

No. 73704-0-I

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

JOHN GROGAN, an individual,

Appellant,

v.

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

Respondents.

BRIEF OF RESPONDENT SEATTLE BANK

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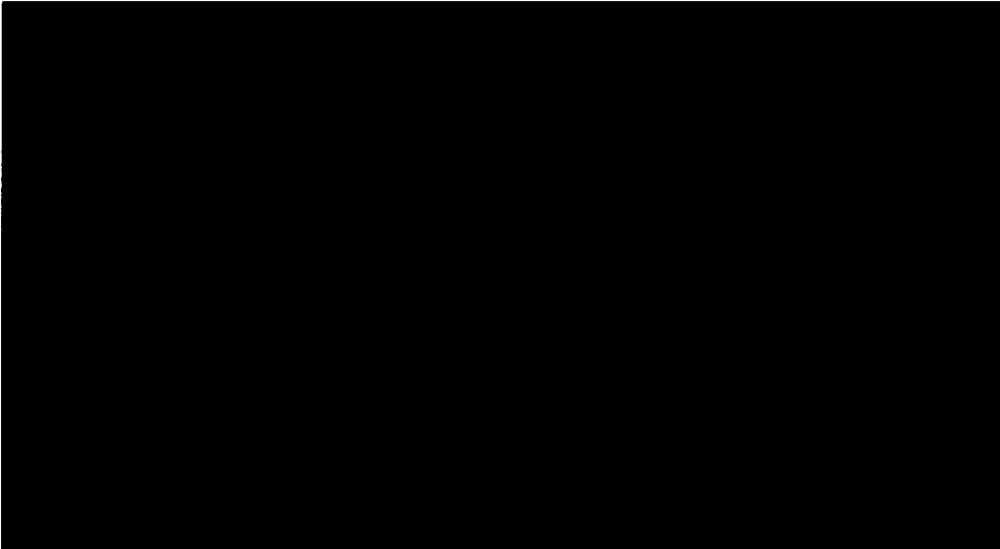
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I. INTRODUCTION

John Grogan signed an employment agreement with Seattle Bank that was both expressly and as a matter of federal law subject to FDIC's "golden parachute" regulations set forth in 12 C.F.R. § 359. With respect to institutions and their holding companies that are deemed to be in "troubled condition" as defined in 12.C.F.R. § 303.101(c), these regulations: (i) do not permit payments deemed to be "golden parachute payments" without FDIC's prior approval; and (ii) provide that a permissible golden parachute payment in connection with a change in control is one that does not exceed 12 months' salary. Grogan resigned from Seattle Bank and demanded a change of control payment of 36 months' salary



On appeal, Grogan makes vague and unclear assignments of error without identifying the underlying trial court orders on which he seeks review—except the final order of dismissal, which he did not oppose. Under any scenario, however, state courts lack jurisdiction to entertain challenges to FDIC decisions, which are subject to judicial review only under the APA in federal court. Moreover, Grogan’s state law claims are preempted by federal law as a result of FDIC’s decisions.

This Court should affirm the trial court in all respects.

II. STATEMENT OF THE CASE

A. Grogan Entered an Employment Agreement With Seattle Bank That Was Expressly Subject to FDIC “Golden Parachute” Regulations.

John Grogan served as Executive Vice President and Chief Credit Officer of Seattle Bank from late 2008 until he resigned effective as of June 27, 2011. His employment was governed by an Executive Employment Agreement dated October 6, 2008 (“Employment Agreement”). CP 772-84. At issue in this case are severance payments Grogan claimed under paragraph 9 of the Employment Agreement. *See* CP 775-77. Paragraph 9 provided that, if Grogan’s employment was terminated within 12 months of a “Change in Control” as defined in the Employment Agreement, he was entitled to receive certain severance benefits, including a cash payment equal to 36 times his highest monthly

base salary rate (three times his annual salary). *See* CP 776. Grogan alleged that a recapitalization transaction completed June 30, 2010 constituted a “Change of Control” under Section 9.a of the Employment Agreement, and that because he terminated his employment within 12 months of the completion of the recapitalization, he was entitled to a “Termination Payment” under Section 9.b equal to three years’ salary—approximately \$540,000. CP 1-7.

The Employment Agreement at Section 9.f specifically provided, however, that if any payment constituted an “impermissible parachute payment” under FDIC regulations, Seattle Bank’s payment obligation was subject to § 359:¹

Notwithstanding anything in this Agreement to the contrary, if the payments or benefits to be provided under this Agreement, together with any other payments or benefits which the Executive has the right to receive from the Bank or any entity which is a member of an “affiliated group” of which the Bank is a member, constitute an “impermissible parachute payment” (as defined in 12 CFR 359 et. seq. (the “FDIC Parachute Payment Regulation”)), then the obligations under this Agreement shall be modified so as to be consistent with FDIC Parachute Payment Regulation and the Bank shall be allowed to modify the Agreement as required to ensure ongoing compliance with such laws.

¹ There was nothing Seattle Bank could do to unilaterally “modify” the agreement to comply with FDIC regulations without the prior approval of FDIC. As discussed below, FDIC must approve any arrangement or agreement providing for a golden parachute payment, as well as the golden parachute payment itself, before it can be made.

CP 777. [REDACTED]

[REDACTED]

B. [REDACTED]

[REDACTED]

[REDACTED] without FDIC consent.

CP 1840. On June 8, 2009, FDIC issued a cease-and-desist order to Seattle Bank. [REDACTED] public cease-and-desist order was replaced with a Memorandum of Understanding in August 2013, and terminated on September 12, 2013, [REDACTED]

[REDACTED]

C. Grogan Resigned and Demanded Three Year's Salary.

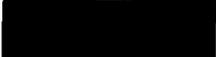
On May 27, 2011, Grogan advised he was terminating his employment. *See* CP 786. He claimed a change in control had occurred

and demanded a change in control payment under in the amount of 36 months' salary (\$540,000). Seattle Bank immediately informed him no payment could be made without FDIC approval because of the cease-and-desist order. CP 788-89.

