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# Bankruptcy 2024: Views from the Bench

## **Resolving Crypto Issues in Bankruptcy with a Judicial Perspective**

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**Hon. Michael B. Kaplan**

U.S. Bankruptcy Court (D. N.J.) | Trenton

**Hon. Michael E. Wiles**

U.S. Bankruptcy Court (S.D.N.Y.) | New York



***Judicial Perspectives on  
Crypto Issues in Bankruptcy***



## The Panel

- **Hon. Michael B. Kaplan**
  - Bankruptcy Judge, United States Bankruptcy Court for the District of New Jersey.
- **Hon. Michael E. Wiles**
  - Bankruptcy Judge, United States Bankruptcy Court for the Southern District of New York.
- **Leslie C. Heilman (Co-Moderator)**
  - Partner in Ballard Spahr's Bankruptcy, Creditor's Rights and Restructuring Group, concentrating her practice on commercial restructuring and bankruptcy, representing creditor committees, debtors, commercial landlords, trade vendors and suppliers, secured and unsecured creditors, and other parties-in-interest in business reorganization and liquidation cases both in Delaware and nationally. Leslie is also experienced in bankruptcy-related litigation, including claims administration, avoidance actions, and other adversary and contested proceedings.
- **Jackson D. Toof (Co-Moderator)**
  - Partner in ArentFox Schiff's Complex Litigation and Bankruptcy & Financial Restructuring Group in the firm's Washington, DC office, focusing on litigating all aspects of bankruptcy and financial services litigation, as well as international customs and trade litigation, qui tam defense actions, trade secret litigation, and other business and commercial disputes.



## Objectives

- Discussing judicial perspectives on a variety of cryptocurrency issues that have surfaced in various bankruptcy cases over the years, including:
  - Jurisdiction,
  - Classification,
  - Valuation,
  - Ownership,
  - Confidentiality, and
  - Priority and Plan treatment.
- Discussing judicial strategies used to balance the interests of creditors and debtors in an effort to ensure fair and equitable outcomes in cases involving cryptocurrencies.
- Discussing practical insights gained and lessons learned from having presided over some of the more high-profile crypto cases in the last several years.



## Overview of Recent Crypto Cases



## Overview of Crypto Cases

- In the last few years, we have seen various crypto exchanges and lending companies file bankruptcy, including some after other bankrupt companies could no longer pay loans they owed. These include:
  - *In re Cred*, Case No. 20-12836 (D. Del.) (Judge Dorsey)
  - *In re BlockFi Inc.*, Case No. 22-19361 (D. N.J.) (Judge Kaplan)
  - *In re Celsius Network*, Case No. 22-10964 (S.D.N.Y.) (Judge Glenn)
  - *In re Voyager Digital*, Case No. 22-10943 (S.D.N.Y.) (Judge Wiles)
  - *In re FTX Trading Ltd.*, Case No. 22-11068 (D. Del.) (Judge Dorsey)
  - *In re Core Scientific*, Case No. 22-90345 (S.D. Tex.) (Judge Lopez)
  - *In re Genesis Global Holdco, LLC*, Case No. 23-10063 (S.D.N.Y.) (Judge Lane)
  - *In re Rhodium Encore LLC*, Case No. 24-90448 (S.D. Tex.) (Judge Perez)
  - *In re Silvergate Capital*, Case No. 24-12158 (D. Del.) (Judge Owens)



