

## RISE Delaware Litigation Update for March 9, 2023

Good afternoon RISE Delaware:

Please read the message from our volunteer liaison with the RISE attorneys, Mary Graham. There has been some confusion about Mary's volunteer role with RISE. Read on to find out more!

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Hi All RISE Supporters,

This is to give you an update on the litigation. But first, for all the great new people joining the RISE email list, here is background about the litigation and who I am.

### **BACKGROUND**

I receive the State's Medicare supplement healthcare benefit as the spouse of a retired UD faculty member. I got involved with Rise shortly before the September 12 Goldey Beacom meeting when my spouse serendipitously learned of the State's switch to Medicare Advantage. (We had fallen victim in the summer to the glossy Highmark brochures and thought the new plan was the same as the old one, just with a different name. Thank you, mystery man Frank working the early polling with my spouse at Claymont for enlightening us!) We investigated (e.g. Kowalko's opinion piece) and learned that Medicare Advantage is privatized, managed care. We had always stayed away from managed care and were deeply alarmed.

When Governor Carney's administration at Goldey Beacom made clear they did not care about retirees' concerns and would press forward with Medicare Advantage come hell or high water, many retirees expressed that RISE should sue quickly to stop Medicare Advantage. Time was of the essence as open enrollment was beginning on October 3.

Given my 35 years of experience as an attorney handling large, complex civil litigation at a Wilmington law firm, I volunteered to help RISE and the NY and Delaware lawyers it was retaining. After intensive research and work, RISE brought the lawsuit in the Superior Court to try to stop Medicare Advantage at least for 2023. It filed a detailed Complaint on September 25 founded primarily on open government and open meetings laws, and an expedited Motion to Stay on October 4 (with extensive briefing and affidavits) that the Superior Court granted on October 19. This victory came with a large financial debt for the fees of the paid NY and Delaware attorneys who appeared. Litigation is always more expensive than you feel it should be, but don't forget - it was made three times as expensive here because of the Administration's conduct (hiding its adoption of MA, delaying telling retirees, and then putting out highly misleading and wrong information).

I understand that some new people wonder if I am being paid something out of the fundraising I am encouraging. **This is not correct.** I have put in hundreds of hours without compensation helping the paid lawyers - with fact and legal research, obtaining the affidavits, strategy input, drafting work for the Complaint and Motion To Stay, and most of the drafting work since then (e.g. seeking attorneys' fees to try to lessen our need for fundraising). These were all volunteer, unpaid hours. Had I not done this, the litigation would have been even more expensive and might have turned out differently. I am not complaining or expecting recognition. It was the right thing to do and I enjoy working with all the amazing people involved in the effort. I just don't want you to think I have any financial interest as an attorney.

### **WHAT THE LITIGATION HAS ACHIEVED**

*First*, because of the October 19 Stay Decision of the Superior Court, we are still on Medicfill in 2023. But for the litigation, we would all be on Medicare Advantage now, or else paying for our own Medicare Supplement plan.

*Second*, the October 19 Stay Decision holds that *the SEBC must comply with Delaware open government and open meetings laws if it wants to adopt Medicare Advantage*. The parties agreed to incorporate this holding into a Final Judgment (not yet adopted), which the Administration wants then to appeal. The Administration has now made clear that, if the holding is overturned, it will immediately proceed with Highmark on the Medicare Advantage contract they signed on September 28 (three days after the Complaint was filed). RISE wants to fight on appeal to keep the important holding of the Stay Decision that the SEBC must comply with open government laws.

*Third*, because of the litigation, we now have had time to further educate ourselves, do additional outreach, and work to participate in and put pressure on the legislature and committees (e.g. the new committee recently established by the legislature).

### **RECENT EVENTS IN THE LITIGATION**

Further to my recent update about the procedural wrangling in the litigation after the Superior Court's Fee Decision on February 8 (denying attorneys' fees on jurisdictional grounds): (1) As earlier explained, Rise filed an election to transfer to the Court of Chancery on February 15 and the State later that day filed a Notice of Appeal of the case to the Delaware Supreme Court.(2) The Delaware Supreme Court the next day issued a Notice To Show Cause to the State requiring the State to show why its appeal was proper because the State appeared to be making an improper appeal of an interlocutory (i.e. non-final) order. (3) The State filed a Response on February 23 in the Supreme Court asserting that its appeal was actually of a final order (4). As requested by the Supreme Court, we filed on March 3 our response that there had been no final

order so the State's appeal at this time was not proper.

You can see all these papers at the "Lawsuit documents" link under the "Legal" tab of the [RiseDe.com](http://RiseDe.com) website.

### **WHAT HAPPENS NOW?**

We think it likely that the Delaware Supreme Court will convene a 3-judge panel to consider whether the State's appeal is proper. That might take about two weeks or so from our response. Until a decision is made, it seems unlikely that the Chancery Court will act on the transfer. If the Supreme Court grants the appeal, then briefing will proceed in that Court on both the October 19 Stay Decision and on the Superior Court's denial of fees. If the Supreme Court denies the appeal at this time, then there will need to be proceedings in Chancery Court and possibly Superior Court. After that, we can expect the State will appeal.

I will let you know when the Delaware Supreme Court indicates if it is accepting the State's appeal at this time.

***Please donate to the Rise Round 2 gofundme appeal (see link below) to support our ongoing litigation effort and our defense of the October 19 Decision on the appeal by the Administration (whether that appeal is accepted by the Delaware Supreme Court now or later)***

Regards,

Mary Graham

Volunteer Legal Liaison for RISE

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

<https://www.facebook.com/groups/1131036457767524>

<https://www.facebook.com/RiseDelaware>

<https://www.gofundme.com/f/rise-delaware-round-2-legal-and-other-costs>

Checks may be made payable to RISE Delaware, address below.

**Our Website:** [www.risede.com](http://www.risede.com)