

September 13, 1972

SUBJECT: INSURANCE

Circular Letter No. 4 (1972)

TO ALL AUTHORIZED TITLE INSURANCE CORPORATIONS

Re: Mechanics' and Materialmen's Liens

Gentlemen:

The New York Insurance Department has recently completed a review of certain title insurance company practices which involve the granting of affirmative coverage against all mechanics' and materialmen's liens under their mortgage policies, including those arising from labor or materials furnished subsequent to the effective date of the policy. Such coverage has apparently been sought by financing institutions, particularly in those Jurisdictions where such liens have priority over the construction mortgage.

Some foreign title companies have coupled this insurance coverage with so called "construction disbursement agreements" whereby for a fee, construction funds are disbursed to the proper parties by the title insurance company on behalf of the financing institution. In the event construction cannot be completed, this agreement includes a provision that the title insurer may elect to complete construction and to hold harmless the financing institution free and clear from any liens that may be filed for labor and materials.

Section 430(8) of the New York Insurance Law provides:

"No foreign or alien insurer shall hereafter be granted a license or renewal of a license to do in this state the kind of business specified in paragraph eighteen of section forty six if it may exercise any powers or conduct any business without this state not authorized by said paragraph eighteen of section forty-six"

You are hereby advised it is the position of this Department that Section 46(18) of the New York Insurance Law does not permit a title insurance company to cover mechanics' and materialmen's liens arising from labor or materials furnished subsequent to the effective date of the policy.

Where mechanics' and materialmen's liens are legitimately covered under a title insurance policy for labor or materials furnished prior to the effective date of the policy, the company should take appropriate steps to protect itself from loss due to unfiled liens. These steps would include waiver agreements, cash deposits, posting of surety bonds or insertion of proper exceptions to coverage.

With regard to the aforementioned "construction disbursement agreements", a question has been raised as to whether or not the power to write such coverage is vested in a title insurance company. Section 42(3) of the New York Insurance Law provides in relevant part, as follows:

"No foreign insurer shall be licensed to do in this state any kind of insurance business, or combination of kinds of insurance business, which are not permitted to be done by domestic insurers hereafter to be

licensed under the provisions of this chapter. No foreign insurer shall be authorized to do business in this state if it does in this state or elsewhere any kind of business, other than an insurance business and such business as is necessarily or properly incidental to the kind or kinds of insurance business which it is licensed to do in this state." (emphasis added).

In addition, Section 46 provides:

". . .In addition to any power to engage in any other kind of business than an insurance business which is specifically conferred by the provisions of this chapter, any insurer authorized to do business in this state may engage in such other kind or kinds of business to the extent necessarily or properly incidental to the kind or kinds of insurance business which it is authorized to do in this state . . .".

This Department is presently considering the question of whether "construction disbursement agreements" which do not include coverage against mechanics' and materialmen's liens arising from labor or materials furnished subsequent to the effective date of the policy and which incorporate proper safeguards against loss due to unfiled liens as heretofore indicated, may be properly entered into by a title insurance company as necessarily or properly incidental to its title insurance business.

Those companies which desire to do so, are hereby afforded an opportunity to submit arguments justifying such construction disbursement agreements as described in the preceding paragraph.

Please address your reply to the attention of Mr. George Fosket,. Supervising Insurance Examiner.

Very truly yours,

[SIGNATURE]

William C. Gould

Assistant Superintendent