

15-288-cv
Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.,

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2015

4 (Argued: September 29, 2015 Decided: February 3, 2017)

5 Docket No. 15-288-CV

6 - - - - -
7 Physicians Healthsource, Inc.,

8
9 Plaintiff-Appellant,

10
11 v.

12
13 Boehringer Ingelheim Pharmaceuticals, Inc., Boehringer Ingelheim
14 Corporation, Medica, Inc.

15
16 Defendants-Appellees,

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18 John Does, 1-10,

19
20 Defendants.

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22 - - - - -
23
24 B e f o r e: WINTER, JACOBS, and LEVAL, Circuit Judges.

25 Appeal from a grant by the United States District Court for
26 the District of Connecticut (Stefan R. Underhill, Judge) of a
27 Rule 12(b)(6) motion dismissing a complaint asserting violations
28 of the Telephone Consumer Protection Act of 1991, as amended by
29 the Junk Fax Protection Act of 2005, 47 U.S.C. § 227. The
30 principal issue is whether an unsolicited fax inviting doctors to
31 a free dinner meeting featuring a discussion of an ailment -- to
32 which an upcoming product, as yet unapproved by the FDA, was

1 aimed -- was an "unsolicited advertisement." We vacate and
2 remand. Judge Leval joins in the panel's opinion and concurs by
3 separate opinion.

4 GLENN L. HARA (Aytan Y. Bellin, Bellin &
5 Associates LLC, White Plains, NY, on the
6 brief), Anderson & Wanda, White Plains, NY,
7 for Plaintiff-Appellant.
8

9 THOMAS D. GOLDBERG (Bryan J. Orticelli, Day
10 Pitney LLP, Stamford, CT, Matthew H. Geelan,
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12 on the brief), Day Pitney LLP, Stamford, CT,
13 for Defendants-Appellees.
14

15 WINTER, Circuit Judge:

16 Physicians Healthsource appeals from Judge Underhill's
17 dismissal of its class action complaint asserting violations of
18 the Telephone Consumer Protection Act of 1991, as amended by the
19 Junk Fax Protection Act of 2005, 47 U.S.C. § 227 (the TCPA). The
20 complaint alleges that appellees (collectively "Boehringer") sent
21 an unsolicited fax invitation for a free dinner meeting to
22 discuss ailments relating to appellees' business. According to
23 appellant, this fax constituted an "unsolicited advertisement"
24 prohibited by the TCPA.

25 Judge Underhill dismissed appellant's complaint for failure
26 to state a claim -- holding that no facts were pled that
27 plausibly showed that the fax had a commercial purpose. While we
28 agree that a fax must have a commercial purpose to be an
29 "unsolicited advertisement," we hold that the district court
30 improperly dismissed appellant's complaint. Where it is alleged

1 that a firm sent an unsolicited fax promoting a free event
2 discussing a subject related to the firm's business, the
3 complaint is sufficient to state a claim.

4 We therefore vacate and remand.

5 BACKGROUND

6 In reviewing a Fed. R. Civ. P. 12(b)(6) dismissal of a
7 complaint, we accept all factual allegations as true, drawing all
8 reasonable inferences in the plaintiff's favor. See Chambers v.
9 Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002).

10 The complaint alleges that, on April 6, 2010, Boehringer, a
11 pharmaceutical company, sent an unsolicited fax to appellant,
12 inviting one of appellant's doctors to a free "dinner meeting"
13 and discussion entitled, "It's time to Talk: Recognizing Female
14 Sexual Dysfunction (FSD) and Diagnosing Hypoactive Sexual Desire
15 Disorder (HSDD)." J. App'x at 24. The "invitation" stated that

16 Boehringer Ingelheim Pharmaceuticals, Inc.
17 cordially invites you to join us for a dinner
18 meeting entitled, It's Time to Talk:
19 Recognizing Female Sexual Dysfunction and
20 Diagnosing Hypoactive Sexual Desire Disorder.
21 Based on recent data from a large US study
22 (PRESIDE), 43% of US women aged > 18 years
23 have experienced a sexual problem in their
24 lives and 9.5% of the same group of women
25 have experienced decreased sexual desire with
26 distress. This program has been developed to
27 discuss Female Sexual Dysfunction (FSD),
28 including Hypoactive Sexual Desire Disorder
29 (HSDD) including pathophysiology models,
30 epidemiology, and diagnosis. We hope you
31 will join us for this informative and
32 stimulating program.
33

1 Id. The fax provided registration details and revealed that the
2 speaker at the dinner meeting would be David Portman, MD.

