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From One Court to Another, in a Snap

By Mark S. Lindensmith

Snap removal. No, this is not a kind of garment alteration involving buttons or snaps. It is a controversial procedural maneuver sometimes used by defendants in civil litigation to remove to federal district court a case originally filed in state court, and to do so even though the case otherwise would have had to remain in state court (and not be removable) due to the “forum defendant rule.”

Let’s recap the background principles. The laws governing federal court jurisdiction provide that federal district courts have jurisdiction to hear civil actions seeking damages in excess of \$75,000 when the action is between citizens of different states. 28 U.S.C. § 1332(a)(1)–(2). This type of federal jurisdiction is called “diversity jurisdiction.” Generally, there must be complete diversity between the plaintiffs and defendants (i.e., every defendant must be a citizen of a state different from every plaintiff). See *Higgins v. E.I. Dupont de Nemours & Co.*, 863 F.2d 1162, 1166 (4th Cir. 1998).

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When a plaintiff files a lawsuit in a state court in the state where the plaintiff lives against a defendant or defendants who all live in some other state, the defendant or defendants have the right to rely upon diversity jurisdiction to remove the lawsuit to federal court. There exists some debate over the reason for the original inclusion of diversity jurisdiction in Article III, Section 2 of the United States Constitution. A leading treatise on federal law states: “It has often been suggested that the provision’s purpose was to avoid potential prejudice against citizens of one state in another state’s courts.” 15A *Moore’s Federal Practice - Civil* § 102.02 (3d ed. 2023).

There is, however, an additional limitation upon removal based upon diversity jurisdiction. Defendants who are citizens of the state where the state court action was brought (the “forum state”)

are referred to as “forum defendants.” Under what is known as the “forum defendant rule,” a case that would otherwise be removable from state court to federal court based on diversity jurisdiction may not be removed to federal court “if any of the parties in interest properly joined and served as defendants is a citizen of the State in which the action is brought.” 28 U.S.C. § 1441(b)(2) (emphasis added). In short, even though there may be complete diversity of citizenship among the parties, the “forum defendant rule” prevents the removal of a state lawsuit to federal court if any of the defendants who have been served with the lawsuit are residents of the forum state.

What if there is complete diversity between the plaintiffs and the defendants but one or more of the defendants is a forum defendant? The defendants want to remove the case to federal court despite the

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“forum defendant rule.” Assume that the lawsuit has been filed but the lawsuit has not yet been served upon any of the forum defendants. In that situation, a defendant desiring to remove the case to federal court may use a technique known as a “snap removal.” If the defendant moves quickly (in a “snap,” so to speak), and takes steps to remove the case to federal court before any of the forum defendants are served, he might have the case removed to federal district court. The removing defendant notes that the forum defendant rule applies only when a forum defendant has been “properly joined and served.” The removing defendant argues that the forum defendant rule does not prevent removal since none of the forum defendants have yet been served with the lawsuit.

This defense tactic essentially allows an in-state defendant to remove a case to federal court even though the removal would be improper if any of the forum defendants had been served. So far, neither the United States Supreme Court nor the Fourth Circuit Court of Appeals has weighed in on the propriety of such removal. “[O]ne commentator has referred to the “raging conflict” in the district courts over the permissibility of “snap removal[.]” 15A *Moore’s Federal Practice - Civil* § 102.21. *E.g., compare Spigner v. Apple Hospitality*

REIT, Inc., 2022 U.S. Dist. LEXIS 86059 at *13 (E.D.Va. 2022) (Judge David J. Novak) (the court finding snap removal proper under the plain language of § 1441(b)(2)), *with Active Res., Inc. v. Hagewood*, 2022 U.S. Dist. LEXIS 115061 at *10–11 (S.D.W.Va. 2022) (holding that in cases involving only resident defendants, the forum defendant rule precludes “resident defendants from removing an action pursuant to diversity jurisdiction before effectuation of service”) (citing and applying *Phillips Construction, LLC v. Daniels Law Firm, PLLC*, 93 F. Supp.3d 544, 556 (S.D. W.Va. 2015)).

