Is It Legal to Waive a Customer's Deductible?

We've all heard the rhetoric from insurers: a repairer waiving a consumer's deductible is insurance fraud. That isn't accurate, and we should all be wary of tossing these kind of statements around as truth when they may not be.

Repairers may run their shops any way they see fit – provided what they do is legal. So, the question remains whether a repairer may forego making a consumer pay the deductible portion of the repair cost or has any obligation to collect a consumer's deductible – because that's truly what we're talking about.

Remember, however, that only general principles are discussed in this article. Individual state laws may change these principles or affect how they apply to your business. Always check with an attorney licensed to practice law in your state to ensure you're in compliance with your applicable law.

First Parties

First, let's sort out a very important issue: We're only talking about first parties (insureds) when we address the issue of deductibles. Third parties (typically the not-at-fault drivers) don't have any deductible to pay because that's a contract issue between the insurer and its insured and has nothing to do with principles of negligence law that apply between the insured and the third party.

Therefore, we're discussing the two contracts involved with a first-party collision repair: 1) the insurance contract between insurer and insured, and 2) the repair contract between collision repairer and consumer. Body shops that have a direct repair relationship with the consumer/insured's insurer may have other obligations, but that's an additional layer not considered in this article and doesn't apply to any shop outside of that direct repair arrangement.

Back in Time

To better understand how this subject became so confusing, let's take a trip back to a time before insurers began "policing" collision repairs. If an insured had an accident, he notified his insurer. The insurer determined that the claim was legitimate and then did one of two things: it either wrote a check for what it believed represented the dollar value of damage that had been done to the vehicle (less the insured's deductible), or it told the insured to take the vehicle to a repair shop, have the vehicle repaired and send it the final invoice after the insured paid – for which the insurer would reimburse the insured (less the insured's deductible). This is how automobile insurance applicable to the insured's own property, which is a contract of indemnification, functions.

Let's look at the first scenario, where the insurer writes a check for the damage (less the insured's deductible). Of course, we presume the insurer acted in good faith and wrote a check truly representing the amount of loss to the vehicle without engaging in the gamesmanship of "write only what you can see" and "we'll be back to supplement 10 times if the repairer and insured can hold out that long."

If the insurer writes the insured a check for the loss to the vehicle, the insured is in complete control over how, when and why the loss money will be spent. The insurer has no involvement or interest in whether the insured either uses the money to have the vehicle repaired properly, uses some of the money to have the vehicle safely but only adequately repaired in terms of appearance, or leaves the damaged vehicle in the garage and uses the money to buy a big screen television. In fact, some states, like New York, have enacted laws (NY CLS Ins §3411(i)) that make it clear that an insurer can't force the insured to have the damaged

vehicle repaired as a condition of paying the loss under the policy.

The insurer has performed under its indemnity contract with its insured. If or how the insured/consumer chooses to spend the indemnity proceeds is none of the insurer's business. Therefore, whether the insured/consumer works out a great deal with a body shop to have the vehicle properly repaired without using all of the indemnity proceeds and the deductible amount is, again, no concern of the insurer's. The insurer performed under its insurance contract, and the consumer and repairer will perform under their separate motor vehicle repair contract.

Fast Forward

Now, fast forward to present day. If a consumer delivered a damaged vehicle to a repairer and paid directly for the repairs, would the repairer even give a fleeting thought about whether a deductible was involved? Of course not. Repairers are businesspeople exercising their expertise for pay. The contract for repair is between the consumer and the repairer. The insurance company that has an obligation to indemnify the consumer has no place interfering with or making demands on rights or obligations under the repair contract.

This becomes less apparent when an insurer wants to keep showing up at the shop and telling the repairer how the insured's vehicle should be repaired and what the insurer will pay for. Somehow, by intruding and invariably looking over the repairer's shoulder, insurers have convinced themselves that they have a right to dictate repairs and pricing and impose obligations on repairers that include holding them accountable for always collecting insureds' deductibles.

Again, unless your state law for some reason requires you to collect an insured's deductible, you have no obligation to do so. Remember, the contract for repair is with the consumer, not the insurer, so arrangements the shop makes with the consumer is per its contract only. If shops remind themselves to think only in terms of the consumer as the payer for goods and services – which the consumer is because that's who's obligated on the repair contract – it's much easier to determine whether the shop has any obligations to engage in certain conduct.

What's Lawful

Here's what's lawful. The shop writes a damage analysis and expects the cost of repair to be $1,000 to reasonably restore the vehicle to its pre-loss condition. The consumer has a $200 deductible. The insurer owes the insured reimbursement of $800. If the insurer wrote the insured a check for $800, there's no question the insured could spend that money any way he wished. He might decide that he doesn't really care if the paint matches or if the damaged panels are replaced and decide to have only a $600 repair performed, leaving $400 in his pocket ($200 paid by the insurer and $200 saved from the deductible).

