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**FILED**

**JUN 29 2005**

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

Attorneys for Respondents, Albertson's, Inc., Skaggs Alpha Beta and Buttrey Food & Drug, Inc.

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN,

Petitioner,

v.

STATE COMPENSATION INSURANCE  
FUND,

Respondent.

WCC No. 2000-0222

RESPONSE TO SUMMONS OF  
ALBERTSON'S, INC., SKAGGS  
ALPHA BETA AND BUTTREY FOOD  
& DRUG, INC.

COME NOW the related entities of Albertson's, Inc., Skaggs Alpha Beta, and Buttrey Food & Drug, Inc. ("Albertson's Group"), and pursuant to the Summons issued by this Court on May 4, 2005, hereby sets forth the following defenses to Petitioner's attorney's request for certification of a common fund and enforcement of his attorney fee lien.

The language of Petitioner's amended attorney fee lien indicates he is seeking common fund attorney fees on every workers' compensation claim with a date of injury occurring on or after July 1, 1974 through August 5, 2003, wherein a claimant incurred costs or fees to obtain a Social Security Disability award for which the insurer took an offset. The Albertson's Group asserts the following with respect to the common fund request of Petitioner's counsel:

1. The decision in *Flynn v. Montana State Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397, applies prospectively only pursuant to the *Chevron Oil* test of non-retroactivity, which was most recently applied by the Montana Supreme Court in *Schmill*

DOCKET ITEM NO. 295

*v. Liberty Nw. Ins. Corp.*, 2005 MT 144, 327 Mont. 293, \_\_\_ P.3d \_\_\_;

2. The decision in *Flynn* cannot be applied retroactively because retroactive application would constitute an unconstitutional impairment of contract;

3. If *Flynn* applies retroactively, the common fund attorney fee lien of Petitioner's counsel has no applicability to claims occurring on or after April 21, 2003, because of the legislative prohibition on common fund attorney fees set forth in Montana Code Annotated § 39-71-611(3) (2003) and Montana Code Annotated § 39-71-612(4) (2003);

4. If *Flynn* applies retroactively, settled files or files which were adjudicated prior to December 5, 2002, the date of the *Flynn* decision, are excluded from the implementation process;

5. If *Flynn* applies retroactively, files which have been inactive or files in which indemnity benefits were paid in full are excluded from the implementation process;

6. If *Flynn* applies retroactively and common fund fees are payable to Petitioner's counsel, the common fund attorney fee lien should have no applicability to claims occurring on or after December 5, 2002;

7. The amount of the attorney fee lien claimed by Petitioner's counsel is excessive;

8. If *Flynn* applies retroactively, the files of deceased claimants are excluded from the implementation process;

9. If *Flynn* applies retroactively, the doctrine of laches and/or the statute of limitations serves to bar any additional entitlement on claims which failed to timely present a demand for *Flynn*-type benefits;

10. If *Flynn* applies retroactively, Petitioner's counsel should be required to bear the financial burden of the identification and entitlement determination process, which includes the administrative and claims-related costs associated with obtaining the necessary Social Security disability information and calculating entitlement; and

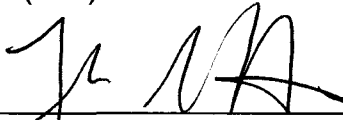
11. The Albertson's Group incorporates the defenses raised by the other insurers named in the global Summons and requests the right to add additional defenses throughout the duration of the post-remand proceedings, especially since many of the implementation issues will not be discovered unless *Flynn* is applied

retroactively and the parties actually begin the implementation process.

DATED this 28 day of June, 2005.

Attorneys for Respondents Albertson's, Inc.,  
Skaggs Alpha Beta and Buttrey Food & Drug,  
Inc.:

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By   
for Bradley J. Luck

### CERTIFICATE OF MAILING

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Respondents, Albertson's, Inc., Skaggs Alpha Beta and Buttrey Food & Drug, Inc., certify that on this 28<sup>th</sup> day of June, 2005, I mailed a copy of the foregoing *Response to Summons of Albertson's, Inc., Skaggs Alpha Beta and Buttrey Food & Drug, Inc.*, postage prepaid, to the following persons:

Rex L. Palmer, Esq.  
Attorneys Inc., P.C.  
301 W. Spruce  
Missoula, MT 59802

  
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