

## APPENDIX 31.

### Chapter 3B. THE NEW HOME WARRANTY AND BUILDERS' REGISTRATION ACT

#### Statutes and Regulations.

##### A. Statute.

###### Section

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**46:3B-1. "The New Home Warranty and Builders' Registration Act."** This act shall be known and may be cited as "The New Home Warranty and Builders' Registration Act."

Adopted. L. 1977, c. 467, §1.

**46:3B-2. Definitions.** As used in this act [L. 1991, c. 202]:

- a. "Department" means the Department of Community Affairs.
- b. "Commissioner" means the Commissioner of Community Affairs.
- c. "Warranty" means the warranty prescribed by the commissioner pursuant to P.L.1977, c.467, (C.46:3B-1 et seq.).
- d. "New home" means any dwelling unit not previously occupied, excluding dwelling units constructed solely for lease.
- e. "Owner" means any person for whom the new home is built or to whom the home is sold for occupation by him or his family as a home and his successors in

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title to the home or mortgagee in possession. Owner does not mean any development company, association or subsidiary company of the builder or any person or organization to whom the home may be sold or otherwise conveyed by the builder for subsequent resale, letting or other purpose.

f. “Builder” means any individual corporation, partnership or other business organizations engaged in the construction of new homes.

g. “Major construction defect” means any actual damage to the load bearing portion of the home including damage due to subsidence, expansion or lateral movement of the soil (excluding movement caused by flood or earthquake) which affects its load bearing function and which vitally affects or is imminently likely to vitally affect use of the home for residential purposes.

h. “Warranty date” means the first occupation or settlement date, whichever is sooner.

i. “Approved claim” means, for the purposes of P.L.1991, c.202 (C.46:3B-13 et al.), a claim examined and approved by the commissioner in accordance with section 3 of P.L.1991, c.202 (C.46:3B-15).

j. “Approved method” means, for the purposes of P.L.1991, c.202 (C.46:3B-13 et al.), a method of remediation approved by the commissioner in accordance with section 3 of P.L.1991, c.202 (C.46:3B-15).

k. “Fund” means the new home warranty security fund established in the department pursuant to section 7 of P.L.1977, c.467 (C.46:3B-7).

l. “Warranty guarantor” means, for the purposes of P.L.1991, c.202 (C.46:3B-13 et al.), (1) the new home warranty program established in the department pursuant to P.L.1977, c.467 (C.46:3B-1 et seq.) or (2) any alternate new home warranty security program approved pursuant to section 8 of P.L.1977, c.467 (C.46:3B-8).

m. “Board” means the Board of Trustees established pursuant to section 2 of P.L.2001, c. 147 (C. 46:3B-7.2).

**Adopted.** L. 1977, c. 467, §2. **Amended.** L. 1991, c. 202, §7, effective October 9, 1991; L. 2001, c. 147, §4, effective July 10, 2001.

**46:3B-3. New home warranty; time periods.** a. The commissioner is hereby authorized and directed to prescribe by rule or regulation a new home warranty and procedures for the implementation and processing of claims against the new home warranty security fund as provided for in section 7a. of this act. Such warranty shall include standards for construction and of quality for the structural elements and components of a new home with an indication, where appropriate, of what degree of noncompliance with such standards shall constitute a defect. Such rule or regulation shall be adopted, and may be supplemented, amended or repealed in accordance with the Administrative Procedures Act (P.L.1968, c. 410, C. 52:14B-1 et seq.), provided, however, that a hearing shall be required prior to the adoption, supplement, amendment or repeal of such rule or regulation.

b. The time periods of warranties established pursuant to this act are as follows:

(1) One year from and after the warranty date the dwelling shall be free from defects caused by faulty workmanship and defective materials due to noncompliance with the building standards as approved by the commissioner pursuant to paragraph 3a. of this act except as set forth in section 3b. (2) and (3).

(2) Two years from and after the warranty date the dwelling shall be free from defects caused by faulty installation of plumbing, electrical, heating and cooling

delivery systems; however, in the case of appliances, no warranty shall exceed the length and scope of the warranty offered by the manufacturer.

(3) Ten years from and after the warranty date for major construction defects as defined in this act.

(4) However, any alternate program as provided for in section 8 of this act submitted for approval, subsequent to the effective date of this act, may contain warranties and time periods greater than provided for in section 3b. (1), (2), and (3) of this act.

**Adopted.** L. 1977, c. 467, §3.

**46:3B-4. Liability of builder.** A builder of a new home shall be liable to any owner thereof during the time period when the new home warranty, prescribed by the commissioner pursuant to this act, is applicable to the home for any defect therein which is covered by the warranty in accordance with its terms and conditions. The liability of a builder under the new home warranty shall be limited to the purchase price of the home in the first good faith sale thereof or the fair market value of the home on its completion date if there is no good faith sale.

**Adopted.** L. 1977, c. 467, §4.

**46:3B-5. Registration with department; application; fee; issuance of certificate; validity; duration; conditions for registration.** No builder shall engage in the business of constructing new homes unless he is registered with the department. The department shall provide application forms for such registration and shall prescribe the information to be included therein. Each application shall be accompanied by a reasonable fee, prescribed by the commissioner, and proof, satisfactory to the commissioner, of participation in the new home warranty security fund or an approved alternate new home warranty security program. Upon receipt of the above, the department shall issue a certificate of registration.

Each certificate of registration shall be valid for a period of 2 years from the date of issue and may be renewed for additional 2-year periods.

As a condition for the registration, a builder shall be required to participate in the new home warranty security fund or an approved alternate new home warranty security program.

No corporation, partnership or other business organization shall be entitled to registration hereunder, nor shall they engage in the construction of new homes unless a stockholder, director, officer, partner, or employee thereof, as the case may be, shall be a registered builder.

