

# SENATE BILL REPORT

## SHB 1699

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As Reported By Senate Committee On:  
Judiciary, March 30, 2005

**Title:** An act relating to agreements for the purchase and sale of real estate.

**Brief Description:** Regulating agreements for the purchase and sale of real estate.

**Sponsors:** House Committee on Judiciary (originally sponsored by Representatives Lantz, Priest and Tom).

**Brief History:** Passed House: 3/08/05, 96-0.

**Committee Activity:** Judiciary: 3/22/05, 3/30/05 [DPA].

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### SENATE COMMITTEE ON JUDICIARY

**Majority Report:** Do pass as amended.

Signed by Senators Kline, Chair; Weinstein, Vice Chair; Johnson, Ranking Minority Member; Carrell, Esser, Hargrove, McCaslin and Rasmussen.

**Staff:** Lilah Amos (786-7429)

**Background:** In liquidated damages clauses in written contracts, a specified amount of money can be agreed upon by all parties as appropriate damages in case of a breach of contract. Common law requires that the liquidated damages clause be a reasonable estimate of the possible harm from the future breach. The liquidated damages clause must be necessary or advisable due to anticipated difficulty in determining actual damages when a breach occurs. Washington courts have attached varied importance to actual damages after a breach when evaluating the reasonableness of liquidated damages clauses in contracts.

In real estate transactions, sellers often require the purchaser to deposit earnest money which can be forfeited as liquidated damages in the event of a breach. In 1991, the Legislature specified the contractual provisions which must be agreed to in earnest money agreements in order for the forfeiture to occur regardless of the seller's actual damages. They must meet the following requirements:

- *Maximum Amount.* The maximum amount which can be forfeited cannot exceed 5 percent of the purchase price.
- *Standard Language.* A clause, using specified language, must be inserted stating that forfeiture of the earnest money deposit is the sole and exclusive remedy available to the seller for breach of contract.
- *Notice.* If the real estate is to be used primarily for residential purposes, the forfeiture provision must be in a typeface no smaller than the other text and must be separately initialed or signed by the seller and the purchaser.

In January, 2005, in *Chrisp v. Goll*, the Court of Appeals, Division One, held that an earnest money forfeiture provision could not be enforced if there was not actual compliance with the

statutory requirement that the forfeiture clause be separately signed or initialed by all parties. The doctrine of substantial compliance was not effective to excuse noncompliance with all acts required by the statute.

**Summary of Amended Bill:** The provision which guarantees enforcement of a clause providing for forfeiture of earnest money as the seller's sole and exclusive remedy upon breach of contract is extended to all provisions for liquidated damages, not just earnest money. These provisions are declared to be valid and enforceable regardless of actual damages. Liquidated damages are defined as an amount agreed upon by the parties as damages for breach of the agreement, and do not include other deposits or payments made by the purchaser.

The requirement that standard language be used in an earnest money agreement, and the requirement that notice of the forfeiture provisions be provided to the parties in specific typeface and authorized by initialing the contract provision, is deleted. These requirements apply equally to residential and commercial property transactions.

The changes apply only to contracts executed after the effective date of the act.

**Amended Bill Compared to Original Bill:** The provisions of the act apply only to contracts executed after the effective date of the act. A technical correction was made.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** The bill contains an emergency clause and takes effect immediately.

**Testimony For:** This bill removes the requirement that earnest money forfeiture provisions be initialed. The requirement is easy to overlook. A recent appellate court decision which appears to be at odds with prior case law has caused some concern that the rights of parties to real estate contracts might be unclear. This proposed legislation is an attempt to clarify how courts must view liquidated damage clauses in all real estate purchase and sale agreements.

**Testimony Against:** None.

**Who Testified:** PRO: Representative Lantz, prime sponsor; and Bob Mitchell and Annie Fitzsimmons, Washington Association of Realtors.