Whether this race between (1) plaintiffs obtaining service of process on in-state defendants, and (2) defendants obtaining “snap” removal to federal court before process is served makes any sense under the statutes and the rationale for diversity jurisdiction ultimately will likely have to be addressed by the U.S. Supreme Court or Congress. In the meantime, some federal courts might continue to conclude that snap removal is permitted, thus allowing a swiftly-acting defendant to use the snap removal tactic to choose to have the case removed to federal court even though he could not have done so if any of the forum defendants had already been served with the state court lawsuit.



Roger T. Creager

Trial Court Time Limits on Case Presentation

By Roger T. Creager

Virginia trial court judges have occasionally considered dividing the available trial time equally between the plaintiff and the defendant. For example, in a four-day trial, if two hours are used for jury selection, and the remaining estimated trial time totals 22 hours (6 hours of actual trial time on each of three days, plus 4 hours of trial time remaining on the first day), the trial court (or counsel for a party) might propose that each side would be allowed a total of 11 hours (660 minutes) for opening statement, direct examination, cross-examination, voir dire of opposing experts, argument on motions and jury instructions, and closing argument. Is this practice authorized? Is it fair and just?

Plaintiff's counsel should consider objecting to any such approach when it is first proposed and should be prepared to explain to the trial court the problems that are involved. Although this type of equal division may superficially appear to be fair, the reality is that it usually is not. Trial judges understandably have a need to insure that trials are conducted in an efficient manner. But they also have a responsibility to allow each side a just and fair opportunity to present its case. If, under the circumstances of a particular case, the plaintiff's case will require more time to present than the defendant's case, a 50-50 division of the trial time will be "equal" but it will nevertheless be unjust and unfair.



Trial judges need to be reminded that a time allocation system that automatically grants each side half of the estimated trial time is arbitrary and unjust. Although this type of equal division may superficially appear to be fair, the reality is that it usually is not. A study done by the National Center for State Courts ("NCSC") has shown that a plaintiff's case typically requires

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substantially more time than the defense case. See “The Trouble With Time Limits,” 106 *Geo. L.J.* 933, 973 (2018) (emphasis added). The cited law review article summarized the results of the study as follows: “[D]o plaintiffs really need more time than defendants? The answer, supplied by the NCSC, is a resounding yes.” “The NCSC found that, across case categories, the plaintiff’s presentation of evidence took far longer than the defendant’s presentation. In fact . . . the plaintiff’s presentation often took twice as long, and sometimes it took more than three times as long.” *Id.* (emphasis added).

The fact that the plaintiff’s case usually takes longer to present than the defendant’s case and the reasons for that reality are both apparent. The plaintiff has the burden to present evidence to prove each aspect of each element of her claim. In many cases, the defense does not have the burden of proof on any issue in the case. Furthermore, in her case the plaintiff has to spend a considerable amount of time presenting evidence about matters that the defendant does not intend to dispute or challenge in any substantial way. This evidence “sets the table” for both the plaintiff and the defendant. It is thus unfair to “charge” to the plaintiff all of the time required to put on this background evidence. Furthermore, even on issues and evidence which the defendant plans to contest, the plaintiff may well need to spend more time than the defense providing the detailed factual background relevant to the pertinent issues. In many (perhaps most) cases, the defense will call far fewer witnesses than the plaintiff and instead the defense case will concentrate on targeted cross-examination of the plaintiff’s witnesses. For these and other reasons, an equal split of trial time between the plaintiff and the defendant is unwarranted and unjust unless there are case-specific considerations that justify that division.