**Adopted.** L. 1977, c. 467, §5.

**46:3B-6. Investigation by commissioner; hearings; denial; suspension or revocation of certificate; grounds.** a. The commissioner, upon the complaint of an aggrieved person, may conduct investigations into the allegations made against any builder required to be registered under this act. In pursuit of such investigations, the commissioner shall be authorized to hold hearings in accordance with the provisions of the Administrative Procedures Act (P.L.1968, c. 410, C. 52:14B-1 et seq.) applicable to contested cases, to subpoena witnesses and compel their attendance, to require the production of papers, records or documents, administer oaths or affirmations to witnesses, to inspect such relevant books, papers, records or documents of such builder at his place of business during business hours, and to conduct inspections of new home construction sites owned by a builder or in which a builder has an ownership interest.

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b. The commissioner may deny, suspend or revoke any certificate of registration, after affording the registrant or applicant the opportunity for a hearing in accordance with the provisions of the Administrative Procedures Act (P.L.1968, c. 410, C. 52:14B-1 et seq.) applicable to contested cases, if the registrant or applicant has:

(1) Willfully made a misstatement of a material fact in his application for registration or renewal;

(2) Willfully committed fraud in the practice of his occupation;

(3) Practiced his occupation in a grossly negligent manner;

(4) Willfully violated any applicable building code to substantial degree;

(5) Failed to continue his participation in the new home warranty security fund or an approved alternate new home warranty security program after proper notice from the commissioner in writing by certified mail; or

(6) Violated any provision of this act or any rule or regulation adopted pursuant thereto, after proper notice from the commissioner in writing by certified mail.

Adopted. L. 1977, c. 467, §6.

**46:3B-7. New home warranty security fund; purpose; investment and reinvestment of moneys; claims; hearing; review through conciliation or arbitration procedure; replenishment of fund.** a. There is hereby established a new home warranty security fund to be maintained by the State Treasurer in a trust account, separate and apart from other funds and administered by the commissioner. The purpose of the fund is (1) to provide moneys sufficient to pay claims by owners against builders participating in the fund for defects in new homes covered by the new home warranty; and (2) to pay the costs of administering the new home warranty program established in the department, including the costs of obtaining sufficient reinsurance to prudently protect the fund against unanticipated risks and costs incurred by the board in the discharge of its duties. The amounts payable by participating builders shall be established and may be changed from time to time, as the experience of the fund shall require, by the commissioner, and shall be sufficient to cover anticipated claims, to provide a reasonable reserve and to cover the costs of administering the fund. Amounts paid by participating builders shall be forwarded to the State Treasurer and shall be accounted for and credited by him to the new home warranty security fund.

b. The State Treasurer shall hold, manage and, through the Division of Investment, invest and reinvest moneys in the fund and credit all income earned thereon to the fund in the same manner as provided by law for the investment of pension and retirement funds administered by the State. The department shall keep the State Treasurer and the board advised of anticipated cash demands for payment of claims against the fund. No funds shall be spent, appropriated or transferred from the fund other than for the express purposes of paying claims or costs related to administering the program or the fund as enumerated in subsections a, c, or e of this section. In the event funds are spent, appropriated or transferred from the fund for other purposes in violation of this subsection, the obligation of participating builders to contribute to the fund shall be suspended until such time as the funds are replenished, and if the amount in the fund shall become insufficient thereafter to pay claims or make awards, the payment of claims and making of awards shall be made from the General Fund. The Joint Budget Oversight Committee, or its successor, shall have the authority to investigate complaints of violative fund

transfers under this section, and shall order the Commissioner of Community Affairs to suspend collection from participating builders if it determines that the provisions of this subsection have been violated.

c. Prior to making a claim against the fund for defects covered by the warranty, an owner shall notify the builder of such defects and allow a reasonable time period for their repair. If the repairs are not made within a reasonable time or are not satisfactory to the owner, he may file a claim against the fund in the form and manner prescribed by the commissioner. The commissioner shall investigate each claim to determine the validity thereof, and the amount of the award that shall be made thereon, and shall hold a hearing if requested by either party, in accordance with the provisions of the Administrative Procedures Act (P.L.1968, c. 410, C. 52:14B-1 et seq.) applicable to contested cases. Reasonable hearing fees shall be assessed against the unsuccessful party. The amount of the award shall be sufficient to cover the reasonable costs necessary to correct any defect or defects covered under the warranty, but the total amount of awards from the fund for any new home shall not exceed the purchase price of the home in the first good faith sale thereof or the fair market value on the home on its completion date if there is no good faith sale. All claims submitted by an owner shall first be reviewed through a conciliation or arbitration procedure by the department, and in the event that the owner is found to be in the right, then the builder shall be required to correct such claims as determined through the conciliation or arbitration procedure. If a builder is unable or willfully refuses to correct such deficiency, then an amount sufficient to cure the problem shall be paid from the fund to the owner. In such cases, the commissioner may then proceed against the builder in accordance with subsection b. of section 6 of P.L.1977, c.467 (C.46:3B-6). Upon certification from the commissioner of the amount of an award, the State Treasurer shall make payment to the claimant from the fund.

d. (deleted by amendment, P.L.2001, c. 147)

e. If the board determines that fund reserves and reinsurance may be insufficient to cover anticipated claims, the board shall recommend steps to the commissioner to restore fund resources to sufficiency, which may include increases in premiums and fees, expanded reinsurance and changes in standards and claims adjudication procedures.

f. The commissioner may provide for surcharges against those builders who are responsible for a significant number of awards against the fund and may discontinue the participation in the fund of any builder who is responsible for an excessive number of awards against the fund after a hearing in accordance with the provisions of the Administrative Procedures Act (P.L.1968, c. 410, C. 52:14B-1 et seq.) applicable to contested cases. At no time shall the State be required to contribute any moneys to the fund, nor shall the State have any liability to any person having any right to or claim against the fund over and above the amount therein except in those instances where it is determined by the Joint Budget Oversight Committee that the provisions of subsection b. of this section have been violated concerning amounts spent, appropriated or transferred from the fund.

g. The commissioner may order the return of funds to owners of enrolled homes as may be recommended by the board pursuant to section 3 of P.L.2001, c.147 (C. 46:3B-7.3).

