

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE OHIO CASUALTY INSURANCE )  
COMPANY, )

Appellee, )

v. )

MANSFIELD PLUMBING PRODUCTS, )  
LLC. )

Appellant. )

CASE NO.: 11-1799

Appeal from the Ashland County Court of Appeals, Fifth Appellate District (Court of Appeals Case No. 11COA-0009)

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MEMORANDUM IN SUPPORT OF JURISDICTION

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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR  
GREAT GENERAL INTEREST.**

The Fifth District Court of Appeals, in a cursory matter, erroneously construed a common exclusion contained in potentially tens of thousands of insurance policies, and thereby nullified crucial coverage for thousands of insured individuals and companies. This nullification has great import for any entity seeking coverage for environmental damage and toxic torts. The Fifth District did this with no discussion or analysis whatsoever.

Any commercial enterprise that seeks coverage for potentially widespread injuries related to product liability, toxic torts, or environmental damage contemplates that they may be subject to hundreds or even thousands of claims related to a single toxic spill, product shipment, or other activity. Without insurance, any single entity could have its assets quickly exhausted resulting in many injured parties being denied compensation. The Fifth District's construction of a common "loss in progress" provision nullifies coverage for this type of incident. Appellant Mansfield Plumbing Products, LLC ("Mansfield"), a manufacturer of toilets, was sold a defective resin. This resin caused failures in thousands of units causing thousands of water damage claims, which manifested themselves over multiple years. It is important to note that, while large in number, the failures occurred in only one percent of the toilets in which the resin was used. When viewed in the context of the number of units sold, the failures were rare and insurable events. However, according to the Fifth District, Mansfield was insured only for the first such failure.

The loss in progress provision is a contractual provision meant to expressly provide for the common law doctrine of "loss-in-progress" or "known loss." Properly construed, the provision means no more than the notion that one cannot buy insurance after a loss has already occurred. Loss-in-progress has no application to situations where a single incident has occurred,

but no losses have occurred at the time that the insurance is purchased. The application of loss-in-progress is frequently debated in the context of an event that causes multiple incidents of damage to different parties and over long periods of time. An Ohio common pleas court in *Buckeye Ranch v. Northfield Insurance* (2005), 134 Ohio Misc.2d 10, 839 N.E. 2d 94, 2005-Ohio-5316, provided an overview of the doctrine noting that it had been at issue in cases involving: pollution (Id at ¶ 25), asbestos (Id at ¶31), construction defects (Id at ¶33), and contaminated products (Id at ¶34). The exclusion has potential application in cases where a dangerous condition, such as contamination, has occurred, but the actual losses are unknown. Knowledge that there is a risk of loss is motivation for buying insurance. In this context, an insured, which has no knowledge of actual damage, should not be precluded from purchasing insurance because it has some knowledge that there may be a risk of claims in the future.

While there is little case law on this doctrine, or the actual contract language, in Ohio, the application of loss-in-progress exclusions is common nationwide. Simply typing “loss-in-progress” into a legal research database will yield hundreds of reported cases. The loss-in-progress doctrine, or the contractual exclusions, are sure to be at issue in future litigation, and it is of great general interest that this Court provide guidance to Ohio Courts on this issue. The Fifth District has ruled that knowledge of a mere risk or possibility of loss, such as knowledge of resin-related claims, places any subsequent claims within the scope of a loss-in-progress exclusion, which applies even if the losses have not occurred prior to the purchase of the insurance policy. This ruling, if applied by other courts, will result in a denial of compensation to injured parties.

## STATEMENT OF THE CASE AND FACTS

Mansfield is engaged in the business of manufacturing toilets for use in residential, commercial, and institutional markets. In early 2002, Mansfield contracted with Polyone Corporation ("Polyone") for the sale of Polyone's resin product, Geon 210 WHITE 271 (HS), Material Number I0210HSA127160 (hereinafter "Geon 210"). Beginning in the Spring of 2002, Mansfield used the Geon 210 to manufacture a hush tube component for its toilets. Mansfield then sold and distributed the toilets for use in residential, commercial, and institutional markets.

