

## Judge Donato Clarifies Special Master's FTAIA *Mens Rea* Finding

AUGUST 21, 2020

To update our earlier [post](#) about a series of rulings on the Foreign Trade Antitrust Improvements Act (FTAIA) in the *In re Capacitors Antitrust Litigation*,<sup>[1]</sup> Judge Donato has now [ruled](#) on the Special Master's Report and Recommendation that the Foreign Trade Antitrust Improvements Act (FTAIA) contains a *mens rea* requirement—in the Special Master's words, that “there is a *mens rea* requirement under the FTAIA in that, at the very least, it must be reasonably foreseeable to a defendant its sale of goods at artificially inflated prices will be shipped to the United States where it will have an effect on U.S. commerce.”

Although Judge Donato accepted the Special Master's Reports and Recommendations in substance, he did not adopt the Special Master's language about the FTAIA having a *mens rea* element.<sup>[2]</sup>

First, Judge Donato accepted that claims related to capacitors that were manufactured, sold, and shipped outside of the United States but incorporated abroad into finished products sold or delivered into the United States are valid claims that could be asserted consistent with the Court's two earlier FTAIA rulings, so long as the elements of the FTAIA were satisfied with respect to that commerce.

Next, while Judge Donato accepted the Special Master's overall conclusion that plaintiffs are required to establish defendants' knowledge or awareness of the ultimate destination of the incorporated capacitors, Judge Donato did not agree with the Special Master's conclusion that such a requirement amounted to a “*mens rea*” element under the FTAIA. Instead, Judge Donato called the use of the term “more a matter of diction than substance” and clarified that the Special Master's inquiry was really whether or not defendants' actions were “directed at a U.S. import market,” which “connotes a degree of awareness of one's actions.” Judge Donato continued by citing the Merriam-Webster dictionary definition of the words “to direct,” which mean “to cause something to move, point to, or project in a specified manner or course.” Accordingly, Judge Donato held that plaintiffs were required to support their claims regarding incorporated capacitors with evidence showing that defendants had “directed” those products at a United States import market.

While Judge Donato's July 15 ruling does provide some clarity into the ever-ambiguous FTAIA, questions as to the evidentiary burden of establishing “direction” remain unclear and are sure to be the subject of future litigation.

Winston & Strawn's Competition Corner podcast on the FTAIA more broadly can be found [here](#).

<sup>[1]</sup> *In re Capacitors Antitrust Litigation (No. III)*, 17-md-2801 (N.D. Cal.).

<sup>[2]</sup> *In re Capacitors Antitrust Litig.*, No. 17-md-02801-JD, 2020 WL 4000973, at \*1 (N.D. Cal. July 15, 2020).

2 Min Read

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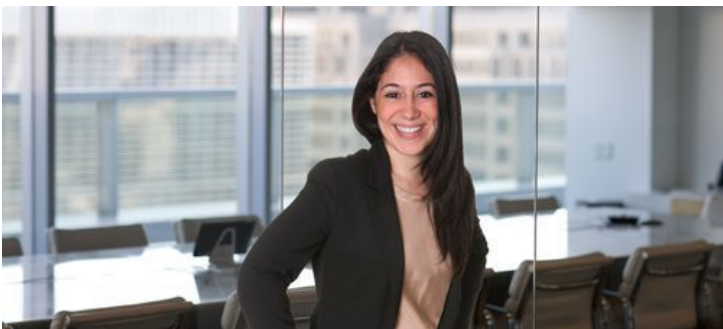
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