Cassels

Inside Insurance: Customer Needs to Show a Lower Deductible? Consider This Solution

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Welcome to our *Inside Insurance* series, developed to provide topical, succinct, and practical insights that address real issues in-house counsel and other insurance and reinsurance industry executives face on a regular basis. As always, we are here to help.

We have seen an increasing number of circumstances where, for a particular risk, an insured is required to show a deductible that is lower (the Lower Deductible) than the deductible negotiated on their existing casualty (liability) insurance policy (the Regular Deductible) - to be eligible to bid on a particular construction project, for example.

Typically, the insured is faced with a time crunch to provide evidence of the Lower Deductible, with their insurer and broker left scrambling to find a solution satisfactory to all. In almost every such case we have encountered, the insurer does not wish to charge additional premiums for the Lower Deductible - call it good customer relations. If you find yourself in this situation, consider collaborating in the following ways:

1. **Prompt Communication**. The insured should notify their broker as soon as they are aware of the need to evidence the Lower Deductible and the time within which it is required. The broker should then immediately communicate this need to the insurer's underwriter responsible for the insured.

2. **Consider the Additional Credit Risk.** It's safe to assume the underwriter did not account for the difference between the Regular Deductible and the Lower Deductible when underwriting and pricing the policy. For instance, if the Regular Deductible is $100,000 and the insured needs to evidence a Lower Deductible of $25,000, the underwriter must consider this $75,000 additional credit risk. The underwriter should engage their internal credit risk team to (i) determine if this additional credit risk is within the insurer's risk appetite given the insured's capital position and, if so, (ii) whether the insurer will require the insured to post collateral to secure this additional credit risk and the form thereof (a letter of credit or cash, for example).

3. **Enter into an Indemnity Agreement.** Once the insurer and the insured settle on whether the insured will post collateral to secure the additional credit risk (and the form thereof), they may consider entering into an indemnity agreement under which the insured is obligated to reimburse the insurer for the difference between the Regular Deductible and the Lower Deductible. While it may reference the relevant insurance policy, this should be a stand-alone agreement and not form part of the insurance policy itself. The agreement should at least (i) establish a retention amount equal to the difference between the Regular Deductible and the Lower Deductible, (ii) provide that the insured is obligated to indemnify the insurer the retention amount in the relevant circumstances, (iii) provide the form of collateral required to be posted (if the insurer requires), and (iv) if deemed appropriate, provide the insurer the right to increase the collateral amount in certain circumstances.

4. **Endorse the Policy.** After the insured and insurer enter into the indemnity agreement, the insurer should endorse the policy to provide the Lower Deductible actually does apply either (i) to the specific risk in respect of which the insured has requested it, or (ii) more broadly, any time the insured is required to show the Lower Deductible. By not having the indemnity agreement form part of the policy and endorsing the policy so that the Lower Deductible *actually does apply* to the applicable risk(s) identified in the applicable endorsement, any certificate of insurance evidencing the Lower Deductible provided to a third party requiring it - a municipality in connection with a request for proposals for a construction contract, for example - is accurate.

5. **Issue an Accurate Certificate of Insurance.** After the policy is endorsed, the insured's broker may issue a certificate of insurance that evidences the required Lower Deductible. In some cases, the third party requiring it may require the insurer to issue the certificate of insurance and will not accept one issued by the broker. In such instances, the underwriter should consult their in-house legal counsel to determine (i) if there are any internal policies prohibiting the

insurer from issuing such certificate and, if not, (ii) whether the underwriter has the requisite internal underwriting authority to sign it.

Whatever solution the insurer and broker choose to pursue, it should be done collaboratively, with speed in mind, and always in the spirit of helping their mutual customer - the insured. This way, everyone wins.

Our team has structured many solutions to meet the needs of customers who require Lower Deductibles and have prepared many related indemnity agreements. We would be pleased to assist you in preparing a solution that is right for a particular risk.

Find other titles in our *Inside Insurance* series here.
