

## **Defendant-Initiated Lawsuit**

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Under Israeli law the plaintiff in a civil case is the master of her complaint, and as such is entitled to choose, with only a few limits, the timing of the lawsuit. Such power entails significant advantages: the plaintiff can properly prepare for the lawsuit, gather the witnesses and evidence required to prove her claim, and choose a convenient time to file the lawsuit. While granting such power to the plaintiff is generally justified, the fact that the plaintiff exclusively can pick the time for the lawsuit may result in the violation of the rights of the defendant and harm social welfare. By delaying the filing of a lawsuit, the plaintiff can cause, either strategically or inadvertently, meaningful hardships for the defendant, both substantive and evidentiary. Such a delay may damage the prospective defendant's reputation, bring about various losses, or impair her ability to conduct her defense at trial. In turn, a strategic delay in bringing the suit may yield an unjustified favorable judgment or a better settlement to an undeserving plaintiff.

We therefore suggest that when certain circumstances arise, the plaintiff's freedom in setting the filing date of the lawsuit should be limited and the prospective defendant should be able to have a say in the timing of the lawsuit filed against her. These circumstances include situations where (a) the delay in filing the lawsuit may result in future accrued liabilities; (b) the mere threat of a lawsuit or the fear thereof can cause real harm to the defendant; (c) the delay harms the defendant's ability to recover from third parties; (d) the delay in submitting the lawsuit causes the defendant evidentiary damages; (e) the defendant has a legitimate interest to join another plaintiff to a pending lawsuit against her; or (f) the balance of interests between the interest of the defendant in early litigation and the plaintiff's interest in delaying it clearly tips in favor of the defendant.

The article discusses different doctrines, under positive law, by means of which courts attempt to resolve the difficulties that arise from the exclusivity currently granted to the plaintiff in choosing the timing of the lawsuit. These doctrines include the negative declaratory judgment, the theoretical declaratory judgment, laches, creative interpretation of statutes of limitation, joinder of plaintiffs by the defendant, refusal to recognize offensive non-mutual collateral, estoppel, class action and interpleader. The article shows that these doctrines provide a partial solution, at best, to the issue at hand, and in some cases the harm they cause exceeds their benefit. Finally, the article proposes an innovative mechanism – an antisuit injunction – which can fully solve the problems caused by the exclusivity granted to the plaintiff in determining the timing of the lawsuit. The article shows that this mechanism is superior to all the doctrines that are currently in use, and that it is readily available for use, without any need for amendment in legislation or regulation.