

OTLA Submission to the Financial Services Regulatory Authority (FSRA)

*Proposed Unfair or Deceptive Acts or Practices (UDAP)
rule*

March 18, 2021

The Ontario Trial Lawyers Association (OTLA) is pleased to provide input to the Financial Services Regulatory Authority of Ontario (FSRA) regarding its public consultation seeking feedback from insurance consumers, industry and other interested stakeholders for its draft rule defining outcomes that are unfair or otherwise harmful to consumers (Unfair or Deceptive Acts or Practices: UDAP).

OTLA was formed in 1991 by lawyers acting for plaintiffs. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others while, at the same time, advocating aggressively for safety initiatives.

OTLA frequently comments on legislative matters and has appeared on numerous occasions as an intervener before the Court of Appeal for Ontario and the Supreme Court of Canada.

Introduction

OTLA welcomes the opportunity to submit comment on FSRA's proposed UDAP rule. As OTLA stated in its 2021 Pre-Budget submission, Ontario's auto insurance system is fundamentally broken¹. It is out of balance and no longer meets the needs or expectations of Ontario's drivers and accident victims. We reiterate here that the basic principles and goals underlying an effective automobile insurance system must include transparency, simplicity and certainty for the consumer.

At the outset, OTLA notes that we agree with the need to balance ongoing consumer expectation for increased choice and value for money with protection of the public interest. Consumer protection is a fundamental piece of automobile insurance. OTLA applauds the recent establishment of a Consumer Office in support of the FSRA Consumer Advisory Panel. As lawyers who represent the end-user, consumers of insurance products, particularly automobile insurance products, our core interest in providing this submission is in the protection of the public interest.

In the context of the proposed UDAP rule, we support FSRA's aim to make the supervision of conduct in Ontario's insurance system more transparent, dynamic and flexible, and support the goals outlined in FSRA's Notice of Proposed Rule and Request for Comment, namely:

“Moving towards a clearly understood regime that is adaptable to changing circumstances and in which all stakeholders participate so that misconduct can be better identified, curbed and sanctioned to protect the public interest.”

OTLA's submission will focus on Targeted Questions 1 and 4 in the Request for Comment.

Targeted Question 1: *Are there any parts of the Proposed Rule that are too general or require further detail, including for the purposes of clarity or closing possible gaps?*

Section 5: Unfair Claims Practices

While understanding that FSRA is moving to a principle-based approach with the proposed UDAP rule, it is vital in the protection of the public interest that a principle-based approach does not come

¹ OTLA 2021 Pre-Budget submission - <https://www.otla.com/docDownload/1720261>

at the cost of eliminating examples of specific circumstances that would be considered unfair or deceptive practices. Consumers and insurers should be provided with clear examples of unfair or deceptive practices so that they can clearly understand the kind of insurer conduct that goes beyond acceptable norms.

For that reason, OTLA recommends the preservation within the Proposed Rule of specific examples of unfair or deceptive practices within the automobile insurance context, as had been outlined in section 5 of O. Reg. 7/00² (examples in relation to statutory benefits under *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996*).

These specific examples of unfair or deceptive practices could include the following section from the UDAP currently in force:

1. Failing to advise an insured of the Accident Benefits available.³⁴
2. Failing to advise an insured of any potential limitation periods.
3. Relying on section 44 reports from a person whom the insurer knows or ought to know is not reasonable qualified by training or experience to conduct the examination.⁵
4. Relying only on section 44 reports to terminate or deny a benefit rather than considering the file evidence as a whole, including treating health practitioners.
5. Failing to promptly respond to a request for documents in the insurer's possession.
6. Relying on section 44 reports that are not entirely written by the author of the report.⁶
7. Failing to promptly respond to claims.⁷
8. Failing to pay periodic benefits on time.
9. Failing to follow FSCO/FSRA Guidelines and Bulletins.^{8 9}
10. Failing to provide accurate Benefit Statements.¹⁰
11. Failing to follow established case law.¹¹
12. Influencing or attempting to influence the opinions of section 44 assessors.¹²
13. Failing to provide or delaying the provision of section 44 reports to the insured.¹³

² O. Reg. 7/00: Unfair or Deceptive Acts or Practices - <https://www.ontario.ca/laws/regulation/000007>

³ Roy v. Primum Insurance, 2020 ONSC 3886 - <https://www.canlii.org/en/on/onsc/doc/2020/2020onsc3886/2020onsc3886.html>

⁴ Stegenga v. Economical Mutual Insurance Company, 2019 ONCA 615 - <https://www.canlii.org/en/on/onca/doc/2019/2019onca615/2019onca615.html>

