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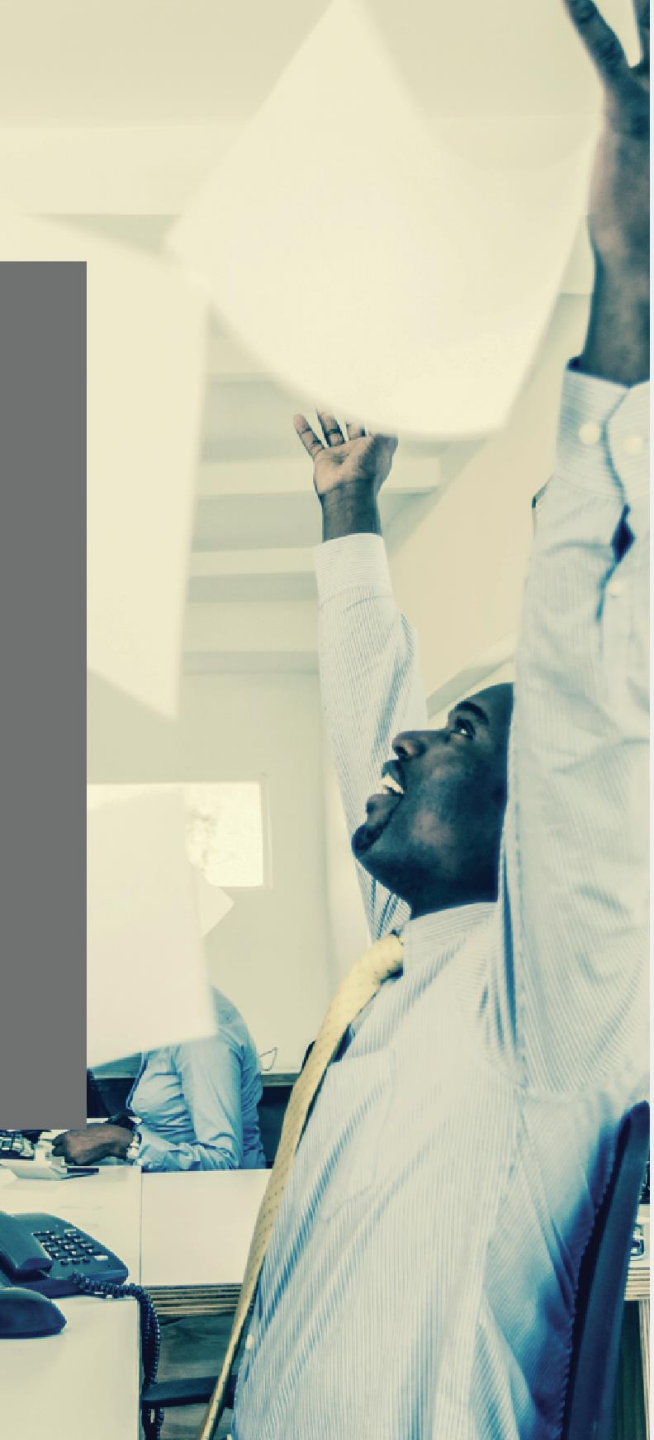

