



Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we are going to be doing another in our “Listen and Learn” series – this one covers covenants. 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’re going to talk about covenants, which are a popular bar exam topic related to real property. We previously discussed a [type of non-possessory interest in land called an easement](#). As a reminder, an easement is a non-possessory interest in the use of someone else’s land. Today, we’re going to explore another type of non-possessory interest in real property, called a covenant.

Lee Burgess: First, let’s start with a rule statement. A covenant is a non-possessory interest in land that obligates the owner to either do something or refrain from doing something. Restrictive covenants would obligate the holder to refrain from doing something, while an affirmative covenant obligates the holder to take some sort of action.

Lee Burgess: This sounds vague, but covenants are actually pretty common in everyday life. Consider a neighborhood with single family homes. Maybe it has a golf course, a club house, or even a gated entrance. If the contract for the house required you as the homeowner to pay fees related to the upkeep of the neighborhood, this would be an affirmative covenant. You, as the homeowner, would be obligated to take action as part of your contract to purchase the home.

Lee Burgess: If your contract limits your house to residential purposes, your contract contains a restrictive covenant. You as a homeowner are obligating yourself to refrain from carrying out business from your home.

Lee Burgess: Now, let’s talk about the different elements needed to enforce a covenant. To enforce the benefit of a covenant, there must be, one, a writing that satisfies the statute of frauds; two, intent that the covenant run with the land; three,



vertical privity; and four, the covenant must touch and concern the land. To enforce the burden, there must be all the elements needed for a benefit, plus horizontal privity between the original parties and notice of the covenant to the new owner.

Lee Burgess: The remedy for a covenant is damages. This is an important distinction because of another real property issue – equitable servitudes. Equitable servitudes are non-possessory interests in land, like covenants, but the remedy is injunctive relief instead of damages. To enforce the benefit of an equitable servitude, there must be, one, a writing that satisfies the statute of frauds; two, intent for the servitude to be enforceable; and three, the servitude must touch and concern the land. To enforce the burden of an equitable servitude, all of the elements of the benefit must be met, plus the new owner must have notice of the servitude.

Lee Burgess: Equitable servitudes are a type of covenants that have a few key differences. The first difference is the remedy. Equitable servitudes are remedied through an injunction, rather than damages. The second difference is that privity is not required for enforcement of the benefit or the burden of equitable servitudes.

Lee Burgess: We've now talked about covenants and equitable servitudes, and the elements required to enforce both. These elements might sound lengthy, so let's apply them through a hypothetical to show how they would come up on an exam. We'll start with a simple hypothetical adapted from the [California bar exam in February 2011](#):

Lee Burgess: "Leo owned a lot on Main Street. This lot held a restaurant named The Grill. In 2008, Leo leased The Grill to Thelma for 15 years at a rent of \$1,000 per month under a written lease providing in relevant part: 'Tenant shall operate only a restaurant on the premises. Landlord shall not operate a restaurant within five miles of the premises during the term of the lease.'

Lee Burgess: In March 2009, Thelma assigned the lease to The Grill to Andrew after he had reviewed it. Although Leo did not express consent to the assignment, he nevertheless accepted monthly rental payments from Andrew.

Lee Burgess: In June 2010, Leo informed Andrew that, within a month, he intended to open a restaurant across the street from The Grill.

Lee Burgess: Andrew has filed a lawsuit against Leo, claiming that he breached the provision of the lease stating, 'Landlord shall not operate a restaurant within five miles of



the premises during the term of the lease.’ Andrew is asking the court for monetary damages. How is the court likely to rule on Andrew’s claim?”

Lee Burgess: First, start with a rule statement. A covenant is a non-possessory interest in land that obligates the holder to either do something or refrain from doing something. Remember that an action for damages specifically involves a covenant. Otherwise, if Andrew wanted an injunction to stop Leo from opening his restaurant, we’d have an equitable servitude.

Lee Burgess: To enforce the benefit of a covenant, there must be, one, a writing that satisfies the statute of frauds; two, intent that the covenant run with the land; three, vertical privity; and four, the covenant must touch and concern the land. To enforce the burden, there must be all the elements needed for a benefit, plus horizontal privity between the original parties and notice of the covenant to the new owner. Even though this rule statement is lengthy, make sure you are repeating it each time a covenant is discussed.

Lee Burgess: Before we dive into analysis, let’s discuss the elements of horizontal and vertical privity. Privity can come up in a number of contexts and it refers to the legal relationship between the two parties. Horizontal privity requires the original owners to have some shared interest in land independent of covenant. Some examples would include landlord/tenant or grantor/grantee. Vertical privity requires a non-hostile nexus between the original covenanting party and the later purchaser. This must be between succeeding parties, and exists when the successor holds the entire interest held by the predecessor.

