

SUPREME COURT
STATE OF LOUISIANA

NO. _____

SUTTON STEEL & SUPPLY, INC., KATE DAVIS,
AND MESTAYER & MESTAYER, APLC,
INDIVIDUALLY AND ON BEHALF OF A CLASS
OF ALL OTHER SIMILARLY SITUATED CUSTOMERS,
Plaintiffs, Respondents

versus

BELLSOUTH MOBILITY INC.,
Defendant, Applicant

Application for Writ of Certiorari to the Third Circuit Court of Appeal
No. CW 07-00106
Hon. John D. Saunders, Jimmie C. Peters, and Billy H. Ezell, Circuit Judges
and the 16th Judicial District Court, Parish of Iberia, State of Louisiana
Case No. 91421
Honorable Gerard B. Wattigny, District Judge

CIVIL PROCEEDING

APPLICATION FOR WRIT OF CERTIORARI

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STATEMENT OF CONSIDERATIONS SUPPORTING REVIEW

BellSouth Mobility Inc. (“BellSouth”) respectfully applies for a writ of certiorari to review the orders of the district court and the Third Circuit that have permitted a class-action lawsuit to proceed on behalf of all of BellSouth’s customers who received wireless service in nine states over a six-year period.

Review is warranted in this case for the following reasons:

1. The decisions below are in direct conflict with this Court’s recent decision in *Aguillard v. Auction Management Corp.*, 04-2804 (La. 6/29/05); 908 So. 2d 1. See Louisiana Supreme Court Rule X.1(a)(1). In *Aguillard*, this Court resolved a split among the Circuits in favor of a “liberal interpretation policy favoring arbitrability” (04-2804 at p. 25; 908 So. 2d at 18), rejecting the Third Circuit’s “conservative policy” towards the enforcement of arbitration agreements (*id.* 04-2804 at p. 13; 908 So. 2d at 11) embodied in cases such as *Sutton’s Steel & Supply, Inc. v. BellSouth Mobility, Inc.*, 00-511 (La. App. 3 Cir. 12/13/00); 776 So. 2d 589 (“*Sutton Steel I*”). Despite this holding, the district court reaffirmed its refusal to enforce the arbitration agreements between BellSouth and its customers, concluding instead that *Sutton Steel I* remains good law. See Reasons for Judgment, Dec. 27, 2006 (Exhibit 1), at 5-7. The Third Circuit implicitly made the same determination by refusing to review the district court’s decision. See Exhibit 2. These decisions not only conflict with *Aguillard*; they also reflect an apparent disregard for this Court’s precedent that “call[s] for an exercise of this [C]ourt’s supervisory authority.” Louisiana Supreme Court Rule X.1(a)(5).

2. The decisions below also fail to honor *Aguillard*’s explanation of how to analyze whether an arbitration provision—or any other contractual term—is adhesionary and therefore unenforceable. See 04-2804 at p. 11; 908 So. 2d at 10; see also *id.* 04-2804 at pp. 7-12, 20-24; 908 So. 2d at 8-11, 16-18. As this Court explained, “the real issue in a contract of adhesion analysis is * * * whether a party truly consented to all the printed terms.” *Id.* 04-2804 at p. 12; 908 So. 2d at 10. Hence, “[o]nce consent is called into question, the party seeking to invalidate the contract as adhesionary **must then demonstrate** [that he] either did not consent to the terms in dispute or his consent was

vitiated by error * * *.” *Id.* (emphasis added). Despite this Court’s express holding, the district court concluded that “[n]o customer-by-customer assessment of consent is * * * necessary.” Reasons for Judgment, Dec. 27, 2006, at 9. Again, review is warranted to resolve this direct conflict between this Court’s precedent and the district court’s order, as ratified by the Third Circuit’s denial of BellSouth’s writ application. *See* Louisiana Supreme Court Rule X.1(a)(1), (5).

3. By permitting this *nine-state* class action to be maintained without considering the laws of the eight class states outside of Louisiana, the decisions below violate both the U.S. Constitution and this State’s established principles governing class certification. Rather than analyzing the law in any of the other class states, the district court simply assumed that its conclusions under Louisiana law apply equally to class members in the other eight states. That failure to consider other states’ laws violates the Due Process and Full Faith and Credit Clauses of the U.S. Constitution. As the U.S. Supreme Court has explained in the context of a multi-state class-action lawsuit, when—as here—the majority of class members “had no apparent connection to the [forum] State * * * except for this lawsuit,” the “application of [the forum state’s] law to every claim * * * is sufficiently arbitrary and unfair as to exceed constitutional limits.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 815, 822 (1985). And, for reasons we explain below, the variations in state law matter: Even if BellSouth’s arbitration provision were not enforceable in Louisiana, the law is clear that the provision would be enforceable in at least seven of the other eight class states. Review is accordingly warranted to rectify these violations of the federal Constitution and Louisiana’s class-certification requirements. *See* Louisiana Supreme Court Rule X.1(a)(1), (4).

MEMORANDUM

A. STATEMENT OF THE CASE

BellSouth Mobility Inc. provided wireless telephone service to customers in Louisiana and other states pursuant to a written form contract that contains standard terms and conditions.¹ The contract is a single document. Ex. 3, LaRussa Aff. ¶ 5.² Since 1998, those terms and conditions have included an arbitration provision. *See., e.g., id.* at Ex. B. A customer agrees to these terms and conditions by signing the front of the agreement. The signature line on front of the BellSouth agreement states: “By signing below, the undersigned ‘Customer’ acknowledges the accuracy of the above information and has received a copy of, read, understands, and accepts the attached Terms and Conditions of Service.” *Id.* ¶ 5 The customer typically receives a copy of the terms and conditions on two-sided, yellow paper. *See id.* ¶ 6 & Ex. B.

Plaintiffs filed this putative class action lawsuit in June 1999, alleging that BellSouth breached its service agreements with its customers by billing its subscribers for wireless service in whole minutes—rather than in one-second increments—by “rounding up” the last partial minute of all calls to the next minute.³ The first page of every BellSouth contract provides the rate plan that the customer is to receive and the number of “airtime minutes.” *Id.* ¶ 5 & Ex. B. The terms and conditions on the reverse side of all BellSouth service agreements—including those signed by the plaintiffs—inform the

¹ The successor-in-interest to BellSouth Mobility Inc. is New Cingular Wireless PCS, LLC, which is a wholly-owned subsidiary of AT&T Mobility LLC (formerly known as Cingular Wireless LLC).

² The Affidavit of Joseph M. LaRussa and its accompanying exhibits were filed with the district court in support of BellSouth’s motion for decertification. This affidavit and its exhibit B (containing a signed version and exact replica of one of the plaintiffs’ contracts) are attached to this Application as Exhibit 3. The remaining six exhibits originally attached to the affidavit (which were other BellSouth service agreements) have been omitted pursuant to Louisiana Supreme Court Rule X.3.5(b).

³ The plaintiffs are Sutton’s Steel & Supply, Inc., a privately held corporation that formerly operated a steel warehouse and currently owns real estate and commercial rental properties; Mestayer & Mestayer APLC, a law firm; Kate Davis, a real estate agent; and Rachel Maddox, a student and former legal secretary.

subscriber that “[u]sage of service shall be measured in one minute increments and each partial minute shall be rounded up to the next one minute increment.” *Id.* at Ex. B.⁴

Soon after the lawsuit was filed, BellSouth moved to compel arbitration of plaintiffs’ disputes. The district court denied the motion, and BellSouth appealed. Taking what this Court has described as a “conservative” approach to arbitration agreements (*see Aguillard*, 04-2804 at p. 13; 908 So. 2d at 11), the Third Circuit affirmed the district court’s decision, holding that BellSouth’s arbitration provision was adhesive and hence unenforceable. *Sutton Steel I*, 00-511 (La. App. 3 Cir. 12/13/00); 776 So. 2d 589. This Court denied a writ of certiorari, although Justice Traylor would have granted it. 01-0152 (La. 3/16/01); 787 So. 2d 316.

