

Legal Hotline Q & A

Q: I represent a buyer that lost his job during the repair negotiation period. I did not become aware of this until the mortgage broker notified me after the repair negotiation addendum was signed by both parties. Subsequently, I submitted a written unconditional disapproval of the inspection report to terminate the transaction since we were still within the inspection period. In addition, we submitted a loan decline letter from the mortgage broker and a letter of apology from my client explaining the misunderstanding at the listing agent's request. The timing was such that it was obvious the buyer had to have known he lost his job and yet continued to negotiate for repairs. The seller refused to release the earnest money. Did I make a mistake on how I handled this for my buyer?

A: Contingencies are not "weasel" clauses used to get out of deals or protect earnest money or any of the other things they are routinely used for by agents. That said, motive is irrelevant when exercising rights under a contingency. The right under the contingency does not depend on the motivation for its use. It depends on the contingency itself using an objective standard.

The most famous case in Oregon using this principle involved a buyer who disapproved of a pest and dry rot inspection because his fiancée, who had not seen the house at the time the contract was formed, decided she didn't like the house. The buyer's agent told the listing agent the "real" reason the buyer disapproved was because of the fiancée not liking the house. The listing broker told the seller and the seller sued the buyer for the earnest money. The court rejected the seller's claim finding that the reason the buyer disapproved was irrelevant if the report showed deficiencies that would support a reasonable person in the same circumstances disapproving. In that case, the report showed dry rot from an unknown water source and that was sufficient to support the disapproval.

By using the inspection contingency when the real reason was loan failure, you have created the same situation as the case just mentioned. However, if there was a finance contingency and it failed as well, the seller suffers no damage by attempted misuse of the inspection contingency. So, all that has happened is that by attempting to use the inspection contingency for something other than it was intended for, you have alienated the seller (or the listing agent, or both) and they are now contesting the earnest money. Once they get to court, the court will ignore the motives and look at the contingencies themselves to determine if there were contractual grounds for the buyer to terminate the transaction.