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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MARK STRAWN, On His Own Behalf and)
as Representative of a Class of)
Similarly Situated Persons,)

Plaintiff,)

v.)

FARMERS INSURANCE COMPANY OF)
OREGON, a Stock Insurance Company,)
Defendant)

Case No. 9908-09080

FINDINGS OF FACT AND
CONCLUSIONS OF LAW, AND
ORDER GRANTING CLASS
CERTIFICATION

Plaintiff's Motion for Class Certification came before the Honorable Harl H. Haas for hearing on March 14, 2000. Plaintiff appeared personally and with his attorneys, Richard S. Yugler and James S. Crane of Landye Bennett Blumstein LLP. Defendant appeared through its attorneys, Mark H. Wagner of Hoffman, Hart and Wagner LLP and Marcie A. Eisenstein of Schiff, Hardin & Waite. Having considered the memoranda, exhibits, evidence, and arguments of the parties, and being fully advised in the premises, the Court makes and enters the following Findings of Fact, Conclusions of Law, and Order Granting Class Certification.

FINDINGS OF FACT

1. Plaintiff Mark Strawn had a policy of automobile liability insurance issued by defendant Farmers Insurance Company of Oregon ("Farmers"), policy no. 73-12705-50-06 (the "policy"). The policy was effective on October 3, 1997 and during all times referenced below.

1 2. Defendant Farmers is in the business of providing motor vehicle liability insurance,
2 inclusive of Personal Injury Protection Benefits ("PIP") benefits, to policyholders in Oregon.
3 Farmers is a subsidiary of Farmers Insurance Group. Mid-Century Insurance and Truck Insurance
4 Exchange of Oregon are subsidiaries of Farmers Insurance Group.

5 3. The policy issued to plaintiff and other class members by Farmers contained Farmers'
6 standard terms and conditions for PIP coverage which, in pertinent part, included the following:

7 **"Coverage D - Personal Injury Protection,**

8 "We will provide the benefits shown in the schedule for bodily injury to an insured
9 caused by an accident arising out of the operation or use of a motor vehicle."
10 *****

11 **"A. Medical Expenses**

12 "We will pay for all expenses incurred within one year from the date of the
13 accident which caused the injury.
14 *****

15 **"Additional Definitions Used In This Part Only**

16 **"Medical Expense** means all reasonable and necessary expenses of medical,
17 hospital, dental, X-Ray services, ambulance services, drugs, artificial
18 substitutes for parts of the body, eyeglasses and nursing services.

19 **"Personal Injury Protection Benefits** means the benefits required by
20 Sections 742.520 and 742.524 O.R.S."
21

22 4. ORS 742.520 to 742.544 required automobile liability insurance policies to provide
23 PIP benefits to insureds. ORS 742.524(a) required the payment for the injury or death of each
24 insured for "[a]ll reasonable and necessary expenses of medical, hospital, dental, surgical,
25 ambulance and prosthetic services incurred within one year after the date of the person's injury..."
26

27 5. On or about November 20, 1997, plaintiff was injured in a motor vehicle accident in
28 Multnomah County. Plaintiff incurred medical and hospital charges in connection with his injuries.

29 6. Class members were injured in accidents in which expenses for medical, hospital,
30 dental, surgical, ambulance services, prosthetic services, x-ray services, drugs, eyeglasses and
31 nursing services were rendered by providers ("medical and hospital providers") of such services.

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1 7. Farmers made direct payment to plaintiff's and class members' medical and hospital
2 providers under PIP. Farmers did not pay the full amounts charged by providers as described below.

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4 8. For plaintiff's medical and hospital providers, Drs. Kazmaryrz and Mayberry,
5 Farmers paid an emergency room physician \$8.30 cents less than the physician charged, a trauma
6 hospital \$7.00 less than the hospital charged, and a neuropsychologist \$412.50 less than the
7 neuropsychologist charged.

8 9. Beginning on or about January 26, 1998, Farmer's procedure for handling claims for
9 medical expense payments under PIP included a review of bills submitted by providers of medical,
10 hospital and other services payable under PIP. The bill reviews were performed by Medical
11 Management Online, Inc. ("MMO"). The bills were reviewed to determine which, if any, exceeded
12 the 80th percentile of charges for comparable services in the same geographic area in which the
13 claimant received the service from such medical or hospital provider.

