

No. 80623-3

SUPREME COURT OF WASHINGTON

MICHAEL MILLER; VICKI RINGER; and JOANNE FAYE  
TORGERSON, as trustee for the TORGERSON FAMILY TRUST;

Petitioners,

v.

ONE LINCOLN TOWER, LLC; BELLEVUE MASTER, LLC; and LS  
HOLDINGS, LLC,

Respondents.

CLERK

BY RONALD R. CARPENTER

2008 AUG 27 P 2:44

FILED  
SUPREME COURT  
STATE OF WASHINGTON

APPEAL FROM THE COURT OF APPEALS  
DIVISION ONE

*AMICUS CURIAE* BRIEF OF THE MASTER BUILDERS  
ASSOCIATION OF KING AND SNOHOMISH COUNTIES ON  
BEHALF OF RESPONDENTS

Scott E. Hildebrand, WSBA #40113  
Attorneys for Master Builders Association

335 116th Avenue Southeast  
Bellevue, WA 98004-6407

Telephone: (425) 460-8205

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2008 AUG 18 A 8:58

BY RONALD R. CARPENTER

CLERK

EXHIBIT   A  

PAGE   1   OF   8

## I. INTRODUCTION

The Master Builders Association of King and Snohomish Counties (“MBA”) submits the following *amicus curie* brief on behalf of Respondents. The MBA strongly supports the enforcement of so-called “earnest money” limitation of remedies provisions in purchase and sale agreements, because they serve a vital public interest as well as honor the freedom of contract.

## II. ABOUT THE MBA

The MBA was founded in 1909 by a group of Seattle builders who saw a need to unite to address the many concerns and issues affecting the housing industry. They shared technology and jointly solved construction problems. They actively worked with government to develop laws that protected the environment while still providing attractive, affordable communities and homes for the families of the Puget Sound region.

The MBA is comprised of professional home builders, architects, remodelers, suppliers, manufacturers and sales and marketing professionals. Because of its active approach to the region’s housing needs, the MBA has become the largest local home builders association in the United States.

The MBA believes in three basic tenets:

1. Home ownership should be in reach of every American.
2. Each house should be well designed, constructed and located in attractive communities.

3. Each home should be built under the free enterprise system.

With more than 4,100 member companies, representing all facets of housing construction, the MBA is the authoritative voice and information source for housing to government, the public, the media and homeowners in the Seattle metropolitan area.

The MBA is dedicated to making homes affordable for the residents of King and Snohomish counties. As a united voice representing the home building industry, the Association works closely with governments to develop legislation that regulate development so that we can build quality homes at reasonable costs while maintaining the beauty and quality of life in our regions.

Most scholars, public policy makers, industry analysts, and civic and community leaders agree that supporting homeownership is good for America. Homeownership helps our community in each of the following ways:

1. Strengthening families and good citizenship. People have greater control when they own their home and can exercise more responsibility over their living environment.

2. Aiding personal financial security. By purchasing a home, a family acquires a place to live, raise children, and invest in an asset that grows in value. A home can provide capital to start a small business, finance college tuition, and generate financial security for retirement. Homeowners have \$4 billion in equity in their homes.

Community. Homeownership helps stabilize neighborhoods and strengthen communities. It creates important local and individual incentives for maintaining and improving private property and public spaces.

3. Providing economic prosperity for families and communities. Homeownership acts as a dynamic generator of economic growth. Every new home creates two jobs directly related to construction, and many more jobs through increased demand for household goods and services. The design, construction and rehabilitation of homes employs local labor and uses a vast array of American-made products and services. Home building has often led the economic recovery from national recessions due to its strong job multiplier effect and because increased home starts and home sales represent renewed economic confidence.

In achieving all of these goals, flexibility is necessary for all parties involved; from the developers on down the line. Inflexibility; particularly imposed by government entities that do not understand the development process, severely hampers the process of getting citizens into homes and keeping them there.

### III. SUMMARY OF ARGUMENT

The MBA believes that this Court should enforce contractual provisions that limit a homebuyer's remedies to the return of earnest money, plus interest, plus any amount the buyer has spent in reliance on the contract. Such

provisions maximize flexibility, which maximize efficiency, which ensure that fewer projects fail. Failed projects have devastating consequences throughout our economy.

