DOWNLOAD PDF THE IMPOSSIBILITY OF SETTLED RULE

Chapter 1 : Arrow's Theorem (Stanford Encyclopedia of Philosophy)

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The suggestions included amendments to that effect within Rule 23 b 3 itself, or alternatively creating a new Rule 23 b 4 providing for settlement class certification: A class action may be maintained if Rule 23 a is satisfied and if: The subcommittee explained the thinking behind this idea in draft official commentary to the possible new rule: Concerns have emerged about whether it might sometimes be too difficult to obtain certification solely for purposes of settlementâ€¦. Increasing confidence in the ability of courts to evaluate proposed settlements, and the tools available to them for doing so, provide important support for the addition of subdivision b 4 â€¦. Subdivision b 4 does not require, however, that common questions predominate in the action. But certification under subdivision b 4 assumes that there will be no trial. Subdivision b 4 is available only in cases that satisfy the common-question requirements of Rule 23 a 2 , which ensure commonality needed for classwide fairness. This amendment recognizes that it does not have a productive role to play and removes it. Others, such as DRI , feared that it would cause more frivolous class actions to be filed in hopes of luring the defendant into a class settlement: While it might make cases easier to settle on a class action basis, that is not a valid goal of the rules of procedure where the case is not otherwise deserving of class treatment. There is no good policy reason for a rule providing that claims which are too individualized to be certified as a class for litigation purposes is nevertheless certifiable as a class for settlement purposesâ€¦. By definition, what this proposal seeks to do is to enable the classwide settlement of cases in which individualized issues predominate, and foreclose consideration of those overriding individual differences in the settlement certification process. If one assumes that the proposed change achieved its stated goal, and that the predominance of individual issues would then no longer be a concern in certifying settlement classes, then the logical result would be that virtually any claim could be pursued on a class basis. After all, from the narrow perspective of the convenience of the court and abstract efficiency, any class settlement is superior to the prospect of individual litigation by each member of the class. But if that alone is the effective meaning of superiority under this proposalâ€”and it seems it would have to be if the predominance of individual issues is expressly removed from the equation for purposes of settlementâ€”then superiority effectively becomes a rubber stamp for settlement classes. It is indeed difficult to imagine any putative class action that could not be certified for settlement purposes if the predominance of individual issues is truly no longer a concern. Would common law fraud class actions now be certifiable for settlement purposes despite the necessity of proving individual reliance in litigated individual cases? What about nationwide personal injury class actions? How does the proposal guarantee otherwise? The 23 b 4 proposal would in fact create unavoidable perverse incentives on the part of counsel for both sides. The 23 b 4 proposal would make that problem much worse. The federal courts would surely see substantial increases in class action filings, since by definition it would then be entirely permissible to file suit with the aim and purpose of achieving settlement certification even for an otherwise uncertifiable class. These otherwise admittedly illegitimate class actions would then very frequently result in class settlements simply because it would very often be cheaper for defendants to settle these cases than litigate them. The abstract efficiency of settling numerous claims at once is simply not a reason in and of itself to certify a class where the underlying issues, claims and damages are predominantly individualized and varying rather than common. In terms of ensuring that the rights of absent class members are fairly represented in proceedings brought by a self-selected class representative, the fees and classwide release that would make such settlement certifications financially attractive to both would-be class counsel and the defendant are hardly a substitute for the identity of interests that the predominance requirement assures. Ultimately, the 23 b 4 settlement-without-predominance proposal was left on the cutting room floor, and does not appear in the Rule 23 amendments currently matriculating toward an effective date as early as late But lower courts are still struggling with the proper role of predominance in the class settlement context, and a recent case from the Ninth Circuit is a good illustration. Before any settlement had been reached, the trial

court had previously indicated that it would deny contested class certification due, among other things, to the fact that state law variations defeated predominance. But then a nationwide class settlement was reached, and for the trial court at least, these concerns disappeared. The trial court approved the nationwide class settlement without analyzing the choice of law issues and resulting state law variations as part of its predominance inquiry, reasoning that the settlement context mooted any such concerns. The Ninth Circuit vacated the class certification and settlement approval. A court may not justify its decision to certify a settlement class on the ground that the proposed settlement is fair to all putative class members. The Ninth Circuit then went on to echo the same concerns DRI had previously voiced about settlement class certification without predominance: Because the district court made clear that it would be unlikely to certify the same class for litigation purposes, the class representatives were well aware that they would be unlikely to succeed in any efforts to certify a nationwide litigation class. Hyundai and Kia knew that there was little risk that they would face a nationwide litigation class action if they did not reach a settlement agreement. Those are two separate inquiries. Both under the plain language of Rule 23 and under binding Supreme Court precedent, they cannot be collapsed into one. On remand, the district court will have to address predominance once again. It may well be asked to find the predominance requirement satisfied despite the state law variations. The argument would likely be that variation in state law is primarily a manageability problemâ€”one of the considerations that the court normally must examine in assessing predominance and superiority, but one which the Supreme Court said in Amchem is indeed mooted to a large degree in the settlement context. But the trial court will still have to show that despite variations in state law, there remain common issues that are capable of common, classwide answers within the meaning of Wal-Mart Stores, Inc. And holding courts and parties to that requirement is a good thing. Class certification should not be a judicial goal unto itself. Class actions are and should be a limited exception to the general rule that each individual litigant should have to prove his or her own claim on an individual day in court. The desire of a court to encourage settlement does not justify ignoring this fundamental due process limitation on the class action device. This case illustrates another practice pointer as well. As a defendant, if you think you might be interested in settling a class action, you would be well-advised to explore that before filing a motion to strike class allegations or an opposition to class certification. Otherwise, as happened here, your arguments against class certification may be quoted back at you by objectors to your later-proposed settlement.

