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July 23, 1974

Rabbi Norman Lamm  
The Jewish Center  
131 West 86th Street  
New York, N. Y. 10024

Dear Rabbi Lamm:

I had fully intended to write to you immediately after the Institute to tell you how deeply we appreciated your being with us and teaching us.

All of us were greatly impressed by your command of the sources but even more impressed with your willingness to teach, even though there were some trying circumstances!

I am enclosing a photostat of a recent article that appeared in the Commercial Law Journal on Consumer Protection in Talmudic Law. Would not anthology of this type of article, including your two celebrated articles on the fourth and fifth amendments, be appropriate for a book?

Elsie joins me in wishing you and Mindy a restful balance of the summer.

Sincerely,



Martin D. Cohn

MDC:bs  
Enclosure

# Consumer Protection in Talmudic Law

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of Brooklyn, New York

CONSUMER PROTECTION has of late evoked considerable interest in America. Nader's Raiders, Bess Meyerson and the like campaign for more stringent rules, efficient regulatory agencies, truth in advertising, etc. *ad infinitum*. However, we are told regulation of goods and sales is not a recent innovation, but originated in the fifteenth and sixteenth centuries.<sup>1</sup> This article will attempt to present the status of consumer protection in Jewish society as reflected in the Talmudic materials—second to sixth centuries. The precocity in this field of the authors of the Talmud—legal corpus of the Jews—will be self-evident. This inquiry is not meant to be exhaustive, although we will delve into the major areas of Talmudic concern for the consumer.

## I. Weights and Measures

Two specific Biblical references warned against the misuse of weights and measures.<sup>2</sup> The gravity of such misconduct was emphatically expressed in the Talmud: "The punishment (*i.e.*, divine) for (false) measures is more rigorous than that for (marrying) forbidden relatives."<sup>3</sup> Moreover, weights and measures were of particular concern to the sages because most transactions required their use, especially such necessities as grain,<sup>4</sup> oil,<sup>5</sup> and wine.<sup>6</sup> Talmudic law specified the type of weights to be employed, procedures of weighing, general merchant rules to be applied, and methods of enforcement.<sup>7</sup>

A vendor was required to have at least three denominations of weights: one quarter, one half, and one pound.<sup>8</sup> All weights had to be made of stone or glass rather than tin, lead, or other metals which would decrease in weight from the friction caused by their use.<sup>9</sup> Similarly, weights could not be kept in salt since it would make the weights lighter.<sup>10</sup> The Talmud also elaborated in great detail on the requirements for the structure of the scales and their suspension.<sup>11</sup>

Each town was at liberty to increase its own standard of measures, but not by more than one sixth.<sup>12</sup> In many locales all measures were sealed and marked by officers appointed for such purpose.<sup>13</sup> It was even prohibited for a person to keep in his house a measure which was smaller or larger than one would assume it to be, lest someone accidentally use it.<sup>14</sup>

Merchants were required to follow the local custom and usage when weighing and measuring since this was what the customer expected.<sup>15</sup> Thus, where the custom was to give a little more than the measure asked for by the buyer, the seller was so obligated and the Talmud even specified the increased amount—one hundredth for liquids and one four hundredth for dry provisions. Where it was the custom to allow the scale pan to drop, the seller had to let it drop a handbreadth.<sup>16</sup> Anytime even the slightest mistake

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1. "In actuality, the concern for consumer protection, both here and in Europe, is not really new. What we see today is the culmination of an ever-growing momentum of consumer concern, rooted in the Middle Ages, and brought to fruition by merchandising changes wrought by modern technology." MAGNUSON & CARPER, *THE DARK SIDE OF THE MARKETPLACE* AT X (1968).

2. Leviticus XIX, 35,36: "Ye shall do no unrighteousness in judgment, in meteyard, in weight, or in measure. Just balances, just weights, a just ephah, and a just hin, shall ye have."

Deuteronomy XXV, 13-16: "Thou shalt not have in thy bag diverse weights, a great and a small. Thou shalt not have in thy house diverse measures, a great and a small. A perfect and just weight shalt thou have; a perfect and just measure shalt thou have; that thy days may be long upon the land which the Lord thy God giveth thee. For all that do such things, even all that do unrighteously, are an abomination unto the Lord thy God."

3. English translations of the Talmudic materials can be found in the Babylonian Talmud published by the Soncino Press in 1935. Hereinafter referred to as *Soncino* and by page number to the appropriate volume. Bava Bathra 88b;

*Soncino* 363. The reasoning is based on the assumption that it would be practically impossible to locate all those who had been defrauded, see generally, S. HIRSCH, HOREB, Mishpatim 48.

