

## Fifth Supplement to Memorandum 81-24

Subject: Study D-300 - Enforcement of Judgments (AB 798) (Effect of Foreclosure Sale on Omitted Junior Lienholder)

Section 701.630 in Assembly Bill 707 governing execution sales provides that if property is sold, the lien under which it is sold and any liens subordinate thereto are extinguished. The execution sale provisions are incorporated for the purpose of sales under writs of sale by Section 716.020 in AB 707. Reading these two provisions together, it seems that junior lienholders in a foreclosure action would lose their liens, whether or not they were joined in the foreclosure action. However, the interest of a junior lienholder of record is not affected by the foreclosure of a senior lien if the junior lienholder is not joined. See *Carpentier v. Brenham*, 40 Cal. 221, 235 (1870); J. Hetland, *Secured Real Estate Transactions* § 7.3 (Cal. Cont. Ed. Bar 1974). Code of Civil Procedure Section 726 (which is amended in AB 798 ) also provides that a lienholder not of record need not be joined and is bound by the judgment in the foreclosure action.

The staff believes that it would be helpful to add a sentence to Section 726 that preserves the rule regarding omitted juniors. The staff recommends the following amendment:

On page 55 [of AB 798], between lines 18 and 19, insert:  
Notwithstanding Section 701.630, if a person who has a lien on the property that appears of record in the proper office at the time of the commencement of the action is not made a party to the action, the lien of such person is not extinguished upon the sale of the property pursuant to Article 6 (commencing with Section 701.510) of Chapter 3 of Division 2 of Title 9.

Respectfully submitted,

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