BellSouth then moved for summary judgment on plaintiffs’ claims. Plaintiffs contended that the “rounding” provision in BellSouth’s service agreements is adhesionary and unenforceable. The district court denied summary judgment, holding that the “rounding” clause is unenforceably adhesive. Reasons for Judgment, Feb. 13, 2003.⁵ Plaintiffs subsequently moved for class certification. Over BellSouth’s objections, the district court certified a class of BellSouth subscribers in Louisiana and eight other states: Alabama, Florida, Georgia, Kentucky, Mississippi, Tennessee, North Carolina, and South Carolina. *See Sutton Steel & Supply, Inc. v. BellSouth Mobility Inc.*, 03-1536 (La. App. 3 Cir. 6/9/04); 875 So. 2d 1062 (“*Sutton Steel II*”) (describing district court’s class

⁴ Not only is this practice commonplace—it is the way that telephone companies have billed calls for decades—it also carries the Federal Communications Commission’s express seal of approval. As the FCC has stated, “telephone services historically have been billed on a rounded-up, whole minute basis, and this is still the most common billing practice for [landline] services, as well as for [wireless service]. The Commission has never questioned the lawfulness of this industry practice for the provision of [wireless service] * * *. Accordingly, these rate practices are clearly among those which [wireless service] providers * * * have discretion to implement.” *In re Southwestern Bell Mobile Systems, Inc.: Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments*, 14 F.C.C.R. 19898, 19904 (1999); *see also Mobley v. AT&T Corp.*, 717 So. 2d 367, 368 (Ala. 1998) (no reasonable consumer would be unaware of rounding); *Alicke v. MCI Commc’ns Corp.*, 111 F.3d 909, 912 (D.C. Cir. 1997) (whole-minute billing practice “could not mislead a reasonable customer”); *Marcus v. AT&T Corp.*, 938 F. Supp. 1158, 1174 (S.D.N.Y. 1996); *Weinberg v. Sprint Corp.*, 801 A.2d 281, 288 (N.J. 2002).

⁵ The Third Circuit denied BellSouth’s writ application, and BellSouth’s writ application to this Court was also denied. *See Sutton Steel & Supply, Inc. v. Bellsouth Mobility, Inc.*, 03-3445, 03-3446 (La. 2/20/04); 866 So. 2d 830, 831.

certification order). BellSouth appealed again to the Third Circuit, which held that the class as certified was “ambiguous and inadequate” in that (1) it “covers only one of the two rates plans involved,” and (2) “the trial court does not provide any time frame for identifying members of the class.” *Id.* 03-1536 at p. 5; 875 So. 2d at 1067-68. Accordingly, the court remanded and directed the district court “to address the inadequacies in its class definition.” *Id.* 03-1536 at p. 10; 875 So. 2d at 1071.

In response to BellSouth’s argument that its arbitration provision was enforceable in the class states outside of Louisiana, the Third Circuit stated that “[t]he trial court has discretion to create subclasses based on the class members’ resident states,” and that the questions of arbitrability in those states would “not render a class action unmanageable *per se.*” *Id.* 03-1536 at p. 8; 879 So. 2d at 1070.⁶ The court further invited the district court to reconsider its class certification decision if circumstances so warranted. *Id.* 03-1536 at pp. 2-3; 875 So. 2d at 1066. This Court declined BellSouth’s application for a writ of certiorari and review; Justices Victory and Weimer would have granted the writ. *Sutton Steel & Supply, Inc. v. Bellsouth Mobility, Inc.*, 04-1654 (La. 11/15/04); 887 So. 2d 478.

On remand from the Third Circuit—and in light of this Court’s intervening decision in *Aguillard*—BellSouth moved to decertify the class in April 2006.⁷ Among other things, BellSouth argued that (a) *Aguillard* had abrogated *Sutton Steel I* and under *Aguillard* the arbitration agreements of its Louisiana subscribers were enforceable; (b) a substantial number of out-of-state class members had entered into arbitration agreements that are enforceable under the laws of their states, and thus could not participate in a class-wide proceeding; and (c) class treatment was inappropriate because under *Aguillard* the resolution of the arbitrability of plaintiffs’ claims and their substantive cause of action

⁶ The Third Circuit also denied BellSouth’s accompanying application for a supervisory writ. *Sutton Steel & Supply, Inc. v. Bellsouth Mobility, Inc.*, 03-1261 (La. App. 3 Cir. 6/9/04); 875 So. 2d 1071.

⁷ As the district court observed, “[b]ecause of discovery, Hurricane Katrina, and other matters important to the parties and their attorneys, this matter was not heard immediately at the fault of none.” Reasons for Judgment, Dec. 27, 2006, at 12.

necessitated an individualized inquiry into the consent of BellSouth subscribers, an inquiry which is antithetical to the class-action device.

The district court denied BellSouth's motion, and instead granted plaintiffs' motion to broaden the class definition. First, the court rejected BellSouth's argument that its arbitration provision is enforceable under *Aguillard*. The court did "not agree * * * that *Aguillard* abrogates the holding of the Third Circuit and this Court in *Sutton [Steel I]*." Reasons for Judgment, Dec. 27, 2006, at 7. Rather, the district court concluded that *Aguillard* was distinguishable because BellSouth's "arbitration clause was in exceedingly small print as compared to the remainder of the contract"; because "in *Sutton* there was no evidence presented that plaintiffs were in any position to bargain over the arbitration provision"; and because the arbitration provision contained an exception for lawsuits relating to debt collection. *See id.* at 6-7. The district court also accorded significance to this Court's denial of review in *Sutton Steel I*. *See id.* at 7.

The court went on to hold that both the arbitration provision and the rounding provision in BellSouth's service agreements "never became part of the contract between plaintiffs and BellSouth"—and therefore that *Aguillard* did not require "customer-by-customer assessment of consent." Reasons for Judgment, Dec. 27, 2006, at 9-10.

The district court next rejected BellSouth's argument that it was improper to include at least some of the class members from the class states outside of Louisiana because, under the laws of those states, the arbitration provision and the rounding provision would be enforceable. With respect to the arbitration provision, the court discussed only the law of Louisiana and Tennessee; it did not analyze the law in the other seven class states. *See id.* at 10.⁸ Similarly, in considering the rounding provision, the court again chose not to analyze the law of the other class states. Instead, the court concluded that the plaintiffs' claims for breach of contract involved "a simple question of contract interpretation" that "would not vary from state to state." *Id.* at 8.

Soon after the district court denied the decertification motion, BellSouth appealed the district court's decision to the Third Circuit. Plaintiffs then moved to dismiss

⁸ Moreover, the court mischaracterized BellSouth's position with respect to Tennessee law. *See* note 22, *infra*.