In August 2002, Mansfield received notice from some of the purchasers of the toilets that the toilets were cracking in the hush tube component that was manufactured with the Geon 210 resin, resulting in the purchasers sustaining property damage. Throughout 2004 and 2005, additional purchasers of the toilets containing the Geon 210 hush tube components sustained property damage and filed claims and complaints for the damage caused by the Geon 210 component. During these two policy years, Mansfield had primary liability insurance through Federal Insurance Company ("Chubb") with policy limits each year of \$1,000,000 per occurrence. Also, during the policy years at issue, Mansfield contracted with Appellee Ohio Casualty to provide excess liability coverage. Ohio Casualty's excess coverage policies were follow form policies, providing liability coverage that was triggered once the Chubb limits were exceeded. The Ohio Casualty policies adopted the majority of the definitions set forth in the underlying Chubb policies, including the definition of "occurrence."

While the Geon 210 resin was utilized in 2002, Mansfield actually wasn't provided notice of the related third party claims until later policy periods, including December 1, 2003 through December 1, 2004 and December 1, 2004 through December 1, 2005. During these

policy years, Chubb paid out the limits of the insurance, and Mansfield exceeded the Chubb policy limits by \$605,244.74 and \$166,951.00, respectively.

Mansfield notified Ohio Casualty as soon as it became apparent that the excess coverage may be triggered. Despite Mansfield's request that Ohio Casualty defend and indemnify it for the amounts paid to the damaged persons in excess of the primary policy limits, Ohio Casualty refused to honor the excess coverage policies, exposing Mansfield to significant loss.

On December 21, 2007, Ohio Casualty filed this declaratory action against Mansfield seeking a determination of its liability relating to the claims against Mansfield for damages caused by the Geon 210 resin product. On February 29, 2008, the trial court granted a stay of proceedings pending the outcome of litigation against Polyone, the maker of the Geon 210 resin product. This action was prosecuted by Mansfield and Chubb, Ohio Casualty declined to participate. The stay was lifted on April 29, 2009, and Mansfield timely answered and Counterclaimed against Ohio Casualty for breach of contract.

Both parties moved for summary judgment on August 13, 2009. On December 1, 2009, the trial court denied both parties motion for summary judgment determining that there remained questions of material fact in regard to whether the third-party claims all related to Geon 210, and further indicating that it hold in abeyance a ruling to resolve the dispute over what constitutes an "occurrence" under the relevant insurance policies. In response, the parties filed, on May 6, 2010, a joint stipulation, wherein both parties acknowledged that all of the third party claims related to the Geon 210 resin. The parties further stipulated that, if each third-party claim constituted an "occurrence," then Ohio Casualty's excess coverage would not apply. If,

however, the use of the Geon 210 resin was a single “occurrence,” then the Ohio Casualty coverage would apply.

In response to the joint stipulation and related motion, the court agreed to reconsider its ruling on the cross motions for summary judgment, referred the matter to the magistrate, and ordered supplemental briefing. The Magistrate rendered a ruling on the cross motions for summary judgment on January 5, 2011, and Mansfield filed objections thereto. The trial court overruled the Mansfield’s objections and adopted the magistrate’s decision of February 3, 2011. Mansfield then brought its appeal to the Fifth District.

**Proposition of Law No. 1: The Fifth District’s decision broadens the scope of the loss-in-progress exclusion such that it has nullified insurance coverage for potentially thousands of insureds and raised the potential that many injured parties will not be compensated.**

For decades, it has been a fundamental tenet of Ohio insurance law that an insurance contract is to be construed against the insurer and in favor of the insured, and in favor of coverage. The trial court, in adopting the Magistrate’s decision, ignored this principle going so far as to re-draft a clear and unambiguous contract in order to deny coverage to Mansfield. The Fifth District Court of Appeals compounded this error by affirming the decision without analysis or explanation. The trial court, in essence, created an exclusion, and then applied that newly-created exclusion to defeat coverage. The Fifth District affirmed. The decision, if followed by other courts, could nullify the insurance coverage of thousands of insured entities.

