

## EMERGING DISCOVERY ISSUES IN BLOCKCHAIN LITIGATION

BY STUART D. LEVI, ALEXANDER C. DRYLEWSKI, GIYOUNG SONG AND THANIA CHARMANI, SKADDEN

The increased use of blockchain technology and, in particular, cryptocurrencies, has given rise to a variety of disputes, including government enforcement actions and private litigation. Substantive issues regarding the offer, sale and trading of digital tokens are coming before the courts, prompting novel discovery questions in these cases.

### Blockchain Litigation

Blockchain technology is a distributed ledger system that allows for the creation of secure and presumably immutable records. Certain blockchains are public and permissionless, allowing anyone to join, while others are private and only accessible by permissioned users (e.g., banks). To date, most applications of the technology have been to record transactions, including those involving digital assets such as cryptocurrencies.

Depending on the circumstances, some digital assets may be subject to regulation by the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the U.S. Treasury Department, federal banking regulators, and/or state and foreign regulators.

In an effort to regulate certain digital assets and related transactions, the SEC and CFTC each have taken a number of enforcement actions, including filing complaints and cease-and-desist proceedings against promoters of initial coin offerings, fund managers investing in digital assets, and decentralized exchanges in which coins and tokens can be traded.

Private cryptocurrency litigation has mostly involved class action complaints filed by plaintiffs purporting to represent investors who bought a particular cryptocurrency, alleging securities violations and various state law claims.

### Potential Discovery Issues in Blockchain Cases

The increase in litigation involving blockchain technology may give rise to issues of first impression in the discovery context as courts apply existing principles to the unique characteristics of blockchain technology, including the discovery of information that is public and transparent, the decentralized and immutable nature of blockchain transactions and the use of “smart contracts” to execute transactions.

**Transparency:** One novel aspect of blockchain technology is that transaction records are transparent, and thus viewable to all, and decentralized, meaning that, for public blockchains, there is no central governing or managerial body. Since no party is in “possession, custody or control” of transaction records, a party receiving a discovery request for such information might have legitimate grounds for objecting.

However, this is not always the case. Many blockchain projects involve data stored on a blockchain as well as “off-chain.” This could yield discovery battles concerning where the line is drawn and what information a party actually controls.

In addition, the parties to blockchain transactions are anonymous or



“pseudonymous,” such that the identities of transacting parties generally are not publicly available. Rather, the public can only see wallet addresses engaged in the transaction, while third parties may hold information linking wallets to identity. As a result, plaintiffs and enforcement agencies have sought discovery of ownership information.

For example, in *Paige v. Bitconnect Int’l PLC* plaintiffs accusing a cryptocurrency exchange of operating a Ponzi scheme were permitted to obtain disclosure of all cryptocurrency wallet addresses, trading account addresses and the identity of account holders. Similarly, in *United States v. Coinbase, Inc.*, the court ordered a digital exchange to provide the IRS with information regarding account holders’ identities to the extent the account holder had a taxable gain.

**Immutability:** When engaging in discovery, parties generally are mindful of the ultimate admissibility of relevant evidence, and another issue of first impression may be the admissibility and authenticity of blockchain records at

