



KANIUK LAW OFFICE, P.A.

# Bankruptcy: Everything You Need To Know and are Afraid to Ask

Tues, May 12  
12:30pm • Via Zoom

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# Historical Bankruptcy Numbers



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**The Number of Bankruptcy Cases has Steadily Declined Over the Last Decade, with the Largest Number Coming in 2010 During the Great Recession and Foreclosure Crisis.**

**The Majority of these Bankruptcies were Personal Bankruptcies, with many designed simply to Delay the Foreclosure Process occurring in State Courts throughout the Country.**

**Bankruptcies have since steadied and declined in number from 2010 through the Present.**

**But that may be about to change....**



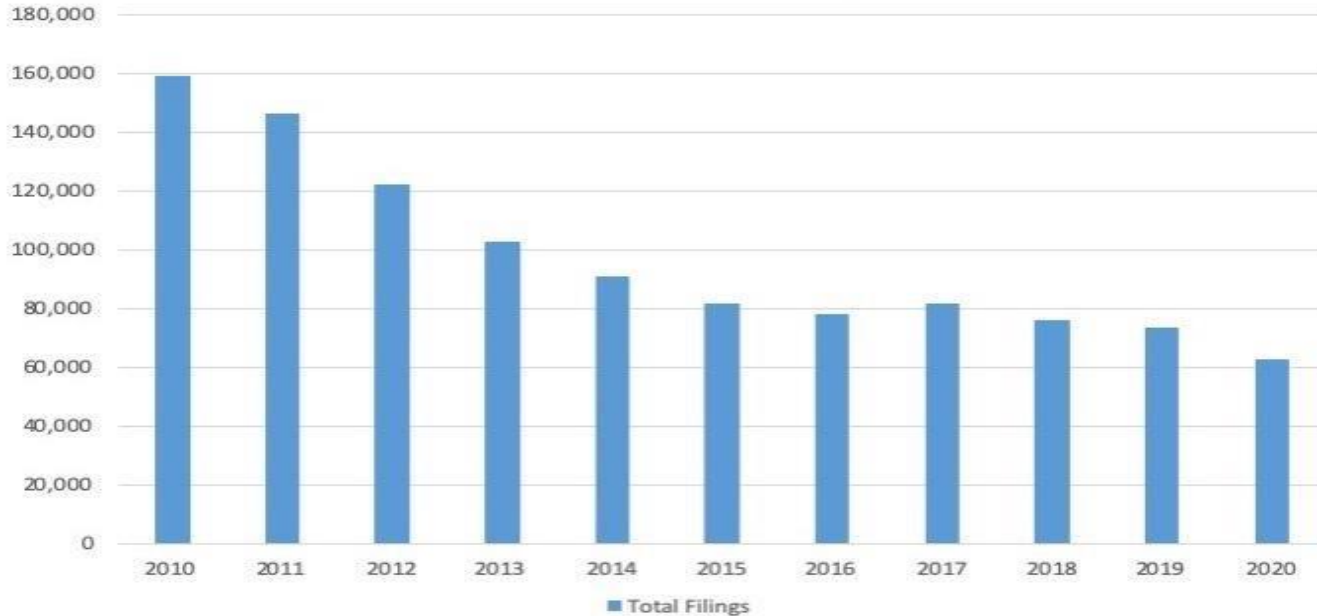
# Bankruptcy Statistics



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## March Total Bankruptcy Filings, 2010-20



Data provided by Epiq Systems



# Bankruptcy in 2020 and Beyond



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**In this rapidly changing economic dynamic, it can be hard to predict how expansive the COVID-19 Crisis will be, how long it will last, and what impact it will have on personal and business finances.**

**That said, most experts are preparing for an expected spike of bankruptcy filings in the Second Half of 2020 and Beyond.**



# 2020 Bankruptcy Forecast



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**MarketWatch—May 9, 2020 (<https://tinyurl.com/MarketWatchMay9>)**

**A wave of bankruptcies, surging taxes, and Americans harboring lasting scars from coronavirus lockdowns — the head of world’s largest asset manager warns of grim outlook.....**

**Fink, speaking privately with clients of a wealth advisory firm, outlined an unattractive future in which the economy continues to weaken, bankruptcies soar and American consumers — the lifeblood of economic vitality in America — remain psychologically scarred from the impact of the deadly pathogen that has infected more than 3.7 million people (1.2 million in the U.S. alone) and claimed more than 260,000 lives globally, according to data compiled by Johns Hopkins University.**



