



Defendants violated § 201-2(4)(viii) which prohibits “disparaging the goods, services or business of another by false or misleading representation of fact” and § 201-2(4)(xxi) which prohibits “engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.”<sup>2</sup> Defendants argue that Plaintiff’s Complaint should be dismissed because: (1) there is no direct relationship between Plaintiff and Defendants; and (2) Plaintiff’s claim is essentially an antitrust claim, and antitrust violations do not state a claim under the UTPCPL.<sup>3</sup>

## **II. DISCUSSION**

### **A. Relationship between Plaintiff and Defendants**

Defendants assert that because Plaintiff bought smokeless tobacco products from a Pennsylvania retailer, and not directly from Defendants, Plaintiff cannot state a private cause of action under the UTPCPL. The UTPCPL includes a private cause of action for “any person who purchases or leases goods or services primarily for personal, family or household purposes” and who “suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful” elsewhere in the

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2. In 1996, the catch-all provision was amended to include the words “or deceptive.”

3. Defendants also argue that Plaintiff’s Complaint should be dismissed because Plaintiff fails to allege that Defendants “made any representations, or engaged in any deceptive acts to defraud Pennsylvania consumers.” (Def. Mot. to Dismiss at 2.) The Court finds, however, that Plaintiff’s Complaint contains numerous assertions of conduct allegedly committed by Defendants that are sufficient to state a claim under the UTPCPL.

statute.<sup>4</sup> 73 P.S. § 201-9.2(a). “[S]trict privity is not always an element of the private cause of action” under the UTPCPL. Katz v. Aetna Cas. & Sur. Co., 972 F.2d 53, 57 (3d Cir. 1992).

Here, Plaintiff alleges that he purchased a good (smokeless tobacco) for personal use and that he suffered an ascertainable loss of money as the result of Defendants’ alleged conduct. Therefore, the Court finds that Plaintiff sufficiently states a private cause of action under the UTPCPL.

Defendants also argue that because there is no direct relationship between Plaintiff and Defendants, Plaintiff cannot establish that he relied on Defendants’ alleged conduct. As noted above, Plaintiff relies upon § 201-2(4)(xxi), the “catch-all” provision, as a basis for his UTPCPL claim against Defendants. Courts in both the state of Pennsylvania and the Eastern District of Pennsylvania are “divided as to the governing standard for a claim under the catch-all provision of the UTPCPL.” Jones v. Aames Funding Corp., No. 04-4799, 2006 U.S. Dist. LEXIS 1119, at \*29-30 (E.D. Pa. Mar. 8, 2006). “Some courts require a plaintiff asserting a claim under [the catch-all provision] to meet all the elements of common law fraud.” Id.; see e.g., Cheatle v. Katz, No. 02-4405, 2003 U.S. Dist. LEXIS 6625, \*25 (E.D. Pa. Apr. 3, 2003) (citing Skurnowicz v. Lucci, 798 A.2d 788, 794 (Pa. Super. 2002)); Booze v. Allstate Ins. Co., 750 A.2d 877, 880 (Pa. Super. Ct. 2000). “Other courts read the inclusion of the term ‘deceptive’ in [the catch-all provision] as creating an alternative, less rigorous level of proof that

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4. The parties dispute whether the definition of “trade or commerce” allows Plaintiff to sue under the UTPCPL where Plaintiff did not purchase the smokeless tobacco directly from Defendants. “Trade or commerce” is defined as “the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth.” 73 P.S. § 201-2(3). Although the private cause of action under the UTPCPL is limited to practices enumerated in the “trade or commerce” definition, the Court believes that the proper section for determining whether Plaintiff has standing to sue under the UTPCPL lies with § 201-9.2(a) outlined above.

falls short of actual fraud.” *Id.*, see e.g., Christopher v. First Mut. Corp., No. 05-1149, 2006 U.S. Dist. LEXIS 2255, \*9-10 (E.D. Pa. Jan. 20, 2006); In re Fisher, 320 B.R. 52, 71 (Bankr. E.D. Pa. 2005); Weiler v. SmithKline Beecham Corp., 53 Pa. D.& C. 4th 449, 454-455 (Pa. Comm. Pl. 2001).<sup>5</sup>

Since the UTPCPL should be liberally construed, Commonwealth v. Monumental Prop. Inc., 329 A.2d 812, 817 (1974), and in light of the 1996 amendment to the catch-all provision, this Court agrees with prior decisions holding that the catch-all provision does not require a plaintiff to prove all the elements of common law fraud.<sup>6</sup> As such, Plaintiff does not need to establish reliance under the catch-all provision of the UTPCPL.