**Adopted.** L. 1977, c. 467, §7. **Amended.** L. 2001, c. 147, §5, effective July 10, 2001.

**46:3B-7.1. Findings and declarations.** The Legislature finds and declares that:

a. New Jersey provides unique protection through “The New Home Warranty and Builders’ Registration Act,” P.L.1977, c.467 (C.46:3B-1), which establishes a program requiring that newly constructed homes conform with certain construction and quality standards and provides buyers of new homes with insurance-backed warranty protection in the event such standards are not met;

b. In addition to authorizing warranty coverage through private insurance programs, the act requires that a new home warranty security fund be maintained by the State Treasurer and administered by the commissioner on behalf of the buyers of new homes;

c. Moneys payable to the fund are solely for the purpose of paying proven claims, providing reasonable reserves, including appropriate forms of reinsurance, and covering the costs of program administration. Accordingly, program premiums, fees and other charges must be adequate to these purposes;

d. Since the premiums, fees and other charges assessed by the fund are solely for the protection of the buyers of new homes enrolled in the program and since such charges bear directly on the affordability of those homes, the fees should be set in an actuarially sound manner, including prudent reinsurance, with provision for the distribution of any accumulated surplus to the buyers of new homes enrolled in the fund; and

e. The purposes of the “The New Home Warranty and Builders’ Registration Act” shall be furthered through the creation of a Board of Trustees to provide independent oversight over the fund on behalf of those whose homes are covered by it.

**Adopted.** L. 2001, c. 147, §1, effective July 10, 2001.

**46:3B-7.2. “New Home Warranty Security Fund Board of Trustees” established.** a. There is hereby established in, but not of, the Department of Community Affairs the “New Home Warranty Security Fund Board of Trustees.” The duties of the board shall include, but shall not be limited to, monitoring, reporting and making recommendations to the commissioner on the financial soundness, premium structure, reinsurance adequacy and administrative efficiency of the new home warranty security fund and, when appropriate, the distribution of surplus reserves to the owners of enrolled homes. The board shall not make any determination regarding the payment of specific claims by the commissioner pursuant to section 7 of P.L.1977, c.467 (C.46:3B-7).

b. The board shall consist of five trustees to be appointed by the commissioner. One trustee shall represent the home buying public; one shall represent the New Jersey Builders Association; one shall be a certified public accountant licensed to practice in New Jersey; one shall be an attorney-at-law who is a member in good standing of the New Jersey bar; and one shall be a representative of the insurance industry.

c. Each trustee shall be appointed for a four-year term; however, among the trustees first appointed, one shall be appointed for a term of one year, two shall be appointed for a term of two years, one shall be appointed for a term of three years and one shall be appointed for a term of four years. The trustees shall annually select a chairperson from among themselves. The commissioner may reappoint a trustee. The commissioner may remove a trustee for cause.

d. Trustees shall serve without compensation, but may be reimbursed for expenses incurred in the performance of their duties.

**Adopted.** L. 2001, c. 147, §2, effective July 10, 2001.

**46:3B-7.3. Duties of Board.** a. The Board of Trustees shall monitor and annually report to the Legislature on the financial performance of the new home warranty security fund, with particular attention to whether the fund's income from fees, premiums, interest and other sources, together with its reserves and reinsurance, will provide sufficient resources to meet anticipated claims on the fund.

b. The board shall commission an independent biennial actuarial analysis of the fund. The initial analysis shall commence June 30, 2001.

c. Based on its continuing monitoring of the fund's financial performance and the adequacy of the fund relative to anticipated claims, the board shall annually submit to the commissioner recommendations concerning the fund's premiums, fees, investments and reinsurance. Within 90 days of receipt of the recommendations, the commissioner shall formally respond as to the implementation of the recommendations, including an explanation of any deviation from the board's recommendations.

d. If, based on the actuarial analysis of the fund, the board determines that the fund's reserves are in excess of what is sufficient to meet anticipated claims, the board shall recommend to the commissioner the amount of fund moneys that should be returned to, and the mode of calculating the distribution of such moneys among, the owners of the enrolled homes.

e. The board shall periodically review and make recommendations to the commissioner regarding the administration of the new home warranty program established in the department. Such review and recommendations shall include, but not be limited to, claims processing procedures, standards of construction and quality for the structural elements and components of a new home, and the degrees of noncompliance that shall constitute a defect subject to the warranty coverage.

**Adopted.** L. 2001, c. 147, §3, effective July 10, 2001.

**46:3B-8. Review and approval of alternate new home warranty security programs.** The commissioner is authorized and directed to review and approve alternate new home warranty security programs which provide for payment of claims against builders for defects covered under the new home warranty and financial security adequate to cover the total amount of claims that may be reasonably anticipated against participating builders at least equivalent to that provided by the new home warranty security fund. However, any new home warranty insurance program approved by the Commissioner of Insurance prior to the adoption of this act shall: (1) Constitute an approved alternate new home warranty security program and shall be deemed in accordance with this section and in compliance with this act in the form and substance heretofore approved by the Commissioner of Insurance, (2) not be subject to any rules and regulations adopted by the Commissioner of the Department of Community Affairs pursuant to this act when such rules and regulations are in conflict with said previously approved new home warranty program. Any person desiring approval of a new home warranty security program shall make application to the commissioner in such form and manner as he shall prescribe. He may establish and charge reasonable fees to cover the costs incurred in reviewing and approving such applications. The commissioner shall review each application and conduct any

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investigation he deems necessary with respect to an application. The commissioner may, and if an applicant so requests, he shall, hold a hearing on an application in accordance with the provisions of the Administrative Procedures Act (P.L.1968, c. 410, C. 52:14B-1 et seq.) applicable to contested cases. If the commissioner finds that a new home warranty security program provides coverage and financial security at least equivalent to the new home warranty security fund, he shall approve the program. The commissioner may revoke or suspend the approval for such a program after a hearing in accordance with the same procedures applicable to hearings on applications if he finds that the program no longer provides coverage and financial security equivalent to the new home warranty security fund.

