In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1540

PAULA SMITH, Executor for the Estate of
DR. RICHARD L. THALMAN,

Plaintiff-Appellant,

v.

FIRST HOSPITAL LABORATORIES, INC.,
doing business as FSSOLUTIONS,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Illinois.
No. 3:21-cv-543 — **Nancy J. Rosenstengel**, *Chief Judge*.

ARGUED NOVEMBER 8, 2022 — DECIDED AUGUST 9, 2023

Before SYKES, *Chief Judge*, and WOOD and SCUDDER, *Circuit Judges*.

SCUDDER, *Circuit Judge*. FSSolutions faxed Dr. Richard Thalman several times to ask him to join its network of preferred medical providers and administer various employment screening and testing services to its clients. Thalman declined the invitation and instead invoked the Telephone

Consumer Protection Act to sue FSSolutions for sending him unsolicited advertisements. The district court dismissed the complaint after finding that the faxes were not "unsolicited advertisements" within the meaning of the TCPA because they merely asked to purchase Thalman's own services rather than inviting him to buy something from FSSolutions.

We agree that a fax must directly or indirectly encourage recipients to buy goods, services, or property to qualify as an unsolicited advertisement. But Thalman plausibly alleged that FSSolutions's faxes did just that by promoting the company's network of preferred medical providers, a network that would bring Thalman new business in exchange for a portion of the underlying client fees. So we reverse and remand.

I

A

FSSolutions provides health monitoring and screening services through a network of medical providers who serve as independent contractors. In May 2021 the company sent a fax inviting Thalman—a chiropractor and medical examiner in Carbondale, Illinois—to join its network of providers. FSSolutions's cover letter stated that its invitation was "not solicitation." Instead, the company claimed, it simply sought to "utilize your services" and "send our donors to you for occupational health services." Included in the fax was a Provider Agreement for Thalman to sign and a fee schedule with proposed pricing for various medical services that he might provide to clients of FSSolutions. The contract explained that FSSolutions—and not the underlying clients themselves—would pay Thalman at a fixed rate for each service rendered

to one of the company's clients. By way of example, FSSolutions offered to pay $15 for collecting a urine sample and $20 for a breath alcohol test.

The proposed contract did not explain how FSSolutions would profit from the arrangement, but it did bar Thalman from billing clients directly or disclosing his fixed fees to them. It also incentivized Thalman to stick with the proposed pricing: if he matched that pricing, FSSolutions would list him as a "Preferred Provider" and route clients to him. On the other hand, if Thalman opted to increase his pricing over the proposed fees, the company suggested it would list him on its network but would not refer clients to him. The company asked Thalman to agree with the proposed pricing or to "add your pricing" and return the forms "ASAP so we can add you to our database."

FSSolutions sent a second fax to Thalman a month later in June, this time asking him to "confirm that you have received the FSSolutions contract." The company sent the second fax with the same cover letter and another copy of the Provider Agreement and proposed fee schedule.

Days later, and aggravated by the faxes, Thalman filed a putative class action in the Southern District of Illinois. On top of a number of state law claims, he alleged that both faxes violated the TCPA because they constituted an "unsolicited advertisement" barred by the statute. See 47 U.S.C. § 227(b)(1)(C). And he claimed that FSSolutions had sent the faxes as part of a "mass broadcasting" to dozens of other healthcare providers in Illinois.

B

The district court granted FSSolutions's motion to dismiss the complaint. As the district court saw it, the TCPA extends liability to unsolicited faxes that promote the sale of the sender's goods, services, or property, if those products are available for purchase immediately. That posed a problem for Thalman because the district court interpreted FSSolutions's faxes as doing something different—namely, offering to purchase medical services from Thalman and to hire him as a contractor. So the complaint failed to state a plausible claim for relief under the TCPA. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). After dismissing Thalman's sole federal claim, the district court declined to exercise supplemental jurisdiction over the remaining state law claims.

While this appeal was still pending, Thalman passed away and Paula Smith, the executor of his estate, stepped in as the plaintiff. See Fed. R. App. P. 43(a)(1).

