The Business Judgment Rule and Common Interest Communities

BY KAREN SAFRAN AND MIRO KOVACEVIC

This article reviews the history of the business judgment rule and discusses how the rule applies to common interest communities in Colorado, with guidance to practitioners on using and defending against the rule.

The business judgment rule (rule) is a common-law-based doctrine that provides that courts should defer to corporate decisions and not substitute their judgment for the good faith decisions of the people charged with running the corporation. The rule originated in 18th century English common law and first appeared in American jurisprudence in the early 19th century. Over the past two and a half centuries, courts have continued to refine, expand, and adjust the rule.

The rule first appeared in Colorado in 1908. Some 60 years later, in *Rhue v. Cheyenne Homes, Inc.*, the Colorado Court of Appeals first recognized the application of rule concepts in the context of common interest communities.[1] A few years later, in 1974, the Colorado Court of Appeals issued its seminal decision concerning the rule in *Rywalt v. Writer Corp.*[2] In the 50 years since *Rywalt* was decided, common interest communities have increasingly cited the rule to justify or defend their decisions. While the case law has developed, the application of the rule in the context of common interest communities has taken twists and turns.

This article aims to provide the practitioner with a working understanding of the rule as it applies to common interest communities under the current state of the law. The article first reviews the origins of the rule and then discusses the applicability of the rule to common interest communities, coupled with appropriate uses and defenses to the rule.

What Is the Business Judgment Rule?

The rule provides that when corporate officers and directors act "honestly and with reason," their discretionary decisions regarding corporate affairs are "not subject to control by either stockholders or the courts."[3] The rule is intended to shield good faith, honest decisions of corporate directors from complaints of dissatisfied shareholders.[4] It is an affirmative defense that protects against claims of ordinary negligence that may be asserted against corporate officers and directors.[5]

Courts have relied on various rationales to support the rule's creation and application, including: "(1) directors and officers are not infallible; (2) competent directors would not accept directorships without some assurance of protection for mistakes; and (3) courts have neither the ability nor the desire to substitute their judgment for that of more experienced professionals."[6]

Despite its wide reach, the rule is not sacrosanct. It is not a defense to claims for breach of fiduciary duty, even if the corporate officers or directors acted in good faith when they made the challenged decision.[7] Likewise, the rule does not apply to protect corporate actions that exceed the scope of the corporation or board's authority or that violate the organization's governing documents.[8] The rule is similarly inapplicable when corporate officers or directors defraud shareholders, take actions that are illegal, or commit gross negligence, or where a conflict of interest exists.[9]

Origin of the Business Judgment Rule

The English Court of Chancery first enunciated the concepts behind the business judgment rule in the 1792 case *Charitable Corp. v. Sutton*.[10] The *Sutton* case involved claims against a corporation's officers and directors for breach of trust that resulted in corporate losses.[11] The court stated that corporate directors "may be guilty of acts of commission or omission, of mal-feasance or non-feasance," but where "acts are executed within their authority . . . though attended with bad consequences, it will be very difficult to determine that these are breaches of trust."[12] The court reasoned that it would be unfair to conclude that the directors could foresee the bad consequences that arose from the exercise of their power.[13]

The concepts enunciated in *Sutton* first appeared in the United States in the 1829 case of *Percy v. Millaudon*.[14] *Percy* is considered the first American decision to invoke the idea that directors should not be liable for the negative consequences that resulted from good faith decisions they made within their authority.[15] In *Percy*, the Louisiana Supreme Court held that directors should not be liable for mistakes in judgment "if the error was one into which a prudent man might have fallen."[16] The Court noted that no person would agree to render service to another if they would be held to an infallible standard of care.[17] Therefore, the Court concluded, the standard to be applied to review corporate decisions was whether "the error of the agent is of so gross a kind, that a man of common sense, and ordinary attention, would not have fallen into it."[18]

