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# Alexander L. Paskay Memorial Bankruptcy Seminar

## **Judicial Roundtable Workouts: Problems, Problems, Problems!**

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**Judicial Roundtable Workouts: Problems, Problems, Problems**

Moderated by:

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Luis E. Rivera II, GrayRobinson, P.A.

**Defying Gravity...and Nondischargeability?**

Just a few months after meeting on the campus of Shiz University, Elphaba and Glinda formed Wicked Consulting, LLC, with each owning a 50% membership interest. The company provided fashion consulting, personal shopping experiences, and tutoring services to the students of Shiz University. The business initially thrived, becoming so popular that Elphaba and Glinda could no longer operate the business from their apartments. They purchased an office building in the heart of Oz, subject to a \$2,500,000 mortgage. Elphaba and Glinda wanted to expand the inventory base for the personal shopping arm of the business and borrowed \$500,000 on an unsecured basis from Wizard Loans, and both witches personally guaranteed the loan. They completed the loan application and separately provided financial statements to Wizard Loans. To further augment cash flow, Wicked Consulting borrowed funds from several merchant cash advance lenders—\$150,000 from Dillamond Cash Solutions, \$50,000 from Averic Funding, Inc., and \$75,000 from Morrible Lending Source—each of which were secured by Wicked Consulting's accounts receivable and also personally guaranteed by Elphaba and Glinda.

Glinda, always looking to expand her wardrobe and her wallet, made an oral agreement to pledge 10% of her interest in Wicked Consulting to Fiyero in exchange for \$100,000, in an effort to avoid taking out another institutional loan. Glinda did not tell Elphaba about her arrangement with Fiyero. Elphaba wanted to purchase a new broom and take flying lessons, but she was also strapped for cash. Elphaba borrowed \$100,000 from Wicked Consulting but did not tell Glinda about the loan, since it was only intended to be a short term loan. None of these transactions was disclosed to Wizard Loans.

Wicked Consulting's success ended when its customers began experiencing adverse side effects from the green skin elixir sold and promoted by Wicked Consulting. And then, backlash from the student body resulting from scandal over insensitive flying monkey backpacks, plunged the company into dire straits. Elphaba and Glinda made the hard decision to seek relief under chapter 11, subchapter V for the Wicked Consulting.

In connection with the preparations for the bankruptcy filing, Glinda learned about Elphaba's loan from the company. Glinda never made any payments on the loan from Fiyero, and shortly after the case was filed, Fiyero filed a proof of interest, asserting a 5% interest in the company. Glinda thought Wicked Consulting should object to Fiyero's proof of interest. Wizard Loans filed a motion to revoke Wicked Consulting's designation as a subchapter V debtor, in addition to a complaint objecting to the dischargeability of its debt under sections 523(a)(2) and (6) of the Bankruptcy Code.

Unsurprisingly, the relationship between Elphaba and Glinda deteriorated after the filing of the bankruptcy petition. Glinda filed a complaint in state court, asserting fraud and breach of

fiduciary duty claims against Elphaba for the unauthorized member loan. Wicked Consulting, purportedly controlled by Elphaba and Fiyero, took the position that the Glinda violated the automatic stay and that the breach of fiduciary duty claims were property of the bankruptcy estate. The bankruptcy court agreed and, reserved ruling on Wicked Consulting's request for sanctions.

Glinda, now facing a possible sanctions award, in addition to mounting personal pressure and unpaid attorney's fees, elected to seek relief under chapter 11, subchapter V personally. Glinda owned multi-use building in downtown Oz—her apartment was located over retail space, currently leased to the Lollipop Guild and operated as a candy store. The real estate was valued at \$350,000, but was subject to a \$500,000 mortgage in favor of the Bank of Oz. Glinda's chapter 11 plan proposed to value the Bank's claim and pay the Bank \$1,500 per month over the 3-year plan period, with a balloon payment of \$296,000 with the final plan payment in full satisfaction of the Bank's secured claim, with the balance allowed as an unsecured claim.

Both cases are before the bankruptcy court for hearings in the cases, and a number of issues are presented to the bankruptcy court for consideration.

### **Questions for Discussion**

#### **I. Eligibility**

1. Is Wicked Consulting eligible to be a subchapter V debtor?

#### **II. Proofs of Interest**

2. Is there a deadline to file a proof of interest? When should a proof of interest be filed? Did Fiyero file his proof of interest prematurely?
3. If a proof of interest is disputed, how could the matter be raised before the bankruptcy court?

#### **III. Exceptions to Discharge in Subchapter V**

4. Should the court dismiss Wizard Loans, Inc.'s non-dischargeability complaint against Wicked Consulting? Should any of the counts be dismissed?
5. May Wicked Consulting withdraw its subchapter V election after the non-dischargeability complaint is filed?
6. To the extent that Wizard Loans prevails on its non-dischargeability adversary proceeding against Wicked Consulting, what, if any collateral estoppel or res judicata effect would a judgment have on Glinda and her personal bankruptcy case?

