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Fraud Case Against Wilmington Trust Remains Largely Intact

By **Vince Sullivan**

Law360, Wilmington (July 7, 2016, 6:51 PM ET) -- Motions to dismiss fraud charges against Wilmington Trust Corp. and four of its former executives were largely defeated Thursday when a Delaware federal judge said the federal government adequately pled its allegations in a second superseding indictment filed in January.

During a hearing in Wilmington, U.S. District Court Judge Richard G. Andrews determined that most of the charges filed against Wilmington Trust and former executives David Gibson, Robert Harra, William North and Kevyn Rakowski contained enough information to survive the motions to dismiss.

"I believe the defendants' motions are requesting more than is required to be in the indictments," Judge Andrews ruled from the bench in denying the requests to dismiss charges of securities fraud, false statements on reports to the U.S. Securities and Exchange Commission, false entries in banking records and false certification of financial reports.

The indictment stems from the alleged masking of hundreds of millions of dollars in overdue loans by Wilmington Trust in the midst of the global financial crisis. The U.S. alleges the fraud was committed in an effort to attract investors and new customers to its lending services.

The defendants told the court that the loans were not being hidden, but that the bank was negotiating with borrowers to extend the credit lines while the customers continued paying interest on the outstanding loans. The definition of overdue the government was using in its indictment did not jibe with the definition of overdue the bank used when reporting on its loan exposure.

"We're talking about loans that were in the process of extension," Michael Kelly of McCarter & English LLP, representing former President and Chief Operating Officer Robert Harra, said. "At what point do you cut off the process?"

Judge Andrews deferred judgment on two motions to dismiss charges of false statements to the SEC and Federal Reserve against all the defendants and to dismiss charges of false certification of financial reports against former Chief Financial Officer David Gibson. The judge said he would take the weekend to review additional case law on the topics presented before ruling, but said he was leaning heavily toward dismissing those counts.

"I'm going to read the cases to see if they change my mind," Judge Andrews said. "Unless I have some change of heart, I will issue a written order on Monday."

His inclination to dismiss those counts results from language choices made in the indictment by the government.

At several points in the indictment, the word "unlawfully" is used in place of "willfully" when describing the alleged false statements made by the defendants to regulatory bodies. Judge Andrews asked the government's attorneys why the indictment language didn't track with the wording of the statue. Assistant U.S. Attorney for the District of Delaware Robert Kravetz said the words were interchanged unintentionally.

"I actually think the charging language should say 'willfully' and it doesn’t," Judge Andrews said, explaining why he was leaning toward granting the motions to dismiss some of the charges. "Having the word scattered elsewhere in the indictment is not an adequate substitute."

In another matter, attorneys for Wilmington Trust questioned the makeup of the grand jury that approved the indictment, saying that a large number of Delaware residents hold stock in the bank and thus could have been biased in their deliberations. Barry S. Simon of Williams & Connolly LLP said there is an 8 percent chance that at least one of the grand jurors is a stakeholder in Wilmington Trust and could have been negatively impacted by the alleged fraud.

Assistant U.S. Attorney Lesley Wolf countered that there is a 92 percent likelihood that no such bias exists. She said the 23-member grand jury panel could approve charges by a simple majority vote of 12 members, and the chance of one of the 12 jurors voting to approve charges and having the supposed bias was less than one half of 1 percent.

"It is not a substantial likelihood," Wolf said.

Judge Andrews asked the bank to provide an alphabetized list of stockholders residing in Delaware so he could compare it to the list of grand jurors, and directed the government to turn over a transcript of the voir dire of the grand jury that would not be included in the record of the case.

Jury selection in the trial is slated to begin in January.

North is represented by David Wilks, R. Stokes Nolte and Samuel Moultrie of Wilks Lukoff & Bracegirdle LLC, Thomas Foley of Thomas A. Foley Esq. and Paul Shechtman of Zuckerman Spaeder LLP. Rakowski is represented by Henry Klingeman of Krovatin Klingeman LLC. Gibson is represented by Kenneth Breen, John Nowak and Phara Guberman of Paul Hastings LLP and William Lafferty and Jay Moffitt of Morris Nichols Arsht & Tunnell LLP. Harra is represented by Michael Kelly, Luke Mette and Daniel Brown of McCarter & English LLP and Andrew Lawler and Sharon Feldman of Andrew M. Lawler PC.

Wilmington Trust is represented by Christopher Gunther and Lori Will of Skadden Arps Slate Meagher & Flom LLP and Brendan Sullivan, Barry S. Simon, Margaret A. Keeley, Tobin J. Romero and Lance A. Wade of Williams & Connolly LLP.

The government is represented by Robert Kravetz, Lesley Wolf, Jamie McCall and Alexander Ibrahim.

The case is U.S. v. North et al., case number 1:15-cr-00023, in the U.S. District Court for the District of Delaware.

--Editing by Catherine Sum.