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EMERGING ISSUES IN DIGITAL ASSET LITIGATION: DISCOVERY AND BEYOND

With the ongoing growth in the use of digital assets, litigators will increasingly encounter disputes in which digital assets play a meaningful role. In this article, the authors discuss prevalent issues that have emerged during litigation involving digital assets and the approaches that litigators have taken to address them. The authors focus on the service of process and jurisdictional issues, discovery tools, and attachment laws, providing a roadmap for applying existing principles and processes to litigation involving digital assets.

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As the development and use of digital assets – an umbrella term that includes a broad and expanding swath of emerging technologies, such as blockchain-based cryptocurrencies, other more centralized digital currencies, protocol- or application-specific tokens, non-fungible tokens (“NFTs”), and others – has accelerated in recent years, so too have the number and variety of legal disputes involving these technologies. While these disputes often involve litigation *about* digital assets, with increasing frequency, they present well-worn causes of action in which digital assets serve an ancillary role as crucial evidence or as the underlying assets that will or could be used to satisfy an adverse judgment. Accordingly, the novel questions presented by litigation and discovery involving these technologies have taken on salience beyond the nascent “crypto bar,” as a broader universe of litigants and courts alike determine how to apply existing principles and processes to litigation around digital assets.

Accordingly, this article explores a select group of the most common and pressing issues that are likely to arise in the course of litigation in which digital assets play a central or supporting role, while providing a helpful road map to navigating those issues for litigators regardless of the frequency with which they encounter crypto-specific disputes. First, it begins by addressing the increasingly prevalent problem of identifying and bringing parties into litigation by describing the processes that litigants in digital asset litigation may use to navigate service-of-process and jurisdictional issues, as a counterparty’s physical location is frequently, in this space, difficult to discern. Second, it provides an overview of three tools that can be used to facilitate discovery related to digital asset litigation: early or expedited discovery, third-party discovery, and the use of consultants and experts in the relevant technology. Lastly, the article covers the application of attachment laws to digital asset litigation, a tool that can help prevent dissipation of the assets in question during the course of a pending action.

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