## *Judicial Perspectives on Cryptocurrency Issues*



### *Jurisdictional Issues*

- Cryptocurrencies pose jurisdictional challenges due to their decentralized nature. Given the cross-border nature of these cases, we have seen several bankruptcy cases involving crypto in the United States be accompanied by foreign proceedings, which can raise questions concerning whether the U.S. bankruptcy court has jurisdiction over certain issues and not others. For example:
  - SEC objection in *Voyager*: SEC taking no position but can't confirm a plan unless Voyager proves it is not a broker-dealer; and tokens are not securities.
  - *Blockfi* – concurrent Bermuda proceeding.
  - *Voyager* Canadian Proceeding. At the same time it filed its Chapter 11 cases in the United States, Voyager commenced a foreign proceeding in the Ontario Superior Court of Justice in Canada, seeking recognition of the Chapter 11 cases under Canadian law. The Canadian court ultimately recognized as a "foreign main proceeding."
    - The Voyager debtors and certain of Voyager's current and former directors and officers were named as defendants in a Canadian class-action suit filed in the Ontario Superior Court of Justice.
    - The class action was automatically stayed as to Voyager. The debtors filed an adversary complaint in the US bankruptcy court against the Canadian class action plaintiffs, seeking to also extend the automatic stay to the directors and officers that were named as defendants in the class action.





# BANKRUPTCY 2024: Views from the Bench



## Jurisdictional Issues *(cont.)*

- Cryptocurrencies pose jurisdictional challenges due to their decentralized nature. Given the cross-border nature of these cases, we have seen several bankruptcy cases involving crypto in the United States be accompanied by foreign proceedings, which can raise questions concerning whether the U.S. bankruptcy court has jurisdiction over certain issues and not others. For example:
  - The FTX Bahamas Proceedings. The FTX Trading debtors (US) and the FTX Digital Markets Joint Provisional Liquidators have had numerous disputes between them, including multiple motions to compel production of electronic records and files and motions for relief from the automatic stay.
  - May see more use of Chapter 15 for cases involving crypto where the entity would not otherwise qualify.
    - Satisfaction of Section 109 to file Chapter 15 (split of authority on recognition) – another vehicle to get into the liquidation.



# BANKRUPTCY 2024: Views from the Bench



## Valuing Cryptocurrency Claims

- No consensus on valuation of crypto assets
- In valuing cryptocurrency claims, relevant considerations include:
  - When and how should cryptocurrency be valued.
  - Whether such claims need to be (or should be) converted to USD, so they are all in a common, stable currency.
  - Certain bankruptcy code provisions distinguish currencies from securities from commodities
    - If treated like cash, valued at par
    - If treated like a commodity, could be valued at time of recovery
- Valuation Date – different valuation methodologies, timing
  - Petition Date or another date?
    - In FTX, the plan set the valuation date for digital assets as of the date FTX filed for bankruptcy — Nov. 11, 2022. *FTX Trading Ltd.*, Case No. 22-11068 (Bankr. D. Del.).
  - How do you deal with volatility?
    - Given a recent surge in crypto values, many FTX creditors are claiming they stand to lose a substantial amount of their investments and are arguing for what they believe is a more equitable valuation of their claims.
    - *BlockFi* - Debtors made business judgment to liquidate crypto assets before Petition Date; liquidation removed an ability to argue appreciation value
  - One size fits all?
- Dollarizing Claims.
  - Pros/Cons.
  - Hybrid.
  - One size fits all?



## Valuing Cryptocurrency Claims (cont.)

- **Cred:** the confirmed Chapter 11 plan provides for the dollarization of cryptocurrency claims and permits general unsecured creditors to make a “cryptocurrency election” that would enable them to receive distributions in cryptocurrency.
- **Voyager:** the confirmed Chapter 11 plan provides for dollarization of claim amounts and distributions in kind.
- **Celsius:** the confirmed Chapter plan provides that claims will be dollarized as of the Petition Date.
- **BlockFi:** the confirmed chapter 11 plan is silent as to cryptocurrency valuation (both dollarizing and applicable date).
- **FTX:** the proposed Chapter 11 plan forecasts that the total value of property collected, converted to cash and available for distribution will be between \$14.5 and \$16.3 billion.



