

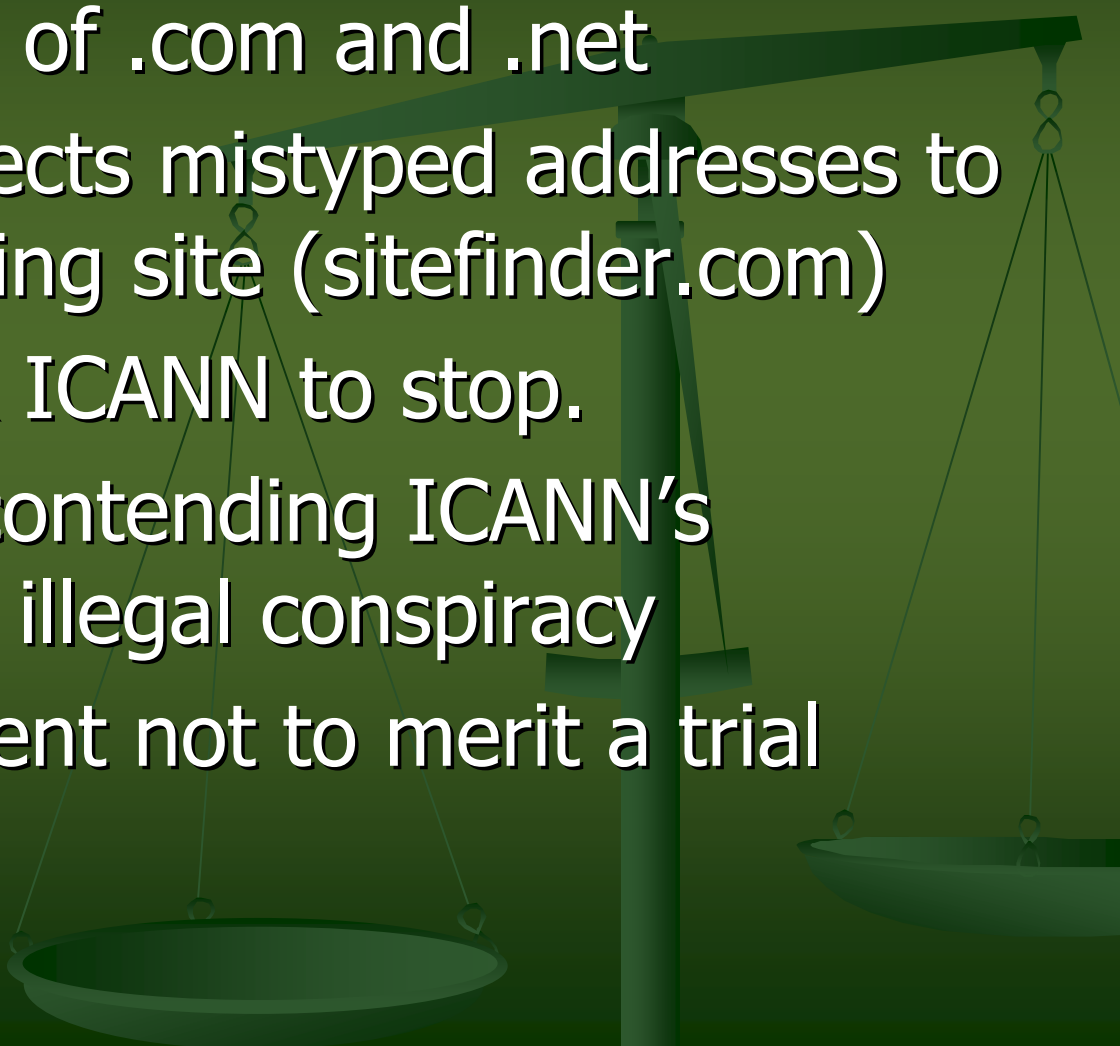
The Strategic Abuse of the Antitrust Laws