Chapter 2 : Note on the Restatements of Contracts and the Uniform Commercial Code

Impossibility. A legal excuse or defense to an action for the breach of a contract; less frequently, a defense to a criminal charge of an attempted crime, such as attempted Robbery or murder.

Never intending to litigate, the settling parties--petitioners and the representatives of the plaintiff class described below--presented to the District Court a class action complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification. The complaint identifies nine lead plaintiffs, designating them and members of their families as representatives of a class comprised of all persons who had not previously sued any of the asbestos manufacturing companies that are petitioners in this suit, but who 1 had been exposed--occupationally or through the occupational exposure of a spouse or household member--to asbestos attributable to a petitioner, or 2 whose spouse or family member had been so exposed. Potentially hundreds of thousands, perhaps millions, of individuals may fit this description. All named plaintiffs alleged exposure; more than half of them alleged already manifested physical injuries; the others, so called "exposure only" claimants, alleged that they had not yet manifested any asbestos related condition. The complaint delineated no subclasses; all named plaintiffs were designated as representatives of the entire class. Pending the issuance of a final order, the District Court enjoined class members from separately pursuing asbestos suits in any federal or state court. Although the objectors maintained that the case was not justiciable and that the exposure only claimants lacked standing to sue, the Court of Appeals declined to reach these issues, reasoning that they would not exist but for the class certification. The court acknowledged that a class action may be certified for settlement only, but held that the certification requirements of Rule 23 must be met as if the case were going to be litigated, without taking the settlement into account. The court therefore ordered the class decertified. The class certification issues are dispositive here in that their resolution is logically antecedent to the existence of any Article III issues. Arizonans for Official English v. Its subdivisions a and b enumerate criteria that must be met for a class to be certified. Rule 23 b 3 was the most adventuresome innovation of the Amendments, permitting judgments for money that would bind all class members save those who opt out. To gain certification under Rule 23 b 3 , a class must satisfy the requirements of Rule 23 a , among them, that named class representatives will fairly and adequately protect class interests; the class must also meet the Rule 23 b 3 criteria that common questions "predominate over any questions affecting only individual members" and that class resolution be "superior to other available methods for the fair and efficient adjudication of the controversy. But the Third Circuit did not, in fact, ignore the settlement. Whether trial would present intractable management problems, see Rule 23 b 3 D , is not a consideration when settlement only certification is requested, for the proposal is that there be no trial. But other specifications of the rule designed to protect absentee class members by blocking unwarranted or overbroad class definitions are of vital importance in the settlement context, for the court in such a case will lack the opportunity to adjust the class as litigation unfolds. See Rule 23 c and d. And, of overriding importance, courts must be mindful that they are bound to enforce the rule as now composed, for Federal Rules may be amended only through the extensive deliberative process Congress prescribed. Second, if a Rule 23 e fairness inquiry controlled certification, eclipsing Rule 23 a and b , and permitting certification despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court would face a bargain proffered for its approval without benefit of adversarial investigation. The benefits asbestos exposed persons might gain from a grand scale compensation scheme is a matter fit for legislative consideration, but it is not pertinent to the predominance inquiry. In contrast, the Rule 23 e inquiry protects unnamed class members from unjust or unfair settlements agreed to by fainthearted or self interested class representatives; the Rule 23 e prescription was not designed to assure the class cohesion that legitimizes representative action in the first place. Although mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement, the Advisory Committee for the Rule 23 revision advised that such cases are ordinarily not appropriate for class treatment, and warned district courts to exercise caution when individual stakes are high and disparities among class

members great. The certification in this case does not follow the counsel of caution. That inquiry serves to uncover conflicts of interest between named parties and the class they seek to represent. See General Telephone Co. Representatives must be part of the class and possess the same interest and suffer the same injury as the class members. Motor Freight System, Inc. In this case, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure only plaintiffs in ensuring an ample, inflation protected fund for the future. Thus, the settling parties achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. The Third Circuit found no assurance here that the named parties operated under a proper understanding of their representational responsibilities. That assessment is on the mark. The Court recognizes, however, the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous as the class certified by the District Court. Congress, however, has not adopted such a solution. Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load the settling parties and the District Court heaped upon it.

Chapter 3 : 20th WCP: Kripkenstein: Rule and Indeterminacy

In contract law, impossibility is an excuse for the nonperformance of duties under a contract, based on a change in circumstances (or the discovery of preexisting circumstances), the nonoccurrence of which was an underlying assumption of the contract, that makes performance of the contract literally impossible.

