

DOJ Tells Judge Boeing Plea Is 'The Best The Gov't Could Do'

By **Catherine Marfin**

Law360 (October 11, 2024, 4:42 PM EDT) -- The federal government told a Texas federal judge Friday that its proposed deal with The Boeing Co. over allegations that it lied to safety regulators about the 737 Max 8's development is "the best the government could do," pushing back against vehement objection from crash victims' families, who called the deal "rotten" and "morally reprehensible."



The proposed deal would require Boeing to pay a second criminal fine of at least \$243 million, invest at least \$455 million in compliance and safety programs and submit to a three-year monitorship overseen by the government. (Sipa via AP Images/Thomas Arnoux)

During a nearly three-hour hearing in Fort Worth, U.S. District Judge Reed O'Connor primarily let the arguing parties — which included the U.S. Department of Justice, Boeing, and two sets of victims' families — emphasize any portions of the plea agreement they felt the court needed more clarification on, rather than asking the parties specific questions. The hearing came less than three months after the U.S. Department of Justice and Boeing **announced the terms of the agreement**.

The proposed deal would require the aerospace giant to pay a second criminal fine of at least \$243 million, invest at least \$455 million in compliance and safety programs and submit to a three-year monitorship by a compliance monitor that the government will select and oversee.

"Boeing acknowledges that money can never replace a loved one, of course," Mark Filip of Kirkland & Ellis LLP, counsel for Boeing, told the court. "The women and men of Boeing carry the memory of your loved ones and these accidents with them every day."

The families of several victims were present in the courtroom Friday. Members of the media were instructed to observe the hearing from a viewing room on a separate floor.

Paul G. Cassell of the Utah Appellate Project at the University of Utah's S.J. Quinney College of Law, counsel for more than a dozen family members of victims of the Lion Air Flight 610 and Ethiopian Airlines Flight 302 crashes in 2018 and 2019, laid out several reasons the court should **reject the agreement**, saying during impassioned arguments that any could be a sufficient basis to reject "this rotten plea deal."

Cassell alleged that the deal "ties the court's hands" by permitting Boeing to specify its own punishment, "airbrushes" the facts of the suit and provides remedial damages that are not based on the harm the company caused. The deal additionally "pins the blame on some midlevel test pilots for what was a long-running corporate conspiracy that went all the way to the top," Cassell said.

"The parties are swallowing the gun in this case," he argued, accusing Boeing and the DOJ of treating Boeing's actions as victimless crime. "They are concealing through legal maneuvering the heart of this case ... [and] want you to proceed as if 346 people did not die."

Adrian Vuckovich of Collins Bargione & Vuckovich, counsel for another set of victims' families, expressed similar sentiments.

"Fundamentally, this agreement is a recap of the deferred prosecution agreement," Vuckovich said, referring to a 2021 agreement meant to end the **DOJ's investigation**. Under that deal, Boeing agreed to pay \$243 million in criminal penalties, \$1.77 billion in compensation to its airline customers and \$500 million to establish a crash victims' beneficiary fund.

The DOJ found that Boeing **breached the agreement** after a Jan. 5 **midair door plug blowout** aboard a 737 Max 9 jet operated by Alaska Airlines renewed public outrage toward the company.

Sean P. Tonolli of the DOJ told the court that the terms of the settlement represented the best set of facts that the government could prove beyond a reasonable doubt if the conspiracy case went to trial.

Tonolli countered accusations that the government didn't properly include or consult with victims' families in negotiating the plea, telling Judge O'Connor that the government "did not water down the deal after speaking to the families."

"We conferred extensively," Tonolli said. "We appreciate the viewpoints of the victims, and we've done what we can to incorporate them where appropriate."

Arguments on Friday repeatedly circled back to the portion of the deal that requires Boeing to be subject to a three-year independent compliance monitorship. The victims' families argued that the government's selection of the monitor makes the punishment inherently impartial.

But Boeing and the DOJ told Judge O'Connor that the monitor's mandate, which is specified as overseeing "the effectiveness of the company's compliance program and internal controls, record-keeping, policies, and procedures as they relate to the company's current and ongoing compliance with U.S. fraud laws," is appropriately tailored to the nature of the alleged crime.

Requiring the monitor to oversee elements like design and engineering, they argued, would impermissibly step on the toes of the Federal Aviation Administration.

"The FAA is doing that work," Benjamin L. Hatch of McGuireWoods LLP, who also represents Boeing, told the court.

The company argued that expanding the scope of the monitor's duties would also unfairly ignore good-faith efforts Boeing has taken since the crashes.

"Boeing has separately accepted responsibility for the Max crashes publicly and in civil litigation" before plea agreement talks, Filip said. "Boeing continues to actively work ... with the FAA to enhance the safety of its products and services."

In response to questions from Judge O'Connor, the DOJ **noted** that the plea agreement contains backstops in the event that Boeing doesn't comply with the monitorship, including prosecution and resentencing.

Judge O'Connor was particularly interested in a portion of the monitoring provision that stipulated that the DOJ would select candidates "with the department's commitment to diversity and inclusion." He asked both Tonolli and Boeing what that mandate would mean in practice, but both sides indicated that different DOJ personnel could better answer the question.

Judge O'Connor also heard arguments from LOT Polish Airlines, which has **argued against** the plea agreement.

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

The government is represented by Lorinda Laryea and Sean P. Tonolli of the U.S. Department of Justice's Criminal Division and Chad E. Meacham of the U.S. Attorney's Office for the Northern District of Texas.

Boeing is represented by Mark Filip and Craig S. Primis of Kirkland & Ellis LLP and Benjamin L. Hatch and Brandon M. Santos of McGuireWoods 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 Alanna Weissman.