Lee Burgess: Okay, now on to the analysis. Do we have a writing that satisfies the statute of frauds? It looks like yes. The lease contained a clause limiting Leo from opening another restaurant within five miles. Is there intent that the covenant run with the land? Leo will likely argue that there is nothing within the lease that specifies intent to run with the land. However, Andrew’s strongest argument is that Leo accepted monthly payments from him, therefore expressing consent to his assignment of the lease and an intent that the covenant run with the land and any new tenants.

Lee Burgess: Is there vertical privity between Andrew and Thelma? Yes, the facts state that Thelma assigned the lease to Andrew, which is a non-hostile nexus that satisfies vertical privity. On the facts, it seems that Thelma assigned her entire interest to Andrew. Does the covenant touch and concern the land? Andrew should argue that the covenant would affect the use of his land because direct competition within five miles would decrease the use of his restaurant. This is a tougher one,



but you should be sure you are stating what “touch and concern” means – the covenant must burden the holder and benefit another party’s use and enjoyment of their land. Then, find any facts in the hypothetical you can connect to that explanation.

Lee Burgess: Lastly, do we have horizontal privity and notice? Remember that horizontal privity requires the original owners to have a shared interest in the land. Thelma was the tenant and Leo was the landlord. This relationship of landlord/tenant is a simple way to establish horizontal privity. Lastly, Andrew had notice of the covenant because it was included in Thelma’s lease, which was assigned to him. Therefore, Andrew likely has a valid action against Leo to enforce the covenant and recover damages.

Lee Burgess: That was a brief example of applying the rules and elements of covenants to a hypothetical essay. The main purpose of that essay was to practice stating the rule statements for covenants and connecting facts from the hypothetical to each element.

Lee Burgess: Next, let’s dive a little deeper and analyze a couple of different legal issues. We’ll read a hypo adapted from the [July 2005 California bar exam](#) and we’ll walk through the issues together:

Lee Burgess: “Developer acquired a large tract of undeveloped land. He subdivided the tract into 10 lots, and advertised the lots for sale as ‘Secure, Gated Luxury Home Sites.’ Developer then entered into a 10-year, written contract with Ace Security Inc. (ASI) to provide security for the subdivision in return for an annual fee of \$6,000.

Lee Burgess: Developer sold the first lot to Cora and quickly sold the remaining nine. Developer had inserted the following clause in each deed:

Lee Burgess: Purchasers hereby covenant and agree on their own behalf and on behalf of their heirs, successors, and assigns to pay an additional fee of \$600 for 10 years to Ace Security Inc. for the maintenance of security within the subdivision. Developer promptly and properly recorded all 10 deeds.

Lee Burgess: Cora’s next-door neighbor, Maria, sold her property to Richard. Maria’s deed to Richard did not contain the above-quoted clause, and now Richard refuses to pay any fee to ASI. ASI threatens to suspend its security services to the entire subdivision unless it receives assurance that it will be paid the full \$6,000 each year for the balance of the contract. Cora wants to ensure that she will not be required to pay more than \$600 a year.



- Lee Burgess: What legal challenges can Cora make and what are her potential remedies?"
- Lee Burgess: Now, Cora has a few options we can explore here. The first argument Cora can make is that there is a covenant. Before diving into analysis, remember to include a rule statement. A covenant is a non-possessory interest in land that obligates the holder to either do something or refrain from doing something. Cora can assert that the original deed between the developer and Maria created a covenant. The burden of the covenant ran to Maria, and arguably later to Richard, while the benefit ran to Cora.
- Lee Burgess: To enforce the benefit of a covenant, there must be, one, a writing that satisfies the statute of frauds; two, intent that the covenant run with the land; three, vertical privity; and four, the covenant must touch and concern the land. To enforce the burden, there must be all the elements needed for a benefit, plus horizontal privity between the original parties and notice of the covenant to the new owner.
- Lee Burgess: Now that we've established the rule statement and elements for covenants, we'll continue with an analysis of each element. As you write, it's a good idea to include headings for each element. This allows the reader to easily follow your analysis. We'll start with the elements to enforce the burden of the covenant.
- Lee Burgess: Since our first element is "writing that satisfies the statute of frauds", you should include a simple "Writing" heading above this section of your essay. Let's return to the hypothetical to see if we have any facts related to writing. We're told that Developer included the covenant language in the deed, which was properly recorded. Therefore, it seems that the writing element is satisfied.
- Lee Burgess: Our second element is intent that the covenant run with the land. The language of the covenant clearly states an intent to apply to the purchasers of the land, as well as their heirs, successors, and assigns. This element has been satisfied.
- Lee Burgess: The third element is vertical privity. Vertical privity requires that there be a non-hostile nexus between the original covenanting party and a later purchaser. It is not satisfied in cases in which title is acquired by adverse possession or in some other hostile way. Here, however, Maria sold the property to Richard. A sale relationship is a non-hostile nexus, and therefore the requirement of vertical privity is met.
- Lee Burgess: The fourth element requires that the covenant touch and concern the land. What exactly does this mean? Basically, the covenant must burden the holder and benefit another party's use and enjoyment of the land. Of the elements



