

Holmes Faces Uphill Battle Fighting 11-Year Prison Term

By **Dorothy Atkins**

Law360 (November 21, 2022, 10:50 PM EST) -- Ex-Theranos CEO Elizabeth Holmes likely faces an uphill battle challenging her conviction in California federal court and recent sentence of 11 years behind bars for defrauding investors, given the detailed trial record and the amount of losses at issue, according to white collar legal experts.

U.S. District Judge Edward Davila sentenced the 38-year-old former Silicon Valley executive on Friday to 11 years and three months in prison on four counts of defrauding investors with bogus blood-testing technology.

The sentence came nearly a year after a jury handed down a mixed verdict in the high-profile, monthslong trial. Aside from the convictions, the panel acquitted her of charges of defrauding patients and was unable to reach a unanimous decision on three additional investor fraud counts.

Andrew George of Baker Botts LLP said Holmes' sentencing was "undoubtedly a dark day" for the defendant and her family, and he noted there is no parole in the federal system. If the conviction and sentence are affirmed on appeal, Holmes will serve no less than nine years and six months behind bars, or 85% of her sentence, assuming she is a candidate for early release for good behavior, he said.

Holmes' defense team has indicated to Judge Davila that it plans to appeal and has teed up numerous issues to challenge before the appellate court, including the length of the sentence and the preponderance of evidence legal standard the court used to calculate the investor losses to inform the duration of her prison term.

Although Judge Davila set Holmes' surrender date for April 27, white collar attorneys expect her legal team to file a motion to stay the conviction and sentence pending the outcome of her appeal, but they say it's unlikely that a stay request will be granted given the uncertainty of how long it will take for the appellate court to decide the matter.

No Way to 'Sugar Coat' \$100 Million in Losses

Michael Weinstein of Cole Schotz PC, a former federal prosecutor, told Law360 on Monday that he expects Holmes' appeal to be vigorously fought, but he doubts that she will ultimately be successful in landing a shorter prison term, given her multicount conviction and the nine-figure investor loss estimates proffered by the government.

"You can't really get around four verdicts as well as \$100 million-plus for direct losses," Weinstein said. "There's no way to sugar coat that. There's no way to brush that aside."

Agustin Orozco, former federal prosecutor and member of Crowell & Moring LLP's white collar and regulatory enforcement group, agreed that Holmes will likely have a difficult time proving her sentence was unreasonable, given the sentencing guidelines and investor fraud counts at issue, which each come with a maximum 20-year prison term.

Orozco noted that defense attorneys in highly publicized cases typically worry that the judge will side with prosecutors and issue a higher sentence than what is necessary to deter similar conduct by others, and that Holmes' case was no exception.

Prosecutors had sought to put Holmes behind bars for 15 years, and they asked the court to order her to pay more than \$800 million in restitution to Theranos investors, an issue the judge had not decided as of Monday.

Holmes' side argued that she should get 18 months at most and that she should be allowed to serve her term in home confinement. The probation office's presentence investigation report pegged the appropriate sentence at nine years, which was in line with estimates other white collar experts gave Law360 before Friday's sentencing hearing.

Before pronouncing the longer sentence Friday, Judge Davila observed that the case is notable in that it has been tried in Silicon Valley, which he said is the "breadbasket" of innovation and has its roots in agriculture.

Judge Davila added that over the past century, technology changed and the abundant farms and orchards were replaced by technology companies, which aim to grow quickly. Although Holmes submitted more than 130 letters in her support, the judge emphasized that none of the letters condoned lies and manipulation to fundraise for business ventures.

Lessons Learned From a Lengthy Sentence

Orozco of Crowell & Moring said Holmes' tough sentence sends a strong message to corporate executives, particularly those at startups, that they should not be overzealous and overstate their technologies, products or financial forecasts.

"When it's all said and done, if things go sideways, they're going to be Monday-morning quarterbacked based on representations they made," Orozco said.

The stiff sentence inspired Nixon Peabody LLP to publish a post on the firm's website Friday co-authored by Hannah Bornstein, deputy leader of the firm's government investigations and white collar defense practice, that lists several "legal lessons learned" from Holmes' conviction and sentence. The post included a warning that workers should assume prosecutors will read their purportedly "ephemeral" text messages.

The post points out that during Holmes' trial, much of the government's evidence showing her intent was taken from her text message exchanges with her convicted co-conspirator Ramesh "Sunny" Balwani, who is set to be sentenced Dec. 7, so corporate executives should be aware their messages are discoverable and they should "text like everyone is watching."

"Text like the government will read every single text, emoji, and GIF you and your company's employees ever send to anyone, anywhere," the firm's website says, noting that the government likely "will not care" if the employee used his or her personal devices to conduct business.

The Novelty of Holmes' Conviction

Former federal prosecutor Amanda Kramer of Covington & Burling LLP said whether Holmes' sentence foretells long prison sentences for CEOs and other executives in future fraud cases remains to be seen.

Kramer noted that the sentences of former WorldCom CEO Bernard J. Ebbers, who received 25 years for one of the largest accounting scandals in history, and Bernie Madoff, who received a 150-year sentence for his infamous multibillion-dollar Ponzi scheme, set "high-water marks at the time of their respective sentencings, which isn't the case for Holmes."

Kramer said Holmes' apparent lack of greed compared to the other fraudsters who cashed in their shares to support their luxury lifestyles may have been one of mitigating factors in her favor that set her apart from other convicted CEOs.

But the judge also had to weigh those factors against Holmes' apparent willingness to exploit the credibility she garnered as a young, female CEO success story to further the fraud.

"Every case is different, but what are the odds that we'll see another CEO featured on the covers of Fortune and Forbes, whose claims of developing transformative technology are found by a jury to have been lies?" Kramer said.

Former federal prosecutor Spencer Kiggins added that while Holmes' severe sentence likely serves as a warning to executives of tech startups, it should also make investors more cautious too, and a bit more discerning about the merits of new technology.

"It's a shot across the bow to Silicon Valley tech startups," Kiggins said.

The government is represented by Jeff Schenk, John C. Bostic, Robert S. Leach and Kelly I. Volkar of the U.S. Attorney's Office for the Northern District of California.

Holmes is represented by Kevin Downey, Lance A. Wade, Amy M. Saharia, Katherine A. Trefz and Jean Ralph Fleurmont of Williams & Connolly LLP and John Cline of the Law Office of John D. Cline.

The case is U.S. v. Elizabeth Holmes et al., case number 5:18-cr-00258, in the U.S. District Court for the Northern District of California.

--Editing by Jill Coffey and Michael Watanabe.