New York Law Journal
A NEW YORK LAW JOURNAL SPECIAL SECTION
Labor&Employment
An ALM Publication
WWW.NYLJ.COM
MONDAY, FEBRUARY 29, 2016

Double Trouble: Courts Shy Away From **Treble Damages** in Wage, Hour Suits

BY GLENN S. GRINDLINGER AND ALEXANDER W. LEONARD

When a wage and hour suit is filed against an employer, one of the first questions asked by the defendant-employer is: What's my exposure?

Generally, in New York state, in wage and hours suits, plaintiffs allege violations of the federal Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL). Both statutes permit prevailing plaintiffs to recover compensatory damages (usually back wages), their reasonable attorney fees and costs and liquidated damages. Whether a successful plaintiff can recover liquidated damages simultaneously under the FLSA and NYLL is an open issue in New York.

In 2010, the legislature passed and the governor signed into law, the New York Wage Theft Prevention Act (WTPA). Effective April 9, 2011, the WTPA increased liquidated damages that may be awarded in wage and hour cases for violations of the NYLL from 25 percent of the underlying back wages owed to 100 percent of the back wages owed and made liquidated damages virtually automatic unless the defendant could prove that it acted in good faith compliance with the law.[1] In other words, after the enactment of the WTPA, for every dollar in back pay owed to a successful plaintiff for violations of the NYLL, the defendant would also likely have to pay the plaintiff an additional dollar in liquidated damages under New York law.

Under the FLSA, successful plaintiffs can also recover liquidated damages equal to 100 percent of the back pay owed and like the NYLL, the burden is on the defendant to prove that it acted in good faith compliance with the FLSA to avoid liquidated damages. Thus, after the enactment of the WTPA, for the first time, the liquidated damage provision under the NYLL appeared to mirror the liquidated damage provision under the FLSA. As most wage and hour practitioners in New York are acutely aware, the plaintiffs' bar has naturally championed applying both sets of liquidated damages to violations covered by both statutes.[2] This permits successful plaintiffs to potentially recover treble damages (i.e., up to 200 percent liquidated damages in addition to any underlying wage liability) in wage and hour litigations, thereby multiplying the recovery available for even relatively minor, technical violations of the NYLL and FLSA.

After the enactment of the Wage Theft Prevention Act, for the first time, the **liquidated damage provision** under the New York Labor Law **appeared to mirror** the liquidated damage provision under the Fair Labor Standards Act.

At the time the WTPA was enacted, practitioners and commentators forecasted these arguments, warning potential "double recovery" theories would be advocated by the plaintiffs' bar,[3] in addition to the robust remedies already available, such as attorney fees that may be awarded to a prevailing plaintiff.

There was certainly a reasonable argument for such cumulative liquidated damages, as federal and state court decisions prior to the enactment of the WTPA (when liquidated damages were only 25 percent under the NYLL) often permitted the recovery of liquidated damages under both statutes (i.e., 125 percent liquidated damages).[4] The theory used by such courts was that liquidated damages under the FLSA were "compensatory" in nature (i.e., meant to compensate the employee for the time he or she was without his or her wages) whereas liquidated damages under the NYLL were "punitive" (i.e., meant to punish and deter employers from engaging in future wage violations).[5] After the enactment of the WTPA, it was assumed that these theories concerning the nature of liquidated damages under both statutes would continue and treble damages might be awarded, thus providing a windfall for successful plaintiffs and further promoting the increase in wage and hour litigation that has occurred over the past decade.

Yet, since the enactment of the WTPA, a split of authority has developed in New York federal and state courts concerning the award of liquidated damages under the FLSA and NYLL. Initially, many courts appeared to allow the simultaneous application of *both* FLSA and NYLL liquidated damages, thus resulting in the application of 200 percent liquidated damages.[6] These courts reasoned that, under existing case law, both statutes still served

GLENN S. GRINDLINGER *is a partner and* ALEXANDER W. LEONARD *is an associate at Fox Rothschild in New York, where they both practice in the labor and employment department.*

differing purposes, and noted that nothing had fundamentally changed regarding either statute other than simply increasing the liquidated damages recovery available under the NYLL.