On July 25, 2011, Seattle Bank's counsel sent a letter to Grogan emphasizing that Seattle Bank: (a) disputed his claim that a change in control had occurred; and (b) could not pay him anything without FDIC approval or non-objection, but offered to try and resolve the matter, noting that FDIC would not consider or approve any payment of the size he was requesting. CP 791-793. Seattle Bank heard nothing from Grogan for six months. His counsel then sent a letter that completely ignored FDIC issues and § 359, and instead claimed that, "at a minimum, Mr. Grogan is owed \$1,086,000," for wages and double damages under Washington law. CP 794-98. In response, Seattle Bank's counsel again explained that no binding settlement or payment to or for the benefit of Grogan could be made without prior FDIC approval. CP 800-03. He again explained that FDIC was generally unwilling to approve payments other than modest ones and he was not aware of any situation in connection with a change of control of an institution deemed to be in troubled condition where FDIC had approved a severance package valued in excess of 12 months' salary because of FDIC guidelines regarding change in control payments. *Id.*

The parties negotiated further, but Grogan would not agree to any payment within FDIC guidelines that had any chance of FDIC approval. Grogan then hired a different lawyer and filed the complaint in this case in August 2012. CP 1-7.²

D. 

In March 2013, after mediation, Seattle Bank and Grogan agreed to settle his claims for a payment of \$500,000. CP 1867-68. The settlement, however, as required by the federal regulations, was expressly conditioned on approval by Seattle Bank's regulators—FDIC and the Washington Department of Financial Institutions ("DFI"). CP 1867. 



² In his complaint, Grogan alleged wage claims against Seattle Bank and its CEO Patrick Patrick, breach of contract against Seattle Bank, double damages, attorneys' fees, and age discrimination claims against all defendants. CP 1-7. Later, Grogan voluntarily dismissed his age discrimination claims. CP 984.

 Grogan amended his complaint to add Seattle Bank Director J.D. Delafield as another individual defendant. CP 60-66.

E. The Trial Court Entered Summary Judgment on Grogan's Claim for Three Year's Severance and Directed Seattle Bank to Apply to FDIC for Permission to Pay One Year's Severance.

Grogan moved for partial summary judgment on his wage claims. CP 456-69. The trial court denied that motion on January 23, 2014.³ CP 1290-91. Seattle Bank cross-moved for summary judgment on the basis that FDIC regulations barred the payments Grogan demanded. CP 1823-24. Because Grogan requested additional time to respond, the trial court deferred on ruling on Seattle Bank's motion. CP 1291. Seattle Bank refiled its motion for summary judgment, which was heard on January 9, 2014 and March 13, 2014.

The trial court granted Seattle Bank's motion for summary judgment on Grogan's claim for three year's severance pay by order dated April 24, 2014 (the "April 24 Order"). CP 1487-91. In the April 24 Order, the trial court directed Seattle Bank to "use its best efforts to obtain

³ The trial court also granted summary judgment in favor of the individual defendants Patrick and Delafield, finding there could be no individual liability, because at a minimum, a "bona fide" dispute existed with respect to the payments demanded by Grogan. CP 1278-79. That order effectively precluded Grogan's double damages claim, for which the existence of a "bona fide" dispute also serves as a defense. *See Pope v. Univ. of Wash.*, 121 Wn.2d 479, 490-91 (1993). Grogan has assigned error or made argument regarding any issue with respect to the dismissal of these individual defendants or the trial court's finding of a "bona fide" dispute.

all necessary regulatory permissions to pay Mr. Grogan one year's severance (\$180,000)." CP 1488-90.

F. The Trial Court Awarded Attorneys' Fees and Prejudgment Interest to Grogan,

Over Seattle Bank's objection, the April 24 Order also directed Seattle Bank to pay Grogan attorneys' fees and costs and prejudgment interest, in amounts to be determined later. CP1490.

[REDACTED]

[REDACTED]

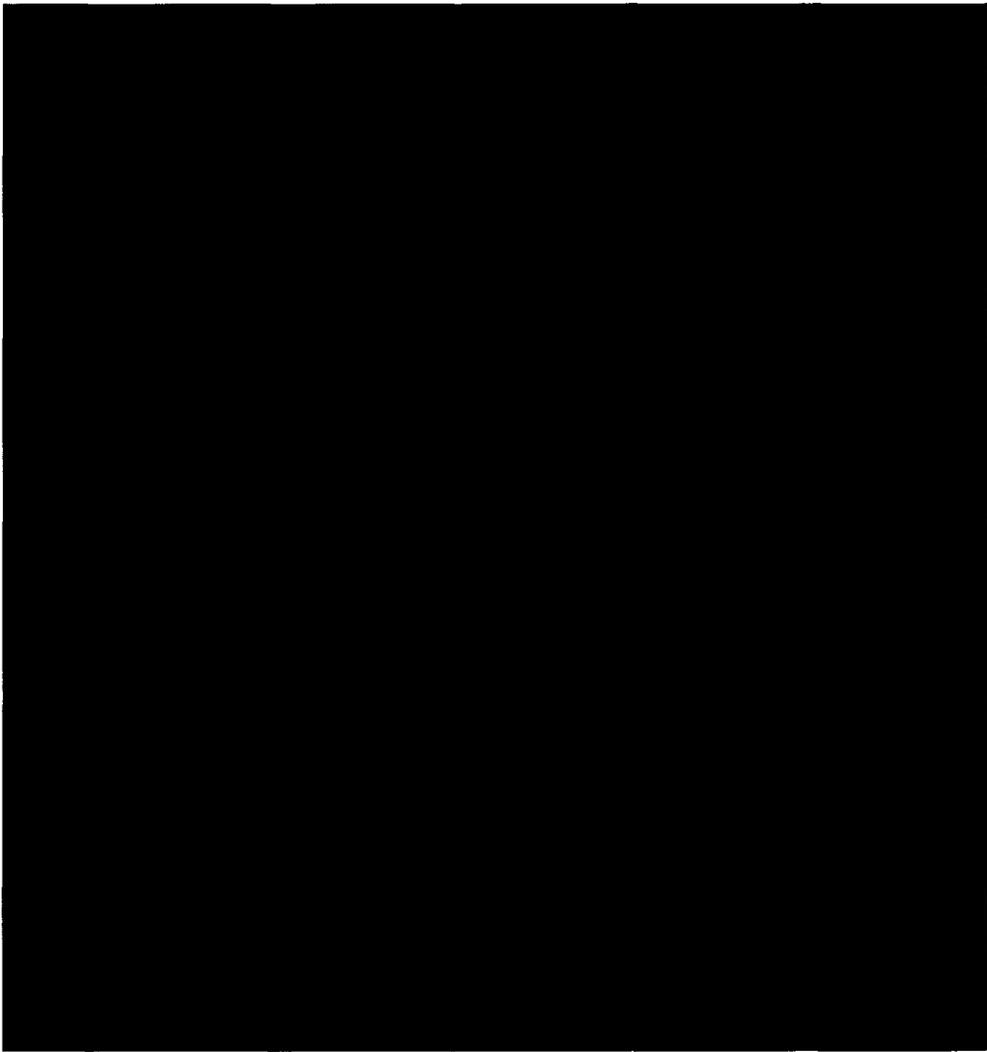
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G.

