



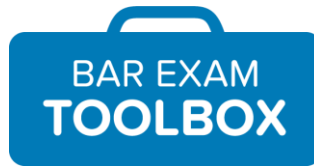
Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're doing another in our "Listen and Learn" series – this one is on adverse possession. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience, so you can study effectively, 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 we are going to be talking about adverse possession, which is a commonly-tested issue in Real Property questions on both law school and bar exams. Adverse possession is a doctrine that allows a person who occupies property owned by another person to eventually acquire valid title to that property, so long as certain requirements are met. Prior to law school, you may have heard of adverse possession colloquially referred to as "squatter's rights", because the doctrine often comes up in the context of a squatter claiming ownership of abandoned property. But it can also arise in other contexts, such as when a homeowner encroaches on a neighbor's land or a buyer takes possession of property with a defective title.

Lee Burgess: As usual, let's start by going over the rule, which consists of several elements that must be met. Note that whether you see the rule written with four, five, or six elements, the substance is always the same. Here's the basic rule: Adverse possession allows someone in possession of land owned by another to acquire title to that land when the possession of the property is, one, open and notorious; two, exclusive; three, actual; four, hostile and under a claim of right; five, continuous; and six, for the statutory period.

Lee Burgess: Now, this rule might seem pretty straightforward at first, but there's actually quite a bit to unpack. So let's go through the elements one-by-one, starting with open and notorious possession. Open and notorious possession is possession that would put an owner on notice of the adverse possession upon reasonable inspection of the land. In other words, the adverse possession must be reasonably obvious.

Lee Burgess: The second element, exclusive possession, requires that the adverse possessor exclude others from possession as if they were the true owner. That doesn't



necessarily mean that others can't use the property; it simply means that the adverse possessor does not share control of the property with anyone else.

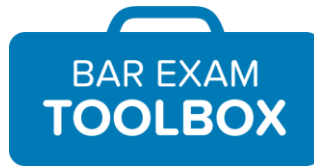
Lee Burgess: The third element, actual possession, requires that the adverse possessor occupy the property such that the true owner would have a cause of action for trespass.

Lee Burgess: The application of the fourth element, hostile and under a claim of right, depends on the jurisdiction. All jurisdictions require the adverse possession to be hostile to the true owner's interest – in other words without the true owner's permission. But states vary in their approach to claim of right. Some states follow the bad faith approach, which requires the adverse possessor to be aware that they have no legal right to be on the property. A few other states follow the good faith approach, which requires that the adverse possessor have a good faith belief that they own the property. The majority of states, however, follow the objective approach, which requires only that the property be used without the true owner's permission, regardless of the adverse possessor's intent.

Lee Burgess: Let's move on to the fifth element, continuous possession. Continuous possession is not the same as constant possession. An adverse possessor does not need to maintain constant possession of the property, but any gaps in possession must be consistent with how the true owner would use the property. In determining how the true owner would use the property, courts consider the typical use of neighboring properties and the improvements made by the adverse possessor. For example, you might recall the case of [Howard v. Kunto](#), in which part-year occupancy of a summer cabin was held sufficient for "continuous" occupancy, where all the neighboring cabins were summer-only use and the adverse possessors made permanent improvements to the property.

Lee Burgess: The sixth and final element requires that all the prior elements be met for the duration of the applicable statute of limitations. The statutory period varies by state and ranges from three to 40 years, with most falling within a period of 10 to 20 years.

Lee Burgess: That's it for the basic rule, but there are a couple of sub-issues that affect the statutory period analysis. The first sub-issue is tacking. Tacking allows adverse possessors in privity to aggregate their years spent possessing the property to meet the statutory period. Privity exists when the land is voluntarily transferred to another – for example by deed or bequest. When addressing tacking, keep in



mind that some courts disfavor allowing two trespassers to tack on policy grounds.

Lee Burgess: The second sub-issue is tolling. If the true owner is disabled when the adverse possessor first trespasses on the land, the statute of limitations does not begin to run until the disability is removed. If, however, the disability occurs at some later time during the statutory period, the statute will not toll and will continue to run.

Lee Burgess: Alright, that covers our rules, so let's move on to our first hypo. This one was adapted from the [July 2011 California bar exam](#):

Lee Burgess: "In 1975, Andy purchased a property called Blackacre. Blackacre consisted of a small white house on 10 acres in State X. In 1976, Andy moved overseas to take a new job, expecting to return in five years when his employment contract expired. In 1977, Beth moved to State X to attend State X University.

Lee Burgess: One day, Beth was going on a walk when she came across Blackacre. Believing Blackacre to be abandoned, Beth moved in shortly after. Beth posted "No Trespassing" signs across Blackacre, repainted the house blue, and hung a sign on the front lawn that said "Beth's Place".

Lee Burgess: In 1981, Andy decided to continue at his job overseas and entered into a new 10-year employment contract. That same year, Beth graduated from State X University and decided to reside at Blackacre indefinitely. In 1991, Andy's contract expired and he returned to Blackacre. When he approached the house, Beth came out and yelled, 'Get off my property or I'll call the police.' Andy brought an action in State X to eject Beth. State X has a statute of limitations of 10 years for adverse possession. Is Andy likely to succeed on his claim?"

