SUPREME COURT OF LOUISIANA

No. 98-CC-2040

**JESSE MARCUS, LINDA MARCUS,
INDIVIDUALLY AND ON BEHALF OF
THEIR MINOR CHILD, JESSE MARCUS, JR.**

v.

**THE HANOVER INSURANCE CO., INC.,
AMERICAN DEPOSIT INSURANCE CO., INC.,
J & J MECHANICAL, INC., AND JOHN F. SANCHEZ**

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FIRST CIRCUIT, PARISH OF EAST BATON ROUGE**

CALOGERO, Chief Justice, concurring in part and dissenting in part

I concur in the portion of the majority's opinion invalidating the business use exclusion. However, I disagree with the portion which reforms the policy to provide only the minimum statutory policy limits. This issue has been considered by a number of jurisdictions, many of which admittedly favor the majority's approach. However, I am inclined to adopt the rule favored by a respectable number of jurisdictions that policy exclusions which violate statutory minimum liability requirements should be rendered totally unenforceable, thereby permitting liability coverage up to the amount of excess liability coverage purchased by an insured. *See Meyer v. State Farm Mut. Auto. Ins. Co.*, 689 P.2d 585, 592-93 (Colo. 1984); *Hughes v. State Farm Mut. Auto. Ins. Co.*, 236 N.W.2d 870, 886 (N.D. 1975); *Kish v. Motor Club of Am. Ins. Co.*, 261 A.2d 662, 666 (N.J. 1970); *Threats v. Derouselle*, No. 93-1047 (La. App. 3d Cir. 4/6/94), 636 So.2d 276; *Cinquemano v. Underwood*, 611So.2d 838, 840 (La. App. 4th Cir. 1992), *writ denied*, 617 So.2d 909 (La. 1993*); Allstate Ins. Co. v. Sullivan*, 643 S.W.2d 21, 23-24 (Mo. Ct. App. 1982); *see also Farmers Ins. Group v. Reed*, 712 P.2d 550 (Idaho 1985); *Collins v. Farmers Ins. Co. of Or.*, 822 P.2d 1146, 1151-62 (Or. 1991) (Unis, J., dissenting) (Van Hoomissen & Fadely, JJ., joining in the dissent of Unis, J.). In any event, it is not for other jurisdictions to decide this significant question of Louisiana insurance law. Rather, that is the business of this Court.

The majority reasons that the policy should be reformed to provide only $10,000/$20,000 coverage, stating:

> Hanover cites no authority, and we discern none, that, apart from the statute, the business use exclusion is void as a matter of public policy. In this case, there is no suggestion that the insurer intended to subvert public policy when it included the business use exclusion in its policy. As discussed above, the circuit courts of our state had reached different conclusions regarding whether the business use exclusions contravene statutory law and the public policy behind it. Thus, the law in this area

> was unsettled and American was not in bad faith in including the business use exclusion in its policy.

Essentially, because the exclusion had not already been declared by this Court to be violative of public policy, the majority excuses the violation by concluding that the policy should be reformed to provide only $10,000/$20,000 coverage rather than $100,000/$300,000 coverage. In my view, it is inappropriate to declare the exclusion invalid based upon a statutory provision, but then to limit the adverse impact of the violation on the premise that the insurer did not know any better at the time it issued the policy.

If American had attempted to limit rather than totally exclude liability, American's policy would have clearly stated that it provided only $10,000/$20,000 coverage, which would have made the insured aware of the precise amount of coverage provided, other than $100,000/$300,000, in the discreet situation of business use. This is consistent with the express language and public policy of Louisiana's Motor Vehicle Safety Responsibility Law, which mandates that an automobile liability policy "shall state . . . the coverage afforded by the policy." La.R.S. 32:900(D). American should not reap the benefit of minimal statutory coverage without providing conspicuous, express notice of its reduced liability.

The facts of this case demonstrate the significance of the statutory requirement that minimal coverage be clearly and expressly stated. The insured likely believed that the policy provided $100,000/$300,000 coverage when the vehicle was being used for business. In fact, the trial court noted that the insured had only a fourth grade education, that he did not understand, nor did anyone explain, the document he was signing, that he and his insurance agent were "pretty close friends," that the agent was aware of the insured's occupation, and that the insured assumed the agent knew how the insured vehicle was to be used.

Thus, a second feature of Louisiana's public policy, other than that requiring minimum liability coverage, is at issue here, namely that of requiring insurers to expressly notify insureds of the amount of liability coverage purchased. I fail to see how an insurer's lack of intention to subvert the compulsory liability statute is cause to limit its liability, when the statute violated by the insurer was intended to protect the insured. I find no compelling reason to sacrifice the insured's statutory right to know his policy limits to the insurer's purported good-faith violation of the compulsory liability statute.

Justice Unis in his well-reasoned dissent in *Collins*, 822 P.2d at 1155 addressed a similar issue, stating:

> The distinction between an insurance policy that grants the required liability coverage by its own terms and an in insurance policy that provides the required liability coverage by operation of law is consistent with the purpose of the statutory provisions regulating insurance companies. Making the distinction meaningful encourages insurance companies to provide clear notice of the coverage to insureds (i.e., to grant the coverage) that is conferred by law in order to gain limited liability.

Id. (quoting *Collins v. Farmers Ins. Co.*, 791 P.2d 498 (Or. 1990)). In effect, the majority's holding will dissuade insurance companies from precisely identifying the basic terms of the insurance contract, and in this case has deprived the insured of the coverage which he thought he purchased.

For the foregoing reasons, I respectfully concur in part and dissent in part.