

The Strategic Abuse of the Antitrust Laws

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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
- Change the terms of the contract
- Punish non-cooperative behavior
- Respond to an existing lawsuit
- Prevent a hostile takeover
- Discourage the entry of a rival
- Prevent a successful firm from competing vigorously

Extort Funds from a Rival

- Conwood Sales
- Microsoft
- Walmart versus Visa, MC
- Extortion is generally bad for society
- When result is forced opening of markets or price reductions, can be beneficial

Change Contract Terms

- Aspen Skiing
- Texaco & price discrimination
- Can be used to prevent price discrimination
 - Ambiguous welfare implications
- Can be used to prevent commitment
 - Effective expropriation of surplus
 - Socially harmful

Punish Non-Cooperative Behavior

- Basic theory:
 - Support cooperative outcome by punishing bad behavior
 - Need punishments that inflict harm on punished, not too much on punisher
 - antitrust works
- Speculative in applications
 - Trucking Unlimited v. California Motor Transport

Respond to an Existing Lawsuit

- Countersuit
 - “Throw mud in the water”
 - Permits reverse discovery
 - Improve Settlement
- Lexmark Secret Handshake
- Effects ambiguous depending on merit of first suit

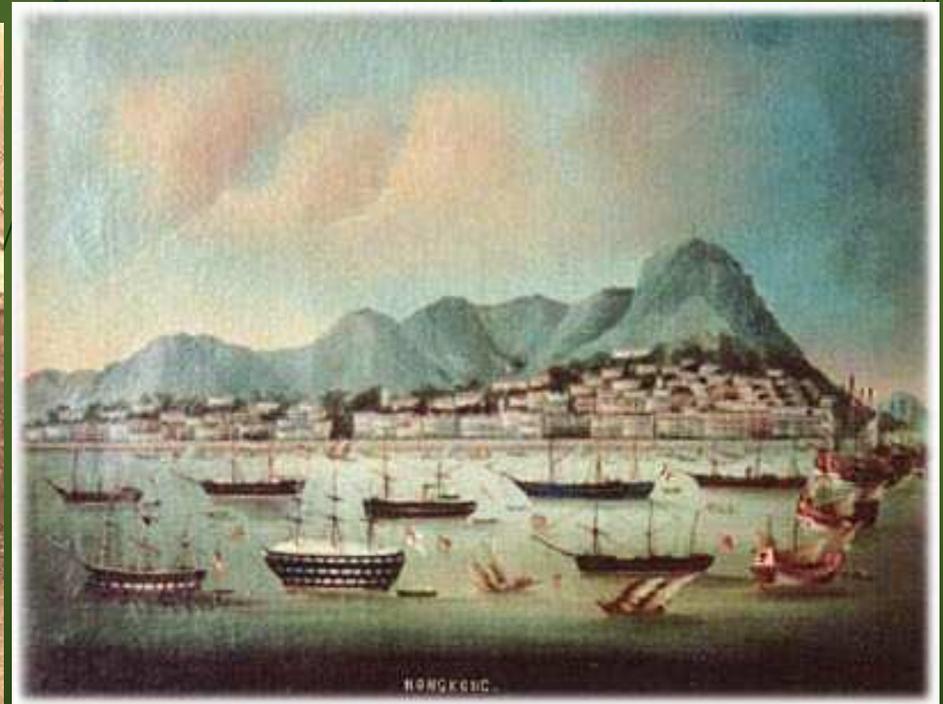
Prevent a Hostile Takeover

- Major strategic advantages
 - Blocks process
 - Creates delay
 - Delay permits other strategies to work
- Service Corp v. Loewen
- Georgia Pacific-Nekoosa
- Socially beneficial when government fails to prosecute harmful mergers

Discourage Entry

- Utah Pie
- Stop a large, efficient competitor
- Generally harmful to consumers

Original Barrier to Entry



Prevent Vigorous Competition

- Many examples:
 - Independent service organizations
 - Generic cigarettes
 - **Digital vs. Intel**
- Socially harmful by reducing competition

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?

