

CHAPTER 25A

**ALTERNATIVE CLAIM PROCEDURES FOR
FIRE RETARDANT TREATED (FRT)
PLYWOOD FAILURES**

Authority

P.L. 1991, c.202, N.J.S.A. 46:3B-13 et seq., and N.J.S.A. 46:3B-10.

Source and Effective Date

R.1992 d.188, effective April 20, 1992.
See: 23 N.J.R. 3603(a), 24 N.J.R. 1476(a).

Executive Order No. 66(1978) Expiration Date

Chapter 25A, Alternative Claim Procedures for Fire Retardant Treated (FRT) Plywood Failures, expires on April 20, 1997.

Chapter Historical Note

Chapter 25A, Alternative Claim Procedures for Fire Retardant Treated (FRT) Plywood Failures, became effective April 20, 1992.
See: Source and Effective Date.

See section annotations for additional rulemaking.

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Law Review and Journal Commentaries

Navigating Through FRT Plywood Litigation. Robert D. Farber, 139 N.J.L.J. No. 9, 10 (1995).

New Home Warranty Act—Administrative Law. Judith Nallin, 135 N.J.L.J. No. 3, 57 (1993).

SUBCHAPTER 1. GENERAL PROVISIONS

5:25A-1.1 Title

This chapter shall be known as, and may be cited as, "Rules Governing Alternative Claim Procedures for Fire Retardant Treated (FRT) Plywood Roof Sheathing Failures".

5:25A-1.2 Scope

(a) This chapter shall:

1. Govern procedures for the review and processing of claims involving premature failure of FRT plywood roof sheathing pursuant to the alternative funding mechanism authorized by the Act;
2. Prescribe the form and documentation necessary for a claim to be considered for assignment;
3. Establish guidelines for permissible and appropriate methods of remediation;
4. Define a standard of adequacy for roof reserves; and
5. Adopt standards, procedures, and technical criteria for making an examination and determination of whether the damage claimed is ascribable to the FRT plywood or the FRT treatment applied to it, resulting or contributing to the creation of a major structural defect.

(b) This chapter shall be construed as supplementing the "Regulations Governing New Home Warranties and Builders' Registration," N.J.A.C. 5:25.

5:25A-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

"Act" means P.L. 1991, c.202 (N.J.S.A. 46:3B-13 et seq.)

"Advance Funding" means moneys advanced by the Commissioner from the New Home Warranty Security Fund for the remediation of structural damages due to FRT plywood occurring in structures covered by an approved private alternate new home warranty security plan, subject to the provisions and requirements of the Act.

"Attorney General" means the Attorney General of the State of New Jersey.

"Bureau" means the Bureau of Homeowner Protection of the Division of Housing and Development in the New Jersey Department of Community Affairs.

"Commissioner" means the Commissioner of the New Jersey Department of Community Affairs.

"Major structural defect" means any actual damage to the load bearing portion of a building that affects its load-bearing function, or is imminently likely to vitally affect use of the building for residential purposes. "Major structural defect" also means and includes inevitable premature failure of FRT plywood roof sheathing if it can be determined, in accordance with N.J.A.C. 5:25A-2.5(b) and 2.6, within the 10 year coverage period of the claimant's new home warranty, that a major structural defect will occur. "Major structural defect" shall have the same meaning as "major construction defect," as used in the Act.

Amended by R.1994 d.506, effective October 3, 1994.
See: 26 N.J.R. 2706(a), 26 N.J.R. 3941(b).

Law Review and Journal Commentaries

New Home Warranty Act—Administrative Law. Judith Nallin, 135 N.J.L.J. No. 3, 57 (1993).

Case Notes

Regulation precluding recovery for inevitable premature failure of FRT roofing unless defect actually occurred within statutory period was void. Appeal of Adoption of N.J.A.C. 5:25A-1.1 et seq., by New Jersey Dept. of Community Affairs, Div. of Housing and Development, 266 N.J.Super. 625, 630 A.2d 383 (A.D.1993).

5:25A-1.4 Administration

(a) The Division of Housing and Development in the Department of Community Affairs shall administer this chapter, in cooperation with the Attorney General. All the powers, duties, and responsibilities vested in the Commissioner by P.L. 1991, c.202 are hereby delegated to and vested in the Director of the Division of Housing and Development except the power to adopt, amend, or repeal regulations.

(b) Within the Division of Housing and Development, responsibility for the administration and enforcement of these rules shall be vested in the Bureau of Homeowner Protection. All powers and responsibilities delegated to the Director, Division of Housing and Development by this chapter shall be executed by the Chief, Bureau of Homeowner Protection except the power to make final determinations resulting from any of the hearings required or permitted to be held pursuant to the Act, this chapter or the Administrative Procedure Act (N.J.S.A. 52:14B-1 et seq.) which power shall be vested in the Commissioner.

