Saiber Prevails on Behalf of BCB Bancorp in Post-Merger Insurance Coverage Dispute

October 2, 2017

Saiber LLC attorneys Jennine DiSomma and Ryan E. San George prevailed on behalf of client BCB Bancorp, on an insurance coverage question that should be understood by both insurance carriers, corporate insureds, and their counsel. The takeaway is that both insurers and corporate policyholders must carefully consider the implications of state merger and acquisition law in drafting insurance policies and structuring mergers, acquisitions, and other corporate transactions.

In an opinion granting Saiber LLC's client a declaratory judgment, the United States District Court for the District of New Jersey, Hon. John Michael Judge Vazquez, held that the surviving entity of a merger is entitled to the insurance coverage under a directors and officers liability insurance policy for the conduct of the merged entity prior to the merger, absent explicit exclusionary language in the insurance policy. General "no assignment" and "other insurance or indemnification" provisions are insufficient as a matter of law, because the purpose and effect of a statutory merger is to require the surviving entity to take on all of the liabilities – and rights— of the merged entity. In other words, the surviving entity "steps into the shoes" of the merged entity, and where the merged entity had coverage, that coverage automatically transfers to the surviving entity. Thus, the surviving entity was entitled to the merged entity's claims-made D&O liability coverage for a shareholder lawsuit brought against the merged entity.

The Court's decision in *BCB Bancorp, et al.* v. *Progressive Casualty Insurance Co.*, 2017 WL 4155235 (D.N.J. Sept. 18, 2017) is especially noteworthy because it expands federal precedent concerning "occurrence" policies to "claims-made" policies.