- Constant mc Cournot model
- Actions can be either
 - pro-competitive (cost reducing) or
 - anti-competitive (rival's cost raising)
- Set price effect from two behaviors equal

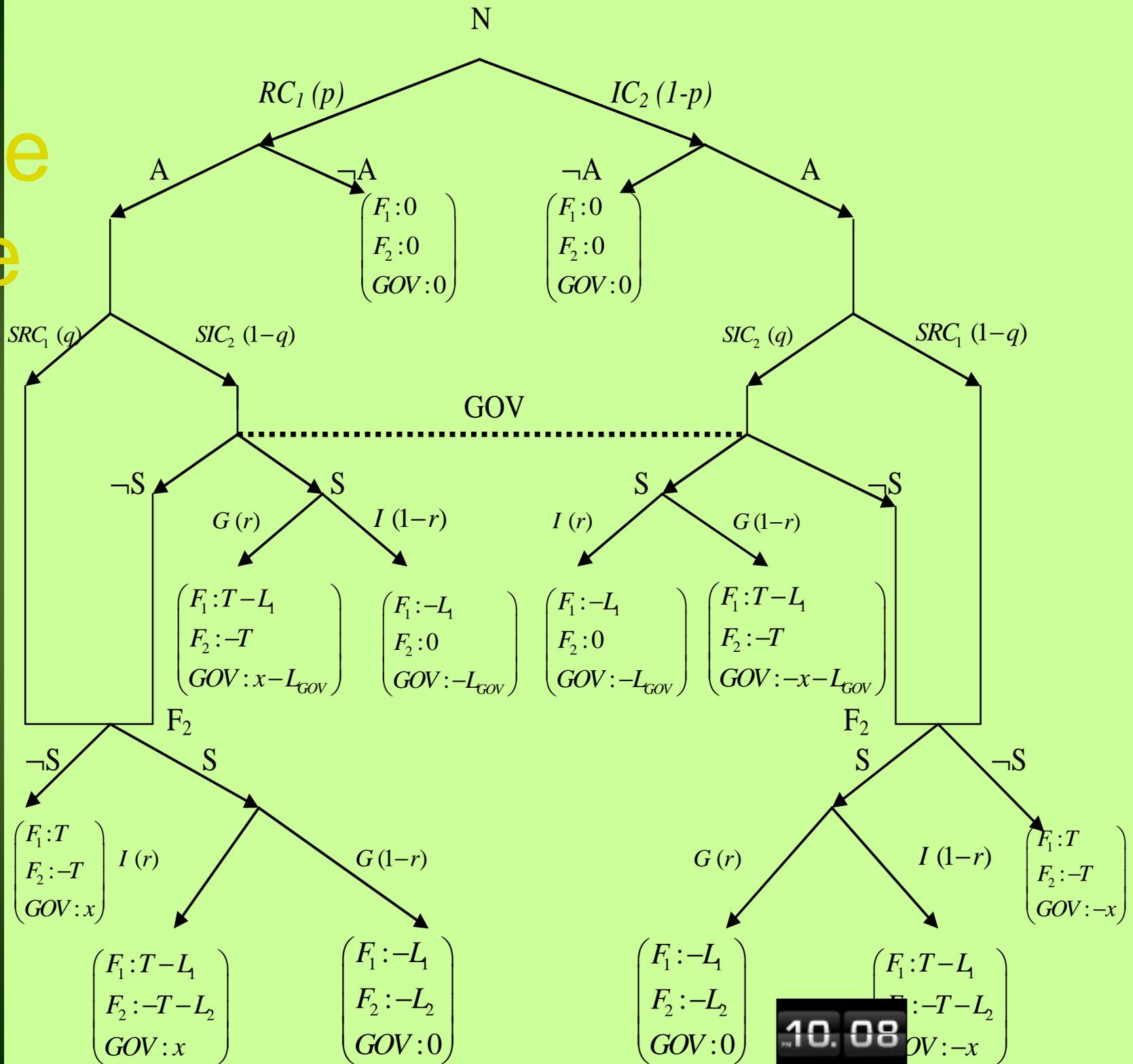
Main Result

- 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

Strategic Analysis

- Private firms have
 - better information than DOJ
 - Incentives not aligned with society
- Tradeoff between accuracy and efficacy
- Errors in government, Court actions
- Endogenous choice of actions
- Affect incentives by decoupling damages

Game Tree



Results

- Pure private enforcement dominated by pure public enforcement
- Mixed enforcement dominates pure public if courts are sufficient accurate
 - Or if courts less accurate but agency ineffective
- Optimality can be achieved by decoupling damages from awards
 - Incentive not to engage in anti-competitive behavior untied from incentive to sue

Private Participation in Gov't Suit

- Model suggests role for government mediation of antitrust litigation
- Companies often help government sue
 - Improves government accuracy
- Private participation in agency suits may be optimal if private suits prohibited.
- Risk of capture

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