

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEXINGTON INSURANCE COMPANY,)	
)	
Plaintiff,)	No. 05-652
)	
v.)	
)	(Ditter, J.)
KIDSPEACE CORPORATION,)	
)	
Defendant and)	
Third-Party Plaintiff,)	
)	
v.)	
)	
PENNSYLVANIA PROPERTY AND)	
CASUALTY INSURANCE GUARANTY)	
ASSOCIATION,)	
)	
Third-Party Defendant.)	

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION
FOR SUMMARY JUDGMENT OF DEFENDANT AND THIRD-PARTY
PLAINTIFF KIDSPEACE CORPORATION**

Defendant and Third-Party Plaintiff KidsPeace Corporation (“KidsPeace”), by and through its counsel, Gross, McGinley, LaBarre & Eaton, LLP, respectfully submits this Reply Memorandum of Law in further Support of its Motion for Summary Judgment.

I. PRELIMINARY STATEMENT

The arguments raised in Plaintiff Lexington Insurance Company’s (“Lexington” or “Plaintiff”) opposition papers are without merit and do not provide a basis for Lexington to avoid summary judgment in favor of KidsPeace. While Lexington concedes that the definition of “professional service” in the policy of insurance issued to KidsPeace by Lexington (the “Lexington Policy”) is broader than the definition fashioned by the Pennsylvania Supreme Court in Physicians

Ins. Co. v. Pistone, 726 A.2d 339 (Pa. 1999), it nevertheless attempts to rely on the definition provided in Pistone. Such reliance is misplaced. It is the definition in the Lexington Policy at issue here, not that in Pistone, that governs the dispute between Lexington and KidsPeace. Furthermore, as explained more fully in KidsPeace's opening brief and discussed again below, the sexual misconduct exclusion in the Lexington Policy does not apply here because there is no allegation in the MC's Complaint (and in fact no conceivable way) that KidsPeace knew or should have known of the sexual misconduct allegedly committed by DS.

The arguments set forth by Third-Party Defendant, the Pennsylvania Property and Casualty Insurance Guaranty Association ("PPCIGA"), are equally unavailing. PPCIGA emphasizes that it is not the insurer, but rather a statutory creation subject to the limitations of the Pennsylvania Property and Casualty Insurance Guaranty Act (the "Act") under which it was created. Despite PPCIGA's assertion to the contrary, the undisputed facts KidsPeace clearly explained the KidsPeace opening brief confirm that PHICO Insurance Company ("PHICO") issued the policy that is the subject of the third-party claim against PPCIGA (the "PHICO Policy") and that PPCIGA is a statutory entity that is only required to pay claims covered under the PHICO Policy, subject to certain statutory limitations, because PHICO was declared insolvent. Because MC's claims against KidsPeace are covered under the PHICO Policy, and there are no provisions in the Act that bar recovery from PPCIGA, PPCIGA is required to indemnify KidsPeace for the amount of the settlement, up to \$300,000 (plus defense costs) to the extent that these amounts are not covered by the Lexington Policy.

II. LEGAL ARGUMENT

A. MC's Claims Against KidsPeace in the Underlying Litigation are Covered Under the Healthcare Professional Liability Coverage of the Lexington Policy.

1. The Definition of "Professional Services" Provided in Pistone is Irrelevant to the Interpretation of the Lexington Policy, which Provides its own Definition of "Professional Services."

Lexington argues that MC's claims against KidsPeace are not covered under the Lexington Policy because most of the allegations against KidsPeace in MC's Complaint do not allege damages resulting from a medical incident and, to the extent that some of the allegations against KidsPeace allege damages resulting from a medical incident, KidsPeace is not entitled to indemnification because those claims are excluded from coverage under the Lexington Policy's sexual misconduct exclusion. These contentions are, however, erroneous.

a. The Draft MC Complaint Alleges the Occurrence of a "Medical Incident" as Defined in the Lexington Policy.

The Healthcare Professional Liability Coverage provides, in pertinent part:

[Lexington] will pay those sums that **you** become legally obligated to pay others as damages resulting from a **medical incident** arising out of **professional services** provided by any **Insured**. The amount [Lexington] will pay for damages is limited as described in Section IV., Limits of Insurance. The **medical incident** must take place on or after the retroactive date and before the end of the **policy period**. A **claim** for a **medical incident** must be first made against an **Insured** during the **policy period** or the extended reporting period, if applicable.

