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Professionalism Topics covered in this presentation:

2.4 Recognizing and being sensitive to clients' circumstances, special needs, and intellectual capacity (e.g., multi-cultural, language, gender, socioeconomic status, demeanour)

Prof. Steven Resnicoff, *Bankruptcy – A Viable Halachic Option?* <http://www.jlaw.com/Articles/bankruptcy.html>

Vignettes

- My observant Jewish client is badly in debt. I want to advise her of bankruptcy options, but she won't hear of it; she says that her parents, Holocaust survivors, would turn over in their grave to hear of their child failing to pay her obligations. What can I tell her?
- My observant Jewish client is filing for bankruptcy; how can I protect him from religious sanctions in his community, as well as from being challenged in a rabbinical court?
- My observant Jewish client owns a Jewish summer camp, and was unable to hold a camp season last summer due to COVID. Her customers are demanding refunds of their deposits, but she spent that money on physical infrastructure and administrative salaries before the pandemic forced the camp to close. Would she be better off addressing this in a secular court, or a rabbinical court?

What is Bankruptcy?

1. Bankruptcy Procedure

Procedure

http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br01545.html

Bankruptcy and Insolvency Act <http://laws-lois.justice.gc.ca/eng/acts/b-3/>

Vignette 1: How can I make my client comfortable with bankruptcy?

2. Comment of Rashi (11th century France) to Talmud, Ketuvot 86a

מצוה עליו לפרוע חובו ולאמת דבריו דכתיב "הין צדק" - "שיהא הן שלך צדק ולאן שלך צדק".

One is obligated to pay his debts and fulfill his words. Leviticus 19:36 says, "An honest *hin* [measurement]", on which Bava Metzia 49a comments, "That your *hen* ('Yes') shall be honest, and your 'No' shall be honest."

3. Rabbi Yom Tov el-Asvili (Ritva, 13th century Spain), cited in Shitah Mekubetzet Ketuvot 86a

והקשו עליו בתוספות דהיא הא אוקימנא בבבא מציעא שלא ידבר אחד בפה ואחד בלב ואילו הכא פיו ולבו היו שוין כשלוה לפרוע, והם שוין עכשיו שלא לפרוע! לכך פר"י דנפקא ליה מדכתיב "האיש אשר אתה נושה בו יוציא אליך את העבוט"...

Tosafot asked that this is understood in the Talmud to mean that one should not speak one way and think another, but here his mouth and heart are aligned when he borrows, intending to pay, and they are aligned now in not paying! Therefore the R"i explained that the source is Deuteronomy 24:11, "And the man from whom you are claiming shall bring the collateral out to you."

4. Rabbi David ibn Abi Zimra (Radbaz, 16th century Spain, Egypt, Israel), Responsa of Radbaz 2:610

מצות עשה של תורה היא דכתיב "והשיב את הגזלה אשר גזל או את העושק אשר עשק או את הפקדון אשר הופקדו או את האבדה אשר מצא, וכתב הרב פ"ז מה' גזלה ואבדה "אחד הגוזל או העושק או הגונב או שהלוהו או שהפקידו אצלו או מצא אבדה וכחש בה..." "הרי שהשוה ז"ל הלואה לשאר הדברים הנזכר בכתוב, ובתחלת ההלכות כתב "שאם גזל חייב להחזיר שנאמר 'והשיב את הגזלה אשר גזל' זו מצות עשה" ע"כ, וכי היכי דהוי מצות עשה להשיב את הגזלה ה"ה לכל הנזכר בכתוב והלואה בכלל..."

It is a biblical mitzvah, as Leviticus 5:23 says, "And he shall return the object he stole or the money he withheld or the charge placed in his care or the lost item he had found." Maimonides wrote (Laws of Theft and Lost Objects 7:2), "Whether one steals or withholds or burglarizes or is lent or is given a charge or finds a lost item, and denies it..." He equated a loan with the other listed items, and he began with, "If he stole, he is obligated to return it, as it is said, 'And he shall return the object he stole', this is a commandment." Just as there is a commandment to return the stolen item, so, too, for every item mentioned, including a loan.

