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Supplementary Payments provision does not cover reasonable attorney fees

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In *Polygon Northwest Co. v. American National Fire Ins. Co., et al.*, ___ P.3d ___, 2008 WL 921390 (Wash. Ct. App., April 7, 2008), the insured developer, Polygon, settled a condominium homeowners association's lawsuit for \$7.8 million. Of that amount, \$6,314,000 was dedicated to the payment of the association's claims and \$1,486,000 was dedicated to "litigation costs," which included the association's attorney fees. Several of Polygon's primary and excess liability insurers funded the settlement. Assurance Company of America and one other primary insurer paid the association's "litigation costs" under the "supplementary payments" provisions in their respective policies.

In a subsequent contribution action, the trial court apportioned the settlement amount among the insurers and said "litigation costs" were payable under Assurance's "supplementary payments" provision as "costs taxed against the insured" in the lawsuit. That is, the share of "litigation costs" paid by Assurance (\$743,000) fell under the supplementary payments coverage and did not count against the policy limit.

The Court of Appeals (Division 1) disagreed and concluded "costs taxed" has a legal and technical meaning, referring to "taxable costs" as "that term is commonly used in Washington legal parlance." According to the court:

Every aspect of the location and phrasing of Assurance's supplementary payments provision indicates that its terms specifically refer to taxable costs. . . . [T]he term is not "sandwiched into the general coverage provisions." . . . To the contrary, the supplementary payments provision is isolated from Assurance's general promises to pay on behalf of and defend Polygon and is clearly subsidiary to the overarching obligations of the contract.

Moreover, the legal meaning of "costs taxed" does not include reasonable attorney fees because Washington law uniformly excludes reasonable attorney fees from that meaning. Consistent with these conclusions, the court remanded the case, with instructions that the payment made by Assurance must be considered a loss in excess of Assurance's primary policy limit and, accordingly, must be paid by and apportioned among the excess insurers.