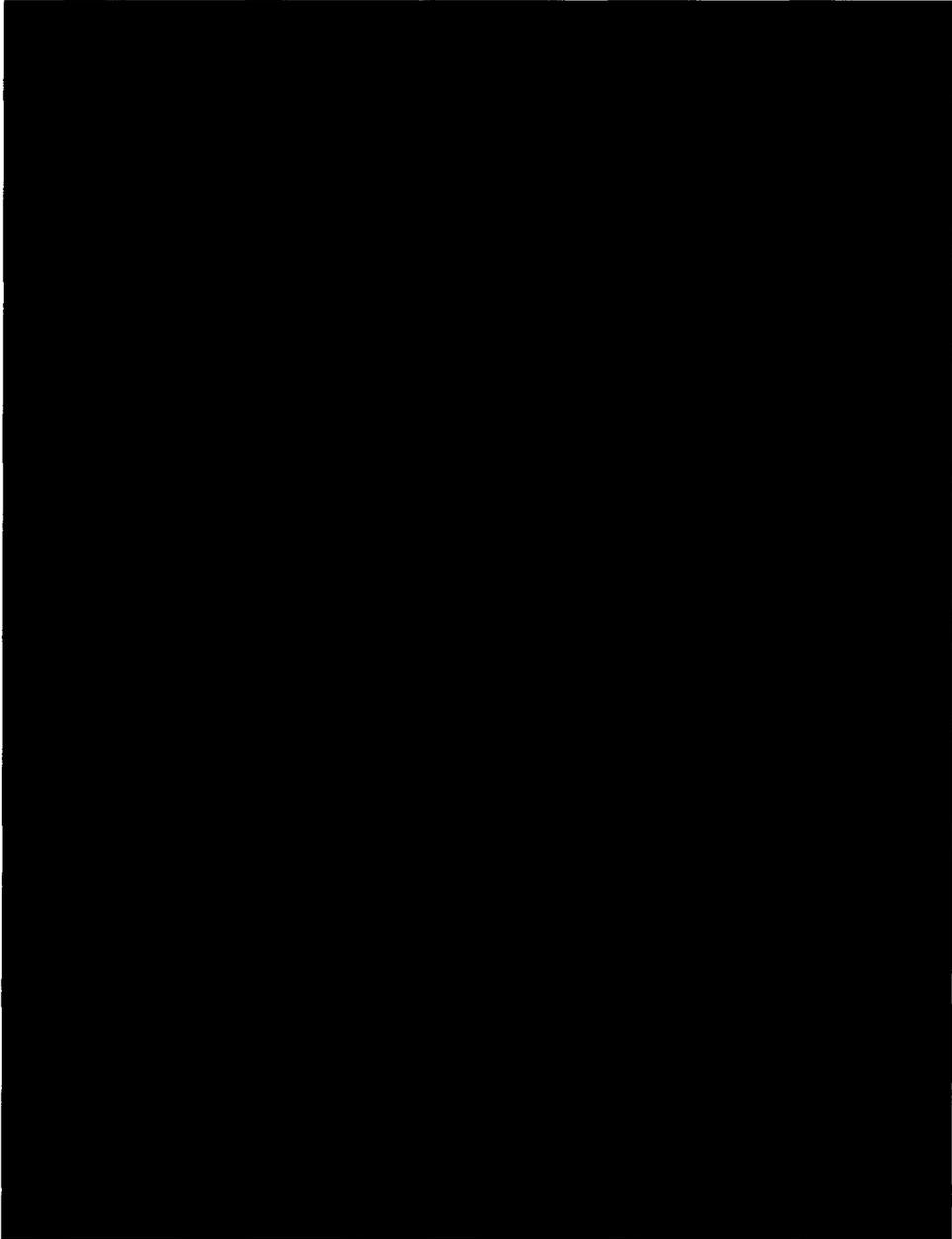
[REDACTED]

In compliance with the April 24 Order, on May 23, 2014, Seattle Bank submitted an application to FDIC requesting permission to pay

Grogan one year's severance as directed by the trial court. CP 2093-2137. Before FDIC acted on the request, on June 6, 2014, the trial court issued an order awarding Grogan \$300,114.38 in attorneys' fees under RCW 49.48.030 and \$1,597.16 in costs, but did not address prejudgment interest (the "June 6 Order"). CP 1618-19. [REDACTED]



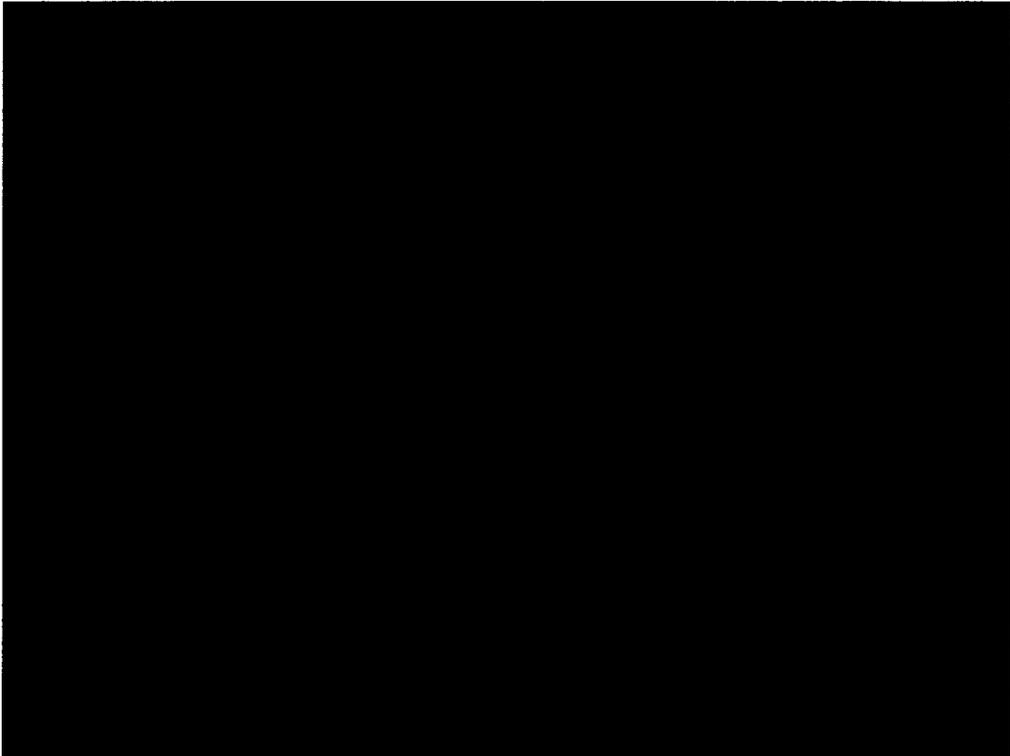
On June 20, 2014, after receipt of Grogan's proposed judgment, which indicated the full amounts he requested judgment on, including prejudgment interest, in an attempt to bring this matter to a close, [REDACTED]