BellSouth's appeal, and BellSouth opposed plaintiffs' motion. The Third Circuit has deferred its decision on the motion to dismiss the appeal. In an abundance of caution, BellSouth also filed an application for a supervisory writ with the Third Circuit. That court denied the writ, stating only: "There is no error in the trial court's ruling." *Sutton Steel & Supply, Inc. v. BellSouth Mobility, Inc.*, 07-0106 (La. App. 3 Cir. 3/30/07). BellSouth believes that the Third Circuit has jurisdiction to hear its appeal and that it will ultimately succeed in that court. Nevertheless, because the possibility exists that the Third Circuit will hold that it lacks jurisdiction to consider BellSouth's appeal, BellSouth seeks certiorari from the Third Circuit's denial of its supervisory writ. (The opening brief is currently due May 22, and accordingly this Court may wish to defer ruling on this petition pending the Third Circuit's determination of the jurisdictional issue.)

B. ASSIGNMENT OF ERRORS

The district court and the Third Circuit erred:

- (1) by disregarding the principles this Court announced in *Aguillard*, in that the courts below
 - (a) refused to enforce class members' agreements to arbitrate, as required under the "liberal" approach to arbitration adopted in *Aguillard*, and instead adhered to the Third Circuit's approach in *Sutton Steel I*, which this Court disapproved; and
 - (b) failed to apply this Court's holding that a party who seeks to challenge the enforceability of a contractual term as adhesive must demonstrate that he or she did not actually consent to the term; and
- (2) by adhering to their earlier decisions certifying a nine-state class action without analyzing the effect of the laws of the states outside of Louisiana, in violation of the Due Process and Full Faith and Credit Clauses of the U.S. Constitution as well as Louisiana class-certification principles.

C. SUMMARY OF ARGUMENT

In *Aguillard*, this Court announced the law of this State on the enforceability of arbitration agreements and the doctrine of contracts of adhesion. But the district court failed to honor that precedent when it denied BellSouth's motion to decertify this class action. Compounding the error, the court refused to analyze the law of the other class states, instead applying its understanding of Louisiana law to the entire nine-state class in violation of the requirements of the U.S. Constitution and this State's class certification principles. In denying BellSouth's application for a supervisory writ, the Third Circuit ratified these fundamental errors.

1. This Court made a choice in *Aguillard* between two contradictory lines of precedent in the Circuit Courts of Appeal. The first line generally favored the enforceability of arbitration agreements; the second line—exemplified by the Third Circuit's earlier decision in this very case—evinced greater hostility to arbitration. This Court resolved the disagreement by adopting a policy favoring arbitrability, and by rejecting the path followed by the Third Circuit. But the district court—in conflict with every other court to consider the issue—held that *Aguillard* did not abrogate the Third Circuit's decision in *Sutton Steel I*, and thus continues to refuse to enforce BellSouth's arbitration provision.

The district court also was faithless to *Aguillard* because it disregarded a key part of this Court's holding: that terms in standard form contracts cannot be invalidated as adhesionary unless the party challenging the term demonstrates that he or she did not consent to it. Accordingly, each BellSouth customer with a desire to avoid his or her arbitration agreement and instead participate in the class action would need to show that he or she “did not consent” to the arbitration provision. Because consent is by necessity an individualized issue, *Aguillard*'s mandate that the district court resolve whether each customer actually consented to the arbitration provision in his or her contract renders this case inherently unsuitable for class-wide treatment.

Similarly, the district court failed to recognize that, under *Aguillard*, plaintiffs' challenge to the enforceability of the “rounding” provision in their service agreements

would also require an individualized assessment of whether each class member consented to that provision. The court sidestepped *Aguillard's* requirement by relying on an idiosyncratic (indeed, manifestly erroneous) reading of contract law that improperly treated the rounding provision as a nullity that could be read out of the contract. That evasion of *Aguillard* should not be allowed to stand.

2. Compounding its error, the district court refused to analyze the laws of the eight class states outside of Louisiana, instead assuming that the laws of all nine states would be the same. This failure to consider the laws of the other class states violates the U.S. Constitution and Louisiana's class certification principles. To begin with, BellSouth has demonstrated that the laws of the other eight states vary from Louisiana's in ways that make a material difference. Under the Due Process and Full Faith and Credit Clauses, when the defendant has made such a showing, the forum state may not apply its law to class members who—as here—have no apparent connection to the forum state except for the lawsuit itself. Moreover, in refusing to consider the laws of the other states, the district court ignored Louisiana's class-certification requirements. Under Article 591 of the Code of Civil Procedure, a court may not certify a multi-state class action when—as here—there are variations in state law that preclude the predominance of common issues of law.

* * * *

In sum, the decisions of the courts below are in direct conflict with this Court's precedent and violate the U.S. Constitution and this State's class action procedures. Without this Court's intervention, the prejudice BellSouth will suffer is extraordinary: it will be forced to defend itself at trial against a class spanning nine states—each with differing legal standards—over a six-year time frame. The costs to BellSouth of defending against this manifestly illegitimate nine-state class action will be entirely irremediable, of course. And there is the substantial risk that this Court will never have the opportunity to correct the district court's seriously erroneous application of *Aguillard*, not to mention its abandonment of the due process limitations on multi-state class actions. For all of those reasons, this Court's immediate review is imperative.

D. ARGUMENT

ASSIGNMENT OF ERROR #1:

The Orders Below Are In Conflict With This Court's Decision In *Aguillard*.

- A. The district court's and Third Circuit's rulings are inconsistent with this Court's adoption in *Aguillard* of the "liberal" policy favoring arbitration and consequent rejection of the Third Circuit's "conservative" approach in *Sutton Steel I*.**

Review is necessary to ensure that the district court and Third Circuit comply with this Court's holding in *Aguillard*. That seminal decision abrogated *Sutton Steel I* and its holding that BellSouth's arbitration provision is unenforceably adhesive. In *Aguillard*, this Court expressly identified the Third Circuit's holding in *Sutton Steel I* as being hostile to arbitration and rejected the Third Circuit's "conservative interpretation" of arbitration clauses in *Sutton Steel I* in favor of the more "liberal interpretation" of the Second and Fourth Circuits. *Aguillard*, 04-2804 at pp. 13-19, 24-25; 908 So. 2d at 11-15, 18. As a consequence, the Third Circuit's holding in *Sutton Steel I*, which affirmed the district court's denial of BellSouth's motion to compel arbitration—thereby enabling this matter to proceed to class certification—has no continuing vitality. For this reason, all Louisiana residents who agreed to arbitrate their disputes with BellSouth—including, for example, named plaintiff Sutton's Steel—must pursue their disputes by arbitration on an individual basis, and therefore cannot be included as class members.

Aguillard resolved a "split among the circuits regarding the enforceability of arbitration agreements in consumer standard form contracts." 04-2804 at p. 1; 908 So. 2d at 3. This Court described the Third Circuit's prior decision *in this very case* as falling on one side of the divide—*i.e.*, the side that had "adopt[ed] a conservative policy as to the enforceability of such agreements." *Id.* 04-2804 at p. 13; 908 So. 2d at 11. This Court "resolve[d] the split" by instead "adopt[ing] the liberal interpretation policy favoring arbitrability of the Second and Fourth Circuits." *Id.* 04-2804 at p. 25; 908 So. 2d at 18 (capitalization omitted). As a consequence, the Third Circuit's prior decision in *Sutton Steel I* has been abrogated as the First and Fourth Circuits and the U.S. Court of Appeals for the Fifth Circuit have recognized. *See LaFleur v. Law Offices of Anthony G. Buzbee, P.C.*, 06-0466, p. 2 (La. App. 1 Cir. 3/23/07); ___ So. 2d ___, 2007 WL 858859, *2 (noting

