



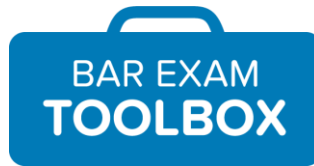
Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're talking about constructive eviction, as part of our "Listen and Learn" series. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience so you can study effectively, stay sane, and hopefully pass and move on with your life. We're the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl's Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form](#) on [BarExamToolbox.com](#), and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Hello, and welcome back to the "Listen and Learn" series from the Bar Exam Toolbox podcast! Today's topic is constructive eviction – something I'm sure you learned about back in law school when you took Real Property.

Lee Burgess: Now, in case your rule knowledge is a tiny bit fuzzy, let's recap. You probably already know what "eviction" means. It's when the homeowner or landlord kicks the person out who's living there. If your landlord literally kicks you out, that's pretty easy to identify. But what if the situation is murkier? What if they just act so terribly that you sort of wish you were evicted? That's where constructive eviction comes in. It's not quite a "throw you out on the street" eviction, but it's bad enough that the law considers it eviction and lets the plaintiff tenant recover damages. So, let's get started!

Lee Burgess: In Property, there's an important law called the Implied Covenant of Quiet Enjoyment. You already know that "covenant" means promise, and this is basically a promise from the landlord that the tenant can peacefully use the property without the landlord interfering. It's called the "implied" covenant because it protects the tenant even if it's not written into the lease. So, if you have a shady landlord who says this doesn't apply to your apartment lease, they're wrong.

Lee Burgess: The Implied Covenant of Quiet Enjoyment is also part of both residential and commercial leases. That's why today we will be talking about both homes and offices. The distinction in the rules is important to keep in mind as you study for the bar, because there is something else called the Implied Warranty of Habitability, which can be easy to mix up. That promise only applies to residential leases – you can remember because "habitability" sounds a lot like someone is going to live on the premises. My point is that you need to keep these two doctrines separate in your outlines and on your essays. But on the



exam, if you see a landlord-tenant type of situation, be looking out for facts that could trigger one or both of these doctrines, because they often both come up in the same essay.

Lee Burgess: Today, we are limiting our discussion to constructive eviction, which is a breach of the Implied Covenant of Quiet Enjoyment. On an essay, your main header would be “Implied Covenant of Quiet Enjoyment”, and then you’d state your general rule. Next goes the sub-header for “Constructive Eviction” because that is a way to show the covenant has been breached. If you don’t already have your attack plans set up, now is a good time to work on those.

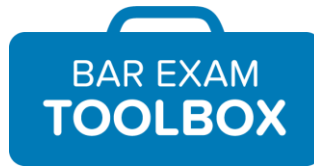
Lee Burgess: So, let’s go through our rule elements. There are three of them, nice and easy to number and remember. First, you need a “substantial interference”. Second, there needs to be notice from the tenant and a reasonable time period for the landlord to respond, then their failure to fix the problem. Third, the tenant has to vacate the premises within a reasonable amount of time after the landlord fails to remedy the situation. A lot of commercial bar outlines out there refer to these rule elements using the mnemonic SING. So, that’s a good way to remember your rule. If you want to claim constructive eviction, you have to SING: Substantial, Interference, Notice, and Goodbye.

Lee Burgess: On the bar exam, you will probably be told when the tenant left and when the problem started. It can also be obvious that there was a problem worth complaining about. These facts are often stated right there in the fact pattern. What you usually need to argue back and forth over are things like the “substantial” element – was the problem bad enough to be considered tantamount to eviction?

Lee Burgess: You can also get some argumentation back and forth about the element of “reasonableness” – did the tenant give the landlord enough of a chance to fix the issue before packing up and leaving? And remember, as we always say with the bar exam, your arguments come down to what the facts are giving you as clues. We will go through some examples of this in a minute.

Lee Burgess: Okay, so what does interference by a landlord look like? What you’re looking for here is a failure to fix something that is broken, like a heater or running water, or something overt like changing the locks, or even an ongoing issue like verbally harassing the tenant – basically anything the landlord is doing or failing to do that makes it hard for the tenant to enjoy the property they are renting.

Lee Burgess: You can see even from the get-go that the surrounding facts are going to matter a lot. For example, if the elevator in a commercial building breaks and the



tenant's office is on the 40th floor, that would be a much more serious problem than if the tenant happened to be on the first or second floor. If the heater is down and it's summer or somewhere with a hot climate, it's not such a big deal. If there is no heat and it's winter, that would cut in favor of the interference being more "substantial" under the first element of your rule. Bottom line here is that facts make all the difference, so use them as clues, and in your essays, always explain why they matter when you write your analysis.