5. Mishnah, Bava Metzia 4:2 (44a)

אבל אמרו מי שפרע מדור המבול הוא עתיד ליפרע ממי שאינו עומד בדיבורו

They have said, 'The One who punished the generation of the flood will punish one who does not stand by his word.'

6. Rambam, Mishneh Torah, Hilchot Mechirah 7:8

הנושא ונותן בדברים בלבד הרי זה ראוי לעמוד לו בדבורו, אף על פי שלא לקח מן הדמים כלום ולא רשם ולא הניח משכון, וכל החוזר בו בין לוקח בין מוכר אף על פי שאינו חייב לקבל מי שפרע הרי זה ממחוסרי אמנה ואין רוח חכמים נוחה הימנו.

One who trades only verbally should stand by his word, even though he has received no payment, has not marked [the goods] and has not given a pledge. And anyone who backs out – whether buyer or seller – even though he need not accept a *Mi shePara*, he acts in bad faith and *ein ruach chachamim nochah heimenu*.

7. On breaking verbal agreements <https://www.yutorah.org/lectures/lecture.cfm/940260/>

8. Talmud, Kiddushin 18a

"[ונמכר] בגניבתו" - ולא בכפילו. "בגניבתו" - ולא בזממו [עד זומם], "בגניבתו" - כיון שנמכר פעם אחת, שוב אי אתה רשאי למוכרו.

"He shall be sold for his theft" – but not to pay his doubling [fine]. "For his theft" – but not for his plot. "For his theft" – After he is sold once, you may not sell him.

9. On debt slavery <https://www.yutorah.org/lectures/lecture.cfm/829441/>

10. Exodus 22:24

אם־כִּסְפָךָ תַּלְוֶה אֶת־עַמִּי אֶת־הָעֲנִי עִמָּךְ לֹא־תִהְיֶה לוֹ כְּנֹשֶׁה...

When you lend money to My nation, to the pauper with you, you shall not be as one who has a claim...

11. Talmud, Sanhedrin 2b-3a

והאי דלא בעינן מומחין משום דרבי חנינא, דאמר רבי חנינא: דבר תורה, אחד דיני ממונות ואחד דיני נפשות בדרישה ובחקירה, ומה טעם אמרו דיני ממונות לא בעינן דרישה וחקירה - כדי שלא תנעול דלת בפני לוויין.

We do not require expert [judges, for financial matters], because of Rabbi Chanina's principle: Biblically, both financial and capital matters should require extensive interrogation of witnesses. Why did they say that financial matters do not require extensive interrogation? To avoid locking the door before borrowers.

12. Talmud, Bava Metzia 30b

"והודעת להם" זה בית חיהם, "את הדרך" זו גמילות חסדים, "יילכו" זה ביקור חולים, "בה" זו קבורה, "ואת המעשה" זה הדין, "אשר יעשו" זו לפני משורת הדין.

"And you shall inform them" is a livelihood. "Of the path" is acts of kindness. "They shall walk" is looking after the sick. "On which" is burial. "And the deed" – This is justice. "They will perform" – This is to transcend the line of the law.

13. Talmud, Bava Metzia 83a

רבה בר בר חנן תברו ליה הנהו שקולאי חביתא דחמרא, שקל לגלימיהו. אתו אמרו לרב, אמר ליה הב להו גלימיהו. אמר ליה דינא הכי? אמר ליה אין, "למען תלך בדרך טובים." יהיב להו גלימיהו. אמרו ליה "עניי אנן, וטרחינן כולה יומא וכפינן ולית לן מידי!" אמר ליה זיל הב אגרייהו. אמר ליה, דינא הכי? אמר ליה, אין, "וארחות צדיקים תשמר."

Porters broke Rabbah bar bar Chanan's wine barrels, and he took their cloaks. They told Rav, who told him to give them their cloaks. He asked, "Is this the law?" Rav replied, "Yes, 'So that you will walk the path of the good.' (Proverbs 2:20)" The porters said, "We are poor, we worked all day, we are hungry and we have nothing!" Rav told him, "Pay them." He asked, "Is this the law?" Rav replied, "Yes, 'And you will guard the path of the righteous.' (ibid.)"

Vignette 2: How can I protect my client in rabbinical court and the Jewish community?

