

**The Saga of *Huber v. the American Accounting Association:*
Forensic Accounting and the Law v4
Wm. Dennis Huber, JD, LL.M., DBA, CPA, CFE**

Abstract

This article is a follow-up of my article “Does the American Accounting Association Exist? An Example of Public Document Research” (Huber, 2011), which chronicles the events that transpired from the publication of the paper in 2011 to the present. This article contributes to an understanding of the interplay between a forensic accounting investigation and the legal issues that a forensic accountant may encounter. The article also demonstrates the types of public document investigations that may have to be conducted both during and following a legal proceeding as part of litigation support.

When auditing corporate financial statements, it is important for auditors to inspect corporate documents, including articles of incorporation and bylaws, to determine the scope of authorizations that officers and directors are granted. Articles of incorporation and bylaws are part of the auditor’s permanent file (Puncel, 2007).

Forensic accountants likewise must inspect corporate documents such as articles of incorporation and bylaws. However, when conducting a forensic accounting investigation, a forensic accountant also must investigate publicly available documents for several reasons. First, subjects of the investigation may not be forthcoming in their production of documents or may not give candid responses to questions. The target may withhold documents or be evasive in their response.

Second, a forensic accountant must corroborate and confirm all evidence obtained from the subject of investigation. This process is often done by searching publicly available documents. Third, some states prohibit anyone without a private investigator’s license from conducting certain types of investigations (Drew, 2013). Searching public documents may be the only alternative for obtaining the desired information.

This rest of this article assumes a basic familiarity with the issues exposed in my previous paper.

Introduction

This article contributes to an understanding of the interplay between a forensic investigation and the legal issues that a forensic accountant may encounter both during and subsequent to a litigation support engagement. While legal proceedings for which forensic accountants are engaged for litigation support often involve the calculations of damages, the legal proceedings at issue here is an action equity. Thus, damages are not a relevant. Nevertheless, forensic accountants need to be aware of the principles involved in actions in equity, and they must be able to investigate documents both public and non-public that support actions in equity. An action in equity seeks some form of equitable relief, such as a specific performance or an injunction, as opposed to damages. This type of proceeding is often used when there is no financial remedy available. In this article, the investigation of public documents is emphasized since public document review and investigation is an inherent part of litigation support (Crumbley 2017; Stalker and Ueltzen, 2009; Nossen, 1993),

Huber v. the American Accounting Association is an action in equity. *Huber v. the American Accounting Association* involves a petition for the judicial dissolution of the *American Accounting Association* filed August 11, 2011 in the Seventh Circuit, Fourth District, Sangamon County, Illinois (#2011-MR-00041). A petition is the equivalent of a complaint in an action for damages.

The complete facts leading up to the petition are given in my previous article. A summary is given here.

The *American Accounting Association* was incorporated in 1935, in Illinois as a not-for-profit corporation (the 1935 Corporation) and was granted a 501(c)(3) designation. In 1996, the Illinois Secretary of State dissolved the 1935

Corporation. According to the Illinois General Not for Profit Corporation Act of 1986 (GNFPCA), the 1935 Corporation was then prohibited from operating except as “necessary to wind up and liquidate its affairs.”¹ However, the 1935 Corporation continued to operate in violation of the GNFPCA from 1996 to August 2002.

In August 2002, a new corporation was formed with the name *American Accounting Association* (the 2002 Corporation). The GNFPCA requires the Articles of Corporation or the Bylaws of a not-for-profit corporation to state there are no members if the corporation is to have no members.² Not only did the Articles of Corporation and Bylaws of the 2002 Corporation not state there were to be no members, the Articles of Corporation created members, and both the Articles of Incorporation and the Bylaws stated the members had full voting rights. The Articles of Corporation further created a Board of Directors as well as an Executive Committee consisting in part of officers currently elected by the members and in part of non-elected officers whose terms had expired.

In the spring of 2011, while conducting a forensic investigation of the public documents associated with *American Accounting Association*, I discovered the *American Accounting Association* had been operating illegally since 1996.³ While in a state of dissolution, the *American Accounting Association* (instead of winding up its affairs) continued to operate illegally from its dissolution in 1996 to 2002. The 2002 Corporation then operated illegally without an elected board of directors as required by the GNFPCA⁴ and its Articles of Incorporation.