Under his insurance contract, however, his insurer owes him the insurer's portion of a $1,000 repair (in this case $800) because that's the amount the shop determined to be necessary and reasonable to return the vehicle, as much as humanly possible, to pre-loss condition. Accepting a repair that is substantially less than pre-loss condition is entirely the consumer's choice, and he's within his rights to enter into a contract with the shop for a $600 repair.

Consider another situation with the same $1,000 repair cost, $200 deductible and $800 insurer portion. The shop may elect to perform a $1,000 repair, but choose to collect only $800. Again, there's nothing improper about waiving collection of the $200 from the consumer because the true cost of the repair provided by the shop was the full $1,000. The shop merely made a business decision not to make the consumer pay for the repair in full.

Insurers reading this example would likely argue that this is wrong and that if the shop is going to perform a $1,000 repair and accept only $800 for it, the consumer/insured should pay the $200 deductible and the insurer should only pay $600. They might even try to convince the shop that failing to make the consumer pay a deductible is insurance fraud. But it is not. Because insurers have tried to inject themselves so much into the consumer-repairer relationship, they've become extremely poor at recognizing their responsibilities under the insurance contract to their insureds.

The amount that the consumer ultimately pays for the repair is not what drives the insurer's obligation to the insured – it's the amount that's necessary and reasonable to restore the vehicle (as much as humanly possible) to its pre-loss condition, which the insurer agreed to in its policy. In this example, that amount is $1,000, and the insurer owes the insured $800 no matter how it's sliced.

There's little difference between providing the consumer with a discount by not collecting some or all of the deductible and shops providing discounts that benefit insurers. Insurers routinely expect that repairers will provide discounts on the overall cost of repairs in the form of parts discounts, reduced labor rates, paint and material caps, and other things. But these are taken exclusively by the insurer and not passed on to the consumer in the repair transaction. By convincing the shop to reduce the overall cost and, therefore, payment of repair it will accept, from $1,000 to $900, the insurer absorbs the entire $100 discount by expecting the consumer/insured to pay his $200 deductible, leaving the insurer to pay only $700. Actually, it could be argued that the insurer, by obtaining a discount that it doesn't share with the consumer, is actually depriving the insured of some of the accrued benefits under the insurance policy – but that's a separate issue.

A shop deciding not to collect all or part of a consumer's deductible is simply making a business decision about the party it intends to benefit with any reduction in payment. Many shops don't or can't afford to waive the consumer's payment of a deductible because doing so eats into their profit margins – and the profit margins for the industry are already razor thin. However, there's nothing unlawful about reducing the payment the shop is willing to accept in a manner that benefits its customer, the consumer.

What's Not Lawful

What's not lawful is the deliberate inflation of the expected cost of repair to trick the insurer into paying both its portion of the necessary and reasonable cost of repairs and the insured's deductible. This occurs when the repairer lies about repairs that must be made to the vehicle to make it appear that the vehicle was more severely damaged than it actually was for the purpose of hiding from the insurer that it will be covering the deductible as well. This raises the value of the repair and, thus, raises the insurer's portion of the necessary costs.

This can be explained with the following example. Instead of writing a damage analysis anticipating repair costs of $1,000 (which reflects the true cost of the repairs), the repairer intentionally exaggerates the necessary repairs to $1,200. If the insured has a $200 deductible, the insurer's portion now equals $1,000. If the actual cost of repairs is $1,000 and the repairer is paid $1,000 for repair work worth $1,000, then the insured and repairer have taken advantage of the insurer in an unlawful manner.

This example illustrates what is an unlawful activity based on a deliberate intention to connive the insurer into reimbursing the insured for more than it actually owes under the policy. The low dollar values used make this less than an ideal example because many things could legitimately cause a $200 increase in expected repair costs – including changes in parts prices alone. The point, however, is that the inflated cost is deliberate and intentional and done for the purpose of benefitting the insured and repairer at the expense of the insurer.

The Bottom Line

What determines whether a repairer has given a proper courtesy payment discount to a consumer or has conspired with the insured to engage in unlawful behavior is often the bottom line. If the repairer opted to accept a lower overall payment and less profit than it really was entitled to by offering a consumer discount, there's little question that the repairer's action was proper. Without going through a repairer's accounting books, however, it can be difficult to determine.

What can also be problematic in such an analysis is that the shop may have been paid what it agreed to but openly disclosed that any discount it was willing to apply on its damage analysis would be applied to the consumer's deductible rather than for the insurer's benefit.

The most important thing to consider here is that a collision repair facility is a professional business. As such, it's entitled to make decisions about how it wishes to run that business without interference from outside entities.

Ultimately, all the money the repairer is being paid belongs to and comes from the consumer/ insured, whether it's paid directly from the consumer or is (partly) paid by a check or draft that has an insurer's name on it. Once the accident occurred, the money owed for the loss immediately became the consumer/insured's. How the consumer/insured chooses to spend it is his business. How your shop offers discounts or incentives is yours.

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Reference: http://www.bodyshopbusiness.com/is-it-legal-to-waive-a-customer-s-deductible/