alleged four claims for relief: (1) breach of contract; (2) breach of an implied covenant of good faith and fair dealing; (3) declaratory judgment that Farmers’ practice of denying charges in excess of the eightieth and ninetieth percentiles violated the requirement to pay “reasonable” medical expenses under ORS 742.524(1)(a); and (4) fraud. The jury returned a verdict in favor of plaintiffs on the breach of contract, breach of an implied covenant, and fraud claims. The jury awarded plaintiffs \$757,051.33 in compensatory damages, \$742,948.67 in prejudgment interest, and \$8 million in punitive damages. The court later entered an order granting plaintiffs’ request for declaratory relief, based on the jury’s response to a special interrogatory.

After the jury returned its verdict, the trial court conducted a claims administration process to determine the “nature of the loss, injury, claim, * * * or damage” to individual class members and to distribute the jury award among those class members who submitted claims. ORCP 32 F(2). During that claims administration process, Farmers disputed individual claims, and, at the end of the process, the trial court reduced the compensatory award to \$607,734.40 and prejudgment interest to \$290,589.40. The punitive damages award, however, remained at \$8 million. Subsequently, the trial court awarded plaintiffs approximately \$2.8 million in attorney fees. This appeal followed.

II. ANALYSIS

A. *First and Second Assignments of Error*

On appeal, Farmers advances eight assignments of error spanning nearly every stage of the case—from the

PIP-related expenses on the ground that the expenses were not reasonable and necessary. *Id.* at 310. The insureds asserted claims for “breach of contract, fraud, breach of the implied covenant of good faith and fair dealing, tortious breach of good faith, and intentional interference with contractual relations.” *Id.* at 308. They also sought a declaration that “Farmers may not deny [PIP] benefits to its insureds solely on the basis of generalized criteria not specific to claimants’ injuries[.]”⁵ The trial court granted summary judgment in favor of Farmers, concluding that the insureds had the burden of proving that their PIP-related expenses were reasonable and necessary and that they had not demonstrated a material factual dispute on that question at the summary judgment stage. *Id.* at 309. We affirmed on narrower grounds, concluding that, in the absence of expert testimony about the expenses, the plaintiffs had failed to produce “evidence from which a trier of fact could infer that the claimed expenses were necessarily incurred.” *Id.* at 317.

Subsequently—and after the parties had completed their briefing in this case—the Supreme Court reversed our decision in *Ivanov. Ivanov v. Farmers Ins. Co.*, 344 Or 421, 185 P3d 417 (2008). Before the Supreme Court, Farmers argued that the plaintiffs could not challenge its PIP claims processing practices unless the plaintiffs could “first demonstrate, in response to Farmers’ summary judgment motion, that their claimed medical expenses were necessary. Specifically, Farmers assert[ed], as it did before the trial court and the Court of Appeals, that plaintiffs’ medical bills alone are insufficient to establish the requisite proof of medical necessity.” *Id.* at 428. The Supreme Court rejected Farmers’ argument as well as its framing of the issue:

“Farmers’ argument in that regard, however, and its framing of the issue to be decided on summary judgment, are both premised on a faulty reading of ORS 742.524(1)(a). ORS 742.524(1)(a) creates a presumption that PIP-related claims for medical expenses submitted by a healthcare provider are reasonable and necessary at the time that they

⁵ The plaintiffs also sought a declaration that “Farmers may not deny [PIP] benefits to [its] insureds * * * unless [the] determination is based on a contemporaneous physical examination [IME] of the insured by a physician selected by Farmers.” That aspect of *Ivanov* is not pertinent to our discussion.

“(d) Refusing to pay claims without conducting a reasonable investigation based on all available information [.]”

“(Emphasis added.) Under that statute, an insurer is obligated to conduct a ‘reasonable investigation’ sufficient to support a decision to deny a medical expense claim that is statutorily ‘presumed to be reasonable and necessary.’ Obedience to that prohibition is a component of Farmers’ good faith obligation in this context.”

