



Going Back to Square One

▶ Can an excess line policy be cancelled flat or retroactively with the effective date back to inception?

ELANY receives a number of requests every year to do just that. Brokers sometimes inquire about the legality of such cancellations. They are right to be concerned since a party that suffers an injury and pursues a claim can start the chain of events to an E&O claim under these circumstances. In short, the answer depends on a number of considerations. Brokers should ask at least five separate questions:

1. Was the policy commercial or personal lines?
2. Who requested the cancellation?
3. What was the reason for the cancellation?
4. What coverage documentation was issued?
5. Was the cancellation request well-documented?

Perhaps the safest scenario for insurers and brokers is where the insured requests a flat cancellation of a policy. In this case, the insured, as a party to the contract, is rescinding the policy, and coverage therefore never attaches. Any such cancellation request should be well-documented with a lost policy release to avoid any later confusion. As noted below, even insureds cannot cancel retroactively in all cases.

When a flat cancellation is initiated by the insurer or broker, a number of concerns should be considered. Generally, contracts that are unregulated can become null and void when a party fails to pay the consideration owed. When the contract is an insurance policy, ELANY is unaware of any New York case law where a court upheld a policy that was cancelled flat for nonpayment of premium.

[New York Insurance Law §3105](#) permits rescission of many, but not all, personal and commercial line policies if the insurer can meet the legal standard demonstrating a material misrepresentation in the application for coverage. An insurer may find it beneficial to file a lawsuit for a declaratory judgment. Otherwise, rescission or flat cancellation leaves open the possibility that an injured party may sue the insured, with the insured subsequently stating it never received a proper cancellation notice or that the rescission or flat cancellation was improper. In

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that case, if the insurer then denies the claim, the insured may decide to sue the insurer and/or broker, asserting the policy was in force on the date of loss.

In New York, personal line policies issued by excess line insurers are subject to [Insurance Law §3425](#). Other than for rescission based on material misrepresentation, an insurer or producer can only cancel prospectively upon proper written notice to the insured.

The [OGC Opinion of May 3, 2011](#), states that **personal line policies may generally not be cancelled back to inception, even for nonpayment of premium**, under Insurance Law §3425. According to the [OGC Opinion of January 4, 2002](#), the only way that personal line policies may be cancelled from inception for nonpayment of premium is when the premium due date is sufficiently in advance of the policy effective date that a notice of cancellation may be issued 15 days prior to the policy's inception.

Commercial line policies are a different story. Excess line policies are expressly exempt from the cancellation/nonrenewal provisions of [Insurance Law §3426](#), which governs the cancellation of commercial line policies. Unlike personal lines, **cancellation of commercial line excess line policies is usually subject to the terms of the contract**. For that reason, excess line brokers and carriers should be wary of cancelling a commercial excess line policy flat or retroactively without clear language in the text of the policy providing such a right.

Here are a few additional considerations for commercial line insurance policies. The [OGC Opinion of May 5, 2003](#), states that automobile liability policies that satisfy the financial responsibility requirements of the New York Vehicle and Traffic Law cannot be cancelled except in accordance with statutorily mandated procedures. It notes that the law in New York disallows the retroactive cancellation of such insurance contracts even for fraud or misrepresentation.

Additionally, with respect to excess line fire insurance coverage as per the [OGC Opinion of September 10, 2003](#), an insurer must provide a minimum of five days' written notice of cancellation to the insured. Therefore, an insurer cannot cancel flat or retroactively for nonpayment of premium. It can cancel prior to inception if the notice of cancellation was provided prior to the effective date of the policy.

Cancellations of premium-financed policies have unique considerations. The New York State Court of Appeals ruled in [Crump v. Unigard Insurance Company](#) that a cancellation by a premium finance company is not valid until the cancellation notice is actually received by the insurer. Therefore, **cancellation of a premium financed policy can only be done prospectively from the date the insurer receives a proper request from a premium finance company**. In addition, any requirements that apply to the timing of an effective cancellation for a specific policy type must be applied.

The bottom line is that insurers and brokers need to consider the basis and propriety of issuing flat cancellations that could later be disputed by the named insured or a party making a claim against the insured.

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120 WALL STREET, 24TH FLOOR
NEW YORK, NY 10005

646.292.5500 | INFO@ELANY.ORG

WWW.ELANY.ORG