## Classification of Cryptocurrency

- Quasi-regulatory role for bankruptcy courts?
  - Application of bankruptcy laws in the absence of regulation
- How should a crypto asset be classified?
  - Security, Commodity, Other.
  - The regulatory classification of a crypto asset or transaction of a crypto asset is often uncertain and regulatory assertions in enforcement may not be dispositive of legal rights.
  - Different assets are treated differently under the Bankruptcy Code.
  - Example: *In re Celsius* – argument over classification of Celsius Earn accounts as securities was based on prior regulatory assertions by the SEC over similar products offered by BlockFi.
  - Has it come up in any of the cases before you?
    - **Voyager:** SEC filed an objection to confirmation of the plan, arguing the proposed asset sale to Binance could violate federal securities laws. Binance subsequently backed out of the purchase agreement, acknowledging a “hostile and uncertain regulatory environment.”



# BANKRUPTCY 2024: Views from the Bench



## Ownership and Recovery of Cryptocurrency

- Whose Property Is it?
  - Are assets deposited into cryptocurrency accounts the property of the customer or property of the Debtor's estate?
  - Tracing of crypto wallets transferred – role of Federal and State Regulators in Crypto bankruptcies?
  - Court orders may compel turnover of crypto assets.
    - Consider role/effectiveness of contempt orders
    - Claims of lost private keys may frustrate recovery/collection efforts
- What is the significance of classifying crypto assets as customer property vs. estate property?
  - If customer property, may potentially be recovered by their owners immediately and not made available for distribution to other creditors.
  - If estate property, subject to automatic stay. Creditors only receive these assets subject to treatment, classification, and other Code provisions.
  - What are some things you look for in making this determination?
    - *Celsius*: held that Celsius' terms of use in the customer agreement was a binding and enforceable contract that required the assets in Celsius' accounts be treated as property of the bankruptcy estate, and that Debtor could use funds from Earn Account as collateral or sell funds and stablecoin of about \$20mm that it owned to finance the operations. Judge Glenn later ruled that Custody Accounts were not property of the estate but crypto belonged to the customer.
    - *Voyager*: Court held that funds in the Debtors' two FBO bank accounts were not property of the bankruptcy estate based on the language in Voyager's Customer Agreement.



# BANKRUPTCY 2024: Views from the Bench



## Withdrawal Clawbacks

- Withdrawal or repayment clawbacks: the recovery of funds or a percentage of funds transferred from a distressed entity to another within a specified timeframe leading up to the bankruptcy filing.
- The purpose of these clawbacks: to prevent certain creditors from receiving preferential treatment at the expense of others during the period leading up to a bankruptcy filing.
  - 90 days for non-insiders and one year for insiders.
- Determining whether digital assets held by a cryptocurrency company in Chapter 11 are property of the debtor's estate or property of the customer also impacts potential preference claims.





## Withdrawal Clawbacks (cont.)

- Is every crypto investor at risk? Typically not. Withdrawal clawbacks will usually have specifications outlined in the bankruptcy plan.
  - In the *FTX* bankruptcy, the plan only looks at withdrawals that exceeded \$250,000 and occurred within ten days of the petition date. *FTX Trading Ltd.*, Case No. 22-11068 (Bankr. D. Del.).
  - The plan in the *Celsius* bankruptcy cast a broader net, using the entire 90-day window and reviewing transactions over \$100,000. *Celsius Network LLC, et al.*, 22-10964 (Bankr. S.D.N.Y.).
- What do you look for in approving clawback thresholds?



## Valuing Preference Claims

- The scope of a debtor's recovery for a preference claim is either the return of the debtor's property that was transferred or the value thereof. *See, e.g., In re DSI Renal Holdings, LLC*, 617 B.R. 496, 503 (Bankr. D. Del. 2020).
- For depreciating assets, courts define value as the fair market value of the subject property at the time of the preferential transfer.
- However, when the property increases in value after the time of transfer, courts may award the value of the property at the time of its recovery by the Debtor. *In re Heller Ehrman LLP*, No. AP 10-3221DM, 2014 WL 323068, at \*8 (Bankr. N.D. Cal. Jan. 28, 2014) ("Certainly, courts can award the value of property measured at the time of recovery where the property naturally increases in value.").
- Given the volatile nature of cryptocurrency, this could result in a discrepancy between the value of the preference claim and the value of the resulting claim against the estate, as valued on the Petition Date.



