Understanding Budget Reconciliation and the Federal Appropriations Process

by Hannah Laufe

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Have you had trouble understanding some of the terms you've heard in the news, such as budget resolution, reconciliation, or mandatory spending? You are not alone if you have. These are terms that pertain to the federal budget and appropriations process. While these terms may sound arcane, understanding how the federal government makes decisions regarding the allocation and use of funds can help explain how the federal government enacts funding levels into law for the myriad of federal programs that benefit the public and why federal agencies can use their funds in certain ways but not others.

The budget and appropriations process provides the underlying framework through which the federal government allocates limited resources for competing priorities, such as defense versus social welfare programs. The process encompasses actions both by the president, who establishes executive branch budget policy and submits a budget request to Congress (referred to as "the president's budget"), and Congress, which, through enacted law, appropriates funds. Pursuant to the U.S. Constitution, the power of the purse is a legislative power: No money may be drawn "from the Treasury but in consequence of appropriations made by law." Accordingly, while the president may request that funds be made available, only Congress can appropriate funding.

One generally thinks of a budget as a planning tool to help align proposed expenditures with revenues. The president's budget request, however, is both a funding proposal and a policy document. It provides very detailed information regarding actual and proposed funding for all executive branch agencies. It also sets forth the president's legislative and program objectives. It includes proposals to fund new programs, modify or eliminate existing programs, and raise revenues based on the president's priorities and agenda regarding the use of federal resources.

In early February, the president is to submit the budget request to Congress, which then must enact laws in order to make funds available for expenditure. In April, both chambers of Congress are to adopt a concurrent resolution on the budget laying out an overall budget plan, including cost and savings targets, that Congress uses to consider revenue, spending, and other budget-related legislation for the upcoming fiscal year. In reality, a concurrent resolution often is not adopted until months after the April deadline. The concurrent resolution is not presented to the president and it does not have the force of law. The concurrent resolution may contain what are called reconciliation instructions, which direct committees of jurisdiction to report legislation changing spending, revenue, and the debt limit to meet the cost or savings targets proposed in the concurrent budget resolution. Reconciliation is generally used for mandatory spending programs, which provide for funding through laws other than the annual appropriations acts. The relevant committees of jurisdiction then report reconciliation bills, which identify specific policies to meet the levels specified in the instructions. The reconciliation process is optional—Congress can pass budget-related legislation without going through reconciliation, but reconciliation has an advantage in that reconciliation bills cannot be filibustered, which means the Senate can pass a reconciliation bill with a simple majority.

After adoption of the budget resolution, the appropriations committees begin developing appropriations bills, which provide funding for the beginning of the fiscal year. Congress, in appropriations acts, is not bound by the president's requests and it may provide more or less than the president has requested. In recent years, annual appropriations acts have not been enacted prior to Oct. 1, and continuing resolutions, which provide appropriations for a specified period, have been enacted into law.

Once an agency does receives its appropriation, it needs to examine it closely in order to know how much it can expend, on what, and when. Appropriations issues often come up on a daily basis within an agency; for example, can an agency enter into a contract for this purpose? How much can it spend for a specific program or item? Can it use its funds to pay for something now that will occur in the future? Is it required to notify Congress before using funds

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for a certain purpose? Can it charge a fee to help defray the costs of a program? Can it accept donations? Each agency must look at the specific appropriation it has been provided by Congress to determine how it can use its funds. For example, while the Federal Aviation Administration (FAA) receives the majority of its funding from a series of excise taxes paid by users of the national airspace, the FAA annual appropriations act specifies how much of these funds the FAA can make available for, among other things, infrastructure grants for airports and air traffic operations. The FAA's appropriation also specifies what amounts can be transferred between funds appropriated for specific purposes and whether the agency must use the funds this year or whether they can be used in future fiscal years.

