STATE OF MICHIGAN

COURT OF APPEALS

CITIZENS INSURANCE COMPANY OF AMERICA,

Plaintiff-Appellant,

v

AMERICAN MANUFACTURER'S MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

No. 194307
Macomb Circuit Court
LC No. 94-002512 CK

Before: White, P.J., and Bandstra and Smolenski, JJ.

WHITE, J. (dissenting).

I respectfully dissent. Applying the applicable rules as stated in the majority opinion, gleaned from *Zurich-American Ins Co v Amerisure Ins Co*, 215 Mich App 526, 530; 547 NW2d 52 (1996), and *Royce v Citizens Ins Co*, 219 Mich App 537, 541; 557 NW2d 144 (1996), I conclude that the policy at issue is ambiguous because, after reading the entire document, its language can be reasonably understood in different ways. *Id.*

I

The policy uses numerical symbols, accompanied by descriptions, to identify categories of vehicles. The numerical symbols are entered on the declarations page next to each type of coverage to show which coverages apply to which autos.

The symbols and descriptions state:

SECTION I - COVERED AUTOS

> ITEM TWO of the Declarations shows the autos that are covered "autos" for each of your coverages. The following numerical symbols describe the "autos" that may be covered "autos." The symbols entered next to a coverage on the Declarations designate the only "autos" that are covered "autos."

A. DESCRIPTION OF COVERED AUTO DESIGNATION SYMBOLS

SYMBOL		DESCRIPTION
1	=	ANY "AUTO"
2	=	OWNED "AUTOS" ONLY. Only those "autos" you own (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" you acquire ownership of after the policy begins.
3	=	OWNED PRIVATE PASSENGER "AUTOS" ONLY. Only the private passenger "autos" you own. This includes those private passenger "autos" you acquire ownership of after the policy begins.
4	=	OWNED "AUTOS" OTHER THAN PRIVATE PASSENGER "AUTOS" ONLY. Only those "autos" you own that are not of the private passenger type (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" not of the private passenger type you acquire ownership of after the policy begins.
5	=	OWNED "AUTOS" SUBJECT TO NO-FAULT. Only those "autos" you own that are required to have No-Fault benefits in the state where they are licensed or principally garaged. This includes those "autos" you acquire ownership of after the policy begins provided they are required to have No-Fault benefits in the state where they are licensed or principally garaged.
6	=	OWNED "AUTOS" SUBJECT TO A COMPULSORY UNINSURED MOTORISTS LAW. Only those "autos" you own that because of the law in the state where they are licensed or principally garaged are required to have and cannot reject Uninsured Motorist Coverage. This includes those "auto" you acquire ownership of after the policy begins provided they are subject to the same state uninsured motorists requirement.
7	=	SPECIFICALLY DESCRIBED "AUTOS". Only those "autos" described in ITEM THREE of the Declarations for which a premium charge is shown) and for Liability Coverage any "trailers" you don't own while attached to any power unit described in ITEM THREE).
8	=	HIRED "AUTOS" ONLY. Only those "autos" you lease, hire, rent or borrow. This does not include any "auto" you lease, hire, rent or

borrow from any of your employees or partners or members of their households.

9 = NONOWNED "AUTOS" ONLY. Only those "autos" you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes "autos" owned by your employees or partners or members of their households but only while used in your business or your personal affairs.

Item three of the declarations entitled "ITEM THREE - SCHEDULE OF COVERED AUTOS YOU OWN" lists 16 specific vehicles, some of which are leased and some of which are owned.

Defendant relies on the policy provision that states:

5. OTHER INSURANCE

a. For any covered "auto" you own, this Coverage Form provides primary insurance. For any covered "auto" you don't own, the insurance provided by this Coverage Form is excess over any other collectible insurance. . . .

The terms "own" and "lease" are not defined in the policy.

II

The Circuit court decided this case on the basis that the policy distinguishes between owned and leased vehicles, and defendant's appellate brief argues only that defendant was an excess insurer under its "Other Insurance" clause because its policy makes such a distinction.[1] Defendant's assertion that the policy distinguishes between leased and owned autos is not supported by a reading of the entire policy, is contradicted by defendant's own representative's testimony, and leads to clearly unintended and non-sensical results. The policy read as a whole does not create distinct categories of autos that are separated by reference to whether the auto is owned or leased. Rather, the policy as a whole contemplates that certain leased autos are owned autos under the policy.

Item Three of the declarations is entitled "SCHEDULE OF COVERED AUTOS YOU OWN" [emphasis added] but includes, nevertheless, some autos that are leased rather than owned. Similarly, the declarations page indicates that for no-fault PIP coverage, a covered auto is defined as:

> 5 = OWNED "AUTOS" SUBJECT TO NO-FAULT. Only those "autos" you own that are required to have No-Fault benefits in the state where they are licensed or principally garaged. This includes those "autos" you acquire ownership of after the policy begins provided they are required to have No-Fault benefits in the state where they are licensed or principally garaged. [Emphasis added.]

Yet, clearly, any leased auto specifically listed in Item Three, and any auto subject to a long-term lease entered into after the policy begins, is intended to be covered for no-fault.

Applying defendant's construction of the policy leads to the result that specifically listed autos that are leased are afforded only excess coverage, but specifically listed autos that are owned are afforded primary coverage. It also leads to the result that autos that are owned are covered for no-fault, but expressly listed autos that are the subject of long-term leases are not.[2] These are clearly unintended results.

Robert Blonn, a claims examiner for defendant, testified that he treated the Lincoln as an "'auto' you don't own" because the auto was not leased to Allstate Fasteners, not because it was leased, rather than owned. When questioned regarding the statute and case law stating that a leasee under a lease extending beyond thirty days is deemed an owner for liability purposes, Blonn responded that there were "long-term leased vehicles. . . declared for coverage on this policy" and stated that

> this declaration declares the owned vehicles under our policy whether they're leased or owned, and so I don't feel that in and of itself should change our interpretation.

The circuit court focused only on the facial language of the definitions of symbols 8 and 9, and erred in concluding that the policy as a whole differentiates between leased and owned vehicles. The distinction between the terms is not borne out when the policy is read in its entirety. Because this is the only basis upon which this case was decided, I would reverse.[3]

/s/ Helene N. White

[1] Defendant does not argue on appeal that because the 1989 Lincoln was not specifically listed it was not owned, does not argue that the vehicle was not leased by a named insured, and does not seek to justify the circuit court's decision on any other basis.

[2] While defendant's construction of the "Other Insurance" clause as applied to the instant case, where liability coverage is at issue, allows for primary coverage under the policy where there is no other coverage available, the "Other Insurance" clause would not so operate where no-fault is involved because the clause refers to a *covered* autos, and the only autos covered for no-fault purposes are owned autos.

[3] In light of this conclusion, I do not address plaintiff's argument that the statutory definitions of "owner" in the no-fault act, MCL 500.3101(2)(g); MSA 24.13101, and Michigan Vehicle Code, MCL 257.37(a); MSA 9.1837(a), must be applied to defendant's policy.