

OTLA Submission to the Financial Services Regulatory Authority (FSRA)

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

August 11, 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 previously provided submissions dated March 18, 2021 (Prior Submission).

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

In our Prior Submission, OTLA focused on the importance of consumer protection. As noted almost 20 years ago by the Supreme Court of Canada in *Smith v. Cooperators*, **consumer protection is “one of the main objectives of insurance law”**.

As OTLA noted, for the UDAP to properly protect consumers, the UDAP must include clear definitions of unfair and deceptive acts or practices as well as a clear and straightforward enforcement mechanism, with clearly defined timelines and consequences.

OTLA is very disappointed that our recommendations have not been implemented. Neither of these requirements are included in the revised proposed UDAP rule. The revisions include only small changes from the previous proposed UDAP.

The UDAP is extremely important for consumer protection. Consumers tend to be unsophisticated in matters of insurance and often, if not always, at the mercy of their insurers. For these reasons, OTLA continues to assert the need for revisions to include:

1. a clear enforcement system;
2. clear definitions with specific examples of unfair and deceptive acts and practices; and
3. data collection transparency.

A Clear Enforcement System is Needed

According to FSRA’s Notice of Proposed Rule and Request for Comment, the goal of the new UDAP was meant to move:

“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.”

While this is a worthy goal, it cannot be met without a clear and straightforward enforcement system with clearly defined timelines and consequences.

Our members have told us that under the current UDAP, the enforcement system is vague and ineffective. It does not appear to have any deterrent effect on insurers, especially in the automobile insurance context.

The proposed UDAP appears to assume insurers will protect consumers. This is often not the case. Insurers and their consumers have an inherent conflict of interest. At its most basic level, insurers make money by taking in more money for premiums than they pay out in claims. That inherent conflict of interest can lead to misbehaviour by insurers in the claims process.

In order to ensure consumers are protected and insurers do not breach the duty of good faith owed to consumers, the UDAP must contain a clear enforcement system. The revised proposed UDAP rule contains no system whatsoever; **it is entirely silent with respect to enforcement.**

You cannot have deterrence without a clear enforcement system. And, you cannot have consumer protection without deterrence for bad actors. It is like having a criminal law system without a Criminal Code or a system of penalties.

As we previously submitted, 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.

A clear enforcement mechanism will deter 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.

Examples of Unfair and Deceptive Practices are Needed

Part of having a clear enforcement system is to clearly define unfair and deceptive acts or practices.

Section 5 of the proposed UDAP deals with Unfair Claims Practices. As we previously submitted:

“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 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 previously recommended 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. 7/00¹ (examples in relation to statutory benefits under *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996*).

In reviewing the other stakeholder submissions, we note that FAIR Association for Victims of Accident Insurance Reform had similar concerns about the lack of examples.

Unfortunately, the revised proposed UDAP rule does not include examples, rendering it slightly ambiguous and difficult to define.

According to FSRA’s Summary Comments in response to the original stakeholder submissions, “the Proposed Rule captures the substantive intent of the Regulation and adequately references current Statutory Accident Benefits”. Basically, FSRA says that examples are not needed.

The UDAP has an important consumer protection purpose. Part of consumer protection is to try to make the system easier for consumers to understand. Judges have criticized automobile insurance legislation for being far too complicated.² Examples help make things easier for all parties to understand.

Keeping these examples would not be hard to do. They are already in the current UDAP regulation.

Consumers and insurers should be provided with clear examples of unfair or deceptive acts or practices so that they can clearly understand the kind of insurer conduct that goes beyond acceptable norms. Examples increase consumer protection.

Data Collection Transparency is Needed

The new UDAP 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.

However, to meet the consumer protection purpose, the new UDAP should include guidance about 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.

¹ O. Reg. 7/00: Unfair or Deceptive Acts or Practices - <https://www.ontario.ca/laws/regulation/000007>

² In *Mercier v. Royal & Sun Alliance*, SCJ, 2003, Justice Quinn called the *Statutory Accident Benefits Schedule* “Byzantine” and said that “Anyone able to fully understand the SABS should be entitled to claim bilingual status.”

In our previous submission, we suggested that the UDAP include:

1. A specific prohibition against the raising of insurance premiums based on information collected as this is meant to be an incentive program.
2. A 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. Assurances 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. A 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.

Again, it appears that our concern was not heard. The revised proposed UDAP rule still does not provide the required level of transparency and detail.

Another part of consumer protection is protecting consumers’ private information. This is especially important as technology continues to advance. The revised proposed UDAP rule provides very little about consumer privacy protection.

Conclusion

OTLA supports a UDAP rule that better identifies, curbs, and sanctions misconduct in order to protect the public.

Unfortunately, the revised proposed UDAP rule raises significant consumer protection concerns. It includes no enforcement mechanism and lacks clarity in what constitutes an unfair and deceptive act. It also gives insurers the ability to collect consumer data without transparency as to how that data will be used.

OTLA strongly recommends that the rule be further revised to include a clear enforcement mechanism, clear definitions which include at a minimum the previously included examples of unfair and deceptive acts, and transparency with respect to data collection.

OTLA appreciates the continued opportunity to provide feedback with respect to FSRA's revised proposed 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.