14. Bankruptcy and Insolvency Act, s. 69

69 (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

15. Rabbi Joseph Colon Trabotto (15th century Italy), Maharik 3

כל אשראי ספק אתא ספק לא אתא לפעמים המלוה סובר שהלוה עני והוא עשיר או שהוא אלם ואין דעתו לפרועו ואינו כך ומשום כך לא מהני ביה יאוש

All credit is subject to doubt – maybe it will be paid and maybe it will not. Sometimes the creditor believes the borrower to be poor and he is actually wealthy, or to be powerful and unwilling to pay and it is not so. Therefore, abandonment of hope is ineffective.

16. Rabbi Meir Auerbach (19th century Poland, Israel), Imrei Binah, Laws of Collection of Debt 4

ובחוב נמי אם יש לו לצאת ידי חובתו ואינו רוצה לשלם כמו בנידון דמהרי"ק גורם הלוה לסיבת היאוש י"ל דלא מהני דהוי כמו גזילה דבאיסורא אתי לידיה והוא גרם בעל כרחו שנתייאשו הבעלים

In debts, too, if he has the means to fulfill his obligation and he does not wish to pay, like in the case of Rabbi Joseph Colon, then the borrower causes the abandonment of hope and it is possible to say that this [loss of hope] is ineffective. It would be like theft; the money came to him in a prohibited way, and he compelled the rightful owners to abandon hope.

17. Rabbi Yosef Karo (16th century Turkey, Israel), Shulchan Aruch Choshen Mishpat 12:11

אם ראובן הפחיד את שמעון למסרו לאנס אם לא יתן לו ממון שהיו דנין עליו ואין לו בו זכות כפי הדין, ועשו פשרה בקנין וביטול מודעא, יכול לחזור בו.

If Reuven intimidated Shimon by threatening to turn him over to an *anas* if he wouldn't pay the disputed sum, and Reuven possessed no legal right to it, and as a result [of the intimidation] they performed *kinyan* and Shimon formally cancelled any *moda'a*, Shimon may still recant.

18. Rabbi Moshe Isserles (16th century Poland), Choshen Mishpat 369:11

לא אמרינן דינא דמלכותא אלא בדבר שיש בו הנאה למלך או שהוא לתקנת בני המדינה, אבל לא שידונו בדיני עובדי כוכבים, דאם כן בטלו כל דיני ישראל

We do not recognize government law other than in matters that benefit the king, or that benefit the citizenry, but not to judge by the laws of idolaters; that would cancel all of the laws of Israel.

19. Rabbi Moshe Feinstein (20th century Russia, USA), Igrot Moshe Choshen Mishpat 2:62

נראה דודאי אף להסוברין דד"מ בכל דבר היינו מה שנקבע מדד"מ בדיני קנינים ותשלומי הלוואות מהנכסים שהוא חסרון להמלכות שיהיה חלוקי דינים בין אינשי לאינשי שמזה אפשר לבא לידי קנאה ותחרות ומריבות ואף שלא שייך זה לכאורה אלא בדיני שופטי המלך והמדינה מ"מ אולי יחוש המלך גם לזה שלא יהיו שופטים אחרים דנין באופן אחר שג"כ אפשר יבא לערער על דיני המלכות

It appears certain that even those who accept government law in all matters only accept established government law in matters of transactions and payment of debts from one's assets, for the government would suffer if there were different laws among the people. It could lead to jealousy and competition and strife. This might appear to relate only to the laws of government-appointed, national judges, but perhaps the king would also be concerned that other judges not judge in other ways, which could cause challenges to the nation's laws.

20. Rabbi Yaakov Breisch (20th century Germany, Switzerland), Chelkat Yaakov Choshen Mishpat 32

ואף להרמ"א המרים ביותר הגדר דדמ"ד, דאף משום תקנת בני המדינה אמרינן דדמ"ד, בני"ד איזו תקנת בני המדינה יש בזה לגזול ממונו מפני שאין ללוה לשעה לשלם

Even according to Rabbi Moshe Isserles, who especially elevates the principle of honouring government law, extending it even to the benefit of the citizens, what benefit for the citizens would apply in our case, stealing this person's assets because the borrower is temporarily unable to pay?

21. Talmud, Bava Metzia 83a

מקום שנהגו שלא להשכים ושלא להעריב אינו רשאי לכופן. מקום שנהגו לזון יזון, לספק במתיקה יספק, הכל כמנהג המדינה.

