Certified Questions to State Supreme Courts

Lessons from Other Circuits

Presented by Dana Livingston

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Raised *sua sponte* during

- Oral Argument

Singleton v. Elephant Ins. Co.

(Argued to 5th.Cir on Feb. 5, 2020)

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Singleton oral argument:

- Judge Ho: Is your policy language fairly typical of the industry?
  - A: Yes . . .
- Judge Ho: My question basically is this: . . . Is this a problem that really just affects Elephant, or does it affect a lot of other insurers?
  - A: There are a lot of these lawsuits out there.
- Judge Ho: Should we certify this to the Texas Supreme Court?
  - A: I don't think it's necessary. This is so close to Schaffer and is addressed by *Schaffer*. I think they're so off on how they apply *Tolar* . . . . I think the law is clear. I think the judge was correct.
- Judge Ho: You acknowledge that it is technically an open issue. I understand that you would extend certain precedents in a certain way. But this issue has not been squarely resolved by the Texas Supreme Court.
  - A: I would look at it as an entrepreneurial class action where an argument has been created to try to get into a certification posture. That argument has no foundation whatsoever . . . .
- Judge Ho: You're point is that it's so frivolous that we don't need to certify it [to the SCOTX], is that sort of the idea?



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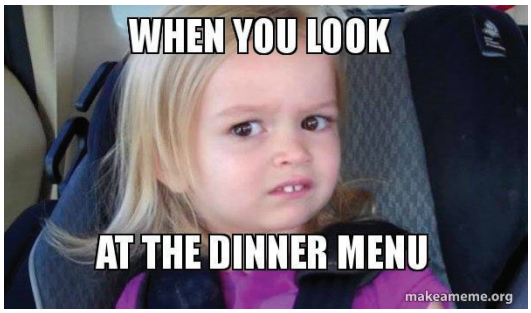
Singleton oral argument:

- Judge Costa: Maybe you should start off by responding to Judge Ho's question about certification—what the plaintiff's view is?
  - A: We also think it's clear. It's certainly not frivolous. . . . . To get to your prior question. These are form policies. . . . .
- Judge Ho: So why isn't this the prototypical case for certification? Both of you have cases you cite from all over the country. Both of you interpret Texas Supreme Court precedent and other Texas cases in different ways. Both of you basically acknowledge that no case is binding on us. And you all stipulate that this is a very common issue across the industry. I can't think of a better case for certification. . . .
  - A: I can't disagree with that, [but] we feel confident in our position.
- Judge Ho: Fair enough.



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Oral argument prep for diversity case in 5th Cir.?



Certification may be on the menu

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