The forensic investigation revealed that the 2002 corporation had been created in August 2002, something that those in control of the 2002 Corporation had never informed the members. More importantly, I discovered that those in control of the 2002 Corporation had never allowed the members to elect a board of directors as required by its Articles of Incorporation. Instead, in August 2002, the Executive Committee declared certain members of the Executive Committee (i.e., themselves) to be the Board of Directors, in contravention of the Articles of Corporation which required the Board of Directors to be elected by the members (Huber 2011). Thus, the 2002 Corporation operated from 2002 to 2011 with no elected board of directors as required by its Articles of Incorporation and the GNFPCA.⁵ The members of the Executive Committee from 2001 to 2012 are given in Appendix A, as well as the initial directors listed in the 2002 Corporation’s Articles of Incorporation, those who declared the members of the Executive Committee to be the Board of Directors in August 2002, those who operated the 2002 Corporation from 2002 to 2012, and those who dissolved the 2002 Corporation (discussed below) stating there were no members.

The Legal Proceedings—Background

After denying there were any errors or that it was operating illegally, in June 2011, those in control of the 2002 Corporation filed a voluntary dissolution of the 2002 Corporation and a reinstatement of the 1935 Corporation to rectify the errors exposed in my previous research. Members of the Executive Committee of the 2002 Corporation claimed in the voluntary dissolution they were the board of directors and that the corporation had no members, and therefore they had the authority to dissolve the 2002 Corporation.⁶ However, as noted by Hugh Webster, the *American Accounting Association*’s previous attorney, a board’s authority is limited by the articles of incorporation (Webster and Webster, 2010, p. 2–35) which, in the case of the 2002 Corporation, gave full voting rights to the members.

At this point, note that a forensic accountant will rarely, if ever, become involved as a party in the legal proceeding for which the forensic investigation is undertaken regardless whether it is an action for damages or an action in equity.

¹ 805 ILCS 105/112.40.

² 805 ILCS 105/107.03(c). “If the corporation is to have no members, that fact shall be set forth in the articles of incorporation or the bylaws.”

³ The findings were published in the *Journal of Forensic & Investigative Accounting*, Vol. 3, Issue 2, Special Issue, 2011.

⁴ 805 ILCS 105/ 108.05. “Each [not-for-profit] corporation shall have a board of directors,” While the board of directors need not be referred to as the board of directors, the Articles of Incorporation of the 2002 Corporation do refer to the board of directors as the board of directors.

⁵ 805 ILCS 105/108.10(a); 805 ILCS 105/108.05.

⁶ 805 ILCS 105 112.05. “Where a corporation has no members or no members entitled to vote on dissolution, the dissolution of a corporation may be authorized by a majority of the directors...”

However, since I was a dues-paying member of the *American Accounting Association* because of the unauthorized dissolution of the 2002 Corporation by those in control of the corporation rather than a vote from the members, I initiated a petition to vacate the dissolution of the 2002 Corporation and the corresponding reinstatement of the 1935 Corporation. The petition, equivalent to a complaint in an action for damages, requested a judicial dissolution of the 2002 Corporation pursuant to Section 112.50(b)(2) of the Illinois General Not for Profit Corporation Act.⁷ As an alternative to dissolution, the petition asked the Court to retain jurisdiction and to order an election for a board of directors as required by the Articles of Incorporation.⁸ The case was assigned to Judge John Schmidt.

The 2002 Corporation's attorney, Donald Tracy,⁹ moved to dismiss the Petition. Judge Schmidt allowed an amended petition to be filed. After filing an Amended Petition, Donald Tracy again moved to dismiss the Amended Petition. Judge Schmidt allowed a second amended petition to be filed.

I then filed a Second Amended Petition. Donald Tracy likewise moved to dismiss the Second Amended Petition arguing I had no standing because there were never any members of the 2002 Corporation, therefore I was never a member, and therefore I had no standing. He also argued that the 2002 Corporation had been only a shell corporation (Tracy, 2013; Huber, 2015a).