**Adopted.** L. 1977, c. 467, §8.

**46:3B-8.1. Warranty guarantor to file statement.** Whenever a builder participating in an alternative new home warranty program approved by the commissioner pursuant to section 8 of P.L. 1977, c. 467 (C. 46:3B-8) issues a warranty guaranteed by that plan, the warranty guarantor shall, before the 15th day of the month next following the month in which the new home covered by the warranty is conveyed to the owner, file with the commissioner a statement listing: (1) the name of the approved program as listed with the department; (2) the name or names and Social Security number or numbers of the owner or owners to whom the warranty was issued, the warranty date, and the enrollment number or other designation by which the warranty is identified in the records of the approved program; (3) the name, address and registration number of the registered builder by whom the warranty has been issued; (4) the sales price of the new home upon which the warranty was issued, its type and method of construction in accordance with categories established by the commissioner, and its location by street address or its block and lot number designation in the tax records of the municipality in which it is located; and (5) such other information as the commissioner may require in order to carry out the provisions and purposes of this act [46:3B-8.1 et seq.].

**Adopted.** L. 1992, c. 56, §1, effective November 14, 1992.

**46:3B-8.2. Filing and indexing.** The commissioner shall cause the information reported to him pursuant to section 1 of this act [46:3B-8.1] to be filed and indexed, in coordination with data on file with the department relating to alternate programs approved by the commissioner, so as to permit a person consulting the file to ascertain the following data and any combination thereof:

(1) The identity and business address of any approved program, of the warranty guarantor of the program, and of the warranty administrator if different from the warranty guarantor.

(2) The identity, business address and registration number of each builder participating in any approved program.

(3) The number of warranties issued and in force by any builder participating in an approved program; the type, sales price and location of each property covered by those warranties; the identity of the owners to whom those warranties were issued; and warranty dates of each.

(4) The number of warranties issued and in force that are guaranteed by the guarantor of any program; the builder by whom they were issued; the type, sales price and location of each property covered by those warranties; the identity of the owners to whom those warranties were issued; and the warranty dates of each.



(5) The address or other location of every property upon which a warranty has been issued and is in force, according to the warranty date, the builder by whom issued, the approved program by which it is guaranteed, the owner or owners to whom issued, the type of construction and the sales price.

(6) Each of the foregoing, or any combination thereof, arranged chronologically according to the year, or any month of any year, of the warranty dates of the warranties involved.

**Adopted.** L. 1992, c. 56, §2, effective November 14, 1992.

**46:3B-8.3. Inspection of files.** The files maintained pursuant to section 2 of this act [46:3B-8.2] shall be open to inspection by the public at any time during regular business hours at the department's main office and at any other location at which the commissioner may direct duplicate files to be maintained. Copies of information derived from these files shall be available, upon payment of fees sufficient to defray the cost of preparing and distributing those copies, to any person requesting them.

**Adopted.** L. 1992, c. 56, §3, effective November 14, 1992.

**46:3B-9. Rights and remedies available to owner.** Nothing contained herein shall affect other rights and remedies available to the owner. The owner shall have the opportunity to pursue any remedy legally available to the owner. However, initiation of procedures to enforce a remedy shall constitute an election which shall bar the owner from all other remedies. Nothing contained herein shall be deemed to limit the owner's right of appeal as applicable to the remedy elected.

**Adopted.** L. 1977, c. 467, §9.

**46:3B-10. Rules and regulations.** The commissioner shall promulgate such rules and regulations as may be necessary to carry out the provisions of this act.

**Adopted.** L. 1977, c. 467, §10.

**46:3B-11. Act to supersede municipal ordinance or regulation.** This act shall supersede any municipal ordinance or regulation which provides for the licensing or registration of builders or for the protection by bonds or warranties required to be supplied by builders, exclusive of those required by water, sewer, utilities, or land use requirements.

**Adopted.** L. 1977, c. 467, §11.

**46:3B-12. Failure to register; penalty.** Any builder who fails to register as required hereunder shall be subject to a penalty not to exceed \$2,000.00 for each offense to be enforced and collected by the commissioner in the name of the State in a summary proceeding in accordance with the Penalty Enforcement Law (N.J.S. 2A:58-1 et seq.).

**Adopted.** L. 1977, c. 467, §12.

**46:3B-13. Legislative findings and declaration.** The Legislature finds, determines and declares:

a. Within the past decade, the building codes of this and other states have permitted, and builders have employed, fire-retardant treated (FRT) plywood roof sheathing as an approved mode of construction to provide fire safety in multi-unit structures.

b. It has recently been discovered that, in many instances, plywood treated for fire retardancy has proven liable to suffer material deterioration and premature structural failure. As a result, many condominiums, cooperatives, fee simple townhouses and similar structures built in recent years have been, and many more

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may soon be, faced with premature problems of replacing sheathing and roofing on a large scale.

c. The difficulty of dealing with such unanticipated structural failure potentially falls most acutely on planned real estate development associations and home owners in condominiums, cooperatives, fee simple townhouses and similar housing developments that employ the type of firewall-separation construction to which FRT plywood sheathing is commonly applied. This failure constitutes a major construction defect under existing law, but because of the varied response of warranty guarantors, including private warranty guarantors under "The New Home Warranty and Builders' Registration Act," P.L.1977, c.467 (C.46:3B-1 et seq.), it appears likely that the difficulties of many owners may be compounded by resistance to their claims for compensation, and that if they may collect at all it will be only after prolonged negotiation or litigation.

d. It is, therefore the intention of this legislation to establish a funding mechanism, based upon the State's New Home Warranty program and not dependent upon general revenues of the State, to make immediate funding available to homeowners faced with emergent needs for immediate remediation of the major construction defect, as well as to builders and warranty guarantors who honor the claims of such owners.

e. It is the further intention of this legislation to provide practicable means for pursuing claims against any responsible party, where appropriate, to recover costs of remediation due to material defects for which a responsible party may be held liable.