Lee Burgess: Okay, the first question specifically tells us we're dealing with adverse possession, so let's work through the elements. First, Beth's possession appears to have been open and notorious. We're told that Beth posted "No Trespassing" signs on Blackacre, repainted the house blue, and hung a sign on the front lawn that said "Beth's Place". Those actions would have certainly put Andy on notice of her possession had he so much as walked by the property.

Lee Burgess: Second, Beth's possession appears to have been exclusive. There are no facts to suggest that she shared control of the property with anyone, and she posted "No Trespassing" signs, indicating her intent to exclude others from the property.



Lee Burgess: Third, Beth maintained actual possession. She lived on the property as though it was her own, and Andy could have brought an action for trespass at any time.

Lee Burgess: Fourth, Beth's possession was likely hostile. Beth yelled, "Get off my property" and threatened to call the police when Andy approached the house. Prior to that, Beth posted "No Trespassing" signs, further indicating her hostility to Andy's ownership interest. Whether Beth's possession was under a claim of right, however, depends on the approach followed by State X. While Beth did yell, "Get off my property", there are no facts that indicate a good faith belief that she was actually the true owner. Therefore, Beth's possession would only be under a claim of right if State X follows the objective or bad faith approach, because she knew she was trespassing.

Lee Burgess: Fifth, Beth's possession appears to have been continuous. The facts suggest that Blackacre was her primary residence, and there is no indication that there were any gaps in her possession of the property.

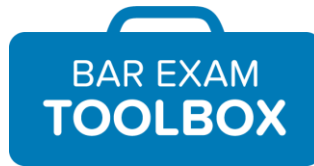
Lee Burgess: Sixth, Beth possessed Blackacre from 1977 to 1991, a longer period than the 10-year statute of limitations in State X.

Lee Burgess: Therefore, because all of the elements of adverse possession have been met, Andy is unlikely to succeed in his action to eject Beth.

Lee Burgess: Now that was a nice straightforward hypo to get comfortable with the elements. Let's do another one that's a bit more complicated:

Lee Burgess: "In 2030, when Katniss Everdeen was 10 years old, she started visiting a lakeside cabin in the woods with her father. Her father had been intermittently visiting this deserted cabin for approximately five years before he brought Katniss with him. Her father used to leave his hunting equipment in the cabin between hunts in the woods. He would also stay at the cabin periodically overnight – lighting fires and sleeping on the single mattress on the floor. He had put a lock on the cabin door so he (and later Katniss) were the only people who could use the cabin.

Lee Burgess: When Katniss was 15 years old, her father was killed in a mining accident. She still went to the cabin after his death and continued using it in the same way that her father had, leaving her bow and arrows in the cabin and staying there on occasion – even sometimes bringing her hunting partner Gale. Some of the neighboring cabins were occupied year-round, but many were only used during the hunting season. Neither Katniss nor her father expended much time or



energy making improvements to the cabin, but they would fix obvious problems, such as a leaking roof or broken window.

Lee Burgess: This particular cabin was actually owned by Mike, whose family had owned the property for 100 years. Mike only had negative memories of the cabin, because his sister had disappeared while playing in the woods in 2025. During that time he dove into a deep depression and was even institutionalized for about 5 years, until 2030.

Lee Burgess: It is now 2037 and Mike hasn't visited the cabin since 2025, however he still considers it his property. Mike has since married Lizbeth and wants to sell the cabin and the associated property in order to buy a new house for him and his wife. Mike went up to visit the cabin recently and found the door locked. He was enraged. Katniss walked up to the cabin and said, 'Hey, get away from my cabin.' 'Your cabin?', screamed Mike, 'This is my cabin.'

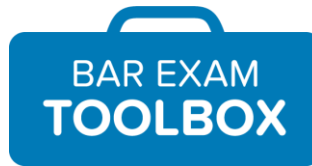
Lee Burgess: Katniss wants to gain title to the property under the doctrine of adverse possession. Is she likely to succeed?"

Lee Burgess: Okay, as you can probably tell, there is bit more going on in this hypo, but our analytical framework should be the same. As with the first hypo, we should take the elements in turn, making sure to address any sub-issues that are triggered by the facts. So let's do that together.

Lee Burgess: First, was Katniss's occupancy open and notorious? In general, Katniss's use appears to have been sufficiently open and notorious. We're told that she left items in the cabin, slept there overnight, set fires, and put a lock on the door. Any reasonably observant owner would have noticed these activities and known to look for potential trespassers. Therefore, Katniss is likely to prevail on this point.

Lee Burgess: Second, was Katniss's occupancy exclusive? Mike might argue that Katniss's use was not exclusive because she originally came to the cabin with her father and later with her friend Gale. The test, however, is whether Katniss was sharing occupancy with Mike or with the public at large, not whether she invited the occasional guest. Here, Katniss locked the cabin and kept out unwanted visitors, only came with accompanied guests, and did not share occupancy with Mike or members of the public. Therefore, she will likely be able to show that her occupancy was sufficiently exclusive.

