The American Tort Reform Association

# Shining a Spotlight on

# "Regulation Through Litigation"

**A CRITICAL EXAMINATION OF THE LITIGATION AGENDA OF**

**CONNECTICUT ATTORNEY GENERAL**

**RICHARD BLUMENTHAL**

***OCTOBER 2006***



1101 Connecticut Ave., NW
Suite 400
Washington, DC 20036
www.atra.org

*"Never stir up litigation. A worse man can scarcely be found than one who does this."*[1]

## Introduction

When Abraham Lincoln wrote these words in 1850, he was still practicing law in Illinois; he was not yet a prominent public official. Today, not only is there plenty of litigation "stirred up" across the United States, but much of it is done by state attorneys general, the public officials that serve as our states' chief law enforcement officers.

Reforming the litigation excesses of the state attorneys general is a core element of ATRA's agenda. In the mid-1990's, ATRA identified a disturbing new trend that Robert Reich coined "regulation through litigation," whereby state attorneys general and personal injury lawyers "bonded" with contingent-fee arrangements to bring state-sponsored litigation that was designed to achieve regulatory or policymaking objectives.

Since ATRA first identified this trend, the practice (which was first deployed against the tobacco industry) has been used to file lawsuits against alcohol beverage producers, respirator manufacturers, paint and pigment companies, pharmaceutical companies, insurers and gun makers.

As part of ATRA's "AG Watch" program, we wanted to evaluate the litigation record of a single attorney general, to determine whether state taxpayers' and citizens' interests were being well-served by this officeholder's litigation agenda.

We selected Connecticut Attorney General Richard Blumenthal for two primary reasons. First, Attorney General Blumenthal is a prolific and public litigator – his office files some 23,000 lawsuits each year, three times more than his predecessor.[2] Second, his tenure in office (since 1991) provides us with an ample record to review.

---

[1] Abraham Lincoln (1809–1865), U.S. president. Fragment, notes for a law lecture, July 1, 1850? Collected Works of Abraham Lincoln, vol. 2, p. 81, Rutgers University Press (1953, 1990).

[2] "A Welcome Rebuke," *The Wall Street Journal*, 27 August 2002, sec. 12A.

What we found was silly lawsuits,[3] a close working relationship with the personal injury bar, and an excess of litigation that appears to have been driven principally by the agenda of politically influential constituencies, rather than the merits of the cases, or an interest in benefiting the citizens of Connecticut.

## About this Analysis

This paper is not intended to be an exhaustive analysis of Mr. Blumenthal's litigation record as attorney general. Rather it is a snapshot of an officeholder that ATRA believes typifies a "new breed" of attorney general – media savvy, politically powerful, and willing to work hand-in-glove with personal injury lawyers and other political allies to pursue public litigation that accrues a private benefit to these parties.

## The *Kelo* Flip-Flop

In one of the most high-profile and significant cases before the Supreme Court of the United States in the last decade, Attorney General Blumenthal almost completely reversed his position on the wisdom of the Court's decision, publicly criticizing a decision he helped argue in favor of before the Court.

The case involved whether the City of New London could exercise its power of eminent domain to condemn private property in the interest of promoting private economic development. In a narrowly-decided 5-4 decision handed down in June 2005, the Court argued that the City could exercise its eminent domain authority in the interest of private economic development.

On the day that the Court's decision was handed down, Blumenthal's office did what it does hundreds of times each year – it issued a press release – this one lauding the Court's decision in a headline claiming, "Attorney General Praises U.S. Supreme Court Decision In New London Eminent Domain Case."[4]

At the time, the decision sparked a furious backlash among policymakers and citizens concerned that the Court's decision gave tremendous power to governments at every

[3] In 2005, Blumenthal's office issued two press releases on the misdeeds at Mitlitsky's egg farm, which he accused of selling counterfeit "Connecticut Grown" eggs. Mitlitsky settled the matter for $70,000 and agreed to stop using the term "farm" in his company name. See: http//www.ct.gov/ag/cwp/view.asp?A=1949&Q=294868. Blumenthal also weighed in against Shelton Brothers Distributors, which sold a holiday microbrew known as Seriously Bad Elf that featured a cartoon label of an elf shooting a slingshot at Santa's sleigh. Blumenthal was concerned that the Seriously Bad Elf would appeal to minors. *See*: *Modern Brewery Age*, 7 November 2005 available at: http://findarticles.com/p/articles/mi_m3469/is_45_56/ai_n15953168.