In a place where workers neither rise early nor remain late at night, one may not force them to do so. Where the practice is to feed them one must feed them. Where the practice is to provide sweet food one must provide it. All is according to the custom of the land.

22. Rabbi Yosef Karo (15th century Turkey, Israel), Shulchan Aruch Choshen Mishpat 7:12

כל דבר שיש לדיין בו צד הנאה, אינו יכול לדון עליו... ולפיכך עסקי המס אין דנין בדייני אותה העיר, מפני שיש להם או לקרוביהם חלק בו. ואם עשו תקנה, או שיש מנהג בעיר שדייני העיר ידונו אף על ענין המסים, דינם דין.

In any matter that benefits a judge, he may not judge... Therefore, on [communal] tax matters the local judges cannot judge, for they or their relatives will have a portion in it. However, if they enacted or have a local custom that the local judges may even judge tax matters, then their verdict is valid.

23. Rabbi Moshe Feinstein (20th century Russia, USA), Igrot Moshe Choshen Mishpat 1:72

לאילו ששכרו אחר שכבר נעשה הדין מהמלכות ולא התנו בפירוש שכשיבא הזמן יהיה מחוייב לצאת אלא סתם הוי כהתנו שאדעתא דדין המלכות השכיר לו

Those who rented after the government's [tenancy] law was enacted - without an explicit condition requiring the tenant leave [after the initial rental ended] - are as though they had rented on condition that the government's law be followed.

24. Rabbi Akiva Eiger (18th century Poland), Commentary to Choshen Mishpat 12:13

בתשו' משאת משה סימן ס"ב העתיק בשם תשובת מהרש"ך ח"ב סי' קי"ג בבע"ח שהסכימו לפשר עם הלוח וא' אינו מסכים עמהם מכמי אנפי רואה אני לכוף את הממאן להתפשר כשאר הסוחרים שהם הרוב כי מנהג הסוחרים לכוף את שאינו רוצה לבוא בפשרה...

Responsa Masat Moshe cited Maharshach regarding creditors who agreed to compromise with a debtor, where one creditor did not agree for various reasons: I see grounds to compel the one who is refusing to compromise, like the others who are the majority, for it is normal business practice to compel the unwilling one to compromise...

25. Maimonides (12th century Egypt), Mishneh Torah, Laws of Courts 26:7

כל הדין בדייני עכו"ם ובערכאות שלהן אע"פ שהיו דיניהם כדניני ישראל הרי זה רשע וכאילו חרף וגדף והרים יד בתורת משה רבינו שנאמר... היתה יד העכו"ם תקיפה ובעל דינו אלם ואינו יכול להוציא ממנו בדייני ישראל יתבענו לדייני ישראל תחלה, אם לא רצה לבא נוטל רשות מבית דין ומציל בדייני עכו"ם מיד בעל דינו

One who litigates before idolater judges and in their courts is wicked, even should their decisions match those of Israel. It is as though he had blasphemed and raised a hand against the Torah of Moses our master... Where the hand of idolaters is stronger and one's opponent is powerful, such that he cannot claim from the opponent in Jewish courts, then he should claim from him before Jewish judges first. Should he refuse to come, one could then seek permission from the Jewish court and rescue his property from the opponent in the laws of the idolaters.

26. Professor Steven Resnicoff, *Bankruptcy – A Viable Halachic Option?*

[A] bankruptcy is technically an "in rem" proceeding, i.e., the debtor does not affirmatively sue anyone in court. Instead, the debtor merely appears before the court and seeks its relief. At least where there is no dispute as to the debtor's eligibility for a discharge, the secular court arguably does not adjudicate legal issues between "parties." In such cases, by filing for bankruptcy relief, the debtor is essentially applying to a government office for a special permit or benefit, not submitting to a "court" for the resolution of a dispute.

Vignette 3: The COVID Cancellation

27. On cancelling services during COVID

<https://www.yutorah.org/lectures/lecture.cfm/976753/>

28. Aubry, Tannerya and Walter, Can a force majeure clause be relied upon in light of the COVID-19 pandemic?

https://www.dickinson-wright.com/-/media/files/news/2020/09/covid-resource-guide__binder1.pdf

Force majeure clauses authorize contracting parties to extend or suspend the time of performance, or to be excused from performance, in whole or in part, as a result of specifically negotiated and enumerated conditions or events.

