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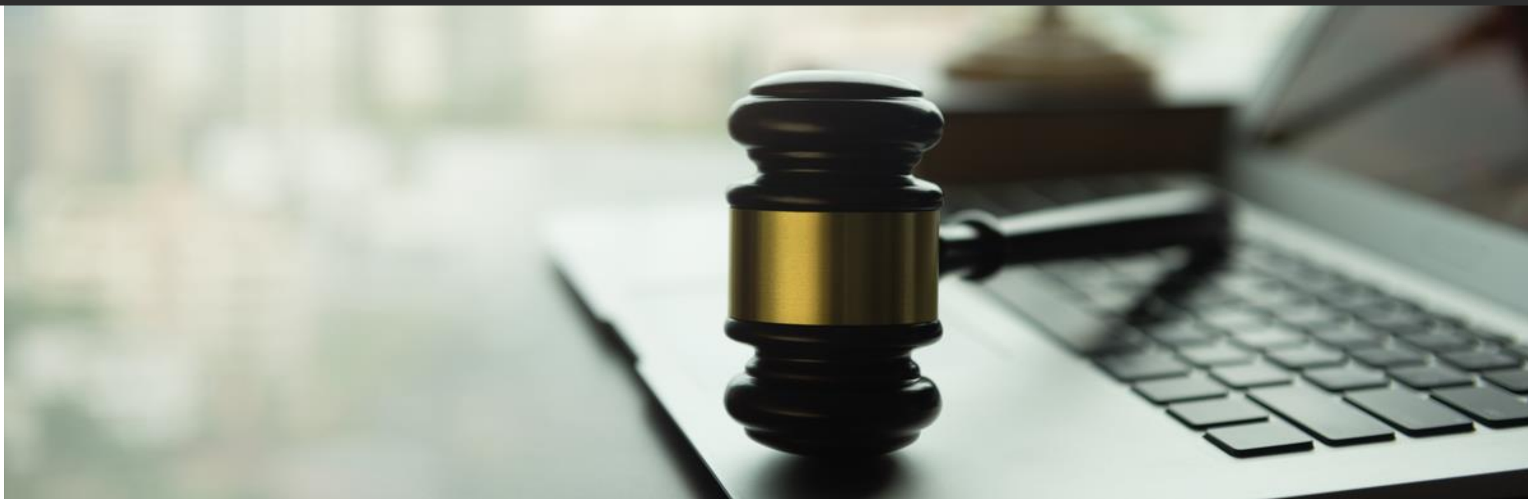

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Understanding Cyber Imposter Fraud and Liability Risks

Cyber criminals constantly develop new ways to steal money from businesses. One common scam targeting law firms and corporate legal departments involves "imposters" pretending to be clients or other parties who are owed payment, then tricking the attorney into paying the imposters. This deception has led to a rise in lawsuits where parties are battling over liability for the stolen funds.

Courts typically apply a two-part analysis in these cases. First, courts look at the parties' agreement to determine how payment was to be tendered. If the paying party tendered payment in a manner inconsistent with the agreement terms, courts have held that the payor breached the agreement when it paid the imposter, and that the payor still owes the original payee full payment. In cases where the payment the imposter intercepted was paid according to the terms of the parties' agreement, courts engage in a fact-specific inquiry and impose liability on the party that was best positioned to have prevented the imposter from seizing the funds but that failed to do so. If the court determines that the payor was negligent in its conduct, then the payor will remain in breach of the agreement until it pays the original payee. If, however, the court determines that the payee was best positioned to prevent the fraud, then the payor is relieved of its obligations to tender payment (having already satisfied its obligations), and the payee must absorb the costs of the imposter's theft.

Erie Ins. Co. v. WAWGD, Inc., an April 2024 case in the U.S. District Court for the District of Maryland, illustrates how courts apply this analysis. WAWGD and Erie had entered into a settlement agreement where WAWGD agreed to mail a $240,000 check payable to "Erie Insurance Company" to Erie's counsel's

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office in Philadelphia. After the settlement agreement was executed, WAWGD's counsel received a series of emails from an imposter that utilized Erie's counsel's email signature and a nearly identical email address. The imposter convinced WAWGD's counsel to mail the check to the imposter's address in Texas, instead of Erie's address in Philadelphia, and to make the check payable to a fictitious entity called "Erie Insurance LLC," instead of the actual recipient entitled to the funds, "Erie Insurance Company." The imposter cashed the check before the parties uncovered the fraudulent scheme, and Erie sued WAWGD for breach of contract. The trial court concluded that WAWGD breached the settlement agreement when it tendered the payment to a different address and entity than the settlement agreement required. The trial court also concluded that WAWGD was best positioned to prevent the fraud because WAWGD could have called Erie's counsel and confirmed that the imposter was requesting WAWGD to deviate from the signed settlement agreement's original terms. As a result, WAWGD remained contractually obligated to tender the $240,000 payment to Erie.

The party tendering payment should do so only according to the agreement terms and assure that payment is made to the intended party. Where a change is sought, that should be checked with the party or parties involved to confirm that the change is genuine and that confirmation should be memorialized in writing. If one suspects unauthorized diversions, do not delay in protecting against that. Even without such a suspicion or incident, it is prudent to proactively strengthen one's safeguards against impostor fraud. Experienced assistance to do so is available.

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