Furthermore, even if the trial court had originally established expected time limits based upon case-specific considerations, any ruling rigidly refusing to

allow a party any more time (e.g., “plaintiff’s time is up, nothing further allowed”) cannot properly be based purely upon the expiration of the amount of time originally allocated. The Virginia Court of Appeals has held, for example, that application of a time limitation in a manner that, in effect, denies a party the opportunity to conduct cross-examination is reversible error:

[W]e recognize that the trial court may appropriately limit cross-examination, subject to the rules of evidence. For example, a trial court may, in its discretion, refuse to allow questions that seek information lacking relevance to any issue before the court, questions that seek to elicit cumulative evidence, or questions that have already been asked and answered. Here, however, the trial court entirely prohibited husband’s cross-examination of two of wife’s material witnesses due solely to the depletion of his allocated time at trial. These witnesses testified “on a matter relevant to the litigation,” specifically the validity of the marital agreement. In fact, whether husband had signed the agreement was the single most relevant fact in deciding whether the agreement was authentic. And because an opportunity to cross-examine is a fundamental right, we hold that the trial court abused its discretion by its arbitrary refusal to allow any cross-examination whatsoever. Error of this magnitude is never harmless.

Campbell v. Campbell, 49 Va. App. 498, 504–05, 642 S.E.2d 769, 773 (2007) (emphasis added).

Certainly, a trial court judge “has broad discretion in conducting a trial[.]” *Justus v. Commonwealth*, 222 Va. 667, 677, 283 S.E.2d 905, 910 (1981). Any exercise of discretion, however, must comport with controlling legal standards. A trial court abuses its discretion “when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones are considered, but

the court, in weighing those factors, commits a clear error of judgment.” *Galiotos v. Galiotos*, 300 Va. 1, 11, 858 S.E.2d 653 (2021) (quoting *Landrum v. Chippenham and Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352, 717 S.E.2d 134 (2011)).

The Virginia Constitution, the Virginia Code, and the *Rules of Supreme Court of Virginia* all guarantee every litigant the right to a jury trial. See Va. Const. art. I, § 11; Va. Code § 8.01-336; Va. Sup. Ct. R. 3:21. At the jury trial, “a litigant is entitled to introduce all competent, material, and relevant evidence that tends to prove or disprove any material issue in the case, unless that evidence violates a specific rule of admissibility,” and that, “[e]very fact that tends to establish the probability or improbability of a fact at issue is relevant.” *Barkley v. Wallace*, 267 Va. 369, 595 S.E.2d 271, 273 (2004) (emphasis added) (citing *Tarmac Mid-Atlantic, Inc. v. Smiley Block Co.*, 250 Va. 161, 458 S.E.2d 462, 465 (1995) and other cases).

Therefore, any time limits imposed by the Court must be reasonable under all the circumstances and must be based upon the consideration of all pertinent factors and circumstances. Limiting a party’s presentation of further evidence, cross-examination, or argument solely on the basis of the number of ticks on a clock would be an abuse of discretion since it would not be based upon an evaluation of all the pertinent factors and circumstances.

Like the Virginia Court of Appeals, numerous courts of other states have held that a trial court must not impose time limitations in a manner that fails to take account of all the pertinent circumstances and factors. See *Barksdale v. Bert’s Marketplace*, 289 Mich. App. 652, 657, 797 N.W.2d 700, 703 (2010) (“[B]y imposing an utterly arbitrary time limit for witness examinations, the trial court selected an outcome falling outside the range of principled outcomes.”); *Rasmussen v. Rasmussen*, No. 03-1206, 2004 Iowa App. LEXIS 693, at *6 (Ct. App. May 14, 2004) (unpublished) (“Arbitrary and inflexible time limits are a serious threat to due process principles.

... Time limits must be applied with sufficient flexibility to ensure a fair trial.”); *In re Marriage of Goellner*, 770 P.2d 1387, 1389 (Colo. App. 1989) (“It is evident from the record that the trial court was adamant in allowing only six hours to each side to present that party’s case. . . . The court allowed no flexibility in the time period allocated. This constitutes prejudicial error[.]”); *Ingram v. Ingram*, 2005 Ok. Civ. App. 87, ¶¶ 21-22, 125 P.3d 694, 699 (2005) (“The trial record shows that Husband’s time expired while he was on the stand to testify at which time the trial court stopped further testimony depriving the trier of fact of potentially useful evidence in reaching an impartial decision. . . . This Court holds that the trial court abused its discretion under the facts here and committed fundamental error. This holding necessitates a complete reversal and setting aside of the judgment below.”).

