

May 20, 2022

Steve Cortez
Arch Telecom
3103 Bee Caves Road, Suite 221
Austin, TX 78746

VIA E-MAIL stevec@archtelecom.com

Re: Application of the TCPA and the Florida and Oklahoma “mini-TCPA” laws to your dialing system

Dear Steve:

You have requested our opinion regarding whether the dialing system that Arch Telecom uses to send texts or make calls is an “automatic telephone dialing system” (“ATDS”) under the Telephone Consumer Protection Act (“TCPA”) or an “automated system” under the Florida and Oklahoma “mini-TCPA” laws.

These statutes allow private causes of action and potentially class actions for failure to comply, so it is important that you review your system on an ongoing basis. As set forth below, it is our opinion that the ArchAgent dialing system complies with these laws.

Please contact me if any of the facts in this letter are incorrect or change as our opinion is based on this scenario.

I. TCPA

The TCPA prohibits any person from making any call using an ATDS or prerecorded message to any cell phone or other service for which the called party is charged without the prior express consent of the called party. 47 U.S.C. § 227(b)(1). “Calls” include texts. *See In re Rules & Regulations Implementing the TCPA of 1991*, 27 FCC Rcd 1830, 1832 (Feb. 15, 2012).

The TCPA defines an ATDS as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers”. 47 U.S.C. § 227(a)(1).

The Supreme Court ruled that “[t]o qualify as an ‘automatic telephone dialing system’ under the TCPA, a device must have the capacity either to store a telephone number using a random or sequential number generator, or to produce a telephone number using a random or sequential number generator.” *Facebook v. Duguid*, 141 S. Ct. 1163, 1167 (2021).

In other words, “Congress’ definition of an autodialer requires that in all cases, whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator.” *Id.* at 1170.

The Supreme Court also refused to adopt a “human intervention” test when assessing the TCPA’s ATDS definition.

[A]ll devices require some human intervention, whether it takes the form of programming a cell phone to respond automatically to texts received while in “do not disturb” mode or commanding a computer program to produce and dial phone numbers at random. We decline to interpret the TCPA as requiring such a difficult line-drawing exercise around how much automation is too much.

Id. at 1171 n. 6. The “human intervention” test had been used by some courts in the past but is no longer applicable to this issue or the definition of ATDS. As set forth below, however, “human intervention” is still relevant to compliance with Florida and Oklahoma law.

In addition, Plaintiffs’ attorneys have seized onto the Court’s hypothetical example in footnote 7 of *Facebook* to argue that any pre-produced contact list that dialing equipment calls from is, by definition, an ATDS: “an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list. It would then store those numbers to be dialed at a later time.” *Id.* at n. 7.

However, this argument has repeatedly failed. District court cases decided post-*Facebook* have held that when a company randomly makes calls from a preproduced list of phone numbers, it is not randomly or sequentially *storing or producing* telephone numbers because the underlying list was not itself created through a random or sequential number generator, and thus it is not an ATDS. *See, e.g., Brickman v. Facebook, Inc.*, No. 16-cv-00751-WHO, 2021 U.S. Dist. LEXIS 175700 (N.D. Cal. Sep. 15, 2021); *Borden v. Efinancial, LLC*, No. C19-1430JLR, 2021 U.S. Dist. LEXIS 153086 (W.D. Wash. Aug. 13, 2021); *Franco v. Alorica Inc.*, No. 2:20-CV-05035-DOC-(KESx), 2021 U.S. Dist. LEXIS 164438 (C.D. Cal. July 27, 2021); *Barry v. Ally Fin., Inc.*, 2021 U.S. Dist. LEXIS 129573 (E.D. Mich. July 13, 2021); *Hufnus v. DoNotPay, Inc.*, No. 20-cv-08701, 2021 U.S. Dist. LEXIS 118325 (N.D. Cal. June 24, 2021); *Watts v. Emergency Twenty Four, Inc.*, No. 20-CV-1820, 2021 U.S. Dist. LEXIS 115053 (N.D. Ill. June 21, 2021); *Timms v. USAA Fed. Sav. Bank, C/A* No. 3:18-cv-01495-SAL, 2021 U.S. Dist. LEXIS 108083 (D.S.C. June 9, 2021).