Throughout the 19th century, courts continued to review the actions of corporate officers and directors using ordinary care standards similar to that announced in the *Percy* decision. For example, in the 1832 case of *Scott v. Depeyster*, the New York Chancery Court applied an ordinary care standard when reviewing the actions of a company's president and directors and found that they were not liable for the company's losses because they had acted reasonably when they appointed the corporate secretary, even though he subsequently committed fraud and embezzled corporate funds.[19] Similarly, in *Hodges v. New England Screw Co.*, the Rhode Island Supreme Court held that directors are bound only to use prudent care.[20] The Court explained that directors should not be liable for innocent mistakes, unintentional negligence, or honest errors of judgment.[21] Rather, they should only be liable for "willful fraud or neglect, and want of ordinary knowledge and care."[22]

In the 20th century, the courts' analyses started to focus on the duties of loyalty and care

as they considered whether corporate officers and directors acted with ordinary prudence. In *Bodell v. General Gas & Electric Corp.*, the Delaware Supreme Court reviewed a shareholders' suit to enjoin the company from issuing additional shares of stock.[23] The defendant corporation argued that because it had statutory power to set the price and sell corporate stock, its actions could only be restrained if there was fraud.[24] Although the Court declined to fully accept the defendant's argument, it noted that if the board of directors made an "honest mistake of business judgment," their decisions would not be reviewable by the court.[25] The Court further stated that the board of directors' discretion "should not be interfered with except for fraud . . . or conscious disregard of the interests of the corporation and the rights of the stockholders."[26]

In *Litwin v. Allen*, the New York Supreme Court discussed a director's duties to the corporation, finding that directors may not "profit at the expense of the corporation and in conflict with its rights" or divert corporate opportunities to themselves.[27] To that end, the court found that directors must use their independent judgment in discharge of their duties, act "honestly and in good faith," and "exercise some degree of skill and prudence and diligence."[28] As with many cases, *Litwin* invoked the concept of the impropriety of infallibility, noting that directors are not insurers, so they are "not liable for errors or for mistakes while acting with reasonable skill and prudence."[29]

In the 1944 decision of *Casey v. Woodruff*, the New York Supreme Court examined the relationship between negligence claims, the rule, and corporate directors' fiduciary duties.[30] The court first noted that "[m]istakes in the exercise of honest business judgment do not subject directors to liability for negligence in the discharge of their fiduciary duties" because the standard for these claims is "reasonable diligence, not the utmost amount of diligence."[31] Examining the rule, the court observed that if directors, in the course of their management duties, "arrive at a decision for which there is a reasonable basis, and they act in good faith, as the result of their independent judgment, and uninfluenced by any consideration other than what they honestly believe to be for the best interests of the [corporation], it is not the function of the court to say that it would have acted differently and to charge the directors for any loss or expenditures incurred."[32] Taking the analysis a step further, the court noted that the law will not hold directors liable where their decisions were made in good faith and with reasonable diligence.[33] Finally, the court concluded that there is no conflict between the rule and the concept of negligence because the rule presupposes that the corporate directors exercised their judgment in an honest, unbiased, and reasonable manner.[34] The court's decision in *Casey* stands for the proposition that if the rule applies, corporate directors' actions will be presumed reasonable, giving rise to a defense to a negligence claim.

The Delaware Supreme Court further developed these concepts, ruling that, "[i]n the absence of a showing of bad faith on the part of the directors or of a gross abuse of discretion the business judgment of the directors will not be interfered with by the courts."[35]

By the latter half of the 20th century, the rule was firmly entrenched in American jurisprudence. Indeed, it was even mentioned in several US Supreme Court decisions.[36] While the rule is commonly invoked in derivative challenges to corporate board decisions, as is discussed herein, the rule has expanded beyond derivative suits and forms the standard against which directors' exercise of discretionary authority is measured.

Development of the Business Judgment Rule Under Colorado Common Law

In Colorado, the rule first appeared in a line of early 20th century decisions in which courts rejected stockholder challenges of internal corporate decisions. In the 1908 case of *Horst v. Traudt*, plaintiffs, a group of church members, sued to restrain the defendant from acting as a pastor, claiming that his contract was procured illegally.[37] The Colorado Supreme Court rejected the claim, holding that the "courts will not, as a general rule, at the suit of a stockholder, or any number of stockholders, interfere with the internal affairs and management of a corporation."[38]

