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Whose Crypto Is It, Anyway?

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On July 18, the maxim "not your keys, not your coin" took on a whole new meaning for customers of the bankrupt cryptocurrency exchange Celsius Network LLC, which had filed Chapter 11 in the Bankruptcy Court for the Southern District of New York. At the first day hearing, attorneys explained the debtor's view that cryptocurrency deposited on the exchange belonged to Celsius, not the depositors. They cited the terms of use for Celsius' "Earn Rewards" program (Earn Program) where retail customers could place cryptocurrency into interest-bearing accounts, which Celsius then pooled to fund its lending, trading, and other operations. Under Celsius' terms of use, "all rights and title" to coins in the Earn Program are transferred to Celsius, and Celsius is free to use, sell, pledge, and rehypothecate those coins.

In other words, according to Celsius' attorneys, coins in the Earn Program are property of the bankruptcy estate,[1] and depositors who thought they were still the owners of those coins are merely general unsecured creditors. The extent to which this came as a shock to depositors is reflected in the dozens of outraged and incredulous letters that have been filed on the docket in Celsius' bankruptcy case.

Coins in the Custody Program

Notably, a very small subset of coins on the Celsius platform in the "Custody" service (about 4% of the total coins on the exchange, worth about $180 million at filing) may be subject to different treatment in the bankruptcy case. A little history is needed for context: As explained in detail here, in 2021, Celsius became the subject of several cease-and-desist actions by state regulators, each of which asserted that Celsius was illegally offering unregistered securities through its Earn Program. After initial resistance, in April 2022, Celsius unveiled the new Custody Program where depositors could store digital assets but would not earn rewards or financial compensation. New transfers made by nonaccredited investors in the United States on or after April 15 would automatically go into Custody. (Coins deposited by nonaccredited U.S. investors prior to April 15 were grandfathered in to the Earn Program and could remain there until moved by the depositors.)

The terms of use for the Custody service provide that title to coins deposited there remain with the customer, and do *not* give Celsius the right to use, sell, pledge, and rehypothecate those coins. The terms of use are not perfect (or perfectly clear) and do not necessarily spell out a slam dunk case for Custody account holders. For example, they provide Celsius with a right to set off mutual debts against coins in Custody, which is more consistent with a creditor relationship, and warns that Custody depositors may be treated as unsecured creditors in a bankruptcy. But the language is, at a minimum, more depositor-favorable than the terms of use for the Earn Program.

The status of coins in the Custody account is likely to come to a head in fairly short order, as hundreds of Custody depositors have organized themselves into an ad hoc committee and retained counsel to pursue this issue. If they are successful in obtaining a judgment that their coins are not property of the bankruptcy estate, they will be well-positioned to demand immediate return of those coins.[2]

Coins in the Earn Program

So where does this leave depositors in the Earn Program — particularly nonaccredited investors who arguably should never have had access to unregistered securities in the first place? Should they resign themselves to treatment as general unsecured creditors who must wait months or years for a distribution that is likely to be in fiat currency and (even worse) based on the depressed value of their crypto assets on the bankruptcy petition date?

Not necessarily.

For one thing, the Earn Program's terms of use are somewhat ambiguous: While they speak in terms of a transfer of title and ownership to Celsius, they also expressly state that depositors are merely entering into "open-ended loans" of their digital assets to Celsius. A loan generally does not effectuate a change of ownership. If I make an open-ended loan of my car to my teenager, she may use the car to do any number of things, but she does not thereby acquire title to it. Or, in a more closely analogous situation, I might enter into a hypothecation agreement for a margin account that allows my broker to lend out my shares to short sellers, but that doesn't make him the owner of the shares. Earn Program depositors may be able to make similar arguments with respect to the status of their coins in Celsius' hands.

In the same vein, New York law looks to the substance of a relationship; the words used to characterize it are not dispositive. Celsius expressly disavowed any fiduciary obligations to depositors in the terms of use, which would tend to preclude a finding that it held depositors' coins as an agent or custodian. However, "where a writing erects the essential structure of an agency relationship, even an explicit disclaimer cannot undo it."[3] As New York's highest court has recognized, the existence of fiduciary obligations "is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation."[4] In other words, just because Celsius claimed it wasn't acting as an agent or custodian for Earn Program depositors doesn't let it off the hook. A factual record must be developed to determine the true relationship between Celsius and the Earn Program depositors.

Alternatively, Earn Program depositors could seek to rescind their transfers of coins to Celsius, based on either securities law considerations applicable to nonaccredited investors or on a theory of fraudulent inducement. (A cursory search of YouTube reveals numerous examples of statements made by Celsius executives that appear to be inconsistent with Celsius' terms of use.)

Earn Program depositors could also argue that the terms of use were orally modified by public pronouncements by Celsius executives, indicating that they would continue to own and control their coins. The terms of use, somewhat surprisingly, contain no integration clause or prohibition of oral modification; thus, under New York law, a colorable argument may be made that the terms were orally modified to keep title to the coins with the depositors.[5]

Conclusion

While Custody account holders are likely in a stronger position to exclude their coins from property of the estate, Earn Program depositors may also have viable arguments to retain ownership of their crypto assets, although further factual development and legal analysis would be required.

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[1] The filing of a bankruptcy petition creates an "estate," consisting of all legal or equitable interests of the debtor in property as of the commencement of the case. *See* 11 U.S.C. § 541.

[2] Of course, many of them will likely face preference lawsuits down the road. Under 11 U.S.C. § 547, the debtor-in-possession can claw back payments made to creditors on account of antecedent debt within 90 days before the bankruptcy filing. If coins in the Earn Program are deemed to be property of the estate, or loans from depositors to Celsius, then the transfer of coins to Custody would be payment of debts owed to creditors. It's no coincidence that Celsius filed for bankruptcy on the 89th day after the Custody accounts were created — the company and its very competent bankruptcy counsel were making sure that any coins transferred from the Earn Program to Custody would fall within the preference period.

[3] *Veleron Holding, B.V. v. Stanley*, 117 F. Supp. 3d 404, 452 (S.D.N.Y. 2015).

[4] *EBC I, Inc. v. Goldman, Sachs & Co.,* 832 N.E.2d 26 (N.Y.2005).

[5] *See, e.g., Merrill Lynch Realty Assocs., Inc. v. Burr*, 140 A.D.2d 589, 593, 528 N.Y.S.2d 857, 860 (1988) (explaining that New York's General Obligations law does not "bar enforcement of a subsequent oral agreement to modify or cancel a contract where . . . the contract does not contain an express prohibition against oral modification").

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