# Bankruptcy Overview



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**The US Constitution gives Congress the authority to enact Bankruptcy Laws for the Entire Country:**

- **Current Law: Bankruptcy Reform Act of 1978 (Codified in Title 11 of the U.S. Code – the “Bankruptcy Code”).**
- **Major Changes in 2005: Congress enacted the Bankruptcy Abuse Prevention And Consumer Protection Act (“BAPCPA”).**
- **Recent Changes: Small Business Reorganization Act of 2019.**
- **Technical Fixes: Congress included changes within the Coronavirus Aid, Relief, and Economic Security Act (“CARES”).**



# The Bankruptcy Code



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**Chapters 1, 3, and 5 are applicable to all bankruptcy cases:**

- **Chapter 1 includes definitions, rules about who can file bankruptcy, and generally describes the powers of the bankruptcy courts, among other general rules.**
- **Chapter 3 governs bankruptcy “case administration,” and includes rules that govern key aspects of all cases, including: filing cases; employing various professionals; establishing the “automatic stay;” selling, using, or leasing bankruptcy estate assets; obtaining financing after a case is filed; executory contracts and unexpired leases; and dismissing or closing cases.**





# The Bankruptcy Code



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- **Chapter 5 covers matters related to the rights of debtors and creditors, including claims and their priorities, exemptions, what constitutes “property of the estate,” and “avoidance” powers.**



# Types of Bankruptcy Cases



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**Chapters 7, 9, 11, 12, 13 & 15 are specific to each type of case.**

- **Chapter 7: Personal Liquidation.**
- **Chapter 9: Municipality Bankruptcy.**
- **Chapter 11: Business Reorganization.**
- **Chapter 12: Family Farmer Bankruptcy.**
- **Chapter 13: Individual Debt Adjustment (Personal Reorganization).**
- **Chapter 15: Ancillary and Cross-Border Bankruptcies.**



# Procedural Rules



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**The Procedural Aspects of the Bankruptcy Process are Governed by the Federal Rules of Bankruptcy Procedure (the “FRBP” or the “Bankruptcy Rules”) and the Local Rules of the Bankruptcy Courts of Each Federal District.**

**Specifically, the Florida Bankruptcy Courts have additional requirements for Admission and Practice beyond those of the Florida State Courts, such that admission to Practice in the State of Florida does not guarantee that an attorney is authorized to practice in Bankruptcy Courts.**

**One additional requirement is specified Continuing Legal Education Credits in Bankruptcy during each 3-Year CLE Cycle.**



# The Bankruptcy Process



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- **Pre-Bankruptcy Meetings with Lawyer: Consultation with an Attorney, and Review of the Bankruptcy Process, is essential. Specifically, the Attorney will often assist with Pre-Bankruptcy Planning, namely the process of converting the Debtor's Property from Non-Exempt to Exempt, so as to take Maximum Advantage of State Law Exemptions, protecting property that would otherwise be surrendered to Creditors in the Bankruptcy Case.**
- **Credit Counseling: Individual Debtors in Chapter 7 and 13 Cases must participate in: (1) a Pre-Bankruptcy Credit Counseling Course and (2) a Post-Bankruptcy Financial Management Class.**



# The Bankruptcy Process



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- **Bankruptcy Petition: Bankruptcy Petitions are filed electronically with the Court and assigned a Case Number. The Clerk's Office randomly assigns a Judge to the Case, and in Chapter 7 and 13 (and Small Business Ch 11), assigns a Panel Trustee.**
- **Automatic Stay Upon Filing (All Debtors/All Cases): The filing of a Bankruptcy Petition invokes the "automatic stay" which is an injunction that automatically stops lawsuits, foreclosures, garnishments, and all collection activity against the Debtor.**



# The Bankruptcy Process



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- **Initial Meeting of Creditors (“341 Meeting”):** All Debtors must appear at an Initial Meeting of Creditors, required by Section 341 of the Bankruptcy Code, and colloquially referred to as the “341 Meeting”, at which time the Debtor is questioned under oath by the Trustee and by any interested creditors who may appear.
- **Confirmation:** After Notice and Hearing, a Bankruptcy Judge will approve a Plan of Reorganization or Liquidation in Chapter 11, or a Payment Plan under Chapter 12 or 13 (with Trustee’s Consent or Over Trustee’s Objection in Chapter 12 or 13).