Factors that should properly guide the trial court’s discretion in this type of situation include those set forth in Rule 2:611 of the *Rules of Supreme Court of Virginia*: “The mode and order of interrogating witnesses and presenting evidence may be determined by the court so as to (1) facilitate the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.” *Va. Sup. Ct. R. 2:611(a)*. The mere fact that a party has used a particular amount or percentage of trial time does not, by itself, establish that there is some just and fair reason for excluding additional evidence, cross-examination, or argument that is necessary.

Sometimes, for example, the time required for earlier portions of that party’s case may have taken longer than expected for reasons that were entirely beyond the party’s control. A rigid application of a time limit would fail to consider pertinent factors. Were contemporaneous objections made to the length of any aspect of the previous portions of the party’s case? Were the party’s witnesses repetitive or cumulative? Were the party’s opening statement or cross-examinations repetitive or unduly time-



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consuming? Did the opposing party create the need for the time-consuming presentation of extensive evidence regarding matters that eventually were essentially undisputed?

Counsel should make the trial court aware of the foregoing issues, arguments, and authorities at the first occasion when time limits are first proposed. It will be more difficult to object to the application of a 50-50 time limit if at the outset of the trial counsel had raised no concerns about or even readily agreed to that time limit. Counsel should also be aware that, in the event that a trial court rules that based upon the expiration of a time limit a party will not be allowed to present any further evidence, cross-examination, or argument, counsel should preserve the issue for appeal by stating objections to the ruling on the record. Furthermore, counsel should make a sufficient proffer of the evidence, cross-examination, or argument which would have been presented but

for the imposition of the time limit. This proffer must be made on the record while the trial judge and opposing counsel are present. *See Galumbeck v. Lopez*, 283 Va. 500, 508, 722 S.E.2d 551, 555 (2012) (issue was not preserved for appeal when the purported proffer “was recorded after court had adjourned for the day and outside of the presence of opposing counsel”). A proffer of that type is necessary so the trial court can evaluate and consider factors, circumstances and arguments relevant to its ruling, and so that an appellate court, if necessary, can evaluate the same matters as well as the extent of the prejudice caused by the exclusionary rulings. If the opposing party does not agree to a proffer, the proffer may itself take a significant amount of time (which would thus paradoxically lengthen the trial that the trial judge was attempting to shorten by its exclusionary ruling).



A Quick Look Under the Hood: Uninsured/Underinsured Motorist Coverage in Virginia

By Steven G. Friedman

Often the wrongdoer (the “tortfeasor”) who causes injuries does not have enough insurance coverage (or perhaps even any coverage) to pay the full amount of the damages a wrongdoer has caused to an innocent victim (the “plaintiff”). Fortunately, in the context of injuries arising out of the ownership, maintenance, or use of a motor vehicle, Virginia law establishes an additional source of insurance coverage applicable to the innocent victim through the victim’s own auto policy, an auto policy applicable to the vehicle in which the victim was riding, and/or an auto policy applicable to a relative with whom the victim was living.

Virginia law mandates that every motor vehicle insurance policy issued or delivered in Virginia must include a few distinct types of coverage. If an insured person causes damage to others, then there is liability coverage to assist the insured person in compensating the injured person. *See* Va. Code § 38.2-2204. And when the insured person is also the injured person, then there is uninsured motorist (UM) coverage and underinsured motorist (UIM) coverage to assist the insured person in being compensated themselves. *See* Va. Code § 38.2-2206.

The latter two types of coverage are referred to collectively as UM/UIM coverage. The UM/UIM coverage does not insure the wrongdoer. Rather, it insures the insured (the injured person) against inadequate compensation from the wrongdoer. *Horne v. Superior Life Ins. Co.*, 203 Va. 282, 285 (1962).

