



And The Defense Wins

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DRI member [John Palmeri](#), a co-managing partner of the Denver office of **Gordon & Rees**, prevailed on a motion for summary judgment in an insurance coverage/bad faith case in the United States District Court for the District of Colorado. The dispute arose during construction of a 41-story residential project in downtown Denver. A water pipe failed during construction, causing damage throughout the building. The piping throughout the building was replaced. The plaintiff, an additional insured subcontractor under a builders' risk policy, alleged the insurance company breached the policy by denying reimbursement of the costs to remove and replace the piping. The insurance company paid for water damage caused by a failed pipe but denied coverage for the costs to remove and replace the faulty piping.

In a 33-page opinion, the federal court held that the costs the plaintiff sought were excluded by the policy's exclusion for correction of defects and did not invoke the ensuing loss provision. The court rejected plaintiff's argument that the costs were covered under the policy's "sue and labor" clause, holding that "Colorado courts would hold that an insured's ability to recover mitigation costs under a sue and labor clause is tied to the general insuring provisions of the policy." The court found that the plaintiff was not under a common law duty to mitigate its damages and rejected the plaintiff's waiver, estoppel and public policy arguments. The court granted the motion for summary judgment in its entirety and entered judgment in the insurance company's favor.

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