

46:3B-1

LEGISLATIVE HISTORY CHECKLIST
Compiled by the NJ State Law Library

NJSA: 46:3B-1

(Home
construction--structural
defects--remediation)

LAWS OF: 1991

CHAPTER: 202

Bill No: S2602

Sponsor(s): Paterniti and others

Date Introduced: April 26, 1990

Committee: Assembly: Consumer Affairs; Appropriations

Senate: County & Municipal

Amended during passage: Yes Amendments during passage
denoted by asterisks.

Date of Passage: Assembly: May 2, 1991

Senate: October 11, 1990

Date of Approval: July 11, 1991

Following statements are attached if available:

Sponsor statement: Yes

Committee Statement: Assembly: Yes 10-18-90 & 4-15-91

Senate: Yes

Fiscal Note: Yes

Veto Message: No

Message on signing: No

Following were printed:

Reports: No

Hearings: No

See newspaper clippings--attached:
KBG/SLJ

RECEIVED
JUL 11 1991
LEGISLATIVE COUNCIL
TREASURY

STATE OF NEW JERSEY

INTRODUCED APRIL 26, 1990

By Senators PATERNITI, VAN WAGNER, COSTA, ZANE,
Assemblymen SPADORO, PELLY. Assemblywoman SMITH,
Assemblymen KYRILLOS, KRONICK, COHEN and MCGREEVEY

1 AN ACT concerning the remediation of structural defects in
2 certain residential structures, amending and supplementing
3 P.L.1977. c.467 (C.46:3B-1 et seq.) and amending P.L.1975,
4 c.217.

5

6 BE IT ENACTED by the Senate and General Assembly of the
7 State of New Jersey:

8 1. (New section) The Legislature finds, determines and
9 declares:

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

15 b. It has recently been discovered that, in many instances,
16 plywood treated for fire retardancy has proven liable to suffer
17 material deterioration and premature structural failure. As a
18 result, many ¹[condominium apartment buildings] condominiums,
19 cooperatives, fee simple ³[townshouses¹] townhouses³ and similar
20 structures built in recent years have been and many more may
21 soon be faced with ³premature³ problems of replacing sheathing
22 and roofing on a large scale ³[at an early date after the
23 completion of construction]³.

24 c. The difficulty of dealing with such unanticipated structural
25 failure potentially falls most acutely on ¹planned real estate
26 development associations and¹ home owners in condominiums,
27 cooperatives ¹, fee simple townhouses¹ and similar housing
28 developments that employ the type of firewall separation
29 construction to which FRT plywood sheathing is commonly
30 applied. ³[Because] This failure constitutes a major construction
31 defect under existing law, but because³ of the varied response of
32 ¹[warrantors] warranty guarantors¹, including private
33 ¹[warrantors] warranty guarantors¹ under "The ³[New Jersey]³
34 New Home Warranty and Builders' Registration Act." P.L.1977,
35 c.467 (C.46:3B-1 et seq.), it appears likely that the difficulties of
36 many ¹[home]¹ owners may be compounded by resistance to their

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the
above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

¹ Senate SCM committee amendments adopted June 14, 1990.

² Senate floor amendments adopted October 1, 1990.

³ Assembly AAP committee amendments adopted April 15, 1991.

⁴ Assembly floor amendments adopted April 25, 1991.

1 claims for compensation, and that if they may collect at all it
2 will be only after prolonged negotiation or litigation.

3 d. It is, therefore the intention of this legislation to establish a
4 funding mechanism, based upon the State's New Home Warranty
5 program and not dependent upon general revenues of the State, to
6 make immediate funding available to homeowners faced with
7 emergent needs for immediate remediation of the ³[consequent
8 structural] major construction³ defect, as well as to builders and
9 ¹[warrantors] warranty guarantors¹ who honor the claims of such
10 ¹[homeowners] owners¹.

11 e. It is the further intention of this legislation to provide
12 practicable means for pursuing claims against ³[manufacturers
13 and treaters of fire-retardant plywood ¹or³ any ³[other]³
14 responsible party¹, where appropriate, to recover costs of
15 remediation due to material defects for which ³[they] a
16 responsible party³ may be held liable.

17 2. (New section) a. The commissioner is hereby authorized to
18 advance moneys out of the fund for the remediation of structural
19 damages due to ³[defective] ⁴[the premature failure of³
20 defective⁴ FRT plywood ⁴[³constituting a major construction
21 defect³]⁴ occurring in structures covered by an approved
22 warranty program, subject to the provisions and requirements of
23 this act.

24 b. A claim for such advance funding may be made by any
25 owner of the affected structure, ³jointly by any owner and
26 builder of the affected structures,³ any builder who ¹[has
27 undertaken] undertakes¹ to remediate the cited damages, or any
28 ¹[warrantor] warranty guarantor¹ who ¹[has undertaken]
29 undertakes¹ to reimburse the owner or builder for the costs of
30 such remediation. Approval ³and payment³ of such claim shall be
31 conditioned upon the claimant's assigning to the State of New
32 Jersey, for the use of the fund, the claimant's rights³[, to the
33 extent of funding provided pursuant to this act,]³ in any claim
34 upon any ³[manufacturer or treater of FRT plywood] responsible
35 party³, or in any other recovery of funds, that may arise out of
36 the damage cited in the claim. ³As a condition of any assignment
37 and as a precondition to the receipt of any advance funding
38 pursuant to this section, a claimant that has not previously
39 instituted suit to recover damages on grounds of failure of FRT
40 plywood shall provide the Department of Community Affairs with
41 all documents and information in the possession of the claimant
42 or of the claimant's counsel or representative that may be
43 relevant to the State's effort to recover from responsible
44 parties, and shall agree to cooperate fully with the Department
45 of Community Affairs and the Attorney General s Office in the
46 prosecution of any legal action to obtain such recovery. If the
47 claimant has previously instituted suit to recover such damages,
48 then the claimant and its counsel, as a condition of any
49 assignment and receipt of advance funding shall cooperate with
50 the Attorney General's pursuit of the claim or any related civil

