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Real Estate Client Alert: The Future is Certain for Future Advances in Washington State

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For years, “first in time, first in right” priority for all future advances seemed certain in Washington state. Enter the Washington Supreme Court’s decision in *Commencement Bank v. Epic Solutions, Inc.*,¹ which precipitated an unwelcomed return to the common law and its attending risks respecting priority for future advances. But to the relief of lenders, years of certainty were followed by just *months* of uncertainty, as the Washington legislature responded quickly last year to override the Supreme Court’s decision in *Commencement Bank* and thereby fortify a future of certainty for future advances in Washington state.

A future advance clause in a mortgage or deed of trust provides security for a lender’s future advance of loan proceeds to a borrower. But not all future advance clauses are created equal. One distinction among the group is whether the lender is *obligated* to make certain advances of loan proceeds in the future or whether the lender may, at its *option*, advance loan proceeds to the borrower at a future date. In Washington, the first in time, first in right principle governs mortgage lien priority. Meaning, the first party to obtain a mortgage lien, either under a mortgage or a deed of trust, has first priority over subsequent mortgagors in a foreclosure proceeding.² However, under Washington common law, if a mortgage or deed of trust secures *optional* future advances, then any such future advance by the lender will be subordinate to an encumbrance that intervenes the initial grant of mortgage or deed of trust to the lender, and the lender’s future advance of loan proceeds, but only if the lender made the optional future advance with actual knowledge of the intervening encumbrance.³

Section 60.04.226 of the Revised Code of Washington (RCW) abrogates the distinction between obligatory and optional future advances with respect to lien priority.⁴ For decades, lenders and lawyers in Washington understood, with apparent certainty, that RCW 60.04.226 applied to all loans, and that a valid future advance clause in a mortgage or deed of trust would effectively secure the priority of a future advance of loan proceeds against an intervening encumbrance (with the exception of certain statutorily described instances regarding construction financing and mechanics’ and materialmen’s liens). This long-held understanding was vitiated by the Supreme Court in June 2022 when it held in *Commencement Bank* that RCW 60.04.226 only abrogates the distinction between obligatory and optional future advance clauses in the construction context.⁵ The Supreme Court’s decision breathed life into the obligatory/optional distinction for future advances in the context of any non-construction loan and it introduced uncertainty for non-construction loans and increased costs for lines of credit.⁶

¹ (In re EM Property Holdings, LLC), 199 Wash.2d 725, 511 P.3d 1258 (2022).

² See, e.g., *Hollenbeck v. City of Seattle*, 136 Wash. 508, 240 P. 916 (1925).

³ *Commencement Bank*, 199 Wn.2d at 739.

⁴ *Id.* at 199 Wash. 2d 731-32, 511 P.3d 1262.

⁵ *Id.* at 199 Wash. 2d 731-37, 511 P.3d 1261-65.

⁶ See Washington Committee Report Concerning Lien Priority of Mortgages and Deeds of Trust, 2023 WA H.B. 1420 (NS) (Jan. 1, 2023).

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The Washington legislature issued an immediate response in early 2023 by introducing House Bill 1420 to make clear that the common law principle of first in time, first in right applies to all loans in Washington, not just construction loans. The bill added new section RCW 61.12.190 (which became effective July 23, 2023) to Washington's foreclosure of mortgages and liens statutes, to make clear that all sums secured by a mortgage or deed of trust have priority to all subsequently recorded encumbrances (with the few specific exceptions enumerated in Washington's mechanics' and materialmen's liens statutes codified in RCW 60.04), regardless of when the secured sums are disbursed or whether the disbursements are obligatory or optional.⁷

The understanding that lenders and lawyers have labored under for decades, that both obligatory and optional future advance clauses alike secure priority for future advances, has now been restored by legislative action. What is more, the first in time, first in right principle is now more broadly established by statute, and lenders no longer have to rely on Washington courts for common law interpretations where there is a dispute regarding lien priorities for future advances.⁸

If you have any questions about business banking, commercial lending or lien priority in the state of Washington, please contact [Nathan Smith](#), [Chris Varallo](#) and [Austin Graves](#). You may also visit us at www.kutakrock.com.

⁷ Washington Final Bill Report, 2023 Regular Session, House Bill 1420.

⁸ See Washington Committee Report Concerning Lien Priority of Mortgages and Deeds of Trust, 2023 WA H.B. 1420 (NS) (March 13, 2023).

