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ATTORNEY GENERAL OPINION NO. 87-8

TO: Anthony J. Fagiano, Director  
Department of Insurance  
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Do the references in Idaho Code, title 41, chapter 44, to medicare supplement insurance policies covering persons eligible for medicare "by reason of age" restrict the writing of such policies in Idaho to this particular group of medicare-eligible persons, or may such policies also be written for persons eligible for medicare by reason of disability?
2. Does the Director of the Department of Insurance have authority to regulate medicare supplement policies covering persons eligible for medicare by reason of disability?

CONCLUSIONS:

1. Medicare supplement policies may be written for persons eligible for medicare by reason of disability.
2. The Director of the Department of Insurance has authority under Idaho Code §§ 41-4403(2), 41-4404, 41-4405, 41-4407, and 41-4408 to regulate medicare supplement policies covering persons eligible for medicare by reason of disability.

ANALYSIS:

QUESTION 1.

The Medicare Supplement Insurance Minimum Standards Act ("the Act"), Idaho Code, title 41, chapter 44, contains several references to persons eligible for medicare "by reason of age." The Director of the Department of Insurance is required to issue

reasonable regulations establishing specific standards that set forth the content and provide for full and fair disclosure of medicare supplement policies covering persons eligible for medicare by reason of age. Idaho Code §§ 41-4403(1), 4406(1). "Free look" provisions for such persons are mandated by Idaho Code § 41-4408. In addition, the director may prescribe informational brochures to improve older buyers' understanding of medicare and their ability to select the most appropriate coverage. Idaho Code § 41-4406(4).

In order to answer your question as to whether the Act excludes the writing of medicare supplement insurance policies for persons eligible for medicare by reason of disability, we must determine the significance of the references to those eligible "by reason of age." The starting point of our analysis is a review of the legislative intent.

The "Statement of Purpose" to 1981 Senate Bill 1078, read as follows:

The purpose of this bill is to comply with Public Law 96-265, Social Security Disability Amendments of 1980 (42 USC 101 et seq.) and thereby retain Idaho's right to regulate the medicare supplemental insurance business in this state. The bill is a National Association of Insurance Commissioners Model Act. 1981 Sess. Laws, ch. 68, p.98.  
(Emphasis added.)

Since the Idaho bill was originally drafted by the National Association of Insurance Commissioners (NAIC) as a Model Act, it is appropriate to examine the history of that organization's use of the phrase "by reason of age." The NAIC meets on a quarterly basis, primarily to draft model legislation dealing with insurance issues common to the states.

In 1979, Ms. Anne DeNovo of the Federal Trade Commission, testifying at an NAIC meeting, noted that the text of the Model Act was amended to add the phrase "because of age" following the word "medicare eligible." She stated that the amendment could eliminate any requirement for providing information to persons eligible for medicare by reason of disability, even though they face the same medicare supplement insurance purchase decisions as those over 65 (eligible "by reason of age"). 1979 NAIC Proceedings, II, 357.

In addressing this amendment, the Model Act contained a drafting note stating that consideration may nonetheless be given to providing information and disclosure materials to prospective supplemental insurance policyholders who are eligible for medicare by reason of disability. 1979 NAIC Proceedings, I, 394. As discussed below, Idaho's version of the Model Act calls for the provision of information for all medicare eligible persons. See, e.g., Idaho Code § 44-4401.

These notes from the history of the NAIC Model Act clearly indicate that the sale of medicare supplement insurance policies to persons eligible for medicare by reason of disability was always contemplated. The phrase "by reason of age" was added only to deal with the question of who was and who was not required to receive information concerning medicare supplement insurance. There is no suggestion that this language was ever intended to restrict the sale of insurance policies to a particular group.

The reasoning behind inclusion of the phrase "by reason of age" is further explained by looking at the early history of the Model Act. Much of the federal medicare legislation was passed in 1965. The intent of that legislation was to provide a broad program of hospital insurance protecting the over-65 population. 1979 NAIC Proceedings, I, 1016 (quoting House Report No. 213, March 29, 1965, p.2). Subsequently, the NAIC undertook a study of medicare supplement insurance.

The study revealed a nationwide problem of over-insurance of senior citizens. 1974 NAIC Proceedings, I, 426. The Model Act addressed these abuses in the marketing of medicare supplement insurance policies to the elderly. 1978 NAIC Proceedings, II, 317. Numerous complaints described the "unique vulnerability" of the elderly to fraud, misrepresentation and misinformation by unfair marketing agents. 1979 NAIC Proceedings, I, 392. More complete disclosure, increased availability of information and buyers' guides to make the senior citizen an informed purchaser were developed as solutions to these problems. These protections became the Model Act itself. 1979 NAIC Proceedings, II, 333.

