The Weese Litigation:
Solvency Defense Under the Cook Islands International Trusts Act

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I. Introduction

Due to its specific and focused trust and fraudulent transfer legislation, the Cook Islands has since 1989 been a favored locale for the creation of offshore asset protection trusts. By way of example, § 13B of the Cook Islands International Trusts Act ("CIITA") forces a creditor to establish beyond a reasonable doubt that conveyances made to a trust were made with fraudulent intent *and* left the settlor of the trust with insufficient assets to pay the creditor's claim. Therefore, even if the creditor can establish that the settlor had an intent to defraud the creditor, the trust may still retain the assets if the creditor cannot prove beyond a reasonable doubt that the transfers left the settlor insolvent (the "solvency defense").

This article explores the effectiveness of the solvency defense in light of a recent Cook Islands case involving Bank of America and Brian and Elizabeth Weese.[1] The Weeses owned Bloomsbury Group, Inc. ("Bloomsbury"), which operated the Bibelot bookstore chain in the Baltimore area. In 2001, Bank of America and other creditors of Bloomsbury brought suit against the Weeses, claiming that the Weeses had fraudulently conveyed assets totaling an estimated $25 million to a Cook Islands asset protection trust. After arbitration and court proceedings in federal bankruptcy court, Maryland state court, and the Cook Islands, the case was settled for approximately $13 million in March 2003.[2] However, the crucial issue in the case, the allegation that the Weeses had fraudulently conveyed their assets in violation of § 13B of the CIITA, never reached trial.[3]

II. Summary of the Weese Litigation

On May 31, 1999, Bank of America issued a line of credit to Bloomsbury.[4] The Weeses personally guaranteed the loan, and when it came due a year later, the amount due totaled more than $16 million. Bank of America demanded payment, but Bloomsbury and the Weeses failed to comply. In June 2000, Bank of America delivered to the Weeses a notice of claim and demand for arbitration on the bank's claim that the Weeses were personally liable for the loan.

On July 12, 2000, notice was sent from an arbitrator notifying the Weeses that arbitration had been initiated in the Bank of America proceedings.[5] That same day, Elizabeth Weese

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[1] For related commentary, *see* Steve Leimberg's Asset Protection Newsletter #31 (available at http://www.leimbergservices.com).

[2] *See* Bank of America v. Weese, 277 B.R. 241 (Bankr. D. Md. 2002); Bank of America v. Weese, Case No. 03-C-01-001892 (Baltimore County Cir. Court, Jul. 30, 2001); A v. B & E, Plaint No. 17/2001 at ¶ 34, High Court of the Cook Islands (Rarotonga, April 4, 2002).

[3] A trial on the merits in the Cook Islands would have been especially informative as judicial precedent on a critical issue of Cook Islands trust law. The only two cases that address similar issues are another Cook Islands case, *515 South Orange Grove Owners Assoc. v. Orange Grove Partners*, Plaint No. 208/94, High Court of the Cook Islands (Rarotonga, March 11, 1995), and a U.S. case, *Fed. Trade Comm'n v. Affordable Media, LLC*, 179 F.2d 1228 (9th Cir. 1999). For a discussion of both cases, see Frederick J. Tansill, *Asset Protection Trusts (APTs): Non-Tax Issues*, I ALI-ABA International Trust & Estate Planning 291, 338, 341-44.

[4] *Bank of America*, Case No. 03-C-01-001892, at 1.

[5] *Id*. at 2.

established a Cook Islands trust, naming her father and Cook Islands Trust Ltd. as co-trustees, and granting Weese's father the controlling authority as between the co-trustees. Mrs. Weese was designated as the initial protector and granted authority to veto any decision of the co-trustees. [6]

Over the course of the next few months, the Weeses transferred assets with a fair market value of approximately $25 million to the trust.[7] Included in the transfers were the Weeses' residence and its furnishings, a home in which the Weeses continued to reside rent-free.[8] Alex Grass, Elizabeth Weese's father, was removed as co-trustee in November 2000, and Ms. Weese was removed as protector.[9]

On December 28, 2000, a judgment was entered in the Baltimore County Circuit Court for $17.6 million in favor of Bank of America based on the arbitration agreement.[10] In January 2001, Bank of America learned for the first time of the transfers to the trust completed by the Weeses the previous year.[11] Meanwhile, the trust liquidated many of its assets and transferred almost $15 million in cash and investments to a Swiss bank as custodian for the trust.

