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# Northeast Bankruptcy Conference and Consumer Forum

*Business Track*

## **Crypto**

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U.S. Securities and Exchange Commission | Boston

**John J. Carney**

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# NORTHEAST BANKRUPTCY CONFERENCE & CONSUMER FORUM

Newport Marriott • Newport, R.I.

JULY | 13-15 | 2023



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## Cryptocurrency: Is Bankruptcy the New Normal?



**Hon. Martin Glenn**

Chief Judge  
*U.S. Bankruptcy Court  
(S.D.N.Y.)*

Restructuring  
New York



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Attorney  
*U.S. Securities and  
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SEC Receiver/Regulatory  
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Partner  
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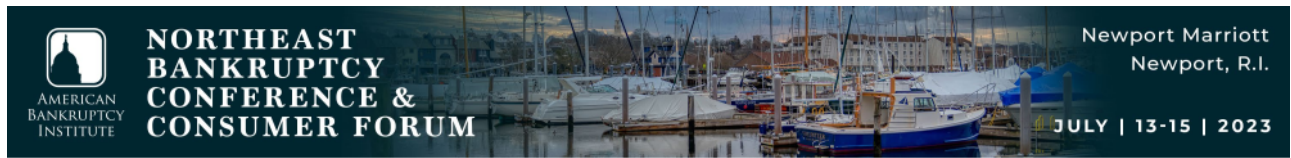
Data Privacy /  
Cybersecurity  
Chicago



**Brett Witherell**

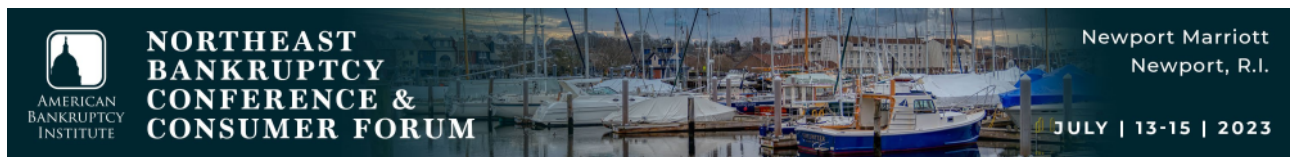
Managing Director  
*BRG*

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Boston



























## Agenda

- I. Overview of Major Bankruptcy Filings – Last 12 months
- II. Ownership Issues
- III. Role of the Examiner
- IV. Competing White Collar Investigations / Regulatory Scrutiny
- V. Valuation Complexities
- VI. What Does the Future Look Like? / What Should You Consider?
- VII. Q&A



## Industry Snapshot

ASSETS	 BTC	 ETH	 Crypto Mining Assets	 Crypto Loan	 NFT
MEDIUM OF EXCHANGE	 Crypto Exchange	 DeFi Protocols	 Peer to Peer	 CeFi Platforms	 NFT Marketplaces
INFRASTRUCTURE	 Proof of Work	 Proof of Stake	 Hot Wallet	 Cold Wallet	 Web3
BENEFITS	 Intermediate Settlement	 Lower Fees	 Global Access	 Identity Protection	 Fraud Prevention
FUTURE	 Regulatory Scrutiny	 Debit/Credit Cards	 Financial Action Task Force	 Global Economic Interconnectedness	



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## Crypto Markets

- As of July 11, 2023, the overall crypto currency market capitalization is approximately **\$1.2 Trillion**. The two largest crypto currencies, Bitcoin and Ethereum, currently have a market capitalization of approximately \$590.6B and \$224.5B respectively. Prices have been positively trending YTD.



