part by Canadian or British or Japanese or other foreign companies? We can find no good answer to the question.

Regardless, even where nations agree about primary conduct, say price fixing, they disagree dramatically about appropriate remedies. The application, for example, of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy. And several foreign nations have filed briefs here arguing that to apply our remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody.

Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America's antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.

* * *

Topics for Further Discussion

1. Suppose Empagran had used its U.S. subsidiary to buy the over-priced vitamins in the U.S. and then ship them to Ecuador. Could Empagran sue under U.S. antitrust laws? How about Empagran's U.S. subsidiary?

2. Would the U.S. have jurisdiction if the top three Japanese automakers were to conspire in Tokyo to fix the price of their new cars in the U.S.?

Bankruptcy

Historical Background

The United States has sometimes been viewed as a country that is "pro-bankruptcy" for a number of reasons. First, it has long been a country of fresh starts. In the beginning, immigrants leaving the Old World could start with a clean record in America. Later on, merchants who failed on the East Coast could start again in the frontier towns of the West. Bankruptcy laws have been a part of U.S. culture since Congress was given the exclusive power to create such laws by the Constitution. Unlike many other industrialized countries, the United States has historically tried to make it relatively easy for debtors to pay off their creditors fairly, erase their debts, and attempt to recreate their fortunes without further persecution by creditors or lasting damage to the debtor's social relations. For much of U.S. history, creditors were located in the major cities while debtors were farmers and ranchers located in the Midwest and West. Many of the frontier states strongly distrusted creditors in far-away cities; some states have provisions in their state constitution requiring debtors to be allowed to keep their homestead, their horse (or automobile), their tools of trade, professional books, clothing, disability and pension payments, etc. State exemptions from seizure by creditors remain to this day, even if the "homestead" is not a wooden hut without running water but a $25 million estate along the Florida seashore. U.S. bankruptcy laws still generally forbid involuntary bankruptcy petitions against individual farmers.

Second, the American economy believes in risk taking, and the ability to fail is a necessary part of risk taking. An entrepreneur can create a start-up corporation, solicit funding, try to grow rich, and, if the entrepreneur fails, have the corporation declare bankruptcy. An honest entrepreneur can walk away to start another corporation and try again, perhaps with better luck. In contrast, other societies may require the entrepreneur to take social responsibility for business failures. In some other countries, the corporate executive whose company goes bankrupt must hide from society, or, in extreme cases, may feel compelled to commit suicide to make up for failing to pay his debts. Social exiles and dead entrepreneurs do not found new companies.

Finally, in the United States there exist financial services companies willing to lend to recently bankrupt debtors after compensating themselves for the higher risk by taking more security and charging higher interest rates. As explained below, bankruptcy law encourages this practice by protecting the debtor during the bankruptcy proceeding and discharging many pre-bankruptcy debts and allowing businesses and individuals a fresh start. Although a record of bankruptcy remains on a debtor's credit file for ten years, it is rare that an individual or corporate debtor has to wait that long for new credit.

Bankruptcy Law — Source and Organization

In the United States, bankruptcy law is exclusively federal law, the U.S. Bankruptcy Code ("Bankruptcy Code"). The Bankruptcy Code covers both liquidations and reorganizations. "Chapter 7" bankruptcies are liquidations, i.e., the debtor's assets are liquidated, the proceeds are divided among creditors, and the debtor is discharged. A Chapter 7 bankruptcy usually means the end of a corporation. A "Chapter 11" bankruptcy, on the other hand, allows the corporation to be reorganized and continue if that is acceptable to creditors.

A traditional definition of "insolvent" is "being unable to pay one's debts in the usual course of business." However, the U.S. Bankruptcy Code definition of "insolvent" for a person or private corporation is "a financial condition such that the sum of . . . debts is greater than all . . . property." In recent years, however, businesses in the United States have used bankruptcy proceedings to rid themselves of liabilities without necessarily being short of cash. For example, corporations have declared bankruptcy to rid themselves of huge potential tort liabilities (discussed in Chapter 7), such as claims by victims of asbestos inhalation from the company's products. Airlines have filed for bankruptcy to get rid of expensive contracts with union-wage employees. The United States allows these and other companies to "restructure" using the Bankruptcy Code on the theory that it is better for the economy to allow a company to reduce its liabilities and stay in business than to go out of business completely.