Obligations under the contract may resume once the condition or event has been remedied – a determination of the exact circumstances will depend on the clause, and its place contextually within the contract as a whole...

If a party wants to rely on a force majeure clause, they must first establish that the event or condition falls within the definition of force majeure; this is evaluated in the context of each specific contract.

The Supreme Court of Canada, in the leading decision, *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp and Paper Company Limited*, defined a force majeure clause as "generally [operating] to discharge a contracting party when a supervening, sometimes supernatural event, beyond control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill."

It is not sufficient that the event makes performance more expensive or time-consuming than expected. The event must make performance substantially more difficult, substantially more expensive, or imprudent.

29. Frustrated Contracts Act, R.S.O. 1990, c. F.34 <https://www.ontario.ca/laws/statute/90f34>

2 (1) This Act applies to any contract that is governed by the law of Ontario and that has become impossible of performance or been otherwise frustrated and to the parties which for that reason have been discharged.

30. Talmud, Bava Metzia 105b

משנה: המקבל שדה מחבירו ואכלה חגב או נשדפה, אם מכת מדינה היא מנכה לו מן חכורו, אם אינה מכת מדינה אין מנכה לו מן חכורו...

גמרא: היכי דמי "מכת מדינה"? אמר רב יהודה כגון דאישדוף רובא דבאגא. עולא אמר כגון שנשתדפו ארבע שדות מארבע רוחותיה...

Mishnah: If one rents a field, and it is eaten by locusts or damaged by plague, if it is a *makkat medinah* then he may reduce his rental payment. If it is not a *makkat medinah*, he may not reduce his rental payment...

Gemara: What is a *makkat medinah*? Rav Yehudah said: For example, if most of the fields were damaged by blight.

Ulla said: For example, if the four surrounding fields on four sides were damaged by blight...

31. Rabbi Moshe Isserless (16th century Poland), Rama Choshen Mishpat 321:1

וכן פסק מהר"ם על מלמד שגזר המושל שלא ילמוד, דהוי מכת מדינה וכל ההפסד על בעל הבית.

And so ruled Maharam regarding a teacher, when the government decreed that one may not learn. This is a *makkat medinah*, and all of the loss is upon the employer.

32. Rabbi Asher Weiss, **הביאני חדריו** pg. 386

א. במכת מדינה מזליה דבעל הבית גרם, דכאשר מדובר בגזירה על הכלל הכל חוזר אל השורש, ומשום כן מנכה החוכר מבעל הבית את שכר

חכירתו כיון שהשדה של בעל הבית היא, והמלמד גובה שכרו מאבי הילד כיון שהילד של אביו הוא...

ב. לעולם יד הפועל על העליונה, ובהלכות רבות חזינן שהתורה והחכמים חסו על הפועל וזכויותיו, וכדחזינן ממצוות רבות כגון "ביומו תתן

שכרו"...

1: In a *makkat medinah*, the employer's *mazal* caused it, for when we are talking about a decree against the community then all returns to the root. Therefore, the tenant reduces his rent for the landlord, since the field belongs to the landlord. And the teacher collects his wages from the child's father, since the child belongs to his father...

2: The worker's hand is always the higher. In many laws we see that the Torah and the Sages had compassion for the worker and his rights, as seen in many mitzvot, like "Pay him on his day"...

Review Questions

- 1) How might bankruptcy benefit society?
- 2) What are three biblical sources in Judaism for the duty to repay debts?
- 3) What are two examples of biblical protection for debtors?
- 4) What are three reasons why Judaism doesn't have a bankruptcy procedure?
- 5) Will Jewish law accept bankruptcy as binding by dint of the creditor's agreement?
- 6) What are two Jewish legal doctrines which might be invoked to support bankruptcy?
- 7) What are steps one could take to prevent conflict surrounding bankruptcy?
- 8) What are the two ways a secular court could resolve a COVID-related cancellation?
- 9) In a rabbinical court, would a service provider who couldn't fulfill the contract due to COVID still be paid? Why?