[4] See, http://www.ct.gov/ag/cwp/view.asp?Q=320514&A=2426.

level that could now seize and condemn private property in the name of private economic development.

Shortly thereafter, Connecticut House Minority Leader Robert Ward began to solicit signatures from officials in both parties, seeking to support legislation that would ban the practice of taking private property as outlined in *Kelo*.[5]

Sensing that his support for the decision could become a political liability, Blumenthal backtracked quickly to reverse his public position. Five days after the decision was handed down, Blumenthal claimed that the state's eminent domain law needed "serious critical scrutinizing."[6]

Three weeks later, Blumenthal was calling for legislative action to forestall misuse of the expansive legal principles that he had supported in *Kelo*.[7]

By October 2005 Blumenthal had come full circle, and was specifically advocating legislation to prohibit the practices he supported in *Kelo*, saying, "This powerful government tool should be clearly circumscribed and subject to close, careful scrutiny by the courts and the public."[8]

## No Lawsuit Left Behind

On August 22, 2005, Blumenthal filed suit challenging President Bush's No Child Left Behind Law – the federal law that creates performance-based standards for public schools across the United States. One of the goals of the law is to close the wide achievement gap between students in low-performing schools and those in high-performing schools. In Connecticut, that achievement gap is one of the nation's widest.[9]

Blumenthal's lawsuit sought to have a judge declare that state and local tax resources could not be used to meet the law's goals related to achievement testing. At least one other state – Maine – considered bringing a similar claim, but decided against it. A similar lawsuit filed by the National Education Association and others was dismissed.[10]

---

[5] Froma Harrop, "You Can't Price Everything," *The Providence Journal*, June 29, 2005, sec. 05B.
[6] Stacey Stowe, On Eminent Domain, Many Shifting Stances, *The New York Times*, July 13, 2005.
[7] Stacey Stowe, July 13, 2005.
[8] See: http://www.ct.gov/ag/cwp/view.asp?A=1949&Q=304220.
[9] David Medina, "Throw Out 'No Child' Lawsuit," The Hartford Courant, March 7, 2006, sec. 09A.
[10] See Sam Dillon, U.S. Is Sued By Connecticut Over Mandates on School Tests, *The New York Times*, August 23, 2005, sec. 01B and "Bush Administration wins victory over No Child Left Behind, *The Associated Press*, November 23, 2005."

While the lawsuit drew widespread public attention, it failed to garner public support – Blumenthal's filing was attacked by civil rights advocates, legal scholars, local and national media, and U.S. Secretary of Education Margaret Spellings.

In fact, the only entity that supported the Connecticut litigation – it encouraged Blumenthal to file the suit – was Connecticut's politically-powerful teachers' union, the Connecticut Education Association.[11]

The NAACP was quick to criticize Blumenthal's filing, both on its merits, and on the precedent it set. NAACP attorney John Brittain said the suit was a "waste of time for the state of Connecticut, which should be dealing with the worst achievement gap."[12]

Other NAACP leaders were concerned about the impact of this potentially-harmful precedent on the federal civil rights laws.

