



August 11, 2021

Financial Services Regulatory Authority of Ontario
Response to Proposed Rule 2020-002: Unfair or Deceptive Acts or Practices (UDAP)

Introduction

The Ontario Psychological Association (OPA) is pleased to respond to the Financial Services Regulatory Authority of Ontario consultation on its proposed rule for Unfair or Deceptive Acts or Practices (UDAP). The OPA is the professional organization representing psychology in Ontario. On behalf of over 2400 members, the OPA provides leadership to promote the mental health and well being of Ontarians, and to inspire excellence in the profession of psychology through research, education, clinical treatment and rehabilitation, and advocacy. The OPA strives for a healthcare system in which psychological services are accessible to all Ontarians, where psychologists can practice to their full potential, and the value of the professional healthcare services psychologists provide is widely and properly recognized. As part of the OPA's Planning and Policy Development Committee, the OPA has an Auto Insurance Subcommittee comprised of psychologists and psychological associates who work with Ontarians involved in vehicle accidents and are thus impacted by various elements of auto insurance.

Unfair Claims Practices

The OPA is pleased to see FSRA has included a section in the rule regarding unfair claims practices aimed at deterring deceptive or abusive conduct, practices, and activities by the insurers. In *Putting Drivers First: A Blueprint for Ontario's Auto Insurance System*, Ontario's 2019 budget acknowledges that "during those unfortunate times when drivers do need to make an insurance claim, they are left at the mercy of a system that often seems to cater to lawyers or insurance companies, rather than to the victims it is supposed to help." In addition, the government's own auto insurance survey found that of the over 51,000 responses, "53% said it takes too long to receive benefits after being injured in an accident."

Auto accidents can be traumatic experiences to begin with. Then, some bad actors in the industry abuse their claimants using malicious tactics, denying claims, delaying timely access to treatment, without any clinical evidence. This forces them through long, expensive processes including multiple invasive and inconvenient assessments when it would have cost less to approve the initial claim, allowing the claimant to get the treatment they needed. Some insurer practices include arbitrary denials of necessary services, unreasonable and systemic requests for duplicative paperwork, and demands for additional unnecessary medical records prior to considering an application for services. These are all examples of abusive insurer behaviours that create delays and barriers for access to services for accident victims. This section on Unfair Claims Practices is a step towards putting drivers first by ensuring that consumers receive the coverage they paid for if they are injured.

Rebating/Incentives – Property and Casualty Insurance Sector

The OPA appreciates the efforts of FRRA to relax some of the prohibitions on incentives to allow for legitimately helpful incentives to be provided to consumers.

With respect to:

- 7(1) Payment, rebate, consideration, allowance, gift or thing of value being offered or provided, directly or indirectly, to an insured or person applying for insurance,*
- (iv) in a manner which involves unfair discrimination or contributes to an anticompetitive practice, including, but not limited to, tied selling or predatory pricing*

The OPA feels the regulator has an opportunity to strengthen this section to prohibit insurers from offering an incentive to commit to using only health service providers from the company's Preferred Provider Network (PPN) at the time of purchasing the policy.



The OPA believes it would be unfair and deceptive to use the term “Preferred Provider Network” (PPN) in offering an incentive as it is misleading, and comes from US style, private, for-profit managed health care. “Preferred” implies that what is being offered somehow superior however, there is no basis to assert that the health professionals on the insurer’s roster will provide better care for the injured person. The use of the term “preferred” may suggest that the consumer would get to see the health professional that they prefer. “PPN” fails to communicate that the injured person is restricted to those health professionals chosen by the insurer. Since the choice of health professionals is limited to a restricted list selected by the insurer, the roster would be more accurately described as an “Insurer Restricted Provider Network” (IRPN).

Insurance companies have been advocating for “enhanced” use of PPNs, meaning locking in their use at the time of purchase and the OPA finds this very troubling. There are inherent conflicts of interest and consumer protection issues with locking in the use of PPNs at the time of purchase. Health care services are not commodities that are interchangeable. There needs to be a level of trust between the patient and practitioner. Fundamentally, insurers should not be allowed to supersede the authority of the Financial Services Regulatory Authority and the regulatory bodies of health professionals.