Although the GNFPICA does not specifically prohibit a not-for-profit shell corporation, the Act does not authorize a not-for-profit shell corporation (Huber, 2016). Nevertheless, to eliminate, or at least reduce, the risk of not-for-profit shell corporations being formed in the future, I sent a letter to the members of the Illinois State Legislature (Appendix B) urging them to revise the GNFPICA to explicitly prohibit the formation of a not-for-profit shell corporation since not-for-profit shell corporations can be used for fraud and financing terrorist organizations (Huber, 2016). There has been no response to date.

Incorporated in Donald Tracy's Motion to Dismiss the Second Amended Petition was an affidavit of Tracey Sutherland, the Executive Director of the 2002 Corporation. Tracey Sutherland stated I had never been a member of the 2002 Corporation.¹⁰ The affidavit also revealed that all the funds received from the dues-paying members of the 2002 Corporation had been deposited into the accounts of the dissolved 1935 Corporation (Tracy, 2013). The necessity of a forensic investigation of public documents to refute sworn statements is thus demonstrated, since the Articles of Incorporation filed with the Illinois Secretary of State in August 2002 stated there were members of the Corporation.

On March 6, 2013, Judge Schmidt granted Donald Tracy's Motion to Dismiss based on Tracy's affidavit arguing there were never any members of the 2002 Corporation, therefore I had no standing, and that the 2002 Corporation was only a shell corporation. Judge Schmidt issued no opinion. However, if no reason is given by a trial court for dismissing an action, the assumption is that the dismissal is for the reasons argued by the movant.¹¹ An appeal was filed, but dismissed for lack of jurisdiction (Huber, 2015a, 2015b).

The Legal Proceedings—Post-Dismissal

Judge Schmidt's dismissal of the Second Amended Petition was against the requirement of the Illinois General Not for Profit Corporation Act.¹² The dismissal also was contrary to the unambiguous facts that neither the Articles of Incorporation nor the Bylaws of the 2002 Corporation stated there were no members as required by the GNFPICA, which

⁷ 805 ILCS 105/112.50(b)(2). "A Circuit Court may dissolve a corporation... in an action by a member entitled to vote... if it is established that... the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent." The case was filed in the Seventh Circuit, Fourth District, Sangamon County. (*Huber v. American Accounting Association*, 2011-MR-00041). Note that as an action in equity damages is not an element which must be demonstrated. A petitioner only need show that those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent. Thus, a forensic investigation is necessary in order to obtain the evidence to support a petition.

⁸ 805 ILCS 105/112.55.

⁹ Brown, Hay & Stephens, LLP, Springfield, Illinois.

¹⁰ In a hearing in February 2016, Donald Tracy blamed the formation of the 2002 Corporation on "bad legal advice" from the previous attorney. (Transcript, June 10, 2016).

¹¹ *Zielinski v. Miller*, 277 Ill. App. 3d 735, 660 N.E.2d 1289 (1995).

¹² 805 ILCS 105/107.03(c). "If the corporation is to have no members, that fact shall be set forth in the articles of incorporation or the bylaws."

states that either the articles of incorporation or the bylaws must state there are to be no members if the corporation is to have no members. Both the Articles of Incorporation and the Bylaws of the 2002 Corporation stated there were members. The dismissal of the Petition meant the 2002 Corporation did not have to respond to the Petition. The dismissal of the Petition also precluded discovery and taking depositions. Therefore, since Judge Schmidt's ruling was contrary to the law and the facts, I was forced to conduct yet another forensic investigation of public documents to see if I could determine the reason for Judge Schmidt's dismissal of the petition. What I discovered provides an explanation for Judge Schmidt's dismissal of the Petition.

If a judge's impartiality might reasonably be questioned, the Illinois Code of Judicial Conduct requires a judge to recuse him or herself.¹³ I discovered that Judge Schmidt had been the recipient of thousands of dollars of political campaign contributions from Donald Tracy and members of his law firm. Furthermore, I discovered that a week prior to Tracey Sutherland's statement, under oath, that I had never been a member of the 2002 Corporation and Donald Tracy arguing there had never been any members of the 2002 Corporation, Sutherland stated under penalty of perjury on the 2002 Corporation's 2010 IRS Form 990¹⁴ that there were members.