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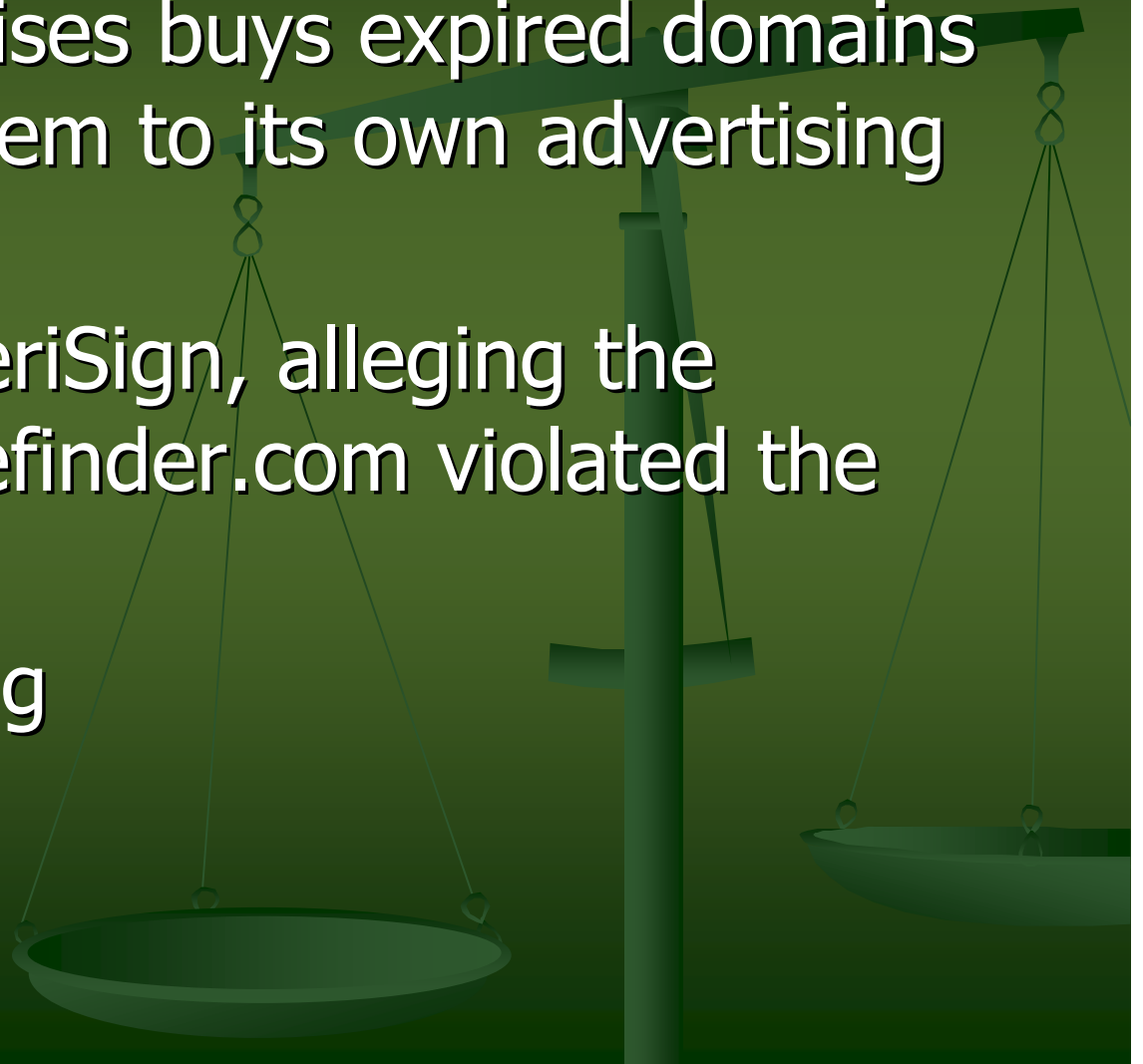
Dec 6, 2006

VeriSign

- Official registrar of .com and .net
 - Sep 2003: redirects mistyped addresses to its own advertising site (sitefinder.com)
 - ISPs object, ask ICANN to stop.
 - VeriSign sued, contending ICANN's decision was an illegal conspiracy
 - Judge: so deficient not to merit a trial
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The VeriSign Plot Thickens

- Popular Enterprises buys expired domains and redirects them to its own advertising site
- Popular sued VeriSign, alleging the existence of sitefinder.com violated the antitrust laws
- Suit is continuing