**Adopted.** L. 1991, c. 202, §1, effective October 9, 1991.

**46:3B-14. Remediation of structural damage due to defective FRT plywood.** a. The commissioner is hereby authorized to advance moneys out of the fund for the remediation of structural damages due to defective FRT plywood occurring in structures covered by an approved warranty program, subject to the provisions and requirements of this act.

b. A claim for such advance funding may be made by any owner of the affected structure, jointly by any owner and builder of the affected structures, any builder who undertakes to remediate the cited damages, or any warranty guarantor who undertakes to reimburse the owner or builder for the costs of such remediation. Approval and payment of such claim shall be conditioned upon the claimant's assigning to the State of New Jersey, for the use of the fund, the claimant's rights 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. As a condition of any assignment and as a precondition to the receipt of any advance funding pursuant to this section, a claimant that has not previously instituted suit to recover damages on grounds of failure of FRT plywood shall provide the Department of Community Affairs with all documents and information in the possession of the claimant or of the claimant's counsel or representative that may be relevant to the State's effort to recover from responsible parties, and shall agree to cooperate fully with the Department of Community Affairs and the Attorney General's Office in the prosecution of any legal action to obtain such recovery. If the claimant has previously instituted suit to recover such damages, then the claimant and its counsel, as a condition of any assignment and receipt of advance funding shall cooperate with the Attorney General's pursuit of the claim or any related civil action in accordance with the provisions of section 6 of this act [46:3B-18]. The

failure of any claimant or its counsel, employees, members, or agents to cooperate fully with the Attorney General or the commissioner shall constitute a basis to deny payment of the claim and the refusal of its assignment or, in the instance that the claim has already been paid and assigned, for the rescission of the assignment and the recovery by the commissioner of any monies paid by the commissioner to the claimant pursuant to this act. All documents and information communicated to the Attorney General and the commissioner by the claimant or its counsel under this section and under section 6 of this act shall be fully protected by all privileges applicable by statute, court rule, or common law for attorney-client communications and attorney work product, and the communication of that information to the Attorney General or the commissioner by claimant or its counsel shall not be deemed a waiver of any of those privileges and shall not be deemed to provide a basis to require those communications to be disclosed to potentially responsible parties, or their counsel, or others.

c. A claim pursuant to this section shall be filed with the commissioner in such manner and form, and accompanied by such supporting data, as the commissioner shall by regulations require. Upon review of such claim the commissioner may require, and the claimant shall supply, such additional data and other information as the commissioner deems necessary in order to substantiate approval of the claim in accordance with the standards set forth in section 3 of this act [46:3B-15].

d. The commissioner is hereby authorized to expend moneys of the fund for the expenses of administration of claims made under this section, including the costs of receiving, verifying and paying such claims, of handling or resolving administrative hearings or litigation arising out of claims that are rejected by the commissioner for advance funding, and of pursuing the recovery of moneys on behalf of the fund pursuant to section 5 of this act [46:3B-17].

e. For purposes of this act “owner” means, for purposes of a claim involving a structure or structures that is filed under this act, an individual fee simple owner, an association of individual owners or lessees that is responsible for the maintenance or replacement of the roof structure or an association formed for the purpose of pursuing a unified claim under this act.

f. For the purposes of this section “undertakes” means, for purposes of a claim filed by a builder or warranty guarantor, a written agreement or written acknowledgement by the builder to remediate the cited damages for the structure or structures for which the claim is being filed, or a written agreement or written acknowledgement by the warranty guarantor to reimburse the owner or builder for the costs to remediate the cited damages for the structure or structures for which the claim is being filed.

**Adopted.** L. 1991, c. 202, §2, effective October 9, 1991.

**46:3B-15. Claims; examination of premises; disbursements.** a. Whenever a claim which appears or purports to be eligible for advance funding pursuant to this act is filed with the commissioner, the commissioner shall:

(1) Order an examination of the subject premises to determine whether the damage claimed is ascribable to the FRT plywood or the FRT treatment applied to it, resulting or materially contributing to the creation of a major construction defect, and, if it is so determined, shall declare the claim eligible for such advance funding; and

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(2) Require the claimant to propose an appropriate method of remediation, which method and the estimated cost thereof shall be within the guidelines set pursuant to subsection b. of this section.

b. The commissioner shall adopt and promulgate, in accordance with the provisions of the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.):

(1) Standards, procedures and technical criteria for making an examination and determination pursuant to paragraph (1) of subsection a. of this section; and

(2) Guidelines for determining permissible and appropriate methods of remediation, for estimating the costs thereof, and for approving proposed methods for application in particular cases as required pursuant to paragraph (2) of subsection a. of this section.

In carrying out the provisions of paragraph (1) of this subsection the commissioner shall cause to be developed a method of nondestructive testing or other procedure capable of ascertaining inevitable premature failure of an FRT plywood installation. As used in this section "inevitable premature failure" means a condition in which deterioration of the FRT plywood, ascribable to a defect: in any of the materials or techniques used in its manufacture, in its fire retardant treatment, or due to other actions or omissions by responsible parties; and which is ascertainable within the ten year warranty period and can be accurately predicted in accordance with the commissioner's testing procedure to make replacement of the material necessary within the ten year warranty period. Inevitable premature failure shall be deemed to constitute a major construction defect as of the time of its detection.

