

## 5th Circuit Rules Which BP Stockholders May Sue as a Class

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On September 8, 2015, the United States Court of Appeals for the Fifth Circuit affirmed a lower court's decision certifying one class of BP PLC shareholders who bought stock within 33 days after the Deepwater Horizon disaster, and denying certification for another class of shareholders who purchased stock before the 2010 incident. *Ludlow v. BP, P.L.C.*, No. 14-20420. This decision is the latest chapter in the ongoing saga of litigation resulting from the blowout and may have significant effect on derivative actions in this circuit.

The “pre-spill” plaintiffs alleged that BP overstated the strengths of its safety procedures before the blowout and, in so doing, manufactured a false impression that there was a lower risk of catastrophic failure. The pre-spill plaintiffs claimed that this deprived them of the opportunity to decide whether to invest before the incident. They further claimed that when BP's stock fell upon full materialization of the risk, those investors were defrauded by the company's assurances that it should be able to recover the bulk of the damages.

The Fifth Circuit rejected this argument. It reasoned that the pre-spill plaintiffs could not meet the certification standards announced by the Supreme Court in *Comcast Corp. v. Behrend*, 133 S. Ct. 1425 (2013), because they could not come forward with a sound method to calculate damages across the entire class. The court elaborated that the pre-spill plaintiffs' theory “hinge[d] on a determination that each plaintiff would not have bought BP stock *at all* were it not for the alleged misrepresentations—a determination not derivable as a common question, but rather one requiring individual inquiry.”

But the Fifth Circuit held that the post-spill investors were properly certified as a class. The court recognized that, unlike the pre-spill plaintiffs, the post-spill plaintiffs presented a common question whether the stock price during this 33-day period after the blowout would have been lower if BP had made other representations during this period about the scope of the blowout.

In response to the decision, “a BP spokesman noted that the Fifth Circuit, in affirming the district court's decision, rejected a proposed class of plaintiffs who bought BP stock over a two-and-a-half

year period prior to the Deepwater explosion, and certified only a class of purchasers who bought stock during a 33-day period after the explosion.” Ed Beeson, *5th Circ. Oks BP Deepwater Class Cert. Split Decision*, Law360 (Sept. 8, 2015). As the life of this case has seen an ever expanding, and sometimes unpredictable, gallery of plaintiffs suing under myriad theories, BP was undoubtedly glad to see at least one of those classes thwarted. As this case continues to work its way through the courts, we will see what theories hold muster and which ones fall to the wayside.