3 On March 30, 2014, appellant filed a class action lawsuit on
4 behalf of more than forty individuals against Boehringer,
5 alleging that the fax violated the TCPA as an "unsolicited
6 advertisement" without a proper opt-out notice. Id. at 11.
7 According to the complaint, the fax was an "unsolicited
8 advertisement" because it "promote[d] the services and goods of
9 [Boehringer]." Id. Appellant sought an award of statutory
10 damages in the minimum amount of \$500 for each violation of the
11 TCPA, and to have such damages trebled. Appellant also requested
12 injunctive relief to enjoin Boehringer from sending similar faxes
13 in the future.

14 Boehringer moved to dismiss, arguing that appellant failed
15 to state a claim under the TCPA because the unsolicited fax was
16 not an advertisement. In its motion to dismiss, Boehringer asked
17 the district court to take judicial notice of public records of
18 the Food and Drug Administration (FDA) -- a request that was
19 unopposed and that the court granted. These records showed that,
20 at the time it faxed appellant, Boehringer had submitted for
21 approval by the FDA to market a drug named Flibanserin. The drug
22 was intended to treat HSDD. Because Flibanserin had yet to be
23 approved by the FDA, Boehringer was forbidden to promote it.
24 See 21 C.F.R. § 312.7(a) (prohibiting, inter alia, pharmaceutical
25 companies from "promoting" drugs not yet approved by the FDA).

1 A claim has facial plausibility when the
2 plaintiff pleads factual content that allows
3 the court to draw the reasonable inference
4 that the defendant is liable for the
5 misconduct alleged. The plausibility
6 standard is not akin to a "probability
7 requirement," but it asks for more than a
8 sheer possibility that a defendant has acted
9 unlawfully. Where a complaint pleads facts
10 that are "merely consistent with" a
11 defendant's liability, it "stops short of the
12 line between possibility and plausibility of
13 'entitlement to relief.'"

14
15 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citations omitted)
16 (quoting Twombly, 550 U.S. at 557).

17 Under the TCPA, it is unlawful for "any person within the
18 United States" to send a fax that is an "unsolicited
19 advertisement" -- unless, inter alia, the fax has an opt-out
20 notice meeting certain requirements. 47 U.S.C. § 227(b)(1)(C).
21 The Act creates a private right of action, providing for
22 statutory damages in the amount of \$500 for each violation as
23 well as injunctive relief against future violations. 47 U.S.C.
24 § 227(b)(3).

25 The parties do not dispute that Boehringer's fax lacked any
26 opt-out notice, and the question is, therefore, whether it was an
27 "unsolicited advertisement." The Act defines "unsolicited
28 advertisement" as "any material advertising the commercial
29 availability or quality of any property, goods, or services which
30 is transmitted to any person without that person's prior express
31 invitation or permission, in writing or otherwise." 47 U.S.C.
32 § 227(a)(5). Exercising its delegated rulemaking authority over

1 the TCPA pursuant to 47 U.S.C. § 227(b)(2), the FCC has
2 promulgated a rule elaborating on the Act's definition of
3 "unsolicited advertisement." Rules and Regulations Implementing
4 the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of
5 2005, 71 Fed. Reg. 25967, 25973 (May 3, 2006) (the "2006 Rule").
6 The 2006 Rule states, in relevant part, that

7 facsimile messages that promote goods or
8 services even at no cost, such as free
9 magazine subscriptions, catalogs, or free
10 consultations or seminars, are unsolicited
11 advertisements under the TCPA's definition.
12 In many instances, "free" seminars serve as a
13 pretext to advertise commercial products and
14 services. Similarly, "free" publications are
15 often part of an overall marketing campaign
16 to sell property, goods, or services. For
17 instance, while the publication itself may be
18 offered at no cost to the facsimile
19 recipient, the products promoted within the
20 publication are often commercially available.
21 Based on this, it is reasonable to presume
22 that such messages describe the "quality of
23 any property, goods, or services."
24 Therefore, facsimile communications regarding
25 such free goods and services, if not purely
26 "transactional," would require the sender to
27 obtain the recipient's permission beforehand,
28 in the absence of an [established business
29 relationship].
30

31 Id. The Rule itself comports with the statutory language, which
32 defines offending advertisements as those promoting "the
33 commercial availability or quality of [the firm's] property,
34 goods, or services." 47 U.S.C. § 227(a)(5).