Ivanov, 344 Or at 430.

In light of that obligation—and the plaintiffs’ focus on the claims review process—the Supreme Court concluded that this court and the trial court had erred in assigning to the plaintiffs the initial burden of establishing medical necessity:

“At the time that Farmers was processing the medical claims at issue here, those claims were presumed to be medically necessary; as a result of that presumption, plaintiffs were not responsible for establishing medical necessity at that point in time. *Consequently, because the gravamen of plaintiffs’ complaint was that Farmers’ review methodology was an impermissible one, Farmers needed to establish that the procedures it employed to deny plaintiffs’ claims satisfied its statutory and common-law duties and did not violate the prohibition set out in ORS 746.230(1)(d).*”

Id. at 430-31 (emphasis added).

In our view, *Ivanov* defeats Farmers’ contention that plaintiffs failed to offer sufficient proof of the reasonableness of their medical expenses. In this case, as in *Ivanov*, the “gravamen of plaintiffs’ complaint was that Farmers’ review methodology was an impermissible one.” *Id.* at 430. Thus, plaintiffs were not required to offer any additional evidence that, at the time the bills were submitted, they were reasonable; the expenses were presumptively reasonable at that point. Instead, Farmers had the burden of establishing that “the procedures it employed to deny plaintiffs’ claims satisfied its statutory and common-law duties.” *Id.* For that reason, the trial court did not err in denying Farmers’ motion for a directed verdict regarding proof of reasonableness, an issue on which plaintiffs enjoyed a statutory presumption.

statutes until they have already paid their bills, why would the PIP reimbursement scheme contemplate direct billing by medical providers to insurers and other communications between providers and insurers? See ORS 742.524(1)(a) (providing that expenses are presumed reasonable and necessary “unless the provider is given notice of denial of the charges not more than 60 calendar days after the insurer receives from the provider notice of the claim for the services” (emphasis added)). The PIP scheme plainly contemplates that insurers will be required to pay PIP benefits when the insured becomes legally obligated to pay the medical expenses, whether the insured has already discharged that obligation or not. Thus, we reject Farmers’ premise that plaintiffs were required to prove that they actually paid the medical expenses that Farmers denied as unreasonable.⁷

Next, Farmers contends that certain plaintiffs were not injured because they received compensation from third-party tortfeasors and that, under the PIP statutes, plaintiffs would have been required to reimburse Farmers for any PIP payments out of any third-party recovery. See ORS 742.536. Reimbursement of PIP insurers, however, is a separate aspect of the PIP scheme, and insurers must follow certain procedures to obtain that reimbursement. See, e.g., *Farmers Ins. Co. v. Conner*, 219 Or App 337, 182 P3d 878, *rev den*, 345 Or 94 (2008); *Gaucin v. Farmers Ins. Co.*, 209 Or App 99, 146 P3d 370 (2006). Farmers offers no principled explanation as to why plaintiffs would have had the burden to refute Farmers’ potential entitlement to reimbursement of benefits that were never paid in the first place.⁸

⁷ In a related vein, Farmers argues that plaintiffs could not have been injured by its refusal to pay certain medical expenses because “patients who receive PIP benefits have no obligation to pay ‘unreasonable’ medical bills.” That argument assumes, of course, that the medical bills were “unreasonable”—an assumption that cannot be made on this record in light of the statutory presumption of reasonableness.

⁸ Farmers’ final argument regarding proof of injury is that plaintiffs’ evidence established only that “the list of charges submitted to the jury had been recommended for reduction by the bill review vendor.” (Emphasis added.) As we noted earlier, 228 Or App at 460 n 4, Farmers’ factual premise—that the bills were only recommended for reduction—is not viable in light of our standard of review. Plaintiffs’ evidence, when viewed in the light most favorable to them, established that the “recommendation” was more than that.

the promise will be performed in the future may be a misrepresentation.”