1 action in accordance with the provisions of section 6 of this act.
2 The failure of any claimant or its counsel, employees, members,
3 or agents to cooperate fully with the Attorney General or the
4 commissioner shall constitute a basis to deny payment of the
5 claim and the refusal of its assignment or, in the instance that
6 the claim has already been paid and assigned, for the rescission of
7 the assignment and the recovery by the commissioner of any
8 moneys paid by the commissioner to the claimant pursuant to this
9 act. All documents and information communicated to the
10 Attorney General and the commissioner by the claimant or its
11 counsel under this section and under section 6 of this act shall be
12 fully protected by all privileges applicable by statute, court rule,
13 or common law for attorney-client communications and attorney
14 work product, and the communication of that information to the
15 Attorney General or the commissioner by claimant or its counsel
16 shall not be deemed a waiver of any of those privileges and shall
17 not be deemed to provide a basis to require those communications
18 to be disclosed to potentially responsible parties, or their counsel,
19 or others.³

20 c. A claim pursuant to this section shall be filed with the
21 commissioner in such manner and form, and accompanied by such
22 supporting data, as the commissioner shall by regulations
23 require. Upon review of such claim the commissioner may
24 require, and the claimant shall supply, such additional data and
25 other information as the commissioner deems necessary in order
26 to substantiate approval of the claim in accordance with the
27 standards set forth in section 3 of this act.

28 d. The commissioner is hereby authorized to expend moneys of
29 the fund for the expenses of administration of claims made under
30 this section, including the costs of receiving, verifying and paying
31 such claims, ³of handling or resolving administrative hearings or
32 litigation arising out of claims that are rejected by the
33 commissioner for advance funding,³ and of pursuing the recovery
34 of moneys on behalf of the fund pursuant to section 5 of this act.

35 e. For purposes of this ³[section] act³ "owner" means, for
36 purposes of a claim involving a structure or structures ¹[in a
37 planned real estate development] that is filed under this ³[1990
38 amendatory and supplementary]³ act, an individual fee simple
39 owner¹, an association of individual owners or lessees that is
40 responsible for the ³[management of common elements and the
41 administration of common expenses] maintenance or replacement
42 of the roof structure³ ¹or an association formed for the purpose
43 of pursuing a unified claim under this ³[1990 amendatory and
44 supplementary]³ act¹.

45 ³f. For the purposes of this section "undertakes" means, for
46 purposes of a claim filed by a builder or warranty guarantor, a
47 written agreement or written acknowledgement by the builder to
48 remediate the cited damages for the structure or structures for
49 which the claim is being filed, or a written agreement or written
50 acknowledgement by the warranty guarantor to reimburse the

1 owner or builder for the costs to remediate the cited damages for
2 the structure or structures for which the claim is being filed.³

3 3. (New section) a. Whenever a claim which appears or
4 purports to be eligible for advance funding pursuant to this act is
5 filed with the commissioner, the commissioner shall:

6 (1) Order an examination of the subject premises to determine
7 whether the damage claimed is ascribable to the FRT plywood or
8 the FRT treatment applied to it, resulting or materially
9 contributing to the creation of a major construction defect, and
10 ³ if it is so determined^{3,3} shall declare the claim eligible for
11 such advance funding; and

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

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

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

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

26 In carrying out the provisions of paragraph (1) of this
27 subsection the commissioner shall cause to be developed a
28 method of nondestructive testing ³or other procedure³ capable of
29 ascertaining inevitable premature failure of an FRT plywood
30 installation. As used in this section "inevitable premature
31 failure" means a condition in which deterioration of the FRT
32 plywood, ascribable to ³a³ defect ^{3,3} in any of the materials or
33 techniques used in its manufacture, ³[or] in its fire retardant
34 treatment, or due to other actions or omissions by responsible
35 parties; and which³ is ascertainable within the ³ten year³
36 warranty period and can be accurately predicted ³in accordance
37 with the commissioner's testing procedure³ to make replacement
38 of the material necessary within the ³ten year³ warranty period.
39 ³[Such a condition] Inevitable premature failure³ shall be deemed
40 to constitute ³[major structural damage] a major construction
41 defect³ as of the time of its detection.

42 ³A person aggrieved by any ruling, action, order or notice of
43 the commissioner denying an FRT plywood claim, in whole or in
44 part, filed pursuant to section 2 of this act, shall be entitled to an
45 administrative hearing. The application for the hearing shall be
46 filed with the commissioner by the 15th day after receipt by the
47 person of the notice of the ruling, action, order or notice. The
48 only issues that may be raised in the administrative hearing are
49 whether the test or other method used by the commissioner to
50 determine if the subjected premises were damaged in accordance

1 with the requirements of paragraph (1) of this subsection was
2 administered properly, or whether the proposed method of
3 remediation was within the guidelines set pursuant to paragraph
4 (2) of this subsection. The aggrieved person shall have the burden
5 to demonstrate that the test or other method was administered
6 improperly or that the proposed method of remediation was
7 within the guidelines.³

8 c. When a claim has been filed with the commissioner pursuant
9 to this section ³and has been accepted for filing pursuant to
10 section 6 of this act³, if the commissioner (1) determines that
11 ³[the damage claimed is in fact] a major construction defect³
12 ascrivable to FRT plywood or FRT treatment ³exists in
13 accordance with subsection b. of this section³ and (2) approves a
14 proposed method of remediation, then the commissioner shall
15 approve the claim for advance funding and authorize
16 disbursement of money from the fund ³, except as prohibited or
17 limited by section 6 of this act³. Disbursement shall be
18 ³[conditioned upon] prohibited until the³ presentation and
19 verification of invoices for work and materials actually provided
20 and installed in accordance with the approved method.

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

23 4. (New section) a. Upon the ³[taking effect of this act]
24 effective date of this section³, and annually thereafter, the
25 commissioner shall estimate, upon the basis of claims approved
26 pursuant to this act, or then pending and likely to be approved,
27 the amount of money needed in the fund, in addition to those
28 sums which will be required to be paid or reserved for claims
29 other than claims under this act, to make full payment, after
30 verification, upon anticipated invoices and upon invoices
31 previously presented and verified, and to meet costs of
32 administration pursuant to subsection d. of section 2 of this act.
33 If this estimate exceeds the amount of money then available in
34 the fund and reasonably anticipated to be received pursuant to
35 subsection a. or b. of section 7 of P.L.1977, c.467 (C.46:3B-7) or
36 pursuant to subsections b. and ³[c.] d.³ of this section within the
37 12 months next following, the commissioner shall relieve the
38 deficiency by levying a surcharge upon new home sales ¹in such
39 amount², not to exceed \$100 per new home sold,² as may
40 reasonably be expected to generate revenue sufficient to promote
41 the actuarial integrity of the new home warranty security fund in
42 light of any expenditures made pursuant to this ³[1990
43 supplementary and amendatory]³ act and not otherwise
44 recovered¹.