II

A

We view the complaint in the light most favorable to Thalman, accepting all well-pleaded facts as true and drawing all reasonable inferences in his favor. See *Burke v. 401 N. Wabash Venture, LLC*, 714 F.3d 501, 504 (7th Cir. 2013). His complaint can survive a motion to dismiss if it contains enough factual allegations to state a claim for relief that is plausible. See *Twombly*, 550 U.S. at 570. The only question before us, then, is whether Thalman plausibly alleged that the faxes were "unsolicited advertisement[s]" prohibited by the TCPA. See 47 U.S.C. § 227(b)(1)(C).

The TCPA defines an unsolicited advertisement as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5), (b)(1)(C).

The cardinal rule of statutory interpretation is that words in a statute take their "ordinary, contemporary, common meaning," allowing us to turn to dictionary definitions for guidance. *Delaware v. Pennsylvania*, 143 S. Ct. 696, 705 (2023) (quoting *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014)). Most dictionaries define "advertising" as the act of drawing the public's attention to a product to promote its sale. See *Florence Endocrine Clinic, PLLC v. Arriva Med., LLC*, 858 F.3d 1362, 1366–67 (11th Cir. 2017) (collecting definitions to interpret the TCPA). The TCPA additionally requires that the fax advertise by reference to the good, service, or property's "commercial availability or quality." 47 U.S.C. § 227(a)(5). The qualifier "commercial" tells us that the advertising must relate to commerce or have profit as a primary aim. See *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218, 222 (6th Cir. 2015) (defining "commercial" as it is used in the TCPA). An unsolicited fax advertisement under the TCPA is therefore a fax that promotes the sale of a good, service, or property, with profit as an aim, by drawing attention to the fact that the good, service, or property is available for purchase or of a desirable quality.

FSSolutions urges us to winnow this definition further. By the company's measure, a fax qualifies as an advertisement only if it offers to sell products—not if it offers to buy products or to otherwise create a commercial relationship with the

recipient. FSSolutions presents this distinction as a binary: promoting the sale of a product is advertising, but an offer to buy products or to enter into a commercial relationship is not. FSSolutions also suggests that we should accept the characterization of the proposed transaction as it is presented in the fax itself. So if the fax describes the transaction purely as an effort to buy from the reader, it is not, in the company's view, an advertisement.

We agree that a fax is an unsolicited advertisement only if it promotes the *sale*—and not simply the purchase—of goods, services, or property. That conclusion follows from the statutory requirement that the faxed materials promote the commercial availability or quality of a good, service, or property. An offer to buy a product will not, without more, advertise that product's quality or its commercial availability. The faxed materials must therefore provide an objective basis for recipients to conclude they are being encouraged to buy, and they must do so by pointing to the commercial availability or quality of the goods, services, or property at issue. See, *e.g.*, *Mauthe v. Optum Inc.*, 925 F.3d 129, 133 (3d Cir. 2019) (requiring the fax to "convey the impression … that a seller is trying to make a sale" (alteration in original) (quoting *Mauthe v. Nat'l Imaging Assocs.*, 767 F. App'x 246, 249 (3d Cir. 2019))); *Sandusky Wellness Ctr.*, 788 F.3d at 222 (giving examples of unsolicited advertisements).

But our analysis does not end there. In some narrow situations a fax offering to buy products from or to do business with the recipient may also amount to an offer to sell services to that same recipient—and therefore qualify as an unsolicited advertisement. Two examples help drive our point home. Suppose, for instance, that a pawnshop acquires space in a

newspaper to promote its business of buying items of value—jewelry, rare coins, antiques, used guitars, and the like. Or, to take another example, suppose that a scrapyard buys space in an industrial trade magazine to plug its willingness to buy metal—wrecked cars, worn aluminum siding, old refrigerators, microwave ovens, and other common items. Everyone would say the businesses have offered to buy goods, yet nobody would hesitate to call the promotions advertisements.