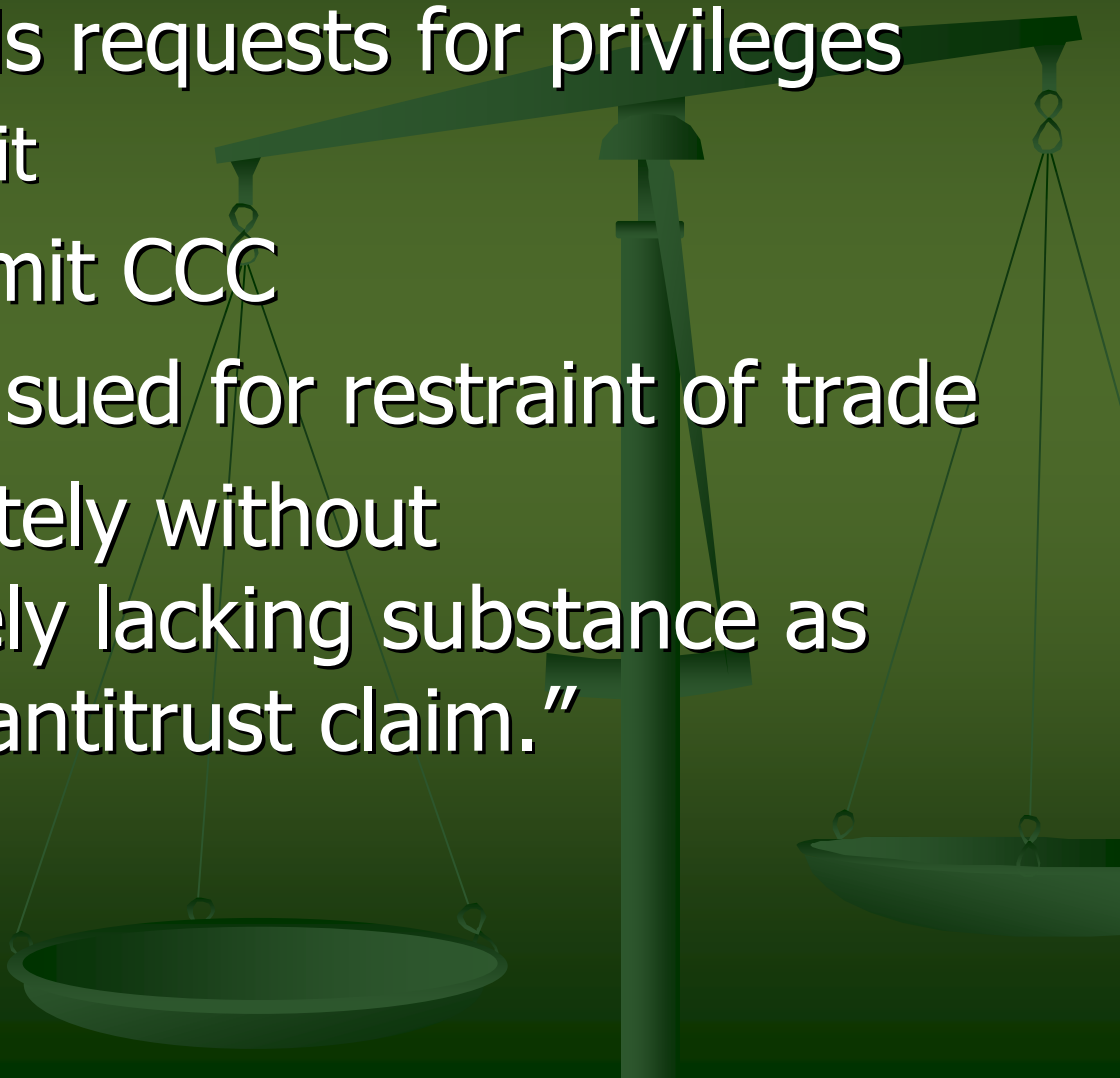


Roadmap

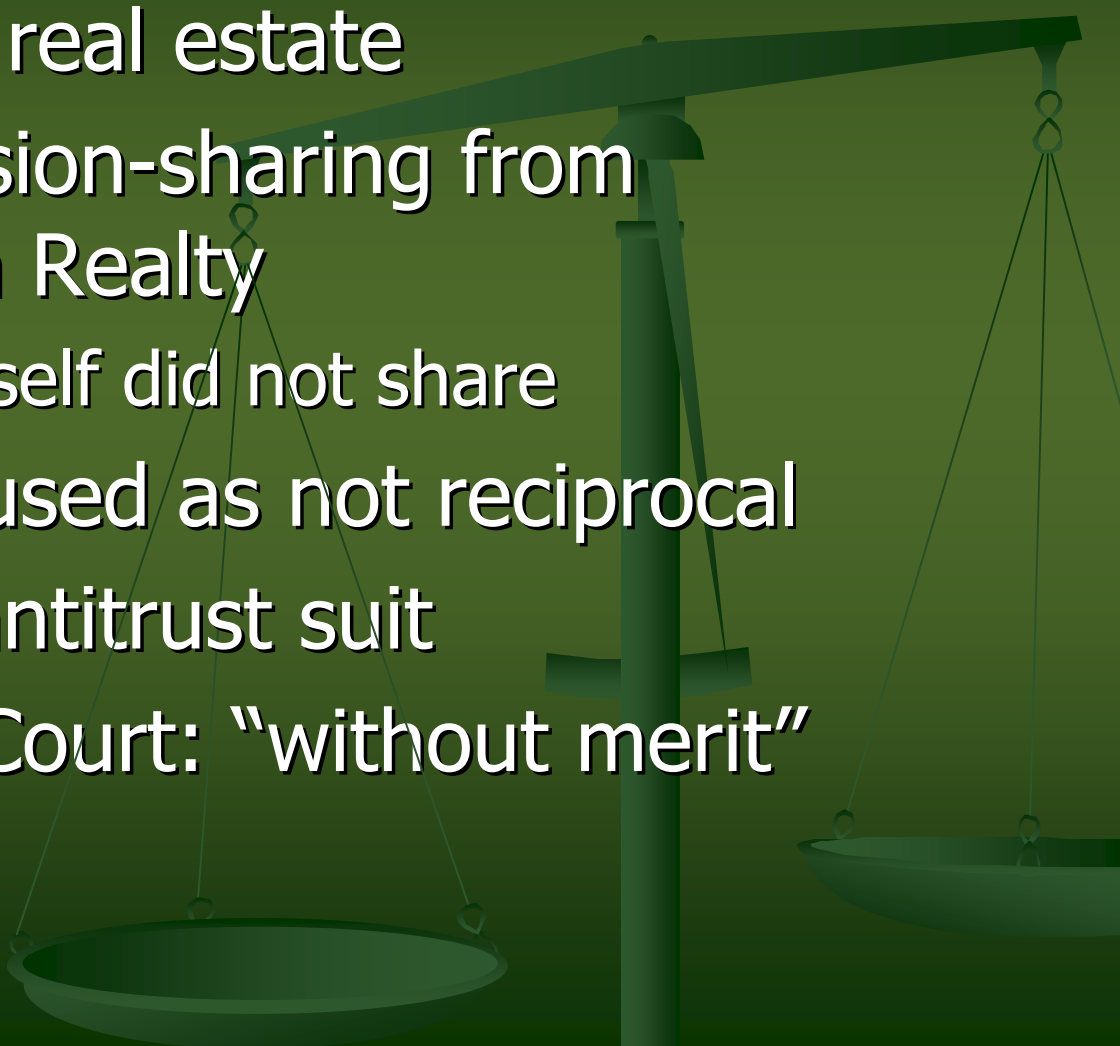
- Examples
- Purposes
- Incentives to sue
- Government as strategic player