Eleven years later, in *Mountain States Packing Co. v. Curtis*, stockholders sought to set aside transactions among three companies, appoint a receiver, and enjoin corporate officers and directors from selling or encumbering corporate property.[39] Ruling against the plaintiffs, the Colorado Supreme Court held that certain issues concerned the business policies of the corporations, and that "[t]hose questions are for the stockholders, not the courts, and, in the absence of actual fraud, the decisions of a

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majority of those stockholders must stand as the decisions of the corporations."[40]

The 1969 case of *Rhue v. Cheyenne Homes* illustrated Colorado judges' developing preference to defer to the decisions of boards, including homeowners associations.[41] In *Rhue*, the defendants were enjoined from moving a 30-year-old house into a residential development.[42] Defendants challenged a restrictive covenant that required architectural control committee approval of all construction in the neighborhood on the grounds that the covenant did not contain specific standards to guide the architectural control committee's decision.[43] Rejecting the defendants' argument, the Colorado Supreme Court held that under due process, a refusal to approve plans "must be reasonable and made in good faith and not be arbitrary or capricious."[44] *Rhue* is the first expression of the standards that would later be used to review corporate decisions in Colorado.

In 1974, the Colorado Court of Appeals issued its decision in *Rywalt*.[45] While the *Rywalt* court did not expressly mention the rule by name, the case is often cited as the seminal case for the rule in Colorado. *Rywalt* involved a dispute between plaintiff homeowners and the defendant homeowners association over the association's construction of tennis courts on common property that was near the plaintiffs' residences.[46] The trial court found that the association had acted arbitrarily and capriciously and enjoined the construction.[47] Rejecting the trial court's conclusion and reversing the issuance of the injunction, the court of appeals held:

> The good faith acts of directors of profit or non-profit corporations which are within the powers of the corporation and within the exercise of an honest business judgment are valid. Courts will not, at the instance of stockholders or otherwise, interfere with or regulate the conduct of the directors in the reasonable and honest exercise of their judgment and duties.[48]

In making this decision, the court of appeals cited *Horst* and an out-of-state case which recognized a "fundamental and elemental principle" that "the action of directors when exercised in good faith and not in fraud of the rights of the stockholders is not subject to their control and will not be interfered with by the courts."[49]

In the years since *Rywalt* was decided, Colorado courts continue to give the rule wide application. In *Rifkin v. Steele Platt*, for example, the Colorado Court of Appeals noted that while a director has a fiduciary duty to the corporation, "he or she is accorded wide discretion in making decisions for the corporation, and generally, if a director acts in good faith, such actions will not form a basis for imposing liability on that director."[50]

In *Hirsch v. Jones Intercable, Inc.*, the Colorado Supreme Court discussed the rule and noted that it "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in furtherance of a lawful and legitimate furtherance of corporate purposes."[51] The Court recognized that the rule reflects the reality that courts "are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments."[52]

In the 2001 case of *Colorado Homes, Ltd. v. Loerch-Wilson*, the Colorado Court of Appeals held that homeowners associations owe a fiduciary duty to the homeowners to enforce restrictive covenants.[53] This duty, according to the court, arises out of homeowners associations' quasi-governmental powers and the fact that their decisions can impact the value and enjoyment of properties within the association.[54] The *Colorado Homes* court also recognized that, unlike other contracts, covenants may require an exercise of discretion in timing and manner of enforcement actions.[55] Accordingly, the court held that the rule could be asserted as a defense to both a breach of contract and breach of fiduciary duty claims against a homeowners association.[56]

