National Year in Review

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John Castellano, Alix Partners LLP, Chicago, IL
Prof. Bruce A. Markell, Northwestern University School of Law, Chicago, IL
Melissa Root, Jenner & Block LLP, Chicago IL

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BROOKINGS

Report

The populist backlash in Chapter 11

David Skeel Wednesday, January 12, 2022

From a bankruptcy perspective, the pandemic has unfolded differently than expected. Prior economic crises have caused sharp upswings in bankruptcy The 2007-2009 crisis was true to form, with business bankruptcy filings dou during this time, to 60,837 in 2009 from 28,322 in 2007.[1] Given that governments almost completely shut down the American economy in 2020, an even greater surge seemed likely. Many observers predicted a massive wave of bankruptcies.[2] Bankruptcy scholars and bankruptcy organizations sprang into action, calling for Congress to increase the capacity of the bankruptcy system (primarily by increasing the number of bankruptcy judges) and to assure access to financing for companies that filed for bankruptcy.[3]

The big surprise of the current pandemic is that the great bankruptcy wave of 2020 never materialized. The number of very large corporate bankruptcies increased,[4] but overall business bankruptcies went down rather than up (from 22,780 in 2019 to 21,655 in 2020), and the decrease in consumer bankruptcy filings was even more dramatic (752,160 in 2019, 522,808 in 2020, a 28% drop).[5] The most obvious reason for the surprising decline in bankruptcy filings was the enormous amount of stimulus money that buoyed the economy, including well over $1 trillion of business lending capacity in the CARES Act of March 2020 and subsequent boosters of the small business portion of the legislation. In addition, the buoyancy of the stock market provided access to equity capital for firms that might have found themselves in bankruptcy under other circumstances.

Although the pandemic confounded the typical pattern of rising bankruptcies during an economic crisis, in another respect the pandemic has proved true to form: It has provoked a populist backlash. During the 2007-2009 crisis, populist movements emerged on both ends of the political spectrum—the Tea Party on the right and Occupy Wall Street on the left—in each case, protesting bailouts of large financial institutions.

The current crisis has prompted another populist backlash, as can be seen in controversies that have arisen in the Purdue Pharma opioid bankruptcy and in the bankruptcy of USA Gymnastics after revelation of horrendous sexual abuse by former team doctor Larry Nassar. Unlike the Tea Party and Occupy Wall Street, the current outrage is directed at the bankruptcy process itself. There is a growing populist perception that Chapter 11—the bankruptcy provisions used to restructure financially distressed businesses—has become deeply unfair. It benefits insiders—the "haves"—at the expense of outsiders—the "have nots."

The closest analogy to the current populist backlash comes not from the most recent pre-pandemic crisis but much earlier, during the Great Depression.[6] After emerging in the second half of the nineteenth century, the American approach to corporate reorganization (originally known as "equity receivership") came to be dominated by large Wall Street banks such as J.P. Morgan and large Wall Street law firms such as Cravath, Swaine & Moore. The banks that had underwritten a class of bonds would offer to represent the investors who bought the bonds in negotiations with a financially distressed railroad or other business. In the 1930s, New Deal reformers such as William Douglas—a Yale law professor who became chairman of the Securities & Exchange Commission and later a Supreme Court Justice—concluded that the Wall Street banks and lawyers were profiting (through the fees they charged and by assuming positions of control) at the expense of the investors they purposed to represent. The reformers ripped control from Wall Street by persuading Congress to enact, and President Roosevelt to sign, the Chandler Act of 1938. The Chandler Act prohibited bankers or lawyers that had represented a company before bankruptcy from representing it after the bankruptcy filing, which meant the company's underwriters could no longer run the reorganization process. Within a few years, Wall Street had disappeared from bankruptcy.

The pandemic has spurred a remarkably similar populist backlash. Even before the pandemic, concerns were growing about current developments in the restructuring of large corporations. Critics complained about companies' ability to file for bankruptcy almost anywhere they want to ("forum shopping"), insider control of the restructuring process, the payment of bonuses to managers before and during bankruptcy, and the use of bankruptcy in cases like Purdue Pharma to resolve not only the obligations of the company itself but also of individuals or entities like the Sacklers who have not filed for bankruptcy themselves. During the pandemic, discontent with current bankruptcy practice has grown considerably.[7] Lawmakers have introduced a spate of bills, each of which has been prompted by populist dissatisfaction with current Chapter 11 practice.

This report describes and comments on four practices that have prompted populist backlash. Several other controversial features of current practice that are not considered here are referenced in the footnote below.[8]

Bankruptcy venue

The first and most longstanding magnet for populist outcry is a company's choice of where to file its bankruptcy case—known as bankruptcy "venue." Under the current filing rule a company can file for bankruptcy in any of the following locations: where its headquarters are; its principal assets are; it is domiciled; or an "affiliate" of the company has already filed for bankruptcy.[9] Although this sounds like a limited set of options, in practice a company can file its bankruptcy case almost anywhere in the country due to the "affiliate" option. If a Pennsylvania company wished to file for bankruptcy in South Dakota, it could simply create a new, wholly owned entity in South Dakota and have the new entity file for bankruptcy in South Dakota. The Pennsylvania company could then file for bankruptcy in South Dakota since an "affiliate" is in bankruptcy there.

During the decade after the current bankruptcy code was enacted in 1970s, many large corporate debtors filed for bankruptcy in the Southern District of New York. Starting in 1990, Delaware joined New York as another popular filing location for large corporate debtors. The late 1990s saw the first serious challenge to this "forum shopping." Critics complained that New York and Delaware judges lured companies to their districts by, among other things, allowing bankruptcy lawyers to charge high fees, quickly approving all of the debtor's initial ("first day order") requests, and by authorizing rapid sales of the debtors' assets.[10] They also complained that New York and Delaware were too inconvenient for employees and small creditors of companies whose operations were in other states, which it made it impossible for small parties to participate.

Venue reform was never enacted, but it continued to percolate, with support from both Democrats and Republicans. In recent years, several other locations have joined New York and Delaware as popular venues, including Richmond, Virginia and most recently the Southern District of Texas (Houston). The new twist in the controversy is that debtors in several of these locations can pick not just the district where they file but the particular judge.[11] The Southern District of Texas has made this easy by committing to assign all large Chapter 11 cases to two judges in the district. In Southern District of New York, a debtor that files its bankruptcy case in White Plains was, until late last year, certain to get Judge Robert Drain, the only Southern District of New York judge sitting in White Plains.[12] Purdue Pharma appears to have filed its case there for this reason.

Congress is currently considering legislation sponsored by Senators Cornyn (R-TX) and Warren (D-MA) that would ban venue shopping.[13] Under the proposed legislation, large corporate debtors would generally be required to file for bankruptcy in the state where their headquarters or principal assets are.[14] The reform would remove domicile—the state where a debtor is incorporated—as a venue option, and the debtor could only file for bankruptcy where an affiliate has filed if the affiliate owns a majority of the debtor's stock—that is, if the affiliate is the parent corporation.

As often is the case with populist measures, the proposed legislation has beneficial features but also deeply problematic ones. Some of the forum shopping concerns are well taken. Debtors should not be able to pick particular judges within a district and permitting a debtor to file anywhere an affiliate has filed is too easy to manipulate. But removing a debtor's ability to file in its domicile would be seriously counterproductive. The loser here would be Delaware, where most large corporations are incorporated. Not only is the debtor's state of domicile an obvious filing location for a large corporation, but substantial empirical evidence suggests that debtors that file for bankruptcy in Delaware file there because of the expertise of Delaware's bankruptcy judges.[15]

Third party releases

Another contentious practice is so-called "third party releases." When a corporation completes a Chapter 11 reorganization, its prebankruptcy obligations are extinguished. The bankruptcy laws only contemplate that the corporate debtor's obligations will be extinguished, however, not the obligations of other parties such as the directors or officers of the debtor or outside parties that were involved in wrongdoing by the debtor. In many cases, a corporate debtor asks the court to extinguish the obligations of some of these other parties, often in return for a payment by the third parties. In the Purdue Pharma case, the Sacklers agreed to pay roughly $4.5 billion in return for a court order extinguishing their potential liability related to the opioid crisis. When companies owned by private equity funds file for bankruptcy, the private equity sponsor often seeks this protection. Such a release is known as a third-party release.

Courts have struggled with the question of whether third party releases should be permitted. Except with corporate debtors that have asbestos liability, which are subject to a special rule,[16] bankruptcy law does not speak to the question of whether third party releases are permissible. There are plausible arguments that they are constitutional and plausible arguments that they are not.[17] Some courts allow them, while others do not. As a result, corporate debtors sometimes seek to file their case in a location where third-party releases are permitted.

The Sacklers' efforts to obtain third party releases has triggered populist ire at their use. The bankruptcy judge approved the releases, although he required the debtor to reduce the scope of the releases. The district court subsequently reversed, concluding that the bankruptcy laws do not authorize third party releases.[18] This decision has been appealed to the federal court of appeals.

As with bankruptcy venue, Congress is currently considering a dramatic intervention —legislation that would almost completely ban third party releases.[19] Unlike with venue, there is a plausible argument for simply disallowing third party releases, even if they are legally permissible. The argument is that parties who have not themselves filed for bankruptcy should not be entitled to benefits of bankruptcy such as the extinguishing of debts. If the Sacklers or other third parties want this benefit, they need to file for bankruptcy.

The argument that third party releases should be permitted, at least on some occasions, is more pragmatic. Some argue that the treatment of nondebtors such as the Sacklers is so closely related to the debtor's reorganization that the company's financial distress cannot be resolved without also addressing potential claims against the nondebtors.[20] Defenders of third party releases also contend that everyone, including victims, may be better off when a release is given in return for compensation by the third parties. The Sacklers have argued that if they were not given relief they would defend themselves vigorously outside of bankruptcy and victims would likely receive much less than the $4.5 billion the Sacklers have agreed to pay in the bankruptcy.

Rather than simply banning third party releases, a more nuanced response would be to insist that third parties seeking a release provide more transparency about their assets and ability to contribute.[21] In a sense, they would be required to submit to some same rules about disclosure that would apply if they had filed for bankruptcy. Releases might also be limited to third parties that did in fact make a substantial contribution to the payment of victims or other creditors.

The "Texas Two-Step"

A third controversial practice is moving assets from one entity to another—often creating a "good company" with plenty of assets and an asset poor "bad company"—and then subsequently putting one or both of the entities in bankruptcy. Private equity funds often conduct internal reorganizations that are alleged to have this effect after they acquire a company, as in the Chapter 11 cases of the Chicago Tribune and Caesar's.[22] More recently, financially distressed debtors have taken advantage of a Texas law that appears to bless these transactions.[23] The most controversial current example is Johnson & Johnson. Johnson & Johnson created a separate entity for its talc line of business, which is subject to numerous lawsuits, and put the separate entity into bankruptcy. This strategy has become known as the "Texas Two-Step."

These transactions also have spurred populist backlash, both because they seem to involve manipulation by insiders and because the manipulators often are private equity funds, a bête noire of many populists. The proposed legislation to ban third party releases mentioned earlier also would amend bankruptcy law to require dismissal of any case involving a divisional merger that "had the intent or foreseeable effect of ... separating material assets from material liabilities ... and ... assigning all or a substantial portion of those liabilities to the debtor."[24]

As with the other issues, courts already have a more nuanced response available to them. When a company transfers assets from a "bad company" to a "good company" within its corporate structure and one or both later end up in bankruptcy, the transfer can be challenged as a "fraudulent conveyance" if the bad company did not receive adequate compensation for the assets it transferred. Fraudulent conveyance challenges were central to the Chicago Tribune and Caesar's cases.

With a Texas Two-Step transaction, creditors also can challenge the bankruptcy case as having been filed in bad faith. If the transaction is abusive—if the bad company doesn't have any real assets, for instance—the court can simply throw the case out.

Lender control of bankruptcy outcomes

Another controversial feature of current practice is lenders' use of their financing agreement and related contracts to dictate the outcome of a Chapter 11 case. When Neiman Marcus filed for bankruptcy, it had signed a financing agreement with lenders to borrow $675 million, together with a so-called Restructuring Support Agreement that locked in a reorganization plan that required Neiman to transfer control to the lenders.[25] Once the financing was approved, the case was over—no other outcome was possible.

If the market for providing financing to debtors in bankruptcy were competitive, lenders' use of lending agreements to control the restructuring process might be less problematic. But the debtors' current senior lenders have a monopoly, or nearly so, because other lenders fear that their loan will simply subsidize the senior lenders if the senior lenders have priority over the new lenders. Only if the court awards new lenders a "priming lien"—that is, priority over the current senior lenders—will new lenders offer to finance the debtor's operations in bankruptcy. Bankruptcy courts have the power to provide priming liens if the senior lenders will be "adequately protected," but they have been reluctant to do so.[26]

Although the monopoly of debtors' current lenders has not yet gotten significant attention in policy circles, the issue is even more pervasive in practice. As with the issues discussed earlier, the problem does not require a legislative solution. Bankruptcy courts could facilitate competition by signaling a greater willingness to grant priming liens to new lenders and by declining to enforce contractual provisions that impede competition.[27]

A breaking point?

Complaints about insider control of Chapter 11 were rising even before the recent pandemic. The pressure has steadily increased during the pandemic, due both to the pandemic and to the confluence of highly controversial bankruptcy filings by Purdue Pharma, USA Gymnastics, the Boy Scouts, and others.

The long-term implications of the populist backlash triggered by these developments may depend on how bankruptcy professionals and bankruptcy judges respond to this unrest. If courts address the legitimate concerns raised by bankruptcy populists, the credibility and effectiveness of Chapter 11 may be restored. The Johnson & Johnson and Purdue Sackler cases offer hints of such a trend. With the talc entity of Johnson & Johnson, a bankruptcy judge transferred the case from North Carolina to New Jersey after allegations of forum shopping, and a motion to dismiss the case as having been filed in bad faith is pending. In Purdue Pharma, a district court struck down the controversial Sackler releases.

If these problems continue to fester, the populist backlash may lead to sweeping bankruptcy reform. Such reform is unlikely to be carefully tailored to the problems that prompted it. It could even destroy traditional Chapter 11 practice, much as the Chandler Act of 1938 brought an end to the reorganization framework that presaged current Chapter 11.

Although the pandemic did not overwhelm the bankruptcy system as many expected, it did bring a spate of preexisting conditions to light.[28] The lesson for bankruptcy insiders, the "haves" of the bankruptcy process, seems to be "Physician, heal thyself," before it's too late.

Footnotes

1. 1 The statistics can be found at https://abi-org.s3.amazonaws.com/Newsroom/Bankruptcy_Statistics/Total-Business-Consumer1980-Present.pdf.
2. 2 See, for example, Mary Williams Walsh, "A Tidal Wave of Bankruptcies is Coming," N.Y. Times, June 18, 2020, available at https://www.nytimes.com/2020/06/18/business/corporate-bankruptcy-coronavirus.html, and the sources cited in the next footnote.
3. 3 See, for example, David Skeel, "Bankruptcy and the coronavirus," Economic Studies at Brookings (April, 2020); Letter from Jared A. Ellias, Chair, Large Corporations Committee of Bankruptcy & COVID-19 Working Group to Sens. McConnell and Schumer, and Reps. Pelosi and McCarthy (June 10, 2020)(attaching memorandum authored by Benjamin Iverson, Jared A. Ellias, and Mark Roe).
4. 4 See, for example, Cornerstone Research, "Trends in Large Corporate Bankruptcy and Financial Distress," Midyear 2021 Update, at p. 1 (bankruptcy filings of companies with more than $1 billion in assets in 2020 were the most since 2005), available at https://www.cornerstone.com/Publications/Reports/Trends-in-Large-Corporate-Bankruptcy-and-Financial-Distress-Midyear-2021-Update.
5. 5 The statistics can be found at https://abi-org.s3.amazonaws.com/Newsroom/Bankruptcy_Statistics/Total-Business-Consumer1980-Present.pdf. The decline continued in 2021, with first quarter business bankruptcy filings at 4,231, as compared to 5,952 in the first quarter of 2020.
6. 6 The events in this paragraph are described in detail in David A. Skeel, Jr., Debt's Dominion: A History of Bankruptcy Law in America, Princeton: Princeton University Press, 2001.
7. 7 For scholarly discontent, see, for example, Adam J. Levitin, "*Purdue's* Poison Pill: The Breakdown of Chapter 11's Checks and Balances," Texas Law Review 100 (forthcoming, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3851339.
8. 8 Other controversial issues include payment of bonuses to managers either before or during the bankruptcy, and the effect of "equitable mootness," a doctrine pursuant to which an appellate court dismisses an appeal of a bankruptcy court decision as "moot" based on a conclusion that it is too late to reverse the effects of a reorganization that has already been confirmed. I have discussed managerial bonuses in detail elsewhere. David A. Skeel, Jr., Taking Stock of Chapter 11," Syracuse Law Review (forthcoming, 2021), manuscript at 29-32, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3846401; Testimony of David A. Skeel, Jr. Before the Subcommittee on Antitrust, Commercial and Administrative Law, House Judiciary Committee, July 28, 2021, at pp. 6-7. Equitable mootness is omitted for reasons of space, and because equitable mootness has been an issue in the Puerto Rico restructurings I am involved in as chairman of the Puerto Rico oversight board.
9. 9 The venue provision is 28 U.S.C. § 1408.
10. 10 The classic criticism of bankruptcy forum shopping is Lynn LoPucki, Courting Failure: How Competition for Big Cases Is Corrupting the Bankruptcy Courts, Ann Arbor, MI: University of Michigan Press, 2005.
11. 11 Adam Levitin discusses this phenomenon in detail in ibid, 100 Texas L. Rev, manuscript at 52-71.
12. 12 The Southern District of New York shifted to random assignment of judges after the controversy around the Purdue Pharma filing. See James Nani, "N.Y. Mega Bankruptcies to Get Random Judges After Purdue Furor," Bloomberg Law, Nov. 22, 2021, available at https://news.bloomberglaw.com/bankruptcy-law/new-york-chapter-11-mega-cases-to-be-assigned-random-judge.
13. 13 S. 2827, 117th Cong., 1st Sess., Sept. 23, 2021.
14. 14 Section 3 of the proposed legislature would replace 28 U.S.C. § 1408 with a new provision limiting venue as described in the text.

    Robert Rasmussen has recently offered a very different strategy for reform, calling for creation of a "business bankruptcy panel" in each judicial circuit, see Robert K. Rasmussen, "COVID-19 Debt and Bankruptcy Infrastructure," Yale Law Journal Forum 131 (2021): 337.

15. 15 For evidence of the role of judicial experience, see, for example, Kenneth Ayotte & David A. Skeel, Jr., "An Efficiency-Based Explanation for Current Corporate Reorganization Practice," University of Chicago Law Review 73 (2006): 425.
16. 16 Congress enacted a special provision for asbestos cases in 1994. 11 U.S.C. § 524(g). Section 524(g) authorizes releases of third parties that have potential liability for victims' asbestos exposure.
17. 17 The classic article questioning whether releases are an appropriate use of the bankruptcy judge's powers is Ralph Brubaker, "Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-debtor Releases in Chapter 11 Reorganizations," University of Illinois Law Review (1997): 959.
18. 18 In re Purdue Pharma, Case No. 21 cv 7532 (CM), U.S. District Court, Southern District of New York, Dec. 16, 2021.
19. 19 H.R. 4777, 117th Cong., 1st Sess., July 28, 2021 (sponsored by Representatives Nadler, Maloney, and Cicilline).
20. 20 For a defense of third party releases on related grounds, at least where there is broad support for the releases, see Douglas Baird, Anthony Casey, and Randal Picker, "The Bankruptcy Partition," University of Pennsylvania Law Review, 166 (2018): 1675, 1686-90.
21. 21 See, for example, Lindsey Simon, "Bankruptcy Grifters," Yale Law Journal (forthcoming, 2021).
22. 22 The controversial restructuring of Caesar's and the battles that ensued in bankruptcy are chronicled in a recent book: Max Frumes & Sujeet Indap, The Caesar's Palace Coup: How a Billionaire Brawl Over the Famous Casino Exposed the Power and Greed of Wall Street, New York: Diversion Books, 2021.
23. 23 For a detailed explanation of this strategy, technically called a division merger, see Parikh, Samir D., "Mass Exploitation," University of Pennsylvania Law Review Online, 170 (forthcoming, 2021), manuscript at pp. 4-6, available at SSRN: https://ssrn.com/abstract=3929647.
24. 24 H.R. 7777, § 4.
25. 25 See, for example, Mike Spector & Jessica DiNapoli, Exclusive: Neiman Marcus Creditor Calls for Deal with Saks Fifth Avenue - Letter, Reuters, May 12, 2020, https://www.reuters.com/article/us-neinmanmarcus-m-a-saksfifthavenue-exc-idUSKBN22P035 [https://perma.cc/Y5B8-Q5KD].
26. 26 For discussion of these issues, and citations to other scholars who have raised similar concerns, see David Skeel, "Pandemic Hope for Chapter 11 Financing," Yale Law Journal Forum 131 (2021): 315.
27. 27 Ibid. at pp. 327-35.
28. 28 For a similar perspective, see Melissa B. Jacoby, "Shocking Business Bankruptcy Law," Yale Law Journal Forum 131 (2021): 409.

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True Sale? Or Not True Sale? That is the Question

March 8, 2022

Within the past 18 months, two bankruptcy courts have used the same factors, but reached opposite conclusions, about the characterization of two merchant cash advance funding transactions as either a "true sale" or not a "true sale" – and instead, a disguised financing. In doing so, the courts' decisions confirm the importance of appropriate structuring to achieve true sale treatment.

The characterization of a transaction as either a true sale or a disguised financing has significant implications for tax, accounting, and bankruptcy purposes. In the context of a bankruptcy proceeding, the characterization of a transaction determines whether the assets at issue are properly included within a debtor's bankruptcy estate and subject to the automatic stay. Specifically, if a transaction is characterized as a true sale, the assets purchased would not be property of the debtor/seller's bankruptcy estate, and would not be subject to the automatic stay. If, however, a transaction is characterized as a secured loan, the assets at issue would be considered merely pledged by the debtor/seller, would be property of the debtor/seller's bankruptcy estate, and would be subject to the automatic stay. This is the precise issue considered by the bankruptcy courts in *Cap Call, LLC v. Foster,* Case No. 15-60979 (Bankr. D. Mont. Sept. 10, 2021) ("Shoot The Moon") and *In re R&J Pizza Corp.*, Case No. 14-43066 (Bankr. E.D.N.Y. Oct. 14, 2020) ("R&J Pizza Corp").

The "true sale" analysis engaged in by these two bankruptcy courts, described in greater detail below, reminds practitioners of the following key structuring considerations:

- Do not rely solely on descriptions in the transaction documents of the parties' "intent" to effectuate a sale rather than a secured loan. If the underlying facts and circumstances do not match these descriptions, courts may hold that these "self-serving" descriptions are not dispositive.
- Examine the allocation of risk as between the seller and the buyer. Generally, if the credit recourse is allocated to the seller or any guarantors, there is a greater likelihood that a court will recharacterize the transaction as a secured loan, regardless of the parties' stated intent.
- To the extent possible, limit recourse, though representations and warranties concerning the facts at the time of a sale are appropriate.
- Avoid broad granting clauses that convey a "security interest" in the seller's assets other than those being sold. Instead, grant only a protective security interest in the assets being sold.
- To the extent possible, limit or prohibit repurchase rights.
- Identify the parties as "seller" and "buyer" (not "lender" and "borrower"/"debtor") in the transaction documents including, if the filing jurisdiction permits, in the UCC-1. Avoid using terms more appropriate for a secured loan rather than a sale.
- If the seller retains servicing obligations with respect to the purchased receivables, to the extent possible limit the commingling of collections on the purchased receivables with other collections.

Generally, to determine whether a transaction is a true sale or a pledge of assets securing a loan, most courts purport to look to applicable state law. Although courts often note the importance of applicable state law, courts have developed and apply a multi-factor test as a matter of federal common law. Because of the fact-intensive nature of the inquiry, no one factor of the test is dispositive, and the relative significance accorded to a particular factor varies significantly from case to case. If most of the relevant factors are present, however, recharacterization of a transfer of assets as a pledge, and the attendant inclusion of such assets in the seller's bankruptcy estate and application of Article 9 duties, probably will result.

Courts have often identified the following eight factors as potentially relevant to a true sale recharacterization analysis:

- Language in the documents and conduct of the parties;
- Recourse to the seller;

- Seller's retention of servicing/commingling of proceeds;
- Purchaser's failure to investigate the creditor of the account debtor;
- Seller's right to any excess collections;
- Purchaser's right to unilaterally alter pricing terms;
- Seller's right to unilaterally alter or compromise the terms of the underlying asset; and
- Seller's retention of the right to repurchase.

The bankruptcy courts in *R&J Pizza Corp* and *Shoot The Moon* applied these factors, and each focused on the same six (out of eight) factors identified in the following chart, which includes facts the courts discussed when analyzing these six factors:

	R&J Pizza Corp	*Shoot The Moon*
Language and conduct	• Transaction documents stated the parties intended a sale; consistently referred to the transaction as "purchase"/"sale" • Financing statement described the transaction as a "sale" between "seller" and "buyer" • Course of conduct between the parties evidenced a true sale • Business terms of the transaction were consistent with that of a sale not secured loan (notably no right to interest)	• Transaction documents stated the parties intended a sale • Financing statement identified Shoot The Moon as a "debtor" rather than as a "seller" • Course of conduct between the parties evidenced loans (business actors often discussed the transactions as "loans" with "balances") • Parties "stacked" or "rolled" funds from one transaction to the next, effectively refinancing earlier transactions
Recourse to the seller	• No recourse provisions against the debtor for non-collection • Personal guaranty effective only upon certain limited circumstances, including misrepresentation of fact and sale of assets w/out notice	• Broad personal guaranty of payment and performance • Confession of judgment • Ongoing obligations to provide financials and other "Protections Against Default" (including acceleration, enforcement of the broad security interest, authorizing the exercise of rights under an assignment of lease, etc.)
Seller's retention of servicing/commingling	• No retention of servicing rights or any rights to collect receivables; to the contrary, transaction documents required use of a credit card processor	• Seller/Debtor commingled funds from the underlying accounts receivables with other operating funds
Seller's right to any excess collections	• Narrow grant of "backup" security interest only in receivables being "sold"	• Broad grant of security interest to assets other than receivables being "sold" (all payment and general intangibles, including tax refunds, customers, licenses, intellectual property)
Purchaser's right to unilaterally alter terms	• No right to unilaterally alter the terms of the receivables	• No right to unilaterally alter the terms of the receivables
Seller's retention of the right to repurchase	• No repurchase rights	• No repurchase rights
	TRUE SALE	NOT TRUE SALE

After a review of the factors identified in the chart, it should be no surprise that the court in *R&J Pizza Corp* determined that transaction was a true sale, while the court in *Shoot The Moon* determined that transaction was a disguised financing. Specifically, while each of the six factors in the chart weigh in favor of a true sale determination in *R&J Pizza Corp*, the first four factors in the chart weigh in favor of recharacterizing the transaction as a secured loan in *Shoot The Moon*.

Although no one factor controls, both bankruptcy courts gave great weight to factors 1 (language and conduct), 2 (recourse to the seller), and 5 (seller's right to excess collections), focusing on the overall nature of the transaction to determine the actual intent of the parties rather than the intent of the parties as stated in the documents.

In light of the relevant facts and circumstances, the conclusions reached by the two bankruptcy courts are not surprising. The two decisions, however, are good reminders of important considerations when structuring a transaction to achieve true sale treatment.

RELATED PEOPLE

Jason W. Harbour
Partner
jharbour@HuntonAK.com
+1 804 788 7233 direct

Jennifer E. Wuebker
Associate
jwuebker@Hunton.com
+1 804 344 8815 direct

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THE MURKY PROCESS OF CHARACTERIZING MERCHANT CASH ADVANCE AGREEMENTS

Kara J. Bruce

INTRODUCTION

When times get tough, businesses and individuals turn to increasingly risky financing sources to make ends meet. A source of funding popular among cash-strapped small businesses is the merchant cash advance ("MCA").[1] An MCA is styled as a sale of future receivables. As stated on one financier's website:

> A merchant cash advance empowers your business to trade tomorrow's earnings for cash today. You receive a lump sum of cash upfront, and then you pay back the advance with a percentage of your daily sales. You're essentially selling your future sales at a discount.[2]

MCAs started growing in popularity when credit was tight in the years following the financial crisis, and they continue to be marketed to companies that cannot qualify for more traditional sources of financing.[3] As one financier advertises:

> Since MCAs aren't *technically* loans, they don't require the same strict eligibility standards that loans do—so you can score capital with low credit and zero collateral in no time.[4]

In 2019, MCA companies provided an estimated $19 billion in financing, mostly to small businesses.[5] Yet far from being the infusion of cash to right a sinking ship, these high-cost financing transactions often exacerbate an already perilous financial position. And, when the business is unable to keep up with payments, MCA financiers have been accused of "mafia-style" collection activity.[6] Predictably, some small businesses that have received MCA financing have quickly found their way to bankruptcy court.

Consider *In re GMI Group*, a chapter 11 case filed by a janitorial services company based in Lawrenceville, Georgia.[7] Over the latter part of 2018, GMI entered into at least three high-cost financing transactions, including two MCA agreements.[8] GMI received its first MCA from Reliable Fast Cash, Inc. ("Reliable") on August 10, 2018.[9] The "Purchase and Sale of Accounts" provided that GMI would receive $150,000 in immediate cash in exchange for the sale of $210,000 in future receivables, payable in daily ACH withdrawals of

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$1,400.[10] This amount was estimated to be 5% of the debtor's daily receipts. GMI granted Reliable a backup security interest in the debtor's collateral, and the CEO of the company signed both an Affidavit of Confession of Judgment[11] and a personal guaranty for the obligations.[12]

A few months later, on October 3, 2018, the debtor entered into a similar transaction with Unique Funding Solutions, LLC ("Unique"). There, in exchange for $75,000, the debtor agreed to transfer $111,750 in future receivables, payable in daily withdrawals of $1,117.[13] This number was estimated to be 17% of the debtor's daily receipts.[14] Unique also obtained a security interest in the debtor's collateral and a personal guarantee from the company's CEO.[15]

Note the high rates of return that the MCA financier enjoys in these transactions. In addition to origination and financing fees of $3,000 and $6,700, respectively,[16] the effective interest rates on these transactions—based on the total amount owed to the financier in excess of the advanced funds—were extraordinarily high. Indeed, the GMI court estimated the effective interest rate of the Unique transaction to be $115%.[17] Applying a similar formula to the Reliable transaction generates an effective interest rate of 69.5%.[18] Such high effective interest rates are commonplace in the MCA industry.

GMI was unable to keep up with the daily withdrawal obligations to avoid default on the MCAs. It appears that GMI defaulted on the Unique transaction *eight days* after the MCA took place.[19] By the middle of November, both Reliable and Unique had obtained confessed judgments against GMI and garnished GMI's bank accounts. The Reliable judgment, obtained 96 days after the MCA funding was provided, was entered in the amount of $177,000. This amount reflected credited payments of $77,000 on an initial advance of $150,000, plus attorney's fees in the amount of $44,289.[20] The Unique judgment, entered two days after the Reliable judgment and 44 days after the Unique transaction closed, was entered in the amount of $136,967.62. This amount reflected credited payments of $8,936 on an initial advance of $75,000, plus attorney's fees of $33,928.62 and other miscellaneous costs totaling $225.[21]

When merchants like GMI find themselves on the wrong side of a confessed judgment,[22] or in bankruptcy,[23] or otherwise in litigation with their MCA financiers,[24] their attorneys may look to usury laws for a solution. Usury does not apply to sale transactions. As such, to benefit from a usury defense, the merchants must demonstrate that the transaction they entered into was a secured loan in disguise. This requires litigants and courts to wade into the case law involving recharacterization of sales—a body of law that is "remarkable for its incoherence."[25]

This *Law Letter* considers the challenging pros-

PUBLISHER: Katherine E. Freije

MANAGING EDITOR: Kathryn E. Copeland, J.D.

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pect of determining whether an MCA transaction is a sale or a loan. It profiles the prevailing approaches to drawing this difficult distinction and examines how courts have grafted existing case law, which arose largely in the context of factoring and securitization transactions, onto MCAs. In so doing, this *Law Letter* highlights several features of MCA agreements that are particularly relevant to the analysis—features which courts do not always consider with adequate depth. These features tend to support recharacterization of these purported sales as secured loans.

INTRODUCING THE MERCHANT CASH ADVANCE

As noted, a Merchant Cash Advance transaction is structured as the sale of a percentage of future receivables.[26] In exchange for an immediate infusion of cash, the merchant pays its financier a specified percentage of its daily receipts.[27] Sometimes payment is accomplished by the merchant directing its credit card companies to allocate a portion of the receivables for transfer to the financier.[28] In other transactions, the financier makes regular ACH withdrawals from the merchant's bank accounts.[29] Daily payments are a hallmark of these transactions.

The daily payment is initially set as a specified percentage of the merchant's average daily receipts. For example, the daily amounts in the GMI transactions were calculated "by multiplying the Debtor's average monthly sales . . . by the Specified Percentage [to be paid to the MCA financier] and then dividing that figure by the average number of business days in a calendar month."[30] While this daily payment rate is fixed at the outset of the transaction, many of these transactions feature some sort of "true-up" or "reconciliation" provision that purports to adjust the amount based on changes to the merchant's business.[31] But regardless of whether the daily payment can be or is adjusted to reflect actual receipts, the financier is entitled to receive a specified total amount. Thus, if the merchant generates lower daily receipts and the daily amount is reduced, that will effectively reduce the financier's rate of return (interest) but not the total amount received.