Colorado Chiropractic Council

- Sent 30 hospitals requests for privileges
 - Threat of lawsuit
 - Nine did not admit CCC
 - These hospitals sued for restraint of trade
 - Judge: "Completely without merit...completely lacking substance as the basis of an antitrust claim."
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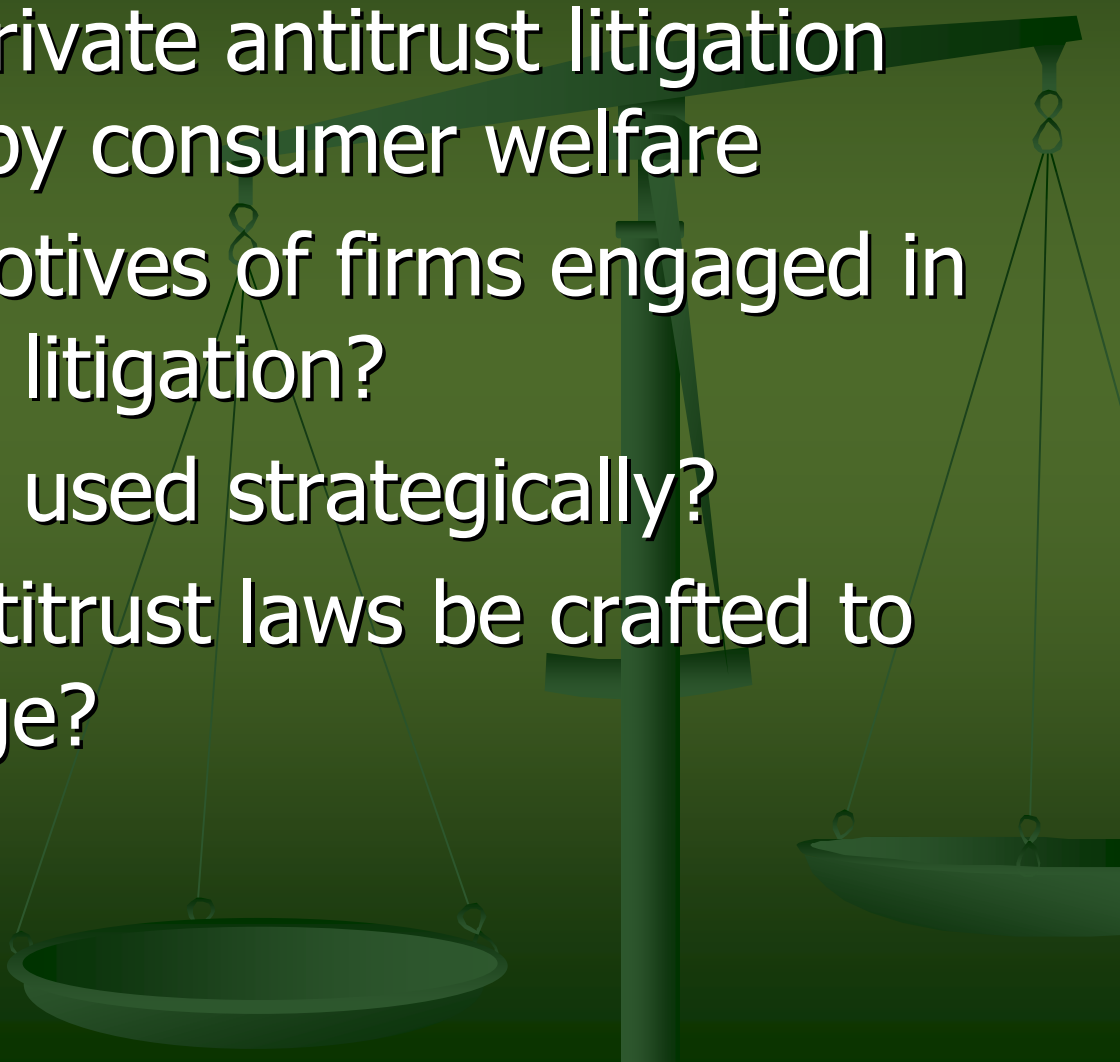
Next Generation Realty

- Entrant in Iowa real estate
 - Sought commission-sharing from incumbent Iowa Realty
 - But Next Gen itself did not share
 - Iowa Realty refused as not reciprocal
 - Next Gen filed antitrust suit
 - Iowa Supreme Court: “without merit”
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Private Action

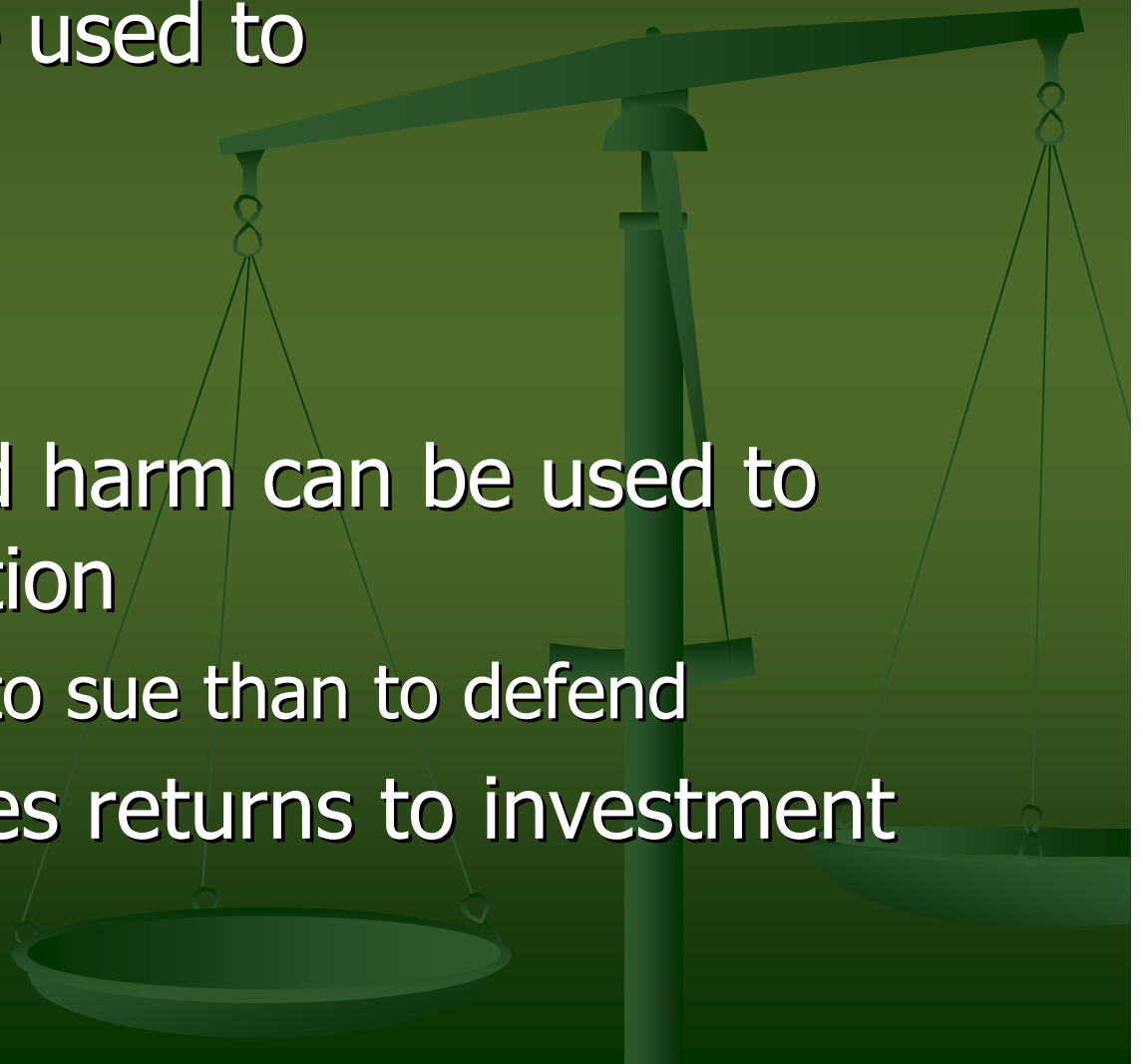
- Outnumber government suits nine to one
- Both Sherman Act (1890, sec 7) and Clayton Act (1914, sec 4) permit private antitrust suits
 - Treble damages
- Canada's 1889 Combines Investigation Act didn't permit private litigation until 1976
 - Single damages
 - Rare