45 b. Upon approval of a claim by the commissioner, an owner
46 which is a planned real estate development within the meaning of
47 P.L.1977, c.419 (C.45:22A-21 et seq.) shall, as a condition of
48 eligibility for funding under this act, transfer into the fund the
49 moneys accumulated, to the date of such approval, in its regular
50 reserve fund for roof replacement for the ¹[structures] roof

1 areas¹ covered by the claim, and shall agree to deposit into the
2 fund periodically thereafter until completion of the remediation
3 all moneys which, under the fiscal administration of the owner,
4 would otherwise be due to be so paid into that reserve fund. The
5 same conditions of eligibility may be imposed by the
6 commissioner upon an owner which is not a planned real estate
7 development within the meaning of the law, whenever it appears
8 to the commissioner from the documentation substantiating the
9 claim that the owner has in fact established a reserve fund for
10 this purpose and has accumulated moneys therein with a view to
11 future roof replacement. Moneys transferred into the fund
12 pursuant to this subsection shall equal the standard of adequacy
13 established by the commissioner. For the purposes of this
14 subsection the commissioner shall determine the amount of
15 reserves deemed to represent an adequate level for roof reserve
16 funding, taking into account the age of the affected structures,
17 the type of construction, and other relevant factors ¹, such as the
18 public offering statement for the project filed with the
19 department pursuant to the "Planned Real Estate Development
20 Full Disclosure Act," P.L.1977, c.419 (C.45:22A-21 et seq.)¹.

21 c. ³[The commissioner is authorized to accept on behalf of the
22 fund and for deposit therein contributions of money from any
23 manufacturer or treater of FRT plywood or any other responsible
24 party who has or may become an object of legal action pursuant
25 to section 5 of this act. Acceptance of such contribution shall be
26 considered a full discharge of the contributor's responsibility and
27 liability for the replacement of any FRT plywood for which legal
28 action may have been taken by the commissioner under section 5
29 of this act, and the ¹[owner] contributor¹ shall be exempt from
30 any such legal action. The commissioner shall not accept any
31 such contribution unless he is satisfied that the amount thereof
32 fairly represents the true extent of the contributor's
33 responsibilities and ¹the contributor's ability to pay and¹ will, as
34 nearly as can be foreseen, suffice to reimburse the fund for funds
35 advanced upon claims related to those responsibilities.

36 d.]³ A surcharge levied pursuant to subsection a. of this
37 section shall be due and payable by the builder prior to transfer
38 of title to the owner, and shall be made directly to the
39 department, which shall issue a receipt to the builder and a
40 duplicate thereof to the owner. No certificate of occupancy
41 pursuant to section 15 of P.L.1975, c.217 (C.52:27D-133) shall be
42 issued except after presentation to the enforcing agency of the
43 receipt or verified duplicate.

44 ³[e.] d.³ Moneys recovered pursuant to section 5 of this act
45 shall be deposited in the fund. Whenever in making ³[his] the³
46 annual estimate pursuant to subsection a. of this section the
47 commissioner determines that the amount of money that will be
48 available in the fund to meet pending and anticipated claims will
49 exceed the amount necessary for that purpose, ³[he] the
50 commissioner³ shall provide that the excess be refunded to those

1 builders who have paid assessments levied in accordance with
2 subsection ³[b.] a.³ of this section. Refunds to each builder shall
3 bear the same proportion to the total excess being refunded as
4 that builder's proportionate share of all surcharges theretofore
5 levied and collected.

6 5. (New section) a. The commissioner, on behalf of the State
7 and for the benefit of the fund, shall take such legal action as
8 may be necessary or appropriate to pursue any ³[claim] claims³
9 against any ³[manufacturer or treater of FRT plywood, or any
10 other]³ responsible party, which may appear justified upon the
11 record of any ³[claim] claims³ approved by the commissioner
12 pursuant to section 3 of this act ³or which otherwise may appear
13 justified³. The Attorney General may sue ³[¹on behalf of the
14 department¹]³ in any federal or state court, in the name of this
15 State, or enter into any appropriate arbitration proceeding under
16 the laws of this or any other state, and may engage such private
17 counsel and employ such technical experts as the Attorney
18 General ¹[deems] ³[and the commissioner deem¹], after
19 consultation with the commissioner, deems³ necessary for full
20 and effective ³[substantiation of the claims referred pursuant to
21 this act] prosecution of any legal action to recover from
22 responsible parties for any of the claims referred pursuant to this
23 act as well as to recover against responsible parties for any other
24 claims, whether or not referred by the commissioner, that the
25 Attorney General may choose to prosecute arising out of what is
26 commonly referred to as the consumer fraud act, P.L.1960, c.39
27 (C.56:8-1 et seq.), or upon any other applicable legal basis³.

28 b. Any moneys recovered pursuant to subsection a. of this
29 section shall, after deduction of the expenses of the Attorney
30 General ³[in pursuit of that claim.] to the extent that such
31 expenses have not already been reimbursed directly out of the
32 fund in pursuit of any claim or claims by the Attorney General
33 against the party from whom such recovery is obtained,³ be
34 deposited in the fund ³, provided that any civil penalty or costs
35 imposed under P.L.1960, c.39 (C.56:8-1 et seq.), shall be
36 deposited in accordance with that act.

37 c. Nothing in this act shall be expressly or impliedly construed
38 or interpreted to abrogate or limit the authority of the Attorney
39 General to investigate and prosecute FRT plywood related
40 claims, whether or not referred by the commissioner, under
41 P.L.1960, c.39 (C.56:8-1 et seq.) or any other statutory or legal
42 basis available to the Attorney General³.

