

NO. 73704-01

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

JOHN GROGAN, an individual,

Appellant

v.

SEATTLE BANK, a Washington State registered bank; PATRICK
PATRICK, an individual; and J.D. DELAFIELD, an individual,

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

APPELLANT'S REPLY BRIEF

NEWMAN DU WORS LLP
By: John Du Wors, WSBA #33987
Attorneys for Appellant
2101 Fourth Ave., Suite 1500
Seattle, WA 98121
(206) 274-2801

2016 FEB -3 11:10:34
COURT OF APPEALS
DIVISION I
SEATTLE, WA

REDACTED

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ARGUMENT.....	1
	A. Designation of final judgment triggers review of underlying orders and rulings.....	1
	B. The Washington Court of Appeals has jurisdiction to review Washington Superior Court decisions.	2
	C. Washington law providing for attorneys’ fees for wage violations is not preempted by federal law.	4
	1. Federal regulations will not preempt state law unless there is a clear conflict.....	4
	2. There is no conflict here because attorneys’ fees mandated by RCW 49.48 and 49.52 are not covered by the applicable federal regulation.	5
	D. The FDIC’s rejection of a “golden parachute” payment to Grogan in the amount of \$528,779.05 does not prohibit the Superior Court from awarding Grogan his attorneys’ fees under RCW 49.48 and 49.52.	8
III.	CONCLUSION.....	11

Cases

Barr v. MacGugan, 119 Wash App. 43, 45-46, 78 P.3d 660 (2003).....2
Dervin Corp v. Banco Bilbao Vizcaya Argentaria, S.A., 2004 WL
1933621 n.2 (S.D.N.Y. Aug. 30, 2004) 7
Inlandboatmen's Union of the P. v. Dept. of Transp., 119 Wash. 2d; 836
P.2d (1992)..... 4, 5, 6, 7
Luckett v. Boeing Co., 98 Wash.App. 307, 309, 989 P.2d 1144 (1999).2
Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 177 (1942)..... 6
UPMC-Braddock Hosp., 592 F.3d 427, 437 (3rd Cir. 2010) 9

Statutes

RCW Ch. 49.48 7, 9
RCW Ch. 49.52 7, 9

Rules

12 C.F.R. § 359.1 6
12 C.F.R. § 359.1(2)(vi) 8
12 C.F.R. § 359.1(f) 5, 8
12 C.F.R. § 359.1(i)(1) 6
12 C.F.R. § 359.2 6
12 C.F.R. § 359.3 6
12 C.F.R. § 359.4(a)(2)..... 9

I. INTRODUCTION

The power of the FDIC is not unlimited. It does not have the power to override Washington's wage protections, and Seattle Bank should be required to fulfill its obligations under Washington law. Instead, the decision of the Superior Court allows Seattle Bank to escape its contractual obligations to Mr. Grogan under the guise of federal preemption. This court has jurisdiction to review the decision of the Superior Court. And federal banking regulations do not preempt all aspects of Washington wage law. Payments such as Grogan's statutorily-mandated attorneys' fees are exempt from the federal regulations at issue. The Superior Court abused its discretion when it allowed Seattle Bank to avoid paying Mr. Grogan what it owes.

II. ARGUMENT

A. **Designation of final judgment triggers review of underlying orders and rulings.**

As a threshold matter, Seattle Bank takes issue with Grogan's designation of only the Superior Court's final dismissal. Seattle Bank implies that this Court should therefore not review the Superior Court's decisions leading to that dismissal. (Respondent's Brief at 14-16.) But Seattle Bank's position is not supported by Washington Law. In fact, the Washington Courts of Appeals are to review trial court orders that are designated *or* if "(1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the

order is entered, or the ruling is made, before the appellate court accepts review.” RAP 2.4(b). The Superior Court’s decision to vacate its orders granting and fixing attorneys’ fees, C.P. 2210-2223, is the basis for the Superior Court’s dismissal. Therefore it “prejudicially affects the decision designated in the notice.” (RAP 2.4(b).) It must be reviewed for abuse of discretion, which is present here because the Superior Court’s decision is based on untenable grounds or reasoning. *Barr v. MacGugan*, 119 Wash App. 43, 45-46, 78 P.3d 660 (2003); *Luckett v. Boeing Co.*, 98 Wash.App. 307, 309, 989 P.2d 1144 (1999).

B. The Washington Court of Appeals has jurisdiction to review Washington Superior Court decisions.

Seattle Bank spends an inordinate amount of time arguing that this Court has no jurisdiction over federal agency decisions.

(Respondent’s Brief at 22-24.) But Seattle Bank mischaracterizes both the procedural history of this case and Grogan’s appeal. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (C.P. 174 at 2:23-37.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
(C.P. 207 at ¶¶ 4, Ex. C; also *compare* C.P. 207 Ex. A (Draft Submission) *with* C.P. 170 at Ex. A (Seattle Bank's May 23 Submission to FDIC).) [REDACTED]

[REDACTED]

In response, the Superior Court required Seattle Bank to submit a request for one-year severance, \$180,000, [REDACTED]. [REDACTED] Grogan does not dispute this decision. But the Superior Court ignored the distinction between Grogan's severance and his attorneys' fees, and dismissed the entire case [REDACTED]. [REDACTED] (C.P. 219; C.P. 221.) The Superior Court's error is clear in its reasoning:

[REDACTED]
[REDACTED]
[REDACTED]. And so I entered \$180,000 for that. It wasn't a hundred percent clear that the regulation further said, and you can't award interest or attorney's fees or anything else. So I said, okay, well why don't we – we'll enter that and see whether it will fly or not. [REDACTED].