## BANKRUPTCY 2024: Views from the Bench



### Valuing Preference Claims *(cont.)*

- Hypothetical: Crypto investor loans 500 bitcoin to Company X in exchange for interest payments. Within the 90 days prior to the Petition Date, Company X pays back the 500 BTC plus interest for a total of 516 BTC. The estate seeks to recover from the investor the greater of the following at the time of actual recovery: (i) 516 BTC, and (ii) cash in an amount equal to the greatest value of 516 BTC at any time since it was repaid to the investor, plus interest.
  - Price fluctuations could result in windfalls.
  - Value equal to the amount transferred as of the time of transfer, time of recovery, or some other date?



## BANKRUPTCY 2024: Views from the Bench



### Creditor Anonymity – To Protect or Not to Protect

- Pursuant to Section 107(a) of the Bankruptcy Code, all documents filed in a bankruptcy case are public records and open to inspection. Section 107(b) authorizes a bankruptcy court to protect a debtor's trade secrets or confidential research, development, or information. Section 107(c) authorizes, for cause, a bankruptcy court to protect an individual's identifying information to the extent disclosure of such information would lead to identity theft or unlawful harm.
- As seen in several crypto cases, anonymity is a fundamental tenet of cryptocurrency transactions.
- Bankruptcy courts have been given the challenging task of reconciling these conflicting positions, and there's not always agreement on the issue:
  - *In re Cred, Inc.*, No. 20-12836 (JTD) (Bankr. D. Del. Dec. 21, 2020) [Dkt. No. 264] (order granting motion to seal individual customer names).
  - *In re Celsius Network LLC*, No. 22-10964 (MG) (Bankr. S.D.N.Y. Sept. 28, 2022) [Dkt. No. 910] (order denying motion to seal individual customer names, finding that names did not constitute commercial or personally identifiable information under the Bankruptcy Code and did not qualify for an exception to the policy of disclosure in bankruptcy cases; but granted motion to seal as to customer addresses, telephone numbers and email addresses should be kept confidential).
  - *In re Voyager Holdings, Inc.*, No. 22-10943 (MEW) (Bankr. S.D.N.Y. July 08, 2022) [Dkt. No. 54] (order granting motion to seal names of any natural personal subject to UK GDPR and EU GDPR regulations).
  - *In re BlockFi, Inc.*, No. 22-19361 (MBK) (Bankr. D.N.J. Nov. 28, 2022) [Dkt. No. 4] (motion to seal individual customer names); [Dkt. No. 1757, Oct. 19, 2023] (order granting in part motion as to all individual creditors, clients, equity holders, and current and former employees; motion denied as to all corporations and other business entities).
  - *In re Genesis Global Holdco, LLC*, No. 23-10063 (SHL) (Bankr. S.D.N.Y. Mar. 17, 2023) [Dkt. No. 137] (motion to seal individual customer names filed); [Dkt. No. 581] (order granting motion in all respects except as to business entities whose information is sought to be redacted under Section 107(c));
  - *In re FTX Trading*, No. 22-11068 (JTD) (Bankr. D. Del. June 15, 2023) [Dkt. No. 1643] (order granting in part and denying in part motion to seal individual customer names, addresses and e-mail addresses).



### *Creditor Anonymity – To Protect or Not to Protect (cont.)*

- So how do you balance public disclosure of customer information and the importance of confidentiality?
  - For example, after the disclosure of individual customer names in *Celsius*, there were several phishing attempts.
    - One attempt involved impersonating an associate from Kirkland & Ellis (using a Hotmail.com address) and emailing a modified “court order” to Celsius customers that required customers to submit their cryptocurrency wallet address and contact information and pay a filing fee.
      - *Notices of Phishing Attempts, In re Celsius Network LLC, et al.*, No. 22-10964 (MG) (Bankr. S.D.N.Y.) [Docket Nos. 1527, 1681, 1904, 1992, 2082].
    - Judge Glenn ordered an investigation into the phishing attempt, referring the matter to the Federal Marshal’s Office, which coordinated with the FBI, given that the incident involved the purported modification of a court order.