43 6. (New section) ³[Any person, association, firm or
44 corporation which prior to the enactment of this act had
45 instituted suit to recover damages on grounds of the failure of
46 FRT plywood may elect instead to pursue a claim under the
47 provisions of this act, provided that the claim is filed within ¹[60]
48 120¹ days of the effective date of ¹[this act] rules adopted by the
49 commissioner that set forth an approved testing procedure for
50 FRT plywood¹ and the prior suit is withdrawn ¹, or that such

1 person, association, firm or corporation assigns to the department
2 all rights in any claim or lawsuit relating to FRT plywood against
3 any and all responsible parties and the department accepts such
4 assignment¹.] a. Any person that prior to the effective date of
5 this act had instituted a civil action to recover damages arising
6 out of the failure of FRT plywood may submit a claim under the
7 provisions of this act within 120 days of the effective date of the
8 rules adopted by the commissioner that set forth an approved
9 testing procedure or an alternate procedure for the detection of
10 ⁴defective⁴ FRT plywood ⁴[that has failed, or will fail,
11 prematurely, constituting a major construction defect,]⁴ and the
12 procedure for filing a claim hereunder. The claim shall set forth
13 information as deemed necessary by either the commissioner or
14 the Attorney General, including but not limited to: the caption
15 and docket number of the civil action; the name, address and
16 telephone number of the claimant's attorney, if any; the status
17 of the civil action; and the status of the discovery. As part of
18 the claim, the claimant shall submit a copy of all pleadings and
19 orders filed in the civil action including the complaint, answers,
20 counter-claims, cross-claims, or any amendments thereto, and
21 any expert reports exchanged among the parties. The
22 commissioner or the Attorney General may require the
23 submission of other documents or information by the claimant or
24 the claimant's attorney as may be necessary to effectuate the
25 purposes of this section.

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

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

47 (a) if one or more co-plaintiffs in the claimant's civil action,
48 or other aggrieved parties whose rights should have been litigated
49 with those of the claimant in the existing action under entire
50 controversy principles, have not themselves filed claims with the

1 commissioner, or have had their own claims rejected by the
2 Attorney General or the commissioner;

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

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

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

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

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

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

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

28 (2) If the Attorney General determines in the initial review to
29 recommend the assignment of the claimant's rights against
30 responsible parties, the commissioner shall then review the claim
31 in accordance with section 3 of this act.

32 (3) If the commissioner approves a claim in whole or in part,
33 the Attorney General shall perform a final review of the claim,
34 the documents required to be filed pursuant to subsection a. of
35 this section, and any other documents or information the
36 Attorney General deems necessary, including but not limited to
37 the consideration of any intervening developments in the
38 litigation, to determine in the Attorney General's discretion
39 whether the acceptance of any assignment of the claimant's
40 rights against responsible parties asserted in the existing civil
41 action would, for any reasons, be impractical or otherwise
42 contrary to the best interests of the State or the public. Such
43 reasons warranting the final rejection of the claim by the
44 Attorney General may include those reasons set forth in
45 paragraph (1) of this subsection. The Attorney General shall not
46 be obligated to disclose to the claimant the specific reason for
47 the final rejection of the assignment.

48 (4) If the Attorney General determines in the final review to
49 recommend the assignment of the claimant's rights against
50 responsible parties, the claimant or its counsel, upon the request

1 of the Attorney General, shall move before the court in which the
2 civil action is pending for any or all of the following relief: a
3 voluntary dismissal of the action or the claimant's own claims
4 therein without prejudice; the severance of those claims approved
5 by Attorney General and the commissioner from other claims in
6 the civil action; a stay of the proceedings in the action; or any
7 other procedural relief that the Attorney General may deem
8 appropriate. The filing of such a motion and the obtaining of the
9 relief requested by the Attorney General shall be necessary
10 conditions of the payment of any claim and the corresponding
11 assignment of the claimant's rights against potentially
12 responsible parties to the State.

13 (5) If the Attorney General determines in the final review to
14 recommend the assignment of the claimant's rights to the State
15 and the court in which the civil action is pending grants the
16 procedural relief deemed necessary and requested by the
17 Attorney General, the claim, if otherwise eligible for advance
18 funding pursuant to section 3 of this act, shall be paid by the
19 commissioner upon the assignment to the State of the claimant's
20 rights against potentially responsible parties. As a condition of
21 payment of the claims and the assignment of the claimant's
22 rights to the State, the claimant and its prior counsel and any of
23 its employees, members and agents shall cooperate with the
24 Attorney General's pursuit of the claim or any related civil
25 action, including, but not limited to, making available to the
26 Attorney General all evidence or material previously gathered
27 and expert reports obtained by the claimant or its counsel to
28 pursue the claim, making the premises available for inspection by
29 the Attorney General, the commissioner, or their employees or
30 agents, and testifying in any administrative or judicial
31 proceedings. The failure of the claimant or its counsel,
32 employees, members or agents to cooperate fully with the
33 Attorney General or the commissioner shall constitute a basis to
34 deny payment of the claim and the refusal of its assignment or, in
35 instances where the claim has already been paid and assigned, for
36 the rescission of the assignment and the recovery by the
37 commissioner of any monies paid by the commissioner to the
38 claimant pursuant to this act.

39 (6) The Attorney General's initial recommendation to accept
40 the assignment of a claim shall not be construed to impose any
41 obligation on the commissioner to approve all or part of that
42 claim unless the commissioner is satisfied that the claim meets
43 the standards of section 3 of this act. Neither the Attorney
44 General's initial recommendation to accept assignment of a
45 claim, the commissioner's approval of that claim, the Attorney
46 General's final determination to accept assignment of the claim,
47 or the fact of the assignment itself shall be construed to require
48 the Attorney General to file or maintain a legal action against
49 potentially responsible parties relating to that particular claim
50 unless the Attorney General, in the Attorney General's

1 discretion, determines that it remains practical and in the best
2 interests of the State and the public to do so. If the claimant's
3 rights are assigned to the State, the Attorney General shall have
4 the sole discretion to determine the manner in which to proceed
5 on the claim in the existing civil action or otherwise.

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

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

23 d. If the commissioner denies any claim accepted for filing
24 under this section in full or in part, any challenge by the claimant
25 to the commissioner's action on the claim shall be limited
26 exclusively to the remedy and hearing procedures set forth in
27 section 3 of this act. Neither the Attorney General's initial
28 recommendation or final determination to accept or reject an
29 assignment of a claim shall be subject to administrative or
30 judicial review. Neither the commissioner's action on the claim,
31 or the Attorney General's determination, whether preliminary or
32 final, to accept or reject an assignment of a claim pursuant to
33 subsection b. of this section, shall constitute a basis for the
34 claimant or any other person or entity to make the State, the
35 department, the commissioner, the Attorney General or any of
36 their respective officials, employees, or agents a party to any
37 civil action.

