

## **RISE Delaware™ Update: LITIGATION PART 2**

### **RISE Delaware™ LITIGATION PART 2: BACKGROUND ON THE LITIGATION ATTORNEYS' FEES**

Here is background to help you better understand the litigation attorneys' fees.

#### **THE LAW FIRMS**

Two New York law firms acted as lead counsel starting in September 2022 to obtain, on an expedited basis, the interim “Stay” of Medicare Advantage granted by Judge Calvin Scott on October 19, 2022 – Pollock Cohen (attorneys Steve Cohen and Sara Haviva Mark) and Walden Macht (attorney Jake Gardener). Those firms, from litigation in New York, were experts on the horrors of Medicare Advantage, the insurance industry’s sneaky methods of pulling the wool over people’s eyes about it, and the financial incentives for governments to offload their retirees onto Medicare Advantage.

The Court rules required RISE to also retain Delaware local counsel to have an active role and be accountable to the Court. In any event, we certainly wanted the benefit of advice from highly knowledgeable Delaware counsel about navigating the Delaware courts and procedures. David Felice of Bailey Glasser in Wilmington stepped up to fill that role commendably as expert local counsel to sue the State, despite the State’s long reach into the legal community.

As the focus of proceedings shifted toward the Delaware Supreme Court, we were able to streamline our representation in April 2023 with just one highly respected law firm, Fox Rothschild. We were very fortunate to have the head of its Delaware office, Sid Liebesman, become our formidable lead counsel who expertly navigated our case through to its conclusion in April 2024 and allowed us to achieve our ultimate “grand slam” success in the General Assembly.

#### **WHAT THE LAW FIRMS DID**

**The first stage of the lawsuit (in the Superior Court).** The Complaint was filed on September 25, 2022. Counsel then briefed and argued the Motion to Stay of Medicare Advantage which was granted on October 19, 2022 by Judge Calvin Scott (an expert on good government laws). The Complaint and Stay were both based on our procedural claims that the State failed to follow good government laws. They were not based on a claim that Retirees were promised a Medicare Supplement benefit (MedicFill). Sara Mark of Pollock Cohen and Jake Gardener of Walden Macht did brilliant work in successfully framing and advocating for this claim in the Superior Court, with the able teamwork of our Delaware counsel David Felice.

In short, the Stay could stop the State from moving retirees to Medicare Advantage in October 2022, but the Stay would not be the end of the game. The goal of the Stay was to “gum up the works,” as Sara Mark, put it. We needed the Administration or the Legislature to act to achieve the ultimate goal of keeping Medicfill for good. In fall of 2022, after Judge Scott issued his well-considered decision, hopes were high that one or the other would act quickly.

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The Carney Administration, however, was not willing to admit it had been wrong, and **it refused after the Stay even to discuss a resolution by settlement**. It also became clear by early 2023 that, because of the Administration's deep political influence, there was not going to be a quick or easy fix in the Legislature. RISE and retirees were going to have to work through in 2023 a whole, long committee process with the RHBAS and hope that the Legislature would then listen to the RHBAS and correct the Administration's headstrong attachment to Medicare Advantage.

So here was the difficulty by early 2023. If the Stay were lifted, without protective legislative action in place, the Administration could, and surely would, have proceeded immediately with its already signed Highmark contract for Medicare Advantage. But corrective legislative action was not going to happen quickly, if at all. As a result, retirees at least had to have some way to prolong the Stay for as long as possible, and then hope and work for the best on the political front.

RISE's ability to keep the Stay in place, however, was far from certain. Indeed, by the end of November 2022, the fees for the litigation attorneys had come to \$340,000 (multiples more than their advance estimate to obtain a stay). But even with very diligent efforts, RISE had only been able to raise about \$125,000 given that it did not have a contact list for the 30,000 retirees. Without full payment, the NY attorneys were not willing to continue. But had we given up because of RISE's inability to raise substantially more money quickly (over \$200,000 for the debt plus more for continuing fees!), our Medicfill would have been lost. It was also far from a sure thing that the Supreme Court would affirm Judge Scott and take what some worried was a politically-fraught step of going against the Administration (in the end, it did not go against the Administration). But even if it did, the Stay ruling was an interim order. We needed legislative protection.

