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MIDCOURSE CORRECTIONS

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Introduction

The Bar Examiners got rather lazy in their Property question on the last bar exam. Instead of asking a reasonably complex or difficult essay question, they took four little multiple choice hypotheticals and packaged them into one large but utterly unintegrated question, with no connection of any kind between the parts.

The overall plot involved four characters: the Builder of a shopping mall; the Owner who purchased it; Lois, a tenant in the mall; and Fast Food, her subtenant. (Why use names for only two of the four characters? And why name a tenant Lois rather than Tina?) Their activities follow.

The first part asked whether Tina violated a provision in her lease “not to assign” when she later sublet her space to Fast Food. Since every law student is taught that an assignment is different from a sublease, the simple answer is “No.” An examinee could pad the answer by adding that the transfer really was a sublease and not a disguised assignment (the 6th to 16th years of a 30-year term), although nothing in the question really invited discussion of that issue. The Writing Edge’s model answer in *The Recorder* added that the fact that Fast Food paid its rent directly to Owner gave it a waiver defense as well, which was a harmless additional point, even if unnecessary. Neither bar review model answer could find anything else to say about this shallow issue.

The second part asked whether Fast Food could sue Builder for trespass because he had taken over five of its designated parking spaces to sell sandwiches on Sundays in competition with it. Since the facts stated that Builder had reserved the right to do so when it conveyed the mall to Owner, the simple answer is again “No.” Lawful exercise of an easement is not a trespass, and Builder’s reservation was good against his grantee, and all who took under him, which meant Lois and Fast Food. (The Writing Edge went astray, I thought, in saying that Lois had no constructive notice of the deed restriction, even though it was recorded, because tenants do not have to search titles (I think they should), but it pretty much recovered by then opining that there was probably inquiry notice from Builder’s previous Sunday sales.) In this, like in the first part, I found no subtlety or complexity whatsoever. There might have been some interesting talk about whether trespass was an appropriate remedy for one-day-a-week sales in a parking lot (did the lease give Lois possession of those spaces?), but that became irrelevant once the reserved easement was put into the facts. Worsening the entire situation was the lack of any connection between the two parts: Fast Food’s nontrespass rights had nothing to do with whether it was an assignee or a subtenant.

The third part of the question asked if Owner had the right to change the locks on the store after Fast Food announced it would stop paying rent in protest. The answer, for the third time, is “No,” although I cannot claim this part is as superficial as the first two. Overall, self-help to regain possession of property is no longer allowed, even when legally justified, so that could be a complete answer. PASS Bar Review in *The Daily Journal* went on to ask whether there was an anticipatory breach in refusing to pay rent that may have been not yet due (the question didn’t give the essential dates), and both bar reviewers made a nod to the issue of privity between a landlord and subtenant, none of which was really necessary in light of our current uniform prohibition against self-help lockouts. As before, nothing in the first two parts had any impact on this third part: Assignment of a sublease, whether an easement or not, says nothing about forcible entries.

Finally, the fourth part asked whether residential neighbors could state a nuisance claim against Fast Food’s cooking odors wafting on warm days. At least this was not subject to the same one-word response that fit the previous parts of the question. While the issue was kept simple by assertions in the question that the tenant was using best available technology and complying with all local health codes, it nevertheless left open the academic possibility that the neighbors could show that it constituted an unreasonable interference with the use and enjoyment of their properties. Both model answers used the question as an occasion for little lectures on the elements of nuisance law (although *The Writing Edge* inexplicably covered only public, not private, nuisance); both had little difficulty in rejecting the claim.

The fact that so much of this question did not need to be in essay form reinforces my long-standing misgivings about the wisdom of using this technique to evaluate prospective lawyers. Essay grading is costly and subjective and not demonstrably superior to the (tested and retested) multiple choice questions that the multistate examiners employ; certainly, there is no justification to warrant the dreadful and inefficient three-month waiting period that it puts bar applicants through. I do not believe that the choice between a score of 70 or 65 on this particular essay question gives examiners or employers better insights into the likelihood of candidates being or not being competent attorneys than is currently available from looking at their scores on the 150 objective multistate questions they answered.