MCA transactions bear similarities to factoring arrangements. But unlike traditional factoring relationships, which typically involve the assignment of identified receivables, MCAs allocate to the finance company an undivided share of the bulk of receivables generated by the merchant each day. In addition, while a factor typically "is responsible for collection [of purchased receivables] directly from the customer or through a lockbox," merchants typically collect their own receivables and deliver the daily payment to the MCA financier.[32]

MCAs are supported by aggressive remedial provisions.[33] First, MCAs are typically supported by security interests in a large pool of the merchant's collateral—not just the assigned receivables—and one or more personal guaranties. Moreover, these transactions are commonly accompanied by confessions of judgment,[34] which allow the financier to obtain judgment upon the counterparty's default without the formalities of bringing suit. The aggressive marketing and enforcement of MCA obligations has drawn the attention of news media,[35] state attorneys general,[36] the Federal Trade Commission,[37] and Congress.[38]

A LOAN IN SALE'S CLOTHING?

As might be clear from the foregoing description, there is little to distinguish an MCA transaction from a loan secured by the merchant's receivables. In both cases, the merchant receives an amount of money up front and grants the financier a property right in its accounts receivable. The financier is paid back on an ongoing basis, and the merchant's "default" triggers acceleration and additional remedies.

In many respects, the distinction between sales of receivables and secured loans is of little import. Article 9 of the U.C.C. applies to both sales and security interests in receivables, minimizing the need to make distinctions in form. This both encourages public notice of the transactions and addresses the difficulty of distinguishing between sales and loans.[39] But there are a handful of circumstances under Article 9—such as certain automatic perfection rules, enforcement duties, and the collectability of surpluses and deficiency—where the distinction can become relevant.[40] There are also a variety of regulatory, accounting, and taxation implications that flow from these characterizations.[41]

Most notably for our purposes, the characterization of an MCA transaction as a sale of receivables, rather than a loan, limits the application of usury laws.[42] New York law, which governs most MCAs,[43] prohibits lenders from knowingly charging interest at a rate above 25% per annum.[44] Corporations cannot assert an affirmative claim for criminal usury, but they can raise usury as a defense to payment.[45] And, if a contract is found to be usurious, it is void.[46]

Whether a transaction is categorized as a sale or a loan might have additional implications for merchants in bankruptcy. Most notably, the characterization of a loan versus a sale determines the extent to which the rights to payment are property of the debtor's estate, which affects, among other things, whether the debtor may use the proceeds of receivables during the bankruptcy process.[47] Likewise, if a transaction is recharacterized as a secured loan, section 552 of the Bankruptcy Code would prevent the MCA financier's security interest from attaching to receivables the debtor acquires after bankruptcy (unless they are proceeds of collateral that existed prepetition).[48] Characterization also might have implications on a financier's preference liability[49] or liability to suppliers under the Perishable Agricultural Commodities Act.[50] All told, bankruptcy courts have had ample opportunity to consider whether MCA transactions ought to be recharacterized as loans.[51]

THE MURKY DISTINCTION

Neither the UCC nor the Bankruptcy Code determine when a transaction should be classified as a sale versus a loan,[52] and courts have long struggled to create a workable framework for evaluating these transactions.[53] Most courts muddle through a totality-of-the-circumstances approach, relying on various multi-factor tests to determine whether "the legal rights and economic consequences of the agreement bear a greater similarity to a financing transaction or to a sale."[54] The analysis is complicated by a number of factors, including the fact that commercial actors often bifurcate the traditional indicia of ownership, transferring some of the benefits and burdens, and retaining others. As such, it is the rare case in which each of the factors points in the same direction. Courts must therefore decide how to balance competing factors and determine the point at which the scale tips toward recharacterization. More cynically, the legal implications discussed above might cause parties to purposefully add layers of complexity to a transaction that cast it in a favorable light.

But while the path courts take through this recharacterization analysis is unpredictable, the goal is generally clear: to assess which party—buyer or seller—holds the risks, benefits, obligations, and other attributes we typically associate with ownership.[55] A core distinction between selling a piece of property and lending against it is that, when property is sold, the buyer takes on the upside and downside risk of that item's future performance. With a secured loan, in contrast, the lender's contractual entitlement to payment does not change as the collateral value waxes and wanes. Further, in a typical sale transaction, the buyer controls the asset and must take on the obligations associated with ownership. If the property is a cow, it must be sheltered, fed, and milked. If the property is an account, it must be serviced. With these distinctions in mind, courts often look to some combination of the following factors in their efforts to distinguish sales from secured loans:

A Buyer's Risk of Loss. A dominant consideration is whether the transaction allocates the risk that the receivables will not be collected on the seller, rather than the buyer.[56] A variety of terms such as chargebacks, price adjustments, collectability guaranties, and indemnification provisions can allocate the risk of non-collection to the seller, supporting recharacterization as a loan.

Seller's Right to Excess Collections, Including Repurchase Rights. Closely related to the risk of non-collectability is whether the seller retains any upside benefits of the receivables. Transactions in which the seller maintains residual rights in the property, such as the right to retain collections over a determined amount or the right to repurchase the receivables, are more likely to be recharacterized as secured loans.[57] Some courts have even found that an *option* to repurchase the accounts also suggests a secured loan.[58]

Pre-Transaction Credit Inquiries. Courts expect that in cases of a true sale, the buyer of receivables has an interest in the credit worthiness of the account debtors. As such, the extent to which the purported buyer investigates the credit of the accounts debtors has been relevant in some cases.[59]

Servicing Obligations. Similarly, when sellers continue to service the accounts after transfer, this residual relationship with the receivables weighs in favor of a secured loan. When the seller also commingles the proceeds with other general operating funds, the case for recharacterization is often thought to be stronger.[60]

Other Indicia of Seller Control: Courts may consider other contractual provisions that suggest the seller retains some degree of authority over the receivables as evidence in favor of recharacterizing a purported sale as a secured loan. For example, courts have found the seller's ability to modify or compromise the terms of the receivables and collateral backing them to strongly suggest a secured loan.[61]

The language of the agreement. Finally, courts look to the language used by the parties to assist with the characterization analysis, although they differ significantly as to how much weight this factor should receive. Most courts treat the parties' characterizations with skepticism.[62] As one court stated:

> The cupidity of lenders, and the willingness of borrowers to concede whatever may be demanded or to promise whatever may be exacted in order to obtain temporary relief from financial embarrassment, as would naturally be expected, have resulted in a great variety of devices to evade the usury laws; and to frustrate such evasions the courts have been compelled to look beyond the form of a transaction to its substance. . . .[63]

Yet some courts give the language used great weight, even when other factors support recharacterization.[64]

On this point, it is worth observing that the weight courts give to the parties' language should vary depending on whether the language used *supports* or *contradicts* the parties' chosen form. For instance, when a document styled as a "sale" has substantive trappings of a loan, the use of debtor-creditor language, which is inconsistent with the document's form, may well support recharacterization.[65] If that same so-called "sale" transaction contained a clause that read, "this is not a loan," this self-serving framing should not overcome a finding that the transaction is, in substance, a loan. Conversely, if the documents refer to the transaction as a loan, there would rarely be any reason or need to recharacterize it as a sale.

While the foregoing factors are commonly invoked by courts analyzing a purported sale, the case law varies greatly in how to apply them. The case law has been described as "confusing, inconsistent, and sometimes incoherent."[66] And, while legal scholars have attempted to craft various unifying theories to reconcile the divergent case law,[67] no theoretical approach has taken hold. Thus, with no "discernible rule of law or analytical approach," to follow, courts "could flip a coin and find support in the case law for a decision either way."[68]

CHARACTERIZING MCA TRANSACTIONS

MCA financiers typically take great pains to establish their transactions as sales. The loan documents, which the financiers write, include overt representations of this character, commonly using language such as the following:

> [Merchant] is selling a portion of a future revenue stream to [Finance Company] at a discount, not borrowing money from [Finance Company]. There is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by [Finance Company].[69]

MCA agreements also commonly include language that emphasizes the risks taken on by the financier, similar to the following:

> If Future Receipts are remitted more slowly than [Finance Company] may have anticipated or projected because [Merchant's] business has slowed down, or if the full Purchased Amount is never remitted because [Merchant's] business went bankrupt or otherwise ceased operations in the ordinary course of business, and [Merchant] has not breached this Agreement, [Merchant] would not owe anything to [Finance Company] and would not be in breach of or default under this Agreement.[70]

Most of these transactions also feature a reconciliation provision, which purports to adjust the daily payment according to the debtor's actual receipts:

> The Initial Daily Amount is intended to represent the Specified Percentage of [Merchant's] daily Future Receipts. For as long as no Event of Default has occurred, once each calendar month, [Merchant] may request that [Finance Company] adjust the Daily Amount to more closely reflect the [Merchant's] actual Future Receipts times the Specified Percentage . . . No more often than once a month, [Finance Company] may adjust the Daily Amount on a going-forward basis to more closely reflect the [Merchant's] actual Future Receipts times the Specified Percentage . . . After each adjustment made pursuant to this paragraph, the new dollar amount shall be deemed the Daily Amount until any subsequent adjustment.[71]

These types of provisions are commonplace in MCA documents, and many courts have found them to be persuasive. Indeed, most courts have concluded that MCAs are true sales, relying primarily on the finding that the merchant's obligation to pay for the advance is dependent on the collection of the underlying accounts.[72] Because the payment owed to the financier is not absolute, courts reason, the financier has taken on the risks of a true sale. Courts tend to mention one or more of the following factors to bolster their conclusion:

— New York Law, which governs most MCAs, is predisposed against finding usury, particularly in commercial contracts.[73]

— The terms of the agreement, as to do otherwise would require "unwarranted speculation and contradict express terms of the agreement."[74]

— The growing body of New York cases that characterizes MCA agreements as sales.[75]

Other factors, such as which party retains the upside benefits of the receivables, the merchant's continued servicing duties, and the apparent absence of pre-transaction credit inquiries of the subject receivables, have seen relatively little emphasis in case decisions.

EXAMINING THE REALITIES OF RISK ALLOCATION IN MCA TRANSACTIONS

While courts' approach to characterizing MCA agreements as true sales finds safety in numbers, it is problematic for a few reasons. First, although MCA transactions *appear* to place the risk of the accounts' non-collection on the financier, the following transactional realities tell a different story.

TOOTHLESS RECONCILIATION PROVISIONS

As noted above, MCAs commonly feature a reconciliation provision that sets out a procedure for adjusting the daily payment obligation to reflect the merchant's actual receipts. Courts often point to this provision as evidence that the transaction is a true sale. "Focusing on the reconciliation provision in a given merchant agreement is appropriate," courts reason, "because it often determines the risk to the funding company."[76] Although this statement may have merit in the abstract, reconciliation provisions can be drafted in a manner that makes reconciliation discretionary or illusory.

For example, in *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, the court examined a reconciliation clause that provided that the financier could adjust the amounts due "at [its] *sole discretion* and as it deems appropriate."[77] The fact that the financier retained discretion over any payment adjustments led the court to conclude that the financier did not assume any risk that the merchant would generate lower revenues than expected.[78]

The court in *GMI Group* likewise determined that the Unique MCA agreement "does not in fact subject Defendant to any risk that the Debtor will fail to make the required payments."[79] The reason appeared in the events of default, which required the debtor to maintain a bank account balance of twice its daily payment amount at all times.[80] Considering that the debtor was subject to withdrawals of 17% on a daily basis, the need to maintain a continual account balance with an *additional* 34% of its daily collections would be "virtually impossible for any business."[81] Concluding that the agreement created "a certainty or near certainty" of default from the very outset of the transaction, the reconciliation provision would never realistically be invoked. Not only that provision, but the debtor's default also triggered acceleration that made the uncollected amounts immediately payable in full. Because of the inevitability and implications of default, the contract "provided for absolute repayment" and "thereby constitute[d] a loan subject to New York's criminal usury law."[82]

A BOTTOMLESS FONT OF RECEIVABLES

Even if an MCA agreement has a functioning reconciliation provision, a more fundamental economic reality strongly supports recharacterization. As noted above, MCA agreements allocate to the financier a percentage of receivables, rather than identified receivables. This structure fundamentally changes the risk profile of the financier. When a buyer buys an identifiable pool of specific receivables, as in a traditional factoring arrangement, the buyer typically bears the loss when any one of those accounts is not repaid. In the MCA context, in contrast, the "buyer's" recovery is not tied to the performance of any individual account. Instead, the buyer receives a set daily payment (perhaps subject to periodic reconciliation), and this payment is satisfied from whatever moneys the merchant has available.[83] In a recent Transactional Lawyer article, John Hilson and Stephen Sepinuck observed that this structure places the risk of loss as to any individual account on the seller, and strongly indicates that an MCA transaction should be characterized as a secured loan.[84]

To be sure, an MCA transaction is not a zero-risk endeavor. After all, the financier would not recover if the merchant ceased to generate receivables entirely. On this point, Hilson and Sepinuck correctly observe that secured lenders also take on the risk of business failure or bankruptcy, and that type of risk is one that an interest rate is designed to address. Some courts have also observed that MCA financiers take on the risk that an investment will generate a lower annual return if the transaction is paid back more slowly than anticipated.[85] But this exposure is much more limited than the risk of the receivables' non-collectability, and it must be considered in light of the concern, discussed above, that daily MCA payments might not be as easily reconciled as they purport to be.

LOAN-LIKE REMEDIES

As noted earlier, many MCA agreements are supported by broad collateral packages extending far beyond the receivables subject to the transaction.[86] And, most MCA agreements give the buyer the right to accelerate payment upon the occurrence of certain conditions.[87] Hilson and Sepinuck observe that in a sale context, "there should be no concept of making the uncollected portion of the Purchased Amount becoming due and payable; it would simply be collected (or not) from the receivables."[88] Further, the idea that, through acceleration, "the buyer could unilaterally increase the property 'sold' - is inconsistent with a true sale."[89] These remedies are, of course, essential components of all secured loans.

EVALUATING OTHER ATTRIBUTES OF OWNERSHIP

All told, the foregoing factors suggest that the risk of the underlying receivable's non-collection, a core attribute of ownership, remains largely with the merchant-seller in many MCA transactions. But also recall that the risk of non-collectability is only one of many signals of ownership. Courts also should consider which party enjoys the benefits of ownership and what other attributes of ownership are borne by the seller.

Here, courts may find further support for characterizing MCA agreements as secured loans. First, considering that only a *percentage* of the debtor's receipts are assigned as part of an MCA, the merchant maintains ownership and control over the balance. The merchant is free (subject to the terms of the MCA) to do what it wants with the underlying accounts. The merchant also continues to service the underlying accounts, retaining a burden we typically associate with ownership. And finally, if the debtor's collections are higher than anticipated, most of the upside benefit remains with the merchant.[90]

Taken together, the substance of MCA transactions may belie the contracts' careful descriptions of risk allocation. As such, MCA agreements' bold statements that the transactions are "not a loan," seem to be rather unreliable *ipse dixit*.

CONCLUSION

The analysis in this *Law Letter* goes against the grain of much of the existing MCA case law. This *Law Letter* stops just short, however, of arguing that all MCA agreements are secured loans in disguise. How a court ultimately characterizes an MCA agreement depends not only on how closely the terms of that specific agreement match those profiled above, but also on how courts select and balance the factors relevant to the determination.[91]

No matter what path a court takes through the murky recharacterization analysis, a few points about MCAs should carry through. First, the assignment of a percentage of receivables, rather than the receivables themselves, has critical bearing on the allocation of risks and benefits of ownership. Courts must think deeply about that structure when analyzing the matter and must be careful when applying precedent from transactions that do not have this novel structure. Second, courts should not take the contract's representations about risk allocation at face value and must instead consider them in light of the broader transactional realities of the agreement.[92]

Bankruptcy courts are accustomed to this type of skeptical analysis and have generated some of the more thoughtful decisions on these matters to date. Bankruptcy courts' future opinions on these matters, so long as they are published or publicly available, could bring welcome coherence to this corner of recharacterization doctrine.[93]

ENDNOTES:

[1]These financing arrangements have risen in popularity since the Great Recession, but they have been around in some form for close to two decades, if not longer. See, e.g., Ideas v. 999 Restaurant Corp., 2007 WL 3234747 (N.Y. Sup 2007) (involving an "advanced meal sales" agreement in which a restaurant was advanced $22,000 in return for a portion of its credit card receivables).

[2]Merchant Cash Advance Guide for Small Businesses, Funding Circle https://www.fundingcircle.com/us/resources/merchant-cash-advance/ (last accessed February 26, 2022).

[3]Recent news reporting about MCA transactions suggests that they are aggressively marketed to small businesses. Zachary R. Mider & Zeke Faux, Sign Here to Lose Everything Part 1: I hereby Confess Judgment, Bloomberg Businessweek November 20, 2018, https://www.bloomberg.com/graphics/2018-confessions-of-judgment/?srnd=confessions-of-judgment; United Capital Source, LLC v. Benisvy, 48 Misc. 3d 1203(A), 18 N.Y.S.3d 582 (Sup 2015) (describing the advertising practices of MCA brokers); see also Doyle v. JTT Funding, Inc., 2019 WL 13037025, at *1 (C.D. Cal. 2019) (alleging that MCA company engaged in robocalling and repeated telephone solicitations).

[4]Merchant Cash Advance Guide for Small Businesses, Funding Circle https://www.fundingcircle.com/us/resources/merchant-cash-advance/ (last accessed February 26, 2022).

[5]Gretchen Morgenson, FTC Official: Legal 'loan sharks' may be exploiting coronavirus to squeeze small businesses, NBC News, April 3, 2020.

[6]Erin Arvelund & Jeremy Roebuck, Par Funding Threatened Violence, Trashed Reputations After Businesses Took out Loans at Brutal Interest Rates, Borrowers Say, Philadelphia Inquirer, Aug. 30, 2020, https://www.inquirer.com/business/par-funding-sec-joseph-laforte-fraud-merchant-cash-advance-fbi-20200830.html; see also Morgenson, supra note 5 (displaying threatening text messages allegedly received by merchants who fell behind on payments, as well as a photo of a disemboweled rat apparently left on the mailbox of an attorney representing troubled merchants).

[7]In re GMI Grp., Inc., No. 19-52577 (PMB) (Bankr. N.D. Ga. 2019).

[8]The first transaction, entered into in July 2018, was structured as a "business loan" in the amount of $100,000. In exchange, GMI agreed to pay $133,000 in a series of 180 daily payments. GMI estimated the effective interest rate to reflect an APR of 66%. GMI v. Group, Inc. v. Expansion Capital Group, LLC (In re GMI Grp., Inc.), Adv. Pro. No. 19-05140-pmb (Bankr. N.D. Ga. Mar. 8, 2019) (Doc. 1-1). The transaction included a South Dakota choice of law clause, likely because South Dakota does not limit the legal rate of interest that can be charged on a loan. S.D. Codified Laws § 54-3-1.1. Because this transaction is not structured as a sale of future receivables, it is not addressed further in this writing.

[9]Exhibit to Proof of Claim filed by Reliable Fast Cash, LLC, In re GMI Grp., Inc., No. 19-52577 (Bankr. N.D. Ga. Aug. 10, 2018) [Claim No. 2, Ex. 4]; In re GMI Group, Inc., 2019 WL 3774117, *1 (Bankr. N.D. Ga. 2019) [hereinafter GMI v. Reliable].

[10]The debtor also paid a financing fee of $6,750. GMI v. Reliable, 2019 WL 3774117, at *3.

[11]An affidavit of confession of judgment, discussed further below, is a document in which one party, at the outset of a transaction, admits to liability and consents to the entry of a judgment in a quantified amount upon the occurrence of a stated condition. If the condition (such as non-payment of amounts owing) occurs, the other party can use the

affidavit to enter judgment without filing a lawsuit. See infra note 33.

[12]GMI v. Reliable, 2019 WL 3774117, at *3.

[13]In re GMI Group, Inc., 606 B.R. 467, 473 (Bankr. N.D. Ga. 2019) [hereinafter GMI v. Unique].

[14]It is difficult to reconcile the estimated daily receipts in the Reliable transaction, which appears to contemplate that GMI collects a daily average of $28,000, with the Unique transaction, which appears to contemplate that GMI collects a daily average of $6,570.59. Perhaps the debtor's business had deteriorated that dramatically in the months between the transactions. An alternative explanation appears in Congressional testimony submitted by an attorney who represents merchants in litigation with MCA financiers: "In my experience, the estimated daily payment has no relationship to the merchant's actual estimated receivables as purported on the face of the agreement. Instead, the purported estimated daily payment is tied to the size of the loan and the time period in which the MCA company wants to be repaid." Statement of Shane R. Heskin before the U.S. House of Representatives Small Business Committee, "Crushed by Confessions of Judgment: The Small Business Story," Hearing Held on June 26, 2019, available at https://smallbusiness.house.gov/uploadedfiles/06-26-19_mr._heskin_testimony.pdf [hereinafter Heskin Statement].

[15]GMI v. Unique, 606 B.R. at 473.

[16]See Verified Complaint (1) Seeking Injunction; (2) Objecting to Claim; (3) Recovering Prepetition Transfers; and (4) Seeking Other Relief, GMI Grp. v. Unique Funding Solutions, LLC (In re GMI Grp.), Adv. Pro No. 19-05138 -PMB (Bankr. N.D. Ga. Mar. 6, 2019) [Doc. No. 32] (discussing transaction details); Verified Complaint (1) Seeking Injunction; (2) Objecting to Claim; (3) Recovering Prepetition Transfers; and (4) Seeking Other Relief, GMI Grp. v. Reliable Fast Cash, LLC (In re GMI Grp.), Adv. Pro No. 19-52577-PMB (Bankr. N.D. Ga. Mar. 6, 2019) (same).

[17]GMI v. Unique, 606 B.R. at 488-89 ("These amounts are calculated by first estimating the time period in which provides for an advanced principal amount (the Purchase Price) of $75,000.00 in exchange for a repayment price of $111,750.00 (the Purchased Amount) to be made by daily debits in the amount of $1,117.00 (the Daily Amount) until the full Purchased Amount is collected. Based upon this payment schedule, Defendant would receive the Purchased Amount within approximately 150 days (101 business days on which payments could occur). Such a payment structure results in interest accruing at approximately 115 percent per annum, which far exceeds the 25 percent annual threshold for criminal usury under New York law.").

[18]These amounts are calculated as simple interest. Compound interest on such a transaction could be as high as 125% in the Reliable transaction and 227% in the Unique transaction.

[19]GMI v. Unique, 606 B.R. at 487 (noting that based on the payment history, "it appears that the Debtor was only able to withstand eight (8) days of debits by Defendant before it defaulted under the Agreement by, according to Defendant, switching bank accounts and made a total of only fifteen (15) payments").

[20]GMI v. Reliable, 2019 WL 3774117, at *4.

[21]GMI v. Unique, 606 B.R. at 475.

[22]See, e.g., Wilkinson Floor Covering, Inc. v. Cap Call, LLC, 59 Misc. 3d 1226(A), 108 N.Y.S.3d 288 (Sup 2018) (action to vacate confessed judgment on the basis of usury, among other things).

[23]See, e.g., Matter of Cornerstone Tower Services, Inc., 2018 WL 6199131 (Bankr. D. Neb. 2018) (usury issues arise in the context of a preference action); In re A Goodnight Sleepstore, Inc., 2019 WL 342577 (Bankr. E.D. N.C. 2019) (usury issues arise in the context of bankruptcy litigation).

[24]See, e.g., Business Credit & Capital II LLC v. Neuronexus, Inc., 2019 WL 1426609, *2 (S.D. N.Y. 2019) (raising usury as a defense to a breach of contract action filed by MCA financier); Colonial Funding Network, Inc. for TVT Capital, LLC v. Epazz, Inc., 252 F. Supp. 3d 274 (S.D. N.Y. 2017) (same).

[25]Kenneth C. Kettering, True Sale of Receivables: A Purposive Analysis, 16 Am. Bankr. Inst. L. Rev. 511, 512 (2008).

[26]This characterization is a bit of a head-scratcher. See John F. Hilson & Stephen L. Sepinuck, A "Sale" of Future Receivables: Disguising A Secured Loan as a Purchase of Hope, 9 Transactional Law. 14, 15-16 (2019) (suggesting it is both legally and metaphysically impossible to transfer property before it exists, and concluding that an MCA transaction could amount to either "a future sale of receivables" or a loan that would become secured by after-acquired receivables).

[27]See In re Hill, 589 B.R. 614, 619, 66 Bankr. Ct. Dec. (CRR) 65 (Bankr. N.D. Ill. 2018).

[28]In re R&J Pizza Corporation, 2014 WL 12973408 (Bankr. E.D. N.Y. 2014) (describing a transaction that required the merchant to enter into an agreement with its credit card processer to allocate a percentage of receivables to the financier).

[29]Hill, 589 B.R. at 619.

[30]GMI v. Unique, 2019 WL 3774117, at *1.

[31]See, e.g., Anderson v. Koch, 2019 WL 1233700, at *4 (Minn. Ct. App. 2019).

[32]In re Steele, 67 Bankr. Ct. Dec. (CRR) 162, 2019 WL 3756368, at *4 (Bankr. E.D. N.C. 2019).

[33]See Hilson & Sepinuck, supra note 26 (discussing this aspect of MCA transactions).

[34]A confession of judgment (cognovits) clause is a debtor's waiver of the constitutional right to due process in a subsequent enforcement action. Under New York, law, which applies to most MCA transactions, a contracting party signs an "Affidavit of Confession" that consents to the entry of a judgment upon a future breach. N.Y. CPLR § 3218. Confession of judgment clauses are barred in consumer credit transactions, and many jurisdictions bar their use entirely. See FTC Credit Practices Rule, 16 C.F.R. § 444.2(a)(1). New York law, which governs many MCA transactions, is relatively permissive regarding the use of confessions of judgment. See Heskin Statement, supra note 14.

[35]See Mider & Faux, supra note 3 (a multi-part series on the enforcement of MCA agreements and the ruinous effects on small businesses).

[36]See Nikita Biryukov, State sues eight firms over predatory loans, abusive collection practices, N.J. Globe Dec. 8, 2020, available at https://newjerseyglobe.com/governor/state-sues-eight-firms-over-predatory-loans-abusive-collection-practices/ (discussing suit filed by the Attorney General of New Jersey).

[37]See, e.g., Federal Trade Commission Press Release, available at https://www.ftc.gov/news-events/news/press-releases/2021/04/cash-advance-firm-pay-98m-settle-ftc-complaint-it-overcharged-small-businesses (discussing a settlement reached with Yellowstone Capital relating to deceptive practices and improper collection activity); Federal Trade Commission Press Release, available at https://www.ftc.gov/news-events/news/press-releases/2022/01/merchant-cash-advance-providers-banned-industry-ordered-redress-small-businesses (discussing a permanent injunction obtained by the FTC against MCA financiers, banning them from the industry for deceptive and unfair acts and practices).

[38]See U.S. House of Representatives Small Business Committee, "Crushed by Confessions of Judgment: The Small Business Story," Hearing Held on June 26, 2019, https://www.govinfo.gov/content/pkg/CHRG-116hhrg36816/pdf/CHRG-116hhrg36816.pdf.

[39]See Steven L. Harris & Charles W. Mooney, Jr., When is a Dog's Tail Not a Leg?: A Property-Based Methodology for Distinguishing Sales of Receivables From Security Interests That Secure an Obligation, 82 U. Cin. L. Rev. 1029, 1038 (2014) ("[T]he UCC sponsors' predominant motivation for bringing sales of virtually all types of receivables into Revised Article 9—by expanding the definition of 'accounts' and adding sales of payment intangibles and promissory notes—was to provide for the first time a coherent, accessible, and uniform body of law to govern these transfers as well as to subject most of them to Article 9's public-notice regime."). This treatment of sales of receivables also carried over similar treatment from pre-UCC statutes enacted in the wake of Corn Exchange Nat. Bank & Trust Co., Philadelphia v. Klauder, 318 U.S. 434, 439-40, 63 S. Ct. 679, 87 L. Ed. 884, 144 A.L.R. 1189 (1943). See 1 Grant Gilmore, Security Interests in Personal Property § 10.7, at 315 (1965).

[40]See, e.g., U.C.C. §§ 9-309(3), (4) (providing for automatic perfection of sales of payment intangibles and promissory notes); 9-406(e) (restricting the applicability of section 406(d) to certain sales of receivables); 9-408 (restricting the applicability of section 406(a) to certain sales of receivables); 9-607(c) (providing that a secured party must act in a commercially reasonable manner only when it has a right of recourse against the debtor, typically in a secured-lending arrangement and not a sale); 9-608(b) (providing that when a transaction is a sale of receivables, "the debtor is not entitled to any surplus, and the obligor is not liable for any deficiency" after the proceeds of collection are applied).

[41]See Robert D. Aicher & William J. Fellerhoff, Characterization of A Transfer of Receivables as a Sale or a Secured Loan Upon Bankruptcy of the Transferor, 65 Am. Bankr. L.J. 181, 183 (1991) (collecting examples).

[42]See, e.g.,Womack v. Capital Stack, LLC, 2019 WL 4142740 (S.D. N.Y. 2019).

[43]Most courts interpreting MCA transactions honor the choice of New York law, but a handful of courts have disregarded the parties' choice of law clauses. See, e.g., Essex Partners Ltd. v. Merchant Cash and Capital, 2011 WL 13123326, at *3 (C.D. Cal. 2011) (applying California law); In re Shoot The Moon, LLC, 635 B.R. 797, 825, 70 Bankr. Ct. Dec. (CRR) 187 (Bankr. D. Mont. 2021) (applying Montana law).

[44]NY Penal Law § 190.40 (McKinney 2018) (providing that one is "guilty of criminal usury in the second degree when, not being authorized for permitted by law to do so, he knowingly charges, takes, or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period"). New York law also has provisions for civil usury that are triggered when interest rates exceed 16%, but they do not apply to corporations. N.Y. Gen. Oblig. Law § 5-521(1).

[45]N.Y. Gen. Oblig. Law § 5-521(3); GMI v. Reliable, 2019 WL 342577, at *7 (collecting authority).

[46]N.Y. Gen. Oblig. Law. § 5-521(1), (3).

[47]See, e.g., In re R&J Pizza Corporation, 2014 WL 12973408 (Bankr. E.D. N.Y. 2014) (concluding that because the transaction was a true sale, the funds collected were not cash collateral); Aicher & Fellerhoff, supra note 41, at 184. This issue might not arise with much frequency in the context of MCA transactions, as an MCA typically assigns only a portion of the debtor's receivables, ostensibly leaving the balance with the debtor. See GMI v.

Reliable, 2019 WL 3774117, at *13 n.13 (observing that the MCA financier did not object to the debtor's use of cash collateral); Matter of Cornerstone Tower Services, Inc., 2018 WL 6199131, at *3 (Bankr. D. Neb. 2018) (observing that the financier "never took any action to exclude any portion of Cornerstone's receivables from the bankruptcy estate").

[48]11 U.S.C.A. § 552. Even in a true sale transaction, the buyer-financiers are not necessarily in the clear. While section 552 would appear not to apply to a true sale, the matter isn't entirely free from doubt. See Hilson & Sepinuck, supra note 26, at n.54. Alternatively, considering that a sale of future receivables is likely not effective until the receivables themselves are created, section 549 of the Bankruptcy Code might be invoked to avoid any such transfers of receivables that are deemed to occur post-petition. See id. at *15 (explaining that "[t]he law . . . does not comprehend or countenance a present transfer of future property"); Id. *18 n.54 (observing that section 549 of the Bankruptcy Code might apply to MCAs that are characterized as true sales).

[49]Several interpretive issues have arisen with respect to preference liability for MCA payments. The first is whether an MCA withdrawal amounts to a transfer of interest of a debtor in property. Some MCA financiers have argued that because they purchased the receivables outright, the debtor no longer has an interest in them. This argument seems to be inconsistent with the underlying transaction, which typically assign to the MCA provider a *percentage* of future receivables. Because the seller/debtor retained a residual percentage of the receivables belonged to the debtor, preference liability might arise from the withdrawals. GMI v. Reliable, 2019 WL 3774117, at *13 n.13. MCA financiers have also argued that they are not "creditors" and the repayments of future receivables are not on account of antecedent debts. But courts handling this issue have found that preference liability also may attach if the underlying transaction were a sale, given that the payment obligations under the transactions constitute "debts." See In re Hill, 589 B.R. at 619 (holding that even if the transactions do not qualify as loans, they created a debt owed to the financier); Goodnight Sleepstore, 2019 WL 342577, at *3 ("The right to payment under the Agreements . . . gives rise to a 'claim' under the Bankruptcy Code and provides the foundation for a 'debt' for purposes of the [avoidance] proceeding"). Fraudulent transfer liability has also arisen in these contexts, the argument typically focusing on the fact that the debtor did not receive reasonably equivalent value for the transfer. But this argument does not appear to turn on whether the transaction is a sale or a secured loan. See, e.g., Anderson v. Koch, 2019 WL 1233700, at *4 (Minn. Ct. App. 2019).

[50]Hilson & Sepinuck, supra note 26.

[51]See, e.g., In re Shoot The Moon, LLC, 635 B.R. 797, 807, 70 Bankr. Ct. Dec. (CRR) 187 (Bankr. D. Mont. 2021); Matter of Cornerstone Tower Services, Inc., 2018 WL 6199131 (Bankr. D. Neb. 2018); In re GMI Group, Inc., 606 B.R. 467 (Bankr. N.D. Ga. 2019); In re Steele, 67 Bankr. Ct. Dec. (CRR) 162, 2019 WL 3756368, at *1 (Bankr. E.D. N.C. 2019); In re Hill, 589 B.R. 614, 619, 66 Bankr. Ct. Dec. (CRR) 65 (Bankr. N.D. Ill. 2018); In re R&J Pizza Corporation, 2014 WL 12973408 (Bankr. E.D. N.Y. 2014).