(January 15, 2015 V.R. at 15:6-22.) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Nor should it have been. Attorneys' fee awards under Washington

law are not part of any “golden parachute” and therefore do not require FDIC permission. But the Superior Court vacated the attorneys’ fee award, dismissed Mr. Grogan’s case, and allowed Seattle Bank to manipulate the legal process in order to avoid liability for clear-cut violations of Washington law. It is that decision Grogan appeals, and there is no question that this Court has jurisdiction over it.

C. Washington law providing for attorneys’ fees for wage violations is not preempted by federal law.

1. Federal regulations will not preempt state law unless there is a clear conflict.

There is a strong presumption against federal preemption of State law. *Inlandboatmen's Union of the P. v. Dept. of Transp.*, 119 Wash. 2d 697, 709; 836 P.2d 823, 831 (1992). Seattle Bank agrees with the Superior Court that federal law preempts Washington law only if the state law is in direct conflict with the applicable federal regulation. Respondent’s Brief at 25, *citing* C.P. 1434-35. “Federal law preempts state law when compliance with both would be impossible.” *Inlandboatmen’s Union*, 119 Wash. 2d at 701. Grogan does not dispute the principle of conflict preemption, nor that it may apply to the enforcement of some state wage laws. But conflict preemption is not at issue here.

2. **There is no conflict here because attorneys' fees mandated by RCW 49.48 and 49.52 are not covered by the applicable federal regulation.**

The Superior Court vacated its attorneys' fees order and dismissed Grogan's case because [REDACTED].” But attorneys' fee awards are not included in the definition of “golden parachute” and therefore, with regard to attorneys' fees, federal law does not preempt RCW 48.49 or 49.52. As discussed at length in Grogan's Appellate Brief, a “golden parachute payment” is:

[A]ny payment (or any agreement to make any payment) *in the nature of compensation* by any insured depository institution or an affiliated depository institution holding company for the benefit of any current or former IAP pursuant to an obligation of such institution or holding company that... (ii) Is received on or after... (c) A determination by the insured depository institution's or depository institution holding company's appropriate federal banking agency, respectively, that the insured depository institution or depository institution holding company is in a troubled condition...

12 C.F.R. 359.1(f) (emphasis added). Seattle Bank has never – not in the court below or in Respondent's brief – provided any legal authority for the argument that attorney's fee awards are “in the nature of compensation.”

As a result of the explicit language of the regulation covering only those payments “in the nature of compensation,” Seattle Bank cannot argue that Congress has “entirely displaced” state regulation

of wage claims against troubled institutions. Therefore, Washington law will be preempted only insofar as there is “an actual conflict... that is, when it is (1) impossible to comply with both federal and state regulation, or (2) where the state law stands as an obstacle to the purposes and objectives of Congress.” *See Inlandboatmen's Union*, 119 Wash. 2d at 709.

But there is no conflict here. Grogan is not asking for the remainder of his severance. He is asking for his attorneys’ fees and costs, which are not “in the nature of compensation” and therefore not prohibited under the FDIC’s golden parachute regulations. Part 359.1 never mentions attorneys’ fees in connection with golden parachute payments. Instead, it treats attorney’s fees separately, specifically prohibiting the payment of attorney’s fees in connection with an indemnification payment to an IAP who has been assessed a civil money penalty, removed from office, or required to cease and desist. *See* 12 C.F.R. § 359.1(i)(1); *compare* 12 C.F.R. § 359.2 (prohibiting golden parachute payments) *with* 12 C.F.R. § 359.3 (prohibiting indemnification payments.) There is no such issue here, and the attorneys’ fees payment mandated by Washington law does not conflict with the FDIC’s golden parachute regulation. There is no conflict, and therefore no preemption.

None of the cases cited by Seattle Bank holds differently. In fact, in each, a federal statute spoke directly to the issue arising under state law, clearly creating a conflict and preempting each state

law. In *Inlandboatmen's Union*, the Supreme Court of Washington concluded that the federal regulations at issue ***did not preempt*** state law because “there has been no showing of a Congressional intent to preclude all state regulation or of an actual conflict.” 119 Wash. 2d at 709. In *Sola Electric*, the Supreme Court held that state contract laws were explicitly preempted by the Sherman Act when the contract at issue violated that Act. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 177 (1942). There is no federal statute at issue, and no violation of any federal statute, at issue here. Likewise, the District Court in *Dervin Corp.* held that a contract in violation of a federal law was unenforceable under conflicting state law. *Dervin Corp v. Banco Bilbao Vizcaya Argentaria, S.A.*, 2004 WL 1933621 n.2 (S.D.N.Y. Aug. 30, 2004). The court noted:

The fact that a contract offends a federal statute or regulation does not, however automatically render it void or unenforceable. Unless the enforcement of a contract would require directing the precise conduct that a statute or regulation makes unlawful...

