

## **Veterans Can Make Claims against Asbestos Trusts, Independently of Disability Claims to the Department of Veterans Affairs.**

By Geoffrey Bestor, Esq.<sup>2</sup>

### 11.0—Veterans' claims

As any veteran who served before the mid-1980s knows, asbestos used to be everywhere in the military. Asbestos was used throughout buildings used by servicemembers, to wrap bare pipes, in HVAC systems, as components of military equipment needing insulation and fire protection (think brake pads, asbestos gloves and aprons, electrical systems, etc.). Some veterans have or will come down with asbestos-related disease as a result. Obtaining service-connected asbestos disability benefits from the VA is very difficult. But another compensation system, completely independent of the VA, exists to compensate asbestos disease sufferers: trusts set up by former asbestos producing and using companies. These trusts currently hold billions of dollars for the sole purpose of compensating asbestos victims.

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<sup>1</sup> We invite the reader's attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 2,000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses' Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

<sup>2</sup> Geoffrey Bestor, a former Staff Director for Oversight and Investigation of the U.S. House Committee on Veterans Affairs and Deputy Assistant Attorney General in the U.S. Department of Justice, is the Chief Legal Officer of [ClearTrust Claims LLP](http://ClearTrustClaimsLLP.com), a law firm whose only practice is representing asbestos trust claimants. You can further information about veterans and asbestos trusts on the podcast Mr. Bestor did with former Secretary of Veterans Affairs Dr. David Shulkin and Lou Celli, Executive Director of PolicyVets. <https://www.buzzsprout.com/1746671/10397606>.

Because of the ubiquity of asbestos in the military, veterans with asbestos-related diseases will more easily qualify for trust compensation than the general population. The asbestos trusts are little known in the veterans community. This should not be. The trusts can provide compensation to sick veterans even when the VA will not. In this article, I will describe the trusts, why they matter to veterans, and what a potentially eligible veteran, or their family, can do to seek out that compensation.

### **Asbestos and the Asbestos Litigation Tidal Wave**

The usefulness of asbestos, as insulation and fire protection, was known by most ancient societies, including the ancient Greeks, Egyptians, and Romans.<sup>3</sup> It was not until the latter 19<sup>th</sup> century, however, that asbestos began to be used on an industrial scale as a result of the Industrial Revolution. Because asbestos was so useful in so many applications, asbestos use boomed: between 1900 and 1910, worldwide production of asbestos tripled, with the United States as the leading user, consuming 43 percent of that production.<sup>4</sup> Asbestos was used in cars, cement, electrical panels and wire insulation, roofing, flooring, boiler insulation, firefighter clothing, and many other uses.<sup>5</sup>

The military was a particularly enthusiastic user of asbestos. Mark C. Greene, an attorney who represents defendants in toxic tort cases, compiled materials he gathered over

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<sup>3</sup> <https://jtd.amegroups.com/article/view/17002/14600>;  
[https://www.umd.edu/bioethics/libbyhealth/introduction/background/asbestos\\_timeline.aspx](https://www.umd.edu/bioethics/libbyhealth/introduction/background/asbestos_timeline.aspx).

<sup>4</sup> Virta, Worldwide Asbestos Supply and Consumption Trends from 1900 through 2003, United States Geological Survey (2006), <https://pubs.usgs.gov/circ/2006/1298/c1298.pdf>, at 2-3.

<sup>5</sup> *Id.* at 3.

the years showing the extent of asbestos use in the military under the title “The Use of Asbestos by the United States Military Other than the Navy.”<sup>6</sup> The extent of asbestos use in the military that Mr. Greene documents is a revelation. For example, Mr. Greene reports:

Military housing and other buildings located on facility bases (including multi-level housing units) were endlessly fitted with building materials containing asbestos ranging from pipe insulation to floor covering to plumbing equipment. In addition, ceiling tiles, vinyl asbestos flooring, roofing shingles, wallboard, drywall, and the usual products found in a typical construction case were all utilized by the military in constructing their bases and military installations. In fact, the military required specific products to be used in military installations nationwide. See attached “Index of Specifications, Standards and Commercial Item Descriptions” authored by the United States General Services Administration. The Government had specifications for use of asbestos gaskets, roofing felts, roofing shingles, roofing cement, gloves, cloth, packings, insulation board, insulation block and blankets, millboard, mittens, paper, wick, tape, drywall, asbestos containing joint compound and even sewer pipe.<sup>7</sup>

Mr. Greene provides military procurement documents that require the use of asbestos in military equipment.