14 10. On or about May 21, 1999, the review level was changed to the 90th percentile, and
15 on or about July 31, 1999, to the 99th percentile. The percentile levels of 80%, 90% and 99% were
16 selected by Farmers.

17 11. MMO reviewed the bills by inputting the uniform billing codes ("CPT"), the uniform
18 diagnosis codes ("ICD9"), and the amounts of the charges for each such code shown on a particular
19 bill into its computer and then used the computer to compare those charges against those in a
20 database of charges for the same codes in a given geographic area.

21 12. Farmers reduced PIP payments to plaintiff and to class members on the basis of the
22 review by MMO. The payments were reduced to the 80th percentile level during the period January
23 27, 1998 to May 21, 1999, and to the 90th percentile level from May 21, 1999, to July 31, 1999.

24 13. Farmers informed its claimants that the percentile reductions were made for the
25 reason that the "charges exceeded an amount that would appear reasonable when the charges are
26 compared to charges of other providers within the same geographic area." This explanation of

1 percentile reductions was referenced by Farmers and MMO as Reason Codes "RC 40" or "B2." An
2 explanation of such reduced payments was made directly to medical and hospital providers or to
3 reimbursed policyholders.

4 14. During the period from January 27, 1998 to May 21, 1999, Farmers informed its PIP
5 claimants and their medical and hospital providers that it was reducing its PIP payments to the 80th
6 percentile, in regard to the bills on which the charges were identified as exceeding the 80%
7 screening level. The same procedure occurred during the period from May 21, 1999 to about July
8 31, 1999 during which Farmers reduced PIP payments to the 90% level.

9 15. The explanation provided by Farmers about the reductions inaccurately stated that
10 the reduction meant that the charges were greater than the amount charged by 80 out of 100
11 physicians in a geographic area. The reduction more accurately related to 80 out of 100 similarly
12 coded procedures in a geographic area.

13 16. Farmers Insurance Group administered payment of PIP benefits by its subsidiaries
14 for plaintiff and class members, the plaintiff and class members relied upon Farmers to do so, and
15 Farmers Insurance Group and its subsidiaries made direct PIP payments to medical and hospital
16 providers based upon the Reduction Codes RC 40 and B2. Evidence was adduced to support
17 plaintiff's allegation that, by reducing PIP payments based upon reason codes RC 40 or B2, plaintiff
18 and class members were damaged in the amount of the reductions.

19 17. Evidence was adduced to support plaintiff's allegation that in issuing its policies of
20 insurance, Farmers failed to disclose to plaintiff and other class members that Farmers would reduce
21 payment of medical and hospital expense based upon a predetermined percentile above which it
22 determined the expense to be unreasonable.

23 18. Farmers and MMO maintain computerized records showing, among other things, the
24 PIP claimant's name, the claim number, a provider number, the date the medical or hospital service
25 was provided, the amount of the bill, the amount by which the bill was reduced based upon reason
26 code RC 40 or B2. The identity of class members and amount of reductions may be ascertained

1 from this information.

2 19. Based upon MMO's records, as many as 7,500 PIP claimants were effected by
3 Farmers' reduction of PIP payments on the basis of reason codes RC 40 and B2, and the average
4 amount of reduction in payments per PIP claimant was approximately \$175.

5 20. Farmers has stipulated that the class is so numerous that joinder of all members is
6 impracticable.

7 21. Farmers asserts that some of the PIP claims during the period from January 26, 1998
8 to July 21, 1999, were arbitrated. Farmers kept a log of such arbitrations. Farmers retained
9 approximately four to six law firms to handle those arbitrations. The identity of such persons who
10 submitted their claims to binding arbitration may be ascertained from the log and the law firms'
11 records.

12 22. Farmers filed a motion to abate this case pending arbitration of plaintiff's PIP claim.
13 The Court has denied Farmers' motion to abate plaintiff's claim. Class members are not precluded
14 from submitting their individual PIP disputes to binding arbitration during the pendency of this
15 action.

16 23. On or about March 26, 1999, plaintiff provided defendant with the prelitigation notice
17 for a class action required by ORCP 32H. Farmers did not comply with the demands made in the
18 notice.

19 24. Plaintiff is represented by Richard S. Yugler of the law firm of Landye Bennett
20 Blumstein LLP. Mr. Yugler and the law firm have experience in class action and other complex
21 litigation and are qualified to serve as class counsel.