The trial court's April 24 Order provided that "absent direction of this Court to the contrary, the Bank must appeal the rejection and otherwise pursue all administrative remedies to obtain regulatory permission to pay Mr. Grogan one year's worth of severance wages."

CP 1489. There was no right of appeal for FDIC's denial of Seattle Bank's application, which is governed by 12 C.F.R. § 303.11(f). Thus, the only administrative remedy remaining was a request for reconsideration under 12 C.F.R. § 303.11(f)(2) and (3).



[REDACTED]

H. [REDACTED]

In yet another attempt to resolve this matter fully, the parties subsequently agreed to a second settlement in the amount of \$250,000, again subject to FDIC approval or non-objection, [REDACTED]

[REDACTED]

I. **The Trial Court Vacated the April 24 and June 6 Orders and Directed Seattle Bank to Request Permission to Make a Payment of One Year's Severance and Nothing More,** [REDACTED]

[REDACTED]

[REDACTED] Seattle Bank moved the trial court to vacate the April 24 2014, and June 6 2014 Orders. CP 2210-23. The trial court granted the motion and vacated those orders, but directed Seattle Bank to seek FDIC approval or non-objection to a

payment of one year's severance to Mr. Grogan. CP 1790-93. The trial court held that such sum would "constitute a full and final satisfaction of any and all obligations of Seattle Bank arising out of Mr. Grogan's employment by Seattle Bank and the Court will order no additional sums to be paid by Seattle Bank to Mr. Grogan of any kind with respect thereto." CP 1791. [REDACTED]

[REDACTED] Grogan has not assigned error to the trial court's vacating its prior orders.⁴

**J. [REDACTED]
the Trial Court Dismissed the Case.**

[REDACTED]

As a result of that payment, Seattle Bank had complied with all court orders [REDACTED] As such, Seattle Bank moved for dismissal. CP 1796-98. Grogan did not object to or oppose that dismissal, which the trial court entered on May 27, 2015. CP 1799. Grogan filed a notice of appeal, in which he identified only the order of dismissal as the basis for his appeal. CP 1800-03.

⁴ In his brief, Grogan makes various contentions in his "Statement of the Case" regarding the scope of documents FDIC has allowed to be disclosed in this case under its confidentiality regulations and his accusations that Seattle Bank's submissions to FDIC were somehow "improper." Grogan made these arguments below and the trial court rejected them. See CP 727-28 (order denying Grogan's Motion to Compel or Exclude Evidence, CP 174-88); CP 1275-76 (order denying Grogan's Motion to Strike, CP 991-1000); CP 1785-86 (order denying Grogan's Motion for Sanctions, CP 2225-42). Grogan assigns no error to these orders and provides no argument or authority regarding them.

III. SEATTLE BANK'S STATEMENT OF THE ISSUES

1. Whether state courts lack jurisdiction over federal agency decisions that are subject to judicial review under the federal Administrative Procedure Act (the "APA").

2. Whether state law claims are pre-empted [REDACTED]

[REDACTED]

IV. AUTHORITY

A. **Grogan Did Not Designate the Trial Court's CR 60(b) Order in His Notice of Appeal or Assign Error to It.**

Grogan's notice of appeal designated only the trial court's final dismissal, which he did not oppose at the time. *See* CP 1800-03. In his opening brief, Grogan fails to assign error to a single order of the trial court. Nowhere in his brief does he explain why the dismissal order was an error— [REDACTED]

[REDACTED] there was nothing more for any party or the trial court to do—and Grogan did not argue otherwise.

RAP 2.4(b) permits review of certain orders not designated in a notice of appeal. RAP 10.3(4), however, requires an appellant to assign error to each error the party contends was made by the trial court,

“together with the issues pertaining to the assignments of error.⁵ RAP 10.3(g) provides that “the appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.” Although it appears Washington courts may relax these requirements in the interest of justice, we found no Washington case where an appellate court entertained review of a trial court order neither designated in the notice of appeal nor assigned error.

Here, Grogan’s first assignment of error contends that the trial court “fail[ed] to enforce its judgment against Seattle Bank for attorneys’ fees.” App. Brief at 2. It is unclear what Grogan is referring to, because the trial court never entered any “judgment” for attorneys’ fees. The trial court’s April 24 Order , CP 1487, granted attorneys’ fees to Grogan. The trial Court’s June 6 Order, CP 1618-19, fixed the amount of attorneys’ fees.⁶ [REDACTED]

[REDACTED] the trial court vacated both orders under CR 60(b). CP 2210-23. Grogan did not designate the trial court’s CR 60(b) order in his notice of appeal, does not assign error to it in his appeal, and provides no argument or citation to authority as to how the trial court erred by entering it. He does not even identify that abuse of discretion is the standard of

⁵ Grogan’s brief contains no issues with respect to his assignments of error.

⁶ No trial court order ever fixed an amount of prejudgment interest to be paid.

review for a decision granting a motion to vacate under CR 60(b). *Barr v. MacGugan*, 119 Wn. App. 43, 46 (2003). He provides no argument how the trial court supposedly abused its discretion. On this basis alone, Grogan's appeal related to attorneys' fees should be dismissed.