5:25A-1.5 Separability

If any provisions of this chapter or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of this chapter that can be given effect, and to this end the provisions of this chapter are severable.

SUBCHAPTER 2. CLAIM ELIGIBILITY AND PROCESSING

5:25A-2.1 Claim eligibility

(a) The following are eligible to file a claim for advance funding provided that the new home is covered at the time the claim is filed under a new home warranty issued by an approved alternate new home warranty security plan:

1. An individual fee simple owner of the new home;
2. An association of individual fee simple owners formed for the purpose of pursuing a unified claim for homes owned by the individuals forming the association;
3. An association of individual owners or lessees that is responsible for the maintenance or replacement of the roof structure;
4. An owner and builder, or an association and builder, jointly if the builder is the warrantor of the home;
5. A builder who is the warrantor of the new home and undertakes to remediate the cited damages and has entered into a written agreement or made a written acknowledgement to remediate the cited damages;
6. A warranty guarantor who undertakes to reimburse the owner, community association or builder for the costs of remediation.

(b) Except as otherwise provided in this subsection, warranty coverage or eligibility for warranty claim coverage shall be in effect only during the 10-year period prescribed by the New Home Warranty and Builders' Registration Act.

1. With regard to new homes in which the warranty coverage expired, or will expire, between July 11, 1991 and January 1, 1995, any eligible claimant may file a claim for the remediation of FRT plywood until October 3, 1995. Any eligible claimant that continues to have coverage under a new home warranty may file and/or refile claims at any time during the warrant period.
2. Any claimant that filed a timely claim pursuant to the act prior to October 3, 1994, which claim was not approved, may refile the claim for a reevaluation of eligibility in light of this section as revised effective October 3, 1994 at any time during the warranty period or until October 3, 1995, whichever is later.

(c) Except where a longer period is permitted pursuant to (b) above, any person who has instituted a civil action may file a claim pursuant to this section at any time up to and including January 31, 1995.

6. Agreement to use the proceeds of any funding only for the purposes approved by the Department;

7. Documentation that the claimant is the warrantor of the new home(s);

8. A copy of the agreement between the builder and the owner(s) of the new home(s) or community association to remediate the damages; and

9. Any additional information that the Department, in its review of the claim, determines would be necessary to effectuate the purposes of the Act.

(e) A claim submitted by a warranty guarantor that has not instituted suit prior to the effective date of the Act to recover damages on grounds of failure of FRT plywood roof sheathing will be accepted upon submission of the certifications, documentation, and agreements required of owners in N.J.A.C. 5:25A-2.3(a); or of community associations (if the roof is a common element) in N.J.A.C. 5:25A-2.3(c); and, of a builder in N.J.A.C. 5:25A-2.3(d), except for N.J.A.C. 5:25A-2.3(d)8.

1. The warranty guarantor must also provide any reports used in making the determination that the FRT plywood has met the criteria for a major structural defect, color photographs of the roof conditions, a roof inspection survey documenting the condition of the attic with respect to ventilation, and mechanical and plumbing exhausts, together with any additional information that the Department, in its review of the claim, determines to be necessary.

5:25A-2.4 Assignment of litigated claims

(a) Any person who, prior to the effective date of the Act, had instituted a civil action to recover damages arising out of the failure of FRT plywood roof sheathing may submit a claim under the provisions of the Act and these regulations.

(b) The claim shall include the following information and documentation:

1. The caption and docket number of the civil action;
2. The name, address and telephone number of the claimant's attorney;
3. The status of the civil action;
4. The status of discovery;
5. A copy of all pleadings and orders filed in the civil action including the complaint, answers, counter-claims, cross claims, and any amendments thereto;
6. A copy of any expert reports exchanged among the parties;
7. All other documents and information that the Commissioner or the Attorney General may require of

the claimant or the claimant's counsel to effectuate the purposes of the Act; and

8. A certification that the submission is truthful and complete.

(c) The claim shall be referred to the Attorney General for a determination of whether the claimant's rights against responsible parties should be accepted for assignment to the State.

(d) If the Attorney General makes an initial recommendation to accept the assignment of the claimant's rights against responsible parties, the Commissioner shall process the claim in accordance with N.J.A.C. 5:25A-2.3 and 2.5, and the claimant shall be required to submit the required documents, certifications, and agreements applicable to N.J.A.C. 5:25A-2.3 at that time.

(e) Prior to the Department's making any payment for remediation, the Attorney General will make a final review of the claim and claimant or claimant's counsel shall at that time file and supply to the Attorney General any supplemental or updated information requested by the Attorney General.

