Combining horizontal and vertical analysis in antitrust: the American Antitrust Institute s roundtable on the implications of the work of Robert L. Steiner

BY GREGORY T. GUNDLACH* and ALBERT A. FOER**

I. Introduction

For the past generation, informed primarily by economics and under the influence of the Chicago school of antitrust, U.S. antitrust policy has downplayed the competitive significance of vertical distribution relationships. Instead, antitrust policy and enforcement has favored a largely "single-stage" approach through which horizontal economic relationships are viewed as the primary determinant of the final prices paid by consumers.[1] Largely guided by the Chicago school's adoption

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AUTHORS' NOTE: *On behalf of the American Antitrust Institute, we are indebted to those who participated in the roundtable, each of the authors who made contributions to this special issue, the interactive audience, the cosponsors, and especially to Robert L. Steiner for his contributions to the field of antitrust.*

[1] As described by Steiner and others, in the single-stage approach, individual manufacturers are positioned as the "firms" and the manufac-

and application of economic models of perfect competition to retailing, under the single-stage model, the role and influence of the distribution sector is assumed to be of little analytical significance (or at minimum neutral) for determining market outcomes.

The basis of such thinking stems from the view that members of the distribution sector operate within a perfectly competitive market composed of large numbers of small firms whose offerings are undifferentiated from one another and whose relationships with manufacturers are complementary and noncompetitive. In such an environment, retailers are thought to have little influence over the prices they pay suppliers. Similarly, cost increases on the part of manufacturers are believed to be fully passed on to consumers—dollar for dollar. Essentially, retail members of the distribution sector are characterized as passive price takers (both in their role as buyers and resellers) having little influence on the workings of the market.

The implications of these economic assumptions and their application by proponents of the Chicago school and others has been that for years, assessment of anticompetitive behavior within the distribution sector and vertical antitrust enforcement has been greatly limited at the federal level. During this time, however, scholarship in economics, law, and business has yielded new insight and understanding of interactions between horizontal competition and vertical distribution relationships, with important implications for antitrust policy. Some of the most provocative writing integrating these insights into antitrust has been by Robert L. Steiner, whose unique experience as a prolific author in marketing and economics, president of a national

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turing sector as the "industry." Manufacturers appear to sell directly to household consumers, or what is the same thing, to deal with them through a perfectly competitive distribution sector whose firms are price takers as buyers and resellers. In this environment manufacturers price changes are passed through dollar for dollar to consumers, and manufacturers and retailers are presumed to have an exclusively complementary, noncompetitive relationship. *See also* Michael P. Lynch, *Why Economists Are Wrong to Neglect Retailing and How Steiner's Theory Provides an Explanation of Important Regularities*, in this issue of *The Antitrust Bulletin*. For a discussion of the nature of triple-stage markets (manufacturer - distributor - retailer), *see* Robert L. Steiner, *A Dual Stage View of the Consumer Goods Economy*, 25 J. ECON. ISSUES 27 (2001).

consumer goods company and as an economist at the Federal Trade Commission, provides further perspective on the role of vertical relationships in antitrust and the utility of a dual-stage approach to antitrust.

Using Steiner's large but underrecognized body of work as a starting point for re-examining antitrust policy the American Antitrust Institute's (AAI's) Roundtable, Combining Horizontal and Vertical Analysis in Antitrust: Implications of the Work of Robert L. Steiner was held on June 21, 2004. The event, a part of AAI's larger effort to further antitrust thought through integration of new insights was cosponsored by Bates White, Cornerstone Research, the David F. Miller Center for Retailing Education and Research, University of Florida and the Coggin College of Business, University of North Florida.

Attracting the interest and participation of over 75 scholars, policy makers and practitioners from the U.S. and abroad, the roundtable preceded AAI's 5th Annual Conference: Buyer Power and Antitrust.[2] For disseminating and archiving contributions from the roundtable, we are pleased to be able to publish in the *The Antitrust Bulletin* articles specially commissioned for the event and authored by prominent scholars in antitrust, economics and marketing.