The confusion of the trial court grew from an alternate argument raised by Ohio Casualty who argued that each hush tube failure claim was a single occurrence, which in monetary value was well below the threshold to invoke Ohio Casualty’s secondary coverage. The trial court therefore

construed the definition of the term “occurrence” in the insurance contract, which was defined in the Chubb Policy as: “...an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” The accident or harmful condition in this instance was the defective resin. The trial court concluded that, if the use of the defective resin constituted as single “occurrence,” then there was no coverage due to application of the loss-in-progress exclusion. However, in order to reach this conclusion, the trial court had to depart completely from the text of the exclusion. The actual contractual provision at issue provided:

[this] insurance does not apply to bodily injury or property damage that is a change, continuation or resumption of **bodily injury** or **property damage** known by [Mansfield], prior to the beginning of the policy period, to have occurred.

(Policy, emphasis added.)

The trial court interpreted the text this way:

[this] insurance does not apply to bodily injury or property damage that is a change, continuation or resumption of [**an Occurrence**] known by [Mansfield], prior to the beginning of the policy period, to have occurred.

As with the common law doctrines, the above exclusion stands for the proposition that, once a loss has been incurred, one can no longer insure it. However, the trial court confused the term “occurrence” with the term “property damage” therefore applying the exclusion to all damages causally related to a single event or “occurrence” instead of to applying to only known damage. In other words, while Mansfield knew that it had used some defective resin, and some damage had occurred, it had no knowledge of the extent of damage or the number of claims, if any, that would ultimately be made. The damage claims in this matter resulted from the failure of less than 1% of

the hush tubes manufactured with the defective resin. Consequently, the potential future claims were insurable events unknown to Mansfield at the time that it bought the policy.

The Magistrate's construction of the exclusion was unsupported by its actual text. The exclusion, as it is written in the contract, actually applies to "bodily injury" and "property damage" known to Mansfield. It does not, as interpreted by the Magistrate, apply to "occurrences" known to Mansfield. While Mansfield knew of the occurrence, the use of the Geon 210, Mansfield did not know of the actual third party claims for property damage, which became known to Mansfield during 2004 and 2005 policy periods. Each claim was a separate and distinct claim that occurred at different times, to different claimants, and in different localities. Therefore, the property damage resulting from the hush tube failures was not known to Mansfield prior to the policy periods. It became known during the policy periods. The Loss in Progress exclusion had no application.

The Fifth District committed the identical error of the trial court. The sum total of the Fifth District's analysis is as follows:

{¶15} The magistrate found it is irrelevant whether there was a single occurrence or multiple occurrences in this case, because the plain language of the parties' contracts excluded any disputed damages from coverage. The magistrate found the loss in progress provision excludes property damage that is a continuation or resumption of any bodily injury or property damage known by appellant before the beginning of the policy period. Stated simply, the magistrate found because appellant knew about the defective resin in 2002, the policies issued in 2003 and 2004 do not cover any damages caused by the defective resin.

{¶16} We find the court did not err in construing the loss in progress provision, and we agree the loss in progress provision excludes damages occurring prior to the beginning of the policy period, of which appellant knew prior to purchasing the policy.

The Fifth District could not have given this issue shorter shrift. Despite extensive briefing, the Fifth District, without any analysis whatsoever, commits the same error confusing the notion that the occurrence was known prior to the policy period with the notion that the actual damages were known prior to the policy period. **The damages claimed occurred during the policy period.** That is when the tubes failed. Consequently, the incidents of damage were not known prior to the policy period. The policy at issue defined an occurrence as including continuous or repeated exposure to substantially the same general harmful conditions. This clearly contemplates that multiple incidents of damage can result from the same occurrence, such as contamination, or the shipment of a defective product. This type of situation occurs frequently with respect to claims for environmental damage, asbestos exposure and other “long-tail” liabilities. “Long tail” liability is defined as: “[o]ne where an injury or other harm takes time to become known and a claim may be separated from the circumstances that caused it by as many as 25 years or more. Some examples: exposure to asbestos, which sometimes results in a lung disease called asbestosis; exposure to coal dust, which might cause black lung disease; or use of certain drugs that may cause cancer or birth defects.” *Dictionary of Insurance Terms*. Barron's Educational Series, Inc, 2000. A seller of an asbestos product knows that, many years ago, it created a risk of harm. That seller does not know if anyone will actually suffer injury. The potential claims are, and should be, insurable. The Fifth District nullified “long tail” insurance policies, and it did so without discussion or analysis.

