

**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.

**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).

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**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).

New Home Warranty and Builders' Registration Act authorizes recovery for inevitable premature failure of fire retardant roofing plywood, and for other major construction defects actually arising within 10-year warranty period. 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).

Regulation precluding recovery for inevitable premature failure of fire retardant roofing plywood was void under New Home Warranty and Builders' Registration Act. 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.

(d) The commencement date of the warranty on common elements is the date the element was first put to use. Therefore, the warranty commencement date on roof sheathing in a development in which roofs are common elements is the commencement date of the first warranty issued in each structure.

(e) Holders of new home warranties with extended structural defect coverage are eligible to file a claim up to the end of the tenth year.

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-2.2 Assignment of claimant's rights against responsible parties

Prior to the investigation by the Department of any claim and the making of any payment for remediating the damage, the claimant must agree to assign to the State of New Jersey, in a form as prescribed by the Attorney General, the claimant's rights and any rights the claimant has acquired in any claim upon any responsible party, or in any other recovery of funds, that may arise out of the damage cited in the claim.

#### 5:25A-2.3 Acceptance of assignment of claimant's rights to recover from others

(a) A claimant who is an owner who 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 have his or her claim accepted upon submission of the following agreements, documentation, and certifications:

1. Proof of ownership and documentation relating to whether the roof is a common element: If the roof is a common element, the claim must be submitted by the community association that is responsible for the administration of common elements;
2. Proof of warranty coverage: If the roof is a common element, proof of warranty coverage must be submitted for all the units in the affected structure;
3. Either of the following:
  - i. Certification that no claim for damages related to FRT plywood roof sheathing has been filed with an approved alternate new home warranty security plan (private plan); or
  - ii. Evidence, if a written denial was received, of a final disposition from the private plan which denied the claim;
4. Certification that a claim for damages related to FRT plywood roof sheathing has not been approved, and is not pending, under any plan of insurance other than a new home warranty;
5. Assignment of claimants right to recover damages from any responsible party to the State of New Jersey;

6. Agreement to fully cooperate with the State of New Jersey in any litigation involving claimant that seeks to recover damages for FRT plywood failures in which funding has been provided to the claimant;

7. A statement of the amount of money held in reserve for the replacement of roofs and/or roofing materials;

8. Certification that no litigation regarding failure of FRT plywood roof sheathing and involving claimant or claimant's association is pending and that no such litigation has been settled or dismissed;

9. Certification that neither the seller, developer, builder, any subcontractor, any supplier of building materials, any manufacturer of building materials including treaters of FRT plywood, any private alternate new home warranty security plan, any warranty guarantor, nor any other party has made any payment to the claimant as compensation for damages caused by the FRT plywood and that no releases have been given to any person and no assignments have been made to any third party. For the purposes of this certification, "compensation" means any form of valuable consideration and includes, but is not limited to, cash payments, services in lieu of cash payments, discounts on goods provided, reduction in the selling price of the home, and any other form of remuneration as compensation for the defect or potential defect in the FRT plywood of the roof of the home;

10. Certification that no remediation of the damaged plywood sheathing, other than temporary repairs needed to retain physical integrity, has been undertaken for units for which claims have been made;

11. Documentation, including any expert reports, photographs, and descriptions of the roof conditions at the time the claim is submitted;

12. A statement as to whether or not the present owner(s) and, to the present owner's knowledge, any prior owners, have made alterations to the roof or otherwise made changes in the home which would have an impact on attic conditions. Such alterations would include, but not be limited to, the installation of mechanical or passive ventilation of living spaces or clothes dryer or plumbing exhaust systems which terminate in the attic, modifications to trusses or rafters, replacement of all or part of the roof sheathing and adding attic insulation;

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

14. Certification that no releases have been given to anyone and that claimants have not assigned their rights to any third party; and

15. Any additional information that the Department, upon review of the claim, determines to be necessary to effectuate the purposes of the Act.

(b) A claimant that is an association of unit owners formed for the purpose of filing a unified claim that has not instituted suit, released or assigned its rights, or obtained a settlement from a potentially responsible party prior to the effective date of the Act to recover damages on grounds of failure of FRT plywood roof sheathing shall have its claim accepted upon submission of the certifications, agreements, and documents cited in N.J.A.C. 5:25A-2.3(a) for each unit for which funding for remediation is sought.

