TURNER:

Hello and welcome back to Wisconsin Law in Action, a podcast where we discuss new and forthcoming scholarship with the University of Wisconsin Law School professors. I'm your host, Kris Turner, and my guest today is Professor W. and Vi Miller, professor of Law, Emeritus Peter Carstensen. Professor Carstensen has been a professor at UW Law since 1973 and is truly a prolific author of numerous well-regarded articles, chapters and books focused on a diverse set of topics, but primarily on antitrust and competition policy.

Today, Professor Carstensen is here to discuss one of his newest articles, "How to Break Up Amazon", a short piece that was coauthored with Professor Darren Bush from the University of Houston and appeared on The Sling. An expanded article based on this piece has been accepted for publication in the University of California Law Review in February 2025. Professor Carstensen's article focuses on the Amazon case where the Federal Trade Commission has accused Amazon of illegally maintaining its monopoly, extracting super competitive fees on merchants that use Amazon's platform. The paper discusses how the condo and cooperative remedy model may be applied to the Amazon case and how it could be used to address competitive harms. Thank you for joining the podcast today, Professor Carstensen.

PROF. CARSTENSEN:

It's a pleasure to be here.

TURNER:

Before we get into our discussion of your paper, congratulations on earning the 2024 Alfred E. Kahn Award for Antitrust Achievement from the American Antitrust Institute. What a well-deserved honor.

PROF. CARSTENSEN:

Well, thank you. I am truly honored by this.

TURNER:

I was looking at the list of recipients, and wow, what a list. I'm not surprised to see you on there, but again, what an incredible honor.

PROF. CARSTENSEN:

I'm a little surprised to see me on that list, but as I say, I am truly honored, and I've had a number of very nice expressions from friends and people who know my work about that honor. And so it's been a pleasure.

TURNER:

Let's now turn to your article. To begin, can you give me a brief review of the complaints against Amazon?

PROF. CARSTENSEN:

Yeah, a brief review of 179-page complaint. Basically, what the Trade Commission claims is that Amazon has monopolized the online retail store business, especially as it serves a variety of independent retailers. Think of it as a public market run by Amazon. And in addition to that market itself, Amazon is accused of monopolizing a group of services related to that market.

Another issue in the case, although not expressly a monopolizing issue, is that Amazon, through its fulfillment program, serves about 92%, as I recall, of all of those vendors using its forum. And by monopolize, what we mean here is conduct that excludes competition as the primary focus, although there's some emphasis on how, as a result of those exclusions, Amazon has been able to exploit its customers, the vendors, and the consumers using its services.

TURNER:

I appreciate that you were able to quickly condense the 179-page complaint, as I was unsurprisingly unable to find time to read it in full.

PROF. CARSTENSEN:

Right.

TURNER:

Is this all related? I've read in some popular mainstream media articles how Amazon services has degraded lately, at least allegedly. Are these two things related?

PROF. CARSTENSEN:

Yeah, that's part of what the complaint charges as this exclusionary and exploitive behavior, that is, Amazon is alleged to have raised prices, to have deteriorated the services that it provides in terms of customer access to useful evaluations, the placement of options to provide particular goods and services, that it has engaged in conduct to design to restrict the freedom of its vendors to offer alternative different prices, and specifically lower prices, in other forums in which they may also be selling, so that there's no opportunity to develop a competing forum that is going to have fewer customers initially. And so how do you make it attractive? Well, you offer a lower price, better service of some sort. And Amazon, according to the complaint, has failed to do... Or has imposed restrictions, I should say... Has imposed restrictions that make it impossible or nearly impossible for its vendor customers to have that kind of opportunity.

TURNER:

Assuming that the FTC prevails on the merits, what remedies could it seek?