## *Insights / Lessons Learned*



## ***Final Comments / Observations***



## ***Questions?***



**-The End-**



# Faculty

**Leslie C. Heilman** is a partner in the Litigation Department and Bankruptcy, Reorganization and Capital Recovery Group of Ballard Spahr LLP in Wilmington, Del. She concentrates her practice on commercial restructuring and bankruptcy, specializing in representing commercial landlords of shopping centers and other commercial properties, among other creditors, in all aspects of chapter 11 bankruptcy cases and nonbankruptcy workouts across the country, including in such high-profile retail cases as *24 Hour Fitness*, *Chuck E. Cheese*, *Ascena*, *Lord & Taylor*, *J.C. Penney*, *Hertz*, *Pier 1 Imports*, *Forever 21*, *Sears*, *Toys R Us*, *Gymboree*, *Payless Shoes*, *Linens 'N Things*, *RadioShack* and *Sports Authority*. She is also experienced in bankruptcy-related litigation, including claims administration, avoidance actions and other adversary proceedings. Ms. Heilman is a long-time member of the International Council of Shopping Centers (ICSC) and sits on the board of the Delaware Network of the International Women's Insolvency & Restructuring Confederation (IWIRC). She is a frequent writer and speaker on bankruptcy and landlord issues. Ms. Heilman received her B.A. *magna cum laude* in 1994 from Cedar Crest College and her J.D. *magna cum laude* in 2004 from Widener University School of Law, where she served as a research editor of the *Delaware Journal of Corporate Law*, received the Honorable Helen S. Balick Award for excellence in the study of bankruptcy or creditors' rights, received the Donald E. Pease Best Student Article Award for the *Delaware Journal of Corporate Law*, and was a nominee for the American College of Bankruptcy's Distinguished Bankruptcy Law Student Award.

**Hon. Michael B. Kaplan** is Chief U.S. Bankruptcy Judge for the District of New Jersey in Trenton, initially appointed on Oct. 3, 2006, and named Chief Judge on May 1, 2020. He has presided over numerous notable cases, including *Revel AC Inc.*, *Crumbs Bakeshop Inc.*, *Sur La Table Inc.*, *LTL Management LLC*, *Blockfi Inc.*, *Rite Aid Inc.* and the *Invitae Corp.* Prior to taking the bench, Judge Kaplan served as a standing chapter 13 bankruptcy trustee, as well as a member of the chapter 7 panel of bankruptcy trustees, where he received case appointments as both a chapter 11 and chapter 12 trustee. His private practice included the representation of institutional lenders consumer debtors (under both chapters 7 and 13), business debtors and individuals undergoing reorganization pursuant to chapter 11. Judge Kaplan is a Fellow of the American College of Bankruptcy and has been appointed by the director of the Administrative Office of the U.S. Courts (AOUSC) to a term as the Third Circuit representative to the Bankruptcy Judges Advisory Group, in addition to appointments as the bankruptcy judge representative for the Risk and Finance Management Advisory Council, Human Resources Advisory Council and Budget & Finance Advisory Council to the AOUSC. As a member of the National Conference of Bankruptcy Judges, Judge Kaplan has served as treasurer and executive board member. He serves currently as a member of the Judiciary Advisory Council for the Rabiej Litigation Law Center. Over the past 30 years, he has spoken to numerous bar associations and business organizations, and since 2009 he has taught as an adjunct professor at Rutgers University School of Law. Judge Kaplan has authored several articles relating to bankruptcy issues and is a co-author of West's *Consumer Bankruptcy Manual* and *Consumer Bankruptcy Handbook*. He received the NCBJ President's Award for Excellence, the Conrad B. Duberstein Memorial Award given by the New York Institute of Credit, the Judicial Service Award from the Association of Insolvency and Restructuring Advisors, the National Association of Chapter 13 Trustees' 2006 Distinguished Service Award and New Jersey State Bar Association's 1999 Legislative Recognition Award. Prior to taking

the bench, Judge Kaplan served as mayor and councilman for the Borough of Norwood, N.J., and as a member of the Norwood Planning Board. He received his A.B. from Georgetown University in 1984 and his J.D. from Fordham University School of Law in 1987.