Essay bar exams ought to be sent the same way as their true forerunners—trials by ordeal and battle—have gone.

New Forms Worth Noting

A TDS Supplement

The California Association of Realtors (CAR) has promulgated a new “Agent’s Visual Inspection Disclosure” form (AVID 4/07) that most home buyers and their attorneys should appreciate. This three-page form spends its first page telling buyers what sorts of physical inspection brokers are required to make and—more importantly—what sorts of physical inspections they are not required to make, *e.g.*, areas that are inaccessible or offsite, public records on common areas of CIDs. While these exclusions are not copied literally from our statutes, I nevertheless found them adequate to serve their intended warning purpose. These nonassurances are further elaborated on the rest of the page by a “non-exclusive list of examples of limitations,” such as not climbing onto roofs or attics, looking behind furniture, operating appliances, measuring, or spotting mold or asbestos or lead paint. If real estate brokers are not

required to do this kind of inspecting, it is both good for them and good for their clients that they say so in plain print.

What I like even more are the second and third pages, which provide 17 locations (*e.g.*, living room, dining room) with lines after each for observational comments by the broker. This is a very effective way to assure that each part of the house is looked at (although basement inspections probably should have had their own category rather than being put under “other room”).

The CAR Release Summary describes this as an attachment to the Transfer Disclosure Statement (TDS), since the statutory form cannot be waived, even by an improved version of the same, or as its own form when no TDS is formally required. Even for properties that do not trigger a mandatory TDS, the form would be useful for a buyer’s broker to complete.

Because the form is so superior to the statutory form, it is regrettable that it is not mandatory. The CAR is not the legislature, however, and cannot force its members to use its published forms. It could do some coercing by having best practices standards, but it is understandably gun-shy of taking positions that can too easily lead to the imposition of liability on its members by clever plaintiffs’ attorneys. However, even without this form, a broker who fails to inspect properly will get into trouble; what this form does well is admonish broker and client what to look for—ahead of time.

A TIC Addendum

Professional Publishing has promulgated a “Tenancy In Common Addendum” (101-TIC CAL) that should make lawyers jump for joy because it mandates (in ¶1) attorney review of this form: “Buyer agrees to consult with a qualified real estate attorney to review the Tenancy in Common Agreement and to explain to Buyer the ramifications of tenancy in common ownership.” The provision is touted as being better than those forms that “strongly advise” buyers to do so, but permit them to declare that they have elected not to, although it would not be that hard for a reluctant purchaser to simply strike the sentence (plus some incidental related clauses).

The form begins with a helpful “Warning” that there is no exclusive use or survivorship for tenancies in common, that carrying costs may be a shared responsibility, and that partition may be available. I might cavil over the statement that joint tenancy interests are unsalable (wrong, but hardly relevant) or over the failure to say that tort liability may be another shared liability, but these will hardly matter in the light of later attorney review.

The Addendum permits a buyer’s attorney to review the project’s tenancy in common agreement, not the buyer-seller purchase contract. But since it (implicitly) gives the buyer complete back-out rights as to that agreement, it hardly matters what reasons the attorney, or the buyer personally, has for withdrawing. Assuming everyone wants to go forward, the Addendum then calls for the current co-owners to meet with the buyer and review her “financial statements” (having gone through New City co-op scrutinies, I can attest that there is nothing more intrusive or arbitrary; income tax audits are a breeze by comparison). Then, the co-owners approve; somewhere along the way, the lenders approve.

Condominium ownership is far superior to tenancy in common for most residential users, but rent control jurisdictions typically do what they can to restrict conversions of apartments in multi-unit buildings into condos, forcing those seeking a place in the sun or California home ownership to follow this torturous route. Prohibiting apartments and flats from

condominiumizing, while at the same time being unable to stop them from escaping the rental market just as effectively by “communizing,” doesn’t seem to do much good for anybody, but that is where our peculiar social and political values have currently taken us.