

AMERICAN COLLEGE OF CONSUMER FINANCIAL SERVICES LAWYERS

SENATOR WILLIAM PROXMIRE LIFETIME ACHIEVEMENT AWARD

PRESENTED TO SHELDON FELDMAN

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Our honoree, better known as "Shelly," is remarkable in several respects. Shelly spent a large portion of his career in the consumer financial services area as a regulator and the remainder of his career in private practice. Shelly was there "in the beginning" of the federal regulation of consumer credit and, during his tenure as a regulator, he heavily influenced the area of law in which we practice. No doubt, Shelly's contribution to our area of the law resulted from him having been born in Philadelphia. He combined this notable beginning with an early move to Washington, D.C. Shelly is a graduate of the Washington public schools, George Washington University and the George Washington University Law School. He was an Articles Editor of the Law Review and graduated in 1961 with honors within the top five students in his law school class.

In 1961, after a brief stint at the DC Legal Aid Agency and the DOJ, Shelly joined the FTC Bureau of Consumer Protection as a trial attorney. Shelly chose the FTC because he was intrigued by the idea of public service. At that time, the agency was focused primarily on anti-trust. Its consumer protection mission, however, was to become increasingly important later in the decade. Shelly's first taste of consumer credit regulation came in the mid-1960s when he headed the FTC's first pilot project to investigate inner-city fraud, which was known as the "DC Consumer Protection Project." He, and the small group that he supervised, investigated the advertising of "easy credit" and fraudulent practices, such as bait and switch and increasing the cash price for those who chose easy credit. Shelly's efforts resulted in the issuance of the DC Consumer Protection Report in 1966 and several cases that broke new ground.

Prior to the enactment of the Truth In Lending Act in 1968, Shelly spent most of his time litigating unfairness and deception cases, including cases involving fraud by sellers and the holder-in-due course doctrine as applied to sales finance companies that purchased retail paper. These cases included the *Empeco* case, which for the first time required oral, as well as written, disclosure of the fact that payment defenses would be lost as a result of a retailer's assignment of its installment sale contracts. He also litigated "fictitious pricing" cases involving such practices as the pre-ticketing of merchandise with fictitious prices and the advertising of "sale" price reductions based upon fictitious regular prices.

Because of Shelly's leadership of the pilot DC Consumer Protection Project and the cases that he litigated, Shelly became a key spokesperson for the FTC with respect to the proposed Truth In Lending Act. TILA, as we know, was the first federal consumer credit protection law. It was introduced initially in 1960 by Senator Paul Douglas. Prior to its enactment eight years later, in 1968, Shelly had numerous conversations with the congressional staff regarding statutory language.

After the enactment of the Truth in Lending Act, the Federal Reserve Board began the daunting task of drafting the implementing regulations. Shelly became the first head of the FTC Division of Consumer Credit, which was established in 1968. In this capacity, he presented the FTC's views on Regulation Z to the FRB, working closely with Griff Garwood who served as the "honest middle man" between industry and the FTC. Shelly also worked closely with other lawyers, including Ed Schmelzer and Milton Schober, who became leading consumer credit gurus in the early days of Truth in Lending.

The FRB had a bank regulatory orientation and was more protective of business interests than the FTC, which was a more consumer-oriented agency. We all know that we work in a rather esoteric area of the law. It therefore is no wonder that, although the meetings with respect to the drafting of Regulation Z were held at the Watergate complex in Washington, there was no break-in to gain access to the discussions surrounding the drafting of Regulation Z. Shelly advocated clear open-end credit disclosures during the discussions, including requiring greater emphasis on the disclosure of the new balance and affirmative

prescreening guideline was later incorporated into the Fair Credit Reporting Act when it was amended in 1996.

At the FTC, Shelly was awarded a superior service award in 1964, a meritorious award in 1968, and in April 1969 he was awarded the Arthur S. Fleming Younger Federal Lawyer of the Year Award by the Federal Bar Association to honor outstanding young lawyers in the federal government.