On May 9, 2022, you provided me an explanation of the equipment, which you demonstrated over Zoom. Our conversation confirmed that the equipment employed by Arch Telecom does not work in concert with any other equipment, whether owned by Arch Telecom, its affiliates or any third party, which individually or taken as a whole, would have any present or future capacity to store or produce, and dial random or sequential numbers.

Specifically, real estate agents or other subscribers that sign up for an ArchAgent account are required to login in with their username and password. Once logged in, agents can review

properties and contact information of individuals that are likely to sell their properties based on ArchAgent's internal algorithms.

Agents must manually select which properties they want to call based on the parameters they set and click "start session" to begin dialing phone numbers based on the list they created. Calls cannot be automatically dialed, and agents can jump around and manually select different properties at any time. Agents can only call one number at a time. Agents cannot make prerecorded calls.¹ The system cannot initiate a call in any other way and cannot generate numbers to be called using a random or sequential number generator.

Based on your explanation, and the sources cited above, it is our opinion that ArchAgent is not an ATDS.

II. Florida

Florida law restricts calls and texts using an "automated system", and you have therefore asked us to review ArchAgent's compliance with that statute, as well.

Florida prohibits "mak[ing] or knowingly allow[ing] a telephonic sales call² to be made if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called." Fla. Stat. Ann. § 501.059(8)(a). The statute exempts calls made with prior express written consent. *Id.* at (1)(g).³

¹ The TCPA prohibits calls to cell phones using an artificial or prerecorded voice for marketing purposes unless the caller has obtained the prior express written consent of the called party. 47 U.S.C. § 227(b)(1)(A)(iii).

² A "telephonic sales call" is defined as:

a telephone call, text message, or voicemail transmission to a consumer for the purpose of soliciting a sale of any consumer goods or services, soliciting an extension of credit for consumer goods or services, or obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes.

Fla. Stat. Ann. § 501.059(1)(j).

³ "Prior express written consent" means a written agreement that:

1. Bears the signature of the called party;
2. Clearly authorizes the person making or allowing the placement of a telephonic sales call by telephone call, text message, or voicemail transmission to deliver or cause to be delivered to the called party a telephonic sales call using an automated system for the selection or dialing of telephone numbers, the playing of a recorded message when a connection is completed to a number called, or the transmission of a prerecorded voicemail;
3. Includes the telephone number to which the signatory authorizes a telephonic sales call to be delivered; and
4. Includes a clear and conspicuous disclosure informing the called party that:
 - a. By executing the agreement, the called party authorizes the person making or allowing the placement of a telephonic sales call to deliver or cause to be delivered a telephonic sales call to the called party using an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called; and
 - b. He or she is not required to directly or indirectly sign the written agreement or to agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

Fla. Stat. Ann. § 501.059(1)(g).

The term “automated system” is not defined, but it is not necessarily the same as an ATDS as defined by the TCPA and interpreted in *Facebook*. Courts have not yet interpreted the term or applied it to dialing systems in published opinions.

However, the Florida Senate Committee notes on the amendment to Fla. Stat. Ann. § 501.059 provide insight on the Senate’s intent for the definition of an “automated system”. In the Bill Analysis and Fiscal Impact Statement prepared by the Professional Staff of the Committee on Rules dated April 19, 2021, it states:

Section 501.059(8), F.S., prohibits solicitations via telephone calls, text messages, and direct-to-voicemail transmissions if the communication is initiated with an automated system that selects or dials the telephone numbers (autodialer), or if the communication plays a recorded message upon connection with the consumer.

