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## James B. Helmer, Jr.: A Legal Maverick for the False Claims Act

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## INTRODUCTION

### JAMES B. HELMER, JR.: A LEGAL MAVERICK FOR THE FALSE CLAIMS ACT

*S. Elizabeth Malloy\* & Michael E. Solimine\*\**

James B. Helmer, Jr. was a legal maverick. The *University of Cincinnati Law Review* is proud to recognize his contributions to the legal profession and specifically to the development of the False Claims Act (“FCA”). Jim was a fan of the “Top Gun” movie franchise starring Tom Cruise.<sup>1</sup> Actor Tom Cruise played Pete Mitchell, a naval aviator, who goes by the call name, Maverick. Like Pete Mitchell, Jim was an excellent athlete, playing varsity college football, and he enjoyed fast vehicles, owning and driving numerous race cars which won many awards. In his legal career, Jim further displayed maverick tendencies in his innovative and influential approach to the FCA and his healthy tolerance for taking chances on what he believed was right.

We here only survey a few highlights of Jim’s distinguished and wide-ranging career in the legal profession. A *cum laude* graduate of Denison University with a bachelor’s degree in History, he graduated from the College of Law, Order of the Coif. He then clerked for United States District Judge Timothy Hogan of the Southern District of Ohio. Not long after, Jim founded his own firm in Cincinnati, which is now Helmer, Martins, Tate & Garrett Co., LPA. He and the firm have represented a variety of plaintiffs and defendants in complex, path-breaking cases in federal and state courts, both in Ohio and around the country.

Jim was especially known for his representation of whistleblowers calling out fraud by government contractors, who bring suit in the federal court under the FCA. The FCA dates to the Civil War, but only since the 1980s has it come into greater use, in large part due to Jim’s indefatigable efforts in representing whistleblowers. His FCA career began while representing John M. Gravett, a Marine who served the United States in Vietnam. Mr. Gravett was fired when he discovered that his supervisors at GE were overbilling the United States government for the work on the B-1 Lancer Bomber. Jim filed a *qui tam* lawsuit for Mr. Gravett against GE. This case became pivotal to the congressional review of the *qui tam* cause of action under the FCA of 1986, amendments that Jim suggested

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1. See TOP GUN (Paramount Pictures 1986); TOP GUN: MAVERICK (Paramount Pictures 2022).

to Congress in testimony concerning the statute. Since that time, Jim represented scores of such plaintiffs and obtained many multi-million-dollar jury verdicts and settlements, returning over one billion dollars to the government. Among the many notable FCA cases he litigated was *Allison Engine Co. v. United States ex rel. Sanders*,<sup>2</sup> which Jim argued and won in a 9-0 decision of the United States Supreme Court in 2008. In the same year, Jim testified again before Congress in favor of amendments to clarify the FCA, and that legislation was passed and signed by President Obama in 2009.

Appropriately for the symposium which we introduce and, given his status as a former Editor-in-Chief of the *Law Review*, Jim was not only a nationally recognized litigator on the FCA, but a scholar as well. He was the author of the leading book on the FCA, now in its eighth edition,<sup>3</sup> and authored or co-authored several substantial law review articles on the FCA. Four of those have been published in the *Law Review*.<sup>4</sup> His work has been cited and discussed by federal courts and by scores of books and law review articles.<sup>5</sup>

This symposium contains scholarship addressing significant legal issues and circuit splits facing the future interpretation of the False Claims Act. In Joel D. Hesch's article, *A Framework for Assessing Whether Civil Penalties under the False Claims Act Violate the Excessive Fines Clause of the Eighth Amendment*, the author analyzes whether the civil penalties (or a portion of the treble damages) available under the FCA violate the Excessive Fines Clause of the Eighth Amendment. In this article, Mr. Hesch proposes a framework for assisting the government in requesting, and the courts in assessing, FCA recoveries, including civil penalties, that do not run afoul of the Excessive Fines Clause. In *The Common-Law Roots of Materiality under the False Claims Act*, Noah Rich examines the FCA's outcome-materiality standard and argues that a detailed exam-

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2. 553 U.S. 662 (2008).