In 1975, Shelly was approached by Weil Gotshal to leave the FTC. Shelly had come into contact with Carl Lobell at Weil in connection with a credit balance case when Carl asked "do you really mean we have to give credit balances back, even if they already have been taken into income?" Undeterred, Shelly said "yes, I really mean that because the credit balances were not your client's to take." Shelly was not interested in moving to New York, but he suggested that the firm contact him if it ever decided to open a DC office. That contact was made soon thereafter and Shelly, together with a young lawyer in the FTC Credit Practices Division, opened the Washington Office of Weil on October 1, 1975. Although Weil was already a large firm by the standards of the day, when Shelly joined Weil there were only 141 lawyers at Weil. Having played such an influential role in credit regulation while at the FTC, it was only fitting that he should join a firm whose senior partner, Ira Millstein, had chaired the National Commission on Consumer Finance.

For the next twenty years, Shelly was heavily involved in consumer financial services as the principal legislative lawyer for the retail industry through what was then known as the National Retail Merchants Association. In that representation, Shelly was involved with the 1981 Simplification of TILA, the Fair Debt Collection Practices Act and the hearings relating to bankruptcy law changes affecting consumers. Shelly drafted much of the NRMA testimony on these issues. When the Fair Credit and Charge Card Disclosure Act of 1988 worked its way through Congress, Shelly worked with then-Representative Schumer on the creation of the highly-controversial "federal box" and the exception for take-one applications that contained initial disclosure statements. Senior congressional staff sought his counsel and proposed language from industry groups, including those of retailers and banking, among others. Often, Shelly's clients' view was to oppose legislation, whereas Shelly's approach in private practice was to find a way to make the legislation work.

While in private practice, Shelly represented a score of retailers in complying with state laws and drafted open-end credit agreements, periodic statements and changes-in-terms for most of the retail industry before that industry discovered credit card banks and federal preemption. Shelly was the antithesis of the determined minimalist when it came to consumer credit counseling. He was always mindful of the consumer protection goals of each of the laws and regulations with which he dealt and his advice would reflect a sensitivity to those goals. For example, he approached change in terms notices from the perspective of the average consumer and always insisted that the old terms and the new terms be juxtaposed so that consumers could make informed decisions with respect to the changed terms. He was never one to write a change in terms notice that read like an amended and restated version of a corporate agreement.

Shelly was also involved in representing clients who were subject to FTC and DOJ investigations, as well as being involved in numerous corporate transactions in assessing the quality of the credit assets being purchased.

Throughout his career, Shelly maintained a sense of perspective and a sense of humor that were noteworthy in their own right and refreshing to those with whom he dealt. Once, when negotiating with the DOJ regarding a TILA credit advertising violation in newspaper ads, his adversary noted the multiplier effect of the TILA statutory damages remedy and solemnly intoned that the potential liability could be "in the billions." Displaying his signature sense of perspective and humor, Shelly promptly asked "are we talking the high billions or the low billions?" The DOJ representative reportedly was not amused.

Shelly was in demand throughout his career as a speaker at numerous PLI and Merchants Research Council presentations, he was active in the ABA Consumer Financial Services Committee and he served as the Chair of its FTC Subcommittee.

Shelly has no regrets about devoting his working life to the consumer financial services world. Working at the FTC, and indeed founding the FTC Division of Credit Practices, gave Shelly a working knowledge of the industry and the needs and aspirations of government. Counseling industry in private practice, Shelly

disclosure of the fact that the consumer should pay the new balance to avoid additional finance charge, and not just prominent disclosure of the minimum payment, which industry had long advanced as the key disclosure.

