

2007 BOYD-GRAVES CONFERENCE

SUBCOMMITTEE REPORT

Bill of Review (§ 8.01-623) and its Abolition

Robert C. Wood, Chair
L. Steven Emmert, Esquire
The Honorable Wyatt B. Durrette, Jr.
The Honorable Diane Strickland

Purpose

The committee was formed in April 2007 at the direction of the Steering Committee to consider whether to recommend abolition of the bill of review, as provided in Code of Virginia (1950) §8.01-623. The committee was directed to evaluate the Code provision in light of current Virginia law, and thereafter to report its findings and recommendations to the Conference in October 2007.

The Current Statute

§8.01-623. Injunction against decree subject to bill of review; limitations to bill of review. – A court allowing a bill of review may award an injunction to the decree to be reviewed. But no bill of review shall be allowed to a final decree, unless it be exhibited within six months next after such decree, except that a person under a disability as defined in § 8.01-2 may exhibit the same within six months after the removal of his or her disability. In no case shall such a bill be filed without the leave of court first obtained; unless it be for error of law apparent upon the face of the record.

As it is currently configured, the bill of review serves two purposes. One of these purposes is to review “error of law apparent upon the face of the [trial court] record.” This is the functional equivalent of an appeal, but with a longer deadline.

The second role of the bill is to serve as a vehicle to secure review of a judgment in light of newly discovered evidence. When used for this reason, leave of the trial court is required to file the petition, as specifically provided in the statute.

Discussion

The Committee unanimously finds that the use of bills of review to address legal error is an anachronism. The Supreme Court clearly thinks so, as it indicated in 1991:

It is true that a bill of review is limited in scope and is rarely used in Virginia procedure. Indeed, in modern appellate practice wherein most litigants have a statutory right to appeal from judgments of trial courts, use of a bill of review is discouraged. Nonetheless, it remains an available procedural device until abolished by the General Assembly.

Blunt v. Lentz, 241 Va. 547, 550 (1991).

Statistics bear out the court's conclusion that bills are "rarely used"; the committee found only six reported cases applying the bill of review statute since it was last amended in 1977. The committee believes that this reflects the prevailing practice, in which dissatisfied litigants overwhelmingly use ordinary appellate channels to seek review of adverse judgments.

Viewed in this light, the availability of such bills to review legal error serves only as an unwarranted safety net for those litigants who fail to adhere to initial appellate deadlines. Given existing appellate remedies, the committee unanimously concludes that bills of review to address claimed legal error should be abolished.

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The second use of such bills presents very different considerations. A bill of review is often the only procedural device available to a civil litigant who discovers case-dispositive evidence more than 21 days after entry of judgment. In this sense, it serves as the civil equivalent to a petition for a writ of actual innocence in the criminal context.

If bills of review were to be completely abolished, a civil litigant who can demonstrate through after-acquired evidence that a judgment is manifestly wrong, would have no recourse whatsoever. In this context, the committee concludes that the bill of review does serve an important purpose, no matter how seldom it may currently be employed.

Almost all other states have provisions for dealing with newly-acquired evidence. Most of these are uniformly based on Fed.R.Civ.P. 60(b), which provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial ...

The rule places a one-year limit on motions based on new evidence, measured from the date of the original judgment.

In light of this consensus provision in the laws of other jurisdictions, complete abolition of the bill of review would move Virginia from one of the most restrictive provisions in the nation for newly discovered evidence (6 months, instead of the one year that is provided elsewhere), to the almost unique position of having no provision at all.

The Committee's Recommendations

The committee unanimously recommends that the bill of review be abolished for the review of legal error, but that it be retained (and expanded slightly) in the realm of newly discovered evidence.

MAJORITY RECOMMENDATION

A majority of the committee supports the following approach, which imposes the fewest changes necessary to implement the committee's views of the best use of the bill. This approach contains a specific abolition of legal error review; retains the requirement that a petitioner obtain leave of court before filing his bill (to weed out frivolous petitions); retains the tolling provision for persons under a disability; adds a requirement of notice before an injunction may be issued; and changes the limitation period from six months to one year, consistent with uniform practice elsewhere. It also moves the statute from Chapter 24 (Injunctions) of Title 8.01 to Chapter 17 (Judgments and Decrees Generally), where other provisions relating to post-judgment proceedings are found.