4. Grain was the basic food staple.

5. Oil was used for lighting purposes.

6. Wine was of particular importance for certain rituals.

7. Bava Kama 113b; *Soncino* 666: Jews were required to abide by all these laws in their dealings with gentiles as well; however the Talmudic sages claimed no control over the gentiles.

8. Bava Bathra 89a; *Soncino* 366.

9. Bava Bathra 89b; *Soncino* 368. Rashbam and Maimonides *ad. loc.* But see, Tosafot for another view.

10. Bava Bathra 89b; *Soncino* 369. Tosafot *ad. loc.* Rashi and Rabbenu Gershom maintain that the salt makes the weight heavy and he will buy with it.

11. Bava Bathra 89a & b; *Soncino* 366-68.

12. Bava Bathra 90a; *Soncino* 371; Bava Bathra 8b; *Soncino* 37; "The townspeople are at liberty to fix weights and measures, prices and wages."

13. Bava Bathra 89b; *Soncino* 369. See *infra*, note 56, Shita Mekubetztes.

14. Bava Bathra 89b; *Soncino* 369; even if used for something else other than a measure, *e.g.*, a urine tub, someone may still accidentally use it for a measure.

15. Bava Bathra V,11; *Soncino* 362.

16. Bava Bathra V,11; *Soncino* 361.



was made in measure, weight, or number, the sale was voidable.<sup>17</sup>

The Talmudic sages were so concerned for the consumer that if a vendor wanted to weigh three quarters of a pound, he could not put a quarter and a half pound on one side because of the possibility of the one quarter pound weight falling off without the buyer's detection. Instead the vendor had to put a one pound weight on one side, and the goods and a quarter pound weight on the other side.<sup>18</sup> The laws, however, were not totally one sided in the favor of the consumer, e.g., if he wanted ten pounds of an item he could not demand that each pound be weighed separately and allow the scale to drop below each time, rather the seller weighed all ten pounds at once and the scale dropped only once.<sup>19</sup>

The Talmud stated that one who dealt in oil, wine, and other such liquids was required to periodically clean his weights and measures of all stickiness so as to insure an accurate weight<sup>20</sup>—wholesalers once in thirty days and home owners once in twelve months.<sup>21</sup> A shopkeeper was obligated to clean his measures twice a week,<sup>22</sup> wipe his weights once a week,<sup>23</sup> and cleanse the scale after every weighing.<sup>24</sup>

The sages were quite specific in their stipulations so as to avoid unnecessary interpretations of general provisions and to allow for rigid enforcement. All complaints could be brought before the local court for adjudication. The Talmudic sages did more than prescribe standards of conduct and supply judicial recourse to those consumers allegedly victimized. A system existed to check on the sellers' honesty and compliance with the laws.

Market officers were appointed by the court to superintend measures, i.e., to inspect the scales, weights, and measures employed.<sup>25</sup> In many locales officers were instructed to maintain uniform prices among the merchants as well.<sup>26</sup> These officers were empowered to punish<sup>27</sup> if necessary by flogging and monetary fines.<sup>28</sup>

## II. Fraud and Merchantability

The doctrine of *caveat emptor* was almost totally rejected in Talmudic law; the seller was obligated to inform the buyer of all defects. It was especially forbidden to deceive people by creating a false impression, i.e., an intentional misrepresentation. Examples of such unfair surprise include: a layer of oil placed on top of a keg of wine,<sup>29</sup> old produce mixed with new,<sup>30</sup> and wine diluted with water.<sup>31</sup> Moreover, certain representations would simply imply a warranty which did not exist and were thus fraudulent, e.g., meat soaked in water to make it look fatter;<sup>32</sup> entrails of an animal displayed in the store inflated to make them appear larger.<sup>33</sup> Similarly utensils could not be painted to make them look newer,<sup>34</sup> although an owner could improve the new ones by polishing, ironing, or beautifying them as he desired.<sup>35</sup> Thus a man's hair or beard could not be dyed to give a younger appearance for that would deceive an employer or master.<sup>36</sup>

There was a duty to volunteer relative information. Thus in selling leather shoes one had to reveal how the particular animal was killed. A man was not to sell shoes made of the hide of an animal which died naturally under the pretense that they were made of the hide of a slaughtered animal because he would be deceiving the buyer<sup>37</sup> and because of health reasons.<sup>38</sup> The duty to disclose information could not be circumvented through subterfuge. Thus if when selling a cow, one described defects of the animal which clearly did not exist and in the middle of the list mentioned one genuine defect the sale was void. The rationale was that the seller intended that the buyer assume the real defect was also non-existent.<sup>39</sup> However, if the seller mentioned one visible defect and said there were many others it was a valid sale because the consumer had been given fair notice.<sup>40</sup>