Therefore, in August 2015 I filed a "Motion to Vacate the Judgment of Judge John Schmidt Dismissing This Case, to Remove Him from the Case, and to Transfer the Case to a Judge Who Has Not Received Contributions to His or Her Political Campaign" for fraudulent concealment and judicial misconduct. Two weeks later the Chief Administrative Judge removed Judge Schmidt and assigned the case to Judge David Cherry in Scott County, the next county over.

On April 10, 2017, Judge Cherry dismissed the Motion stating:

With regard to the campaign contribution issue, in addition to the fact that the Plaintiff does not claim that such contributions are fraud per se, there could be no concealment as all contributions must be reported to the State Board of Elections on a regular timely basis, and are available to the public almost immediately upon filing... the newly discovered information proffered by the Petitioner as grounds for his relief from the Order dismissing his Amended Petition, which Petitioner claims he 'discovered' after the March 6, 2013, ruling, was 'discoverable' well in advance of Judge Schmidt's order dismissing the Plaintiffs Amended Petition (Cherry, 2017).

Judge Cherry's ruling now creates a duty for all trial lawyers practicing in Illinois, and perhaps elsewhere, to investigate every judge presiding over every case in which they are appearing to determine whether the judge has received political campaign contributions from opposing counsel. Judge Cherry's ruling also provides an example of the importance for forensic accountants to become proficient in public document research. The implication of Judge Cherry's ruling for forensic accountants is that when providing litigation support services, judges should not be excluded from consideration of factors that could affect the outcome of the litigation. Judge Cherry's ruling also underscores the importance for forensic accountants to be able to conduct public document research.

Judge Cherry also ruled:

The Plaintiff's claim of fraudulent filings by the Respondent with the Internal Revenue Service was first raised by Plaintiff in his original Complaint and then voluntarily withdrawn by Plaintiff in his RESPONSE TO RESPONDENT'S SUPPLEMENTAL AMENDMENT TO MOTION TO DISMISS AND CROSS-MOTIONS FOR JUDICIAL NOTICE OF ADJUDICATORY FACTS, PARTIAL SUMMARY JUDGMENT AND PRELIMINARY INJUNCTIONS filed on October 9, 2012 (Cherry, 2017, emphasis in original).

¹³ Judge Schmidt failed to disqualify himself. Illinois Code of Judicial Conduct RULE 63, Canon 3, Paragraph C, Section (1). states: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer..."

¹⁴ Certain 501(c)(3) corporations are required to file annually IRS Form 990 as information returns.

That statement is patently incorrect. The original petition included allegations that the 2002 Corporation had committed fraud on the IRS for claiming to be a 501(c)(3) corporation, when it had never obtained a 501(c)(3) designation from the IRS (Huber, 2011). The issue of fraudulent concealment raised in my Motion to Vacate Judge Schmidt's dismissal of the Petition concerned Tracey Sutherland's contradictory statements under oath—to the court there were no members, and to the IRS there were members. As shown by public documents, the two issues are unrelated. Judge Cherry's confusion of the two issues is itself confusing and another example of the importance for forensic accountants to establish all facts from available public documents.

Conclusion

The purpose of this article is to demonstrate the interplay between a forensic investigation and the legal issues that a forensic accountant may encounter. This follow up article shows the types of investigation of public documents that a forensic accountant may have to conduct both during and following a legal proceeding as part of litigation support. This research also shows that forensic accounting, especially when providing litigation support, may involve more than just questions limited strictly to accounting, and may involve public document research that supports both actions for damages and actions in equity.

While a forensic investigation can reveal various irregularities and illegalities that may be at issue in a legal proceeding for which a forensic accountant is engaged, their resolution may be thwarted and subverted by the very legal proceedings for which the forensic accountant is providing litigation support, thus requiring further, and broader, investigation. A forensic accountant must meticulously identify, categorize, record, and cross-reference all publicly available documents discovered or obtained during a forensic investigation.