II. The contributions of Robert L. Steiner[3]

Like so many important insights, the key contribution of Robert Steiner's work for antitrust can be summarized in simple yet significant terms—*retailing and vertical distribution relationships do and should matter to antitrust.* This straightforward, but critical assessment stems from three decades of observations, experience and teaching regarding the basic workings of the consumer goods markets, the

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[2] *See* http://www.antitrustinstitute.org/conference2004/agenda.cfm.

[3] *See* Robert L. Steiner, *Does Advertising Lower Consumer Prices?*, 37 J. MARKETING 1 (1973), American Enterprise Institute Reprint 37 (January 1976); *The Prejudice Against Marketing*, 40 J. MARKETING 2 (July 1976); *A Dual-Stage Approach to the Effects of Brand Advertising on Competition and Price*, *in* John Cady, ed., Marketing and the Public

nature of competition that occurs and the distribution relationships that arise in these markets.

Steiner finds that, contrary to prior assumptions in economics, the distribution sector is imperfectly competitive, enabling retailers to exercise varying degrees of market power in their distribution relationships. Given this power, there exists a competitive as well as complementary dimension to manufacturer-retailer relationships in which manufacturers and retailers engage in "vertical competition" to perform important functions and to obtain a larger share of a brand's retail price. As a result, Steiner contends that final consumer prices are influenced not only by the actions of firms at each stage of production and distribution, but also by the interactions of such actions across these stages.

According to Steiner, a recurrent example of the interplay of production and distribution and its effects for prices may be found in the inverse association of retail margins and brand advertising. Based on his own observations and the empirical findings of others, Steiner notes that manufacturers who build widespread consumer acceptance and brand identification for their products typically find retailers are

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Interest, Proceedings of 1977 Symposium Conducted by the Marketing Science Institute in Honor of E. T. Grether. MSI Report No. 78-105, at 127; *Marketing Productivity in Consumer Goods Industries—A Vertical Perspective*, 42 J. MARKETING 60 (January 1978); *Basic Relationships in Consumer Goods Industries*, 7 RES. MARKETING 165 (1984); *The Nature of Vertical Restraints*, 30 ANTITRUST BULL. 143 (1985); *Point of View: The Paradox of Increasing Returns to Advertising*, 27 J. ADVERTISING RES. 45 (February/March 1987); *Manufacturers' Promotional Allowances, Free Riders and Vertical Restraints*, 36 ANTITRUST BULL. 383 (1991); *Intrabrand Competition—Stepchild of Antitrust*, 36 ANTITRUST BULL. 155 (1991); *Sylvania Economics—A Critique*, 60 ANTITRUST L.J. 41 (1991); *The Inverse Association Between the Margins of Manufacturers and Retailers*, 8 REV. INDUS. ORG. 717 (1993); *How Manufacturers Deal With the Price-Cutting Retailer: When Are Vertical Restraints Efficient?*, 65 ANTITRUST L.J. 407 (1997); *The Third Relevant Market*, 45 ANTITRUST BULL. 719 (2000); *A Dual-Stage View of the Consumer Goods Economy*, 25 J. ECON. ISSUES 27 (2001); and *Category Management—A Pervasive New Vertical/Horizontal Format*, 15 ANTITRUST 77 (2001); *The Evolution and Applications of Dual-Stage Thinking*, in this issue of *The Antitrust Bulletin*.

forced to sell their products at relatively low margins. In contrast, manufacturers whose products are largely indistinguishable from those of their competitors find retailers take high markups over factory invoice prices. Through their control of shelf space, display position, promotion of store brands and other sources of power, these retailers can and often do force manufacturers to lower factory prices. Fundamentally, according to Steiner, the magnitude of the margins of manufacturers and retailers reflect the relative willingness of consumers to *switch brands within store versus their willingness to switch stores within brand.* When the relative magnitudes are quite different, margins at the two stages will be inversely related (otherwise not) with retailers enjoying the high margins in the first case and manufacturers in the second.[4]

Steiner counsels that such effects demonstrate that the costs and efficiencies of firms in both manufacturing and distribution are important determinants of outcomes in the market. Arguing for a dual-stage approach, Steiner emphasizes that ultimately consumer prices depend on both manufacturers' and retailers' costs and markups and that retailers' markups are more likely to be influenced by the degree of intrabrand competition than interbrand competition. Steiner therefore contends that a dual-stage approach that accounts for and examines both horizontal and vertical interactions among and between firms at successive stages of production and distribution is required to appropriately determine market outcomes.

