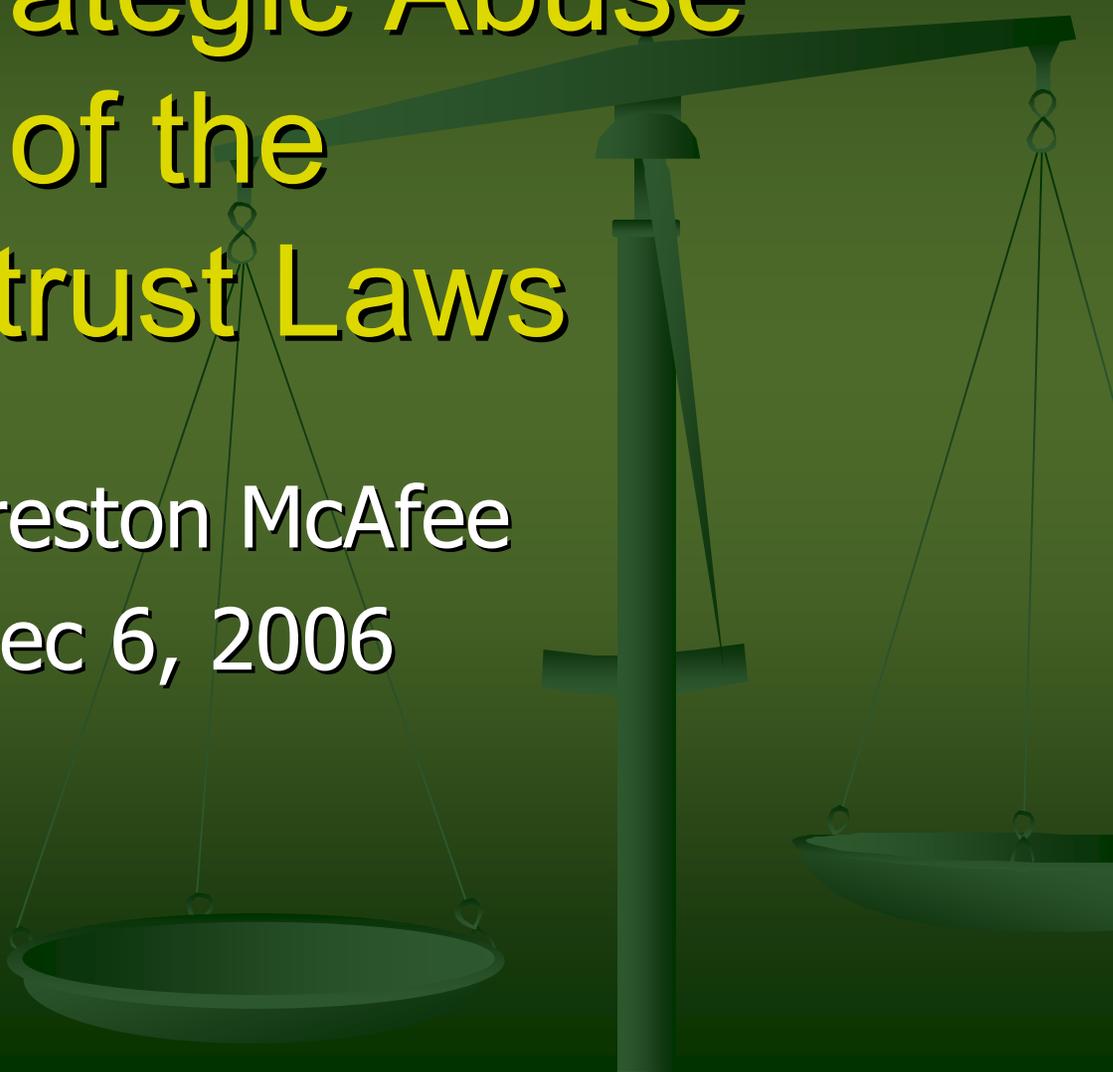


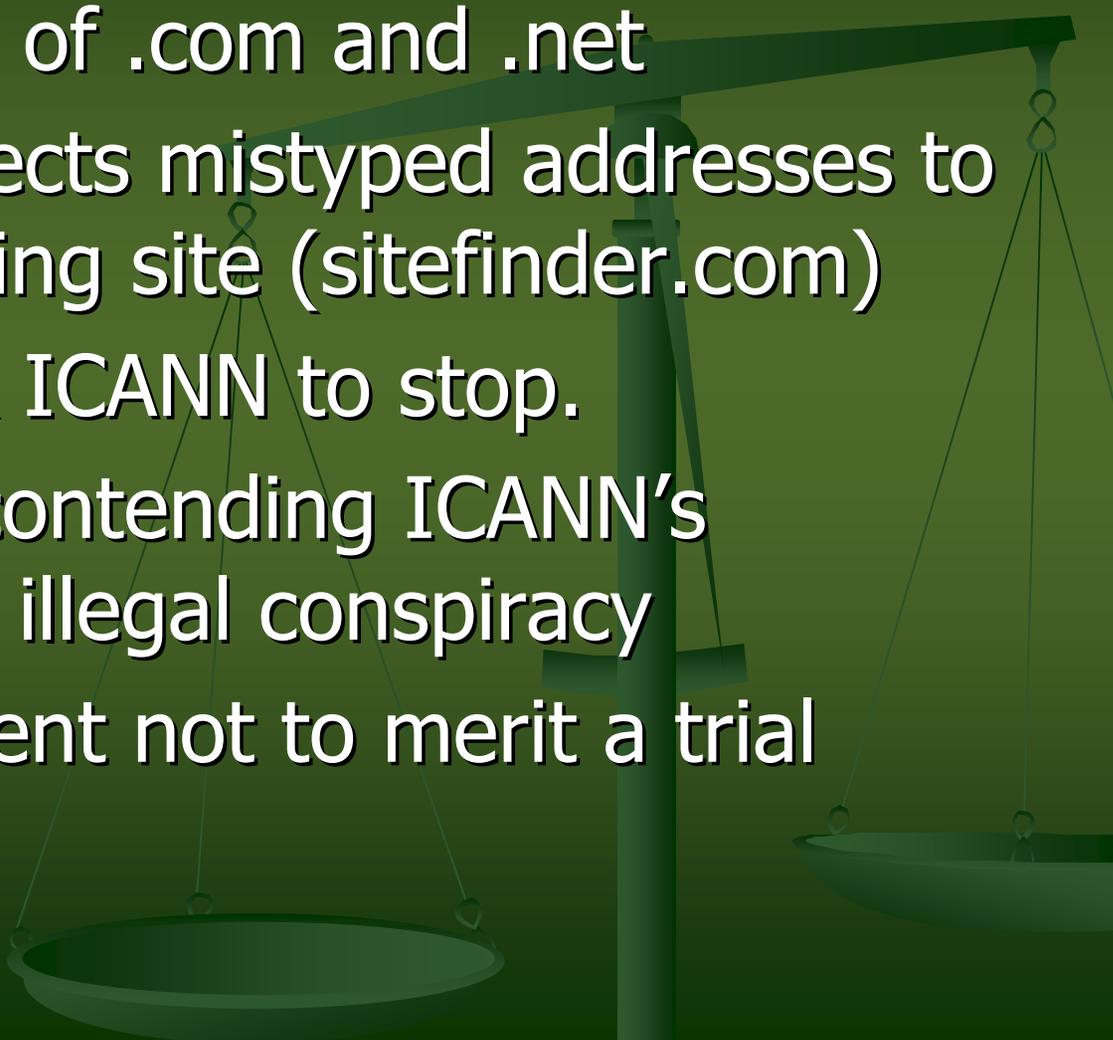
# The Strategic Abuse of the Antitrust Laws



