



What Constitutes Earned Premium in New York State?

The International Risk Management Institute defines earned premium as:

That portion of a policy's premium that applies to the expired portion of the policy. Although insurance premiums are often paid in advance, insurers typically "earn" the premium at an even rate throughout the policy term. The unearned portion of the premium that has been paid is kept in the "unearned premium reserve."

The New York State Court of Appeals' recent ruling in [Gevorkyan v Judelson \(2017 NY Slip Op 05176\)](#) states that a bail bond surety cannot retain paid premiums if a court refuses to grant bail to a criminal defendant. The Court went on to say that under New York Insurance Law, premium follows risk and therefore if the bond is not approved and the defendant is not released, no risk exists and all premiums paid are unearned premium that must be returned to the payor. As an interesting aside for producers, [New York Department of Financial Services Circular Letter No. 13 \(2017\)](#) states, "[T]he Gevorkyan decision does not address the rights of the bail agent to receive compensation or commission from the bail insurer for work performed by the agent when a defendant is not released from custody after a criminal court does not accept a bail bond as the result of a bail sufficiency hearing. Whether the bail agent may receive any compensation from the bail insurer is dependent upon the contract between those parties."

The court decision and circular letter are unique to the bail bonds. While it appears the court decision would apply to bail bonds issued by excess line insurers, ELANY rarely, if ever, processes bail bonds issued by excess line insurers.

Policies issued in the excess line market often provide for the premium to be earned proportionately over the term of the policy, however a fair number of policies for certain types of coverages contain minimum earned premiums, minimum and deposit premiums, or both.

Unlike the limitations imposed on what constitutes bail bond earned premium, unambiguous minimum earned and minimum deposit premium policy terms in excess line policies have been enforced when litigated in New York courts.

Minimum earned premium is the smallest amount of guaranteed premium an insurer is willing to accept to write a risk. For example, general liability annual policy may state 25% of the policy premium is earned once the policy is in effect. If the insured cancels the policy mid-term, the earned premium retained by the insurer would be the greater of the pro-rata earned premium or the minimum earned premium, which in the above example is 25% of policy premium.

If a policy is written by an authorized insurer, the amount of minimum earned premium permitted by the New York Department of Financial Services is dependent upon the insurer's ability to prove that the minimum earned premium equals the cost associated with issuing the policy and the expense of writing the business ([NY OGC Op. No. 02-03-26](#)). The Department of Financial Services views the purpose of minimum earned premium to be the recovery of expenses incurred to write the business should the policy be cancelled prior to the expiration date. The Department exercises this authority over licensed insurers to approve or disapprove policies with minimum earned premiums pursuant to these standards under Article 23 of the New York Insurance Code.

However, in [NY OGC Op. No. 08-09-13](#), the Department found that Article 23 does not apply to unauthorized insurers (such as eligible excess line insurers) and therefore an unauthorized insurer may impose minimum earned premium as spelled out in the policy. As such, the excess line market affords a great deal of flexibility in shaping minimum earned premium and/or minimum and deposit premium constructs.

Minimum and deposit premium is the amount of premium due at the inception of the policy and later subject to adjustment based on an audit calculation once the policy has expired or is cancelled. The annual earned premium cannot be less than the minimum and deposit premium if the

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policy remains in force to its natural expiration. In the event of a midterm cancellation, the earned premium will be the greater of the annual minimum and deposit premium calculated on either a short rate or prorated basis or the actual earned premium as determined by audit for the period the policy was in effect. The foregoing result might be a bit different when the policy contains both a minimum earned provision as well as minimum and deposit provisions.

As to insurance policies which contain both minimum earned and minimum and deposit premium provisions, the results may differ. When such a policy expires at its specified expiration date and a premium audit is conducted, the minimum earned premium has, by definition, been met and the potential for return premium is dependent on whether the policy language provides for return premium upon the audit calculation. When a policy is cancelled midterm, the minimum earned premium applies if it is greater than the audit premium for the shortened policy period.

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