

# In the Case of ...

September 2021

Welcome to Pendulum Claims Management's most recent installment of

## *In the Case of ... The Case of Antibiotic and Pain Therapies Gone Wrong*

These semi-regular articles will outline a set of fictitious claim circumstances and some opinions on actions that a senior housing and/or elder care insured can use to help protect their coverage and improve communication with their brokers and insurers.

These articles are not legal advice, they are merely being provided as general examples meant to help educate and inform. Always follow up with your carrier and broker on any actual claims and coverage questions and, as always, make sure to read and understand your policies.

### **Fact Pattern**

The skilled nursing facility is part of a small-medium, regional long term care chain.

The resident was a married, 46-year-old mother of four, who had suffered a ruptured abdominal aortic aneurysm which required surgical intervention. Her post-op course was complicated due to numerous factors, including underlying renal issues, as well as dysphagia requiring a percutaneous endoscopic gastrostomy (PEG) tube placement. She was bed/wheelchair bound and required assistance with all activities of daily living (ADLs). She was admitted with an unstageable skin breakdown to the left buttock and a Stage 3 skin breakdown to the coccyx.

During her 30-day residency, the skin breakdown at the coccyx resolved, but the wound on the left buttock did not improve. A culture was taken two days before her discharge to home health and returned positive for E. coli after her discharge.

The resident was subsequently admitted to a different skilled nursing facility for significant antibiotic and pain therapies. She was discharged to home health after a 60-day stay, and her skin conditions resolved.

### **Considerations**

The facility records contained several areas of inaccurate charting and, of specific issue, was the fact that the initial skin assessment upon admission reflected the resident was "at a low risk" for skin breakdown. Although a wound care nurse was consulted and a care plan was initiated, charting was spotty at best with respect to the implementation of that care plan as well as other items including documentation of the provision of her nutritional requirements.

However, the record was replete with documentations of the resident's significant and frequent complaints of pain and the medications ordered to alleviate it throughout her stay.

Two of the formerly employed facility certified nursing assistants presented poorly to defense counsel during the initial interviews. They had both left the employment of the facility before the onset of litigation. Despite their departure on what administrators described as "good terms," both witnesses were extremely verbal in their criticism of their former Director of Nursing and their employment. Sadly, the Director of Nursing of the facility died prior to the onset of discovery.

The skilled nursing facility was but one of several defendants in the case. The acute care facility, and rehabilitation facility where the skin breakdowns began were also named. They also faced documentation issues of their own.

The case ended in a global settlement, with the skilled nursing facility bearing approximately 25 percent of the settlement amount.

## Conclusion

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While the initial assessment was clearly inaccurate (as the resident did in fact present as someone at considerable risk for skin breakdown), the fact that the initial intake conflicted with the rest of a less-than-consistent record was a significant liability downside.

Add to that the less-than-cooperative former employees who harbored a silent ill-will against a Director of Nursing who could no longer participate in her or her employer's defense, and early settlement was the facility's best option. It should be noted, the facility owners take extraordinary pride in their facility's reputation in the area. While they might have been able to rely on that reputation against the former employees, they did not want their "internal family problems" to become the fodder for local news or the rural area's water cooler discussions.

Additionally, despite decades of haranguing by risk managers, defense counsel, insurance adjusters, long term care administrators, and managers, charting is still one of the biggest challenges faced in the defense of a skin breakdown case. Consistency is key. The old, unwritten rule still applies in most cases: "If it isn't written down, it didn't happen."

While some adventurous facilities move toward a less-is-more approach and have a charting-by-exception policy, that's only helpful when the exceptions are actually documented. Educating a jury on such a novel approach is a challenge unto itself. The fact is, most long term care facilities still document things the "old fashioned" way, whether that be electronically or not, and that is charting everything every provider does, and when some documents directly conflict with other items in the same chart, it's simply too easy for plaintiff counsel to get a jury to believe that something nefarious occurred.

## Lessons to be Learned

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Firstly, cases like this are a prime example of the importance of an immediate investigation into any claim or potential claim. Having the medical records reviewed and involved personnel be interviewed by the adjuster and/or defense counsel as soon as possible is imperative to grasp the not-so-obvious problems that can present themselves after formal discovery kicks off.

Also, utilizing a risk management company is a great way to discover hidden issues that may be lurking. Risk control consultants can assist an organization to plan to prevent these situations from occurring through on-site or desk-based assessments.

## About Pendulum Claims Management

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Pendulum Claims Management offers professional and general liability claims management to the aging services industry. As a boutique claims management firm, Pendulum customizes services specifically to meet clients' needs. Our mission is to serve our clients by utilizing our strong industry background and experience to generate the best possible outcomes. Visit us at [www.PendulumClaims.com](http://www.PendulumClaims.com).