Furthermore, while investigating a judge for possible bias would not be initiated by a forensic accountant, but initiated by the attorney for whom litigation support is provided, a judge's bias may be difficult to substantiate even with public documents since normally there are alternative interpretations of both law and fact. Here, there are no alternative interpretations of either law or fact since the GNFPCCL is clear regarding membership of a not-for-profit corporation as was the Articles of Incorporation of the 2002 Corporation.

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Appendix A: Executive Committee Members

<http://aaahq.org/About/Archive>

2001–2002 (These are the members of the Executive Committee serving when the 2002 Corporation was incorporated. The Articles of Incorporation of the 2002 Corporation said there are members and the Board of Directors must be elected by the members.)

- Joel S. Demski
- Mary S. Stone
- G. Peter Wilson
- William E. (Bill) McCarthy
- Samuel A. Vitkoski
- Kevin D. Stocks
- Lawrence A. Tomassini
- Larry E. Rittenberg
- Ronald A. Dye
- Judy S. L. Tsui
- Alexander L. Gabbin

2002–2003

- G. Peter Wilson*
- William L. Felix, Jr. *
- Joel S. Demski*
- William E. (Bill) McCarthy
- Kevin D. Stocks
- Judy D. Rayburn
- Judy S. L. Tsui
- Samuel A. Vitkoski
- Lawrence A. Tomassini
- Zoe-Vonna Palmrose
- Joanna L. Ho
- Finley Graves
- Robert Libby

* These are the members of the Executive Committee who declared in August 2002 that members of the Executive Committee (i.e., themselves) would be the Board of Directors.

2003–2004

- William L. Felix, Jr.
- Jane F. Mutchler
- G. Peter Wilson
- Carolyn M.
- Judy D. Rayburn
- Lee David Parker
- Mark M. Chain
- Robert Libby
- Zoe-Vonna Palmrose
- Joanna L. Ho
- Susan Haka

2004–2005

- Jane F. Mutchler
- Judy Rayburn
- William L. Felix, Jr.
- Carolyn M. Callahan
- O. Finley Graves
- Susan Haka
- Lee David Parker
- Mark M. Chain
- Robert Libby
- John Fellingham

- Susan V. Crosson
- Nancy A. Bagranoff
- Morton P. Pincus

2005–2006

- Judy Rayburn
- Shyam Sunder
- Past President
- Jane F. Mutchler
- James E. Hunton
- Nancy A. Bagranoff
- Susan Haka
- Alfred Wagenhofer
- D. Scott Showalter
- Morton P. Pincus
- John Fellingham
- Susan V. Crosson
- Joseph V. Carcello

2006–2007

- Shyam Sunder
- Gary J. Previts
- Judy Rayburn
- James E. Hunton
- Nancy A. Bagranoff
- Joseph V. Carcello
- Alfred Wagenhofer
- D. Scott Showalter
- Morton P. Pincus
- Arnold Wright
- Mark Higgins
- Philip M. J. Reckers
- David Burgstahler

2007–2008

- Gary J. Previts
- Susan Haka
- Shyam Sunder
- Jane Saly
- Philip M. J. Reckers
- Joseph V. Carcello
- Sidney Gray
- Robert J. (Bob) Daugherty
- David Burgstahler
- Arnold Wright
- Mark Higgins
- Christopher J. Wolfe

2008–2009

- Susan Haka
- Nancy Bagranoff
- Gary J. Previts
- Jane Saly
- Philip M. J. Reckers
- Christopher J. Wolfe
- Sidney Gray
- Robert J. (Bob) Daugherty
- David Burgstahler
- Greg Waymire

- Bruce Behn
- Belverd Needles
- Jean Bedard

2009–2010

- Nancy Bagranoff
- Kevin Stocks
- Susan Haka
- Ira Solomon
- Belverd Needles
- Christopher J. Wolfe
- Kazuo Hiramatsu
- Robert H. Colson
- Jean Bedard
- Greg Waymire
- Bruce Behn
- Stacy E. Kovar

2010–2011**

- Kevin Stocks
- Greg Waymire
- Nancy Bagranoff
- Ira Solomon
- Belverd Needles
- John Christensen
- Kazuo Hiramatsu
- Robert H. Colson
- Jean Bedard
- Gail Hoover King
- Stacy E. Kovar
- Christine A. Botosan
- Alan Reinstein

** These are the members of the Executive Committee who dissolved the 2002 Corporation by saying there were no members of the 2002 Corporation and the dissolution was approved by a majority of the board of directors.

