Reading Assignment: Casebook pp. 408-428. Discussion questions for this reading assignment:

1. If the mortgagee takes possession of the premises but has not yet completed a foreclosure, should the law impose premises liability on the mortgagee to the same extent of the liability otherwise borne by the mortgagor? Is that really so problematic?

2. Suppose the mortgaged property is a shopping center. The mortgagee has not taken physical possession of the premises, but has notified all of the tenants to begin paying rents to the mortgagee. Should this make the mortgagee a mortgagee in possession? Why or why not?

3. What are the “pros” and “cons” that you see for the mortgagee in terms of using a receiver to take possession of the property, if the borrower has defaulted? Would it make sense for a mortgagee in Missouri to try to use a receivership? Why or why not?

4. Residential mortgage forms typically don’t contain a “receivership clause” (i.e., a provision by which the mortgagor consents in advance to the mortgagee’s ability to obtain the appointment of a receiver after default). For example, the Fannie/Freddie single-family residential deed of trust form you reviewed in week #1 does not have a receivership clause in it. By contrast, commercial mortgage loans typically have a “receivership clause” in them. Here’s an example of one:

5.6 Appointment of Receiver. Beneficiary, separately or in any action to foreclose this Deed of Trust, shall be entitled (without notice and without regard to the adequacy of any security for the Note, the absence of waste or deterioration of the Property or other arguments based on equity) to the appointment of a receiver of the Rents of the Property who shall have, in addition to all the rights and powers customarily given to and exercised by such receiver, all the rights and powers granted to Beneficiary by the covenants contained herein. Once appointed, at Beneficiary’s option, such receiver may remain in place until all amounts secured hereby are paid in full.

(a) What explains the difference between residential and commercial mortgages with regard to the absence/presence of a receivership clause?

(b) Suppose that a commercial borrower is in default, the mortgage lender asks the court to appoint a receiver, and the mortgage has the above receivership clause in it. Should the language “Beneficiary ... shall be entitled” mean that the court has to appoint the receiver, or should the court have the discretion to refuse?