General Idea

- Incentives for private antitrust litigation are not guided by consumer welfare
 - What are the motives of firms engaged in private antitrust litigation?
 - How can law be used strategically?
 - How can the antitrust laws be crafted to minimize damage?
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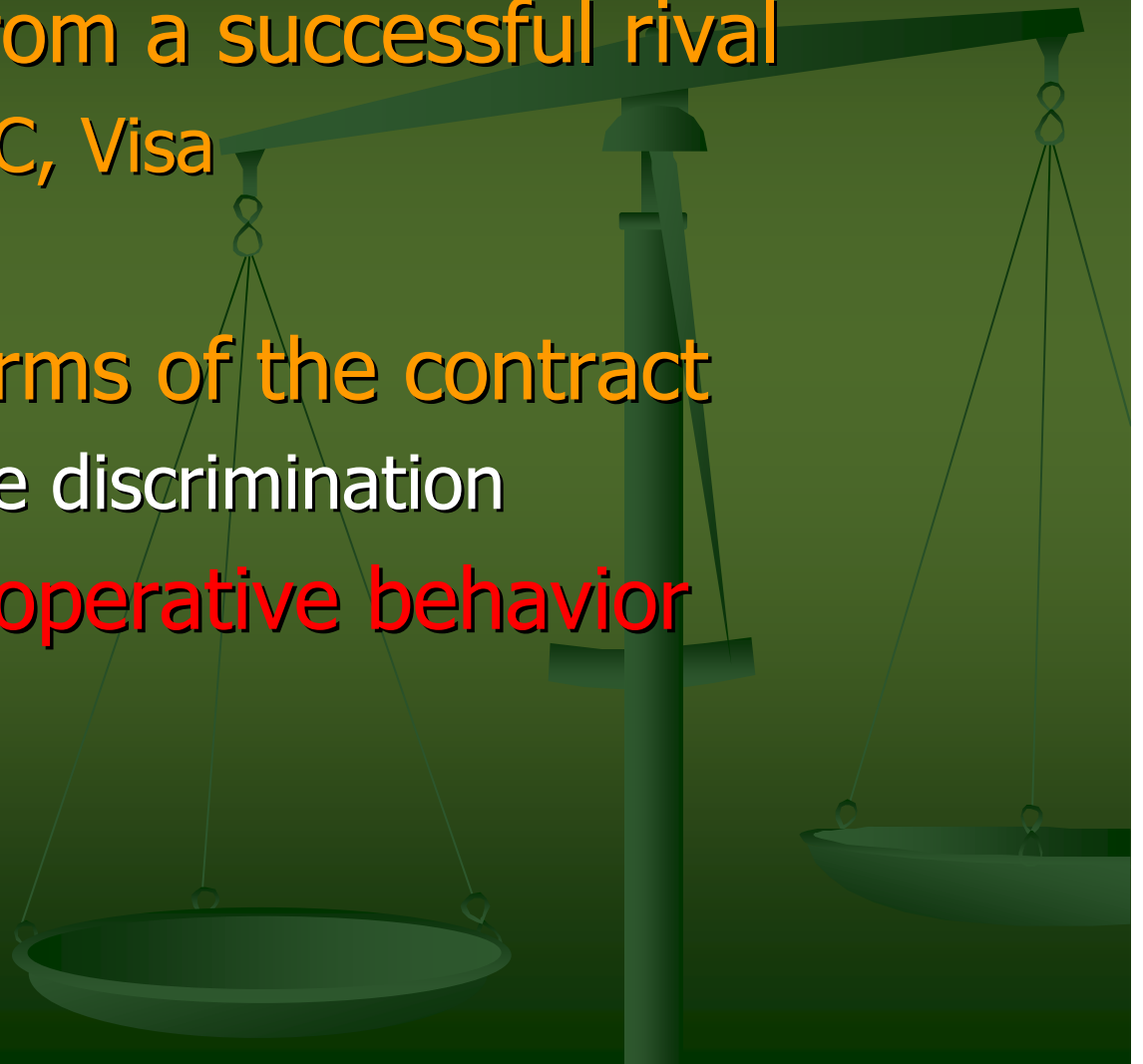
Strategic Use

