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How the Crime Victims' Rights Act Impacts Victims and Can Affect the Justice Department's Resolution of Claims to Defraud the Federal Government

*By Nicholas C. Harbist and Yaffa D. Stone**

In this article, the authors contend that federal prosecutors, when prosecuting conspiracies to defraud the government, would do well to not only consider potential victims outside the four corners of the conspiracy to defraud charged in the indictment, but should solicit their input before attempting to enter a plea agreement or negotiate a deferred prosecution agreement. The authors also offer steps that practitioners should take when considering victims' rights issues under the federal Crime Victims' Rights Act.

In *United States v. Boeing Company*, the U.S. District Court for the Northern District of Texas considered whether individuals who lost family members in 737 Max plane crashes were “crime victims” under the federal Crime Victims’ Rights Act (CVRA). The victims lost their family members in two fatal plane crashes as a result of Boeing’s admitted conspiracy to defraud the Federal Aviation Administration (FAA) about the new 737 Max.

Boeing is the latest in a series of cases that expand the definition of “crime victim” under the federal crime victim legislation where the crime charged is “scheme” based. It demonstrates that victims must plainly establish that the harm they suffered was directly linked to the scheme charged. It also shows the importance of respecting victims’ rights and cautions prosecutors to afford all potential victims their rights under the CVRA.

This article outlines the definition of a “crime victim” under the different federal laws protecting crime victims’ rights. It next summarizes the *Boeing* case, including the relevant facts, parties’ arguments, and the court’s holding. Finally, the article concludes by analyzing how *Boeing* fits in with prior crime victims’ rights jurisprudence and offers recommendations for practitioners representing both victims and the government so that they may better anticipate and respond to issues under the CVRA.

* The authors, attorneys with Blank Rome LLP, may be contacted at nicholas.harbist@blankrome.com and yaffa.stone@blankrome.com, respectively.

SUMMARY OF THE LAW SURROUNDING VICTIMS' RIGHTS LEGISLATION

The Victim Witness Protection Act, the 1996 Mandatory Victims' Restitution Act, and the Early Days of the Crime Victims' Rights Act

The CVRA¹ was intended as a broad piece of remedial legislation.² And indeed, in relation to its predecessors—the Victim Witness Protection Act of 1982 (VWPA) and the 1996 Mandatory Victims' Restitution Act (MVRA)—the CVRA succeeded in broadening the rights and protections for crime victims.³

But the CVRA it is not without its limitations. Generally, the definition of “crime victims” extends only to the narrow class of individuals directly and proximately harmed by a federal offense.⁴ But when the CRVA was first passed, the definition of exactly who can be directly and proximately harmed was somewhat less clear.⁵

As such, before the development of case law interpreting the CVRA, the jurisprudence under the VWPA and MVRA provided some initial guidance on the matter.⁶ Under the VWPA, courts generally restricted recovery to those harmed by the “conduct under the offense of conviction.”⁷ But the Crime Control Act of 1990 created an exception, broadening the definition of “victim” under the VWPA in conspiracy cases to include all victims directly harmed by the defendants’ scheme,⁸ even if they are not named in the indictment or are only harmed by conduct emanating from the scheme.⁹ Plaintiffs must also show

¹ See generally Nicholas C. Harbist & Dina L. Relles, *The Crime Victims' Rights Act: How to Make the New Victims' Rights Legislation with Teeth More Than Just Food for Thought*, 2008 N.J. Law. 48, 48–54 (2008).

² *Id.* at 48.

³ *Id.*

⁴ 18 U.S.C. 3771 § (e)(2)(A) (“The term ‘crime victim’ means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.”).

⁵ Harbist, *supra* note 1, at 49.

⁶ *Id.* at 49–51.

⁷ *Id.* at 49 (quoting *Hughey v. United States*, 495 U.S. 411, 420, 422 (1990)).

⁸ 18 U.S.C. § 3663(a)(2) (Crime victims include “in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern.”).

