2023 Alexander L. Paskay Memorial Bankruptcy Seminar

Crypto Bankruptcy

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2023

Current Issues with Cryptoassets & Bankruptcy

ABI Alexander L. Paskay Memorial Bankruptcy Seminar
Tampa, FL

2/21/23

Why Crypto Assets

- Reaction to historical role of intermediaries and price of financial services
- Bitcoin release offered as a rebuke to failures of centralized economic management
- Open source/ low barriers to access
- "Internet, but for transactions"


THE TIMES

Eat Out from £5

Israel prepares to send tanks and troops into Gaza

Chancellor on brink of second bailout for banks

Crypto Asset Basics

- Natively digital intangible assets enabled by distributed database networks
- No consensus as to naming/taxonomy
- Exclusively online /digital
- Vary by number of legal and technical attributes:
- Technical:
    - Number of tokens
    - Mechanism of token generation & distribution
    - Transaction types
    - Consensus mechanism
- Legal:
    - Rights/powers of holders
    - Obligations/burdens of issuers

Bitcoin: P2P Digital Cash

Decentralized, internet-operated P2P cash

- Launched Jan. 9, 2009 by “Satoshi Nakamoto”
- Critical Innovation: Participant consensus (mining) instead of reliance on TTP
- Cryptography used to ensure validity of transactions
    - Each transaction is “signed” by the sender’s private key and recipient’s public key
    - Mining: novel use of cryptography to “confirm” transactions
- Users identified/participate using cryptographic keys pairs provided by “wallet” software
- Native state is escrow; affirmative act required to transact
- Transactions recorded on an “immutable” ledger maintained & synchronized by volunteer network of computers (“nodes”)
- Transactions are “pseudo anonymous”

Bitcoin Economics

- Software “pays” new assets at regular intervals to incentivize participants to confirm new blocks of transactions (“mining”)
- Bitcoin uses resource - consumptive “proof of work” consensus
    - Newer systems use greener “proof of stake”
- Blocks of confirmed transactions “linked” to evidence tampering
    - “Computationally Impractical to Reverse” not “immutable”
- Asset population & distribution “fixed by code & agreement”
    - Requires collective agreement to modify system attributes
- Market Value primarily driven by supply/demand
- “Crypto”= Approximately $1.1 trillion-dollar (USD) market

Crypto Asset Wallets

“Wallets”: Software that generates credentials used to connect a user to the blockchain and allow users to control assets

- Public Key – used to generate a public key address which is the “location” on the blockchain where assets may be controlled
- Private Key – used to authorize a transaction of an asset
- Hardware wallets- devices that protect the private key
    - Object + private key are needed to transact an asset
    - Paper wallet – piece of paper with private key written on it
- Multi-signature wallet – wallet structure with private key split into sub-keys where m of n subkeys are needed to transact.

Tokens

- Digital Assets created using applications built on top of existing blockchains
  - Example: ERC 20 fueled most of the 2016-2019 ICO boom.
- Why?
  - Low cost, fast, easy way to generate new assets
  - Leverages existing network infrastructure
  - Limited Flexibility

Exchanges

- CEX: centralized
  - Entity -operated platform
  - Order Book/Proprietary model
  - Exchange controls user assets
  - Regulatory obligations vary by asset and transaction type
    - Spot trading regulated on federal/state level as a money transmitter
    - Digital Asset Securities require registration with SEC
    - Derivatives require registration with CFTC
- DEX: decentralized
  - Not generally operated by a business
  - No “counterparty” to trades
  - Users connect with self custodial wallets
  - Unclear regulatory status
  - Basic sanctions compliance on user facing software
- Relationships with users defined by Terms of Service

Smart Contracts

First Discussed by Nick Szabo, 1997:

"…many kinds of contractual clauses (such as collateral, bonding, delineation of property rights, etc.) can be embedded in the hardware and software we deal with, in such a way as to make breach of contract expensive. . ."