⁵ Roy v. Primum Insurance, 2020 ONSC 3886 - <https://www.canlii.org/en/on/onsc/doc/2020/2020onsc3886/2020onsc3886.html>

⁶ Adrienne Kielesinski vs. Allstate Insurance, 2019 ONLAT 17- 008646/AABS - <https://www.otla.com/docDownload/1721485>

⁷ Stegenga v. Economical Mutual Insurance Company, 2019 ONCA 615 - <https://www.canlii.org/en/on/onca/doc/2019/2019onca615/2019onca615.html>

⁸ [The Applicant], [Litigation Guardian] vs. Dominion of Canada General Insurance Company (Travelers), 2020 ONLAT 18-002185/AABS - <https://www.canlii.org/en/on/onlat/doc/2020/2020canlii12760/2020canlii12760.html>

⁹ F.R. and Dominion of Canada General Insurance Company, 2020 ONLAT 18-002185/AABS - <https://www.canlii.org/en/on/onlat/doc/2020/2020canlii40336/2020canlii40336.html>

¹⁰ Stegenga v. Economical Mutual Insurance Company, 2019 ONCA 615 - <https://www.canlii.org/en/on/onca/doc/2019/2019onca615/2019onca615.html>

¹¹ Roy v. Primum Insurance, 2020 ONSC 3886 - <https://www.canlii.org/en/on/onsc/doc/2020/2020onsc3886/2020onsc3886.html>

¹² Roy v. Primum Insurance, 2020 ONSC 3886 - <https://www.canlii.org/en/on/onsc/doc/2020/2020onsc3886/2020onsc3886.html>

¹³ Roy v. Primum Insurance, 2020 ONSC 3886 - <https://www.canlii.org/en/on/onsc/doc/2020/2020onsc3886/2020onsc3886.html>

Section 7: Incentives

The Proposed Rule allows consumer incentive programs based on behaviour. The implication for the automobile insurance sector is that consumers will be able to point to their good driving habits and be rewarded with driving discounts.

The concerns raised by this section of the Proposed Rule pertain to the consumer data collected. The Proposed Rule should include guidance regarding how driver information will be collected, how much information will be collected and what will the insurer do, or be allowed to do, with that information.

The specific guidance regarding data use and collection could include:

1. As this is meant to be an incentive program, a specific prohibition against the raising of insurance premiums based on information collected.
2. Specific prohibition against using the collected data to justify increasing rates or assigning fault to the consumer.
3. Specifics regarding the basis on which incentives would be provided and the method by which data is collected.
4. Specifics governing the collection of data through vehicle plug-in devices or mobile phone applications – ensuring that the data collected accurately reflects consumer behaviour.
5. Assurance that the promised incentives are, in fact, provided and, if the incentives are withheld, access to the decision-making process and a process of appeal should be specified in the regulation.
6. Specific regulations on what information may be gathered, specifying whether acceleration rates, drive speed, braking speed, location tracking, time of day, and total kilometres driven will be gathered and collected.
7. Specific regulations governing the use of the collected data, including use of the data with advertisers, social media sites, market research groups, or for the purposes of analytics.
8. Standardized guidance regarding the definition of “safe driving” and other critical definitions.
9. Specific regulation ensuring that the proposed definitions are not set at a standard that would be impossible to meet.
10. Standardized guidance regarding whether collected consumer information may be used or referred to once an insurance claim is made, whether to determine time, place, or to determine degrees of responsibility or fault.
11. Specific and clear information provided to the consumer prior to signing up for any incentive program, clearly outlining what information will be collected, how long it will be retained, and to what use it will be put.
12. Acknowledgement that the raw data collection does not take into consideration external factors, such as weather conditions, or other driver behaviour, that may have an impact on what is recorded in the incentive program data collection.

13. Data management and retention regulations, including the timing of deletion of the information.

Targeted Question 4: Are there any other issues or amendments to the Proposed Rule that FSRA should consider as it proceeds to its intended second stage of work in this area?

FSRA states that it aims to contribute to public confidence, deter deceptive or abusive conduct, practices and activities, promote transparency and disclosure of information, and protect the rights and interests of consumers. OTLA agrees with all the deliverables proposed to achieve these goals, but particularly endorses the goal of deterring deceptive or abusive conduct, practices and activities by the regulated sectors.