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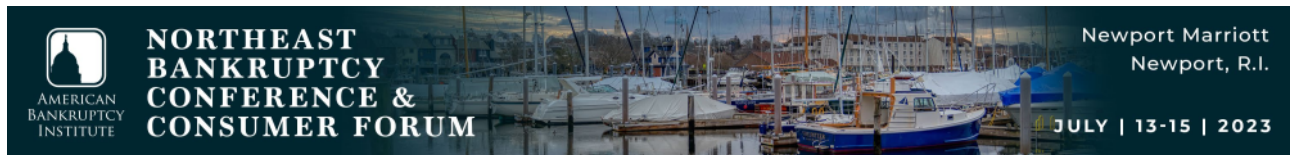
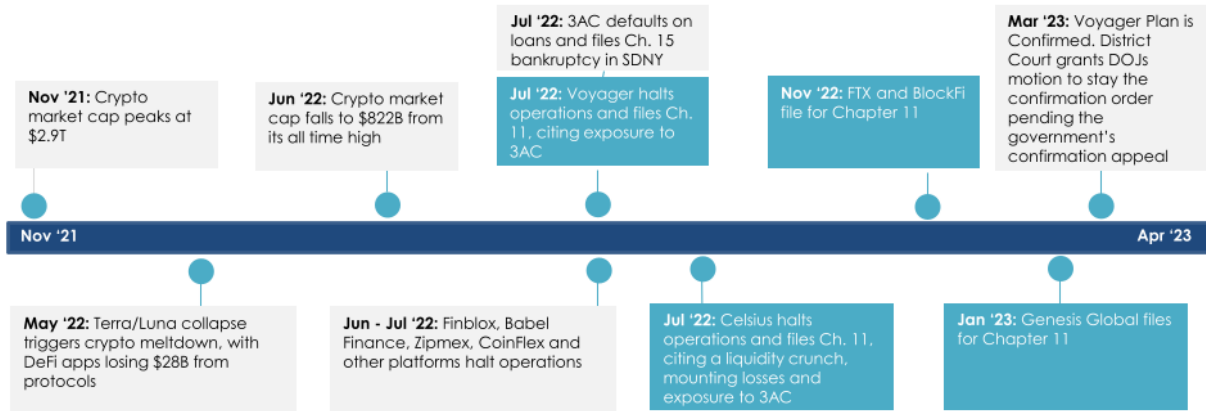
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## I. Overview of Major Bankruptcy Filings – Last 12 months



## Overview of Major Bankruptcy Filings – Last 12 months



## II. Ownership Issues





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## Who owns the digital assets?

- Using Celsius as an example, does the debtor (Celsius Network LLC, crypto exchange) or do the creditors (customer account-holders) own cryptocurrency assets deposited in interest-bearing accounts?
- **Celsius' position:** points to the consumer terms that state Celsius holds rights and title to cryptocurrency assets held in earn accounts [describe Celsius earn accounts for the audience here – high interest-bearing deposit accounts, approx. 600,000 accounts, \$4 Billion +]
- **Account holder's position:** terms were ambiguous and misleading and did not constitute a binding contract
- **State regulator's position:** question of asset ownership must consider/wait for the conclusion of the Examiner's investigation
- **Court's conclusion:** Judge Glenn



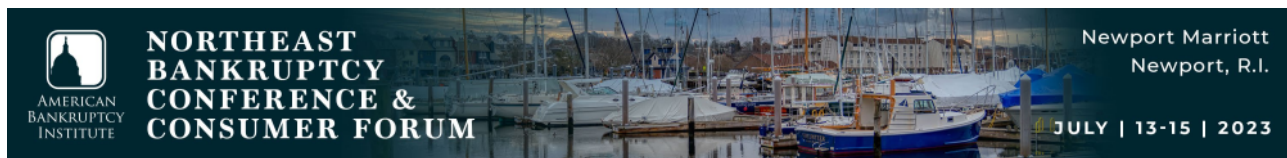
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## What are the exceptions, if any?

- Who owns the assets when accounts are held in trust by a custodian? Are there scenarios where this custodian exception does not apply?
- What is the difference between storing assets on an exchange and storing them in a wallet?
- If customer accounts are distinct and segregated, would that change the conclusion on ownership?



Are there resources for account holders?

Does the SEC have a perspective?



### III. Role of the Examiner



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## What is the role of the examiner?