III. Relevance and recognition of Steiner's insights

Steiner's early observations and counsel are of special relevance today as members of the distribution system in many areas of our economy gain increasing clout in their relationships with manufacturers. This is particularly true within the retail sector where "category killer" formats, increased private label offerings and large-scale opera-

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[4] The strength of the inverse association between margins of manufacturers and distributors (retailers plus wholesalers) is slightly attenuated in "triple-stage" categories in which a goodly percentage of manufacturers' shipments go through wholesalers. *See* Steiner, *A Dual-Stage View of the Consumer Goods Economy*, *supra* note 3, at 36–39.

tions like Wal-Mart have over time yielded greater efficiency in distribution and also resulted in greater vertical bargaining power (e.g., buyer power) on the part of large retailers.[5] The result, far from being a perfectly competitive market, the distribution sector has become as varied in size and as uniquely differentiated in format as the upstream manufacturing sector to which it is vertically connected. Rather than being composed of a myriad number of price-takers whose actions bear little economic effect and therefore whose analytic significance may be assumed away (or considered neutral), members of the distribution sector have in many instances become important and influential actors in the market whose vertical actions can and do impact horizontal competition in many ways.

The progressive rise of power retailers has also spurred the efforts of some manufacturers to maintain and counterbalance such power through increased consolidation and other strategies. The consequence of this state of affairs is that now, more than ever, to fully understand competition and its outcomes in a market requires a dual-stage approach that includes assessment of the overall structure and dynamics of vertical relationships and the interactions that take place within and across the distribution system.

To be sure, in recent years economists and antitrust policy makers, building on the early work of Steiner and others, have begun to examine more closely the distribution sector and to recognize its implications for competition and antitrust policy.[6] This work, integrating insights from economics, marketing and other disciplines, includes a growing accumulation of knowledge regarding the nature and causes of retail price variation, the nature of interaction and influence among

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[5] The increasing prominence of buyer power in the U.S. economy and its significance to antitrust provided the motivation for the American Antitrust Institute's 5th Annual Conference: Buyer Power and Antitrust. For further information, *see* www.antitrustinstitute.org. Papers from this conference will be published in a forthcoming volume of *The Antitrust Law Journal.*

[6] For a description of aspects of this work *see* Pamela Jones Harbour, *An Enforcement Perspective of the Work of Robert L. Steiner: Why Retailing and Vertical Relationships Matter*, in this issue of *The Antitrust Bulletin.*

and between manufacturers and members of their distribution system, and the ways in which this influence is manifested to affect horizontal competition. As these insights continue to be cultivated and accumulate they are likely to provide important and helpful input to antitrust development and enforcement.

IV. Implications for antitrust

Following the adoption of a dual-stage approach as advocated by Steiner and others and increasing our understanding of the nature and implications of relationships and interactions on the part of members of the distribution sector can be helpful to furthering antitrust thought and practice in many ways. Two important examples include merger analysis and enforcement policy in the area of vertical restraints.

A. Merger analysis

With respect to merger analysis, although some suggest such insights have already been recognized and incorporated into existing analysis, others point out that such understanding, if more fully accounted for, has the potential of yielding even more robust and realistic analysis and outcomes.[7] One implication, for example, is that common assumptions regarding the effects of increased concentration on the part of upstream manufacturers leading to concerns for collusive outcomes, enhanced market power and higher prices for consumer goods may require modification.[8] While appropriate for assessments of mergers involving producers selling directly to consumers, such assumptions may be in need of adjustment where producers sell through distributors. In particular, as Steiner points out, increases in manufacturers' prices are generally not passed through dollar-for-dollar so that consumer prices can rise or fall by more or less than changes in

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[7] *Compare* Philip Nelson, Gloria Hurdle & Tessie Su, *The Implications of Robert Steiner's Work for Merger Analysis*, in this issue of *The Antitrust Bulletin*, *with* Harbour, *supra* note 6. *See also* William S. Comanor, *Steiner's Two-Stage Vision: Implications for Antitrust Analysis*, in this issue of *The Antitrust Bulletin.*