- Antitrust can be used to
 - Harass
 - Harm
 - Extort
- Harassment and harm can be used to induce cooperation
 - Often cheaper to sue than to defend
- Extortion reduces returns to investment



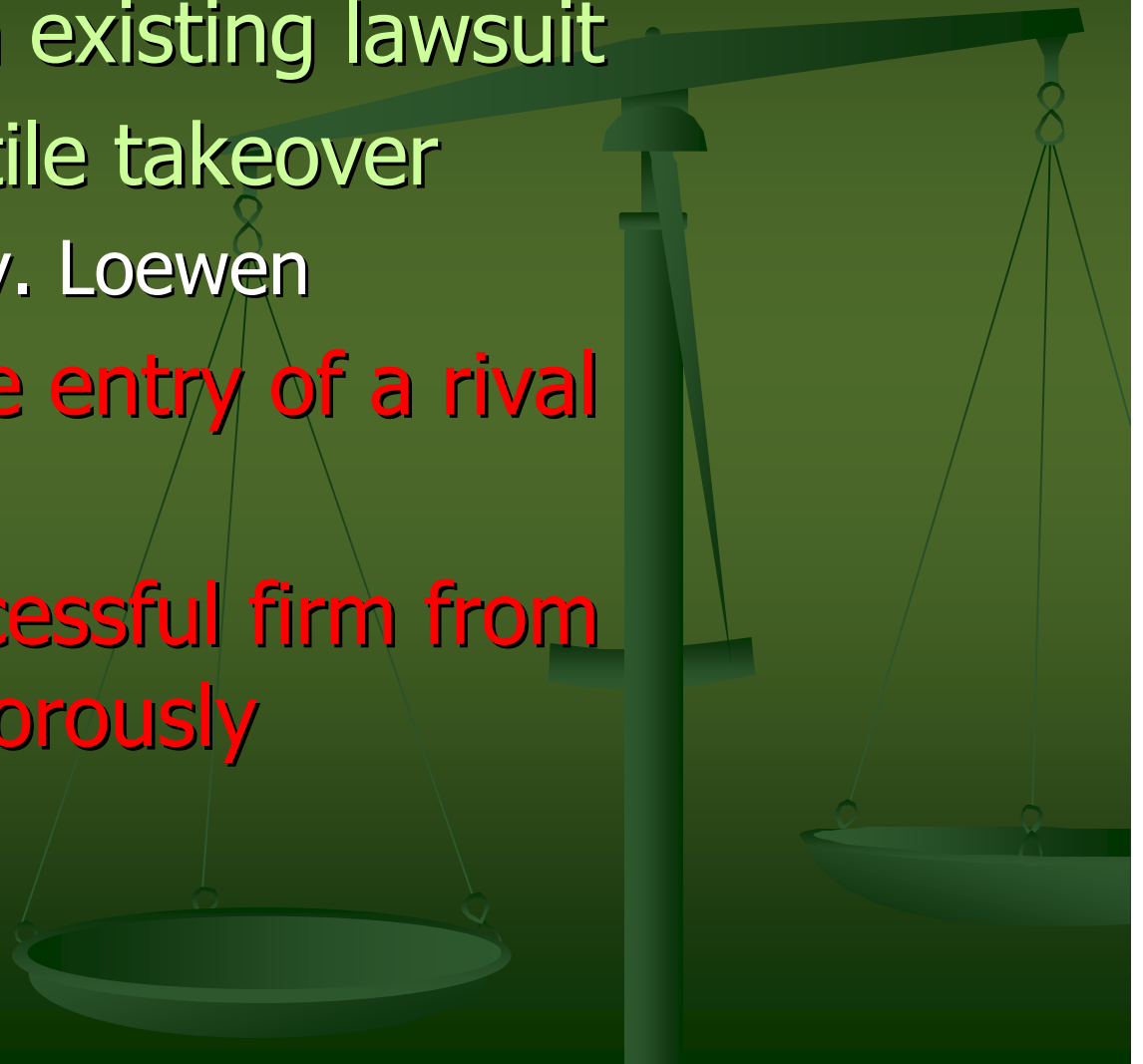
Reasons for Private Litigation

- Extort funds from a successful rival
 - Walmart vs MC, Visa
 - Microsoft
- Change the terms of the contract
 - Texaco & price discrimination
- Punish non-cooperative behavior

