



Thomas H. Curran
Managing Partner, Curran Antonelli

+1 617 207 8670
tcurran@curranantonelli.com
irglobal.com/advisor/thomas-h-curran

curranantonelli.com

Thomas Curran has developed his practice over the past four decades, focusing primarily on bankruptcy and insolvency proceedings and debt and asset recovery. He assists clients in navigating in asset recovery, assignments for the benefit of creditors, foreclosures, repossessions, and the sale of distressed assets and businesses. He has extensive experience in all facets of cross border insolvency litigation and cross-border debt and asset recovery strategies in an insolvency scenario, with particular emphasis on United States/Western Europe jurisdictions. He has cultivated extensive knowledge and skill in commercial and complex business litigation including asset location and recovery, veil piercings, corporate officer and director liability, successor liability, fraudulent conveyance, transfer litigation and constructive trust litigation.

Curran Antonelli represents a wide variety of clientele in litigation and transactional matters throughout the United States and Western Europe. We have navigated a broad range of commercial litigation cases, including debt and asset recovery, cross-border insolvency, institutional creditors' rights, and "bet the company" litigation, and have earned a winning track record throughout the United States. Our group has a unique speciality in counselling on financing, buying and selling, and investing in distressed assets. We assist domestic and foreign firms with these complex transactions from a debt and asset recovery perspective.

QUESTION ONE

How is cryptocurrency treated as an asset in a bankruptcy proceeding in your jurisdiction?

Recently, Texas passed novel laws regarding cryptocurrency, or "virtual currency" as it is referred to in the bill. The "Texas Virtual Currency Bill" is cryptocurrency-specific legislation and was passed in Texas when Governor Abbott signed House Bill 4474 into law on 15th June 2021. The bill adds amendments to the Texas Business & Commerce Code, specifically addressing virtual currency.

As a result of these amendments, Texas now recognises the legal status of virtual currency, ensures that cryptocurrencies are privy to commercial laws under Texas regulations, and guarantees legal rights to cryptocurrency holders. The Texas Virtual Currency Bill went into effect 1st September 2021.

Despite the Texas Virtual Currency Bill Texas, and the federal government, still do not recognise cryptocurrencies as legal money. They do, however, recognise them as a taxable commodity that can be used for transactions. The Internal Revenue Service (IRS) does not consider cryptocurrencies to be legal tender but does consider them to be taxable income that must be reported when they are provided for services. Taxes apply to cryptocurrency comparably to a mutual fund, stock or bond.

In bankruptcy proceedings, cryptocurrency holdings are appearing more and more frequently on the bankruptcy schedules of debtors. In Texas, cryptocurrency can be classified in a few different types of asset categories. For instance, it can be classified as "cash" or a "financial security", yet it does not fit into either classification. At a minimum, debtors are expected to disclose the asset as an 'other asset' on their bankruptcy schedules.

Currently, on the issue of bankruptcy exemptions in Texas, cryptocurrency is not perfectly classified as any type of "exempt asset" within which crypto would qualify.

Further, similar to any other asset, a transfer of cryptocurrency within two years of a bankruptcy filing could be susceptible to a claim of fraud. If the debtor transferred the cryptocurrency voluntarily or involuntarily with the actual intent to hinder, delay, or defraud any entity to which the debtor was

indebted, it may be considered a fraudulent transfer. Regardless of how cryptocurrency is classified, it is likely that it will be treated as any other valued asset for asset recovery purposes.

The most significant issue that the bankruptcy courts will face regarding cryptocurrency is valuation. The cryptocurrency market is highly volatile, and no tangible market exists. Each cryptocurrency has its own software for valuation, and it changes frequently. A trustee in bankruptcy would need to take additional steps to understand the software for the specific cryptocurrency in question and would require access to the exchange on which that cryptocurrency is traded for any type of meaningful valuation to be undertaken.

QUESTION TWO

Are there legal tools in your jurisdiction that can be used against exchanges to recover stolen cryptocurrency?

