

Facebook's \$90M Deal To End Privacy Lawsuit Gets Early OK



By [Bonnie Eslinger](#) · [Listen to article](#)

Law360 (March 31, 2022, 6:42 PM EDT) -- A California federal judge on Thursday preliminarily approved Facebook's \$90 million deal to settle a long-running data privacy lawsuit claiming it unlawfully tracked browsing activity for about 124 million users even after they logged off the social media platform, bringing over a decade of litigation near to a close.

Before giving the greenlight, U.S. District Judge Edward Davila said the case has had a "very important path," noting the long history of the litigation, including a Ninth Circuit decision on economic harm that revived the lawsuit and Facebook's failed bid to have the U.S. Supreme Court weigh in on the matter.

"New law was made; this case has had serious litigation, both at the trial court level, at the appellate court level, and also an attempt to get to the Supreme Court, and that's not a feat that should go unnoticed," the judge said.

A final approval hearing for the settlement agreement has been scheduled for July 14.

A lawyer for the plaintiffs and proposed 124 million-member settlement class, Stephen Grygiel of Grygiel Law LLC, added to the list of legal successes and setbacks, including three motions to dismiss that had been won by Facebook before the plaintiffs prevailed on the third at the Ninth Circuit and beating back the social media giant's petition for writ of certiorari.

"All of which shows not just perseverance, but shows our fiduciary obligations to our class members were honored here in full," Grygiel said.

In its 2020 decision, the Ninth Circuit found the plaintiffs had asserted the type of concrete privacy harms required to establish standing, and they had sufficiently alleged Facebook's tracking and collection practices violated the federal Wiretap Act and the California Invasion of Privacy Act.

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Case Information

Case Title
[In Re FACEBOOK INTERNET TRACKING LITIGATION](#)

Case Number
[5:12-md-02314](#)

Court
California Northern

Nature of Suit
Other Statutory Actions

Judge
Edward J. Davila

Date Filed
February 08, 2012

Law Firms
[Bartimus Frickleton](#)

Facebook's lawyer, Kyle C. Wong of [Cooley LLP](#), told the court on Thursday the company still believed in its case, adding that before a series of mediation sessions between the two parties, Facebook was ready to bring a fourth motion to dismiss if the litigation had proceeded.

The company had eyed points to argue the Ninth Circuit did not rule on, but had succeeded before lower courts, Wong said without elaborating.

"That being said, we are aware that even though we did prevail before your honor, we did not prevail at the Ninth Circuit ... leaving trial to be more uncertain," Wong said. "So we felt this was a fair and reasonable settlement and would end something that had been going on for 10 plus years ... This was a graceful way to exit."

The deal applies to a nationwide class of Facebook users who had active accounts between April 22, 2010, and Sept. 26, 2011, when their internet use was tracked when they weren't logged in.

During Thursday's hearing, Facebook's lawyer told the court the challenged conduct ended "well over a decade ago" after it was brought up to the company via the litigation.

The \$90 million settlement also requires Facebook, owned by [Meta Platforms Inc.](#), to delete the data it had collected from users during the class period.

"The injunctive relief, which we believe is unprecedented, is the sequestration and ultimate deletion of data that we allege was improperly taken," Grygiel told the court Thursday. "We also have a settlement for \$90 million dollars, I believe that's the seventh-largest settlement of its kind ... for comparable settlements."

The settlement funds are not reversionary and there will be a "robust" notice program with several attempts at reaching class members, the majority of which can be contacted via direct email, the lawyer added.

During Thursday's hearing, Judge Davila asked how much class members could expect to receive in actual dollars.

Another lawyer for the plaintiffs, David A. Straite of [DiCello Levitt Gutzler LLC](#), said he believed "it's more likely than not" the settlement amounts would be in the \$5 to \$9 range.

The dispute dates to February 2012, when 21 related cases filed in different states were consolidated in California federal court following a dispute between the parties over what the case caption should be.

The users sought more than \$15 billion in damages and injunctive relief for Facebook's interception of users' internet communications and activity after logging out of their Facebook accounts.

Judge Davila trimmed the suit twice, **then tossed it** in November 2017 after concluding the standing and pleading deficiencies doomed the case.

The case then went to the Ninth Circuit, which **partially reversed** the dismissal in April 2020.

When it came to standing, the appellate panel agreed with the plaintiffs' assertion that Facebook had profited from users' data by selling it to advertisers to generate revenue, and that this allegedly unlawful gathering and monetization created the type of "economic harm" necessary to establish standing to press claims in federal court, even if the value of the data in the plaintiffs' hands hadn't diminished as a result.

The Ninth Circuit panel also rejected Facebook's argument that it was a "party" to the communications between users and the third-party websites they visited that contained Facebook plug-ins.

The tech giant argued it was therefore covered by an exemption from liability contained in the federal and state wiretap laws for those who are a "party" to such conversations.

"We did make new law, both in terms of the economic harm and the privacy harm, and in terms of the party to the communication exception to the Wiretap Act," Grygiel told the court on Thursday. "I don't think it's bragging to say it's changed the shape of privacy rights in law and litigation, and for the better, in a pro plaintiff way."

After the full Ninth Circuit refused to review the panel decision, Facebook asked the Supreme Court to weigh the issue of whether online companies violate the Wiretap Act when they're instructed by a web browser to display content on webpages that users visit.

The Supreme Court **declined the request** without comment in March.

The users are represented by David A. Straite and Amy E. Keller of DiCello Levitt Gutzler LLC, Stephen G. Grygiel of Grygiel Law LLC, Paul R. Kiesel of Kiesel Law LLP, Jason Barnes of Simmons Hanly Conroy LLC, James Frickleton of Bartimus Frickleton Robertson & Rader PC, Stephen M. Gorny of The Gorny Law Firm LC, Margery Bronster of Bronster Fujichaku Robbins, and Andrew Lyskowski of Bergmanis Law Firm LLC.

Facebook is represented by Michael G. Rhodes, Kyle C. Wong, Lauren J. Pomeroy and Sharon Song of Cooley LLP.

The case is In re: Facebook Internet Tracking Litigation, case number 5:12-md-02314, in the U.S. District Court for the Northern District of California.

--Additional reporting by Allison Grande. Editing by Lakshna Mehta.