(Stipulation of Facts, Ex. A at 027 (emphasis in original))

The Lexington Policy defines "medical incident" as "any act, error or omission in the providing of or failure to provide **professional services**." (Stipulation of Facts, Ex. at 016 (emphasis in original)) "Professional services" are defined as:

1. Medical, surgical, dental, nursing or other health care services including but not limited to the furnishing of food or beverages in connection with such services; the practice of nuclear medicine; the furnishing or dispensing of

drugs or medical, dental or surgical supplies or appliances; or the handling or treatment of deceased human bodies, including, but not limited to, autopsies, organ donation or other procedures;

2. Services by any person as a member of a formal accreditation, standards review or similar professional board or committee of any Insured; or
3. Supervising, teaching, proctoring others at your request.

(Stipulation of Facts, Ex. A at 018)

According to Lexington, only two of the allegations against KidsPeace conceivably qualify as medical incidents because, under Pistone, in order to determine whether a lawsuit alleges a “professional service,” the court must determine whether the act that caused the harm is a medical skill associated with specialized training and none of the acts or omissions of which MC accused KidsPeace is a medical skill associated with specialized training. (Pl.’s Mem. at 9-10)¹ The definition of professional services provided in Pistone is, however, inapposite. The court in Pistone developed a definition of “professional service” because the policy at issue there did not supply a definition of the term. Because the Lexington Policy provides its own definition of “professional services,” there is no need to turn to a court-created definition.² A review of the Lexington Policy’s definition of “professional services” demonstrates that it clearly was not intended to be confined to acts or omissions involving a medical skill associated with specialized training.

¹ References to the Memorandum of Law in Support of the Response and Cross-Motion for Summary Judgment of Plaintiff, Lexington Insurance Company are cited herein as “Pl.’s Mem. at ___.”

² Lexington’s reliance on Visiting Nurse Assoc. of Greater Philadelphia v. St. Paul Fire and Marine Ins. Co., 65 F.3d 1097 (3d Cir. 1995), is similarly misplaced. As in Pistone, and unlike the circumstances here, the policy at issue in Visiting Nurse Assoc. of Greater Philadelphia did not provide a definition of the term “professional services.” Id. at 1100. Accordingly, the court had to supply its own definition. Here, the Court must apply the Lexington Policy’s definition of the term. As the Visiting Nurse Assoc. of Greater Philadelphia Court stated “disposition in each case will *depend upon the specific language of the provisions defining the coverage* and exclusions of the particular policy.” Id. at 1102 (emphasis added). Furthermore, the insured’s contention in Visiting Nurse Assoc. of Greater Philadelphia that bribing the employees of a hospital to refer patients to it is somehow connected to the professional services it renders is simply ludicrous, id. at 1100, and a far cry from the allegations against KidsPeace in MC’s complaint.

The Lexington Policy’s definition of “professional services” encompasses “other health care services including *but not limited to* the furnishing of food or beverages in connection with such services” (Stipulation of Facts, Ex. A at 018 (emphasis added)) First, even without the inclusion of the “including but not limited to” language, the term “other health care services” is an extremely broad expression encompassing innumerable unnamed “services” in the health care field. Second, the furnishing of food or beverages is *not* a medical skill and is *not* associated with specialized training, yet it is included in the Lexington Policy’s definition of “professional services.” If professional services is defined to include, but is “not limited to,” furnishing food or beverages in connection with health care services, then, *a fortiori*, acts or omissions that are not medical skills associated with specialized training cannot be said to be excluded from the definition of “professional services.” (*Id.*) The definition explicitly includes such acts or omissions. Furthermore, both “furnishing or dispensing of . . . medical, dental or surgical supplies or appliances” and “supervising, teaching, proctoring others at your request” encompass acts that do not entail medical skill associated with specialized training. Because the definition of “professional services” provided in the Lexington Policy is not limited to acts or omissions involving medical skills associated with specialized training, the narrow court-created definition in the Pistone decision is inapposite and the acts or omissions allegedly committed by KidsPeace, which the underlying complaint asserts caused MC’s injury, constitute medical incidents even if they do not require medical skills associated with specialized training.