- Examples: Vending Machines, Automobile Starter Inhibitors, Securities Limit Orders
- Useful to combine automatic execution with blockchains that support digital assets
- "Guarantees" performance, i.e. intended to be irrevocable

How They Work:

- Smart Contract is code published to a blockchain wallet address
- Users transact a digital asset to the address
- When the smart contract receives information (via an Oracle), its code will "execute" which will affect the assets controlled by the smart contract
- Usually results in transaction of an asset to another address

Almost never replaces a legal contract

May not interrupted or modified once deployed

Used to create increasingly complex transactions i.e. "DeFi"

NFTs

- Non- Fungible Tokens:
  - Fungibility is on a spectrum
  - NFTs- Tokens that can be traced to original issuer
  - Frequently issued on Ethereum, Solana, Matic or Flow blockchains
    - May be "closed" or "open" network systems
  - Used "as a pointer" to other assets/goods/powers
    - Usually refers to an audio-visual (AV) asset maintained on another resource
  - "Meaning" of an asset is a function of legal rights
    - NFT + AV asset + IP license + issuer promises

Complex, Evolving Regulatory Environment

- Many sales of digital assets are securities under federal securities law
  - SEC applies *Howey* Test to digital asset sales in Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: In re: The DAO
    - Payment of money, in a common enterprise, with expectation of return, based on entrepreneurial and managerial efforts of third parties
    - Settlements, non-binding guidance and regulator speeches provide interpretive gloss on *Howey*
    - *Most comprehensive guidance found in 2019 Framework for Investment Contract Analysis of Digital Assets*
    - *No rules, regulation, or appellate precedent exists.*
    - Classification is highly fact specific
  - Frustration by issuers over claimed "regulation by enforcement"
- Compliance requires '33 Act registration/exemption obligation
  - Extremely narrow arguments remain for offering digital assets without securities law compliance
- Compliance with law or exemptions not a fit for most digital asset sales

Complex, Evolving Regulatory Environment

- Bitcoin & Ethereum are commodities
  - CME futures
  - *CFTC v. McDonnell* (2018) - CFTC has enforcement jurisdiction over spot commodities markets
  - *CFTC v. Todd* (2022)- first enforcement action brought against digital asset derivatives platform and its operator for facilitating unlawful futures transactions, failure to register and manipulation of digital asset
  - *CFTC v. Eisenberg* (2023)- Bitcoin, Ethereum, Tether are commodities
    - Also first action brought for market manipulation under 7 U.S.C. § 9(1) (2018), and Regulation 180.1(a), 17 C.F.R. § 180.1(a)(1)-(3) (2022)

Complex, Evolving Regulatory Environment

- If a digital asset is value that substitutes for currency:
  - Pursuant to FIN-2019-G001, Exchangers and administrators are money transmitters and are regulated by FinCEN
  - If engaged in money transmission, must register with FinCEN, comply with BSA obligations
    - CCO, policies, education, data retention, data reporting obligations
  - 49/50 States regulate via money transmission laws
  - Varying legal requirements by state depending on transaction types
    - Montana- no law
    - New York- Bitlicense

Where do Insolvency + Cryptoassets Collide?

- What kind of asset is a “cryptoasset”?
- What property rights does a user have over a cryptoasset?
- Identifying Evidence of Use of Crypto Assets
- Tracing /Locating /Recovering Assets
- Valuation of cryptoassets
- Effectiveness of Secured transactions involving crypto assets
- Do claims “attach” to digital assets?
- Crypto-specific privacy issues
- Government enforcement actions vs. bankruptcy estate
- Section 363- specific concerns

What Kind of Asset is a "Cryptoasset"?

- The regulatory classification of an crypto asset or transaction of cryptoassets is often uncertain
  - May be classified differently depending on context, use
- Regulatory assertions may not be dispositive of legal rights
- Result – issues of first impression may be argued in front of bankruptcy courts

What Kind of Asset is a "Cryptoasset"?

- Different assets are treated differently under the Bankruptcy Code
  - Example – currency swaps under Section 546(g)/ margin swaps under Section 546(e)
    - If crypto assets are currency, then BTC for USD trades could be protected
    - Unclear whether certain transactions involving cryptoassets are "forward contracts" under Section 101(25)(A)
  - Example: *In re: Celsius* argument over classification of Celsius Earn accounts as securities based on prior regulatory assertions over similar products offered by Blockfi

Property Rights Over Cryptoassets?