The Bankruptcy Code contains special provisions for certain types of businesses and municipal governments, but the discussion that follows applies generally (unless indicated) to corporations. A bankruptcy case begins with the filing of a petition in the federal district court with jurisdiction over the debtor. The Bankruptcy Code provides that federal district courts have original and exclusive jurisdiction over bankruptcy cases, and original, but not exclusive, jurisdiction over civil cases related to the bankruptcy proceedings. Federal district courts also have exclusive jurisdiction over the debtor's property, and the exclusive right to issue a final order or judgment in the bankruptcy case. The actual hearing of bankruptcy cases is handled by a "bankruptcy court" staffed by federal bankruptcy judges under the jurisdiction of the federal district court. Bankruptcy cases can be appealed like any other judgment to the circuit court that hears appeals from the district court.

The great majority of bankruptcy cases are voluntary, meaning that they are started by the debtor. Any debtor, whether insolvent or not, may file a voluntary petition for bankruptcy. The petition must list all creditors, all property the debtor owns, all property that the debtor claims is exempt from being divided up among creditors, and a statement of the debtor's financial situation. An involuntary bankruptcy petition is also permitted under the Bankruptcy Code if the relevant requirements are satisfied.

The Bankruptcy Setting

The filing of a bankruptcy petition, whether voluntary or involuntary, operates as an "automatic stay" against creditors. This means that, from the moment the bankruptcy petition is accepted, a creditor cannot recover property from the debtor, enforce judgments against the debtor, or otherwise try to get payment or security for the debt except through bankruptcy proceedings. Any creditor that violates the stay can be ordered by the bankruptcy court to undo its action and to pay fines and any damages, as well as attorneys' fees and court costs. The automatic stay stops a race by creditors to grab the debtor's assets and forces all creditors into working out their claims at the bankruptcy court.

The property of the debtor is called the bankruptcy "estate." It includes all property, assets, and valuable rights of the debtor that are not subject to exemption. It also includes property the debtor receives within 180 days after filing the petition as a result of inheritance, property settlement, a divorce settlement, or property the debtor gains as the beneficiary of a life insurance policy. As discussed below, it also includes any assets or valuable rights that the trustee can bring into the estate. The bankruptcy court will select a trustee by vote of creditors in a Chapter 7 proceeding, and may, in certain unusual cases, name a trustee in a Chapter 11 proceeding.

Chapter 7 Bankruptcies

The bankruptcy trustee has a variety of duties and broad powers to carry out those duties. Trustees are, on the one hand, supervised by the bankruptcy judge and ultimately the federal district court. On the other hand, trustees are usually compensated based on a percentage of the value of the bankruptcy estate. Expenses of administration of the debtor's estate are paid before the claims of creditors without security (collateral) for their debts. With the stick of federal court supervision on one side, and the carrot of a percentage of asset value on the other side, trustees are usually strongly motivated to increase the bankruptcy estate. The trustee must make a list of the property of the estate without including property subject to exemptions. The trustee must also receive a proof of claim from each creditor, or file such proof on behalf of a creditor, because only creditor claims that have been proven to a bankruptcy court will be paid in a bankruptcy proceeding.

The trustee has the power to manage the estate. This includes using, selling, or renting property in the estate; employing professional advisors and agents; and investing or depositing money for the estate. The trustee also has the power to accept or reject any contract made by the debtor that has not been fully performed, and any lease signed by the debtor that has not expired. The trustee is also "subrogated" to the debtor's rights under any existing contract. This means that the trustee can use any rights the debtor had to collect payment. For example, if the debtor was a guarantor of A's debt to B and the debtor had to pay B because A failed to pay, the trustee can use the debtor's right of subrogation to sue A for repayment.

