

1. Shane Dingman, The Globe and Mail, *Volkswagen's deception, and how it was discovered*, Sept. 22 '15  
To sell a car in North America, the company must prove it is in compliance with the U.S. Clean Air Act. Cars must pass tests such as the EPA's Urban Dynamometer Driving Schedule (UDDS), also known as "the city test" – an 11.9 km test at an average speed of 30.6 km per hour, or the Highway Fuel Economy Test, which is a 16-km test at an average speed of 77.2 kph. The test measures pollutant in emissions and involves very specific calibrations to which car-makers and testers have agreed.

VW has yet to describe publicly how it engineered its defeat device, but the EPA says VW's onboard computer software recognized the test conditions – perhaps because the car steering wheel was not turning at high speed – and activated technology that would capture Nox [*nitrogen oxides*] and allow it to pass the test.

#### Buyer and Seller: Different standards of disclosure

2. Talmud, Bava Metzia 60b

One may not cause an animal's hair to stand on end [to make it look larger], one may not inflate innards [for sale in the market], and one may not soak meat in water.

3. Rabbi Moses Maimonides (12<sup>th</sup> century Egypt), Mishneh Torah, Laws of Sale 15:6

One who purchases without specifications only expects to purchase a whole entity, without defect. Where the seller specifies, "This sale is on the condition that you not come back to me regarding a defect," the buyer may still come back to the seller, unless the seller specifies the defect in his merchandise and the seller forgives it...

4. Sale of Goods Act, R.S.O. 1990, Chapter S.1, 15(2)

Where goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not), there is an implied condition that the goods will be of merchantable quality, but if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed.

#### What counts as a "defect"?

5. Rabbi Yechiel Michel Epstein (19<sup>th</sup>-20<sup>th</sup> century Lithuania), Aruch haShulchan, Choshen Mishpat 232:1

*Onaah* [sale for an incorrect price, which may involve a partial refund] is only with money. *Onaah* is not relevant for volume, weight or number; those are simply error. Therefore, if one sells by volume, weight or number and makes a mistake, the sale is valid and the error, large or small, is refunded.

6. Rabbi Moses Maimonides (12<sup>th</sup> century Egypt), Mishneh Torah, Laws of Sale 15:5

Whatever the population agrees to consider a defect, such that a sale should be reversed, is cause for reversal. Whatever the population agrees not to consider a defect is not cause for reversal, unless the buyer specified it. One who transacts without specification relies upon popular practice.

7. Rabbi Yechiel Michel Epstein (19<sup>th</sup>-20<sup>th</sup> century Lithuania), Aruch haShulchan, Choshen Mishpat 232:7

If it is known that the purchased item is stolen, and this could cause pain or loss to the purchaser, there could be no greater defect, and the sale is cancelled.

#### The El Al case

8. El Al To Honor All Tickets Purchased In Pricing Glitch, CBS New York, Aug. 9, '12

Thousands of people cashed in on a deeply-discounted deal on Monday after an online glitch offered fares for about 75 percent off. "Although a review of this occurrence has not been finalized, a decision was made to accommodate El Al passengers who purchased these low fares because we value our reputation of offering excellent customer service," Vice President Danny Saadon said. "Hopefully, we have provided an opportunity to many first timers to visit Israel as well as reconnect family and friends."

Many couldn't believe their eyes when they saw round-trip tickets available for as little as \$350 from cities such as New York, Boston and Chicago. New York-to-Tel Aviv fares typically go for \$1,600 to \$1,900.

9. Rabbi Yair Hoffman, *The El-Al Pricing Error: A Halachic Analysis*, Five Towns Jewish Times

There is a third factor, however, which may be very pertinent here. If one looks closely at this particular sale, the price of the ticket was not, in fact, below market. The reason why the total cost of the ticket was so much lower than usual was the fact that the fuel surcharges were not included in the pricing. When someone does not charge an additional fee that is not part of the sale, but rather is construed as an extraneous cost, not charging it would not negate the sale (See Responsa of the Rosh 13:20 for a similar issue).

The situation may be analogous to a store that charges an entrance fee and then makes sales. If the store owner appointed a person who did not collect the entrance fee and the person did not sneak in, there would be no obligation for the purchaser of the item to pay that entrance fee.

While some may argue that the fuel surcharge is an accounting device, the fact is that technically it appears to be legally construed as an extraneous fee.

Why do they charge these surcharges? Travel experts list a number of reasons:

- 1] So they can charge travelers for allegedly "free" frequent flier awards and companion tickets with part of the fare.
- 2] To make their fares appear much lower than they really are.
- 3] So they can lower the fare basis on which they pay commissions to travel agents.
- 4] So they can circumvent the law and raise the fares on routes where fare increases still need some sort of outside approval.

In the United States itself, domestic carriers are not allowed to have these two separate fees, but international carriers are allowed to do so. It is this author's view, the fact that it is technically not part of the sale itself, has implications both ways too – and one would not be forced to undo the deal from a halachic perspective.

Is the seller always required to accept the refund?

10. Limitations Act, S.O. 2002, Chapter 24, Schedule B, 4

Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

11. Rabbi Moses Maimonides (12<sup>th</sup> century Egypt), Mishneh Torah, Laws of Sale 15:3

If one sells [an item]... and a defect of which the buyer had not known becomes evident, the buyer may return it even years later, for this is an erroneous transaction. This assumes he does not use it after becoming aware of the defect; if he uses it after seeing the defect, he forgives it and he cannot reverse the sale.

12. Rabbi Vidal of Toulouse (14<sup>th</sup> century Spain), Maggid Mishneh commentary to Laws of Sale 15:3

One author has written that where the defect was something the buyer could have perceived immediately, such as where he could have tested or tasted the goods and he was not careful to do so and the seller sold him the item without identifying the defect, there is no refund.

13. Rabbi Yechiel Michel Epstein (19<sup>th</sup>-20<sup>th</sup> century Lithuania), Aruch haShulchan, Choshen Mishpat 232:5

In truth, there is no substance to this, and many disagree with it.

14. Consumer Protection Act, S.O. 2002, Chapter 30, Schedule A, 7(1)

The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.