

California Court Refuses To Dismiss Suit Against Insurer Based On Appointed Counsel's Alleged Inadequacies

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Last month's [Alert](#) discussed an Eleventh Circuit decision that held that even assuming appointed counsel was negligent in defending a policyholder, the insurer could not be held liable, so long as counsel was competent and qualified. *See Kapral v. Geico Indem. Co.*, 2018 WL 509308 (11th Cir. Jan. 23, 2018). This month, a California federal district court declined to dismiss a breach of contract claim against an insurer based on the allegedly inadequate defense provided by appointed counsel. *DiMuccio v. Government Employees Ins. Co.*, 2018 WL 1382048 (E.D. Cal. Mar. 19, 2018).

Sherita Wicks was sued for her involvement in an automobile accident. Geico initially refused to defend but thereafter provided a defense without a reservation of rights. Geico appointed counsel who was identified in various communications as a salaried employee of GEICO and as "GEICO Staff Counsel." Once assigned, counsel failed to oppose a pending summary judgment motion or seek a continuance. When judgment was ultimately entered against Wicks, counsel failed to appeal or move to set the judgment aside. Plaintiffs, as assignees of Wicks' claims against Geico, sued the insurer for failure to provide an adequate defense. The court refused to dismiss the suit on summary judgment.

The court explained that because counsel represented himself as a Geico employee, he could "hardly argue" that he was in the same position as independent counsel, free from the control and direction of Geico. The court found that issues of fact existed as to whether Geico was responsible for its counsel's conduct in providing a defense. In so ruling, the court highlighted the distinction between independent counsel retained by an insurer, and in-house staff counsel. Notably, the *Kapral* court deemed that distinction immaterial, explaining that "under Florida law, an insurer has no more right to exercise control over staff counsel's professional conduct and independent judgment than it does over outside counsel's conduct and judgment."

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