The Federal District Court construed very similar insurance language in *Generali U.S. Branch v. National Trust Ins.*, 2009 WL 2762273. The Court explained that property damage claims are covered in the policy periods in which the damage occurred, even if the occurrence pre-existed the policy:

An ‘ occurrence’ policy covers any losses for which the insured is liable, no matter when the damage is discovered ... so long as the damage occurs during the policy period.” Am.Jur.2d Insurance § 687. “Under an occurrence-based comprehensive general liability policy, the “continuous trigger” theory applies to determine coverage where the damage can be characterized as continuous or progressive.” Am.Jur.2d Insurance § 688. “Under that theory, bodily injury and property damage that are continuous or progressively deteriorating throughout successive policy periods are covered by all policies in effect during those periods.” Id.

Id. at \*2.

The *Generali U.S. Branch* court also construed a similar Loss in Progress argument:

The loss in progress doctrine bars coverage where the insured is aware that a specific loss is imminent or still occurring at the time the policy becomes effective.” *Pizza Magia Int’l, LLC v. Assurance Co. of Amer.*, 447 F. Supp 2d 766 (W.D.Ky.2006). “[T]he principle that losses which exist at the time of the insuring agreement, or which are so probable or imminent that there is insufficient ‘risk’ being transferred between the insured and the insurer, are not proper subjects of insurance....

\*\*\*

The loss in progress doctrine applies “where the insured has subjective knowledge of the damages that could underlie a legal claim against it.” *American & Foreign Ins. Co., Inc.*, 441 F.3d at 346.

Id. at \*6.

In this case, the property damage at issue occurred to each third party within either the policy period of December 1, 2003 to December 1, 2004, or December 1, 2004 to December 1, 2005. The policy at issue provides:

This coverage applies only to such bodily injury or property damage that occurs during the policy period.

*(Excerpt from primary insurance policy.)*

Although the occurrence that caused the damage took place in 2002, the damage itself did not immediately manifest for each third-party. The policy covered property damage that occurs during the policy period. The property damage from the hush tube failures occurred during the policy periods. The losses were covered. The loss-in-progress exclusion did not apply.

### CONCLUSION

The loss-in-progress exclusion is a common provision in many insurance contracts, and it applies frequently to cases involving widespread injury to multiple parties such as asbestos exposure, environmental contamination, and defective products. For the protection of the public, entities must be able to insure against such losses. The Fifth District construed this type of coverage out of existence, and it did so without any analysis whatsoever. This issue is of public and great general interest because it is almost certain to replicate in a situation where multiple parties would receive no compensation for their injuries.

Respectfully submitted,



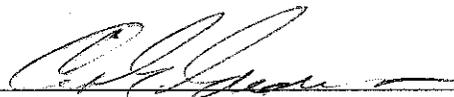
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was sent via regular U.S. mail this 21<sup>st</sup> day of October, 2011, to the following:

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**APPENDIX**

COURT OF APPEALS  
ASHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

2011 SEP -7 AM 10: 56

THE OHIO CASUALTY INSURANCE  
COMPANY

Plaintiff-Appellee

-vs-

MANSFIELD PLUMBING  
PRODUCTS, LLC

Defendant-Appellant

JUDGES: ANHETIE SHAW  
CLERK OF COURTS  
ASHLAND, OHIO  
Hon. W. Scott Gwin, J.  
Hon. Sheila G. Farmer, J.  
Hon. Julie A. Edwards, J.