R. Preston McAfee

Dec 6, 2006

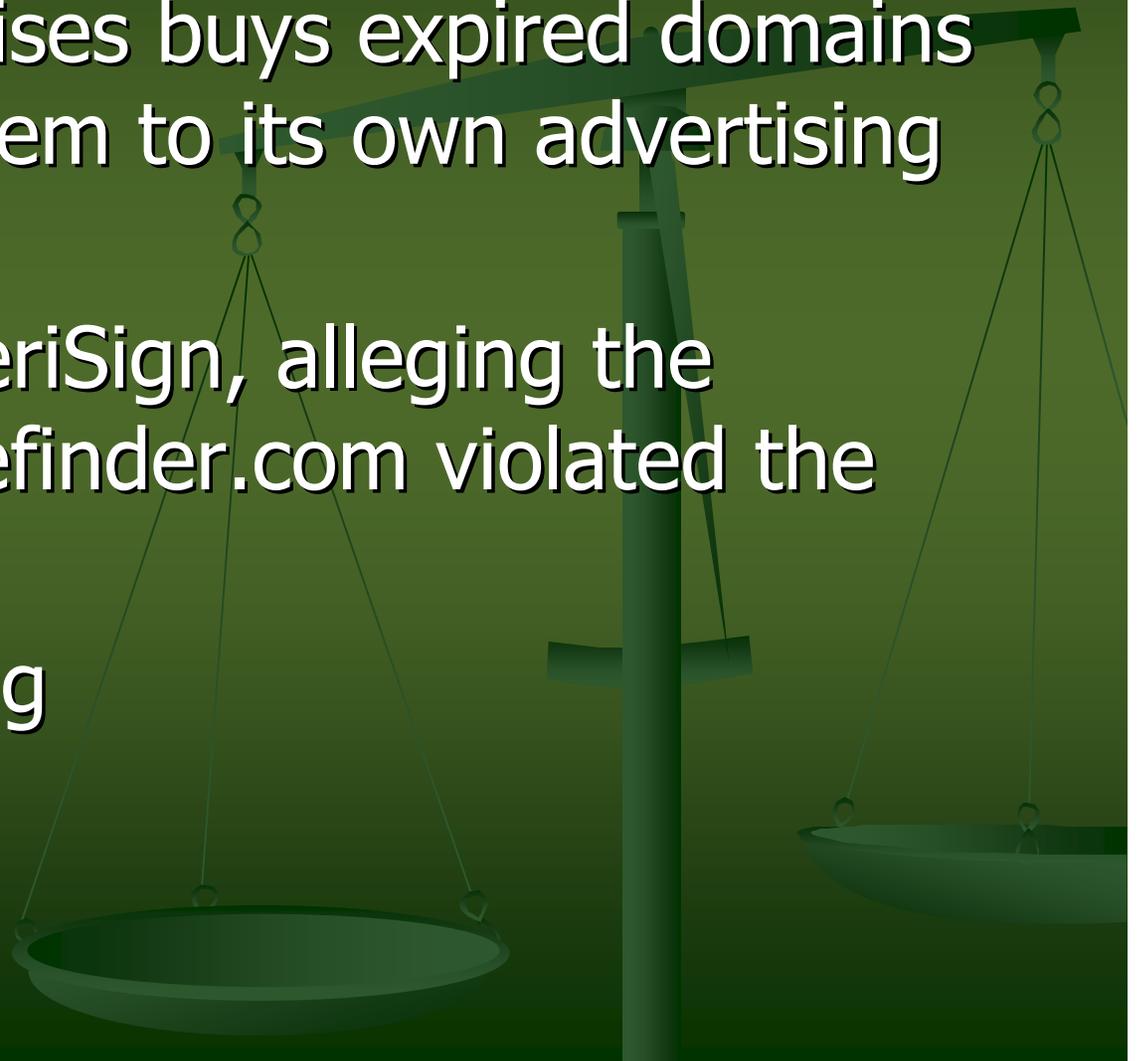
# VeriSign



- 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

# 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