38 e. Except as set forth in subsection d. of this section, the
39 commissioner's review and action on any claim, the initial
40 recommendation and the final determination of the Attorney
41 General to accept or reject an assignment of the claimant's
42 claim, and any oral or written communications or mental
43 processes which reflect or relate to those reviews and
44 determinations by the commissioner and the Attorney General
45 shall not in any way be subject to discovery or inquiry in any
46 administrative or judicial proceedings, and any documents
47 obtained or issued in the course of these reviews and
48 determinations shall not constitute public records pursuant to
49 P.L.1963, c.73 (C.47:1A-1 et seq.) or the common law. All
50 documents and information communicated to the Attorney

1 General and the commissioner by the claimant or its counsel
2 under this section shall be fully protected by all privileges
3 applicable by statute, court rule, or common law for
4 attorney-client communications and attorney work product, and
5 the communication of that information to the Attorney General
6 or the commissioner by claimant or its counsel shall not be
7 deemed a waiver of any of those privileges and shall not provide a
8 basis to require those communications to be disclosed to
9 potentially responsible parties, or their counsel, or others.³

10 7. Section 2 of P.L.1977, c.467 (C.46:3B-2) is amended to read
11 as follows:

12 2. As used in this act:

13 a. "Department" means the Department of Community Affairs;

14 b. "Commissioner" means the Commissioner of the
15 Department of Community Affairs;

16 c. "Warranty" means the warranty prescribed by the
17 commissioner pursuant to this act;

18 d. "New home" means any dwelling unit not previously
19 occupied, excluding dwelling units constructed solely for lease;

20 e. "Owner" means any person for whom the new home is built
21 or to whom the home is sold for occupation by him or his family
22 as a home and his successors in title to the home or mortgagee in
23 possession. Owner does not mean any development company,
24 association or subsidiary company of the builder or any person or
25 organization to whom the home may be sold or otherwise
26 conveyed by the builder for subsequent resale, letting or other
27 purpose;

28 f. "Builder" means any individual corporation, partnership or
29 other business organizations engaged in the construction of new
30 homes.

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

37 h. "Warranty date" means the first occupation or settlement
38 date, whichever is sooner.

39 i. "Approved claim" means ¹, for the purposes of ³[this 1990
40 amendatory and supplementary act] P.L. , c. (C.) (now
41 pending before the Legislature as this bill)^{3, 1} a claim examined
42 and approved by the commissioner in accordance with section 3
43 of P.L. , c. (C.) ³[(now pending in the Legislature as this
44 bill)]³.

45 j. "Approved method" means ¹, for the purposes of ³[this 1990
46 amendatory and supplementary act] P.L. , c. (C.) (now
47 pending before the Legislature as this bill)^{3, 1} a method of
48 remediation approved by the commissioner in accordance with
49 section 3 of P.L. , c. (C.) ³[(now pending in the
50 Legislature as this bill)]³.

1 k. "Fund" means ¹, for the purposes of ³[this 1990 amendatory
2 and supplementary act] P.L. , c. (C.) (now pending before
3 the Legislature as this bill)^{3,1} the new home warranty security
4 fund established in the department pursuant to section 7 of
5 P.L.1977, c.467 (C.46:3B-7).

6 l. ¹["Warrantor"] "Warranty guarantor"¹ means ¹, for the
7 purposes of ³[this 1990 amendatory and supplementary act] P.L. ,
8 c. (C.) (now pending before the Legislature as this bill)^{3,1}
9 (1) the new home warranty program established in the department
10 pursuant to P.L.1977, c.467 (C.46:3B-1 et seq.) or (2) any
11 alternate new home warranty security program approved pursuant
12 to section 8 of P.L.1977, c.467 C.46:3B-8).

13 (cf: P.L.1977, c.467 s.2)

14 8. Section 15 of P.L.1975, c.217 (C.52:27D-133) is amended to
15 read as follow:

16 15. No building or structure hereafter constructed shall be
17 used or occupied in whole or in part until a certificate of
18 occupancy shall have been issued by the enforcing agency. No
19 building or structure hereafter altered, in whole or in part, shall
20 be used or occupied until such a certificate has been issued,
21 except that any use or occupancy in an already existing building
22 or structure that was not discontinued during its alteration may
23 be continued in the preexisting structure for 30 days after the
24 completion of the alteration without the issuance of a certificate
25 of occupancy. A certificate of occupancy shall be issued by the
26 enforcing agency when all of the work covered by a construction
27 permit shall have been completed in accordance with the permit,
28 the code, and other applicable laws and ordinances. In the case
29 of any new home subject to sales surcharge pursuant to P.L. ,
30 c. (C.) (now pending in the Legislature as this 1991
31 amendatory and supplementary act) a certificate of occupancy
32 shall not be issued except after presentation of a receipt, or
33 verified duplicate thereof, from the Department of Community
34 Affairs evidencing the payment of the surcharge. On request of a
35 holder of a construction permit, the appropriate enforcing agency
36 may issue a temporary certificate of occupancy for a building or
37 structure, or part thereof, before the entire work covered by the
38 construction permit has been completed, if the part or parts of
39 the building or structure to be covered by the certificate may be
40 occupied prior to completion of all work in accordance with the
41 permit, the code, and other applicable laws and ordinances,
42 without endangering the health and safety of the occupants or
43 users. When a building or structure is entitled thereto, the
44 enforcing agency shall issue a certificate of occupancy within 10
45 business days after receipt of a written application therefor in
46 accordance with regulations established by the commissioner on a
47 form prescribed by the commissioner accompanied by payment of
48 a fee to be established by the municipal governing body by
49 ordinance in accordance with standards established by the
50 commissioner. The certificate of occupancy shall certify that

1 the building or structure has been constructed in accordance with
2 the provisions of the construction permit, the code, and other
3 applicable laws and ordinances.

4 (cf: P.L.1975, c.217 s.15)

5 9. (New section) The commissioner shall adopt and
6 promulgate, in accordance with the "Administrative Procedure
7 Act," P.L.1968, c.410 (C.52:14B-1 et seq.), such rules and
8 regulations as may be necessary or expedient to the timely and
9 effective implementation of this act.

