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SECURITIES LAW

## Blockchain neophyte carves out niche in cryptocurrency litigation

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*David Silver.*

David Silver learned about cryptocurrency the way a lot of people do—at a dinner party.

It was 2014 and there was one person at the dinner table who was heavy into bitcoin mining—the computer-powered competition that creates new bitcoins. It was the first Silver and most of his friends, who were on a trip to Utah as part of their service on a nonprofit philanthropic foundation’s board, had ever heard of it. But after the dinner conversation, Silver returned home to Florida and found himself the beneficiary of philanthropy from this miner.

“He gave everyone bitcoin,” recalled Silver, who received five bitcoins—worth over \$1,500 back then. Silver still holds them, worth more than \$18,705 at presstime, down significantly from \$95,000 in December 2017 when bitcoin hit an all-time high.

The world of cryptocurrency soon spilled over into his practice. He learned that the under-regulated industry has tremendous potential for fraud and that investors have suffered real losses. The Coral Springs, Florida-based plaintiffs' attorney, who had mainly concentrated on securities and financial fraud cases, began to carve out a niche representing allegedly defrauded cryptocurrency investors in class-action lawsuits against the largest crypto exchanges and companies that conducted initial coin offerings.

He has pushed the issue legally in his class actions against Tezos Foundation, Giga Watt and Monkey Capital, all companies that conducted ICOs to fund various blockchain and cryptocurrency projects, but resulted in investors crying foul over stalled-out product development and alleged broken promises over the value of the companies' new cryptocurrency, according to complaints in the cases. The suits allege the defendants conducted unregistered offerings of securities. The Tezos case, assigned to a different class counsel, is pending, while Silver settled the Giga Watt matter and won a default judgment against Monkey Capital.

He claims that his lawsuits, coupled with appearances at crypto and blockchain conferences, shine a light on problematic practices in the industry that need regulatory solutions.

"The biggest players in the space don't like me. They feel I'm pro-regulation," says Silver, founder of the Silver Miller law firm. "As the price exploded and more people had money stolen from them, I'm being more appreciated."

Silver has become the head of the class when it comes to plaintiffs-side crypto work, says Washington, D.C., attorney Carol Van Cleef, who has practiced crypto law since bitcoin's creation in 2009. She says more plaintiffs' lawyers will jump into the fray, but it may be a small group, since the new technology is complicated and the cases take securities law expertise.

"When the dust settles on this boom, this is, I think, the biggest plaintiffs' lawyers opportunity that's existed since the tobacco litigation, because real money, real value, has been raised, so there is real value to go after," says Van Cleef, the CEO of Luminous Group, which consults businesses about using blockchain technology.

Silver earned his law degree from the University of Miami School of Law in 2002. He began as a civil litigator at Patton Boggs in Washington, D.C., from 2004 to 2010. He struck out on his own in 2011, operating small firms focused on the financial services and banking industry.

His crypto practice follows that same thread, as he works on a contingent-fee basis to represent plaintiffs who are alleged financial fraud victims, but involving cryptocurrency rather than stock. He estimates that crypto cases make up 60 percent of his practice, and the workload led Silver to grow his practice, adding a lawyer and partnering with larger plaintiffs class-action firms.

“I was just a small guy with a couple of lawyers. Now, all of a sudden, the big plaintiffs class-action firms want to do business with me,” he said. “When people started losing money, they started coming to me and it sort of just snowballed.”

William Restis, of the Restis Law Firm in San Diego, said that Silver was very early in the game of representing cryptocurrency clients. Now the largest, traditional plaintiffs firms in the securities class-action space are evolving, too, “because we have the intersection between securities law and crypto law,” Restis said.

Silver himself has admitted his expertise is in securities law and that he’s not as well versed in class actions, so he’s partnered with other class-action firms.

“I believe private litigation forces the issues,” he says.

In speeches since at least 2015 at crypto and blockchain conferences, Silver has frequently argued that utility tokens count as securities under federal law. Companies were conducting ICOs to raise funds for their blockchain projects, and issuing utility tokens, which supposedly granted the investors access to the company’s future product or service, rather than ownership of an asset like stock or debt.

Silver says audiences used to boo him off the stage for saying utility tokens were securities, believing that utility token ICOs didn’t need to register with the U.S. Securities and Exchange Commission. But now, Silver says he gets cheered for the same message.

Utility token ICOs slowed to a trickle after the SEC issued a July 2017 report (<https://www.sec.gov/litigation/investreport/34-81207.pdf>) saying that some ICOs are securities offerings. In a November 2018 settlement of SEC charges, two companies that conducted previous ICOs agreed to register their tokens as securities, said an SEC press release (<https://www.sec.gov/news/press-release/2018-264>).

Van Cleef, the longtime crypto practitioner who used to work with Silver at Patton Boggs years ago, believes government regulators are watching Silver’s lawsuits.

“There’s more than enough law there for a smart lawyer who understands the technology and law to make use of it,” Van Cleef says. “This is a useful policing mechanism. It’s certainly a strong adjunct to our traditional regulatory system.”



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