Case No. 2011-COA-009

OPINION

CHARACTER OF PROCEEDING:

Civil appeal from the Ashland County Court  
of Common Pleas, Case No. 07CIV467

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

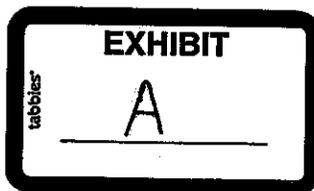
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*Gwin, P.J.*

{¶1} Defendant-appellant Mansfield Plumbing Products, LLC appeals a judgment of the Court of Common Pleas of Ashland County, Ohio, which affirmed the decision of the magistrate to whom the matter was referred. The magistrate found plaintiff-appellee the Ohio Casualty Insurance Company had no obligation to defend, indemnify, or provide coverage for claims for damages arising from the failure of a component of one of appellant's products. Appellant assigns two errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED IN ADOPTING THE MAGISTRATE'S DECISION WHICH IGNORED, OR NULLIFIED, A VALID STIPULATION OF THE PARTIES.

{¶3} "II. THE TRIAL COURT ERRED IN ADOPTING THE MAGISTRATE'S DECISION WHEREIN THE MAGISTRATE ERRONEOUSLY CONSTRUED THE CONTRACTUAL LOSS IN PROGRESS EXCLUSION."

{¶4} The issue in this case is whether the "loss in progress" exclusion contained in the parties' contracts of insurance was properly before the magistrate, and if so, whether it precludes appellant's recovery.

{¶5} The matter was submitted to the magistrate on cross motions for summary judgment. The magistrate found the relevant facts of the case are undisputed. Appellant produces various plumbing parts and fixtures. In the spring of 2002, appellant purchased a resin identified as Geon 210 from PolyOne Corporation, which is not a party to the lawsuit. Appellant used the Geon 210 resin to manufacture a toilet component known as a hush tube. Appellant installed the hush tubes made from Geon

210 in toilets which were subsequently sold to third-party consumers. In August 2002, appellant became aware of cracks developing in some of the hush tubes produced from Geon 210 resin. Many of appellant's customers suffered property damage as a result of cracked hush tubes, and numerous damage claims were submitted by the customers between 2002 and 2005.

{¶16} In the years 2003 and 2004, appellant contracted with Federal Insurance Company to provide primary liability insurance coverage. The primary policies had a policy limit of \$1,000,000 of coverage per occurrence. The policies also required a \$500,000 per occurrence self-insured retention, which operates like a deductible.

{¶17} Appellant also purchased excess insurance policies from appellee for the years 2003 and 2004. The 2003 excess policy provided coverage of up to \$25,000,000 per occurrence, while the 2004 excess policy provided \$5,000,000 in coverage per occurrence. The excess policies were only triggered by exhaustion of the primary liability policies. This means before appellee's policies would apply, appellant would be required to pay the first \$500,000 of damages arising out of each occurrence, and the primary policy would pay the next \$1,000,000 in damages.

{¶18} Ultimately, appellant paid third-party property damage claimants \$3,781,675.74 for damages caused by the failure of the hush tubes during the years 2003 and 2004. The primary insurance company recognized all the hush tube failures in any given policy year as one occurrence, and paid appellee \$1,000,000 for each of the relevant policy years. Appellant paid its self-insured retention of \$500,000 for each policy year.

{¶9} The magistrate's decision reviewed two specific terms in the excess policy. The excess policy provides it will insure appellant against "bodily injury or property damage that occurs during the policy period." The primary policy defines the word "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The magistrate noted the excess policies for 2003 and 2004 are "follow form" policies, which means they adopt the terms of the primary policies unless they specifically state otherwise.

{¶10} The second policy term in dispute is the "loss in progress" exclusion. The excess policy excludes "bodily injury or property damage that is a \*\*\* continuation or resumption of any bodily injury or property damage known \*\*\* prior to the beginning of the policy period, to have occurred." Appellee successfully argued to the magistrate and the court that appellant knew its toilets malfunctioned in 2002, prior to its purchase of the excess policy. Appellee argued because appellant knew of the damage, even if the damage fell within the policy period, it was excluded.

I.

{¶11} Appellant's first assignment of error urges the trial court erred in adopting the magistrate's decision because the magistrate considered a policy exclusion that was beyond the scope of the issues and the stipulation presented.