10 ¹10. (New section) Except as otherwise provided in this ³[1990
11 amendatory and supplementary]³ act, no payment shall be made
12 from the new home warranty security fund established pursuant
13 to section 7 of P.L.1977, c.467 (C.46:3B-7) for any defect in any
14 new home warranted under an approved alternative new home
15 warranty security program approved pursuant to section 8 of
16 P.L.1977, c.467 (C.46:3B-8). The builder or other transferor of
17 any new home warranted under an approved alternative new home
18 warranty security program shall give written notice to the owner,
19 and to any subsequent purchaser during the period in which the
20 warranty is in effect, that the approved alternate new home
21 warranty security program has exclusive responsibility for
22 warranting the new home and that no claim may be brought
23 against the new home warranty security fund for any cause other
24 than ³[defective] ⁴[the premature failure of³] defective⁴ FRT
25 plywood roof sheathing ⁴[³constituting a major construction
26 defect³] ⁴.¹

27 ³11. (New section) a. For purposes of a claim filed by a
28 claimant for damages arising out of the failure of fire retardant
29 treated plywood pursuant to this act, the claimant shall be
30 deemed to have elected a remedy pursuant to section 9 of
31 P.L.1977, c.467 (C.46:35-9) upon the filing of a claim with the
32 commissioner pursuant to section 2 or section 6 of this act.
33 However, such an election of remedy shall not be deemed to have
34 occured for a claim filed pursuant to section 6 of this act if the
35 assignment of the claim is declined by the Attorney General
36 pursuant to paragraph (1) or (3) of subsection b. of section 6 of
37 this act, or if the relief required for the assignment of the claim
38 pursuant to paragraph (4) of subsection b. of section 6 of this act
39 is denied by the court. In such instance the claimant may
40 continue to pursue the civil action for damages arising out of the
41 failure of fire retardant treated plywood.

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

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

6 ¹[10.] ³[11.1] 12.³ This act shall take effect on the 90th day
7 next following the date of enactment, except that section 9 shall
8 take effect immediately.

9

10

11

HOUSING AND CONSTRUCTION

12

13

14

15

Provides emergency remedy for structural major construction
defects due to certain fire-retardant materials in home
construction.

1 occupied prior to completion of all work in accordance with the
2 permit, the code, and other applicable laws and ordinances,
3 without endangering the health and safety of the occupants or
4 users. When a building or structure is entitled thereto, the
5 enforcing agency shall issue a certificate of occupancy within 10
6 business days after receipt of a written application therefor in
7 accordance with regulations established by the commissioner on a
8 form prescribed by the commissioner accompanied by payment of
9 a fee to be established by the municipal governing body by
10 ordinance in accordance with standards established by the
11 commissioner. The certificate of occupancy shall certify that
12 the building or structure has been constructed in accordance with
13 the provisions of the construction permit, the code, and other
14 applicable laws and ordinances.

15 (cf: P.L.1975, c.217 s.15)

16 9. (New section) The commissioner shall adopt and
17 promulgate, in accordance with the "Administrative Procedure
18 Act," P.L.1968, c.410 (C.52:14B-1 et seq.), such rules and
19 regulations as may be necessary or expedient to the timely and
20 effective implementation of this act.

21 10. This act shall take effect on the 90th day next following
22 the date of enactment, except that section 9 shall take effect
23 immediately.

24

25

26

sponsors' STATEMENT

27

28 In recent years, the use of fire-retardant treated (FRT)
29 plywood has become prevalent as an economic means of providing
30 required fire-retardancy between separate units in condominiums
31 and similar multi-unit structures. It has recently become
32 evident, however, that the same treatment that provides the
33 needed fire-retardancy may cause structural weakness resulting
34 in premature material failure. This may necessitate radical
35 repair or reconstruction.

36 The shortcomings of the FRT treatment were unanticipated
37 and may vary according to type of treatment, nature of the
38 composition treated, and the manner of handling and application.
39 Therefore, some uncertainty has been created as to the honoring
40 of home-owners' warranty claims under "The New Jersey New
41 Home Warranty and Builders' Registration Act" P.L.1977, c.467
42 (C.46:3B-1 et seq.). The State-run warranty program, which
43 covers about one-third of the warranties under the act, plans to
44 honor claims arising from this situation. The State program
45 considers damage resulting from FRT treatment a structural
46 defect that should also be covered under the privately run
47 alternate warranty programs. The response of the private
48 programs, however, indicates that litigation may be involved.

49 In the meantime, while many dwelling unit owners in

1 multiple-unit dwellings may have, at best, a long wait until their
2 warranty claims are honored, they are faced with the immediate
3 and expensive necessity of remedying roofing defects. In
4 addition, builders and warrantors may be called upon to bear
5 remediation expenses which they could not have anticipated and
6 against which their financial reserves may be inadequate.

7 It is the purpose of this act to provide emergency funding
8 which homeowners, builders and warrantors may draw upon for
9 their immediate need. The money would be advanced by the
10 State's New Home Warranty Security Fund, to which home
11 builders contribute. Disbursement would be administered by the
12 Department of Community Affairs, which would examine claims
13 and advance funding to provide immediate remediation for those
14 which are found to be valid, so long as the method of repair or
15 reconstruction is approved by departmental officials.

16 To recover these moneys for the fund, the Attorney General is
17 directed to pursue all legal avenues of redress against FRT
18 manufacturers and treaters responsible for supplying the
19 defective materials.

20 In order to assure that there will be sufficient money in the
21 fund to meet these FRT claims without affecting the payment of
22 other claims for which the fund is responsible, the bill provides:

23 (1) When condominium associations or similar development
24 management organizations make claims, they shall put at the
25 fund's disposal so much of their reserve fund for eventual roof
26 replacement as has already been accumulated;

27 (2) Manufacturers and treaters are permitted to make
28 voluntary contributions to the fund if the Commissioner of
29 Community Affairs is satisfied that the amount offered will
30 adequately cover their responsibilities -- in return for which they
31 will be exempted from being sued by the Attorney General in the
32 manner described above;

33 (3) Moneys recovered from FRT manufacturers and treaters by
34 legal action of the Attorney General will be deposited in the fund.