Bank of America filed suit in both Maryland and the Cook Islands to recover the assets. On July 2, 2001, the High Court in the Cook Islands issued a "Mareva Injunction," which required the trustee of the trust to transfer all the assets in the Swiss bank to a bank within the jurisdiction of the High Court.[12] The injunction further prohibited the trustee and the Weeses from disposing of trust assets in any way and from changing certain terms of the trust. On July 30, 2001, the Baltimore County Circuit Court issued an injunction freezing the Weeses' trust assets.[13]

Bank of America also filed motions in both Baltimore County, Maryland, and the Cook Islands to obtain authorization to review certain documents ordinarily subject to the attorney-client privilege. In April 2002, the High Court rejected the trustees' and settlors' defense and ordered discovery of the specified documents.[14]

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[6] Naming a U.S. co-trustee and U.S. protector is questionable under prudent asset protection planning because it bring critical parties under the jurisdiction of the U.S. courts.

[7] *See Bank of America*, Case No. 03-C-01-001892, at 3-5 (detailing the transfers to the trust); Tansill, *supra* note 3, at 347 (summarizing the Weese litigation).

[8] *Bank of America*, Case No. 03-C-01-001892, at 4, 5. In June and August 2000, the Weeses obtained loans totaling almost $3.3 million from Allright Bank and Wachovia Bank in return for deeds of trust on the Weeses' residence. *See Bank of America*, Case No. 03-C-01-001892, at 2, 4.

[9] *Bank of America*, Case No. 03-C-01-001892, at 8.

[10] *See Bank of America*, Case No. 03-C-01-001892, at 5.

[11] *Bank of America*, Case No. 03-C-01-001892, at 5.

[12] *See Bank of America*, Case No. 03-C-01-001892, at 6 (summarizing the Cook Islands proceedings). A Mareva Injunction is "an *ex parte*, interlocutory measure intended to freeze a defendant's assets prior to judgment in order to prevent the removal of those assets from the jurisdiction of the court." Peter S. O'Driscoll, *Performance Bonds, Bankers' Guarantees, and the* Mareva *Injunction*, 7 Nw. J. Int'l L. & Bus. 380, 398 (1985).

[13] *Bank of America*, Case No. 03-C-01-001892, at 8-10.

[14] A v. B & E, Plaint No. 17/2001 at ¶ 34.

After further litigation, the case was settled for approximately $13 million in March 2003.[15] As a result, the High Court was not called upon to address or resolve the bank's claim under § 13B of the CIITA that the Weeses' asset transfers to their Cook Islands trust rendered them insolvent to pay their debt to Bank of America.[16]

III. The Solvency Defense Under Section 13B of the CIITA

A. Components of a Favorable Asset Protection Statute

The Cook Islands arguably has the "[s]trongest asset protection trust statute in the world."[17] The CIITA was enacted in 1989 as the world's first asset protection trust ("APT") statute[18] and applies only to "international trusts" registered under the act.[19] As a result of the attractiveness of the Cook Islands statute, a number of other jurisdictions have followed suit with their own APT statutes.[20] APT statutes are favorable to trust settlors because they often provide one or more of the following important characteristics.[21] First, APT statutes frequently refuse to recognize or enforce foreign judgments based on law that differs from that of the APT jurisdiction. Thus, even a creditor with a judgment in hand from another jurisdiction is forced to bring the case *de novo* in the offshore trust jurisdiction to establish that a fraudulent transfer was made. This requires the creditor to engage in costly litigation in an unfamiliar and potentially hostile jurisdiction, hire local counsel, re-try the case in full, and deal with substantive and procedural rules that almost certainly differ from those of the creditor's home jurisdiction.[22]

Second, APT statutes do not prohibit settlors from creating "self-settled spendthrift trusts." A self-settled spendthrift trust is a trust created by the settlor for her own benefit that is immune from the settlor's creditors. While such trusts are generally not permitted in the U.S.,[23] in the jurisdictions with APT statutes, protection is provided against the settlor's unknown future creditors (i.e., creditors who had no existing or contemplated claim at the time of the trust settlement).[24]

Third, strong APT statutes provide stringent provisions relating to fraudulent conveyances. A creditor bears a heavy burden in any effort to reach assets in an offshore trust when his claim is based on an allegation of fraudulent transfer of assets to the trust. The CIITA's fraudulent conveyance provision is particularly aggressive in this regard.