The NAIC's concern for the elderly can also be explained by sheer numbers. A 1978 census report put 23.5 million people in the group of those eligible for medicare "by reason of age." 1980 NAIC Proceedings, II, 1073 (quoting the U.S. Department of Commerce Bureau of the Census Statistical Abstract of the United States [1978]). By contrast, the group of those eligible for medicare by reason of disability in the same census report numbered 2.4 million. 1979 NAIC Proceedings, II, 357. Thus, it

is understandable why those eligible "by reason of age" were targeted to receive special protection.

In short, the history of the NAIC Model Act shows that our version, Idaho Code, title 41, chapter 44, was aimed at facilitating understanding of policy provisions, not at restricting the sale of such policies to a given group. The overall purpose of the Medicare Supplement Insurance Minimum Standards Act, as set out in Idaho Code § 44-4401, demonstrates this intent:

The purpose of this act shall be to provide reasonable standardization and simplification of terms and coverages of medicare supplement disability insurance policies, subscriber contracts of nonprofit hospitals, medical and dental service associations, and subscriber contracts of health maintenance organizations to facilitate public understanding and comparison, to eliminate provisions contained in disability insurance policies, subscriber contracts of nonprofit hospital, medical and dental service associations, and subscriber contracts of health maintenance organizations which may be misleading or unreasonably confusing in connection either with the purchase of such coverages or with the settlement of claims, and to provide for full disclosure in the sale of such coverages. (Emphasis added.)

It is clear that the purpose of the Act is to facilitate understanding and provide for disclosure. Nowhere does the Act restrict the classes to whom such policies may be sold.

QUESTION 2:

We have determined that the intent of the references to those eligible for medicare "by reason of age" is to provide special protection for the elderly against unscrupulous marketing tactics. While noting the legislature's intent to protect the elderly, we do not mean to imply that the director is powerless to protect the disabled. As we noted above, the history of the Model Act makes it clear that consideration should also be given to protecting the other group of medicare-eligible persons, the disabled. 1979 NAIC Proceedings, I, 394.

The Idaho legislature has considered the disabled and has not excepted them from the majority of the Act's protective provisions. For instance, Idaho Code § 41-4403(2) authorizes the Director of the Department of Insurance to consider protective measures for any person insured under a medicare supplement policy:

The director may issue reasonable regulations that specify prohibited policy provisions not otherwise specifically authorized by statute, which in the opinion of the director are unjust, unfair, or unfairly discriminatory to the policyholder, beneficiary or any person insured under a medicare supplement policy.

Similarly, the general "free look" provision applies to both medicare-eligible groups. Idaho Code § 41-4408. Other sections of the Act apply across the board to all eligible persons. See, e.g., Idaho Code § 41-4404 (minimum standards for benefits), § 41-4405 (loss ratio standards), and § 41-4407 (preexisting conditions).

We conclude that the Medicare Supplement Insurance Minimum Standards Act is intended to give the Director of the Department of Insurance the authority to assist all medicare-eligible persons with decisions relating to medicare supplement insurance. The fact that the elderly receive special assistance does not preclude the director from guaranteeing regulatory assistance to the disabled as well.

AUTHORITIES CONSIDERED:

Idaho Statutes

Idaho Code § 41-4401

Idaho Code § 41-4403

Idaho Code § 41-4404

Idaho Code § 41-4405

Idaho Code § 41-4406

Idaho Code § 41-4407

Idaho Code § 41-4408

Session Laws

1981 Sess. Laws, ch. 68, p.98

Other Authorities

1980 NAIC Proceedings, II, 1073

1979 NAIC Proceedings, I, 394

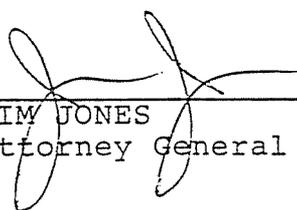
1979 NAIC Proceedings, II, 333, 357, 1016

1978 NAIC Proceedings, I, 392

1978 NAIC Proceedings, II, 317

1974 NAIC Proceedings, I, 426

DATED this 17<sup>th</sup> day of August, 1987.

  
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ANALYSIS BY:

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cc: Idaho Supreme Court  
Supreme Court Library  
Idaho State Library