

THE IMPACT OF MARCELLUS SHALE ON TRUST FIDUCIARY RESPONSIBILITIES

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One of the challenges that Trust Officers have always had to deal with is handling unique assets, such as timber and mineral rights, especially with regards to beneficiaries. This challenge has become magnified by the impact of the Marcellus Formation, or simply the Marcellus Shale. Marcellus Shale is a unit of marine sedimentary rock found throughout the Appalachian Basin. The natural gas industry cited Marcellus Shale as having the potential to be one of the United States' most promising natural gas resources. The shale is considered to be a desirable resource because when a procedure involving high pressure water is initiated, the Marcellus Formations (rocks) break up, which in turn releases and increases the flow of natural gas and oil.

While this new process has benefited many local economies in the Appalachian Basin, it has increased the litigation risk to Trust Departments and Trust Companies. Fiduciary responsibilities of the Trust Officer encompass not only the income beneficiaries, which are usually the first generation of the trust agreement, but also the principal beneficiaries, which are frequently the second or third generation of the trust relationship. Real estate property held in trust, and the manner in which it is administered, has the potential to create significant liability exposure. The lawsuits emerging in the Appalachian Basin area are the result of Marcellus Shale or Utica Shale, a rock unit located a few thousand feet below the Marcellus Shale, discovered on real estate that was previously held in trust. These claims are citing the Uniform Prudent Investor Act and management's "prudent" handling of the sale of real estate held in trust. It is no longer sufficient to have beneficiaries approve and sign off on the sale of real estate held in trust: the risks are too great. Recent lawsuits are indicating that, even with the beneficiary sign off, Trust Officers did not act in the best interest of all beneficiaries, including both income and principal beneficiaries. Given the potential income benefit of Marcellus Shale, the loss related to a single lawsuit can be catastrophic.

The real estate can be located just about anywhere within the Appalachian Basin, from farmlands in Ohio to the Pocono Mountains in Pennsylvania, where there are an abundance of second homes purchased with vast amounts of acreage. The best way to ensure appropriately fulfilling your fiduciary responsibilities to all beneficiaries would be to first consult with legal counsel for their advice on the specific property being held in trust. Prior to the selling or disposing of any real estate held in trust, professionals should be hired to determine if there actually is Marcellus Shale or Utica Shale on the property, the quantity of shale that is potentially present, and the estimated value of this exclusive resource. If the shale is present, it is critical that both the income and principal beneficiaries are educated on the shale, the probable value, and options for handling this unique asset.

Proceeding with caution when it comes to the potential impact of Marcellus Shale on real estate held in trust cannot be overemphasized. After identifying those properties that may be impacted, Trust Officers should develop a Board of Director approved planned course of action that will minimize potential litigation risk to all interested parties, including your company.