Of course, while civilian asbestos use was perhaps less concentrated than in the military, that use was still extensive. And asbestos is not good for human health. This was known even in ancient times; the Greek geographer Strabo and Roman Pliny the Elder both reported sickness of the lungs in workers who wove asbestos fibers into cloth.<sup>8</sup> It was not until the 20<sup>th</sup>

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<sup>6</sup> 17th National Advanced Forum on Asbestos Claims & Litigation (June 2014), available at <https://www.americanconference.com/asbestos-claims-litigation-858114-chi/publications/conference-materials/>. Notwithstanding the title, Mr. Greene’s materials apply equally well to the Navy, as he himself notes.

<sup>7</sup> *Id.* at 366.

<sup>8</sup> University of Montana, Ethics and Environmental Health website, [https://www.umt.edu/bioethics/libbyhealth/introduction/background/asbestos\\_timeline.aspx#:~:text=The%20ancient%20Greeks%20named%20the,who%20wove%20asbestos%20into%20cloth.](https://www.umt.edu/bioethics/libbyhealth/introduction/background/asbestos_timeline.aspx#:~:text=The%20ancient%20Greeks%20named%20the,who%20wove%20asbestos%20into%20cloth.)

century, when asbestos use exploded and medicine became modern, that the full extent of asbestos's effect on human health was recognized.

Asbestos is primarily an airborne disease vector, the result of the ease with which asbestos can create clouds of microscopic particles. When those particles are inhaled, they lodge in the lungs and other nearby parts of the body. The most well-known disease to result is mesothelioma, and cancer of the lining (pleura) of the lungs or abdomen. Asbestos is the only known cause of mesothelioma, and mesothelioma is an exceptionally deadly disease. Asbestos inhalation can also cause lung cancer, although there are other causes, particularly cigarettes. Asbestos is also implicated in other cancers such as primary colorectal, laryngeal, esophageal, pharyngeal, and stomach cancer. Finally, inhaled asbestos can cause bilateral scarring of the lungs, a condition known as asbestosis. The burden of asbestos disease ranges from asymptomatic to severe breathing problems requiring oxygen assistance.<sup>9</sup>

Another significant characteristic of asbestos disease is its exceptionally long latency period – the time between exposure and symptomatic disease. For mesothelioma, the latency period can be 40 years or more. The latency periods of other asbestos diseases are similarly measured in decades. The use of asbestos in the United States peaked in 1973<sup>10</sup> and, while new use declined thereafter, the fact that asbestos was used so widely in construction and other long-term uses means that asbestos remediation continues to be an issue even today.

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<sup>9</sup> See American Cancer Society, Asbestos and Cancer, <https://www.cancer.org/healthy/cancer-causes/chemicals/asbestos.html>.

<sup>10</sup> Vallach & Sherman, "Mass-bestosis: Examining the American Asbestos Litigation Phenomenon," *Journal of Business and Applied Sciences* Vol. 3 (2), 2014, at 15.

While asbestos's disease-causing properties have been known to medical science for decades, given the long latency period many asbestos victims first became symptomatic only in the 1960s and 1970s. In 1973, a federal appeals court affirmed a lower court ruling that a worker who acquired mesothelioma from asbestos exposure at work could sue asbestos manufacturers in a product liability suit. See *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1974).<sup>11</sup> This case opened the litigation floodgates. Over the next 30 or so years, hundreds of thousands of asbestos lawsuits were filed naming thousands of defendants.<sup>12</sup> The burden of this potential liability was too much for some of the bigger asbestos manufacturers. The biggest was Johns-Manville Corporation. In 1982, Johns-Manville filed for Chapter 11 bankruptcy reorganization. The Mansville bankruptcy resulted in the creation of the first trust to compensate asbestos victims, and served as the model for all subsequent trusts.