The 2021 decision of *Walker v. Women's Professional Rodeo Ass'n* is the most recent published Colorado appellate decision that discusses the rule in detail.[57] In *Walker*, members of a women's rodeo association sued the association—a nonprofit corporation—and its chief executive officer, challenging the defendants' application of rules regarding prize money and competition points.[58] The district court found that the plaintiffs failed to state a plausible claim.[59] The court of appeals agreed, noting that the plaintiffs had not alleged "fraud, arbitrariness, or bad faith."[60] Quoting *Rywalt*, the court noted: "Under the business judgment rule, '[t]he good faith acts of directors of profit or non-profit corporations which are within the powers of the corporation and within the exercise of an honest business judgment are valid.'"[61] The court further stated that the rule is based on the "reality that courts 'are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments.' . . . Courts presume that a corporation's directors possess the expertise and knowledge to make business decisions."[62] The court recognized that, despite the rule's broad application, it does not confer blanket immunity: it does not protect directors who engage in fraud, self-dealing, unconscionability, and similar conduct that is "incompatible with good faith and the exercise of honest judgment."[63] Applying these principles, the court found that the plaintiffs' challenges to the directors' exercise of their discretion in interpreting and applying the rules were "archetypical examples of corporate board decisions that courts will not second-guess under the business judgment rule in the absence of allegations of fraud, arbitrary conduct, or bad faith."[64] The court found that the rule was "particularly applicable" to the challenged actions, which required that the directors exercise discretion in interpreting the rules to determine how the prize money and points would be awarded under the particular circumstances involved.[65] Because the *Walker* case provides that the rule applies to voluntary membership associations as well as for-profit corporations, and because the dispute involved a board's exercise of its discretion when interpreting and applying governing rules, *Walker* is instructive to the operations of common interest communities.[66]

Codification of the Business Judgment Rule in Colorado

While common law is typically cited as the basis for the rule, the rule's concepts have also been adopted by statute. Under CRS § 7-108-401, known as the Colorado Business Corporations Act, corporate officers and directors owe a duty to discharge their discretionary authority:

(a) in good faith, (b) with care, and (c) in a manner they reasonably believe to be in the corporation's best interests.[67] To that end, officers and directors may rely on information provided to them by others, unless the officer or director has information that would make the reliance unwarranted.[68]

In 2020, the Colorado Legislature codified the rule to insulate directors of corporations from claims for pecuniary relief. Under the current version of the statute, CRS § 7-108-402(1), corporate directors are liable for money damages or other monetary relief if the director's action:

a. was not in good faith;
b. was an action that the director did not rationally believe to be in the corporation's best interests;
c. was an action as to which the director was at least grossly negligent, unless the articles of incorporation change the standard of liability to knowing misconduct, knowing violation of law, or negligence;
d. was an action as to which the director failed to make or cause to be made appropriate inquiry, when particular facts or circumstances of significant concern came to the director's attention that would have alerted a reasonably attentive director to the need for inquiry;
e. consisted of or resulted from a sustained or systematic failure by the director to exercise oversight of the business and affairs of the corporation;
f. subject to CRS § 7-108-501 (defining "conflicting interest transactions"), was a breach of the director's duty of loyalty to the corporation, including by directly or indirectly receiving an improper personal benefit; or
g. consisted of or resulted from a vote or assent specified in CRS § 7-108-405, which provides that directors are personally liable to the corporation for unlawful distributions.[69]

Not every scenario listed in CRS § 7-108-402 applies to common interest communities. However, the Colorado Common Interest Ownership Act (CCIOA)[70] contains protections consistent with the rule. Specifically, the CCIOA provides that "[e]very contract or duty governed by this article imposes an obligation of good faith in its performance or enforcement."[71] This obligation of good faith is consistent with the prerequisites for the rule. Likewise, the Colorado Revised Nonprofit Corporation Act (CRNCA)[72] contains general standards of conduct for officers and directors that are consistent with the rule. Specifically, if the officers and directors perform their duties

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in compliance with the CRNCA, they are not liable to the nonprofit corporation or its members.[73] Conversely, if an officer or director does not act in good faith, then their actions are not protected by the CRNCA.[74] Thus, even communities that are not governed by the CCIOA can use the rule through both common law and the CRNCA.

Application of the Business Judgment Rule in Common Interest Communities

The rule has been applied to common interest communities in Colorado since at least 1969, when the *Rhue* decision was issued.[75] While *Rhue* involved the standards to be applied by an architectural control committee under a declaration of protective covenants, it was not considered a business judgment rule case until the *Colorado Homes* decision was issued.[76] Likewise, while *Rywalt* involved a dispute within a common interest community, the decision was not written in a way that specifically addressed common interest communities.[77] The fact that the *Rywalt* case involved a common interest community was almost an afterthought. Thus, *Colorado Homes* is the case that clearly provides that the rule applies to homeowners associations.