Lee Burgess: So, let's get into some hypos. This first one is from the [California bar exam's Property essay from February 2012](#). We've omitted and made some really minor changes to some facts to keep the hypo focused on our constructive eviction issue. But I've got to say, this is one of my all-time favorite fact patterns, based solely on how the landlord responds when confronted. You'll see what I mean:

Lee Burgess: "Donna was looking for a place to live. Perry owned a two-story home, with the second story available to lease. Donna and Perry signed a two-year lease. Upon moving in, Donna discovered that the water in her shower became very hot if Perry ran water downstairs. When Donna complained to Perry about the shower and asked him to make repairs, Perry refused, saying, 'I'll just make sure not to run the water when you are in the shower.' Donna was not so happy and threatened to move out. Thereafter, every time Donna took a shower, Perry deliberately ran the water downstairs. Donna was afraid of being scalded every time she took a shower. Perry also adopted a new diet featuring strong-smelling cheese. Donna told Perry that the smell of the cheese annoyed and nauseated her, and Perry replied, 'Too bad; that's my diet now.' After constantly smelling the cheese for three weeks, Donna decided to move out. What claims may Donna raise?"

Lee Burgess: So, can you see why I said this hypo was great? I love how Perry just shrugs and says, "Well, too bad; that's my diet now." And yes, that was in the real bar question, we didn't edit that in.

Lee Burgess: Okay, so we need to use the three rule elements for constructive eviction. First, what was Perry doing that Donna can try and argue was such a "substantial interference" that it effectively kicked her out of her apartment? There were two things going on here, right? The hot water, and the cheese. On the bar, you should always take each event or related grouping of events in turn, and walk through your rule elements. So, let's try it together.

Lee Burgess: First element is substantial interference. Let's look at the hot water first. Do you think it is an interference that Donna's water got hot when Perry ran his water? Probably. Was it a "substantial" interference though? Well, if she was afraid of



being burned every time she took a shower, that sounds pretty serious. So, this element is pretty easy to check off.

Lee Burgess: The next element – notice. And remember, the “notice” here means the tenant said something about the problem, gave the landlord a chance to fix it, and he didn’t. Did that happen here? Well, we know Donna told Perry about the hot water problem because the facts gave us that. We are also told that Perry refused to fix the issue. So, we know there was notice and the landlord did nothing. That checks off some parts of element number two.

Lee Burgess: Now, what about reasonableness? We don’t know the precise day that Donna moved in and exactly when she told Perry about the problem. The fact pattern didn’t give us any dates to use. But we have a clue towards the end when it says “after two weeks”. This is not just a background fact; it’s a clue for you to use. So, since we know Donna told Perry about the shower before that time, she must have waited around two weeks at the very least before leaving. Is that a reasonable time? Probably. It could have been a different story if Perry responded in another way, saying, “Oh wow, I’m sorry, I’ll get that fixed right away.” But he didn’t. He told Donna he wasn’t going to do anything. So, it was reasonable for her to think that he wouldn’t fix the water.

Lee Burgess: Finally, for our last element, did Donna say “Goodbye”? Yes, she did. This one is easily checked off. There is nothing to argue, so you would want to get through this part very quickly. Make sense?

Lee Burgess: Now let’s move on to the example about the stinky cheese. What’s your first rule element? Substantial interference. The interference was the smell of the cheese. The question is whether it meets the hurdle of being “substantial”. What do you think? On one hand, the facts tell us that Donna was annoyed and nauseated by the smell, and it was bad enough that she moved out. That sounds like a pretty substantial problem. Seriously, how nasty was that cheese he was eating?!

Lee Burgess: On the other hand, we could dig even deeper into the facts. Perry lives downstairs, and his cheese is so incredibly strong that Donna can smell it through the walls or the windows or whatever and get sick? That seems a little strange. Note, there’s a reason the fact pattern says “cheese” and not something more noxious. Imagine if the problem was radiation, carbon monoxide, a pesticide, or the smell of sewage leaking through the walls. We’d probably have a more substantial problem on our hands because those things could harm a person’s health. See how the different facts could easily turn the argument in a different direction?



Lee Burgess: However, what we are dealing with is food, and not even rotten food – cheese that is perfectly fine for Perry to eat. The only problem is Donna happens to think it is gross. When you read through a fact pattern, see if you can visualize the scene playing out in real life and give it your gut-instinct response. For example, if your friend told you they moved out because their neighbor’s cheese smelled terrible, that would seem super weird, right? It’s more likely that Donna is the problem here. Maybe she’s just too sensitive. Again, what is or is not a “substantial” interference is going to be based on what a normal, reasonable person would think.

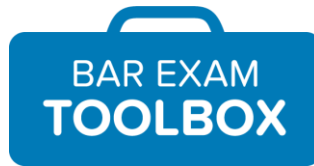
Lee Burgess: So, Donna probably doesn’t pass that first element of the rule when it comes to the cheese. The bad smell was an interference, but it wasn’t a substantial enough interference. Should we stop with the analysis there? No. On your bar essays, you should always continue on and hit the remaining rule elements. Did Donna give Perry notice and a chance to fix the problem? Yes. Donna told Perry the cheese annoyed and nauseated her. But did he do anything? Nope. All he said was, “That’s my diet now; deal with it.”

Lee Burgess: Did Donna say “Goodbye” after giving Perry a reasonable time to solve the issue? Yes, she did. She endured the bad cheese smell for three weeks and then left. These elements are easily met. You can see how most of the discussion about the cheese centers around that first element about “substantial” interference. That’s where most of the facts were in the fact pattern. That means that’s where more points are when you write analysis. That is where you want to argue both sides, because there are facts to allow you to do that.