B. Grogan Did Not Assign Error to the Trial Court's Summary Judgment Rulings.

Although it is also general and unclear, Grogan's second assignment of error appears to be related to the trial court's granting summary judgment dismissing his claims for more than one year's salary in severance.⁷ Again, Grogan did not did not designate any summary judgment ruling in his notice of appeal and did not assign error to any summary judgment ruling. In any event, his assignment of error is limited to arguing that § 359 does not apply because of the state law and "white knight" exceptions he notes in his brief. As discussed below, these arguments are irrelevant because: (1) [REDACTED]

[REDACTED]

that determination is exclusive to federal courts under the APA; and

(2) Grogan's state law claims are pre-empted [REDACTED]

[REDACTED]

⁷ The trial court denied Grogan's motion for partial summary judgment on his wage claims by order dated January 23, 2014. CP 1290-91. In response to Seattle Bank's motion for summary judgment, the trial court entered the April 24 Order, which provided for one year's severance only, if approved by FDIC. CP 1487-91.

C. FDIC Regulatory Jurisdiction Over Insured Depository Institutions and Institution-Affiliated Parties.

Banking is “one of the longest regulated and most closely supervised of public callings.” *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947). FDIC’s oversight role is underscored by the \$9 trillion of deposits in United States banks, of which FDIC insures each qualifying account up to a maximum of \$250,000. *See* 12 U.S.C. § 1821(a)(1)(E); <https://fdic.gov/about/learn/symbol>. The appropriate banking agency—including FDIC directly or pursuant to its backup authority—may institute a cease-and-desist action against an insured depository institution it deems to be engaging in or about to engage in an unsafe or unsound practice, or is violating or is about to violate a law, rule, or regulation, or any condition imposed in writing by the federal regulator. 12 U.S.C. § 1818(b)(1).

FDIC insurance may be suspended or cancelled under certain conditions. 12 U.S.C. § 1818(a) and 1818(w). Also, FDIC may seek civil money penalties against an insured depository institution ranging from \$5,000 for each day a violation continues to a maximum daily penalty of \$1 million or one percent of the total assets of the institution. 12 U.S.C. § 1818(i)(2).

When an insured depository institution's financial condition deteriorates, the appropriate federal banking agency is required by Congress to take prompt corrective action. 12 U.S.C. § 1831(m). FDIC regulations define when it may deem a depository institution to be in "troubled condition." 12 C.F.R. § 303.101(c).

The jurisdiction of the appropriate federal banking agency—including FDIC directly or indirectly pursuant to its authority as the insurer of deposits—to institute a cease-and-desist or a civil monetary penalty enforcement proceeding also applies to an institution-affiliated party of a bank ("IAP"). 12 U.S.C. § 1813(u) (defining IAPs); 12 U.S.C. § 1818(b)(1) (authorizing cease-and-desist proceedings against IAPs; 12 U.S.C. § 1818(i) (authorizing civil monetary proceedings against IAPs). The definition of an IAP includes "any director, officer, employee, or controlling stockholder." 12 U.S.C. § 1813(u). There is no dispute in this case that Grogan was Seattle Bank's Executive Vice President and Chief Credit Officer. Because he was an officer, he is included in the definition of an IAP under 12 C.F.R. § 359.1(h)(1) and as referred to in the golden parachute payment definition set forth in 12 C.F.R. § 359.1(f)(1)(iii)(B).

D. Golden Parachute Regulation Background.

In 1990, Congress authorized FDIC to issue regulations to prohibit payment of golden parachutes to provide a means of preventing executives who have been terminated from troubled depository institutions from draining money from those institutions. *See* 12 U.S.C. § 1828(k)(1). The statute defines such payments to include those contingent on termination of employment and made while the bank was in troubled financial condition. 12 U.S.C. § 1828(k)(4). The statute exempted certain qualified retirement plans and bona fide deferred compensation plans from the definition of prohibited golden parachute payments. 12 U.S.C. § 1828(k)(4)(C).⁸

FDIC issued regulations implementing the statute after notice and comment rulemaking. 12 C.F.R. Part 359; 12 C.F.R. § 303.244. *See* 61 Fed. Reg. 5930-5934 (Feb. 15, 1996). The regulations closely follow the definition of “golden parachute payment.” 12 C.F.R. § 359.1(f). They broadly define “payment” to include any “direct or indirect transfer of any funds or any asset,” as well as other devices such as forgiveness of debt, and the “conferring of any benefit.” 12 C.F.R. § 359.1(k)(1)–(3). FDIC regulations define as a golden parachute payment any payment that:

⁸ These exemptions are not applicable in this case. There was no evidence that the severance payment requested by Grogan was pursuant to a qualified retirement plan or a bona fide deferred compensation plan.

Is contingent on, or by its terms is payable on or after, the termination of such party's primary employment or affiliation with the institution or holding company.

12 C.F.R. § 359.1(f)(i) (emphasis added).⁹ *See Von Rohr v. Reliance Bank*, 2014 WL 2110031 (E.D. Mo. May 20, 2014) (FDIC was within the power delegated by it from Congress to prohibit any payment to an IAP “on or after” termination from a troubled institution).

Banks may make golden parachute payments only with FDIC's prior permission. 12 C.F.R. § 359.4(a). Moreover, a reasonable payment to an executive in the event of a change of control of an institution that is in troubled condition—as Grogan alleged in this case—is not to exceed 12 months' salary and must be approved by FDIC:

Such a payment is made pursuant to an agreement which provides for a reasonable severance payment, **not to exceed twelve months salary**, to an IAP in the event of a change in control of the insured depository institution; *provided, however*, that an insured depository institution or depository institution holding company **shall obtain the consent** of the appropriate federal banking agency prior to making such a payment

12 C.F.R. § 359.4(a)(3) (emphasis added).

The regulations require filing of an application to make a golden parachute payment with FDIC and the bank's primary federal regulator, if

⁹ The “change in control” payment demanded by Grogan indisputably was “contingent on” termination of his employment. The trial court's award of attorneys' fees and prejudgment interest fall within the conjunctive inclusion of any payment made “on or after” termination of employment.

the bank is federally chartered. 12 C.F.R. § 359.6. The filing procedure is set out in 12 C.F.R. § 303.244. The application must contain a number of elements including “certification and documentation as to each of the points cited in § 359.4(a)(4),” *i.e.*, that the employee to whom the bank proposes to make the payment is not responsible for the bank’s troubled condition and has not taken improper or illegal actions that had a material effect on the bank’s financial condition. 12 C.F.R. §303.244(c)(6). Once the application is complete, FDIC considers the submission, may request further information, if necessary, and notifies the bank in writing of its final decision. 12 C.F.R. § 303.244(d)-(e).