Given the broad definition of “professional services,” the allegations against KidsPeace in the MC Complaint allege the occurrence of a medical incident under the Lexington Policy. With respect to MC’s claims against KidsPeace, Counts II and III of MC’s complaint allege claims of negligence and breach of a financial fiduciary duty against KidsPeace. (Stipulation of Facts, Ex. C

¶¶ 25-39) These counts allege, in part, that KidsPeace: failed to properly investigate and hire employees; failed to properly test, train and supervise employees so as to prevent sexual abuse of its patients; failed to implement appropriate monitoring and security practices to prevent the sexual abuse and mistreatment of patients; failed to terminate DS, who KidsPeace knew or should have known was unfit for employment at KidsPeace; failed to protect MC from DS, who, by his history, temperament and stature was inclined to intimidate, overreach and abuse patients; failed to take reasonable precautions to ensure the safety of MC; failed to adequately monitor the television surveillance activities including the treatment of MC by DS; and failed to abide by certain statutes and regulations. (Stipulation of Facts, Ex. C at ¶ 26) MC asserts that these failures resulted in his injuries. (Stipulation of Facts, Ex. C at ¶ 27-31) All of these allegations relate to failures with respect to the evaluations, therapy, and diagnostic and treatment services provided by KidsPeace. These services are no less integral to the healthcare KidsPeace provides to its patients than the furnishing of food or beverages.³ This list of alleged failures constitute “omissions” “in the providing of or failure to provide professional services” as defined in the Lexington Policy. Additionally, as discussed in KidsPeace’s opening brief, and as conceded by Lexington in its opposition (Pl.’s Mem. at 11, 12),⁴ certain of these allegations concern “[s]upervising, teaching,

³ As noted by PPCIGA in its opposition brief, the Superior Court of Pennsylvania has expressly held that “the training, supervising and monitoring of employees to assist with the care and treatment of a health care professional’s patients is an integral part of providing such professional’s service.” American Rehabilitation and Physical Therapy v. American Motorists Ins. Co., 829 A.2d 1173, 1178 (Pa. Super 2003), rev’d on other grounds, 578 Pa. 154, 849 A.2d 1202 (2004); see also Yee v. Roberts, 878 A.2d 906, 912-13 (Pa. Super. 2005)

⁴ Although Lexington admits that subparagraphs c. and g. of paragraph 26 of MC’s complaint qualify as claims for damages resulting from a medical incident (Pl.’s Mem. at 11), Lexington glosses over the fact that, based on its own rationale, subparagraph b. would also qualify as a claim for damages resulting from a medical incident. How can one whose job is to supervise employees who are required by their positions in a psychiatric hospital to have medical skills associated with specialized training not himself have medical skills associated with specialized training? The supervisor would, of course, also be required to have medical skills associated with specialized training. Nevertheless, as discussed above, the Pistone definition of “professional service” is not applicable here.

proctoring others at your request,” which is specifically included in the definition of “professional services.”

Lexington also argues that none of the alleged acts or omissions allegedly committed by KidsPeace are medical incidents because the act that caused MC’s injuries was the alleged sexual misconduct. (Pl.’s Mem. at 10) This is contrary to the allegations of MC’s complaint. While MC’s complaint asserts that DS’s conduct harmed him, it also asserts that acts and omissions that he attributes to KidsPeace resulted in physical, psychological and monetary injury. (Stipulation of Facts, Ex. C at ¶ 27-31, 36-39) If KidsPeace’s conduct did not purportedly cause MC’s injuries, he would not have had a cognizable claim, and would not have filed suit, against KidsPeace.

Because the Lexington Policy defines “medical incident” as “any act, error or omission in the providing of or failure to provide **professional services**,” (Stipulation of Facts, Ex. A at 016 (emphasis in original)), and because the failures of KidsPeace alleged by MC are omissions in the providing of or failure to provide professional services, a “medical incident” occurred, thereby triggering coverage under the Healthcare Professional Liability Coverage of the Lexington Policy. Accordingly, summary judgment should be granted in favor of KidsPeace.

b. Exclusion O is not Applicable to MC’s Claims against KidsPeace.

Lexington argues that sexual misconduct exclusion is applicable here because MC’s complaint alleges that KidsPeace should have known of the alleged attack, but failed to prevent or stop it. (Pl.’s Mem. at 15-16) This is patently untrue.

The Healthcare Professional Liability Coverage of the Lexington Policy contains an exclusion for “sexual misconduct.” (Stipulation of Facts, Ex. A at 031) According to the Lexington Policy, there is no Healthcare Professional Liability Coverage for a medical incident, claim or suit arising out of:

O. Sexual Misconduct

Any sexual act, including without limitation sexual intimacy (even if consensual), sexual contact, sexual advances, requests for sexual favors, sexual molestation, sexual assault, sexual abuse, sexual harassment, sexual exploitation or other verbal or physical conduct of a sexual nature. However, this exclusion does not apply to:

1. Any Specific Individual **Insured** who allegedly committed such sexual misconduct, unless it is judicially determined that the Specific Individual **Insured** committed the sexual misconduct. If it is judicially determined that the Specific Individual **Insured** committed the sexual misconduct [AIG] will not pay any damages.
2. Any other **Insured**, unless that **Insured**:
 - a. knew or should have known about the sexual misconduct allegedly committed by the Specific Individual **Insured**, but failed to prevent or stop it; or
 - b. knew or should have known that the Specific Individual **Insured** who allegedly committed the sexual misconduct had a prior history of such sexual misconduct.

