

## LAW REVIEW 16011

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### Why Do Asbestos Attorneys Advertise in Veterans' Organization Magazines?

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>1</sup>

Update on Sam Wright

11.—Veterans' claims

**Q: I am a retired Navy Reserve Commander and a life member of the Reserve Officers Association (ROA). I was born in 1948. While in college, I participated in the Naval Reserve Officers Training Corps (NROTC), and when I graduated in 1970 I was commissioned an Ensign. I remained on active duty until 1976 and then affiliated with the Navy Reserve. I retired from the Navy Reserve in 1998 and starting drawing my retired pay in 2008, when I turned 60.**

**I spent most of my six active duty years at sea, on two different ships. In 1973, as a Lieutenant (junior grade), my ship went through an extensive overhaul. It is possible that I was exposed to asbestos during the overhaul.**

**In recent months, my health has taken a decided turn for the worse. My physician told me that I have mesothelioma, a cancer of the pleural cavity that is generally fatal. Several friends, after learning of this diagnosis, have sent me copies of full-page advertisements by lawyers and law firms seeking asbestos plaintiffs. These advertisements have been published in magazines of the American Legion, the Veterans of Foreign Wars, and the Fleet Reserve Association (the organization for enlisted members of the Navy, Marine Corps, and Coast Guard).**

**Who are these lawyers suing? Are they suing the Navy? I thought that claims against the Federal Government by service members were precluded by law.**

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<sup>1</sup> BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) Georgetown University. Wright is retired from the Navy Reserve as a Captain in the Judge Advocate General's Corps (JAGC). As a Lieutenant in the late 1970s, he served in the Claims Division of the Office of the Judge Advocate General of the Navy, and his principal duties related to assisting the United States Department of Justice in the defense of Federal Tort Claims Act (FTCA) claims against the Navy alleging exposure to asbestos in the construction and repair of Navy ships during and after World War II. Wright was awarded a Navy Commendation Medal for that service. He is the author or co-author of more than 80% of the "Law Review" articles published at [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). At that site, you will find almost 1500 articles about laws that are especially pertinent to those who serve or have served our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. Wright was the Director of the Service Members Law Center, as a full-time employee of ROA, from 2009 to 2015. He is available at (800) 809-9448, extension 730, or SWright@roa.org.

**A:** You are correct that the Supreme Court has held that the Federal Tort Claims Act (FTCA), which was enacted in 1946 to waive sovereign immunity of the Federal Government for most tort claims arising out of alleged negligence by federal employees or military personnel, does not waive sovereign immunity for claims by service members for personal injury or wrongful death arising out of events that were incident to the service member's service.<sup>2</sup> These advertising lawyers are not contemplating suing the Navy or the United States of America. They are suing the companies that manufactured asbestos insulation and other products and sold those products to the Navy, for use in the construction and overhaul of Navy ships.

**Q: How do I know and how do I prove that my asbestos exposure in 1973 caused my mesothelioma today?**

**A:** Mesothelioma is a rare disease, except among people who have been exposed to asbestos. The American Cancer Society, on its website, says the following about the relationship between asbestos exposure and mesothelioma:

Asbestos exposure is the main cause of pleural mesothelioma. When asbestos fibers are breathed in, they travel to the ends of small air passages and reach the pleura, where they can cause inflammation and scarring. This may damage cells' DNA and cause changes that result in uncontrolled cell growth. If swallowed, these fibers can reach the abdominal lining, where they can have a role in causing peritoneal mesothelioma.<sup>3</sup>

There is a very long lag time, in many cases, between the asbestos exposure and the onset of mesothelioma. Unless you were exposed to asbestos in civilian employment after you left active duty in 1976,<sup>4</sup> it is very likely that your mesothelioma today resulted from your asbestos exposure during your 1970-76 active duty.

**Q: How do I determine, and how do I prove, that asbestos manufactured by a specific company caused my mesothelioma?**

**A:** Because of the "enterprise liability" theory, you are not required to prove that. Moreover, the asbestos insulation that was removed from your ship during the 1973 overhaul, and the new asbestos insulation that was installed, may have been supplied by two or three different companies.

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<sup>2</sup> See *Feres v. United States*, 340 U.S. 135 (1950). The citation means that you can find this 1950 Supreme Court decision in Volume 340 of *United States Reports*, starting on page 135. I discuss the *Feres* case in detail in Law Review 147 (November 2004), Law Review 0830 (June 2008), and Law Review 13039 (March 2013).

<sup>3</sup> <http://www.cancer.org/cancer/malignantmesothelioma/detailedguide/malignant-mesothelioma-what-causes>.

<sup>4</sup> You could have been exposed to asbestos if you worked as a civilian employee of a naval or commercial shipyard, or if you worked with asbestos insulation in buildings, or if you worked with vehicle brakes, which until recent years used asbestos.

Here is how enterprise liability works. Let us assume that Company A had 40% of the asbestos market at the time of your exposure. Company B had 20% of the market. Companies C, D, E, and F had 10% each. Liability is assigned to these companies in proportion to their respective shares of the relevant market in the relevant time period.

**Q: I have heard that there are “asbestos trust funds.” How do those trust funds work?**

**A:** Several of the major asbestos manufacturers went through the bankruptcy process because of the huge burden of actual and potential asbestos tort claims. To get out of bankruptcy, these companies set up huge (billions of dollars in some cases) trust funds to pay future asbestos claims. In most cases, the advertising law firms do not need to file lawsuits against asbestos manufacturers. All they need to do is file claims with these trust funds, and those claims are paid by the funds.

**Q: In my home state (Texas), the Texas Veterans’ Commission (TVC), an agency of the state government, represents veterans in presenting claims for service-connected disabilities to the United States Department of Veterans Affairs (VA). In other cases, veterans’ service organizations (VSOs), like the American Legion, the Veterans of Foreign Wars, and the Disabled American Veterans, represent veterans with respect to VA disability claims. Is it possible for the TVC and these VSOs to represent asbestos claims on behalf of veterans to these asbestos trust funds?**

**A:** Under current law, it would not be lawful for the TVC and the VSOs to represent veterans in filing such claims, because Texas (like most other states) has a strict and broad statute against the unauthorized practice of law (UPL). The Texas Legislature will not be in session this year (2016). I have met with some folks in Austin to discuss the possibility of pushing legislation during the 2017 legislative session, to amend the UPL statute and to permit the TVC (and possibly VSOs) to represent veterans in preparing and filing claims with asbestos trust fund administrators. Such legislative efforts are probably also necessary in most other states.

**Q: Should I also file a claim with the VA for my mesothelioma? What is the relationship between compensation that I may receive from the VA and compensation that I may receive from the asbestos trust funds or from suing asbestos manufacturers?**

**A:** Yes, you should file with the VA, and if you have a diagnosis of mesothelioma the VA will likely pay your claim without a whole lot of delay or push-back. There is no offset of your VA payments based on what you have received or will receive from asbestos manufacturers. Similarly, there is no offset on what you receive from the manufacturers, based on what you have received or will receive from the VA.