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**THE COST OF OBEYING THE LAW?: THE
SEVENTH CIRCUIT REJECTS THE BONA FIDE
ERROR DEFENSE FROM A DEBT COLLECTOR
WHO FOLLOWED THE THEN-BINDING LAW**

JUN QIU*

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INTRODUCTION

People should follow the law, which includes the statutes themselves and the judicial rulings interpreting those statutes. However, if the binding judicial interpretation changes, should a party be liable for following an old binding judicial interpretation of a federal statute at a time when the interpretation was still in effect? Or, should a defense allow the parties to shield themselves from liability for relying in good faith on the old binding judicial interpretation?

The courts in the Seventh Circuit faced such a dilemma in 2014 after a change in that circuit's judicial interpretation of the venue provision in the Fair Debt Collection Practices Act (FDCPA).¹ The

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¹ *Oliva v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 185 F. Supp. 3d 1062, 1065 (N.D. Ill. 2015) [hereinafter *Oliva I*], *aff'd*, 825 F.3d 788 (7th Cir. 2016) [hereinafter *Oliva II*], and *vacated on reh'g en banc*, 864 F.3d 492 (7th Cir. 2017) [hereinafter *Oliva III*]. All of the district court decisions on point other than *Oliva I*

FDCPA requires that a debt collector who sues to collect a consumer debt must sue in the “judicial district or similar legal entity” where the debtor lives or signed the contract in question.² In 1996, in *Newsom v. Friedman*, the Seventh Circuit interpreted “judicial district” to mean a circuit court.³ Thus, for example, when a debt collector file suit in Cook County, the “judicial district” is the Circuit Court of Cook County and the debt collector can file suit in any of the county’s six municipal districts, as long as the debtor resides in Cook County or signed the underlying contract there.⁴

In 2013, relying on *Newsom*, a debt collection law firm Blatt, Hasenmiller, Leibsker & Moore, LLC (“BHLM”) filed suit against a debtor, Ronald Oliva, in the first municipal district of Cook County in downtown Chicago.⁵ Oliva did not reside in that district at the time the lawsuit was filed.⁶ While the lawsuit was pending, the Seventh Circuit overruled *Newsom* and issued a new rule in *Suesz v. Med-1 Solutions, LLC* that interpreted the “judicial district or similar legal entity”

have ruled in favor of retroactive application of *Suesz v. Med-1 Solutions, LLC*. See 757 F.3d 636, 638 (7th Cir. 2014) (en banc); *Oberg v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, No. 14 C 7369, 2015 WL 9478213, at *4 (N.D. Ill. Dec. 29, 2015); *Desfassiaux v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 142 F. Supp. 3d 667, 674 (N.D. Ill. 2015) (holding in favor of retroactive application of *Suesz*); *Browne v. John C. Bonewicz, P.C.*, No. 14 CV 6312, 2015 WL 6165033, at *3 (N.D. Ill. Oct. 20, 2015) (same); *Rowan v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, No. 14 CV 08923, 2015 WL 5920873, at *6 (N.D. Ill. Oct. 8, 2015) (Chang, J.) (same); *Conroy v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, No. 14 C 6725, 2015 WL 5821642, at *4 (N.D. Ill. Oct. 1, 2015) (same); *Portalatin v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 125 F. Supp. 3d 810, 817 (N.D. Ill. 2015) (same); *Maldonado v. Freedman Anselmo Lindberg, LLC*, No. 14 C 6694, 2015 WL 2330213, at *3 (N.D. Ill. May 14, 2015) (same). It is also interesting that *Oliva* is one of the twenty-eight retroactive *Suesz* cases that the debtor *Oliva*’s attorneys filed against BHLM between August 2014 and July 2015, and that the debtor *Oliva* testified, “I would say it only matters to me because it matters to my lawyer.” See *Oliva I*, 185 F. Supp. 3d at 1064.

² 15 U.S.C. § 1692i (2012).

³ *Newsom v. Friedman*, 76 F.3d 813, 820 (7th Cir. 1996), overruled by *Suesz*, 757 F.3d 636.

⁴ *Id.* at 819-20.

⁵ *Oliva I*, 185 F. Supp. 3d at 1064.

⁶ *Id.*

language in the FDCPA’s venue provision to mean “the smallest geographic area that is relevant for determining venue in the court system in which the suit is filed.”⁷ Such an area can be smaller than a county if the court system there uses smaller districts, such as the six districts of Circuit Court of Cook County.⁸ Eight days later, BHLM voluntarily dismissed its pending lawsuit against Oliva.⁹

About one month later, Oliva sued BHLM under the FDCPA alleging that BHLM violated the venue provision in § 1692i when it filed a collection suit against him at the Daley Center rather than at a Cook County courthouse closest to his residence.¹⁰

The district court ruled in favor of BHLM (*Oliva I*).¹¹ Oliva appealed to the Seventh Circuit, which affirmed the district court’s decision (*Oliva II*).¹² Then the Seventh Circuit reheard the case en banc (*Oliva III*), where it refused to apply *Suesz* only prospectively, concluding that the debt collector’s venue choice violated the FDCPA and that the bona fide error defense did not apply to BHLM’s violation.¹³ In the petition for the rehearing en banc, Oliva argued, among other things, that the panel decision in *Oliva II* incorrectly applied the Supreme Court’s ruling in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, which held that the bona fide error defense under the FDCPA was not available with respect to a mistake of law.¹⁴ The panel in *Oliva II* read *Jerman* to mean that only a debt collector’s *own* mistaken interpretation of the law would prevent the application of the bona fide error defense, and found that BHLM’s reliance on *Newsom* was not a mistake of law on BHLM’s part, but

⁷ *Id.* (quoting *Suesz*, 757 F.3d at 638).

⁸ *Suesz*, 757 F.3d at 648; *Oliva I*, 185 F. Supp. 3d at 1066.

⁹ *Oliva I*, 185 F. Supp. 3d at 1064.

¹⁰ *Id.*

¹¹ *Id.* at 1067.

¹² *Oliva v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 825 F.3d 788, 793 (7th Cir. 2016), *on reh’g en banc*, 864 F.3d 492 (7th Cir. 2017).

¹³ *Oliva v. Blatt, Hasenmiller, Leibsker & Moore LLC*, 864 F.3d 492, 497–99 (7th Cir. 2017) (en banc).

¹⁴ *Id.* at 495; *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 576 (2010).

rather an unintentional bona fide error for which such defense remained available.¹⁵ In contrast, the en banc court in *Oliva III* read *Jerman* more broadly, concluding that the bona fide error defense is not available with respect to *all* mistakes of law, including where a debt collector relies in good faith on a binding court's interpretation of the law that is later overruled.¹⁶ Essentially, the Seventh Circuit reasoned that reliance on the court's precedent is permitted *only* if there can be no doubt whatsoever as to the accuracy of the court's interpretation of the law.¹⁷ Consequently, the en banc Seventh Circuit held that BHLM was not excused under the safe harbor of the bona fide error defense.¹⁸

Part I of this article discusses the FDCPA, its venue provision and the bona fide error defense, and the retroactive application of judicial decisions. Part II reviews the facts and holdings of the Seventh Circuit's en banc decision in *Oliva III*, as well as the district court decision in *Oliva I* and the Seventh Circuit panel decision in *Oliva II*. Finally, Part III asserts that the Seventh Circuit's en banc decision in *Oliva III* was improperly reasoned and decided.

THE FAIR DEBT COLLECTION PRACTICES ACT

Concerned about debt collectors' use of abusive, deceptive, and unfair debt collection methods, Congress enacted the FDCPA in 1977 to establish some nationally-uniform controls on debt collection methods.¹⁹ Congress noted that abusive debt collection practices

¹⁵ *Oliva II*, 825 F.3d at 792.

¹⁶ *Oliva III*, 864 F.3d at 498.

¹⁷ Amy Jonker, *7th Cir. Divided Panel Holds Debt Collector Liable under FDCPA Despite Changes in Underlying Law at Issue*, CONSUMER FIN. SERVS. BLOG (Aug. 3, 2017), <http://consumerfsblog.com/2017/08/7th-cir-divided-panel-holds-debt-collector-liable-fdcpa-despite-changes-underlying-law-issue/>.

¹⁸ *Oliva III*, 864 F.3d at 500.

¹⁹ 15 U.S.C. § 1692(a) (2012); *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227 (3d Cir. 2005); Philip White Jr., Annotation, *Construction and Application of Venue Provision of Fair Debt Collection Practices Act*, 15 U.S.C.A. § 1692(i), 28 A.L.R. Fed. 2d 523 (2008).

contributed to the number of personal bankruptcies, marital instability, the loss of jobs, and to invasions of personal privacy.²⁰ Congress stated three purposes of the FDCPA: (1) “to eliminate abusive debt collection practices by debt collectors”; (2) “to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged”; and (3) “to promote consistent State action to protect consumers against debt collection abuses.”²¹ The FDCPA deters abusive debt collection practices,²² and “imposes civil liability on ‘debt collector[s]’ for certain prohibited debt collection practices.”²³ Among other provisions, the FDCPA prohibits debt collectors from making false representations as to a debt’s character, amount, or legal status; communicating with consumers at unusual and inconvenient times or places; or using obscene language, violence, or threats.²⁴

The FDCPA is enforced both through administrative actions and private lawsuits.²⁵ The following sections explain relevant FDCPA provisions and judicial interpretations.

