

## DAILY REPORT

# Federal Judge Throws Out FTC's Suit Against Former Discount Club Marketers

By Riley Brennan

March 27, 2024

**A**fter more than a half-decade of litigation, a federal judge in Georgia has sided in favor of the remaining defendants, rejecting the Federal Trade Commission's pursuit of a permanent injunction that would have effectively banned them from marketing and selling products over the internet and via the telephone.

District Judge William M. Ray II of the Northern District of Georgia entered a March 22 judgment in favor of William R. Wilson and Dale Paul Cleveland, the owners of EDP Entities discount club, as well as James McCarter and Earl Robinson, concluding the FTC failed to prove that they are reasonably likely to violate any law the FTC has jurisdiction to enforce.

"It is extremely rare for defendants to take an enforcement action to trial against the FTC and even more rare for defendants to emerge victorious," Michael Mallow, a partner at Shook, Hardy & Bacon, who successfully defended the defendants, said in a press release. "The ruling by the Court is a momentous occasion for our clients and marks the end of a very long, difficult and unnecessary saga in our clients' lives."

Mallow further noted that his clients, Wilson and Cleveland, hadn't been involved in the business for



**Federal Trade Commission building in Washington, D.C.**

Photo: Diego M. Radzinski/ALM

years and questioned why the government would waste its resources on a "very stale" case.

This suit stems violations against EDP Entities and Hornbeam Entities—which James McCarter and Earl Robinson allegedly became involved with through another investor, Jerry Robinson. Hornbeam Entities closed its doors in mid-2016.

While the court concluded that the operation of the Discount Clubs violated the FTC Act, the Restore Online Shoppers Confidence Act and the Telemarketing Sales Rule and entered default judgment against defendants Hornbeam and EDP entities, it found that the FTC failed to establish

individual liability for Wilson, Cleveland, McCarter and Robinson.

Ray noted that Wilson and Cleveland were the sole owners of EDP when it was first founded in 2001, though the Discount Clubs did not begin operation until 2010. In 2013, EDP was sold to Hornbeam. Both men went on to be involved in other businesses. Following Hornbeam's interception, McCarter and Robinson became involved, investing in the company. Hornbeam eventually closed its doors in 2016, according to the order.

The court noted that the FTC could only pursue injunctive relief against Wilson and Cleveland and that 15 U.S.C. Section 57b(d) provided for a three-year statute of limitations for bringing an action based on rule violations regarding unfair or deceptive acts/practices.

The court determined that there was no evidence presented that Wilson and Cleveland participated in any Discount Club scheme within three years of the original complaint filing. It further concluded that the FTC failed to show there was a reasonable likelihood of further violations on either of the men's behalf.

"To establish Wilson's likelihood of future violations, the FTC points to his current involvement in AdMediary and North America Autocare," Ray said. "The FTC argues that because AdMediary is also within the payday lending business, there is a likelihood of future violations. But, the Court has seen no evidence tending to show that AdMediary is currently engaging in unfair or deceptive practices similar to the Discount Clubs."

The FTC's alternative argument, "that there is a likelihood of future violations related to North American Autocare because there are instances of consumer fraud in the auto warranty loans business," was denied. The court concluded it wouldn't

issue a permanent injunction based on speculation without indication that the company was actually deceiving customers.

The court also concluded that the FTC couldn't point to any current activities which would establish Cleveland's likelihood of future violations.

Ray also entered judgment in favor of McCarter and Robinson, concluding the FTC failed to show they "participated directly in practices or had the authority to control them." While the FTC had established both men "had some knowledge" regarding the Discount Clubs' practices, the court concluded the FTC failed to show they "participated directly in practices or had the authority to control them," the opinion said.

Robinson's attorney, Charles Edgar Hoffecker of Hotchkiss Hoffecker Peacock, in Atlanta, said the court's decision was a great for his client, noting that anytime "you're litigating with the federal government, and in this case the FTC," who he complimented as great lawyers, "a win is a great outcome," the attorney said.

"Facts win cases," Hoffecker said. "And I think ultimately this case was about people and the facts, and we got the better of it this time."

"Mr. McCarter appreciates all the hard work and time the court devoted to the handling of the case including the trial and issuing its final order," said McCarter's Atlanta-based attorney, William Charles Buhay of Weinberg Wheeler Hudgins Gunn & Dial. "We completely agree with the court's ultimate conclusion that Jim McCarter is not liable for the claims brought against him. It's been a long 11 years for Mr. McCarter and he hopes to finally be able to put this whole matter behind him and move on with the rest of his life."

The FTC did not immediately respond to requests for comment.