The MBA also supports the prevention of unjust enrichment by the real estate agents at issue in this case. While agents and developers should have the right to contract with each other, maintaining the integrity of the fiduciary relationship should be paramount, and any ambiguity about whether that relationship has been maintained should be resolved in favor of disgorging benefits from the fiduciary.

#### IV. ARGUMENT

A. **“Earnest Money” Limitation of Remedy Provisions Aid Flexibility in a Valuable Way.**

The MBA believes that consenting parties should have the freedom to contract, and the provision at issue in the case could be affirmed solely on those grounds. However, because that issue is likely already well briefed for the Court, this brief will focus on the other reasons that these provisions should be enforced.

Property development is, and must be, a fluid process. It takes years for a project to evolve and it is impossible to predict all the twists and turns that will befall a project. If developers are punished with expensive litigation when a project fails or must be significantly changed, they will be less likely to take the immense risk of property development. Without developers taking those risks,

new development will stagnate and the results will be disastrous.

In the instant case, there was a contract provision that allowed the Sellers to limit the Buyers' remedies to the return of earnest money plus interest if the project was not built. There was also a separate provision that limited the Buyers' remedies in the event of any breach.

Buyers have argued that the former provision is reasonable, but the latter is not. In reality, each is necessary to effectuate the same goal. The latter provision protects the developer in the event of changes to the project.

To take a common example, developers often "aim big." Imagine that they plan a development with 100 condominiums. They secure earnest money from 100 buyers and begin to develop. However, because of factors beyond the developers' control, the developer can now only develop 50 condominiums.

In one sense, the project is now "not being built" for 50 of the buyers, and is being "built" for the remaining 50. However, each of the 100 buyers could claim that their unit is being built.

What should the developer do? She has, in essence, two options. One is to terminate 50 of the Agreements; the other is to terminate all 100. If the developer has the benefit of the two contractual provisions like Seller had in the instant case, she would terminate 50 of the Agreements and still provide housing for the other 50. However, if she is only permitted to refund earnest money if the project is "not built", then the only way to avoid liability for damages or

specific performance for 50 of the buyers is to terminate the Agreements of all 100. This would yield a less efficient outcome and be worse for everyone involved.

**B. Earnest Money Limitations of Remedy Provisions Are Especially Appropriate when an Agreement Is Between a Developer and Her Real Estate Agent.**

The MBA is particularly concerned with the possibility that the earnest money limitation of remedy provision might not be enforced against real estate agents seeking to obtain the property of the developer they were representing in the transaction.

The MBA believes in the highest code of ethics for all participants in the home development process. This is especially true for participants who expressly owe fiduciary duties. Real estate agents, like attorneys and trustees, owe the utmost duty of good faith to the people they represent.

Here, even if the Buyers are believed, they were still the agents for the project. They are now facing a developer who does not want to sell to its agent. It seems inappropriate for the Buyers to take a contrary position against their principal; both in signing the contracts, and in suing their principal after the fact.

Attorneys who seek to do business with their clients must meet an extraordinarily high threshold. Even then, if a client objects, the transaction is essentially voidable at the option of the client. Real estate agents hold no lesser a duty to their principals. A similar rule applied to them would be in the interest

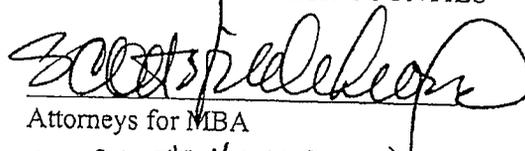
of the MBA and the public, by maintaining confidence in all aspects of the home development system.

#### V. CONCLUSION

The MBA respectfully asks this Court to adopt a rule that allows developers to limit a buyer's remedies to the return of earnest money, plus interest, plus amounts expended by the buyer in the course of the Agreement. Such an agreement is fair and will maximize the benefits not only to the parties to the Agreement, but to the community as a whole.

RESPECTFULLY SUBMITTED this 13 day of August, 2008.

MASTER BUILDERS ASSOCIATION OF  
KING AND SNOHOMISH COUNTIES

  
Attorneys for MBA  
WSBA # 40113

FILED AS ATTACHMENT TO E-MAIL