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[15] Lorraine Mirabella, *3 Bibelot creditors, Weeses settle; $13 million deal with banks appears to be final chapter in rise, fall of book chain*, Baltimore Sun, March 1, 2003, at 10C.
[16] *See* A v. B & E, Plaint No. 17/2001, at ¶ 6.
[17] Tansill, *supra* note 3, at 435.
[18] *Id*. at 322.
[19] CIITA § 2.
[20] *See* 2-3 Osborne & Schurig, Asset Protection: Domestic and International Law and Tactics, Ch. 27-48 (2003) (discussing the asset protection statutes of various offshore jurisdictions).
[21] Tansill, *supra* note 3, at 309.
[22] *Id*. at 310.
[23] *See* David C. Lee, Notes & Comments: Offshore Asset Protection Trusts: Testing the Limits of Judicial Tolerance in Estate Planning, 15 Bankr. Dev. J. 451, 454-57 (Spring 1999) (discussing the aversion for such trusts under U.S. law). *But see* Karen E. Boxx, *Gray's Ghost—A Conversation About the Onshore Trust*, 85 Iowa L. Rev. 1195 (2000) (discussing the development of onshore asset protection trust statutes).
[24] Tansill, *supra* note 3, at 314.

B. Fraudulent Conveyances and the CIITA's Solvency Defense

Section 13B of the CIITA is the Cook Islands trust fraudulent conveyance provision. It reads, in part, as follows:

> (1) Where it is proven beyond a reasonable doubt by a creditor that an international trust settled or established or property disposed to an international trust –
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> > a. was so settled, established or disposed by or on behalf of the settlor with principal intent to defraud that creditor of the settlor; and
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> > b. did at the time such settlement, establishment or disposition took place render the settlor, *insolvent or without property by which that creditor's claim (if successful) could have been satisfied*;
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> then such settlement, establishment or disposition shall not be void or voidable and the international trust shall be liable to satisfy the creditor's claim out of the property which, but for the settlement, establishment or disposition, would have been available to satisfy the creditor's claim and such liability shall only be to the extent of the interest that the settlor had in the property prior to settlement, establishment or disposition and any accumulation to the property (if any) subsequent thereto.
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> (2) In determining whether an international trust, settled or established or a disposition, has rendered the settlor insolvent or without property by which a creditor's claim (if successful) may be satisfied, regard shall be had to the fair market value of the settlor's property, (not being property of or relating to the trust) at the time immediately after the settlement, establishment or the disposition referred to in subsection (1)(b) and in the event that the fair market value of such property exceeded the value of the creditor's claim, at that time, after the settlement, establishment or disposition, the trust so settled or established or the disposition shall for all purposes be deemed not to have been so settled established or the property disposed of with intent to defraud the creditor.[25]

While the statute protects against fraudulent conveyances, it establishes a set of requirements that are settlor-friendly, when compared with other fraudulent transfer laws such as the traditional Statute of Elizabeth or the modern Uniform Fraudulent Transfer Act ("UFTA").[26] For instance, while the general standard of proof in civil proceedings in the U.S. is "preponderance of the evidence,"[27] the CIITA requires a creditor to establish its case according

[25] CIITA § 13B.(1)-(2) (emphasis added).

[26] The UFTA is representative of the approach taken in most U.S. states. According to The National Conference of Commissioners on Uniform State Laws, forty-one states and the District of Columbia have adopted the UFTA, and two other states have introduced it. *See* http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ufta.asp (last visited September 16, 2003).

[27] *See* Elena Marty-Nelson, *Offshore Asset Protection Trusts: Having Your Cake and Eating It Too*, 47 Rutgers L. Rev. 11, 60-61 (1994) (discussing the "formidable task" of obtaining a "fraudulent conveyance" judgment in jurisdictions like the Cooks Islands).

to the "beyond a reasonable doubt" standard—a higher standard of proof generally only applicable in criminal cases.

