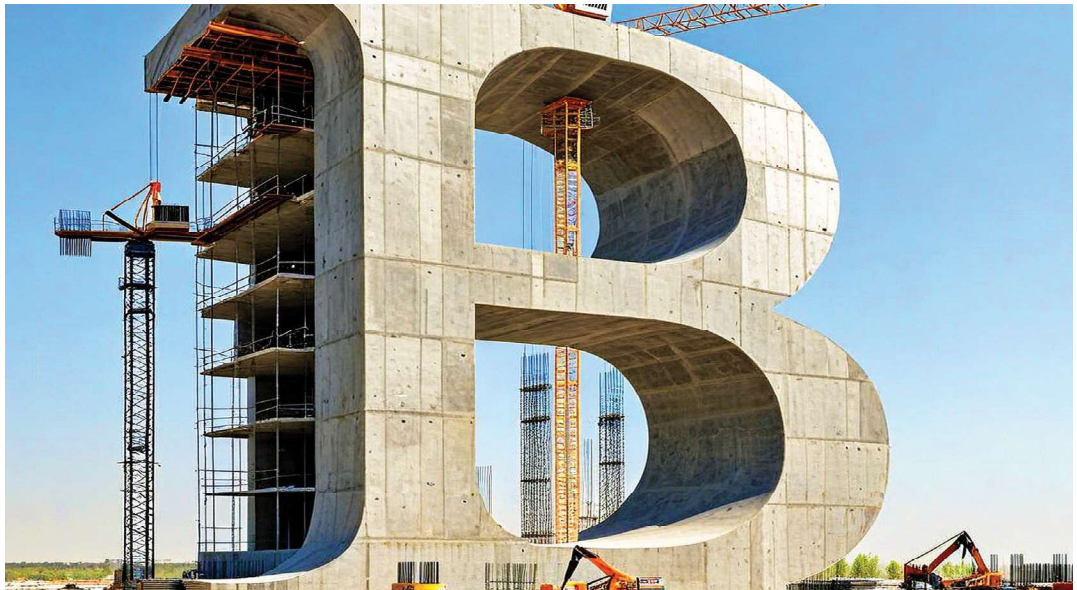




WHEN REASON DRIVES RESOLUTION

The Plan B Alternative to Traditional Construction-Defect Litigation

By Kyle Wiegghaus and David M. McLain



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Construction-defect litigation has long been one of the most expensive and complicated areas of insurance and commercial litigation. A single case may involve an owner or homeowners' association, developer, general contractor, dozens of subcontractors, design professionals, multiple insurers, and competing experts all attempting to answer the same question: What is wrong with the project, and what will it reasonably cost to fix?

Traditional Plan A Litigation

As large-scale construction-defect litigation became more common in Colorado nearly three decades ago, the answer almost always followed traditional litigation, or Plan A. The parties litigated first and negotiated later. They retained experts, conducted extensive discovery, exchanged fully developed and final expert reports, and conducted countless fact and expert depositions. Mediation often occurred only after each side had become firmly committed to its own opinions regarding liability, scope of repair, and cost. By then, the parties had invested years of time and hundreds of thousands of dollars in attorneys' fees and expert costs before having a meaningful discussion about resolving the claim.

How Plan B Agreements Developed

Over time, Colorado practitioners began experimenting with a different approach. Instead of mediating solely based on litigation positions and trading demands and offers, the parties would enter what became known as a Plan B agreement. After discovery and the exchange of expert disclosures, the parties would work toward identifying the problems being experienced by an owner and the defects causing those problems, developing a reasonable scope of repair, and obtaining contractor pricing for that work. If the parties could reach consensus on enough issues, those agreed repair costs could become the foundation for meaningful settlement discussions.