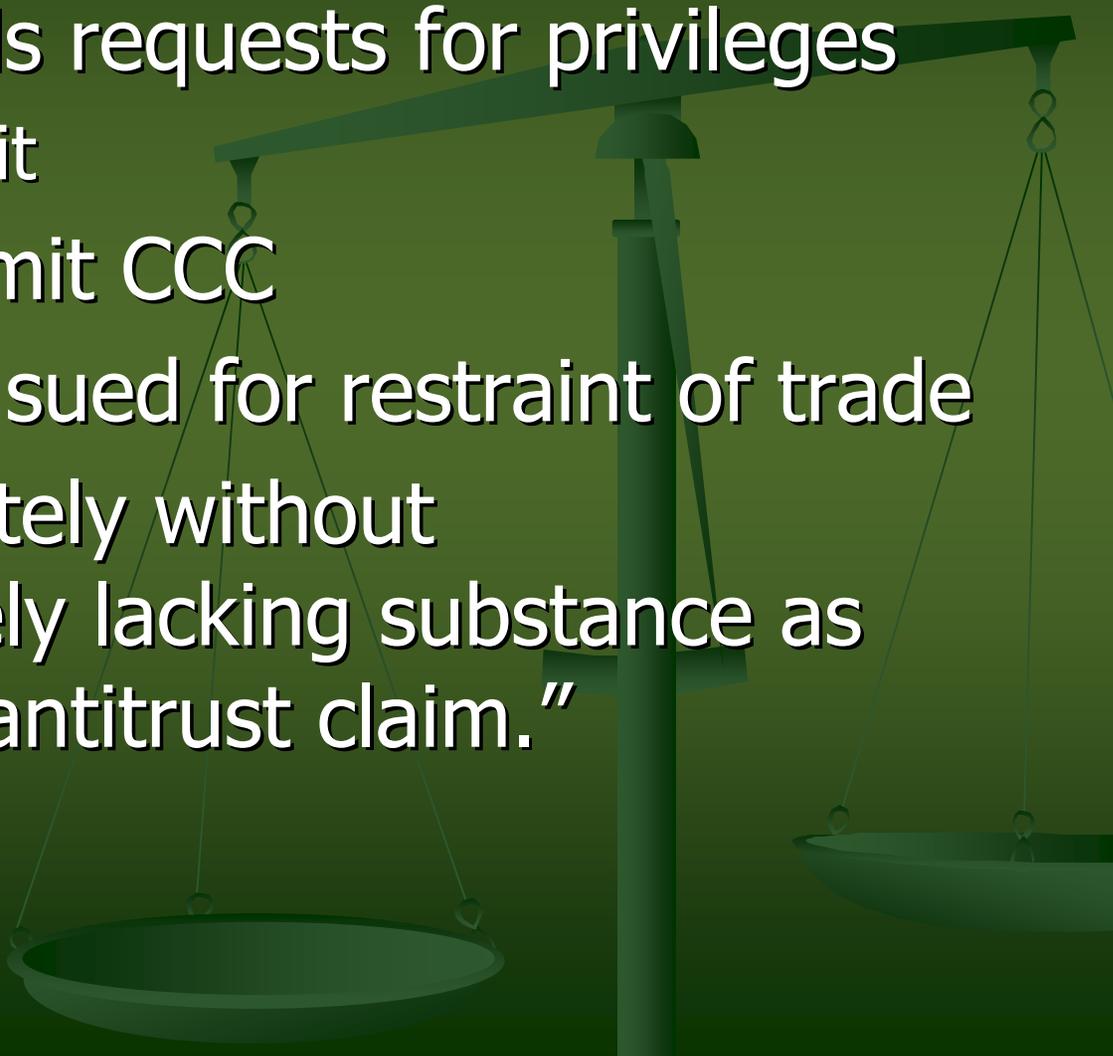


# Roadmap

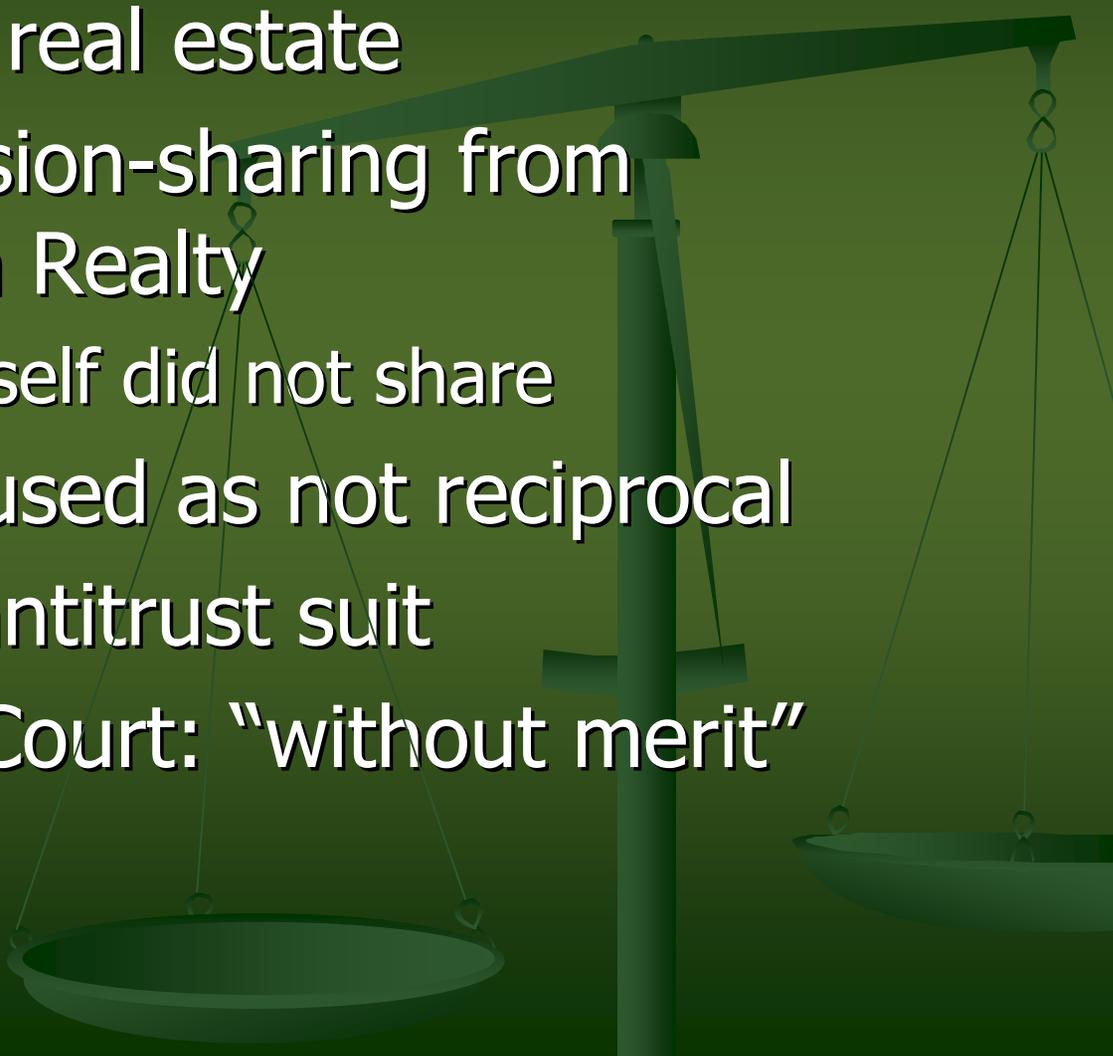
- Examples
- Purposes
- Incentives to sue
- Government as strategic player