That language is drawn from cases involving “promissory fraud” or “fraud in the inducement,” *i.e.*, cases in which false promises were made to induce another to act or refrain from acting. See *Elizaga v. Kaiser Found. Hospitals*, 259 Or 542, 548, 487 P2d 870 (1971) (“A failure to perform a promise is not a basis for an action for fraud. Making a promise, however, with the knowledge that it probably cannot be performed or with reckless disregard whether the promisor can or cannot perform can be the basis for an action of fraud.”). Here, plaintiffs assert that Farmers continued to collect insurance premiums knowing that it did not intend to pay reasonable medical expenses as it had promised; whether plaintiffs’ theory of fraud is actionable, in light of the jury instructions and evidence in this case, is at the very least subject to reasonable dispute. Accordingly, we reject Farmers’ unpreserved contention that plaintiffs failed to state an actionable claim for fraud.

4. *Proof of reliance*

Farmers’ final argument under its first two assignments of error is that plaintiffs were required to present evidence that each member of the class relied on Farmers’ misrepresentation regarding the payment of PIP benefits and that plaintiffs failed to present that proof. According to Farmers, the trial court actually eliminated the element of reliance altogether, “ruling that class members did not need to establish reliance because there was evidence of ‘omissions’ and ‘half-truths.’”

Farmers’ characterization of the trial court’s ruling, however, is not supported by the record. In response to Farmers’ motion for a directed verdict, plaintiffs’ counsel made the following argument regarding reliance:

“When you have omissions here—these are omission cases, so we don’t need to prove that you acted in a particular way. *We have omissions, and we have people refraining from acting because of the misrepresentations being made here, and there are a variety of them.*”

expenses as part of its PIP coverage; (2) selected an arbitrary percentile cutoff that would increase its profits at the expense of insureds; and (3) continued to collect premiums from its insureds without informing them that it had decided not to pay all reasonable and necessary expenses. From that evidence, a reasonable trier of fact could conclude that the payment of reasonable and necessary PIP-related expenses was a material part (and, in fact, a statutorily required part) of the insurance policy and could therefore reasonably infer that plaintiffs relied on Farmers' misrepresentation that it would pay reasonable and necessary PIP-related expenses when they continued to pay their premiums. That is, on this record, a reasonable trier of fact could conclude that plaintiffs acted to their detriment in paying premiums for PIP coverage that Farmers never intended to provide. *Cf.* Richard A. Lord, 27 *Williston on Contracts* § 69:32, 12 (4th ed 2003) ("Where representations have been made in regard to a material matter and action has been taken, in the absence of evidence showing the contrary, it will be presumed that the representations were relied on."); *Restatement (Second) of Contracts* § 167 comment b (1981) (where fraud or misrepresentation is material with reference to a transaction subsequently entered into, "it is assumed in the absence of facts showing the contrary, that the recipient attached importance to the truth of a misrepresentation"). The trial court did not err in denying Farmers' motion for a directed verdict on the issue of reliance.

Nor has Farmers explained how the evidence of reliance would differ from class member to class member in this case; the same misrepresentations were made to each member of the class. Thus, we are not persuaded that the trial court was required to decertify the class because of individual questions regarding reliance.¹⁰

¹⁰ Throughout its briefing, Farmers cites cases from federal courts that have considered class certification issues in similar cases involving payment of PIP benefits. Those cases, which were decided under the Federal Rules of Civil Procedure, are of limited value to us because of the difference between FRCP 23, the federal rule governing class certification, and ORCP 32. *See Shea v. Chicago Pneumatic Tool Co.*, 164 Or App 198, 206-07, 990 P2d 912 (1999), *rev den.*, 330 Or 252 (2000) (discussing the differences between Oregon and federal law regarding the predominance of common questions of law and fact as prerequisites for class certification). Apart from noting that federal courts have often elected not to certify these types of cases, Farmers does not explain why the same result obtains under ORCP 32.