However, even in 2011, seeds of dissent were already sprouting given the obvious windfall this handed to plaintiffs. Some courts aptly noted that since liquidated damages under the NYLL now mirrored the FLSA, both sets of liquidated damages effectively "serve the same purpose and have the *same practical effect* of deterring wage violations and compensating underpaid workers."[7] This "practical effect" argument lingered as some judges, then in the minority,[8] refused to allow double liquidated damages. These judges found that the purported distinction between liquidated damages under the NYLL and FLSA was illusory since both remedies were identical.

Despite this split of authority, no appellate court has yet to weigh in and settle whether both forms of liquidated damages may be recovered simultaneously.[9] Thus, over the past several years, the courts have reversed course from the initial bevy of federal and state court decisions applying 200 percent liquidated damages. Countless applications seeking 200 percent liquidated damages have since been denied by numerous judges who find such recoveries to be duplicative and unnecessary.[10] These courts continue to reason that "[b]oth forms of damages seek to deter wage-and-hour violations in a manner calculated to compensate the [plaintiff]."[11] Even judges that still apply *both* NYLL and FLSA liquidated damages together have noted the recent trend away from granting 200 percent liquidated damages.[12]

In fact, in some instances judges have begun abrogating their own precedent, and now embrace the view that double liquidated damages under both the NYLL and FLSA are inappropriate given the similarities between both statutes.[13] Today, the prevailing view appears to be that applying liquidated damages remedies under both the NYLL and FLSA results in "a windfall that neither the state nor the federal legislature appears explicitly to have intended."[14] Some courts have gone even further and held that applying prejudgment interest pursuant to N.Y. C.P.L.R. §5004 is inappropriate as well since such interest serves an identical purpose to the FLSA. Therefore, prejudgment interest cannot be awarded where FLSA liquidated damages are also available.[15]

It is certainly difficult to speculate as to the impetus for this sudden reversal by the courts. Perhaps the Second Circuit's recent increased scrutiny of wage and hour cases in the seminal *Cheeks v. Freeport Pancake House* in 2015 sparked this trend.[16] Alternatively, perhaps this trend is a backlash to the record-breaking filings of wage and hour cases in recent years that have clogged federal dockets. Regardless of the reason, there are strong trends within the judiciary to oppose 200 percent liquidated damages for prevailing plaintiffs in FLSA and NYLL litigations.

While much remains to be seen as to how the split among the lower court judges will be resolved over the next few years, and/or if an appellate court will weigh in on the subject, as of now it is clear that a multitude of judges reject treble damages for wage and hour violations in New York. Indeed some plaintiffs' attorneys have begun forgoing such cumulative claims altogether given this recent trend.[17] Now that the initial proliferation of duplicative damages under the NYLL and FLSA has been counterbalanced, practitioners can also expect the defense bar to increasingly reject redundant liquidated damages claims. This is especially true now that some judges who have previously approved both forms of liquidated damages are more recently rejecting such windfall recoveries.

Now that the initial proliferation of duplicative damages under the NYLL and FLSA has been counterbalanced, practitioners can also expect the defense bar to **increasingly reject redundant liquidated damages claims.**

1. Wage Theft Prevention Act of 2010, ch. 564, 2010 N.Y. Laws 1446; N.Y. LAB. LAW §§198(1-a), 663(1).

2. The NYLL provides for a six year statute of limitations, while the FLSA provides for up to a two or three year statute of limitations period depending on whether the violations were "willful." See 29 U.S.C. §255(a); N.Y. LAB. LAW §198(3). Therefore, the double liquidated damages discussed in this article are only applicable for the two or the three year period where both statutes of limitations overlap.

3. See, e.g., "New York Enacts Law Increasing Penalties for Wage and Hour Violations," Carolyn D. Richmond & Glenn S. Grindlinger, December 2010 ("These changes to the NYLL are likely to embolden plaintiffs' attorneys. In the event an employer fails to properly pay its employees, employees will be able to obtain double damages."), available at http://www.foxrothschild.com/publications/new-york-enacts-law-increasing-penalties-for-wage-and-hour-violations; see also "New York's New 'Wage Theft' Law: What It Means, and What To Do Now," Allan S. Bloom & Rebecca E. Raiser, March 2011 ("[T]he WTPA allows a plaintiff to recover "double damages" for wage violations."), available at http://www.paulhastings.com/Resources/Upload/Publications/1845.pdf.

