

ESCROW AGENT FOUND 100% LIABLE FOR WIRE TRANSFER TO CYBERCRIMINAL/IMPOSTER

By Patrick McCormick, CIPP/US on 04/13/2023
Posted in Data Privacy and Cybersecurity



The Arizona Court of Appeals affirmed a jury verdict that imposed 100% liability on an escrow agent for a wire transfer it sent to a cybercriminal/imposter and attributed no fault to the imposter or the party whose systems were compromised by the imposter. Cybersecurity practitioners and Arizona litigators should take note of the decision and its potential implications.

In *Mago v. Arizona Escrow & Financial Corp.*, the plaintiff (“Mago”) had contracted to purchase a Subway franchise from the prior owners (the “Sellers”). The escrow agent for the deal was Arizona Escrow (the “Escrow Agent”).

Before the transaction closed, a cybercriminal (the “Imposter”) breached Mago’s email account and imitated the Sellers by creating a similar email address (in which an “rn” in the Sellers’ email address was changed to an “m”). The day before the sale, the Imposter emailed with Mago directly. On the day of the sale, the Imposter emailed Mago and the Escrow Agent, explaining that the wire instructions had changed. The Escrow Agent questioned the changed instructions in both the group email and to Mago directly; Mago confirmed that the Escrow Agent should release the funds per the new wire instructions. However, the Escrow Agent did not call the Sellers to get a voice confirmation of the new wire instructions.

The Escrow Agent transferred the funds per the Imposter’s wire instructions. As a result, the Sellers never received the funds, Mago could not recover his funds, and the sale did not close. Mago therefore sued the Escrow Agent.

The trial court instructed the jury to determine “the relative degrees of fault” for Mago, the Imposter, and the Escrow Agent. The jury found that the Escrow Agent was 100% at fault for Mago’s loss. As a result, Mago recovered from the Escrow Agent the full amount that was lost in the transfer,¹ as well as prejudgment interest and attorneys’ fees.

On appeal, the Escrow Agent argued that A.R.S. § 12-2506(B), Arizona’s Uniform Contribution Among Tortfeasors Act, required the jury “to assess some fault against [the Imposter], whose fault is undisputed.” The Court of Appeals rejected that argument, holding that A.R.S. § 12-2506(B) only required the jury to consider apportionment of fault, which was satisfied by the jury instructions and the verdict form, which had fields in which the jury was to indicate the relative degrees of fault for Mago, the Imposter, and the Escrow Agent. The appellate court thus affirmed the jury’s verdict and awarded Mago his attorneys’ fees on appeal.

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This jury verdict and appellate opinion could have significant implications in both the cybersecurity field and in Arizona litigation more broadly. In the cybersecurity context, professional service providers should note that they may be held liable for failing to catch or prevent a cybercrime or unauthorized payment, even if the hacker never infiltrates the service provider's own systems. Arizona litigants and litigators, meanwhile, should note that an allocation of liability to all parties at fault is not mandatory and juries may decline to attribute any fault to an undisputed non-party at fault, so long as they consider whether to do so.

For more information about the case, or to discuss any questions regarding cybersecurity or Arizona litigation, please contact Patrick Emerson McCormick, CIPP/US or another member of Lewis Roca's Data Privacy and Cybersecurity team.

¹ The jury awarded additional damages to Mago above the amount lost in the transfer, but those additional damages were eliminated by the trial court on remittitur.

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