

SENATE BILL REPORT

SHB 2042

AS REPORTED BY COMMITTEE ON LAW & JUSTICE, APRIL 2, 1991

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

**SPONSORS:** House Committee on Judiciary (originally sponsored by Representatives Appelwick and Padden).

**HOUSE COMMITTEE ON JUDICIARY**

**SENATE COMMITTEE ON LAW & JUSTICE**

**Majority Report:** Do pass.

Signed by Senators Nelson, Chairman; Thorsness, Vice Chairman; Erwin, Hayner, Madsen, Newhouse, and Rasmussen.

**Staff:** Susan Carlson (786-7418)

**Hearing Dates:** March 28, 1991; April 2, 1991

**BACKGROUND:**

Real estate transactions commonly provide for forfeiture of earnest money as liquidated damages upon default. Liquidated damages are the amount in the contract agreed on by the parties as the sum to be paid if the contract is breached.

In 1989, the Washington Court of Appeals in Lind Building v. Pacific Bellevue Developments 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." In the Lind case, however, the court held that a liquidated damages clause in a contract would not be enforced if: (1) the amount of liquidated damages does not represent an effort by the parties to make a reasonable forecast of anticipated damages; (2) there are no actual substantial damages; or (3) calculation of actual damages is not difficult to ascertain or prove.

**SUMMARY:**

A real estate transaction which provides for forfeiture of earnest money to the seller as the seller's sole and exclusive remedy upon default by the purchaser is valid and enforceable regardless whether the seller has any actual damages IF:

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

(2) The agreement expressly states that forfeiture of the earnest money is the seller's sole and exclusive remedy. If the real estate is primarily for the purchaser's personal,

family, or household purposes, this provision must be in typeface no smaller than other text, and initialed by the purchaser and seller.

If the real estate agreement does not satisfy these requirements, the seller has all rights and remedies otherwise available.

**Appropriation:** none

**Revenue:** none

**Fiscal Note:** none requested

**TESTIMONY FOR:**

The uncertainty and increased litigation caused by the Lind case will be reduced.

**TESTIMONY AGAINST:** None

**TESTIFIED:** Doug Tinville, Washington Association of Realtors (pro)