⁹ *United States v. Bogart*, 490 F. Supp. 2d 885, 905 (S.D. Ohio 2007); *United States v. Dickerson*, 370 F.3d 1330, 1339 (11th Cir. 2004) (discussing cases); *United States v. Cohen*, 459 F.3d 490, 499 (4th Cir. 2006), cert. denied, 127 S. Ct. 1169 (2007). That said, for un-named victims to recover, the indictment still had to accurately set forth a scheme, not merely

that the harm flows directly from the defendant's actions and is not merely tangentially linked.¹⁰

The text of the CVRA, in contrast, does not include explicit language extending the definition of "crime victim" in scheme-based cases. But, as predicted in a previous article, because the CVRA grants victims the right to "timely restitution as provided in law,"¹¹ it likely incorporates the wider reach of its predecessors.¹² The CVRA's legislative history supported such a reading as well.¹³

Legal Updates on the CVRA

In the years since, federal courts have indeed adopted the broad legal standard elucidated under the MVRA and VWPA to define crime victims under the CVRA.¹⁴ In short, it may be expected that where the federal offense is a conspiracy or scheme-based offense, like mail or wire fraud, courts would broadly interpret the definition of "crime victim."¹⁵ And indeed, several cases

a multitude of disparate fraudulent acts. *United States v. Henoud*, 81 F.3d 484, 488–89 & n.11 (4th Cir. 1996). Some courts also ordered restitution for losses resulting from conduct related to the scheme, but for which the defendant was not convicted, *United States v. Lawrence*, 189 F.3d 838, 846 (9th Cir. 1999), and even for losses caused by conduct committed outside the statute of limitations, *Dickerson*, 370 F.3d at 1342 & n.19 (limiting its holding to scheme-based crimes, but noting "[w]e suspect that our rule applies similarly to cases (1) proceeding under § 3663, and (2) arising from crimes that involve as an element a conspiracy or pattern of criminal conduct").

¹⁰ *Dickerson*, 370 F.3d at 1342–43.

¹¹ 18 U.S.C. 3771 § (a)(6).

¹² Harbist, *supra* note 1, at 50.

¹³ 150 Cong. Rec. S10910, 10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). Even at the time of the first article, some courts had already interpreted the CVRA to broadly define the scope of "crime victims." *United States v. Turner*, 367 F. Supp. 2d 319, 327 (E.D.N.Y. 2005) ("absent an affirmative reason to think otherwise, I will presume that any person whom the government asserts was harmed by conduct attributed to a defendant, as well as any person who self-identifies as such, enjoys all of the procedural and substantive rights set forth in § 3771."). Others, however, have imposed a narrower definition. *United States v. Sharp*, 463 F. Supp. 2d 556, 566 (E.D. Va. 2006); *United States v. Sandhu*, 462 F. Supp. 2d 663, 663–64 (E.D. Pa. 2006).

¹⁴ *United States v. Thuna*, 382 F. Supp. 3d 166, 170 (D.P.R. 2019) ("Federal courts apply the same legal standard to the VWPA and the CVRA in determining a claimant's victim status."). Courts have developed a two-step process to determine whether individuals are victims under the CVRA: first, courts identify the behavior constituting the federal offense and then they determine whether the individual was directly and proximately harmed by that offense. *United State v. Ruzicka*, 331 F. Supp. 3d 888, 893 (D. Minn. 2018); see also *United States v. Boeing Co.*, No. 4:21-cr-5-O (N.D. Tex. July 27, 2022).

¹⁵ *Thuna*, 382 F. Supp. 3d at 170.

have held that individuals who are directly and proximately harmed by a scheme-based crime satisfy the definition of “crime victim” under the CVRA,¹⁶ even when that individual was neither the direct target of the crime, nor specifically named in the indictment.¹⁷

That said, courts still heavily emphasize that individuals must clearly establish a direct causal link between the harm and the alleged crime to qualify as victims under the CVRA. The harm to the victim must be “closely related to the conduct inherent to the offense, rather than merely tangentially linked.”¹⁸ When individuals lost money on property as a result of conduct inherent in the scheme or conspiracy, for example, the causal chain can usually be established.¹⁹

But victims often have a hard time showing causation where the harm relates to the conspiracy but is not usually one that flows from the crime itself. In *McNulty*, for instance, an individual sought to establish victim status under the CVRA after he was fired and blacklisted for refusing to participate in his employer’s conspiracy to eliminate competition in violation of the Sherman Act.²⁰ The U.S. Court of Appeals for the Sixth Circuit denied crime victim status finding, among other things, that the firing was too ancillary to the crime of conspiracy.²¹ The alleged harm stemmed from plaintiff’s refusal to participate in the conspiracy and was not directly related to or done in furtherance of the conspiracy itself.²²

Similarly, in *In re Rendon Galvis*, the U.S. Court of Appeals for the Second Circuit upheld the district court’s ruling that a woman whose son was killed by militants charged with conspiracy to import cocaine into the United States was not a “crime victim” under the CVRA.²³ Plaintiff’s evidence presented two alternative motives behind defendants’ murdering her son and thus failed to

¹⁶ *In re McNulty*, 597 F.3d 344, 350–52 (6th Cir. 2010).