E. FDIC Guidance Regarding Golden Parachute Payments.

1. Absent Rare Circumstances Not Present Here, 12 Month’s Salary Is the Maximum Golden Parachute Payment FDIC Will Approve.

FDIC has provided additional guidance to institutions concerning golden parachute applications in the form of a Financial Institution Letter (66-2010). <http://www.fdic.gov/news/news/financial/2010/fil10066>. This FIL makes clear that FDIC will only in very rare circumstances exercise its discretionary authority contained in 12 C.F.R. § 359.4(a)(1) to approve a golden parachute payment in excess of 12 months’ salary. *Id.* at 8. The FIL suggests FDIC might use the authority to approve a golden parachute payment to a low-level employee in an institution technically in troubled

financial condition but not experiencing financial difficulty. *Id.* These “rare circumstances” were not present here because: (1) Grogan was not a “low-level employee;” and (2) [REDACTED]

F. State Courts Have No Jurisdiction Over FDIC’s Decisions on Grogan’s Claims.

As discussed above, Congress delegated exclusive authority to FDIC to determine what payments fall within the golden parachute regulations. Once FDIC determines that a proposed payment is a golden parachute, “it is prohibited forever” absent authorization by FDIC. 61 Fed. Reg. 5926-5928 (Feb. 15, 1996); *see also* 60 Fed. Reg. 16069-16073 (Mar. 29, 1995). Grogan cites no authority that a state court has the jurisdiction or authority to review FDIC’s determination that a payment is a golden parachute. Moreover, Congress vested FDIC with the exclusive authority to decide, in the first instance, whether to bar payments made by troubled financial institutions as impermissible golden parachute payments. The only avenue for judicial review of federal agency decisions is under the APA. 5 U.S.C. § 702. Under the APA, a reviewing federal court is required to uphold an agency’s decision unless it concludes that the decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

The United States as sovereign is immune from suit except as it consents to be sued. *U.S. v. Sherwood*, 61 S. Ct. 767 (1941). Thus, “no court, state or federal, is competent to hear a cause of action for review of the administrative decisions of a federal agency absent an express congressional waiver of immunity for such actions.” *Double LL Contractors, Inc. v. Okla. Dept. of Transp.*, 918 P.2d 34, 41 (Okla. 1996). In 1976, Congress amended 5 U.S.C. § 702 by enacting Pub. L. No. 94–574 to facilitate judicial review of federal agency actions by eliminating the defense of sovereign immunity. However, sovereign immunity was waived only for actions instituted in “a court of the United States:”

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action **in a court of the United States** seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702 (emphasis added). As discussed above, courts repeatedly have held that “court of the United States” means exclusively federal court and does not include state courts. Grogan cites no authority to the contrary.

As an “aggrieved” party,” Grogan’s exclusive remedy to challenge FDIC’s decisions regarding his claims was under the APA in federal court, a claim over which state courts have no jurisdiction. *See also Mabin Const. Co. v. Missouri Highway Transp. Comm’n*, 974 S.W.2d 561, 565 (Mo. Ct. App. 1998) (state courts lack jurisdiction to review federal agency actions); *Nat’l State Bank of Elizabeth v. Gonzalez*, 630 A.2d 376, 381-83 (N. J. Super. Ct., App. Div. 1993) (no waiver of sovereign immunity for state courts jurisdiction of claims subject to APA); *Edwards v. U.S. Dep’t of Justice*, 43 F.3d 312, 315 (7th Cir. 1994) (state court had no jurisdiction over FBI decision subject to APA review); *Aminoil U.S.A., Inc. v. Cal. State Water Res. Control Bd.*, 674 F.2d 1227, 1234-36 (9th Cir. 1982) (state courts had no jurisdiction over review of EPA decision subject to APA).

Grogan argues the trial court owed no deference to FDIC’s decisions over his claims and proceeds to spend several pages discussing “how” the APA and judicial review should apply in this case. *See App. Brief at 28-32*. Fatally, however, he cites no authority for a state court’s power to review federal agency decisions that are subject to federal review under the APA. As discussed above, the law is decidedly against such a proposition.

G. Grogan’s State Law Claims for Wages, Attorneys’ Fees, and Prejudgment Interest Are Preempted.

The trial court understood that any of its orders would be preempted [REDACTED] “I think that Washington law applies to the extent that it’s not inconsistent with FDIC law.” CP 1434-35. If Congress indicates an intent to occupy a given field (explicitly or impliedly), any state law falling within that field is preempted; even if Congress has not indicated an intent to occupy a field, state law is still preempted to the extent it would actually conflict with federal law. *See Inlandboatmen’s Union of the Pac. v. Dep’t of Transp.*, 119 Wn.2d 697, 701-702 (1992). Where federal statutes lack express preemption language, the doctrine of implied preemption must be analyzed, which comes in two types: (1) field preemption, which arises when the federal regulatory scheme is so pervasive of the federal interest and so dominant that Congress intended to occupy the entire legislative field; and (2) conflict preemption, which arises either when the scheme of federal regulation is pervasive or when state law conflicts with federal law to the extent that compliance with both federal and state regulations is a physical impossibility. *See, e.g. Arizona v. U.S.*, 132 S. Ct. 2492, 2501 (2012); *Inlandboatmen’s Union*, 119 Wn.2d at 701. As noted by the *Inlandboatmen’s Union* Court:

Federal preemption is governed by the intent of Congress and may be expressed in the federal statute. Absent explicit preemptive language, Congress' intent to supersede state law in a given area may be implied if (1) a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, (2) if the federal act touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or (3) if the goals sought to be obtained or the obligations imposed reveal a purpose to preclude state authority. Federal regulations, within the scope of an agency's authority, have the same preemptive effect as federal statutes.

Even if Congress has not occupied an entire field, preemption may occur to the extent that state and federal law actually conflict. Such a conflict occurs (1) when compliance with both laws is physically impossible, or (2) when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Id. at 701–02.