[52]U.C.C. § 9-109 cmt. 4 ("Although [Article 9] occasionally distinguishes between outright sales of receivables and sales that secure an obligation, neither this Article nor the definition of 'security interest' . . . delineates how a particular transaction is to be classified. That issue is left to the courts.").

[53]Heather Hughes, Reforming the True-Sale Doctrine, 36 Yale J. on Reg. Bull. 51, 51-52 (2018) ("Despite the fact that the true-sale doctrine governs transactions that are central to the multi-trillion-dollar securitization market, the doctrine is inconsistent, lacks normative direction, and is under-theorized.").

[54]Major's Furniture Mart, Inc. v. Castle Credit Corp., Inc., 602 F.2d 538, 544, 26 U.C.C. Rep. Serv. 1319 (3d Cir. 1979).

[55]Kenneth N. Klee and Brendt C. Butler, Asset-Backed Securitization, Special Purpose Vehicles and Other Securitization Issues, 35 U.C.C.L.J. 23, 49 (2002) (Courts drawing this distinction are attempting to pinpoint "the extent to which the risks and benefits associated with ownership have either been retained by the [seller] or transferred to the [purchaser].").

[56]Id. at 49 (collecting cases).

[57]Aicher & Fellerhoff, supra note 41, at 192.

[58]Id. at 193.

[59]Mid-Atlantic Supply, Inc. of Virginia v. Three Rivers Aluminum Co., 790 F.2d 1121, 1123, 1 U.C.C. Rep. Serv. 2d 898 (4th Cir. 1986) (buyer's failure to investigate the account debtors supported court's finding that the transaction was a loan); c.f. In re Golden Plan of California, Inc., 829 F.2d 705, 712, 15 Bankr. Ct. Dec. (CRR) 1413, 15 Collier Bankr. Cas. 2d (MB) 1459, Bankr. L. Rep. (CCH) P 71522 (9th Cir. 1986) (indicating the same but concluding based on other factors that the transaction was a sale). But see Harris & Mooney, supra note 39, at 1042 (questioning courts' reliance on this factor because "a buyer might properly rely on a seller's representations and warranties or on recourse against the seller instead of on an independent investigation").

[60]See, e.g., Southern Rock, Inc. v. B & B Auto Supply, 711 F.2d 683, 685, 83-2 U.S. Tax Cas. (CCH) P 9529, 36 U.C.C. Rep. Serv. 1321, 52 A.F.T.R.2d 83-5795 (5th Cir. 1983) (suggesting in dicta that

the seller's retention of the right to receive payments supported recharacterization). In re Major Funding Corp., 82 B.R. 443 (Bankr. S.D. Tex. 1987) (pointing to the commingling of mortgage payments with general funds as evidence that the transaction was a secured loan). But see Harris & Mooney, supra note 39, at 1041 (questioning courts' reliance on this factor because "[p]articularly when the buyer and seller have a continuing relationship and the seller has a stake in maintaining its reputation, it may make good sense for the buyer to delegate such discretion to the seller").

[61]Northern Trust Co. v. Federal Deposit Ins. Corp., 619 F. Supp. 1340, 1342 (W.D. Okla. 1985).

[62]Major's Furniture Mart, Inc. v. Castle Credit Corp., Inc., 602 F.2d 538, 544-45, 26 U.C.C. Rep. Serv. 1319 (3d Cir. 1979) ("[I]t is more important what the parties do than what they say they do.").

[63]Vee Bee Service Co. v. Household Finance Corp., 51 N.Y.S.2d 590, 611 (Sup 1944), order aff'd, 269 A.D. 772, 55 N.Y.S.2d 570 (1st Dep't 1945).

[64]In re Lemons & Associates, Inc., 67 B.R. 198, 209-10, 15 Bankr. Ct. Dec. (CRR) 395, 16 Collier Bankr. Cas. 2d (MB) 356, Bankr. L. Rep. (CCH) P 71624 (Bankr. D. Nev. 1986).

[65]See, e.g., In re Shoot The Moon, LLC, 635 B.R. 797, 814-20, 70 Bankr. Ct. Dec. (CRR) 187 (Bankr. D. Mont. 2021) (finding that continuous use of loan terminology in the negotiations and financing statement, together with economic aspects of the transaction that supported recharacterization, overcame language in the document that styled the transaction as a sale).

[66]Heather Hughes, Property and the True-Sale Doctrine, 19 U. Pa. J. Bus. L. 870, 900 (2017); See also Hilson & Sepinuck, supra note 26 (describing this factors-based approach as "inherently problematic" because it "provides courts with little real guidance and can instead be used to mask decisions based on other considerations").

[67]Heather Hughes, for example, proposes a model linked to concerns of fairness and efficiency, which "focuses on the relevance of price terms and the property concept of rights of exclusion, considering when and why companies should exclude unsecured creditors from securitized assets." Hughes, supra note 53, at 52 n.2; Hughes, supra note 66. The late Steven Harris and Charles Mooney found that considerations of pricing, recourse, and the like distracted from the true question underlying the sale-loan distinction: whether the assignor retains any interest in the assets. As such, they advocate for a methodology akin to the lease-sale distinction. Harris & Mooney, supra note 39. Ken Kettering, meanwhile, suggests that the factors-based approach should give way to a strong presumption in favor of a true sale, recharacterizing only when necessary to prevent a forfeiture. Kettering, supra note 25, at 513. Many other approaches have been advanced.

[68]Aicher & Fellerhoff, supra note 41, at 206-07.

[69]GMI v. Unique, 606 B.R. at 473; see also Hill, 589 B.R. at 619 ("Merchant and LG agree that the Purchase Price under this Agreement . . . is not intended to be, nor shall it be construed as a loan from LG to Merchant.").

[70]GMI v. Unique, 606 B.R. at 473.

[71]In re GMI Group, Inc., 606 B.R. 467, 485 (Bankr. N.D. Ga. 2019); see also Wilkinson Floor Covering, Inc. v. Cap Call, LLC, 59 Misc. 3d 1226(A), 108 N.Y.S.3d 288 (Sup 2018) (describing a monthly reconciliation clause).

[72]See, e.g., Wilkinson Floor Covering, Inc. v. Cap Call, LLC, 59 Misc. 3d 1226(A), 108 N.Y.S.3d 288 (Sup 2018) (looking solely to the fact that "plaintiffs' obligation to repay them [sic] future receivables is conditioned on plaintiffs' receipt of such" to evidence that the agreements were not loans).

[73]Id. (collecting authority).

[74]Merchant Cash and Capital, LLC v. Liberation Land Co., LLC, 2016 WL 7655829, at *1 (N.Y. Sup 2016).

[75]See, e.g., Womack v. Capital Stack, LLC, 2019 WL 4142740 (S.D. N.Y. 2019) (supporting its conclusion with a string cite of 28 recent court decisions characterizing MCA transactions as sales).

[76]McNider Marine, LLC v. Yellowstone Capital, LLC, 2019 WL 6257463, *4 (N.Y. Sup 2019), appeal dismissed, 199 A.D.3d 1301, 154 N.Y.S.3d 508 (4th Dep't 2021).

[77]LG Funding, LLC v. United Senior Properties of Olathe, LLC, 181 A.D.3d 664, 666, 122 N.Y.S.3d 309 (2d Dep't 2020).

[78]LG Funding, LLC, 181 A.D. 3d at 666; AH Wines, Inc. v. ö Capital Funding LLC, 2020 WL 5028672, *8-11 (N.Y. Sup 2020), appeal dismissed, 199 A.D.3d 1327, 154 N.Y.S.3d 510 (4th Dep't 2021) and rev'd on other grounds, 199 A.D.3d 1328, 154 N.Y.S.3d 526 (4th Dep't 2021) (concluding that the reconciliation provision was solely in the discretion of the funder and, as such, is illusory and indicative of a secured loan).

[79]606 B.R. at 486.

[80]606 B.R. at 474.

[81]606 B.R. at 487 ("The Defendant 'purchased' 17 percent of the Debtor's future receivables under the Agreement. Requiring the Debtor to have twice the Daily Amount in its account would require it to maintain as cash the equivalent of at least 34 percent of its daily collections in its account. Assuming that half of that would be taken by Defendant in its daily debit, that would still require the Debtor to keep another 17% of its daily collections permanently unused in its checking account just to satisfy this requirement. Satisfying such a require-

ment continually would be virtually impossible for any business.").

[82]606 B.R. at 487.

[83]Repayment might include funds from the MCA itself. In re AH Wines, Inc, 2020 WL 5028672, at *1-2.

[84]Hilson & Sepinuck, supra note 26; *see also* John F. Hilson & Stephen L. Sepinuck, A "Sale" of Future Receivables: Criminal Usury In Another Form, 9 Transactional Law. 1 (Aug. 2019).

[85]See Merchant Cash and Capital, LLC v. Transfer Intern. Inc, 2016 WL 7213444 (N.Y. Sup 2016) (determining the agreement was not a loan because "plaintiff assumed the risk that, if the receipts were less than anticipated, the period of repayment would be correspondingly longer, and the investment would yield a correspondingly lower annual return.").

[86]In re Shoot The Moon, LLC, 635 B.R. 797, 814-15, 70 Bankr. Ct. Dec. (CRR) 187 (Bankr. D. Mont. 2021) (observing that the MCA documents "confer[ed] security interests overly generous for a sale").

[87]Anderson v. Koch, 2019 WL 1233700, at *4 (Minn. Ct. App. 2019) (finding the acceleration provision to support the conclusion that the transaction is a secured loan).

[88]Hilson & Sepinuck, supra note 84, at *17.

[89]Hilson & Sepinuck, supra note 84, at *17.

[90]To be sure, if the MCA agreement has a functional reconciliation clause, and that gives the financier discretion to increase payments when business is good, the advance might be paid back more quickly when business is booming. But aside from that adjustment in timeline, the merchant retains all remaining benefits.

[91]Along these lines, various scholars have suggested that courts apply presumptions in favor of sales, and New York Law, as noted above, is predisposed against finding a contract to be usurious. Courts working under such frameworks may reach a decision contrary to one reached above, particularly when the terms of the MCA are distinguishable. C.f. Hilson & Sepinuck, supra note 84, at *4 ("Even if . . . the borrower has the burden of proving that a loan is usurious, courts should not allow a highly unlikely contingency to deprive borrowers of the protection that usury law is intended to provide. A loan that is usurious except when pigs fly, is usurious.").

[92]The *GMI* court's analysis of Unique's reconciliation provision is instructive as to the level of depth required.

[93]For a discussion of the importance of meaningful public access to court decisions, see Elizabeth Y. McCuskey, Submerged Precedent, 16 Nev. L.J. 515 (2016).

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NOT YOUR KEYS, NOT YOUR COINS
UNPRICED CREDIT RISK IN CRYPTOCURRENCY

ADAM J. LEVITIN*

Cryptocurrency exchanges play a key role in the cryptocurrency ecosystem, serving not only as central marketplaces for buyers and sellers to trade, but also as custodians for their customers' cryptocurrency holdings. Exchanges, however, are thinly regulated for safety-and-soundness and face major insolvency risks from their own proprietary investments and hacking. This Article considers what would happen to customers' custodial holdings if a cryptocurrency exchange in the United States were to fail.

Any custodial relationships can potentially be characterized as a debtor-creditor relationship between the custodian and customer, rather than an entrustment or bailment of property. U.S. law gives substantial protection to the custodial holdings of securities, commodities, or cash deposits by securities or commodities brokers or banks. No such regime exist, however, for custodial holdings of cryptocurrencies. Instead, bankruptcy courts might well deem the custodial holdings to be property of the bankrupt exchange, rather than of its customers. If so, the customers would merely be general unsecured creditors of the exchange, entitled only to a pro rata distribution of the exchange's residual assets after any secured or priority creditors had been repaid. And, even if the holdings were ultimately deemed property of the customers, however, the customers would still experience extended disruption to their access to their holdings.

Cryptocurrencies are designed to address a problem of transactional credit risk—the possibility of "double spending." The lesson here is the credit risk can arise not just from active transacting *in cryptocurrency, but also from passive* holding *of cryptocurrency. Because this passive holding risk turns on technical details of bankruptcy and commercial law, it is unlikely to be understood, much less priced, by most market participants. The result is a moral hazard in which exchanges are incentivized to engage in even riskier behavior because they capture all of the rewards, while the costs are externalized on their customers.*

* Anne Fleming Research Professor & Professor of Law, Georgetown University Law Center. Thank you to David Gray Carlson, Stephen Keen, Chris Land, Robert Lawless, Charles Mooney, Chris Odinet, David Shemano, Steven Weise, and David Wishnick for helpful comments and to Maya Pierce for outstanding research assistance.

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INTRODUCTION

It was hard to miss cryptocurrency exchanges at Superbowl LVI. The game was played in February 2022 at Sofi Stadium, named after cryptocurrency exchange Sofi Technologies, and the broadcast of the game featured ads from cryptocurrency exchanges Coinbase, eToro, FTX Ltd., and Crypto.com.[1] Exchanges and brokerages like these serve as the central marketplaces for cryptocurrencies transactions, enabling buyers and sellers to trade with minimal search costs. For simplicity, this Article will generally refer to both types of institutions as "exchanges" given their substantial overlap in function.

Exchanges generally hold massive amounts of custodial funds—cryptocurrencies that customers have deposited with them. What would happen if the exchange were to fail?

Suppose, for example, that the exchange is victim of a massive hacking and finds itself short hundreds of millions of dollars of custodial funds. Or alternatively, suppose that the exchange has made large proprietary bets on cryptocurrency prices that have fared badly. In either scenario, the exchange, rendered insolvent, might decide to cover its own losses by improperly dipping into custodially held funds, planning on restoring those funds from its future retained earnings. As news of the problems leaks out, however, customers start getting antsy and withdrawing funds. Faced with a customer run and inadequate

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[1] Jason Notte, *Crypto Believers Try to Recruit You in eToro's Super Bowl Ad*, ADWEEK, Feb. 13, 2022, https://www.adweek.com/brand-marketing/etoro-crypto-super-bowl-ad/.

funds, the exchange files for Chapter 11 bankruptcy. What would happen to its customers then? Where would they stand in a bankruptcy?

This is hardly an idle question. While this Article was in the editing process, cryptocurrency brokerage Voyager Digital Holdings, Inc. filed for Chapter 11 bankruptcy.[2] There are hundreds of cryptocurrency exchanges in existence.[4] Numerous exchanges outside the US have failed previously, with some filing for bankruptcy protection in other countries,[5] and the cryptocurrency market's downturn in 2022 may have left many exchanges insolvent.[6] Exchanges are major targets for hacking,[7] and many of them engage in their own proprietary investments in volatile crypto assets, which could easily leave them insolvent. It is only a matter of time before further US cryptocurrency exchanges fail.

This Article argues that the risks cryptocurrency exchanges pose for their customers are both substantial and poorly appreciated by many cryptocurrency investors. Cryptocurrency exchanges enable (and sometimes require) their customers to keep their cryptocurrency in a crypto wallet provided by the exchange. In these arrangements, the exchange, rather than the customer frequently is the only party with access to the cryptocurrency, and the exchange may in fact commingle

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[2] Voluntary Petition, *In re Voyager Digital Holdings, Inc.,* No. 22-10943 (S.D.N.Y. July 6, 2022)..

[4] CoinMarketCap listed 313 cryptocurrency exchanges as of Feb. 8, 2022. https://coinmarketcap.com/rankings/exchanges/.

[5] Martin Young, *75 crypto exchanges have closed down so far in 2020*, COINTELEGRAPH.COM, Oct 7, 2020, *at* https://cointelegraph.com/news/75-crypto-exchanges-have-closed-down-so-far-in-2020; Luke Parker & Aditya Das, *Crypto exchanges continue to fail as hacks and exit scams bite,* BRAVENEWCOIN.COM, July 17, 2021, https://bravenewcoin.com/insights/36-bitcoin-exchanges-that-are-no-longer-with-us. Mt. Gox Co., Ltd. filed for bankruptcy in Japan and also commenced an ancillary Chapter 15 case in the United States. Similarly, Cryptopia commenced a New Zealand liquidation proceeding, but also commenced an ancillary Chapter 15 case in the United States. *In re Cryptopia Ltd. (in Liquidation)*, No. 19-11688-smb (Bankr. S.D.N.Y. May 24, 2019).

[6] Steven Ehrlich, *Bankman-Fried Warns: Some Crypto Exchanges Already "Secretly Insolvent",* FORBES, June 28, 2022, *at* https://www.forbes.com/sites/stevenehrlich/2022/06/28/bankman-fried-some-crypto-exchanges-already-secretly-insolvent/?sh=75294ab47f7f.

[7] Tyler Moore & Nicholas Cristin, *Beware the Middleman: Empirical Analysis of Bitcoin-Exchange Risk* 25, in FINANCIAL CRYPTOGRAPHY AND DATA SECURITY (AHMED-REZA SADEGHI, ED. 2013).

the customer's holdings with those of other customers in a single crypto wallet controlled solely by the exchange.

While this sort of arrangement may facilitate transactions on the exchange (as well as the exchange's own use of the cryptocurrency deposited with it), it poses credit risk for the exchange's customers. If the cryptocurrency exchange were to fail, the cryptocurrency that it holds custodially might not be treated as property of the customers, but as property of the exchange.[8] The customers would not "own" the cryptocurrency, but would be mere unsecured creditors of the exchange. In bankruptcy, that would put them almost last in line for repayment from the failed exchange's limited pool of assets.

One of the major design features of cryptocurrencies is that they are designed to be free of credit risk and therefore informationally insensitive. A payment from a bank, for example, such as a check, is not credit risk for the recipient because the recipient cannot tell if the check will be honored. It might be that the payor lacks the funds to pay the check or it might be that the payor's bank fails and does not honor the check.

The traditional financial system mitigates the risk of the bank failure through regulation and deposit insurance, but any non-real-time payment system poses the risk of insufficient funds and, in particular, of a double spending problems. For example, suppose that Moe has $1,000 in the bank and writes a check to Curly for $1,000 in exchange for a computer. Curly faces the risk that Moe has also written a $1,000 check to Larry, and that the check to Larry is paid first. If so, Curly, has parted with the computer, but won't be able to collect payment.

The same problem arises with cryptocurrencies. To wit, let's say Moe has 50 Satoshi (that's the subunit of a bitcoin) associated with an address in a bitcoin wallet. If Moe pays 50 Satoshi to purchase a computer from Curly, what prevents Moe from then paying Larry for a whoopie cushion with the same 50 Satoshi? How does anyone know who actually has the right to those 50 Satoshi?

Cryptocurrency solves the double spend problem with a distributed ledger called a blockchain to establish ownership of the cryptocurrency through a consensus mechanism of one sort or another. For example, because Bitcoin lacks a central authority

[8] *See infra* part II.B.

through which all transactions are run, a more complex solution is necessary to verify which transaction was the original spend (and hence which would be the later and unsuccessful spend): the mining process.

When Moe wants to send bitcoins to Curly, he needs to get Curly's bitcoin address, which includes a public key. Moe then creates a message signed with his private key that attaches Curly's public key to that amount of bitcoins. When Moe sends the message to Curly, it is also broadcast to the entire Bitcoin network; a transfer of bitcoins is not simply a private affair between the parties to the transfer. The broadcasting of the transfer is done to enable anyone in the network to verify this transaction by solving the associated algorithms. Only if a transaction is successfully verified will it be added to the blockchain, thus indicating a transfer of ownership of bitcoin between the bitcoin addresses. Solving the algorithm is known as mining and is incentivized with by rewarding the first successful miner with a reward of newly issued cryptocurrency.

The verification done through the mining should show that Moe sent the bitcoins to Curly before he sent the same coins to Larry, so that only Curly's blockchain address's ownership of that 50 Satoshi is verified. The public nature of the blockchain ledger makes it difficult for Moe to double-spend.

The original blockchain design for Bitcoin, the first cryptocurrency, envisioned a peer-to-peer system without centralized, custodial holding.[9] Exchanges are not something that were contemplated in the cryptocurrency universe. Yet without exchanges, cryptocurrency miners cannot readily convert their mining rewards, which are paid in cryptocurrency, into fiat currency, which they must do in order to cover their capital and operating expenditures. Moreover, without exchanges, there would be limited interest in cryptocurrencies as a speculative medium—perhaps the greatest source of interest in them—because high search costs for finding transaction partners would impose substantial market inefficiencies.

Because the blockchain system was envisioned as operating in a peer-to-peer environment, it addresses only the credit risk involved in *transacting* in cryptocurrencies. It does not address the credit risk

[9] *See* Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* (2008), *at* https://bitcoin.org/bitcoin.pdf.

involved in *holding* cryptocurrencies. Cryptocurrency investors, however, are unlikely to appreciate that they take on the credit risk of the exchange if they use the exchange's crypto wallet services. Few crypto investors know the technical details of bankruptcy law, and because they cannot readily gauge the likelihood of a bankruptcy—a black swan type event—or estimate its consequences, they are likely to simply ignore the risk.

Moreover, the exchanges lull their customers regarding their credit risk. Many exchanges emphasize that they only hold the cryptocurrency in a custodial capacity and that the customers continue to "own" the cryptocurrency, suggesting that there would be no risk in the event of an exchange failure.[10] This is misleading and self-serving. The lay concept of "ownership" does not neatly track onto a potential legal treatment of custodial holdings of cryptocurrency in bankruptcy, which is that it would be treated as property of the exchange, rather than property of the customers.

Indeed, one major exchange, despite such using the lulling language of ownership in its user agreement, has even begun to disclose in its quarterly report (which is not provided to its customers) that its customers face the significant risk in the event of its bankruptcy that their custodially held cryptocurrency could be treated as its property in the event of bankruptcy, rendering the customers as mere general unsecured creditors who stand last in line for repayment.[11]

To be sure, some awareness of these risks exists within the cryptocurrency investor community. The mantra "not your keys, not your coins," appears frequently in online cryptocurrency forums.[12] Yet this mantra is generally recited without analysis or understanding of particular nature of the underlying legal risks.

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[10] *See infra* part I.C..

[11] Coinbase Global, Inc., Form 10-Q, May 10, 2022 at 83 ("because custodially held crypto assets may be considered to be the property of a bankruptcy estate, in the event of a bankruptcy, the crypto assets we hold in custody on behalf of our customers could be subject to bankruptcy proceedings and such customers could be treated as our general unsecured creditors."). For Coinbase's lulling language, see *infra* Part I.C.

[12] Binance, Where to Safely Keep Bicoin? Blog ng Binance, Mar. 28, 2021, *at* https://www.binance.com/ph/blog/all/where-to-safely-keep-bicoin-421499824684901861 (this blog post originally appeared on the US version of the Binance website, but is no longer available there. It is still available on the Philippines version of the website).

Because cryptocurrency is untested in American bankruptcy law, it is impossible to say with certainty how any particular United States bankruptcy court would treat custodial holdings of cryptocurrency.[13] What is certain is that the treatment will be contested. Even if cryptocurrency investors prevail in litigation, it will be only after cost and delay. Put another way, cryptocurrency investors will lose either way in an exchange's bankruptcy. The only issue is how much they lose.

The custodial credit risk is a problem that has previously arisen in other financial markets, in particular with bank deposits and securities accounts at broker-dealers. While the custodial credit risk problem has been successfully addressed in those markets through federal regulation, cryptocurrency remains in practice outside of the regulatory regimes for securities and commodities. Indeed, the risk to cryptocurrency exchange customers is particularly pronounced because of the lack of regulation of exchanges.

Unlike commodities futures or securities exchanges or banks, there is no federal regulation of cryptocurrency exchanges other than for anti-money laundering purposes.[14] No federal law requires expressly segregation of cryptocurrency customer assets or minimum levels of operational resiliency. While particular cryptocurrencies may be securities or commodities, cryptocurrency exchanges do not operate—and regulators have not generally treated them as securities or commodities exchanges; the largest cryptocurrency exchanges operate without supervision by the SEC or CFTC.

Many cryptocurrency exchanges register as money transmitters with states, but not all state money transmitter licenses even cover transmission of digital assets.[15] Even state money transmitter laws apply, they are inadequate for addressing the risks exchanges pose to their customers: the bonding requirements are massively too small, and the requirement of maintaining safe investments equal to the amount of customers' funds does not always apply to most cryptocurrency

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[13] It is important to emphasize that this Article's analysis is focused on American bankruptcy law. Different outcomes could obtain under other countries' insolvency regimes.

[14] Arguably, cryptocurrency exchanges are unregistered securities and commodities futures exchanges, which would subject them to the regulatory regimes for these exchanges.

[15] *See, e.g.*, Bloomberg Law, *Cryptocurrency Laws and Regulations by State*, May 26, 2022, *at* https://pro.bloomberglaw.com/brief/cryptocurrency-laws-and-regulations-by-state/ (50 state survey).

deposits.[16] New York and Wyoming have special cryptocurrency specific regulatory regimes,[17] but only Wyoming's little-used regime offers any real protection for exchange customers.

Nor is there any sort of Federal Deposit Insurance Corporation or Securities Investor Protection Corporation insurance to protect cryptocurrency exchange customers. Likewise, there is no specialized regime for resolving failed cryptocurrency exchanges. Accordingly, there is no statutory prioritization of the claims of exchanges customers, unlike those of depositors in bank insolvencies.

To date, there has only been very limited scholarly engagement about the intersection of cryptocurrencies and insolvency. The scant scholarship that has addressed cryptocurrency exchanges and insolvency has not done so with reference to U.S. law.[18] Instead, much of the extant literature focuses on the issue of how to classify cryptocurrencies under bankruptcy law—are they currencies, commodities, securities, or something else—rather than the risks attendant to the failure of exchanges.[19] While the classification issue has important ramifications regarding the ability of the bankruptcy

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[16] *See, e.g.*, K.S.A. §§ 9-513b (requiring maintenance of permissible investments with an aggregate market value equal to that of the licensee's "outstanding payment liability"); 9-508(i) (defining "outstanding payment liability" as limited to payment instruments sold and money taken for transmission). *But see* R.C.W. § 19.230.190(1)(b) (permitting licensee to hold virtual currency of like-kind to that being transmitted in lieu of permissible investments).

[17] *See infra* parts IV.F and IV.G.

[18] Matthias Haentjens, Tycho De Graaf & Ilya Kokorin, *The Failed Hopes of Disintermediation: Crypto-Custodian Insolvency, Legal Risks and How to Avoid Them*, 2020 SINGAPORE J. LEG. STUD. 526 (focusing on treatment of failed cryptocurrency exchanges under civil law); Dan Awrey & Kristin van Zwieten, *Mapping the Sahdow Payment System*, SWIFT Institution Working Paper No. 2019-001, Oct. 8, 2019, *at* https://ssrn.com/abstract=3462351 (general consideration of insolvency risk); Dan Awrey & Kristin van Zwieten, *The Shadow Payment System*, 43 J. CORP. L. 775 (2018) (same).

[19] Brad M. Kahn, Rachel Biblo Block, & Joseph E. Szydlo, *The Need for Clarity Regarding the Classification and Valuation of Cryptocurrency in Bankruptcy Case*, 17 PRATT'S J. OF BANKR. L. 17-5-II (2022); Josephine Shawver, Note: *Commodity or Currency: Cryptocurrency Valuation in Bankruptcy and the Trustee's Recovery Powers*, 62 B.C. L. REV. 2013 (2021); Amanda Wiese, *Cryptocurrency Is Currency*, 40-8 AM. BANKR. INST. J. 17 (Aug. 2021); Megan McDermott, *The Crypto Quandary: Is Bankruptcy Ready?*, 115 NW. U. L. REV. ONLINE 1921 (2021); Joanne Molinaro & Susan Poll Klaessy, *Bitcoin as a "Commodity" and the Resulting Impact on Bankruptcy Proceedings*, Am. Bar Ass'n, Mar. 5, 2019, *at* https://www.americanbar.org/groups/litigation/committees/woman-advocate/articles/2019/winter2019-bitcoin-as-a-commodity-and-the-resulting-impact-on-bankruptcy-proceedings/ [https://perma.cc/KW9E-9MAW]; Dennis Chu, Note, *Broker-Dealers for Virtual Currency: Regulating Cryptocurrency Wallets and Exchanges*, 118 COLUM. L. REV. 2323 (2018).

trustee to claw back cryptocurrency transferred by the debtor shortly before bankruptcy, none of these analyses engaged in more than a passing way with the broader issue of custodial holdings of cryptocurrency exchanges and what that means for exchanges' customers. In particular, there has been no prior analysis of whether under American law the assets in custodial accounts held by exchanges are property of the exchanges (making customers merely unsecured creditors of the exchanges) or property of the customers themselves.

This Article examines the likely legal treatment of cryptocurrency exchange customers in the event a U.S.-based exchange were to fail. A failed exchange would likely end up in Chapter 11 bankruptcy, whether voluntarily or involuntarily. Part I of the Article reviews the role of cryptocurrency wallets and exchanges and the provisions in exchanges' user agreements regarding how customer funds are held. Part II examines the key issues confronting cryptocurrency customers in an exchange's bankruptcy. In particular, it considers, whether the automatic stay would apply, whether custodial holdings would be considered property of the bankruptcy estate, whether pre-bankruptcy transfers could be avoided as preferences, and the status of customers' claim in a bankruptcy. Part III considers the additional credit risk that investors face when dealing with a staged cryptocurrency wallet, where there is no direct investor privity with the actual custodian. Part IV addresses the lack of cryptocurrency exchange regulation and the inadequacy of money transmitter regulation and private insurance. It suggests that the Consumer Financial Protection Bureau is actually the agency best situated under existing legal authorities, to ensure the protection of exchange customers' funds. A conclusion summarizes the nature of credit risk borne and not priced by cryptocurrency exchange customers and the moral hazard this unpriced risk creates for exchanges.

I. CRYPTOCURRENCY WALLETS AND EXCHANGES

A. Crypto Wallets

Cryptocurrencies, such as Bitcoin and Ethereum, are purely digital assets.[20] There is no physical "coin" for these cryptocurrencies,

[20] This Article assumes that once cryptocurrency exchanges are running Superbowl advertisements that readers will be familiar with the basic concept of cryptocurrencies, which

despite meme images depicting physical coins. The cryptocurrency exists only as an entry on an append-only distributed ledger called a blockchain that associates a cryptocurrency balance with a network address on the blockchain. The blockchain tracks the association of cryptocurrency with cryptographic keys—an alphanumeric strings—rather than who "owns" the keys.

Undertaking a transaction in the cryptocurrency—that is to change the network address associated with some amount of cryptocurrency on the blockchain—requires a paired public key and a private key (password). These keys are each associated with an address on the blockchain. The public key is a large numerical value used for encrypting the transaction, while the private key is a password that is used to verify the authorization of the transaction.

To transfer cryptocurrency into to a blockchain address, a transferor must digitally sign the transaction with the private key of the address from which the cryptocurrency is being sent and the public key of the recipient address and broadcast the transaction to the blockchain network.[21] The transaction is verified through a cryptographic hashing process called mining.

Cryptocurrencies vary in how they incentivize network participants to engage in mining. The key detail here is that without the private key, it is impossible to access cryptocurrency associated with a blockchain address. Thus, if a key is lost, so too is access to the cryptocurrency.

Critically, the private key can be used by anyone who has access to it, not just by its "owner." While the key is the authorization device for transactions on the blockchain, the mining system only checks the validity of the key, not the authorization for the key's use in the transaction. Each cryptocurrency runs on its own blockchain, and each cryptocurrency blockchain address has its own public and private key. Thus, if an individual owns both bitcoin and Ethereum, the individual will have two separate sets of keys because there are two separate blockchains involved, one for each cryptocurrency.[22]

have been amply described in numerous academic articles, and provides only a discussion of how cryptocurrencies operate that is limited solely to what is germane to the issue of custodial holdings by exchanges.

[21] *See* Coinbase Global, Inc., Form S-1/A, Mar. 17, 2021, at 44-45.

[22] Further complicating things, however, a single wallet, however, might contain the keys

Investors need to keep their private keys somewhere when they are not using them. Investors store their private keys in crypto wallets. While a private key can be written down on paper and stored physically until it needs to be used, cryptocurrency investors generally store their keys in crypto wallets. Crypto wallets are encrypted software programs. Typically the investor would enter a password in order to unencrypt the private key, which would then be used to authorize a transaction on the blockchain.

There are two types of crypto wallets: unhosted and hosted.[23] An unhosted wallet involves storage of the customer's private keys in some format in the customer's possession. This might be in the form of a non-custodial software wallet, such as a wallet app on the investor's phone or computer, a thumb drive, or even a scrap of paper. While an unhosted wallet lets the investor retain possession of the private key, it also poses a risk of loss. If the investor loses the scrap of paper, the thumb drive, or the digital device, the key and thus the access to the cryptocurrency is lost forever.

In contrast, a hosted or custodial wallet puts the customer's private keys in the custody of a third-party, generally an cryptocurrency exchange. With a hosted wallet, the exchange has possession of the private keys and the customer accesses them using a password or other security protocol provided by the exchange. These security protocols might let a customer who forgot a password still access his private keys. Additionally, if the hosted wallet provider were to lose the keys, it would be liable to the customer.

Cryptocurrency investors use hosted wallets for several reasons: concerns about losing their own unhosted wallets; avoiding fees for transferring funds between wallets; the transactional ease offered through hosted wallets that are integrated with an exchange; access to additional income-generating services, such as lending and staking ventures, that exchanges offer customers with hosted wallets; and greater ease at converting cryptocurrency to fiat currency or vice-

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for multiple addresses on the same blockchain. Thus, a single wallet might contain separate keys for multiple addresses on multiple blockchains.