Automobile insurance in Ontario is a compulsory product. It is also an expensive product. For many consumers, at the time they are purchasing or renewing their automobile insurance, their primary concern is the cost of the premium. They assume they are protected from deceptive or abusive conduct, and that they will be covered in the case of an accident. This is particularly so given that auto insurance is compulsory, as mandated by legislation. Citizens trust the government to ensure that the insurance offers adequate protection and coverage. When a collision happens, many are surprised to find out that is not the case. **To ensure adequate consumer protection, deterrence of deceptive or abusive conduct must be accompanied by a clear and straightforward enforcement mechanism, with clearly defined timelines and consequences.**

Legal rules meant to deter deceptive and abusive conduct have been severely restricted, or completely removed, by other legislative changes. For example, insureds cannot sue for bad faith. And, special awards at the Licence Appeal Tribunal (LAT) are exceedingly rare. Even cost awards at the LAT are extremely rare.

The Stakeholder Feedback for principles-based redrafting noted that health service provider stakeholders raised questions about the enforceability of principles-based regulation and expressed concern that a shift to principles-based regulation could lead to abuse by insurers.

In response to the stakeholder concerns, FSRA indicated that principles-based regulation does not entail giving up the ability to enforce the regulation. **Although indicating that principles-based regulation would not result in giving up the ability to enforce, the proposed rule is silent regarding enforcement.** The enforcement mechanism regarding regulations under the *Insurance Act*¹⁴, including UDAP, is broadly contained in Part XVIII of the *Insurance Act*. **The enforcement sections however lack specifics. Those specifics should be provided within the Proposed Rule.**

We recognize and support FSRA's Notice of Proposed Rule and Request for Comment in that the recommendation that the Proposed Rule be approved by the Minister of Finance should be conditional on consequential amendments being made to the *Insurance Act*, O. Reg 408/12

¹⁴ Insurance Act, R.S.O. 1990, c. I.8 - <https://www.ontario.ca/laws/statute/90i08>

(Administrative Penalties)¹⁵ and O. Reg 132/97 (Variable Insurance Contracts)¹⁶, which, if passed or approved, would provide FSRA with the necessary powers to enforce the Proposed Rule.

Consumers must be provided with clear, easy-to-understand information about FSRA's enforcement of UDAP, including:

- 1. Clear and accessible enforcement process**
 - When consumers wish to bring a complaint under UDAP, the enforcement process should be available, easy to find, and simple to access.
- 2. Certainty in response to complaint**
 - If a consumer brings a complaint through the easily accessible enforcement process, they should be assured the certainty of a meaningful response from the regulator.
- 3. Clarity of process in investigation**
 - In the response to the consumer complaint, the process of investigation and the documentation and information required, as well as the decision-making process, and timelines, should be clearly outlined to the complainant.
- 4. Clear and expected punitive measures**
 - If undesirable conduct is identified, the consumer ought to be assured of the punitive measures available through the enforcement mechanism.

Such clarity in enforcement would help the goal of deterring undesirable conduct.

Without an effective enforcement mechanism that provides certainty of response including expected sanctions, the proposed UDAP rule would be ineffective in deterring undesirable conduct and consumer and customer confidence would be undermined.

Conclusion

OTLA supports FSRA's proposed UDAP rule, including the initiative to better identify, curb, and sanction misconduct to protect the public interest. The protection of the public interest must be front and center in any movement to amend and make more effective the specific actions that are considered as unfair or deceptive and may apply to providers engaged in the insurance sector.

Given the mandatory nature of the auto insurance product, it is imperative that specific actions that are considered unfair or deceptive be outlined clearly, in an easy-to-understand manner. It is imperative that consumers understand how any data may be collected for the purpose of incentive programs and how that data will ultimately be used by insurers. It is further imperative that consumers be provided with clear, easy to understand information about any available enforcement mechanisms, expected timelines, and punishments following a complaint. Automobile insurance legislation is consumer protection legislation. This has been confirmed by the Supreme Court of Canada in *Smith v. Co-operators General Insurance Co.*, [2002] 2 S.C.R. 129, 2002 SCC 30¹⁷.

¹⁵ O. Reg. 408/12: Administrative Penalties - <https://www.ontario.ca/laws/regulation/120408>

¹⁶ O. Reg. 132/97: Variable Insurance Contracts - <https://www.ontario.ca/laws/regulation/970132>

¹⁷ *Smith v. Co-operators General Insurance Co.*, [2002] 2 S.C.R. 129, 2002 SCC 30 - <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1969/index.do>

Consumers can only be empowered if they are provided with detailed information and an effective process by which to enforce the regulation.

OTLA appreciates the opportunity to provide feedback with respect to FSRA's proposed UDAP rule and looks forward to continuing to work together to protect and empower consumers in the public interest. OTLA would be pleased to discuss these submissions if there be any questions, or if OTLA can be of any further assistance.