- As discussed previously, state regulators opposed a Court ruling on the question of ownership whilst the Examiner's investigation was still underway
- Discuss Celsius Examiner findings regarding:
  - Debtor's public representations to customers regarding ownership
  - Where cryptocurrencies were stored including comingling
  - Whether and how customer deposits were used



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## IV. Competing White Collar Investigations / Regulatory Scrutiny





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## Competing White Collar Investigations / Regulatory Scrutiny

- FTX example
- Investigations regarding location of assets / various storage methods / transfers
- Question of stolen assets, whether accounts changed hands / timing



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## The importance of tracing assets

- What should Trustees consider first – determining the value or location of assets?



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## SEC Recent Actions: Rule 3b-16

- Cost of compliance
- Impact on crypto industry
- Impact on bankruptcy proceedings



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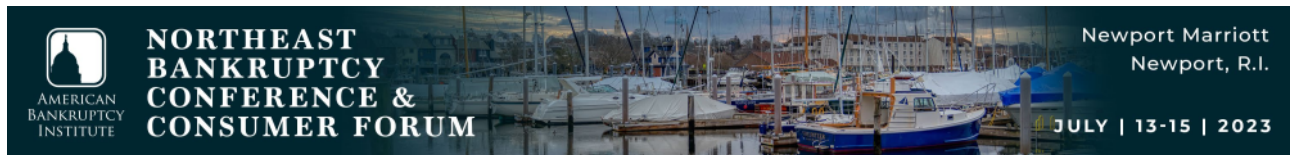
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## V. Valuation Complexities



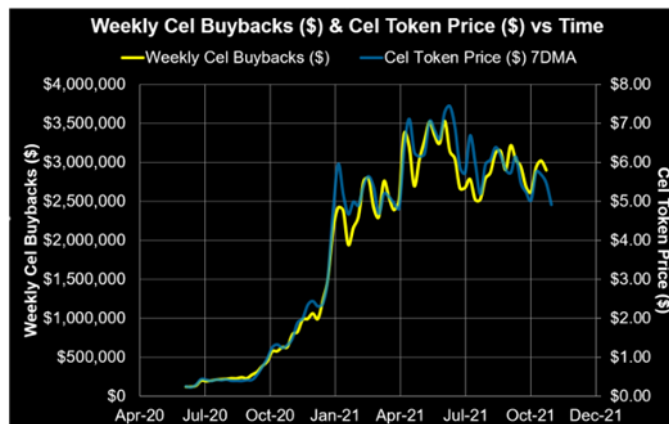
## Valuation Complexities

- What is the proper valuation date – transfer or petition date?
  - Per the bankruptcy code, the proper valuation date is the petition date
  - Due to the volatile nature of cryptocurrency, using the date of transfer for valuation may lead to certain creditors realizing a better recovery



## Example of Token Price Manipulation

FIGURE 9: CEL BUYBACKS COMPARED TO CEL PRICE<sup>319</sup>



Note: This chart reflects the strong correlation between CEL's price and Celsius's buy-back activity



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## Valuation Complexities

- Describe the wild fluctuations in asset value.
  - The overall market cap of the crypto space peaked at \$3 trillion in November 2021 and has declined to \$1.2 trillion as of July 2023.
  - Bitcoin peaked at \$69,044.77 in November 2021 and has since declined to \$30,746.14 as of July 2023 – a low of 15,742.44 was hit on November 9, 2022 (one day before FTX filed for Chapter 11)
- Do you consider the time value?



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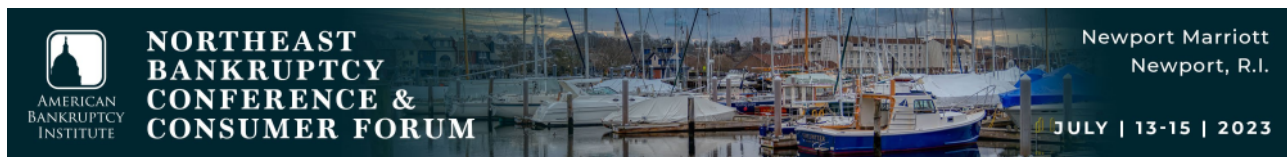
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## Valuation Complexities