[23] Both unhosted and hosted wallets can be "cold" or "hot". A "cold" wallet, also called an "hardware wallet," or "offline wallet", is it is not connected to the Internet, so it cannot be hacked. In contrast, a "hot" wallet is an online wallet. A wallet must be made hot in order to transact. The particular technological form of a wallet does not affect the analysis in this Article.

versa, which requires a service that can route fiat payments from a bank account or settle them into a bank account, something that is not possible on an unhosted wallet alone.[24]

B. Cryptocurrency Exchanges

1. *The Need for Centralized Marketplaces*

It is possible for any two people with crypto wallets to transact bilaterally with each other. Suppose that Moe wishes to pay Curly back for a cup of coffee using Bitcoin: Moe would use the private key in his digital wallet to direct the Bitcoins associated with his key to Curly's key, and once the transaction is processed (mined), then the Bitcoin blockchain will be amended to reflect this transaction.

This sort of bilateral transaction works fine when Moe and Curly know each other and have some reason to transact with each other. But suppose that Moe simply wants to sell his Bitcoin for the highest available price, and Curly wishes to buy Bitcoin for the lowest available price. In that situation bilateral contracting makes little sense—neither Moe nor Curly have any reason to think that the other is offering the best available price.

Indeed, neither Moe nor Curly necessarily even knows that the other is looking to transact. Learning who might want to transact and on what terms creates substantial search costs that might prevent some transactions from happening.

The solution to this problem is a cryptocurrency exchange. The exchange matches buyers and sellers with each other based on their bids and asks without the buyers ever having to know the sellers or vice-versa. The exchange functions as a centralized marketplace that enables numerous buyers and sellers to transact without them having to identify each other. Moe and Curly can go to the exchange without having to know each other, transact with each other through the

[24] If an investor with an unhosted wallet wishes to convert cryptocurrency to fiat currency, the investor will either need to use a peer-to-peer system (involving fees) or move its cryptocurrency keys from the unhosted wallet to a hosted wallet (for which there will be a fee) and then sell the cryptocurrency on the exchange using exchange-hosted wallet. The exchange will then settle the fiat currency (minus its fees) into the bank account the consumer directs. Using the exchange hosted wallet eliminates the fees incurred by moving the cryptocurrency keys from the unhosted to hosted wallet.

exchange, and have an assurance that they will get the best price being offered among exchange customers.

Moreover, they will benefit from network effects that enhances the value of a central exchange. The more users there are in a network, the more valuable the network is to all of its users. If Larry also goes to trade on the exchange, there is a better chance that Moe and Curly will get a better price than if Moe and Curly were the only ones making offers to buy and sell because each additional participant adds additional possibility of the best price offer. Thus, the benefit further grows for Moe, Larry, and Curly if Shemp also trades on the exchange. And so forth.

2. The Dual Functions of a Cryptocurrency "Exchange"

The terminology of "exchange" in the cryptocurrency context is confusing because some of the functions performed by a cryptocurrency exchange are more akin to those of a broker in securities or commodities markets. To understand the particular role of a cryptocurrency exchange, it is necessary to understand the relationship of three different functions in financial market places: exchanges, clearinghouses, and brokerages.

In general, an exchange is a marketplace that merely enables buyers and sellers to contract; it does not actually execute the contract. The execution function is performed by the clearinghouse that accepts and processes the actual payments for the transactions agreed to on the exchange. While the exchange and clearinghouse functions are technically separate, in the securities or commodities context, they are typically performed together by affiliated entities or even the same entity. In the cryptocurrency context, the blockchain sometimes performs part of the clearinghouse function.

In the securities or commodities context, exchanges are not open to the public; instead, the exchange (and clearinghouse) are open only to their members. This is done as a way of ensuring the reputability of transacting parties because at the end of the day it is the exchange and associated clearinghouse member, not the member's customer, that is liable for payment to the clearinghouse. The actual end-buyers and sellers of securities and commodities thus access the exchanges and clearinghouses in an intermediated fashion through the exchange/clearinghouse members, which are called brokerages.

To illustrate, suppose that Moe owns a share of Acme common stock, which he holds in a brokerage account at Howard Bros. Moe will instruct Howard Bros. to sell the share, which it will do by going to a stock exchange and finding the best price available. The bids offered on the stock exchange will come from other brokerages, which make the bids on behalf of their customers.

Let's suppose that the bid accepted by Howard Bros. is for $1 from the Shemp, Inc. brokerage on behalf of its customer, Larry. Howard Bros. and Shemp, Inc. will take their contract over to the clearinghouse affiliated with the exchange. The clearinghouse will novate itself into both sides of the contract: instead of Howard Bros. directly transferring the stock to Shemp, Inc. in exchange for a direct transfer of money, Howard Bros. will transfer the stock to the clearinghouse, and Shemp, Inc. will transfer the money to the clearinghouse. The clearinghouse will assume the role of each of the counterparties and transfer the stock and money, respectively, to each of the brokerages. That way, Howard Bros. does not need to worry about the solvency of Shemp, Inc. or vice-versa. They only need worry about whether the clearinghouse itself is money good. The clearinghouse assumes the counterparty risk on both Howard Bros. and Shemp, Inc.

Once Howard Bros. has received the $1 from the clearinghouse and Shemp, Inc. has received the share of stock, Howard Bros. will "settle" the transaction by crediting Moe's brokerage account with $1 and debiting it for one share of Acme common stock. Shemp, Inc. will likely settle the transaction by crediting the account of Larry, the buyer, with one share of Acme common stock and debiting it for $1.

Things work somewhat differently with cryptocurrency. Let's suppose Moe wants to sell 1 Bitcoin, the private key for which he maintains in an unhosted wallet. Moe wants to get the best price possible, so he goes to the Stooges Exchange, a cryptocurrency exchange. The prices quoted on the Stooges Exchange are based on the bids tendered by other customers of the Stooges Exchange (or by the Stooges Exchange in its own dealer capacity).[25]

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[25] An alternative trading method is to use a cryptocurrency broker. Whereas an exchange matches asks and bids on its own order book, a broker will attempt to execute the

If Moe wants to get the price quoted on the Stooges Exchange, he will have to transfer his bitcoin from his unhosted wallet to a hosted wallet provided by the exchange. His bitcoin will then be credited to the buyer's account, and the buyer's payment—fiat or crypto—will be credited to Moe's account. Because the payments going both directions are from accounts at the same exchange, the exchange has limited counterparty risk; it can tell whether the payment asset is present or not.

Whether the transfer of Moe's bitcoin will be recorded on the bitcoin blockchain, as opposed to merely being reflected on the exchange's own books and records, will depend on the exchange's policies. If the payment is recorded on-chain, then the blockchain assumes part of the clearing function. If the payments going both ways are in crypto—for example, Moe sells his Bitcoin for a Dogecoin—then all the clearing will be done by the blockchain if the transactions are recorded on-chain. If the transaction is not recorded on-chain or there is a fiat payment, then the exchange will act as the clearinghouse.

What we see, then, is that despite their names, cryptocurrency exchanges provide not just an exchange function, but also a brokerage function and a clearinghouse function.[26] The on-ramp into a cryptocurrency exchange is a wallet hosted by the exchange that performs the same function as a brokerage account for securities or commodities.[27] That wallet is effectively a brokerage account,[28] and similar to securities and commodities brokerages, cryptocurrency exchanges will offer customers margin loans against the funds in their

order using an over-the-counter dealer market or by searching exchange prices, meaning that the asks and bids are not limited to the broker's own order book. *See, e.g.*, Declaration of Stephen Ehrlich, Chief Executive Officer of the Debtors in Support of Chapter 11 Petitions and First Day Motions, *In re Voyager Digital Holdings, Inc.*, No. 22-10943 (S.D.N.Y. July 6, 2022) at 11, n.2 (Dkt. No. 15). In practice, the distinction between exchange and broker is often more fluid because the exchange or the broker will often itself be the real counterparty.

26 The combination of brokerage (wallet) with exchange functions in cryptocurrency is unusual because in securities and commodities functions, exchanges are separate from and in fact regulate brokerages. The combination of exchange and brokerage functions raises considerable customer protection and market manipulation risks that are beyond the scope of this Article.

27 While it is possible for two parties to transfer cryptocurrency to each other without any intermediation, such bilateral transactions are comparatively rare because cryptocurrency is mainly used for speculation, where centralized markets are essential for getting the best price, rather than payments.

28 The main difference is that each cryptocurrency is in a separate wallet, whereas a traditional brokerage account can contain all manner of assets.

wallets. While the actual exchange and clearinghouse functions of cryptocurrency exchanges are important, for purposes of this Article, it is the brokerage function that is key. Indeed, it is easiest to understand the problem of exchange failures if one conceptualizes cryptocurrency exchanges as operating like unregulated securities or commodity brokerages that hold customer funds.

3. *Custodial Practices of Cryptocurrency Exchanges*

Cryptocurrency exchanges will generally offer custodial services for hosted wallets for their customers.[29] This means that the customer is giving the private keys—and hence access to the associated cryptocurrency—to the exchange for safe-keeping. While the exchange might be contractually limited in what, if anything, it can do with the private keys, the private keys are in the control of the exchange and can only be accessed by the customer using the exchange's security protocols.

Rather than leave each customer's account segregated, exchanges will often transfer the customers' cryptocurrency to a single omnibus account for which it alone holds private key.[30] The customer's interest is then tracked solely on the exchanges books and records, rather than on the blockchain.

Using a single omnibus account has a number of operational benefits for the exchange. Among other things, it lets the exchange keep down mining fees for transactions through bundling and netting. Mining fees are based on the number, rather than the size of transactions. If the exchange were to process 1,000 transactions totaling 100 bitcoins for different customers separately, it would pay 1,000 mining fees. But if the exchange can bundle the transactions together, it would pay only a single mining for one transaction for 100 bitcoins. The exchange could either keep the savings itself or pass it

[29] Exchanges may also offer custodial holdings for customers' fiat currency assets, typically in omnibus bank accounts established "for the benefit of" the customers.

[30] As a technical matter, the transfers would be to a distinct blockchain address or addresses for each type of cryptocurrency. Depending on the technical workings of the particular cryptocurrency, one or more blockchain addresses might be used for it, such that an omnibus "account" might actually consist of multiple addresses on multiple blockchains that exist as an "account" only in the sense that the same party—the exchange—controls their private keys. *See* Haentjens *et al., supra* note 18, at ___ (discussing the technical operation of bitcoin addresses).

along to customers in order to attract more business by offering lower costs.

Likewise, the use of master accounts enables the exchange to capture savings from netting of on-us transactions.[31] If Moe and Curly are both customers of the same exchange (an on-us transaction), and Moe wishes to sell Curly his Bitcoin for payment in Ethereum, there would be a mining fee for Moe and one for Curly. But because they are both customers of the same exchange, the exchange can avoid the mining entirely and simply reallocate the ownership of the Bitcoin and Ethereum on its own books and records. The exchange can then capture the savings because it will charge both Moe and Curly a fee for the transaction based on the prevailing mining costs, even though no mining took place.

Because exchanges are able to achieve transaction account savings through bundling and netting, they are able to offer customers even better execution prices than bilateral trades, further encouraging use of exchanges by investors.

Additionally, exchanges offer various add-on services for customers using their custodial wallets. Some exchanges offer products that enable customers to lend their cryptocurrencies out in exchange for a return.[32] Relatedly, some exchanges offer staking services that enable customers to lend out their stake (essentially a voting right) in exchange for a return.[33] Parties looking to borrow cryptocurrencies or

[31] *See* Awrey & van Zwieten, *Mapping the Sahdow Payment System*, *supra* note 18, at 20 (discussing "off chain" transactions between customers of centralized cryptocurrency exchanges).

[32] *See, e.g.* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Section 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing a Cease-and-Desist Order, *In the Matter of BlockFi Lending, LLC*, Securities Act of 1933 Release No. 11029, Feb. 14, 2022, Investment Co. Act of 1940 Release No. 34503, Feb. 14, 2022 (crypto lending product was an unregistered securities offering).

[33] *See, e.g.*, Kraken, Stake with Kraken, *at* https://www.kraken.com/en-us/features/staking-coins (last viewed May 11, 2022 at 10:44am ET). Cryptocurrencies are variously proof of work systems (such as Bitcoin or Ethereum 1.0) or proof of stake systems (such as Ethereum 2.0) proof of stake systems, rather than proof of work systems. In a proof of work system, multiple parties might attempt to mine a block, but the mining rewards are given only to the first party to successfully mine. Mining involves trying to solve a cryptographic puzzle and is largely a brute computing force exercise—computer bingo. This makes mining an exercise in amassing the most computing power and incredibly inefficient, as rewards are not given to any party other than the successful miner. In contrast, in a proof of stake system, the right to mine a block and get the mining rewards is awarded to the party with the largest stake in the system. A party's stake corresponds to its holding of the

stakes do not want to have to identify and negotiate bilaterally with every Larry, Moe, or Curly investor, nor do they want to pay transaction fees for multiple funders if a single funder is not capable of funding their loan or stake itself. Bundling separate investors' holdings in a single omnibus account enables an exchange to offer one-stop funding to borrowers of various types. The same is true if the exchange has the right to rehypothecate the customers' holdings for its own benefit.

Thus, various cryptocurrency exchanges are incentivized to transfer customers' funds from dedicated custodial accounts for individual customers into a single, commingled omnibus account for which the exchange alone holds the private key. Accordingly, some exchanges will offer customers the possibility of non-commingled holdings, but will charge an extra fee for segregating funds.[34] The customers' interests in the cryptocurrency are merely tracked on the exchange's own ledger, not the blockchain. If the customer were to look at his account statement on the exchange, however, the account statement would indicate what is in the exchange's own ledger, not the blockchain, such that without doing an audit of the blockchain, the transfer of the cryptocurrency from the customer's own private key to an omnibus account controlled by the exchange's own private key would not be visible to the customer.

While this sort of arrangement may facilitate transactions on the exchange (as well as the exchange's own use of the cryptocurrency deposited with it), it poses enormous risk for investors. As the following section addresses, if the cryptocurrency exchange were to fail, the cryptocurrency that it holds custodially—including when users of unhosted wallets temporarily use a hosted (custodial) wallet—would likely not be treated as property of the customers, but as property of the exchange. The customers would not "own" the cryptocurrency, but would be mere unsecured creditors of the exchange. That would put them almost last in line for repayment from the failed exchange's limited pool of assets.

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cryptocurrency, but stakes can be pledged to others as part of staking pools, generally in exchange for part of the mining rewards if the right to mine is awarded. A proof of stake system is much more efficient in use of computing power, but it shifts the nature of the race from being the first to solve the puzzle into one to assemble the largest staking pool.

[34] *See infra* text accompanying notes 43-46.

C. Cryptocurrency Exchange User Agreements

Cryptocurrency exchanges' user agreements vary in terms of what they disclose to customers about their rights and risks. Some exchanges' user agreements are silent about how they hold customers' assets, leaving unclear what their actual practices are likely to be, but raising the strong likelihood that these exchanges do not segregate customers' holdings.

Other exchanges expressly indicate that they hold the assets in a merely custodial capacity. For example, Coinbase's user agreement provides that "All Digital Assets held in your Digital Asset Wallet are custodial assets held by Coinbase for your benefit".[35] The Coinbase User Agreement further provides that:

> **2.6.1. Ownership.** Title to Digital Assets shall at all times remain with you and shall not transfer to Coinbase. As the owner of Digital Assets in your Digital Asset Wallet, you shall bear all risk of loss of such Digital Assets. Coinbase shall have no liability for Digital Asset fluctuations or loss. None of the Digital Assets in your Digital Asset Wallet are the property of, or shall or may be loaned to, Coinbase; Coinbase does not represent or treat assets in User's Digital Asset Wallets as belonging to Coinbase. Coinbase may not grant a security interest in the Digital Assets held in your Digital Asset Wallet. Except as required by law, or except as provided herein, Coinbase will not sell, transfer, loan, hypothecate, or otherwise alienate Digital Assets in your Digital Asset Wallet unless instructed by you.[36]

The Coinbase User Agreement also provides:

> **2.6.2. Control.** You control the Digital Assets held in your Digital Asset Wallet. At any time, subject to outages, downtime, and other applicable policies, you may withdraw your Digital Assets by sending it to a different blockchain address.[37]

These two sections tell the user that the user has "title" to the cryptocurrency and is the "owner" of the cryptocurrency. Yet another section of the Coinbase User Agreement also provides that:

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[35] Coinbase, User Agreement as of May 6, 2022, § 2.6.
[36] Coinbase, User Agreement as of May 6, 2022, § 2.6.1.
[37] Coinbase, User Agreement as of May 6, 2022, § 2.6.2.

> As long as you continue to custody your Digital Assets with Coinbase, Coinbase shall retain control over electronic private keys associated with blockchain addresses operated by Coinbase, including the blockchain addresses that hold your Digital Assets.[38]

In other words, Coinbase, not the user, will have access to the private keys that are used to access the cryptocurrency. Moreover, the Coinbase User Agreement provides that Coinbase is allowed to store its customers' cryptocurrency in shared blockchain address—unsegregated accounts for all purposes—controlled solely by Coinbase, with the individual customers' holdings tracked only on Coinbase's ledger, and not reflected in the blockchain for the particular cryptocurrency:

> **2.6.3. Digital Assets Not Segregated.** In order to more securely custody assets, Coinbase may use shared blockchain addresses, controlled by Coinbase, to hold Digital Assets held on behalf of customers and/or held on behalf of Coinbase. Although we maintain separate ledgers for User accounts and Coinbase accounts held by Coinbase for its own benefit, Coinbase shall have no obligation to segregate by blockchain address Digital Assets owned by you from Digital Assets owned by other customers or by Coinbase.[39]

The user agreement for cryptocurrency exchange Robinhood has a similar provisions. On the one hand, Robinhood refers to the customer acquiring "title" to the cryptocurrency:

> **4.d. Title and Ownership.** I understand that any order for Cryptocurrency that I place on the Robinhood Platform that is subsequently filled will result immediately in my RHC Account being credited the amount of such Cryptocurrency and me obtaining title to such Cryptocurrency. The amount of Cryptocurrency that I purchase will be reflected on the Robinhood Platform. After I obtain title to such Cryptocurrency, I may sell all or a portion of the Cryptocurrency using the Robinhood Platform. Except at my direction or instruction, or as may be required by applicable law or regulation or legal order, RHC will not loan, hypothecate, pledge, or encumber Cryptocurrency

[38] Coinbase, User Agreement as of May 6, 2022, § 2.6.2.
[39] Coinbase, User Agreement as of May 6, 2022, § 2.6.3.

> stored and held by RHC in one or more omnibus Cryptocurrency wallets for the benefit of RHC customers.

On the other hand, Robinhood explains that it will commingle customers' cryptocurrency holdings in its own omnibus accounts:

> **9. Custody.** Cryptocurrencies that I purchase shall be stored and held by RHC in one or more omnibus cryptocurrency wallets for the benefit of RHC customers. RHC shall track the balance and ownership of Cryptocurrencies purchased as part of the RHC Services, and I understand that I can view the balance of Cryptocurrencies in my RHC Account on the Robinhood Platform. RHC shall use commercially reasonable efforts to securely store the private keys associated with my Cryptocurrencies.[40]

Similar disclosures can be found in the user agreements of many other cryptocurrency exchanges.[41] Only exchange CEX is unambiguously explains that it will hold and use customers' cryptocurrency in its own omnibus account:

> **24.1.** The User agrees and acknowledges that the User expressly grants CEX.IO Corp. the right, to the fullest extent that it may effectively do so under applicable law to: (i) hold the Cryptocurrency in our own omnibus account and to pledge, repledge, hypothecate, rehypothecate, collateralize or otherwise transfer or use any of the Cryptocurrencies, with all attendant rights of ownership, and (ii) to use or invest the Cryptocurrencies for our own benefit or risk. The User agrees and acknowledges that with respect to Cryptocurrencies used by CEX.IO Corp. pursuant to this paragraph; (i) the User may not be able to exercise certain rights of ownership and (ii) CEX.IO Corp. may receive compensation in connection with

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[40] Robinhood, Crypto User Agreement, Dec. 13, 2021, *at* https://cdn.robinhood.com/assets/robinhood/legal/Robinhood%20Crypto%20User%20Agreement.pdf.

[41] *See, e.g.*, Bitfinex, Terms of Service, https://www.bitfinex.com/legal/exchange/terms § 17.16, last viewed, Feb. 9, 2022 ("that you acknowledge and agree that Fiat, Digital Tokens or other property reflected in your Account, subaccount or Digital Tokens Wallet are not segregated assets held in your name or for your benefit but reflected only in the books and records of Bitfinex.")

> collateralizing or otherwise using Cryptocurrencies in its business to which the User will have no entitlement.[42]

Cryptocurrency exchange Gemini takes a different approach that underscores the commingling issue. Gemini offers its customers two different ways of holding cryptocurrency assets: a Depository Account or a Custody Account. In a Depository Account, Gemini will pool customers' cryptocurrency holdings, which will be tracked solely on Gemini's own ledger.[43]

In contrast, in a Custody Account, Gemini will segregate the customer's holdings with unique blockchain addresses, directly verifiable via the applicable blockchain, that will be indicated in Gemini's books and records as "belonging" to the customer.[44] A Custody Account is "intend[ed] to create a bailment" of the cryptocurrency assets with Gemini.[45]

Using a Custody Account is more expensive however—Gemini charges a 0.4% annual fee and a $125 fee per withdrawal.[46] No such fees exist for Depository Accounts. In either case, however, Gemini claims that "Digital Assets custodied on your behalf and reflected in the Digital Asset Account of your Gemini Account are not treated as general assets of Gemini."[47]

Cryptocurrency user agreements do sometimes disclose the possibility of asset commingling, but as shown above, they simultaneously assure the customers about "ownership" and "title,"

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[42] CEX, Terms of Use, May 31, 2022, https://cex.io/terms

[43] Gemini User Agreement as of Jan. 14, 2022, https://www.gemini.com/legal/user-agreement ("Digital Assets custodied in a Depository Account are pooled together in one or more of our Digital Asset wallets.").

[44] Gemini Custody Agreement, as of Mar. 10, 2020, https://www.gemini.com/legal/custody-agreement ("Your Custody Account will have one or more associated unique Blockchain Addresses in which your Assets will be (i) segregated from any and all other assets held by us and (ii) directly verifiable via the applicable blockchain.").

[45] Gemini Custody Agreement, as of Mar. 10, 2020, https://www.gemini.com/legal/custody-agreement (". By entering into this Custody Agreement, you agree that you intend to create a bailment of Assets with us, and you agree that you intend that we be the bailee.").

[46] Gemini, What are the fees for Custody accounts?, https://support.gemini.com/hc/en-us/articles/360032825231-What-are-the-fees-for-Custody-accounts-, last viewed Feb. 9, 2022.

[47] Gemini User Agreement as of Jan. 14, 2022, https://www.gemini.com/legal/user-agreement.

which suggests that customers do not need to be concerned about commingling. Likewise, Gemini mentions that it is:

> a fiduciary under § 100 of the New York Banking Law (the "NYBL") and a custodian that is licensed to custody your Digital Assets in trust on your behalf.[48]

Yet it is not at all clear what this means—Gemini interacts with customers in a range of fashions. While it has fiduciary *powers* as a trust company under New York law, that does not mean that it is acting as a fiduciary for its customers in any particular capacity. Indeed, to the extent it is acting as a bailee, such as for a Custody Account, it is not a fiduciary. Similarly, being "licensed to custody your Digital Assets in trust on your behalf" does not itself actually tell a customer anything about what is expected from Gemini, but it sounds very reassuring.

This sort of language in user agreement is potentially lulling to customers who do not understand the intricacies of bankruptcy law. Cryptocurrency exchange user agreements are merely private law that can determine the relationship between the exchange and its customer. They cannot override public law such as bankruptcy law. Thus, even if an exchange tells its customers in a passive construction that the custodied assets "are not treated as general assets" of the exchange, it can only definitively make such a statement regarding how *it* will treat the assets, not how the assets would be treated by a bankruptcy court. As the next section addresses, in bankruptcy the custodial holdings are likely not treated as property of the customers, but as property of the exchange, with the customers as mere creditors of the exchange.

II. CRYPTOCURRENCY EXCHANGES IN BANKRUPTCY

Let's imagine that a cryptocurrency exchange has failed and ends up in Chapter 11 bankruptcy, either voluntarily or involuntarily. What would happen to its customers? This section reviews the key questions regarding customer accounts that would arise in a cryptocurrency exchange's bankruptcy and how they would likely be resolved.

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[48] *Id.*

A. The Automatic Stay

When a company files for bankruptcy two things immediately happen by function of law. First, a new legal entity springs into existence.[49] This is called the "bankruptcy estate," and it consists of "all legal or equitable interests of the debtor in property as of the commencement of the case."[50] Whatever the extent of the debtor's interest in the property becomes the extent of the estate's interest in the property.

Second, most attempts to collect from the estate are stayed automatically, without need for an injunction.[51] The stay has the effect of channeling attempts to collect from the estate into a single forum—the bankruptcy court. The automatic stay normally remains in effect until the end of the bankruptcy,[52] yet it can be lifted earlier upon motion "for cause"[53] or if the debtor does not have any equity in the property and it is not necessary for an effective reorganization,[54] but that requires parties actually going to court and litigating the issue.

The automatic stay, however, only restricts attempts to collect from the property of the estate. If an asset was not property of the debtor, then it would not become property of the estate and would not be subject to the automatic stay. Violations of the stay are subject to sanctions, so if there is doubt about whether the stay applies parties usually seek court permission before attempting to exercise remedies that could affect the estate. Accordingly, even if the automatic stay does not actually apply, there can still be frictions for parties obtaining access to their own property if it is held by the debtor.

B. Property of the Estate

Thus, the first issue for customers of a cryptocurrency exchange in a bankruptcy is whether the exchange's custodial holdings

[49] 11 U.S.C. § 541(a).
[50] 11 U.S.C. § 541(a)(1).
[51] 11 U.S.C. § 362(a). The stay exceptions for securities contracts, forward contracts, swaps, and repos are inapplicable. Even if a cryptocurrency is a security or a commodity, the stay exceptions do not cover custody, only financial transactions themselves, and even then the exceptions permit only the termination, acceleration, and liquidation of margin posted to cover the transactions. None of that applies to custody of cryptocurrency, where there is no margin.
[52] 11 U.S.C. § 362(c).
[53] 11 U.S.C. § 362(d)(1).
[54] 11 U.S.C. § 362(d)(2).

are property of the estate and therefore subject to the automatic stay.[55] If the assets are not property of the estate, then the customers should be able to get access to their assets—to the extent they still exist—either through the exchange's voluntary cooperation or through court order, such as through a replevin or revendication action.

The legal relationship between the cryptocurrency exchange and its customer regarding the custodial holdings could potentially be characterized in several ways depending on the particular facts and the legal analysis: an express trust, a constructive trust, financial assets subject to Article 8 of the Uniform Commercial Code, a bailment, or a sale. If the custodial holdings are a express trust, a constructive trust, financial assets subject to Article 8 of the Uniform Commercial Code, or a bailment, then the exchange's interest is limited to its possessory interest,[56] while if holdings are through a sale, then the holdings are property of the estate outright, with the customers being merely creditors of the estate.

Put another way, if the exchange customers' interest in the custodial holdings is deemed a property interest of one sort or another, then that interest will be free of the claims of competing creditors, such as bondholders or employees. But if the exchange customers' interest in the custodial holdings is deemed to be merely contractual rights, then the customers will be competing with other creditor groups for the custodial holdings (and other assets of the exchange).

Unfortunately, the legal concepts of trust, financial assets, bailment, and sale are often not as distinct as one might suppose.[57] The

[55] An issue *not* likely to arise under U.S. law is whether cryptocurrency can even be "property." Civil law jurisdictions have a strong *numerus clausus* principle that limits the recognition of new forms of property, and if ownership forms do not fit into recognized patterns, then ownership is not legally recognized. Thus, in the Japanese bankruptcy of the Mt. Gox exchange, the court held that there could not be ownership of bitcoins under Japan's Civil Code because it was not a tangible thing and was not covered by other laws like copyright that recognize ownership based on exclusive control. Tokyo District Court, Judgement from 5 August 2015, Reference number 25541521, available at https://www.law.ox.ac.uk/sites/files/oxlaw/mtgox_judgment_final.pdf. Dutch and Russian courts have reached different conclusions on a similar question. Ilya Kokorin, *When Bitcoin meets insolvency: Is Bitcoin property? Dutch and Russian responses*, 8 June 2018, LexisNexis, *available at* https://www.lexisnexis.co.uk/blog/restructuring-and-insolvency/when-bitcoin-meets-insolvency-is-bitcoin-property-dutch-russian-responses.

[56] 11 U.S.C. §§ 541(a)(1), (d).

[57] Transaction characterization, such as loan vs. lease or loan vs. sale or loan vs. time sale or bailment vs. lease, is a problem that bedevils much of commercial law.

applicable law is generally common law, not statutory (other than about financial assets), and the case law on is often older and confused. As a result, a transaction might be plausibly characterized in multiple ways.

This lack of clarity about legal characterization of custodial arrangements is the key point. The lack of legal clarity makes impossible for cryptocurrency exchange customers to have confidence in their treatment in the event of the exchange's bankruptcy. Moreover, the lack of legal clarity almost assuredly means that there will be litigation in the bankruptcy regarding who "owns" the custodially held cryptocurrency and in what capacity. While that litigation is pending—which could be for significant time—exchange customers will not to have access to the custodially held cryptocurrency.[58] This means that even if the customers prevail, they will bear exposure to market swings during the duration of the litigation and may also bear the costs of the litigation.

The remainder of this section considers in some detail the possible characterizations of custodial holdings of cryptocurrency: express trust, constructive trust, financial assets governed by Article 8 of the Uniform Commercial Code, bailment, and property sold to the exchange.

1. *Express Trust*

A common device used to make assets of all sorts bankruptcy remote is the trust.[59] When assets are bankruptcy remote, it means that they will not become part of the debtor's bankruptcy estate.[60] When assets are held in trust, legal title (formal ownership) of the assets is separated from the beneficial interest (economic rights) in the assets. Legal title to the assets is held by the trustee, while the beneficial interest belongs to the trust beneficiary.

Bankruptcy law provides that when the debtor is the trustee for a trust, then bankruptcy estate's interest in the assets is limited to legal title to the assets; the beneficial interest remains with the non-

[58] Awrey & van Zwieten, *The Shadow Payment System*, *supra* note 18, at 814 (2018).

[59] Jonathan Greenacre & Ross P. Buckley, *Using Trusts to Protect Mobile Money Customers,* 2014 SINGAPORE J. LEG. STUD. 59; Awrey & van Zwieten, *Mapping the Shadow Payment System*, *supra* note 18, at 27-28.

[60] In contrast, when an *entity* is bankruptcy remote, it means that it cannot or will not file for bankruptcy.

bankrupt trust beneficiaries.[61] In such a case, the bankruptcy estate will relinquish legal title to the assets and distribute them to the trust beneficiaries.[62] The assets held in trust will not be available for distribution to the debtor's creditors.[63] Notably, the Bankruptcy Code does not prescribe any timetable for the distribution of the trust corpus to the beneficiaries, other than that it occur before the final distribution in the bankruptcy.

The device used to intentionally place assets in trust is an express trust. An express trust can be created by private parties or by statute. Each type is discussed in turn.

i. Privately Created Express Trusts

The private creation of an express trust requires a writing that manifests the intent to place the assets in trust for the benefit of currently or subsequently identifiable beneficiaries.[64]

Express trust arrangements for cryptocurrency can involve a direct entrustment or an intermediated entrustment. In a direct entrust, the custodial funds are place in trust *for the exchange's customer*. In an intermediated entrustment, the custodial funds are placed in trust *for the exchange*. The difference is significant in terms of the bankruptcy because it changes whether the exchange is the trustee or the trust beneficiary.

In a direct entrustment, the exchange itself could hold the cryptocurrency in trust for its individual customers. If so, the exchange's bankruptcy would not change the customer's beneficial interest in the cryptocurrency. The bankruptcy estate's interest would be limited to legal title to the cryptocurrency,[65] and the estate would be required to relinquish control of the assets (assuming that there is not

[61] 11 U.S.C. § 541(d). Likewise, any power the debtor can exercise *solely* for the benefit of another entity than the debtor is not part of the estate. 11 U.S.C. § 541(b)(1). Thus, if the debtor has the power to put customer fiat funds in a bank account, those funds would not be property of the estate, unless the debtor was able to benefit from them, as would be the case if the debtor were the party entitled to the interest earned on the funds.

[62] 11 U.S.C. § 725 (requiring the bankruptcy estate to "dispose of any property in which an entity other than the estate has an interest … that has not been disposed of under another section of this title.).

[63] Pealman v. Reliance Ins. Co. 371 U.S .132, 135-36 (1962) ("The Bankruptcy Act simply does not authorize a trustee [in bankruptcy, that is the individual managing the debtor's bankruptcy estate] to distribute other people's property among a bankrupt's creditors.").

[64] Restatement (3d) of Trusts, §§ 10, 13, 44.

[65] 11 U.S.C. § 541(d).

an assumable executory contract for custody). While the customers' ownership interest would be protected, they would still likely experience disruptions in liquidity and might have to obtain a court order authorizing the transfer of the assets out of the exchange.

Sometimes a third-party custodian (sometimes affiliated with the exchange, sometimes independent) serves as the trustee. In this situation both a direct express entrustment is still possible. In such a situation, the failure of the exchange might, as an operational matter, affect customers' liquidity, but as a formal legal matter, the custodial cryptocurrency would not become part of the exchange's bankruptcy estate. To be sure, there is still the possibility of the bankruptcy of the trustee entity itself, but third-party custodians tend to be entities with limited operational risk.