22 25. Another case pending before this Court, *Tyler, et al. v. Farmers Insurance Company*,
23 Case No. 99-1-10826, involves allegations, among others, similar to the allegations in the case at
24 hand. The Court has neither granted nor denied class certification motions in that case. The putative
25 class representatives in the *Tyler* case have withdrawn any claim for class action or certification
26 based upon the reductions under RC 40 or B2 subsequent to hearing on plaintiff Strawn's motion

1 for class certification.

2 26. All Conclusions of Law that are properly Findings of Fact are hereby incorporated
3 by reference.

4 CONCLUSIONS OF LAW

5 1. The Court has jurisdiction over the subject matter of this lawsuit and over the parties.

6 2. Venue is proper in the Circuit Court for Multnomah County.

7 3. The class certified herein is so numerous that joinder of all members is impracticable.
8 ORCP 32A(1).

9 4. There are questions of law or fact common to all members of the class certified
10 herein. ORCP 32A(2). These questions include, but are not necessarily limited to, the following:

11 a. Whether Farmers reduced PIP payments for medical or hospital expenses by
12 application of a statistical or mathematical method;

13 b. Whether Farmers had a business policy or practice to reduce PIP payments
14 for medical or hospital expenses by application of a statistical or mathematical method;

15 c. If Farmers reduced PIP payments for medical or hospital expenses by
16 application of a statistical or mathematical model or cap, whether the selection and particulars of
17 such method were arbitrary;

18 d. Whether all expenses reduced by Farmers from a medical or hospital provider
19 that exceed the 80th or 90th percentiles of charges for similar services used by Farmers ("Farmers'
20 percentiles") are unreasonable;

21 e. Whether expenses by a medical or hospital provider that exceed Farmers'
22 percentiles are reasonable due to factors that may not have been considered by Farmers;

23 f. Whether the usual and customary charges by a medical or hospital provider
24 are reasonable if they exceed Farmers' percentiles;

25 g. Whether Farmers' decision to reduce PIP payments for medical or hospital
26 expenses may be based solely on an arbitrarily selected statistical or mathematical method;

1 h. Whether Farmers' reduction of PIP payments for medical or hospital expenses,
2 if done on the basis of a statistical or mathematical method, is a reliable and accurate basis for
3 rejecting payment upon grounds of unreasonableness in the absence of an opinion of
4 unreasonableness by a qualified medical or hospital provider with knowledge of usual and
5 customary charges in the community.

6 i. Whether Farmers or plaintiff bears the burden of proving that a charge in
7 excess of Farmers' percentiles is reasonable;

8 j. Whether Farmers' owed a fiduciary duty to members of the class certified
9 herein to protect them from economic loss in the administration and payment of PIP benefits; and

10 k. Whether Farmers represented that it would pay under its PIP coverage all
11 reasonable and necessary medical expenses to the policy limits, and whether such representation was
12 false and, if so, whether such falsity was intentional or negligent.

13 5. The claims of plaintiff as the representative party for breach of contract, breach of the
14 covenant of good faith and fair dealing, declaratory relief, breach of fiduciary duty, negligent
15 misrepresentation and deceit are typical of the claims of the class certified herein. ORCP 32A(3).
16 These claims include, but are not necessarily limited to, the following allegations typical in the
17 claims of class members that:

18 a. Farmers' refusal to pay all reasonable and necessary medical and hospital
19 expenses to the limits of its liability on the basis of the percentiles constituted a breach of its contract
20 of insurance containing its standard terms governing PIP coverage and benefits, entitling members
21 of the class to monetary damages;

22 b. Farmers' refusal to pay all reasonable and necessary medical and hospital
23 expenses to the limits of its liability on the basis of the percentiles breached the covenants of good
24 faith and fair dealing implied in its contract of insurance containing its standard terms governing PIP
25 coverage and benefits, entitling members of the class to monetary damages;

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1 c. Farmers' refusal to pay all reasonable and necessary medical and hospital
2 expenses to the limits of its liability on the basis of the percentiles constituted a violation of ORS
3 742.520 *et seq.*, entitling members of the class to a judicial declaration that such conduct is
4 wrongful;

5 d. Farmers' refusal to pay all reasonable and necessary medical and hospital
6 expenses to the limits of its liability on the basis of the percentiles was a breach of its fiduciary duty
7 to protect the members of the class from economic loss in the administration and payment of PIP
8 benefits;

9 e. Farmers' representation that it would pay under PIP coverage all reasonable
10 and necessary medical expenses to the policy limits was an intentional misrepresentation, entitling
11 plaintiff and members of the class to compensatory and, possibly, punitive damages; and

12 f. Farmers' representation that it would pay under PIP coverage all reasonable
13 and necessary medical expenses to the policy limits was a negligent misrepresentation, entitling
14 plaintiff and members of the class to compensatory damages.