#### **IV. Derivative Claims and Plan Confirmation**

7. How should the court rule on Wicked Consulting's motion to enforce the automatic stay? Did Glinda violate the automatic stay? Are the breach of fiduciary duty claims property of the estate?

8. If Wicked Consulting opts to settle the breach of fiduciary duty claims with Elphaba, should the court approve the settlement? What is the debtor's burden of proof and what evidence is needed to establish that the settlement is appropriate?
9. Does Glinda's plan treat the Bank of Oz's claim appropriately?

**JUDICIAL  
ROUNDTABLE  
PROBLEMS  
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**Moderated By:**

**Kathleen L. DiSanto  
Bush Ross, P.A.**

**Luis E. Rivera II  
GrayRobinson P.A.**



## Question 1

**Is Wicked Consulting eligible  
to be a subchapter V debtor?**

## Question 2

**Is there a deadline to file a proof of interest? When should a proof of interest be filed? Did Fiyero file his proof of interest prematurely?**

## Question 3

**If a proof of interest is disputed, how could the matter be raised before the bankruptcy court?**



## Question 4

**Should the court dismiss Wizard Loans, Inc.'s non-dischargeability complaint against Wicked Consulting? Should any of the counts be dismissed?**

## Question 5

**May Wicked Consulting withdraw its subchapter V election after the non-dischargeability complaint is filed?**

## Question 6

**To the extent that Wizard Loans prevails on its non-dischargeability adversary proceeding against Wicked Consulting, what, if any collateral estoppel or res judicata effect would a judgment have on Glinda and her personal bankruptcy case?**





## Question 7

**How should the court rule on Wicked Consulting's motion to enforce the automatic stay? Did Glinda violate the automatic stay? Are the breach of fiduciary duty claims property of the estate?**

## Question 8

**If Wicked Consulting opts to settle the breach of fiduciary duty claims with Elphaba, should the court approve the settlement? What is the debtor's burden of proof and what evidence is needed to establish that the settlement is appropriate?**

## Question 9

**Does Glinda's plan treat the Bank of Oz's claim appropriately?**



**THANK YOU FOR PARTICIPATING!**

# Faculty

**Kathleen L. DiSanto** is a shareholder with Bush Ross, P.A. in Tampa, Fla., where she focuses her practice on bankruptcy and insolvency matters. She also is an experienced litigator in state and federal courts throughout Florida. Ms. DiSanto began her career as the first law clerk to Chief Judge Caryl E. Delano of the U.S. Bankruptcy Court for the Middle District of Florida. Prior to joining Bush Ross, she practiced at boutique bankruptcy firm in Tampa. Ms. DiSanto regularly represents debtors and assists them in navigating the complexity of business bankruptcies. She has helped more than 30 chapter 11 debtors successfully reorganize, including many closely held family businesses and individuals. She also is experienced in representing creditors and trustees in the bankruptcy process and has specialized expertise in defending trustees on *Barton* doctrine issues. In addition to her role as a client advocate, Ms. DiSanto is a Florida Supreme Court Certified Circuit Mediator and serves as a subchapter V trustee in small business cases filed under the Small Business Reorganization Act of 2019. She was appointed by the Office of the U.S. Trustee in April 2022, and assists parties in small business cases in facilitating the expeditious and economical confirmation of a plan. Ms. DiSanto has been Board Certified in Business Bankruptcy Law by the American Board of Certification since 2014 and has held an AV rating from Martindale-Hubbell since 2015. She also was the youngest president of the Tampa Bay Bankruptcy Bar Association. Ms. DiSanto received her B.S. in 2005 from the University of Virginia and her J.D. in 2008 from Stetson University College of Law. During law school, she interned with Hon. Alexander L. Paskay.

**Luis E. Rivera, II** is the deputy chair of the Bankruptcy and Creditors' Rights practice group at GrayRobinson, P.A. in Fort Myers, Fla. He is experienced in counseling clients in business litigation, bankruptcy, creditors' rights and insolvency. A 2017 ABI "40 Under 40" honoree, Mr. Rivera serves as a trustee of Florida Gulf Coast University and a director of numerous community organizations, including the Middle District of Florida *Pro Se* Legal Assistance Clinic, Inc. and the Bankruptcy Law Education Series Foundation, Inc. Since 2010, he has served as a panel trustee for the Middle District of Florida. Mr. Rivera received his B.A. *magna cum laude* from Loyola University New Orleans, where he was an Ignatian Scholar, and his J.D. from Washington and Lee University School of Law, where he was editor-in-chief of the *Washington and Lee Journal of Civil Rights and Social Justice*.