In *Lion Square Condominium Ass'n v. Hask*, the Colorado Court of Appeals held that common interest associations are allowed to invoke the rule because "[u]nlike other types of contracts that require specific acts at specific times by contracting parties, covenant enforcement may require the exercise of discretion as to both the timing and the manner of enforcement."[78] The court also noted that a condominium association's powers do not exceed "the constraints of its condominium declaration and bylaws."[79] Colorado courts have also held that homeowners associations serve quasi-governmental functions when they enforce covenants and, as such, they must follow the due process requirements of the Colorado and US Constitutions.[80] Given their quasi-governmental authority, associations owe fiduciary duties to their unit owners to deal with them in the utmost good faith and make reasonable decisions.[81]

Colorado's application of the rule to common interest communities is not unique. Courts in other jurisdictions have also cited the rule in disputes between owners and homeowners associations. Florida has developed a two-prong test to review condominium board decisions: (1) whether the association has contractual or statutory authority to perform the challenged act, and (2) if the authority exists, whether the board's actions are reasonable.[82]

Other states follow the concepts detailed in the Florida test. In *Baumann v. Long Cove Club Owners Ass'n, Inc.*, the South Carolina Court of Appeals ruled that "absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors [of a homeowners association] will not be set aside by judicial action."[83] The *Baumann* Court further held that the rule does not apply to acts that are beyond the scope of the corporation's powers.[84] Thus, if the officers or directors engaged in ultra vires acts, the rule will not shield them from liability. In *Cohan v. Board of Directors of 700 Shore Road Waters Edge, Inc.*, a panel of the appellate division of the Supreme Court of New York ruled, in the context of cooperative dwellings, that the court should defer to the board's decisions "so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith," but the rule does not apply when a board acts outside of its authority or violates its governing documents.[85] In *Goldberg v. Astor Plaza Condominium Ass'n*, the Illinois Court of Appeals examined the rule and noted it was only applicable if the directors use due care in carrying out their duties.[86] The court also noted that due care included the directors' need to be informed of material facts necessary to exercise their judgment and that the rule "is defeated where directors 'act without becoming sufficiently informed to make an independent business decision.'"[87] Relying on *Goldberg*, another Illinois appellate panel ruled that the rule did not defeat a plaintiff's claim that her condominium association failed to make necessary repairs to her unit.[88] In *Dinicu v. Groff Studios Corp.*, the appellate division of the Supreme Court of New York ruled that the proper exercise of business judgment could shield board members from liability because "directors are not liable in tort for inducing breach of contract if they are reasonably acting in the best interest of the corporation."[89] However, the court also held that the rule is not a defense to a claim for breach of contract where the board member failed to properly execute a document as required under a lease agreement.[90] Presumably, the failure to execute the document did not involve the exercise of discretion, making the rule inapplicable.[91]

There is a split both within Colorado and among other jurisdictions regarding whether the rule is an affirmative defense or a presumption that the plaintiff must overcome in order to state a claim. On the one hand, some Colorado courts have recognized the basic premise of the rule as an affirmative defense in cases between homeowners and associations.[92] However, at least one court stated that a plaintiff must plead "sufficient factual allegations to overcome the business judgment rule" in order to state a plausible claim.[93] Many other jurisdictions have held that the rule creates a rebuttable presumption that the directors complied with the rule. For example, the Delaware Supreme Court explained that the rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[94] Likewise, in Florida, the party challenging the board's decision has the burden of establishing facts to rebut the rule's presumption that directors "acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company."[95] As a result, citations to application of the rule in other jurisdictions must be carefully reviewed and distinguished where appropriate.

Considerations for the Practitioner Regarding Application of and Challenges to the Business Judgment Rule

The rule is a powerful affirmative defense, but its application and effectiveness varies depending on the circumstances of each case. Because the rule is a fact-driven doctrine, practitioners who wish to use or challenge an assertion of the rule should consider the following:

- The rule is a defense to a claim of liability for corporate actions. In Colorado, it has been treated as an affirmative defense, meaning that the defendant has the burden of establishing that the rule applies.[96] However, as noted above, there may be a split of authority within Colorado regarding the need to plead specific facts to overcome a presumption that the board's actions complied with the rule.
- Even where the plaintiff has the burden of overcoming a presumption of good faith, at least one out-of-state court has found that a breach of good faith can be established by demonstrating that the defendant evaded the spirit of the bargain, did not act with diligence, willfully rendered an imperfect performance, abused its power, or interfered with or failed to cooperate in the plaintiff's performance.[97]
- Claims against common interest communities may arise from tort as well as from breaches of governing documents.[98] While the rule is a defense to both claims, a claim for breach of fiduciary duty may provide an additional avenue for recovery, especially in covenant enforcement cases.
- Whether a party acts in good faith in the context of the rule is a question of fact.[99] Thus, whether the rule applies will depend on the specific circumstances of the case.
- The starting point for any analysis is whether the association's board of directors acted within the scope of its authority. This authority is derived either from statute or the community's governing documents. Any act beyond these authorities is ultra vires.[100] In that instance, the rule does not apply.
- Statutes, including the CRNCA and CCIOA, contain the basic elements of the rule in Colorado. While these statutes may not apply to every case, they may be used as a guideposts to determine the reasonableness of the officers' and directors' actions. The statutes can likewise override the community's governing documents. For instance, the CCIOA contains requirements that limit a board's discretion and sets deadlines for board action. These requirements would override the rule. The CCIOA requires that certain activities, such as repairs to the common elements, occur "promptly."[101] As noted above, at least one court has ruled that the rule did not bar a claim that an association failed to make necessary repairs.[102]
- The rule does not protect directors from liability for "fraud, self-dealing, unconscionability, and similar conduct" because that type of behavior is "incompatible with good faith and the exercise of honest judgment."[103]
- The information that the directors considered, or whether anything was considered, can play a role in whether the rule applies. While directors may rely on information, opinions, reports, and statements of others when discharging their duties,[104] this reliance, in and of itself, is not sufficient to invoke the rule's protections. If the director knows that the information is not reliable, it cannot be used to justify a decision.[105] Practitioners should explore the steps that directors took to make a sufficiently informed business decision. Directors' failure to do so could render the rule inapplicable.
- The rule codified in CRS § 7-408-402(1) only references monetary damages. Thus, it may arguably not apply to a claim for injunctive relief. Additionally, the statute only references directors. Thus, arguably officers and others who may act on behalf of the association may be left unprotected.

Conclusion

In the context of common interest communities, the business judgment rule helps incentivize people to serve on boards by protecting good faith actions of directors that are within the scope of their authority. However, it is not a license to act improperly. Boards must still act within the scope of their authority, afford due process, be informed, and act in good faith. Practitioners wishing to invoke or challenge the rule should carefully consider the actions taken by the directors, the information they relied upon, and all appliable governing documents and statutes. CL

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NOTES

1. *Rhue v. Cheyenne Homes, Inc.*, 449 P.2d 361 (Colo. 1969).
2. *Rywalt v. Writer Corp.*, 526 P.2d 316 (Colo.App. 1974).
3. *Herald Co. v. Seawell*, 472 F.2d 1081, 1094 (10th Cir. 1972).
4. *Wolf v. Rose Hill Cemetery Ass'n*, 914 P.2d 468, 473 (Colo.App. 1995) (citing Fletcher, *Cyclopedia of the Law of Private Corporations* §§ 1037 and 2104 (1994)). Importantly, no Colorado court has directly addressed who carries the burden to prove or disprove the rule, while courts in other jurisdictions have held that the plaintiff has the burden of disproving the rule.
5. *Resol. Tr. Corp. v. Heiserman*, 839 F. Supp. 1457, 1463 (D.Colo. 1993), *abrogated on other grounds by F.D.I.C. v. Schuchmann*, 235 F.3d 1217 (10th Cir. 2000).
6. McMurray, "An Historical Perspective of the Duty of Care, Duty of Loyalty, and the Business Judgment Rule," 40(3) *Vand. L. Rev.* 605, 616 (Apr. 1987).
7. *Polk v. Hergert Land & Cattle Co.*, 5 P.3d 402, 405 (Colo.App. 2000); *Rifkin v. Steele Platt*, 824 P.2d 32, 35 (Colo.App. 1991).

8. *Cohan v. Bd. of Dirs. of 700 Shore Rd. Waters Edge, Inc.*, 108 A.D.3d 697, 699 (N.Y.App.Div. 2013); *Lion Square Phase II and III Condo. Ass'n. v. Hask*, 700 P.2d 932 (Colo.App. 1985).