Further, under the CIITA, the creditor must show that the conveyance was made with actual intent to defraud—a standard that one commentator has characterized as "almost impossible to meet."[28] UFTA § 4 permits a present or future creditor to set aside a conveyance if the creditor can show either that the transferor actually intended to defraud any creditor or the transferor made the conveyance "without receiving a reasonably equivalent value."[29] In addition, the UFTA looks to a list of enumerated factors that may evidence a fraudulent intent (including the traditional "badges of fraud") obviating the need to show actual intent.[30] The CIITA requires that the fraudulent conveyance be made in circumvention of the particular creditor, rather than a general class of creditors[31] or the UFTA's "any creditor."[32] The CIITA does not permit any claims by creditors whose claim arose after the conveyance to the trust (future creditors).[33]

Additionally, while both the CIITA and the UFTA permit a creditor to reach only those assets needed to satisfy its claims against the transferor, the CIITA does not permit a trust to be made void or voidable. Thus, even if a creditor establishes its case under the CIITA, it may only reach the assets in the trust to the extent needed to satisfy its claim, leaving the trust itself and the remaining trust assets untouched. The UFTA, on the other hand, allows a creditor to "avoid" a transfer and essentially dismantle the trust.[34]

Most important for purposes of this article is the disparity between the CIITA and the UFTA (and similar laws) with respect to solvency. Both the UFTA and the CIITA allow a present creditor to reach conveyed assets when the conveyance leaves the settlor insolvent.[35] However, by virtue of the differences in the definition of "insolvent" under the two laws, as well as the higher standard of proof required under the CIITA, the CIITA effectively provides a settlor with a potentially powerful "solvency defense" not available under the UFTA.

In addition to the claim available to both present and future creditors under UFTA § 4, UFTA § 5 provides another basis for relief for creditors whose claim arose before the conveyance (present creditors). Under § 5, a transfer is fraudulent as to present creditors if (1) the transfer was made without receiving reasonably equivalent value and the debtor was insolvent at the time of the transfer, or (2) the debtor became insolvent as a result of the transfer.[36] The UFTA adopts the approach of § 101(32) of the U.S. Bankruptcy Code in defining "insolvent."[37] According to the UFTA, "A debtor is insolvent if the sum of the debtor's debts is

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[28] *Id*. at 60.
[29] UFTA § 4(a).
[30] UFTA § 4(b). *See* UFTA § 4 cm.t 5.
[31] *See* 3 Osborne & Schurig, *supra* note 20, at § 34:67 (2003).
[32] UFTA § 4(a)(1).
[33] *See* CIITA § 13B.(4) (providing that a Cook Islands international trust shall be deemed not to be fraudulent if its settlement "took place before that creditor's cause of action accrued.")
[34] UFTA § 7(a)(1).
[35] UFTA § 5(a); Act § 13B.(1).
[36] UFTA § 5(a).
[37] *See* UFTA § 2 cmts. 1 and 4.

greater than all of the debtor's assets, at a fair valuation."[38] "Assets" is defined to exclude both "property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors"[39] as well as "property to the extent that it is generally exempt under nonbankruptcy law."[40] This approach is called the "balance sheet test."[41]

Under the CIITA, a creditor must prove that the intent and effect of the transfer was to render the settlor insolvent to pay the particular creditor's claims. Thus, even if a creditor could successfully prove that the settlor intended to defraud the creditor, the creditor must still establish that the transfer left the settlor insolvent. The CIITA's test for insolvency under § 13B.(2) focuses not on the settlor's overall financial position or her position relative to all creditors; rather, it requires a creditor to establish that the conveyance left the settlor insolvent to pay that particular creditor's claim.[42] Further, "the settlor's property" specifically excludes the assets conveyed to the trust, but no mention is made as to whether property that is exempt under other laws may be considered in determining the settlor's solvency.

The CIITA approach may prove quite advantageous to a settlor of a Cook Islands trust. For instance, assume Settlor S has assets valued at $30 million, and her creditors have claims collectively totaling $20 million. S transfers assets worth $15 million to the trust, leaving $15 million in non-trust assets. Assume that Creditor C, with a claim of $10 million against S, brings suit in a UFTA jurisdiction, seeking to set aside the conveyance as fraudulent. Presumably, C will prevail since S's non-trust assets following the ($15 million) transfer are less than the total claims of his creditors ($20 million). However, if C brought his claim in the Cook Islands, he should lose under the CIITA since S has retained adequate non-trust assets ($15 million) to pay C's claim ($10 million). Thus, while the CIITA certainly does not condone fraudulent conveyances to Cook Islands trusts, it provides greater protection to settlors than would generally be afforded under domestic fraudulent conveyance laws.

