

Page Printed From:

<https://www.law.com/newyorklawjournal/2023/09/20/a-primer-on-poundage-due-in-judgment-enforcement-proceedings/>

NOT FOR REPRINT

ANALYSIS

A Primer on Poundage Due in Judgment Enforcement Proceedings



An execution is a powerful judgment enforcement tool, but it should be employed cautiously with a full understanding of the right of the sheriff or marshal to collect poundage on a settlement.



September 20, 2023 at 12:00 PM



Creditors' and Debtors' Rights

By Bernard D'Orazio | September 20, 2023 at 12:00 PM

Counsel for a judgment creditor may choose to enforce a money judgment by execution, which are of two varieties: property (personal or real) and income. Before making the decision to deliver an execution to a sheriff or marshal, counsel must consider the issue of poundage.

Poundage is the ancient but still used term for fees due to a judgment enforcement officer for assisting a judgment creditor enforce a judgment or an order of attachment. See CPLR 8012. In cases involving large sums of money, the amount of poundage can be quite significant.

In New York City, poundage is 5% of the amount due on a judgment or the settlement amount, whichever is less. CPLR 8012(b)(4). There is a statutory cap on the amount of poundage due on an order of attachment, but not on an execution. See Weinstein-Korn-Miller, *New York Civil Practice* ¶ 8012.09.

Poundage is governed by statute. Poundage does not require a court ruling and is not a matter of judicial discretion. See *Downe Communications v. Aetna Cas. & Sur.*, 37 N.Y.2d 903, 905 (1975).

Moreover, the sheriff or marshal is not required to collect monies or property to be entitled to poundage. Per CPLR 8012(b)(2), poundage is due where “a settlement is made after a levy by virtue of an execution.” Thus, “where, as here, ‘payment by the debtor is made directly to the creditor after a sheriff levies, the payment constitutes a settlement, and the sheriff will be entitled to poundage.’” *Foley v. West-Herr Ford*, 111 A.D.3d 1288 (4th Dep’t 2013) (quoting *Kurtzman v. Bergstol*, 62 A.D.3d 757 (2d Dep’t 2009)); *Estate of Pearson*, 72 Misc. 2d 995 (Sur. Ct. N.Y. County 1973) (“[CPLR 8012(b)(2)] provides that when a party has made use of the services of the sheriff’s

office in the pursuit of a claim, and he later satisfies that claim by means of a settlement, the sheriff is entitled to his poundage whether he has actually made any collections or not.”).

Furthermore, it is also well established that a sheriff or marshal is entitled to poundage where there was “affirmative interference” with his collection efforts. See *Solow Mgt. v. Tanger*, 10 N.Y.3d 326, 331 (2008). Under this doctrine, a judgment creditor who agrees to take payment directly from the debtor commits “an affirmative act interfering with collection by the [Marshal],” entitling a marshal or sheriff to poundage. *Cabrera v. Hirth*, 87 A.D.3d 844 (1st Dep’t 2011) (quoting *Greenfield v. Tripp*, 23 Misc. 2d 1088, 1089 (Sup. Ct. Nassau County 1960)).

CPLR 8012(b)(2) specifically provides that poundage be paid where “a settlement is made after a levy by virtue of an execution . . . [calculated] upon the judgment or the settlement amount, whichever is less.” As indicated in the leading practice treatise, a “settlement” within the meaning of CPLR 8012(b)(2) “is an agreement determining the controversy between the parties,” including payment of the judgment. See Weinstein-Korn-Miller, *New York Civil Practice* ¶ 8012.05.

Nor does it matter that the judgment creditor filed and prevailed in a turnover order proceeding after the marshal levied. See *Morris v. Morris*, 43 Misc. 2d 854 (Sup. Ct. N.Y. County 1964) (“that a special proceeding is necessary after a levy to compel garnishee to pay or surrender the property does not deprive the Sheriff of poundage fees for services rendered by him in making the levy.”).

Who is liable for poundage? The general rule is that the judgment debtor is liable for poundage. See *Dawkins v. Dawkins*, 191 A.D.3d 945 (2d Dep’t 2021); *DePasquale v. Estate of DePasquale*, 89 A.D.3d 672, 674 (2d Dep’t 2011).

However, the court has discretion under CPLR 8012(b) to shift liability for the poundage due to any party or even to their attorneys. See *Cabrera v. Hirth*, supra, 87 A.D.3d at 844. In many cases, the judgment creditor has been held liable for poundage. See, e.g., *McCloskey v. Brill*, 286 A.D. 143 (1st Dep’t), affirmed 1 N.Y.2d 755 (1955); *Matter of Associated Food Stores v. Farmer’s Bazaar of Long Island*, 126 Misc. 2d 541 (Sup. Ct. Nassau County 1984); *Seymour Mfg. v. Tarnopol*, 20 Misc. 2d 210, (Sup. Ct. Kings County 1959); *Zimmerman v. Engel*, 114 N.Y.S.2d 293 (Sup. Ct. Kings County 1952).

Once counsel has delivered an execution to a judgment enforcement officer, counsel for a judgment creditor must be aware of the poundage issue when negotiating a settlement. It is prudent to provide for the debtor’s payment of the poundage as part of the settlement. If not, the poundage will be due on the settlement nonetheless, out of monies otherwise flowing to the judgment creditor.

In some cases, counsel for a judgment creditor may wish to hold off on proceeding with an execution so he can retain leverage with a debtor, who may avoid poundage by settling beforehand. Or counsel may try to maximize collection from a debtor who is not believed to have sufficient assets to pay the judgment, by settling without use of the sheriff’s or marshal’s services.

There of course are other considerations to be weighed (e.g., delay in use of an execution could result in loss of priority to another judgment creditor). Priority to a judgment debtor's personal property is based on the date of delivery of an execution to a judgment enforcement officer (see CPLR 5202), not the date of entry of the judgment. This is different than for real property, where priority is based on the date of docketing of a judgment with the county clerk in the county where the judgment debtor's property is located. See CPLR 5203.

Failure to pay poundage can have painful consequences. An aggrieved judgment enforcement officer can file an action to recover his poundage, CPLR 8012(b)(5), or can simply make a motion in the underlying action, see *Foley v. West-Herr Ford*, 111 A.D.3d 1288 (4th Dep't 2013); *Cabrera v. Hirth*, 87 A.D.3d 844 (1st Dep't 2011); *Knoll v. Knoll*, 78 Misc. 2d 710 (Sup. Ct. N.Y. County 1974).

If the sheriff or marshal prevails, he may be entitled to recover his attorneys' fees and costs, CPLR 8012(b)(5), and prejudgment interest, CPLR 5001.

Execution can be a powerful weapon to enforce a judgment. Use it wisely and make sure you are cognizant of the poundage that will be owed on any settlement reached after there has been a levy by the sheriff or marshal.

Bernard D'Orazio is principal attorney at the Law Offices of Bernard D'Orazio & Associates in Manhattan and can be reached at bdorazio@dorazio-law.com.

NOT FOR REPRINT
