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FILED

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OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

Attorneys for TIG Insurance Company, TIG Premier
Insurance Company, Fairmont Insurance Company

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN, <i>et al.</i> ,)	
)	
Petitioners,)	WCC NO. 2000-0222
)	
-vs-)	
)	
MONTANA STATE FUND,)	
)	
Respondent/Insurer,)	RESPONSE TO SUMMONS
)	OF TIG INSURANCE
and)	COMPANY, TIG PREMIER
)	INSURANCE COMPANY
LIBERTY NORTHWEST INSURANCE)	and FAIRMONT
CORPORATION,)	INSURANCE COMPANY
)	
Intervenor.)	
)	
)	

Fairmont Insurance Company, TIG Insurance Company and TIG Premier Insurance Company assert the following defenses in response to the Summons which issued May 4, 2005.

RESPONSE TO SUMMONS OF FAIRMONT INSURANCE COMPANY, TIG INSURANCE COMPANY AND TIG PREMIER INSURANCE COMPANY

Petitioner's 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, where a claimant incurred costs or fees to obtain a Social Security Disability award for which the insurer took an offset. Fairmont Insurance Company, TIG Insurance Company and TIG Premier Insurance Company assert the following defenses to Petitioner's request for common fund certification and on this basis dispute application of the Flynn decision to them.

- 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 recently applied by the Montana Supreme Court in Schmill v. Liberty Northwest Ins. Corp., 2005 MT 144, 327 Mont. 293, 114 P.3d 204.
- 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 application 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 Section 39-71-611(3) (2003) and Montana Code Annotated Section 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 has no application 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.

- 11) Application of a common fund would violate provisions of the U.S. and Montana Constitutions, including but not limited to, procedural and substantive due process, freedom of contract and taking without just compensation.
- 12) An order requiring identification of Flynn beneficiaries creates an unreasonable and undue burden upon Fairmont Insurance Company, TIG Insurance Company and TIG Premier Insurance Company.
- 13) Fairmont Insurance Company, TIG Insurance Company and TIG Premier Insurance Company incorporate the defenses raised by the other insurers named in the Summons and request the right to add additional defenses throughout the duration of these 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 19th day of August, 2005.

UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

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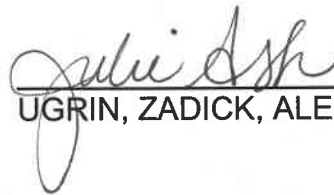
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CERTIFICATE OF MAILING

I hereby certify that the foregoing was duly served upon the respective attorneys for each of the parties entitled to service by depositing a copy in the United States mails at Great Falls, Montana, enclosed in a sealed envelope with first class postage prepaid thereon and addressed as follows:

Rex Palmer
301 West Spruce
Missoula, Montana 59802

DATED this 19 day of August, 2005.



UGRIN, ZADICK, ALEXANDER & HIGGINS, P.C.