[Lexington] will defend **claims** alleging such acts until final adjudication.

As used in this exclusion, Specific Individual **Insured** includes employees and authorized volunteer workers while performing duties related to the conduct of **your** business.

(Stipulation of Facts, Ex. A at 031 (emphases in original))

MC's claims against KidsPeace do not allege that KidsPeace committed any sexual misconduct. The claims in MC Complaint that implicate KidsPeace do not allege that KidsPeace "knew or should have known about the sexual misconduct allegedly committed by . . . [DS], but failed to prevent or stop it," or that KidsPeace "knew or should have known that . . . [DS] who allegedly committed the sexual misconduct had a prior history of such sexual misconduct."

(Stipulation of Facts, Ex. A at 031)

MC's Complaint alleged, for example, that KidsPeace: (1) failed to "implement appropriate monitoring and security practices to prevent the sexual abuse and mistreatment of patients;" and (2) failed "to adequately monitor the television surveillance activities including the aforementioned treatment of . . . [MC] by . . . [DS]." (Stipulation of Facts, Ex. C at ¶ 26) There is no allegation that, had KidsPeace undertaken the suggested actions, it would have or should have learned of the sexual misconduct purportedly committed by DS. Even assuming, *arguendo*, that the procedures advocated by MC in his complaint were implemented, KidsPeace would not have known of the sexual misconduct allegedly committed by DS in time to prevent it. Someone viewing a monitor or other surveillance equipment could only have learned of the sexual misconduct at the time it occurred.⁵ MC's complaint does not call for the installation of a crystal ball that reveals future acts. Because any monitoring equipment would not have revealed sexual misconduct until the misconduct actually occurred, KidsPeace could not have known of this misconduct prior to its occurrence, and therefore could not have prevented such malfeasance. Since the sexual misconduct exclusion could only be applicable here if KidsPeace could have known and prevented the sexual assault purportedly committed by DS, the sexual misconduct exclusion does not apply.

Because a medical incident as defined in the Lexington Policy occurred here, and the sexual misconduct exclusion is inapplicable, Lexington improperly denied coverage to KidsPeace and KidsPeace's summary judgment motion against Lexington should be granted.

⁵ In support of its argument, Lexington quotes the following language from KidsPeace's opening brief: "The most that could be taken away from the various allegations is the proposition that, had KidsPeace implemented the suggested measures, it allegedly could have prevented the purported sexual misconduct committed by DS." (Pl.'s Mem. at 16) This quote provides no support for Lexington's argument that the sexual misconduct exclusion applies here. The quoted language does not suggest that KidsPeace could have or should have known of the purported sexual assault prior to its occurrence. What the quoted passage means is that, had the suggested measures been implemented, they could arguably have had some sort of prophylactic effect, preventing misconduct because an employee would be aware that he or she was being monitored. This, however, does not satisfy the "knew or should have known" provision of the sexual misconduct exclusion. Had a KidsPeace employee decided to engage in the conduct of which DS has been accused, despite the surveillance, KidsPeace still would not have known until such conduct occurred.

B. PPCIGA is Obligated to Indemnify KidsPeace.

1. The Act's Exhaustion Requirement Does Not Preclude Recovery from PPCIGA.

PPCIGA argues that, because the Act requires an insured to exhaust his rights under any other applicable policy of insurance, it is not obligated to indemnify KidsPeace by virtue of its claim against Lexington. (PPCIGA Br. at 8-9)⁶ PPCIGA's argument is untenable.

If the Court were to decide that the Lexington Policy does not cover MC's claims against KidsPeace, then PPCIGA's exhaustion argument would be moot. Similarly, if the Court were to determine that the PHICO Policy does not cover MC's claims, PPCIGA's exhaustion argument would again be moot. Assuming, however, that both the Lexington Policy and PHICO Policy cover MC's claims, which they do, the Act's exhaustion requirement still would not preclude KidsPeace from recovering from PPCIGA.