- Property rights are defined by state law
  - Most state laws are extremely broad: Cal Civ. Code § 654:
  - "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property"
- Assuming that cryptoassets are legally recognized property, what claims may be asserted as to crypto provided to third parties?
- Uncertainty of application of Article 8 and Article 9 of the UCC to cryptoassets offered as collateral (*i.e.* description of collateral, perfection, competing claims, take free rules, etc…)
- Variation in terms of service for custodial entities providing services for cryptoasset holders result in varying treatment of creditor claims
  - For example in *In re: Celsius*, the court determined that customers do not own assets and that assets are property of the debtor estate based on the Terms of Service

Valuation of Cryptoassets

- No consensus on valuation of crypto assets
- IRS Guidance treats "virtual currency" as property for federal income tax purposes
  - No special rules that apply to cash or securities apply to cryptoassets
- Certain bankruptcy code provisions distinguish currencies from securities from commodities
  - Different valuation methodologies, timing
  - If treated like cash, valued at par
  - If treated like a commodity, could be valued at time of recovery
- Sources of valuation data are uncertain
  - Liquidity
  - Lack of formally regulated exchanges for most cryptoassets
  - Regulated exchange pricing for some assets could be helpful

Locating Evidence of Use of Cryptoassets

Discovery of purported crypto user :

- Internet Browser History
- Internet Browser Extensions- crypto wallets
- Downloads of crypto wallets
- Identify wallets (custodial and non-custodial), asset types used
- Transfers from bank accounts to exchanges, transfers via regulated money transmitters
- Emails- login and transaction confirmations, confirmation of sign ups to use platforms
- 2FA apps
- Mobile apps

Discovery of Crypto Assets

Identifying evidence of crypto asset use

- Signs of Crypto: Bank accounts, Credit accounts, Wallets, mining equipment, tax filings.
- Telltale signs: Transaction format, numerous letters, Gemini, Binance, accounts on RobinHood, DeFi, New age accounts

What information to demand:

- Bank statements
- Tax return (1040) / 1099 (soon)
- Password manager

Discovery of Crypto Assets

Questions to ask:

- Have you or any entity you controlled, ever owned any bitcoin or any other cryptocurrency, virtual coins or tokens?
- Have you ever owned any ETF or other funds that holds cryptocurrency?
- Have you ever opened any account at an online website to trade or hold cryptocurrency?
- Have you ever owned any hardware wallet or cold storage for cryptocurrency?
- Have you ever reported anything to the IRS regarding Cryptocurrency gain or loss?
- Is anyone else holding any cryptocurrency on your behalf?
- Have you held cryptocurrency in any family member's name?
- Have you ever bought cryptocurrency for anyone else?
- Have you ever sold or transferred cryptocurrencies to anyone else?
- Have you conducted any virtual currency transactions on anyone else's behalf?
- Does anyone owe you any cryptocurrency or money from a cryptocurrency transaction?

Discovery of Crypto Assets

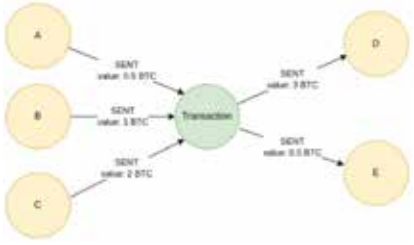
If the person testifies that he/she has owned cryptocurrency

- When and why did you start using the virtual currency?
- What was the purpose of your initial and subsequent Crypto transactions?
- In the last 2 years, what was the highest amount of cryptocurrency you held?
- What exchanges/payment processors do you use?
- What email address did you use to create digital wallets?
- Where do you retain your digital wallet?
- Is the digital wallet on a USB drive or written down on paper?
- Where is any cold storage wallet located?
- Where is your private key stored right now?

