

LITIGATION MINUTE: CURRENT ISSUES IN CRYPTOCURRENCY-RELATED LITIGATION

CRYPTOCURRENCY LITIGATION SERIES: PART FOUR OF FOUR

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WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

Blockchain and distributed ledger technology hold great promise for advancements in logistics and supply chain management, health care, finance, and many other aspects of business and personal life. Smart contracts are revolutionizing digital asset trading, decentralized finance, corporate governance, and even the practice of law.

Cryptocurrency markets—though currently challenged by startling devaluations, bankruptcies, and regulation by enforcement—still attract substantial interest from traditional financial institutions and retail investors. However, litigators should be mindful of recurring malfeasance and resulting legal claims concerning cryptocurrency and other digital assets.

Digital Asset Hacking and Theft

Hackers and other bad actors have long focused on cryptocurrency markets, and continue to steal digital assets from trading platforms and the market participants who use them. However, telecommunication service providers, commercial retailers, banking institutions, and other entities have not been spared. Plaintiffs have filed several lawsuits claiming that the defendants acted negligently by failing to prevent unauthorized transactions and theft of digital assets.¹

To avoid or mitigate litigation risk, companies should fortify their cybersecurity measures by retaining experts to both assess their cyber-deterrence capabilities and implement best practices. Companies should ensure that all applicable contractual agreements contain appropriate warranties, limitations, and exclusions to properly address the risk of a claim of theft of digital assets or personal information.

Insurance Coverage

Those who experience a cryptocurrency theft may try to recover from their insurance carrier.² Many insurance policies do not specifically address digital assets. Where there is ambiguity, there is opportunity—but also risk.

Policyholders should examine their existing policies accordingly, assess whether to seek coverage for cryptocurrency-related losses, and potentially obtain new or supplemental coverage tailored to protect their interests.

Arbitration Clauses

Many digital asset-trading platforms require that users agree at account-opening to arbitrate any claims for losses, rather than seek recourse in court in the event of a cyber breach and resulting loss of asset value. When

assessing how to pursue (or defend against) such a claim, litigators must first assess the existence or nature of any arbitration clause in their account-opening documents or terms of service.³

Though blockchain technology and digital assets raise novel and complex issues for litigators, the rules of the game have not completely changed. Litigators should monitor developments in this space in order to enhance their legal practice and fulfill their professional responsibilities concerning technological competence.

FOOTNOTES

¹ See, e.g., *IRA Financial Trust v. Gemini Trust Co.*, 1:22-cv-04672 (S.D.N.Y.) (plaintiff alleged that the defendant failed to provide proper safeguards to protect its clients' digital assets that were stored on the defendant's trading exchange which were subsequently hacked and caused more than \$36 million in damages.)

² See, e.g., *Nationwide Mutual Insurance Company v. Choi et al.*, 4:22-cv-01231 (S.D. Tex.) (insurance company seeks a declaration that it has no duty under the homeowner policy or umbrella policy to defend or indemnify the defendants in connection with a cryptocurrency theft lawsuit or any related claims); *Virtu Financial Inc. v. Axis Insurance Company*, 1:20-cv-06283 (S.D.N.Y.) (trading company filed suit against its insurance carrier in connection with cyber-breach and theft, and the parties settled the case.)

³ See, e.g., *Clark et al. v. Payward Inc. d/b/a Kraken*, 8:17-cv-01623 (M.D. Fla.) (plaintiffs filed complaint alleging negligence and breach of contract by Kraken as a result its handling of a cyber-attack and resulting "flash crash," and Kraken moved to compel arbitration.)

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