Lee Burgess: Third, was Katniss's possession an actual trespass? Katniss should have no problem satisfying this element because she visited the cabin regularly during



the hunting season, stayed overnight, put a lock on the door, set fires, and so on. All of these are activities that would be undertaken by an owner.

Lee Burgess: Fourth, was Katniss’s possession hostile under a claim of right? Her possession was clearly hostile because Mike confronted her when he saw her using the cabin, and both parties claimed ownership of the cabin. Prior to that, Katniss or her father had placed a lock on the door, clearly establishing her hostility to Mike’s ownership interests by locking him out of his own cabin.

Lee Burgess: With respect to claim of right, it is somewhat unclear from the facts whether Katniss believed she had inherited the cabin from her father, or whether she knew he was squatting in the cabin. In either case, her possession would likely satisfy the claim of right requirement in most jurisdictions.

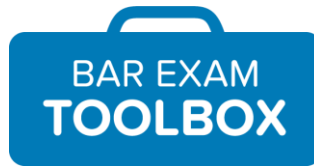
Lee Burgess: Fifth, was Katniss’s occupancy continuous? The primary issue here is that Katniss only used the cabin part of the year – as a hunting cabin during the hunting season. Therefore, Mike would likely argue that her occupancy was not sufficiently continuous because it wasn’t year-round.

Lee Burgess: Nevertheless, Katniss is likely to prevail under *Howard v. Kunto*. We’re told that some of the neighboring cabins were used year-round, but others were used only during the hunting season. While this is a closer call than in *Howard*, where all of the cabins were summer-only use, the court is likely to hold that Katniss’s use was typical of the area, and therefore sufficiently continuous.

Lee Burgess: Similarly, while Katniss made fewer improvements than in *Howard*, she did perform routine maintenance and fixed broken windows and leaks. Given the relatively minimal requirements of a functional hunting cabin, which doesn’t require fancy permanent improvements, performing such maintenance is likely sufficient to establish ongoing occupancy. Therefore, Katniss will be able to satisfy the “continuous possession” element.

Lee Burgess: Sixth, was Katniss’s occupancy for the statutory period? The facts don’t tell us what the statute of limitations is for adverse possession in this jurisdiction. We’re told, however, that Katniss visited the cabin from 2030 to 2037, so Katniss can easily show seven years of continuous possession on her own. If the statute is less than seven years, she will likely prevail on her adverse possession claim, having satisfied all the other required elements. This would be a relatively short statute of limitations, but not unheard of.

Lee Burgess: But if, on the other hand, the statute is longer than seven years, Katniss will have to try to add time from her father’s use, via the doctrine of tacking. We’re



told that Katniss’s father used the cabin for five years before he brought her along, bringing the overall period of combined occupancy to 12 years, if her tacking argument is successful.

Lee Burgess: Unfortunately for Katniss, her tacking argument is unlikely to succeed. Both Katniss and her father are trespassers and not good faith purchasers, whether Katniss realizes it or not. Therefore, the court is likely to find that there is no privity of estate between Katniss and her father. As a result, the court will likely not permit Katniss to tack on her father’s five years of occupancy, limiting her occupancy to seven years.

Lee Burgess: Moreover, even if the court did accept the tacking argument, Katniss’s claim would be further limited by tolling. We’re told that Mike fell into a deep depression and was institutionalized from 2025 to 2030. Given that Mike was disabled when Katniss’s father began trespassing on the property, the statute of limitations would not have begun to run until 2030. Therefore, even if Katniss’s overall period of combined occupancy is 12 years, the statute would only have run for seven years.

Lee Burgess: Ultimately, if the statute of limitations for adverse possession in this jurisdiction is less than seven years, Katniss is likely to prevail in her adverse possession claim and gain title to the cabin. If, however, the statute is seven years or more, her claim is likely to fail and title will remain with Mike.

Lee Burgess: Well, that’s all that we have for today. We hope you found these hypos to be helpful examples of how to work through adverse possession issues. 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 any questions or comments, please don’t hesitate to reach out to myself or Alison at [lee@barexamtoolbox.com](mailto:lee@barexamtoolbox.com) or [alison@barexamtoolbox.com](mailto:alison@barexamtoolbox.com). Or you can always contact us via our website [contact form](https://www.barexamtoolbox.com/contact) at BarExamToolbox.com. Thanks for listening, and we’ll talk soon!

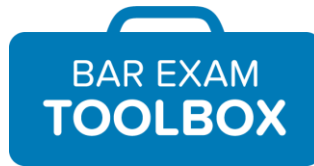
## **RESOURCES:**

[“Listen and Learn” series](#)

[California Bar Examination – Essay Questions and Selected Answers, July 2011](#)

[Howard v. Kunto](#)

[Podcast Episode 39: Tackling a California Bar Exam Essay: Real Property](#)



[Podcast Episode 65: Tackling an MEE Real Property Essay Question](#)

[Podcast Episode 93: Listen and Learn – Constructive Eviction](#)

[Podcast Episode 122: Listen and Learn – Easements \(Real Property\)](#)

[Podcast Episode 133: Listen and Learn – Covenants \(Real Property\)](#)