Cryptocurrency exchange user agreements for retail customers do not provide for the creation of an express trust, so (absent another document creating such a trust) exchanges do not directly hold the cryptocurrency in express trust for their customers. In contrast, some institutional cryptocurrency investors do have direct entrustment agreements with custodians.

For example, the Annual Report of Coinbase Global, Inc., the parent company of cryptocurrency exchange Coinbase, Inc., reports that its subsidiary Coinbase Custody Trust Company, LLC, a New York limited purpose trust company, that holds cryptocurrency in trust for the benefit of certain *institutional clients*.[66] Thus, the issuers of certain securities that are backed by holdings of cryptocurrency entrust their holdings to Coinbase Custody Trust Company, LLC.[67] Notably, the entrustment in these cases occurs through a bespoke bilateral contract, rather than Coinbase User Agreement.

For retail customers, cryptocurrency exchanges that use entrustment appear to use intermediated entrustment, even though direct entrustment is possible.[68] In an intermediated entrustment, the

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[66] Coinbase Global, Form 10-K, 2022, at 17 ("Coinbase Custody Trust Company, LLC, a New York limited liability trust company, which is authorized to exercise fiduciary powers under New York state banking law and holds certain crypto assets in trust for the benefit of our institutional customers.").

[67] *See, e.g.*, Osprey Bitcoin Trust, Form 8-K, Feb. 10, 2022, Exh. 10.1 (Coinbase Custody Custodial Services Agreement between Osprey Bitcoin Trust and Coinbase Custody Trust Company, LLC, Feb. 4, 2022).

[68] It is possible to create an express trust that would provide for the exchange's customers

exchange, rather than its customer is the trust beneficiary.[69] This sort of arrangement provides little protection for the cryptocurrency exchange's customers in the event of the exchange's failure, as it suggests that the economic interest in the cryptocurrency belongs to the exchange, not its customers, who merely have a general unsecured claim on the exchange. Intermediated entrustment requires the exchange to be able to alienate the cryptocurrency by placing it in trust for itself. The ability to alienate the cryptocurrency is a strong indication that the cryptocurrency belongs to the exchange, rather than to the customer. If so, the exchange's customer is nothing more than a creditor of the exchange without a claim on an particular cryptocurrency asset.

If the exchange is the trust beneficiary, the trust structure only ensures that the cryptocurrency is being kept safe *for the exchange*, not for the customers (and even then, it is not a guarantee against loss of the assets). At most, the trustee has a financial obligation to the exchange if the cryptocurrency assets are lost, but if the trustee is an affiliate of the exchange, it is unlikely that it provides a material source of additional financial strength.

ii. Public Law Express Trusts

Many cryptocurrency exchanges have state money transmitter licenses. State money transmitter laws require licensee to maintain a certain level of "permissible investments" relative to particular types of liabilities to customers.[70] By statute, these permissible investments are held in trust for the customers.[71] Additionally, funds received for transmission are deemed to be held in trust for customers.[72]

Three questions exist about such trusts. First, does such a trust even apply to cryptocurrency deposits? Only a minority of state money transmitter laws expressly cover cryptocurrency,[73] so a challenge that a

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to be the trust beneficiaries, even though the customer base is dynamic. *See* Restatement (Third) of Trusts, § 44.

[69] This situation is a type of staged wallet. For a more general discussion of staged wallets, *see* Part III, *infra.*

[70] *See, e.g.*, MCL § 487.1031(1).

[71] *See, e.g.*, MCL § 487.1031(3); Tex. Fin. Code Ann. § 151.309(e).

[72] *See, e.*g, Az. Rev. Stat Ann. § 6-1209(B); MCL § 487.1034(3); Tex. Fin. Code Ann. § 151.404(a).

[73] *See, e.g.*, Bloomberg Law, *Cryptocurrency Laws and Regulations by State*, May 26, 2022, *at* https://pro.bloomberglaw.com/brief/cryptocurrency-laws-and-regulations-by-state/ (50 state survey).

bankruptcy court will face is determining which state money transmitter laws apply and which create express trusts in custodial holdings of cryptocurrency. As a result, there could be different results depending on the state of the exchange's customer.

Second, even if the trust applies to cryptocurrency deposits, would such trusts even be honored in bankruptcy? Bankruptcy law will generally honor state law property entitlements, but if the state property law entitlement only springs on bankruptcy, as is the wording of some state laws,[74] it might be viewed as an *ipso facto* provision that bankruptcy law will not respect.[75]

And third, if there is a trust that applies to cryptocurrency holdings, what is the extent of the trust? In particular, if trust assets have been commingled with other assets of the debtor, they might be limited to identifiable proceeds using tracing principles. In the sole reported case to address this issue, the bankruptcy court dealt with state money transmitter laws that purported to create a trust not just on funds received by a debtor money transmitter for a payment instrument, but also on any commingled property of the debtor.[76] The bankruptcy court held that federal bankruptcy law requires the imposition of tracing principles as a limitation on the scope of the trust.[77] In that case, the commingled funds were in a bank account that had a "lowest intermediate balance" of $0.[78] Accordingly, there was no longer an express trust because there was no longer a trust corpus. All the money transmitter's customers had was an unsecured claim.[79]

iii. Summary

To summarize, if the cryptocurrency is held in an express trust, whether privately or publicly created, the identifiable trust beneficiary—the exchange customer—will retain its beneficial interest

[74] *See, e.g.*, MCL § 487.1031(3) ("Even if commingled with other assets of a licensee, permissible investments are held in trust for the benefit of the purchasers and holders of the licensee's outstanding payment instruments *in the event of bankruptcy or receivership of the licensee*.") (emphasis added).

[75] 11 U.S.C. § 545(a) (avoiding *ipso facto* liens). Arguably a springing trust is the same as a springing lien in that it creates property rights contingent upon the filing of a bankruptcy or other event of insolvency.

[76] *See* Blackhawk Network, Inc. v. Alco Stores, Inc. (*In re* Alco Stores, Inc.), 536 B .R. 383, 401 (N.D. Tex. 2015).

[77] *Id.* at 402, 404-14.

[78] *Id.* at 414.

[79] *Id.* at 415.

in the cryptocurrency in the event of a trustee exchange bankruptcy. The customer should ultimately be able to exercise control of its holdings, but likely not without disruption and delay. For privately created trusts for retail investors, the trust beneficiary, however, is typically the exchange itself, rather than the exchange's customer, an arrangement that means that the exchange holds the beneficial interest in the cryptocurrency and its customers are merely its unsecured creditors. Some state money transmitter laws create express trusts for cryptocurrency customers, but these laws are far from universal, and even when applicable, may not apply in bankruptcy. Even if they apply, however, it is still unclear whether commingling of assets will undermining the trusts because of the application of tracing principles.

2. *Constructive Trust*

Another possibility is that custodial accounts at an exchange are held in constructive trust for the exchange's customers. A constructive trust is a type of implied trust that is judicially created as a remedy when a party is unjustly enriched by the acquisition of title to identifiable property at the expense of another or in violation of the other's rights.[80] As Justice Cardozo explained:

> A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.[81]

If property is found to be in constructive trust for creditors, it will generally not be found to be property of the estate,[82] so the bankruptcy estate will be required to relinquish it to the trust beneficiaries, just as with an express trust.[83]

Whether a constructive trust exists is a matter of state law, and state law on constructive trusts varies substantially, with some states not even recognizing constructive trusts,[84] and other states not

[80] Restatement (Third) of Restitution and Unjust Enrichment, § 55.

[81] Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 386 (N.Y. Ct. of App. 1919).

[82] 5 Collier on Bankruptcy ¶ 541.28 (16th ed. 2021).

[83] 11 U.S.C. § 725.

[84] *E.g.*, Tow v. Exxon Mobil Corp. (*In re* ATP Oil & Gas Corp.), 553 B.R. 577 (Bankr. S.D. Tex. 2016) (Louisiana does not recognize constructive trusts).

permitting their creation when parties' relationship is governed by contract because unjust enrichment will not lie when there is a breach of contract cause of action.[85] In yet other states, a constructive trust only arises upon a court order creating it,[86] so if there is no court order prior to the bankruptcy, there is no constructive trust. The creation of a constructive trust is an equitable remedy, however, and bankruptcy courts are permitted to consider different equities than a state court.[87]

Because constructive trusts benefit one group of claimants at the expense of others by precluding other claimants from benefitting from the trust corpus, bankruptcy courts have historically been hostile to the remedy, which runs contrary to the fundamental bankruptcy principle that equity is equality.[88] As the 6th Circuit has noted, "Constructive trusts are anathema to the equities of bankruptcy since they take from the estate, and thus directly from competing creditors, not from the offending debtor."[89]

The doctrinal state of constructive trusts in bankruptcy is "in great disarray,"[90] depending both on the particulars of state law and federal courts view of its interaction with bankruptcy. It is possible that a court would rule that custodial holdings of cryptocurrency are held to be in constructive trust for the exchange's customers, but there is no guaranty about that, and the possibility should provide limited comfort for cryptocurrency exchange customers.

Critically, the doctrine of constructive trust would only protect exchange customers to the extent that the exchange still has its cryptocurrency or the traceable proceeds thereof, so commingling would potentially destroy or limit the trust depending on how tracing rules would apply. To the extent that the cryptocurrency is missing, the

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85 *See, e.g.*, *In re* Miami Metals I, Inc., 603 B.R. 727, 739-40 (Bankr. S.D.N.Y. 2019).

86 *See, e.g.*, CHoPP Computer Corp. v. United States, F.3d 1344, 1348-49 (9th Cir. 1993) (applying California law).

87 Ades and Berg Group Investors v. Breeden *(In re* Ades and Berg Group Investors), 550 F.3d 240, 245 (2d Cir.2008).

88 *See, e.g.*, CRS Steam, Inc. v. Engineering Resources (*In re* CRS Steam, Inc.), 25 B.R. 833 (Bankr. D. Mass. 1998).

89 XL/Datacomp, Inc. v. Wilson (*In re* Omegas Group, Inc.), 6 F.3d 1443 (6th Cir. 1994). Professor David Gray Carlson has rightly noted that the 6th Circuit's ruling presumes that beneficiaries of constructive trusts are creditors, while the whole point of a constructive trust is that the beneficiaries are *not* creditors. David G. Carlson, *Constructive Trusts and Fraudulent Transfers: When Worlds Collide*, 103 MARQUETTE L. REV. 365, 396 (2019).

90 *Id.* at 422.

customers are merely creditors of the exchange, the treatment of which is covered by section D of this Part.

3. Financial Assets Governed by UCC Article 8

Yet another possible characterization of custodial holdings is as "financial assets" subject to Article 8 of the Uniform Commercial Code, a uniform state law. Article 8 provides a set of rules governing custodial holdings certain investment assets.

i. Security Entitlements

Historically, physical securities certificates were considered to be reifications of the actual financial rights, and they were transferred by negotiation, meaning indorsement and physical transfer.[91] As the volume of securities transactions grew in the 1960s, Wall Street experienced a "Paperwork Crisis" because the systems for processing the then-paper-based transfers were unable to keep up. As a result, there was "a virtual breakdown in many firms of the control over the possession, custody, location, and delivery of securities and the payment of money obligations of customers, all of which exposed customers to the risk of the loss of their cash and securities."[92]

Article 8 originated as part of the state-level legislative response to the Paperwork Crisis. Part 5 of Article 8 created a system of indirect securities holding based upon immobilization of legal title to securities: the physical securities certificates are deposited at issuance with a central securities depository (usually the Depository Trust Company), which maintains the physical certificates in its vaults. The depository (called a "securities intermediary") then tracks the beneficial interest in the securities (or more precisely the broker for the beneficial owner), which is called a "security entitlement," on its electronic books and records.[93] That way trades between customers of the same brokerage are merely tracked on the brokerage's own balance sheet and trades between customer of different brokerages are recorded electronically on the central depository's balance sheet, but because all the parties are using the same depository, the physical securities certificates never

[91] *See* UCC § 8-301(a) (transfer by delivery or negotiation).
[92] Michael P. Jamroz, *the Customer Protection Rule*, 57 BUS. L. 1069, 1074 (2002).
[93] Article 8 also applies to the broker-customer relationship: the customer has a security entitlement with the broker, which in turn has its own security entitlement with the central depository. *See* UCC § 8-501(c) (providing that the securities intermediary does not have to hold the financial asset itself).

need to move. Article 8's "security entitlement system, however, does not merely apply to certificated securities. Instead, it covers uncertificated securities and certain other types of "financial assets," as discussed below.

Article 8's immobilization of title is a type of a legal fiction—the central depository maintains legal title, but nothing more in the securities. Accordingly, Article 8 provides that any securities or other financial assets held by a securities intermediary "are not property of the securities intermediary, and are not subject to claims of creditors of the securities intermediary" other than secured creditors.[94]

What's more, Article 8 presumes a commingling of all of the financial assets of a particular type held by a securities intermediary. Accordingly, if Article 8 applies to a cryptocurrency held by an exchange (the "securities intermediary"), then the investor's property interest in the cryptocurrency would be a pro rata property interest in all of that cryptocurrency held by the exchange.[95] In other words, there would be a property interest, but not in a specific identifiable asset, just a beneficial tenancy in common for the entire custodial pool of the type of asset.[96]

To illustrate, suppose the Three Stooges Exchange held 100 Bitcoin and 100 Ether for its customers, including 10 Bitcoin for Moe and 20 Ether for Schemp. Moe's security entitlement would give him a property interest of 10% of all of the Bitcoin held by the exchange, rather than on his particular 10 Bitcoin. Instead, he would have a right to get back 10 Bitcoin, but not necessarily the ones he deposited. He would also not have any interest in the 100 Ether held by the exchange. Likewise, Schemp would have an security entitlement giving him a property interest in 20% of all of the Ether held by the exchange, rather than on his particular 20 Ether. Schemp would not have any interest in the 100 Bitcoin held by the exchange.

The pro rata nature of the property interest created by a security entitlement matters because if the exchange lost 30 Bitcoin (say to a hacking), then Moe's security entitlement would still be 10%

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[94] UCC §§ 8-501(a), 8-511.
[95] UCC § 8-503(b).
[96] The difference between a tenancy in the entirety and ownership of a specific can be conceptualized as the difference between owning shares in a co-op versus owning a specific condominium unit.

of all of the Bitcoin held by the exchange, but that would now entitle him to just 7 Bitcoin (10% of the remaining 70), even if the Bitcoin that were hacked were not his Bitcoin. What of the other 3 Bitcoin in which Moe had previously held an interest? For those, he would just be a general unsecured creditor of the exchange. Article 8 assigns a pro rata property interest in the property that exists; if there is a shortfall in property held by the securities intermediary, that just becomes an unsecured claim.[97]

Article 8's beneficial tenancy in common in the custodial pool implies that the exchange's customers should have priority in the custodial cryptocurrency pool, ahead of other creditors of the exchange. In other words, the custodial pool (even if it had deficiencies) would be reserved for the exchange's customers, and would be off limits for the exchange's other creditors, effectuating the equivalent of a constructive trust. Indeed, in a Securities Investor Protection Corporation liquidation, customers of a failed broker-dealer share ratably in the commingled holdings of customer securities and cash.[98] It is not clear exactly how this would play out in a bankruptcy, but there would at least be a credible argument that if Article 8 applies, then it creates a state law property right in the custodial asset pool that bankruptcy law must honor.[99]

ii. Application of Article 8 to Cryptocurrency

Does Part 5 of Article 8 apply to cryptocurrency? The Article 8 system of title immobilization in Part 5 is based upon the creation of a "security entitlement" for a person at a "securities intermediary" that maintains "securities accounts" for others. The "securityentitlement" exists when a "securities intermediary" credits another person's "securities account" with a "financial asset" on its books and records.[100] A "securities account" is defined as an account to which a "financial asset" may be credited.[101] In other words, a security entitlement requires a security account, which in turn requires there to be a financial asset. Thus, the key to the application of Article 8's title

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[97] *See* UCC § 8-511, Cmt. 2 (noting that Article 8 does not protect against a securities intermediary failing to hold the customer funds it is supposed to hold).

[98] 15 U.S.C. § 77fff-2(c).

[99] *See* 11 U.S.C. § 725.

[100] UCC § 8-501(a)-(b).

[101] UCC § 8-501(a).

mobilization provision would seem to be whether an asset is a "financial asset."

Applying this terminology to a cryptocurrency, if a cryptocurrency were a "financial asset," then the exchange would be "securities intermediary" that would maintain a "securities account" for the exchange's customer, which would make the customer an "entitlement holder" that holds a "security entitlement" with respect to the cryptocurrency held by the exchange.[102] This analysis tees up the question of whether a cryptocurrency is a "financial asset" for Article 8 purposes. Article 8 defines a "financial asset" as:

> (i) a security;
>
> (ii) an obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, which is, or is of a type, dealt in or traded on financial markets, or which is recognized in any area in which it is issued or dealt in as a medium for investment; or
>
> (iii) any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this Article.[103]

Cryptocurrencies clearly do not qualify as "financial assets" under the first prong of the definition. The definition of "security" for Article 8 does not track the *Howey* test for what constitutes a "security" under federal securities laws.[104] Article 8's definition requires, among other terms, that a "security" be "represented by a security certificate".[105] An Official Comment to Article 8 makes clear that the

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[102] UCC §§ 8-102(a)(7), 8-102(a)(17), 8-501(a).

[103] UCC § 8-102(a)(9).

[104] SEC v. W.J. Howey Co., 328 U.S. 293 (1946).

[105] UCC § 8-102(15). Even if uncertificated, an obligation or interest of an issuer or an interest in property or an enterprise of an issuer can still be a "security" for Article 8 purposes if its transfer "may be registered upon books maintained for that purpose by or on behalf of the issuer." *Id.* Cryptocurrencies other than stablecoins lack "issuers," however, so this disjunctive part of the definition is generally inapplicable.

term "security certificate" refers to a paper certificate.[106] Thus, because cryptocurrency exists solely in digital form, no cryptocurrency is a "security" for purposes of UCC Article 8.

To qualify under the second prong of the definition of "financial asset" a cryptocurrency must be either "an obligation of a person" or a "share, participation, or other interest in a person or in property or an enterprise of a person." Both of these possibilities require the involvement of a "person."

The term "person" is defined in the Uniform Commercial Code as "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity."[107] This term must necessarily be tied to an actual legal entity—it cannot be read so broadly as to cover informal associations of individuals in a cryptocurrency project or else the term would make little sense in many of the places it is used throughout the UCC.

For example, the UCC refers to a "person maintaining an account".[108] An account cannot be maintained for something other than a legal entity. Likewise the UCC refers to a person acquiring possession of a security certificate or becoming the registered owner of an uncertificated security, a usage of "person" that can only encompass legal entities.[109]

When a cryptocurrency has an issuing entity, rather than only an issuing algorithm, there is a person. Thus a redeemable stablecoin, a type of cryptocurrency that is supposed to be redeemable from an issuer for fiat currency at a fixed price, will always be an obligation of a person. For example, the stablecoin Tether is an obligation of its issuer, Tether, Ltd. Because Tether is of a type of obligation that is

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which is represented by a security certificate in bearer or registered form, or the transfer of which may be registered upon books maintained for that purpose by or on behalf of the issuer;

[106] UCC § 8-102, Official Cmt. 16 ("The term 'security certificate' refers to the paper certificates that have traditionally been used to embody the underlying intangible interest.").

[107] UCC § 1-201(27).

[108] UCC § 8-501.

[109] UCC § 8-301(a)(2), (b)(2).

traded on financial markets and recognized as a medium for investment, it is a "financial asset" for purposes of Article 8.

Cryptocurrencies other than stablecoins, however, are less likely to be "financial assets," because they do not involve "a person".[110] Instead, these cryptocurrencies are open-source software development projects that involve the collaboration of numerous persons, but no identifiable legal entity has control over the system. Rather, design choices are made through consensus mechanisms.

Bitcoin and Ethereum, for example, are not obligations of anyone, nor are they a share, participation or other interest in "a person" because there is no issuing entity of any sort involved, nor are they an interest in the property of a "person," again because there is no entity of any sort involved. Nor can they be said to be an interest in the enterprise of a "person," for whose enterprise is Bitcoin or Ether? Bitcoin lacks any sort of organization. Ethereum has an Ethereum Foundation that has an unofficial stewardship role in the Ethereum ecosystem, but the Ethereum Foundation does not control Ethereum.[111] Decentralized financial products lack the entity necessary for triggering the second prong of the definition of "financial asset" under Article 8.

The third prong of the definition of "financial asset" would defer to the parties' contractual choice to bring their relationship within the scope of Article 8. This would be a simple enough thing to do, but it does not appear to be the practice of cryptocurrency exchanges. At present, the sole cryptocurrency user agreement I have identified as invoking Article 8 is the June 1, 2022, version of the Coinbase user agreement.[112] No other retail cryptocurrency user

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[110] A cryptocurrency that operates on privately controlled software, rather than on a consensus mechanism for its users, necessarily involves "a person" who controls the software code, and their tokens are likely to be interests in an enterprise of that person that is dealt in or traded on financial markets or recognized as a medium for investment. I have not been able to identify any example of a cryptocurrency that operates on privately controlled software, perhaps because investors would eschew the risk of the controlling party changing the code to deprive them of value.

[111] https://ethereum.foundation/about/.

[112] Coinbase User Agreement, § 2.7.2, June 1, 2022 ("All Supported Digital Assets credited to the Digital Asset Wallet will be treated as "financial assets" under Division 8 of the California Uniform Commercial Code…."). *See also* Paul Grewal, *Seeting the record straight: Your funds are safe at Coinbase—and always will be*, June 1, 2022, *at* https://blog.coinbase.com/setting-the-record-straight-your-funds-are-safe-at-coinbase-and-always-will-be-f8cf2b588fd8; Paul Grewal, tweet, June 1, 2022, 6:04pm, *at*

agreement the author has reviewed provides for the application of Article 8, suggesting that cryptocurrency exchanges do not generally desire the application of Article 8.[113]

Considering these three prongs, then, it would appear that under the present form of cryptocurrency user agreements some cryptocurrencies—namely stablecoins—are, according to the black letter text of Article 8, likely covered by its provisions, while other cryptocurrencies are not. If Article 8 applies, then the custodial holdings of the cryptocurrency would be treated as property of the exchange's customers held as a tenancy in common. The cryptocurrency to which Article 8 applies should be released to the customers by the bankruptcy estate, and the estate's other creditors would not have a claim on it, unless they held a lien on the custodial cryptocurrency.[114] The tenancy in common created by Article 8 would then dictate the distribution of the cryptocurrency among the exchange's customers, even if particular tokens are identifiable to particular customers' accounts at the exchange.

The possibility that Article 8 might apply to some cryptocurrencies, but not others, means that there could be divergent treatment of different types of cryptocurrency in bankruptcy based on technical distinctions the significance of which investors are not likely to understand. It is not clear if such a divergence would trouble a court. Still the possible divergence in treatment might incline consistency-minded courts toward rulings on the property status of non-Article 8 cryptocurrencies that would also take them out of the bankruptcy estate.

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https://twitter.com/iampaulgrewal/status/1532121035671080960. Coinbase's change to its user agreement occurred shortly after the public circulation of a draft of this Article that observed that no exchange had opted into Article 8 and the author's exchange on the issue with the Reporter for Article 8 and members of the Permanent Editorial Board for the Uniform Commercial Code, some of whom are attorneys representing exchanges. Whether this is coincidental is unclear.

[113] The author's informal communications with attorneys who work in this area, however, suggest that institutional custody arrangements, which are individually negotiated, do commonly use the Article 8 framework. *See, e.g.*, Trust Company Custodial Services Agreement, Greyscale Ethereum Trust (ETH), Form 10, Aug. 6, 2020, Exh. 10.1, *at* https://www.sec.gov/Archives/edgar/data/1725210/000119312520211399/d918957dex101.htm. Institutional custody agreements, however, are not generally not publicly available.

[114] UCC § 8-511(a)-(b).

iii. Effect of the Official Commentary to Article 8

There is a substantial catch to this analysis, however. While the black letter text of Article 8 is clear enough, the Official Commentary to Article 8, which is codified in some states' adoption of the Article, indicates that that the black letter text is to be disregarded if it does not make sense to apply the indirect holding system rules to an asset:

> The fact that something does or could fall within the definition of financial asset does not, without more, trigger Article 8 coverage. The indirect holding system rules of Revised Article 8 apply only if the financial asset is in fact held in a securities account, so that the interest of the person who holds the financial asset through the securities account is a security entitlement. Thus, questions of the scope of the indirect holding system rules cannot be framed as "Is such–and–such a 'financial asset' under Article 8?" Rather, one must analyze whether the relationship between an institution and a person on whose behalf the institution holds an asset falls within the scope of the term securities account as defined in Section 8–501. That question turns in large measure on whether it makes sense to apply the Part 5 rules to the relationship.[115]

Thus, the real analysis is not whether Article 8 applies by its own textual terms, but a purposivist analysis about "whether it makes sense to apply the Part 5 rules". Likewise another Official Comment notes that the question of whether there is a "securities account," which is a precondition for there being a "security entitlement," which triggers the rest of Part 5 is to be determined through a purposivist analysis:

> Section 1–102 … states the fundamental principle of interpretation that the Code provisions should be construed and applied to promote their underlying purposes and policies. Thus, the question whether a given arrangement is a securities account should be decided not by dictionary analysis of the words of the definition taken out of context, but by considering whether it promotes the objectives of Article 8 to include the arrangement within the term securities account.[116]

[115] UCC § 8-102, Official Cmt. 9.
[116] UCC § 8-501, Official Cmt. 1.

What is one to make of this two-faced drafting?[117] On the one hand there is a detailed statutory scheme that by its plain blackletter text says one thing without any ambiguity. Normal canons of statutory interpretation would say that is the end of the matter.

On the other hand, there is Official Commentary, which is sometimes itself formally codified law with equal status to the blackletter text. That Official Commentary instructs courts to defer to the policy goals of Part 5, rather than to the plain meaning of the text. Those policy goals, however, are never specified anywhere in the UCC. Instead, they need to be gleaned from its legislative history and surrounding commentary. So which controls? The blackletter text or the Official Commentary, which is not even always law?

It is hard to overstate how uniquely problematic Article 8's drafting is within the entirety of American law. Nevertheless, the Official Commentary provides a way to resolve the disparate application of Article 8 to stablecoins and other cryptocurrencies by teeing up the question about whether it makes sense to apply the Part 5 indirect holding system rules to cryptocurrencies in the first place.

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[117] The implication of the Official Commentary is further complicated by a draft comment to a pending revision of the Uniform Commercial Code. The draft comment explains that a securities account could extend to "controllable electronic records, controllable accounts, and controllable payment intangibles," UCC § 8-501, Official Cmt. 4 (proposed), terms that encompass cryptocurrencies under proposed revisions to Article 9, UCC §§ 9-102(27A), (27B) (proposed), and new Article 12 of the Uniform Commercial Code. UCC § 12-102(a) (proposed). *See also* UCC § 12-104 (proposed), Reporter's Note 4 ("An example of such a resulting controllable electronic record is the unspent transaction output (UTXO) generated by a transaction in bitcoin."). The draft comment would distinguish between direct and indirect holdings of cryptocurrencies. The comment suggests that the relationship between the customer and the putative securities intermediary be considered one of direct holding (and thus not subject to the rule of Part 5) if the customer retains or shares:

> control of the financial asset under an arrangement whereby the exercise of powers, such as the power to transfer control, requires the exercise of the power by both the intermediary and the customer. Such an arrangement would be, functionally, substantially equivalent to the [direct holding] arrangement explicitly contemplated by subsection (d) [that is not subject to Part 5's rules].

UCC § 8-501, Official Cmt. 4 (proposed). The negative implication from this provision is that if the exchange has exclusive control of the private key to the cryptocurrency, then it is an indirect holding that is within the scope of the rules of Part 5. While this might well be the intent of the drafters, it is hardly explicit and it seems to run contrary to the analysis of whether it makes sense to apply the Part 5 indirect holding rules to a system that does not need immobilization of title.

iv. Does Article 8 Make Sense for Cryptocurrency?

At first glance, cryptocurrencies seem like a good fit for the Article 8 indirect holding system. Article 8 facilitates all of the benefits of commingling and avoids the cumbersome process of moving assets in and out of direct holding, while maintaining protections for exchange customers.

On the other hand, Article 8 was always intended to operate as part of a universe of regulated financial institutions—securities and commodity broker-dealers.[118] While it has some protections for customers, it does not ensure that there will actually be assets to back up their security entitlement. Article 8 expressly assumes that will be handled by other regulation, and that SIPC insurance will protect entitlement holders if the securities intermediary wrongfully lacks the financial asset it is supposed to maintain.[119] As an Official Comment to Article 8 notes:

> Article 8 is premised on the view that the important policy of protecting investors against the risk of wrongful conduct by their intermediaries is sufficiently treated by other law.[120]

That premise does not hold true for cryptocurrency, which is not covered by the securities regulation that Article 8 expects.

Article 8 permits outcomes that are harsh for entitlement holders because it assumes that the risk of these outcomes will be mitigated by federal regulation and the outcome itself will be at least partially mitigated by SIPC insurance coverage.[121] Consider, for example, the effect of a wrongful granting of a security interest in all of a type of a financial asset by a securities intermediary that subsequently goes bankrupt. Article 8 requires a securities intermediary to obtain the consent of the holder of a security entitlement before granting a security interest in the entitlement holder's financial asset.[122] But if the entitlement holder does not consent, and a security interest is nevertheless granted, Article 8 upholds the validity of the wrongful security interest and exculpates the secured party from any liability

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118 UCC § 8-511, Cmt. 2 (noting that other regulatory regimes protect investors against the risk that a securities intermediary will not have the securities it was supposed to be holding).

119 *Id.*

120 *Id.*

121 *Id.*

122 UCC § 8-504(b).

unless it actively colluded with the securities intermediary.[123] The entitlement holder is left with nothing more than an unsecured claim against the bankrupt securities intermediary. The entitlement holder's pro rata property interest in the intermediary's aggregate holdings of the financial asset is gone because the intermediary no longer has any holdings of the financial asset.

This good faith purchaser "take free" rule imposes a harsh outcome on the innocent entitlement holder, but Article 8 presumes that regulatory oversight of securities intermediaries that will avoid wrongful pledges, the failure to maintain the required financial assets, and the ultimate failure of securities intermediaries. Article 8 is also premised on the idea that entitlement holders will be compensated SIPC insurance in the event of such a failure. None of that exists for crypto.[124]

In the absence of Article 8, a custodian's ability to grant a security interest would be limited to its own property. This is the basic rule of *nemo dat quod non habet*—you cannot give what you don't have. Thus, if the custodian's property interest is mere legal title or control or possession, but not the beneficial ownership, then the security interest could only be in the legal title or control or possessory interest—and would be of little value to the secured party. For example, if the parking valet borrows money, he cannot grant a security interest in your car. At most he can grant a security interest in his limited possessory right.

Outside of the Article 8 context, there is no "take free" rule that expands the scope of a security interest beyond the property interest of the custodian. Instead, such "take free" rules exist only for negotiable instruments and negotiable documents of title, where the law deliberately acts to protect holders in due course in order to

[123] UCC §§ 8-504, Cmt. 2 (rights of the secured party are determined by 8-503 and 8-511); 8-503(e) (no liability to entitlement holder for purchaser of a financial asset that gives value and obtains control of the financial asset if not colluding with the securities intermediary); 8-511 (claim of a secured creditor has priority in a financial asset over claims of entitlement holder if the secured creditor has control over the financial asset).

[124] The lack of a regulatory and insurance regime makes the newly proposed UCC Article 12 regime, which would apply such take-free rules to crypto that is not covered by Article 8, particularly harsh, especially as under Article 12 there is no requirement of customer consent for an exchange to grant a security interest in custodial digital assets. UCC §§ 9-207(c)(3); 12-104(e), (g).

enhance the liquidity of these instruments and documents.[125] As the parking valet example shows, a lack of take free rules makes sense absent a protective regulatory framework. Were it otherwise, not only could the parking valet give a security interest in your car that would trump your ownership interest, but *anyone* could give a security interest in any asset, irrespective of having any rights in the asset.[126] The Article 8 system makes sense only when combined with the robust system of federal securities regulation.

4. Bailment vs. Sale

i. Bailments

Another possible characterization of custodial holdings is as a bailment. A bailment is a delivery of property from one person to another for a specific purpose under a contract providing that the property will be returned when that purpose has been accomplished or the bailor reclaims the property.[127] Bailment bifurcates ownership from possession; general ownership remains with the bailor while the bailee has lawful, but limited possession.[128] While traditionally bailments applied only to tangible goods, there is nothing that inherently limits the doctrine so, and the doctrine could certainly apply to storage of digital assets.[129]

Thus, when possession or control is not bifurcated from ownership, such as in the case of an individual renting a locker from another, the owner of the locker does not hold the contents of the locker as a bailment because the renter maintains a possessory interest

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[125] UCC § 3-306, § 7-502(a)(4). *See* Edward J. Janger, *The Costs of Liquidity Enhancement: Transparency Cost, Risk Alteration, and Coordination Problems*, 4 BROOK. J. CORP. FIN. & COM. L. 40 (2009) (negotiability as liquidity enhancer).

[126] Note, however, that under UCC Article 9, a different rule applies regarding collateral in the control or possession of the secured creditor. UCC § 9-207(c)(3).

