



Deeds conveying title to a trust - Fifth Circuit weighs in and vacates *Fugedi*

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Most escrow officers have encountered the common scenario of a deed conveying title into a trust as opposed to the ***trustee*** of the trust. The underlying concern with such a deed is that it may be void or voidable for lack of a grantee based on a combination of the “a trust is not an entity in Texas” line of cases with the “a deed is void if the grantee is not in existence at the time of the execution of the deed” line of cases.

But up until 2021, no court had actually combined those two lines of cases to hold that a deed into a trust was void and did not convey title. That changed on March 31, 2021, when the federal District Court for the Southern District of Texas issued its opinion in *Fugedi v. United Rentals (N.Am.) Inc.*, No. 3:19-CV-00249, 2021 WL 1220032 (*Fugedi*). Using those two lines of cases, the court found that a deed conveying title to Texas real property to a trust, as opposed to the trustee of the trust, is void. Worse still, the court also held that such a deed can never be corrected with either a material or non-material correction, and any attempted correction of such a deed is invalid.

Recognizing the extreme harm the *Fugedi* opinion could do to our industry, TLTA filed an Amicus Curiae Brief to the federal Fifth Circuit Court of Appeals on December 27, 2021, in support of reversing the District Court’s judgment and allowing the established practice of correcting such vesting issues via the Texas correction statutes (Texas Property Code §§ 5.027-5.030) to continue.

On August 29, 2022, the Court of Appeals ruled consistent with TLTA’s request. It vacated the *Fugedi* opinion and remanded the case back to the District Court for further proceedings. In its opinion, the Court of Appeals confirmed that the District Court was correct in stating that a trust

is a relationship, not an entity, and that a grantee must be in existence for a deed to be valid. However, the District Court's decision was inconsistent with the long-standing approach of Texas courts to look past mere formalities in such cases and infer a grantee if one can be ascertained in order to give the instrument legal effect. Since the identity of the proper grantee could be ascertained from the context, the deed in *Fugedi* should have been interpreted as conveying the property to the trustee of the trust rather than the trust itself (Mr. Fugedi was the trustee at the time of the deed, remains so today, and is the only person capable of holding property for the benefit of the trust).

Even if a court would not save the original deed by reading in a grantee, the Court of Appeals also held that a non-material correction affidavit under § 5.028 of the Texas Property Code would cure the defect. The District Court erred in concluding that the change was material since the trustee had always been part of the transaction as trustee of the trust (albeit not correctly shown on the deed as such) and was not a new party to the transaction. The correction was simply a clarification of the capacity in which the party acted, and thus constituted a non-material change allowing for use of a non-material correction affidavit.

In summary, if the Court of Appeals decision becomes final, a deed directly into a trust instead of a trustee should no longer be considered void, as it was under the original *Fugedi* opinion. However, there is still an opportunity for the parties to request a rehearing or even appeal the case further. Therefore, continue to discuss with your underwriter how you should handle conveyances directly into a trust in your chain of title.

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