Dervin Corp., 2004 WL 1933621, at *3.

Seattle Bank cannot overcome the “strong presumption against federal preemption” where, as here, the federal statute or regulation does not explicitly preempt the state law and enforcement of the state law does not conflict with the federal regulation.

Inlandboatmen's Union, 119 Wash. 2d at 709-710.

D. [REDACTED] does not prohibit the Superior Court from awarding Grogan his attorneys' fees under RCW 49.48 and 49.52.

As it did in the proceedings below, and its applications to the FDIC, Seattle Bank conflates Grogan's attorneys' fee award under RCW Ch. 49.52 and RCW Ch. 49.48 with his severance. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] and wholly without Grogan's input. Appellate Brief at 15-16; C.P. 2087-2165, Exh. E. But Grogan's attorneys' fee award under RCW 49.48 and 49.52 are not golden parachute payments. *See infra* Section II.C; Appellate Brief at 20-22.

First, as discussed above, they are excluded from the definition of "golden parachute" in 12 C.F.R. 359.1(f).

Second, even if Grogan's attorneys' fee award is considered part of his severance, it is mandated by Washington law and therefore explicitly exempted from the definition of "golden parachute":

(2) Exceptions. The term golden parachute payment shall not include:

...

(vi) Any severance or similar payment which is required to be made pursuant to a state statute or foreign law which is applicable to all employers within the appropriate jurisdiction (with the exception of

employers that may be exempt due to their small number of employees or other similar criteria).

12 C.F.R. § 359.1(2)(vi).

Seattle Bank argues that this state law exemption does not apply here because “this exception was included to address an issue raised... which noted that in certain states, such as California, which had statutes at the time that expressly required employers to pay severance benefits in certain circumstances, an insured institution... could potentially be deemed to violate Part 359.” Respondent’s Brief at 34. Seattle Bank claims that applying this exception to the Washington wage laws requiring payment of wages would interpret it “more broadly than intended by the FDIC.” But Seattle Bank’s only authority for this position is commentary to the rule. And where the language of the rule is clear—as it is here—such commentary deserves no deference. *UPMC-Braddock Hosp.*, 592 F.3d 427, 437 (3rd Cir. 2010). Even considering that commentary, it does not indicate that applying the exception here would “swallow the rule”. Applying the exception here would eliminate banks’ dilemma in choosing to comply with RCW Ch. 49.48 and 49.52 or the federal

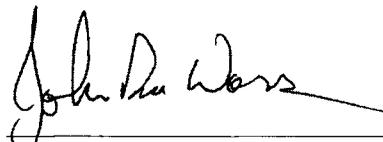
regulation – precisely what the commentary states the exception was meant to avoid.

Finally, the White Knight exception applies here because it permits payments to “white knights” hired pursuant to an agreement to become an institution-affiliated party when the covered entity is “troubled” or to prevent it from *imminently becoming so*. CFR 359.4(a)(2). Seattle Bank insists that the exception only applies to already troubled institutions and therefore does not apply to Grogan. Respondent’s Brief at 36. But this is simply untrue. Seattle Bank hired Grogan in October 2008, [REDACTED]. [REDACTED]. (C.P. 85 Ex. E, at 9:16-11:4.) And Seattle Bank assured Mr. Grogan it would seek pre-approval of the Employment Agreement (including, by extension, the severance payment) and he relied on Seattle Bank to do so. (C.P. 53 ¶ 5.) Such an agreement is within the White Knight exception to the golden parachute prohibition. As such, the Superior Court erred when it dismissed Grogan’s case [REDACTED]. [REDACTED].

III. CONCLUSION

The FDIC's decisions in this case do not prohibit the Superior Court from awarding Grogan his statutorily-mandated attorneys' fees. By simply accepting Seattle Bank's position [REDACTED]
[REDACTED], the Superior Court undermined Washington's wage protections and abused its discretion. This Court should reverse the Superior Court and allow Grogan to recover the attorneys' fees to which he is entitled under Washington law.

RESPECTFULLY SUBMITTED this 13th day of January, 2016.



JOHN DU WORS, WSBA 33987
Attorney for Appellant
John Grogan

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2015, I caused the foregoing to be served via US mail and Email to:

Jeffrey M. Thomas
Gordon Tilden Thomas & Cordell LLP
1001 Fourth Avenue
Suite 4000
Seattle, WA 98154
jthomas@gordontilden.com
chudson@gordontilden.com

Kenneth J. Diamond, WSBA
Winterbauer & Diamond PLLC
1200 Fifth Avenue, Suite 1700
Seattle, Washington 98101
ken@winterbauerdiamond.com

Richard C. Yarmuth
Lyle A. Tenpenny
Yarmuth Wilsdon PLLC
818 Stewart Street, Suite 1400
Seattle, Washington 98101
yarmuth@yarmuth.com
ltenpenny@yarmuth.com

I declare under penalty of perjury that the foregoing is true and correct.