



6-24-2013

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Recommended Citation

The Fixable Flaws of America's Civil Justice System, Balt. Sun, June 24, 2013.

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News / Opinion

The fixable flaws of America's civil justice system

By **James R. Maxeiner**

JUNE 24, 2013, 6:00 AM

Our civil justice system is obsessed with multimillion-dollar personal injury, antitrust and politically charged cases. It is unmoved by ordinary cases. Every day, it denies justice to ordinary Americans who are in need. The late U.S. Chief Justice Warren Burger got it right: Our system is "too costly, too painful, too destructive, too inefficient for a truly civilized people."

Many civil lawsuits for less than \$100,000 are too small to be worth bringing. That amount, \$100,000, is not small to most Americans; it is double the annual family median income. But the system is telling you that if you paid \$100,000 for substandard improvements to your home, it's your loss. We can't help you with small potatoes. Imagine if America's physicians were to say, you only have the **flu**, don't bother us. Come back when you have a heart attack.

Americans would be outraged if they knew how much better some other countries do. Some civil justice systems handle claims for \$100,000, \$10,000 and even \$1,000 efficiently. Swiftly and justly, they return close to 100 cents on the dollar. They give us clues what we might do:

- We would recognize that people seeking justice want results and not the game that American lawsuits have become. What use is my right to \$100,000 if, after the court finds in my favor for \$100,000, I owe my lawyer \$75,000?
- We would affirm that lawsuits are about deciding disputes by applying and not making law.
- We would have nonpolitical judges who are trained to judge. They would be expected to do professional and prompt work and be evaluated on it — and they would not expect political accolades.
- We would have plaintiffs tell courts up front why they believe they are entitled to help and how they plan to prove it. You thought that we do that already? We don't.
- We would have plaintiffs and defendants, and not just their lawyers, meet with judges at the beginning of lawsuits to tell the judges what their cases are all about. Right away plaintiffs, defendants and judges would know what their fights entail.
- We wouldn't let lawyers do as they do now and go off willy-nilly to find out anything they might want to "discover" about their opponents, looking for the "smoking gun" that could cinch the case (or for

some new claim to raise).

- We would have judges keep cases focused on what the disputes are about. They would make sure that both sides address all issues between them. Parties wouldn't be forced to settle cases because the risks, or simply the costs, of trying them are too great.

- Court decisions, which now occur in fewer than 5 percent of cases, would be routine and not rare. Most settlements in the U.S. are reached for reasons other than the merits of the case. Courts would explain fully why they decided as they did. There would be no surprises.

- In the end, courts will have managed cases to keep costs proportionate to amounts in dispute. They will charge those costs to the side judged to have been in the wrong.

This is how some systems abroad work well to deliver justice. This is not the system that we have. When it is, we will at long last come close to fulfilling the promises of our founders; in 1776 they declared that every American "ought to have justice and right, freely without sale, fully without denial, and speedily without delay, according to the law of the land."

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