“necessity” (as opposed to reasonableness) was not at issue in the case and that Farmers was “estopped” from raising a new ground for denying payment of the benefits at that point in the case. Given the timing and circumstances of Farmers’ proffer, the trial court did not err in excluding that evidence. *Cf. ABCD...Vision v. Fireman’s Fund Ins. Companies*, 304 Or 301, 307, 744 P2d 999 (1987) (explaining that “timely disclosure of the reasons for denying a claim can estop the insurer from subsequently denying a claim on other grounds”).

C. *Fourth assignment of error*

Farmers’ fourth assignment asserts that the trial court erred in requiring Farmers to rebut the presumption under ORS 742.524(1)(a) that the medical expenses were reasonable. As we explained with respect to Farmers’ first and second assignments of error, plaintiffs were entitled to that presumption under the reasoning of *Ivanov*. We reject plaintiffs’ fourth assignment for the same reason.

D. *Fifth assignment of error*

In its fifth assignment of error, Farmers contends that “the trial court erred in permitting a jury to determine the meaning and application of ORS 742.524(1)(a).” According to Farmers, the court erred in instructing the jury as follows:

“The court instructed the jury to determine whether ‘Farmers breached the insurance contracts by failing * * * to pay all reasonable medical expenses of the class members that exceeded the 80th and later the 90th percentile.’ For the implied covenant claim, the court instructed the jury to determine whether Farmers ‘breached its duty of good faith and fair dealing * * * by unilaterally refusing to pay for any and all medical expenses usually and customarily charged by providers to plaintiff and class members that exceeded the 80th and later the 90th percentile for such charges as determined by defendants,’ contrary to ‘the reasonable expectations’ of the class members. The court then instructed the jury to assume that all the bills were reasonable and to construe ‘any ambiguity of any term’ in the policy against Farmers.”

(Record citations omitted.) Those instructions, Farmers argues, presented the jury with a legal question:

until argument; Farmers has made no attempt to comply with ORAP 5.45(2) or (4). Many of the rulings do not fit Farmers' statement of the nature of the assignment. Even if Farmers had properly framed separate assignments of error, the rulings involve diverse legal issues and are not suited for combined argument."

In its reply brief, Farmers concedes that its fifth assignment of error is a "clean up" assignment of four interrelated trial court rulings, but urges this court not to "indulge Plaintiffs' exaltation of form over substance."

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.

E. Sixth assignment of error

In its sixth assignment of error, Farmers contends that plaintiffs' declaratory judgment claim was moot by the time that the trial court entered judgment on that claim. The judgment entered by the trial court, which was based on the jury's verdict, declared that Farmers "use of the 80th and later the 90th percentiles for reduction of medical expenses, in conjunction with its review and appeal process," breached the insurance policies, breached the implied covenant of good faith and fair dealing, and "is and was in violation of ORS 742.524(1)(a)." By the time the court entered that judgment, ORS 742.525 had been enacted. Or Laws 2003, ch 813, § 4. That statute expressly limited provider charges for PIP claimants based on workers' compensation fee schedules for medical, hospital, dental, surgical, ambulance, and prosthetic services—schedules calculated not unlike MMO's percentiles. According to Farmers, that legislation rendered

punitive damages. After the post-verdict claims administration process, the trial court reduced the compensatory damages award to \$607,734.40 and the prejudgment interest award to \$290,589.40. The court, however, denied Farmers' request to reduce the punitive damages award.

On appeal, Farmers argues that an \$8 million punitive damages award violates its rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.¹² The Oregon Supreme Court explained in *Goddard v. Farmers Ins. Co.*, 344 Or 232, 251, 179 P3d 645 (2008):

"Punitive damages awards that are 'grossly excessive' violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution, because excessive punitive damages serve no legitimate purpose and constitute arbitrary deprivations of property. *BMW of North America, Inc. v. Gore*, 517 US 559, 568, 116 S Ct 1589, 134 L Ed 2d 809 (1996). Excessive punitive damages also implicate the requirement of fair notice that is enshrined in the Due Process Clause: Due process dictates that 'a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose.' *Id.* at 574."