A Chapter 7 trustee will make a final report of the administration of the estate and a proposed plan for paying creditors at least some of the money they are owed, according to the order for distribution of assets specified by the Bankruptcy Code. The creditors may accept the trustee's recommendation, work as a committee of creditors to have the recommendation modified, or appeal to the bankruptcy court or, ultimately, to the federal court system to have the plan modified. If the plan is accepted, the bankruptcy court will order the debtor discharged, meaning legally relieved of all debts before the date of the bankruptcy discharge. A few kinds of debts cannot be discharged in bankruptcy. The major categories of debts that cannot be discharged in bankruptcy are taxes and fines due to the government; unlisted debts; debts due to criminal activity; and, for individuals, student loans, child support, and certain consumer loans made within sixty days of discharge.

Chapter 11 Bankruptcies

One often hears that a business is "in Chapter 11," meaning that it is reorganizing under Chapter 11 of the Bankruptcy Code. Once a bankruptcy petition requesting Chapter 11 status has been filed by an eligible debtor, a committee of unsecured creditors, and possibly other creditors, is appointed by the court. The committee may investigate the debtor's finances and participate in creating a plan of reorganization.

Chapter 11 is often called "debtor in possession" bankruptcy because normally a trustee is not required. The debtor corporation continues to manage its assets, often with the same management team that was in place when the debtor went bankrupt. In fact, corporations often file for bankruptcy under Chapter 11 because the management knows it will likely not be terminated, whereas a trustee in a Chapter 7 liquidation may work to replace managers who caused the problem. The court will appoint a trustee elected by the creditors in cases of suspected fraud or other mismanagement when it is in the interest of creditors or shareholders. In many larger Chapter 11 bankruptcies, the debtor will seek debtor-in-possession financing. Bankruptcy law encourages this practice by assigning a high priority to the "post-petition" claims of lenders who extend funding after the commencement of a bankruptcy proceeding.

For the first 120 days after a Chapter 11 petition is filed, only the debtor (meaning the management of a corporation) has the right to file a plan of reorganization. The plan of reorganization lists the debts, divides the claims into creditors' and shareholders' interests, classifies the debts, explains how each class will be treated, demonstrates that within each class each debtor is treated equally, and shows how the debtor has the ability to carry out the plan as stated. As a practical matter, the 120-day exclusive period is often substantially extended, particularly in the case of reorganization of a large corporation. After 120 days (plus any extensions), the creditors' committee or the trustee can propose a plan of reorganization in addition to the debtor.

The plan of reorganization binds all classes of creditors, shareholders, and the debtor. When the plan is confirmed by the court, and a final bankruptcy decree is made, the debtor is discharged. In order for a bankruptcy court to confirm a plan of reorganization, the court must agree that the plan has been proposed in good faith and can be carried out as stated. Next, the court must find either that an adequate number of classes of creditors and shareholders have accepted the plan of reorganization, or a reason exists to force creditors to accept the plan. Creditors and shareholders who do not have their legal rights changed under a plan are not "impaired" (damaged) and automatically accept the plan. A class of creditors or shareholders that has its legal rights adjusted or "impaired" under the plan accepts the plan if more than half of the members of that class, who also represent at least two-thirds of the value of the class in amount, accept the plan. What happens if creditors from various classes cannot agree on whether to approve the plan of reorganization? The bankruptcy court can "cram down" the plan, i.e., force it down the throats of all creditors and interests. The court can do so if the parties cannot agree, the court finds the plan of reorganization to be fair, and at least one "impaired" class has approved the plan.

Use of Corporate Bankruptcy to Release the Corporation's Individual Owners from Direct Claims of Tort Liability

This issue arose in stark form in the case of a Chapter 11 bankruptcy filing in 2019 by Purdue Pharma L.P., widely viewed as the main entity responsible for the opioid crisis. Purdue (a privately held company) and affiliated corporate entities filed under