

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 94-10241  
Summary Calendar

---

TEL-PHONIC SERVICES, INC., et al.,  
Plaintiffs,  
TEL-PHONIC SERVICES, INC.,  
Plaintiff-Appellant,  
VERSUS  
TBS INTERNATIONAL, INC.,  
a/k/a DY-CON INTERNATIONAL, INC.,  
a/k/a BANK BY PHONE, INC.,  
and  
THE DISPATCH PRINTING CO.,  
Defendants-Appellees.

---

Appeal from the United States District Court  
for the Northern District of Texas  
(3:88-CV-2181-P)

---

(December 1, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:\*

The plaintiff, Tel-Phonic Services, Inc. ("Tel-Phonic"),  
appeals the dismissal of its supplemental state law claims for want

---

\* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

of jurisdiction. Concluding that the district court applied the wrong precedent, we vacate and remand.

I.

In February 1987, Tel-Phonic, William Kirk, and James Bowen sued defendant TBS International, Inc. ("TBS"), and its parent corporation, Dispatch Printing Company, in federal district court in Tennessee, asserting RICO violations, an antitrust claim, and claims for breach of contract, fraud, and breach of fiduciary duty. The court ruled that a valid RICO claim was necessary for venue to be proper in Tennessee, that the complaint failed to state a RICO claim, and that it was therefore transferring the remaining claims to the Northern District of Texas pursuant to a contractual provision between the parties.

The Texas court dismissed the remaining federal cause of action for failure to state a claim and dismissed the remaining state law claims as time-barred. On appeal, we affirmed the dismissal of the federal claims and the claim for breach of fiduciary duty but reversed and remanded for consideration of the state law claims of fraud and breach of contract. Tel-Phonic Servs., Inc. v. TBS Int'l, Inc., 975 F.2d 1134, 1145 (5th Cir. 1992).

On remand, the district court dismissed the state law claims for lack of subject matter jurisdiction, concluding that there was

no supplemental jurisdiction<sup>1</sup> over the plaintiffs' remaining state law claims "[s]ince prior to remand, the district court dismissed Plaintiff's federal claims without consideration of them on the merits . . . ." Id. The court also held that there was no basis for diversity jurisdiction, because the plaintiffs had "failed to allege where TBS is incorporated." Id.

## II.

The district court dismissed the plaintiffs' state law claims, concluding that "there is no pendent jurisdiction in this case . . . [and] there is no diversity jurisdiction plead [sic] by Plaintiff." Although not referred to as such by the district court, this is a dismissal under FED. R. CIV. P. 12(b)(1). Such dismissals are reviewed de novo. Hobbs v. Hawkins, 968 F.2d 471, 475 (5th Cir. 1992). A dismissal for lack of subject matter jurisdiction will not be affirmed unless it appears certain that the plaintiff cannot prove any set of facts in support of its claim that would entitle it to relief. Id.

### A.

The district court concluded that there was no basis in the pleadings to support diversity jurisdiction. To establish citizenship of a corporation, a plaintiff must plead with specificity both the state of the corporation's principal place of business

---

<sup>1</sup> The district court and the parties refer to "pendent" or "ancillary" jurisdiction. Effective December 1, 1990, however, such jurisdiction is referred to as "supplemental." See 28 U.S.C. § 1367.

and the state where it is incorporated. See Joiner v. Diamond M. Drilling Co., 677 F.2d 1035, 1039 (5th Cir. 1982).

The plaintiffs failed to allege where TBS is incorporated. Moreover, because all of the plaintiffs and one of the defendants are Ohio citizens, there remains a nondiverse defendant. Based upon the record before it, the district court properly concluded that there was no basis for diversity jurisdiction.

B.

The district court erred, however, in concluding that it had no legal basis for exercising supplemental jurisdiction over the state law claims. If "a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole." United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1965).

In Dayton Indep. Sch. Dist. v. U.S. Mineral Prods., 906 F.2d 1059, 1066-67 (5th Cir. 1990), we held "that the exercise of pendent jurisdiction over state law claims is proper only when there is a substantial federal question before the court." We reasoned that because the plaintiff's federal cause of action (a CERCLA claim) had been dismissed for failure to state a claim, there had been no consideration of the merits of the claim. See id. at 1066. Consequently, the substantiality requirement of pendent claim jurisdiction was absent, and the district court did not have jurisdiction over the remaining state law claims. See id.

Relying upon that decision, the district court apparently concluded that because the federal claims had been dismissed for failure to state a claim, they had not been considered on the merits, and therefore the requisite "substantiality" of a federal issue was missing. In Bell v. Hood, 327 U.S. 678, 682 (1945), however, the Court stated:

[T]he failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

In decisions prior to U.S. Mineral Products, this court had held that when a cause of action is dismissed for failure to state a claim, it is not equivalent to a dismissal without addressing the merits of the claim. See Daique v. Opelousas Health Care, Inc., 774 F.2d 1344, 1346-47 (5th Cir. 1985); Fellows v. Universal Restaurants, Inc., 701 F.2d 447, 449 (5th Cir. 1983). In Daique, we stated:

This court, consistent with the great weight of legal authority, has held that when a defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper procedure for the district court is to find that jurisdiction exists and to deal with the objection as a direct attack on the merits of the plaintiff's case.

774 F.2d at 1347. We also have stated that

[t]he scope of federal subject matter jurisdiction is not coextensive with the existence of a cause of action. . . . A federal court may have subject matter jurisdiction even though the complaint fails to state a

claim for which relief can be granted. . . . Only if the federal statute or constitutional provision invoked is clearly immaterial and is invoked solely for the purpose of obtaining jurisdiction or if the claim is wholly insubstantial and frivolous will subject matter jurisdiction be found lacking.

Holland/Blue Streak v. Barthelemy, 849 F.2d 987, 988-89 (5th Cir. 1988).

U.S. Mineral Products is in conflict with our controlling precedent and, more importantly, with that of the Supreme Court. One panel within this circuit may not overrule another. United States v. Taylor, 933 F.2d 307, 313 (5th Cir.), cert. denied, 112 S. Ct. 235 (1991). In the event of conflicting precedents, the older decision is presumptively correct. Alcorn County, Miss. v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1166 (5th Cir. 1984).

Accordingly, the district court erred in relying upon the later decision in U.S. Mineral Products in dismissing the supplemental pendent state law claims for lack of subject matter jurisdiction. It incorrectly concluded that the requisite substantiality of the federal issue was absent. The judgment of dismissal is VACATED, and this matter is REMANDED for the district court to determine whether it should exercise supplemental jurisdiction over the remaining state law claims pursuant to the dictates of Gibbs, 383 U.S. at 723-27.