

Attorney Gambles Chasing Fees and Loses Big

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As lawyers often advise their clients, any litigation involves some element of risk, and “there is no such thing as a slam dunk.” A recent California case illustrates that when attorney fees are on the line, the stakes are increased and litigants—and their counsel—need to evaluate carefully the risks before going all-in. In *Nemecek & Cole v. Horn*, [the California Second District Court of Appeal](#) affirmed an attorney fees award, concluding a string of cases that started with a lot boundary line dispute between neighbors. By the end, the attorney at the center of these cases was more than \$600,000 in debt after being ordered to pay attorney fees three separate times—once by an arbitrator and twice by two different trial court judges. **Attorneys Pursuing Unpaid Fees Risk More Than Just Losing the Case** Attorney Steven Horn was initially retained to represent a couple in a lot line dispute against their neighbors. Horn's clients' lost and failed to pay Horn's invoice. Horn then sued his clients for unpaid fees. They counterclaimed for fraud. “It's almost universally the case that when attorneys sue clients over fees, the clients think of something they didn't like that their attorneys did, and they counterclaim,” observes Betsy P. Collins, Mobile, AL, cochair of the ABA Section of Litigation's [Pretrial Practice and Discovery Committee](#). “Then you have a malpractice claim instead of just a fee claim,” adds Collins. “Many attorneys and law firms are reticent to enter into fee disputes because of the danger to their reputations—if not to their financial well-being—from the counterclaims,” notes Thomas J. Donlon, Stamford, cochair of the Section of Litigation's [Appellate Practice Committee](#). “Even if the counterclaim is unsuccessful, the negative publicity that arises from allegations of fraud, malpractice, or malfeasance is more damaging than the amount recovered,” explains Donlon. Horn retained Nemecek & Cole to represent him in the litigation against his former clients. The case resulted in Horn being awarded \$42,282.56 on his fee claim and a matching award for his former clients on their fraud counterclaim. These awards offset, resulting in a net judgment of zero dollars. Horn's former clients, however, sought and were ultimately awarded \$380,000 in attorney fees because “they were the prevailing defendants on the complaint.” Horn settled the case for \$250,000 while it was on appeal. **Know When to Fold When Attorney Fees Are in Play**

Horn, undeterred by his loss to his former clients or the hefty fee award, made another litigation gamble. This time Horn initiated arbitration against his former counsel, Nemecek, asserting that the

firm's negligence was the cause of the "disastrous results" in the litigation with his former clients. Nemecek counterclaimed for unpaid attorney fees that Horned owed to the firm. "Having lost that first case so substantially, to then turn around and sue his next lawyer, really indicates that he didn't analyze his situation very closely," concludes Donlon. "When professionals are going to sue over fees, they better decide carefully what their risk is," Collins warns. "When you're not prevailing in a variety of forums, you are usually better off finding a different battle to spend your time on," adds Bruce A. Rubin, Portland, OR, cochair of the Section's [Alternative Dispute Resolution Committee](#). Horn and Nemecek were awarded nothing on their respective claims asserted in the arbitration. The arbitrator, however, found that Nemecek was entitled to \$289,028.95 in attorney fees and denied any offset claimed by Horn, finding that "Nemecek was the prevailing party since they were granted virtually all the relief they sought on Horn's claim." **Know When to Run From a Fee Dispute**

Horn, still determined despite his mounting losses, pressed on and filed a petition to vacate the arbitration award and to oppose Nemecek's confirmation petition. The arbitration award was confirmed and, for the third time, Horn was ordered to pay fees. This time, he was required to pay his opponent's "reasonable attorneys' fees" in connection with the confirmation proceedings in the amount of \$42,207.31. After losing at arbitration and in the confirmation case, Horn played his last card and appealed the confirmation decision. He argued that the trial court abused its discretion because the fee award from the confirmation proceedings "was more than double the amount actually incurred" and the fee award should have been capped at the amount actually incurred. The appellate court disagreed, affirmed the trial court's judgment, and permitted Nemecek to recover its costs for the appeal from Horn, which made Horn a four-time loser in litigation that all began with a lot boundary line dispute between neighbors. While this case is exceptional, it teaches litigants fundamental lessons to keep in mind when attorney fees are on the table. "You need to talk to your client whether you're on the plaintiff's side or the defense side about the risk of being exposed to an attorney fee award to the other side. That's a discussion that I'm not sure happens as often as it should," says Edward A. Salanga, Phoenix, cochair of the Section's [Expert Witnesses Committee](#). "It's not as simple as, well if we don't win, my client doesn't recover anything and maybe I don't get paid if I'm on a contingency fee agreement. In some cases, there is an additional ramification actually exposing your client to a fee award," explains Salanga. When attorney fees are in play, recognize, evaluate, and know the risks before gambling on litigation.

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Related Resources

- *Nemecek & Cole v. Horn*, 208 Cal. App.4th 641 (2012).

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