"One can't help but remember back in the Dixiecrat period when certain Southern states asserted that they were not required to comply with certain federal civil rights laws to protect people's rights," said Victor L. Goode – Assistant General Counsel of the NAACP. [13]

*The Hartford Courant* also editorialized against the lawsuit writing, "For Connecticut to claim that it support the goals of No Child Left Behind while it clings to practices that undermine those objectives is sheer hypocrisy. If this lawsuit ever goes to trial, Connecticut will have perpetrated a masterful triumph of unmitigated arrogance over merit."[14]

On September 27, 2006, a federal court dismissed three of the four counts alleged in Blumenthal's lawsuit, allowing the case to proceed only on a single count. Despite this criticism, and a wide achievement gap between white and minority students in Connecticut schools, Blumenthal continues to aggressively pursue this litigation. His office has promised an appeal of the court's dismissal.[15]

---

[11] National Education Association Publication, 'Stateside" section, April 8, 2005.
[12] Donna Tommello, "Connecticut NAACP contesting state education lawsuit." *Associated Press*, January 20, 2006.
[13] Avi Salzman, "N.A.A.C.P. is Busk aAlly in School Suit Versus State. The New York Times, 1 February 2006, sec. 03B.
[14] David Medina, March 7, 2006.
[15] Robert Frahm, "State's `No Child' Lawsuit Still Alive," *The Hartford Courant*, September 28, 2006, online edition.

## Microsoft

After joining the federal government and nineteen other states in a five-year legal battle against Microsoft over its Internet browser, the federal government and eight states were prepared to enter into a settlement with the software company that would resolve the matter.

The settlement was resisted, however, by Blumenthal and eight other attorneys general who wanted to use the litigation as a means to force Microsoft to change its business practices, including requirements that the company turn over the source code (instructions) for its software.

This idea was rejected out-of-hand by Judge Kathleen Kotar-Kelly, who, in approving the settlement, opined that most of the remedies proposed by Blumenthal and the other AGs were less about serving the public interest and more about "certain of Microsoft's competitors [who] most desire these provisions."[16]

## Losing

While Blumenthal's press office cranks out hundreds of news releases each year on weighty issues like the correct way for retail stores to display lawn pesticides[17] and counterfeit eggs, it focuses little of its media resources on the significant legal setbacks that the attorney general has suffered when he oversteps his legal authority.

In 2002, Blumenthal filed suit appealing a Connecticut Siting Council decision that approved a power cable across the bottom of Long Island Sound. Blumenthal initiated the litigation at the behest of environmental groups, who opposed the cable, believing that it would harm shellfish beds.[18]

It was a curious position for a state's chief law enforcement officer to stake out, since the Connecticut Siting Council is a state agency. Put simply, Blumenthal had turned on his own client.[19]

---

[16] "Back to Microsoft's future," *The Wall Street Journal*, 4 November 2002, sec. 14A.
[17] See http://www.ct.gov/ag/cwp/view.asp?A=1777&Q=283688.
[18] Elissa Gootman, "Cable for Long Island Sound is Approved, but Opponents Are Not Giving Up," The New York Times, March 22, 2002, sec., 02B. Also, Collin Levey, "Lobsters in Distress," The Wall Street Journal, November 22, 2002, online edition.
[19] Editorial, *Connecticut Post*, October 25, 2005.

Even after U.S. Energy Secretary Spencer Abraham, turned the power in order to help mitigate the impact of New York City's 2003 blackout, Blumenthal continued to litigate the case before the Second Circuit Court of Appeals. [20]

Blumenthal lost again when he pursued litigation through which he hoped to establish that he was entitled, as a matter of common law, to pursue claims absent any statutory authority granted to his office by the legislature.

Had he succeeded, this precedent would have greatly expanded the power of the AG's office – it would have allowed Blumenthal to pursue litigation based exclusively on the views and legal interpretations of his office. In effect, he would have become a litigator-in-chief, unencumbered by the statutory "burden" of actual state agency clients.

