

**PRESENTED AT  
16<sup>TH</sup> ANNUAL CONFERENCE ON CONSUMER BANKRUPTCY PRACTICE  
JULY 27-28, 2020  
GALVESTON, TEXAS**

**SALE OF ASSETS IN CHAPTER 13 ... FREE AND CLEAR AND OTHER ISSUES  
FORCED TRANSFER OF PROPERTY**

Written and Presented by:

**MITCHELL J. BUCHMAN**  
BARRETT DAFFIN FRAPPIER TURNER & ENGEL, L.L.P.  
1900 St. James Place, suite 500  
Houston, Texas 77056  
[mitchelb@bdfgroup.com](mailto:mitchelb@bdfgroup.com)  
(713) 693-2014

**SALE OF ASSETS IN CHAPTER 13 ... FREE AND CLEAR AND OTHER ISSUES  
FORCED TRANSFER OF PROPERTY**

**I. The Traditional View.**

Can the bankruptcy court force a secured creditor to accept the transfer of title of its collateral to the Creditor in satisfaction of its secured claim?

*11 U.S.C. §1325(a)(5)* governs the three different methods for treatment of a secured claim that can be approved by the court and lead to confirmation of a chapter 13 plan, to wit:

- a. Obtain the creditor's acceptance of the plan [See *11 U.S.C. §1325(a)(5) (A)*];  
*or*
- b. The plan surrenders the collateral to the creditor [See *11 U.S.C. §1325(a)(5)(C)*]; *or*
- c. The holder of the secured claim retains its lien and the plan makes distributions to the secured creditor [See *11 U.S.C. §1325(a)(5)(B)(i)(I)*.]

Absent compliance with one of these three forms of treatment of a secured claim, the traditional view is that a plan cannot be confirmed over the objection of a secured creditor. *Associates Commercial v. Rash*, 520 U.S. 953 (1997); *In re Stone*, 166 B.R. 621 (Bankr. S.D. Tex. 1993); *In re Sanford*, 390 B.R. 873 (Bankr. E.D. Tex. 2008). The forced vesting of property is not uniformly accepted by courts. *In re Sagendorph*, 562 B.R. 545 (D. Massachusetts 2010)

**II. Is Surrender Option?**

The chapter 13 Uniform Plan adopted in the Southern district contains the following provisions relating to surrender:

- 7. Secured Claims for which Collateral is Surrendered.** The Debtor(s) surrender the following collateral under this Plan:

Name of Creditor	Description of Collateral

- A. Upon confirmation of this Plan, the Debtor(s) surrender the collateral and the automatic stay under 11 U.S.C. § 362(a) is terminated as to actions against any (i) collateral that is described in the preceding table; and (ii) escrow deposit held by the holder of a security interest to secure payment of taxes and insurance. The automatic stay is not terminated under this Paragraph as to any other action. The

co-debtor stay under 11 U.S.C. § 1301(a) is terminated with respect to the collateral identified in the preceding table.

B. Other than terminating the co-debtor stay, this Plan does not affect any co-debtor's rights in the collateral or the obligation of any secured creditor to act with respect to such a co-debtor in compliance with applicable non-bankruptcy law.

C. The Debtor(s) and the creditor asserting a security interest against the collateral must comply with Bankruptcy Local Rule 6007-1 with respect to the surrender of the collateral.

D. The rights of a secured creditor to a deficiency claim will be determined (i) in accordance with the creditor's allowed unsecured claim in any timely filed proof of claim; or (ii) by separate Court order.

A chapter 13 Plan may provide for surrender of the collateral to the Creditor. *11 U.S.C. §1325(a)(50)(C)*. The term surrender was contemplated by congress to be a return of property and relinquishment of the possession or control of the property to the holder of a claim. *In re Robertson*, 72 B.R. 2 (Bankr. D. Colo. 1985). However, surrender of collateral does not obligate a creditor to foreclose its lien and transfer title to the property. *In re Weller*, 548 B.R. 392 (D. Massachusetts 2016). Surrender of the collateral does not transfer title to the property or terminate the estates interest in the property. *In re Gray*, 375 B.R. 343 (Bankr. E.D. Tex. 2007).

Although in most instances surrender of the collateral pursuant to the plan is a satisfactory treatment for the debtor, certain post-petition issues may continue to impact the debtor. For example, surrender of real property will not avoid the debtor's personal liability for post-petition ad valorem taxes that are assessed against the collateral. For as long as title to the property remains in the debtor's name, the ad valorem taxes will be assessed against the debtor. In addition, to the extent that there are homeowner's association fees assessed against the property, surrender may not relieve the debtor of liability for post-petition homeowner's association fees. For these and other reasons, because surrender does not obligate a creditor to foreclose and transfer title to the collateral, surrender may not be the best relief available to the Debtor.

### **III. Southern District Plan – Forced Transfer Option**

The local chapter 13 Uniform Plan adopted by the bankruptcy judges for the Southern District of Texas provides debtors with a fourth (4<sup>th</sup>) option for treatment of secured claims. Although the undersigned cannot state the specific legal basis for adoption of the provisions in the uniform plan (one of our local judges attending the hearing may be in a better position to speak to that issue), it is clear that *11 U.S.C. §1322(b)(9)* states that a

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

## Title search: Sales of Assets in Chapter 13...Free and Clear and Other Issues

Also available as part of the eCourse

[2020 Consumer Bankruptcy eConference](#)

First appeared as part of the conference materials for the 16<sup>th</sup> Annual Conference on Consumer Bankruptcy Practice session "Sales of Assets in Chapter 13...Free and Clear and Other Issues"