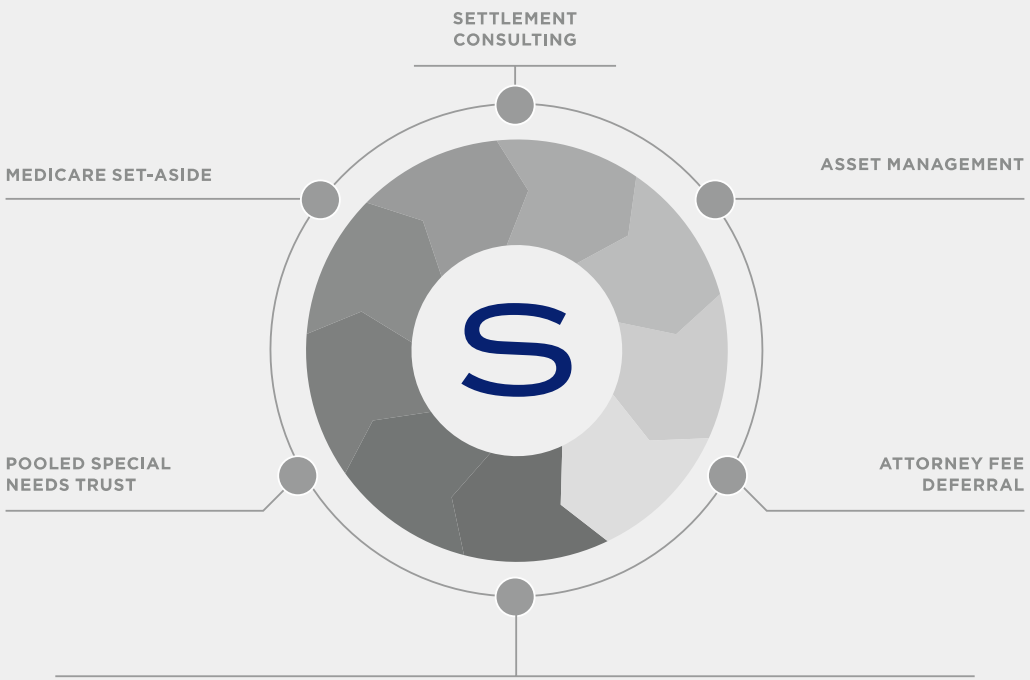

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SETTLEMENT PLANNING AND CONSULTING

THE SYNERGY DIFFERENCE

EXPERTISE - RESULTS - PLAINTIFF ONLY PARTNER

Know Your Enemy

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Rawlings 1,000 Acre Campus La Grange, Kentucky