Our methodology for reviewing a punitive damages award under the Due Process Clause involves three steps. First, we must determine whether there is a factual predicate for a punitive damages award, reviewing the relevant evidence in the light most favorable to the party who obtained the award. *Goddard*, 344 Or at 261. Second, we examine the predicate facts in light of the three "guideposts" originally set out by the United States Supreme Court in *Gore* for determining whether an award comports with the strictures of due process. Those guideposts are

"(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages

¹² Farmers also contends that the punitive damages award must be reversed in its entirety because Farmers was entitled to a directed verdict on the fraud claim, the claim on which punitive damages were awarded. As discussed earlier in this opinion, we reject Farmers' arguments regarding the directed verdict motion.

of thumb, the federal constitution prohibits any punitive damages award that significantly exceeds four times the amount of the injured party's compensatory damages, as long as the injuries caused by the defendant were economic, not physical." *Id.* at 260. That said, a higher ratio of punitive damages to actual or potential harm may be permitted under certain "narrow circumstances," such as "(1) when a particularly egregious act causes only a small amount of economic injury; (2) when the injury is hard to detect; (3) when it is difficult to place a monetary value on noneconomic harms; and (4) when 'extraordinarily reprehensible' conduct * * * is involved." *Id.* at 270. None of those circumstances is present here. Even assuming that Farmers' act was "particularly egregious,"¹³ the jury awarded plaintiffs (as a class) substantial compensatory damages for economic injury. Moreover, no claim of noneconomic harm was involved; the harm to plaintiffs is not difficult to detect;¹⁴ and Farmers' conduct "is in no way comparable to [other cases of 'extraordinarily reprehensible' conduct], for example, Philip Morris's 50-year campaign to delude a large part of the population of Oregon about the potentially devastating physical effects of smoking its products." *Id.* Thus, we presume that the maximum constitutionally permissible punitive damages award in this case is

¹³ That assumption is itself dubious, in light of our prior case law. *Bocci v. Key Pharmaceuticals, Inc.*, 189 Or App 349, 360, 76 P3d 669, *adh'd to on recons*, 190 Or App 407, 79 P3d 908 (2003) (defendant knowingly withholding or misrepresenting information from the FDA and physicians about its product's risks of toxicity were highly reprehensible but did not "rise to the level of 'particularly egregious' " acts justifying a higher ratio). *But see Hamlin v. Hampton Lumber Mills, Inc.*, 222 Or App 230, 246, 193 P3d 46, *modified as to prevailing party designation*, 227 Or App 165, 205 P3d 70 (2008), *rev allowed*, 346 Or 157 (2009) ("[I]t would appear that, under circumstances where the compensatory damage award can be properly characterized as 'small,' we need not dwell on whether the conduct was 'particularly egregious.'").

¹⁴ Although plaintiffs' injuries were difficult to detect in the sense that they involved small dollar amounts and deceitful conduct, this case does not appear to present the type of difficult-to-detect injury that the United States Supreme Court envisioned in *Gore* as deserving of a higher ratio. In *Gore*, the Court used "cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine" as examples of cases in which the compensatory award does not adequately account for the actual or potential harm suffered by the plaintiffs. *Gore*, 517 US at 582. Other than generalized statements that insureds suffered stress as the result of Farmers' conduct, plaintiffs do not contend that they suffered any additional injury that cannot be detected or adequately accounted for in a compensatory award.

Again, the first guidepost requires us to assess “the degree of reprehensibility of the defendant’s misconduct.” *Campbell*, 538 US at 418. We consider several “aggravating factors” as part of that assessment, including whether

“the harm caused was physical as opposed to economic; whether the tortious conduct evinced indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; whether the conduct involved repeated actions; and the harm was the result of intentional malice, trickery, deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.”

Goddard, 344 Or at 253 (internal quotation marks and citations omitted).

Once more, viewed in the light most favorable to plaintiffs, the evidence established that Farmers intentionally engaged in a pattern of misrepresentation designed to increase its profits at the expense of its insureds. Thus, in this case, two of the *Gore* factors are present: First, the harm involved repeated actions over the course of the class period; second, the harm was the result of “intentional malice, trickery, [or] deceit” rather than mere accident.