- What are the challenges of determining fair value of assets for balance sheet test insolvency test?
  - Securities regulations
  - Bad actors / fraud
  - Market dynamics
  - Preference payments
  - Asset makeup
  - Product type



## VI. What Does the Future Look Like? / What Should You Consider?



### Looking Forward

- When to unwind – does 546 Safe harbor apply?
- Are crypto assets securities? Commodities? What are the indicia of each?
- Avoidance actions – crypto issues – Consider the valuation complexities described previously, consider account type, comingling
- Good technology/bad actors – agree or disagree?
  - The technology has useful applications for security / privacy purposes, however, cryptocurrency has been negatively impacted by a multitude of bad actors whom have taken advantage of a nascent space that lacks clear guidelines





## VII. Q&A

# Faculty

**Amy Harman Burkart** is a senior trial counsel in the Division of Enforcement at the U.S. Securities and Exchange Commission (SEC) in Boston. Prior to joining the SEC, she was an assistant U.S. attorney (AUSA) and chief of the Cybercrime Unit at the U.S. Attorney's Office (USAO)/Department of Justice (DOJ) in Boston, where she spent a decade investigating and prosecuting computer, intellectual property and financial crimes. Ms. Burkart also served as co-director of the USAO's Civil Rights Enforcement Team, a cross-office team focused on criminal civil rights matters, including sex and labor trafficking. She was a member of the Computer Hacking and Intellectual Property Working Group, a national group of prosecutors that work with the DOJ's Computer Crime and Intellectual Property Section (CCIPS) to train other prosecutors working in these areas. Ms. Burkart was also a leader of both districtwide and nationwide initiatives at DOJ related to technology and discovery issues. In addition to her work at the government, she worked in private practice at Davis Polk & Wardwell (New York), Goodwin (Boston) and Jones Day (Boston). Ms. Burkart clerked for Hon. Colleen McMahon in the U.S. District Court for the Southern District of New York. In addition, she has taught courses at Boston University School of Law and Vermont Law School. Ms. Burkart received her bachelor's degree in 1996 in political science and government from Dartmouth College, and her J.D. in 2001 from New York University School of Law.

**John J. Carney, CTCF, CFF** serves as BakerHostetler's White Collar, Investigations and Securities Enforcement and Litigation team co-leader in New York. He is a former securities fraud chief, assistant U.S. attorney, U.S. Securities and Exchange Commission (SEC) senior counsel and certified public accountant at a "Big Four" accounting firm. Mr. Carney represents public and private corporations and financial institutions in complex civil, regulatory and criminal law enforcement investigations and litigation, and advises and defends corporations and senior officers on FCPA compliance, investigation and defense. His experience conducting investigations of possible FCPA violations and other potentially improper foreign country-based financial transactions has included working on major matters in the BRIC countries: Brazil, Russia, India and China. Having litigated for, and against, the U.S. government, he strongly encourages clients to take preemptive governance and remediation measures to mitigate legal and reputational risk in today's increasingly aggressive law enforcement environment. Based on his having represented institutional and individual clients in complex regulatory and law enforcement matters, Mr. Carney was recently listed as one of the best securities enforcement defense lawyers in the U.S. in the Securities Docket "Enforcement 40." He is ranked in *Chambers USA*, is a Cryptocurrency Tracing Certified Examiner and also is Certified in Financial Forensics by the American Institute of Certified Public Accountants. Mr. Carney lectures frequently at domestic and international conferences and training seminars on anticorruption and anti-money-laundering laws, corporate governance, compliance and disclosure, insider trading, securities, tax and other financial crimes, and defending complex and multijurisdictional civil and criminal cases. He received his B.A. *cum laude* in accounting from Rutgers University in 1984 and his J.D. in 1990 from Rutgers University School of Law.

