



# WASHINGTON REALTORS®

## Legal Hotline Q&A of the Week

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### Question:

We represent a buyer attempting to purchase a property with a financing contingency in place, as indicated by Paragraph 2.A of Form 22A. Despite the buyer's good faith effort to obtain financing, the loan underwriter ultimately rejected the loan on the closing date due to a discrepancy in the calculation of variable income. On the evening of the closing date, the seller's agent delivered Form 90D, demanding the release of earnest money to the seller, and changed the listing back to active on the MLS. The following day, the lender provided the buyer with a loan denial letter, which was then submitted to the seller along with Form 90I, the loan application date, the initial loan estimate, and verification that the buyer had sufficient non-contingent funds, all in accordance with Paragraph 4 of Form 22A. While the loan denial was issued after the closing date and both parties are now out of contract, the buyer never waived the financing contingency—no Form 22AR was executed, nor was the contingency otherwise waived. Given these circumstances, does the buyer still retain the protections of the financing contingency, and are they entitled to a return of their earnest money despite the timing of the loan denial?

### Answer:

Yes. Based on the facts presented, buyer is entitled to recovery of the EM. The language in paragraph 1 of the Form 22A Financing Addendum regarding "survival" means that the buyer is entitled to the protections of the contingency even if buyer does not provide the lender's letter and demand for recovery of the EM until after the sale has failed. It appears this buyer has done everything buyer could do, under the timing of events, to timely and properly demand recovery of the EM based on the financing contingency. If seller refuses to release the EM to buyer, broker should advise buyer to seek legal counsel.

*The Legal Hotline Lawyer does not represent Washington REALTORS® or its members. The advice contained herein does not constitute legal counsel. To browse through our database of past Q&A's, visit [warealtor.org/legal-hotline](http://warealtor.org/legal-hotline). Attorney Annie Fitzsimmons writes the Legal Hotline Question and Answer of the Week. This is a WR members-only benefit so you will be prompted to log in with your MI number and password. Your Designated Broker is cc'd on Legal Hotline inquiries.*