Recognize, then, what these simple examples illustrate: the pawnshop and scrapyard have simultaneously offered to buy goods and also advertised their own commercial "service" to be acquired by people or businesses willing to sell certain goods of value. See *Service*, *Black's Law Dictionary* (11th ed. 2019) (defining a "service" in part as "the performance of some useful act or series of acts for the benefit of another, [usually] for a fee"). We would reach the exact same result—that the businesses are advertising—if they opted to promote their services by blasting fax messages far and wide rather than by using space in a newspaper or trade magazine.

Nor would our analysis change if the fax message itself denied being an advertisement or other form of solicitation. Indeed, a fax may meet all the requirements we have discussed here even if the sender disavows any intention to solicit purchases or characterizes the message as an offer to enter into a commercial relationship. The most effective advertisements sometimes fall short of an express solicitation. We recognized as much in *Ira Holtzman, C.P.A., & Associates v. Turza*, 728 F.3d 682 (7th Cir. 2013), when we concluded that Gregory Turza's faxed newsletters—sent to prospective legal clients and containing descriptions of his fields of expertise and contact information—advertised his services within the

meaning of the TCPA even though they purported to give "mundane [business] advice." *Id.* at 683, 685–87. What mattered was that the newsletters declared the availability of Turza's legal services in a "promotional" way, notwithstanding his efforts to prepare and present the newsletters as being merely informational. *Id.* at 686–87.

Today's case does not require us to pinpoint this dividing line between faxes that advertise in subtle or indirect ways and faxes that are not advertisements at all. At the end of the day, courts must engage in a holistic examination of the faxed materials to determine whether they meet the requirements we have articulated here.

B

Returning to the case before us, a recipient like Thalman could plausibly view FSSolutions's faxes as an unsolicited advertisement plugging the company's network of preferred medical providers.

The most difficult aspect of Thalman's claim is whether the faxes advertised a "service" within the meaning of the TCPA. It would be difficult for us to conclude that FSSolutions had engaged in advertising if the company merely offered to add Thalman's information to a list of providers. But that is not all that FSSolutions proposed. Recall the details of the exchange proposed in the faxes: if Thalman matched the company's suggested pricing, then FSSolutions would route new clients to him and invoice those clients directly for his services, paying him according to his fee schedule. The contract also provided that Thalman could not bill clients directly or disclose to them his fees—implying that what FSSolutions

charged clients was greater than what a preferred provider would receive.

A reasonable inference from these terms, then, was that Thalman, by accepting the discounted fees set forth in the fee schedule for preferred providers, would access new streams of revenue from new clients in exchange for paying FSSolutions a cut of the total amount due from each client. In effect, Thalman plausibly alleged that FSSolutions offered to sell him access to its network of preferred providers in exchange for a fee—specifically, a portion of the underlying client payments. The network FSSolutions promoted looks akin to a lead-generation or brokerage service, both of which involve routing new business or products to the purchaser in exchange for some kind of fee. We have no doubt that such an activity, much like the pawnshop or the scrapyard, would qualify as a "service" within the meaning of the TCPA's definition of "unsolicited advertisement."

From there our analysis simplifies considerably. A recipient could conclude the faxes were promotional. Not only did the faxes urge Thalman to join the network straight away, but Thalman alleged in his complaint that they were part of a "mass broadcasting" campaign aimed at encouraging other providers to join the network too. The faxes themselves support his assertion. The messages were impersonal: the first one contained a letter addressed "[t]o whom it may concern" while the second simply said "hello." Nor did the company appear to know what services Thalman provided. In its first message the company told Thalman it had "an occasional need for an on-site drug collection, if that is a service you offer." In the second message, it said that "we were recently informed that our services and pricing do not match what you

offer" and asked him to update his "site profile" with accurate information. The fair import from all these details is that the faxes were part of an impersonal, widely disseminated promotional campaign.

Thalman also plausibly alleged that the faxes advertised the network by pitching both its commercial availability and quality. The faxes informed Thalman that he could and should sign the contract "ASAP," making clear the service was available to him immediately. The faxes implied, too, that the network was a high-quality service by alluding to the company's large numbers of clients, which FSSolutions approximated as being in the "thousands"—a message the company undoubtedly conveyed to help Thalman and other recipients see membership as yielding new, lucrative streams of revenue. FSSolutions's proposed fee schedule may well have conveyed the same message by providing Thalman with a more concrete picture of how he stood to profit.

