

IS BITCOIN MONEY?

By **Thomas J. McNamara**

Some investors think that Bitcoin and other digital currencies which employ the block chain technology are transformational and the way of the future. Others believe that Bitcoin represents a speculative asset bubble which is not being used for the purpose for which it was invented, a medium of exchange. While the debate about the nature and future of Bitcoin rages in the marketplace, sparked by recent volatility in its price, courts also cannot agree on the nature of Bitcoin and whether, legally speaking, it constitutes “money.”

Florida Decision Holding Bitcoin Is Not Money

In a Florida criminal case¹ the defendant advertised the sale of Bitcoin on an internet website and met with an undercover officer who told him that he wanted to buy Bitcoin for the purpose of paying for stolen credit card numbers. In dismissing an information charging the defendant with money laundering and being an unlicensed money transmitter, a Florida trial court stated: “This Court is not an expert in economics, however, it is very clear, even to someone with limited knowledge in the area, that Bitcoin has a long way to go before it is the equivalent of money.”² The court noted that Bitcoin was not commonly used as a means of exchange, was not accepted by most merchants, fluctuated wildly in price, and is not backed by anything of intrinsic value. With regard to the money-laundering count, the court indicated that it was “unwilling to punish a man for selling his property to another, when his actions fall under a statute that is so vaguely written that even legal professionals have difficulty finding a singular meaning.”³

Federal Courts in New York Generally Hold That Bitcoin Is Money

A number of federal courts have considered the nature of Bitcoin, often in connection with criminal indictments for money laundering. In *United States v. Ulbricht*,⁴ the founder of the Silk Road website argued that he could not be charged with money laundering because all of the transactions involved Bitcoin. Judge Forrest of the Southern District of New York disagreed: “Bitcoins carry value--that is their purpose and function--and act as a medium of exchange. Bitcoins may be exchanged for legal tender, be it U.S. dollars, Euros, or some other currency.”⁵ The court found that Bitcoin fit within the meaning of a financial transaction involving the movement of funds for purposes of the money laundering statute, 18 USC §1956, and upheld the indictment.

In *United States v. Murgio*,⁶ the defendant, who operated an unlicensed Bitcoin exchange, was charged with the operation of an unlicensed money transmitting business in violation of 18 U.S.C. §1960. The statute in question did not define the term “money,” but stated that it included “funds.” The court explained that money was “something generally accepted as a medium of exchange, a measure of value, or a means of payment.”⁷ The court added that funds are generally thought of as money, or often money for a specific purpose. Judge Rakoff came to a similar conclusion when interpreting the same statute, finding that “Bitcoin can be easily purchased in exchange for ordinary currency, acts as a denominator of value, and is used to conduct financial transactions.”⁸

On the other hand, in *United States v. Petix*, Magistrate Scott of the Western District of New York held that Bitcoin did not constitute funds or money within the meaning of 18 U.S.C. §1960, which makes it unlawful

to operate a money transmitting business without a license. Interestingly, Magistrate Scott emphasized the fact that Bitcoin was not a fiat currency issued by a sovereign power. The court explained “that money is just not any financial instrument or medium of exchange that people can devise on their own. ‘Money,’ in its common use, is some kind of financial instrument or medium of exchange that is assessed value, made uniform, regulated and protected by sovereign power.”⁹

The court concluded that Bitcoin is not “money” as people ordinarily understood that term, and that Bitcoins “are simply computer files generated through a ledger system that operates on block chain technology,” and does not issue from or enjoy the protection of any sovereign state.¹⁰ The court reasoned that, like marbles, Beanie Babies, or Pokémon trading cards, Bitcoins have value only to the extent that people at any time privately choose to attribute value to them.¹¹ Accordingly, Magistrate Scott recommended dismissal of the count of the indictment alleging unlawful operation of a money transmitting business in violation of 18 U.S.C. §1960, but the Magistrate's recommendation became moot when a plea bargain was subsequently entered into between the government and the defendant.

New York State Law

In a case of first impression, Supreme Court, New York County, considered a challenge by an entrepreneur who wanted to install Bitcoin processing services in bodegas within New York State. Petitioner claimed that regulations promulgated by the New York Department of Financial Services requiring licenses for businesses engaged in virtual currency business activities were beyond the jurisdiction of the department because Bitcoin was neither money nor a financial product or service.¹² The court dismissed the petition, but not on the merits, finding that petitioner had not completed an application to be licensed to transmit virtual currency pursuant to 23 N.Y.C.R.R. §200.1, *et seq.*, had not exhausted administrative remedies, and basically lacked standing to challenge the regulations.

Conclusion

Is Bitcoin money? The unsatisfactory answer is that it depends, on the court answering the question, and the purpose for which the question is being asked. Just like there is a lack of consensus concerning the value of Bitcoin in the marketplace, such lack of consensus is mirrored in court decisions as well. ■

¹ *Florida v. Espinoza*, Case No.: F14-2923 (Fla. Cir. Ct. July 22, 2016).

² *Id.* at 6.

³ *Id.* at 7.

⁴ 31 F.Supp3d 540 (S.D.N.Y. 2014).

⁵ *Id.* at 548.

⁶ 209 F.Supp.3d 698 (S.D.N.Y. 2016).

⁷ *Id.* at 707.

⁸ *United States v. Faiella*, 39 F.Supp. 3d 544, 545 (S.D.N.Y. 2014).

⁹ *United States v. Petix*, 2016 WL 7017919 (W.D.N.Y. 2016), at *4.

¹⁰ *Id.* at *5.

¹¹ *Id.*

¹² *Chino v. New York Department of Financial Services*, 58 Misc.3d 1203(A), 2017WL6568010 (Sup. Ct., N.Y. Cty. 2017).

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