[8] For an explication of these implications *see* Comanor, *supra* note 7.

manufacturers prices. Therefore, given this mixed potential, welfare effects must be determined by measuring merger-related changes in consumer prices. Moreover, to make certain that the impact of vertical competition is captured in measuring the market power of manufacturers and retailers, Steiner has proposed adding retail gross margins into the calculation.[9] Incorporation of insights regarding the nature and influence of members of the distribution system may also be helpful in the areas of market definition, market power assessment, understanding proffered efficiencies and the estimation of manufacturing level effects using retail (scanner data) prices.[10] Overall, merger analysis and enforcement is likely to benefit from an increased understanding of those circumstances where the structure and dynamics found in the distribution sector are likely to attenuate the potential anticompetitive effects of increased upstream concentration.[11]

B. *Vertical restraints*

In the area of vertical restraints, Steiner's admonitions of the importance of understanding the horizontal and vertical relationships among firms at the same stage and at successive stages of production and distribution may have even more far-reaching implications.[12] For example, he observes that the implicit Chicago school assumption that firms at successive stages are in an entirely complementary relationships leads to the false inference that when manufacturers voluntarily adopt vertical restraints their only motivation must be to improve the

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9 *See*, Steiner, *The Evolution and Applications of Dual-Stage Thinking*, *supra* note 3.

10 *See*, Steiner, *The Third Relevant Market*, *supra* note 3, at 721.

11 *See*, Harbour, *supra* note 6.

12 *See, e.g.*, Steiner, *Marketing Productivity in Consumer Goods Industries—A Vertical Perspective*, *supra* note 3; *Basic Relationships in Consumer Goods Industries*, *supra* note 3; *The Nature of Vertical Restraints*, *supra* note 3; *Manufacturers' Promotional Allowances, Free Riders and Vertical Restraints*, *supra* note 3; *Intrabrand Competition—Stepchild of Antitrust*, *supra* note 3; *The Inverse Association Between the Margins of Manufacturers and Retailers*, *supra* note 3; *How Manufacturers Deal with the Price-Cutting Retailer: When Are Vertical Restraints Efficient?*, *supra* note 3.

efficiency of distribution.[13] Hence, the interests of manufacturers and consumers are taken to be virtually identical and the former's voluntary adoption of vertical restraints to stop price cutting is interpreted as reflecting a welfare-enhancing desire to prevent free riding and cure other principal/agent problems. So, as Chicago sees it, the antitrust agencies should seldom intervene in this area.

In contrast, Steiner's writings identify both pro- and anticompetitive adoptions of vertical restraints.[14] Historically he finds that the major welfare-reducing application of vertical price and distribution restraints, especially in a dynamic efficiency context, has been their use to retard the entry of a series of new and more efficient forms of retailing whose service package was different than but not overall-inferior to that of the incumbent retailers of the day. While Chicago invariably ascribes price cutting to free riding, Steiner argues that it is often explained by the fact that the new-breed retailers are simply more efficient. But until the newcomers attain a "critical mass" market share, it will be more profitable for all but the most preeminent brands to adopt vertical restraints, for the weaker brands would lose more sales from incumbent retailers that would accord them less dealer support or drop them altogether than they would gain from their brands' lower retail prices.[15]

Steiner also takes issue with the Supreme Court's view that the presence of substantial interbrand competition will discipline the margins of retailers and overcome the tendency for vertical restraints to diminish intrabrand competition,[16] pointing out that the more vigorous

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[13] *See, e.g.*, Steiner, *The Nature of Vertical Restraints*, *supra* note 3, at 145 (arguing, *inter alia*, that "[o]n the whole, but with important exceptions, vertical restraints tend to be economically injurious to society . . ."). *See also*, Steiner, *Basic Relationships in Consumer Goods Industries*, *supra* note 3.

[14] *See*, Comanor, *supra* note 7. *See also* Harbour, *supra* note 6.