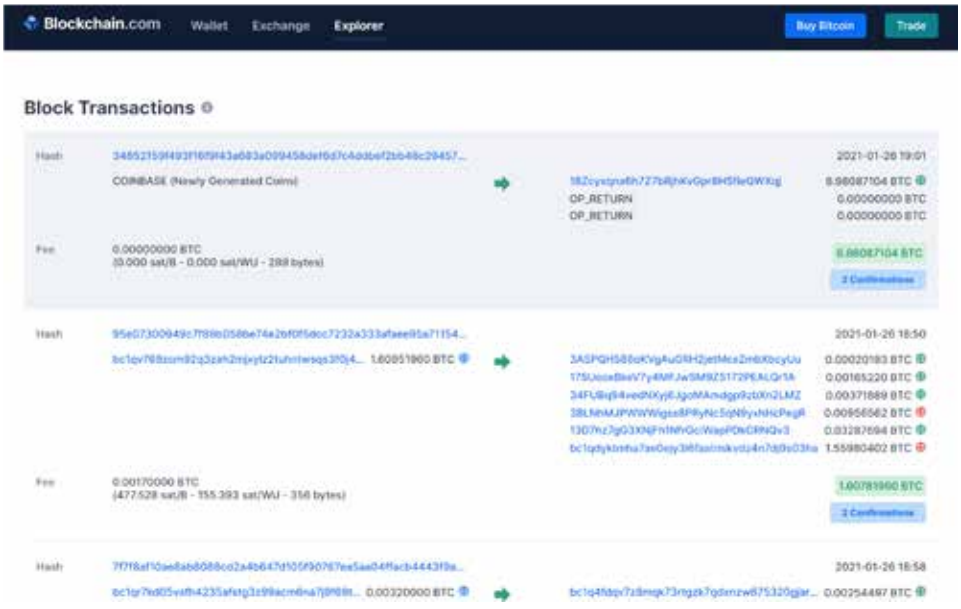
Blockchain Tracing

- Digital asset systems do not natively require user AML/KYC compliance
- BSA requires compliant intermediaries to collect identifying information about users
- Blockchain system records are public but do not include user identity
- Forensics vendors provide services that map public key addresses to known users
- Combination of forensic and public information facilitates tracing

Does Lowest intermediate balance rule apply?



Blockchain Explorers



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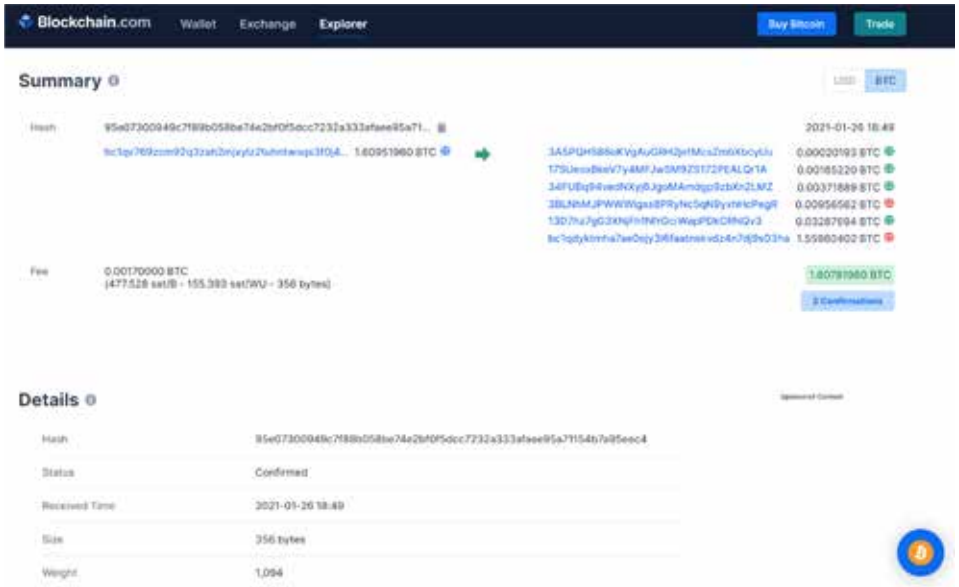

Recovery of Cryptoassets

- Forensic consultants may assist with tracing
  - Probabilistic results- can tell you who has previously been associated with a public key address, not who actually authorized a specific transaction
- Court Orders may compel turnover of cryptoassets
  - Easy to obtain from compliant entities
  - Harder to get from individuals
  - May be impossible to enforce a turnover order “against” smart contracts
    - May be limited to *ex ante* and *ex post* remedies
    - Do executory smart contracts violate the Automatic Stay?
- Claims of lost private keys may frustrate recovery/collection efforts
  - Consider the role/effectiveness of contempt orders