4. See, e.g., *Cao v. Wu Liang Ye Lexington Rest.*, No. 08 CIV. 3725, 2010 WL 4159391, at *5 (S.D.N.Y. Sept. 30, 2010); *Ke v. Saigon Grill*, 595 F. Supp. 2d 240, 261-62 (S.D.N.Y. 2008).

5. *Cao*, 2010 WL 4159391, at *5 ("Under the FLSA, liquidated damages are compensatory, rather than punitive … . In contrast, liquidated damages under the Labor Law are punitive 'to deter an employer's willful withholding of wages due.' … . Because liquidated damages under the FLSA and the Labor Law serve fundamentally different purposes, a plaintiff may recover liquidated damages under both the FLSA and the Labor Law.") (citations omitted).

6. See, e.g., *Gurung v. Malhotra*, 851 F. Supp. 2d 583, 593-94 (S.D.N.Y. 2012); *Santillan v. Henao*, 822 F. Supp. 2d 284, 297 (E.D.N.Y. 2011); see also *Ho v. Sim Enterprises*, No. 11 Civ. 2855, 2014 WL 1998237, at *19 (S.D.N.Y. May 14, 2014); *Hernandez v. P.K.L. Corp.*, No. 12-CV-2276, 2013 WL 5129815, at *1, *5-6 (E.D.N.Y. Sept. 12, 2013); *Hernandez v. Punto y Coma*, No. 10-CV-3149, 2013 WL 4875074, at *1, *8 (E.D.N.Y. Sept. 11, 2013); *Castellanos v. Deli Casagrande*, No. CV 11-245, 2013 WL 1207058, at *6 (E.D.N.Y. March 7, 2013), report & rec. adopted, 2013 WL 1209311 (E.D.N.Y. March 25, 2013).

7. *Fu v. Pop Art Int'l*, No. 10 Civ. 8562, 2011 WL 4552436, at *3-5 (S.D.N.Y. Sept. 19, 2011) (emphasis added) (holding that plaintiff was not entitled to liquidated damages under both federal and state law simultaneously), report & rec. adopted as modified on other grounds, 2011 WL 6092309 (S.D.N.Y. Dec. 7, 2011); *Pineda-Herrera v. Da-Ar-Da*, No. 09-CV-5140, 2011 WL 2133825, at *4-5 (E.D.N.Y. May 26, 2011).

8. *Gurung*, 851 F. Supp. 2d at 593 n.6 (stating that the theory that double damages should not be awarded in light of the amendment of the NYLL to mirror the FLSA is the "minority view").

9. *Inclan v. New York Hosp. Grp.*, 95 F. Supp. 3d 490, 505 (S.D.N.Y. 2015) ("There is no appellate authority as to whether a plaintiff may recover cumulative (sometimes called 'simultaneous' or 'stacked') liquidated damages under the FLSA and NYLL … ."); see also *Garcia v. JonJon Deli Grocery*, No. 13 CIV. 8835, 2015 WL 4940107, at *6 (S.D.N.Y. Aug. 11, 2015) ("The Second Circuit has provided no guidance on whether a Plaintiff may obtain cumulative recovery of liquidated damages under the FLSA and the NYLL.").