A person aggrieved by any ruling, action, order or notice of the commissioner denying an FRT plywood claim, in whole or in part, filed pursuant to section 2 of this act [46:3B-14], shall be entitled to an administrative hearing. The application for the hearing shall be filed with the commissioner by the 15th day after receipt by the person of the notice of the ruling, action, order or notice. The only issues that may be raised in the administrative hearing are whether the test or other method used by the commissioner to determine if the subjected premises were damaged in accordance with the requirements of paragraph (1) of this subsection was administered properly, or whether the proposed method of remediation was within the guidelines set pursuant to paragraph (2) of this subsection. The aggrieved person shall have the burden to demonstrate that the test or other method was administered improperly or that the proposed method of remediation was within the guidelines.

c. When a claim has been filed with the commissioner pursuant to this section and has been accepted for filing pursuant to section 6 of this act, if the commissioner (1) determines that a major construction defect ascribable to FRT plywood or FRT treatment exists in accordance with subsection b. of this section and (2) approves a proposed method of remediation, then the commissioner shall approve the claim for advance funding and authorize disbursement of money from the fund, except as prohibited or limited by section 6 of this act [46:3B-18]. Disbursement shall be prohibited until the presentation and verification of invoices for work and materials actually provided and installed in accordance with the approved method.

d. Disbursements of advance funding shall be the actual cost of the work and materials as shown by verified invoices.

**Adopted.** L. 1991, c. 202, §3, effective October 9, 1991.

**46:3B-16. Funding; planned real estate developments.** a. Upon the effective date of this section, and annually thereafter, the commissioner shall estimate, upon the basis of claims approved pursuant to this act, or then pending and likely to be approved, the amount of money needed in the fund, in addition to those sums which will be required to be paid or reserved for claims other than claims under this act, to make full payment, after verification, upon anticipated invoices and upon invoices previously presented and verified, and to meet costs of administration pursuant to subsection d. of section 2 of this act. If this estimate exceeds the amount of money then available in the fund and reasonably anticipated to be received pursuant to subsection a. or b. of section 7 of P.L.1977, c.467 (C.46:3B-7) or pursuant to subsections b. and d. of this section within the 12 months next following, the commissioner shall relieve the deficiency by levying a surcharge upon new home sales in such amount, not to exceed \$100 per new home sold, as may reasonably be expected to generate revenue sufficient to promote the actuarial integrity of the new home warranty security fund in light of any expenditures made pursuant to this act and not otherwise recovered.

b. Upon approval of a claim by the commissioner, an owner which is a planned real estate development within the meaning of P.L.1977, c.419 (C.45:22A-21 et seq.) shall, as a condition of eligibility for funding under this act, transfer into the fund the moneys accumulated, to the date of such approval, in its regular reserve fund for roof replacement for the roof areas covered by the claim, and shall agree to deposit into the fund periodically thereafter until completion of the remediation all moneys which, under the fiscal administration of the owner, would otherwise be due to be so paid into that reserve fund. The same conditions of eligibility may be imposed by the commissioner upon an owner which is not a planned real estate development within the meaning of the law, whenever it appears to the commissioner from the documentation substantiating the claim that the owner has in fact established a reserve fund for this purpose and has accumulated moneys therein with a view to future roof replacement. Moneys transferred into the fund pursuant to this subsection shall equal the standard of adequacy established by the commissioner. For the purposes of this subsection the commissioner shall determine the amount of reserves deemed to represent an adequate level for roof reserve funding, taking into account the age of the affected structures, the type of construction, and other relevant factors, such as the public offering statement for the project filed with the department pursuant to the "Planned Real Estate Development Full Disclosure Act," P.L.1977, c.419 (C.45:22A-21 et seq.).

c. A surcharge levied pursuant to subsection a. of this section shall be due and payable by the builder prior to transfer of title to the owner, and shall be made directly to the department, which shall issue a receipt to the builder and a duplicate thereof to the owner. No certificate of occupancy pursuant to section 15 of P.L.1975, c.217 (C.52:27D-133) shall be issued except after presentation to the enforcing agency of the receipt or verified duplicate.

d. Moneys recovered pursuant to section 5 of this act [46:3B-17] shall be deposited in the fund. Whenever in making the annual estimate pursuant to subsection a. of this section the commissioner determines that the amount of money that will be available in the fund to meet pending and anticipated claims

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will exceed the amount necessary for that purpose, the commissioner shall provide that the excess be refunded to those builders who have paid assessments levied in accordance with subsection a. of this section. Refunds to each builder shall bear the same proportion to the total excess being refunded as that builder's proportionate share of all surcharges theretofore levied and collected.

**Adopted.** L. 1991, c. 202, §4, effective October 9, 1991.

**46:3B-17. Legal action in pursuit of claims.** a. The commissioner, on behalf of the State and for the benefit of the fund, shall take such legal action as may be necessary or appropriate to pursue any claims against any responsible party, which may appear justified upon the record of any claims approved by the commissioner pursuant to section 3 of this act or which otherwise may appear justified. The Attorney General may sue in any federal or state court, in the name of this State, or enter into any appropriate arbitration proceeding under the laws of this or any other state, and may engage such private counsel and employ such technical experts as the Attorney General, after consultation with the commissioner, deems necessary for full and effective prosecution of any legal action to recover from responsible parties for any of the claims referred pursuant to this act as well as to recover against responsible parties for any other claims, whether or not referred by the commissioner, that the Attorney General may choose to prosecute arising out of what is commonly referred to as the consumer fraud act, P.L.1960, c.39 (C.56:8-1 et seq.), or upon any other applicable legal basis.

b. Any moneys recovered pursuant to subsection a. of this section shall, after deduction of the expenses of the Attorney General to the extent that such expenses have not already been reimbursed directly out of the fund in pursuit of any claim or claims by the Attorney General against the party from whom such recovery is obtained, be deposited in the fund, provided that any civil penalty or costs imposed under P.L.1960, c.39 (C.56:8-1 et seq.), shall be deposited in accordance with that act.

c. Nothing in this act shall be expressly or impliedly construed or interpreted to abrogate or limit the authority of the Attorney General to investigate and prosecute FRT plywood related claims, whether or not referred by the commissioner, under P.L.1960, c.39 (C.56:8-1 et seq.) or any other statutory or legal basis available to the Attorney General.

