

VOLUME NO. 38

OPINION NO. 115

STATE AUDITOR - Duty to accept writ of attachment;  
ATTACHMENT - Common law writ, validity;  
ATTACHMENT - Judicial authorization required;  
GARNISHMENT - Common law writ of attachment;  
MONTANA CODE ANNOTATED - Sections 21-18-201, et. seq., MCA.

HELD: The State Auditor may refuse to accept writs of attachment issued without judicial authorization.

10 December 1980

E. V. "Sonny" Omholt  
State Auditor  
Mitchell Building  
Helena, Montana 59601

Dear Mr. Omholt:

You have requested my opinion on the following question:

Must the State Auditor honor a writ of attachment which is issued without judicial supervision or authority?

The inquiry focuses upon the duty of the State Auditor to accept documents termed "common law writs of attachment." Recently, I ruled that County Clerk and Recorders are not required to file self-styled common law liens that don't conform to statute or contract, 38 Op. Att'y Gen. No. 114. This question is whether wages may be attached merely by

presentment of a "common law writ of attachment" based on the conclusory allegations of an individual without any determination of specific facts by a judge. The answer is no.

Montana recognizes the existence of common law, but only insofar as it does not conflict with specific statutory enactments. § 1-1-108, MCA. Montana has established by statute the procedures for attaching property of another. The petition must be supported by an affidavit of the person seeking attachment. § 27-18-202, MCA. The petitioner must furnish a written undertaking to be approved by a court. § 27-18-204, MCA. Finally, a judge, not the petitioner, issues the writ of attachment. § 27-18-205, MCA.

The attachment statutes were substantially revised in 1977, after being held unconstitutional by the Montana Supreme Court, because they failed to provide the respondent with meaningful notice and opportunity to be heard. Williams v. Matovich, 172 Mont. 109, 114, 560 P.2d 1338 (1977).

The prejudgment common law writs of attachment which you describe are not issued under judicial supervision. This directly conflicts with the statutory requirements of this state's prejudgment attachment laws as well as Williams v. Matovich. Thus, common law writs of attachment, issued without judicial supervision, are of no effect in the State of Montana.

THEREFORE, IT IS MY OPINION:

The State Auditor may refuse to accept writs of attachment issued without judicial authorization.

Very truly yours,

MIKE GREELY  
Attorney General