# The Bankruptcy Process



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- **Reaffirmation Agreement: An agreement by a chapter 7 Debtor to continue paying, notwithstanding the discharge, a dischargeable debt (such as a mortgage or auto loan) for the purpose of keeping the house or car that would otherwise be subject to foreclosure or repossession.**



# Chapter 7



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- **Chapter 7, entitled Liquidation, contemplates an orderly, Court-supervised procedure by which the Standing Chapter 7 Trustee (assigned randomly) takes over the assets of the Debtor's Estate, Reduces them to Cash, and Makes Pro Rata Distributions to Unsecured Creditors, Subject to the Debtor's right to retain certain Exempt Property and the Rights of Secured Creditors (usually Banks with Mortgages on Real Property and Lenders with Liens on Automobiles and the Like).**
- **In most Chapter 7 cases, if the Debtor is an Individual, he or she receives a Discharge that releases him or her from Personal Liability for certain Dischargeable Debts.**





# Chapter 13



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- **Chapter 13, entitled Adjustment of Debts of an Individual With Regular Income, is designed for an Individual Debtor who has a Regular Source of Income.**
- **Chapter 13 is often preferable to Chapter 7 because it enables the Debtor to keep a valuable asset, such as a House, and because it allows the Debtor to propose a “Plan” to Repay Creditors Over Time – usually 3-5 years.**
- **Chapter 13 is also used by consumer debtors who do not qualify for Chapter 7 relief under the “means test” (an effect of BAPCPA Reform).**



# BAPCPA's Effect on Ch 7 & 13



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- **The Bankruptcy Abuse Prevention And Consumer Protection Act (BAPCPA), enacted in 2005, represented a significant reformation of the Bankruptcy Code as enacted in 1978.**
- **Under BAPCPA, filing for Chapter 7 Personal Bankruptcy became more difficult as more stringent guidelines and Eligibility Requirements were defined. Specifically, the Debtor is required to satisfy a “Means Test” for eligibility.**
- **The “goal” was to prevent the bankruptcy process from being “abused” and to “encourage” more Chapter 13 filings instead of the more forgiving Chapter 7.**



# BAPCPA “Means Test”



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- **Section 707(b)(2) of the Bankruptcy Code applies a “means test” to determine whether a Debtor’s Chapter 7 filing is presumed to be an abuse of the Bankruptcy Code requiring Dismissal or Conversion (generally to Chapter 13).**
- **Abuse is presumed if the Debtor’s aggregate current monthly income over 5 years, net of certain statutorily allowed expenses is more than (i) \$10,950.00, or (ii) 25% of the Debtor’s nonpriority unsecured debt, as long as that amount is at least \$6,575.00.**
- **The Debtor may rebut a presumption of abuse only by a showing of special circumstances that justify additional expenses or adjustments of current monthly income.**



# BAPCPA “Means Test”



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- The fallout from COVID-19 will cause otherwise healthy businesses to fail leaving small business owners with personal liability that in other circumstances would have been paid by the business. **Having More “Business Debt” than “Consumer Debt” will make Business Owners Eligible for Chapter 7 Without Being Subject to the “Means Test”.**



# Reasons to File Chapter 13



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- **Ineligible for Chapter 7 Due to “Means Test”.**
- **Homeowner seeking to repay mortgage arrears on house (or loan arrears on car) while making regular payments in the future.**
- **Prevent Wage Garnishment while paying off a Tax Bill, Overdue Child Support Obligations; or Other Non-Dischargeable Debt.**
- **Keep Otherwise Non-Exempt Property.**



# Chapter 13 Debt Limits



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**As of April 2019, the current Chapter 13 Debt Limitations are:**

- **Secured Debt No Greater Than \$1,257,850.00.**
- **Unsecured Debt No Greater Than \$419,275.00.**

**Debt limitations can change every Three (3) years. These Figures are accurate through April 2022.**



# CARES Act and Chapter 13



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- **Under Section 1113 of the CARES Act, “. . . payments made under the Federal law relating to the national emergency declared by the President under the National Emergencies Act . . . with respect to the coronavirus disease 2019 (COVID-19) . . .” are not included as part of current monthly income or disposable income when filing for Bankruptcy.**
- **This temporary change will remain in effect until March 25, 2021.**



# CARES Act and Chapters 7 & 13



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**The CARES Act provides temporary changes to Chapter 7 and Chapter 13:**

- **For purposes of calculating a Debtor's income to determine his or her eligibility for Chapter 7 and Chapter 13, COVID-19 Payments from the Federal Government are EXCLUDED from the "means test" analysis.**
- **COVID-19 Payments are likewise not considered in determining a Debtor's Disposable Income in a Chapter 13 Case.**





