



**STATE OF NEW YORK
INSURANCE DEPARTMENT**
25 BEAVER STREET
NEW YORK, NEW YORK 10004

The Office of General Counsel issued the following informal opinion on March 8, 2002, representing the position of the New York State Insurance Department.

Re: Minimum Earned Premiums

Question Presented:

- 1) May an insurer charge a minimum earned premium of twenty-five percent on a property/casualty policy of commercial risk insurance, regardless of how long the policy remains in effect?
- 2) May an insurer do so with respect to insurance within the Free Trade Zone?

Conclusions:

- 1) Whether an insurer may charge a minimum earned premium of twenty-five percent on a property/casualty policy of commercial risk insurance, no matter how long the policy is in effect, is dependent upon the insurer's ability to prove that the minimum earned premium filed equals the cost associated with issuing the policy. It is unlikely, however, that a percentage based (rather than a flat charge) minimum earned premium would be acceptable because the purpose of the minimum earned premium is to cover the expenses of writing the business.
- 2) Although an insurer that is writing within the "Free Trade Zone" is not required to file the rates or policy forms for such insurance, the insurer "must still satisfy the governing standards set forth in the Insurance Law and regulations." N.Y. Comp. Codes R. & Regs. tit. 11, § 16.0 (1995). Thus, such an insurer may not charge a minimum earned premium that exceeds the cost associated with issuing the policy. Additionally, such insurer may not charge a percentage based (rather than a flat charge) minimum earned premium unless the percentage actually measures the cost associated with issuing the policy.

Facts:

The inquiry received was of a general nature and did not provide specific facts, other than to make reference to the September 5, 2001 opinion, which is entitled "Fully Earned Premium." That opinion deals with a property/casualty policy of commercial risk insurance as defined by N.Y. Ins. Law § 107(a)(47) (McKinney 2001-2002 Interim Pocket Part). Therefore, it is assumed that the inquiry is made with reference to such kind of insurance. The inquiry also posed a question about insurance written in the "Free Trade Zone."

Analysis:

In regard to policies that provide property/casualty insurance, N.Y. Ins. Law § 3428(a) (McKinney 2000) states:

Except as provided in subsection (d) of this section, whenever an insurance contract made or issued in this state is cancelled or otherwise terminated by the insured before the expiration thereof in accordance with the terms of such contract, the earned premium to be retained by the insurer shall be determined by the applicable rate filing, if any, otherwise in accordance with the provisions of such contract.

Thus, where an insured cancels a policy that provides property/casualty insurance in accordance with the cancellation provisions of such contract, the insured is entitled to the return of any unearned premium based on the rates that the insurer filed with the Department, or where no rates have been filed (such as where the insurance is written in the "Free Trade Zone", discussed infra), the unearned premium should be calculated based on the policy's provisions.

Note that § 3428(a) only requires a return of unearned premium based on the applicable rate filing or in accordance with policy provisions. The Department has approved minimum earned premium filings where the insurer has provided supportable evidence that the minimum earned premium equals the cost associated with issuing the policy. However, the filings have been in the form of a flat charge, rather than a percentage based minimum earned premium. It is unlikely that a percentage based (rather than a flat charge) minimum earned premium would be acceptable because the purpose of the minimum earned premium is to cover the expenses of writing the business.

N.Y. Ins. Law § 6301(a) (McKinney 2000), subject to § 6301(b) and (c), empowers the Superintendent to create exemptions from the requirement of the filing of policy forms and rates for authorized insurers. It states:

(a) Notwithstanding any provision of this chapter, the superintendent shall, pursuant to regulations promulgated by him, permit exemption from filing requirements only with respect to rates and policy forms, where applicable, for any of the kinds of insurance authorized to be written in this state.

(b) No exemption pursuant to subsection (a) hereof shall be permitted in relation to the kinds of insurance set forth in paragraph one, two, three, fifteen, eighteen or twenty-three of subsection (a) of section one thousand one hundred thirteen of this chapter, or to coverage for personal lines to natural persons for non-business purposes. However, any risk pursuant to paragraph one, two or three of such subsection of such section of this chapter or personal lines risk (except private passenger, non-fleet automobile insurance) shall be exempt pursuant to subsection (a) hereof if it is included by the superintendent on the list maintained by him pursuant to subsection (a) of section six thousand three hundred three of this article.

(c) An exemption granted pursuant to this section shall apply only to authorized insurers complying with this chapter, except that it shall not apply to insurers subject to article sixty-six of this chapter. The exemption shall not be an exemption for joint underwriting or joint reinsurance transactions pursuant to section two thousand three hundred seventeen of this chapter.

N.Y. Comp. Codes R. & Regs. tit. 11, § 16.0 (1995) (Regulation 86) states:

This Part implements article 63 of the Insurance Law and establishes methods, procedures and reports for licensing, facilitating, monitoring and verifying compliance with the requirements of the Insurance Law. In effect, article 63 allows special risks that are jumbo in dimensions [sic] or exotic in nature to be written, free of filing rates or policy forms, in what is sometimes called the "Free Trade Zone." Although filing is not required, rates and policy forms applied to special risks must still satisfy governing standards set forth in the Insurance Law and regulations.

Although the rates and policy forms for insurance written in the "Free Trade Zone" are exempt from filing, an insurer is still bound by the same standards of fairness that are applied to rates that are required to be filed. N.Y. Comp. Codes R. & Regs. tit. 11, § 16.5 (1995) states:

The rates applies [sic] to policies issued pursuant to section 6301 of the Insurance Law shall not be excessive, inadequate, unfairly discriminatory, destructive of competition, detrimental to insurer solvency, or otherwise unreasonable. Each insurer shall maintain in its files the premium charged for each special risk and the basis for the rate or premium.

Thus, such an insurer may not charge a minimum earned premium that exceeds the cost associated with issuing the policy. Additionally, such insurer may not charge a percentage based (rather than a flat charge) minimum earned premium unless the percentage actually measures the cost associated with issuing the policy.

For further information you may contact Senior Attorney Sally Geisel at the New York City Office.