[127] United Truck Rental Equip. Leasing, Inc. v. Kleenco Corp., 84 Haw. 86, 91 (1996). *See also* Sirpal v. Univ. of Miami, 684 F.Supp.2d 1349, 1364 (S.D. Fla. 2010) (quoting S&W Air Vac Sys., Inc. v. Dep't of Rev., 697 So. 2d 1313, 1315 (Fla. 5th DCA 1997) ("generally a contractual relationship among parties in which the subject matter of the relationship is delivered temporarily to and accepted by one rather than the owner."). "Found" property is also considered a bailment, even though there is no voluntary act of delivery.

[128] *See* Cornelius v. Berinstein, 50 N.Y.S.2d 186, 188 (N.Y. Sup. Ct. 1944) ("It is a generally recognized feature of bailments that possession of the thing bailed is severed from ownership; the bailor retains the general ownership, while the bailee has the lawful possession or custody for the specific purpose of the bailment."). The bailee's possession is limited because it is only on behalf of the bailor.

[129] Danielle D'Onfro, THE NEW BAILMENTS, 97 WASH. L. REV. 97, 100 (2022).

in everything within the locker by virtue of control of the lock.[130] A bailment is not a fiduciary relationship nor is it actually an entrustment, even though courts will sometimes refer to the bailed property being held "in trust."[131] Entrustment gives the trustee legal title to the asset, regardless of physical possession, whereas a bailment requires possession, but does not transfer title.[132]

Common examples of bailments are parking valets and coat checks and safe deposit boxes. The parking valet does not acquire title to your car when you hand over the keys. Instead, the valet's interest is merely possessory, and the valet is obligated to return the car to you on demand. If the valet fails to do so, the valet will be liable to you for breach of contract, which should mean for the value of the car (assuming no stipulated damages). Likewise, if the car is damaged due to the valet's negligence or purposeful behavior, then the valet is also liable for the diminution in the value of the car.

A bailment is distinct from an agency relationship. The bailee is free from control by the bailor, whereas the agency is subject to the control of the principal.[133] Moreover, the agent is precluded from conflicts of interest with the principal, whereas no such duty lies on the bailee.[134]

It should be clear from this that any sort of custodial holding of cryptocurrency by an exchange could not be an agency relationship as the exchange is acting on behalf of multiple, potentially adverse principals and may also trade on its own account in ways that are adverse to customers. Despite this distinction, at least one cryptocurrency exchange proclaims in its securities filings that:

> We act as an agent in the cryptocurrency transactions of our users. We have determined we are an agent because we do not control the cryptocurrency before delivery to the user, we are not primarily responsible for the delivery of cryptocurrency to our users, we are not exposed to risks arising from fluctuations of the market price of

130 Cornelius v. Berinstein, 50 N.Y.S.2d at 189.
131 8A Am. Jur. 2d Bailments § 19.
132 *Id.*
133 *Id.* § 17.
134 *Id.*

> cryptocurrency before delivery to the customer and we do not set the prices charged to users.[135]

Whatever the customer-exchange custodial relationship is, it cannot be properly characterized as a principal-agent relationship.

ii. Sales

In contrast, a sale involves transfer of ownership from the buyer to the seller for a price.[136] Ownership is a tricky concept at law, however, as it is not a binary matter. Property ownership is thought of a package of various rights—a bundle of sticks in the usual formulation—that can be divvied up among different parties. For example, I might "own" an estate called Blackacre, but I can rent the back 40 to you, lease the westfold to your cousin, give you brother fishing rights in the stream, your sister an easement to cross the forest and pick the mushrooms that grow there (but not those that grow in the meadow), your aunt the right to the apples from the trees in the orchard (but not to the wood from the trees themselves), and the bank a mortgage (that's a contingent property interest). Moreover, let's imagine that like Downtown Abbey or Mr. Bennet's property in *Pride and Prejudice*, that Blackacre is entailed, meaning that I have no power to transfer fee simple absolute title to anyone. I can give out a life estate, but upon my death it will go to my oldest male heir.[137]

In all of these situations, I still "own" Blackacre, but lots of other folks have property interests in it. What really matters in terms of "ownership" are rights to possess, consume, and alienate property interests,[138] including whether one's creditors can force the sale of the property in a foreclosure.

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[135] Robinhood Markets, Inc., Form S-1, July 18, 2021, at F-18, *at* https://www.sec.gov/Archives/edgar/data/1783879/000162828021013318/robinhoods-1.htm.

[136] *See* UCC § 2-106(1) ("A 'sale' consists in the passing of title from the seller to the buyer for a price.").

[137] This, of course, assumes that the property is not disentailed through common recovery. *See* Jeffery Evans Stake, *Evolution of Rules in a Common Law System: Differential Litigation of the Fee Tail and Other Perpetuities*, 32 FLA. ST. U. L. REV. 401, 416 (2005) (explaining common recovery).

[138] *See* UCC § 2-403 (providing for situations in which a person can transfer better title than they themselves have).

iii. Bailment or Sale?

While the question of whether a transaction is a bailment or a sale is a question of state law,[139] the United States Supreme Court has addressed the bailment vs. sale issue as a matter of general federal common law in a pair of 19th century cases. While these United States Supreme Court cases are not binding in light of the Court's declaration in *Erie Railroad v. Tompkins* that there is no general federal common law,[140] they are nevertheless instructive.

In the first, *Powder Co. v. Burkhardt*, a plaintiff provided materials and money to the defendant, an inventor, to manufacture an explosive compound. The court held the contract was a sale because there was nothing in the contract that required the identical materials to be returned to the plaintiff—the inventor was free to exchange the materials for others as he saw fit.[141] The Court explained that:

> where logs are delivered to be sawed into boards, or leather to be made into shoes, rags into paper, olives into oil, grapes into wine, wheat into flour, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same wheat or flour or paper, but may deliver any other of equal value, it is said to be a sale or a loan, and the title to the thing delivered vests in the manufacturer.[142]

In the second case, *Sturm v. Baker*, the Court addressed which party—the shipper or the shipping company—bore the risk of loss when a ship transporting a consignment of arms and munitions to Mexico sank in a storm. The Court reiterated that the distinction between a bailment and a sale hinges on the obligation to return the specific property entrusted or merely another thing of value:

> the recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the specific article and

[139] Butner v. United States, 440 U.S. 48, 55 (1979).
[140] 304 U.S. 64 (1938) (holding that there is no general federal common law).
[141] Powder Co. v. Burkhardt, 97 U.S. 110, 116 (1878).
[142] *Id.*

> the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed. The transaction is a sale.[143]

The bailment vs. sale difference matters in general because of the question of which party bears the risk of loss of the goods and whether the goods are subject to the claims of the creditors of the party holding them.[144]

iv. Commingled Property

When cryptocurrency exchanges transfer custodial holdings into omnibus wallets controlled by the exchange, the custodial assets are commingled.[145] When the assets involved in a contract are commingled with other assets, then the sale vs. bailment question becomes more complicated. This complication of the legal question should itself be concerning to cryptocurrency investors because there is no guaranty about how any particular will analyze the issue given the facts presented to it.

The problem is that commingling of fungible assets can in some circumstances destroy a bailment and constitute conversion by the bailee.[146] When the commingled assets are fungible, the treatment as a bailment has generally depended upon whether the transfer is made for the purpose of processing, rather than mere storage or transport. If the transfer is made for processing, then unless the processed asset is to be made solely from the transferred good and not possibly from another like kind good, there is no bailment.[147] For example, if a farmer gives wheat to a miller to mill into flour, unless the agreement is that the miller will give the farm flour made solely

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143 Sturm v. Boker, 150 U.S. 312, 329-30 (1893).

144 *See* UCC 2-326(2) (goods in the buyer's possession held on "sale or return" are subject to claims of the buyer's creditors).

145 How this commingling actually occurs depends on the technical details of particular cryptocurrencies. Haentjens et al*., supra* note 18, at ___, explains that while some cryptocurrencies can be commingled into a single address, bitcoin transfers are traceable and remain at separate blockchain addresses with a transferee, but that if the transferee undertakes any further transfers, the bitcoin protocol's software will select at random which of the balances at the various addresses it controls will be used for the transfer, effectuating something like a commingling.

146 8 Am. Jur. 2d Bailments §§ 71-72.

147 *See e.g.*, *In re* Miami Metals I, Inc., 603 B.R. 727, 741 (Bankr. S.D.N.Y. 2019) (commingling of non-fungible precious metals); A. Ballou & Co. v. Citytrust, 218 Conn. 749, 755-756 (1991) (commingling of scrap metals).

from his wheat, then there is no bailment.[148] The examples that the Supreme Court gave in *Powder Co. v. Burkhardt*—processing of logs into board or leather into shoes—fit into this situation.[149]

Yet, if the contract is for storage or transport, however, some courts have held that commingling does not destroy the bailment, at least when the bailor specifically intended to retain ownership of a known share of the commingled goods.[150] The storage and transportation cases, however, have arisen in the context of oil and gas, where there are particular industry customs and practices and additional statutory frameworks. In contrast, when courts have dealt with money—the most fungible of goods—they have held that a commingling of customer funds defeats a bailment.[151]

Indeed, in the context of deposit accounts, courts have distinguished "specific deposits" (such as items placed in safe deposit boxes) from "general deposits" based on the commingling.[152] A general deposit of money into a bank account does not entitle the depositor to the return of a specific bill, only to the return of currency of the same value. A general depositor is merely an unsecured creditor of a bank. In contrast, if the depositor put property into a safe deposit box or under a contract that required its segregation, it would have made a special deposit, which entitles the depositor to the return of the same item deposited. Thus, if you put a dollar with a particular

148 Slaughter v. Green, 22 Va. 3, 9 (1821).

149 97 U.S. at 116.

150 Pub. Serv. Elect. & Gas Co. v. Fed. Power Comm., 371 F.2d 1 (3d Cir. 1967) (commingling of natural gas in a pipeline is not inconsistent with a bailment); Nat'l Corp. Housing P'ship v. Liberty State Bank, 836 F.2d 433, 436 (8th Cir. 1988) (rejecting argument that unless a landlord was required to return to the tenant the identical check or money the tenant deposited, the relation cannot be a bailment); Gulf Oil Corp. v. Fuel Oil Supply & Terminaling, Inc., 837 F.2d 224, 227 (5th Cir. 1988) (commingling of gasoline storage did not defeat a bailment); *In re* Enron Corp., No. 01-16034, 2004 U.S. Dist. LEXIS 2262, at *10 (Bankr. S.D.N.Y. Jan. 22, 2003) (commingling of natural gas did not default a bailment).

151 Picard v. JPMorgan Chase Bank & Co. (*In re* Bernard L. Madoff Inv. Sec. LLC), 721 F.3d 54, 73 (2d Cir. 2013) (commingling of brokerage account funds); Hossain v. Rauscher Pierce Refsnes, Inc., 15 Fed. Appx. 745 (10th Cir. 2001) (delivery of an investor's funds to a clearing broker does not create a bailment, since the investor has no expectation of a return of the identical property).

152 Peoples Westchester Sav. Bank v. FDIC, 961 F.2d 327, 330 (2d Cir. 1992); United States v. Khan, 1997 U.S. App. LEXIS 31870, *6 (2nd Cir. Nov. 10, 1997). *See also* Laura B. Bartell, *The Lease of Money in Bankruptcy: Time for Consistency?*, 16 BANK. DEV. J. 267, 306 (2000) (noting different treatment of specific deposits).

serial number in the safe deposit box, you are entitled to the return of that very same dollar, not any old dollar.

A general deposit is a sale to the bank of the currency—you give the bank currency now in exchange for a return of currency (perhaps with interest) later. In contrast, a special deposit is a bailment—you give the bank a good for safekeeping and expect the return of that same good later. When courts have analyzed the issue, they look at whether the customer had an expectation of getting back the specific good given (a bailment, even if the good has been improved) or a like-kind good (a sale).

5. *Other Factors Affecting Property of Estate Treatment*

i. Inaccurate Books and Records

Besides the questions of whether a constructive trust exists or whether a transaction is a bailment or sale, there are additional issues that can affect whether an exchange's custodial holdings of cryptocurrency are treated as property of the bankruptcy estate. Suppose an exchanged filed for bankruptcy, and one of its customers moved to lift the stay to recover her custodially held cryptocurrency. If there are any concerns about the accuracy of the estate's books and records or if the estate lacks sufficient cryptocurrency holdings to satisfy all customer obligations, then the stay is unlikely to be lifted, even if the estate's interest is merely possessory. If the books and records are not fully reliable, in terms of identifying the owners, then the bankruptcy court will be unlikely to lift the stay because of the concern that the wrong parties might get paid, leaving the rightful parties with claims on the estate's remaining assets. Similarly, if the debtor's books and records do not accurately reflect the estate's actual cryptocurrency holdings, the court might be chary of releasing any cryptocurrency holdings lest it turn into a first-come, first-serve situation that results in an inequitable distribution among customers who could not prove what they individually were owed. [153]

ii. Shortfalls in Custodial Holdings

Property can only be property of the estate of if it exists, however. If any part of a customer's holdings of cryptocurrency have

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[153] *See* Stoebner v. Consumers Energy Co. (*In re* LGI Energy Solutions, Inc.), 460 B.R. 720, 732-733 (8th Cir. B.A.P. 2011) (citing a concern that the creditors who complain the loudest will get paid to the detriment of the others).

been lost—they have been stolen in a hack, the exchange has lost the private key,[154] or the exchange has used and lost the cryptocurrency in its own business dealings—then the customer is merely an unsecured creditor of the exchange for the missing holdings[155] and there would be no cause for lifting the automatic stay.

iii. Exchange Use of Custodial Holdings

If the exchange has any rights to use the cryptocurrency, such as lending it or associated staking rights out—that would only make the case for it being property of the estate stronger. For example, Coinbase offers a staking arrangement in which it shares the profit with a 25% cut of the staking rewards as a "commission" and agrees to indemnifies the customer for any slashing losses if the stake is awarded the mining rights, but fails to successfully mine the block within the allotted time. The shared gains and internalized losses suggest an investment partnership in which the exchange has a property interest beyond the possessory interest in the underlying cryptocurrency.

6. Summary

Given that the express trusts vs. constructive trust vs. bailment vs. sale treatment turns on the specifics of state law and contractual provisions, it is impossible to state with certainty whether custodially held cryptocurrency would be treated as an express trust, a constructive trust, or bailment rather than as a sale. There is, however, a substantial possibility that courts would treat it by analogy to money deposits, rather analogizing to natural gas shipment contracts, particularly if the cryptocurrency is not itself in identifiable units.[156] For example, bitcoins do not have serial numbers, but are just balances associated with particular digital keys.[157]

If any additional factors are involved—inaccurate books and records, shortfalls in custodial holdings, or exchange use of custodial holdings, then a court would be likely to rule that the custodially held

[154] *See* Coinbase Global, Inc., Form S-1/A, Mar. 23, 2021, at 9, 34 "(The loss or destruction of private keys required to access any crypto assets held in custody for our own account or for our customers may be irreversible. If we are unable to access our private keys or if we experience a hack or other data loss relating to our ability to access any crypto assets, it could cause regulatory scrutiny, reputational harm, and other losses.").

[155] As discussed in Part II.D, *infra*, the claim should be for whatever it would have been in U.S. dollars under applicable nonbankruptcy law as of the date of the bankruptcy filing.

[156] *See supra* part II.B.2.iv.

[157] Cryptoassets are potentially traceable, however.

cryptocurrency was property of the estate, so the automatic stay would prevent attempts to recover it outside of the bankruptcy process. At the very least, the estate accedes to the exchange's possessory interest in the private keys. That alone should trigger the automatic stay.

If the estate's interest is limited to the possessory interest, then customers should be able to get the stay lifted for cause or because the estate has no equity interest in the custodial holdings and does not need them for an effective reorganization, but that will require them to go to court and litigate the issue, which will impose some costs on them and, more importantly, take time during which period they would not have access to their cryptocurrencies and not be able to sell if market prices were falling.

Again, the key point about the preceding analysis is that it does not predict a definitive outcome. How any particular bankruptcy court would characterize custodial holdings of cryptocurrency in light of the particular facts before it is uncertain and sure to be contested. That alone should be cause for concern to cryptocurrency investors. Even if the investors were to ultimately prevail, it would not be until after drawn out litigation with all of the attendant delays and costs.

C. Preference Actions

If the debtor is in Chapter 7 bankruptcy, an independent trustee, appointed by the Department of Justice, will manage the estate.[158] If the debtor is in Chapter 11 bankruptcy, the debtor will manage the estate itself as a "debtor in possession" (DIP).[159] Either way, the trustee or DIP is charged with maximizing the value of the estate. This means, among other things, that the trustee or DIP will exercise the estate's power to unwind certain pre-bankruptcy transactions.

In particular, certain transfers of interest of the debtor in property to or for the benefit of creditors that are made in the 90 days before the bankruptcy filing may be unwound as voidable preferences.[160] If this happens, the asset transferred prior to the bankruptcy (or potentially its value) must be returned to the estate.[161]

[158] 11 U.S.C. §§ 323, 701, 702.
[159] 11 U.S.C. § 1107.
[160] 11 U.S.C. § 547(b).
[161] 11 U.S.C. § 550(a).

In exchange, the transferee will be given a claim against the debtor in the bankruptcy. In practical terms, if a transfer is clawed back, the transferee returns an asset at 100¢ on the dollar, but will get a corresponding claim that will likely be paid only pennies on the dollar.

The policy behind this power is to ensure an equality of distribution among unsecured creditors on the theory that like claims should be treated alike. The ability to avoid a preferential transfer prevents the debtor from favoring certain creditors when it is on the cusp of bankruptcy and also discourages creditor runs on the debtor by making them reversible.

There are some exceptions and defenses to preference actions. In particular, some transfers might qualify for the *de minimis* exception for transfers to one beneficiary aggregating less than $7,575 (as of 2022).[162] Additionally, some transfers might qualify for the ordinary course exception.[163] This requires not only that the transfer be made according to ordinary business terms, but also that be made in the ordinary course of both the debtor and the transferee's business. While redemptions are likely to be made according to ordinary business terms and be in the ordinary course of an exchange's business, they might not be in the ordinary course of a transferee's business. Many transferees hold their crypto for long periods of time without redemptions,[164] suggesting that redemptions might not be in the ordinary course of some customers' business.[165]

There also is the possibility that a preference action could face either the settlement payment or the financial institution beneficiary defense.[166] These defenses provide that a transfer cannot be avoided as a preference if it is a settlement payment or margin payment made to

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162 11 U.S.C. § 547(c)(9).

163 11 U.S.C. § 547(c)(2).

164 Stablecoins are more likely to be more regularly redeemed because they are primarily used as a mechanism for undertaking crypto-to-crypto transactions in order to avoid the higher trading fees exchanges charge for crypto-to-fiat transactions. Julian Dossett, *Stablecoins: What They Are, How They Work, and Why They Are Freaking Out Crypto Investors*, CNet.com, May 12, 2022, https://www.cnet.com/personal-finance/crypto/stablecoins-what-they-are-how-they-work-and-why-they-are-freaking-out-crypto-investors/.

165 Preference actions could also be applied to on-us transactions in which one type of crypto is exchanged for another. The estate could prosecute a preference action against only the side of the exchange that received a currency that subsequently appreciated. By avoiding the transfer, the estate could capture the subsequent gain in market value for itself.

166 11 U.S.C. § 546(e)-(g).

or for the benefit of a financial institution, if it is a payment made by or to a financial institution in connection with a securities contract, commodity contract, or forward contract, or if it is a made to or for the benefit of a swap participant.

In order to trigger these defenses there would first have to be a determination that the cryptocurrency is a security, commodity, or currency that is the subject of a swap. While one court has held in a non-bankruptcy context that cryptocurrencies are commodities subject to CFTC regulation,[167] the issue is generally considered unresolved, and cryptocurrency transactions are not commonly documented in the same way as security, commodity, and swap contracts. Moreover, the determination would need to be made on a cryptocurrency by cryptocurrency basis, as not all cryptocurrencies operate the same way.

If a court were to determine that a cryptocurrency were a security or commodity, the defenses against preference avoidance might hold if the customer was itself a financial institution,[168] but the lack of application of the extensive regulatory regimes for securities and commodities futures might give a court pause.[169] Similarly, it is questionable whether a court would treat a cryptocurrency as currency if it lacks legal tender status.

All of this is to say that if custodial cryptocurrency holdings are property of the estate, rather than mere bailments, there is risk of pre-bankruptcy transfers being unwound as preferences. If so, there is a question about the measure of recovery: is the recovery of the cryptocurrency itself or merely of its value, and if of the value, then as of what date—the transfer date, the bankruptcy date, or the recovery date? Resolution of this issue determines who gets the benefit of any appreciation subsequent to the transfer. Once again, the classification question matters. If cryptocurrencies are classified as currencies, then

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[167] CFTC v. My Big Coin Pay, Inc., 334 F. Supp. 3d 492, 495-98 (D. Mass. 2018) (discussing Bitcoin's commodity status); *see also* CFTC v. McDonnell, 287 F. Supp. 3d 213, 217 (E.D.N.Y. 2018) (holding that virtual currencies are subject to CFTC regulation).

[168] *See, e.g.*, Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V., 651 F.3d 329 (2d Cir. 2011) (bond redemption payments were settlement payments).

[169] *See In re* Tribune Co. Fraudulent Conveyance Litig., 946 F.3d 66, 94 (2d Cir. 2019) (noting that "Securities markets are heavily regulated by state and federal governments. The statutory supplements used in law school securities regulation courses are thick enough to rival Kevlar in stopping bullets.").

liability would presumably be in the dollar value of the cryptocurrency as of the transfer date. If, on the other hand, the cryptocurrency were treated as a commodity, then the liability would be for the return of the cryptocurrency itself or its value as of the recovery date.[170]

To the extent that custodial holdings are property of the estate beyond a mere possessory interest, then preference actions would pose a threat to former customers of a cryptocurrency exchange as well as existing customers who made redemptions during the 90 days before the bankruptcy.

D. Status of Exchange Customers' Claims

Custodial holdings of cryptocurrency might be held in express or constructive trust, might be financial assets governed by UCC Article 8, or might be a bailment—statuses that would make the custodial holdings property of the exchange's customers.[171] If they are not, however, then the cryptocurrency exchange's customers would be merely general unsecured creditors of the exchange, meaning that they would have a "claim"—a right to payment—in the bankruptcy.[172]

Creditors collect on obligations in the bankruptcy process by filing a proof of claim against the debtor (or the debtor might schedule the claim itself).[173] The claim will be deemed allowed absent an objection,[174] but claim allowance does not mean that a creditor gets paid, only that it is eligible to be paid if there are sufficient assets available. The claim will be for the dollar value of the cryptocurrency as of the date of the bankruptcy filing,[175] so any future appreciation will go to the estate for distribution according to bankruptcy law's priority scheme, rather than to the exchange's customers.

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[170] *See* Hashfast Techs. LLC v. Lowe (In re Hashfast Techs. LLC), No. 14-30725DM, slip op. at 2 (Bankr. N.D. Cal. 2016) (addressing the impact of the currency-versus-commodity classification on which party bears the risk in the shift of the cryptocurrency's value subsequent to the transfer).

[171] Exchange customers might also have cash holdings. The analysis for customer cash holdings should be similar, but might be covered by different contractual provisions, in particular, it might be in express trusts by virtue of being in bank accounts "for the benefit of" the customers.

[172] 11 U.S.C. § 101(5).

[173] 11 U.S.C. § 501.

[174] 11 U.S.C. § 502(b).

[175] *Id.*

The Bankruptcy Code's priority scheme depends in the first instance on whether a claim is a secured claim or an unsecured claim. If the claim is for an obligation secured by a lien or for which a right of setoff exists, then the claim will be a secured claim to the extent of the lien or the setoff obligation.[176] Otherwise it will be an unsecured claim.[177]

Secured claims are paid first out of their collateral or its proceeds.[178] The debtor's remaining assets are then distributed to creditors with statutory priority claims until they are paid in full.[179] This includes the administrative expenses of the bankruptcy, including the debtor's and any official creditors' committee's attorneys and financial advisors and the costs of otherwise operating the debtor in bankruptcy.[180] If funds are left over, they are then distributed on a *pro rata* basis to unsecured creditors.[181] The unsecured creditors are essentially at the back of the distribution line, ahead of only equity holders and any subordinated creditors. They are likely to get paid little, if anything, and payment might not be for quite a while.

To the extent that there are no funds remaining, a creditor's claim will simply not be paid. If the debtor is liquidating, that is the end of the matter, while if the debtor is reorganizing in Chapter 11, the unpaid debts will be discharged, which means that a permanent federal injunction prohibits attempts to collect them.[182]

If a cryptocurrency exchange's customers are just general unsecured creditors in regards of their custodial holdings, they would rank at the bottom for repayment priority and could expect to see recoveries of far less than par in an exchange's bankruptcy. The one possible boon for them is that if the estate continues to hold onto the cryptocurrency during the bankruptcy and it appreciates, they will potentially be able to share in the appreciation, but that will be only after all priority creditors are paid in full.[183] In short, if cryptocurrency

[176] 11 U.S.C. § 506.
[177] 11 U.S.C. § 502.
[178] 11 U.S.C. § 725; 1129(a)(7).
[179] 11 U.S.C. § 726(a); 1129(a)(9).
[180] 11 U.S.C. §§ 503(b), 507(a)(2). There is also priority repayment for up to $3,350 per creditor of funds deposited for goods or services. 11 U.S.C. § 502(a)(7). It is unclear if custodial holdings would qualify for this treatment.
[181] 11 U.S.C. § 726(a)(4); 1129(a)(7).
[182] 11 U.S.C. § 1141(d).
[183] 11 U.S.C. §§ 726, 1129(a)(7).

exchange customers are just unsecured creditors, then bankruptcy is likely to be an unhappy outcome for them.

III. THE ADDITIONAL RISKS OF STAGED WALLETS

The regular risks of bankruptcy are compounded for cryptocurrency investors who use staged wallets. A staged wallet, such as the intermediated express trust discussed in Part II.B.1 *supra*, involves two financial institutions: the investor purchases cryptocurrency via one financial institution, which tracks the investor's holdings on its own books and records, but actually holds the cryptocurrency in its own wallet held at a separate institution.[184] Many exchanges use a staged wallet structure, but there is variation in whether the actual custodian is a corporate affiliate of the exchange or merely a contractual counterparty.

In a staged wallet, the investor has a relationship with the first financial institution, which holds the wallet keys, but none with the second financial institution that provides the actual wallet. The investor's lack of privity with the actual wallet provider matters here because in the event of a problem with the actual wallet provider, the investor's recourse is solely against the first financial institution.

Venmo provides an example of this staged wallet structure. When an investor purchases cryptocurrency through Venmo, the investor has a cryptocurrency balance at Venmo, but that is merely a notation on Venmo's books and records. Venmo does not itself provide the cryptocurrency wallet, meaning the digital address for sending and receiving the cryptocurrency that will be recorded on the cryptocurrency's blockchain. Instead, Venmo holds all of its customers' cryptocurrency investments in commingled wallets hosted by Paxos Trust Company LLC, a New York limited purpose trust company. As Venmo discloses:

> Any balance in your Cryptocurrencies Hub represents your ownership of the amount of each type of Crypto Asset shown. We combine your Crypto Asset balance with the Crypto Asset balances of other Venmo accountholders and hold those Crypto Assets in an omnibus account through

[184] *See* Adam J. Levitin, *Pandora's Digital Box: The Promise and Perils of Digital Wallets*, 166 PENN. L. REV. 305, 318 (2018) (explaining staged wallets).

> our custodial Service Provider. We keep a record of your interest in that omnibus account based on the amount of each type of Crypto Asset that is reflected in your balance. You do not own any specific, identifiable, Crypto Asset. These Crypto Assets are held apart from our corporate assets and we will neither use these assets for our operating expenses or any other corporate or business purposes, nor will it voluntarily make these Crypto Assets available to its creditors in the event of bankruptcy.[185]

Venmo's customers are thus exposed to *two* levels of credit risk, one indirect and one direct. First is the indirect credit risk, namely that Paxos Trust Company fails, potentially imperiling Venmo. If Paxos Trust were to fail, Venmo's customers would not have any claim against Paxos Trust, as they have no contractual relationship with it. It is not *their* funds deposited with Paxos, but Venmo's. Instead, Venmo's customers would have only an unsecured claim against Venmo.

If Paxos Trust were to fail, Venmo would face all of the problems that cryptocurrency investors generally face in the event of an exchange's bankruptcy, as described in the previous Part. The loss or illiquidity could in turn render Venmo insolvent and unable to pay its customers, who have only general unsecured claims on Venmo, rather than any sort of property-based claim.

Even if Venmo remained solvent, that might be cold comfort to its customers. While it's possible that Venmo would attempt to purchase cryptocurrency on the open market to cover its customers' holdings, there would still inevitably be delay in access to funds for customers, leaving them illiquid and exposed to market swings. And that assumes that Venmo would attempt to fix the problem itself, as opposed to requiring customers to sue it for damages. Damages would be paid in dollars, not cryptocurrency, and raising the question of the valuation date of the damages claim—not an insignificant issue given the price volatility of cryptocurrencies. And even if customers were paid in full, there would be no guaranty as to when they would be compensated.

The second level of credit risk is the direct credit risk of Venmo unrelated to Paxos Trust. Even if Paxos Trust were solvent, Venmo

[185] Venmo, Cryptocurrency Terms and Conditions, Feb. 28, 2022, *at* https://venmo.com/legal/us-user-agreement/.

could itself fail, which would leave Venmo's customers with mere unsecured claims against Venmo. While Venmo says that it will not use the custodial cryptocurrency for its own operating purposes and will not "voluntarily" make the custodial cryptocurrency available to other creditors in the event of its bankruptcy, this is not a specifically enforceable promise. It is a just a covenant, the breach of which does not result in any claim for damages over and above the lost cryptocurrency itself. Moreover, the "voluntarily" language is somewhat misleading because in bankruptcy a trustee might be appointed, obviating any choice for Venmo, and even if not, Venmo would be acting as a "debtor in possession"—a distinct legal identity with fiduciary duties that would override this pre-bankruptcy covenant.[186] Because staged wallets increase the credit risk assumed by the exchange, staged wallets present even greater credit risk to cryptocurrency investors than regular hosted wallets.

IV. INADEQUACY OF MOST EXISTING REGULATORY REGIMES

Cryptocurrency exchanges are subject to a range of private and public law regulatory systems. This section reviews these systems in turn, starting with market self-regulation and insurance before turning to public law systems.

A. Market Self-Regulation

The cryptocurrency market is unable to engage in self-regulation to protect the custodial holdings of exchange customers. There are three reasons for this. In the first instance, the market is constrained by the public law system of bankruptcy. Bankruptcy honors *property* rights, but not *contract* rights. Contract rights merely result in a claim on the bankruptcy estate, rather than rights to specific property. The ability of parties to cast their relationships as ones of property, rather than contract is constrained by what bankruptcy law will recognize as a property right, as the discussion of constructive trusts, bailments, and sales in the preceding section indicates.

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[186] The only time Venmo would have agency in bankruptcy as Venmo, rather than as a debtor in possession would be in terms of proposing a Chapter 11 plan. 11 U.S.C. § 1121 (initial exclusive right to propose a plan is held by the "debtor" not the "debtor in possession").

But even if customers had the ability to cast their relationship with exchanges as one of property rights, rather than contract rights, it seems unlikely that they would take care to do so. Cryptocurrency investors are unlikely to understand their legal treatment in the event of an exchange bankruptcy. The technical workings of bankruptcy law are not well understood by most laypersons or even attorneys (it is not a bar exam topic, for example). Retail investors are also unlikely to give bankruptcy risk much thought as it is a hard to quantify event in terms of likelihood and magnitude; if investors thought there were material risk of an exchange failing, they would likely avoid that exchange altogether. Instead, because investors cannot quantify the risk, they treat it as non-existent.

On top of this, as noted above, cryptocurrency exchanges are incentivized to lull customers with misleading language about "ownership" and title," lest the customers start pricing for the credit risk of the exchange. Indeed, Gemini's extra charges for segregated holdings (which do not alone solve all of the issues) indicate that the costs of the credit risk are real.[187]

B. Insurance

Some cryptocurrency exchanges have third-party insurance for their custodial holdings,[188] including under required surety bonds.[189] It is unclear, however, how much coverage exists under these policies and what the precise exclusions are from coverage. Whatever the extent of coverage, the loss payee is the exchange, not the customer.

While third-party insurance might well be adequate to cover losses on a onesies-twosies basis, it seems unlikely that it would be sufficient to cover a major hacking that drains billions of dollars of custodial holdings from an exchange. More to the point, there is no way for a customer to tell. Third-party cryptocurrency exchange insurance policies are private contracts; the terms of the coverage are not publicly known and advertised, unlike Federal Deposit Insurance

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187 *See supra* note 46.

188 *See, e.g.*, Gemini, User Agreement as of Jan. 14, 2020 ("We maintain commercial crime insurance for Digital Assets we custody in trust on your behalf in our online hot wallet ("Hot Wallet"). Our insurance policy is made available through a combination of third-party insurance underwriters. Our policy insures against the theft of Digital Assets from our Hot Wallet that results from a security breach or hack, a fraudulent transfer, or employee theft.").

189 *See, e.g.*, 23 N.Y.C.R.R. § 200.9(a).

Corporation (FDIC) deposit insurance or Securities Investor Protection Corporation (SIPC) brokerage account insurance. The possibility of third-party insurance provides little assurance for cryptocurrency customers regarding the credit risk posed by exchanges.

C. Smart Contracts

In theory cryptocurrency exchange customers could be protected via blockchain-based smart contracts that would automatically transfer their pro-rated share of the exchanges' cryptocurrency holdings to them upon the occurrence of a trigger event. For example, the failure of an exchange's auditor to make a periodic certification of the exchange's holdings could be the trigger. This system would effectuate a private liquidation of the exchange's custodial holdings according to its own priority system, outside of the bankruptcy system.

