

FINAL BILL REPORT

SHB 2042

C 210 L 91
Synopsis As Enacted

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

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

House Committee on Judiciary
Senate Committee on Law & Justice

Background: Residential real estate transactions commonly provide for the forfeiture of an earnest money deposit in the event that the terms of the transaction are breached. The forfeiture of the earnest money deposit is considered payment of liquidated damages. Liquidated damages are the monies a party to a contract agrees to pay upon breach of the contract, without the other party having 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 went on to find 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, arising 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 the Lind case has created some uncertainty regarding the enforceability of liquidated damages clauses.

Summary: For the purposes of this legislation, an "earnest money deposit" is defined as a deposit or payment of a part of the purchase price for property for the purpose of binding the purchaser to the agreement. The deposit or payment may be in the form of cash, check, promissory note,

or other things of value. The deposit or payment must be identified in the purchase agreement as an earnest money deposit, separate from other deposits or payments made by the purchaser.

A provision in a written agreement for the purchase of real estate which provides for the forfeiture of an earnest money deposit is valid and enforceable under certain conditions. The forfeiture of the deposit must be the seller's sole and exclusive remedy if the purchaser fails, without legal excuse, to complete the purchase. In addition, the following two conditions must be satisfied:

- (1) The total earnest money deposit to be forfeited must not exceed 5 percent of the purchase price; and
- (2) The agreement must include an express provision regarding the forfeiture of the earnest money deposit.

If the real estate is being purchased 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. The provision must be separately initialed or signed by both the purchaser and the seller.

If the real estate purchase agreement does not meet the above requirements, then the seller has all rights otherwise available at law or in equity as a result of the purchaser's failure to complete the purchase. This legislation does not affect the rights of any party involved in the real estate transaction with respect to any cause of action arising from a breach of the agreement or to the recovery of attorneys' fees.

These provisions apply only to written agreements entered on or after the effective date of this act.

Votes on Final Passage:

House	95	0	
Senate	45	0	(Senate amended)
House	95	0	(House concurred)

Effective: July 28, 1991