35 The district court interpreted the Rule as "requir[ing]
36 plaintiffs to show that the fax has a commercial pretext -- i.e.,
37 'that the defendant advertised, or planned to advertise, its

1 products or services at the seminar.'" Physicians Healthsource,
2 2015 WL 144728, at *3 (quoting Bais Yaakov of Spring Valley v.
3 Richmond, the Am. Int'l Univ. in London, Inc., No. 13-CV-4564
4 (CS), 2014 WL 4626230, at *3 (S.D.N.Y. Sept. 16, 2014)). We do
5 not disagree. But, at the pleading stage, where it is alleged
6 that a firm sent an unsolicited fax promoting a free seminar
7 discussing a subject that relates to the firm's products or
8 services, there is a plausible conclusion that the fax had the
9 commercial purpose of promoting those products or services.
10 Businesses are always eager to promote their wares and usually do
11 not fund presentations for no business purpose. The defendant
12 can rebut such an inference by showing that it did not or would
13 not advertise its products or services at the seminar, but only
14 after discovery. This interpretation comports with the 2006
15 Rule. "In interpreting an administrative regulation, as in
16 interpreting a statute, we must begin by examining the language
17 of the provision at issue." Resnik v. Swartz, 303 F.3d 147, 151
18 (2d Cir. 2002). The 2006 Rule states that "it is reasonable to
19 presume that such messages [advertising free seminars] describe
20 the 'quality of any property, goods, or services,'" potentially
21 violating the TCPA. 2006 Rule, 71 Fed. Reg. at 25973 (quoting 47
22 U.S.C. § 227(a)(3)).

1 Of course, as other courts have ruled,¹ not every
 2 unsolicited fax promoting a free seminar satisfies the Rule.
 3 There must be a commercial nexus to a firm's business, i.e., its
 4 property, products, or services; that, in our view, is satisfied
 5 at the pleading stage where facts are alleged that the subject of
 6 the free seminar relates to that business. The Rule does not aim
 7 at faxes promoting free seminars per se,² but states only that,
 8 "[i]n many instances, 'free' seminars serve as a pretext to

¹ See Physicians Healthsource, Inc. v. Stryker Sales Corp., 65 F. Supp. 3d 482, 489 (W.D. Mich. 2015); Bais Yaakov of Spring Valley v. Richmond, the Am. Int'l Univ. in London, Inc., No. 13-CV-4564 (CS), 2014 WL 4626230, at *3 (S.D.N.Y. Sept. 16, 2014) ("While the [2006 Rule] could be read to categorize all faxes promoting free seminars as unsolicited advertisements, many courts require plaintiffs to show that the defendant advertised, or planned to advertise, its products or services at the seminar."); Addison Automatics, Inc. v. RTC Group, Inc., No. 12 C 9869, 2013 WL 3771423, at *2 (N.D. Ill. July 16, 2013) ("[F]axes promoting free seminars may be unsolicited advertisements because free seminars are often a pretext to market products or services.") (internal quotation marks omitted); St. Louis Heart Center, Inc. v. Forest Pharms., Inc., No. 4:12-CV-02224, 2013 WL 1076540, at *4 (E.D. Mo. Mar. 13, 2013); Phillips Long Dang, D.C., P.C. v. XLHealth Corp., No. 1:09-CV-1076-RWS, 2011 WL 553826, at *4 (N.D. Ga. Feb. 7, 2011) ("[T]he Court does not read the FCC Promulgation as creating a per se ban on free seminar communications.").

² Appellant relies on another provision of the 2006 Rule -- that "applications and materials regarding educational opportunities and conferences sent to persons who are not yet participating or enrolled in such programs are unsolicited advertisements," 2006 Rule, 71 Fed. Reg. at 25973 -- to support its argument that faxes promoting free seminars are per se violations of the TCPA. We are unconvinced. The cited provision targets pretextual materials that promote, for example, enrollment at particular educational institutions; it does not purport to create a per se rule of the sort appellant advances. See 2006 Rule, 71 Fed. Reg. at 25974.

1 advertise commercial products and services." 2006 Rule, 71 Fed.
2 Reg. at 25973 ("[M]essages that promote goods and services even
3 at no cost, such as . . . free . . . seminars, are unsolicited
4 advertisements under the TCPA's definition."). In a different
5 but relevant context, the Rule states that "a trade
6 organization's newsletter sent via facsimile would not constitute
7 an unsolicited advertisement, so long as the newsletter's primary
8 purpose is informational, rather than to promote commercial
9 products." Id.

