



Lawyers' Fraud Avoidance Duties Clarified

Over the past 15 years or so, cyber fraud and related exploits have cost lawyers and their clients millions of dollars. One of the most successful strategies used to separate lawyers and clients from their money during a transaction has been and continues to be spoofing email. In fact, the exploit has been so successful that courts have developed a rule to answer the question of who should bear the loss when the fraudulent conduct of a third party causes a party breach a contract.

Most recently, the Alabama Court of Civil Appeals applied the so-called “impostor rule” to resolve a dispute between two parties to a failed settlement agreement and payment. See, *Mile High, LLC v. Flying M. Aviation, Inc.*, ___ So.3d ___, 2024 WL 57451 (Ala. Civ. App. Jan. 5, 2024). There, the court concluded (to paraphrase the rule) that the party who was in the best position to prevent the fraud by exercising reasonable care should bear the loss. This application squares with other courts addressing similar circumstances. See, e.g., *Parmer v. United Bank, Inc.*, (No. 20-0013, Dec. 7, 2020) (W.Va. 2020) (not reported in South Eastern Reporter); *Arrow Truck Sales, Inc. v. Top Quality Truck & Equip., Inc.*, (No. 8:14-cv-2052-T-30TGW, Aug. 18, 2015) (M.D. Fla. 2015) (not reported in Federal Supplement).

In *Mile High's* all-too-familiar fact pattern, the parties negotiated a settlement agreement. Plaintiff's counsel sent an email to defendant's counsel with payment instructions. That email never arrived; instead, a third party intercepted the email and sent a different email with different payment instructions, which defendant's counsel followed, wiring the settlement money to the third party instead of the plaintiff. The parties to the settlement disputed who should bear the loss.

The court found that “Based solely on the appearance of the e-mail and the wiring instructions, [defendant's counsel] had no reason to believe that the e-mail and wiring instructions were inauthentic.” Rather, the court determined that the defense counsel was in the best position to avoid the fraud by exercising reasonable care and verifying the wiring instructions: “Under the circumstances, [defense counsel] should have verified the wiring instructions before executing the wire transfer, which it easily could have done. Because [defense counsel] did not contact [plaintiff counsel] or anyone else at [plaintiff] to verify the wire transfer instructions, [plaintiff] was completely unaware of the fraudulent wiring instructions before the wire transfer was executed; therefore, [plaintiff] could not have prevented it from occurring.”

Always independently verify wiring instructions before sending money.

Have a risk management or ethics questions? We're here to help. To obtain a consultation, you should log in to [Attorneys Risk Management](https://www.attorneysriskmanagement.com), and click on the “Request a Risk Management Consultation” button.

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