Cryptoasset-specific Privacy Issues

- Identification of Cryptoasset users implicates specific risks:
  - "$5 wrench attack"
  - Hacking targets
  - Identity theft risk
- Desire for privacy collides with fundamental rights and norms favoring public disclosure
- *In re: Celsius*- Motion to redact PII regarding identity of creditors denied
- *In re: Cred*, *In re: Altegrity*, *In re: FTX*: orders permitted creditor identity and PII to remain confidential

Crypto Assets in 363(f) Sales

- Lien priority
- Consent rights
- Co-ownership
- Tax fees/copyright, royalties and other interests
- Bid procedures
- Recordation
- Notice
- Valuation date
- Jurisdiction
- Extent of conveyable rights/*nemo dat*

Secured Transactions and Cryptoassets

- Did borrowers/lenders have security interests in cryptoassets borrowed and loaned?
- How do you create and perfect a security interest in a crypto asset?
  - No specific existing provision specifically describes cryptoassets in UCC
  - Article 9 perfection by filing is problematic
  - Best fit is Article 8 “general intangibles”
- Secured lending requires a legally effective Security Agreement
  - How to describe the collateral?
- Perfection options:
  - Article 9- Perfection by Filing
  - Perfection by transferring the asset to a Securities intermediary
    - Requires agreement among parties stipulating to consider the asset as a financial asset, asset control agreement
- Does a specific cryptoasset owner have “clean” title?

Why Article 12?

- New types of digital assets
- New structures & transaction types
- New problems:
  - Cutting off 3rd party property claims/ threats to asset fungibility
  - Questions about secured transactions
    - Unappealing choices for perfection
  - Digital assets that (maybe) become fiat

Treatment & scope of digital assets under Article 12

- Technology neutral
- What are “Digital assets”?
  - “Asset”?
  - Digital “Tokens”?
- “Rivalrous”
- Increasingly used in commercial transactions
  - cryptoassets, tokens, stablecoins, NFTs, electronic negotiable instruments, digital asset securities
  - Excludes existing assets already covered by UCC (*i.e.* deposits, chattel paper, E-money, etc…)

Why Control?

- The problem of intangibility
- Possession vs. Control
- What do you control when you control a digital asset?

Controllable Electronic Record (CER)

- Electronic +
- Record: “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form” (UCC 1-201(b)(31)) +
- Subject to Control
  - If not controllable, excluded; also excludes many other existing categories (chattel paper, deposit accounts, general intangibles etc…)

Controllable Electronic Record (CER)

- Control
  - Non-exclusive power to enjoy “substantially all the benefit”
  - Must have use that one can enjoy to the exclusion of others
    - Prevents others from enjoying “substantially all the benefit”
  - Exclusive power to transfer to another the power to use
    - The transfer must divest the transferor of the power to use the CER
  - Identification (name, station, key, or similar)
- Creates a rebuttable presumption of exclusive control

Controllable Electronic Record (CER)

- Control may be exercised for another
  - A has control but acknowledges that A has control for B. B also has control.
- Exclusivity allows sharing/multi-sig/custodial arrangements by agreement or system design.
- Multi-sig (m of n) hypos:
  - 1/2: Both have control.
  - 3/4: All have control.
  - 2/2: Both have control.
  - A can transfer /prevent a transfer but B can only transfer control, or prevent a transfer with the consent of A. Only A has control.

"Take Free" Rules

- Digital assets vs. cash
- Negotiability
- What's the alternative?