Shortening a much longer story, this is what we did: RISE in November 2022 petitioned the Superior Court for attorneys' fees. If the Court awarded fees (a long shot), wonderful. If not, we would have a cross appeal in the Delaware Supreme Court which ultimately could delay the lifting of the Stay. Essentially this was a win either way. I had already helped *pro bono* with development of the factual record, strategy and drafting of filings. So I took on *pro bono* much of the work in the Superior Court after the Stay, including on the fee petition, so as to limit further fees and keep the Stay in place. David Felice generously agreed to continue on in the Superior Court for a time, even though his firm too was owed money.

Our fee petition was ultimately denied by the Superior Court. So given that the Administration *again* refused even to discuss settlement, the case would go up to the Delaware Supreme Court on the State's appeal of the Stay Order, with RISE then cross appealing the denial of its attorneys' fees petition.

**The second stage of the lawsuit (in the Delaware Supreme Court).** To proceed in the Supreme Court, however, RISE needed lead counsel. That is where we were extremely fortunate that Austen Endersby of Fox Rothschild reached out to the outstanding and highly experienced head of the firm's Delaware office, Sid Liebesman, who agreed to take on our case as lead counsel with a reasonable retainer (which by then RISE had raised). The Superior Court lawyers agreed to delayed payment of the monies owed them.

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Because of Sid's legal, strategic and political acumen in handling the tail end of the Superior Court case and of the State's appeal and RISE's cross appeal of the denial of its attorneys' fees, we were able to keep the Stay in place until April 2024 when it was lifted by the Delaware Supreme Court. This was an incredible achievement as the lifting of the Stay came only AFTER the Highmark Medicare Advantage contract had been canceled (in September 2023) and AFTER the SEBC had moved irrevocably forward with Medicfill in the next contract cycle. Because of this achievement, RISE and retirees were able to work with the RHBAS committee throughout 2023 and through the legislative process in 2024 to secure total victory in June 2024!

**EVERY SINGLE ATTORNEY DID AN OUTSTANDING JOB AND THE INVOICED AMOUNTS WERE PROPERLY AND FULLY EARNED.**

The law firms all gave RISE discounted attorney billing rates and provided detailed invoices of their work that fully justified the amounts billed. I can vouch, based on my 35 years of experience in complex civil litigation, that the attorneys uniformly were careful in their billing, even as the matter was expedited in the first three months (requiring all-hands-on deck) and thereafter was hard fought as the State persisted without regard to anyone's legal costs.

**KEEP SOMETHING IN MIND ON THE AMOUNT OF THE FEES.**

We had to keep going for so long (and at such great expense) because the Carney Administration, irresponsibly, was never willing even to discuss settlement. We reached out to discuss settlement on at least four occasions at various stages of the case, even as late as a month before the Supreme Court argument. There was a win-win resolution without further litigation that we thought could work. The Administration simply did not care. The Administration's arrogance cost us all a lot of money in unnecessary expense for lawyers' fees (and cost taxpayers too, who got to fund the State's expensive counsel the whole time), and a lot of time and angst for many of us.

**In the end, in a rebuke to the Carney Administration, RISE Delaware and retirees won with a grand slam!! Medicare Advantage has gone to the trash heap. Thank you Lt. Gov. Bethany Hall-Long, Rep. Paul Baumbach and Sen. Bryan Townsend for wrapping up victory through the RHBAS and with the General Assembly in a great legislative package!**

Regards,

Mary Graham, Legal Liaison and Vice President, RISE Delaware

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**RISE Delaware: Retirees Investing in Social Equity Delaware**

Elisa Diller, President

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Our Web site: [www.risede.com](http://www.risede.com)

*Checks may be made payable to: RISE Delaware*

Address: RISE Delaware, P.O. Box 7262, Newark, DE 19714

Public Meeting Calendar: State of Delaware

<https://publicmeetings.delaware.gov/#/>

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