### **The Johns-Manville Trust and Bankruptcy Code § 524(g)**

In the bankruptcy, Johns-Manville created the Manville Personal Injury Settlement Trust, with about \$2.5 billion in assets.<sup>13</sup> Thereafter, all asbestos claimants against Johns-Manville could obtain compensation only from the trust; litigation was prohibited. In 1994, Congress ratified the Manville model in amendments to the Bankruptcy Code,<sup>14</sup> the primary provisions

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<sup>11</sup> Before this case, workers could only receive workers compensation. *Id.* at 17.

<sup>12</sup> Stephen J. Carroll *et al.*, Asbestos Litigation xxiv (2005), [https://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND\\_MG162.pdf](https://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf) [<https://perma.cc/GH43-275B>] (“Approximately 730,000 people had filed an asbestos claim through 2002.”).

<sup>13</sup> Carroll, S., et al., 2005, “Asbestos Litigation.” RAND Institute for Social Justice at 5-6.

<sup>14</sup> The amendments were part of the Bankruptcy Reform Act of 1994 (Pub. L. 103-393, § 111), and the key provisions are contained in 11 U.S.C. §§ 524(g)(1) *et seq.*

being 11 U.S.C. §§ 524(g)(1) *et seq.* This statute permits companies to establish and fund trusts for compensation of asbestos victims in return for an injunction permanently shielding the companies from tort litigation. In other words, for companies with 524(g) trusts, asbestos victims, past, present, and future, may seek compensation only from the trusts with no resort to court.

### **The Structure of Asbestos Trust Claims Procedures**

As of the date of this article, approximately 60 asbestos trusts, with combined assets of \$23 billion, are in operation.<sup>15</sup> While some details vary, almost all of the trusts follow the same basic procedures to pay claims. The claims process is not quite as easy as, say, qualifying for social security, but the model is the same: if the claimant can check the right boxes, the claimant gets paid. The best way to illustrate this is with an example, with the understanding that a large majority of trusts operate in this manner.

Armstrong World Industries (“AWI”) established an asbestos trust in 2006 with more than \$2 billion to pay claims.<sup>16</sup> To qualify for compensation, a claimant has to have one of several specified diseases, have been exposed to AWI asbestos products for six months, and have a lifetime asbestos exposure (called “significant occupational exposure”) from any source

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<sup>15</sup> Figures based on information gathered from public Section 524(g) trust annual reports and related disclosures.

<sup>16</sup> Carroll, S., et al., 2005, “Asbestos Litigation.” RAND Institute for Social Justice at 26.

of five years (except for mesothelioma, which has no five-year requirement), at least two of which occurred before 1982. The specified diseases are:<sup>17</sup>

1. Mesothelioma;
2. lung cancer;
3. primary colorectal, laryngeal, esophageal, pharyngeal, or stomach cancer;
4. three levels of asbestosis, from lung scarring with no symptoms to severe asbestosis with marked reductions in lung capacity and efficiency.

For all diseases except mesothelioma, claimants must have x-rays or CT scans showing the bilateral lung scarring typical of asbestos.

Establishing exposure to AWI's asbestos products is straightforward: AWI provides a list of sites at which AWI asbestos products were used, and exposure is presumed for anyone working or for some other reason located at these sites. AWI's site list has 80,000 entries, including many military bases and facilities.<sup>18</sup> Trust claimants must establish at least six months exposure at one or more sites cumulatively (*e.g.*, two months at site 1, three months at site 2, two months at site 3). For veterans, establishing this six months exposure is a simple matter of extracting the relevant information from the veterans' service files that are maintained by the National Personnel Records Center in St. Louis.