Comparison of unclipped and clipped *Siliqua* from the Hoxne Hoard

An unclipped siliqua | Partially clipped siliqua | A clipped siliqua

c/o Wikipedia

Qualifying Purchaser

- A purchaser of a CER acquires all rights in the CER that the transferor had (*nemo dat*)
- A *qualifying purchaser* takes free of any property claims to the CER
- A *qualifying purchaser* is a purchaser who obtains control of a CER:
  - for value,
  - in good faith, and without notice of a property claim to the CER.
  - The filing of a financing statement itself is not notice of a property claim to the CER
- Applies to CER maintained through a custodian or exchange
- Substantive legal rights associated with a given CER determined by other law

Article 12 Does & Does Not

Does:

- Address the rights of private parties transacting using CERs.
  - Address negotiability of CERs
  - Lay the groundwork for enforceable secured transactions in CERs

Does not:

- Address substantive law issues related to CERs:
  - Taxation
  - Regulatory classification
  - IP issues
  - Contractual relationships
  - Regulatory Compliance

Status of Adoption

- Pre A12: Wyoming (Wyo. Stat. § 34-29-101 et seq.), Idaho (HB 583)
  - Broad scope for digital assets
  - Treats virtual currency as money
  - Treats control (broad definition) as possession
  - Adverse claim cut-off rule applies after two years
  - Aggressive choice-of-law rules
- New Hampshire (HB 1503), Iowa (H. 2445), Nebraska (LB 649) & Indiana (HB 351) adopted earlier version of CER proposal
- Arkansas (HB 1926) & Texas (HB 4474): adopted earlier versions & limited CER definition to virtual currencies

Faculty

Ido J. Alexander, CTCE is the founder of AlignX Law in Fort Lauderdale, Fla., and is a bankruptcy and restructuring attorney with experience representing corporate and individual debtors, creditors and bankruptcy trustees in chapter 11 and 7 proceedings. In the last four years, he has focused on crypto/blockchain issues, representing bankruptcy trustees dealing with crypto-related assets, assisting crypto/blockchain companies in efforts to restructure debts, and advising and assisting in court proceedings that include crypto assets. Mr. Alexander is a Cryptocurrency Tracing Certified Examiner by CipherTrace and is trained in locating/tracing crypto assets. He also is a certified mediator and has presided over 200 cases. Mr. Alexander is a member of the Florida Bar Business Law Section's Blockchain & Cryptocurrency Task Force. Before forming AlignX Law, he co-founded Alexander + Somodevilla, PLLC, which became Leiderman Shelomith Alexander + Somodevilla, PLLC. As the managing attorney of the firm, he regularly represented clients — including trustees, debtors and creditors — in chapter 11 and 7 bankruptcy cases. Prior to that, he focused on federal equity receiverships at Damian & Valori, LLP in Miami, and began his career at the the firm of Markowitz, Ringel, Trusty & Hartog, PA, also in Miami. Mr. Alexander served as an officer of the Bankruptcy Bar Association of the Southern District of Florida from 2011-17 and served as president from 2016-17. Fluent in English and Hebrew, he received his B.B.A. from Emory University Goizueta Business School, and his M.B.A., with an emphasis on finance and commercial bankruptcy law, and his J.D. from the University of Miami.

Steven M. Berman is a partner in the Tampa, Fla., office of Shumaker, Loop & Kendrick, LLP, specializing in the firm's bankruptcy and creditors' rights practice group. He has more than 30 years of bankruptcy experience and focuses his practice on business bankruptcy litigation, representing creditors, investors, distressed-debt lenders, trustees, committees and business entities litigating disputes in bankruptcy court. Mr. Berman is Board Certified by the American Board of Certification in both Creditors' Rights Law and Business Bankruptcy Law, and he is a member of the Florida, California, District of Columbia, New York and Puerto Rico (Federal) bars. He is also admitted to practice before the Eleventh Circuit Court of Appeals and the U.S. Supreme Court. Mr. Berman serves on the board of directors of the American Board of Certification and is a member of its Faculty Committee. He also serves on ABI's Board of Directors, its Endowment Committee and its Task Force on Veterans and Servicemembers Affairs, and he routinely volunteers and speaks at its seminars and other programs. On a local level, Mr. Berman is a member of the Tampa Bay Bankruptcy Bar Association, the Bankruptcy Bar Association of the Southern District of Florida, the Southwest Florida Bankruptcy Professionals Association and the San Diego Bankruptcy Forum. He also guest lectures at the University of Florida College of Law and Stetson University College of Law, both in the advanced bankruptcy courses. Additionally, Mr. Berman serves as the Judge Advocate and Parliamentarian to the Coronado Yacht Club in Coronado, Calif., and volunteers in providing *pro bono* bankruptcy and insolvency services and training for U.S. Navy Judge Advocate General officers and staff, along with representation of service members and their families in need. He received his B.S. in multinational business operations from Florida State University and his J.D. from the University of Florida Levin College of Law.

