

SUPREME COURT OF WISCONSIN
OFFICE OF LAWYER REGULATION

Public Reprimand With Consent

2012-OLR-16

Sara L. Bergman
Attorney at Law (Suspended)

During the time period relevant to this matter, Atty. Sara L. Bergman (“Bergman”) was employed as Claims Counsel for a title insurance company. As of May, 2012, Bergman’s license to practice law in Wisconsin is inactive and is suspended for failure to pay mandatory bar dues.

In 2004 and 2005, a couple bought two adjacent lots (“Lot A” and “Lot B”) on a Wisconsin lake. The wife was the owner of record of Lot A, and the husband’s corporation owned Lot B. Both lots were insured with title insurance from the title company that employed Bergman. The couple built a home on Lot A. Lot B remained vacant.

The couple’s neighbors filed a lawsuit against the wife and the husband’s corporation in June, 2006, alleging that the new house on Lot A violated a deed restriction requiring houses to be set back a certain distance from the lake. (“Setback lawsuit.”) The plaintiffs sought an order requiring the defendants to remove the part of the house that violated the deed restriction and a declaration that any home built on Lot B would comply with the setback requirement.

The couple’s title insurance policies did not list the setback requirement as an exception from coverage. The couple tendered the defense of the lawsuit to the title company, which paid for the couple’s legal representation in the setback lawsuit.

In July, 2007, the parties settled the setback lawsuit with a stipulation that allowed the house on Lot A to remain on its site, but established additional setback terms for any home that might be constructed on Lot B.

Before the defendants agreed to the settlement, the defendants' attorneys contacted Bergman, who confirmed that the title company approved the terms of the proposed settlement. The husband's corporation, however, believed that the setback requirement reduced the value of Lot B. The husband's corporation was only willing to settle the setback lawsuit if the title company agreed to pay the lost value that resulted from the new setback. Bergman confirmed to an attorney for the husband's corporation that the settlement would not affect the title company's coverage of the lost value. Bergman told the attorney for the husband's corporation that Bergman would have an appraiser assess the lost value so that the title company and the husband's corporation could work toward a resolution of that damage claim. Relying on Bergman's statements, the defendants agreed to settle the setback lawsuit. The attorney for the husband's corporation wrote to Bergman on July 26, 2007, confirming the substance of their conversation.

The husband (who filed the grievance against Bergman) did not trust Bergman's promise to have an appraisal completed, so he hired two appraisers, who appraised the lost value and sent the appraisals to Bergman in September, 2007. On September 14 and 17, 2007 and on October 23, 2007, Bergman told an attorney for the husband's corporation that she had ordered an appraisal and would check on its status, when, in fact, Bergman did not formally hire an appraiser until October 23, 2007. Bergman's statements to the attorney for the husband's corporation regarding the appraisals were as follows:

- In an e-mail to counsel dated September 14, 2007, Bergman stated that she would “check on the status of our appraisal. We can compare the appraisals and go from there.”
- In a letter to counsel dated September 17, 2007, Bergman stated, “In addition, I am still working on gathering the results of the appraisal. As I stated in a previous e-mail to you, I will be in touch as soon as I receive this, and we can work towards a determination of damages, if any.”
- In an e-mail to counsel dated October 23, 2007, Bergman said, “[The title company] has ordered an appraisal as well, however, I have not received it. I will check in[*sic*] its status.”

Bergman formally hired an appraiser on October 23, 2007, when she wrote to him, stating, in part:

Thank you for your time earlier today. At this time, [the title company] would like to retain your services for the appraisal of the above-referenced property. Again, we are interested in determining the reduction in value of the subject parcel ...

Bergman told OLR that she typically has informal discussions with a service provider, such as an appraiser, before hiring him or her. According to Bergman, only after she receives confirmation that the service provider is willing and able to take the project does Bergman send a formal letter to the provider. Bergman stated that her “ordering” of the appraisal would have included the informal telephonic discussions with the appraiser.

It is the title company’s position that the appraiser hired by Bergman never provided an appraisal to the title company. The title company did not pay the husband’s corporation for any lost value of Lot B.

The wife and the husband’s corporation sued the title company in January, 2008 for breach of contract and bad faith in the handling of their insurance claims. (“breach of contract lawsuit.”) During the breach of contract lawsuit, the title company filed a motion to disqualify counsel for the plaintiffs on the grounds that he had witnessed the conversation in which

Bergman said that she had approved the settlement. In support of the motion, the title company filed an affidavit signed by Bergman on April 28, 2008, in which she stated:

At no time did your affiant understand that [the husband's corporation] would claim actual loss and damages as a result of the settlement agreement. Were your affiant informed, your affiant would have denied settlement authority and instructed [the husband's corporation] and [the wife] to proceed with a trial on the merits.

Bergman subsequently testified at a deposition in the breach of contract lawsuit. Bergman testified that she had read the affidavit before she signed it, and she admitted that as of August 1, 2007, she knew that the husband's corporation was claiming actual loss. Bergman also admitted that on August 1, 2007, she had received a faxed letter dated July 26, 2007, from the couple's lawyer that memorialized the settlement agreement and that explained that the husband's corporation was making a claim for actual loss.

At the trial in the breach of contract lawsuit, Bergman testified that she made the foregoing statement in her affidavit because she had failed to review her notes in her file. Bergman also testified about the title company's process of ordering an appraisal. Bergman testified that she first had an informal discussion with the appraiser to determine if the matter was within his expertise. Bergman testified that the title company did not formally hire the appraiser until she wrote to him on October 23, 2007.

A jury awarded damages to the couple for their breach of contract claim. The bad faith claim went to mediation. During the mediation process, the appraiser hired by Bergman signed an affidavit on October 5, 2009, stating that he did not recall talking to Bergman at any point prior to October, 2007 and that he was hired to review two appraisals that were sent to him by the title company. The appraiser said he reviewed the appraisals and concluded that he could not

help the title company because he found the appraisals to be reasonable values for the lost buildable area. The appraiser said he was never hired to perform a full appraisal of the property.

Bergman's statements to the counsel for the husband's corporation on September 14 and 17, 2007 and October 23, 2007, implied that an appraisal was ordered, when an appraiser had not been hired, and therefore constituted a violation of SCR 20:8.4(c), which states, "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Bergman's statement in the affidavit dated April 28, 2008 that she did not understand that the husband's corporation would claim actual loss as a result of the settlement agreement in the setback litigation, when Bergman later admitted in a deposition that she knew that the corporation would claim actual loss, constitutes a violation of SCR 20:3.3(a)(1), effective July 1, 2007, which states, "A lawyer shall not knowingly make a false statement of fact or law to a tribunal."

Bergman has no prior discipline.

In accordance with SCR 22.09(3), Attorney Sara L. Bergman is hereby publicly reprimanded.

Dated this 1 day of November, 2012.

SUPREME COURT OF WISCONSIN

/s/ James C. Boll Jr.
James C. Boll Jr., Referee