Note that unanimity implies non-imposition. Non-dictatorship There is no individual, i whose strict preferences always prevail. Informal proof[edit] Based on two proofs [9] [10] appearing in Economic Theory. For simplicity we have presented all rankings as if ties are impossible. A complete proof taking possible ties into account is not essentially different from the one given here, except that one ought to say "not above" instead of "below" or "not below" instead of "above" in some cases. Full details are given in the original articles. We will prove that any social choice system respecting unrestricted domain, unanimity, and independence of irrelevant alternatives IIA is a dictatorship. The key idea is to identify a pivotal voter whose ballot swings the societal outcome. We then prove that this voter is a partial dictator in a specific technical sense, described below. Finally we conclude by showing that all of the partial dictators are the same person, hence this voter is a dictator. There is a "pivotal" voter for B over A[edit] Part one: The voter whose change results in B being ranked over A is the pivotal voter for B over A. Say there are three choices for society, call them A, B, and C. Suppose first that everyone prefers option B the least: By unanimity, society must also prefer both A and C to B. Call this situation profile 0. On the other hand, if everyone preferred B to everything else, then society would have to prefer B to everything else by unanimity. Now arrange all the voters in some arbitrary but fixed order, and for each i let profile i be the same as profile 0, but move B to the top of the ballots for voters 1 through i. So profile 1 has B at the top of the ballot for voter 1, but not for any of the others. Profile 2 has B at the top for voters 1 and 2, but no others, and so on. Since B eventually moves to the top of the societal preference, there must be some profile, number k, for which B moves above A in the societal rank. We call the voter whose ballot change causes this to happen the pivotal voter for B over A. Note that the pivotal voter for B over A is not, a priori , the same as the pivotal voter for A over B. In part three of the proof we will show that these do turn out to be the same. Also note that by IIA the same argument applies if profile 0 is any profile in which A is ranked above B by every voter, and the pivotal voter for B over A will still be voter k. We will use this observation below. The pivotal voter for B over A is a dictator for B over C[edit] In this part of the argument we refer to voter k, the pivotal voter for B over A, as pivotal voter for simplicity. That is, we show that no matter how the rest of society votes, if Pivotal Voter ranks B over C, then that is the societal outcome. Note again that the dictator for B over C is not a priori the same as that for C over B. In part three of the proof we will see that these turn out to be the same too. Switching A and B on the ballot of voter k causes the same switch to the societal outcome, by part one of the argument. Making any or all of the indicated switches to the other ballots has no effect on the outcome. To begin, suppose that the ballots are as follows: Every voter in segment one ranks B above C and C above A. Pivotal voter ranks A above B and B above C. Every voter in segment two ranks A above B and B above C. Then by the argument in part one and the last observation in that part , the societal outcome must rank A above B. Furthermore, by unanimity the societal outcome must rank B above C. Therefore, we know the outcome in this case completely. Now suppose that pivotal voter moves B above A, but keeps C in the same position and imagine that any number or all! Then aside from a repositioning of C this is the same as profile k from part one and hence the societal outcome ranks B above A. In particular, the societal outcome ranks B above C, even though Pivotal Voter may have been the only voter to rank B above C. By IIA, this conclusion holds independently of how A is positioned on the ballots, so pivotal voter is a dictator for B over C. There can be at most one dictator[edit] Part three: Since voter k is the dictator for B over C, the pivotal voter for B over C must appear among the first k voters. That is, outside of segment two. Likewise, the pivotal voter for C over B must appear among voters k through N. That is, outside of Segment One. In this part of the argument we refer back to the original ordering of voters, and compare the positions of the different pivotal voters identified by applying parts one and two to the other pairs of candidates. First, the pivotal voter for B over C must appear earlier or at the same position in