²⁰ § 1692(a).

²¹ § 1692(e).

²² Shauna Cully Wagner, Annotation, *Construction and Application of Fair Debt Collection Practices Act (FDCPA) Bona Fide Error Defense*, 15 U.S.C.A. § 1692k(c), 14 A.L.R. Fed. 2d 207 (2006).

²³ *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 573 (2010) (alteration in original).

²⁴ *See generally* §§ 1692b–1692j; *Heintz v. Jenkins*, 514 U.S. 291, 292–93 (1995).

²⁵ §§ 1692k–1692l. In administrative actions, for example, debt collectors are subject to penalties of up to \$16,000 per day if they acted with “actual knowledge or knowledge fairly implied on the basis of objective circumstances that [their actions were] unfair or deceptive and [were] prohibited [by the FDCPA].” § 45(m)(1)(A)–(C); *see also* Federal Civil Penalties Inflation Adjustment Act of 1990, 16 C.F.R. § 1.98(d) (2010) (adjusting the maximum civil penalties to \$16,000). In civil cases, in addition to actual damages, courts may award statutory damages up to \$1,000 in any action by an individual, or, in a class action, award up to “the lesser of \$500,000 or 1 [percent] of the net worth of the debt collector.” § 1692k(a); *see Vartan S. Madoyan, Attorneys Beware: Jerman v. Carlisle Holds You Liable for Technical Legal Errors under the FDCPA*, 44 LOY. L.A. L. REV. 1091, 1093 (2011).

A. Venue Provision of the FDCPA

The venue provision of the FDCPA limits the venues in which debt collectors can file legal actions to collect consumer debts, providing in pertinent part that:

Any debt collector who brings any legal action on a debt against any consumer shall—

(1) in the case of an action to enforce an interest in real property securing the consumer’s obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or

(2) in the case of an action not described in paragraph (1), bring such action only in the *judicial district or similar legal entity*—

(A) in which such consumer signed the contract sued upon; or

(B) in which such consumer resides at the commencement of the action.²⁶

When a debt collector files a debt collection suit in the wrong venue, the FDCPA permits the consumer to sue the debt collector and recover “actual damage[s],” costs, “a reasonable attorney’s fee as determined by the court,” and statutory “additional damages.”²⁷

In accordance with § 1692n, federal courts have ruled in several cases that state venue statutes or rules must yield to the venue provision of the FDCPA.²⁸ As applied to debt collection actions in state courts, “§ 1692i must be understood not as a venue rule but as a

²⁶ § 1692i(a) (emphasis added).

²⁷ § 1692k.

²⁸ See e.g., *Harrington v. CACV of Colo., LLC*, 508 F. Supp. 2d 128, 134 (D. Mass. 2007); *McKnight v. Benitez*, 176 F. Supp. 2d 1301, 1309 (M.D. Fla. 2001).

penalty on debt collectors who use state venue rules in a way that Congress considers unfair or abusive.”²⁹

The following sections detail the Seventh Circuit precedent on the venue issue under the FDCPA, *Newsom* and *Suesz*.³⁰ The debt collector BHLM in *Oliva* filed the debt collection claim against the debtor *Oliva* when *Newsom* was in effect. While the case was pending, the Seventh Circuit issued *Suesz*, overruling *Newsom*.

1. *Newsom v. Friedman*

In *Newsom*, the Seventh Circuit, interpreting the venue provision of the FDCPA, expressly held that for consumer debt collection suits in Cook County, Illinois, the relevant “judicial district” in which the debt collector could file the debt collection suit was the entire county and not the smaller municipal districts within the county.³¹ The Seventh Circuit explained that the statutory language of the FDCPA was not ambiguous in the context of this case,³² and thus an Illinois circuit court constituted a “judicial district or similar legal entity” where a debtor resides under the plain meaning of the FDCPA.³³ The court pointed to the procedural rules of the circuit court, which provided that any action may be assigned to any circuit court judge in Cook County for hearing or trial, regardless of the municipal department, division or district in which the case was filed.³⁴ The circuit court possessed original jurisdiction, and the division of the circuit court into subordinate divisions was for administrative purposes only, rather than for jurisdictional purposes.³⁵ This interpretation of the

²⁹ *Suesz v. Med-1 Sols., LLC*, 757 F.3d 636, 653 (7th Cir. 2014) (en banc).

³⁰ There is no Supreme Court precedent on this issue.

³¹ *Newsom v. Friedman*, 76 F.3d 813, 819 (7th Cir. 1996), overruled by *Suesz*, 757 F.3d 636.

³² *Id.* at 816–17.

³³ *Id.* at 820.

³⁴ *Id.* at 818–19; ILL. COOK CTY. CIR. CT. R. Order 1, ¶ 1.3(a).

³⁵ *Newsom*, 76 F.3d at 818.

venue provision in the FDCPA was controlling law for eighteen years—until the *Suesz* decision.

2. *Suesz v. Med-1 Solutions, LLC*

In *Suesz*, some eighteen years later, the Seventh Circuit, in a divided en banc opinion, held that the “judicial district or similar legal entity” for purposes of § 1692i is the smallest geographic area that is relevant for determining venue in the court system in which the suit is filed.³⁶ The geographic area can be smaller than a county where the court system uses smaller districts, such as the township small claims courts in Marion County, Indiana that were at issue in *Suesz*.³⁷ Overruling *Newsom*, the court in *Suesz* ruled that the smallest geographic area was the township where the debtor lived or where the contract giving rise to alleged debt had been signed.³⁸ Therefore, the township’s small claims court was the proper venue for purposes of an FDCPA claim, even though state trial courts in Indiana were organized by county for both court administration and venue purposes; and the Indiana statute and court rule regarding venue in effect at the time permitted debt collectors to bring an action in any one of the nine small claims courts located in the county where the debtor resided or the contract was signed.³⁹

Judge Hamilton and Judge Posner, in their joint opinion for the majority, explained that although the FDCPA does not define “judicial district,” the statute’s inclusion of the phrase “or similar legal entity” indicated that it was drafted broadly—presumably so the venue provision could be applied flexibly to all court systems around the country, which vary in structure and nomenclature.⁴⁰ The court thus

³⁶ *Suesz*, 757 F.3d at 648.

³⁷ *Id.* (concluding that if a debt collector chooses to file suit in a township small claims court, venue is determined at the township level, whereas if the debt collector chooses to file suit in a circuit or superior court, the debt collector could file it in a courthouse in the center of the county).

³⁸ *Id.*

³⁹ *Id.* at 648–49.

⁴⁰ *Id.* at 639.

overruled *Newsom*, explaining that *Newsom* had adopted a test based on the details of court administration rather than on the applicable venue rules.⁴¹

The Supreme Court denied certiorari in *Suesz*;⁴² therefore, the Seventh Circuit’s decision is still the controlling law in this circuit.

B. Bona Fide Error Defense

Notwithstanding the civil liability provisions under the FDCPA, the FDCPA permits a debt collector to avoid liability for violating the FDCPA provisions if the debt collector “shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.”⁴³ Under certain circumstances, this defense provides a safe harbor for debt collectors who improperly file a claim in the wrong venue.⁴⁴

However, in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, the Supreme Court held that the bona fide error defense to civil liability under the FDCPA does not apply to a mistake of law—that is, a violation of the FDCPA resulting from a debt collector’s incorrect interpretation of the FDCPA’s legal requirements.⁴⁵

In the *Jerman* case, the respondents, a law firm and one of its attorneys (“Carlisle”), had filed a lawsuit in Ohio state court on behalf of a mortgage company to foreclose on property owned by the petitioner Karen L. Jerman, a debtor.⁴⁶ The complaint included a “notice” that the mortgage debt would be assumed valid unless the

⁴¹ *Id.* at 638.

⁴² *Med-1 Sols., LLC v. Suesz*, 135 S. Ct. 756 (2014) (mem.).

⁴³ 15 U.S.C. § 1692k(c) (2012).

⁴⁴ *See id.*; *see also* *Nichols v. Byrd*, 435 F. Supp. 2d 1101, 1108 (D. Nev. 2006).

⁴⁵ *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 604–05 (2010).