As head of the FTC Division of Consumer Credit, Shelly built the unit up to approximately 25 lawyers by the early 70s. In those days, most major retailers accepted only their own proprietary credit cards and closed-end retail installment sales were commonplace. In addition, the FTC served as the administrative enforcement agency for small loan companies that generated no shortage of interesting consumer protection issues. Accordingly, much of the non-mortgage credit was extended by non-bank creditors that were subject to the jurisdiction of the FTC and the FTC therefore became the principal administrative enforcer of Truth in Lending. Shelly's administrative enforcement experience gave Shelly a compliance perspective that was, shall we say, "broader" than that of most private practitioners - he encountered things that would be difficult for most private practitioners to imagine. For example, in anticipation of TILA taking effect on July 1, 1969, the FTC undertook a creditor educational initiative and mailed out over a million creditor education pamphlets entitled "What You Ought to Know About Federal Reserve Regulation Z, Truth in Lending Consumer Credit Cost Disclosure." Despite this and other attempts at creditor outreach, when TILA took effect Shelly encountered numerous creditors whose forms were not close to being in substantial compliance and, believe it or not, some creditors who simply had made no attempt to comply. Shelly hauled these creditors in, presented them with Consent Orders and said, simply, "sign here." Years later, when one of his colleagues in private practice wondered whether he had been a tad harsh on the non-compliant creditors, Shelly's response was the analogy to getting the attention of a mule -- "sometimes you need to hit it in the head with a two-by-four."

Under Shelly's leadership, the FTC brought hundreds of enforcement cases, resulting mostly in consent orders. These cases included credit advertising, credit disclosure and credit insurance practices. Shelly also was personally responsible for the credit balance cases - seminal unfairness cases brought under Section 5 of the FTC Act that were among the first cases in which consumer restitution was obtained under federal law. The credit balance cases were brought against numerous creditors who routinely would "write off" credit balances after varying short intervals, no longer reflect them on periodic statements and take them into income. The consumer restitution obtained by the FTC in the credit balance cases amounted, in the aggregate, to millions of dollars and the provisions of the FTC credit balance consent orders were later largely incorporated into the Truth in Lending Act.

Shelly also brought unsolicited credit card cases after persuading the Commission to bring such cases over the opposition of the Director of the Consumer Protection Bureau. The Bureau Director, Robert Pitofsky, was opposed to bringing unsolicited credit card cases because he thought unsolicited credit cards fostered competition. Indeed, we understand that the Commission never rejected a recommendation by Shelly's division to bring a lawsuit.

During the early years of Truth in Lending, Shelly spoke two or three times a month to groups, including industry and practitioners at PLI sessions. He guest lectured at the University of Maryland, GW University, Catholic University and Purdue University. Indeed, Shelly once had the opportunity, which all of us at law firms covet, of having an audience of over 5,000 people at a national convention of realtors in Florida. During the period from the enactment of TILA until 1975, when Shelly left the FTC, he spent time on Capitol Hill testifying on several bills which became laws, including the Fair Credit Billing Act, the Fair Credit Reporting Act and the 1976 amendments to the Equal Credit Opportunity Act.

When the Fair Credit Reporting Act was enacted, it did not provide for rulemaking authority because the FRB did not have jurisdiction over credit bureaus and industry convinced Congress that the FTC was "too aggressive" to have rulemaking authority. Despite the absence of rulemaking authority, Shelly decided that the FTC should publish extensive Fair Credit Reporting Act "guidelines" which he knew effectively would serve as de facto regulations because the FTC had administrative enforcement authority over credit bureaus and most users of credit information. Shelly worked closely with the credit bureau trade association, then known as "Associated Credit Bureaus," in creating these guidelines. These FCRA guidelines included an outright ban on "credit guides," which were lists of consumers with adverse credit information that were circulated to creditors, and a significant guideline which permitted the practice of pre-screening, but required that credit be extended to those who desired it in response to a pre-screened offer. This

deepened his knowledge of the workings of the industry and, while representing his clients' interests, his focus always was to make legislation and regulation workable.

The highlights of the last few years for Shelly have been spending more time with his family, often at his home on the eastern shore of Maryland, exercising his passion for automobiles and extending that to a boat. Shelly continues as a member of the Thursday night poker group, which he has attended for over fifty years from its start in high school in 1952. One would have thought that, after fifty years of playing poker, he would have figured out the game and would be ready for Las Vegas, but Shelly feels he still needs a few more games before he is ready.

The American College is proud to present this Lifetime Achievement Award to Shelly Feldman for his years of sustained excellence as a regulator and as a practitioner. He helped to shape the area of the law in which we practice and contributed to the education of many of us in this room.