3. JAMES B. HELMER, JR., *FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION* (8th ed. 2021).

4. James B. Helmer, Jr. & Erin M. Campbell, *Jury Instructions for False Claims Act Cases*, 84 U. CIN. L. REV. 943 (2016); James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261 (2013); James B. Helmer, Jr. & Julie W. Popham, *Materiality and the False Claims Act*, 71 U. CIN. L. REV. 839 (2003); James B. Helmer, Jr., *How Great is Thy Bounty: Relators Share Calculations Pursuant to the False Claims Act*, 68 U. CIN. L. REV. 737 (2000).

5. For a small sampling of citations, see, e.g., *U.S. ex rel. Spay v. CVS Caremark Corp.*, 875 F.3d 746, 753 n.31 (3rd Cir. 2017)(citing Helmer, *False Claims Act*, *supra* note 4); *United States v. President and Fellows of Harvard College*, 323 F. Supp.2d 151, 181 (D. Mass. 2004)(citing Helmer & Popham, *supra* note 4); J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. 539, 544 n.19 (2000)(citing Helmer & Neff, *supra* note 4); David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from the Qui Tam Litigation*, 114 Colum. L. Rev. 1913, 1916 n.7 (2014)(citing Helmer, *How Great is Thy Bounty*, *supra* note 4); Hope Brinn, Note, *Employer Accountability in a World of Private Dispute Resolution*, 118 Mich. L. Rev. 285, 294 n.70 (2019)(citing Helmer, *False Claims Act*, *supra* note 4).

ination of the case law on materiality leads to the conclusion that courts have misinterpreted the Supreme Court's *Universal Health Services, Inc. v. United States ex rel. Escobar* decision to require an FCA litigant prove that the falsehood in question actually affected the government's payment decision—rather than merely being capable of affecting that decision. Mr. Rich asserts that the FCA was intended to proscribe a broader set of misconduct than has generally been understood in the wake of *Escobar* and demonstrates the reasons that the actually affected standard for materiality should be applied to the FCA. In Renee Brooker & Jaclyn Tayabji's article, *All Hands on Deck: The Role of Government Employees as Qui Tam Relators*, the authors set forth extensive analysis of the FCA's legislative history as well as legislative public policy goals of fraud reduction to argue in support of government employees serving as relators. Their research clarifies that courts should not be hesitant in permitting government employees to serve as relators in FCA cases. Glen McClain, a joint JD/MD student, in *Fixed Payment Schedules do not Foreclose Liability Under the False Claims Act*, examines the federal circuit split concerning whether fixed payment systems, as used by Medicare Advantage plans, are material, and based on an extensive legislative history and case law review, concludes that such payments do satisfy the materiality standard. Finally, a student member of the *Law Review* addresses another recent circuit split under the FCA. In Nathaniel Kinman's note, *Whistleblower Protection Under the False Claim Act: Providing Former Employee Inclusion*, he argues that the FCA's anti-retaliation provision should be interpreted to afford former employees relief from retaliation as the Sixth Circuit provided in *William Beaumont Hospital v. United States, ex rel. Felten*.<sup>6</sup> Mr. Kinman argues that the Sixth Circuit decision most accurately complies with legislative intent and governing policies inherent to the FCA and should guide other federal courts in deciding whether former employees receive protection against post-employment retaliation under the FCA.

These excellent articles add to growing scholarship on the FCA and demonstrate Mr. Helmer's important and continuing legacy to that statute and its development. There are rare occasions in this profession where the term *maverick* can be used appropriately to describe a person; Mr. Helmer was one of those people. As a University of Cincinnati Law graduate, a former Editor-in-Chief of the *Law Review*, a titan of the law of FCA litigation, and the spearhead behind modern FCA amendments and reform, Mr. Helmer exemplifies a modern-day legal maverick.

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6. 993 F.3d 428 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 896 (2022).