Repeal §8.01-623; enact the following new statute:

8.01-429.1 Bill of review; limitations thereon; injunction against decree on review.

A. Bills of review may only be filed based upon evidence acquired by a party after the entry of judgment, which evidence could not have been obtained before judgment by that party through the exercise of reasonable diligence. The previous use of bills of review to assert error apparent upon the face of the record is hereby abolished.

B. No bill of review shall be allowed to a final judgment unless it be exhibited within one year next after such judgment, except that a person under a disability as defined in §8.01-2 may exhibit the same within one year after the removal of his disability. In no case shall such a bill be filed without the leave of court first obtained. A court allowing a bill of review may award an injunction to the judgment to be reviewed, upon reasonable notice to the parties and their respective counsel, if known.

MINORITY RECOMMENDATION

A minority of the committee recommends the approach set forth below, which is significantly more detailed than the majority recommendation, and thus represents a greater departure from the existing statute. (The majority believes that the magnitude of this proposed change would make its acceptance by the General Assembly less likely, or at least more difficult, and that its recommendation accomplishes the desired goal.) The minority approach provides more guidance to courts and litigants on the procedures to be used, while implementing the substance of the majority's recommendation. This approach adds two new procedural requirements: The motion for leave must be verified, and must be accompanied by the proposed bill and by supporting documentation.

Repeal §8.01-623; enact the following new statute:

8.01-429.1 Bill of review; limitations thereon; injunction against decree on review.

A. *Availability.* Any party to a concluded action may exhibit a bill of review in which that party alleges that, after the date of entry of final judgment, the party acquired evidence that would, if true, produce a different judgment upon rehearing.

B. *Procedure.* 1. A party desiring to exhibit a bill of review must first obtain leave of court. The motion for such leave must be verified, and must be filed in the same court that entered the judgment for which review is sought. The motion must allege sufficient facts to enable the court to determine that the moving party could not have discovered the evidence before judgment through reasonable diligence. The moving party must attach to the motion a copy of the proposed bill, together with either a copy of the after-acquired evidence (if it is in documentary form) or an affidavit from the witness setting forth the after-acquired evidence (if it is testimonial in nature), or both. Copies of the motion and all attachments must be promptly served on all counsel of record in the original proceeding.

2. The court in which the motion is filed may, in its discretion, deny the motion or direct the filing of a response thereto. The court may, in its discretion, conduct a hearing upon the motion or decide the matter upon the motion and response. After a motion has been granted and a bill exhibited, the trial court shall conduct such further proceedings on the merits of the bill as it shall deem

advisable in its discretion, and thereafter issue such orders and grant such relief as may appear appropriate.

C. *Limitation.* No bill of review shall be allowed unless the motion described in paragraph B above, together with all attachments thereto, is filed within one year after the date of entry of the final judgment of which review is sought. Notwithstanding the foregoing, a person under a disability, as defined in §8.01-2, may file the motion and attachments within one year after the removal of his or her disability.

D. *Injunction pending resolution of bill of review.* If a court grants leave for the exhibiting of a bill of review, it may, in its discretion, award an injunction to the judgment to be reviewed.

E. *Legal-error review abolished.* The previous use of bills of review to challenge error of law apparent upon the face of the record, is hereby abolished.

Conclusion

The committee encourages the Conference to recommend to the General Assembly the abolition of bills of review for legal error; that use has been rendered anachronistic by modern rules of appellate practice. The use of bills to address newly discovered evidence, however, is an important procedural tool that should be retained.

Robert C. Wood, III, Chairman

The Hon. Diane M. Strickland
The Hon. Wyatt B. Durette, Jr.
L. Steven Emmert

Editor's Note:

The Committee presented majority and minority reports recommending that § 8.01-623 be repealed and a new statute, § 8.01-429.1, be adopted which differed in certain respects. Both recommendations failed to achieve a consensus of the Conference.