Next, assume that S has made the same conveyance to the trust and C holds the same claim against S, but the dispute pertains to the value of S's non-trust assets. The CIITA is especially helpful to S in this situation because it requires C to establish its valuation of the assets beyond a reasonable doubt. Several factors make the creditor's task formidable. First, valuation may be difficult where there is not a ready market for the assets at issue. Second, since the CIITA essentially takes a "snapshot" of the settlor's trust and non-trust assets at the time of the transfer, the valuations must be established at the time that the transfer was made. Where the settlor makes a series of transfers over time, rather than a single lump-sum transfer, the creditor must value the non-trust assets at the time of each transfer. Market fluctuations will further complicate the task. Moreover, if S can provide a reasonably credible alternative valuation of assets according to which S is able to pay C's claim with non-trust assets, then S should prevail under the "beyond a reasonable doubt" standard. This result remains true even if the valuation turns out to be incorrect, as long as the settlor believed it to be correct. Thus, by forcing the

[38] UFTA § 2(a).
[39] UFTA § 2(d).
[40] UFTA § 1(2). *See also* Vernon Jacobs, *The Question of Solvency: How to Determine Whether a Transfer Renders You Insolvent*, 3:1 Asset Protection J. 19 (Spring 2001) (distinguishing between "normal" solvency analysis and solvency analysis for fraudulent conveyance purposes).
[41] *See* Tansill, *supra* note 3, at 318.
[42] *See* 3 Osborne & Schurig, *supra* note 20, at § 34:67.

creditor to establish insolvency, the CIITA effectively creates a "solvency defense" against creditors if the settlor can show that, in spite of the transfers, she is able to pay the creditor's claims. This argument, potentially at least, provided the main point of dispute in *Weese*.

IV. The Weese Litigation and the Solvency Defense

A. Bank of America's Claim

The crux of Bank of America's claim against the Weeses was the contention that the Weeses' conveyances to the trust were fraudulent under § 13B.(1). According to the Cook Islands High Court, the bank's "central allegation" was that the conveyances "of the Residence, Furnishings and Liquid Assets to the Second Defendants as trustees of the Trust were made with the intention and effort to hinder, delay, deprive or defraud the Plaintiff and has left the First Defendants without property sufficient to satisfy the First Defendants indebtedness to the Plaintiff . . . ."[43] Since the issue was not tried on its merits, however, it is impossible to know whether Bank of America could have carried its steep burden of proof at trial in the Cook Islands. However, the bank apparently made a strong case in the Baltimore court that the Weeses' liabilities greatly exceeded their assets. The bank claimed that "[a]s of that date [October 31, 2000 when the arbitration awards were entered], for purposes of determining the solvency of the Weeses under applicable law, the Weeses had liabilities in excess of $25,000,000.00 and assets worth less than $1,000,000.00, including their 100% stock in Bloomsbury, a company which would be filing a bankruptcy petition in less than three months."[44]

The Baltimore court was largely convinced by the bank's arguments. Judge Kahl found that "there is a strong probability that the Bank will be able to prove at trial that the Weeses were insolvent after the transfers were made, i.e., that their assets were insufficient to pay their probable liabilities after the transfers were made."[45] Specifically, the court believed that there was a strong probability that Bank of America would be able to prove at trial that the Weeses had approximately $24 million in liabilities and no more than $8.5 million in assets following the conveyances.[46]

Of particular importance, the court disregarded the Weeses' evidence that the Bloomsbury stock was worth millions. The court believed that the Weeses' appraisal of the stock was "of little probative value" and suggested that the bank would be likely to prove that the Bloomsbury stock was "worthless after the transfers."[47] The court also refused to consider as assets in the Weeses' favor certain "Custodial Accounts consisting of spendthrift trusts" because they could be neither alienated by the Weeses nor reached by creditors.[48] As a result, the court issued a preliminary injunction against the Weeses, freezing their assets, based on the belief that "there is a substantial probability that the Defendants engaged in fraudulent conduct and that the

[43] A v. B & E, Plaint No. 17/2001 at ¶ 6.
[44] Defendant's Brief at 8 (quoting Bank of America's motion).
[45] *Bank of America*, Case No. 03-C-01-001892, at 7.
[46] *Bank of America*, Case No. 03-C-01-001892, at 7.
[47] *Bank of America*, Case No. 03-C-01-001892, at 7.
[48] *Bank of America*, Case No. 03-C-01-001892, at 7.

