

WHITE-COLLAR CRIME

Not So Fast: The Rights of Victims in Corporate Deferred Prosecutions

Deferred Prosecution Agreements (DPAs) have become a significant part of white-collar criminal practice. Pioneered in the United States, they are now authorized (with modifications) in the United Kingdom, France, Canada and elsewhere. DPAs have been accepted as a means of achieving corporate remediation and reform without causing the collateral harm of a guilty plea. This outlook is reflected in Department of Justice policy developed over many years, including recent policy statements and speeches.

But DPAs (and nonprosecution agreements, or NPAs) are not without controversy. These agreements have been attacked as too lenient, not forcing companies to be held accountable for illegal conduct. They are also seen as a way for prosecutors to appear tough on white-collar crime while not bringing charges against individuals.

Recent court decisions involving the Boeing Co. (Boeing) highlight another



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challenge posed to DPAs (and NPAs)—from victims who claim that their rights were not adequately considered before the government entered into a DPA. Boeing entered into a DPA with the Department of Justice in 2021 following two plane crashes attributed to a software design flaw concealed by the company. Victims of the crashes claimed that the DOJ had failed to consult with them prior to the deal. U.S. District Judge Reed O'Connor of the Northern District of Texas agreed with the victims, but, after months of further litigation, ultimately held that the court lacked the authority to order a “substantive review and disapproval or modification” of the deal. See *United States v. Boeing*, Dkt No. 185, Case No. 4:21 CR 05 (N.D. Tex. Feb. 9, 2023).

In this article, we first talk briefly about victims’ rights in federal criminal law, and then move to the facts in the Boeing prosecution and Judge O’Connor’s consideration of the victims’ claims. We

then conclude with some observations about how, in light of the Boeing litigation, corporate DPAs may be less certain and face more challenges in the future.

Crime Victims’ Rights

In 2004, Congress passed the Crime Victims’ Rights Act (CVRA), which specifies eight rights that federal courts are obliged to “ensure” crime victims are “afforded” through established procedures. 18 U.S.C. Section 3771. The CVRA defines a “crime victim” as “a person directly and proximately harmed” by the “commission of a Federal offense.” The CVRA provides that crime victims have “the right to be informed in a timely manner of a plea bargain or deferred prosecution agreement,” see Section 3771(a)(9), and “officers and employees of the Department of Justice and other departments and agencies engaged in the detection, investigation, or prosecution of crime” must use their “best efforts” to “see that crime victims are notified of, and accorded, the rights described in subsection (a).”

An important procedural issue has remained unresolved—precisely when does the right to be informed of a “plea bargain or deferred prosecution agreement” attach: after a case is filed, or earlier, when a corporate DPA or similar deal is being considered. The question

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arose with respect to Jeffrey Epstein. Victims claimed that they should have been consulted before an NPA with Epstein, but the timing issue was not resolved in the lawsuit they brought. See *In re Wild*, 994 F.3d 1244 (11th Cir. 2021).

Boeing

In 2021, Boeing and the DOJ entered into a DPA following two crashes of planes manufactured by Boeing, resulting in 346 deaths. The DPA arose from Boeing's concealment of a software design feature, the Maneuvering Characteristics Augmentation System (MCAS), which automatically adjusted the pitch of a new class of planes (the 737 MAX), from the Federal Aviation Administration (FAA).

Pursuant to the DPA, the government filed an information in the Northern District of Texas which charged Boeing with conspiracy to defraud the United States by interfering with the lawful functioning of a government agency. Boeing admitted that two of its technical pilots had submitted deceptive information about the plane's speed range capabilities in connection with pilot training certification requirements. Boeing agreed to pay a criminal monetary penalty of \$243.6 million, \$1.77 billion in compensation to its airline customers, and \$500 million to crash victims' heirs, relatives, and beneficiaries.

Almost one year after the DPA was made public, over a dozen family members and representatives of the crash victims (movants) filed three motions in the criminal case which arose from the government's nonpublic negotiating of the DPA with Boeing. The movants said that the government violated their right under the CVRA "to be informed in a timely manner of any ... deferred prosecution agreement" and right to

"be treated with fairness" and dignity." The movants also argued that the agreement was too lenient, and the compensation amount was "far below" what is reasonable for the deaths of hundreds of victims.

As relief, the movants requested that the district court withhold approval of the DPA until the government conferred with the movants, and order that Boeing be publicly arraigned to give the movants an opportunity to be heard on the appropriate conditions of release during the term of the DPA. The movants further requested that the district court impose an independent compliance monitor to oversee Boeing's compliance with the DPA, supervise implementation of the DPA to ensure their rights under the CVRA are protected, and order the government to disclose to the victims

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information about Boeing's crimes and the DPA's negotiation history.

Shortly thereafter, the government held several meetings with some of the movants, but the government did not change its position. The government argued that the movants were not "crime victims," as defined by the CVRA, because their injuries were not caused by the particular crime charged by the government—a scheme to defraud the

United States. The government and Boeing also argued that neither the CVRA nor any other authority allows the court to supervise, modify, or reject the DPA.