⁴⁶ *Id.* at 578.

debtor disputed it in writing.⁴⁷ Jerman's lawyer sent a letter disputing the debt, and when the mortgage company acknowledged that the debt had in fact been paid, Carlisle withdrew the suit.⁴⁸

Jerman then brought a putative class action against Carlisle, asserting that they violated § 1692g of the FDCPA by erroneously representing that a debt will be assumed valid absent a written dispute.⁴⁹ Section 1692g(a) requires a debt collector, within five days of an "initial communication" about the collection of a debt, to send the consumer a written notice containing, among other things, "a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector."⁵⁰

The district court heard the case and granted summary judgment to the defendants, concluding that the notice violated § 1692g by requiring Jerman to dispute the debt in writing.⁵¹ However, because the violation was not intentional, resulted from a bona fide error, and occurred despite the maintenance of procedures reasonably adapted to avoid any such error, the defendants were shielded from liability by the FDCPA's bona fide error defense.⁵²

Jerman appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the district court's decision and held that the defense in § 1692k(c) is not limited to clerical or factual errors, but extends to mistakes of law.⁵³ Factual errors, for instance, include a debt collector sending a debtor a collection letter without knowing that the debtor has filed for bankruptcy, regardless of the various procedures the debt collector maintained to identify bankruptcy and to

⁴⁷ *Id.* at 579.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 15 U.S.C. § 1692g(a) (2012).

⁵¹ *Jerman*, 559 U.S. at 579. At that time, no Sixth Circuit precedential opinion had addressed the issue, so defendants relied on another circuit court's decision.

⁵² *Id.*

⁵³ *Id.* at 580.

ensure compliance of the FDCPA.⁵⁴ Clerical errors, for instance, include a debt collector mailing a second collection letter shortly after receiving consumer’s cease and desist letter—and thus violating the FDCPA—notwithstanding the procedures it adapted to avoid any such error.⁵⁵ In contrast, mistakes of law, for instance, include a debt collector mistakenly interpreting a provision of the FDCPA.⁵⁶

Jerman petitioned for certiorari to the Supreme Court, which reversed the Sixth Circuit’s decision.⁵⁷ The Court first examined the case using the elements of § 1692k(c).⁵⁸ The Court then stated that a violation resulting from a debt collector’s misinterpretation of the legal requirements of the FDCPA under § 1692k(c) cannot be unintentional⁵⁹: it is a “common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.”⁶⁰ The Court noted that the administrative-penalty provisions of the Federal Trade Commission Act, which are expressly incorporated into the FDCPA, apply only when a debt collector acts with “actual knowledge or knowledge fairly implied on the basis of objective circumstances” that its action was “prohibited by [the FDCPA].”⁶¹ Given the absence of similar language in § 1692k(c), the Court reasoned it was fair to infer that Congress chose to permit injured consumers to recover damages for “intentional” conduct, including violations resulting from a mistaken interpretation of the FDCPA, while reserving the more onerous administrative penalties for debt collectors whose intentional actions reflected “knowledge fairly

⁵⁴ Novak v. Monarch Recovery Mgmt., 235 F. Supp. 3d 1039, 1043 (N.D. Ill. 2016).

⁵⁵ Smith v. Transworld Sys., Inc., 953 F.2d 1025, 1034 (6th Cir. 1992).

⁵⁶ *Jerman*, 559 U.S. at 578.

⁵⁷ *Id.* at 605.

⁵⁸ *Id.* at 576–77.

⁵⁹ *Id.* at 581.

⁶⁰ *Id.* (quoting *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833)).

⁶¹ *Id.* at 583–84 (alteration in original); 15 U.S.C. §§ 45(m)(1)(A), (C) (2012).

implied on the basis of objective circumstances” that the conduct was prohibited.⁶²

Second, the Court stated that § 1692k(c)’s requirement that debt collectors maintain “procedures reasonably adapted to avoid any such error” is “*more naturally* read to apply to processes that have mechanical or other such ‘regular orderly’ steps to avoid mistakes.”⁶³ Even though the majority conceded that some attorney debt collectors may maintain procedures to avoid legal errors, nevertheless, it stated that “legal reasoning is not a mechanical or strictly linear process.”⁶⁴ Therefore, the Court concluded that “the broad statutory requirement of procedures reasonably designed to avoid ‘any’ bona fide error indicates that the relevant procedures are ones that help to avoid errors like clerical or factual mistakes.”⁶⁵

Moreover, the Court found additional support for this reading in the statute’s context and history.⁶⁶ The Court noted that Congress had essentially copied the relevant sections of the bona fide error defense from the Truth in Lending Act (TILA) into the FDCPA.⁶⁷ In the nine years between the TILA’s enactment and the FDCPA’s passage, the three federal courts of appeals to consider the question had interpreted the TILA’s bona fide error defense as referring to clerical errors; none

⁶² *Jerman*, 559 U.S. at 584; *see also id.* (comparing 29 U.S.C. § 260 (2012), which allows courts to reduce liquidated damages relying on the Portal-to-Portal Act of 1947 if an employer demonstrates that “the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938”); *id.* (comparing 17 U.S.C. § 1203(c)(5)(A) (2012), a provision of Digital Millennium Copyright Act authorizing court to reduce or remit the total award of damages where “the violator was not aware and had no reason to believe that its acts constituted a violation”).

⁶³ *Id.* at 587 (emphasis added). The Court gave two examples: “the kind of internal controls a debt collector might adopt to ensure its employees do not communicate with consumers at the wrong time of day, § 1692c(a)(1), or make false representations as to the amount of a debt, § 1692e(2).” *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 590.

had interpreted the defense to extend to mistaken legal interpretations.⁶⁸ Thus, the Court inferred that Congress agreed with those interpretations when it enacted the FDCPA.⁶⁹ Additionally, the Court reasoned that Congress' amendment to the defense in the TILA, but not in the FDCPA, to exclude errors of legal judgment, was not evidence of Congress's intent to give the defense in the FDCPA a more expansive scope for several reasons.⁷⁰ First, the amendment did not obviously change the scope of the TILA's bona fide error defense in a way material to the Court's analysis, given the consistent interpretations of three courts of appeals holding that the TILA defense does not extend to mistakes of law.⁷¹ Next, it was also unclear to the Court why Congress would have intended the FDCPA's defense to be broader than the TILA's.⁷² Finally, the Court noted that Congress had not expressly included mistakes of law in any of the parallel bona fide error defenses elsewhere in the U. S. Code.⁷³

Further, the majority stated that this decision does not place "unmanageable burdens on lawyers practicing in the debt collection industry,"⁷⁴ because the FDCPA contains multiple provisions expressly protecting against abusive lawsuits and provides courts discretion to

⁶⁸ *Id.* at 589 & n.10 (citing *Ives v. W.T. Grant Co.*, 522 F.2d 749, 757–58 (2d Cir. 1975) (bona fide error defense unavailable for reliance on a pamphlet issued by the Federal Reserve Board); *Haynes v. Hogan Furniture Mart, Inc.*, 504 F.2d 1161, 1167 (7th Cir. 1974) (bona fide error defense unavailable for reliance on advice from private counsel); *Palmer v. Wilson*, 502 F.2d 860, 861 (9th Cir. 1974) (similar)). However, none of them relied on a binding judicial decision. The Court also noted that the interpretations by the three Federal Courts of Appeals may not have "settled" the meaning of the TILA's bona fide error defense. *Id.* at 590.

⁶⁹ *Id.* at 590.

⁷⁰ *Id.* at 591.

⁷¹ *Id.*

⁷² *Id.* at 592.

⁷³ *Id.* at 593. The Court compared the bona fide error provision in the Expedited Funds Availability Act, 12 U.S.C. § 4010(c)(2) (2012), which expressly excludes "an error of legal judgment with respect to [obligations under that Act]," as well as those in the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693m(c), 1693h(c) (2012), which are silent as to mistakes of law. *Id.*

⁷⁴ *Id.* at 604.

adjust any additional damages and attorney’s fees.⁷⁵ Furthermore, many state consumer protection and debt collection statutes contain bona fide error safe harbors that are either silent as to, or expressly exclude, legal errors.⁷⁶

RETROACTIVITY OF JUDICIAL DECISIONS

Another important consideration in analyzing the *Oliva* decisions is the retroactivity of *Suesz* in declaring a new interpretation of the FDCPA’s venue provision. The following sections analyze Supreme Court precedent on when judicial decisions ought to be applied retroactively.

A. *Chevron Oil Co. v. Huson*

The Supreme Court articulated its modern approach to decisional retroactivity in the 1971 *Chevron Oil Co. v. Huson* test.⁷⁷ The test considers three factors: (1) whether the decision to be applied nonretroactively establishes a new legal principle; (2) whether the retroactive application of the new rule would further or retard the rule’s operation, given its previous history, purpose, and effect; and (3) whether the retroactive application would cause inequity to the extent of “injustice or hardship.”⁷⁸ In *Chevron Oil*, the issue before the Court was whether its decision in *Rodrigue v. Aetna Casualty & Surety Co.*⁷⁹—which resulted in the imposition of a one-year statute of limitations for personal injury actions—barred Huson’s action, even though *Rodrigue* was decided after Huson’s action was commenced.⁸⁰

⁷⁵ *Id.* at 597–98.

⁷⁶ *Id.* at 601.

⁷⁷ 404 U.S. 97, 106–07 (1971), *disapproved of by* Harper v. Va. Dep’t of Taxation, 509 U.S. 86 (1993); Richard S. Kay, *Retroactivity and Prospectivity of Judgments in American Law*, 62 AM. J. COMP. L. (SUPP.) 37, 45 (2014).

