

# Crypto Insolvency and Fiduciary Practice

## Overview

Innovative companies using cryptocurrencies, tokens, and smart contracts built on blockchain technology have upset paradigms, grabbed market share, and enabled new businesses and products to emerge. Whether peer-to-peer lending, payments technology, democratized investing, smart contracts, or insurtech, companies using blockchain technology and crypto assets continue to grow into a powerful force in the modern economy. Businesses and individuals may own, operate, license, or otherwise conduct business including these assets and systems and may obtain security interests in these assets through financing or other transactions. Inevitably, certain businesses and individuals who own or have interests in these assets will become financially distressed or insolvent. The interplay between the developing regulations governing these new assets and the federal and state laws governing bankruptcy and creditors' rights presents unique and complex challenges and opportunities. As circumstances continue to change and trends and cycles shift, the complexities involved will also continue to evolve.

Carlton Fields' Crypto Insolvency and Fiduciary service team combines insight into crypto assets and blockchain technology with experience in all forms of insolvency, restructuring proceedings, and workouts. We understand the challenges of the fast-moving and dynamic economic and regulatory environment affecting crypto assets, smart contracts, DeFi systems, and blockchain technology. Our multidisciplinary team includes professionals in the digital assets, bankruptcy, transactional, and litigation arenas. We also draw on the significant knowledge and experience of our attorneys who concentrate in the areas of intellectual property, successor liability, and taxation.

## Entity Wind Down

We recognize that entities like token issuers, funds, or intermediaries servicing the crypto industry that raised capital may face creditor claims, devaluation of treasury assets, regulatory hurdles, unanticipated technical difficulties, or an unexpectedly high burn rate. Sometimes businesses simply fail. Many companies face the hard reality that the environment may not facilitate economic development. Those businesses may elect to discontinue operations and wind-down, a decision that, if executed without the advice of counsel, may result in unnecessary adverse consequences and liabilities for business owners and creditors. The officers and directors of such

businesses should be cognizant of, and obtain advice regarding, fiduciary duties that may be owed to various parties through a wind-down or dissolution process. Those who hold rights to crypto assets, including SAFTs, cryptocurrencies, or tokenized assets representing real assets, or other digital asset securities, may have unique issues as to custody, valuation, liquidation, and executory or unexecuted smart contracts when winding down. Our team has the experience and skills to assist in these and other crypto-related matters.

## Fiduciary Representation

Some entities wind-down or reorganize through a judicial process, which may include the appointment of a fiduciary, such as a receiver or trustee, to assist with the orderly disposition of creditor claims. These fiduciaries often marshal assets, report the status of the entity's affairs to the court, and, in some cases, act to recover assets transferred to third parties. These fiduciaries also may distribute assets to claimants or creditors under court supervision. Cryptocurrencies, smart contracts, and DeFi system use create unique challenges for fiduciaries. The legal status of a given crypto asset, smart contract, or DeFi arrangement may be unclear. Concepts of ownership and control of crypto assets are legally unsettled, and valuation methodologies for these assets remain fluid. Certain debtors or receivership entities may be subject to regulatory investigations or restrictions by administrative agencies, which may complicate their efforts to wind-down or limit their payment of claims. Our team can advise on how to control, take custody of, and trace these assets, report their value to the court, identify transfers including preferences and fraudulent transfers, and facilitate asset recovery and disposition

- Land Development
- Vertical and Horizontal Mixed-Use Development
- Hotel and Resort Development
- Retail Development
- Office Development, Industrial Parks, Self-Storage Facilities, and Fulfillment Centers
- Condominium, Residential, and Resort Development
- Senior Housing and Assisted Living Development
- Other Specialty Development

## Investor Disputes

When investors seek to exit their investments, it often impacts other investors and the continuing viability of the investment entity. Our team can assist in these matters by, among other things,

modifying operating documents to permit investor exits, helping to unwind a fund, or enforcing fund or investment documents, including through litigation if necessary. Among other representations, our lawyers have defended issuers whose investors sought to rescind purchases of instruments or to substitute equity or debt for tokens in litigated actions, and have helped clients to achieve negotiated resolutions of these claims against issuers and funds.

## Distressed Purchase/Sale

Investors and companies alike understand the opportunities for growth by strategic acquisitions and divestment during challenging economic circumstances. We have experience with strategic mergers and acquisitions and can assist parties with distressed opportunistic acquisition or financing transactions, including those involving cryptocurrencies and blockchain-related assets, such as refinancing a distressed cryptocurrency mining operation or purchasing rights to a token issuer's foundation or operating entity.

## Assignment for the Benefit of Creditors

Assignment for the benefit of creditors is an alternative procedure available in some states to wind-down a business entity through which the entity employs an assignee to liquidate the company's assets for the benefit of its creditors. Assignees may facilitate the sale of the entity as a going concern, and an assignment for the benefit of creditors may be attractive to crypto-related companies as an alternative to bankruptcy or entity wind-down.

## Creditors' Rights

Increasing business awareness of crypto assets has led to a growing market for borrowing, lending, and taking secured positions against those assets. Creditors need counsel who understand how to create and perfect enforceable interests against these assets, how to find and execute against crypto assets, and how to handle potential competing claims and priority disputes regarding crypto assets.

## Insights

08.12.2020

Recovery by ICO Token Investors May Be Challenged in Bankruptcy

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07.31.2020

Digital Assets and Blockchain Technology: U.S. Law and Regulation

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07.06.2020

Is Cryptocurrency Use an Automatic Badge of Fraud?

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06.24.2020

The Coming Storm: DeFi and Bankruptcy Courts

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10.24.2019

Set It and Regret It?: Smart Contracts, Injunctions, and Fraudulent Transfers, Part I

*Medium*

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02.19.2016

Hashfast's \$1 Million Question: Is Bitcoin a Currency or Commodity?

*CoinDesk*

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02.18.2016

Bitcoin in Bankruptcy: Is It Commodity or Currency?

*Law360*

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06.29.2015

What Bankruptcy Trustees Need to Know About Bitcoin

*Law360*

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07.13.2014

Regulatory and Commercial Law Concerns Relating to Bitcoin and Internet Payment Systems

*The Cramdown*

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04.22.2014

Deal carefully with bitcoins until legislation catches up

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**Our Team**

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## Related Capabilities

### Practices

- Creditors' Rights and Bankruptcy
- Distressed Asset and Workout
- Distressed Health Care
- Insolvency-Related Directors and Officers (D&O) Litigation
- Technology
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- AdTech

### Industries

- Technology

- Blockchain and Digital Currency