

Promissory Nope: You'll Gain If You Refrain

Adapted from the writings of Dayan Yitzhak Grossman

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Business Insider reports:

An anti-abortion group says it will pay three women \$9,460 after a Business Insider investigation found it failed to give them the payments it promised in exchange for them agreeing not to have abortions.

Let Them Live, an Indiana-based nonprofit, promised the three women thousands of dollars of support in contracts...

The group offers women financial assistance if they are considering having an abortion for economic reasons—as long as they sign a contract vowing not to terminate their pregnancy.

BI spoke with a total of four women who were promised thousands of dollars by Let Them Live, and went on to carry their babies to term. They said it failed to deliver \$30,660 of support it promised them for childcare, food, rent, and utilities, leaving one considering suicide and another having to “ask on Facebook” for diapers.

All the women said they were at least five months pregnant when they were told the support would be cut, meaning their options for abortion were narrowing. “I feel conned into keeping this baby,” one told BI...

Nathan Berning, Let Them Live’s CEO and cofounder, acknowledged multiple mistakes on the group’s part and told BI it was looking into the cases of women not getting what they were pledged.

He said the group is auditing its finances. “We have a better process to ensure that something like that doesn’t happen again,” he said.[1]

In this article, we consider the halachic validity of a contract to compensate someone for refraining from engaging in some specified conduct.

The earliest discussion of this topic of which I am aware is by R’ Efraim Navon (the Machanei Efraim). He considers the case of a businessman who made a deal with another businessman that the latter would stay home on a particular day and not engage in business, and the former would compensate him with a portion of his own profits. The man apparently stayed home as promised but did not receive the compensation.

Much of the Machanei Efraim’s analysis revolves around the following Gemara:

Was it not taught in a *breisa*: There was someone who was fleeing from prison, and there was a ferryboat before him. He said to the ferryman: “Take a dinar and ferry me across the river.” The ferryman receives only his fee (and not the full dinar). We see that he can say to him: “When I offered you a dinar, I was joking with you.”

The Gemara cites the continuation of the *breisa*:

But if he said to him, “Take this dinar as your fee, and ferry me across the river,” he must give him his fee in full.

The Gemara explains the difference:

Rami bar Chama said, the second clause speaks of a ferryman who is also a fisherman, and he says to the escaped prisoner, "You caused me the loss of a fish worth a *zuz* (dinar)," for that is the amount he would have caught during the time he spent ferrying the prisoner.[2]

The Machanei Efraim acknowledges that this Gemara indicates that one who makes a promise that is relied upon by another to his detriment by abstaining from profitable activity is liable to compensate him for his opportunity costs. In the Machanei Efraim's case, however, it is possible that the victim would not actually have realized any profit, and even if he would have, it might have been small, so there is no basis to demand that the commitment be honored. (The Machanei Efraim is apparently assuming that the fisherman in the Gemara would have definitely caught fish worth the specified amount, an assumption that is challenged by R' Shlomo Yehudah Tabak, author of *Erech Shai* and *Shu"t Tshuras Shai*.[3])

The Machanei Efraim adds a second distinction between the Gemara's case and his own that applies even if we assume that in his case, too, the victim would definitely have realized profit of his own equal to the amount promised: In the case of the Gemara, the compensation was for services rendered (notwithstanding the fact that the amount promised is excessive), whereas in his case, the compensation was promised not for doing but for refraining from doing, and such a promise is not binding, even if opportunity costs were incurred by relying on it.

The Machanei Efraim subsequently rejects this second argument in light of the comments of various *Rishonim* that a promise to compensate someone for losses incurred in relying upon the promise is indeed binding, and he thus concludes, as per his initial distinction, that whether the promise is binding hinges on whether the potential profits were certain or uncertain.[4]

R' Dovid Tebel of Minsk (a leading disciple of R' Chaim Volozhiner) discusses a case similar to that of the Machanei Efraim, of a merchant who is concerned about potential competition from other merchants and so promises to compensate them for not entering the market. He argues at length for the basic principle that unlike a promise to compensate someone for doing something (i.e., an employment agreement), a promise to compensate someone for not doing something is not binding (even in the absence of a claim that the offer was unserious), at least in the absence of a *kinyan* (a formal act of commitment to an agreement).[5]