⁷⁸ See *Chevron Oil Co.*, 404 U.S. at 106–07 (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969)).

⁷⁹ 395 U.S. 352 (1969).

⁸⁰ *Chevron Oil Co.*, 404 U.S. at 98–99.

The Court held that the *Rodrigue* holding should not be applied to bar Huson's action retroactively.⁸¹

B. Harper v. Virginia Department of Taxation

The Supreme Court reexamined the retroactivity issue in *American Trucking Associations, Inc. v. Smith*⁸² and *James B. Beam Distilling Co. v. Georgia*,⁸³ but left the issue unresolved. The Court confronted it again in *Harper v. Virginia Department of Taxation*, and, by a clear majority, held that “this Court’s application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision.”⁸⁴

Note that there are instances of pure prospectivity and selective prospectivity: the former indicates that a court refuses to apply the decision not only to the parties before the court but also to any case where the relevant facts predate the decision, while the latter indicates that a court applies the rule to some but not all cases where the operative events occurred before the court’s decision, depending on the equities.⁸⁵

Therefore, the Supreme Court in *Harper* forbade only “selective prospectivity,” where courts consider whether to apply a new rule which the Court has already applied to the parties before it.⁸⁶ It did not

⁸¹ *Id.* at 100.

⁸² 496 U.S. 167 (1990).

⁸³ 501 U.S. 529 (1991).

⁸⁴ *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 90 (1993).

⁸⁵ *See e.g., James B. Beam Distilling Co.*, 501 U.S. at 535–38 (1991).

⁸⁶ *See Harper*, 509 U.S. at 90; *see also Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995) (noting, but not expressly addressing, that respondent Hyde alleged “*Harper* overruled *Chevron Oil* insofar as the case (selectively) permitted the prospective-only application of a new rule of law”); *see* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-3, at 226 (3d ed. 2000) (noting that the *Harper* Court simply “did not hold that *all* decisions of federal law must necessarily be applied retroactively” and explaining that the Supreme Court has never expressly “renounced the power to make its decisions *entirely* prospective, so that they do not apply even to the parties before it”).

overrule *Chevron Oil*, which was an instance of “pure prospectivity,” where the new rule was not applied to the parties before the Court retroactively.⁸⁷

C. Reynoldsville Casket Co. v. Hyde

The Supreme Court most recently addressed the retroactivity issue in *Reynoldsville Casket Co. v. Hyde*.⁸⁸ The Court in *Hyde* held that litigants cannot prevail by offering no more than their simple reliance on the old law as a basis for creating an exception to *Harper*’s retroactivity rule, or arguing that a court’s refusal to apply the new federal law to the parties in a prior case was an effort to create a “remedy,” rather than being based on “non-retroactivity.”⁸⁹ However, the Court stated that prospective-only effect may be given under special circumstances “where [a] new rule, for well-established legal reasons, does not determine the outcome of the case.”⁹⁰ Under such special circumstances, a court may find (1) an alternative way of curing the constitutional violation; (2) a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief;⁹¹ (3) as in the law of qualified immunity, a well-established general legal rule that trumps the new rule of law, which general rule reflects both reliance interests and other significant policy

⁸⁷ See *Harper*, 509 U.S. at 90; *Chevron Oil Co. v. Huson*, 404 U.S. 97, 100 (1971). The Ninth Circuit recently held that, in the absence of explicit overruling, it was still bound to apply new rules purely prospectively when the three *Chevron Oil* factors so required. See *Nunez-Reyes v. Holder*, 646 F. 3d 684, 690–95 (9th Cir. 2011); see also Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1062 (1997). However, we need not address the “pure prospectivity” issue here because the Seventh Circuit already determined to apply the new rule to the parties before the court in *Suesz*.

⁸⁸ 514 U.S. 749 (1995).

⁸⁹ *Id.* at 754.

⁹⁰ *Id.* at 758–59.

⁹¹ See e.g., *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep’t of Bus. Regulation of Fla.*, 496 U.S. 18, 40–41 (1990) (finding that where the violation depends, in critical part, upon differential treatment of two similar classes of individuals, then one might cure the problem either by similarly burdening, or by similarly unburdening, both groups).

justifications;⁹² or (4) a principle of law⁹³ that limits the principle of retroactivity itself.⁹⁴ Therefore, *Hyde* allows a court to not apply a new rule retroactively even if the court which declared the new rule has applied it to the parties before the court.

Today, when the Court has applied a rule of federal law to the parties before the Court, courts consult *Harper* and *Hyde* to determine whether to give that decision retroactive application.⁹⁵ In the absence of explicit overruling, courts still need to apply new rules purely prospectively when the three *Chevron Oil* factors so require.⁹⁶

OLIVA V. BLATT, HASENMILLER, LEIBSKER & MOORE LLC

The following sections explain the factual and procedural background of the *Oliva* case, and the district court's and the Seventh Circuit's decisions.

A. *Factual Background*

In 2002, Ronald Oliva, the plaintiff-debtor, opened an HSBC MasterCard account in Chicago while a student at DePaul University,

⁹² See e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that government officials performing discretionary functions generally are shielded from liability for civil damages to avoid excessive disruption of government insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known).

⁹³ See e.g., *Teague v. Lane*, 489 U.S. 288 (1989) (concluding that a habeas corpus petitioner cannot obtain a habeas corpus remedy where doing so would require the habeas court to retroactively apply a new rule of criminal law). However, “the *Teague* doctrine embodies certain special concerns—related to collateral review of state criminal convictions—that affect which cases are closed, for which retroactivity-related purposes, and under what circumstances.” *Hyde*, 514 U.S. at 758.

⁹⁴ *Hyde*, 514 U.S. at 759.

⁹⁵ See *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993); *Hyde*, 514 U.S. at 758–59.

⁹⁶ See *Chevron Oil Co. v. Huson*, 404 U.S. 97, 100 (1971); *Nunez-Reyes v. Holder*, 646 F. 3d 684, 690–95 (9th Cir. 2011).

and continued to use the account during his subsequent employment with CDW at its downtown office.⁹⁷ Oliva lived and worked in Chicago almost continuously from 2002 until he moved back home to Orland Park, Illinois in August 2013.⁹⁸

Oliva ended up falling behind on his credit card payments and HBSC charged off his account in 2012.⁹⁹ At the end of 2012, Oliva's HSBC account had a final balance of \$8,205.20.¹⁰⁰ Portfolio Recovery Associates, LLC ("PRA") ultimately acquired Oliva's account.¹⁰¹

On behalf of PRA, the law firm BHLM filed a collection suit in 2014 against Oliva in the Circuit Court of Cook County.¹⁰² For such relatively small claims, the Circuit Court of Cook County divides the county into six municipal districts for venue purposes.¹⁰³ BHLM filed the suit against Oliva in the first municipal district at the Richard J. Daley Center in downtown Chicago.¹⁰⁴

In deciding where to file suit, BHLM relied on *Newsom*, which held that the Circuit Court of Cook County is a single "judicial district" for purposes of the FDCPA's venue provision, allowing a debt collector to file a suit in any of the circuit court's six districts as long as the debtor lived in Cook County or signed the underlying debt contract there.¹⁰⁵ BHLM's standard practice after *Newsom* was to sue all Cook County residents in the first municipal district even if the debtor, like Oliva, lived in a different municipal district.¹⁰⁶

⁹⁷ *Oliva v. Blatt, Hasenmiller, Leibsker & Moore LLC*, 185 F. Supp. 3d 1062, 1063 (N.D. Ill. 2015), *aff'd*, 825 F.3d 788 (7th Cir. 2016), and *vacated on reh'g en banc*, 864 F.3d 492 (7th Cir. 2017). Oliva graduated from DePaul University in 2005 and worked at CDW until August 2015. *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 1064.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1063–64.

¹⁰⁵ *Id.* at 1064; *see Newsom v. Friedman*, 76 F.3d 813, 819 (7th Cir. 1996), *overruled by Suesz v. Med-1 Sols., LLC*, 757 F.3d 636 (7th Cir. 2014) (en banc).

¹⁰⁶ *Oliva I*, 185 F. Supp. 3d at 1064.

At the time the collection suit was filed, Oliva lived in Orland Park, which falls within the Cook County Circuit’s fifth municipal district, not the first municipal district.¹⁰⁷ Oliva retained counsel, but never challenged venue in the collection suit.¹⁰⁸ Indeed, Oliva admitted that the first municipal district Daley Center courthouse was a more convenient forum for him than the fifth municipal district Bridgeview courthouse, the closest Circuit Court of Cook County to his residence.¹⁰⁹

On July 2, 2014, while BHLM’s debt collection suit against Oliva was still pending, the Seventh Circuit overruled *Newsom* and held that “the correct interpretation of ‘judicial district or similar legal entity’ in § 1692i [the FDCPA’s venue provision] is the smallest geographic area that is relevant for determining venue in the court system in which the case is filed.”¹¹⁰ Eight days later, BHLM voluntarily dismissed the suit against Oliva.¹¹¹

B. Procedural Background

Later in 2014, Oliva filed a lawsuit alleging that BHLM had violated the FDCPA’s venue provision, § 1692i, by suing him in a venue where he did not reside and had not signed the contract in suit.¹¹² The parties filed cross-motions for summary judgment.¹¹³ The district court granted BHLM’s motion and denied Oliva’s motion.¹¹⁴

¹⁰⁷ *Id.* at 1063–64.