[15] *See, e.g.*, Steiner, *The Nature of Vertical Restraints*, *supra* note 3; *How Manufacturers Deal with the Price-Cutting Retailer: When Are Vertical Restraints Efficient?*, *supra* note 3.

[16] *See*, Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988).

is interbrand competition among manufacturers, the weaker will be intrabrand competition among retailers and the higher their markups. He asserts that total surplus in the product category should be the preferred test of the social welfare effects of a vertical restraint (or other marketing policy), which in a dual-stage world is the sum of producer, distributor and consumer surplus.[17] In the long run Steiner believes that productive and distributive efficiency are more important contributors to social welfare than allocative efficiency.[18]

Finally, he contends that consumer welfare can only be advanced when the agencies bring cases against powerful brands that have adopted vertical restraints. If weak brands are not allowed to adopt vertical restraints to stop price cutting, retailers will simply replace them with another manufacturer's brand or a store brand, thereby injuring a competitor without improving competition.[19]

V. Contents of the special issue

The articles described below and appearing in this issue of *The Antitrust Bulletin* were specially commissioned for the AAI Roundtable and are authored by prominent scholars in antitrust, economics and marketing and past policy makers. Each contributes to the central theme of the roundtable and was presented by the authors as part of the event. Together, they contribute to our overall understanding of the importance and impact of vertical relations and the distribution sector to antitrust.

A. Vertical Relations in Antitrust: Some Intellectual History (*F.M. Scherer*[20])

Tracing the development of a subject provides an important foundation for understanding. Furnishing such background, Scherer

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[17] *See, e.g.*, Steiner, *The Nature of Vertical Restraints*, *supra* note 3.

[18] *See*, Steiner, *How Manufacturers Deal With the Price-Cutting Retailer: When Are Vertical Restraints Efficient?*, *supra* note 3.

[19] *See, e.g.*, Steiner, *The Nature of Vertical Restraints*, *supra* note 3; *How Manufacturers Deal With the Price-Cutting Retailer: When Are Vertical Restraints Efficient?*, *supra* note 3.

[20] Aetna Professor Emeritus, John F. Kennedy School of Government, Harvard University.

describes important historical developments pertinent to the role of distribution in antitrust. He focuses on three main areas of interest: the ability of powerful enterprises to exert monopoly power, how the pricing of monopoly power reiterated at successive stages in the chain affects market outcomes and the nature of vertical restraints. In tracing historical developments in each of these areas, Scherer articulates the role and importance of vertical relations for understanding monopoly power and concludes that "[T]he extension of monopoly power to other vertical stages in the chain of distribution is a phenomenon that matters."[21] Calling for the further integration of such thinking into antitrust, he suggests that "a good deal of economic and marketing sophistication is needed to do the job properly" and counsels that important cases may benefit from the proper application of such expertise.[22]

B. Vertical Relationships in Distribution Channels: A Marketing Perspective *(Barton A. Weitz[23] and Qiong Wang[24])*

Since the inception of the field of marketing, vertical distribution relationships, interaction and strategy have been a primary focus of scholarship. As such, insights garnered from marketing provides a further basis for understanding the role of distribution in antitrust. Recognizing both the independent and complementary nature of vertical manufacturer-distribution member relationships, Weitz and Wang review various mechanisms of governance for managing such associations, including vertical integration, power, contractual terms involving price and nonprice issues and relational norms, and trace the evolution of the use of such mechanisms over time. In particular, they note that the last several decades have witnessed both an increased

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[21] F. M. Scherer, *Vertical Relations in Antitrust: Some Intellectual History*, in this issue of *The Antitrust Bulletin.*

[22] *Id.*

[23] Executive Director, David F. Miller Center for Retailing Education and Research; JC Penney Eminent Scholar Chair in Retail Management, University of Florida.

[24] Doctoral Student of Department of Marketing, Warrington College of Business Administration, University of Florida.

use of mechanisms yielding coordination versus past primary reliance on power as well as a shift in the locus of power for many relationships in the consumer goods industry from the manufacturer to members of the distribution channel, especially retailers.