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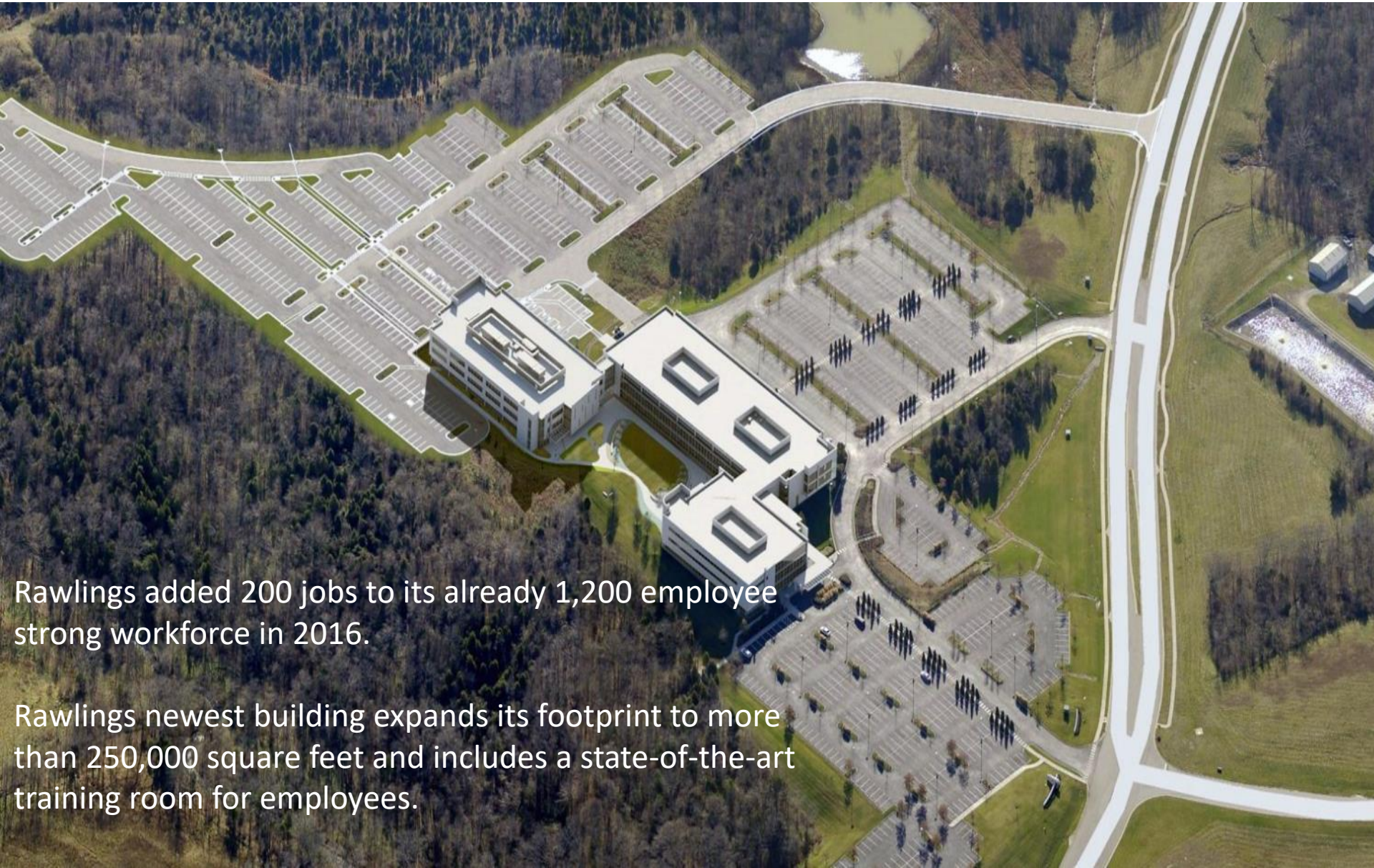
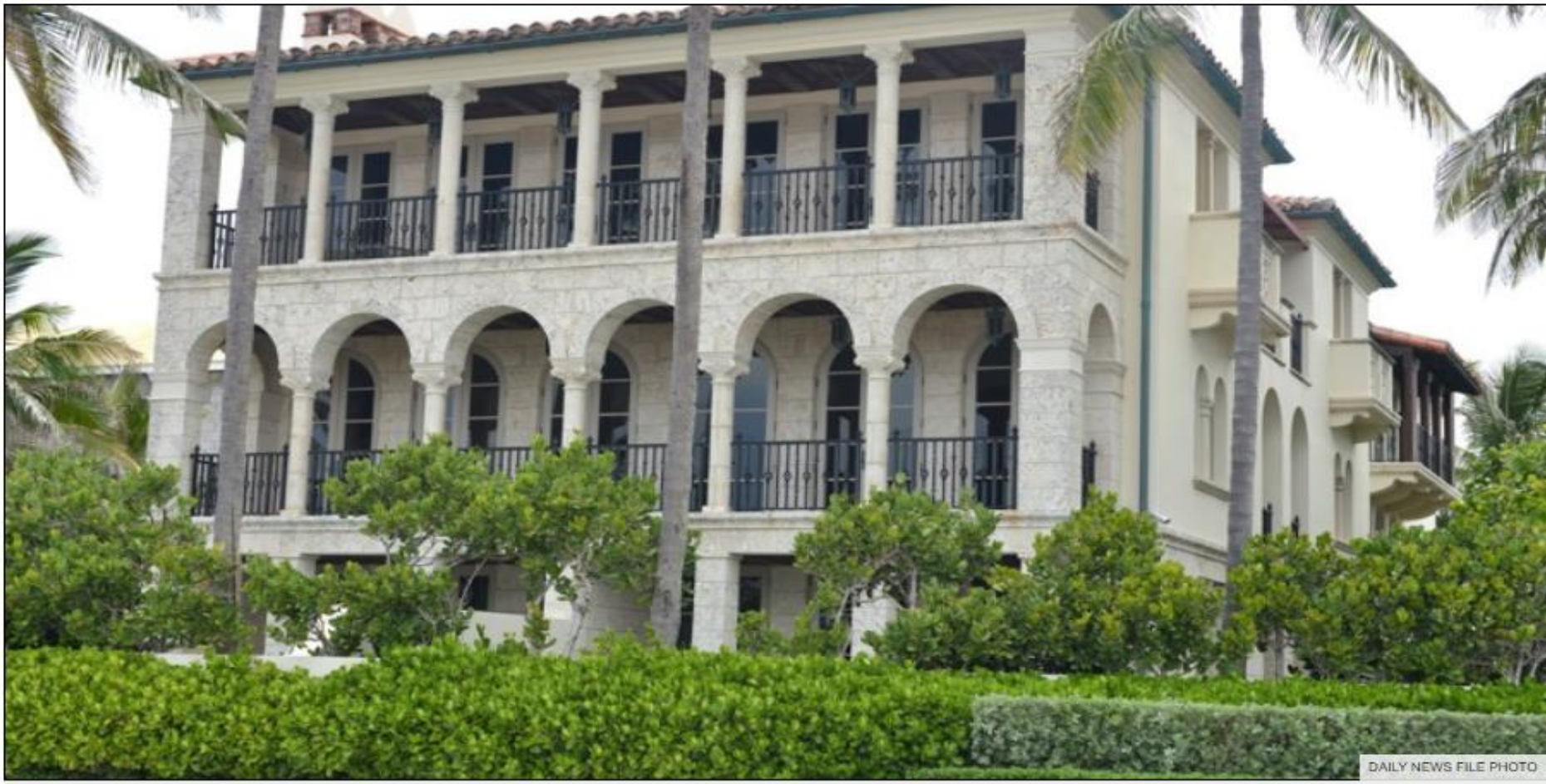


