

Do You Feel The Walls Closing In?

By Alan Nelson

"You can fool all the people all the time if the advertising is right and the budget is big enough."

Joseph E. Levine

A drunken Supreme Court Justice once told me, "The public doesn't want juries."

It was one of those horrid epiphanies, when the scales fall from your eyes and you realize how bad things have become. I was stunned, and not just from the liquor. I responded with a rant, the gist of which declared the public certainly wants juries; it is the Supreme Court that doesn't want juries.

Now *Bell Atlantic Corp v Twombly* and *BIC Pen Corp. v. Carte* have arisen on the scene and threaten to shut the courthouse door before you try to assert your weakening rights for a jury.

Twombly is already shutting down access to federal courthouses, a haven for corporate defendants. Many already predict that all federal cases will see *Twombly* motions. This will continue to push plaintiffs to state courts, or else, where only federal jurisdiction is available, keep valid claims from a day in court. Again, the cost rises astronomically.

One sober judge privately believes the question comes down to whether federal courthouses "should be open to disputes involving ordinary people (like those who have civil rights or employment claims) or instead whether the doors should be open only to litigants arguing over tens of millions of dollars in patent cases and to criminal cases."

BIC Pen Corp. threatens state law on product liability and sanctifies federal regulatory schemes. Federal preemption rears its state-smothering pillow again to protect us from those fifty states.

This is the latest of that pendulum swing that many thought couldn't swing any further years ago. The first instance of shutting access to Texas courts came with the rewrite of Worker's Compensation to move injured worker claims out of the courthouse. One consequence has been the focus on medical records generated by some (certainly not all) doctors who will take this type of insurance. We all see medical records created by clinics and doctors saying that workers are ready to go back to work, that the pains they feel in their necks, backs etc. aren't worth the cost of an x-ray to investigate.

Then the Binding Arbitration movement came. You try your case to one or three arbitrators. Sometimes, it's a local businessman picked by the Better Business Bureau. Sometimes, it's a retired Judge through JAMS. The numerous court challenges to unconsciously and unwitting public contracting their rights to a trial have all but dwindled away.

And if you don't deal your rights away, legislation and case law raised the bar. Medical malpractice has all but disappeared since "tort reform." I enclose the phrase in quotes since I believe it was the opposite of reform. Many

lawyers turn away once valid cases with harsh facts now barred by law. The number of lawsuits dropped have dramatically, but not because health care suddenly improved, and hospitals became safer. No miracles of healing of the broken and diseased transpired.

Damage caps value mental anguish caused by the injuries and deaths of a man or woman with a huge income far beyond those with modest incomes, or the impoverished. In other words, the survivors of the rich are more sensitive than the poor.

Of course, the rising cost of litigation always has been a problem. The Texas twist on *Daubert* and its successors requires so much proof up front for a judge to rule. In medical malpractice, toxic exposures, industrial accidents and anything technical, the cost of experts, if they haven't already been rounded up, are prohibitive. And whatever judge the case draws at filing often determines whether the case continues to draw breath, or is dead at filing, protecting us from those dangerous juries. And jurors can be so ordinary. They might say "if the thing is there, why there it is." Jurors might be swayed, and might even get angry at the facts.

What happened? Corporate America, which controls the legislature and judiciary, believes Joseph Levine. With enough lobbyists, advertising and budget to place the right laws, legislators and judges in position, corporate America believes you can fool all of the people, all of the time. The fewer people, they reason, the fewer fools that might get angry in a jury box, because no one is allowed to be a juror.

Do you feel the ceiling moving down? We rid ourselves of our rights in order to protect us from that dangerous jury. We rid ourselves of our rights to recover for damages in a court of law. We brick up the door to the courthouses. We classify torts as frivolous lawsuits. We adopt the attitude that we need to be protected from the man or woman in the street. We refuse judgment by our peers. Do you feel the walls closing in?