KidsPeace settled MC's claims for \$700,000. Although the Lexington Policy limit is \$1,000,000, the Policy has a \$100,000 deductible. Accordingly, once KidsPeace recovered \$600,000 from Lexington, its rights under the Lexington Policy would be completely exhausted. At that point, the \$100,000 difference between the amount paid to MC in settlement of his claims against KidsPeace and the amount collected from Lexington would be payable as a covered claim under the PHICO Policy.

PPCIGA contends that the \$100,000 is excluded from the definition of "covered claims" provided in Section 991.1802 of the Act, and, therefore, it would not be obligated to indemnify

⁶ References to the Brief of Third-Party Defendant the Pennsylvania Property and Casualty Insurance Guaranty Association in Opposition to Motion for Summary Judgment of Defendant and Third-Party Plaintiff KidsPeace Corporation are cited herein as "PPCIGA Br. at ___."

KidsPeace for this amount. (PPCIGA Br. at 8-9) This definition of “covered claim” does not preclude recovery from PPCIGA.

Under the Act’s definition of the term “covered claim,” “covered claim” does not include any amount “due any reinsurer, insurer, insurance pool or underwriting association as subrogation recoveries or otherwise.” 40 P.S. § 991.1802. Contrary to PPCIGA’s argument, the \$100,000 deductible does not constitute an amount due to Lexington. A deductible is “a clause in an insurance policy that relieves the insurer of responsibility for an initial specified loss of the kind insured against.” Webster’s Ninth New Collegiate Dictionary 332 (9th ed. 1986). Consequently, if there is overlapping coverage under the two policies, no amount will be due to Lexington. Instead, the deductible would simply relieve Lexington of paying the first \$100,000 of the \$700,000 covered claim, and, accordingly, Lexington would be required to pay KidsPeace the remaining \$600,000. Lexington would not have to pay \$700,000, and then have KidsPeace owe it \$100,000. The \$100,000 is not due Lexington. Because the \$100,000 deductible is not an amount due Lexington, it is not excluded from the Act’s definition of “covered claim.” Once KidsPeace fully recovered under the Lexington Policy, \$100,000 of the claim covered by both the Lexington and PHICO Policies would still remain. Accordingly, even with overlapping coverage, exhaustion of the claim under the Lexington Policy does not preclude recovery under the PHICO Policy because, despite exhaustion, a portion of the claim would remain unpaid.

2. The Claims Against KidsPeace in the MC Litigation are Covered Under the General Liability Coverage of the PHICO Policy.

PPCIGA argues MC’s claims against KidsPeace are not covered by the general liability coverage (“GL Coverage”) of the PHICO Policy for the same reasons that they are covered under the

professional liability coverage of the Lexington Policy. (PPCIGA Br. at 10) This does not hold because the definitions of the term “medical incident” in each policy are materially different.

The GL Coverage indemnifies KidsPeace for “all sums which the **insured** shall be legally obligated to pay as damages because of **personal injury** and **property damage** caused by an **occurrence** during the **policy period.**” (Stipulation of Facts, Ex. B at 0017 (emphases in original))

An “occurrence” is defined as:

- (1) an accident (including continuous or repeated exposure to substantially the same general conditions, or the happening of any of the offenses described in the definition of personal injury) which results in personal injury or property damage neither expected nor intended from the standpoint of the insured;
- (2) an assault, battery, or assault and battery, not committed by or at the direction of the insured which results in bodily injury or property damage; or
- (3) any action taken by the insured in good faith in an emergency for the purpose of preventing injury or damage to the person or property of the insured or others, which results in bodily injury or property damage.

(Stipulation of Facts, Ex. B at 0013) (emphases omitted). Based upon these terms and definitions, the claims asserted against KidsPeace in Counts II and III of MC’s draft complaint are covered under the PHICO Policy’s GL Coverage. MC asserted he suffered bodily injury as a result of the alleged assault and battery committed by DS. (See Stipulation of Facts, Ex. C ¶¶ 27, 29, 34, 37)

PPCIGA contends that the claims asserted by MC against KidsPeace arise from a “medical incident,” and that such claims are excluded from GL Coverage under the PHICO Policy. (PPCIGA Br. at 11-13) The claims MC asserted against KidsPeace do not, however, arise from a “medical incident” as that term is defined in the PHICO Policy. The PHICO Policy defines a “medical incident,” in pertinent part, as:

any act or omission:

- (1) in the furnishing of any professional health care service *immediately incident* to the care of patients including, but not limited to, the furnishing of food, beverages, medications or appliances in connection with such services and the post-mortem handling of human bodies by the insured, any employee of the insured, or any person acting under the personal direction, control or supervision of the insured.”

