TROUBLE IN PARADISE: FLORIDA COURT RULES THAT SELLING BITCOIN IS MONEY TRANSMISSION

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U.S. FinTech Alert

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The growing popularity of virtual currency over the last several years has raised a host of legislative and regulatory issues. A key question is whether and how a state's money transmitter law applies to activities involving virtual currency. Many states have answered this – albeit in a non-uniform way – through legislation or regulation, including regulatory guidance documents. For instance, Georgia and Wyoming have amended their money transmitter statutes to include or exclude virtual currencies explicitly. In other states, such as Texas and Tennessee, the state's primary financial regulator has issued formal guidance. In New York, the Department of Financial Services issued an entirely separate regulation for virtual currencies. Still, in others, neither the legislature nor the relevant regulator has provided any insight into how the state's money transmitter law may apply.

In most states, the judicial branch has not yet weighed in on the question. But Florida is an exception. On January 30, 2019, in *State v. Espinoza*, Florida's Third District Court of Appeal interpreted the state's money transmission law broadly and held that selling bitcoin directly to another person is covered under the law. [1] The decision will have broad implications for the virtual currency industry in Florida.

BACKGROUND: MIAMI BEACH POLICE DEPARTMENT AND MICHELL ESPINOZA

In December 2013, the Miami Beach Police Department (“MBPD”) perused an Internet website that provided a directory of buyers and sellers of bitcoin. In an undercover capacity, an MBPD agent contacted one of the users, Michell Espinoza. Shortly thereafter, the agent arranged to meet and purchase bitcoin from Espinoza in exchange for cash. The MBPD agent who purchased the bitcoin implied that he would use the bitcoin to fund illicit activities. One month later, the MBPD made a second purchase from Espinoza, telling him that the bitcoin would be used to purchase stolen credit card numbers. After a third and fourth transaction, the MBPD arrested Espinoza. The State of Florida charged him with two counts of money laundering and one count of engaging in the business of a money transmitter without a license. Espinoza moved to dismiss the charges, arguing, among other things, that Florida's money transmitter law does not apply to bitcoin. The trial court agreed and dismissed all counts against Espinoza.

THE THIRD DISTRICT COURT'S OPINION: SELLING BITCOIN CONSTITUTES MONEY TRANSMISSION

Florida appealed, and the appellate court reversed the trial court's ruling. The court started its analysis noting that the state's money transmitter law requires anyone engaging in a “money services business” to be licensed. [2] A “money services business” is defined as “any person . . . who acts as a payment instrument seller, . . . or money

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transmitter." [3] The court held that bitcoin is regulated by Florida's money transmitter law, and, as a result, Espinoza was both "acting as a payment instrument seller" and "engaging in the business of a money transmitter."

Under the Florida statute, a "payment instrument seller" is an entity that sells a "payment instrument." [4] The phrase "payment instrument" is defined to include a variety of instruments, including "payment of money, or *monetary value* whether or not negotiable." [5] The phrase "monetary value," in turn, is defined as "a medium of exchange, whether or not redeemable in currency." [6] The court interpreted these definitions – which it described as "plain and unambiguous" – to conclude bitcoin falls under the definition of "payment instrument." To reach that conclusion, it reasoned that bitcoin, which is redeemable for currency, is a medium of exchange, which falls under the definition of "monetary value." Therefore, it falls under the definition of "payment instrument." [7] To purportedly bolster its point, the court noted that several businesses in the Miami area accepted bitcoin as a form of payment. It also pointed to a final order from the Florida Office of Financial Regulation ("OFR") in which OFR granted Coinbase a money transmitter license. The court noted that Coinbase provides a service "where a Coinbase user sends fiat currency to another Coinbase user to buy bitcoins." "Like the Coinbase user," the court reasoned, the MBPD detective "paid cash to Espinoza to buy bitcoins."

The court also concluded Espinoza was acting as a money transmitter. Under the Florida statute, a money transmitter is an entity that "receives currency, monetary value, or payment instruments for the purpose of transmitting the same by any means…." [8] Espinoza argued he fell outside this definition because he did not receive payment for the bitcoin for the purpose of transmitting the same *to a third party*. The court disagreed. It held that the law does not require the presence of a third party because the definition of money transmitter does not mention a third party, either expressly or implicitly. [9] It also disagreed with the trial court and Espinoza's "bilateral limitation," which would require Espinoza to have both received and transmitted the same form of currency, monetary value, or payment instrument. According to the court, Espinoza fell within the ambit of the law because he received *fiat* for the purpose of transmitting *bitcoin*. It explained that the phrase "the same" in the definition of "money transmission" modifies the list of payment methods, and the use of "or" in that list of payment methods – "currency, monetary value, *or* payment instrument" – means that "any of the three qualifies interchangeably on either side of the transaction."