**Hon. Martin Glenn** is Chief U.S. Bankruptcy Judge for the Southern District of New York in New York, initially sworn in on Nov. 30, 2006, and appointed Chief Judge on March 1, 2022. Previously, he was a law clerk for Hon. Henry J. Friendly, Chief Judge of the U.S. Court of Appeals for the Sec-

ond Circuit, from 1971-72, and he practiced law with O'Melveny & Myers LLP in Los Angeles from 1972-85 and in New York from 1985-2006, where he focused on complex civil litigation including securities, RICO, financial and accounting fraud, and unfair competition. Judge Glenn is a Fellow in the American College of Bankruptcy and a member of the American Law Institute, International Insolvency Institute, New York Federal-State Judicial Council, New York City Bar, National Conference of Bankruptcy Judges and ABI. He is a past member of the Committee on International Judicial Relations of the U.S. Judicial Conference and the Bankruptcy Judge Advisory Group of the Administrative Office of the U.S. Courts. In addition, he is an adjunct professor at Columbia Law School, a contributing author to *Collier on Bankruptcy* and a frequent lecturer on bankruptcy-related issues. Judge Glenn received his B.S. from Cornell University in 1968 and his J.D. from Rutgers Law School in 1971, where he was an articles editor of the *Rutgers Law Review*.

**Shoba Pillay** is a partner and co-chair of Jenner & Block LLP's Data Privacy & Cybersecurity Practice in Chicago. She advises clients on mitigating and responding to cybersecurity threats and national security risks, as well as developing robust regulatory compliance programs. Mr. Pillay is a former federal prosecutor and corporate crisis manager with extensive trial and investigations experience who leads complex and high-stakes internal and government-facing investigations. Due her technical expertise and significant investigation experience, she was the court-appointed examiner in the bankruptcy of digital asset lender Celsius Network LLC. As a federal prosecutor, Ms. Pillay gained experience with complex investigations and prosecutions involving cybercrime, complex fraud, human trafficking, theft of trade secrets, terrorism, espionage, and export control and international sanctions violations. Among her significant trials during her 11 years in the U.S. Attorney's Office in the Northern District of Illinois, she prosecuted a theft of trade secrets case involving a Chinese competitor, the computer intrusion of a Fortune 500 company, and the illegal export of technical data to China. She was honored with the Department of Justice John Marshall Award from the Attorney General in 2022. Ms. Pillay received her B.A. in political science in 1998 from Washington University and her J.D. in 2003 from Boston College Law School.

**Mark A. Renzi** is a member of Berkeley Research Group, LLC Corporate Finance in Boston and specializes in performance improvement and restructurings. He has more than 20 years of business experience, with approximately 16 years of financial consulting experience, including liquidity and capital structure assessment, debt and equity restructuring advice, and identification of reorganization alternatives. Mr. Renzi has experience across a broad range of industries, including financial services, retail and consumer products, metals, manufacturing, health care, chemical, oil and gas, and telecommunications. He has provided restructuring services on more than 35 engagements in both out-of-court workout situations and chapter 11 proceedings. Further, he has advised distressed companies with day-to-day management activities, including development of *pro forma* financials, cash-flow management, cost rationalization, and identification of liquidity enhancing activities. He also has provided restructuring advice to portfolio companies of private-equity firms and has served in interim management positions. Mr. Renzi is experienced in analyzing and implementing strategic and operational change, including the refinement of business plans and redeployment of capital to address changing industry conditions, as well as stabilizing and fixing noncore operations through product and customer rationalization initiatives. He has developed options and solutions through detailed financial and operational analyses while collaborating closely with management and other stakeholders. In addition to operational turnarounds, he has assisted in financial restructurings, including refinancings, recapitalizations, debt-for-equity swaps, and strategic mergers and acquisitions. Previ-

ously, Mr. Renzi was a senior managing director at a global business advisory firm with a 15-year tenure. He also worked at a boutique money management firm in New York evaluating equity and commodity derivative portfolios, and he held various positions in FP&A, business plan development, treasury and global cash management. Mr. Renzi received his B.A. in economics from Washington College and his M.S. in finance from Boston College.