

# What 5-Year BIPA Time Limit Means For Class Action Defenses

By **Robert Sparkes, Marvis Barnes and Wesley Prichard** (March 6, 2023)

Class actions often present higher stakes than individualized litigation. Given the risks presented, class action claims that survive early dispositive motions tend to resolve via settlement.

However, when considering resolution of a putative class action, defendants must remain cognizant of complicating factors such as potential follow-on individual claims.

Particularly for putative class claims with long statutes of limitations, follow-on individual claims can present a risk, even years after the events at issue given how putative class actions interact with statutes of limitations in many jurisdictions.

This article covers how putative class actions can pause limitations periods and considers biometric privacy claims — particularly the recent *Tims v. Black Horse Carriers Inc.* case in the Illinois Supreme Court — as a use case.

When developing a strategy to defend and resolve a putative class action, defendants and their counsel should be mindful of these realities to minimize the risk of subsequent litigation exposure and achieve finality.



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## The Contours of American Pipe Tolling

When thinking about dispute resolution, class action defendants must take into account the potential for putative class members to file individual claims, even after the court denies class certification and even if the relevant statutes of limitations would have long since run.

Known as American Pipe tolling, courts have held that members of a putative class are parties to the class action such that the statutes of limitations for their individual claims are tolled until the certification issue is decided.[1]

But not all individual actions following denial of class certification can dodge a limitations defense. When assessing the risk of subsequent individual claims or whether a particular subsequent individual claim may be able to evade a limitations defense, we have seen several frequently asked questions:

### ***To whom does American Pipe tolling apply?***

American Pipe tolling applies only to those who would have been encompassed within the class definition. As the U.S. Supreme Court made clear in *American Pipe Construction Co. v. Utah* in 1974, only asserted members of the class may take advantage of tolling.[2]

### ***Which claims does American Pipe toll?***

Tolling applies only to those claims that were asserted on behalf of the putative class. While

some jurisdictions maintain that tolling is limited strictly to the specific claims asserted in the initial class action, other jurisdictions toll claims that are substantially similar to the class claims through sharing a common factual basis and legal nexus so that the defendant would rely on the same evidence and witnesses in its defense.[3][4]

### ***When does the limitations period resume?***

Tolling ends and the limitations clock resumes when the court denies class certification; a class member opts out of a class; the class component of an action is voluntarily dismissed; putative class claims are dismissed without prejudice; or a court dismisses a putative class action for lack of subject-matter jurisdiction.[5]

### ***Does tolling apply to subsequent class actions?***

No. The Supreme Court in 2018 clarified in *China Agritech Inc. v. Resh* that a plaintiff cannot file a class action outside the applicable statute of limitations simply because an unsuccessful prior class action tolled the limitations period for individual claims.[6]

### ***Does American Pipe tolling apply to statutes of repose?***

No. The U.S. Supreme Court in 2017 made clear that "the American Pipe tolling rule does not apply to ... a statute of repose" in *California Public Employees' Retirement System v. ANZ Securities Inc.*[7]

### ***Does the pendency of a federal class action toll a state statute of limitations?***

Not necessarily. Known as cross-jurisdictional tolling, some jurisdictions, like the U.S. Court of Appeals for the Ninth Circuit in *Clemens v. DaimlerChrysler Corp.* in 2008, have held that American Pipe tolling does not operate to toll a statute of limitations for a state-law claim based on a putative class action pending in federal court.[8]

Other jurisdictions, however, recognize cross-jurisdictional tolling, like the New York Court of Appeals in *Bermudez Chavez v. Occidental Chemical Corp.* in 2020.[9]

Depending on the circumstances of each case, class action defendants may find their dispute resolution efforts complicated by follow-on individual actions after defeating a class action, even years after the underlying events at issue.

Any strategy for resolving a class dispute thus should consider the risk of follow-on individual actions — particularly where the putative class is broadly defined — and the tolling laws of the relevant jurisdictions.

## **Statutes of Limitations and Biometric Privacy Litigation**

That risk is especially true for biometric privacy litigation — a booming subset of class actions — given that the Illinois Supreme Court recently held that the applicable limitations period for claims under the Illinois Biometric Information Privacy Act is the longer of the two potentially applicable periods.

On Feb. 2, the Illinois Supreme Court settled a long-standing debate and **held** in *Tims v. Black Horse Carriers* that the applicable limitations period for BIPA claims is the five-year torts catchall period, rather than the one-year period for privacy claims.[10]

Prior to the court's holding, class action defendants successfully argued that the shorter one-year limitations period applied for at least some claims, or could leverage the uncertainty for settlement purposes. With that tool no longer available, class action defendants should be on alert -- in Illinois and elsewhere, since Illinois is a leader in biometric privacy litigation.

### ***Tims v. Black Horse Carriers***

In *Tims*, a former employee filed a putative class action against his former employer, Black Horse Carriers, alleging violations of BIPA relating to Black Horse's scanning and use of employee fingerprints for time clock purposes.

The complaint alleged that Black Horse violated BIPA because it: failed to institute, maintain and adhere to a publicly available biometric information retention and destruction policy; failed to provide notice and to obtain consent when collecting biometric information; and disclosed or otherwise disseminated employees' biometric information to third parties without consent.[11]

Black Horse moved to dismiss the complaint as untimely and argued that because BIPA does not itself contain a limitations period, the one-year statute for privacy claims should apply. The plaintiff argued that the five-year catchall statute for torts should apply.