2011–2012

- Greg Waymire
- Karen Pincus
- Kevin Stocks
- Stacy E. Kovar
- John Christensen
- David E. Stout
- Recep Pekdemir
- Ken Bouyer
- Christine A. Botosan
- Gail Hoover King
- Dale L. Flesher

Appendix B: Letter to Illinois State Legislators

May 15, 2017

Dear Senator/Representative:

This letter is to warn you of the risk of not-for-profit shell corporations being formed in Illinois for the purposes of fraud and money laundering and to urge you to take action to amend the Illinois General Not for Profit Corporation Act of 1986 to eliminate or at least reduce the risk.

The Illinois General Not for Profit Corporation Act of 1986 states “If the corporation is to have no members, that fact shall be set forth in the articles of incorporation or the bylaws” (805 ILCS 105/107.03).

For the past several years, I have been involved in a case concerning this particular statute. While the details of the case are too complex and lengthy to recite here completely, a summary is sufficient to convey the seriousness of the issue.

The American Accounting Association was an Illinois not-for-profit corporation incorporated in 2002. Neither the Articles of Incorporation nor the Bylaws of the Respondent stated there were no members, and actually stated there were members.

In 2011 as a member of the American Accounting Association I initiated a petition in the Seventh Circuit, Fourth District, Sangamon County (*Huber v. American Accounting Association*, 2011-MR-00041) to judicially dissolve the corporation on the grounds that “those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive or fraudulent” (805 ILCS 105/112.50). The case was assigned to Judge John Schmidt (whom I later discovered had received thousands of dollars in political campaign contributions from the Respondent’s attorney and his law firm).

In 2013, the Respondent moved to dismiss the petition on the grounds the corporation had no members and it was merely a shell corporation. Although Judge Schmidt knew the GNFPCA required “If the corporation is to have no members, that fact shall be set forth in the articles of incorporation or the bylaws” and also knew that neither the Articles of Incorporation nor the Bylaw of the Respondent stated there were no members and in fact stated there were members, he nevertheless dismissed the petition without opinion for the reasons the Respondent had no members and was a shell corporation. (If no reason is given by a trial court for dismissing an action it must be assumed that the dismissal is for the reasons argued by the movant. *Zielinski v. Miller*, 277 Ill. App. 3d 735, 660 N.E.2d 1289 (1995)). Judge Schmidt’s dismissal of the petition thus disregarded the clear requirement of the statute and the express will of the Illinois State Legislature.

(There were subsequent appeals and motions which were denied on jurisdictional grounds and are not relevant here. See, “A survey of Illinois Code of Civil Procedure Section 2-619(a),” *John Marshall Law Review*, 48(4), 1009-1038, and “The curious, perjurious requirements of Illinois Supreme Court Rule 12(b)(3).” *Southern Illinois University Law Journal*, 39(3), 451–47, https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=371197.)

Judge Schmidt’s ruling sets a dangerous precedent. The question of the diminished integrity of the Illinois judiciary as a result of Judge Schmidt ruling contrary to the law after receiving thousands of dollars in political campaign contributions from the Respondent’s attorney is a separate issue. The issue here is the very real risk of this ruling being used as a precedent to form other not-for-profit shell corporations in order to engage in fraud and money laundering. (For more information see, “Can a not-for-profit membership corporation be created as a “shell” corporation?” *Liberty University Law Review*, 11(1), 1–3; https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=371197.)

I therefore strongly urge the Illinois State Legislature to take immediate action to amend the Illinois General Not for Profit Corporation Act of 1986 to eliminate or at least reduce the risk by explicitly prohibiting the formation of not-for-profit shell corporations.

Sincerely,

Distribution:

All Representatives and Senators
Illinois State Bar Association