Stealing cryptocurrency is considered theft in the state of Texas. On the Federal level, losses suffered due to cryptocurrency scams are a tax-deductible event. The loss is reported on IRS Form 1040, Schedule D. In Texas, if one discovers that their cryptocurrency has been stolen, there are legal avenues to pursue both on the criminal side as well as the civil side of the law. In terms of remedies, there are experienced blockchain searchers who are capable of investigating the theft and recovering the funds for a fee.

Reports of cryptocurrency crimes are on the rise. In September 2022, a woman was faced with indictment for theft of more than \$300,000 in Bitcoin after a January 2021 burglary. The items stolen included a safe containing Bitcoin account passwords and a follow-up investigation revealed that the passwords had been used to access accounts and transfer \$570,000 of Bitcoin.

Most recently, on 30th November 2022, the United States Attorney's Office for the Eastern District of Texas released court documents indicting 21 people in Texas for their involvement in a scheme to launder stolen money using cryptocurrency. The parties involved opened and controlled business bank accounts in the names of the companies. They persuaded people to deposit, wire and/or transfer funds into the bank accounts and mail funds to specific addresses. In total, this scheme resulted in more than \$300 million in money laundering transactions, forfeited millions of dollars in both cash and cryptocurrency and impacted thousands of victims. The parties involved were charged with wire fraud, mail fraud and conspiracy.

QUESTION THREE

How can the filing of a Chapter 15 proceeding be used in connection with a cryptocurrency exchange that is the subject of a foreign insolvency proceeding?

Filing for Chapter 15 Bankruptcy is often a strategic decision for most parties. The use of Chapter 15 for cryptocurrency related companies is a useful tool to prevent creditors who want to file lawsuits or lock assets within the United States. Chapter 15 establishes United States procedures for filing claims in the foreign proceeding and facilitates asset sales approved in the foreign proceeding.

One of the most notable recent examples is Three Arrows

TOP TIPS

Taking legal and financial protection of crypto-assets in insolvency proceedings

Educate yourself: If you find yourself involved in legal or insolvency proceedings involving cryptocurrency assets, it is imperative to understand both the cryptocurrency market in your jurisdiction for transfer and valuation analysis. Moreover, as the cryptocurrency market is constantly changing, so are the laws regulating it. Therefore, an initial analysis of the statutory regulatory construct in your jurisdiction will guide the initial asset protection and/or recovery strategy.

Report crimes: If you suspect cryptocurrency has been inappropriately transferred or stolen before or during a bankruptcy proceeding, do not hesitate to report such transfer to authorities including the United States Trustee's office, as quickly as possible. Cryptocurrency is treated the same as any other theft despite its virtual properties, yet its fluid nature may render recovery elusive if sought after using traditional asset recovery methodologies.

Consider Chapter 15 where applicable: With the undeniable wave of cryptocurrency related insolvency proceedings expected throughout the world, utilising Chapter 15 of the Bankruptcy Code to assist in the recovery and protection of cryptocurrency assets which are related to a foreign insolvency proceeding, will be imperative. Many US courts have already ruled that cryptocurrency is subject to freezing orders under Chapter 15.

Capital (3AC), a Singapore-based crypto hedge fund that recently filed for Chapter 15 bankruptcy. On 6th July 2022, Voyager Digital, a New York-based cryptocurrency firm, filed for chapter 11 relief in the United States Bankruptcy Court for the Southern District of New York after it sent notice of default to 3AC for failure to make payments on loans ascribed as 15,250 bitcoin and \$350 Million (approximately \$650 million). In response, 3AC initiated an insolvency proceeding in the British Virgin Islands and on 1st July 2022, 3AC commenced a Chapter 15 proceeding in the Southern District of New York, requesting to recognise the British Virgin Islands insolvency proceedings. Just over a week after the Chapter 15 filing, on 12th July 2022, Bankruptcy Judge Martin entered an order freezing 3AC's assets.