Instead, the Connecticut Supreme Court unanimously ruled against Blumenthal. According to the Court, the attorney general is "a creature of statute…with no common law authority."[21] The Court reasoned that Blumenthal's authority as Connecticut's chief legal officer was inextricably bound to the statutory authority that created his office in 1897, and that he was not free to purse litigation based on his own views of what industries needed 'reforming,' unless authorized by law or his clients – state agencies – to do so.[22]

A similar lapse in strategic judgment took place when Blumenthal pursued litigation against Forstmann Little & Co., a private equity firm that lost $125 million in state Connecticut pension funds that it had invested in XO Communications and McLeod USA – two high tech companies.

Even though every other Forstmann investor involved in these companies declined to pursue litigation after losing money, Blumenthal and Connecticut Treasurer Denise Nappier persisted.

After taking the case to trial, a Connecticut jury found Forstmann to have violated a number of terms relating to its investment contract with the state. But the jury awarded the state no damages, despite an aggressive public relations campaign launched by Blumenthal claiming that Forstmann has "Enronized" Connecticut.[23]

---

[20] *See* http://www.ct.gov/ag/cwp/view.asp?A=1778&Q=283998.
[21] "Court limits Blumenthal's authority," *The Associated Press*, 10 August 2002.
[22] Editorial, "A Welcome Rebuke," *The Wall Street Journal*, 27 August 2002, sec. 12A.
[23] Editorial, A Connecticut Comeuppance, *The Wall Street Journal*, July 6, 2004.

As one mergers and acquisitions lawyer not involved in the case commented in *The Wall Street Journal*, "These pension funds know, if you want to play with the big boys, you have to understand the risk."[24]

## Media Savvy?

At the state Capitol, it's a well known joke that the most dangerous place in Hartford is between Dick Blumenthal and a TV camera.[25] Early in his career, Blumenthal earned a reputation for pandering to the media. As a U.S. Attorney, he was accused of leaking information to the media about the Congressional ABSCAM investigation while he was investigating FBI leaks to the media.

What is less well-known is the potentially harmful impact Blumenthal's thirst for the spotlight has had on at least one criminal investigation, as well as the negative influence it has had on his ability to work constructively with the Connecticut legislature on common issues of concern to Connecticut voters.

## A Tragedy at Sea

In July 2005, Greenwich, Connecticut honeymooner George Smith disappeared from his balcony on a Royal Caribbean Cruise, and was presumed lost at sea. The investigation of Smith's disappearance, headed by United States Attorney Kevin O'Connor, drew widespread media and tabloid news attention.[26]

Blumenthal didn't hesitate to weigh in on the investigation, commenting on *Fox News* about forensic evidence that "we needed," and interviews being conducted by investigators. There were only two problems with Blumenthal's commentary – his office had no role in the proceedings, and his public comments may have undermined the integrity of the investigation that was underway without him.[27]

U.S. Attorney O'Connor contacted Blumenthal to, "ask him that in the future he make it clear he has no official role." According to O'Connor, "There is a time and a place. The time and place is not when you're investigating, it's when you're ready to step into the courtroom and charge somebody."

---

[24] Andrew Ross Sorkin, "In Connecticut, a Trial On Pension Fund Losses Could Shake Wall Street," *The New York Times*, 27 May 2004, sec. 01C.
[25] Diane Scarponi, "Blumenthal, darling of the media," *Associated Press*, 3 October, 2002.
[26] See http://www.google.com/search?hl=en&q=George+Smith+and+cruise.
[27] Matt Apuzzo and John Christoffersen, "Ever-present Blumenthal rankles criminal investigators," *The Associated Press*, 5 August 2005.

