
FINANCING

Question: I received a phone message from the listing agent asking the buyers to remove their financing contingency. Would I possibly not be representing my buyers properly by having them remove the contingency when we did not get a written request?

Answer: Do not even suggest that the buyers waive the financing contingency, unless and until the sellers give proper written notice of their election to terminate the agreement. If the sellers do give such notice, let the buyers make the decision as to whether they waive the financing contingency. Agents have been held liable for suggesting that the buyers remove the financing contingency when there was no benefit to them in doing so.

Question: We have a sale pending calling for zero-down conventional financing. It turns out there is no such product in the market. The buyers want to switch to a 3%-down FHA loan. The sellers have received another offer that will net them more money. Can the sellers get out of the first sale because the buyers are changing financing?

Answer: The sellers cannot avoid the agreement if the buyers can obtain alternate financing without any additional expense or delay to the sellers. With FHA financing, the buyers are prohibiting from paying certain closing costs. The sellers are not obligated to pay those additional costs, but are bound by the agreement, if someone else pays them.

Question: Who is protected by the Financing Contingency -- the Buyer or the Seller? If the Buyer doesn't remove the contingency, the Seller has the option to sell the property to someone else, with appropriate notification to the Buyer, after the Buyer has missed the waiver deadline. If the Buyer does not give notice, can he, when it comes time to close, say, "I didn't waive the financing contingency -- I couldn't get financing -- and I want out." Is the Buyer obligated to buy the home, even if he doesn't waive the contingency? Do you recommend asking for the financing contingency waiver if it isn't submitted by the deadline, or have you found that that reminds the Buyer of an "out" he may have forgotten?

Answer: The financing *contingency* is solely for the buyers' benefit and protection. Therefore, only they can assert or waive it. However, the *deadline* for waiving the financing contingency is for the sellers' benefit. The sellers may elect to terminate the agreement, if the buyers have not waived the financing contingency by the agreed deadline. The sellers should only exercise that right if they want badly enough to firm up the deal that they are willing to risk killing it. The buyers should not waive the financing contingency, unless and until the sellers elect to terminate the agreement, and even then, they should carefully consider the risk before doing so. Accordingly, most sales close without the financing contingency ever having been waived.

If the buyers ultimately are unable to obtain financing through no fault of their own and have not waived the financing contingency, then they are excused from the transaction without liability (i.e., they have a "shield" or defense) and are entitled to a refund of the earnest money.

Question: Mutual acceptance occurred on January 16th. The buyers have a pre-approval letter for the subject property dated January 17th. Paragraph one of NWMLS Form 22A states that buyer has 5 days to make loan application. Paragraph two permits the sellers to elect to terminate the agreement, if the buyers have not waived the financing contingency within 30 days after making loan application. When is the deadline? 30 days from the 17th or from the 24th (expiration of the 5-day time limit for loan application)?

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Answer: The time limit for waiver of the financing contingency begins when the buyers complete their loan application for the subject property. A loan application is complete when the lender or mortgage broker has received sufficient information, documents and fees to begin processing the application. In this case, that was January 17th, assuming the buyers also paid their loan application fee and submitted all documents necessary to begin processing the loan.

Question: The buyers made loan application and are told that they do not qualify. The sellers gave notice of their election to terminate the purchase and sale agreement based on the buyers' failure to deliver a prequalification letter within 3 days after making loan application, as agreed. The buyers *thereafter* obtain a prequalification letter from another lender. Under the financing contingency, can the sellers terminate the purchase and sale agreement and accept an offer from another buyer?

Answer: Yes. If the agreement so provides, the sellers may elect to terminate the agreement if the buyers fail to deliver to the listing agent a prequalification letter within 3 days after making loan application. If the buyers deliver the prequalification letter *after* the expiration of the 3 day period, but *before* the sellers elect to terminate, then the lateness of the letter is excused and the sellers cannot terminate the agreement.

Question: If the buyers fail to make loan application within the time limit specified in the purchase and sale agreement, are the buyers in default, such that the sellers can accept another offer?

Answer: The failure to timely make loan application probably is not a material breach of the contract, but rather, excuses (*i.e.* waives) the financing contingency. *Cavell v. Hughes*, 29 Wn.App. 536, 629 P.2d 927 (1981). "[F]ailure or nonoccurrence of a condition will not excuse the promisor's performance if the condition's failure was the fault of the promisor." *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wn.App. 630, 636, 700 P.2d 338 (1985). In other words, if the buyers fail to complete the purchase, they will be in default, regardless of their inability to obtain financing, unless some other contingency in the purchase and sale agreement is not satisfied or waived.

Question: A purchaser provided a letter from their lender stating that they were approved for their loan. They did not get their loan at the last minute. Does the letter from the lender constitute a waiver of the financing contingency?

Answer: No. A waiver is a "voluntary relinquishment of a known right." A waiver must be clear, unequivocal and unconditional. A contingency is satisfied when the event upon which the agreement was conditioned has occurred. In a financing contingency, that event is the buyer obtaining the loan, which does not occur until the loan is funded concurrent with closing. A loan commitment or approval letter does not satisfy the financing contingency. Therefore, unless the buyers failed to make a best effort to obtain a loan, they are not in default and are entitled to a refund of the earnest money.

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