R' Avraham Tzvi Hirsch Eisenstadt (the *Pis'chei Teshuvah*) maintains that even a promise backed by a *kinyan* is not binding in a situation where the person is halachically prohibited to engage in the conduct he commits to abstain from, because in such a case the promiser can indeed claim he wasn't serious.[6] It might follow from this that since the abortions in the Let Them Live cases are halachically prohibited, the organization's promises of compensation would not be binding. But given that such abortions are unfortunately legal and common in modern society, the organization cannot plausibly claim it was fooling, despite the fact that the abortions are halachically forbidden.

In a very brief ruling, R' Refael Berdugo (17th-18th century, Meknes, Morocco) espouses a position similar to that of the Machanei Efraim and R' Dovid Tebel:

Reuven desired to purchase merchandise, and Shimon wished to offer more than Reuven and purchase it. Reuven approached Shimon and said to him: "Be silent, and when I purchase it, I will give you half." But subsequently he said to him, "I will not give you anything"—he toyed with him (*sicheik bo*).[7]

R' Moshe Feinstein, in a *teshuvah* addressed to R' Nota Greenblatt, considers the case of a teacher who had agreed to relinquish his position and move to a different location. He claimed that the school principal had promised to compensate him for moving expenses. R' Moshe ruled that if the promise had been made as an inducement to the teacher to quit his position (even if the teacher had no right to demand compensation for leaving, and his employer offered it voluntarily, but the teacher refrained from suing the employer because of the promise), then if the teacher gave up his position and relocated and is now unable to return, the promise of compensation is binding even without a *kinyan*. [8]

R' Moshe's intent is not entirely clear to this author. Is he disagreeing with all the cited *Acharonim* who maintain that, at least in the absence of a *kinyan*, a promise to compensate someone for *not* doing something is not binding? Or perhaps he considers relinquishing a current position to be a positive act, for which a promise of compensation is indeed binding, as opposed to not seizing an available opportunity, where he would agree with the other *Acharonim* that a promise of compensation is not binding.

Note that this entire discussion is solely about whether a promise to compensate someone for refraining from doing something creates a binding contract enforceable by *bais din*. In general, however, even in the absence of a binding obligation, there is nevertheless a serious moral obligation to keep one's word. As we discussed a couple of months ago, the *halacha* is that one who reneges on a commitment, even in the absence of a *kinyan*, is considered to be acting in bad faith (*mechusar amanah*), and many halachic authorities explain that doing so is strictly prohibited.[9] While this imperative, too, has certain exceptions, it is important to recognize that a Jew is generally expected to abide by his commitments, as per the *pasuk* in Tzeephaniah (3:13) "The remnant of Yisrael will not commit corruption, they will not speak falsehood, and a deceitful tongue will not be found in their mouth."

[1] Louise Ridley. Anti-abortion group Let Them Live to pay \$10,000 it never gave to women who agreed not to terminate pregnancies <https://www.businessinsider.com/let-them-live-pro-life-anti-abortion-group-pay-women-2023-12>.

[2] Bava Kama 116a.

[3] Erech Shai C.M. beginning of *siman* 228. See, however, Shu"t Tshuras Shai *cheilek* 1 *siman* 421 s.v. *Ulefi zeh afilu belo ta'anas meshateh* where Rav Tabak apparently agrees with the basic position of the Machanei Efraim.

- [4]Machanei Efraim, Hilchos *Sechirus siman* 18.
- [5]Shu"t Bais Dovid (Tebel) C.M. *siman* 4.
- [6]Pis'chei Teshuvah C.M. *siman* 176 *s.k.* 4.
- [7]Shu"t Mishpatim Yesharim *cheilek* 1 *siman* 38. Cf. Shu"t Pri Chaim (Epstein) C.M. *siman* 9.
- [8]Shu"t Igros Moshe C.M. *cheilek* 1 *siman* 37. Cf. Shu"t Maharash (Engel) *cheilek* 4 *siman* 28.
- [9]My Word: When May One Renege on a Commitment? Bais HaVaad Halacha Journal. Oct. 19, 2023.