

THOUGHT LEADERSHIP

News

## SOUTHERN DISTRICT DISMISSES EC CLAIMS IN FIRST-PARTY ACTION ARISING OUT OF CONSTRUCTION DEFECT LAWSUIT

Newsbrief

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Judge Keith Ellison of the Southern District of Texas last month in a multi-party coverage and bad faith action granted several defendants' 12(b)(6) motions to dismiss extra-contractual claims asserted against a number of different insurers. The principal disputes in *Burlington Ins. Co. v. Ranger Specialized Glass, Inc., et al*, Civ. No. 4:12-CV-1759, are between Lyda Swinerton Builders, Inc., and insurers for several of its subcontractors on a major construction project in College Station, Texas. Swinerton Builders was sued in Texas state court by the owner of the project, and in turn sued its subcontractors as third-party defendants. Swinerton Builders also sought defense coverage as an additional insured under the subcontractors' liability policies. The coverage requests resulted in the federal court litigation, in which Swinerton and the subs' insurers disputed whether Swinerton qualified as an additional insured under the policies.

Swinerton Builders not only asserted a right to a defense, but urged bad faith claims as well. Many of the insurers filed 12(e) motions for more definite statements and 12(b)(6) motions to dismiss the bad faith allegations. Judge Ellison denied the 12(e) motions, but granted the 12(b)(6) motions. The insurers contended that there is no cause of action for bad faith in the third-party context. Swinerton Builders did not dispute this; instead, it argued that its claims were for violations of the Texas Deceptive Trade Practice Act and the Texas Prompt Payment of Claims Act.

Judge Ellison first agreed that Texas does not extend the common law bad faith tort to third-party claims. Second, Judge Ellison concluded that Swinerton Builders' third-party petition did not allege a DTPA claim. He further ruled that while the petition did not explicitly urge a prompt payment claim, it did allege facts to support a prompt payment claim. Judge Ellison therefore granted the 12(b)(6) motions as to the extra-contractual claims alleged, but granted Swinerton Builders leave to amend to plead prompt payment violations. Swinerton Builders' contract claims remain pending.

[Editor's Note: Chris Martin and Amber Duntan of our firm assisted third-party defendant Travelers Lloyds Insurance Company with its 12(b)(6) motion in this case. We congratulate all the movants on their successful motions.]