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<sup>17</sup> This information can be found in the AWI Trust Distribution Procedures paragraph 5.3(a)(3), available at <http://www.armstrongworldasbestostrust.com/wp-content/uploads/2021/03/Conformed-Copy-Third-Amended-and-Restated-TDP-as-of-February-17-2021.pdf>.

<sup>18</sup> AWI's site list is available in the "References" section at <https://www.armstrongworldasbestostrust.com/resources/documents/>.

For veterans who served more than five years, claimants may be able to satisfy the five-year lifetime exposure requirement from military records alone. If not, asbestos exposure during veterans' civilian life counts toward this requirement as well. AWI's list of 80,000 sites is composed mostly of civilian sites and a veteran claimant may have worked at one or more of those sites. In addition, the AWI trust provides a list of more than 1800 occupations for which asbestos exposure is presumed.<sup>19</sup> These are generally blue-collar jobs in such industries as automobiles, construction, utilities, chemicals, maritime, railroads, and others.

Finally, trust claimants can submit their own evidence by way of declarations. For example, a Navy veteran who followed his Navy career with working on, and eventually captaining, tugboats could satisfy the five-year exposure requirement with a declaration accompanied by employment records available from the Social Security Administration.<sup>20</sup> Since the five-year requirement is for asbestos exposure from any source, there is no need to identify specific companies as the source of the asbestos.<sup>21</sup>

The asbestos trusts pay qualified claims on the basis of tables that provide specified payments based on disease level, with mesothelioma the highest and asbestosis without significant breathing impairment the lowest. For example, AWI's schedule payment for mesothelioma is \$110,000; for asymptomatic asbestosis it is \$3,700.<sup>22</sup> However, the AWI trust,

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<sup>19</sup> This list is called "Significant Occupational Exposure Rating" and is available for download in the "References" section at <https://www.armstrongworldasbestostrust.com/resources/documents/>.

<sup>20</sup> This is a real case.

<sup>21</sup> Unlike the six-month exposure requirement to the specific company that established the trust to which a claim is made.

<sup>22</sup> AWI TDP 5.3(a)(3), <http://www.armstrongworldasbestostrust.com/wp-content/uploads/2021/03/Conformed-Copy-Third-Amended-and-Restated-TDP-as-of-February-17-2021.pdf>.



and most of the others, pay a percentage of the scheduled values, not the full amount.

Asbestos trusts were each funded with a fixed amount of money/assets, and that money has to be available to pay claims into the future. The asbestos trusts have actuaries whose job it is to estimate how much the trust can pay now and still have money to pay future claims, which may continue to as late as 2050. The AWI trust currently pays 19.7 percent of scheduled values.<sup>23</sup>

The asbestos trusts operate separately from each other: claimants will be paid by each trust for which they qualify without regard to other trust payments. Because veterans generally serve in many different locations during their military career, veterans who are otherwise qualified (disease and lifetime exposure) will almost always be able to submit to multiple trusts. For example, the U.S. Naval Academy appears on the site lists of nine trusts, and any Annapolis graduate will almost certainly have served at several other locations on trust site lists. The same is true for bases and other military sites and for other services. Army and Air Force bases, for example, are almost always on multiple site lists.

### **Obtaining Asbestos Trust Compensation For Veterans**

Veterans will qualify for asbestos trust compensation disproportionately to the general population simply because of the ubiquity of asbestos at military facilities and in military equipment. While the military created asbestos exposure limits starting in the 1950s, these did not limit the use of asbestos on military bases and in military equipment. It was not until 1998

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<https://www.armstrongworldasbestostrust.com/#:~:text=The%20current%20payment%20percentage%20for,settlement%20value%20for%20Individual%20Review.>

that the US Army ordered its main and reserve facilities to catalog asbestos at their facilities and develop remediation plans.<sup>24</sup> Given the long latency period for asbestos disease, some veterans will unfortunately be diagnosed with asbestos disease for many years to come.