35 (4) Whatever additional moneys are needed to meet claims will
36 be raised by a surcharge upon new home sales. The rate of
37 surcharge will be determined annually, upon the basis of a
38 determination of the condition of the fund; and payment will be
39 made by builders, at the rate thus set, upon each new home sale.
40 If the amount coming into the fund from these sources should
41 exceed the commissioner's annual estimate of what will be
42 needed to meet FRT claims, the builders would become entitled
43 to a proportional reimbursement of previous surcharges.

44

45

46

HOUSING AND CONSTRUCTION

47

48 Provides emergency remedy for structural defects due to certain
49 defective fire-retardant materials in home construction.

ASSEMBLY CONSUMER AFFAIRS COMMITTEE

STATEMENT TO

[SECOND REPRINT]

SENATE, No. 2602

STATE OF NEW JERSEY

DATED: OCTOBER 18, 1990

The Assembly Consumer Affairs Committee favorably reports Senate Bill 2602 [2R].

Senate Bill No. 2602 [2R] concerns the remediation of structural defects in certain residential structures.

In recent years, the use of fire-retardant treated (FRT) plywood has become prevalent as an economic means of providing required fire-retardancy between the roof areas of separate units in condominiums and similar multi-unit structures. It has recently become evident, however, that the same treatment that provides the needed fire-retardancy may cause structural weakness resulting in premature material failure which may necessitate radical repair or reconstruction.

The shortcomings of the FRT treatment were unanticipated and may vary according to the type of treatment, the nature of the composition treated, and the manner of handling and application. Therefore, some uncertainty has been created as to the honoring of home-owners' warranty claims under "The New Jersey New Home Warranty and Builders' Registration Act" P.L.1977, c.467 (C.46:3B-1 et seq.). The State-run warranty program, which covers about one-third of the warranties under the act, plans to honor claims arising from this situation. Under the State program, the damage resulting from FRT treatment is considered to be a structural defect and, therefore, one that should also be covered under the privately run alternate warranty programs. The response of the private programs, however, indicates that litigation may be involved.

In the meantime, while the owners of the damaged multiple-unit dwellings are waiting for their warranty claims to be honored, they are faced with the immediate and expensive necessity of remedying their roofing defects. In addition, builders and warrantors may be obligated to assume remediation expenses which they could not have anticipated and for which they lack adequate financial reserves.

It is the purpose of this bill to provide emergency funding which owners, builders and warranty guarantors may draw upon for their immediate needs. The money would be advanced by the State's New Home Warranty Security Fund, to which home builders contribute. Disbursement would be administered by the Department of Community Affairs, which would examine claims and advance funds to provide immediate remediation for those claims which are found to be valid, so long as the method of repair or reconstruction is approved by departmental officials.

To recover these moneys for the fund, the Attorney General is directed to pursue all legal avenues of redress against those FRT

manufacturers and treaters who are responsible for supplying the defective materials.

In order to assure that there will be sufficient money in the fund to meet these FRT claims without affecting the payment of other claims for which the fund is responsible, the bill provides:

(1) When condominium associations or similar development management organizations make claims, they shall put at the fund's disposal the portion of their reserve fund for "roof area replacement" that represents those roof areas subject to the claim.

(2) Manufacturers and treaters are permitted to make voluntary contributions to the fund if the Commissioner of Community Affairs is satisfied that the amount offered will adequately cover their responsibilities -- in return for which they will be exempted from being sued by the Attorney General in the manner described above. The bill specifies, however, that the commissioner is not to accept any contribution unless that contribution reflects, on balance, both the true extent of the contributor's responsibilities and the contributor's ability to pay.

(3) Moneys recovered from FRT manufacturers and treaters by legal action of the Attorney General will be deposited in the fund.

(4) Whatever additional moneys are needed to meet claims will be raised by a surcharge upon new home sales. The rate of surcharge will be determined annually, upon the basis of a determination of the condition of the fund; and payment will be made by builders, at the rate thus set, upon each new home sale. If the amount coming into the fund from these sources should exceed the commissioner's annual estimate of what will be needed to meet FRT claims, the builders would become entitled to a proportional reimbursement of previous surcharges. The bill specifies, however, that in no case shall the surcharge set by the commissioner be more than \$100 per new home.

The bill also provides that in any suit to recover damages on grounds of the failure of FRT plywood, the plaintiff may elect instead to pursue a claim under the provisions of this bill, provided that the claim is filed within 120 days of the effective date of rules adopted by the commissioner that set forth an approved testing procedure for FRT plywood and the prior suit is withdrawn. The bill further provides, however, that the plaintiff may, as an alternative, assign to the department all rights in any such claim or lawsuit.

Finally, the bill provides that payment will not be made from the State new home warranty security fund for new homes warranted under an alternate (private) plan for any cause other than defective FRT plywood roof sheathing.

Senate Bill 2602 [2R], as reported by the committee, is identical to the Assembly Committee Substitute for Assembly Bills 3409 and 3497.

ASSEMBLY APPROPRIATIONS COMMITTEE

STATEMENT TO

[SECOND REPRINT]

SENATE, No. 2602

with Assembly committee amendments

STATE OF NEW JERSEY

DATED: APRIL 15, 1991

The Assembly Appropriations Committee reports favorably Senate Bill No. 2602 [2R], with Assembly committee amendments.

Senate Bill No. 2602 [2R], as amended, provides emergency funding which owners, builders and warranty guarantors may draw upon to repair or reconstruct structural defects resulting from the use of fire-retardant treated (FRT) plywood. It has recently been evident that the use of this plywood may cause structural weakness resulting in premature material failure. Currently, the State-run warranty program, which covers about one-third of the warranties under the act, plans to honor claims arising from this situation. However, the response of the privately run warranty programs indicates that litigation may be involved. While the owners of the damaged dwellings are waiting for their warranty claims to be honored, they are faced with the immediate and expensive necessity of remedying their roofing defects. In addition, builders and warrantors may be obligated to assume remediation expenses which they could not have anticipated and for which they lack adequate financial reserves. Under these uncertainties, this bill permits money to be advanced by the State's New Home Warranty Security Fund. Disbursement would be administered by the Department of Community Affairs (DCA), which would examine claims and advance funds to provide immediate remediation for those claims which are found to be valid, so long as the method of repair or reconstruction is approved by departmental officials. To recover these moneys for the fund, the Attorney General is directed to pursue all legal avenues of redress against responsible parties.

This bill, as amended, is identical to Assembly Bill No. 3409/3497 Acs, as amended.