¹⁷ *Ruzicka*, 331 F. Supp. 3d at 894; *In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008).

¹⁸ *In re McNulty*, 597 F.3d at 352.

¹⁹ See *United States v. Thetford*, 935 F. Supp. 2d 1280, 1283 (N.D. Ala. 2018) (finding that plaintiffs were crime victims where defendants’ wire fraud scheme involved forging plaintiffs’ signatures and selling their boat in interstate commerce); *In re Stewart*, 552 F.3d 1285, 1288 (11th Cir. 2008) (holding that plaintiffs who paid increased amounts on their mortgage as a result of defendants’ conspiracy to defraud a bank and pocket additional mortgage payments were crime victims).

²⁰ *McNulty*, 597 F.3d at 347–48.

²¹ *Id.* at 352–53.

²² *Id.* at 352.

²³ 564 F.3d 170, 175–76 (2d Cir. 2009). The plaintiff was attempting to establish standing as the crime victim representative for her son. See also 18 U.S.C. § 3771(d)(1).

establish a definitive link between the conspiracy and her son's death.²⁴ As such, the court found that although there might be some linkages between her son's death and the charged conspiracy, there were "too many unanswered questions" concerning the connection between the crime and the alleged harm to prove that the plaintiff's son was a victim.²⁵

Some courts further narrow the definition of "crime victim" and insist that the harm must result from an element of the offense of conviction.²⁶ Others disagree,²⁷ holding instead that the harm must have occurred in furtherance or as a direct result of the conspiracy.²⁸

In either case, however, it is clear that to establish victim status under the CVRA, the harm cannot be too attenuated.

UNITED STATES V. BOEING COMPANY: ANOTHER STEP FORWARD FOR VICTIMS' RIGHTS

Relevant Facts

Enter *United States v. Boeing Company*, where the court considered whether the family members of the individuals who died in 737 Max plane crashes resulting from a conspiracy to defraud the FAA were "victims" under the CVRA.²⁹

In 2011, Boeing started development of the 737 MAX, a new version of the Boeing 737.³⁰ The relevant upgrades impacted the 737 MAX's aerodynamics, so Boeing installed the Maneuvering Characteristics Adjustment System (MACS) to correct the issue.³¹ As originally designed, MACS was only intended to activate during high-speed maneuvers that do not occur during routine commercial flights.³² However, the MACS operational scope was

²⁴ Id. at 175–76 ("Rendón has not specified a motivation for Vargas's murder, stating both that the [militants] used force to secure strategic drug-trafficking areas [for the conspiracy] and also that the AUC targeted individuals who did not express support for the [militants].").

²⁵ Id. at 176–77.

²⁶ *United States v. Sharp*, 463 F.Supp.2d 556, 563–64 (E.D. Va. 2006).

²⁷ *In re Stewart*, 552 F.3d at 1289.

²⁸ *In re de Henriquez*, No. 15-3054 (D.C. Cir. Oct. 16, 2015).

²⁹ No. 4:21-cr-5-O (N.D. Tex. Oct. 21, 2022). In a prior decision, the Boeing Court found that the relevant federal offense was conspiracy to defraud the United States. As such, if the family members could establish causation, they would qualify as "crime victims" under the CVRA.

³⁰ Id.

³¹ Id.

³² Id.

eventually expanded to activate at the lower speeds often achieved during takeoff and landing.³³

The Aircraft Evaluation Group (AEG), a sub-group of the FAA, is responsible for determining the minimum level of training pilots in the United States must complete before operating a newly updated aircraft. AEG publishes those determinations in a Flight Standardization Board Report (FSB).³⁴ Since the AEG is regarded as the leading global aviation authority, foreign entities also routinely rely on the AEG's training determinations.³⁵

Boeing hoped that the AEG would only mandate low levels of training for pilots intending to operate the 737 MAX, as higher training levels would cost the company more time and money to successfully complete.³⁶ Boeing hid the data about the MACS's low-speed expansion from the AEG and recommended that the AEG omit information concerning the MACS from the FSB.³⁷ Sure enough, in July 2017, the AEG published an FSB certifying the 737 MAX for a low-level of training.³⁸

