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Resolving Data Privacy Class Actions: Practical Lessons for Mediating Website Tracking Litigation

By Ellie K Vilendrer – September 3, 2026

Website tracking litigation has rapidly become one of the most active areas of consumer class action practice. Claims brought under federal and state privacy statutes—including the Federal Wiretap Act, the California Invasion of Privacy Act (CIPA), and the Video Privacy Protection Act (VPPA)—have generated thousands of lawsuits challenging the use of website technologies such as pixels, cookies, session replay software, chat features, and analytics tools.

Although the legal theories vary, these cases often share a common characteristic: They present significant uncertainty for both plaintiffs and defendants. Plaintiffs frequently assert enormous theoretical exposure based on statutory damages and large putative class sizes. Defendants, in turn, point to standing challenges, evolving case law, arbitration provisions, certification hurdles, and substantial merits defenses. The resulting gap between perceived exposure and perceived litigation risk can make settlement particularly challenging.

Yet most of these cases do settle.

From a mediator perspective, successful resolution rarely turns on a single legal issue. Instead, settlement depends on helping the parties move beyond competing litigation narratives toward a practical risk assessment. That process often requires addressing not only the strengths and weaknesses of the legal claims but also the uncertainty inherent in rapidly evolving privacy law.

This article discusses several recurring issues that arise in mediating website tracking class actions and offers practical suggestions for counsel preparing for mediation.

Preparation Before Mediation

Privacy class actions are information sensitive. Productive mediations often depend on the exchange of key information before the mediation session.

Among the issues that commonly influence settlement discussions are:

- the estimated size of the proposed class;
- the technologies at issue (pixels, session replay, chat tools, cookies, [SDKs](#), etc.);
- the extent of any data collection and sharing with third parties;
- available analytics concerning website traffic;
- arbitration provisions and class action waivers;

- privacy policies, terms of service, and consent issues;
- insurance coverage;
- prior regulatory investigations;
- recent decisions affecting the asserted claims; and
- any technical information necessary to evaluate the allegations.

Counsel need not complete formal discovery before mediation. However, exchanging enough information to frame the risk can substantially increase the likelihood of a productive negotiation. Early mediations of privacy class actions can be particularly valuable because they allow the parties to address potential settlement structures, business-practice changes, and other resolution options before substantial resources are invested in discovery and motion practice.

Understanding the Valuation Gap

Nearly every privacy mediation begins with a significant disagreement regarding case value.

Plaintiffs often emphasize the potentially enormous statutory damages available under privacy statutes. When multiplied across a nationwide or statewide class, those damages can produce theoretical exposure reaching hundreds of millions—or even billions—of dollars. Plaintiffs may also point to recent settlements involving website tracking technologies and argue that businesses increasingly recognize the litigation risks associated with these claims.

Defendants frequently view the same case quite differently. Rather than focusing on maximum statutory exposure, defendants often evaluate the likelihood that plaintiffs can successfully navigate each stage of the litigation. They consider threshold issues such as Article III standing, personal jurisdiction, arbitration agreements, the availability of class certification, statutory interpretation, and evolving defenses such as the “party exception” under wiretap statutes. Even if liability were ultimately established, defendants may discount theoretical damages based on practical settlement realities, including claims rates and judicial scrutiny of aggregate statutory awards.

Neither perspective is inherently unreasonable. Rather, the parties are frequently valuing different risks.

One of the mediator’s principal tasks is helping each side appreciate not only the strengths of its own position but also the uncertainty surrounding the assumptions underlying that position.

Class Size: The Issue That Frequently Dominates Mediation

One recurring challenge in website tracking litigation is disagreement regarding the size of the putative class.

Plaintiffs may estimate that millions of individuals visited the relevant website during the class period. Defendants may contend that the actual number of potentially affected users is significantly smaller after accounting for duplicate visitors, jurisdictional limitations, consent issues, statutory exclusions, technical limitations, or other narrowing factors.

The disagreement matters. Class size often serves as the starting point for evaluating potential statutory exposure, settlement administration costs, notice programs, and overall settlement structure.

Where reliable class information is unavailable before mediation, parties may benefit from agreeing upon a process for exchanging this information before finalizing settlement terms or incorporating mechanisms that adjust settlement obligations if later-discovered data materially changes the estimated class size.

Settlement Structure: A Critical Factor in Resolution

Website tracking class actions may resolve through traditional common fund settlements or claims-made settlements. A *common-fund settlement* establishes a fixed, defined fund from which payments to class members are made. A *claims-made settlement* provides compensation only to class members who submit valid claims, with the total amount distributed based on the number and value of claims actually made.

These structures may be combined with other settlement terms including guaranteed minimum payments, caps, non-cash benefits, or injunctive relief addressing business practices and policies. They can provide a level of certainty regarding the defendant's total monetary exposure while providing meaningful compensation to participating class members.

Because claims-made settlements have received increased judicial scrutiny, counsel should carefully consider notice programs, anticipated participation rates, attorney fees, and the rationale supporting the chosen settlement structure. Addressing these issues early during mediation can reduce obstacles during the approval process.

The Mediator's Role

Successful mediations often occur when both parties develop a shared appreciation of litigation uncertainty.

For plaintiffs, that may include recognizing the risks associated with standing, certification, arbitration, or unsettled legal questions.

For defendants, it may involve acknowledging litigation expense, reputational concerns, the unpredictability of emerging privacy laws, and the possibility that adverse rulings could significantly increase settlement exposure.

There may also be other business reasons that incentivize settlement. For example, an anticipated acquisition or other significant corporate event may create incentives for either side to resolve litigation promptly.

The mediator's role is to help the parties arrive prepared for productive settlement discussions, realistically assess litigation risk and uncertainty, and explore settlement structures that support a meaningful resolution. In order for the mediator to guide the conversation effectively, the mediator must first earn the parties' trust—a process that should start long before the mediation day.

Indeed, the mediator's role extends beyond facilitating a conversation. The effective mediator is a *resolution advocate*—building momentum toward agreement, challenging assumptions when necessary, diagnosing and addressing roadblocks, and fostering confidence that resolution is possible.

Conclusion

Website tracking litigation continues to evolve, and courts remain divided on numerous legal issues. As a result, mediation has become an increasingly important mechanism for resolving these disputes before significant litigation costs are incurred.

Successful mediation requires more than a discussion of statutory damages or recent settlements. It requires thoughtful preparation, meaningful information exchange, realistic risk assessment, and creative settlement design. It also requires a commitment to the process. Not every case will resolve on the day of mediation, but the momentum, insights, and progress generated during the mediation can provide a foundation for continued negotiations and, ultimately, resolution.

As privacy litigation continues to mature, counsel and mediators who approach mediation with these principles in mind will be better positioned to achieve efficient and durable resolutions.

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