15 6. The plaintiff and his counsel will fairly and adequately protect the interests of the
16 class certified herein. ORCP 32A(4).

17 7. Plaintiff has complied with the prelitigation notice provisions of ORCP 32H. ORCP
18 32A(5).

19 8. A class action is superior to other available methods for the fair and efficient
20 adjudication of the controversy. ORCP 32B. In reaching this conclusion, the Court has considered
21 the following matters pertinent:

22 a. Certification of the class will not create a risk of inconsistent or varying
23 adjudications with respect to members of the class which would establish incompatible standards
24 of conduct for defendant Farmers, ORCP 32B(1)(a);

25 b. Certification of the class would not create a risk of adjudication with respect
26 to members of the class which would as a practical matter be dispositive of the interests of the other

1 members not parties to the adjudications or substantially impair or impede their ability to protect
2 their interests, ORCP 32B(1)(b);

3 c. Plaintiff seeks declaratory relief with respect to the class as a whole, ORCP
4 32B(2);

5 d. Questions of law or fact common to the members of the class predominate
6 over any questions affecting only individual members, ORCP 32B(3);

7 e. In light of the complexities of the issues, the average size of the amount in
8 controversy for each class member, and the expenses of litigation, the members of the class do not
9 have an interest in individually controlling the prosecution of separate actions that outweighs the
10 interest in a classwide adjudication, ORCP 32B(4);

11 f. The Court can administer the cases involving similar allegations against
12 Farmers such that the nature and extent of the cases other than the one at hand do not mitigate
13 against the maintenance of this action as a class action, ORCP 32B(5);

14 g. The numerosity of the class, the complexities of the issues, the average size
15 of the amount in controversy for each class member, and the expense of litigation render it desirable
16 to concentrate the litigation of the claims in this forum, ORCP 32B(6);

17 h. A class action is manageable and the most efficient means of managing this
18 controversy. The difficulties likely to be encountered in the management of this action as a class
19 action are not such so as to render other available means of adjudication superior to a class action
20 proceeding, ORCP 32B(7);

21 i. The claims of individual class members are insufficient in the amounts or
22 interests involved, in view of the complexities of the issues and the expenses of the litigation, to
23 afford significant relief to the members of the class, ORCP 32B(8).

24 9. Each Conclusion of Law shall remain the law of the case notwithstanding any
25 subsequent appellate ruling on this Order, unless such appellate ruling necessarily invalidates a
26 Conclusion.

1 g. "Codes RC 40 and B2" mean the coded reasons designated by Farmers or
2 Medical Management Online, Inc. as grounds for reducing benefit payments during the class period;

3 h. "Barred" means bound by binding PIP arbitration with or a final judgment
4 resulting from a PIP dispute with Farmers;

5 5. Pursuant to ORCP 32E(2) and 32F(1), plaintiff shall prepare and submit for approval
6 a proposed notice to class members and a proposed plan for promulgating such notice.

7 6. Within thirty (30) days, the parties shall confer and attempt to agree upon a trial date.

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9 DATED THIS ___ day of _____, 2000.

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Judge of the Circuit Court

13 Presented by:

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Richard S. Yugler, OSB #80416
16 LANDYE BENNETT BLUMSTEIN, LLP

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9 DATED THIS 15 day of June, 2000.

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✓ HARL H. HAAS

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Judge of the Circuit Court

13 Presented by:

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Richard S. Yugler, OSB #80416
LANDYE BENNETT BLUMSTEIN, LLP

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDER GRANTING CLASS CERTIFICATION** on the following attorney(s):

Mark Wagner
Hoffman Hart & Wagner LLP
1000 SW Broadway, 20th Floor
Portland, OR 97205

Of Attorneys for Defendant

by first class mail on the 12th day of June, 2000.

LANDYE BENNETT BLUMSTEIN LLP

By: 

Kathy Baker, Legal Assistant to
Richard S. Yungler, P.C., OSB #80416
Of Attorneys for Plaintiff