

UNDERWRITING BULLETIN

To: Florida Agents and WFG employees
From: Florida Underwriting Department
Date: July 22, 2010
Bulletin No: FL-10-2
Name: Transferee Liability for Taxes

Effective May 28, 2010, a new Florida law went into effect which provides that the transferee of more than 50% of a business or of a stock of goods becomes liable for all unpaid state taxes, interest and penalties owed by the seller. The transferee liability does not attach in the case of an involuntary transfer to non-insider -- such as by foreclosure.

While this provision does not technically establish a lien on real property (until the tax warrant or other notice is recorded), an insured purchaser facing this type of obligation may assert claims against our agents for failing to point this out.

To minimize the risk of this type of claim against a WFG agent, we recommend including language along the lines of the following in your seller's affidavits (where appropriate).

The conveyance of the above described property is not part of a transaction involving the sale of a business or a stock of goods. As such, the transferee will not have any liability for my unpaid state taxes (if any) pursuant to s. 213.758 Fla. Stat.

Where the conveyance of insured property is in conjunction with the sale of a business or stock of goods, the purchaser should be encouraged to consult his lawyer as to ways to minimize this risk. The statute provides two safe harbors for the transferee:

1. The transferor provides a receipt or certificate from the department to the transferee showing that the transferor is not liable for taxes, interest, or penalties from the operation of the business; and
2. The department finds that the transferor is not liable for taxes, interest, or penalties after an audit of the transferor's books and records. The audit may be requested by the transferee or the transferor. The department may charge a fee for the cost of the audit if it has not issued a notice of intent to audit by the time the request for the audit is received.

And the lawyer may be able to suggest other ways of minimizing the risk.

The Business Law Section of the Florida Bar is working on legislation to clarify this statute.

NOTE: This Bulletin is intended for use by title issuing offices, title insurance agents and approved attorneys of WFG National Title Insurance Company and any reliance by any other person or entity is unauthorized. This bulletin is intended solely for the purpose of underwriting policies of WFG National Title Insurance Company.

Excerpt of Ch. 2010-166 LAWS OF FLORIDA
Effective May 28, 2010

Section 8. Section 213.758, Florida Statutes, is created to read:

213.758 Transfer of tax liabilities.—

(1) As used in this section, the term:

(a) “Involuntary transfer” means a transfer of a business or stock of goods made without the consent of the transferor, including, but not limited to, a transfer:

1. That occurs due to the foreclosure of a security interest issued to a person who is not an insider as defined in s. 726.102;
2. That results from an eminent domain or condemnation action;
3. Pursuant to chapter 61, chapter 702, or the United States Bankruptcy Code;
4. To a financial institution, as defined in s. 655.005, if the transfer is made to satisfy the transferor’s debt to the financial institution; or
5. To a third party to the extent that the proceeds are used to satisfy the transferor’s indebtedness to a financial institution as defined in s. 655.005. If the third party receives assets worth more than the indebtedness, the transfer of the excess may not be deemed an involuntary transfer.

(b) “Transfer” means every mode, direct or indirect, with or without consideration, of disposing of or parting with a business or stock of goods, and includes, but is not limited to, assigning, conveying, demising, gifting, granting, or selling.

(2) A taxpayer who is liable for any tax, interest, penalty, surcharge, or fee administered by the department pursuant to chapter 443 or described in s. 72.011(1), excluding corporate income tax, and who quits a business without the benefit of a purchaser, successor, or assignee, or without transferring the business or stock of goods to a transferee, must file a final return and make full payment within 15 days after quitting the business. A taxpayer who fails to file a final return and make payment may not engage in any business in this state until the final return has been filed and all taxes, interest, or penalties due have been paid. The Department of Legal Affairs may seek an injunction at the request of the department to prevent further business activity until such tax, interest, or penalties are paid. A temporary injunction enjoining further business activity may be granted by a court without notice.

(3) A taxpayer who is liable for taxes, interest, or penalties levied under chapter 443 or any of the chapters specified in s. 213.05, excluding corporate income tax, who transfers the taxpayer’s business or stock of goods, must file a final return and make full payment within 15 days after the date of transfer.

(4)(a) A transferee, or a group of transferees acting in concert, of more than 50 percent of a business or stock of goods is liable for any tax, interest, or penalties owed by the transferor unless:

1. The transferor provides a receipt or certificate from the department to the transferee showing that the transferor is not liable for taxes, interest, or penalties from the operation of the business; and
2. The department finds that the transferor is not liable for taxes, interest, or penalties after an audit of the transferor’s books and records. The audit may be requested by the transferee or the transferor. The department may charge a fee for the cost of the audit if it has not issued a notice of intent to audit by the time the request for the audit is received.

(b) A transferee may withhold a portion of the consideration for a business or stock of goods to pay the taxes, interest, or penalties owed to the state from the operation of the business. The transferee shall pay the withheld consideration to the state within 30 days after the date of the transfer. If the consideration withheld is less than the transferor’s liability, the transferor remains liable for the deficiency.

Excerpt of Ch. 2010-166 LAWS OF FLORIDA
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(c) A transferee who acquires the business or stock of goods and fails to pay the taxes, interest, or penalties due may not engage in any business in the state until the taxes, interest, or penalties are paid. The Department of Legal Affairs may seek an injunction at the request of the department to prevent further business activity until such tax, interest, or penalties are paid. A temporary injunction enjoining further business activity may be granted by a court without notice.

(5) The transferee, or transferees acting in concert, of more than 50 percent of a business or stock of goods are jointly and severally liable with the transferor for the payment of the taxes, interest, or penalties owed to the state from the operation of the business by the transferor.

(6) The maximum liability of a transferee pursuant to this section is equal to the fair market value of the property transferred or the total purchase price, whichever is greater.

(7) After notice by the department of transferee liability under this section, the transferee has 60 days within which to file an action as provided in chapter 72.

(8) This section does not impose liability on a transferee of a business or stock of goods pursuant to an involuntary transfer.

(9) The department may adopt rules necessary to administer and enforce this section.