In other words, when the wrongdoer does not have sufficient liability coverage to pay the damages she caused, the victim’s own insurance coverage steps in to help pay for the damages caused by the wrongdoer. UM coverage is implicated in any one of several scenarios: (1) the tortfeasor has no liability insurance, (2) the tortfeasor has liability insurance with policy limits that are less than the amount of coverage required in Virginia, (3) the tortfeasor is immune from liability, (4) the tortfeasor is unknown, or (5) the tortfeasor’s insurance carrier denies liability coverage for any reason. *See* Va. Code § 38.2-2206(B)(1). UIM coverage is triggered when the tortfeasor has some available insurance coverage but the amount of that insurance coverage is not sufficient to pay all of the wrongdoer’s liability for the plaintiff’s damages. *See id.*

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Significantly, the persons insured under a motor vehicle insurance policy are not limited to the vehicle owner to whom the policy was issued. The applicable Virginia law defines “insured” much more broadly, and provides:

“Insured” . . . means [1] the named insured and, while resident of the same household, [2] the spouse of the named insured, and [3] relatives, [4] wards or foster children of either, while in a motor vehicle or otherwise, **and** [5] any person who uses the motor vehicle to which the policy applies, with the expressed or implied consent of the named insured, and [6] a guest in the motor vehicle to which the policy applies[.]

Va. Code § 38.2-2206(B) (bracketed numbers & emphasis added).

The types of insureds listed on either side of the emphasized “**and**” in the above-quoted statute are not treated the same. Instead, the first four types of insureds (numbers 1 to 4) are referred to as “first class insureds” and the last two types of insureds (numbers 5 and 6) are referred to as “second class insureds.” The different treatment of the two classes of insureds is summarized as follows:

The UM/UIM statute provides “different benefits accruing to each class.” *Cunningham v. Insurance Co. of N. Am.*, 213 Va. 72, 75, 189 S.E.2d 832, 834 (1972). For insureds in the first class, UM/UIM coverage follows them wherever they go, whether in or out of a covered vehicle. *See Insurance Co. of N. Am. v. Perry*, 204 Va. 833, 836, 134 S.E.2d 418, 420 (1964) (decided under predecessor statute). Those in the second class, however, have more limited coverage. To be covered, an accident must take place while they are either “using,” with the named insured’s consent, a vehicle specifically covered by the policy or while they are a guest within a covered vehicle. *Id.* at 837, 134 S.E.2d at 421.

Bratton v. Selective Ins. Co. of Am., 290 Va. 314, 335, 776 S.E.2d 775, 786 (2015) (Kelsey, J., dissenting).

For first-class insureds, UM/UIM “coverage is designed to protect not vehicles, but persons Thus, the emphasis is upon the status of an insured when injured, rather than upon vehicles, in determining whether coverage applies.” *Lipscombe v. Security Ins. Co.*, 213 Va. 81, 83-84, 189 S.E.2d 320, 323 (1972), *superseded by statute in part on other grounds as stated in Allstate Ins. Co. v. Wade*, 265 Va. 383, 579 S.E.2d 180 (2003).

For a first-class insured, UM/UIM coverage applies regardless of whether the plaintiff was in an auto explicitly mentioned in the policy. *See, e.g., Virginia Farm Bureau Mut. Ins. Co. v. Williams*, 278 Va. 75, 78, 677 S.E.2d 299, 300 (2009) (minor plaintiff was injured in a motor vehicle crash and “qualified as an insured of the first class under her father’s automobile insurance policy . . . [which] provides coverage for three separate vehicles, none of which was involved in the accident”); *Allstate Ins. Co. v. Meeks*, 207 Va. 897, 153 S.E.2d 222 (1967) (while plaintiff was driving an uninsured vehicle he owned plaintiff suffered injuries in a collision with another uninsured motorist; court held that plaintiff, as a first class insured, was entitled to recover under the UM provision of his policy which insured another car plaintiff owned).