Blumenthal's actions drew criticism from legal scholars. Legal ethicist Geoffrey Hazard, a professor at the University of Pennsylvania Law School, opined that Blumenthal's public comments were likely to have been misinterpreted by viewers, by leaving the impression that Blumenthal's office was somehow involved in the case. Boston College Law Professor Michael Cassidy expressed a far more serious concern -- that Blumenthal's pretrial publicity could prejudice juries or jeopardize cases.[28]

Despite these ethical concerns and an admonishment from the U.S. Attorney, Blumenthal was undeterred. He soon reappeared on *MSNBC* to weigh in on the case, but this time he disclosed his lack of actual involvement. [29]

Blumenthal drew similar ire from Massachusetts Assistant Attorney General Richard Grundy, who was conducting an investigation on an insurance company. The prosecutor wrote Blumenthal, who was prepared to release sensitive information about the Massachusetts investigation to members of the media, saying that Blumenthal's planned release, "could prove detrimental to this investigation."

Ultimately, a judge stepped in and ordered Blumenthal not to disclose the information.[30]

"How many more people and corporations can Dick sue and have press conferences announcing that he's suing them?" asked one exasperated defense lawyer.[31]

There is also evidence that Blumenthal's desire to be in the media spotlight compromises his efficacy before the legislature.

Both Democrats and Republicans in the statehouse have criticized Blumenthal for an advocacy style that seems focused primarily on garnering media attention.

The legislature consistently rejected his proposals on ATM fees, zoned gas pricing, car insurance rates, and smoking bans in restaurants. While Blumenthal has blamed business lobbyists for his failures, policymakers blame his media-focused style.

"Dick's style is not to ask or persuade anybody. It's to give formal stiff testimony and fight the battle in the press," said Representative Robert Ward (R). [32]

---

[28] Matt Apuzzo and John Christoffersen, 5 August 2005.
[29] Matt Apuzzo and John Christoffersen, 5 August 2005.
[30] Matt Apuzzo and John Christoffersen, 5 August 2005.
[31] Matt Apuzzo and John Christoffersen, 5 August 2005.
[32] Diane Scarponi, "Blumenthal not slam-dunking the legislature," *Associated Press*, 3 October 2002.

When Connecticut State Representative Bill Dyson (D), served as Chair of the House Appropriations Committee he played a critical role in state budget matters. During that time he never recalled having a one-on-one discussion with Blumenthal about an issue before his committee, including the millions that the state of Connecticut won in state tobacco litigation.

"Whatever he does, he doesn't consult with anyone before he does something. When he says 'I need this' I say 'Gee, you didn't talk to me before about it, so there's little I feel I have to do,'" said Dyson. [33]

## Forging and Alliance with the Personal Injury Bar

Richard Blumenthal's close partnership with the personal injury bar goes back at least to the state's litigation against the tobacco industry. At the time, three in-state Connecticut firms were awarded $65 million in fees for their work representing the state in its litigation against the industry. At least two of the firms had extremely close ties to Blumenthal. The Stamford firm of Silver, Golub & Teitell was Blumenthal's former law firm, and Stamford's Emmett & Glander, whose name partner, Kathryn Emmett, is married to partner David S. Golub of Silver, Golub & Teitell. "I know how it [looks]", conceded Golub.[34]

Before the fee was awarded, Blumenthal professed to have "no idea" how much the firms would earn in fees.[35]

Former Virginia Attorney General Jerry Kilgore recently spoke out against the practice of hiring law firms on a contingent fee basis – the method by which these firms were retained – precisely because it can be difficult to ascertain whether the state received any value for the legal services it received.

"With few standards in place to regulate these contingent fee arrangements, it's a real question whether public justice or private profit is the principle interest of outside counsel who are encouraging the attorneys general to bring this litigation," said Kilgore. "Moreover, counsel retained on a contingent fee basis typically do not maintain records of the time spent on the state's matter. As such, states have little way of knowing the market value of the legal services, or whether an hourly arrangement with counsel would have returned more taxpayer money to state agencies and programs." Kilgore added. [36]

---

[33] Diane Scarponi, 3 October 2006.
[34] See http://www.overlawyered.com/archives/00feb2.html
[35] See http://www.overlawyered.com/archives/00feb2.html.
[36] Jerry Kilgore, "Outsourcing the State AG," *Legal Times*, 10 July, 2006.