On October 28, 2018, Lion Air Flight 610 out of Indonesia fatally crashed shortly after takeoff and on March 10, 2019, Ethiopian Airlines Flight 302 out of Ethiopia met a similar fate.³⁹ Both aircrafts were 737 MAXs whose MACS had activated during the flight,⁴⁰ and both were subject to regulatory authorities that relied on the AEG's FSB in setting training standards for 737 MAX aircrafts.⁴¹

The U.S. Justice Department began investigating Boeing around the time of the second crash, but did not inform the crash victims' families of the investigation.⁴²

On January 7, 2021, the government charged Boeing with conspiracy to defraud the United States under 18 U.S.C. § 371, alleging that Boeing

³³ Id.

³⁴ Id.

³⁵ Id.

³⁶ Id.

³⁷ Id.

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

⁴² Id.

defrauded the AEG to manipulate its evaluation of the MACS, the 737 MAX training requirements, and the FSB Report.⁴³

That same day, the government filed a deferred prosecution agreement (DPA), which imposed several conditions on Boeing, including payments of a monetary penalty; \$1,770,000,000 in compensation to airline customers and \$500,000,000 to the victims' families; and regular reporting to the Justice Department.⁴⁴ As part of the DPA, the Justice Department agreed to dismiss all charges against Boeing if the company complied with the terms of the DPA for three years.⁴⁵ In the DPA, Boeing also admitted that the factual allegations in the information were true, and that it was responsible for the acts of its officers, directors, employees, and agents as charged in the information.⁴⁶

The Parties' Briefing

On December 16, 2021, the family members of the crash victims filed three motions arguing that the government and Boeing violated the CVRA by negotiating the DPA without conferring with them as the victims' representatives.⁴⁷ As a threshold matter, the representatives explained that they were "crime victims" under the CVRA because they were directly and proximately harmed by Boeing's conspiracy.⁴⁸ According to the victims, the fatal crashes would not have occurred but for Boeing's criminal conduct, which was a foreseeable result of inadequate training on the MACS.⁴⁹ The representatives then asserted that the Justice Department neither conferred with nor informed the victims of the

⁴³ *Id.*

⁴⁴ Deferred Prosecution Agreement at 7, *United States v. Boeing Co.*, No. 4:21-cr-5-O (N.D. Tex. Oct. 21, 2022) (No. 4:21-CR-5-O), ECF No. 4.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Boeing*, supra note 29.

⁴⁸ Reply Brief of Representatives at 5, *United States v. Boeing Co.*, No. 4:21-cr-5-O (N.D. Tex. Oct. 21, 2022) (No. 4:21-CR-5-O), ECF No. 71. In their first memorandum of law in support of their motion, the representatives assumed that they were "crime victims" under the CVRA and did not elaborate on that position. See Brief of Representatives at 17–26, *United States v. Boeing Co.*, No. 4:21-cr-5-O (N.D. Tex. Oct. 21, 2022) (No. 4:21-CR-5-O), ECF No. 52. However, as explained more thoroughly below, the government's response brief argued that the representatives could not recover as they did not meet the CVRA's definition of "crime victim." The United States of America's Response Brief at 8, *United States v. Boeing Co.*, No. 4:21-cr-5-O (N.D. Tex. Oct. 21, 2022) (No. 4:21-CR-5-O), ECF No. 58. As such, the representatives dedicated time in their reply brief to establish their victim status.

⁴⁹ Reply Brief of Representatives, supra note 48.

DPA with Boeing, thereby violating their CVRA rights to participate in “criminal proceedings that directly implicate them.”⁵⁰

The government’s response relied primarily on refuting the representatives’ status as “crime victims.”⁵¹ According to the government, a person is considered a victim based on the harm derived from the specific charges brought and the courts cannot interfere with DOJ’s charging decisions. Here, the government chose not to charge Boeing with negligent homicide because the evidence did not demonstrate the elements of actual and proximate cause.⁵²

Moreover, the harm that the representatives suffered was the deaths of their loved ones, which would typically result from the crime of negligent homicide, not conspiracy to defraud the FAA.⁵³ In other words, because the harm they suffered was not clearly linked to the conspiracy charged, the representatives could not recover under the CVRA.