“that to the extent that the trial court relied on the principles found in *Sutton’s Steel I*], the trial court was legally incorrect per the Louisiana Supreme Court’s recent holding in *Aguillard*, 908 So. 2d at 16-18, abrogating *Sutton’s Steel*”); *Hoffman, Siegel, Seydel, Bienvenu & Centola, APLC v. Lee*, No. 05-1491, p. 9 (La. App. 4 Cir. 07/12/06); 936 So. 2d 853, 859 (recognizing that in light of *Aguillard* “the trial court erred when it concluded that the contract * * * [was unenforceable] based on the principles found in the Third Circuit [*Sutton Steel I*] case”); *Brown v. Pacific Life Ins. Co.*, 462 F.3d 384, 397 (5th Cir. 2006) (“[t]he Louisiana Supreme Court has * * * recently abrogated *Sutton’s Steel I*] * * * in *Aguillard*”).⁹

In the face of this change in the law, the district court nevertheless stated that it “does not agree with BellSouth that *Aguillard* abrogates the holding of the Third Circuit and this Court in *Sutton [Steel I]*.” Reasons for Judgment, Dec. 27, 2006, at 7. In justifying its renewed determination to invalidate BellSouth’s arbitration agreement under Louisiana law, the court merely repeated and relied on *Sutton Steel I*’s “conservative” rationales—rejected by this Court—that, in the district court’s view, the print of BellSouth’s contract was “exceedingly small,” the bargaining positions of the parties were not equal, and the obligation to arbitrate was purportedly non-mutual. All three rationales were either expressly or impliedly rejected by *Aguillard* as legitimate grounds to deny the enforcement of arbitration agreements. The district court’s contrary analysis is irreconcilable with *Aguillard* and therefore cries out for review and reversal.

To begin with, the print size of BellSouth’s arbitration provisions is no smaller than the 9-point type approved in *Aguillard*. Compare *Aguillard*, 04-2804 at p. 3; 908 So. 2d at 4 (arbitration agreement in 9-point font) with, e.g., Ex. 3, LaRussa Aff. ¶9 & Ex. B (exact replica of *Sutton’s Steel*’s BellSouth contract, including two-sided, yellow copy of terms and conditions in **larger** than 9-point font)). In addition, in *Aguillard*, this Court held that the 9-point type in which the arbitration provision was printed was not “unreasonably small.” 04-2804 at p. 21; 908 So. 2d at 16. And this Court further observed that “neither the print nor the font size of the arbitration agreement differ[ed] in

⁹ In addition, Westlaw’s Keycite and Lexis’s Shepard’s services note that *Sutton Steel I* was abrogated or overruled by *Aguillard*.

any way from the other clauses in the standard form contract.” *Id.* The same is true here. The arbitration provisions in BellSouth’s contracts with Louisiana class members are in capitalized letters, appear in bold-faced print, and are often printed in even *larger* font than other terms in those contracts. *See, e.g.*, Ex. 3, LaRussa Aff. Ex. B. Thus, the manner in which they are printed and prominently disclosed favors, rather than disfavors, enforcement. *See Hoffman*, 05-1491 at p. 9; 936 So. 2d at 859 (enforcing arbitration agreement under *Aguillard* where “[t]he entire contract was printed in relatively small print” but “[t]he arbitration clause did not appear to be significantly smaller than other portions of the contract”). The district court’s reference to a contrary finding by the Third Circuit that BellSouth’s “arbitration clause was in exceedingly small print *as compared to the remainder of the contract*” (Reasons for Judgment, Dec. 27, 2006, at 6 (emphasis added)) simply misreads the decision. The Third Circuit previously drew no such comparison, stating only that the print was “exceedingly small.” *Sutton Steel I*, 00-511 at p. 10; 776 So. 2d at 596.¹⁰ That holding has been definitively superseded by *Aguillard*.

The district court’s reliance on the bargaining positions of the parties is also in conflict with *Aguillard*. This Court squarely held in *Aguillard* that bargaining position is considered only if the agreement involves “a necessary transaction * * * [that] the plaintiff was compelled to enter [into].” 04-2804 at p. 22; 908 So. 2d at 17. If the plaintiff could have “refused to participate” in the transaction, then any inequality in the bargaining position of the parties does not call the weaker party’s consent into question. *Id.* Here, plaintiffs cannot plausibly contend that BellSouth’s cellular service was so

¹⁰ The district court also disregarded *Aguillard*’s recognition that arbitration provisions need not be specially prominent in order to be enforced. The district court sought to distinguish *Aguillard* by commenting that BellSouth had failed to provide its arbitration provision “in a single sentence paragraph within the section of the document labeled in capital letters ANNOUNCEMENTS” (Reasons for Judgment, Dec. 27, 2006, at 6) as had the defendants in *Aguillard*. This distinction has no bearing on unconscionability, however; as the district court itself recognized (*id.*), it “would be unlawful” to require that an arbitration provision stand out from other contract terms. *Cf. Aguillard*, 04-2804 at p. 21; 908 So. 2d at 16 (“the FAA presumption of arbitrability preempt[s] a state statute requiring special notice requirements applicable only to arbitration agreements before an arbitration clause [can] be enforced”). In any event, nothing in *Aguillard* suggests that an arbitration provision must emulate the one in that case in all respects in order to be enforceable. The point, instead, is simply that if the arbitration provision is set forth in barely readable type size or is buried among other terms, the customer’s consent may be called into question. Neither precondition is satisfied here.

essential that they had no choice but to agree to the terms and conditions under which BellSouth was willing to provide that service. Not only were there plenty of feasible alternatives to cellular service (including traditional land-line service and pagers), but plaintiffs also cannot establish that BellSouth was the only source of cellular service. To the contrary, during their alleged class period there were numerous companies offering cellular service in Louisiana.¹¹ Thus, the district court's finding that plaintiffs "were [not] in any position to bargain over the arbitration provision" (Reasons for Judgment, Dec. 27, 2006, at 6) provides no basis for invalidating the parties' agreement to arbitrate.

Finally, *Aguillard* does not support the district court's holding that an arbitration agreement may be invalidated merely because the parties' obligation to arbitrate is non-mutual. If anything, the import of *Aguillard* is to the contrary.¹² The three cases that this Court characterized as taking the discredited, "conservative" approach to arbitration *each* relied on non-mutuality as a primary basis for invalidating an arbitration provision. This Court described *Posadas v. The Pool Depot, Inc.*, 02-1819 (La. App. 1 Cir. 6/27/03); 858 So. 2d 611, as holding "unduly burdensome" an arbitration provision that "reserv[ed] unto the defendant the option of pursuing other remedies." *Aguillard*, 04-2804 at p. 17; 908 So. 2d at 13. Next, this Court noted that in this case (*Sutton Steel I*), the Third Circuit also held BellSouth's purported reservation to itself alone of the option to pursue non-arbitration remedies to be "unduly burdensome and extremely harsh." *Aguillard*, 04-2804 at p. 18; 908 So. 2d at 14. Last, this Court described *Simpson v. Grimes*, 02-0869, (La. App. 3 Cir. 5/21/03); 849 So. 2d 740, as "finding the arbitration provisions adhesionary, because of lack of mutuality." *Aguillard*, 04-2804 at p. 20; 908 So. 2d at 16. Under *Aguillard*, these "conservative" non-mutuality holdings have been abrogated.

¹¹ See FCC, *Fourth Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services* (June 24, 1999) at H-2, available at <http://wireless.fcc.gov/auctions/data/papersAndStudies/fc99136.pdf> (showing between three and six mobile telephone operators with coverage throughout most of Louisiana).

