Discussion Questions:

1. Note that Paragraph 25 of the Freddie Mac Missouri Deed of Trust form includes the following provision:

**Lease of the Property.** Trustee hereby leases the Property to Borrower until this Security Instrument is either satisfied and released or until there is a default under the provisions of this Security Instrument. The Property is leased upon the following terms and conditions: Borrower, and every person claiming an interest in or possessing the Property or any part thereof, shall pay rent during the term of the lease in the amount of one cent per month, payable on demand, and without notice or demand shall and will surrender peaceable possession of the Property to Trustee upon default or to the purchaser of the Property at the foreclosure sale.

(a) Does this language mean Missouri follows the title theory? Why or why not?

(b) To what extent is this language consistent or inconsistent with the material from the casebook reading for this assignment? [How can the Borrower be both the “owner” of the property and simultaneously a “tenant”?]

(c) Is this language enforceable? What purpose do you think it might serve? [Hint: focus on the last clause, which talks about “the purchaser of the Property at the foreclosure sale.” How would a purchaser go about getting possession of the home if the Borrower was still there?]

2. Bert and Ernie are joint tenants of Blackacre (i.e., they have a right of survivorship, but they are not married). Without Bert’s approval or knowledge, Ernie grants a mortgage on Blackacre to Bank to secure repayment of a loan Ernie got from the Bank to cover some medical expenses. [Bert obviously doesn’t sign this mortgage, since he doesn’t know about it.]

(a) Is the mortgage valid? If so, exactly what does it cover?

(b) Does the granting of the mortgage affect the right of survivorship between Bert and Ernie? Why or why not? Does it make sense to resolve this question by focusing on whether the state follows the “lien theory” or the “title theory”? Suppose Ernie dies six months later, without having repaid the loan. Can the Bank foreclose?
3. Read the *Dover Mobile Estates v. Fiber Form Products* case (page 380) very carefully—it is a foundational case in understanding mortgage law as it applies to leased property—and consider the following questions:

(a) Is it appropriate to let Fiber Form escape its obligation as tenant to perform the terms of its lease, simply because the landlord (Old Town Properties) defaulted on its mortgage and the lender (Saratoga Savings) foreclosed the mortgage? Why or why not?

(b) Dover (the buyer of the property at the foreclosure sale) acquired the property precisely because it expected to be able to enforce the lease (and thus to collect the agreed rent from Fiber Form as it accrued under that lease). If you had been advising Dover, what would you have advised them to have done differently?

(c) Why would Fiber Form have agreed to a lease that contained Section 21.1, as quoted by the court on page 382? If that provision is enforceable according to its terms, in what situation does that put Fiber Form? As a prospective tenant, would you be enthusiastic about having that provision in your lease?

4. Note 3 (pages 386-388) talks about a “Subordination, Nondisturbance and Attornment Agreement.” This is a three-party agreement to which the parties are the Landlord (Mortgagor), the Tenant, and the Lender (Mortgagee). It is customarily executed between those parties either (1) at the time the Lender makes a mortgage loan to the Landlord, or (2) at the time the Landlord signs a new lease with a new tenant (if the mortgage loan is already in place).


(a) What does “attornment” mean?

(b) If the Lender is going to require the Tenant to enter into a subordination agreement that subordinates the Tenant’s lease to the Lender’s mortgage, why would the Lender agree to a “nondisturbance” agreement with the Tenant?

(c) If the Lender has agreed to “nondisturbance,” does the “subordination” serve any purpose? If so, what?

5. Under UCC Article 9, a security interest in personal property extends automatically to any “proceeds” of the collateral. U.C.C. § 9-315(a)(2). Under Article 9, “proceeds” includes anything that is received upon the “sale, lease, license, exchange, or other disposition of the collateral.” U.C.C. § 9-102(a)(64). Thus, if Bank has a security interest in a crane owned by Uphoff, and Uphoff leases the crane to Contractor for six months at a rental of $10,000 per month, Bank’s security interest in the crane automatically extends to the rental payments, even if the Bank’s security agreement with Uphoff didn’t say so explicitly. This means that if Uphoff defaulted to the
Bank, Bank could choose to enforce its security interest by collecting the monthly rent payments Contractor is obligated to make to Uphoff, either through a garnishment action or by giving a notification to Contractor to begin paying her rent payments to Bank. U.C.C. § 9-607.

Assume that Bank also has a mortgage on an office building owned by Litton. Assume the mortgage does not have any provisions in it regarding leases of office space within the building or the rents payable under those leases. [This is atypical; most commercial mortgage documents contain a provision called an “Assignment of Leases and Rents.”] Does the mortgage lien also cover the right to rents? If Litton defaulted, could Bank simply choose to give all of Litton’s tenants instructions to make their rent payments directly to the Bank? Why or why not? Is there any legitimate reason to treat rents due from leasing real estate differently from the way Article 9 treats rents due from leasing personal property?

6. Lambert owns the Free Market, a shopping center with 10 tenants. Lambert financed the purchase of the Free Market by obtaining a mortgage from Second Life Insurance Co. Lambert has defaulted on the mortgage (assume he didn’t make the monthly payments due for July and August). Also assume that the Free Market is located in a state that permits only judicial foreclosure; the foreclosure process in the state takes (on average) 18 months to complete. Finally, assume that the mortgage also contains an “assignment of leases and rents” provision (you can assume it is similar to the language in the Millette case on page 391), and that the mortgage was properly recorded.

(a) To whom must the tenants pay their rent checks for September 2019? To Lambert? To Second Life? What if the tenants get a written demand for rent from both both parties? How would you advise a tenant that received such duplicate notices? What additional information would you want to know?

(b) Now suppose that all 10 tenants have already paid their September 2019 rent to Lambert. Further, suppose that Lambert used that money to pay Strong Paving to resurface the parking lot. Second Life sues Strong Paving, claiming that Lambert paid Strong Paving using rent monies that Lambert had assigned to Second Life, such that by accepting the payment, Strong Paving had converted Second Life’s collateral. Do you agree? What should happen here?

(c) Now suppose that Lambert filed for bankruptcy on August 31, 2019. As of August 31, Second Life has taken no steps to begin collecting rents. If the tenants pay rents during September, are they still subject to Second Life’s assignment of rents, or should the bankruptcy trustee be able to argue that Second Life’s interest in those rents was “unperfected” and thus avoidable under bankruptcy law? Do you think the court’s reasoning in Millette is sound?

7. Note 1 on page 396 talks about so-called “absolute assignments of rents.” The note does imply that your professor thinks that the “absolute assignment of rents” is a terrible, unfortunate idea. Is it really? As between a lawyered-up commercial developer and a lawyered-up lender, why not just give effect to the parties’ agreement no matter how formalistic or stupid?