

## 6th Circ. Affirms Toss Of Bridal Salon's Virus Coverage Suit

By **Ganesh Setty**

Law360 (November 30, 2021, 8:11 PM EST) -- The Sixth Circuit continued its trend on Tuesday of favoring insurers in COVID-19 business interruption suits, this time in a bridal salon's proposed class action seeking coverage of losses because of pandemic-related restrictions.

The three-judge panel, including the U.S. Circuit Chief Judge Jeffrey Sutton, unanimously **affirmed an Ohio federal court's dismissal** of Bridal Expressions LLC's suit against Owners Insurance Co. The judges pointed to a prior decision from the court in September, which they said "forecloses" the salon's central argument that its insurance policy should cover "reduced use" of property caused by the restrictions.

The appellate panel's nonprecedential decision **is based on the same rationale** in the court's ruling in [Santo's Italian Café LLC v. Acuity Insurance Co.](#), which held that economic losses solely from pandemic rules and restrictions do not fall under a policy's provision on direct physical loss or damage to property. The panel said Tuesday that the direct physical loss provision in Bridal Expressions' policy was the "gatekeeper" to a potential recovery.

"Throughout the coverage period, Bridal Expressions retained possession of its property and could put it to use," the panel wrote in its five-page ruling. "The company's inability to use the property in the same way as it did before the pandemic — not unlike the situation faced by restaurants at the time — does not satisfy the policy's language."

The panel further rejected Bridal Expressions' argument that the virus that causes COVID-19 physically altered its property, ruling that the salon did not adequately explain how the virus did so, and that Bridal Expressions instead just repeated language of the policy.

"For this theory to have traction, the complaint would need to allege at a minimum that the coronavirus was present in the store and materially altered specific property at the time," the panel continued. "If that were the theory of coverage, moreover, the complaint presumably would seek coverage for replacing that property and only for the time that property was damaged or lost."

The panel also noted that the district court "never addressed" that particular argument on direct physical alteration of property.

"When a federal court ignores the consumer protection aspects of state law and favors us with unmoored and narrow definitions of 'loss' and 'physical,' like the Sixth Circuit did in Santo's, it should come as no surprise that the same federal court is willing to dilute the protection of the 'short, plain statement' pleading rule to the point of evaporation," Timothy Burns, an attorney for Bridal Expressions, told Law360 in an emailed statement.

"All the decision really shows is that, if we are going to get back to a place in this country where insurance consumer rights are once again respected, that restoration will likely have to be led by the state courts," he added.

Owners Insurance's bid for dismissal was also aided by the American Property Casualty Insurance Association and National Association of Mutual Insurance Companies, which both filed amicus briefs in support of the insurer.

The insurer, its counsel and counsel for the amici curiae did not immediately respond to Law360's requests for comment.

Aside from Santo's, Tuesday's ruling joins two prior virus-coverage decisions from the Sixth Circuit in favor of insurers, in which the court **vacated a coverage win** for more than a dozen steak and seafood restaurants and upheld dismissal of an action **brought by 16 private preschools**,

There are 17 pending appeals before the Sixth Circuit on pandemic-related coverage disputes, according to the University of Pennsylvania Carey School of Law's COVID Litigation Tracker.

Bridal Expressions is represented by Timothy Burns, Freya K. Bowen and Nathan M. Kuenzi of Burns Bowen Bair LLP and by Mark A. DiCello, Kenneth P. Abbarno and Adam J. Levitt of DiCello Levitt Gutzler LLC.

Owners Insurance is represented by Lori McAllister and Kyle M. Asher of Dykema Gossett PLLC.

Amici curiae for Owners Insurance are represented by Laura A. Foggan of Crowell & Moring LLP and by Wystan M. Ackerman of Robinson & Cole LLP.

The case is Bridal Expressions LLC et al. v. Owners Insurance Co., case number 21-3381, before the U.S. Court of Appeals for the Sixth Circuit.

--Editing by Amy Rowe.