9. *Rywalt*, 526 P.2d at 317; McMurray, *supra* note 6 at 617.

10. *Charitable Corp. v. Sutton*, 2 Atk. 400, 26 Eng. Rep. 642 (1742).

11. *Id.*; Louis, "The Verdict on the Business Judgment Rule," 76(2) *J. of the Mo. Bar* (Mar.–Apr. 2020).

12. *Charitable Corp.*, 2 Atk. at 405.

13. *Id.* at 426.

14. *Percy v. Millaudon*, 8 Mart (n. s.) 68 (La. 1829).

15. Louis, *supra* note 11; Mantese and Fields, "The Business Judgment Rule," *Mich. Bar J.* 30 (Jan. 1999).

16. *Percy*, 8 Mart (n. s.) at 78.

17. *Id.*

18. *Id.*

19. *Scott v. Depeyster*, 1 Edw. Ch. 513; 6 NY Ch. Ann. 229 (1832).

20. *Hodges v. New England Screw Co.*, 1 R.I. 312 (1850).

21. *Id.* at 326.

22. *Id.*

23. *Bodell v. Gen. Gas & Elec. Corp.*, 15 Del.Ch. 420 (1927).

24. *Id.* at 426.

25. *Id.*

26. *Id.* at 427.

27. *Litwin v. Allen*, 25 N.Y.S.2d 667, 677–78 (1940).

28. *Id.*

29. *Id.* at 678.

30. *Casey v. Woodruff*, 49 N.Y.S.2d 625 (1944).

31. *Id.* at 642.

32. *Id.* at 642–43.

33. *Id.* at 643.

34. *Id.*

35. *Warshaw v. Calhoun*, 221 A.2d 487, 492–93 (Del. 1966).

36. *Burks v. Lasker*, 441 U.S. 471 (1979); *N.R.L.B. v. Bildisco and Bildisco*, 465 U.S. 513 (1984); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90 (1991).

37. *Horst v. Traudt*, 96 P. 259 (Colo. 1908).

38. *Id.* at 260.

39. *Mountain States Packing Co. v. Curtis*, 281 P. 737 (Colo. 1929).

40. *Id.* at 740.

41. *Rhue*, 449 P.2d 361.

42. *Id.* at 362.

43. *Id.* at 363.

44. *Id.*

45. *Rywalt*, 526 P.2d 316.

46. *Id.*

47. *Id.* at 317.

48. *Id.*

49. *Taylor v. Axton-Fisher Tobacco Co.*, 173 S.W.2d 377, 378 (Ky. 1943).

50. *Rifkin v. Steele Platt*, 824 P.2d 32, 35 (Colo. App. 1991).

51. *Hirsch v. Jones Intercable, Inc.*, 984 P.2d 629, 637 (Colo. 1999).

52. *Id.* at 638.

53. *Colo. Homes, Ltd. v. Loerch-Wilson*, 43 P.3d 718, 721–22 (Colo.App. 2001).

54. *Id.* at 722.

55. *Id.* at 723–24.

56. *Id.*

57. *Walker v. Women's Pro. Rodeo Ass'n*, 498 P.3d 648 (Colo.App. 2021).

58. *Id.* at 653.

59. *Id.* at 658.

60. *Id.*

61. *Id.* (quoting *Rywalt*, 526 P.2d at 317).

62. *Id.* (quoting *Curtis v. Nevens*, 31 P.3d 146, 151 (Colo. 2001) (quoting *Hirsch*, 984 P.2d at 638)).

63. *Id.* (citing *Fletcher v. Dakota, Inc.*, 99 A.D.3d 43, 948 N.Y.S.2d 263, 267 (2012)); *Rywalt*, 526 P.2d at 317.

64. *Walker*, 498 P.3d at 659.

65. *Id.*

66. *Id.* at 658.

67. CRS § 7-108-401(1).

68. CRS § 7-108-401(2).

69. CRS § 7-108-402(1).

70. CRS §§ 38-33.3-101 et seq.

71. CRS § 38-33.3-113.

72. CRS §§ 7-121-101 et seq.

73. CRS § 7-128-401.

74. CRS § 7-128-401(3).

75. *Rhue*, 449 P.2d 361.