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Stern School of Business and the NYU School of Law, where since 2018 he has taught "Digital Currency, Blockchains, and the Future of the Financial Services Industry" to J.D./M.B.A. students. Since 2019, Mr. Hinkes has been involved in law reform focusing on digital assets, serving as an adviser for the Uniform Law Commission Uniform Commercial Code and Emerging Technologies Digital Assets Working Group, and as observer to the UNIDROIT Working Group on Digital Assets and Private Law. In 2020, he co-wrote *Digital Assets and Blockchain Technology: U.S. Law and Regulation*, a textbook covering U.S. legal and regulatory approaches to digital assets and related technology, published by Elgar. Mr. Hinkes is frequently quoted and cited in articles related to digital assets and blockchain technology, and regularly speaks at legal, industry, and academic conferences and symposia. He was nominated as one of *Coindesk*'s Most Influential People in Blockchain in 2017. Mr. Hinkes received his A.B. *cum laude* in 2000 from Washington University in St. Louis and his J.D. *cum laude* in 2005 from the University of Miami School of Law.

Hon. Erik P. Kimball is a U.S. Bankruptcy Judge for the Southern District of Florida in West Palm Beach, appointed in 2008. Prior to his appointment to the bench, he was a member of the Commercial Law and Bankruptcy Department at Hale and Dorr (now WilmerHale) in the firm's Boston office, where he specialized in corporate bankruptcy, workouts and debt restructuring, and spent considerable time on *pro bono* representations of individual debtors. Judge Kimball left Hale and Dorr to become a vice president at Colonial Management Associates Inc., a Boston-based mutual fund advisor, where he oversaw all fixed-income defaults for the firm's municipal department. Thereafter, he was a shareholder with the Florida firm Nabors, Giblin & Nickerson, P.A., where his practice focused on representing institutional investors and indenture trustees in connection with defaults of publicly traded debt securities. He later returned to Boston as a vice president in the Investment Department at Columbia Management Advisors, an affiliate of Bank of America, where he supervised all fixed-income defaults and assisted in the management of its Municipal Department. From 2003 until his judicial appointment in 2008, Judge Kimball was a shareholder at Akerman Senterfitt in the firm's Orlando office, where he represented secured creditors, indenture trustees, institutional investors, corporate debtors and other parties in bankruptcy, receivership and debt-restructuring matters. Prior to his appointment, Judge Kimball was a member of the Board of Governors and a member of the Executive Committee of the National Federation of Municipal Analysts, an organization of more than 2,000 municipal credit analysts whose primary goal is to provide educational programs for municipal finance professionals. During his long association with the NFMA, he assisted in writing and presenting on numerous topics relevant to municipal finance. Judge Kimball is a recipient of the Denis Maguire *Pro Bono* Award of the Boston Bar Association. He received his his B.A. from the University of Massachusetts at Amherst in 1987 and his J.D. from Boston College Law School in 1990.

Shirley R. Palumbo is a bankruptcy senior counsel and general counsel at NextEra Energy Resources, LLC in Juno Beach, Fla. She provides transactional structure and court representation on restructuring, insolvency and bankruptcy on matters related to distressed investments. Ms. Palumbo represents businesses and individuals on bankruptcy-related issues of national or international scope on behalf of creditors, debtors, trustees, third-party purchasers and financial institutions. She also has knowledge of the cryptocurrency ecosystem and players involved. Ms. Palumbo is Board Certified in Consumer Bankruptcy Law by the American Board of Certification and has received Martindale-Hubbell's highest ranking. She is a member of the Florida and Puerto Rico (federal) Bars and is admitted to the Eleventh Circuit Court of Appeals. Ms. Palumbo is a member of ABI and INSOL, and she is a member of the Southern District of Florida Bankruptcy Bar Association and the Judicial

Liaison of the Florida Bar's Bankruptcy/UCC and Communications Committee. She received her J.D. from St. Thomas University and her LL.M. in international law from the University of Miami.