# CARES Act and Chapters 7 & 13



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- **Lastly, the CARES Act allows Chapter 13 Debtors who have already confirmed a Chapter 13 Plan to Modify the Plan based on a Material Financial Hardship caused by the pandemic, including extending their payments for seven (7) years after their Initial Plan Payment was due. The changes apply in pending Chapter 7 and Chapter 13 cases and will be applicable for one (1) year from the effective date of the CARES Act.**



# Chapters 9, 12 and 15



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**Chapters 9, 12 and 15 govern very specific types of Bankruptcy Cases beyond the scope of this Webinar.**

- **Chapter 9: Municipality Bankruptcy.**
- **Chapter 12: Family Farmer Bankruptcy.**
- **Chapter 15: Ancillary and Cross-Border Bankruptcies.**



# Chapter 11



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- **Chapter 11, entitled Reorganization, ordinarily is used by commercial enterprises that desire to continue operating a business and repay creditors concurrently through a court-approved plan of reorganization (a “Chapter 11 Plan”).**
- **Under a Chapter 11 Plan, the Debtor can reduce its debts by repaying a portion of its obligations and discharging others. The Debtor can also Terminate burdensome Contracts and Leases; Recover Assets; and Rescale its Operations in order to return to profitability.**
- **Under chapter 11, the Debtor normally goes through a period of consolidation and emerges with a reduced debt load and a reorganized business.**



# Pre-Bankruptcy Planning



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**For a distressed business (or individuals), Bankruptcy is generally an option of last resort. It can be a valuable tool for Debtors to level the playing field with Creditors. But it comes with costs and risks.**

**The difficulty in this environment of uncertainty is that no business can make realistic projections of their future earnings. No industry is unaffected. Nearly every industry is suffering now. But the smart strategy is to start planning ahead.**

**Distressed business leaders should begin working with experienced Bankruptcy Professionals now to start evaluating options and preparing for that moment, hopefully soon, when we have some better vision to our Economic Future.**



# Special Debtor Powers



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- **Automatic Stay: Filing for Bankruptcy imposes an Automatic Stay on Any and All Litigation and Collection Efforts Against the Debtor.**
- **Power to Reject Leases and Contracts: The Bankruptcy Code gives Debtors the power to reject leases and executory contracts, thereby reducing obligations on a going-forward basis and giving Debtors a stronger hand in negotiating with Landlords and Vendors.**
- **DIP Financing: Debtors can obtain special financing from Lenders who can obtain priority over other creditors.**



# **Negotiating with Vendors; Creditors; Landlords; and/or Lenders (Pre-BK and During)**



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- **Review Applicable Contract; Lease and/or Loan Documents with Legal Counsel in Advance.**
- **Prepare List of Important Concessions You Need.**
- **Ask for Help and Communicate.**
- **Get New Deal in Writing.**
- **Take Short Term Victories and Negotiate Again Later.**



# Pre-BK Business Financing



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- **Contact Your Existing Lender for Additional Capital and/or Renegotiation and/or Refinance of Existing Loans.**
- **Avoid Personal Guarantees.**
- **Explore Other Lending Sources.**
- **Consider Seeking Equity Investors.**
- **Take Short Term Victories and Negotiate Again Later.**



# Chapter 11 Funding Options



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- **Debtor-in-Possession Financing (“DIP Financing”)** is a special form of financing that is provided for companies in financial distress, typically during restructuring under corporate bankruptcy law, such as Chapter 11 Bankruptcy.
- **DIP Financing is subject to Court Approval, and usually involves the Lender getting special priority above Pre-Petition Creditors, including Pre-Petition Secured Creditors.**





# Small Business Reorganization Act of 2019



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- **The Small Business Reorganization Act of 2019 (the “SBRA”) only took effect on February 19, 2020.**
- **The SBRA endeavors to strike a balance between Chapter 7 and Chapter 11 bankruptcies for Small-Business Debtors.**
- **The SBRA was enacted to reduce the cost and expense for small businesses to reorganize under Chapter 11.**
- **The SBRA lowers costs and streamlines the plan confirmation process to better enable Small Businesses to survive Bankruptcy and retain control of its’ operations.**



# Small Business Reorganization Act of 2019



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- **Under the SBRA, a Debtor must file a Chapter 11 Plan within ninety days of the Filing Date. Costs are reduced based on this quicker schedule and the elimination of both the requirement to file a Disclosure Statement and eliminating any Committee of Unsecured Creditors.**
- **To qualify as a Debtor under the SBRA, the debts of a company must not exceed \$2,725,625 (secured and unsecured debts). Note: These limits have been temporarily modified by the CARES Act.**