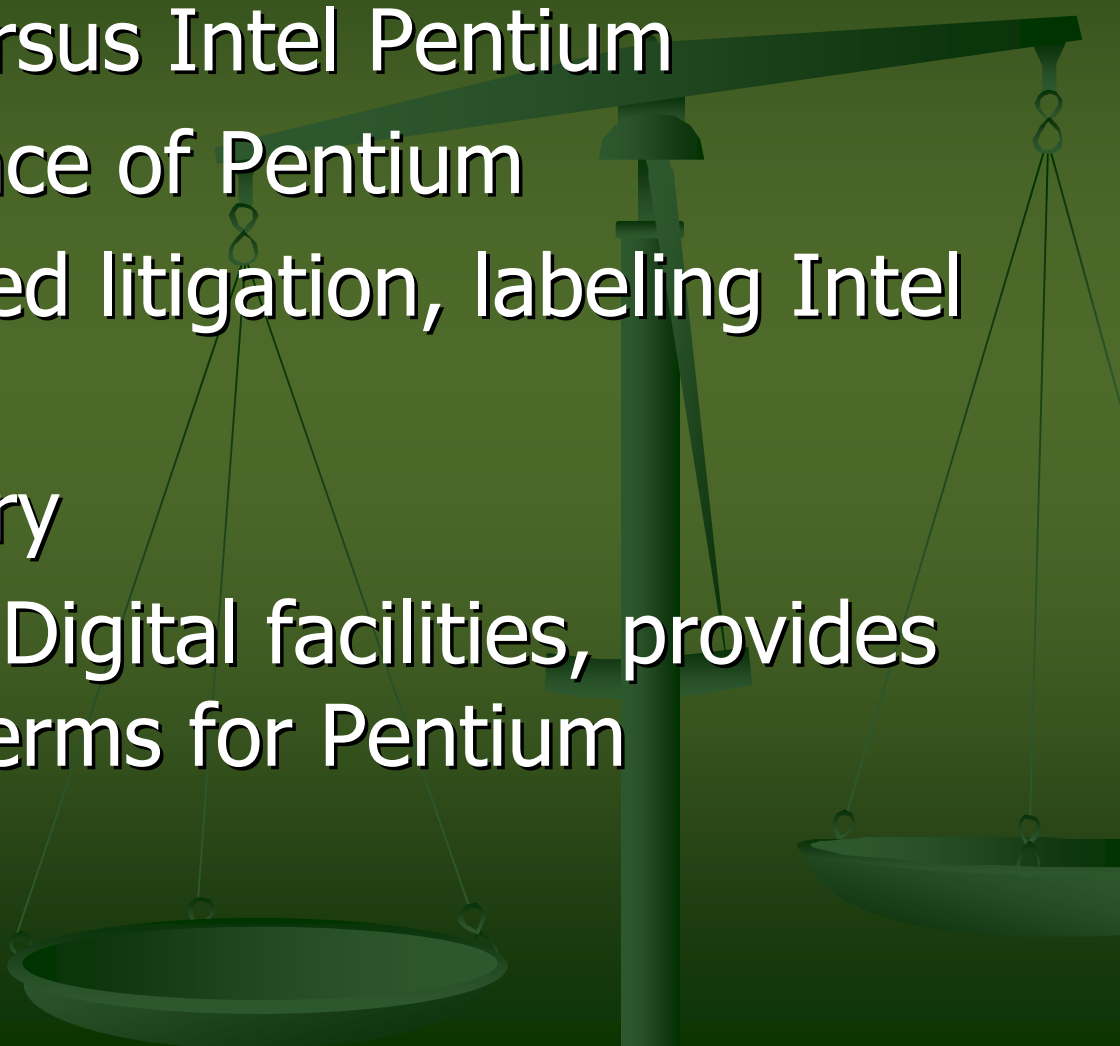


Reasons for Private Litigation

- Respond to an existing lawsuit
- Prevent a hostile takeover
 - Service Corp v. Loewen
- Discourage the entry of a rival
 - Utah Pie
- Prevent a successful firm from competing vigorously
 - ISOs