(c) A claimant that is a community association that has not instituted suit, released or assigned its rights, or obtained a settlement from a potentially responsible party prior to the effective date of the Act to recover damages on grounds of failure of FRT plywood roof sheathing shall have its claim accepted upon submission of the following certifications, agreements, and documents:

1. Documentation that the roof is a common element;
2. Proof of warranty coverage for all of the units in any structure in which there is at least one unit for which a claim is being filed;
3. Either of the following:
  - i. Certification that no claim for damages related to FRT plywood roof sheathing has been filed with an approved alternate new home warranty security plan (private plan); or
  - ii. Evidence, if a written denial was received, of a final disposition from the private plan which denied the claim;
4. Certification that a claim for damages related to FRT plywood roof sheathing has not been approved, and is not pending, under any plan of insurance other than a new home warranty;
5. Assignment of claimant's right to recover damages from any responsible part to the State of New Jersey;
6. Agreement to fully cooperate with the State of New Jersey in any litigation involving claimant or claimant's association which seeks to recover damages for FRT plywood failures in which funding has been provided to the claimant;
7. A statement of the amount of money held in reserve for the replacement of roofs and/or roofing materials;
8. Certification that no litigation regarding FRT plywood roof sheathing and involving the claimant is pending and that no such litigation has been settled or dismissed;
9. Certification that no party including the builder, any sub-contractor, the supplier, manufacturer, private plan, warranty guarantor, or any other person has made any payment to the claimant as compensation for damages caused by the FRT plywood;

10. Certification that no remediation of the damaged plywood sheathing, other than temporary repairs needed to retain physical integrity, has been undertaken for units for which claims are made;

11. Documentation, including any expert reports, photographs, and descriptions of the roof conditions at the time the claim is submitted;

12. A statement as to whether or not the community association, the present owner(s) and/or, to the present owner's knowledge, any prior owners have made alterations to the roof or otherwise made changes in the home that would have an impact on attic conditions. Such alterations would include, but not be limited to, the installation of mechanical or passive ventilation of living spaces or clothes dryer or plumbing exhaust systems which terminate in the attic, modifications to trusses or rafters, replacement of all or part of the roof sheathing and adding attic insulation;

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

14. Certification that no releases have been given to anyone and that no rights have been assigned to any third party; and

15. Any additional information that the Department, upon review of the claim, determines to be necessary to effectuate the purposes of the Act.

(d) A builder 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 have its claim accepted upon submission of the agreements, documentation, and certifications listed in N.J.A.C. 5:25A-2.3(a) for each unit on which a claim is submitted. In addition, the builder must make the following certifications and provide the following documentation:

1. Certification that a claim for damages related to FRT plywood roof sheathing has not been approved, and is not pending, under any plan of insurance other than a new home warranty;
2. Assignment of claimant's right to recover damages from any responsible party to the State of New Jersey;
3. Agreement to fully cooperate with the State of New Jersey in any litigation which seeks to recover damages for FRT plywood failures in which funding has been provided to the claimant;
4. Certification that no litigation regarding failure of FRT plywood roof sheathing and involving the claimant and the unit(s) for which the claim has been submitted is pending and that no such litigation has been settled or dismissed;
5. Certification that no remediation of the damaged plywood sheathing has been undertaken;

(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.

(c) Unless the contractor has been selected by the Bureau, payment shall be made by check payable jointly to the owner and contractor selected by the owner to perform the remediation. No payment will be made in advance of the commencement of work.

#### Case Notes

Individual was precluded from obtaining remediation of alleged roof defects absent submission of verified work invoices. Fox Meadow v. Department of Community Affairs, 95 N.J.A.R.2d (CAF) 99.

#### 5:25A-2.9 Hearings

(a) Decisions of the Bureau shall be final, except that a person aggrieved by any ruling, action, order or notice of the Bureau denying a claim filed pursuant to this chapter, in whole or in part, shall be entitled to an administrative hearing in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1, on the issue of whether the examination of the roof sheathing was conducted in accordance with N.J.A.C. 5:25A-2.5 or whether the pro-

posed method of remediation was consistent with N.J.A.C. 5:25A-2.7. The burden of proof in either case shall lie with the claimant.

(b) Any request for an administrative hearing must be filed with the Hearing Coordinator of the Division of Housing and Development, CN 802, Trenton, NJ 08625 within 15 days after receipt by the person of the notice of the ruling, action, order, or notice complained of.

(c) Decisions by the Attorney General not to recommend assignment shall not be reviewable in an administrative hearing.

#### 5:25A-2.10 Roof reserve standard of adequacy

A claimant that is an association shall be required to contribute towards the cost of remediation a percentage of its accumulated roof reserves that is proportionate to the percentage of the total roof area requiring replacement. In the event that accumulated roof reserves are less than the amount that would have been accumulated based on a 30-year useful life of roofing materials, or such shorter period as may be specified in a manufacturer's warranty or guarantee of such materials, the difference shall also be required to be contributed by the association towards the cost of remediation.