Subsequent to the tobacco litigation, Blumenthal's office also entered into a contingent-fee arrangement with the Seattle-based firm of Hagens-Berman in order to sue the pharmaceutical industry over pricing issues. While Connecticut has since amended its law to require the competitive bidding of legal services, the new law will not apply to earlier contracts, and Blumenthal's public record on the litigation makes no mention- of the firm's involvement. As such, it's unlikely that Connecticut taxpayers will have any way to know whether the deal is ultimately in their best interest.

## Good Government or Incumbency Protection?

Blumenthal refuses to accept political contributions from law firms doing business with the state. Beginning in 1995, he began inserting language into state legal contracts that forbade private law firms, their lawyers, and spouses from contributing to the attorney general's campaign, or that of his opponents.

While this ban might sounds virtuous, it had the effect of shutting off a significant source of campaign funds to Martha Dean, his 2002 Republican opponent for Attorney General. She was told by one Republican town committee chair that he could not support her because his spouse was a secretary at a law firm doing business with the state.

Dean sued to have the contract terms struck down, claiming that the terms were illegal, and gave her opponent – Blumenthal – a tremendous advantage.

"He has the power of the incumbency. He gets media just by being attorney general. It costs millions to buy the kind of media he gets for free. He has made it impossible for a lawyer running against him to raise money," said Dean.[37]

Rather than litigate the case and – presumably – run the risk of having his own legal terms struck down, Blumenthal abrogated the contract terms one week before the November 5, 2002 election. By then, it was too late for Dean. She lost the election by approximately a two-to-one margin.[38]

Curiously, the issue has reemerged in the 2006 election as well. According to the *Connecticut Law Tribune*, the case has remained on the docket, unresolved since 2002. As a result of the unresolved nature of the case, Blumenthal's 2006 challenger,

[37] Rich Harris, "GOP Candidate files suit over AG contract language." The Associated Press, 25 October 2002.
[38] http://www.sots.ct.gov/RegisterManual/SectionVIII/SOV02AttorneyGeneral.htm.

Robert Farr was unable to determine whether he and his wife (who works for a firm doing business with the state) would be prohibited from contributing to his own campaign![39]

The contractual terms bind several thousand individuals who work as partners and associates at 62 firms doing business with the state, as well as their spouses. In July 2006, Blumenthal sent a letter to all 62 firms reminding them that the ban remained in place, but vowing to arbitrarily suspend it while the Dean litigation remained unresolved.

That wasn't good enough for Farr. "The effect of this letter is to notify [the recipients] that their firm is benefiting from the good graces of Dick Blumenthal, because if the lawsuit were to end, so might their contract."[40]

## Conclusion

Serving as a state's chief legal officer is one of the most demanding jobs in public service; the attorney general and his or her staff are responsible for protecting consumers, litigating on behalf of state agencies, and enforcing state laws. In most of these areas, our state attorneys general – including Mr. Blumenthal – perform well.

However, when the interests of the attorney general deviate from the public interest, Mr. Blumenthal's record is less distinguished.

When Mr. Blumenthal's goal is to instead serve the interests of political allies, or the interest of self promotion, Mr. Blumenthal's record is replete with political missteps, lost cases, bad publicity, errors in judgment, and questionable relationships with contingent-fee personal injury lawyers.

When it comes to filing lawsuits to achieve a political objective, Mr. Blumenthal would be well advised to heed another of Abraham Lincoln's maxims:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."[41]

---

[39]

[40] Lisa Siegel, "Farr cried foul in AG race," *The Connecticut Law Tribune*, 7 August 2006, Volume 27, Issue 99.

[41] Abraham Lincoln (1809–1865), U.S. president. Fragment, notes for a law lecture, July 1, 1850? Collected Works of Abraham Lincoln, vol. 2, p. 81, Rutgers University Press (1953, 1990).

With 23,000 lawsuits filed every year, there always be “business enough” for Mr. Blumenthal’s office.