**Adopted.** L. 1991, c. 202, §5, effective October 9, 1991.

**46:3B-18. Claims where legal actions are pending.** a. Any person that prior to the effective date of this act had instituted a civil action to recover damages arising out of the failure of FRT plywood may submit a claim under the provisions of this act within 120 days of the effective date of the rules adopted by the commissioner that set forth an approved testing procedure or an alternate procedure for the detection of defective FRT plywood and the procedure for filing a claim hereunder. The claim shall set forth information as deemed necessary by either the commissioner or the Attorney General, including but not limited to: the caption and docket number of the civil action; the name, address and telephone number of the claimant's attorney, if any; the status of the civil action; and the status of the discovery. As part of the claim, the claimant shall submit a copy of all pleadings and orders filed in the civil action including the complaint, answers, counter-claims, cross-claims, or any amendments thereto, and any expert reports exchanged among the parties. The commissioner or the Attorney General may

require the submission of other documents or information by the claimant or the claimant's attorney as may be necessary to effectuate the purposes of this section.

b. A claim filed with the commissioner pursuant to subsection a. of this section, by any person who had instituted or whose interests are being litigated in any pending civil action, shall be subject to the following reviews and determinations respectively by the commissioner and the Attorney General prior to and as a condition of the disbursement of any advance funding by the commissioner pursuant to section 3 of this act [46:3B15] and the corresponding assignment of the claimant's rights against potentially responsible parties to the State:

(1) The Attorney General shall initially review the claim, documents and information required to be filed pursuant to subsection a. of this section to determine, in the Attorney General's discretion based on the information provided at that time and subject to further information that may be obtained or developed, whether the acceptance of any assignment of the claimant's rights against responsible parties asserted in the existing civil action would, for any one or more reasons, be impractical or otherwise contrary to the best interests of the State or the public. Such reasons warranting initial rejection of the claim by the Attorney General may include but are not limited to:

(a) if one or more co-plaintiffs in the claimant's civil action, or other aggrieved parties whose rights should have been litigated with those of the claimant in the existing action under entire controversy principles, have not themselves filed claims with the commissioner, or have had their own claims rejected by the Attorney General or the commissioner;

(b) if the court in which the civil action is pending has issued orders in, or otherwise imposed conditions on, the litigation which the Attorney General finds would be impractical or otherwise contrary to the best interests of the State or the public to accept if the claimant's rights against potentially responsible parties were assigned to the State;

(c) if all or the approved portion of the claims of the claimant in the litigation against potentially responsible parties cannot be severed from other claims in the litigation not being assigned to the State;

(d) if the testimony or other evidence that has emerged in discovery or in the investigation of the case make it impractical or otherwise contrary to the best interests of the State or the public to accept the assignment of the claimant's rights;

(e) if the claimant has presented insufficient information upon which the Attorney General can recommend the acceptance of the assignment of the claimant's rights;

(f) if it would not be cost-effective to accept the assignment and litigate the claimant's rights against potentially responsible parties; or

(g) any other reason within the discretion of the Attorney General.

The Attorney General shall not be obligated to disclose to the claimant the specific reason for the initial recommendation to reject the assignment.

(2) If the Attorney General determines in the initial review to recommend the assignment of the claimant's rights against responsible parties, the commissioner shall then review the claim in accordance with section 3 of this act [46:3B15].

(3) If the commissioner approves a claim in whole or in part, the Attorney General shall perform a final review of the claim, the documents required to be filed pursuant to subsection a. of this section, and any other documents or information the Attorney General deems necessary, including but not limited to

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the consideration of any intervening developments in the litigation, to determine in the Attorney General's discretion whether the acceptance of any assignment of the claimant's rights against responsible parties asserted in the existing civil action would, for any reasons, be impractical or otherwise contrary to the best interests of the State or the public. Such reasons warranting the final rejection of the claim by the Attorney General may include those reasons set forth in paragraph (1) of this subsection. The Attorney General shall not be obligated to disclose to the claimant the specific reason for the final rejection of the assignment.

(4) If the Attorney General determines in the final review to recommend the assignment of the claimant's rights against responsible parties, the claimant or its counsel, upon the request of the Attorney General, shall move before the court in which the civil action is pending for any or all of the following relief: a voluntary dismissal of the action or the claimant's own claims therein without prejudice; the severance of those claims approved by Attorney General and the commissioner from other claims in the civil action; a stay of the proceedings in the action; or any other procedural relief that the Attorney General may deem appropriate. The filing of such a motion and the obtaining of the relief requested by the Attorney General shall be necessary conditions of the payment of any claim and the corresponding assignment of the claimant's rights against potentially responsible parties to the State.

(5) If the Attorney General determines in the final review to recommend the assignment of the claimant's rights to the State and the court in which the civil action is pending grants the procedural relief deemed necessary and requested by the Attorney General, the claim, if otherwise eligible for advance funding pursuant to section 3 of this act [46:3B15], shall be paid by the commissioner upon the assignment to the State of the claimant's rights against potentially responsible parties. As a condition of payment of the claims and the assignment of the claimant's rights to the State, the claimant and its prior counsel and any of its employees, members and agents shall cooperate with the Attorney General's pursuit of the claim or any related civil action, including, but not limited to, making available to the Attorney General all evidence or material previously gathered and expert reports obtained by the claimant or its counsel to pursue the claim, making the premises available for inspection by the Attorney General, the commissioner, or their employees or agents, and testifying in any administrative or judicial proceedings. The failure of the claimant or its counsel, employees, members or agents to cooperate fully with the Attorney General or the commissioner shall constitute a basis to deny payment of the claim and the refusal of its assignment or, in instances where the claim has already been paid and assigned, for the rescission of the assignment and the recovery by the commissioner of any monies paid by the commissioner to the claimant pursuant to this act.