Unlike a traditional mediation, a Plan B agreement is not simply another settlement conference. It is a voluntary, confidential framework that allows the parties to step away from anchored litigation positions and enables experts to meet, discuss their opinions candidly, narrow areas of disagreement, and develop reasonable repair recommendations before those positions become entrenched. Settlement discussions remain protected under Colorado's Rule of Evidence 408 and the state's mediation privilege, allowing experts, attorneys, carriers, and contrac-

tors to have candid discussions without concern that concessions will later be used against them if the process fails and they find themselves back in litigation.

The Legal Perspective on Plan B Settlements

From a legal perspective, Plan B changes the conversation. Instead of asking who can better prove their litigation position, the process asks what information is necessary to make a sound business decision. The goal is not solely to reduce indemnity payments; it is also to reduce the total cost of resolving the claim, including attorneys' fees, expert expenses, discovery costs, and the opportunity costs associated with years of litigation.

A simple example illustrates the distinction: A plaintiff's expert may identify a technical code violation involving the fastening pattern of an asphalt shingle roof and conclude that every roof must be removed and replaced to achieve code compliance. The legal question may be whether the installation violated the building code or the implied warranty of habitability. The practical questions, however, are different: Has the roof actually failed? Is it allowing water intrusion? Is there evidence that the condition will impair the roof's performance during its expected service life? If the answer is no, replacing an otherwise functional roof may create unnecessary costs without improving the performance of the building. Plan B encourages the parties to answer those practical questions before committing to expensive litigation positions.

The Engineering Perspective on Plan B Settlements

The engineering perspective follows the same approach. Not every construction deficiency presents the same level of risk. Some conditions involve life safety, structural integrity, water intrusion, or long-term durability and clearly warrant repair. Others may represent technical deviations that have little or no effect on building performance. Objective forensic evaluation focuses on understanding where a particular condition falls along that spectrum. The most important questions become practical ones: What is the condition? What risk does it create?



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Has damage occurred, or is it likely to occur if the condition is not repaired? What repair is actually necessary? What is the reasonable cost to perform that repair?

Making Plan B Work

The Plan B process requires experts willing to function as forensic professionals rather than advocates. When experts remain open to additional investigation, testing, and information, disagreements frequently narrow. Parties often discover that the true dispute is considerably smaller than originally believed. Early expert involvement also allows carriers and counsel to establish more accurate reserve estimates, better evaluate exposure, and make informed settlement decisions before litigation expenses begin to dominate the claim.

Plan B is not appropriate for every case, and it is certainly not a guarantee of settlement. The process works only when the participants engage in good faith and remain willing to adjust their positions as the facts develop. It breaks down when experts become advocates rather than objective evaluators, when parties refuse to reconsider assumptions despite new information, or when the process is treated as merely another litigation tactic. No settlement framework can overcome an unwillingness to participate honestly.

How Plan B Is Used Today

Historically, the Plan B process would take place during litigation, after the exchange of expert reports and discovery. Colorado's construction-defect practice has evolved, in part, because the widespread use of wrap insurance programs has resulted in the opportunity to engage in a Plan B process earlier. With fewer parties involved in a claim, it is easier to reach early consensus on a reasonable resolution.

Today, experienced practitioners evaluate whether the project, the parties, the insurers, and the experts are all likely to benefit from a collaborative process before litigating at all. The process is no longer an alternative mediation strategy; it has, in some cases, become an alternative to litigation altogether. It is a strategic tool used when the circumstances suggest that informed collaboration can produce a better, more efficient outcome than prolonged advocacy.

The Value of Plan B

Perhaps the greatest takeaway from Colorado's experience is that successful claim resolution is not measured solely by obtaining the lowest settlement amount. It is measured by achieving the best overall outcome, as early as possible, at the lowest total cost. A settlement reached earlier, supported by objective engineering, realistic repair costs, and substantially lower litigation expense often represents a better result than a marginally lower settlement achieved only after years of litigation and expense.

Plan B agreements do not eliminate disagreement, nor should they. Construction-defect claims will always involve disagreement. The question is not whether parties disagree, but when they choose to stop defending positions and begin solving problems. ■

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