{¶12} The joint stipulation filed by the parties on May 6, 2010 provides that if the court finds there was one occurrence under the primary liability insurance contracts, then appellant "\*\*\*\* sustained a net loss, in excess of itself-insured retentions and primary insurance, of \$781,675.74, for which it is entitled to recovery, together with interest on said amount \*\*\* subject to the court's ruling on the legal issues described

and set forth in paragraph four below". In the alternative, if the court found each third party damage claim was a separate occurrence, then appellee's policies would not apply. The stipulation provided the parties reserved all rights to appeal the rulings of the court, and the right to supplement the record on the remaining legal issues.

{¶13} It is appellant's position that because the stipulation does not expressly refer to the loss in progress provision, the magistrate should not have considered it. Appellant also argues, appellee had waived any argument regarding the exclusion by omitting it from the stipulation.

{¶14} Appellee asserts the joint stipulation does not provide that the loss in progress exclusion is inapplicable to the case. Appellee also argues the stipulated provision reserving the right to supplement the record on the legal issues means it has not waived its arguments regarding the applicability of the loss in progress coverage exclusion. In fact, appellee argues appellant specifically admitted the loss in progress issue is potentially determinative of the case, and never moved to strike any of the arguments appellee raised regarding the loss in progress exclusion.

{¶15} The magistrate found it is irrelevant whether there was a single occurrence or multiple occurrences in this case, because the plain language of the parties' contracts excluded any disputed damages from coverage. The magistrate found the loss in progress provision excludes property damage that is a continuation or resumption of any bodily injury or property damage known by appellant before the beginning of the policy period. Stated simply, the magistrate found because appellant knew about the defective resin in 2002, the policies issued in 2003 and 2004 do not cover any damages caused by the defective resin.

{¶16} We find the court did not err in construing the loss in progress provision, and we agree the loss in progress provision excludes damages occurring prior to the beginning of the policy period, of which appellant knew prior to purchasing the policy.

{¶17} The first assignment of error is overruled.

II.

{¶18} In its second assignment of error, appellant argues if the loss in progress exclusion was properly before the court, then the court misconstrued the provision, and it does not bar appellant's recovery.

{¶19} Appellant asserts even if the occurrence that caused the damages took place in 2002, the damage did not immediately manifest itself until later. Appellant asserts the excess coverage applies to damages that occurred during the policy periods, and it had no way of knowing when any future property damage claims might arise or how extensive they would be. Appellant urges the policies were in effect when the property damage actually developed.

{¶20} As the magistrate properly found, even if we were to find each damage claim is a separate occurrence, the damages all arose from use of the defective resin, and appellant knew prior to purchasing the policies that the hush tubes were failing and causing damage to third parties. We agree with the court the failing of the hush tubes is a continuation of property damage and is excluded by the loss in progress provision.

{¶21} The second assignment of error is overruled.

{¶22} For the foregoing reasons, the judgment of the Court of Common Pleas, of Ashland County, Ohio, is affirmed.

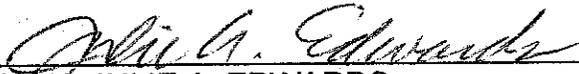
By Gwin, P.J.,

Farmer, J., and

Edwards, J., concur

  
HON. W. SCOTT GWIN

  
HON. SHEILA G. FARMER

  
HON. JULIE A. EDWARDS

WSG:clw 0809

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

2011 SEP -7 AM 10: 56

ANNETTE SHAW  
CLERK OF COURTS  
ASHLAND, OHIO

THE OHIO CASUALTY INSURANCE  
COMPANY

Plaintiff-Appellee

-vs-

JUDGMENT ENTRY

MANSFIELD PLUMBING  
PRODUCTS, LLC

Defendant-Appellant

11-COA-009  
CASE NO. 2010-CAF-03-0024

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, of Ashland County, Ohio, is affirmed. Costs to appellant.

W. Scott Gwin  
HON. W. SCOTT GWIN

Sheila G. Farmer  
HON. SHEILA G. FARMER

Julie A. Edwards  
HON. JULIE A. EDWARDS

Young  
Kramer  
COA  
Muni Ct. COA  
Muni Ct. Judge

JM # CA-1 *DP*