FIRST CIRCUIT RULES "FOLLOW-ON" FEDERAL SUIT MAY PROCEED AGAINST ALLEGED ALTER EGO

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In 2012, a multiemployer pension fund (the "Fund") secured a default judgment against D&N Transportation, Inc. (D&N") for unpaid withdrawal liability that was triggered when D&N ceased operations. When no withdrawal liability payments were made within the first eighteen months of the Fund securing the judgment, the Fund filed a follow-on suit against N&D Transportation, Inc. ("N&D"), among others, seeking to hold N&D liable for the withdrawal liability. N&D was owned by the children of the two former D&N shareholders. The Fund alleged that N&D was the alter ego of D&N. In support of its contention, the Fund alleged that D&N and N&D shared office space and the same telephone number, had joint insurance coverage and linked bank accounts, and shared employees.

The district court initially dismissed the Fund's complaint on the basis that the complaint failed to sufficiently allege that N&D was an alter ego of D&N at the time of D&N's withdrawal from the Fund. The Fund filed a post-judgment motion to amend its complaint, but the district court denied the Fund's motion. In this regard, the court ruled that, even if the complaint was amended to include the necessary temporal connection, the district court would still lack subject matter jurisdiction due to the fact that there is no basis in ERISA for holding D&N liable. The district court's ruling relied on the Supreme Court's decision in *Peacock v. Thomas*, where the Supreme Court held that federal courts lacked subject matter jurisdiction in a follow-on suit alleging that the defendant had siphoned off assets in order to avoid a prior judgment in an earlier ERISA action.

On review, the First Circuit Court of Appeals reversed the district court. In doing so, the First Circuit reasoned that, unlike the *Peacock* case where the alleged bad conduct arose *after* the ERISA violation, the Fund's allegations were that D&N and N&D were alter egos *at the time of* D&N's withdrawal and, therefore, D&N and N&D should collectively be treated as the "employer" withdrawing from the Fund. As a result, the First Circuit ruled that the Fund's allegations were grounded in ERISA and the federal courts have subject matter jurisdiction over the case.

To the extent the Fund's alter ego allegations prove to be true, the case serves as just the latest example on the importance of observing corporate formalities. *Groden v. N&D Trans. Co.* (1st Cir. 2017).