Our qualitative assessment of those two *Gore* factors is informed by our analysis of the first guidepost in *Hamlin v. Hampton Lumber Mills, Inc.*, 222 Or App 230, 239-40, 193 P3d 46, *modified as to prevailing party designation*, 227 Or App 165, 205 P3d 70 (2008), *rev allowed*, 346 Or 157 (2009)—a case, like this one, involving only economic loss:

“Oregon courts have had several opportunities to apply those factors in cases where, as here, the plaintiffs sustained only financial harm. Most recently, *Goddard* involved an employee of the defendant insurer who engaged in extensive and repeated ‘stonewalling’ and ‘low-balling’ during claims evaluation and settlement processes that exposed its insured to a ‘devastating’ verdict in a no-defense case. 344 Or at 262. The Supreme Court described the defendant’s actions as ‘very reprehensible,’ *id.* at 268, and found that three *Gore* factors were present: the defendant knew of the plaintiff’s financial vulnerability, the evidence

that, “[t]aken together with the consideration that defendant’s wrongdoing was of a purely economic nature, *our analysis leads us to conclude that defendant’s conduct was of moderate reprehensibility.*” *Id.* at 241 (emphasis added).¹⁶

As was the case in *Hamlin* and *Vasquez-Lopez*, the presence of two of the *Gore* factors leads us to conclude that Farmers’ actions were of moderate reprehensibility. On the one hand, the harm was financial only, did not involve a risk to health or safety of others, and was not directed at a financially vulnerable class of persons.¹⁷ Moreover, the risk of financial harm (and the actual harm) to any *individual* member of the class was relatively small. In fact, the success of Farmers’ scheme was predicated, in part, on the theory that the reductions were too small to be worth litigating. On the other hand, Farmers engaged in a pattern of intentional deceit that would expose a large number of insureds to economic loss. Thus, in our view, in the universe of reprehensibility, the case appears to be somewhat on par with *Hamlin* and *Vasquez-Lopez*, cases that involved conduct that was more malevolent than in this case but that was carried out on a much smaller scale.

As the court explained in *Goddard*, the first guidepost “does not generate numerical answers at all, because the

¹⁶ After *Hamlin*, we decided *Lithia Motors, Inc. v. Yovan*, 226 Or App 572, 204 P3d 120 (2009), a case in which the trial court reduced an award of punitive damages from \$100,000 to \$2,000. In that case, a car dealership undertook efforts to repossess a vehicle that it no longer had a right to possess, thereby violating Oregon’s Unlawful Debt Collection Practices Act. We affirmed by an equally divided court in an en banc decision. Five members of this court agreed that the “reprehensibility of plaintiff’s conduct, while significant, is not egregious.” 226 Or App at 585 (Edmonds, J., concurring). Two other judges “agree[d] that plaintiff’s conduct is not very reprehensible in the universe of cases in which juries have awarded punitive damages” but nonetheless concluded that “low reprehensibility” could not be used to decrease the amount of punitive damages below a 9:1 ratio to compensatory damages. 226 Or App at 598 (Sercombe, J., dissenting).

¹⁷ Plaintiffs contend that the victims of Farmers’ fraud were individuals who were injured in accidents and that, as a result of unpaid medical bills, those particularly vulnerable victims suffered emotional distress as well. Plaintiffs did not seek emotional distress damages in this case, and there is no evidence that Farmers specifically directed its percentile reductions at financially vulnerable individuals. However, even assuming the presence of those additional factors, they would not affect our ultimate conclusion regarding reprehensibility, given the relatively small amounts of money involved with respect to the overwhelming majority of class members.

as a direct predictor of the constitutional limits of an individual punitive damages award." (Emphasis added.)). However, the relatively high civil penalties for Insurance Code violations do militate in favor of a more significant punitive damages award, toward the higher end of the presumptive limit, but not an award that is nine times plaintiffs' actual or potential harm.

