

Texas Judge Apologizes To 737 Max Families For Boeing Flub

By **Katie Buehler**

Law360 (May 3, 2022, 7:38 PM EDT) -- A Texas federal judge apologized Tuesday to families of victims of the 737 Max crashes for not verifying that the U.S. Department of Justice had conferred with them before inking a \$2.5 billion deferred prosecution agreement with the Boeing Co. but questioned if he could rescind the deal.

U.S. District Judge Reed O'Connor told the eight family members who attended Tuesday's hearing in Fort Worth he was sorry for not considering at the beginning of the case whether they were victims under the Crime Victims' Rights Act, entitled to confer with federal prosecutors and be informed ahead of time that a deferred prosecution agreement would be filed in Boeing's case.

"The error completely is mine, on top of the government," Judge O'Connor said during the three-hour hearing. He apologized to the families once more as he left the bench.

The families have asked Judge O'Connor to **rule they are crime victims** under the statute who were not properly consulted before the DOJ signed its **deferred prosecution agreement** with Boeing in relation to the company misleading regulators about defects in the 737 Max jets' Maneuvering Characteristics Augmentation System. Flaws in the software were contributing factors to the October 2018 crash of Lion Air Flight 610 in the Java Sea, which killed 189 people, and the March 2019 crash of Ethiopian Airlines Flight 302, which killed 157.

The families have also requested that the judge scrutinize, and potentially set aside, the agreement to allow for meetings between the families and federal prosecutors, and for Boeing to be arraigned, according to court documents.

Federal prosecutors have defended the deferred prosecution agreement, arguing the DOJ carefully investigated and weighed all potential charges it could file against the airplane manufacturer.

Boeing has also argued against striking the agreement, saying the families must be victims of a charged federal offense to be entitled to the rights created by the CVRA. The federal government has only charged Boeing with conspiring to defraud the United States.

An attorney for the families, Paul Cassell of the University of Utah's S.J. Quinney College of Law, told Judge O'Connor he is obligated to ensure the victims' families have a say in the outcome of this case.

"It violates fundamental human decency to think you can spring that announcement on the families," Cassell said about the deferred prosecution agreement, which was announced in January 2021.

Judge O'Connor asked Cassell, as well as attorneys for the DOJ and Boeing, whether he has the authority to reject a deferred prosecution agreement and what the appropriate remedies for this situation would be.

"I can reject a plea agreement, but I don't understand that I can weigh in and say what it should be," Judge O'Connor said. "Why would I look at this differently from a plea?"

Cassell said he believed the judge had the authority to raise concerns about provisions in the agreement, such as one the families argue grants immunity to Boeing executives, and require the DOJ to confer with the families and revise the agreement.

DOJ attorney Jerrob Duffy countered, saying Judge O'Connor has no authority to direct what provisions should be included in a deferred prosecution agreement.

Judge O'Connor asked Duffy how he would ensure compliance with the CVRA if he didn't strike or order revisions to the deferred prosecution agreement. Duffy said ordering the DOJ to confer with the families would qualify as compliance, but Duffy admitted any meetings with the families wouldn't change the department's stance in the case.

Duffy added that U.S. Attorney General Merrick Garland, who is named the final arbiter in CVRA disputes, has already met with the families and heard their concerns.

Cassell told Judge O'Connor the families' request to make that meeting a conferring session was denied.

Boeing's attorney, Benjamin Hatch of McGuireWoods LLP, added that, if Judge O'Connor set aside the deferred prosecution agreement, it would be impossible to return the airplane manufacturer to the position it was in at the time the agreement was negotiated.

Under the agreement, Boeing pledged to pay a \$243.6 million criminal penalty, \$1.77 billion in compensation to its airline customers and \$500 million to establish a crash victims' beneficiary fund. Hatch said Boeing has paid out all that money and met other reporting obligations included in the agreement for more than a year.

"No case in the country has ever done what they are asking this court to do," he said of the families' requests.

Additionally, Hatch said, holding Tuesday's hearing was enough to vindicate the CVRA if Judge O'Connor decided the families were crime victims.

The families are represented by Paul G. Cassell of the University of Utah's S.J. Quinney College of Law, Warren T. Burns, Darren P. Nicholson and Kyle Kilpatrick Oxford of Burns Charest LLP, Erin Ressa Applebaum of Kreindler & Kreindler LLP, Pablo Rojas of Podhurst Orseck PA and Tracy A. Brammeier of Clifford Law Offices PC.

The federal government is represented by Jerrob Duffy, Chad E. Meacham, Alex C. Lewis, Cory E. Jacobs, Michael T. O'Neill and Scott Philip Armstrong of the U.S. Department of Justice.

Boeing is represented by Mark Filip, Craig S. Primis and Patrick Haney of Kirkland & Ellis LLP, Richard Cullen, Benjamin L. Hatch and Brandon M. Santos of McGuireWoods LLP and Richard B. Roper III of Holland & Knight LLP.

The case is U.S. v. The Boeing Co., case number 4:21-cr-00005, in the U.S. District Court for the

Northern District of Texas.

--Additional reporting by Linda Chiem. Editing by Janice Carter Brown.

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