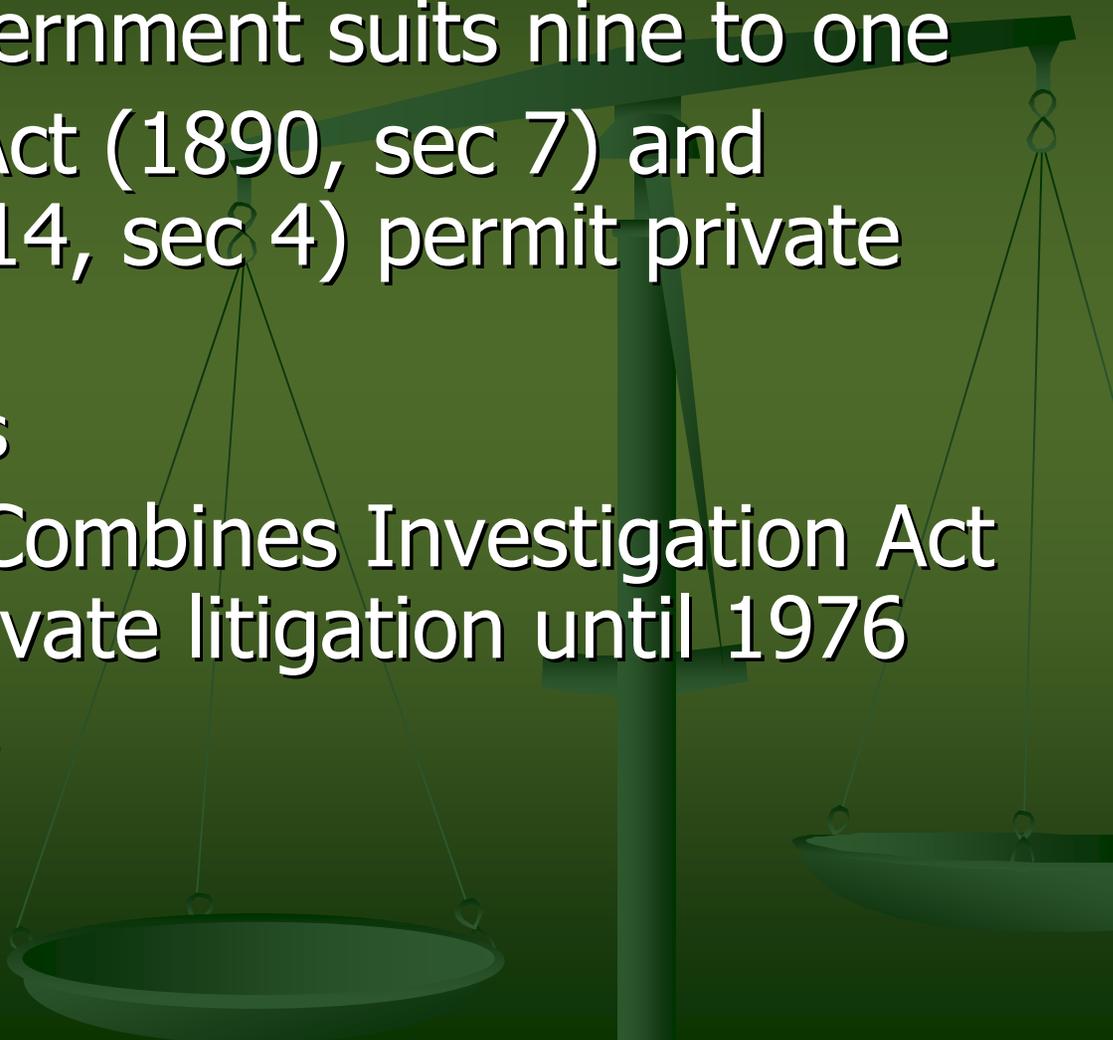
# Colorado Chiropractic Council

- 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."
- 

# Next Generation Realty

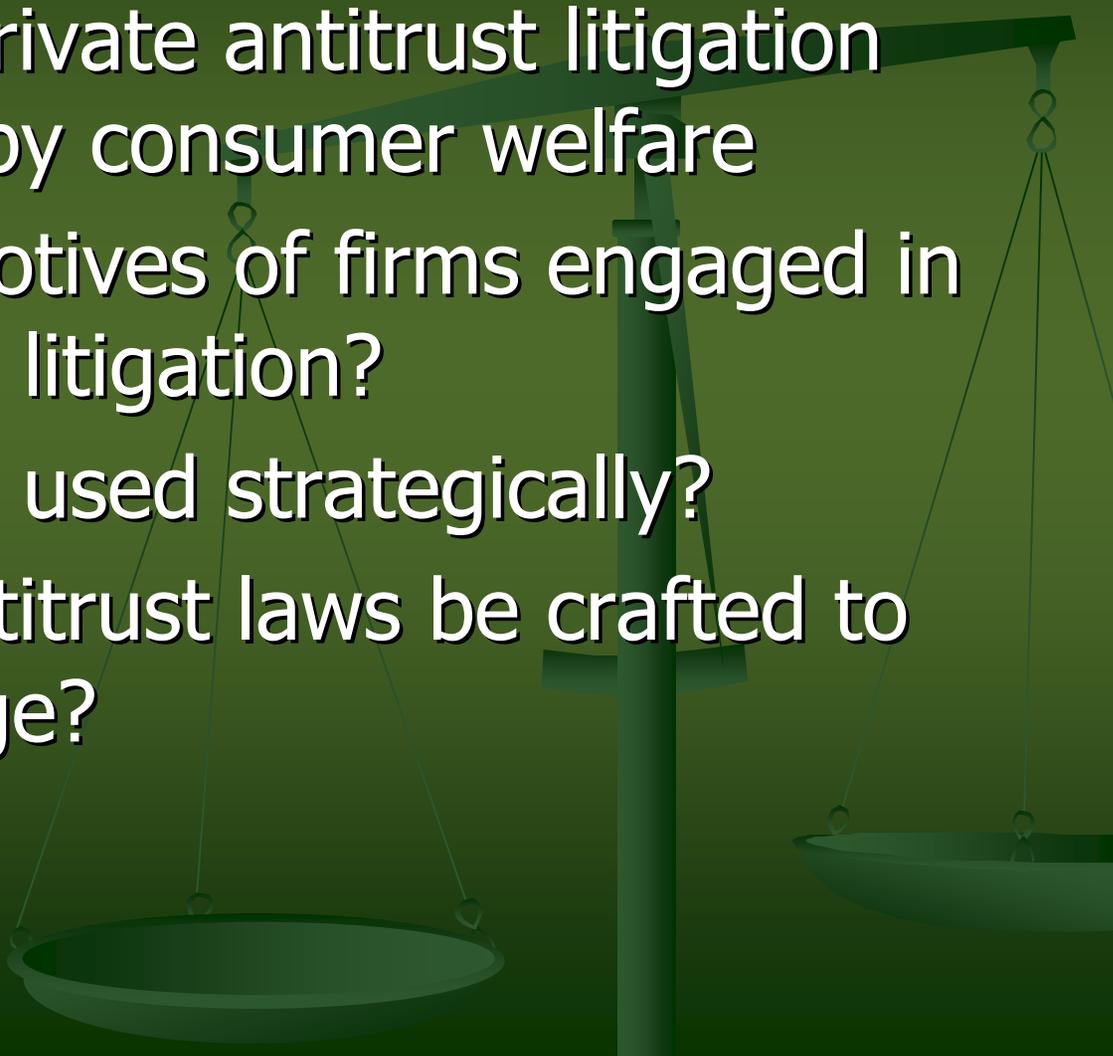
- Entrant in Iowa real estate
  - Sought commission-sharing from incumbent Iowa Realty
    - But Next Gen itself did not share
  - Iowa Realty refused as not reciprocal
  - Next Gen filed antitrust suit
  - Iowa Supreme Court: “without merit”
- 