10. E.g., *Inclan*, 95 F. Supp. 3d at 506 ("[W]e decline to rule that plaintiffs are entitled to cumulative liquidated damages under the FLSA and NYLL"); see also *Kim v. 511 E. 5TH St.*, No. 12CV8096, 2015 WL 5732079, at *11 (S.D.N.Y. Sept. 30, 2015); *Chowdhury v. Hamza Exp. Food*, No. 14-CV-150, 2015 WL 5541767, at *8 (E.D.N.Y. Aug. 21, 2015) report & rec. adopted, No. 14-CV-150, 2015 WL 5559873 (E.D.N.Y. Sept. 18, 2015); *Garcia*, 2015 WL 4940107, at *6; *McGlone v. Contract Callers*, No. 11-CV-3004, 2015 WL 4425895, at *2 (S.D.N.Y. July 20, 2015); *Olvera v. Los Taquitos Del Tio*, No. 15 CIV. 1262, 2015 WL 3650238, at *2 n.2 (E.D.N.Y. June 11, 2015); *Lopez v. Yossi's Heimishe Bakery*, No. 13 CV 5050, 2015 WL 1469619, at *11 (E.D.N.Y. March 30, 2015); *Jimenez v. Computer Express Int'l Ltd.*, No. 14-CV-5657, 2015 WL 1034478, at *2 (E.D.N.Y. March 10, 2015); *Chuchuca v. Creative Customs Cabinets*, No. 13 Civ. 2506, 2014 WL 6674583, at *16 (E.D.N.Y. Nov. 25, 2014); *Shiu v. New Peking Taste*, No. 11 Civ. 1175, 2014 WL 652355, at *13 (E.D.N.Y. Feb. 19, 2014).

11. *Chuchuca*, 2014 WL 6674583, at *16.

12. *Spain v. Kinder Stuff 2010*, No. 14-CV-2058, 2015 WL 5772190, at *6 (E.D.N.Y. Sept. 29, 2015) ("There is an emerging trend towards denying a cumulative recovery of liquidated damages."); *Herrera v. Tri–State Kitchen & Bath*, No. 14 Civ. 1695, 2015 WL 1529653, at *12 (E.D.N.Y. March 31, 2015) ("[T]here is an emerging trend towards denying a cumulative recovery of liquidated damages, as the NYLL liquidated damages provision now closely parallels the FLSA provisions because of the 2011 amendments, which increased liquidated damages from 25 percent to 100 percent and changed the standard of proof.").

13. Compare *Shiu*, No. 11-CV-1175, 2014 WL 652355, at *13 & n.19 (denying double liquidated damages) (Garaufis, J.), and *Kim*, 2015 WL 5732079, at *11 (S.D.N.Y. Sept. 30, 2015) (denying double liquidated damages) (Maas, Mag. J.), with *Hernandez*, 2013 WL 4875074, at *1, *8 (E.D.N.Y. Sept. 11, 2013) (allowing double liquidated damages) (Garaufis, J.), and *Gurung*, 851 F. Supp. 2d at 593-94 (S.D.N.Y. 2012) (allowing double liquidated damages) (Maas, Mag. J.); see also *Lopez*, 2015 WL 1469619, at *11 & n.13 (E.D.N.Y. March 30, 2015) (denying double liquidated damages and discussing at length that the presiding judge had previously allowed double liquidated damages).

14. *Lopez*, 2015 WL 1469619, at *11.

15. E.g., *Chen v. New Fresco Tortillas Taco*, No. 15 Civ. 2158, 2015 WL 5710320, at *9 (S.D.N.Y. Sept. 25, 2015) ("The same logic which prevents this Court from allowing cumulative liquidated damages under both the NYLL and FLSA … likewise prevents prejudgment interest on overlapping claims for which FLSA liquidated damages have been awarded.") (citation omitted).

16. *Cheeks v. Freeport Pancake House*, 796 F.3d 199 (2d Cir. 2015).

17. *Baltierra v. Advantage Pest Control Co.*, No. 14 CIV. 5917, 2015 WL 5474093, at *9 (S.D.N.Y. Sept. 18, 2015) ("Plaintiffs do not seek cumulative liquidated damages under both the NYLL and FLSA … . In any event, the Court would not award them."); *Pinovi v. FDD Enterprises*, No. 13 CIV. 2800, 2015 WL 4126872, at *6-7 (S.D.N.Y. July 8, 2015) ("A number of courts have challenged whether this 'different purposes' rationale is persuasive after the April 9, 2011 amendment to the NYLL, which renders the liquidated damages provisions of the FLSA and the NYLL nearly identical … . Here, this Court need not choose a side in this debate because Plaintiff's proposed damages calculations only request liquidated damages consistent with the FLSA.") (citation omitted).