PROF. CARSTENSEN:

Well, that's the hundred million dollars or several billion question. In monopoly cases, generally, historically the primary remedy was to break the company up. And you could see separation of the fulfillment services from some of the other services, but it's hard to imagine breaking up the platform. You can't. The whole benefit of the platform is that network effect that you've got lots of vendors, lots of customers. Breaking it up doesn't seem to be a viable option. The other standard remedy is what's called behavioral remedies, conduct remedies, "Don't do this," "Don't do that," or sometimes, "Do this" or "Do that." So you're telling the monopolist how to run its business or imposing restrictions on how it runs its business. The problem here is conduct remedies are generally disfavored now as an alternative for a variety of reasons.

TURNER:

You mentioned that behavioral remedies are out of favor with antitrust scholars. Why is that?

PROF. CARSTENSEN:

Well, and not only antitrust scholars, but also antitrust enforcers, basically consider the incentive of a monopolist is to exploit the monopoly. Tell it "Don't do that," and it will start looking, "Don't do it in certain ways." You start looking for alternative ways to do this. I just read a complaint involving... Gosh, I don't remember the industry, where the FTC had imposed on the monopolist a series of restrictions of what it could do. I remember... It's veterinarian tests that individuals can use in their home. They can't impose those restrictions on the wholesalers that were selling to the veterinarians, so they turn around and start selling directly to the veterinarians and imposing the same restraints. "Oh, gee," notice you've got the same effect, slightly different channel.

So that's why behavioral remedies are looked on as very, very difficult to police the agency. Neither the FTC nor the Justice Department are really set up as regulatory agencies that will provide continued oversight. Indeed, our real regulatory agencies, the Federal Energy Regulatory Commission, the Federal Communications Commission, have also, in trying to move markets towards competition, tried to use conduct-oriented remedies. And by and large, that has not been very successful. So there's a broad history, and again, not successful because even a regulator is not inside the corporate actor, and that actor can find other ways to misbehave.

TURNER:

So it sounds time-consuming, expensive, and just in general, people find ways to modify behavior to still do what they're trying to stop.

PROF. CARSTENSEN:

Yeah. Now, I should say, sometimes you can spot, here's a particular agreement, a particular restraint of, "Hey, we can come in and say, stop that. Don't do that," and it really does solve the problem. I'm thinking of a case some years ago where a pharmaceutical manufacturer had gone around and gotten contracts with all of the input suppliers relevant to this particular generic drug, and so they became the monopolist. By saying, "Those contracts are now null and void and others can buy the product," and part of the wrinkle there was that the monopolist was sharing some of its monopoly profits with their upstream suppliers, "No, you can't do that anymore..." Well, that opened the field up, and sometimes you can identify some other specific problem barrier limitation and zero in on that, and that opens the field. But when you don't have that, then trying to regulate how a monopolist competes going forward, extremely different.

TURNER:

What are the cooperative and condo models that you're suggesting and how are they different from other remedies?

PROF. CARSTENSEN:

The central insight that Darren and I had, and we each credit the other with having the initial insight-

TURNER:

That's a good partnership right there.

PROF. CARSTENSEN:

... I'm pretty sure it was him. But the insight is the problem in your standard monopoly is the incentive to monopolize, because you would stand to get a monopolistic gain in terms of exploiting the market and in terms of excluding competition... With the category of monopolies that we call bottlenecks, these are some step in the production distribution process where you really need to have a single entity engaged in providing whatever service transmission. Think of it like a highway or a railroad. We need that to get from here to there. If somebody owns it, they're going to exploit it.

So our suggestion is, let's not eliminate that entity, but let's change its ownership. Let's either create what we call the condo. The idea here, the concept, is that you disperse the ownership of the entity among a bunch of individual owners of a segment of that entity, and then a third party manages the entity. A good example, in a way, are natural pipelines. Historically, the pipeline owner bought the gas down in Texas and delivered it and sold it up to various natural gas distributors. The Federal Energy Commission said, "Wait a minute, now, why don't we give the buyers of gas a piece of the pipeline so that they can buy the gas down in Texas, pay the gas company for shipping it," that if it's properly worked out, and there would turn out to be some problems with the way Federal Energy Regulatory Commission set it up initially... But if it works out right, then you get the upstream or the downstream user of natural gas as a buyer of gas in a competitive market for gas down in Texas or Louisiana. So that's the condo model where each actor has a piece of the property, so they can either use it or in some cases they may want to lease that right, or sell it for a short term if they don't need it. But because they don't have a monopoly position, they don't have the incentive to exploit that dominance.