FISCAL IMPACT:

Enactment of the bill will not affect the State General Fund. Money will be advanced to homeowners, builders, and warranty guarantors from the New Home Warranty Security Fund, which is a trust fund. Based on the most recent available fiscal report from the Department of the Treasury, this fund has approximately \$54 million in unexpended balances. Information provided by DCA indicates that, on average, it will cost approximately \$2,500 to \$3,000 per unit to replace an estimated 40,000 defective roofs over the next eight year period. There have been approximately 1,200 applications to

date. It is believed that since there will be fund recovery, money deposited in the New Home Security Fund over the next eight years is likely sufficient to implement the program. DCA also indicates that although its commissioner is permitted to levy surcharges upon new home sales, in amounts not to exceed \$100 per sale, to generate revenue for the fund, the commissioner will not need to do so. Further, condominium associations and the like making a claim shall put a portion of their reserve funds at the disposal of the New Home Warranty Security Fund. Any monies recovered from legal action, after expenses of the Attorney General's Office, are to be deposited in the fund.

COMMITTEE AMENDMENTS

The committee amended the bill to clarify the rights and responsibilities of the several parties involved in the process of assigning FRT plywood claims to the State, to assure that the assignment of claimant's rights are practical and in the public interest. The amendments make clear that claimant's must cooperate with the Attorney General and DCA against responsible parties, detail the process by which claims already in private litigation will be evaluated for assignment, protect the confidentiality of the private documents used for that evaluation, and clarify rights of review and appeal. The amendments specify when an election of remedies has been made, and make clear that the Attorney General's authority to proceed under the consumer fraud act or other legal grounds is not diminished by the bill. Various clarifying and technical amendments were also made.

SENATE COUNTY AND MUNICIPAL
GOVERNMENT COMMITTEE

STATEMENT TO

SENATE, No. 2602

with Senate committee amendments

STATE OF NEW JERSEY

DATED: JUNE 14, 1990

The Senate County and Municipal Government Committee reports favorably Senate Bill No. 2602 with committee amendments.

Senate Bill No. 2602, as amended by the committee, concerns the remediation of structural defects in certain residential structures.

In recent years, the use of fire-retardant treated (FRT) plywood has become prevalent as an economic means of providing required fire-retardancy between the roof areas of separate units in condominiums and similar multi-unit structures. It has recently become evident, however, that the same treatment that provides the needed fire-retardancy may cause structural weakness resulting in premature material failure. This may necessitate radical repair or reconstruction.

The shortcomings of the FRT treatment were unanticipated and may vary according to type of treatment, nature of the composition treated, and the manner of handling and application. Therefore, some uncertainty has been created as to the honoring of home-owners' warranty claims under "The New Jersey New Home Warranty and Builders' Registration Act" P.L.1977, c.467 (C.46:3B-1 et seq.). The State-run warranty program, which covers about one-third of the warranties under the act, plans to honor claims arising from this situation. The State program considers damage resulting from FRT treatment a structural defect that should also be covered under the privately run alternate warranty programs. The response of the private programs, however, indicates that litigation may be involved.

In the meantime, while many dwelling unit owners in multiple-unit dwellings may have, at best, a long wait until their warranty claims are honored, they are faced with the immediate and expensive necessity of remedying roofing defects. In addition, builders and warrantors may be called upon to bear remediation expenses which they could not have anticipated and against which their financial reserves may be inadequate.

It is the purpose of this act to provide emergency funding which owners, builders and warranty guarantors may draw upon for their immediate need. The money would be advanced by the State's New

Home Warranty Security Fund, to which home builders contribute. Disbursement would be administered by the Department of Community Affairs, which would examine claims and advance funding to provide immediate remediation for those claims which are found to be valid, so long as the method of repair or reconstruction is approved by departmental officials.

To recover these moneys for the fund, the Attorney General is directed to pursue all legal avenues of redress against FRT manufacturers and treaters responsible for supplying the defective materials.

In order to assure that there will be sufficient money in the fund to meet these FRT claims without affecting the payment of other claims for which the fund is responsible, the bill provides:

(1) When condominium associations or similar development management organizations make claims, they shall put at the fund's disposal so much of their reserve fund for eventual roof replacement as has already been accumulated;

(2) Manufacturers and treaters are permitted to make voluntary contributions to the fund if the Commissioner of Community Affairs is satisfied that the amount offered will adequately cover their responsibilities -- in return for which they will be exempted from being sued by the Attorney General in the manner described above;

(3) Moneys recovered from FRT manufacturers and treaters by legal action of the Attorney General will be deposited in the fund.

(4) Whatever additional moneys are needed to meet claims will be raised by a surcharge upon new home sales. The rate of surcharge will be determined annually, upon the basis of a determination of the condition of the fund; and payment will be made by builders, at the rate thus set, upon each new home sale. If the amount coming into the fund from these sources should exceed the commissioner's annual estimate of what will be needed to meet FRT claims, the builders would become entitled to a proportional reimbursement of previous surcharges.

The committee amended the bill by making various technical and clarifying language changes.

The committee further amended the bill by clarifying that an owner shall be required to transfer into the State fund moneys accumulated in its reserve fund for "roof area replacement" covered by the claim and not be required to transfer into the State fund moneys accumulated in its reserve fund for roof replacement for the structures covered by the claim, which structures may have roof areas without an FRT claim.

Also, the committee amended the bill by directing the commissioner not to accept any contribution unless that contribution reflects on balance both the true extent of the contributor's responsibilities and the contributor's ability to pay.

In addition, the committee amended the bill to provide that in any suit to recover damages on grounds of the failure of FRT plywood the plaintiff may elect instead to pursue a claim under the provisions of this act, provided that the claim is filed within 120 days instead of 60 days of the effective date of rules adopted by the commissioner that set forth an approved testing procedure for FRT plywood and the prior suit is withdrawn. The committee further provided that in the alternative rights to the claim could be assigned to the Department.

Finally, the committee amended the bill to make it clear that payment will not be made from the State new home warranty security fund for new homes warranted under an alternate (private) plan for any cause other than defective FRT plywood roof sheathing and that the surcharge that the Commissioner of Community Affairs is authorized to levy on new home sales must be in an amount sufficient to promote the actuarial integrity of the new home warranty security fund in light of any money expended for FRT plywood roof sheathing replacement and not otherwise recovered.