The trial court denied Black Horse's motion to dismiss. On appeal, the intermediate appellate court held that the one-year limitations period governed actions under certain sections of BIPA, but the five-year period governed actions under other sections.[12]

Ultimately, the Illinois Supreme Court affirmed in part and reversed in part, holding that the five-year limitations period applies to all BIPA claims.

In reaching its decision, the court considered the intent of the legislature and advancement of the general policy concerns that BIPA was meant to address. The court also noted that certainty and predictability in present and future BIPA actions could be realized by applying the five-year statute of limitations period to all claims.[13]

### ***Tims' Impact Beyond Illinois***

With BIPA being the earliest and most prominent state biometric privacy law containing a private cause of action, Illinois is widely considered the epicenter of biometric privacy class actions and BIPA is a legislative model for other jurisdictions. Therefore, the outcome in *Tims* may affect biometric privacy litigation beyond Illinois.

For example, the California Consumer Privacy Act, like BIPA, creates a private right of action for biometric privacy claims, but does not itself contain a specific limitations period.

Additionally, *Tims*' impact may be even more localized than the state level. Portland, Oregon, and New York City each recently enacted a biometric privacy law providing a private cause of action and lacking a statute-specific limitations period.[14][15]

### **Analysis and Takeaways: Resolving Class Actions in a Shifting Landscape**

The Illinois Supreme Court's ruling in *Tims* highlights the important interaction between putative class action claims and statutes of limitations.

Tims not only weakens a BIPA defendant's statute-of-limitations defense, but it also means that defendants facing class claims under BIPA could now see follow-on claims even years after resolving the class claims. And given that various jurisdictions often look to Illinois and BIPA for guidance, Tims may foretell future challenges to the limitations periods applicable to other biometric privacy laws.

With an increasing number of companies across all industries using fingerprints, retina or iris scans, voiceprints, or scans of hand or face geometry for internal and external purposes, there is potential for significant exposure under any applicable biometric privacy laws to a wide array of defendants.

As new biometric privacy laws are passed and the jurisprudence regarding biometric privacy claims continues to mature, class action defendants must not forget the broader class action jurisprudential landscape — which is itself continually evolving — when developing defense and resolution strategies.

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[1] *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550–51 (1974) (when a putative class action is filed, "the claimed members of the class s[and] as parties to the suit until and unless they receive[ ] notice thereof and cho[ose] not to continue").

[2] *Id.* at 554 ("the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action"); see also *In re LIBOR-Based Fin. Instruments Antitr. Litig.*, 27 F. Supp. 3d 447, 486 (S.D.N.Y. 2014) (holding that plaintiffs who transacted after the class period were not part of the previous class and therefore could not benefit from American Pipe tolling).

[3] See, e.g., *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 467 (1975) (noting that "the tolling effect given to the timely prior filings in American Pipe ... depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted"), abrogated in part on other grounds as recognized by *Coleman v. Domino's Pizza, Inc.*, 728 F. Supp. 1528 (S.D. Ala. 1990).

[4] See, e.g., *Asplundh Tree Expert Co. v. Abshire*, 517 S.W.3d 320, 345 (Tex. App.-Austin 2017) (holding that claims sharing "a common factual basis and legal nexus to the class claims" were tolled, even though they were not asserted in the prior class action, because "they all rely on the same alleged acts and omissions" as the causes of action asserted in the prior class action).

[5] *Collins v. Vill. of Palatine*, 875 F.3d 839, 843–44 & n.1–4 (7th Cir. 2017) (collecting cases).

[6] *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1804 (2018) ("American Pipe does not

permit a plaintiff who waits out the statute of limitations to piggyback on an earlier, timely filed class action.").

[7] Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042, 2052 (2017).

[8] See, e.g., Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1025 (9th Cir. 2008) (declining to read cross-jurisdictional tolling into California law); Vaught v. Showa Denko K.K., 107 F.3d 1137, 1147 (5th Cir. 1997) (noting that Texas law does not recognize cross-jurisdictional tolling); Maestas v. Sofamor Danek Grp., Inc., 33 S.W.3d 805, 808 (Tenn. 2000) (declining to recognize cross-jurisdictional tolling).

[9] See, e.g., Bermudez Chavez v. Occidental Chem. Corp., 158 N.E.3d 93, 101 (N.Y. 2020) (recognizing cross-jurisdictional tolling under New York law).

[10] Tims v. Black Horse Carriers, Inc., --- N.E.3d ---, 2023 IL 127801, at \*7 (Ill. 2023).

[11] Id. at \*1.

[12] Id. at \*2.

[13] Id. at \*3–8. In a subsequent decision, the Illinois Supreme Court appears to have discarded any potential finality concerns with respect to BIPA claims, finding that a claim accrues with each non-consensual scan or transmission of biometric data. Cothron v. White Castle Sys., Inc., --- N.E.3d ---, 2023 IL 128004, at \*8 (Ill. Feb. 17, 2023) ("[W]e conclude that the plain language of section 15(b) and 15(d) [of BIPA] shows that a claim accrues under the Act with every scan or transmission of biometric identifiers or biometric information without prior informed consent.").

[14] Code of the City of Portland, Oregon Ch. 34.10 et seq.

[15] 2021 NYC Local Law No. 3, NYC Admin. Code §§ 22-1201–22-1205.