As noted, trust site lists provide the means for veterans to establish exposure to specific company's asbestos products. Veterans' DD-214s often can provide the necessary information. If not, personnel files from the National Personnel Records Center, which are easily, if not necessarily swiftly, obtainable, provide complete information on service locations. Many veterans who may be eligible for trust compensation also have, or are applying for, disability support from the Veterans Administration. In those cases, the veteran will most likely already have copies of their complete military record.

One point about the VA is very important: the asbestos trusts are completely independent of the VA. Asbestos trusts pay claims without regard to any VA disability claim the veteran might have. This extends to VA service-connected claims for asbestos disease. Obtaining asbestos disease disability from the VA is very difficult because the veteran must show his or her asbestos disease is service connected to the exclusion of other possible sources of the disease. Asbestos exposure, unlike, for example, agent orange exposure, carries no presumption of service connection. Any veteran who smoked is almost certainly not going to qualify, and it is very difficult to prove exposure during military service was the predominant cause of the asbestos disease and not any other sources of exposure.

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<sup>24</sup> See Greene, *supra*, at 366.

The asbestos trusts do not care where the exposure to the asbestos took place as long as the veteran can meet the six-month and five-year requirements. The exposure could have occurred entirely during military service or partly military/partly civilian; the trusts are indifferent. The trusts also do not factor in cigarette smoking, unlike the VA.

Trust claimants establish their disease with medical records. Patients have the right to copies of their medical records and doctors and hospitals all know this. For all diseases except mesothelioma, trust claimants must have an x-ray or CT scan showing “bilateral asbestos-related non-malignant disease,” defined as “bilateral interstitial fibrosis, bilateral pleural plaques, bilateral pleural thickening, or bilateral pleural calcification,”<sup>25</sup> which are the characteristic signs of asbestos-related lung damage. For more serious non-malignant asbestosis, trust claimants must have results from lung function tests showing significant impairment. Claims for mesothelioma and other cancers must document the relevant disease with medical records.

While asbestos victims are free to submit applications on their own, this is not realistic. Apart from the fact that making an application is likely to be overwhelming for someone who is old and sick, which trust claimants all are, there are, as noted above, about 60 trusts currently operating. Trust claimants can qualify for multiple trusts, and must submit a separate

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<sup>25</sup> AWI TDP 5.3(a)(3) at fn. 6, <http://www.armstrongworldasbestostrust.com/wp-content/uploads/2021/03/Conformed-Copy-Third-Amended-and-Restated-TDP-as-of-February-17-2021.pdf>.

application to each trust for which they might qualify. Trust claimants need the assistance of an attorney<sup>26</sup> who is already capable of ascertaining eligibility across all of the trusts.

Finding an attorney to submit a claim is easy: simply search “asbestos trust” online and potential claimants will find pages of attorneys. How to determine which of these attorneys is competent and trustworthy is beyond the scope of this article, but there is something to be said about fees. Attorneys representing trust claimants always (or near enough) charge a contingency fee – a percentage share of any trust payment – that relieves the trust claimant from having to pay any fees up front. A few of the asbestos trusts limit contingency fees to 25 percent, but most do not. Client experience and diligent search has uncovered no law firm that charges less than 33-40 percent, the standard contingency fee in tort cases. Filing trust claims is for the most part a check-the-box process. Trust claims incur none of the costs of litigation – depositions, hearings before a judge, experts, travel, *etc.* There is no good reason to charge trust claimants the same amount attorneys charge for full court litigation. Trust claimants should not pay more than 10 percent, or perhaps a bit more, for making trust claims that involve little of the work, and even less of the risk, than lawsuits in court.

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ROA is more than a century old—it was established on 10/1/1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S.

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<sup>26</sup> Trust claimants who do not submit applications themselves must be represented by attorneys. The trusts do not permit non-attorneys to represent claimants.

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<sup>27</sup> Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.

<sup>28</sup> You can also contribute on-line at [www.roa.org](http://www.roa.org).