76. *Colo. Homes*, 43 P.3d at 724. ("The court noted that the board's refusal to approve the plans must be made in good faith and must not be arbitrary. This test is the substance of the business judgment rule.").

77. *Rywalt*, 526 P.2d 316.

78. *Lion Square*, 700 P.2d at 934.

79. *Colo. Homes*, 43 P.3d at 723.

80. *C & C Invs., LP v. Hummel*, 514 P.3d 328, 335 (Colo.App. 2022) (citing *Colo. Homes*, 43 P.3d at 722).

81. *Colo. Homes*, 43 P.3d at 721–22.

82. *Garcia v. Crescent Plaza Condo. Ass'n*, 813 So.2d 975, 978 (Fla.Dist.Ct.App. 2002); *Hollywood Towers Condo. Ass'n v. Hampton*, 40 So.3d 784, 787 (Fla.Dist.Ct.App. 2010).

83. *Baumann v. Long Cove Club Owners Ass'n*, 380 S.C. 131, 138 (S.C.App. 2008).

84. *Id.*

85. *Cohan*, 108 A.D.3d at 699.

86. *Goldberg v. Astor Plaza Condo. Ass'n*, 971 N.E.2d 1, 17 (Ill.App.Ct. 2012), *as modified on denial of reh'g* (May 4, 2012).

87. *Id.* (citing *Ferris Elevator Co. v. Neffco, Inc.*, 285 Ill.App. 3d 350, 354 (1996)).

88. *Duffy v. Orlan Brook Condo. Owners' Ass'n*, 981 N.E.2d 1069, 1077 (Ill.App. 2012).

89. *Dinicu v. Groff Studios Corp.*, 257 A.D.2d 218 (N.Y.App.Div. 1999).

90. *Id.* at 222–23.

91. *Id.* (noting that "while it may be good business judgment to walk away from a contract, this is no defense to a breach of contract claim").

92. *Rhue*, 449 P.2d 361; *Colo. Homes*, 43 P.3d 718.

93. *Walker*, 498 P.3d at 657 (citing *Weinman v. McCloskey*, No. 14-cv-00296, 2015 WL 1528896, at *7 (D.Colo. Mar. 31, 2015)).

94. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). However, Delaware may draw a distinction between cases where the business judgment rule is used to shield directors from personal liability and cases where the rule is used to defend a transaction, such as a takeover. In the former, the plaintiff has the burden of proof. In the latter, the directors have the burden. *See Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1374 (Del. 1995).

95. *Williams v. 3rd Home Ltd.*, 8:20-CV-1647, 2023 WL 6248715, at *11 (M.D.Fla. Sept. 26, 2023).

96. *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1057 (Colo. 1992) ("The burden of proving an affirmative defense rests upon the defendant asserting the defense.").

97. *Santoro v. Eagle Crest Est. Homesite Owners Ass'n*, 319 Or. App. 793, 800 (Or.App. 2022) (quoting *Restatement (Second) of Contracts* § 205 comment d (1979)).

98. *Colo. Homes*, 43 P.3d at 721–22; *Woodward v. Bd. of Dirs. of Tamarron Ass'n of Condo. Owners, Inc.*, 155 P.3d 621, 624 (Colo.App. 2007).

99. *Polk v. Hergert Land & Cattle Co.*, 5 P.3d 402, 405 (Colo.App. 2000); *RCHFU, LLC v. Marriott Vacations Worldwide Corp.*, No. 16-cv-01301, 2018 WL 1535509, at *8 (D.Colo. Mar. 29, 2018); *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 499 (Colo. 1995).

100. *Rywalt*, 526 P.2d at 317; *Lion Square*, 700 P.2d at 934.

101. CRS § 38-33.3-307(1) references "prompt repair" of damage to the common elements, and CRS § 38-33.3-313(9) requires the prompt repair or replacement of "[a]ny portion of the common interest community for which insurance is required" that is damaged or destroyed.

102. *Duffy*, 981 N.E.2d 1069.

103. *Walker*, 498 P.3d at 658.

104. CRS § 7-108-401(2).

105. CRS § 7-108-401(3).