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The Claims of Two Gulfs

Kenneth Feinberg, the "claims czar" for the BP catastrophe in the Gulf, reportedly looks to how to adapt his experience with the claims process he devised following the 9/11 attacks. Another mass claims process provides a more apt analogy, however: the very successful mass claims process following the 1991 Persian Gulf War oil well blowouts, fires and oil spills unleashed by then-president Saddam Hussein. In the wake of that disaster, then the largest oil spill in history, a claims commission processed claims from individuals and corporations and also public authorities regarding the environment and health. 19 years later, the experience offers at least four lessons as we confront our current disaster:

A claims process may distort, or even hinder, recovery. It is a mistake to divorce the possibility of later compensation from decisions made to initiate clean-up, assessments and restoration today. In the Persian Gulf, local governments' efforts to address environmental damage slowed as they awaited funds. Eventually, authorities situated along the Gulf of Mexico coast will be compensated, at least in part, but providing interim payments now will ensure that their work continues. Vague guidelines as to which efforts will be remunerated, and when, may lead to hesitation at the starting gate.

The ongoing harm to the environment must be addressed. It's no secret that environmental damage is accumulating. Recently, President Obama declared the Gulf spill the worst environmental disaster America had ever faced. A proactive claims process will aid the response in the Gulf and limit damage.

Local, state and federal government officials have a responsibility to ascertain, within reason, the extent of harm. Compensation follows environmental damage. But suppose a public authority spends funds to ascertain the extent of the damage. And having spent a significant amount of public funds does not find damage in a particular area. What then? An important lesson from the Gulf War claims process is that the presence of a large oil spill creates risks of future harm which a government has the responsibility to take
reasonable steps to assess as quickly and efficiently as possible. And the costs of those efforts should be compensated.

A claims body can streamline the recovery effort. Courts typically focus on individual claims. Mass claims processes do, too, but also cast an eye on the larger situation. The Feinberg claims commission will receive a tremendous amount of information on the damage wreaked by oil on coasts, wildlife and businesses. It will also influence decision-makers at all levels tasked with compensating victims. The commission thus occupies a key berth from which it can encourage assessments that answer questions shared by many claimants. In light of the giant data collection effort that will occur, the commission can coordinate data about the region which will further our long-term understanding of what occurred, how the environment of the Gulf was damaged, and how it can, we hope, be restored.

As Kenneth Feinberg knows from his experience with the 9/11 Compensation Fund, a key element of a mass claims process is that the lawyers must think not only like lawyers with one client. They must focus simultaneously on the individual claimant and on the region as a whole, for the recovery of the region is an important part of the true recovery of each individual.

David D. Caron is President of the American Society of International Law and served as a Member of the Precedent Panel of the U.N. Compensation Commission for the 1991 Gulf War.