¹² Mutuality of obligation is not—and never has been—a part of Louisiana law. The legal requirements for a valid contract in Louisiana, which have not changed since 1825, are: (1) capacity; (2) consent; (3) cause; and (4) a lawful object. See La. Civ. Code. arts. 1918-20, 1927, 1966-67, 1971. Even the common law, from which the idea of mutuality of obligation derived, has moved away from such a requirement. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 79 ("If the requirement of consideration is met, there is no additional requirement of * * * 'mutuality of obligation.'").

It is therefore unsurprising that the first Louisiana appellate court to address this issue post-*Aguillard* held that non-mutuality alone was *not* “sufficient to invalidate a contract”—when, as here—“the ‘weaker party’ had the ability to negotiate the terms of the contract or simply to utilize another service provider.” *See Hoffman*, 05-1491 at p. 10; 936 So. 2d at 859 (enforcing an arbitration provision that allowed the defendant, “in its own discretion[,] to litigate its claims for money under the contract”); *see also Vishal Hospitality, LLC v. Choice Hotels Int’l, Inc.*, 04-0568 (La. App. 1 Cir. 6/28/06); 939 So. 2d 414.¹³

In sum, the district court’s conclusion that *Sutton Steel I* remains good law cannot be squared with this Court’s opinion in *Aguillard*. Non-mutuality cannot render an arbitration agreement unenforceable.¹⁴ Review is essential to conform the Third Circuit’s approach to the policy of this Court favoring the enforcement of arbitration agreements.

B. The orders below also ignore *Aguillard*’s holding that, in order to avoid enforcement of contractual terms on the ground that those terms are adhesionary, non-drafting parties must demonstrate that they “did not consent to the terms in dispute.”

The district court’s order directly conflicts with *Aguillard*’s teachings in another fundamental respect: Despite this Court’s express holding that “[o]nce consent is called into question, the party seeking to invalidate the contract as adhesionary must then demonstrate [that] the non-drafting party either did not consent to the terms in dispute or his consent was vitiated by error” (04-2804 at p. 12; 908 So. 2d at 10)—an inherently individualized inquiry—the district court held that there is no need for individualized

¹³ In *Vishal*, the First Circuit had originally relied on *Sutton Steel I* in refusing to enforce a non-mutual arbitration provision. On remand for reconsideration in light of *Aguillard*, that court shifted course and held that the arbitration provision was enforceable.

¹⁴ In any event, BellSouth’s arbitration provision—like the one in *Aguillard*—does in fact impose mutual obligations because the debt-collection exception scrutinized by the district court applies equally to BellSouth and its customers: “**NO CLAIM OR DISPUTE SHALL BE SUBMITTED TO ARBITRATION IF, AT THE TIME OF THE PROPOSED SUBMISSION, SUCH DISPUTE OR CLAIM INVOLVES AN ATTEMPT TO COLLECT A DEBT OWED TO THE COMPANY BY THE CUSTOMER.**” Ex. 3, LaRussa Aff. Ex. B. This exception allows the company to sue to collect a debt, but it also allows the customer to pursue causes of action against the company for improper debt collection activities (for example, under the federal Fair Debt Collection Practices Act and Fair Credit Reporting Act).

assessment of plaintiffs' consent to a disputed contractual term. Reasons for Judgment, Dec. 27, 2006, at 9. Review is necessary to correct the district court's forthright refusal to apply this Court's precedent. *See* Louisiana Supreme Court Rule X.1(a)(1), (5).

In *Aguillard*, this Court took great pains to provide the lower courts with clear guidance regarding the proper application of Louisiana's doctrine of adhesion. As this Court explained, "we are not willing to declare **all** standard form contracts adhesionary; rather, we find [that] standard form merely serves as a **possible** indicator of adhesion." *Aguillard*, 04-2804 at p. 11; 908 So. 2d at 10 (emphasis added). Adopting the legal principles "recognized by [Professor] Litvinoff," who appears on the brief, "the **real issue** in a contract of adhesion analysis is **not** the standard form of the contract, but rather whether a party **truly consented** to all of the printed terms." *Id.* 04-2804 at p. 12; 908 So. 2d at 10 (citing Saúl Litvinoff, *Consent Revisited: Offer, Acceptance, Option, Right of First Refusal and Contracts of Adhesion in the Revision of the Louisiana Law of Obligations*, 47 LA. L. REV. 699, 758 (1987)) (emphasis added); *see also id.* 04-2804 at p. 11; 908 So. 2d at 10 (quoting Litvinoff, 47 LA. L. REV. at 757-59).

The Court then identified a two-stage process for determining whether a challenged contractual term constitutes an unenforceable contract of adhesion. First, the court must determine whether consent has been "called into question," considering such factors as (i) whether the term is found in a "standard form," (ii) whether the term is set forth in "small print," and (iii) whether the non-drafting party occupied a "disadvantageous position" relative to the drafting party. Second, "[o]nce consent is called into question, **the party seeking to invalidate the contract as adhesionary must then demonstrate** [that he] either did not consent to the terms in dispute or [that] his consent was vitiated by error, which in turn, renders the contract or provision unenforceable." *Id.* 04-2804 at p. 12; 908 So. 2d at 10 (emphasis added; footnote omitted). This Court underscored that "even if a contract is standard in form and printed in small font" (*id.* 04-2804 at p. 12; 908 So. 2d at 11), that is not enough to render the contract one of adhesion. Rather, if the challenged term "does not call into question the non-drafting party's consent **and** if it is not **demonstrated** that the non-drafting party did

not consent or his consent is vitiated by error,” then “the contract *is not* a contract of adhesion.” *Id.* (emphasis added). In short, “the real issue in a contract of adhesion analysis,” as this Court explained, “is not the standard form of the contract”—which is merely one factor that may call consent into question—“but rather whether a party truly consented to all the printed terms.” *Id.* 04-2804 at p. 12; 908 So. 2d at 10 (citing Litvinoff, 47 LA. L. REV. at 758).¹⁵

The district court ignored *Aguillard*'s reasoning, holding that the arbitration provision in *every* class member's BellSouth contract is unenforceable because (in its view) the provision is part of a “standard form service agreement” and “appears nowhere near the customer's signature” and “in a small, virtually unreadable font.” *See* Reasons for Judgment, Dec. 27, 2006, at 9. The court relied on these reasons to hold that, under the “4-factor test of *Aguillard* * * *”, BellSouth's arbitration clauses never became an enforceable term of its contract.” *Id.* at 10. The court concluded that the arbitration provisions were unenforceable contracts of adhesion. *See also id.* at 9-10 (“When the principles of *Aguillard* and Louisiana contract law are applied to the arbitration clause in this case, the clause is clearly not enforceable as a matter of law because the clause never became part of the contract between plaintiffs and BellSouth.”). Thus, the district court determined, “[n]o individualized consent is needed for terms that never became binding * * *.” *Id.* at 10.

That holding is a blatant end run around *Aguillard*. Even assuming that the district court's conclusions about the size and placement of the arbitration provision were valid (*but see* Part 1(A), *supra*), that is only the first part of *Aguillard*'s analysis. The fact that a contract is in small print and is part of a standard form may “call into question” whether the parties actually consented to the contract. *See Aguillard*, 04-2804 at p. 12; 908 So. 2d at 10. But these factors standing alone are insufficient to render a contract term unenforceably adhesive. Rather, “[o]nce consent is called into question,” the party challenging the term “must *then* demonstrate” that he or she “did not consent to the

¹⁵ Indeed, a clear analogy can be drawn to French jurisprudence, which treats arguably adhesionary contracts as perfectly lawful and enforceable, provided that they are not vitiated by lack of consent. *See* FRANÇOIS TERRÉ ET AL., DROIT CIVIL: LES OBLIGATIONS 186 (7th ed. 1999).

term[] in dispute.” *Id.* (emphasis added). That required showing is perforce individualized: No presumption of lack of consent is permissible in light of this Court’s recognition that “[i]t is well settled that a party who signs a written instrument is presumed to know its contents and cannot avoid its obligations by contending that he did not read it, that he did not understand it, or that the other party failed to explain it to him” (*Aguillard*, 04-2804 at p. 22; 908 So. 2d at 17). Rather, because it is presumed that the non-drafting party *did* consent, each party claiming otherwise must establish lack of consent with proof specific to the circumstances of that party.

