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**ARIZONA COURT RULES THAT THE TELEPHONE CONSUMER  
PROTECTION ACT OF 1991 APPLIES TO TEXT MESSAGES**

*Joffe v. Acacia Mortgage Corp.*, Cause No. CV01-009399 (Ariz. Ct. App. Sept. 20, 2005)

The Arizona Court of Appeals held that Acacia Mortgage Corporation ("Acacia") violated the Telephone Consumer Protection Act of 1991 ("TCPA") when it delivered unsolicited advertisements in the form of text messages to Rodney L. Joffe's ("Joffe") cellular telephone. The Court rejected Acacia's argument that the TCPA did not apply to text messages and, if it did, the TCPA violated its rights under the First Amendment.

The Court began its analysis by focusing on the purpose of the TCPA. The TCPA was enacted to deal with various telemarketing practices arising out of the telemarketing industry's use of sophisticated equipment, generically known as autodialers, to generate millions of automated telephone calls to residential and business telephone subscribers. Accordingly, the TCPA prohibits, in relevant part, "any call" using "any automatic dialing telephone system" to "any telephone number assigned to a ... cellular telephone service." 47 U.S.C. § 227(b)(1)(A)(iii).

Acacia argued that the TCPA did not apply to its actions because the TCPA regulates only ordinary phone calls involving two-way real time voice intercommunication. Accordingly, its text message to Joffe did not constitute a "call" as contemplated by the TCPA. The Court rejected this argument concluding that Congress used the word "call" in the TCPA to refer to any attempt to communicate by telephone, Congress did not limit the TCPA to two-way real time voice intercommunications. The Court held that in sending the text message Acacia initiated a demand to make a communication for purposes of delivering a message by telephone. In so doing, Acacia attempted to communicate by telephone and, thereby, "called" Joffe in violation of the TCPA.

The Court then noted that just placing the call did not violate the TCPA. It was Acacia's use of an automatic dialing system to call Joffe that constituted a violation. Acacia argued that it did not violate the TCPA because it did not contact Joffe using equipment that called or dialed his cellular telephone number. Instead, its computers simply sent an email to an email address. The Court rejected this argument reasoning that Acacia took advantage of Internet-to-phone SMS

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technology – technology guaranteed to generate text messages to Joffe’s cellular telephone. By pairing its computers with SMS technology, the Court held that Acacia did what the TCPA prohibits - it used an automatic telephone dialing system to call a telephone number assigned to a cellular telephone.

Acacia next argued that the CAN-SPAM Act, used by the FCC to regulate Internet-to-phone SMS messages, precluded the application of the TCPA to regulate the same conduct. The Court rejected this argument based on the CAN-SPAM Act’s plain language that it shall not be interpreted to preclude or override the applicability of the TCPA. 15 U.S.C. § 7712(a). The Court further reasoned that applying the TCPA to Internet-to-phone SMS messages did not render the CAN-SPAM Act’s regulation of such messages superfluous because the CAN-SPAM Act is broader than TCPA. While the TCPA applies only to calls made using an automated dialing system or an artificial or prerecorded voice, the CAN-SPAM Act applies to all uninvited commercial electronic mail messages transmitted directly to a wireless device.

The Court also rejected Acacia’s final argument that the TCPA violated its First Amendment rights under the United States Constitution. The Court reasoned that the TCPA creates a content-neutral time, place and manner restriction on speech. Therefore, it survives a First Amendment challenge so long as it serves a significant governmental interest, is narrowly tailored and leaves open alternative channels of communication for the information. The Court concluded that the government has a significant governmental interest in protecting the privacy of the home from unwarranted and unrequested intrusions. In protecting the privacy of cellular telephone subscribers from automated calls, the TCPA furthers that interest.

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