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FINAL EXAMINATION
Federal Courts § O
Professor McManamon
Spring 2007

This examination is a three-and-a-half hour, open-book test. You are allowed to refer to any written materials in answering the questions. You may not, however, use a computer for research while taking this test. And, of course, no discussion about the examination is allowed with anyone else—except me—during the test.

There are two questions in this exam. The first is worth two-thirds of the grade, and the second is worth one-third.

If you are handwriting your exam, write only on one side of each sheet of paper. And remember, a legible exam makes a happy professor!

Do NOT identify yourself as a graduating senior. All papers will be graded as if you are a graduating senior.

Good luck to all.

QUESTION I (2 hours)

John Smith is a federal employee and, as such, is covered by a health insurance plan. The Federal Employees Health Benefits Act of 1959 (FEHBA), 5 U.S.C. § 8901 *et seq.*, established a comprehensive program of health insurance for federal employees. The Act authorizes the federal Office of Personnel Management (OPM) to contract with private insurance carriers to offer federal employees an array of health-care plans. The plan that covers Smith is the Blue Cross Blue Shield Service Benefit Plan, which is administered by the local Blue Cross Blue Shield company (BCBS).

Smith was injured in a car accident and incurred substantial medical bills, which BCBS paid. In addition, Smith sued the driver of the other car, seeking tort damages, in state court. BCBS had notice of the state-court action, but took no part in it. The tort action terminated in a settlement, from which Smith had to pay a significant portion for attorney's fees and court costs. Thereafter, BCBS filed suit in federal court seeking reimbursement of the full amount it had paid for Smith's medical care.

Smith has filed a motion to dismiss for lack of subject matter jurisdiction. The question presented is whether 28 U.S.C. § 1331 encompasses BCBS's action against Smith. He argues that the action is one sounding in contract, which is created by state law, and there is no diversity of citizenship. BCBS responds that either (1) the action is created by federal common law or (2) the construction of federal law is a necessary element of plaintiff's claim. (The parties disagree as to whether attorney's fees and court costs incurred in recovering the tort award must be subtracted in determining the proper amount of reimbursement. Smith offered to reimburse BCBS for his medical expenses, but deducting a portion of his litigation expenses from the total amount; BCBS refused this offer, demanding 100% reimbursement.) Therefore, BCBS maintains that the case presents a federal question.

You are the law clerk to the federal judge who has been assigned the case of *BCBS v. Smith*. She has asked you to write a memorandum evaluating the issues raised by Smith's motion and BCBS's response and advising her as to how she should rule. Be sure to explain your conclusions fully.

Following are additional details about the program established by FEHBA:

1. The OPM contracts with a few large insurance carriers, including BCBS, to administer the health-care plans for federal employees. The contracts are a standard OPM form and dictate the benefits to be provided, among other things. The Federal Government pays about 75% of the premiums, and the employee pays the rest. These premiums are placed in a trust fund from which the insurance carriers withdraw the money to pay for plan benefits. Thus, each insurance carrier is merely an administrator, which receives a fee from the Federal Government for its services.

2. The contracts between OPM and the insurance carriers require them to provide a brochure to the federal employees that describes the terms of the plan. This brochure explains that these terms are the benefits under the insurance carrier's "contract with OPM, as authorized by FEHBA." The contracts between OPM and the insurance carriers, moreover, obligate the carriers

to make “a reasonable effort” to recoup amounts paid for medical care. The brochure distributed by the carriers alerts the participating federal employees that all recoveries they receive “must be used to reimburse the plan for benefits paid.”

3. The only jurisdictional section in FEHBA itself provides for jurisdiction in the federal district courts in actions against the United States. This FEHBA jurisdiction is an exception to 28 U.S.C. § 1346, which requires that, ordinarily, claims against the United States exceeding \$10,000 must be brought in the Court of Claims.

4. FEHBA contains a preemption clause, displacing state law on issues relating to “coverage or benefits” afforded by health-care plans. Federal regulations provide that disputes between an employee and the relevant insurance carrier over benefits or coverage are to be resolved by OPM; such resolution is reviewable in federal district court under the Administrative Procedure Act. FEHBA, however, contains no provision addressing the subrogation or reimbursement rights of insurance carriers.

QUESTION II (1 hour)

The overarching question addressed in this course is “What is the role of the federal judiciary in our system of government?” The suggested answers to this question have varied over time. Following are several attempts at an answer:

1. “It is emphatically the province and duty of the judicial department to say what the law is.” Chief Justice Marshall, for the Court in *Marbury v. Madison*.
2. “[A court] can only disregard [an] Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question.” Professor Thayer, “The Origin and Scope of the American Doctrine of Constitutional Law.”
3. “The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.” Justice Frankfurter, dissenting in *Baker v. Carr*.
4. “It is well for this Court to practice self-restraint and discipline in constitutional adjudication, but never in its history have those principles received sanction where the national rights of so many have been so clearly infringed for so long a time. National respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuges.” Justice Clark, concurring in *Baker v. Carr*.

Construct your own answer to the question, “What is the role of the federal judiciary in our system of government?” In so doing, evaluate the foregoing quotations, noting if any of them mirror your own views. In addition, be sure to discuss cases you have read this semester in Federal Courts as examples of appropriate and inappropriate exercises of judicial power.