In fact, a first-class insured is entitled to UM/UIM coverage even when they are not using or occupying a vehicle, provided, however, that they are injured by the ownership, maintenance, or use of a motor vehicle. *See* Va. Code § 38.2-2206(B) (“while in a motor vehicle or otherwise”) (emphasis added). For instance, a pedestrian walking on the sidewalk struck by a motor vehicle leaving the roadway could obtain UM/UIM coverage under his own auto insurance policy. *See, e.g., Insurance Co. of N. Am. v. Perry*, 204 Va. 833, 134 S.E.2d 418 (1964). The first class insured is covered wherever the insured may be. The policy insuring the first class insured is “glued” to his/her person.

There is often debate about whether someone is a “resident of the same household” as the named insured. Determining a person’s residence requires

an intent manifested by actions. See *Allstate Ins. Co. v. Patterson*, 231 Va. 358, 344 S.E.2d 890 (1986). The household component entails one or more persons collectively living as a single unit under the same roof. See *Phelps v. State Farm Mut. Auto Inc. Co.*, 245 Va. 1, 426 S.E.2d 484 (1993). In certain limited situations, these concepts stretch to make practical sense. See, e.g., *id.* (college student living away from home still considered resident of family household); *Nationwide Mut. Ins. Co. v. Robinson*, 36 Va. Cir. 193 (City of Richmond Cir. Ct. 1995) (teenager, over whom divorced parents had joint custody and who had a room at each of his parent's separate homes, was deemed a resident of each parent's home).

For second-class insureds, by contrast, coverage requires use of an expressly covered vehicle. See *Cunningham v. Insurance Co. of N. Am.*, 213 Va. 72, 76, 189 S.E.2d 832, 835 (1972) (“To be insured, [second class insureds’] . . . coverage is tied to and limited to actual occupancy of a particular automobile [expressly listed in the policy].”) (quoting out-of-state opinion).

Also in the second-class situation, the named insured must give permission (express or implied) to the plaintiff to use the covered vehicle. Notably, however, such permission can be second-hand or once removed. See *GEICO v. USAA*, 281 Va. 647, 657, 708 S.E.2d 877, 883 (2011) (“When a named insured entrusts a car to another for his general use, the person so entrusted—i.e., the first permittee—also may permit a third person to use the car—i.e., the second permittee. In such instances, we have held that the second permittee has the implied permission of the named insured to use the vehicle.

. . . [such that t]he second permittee then is covered under the policy of the named insured.”). Provided, however, that the permissive use of the vehicle must have been within the scope of the permission given at both levels of the entrustment. See *id.*, 281 Va. at 658-59, 708 S.E.2d 883-884. Accordingly, if the owner gives permission to Batman to drive the car, but explicitly prohibits Robin from driving the car, then Robin would not be an insured if he was driving the vehicle at the time of the crash.

However, if a person has permission to use the vehicle then there is coverage notwithstanding a failure to abide by any instruction about the manner of using the vehicle. See *City of Norfolk v. Ingram*, 235 Va. 433, 437, 367 S.E.2d 725, 727 (1988) (there cannot be any “loss of omnibus coverage because the bailee operated the owner’s car in a manner violating the owner’s instructions”) (emphasis in original). For example, even if the owner directs the driver not to drive drunk, a drunk driver would be an insured.

The requisite “use” of a vehicle for second-class UM/UIM coverage has been broadly construed such that it is not limited to driving or riding in the vehicle. See, e.g., *Newman v. Erie Ins. Exch.*, 256 Va. 501, 507 S.E.2d 348 (1998) (crossing street to board school bus); *Edwards v. GEICO*, 256 Va. 128, 500 S.E.2d 819 (1998) (changing tire on parked car); *Slagle v. Hartford Ins. Co. of the Midwest*, 267 Va. 629, 594 S.E.2d 582 (2004) (standing outside giving hand signals to driver); *Bratton, Adm’r v. Selective Ins. Co. of Am.*, 290 Va. 314, 776 S.E.2d 775 (2015) (placing truck with flashing lights as a buffer to protect roadside workers).

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