Such a regime suffers from four problems. First, it is not in the interest of the cryptocurrency exchange, because whatever the specified trigger event is would be tantamount to the liquidation of the cryptocurrency exchange. An exchange is unlikely to agree to such an automatic corporate death penalty.

Second, it would be difficult to set properly calibrated triggers that do not rely on the actions of third parties of some sort. Complete automation of such a system might not be possible, meaning that there would be some agency risk, such that investors would risk that the smart contract might not be triggered when it should be.

Third, smart contracts could actually be self-defeating for investors because of the fire sale effect. A smart contract could trigger a massive sell-off of cryptocurrencies by the exchange that would force down crypto prices, resulting in a smaller recovery for the exchange and thus for its customers.

And fourth, such a system would not actually be bankruptcy remote. Nothing would prevent the exchange from subsequently filing for bankruptcy (or being put into involuntary bankruptcy). All of the smart contract transfers would be vulnerable to being unwound as voidable preferences, and the ordinary course defense would not be available for such an extraordinary transfer.[190] Given that the exchange would have records of who its customers were, it would be no problem to identify the transferees.

D. Federal Regulation

The Paperwork Crisis of the 1960s led to numerous trades failing because securities were not timely delivered to buyers.[191] The liability from these failed executions resulted in the failure of some broker-dealers. When these broker-dealers failed, their books and records did not accurately reflect their customers' holdings because of problems in processing transactions and remitting payments.

A system of title immobilization through Article 8 of the Uniform Commercial Code was the state law response to the Paperwork Crisis. The federal response was in the form of the Securities Investor Protection Act of 1970 ("SIPA"). SIPA created a system for liquidating broker-dealers as well as an insurance program to protect investors against loss of securities and cash held in accounts at broker-dealers. The SIPA liquidation process still has some of the uncertainty, delay, and cost of the bankruptcy process. Accordingly, the SEC has adopted both a Net Capital Rule and a Customer Protection Rule under SIPA.

The Net Capital Rule,[192] which requires broker-dealers to have sufficient liquid resources on hand to satisfy customer claims, aims to prevent broker-dealer failures in the first place. If they do fail, however, the Customer Protection Rule is designed to enable a liquidation without a legal proceeding so as to enable the customer to have uninterrupted access to the assets in his investment account.[193]

The Customer Protection Rule requires "registered broker-dealers to maintain adequate liquid assets, to keep current and accurate books and records, and to safeguard investment assets under their control".[194] Safeguarding of investment assets requires brokers—which play the role of wallet providers in the securities and commodities systems—to segregate customers' holdings of securities or commodities from their own funds (although the holdings of

190 *See supra* part II.C.
191 *See supra* part II.B.3.
192 17 C.F.R. § 240.15c3-1.
193 Jamroz, *supra* note 92, at 1069.
194 *Id.*

different customers can be commingled).[195] This is done both to ensure that a broker does not use customer funds for its own proprietary trading and to protect customers in the event of a broker's insolvency. As a backstop, missing assets from segregated securities brokerage funds (but not commodities futures funds) are insured by the Securities Investor Protection Corporation.

A parallel system (but without insurance) exists for forward commission merchants dealing in commodities futures.[196] In contrast, banks are not required to segregate general deposits, but they are subject to a stricter supervisory regime for safety-and-soundness and their deposit liabilities are covered by FDIC insurance, which guaranties that all but the largest deposit accounts will be made whole upon a loss.

Cryptocurrency exchanges, however, are generally not regulated for safety and soundness or investor protection by federal regulators. Neither federal banking regulators, the SEC, nor the CFTC has to date claimed general jurisdiction over cryptocurrency exchanges for exchange activity, as opposed to other types of activity, in part because of questions about precisely what any particular cryptocurrency or cryptocurrency-related product is in terms of legal categories.

The SEC has brought a few enforcement actions crypto platforms for operating as unregistered securities exchanges.[197] It has not, to date, taken the stance that all cryptocurrency exchanges are subject to the requirements of the Securities Exchange Act of 1934.[198]

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[195] 17 C.F.R. § 240.15c3-3.

[196] 17 C.F.R. § 1.20.

[197] Order Instituting Cases-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, *In the Matter of Poloniex LLC*, Securities Exchange Act of 1934 Release No. 92607, Aug. 9, 2021; Complaint, SEC v. Bitqyck, Inc., No. 3:19-cv-02059-N (Aug. 29, 2019, N.D. Tex.); Order Instituting Cases-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, *In the Matter of Zachary Coburn*, Securities Exchange Act of 1934 Release No. 84553, Nov. 8, 2018; Complaint, SEC v. Jon E. Montroll and Bitfunder, No. 1:18-cv-01582 (S.D.N.Y. Feb. 21, 2018). The SEC reportedly threatened suit against Coinbase for an unregistered offering of a cryptocurrency lending product, rather than for being an unregistered exchange. Matthew Goldstein & Ephrat Livni, *Coinbase says the S.E.C. has threatened to sue it over a plan to pay interest*, N.Y. TIMES, Sept. 8, 2021.

[198] *See* Prepared Remarks of Gary Gensler on Crypto Markets, Penn Law Capital Markets Association Annual Conference, Apr. 4, 2022, *at* https://www.sec.gov/news/speech/gensler-

Likewise, the CFTC has brought enforcement actions against some cryptocurrency exchanges based on their conducting transactions for customers in cryptocurrency options and futures with being registered as futures commission merchants.[199] The CFTC's jurisdiction over spot markets—markets for prompt delivery—is limited, however. While the CFTC did note in one complaint that the exchange "never transferred possession and control of the entire quantity of the assets purchased using margin," it did not charge the exchange with a violation of its rule requiring segregation of customer assets,[200] but rather with failing to be registered as a futures commission merchant.[201]

While both the SEC and CFTC have claimed jurisdiction over some cryptocurrency exchange activity through enforcement actions, neither has acted more broadly to regulate cryptocurrency exchanges for safety-and-soundness or to ensure the type of investor protections that are required of securities and commodities exchanges. Instead, the major form of regulation of cryptocurrency exchanges is at the state level—state money transmitter statutes, and the special cryptocurrency specific licensing regimes for New York's Bitlicense and Wyoming's Special Purpose Depository Institution (SPDI) charters. Each in turn is reviewed below.

E. State Money Transmitter Laws

Every state has a money transmitter statute that requires money transmitters to be licensed, and it is a federal felony to engage in money transmission without a state license.[202]

remarks-crypto-markets-040422 (noting that SEC staff had been asked to work on getting cryptocurrency exchanges registered as securities exchanges because "crypto platforms play roles similar to those of traditional regulated exchanges. Thus, investors should be protected in the same way.")

199 Order Instituting Proceedings Pursuant to Section 6(C) and (D) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, *In the Matter of Payward Ventures, Inc. (d/b/a Kraken)*, CFTC Docket No. 21-20 (Sept. 28, 2021); CFTC, *CFTC Charges 14 Entities of Failing to Register as FCMs or Falsely Claiming to be Registered*, Release No. 8434-21, Sept. 29, 2021.

200 17 C.F.R. § 1.20

201 Order Instituting Proceedings Pursuant to Section 6(C) and (D) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, *In the Matter of Payward Ventures, Inc. (d/b/a Kraken)*, CFTC Docket No. 21-20 (Sept. 28, 2021).

202 18 U.S.C. § 1960.

The basic features of money transmitter laws is that they require a licensee to show a certain level of financial capacity and character,[203] the posting of a surety bond of a relatively modest amount,[204] and the maintenance of safe, "permissible investments" or "eligible securities" equal to the aggregate amount of its outstanding money transmission obligations.[205] These requirements are enforced through a supervisory regime, although the frequency of examination is limited, meaning that it is entirely possible for a money transmitter to be out of compliance with its permissible investment requirement most days of any given year.

Only a handful of state money transmitter laws expressly apply to cryptocurrencies.[206] It is unclear if those that do not expressly apply cover cryptocurrencies. In particularly, it is unclear if the permissible investments requirement applies to custodial holdings of cryptocurrency, which are not clearly payment instruments or money under the definitions used in these statutes. While the major U.S.-based cryptocurrency exchanges have money transmitter licenses from all or nearly all states, it is unclear how the exchanges interpret the application of those laws to their custodial holdings. They might hold the licenses out of an abundance of caution or because some of their activities besides custodial holdings require a license.

As a result, it is not clear that cryptocurrency exchanges are generally holding permissible investments equal to their custodial holding obligations. Indeed, given the enormous volatility of cryptocurrencies, it would seem difficult for an exchange to actually stay in compliance with a permissible investment obligation. Whereas a regular money transmitter like Western Union could use cash given to it for transmission to purchase safe assets like permissible investments, that is not possible for a cryptocurrency exchange except at great investment risk.

For example, if a cryptocurrency exchange were to take custody of 10 bitcoin (posit a market value $1 million) and then use that to purchase $1 million of US Treasury securities, the exchange

[203] *See, e.g.*, Mich. Comp. L. §§ 487.1012-13.

[204] *See, e.g.*, Mich. Comp. L. § 487.1013(5).

[205] *See, e.g.*, Mich. Comp. L. § 487.1031(1); Cal. Fin. Code § 2081.

[206] https://pro.bloomberglaw.com/brief/cryptocurrency-laws-and-regulations-by-state/#content-bystate.

would face the risk that when the bitcoins were subsequently redeemed that it would need to convert the Treasuries into bitcoin in order to transfer them to whatever wallet its customers had directed. If the price of bitcoin had gone up—for example, suppose that 10 bitcoin would now cost $3 million to purchase—the exchange might not be able to cover its redemption obligations. In other words, the permissible investment requirement could actually undermine a money transmitter's safety and soundness. While a few states have addressed this issue, by allowing the permissible investment requirement for cryptocurrency to be satisfied by the holding of an equal amount of the like-kind cryptocurrency,[207] for other states this question remains.

Money transmitters are eligible to file for bankruptcy, although states may also have special parallel insolvency regimes that a money transmitter may use. The permissible investments are meant to serve as a pool from which customers can be compensated in the event of a money transmitter insolvency. As discussed above in Part II.B.1.ii, some states' statutes even specify the permissible investments are held in trust for the benefit of customers "in the event of a bankruptcy" of the money transmitter.[208] It is unclear if this sort of *ipso facto* provision would be honored in bankruptcy, however,[209] and even if honored, it scope is unclear.[210]

What this all means is that money transmitter statutes provide relatively little protection to cryptocurrency exchange customers. There is no guaranty that an exchange will actually have maintained the permissible investments required (or that the requirement will even apply to custodially held cryptocurrency), and even if it does, the customers are still going to be just general unsecured creditors in the exchange's bankruptcy.

F. New York Limited Purpose Trust Companies & Bitlicense

New York is one of two states with a special cryptocurrency institution regulatory regime. New York offers two special

[207] *See, e.g.*, RCW § 19.230.200(1)(b).

[208] Cal. Fin. Code § 2081(c); Mich. Comp. L. § 487.1031(3).

[209] 11 U.S.C. § 545(a) (avoiding *ipso facto* liens). Arguably a springing trust is the same as a springing lien in that it creates property rights contingent upon the filing of a bankruptcy or other event of insolvency.

[210] *See supra*, text accompanying notes 76-79.

organization forms for companies in cryptocurrency businesses. One is a limited purpose trust company charter. The other is a Bitlicense.

The limited purpose trust company charter is not a cryptocurrency-specific organizational form. Instead, it is a general form of organization for companies that engage primarily in custodial operations of all sorts. New York began to issue charters for "limited purpose trust companies" in 1971 in response to the Paperwork Crisis.[211] While there is no specific statutory authorization in New York for limited purpose trust companies, as opposed to trust companies in general, the term "limited purpose" indicates that the trust company lacks the power to take deposits or make loans.[212] Instead, the trust company holds property in trust as a fiduciary for its customers.[213] Thus, a cryptocurrency exchange (or its custodian) can be structured as a limited purpose trust company.

The advantages to using a limited purpose trust company form are that the assets would be held in an express trust, substantially reducing the credit risk in the event of the trust company's failure. Moreover, the trust company is unlikely to fail as it cannot make loans, so its own operational risk is slight. Additionally, although a trust company's custodial holdings are not FDIC insured, the trust company is subject to prudential regulation by the New York Department of Financial Services.[214]

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211 NY Dept. of Fin. Servs., *Organization of a Trust Company for the Limited Purpose of Exercising of Fiduciary Powers*, https://www.dfs.ny.gov/apps_and_licensing/banks_and_trusts/procedure_certificate_merit_trust_comp (last viewed May 18, 2022, at 8:46pm ET).

212 *Id.* The term "deposit" is not defined in New York law, but in this context it would seem to have to apply to deposits of money as opposed to deposits of securities, jewelry, etc. *See* First Nat'l Bank v. Ocean Nat'l Bank, 60 N.Y. 278, 287-288 (N.Y. Ct. of App. 1875) (noting that a principal attributes of a bank is the right to "receive deposits of money" and differentiating it from the business of a safe deposit company). *Cf.* 12 U.S.C. § 1813(l) (defining "deposit" for federal law as including "money or its equivalent" or "funds" or "money received"). It is not clear, therefore, whether the prohibition on taking "deposits" extends solely to taking fiat currency deposits and therefore does not require that cryptocurrency actually be held in trust.

213 *See,* N.Y. Banking L. § 100

214 It is unclear how a failed trust company would be resolved. One possibility would be a state bank insolvency proceeding. Another would be a federal bankruptcy proceeding, but it is unclear if a trust company is eligible to be a debtor in bankruptcy. The Bankruptcy Code precludes "banks" from being debtors. 11 U.S.C. § 109(b)(2). Only a handful of cases have addressed the question of whether a trust company qualifies as a "bank" for purposes of eligibility for bankruptcy, but those cases have generally held that a trust company that does

In addition to the limited purpose trust company charter that can be used by custodians, New York offers a Bitlicense for companies that store, receive for transmission, broker, exchange, or control or administer virtual currencies involving New York or a New York resident.[215] Thus, a broader range of cryptocurrency entities can have a Bitlicense than can have a limited purpose trust company charter. It is possible for an exchange to have a Bitlicense and then affiliate with a trust company that acts as its custodian. Alternatively, the Bitlicensee exchange can provide the custody services itself.

The granting of a Bitlicense is discretionary to the New York Banking Superintendent, as are many of the conditions of the license.[216] Only twenty-eight Bitlicenses are outstanding as of February 2022.[217]

The Bitlicense regime imposes individualized capital requirements upon the licensee that are left to the discretion of the New York Banking Superintendent.[218] Nothing requires the particular capital requirements to be publicly disclosed, so the capitalization of a Bitlicensee may vary and will not necessarily be known to customers.

The Bitlicense also requires the licensee to maintain a surety bond or trust account for the benefit of its consumers in an amount again left to the New York Banking Superintendent's discretion,[219] requires the licensee to actually hold virtual currency of the same type and amount as any virtual currency assets it has agreed to hold custodially,[220] and prohibits the licensee from using custodial assets other than at the customer's direction.[221]

While the Bitlicense also subjects licensees to supervisory authority and to various security requirements,[222] nothing guaranties

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not engage in the core business of banking—accepting deposits—is not a bank. Irrespective, for assets held in trust, the difference between the insolvency regimes is not likely to be material.

215 23 N.Y.C.R.R. §§ 200.2(q), 200.3.

216 23 N.Y.C.R.R. § 2004(c).

217 N.Y. Dept of Fin. Servs. Regulated Entities, Jan. 12, 2022, *at* https://www.dfs.ny.gov/apps_and_licensing/virtual_currency_businesses/regulated_entities.

218 23 N.Y.C.R.R. § 200.8.

219 23 N.Y.C.R.R. § 200.9(a).

220 23 N.Y.C.R.R. § 200.9(b).

221 23 N.Y.C.R.R. § 200.9(c).

222 23 N.Y.C.R.R. §§ 200.13, 200.16.

that a licensee will in fact remain solvent and will actually have abided by the terms of its license. Moreover, a Bitlicense is not a banking license and there is no special insolvency regime for Bitlicense holders, which are eligible to file for Chapter 11 bankruptcy.

The Bitlicense is meant to ensure that licensees remain solvent and do not enter Chapter 11. If the regulatory regime fails—for example there is a hacking that results in the theft of substantial amounts of cryptocurrency, rendering the licensee insolvent—then nothing in the Bitlicense regime affects an exchange's customers' treatment in bankruptcy. The customers of exchanges that are Bitlicense holders will be general unsecured creditors in the exchanges bankruptcy.

G. Wyoming Special Purpose Depository Institutions

The only existing regulatory regime that seems to successfully address most of the custodial holding risk is Wyoming's regime. In 2019, Wyoming created a new type of banking charter for "Special Purpose Depository Institutions" (SPDIs) in order to attract crypto business to the state. Wyoming SPDIs hold a type of limited banking charter that allows them to act primarily as custodians in cryptocurrencies.[223] Wyoming law requires deposit balances to be at least $5,000.[224] This precludes many smaller retail customers from using Wyoming SPDIs.

Wyoming SPDIs are generally prohibited from making loans using customer deposits of fiat currency.[225] They are prohibited from rehypothecating consumer assets or otherwise using them without customer instructions.[226] They must also constantly maintain unencumbered high-quality, liquid assets worth 100% or more of their "depository liabilities."[227] That term is undefined in Wyoming law, but

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[223] Wyoming Div. of Banking, *Special Purpose Depository Institutions,* at https://wyomingbankingdivision.wyo.gov/banks-and-trust-companies/special-purpose-depository-institutions (last viewed Feb. 12, 2022).

[224] Wyo. Stat. § 13-12-104(a).

[225] Wyo. Stat. § 13-12-103(c).

[226] Wyo. Stat. § 34-29-104(k).

[227] Wyo. Stat. § 13-12-105. The eligible assets are basically limited to cash and government and agency securities, Wyo. Stat. §§ 13-12-105, 13-3-202, meaning that cryptocurrency held in Wyoming SPDIs is basically a monetization of U.S. government debt, an irony given that part of the attraction of cryptocurrencies is that it is supposed to be delinked from government debts. Wyoming SPDIs must also maintain a contingency account equal to 2% of their assets. Wyo. Stat. §§ 13-12-105, 13-12-106.

it does not appear to cover custodial holdings of cryptocurrency, just cash accounts for customers to move funds in and out of the SPDI; were it otherwise, SPDI's liability coverage requirements would fluctuate with cryptocurrency market prices, rather than being tied to the fixed dollar amount obligation of a deposit. Wyoming SPDIs are subject to supervision by the Wyoming Division of Banking.[228]

It is unclear whether a Wyoming SPDI is eligible to file for bankruptcy.[229] If an SPDI were to liquidate under Wyoming law, customers' custodial holdings would likely be treated as the property of those customers. But even if a Wyoming SPDI were to end up a debtor in bankruptcy, Wyoming law includes a critical additional piece that makes it more likely that custodially held cryptocurrency would be treated as a bailment in bankruptcy. Wyoming law departs from UCC Article 8 and specifies a different property law treatment of digital assets held in custody.

Rather than Article 8's beneficial tenancy in common approach, Wyoming law provides that custodially held digital assets are neither liabilities nor assets of a bank.[230] Instead customers must elect one of two forms of custody: a bailment, which shall be "strictly segregated from other assets,"[231] or a bailment under which the bank may undertake transactions with the digital asset (and possibly coming the assets), but with a specified time for return and for which all risk

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[228] Wyo. Stat. § 13-12-119(c).

[229] A "bank" may not file for bankruptcy, 11 U.S.C. § 109(b)(2). but the term "bank" is undefined in the Bankruptcy Code. There is scant case law on the subject under the current Bankruptcy Code. In that case law courts have applied no less than three distinct tests, none of which involve a bright line factor. *See In re* Colo. Indus. Bank, 84 B.R. 735, 738 n.3 (Bankr. D. Colo. 1988) (describing tests); In re Bankwest Boulder Indus. Bank, 82 B.R. 559, 564 (Bankr. D. Colo. 1988). Reflecting the legislative history of the Bankruptcy Code, which provides that banks are excluded from bankruptcy "because they are bodies for which alternate provision is made for their liquidation under various State or Federal regulatory laws," S.Rep. No. 95-989, the most important factor in the analysis is typically the availability of an alternative liquidation procedure, but even that is not determinative. In re Republic Trust & Sav. Co., 59 B.R. 606, 614 (Bankr. N.D. Okla. 1988). Other commonly considered factors include what the institution is called and whether it accepts deposits. DuVoisin v. Anderson (In re Southern Indus. Banking Corp.), 59 B.R. 978, 983 (Bankr. E.D. Tenn. 1986). SPDIs are allowed to call themselves "banks," Wyo. Stat. § 13-1-204(b), and can take deposits, Wyo. Stat. § 13-12-013(b)(iv), but are subject to a state liquidation procedure. Wyo. Stat. §§ 13-12-122, 13-12-123. This leaves uncertain whether they would be eligible to be debtors under federal bankruptcy law.

[230] Wyo. Stat. § 34-29-104(d).

[231] Wyo. Stat. § 34-29-104(d)(i).

of loss remains on the customer.[232] While it seems clear that bankruptcy law would respect the former type of a bailment arrangement by virtue of it being deemed a bailment under state law, it is less clear how a bankruptcy court would treat the second arrangement, particularly with commingling.

While Wyoming's laws seem to offer the greatest assurance to cryptocurrency exchange customers, Wyoming has only issued a handful of SPDI charters, and most cryptocurrency exchanges are not Wyoming SPDIs.[233] This suggests that customers are not placing substantial value on bankruptcy risk or that there are other offsetting disadvantages of a Wyoming SPDI charter that have led most major institutions to prefer the New York Bitlicense and limited purpose trust company charter.

H. Consumer Financial Protection Bureau Regulation

A potential, but to date unrealized, source of regulation is the federal Consumer Financial Protection Bureau (CFPB). The CFPB has regulatory jurisdiction over "consumer financial products or services."[234] Such products or services must be provided or offered "for use by consumers primarily for personal, family, or household purposes,"[235] and include:

> (iv) engaging in deposit-taking activities, transmitting or exchanging funds, or *otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer*;
>
> (v) selling, providing or issuing … payment instruments…
>
> …
>
> (vii) providing payments or other financial data processing products or services to a consumer by any technological means, including processing or storing

[232] Wyo. Stat. § 34-29-104(d)(ii)-(e), (g)(iv).
[233] https://www.nasdaq.com/articles/commercium-financial-becomes-fourth-wyoming-chartered-crypto-bank-2021-08-11.
[234] 12 U.S.C. § 5536(a)(1) (prohibiting offering or provision of a consumer financial product or service not in conformity with Federal consumer financial law).
[235] 12 U.S.C. § 5481(5).

> financial or banking data for any payment instrument, or through any payments systems or network used for processing payments data….[236]

Cryptocurrency custody could readily fall under all three of these categories. First, cryptocurrency exchanges act "as a custodian of funds…for use by …a consumer." Second, because exchanges provide wallets that are used for the payment of cryptocurrencies, they provide "payment instruments," which are defined as meaning "a check, draft, warrant, money order, traveler's check, electronic instrument, or other instrument, *payment of funds, or monetary value (other than currency)*.[237] And third, by providing wallets, exchanges provide payments processing products or services, both for transactions and for "storing financial … data" for payment instruments.[238]

There are limits on CFPB jurisdiction, however. The Bureau has no enforcement power over entities that are registered (or required to be registered) with the SEC or CFTC.[239] This means that while the Bureau can promulgate rules that cover these entities, it cannot bring enforcement actions against them. Instead, enforcement is limited to the respective federal regulator or state attorneys general.[240] This jurisdictional limit tees up the question of whether any particular exchange is supposed to be registered with the SEC or CFTC, but that is only a question about enforcement authority, not rulemaking authority, and the key issue is about rulemaking, as once a rulemaking is in place, there is likely to be compliance.

The CFPB has not exercised jurisdiction over cryptocurrency to date. Yet it would be squarely within the Bureau's regulatory ambit to require the providers of cryptocurrency wallets to:

(1) hold custodial funds in a segregated, bankruptcy remote arrangement (unless the consumer affirmatively opts-out), analogous to the SEC's Customer Protection Rule;[241]

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236 12 U.S.C. § 5481(15) (emphasis added).

237 12 U.S.C. § 5481(18) (emphasis added).

238 Beyond this jurisdictional hook, the CFPB also administers certain provisions in the Federal Deposit Insurance Act, 12 U.S.C. §§ 1831t(b)(-(f), dealing with disclosure requirements uninsured depositories and institutions that a could reasonably be mistaken for a depository by consumers. 12 U.S.C. § 5481(12)(I), (14).

239 12 U.S.C. §§ 5481(20)-(21); 5517(i)-(j).

240 12 U.S.C. § 5552(a)(1).

241 17 C.F.R. § 240.15c3-3. It would similarly be in the Bureau's regulatory ambit to

(2) not rehypothecate or otherwise use customer funds without express customer opt-in;

(3) not grant or suffer to exist liens on custodial funds;

(4) disclose in a standardized fashion that the custodial funds are insured and the risks associated with custodial holdings;[242]

(5) to have policies and procedures to ensure operational continuity that will protect customers against liquidity disruptions in the event of a bankruptcy, effectively a sort of partial resolution plan or "living will."[243]

Specifically, the CFPB has the power to prohibit unfair, deceptive, and abusive acts and practices in connection with the offering or provision of a consumer financial product or service.[244] An act or practice is unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers" and "such substantial injury is not outweighed by countervailing benefits to consumers or to competition."[245] An act or practice is abusive if , *inter alia*, it "take unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service."[246]

A cryptocurrency exchange's failure to hold customer funds in a bankruptcy remote arrangement would seem to be unfair. It would be unfair because it is likely to cause substantial injury to consumers in the event of an exchange's bankruptcy. The consumer cannot reasonably avoid the injury because that would require engaging in a technical legal analysis of the details of exchange custody arrangements along the line of this Article. And there are no obvious benefits to consumers from non-bankruptcy remote arrangements. At best, such arrangements result in greater net revenue for exchanges that can be passed through to consumers in the form of lower prices, but unless

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extend a similar requirement to stablecoin issuers, mandating that the assets they hold to back their stablecoins be held in a bankruptcy remote arrangement for the benefit of the stablecoin holders. The Bureau could also mandate disclosure of stablecoin reserves. 12 U.S.C. § 5532(a).

[242] 12 U.S.C. §§ 1831t(c)-(f) (disclosures for uninsured depositories or institutions that could be mistaken for depositories); 5481(12)(I) (giving the CFPB authority over disclosures under 12 U.S.C. § 1831t); 5532(a) (disclosures for covered persons).

[243] 12 U.S.C. § 5365(b)(1)(A)(iv); 12 C.F.R. Pt. 243.

[244] 12 U.S.C. § 5531(c)-(d).

[245] 12 U.S.C. § 5531(c)(1).

[246] 12 U.S.C. § 5531(d)(2)(A).

the pass through is 100 percent, then rewards from greater risk cannot outweigh the increased risk.

Likewise, a cryptocurrency exchange's failure to hold customer funds in a bankruptcy remote arrangement would seem to be abusive. Consumers are unlikely to understand the highly technical nature of bankruptcy remote arrangements, which is a material risk of the product or service. Because the exchange benefits from avoiding bankruptcy-remote arrangements (for why else would the exchange not use a bankruptcy-remote arrangement?) it is taking unreasonable advantage of consumers' lack of understanding.

Mandating the use of bankruptcy remote structures will not guaranty against liquidity disruption in the event of an exchange bankruptcy, but such disruptions can be minimized with advanced planning. A resolution plan that might have in place plans for the selling or transfer of specific assets could help minimize liquidity disruption.

The CFPB has yet to act in the cryptocurrency space, but it has clear authority to do so. CFPB action presents the most direct route to having a level-playing field that ensures a consistent level of protection for all cryptocurrency customers.

I. Summary

The customer-protection regulation of cryptocurrency exchange custodial holdings is entirely on the state level and varies considerably depending on the applicable state regime: money transmitter acts, New York's limited purpose trust company charter, New York's Bitlicense, or Wyoming's SPDI charter. How any of these regimes interact with bankruptcy in the cryptocurrency context is untested, but only Wyoming's system seems likely to ensure that custodial holdings would be treated as bailments that are not property of the bankruptcy estate. The express trust that exists with custodial holdings of New York's limited purpose trust charters ensures that the custodial holdings would not be property of the trust company, but because the trust beneficiary is most likely the exchange, the custodial assets would likely be deemed property of the exchange, rather than of its customers. For exchanges governed by the Bitlicense or money transmitter acts, the custodial holdings are more likely to be deemed property of the estate and the exchange's customers as mere unsecured creditors.

The contrast between this uncertain and likely unfavorable treatment for cryptocurrency investors and the greater protections that exist for bank depositors and securities and commodities brokerage customers is striking. While cryptocurrencies benefit in certain ways from avoiding federal regulation, the lack of regulation also imposes substantial credit risk on the users of cryptocurrency exchanges when dealing with exchanges, which are the central nodes of the cryptocurrency ecosystem. This credit risk is exacerbated by the lack of regulatory oversight of the exchanges' operations, which can itself be a source of risk.

The easiest resolution under existing legal authorities would be a CFPB rulemaking that would require all cryptocurrency exchanges to hold custodial funds in bankruptcy remote arrangements, unless a consumer expressly consents to an alternative custody arrangement. Such a requirement could be bolstered by a resolution plan requirement to minimize liquidity disruptions in the event of an exchange bankruptcy. To date, however, the CFPB has not engaged in regulation of the cryptocurrency market.

CONCLUSION

While cryptocurrencies are designed to address the credit risk that exists from transacting, namely the double-spend problem, they are still vulnerable to the credit risk that arises from passive holding in custodial arrangements. Cryptocurrency investors do not generally seem aware of the credit risk involved with custodial holdings and do not appear to price for this risk, meaning that exchanges are benefitting from imposing a substantial unpriced risk on their customers. What's more, because the exchanges' credit risk is completely externalized on its customers, there is a serious moral hazard problem: the exchanges have every incentive to engage in riskier behavior because they gain all of the upside from their risky ventures, while the downside is externalized on their customers.

Bankruptcy (and bank insolvency) law has special regimes to protect the customers of insolvent securities and commodities brokerages and banks. But because cryptocurrency—even if it is a security, commodity, or currency—does not fall into those special regimes, cryptocurrency is subject to the default treatment in bankruptcy. Bankruptcy law honors property rights, not contract rights. If a customer does not hold the private key to cryptocurrency, its beneficial interest in a custodially held cryptocurrency could well be characterized as a mere contract right rather than a property right. That means that the customer of a failed exchange is could well to end up in the unhappy position of being a general unsecured creditor of the exchange, looking at eventually recovering only pennies on the dollar, rather than be deemed the owner of the cryptocurrency. Unfortunately, it might well take a high-profile bankruptcy of a U.S. cryptocurrency exchange for cryptocurrency investors to understand this Article's basic lesson: "not your keys, not your coins." Or as the Three Stooges would have said, "NYuK, NYuC."

Celsius Network
Voyager Digital
Three Arrows Capital Ltd.

Crypto Questions: Who Owns the Assets, How to Reorganize and What Enforcement Comes Next?

Wed 07/27/2022 12:05 PM

By now, consumers and crypto investors alike have already begun to grapple with newfound realities related to the cryptocurrency market as high-profile companies file for bankruptcy, hire advisors and weigh their futures. The blockchain technology aimed at solving the "double spend problem" and decentralizing currency has created new problems of its own.

While some have prematurely decried recent price plunges as the end of crypto, most agree that the market can outlast the downturn and spur of bankruptcy filings it has generated. However, crypto lending could look different in the future, as regulators look to put new guidelines in place and consumers themselves begin to understand their own standing, relationships and risks.

Substantial questions remain, though. The nature of restructuring companies with such ambiguous assets - and some aspects of crypto holdings may not be assets at all - as well as the nature of relationships between a crypto lender and investor are still dubious and in some cases have been misrepresented altogether.

The bankruptcy filings we have seen so far stay within the confines of the crypto-lender entities: companies that allow investors to lend their funds to other borrowers and earn a yield on the exchange or that offer crypto-backed loans. This differs from crypto exchanges, such as Coinbase, which act as a marketplace for the trading of various cryptocurrencies such as bitcoin, dogecoin and ethereum. A third type of crypto operation is crypto-mining operations, where new bitcoins are essentially created and verified.

The Voyager Digital and Celsius Networks filings have highlighted questions the market does not yet have answers to, including how these companies can be restructured (if they can), what customers are entitled to and how to treat the liabilities associated with leveraged crypto entities lending to one another. Celsius included a list of questions in its first day declaration outlining just how many crucial issues in the case will need decisions of first impression from the bankruptcy court.

At the same time, the recent bankruptcy filings have also brought to light broader questions around industry dynamics, the future of the market and the regulatory environment that may emerge. Below, we will explore the questions that exist both inside and out of the bankruptcies, how the market got to where it is, and where it is likely to go.

Setting the Stage: How Did Crypto Get to This Point?

Cryptocurrency and blockchain technologies go far beyond just bitcoin. The possibilities are seemingly endless, but the industry still tends to be viewed in a unary fashion, and the digital tokens that have long been the market's focal point, the ones that were only meant to go up, up and away, have come crashing down, hard.

The volatility the industry is infamous for has reached new heights (or lows) as the price of bitcoin has dropped surreptitiously from $60,955.77 on Nov. 1, 2021, to $19,488 earlier this month.

There are a few reasons for this, says Jeff Dorman, chief investment officer at Arca, an asset management firm that invests in digital assets. One is that while crypto remains largely separate from centralized financial systems, it is not immune to the macro trends that sway markets insofar as many of its investors are exposed to other areas as well.

