

State Collection Services Defeats TCPA/FDCPA Claim: Debtor Gave Effective Consent and No Evidence of Intent to Harass

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Authors: [David M. Krueger](#)

Just because the number of TCPA and FDCPA claims is falling (for now) is not necessarily a guarantee that the quality of remaining cases is any better, as evidenced by the Western District of Wisconsin's recent decision in *Shannon v. State Collection Serv.*, No. 19-cv-983, 2021 U.S. Dist. LEXIS 25358 (W.D. Wis. Feb. 10, 2021)

Jacob Shannon obtained medical treatment from the medical provider TriHealth. When providing consent for treatment, Shannon signed a Consent for Treatment form stating that "if at any time I provide a wireless telephone number at which I may be contacted, I consent to receive calls or text messages, including but not limited to communications regarding billings and payment for items and services." Two months later, Shannon signed an "Involvement in Care" form and provided his cell phone number as his preferred contact number.

TriHealth later assigned Shannon's account to State Collection Service, Inc. ("SCS") for debt collection. Over the next two months, SCS proceeded to call Shannon 28 times. Eventually, Shannon called SCS and requested that SCS stop calling him. SCS honored the request and did not call Shannon again. So, SCS called the number Shannon provided, regarding the medical treatment for which he provided the number, and then stopped calling after Shannon requested. Everyone's happy right? Unfortunately, no. Shannon then proceeded to sue SCS for alleged violations of the Telephone Consumer Protection Act ("TCPA") and Fair Debt Collection Practices Act ("FDCPA").

Shannon argued that SCS violated the TCPA because he never gave effective prior express consent for SCS to call his cell phone using an automatic telephone dialing system or artificial or prerecorded voice. Shannon also argued that SCS violated the FDCPA by causing his telephone to ring with the intent to harass him into paying his debt, and also engaged in other general "unconscionable" conduct. SCS moved for summary judgment, and the court made short work of granting the motion in favor of SCS.

As to the TCPA claim, given that SCS honored Shannon's do-not-call request, Shannon tried to argue that he never gave prior express consent to TriHealth (and by extension, SCS) to call his cell number. Shannon argued that, under FCC guidance, providing a telephone number for contact only constitutes prior express consent when the number "was provided *during the transaction* that resulted in the debt owed." In Shannon's view, because he provided his telephone number about two months later, and not when he signed the consent form, his number was therefore not provided "during the transaction" that led to the debt.

The problem for Shannon, as the court observed, is that Shannon presented “no support for a requirement that the phone number must be provided *at the same time* as the consent.” (Emphasis in original.) The court was not only right that there is no authority to support that position, but essentially every court going back over a decade has rejected that exact argument. Honestly, it’s a bit of a head scratcher that some plaintiffs still even attempt to make this argument. Also, a potentially even bigger head scratcher is that Shannon made this argument even when the Consent for Treatment form expressly stated that Shannon was consenting to receive calls for telephone numbers he provided at “at any time.” So, the court concluded that under either scenario, Shannon gave prior express consent, and because SCS did not make any calls after Shannon revoked that consent, the TCPA claim failed.

The court’s decision on the TCPA claim is very straightforward. The more interesting aspect of the court’s decision is its analysis in holding that Shannon did not present sufficient evidence to raise an issue of fact as to an intent to harass. Section 1692d(5) of the FDCPA broadly prohibits “[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.” Since “intent to harass” can be difficult to establish (what defendant is going to admit “yes, we intended to harass so-and-so into paying the debt”?), courts generally look to the “volume and pattern” of calls and whether there was other “oppressive conduct” in deciding whether there is a triable issue of fact.

Courts, however, are all over the map in deciding what constitutes a sufficient “volume and pattern” of calls and “oppressive conduct.” Here, the court focused on the fact that 28 calls over two months-about one call every other day-was not sufficient to raise a legitimate issue as to an intent to harass. The court also looked to other surrounding facts, including that SCS never called more than once on a single day, and that SCS never called after Shannon revoked consent, to conclude there was not sufficient evidence as to any potential intent to harass. Shannon finally alleged a claim under Section 1692f of the FDCPA, which broadly prohibits “unfair or unconscionable” conduct when attempting to collect a debt. However, the court quickly noted that a claim under Section 1692f could not simply be predicated on a claim of telephone harassment, as a multitude of other courts have likewise concluded.

By itself, the outcome of *Shannon* is not remarkable and is 100% correct. However, the decision adds to the useful quiver of cases affirming that prior express consent extends to when debtors later provide new telephone numbers for contact under the TCPA, and that a low volume of calls is not sufficient to state a plausible claim under the FDCPA.

However, the usefulness of this quiver of FDCPA cases may be short lived. Later in 2021, new CFPB regulations go into effect that create a rebuttable *presumption* of an intent to harass when a debt collector calls more than seven times in a seven day period, or within a period of seven days after having a telephone conversation with a person regarding the debt.

Fortunately for SCS, even under the new regulations this claim appears it would have failed. However, the new CFPB regulations will likely have a significant impact on the factors that courts evaluate for FDCPA harassment claims. Debt collectors, are you ready?

For more information on this topic, contact David M. Krueger at dkrueger@beneschlaw.com or 216.363.4683.