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Client Alert: Community Associations' Use of Best Efforts to Obtain Insurance

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Each year, condominium associations work to obtain insurance at reasonable rates in an effort to comply with their statutory obligations to use "best efforts" to obtain insurance. In recent years, however, insurance rates have increased significantly, causing associations to question whether insurance is required at any cost. While best practice is, of course, for an association to maintain adequate insurance, an association may wonder whether "best efforts" means it must obtain insurance at any cost.

Assuming there are no provisions in an association's governing documents requiring the association to maintain adequate insurance, an association's insurance obligations are set forth in Section 718.111(11)(d), Florida Statutes, which requires an association to use "its best efforts to obtain and maintain adequate property insurance to protect the association, the association property, the common elements, and the condominium property that must be insured by the association." The question then becomes at what point a fiscal concern affects "best efforts."

At this time, there is no case law or arbitration decision expressly addressing a condominium association's obligation to use "best efforts" to obtain insurance. However, in at least two arbitrations before the Department of Business and Professional Regulation (DBPR), the arbitrators interpreted Fla. Stat. § 718.111 to essentially require insurance regardless of cost or availability. *See Moriarty v. Glades Golf & Country Club, Inc.* 2013 WL 5603060 (Fla.DBPR Sept. 6, 2013) (citing § 718.111 and stating "This provision and its subsections clearly require an association to carry hazard and casualty insurance to protect the association and property, the common elements, and the condominium property required to be insured by the declaration of condominium."); *see also Bleau Fontaine Condo. Ass'n. v. Betancourt*, 2020 WL 756723 (Fla.DBPR Jan. 15, 2020) (finding that a fence enclosing terrace was part of the condominium property as originally installed; as such, the association "was required to secure primary insurance coverage for the terrace fence," and the association was responsible for damage caused by a hurricane even though it claimed insurance was unavailable for the fence at any price).

Nevertheless, in *First Nat. Bank of Lake Park v. Gay*, 694 So. 2d 784 (Fla. 4th DCA 1997), the court declined to give a jury instruction defining "best efforts" in a context outside of Fla. Stat. § 718.111, and, on appeal, the Court noted "[t]he definition of 'best efforts' may vary depending upon the factual circumstances surrounding the transaction and the intent of the parties in entering into the transaction." The court found

that where the interpretation of the term “best efforts” is in dispute, the question is properly for the jury. *Id.* Consistent with this reasoning, in *Department of Business and Professional Regulations, Division of Florida Condominiums, Timeshares and Mobile Homes*, 2011 WL 4937279 (Fla.DBPR Aug. 11, 2011), *report and recommendation adopted*, 2011 WL 4937295, the arbitrator considered the definition of “best efforts” under the 2009 version of Fla. Stat. § 718.111 and determined that “‘best efforts’ does not require that [the association] purchase an insurance at any cost.” *Id.* at *9.

Similarly, in *Citizens Property Insurance Corporation v. River Manor Condominiums Association, Inc.*, 125 So.3d 846 (Fla. 4th DCA 2013), Florida’s Fourth District Court of Appeals considered an insurance company’s obligation to offer policies that comply fully with Fla. Stat. § 718.111. *Id.* In answering the question in the negative, the Court considered a condominium association’s obligation to practice “best efforts” to obtain insurance. *Id.* at 851. In so doing, the Court suggested, though did not expressly find or determine, that a condominium association could potentially self-insure some or all of its property in effort to avoid prohibitively expensive policies. *Id.*

Given the lack of a clear consensus as to the definition of “best efforts,” it is questionable if an association could argue that failure to obtain insurance due to the cost of the insurance would satisfy the association’s obligations to use best efforts. Until the law is better defined, we caution associations from asserting the cost of insurance as a basis for not obtaining the insurance.