As additional support for its position, the court distinguished a final order entered into by OFR: *In re Petition for Declaratory Statement Moon, Inc.* According to the court's description, Moon sought to establish a bitcoin kiosk program under which a Moon customer would pay fiat to a licensed money services business in exchange for a PIN, and the customer would then enter the PIN into a Moon kiosk, which would initiate a transfer of bitcoins to the user from a Moon bitcoin address. Once the PIN was redeemed, the licensed entity would pay Moon. OFR determined Moon did not a license. The court distinguished the Moon order because "Moon merely facilitated the transfer of bitcoins through the use of a licensed money services business," whereas "[h]ere, no licensed money services business was utilized in the exchange of U.S. dollars for bitcoins that occurred between Espinoza and" the MBPD agent.

COUNTERPOINTS TO THE COURT'S OPINION

Several state legislatures or regulators have amended or interpreted their money transmitter laws to apply to virtual currency, but those actions do not take the form of a judicial opinion. Here, the Third District Court provided its specific reasoning for reaching its conclusions. It remains to be seen whether Espinoza will seek review from

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the Florida Supreme Court, but there are at least a few points in the court's opinion that warrant further review and analysis.

First, Espinoza did not receive money for the purpose of transmitting it. He received it in exchange for selling bitcoin; he received it for the purpose of possessing it. The court rejected Espinoza's attempt to impose a third-party requirement, but the most natural reading of the phrase “transmitting” would require Espinoza to send onward whatever value he received. Merriam-Webster defines “transmit” as “to send or convey from one person or place to another.” By using the words “receive” and “transmit,” the Florida law focuses on the act of sending money to another person and excludes the act of selling money or monetary value. If simply selling property were sufficient to trigger the money transmitter law, the statute would likely sweep far more broadly than intended. Here, Espinoza was acting as a merchant selling goods. This would not constitute money transmission under any reasonable reading of the law. Indeed, some states (and FinCEN) have recognized that a party selling its own inventory of virtual currency in a two-party transaction is not a money transmitter.

Second, the court's conclusion is further undercut by considering the Moon proceeding the court discusses. The opinion notes “the PIN provided by the licensed money services business to Moon's customers provided a mechanism by which the exchange of U.S. dollars for bitcoins could be identifiable.” The PIN could arguably be classified as a payment instrument because it is an “other instrument” or “monetary value.” If transmission to a third party is not required, as the court holds, then Moon should have needed a license when it *received* the PIN and then *transmitted* bitcoins back to the user that was redeeming the PIN. But that wasn't the conclusion OFR reached.

Third, the court's interpretation of how OFR would treat Espinoza's actions is questionable. In 2014, OFR issued a consumer alert stating that “[v]irtual currency and the organizations using them are not regulated by the OFR.” [10] In addition, in January 2018, OFR released another consumer alert regarding cryptocurrency, stating that “[cryptocurrencies] are subject to little or no regulation,” which further indicates OFR does not interpret the money transmission law to cover cryptocurrencies. [11] The court does not acknowledge these statements. Although the court focuses on an OFR order regarding Coinbase, that order granted Coinbase a license and listed a variety of activities in which Coinbase was engaged or planned to engage. The order does not specify what specific activity was licensable, but it is likely that a license was granted because of the receipt and transmission of *fiat* currency.

CONCLUSION

If Espinoza appeals, the case could go to the Florida Supreme Court, where the virtual currency industry will receive a more definitive answer. In the meantime, virtual currency businesses should be aware that the Florida Attorney General's Office interprets the state's money transmitter act to regulate bilateral sales of virtual currency for fiat currency and is willing to prosecute at least certain cases of unauthorized sales. As of now, Florida's Third District Court agrees. How the Espinoza case concludes and whether and how the Florida legislature responds will be important to the virtual currency industry.

NOTES

[1] -- So. 3d --, 2019 WL 361893 (Fla. 3d DCA 2019).

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[2] FLA. STAT. § 560.125.

[3] *Id.* § 560.103(22).

[4] *Id.* § 560.103(30).

[5] *Id.* § 560.103(29) (emphasis added).

[6] *Id.* § 560.103(21).

[7] The court principally discusses whether bitcoin falls under Florida's money transmitter law. In a few instances, it also references “virtual currency” generally, but it is not clear how broadly it was intending to apply its holding.

[8] *Id.* § 560.103(23).

[9] As a counterpoint, the court noted that the Financial Crime Enforcement Network's (“FinCEN”) definition of money transmitter explicitly includes a third party requirement because it defines a money transmitter as someone that accepts value from one person and transmits value to “another location or person by any means….” 31 C.F.R. § 1010.100(ff)(5)(i)(A).

[10] Consumer Alert: Update on Virtual Currency, Office of Financial Regulation, Sept. 17, 2014.

[11] Consumer Alert: Cryptocurrency, Office of Financial Regulation, Jan. 17, 2018.

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