Based on the foregoing review, we conclude that a punitive damages award of \$8 million violates Farmers' due process rights on the facts of this case. Our remaining task is to determine the highest constitutional amount of punitive damages that plaintiffs can recover. As our discussion above suggests, under the second guidepost, we begin with the presumption that an award greater than four times plaintiffs' actual and potential harm would violate due process. Under the first guidepost, we have concluded that the conduct in this case is moderately but not severely reprehensible. That guidepost suggests that a permissible award would be somewhere near the highest presumptive ratio of four to one, but certainly not in excess of it. Under the third guidepost, as previously discussed, the significance of comparable sanctions also suggests that a higher punitive damages award is justified—again, something that approaches the presumptive ratio but does not exceed it. Thus, all three guideposts suggest that four to one is the proper ratio of punitive damages to actual or potential harm in this case.

For that reason, in light of the scope and nature of Farmers' conduct, the number of persons affected, and the comparable civil penalties that inform our analysis, we conclude that a punitive damages award that is four times plaintiffs' actual or potential harm is all that due process will bear. Accordingly, we vacate the judgment with instructions to grant Farmers' motion for a new trial limited to punitive damages, unless plaintiffs agree to remittitur of punitive damages to four times their compensatory damages and pre-judgment interest.

G. *Eighth assignment of error*

In its eighth assignment of error, Farmers challenges the trial court's award of attorney fees to plaintiffs. Farmers contends that any attorney fee award to plaintiffs is

statute? Although the text of the statute is silent on that issue, the legislative history of the 1999 amendments provides some guidance. That history indicates that the amendments were intended to eliminate a potential incentive to litigate rather than arbitrate PIP claims. *See, e.g.*, Audio Recording, Senate Floor Debate, SB 504, May 28, 1999, at 1:02 (statement of Sen Neil Bryant), <http://www.leg.state.or.us/listn/archive/archive.1999s/SENATE-199905280953.ram>. Considering that the amendments were intended to influence the insured's decision to litigate rather than arbitrate—specifically, to deter litigation—it is not apparent to us that the legislature would have intended the amendments to apply retroactively to circumstances like these, where plaintiffs' initial decision to litigate rather than arbitrate was made well *before* those amendments took effect.

Moreover, as a general matter, courts “assume that the legislature intends its amendments to existing legislation to apply prospectively unless the legislature signals an intention to apply an amendment retrospectively.” *Black v. Arizala*, 337 Or 250, 271, 95 P3d 1109 (2004). Similarly, the Supreme Court has “ordinarily decline[d] to construe a legislative amendment to have a retrospective effect if to do so would ‘impair existing rights, create new obligations or impose additional duties with respect to past transactions.’” *Id.* (citations omitted). In this case, ORS 742.061 (1997) was the source of plaintiffs' right to attorney fees. Retroactive application of the 1999 amendments to that statute would impair that right by giving a different legal effect to the parties' past actions. *Cf. Robert Camel Contracting, Inc. v. Krautscheid*, 205 Or App 498, 502, 134 P3d 1065 (2006) (concluding that ORS 20.077 was merely procedural, and therefore retroactive in effect, because it “neither offers nor alters any rights; it does not provide for a remedy in the form of costs or otherwise, unless the underlying contract or statute so provides”). In the absence of some indication that the legislature intended to retroactively eliminate the plaintiffs' ability to recover attorney fees, “we adhere to our usual assumption that the legislature intended a prospective application of its amendment[s].” *Black*, 337 Or at 271.

Farmers' final argument is that the attorney fee award is unreasonable in this case given the “modest size of the policy-based award” to class members. Farmers does not

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **PETITION FOR REVIEW** on the following named person(s) on the date indicated below by

- mailing with postage prepaid
- hand delivery
- facsimile transmission
- overnight delivery
- email
- notice of electronic filing using the Cm/ECF system

to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at his or her last-known address(es) indicated below.

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