DREHER TOMKIES LLP

ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

February 18, 2019

REPORTS: THE *MARKS* AUTODIALER CASE SETTLES.

It has been reported that the parties in *Crunch San Diego v. Marks* have settled their case. The settlement means that the U.S. Supreme Court will not have a chance to review a controversial decision issued by the U.S. Court of Appeals for the Ninth Circuit regarding the definition of "automatic telephone dialing system" ("ATDS") under the federal Telephone Consumer Protection Act ("TCPA").

In *Marks v. Crunch San Diego LLC*, the Ninth Circuit held that telephone equipment is not required to have the capacity to generate telephone numbers randomly or sequentially to qualify as an ATDS. Rather, equipment that stores numbers and dials the stored numbers automatically could qualify as an ATDS. Earlier this month, Crunch filed a petition asking the Supreme Court to review the Ninth Circuit's decision. See our ALERT on Feb. 4, 2019. At the time of settlement, the Supreme Court had not announced whether it would hear the case.

While the financial services industry has lost an opportunity to receive helpful guidance on the scope of the term "ATDS" under the TCPA, guidance could still come from the Federal Communication Commission ("FCC") in the form of an interpretative rule. In October 2018, the FCC issued a request for public comment on how the FCC should interpret the definition of ATDS after *Crunch*. See our ALERT on Oct. 8, 2018. The FCC has not released a timeline for issuance of a proposed or final rule. For now, the industry must navigate divergent judicial opinions on the definition of "ATDS" in different jurisdictions. ❑

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