the line than the dictator for B over C: Likewise, reversing the roles of B and C, the pivotal voter for C over B must be at or later in line than the dictator for B over C. This voter is the dictator for the whole election. Various theorists have suggested weakening the IIA criterion as a way out of the paradox. Proponents of ranked voting methods contend that the IIA is an unreasonably strong criterion. It is the one breached in most useful electoral systems. Advocates of this position point out that failure of the standard IIA criterion is trivially implied by the possibility of cyclic preferences. If voters cast ballots as follows: In this circumstance, any aggregation rule that satisfies the very basic majoritarian requirement that a candidate who receives a majority of votes must win the election, will fail the IIA criterion, if social preference is required to be transitive or acyclic. To see this, suppose that such a rule satisfies IIA. Thus a cycle is generated, which contradicts the assumption that social preference is transitive. Scalar rankings from a vector of attributes and the IIA property[edit] The IIA property might not be satisfied in human decision-making of realistic complexity because the scalar preference ranking is effectively derived from the weightingâ€”not usually explicitâ€”of a vector of attributes one book dealing with the Arrow theorem invites the reader to consider the related problem of creating a scalar measure for the track and field decathlon eventâ€”e. Edward MacNeal discusses this sensitivity problem with respect to the ranking of "most livable city" in the chapter "Surveys" of his book MathSemantics: These investigations can be divided into the following two: Approaches investigating functions of preference profiles[edit] This section includes approaches that deal with aggregation rules functions that map each preference profile into a social preference , and other functions, such as functions that map each preference profile into an alternative. Since these two approaches often overlap, we discuss them at the same time. What is characteristic of these approaches is that they investigate various possibilities by eliminating or weakening or replacing one or more conditions criteria that Arrow imposed. Infinitely many individuals[edit] Several theorists e. However, such aggregation rules are practically of limited interest, since they are based on ultrafilters , highly non-constructive mathematical objects. In particular, Kirman and Sondermann argue that there is an "invisible dictator" behind such a rule. Why is there such a sharp difference between the case of less than three alternatives and that of at least three alternatives? It establishes that if the number of alternatives is less than a certain integer called the Nakamura number , then the rule in question will identify "best" alternatives without any problem; if the number of alternatives is greater or equal to the Nakamura number, then the rule will not always work, since for some profile a voting paradox a cycle such as alternative A socially preferred to alternative B, B to C, and C to A will arise. Thus, whenever more than two alternatives should be put to the test, it seems very tempting to use a mechanism that pairs them and votes by pairs. As tempting as this mechanism seems at first glance, it is generally far from satisfying even Pareto efficiency , not to mention IIA. The specific order by which the pairs are decided strongly influences the outcome. This is not necessarily a bad feature of the mechanism. Many sports use the tournament mechanismâ€”essentially a pairing mechanismâ€”to choose a winner. This gives considerable opportunity for weaker teams to win, thus adding interest and tension throughout the tournament. This means that the person controlling the order by which the choices are paired the agenda maker has great control over the outcome. Domain restrictions[edit] Another approach is relaxing the universality condition, which means restricting the domain of aggregation rules. The best-known result along this line assumes "single peaked" preferences. Suppose that there is some predetermined linear ordering of the alternative set. For example, if voters were voting on where to set the volume for music, it would be reasonable to assume that each voter had their own ideal volume preference and that as the volume got progressively too loud or too quiet they would be increasingly dissatisfied. If the domain is restricted to profiles in which every individual has a single peaked preference with respect to the linear ordering, then simple [19] aggregation rules, which includes majority rule, have an acyclic defined below social preference, hence "best" alternatives. Under single-peaked preferences, the majority rule is in some respects the most natural voting mechanism. One can define the notion of "single-peaked" preferences on higher-dimensional sets of alternatives. However, one can identify the "median" of the peaks only in exceptional cases. If we impose neutrality equal treatment of alternatives on such rules, however, there exists an individual who has a "veto". So the possibility provided by this approach is also very limited.

Chapter 4 : SAGE Books - The Impossibility of Settled Rule

In , the Rule 23 Subcommittee to the Advisory Committee on Civil Rules floated the idea of amending Rule 23 to eliminate the predominance requirement for class certification in the settlement context.

Thus, this indeterminacy is only logically possible or hypothetical. A community cannot agree on arbitrary rules and rules other than some highly selected ones cannot bind a community together. What a community agree or disagree is not an arbitrary game. The topic is difficult and the presentation seems to inherit some characteristics of the original work, which "is not presented in the form of a deductive argument with definitive theses as conclusions, Kripke tells the reader: We find that a reciprocal reading helps me to understand and absorb the main points and arguments. It is meaningless to talk about rules for a single person in isolation. Wittgenstein solution of private language does not allow us to speak whether a single individual in isolation follows rules or not. Agreement is essential for our game of ascribing rules and concepts to each other. Form of life is about how activities are organized in a community. The commercial and trade activity in a community requires accounting and calculations. Criteria sets up standards to check and make judgment on whether a subject follows a specific rules or not. The way they check this, in general, "a primitive part of the language game" Kripke, , p. Special problem arises for individual sensations, which is not available to the public. In such a sense, it is impossible to find necessary and sufficient truth conditions for following rules, without winding up blindly or circularly. Since rules are based upon a collective agreement, the notion of a rule as guiding a single person in isolation who adopts it can have no substantive content. Only a sceptic lived on the island. I did not know where he was from. He, like any sceptics, doubts about everything and was even more bizarre. Following was a piece of conversation between us. Your answer must satisfy two conditions: How do you justify your decimal system? First time I keep introducing new rules to explain previous rules. Finally I have to agreed that I have no more new rules as explanations and I accept that I act unhesitatingly but blindly. My rule of carry can be proved by counting. Do you agree that those hypotheses are not a priori, logically impossible? For example, your hand calculator has maximum 8 digits, and any sum above 99,, it always gives 99,, as the answer. Our life time is limited, but we need to prove your usage for infinite pair of numbers. He showed me a photo of a wood structure with a rectangular board and four legs less than a foot tall. I have never seen such things before. My past usage and my inclination have no facts at all that give guide to my new usage. I try to follow my past usage anyway. It is a bench, not a table. I have to emphasize that I am not even sure about your concept, even though you have given me a definite answer. You may have made a mistake under some whim or fatigue of your exhausting adventure, but you are thinking that you are still following the same rule as usual. I have to say I am using the simplest concepts. You are talking about the principle of simplicity. No unique answer to the question of simplicity. I realized that, without the consensus of my community, I am not so sure about a particular usage of a word and nothing tells me what I ought to do in each new instance. I have no either facts nor truth conditions corresponding to my inclination of following a specific rule. What I can say is whatever is going to seem right to me is right. This is the only proof, a viciously circular one, of my usage of concepts I can give. Quine sees the philosophy of language within a framework of behaviorism , he thinks of problems about meaning as problems of disposition to behavior. Quine bases his argument from the outset on behavioristic premises. These are distinct hypotheses. As an isolated person, he would never aware of his usage, even though a new issue arises. Imagine the community makes a rule that only one of the translation manual is allowed and every member in the community must follow this manual not the other. But this circle is a virtuous one. Goodman seems to mixes up two different processes, confirming process and application process, in his claim of a virtue circle. In the confirming process, we start with empirical facts as premises and apply the deduction rules to get inferences. Those inferences are empirically verifiable. The application process starts with a empirical fact, then apply the deduction rule to get an inference which is not verifiable or we do not want to verify empirically. We take the inference as a valid result of the deduction process. These two processes are different and can be differentiated. There are some cases, the two processes are entangled each other. For example, modern particle