Rawlings added 200 jobs to its already 1,200 employee strong workforce in 2016.

Rawlings newest building expands its footprint to more than 250,000 square feet and includes a state-of-the-art training room for employees.

Palm Beach condo sets oceanfront sales record at nearly $14M

NEWS By Darrell Hofheinz - Daily News Real Estate Writer



One of two condominium units in the Las Ventanas oceanfront building apparently has sold for a recorded $13.9 million, according to preliminary information posted today on the Palm Beach County Clerk's website. Facing Midtown Beach, Unit A at 102 Gulfstream Road comprises the entire second floor of the three story building along with and half of ground level. Daily News File Photo

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Just five months after selling their sprawling Wellington equestrian estate to Los Angeles Dodgers owner Frank McCourt for $20 million, George and Beverly Rawlings just picked up an oceanfront pad in Palm Beach for $13.9 million.

MEMORANDUM

RE: United States Supreme Court's *McCutchen* Decision

DATE: April 2013

The United States Supreme Court has overturned the Third Circuit's decision in *US Airways, Inc. v. McCutchen*, finding that principles of unjust enrichment and equitable considerations, such as the made whole and common fund doctrines, cannot nullify the terms of an ERISA-qualified, self-funded health plan. *See US Airways, Inc. v. McCutchen*, 133 S.Ct. 1537 (April 16, 2013). The well-reasoned opinion, authored by Justice Kagan, conclusively establishes that in a § 502(a)(3) action based upon a lien by agreement, plan participants **cannot** raise these equitable concerns to "override the clear terms of a plan." *McCutchen, Id.* at 1543.

The High Court granted *certiorari* in the matter to resolve a circuit split on whether equitable defenses could defeat an ERISA plan's reimbursement provisions. It specifically referenced and compared the faulty Ninth Circuit decision of *CGI Technologies & Solutions, Inc. v. Rose*, 683 F. 3d 1113 (9th Cir. 2012), abrogated by *McCutchen* (equitable doctrines can trump a plan's terms), to the majority of circuits that followed the correct rule of adhering to ERISA plan language as written.

In overruling *McCutchen* and *Rose* and resolving the split, the Court returned to its reasoning announced in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006). Namely, that an equitable lien by agreement "both arises from and serves to carry out a contract's provisions…So enforcing the lien means holding the parties to their mutual promises." *McCutchen, Id.* at 1546 [internal citations omitted].

> Conversely, it means declining to apply rules - even if they would be "equitable" in a contract's absence—at odds with the parties' expressed commitments. McCutchen therefore cannot rely on theories of unjust enrichment to defeat US Airways' appeal to the plan's clear terms. Those principles, as we said in *Sereboff*, are "beside the point" when parties demand what they bargained for in a valid agreement. See Rest. (3rd) of Restitution and Unjust Enrichment §2(2), p. 15 (2010) ("A valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment"). In those circumstances, hewing to the parties' exchange yields "appropriate" as well as "equitable" relief.