District Court Rulings

In a series of decisions between July 2022 and February 2023, Judge O'Connor fleshed out the scope of victims' rights and remedies.

In a preliminary decision issued in July 2022, Judge O'Connor explained that, according to the text of the CVRA, rights under the CVRA may attach before formal charges are brought against a defendant—"the CVRA does permit crime victims to assert their rights even 'if no prosecution is underway'"—but focused chiefly on the thorny question of whether the victims were "directly and proximately harmed" by a federal offense encompassed by the DPA. See *Boeing v. United States*, 2022 WL 2972231 at *5 (July 27, 2022) (quoting 18 U.S.C. Section 3771(e)(2)(A)).

As a threshold matter, the court had to determine what the appropriate "federal offense" was for purposes of its analysis. The movants argued that the offense includes all crimes that the government considered during its investigation, as well as any crime that could arise from Boeing's admissions pursuant to the DPA. Judge O'Connor disagreed, finding that to avoid intruding on prosecutorial discretion, the scope of the offense should be defined within the bounds of the charging document and DPA. The relevant "federal offense" here was the offense Boeing admitted in the DPA—conspiracy to defraud the United States.

Next, the court determined whether the crash victims were "directly and proximately harmed as a result of" Boeing's offense. The court ordered

an evidentiary hearing and heard testimony from three experts over two days in August 2022. In October 2022, Judge O'Connor held that the movants had established causation and therefore had standing as victims of Boeing's conspiracy to defraud the FAA to assert rights under the CVRA. The court found that "but for" Boeing's fraudulent concealment of knowledge of how MCAS could improperly activate, the FAA would not have certified the plane without a more rigorous level of training, and pilots would have been prepared to land the planes safely.

In an order dated Jan. 19, 2023, Judge O'Connor granted the movants' request to arraign Boeing in open court and permit crime victims and their representatives to be heard regarding the DPA. At the arraignment on Jan. 26, 2023, about a dozen relatives of crash victims gave testimony and asked Judge O'Connor to impose the conditions on Boeing that had been requested by the movants, as noted above. Boeing and the government opposed the added conditions.

Ultimately, on Feb. 9, 2023, Judge O'Connor issued an opinion denying the movants' motion to impose conditions and limitations beyond those set forth in the DPA. The movants wanted the court, for example, to withhold approval of the DPA or, alternatively, excise from the DPA the immunity provisions blocking Boeing from prosecution. The court held that it lacks the statutory and inherent authority to supervise or substantially review and reject substantive terms of DPAs. Judge O'Connor cited other court decisions that limited a court's supervisory authority over a DPA chiefly to "determining whether the agreement was reached for a legitimate or illegitimate purpose." *Boeing*, Dkt No. 185 at 14 (citing *United States v. Fokker Ser-*

vices., 818 F.3d 733, 744-45, 747 (D.C. Cir. 2016); *United States v. HSBC Bank USA*, 863 F.3d 125, 129 (2d Cir. 2017)). Judge O'Connor more generally held that, notwithstanding the government's failure to consult with the movants, the court lacked authority to review the substantive terms of the DPA because the movants had not demonstrated that the government acted with the bad faith or impropriety required to invoke the court's supervisory powers.

On Feb. 23, 2023, the movants appealed Judge O'Connor's rejection of their proposed remedies to the U.S. Court of Appeals for the Fifth Circuit.

Prior to entering into a DPA, the parties must also carefully analyze who may properly be considered victims, an issue that turns on the particular criminal charge to be filed in court.

DOJ Guidance

DOJ seems to have taken note of the issues in the Boeing DPA. On Oct. 1, 2022, shortly after Judge O'Connor held that the government had violated the movants' CVRA rights, the DOJ published new guidelines, which stated, for the first time, that DOJ personnel "shall make their best efforts to accord to victims the rights set forth in the [CVRA] ... as early in the criminal justice process as is feasible and appropriate, including prior to the execution of a nonprosecution agreement [and] deferred prosecution agreement." See Attorney General Guidelines for Victim and Witness Assistance, 2022 Edition. These guidelines take effect on March 31, 2023. The earlier version of the guidelines was very different; it stated

that "CVRA rights attach when criminal proceedings are initiated by complaint, information, or indictment."

Conclusion

The CVRA gives a victim a right to be consulted by federal prosecutors. But what right do victims have while a DPA is being negotiated by the government and a company? In the *Boeing* case, the district court held that victims had a right to be heard before the DPA had been agreed upon, and that the right had been violated by the government. The ruling did not affect the outcome, however—the DPA was accepted by the district court—but the litigation no doubt complicated the process of concluding the DPA.

Going forward, especially in light of the newly revised DOJ guidelines, prosecutors and defense counsel must consider when and how best to confer with putative victims during settlement negotiations to ensure that similar problems do not arise later on. Prior to entering into a DPA, the parties must also carefully analyze who may properly be considered victims, an issue that turns on the particular criminal charge to be filed in court. All of these issues increase the risks and uncertainty of DPAs.