The Court’s Holding

The court found that the representatives satisfied the CVRA’s definition of “crime victims.”⁵⁴ As to direct cause, the court found that the AEG relied on Boeing’s misrepresentations in issuing its FSB Report on the 737 MAX. “Had Boeing’s employees not concealed their knowledge about MACS,” the court explained, “the AEG would have certified a more rigorous level of training, pilots around the world would have been adequately prepared for MACS activation, and neither crash would have occurred.”⁵⁵ Moving to proximate cause, the court noted that given the international reliance on the AEG’s FSB, it was generally foreseeable that a FSB recommending an improper level of pilot training could result in catastrophic 737 MAX crashes in flights around the world.⁵⁶

Accordingly, the court concluded that the government violated the representatives’ rights under the CVRA by failing to consult with them before

⁵⁰ Id. at 18–24 (citing 150 Cong Rec. S4261 (Apr. 22, 2004)).

⁵¹ The United States of America’s Response Brief, *supra*.

⁵² Id. at 11 (“[T]he evidence in the record does not establish that (1) but for Boeing’s conspiracy to defraud the FAA Aircraft Evaluation Group, Lion Air Flight 610 and Ethiopian Air Flight 302 would not have crashed; or that (2) any causal link on this front was reasonably ‘foreseeable’ and not too attenuated.”).

⁵³ Id. at 12.

⁵⁴ Boeing, *supra*.

⁵⁵ Id.

⁵⁶ Id.

negotiating the DPA resolution with Boeing.⁵⁷ The court reserved judgment on the appropriate remedy. On February 9, 2023, after considering the parties' supplemental briefing on the topic, the court ultimately declined to impose any remedies for the government's CVRA violation.

The crime victims' requested that the court withhold its approval of the DPA, confer with the representatives about "other ways to hold Boeing accountable for its crimes beyond the provisions of the DPA," and "refer the government to the appropriate investigative authorities for its violations of the CVRA."⁵⁸

As to the crime victims' first request, the court reasoned that under the separation of powers doctrine, it lacked the statutory authority to supervise, review, modify, or overturn the DPA, since there was no evidence that it was entered into for an illegitimate purpose.⁵⁹

Similarly, the court could not exercise its inherent authority to supervise the administration of justice because the crime victims did not show that the government acted in bad faith, such that there was a need to implement a remedy for violation of recognized rights, preserve judicial integrity, or deter illegal conduct.⁶⁰ Indeed, the DOJ met with the victims before they were even found to be victims by the court,⁶¹ and once the court recognized that their rights had been violated, the DOJ recognized their rights and held a five-hour meet and confer with the representatives to discuss appropriate remedies.⁶² And on January 26, 2023, the court held a three-hour public arraignment, during which the crime victims' representatives were permitted to offer testimony or file written statements on the docket.

Finally, the court declined to impose the crime victims' other requested remedies, as the government's subsequent efforts to engage with and recognize the crime victims had substantially, meaningfully, and in good faith satisfied their rights.⁶³

Dissatisfied with this result, the crime victims' representatives have filed an appeal to the U.S. Court of Appeals for the Fifth Circuit, requesting review of

⁵⁷ See *id.*

⁵⁸ *United States v. Boeing Co.*, No. 21-cr-5-O, slip op. at 10–11 (N.D. Tex. Feb. 9, 2023).

⁵⁹ *Id.* at 4.

⁶⁰ *Id.* at 16–18.

⁶¹ *Id.* at 20 ("Attorney General Merrick Garland personally attended one of those meetings.").

⁶² *United States v. The Boeing Company*, U.S. DEP'T JUST., *United States v. The Boeing Company* | CRIMINAL-FRAUD | Department of Justice (last visited Dec. 19, 2022).

⁶³ *Boeing Co.*, slip op. at 25.

the court's decision to uphold the DPA.⁶⁴ But as it currently stands, while the *Boeing* court was willing to recognize the crash victims' family members as "crime victims" under the CVRA, it ultimately declined to provide them with any substantive remedies for the government's initial violation of their rights.

HOW DOES THIS CASE FIT IN WITH PRIOR PRECEDENT?