# CARES Act and the SBRA



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- **Section 1113 of the CARES Act increases the SBRA debt limit to \$7.5 Million. (The increased debt limit applies to cases filed after the enactment of the CARES Act and is valid for one year after the CARES Act becomes effective. Thereafter, the debt limit will once again be reduced to \$2,725,625).**



# Creditors' Rights in Bankruptcy



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**Creditors' have a significant set of remedies available to them in Bankruptcy Court, including, but not limited to:**

- **Involuntary Petition: Creditors have the right to initiate an Involuntary Bankruptcy Case on behalf of a Corporate Debtor who might not be ready or willing to file their own Petition.**
- **Relief from the Automatic Stay: A creditor may request relief from the automatic stay in order to allow them to continue state court litigation against the Debtor, such as in a Foreclosure Case or Eviction.**



# Creditors' Rights in Bankruptcy



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- **Adversary Proceeding:** In a Chapter 7 Case, the Trustee (or, in a Chapter 11 Case with the Debtor acting as Trustee) may commence an adversary proceeding to recover money or property. In addition, in a Chapter 7 Case, the Trustee or a Creditor may file a lawsuit to object to the Debtor's general discharge of debts or to the discharge of certain debts.
- **Proof of Claim:** Creditors will file a written statement and verifying documentation that describes the reason the Debtor owes the Creditor money. (There is an official form for this purpose). This is used to determine distributions from a Chapter 7 Trustee, or pursuant to a Confirmed Plan under Chapter 11 (overseen by Debtor) or Chapter 13 (overseen by Trustee).



# **Servicemembers' Civil Relief Act**



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**The Servicemembers' Civil Relief Act, among other things, provides protection to members of the US Military against the entry of Default Judgments and gives the Court the ability to stay proceedings against Debtors who are active military personnel.**



# Concluding Thoughts



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- COVID-19 is going to have Significant, Sweeping Impact on **Our Lives and Our Businesses.**
- Businesses will need to be Adjust to these Health Challenges and Societal Concerns.
- Social Distancing; Telecommuting; and Virtual Meetings Will Be Part of Our Vocabulary and Lifestyle for a **Significant** Time.
- Second Wave in Dec. 2020? (<https://tinyurl.com/tyjfp32>)
- **Consulting with Professionals Can Save Time and Money Going-Forward.**



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# Ronald Scott Kaniuk, Esq.



KANIUK LAW OFFICE, P.A.

- **Attorney with Nearly Twenty-Five (25) Years' Experience.**
- **Former Law Clerk to U.S. Bankruptcy Judge Marvin A. Holland (EDNY-Retired).**
- **Licensed to Practice in State Courts of Florida, New York and New Jersey and Multiple U.S. Federal Courts.**
- **Double-Degree Graduate of **St. John's University School of Law** (Queens, NY): Law Degree (1996) and LL.M. (Master of Laws) in Bankruptcy (2002).**
- **Proud Graduate of **Northwestern University** (Evanston, IL).**
- **Member of Board of Directors and Executive Committee (Vice Chair of Legal & Governance) for the **Greater Delray Beach Chamber of Commerce**.**
- **Former HOA President and Board Member.**
- **Married (18 Years) with Three (3) Children.**



# Kaniuk Law Office, P.A.



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Kaniuk Law Office, P.A. is Law Firm Focused on Helping **Individuals** and **Small Businesses**, with their **Legal Issues**, including, but not limited to, the following:

- Consumer Law.
- Bankruptcy—Debtor and Creditors' Rights.
- Business and Corporate Law.
- Real Estate (Residential and Commercial).
- Urgent Disaster Relief Issues.

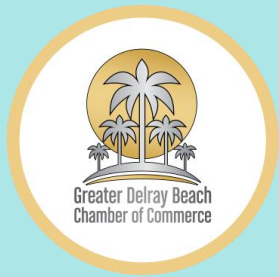


# Disclaimer



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- **This Presentation is meant to provide an Overview of the Bankruptcy Laws and Procedure. The Information Contained Herein is Subject to Change Without Notice.**
- **Attendees should contact an Attorney Regarding Specific Legal Issues Addressed Herein, or Other Legal Questions that they may have.**
- **This Presentation may not be modified without permission from Ronald Scott Kaniuk, Esq.**
- **The Delray Chamber may distribute this Presentation subject to the foregoing.**



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**Thank You For Attending!**

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