So as I say, that's the one thing, but notice that that really implies that you've got entities that can fairly independently. When you think about many of our bottlenecks, they really require much more continued management by their users. You've got to redefine what you're doing. You need to agree about scale, about how it will be organized. So that's our cooperative model, where the users or participants or stakeholders, are members of the cooperative that in totality, of course, owns and operates this enterprise, but individually, their interest is to make efficient and effective use of the enterprise. We used an example from earlier history, rural grain elevator cooperatives. Back when you had a horse and wagon, you couldn't haul your grain very far. You needed to have a grain elevator that was fairly large so that it could store the available grain and have enough volume that it could load railroad cars full of grain to be shipped to markets.

And that meant that a private owner of a grain elevator had a lot of power vis-a-vis the farmers, not much power in the grain market because once you began to ship that grain, there were lots of places, lots of buyers. There was no significant power at that end, but a lot of power over the farmers. What farmers found was they could get together, set up a cooperative that would invest in building a grain elevator that they would need to continue to use to manage, etc., that would be big enough to serve all reasonable needs, and you build it by the railroad line and then you can ship the grain. And that elevator has no incentive to exploit its farmer members. They're the ones that are going to get the benefit. They're going to get a patronage refund. So there's no point in underpaying them initially. So that's our cooperative model, where you need ongoing management that involves the stakeholders.

TURNER:

Now I've got the outline. Let's color it in a bit. How could they be applied to the Amazon case?

PROF. CARSTENSEN:

Well, in Amazon, what we speculated, and we were working when we wrote that piece on the initial complaint that the Trade Commission filed that was redacted... There were whole pages that were blacked out, so we didn't have as good a picture as we would've liked. They then have put out a second edition of that same complaint that has significantly more of the detail. But the way we thought about it was the Amazon store, and I used this analogy earlier, is like a public market. You've got a lot of stalls, they're virtual stalls, of course, at which individual vendors are selling to the public. So we thought about that in terms of a condo situation. You would need to have, again, the public market manager. That is the entity that would provide the platform and services needed for the vendors to be able to put their products out on the market.

There's some tricky negotiations in there. I don't want to underplay how difficult this could be in particular circumstances to put together, or I shouldn't say... Particularly in this circumstance, put together a cooperative that has a set of guidance rules about how the manager will handle things like customer comments, like ratings, like promotions. Right now the website offers the "Pick of the Week" thing. So this is not an easy process. And at the outset, those condo members, those stakeholders are going to need to compromise on what will be included in terms of what's going to be in the public market.

And think of if you've ever been to the market in San Francisco, there's a beautiful one up in Seattle. We're going to have one here in Madison, eventually, work has finally started, but there's going to be how many spaces do you have in a physical market? How many spaces do you have? How big can they be? What kind of advertising, what kind of merchandise? So there are a whole set of things that would need to be, but that's kind of the condo model applied. At least we think it could be applied.

Now, when you turn to the fulfillment services, which include both the process of having a warehouse in which you've got all the goods of the vendors and some system for picking out the things for a particular order, putting it together and then arranging for delivery, whether the delivery will be through your own system or whether you're going to use a third party.

Well, to us, this looked much more like something that's going to require a cooperative. That is, you want to minimize the total costs of this. You're not making any money by your warehousing and your delivery. What you want to do is to minimize this, and that means having ongoing management by the users of this service so that, again, how many places do you set up, which will warehouse a lot of different items? Do you as a particular vendor really want to be part of this cooperative, or do you think you could handle even if it's a two or three-day lag, your vending coming out of a single warehouse in, I don't know, Poughkeepsie, New York? Or do you want to have some of your goods in the fulfillment center because they're frequently purchased across the country? And then you've got some other goods that you offer that really only need to be in your warehouse, so you're going to say there's going to be a three-day delay.