physics makes assumptions about quarks based on existing empirical data, and then goes through a long deduction processes to get some observable inferences. Empirical verification of the inferences become crucial evidences of the hypothesis of quarks. If the empirical facts do not agree with the inferences, should we reject deduction rules or the hypothesis? In practice of science, the hypothesis is normally rejected and save the key component of the core of the science paradigm, deduction. If the empirical facts do agree with the inferences, do we accept the existence of quarks? Objections have been raise to an answer of yes. Supposing we have the rigid inductive rules as deductive and the rules to generate all the valid assumptions, does it mean that a super-computer can induce and deduce all the knowledge for us? Does it means that we can predict the future with certainty? Do we still need creativity? The answer seems to me, we would never have such rules for induction in the same sense for deduction. Induction controls the interface between human mind and the external world and deduction is a process inside the mind. External world presents itself in time and expanding space. Control of the channel between the mind and external world needs to be loosen up, not tighten up. Induction is creative activity and open ended. Creativity should be allowed leap from any possible world to another. Many creative ideas are regarded as odd or crazy ideas. Similarity exists between every thing to every thing, even though we do not have empirical proof of them. Creativity is the link between them. It is not that we have too many bad hypothesis; on the contrary, it is that we need to break the limit of our imagination and we need more creative hypotheses. By definition, such another form of life would be bizarre and incomprehensible to us. History has shown that the societies adopts particular rules may be unstable and eventually destroy themselves. Furthermore, agreement is only a half truth of a community and disagreement is the other half of the story. A community, even a family, in an absolute harmony is only a dream. In many cases, a community cannot reach an agreement and results in social conflict, even civil war. Examples are abortion, homosexual, social benefit, and even scientific believes. If what we agree on are brute facts, then what we disagree on are brute facts too. However, many conflicts on scientific and social issues have reasons, either natural or social, and some of the issues can be explained. What a community agrees or disagrees is not an arbitrary game. Human community can be so divided that the agreement is impossible to be reached between two sides, for example, those who supported either vitalism or physicalism on the basic scientific rules of life. The final settlement of the issue is the new discovery of facts on nature. It is not that it is the rule because we agree on, but we agree on it because it is supported by nature. For this example, the causal relation is irreversible. Rather we play a language game that allows us to attribute such a causal power to some phenomena as long as the regularity holds up. The regularity must be taken as a brute fact. Is linguistic grammar a brute facts or explainable based on science? Which rule is correct can be verified by the information coded on human gene. Chomsky claims that eventually brain science will discovery the information physically encoded in human brain. If so, it is not because language rules are brute facts, but because of new discovery of empirical facts. Acknowledgments The author is grateful to Professor Philip L. Peterson, Syracuse University, for his many comments and remarks on this paper. It turns out that the sceptical solution does not allow us to speak of a single individual, considered by himself and in isolation, as ever meaning anything. The members of the community respond unhesitatingly to the question what it is, when they are asked in front of the metal. However, different divisions of linguistic labor do have some different aspects of form of life. Therefore, their rules and usage have subtle differences.

Chapter 5 : Amchem Products, Inc. v. Windsor, racedaydvl.com , racedaydvl.com2d ().

SUPERVENING IMPOSSIBILITY OF PERFORMING CONDITIONS PRECEDENT The life history of a contract may be outlined as follows: First, preliminary inquiries and negotiations wholly inoperative as to legal.*