¹⁰⁸ *Id.* at 1064.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (alteration in original) (quoting *Suesz*, 757 F.3d at 638).

¹¹¹ *Id.*

¹¹² *Oliva v. Blatt, Hasenmiller, Leibsker & Moore LLC*, 864 F.3d 492, 495 (7th Cir. 2017) (en banc).

¹¹³ *Id.*

¹¹⁴ *Id.*

C. *The District Court's Decision*

The district court judge, Judge Elaine E. Bucklo, held that BHLM had shown that its violation of the venue provision in § 1692i was the result of a bona fide error in relying on the circuit precedent of *Newsom*.¹¹⁵ The court differentiated *Jerman* stating that the debt collector in *Jerman* had relied on a non-controlling case, and therefore, the debt collector could not escape liability relying on the bona fide error defense because of his own mistaken interpretation of law.¹¹⁶ However, here BHLM relied on *Newsom*, the then-controlling ruling interpreting the FDCPA's venue provision, and “did not exercise any ‘legal judgment’ of its own.”¹¹⁷ Furthermore, the court drew an analogy to another defense under the FDCPA for debt collectors who rely on an advisory opinion by the Consumer Financial Protection Bureau of the Federal Trade Commission (FTC) to avoid liability even if “such opinion is [later] amended, rescinded, or determined by judicial or other authority to be invalid for any reason.”¹¹⁸ Therefore, BHLM's reliance on *Newsom* was not a legal error that would preclude the bona fide error defense to apply.¹¹⁹

Moreover, the court rejected Oliva's argument that *Suesz*—which declared a new interpretation of the FDCPA's venue provision while BHLM's debt collection case against Oliva was pending—should apply.¹²⁰ The court stated that the debt collector in *Suesz* attempted to extend *Newsom*'s holding to a different county court system, whereas BHLM squarely relied on *Newsom*'s holding that the Circuit Court of Cook County was one judicial district for purposes of the FDCPA

¹¹⁵ *Oliva I*, 185 F. Supp. 3d at 1067.

¹¹⁶ *Id.* at 1066.

¹¹⁷ *Id.* (quoting *Kort v. Diversified Collection Servs., Inc.*, 394 F.3d 530, 538 n.9 (7th Cir. 2005) (finding no mistake of law where debt collector relied on implementing agency's interpretation and did not exercise independent legal judgment)).

¹¹⁸ *Id.* (alteration in original) (quoting 15 U.S.C. § 1692k(e) (2012)).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1066–67.

filings.¹²¹ Judge Bucklo noted that “[i]f the Seventh Circuit had overruled *Newsom* in a case involving a Cook County collection suit, the court may well have applied its ruling only on a prospective basis.”¹²² Judge Bucklo concluded that the retroactivity holding in *Suesz* was limited to the parties in *Suesz*.¹²³

Accordingly, the court held BHLM’s violation of the FDCPA’s venue provision was result of a bona fide error in relying upon the then-binding precedent, thereby precluding liability under FDCPA.¹²⁴

D. The Seventh Circuit’s Panel Decision

On Oliva’s appeal, a panel of the Court of Appeals for the Seventh Circuit affirmed the district court’s decision.¹²⁵

¹²¹ *Id.*

¹²² *Id.* at 1067 (citing *Suesz v. Med-1 Sols., LLC*, 757 F.3d 636, 650 (7th Cir. 2014) (en banc) (permitting prospective overruling where “the law had been so well settled before the overruling that it had been unquestionably prudent for the community to rely on the previous legal understanding”)).

¹²³ *Id.* (citing *Suesz*, 757 F.3d at 649 (“[A]dopting a new rule while refusing to apply it to the parties before us would raise serious constitutional concerns.”)).

¹²⁴ *Id.* at 1065. BHLM had also argued in the alternative that venue in the first judicial district was proper on the ground that Oliva had signed the relevant contract in that district. *Id.* Relying on *Portfolio Acquisitions, L.L.C. v. Feltman*, 909 N.E.2d 876, 881 (Ill. App. Ct. 2009), which held that “each time [a] credit card is used, a separate contract is formed between the cardholder and bank,” BHLM argued that “Oliva signed separate contracts with HSBC each time he used his MasterCard in the City of Chicago while attending DePaul University and working at CDW’s downtown office.” *Id.* (alteration in original). “Oliva counter[ed] that credit card agreements are considered oral contracts, which are incapable of being ‘signed’ within the meaning of the FDCPA’s venue provision.” *Id.* (citations omitted). The district court did not address that argument. *Id.*

¹²⁵ *Oliva v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 825 F.3d 788, 793 (7th Cir. 2016), *on reh’g en banc*, 864 F.3d 492 (7th Cir. 2017). The panel included Judge Bauer, Flaum, and Manion, and Judge Manion authored the opinion. *Id.* at 789. The Seventh Circuit reviewed the district court’s grant of summary judgment de novo, “construing all facts and reasonable inferences in the light most favorable to the nonmoving party.” *Id.* at 791; *see Hammarquist v. United Cont’l Holdings*, 809 F.3d 946, 949 (7th Cir. 2016).

Even though the panel noted in *Oliva II* that *Suesz* did not specify the scope of its retroactivity, the judges assumed without deciding that *Suesz*'s holding would apply retroactively to BHLM, and held that BHLM's decision to file suit in the first municipal district of the Circuit Court of Cook County violated § 1692i as interpreted by *Suesz*.¹²⁶ The parties did not dispute that BHLM's violation was unintentional or that BHLM maintained procedures reasonably adapted to avoid the error that led to the violation.¹²⁷ Therefore, the panel focused only on the issue of whether the violation was the result of a bona fide error.¹²⁸ The court reasoned that "*Newsom*'s unambiguous holding expressly permitted [BHLM] to file suit exactly where it did," and that "*Suesz* may have created a retroactive cause of action for violations that preceded it, but it did not retroactively proscribe the application of the bona fide error defense."¹²⁹ Therefore, the court held that BHLM's violation of § 1692i as interpreted by *Suesz* was the result of a bona fide error that precluded liability under the FDCPA.¹³⁰

The panel also found that the Supreme Court's opinion in *Jerman* did not apply to mistakes of law that relied on controlling circuit precedent.¹³¹ First, the panel stated that *Jerman* applied only when the debt collector's violation resulted from the *debt collector's* mistaken interpretation of the law.¹³² Here, BHLM simply abided by the judicial interpretation in *Newsom* and did not make "an independent (and entirely futile) 'interpretation'" of the FDCPA's venue provision, "which *Newsom* had already definitely interpreted and handed down as the binding law of this Circuit."¹³³ *Newsom*, the then-controlling

¹²⁶ *Oliva II*, 825 F.3d at 790–91.

¹²⁷ *Id.* at 791.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 791–92.

¹³¹ *Id.* at 792.

¹³² *Id.*

¹³³ *Id.*

law, expressly permitted BHLM’s conduct.¹³⁴ Thus, the court concluded that if BHLM’s venue choice under *Newsom* was the result of a mistaken interpretation of the FDCPA, it was the result of the Seventh Circuit’s mistaken interpretation, not BHLM’s.¹³⁵ “[BHLM’s] failure to foresee the retroactive change of law heralded by *Suesz* was not a mistaken legal interpretation, but an unintentional bona fide error that preclude[d] liability under the [FDCPA].”¹³⁶

Second, even if BHLM’s violation was the result of its own interpretation of the law, BHLM’s interpretation was not mistaken *when it was made*, resulting in *Jerman* inapplicable.¹³⁷ It was the retroactive change of the law—entirely outside BHLM’s control—that caused BHLM’s conduct later to be deemed a violation under *Suesz*, not BHLM’s mistaken interpretation of the FDCPA.¹³⁸

The panel then concluded that BHLM had shown by a preponderance of evidence that its challenged conduct was the result of an unintentional good-faith mistake that it took every reasonable precaution to avoid; accordingly, the bona fide error defense applied.¹³⁹ Therefore, the panel affirmed that the district court properly granted summary judgment to BHLM.¹⁴⁰

E. The Seventh Circuit’s Rehearing En Banc

Oliva petitioned for rehearing en banc under Federal Rule of Appellate Procedure 35, arguing that the panel decision conflicted with both the en banc decision in *Suesz* and the Supreme Court’s decision in *Jerman*.¹⁴¹ The Seventh Circuit granted en banc review,

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 790.