Because consent is an inherently individualized issue, each and every BellSouth subscriber who wants to avoid his or her arbitration agreement and instead participate in the class action would have to “demonstrate” that he or she “did not consent” to the arbitration provision. That would require perhaps thousands of mini-trials on the issue of consent, rendering class-wide treatment entirely impractical. For this reason, the district court cannot maintain a class action with respect to Louisiana subscribers whose contracts contained arbitration provisions without gutting *Aguillard* (and the Due Process rights of BellSouth) in the process.

For similar reasons, the district court’s refusal to accept that plaintiffs’ substantive theory of liability will require an individualized inquiry as to whether each class member consented to the rounding provision in his or her agreement is flatly irreconcilable with *Aguillard*. The court evaded the application of *Aguillard* by inventing its own method of reading contract terms out of a standard form agreement, declaring the rounding provisions to be in “conflict[]” with a “price/object term” that requires “BellSouth to deliver and bill for * * * a specific amount of air time minutes.” Reasons for Judgment, Dec. 27, 2006, at 8. Having declared that the terms are in conflict, it proceeded to reason that “[s]tandard contract law precludes the rounding clause from becoming an enforceable contract term.” *Id.* at 9.

Of course, “standard contract law” requires courts to harmonize contractual provisions whenever possible, not cavalierly excise them. *See, e.g.*, La. Civ. Code arts. 2049, 2050 & 2053; *Toce Oil Co. v. Great S. Oil & Gas Co.*, 545 So. 2d 1085, 1090 (La.

App. 3 Cir. 1989) (“The Louisiana Civil Code mandates that the provisions of a contract are to be interpreted with reference to each other and in such a manner as to render them effective rather than ineffective.”); *Gulf Coast Marine, Inc. v. Young*, 608 So. 2d 251, 252 (La. App. 5 Cir. 1992) (“An endorsement becomes part of the contract of insurance if attached to the insurance policy. An endorsement must be considered, along with the policy, as a part of the same contract and harmonized with the provisions of the original policy.”); *Ledbetter v. Concord Gen. Corp.*, 564 So. 2d 732, 735 (La. App. 2. Cir. 1990) (“Riders or endorsements affixed to an insurance policy are to be read with and harmonized with the provisions of the policy. In the event of any conflict between the endorsement and the policy, the endorsement prevails.”). And harmonizing these provisions surely was possible here: The specific rounding terms helped explicate the more general “price/object term.” See *Mixon v. St. Paul Fire & Marine Ins. Co. of St. Paul, Minn.*, 147 La. 302, 306, 84 So. 790, 791 (La. 1920) (“[i]n the interpretation of statutes and contracts the specific controls the general”).¹⁶

The district court implicitly recognized that, but for this gambit, it would have had to conduct an individualized inquiry into consent under *Aguillard*. See, e.g., Reasons for Judgment, Dec. 27, 2006, at 1-2. Indeed, the court adopted this invalid contract theory precisely in order to justify ignoring BellSouth’s evidence that numerous customers were aware of, and consented to, the rounding provisions. *Id.* at 9-10.¹⁷

In short, this Court’s decision in *Aguillard* provides a straightforward methodology for determining whether a contract provision is unenforceably adhesive.

¹⁶ It is perfectly consistent with the sale of “airtime minutes” to provide for rounding up of *partial* minutes of use. Indeed, the use of the word “minute” suggests that the unit of measure is “minutes,” not seconds. Thus, in a case involving a contract that did not even have a rounding provision, the federal district court for Massachusetts held that a reasonable person would expect call duration to be rounded up to the next minute for billing purposes, and observed that, had the parties intended per-second billing, the rate plan would have said so. *Smilow v. Southwestern Bell*, No. 97-10307-REX, slip. op. at 11-14 (D. Mass. June 10, 1999). See also cases cited at note 4, *supra*.

¹⁷ These subscribers included the Honorable Ronald Cox (retired) of Lafayette Parish, who averred that, when he met with BellSouth representatives to negotiate for wireless service for all the district judges of the 15th Judicial District, he not only was informed that calls would be rounded up to the next whole minute, but also received instructions from his sales representative on how to use his phone’s timer to utilize the service most economically. Ex. 7, Affidavit of Ronald Cox.

The district court's failure to follow *Aguillard's* requirements calls for this Court's review and exercise of its supervisory authority.

ASSIGNMENT OF ERROR #2:

The Lower Courts' Failure To Apply The Laws Of The Eight Other Class States Violates The Due Process And Full Faith And Credit Clauses Of The U.S. Constitution And This State's Class Certification Requirements.

In order to maintain this multi-state class action, the lower courts disregarded the laws of the other class states. Rather, the district court simply asserted that its "contract interpretation would not vary from state to state." Reasons for Judgment, Dec. 27, 2006, at 8. The refusal to analyze and apply the laws of the out-of-state class members' home states violates the U.S. Constitution's Due Process and Full Faith and Credit Clauses and Louisiana's class certification principles. The decisions below raise serious concerns in our federal system because they (a) encroach upon the power of Louisiana's sister States to determine the rules under which they enforce contracts and (b) impermissibly regulate contracts that were formed and performed outside of Louisiana's borders. Review by this Court is needed to ensure the continued vitality of the constitutional safeguards that apply to multi-state class actions as well as this State's own class-certification procedures.

A. The federal Constitution required the district court to analyze and apply the law of each of the class states in this multi-state class action.

The Due Process and Full Faith and Credit Clauses of the U.S. Constitution place significant limits on whether the law of a forum state may constitutionally be applied to the claims of out-of-state class members in a multi-state class action. As the U.S. Supreme Court has explained, "if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981) (plurality opinion). Following this principle, the Supreme Court held that, in a multi-state class-action lawsuit in Kansas state court, "application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits" because the majority of class members "had no apparent connection to the State of Kansas except for this lawsuit." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822, 815 (1985). To apply the forum state's law to claims by out-of-state class members would "abrogate the rights of parties beyond [the forum

state's] borders" (*id.* at 822 (internal quotation marks omitted)), thereby eliminating the protections afforded by the laws of the other states. Indeed, that would frustrate the "expectation[s] of the parties," because "[t]here is no indication that when the [contracts] involving [parties] outside of [the forum state] were executed, the parties had any idea that [the forum state's] law would control." *Id.* As Justice Stevens explained in his concurring opinion in *Allstate*, "[a] choice-of-law decision that frustrates the justifiable expectations of the parties can be fundamentally unfair. This desire to prevent unfair surprise to a litigant has been the central concern in this Court's review of choice-of-law decisions under the Due Process Clause." *Allstate Ins. Co.*, 449 U.S. at 327 (Stevens, J., concurring). Such concerns have led state and federal courts alike to police these constitutional limitations vigilantly in the context of multi-state class actions.¹⁸

