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JUSTICE WATCH

Cell-phone resales prompt lawsuits

Three years ago, wireless phone companies declared war on businesses that unlock specialized software on their inexpensive prepaid cell phones and sell them overseas, filing dozens of lawsuits nationwide.

The cell phone distributors are ready to fight back, saying they have a congressional exception on their side.

A lawyer for TracFone — the leader in prepaid cellular phones — said the wireless carriers are more than willing to go to trial. TracFone has been particularly aggressive in its litigation against so-called gray market distributors.

"We are going after everybody and anyone who is associated with this," said **James Baldinger**, a shareholder at Carlton Fields in West Palm Beach who is representing TracFone. "This is a huge business. These guys are making a fortune. It's not legitimate honest work. It's stealing. The product doesn't belong to them."

Attorney **D. Fernando Bobadilla** begs to differ.

The partner with Miami-based Lipscomb Brady & Bobadilla said he

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by John Pacenti

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has nine defendants in six-related lawsuits in South Florida and Georgia. He called the lawsuits "anti-competitive and wrong."

"They didn't steal anything from anyone," Bobadilla said. "They purchased these telephones from people who bought these telephones legitimately from retailers."

The cell phone brouhaha started in 2005 when some creative middlemen discovered they could buy prepaid cell phones like the Motorola C-139 from Wal-Mart, Sam's Club and Costco for about \$10.

They stripped out the carrier's software, erased their logos and sold them to companies that ship them overseas to Latin America, the United Arab Emirates, the

Philippines and Hong Kong. Without the restrictive software, the phones could connect to any provider.



Baldinger

The middlemen use runners, who are allowed to buy only two prepaid phones at a time. The runners go from store to store buying up prepaid cell phones and sell them for a few bucks more than retail.

It's the exporters — not the runners or the middlemen — who have been the main targets, though.

Baldinger said companies like Miami-based TracFone recover the cost of the phones by getting customers to buy minutes and add more when the first batch expires.



RICHARD M. BROOKS

Attorney **D. Fernando Bobadilla** said he has nine defendants in six related lawsuits. He called the lawsuits 'anti-competitive and wrong.'

Prepaid cell phones are popular with people who don't qualify for regular wireless contracts because of poor credit. The minutes usually can be purchased for 10 cents to 25 cents.

Besides TracFone, AT&T Mobility, Virgin Mobile and T-Mobile have been bullish in fighting the secondary market over their prepaid wireless phones.

"These traffickers are stepping in the middle of this transaction, and they are com-

pletely ruining TracFone's effort to gain new customers," Baldinger said.

Wireless companies are losing millions of dollars, and customers on the other end are getting cheated because they believe they are buying a new phone from the manufacturer rather than a doctored version, he said. The warranty on prepaid cell phones is invalid because of the software tampering.

"The guys who are doing the hacking don't

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have the same quality control that Motorola has at their factory," Baldinger said.

The lawsuits filed by the wireless carriers claim trademark infringement and breach of contracts, among other counts. But defendants say their products carry only the manufacturer's name — not the carrier's — and the manufacturers never had any contract with the plaintiffs.

Bobadilla cites a 2006 exception in the Digital Millennium Copyright Act that allows the disabling of firmware that limits cell phones connectivity to a single carrier.

Baldinger said Congress carved out the exception for legitimate customers who wanted to change carriers but keep their phones when their contracts expired.

A bigger issue for the defendants is that many of the phones they sell have been purchased at auction or are returned, refurbished or broken phones without a carrier's software.

Leonardo Schamy, owner of Dynamic Cellular in Doral, said his company sold \$30 million worth of phones last year and is a simple cell phone distributor that buys phones from numerous sources.

AT&T Mobility sued the company in February.

"They are targeting the wrong people," Schamy said. "If they want to limit the sale of their own phones, they probably should target the distributors."

AT&T also sells the same prepaid cell

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phones at auctions.

"They basically confuse the market," Schamy said. "There is no way to identify the phones whether they come from the auction or if they came from the store."

Schamy said his and other companies have sold phones to Telcel, Mexico's largest mobile phone carrier. Its parent is Mexico's America Movil, which also owns TracFone.

One way to fix the problem would be for the prepaid phones to be of a specialized model that can easily be distinguished from popular low-cost models, he said. Then companies such as his could identify prepaid phones in the secondary market.

Schamy also faces a lawsuit from Motorola for allegedly repackaging phones in boxes bearing the Motorola name and logo. He said he buys the boxes and is not trying to infringe on the company's trademark.

Baldinger said it's all a ruse.

"Companies like Dynamic go to great lengths to make their product look like legitimate phones," he said.

Bobadilla paints the lawsuits in a David v. Goliath light in which the wireless providers are bullying his clients, forcing them into settlements to avoid extended, expensive litigation.

"They are getting sued by these heavyweights," he said. "My clients can either defend themselves and spend hundreds of thousands of dollars or settle."

There have been 54 lawsuits filed in several states and at least 35 settlements, which often include injunctions to stop selling prepaid cell phones. The settlements often range from \$1 million to \$5 million, according to lawyers on both sides.

In Houston, Muhammad "Mubi" Mubashir pleaded guilty last May to criminal contempt for continuing to alter cell phones in violation of an injunction. It was the first federal criminal conviction related to disputed prepaid cell phone sales, Baldinger said.

Bobadilla likes to point out that no civil case against an exporter of gray market prepaid cell phones has gone to trial.

Baldinger says it's time to bring it on.

"We would love to have a case get to trial," he said. "We hear the criticism that these cases have never been heard before a judge. Once we get through at trial, they won't be able to say that anymore." ■

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