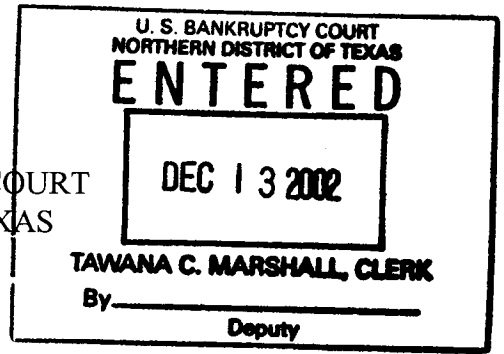


From Chambers

DEC 13 2002

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
LUBBOCK DIVISION



IN RE:

SOUTHERN DYNAMICS THERAPY, INC.,  
Debtor

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§

CASE NO. 02-50095-RLJ-11

SOUTHERN DYNAMICS THERAPY, INC.,  
Plaintiff

§  
§  
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§

v.

ADVERSARY NO. 02-5017

TRAILBLAZER HEALTH ENTERPRISES,  
L.L.C. AND NATIONAL HERITAGE  
INSURANCE COMPANY,  
Defendants.

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§

**MEMORANDUM OPINION AND ORDER**

Trailblazer Health Enterprises, L.L.C. (Trailblazer) and National Heritage Insurance Company (National Heritage), the Defendants in this adversary proceeding, seek dismissal of this cause under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).<sup>1</sup> After Trailblazer and National Heritage filed their respective motions to dismiss, Southern Dynamics Therapy, Inc. (Southern Dynamics), the Plaintiff and Debtor in this bankruptcy case, filed its first amended complaint and brief in opposition to the motions to dismiss. Hearing on the motions was held October 28, 2002. Both Trailblazer and Southern Dynamics filed post-hearing supplemental briefs in support of their respective positions.

<sup>1</sup>Fed. R. Bank. P. 7012(b) provides that Rule 12(b)-(h) of the Federal Rules of Civil Procedure applies in adversary proceedings.

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By its first amended complaint, Southern Dynamics seeks recovery or “turnover” of medicare and/or medicaid payments of approximately \$1.2 million arising from claims made by Southern Dynamics for physical, speech, and occupational therapy services provided by Southern Dynamics.<sup>2</sup> In addition, Southern Dynamics specifically requests an order directing Trailblazer and National Heritage to properly apply the rules and regulations under which they operate, to provide an accounting, and to establish a proper procedure for considering claims made by Southern Dynamics.

Southern Dynamics makes the following factual allegations in support of its cause of action:

- That Southern Dynamics, through therapists employed by Southern Dynamics, provides physical, speech, and occupational therapy services to patients covered by medicare and/or medicaid benefits.
- That Trailblazer and National Heritage administer the payment of the medicare and/or medicaid benefits.
- That Trailblazer instructed Southern Dynamics to utilize a “57” modifier to the occupational therapist’s submissions which resulted in denial of payments and allegations of fraud against Southern Dynamics.<sup>3</sup>
- That all claims made by Southern Dynamics were earmarked for “the Medical Claims Review process,” which is contrary to applicable regulations.
- That Trailblazer “flagged all occupational therapy codes thus illegally reviewing all of [Southern Dynamics’] claims.”

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<sup>2</sup>Southern Dynamics states its action is brought pursuant to 11 U.S.C. § 542(b). Section 542 addresses the turnover of property to the estate.

<sup>3</sup>The first amended complaint is actually confusing on this point as at one point it complains of Trailblazer instructing Southern Dynamics to use the “57” modifier for the occupational therapy claims while another allegation complains of Southern Dynamics being instructed to use the “57” modifier for speech therapy claims.

- That the use of both group and individual numbers, as advised by Trailblazer, caused denial of medicare and medicaid claims.
- That Southern Dynamics has not been paid approximately \$40,000 on 50 claims heard and approved by an administrative law judge.
- That Trailblazer has told Southern Dynamics that Southern Dynamics may not be paid on certain claims awarded by the administrative law judge, and that certain awards may have been lost or misplaced.
- That there are between 800 and 900 cases set for review before the administrative law judge, which cannot be scheduled because Trailblazer has lost the files and has therefore been unable to forward the necessary files to the administrative law center.

Southern Dynamics' complaint states the requested relief is justified under the following legal theories: violation of constitutional rights of due process and equal protection; breach of contract, or alternatively, recovery under *quantum meruit*; negligence; tortious interference with business relationships; fraud; and improper methodology.