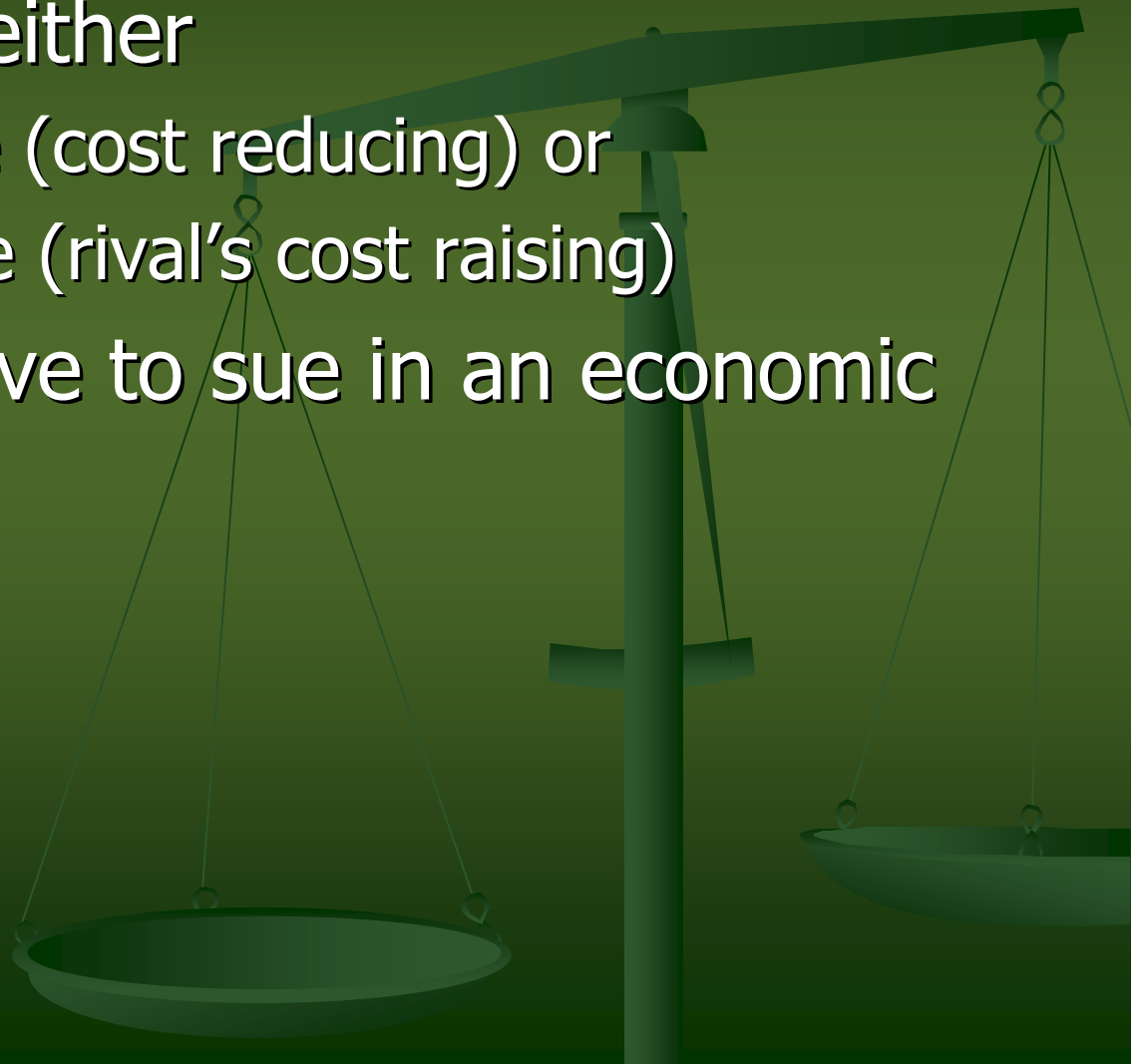


Prevent Vigorous Competition: Digital v. Intel

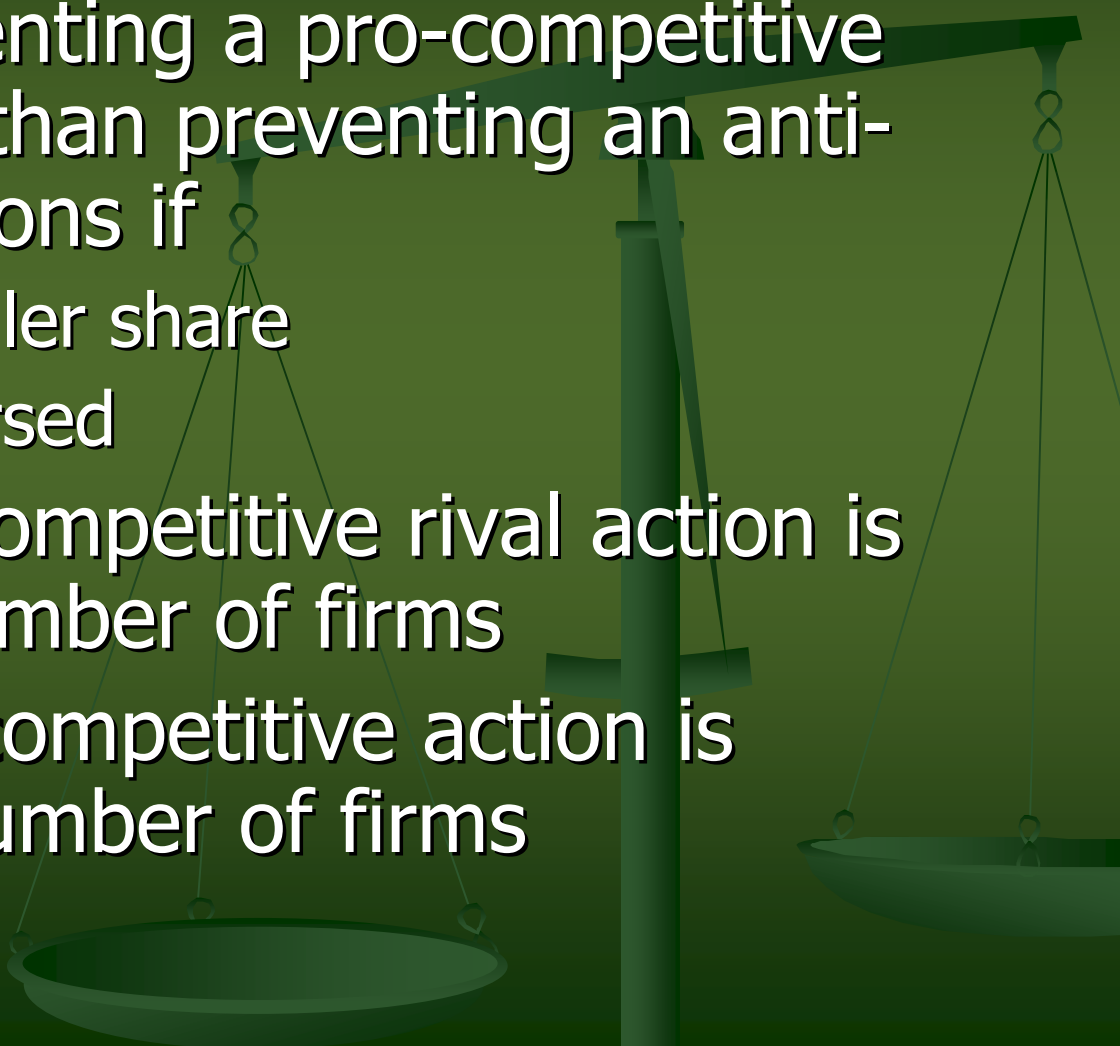
- Digital Alpha versus Intel Pentium
 - Market dominance of Pentium
 - Digital threatened litigation, labeling Intel a monopoly
 - FTC starts inquiry
 - Intel purchases Digital facilities, provides advantageous terms for Pentium
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Who Profits?

- Actions can be either
 - pro-competitive (cost reducing) or
 - anti-competitive (rival's cost raising)
- Examine incentive to sue in an economic model



Main Result

- Gain from preventing a pro-competitive action is larger than preventing an anti-competitive actions if
 - Firm has a smaller share
 - Market is dispersed
 - Loss from pro-competitive rival action is increasing in number of firms
 - Loss from anti-competitive action is decreasing in number of firms
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Conclusion

- Antitrust laws often distorted to reduce competition
 - Very undesirable side effect
- Outright ban on private antitrust litigation would solve that problem
 - At cost of stopping some legitimate suits
 - Encouraging more anti-competitive behavior

Conclusion, Continued

- Alternative models may provide best of both worlds
 - Agency “gate-keeper” for private litigation
 - Agency *amicus curiae* for private litigation
 - Private financial support for agency litigation
 - Decoupling damages and awards
 - Providing experts to courts to reduce uncertainty
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