The federal government has limited resources to pay for the federal programs various constituencies believe are important. The president and Congress have different roles to play in developing and sharing information with each other and the public and in developing budget proposals. The president's budget request helps inform Congress, but it is ultimately Congress that provides appropriations that specify to agencies how they may use their funds. ⊙

Alternative Dispute Resolution *continued from page 9*

arbitration agreements in the power of attorney—Kentucky's "clear statement rule."

On Feb. 22, 2017, the U.S. Supreme Court heard the case. On May 5, 2017, it ruled against the Kentucky Supreme Court's decision holding that "the Kentucky Supreme Court specifically impeded the ability of [the] attorney-in-fact to enter arbitration agreements." The Kentucky Supreme Court's "clear statement rule" violates the FAA by singling out arbitration agreements for disfavored treatment. Arbitration agreements are like any other contracts and by singling them out, they were no longer on equal footing with other contracts. Where state-law rules interfere with the goals of arbitration, the Court would reverse the decision.

Conclusion

Health care has a critical mission, a mission that should not be derailed by disputes. Lives are at risk, and disputing parties must maintain a continued relationship to achieve the quality outcomes expected by their patients, insurers, and regulators. ADR is ideal for this environment. Yet the issue of pre-dispute arbitration in nursing home agreements has taken the forefront on the issue of ADR in health care, tainting the arbitration process.

The issue is one of the reach of the arbitration enabling statute—the FAA. The highest court in the nation has ruled that arbitration agreements are contracts with no distinguishing factors. It is therefore futile for consumers and their advocates, who believe that pre-dispute arbitration clauses are unfair, to attempt to make changes through the courts. The U.S. Supreme Court has effectively, through its holdings, stated that it cannot prevent the enforcement of arbitration agreements for consumers unless "the FAA's mandate has been overridden by a contrary congressional command."[12] The legislature must do so.

ADR practitioners—proponents and friends—have a responsibility to seek changes through channels other than the courts. They have a responsibility to avoid further waste of resources in cases that are highly unlikely to result in the desired change of the application of the FAA. ADR professionals have a responsibility to effect legislation that will address what appears to be an all-consuming problem. Arbitration should be restored back to its original purpose. ⊙

Endnotes

[1]Jessica Silver-Greenberg & Michael Corker, *In Arbitration, a "Privatization of the Justice System*," N.Y. Times (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html; Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html.

[2]*See American Health Care Ass'n v. Burwell*, No. 3:16-CV-00233, 2016 WL 6585295, at *2 (N.D. Miss. Nov. 7, 2016) (the Centers for Medicare & Medicaid Services promulgated rules to prohibit the use of pre-dispute arbitration clauses but soon had to withdraw them due to litigation claiming the regulatory agency overstepped its authority).

[3]*See CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012); *N.L.R.B. v. Murphy Oil USA Inc.,* 137 S. Ct. 809 (2017); and *Epic Sys. Corp. v. Lewis,* 137 S. Ct. 809 (2017).

[4]*See* Joint Comm'n Leadership Standard LD.02.04.01 (the hospital manages conflicts between the leadership groups to protect the quality and safety of care).

[5]*AT&T Mobility v. Concepcion,* 563 U.S. 333 (2011).

[6]9 U.S.C. § 2.

[7]*See* Joseph M. Desmond, *Pre-Dispute Arbitration Agreements In Provider Contracts: What Healthcare Risk Managers Should Know*, Am. Soc'y for Healthcare Risk Mgmt. (2008), http://www.ashrm.org/pubs/files/white_papers/Mono_arbitrat.pdf (studies by insurance providers AON and CNA in the late 1990s through mid-2000s reflected the upward trend).

[8]AT&T Mobility, *supra* note 5.

[9]*Id.* (citation omitted).

[10]*Marmet Health Care Ctr. Inc. v. Brown*, 565 U.S. 530 (2012).

[11]*Kindred Nursing Ctr. L.P. v. Clark,* 581 U.S. ____ (2017).

[12]*CompuCredit Corp., supra* note 3.