Id. at 1546-47

In other words, the Court found that the existence of a clear, contractual agreement between an ERISA Plan and its participants negated the use of any equitable doctrines which would only be available in the absence of such language. A review of the US Airways Reimbursement Provision analyzed by the Court is instructive in this regard.

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The Rawlings *McCutchen* Memo

Is it ERISA?

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ERISA governs employer-employee plans except where the employer is a government organization or a church organization.

- If the employer is the federal government, FEHBA applies.
- If the employer is the state government, State law applies.
- If the employer is a church, State law applies.

ERISA does not govern individual plans.

- Medicare, Medicaid, or state law applies to individual plans.

The Real Question – Funding Status

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Self-Funded ERISA pre-empts state law

- Funded by contributions from employer and employee

Fully insured ERISA subject to state law

- Funded by purchased insurance coverage

Get What You Are Owed!

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- 29 U.S.C §1024(b)(4) provides list of what the ERISA Plan Administrator must provide upon request.
  - ✓ Copy of the latest updated Summary Plan Description (SPD)
  - ✓ The latest annual report
  - ✓ Any terminal report
  - ✓ The bargaining agreement
  - ✓ The trust agreement, contract, or other instruments under which the plan is established or operated.

- Administrative Services Agreement was subject to the ERISA disclosure requirements as it is a document "that restrict[s] or govern[s] a plan's operation." *Shaver v. Operating Eng'rs Local 428 Pension Trust Fund*, 332 F.3d 1198, 1202 (9th Cir. 2003*), Hughes Salaried Retirees Action Comm. v. Administrator of the Hughes Non-Bargaining Retirement Plan*, 72 F.3d 686, 690 (9th Cir. 1995); *Grant v. Eaton*, S.D. Miss, Civil Action No. 3:10CV164TSL-FKB; *Fisher v. Metropolitan Life Ins. Co.*, 895 F.2d 1073, 1077 (5th Cir. 1990) *Heffner v. Blue Cross and Blue Shield of Alabama, Inc.*, 443 F.3d 1330, 1343 (11th Cir. 2006).

Ask the Correct Party

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- 29 U.S.C §1024(b)(4) is a requirement placed upon the “Plan Administrator”.
- Named on administrative page in SPD. If not named then default is Plan Sponsor who will be employer or possibly a union.
- The Third Party Claims Administrator (TPA) is NOT the “Plan Administrator”.
- The recovery vendor or agent is NOT the “Plan Administrator”.
- Rawlings, Equian, Optum, Conduent, etc. will NEVER be the “Plan Administrator”.

“Optum has received your request for plan documents. It is our position that section 104(b) of ERISA [29 U.S.C. sec. 1024(b)] does not apply to Optum, since Optum is not the plan administrator. See, e.g., *Nechis v. Oxford Health Plans*, Inc., 421 F.3d 96, 104 (2d Cir. 2005). Nevertheless, without waiving any objections or defenses, and solely as an accommodation, we are enclosing copies of the following documents:”

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<<Date>>

PLAN ADMINISTRATOR
<<Address>>
<<Address>>

SENT VIA CERTIFIED MAIL

Re: <<Plan Member>>
<<Employer Group>>
<<Date of Loss>>

Dear Plan Administrator:

This letter shall serve as notice that Synergy Lien Resolution Services ("SLRS") has been engaged by <<Attorney>>, attorney for your plan participant <<Plaintiff>> to resolve any alleged subrogation or reimbursement claims, related to the above referenced matter. Attached you will find an executed release allowing SLRS to discuss and resolve this matter.

We respectfully request copies of the following materials:

* Copies of the Summary Plan Description (SPD), Master Plan Document (MPD), all other Plan Documents relating to this plan participant's health insurance from the year preceding the date of loss until present.
* The Form 5500 for the plan from the year preceding the date of loss until present, including all schedules.
* An itemization, including diagnosis/procedural codes and/or ICD-9/10codes, for all alleged medical benefits provided which relate to the above referenced date of loss.
* The latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.

This request is being made by the plan participant pursuant to 29 U.S.C § 1024(b)(4). Be advised that failure to provide these materials within thirty (30) days **may result in a fine of $110.00 per day**. 29 U.S.C. § 1132(c)(1)(b) & 29 CFR § 2575.502c-1.

