

## ALERTS

### Intellectual Property Law Alert - Federal Circuit Confirms TC Heartland Was A Change Of Law

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A U.S. Court of Appeals has said the U.S. Supreme Court's ruling in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, which made it harder for plaintiffs to choose a venue for patent infringement cases, is a change in law, not just a reaffirmation of precedent. The Nov. 15 ruling by a U.S. Court of Appeals for the Federal Circuit panel means defendants can request venue transfers on the grounds that the plaintiff chose the wrong court, even if they hadn't previously raised the issue.

In *In re: Micron Technology, Inc.*, the defendant had not challenged venue in its motion to dismiss in August 2016. After the May 2017 *TC Heartland* decision, Micron filed a motion to dismiss or to transfer the case on the ground that the District of Massachusetts was not a proper venue for the case. The court denied the motion, concluding that, under Rule 12(g)(2) and (h)(1)(A), Micron had waived its venue defense by not objecting to venue in its first motion to dismiss.

#### Federal Circuit Holding

The Federal Circuit panel held that “TC Heartland changed the controlling law in the relevant sense: at the time of the initial motion to dismiss, before the Court decided *TC Heartland*, the venue defense now raised by Micron (and others) based on TC Heartland’s interpretation of the venue statute was not ‘available,’ thus making the waiver rule of Rule 12(g)(2) and (h)(1)(A) inapplicable.” The venue objection did not become available “until the Supreme Court decided *TC Heartland* because, before then, it would have been improper, given controlling precedent, for the district court to dismiss or to transfer for lack of venue.”

#### Takeaways

Because *TC Heartland* has been confirmed as a change in the law, defendants that did not originally challenge venue will not be found to have waived a venue challenge. However, a defendant will need to consider raising any such venue objection in a timely fashion, as well as whether it may have consented to venue by action and whether any other arguments may be raised that it has forfeited an otherwise proper venue objection.

For more information, contact the Barnes & Thornburg attorney with whom you work or a member of the firm’s Intellectual Property Law Department in the following offices: Atlanta (404-846-1693), Chicago (312-357-1313), Columbus (614-628-0096), Dallas (214-258-4200), Delaware (302-300-3434), Elkhart (574-293-0681), Fort Wayne (260-423-9440), Grand Rapids (616-742-3930), Indianapolis (317-236-1313), Los Angeles (310-284-3880), Minneapolis

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