**Jackson D. Toof** is a partner in ArentFox Schiff LLP's Complex Litigation and Bankruptcy and Financial Restructuring Group in the firm's Washington, D.C., office, where he focuses on all aspects of bankruptcy and financial services litigation. He has represented both plaintiffs and defendants in a wide range of commercial matters. Rated AV-Preeminent by Martindale-Hubbell, he has been involved in all aspects of bankruptcy and financial services litigation, including pursuing and defending actions on behalf of various creditor constituencies, complex financial restructurings and valuation disputes, and he has handled all aspects of litigation-enforcing indentures and the rights and remedies of indenture trustees. He also has been involved in ratemaking determinations for digital music licenses before the Copyright Royalty Board, and he has extensive experience defending and pursuing actions in numerous areas, including a variety of business tort, contract and real estate actions, shareholder litigation, noncompete and nonsolicitation litigation, probate litigation, False Claims Act/*qui tam* and health care matters, as well as criminal and white-collar criminal defense. Mr. Toof has first- and second-chaired jury, bench and administrative trials in a variety of civil and criminal matters, and his litigation practice involves all phases of litigation from strategic business counseling and problem-solving through trial and appellate review. He serves on the firm's Professional Conduct Committee and co-chairs the firm's Litigation Support Committee, and was the chair of the firm's Associates Committee from 2009–12. Mr. Toof began his career in 2003 as a litigator while serving on active duty with the U.S. Navy's Judge Advocate General's (JAG) Corps. He continued his service as a Lieutenant Commander in the U.S. Navy reserve until 2012. Mr. Toof has served as an adjunct professor at American University Washington College of Law teaching criminal procedure. He is a member of ABI and the Virginia, Fairfax County, Northern Virginia Bankruptcy, District of Columbia and American Bar Associations. Mr. Toof received his B.A. *summa cum laude* and Phi Beta Kappa in 1999 from the University of New Hampshire and his J.D. in 2002 from American University's Washington College of Law, and he graduated from the Naval Justice School in 2003.

**Hon. Michael E. Wiles** is a U.S. Bankruptcy Judge for the Southern District of New York in New York, sworn in on March 3, 2015. Previously, he was a partner with Debevoise & Plimpton LLP, where he focused on general commercial litigation and bankruptcy. Judge Wiles has presided over many large bankruptcy cases, including *Westinghouse*, *Pacific Drilling*, *Garrett Motion*, *McClatchy*, *Aegean Marine Petroleum*, *Relativity Media*, *SAS AB* and *Voyager Digital*. He also co-authored the *Collier Business Workout Guide* (Mathew Bender 2007). Judge Wiles has appeared on panels organized by ABI, the Association of the Bar of the City of New York, the American College of Investment Council, the Federal Judicial Center and many other organizations to discuss current bankruptcy issues, and he is a judicial delegate to the Committee on Bankruptcy and Reorganization of the Association of the Bar of the City of New York. His publications and written CLE materials include "May Parties Consent to Bankruptcy Court Adjudication of 'Stern Claims'" (September 2014) (presented at a continuing legal education session at the Association of the Bar of the City of New York); "Ponzi Schemes and Avoidance Actions: 3 Issues," *Law360* (March 7, 2011); "The Good Faith Defense to Fraudulent Transfer Claims" (December 2010) (presented at a continuing legal education session at the Association of the Bar of the City of New York); and "At the Crossroads: The Intersection of the Federal Securities Laws and the Bankruptcy Code," *The Business Lawyer* (November 2007). Judge

Wiles received his A.B. from Georgetown University in 1975 and his J.D. from Yale Law School in 1978.