Please direct all future contact and correspondence to our office.

Respectfully,

Dave Place, J.D.
Vice President, Director of Synergy Lien Resolution Services

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29 U.S.C §1024(b)(4)

Don’t Take Yes for an Answer!

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- Often the Plan Administrator is unsophisticated and relies on their TPA or recovery vendors to handle these matters.
- The TPA or recovery vendor may provide some of the required documents, but they almost never provide all that is required by 29 U.S.C §1024(b)(4).
- Documents supplied by bill collectors are entirely self-serving, and there is no penalty for providing misleading or inaccurate information to attorneys.
- Accept documents provided, most often the SPD and claims summary.
- The demand for documents itself is burdensome to the Plan Administrator, their TPA and recovery vendors. Do not let them off the hook.
- They have thirty (30) days to comply or face penalties.

Track Penalties

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- 29 U.S.C. § 1132(c)(1)(b)
  - Establish $100.00 per day penalty for failure to comply
- 29 CFR § 2575.502c-1
  - Allows for this penalty to be increased to $110.00 per day

- *Harris-Frye v. United of Omaha*, (E.D. Tenn. Sept. 21, 2015) - Penalty $61,380.00
- *Leister v. Dovetail, Inc.,* No. 05-2115, (C. Dis. Oct. 22, 2009) – Penalty $377,600.00
- *Huss v. IBM Medical Plan*, No. 07 C 7028, (N.D Dis. Ill. Nov. 4, 2009)–Penalty $11,440.00
- *Law v. Ernst & Young*, 956 F.2d 364, 375 (1st Cir. 1992)(affirming penalty of $100 per day)
- *Gorini*, 94 Fed. Appx. 913 (3rd Cir. 2004)(affirming an award totaling $160,780)
- *Kollman v. Hewitt Assoc*., 2005 WL 2746659 (E.D. Pa. 2005)($100 per day)
- *Freitag v. Pan Am. World Airways, Inc*., 702 F.Supp. 128, 132 (E.D. Vir. 1988)($100 per day)
- *Tait v. Barbknecht & Tait Profit Sharing Plan*, 997 F.Supp. 763 (N.D. Tex. 1998)($100 per day)
- *Gatlin v. Nat. Healthcare Corp*., 16 Fed. Appx. 283 (6th Cir. 2001)($100 per day)
- *Kreuger Intl v. Blank*, 225 F.3d 806, 811 (7th Cir. 2000)(affirming $100 per day)
- *Brown v. Aventis Pharma.,* 342 F.3d 822, 825-826 (8th Cir. 2003)(affirming maximum penalty)
- *Koegan v. Towers, Perrin, Forster & Crosby*, 2003 WL 21058167 (D. Minn. 2003)($100 per day)
- *Conger v. Univ. Marketing, Inc*., 2000 WL 1818521 (D. Or. 2000)(($100 per day).

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McCutchen

The “Common Fund” Argument

U.S. Airways v. McCutchen - Dissent

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Scalia's dissent to *McCutchen* references the fact that at a lower court level all the parties conceded that the Plan language addressed attorney fees.

"In their brief in opposition to the petition they conceded that, under the contract, 'a beneficiary is required to reimburse the Plan for any amounts it has paid out of any monies the beneficiary recovers from a third-party, without any contribution to attorney's fees and expenses."

U.S. Airways v. McCutchen, 133 S.Ct. 1537(2013) Scalia's dissent citing Brief in Opposition 5 (emphasis added); See Brief for Petitioner 18, and n. 6; Brief for Respondents 29; Brief for United State as *Amicus Curiae* 21.

U.S. Airways v. McCutchen - The Remand!