Those limits are equally applicable here; just as in *Shutts*, the district court's failure to consider the law of the other class states is "sufficiently arbitrary and unfair as to exceed constitutional limits." 472 U.S. at 822. As in *Shutts*, the majority of the class members have "no apparent connection to the State of [Louisiana] except for this lawsuit." *Id.* at 815. And there is no reason to believe that either BellSouth or its customers in the eight class states outside of Louisiana "had any idea that [Louisiana] law

¹⁸ See *Dragon v. Vanguard Indus., Inc.*, 89 P.3d 908, 918 (Kan. 2004) (noting that "full faith and credit and due process issues prevent Kansas from constitutionally applying its own substantive law to every claim" in multi-state class action); *Berry v. Fed. Kemper Life Assurance Co.*, 99 P.3d 1166, 1187 (N.M. Ct. App. 2004) (noting in multi-state class action that "conflicts of law are potentially of constitutional dimension"); *Stetser v. TAP Pharm. Prods., Inc.*, 598 S.E.2d 570, 587 (N.C. Ct. App. 2004) (failure to apply the law of the class states in multi-state class action appeared "[o]n its face * * * to violate defendants' due process rights"); *W. Va. ex rel. Chemtall, Inc. v. Madden*, 607 S.E.2d 772, 781 (W. Va. 2004) (relying upon constitutional principles in reversing the lower court for failing to conduct "a thorough analysis" of applicable state laws in a multi-state class action); see also *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002) ("Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court."); *Zinser v. Accufix Res. Inst., Inc.*, 253 F.3d 1180, 1187 (9th Cir.) (recognizing that "under * * * *Shutts* * * *, California law cannot be constitutionally applied to all putative class members" in a multi-state class action), amended by 273 F.3d 1266 (9th Cir. 2001); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) (explaining that it is "unconstitutional * * * to apply general common law rather than the common law of the state whose law would apply" in a multi-state class action and holding that constitutional requirements may not be relaxed when the law "differ[s] among the states only in nuance"); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016 & n.90 (D.C. Cir. 1986) (refusing to accept "on faith" the assertion that state law did not vary in multi-state class action).

would control.” *Id.* at 822.

B. Under the law of the other class states, BellSouth’s arbitration provision is enforceable.

Moreover, there are important differences between Louisiana law—particularly as construed by the district court—and the laws of the other class states. The district court effectively ruled—without considering the law of *any* of the class states—that every state would follow its lead in concluding that BellSouth’s arbitration provision was “literally and intentionally buried among many detailed terms crowded onto an unreadable page” (Reasons for Judgment, Dec. 27, 2006, at 9), that “[t]he courts simply find they are not part of the contract agreement” (*id.*), and that “[under] no theory of consent [are they] enforceable” (*id.*). For reasons we have explained (*see* Part I(A), *supra*), these conclusions are mistaken, and do not accurately reflect Louisiana law. But even if the district court had properly construed and applied this State’s law, that would not mean that BellSouth’s arbitration provision is unenforceable in the eight class states outside of Louisiana.

Indeed, the law in those states differs at a basic level, because they do not follow Louisiana’s contract-of-adhesion analysis. Rather, they follow the related—but distinct—doctrine of unconscionability. Had the district court analyzed whether BellSouth’s arbitration provision is unconscionable under the laws of the class states—instead of simply applying its mistaken conclusions about Louisiana law to the other eight states—it would have been compelled to find that the provision is not unconscionable in those states. In most states, unconscionability is understood to have two components: “procedural” unconscionability and “substantive” unconscionability. 21 Richard A. Lord, WILLISTON ON CONTRACTS § 57:15 (4th ed. 1990). Procedural unconscionability refers to the manner in which the contract was formed, and substantive unconscionability refers to the content of the challenged contractual term. *Id.* In five of the eight class states, it is established that the party seeking to avoid a contractual provision must prove *both* procedural and substantive unconscionability.¹⁹ As we

¹⁹ In Mississippi, either procedural or substantive unconscionability may suffice for a contractual provision to be deemed unconscionable. *See Sanderson Farms, Inc. v.*

demonstrated in our briefing to the district court, neither procedural nor substantive unconscionability can be shown in any of the class states.

As to procedural unconscionability, we showed below that the factors ultimately relied upon by the court—font size, use of a standard form, and incorporation of terms on the back of the contract—either did not constitute procedural unconscionability under the law of particular states or barely registered as procedurally unconscionable under the laws of other states. By refusing to analyze this well-established body of law in the class states—and instead citing four inapposite cases decided in *other* jurisdictions unrelated to the class states²⁰—the district court failed to carry out its constitutional duties.

Gatlin, 848 So. 2d 828, 845 (Miss. 2003). The question is an open one in Georgia. See *NEC Techs., Inc. v. Nelson*, 478 S.E.2d 769, 773 & n.6 (Ga. 1996). In Kentucky, the courts have not addressed the issue at all. Generally, to invalidate a contract on the basis of procedural unconscionability alone, a court would have to find a very high degree of procedural unconscionability to avoid the anarchy that would result from treating all form contracts as voidable at the will of the non-drafting party. See, e.g., 21 WILLISTON ON CONTRACTS, *supra*, § 57:15 (“[W]hile it is conceivable that a contract might be unconscionable on a theory of procedural unconscionability without any substantive imbalance in the obligations of the parties to the contract, that would be rare.”) (citing Utah cases); see also *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir. 2002) (“A ruling of unconscionability based on [a gross disparity in bargaining power and a take-it-or-leave-it contract] alone could potentially apply to every contract of employment in our contemporary economy.”).

In the remaining five states, a contractual term cannot be unconscionable unless *both* procedural and substantive unconscionability are proven. **Alabama:** *Blue Cross Blue Shield v. Rigas*, 923 So. 2d 1077, 1087 (Ala. 2005). **Florida:** See *Golden v. Mobil Oil Corp.*, 882 F.2d 490, 493 (11th Cir. 1989) (applying Florida law); *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1027 (Fla. Dist. Ct. App. 2005). **North Carolina:** *Wilkerson v. Nelson*, 395 F. Supp. 2d 281, 289 (M.D.N.C. 2005) (applying North Carolina law). **South Carolina:** *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1046, 1046 n.10 (D.S.C. 1993) (applying South Carolina law). **Tennessee:** *Haun v. King*, 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984); *Elliott v. Elliott*, 1988 Tenn. App. LEXIS 242, at *12 (Tenn. Ct. App. Apr. 13, 1988); *Advantage Sales & Leasing Co. v. Townsend*, 1987 Tenn. App. LEXIS 2892, at *4-*5 (Tenn. Ct. App. Aug. 28, 1987).