Sometimes damaged or defective goods were to be expected and the consumer was obligated within reason to accept them. For example, when buying jars in Sharon, an area where pottery could not be glazed well, if less than ten percent of the jars were bad, the buyer had to accept them.<sup>41</sup>

17. Kiddushin 42b; *Soncino* 212; Bava Metzia 56b; *Soncino* 337.

18. Bava Bathra 89a; *Soncino* 366. See Alfasi *loc. cit.*; Maimonides, Theft VIII, 19.

19. Bava Bathra 89a; *Soncino* 366.

20. Bava Bathra V, 11; *Soncino* 361.

21. Others sages such as R. Simeon b. Gamaliel reverse the numbers. Bertinoro: Since the wholesaler had many more customers, he used his measures more frequently which necessitated more cleansing.

22. Bertinoro: Since a shopkeeper does not have to allow three drops to overflow as does the wholesaler, more accumulation occurs.

23. Tosafoth Yom Tov: It refers to the weights which are used for weighing moist foods, e.g., meat, oil, honey, and salted fish.

24. Maimonides, Sales VIII, 18: The cleansing was designed to prevent rust. Rashbam: The cavity of the scales increases the chances of accumulation.

25. Bava Bathra 89a; *Soncino* 365.

26. Bava Bathra 89a; *Soncino* 366.

27. The officers would punish pursuant to a court order, Maimonides, Theft VIII, 20; Tur, Hoshen Mishpat CCXXXI, 2.

28. See, Yerushalmi, Bava Bathra V, 5. See also, Torah Temimah, Leviticus XIX, 36.

29. Hullin 94a; *Soncino* 528.

30. Bava Metzia 60a; *Soncino* 357.

31. Bava Metzia 60a; *Soncino* 358.

32. Bava Metzia 60b; *Soncino* 359.

33. Bava Metzia 60b; *Soncino* 360.

34. *Id.*

35. Maimonides, Sales XVIII, 2.

36. Bava Metzia 60a; *Soncino* 360. Meiri: Since the buyer expects it to occur, there is no fraud involved.

37. Rashi: The hide of a slaughtered animal is stronger. Rabenu Gershom: The hide is better.

38. Rashi: The animal may have died through the bite of a snake, in which case the hide of the animal may contain poison.

39. Bava Metzia 80a; *Soncino* 460.

40. *Id.*

41. Bava Bathra VI, 2; *Soncino* 358. Tifereth Yisroel: It is obvious that in any other locales the buyer would not be obligated to accept any damaged jars.



Also with regard to warranties, the seller was liable for fraud or mistake as to merchantability only if he had been aware of the purpose for which the item was purchased. Thus, if one sold produce to his neighbor<sup>42</sup> who planted it, yet it did not sprout, the seller was not responsible.<sup>43</sup> R. Simeon b. Gamaliel added that for a garden seed variety which was not eaten, the buyer was responsible since its only use was for planting.<sup>44</sup> Similarly, the question was raised whether an ox was sold with an implied warranty that it was not vicious.<sup>45</sup> Rav contended that farmers generally bought oxen for ploughing and therefore if the ox was discovered to be a gorer the sale was invalid. Samuel argued that the seller was not liable since perhaps the ox was bought for slaughtering.<sup>46</sup>

### III. Price Controls

The Talmudists wrestled with the desirability of permitting "bait" techniques. Thus the question arose whether a storekeeper was permitted to give away nuts to children<sup>47</sup> whose parents sent them to shop.<sup>48</sup> R. Judah maintained that this means of enticement was forbidden, while the majority of the sages claimed it was all right.<sup>49</sup> When pressed for their reasoning the sages explained that one storekeeper could distribute nuts and another plums,<sup>50</sup> i.e., the sellers could compete and the consumer would profit. Also with regard to competition and baiting, a storekeeper was permitted to lower his prices in order to undersell his competitors (or to bait the consumer into the store by selling only one item at less), and such conduct was praiseworthy since survival would necessitate that the other stores lower their prices, and the consumer would again benefit.<sup>51</sup> Fraudulent baiting, however, was illegal: a merchant could not pretend to be opening a new cask for the sake of his customer if he would have done so in the ordinary course of his business anyway.<sup>52</sup>