I actually just bought something on Amazon... I got to admit, I'm an Amazon user that where it said there's going to be a three-day delay, even though you've got prime because it's got to come from somewhere. It's a small enterprise that has a specialized product. Okay. And again, you could say in your cooperative, "Well, sometimes I only want to have it at maybe two fulfillment centers, one in the east, one in the west, because it's going to be a two or three-day delay. Do I want to use the delivery system that comes with the warehouse, or do I want to use something else?"

So again, there are so many more choices to be made and ways to structure this, because part of the embedded price of the product has to be the cost of the packaging and delivery. And so again, I need to know, as a member of the cooperative, how that's going to be priced. And so I will want to select prices for my own products that fulfill that. So again, here the stakeholders have many more decisions to be made that are ongoing decisions, both in the management definition of the enterprise and in their use of it, which again suggest it does, that this was a better place to put in a cooperative model that gives we think the right incentives not to exploit, but rather to find the most efficient solution.

TURNER:

What are the primary reasons that the proposals you suggest should be adopted? What positives would customers potentially see?

PROF. CARSTENSEN:

We think... Again, goes back to that initial insight. You're trying to move these bottlenecks away from ones that are under control of an enterprise that sees monopoly profits as part of the gain of controlling the bottleneck, and moving control of this bottleneck to an enterprise, whether it's a condo or a cooperative, which has the incentive to operate efficiently, maximize the efficiency. Because what we want to do is to facilitate that flow from the upstream vendor to the downstream consumer. We want to minimize those costs of distribution that are involved.

That's the core thinking here, and that we think that by changing the ownership, you change the incentives. That's the core concept here. And at the same time, our central point has been a recognition that these are bottlenecks. We, in fact, include some fairly serious discussion of that particular point.

Sometimes things appear to be bottlenecks, but if you, for example, break it up, you can have an efficient enterprise with 10% of the scale or 15% of the scale. And so you don't need the single entity. And that's the history of a lot of antitrust monopolization cases.

So you've got to see that the bottleneck is substantial, important and durable before you start thinking about condos or cooperatives, because otherwise, why are you doing that? It may frustrate other kinds of entry and development. But given that that exists, and I think Amazon, based on the FTC's complaint, is a good example of this. It is a durable and substantial public market, public market platform, and that the potential for alternative platforms is limited to non-existent. If that's not true, then we got to rethink the whole thing. But taking that as true, the remedy's got to focus on how do you manage that public market platform? And we think our way of our proposals allow us then to do something that is not otherwise imaginable. We preserve the benefits of a monopolistic platform, a monopolistic fulfillment development, but we take away the incentives to monopolize to exploit that monopoly. So we're trying to have the best of both worlds, which is not without some challenges.

TURNER:

Now let's turn to the... I want to focus on the fulfillment centers for a little bit. How could a co-op model change Amazon's fulfillment center model for the better or at least serve as an acceptable remedy?

PROF. CARSTENSEN:

Well, I think it serves as an acceptable remedy and makes things work better in the sense of lower cost. That is, it can be more efficient. And again, what we're proposing is what takes away the monopoly and exploitation incentive. Right now, it forces users to use it and then charges them increasing fees for warehousing and inventorying their goods. And if you take away the model, it looks much more like my grain elevator. We all want to use that elevator. We want to have the capacity in that elevator to store our goods. We want to minimize the cost. We want to develop the best fulfillment process. This is this search process. I've seen it done, actually, in a grocery warehouse where you've got everything arranged in a way so that in that case, guys on little electric carts could go around and build the inventory that was to go on a truck to be sent to a grocery store.