(Stipulation of Facts, Ex. B at 0012) (emphases omitted and added). Unlike the Lexington Policy, the PHICO Policy requires the “professional health care service” be “immediately incident to the care of patients” and, further, does not define the term “professional health care service.”

(Stipulation of Facts, Ex. B at 0012)

Because the PHICO Policy does not provide a definition of “professional health care service,” the Pistone definition is applicable. As previously discussed, in Pistone, the court held courts must examine “whether the act that caused the alleged harm is a medical skill associated with specialized training” to determine whether the act relates to a professional health care service. Pistone, 726 A.2d at 344. Here, the acts allegedly committed by KidsPeace, which purportedly led to MC’s injuries, do not concern a “professional health care service” because these acts or omissions do not involve “medical skill[s] associated with specialized training.” Id.

In support of its position, PPCIGA cites several Pennsylvania intermediate appellate decisions, some of which stand for the proposition that the hiring, supervision, and monitoring of employees are part of the provision of professional health care services, see, e.g., American Rehabilitation and Physical Therapy v. American Motorists Ins. Co., 829 A.2d 1173 (2003), while other decisions stand for the proposition that the very same functions are not professional health care services, see, e.g., St. Joseph Med. Ctr. v. Medical Professional Liability Catastrophe Loss Fund, 854

A.2d 692 (2004).⁷ Without regard to this split in authority, the medical incident exception found in the PHICO Policy cannot apply here. Unlike the policies at issue in the cases cited by PPCIGA, the PHICO Policy's definition of "medical incident" requires the act or omissions constituting a "medical incident" to be "*immediately incident*" to the care of patients. (Stipulation of Facts, Ex. B at 0012) (emphasis added).

As discussed above, the claims against KidsPeace allege, in part, that it: failed to properly investigate and hire employees; failed to properly test, train and supervise employees so as to prevent sexual abuse of its patients; failed to implement appropriate monitoring and security practices to prevent the sexual abuse and mistreatment of patients; failed to terminate DS, who KidsPeace knew or should have known was unfit for employment at KidsPeace; failed to protect MC from DS, who, by his history, temperament and stature was inclined to intimidate, overreach and abuse patients; failed to take reasonable precautions to ensure the safety of MC; failed to adequately monitor the television surveillance activities including the treatment of MC by DS; and failed to abide by unspecified statutes and regulations. (Stipulation of Facts, Ex. C ¶ 26) While some of the allegations pertaining to supervision or monitoring arguably occur at the time of the provision of care to the patient, and therefore could be considered "immediately incident" to such care (PPCIGA Br. at 13), other of the allegations, such as the failure properly investigate and hire employees, the failure to properly test and train employees, and the failure to terminate an unfit employee, clearly are not contemporaneous with, and therefore not "immediately incident" to, the care of patients. Accordingly, these claims are not excluded from the GL Coverage of the PHICO Policy and PPCIGA wrongfully denied coverage.

⁷ For the reasons set forth in KidsPeace's opening brief, KidsPeace maintains that these functions are not professional health care services under the PHICO Policy and, therefore, the medical incident exception is not triggered.

For these reasons, and the reasons set forth in KidsPeace's opening brief, PPCIGA is obligated to indemnify KidsPeace and KidsPeace's motion for summary judgment should be granted.

VI. CONCLUSION

Therefore, in view of the foregoing, Defendant and Third Party Plaintiff KidsPeace Corporation respectfully requests that this Honorable Court enter a judgment in favor of Defendant and against Plaintiff Lexington Insurance Company and against Third-Party Defendant Pennsylvania Property and Casualty Insurance Guaranty Association.

Respectfully submitted,

GROSS, MCGINLEY, LABARRE & EATON, LLP



BY: _____

Date: February 3, 2006

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CERTIFICATE OF SERVICE

SUSAN ELLIS WILD, ESQUIRE, hereby certifies that she has electronically filed a true and correct document entitled Reply Memorandum of Law in further Support of Motion for Summary Judgment of Defendant and Third-Party Plaintiff Kidspace Corporation, which is available for viewing and downloading from the United States District Court, Eastern District of Pennsylvania Electronic Case Filing System (ECF), and in addition, she will serve a true and correct copy of this document upon the following person(s) listed below, by first class United States Mail, postage prepaid, on Friday, February 3, 2006:


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Date: 2/3/06

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