# Private Action



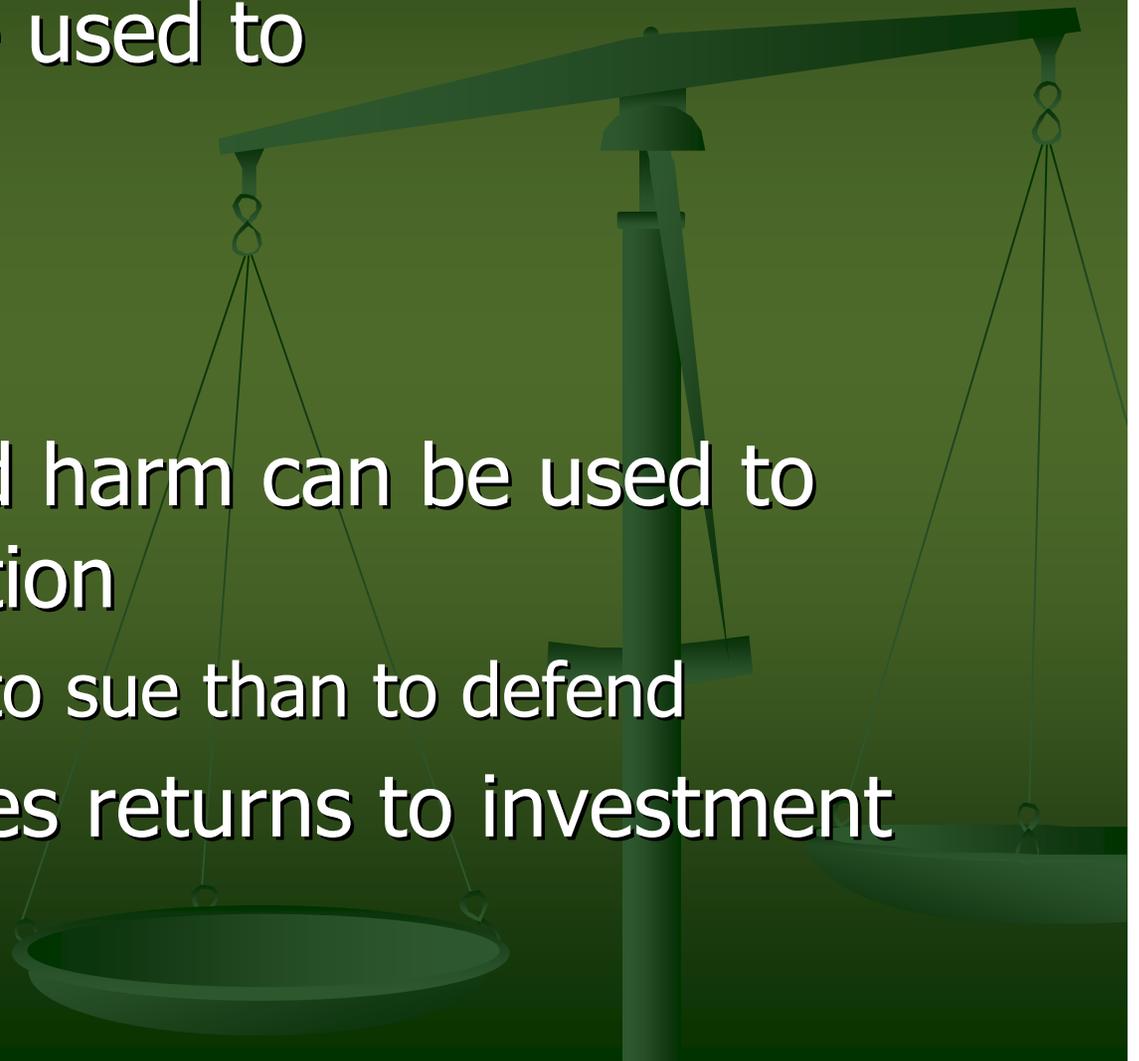
- Outnumber government suits nine to one
- Both Sherman Act (1890, sec 7) and Clayton Act (1914, sec 4) permit private antitrust suits
  - Treble damages
- Canada's 1889 Combines Investigation Act didn't permit private litigation until 1976
  - Single damages
  - Rare

# General Idea

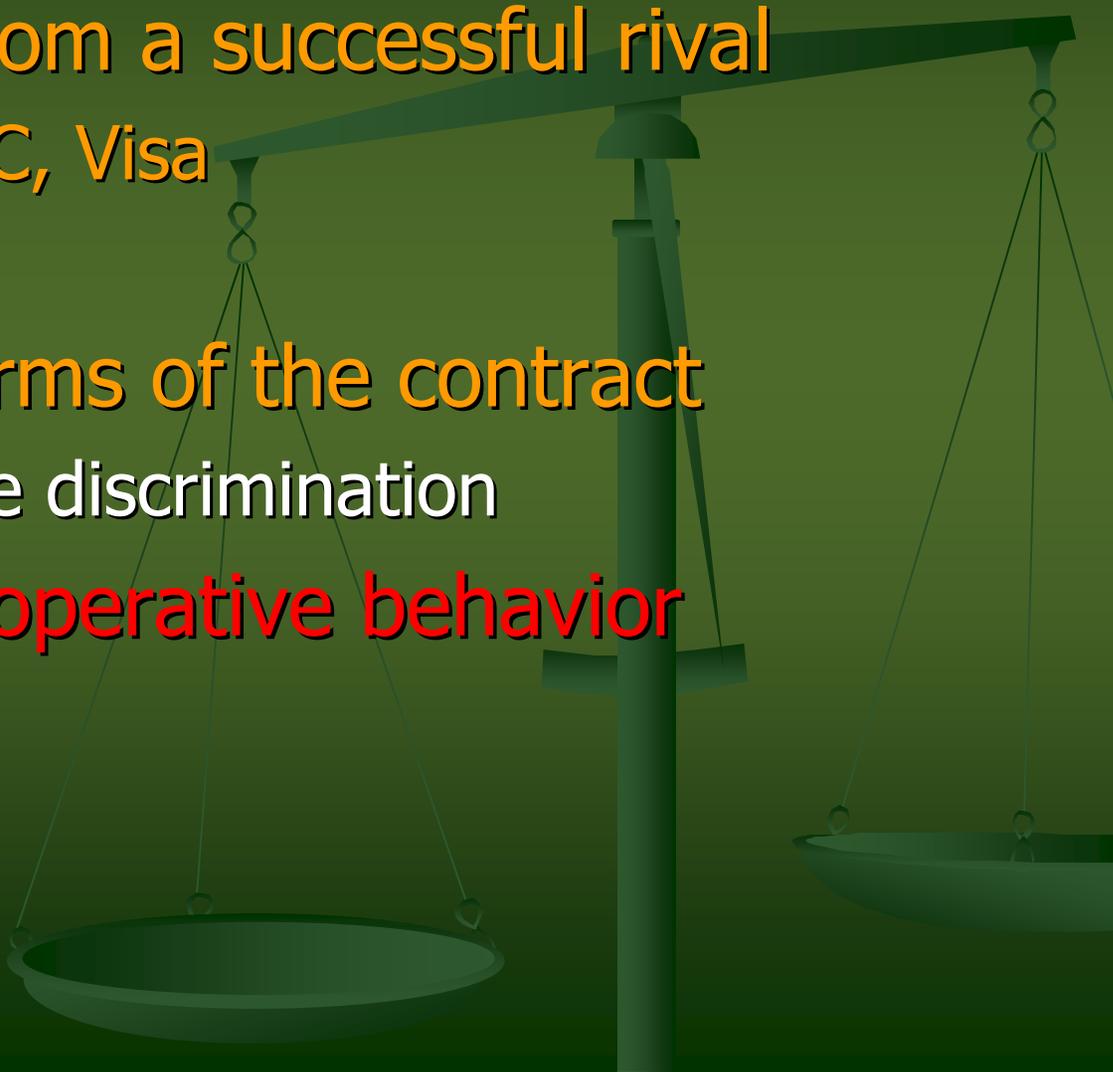
- Incentives for private antitrust litigation are not guided by consumer welfare
  - What are the motives of firms engaged in private antitrust litigation?
  - How can law be used strategically?
  - How can the antitrust laws be crafted to minimize damage?
- 

