

Senator Ted Cruz Takes A Trip Down FTC Memory Lane

A photograph of a modern building with a curved glass facade, showing multiple stories and windows, set against a light blue sky.

3 MIN READ

October 31, 2023, 7:57 AM

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A little-known fact is that Senator Ted Cruz spent time at the FTC during a time when there were, as he reflects, certain bipartisan efforts. One of his most important projects during his time there was his association with the FTC's State Action Report, as reflected in the acknowledgment of that Report:

The State Action Task Force was convened in July 2001 and, at that time, was headed by R. Ted Cruz, the former Director of the Office of Policy Planning. Mr. Cruz departed from the Federal Trade Commission in early February 2003.

The Report came out in September 2003. [State Action Task Force Report \(ftc.gov\)](https://www.ftc.gov). This Report set out the FTC's strategic vision to reinvigorate the State Action Doctrine. At a general level, the State Action Doctrine shields anticompetitive behavior from federal antitrust liability, where the conduct (a) is the foreseeable result of a clearly articulated and affirmatively expressed State policy and (b) is actively supervised by the State. The Commission had been concerned that the courts were allowing too much conduct to fall under this defense that should not meet the test.

This project was highly successful, with two Supreme Court victories notched. The first was *FTC v. Phoebe Putney*, and the second was *FTC v. North Carolina State Board of Dental Examiners*. I was fortunate to be the lead counsel in the NC Dental matter, where the Supreme

Court agreed that state boards run by financially interested market participants (e.g., dentists) require active supervision by a disinterested entity to prevail on a defense of anti-competitive activity.

Notably, after a nice string of successes, the FTC suffered a significant recent state action setback in *Louisiana Children's Medical Center v. Attorney General of the United States*, a decision by the District Court in the Eastern District of Louisiana. In that case, the merging hospitals obtained a Certificate of Public Advantage ("COPA") from Louisiana's Department of Justice. The merging hospitals did not report the transaction to the FTC. Failure to report a reportable transaction can result in penalties exceeding \$50,000 per day. In the past month, the district court found that the COPA process satisfied the State Action Doctrine by meeting both prongs of the doctrine. Particularly noteworthy here with respect to active supervision is the court's reference to the fact that "the terms and conditions empower the LADOJ to 'actively supervise' both the transaction itself and the new health system on an *ongoing basis*." (emphasis added). During the expected appeal or other future litigation, this reference to supervision on an "ongoing basis" is likely to require additional parsing as, on the one hand, merging parties may argue that such ongoing oversight is unnecessary if the state approves the transaction, and, on the other, the FTC argues the generally accepted proposition that "empowering" supervision is not enough to show actual supervision.

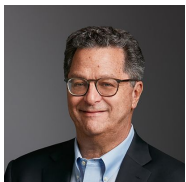
Since R. Ted Cruz left the FTC 20 years ago, much has happened in the State Action area. Much clarity has been achieved, but additional battles remain to be fought.

“When I was at the FTC – now two decades ago – bipartisanship was a defining characteristic of the agency and one of the reasons it was so often successful,” Cruz said.

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