Here, the golden parachute statute and regulations do not contain an express “preemption clause,” but the application of implied conflict preemption could not be clearer. Federal law preempts state law when compliance with both would be impossible. *See Inlandboatmen's Union*, 119 Wn.2d at 701; *Arizona v. U.S.*, 132 S. Ct. at 2501. [REDACTED]

[REDACTED] It would be impossible for Seattle Bank to comply with federal law and FDIC's direction and any contrary state court order. As such all inconsistent state law claims are preempted,

including breach of contract claims, state law wage claims, attorneys' fees claims, and claims for prejudgment interest.

Cases from other jurisdictions are consistent. In *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942), the owner of a patent sued its licensee alleging that, in not selling its product at the agreed prices in the licensing agreement, the licensee was liable for breach of contract. The Supreme Court held that the price-fixing provision was unenforceable because it violated the Sherman Anti-Trust Act: "It is familiar doctrine that the prohibition of a federal statute may not be set at naught . . . by state statutes or state common law rules." *Id.* The Court continued that, where a federal statute applies to the legal relations between private parties those "legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." *Id.* Citing the Supremacy Clause, the Court concluded:

When a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, cl. 2.

Id.

In support of this conclusion, the court cited *Awotin v. Atlas Exch. Nat'l Bank of Chicago*, 295 U.S. 209 (1935). In that case, Atlas Exchange National Bank of Chicago sold bonds of another bank to Awotin, agreeing, if asked, to repurchase the bonds at maturity, at par, and with accrued interest. *Id.* at 210. Section 5136 of the National Bank Act (“NBA”), however, prohibited national banks from selling marketable bonds “with recourse.” *Id.* at 211. When Atlas Exchange National Bank of Chicago refused to repurchase the bonds, Awotin sued in Illinois state court, which held that the bank was required to pay restitution to Awotin. *Id.* at 213.

The Supreme Court reversed: “The petitioner [Awotin], who was chargeable with knowledge of the prohibition of the statute [NBA], may not invoke an estoppel to impose a liability which the statute forbids.” *Id.* The Court noted that the opinion of the state court did not disclose whether its decision was based upon state common law—a quasi-contractual right to compel restitution of the purchase price—or upon its construction of Section 5136 of the NBA. *Id.* The Court concluded that the contract was unenforceable based upon federal law:

While we may not properly exercise our jurisdiction to review or set aside the state court’s application of local law to the quasi contractual demand, we may, in the present ambiguous state of the record, appropriately determine

whether the federal statute precludes recovery of the purchase money. We think that such is its effect.

Id. at 213-14.

More recently, *Dervin Corp. v. Banco Bilbao Vizcaya Argentaria*, 2004 WL 1933621 (S.D.N.Y. Aug. 30, 2004) relied upon *Sola Electric Company* in concluding that an agreement to pay interest on a checking account was unenforceable because it violated a federal law prohibiting the payment of interest on checking accounts. *Id.* at 3 n.2. After citing *Sola Electric*, the court explained that:

As this Court recently noted, a federal court has a duty to determine whether a contract violates federal law before enforcing it. “The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in . . . federal statutes Where the enforcement of private agreements would be violative of that policy it is the obligation of the courts to refrain from such exertions of judicial power.” *Wechsler v. Hunt Health Sys., Ltd.*, 216 F. Supp. 2d 347, 354 (S.D.N.Y. 2002) (quoting *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84 (1982)).

Id. at *3.

As applicable here, Grogan’s Employment Agreement **expressly** incorporated FDIC golden parachute regulations, which explicitly prohibit any post-termination payment to an IAP that FDIC deems within the regulations without its prior approval or non-objection. And even without such language, the golden parachute regulations applied [REDACTED]

[REDACTED]

[REDACTED] any such payments (including attorneys' fees and prejudgment interest) are prohibited by federal law, whether due to contract, state statute, state policy, or anything else that is required to yield to federal law and policy.¹⁰ Under the Supremacy Clause, Section 1828(k) and FDIC implementing regulations, any state court order directing payments [REDACTED] is preempted.

H. Notwithstanding Lack of Jurisdiction and Preemption in State Court, Grogan's Arguments Are Without Merit.

As discussed above, [REDACTED]

[REDACTED]

[REDACTED] there is no jurisdiction in state court because Grogan's sole remedy was in federal court under the APA.

Moreover, any state court order [REDACTED]

[REDACTED] would be preempted because it would be impossible for Seattle Bank to comply with such an order and also comply with federal law [REDACTED]

¹⁰ Even under Washington law, any contract that is in conflict with statutory requirements is illegal and unenforceable as a matter of law. *See, e.g., Failor's Pharmacy v. Dept. of Soc. & Health Servs.*, 125 Wn.2d 488, 499 (1994).

In his opening brief Grogan takes the remarkable position that “the Superior Court should have overruled the FDIC.” App. Brief at 29. Despite presenting no authority that Washington courts have jurisdiction to review and reverse federal agency decisions and presenting no authority that his claims are not preempted by federal law, Grogan spends much of his brief arguing application of federal law as if he were in federal court. Although this Court can completely disregard such arguments, they are patently wrong in any event and addressed below.

1. Courts Will Not Order a Payment to an IAP Prohibited by FDIC.

As the agency administering the golden parachute statute and regulations, FDIC is due the highest deference when it interprets its own statute and regulations. *E.g.*, *Barnhart v. Walton*, 535 U.S. 212, 217-18, 122 S. Ct. 1265, 152 L. Ed. 2d 330 (2002); *Utah v. Evans*, 536 U.S. 452, 472, 122 S. Ct. 2191, 153 L. Ed. 2d 453 (2002); *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778 (1984). Seattle Bank is aware of no decision in any jurisdiction rejecting FDIC’s consistent position that all amounts payable to or for the benefit of an IAP arising from his or her termination are subject to the golden parachute regulations, including attorneys’ fees, costs, and interest otherwise recoverable by the claimant. *See Harrison v. Ocean Bank*, 2011

WL 2607086, No. 10-23138-CIV (S.D. Fla. June 30, 2011); *Cent. Pac. Bank v. Kirkeby*, 2013 WL 6487468 (D. Haw. Dec. 9, 2013).