The authors also classify and overview extant research in marketing that has examined vertical channel relationships. They observe that such work has included *economic* research that draws on microeconomic theory and the use of game theoretic models to develop insights into vertical relationships as well as *behavioral* research that draws on prior understanding concerning interpersonal and interorganizational behaviors to develop and empirically test theory describing behaviors in vertical relationships. The authors conclude that "academic marketing research has a rich tradition in treating retailers as important independent decision makers in a vertical relationship with manufacturers."[25] They note, however, that while coordinating the activities of firms in a vertical relationship offers the opportunity to improve efficiency, it is a challenging task given the varying goals and perspectives of each firm and their own individual profit goals. In this regard, Weitz and Qiong observe that while there is evidence that significant productivity gains have been achieved through supply-chain coordination in the consumer product goods channel, there is a potential "dark side" to these coordinating efforts including the potential creation of entry barriers and coordinated behavior that can adversely effect social welfare through limiting competition.[26]

C. The Evolution and Applications of Dual-Stage Thinking *(Robert L. Steiner[27])*

Tracing the inception, evolution and applications of the dual-stage approach, Steiner describes the confluence of economic theory, business experience and public policy that led to the gestation of his think-

[25] Barton Weitz & Qiong Wang, *Vertical Relationships in Distribution Channels: A Marketing Perspective*, in this isssue of *The Antitrust Bulletin.*

[26] *Id.*

[27] Economic consultant, former Economist, Federal Trade Commission, and former President of Kenner Products Co.

ing, its development and key applications within antitrust. Beginning with his encounter with what he later describes as the "single-stage" approach advanced in economics, he describes the discrepancy of such thinking in relation to his experience as a marketing practitioner within the field of consumer goods. Applying both economic thought and business experience, Steiner then outlines the basic elements of a dual-stage analysis including various empirical regularities such as the inverse relationship between margins typically found between manufacturers and retailers, and the concept and implications of vertical competition. He then concludes with a discussion of how a dual-stage approach may be applied to existing principles in merger analysis and a summary of existing legacies from the single-stage paradigm.

Steiner makes two proposals to the agencies when examining mergers among consumer goods manufacturers. First, the default procedure should be to measure parameters in retail prices rather than, as presently done, in manufacturers' prices. As Steiner puts it, "[I]f consumer welfare is the standard, shouldn't the default assumption be that the welfare effects of a merger must be measured by changes in the prices consumers pay rather than by changes in manufacturers' prices?"[28] Steiner also proposes the use of an "RGM adjusted HHI" suggesting that by including the retail gross margin along with the HHI in the estimates of the market power of manufacturers and retailers, their standing as vertical as well as horizontal competitors is more fully captured.[29]

D. Why Economists Are Wrong to Neglect Retailing and How Steiner's Theory Provides an Explanation of Important Regularities *(Michael P. Lynch[30])*

Elaborating on the core ideas advanced by Steiner, Lynch traces and documents the neglect of distribution and retailing within the

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28 Steiner, *The Evolution and Application of Dual-Stage Thinking*, *supra* note 3.

29 *Id.*

30 Economist, Former Director, Bureau of Economics, Federal Trade Commission.

field of economics and the basis for such treatment on the part of economists. The basic rationale found by Lynch is that often "economists believe that retailing can be acceptably modeled as a perfectly competitive industry with constant marginal costs."[31] Lynch goes on to document that the actual retail industry is very different from the simplifying assumptions that underlie the model of perfect competition. He observes, for example, that most troubling are assumptions that characterize the retailer sector as "spaceless" in location and distance to consumers, that retailers face infinitely elastic demand curves, sell only one product and, most troubling to Lynch, the assumption that there are no economies of scale in the provision of retail services or for consumers who must travel to reach stores. Lynch explains why such assumptions are invalid when applied to the real world of retailing.

In addition to such detail, Lynch also investigates Steiner's observations regarding the inverse relationship of margins at the successive stages of manufacturing and retailing often found within consumer goods markets. Taking these observations and drawing on secondary data, he shows the regularity with which such observations occur and then advances an economic model that captures and formalizes these observations and Steiner's original thinking.