The sages allowed baiting, but not switching. Thus the seller was restricted in areas susceptible to abuse. Promising more for your money as bait, the seller might then switch by giving inferior goods.<sup>53</sup> Realizing that the con-

sumer would very often be swayed by such seller representations, some of which would be false, especially with regard to the quality and quantity of the merchandise; the Talmudists displayed their paternalistic instinct by declaring that measures and maximum prices be set by court appointed officers.<sup>54</sup> At first the Talmudic lawmakers were hesitant to obstruct free competition; they felt every man was privileged to charge more for his goods if he believed they were superior to another's.<sup>55</sup> However, such price fixing was determined to be a necessary evil because of "imposters". Such merchants would wait until their competitor's supply of an item would be sold cheaply and then sell their stock at a very high price claiming they were giving more in quantity or that their goods were of better quality, when in fact only the top layer was better and other such manipulations.<sup>56</sup> To prevent these abuses, the court appointed market commissioners to superintend measures and prices.<sup>57</sup> Price fixing was also invoked in some cities by the common consensus of the populace.<sup>58</sup> Intervention to prevent exploitation was justified in these realms where product information was most difficult for the consumer to obtain.

To prevent undue advantage by either party, all commodities which were not fixed in price by officers or the city were nevertheless limited in their sale price. Overcharging or undercharging by more than one sixth of the worth of an article was considered fraud and deemed unconscionable. When the "overreaching" was precisely one sixth of the value of the article, the sale was valid, but the party that had been overcharged or that had underpaid had the right to restitution.<sup>59</sup> When the "overreaching" was more than one sixth of the value of the article, the one who had been short changed had the option of receiving restitution or voiding the sale.<sup>60</sup> One could, however, stipulate a disclaimer to the effect that: I agree to this sale on condition that you have no claim of "overreaching" against me.<sup>61</sup> The doctrine of "overreaching" was not applicable to certain items:<sup>62</sup> slaves, bonds for money, sacred objects,<sup>63</sup> and real property.<sup>64</sup> Some sages maintained that a

42. Bertinoro: It was not mentioned whether they were for eating or planting.

43. Commentaries: The majority rule regarding use is not followed in money matters.

44. Bava Bathra VI, 1; *Soncino* 381.

45. Bava Kama 46b; *Soncino* 262-63; Bava Bathra 92a; *Soncino* 381.

46. The rule is that the prevalent use of such item for a particular purpose is neither conclusive proof of the intent of the buyer or evidence thereto, see *supra* note 43. The ruling of Samuel was accepted, *Hoshen Mishpat*, CCXXXII, 29.

47. Children were even more susceptible to baiting. Maimonides includes female slaves.

48. Rashi, Bava Bathra 21b; *Soncino* 108.

49. Bava Metzia 60a; *Soncino* 358-59. Maimonides, *Sales* XVIII, 4.

50. Meiri: Plums were more expensive.

51. Bava Metzia 60a; *Soncino* 359.

52. *Hullin* 9'a; *Soncino* 528; actually the reference is to a homeowner misleading his guest. See, *Mekilta Mishpatim* 13.

53. Bava Bathra 89a; *Soncino* 366; (as practiced by the "imposters").

54. Bava Bathra 89a; *Soncino* 366.

55. See Rabbenu Gershom *ad. loc.*

56. See Rashbam, Rabbenu Gershom, and Numukai Yosef *ad. loc.* *Shita Mekubetztes*: These officers stamped the official amount of each measure to prevent imposters from mislabeling the measures.

57. *Yoma* 9a; *Soncino* 36; These officers often maintained prices at such a low level to benefit the consumers that special tax considerations were given to bakers as one particularly hard hit group.

58. Bava Bathra 8b; *Soncino* 37. See *supra* note 12.

59. Bava Metzia 50a; *Soncino* 298.

60. *Id.*

61. Bava Metzia 51a; *Soncino* 301; according to Samuel. Rab, however, disagreed and rejected such a notion.

62. Bava Metzia IV, 7; *Soncino* 335. R. Judah wanted to include pearls, gems, cattle and books because they had no fixed market value.

63. Sacred objects were items dedicated to the Temple in Jerusalem.

64. Bava Metzia IV, 7; *Soncino* 335. Maimonides, *Sales* XIII, 8: "Even if they are worth 1,000 denar and a person has sold them for one denar the law of overreaching does not apply because in the laws of fraud it is said: or buy of thy neighbor's hand (Leviticus 25:14), implying that the laws apply to an object acquired by delivery from hand to hand. This excludes land and it excludes slaves which have the status of land. It excludes deeds which are not owned intrinsically, but only for the evidence in them. The words 'thy neighbor's' exclude sacred objects."



private individual could charge all he wanted for an item because of the possible sentimental value.<sup>65</sup> Others said a "merchant" also was not bound by "overreaching."<sup>66</sup> The regulations with respect to "overreaching" when money changing were slightly different.<sup>67</sup>