# 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



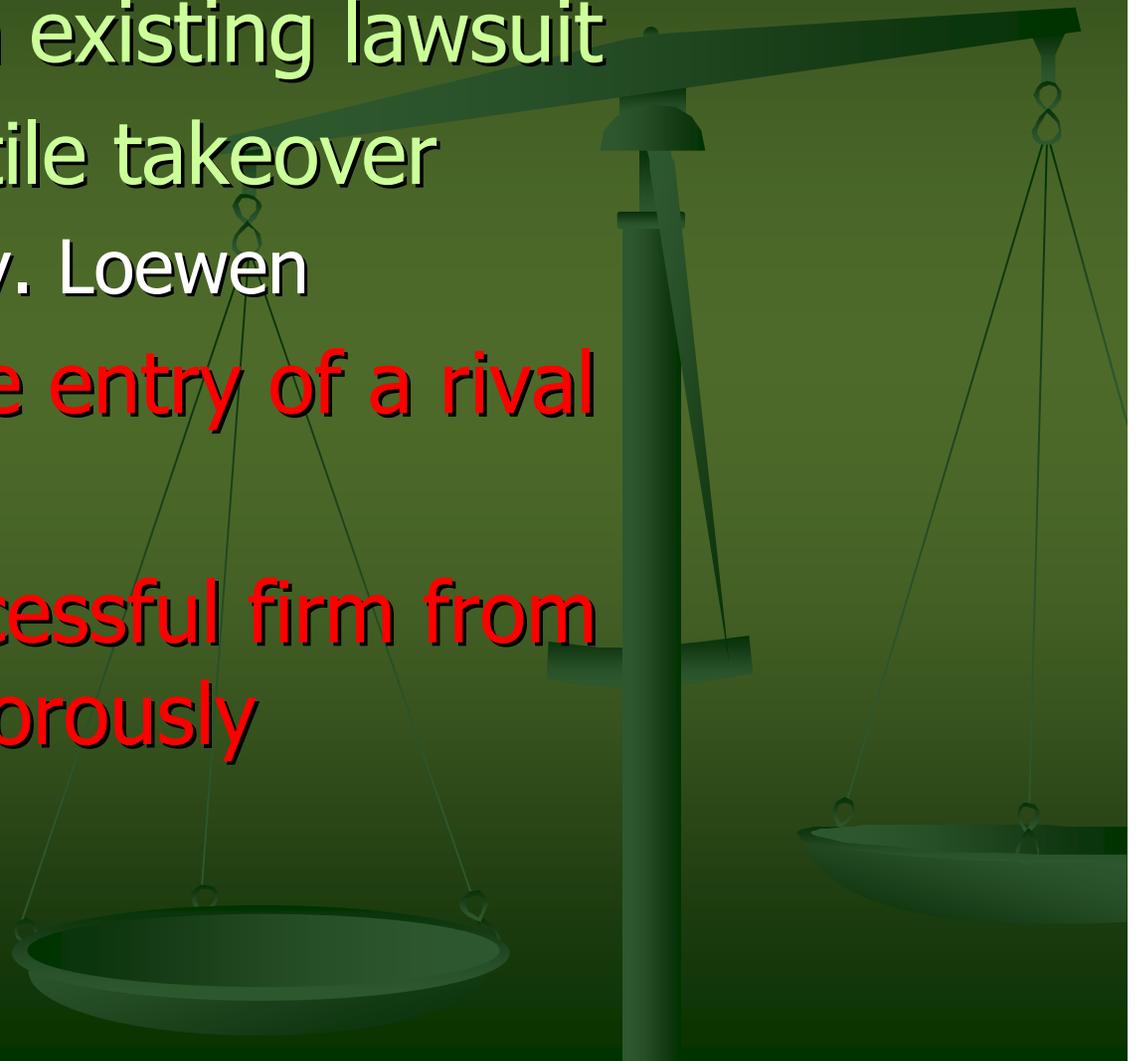
# Reasons for Private Litigation



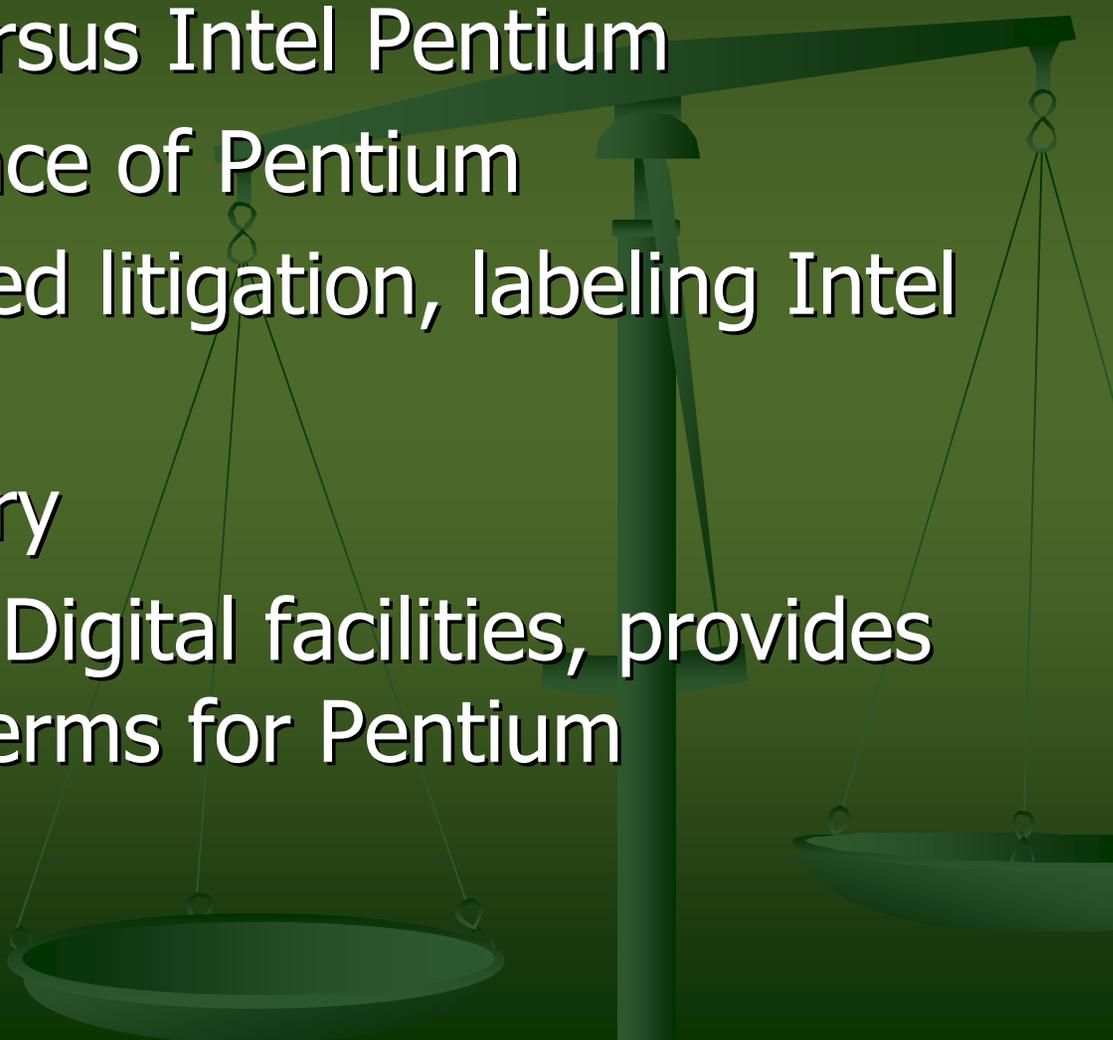
- Extort funds from a successful rival
  - Walmart vs MC, Visa
  - Microsoft
- Change the terms of the contract
  - Texaco & price discrimination
- Punish non-cooperative behavior

