

INSIGHTS

Crypto Assets in the Voyager Bankruptcy: Can Customers Recover?

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By: [Mark E. Dendinger](#) and [Jeonghoon Ha](#)

The crypto winter has overcast the summer for many Voyager customers. Upon the commencement of Voyager's chapter 11 filing in July, customer accounts were frozen. Unable to trade their own crypto assets, some frustrated customers rushed to consult with legal counsel. Others began studying bankruptcy law in the hopes of finding a legal solution. It was only late last week, on August 4, when some customers found relief from the crypto storm: Judge Michael Wiles approved Voyager's motion to allow certain customers who had cash in their accounts to withdraw cash, up to \$270 million.

But what about Voyager's customers whose crypto assets are not included in the court's ruling? Judge Wiles also approved Voyager's bid procedures motion, with certain modifications, setting an expedited timeline for a sale of substantially all of Voyager's assets that will conclude with a September 8 sale hearing in the bankruptcy proceeding. Voyager had approximately \$1.3 billion of crypto assets on the platform as of early July 2022. These assets will likely be sold with the company by September 8.

Ignoring many customers' frustrations expressed through a broad letter-writing campaign,¹ Voyager is moving forward with the bid process to sell the company. This has been Voyager's goal from the outset, despite some Voyager customers still raising questions about the status of their crypto assets at the August 4 hearing. Voyager has claimed ownership of customers' crypto assets with the submission of the most updated user agreement to the court. The most recent version states that customers' crypto assets are under Voyager's name. Based on this claim, Judge Wiles has approved Voyager's bid procedures motion without further questioning the ownership of crypto assets.

While a sale process is a typical event in bankruptcy, this is not a typical bankruptcy. Let's not forget. This case is about Voyager's customers and there is a looming question: can Voyager's customers recover their crypto assets without going through the bankruptcy proceeding?

The answer may be yes. Here's the argument that Voyager customers could make and the next steps they should consider taking:

- Voyager likely holds private keys of the crypto wallets or from the cryptocurrency transactions for the benefit of Voyager customers

- These private keys are not property of the bankruptcy estate pursuant to Section 541(b)(1) of the Bankruptcy Code, which provides that property of the estate excludes “any power that the debtor may exercise solely for the benefit of an entity other than the debtor”
 - Voyager’s act of holding private keys qualifies for the “power of the debtor” exception because the keys allow Voyager, the holder, to transfer the crypto assets
 - Voyager exercises this power solely for the benefit of Voyager customers because the security of private keys is essential for the customers
 - Unless a Voyager customer waived ownership through their contract with Voyager, Voyager doesn’t benefit from holding on to the private keys because private keys are utilized solely to prove ownership and to transfer the crypto assets, the acts that inherently belong to Voyager customers as rightful owners of their crypto assets
- Because Voyager’s act of holding private keys constitutes a power that it exercises solely for the benefit of an entity (the group of Voyager customers), private keys are not property of Voyager’s bankruptcy estate and should be property of Voyager customers

If the crypto assets are not property of the bankruptcy estate, Voyager customers are entitled to their return without seeking relief from stay in the bankruptcy proceeding. If the court agrees, there are important process points to consider given customer identification sensitivities:

- According to Voyager’s most recent user agreement, Voyager holds customers’ crypto assets in omnibus accounts or wallets. What that means is that each customer doesn’t have his or her own wallet for crypto assets. Therefore, customers will need to designate a trusted group of individuals or a third party that will be in charge of receiving a small number of private keys for omnibus accounts and either transfer or convert in a manner that is consistent with the customers’ will, not Voyager’s
- Transfer or conversion of cryptocurrency assets should take place based on the pro rata shares of Voyager customers, and Voyager should make this information available to the trusted group of individuals or the third party designated by Voyager customers
- Also, transfer of private keys must occur in a confidential manner as any leakage of information might allow non-customers to take ownership of crypto assets and transfer them before the customers’ representative can get to the assets

How do you determine the ownership of private keys?

- Ownership of private keys will likely be determined by the contracts signed by Voyager and its customers
- Different Voyager customers signed different contracts with Voyager so it is important for each customer to consult with a legal counsel to review her contract and determine the

nature of ownership under the contract

- Based on analogous bankruptcy law, a customer's ownership status (as opposed to a private key being property of the estate) will likely be heavily dependent on the amount of control Voyager exercises over such property. Where a debtor merely holds property for the benefit of a creditor, such property is not property of the debtor's estate; however, where the debtor uses and/or commingles that property and is given a high degree of control over the property, the creditor may be found to have relinquished its property rights

What are a Voyager customer's potential next steps based on this argument?

- Form a group with other Voyager customers who signed similar contracts regarding the ownership of private keys
- File individual claims or a claim as a group to recover private keys of crypto assets
- Discuss with your counsel other potential arguments to help recover crypto assets while waiting for the court's decision on the filed claim(s)

Private key is a key element of blockchain. It may also be the key for Voyager customers to protect themselves through the court-approved sale process that is ongoing.

1. Voyager customers have submitted approximately 30 letters. For example, in a letter to Judge Wiles filed on July 21, 2022, a Voyager customer claimed that "many customers of Voyager... have been defrauded quite literally."