Student Loan Debt Settlements Advertisement This page discusses debt settlement for defaulted federal student loans. The US Department of Education has very strong powers to compel payment of defaulted student loans, including garnishment of wages and Social Security benefits, income tax refund offset and blocking renewal of professional licenses. Federal student loans cannot generally be discharged in bankruptcy unless the borrower can demonstrate undue hardship in an adversary proceeding. The availability of income-based repayment, which reduces the loan payments to an affordable level, makes bankruptcy discharge of federal student loans very rare. But the US Department of Education does occasionally settle debt for less than what is owed. Consider Income-Based Repayment First If all you want is an affordable repayment plan, ask about income-based repayment. To obtain income-based repayment, you may need to rehabilitate your loans first. This may mean paying a higher monthly payment for 9 months before being able to switch to income-based repayment. The monthly payment under income-based repayment is lower than the monthly payment under administrative wage garnishment for low and moderate-income borrowers and for borrowers with larger families. But even so the income-based repayment amount will usually be lower than the wage garnishment amount. It is not unusual for there to be mistakes that increase the amount owed slightly. The most common errors involve incorrect calculations of interest or collection charges e. Look for errors especially at transitions or status changes. Nature of the Settlement A settlement is a settlement, not a new payment plan. When seeking a settlement, offer a lump sum payment for satisfaction of the debt in full. The US Department of Education will want to receive full payment of the settlement amount within a single fiscal year. In most cases the US Department of Education will want the settlement to be paid in full within 90 days of the date of the settlement offer. In some cases the US Department of Education will allow a defaulted borrower to pay part of the settlement amount in monthly installments, but these installments will generally be paid within the same fiscal year. It will also not settle any debts for which a judgment was obtained against the borrower except in the most unusual circumstances. Settlements are almost always for much greater amounts. The US Department of Education is also unlikely to settle debts at less than the current recovery rate. The recovery rate is the percentage of disbursements on defaulted loans that are recovered and includes interest and penalties in addition to the payments toward the principal balance. The US Department of Education reports a This does not mean that the government recovers more than is owed, as some defaulted borrowers assume, since interest continues to accrue even after the loan is in default. To set the recovery rate in context, total payments on a 6. They may be willing to accept less if the default was very recent. The US Department of Education will also consider how much they will be able to recover without a settlement by considering the cash flow they have been receiving from wage garnishment and offsets of income tax refunds. They will seek a settlement offer that is at least the net present value of all the future payments they expect to receive from the defaulted borrower. This suggests that a borrower would be best to argue for a settlement based on the impossibility of ever paying back the full amount even with wage garnishment and the withholding of income tax refunds. A good starting point for a settlement negotiation is to offer to split the difference between the current amount owed and the amount of the original default claim. The private collection agencies used by the US Department of Education have the authority to accept three types of standard settlements without prior US Department of Education approval: If the borrower offers less than these standard compromises, the collection agency must seek US Department of Education approval. The collection agencies also have the authority to offer a handful of non-standard compromises to borrowers each quarter. The number of such nonstandard settlements per quarter is at most 6. Such settlement offers are initiated by the collection agency, not the borrower, and do not need to be approved by the US Department of Education. However, the collection agency is required to compensate the US Department of Education for the difference from the net amount the US Department of Education would have recovered under one of the three standard settlements. In effect, the

collection agency is forgoing all or part of its commission or in some cases, taking a net loss. Such nonstandard compromises are used only in the most exceptional circumstances and are extremely rare. In almost all cases the collection agency will seek approval from the US Department of Education in order to preserve its commission. Get the Settlement Offer in Writing Before you agree to the settlement or make any payments, get the offer in writing. Make sure that the settlement indicates that it will satisfy all the debts in full. In some cases borrowers thought they were settling a loan in full, but were lied to by a collection agency who applied the payments to the debt without settling it. Or the borrower had both private and federal loans with the same lender and the lender settled just the private student loans, not the federal loans. After you make all required payments as part of the settlement offer, you should receive a "paid in full" statement. If you do not receive such a statement, then the debt might not have been fully satisfied. The most common cause is a reversal of a prior payment, such as an injured spouse claim on an income tax refund offset. The borrower must make up the difference before the settlement will be effective. It is important to have the settlement agreement in writing and a paid in full statement, since the unpaid portion of a settled debt can sometimes resurrect itself years later. If you have signed paperwork, it makes it much easier to prove that the debt was settled in full. Who to Call Start by calling the current holder of the loans. When talking with the collection agency, keep in mind that they have a financial incentive to extract as large a settlement as possible, since they operate on commission. They may try for a larger settlement even though they have the authority to agree to a lower settlement. They may be focused more on collecting their commission than on reaching a reasonable settlement. You will need to be firm and repeat yourself multiple times. Also keep in mind that if you are asking for a non-standard settlement, they will have to get approval from the US Department of Education before agreeing to the lower settlement amount. Finally, remember that the collection agency has more experience than you in negotiating settlements. The collection agency will not make or consider an offer to settle the account until after they have discussed your ability to repay the debt. The collection agency may ask for proof of your inability to pay the full amount owed, such as pay stubs or a recent unemployment benefits letter , tax returns, W-2s, s and bank account statements. You are not required to report an inheritance or other windfall that you have not yet received unless you are asked about pending inheritances. But if you have already received the money, it may affect the amount they offer as a settlement. If you are getting nowhere with the collection agency e. You can also try calling the FSA Ombudsman at or sending email to fsaombudsmanoffice ed. The FSA Ombudsman is not involved in negotiating settlement amounts, but sometimes they can help clarify a situation. US Department of Education rules bans private collection agencies from using harassment, intimidation or false and misleading representations to collect an account. If a borrower exercises their rights against a collection agency under the FDCPA, the US Department of Education will recall the account from the collection agency and either collect it itself or assign it to a different collection agency. The US Department of Education may also recall the account if a borrower makes a complaint against a collection agency but does not exercise their rights under the FDCPA. How to Pay Clearly, most defaulted borrowers are not in a position to negotiate a settlement because they lack the means to pay a settlement. However, sometimes defaulted borrowers can obtain a loan from friends and family e. Offsets of federal income tax refunds can count as part of the settlement payment if they occur after the date of the settlement offer and before the day deadline for paying the settlement amount. Offsets that post after the settlement is paid in full will be refunded to the borrower. Generally it takes weeks after an account is settled in full before the US Department of Education notifies the US Treasury to halt the offset of future federal income tax refunds.

Chapter 6 : Law: When can 'impossibility of performance' be used as a defense?

IMPOSSIBILITY OF PERFORMANCE OF CONTRACTS 31 In America the rule was applied with the same absurd results in a number of cases.8 A good illustration is the case of West v.