See The Florida Senate Bill Analysis and Fiscal Impact Statement for CS/SB 1120, <https://www.flsenate.gov/Session/Bill/2021/1120/Analyses/2021s01120.rc.PDF> (Apr. 19, 2021) (emphasis added).

“Autodialer” is not defined in the statute or Committee notes, but in practice it is often used to refer to a “predictive dialer”. A “predictive dialer” is a type of automated dialer that systematically dials phone numbers and connects the call to the agent if someone picks up their phone. It is designed to increase agents’ efficiency by calling as many leads as possible. The system quickly moves on to the next lead after an unanswered call.

Relying on the Committee notes, it appears the intent of the statute is to prohibit calls made using a predictive dialer absent prior express consent, i.e., a dialer that systematically dials phone numbers without an agent taking any action to initiate the call.

In our opinion, there are two ways in which a dialing system could call or text numbers using human actions that would significantly reduce the risk that the system is an “automated system”:

1. When using the dialing system, the agent would make at least two clicks: one to select the number to dial and one to make the dialer call/text.
2. When using the dialing system, the agent would make one click to select and dial the number. The screen should not automatically bring up or “pop up” the number. This also likely complies with Florida’s law.

As explained above, the ArchAgent dialing system requires multiple clicks from an agent to send texts or make calls. Agents must manually select which properties they want to call based on the parameters they set and click “start session” to begin dialing phone numbers based on the list they created. Calls cannot be automatically dialed, and agents can jump around and select different properties at any time. Agents can only call one number at a time. Agents cannot make prerecorded calls. The system cannot initiate a call in any other way and cannot generate numbers to be called using a random or sequential number generator.

Based on your explanation, and the sources cited above, it is our opinion that ArchAgent is not an “automated system” under Florida law.

III. Oklahoma

Like Florida’s “mini-TCPA” law, Oklahoma’s newly created Telephone Solicitation Act of 2022 prohibits “a telephonic sales call to be made if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called without the prior express written consent of the called party.” *See [Oklahoma HB 3168](#)*.⁴

The term “automated system” is also not defined, but it is not necessarily the same as an ATDS as defined by the TCPA and interpreted in *Facebook*. Courts have also not yet interpreted the term or applied it to dialing systems in published opinions.

In absence of other guidance and the fact that the bill mirrors Florida’s statute, it appears the intent of the bill is to prohibit calls made using a predictive dialer absent prior express consent, i.e., a dialer that systematically dials phone numbers without an agent taking any action to initiate the call.

In our opinion, there are two ways in which a dialing system could call or text numbers using human actions that would significantly reduce the risk that the system is an “automated system”:

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As explained above, the ArchAgent dialing system requires multiple clicks from an agent to send texts or make calls. Agents must manually select which properties they want to call based on the parameters they set and click “start session” to begin dialing phone numbers based on the list they created. Calls cannot be automatically dialed, and agents can jump around and select different properties at any time. Agents can only call one number at a time. Agents cannot make prerecorded calls. The system cannot initiate a call in any other way and cannot generate numbers to be called using a random or sequential number generator.

Based on your explanation, and the sources cited above, it is our opinion that ArchAgent is not an “automated system” under Oklahoma law.

⁴ To be codified as Okla. Stat. Ann. tit. 15, § 755C.3(A).

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Please note that while the bill has passed both the Oklahoma House and Senate, it has not been signed by the governor as of the date of this letter. Once signed, the law becomes effective November 1, 2022.

IV. Conclusion

It is our opinion that ArchAgent is not an ATDS as defined by the TCPA and interpreted in *Facebook*, and that ArchAgent is not an “automated system” under Florida or Oklahoma law. Our opinion is based on the facts as you described them and could change if those facts change. Third parties or courts could disagree which could also change based on further court or agency action. Please contact me if you have further questions.

Sincerely,

A handwritten signature in black ink that reads "Kellie Mitchell Bubeck". The signature is written in a cursive style and is positioned above the typed name.

Kellie Mitchell Bubeck
Attorney for the Firm

Cc: William Raney