# Supplementary Payments Provision Does Not Cover Award of Attorney's Fees

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The Massachusetts Appeals Court has adopted a legal rather than lay interpretation of the term "costs," concluding that an insurer's obligation to pay "costs taxed" to the insured in a suit defended by the insurer, did not require an insurer to pay attorneys' fees awarded to the plaintiff in a suit against the insured.

In *Styller v. Nat'l Fire & Marine Ins. Co.*, 95 Mass. App. Ct. 538 (2019), the plaintiff, as assignee of the insured contractor, sued National Fire & Marine for coverage of a judgment against the insured. The judgment which included damages for property damage arising from negligent work on a demolition and construction project, damages awarded under G.L. c. 93A for unfair and deceptive acts and practices, and attorneys' fees awarded to the plaintiff under c. 93A. The superior court held that there was no coverage for the property damage, as it fell within the policy's exclusion for property damage to any part of real property on which the insured contractor was "performing operations." However, the court determined the insurer was obligated to pay the attorneys' fees award (plus post-judgment interest) under the policy's supplementary payments provision.

In adopting a technical legal definition of "costs taxed," the Appeals Court considered but rejected an Idaho decision adopting a plain-language reading of "costs" to include attorneys' fee awards as part of the cost of litigation. *See Mut. of Enumclaw v. Harvey*, 115 Idaho 1009, 1013, 772 P.2d 216, 220 (1989) ("Though the word 'costs' as a legal term of art may be ambiguous, it is not so from the perspective of the ordinary person unfamiliar with the jargon of the legal and insurance professions standing in the position of the insured. An insurance policy must be interpreted from that perspective.")

Rather, the Appeals Court panel pointed to G.L. c. 261, § 1 et seq., a Massachusetts statute providing that a prevailing party in a civil action "shall recover his costs." This statute has been interpreted to apply only to "certain taxable costs," such witness fees, deposition expenses, photocopying costs, and court fees. *See* G.L. c. 261, § 11. The Massachusetts Supreme Judicial Court has acknowledged that these taxable costs are "nominal and wholly inadequate" to truly compensate a litigant for the expense of conducting litigation. *Waldman v. American Honda Motor Co.*, 413 Mass. 320, 321-322 (1992). *See also id.* at 323 (legislature did not intend to modify the "American rule" requiring parties to bear their own costs of litigation). Attorneys' fees are not "taxable costs" under c. 261; unless a statute like c. 93A provides otherwise, each litigant must bear his own attorneys' fees.

Massachusetts courts frequently look for "plain meaning" and seek to vindicate the reasonable expectations of the insured. *See, e.g.*, *Holyoke Mut. Ins. Co. in Salem v. Vibram USA, Inc.*, 480 Mass. 480, 485 (2018) (policies must be interpreted "in light of their plain meaning, … giving full effect to the document as a whole[,] … consider[ing] 'what an objectively reasonable insured, reading the relevant policy language, would expect to be covered'). In *Styller*, however, the Appeals Court acknowledged that it was adopting the definition of "costs taxed … in the technical sense – namely, the meaning of that term in the context of a legal proceeding." In doing so, the panel cited a 1942rule of construction that insurance policies "must be reasonably construed by giving to the worlds contained therein their usual and ordinary significance, unless it appears that they are to be given a peculiar or technical meaning." *See Woogmaster v. Liverpool & London & Globe Ins. Co.*, 312 Mass. 479, 481 (1942). Here, the Appeals Court concluded that the use of "costs taxed" intended the technical legal meaning, in line with the courts' interpretation of "costs" in G.L. c. 261.

In those jurisdictions that have not yet addressed the meaning of "costs," as used in a policy's supplementary payments clause, there remains reasonable arguments that absent further language in the policy, "costs" should be construed to encompass an award of attorney's fees. At least some other courts have followed Idaho in applying a non-technical reading to "costs taxed" and similar supplemental payment provisions. *See, e.g.,* St. Paul Fire & Marine Ins. Co. v. Hebert Const., Inc., 450 F. Supp. 2d 1214, 1235 (W.D. Wash. 2006) ("In sum, the plain, ordinary meaning of the "costs taxed" clause in the St. Paul policies includes attorneys' fees").

The plaintiff has requested further appellate review of the ruling from the Supreme Judicial Court.