There was a statute of limitations on invoking a claim of "overreaching." Thus, a buyer of an object was allowed to revoke the sale within the time necessary to show the article to a merchant or relative.<sup>68</sup> However, the vendor who did not have the purchase in his possession could always retract<sup>69</sup>; unless it was the type of commodity which had a uniform price, e.g., pepper or wheat, in such cases a vendor could only retract within the time needed to ask the market price and realize the error.<sup>70</sup>

Other pricing regulations were instituted besides the imposition of certain fixed prices and the doctrine of "overreaching." Certain necessities, e.g., flour, oil, and wine, had to be sold directly without an intervening middleman so as to keep prices to a minimum.<sup>71</sup> Also, to insure maximum supply of these necessities it was forbidden to export them from Israel to foreign countries.<sup>72</sup> Similarly, it was prohibited to hoard these necessities for that too would affect supply and price.<sup>73</sup>

The threat of legal action against a seller was an effective deterrent against the abuse of consumers. There were no court costs,<sup>74</sup> no lawyers fees,<sup>75</sup> and no filled dockets.<sup>76</sup> Bringing a court suit was so cheap and simple that there was a case recorded of a man selling jewelry worth fifty

pieces for sixty (an illegal overcharge).<sup>77</sup> The seller was willing to accept fifty five, but the buyer paid sixty with the intention of bringing the seller to court to regain the ten piece difference, thus saving himself a mere five pieces.<sup>78</sup>

Moreover, Talmudic law functioned for a society which accepted its theological implications. Consequently, vendors feared divine wrath as well as civil retribution. Integrity in business dealings was emphasized in this religious framework.<sup>79</sup> After death, the first question asked by the Heavenly Tribunal—Were you honest in your business transactions?<sup>80</sup>

#### IV. Conclusion

In conclusion, the Talmudic approach consisted of free unfettered competition, except with regard to necessities and unconscionable sales. A great deal of market discretion was attributed to the consumer as evidenced by the law permitting "bait" techniques. However, certain areas beyond the consumer's cognition, e.g., weights and measures were regulated. Current market practice was the general rule for defining the permissible, provided the buyer and seller acted in good faith. Regulatory agencies, an efficient and cheap court system, clearly defined standards of conduct, and fear of divine punishment all contributed to form a strong deterrent to potential abuse of the consumer. The need for consumer protection was recognized and dealt with by the Talmudic sages.

65. Bava Metzi'ah 51a; *Soncino* 302.

66. *Id.* There were two approaches taken regarding the "merchant". (1) He was an expert and consequently even less than one sixth was fraud. (2) His livelihood depended on a small profit margin, so even underselling by less than one sixth was revocable by him.

67. Bava Metzi'ah IV, 5; *Soncino* 327. Some sages set the limit of "overreaching" at one twelfth of the value of the coins, others at one twenty fourth, and others at one sixth.

68. Bava Metzi'ah IV, 2; *Soncino* 295-96. R. Tarfon suggested the amount of "overreaching" should be one third and the Lyddan merchants rejoiced. However, he stipulated that one could retract the whole day. Thereupon the Lyddan merchants asked that the status quo of the sages be maintained, i.e., one sixth, but a shorter revocation period.

69. Bava Metzi'ah 51a; *Soncino* 301; since he would have to wait until he would find another article like his, and only then would he know whether he erred or not.

70. Bava Metzi'ah 51a; *Soncino* 301; Maimonides, *Sales* XII, 6;

Hoshen Mishpat CCXXVII, 9.

71. Bava Bathra 91a; *Soncino* 374. In places where there was a sufficient supply of oil, it was permitted to profit by resale.

72. Bava Bathra 90b; *Soncino* 374; Maimonides, *Sales* XIV, 8.

73. Bava Bathra 90b; *Soncino* 373; Maimonides, *Sales* XIV, 5.

74. Bekoroth IV, 6; *Soncino* 184-85; accepting a fee to judge invalidated the verdict.

75. Litigants presented their cases themselves with the help of the presiding judges, Yerushalmi, Sanhedrin 3.

76. See generally, Silverstein, *Right of Appeal in Talmudic Law*, 6 CASE W. RES. J. INT'L L. (issue 1).

77. See discussion *supra* on overreaching.

78. Bava Metzi'ah 51a; *Soncino* 302.

79. The theological implications were often esoteric, e.g., Ovadiah ben Jacob Sforno in his Biblical commentary wrote with reference to keeping false measures: God abhors not only the actual practice of dishonesty, but also the instruments that enable one to commit dishonesty.

80. Shabbath 31a; *Soncino* 141-42.