E. Using Steiner's Dual-Stage Model to Develop Better Measures of Retail Distribution *(Paul W. Farris[32])*

Highlighting the importance of the dual-stage approach for the study and understanding of consumer markets by both economists and marketers, Farris details how the inverse relationship of manufacturer and distributor gross margins observed by Steiner is actually part of the larger relationship between distribution and marketing performance. According to Farris, "[T]he dual-stage approach makes it clear that distribution is a cause as well as an effect of marketing success: the strategies, structures, and performances of both retailers and manufacturers codetermine the equilibrium relationship

[31] Lynch, *supra* note 1.

[32] Landmark Communications Professor of Business Administration, Darden School, University of Virginia.

between share and distribution that characterize a given market."[33] Commenting on the effects observed by Steiner, Farris points out that broad-based distribution plays a key role in the "Steiner" effect. He suggests that more generally, the moderating effect of manufacturers' distribution policies is an important determinant of whether retailers will be able to use increases in demand created by advertising to raise their own selling prices and margins. Citing extant research in marketing and his own insights, Farris details the more general relationship between distribution and market share performance and the more specific factors that may contribute to variations in this relationship. He concludes that while the inverse correlation of manufacturer and retail gross margin is an important phenomenon in consumer goods marketing, "[T]o more fully apply the dual-stage model we will need improved, more complete, measures of distribution effects"[34]

F. Distribution Matters *(Howard P. Marvel[35])*

Tracing both the divergence and at times contending their similarities, Marvel chronicles Steiner's analysis regarding the role of marketing, advertising and distribution and extant economic thinking as found under the Chicago school of antitrust. Describing the field of economics, Marvel distinguishes the traditional way in which economists have looked at distribution issues from that of the Chicago school. Marvel suggests that Steiner's criticisms of the economics profession apply differently to each. To the former, he observes that Steiner's admonitions to the economics profession for its neglect of distribution are justified. To the latter, however, Marvel contends that such criticism does not apply and that, rather, the Chicago school's address of distribution issues has been extensive and often correct. He observes, for example, that both the Chicago school and Steiner share "an abiding interest in opening the black box of distribution and mar-

33 Paul W. Farris, *Using Steiner's Dual-Stage Model to Develop Better Measures of Retail Distribution*, in this issue of *The Antitrust Bulletin.*

34 *Id.*

35 Professor of Economics & Law, The Ohio State University.

keting"[36] and that their views, representing differing perspectives "are in no way incompatible."[37]

Marvel concludes with remarks on the lessons that Steiner's work offers on the importance of distribution and its role in antitrust. In this respect, Marvel observes that "Steiner's analyses of the economics of distribution and promotion have brought a fresh and imaginative outsider's perspective to bear on issues that economists have been too willing to brush aside."[38]

G. An Enforcement Perspective on the Work of Robert L. Steiner: Why Retailing and Vertical Relationships Matter *(Pamela Jones Harbour[39])*

Summarizing some of the main contributions of Steiner's work and observing their relation to recent economic research concerning distribution and the retail sector, FTC Commissioner Harbour explores the implications of this work and research for analyzing mergers and vertical restraints. She contends that horizontal merger analysis would likely be more robust and realistic, albeit more uncertain at times, were it to more fully account for the unique aspects of retail markets. However, she notes that Steiner's work and recent economic studies, though providing further insight, have yet to provide clear guidance to identify real-world circumstances where retail sector dynamics are likely to either attenuate or exacerbate the potential anticompetitive effects of increased concentration arising out of such mergers. Similarly, she acknowledges the fundamental divergence of Steiner's view of vertical competition and the importance of intrabrand competition from that held by the Chicago school and mainstream economics, but notes that the "future of vertical restraints law will remain highly uncertain unless and until antitrust scholars make an affir-

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36 Howard P. Marvel, *Distribution Matters*, in this issue of *The Antitrust Bulletin.*

37 *Id.*

38 *Id.*

39 Commissioner, Federal Trade Commission.

mative effort to intensify and refine their empirical study of vertical effects."[40] She concludes that "the fundamental insight of Robert Steiner's writings—which argue that such a neglect [of vertical competition] can result in mistaken applications of the antitrust laws—resonates with my intuitions about the market, as well as with my past experience as a state enforcement official"[41] and that "current antitrust doctrine thus greatly needs to build on the foundation laid by Steiner and other scholars."[42]