10 Requiring plaintiffs to plead specific facts alleging that
11 specific products or services would be, or were, promoted at the
12 free seminar would impede the purposes of the TCPA. See Gager v.
13 Dell Fin. Servs., LLC, 727 F.3d 265, 271 (3d Cir. 2013) ("Because
14 the TCPA is a remedial statute, it should be construed to benefit
15 consumers."); Physicians Healthsource, Inc. v. Alma Lasers, Inc.,
16 No. 12 C 4978, 2012 WL 4120506, at *2 (N.D. Ill. Sept. 18, 2012)
17 ("Congress enacted the TCPA to prevent the shifting of
18 advertising costs to recipients of unsolicited fax
19 advertisements.") (citing H.R. Rep. No. 102-317, at 10 (1991); S.
20 Rep. No. 102-78, at 2, 5 (1991), reprinted in 1991 U.S.C.C.A.N.
21 1968, 1972 ("[U]nsolicited calls placed to fax machines, and
22 cellular or paging telephone numbers often impose a cost on the
23 called party (fax messages require the called party to pay for
24 the paper used . . .)")). And -- unless plaintiffs actually
25 attended the free seminar -- in many cases it will be difficult

1 for plaintiffs to know whether it was in fact used to advertise a
2 defendant's products or services. See Arista Records, LLC v. Doe
3 3, 604 F.3d 110, 120 (2d Cir. 2010) ("The Twombly plausibility
4 standard, which applies to all civil actions . . . does not
5 prevent a plaintiff from pleading facts alleged upon information
6 and belief where the facts are peculiarly within the possession
7 and control of the defendant.") (internal quotation marks
8 omitted).

9 Two fanciful examples illustrate the distinction. If a
10 complaint alleged that the Handy Widget Company funded a
11 professorship at a local law school in the name of its deceased
12 founder and faxed invitations on its letterhead to an inaugural
13 lecture entitled "The Relevance of Greek Philosophers to
14 Deconstructionism," the complaint would not state a claim under
15 the TCPA because the Handy Widget Company is not in the business
16 of philosophical musings. In contrast, if the Handy Widget
17 Company faxed invitations to a free seminar on increasing
18 widgets' usefulness and productivity, a claim under the TCPA
19 would be validly alleged. Of course, the Handy Widget Company
20 could rebut at the summary judgment stage with evidence showing
21 that it did not feature its products or services at the seminar.

22 Boehringer's fax advertised a "dinner meeting" to discuss
23 two medical conditions -- Female Sexual Dysfunction (FSD) and
24 Hypoactive Sexual Desire Disorder (HSDD) -- and their
25 "pathophysiology models, epidemiology, and diagnosis." J. App'x

1 at 24. As a pharmaceutical company, Boehringer was generally in
2 the business of treating diseases and medical conditions, such as
3 FSD and HSDD. Moreover, the fax makes clear to the invitee that
4 the dinner meeting was "sponsored by Boehringer Ingelheim
5 Pharmaceuticals, Inc." Id. The fax invitation was sent to a
6 doctor, whom Boehringer would presumably hope to persuade to
7 prescribe its drugs to patients. Therefore, facts were alleged
8 that Boehringer's fax advertised a free seminar relating to its
9 business.

10 In addition, Boehringer's seeking approval from the FDA for
11 the marketing of Flibanserin is relevant, although not
12 dispositive. Although not approved, the drug is intended as a
13 remedy for the ailments to be discussed at the event. To be
14 sure, Boehringer was prohibited from, inter alia, "promoting" an
15 unapproved drug, 21 C.F.R. § 312.7(a), but that prohibition is
16 not necessarily inconsistent with the free dinner's mentioning
17 the possible future availability of the drug. Nothing in the
18 statute or Rule limits their scope to the advertisement of
19 products or services then available.

20 In defense, Boehringer can present, inter alia, testimony of
21 the dinner meeting participants as well as provide the meeting's
22 agenda, transcript, presentation slides, speaker list, or any
23 internal emails or correspondences discussing the meeting. See
24 Physicians Healthsource, Inc. v. Stryker Sales Corp., 65 F. Supp.
25 3d 482, 492 (W.D. Mich. 2015) (holding that "the TCPA's text does

1 not require a court to put on evidentiary blinders in deciding
2 whether a particular fax amounts to an advertisement" and
3 allowing parties to present evidence beyond the four corners of
4 the fax -- such as presentation slides -- to determine if a fax
5 promoting a free seminar was pretextual). It is also possible
6 that Boehringer used the seminar to advertise other drugs or
7 services in its inventory -- which would certainly support
8 finding a violation of the TCPA.

9 CONCLUSION

10 For the foregoing reasons, we vacate and remand for further
11 proceedings consistent with this opinion.
12