A recipient could fairly construe the faxes as proposing a "commercial" transaction as well. The faxes suggested, after all, that FSSolutions would charge preferred providers by pocketing some of the underlying fees in exchange for routing new business to them. Taken together, these aspects of the fax messages are enough for Thalman's claim to proceed to summary judgment.

Our conclusion aligns with our case law. *Holtzman v. Turza* is a good example. We explained there that attorney Gregory Turza's faxed newsletters qualified as advertisements even though the portion of the newsletters that did the advertising (by displaying his contact information and legal services) took up relatively little space and was "incidental" to his free business advice. See 728 F.3d at 683, 686, 688. Turza's indirect

advertising was still advertising for which he could be held liable under the TCPA.

The same rationale leads us to reverse here. Our analysis does not end just because FSSolutions assured Thalman it was not engaged in solicitation. Nor are we required to accept the faxes' own gloss on the transaction—in this case, that FSSolutions's sole purpose was to buy services from Thalman, and not the other way around. The TCPA instead directs us to consider the portions of the faxes that indirectly encouraged Thalman to buy FSSolutions's services in exchange for economic value. And that is what we have done.

For that reason, we do not need to consider whether Thalman's alternative legal theory—that FSSolutions advertised its confidential client lists for Thalman to purchase—passes muster. Thalman's allegations relating to the network of medical providers are enough to state a claim for relief.

C

FSSolutions presses a different view of the faxes. It reads them narrowly, as merely offering to enter into a commercial relationship in which FSSolutions would acquire Thalman's services as a hired contractor. For support FSSolutions analogizes to cases where courts rejected TCPA liability for faxes offering to hire recipients or pay them to take a survey. According to the company, those cases illustrate that similar invitations to do business are not advertising. See, *e.g.*, *Advanced Dermatology v. Fieldwork, Inc.*, 550 F. Supp. 3d 555, 566 (N.D. Ill. 2021) ("A fax offering an incentive for the recipient's participation in a survey is no more an advertisement than a fax informing the recipient that the sender is looking to purchase a particular consumer good, hire a babysitter or lawn care, or

accept bids from contractors for a job—both types of fax undoubtedly propose a 'commercial transaction,' but neither advertises the 'commercial availability or quality of any property, goods or services.'"); *Payton v. Kale Realty, LLC*, 164 F. Supp. 3d 1050, 1061–62 (N.D. Ill. 2016) (collecting cases in the recruitment context).

Although the company offers a reasonable perspective, we are not persuaded. To be sure, a bare offer to buy goods from the recipient or to do business with the recipient is not an advertisement under the TCPA. And had the faxes done no more than inquire whether Thalman was interested in providing services to some of FSSolutions's clients, our outcome today might be different. But the faxes did not stop there. Instead, FSSolutions used the faxes (at least in part) to pitch the company's network, including by approximating the number of clients at stake and by attaching a fee schedule itemizing the revenue Thalman would receive as a preferred provider for providing particular services. That tips Thalman's complaint over *Twombly*'s plausibility line: he has plausibly alleged that the network is a "service" and that the faxes widely broadcasted that service's availability and quality for purchase. So Thalman has stated a claim under the TCPA.

III

We are mindful that many plaintiffs' attorneys view the TCPA opportunistically. See *Craftwood II, Inc. v. Generac Power Sys., Inc.*, 63 F.4th 1121, 1123–24 (7th Cir. 2023) (expressing concern that the TCPA "so handsomely reward[s] litigiousness over annoyances that have been greatly diminished by changes in technology"). So be careful not to overread what we are saying. Our opinion bears on a slice of fax messaging—unsolicited faxes that an objective recipient would construe as

urging the purchase of a good, service, or property by emphasizing its availability or desirability. And of course, the TCPA regulates only fax messages and other forms of telephonic communication. The statute does nothing to prevent companies like FSSolutions from advertising through other, non-telephonic means.

For these reasons, we REVERSE and REMAND the case for proceedings consistent with this opinion.