¹³⁷ *Id.* at 792.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Oliva v. Blatt, Hasenmiller, Leibsker & Moore LLC*, 864 F.3d 492, 495 (7th Cir. 2017) (en banc).

and eventually vacated the judgment of the district court and remanded for proceedings consistent with its opinion.¹⁴²

The en banc court, in an opinion written by Judge Hamilton, first examined the venue issue.¹⁴³ The court emphasized the FDCPA's congressional purpose "to eliminate *abusive debt collection practices* by debt collectors," which include "abusive forum-shopping by debt collectors choosing the venues for lawsuits to collect consumer debts."¹⁴⁴

The court then analyzed the Seventh Circuit precedent interpreting the venue provision of the FDCPA, noting that *Newsom* allowed debt collectors in Cook County to choose freely among the six different municipal department districts when BHLM initially filed the debt collection case, for purposes of the FDCPA.¹⁴⁵ Regardless of the sharp change in the interpretation, the court acknowledged that the reasoning and holding of *Suesz*, decided while BHLM's debt collection's case was pending, "clearly extend[ed] to the municipal department districts in Cook County, Illinois."¹⁴⁶

The court went on to discuss the retroactivity issue under *Suesz*.¹⁴⁷ The en banc decision in *Suesz* refused to give the decision only prospective effect, and applied the new rule to *Suesz* itself.¹⁴⁸ The court acknowledged that as a general rule, judicial decisions are given retroactive effect, unlike legislation, which ordinarily is not given retroactive application.¹⁴⁹ Nevertheless, the Supreme Court sometimes

¹⁴² *Id.* at 494. The court elected not to schedule a further oral argument because the court noted that the issues were presented sufficiently in the briefs and opinions under review. *Id.*

¹⁴³ *Id.* at 495.

¹⁴⁴ *Id.*; 15 U.S.C. § 1692(e) (2012) (emphasis added).

¹⁴⁵ *Oliva III*, 864 F.3d at 496.

¹⁴⁶ *Id.* *Suesz* overruled *Newsom* and held that a "judicial district or similar legal entity" under § 1692i is "the smallest geographic area that is relevant for determining venue in the court system in which the case is filed." *Id.* (quoting *Suesz v. Med-1 Sols., LLC*, 757 F.3d 636, 638 (7th Cir. 2014) (en banc))

¹⁴⁷ *Id.* at 497.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

applied its rulings in civil cases only prospectively “to avoid injustice or hardship to civil litigants who have justifiably relied on prior law.”¹⁵⁰ However, a prospective-only ruling would be “impermissible unless the law had been so well settled before the overruling that it had been unquestionably prudent for the community to rely on the previous legal understanding.”¹⁵¹ The court in *Suesz* hypothesized that if a circuit court of appeals had continued to follow *Newsom* but the Supreme Court had granted certiorari in *Suesz* and reversed, neither *Newsom* nor the panel’s decision in *Suesz* would have justified the Supreme Court giving its decision only prospective effect.¹⁵² The court also reasoned that none of the Supreme Court’s FDCPA decisions against debt collectors have given any sign of applying their holdings only prospectively.¹⁵³

The court *claimed* that “[t]he panel opinion in this case declined to apply the *Suesz* holding on retroactivity,” that the panel noted that “*Suesz* ‘did not specify the scope of its retroactivity,’” and that “the panel assumed without deciding that the *Suesz* retroactivity holding would apply to [BHLML].”¹⁵⁴ The court then went on to consider the good-faith mistake issue under § 1692k(c).¹⁵⁵

As noted by the court in *Oliva III*, the Supreme Court in *Jerman* held that the bona fide error defense in § 1692k(c) does not apply to “a violation of the FDCPA resulting from a *debt collector’s incorrect*

¹⁵⁰ *Id.* (quoting *Suesz*, 757 F.3d at 649).

¹⁵¹ *Id.* (quoting *Suesz*, 757 F.3d at 650).

¹⁵² *Id.*

¹⁵³ *Id.*; see *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010).

¹⁵⁴ *Oliva III*, 864 F.3d at 497 (majority opinion) (quoting *Oliva v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 825 F.3d 788, 790–91 (7th Cir. 2016), *on reh’g en banc*, 864 F.3d 492 (7th Cir. 2017)). However, the panel in *Oliva II*, joined by Judge Kanne, disputed in the dissenting opinion that “[t]he panel explicitly assumed that *Suesz*’s retroactivity did apply in this case—applied it—and then concluded that the bona fide error defense excused [BHLML] from liability for its retroactive violation.” *Id.* at 503 (Manion, J., dissenting).

¹⁵⁵ *Id.* at 498 (majority opinion).

interpretation of the requirements of that statute.”¹⁵⁶ The en banc court in *Oliva III* disagreed with the panel in *Oliva II* that read *Jerman* narrowly as applying only to the debtor collector’s own mistaken interpretation of law but not to reliance on a precedent that was later overruled as mistaken.¹⁵⁷ Instead, the court in *Oliva III* read *Jerman* as to include all mistaken interpretations of the FDCPA, both mistakes supported by “controlling” legal authority and those supported by “substantial” legal authority.¹⁵⁸ The court also pointed out (and agreed with) the *Jerman* decision that, if § 1692k(c) is a broad defense for good-faith mistakes of law, it is not necessary to specify another safe harbor under § 1692k(e) for the FTC advice.¹⁵⁹ Therefore, the court concluded that the *Jerman* opinion rejected the application of § 1692k(c) to any legal errors concerning the FDCPA.¹⁶⁰ In essence, as the court in *Oliva III* stated, the Court in *Jerman* read the FDCPA as putting the risk of legal uncertainty on debt collectors, incentivizing them to stay well within legal boundaries.¹⁶¹

The court also noted that *Newsom* and the FDCPA permitted, but did not *require* BHLM to sue *Oliva* in the venue it chose.¹⁶² However, the court acknowledged that “if any mistaken interpretations of the [FDCPA] were made in good faith, it was in cases like this,” because the debt collectors relied on circuit precedent in believing they could file debt collections suits in any districts within the county.¹⁶³

¹⁵⁶ *Id.* (emphasis added) (quoting *Jerman*, 559 U.S. at 604–05).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 499 (quoting *Jerman*, 559 U.S. at 588 (“Debt collectors would rarely need to consult the FTC if § 1692k(c) were read to offer immunity for good-faith reliance on advice from private counsel.”)); *see also id.* (citing *Jerman*, 559 U.S. at 605–06 (Breyer, J., concurring) (noting that Justice Breyer “emphasiz[ed] the safe harbor for FTC advice as solution for legal uncertainty”)).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* The majority opinion in *Oliva III* clarified that they did not address the situations where the FDCPA *required* a debt collector to file in such a venue that a court later determined was prohibited. *Id.* at 501 n.5.

¹⁶³ *Id.* at 500.

Moreover, the court declared that a judicial decision interpreting a statute is not the law, or the controlling law.¹⁶⁴ The court stated as follows:

With a statute, however, the controlling law is and always has been the statute itself, as enacted by both houses of Congress and signed by the President. One judge or a panel of judges may or may not understand that text correctly, but the statute remains the law even if judges err. . . . Defendant was mistaken about the meaning of the statute, and so were the panels in *Newsom* and *Suesz*. The fact that different sets of lawyers, including those with judicial commissions, made a legal error does not make it less a legal error.¹⁶⁵

Nevertheless, the court stated that in determining damage when the FDCPA safe harbor is not available, the court “shall consider, among other relevant factors . . . the extent to which such noncompliance was intentional.”¹⁶⁶

The court concluded the discussion by comparing the debt collection cases with certain Fourth Amendment cases.¹⁶⁷ The Supreme Court recognized a good-faith exception to the exclusionary rule for Fourth Amendment violations when police officers reasonably relied on facially valid search warrants in *United States v. Leon*.¹⁶⁸ Then, in *Davis v. United States*, the Supreme Court extended the good-faith exception to searches—that would otherwise be Fourth Amendment violations—conducted in *objectively reasonable reliance*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (quoting 15 U.S.C. § 1692k(b)(1) (2012)).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (citing *United States v. Leon*, 468 U.S. 897 (1984)). The exclusionary rule under the Fourth Amendment indicates that evidence illegally seized by law enforcement officers in violation of a suspect’s right to be free from unreasonable searches and seizures cannot be used against the suspect in a criminal prosecution. See *Weeks v. United States*, 232 U.S. 383 (1914).

on binding appellate precedent.¹⁶⁹ The en banc court in *Oliva III* stated that such extended rule was unusual, and it was based on “the exclusionary rule’s ‘high cost to both the truth and the public safety,’ and the absence of offsetting benefits resulting from deterring police misconduct when the police are complying with circuit precedent.”¹⁷⁰ The court then distinguished the interest in protecting debt collectors’ choice of venue from the stakes under the exclusionary rule as “not at all comparable,” and concluded there was no need to create a similar exception under the FDCPA.¹⁷¹

THE SEVENTH CIRCUIT’S EN BANC DECISION DEPARTS FROM PRECEDENT AND CONSISTENCY

The Seventh Circuit’s en banc decision was improper in at least three respects, as discussed in the following sections: (1) retroactivity of the new interpretation of the venue provision; (2) bona fide defense; and (3) policy justification.