Defendants, absent the requested relief, will dispose of, dissipate or further transfer the assets in question."[49]

B. The Weeses' Solvency Defense

The Weeses responded to the claim that the transfers were made with the intent to defraud by vague citations to estate planning action taken by Elizabeth Weese in response to news of her father's illness.[50] Their focus, however, appears to have been on the solvency defense.

Although the bank's success in the Baltimore preliminary injunction hearing was noteable, it may not have forecast similar success in the Cook Islands suit. The Baltimore court was looking to Maryland's definition of insolvency[51] rather than the CIITA's more settlor-friendly provisions.

In the Baltimore court, the Weeses defended on the ground that Bank of America's characterization of the Weeses' financial condition was full of "hyperbole and inaccuracies."[52] They argued that Bank of America had inaccurately deflated the value of the Weeses' assets and inflated the amounts of liabilities in claiming that the transfers rendered the Weeses insolvent. They also claimed that the bank had failed to pursue the Weeses' non-trust assets before seeking to reach trust assets.[53] In short, they argued that "a fair consideration of the Weeses' actions, and of their assets and liabilities, establishes that they acted properly and reasonably in allocating their assets between the Trust and their potential liability to the Bank."[54]

Most significantly, the Weeses attempted to rebut Bank of America's claim that the Bloomsbury stock was valueless following the transfers. Early in the summer of 2000, Bloomsbury initiated contact with several major bookstore chains, including Barnes & Noble, Borders, Crown Books, and Books-A-Million in an attempt to sell Bibelot.[55] The Weeses stressed that, at the time the contact was initiated, they were "confident that the stores could be sold for a very substantial sum because they were in excellent locations; had top-of-the-line build-outs, furniture and fixtures; and were operating at a profit before interest, taxes, and general administrative overhead."[56] Crown Books and Borders remained interested through the fall of 2000, with focus eventually centering primarily on Crown. However, near the end of the year, Crown backed out, citing the need to obtain additional capital before it could expand and

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[49] *Bank of America*, Case No. 03-C-01-001892, at 7.
[50] "Defendants Brian and Elizabeth Weese's Opposition to the Bank's Second Motion for "*In Camera*" Review of Alleged Privileged Information and For Order Compelling Testimony and Production of Documents" (hereinafter, "Defendants' Brief") at 2. The Baltimore Court also cited to the "unmistakable silence from Weeses regarding what lawful purpose was served by establishing the trust." *Bank of America*, Case No. 03-C-01-001892, at 7-8.
[51] *See Bank of America*, Case No. 03-C-01-001892, at 7 (citing Md. Code Ann., Comm. Law II § 15-202(a)). The Maryland statute is based on the Uniform Fraudulent Conveyance Act, which was revised by the UFTA. Thus, the Maryland definition is similar to the UFTA definition discussed *supra* in Section III.
[52] Defendants' Brief at 1.
[53] Defendants' Brief at 3.
[54] *Id*. at 3.
[55] *Id*. at 4.
[56] *Id*. at 4.

purchase Bibelot. After Crown backed out, Bloomsbury filed for bankruptcy on March 9, 2001.[57]

The Weeses' defense leaned heavily on an appraisal they had obtained from PriceWaterhouse Coopers ("PWC") in connection with the attempted sale. PWC appraised Bibelot at $12 million to $14 million, and Bibelot had been offered for sale for approximately $15 million.[58] Although the Baltimore court was unconvinced by the PWC appraisal,[59] the timing and amount of the appraisal would likely have been an essential component of the Weeses' § 13B solvency defense in the Cook Islands litigation. Since the § 13B.(2) solvency test revolves around a "snapshot" of the fair market value of the settlor's non-trust assets taken immediately following the transfers to the trust, the settlor need only have adequate non-trust assets to pay the plaintiff-creditor's claim, not all the settlor's liabilities. Applying this test and considering the PWC appraisal of Bibelot, the Weeses could have made a colorable case that they had sufficient non-trust assets with which to pay Bank of America's $17.6 million claim.