Moreover, courts routinely refuse to permit payments FDIC has prohibited. *See Martinez v. Rocky Mountain Bank*, 2013 WL 5498121 (10th Cir. Oct. 4, 2013) (bank excused under doctrine of impossibility from paying bank executive's request for 12 months' severance under employment contract, where FDIC refused to authorize the payment as a prohibited golden parachute); *McCarron v. FDIC*, 111 F.3d 1089, 1096 (3rd Cir. 1997) (no factual or legal basis to permit payment of bank executives' severance claims under golden parachute regulations where FDIC did not consent to payment); *Harrison v. Ocean Bank*, 2011 WL 2607086, No. 10-23138-CIV (S.D. Fla. June 30, 2011) (absent FDIC approval, troubled institutions are prohibited from making golden parachute payments, as defined by § 12 C.F.R. § 359.1(f) and 359.2); *Mountain Heritage Bank*, 728 S.E.2d 914 (Ga. Ct. App. 2012) (bank prohibited by federal regulations from paying severance where payment fell within the definition of a prohibited golden parachute payment and FDIC did not consent to it); *Clark v. Carver Fed. Sav. Bank*, 297 A.D.2d 599, 600 (N.Y App. Div. 2002) (bank had no obligation to pay severance benefits pursuant to former bank president's employment contract absent regulator's approval, which was denied).

Even under Washington law, FDIC approval was a condition precedent to Seattle Bank's obligation to pay any severance pay to Grogan. *See Martinez*, 2013 WL 5498121 at 3 (federal golden parachute regulations impose condition precedent of agency approval on any contract where regulations apply, regardless whether parties consent to such condition); *Ross v. Harding*, 64 Wn.2d 231, 236, 391 P.2d 526 (1964) ("Conditions precedent are those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available."). Thus, absent FDIC approval of a single year's severance pay, Grogan had no right to performance, there was no breach by Seattle Bank, and Grogan was not entitled to any judicial remedy. [REDACTED]

[REDACTED] To the extent Grogan's Employment Agreement required more, any such conditions precedent failed when FDIC approval was denied.

I. The "State Law Exception" Does Not Apply.

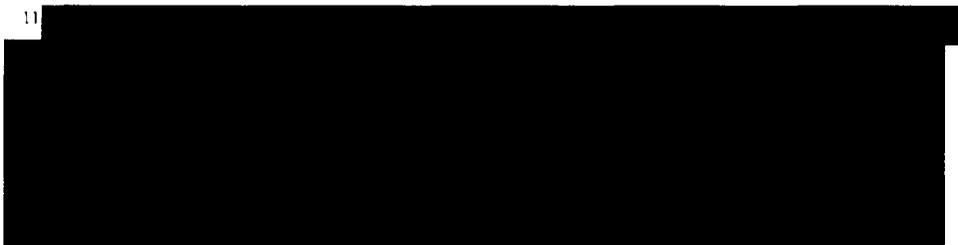
Again, although he should be making this argument in federal court, if anywhere, Grogan cites 12 C.F.R. § 359.1(f)(2)(vi) as authority that the payment of severance to him is not a payment within the definition of "golden parachute" contained in Section 359.1(f)(1) because

the payment could be construed as “wages” under certain provisions of Washington law.¹¹ The language of the cited regulation reads in full as follows:

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).

Grogan’s argument interprets the language of the statute more broadly than intended by FDIC. According to the Federal Register, Vol. 60, March 29, 1995, this exception was included to address an issue raised in a small number of comment letters to the proposed rule, which noted that in certain states, such as California, which had statutes at that time that expressly required employers to pay severance benefits in certain circumstances, an insured institution complying with those state statutes could potentially be deemed to violate Part 359. This is a very limited exception to address those situations where severance or similar payments were specifically required to be paid under state law. Simply stating that severance pay may be considered wages under Washington law does not

¹¹



make severance pay “required . . . pursuant to state statute.” Under Grogan’s interpretation, the exception would swallow the rule because whenever severance pay was covered by state law, Part 359 would not apply. Seattle Bank has found no case or other authority—and Grogan cites none—that support this interpretation. Indeed, the Part 359 cases uniformly reject legalistic arguments that are inconsistent with the overriding federal purpose of precluding excess compensation to executives when banks are designated as being in “troubled condition.”

J. The “White Knight” Exception Does Not Apply, and Even If It Did, FDIC Still Would Have to Approve Any Payment.

Again, while he should be making this argument in federal court, Grogan claims he is entitled to the “white knight” exception to prohibitions on golden parachute payments as set forth in § 12 C.F.R. 359.4(a)(2). This exception is intended to allow troubled institutions to hire individuals to help save the institution from failing after they become troubled. This section, however, could not have applied to Grogan, because it is undisputed that Seattle Bank [REDACTED] [REDACTED] and FDIC never approved such exception before he came to work at Seattle Bank. *See McCarron*, 111 F.3d at 1097 (white knight exception applies to “employees who, with full and unambiguous written prior approval by the FDIC and the appropriate

regulatory authority, are induced to leave a stable position with another institution in order to try to prevent a **troubled** institution's failure.") (emphasis added). Because the golden parachute regulations only apply to troubled institutions, Grogan's contention that Seattle Bank should have sought such an exemption for him [REDACTED] is nonsensical on its face. In any event, it is wholly irrelevant, because even where a "white knight" exception is approved, FDIC still must provide prior approval of any actual payment pursuant to an arrangement or agreement previously approved pursuant to such exception. *See id.* at 1096 (even if prior approval is granted, any payment to "white knight" is subject to FDIC approval). [REDACTED]

the "white knight" exception is irrelevant.

V. CONCLUSION

[REDACTED]
[REDACTED]
[REDACTED] State courts have no jurisdiction to entertain challenges to FDIC determinations because judicial review of those decisions lies exclusively in federal court under the APA. Grogan's state law claims for any amount in excess of one year's salary are preempted [REDACTED]
[REDACTED]

[REDACTED] This court should affirm the trial court in all respects.

RESPECTFULLY SUBMITTED this 14th day of December, 2015.

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DECLARATION OF SERVICE

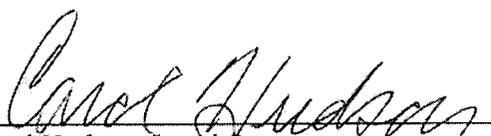
The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused a true and correct copy of this document to be delivered via email and U.S. mail to:

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