# 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

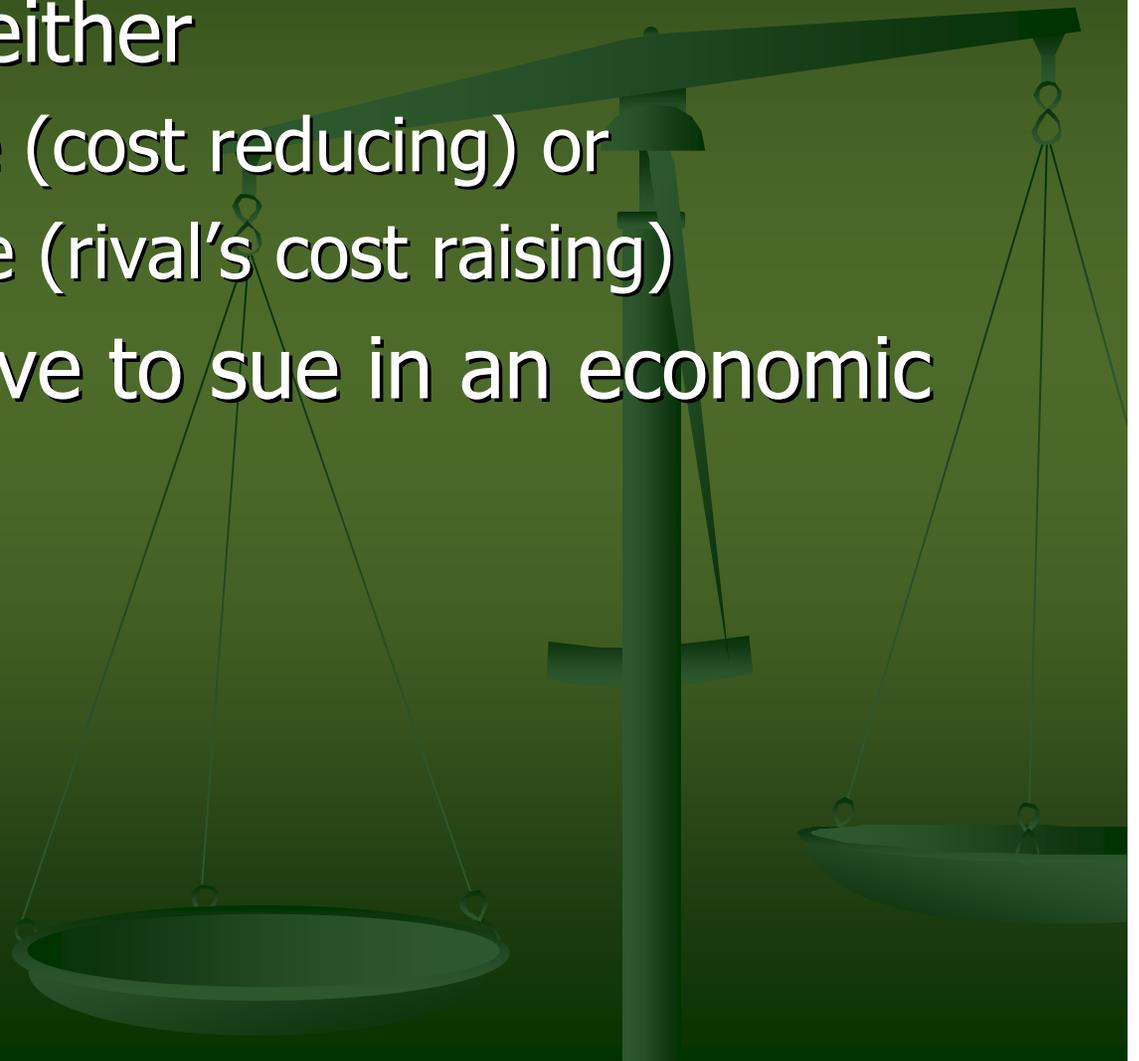


# Prevent Vigorous Competition: Digital v. Intel

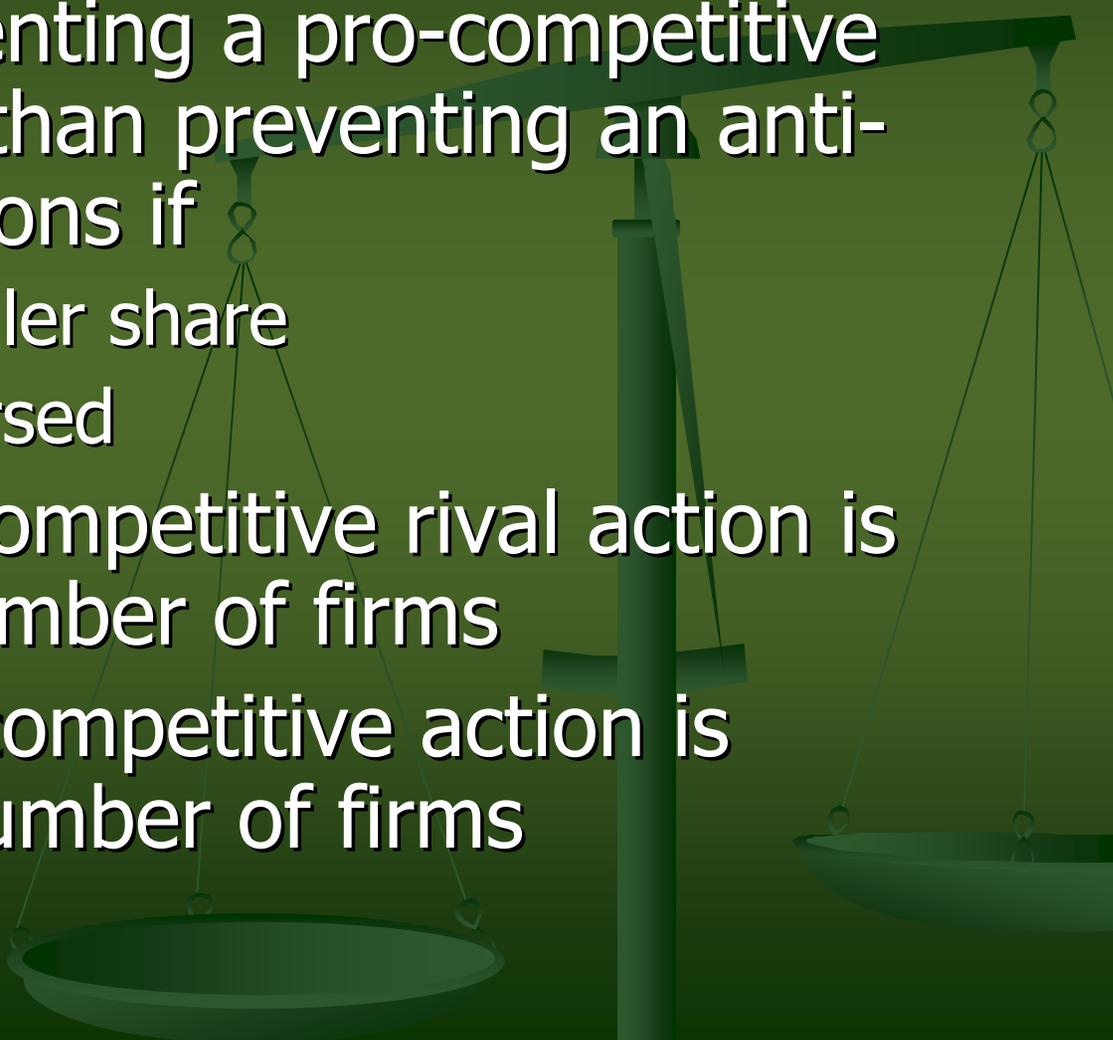
- Digital Alpha versus Intel Pentium
  - Market dominance of Pentium
  - Digital threatened litigation, labeling Intel a monopoly