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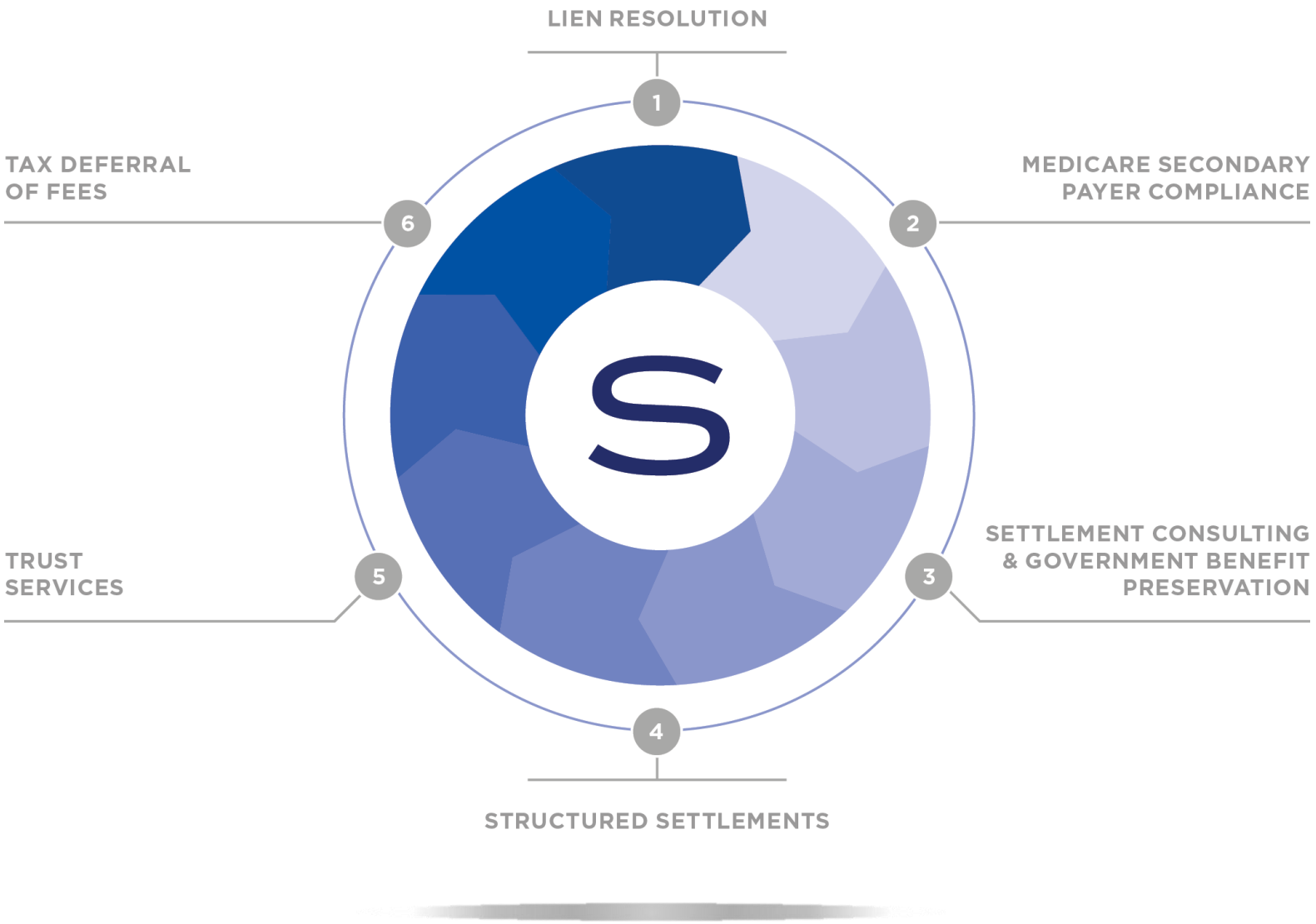
"Under the common-fund doctrine 'a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee ***from the fund as a whole***.' *US Airways, Inc. v. McCutchen*, 133 S. Ct. at 1551 (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). '[I]f . . . injured persons could not charge legal costs against recoveries, people like [McCutchen] would in the future have every reason' to make different judgments about bringing suit, 'throwing on plans the burden and expense of collection.' Accordingly, McCutchen is entitled to deduct his proportional fees and expenses that resulted in the recovery of the $10,000.00.

U.S. Airways v. McCutchen, Case 2:08-cv-01593-DSC (emphasis added) (W.D. PA. March 16, 2016).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