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Texas Supreme Court Denial of Review Could Impact / Dissuade Health-Based Tort Claims Involving Neighboring Oil and Gas Activities

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On December 2, 2016, the Texas Supreme Court denied review in *Cerny v. Marathon Oil Corp.*, leaving in place the decision of the Fourth Court of Appeals, affirming summary judgment for the defendants and finding that the plaintiffs' nuisance and negligence claims were "in the nature of toxic tort claims which fall outside a lay person's general knowledge and experience, [and] must therefore be proven with expert testimony."

While undoubtedly welcome news for defendants Marathon Oil and Plains Exploration & Production, the decision may have a broader impact on pending and future litigation in which landowners have asserted health-related personal injury claims involving alleged exposure to hazardous gases and industrial chemicals from neighboring oil and gas activities, potentially including the closely-watched case of *Parr v. Aruba Petroleum.*

Parr, the so-called "first fracking trial," garnered attention in Texas and beyond when plaintiffs obtained a $2.9 million verdict on their private nuisance claim. While the claims raised in *Parr* and *Cerny* are strikingly similar, the Parrs were able to avoid the strict proof requirements established by the Texas Supreme Court in *Merrell Dow Pharms., Inc. v. Havner*, (holding that expert testimony is necessary in cases seeking to recover for injuries caused by alleged toxic exposure), at least at the trial court level, by expressly disclaiming personal injury damages that invoke the *Havner* requirements. Interestingly, despite the disclaimer, when asked at trial what made him sick – sights, lights, and sounds or toxic emissions – Mr. Parr testified that it was toxins and emissions.

The *Parr* verdict remains on appeal and it remains to be seen whether the Fifth Court of Appeals will allow it to stand, modify it or overturn it. On appeal, the Parrs have argued that *Havner* should not apply because their case is not a "toxic tort," but a "private nuisance," and that they sought damages for "symptoms typical of discomfort rather than disease." In contrast, Aruba has argued that the applicability of *Havner* and its progeny does not depend on the type of claim pursued, as *Havner* applies to all causes of action alleging toxic exposure – a contrary result would allow plaintiffs to opt out of strict proof requirements through artful pleading.

In addition to whatever impact the Texas Supreme Court's denial of review in *Cerny* may have on the *Parr* appeal itself, should the Fifth Court of Appeals find – consistent with the Fourth Court of Appeals opinion in *Cerny* left in place by the Texas Supreme Court – that the Parrs' claims are in the nature of toxic torts that fall outside a lay person's general knowledge and experience and must therefore be proven with expert testimony under *Havner*, it could go a long way to deter similar claims, at least in Texas.