  - FTC starts inquiry
  - Intel purchases Digital facilities, provides advantageous terms for Pentium
- 

# 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

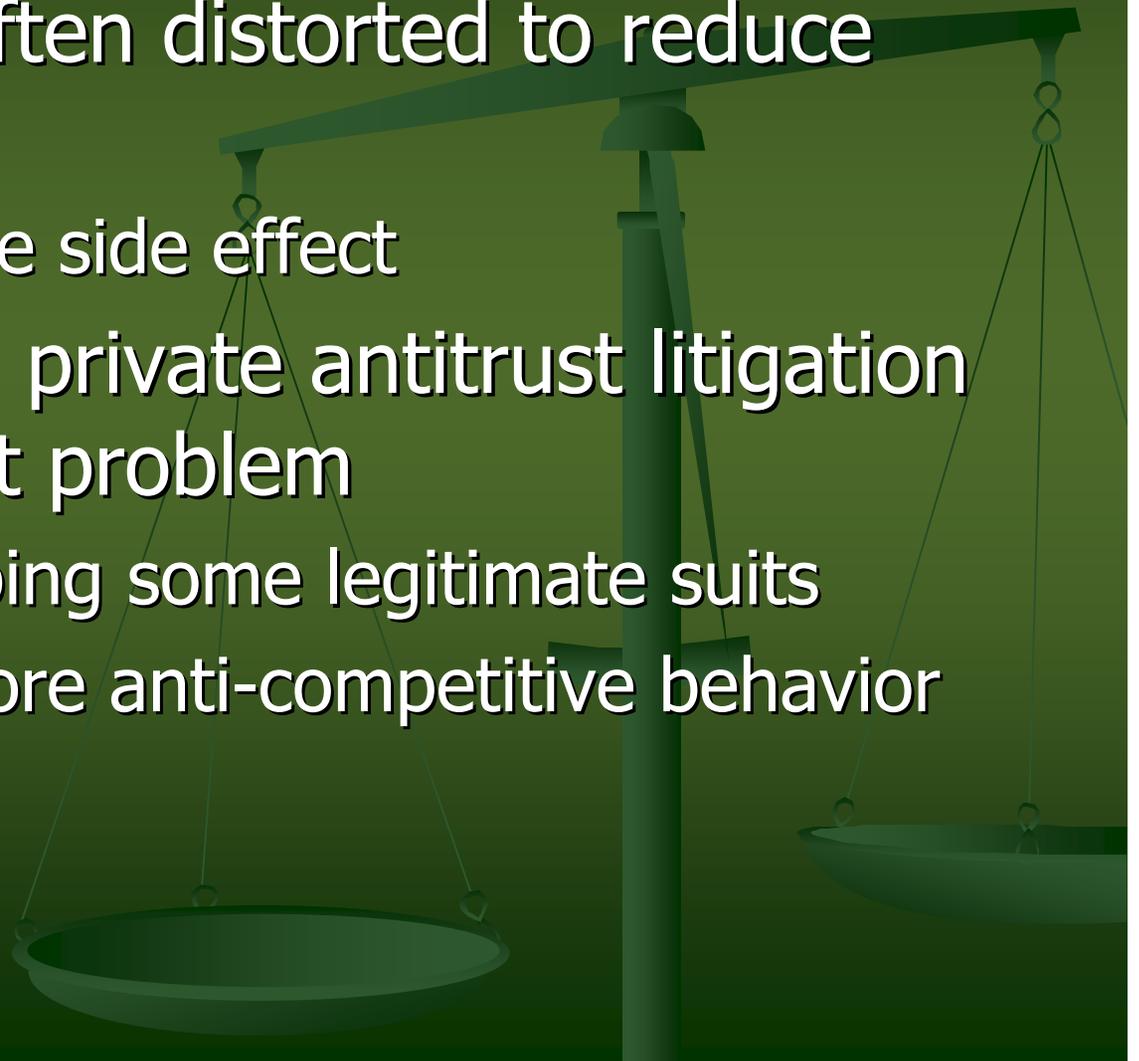


# Main Result

- 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
- 

# 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
- 