So here I've got all these different orders, somehow need to have it all picked. I think with the use of automation AI, you can probably do much more of that electronically without any human being having to do any physical stuff until it comes out at the end. And then it needs to be coded so it can get sorted. Some is going to go through FedEx or the post office when that's the most efficient option. Some is going to go to some kind of trucking to distribution centers where we see those little Amazon cars going or trucks going around.

So the idea here is we preserve the benefits of the fulfillment center model, which is an inventory system where you've got it in efficient points to get all of this collected. It then goes to distribution one way or another, and delivery. And we think, that if you take away the monopoly incentives, then what you substitute is an incentive overall. Let's make this as efficient as possible. We want to minimize our costs of delivery, but we don't want to violate the two-day rule. We want to make sure it's done well, because our reputation individually rests on that. And if we don't do that, then we're all going to lose again.

One of my favorite analogies on shared reputation... Years ago, my father had come to visit us when we lived in Washington, D.C. My father lived out in Seattle, and we were suggesting going to KFC to get chicken for dinner. And he said, "Oh, absolutely not." The last time he had KFC out in Seattle, it was terrible. Well, here in Washington, D.C., we knew it was pretty good. "Well, no, okay, Dad, we'll get something else," because it's a shared reputational thing. So that's where all the users, all the vendors using the system are going to have a stake. They get a complaint from the customer. The underlying that cooperative that was handling that delivery is going to hear about it in big, bold letters. "We don't like what you have done here for whatever reason, clean up your act." So there will be policing of the process, we think.

TURNER:

Absolutely. And I suspect that social media will have a role in this, as well. Like at Amazon, why did you change this or that? That may enhance the issues with the shared reputation that you just discussed as well,

PROF. CARSTENSEN:

Right.

TURNER:

What if any, caveats are there to this proposal? You touched on this a bit already, but I wanted to flesh it out further.

PROF. CARSTENSEN:

Well, yeah. First, and it depends on the circumstance and the economics of the situation, there are definitely incentives to collude among the condo owners or the cooperative participants. If whatever that bottleneck is providing is a significant part of the cost, maybe we can coordinate and thus raise prices downstream, exclude upstream potential participants. So that's what we put up as a big flag, "Hey, you got to watch out for that."

Another thing that concerned us is innovation. The more you're committed to a condo or a cooperative and you've got some sunk costs in there, and even though economists tell me sunk costs, you should pay no attention to sunk costs. Every businessman does because those costs have been sunk. If they can't recover them, they're sunk. So now you've got an incentive to stay with what you've got rather than innovating, developing your own platform, developing your own distribution system. So we worry a lot about innovation.

And the last thing we worry about a lot in this context, and I flagged it, I think, in many ways specifically is you need durable governance that will work. There's some work been done on the public domain, and looking at frameworks in which the public domain can be administered so that it is not over exploited. Elinor Ostrom got a Nobel Prize in Economics for working on this, and I looked at some of her writings about it and she says, "Oh, this governance process is incredibly difficult." You can see where it works, where it doesn't work. And again, because of things will change, markets are dynamic. You no longer need a cooperative to run a grain elevator because you can truck your grain a lot further. You've got many more options to sell your grain. So the rationale for the cooperative has gone away. A lot of cooperatives out there, they still are a good place to market your grain.

So you want to be able to have something that is dynamic and that creates an enormous problem of governance. One of the things we've suggested that at least as an antitrust remedy, you probably want to have the court continue to be involved, so there's some external review periodically of what's going on with the bottleneck so that... Again, stakeholders may change, may want to have different voices heard. Again, long-term governance is a real problem. The best example of that right now is the music copyright world, BMI and ASCAP desperately needs reform. I'm not prepared to even think about what the reforms might be, but there is a kind of cooperative... No, condo, I should say, really. Governance that now needs to be dramatically rethought as the uses of music. Copyright have changed dramatically. And because of the legal context, there are two courts that have oversight. Unfortunately, it's two courts, not one, and nobody's been able to figure out how to come to that court and force some renegotiation. So that's another... That governance thing is, long-term, I think a massive problem whenever you do these kinds of things, but it can be addressed.