(6) The Attorney General's initial recommendation to accept the assignment of a claim shall not be construed to impose any obligation on the commissioner to approve all or part of that claim unless the commissioner is satisfied that the claim meets the standards of section 3 of this act [46:3B15]. Neither the Attorney General's initial recommendation to accept assignment of a claim, the commissioner's approval of that claim, the Attorney General's final determination to accept assignment of the claim, or the fact of the assignment itself shall be construed to require the Attorney General to file or maintain a legal action against



potentially responsible parties relating to that particular claim unless the Attorney General, in the Attorney General's discretion, determines that it remains practical and in the best interests of the State and the public to do so. If the claimant's rights are assigned to the State, the Attorney General shall have the sole discretion to determine the manner in which to proceed on the claim in the existing civil action or otherwise.

(7) If the court in which the civil action is pending grants, at the request of the Attorney General, a claimant's motion for a voluntary dismissal of the action without prejudice, any subsequent action commenced by the Attorney General encompassing the claimant's rights which have been assigned to the State shall be deemed to have been commenced for purposes of the applicable statute or statutes of limitations at the time the claimant instituted the original dismissed civil action.

c. If a person that had instituted a civil action prior to the adoption of this act to recover damages arising out of the failure of FRT plywood fails to submit a timely and complete claim with the commissioner in accordance with subsections a. and b. of this section, that person may continue to pursue its civil action and such failure to submit a timely claim shall bar that person from pursuing any remedy under this act or from otherwise challenging any actions or inactions by the commissioner or the Attorney General relating to their administration of this act.

d. If the commissioner denies any claim accepted for filing under this section in full or in part, any challenge by the claimant to the commissioner's action on the claim shall be limited exclusively to the remedy and hearing procedures set forth in section 3 of this act [46:3B15]. Neither the Attorney General's initial recommendation or final determination to accept or reject an assignment of a claim shall be subject to administrative or judicial review. Neither the commissioner's action on the claim, or the Attorney General's determination, whether preliminary or final, to accept or reject an assignment of a claim pursuant to subsection b. of this section, shall constitute a basis for the claimant or any other person or entity to make the State, the department, the commissioner, the Attorney General or any of their respective officials, employees, or agents a party to any civil action.

e. Except as set forth in subsection d. of this section, the commissioner's review and action on any claim, the initial recommendation and the final determination of the Attorney General to accept or reject an assignment of the claimant's claim, and any oral or written communications or mental processes which reflect or relate to those reviews and determinations by the commissioner and the Attorney General shall not in any way be subject to discovery or inquiry in any administrative or judicial proceedings, and any documents obtained or issued in the course of these reviews and determinations shall not constitute public records pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.) or the common law. All documents and information communicated to the Attorney General and the commissioner by the claimant or its counsel under this section shall be fully protected by all privileges applicable by statute, court rule, or common law for attorney-client communications and attorney work product, and the communication of that information to the Attorney General or the commissioner by claimant or its counsel shall not be deemed a waiver of any of those privileges and shall not provide a basis to require those communications to be disclosed to potentially responsible parties, or their counsel, or others.

**46:3B-19. FRT plywood roof sheathing exception.** Except as otherwise provided in this act [L.1991, c.202], no payment shall be made from the new home warranty security fund established pursuant to section 7 of P.L.1977, c.467 (C.46:3B-7) for any defect in any new home warranted under an approved alternative new home warranty security program approved pursuant to section 8 of P.L.1977, c.467 (C.46:3B-8). The builder or other transferor of any new home warranted under an approved alternative new home warranty security program shall give written notice to the owner, and to any subsequent purchaser during the period in which the warranty is in effect, that the approved alternate new home warranty security program has exclusive responsibility for warranting the new home and that no claim may be brought against the new home warranty security fund for any cause other than defective FRT plywood roof sheathing.

**Adopted.** L. 1991, c. 202, §10, effective October 9, 1991.

**46:3B-20. Election of remedy for claims filed under act.** a. For purposes of a claim filed by a claimant for damages arising out of the failure of fire retardant treated plywood pursuant to this act [L.1991, c.202], the claimant shall be deemed to have elected a remedy pursuant to section 9 of P.L.1977, c.467 (C.46:35-9) upon the filing of a claim with the commissioner pursuant to section 2 or section 6 of this act [46:3B-14 or 18]. However, such an election of remedy shall not be deemed to have occurred for a claim filed pursuant to section 6 of this act if the assignment of the claim is declined by the Attorney General pursuant to paragraph (1) or (3) of subsection b. of section 6 of this act, or if the relief required for the assignment of the claim pursuant to paragraph (4) of subsection b. of section 6 of this act is denied by the court. In such instance the claimant may continue to pursue the civil action for damages arising out of the failure of fire retardant treated plywood.

b. For purposes of this section, a “claim” means a claim filed pursuant to this act by an owner, a warranty guarantor, a builder, or jointly by an owner and builder for the remediation of damages to any portion of the affected structure or structures arising out of the failure of fire retardant treated plywood. For purposes of this section, the claim shall be deemed to include all portions of the structure or structures which contain fire retardant treated plywood, whether or not the claimant or the joint claimant has sought remediation of all the affected structure or structures.

c. The provisions of section 9 of P.L.1977, c.467 (C.46:3B-9), shall not be deemed to preclude the Attorney General from filing, maintaining, or continuing a legal action against potential responsible parties regarding a claim which the Attorney General has accepted for assignment pursuant to this act [L.1991, c.202].

**Adopted.** L. 1991, c. 202, §11, effective October 9, 1991.