H. Steiner's Two-Stage Vision: Implications for Antitrust Analysis *(William S. Comanor[43])*

Citing Steiner's primary contribution as his two-stage vision for antitrust, Comanor counsels that antitrust "cannot ignore interactions among firms at different stages of production or draw conclusions entirely from what occurs at one or another stage."[44] Elaborating on Steiner's fundamental insight that vertical as well as horizontal economic relationships determine the final prices paid by consumers for most commodities, he describes the nature of implications that arise from such thinking for consumer harm, merger analysis and vertical restraints. In terms of consumer harm as evidenced through consumer prices, he notes that while under a single-stage view, the relationship between market power and price levels is thought to be so direct that the former is actually often measured by the latter, incorporating a dual-stage perspective complicates this relationship. Further, in terms of merger analysis, he elaborates on Steiner's caution that conclusions regarding the effects of increased concentration stemming from a merger on the part of upstream manufacturers may

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40 Harbour, *supra* note 6.

41 *Id.*

42 *Id.*

43 Professor of Economics, University of California, Santa Barbara; Professor Health Services and Director of the Research Program on Pharmaceutical Economics and Policy, University of California, Los Angeles; former Chief, Bureau of Economics, Federal Trade Commission.

44 Comanor, *supra* note 7.

need to be modified considering the role of members of the distribution sector.

Finally, with regard to vertical restraints, he finds important implications of Steiner's analysis for antitrust. In particular, he observes Steiner's views as similar to his and others who contend that the competitive effects of certain restraints may be quite different depending on the locus of motivation for the restraint. He points out that, in contrast, extant studies have primarily sought to explain such restraints by conditions occurring at the manufacturing or distribution stage alone. Elaborating upon the various possible associations between manufacturers and distributors, he concludes that Steiner's "papers brought us back to the recognition that final outcomes depend on processes in both manufacturing and distribution as well as on the relationship between them."[45]

I. The Implications of Robert L. Steiner's Work for Merger Analysis *(Philip Nelson,[46] Gloria Hurdle[47] and Tessie Su[48])*

Focusing on the key insights derived from Steiner's ideas about competition in dual-stage markets, Nelson, Hurdle and Su, consider their implications for merger analysis. In particular, they focus on five fundamental questions that Steiner's work raises in relation to such analyses. These include (1) Is competition between firms at different vertical levels of an industry appropriately reflected in merger analysis? (2) When analyzing mergers between two manufacturers, is it correct to focus on price effects at the manufacturing level? (3) What pricing data should be used to analyze a merger between two manufacturers? (4) Is the Merger Guidelines' treatment of power buyers inadequate? and (5) Is the Merger Guidelines' efficiency analysis too restrictive?

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[45] *Id.*

[46] Principal, Economists, Inc., formerly Assistant Director for Competition Analysis, Federal Trade Commission.

[47] Senior Economist, Economists, Inc.

[48] Senior Economist, independent economic consultant, San Francisco.

They conclude that Steiner has "advanced a number of innovative ideas about competition in 'dual-stage' markets," and "correctly points out the importance of recognizing that retailer behavior can affect prices both at the manufacturing level and the retail level."[49] They observe, however, that based on their experience in the review of numerous merger cases in recent years, with the fundamental exception that current U.S. merger policy will stop mergers that raise prices at the manufacturing level even if there is no evidence that retail prices will be affected, Steiner's basic teaching is already recognized and incorporated in the agencies' merger analysis.

VI. Conclusion

What may be concluded from the articles appearing in this special issue is neither a prescription for specific outcomes that may be either proplaintiff or prodefendant nor a full agreement on exactly how to apply Steiner's insights, but rather a strong case for a methodology of antitrust analysis of vertical relationships that would be more empirically-based and hence more realistically anchored than the theories that have driven antitrust for at least the past quarter century. For this, the antitrust community owes a lasting debt to Robert L. Steiner, whose unique multidisciplined life history and tenacious personal character have given us a body of writing that was long overlooked, but has finally received the recognition that it deserves.

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[49] Nelson, et al., *The Implications of Robert Steiner's Work for Merger Analysis*, *supra* note 7.