we've encountered so far, this one might be the hardest for Cora to prove. The covenant would no doubt burden Richard by requiring him to pay an annual fee. But does it benefit Cora's enjoyment and use of her land? Richard would likely argue that his security system has nothing to do with Cora's property. Cora would need to argue the security and safety of her neighbors affects her use and enjoyment of her land. Likely, Cora could prevail on establishing that the covenant touches and concerns the land.

Lee Burgess: Let's move on to the next element – horizontal privity. Note that this fifth element is only to enforce the burden of a covenant. The analysis for benefit stops at the fourth element – it must touch and concern the land. Horizontal privity requires the parties to be successors in interest. The relationship between Maria and Richard is one of buyer/seller, and this would establish horizontal privity.

Lee Burgess: The last element here is notice. To enforce burden, the burdened party must have notice of the horizontal privity. Notice can be through, one, actual notice; two, by inquiry; or three, by record. This is where headings are going to be really important in your essay. We're analyzing not only an element, but three different ways an element can be satisfied. Here, I would recommend having the label for your element, "Notice", and then subheadings for each of the different ways.

Lee Burgess: First, we'll talk about actual notice. Actual notice occurs where the substance of the covenant is actually communicated to the party to be burdened, either by words or in writing. The hypothetical specifically states that Richard's deed did not contain the covenant in it. Therefore, it seems unlikely that Richard had actual notice of the covenant.

Lee Burgess: Second, let's discuss notice by inquiry. Inquiry notice exists if the covenant would be apparent from a reasonable inspection of the property. An agreement to pay for security would likely not be apparent from reasonable inspection. Cora may argue that Richard could tell that the neighborhood was protected by security, through signs, gates, etc. However, even if Richard did see the security features, it would be unlikely that any part of the neighborhood would indicate the cost associated with these features that was required by each owner. Therefore, Cora's argument of inquiry notice would likely fail.

Lee Burgess: The last category of notice is record notice of a covenant. Record notice applies where a deed is recorded containing covenants. The burdened party is said to have constructive notice of the covenant that is recorded in its chain of title.



Although Richard's deed did not contain the covenant, as a purchaser he would likely perform a title search, and this would reveal the covenant deeded in the chain of title. Therefore, the last element to enforce the burden of the covenant – notice – is likely satisfied.

Lee Burgess: To end your covenant analysis, wrap it up with a nice conclusion. The requirements to enforce both the benefit and the burden of the covenant have been satisfied. Therefore, Cora can enforce the covenant against Richard, and recover damages as a result of Richard's failure to pay for the security system.

Lee Burgess: Despite all this great analysis, we aren't done with the hypothetical yet. Remember our conversation about equitable servitudes? We should do that analysis here as well, since we're exploring all of Cora's possible remedies. Equitable servitudes are a type of covenant enforced in equity through injunctive relief. To enforce the benefit of an equitable servitude, there must be, one, a writing that satisfies the statute of frauds; two, intent for the servitude to be enforceable; and three, the servitude must touch and concern the land. To enforce the burden of an equitable servitude, all of the elements of the benefit must be met, plus the new owner must have notice of the servitude.

Lee Burgess: Luckily, we've already done this analysis for the covenant. Equitable servitudes require fewer elements. You'll notice that privity – both horizontal and vertical – are not present as part of equitable servitudes. We know, based on our previous analysis, that the equitable servitude, one, contains a writing that satisfies the statute of frauds; two, was intended to be enforceable; three, touches and concerns the land; and four, there was a record notice of the servitude.

Lee Burgess: Therefore, Cora could also enforce the burden of the equitable servitude on Richard. Because the remedy is an injunction, Richard would be required to pay the annual fee for the security feature.

Lee Burgess: Notice that we started our analysis with the most comprehensive list of elements – enforcing the burden of a covenant. After the analysis, we were able to move easily into the other types of actions Cora might have, without re-inventing the wheel. The important part is that you not only do the analysis but recognize the nuanced differences between enforcing the benefit and burden, and between equitable servitudes and covenants.

Lee Burgess: And that's all the time we have for today. 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. And be sure to subscribe so you don't miss an



episode. If you have any questions or comments, 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](#) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

### **RESOURCES:**

["Listen and Learn" series](#)

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

[California Bar Examination – Essay Questions and Selected Answers, July 2005](#)

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

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

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