Locking in the use of PPNs could be considered anticompetitive since PPNs are limited to very large companies. The insurer’s selection processes for the PPN’s generally involve Request for Proposals (RFPs) or similar processes. The criteria for PPNs often have requirements that cannot be met by sole or small providers including province wide coverage; multi-disciplinary services; and time frames for provision of services. The PPNs may also be expected to offer discounted pricing in exchange for anticipation of volume of referrals. The PPNs additional administrative burden (beyond the FSRA licensing and regulatory college requirements) and the requirements preclude participation by sole providers or small clinics seeing a limited number of patients injured in auto accidents.

A large PPN company may attempt to address some issues of access to services by subcontracting to local, sole practice, or small groups of health professionals. However, there is little incentive for most local, sole practice, or small groups of health professionals to agree to the PPN arrangements. The fees paid to the subcontracted health professionals are reduced by the PPN company who takes a portion of the fee paid by the insurer. In addition, there are often additional administrative requirements and unattractive service expectations.

A Locked-In PPN with service delivery organized through large companies undermines the direct relationship between the patient and their chosen health professionals. The primary contract for care and accountability should be between the health professional and the patient. There are many inherent and regulatory mechanisms for accountability and consumer protection in this model. In contrast, in a Locked-In PPN model the insurer contracts with their selected large company. The large company then contracts with service providers. The injured person’s control over their own health care is reduced by this highly problematic shift in the contracting and accountability.

Of particular concern to the OPA, Locked-In PPNs pose an even greater hazard for injured individuals with psychological disorders including brain injuries. Individuals with psychological injuries often have experienced the motor vehicle accident as a traumatic event. The trauma of the event may result in perceived loss of control and feelings of victimization. The ability to seek care from the practitioner recommended by a trusted source, such as the primary care practitioner, is often critical in being able to take this step and begin to regain a sense of control. In contrast, a Locked-In PPN in which access to care is limited to the insurer’s selected list of service providers, would often have the negative effect of increasing the sense of loss of control and victimization. This would interfere with the injured person’s ability to obtain timely treatment.

Obtaining care from the right practitioner is often critical to recovery from psychological injuries. Psychological treatment requires a high level of trust by the injured person in their practitioner to be able to disclose very personal information and tolerate challenging their beliefs and behaviour.

The OPA is also concerned that the section below may open the door to insurers offering this incentive if they try to



make the argument that it would be “reasonably related to reducing the risk insured” due to their projected cost savings.

7(5) For the purposes of this section, a gift or thing of value will not be considered an incentive or inducement if that gift or thing of value is a good or service reasonably related to reducing the risk insured by the contract of insurance to which it is related.

Some insurers propose locked-in PPNs as a response to undefined and unquantified assumptions of fraud and abuse by health professionals. The OPA believes that reducing costs in the auto insurance system must and can be achieved without interference with providing consumer protection, including patient choice of their treating health professional(s).

Principles-based regulation and implementation

The OPA appreciates that FSRA will amend the Proposed Rule so that it comes into force on the date that supporting consequential enforcement amendments in the *Insurance Act* come into force. However, the OPA is concerned that there is still a lack of information on what the consequences might be for any UDAP complaints.

FSRA has stated that it will “continue to take an outcomes-focused approach to monitoring compliance with the new UDAP Rule, including supervision, deterrence and encouraging proper market conduct to ensure public confidence and safety,” and that “a methodical and criteria-based framework is in place for assessing potential compliance issues with the highest impact and priority, which may be subject to further investigation and review, to ensure the fair treatment of customers.”

This is a start, but FSRA should be more transparent than this for both the regulated entities and the those making complaints. FSRA should outline specifically what sanctions or disincentives exist to act as a deterrent. FSRA should post any decisions that are made and what the outcomes are.

CONCLUSION

The OPA is grateful for the opportunity to respond to the FSRA’s consultation on its proposed rule for Unfair or Deceptive Acts or Practices (UDAP).

We applaud the inclusion of a section on Unfair Claims Practices

The OPA would encourage FSRA to consider leveraging the opportunity this rule provides to prohibit insurers from offering incentives for customers to commit to using Preferred Provider Networks (PPNs) at the time of purchasing their policy.

The OPA would encourage the regulator to be more transparent and specific about enforcement of the UDAP rule.

Overall, the OPA supports FSRA’s efforts to modernize and improve the UDAP provisions to better protect consumers and appreciates the opportunity to provide input.