According to the Baltimore court, immediately following the transfers to the Cook Islands Trust, the Weeses held only the following assets: a Custodial Account, partnership interests, the Bloomsbury stock, and a Merrill Lynch account.[60] Assuming that the PWC appraisal was generally accurate and remained reliable[61] from the time of its issuance until October 2000,[62] the Bloomsbury stock was worth approximately $13 million.[63] The Weeses contended that the partnership interests alone were worth $7 million[64] and that they had other non-trust assets. [65] Thus, according to the Weeses, they had assets in excess of $20 million to settle Bank of America's $17.6 million claim.

Unless Bank of America could have proven beyond a reasonable doubt that the valuations were incorrect and that the Weeses did not believe them to be correct, the Weeses would have had a chance to win in the Cook Islands court. At the very least, the Weeses could

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[57] *See* Michael Anft, *Closing the Book: Why the Bibelot Story Stopped at Chapter 11*, Baltimore City Paper, April 4, 2001.

[58] Defendants' Brief at 3-4.

[59] *See Bank of America*, Case No. 03-C-01-001892, at 7 ("The appraisal of the Bloomsbury stock submitted by the Weeses indicating a value of approximately $13 million, which was admitted into evidence based solely on an affidavit, is of little probative value.").

[60] *Bank of America*, Case No. 03-C-01-001892, at 5.

[61] The exact value of Bibelot at the time of the last conveyance would certainly have been a matter of contention had the suit gone to trial. There may be reason to doubt that Bibelot's value remained at the appraisal value. For instance, one newspaper article from April 2001 suggests that Bloomsbury was experiencing financial difficulty in 2000. *See* Anft, *supra* note 57.

[62] The Baltimore court sets forth the Weeses' transfers in some detail, often providing the dates of those transfers. The last date provided is October 16, 2000. Assuming that the transfers listed without a corresponding date occurred prior to that date, the significant date for solvency analysis is October 16, 2000.

[63] Bibelot eventually fetched only $3.4 million in liquidation. However, the significant time for valuation was at the time of the transfers, not several months later, when Bibelot was liquidated.

[64] Defendant's Brief at 11-13. The value of the ML Warburg-Pincus Trust is derived from the subtracting the $7 million value attached to the partnerships interests from the sum value of $8 million given to the partnership interests combined with the ML Warburg-Pincus Trust.

[65] The Weeses contend that they had at least one other asset—an investment in Western Select Properties worth $1 million. *See* Defendants' Brief at 11 n.5.

have raised a reasonable doubt, thereby making it difficult for Bank of America to establish that the Weeses did not have adequate non-trust assets to protect the bank's claim.

The probative value of the PWC appraisal is enhanced because it is an objective asset-valuation from a third party issued in a non-litigious context. The Weeses' case may have been further aided if they could have produced an Affidavit of Solvency.[66]

An Affidavit by the Weeses made prior to the July 12, 2000 settlement of their Cook Islands trust would have listed the Bank of America claim and shown that the Weeses expected to have assets well in excess of the bank's claim. One can surmise that such a document backed by reliable appraisals could later serve as valuable evidence of the Weeses' intent to pay existing creditors (i.e., Bank of America) and non-fraudulent intent in transferring the assets to the trust.

V. Conclusion

Since the CIITA § 13B issue was never tried in the Cook Islands, the final lesson to be learned from the Weese litigation is conjectural. The Weeses' transfer of assets to the Cook Islands trust was, at best, an aggressive use of offshore asset protection options or, at worst, a transparently desperate attempt to evade creditors. Nevertheless, it is not obvious that Bank of America would have won their § 13B fraudulent transfer claim in the Cook Islands. Had the Cook Islands court given weight to the PWC appraisal of Bibelot or an Affidavit of Solvency executed prior to the transfers, Bank of America might have had a difficult time establishing insolvency or intent to defraud beyond a reasonable doubt. At the least, the bank would have been forced to fight a costly uphill battle against the settlor-friendly provisions of the CIITA.

[66] *See* Tansill, *supra* note 3, at 58 (discussing the necessity and components of the Affidavit). Such an Affidavit is generally regarded as a means of protecting attorneys who practice in the asset protection arena from representing clients willing or desirous to defraud their creditors. The Affidavit lists all information material to the client's solvency, is usually requested at the beginning of the representation, at the time of the initial funding, and again at the time of any further funding. *See* Tansill, *supra* note 3, at 58. An Affidavit reciting the settlor's financial situation and listing any potential creditors would serve as compelling evidence in protecting against creditors' claims that a settlor has made a fraudulent conveyance. The authors are not aware if such an Affidavit existed in the Weese case.