The *Boeing* case is illustrative of several different principles that color CVRA jurisprudence. First and foremost, *Boeing* follows the line of precedent illustrating that under the VWPA, MVRA, and CVRA, courts are willing to show increased recognition of victims' rights in conspiracy- or scheme-based cases, even where the victims are not named in the indictment, the harm suffered is not an element of the conspiracy, and the harm is not alleged to be in furtherance of the scheme. The government in *Boeing* unsuccessfully argued that the crime charged in the indictment should govern the definition of "crime victim."⁶⁵ But the *Boeing* court found that the representatives were victims, despite not being explicitly named in the charging document or the DPA or listed as parties in the matter. The victims of the Flight 610 and Flight 302 crashes were certainly not the direct target of the conspiracy to defraud the FAA, nor was Boeing specifically charged for their deaths. And while the victims' deaths were a byproduct of Boeing's conspiracy to defraud, Boeing did not perpetrate the tragic loss of life to accomplish or further this object of the conspiracy. Thus, much like the prior precedent considering victims' rights, the *Boeing* court was willing to extend the definition of "crime victim" to encompass the harm suffered here.

That said, however, *Boeing* is still somewhat unique among CVRA cases dealing with victims' rights and conspiracy charges. *Boeing* appears to be one of the first conspiracy-based cases to hold that the victims' harm was a direct and proximate result of the conspiracy where the victims themselves were not defrauded by the acts in furtherance of conspiracy in the same way as the direct target of the crime.⁶⁶ Death is not traditionally part of the crime of conspiracy to defraud the government. Indeed, at first glance, *Boeing* seems to conflict with

⁶⁴ David Shepardson, Families Appeal Decision to Uphold Boeing 737 MAX Crashes Plea Deal, REUTERS (Feb. 23, 2023, 6:54 PM), <https://www.reuters.com/legal/families-appeal-decision-boeing-737-max-crashes-plea-deal-2023-02-23/>.

⁶⁵ The United States of America's Response Brief at 12, *United States v. Boeing Co.*, No. 4:21-cr-5-O (N.D. Tex. Oct. 21, 2022) (No. 4:21-CR-5-O), ECF No. 58.

⁶⁶ Compare *Boeing* with *In re McNulty*, 597 F.3d 344 (6th Cir. 2010), and *In re Rendon Galvis*, 564 F.3d 170 (2d Cir. 2009), with *United States v. Thetford*, 935 F. Supp. 2d 1280 (N.D. Ala. 2018), and *In re Stewart*, 552 F.3d 1285, 1288 (11th Cir. 2008).

the cases holding that the harm suffered must be directly linked to the object of the conspiracy.⁶⁷

But perhaps this is just the first case where the victims successfully showed a direct and foreseeable link flowing from the conspiracy to the actual harm suffered. The *In re Rendon Galvis* court for example, noted that although there was some connection between the alleged victim's harm and the conspiracy, the evidence did not clearly link the two because counsel offered two alternative motives for defendant's actions.⁶⁸ Counsel for the representatives in *Boeing*, however, carefully explained the causal link between Boeing's conspiracy to defraud the FAA and the crash victims' deaths. Their brief dedicates several pages to a step-by-step analysis of but-for causation, clearly laying out each link in the chain from Boeing's decision to conceal information about the MACS to the fatal crashes of Flight 610 and Flight 302.⁶⁹ They also offered two expert opinions to bolster the conclusion that Boeing's conspiracy directly caused the victims' deaths.⁷⁰ By plainly laying out the building blocks of the causal chain and showing that these deaths directly flowed from that conspiracy and were a foreseeable result of that conspiracy, the representatives demonstrated their status as victims.

Much like some of its predecessors, *Boeing* thus highlights the importance of clearly establishing a close causal nexus between the victims' harm and the defendant's criminal actions. Practitioners representing victims should take care to model the representative's approach in *Boeing* and lay out a step-by-step analysis of causation.

Boeing also shows that while some courts are willing to broadly interpret the definition of "crime victim" in conspiracy cases, they will not do so to the point of unfairness. The U.S. District Court for the Northern District of Texas employed the doctrine of laches to hold that several additional family members of fifty-five crash victims and two foreign carriers—who waited to two years after the government filed the DPA and only asserted their rights as crime victims after the court's October 2022 opinion—could not be recognized as crime victims under the CVRA.⁷¹ As the DPA was set to expire only fifteen months after the court's February 2023 opinion, recognizing these new parties

⁶⁷ See McNulty, 597 F.3d 344, 350–52; Rendon Galvis, 564 F.3d 176–77.

⁶⁸ Rendon Galvis, 564 F.3d at 175–76.

⁶⁹ Reply Brief of Representatives at 11–14, *United States v. Boeing Co.*, No. 4:21-cr-5-O (N.D. Tex. Oct. 21, 2022) (No. 4:21-CR-5-O), ECF No. 71.

