Trust Administration and Estate Planning in the Age of Climate Change

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A recent foreboding report by the UN's Intergovernmental Panel on Climate Change offers warnings to policy makers and others about dire consequences that have and will continue to arise due to rapid climate change. Rising ocean levels, unprecedented heatwaves, increased drought conditions and wildfires, and more frequent and extreme storms are some of the impacts that UN scientists have connected to emissions of greenhouse gasses and associated global warming. For years climate change was viewed by many as a potential future problem with theoretical consequences. As obvious impacts of climate change become harder to ignore, there is growing recognition that climate change is an issue that is impacting many aspects of daily life *now* and placing people and property at risk.

So, what does climate change have to do with trust administration and estate planning? The answer is that there are a number of important issues concerning climate change about which trustees and estate planning lawyers should, and in some circumstances, must, be aware.

What Trustees (and other Fiduciaries) Need to Know in the Age of Climate Change

The basic obligations of a trustee are well known to those experienced in the administration of trusts. A trustee must act reasonably, in good faith, and in the best interest of the beneficiaries to whom duties are owed. To perform these obligations, a trustee should (among other things) remain aware of events and circumstances that are relevant to assets or property over which they have responsibility. One of the more well-known circumstances in which a trustee must perform these obligations arises in connection with a trust's investment portfolio. A trustee charged with managing investments must keep apprised of economic conditions, market performance and trends, and other economic data and events that might impact the portfolio at issue. A competent trustee must evaluate this information and take reasonable steps under the circumstances to protect and preserve trust assets. Although a trustee is not tasked with predicting the future, they are responsible for understanding and adapting to foreseeable risks and opportunities.

The same principles that apply to a trustee's management of an investment portfolio also apply to assets that are subject to climate-based risks. For example, a trustee holding interests or investments in an agricultural business in an area suffering from increased drought or flooding, should evaluate the short and long-term risks associated with climate change. Likewise, a trustee who holds property in a coastal area experiencing increased erosion, sea-level rise, and/or a heightened threat of extreme storms, should consider what steps can and should be taken to protect the best interests of the trust and its beneficiaries.

There are a number of reasons a trustee should consider potential climate impacts on trust property, and one of the most obvious is that such impacts are very likely to be considered foreseeable should an issue or loss arise. In decades past, a trustee might not have been expected to consider climate risks when making short and long-term decisions about trust assets. Today, climate change dominates much of the news cycle and has become a ubiquitous part of our public discourse. Further, local, regional, and national governments around the globe are increasingly focused on climate change and have begun to implement policies and rules to address associated risks. Among the issues that various states and countries are focused on is whether and how public pension managers should consider climate-based risks to the portfolios they manage. Some state and national governments have implemented rules and regulations requiring pension fund managers to specifically address climate-related economic risks in the management of the assets they oversee. Although the rules and regulations governing public pension funds may not apply directly to private trustees, the steps being taken by public bodies to protect investment portfolios further increase the overall awareness of the economic threat presented by rapid climate change.

What Can Be Done in these Circumstances

Trustees are not required to perform miracles or prevent all harms that might impact to trust property. However, trustees can and should recognize foreseeable risk and take reasonable steps to protect trust property. The following are some of the steps that trustees should consider taking to protect trust assets (and themselves) from potential climate-related risks:

- ***Understand trust assets in the context of climate change and associated risks:*** Evaluating the nature, value, and other circumstances related to trust assets in the context of climate change will help identify potential risks. For example, if a trust owns waterfront property in a hurricane zone, a trustee might consider whether the property be reinforced or modified? If that is not possible, should the property be sold before its value declines? If a trust holds gas and oil interests, a trustee might consider the potential impacts on the value of the holdings in the event of regulations concerning fossil fuels as well as future shifts to renewable/clean energy. By focusing specifically on climate-related issues concerning specific property, a trustee can more easily identify potential risks to trust property and reasonable steps that might be taken to protect and preserve that property.
- ***Understand relevant insurance data and coverage options:*** A trustee with property or assets subject to climate-related risks should evaluate whether there is insurance available to protect against relevant risks. If a trustee identifies a risk that is uninsurable or for which insurance can only be obtained to cover a portion of a foreseeable loss, that is important to know and understand. An insurance analysis not only assists a trustee in identifying potential loss exposure, it also can be helpful to understand how insurance companies view various risks. After all, if an insurance company has determined that it will not insure assets or property against certain harms, there is likely a good reason (hint, it is probably because the

insurance company views the foreseeable losses as more costly than the value of premiums they can collect).

- ***Communicate and document decisions as they take place:*** As with any important decision a trustee makes, it is important that the trustee be able to explain their thinking and reasoning if they are challenged. A trustee is not required to be correct every time they take action, but a trustee does have to act reasonably and in good faith. If a trustee is responsible for property that is subject to climate risks, it may be helpful to document these risks and the available options (*e.g.*, diversification, insurance, protective actions, liquidation, etc.). It also is helpful (and perhaps required under the circumstances) to engage with beneficiaries to discuss such risks and options. These discussions will help keep beneficiaries fully informed and often will protect a trustee against potential liability, particularly where a beneficiary acknowledges specific risks and nevertheless expresses a desire that the trustee not pursue protective action.
- ***Consider and engage with the "next generation" of beneficiaries:*** Long-term risks are inherently more difficult to assess than current or short-term risks, but a trustee is often responsible for considering current and future generations of beneficiaries. Trustees should engage proactively with all generations of beneficiaries where feasible to better understand their respective interests, concerns, and plans for the future. Different beneficiaries may have more awareness or interest in climate change and related risks than others, and they may also have plans that impact a trustee's considerations about whether to continue holding property that is subject to climate change or consider other options better suited to the interests and plans of future generations.
- ***Keep up with evolving climate data and warnings:*** Just like a prudent investor must keep apprised of economic and market conditions, a competent trustee holding property that is subject to foreseeable climate risks should keep themselves informed about climate trends, data, and forecasts in order to be well positioned to identify and protect against such risks.

Planning for Vulnerable Assets

Estate planning lawyers also should consider the impact of climate change and analyze whether a client has property or other interests that may be impacted by climate-related risks. Estate planning lawyers should keep in mind that climate change affects not only single, condensed properties (such as a vacation home or a family farming enterprise), but also might impact investments in a variety of public and private companies and various asset classes.

As with a trustee, an estate planning lawyer is not tasked with being able to predict the future and a crystal ball is not required, but common sense consideration should be given in all circumstances, particularly when a client holds property or assets that are reasonably likely to be impacted by climate change now or in the future.

Conclusion

No matter what one thinks about climate change and its current and future impacts, it is undeniable that climate change is an important issue being discussed and addressed in countless aspects of our daily lives and is sparking shifts in the considerations that can and should be made by anyone responsible for potentially vulnerable assets. Responsible, thoughtful trustees and estate planning attorneys should keep these considerations in mind as they endeavor to protect and preserve assets for current and future generations.