A. Retroactivity of the New Interpretation of the Venue Provision

It is undisputed that when the debt collector BHLM initially filed the claim against *Oliva* in the first municipal district of the Cook County, the venue choice was permissible under the then-binding decision in *Newsom*, which interpreted the “judicial districts or similar legal entity” under § 1692i as the entire county for Cook County, Illinois, rather than the internal municipal department districts.¹⁷² While the case was pending, the Seventh Circuit issued its en banc decision in *Suesz*, overruling *Newsom*, under which BHLM’s venue choice would be improper because *Oliva* resided in Orland Park, the fifth municipal district, and BHLM filed the case in the first municipal

¹⁶⁹ *Oliva III*, 864 F.3d at 500 (citing *Davis v. United States*, 564 U.S. 229 (2011)).

¹⁷⁰ *Id.* (quoting *Davis*, 564 U.S. at 232).

¹⁷¹ *Id.*

¹⁷² *See id.* at 496.

district, a different “smallest geographic area that is relevant for determining venue in the court system in which the case is filed.”¹⁷³ Oliva relied on the “new” law under *Suesz* to sue BHLM, alleging it violated the FDCPA by filing the debt collection case in the wrong venue.¹⁷⁴

The Seventh Circuit’s conclusions in *Oliva III* on retroactivity depart from precedent and consistency for the following two reasons.¹⁷⁵ First, *Harper* arguably applies only to the judicial rulings of the Supreme Court interpreting federal law, where the court determined that:

When *this Court* applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the announcement of the rule.¹⁷⁶

The court in *Oliva III* stated several times that if it were the Supreme Court reversing the decision, the decision would have a retroactive application; however, it overlooked the fact that the implication of a Supreme Court decision may differ materially from that of a Seventh Circuit decision, which could support the view that *Harper* applies only to Supreme Court interpretations.¹⁷⁷

Second, even if *Harper* applies to judicial rulings of the circuit courts, and not only to Supreme Court decisions, the retroactive application of the new rule in *Suesz* itself did not extend automatically

¹⁷³ *See id.*

¹⁷⁴ *Id.* at 495.

¹⁷⁵ *See id.* at 497.

¹⁷⁶ *See Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 86 (1993) (emphasis added); *see also Gibson v. Am. Cyanamid Co.*, 719 F. Supp. 2d 1031, 1045 (E.D. Wis. 2010) (declining to apply *Harper*’s retroactivity rule to a Wisconsin Supreme Court decision because “the United States Supreme Court’s interpretation of federal law is not at issue”).

¹⁷⁷ *See Oliva III*, 864 F.3d at 497–500.

or guarantee retroactivity to other cases.¹⁷⁸ Because the court in *Suesz* already declined to give the new rule prospective-only effect, it was a matter of selective prospectivity—whether *Suesz* applied to other cases that involved similar conduct or events occurring prior to the date of the decision—triggering analysis under *Hyde*.¹⁷⁹ In *Hyde*, the Supreme Court made it clear that reliance alone may be insufficient to justify prospective-only application; however, other special circumstances may allow the court to depart from the norm of retroactive application under such circumstances.¹⁸⁰ Had the court in *Oliva* applied *Hyde*, it likely would have found a “previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief”—the bona fide error defense.¹⁸¹ Therefore, the court should not have applied *Suesz* retroactively to *Oliva* because of the special circumstance of the bona fide error defense.

B. Bona Fide Error Defense

Furthermore, even if *Suesz* created a cause of action for retroactive violations of the venue provision in § 1692i, the Seventh Circuit in *Oliva III* erred by rejecting the bona fide error defense in § 1692k(c).¹⁸² The following sections explain the en banc court’s misinterpretation of *Jerman* and *Oliva III*’s inconsistencies with the FDPCA and its legislative intent.

¹⁷⁸ See *id.* at 497; *Suesz v. Med-1 Sols., LLC*, 757 F.3d 636, 649 (7th Cir. 2014) (en banc) (noting that “adopting a new rule while refusing to apply it to the parties before [the court] would raise serious constitutional concerns,” but saying nothing about applying the rules to other cases).

¹⁷⁹ See *Suesz*, 757 F.3d at 649–50; *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758–59 (1995).

¹⁸⁰ See *Harper*, 509 U.S. at 97; *Hyde*, 514 U.S. at 758–59.

¹⁸¹ See *Hyde*, 514 U.S. at 759; 15 U.S.C. § 1692k (2012).

¹⁸² *Oliva III*, 864 F.3d at 498–500; see also *id.* at 502 (Manion, J., dissenting) (maintaining that, as the original panel in *Oliva II*, 825 F.3d 788, 791 (7th Cir. 2016), stated, *Suesz* may have created a cause of action for retroactive violations, but it did not “retroactively proscribe the application of the bona fide error defense,” and that *Suesz* said nothing about the bona fide error defense).

1. Misinterpretation of *Jerman*

The Seventh Circuit erroneously relied on *Jerman* to reject any bona fide error defense resulting from mistakes of law.¹⁸³ However, *Jerman* materially differed from *Oliva*, and therefore did not mandate the outcome in the latter case.¹⁸⁴

First, the court in *Oliva III* overlooked the distinction between a debt collector's own independent mistaken interpretation of the federal law and a debt collector's good faith reliance on federal judicial interpretation of the federal law, even if that interpretation is later overruled.¹⁸⁵ The Supreme Court in *Jerman* held that "[t]he bona fide error defense in § 1692k(c) does not apply to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA."¹⁸⁶ However, the debt collector in *Oliva*, BHLM, did not independently interpret the FDCPA's venue provision when it filed the suit in the first municipal district within Cook County.¹⁸⁷ It was simply relying on the then-binding judicial interpretation under the Seventh Circuit's decision in *Newsom*.¹⁸⁸

Second, the Seventh Circuit failed to find a clear and "manageable way to distinguish between mistakes" supported by "substantial" legal authority, as in *Jerman*, and those supported by "controlling" legal authority, as in *Oliva*.¹⁸⁹ Substantial legal authority, as described in *Jerman* and discussed in *Oliva III*, is non-binding and "at best persuasive," whereas controlling legal authority is binding in a given

¹⁸³ See *id.* at 498–500 (majority opinion).

¹⁸⁴ See *id.*

¹⁸⁵ See *id.* at 498; *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 574–75 (2010); see also *Daubert v. NRA Group, LLC*, 861 F.3d 382, 394 (3d Cir. 2017) (noting that *Jerman* concerns with and controls in cases where the debt collectors relied on persuasive legal authority regarding legal issues that were unsettled by any relevant binding authority).

¹⁸⁶ *Jerman*, 559 U.S. at 574 (emphasis added).

¹⁸⁷ See *Oliva III*, 864 F.3d at 494–95.

¹⁸⁸ *Id.*

¹⁸⁹ See *id.* at 499.

jurisdiction.¹⁹⁰ Therefore, it might have been a mistaken interpretation of law for the debt collector in *Jerman* to erroneously rely on another circuit court’s decision (substantial legal authority) when that issue was unsettled by any relevant binding authority in its own circuit.¹⁹¹ However, BHLM made no mistake of law at the time of filing,¹⁹² when it correctly relied on the then-binding decision *Newsom* in this circuit—controlling legal authority—where the issue was well settled for eighteen years at that time.¹⁹³ That is a fundamental difference from the mistakes supported merely by substantial, non-binding legal authority.

Third, the Seventh Circuit en banc decision concluded that a court’s legal error about the meaning of a statute does not make it less a legal error because the statute itself is the only controlling law; however, that conclusion is self-contradictory.¹⁹⁴ On one hand, the Seventh Circuit likely mistook the controlling law as law that will always control when it reasoned that “[o]ne judge or a panel of judges may or may not understand that text correctly, but the statute remains the law even if judges err. That is why overrulings of earlier statutory decisions, like reversals by the Supreme Court, are retroactive.”¹⁹⁵ However, the judicial interpretations of federal statutes have always been treated as controlling law just as the words of the statutes themselves.¹⁹⁶ The judicial interpretation may evolve over time, as

¹⁹⁰ See *id.* at 505 (Manion, J., dissenting).

¹⁹¹ See *Jerman*, 559 U.S. at 597.

¹⁹² *Oliva III*, 864 F.3d at 502–03 (Manion, J., dissenting).

¹⁹³ See *id.* at 494–95 (majority opinion).

¹⁹⁴ See *id.* at 500.

¹⁹⁵ *Id.*

¹⁹⁶ See *e.g.*, 42 U.S.C. § 1988 (1964) (“[Section 1983 and other civil rights] shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to

well as the statute itself when Congress makes amendments. Therefore, the judicial decision of the Seventh Court in *Newsom* interpreting the FDCPA was the controlling law until *Suesz*, where the en banc court adopted a new interpretation regarding the statute and that interpretation became the new controlling law. On the other hand, the Seventh Circuit en banc concluded that BHLM violated the FDCPA as interpreted by *Suesz*, assuming implicitly that *Suesz* controlled.¹⁹⁷ But, ironically, as the court claimed explicitly in *Oliva III*, a judicial decision is not law, or controlling law.¹⁹⁸ Moreover, if as the court stated the statute remains the (only) law even after judicial interpretation changes, there is no change of law when the Seventh Circuit declared a new judicial interpretation of the FDCPA's venue provision, but the provision itself remained the same. Consequently, there is no new "law" in *Suesz* that needs to apply retroactively to *Oliva*.