⁷⁰ *Id.* at 12–13.

⁷¹ *United States v. Boeing Co.*, No. 21-cr-5-O, slip op. at 26–28 (N.D. Tex. Feb. 9, 2023).

as victims would prejudice Boeing and the government.⁷² The lesson is that potential crime victims should not delay in asserting their rights under the CVRA, even in conspiracy cases.

Finally, *Boeing* demonstrates the importance some courts place on victims' rights and may serve as a cautionary tale for prosecutors dealing with corporate defendants. Courts may be willing to impose broad remedies for DPAs or plea agreements negotiated in violation of crime victims' rights, even when the agreement is generous to the potential victims or the term of the agreement is almost completed. After all, the *Boeing* court was willing to at least consider remedies for violating victims' rights, such as overturning or modifying the DPA, ordering the government to further meet and confer with the crime victims' representatives, and referring the government to the appropriate investigative authorities for its failure to comply with CVRA.⁷³ When prosecuting conspiracies to defraud the government, therefore, federal prosecutors would do well to not only consider potential victims outside the four corners of the charges in the indictment, but should solicit their input before attempting to enter a plea agreement or negotiate a DPA.

Of course, as it stands now, the *Boeing* court ultimately declined to impose draconian remedies for the government's CVRA violation.⁷⁴ But that is largely due to the fact that the government promptly acted to respect the crime victims' rights and provided them with multiple opportunities to be heard. As such, prosecutors who have inadvertently negotiated a DPA in violation of the CVRA should take immediate steps to remedy the situation. Allowing the crime victims to be heard and demonstrating respect for their CVRA rights can circumvent the need for the court to impose additional, more burdensome remedies on the government and defendant.⁷⁵

⁷² *Id.*

⁷³ *Id.* at 11.

⁷⁴ The crime victims' appeal to the Fifth Circuit may potentially change things.

⁷⁵ For example, the government in *Boeing* explained that modifying or overturning the DPA would create burdensome "practical concerns about . . . the distribution of this \$500 million to the crash victims' beneficiaries," the vast majority of which had already been distributed. The United States of America's Response Brief at 13 & n.7, *United States v. Boeing Co.*, No. 4:21-cr-5-O (N.D. Tex. Oct. 21, 2022) (No. 4:21-CR-5-O), ECF No. 58. *Boeing* also pointed out that for nearly two years, it expended significant time and energy to comply with the DPA. Negating the DPA entirely would ignore *Boeing's* compliance with and reliance on the contractual terms. The *Boeing Company's* Supplemental Response Regarding Remedies at 10–12, *United States v. Boeing Co.*, No. 4:21-cr-5-O (N.D. Tex. Oct. 21, 2022) (No. 4:21-CR-5-O), ECF No. 129.

TIPS FOR PRACTITIONERS

Boeing illustrates that practitioners should take the following steps when representing crime victims under the CVRA:

- Determine whether your client is indeed a victim of one of the statutorily specified crimes.
- Determine the full scope of your client's compensable harm, collecting and documenting actual evidence of loss.
- Make the government and the court aware of your client's potential status as a crime victim as soon as you become aware of it and reassert your client's rights often.
- Provide clear evidence of your client's loss, such as property value decreases and medical expenses, to the government attorney on the case, underscoring any causal link between the defendant's conduct and this loss.
- Take particular care to outline the causal chain step-by-step, to clearly demonstrate the direct harm defendant's actions had on your client.
- To the extent possible, ensure the presentence report or the indictment includes specific mention of your client's harm or makes broad references to an overarching scheme or conspiracy such that adequately encompasses your client's loss.
- Emphasize the harm that your client suffered that could arguably have flowed from a cognizable "pattern" of criminal conduct.
- Request that any plea or deferred prosecution agreement take into account your client's specific harm.

Prosecutors should also be sure to take into account the broad ramifications of victims' rights:

- Prosecutors should make sure to consider potential victims outside the four corners of the indictment.
- If prosecutors are aware of any victims harmed by the defendants' actions, reach out to them before executing a deferred prosecution agreement. Providing for potential victims in the DPA may not be sufficient on its own.
- If prosecutors do violate the CVRA by failing to negotiate with potential crime victims before executing a DPA or settlement agreement, they should take immediate steps to meet and confer and respect the crime victims' rights. Good faith efforts to do so may help the government avoid responsibility for any further remedies.