#### **B. Antitrust claims under the UTPCPL**

Finally, Defendants argue that “it is well established that alleged antitrust violations do not state claims under the UTPCPL.” (Def. Mot. to Dismiss at 3.) Defendants rely primarily on Yeager’s Fuel, Inc. v. Penn. Power & Light Co., 953 F. Supp. 617 (E.D. Pa. 1997), and In re New Motor Vehicles Canadian Exp. Antitrust Litig., 350 F. Supp. 2d 160, 200-201 (D. Me. 2004), to support this proposition.

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5. The Court notes that even under this less vigorous level of proof, based upon the language of § 201-9.2(a) Plaintiff must establish causation. That is, Plaintiff must establish that he suffered an ascertainable loss *as a result of* Defendants’ prohibited conduct.

6. The Court is aware of the impact this conclusion has on the class action at hand. “While proving reliance on a class-wide level will frequently raise individual issues of fact, thus often precluding certification, the challenge of satisfying the element of causation on a class-wide basis is less formidable, although it still may pose difficulties.” Seth William Goren, A Pothole on the Road to Recovery: Reliance and Private Class Actions under Pennsylvania’s UTPCPL, 107 Dick. L. Rev. 1, \*12 (2002). Nonetheless, it is not appropriate for the Court to address class certification at this point in the proceedings.

The Court, however, disagrees with Defendants' broad reading of the cited cases. In Yeager's Fuel, the court stated "while plaintiffs in the actual case have presented several allegations of antitrust violations, they have not produced any evidence of fraudulent, disparaging conduct that the UTPCPL aims to protect." 953 F. Supp. at 668. Similarly, the District Court of Maine in interpreting the UTPCPL, stated that "although the statute is to be liberally construed, and although the 'unfair methods of competition' language might be thought to prohibit anticompetitive behavior," the plaintiff's complaint "does not state a claim for fraud or deception." In re New Motor Vehicles Canadian Exp. Antitrust Litig., 350 F. Supp. 2d at 200-201. The Court concludes that these cases do not state that antitrust violations can never state a cause of action under the UTPCPL but, that antitrust violations can never state a cause of action under the UTPCPL in the absence of fraudulent, deceptive or disparaging conduct committed by a defendant.

Here, although Plaintiff's Complaint sounds in anticompetitive conduct characteristic of an antitrust violation, the Court finds that Plaintiff also alleges sufficient fraudulent, deceptive and/or disparaging conduct under the UTPCPL. Thus, the Court agrees with Plaintiff that a plaintiff can allege conduct that is actionable under the UTPCPL regardless of whether the conduct at issue may also give rise to antitrust liability.

### **III. CONCLUSION**

For the foregoing reasons, Defendants' Motion to Dismiss is denied. An order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

GREGORY HUNT, individually and on	:	CIVIL ACTION
behalf of all others similarly situated,	:	
Plaintiff,	:	NO. 06-1099
	:	
v.	:	
	:	
UNITED STATES TOBACCO	:	
COMPANY, et al.,	:	
Defendants.	:	

**ORDER**

AND NOW, this 11<sup>th</sup> day of September 2006, upon consideration of Defendants' Motion to Dismiss (Docket No. 3), Plaintiff's Response thereto (Docket No. 6), and Defendants' Reply (Docket No. 9), it is hereby **ORDERED** that Defendants' Motion to Dismiss is **DENIED**.

BY THE COURT:

s/ Ronald L. Buckwalter, S. J.  
RONALD L. BUCKWALTER, S.J.