Finally, nothing in *Jerman* indicates that the Court intended to prohibit the bona fide error defense from being used with respect to *all* mistakes of law.¹⁹⁹ The Court expressly refused to consider whether § 1692k(c) applies when a violation results from a debt collector's misinterpretation of the legal requirements of state law or federal law other than the FDCPA.²⁰⁰ Moreover, the Court was clear in its warning that "we need not authoritatively interpret the [FDCPA]'s conduct-regulating provisions to observe that those provisions should not be assumed to compel absurd results when applied to debt collecting attorneys."²⁰¹ But the *Oliva III* decision is exactly an absurd result, by punishing the debt collector for its venue choice expressly permitted

and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.").

¹⁹⁷ *Oliva III*, 864 F.3d at 494.

¹⁹⁸ *Id.* at 500; *see also id.* at 509 (Manion, J., dissenting) ("By denying the controlling effect of its own legal determinations, the court pulls the rug out from under its own feet.").

¹⁹⁹ *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010).

²⁰⁰ *Id.* at 580 n.4.

²⁰¹ *Id.* at 600.

under the then-controlling law, *Newsom*, and by giving superior liability protection to factual and clerical errors as compared to good-faith reliance on controlling judicial decisions.

Therefore, *Jerman* did not bind the court's decision in *Oliva*, and the Seventh Circuit should have applied the elements under § 1692(c) to determine whether BHLM's venue selection constituted an excusable bona fide error.

2. Inconsistency with the FDCPA and Its Legislative Intent

Additionally, excluding all mistakes of law from the bona fide error defense under § 1692k(c) runs afoul of the FDCPA's legislative intent and its other provisions.

Relying on the court's binding interpretation to choose the venue for filing an FDCPA suit is not an abusive debt collection practice of the type that the FDCPA aims to eliminate.²⁰² BHLM's choice of venue was permissible under the then-binding law when it filed the collection suit against *Oliva*.²⁰³ Also, as *Oliva* admitted, the venue where BHLM initially filed the suit was more convenient for *Oliva* than the closest courthouse, the proper venue under *Suesz*.²⁰⁴ Moreover, as the Seventh Circuit noted in *Oliva III*, "if any mistaken interpretations of the [FDCPA] were made in good faith, it was in cases like this."²⁰⁵ Contrary to the FDCPA's legislative intent to regulate debt collection methods, the Seventh Circuit's en banc decision in *Oliva III* increased the legal uncertainty of debt collection methods and discouraged debt collectors from following courts' controlling precedent, enlarging the harmful risks to debtors.

Further, there is no reason to believe an agency's advisory opinion should be given more authority than a binding circuit court's opinion.

²⁰² See 15 U.S.C. § 1692(e) (2012).

²⁰³ *Oliva III*, 864 F.3d at 495 (majority opinion).

²⁰⁴ *Oliva v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 185 F. Supp. 3d 1062, 1064 (N.D. Ill. 2015), *aff'd*, 825 F.3d 788 (7th Cir. 2016), and *vacated on reh'g en banc*, 864 F.3d 492 (7th Cir. 2017).

²⁰⁵ *Oliva III*, 864 F.3d at 500.

The FTC may answer requests for advice when “[t]he matter involves a substantial or novel question of fact or law and there is no clear [FTC] or *court* precedent” or “[t]he subject matter of the request and consequent publication of [the FTC] advice is of significant public interest.”²⁰⁶ Therefore, the FTC advisory opinions are supplementary to court precedent, and the FTC will not issue advisory opinions if there is clear *court* precedent, as was the case with the well-settled law in *Newsom*.²⁰⁷ Moreover, if relying on an FTC advisory opinion could protect debt collectors from liability even if the opinion later is amended, rescinded, or determined by judicial or other authority to be invalid for any reason,²⁰⁸ relying on binding judicial interpretation should offer, at least, the same degree of protection. Additionally, unlike the Court’s concern in *Jerman* of relying on private counsel’s advice, as compared with an FTC advisory opinion, in the case of *Oliva*, relying on a circuit court’s binding interpretation did not “give a competitive advantage to debt collectors who press the boundaries of lawful conduct.”²⁰⁹ Congress sought to regulate debt collectors’ practices by requiring them to comply with the FDCPA’s provisions, which is exactly what BHLM did in *Oliva*.²¹⁰

Therefore, the FDPCA and its legislative intent suggest the bona fide error defense should have protected a debt collector who relied on the binding judicial interpretation in filing suit in what subsequently turned out to be the wrong venue, resulting in an FDCPA violation.

²⁰⁶ 16 C.F.R. § 1.1 (2016).

²⁰⁷ See *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 606 (2010) (Breyer, J., concurring).

²⁰⁸ 15 U.S.C. § 1692k(e) (2012).

²⁰⁹ See *Jerman*, 559 U.S. at 602 (majority opinion).

²¹⁰ As the majority noted in *Oliva III*, *Newsom* permitted, but did not require, BHLM to file the suit in the first municipal district. *Oliva III*, 864 F.3d at 499. But that did not affect the analysis here because BHLM’s choice of venue was still in compliance with the law.

C. Policy Justification

Additionally, the Seventh Circuit's en banc decision was improper when considered from a policy perspective.

1. Extra Burden on the Courts

The courts adjudicate cases based on the controlling law at that time. The en banc decision in *Oliva III* will result in significant legal uncertainty in the FDCPA, because the opinion states that judicial interpretations and decisions (including *Oliva III*) are not controlling law.²¹¹ Therefore, the courts will have to independently interpret the FDCPA every time when they hear cases, increasing the risk of inconsistent interpretations of the FDCPA.

2. Extra Burden on the Public

As the dissent noted, *Oliva III* violates due process by not giving fair notice to debt collectors of the FDCPA's requirements.²¹² "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."²¹³ Therefore, it is not "unusual" to give exceptions to good-faith mistakes by relying on the then-binding judicial interpretation of federal statute. The court in *Oliva III*, however, penalized a law-abiding litigant who followed the then-controlling law, which is a direct violation of this due process principle.

Additionally, the en banc decision in *Oliva III* diminishes the court's authority and credibility.²¹⁴ Under this decision, no protection is available for good-faith reliance on the court's controlling

²¹¹ See *id.* at 500.

²¹² *Id.* at 511 (Manion, J., dissenting).

²¹³ *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

²¹⁴ *Oliva III*, 864 F.3d at 511 (Manion, J., dissenting) ("Today's decision also gravely undermines the rule of law by discouraging debt collectors from following this court's controlling precedent.").

precedent, or even worse, a federal circuit court's interpretation of federal statute such as the FDCPA can no longer be viewed as controlling. How can a party know what is legal if it is required to follow only the statute, but not the applicable court of appeals cases interpreting such statute? Consequently, the public has to understand and interpret the law by themselves. But if our judges are unable to make the right decision, how can we fairly impose liability on the parties without legal training if they interpret wrongly? In the context of the FDCPA, debt collectors have to hope that the existing judicial interpretations related to their collection and litigation efforts do not change before the case concludes or the statute of limitations runs, and that the courts adjudicating their cases adopt the same interpretations. Or, if debt collectors apply their own interpretation of the statute and act differently from an existing judicial interpretation, they have to hope that the courts adjudicating their cases do not rely on the existing judicial interpretation and interpret the FDCPA provisions in the same way as the debt collectors.

CONCLUSION

The Seventh Circuit's en banc opinion in *Oliva III* was erroneously reasoned in several aspects, and they reached an improper decision as a result. The reasoning failed because *Suesz* should not have been applied retroactively to this case, based on the special circumstance exception under *Hyde*.

Furthermore, *Jerman*, which held that the bona fide error defense does not extend to debt collectors' mistaken interpretation of law, is not instructive in *Oliva*, and therefore, even if *Suesz* applied retroactively here, the bona fide error defense should have excused BHLM's liability for the violation of the FDCPA.

Finally, the en banc decision will result in extra burdens on both the courts and the public, and diminish the court's authority and credibility. The public has to understand and interpret the law by themselves and hope their interpretation will be same as the judicial tribunal's if challenged at the court.

Accordingly, when deciding whether a new interpretation of the federal statute should have retroactive effect to the parties before a particular court, the court should apply the *Chevron Oil* test. Once it decides to apply the new interpretation to the parties before the court, the court then should consult the holdings in *Harper* and *Hyde* to determine its retroactivity to other cases. In addition, the bona fide error defense, if applicable, should excuse the liability for violations resulted from good faith reliance on a then-controlling judicial interpretation in the event that such judicial interpretation subsequently evolves.