

HOUSE BILL REPORT

SHB 2042

*As Passed House
March 18, 1991*

Title: An act relating to earnest money agreements.

Brief Description: Establishing conditions for the forfeiture of an earnest money deposit as an exclusive remedy.

Sponsor(s): By House Committee on Judiciary (originally sponsored by Representatives Appelwick and Padden).

Brief History:

Reported by House Committee on:
Judiciary, March 5, 1991, DPS;
Passed House, March 18, 1991, 95-0.

**HOUSE COMMITTEE ON
JUDICIARY**

Majority Report: *That Substitute House Bill No. 2042 be substituted therefor, and the substitute bill do pass.*
Signed by 18 members: Representatives Appelwick, Chair; Ludwig, Vice Chair; Padden, Ranking Minority Member; Paris, Assistant Ranking Minority Member; Belcher; Broback; Forner; Hargrove; Inslee; R. Meyers; Mielke; H. Myers; Riley; Scott; D. Sommers; Tate; Vance; and Wineberry.

Staff: Susan Kirkpatrick (786-7291).

Background: Residential real estate transactions commonly provide for forfeiture of earnest money as liquidated damages upon default. Liquidated damages are set in a contract and are to be paid upon breach of the contract without the need to prove actual damages.

The enforceability of a liquidated damages provision was recently reviewed by the Washington Court of Appeals in Lind Building v. Pacific Bellevue Developments. The court in Lind noted that "Washington courts have generally looked with favor upon liquidated damages clauses and have upheld them where the sums involved did not constitute a penalty."

However in Lind, the court found that a liquidated damages clause in a contract is unenforceable if: (1) the amount of liquidated damages is not a reasonable forecast of anticipated damages; (2) there is no actual loss or only a

minimal loss, as compared to the amount of liquidated damages, from the breach of the contract; or (3) calculation of actual damages is not difficult to ascertain or prove.

There is some concern that the rules set out in Lind depart somewhat from prior case law, and that the Lind case has created some uncertainty regarding the enforceability of liquidated damages clauses.

Summary of Bill: A provision in an earnest money agreement for a real estate transaction which provides for forfeiture of an earnest money deposit to the seller as the seller's sole and exclusive remedy if the purchaser fails, without legal excuse, to complete the purchase, is valid and enforceable if the following conditions are met:

(1) The total earnest money deposit to be forfeited does not exceed 5 percent of the purchase price; and

(2) The agreement includes an express provision regarding the forfeiture of the earnest money deposit. If the real estate is being purchased by the purchaser primarily for the purchaser's personal, family, or household purposes, the express provision regarding the earnest money deposit forfeiture must be in typeface no smaller than other text provisions of the agreement, and must be separately initialed or signed by the purchaser and seller.

If the agreement for the purchase and sale of real estate does not meet the requirements, the seller has all rights and remedies otherwise available. The rights of any party to such an agreement arising from any other breach or default by either party under the agreement or the recovery of attorneys' fees, if provided by the agreement, is not affected or limited.

Fiscal Note: Not requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: This bill is a fair and appropriate compromise. A buyer's liability is limited, and sellers are not embroiled in litigation under Lind. Parties can opt into the safe harbor statute by meeting the conditions. If the conditions are met, the earnest money deposit is forfeitable. Forfeiture of the earnest money deposit has to be the seller's sole and exclusive remedy.

Testimony Against: None.

Witnesses: Doug Tingvall, Washington Association of Realtors (in favor).