The Code draftsmen had lived during a period of stable or declining prices. As every draftsman knows, however, whatever formula he comes up with will run the gauntlet of litigation on states of facts he never dreamed of. The buyer naturally insists that the seller continue deliveries, no matter how many hundreds of millions the seller may lose. In the s Westinghouse, which had gone into the business of manufacturing nuclear power plants, offered to supply the buyers of its plants with uranium at fixed prices over long terms of years. Many such contracts were entered into with various utilities. Westinghouse did not attempt to protect itself by stockpiling uranium. During the late s the market price of uranium increased five-fold, principally as the result of the operations of an international cartel. The utilities brought suit against Westinghouse. Instead, he urged the parties to arrive at out-of-court settlements and pursued his settlement policy with extraordinary diligence. Eventually the utilities agreed to settlements on terms relatively favorable to Westinghouse. Those associated with the Chicago School, while disagreeing among themselves on details, have generally supported the conclusion that sellers should be denied any relief either discharge or a price adjustment and ordered either to perform their contracts or pay full compensatory damages for breach. They argue that the seller is the superior risk bearer, that the allocation of the risk of price increase to the seller is "efficient," and that the adoption by the courts of such a rule of liability would lead to more rational bargaining between the parties at the outset. An Economic Analysis, 6 J. He suggests that the parties be urged or even pressured as the trial judge in the Westinghouse litigation may have done to bargain in good faith about readjustments of their deal in the light of changed circumstances. Failure to bargain in good faith could lead to penalties, to be devised by the courts. Judicial intervention to reform the contract on equitable principles by granting a price adjustment as was done in Aluminum Co. In his discussion of the Aluminum Co. The contract involved in that case included an elaborate price index, but it did not cover the rise in the cost of electricity that was specifically at issue in that litigation. Recent examples of such "conditional decrees" have been, as he notes, "infrequent" Speidel, supra page , at , n. See the materials in Chapter 3, Section Do you think that the two sections should have been combined and rewritten at least with respect to discharge or excuse? What would you think of a rule under which buyers can get out of their long-term contracts when prices fall during a depression but sellers continue to be bound by their long-term contracts when prices rise during a period of inflation?

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supervening impossibility of performance as a defense.r-the ever in- creasing tenseness in international relations, fomented by internal strife, and aggravated by international animosities, may soon eventuate in armed con-.

AC CA Now the remaining condition can be stated: Independence of Irrelevant Alternatives I: For example, consider the profile: Suppose the domain of a social welfare function includes both of these profiles. Some voting methods do not satisfy I see Section 5. Suppose there are more than two alternatives. See among many other works Kelly , Campbell and Kelly , Geanakoplos and Gaertner for variants and different proofs. Apparently, they ask of an aggregation procedure only that it will come up with a social preference ordering no matter what everybody prefers U and SO , that it will resemble certain democratic arrangements in some ways WP and I , and that it will not resemble certain undemocratic arrangements in another way D. Taken together, though, these conditions exclude all possibility of deriving social preferences. It is time to consider them more closely. To impose U, on his epistemic rationale, amounts to assuming that they might have any preferences at all: Arrow wrote in support of U: If we do not wish to require any prior knowledge of the tastes of individuals before specifying our social welfare function, that function will have to be defined for every logically possible set of individual orderings. It does nothing of the sort. What it requires is that the social welfare function can handle the widest possible range of preferences among whichever alternatives there are to choose among, and whether there happen to be many of these or only a few of them is beside the point: Then, it might be thought, variety among the alternatives to which the labels can be attached will generate variety among the profiles that an aggregation procedure might be expected to handle. It does not seem to have been explored in the literature. These versions, being more informative, are, from a logical point of view, better. U is simpler to state than their domain conditions, though, and might be found more intuitive. Notice that the weaker domain conditions still require a lot of variety among profiles. A typical proof of an Arrow-style impossibility theorem requires that the domain is unrestricted with respect to some three alternatives. In this case there is always a preference profile like the one implicated in the paradox of voting in Section 1 , from which pairwise majority decision derives a cycle. Whether it is sensible to impose U or any other domain condition on a social welfare function depends very much on the particulars of the choice problem being studied. Sometimes, in the nature of the alternatives under consideration, and the way in which individual preferences among them are determined, imposing U certainly is not appropriate. If for instance the alternatives are different ways of dividing up a pie among some people, and it is known prior to selecting a social welfare function that these people are selfish, each caring only about the size of his own piece, then it makes no obvious sense to require of a suitable function that it can handle cases in which some people prefer to have less for themselves than to have more. The social welfare function will never be called on to handle such cases for the simple reason that they will never arise. Arrow made this point as follows: If this be the case, we should only require that our social welfare function be defined for those sets of individual orderings which are of the type described; only such should be admissible Arrow []: Intuitively, the result has to be a ranking of the alternatives from better to worse, perhaps with ties. There is never to be a cycle of social preferences, like the one derived by pairwise majority decision in the paradox of voting, in Section 1. Arrow did not state SO as a separate condition. Criticized by Buchanan for transferring properties of individual choice to collective choice, Arrow in the second edition of Social Choice and Individual Values gave a different rationale. There he argued that transitivity is important because it ensures that collective choices are independent of the path taken to them Arrow []: He did not develop this idea further. Charles Plott elaborated a suitable notion of path independence. Suppose we arrive at our choice by what he called divide and conquer: Then we gather together all the alternatives that we have chosen from the smaller sets, and we choose again from among these. There are many ways of making the initial division, and a choice procedure is said to be path independent if the choice we arrive at in the end is independent of which division we start with Plott Consider again the paradox of voting of Section 1. The full strength of SO is not needed to secure path independence of choice. It is sufficient that social preference is a complete and quasi-transitive relation,