Trailblazer and National Heritage contend that Southern Dynamics' complaint should be dismissed for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), because Southern Dynamics has failed to exhaust administrative remedies required by the Social Security Act, which governs the claims made by Southern Dynamics. Alternatively, Trailblazer submits that Southern Dynamics' complaint fails to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6).

National Heritage also argues that it is a "fiscal intermediary" or "arm of the state" and is therefore entitled to sovereign immunity under the Eleventh Amendment of the United States Constitution.

Southern Dynamics is seeking recovery of approximately \$1.2 million. This sum is the estimated aggregate of all medicare/medicaid claims that it contends it holds. Apart from this monetary recovery, Southern Dynamics complains of the instructions provided by Trailblazer (and perhaps National Heritage), the procedures employed by Trailblazer and National Heritage, and the overall conduct and methodology in administering Southern Dynamics' claims by Trailblazer and National Heritage.

If the claims here arise under the Social Security Act, this court does not have jurisdiction prior to Southern Dynamics exhausting its administrative remedies. *See Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 5, 120 S.Ct. 1084, 1089 (2000). The Social Security Act controls over any claims "arising under" the Act.<sup>4</sup> The term "arising under" is to be construed broadly and includes claims that are "inextricably intertwined" with benefits determinations. *See Heckler v. Ringer*, 466 U.S. 602, 622-24, 104 S.Ct. 2013, 2025-2027 (1984). The claims made by Southern Dynamics clearly fall within the purview of the Act. *See id.* *See also Shalala*, 529 U.S. at 13-14.

By seeking a monetary recovery of all disputed claims, Southern Dynamics is effectively requesting that the bankruptcy court be the central forum for resolution of all claims disputes. The bankruptcy court is not the proper forum for this, however. Southern Dynamics must meet the burden of establishing jurisdiction. *See Strain v. Harrelson Rubber Co.*, 742 F.2d 888, 889 (5th Cir. 1984). Both the complaint and counsel's argument at hearing on the motion to dismiss admit that administrative remedies have not been exhausted. According to its complaint,

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<sup>4</sup>42 U.S.C. § 405(h) provides in part, "[n]o action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim **arising under** this subchapter." 42 U.S.C. § 405(h) (2002) (emphasis added).

Southern Dynamics has hundreds of claims presently pending before the administrative law judge.

Southern Dynamics wants the bankruptcy court to correct the procedures and methodology employed by Trailblazer and National Heritage. However, the pleadings do not indicate that Southern Dynamics has sought administrative review of the procedures and methodology employed by Trailblazer and National Heritage, as opposed to discreet claims determinations. *See Heckler*, 466 U.S. at 614, 104 S.Ct. 2021 (holding that challenges to procedure must be administratively exhausted before federal court jurisdiction arises).

Southern Dynamics contends that compliance with administrative remedies is futile because it has received no payment for awards in its favor from the administrative law judge. The claim is simply too vague and indefinite to justify jurisdiction. Moreover, unrebutted evidence was submitted by Trailblazer to the effect that awards are being paid on a timely basis and in accordance with applicable rules and procedures. *See Declaration of Cecilia Durr*.

### **Conclusion**

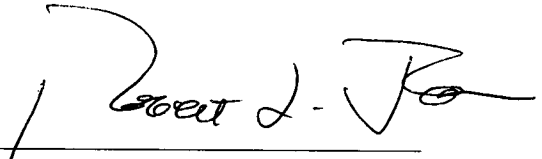
The claims made by Southern Dynamics in the first amended complaint are covered by the Social Security Act. The Act precludes federal court review of claims prior to exhaustion of administrative remedies. Southern Dynamics has failed to exhaust applicable administrative remedies.<sup>5</sup> It is, therefore,

ORDERED that this adversary is dismissed without prejudice.

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<sup>5</sup>As the court concludes it lacks jurisdiction over Southern Dynamics' claims, it is not necessary to address Trailblazer's immunity claims.

SIGNED December 12, 2002.

A handwritten signature in black ink, appearing to read "Robert L. Jones", written over a horizontal line.

ROBERT L. JONES  
UNITED STATES BANKRUPTCY JUDGE

The Clerk shall provide copies to:

Attorney for Plaintiff/Debtor: J. Edwin Price, 2301 Broadway, Lubbock, TX 79401;

Attorney for Trailblazer Health Enterprises, L.L.C.: E. Scott Frost, Assistant United States Attorney, 1205 Texas Avenue, Room 700, Lubbock, TX 79401; and

Attorney for National Heritage Insurance Company: Robert Michael McCauley, Jr., McWhorter, Cobb & Johnson, P.O. Box 2547, Lubbock, TX 79408-2547.