²⁰ The trial judge’s opinion in *Joiner v. Ameritech Mobile Communications*, No. 96-L-121, slip op. (Ill. Cir. Ct., Madison County, May 11, 1999), did not hold—as the district court believed—that “[c]ontractual terms that are intentionally buried in transaction documents” are unenforceable. Reasons for Judgment, Dec. 27, 2006, at 9. Instead, it enforced an “*actual usage*” billing provision on the front of the contract that “flatly contradict[ed]” a rounding provision found on the back page of the same contract. *Joiner*, slip op. at 2 (emphasis added). No such conflict exists between BellSouth’s arbitration provision and any term on the front of the contract; nor does the price term on the front of BellSouth’s contract conflict with the rounding provision on the back. As indicated above, the latter clarifies the former. Indeed, the *Joiner* court refused to include in those classes subscribers whose contracts, like the BellSouth contract, did not include the “actual usage” language on the front. See *Joiner v. Ameritech Mobile Commc’ns*, No. 96-L-121, Order (Ill. Cir. Ct., Madison County, July 25, 2000). The other cases cited by

Because the district court did not analyze the law of the other class states, it is unsurprising that it ignored whether BellSouth's arbitration provision was *substantively* unconscionable under those states' laws. Indeed, in assuming that the arbitration provision is unenforceable in the other class states, the court made no reference to any substantive flaws in the provision. Moreover, the only qualm that the district court expressed about the substance of BellSouth's arbitration provision under Louisiana law was that it supposedly is not fully mutual. Even if that perception were accurate (*but see* note 14, *supra*), mutuality is *not* a requirement for enforcement of arbitration provisions in at least seven of the eight other class states.²¹ And in the remaining state, Tennessee, the FAA would preempt contrary state law and require enforcement of BellSouth's arbitration provision.²²

the district court similarly offer no support for its theory that terms incorporated by reference and printed on the reverse side of a form contract are *per se* unenforceable in the class states. See *Sierra Diesel Injection Serv. v. Burroughs Corp.*, 890 F.2d 108, 113 (9th Cir. 1989) (applying Nevada law) (addressing the "conspicuousness" of warranty exclusions under the Uniform Commercial Code § 2-316); *RDO Fin. Servs. v. Powell*, 191 F. Supp. 2d 811, 814 (N.D. Tex. 2002) (addressing knowing and voluntary waiver of Seventh Amendment right to a jury trial); *McCarthy Well Co. v. St. Peter Creamery, Inc.*, 410 N.W.2d 312, 316 (Minn. 1987) (addressing literally unreadable terms "printed on dark paper" in "3-point type").

²¹ **Alabama:** *Rigas*, 923 So. 2d at 1091 (rejecting as "simply erroneous" an unconscionability challenge to an arbitration provision that allowed the defendant "to litigate any claims it may have against [the plaintiff] in court"). **Florida:** *Avid Eng'g, Inc. v. Orlando Marketplace Ltd.*, 809 So. 2d 1, 4 (Fla. Dist. Ct. App. 2002) (if "there was sufficient consideration to support the entire contract, the arbitration provision [is] not void for lack of mutuality of obligation"). **Georgia:** *Saturna v. Bickley Constr. Co.*, 555 S.E.2d 825, 826-27 (Ga. Ct. App. 2001) (arbitration agreement that provided "additional methods of redress" by according one party access to judicial proceedings was fully enforceable). **Kentucky:** *Conseco Fin. Serv. Corp. v. Wilder*, 47 S.W.3d 335, 342-43 (Ky. Ct. App. 2001) (the fact that a company retains "the option to litigate some issues in court, while [its customers] must arbitrate all claims [does] not render [the arbitration provision] substantively unconscionable") (internal quotation marks omitted). **Mississippi:** *McKenzie Check Advance of Miss., LLC v. Hardy*, 866 So. 2d 446, 453 (Miss. 2004) ("mutuality of obligation is not required for an arbitration agreement to be enforceable as long as there is consideration"). **North Carolina:** *Wilkerson*, 395 F. Supp. 2d at 287 (a "reciprocal agreement * * * to arbitrate * * * is not required" because "the only reciprocal promise necessary for consideration is that both parties agree to be bound by the rules of the arbitration procedure and its result, irrespective of whose claims must be arbitrated") (emphasis in original). **South Carolina:** *Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360, 365 (S.C. 2001) (rejecting an unconscionability challenge to an arbitration agreement that allowed only one party access to a judicial forum because the party required to arbitrate has "not been deprived of a remedy – [it] simply must seek [its] remedy through arbitration rather than through the judicial system").

²² Perhaps because Tennessee alone among the class states requires arbitration provisions to be 100% mutual, the district court made mention of this aspect of

In short, had the district court applied the law of the other class states, it would have been required to hold that BellSouth's arbitration provision is fully enforceable in those states.

C. The district court's failure to analyze the law of the other class states also violates this State's class-certification principles.

By failing to analyze the law of any of the class states or the out-of-state class members' contacts with Louisiana, the district court not only violated the U.S. Constitution but also ignored the fundamental mandates of this State's class-certification principles. Article 591 of the Louisiana Code of Civil Procedure requires a court to assess the predominance of common issues over individual questions. Accordingly, the First Circuit has explained that, when "plaintiffs seek to represent a nationwide class, the trial court must consider which states' law will apply, and how variation in state law will affect the superiority of a class action. Variations in state law may swamp any common issues and defeat predominance of common questions of law." *Carr v. GAF, Inc.*, 97-0838, p. 9 (La. App. 1 Cir. 4/8/98); 711 So. 2d 802, 807 (citing *Shutts* and *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996)). The district court ignored these precepts, instead presuming (wrongly) that no variation existed between the relevant class states' laws and the law of Louisiana.²³

As both *Carr* and several federal circuit courts of appeals applying the analogous Fed. R. Civ. P. 23, have recognized though, the district court was required to make a reasoned "determination that there is an absence of state law variations or that such

Tennessee law in its ruling. *See* Reasons for Judgment, Dec. 27, 2006, at 10. But the court proceeded to ignore our contention that this principle of Tennessee law is preempted by the FAA, which requires that courts enforce an agreement to arbitrate "save upon such grounds as exist at law or in equity for the revocation of *any* contract." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (citations omitted; emphasis in original) (quoting 9 U.S.C. § 2). Because Tennessee courts have long enforced non-mutual obligations *outside* the realm of arbitration (*see, e.g., Jeffers v. Hawn*, 212 S.W.2d 368, 370 (Tenn. 1948)), their selective use of non-mutuality to invalidate *only* arbitrate agreements is preempted by the FAA. *See Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004) ("state courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny").

²³ *Cf.* Charles S. McCowan, Jr. & Calvin C. Fayard, Jr., *Class Actions in the Gulf South and Beyond: Louisiana Complex Litigation*, 80 TUL. L. REV. 1905, 1964 (2006) ("Defining a class as a 'nationwide' class often makes it more difficult to satisfy the requirements of 'predominance' of common issues and 'superiority' of the class action procedure over traditional procedures. This is especially true when the underlying substantive law varies from state to state.").

variations would not be an insurmountable obstacle, a determination to be made *by reference to the applicable law.*” *Carr*, 97-0838 at p. 9; 711 So. 2d at 807 (emphasis added); *see also Castano*, 84 F.3d at 741 (holding that a trial court’s “duty to determine whether the plaintiff has borne its burden on class certification requires that a court consider variations in state law when a class action involves multiple jurisdictions”); *Andrews v. AT&T Co.*, 95 F.3d 1014 (11th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995) (Posner, J.); *Walsh v. Ford Motor Co.*, 807 F.2d 1000 (D.C. Cir. 1986). The district court’s analysis began and ended with a refusal to make this determination, and it reached a result that cannot be justified either constitutionally or procedurally. The lower courts’ violation of the federal Constitution and Louisiana’s class-certification requirements in the context of multi-state class actions warrants this Court’s review.

CONCLUSION

For the reasons set forth above, BellSouth respectfully requests that the Court grant review and set the case for plenary briefing and oral argument.

Respectfully submitted,

DATED: April 30, 2007

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VERIFICATION

I certify that all of the information contained in this Application for Writ of Certiorari are true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by the Supreme Court Rule X, are attached to this filing. I further certify that a copy of the Application for Writ of Certiorari has been served upon the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties of record, by facsimile and/or by placing same in the United States mail, postage prepaid and properly addressed, this 30th day of April, 2007.

GARY J. RUSSO