Lee Burgess: Now, let’s go through another hypo, and this one is from a Property essay on the [July 2007 bar exam in California](#). Again, we’ve shortened it up a bit so it fits our issue for today:

Lee Burgess: “Larry leased in writing to Tanya a four-bedroom office suite at a rent of \$500 payable monthly in advance. The lease commenced in July. In November, Tanya experienced several issues: Elevator service and running water were interrupted once; heating was interrupted twice; and electrical service was interrupted on three occasions. These services were interrupted for periods of time lasting from one day to one week.

Lee Burgess: On December 5, the heat, electrical, and running water services were interrupted and not restored until December 12. In each instance Tanya immediately complained to Larry, who told Tanya that he was aware of the problems and was doing all he could to repair them.



Lee Burgess: On December 12, Tanya orally told Larry that she was terminating her lease on February 28, 2007 because the constant interruptions of service made it impossible for her to conduct her business. She picked the February 28 termination date to give herself ample opportunity to locate alternative office space. Tanya vacated the suite on February 28, even though between December 12 and February 28 there were no longer any problems with the leased premises. What causes of action can Tanya bring against Larry?"

Lee Burgess: So, first things first. This was a commercial lease since it was for an office suite. No problem under the Implied Covenant of Quiet Enjoyment though, because that covers both residential and commercial leases.

Lee Burgess: Okay, let's get into our elements. Was there a substantial interference? Well, at various times, Tanya didn't have an elevator, running water, heat, or electricity. To see about whether these interferences were substantial or not, we need to look at the other facts.

Lee Burgess: First, the office was on the 12th floor, which means that the elevator is probably important. No client is going to walk up 12 flights of stairs. What about running water? Well, there aren't facts specifically about how this affected Tanya's business, but we know that this is an office, which means there presumably needs to be water to flush toilets, wash hands, and maybe even make coffee. We can surmise from general common sense knowledge about the world that cutting off water is a substantial interference for an office. You never want to go outside the fact pattern on the bar, but doing this kind of very common sense extrapolation from the facts is a good idea.

Lee Burgess: Now, how about heat? Like I said earlier, let's look at the specifics. We don't know where this office is located – maybe the climate was warm – but we do know the heat was shut off in November and December, which means it was winter. That means we can surmise that it was likely cold. Again, we don't know with 100% certainty that it was cold, but the November and December facts are clues that you should bring up and explain why this interference was substantial. Once again, it's the explaining part that's important. If you just say, "It was November, so the interference was substantial" – that doesn't cut it. You need to piece the analysis together by spelling it out more. For example, "It was November, which means it was winter and likely cold, which shows more of a substantial interference not to have a heater" – that really explains your reasoning.



Lee Burgess: Finally, what about electricity? Same thing as with the water. All businesses probably need electricity to run their computers, lights, and phones. Again, there's nothing in the facts about computers, lights, and phones, but you can make this logical leap because it is very common for businesses to need computers, lights, and phones. So, this one is easy to check off. The interference of having no electricity would be substantial. You could even get more specific in your explanation by using the dates and the length of time each problem lasted. You should do that in your essays on the bar if you have time. For our purposes today, I'm just going to focus on the most important parts of the analysis here.

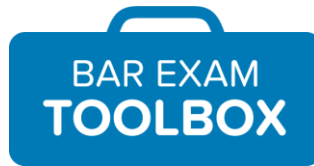
Lee Burgess: Also, on the bar, be sure to walk through each fact and go step-by-step. You don't want to merge the facts about the water, power, and heat, and just conclude, "Oh yeah, all that stuff was substantial interference." Even though you'd be correct that it was, you would miss almost all the available points for not explaining how you got to that end result. Just like with Math class growing up, you need to show your work. Go through the events one by one.

Lee Burgess: Step two of the analysis: Did Tanya give Larry notice? Yes. Was it within a reasonable timeframe? Yes, because she told him immediately. Now, did Larry fix the problems? Yeah, in this hypo he actually did. That is something you would want to argue in Larry's favor. Use all the facts about what Tanya said and did, when each event took place, and what Larry said and did.

Lee Burgess: Now, how about the final element? Did Tanya say "Goodbye" within a reasonable time? We know she left, but there is some room to argue about whether she got out fast enough. You would want to use that fact about her needing to look for an alternative office space, and again, argue both sides about whether or not this was reasonable. And of course, don't actually use the phrase "Say Goodbye" on the bar. Keep it professional and say, "Vacate the premises", or simply "Left the property" or something like that.

Lee Burgess: If you want some practice, you can go through and IRAC out these hypos on your own. Again, these were from the California bar exam Property essays from July 2007 and February 2012. These are good fact patterns to practice with, even if you're not studying for the California bar. But do realize that these are one-hour questions and not 30-minute questions like the MEE.

Lee Burgess: If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have questions or comments, please don't hesitate to reach out to myself or Alison at



lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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