"Everyone who's invested in digital assets is largely invested in other areas as well, and as we're starting to see pain, you see universal selling everywhere," Dorman said. "The first selloff was pretty innocent - it was in line with macro trade, the dollar rising, interest rates rising, the Fed fighting inflation, and everything from tech stocks to bonds to crypto has been way down."

However, there are also some trends more specific to crypto, including highly leveraged capital structures and insufficient liquidity. While the over-leverage is by no means a story Wall Street hasn't seen before, some crypto companies seem to be the latest victim in a long line of folly.

"The institutions that lever up to make pretty hefty bets, when those go against them, it leads to a cascading effect of leverage, and that's what we've seen for the last few months," Dorman added. "So you have these lenders in the space who are borrowing short-term assets and lending out longer-term assets and getting liability asset mismatches."

This is what resulted in Celsius and other companies being unable to satisfy requests to give money back to lenders and the subsequent liquidation of its collateral.

The industry is also a capital intensive one, said Michael Katzenstein, a senior managing director in the corporate finance and restructuring segment at FTI Consulting, and requires a certain degree of profitability in order to maintain its technology in respect of miners and others supporting cryptocurrency blockchain, which requires profitability in order to maintain the ecosystem. If there were to continue precipitous declines in the value of tokens, the entire system could be threatened.

"There are monumental amounts of capital attached to it and uncertainty as to the outcome. This is a big deal. It's extremely interesting to insolvency practitioners, and it's going to require a high degree of skill for there to be orderly and equitable resolution for creditors," Katzenstein said.

Inside the Bankruptcies

Where Do Investors Stand? Whose Crypto Is It Anyway?

Recent events show that many customers did not understand in certain terms their transactional relationship between crypto lenders and themselves, and that uncertainty in and of itself creates certain risks. Adam Levitin, a Georgetown Law professor and principal at Gordian Crypto Advisors, discusses in his piece, "Not Your Keys, Not Your Coins: Unpriced Credit Risk in Cryptocurrency" the possibility that customers may be deemed unsecured creditors in a chapter 11 case as well as the lack of protections for crypto custodial holdings.

"There's a question mark about how customers will be treated in any cryptocurrency bankruptcy. The answer is going to depend on the specifics of the contractual relationship," Levitin said in an interview.

As has already become clear in the Celsius and Voyager cases, different customers entered into different contractual agreements, with potentially drastic differences between - for example, a traditional depositor and one who agreed to allow the firm to use the assets in order to generate outsized interest payments. There are still questions about how the court will view these relationships, and that analysis will necessarily entail whether the crypto is viewed as property of the bankruptcy estate or property of the customers themselves.

Levitin stressed that the way a court views such questions will also likely vary between crypto companies - blanket answers across the industry are unlikely. In terms of disclosures to customers and the market, some companies tiptoed around the subject, making no representations about what may or may not happen in the event of a bankruptcy, Levitin added while noting others were more misleading, such as Voyager, who used language that suggested the holdings were FDIC insured against its own failure rather than the failure of Metropolitan Bank, where the cash holdings were held. (They are not.)

FDIC insurance protects funds held at a bank in the case of a bank's insolvency, Bob Gayda, a partner at Seward & Kissel, said.

"It seems that Metropolitan has customer's cash, and that will be returned on a dollar for dollar basis, which is the right result, once done with a fraud review," Gayda said. "But I think any suggestion by Voyager that FDIC insurance would be implicated may be an example of some of the statements made in the public that do not necessarily meet reality."

Avi Israeli, partner at Holwell Shuster & Goldberg, echoed the same sentiments, noting the risk involved in the possibility of being an unsecured creditor.

"There's a real likelihood [customers] will face significant losses here because money in their accounts will be used to pay the debts of secured creditors who take priority," he observed.

In most cases it seems that much of the misunderstanding also comes from inexperienced investors getting involved because of the puffery and the culture that encapsulated the market.

"Yeah, it's a weird combination of cultish believers, fools and sharp players. And I think a lot of people don't realize that they are the marks rather than the shark," Levitin said.

Israeli said that in some cases, consumers viewed these companies as something akin to banks and therefore assumed their deposits bore the same protections.

"They were happy to earn interest at rates much better than they would otherwise get," Israeli said. "The major difference is, their funds are not guaranteed in the event of insolvency."

Timothy Spangler, a partner at Dechert LLC, believes that there was some undue faith in the platforms themselves. "There's a belief that code is law, that my token is my token," Spangler said. "But code is not law, code is code. Law is an additional set of rights and remedies and liabilities and obligations that parties can elect to enter into contractually or is applied due to the need to regulate financial services."

Gayda agreed that for the most part, there was expectation of an entitlement to the return of their crypto assets, and it seems clear, at least in the case of Voyager, that that will not be the case.

"That could give rise to claims against management for misleading statements, lack of disclosure, things like that," Gayda said.

Katzenstein, however, said it is not really a question of whether people should have known earlier, noting that the revelation came with the rapid decline in token values as an immense surprise across the industry. Until recently, it was a great investment category, he said, and retail investors often placed their tokens with crypto yield providers (lenders) on a short-term basis, which is frustrating for those whose funds are frozen until insolvency proceedings take their course.

"This is not a question of whether they should have known better or should have read the hypothecation agreements more carefully and understood perhaps that they were transferring title when they thought they were just lending their crypto for a month or two," Katzenstein said.

Price Fluctuations and Continuing Risk

An added level of risk arises from the volatility in pricing throughout the bankruptcy proceedings. While the cryptocurrency *could* be returned to the customer, there is no way of knowing whether that is legally or practically feasible and where the value will stand at that point. Prices will continue to be at the mercy of the market, even when those whose funds are tied up and inaccessible.

"You're illiquid until there's a resolution of who owns the cryptocurrency," Levitin said.

While it remains unclear in many cases whether the currency is owned by the estate or by the customer, Levitin says that even if it were determined that the customers owned that crypto, they would get that crypto back - but not its cash value prior to proceedings.

"And if the crypto has declined in value since the beginning of the case and has been locked up, because there's been litigation over who owns the crypto, customers might prevail, but they're gonna get back something that's not worth much, and there's a real risk," he added.

The issue of how to calculate customer claims has already become a major issue for Voyager. In its offer to buy the majority of Voyager's assets, FTX asserts that Voyager customers have a fixed U.S. dollar claim based on the value of the digital assets in their wallets as of the petition date. FTX essentially asserted that only its proposal could allow customers to quickly reinvest such funds in crypto and avoid missing out on a pricing upswing. Voyager rejected this premise - and FTX's offer - maintaining that customers' claims are not "capped" and noted the debtor has no plans to dollarize claims.

Is Restructuring Even Possible?

Liquidity is a major problem in crypto cases, Levitin said. A substantial part of a debtor's assets will be various crypto holdings, and it will be difficult to receive DIP financing against such assets, he added.

"The question is, to what extent is this stuff encumbered," Levitin said.

Additionally, crypto companies are likely to face a plan feasibility problem where feasibility is highly dependent upon cryptocurrency prices, Levitin said. Crypto prices are historically volatile and difficult to predict; where stocks and bonds have cash flows, digital tokens trade on little more than faith.

What's more likely than a company reorganizing on a prayer that crypto prices rise to the point that mining remains profitable, Levitin said, is the companies simply liquidating in chapter 11.

"I don't expect to see many cryptocurrency companies that go into bankruptcy be able to reorganize," Levitin said. "Once they're in bankruptcy, they're looking at liquidating."

Katzenstein echoed the difficulties of making mining profitable, noting the power, space and expertise required to maintain the technology and complex networks these platforms operate on. What is more, the declining value of coins creates an obvious pressure on mining.

Are the Customers the Asset?

In comparison to a bank restructuring, Levitin believes that none of the loyalty that comes from access to physical locations or particular offerings are likely to arise in a crypto case, meaning customers will not be "sticky." And for that same reason, a white knight looking to salvage what's left is equally unlikely.

However, Josh Sterling, partner at Jones Day and a former federal regulator, believes that one of the main assets a white knight could inherit is customer account relationships, which are typically one of the most valuable assets of any financial services business.

No Reorg to Be Had?

Another issue in restructuring these companies stems from the fact that there may not be a whole lot to reorganize. The crypto assets themselves, no matter who they belong to, fluctuate in value, and the technology platforms require financial backing to maintain.

But there are cases in which restructuring has no play at all. Some of these platforms are little more than a program, similar to C++ or Python, and in that case, who do you have a claim against?

"For some cases, it might not even be clear if you can sue anyone," Spangler said. "I think as we move away from the corporate entities, and we start looking at the protocols and the digital assets that are, in essence, lines and lines of code, people are going to be scratching their head saying: 'Well, you know, there might not be a remedy here,' because you might not have a counterparty that can be identified as having a legal obligation that's been breached."

Dorman concurred, noting that in the case of Terra LUNA, a layer-one blockchain without ownership, meaning that it is not a business and therefore cannot run out of money.

"There's no cost. There's no revenue. It's just a protocol, right?" Dorman said.

In the case of Terra LUNA, the platform and its community came up with and implemented a plan in a matter of weeks which included the launch of a new token distributed via a recovery waterfall to UST holders (worth nearly $20 billion at the peak) and LUNA token holders (worth nearly $40 billion at the peak), essentially handling its own out-of-court restructuring. Dorman goes into far more detail on this case in his own blog.

In Voyager's case, Gayda observed that the company is essentially searching for a stalking horse bid. "They're out there looking for prospective purchasers for the platform, or investors, financing for the platform, which might be able to lead to a more traditional restructuring if someone came in and bought it."

Regardless, it is a tough position to be in, Gayda said, because, again – there are no hard assets, and the business is "such dire straits."

A Look at the Industry

Widespread Failure or a Few Bad Apples?

Gayda said that the problems crypto is facing can, in some ways, be isolated to a few companies which have intertwined themselves, so to speak, rather than an industry wide systemic issue.

Some of these companies were lending to one another, including a $665 million loan Voyager made to Three Arrows Capital, which interwove their finances and subsequently caused Voyager to file for bankruptcy once Three Arrows defaulted on the loan.

It is possible that the business model at hand is posing more problems than the industry at large, Gayda observed.

"If you look at the business model, a crypto customer loans crypto to Celsius, and Celsius promises a pretty exorbitant interest rate, then turns around and runs that to third parties to generate whatever yield they need to generate to pay the interest rate," Gayda said. "I think that dynamic may be at issue."

Katzenstein said that some of these companies had taken on principal risk in order to finance their operations, and that risk was, in some cases, associated with opaque entities and other cryptocurrency lending practices.

"The failures of those counterparties could put those entities at risk," Katzenstein said. "And there is no question that the amount of lending and investing back and forth is massive."

Sterling said that the importance of the intermingling is illustrated in Coinbase's disclosure that it had no financial exposure to the bankrupt crypto firms.

"[Coinbase's] stock price went up after that announcement by about 14%, so that has seemed to be important information, and maybe that's a little bit of market validation," Sterling said.

While that is certainly a factor that led to the fallout, Sterling also noted that the public is currently trading cryptocurrencies far less than in the recent past and that transaction fees, which are an important revenue stream for many platforms, have fallen off dramatically.

"It is entirely possible that there are more fundamental factors underlying recent moves in the digital asset markets that go beyond bad loans made among a handful of companies," Sterling added. "I think there's a lot of leverage involved in the crypto markets, which has led to a dramatic reduction in price as sources of leverage have withdrawn."

Where We Go From Here: Regulation and Enforcement

The future of the market may not be hanging in the balance of the handful of ongoing bankruptcy proceedings, but the bankruptcies are likely to have an effect on how consumers and regulators alike view the industry. What does seem certain, at least, is that there will be regulatory changes, new guidelines and enforcement actions coming down the pike.

That being said, the nature of the industry, the nascent features of proposed regulations and the one-off facets of decisions being made in courtrooms has everyone from judges to disillusioned investors swimming in unprecedented waters.

"There are no fundamentals to any of this, right? It's not like there's some consumable good at the end, like speculating on wheat or orange juice futures or something. The only speculation in crypto is on future demand and there's no basis for future demand other than expectations of future price rises," Levitin said.

A lot of the loudness and the culture that surrounds crypto investing stems from the need to hype it in order to feed its growth because there is little other basis for it. And, eventually, the market will be tapped - all willing consumers will have bought in, the ceiling will have been reached and there will be no more rising.

"And once we hit that maximum investment, you won't have that future expectation price rises. It starts collapsing. And then the spiral starts going the other way," Levitin said.

Levitin said he expects a smaller market to rise from the ashes, less-levered companies with sufficient cash surviving and consumers pushing ahead, albeit with less tenacity and possibly more skepticism.

Up until now, the industry remained largely unregulated, with patchwork regulations being brought by various agencies in a piecemeal approach over the past few years. Levitin noted that one reason for this lack of action could be that each of the various financial regulatory bodies - the Securities and Exchange Commission, the Consumer Financial Protection Bureau and others - is subject to political influence, and there may be a fear that to regulate crypto would be to legitimize it. Now those agencies are realizing they may be outflanked following a bipartisan effort to regulate the industry comprehensively.

Levitin described in his paper a number of ways that the Consumer Financial Protection Bureau could use its authority to regulate the industry. Among these, he writes that it would be "squarely" within the CFPB's "regulatory ambit" to require the providers of cryptocurrency wallets "to hold custodial funds in a bankruptcy remote arrangement (unless the consumer affirmatively opts-out), analogous to the SEC's Customer Protection Rule" and to "have policies and procedures to protect customers rule, against liquidity disruptions in the event of a bankruptcy, effectively a sort of partial resolution plan or 'living will.'"

For Spangler, the question really is: Why was more not done sooner by market participants to understand their legal situation and work with lawyers to improve it? For those who have watched the crypto market over the last decade, they have seen the intense volatility, the accelerated cycles and the pain of buying in at a peak. That being said, many questions remained unasked (and therefore unanswered) with little effort being made by customers to protect themselves from risk.

"Why wasn't more done earlier on to get the legal and contractual protection, to jump through the hoops the way other asset classes do?" Spangler said. "No matter how esoteric the assets are, there is a process for evaluating credit risk and protecting creditors rights. I think those that are in a distressed position now really need to ask themselves why wasn't more done earlier on to understand potential legal exposure?"

Regulations will often be difficult to prescribe, however, because crypto isn't really any one thing. The blockchain could be used in a hundred different ways, and so to institute blanket regulation on a technology based one use case makes little sense, Spangler said.

"I think the better approach is the one embedded in the Biden Executive Order. I think it was really insightful to not pretend that there's one answer here, that we need some sort of a lead regulator for crypto. We didn't need a lead regulator for the World Wide Web," Spangler said.

The executive order creates a national policy for digital assets intended to "support technological advancements and promote responsible development." It also outlines a set of required reports coordinated between agencies and potentially creates a central bank digital currency, or CBDC.

Spangler said he anticipates incremental improvements across specific use cases. Attorneys in the government and private practice will be examining how existing laws - bankruptcy, financial regulatory, civil and criminal - map onto crypto.

Dorman has little misgivings on the fate of crypto. He stands firm that the recent fallout will be a blip on the market's radar and that the technology will continue to grow and to work.

"Bitcoin is certainly a success story, going from nothing to a trillion dollar asset in 10 years with hundreds of millions of people who know about it," Dorman said. "And Decentralised Finance (DeFi) is another success story - if you aggregated all of the money that's deposited into these DeFi applications, it would be a top 25 US bank by assets."

In terms of regulation, Dorman also believes that some existing laws will fit to govern certain entities. For instance, he says stable coins could be regulated with the money market, while Voyager and Celsius could be regulated using a bank framework. Other innovative areas get a little hairy, such as tokens with dual properties.

"I think it's inevitable that this will be regulated, but it's gonna take decades to get the whole space regulated," Dorman said.

On Thursday, July 21, the SEC charged a former Coinbase product manager and two others with insider trading. The SEC's complaint alleges that while employed at Coinbase, Ishan Wahi helped to coordinate the platform's public listing announcements that included what crypto assets or tokens would be made available for trading, which Coinbase treated as confidential.

Sterling, who was formerly the director of CFTC's Market Participants Division, said that this is likely a move by the SEC to try to establish that digital assets should be treated as securities, using its enforcement program to achieve a regulatory outcome, so-called regulation by enforcement. Essentially, if a judge rules that the cryptocurrencies involved are securities in this case, that decision will become a precedent that the SEC can use to bring other cases or to write rules that regulate digital asset companies as securities exchanges or broker-dealers. This could come before Congress acts by passing legislation settling the issues.

"If the SEC prevails, we may ultimately find ourselves with rules that are less fulsome and thoughtful than they should be, because they will come off the back of an enforcement action, rather than by Congress first having written a law that balances competing priorities and decides major issues before agencies like the SEC and CFTC create regulations. Hopefully we'll get some legislation at some point," Sterling said.

Sterling said he believes that major cryptocurrencies fall more along the lines of a commodity and that the CFTC would "naturally be a better regulator for digital assets, given its more evenhanded and apolitical approach to developing markets and asset classes."

"It has a more flexible approach and has a history of regulating things that operate like commodities or goods in a market, and I think that tokens are generally more like goods than they are like securities," Sterling said.

Sterling concluded that an important question people aren't asking is: "What elements of the digital assets ecosystem need to be regulated as part of the financial system?"

"It is not obvious that the whole ecosystem needs to fall within the guise of prudential regulation, or even financial market regulation, potentially. All this is best for Congress to decide, as representatives, before the regulators go off on their own," Sterling added.

--Ellen Schneider

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News at 11

By Samuel P. Hershey and Kathryn Sutherland-Smith

Two Sides of the Same Coin?

Cryptoassets and Estate Property in Bankruptcy

Samuel P. Hershey
White & Case LLP
New York

Kathryn Sutherland-Smith
White & Case LLP
New York

Samuel Hershey is a litigation partner and Kathryn Sutherland-Smith is an associate with White & Case LLP in New York.

Recent volatility in the cryptocurrency market has upended years of gravity-defying gains, causing major players in the industry to post significant losses and spark global speculation regarding potential bankruptcy filings. U.S bankruptcy courts are no strangers to disputes regarding cryptocurrencies, having refereed disputes regarding whether principals of cryptocurrency trading and mining businesses are entitled to a discharge,[1] overseen the sale of cryptomining assets,[2] and adjudicated actions to recover cryptocurrency or its value,[3] as well as fielded requests for chapter 15 recognition, emergency stay relief, discovery, entrustment and associated relief.[4]

Despite this extensive experience, U.S. bankruptcy courts have yet to see a chapter 11 filing by a cryptocurrency exchange. Such a filing would raise novel and complex issues, including the threshold question of whether cryptoassets held by an exchange are "estate property" within the meaning of § 541(a)(1) of the Bankruptcy Code.

In considering these questions, U.S. courts may look to the recent experiences of courts in various foreign jurisdictions that have grappled with analogous issues. While certain U.S. law considerations will no doubt influence how a U.S. court would rule, these foreign case studies illustrate the issues that a cryptoexchange bankruptcy would likely pose and how U.S. courts may respond.

Are Cryptoassets Held by Cryptoexchanges as Estate Property?

"Estate property" is broadly defined by the Bankruptcy Code as "all legal or equitable interests of the debtor in property as of the commencement of the case."[5] Whether this definition encompasses cryptocurrency is unclear: U.S. regulators and civil courts have varied in their efforts to classify cryptocurrency, adopting alternative designations such as a security,[6] commodity[7] or currency.[8] However, bankruptcy courts have yet to opine.[9] How cryptocurrency is classified has significant bearing on a number of bankruptcy-related matters, such as whether (1) coins or their value must be returned in a fraudulent-transfer action; (2) the Code's swap provisions allow parties to a cryptocurrency transaction to enforce the contract irrespective of the automatic stay;[10] and (3) valuation or estimation requires

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1 *See, e.g.*, *In re Reichmeier*, Nos. 18-21427-7, 18-6072, 2020 Bankr. LEXIS 1029 (Bankr. D. Kan. April 15, 2020) (chapter 7 discharge permitted where debtor maintained sufficient records of cryptocurrency trading); *In re Hortman*, Nos. 19-29252, 20-02021, 2022 Bankr. LEXIS 204 (Bankr. D. Utah Jan. 27, 2022) (chapter 7 discharge permitted).

2 *See, e.g.*, *In re Virtual Citadel*, Nos. 20-62725-JWC, 20-06146-JWC, 2021 Bankr. LEXIS 3490 (Bankr. N.D. Ga. Dec. 21, 2021) (determining value of debtor's cryptocurrency mining assets and data center); *In re Giga Watt Inc.*, No. 18-03197-FPC7, 2020 Bankr. LEXIS 2963 (Bankr. E.D. Wash. Oct. 20, 2020) (cryptocurrency mining facilities sold free and clear where debtor and chapter 11 trustee maintained exclusive control of property).

3 *Cred Inc. Liquidation Tr. v. Winslow Carter Strong*, No. 20-12836 (Bankr. D. Del. 2020) (complaint by liquidating trust to recover alleged fraudulent transfer of Bitcoin); *see also In re Giga Watt Inc.*, No. 18-03197-FPC7, 2021 Bankr. LEXIS 2636 (Bankr. E.D. Wash. Sept. 26, 2021) (contract and tort class-action claims in respect of disbursement funds raised in debtor's initial coin offering were estate property).

4 *See, e.g.*, *In re Mt. Gox Co. Ltd.*, No. 14-31229-SGJ15 (Bankr. N.D. Tex. 2014); *Cryptopia Ltd. and David Ian Ruscoe*, No. 11688 (Bankr. S.D.N.Y. 2019); *Dooga Ltd.*, No. 30157 (Bankr. N.D. Cal. 2020).

5 11 U.S.C. § 541(a)(1).

6 *See, e.g.*, *Balestra v. ATBCOIN LLC*, 380 F. Supp. 3d 340 (S.D.N.Y. 2019) (digital tokens are considered securities); *SEC v. Shavers*, No. 13-cv-416, 2013 WL 4028182, at *2 (E.D. Tex. Aug. 6, 2013) (same); "Report of Investigation Pursuant to Section 21(A) of The Securities Exchange Act of 1934: The DAO," Securities and Exch. Comm'n (2017), *available at* sec.gov/litigation/investreport/34-81207.pdf (unless otherwise specified, all links in this article were last visited on June 28, 2022).

7 *See, e.g.*, *CFTC v. McDonnell*, 287 F. Supp. 3d 228-29 (E.D.N.Y. 2018) (virtual currencies are commodities subject to Commodity Futures Trading Commission regulatory protections); *CFTC v. My Big Coin Pay Inc.*, 334 F. Supp. 3d 492, 498 (D. Mass. 2018) (same).

8 *See, e.g.*, "Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies," Fin. Crimes Enforcement Network (March 18, 2013,) *available at* fincen.gov/resources/statutes-regulations/guidance/application-fincens-regulations-persons-administering (treating crypto as virtual currency); *United States v. Ulbricht*, 31 F. Supp. 3d 540 (S.D.N.Y. 2014) (finding Bitcoin were monetary instruments within meaning of anti-money-laundering legislation).

9 *In re Hashfast Techs. LLC*, 2016 WL 8460756 (Bankr. N.D. Cal.) (observing that cryptocurrencies are either currencies or commodities in bankruptcy context but declining to decide classification issue).

10 *See, e.g.*, 11 U.S.C. §§ 546(g), 560; *see also* Josephine Shawver, "Commodity or Currency: Cryptocurrency Valuation in Bankruptcy and the Trustee's Recovery Powers," 62 *B.C. L. Rev.* 2013, 2039-40 (2021).

the conversion of cryptoassets into fiat currency (such as U.S. dollars).[11]

Irrespective of these issues, it is clear — and foreign courts have almost universally held — that cryptocurrency is "property" for purposes of administration in bankruptcy.[12] However, the question of whether cryptoassets held by an exchange are *estate* property is more nuanced.

If cryptoassets are not estate property, users of an exchange might not be subject to the automatic stay and will likely be entitled to the return, *in specie*, of their cryptoassets, leaving the debtor with limited ability to effectuate a restructuring, including by hampering its ability to raise new financing to fund its chapter 11 case. This result is analogous to a broker-dealer bankruptcy under the Securities Investor Protection Act (SIPA),[13] in which the broker-dealer is liquidated and investor assets are held in trust rather than assimilated into estate property. However, while the Securities and Exchange Commission (SEC) attempts to regulate cryptoexchanges as broker-dealers, cryptoexchanges have generally not accepted this designation and have not registered as such with the SEC or Securities Investor Protection Corp., making their susceptibility to a bankruptcy proceeding under SIPA uncertain.[14]

Alternatively, if cryptoassets are estate property, they will likely be available for the debtor's use in the chapter 11 case, and exchange users will be required to wait until the conclusion of the case to receive a *pro rata* distribution on account of their cryptoassets. This result would likely dismay cryptocurrency owners, who would vigorously dispute an exchange's right to use and control their property in bankruptcy. While U.S. law on this issue remains unclear, two foreign precedents have provided guidance on the issue of how cryptoassets may be administered in bankruptcy.

New Zealand Determines Cyptoassets Are Property, but Not Estate Property

Cryptopia was formed in 2014 as a cryptocurrency exchange designed to allow users to trade, deposit and withdraw an array of cryptocurrencies for a fee.[15] Users stored their digital assets in a wallet, which was held on the Cryptopia exchange network.[16] Following the hack of its servers in January 2019, resulting in the theft of approximately NZD 30 million in cryptocurrency, Cryptopia commenced liquidation proceedings in New Zealand.[17] In administering Cryptopia's insolvency, the court was called upon to consider whether the cryptoassets were "property" and, if so, whether they were held in trust. The court held that the answer to both of these questions was "yes."[18]

Notably, the court grounded its decision in the terms and conditions of the exchange. Although the court found that Cryptopia exercised effective control over the coins in users' wallets and had commingled those coins with its own assets, it also found that its terms of use gave rise to an express trust. Specifically, the terms of the exchange used language throughout that was consistent with the user's beneficial ownership of the coins,[19] including that "each user's entry in the general ledger of ownership of Coins is held by us [in] trust for that user."[20] As a result, the court held that the account-holders were entitled to the return of their coins rather than a distribution alongside unsecured creditors (although the account-holders in the affected trusts would share *pro rata* in the losses arising from the theft).[21]

Cryptoassets Controlled by the Exchange Are Estate Property, While Those Controlled by Users Are Not

Torque Group Holdings Ltd. in the Eastern Caribbean Supreme Court of the British Virgin Islands (BVI) provides similar guidance. Torque was a BVI-headquartered cryptoexchange that commenced BVI liquidation proceedings in February 2021. Its platform provided for cryptoassets to be held in two different types of digital wallets: personal and trading.[22]

The personal wallets formed part of the hosting service offered by Torque and provided users with the ability to trade, deposit and withdraw a variety of cryptocurrencies.[23] Trading wallets were used to conduct automated trades with external exchanges to generate profits for Torque's customers through cryptoarbitrage and scalping strategies.[24] Those profits were distributed to customers who used Torque's trading wallets in the form of "TORQ" tokens, a native currency of the Torque system.[25] While users of personal wallets retained exclusive access to and knowledge of the private key necessary to access the cryptoassets in the user's personal wallet (notwithstanding that such keys were generated by the exchange platform), Torque had exclusive means for controlling the trading wallets.[26]

In response to a request for direction by Torque's liquidators, the court held that the cryptoassets stored in the trading wallets were property of the estate, but the cryptoassets stored in the personal wallets were not.[27] The decision turned on whether Torque had access to the private key necessary to

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11 Joanne Lee Molinaro & Susan Poli Klaessy, "Crypto as Commodity, and the Bankruptcy Implications," *Law360* (Oct. 17, 2018), *available at* law360.com/articles/1093091/crypto-as-commodity-and-the-bankruptcy-implications (subscription required to view article).

12 *Shair.Com Global Digital Servs. Ltd. v. Arnold*, 2018 BCSC 1512 (Can); *AA v. Persons Unknown* [2019] EWHC 3556, [2020] 4 WLR 35 at [57]-[59] (U.K.); *Re Quadriga Fintech Solutions Corp., et al.* (March 1, 2021), Toronto CV-19-627184-00CL (31-2560674), Ont. Sup. Ct. [Comm List]; *Philip Smith and Jason Kardachi in Their Capacity as Joint Liquidators of Torque Grp. Holdings Ltd. (in Liquidation) and Torque Grp. Holdings Ltd. (in Liquidation)*, Claim No. BVIHC (COM) 0031 OF 2021; *cf.*, Louise Gullifer QC, Megumi Hara & Charles W. Mooney Jr., "English Translation of the Mt. Gox Judgment on the Legal Status of Bitcoin Prepared by the Digital Assets Project," Univ. of Oxford Faculty of Law (Feb. 11, 2019), *available at* law.ox.ac.uk/business-law-blog/blog/2019/02/english-translation-mt-gox-judgment-legal-status-bitcoin-prepared (Tokyo District Court held that Bitcoin could not be object of ownership, as Japanese law did not recognize intangible forms of property). However, the Tokyo District Court's decision appears to have been superseded by statute. Payment Services Act, Law No. 59 of 2009, (Japan) art. 2, para. 5 (recognizing proprietary interests in cryptocurrency); art. 63(11), para. 1 (prohibiting comingling of cryptoassets of users and exchange).

13 15 U.S.C. §§ 78aa, *et seq.*

14 It is an open question as to whether cryptoexchanges will be eligible for chapter 11 relief in light of the attempts to regulate them as broker-dealers. 11 U.S.C. § 109(a) (excluding commodities brokers and certain banking institutions from list of entities that qualify as "debtor").

15 *Ruscoe v. Cryptopia Ltd. (in Liquidation)*, CIV-2019-409-000544 [2020] NZHC 728 (Gendall, J.) at 1-10.

16 *Id.* at 22.

17 *Id.* at 12-13.

18 *Id.* at 209.

19 *Id.* at 174-78.

20 *Id.* at 27, 172.

21 *Id.* at 196, 204-205.

22 *Torque* at 9.

23 Liquidators' Preliminary Report to Creditors Pursuant to Section 226 of the Act, at 6 (May 7, 2021), *available at* kroll.com/-/media/kroll/pdfs/borrelli-walsh/torque-4th-circular-to-creditors-ot.pdf (the "Liquidators' Report").

24 *Id.* at 6.

25 *Id.*

26 *Torque* at 29-32.

27 *Id.*

control the cryptoassets.[28] The court reactivated the personal wallets to allow customers to withdraw the cryptoassets held there,[29] but the contents of the trading wallets remained subject to the liquidators' control pending a *pro rata* distribution to creditors at the conclusion of the liquidation.[30]

The Looming Choice that U.S. Courts May Soon Face

Should the U.S. cryptocurrency markets continue on their current trajectory, the issues presented in *Cryptopia* and *Torque* may soon evolve under U.S. law from theoretical to precedential. Because it is a fundamental rule under the U.S. Bankruptcy Code that the estate succeeds only to the title and rights in the property that the debtor possessed,[31] the terms and conditions governing the exchange will likely play a key role in determining whether the estate is deemed to incorporate those assets, as it has in foreign cases.

If the terms of a cryptocurrency exchange are clear that the platform serves as custodian or trustee in respect of cryptoassets, an express trust is likely to be found.[32] However, where the exchange's terms do not give rise to an express trust, courts may impose other forms of trust, such as a resulting trust based on the actual intent of the parties[33] or a constructive trust to prevent unjust enrichment of the platform.[34] Where an exchange's terms of use are ambiguous or silent as to the nature of its relationship with its users, both U.S. trust law[35] and foreign precedent demonstrate that an exchange that exercises exclusive control over cryptoassets is more likely to hold those assets as estate property in bankruptcy. abi

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28 *Id.* at 27. By contrast, in the *Mt. Gox* decision, the Tokyo District Court indicated that Bitcoin could not be the subject of exclusive control by the person holding the private key as Bitcoin is transferred by mining, which involves third parties. Gullifer, *et al.*, *supra* n.12.

29 *Torque* at 19-20.

30 *Id.* However, following the decision, the liquidators announced that they were investigating the existence of subaccounts within certain trading wallets pursuant to which Torque may hold assets in trust for customers' personal trading. If any trusts are found to exist by the liquidators or the court, the relevant assets will be returned to the relevant users and will not form part of the *pro rata* distribution to creditors. *See* Liquidators' Report, *supra* n.23.

31 5 *Collier on Bankruptcy* ¶ 541.28 (16th 2022); 11 U.S.C. § 541(a)(1), (d).

32 *Restatement (Third) of Trusts* § 1 (Am. L. Inst. 2003) (express trust is created where settlor manifests intention to create it, by written or spoken words or by conduct).

33 85 *Am. Jur. Proof of Facts* 3d 221 §2 (2005); *Restatement (Third) of Trusts* § 7 (Am. L. Inst. 2003).

34 *Restatement (Third) of Trusts* § 1(d) (Am. L. Inst. 2003). The party seeking to establish such a trust must do so by clear and convincing evidence. *In re Taylor*, 133 F.3d 1336, 1341 (10th Cir. 1998).

35 Julie Elizabeth Hough, "'Bare Legal Title' — or Property of the Bankruptcy Estate?," XXXI *ABI Journal* 9, 18, 80, October 2012, *available at* abi.org/abi-journal ("Cases often turn on whether the debtor has control over the property, has contributed to the purchase or upkeep of the property or has received any benefit from the property (such as using it to obtain credit)") (citations omitted); Robert J. Keach, "The Continued Unsettled State of Constructive Trusts in Bankruptcy: Of *Butner*, Federal Interests and the Need for Uniformity," 103 *Com. L.J.* 411, 423 (1998) (describing dominion or control as "critical factor" in cases involving constructive trusts).