

CLIENT ALERT

The Fifth Circuit Creates Minimum Approximate Physical Presence Test for General Jurisdiction

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A series of Supreme Court decisions in the past decade has generally limited the exercise of general jurisdiction over a corporation to its place of incorporation and its principal place of business.¹ The Supreme Court has, however, indicated that in an exceptional circumstance a corporation could be subject to general jurisdiction where it was not incorporated and did not have its principal place of business if its contacts with the state were so continuous and systematic that the corporation was essentially at home in the foreign jurisdiction. While courts and parties have struggled to define an “exceptional circumstance,” the Fifth Circuit recently provided guidance on what would not constitute an exceptional circumstance. The Fifth Circuit held that targeted advertising into a state would not confer general jurisdiction over a corporation unless that corporation’s “affiliations with the forum state . . . approximate physical presence.”²

In *Frank v. P.N.K. (Lake Charles) L.L.C.*, the Louisiana defendant casino had purposely targeted Texas patrons by sending marketing teams to Texas, conducting focus groups to attract Texas customers, heavily advertising in Houston and subsidizing a charter bus to shuttle Texas patrons to Louisiana.³ Despite finding that these activities were “among the indicia of ‘continuous and systematic’ contacts,” absent a physical presence in Texas, the casino was not essentially “at home” in Texas and the plaintiff could not maintain a wrongful-death lawsuit in Texas based on an injury that occurred at the casino in Louisiana.⁴ The Fifth Circuit’s decision focused on the fact that the casino did “not have employees or registered agents stationed in Texas; a Texas license or permit; offices, gaming facilities or real estate in Texas; nor [did] it have a bank account or pay taxes in Texas.”⁵

This ruling is not without uncertainty. Although corporations can rest assured that purposefully targeting foreign consumers or patrons without an approximate physical presence will not leave the corporation vulnerable to a lawsuit within the Fifth Circuit’s jurisdiction based on general jurisdiction, the Fifth Circuit did not opine on what level of “approximate physical presence” would be enough to confer general jurisdiction over a foreign corporation who was engaging in targeted advertising. The Fifth Circuit’s opinion focused on why there was not an approximate physical presence (lack of employees, lack of license to do business in Texas, lack of bank account or payment of Texas taxes), and future courts will have to use those points as guidance to determine what will constitute approximate physical presence. More importantly, if a court determines a corporation does have a sufficient “approximate physical presence,” the Fifth Circuit offered no opinion about whether activities other than targeted advertising could render a case an “exceptional case,” such that the exercise of personal jurisdiction would be appropriate. There is no doubt that district courts will be forced to confront these issues in the future.

¹ See, e.g., *Daimler AG v. Bauman*, 571 U.S. 117, 138-39 & n.19 (2014).

² *Frank v. P.N.K. (Lake Charles) L.L.C.*, 947 F.3d 331, 339 (5th Cir. 2020)

³ *Id.* at 335.

⁴ *Id.* at 339-40.

⁵ *Id.* at 339.

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