having a strict component that is transitive but an indifference component that, perhaps, is not transitive. Its unattractiveness was no accident. There has in every case to be some group of individuals, the oligarchs, such that the society always strictly prefers one alternative to another if all of the oligarchs strictly prefer it, but never does so if that would go against the strict preference of any oligarch. This has long been a basic assumption in welfare economics and might seem completely uncontroversial. But WP is not as harmless as it might seem, and in combination with U it tightly constrains the possibilities for social choice. For further discussion, see the entry social choice theory. We may think of WP as a vestige of what Sen called: The judgement of the relative goodness of alternative states of affairs must be based exclusively on, and taken as an increasing function of, the respective collections of individual utilities in these states Sen Sen argued that even these limited demands might be found excessive on moral grounds Sen The preferences of people other than the dictator can still make a difference, and so can non-welfare factors, but only when the dictator is indifferent between two alternatives, having no strict preference one way or the other. Plainly it rules out many undemocratic arrangements, such as identifying social preferences in every case with the individual preferences of some one person. This apparently straightforward condition has attracted very little attention in the literature. In fact there is more to the non-dictatorship condition than meets the eye. Aanund Hylland once made a related point while objecting to the unreflective imposition of D in single profile analyses of social choice: In the single-profile model, a dictator is a person whose individual preferences coincide with the social ones in the one and only profile under consideration. Nothing is necessarily wrong with that; the decision process can be perfectly democratic, and one person simply turns out to be on the winning side on all issues. He has no tastes, values or preferences of his own but temporarily takes on those of another, whoever is close at hand. He is a human chameleon, the ultimate conformist. In each admissible profile, two of the three individual orderings are identical: But of course really Zelig is a follower, not a leader, and majority voting is as democratic as can be. Arrow imposed D in conjunction with the requirement U that the domain is completely unrestricted. Perhaps this condition expresses something closer to its intended meaning then. However this may be, the example of Zelig shows that whether it is appropriate to impose D on social welfare functions depends on the details of the choice problem at hand. The name of this condition is misleading. Speaking figuratively, what this means is that when the social welfare function goes about the work of aggregating individual orderings, it has to take each pair of alternatives separately, paying no attention to preferences for alternatives other than them. Some aggregation procedures work this way. Pairwise majority decision does: It is a simpler one that has since become the standard in expositions of the impossibility theorem. Independence of Irrelevant Alternatives choice version: The stronger universal reading is needed for an impossibility theorem, though, so it must be what Arrow intended. The universal reading secures equivalence to I. Iain McClean finds a first statement of Independence, and appreciation of its significance, already in Condorcet Meanwhile much controversy has surrounded this condition, and not a little confusion. Some of each can be traced to an example with which Arrow sought to motivate it. Evidently Arrow took this for his choice version of the independence condition. Alternatively stated, if we consider two sets of individual orderings such that, for each individual, his ordering of those particular alternatives in a given environment is the same each time, then we require that the choice made by society from that environment be the same when individual values are given by the first set of orderings as they are when given by the second Arrow []: It is not clear why Arrow thought the case of the dead candidate involves different values and preference profiles. There has been much discussion of this point in the literature. Hansson argues that Arrow confused his independence condition for another; compare Bordes and Tideman for a contrary view. For discussion of several notions of independence whose differences have not always been appreciated, see Ray The following condition has also been called Independence of Irrelevant Alternatives: Now suppose we favor reform if it is generally thought that change will be for the better, but not otherwise. Independence of Irrelevant Alternatives might be said to require that the social comparison among any given pair of alternatives, say social states, depends only on individual preferences among this pair. This is correct but it leaves some room for misunderstanding. I says that the only preferences that count are those concerning just these two social states. And, indeed, as far as I is concerned, non-welfare features of the two states may also make a difference. The

doctrine that individual preferences are the only basis for comparing the goodness of social states is welfarism mentioned already in Section 4. An example illustrates how nasty it can be: Would it be better to take from Peter and give to Paul? This is one case. Compare it to another. This time, though, their fortunes are reversed. Whatever we think about taking from the rich to give to the poor, though, taking from the poor to give to the rich is quite another thing. Condition I does not express welfarism. The condition that expresses welfarism is: SN is more demanding than I. SN also requires this, but in addition it requires consistency as we go from one pair to the next, whether that is within a single profile or among several different ones. This is how SN keeps non-welfare features from making any difference: Such a theorem will be less interesting, thoughâ€”not only because it is logically weaker but also because, as we have seen, these more demanding conditions often are unreasonable.

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SUPERVENING IMPOSSIBILITY OF PERFORMING CONDITIONS PRECEDENT IN THE LAW OF NEGOTIABLE PAPER To discuss conditions 1 with reference to negotiable paper is to inÂ- volve the discussion in apparent self-contradictionat the outset, unless it.*

Chapter 9 : Arrow's impossibility theorem - Wikipedia

Kenneth Arrow's "impossibility" theoremâ€”or "general possibility" theorem, as he called itâ€”answers a very basic question in the theory of collective decision-making.