1. If, and only if, the Attorney General, after conducting such final review, continues to recommend the assignment of the claimant's rights against responsible parties, the claimant will be required to file a motion for voluntary dismissal without prejudice of the civil action pending before the court, for the severance of those claims approved by the Attorney General and by the Department from other claims in the civil action, for a stay of the proceedings in the action, or to take other such action as the Attorney General may direct.

2. The Attorney General may refuse the assignment even if the court refuses to grant the requested relief.

(f) Where a case is in litigation, all parties shall be given at least 21 days in which to conduct investigations of the condition of the roof sheathing prior to commencement of work authorized by the Department. When the Department accepts the assignment of the claim, notice shall be given to the parties and the 21-day period for conducting investigations shall thereupon commence.

5:25A-2.5 Claim examinations

(a) Upon acceptance of a claim for assignment, the Bureau shall examine the premises. This examination shall be done in accordance with the standard practices of the Bureau using the following classification system:

1. Standard characteristics not to be confused with deterioration:
 - i. Darker color than regular plywood sheathing;
 - ii. Rough exposed surface on attic side (usually "D" face);

iii. Grain checking of surface veneer.

2. Levels of deterioration:

i. None to slight:

- (1) Efflorescence-surface bloom;
- (2) Roofing nails secure;
- (3) Firm to pressure—no veneer separation;
- (4) Slight to moderate veneer checking along the grain.

ii. Moderate:

- (1) Roofing nails secure;
- (2) Slight veneer checking perpendicular to and along the grain;
- (3) Slight sag and give to pressure.

iii. Severe:

- (1) Excessive darkening (charring) and efflorescence (surface bloom);
- (2) Face veneer separation, buckling and cracking;
- (3) Noticeable give to pressure;
- (4) Roofing nails show sign of corrosion and are no longer snug enough to adequately secure the roofing material.

iv. Failure:

- (1) Veneer delamination, peeling and falling away; and
- (2) Easy give to pressure, soft and flexible.

(b) To be eligible for funding, the condition of the FRT plywood sheathing must qualify as a major structural defect, as defined in N.J.A.C. 5:25A-1.3. In accordance with the classification system described in N.J.A.C. 5:25A-2.5(a), if the roof sheathing is characterized as "severe" or "failure" by the Bureau, the defect shall be classified as a major structural defect. If a condition of inevitable premature failure, as determined in accordance with N.J.A.C. 5:25A-2.6, is found to exist by the Bureau, the condition shall also be classified as a major structural defect.

(c) If a claim is accepted for assignment and is found eligible for funding based on the examination, the owner or association, as the case may be, shall be instructed to propose an acceptable method of remediation and to obtain a minimum of two independent estimates from contractors of the cost of implementing the method of remediation.

(d) Nothing in this chapter shall be construed to prohibit the Bureau from making a determination, in the interest of economy and efficiency, to secure the replacement of sections of roofs adjacent to sections that have a major structural defect.

Amended by R.1994 d.506, effective October 3, 1994.
See: 26 N.J.R. 2706(a), 26 N.J.R. 3941(b).

5:25A-2.6 Predictive testing procedure for inevitable premature failure

FRT plywood roof sheathing shall be examined in accordance with the procedure and classification system described in N.J.A.C. 5:25A-2.5(a). FRT plywood roof sheathing found by the Bureau, using that classification system, to have experienced deterioration that is "moderate" or worse shall be deemed to be in a condition of inevitable premature failure.

New Rule, R.1994 d.506, effective October 3, 1994.
See: 26 N.J.R. 2706(a), 26 N.J.R. 3941(b).

Case Notes

Regulation precluding recovery for inevitable premature failure of FRT roofing unless defect actually occurred within statutory period was void. Appeal of Adoption of N.J.A.C. 5:25A-1.1 et seq., by New Jersey Dept. of Community Affairs, Div. of Housing and Development, 266 N.J.Super. 625, 630 A.2d 383 (A.D.1993).

5:25A-2.7 Methods of remediation

A proposed plan of remediation of structural failures in FRT plywood roof sheathing must conform to the New Jersey Uniform Construction Code (N.J.A.C. 5:23). The Bureau will accept a true copy of a building permit as proof of compliance with this provision.

5:25A-2.8 Claim payments

(a) The cost of remediation shall not exceed the lesser of the estimates accepted by the Bureau. The Bureau shall not approve a plan for remediation that exceeds the authorized scope of work. The authorized scope of work shall not include the replacement of roof shingles over undamaged plywood sheathing for the sole purpose of not having mismatched roof shingles; provided, however, that replacement of roof shingles over undamaged plywood roof sheathing may be permitted by the Bureau in the interest of economy and efficiency. Proposals that call for an upgrade in the quality of roof shingles compared to that which exists shall not be approved. The Bureau shall have the right to engage a contractor of its choice to perform the remediation.

(b) Payment shall be made only upon presentation of verified invoices for work and material actually provided and installed in accordance with the approved plan of remediation.