TURNER:

Right. It sounds like it's an evolving, fluid situation. The governance has to be aware of how the intents and goals of actors may change. Clearly complicated as you described, but it can be done.

So we mentioned earlier that you have an extended version of your article coming out in 2025. Will you be applying your models to other monopoly contexts in this forthcoming article?

PROF. CARSTENSEN:

Yes. Yes. We tried to show how... For example, you went back to the settlement of the Microsoft case. It might've made much more sense to make the Microsoft operating system either a condo, or probably more likely a cooperative, so that everybody who was interested could participate to put their own applications on it. We looked at the other end of the spectrum, trash dumps, where again, you can't haul trash great distances. The dump is the bottleneck where the dump is privately owned by one of the trash haulers. It can exploit and it can exclude, make that into a condo, somebody administers it. Trash haulers in the community have some kind of right to deliver a certain quantity of trash. You've got to deal with the problem of new entrance and exit and so on. But that was another example.

Airports are another possibility. Certainly it's true in other parts of the world. The airport landing rights can be moved into some kind of a condo or cooperative and redistributed so that you can actually create more workable competition. I just learned about a very successful cooperative, that's not a product of antitrust, but in securities transactions, people buy and sell stock. You've got to record those transfers. The brokers, investment bankers, got together some years ago and created a single entity that's a cooperative that provides that service efficiently, effectively. It's all done electronically these days. It's a great example of a cooperative model solving what could otherwise have been either a terribly inefficient system or a monopoly bottleneck.

And over on the regulated industries side, we suggest that FERC, and maybe the FCC with respect to some of the telecommunications issues, might well want to focus much more on either creating condos for electric transmission. FERC did the condo model for gas transmission, then failed to exercise certain kinds of regulatory common sense, so maybe the surface transportation board dealing with railroads. We have way too few railroads and there are major problems of access. So again, condominium-izing... That's a word, some of the rail trackage so that various railroads would have rights of usage, but somebody else was responsible for maintenance. Again, there's some issues there, but so there are lots of applications we think.

TURNER:

Great. Well, I look forward to reading the expanded article when it comes out.

PROF. CARSTENSEN:

Yes. So do I.

TURNER:

I bet. So with that, what do you most hope readers take away from your article?

PROF. CARSTENSEN:

I think the point about monopoly incentives, that is the core of remedy ought to be trying to deal with those incentives, and you ought to be looking for remedies that will deal with those incentives, whether it's our particular ones, or you need to be creative in your thinking about how you deal with that incentive problem. But that's the core problem to address.

TURNER:

Oh, great. I really do think they'll definitively take that away. I certainly did, and I learned a lot more than that, as well. Thank you again, and I'll tell you what, after we're finished recording here, we'll go out to a local Madison KFC and see if the taste compares to Washington, D.C. or elsewhere in the U.S.

PROF. CARSTENSEN:

Great idea.

TURNER:

Where can listeners find more of your work, especially since you've had several other new articles recently published?

PROF. CARSTENSEN:

I understand that the Law Library has a website where you can access faculty scholarship, and I'm trying to make sure that whatever I publish gets posted there. Or you can go to my entry again on the UW Law School website, and there's a link to my publications.

TURNER:

We'll also link to Professor Carstensen's scholarship on our podcast page. Thank you again for joining the podcast today, professor Carson. It's truly been our pleasure.

We've been discussing Professor Carson since the newest article, how to Break Up Amazon, published on The Sling with co-author, Darren Bush. A longer version will be published in 2025 in the University of California Law Review. For a complete listing of Professor Carstensen's work, visit the University of Wisconsin Law School, Repository. Thank you for listening. Find links to the paper we discussed today and links to all of our previous podcasts at wilawinaction.law.wisc.edu. Stay up to date on Wisconsin Law School scholarship by subscribing to this podcast by the Apple iTunes store, or follow, either at Wisconsin Law or at UW Law Profs on X, formerly Twitter, for updates on faculty news and publications. See you next time and happy researching.