

STATE OF NEW MEXICO
OFFICE OF SUPERINTENDENT OF INSURANCE

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Russell Toal



DEPUTY SUPERINTENDENT

Robert E. Doucette, Jr.

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New Mexico

Title Escrow Theft & Title Insurance Fraud

There are methods for combating and preventing escrow theft, defalcations and other forms of fraud associated with title insurance and closing services.

Terms that will be used in this article, “title underwriter” means a title insurer; “title insurance agent” and “escrow officer” means any person who solicits title insurance policies, signs commitments and policies and performs escrow or other closing services; and “settlement service provider” means any person or entity that performs escrow or other closing services including a title underwriter. The escrow provider may be a title insurance agent for a title underwriter.

Underwriters contract with agencies and appoint agents. The underwriter primarily manage escrow theft risk through agency audits and require agencies to utilize sound business practices. The industry is primarily responsible for escrow theft prevention. In New Mexico, the Office of Superintendent of Insurance (OSI) by regulation 13.14.4.11 NMAC annually requires a third-party certified public accountant (CPA) review of all licensed title insurance agents. By using periodic and random audits, irregularities may be revealed. Title insurance agents, entities, individuals, and escrow officers who sign commitments and policies are licensed by the OSI. Prior to being issued a license, all licensees must pass the title insurance exam. Continuing education is required by the OSI.

Types of Escrow Theft

Methods by which closing funds and title insurance premiums can be misappropriated are numerous. Some of the potential methods include:

- Misappropriation of closing funds for use other than as provided for in the closing instructions.
- Failure to pay off existing mortgage loans in full, diverting closing funds for personal use while attempting to make periodic payments on the existing loans.
- Misappropriation of title insurance premiums. Failure to report and issue title insurance policies.
- Failure to perform all services specified in the closing instructions or U.S. Department of Housing and Urban Development (HUD) form.

Main Office: 1120 Paseo de Peralta, Room 428, Santa Fe, NM 87501
Satellite Office: 6200 Uptown Blvd NE, Suite 100, Albuquerque, NM 87110
Main Phone: (505) 827-4601 | Satellite Phone: (505) 322-2186 | Toll Free: (855) 4 - ASK - OSI

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- Fraudulent activity by unlicensed or unauthorized entities.
- Engaging in check-kiting or other banking-related fraudulent schemes with title agency accounts.
- Acceptance of funds that are not “good funds” “collected funds” for the purpose of closing transactions.
- Intentional or fraudulent misrepresentation of title defects or failure to disclose title defects with the intention of burdening the title underwriters with subsequent losses.
- Participation or complacency in mortgage or real estate fraud schemes as flipping and flopping (reverse staging), phony appraisals or rushed escrow closings.
- Not using federally insured banking institutions
- Cyber-fraud aimed at identity theft or misdirection of escrow funds to the accounts of unrelated parties, typically via fraudulently obtained online banking credentials of the title company, or realtor’s email and license, and hacked emails.

Harm to Consumer

Escrow and title insurance thefts harm consumers in a number of ways. The most obvious example of loss to consumers is instances where customer funds are stolen without recourse from responsible parties such as title underwriters. Failure by the title agency to pay off certain escrowed funds, may not surface for years or until the property is resold. Did you ask for an insured closing letter from the underwriter? The lender requires an insured closing letter. The borrower should ask for an insured closing letter.

Related Concerns

- Mingling of escrow funds with operational or personal funds are prohibited in New Mexico.
- Inappropriate investment of escrow funds in unsound or non-guaranteed accounts.
- Title underwriters and title agents are prohibited from receiving for their own use interest from escrow accounts.
- Delays in issuing title policies and premium remittance.
- Failure to fulfill closing obligations (deed recording).
- Mishandling funds because of confusing closing instructions.
- Inadequate prevention of fraud against title underwriters and cybercrime that is initiated by unrelated parties aimed at identity theft, obtaining fraudulent remittances or misdirection of funds.

Detect and Prevent Escrow Theft

Model Laws and regulation from the National Association of Insurance Commissioners (NAIC Model GDL 1750). New Mexico regulates title insurance and escrow handling.

- Title agent and escrow officer licensing.
- Examination of title agents by the OSI.
- Required underwriting contacts for title insurance underwriters.
- Timely remittance of title premiums to the title underwriters by title agents.
- Require timely delivery of title policy after closing.

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- Fiduciary accounts for premium funds owed to the title underwriter.
- Title underwriters access to records and accounts.
- Separation of records for different underwriters.
- Timely submission of escrow and title claims to the title underwriter.
- Maintenance and accountability of an inventory of policy forms or numbers.
- Statements of financial condition of the title underwriter and title agent.
- Fiduciary trust accounts in a federally guaranteed institution for escrow and settlement.
- All settlement disbursements should be drawn on accounts designated “Escrow” or “Trust” accounts.
- Disbursements of funds only pursuant to applicable written directions from buyers, lenders, or sellers.
- New Mexico requires “Available Funds” and no float as required and defined in 13.14.1.7.E NMAC.
- New Mexico annually requires independent audits of escrow, settlement, closing, and security deposit accounts.
- New Mexico requires a fifteen (15) year record retention including copies of checks both front and back.
- Request closing or settlement protection. Ask the provider if they have Errors and Omissions, Surety Bonds and Fidelity Bonds for all employees.
- Ask the agent for proof of licensing. Call the OSI for proof of licensing. (855.427.5674)
- New Mexico requires continuing education of all licensees.
- New Mexico was rated by Demotech, Inc. as having substantially more regulation than the NAIC Model Act. (http://www.demotech.com/pdfs/papers/20120604_defalcation_study.pdf)

The OSI’s Title Insurance Bureau has over 90 years of title experience. The Bureau offers their experience to the consumer.