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SUPREME COURT
STATE OF LOUISIANA

NO. _____

SUPREME COURT
LOUISIANA

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CLERK
JUDICIAL DEPARTMENT

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
Nos. CM 07-146 & CA 07-512

Hon. John D. Saunders, Jimmie C. Peters, and Glenn B. Gremillion, 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

Respectfully submitted,

GARY J. RUSSO (10828)
CAMILLE B. POCHÉ (22597)
Longman Russo, APLC
Suite 1600, 600 Jefferson Street
Lafayette, LA 70502-3408
Phone: (337) 262-9000

SEAMUS C. DUFFY
WILLIAM M. CONNOLLY
ALEXANDER S. HELDERMAN
CHRISTOPHER P. COVAL
Drinker Biddle & Reath LLP
One Logan Square, 18th & Cherry Streets
Philadelphia, PA 19103-6996
Phone: (215) 988-2700

EVAN M. TAGER
ARCHIS A. PARASHARAMI
LAUREN R. RANDELL
Mayer Brown LLP
1909 K Street NW
Washington, DC 20006-1101
Phone: (202) 263-3000

OF COUNSEL:

DR. SAÚL LITVINOFF
Boyd Professor of Law
Paul M. Hebert Law Center
Louisiana State University
366 Law Center Building
Baton Rouge, LA 70803-1000
Phone: (225) 388-1126

Attorneys for BellSouth Mobility Inc.

LONGMAN RUSSO

A PROFESSIONAL LAW CORPORATION

GARY J. RUSSO*
* ADMITTED TO PRACTICE IN TEXAS
GJRUSSO@LRFIRM.COM

SUITE 1600, CHASE TOWER
600 JEFFERSON STREET
LAFAYETTE, LOUISIANA 70501
TELEPHONE (337) 262-9000
FACSIMILE (337) 262-9001

MAILING ADDRESS:
P. O. DRAWER 3408
LAFAYETTE, LOUISIANA 70502-3408
OUR FILE NUMBER:
2374.10

January 11, 2008

Clerk, Supreme Court of Louisiana
400 Royal Street
New Orleans, LA 70112-1887

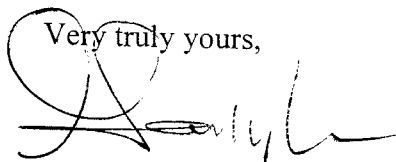
Re: Sutton Steel & Supply, Inc., Kate Davis,
and Mestayer & Mestayer, APLC,
Individually and on Behalf of a Class
of All Other Similarly Situated Customers
versus BellSouth Mobility Inc.

Dear Sir/Madame:

Enclosed are duplicate originals and seven copies of An Application for Writ of Certiorari filed on behalf of Defendant-Appellant, BellSouth Mobility Inc. Also enclosed is our firm check in the amount of \$170.00 to cover filing fees. If you should have any questions, please do not hesitate to contact me.

Thank you for your courtesy. With kindest regards, I am

Very truly yours,



Gary J. Russo

GJR:LL coc.supreme.01.decert.doc

Enclosure

C - Third Circuit of Appeal
Judge Gerard Wattigny
Jonathan Andry, Bob Wright, Lionel Sutton, Peter Butler
Client

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
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Respectfully submitted,

GARY J. RUSSO (10828)
CAMILLE B. POCHÉ (22597)
Longman Russo, APLC
Suite 1600, 600 Jefferson Street
Lafayette, LA 70502-3408
Phone: (337) 262-9000

SEAMUS C. DUFFY
WILLIAM M. CONNOLLY
ALEXANDER S. HELDERMAN
CHRISTOPHER P. COVAL
Drinker Biddle & Reath LLP
One Logan Square, 18th & Cherry Streets
Philadelphia, PA 19103-6996
Phone: (215) 988-2700

EVAN M. TAGER
ARCHIS A. PARASHARAMI
LAUREN R. RANDELL
Mayer Brown LLP
1909 K Street NW
Washington, DC 20006-1101
Phone: (202) 263-3000

OF COUNSEL:

DR. SAÚL LITVINOFF
Boyd Professor of Law
Paul M. Hebert Law Center
Louisiana State University
366 Law Center Building
Baton Rouge, LA 70803-1000
Phone: (225) 388-1126

Attorneys for BellSouth Mobility Inc.

SUPREME COURT OF LOUISIANA

WRIT APPLICATION FILING SHEET

NO. _____

TO BE COMPLETED BY COUNSEL
or PRO SE LITIGANT FILING APPLICATION

TITLE

Sutton Steel & Supply, Inc., Kate Davis, and
Mestayer & Mestayer, APLC, Individually
and on Behalf of a Class of All Other
Similarly Situated Customers

v.

BellSouth Mobility Inc.

Applicant: BellSouth Mobility Inc.

Have there been any other filings in this
Court in this matter? Yes

Are you seeking a Stay Order? No

Priority Treatment? No

If so you MUST complete & attach a
Priority Form

LEAD COUNSEL/PRO SE LITIGANT INFORMATION

APPLICANT:

Name:
Longman Russo, APLC
Gary J. Russo, Bar Roll # 10828
Camille B. Poché, Bar Roll # 22597
600 Jefferson Street, Suite 1600
P.O. Drawer 3408
Lafayette, LA 70502
Phone: (337) 262-9000

Name:
Drinker Biddle & Reath LLP
Seamus C. Duffy
Lead Counsel
William M. Connolly
Alexander S. Helderman
Christopher P. Coval
One Logan Square
18th & Cherry Streets
Philadelphia, PA 19103-6996
Phone: (215) 988-2700

Name:
Mayer Brown LLP
Evan M. Tager
Archis A. Parasharami
Lauren Randell
1909 K Street NW
Washington, DC 20006-1101
Phone: (202) 263-3000

Of Counsel:

Dr. Saúl Litvinoff
Boyd Professor of Law
Paul M. Hebert Law Center
Louisiana State University
366 Law Center Building
Baton Rouge, LA 70803-1000
Phone: (225) 388-1126

Pleading being filed: In proper person, In Forma Pauperis
Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

- Civil, Criminal, Bar, Civil Juvenile, Criminal Juvenile, Other
- CINC, Termination, Surrender, Adoption, Child Custody

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court: _____; Docket No.: _____;
Judge/Commissioner/Hearing Officer: _____; Ruling Date: _____

DISTRICT COURT INFORMATION

Parish and Judicial District Court: Iberia Parish, 16th Judicial District Court
Docket No.: 91421
Judge and Section: Honorable Gerard B. Wattigny
Date of Ruling/Judgment: December 27, 2006 (Reasons for Judgment with respect to the Motion to Decertify the Class)

APPELLATE COURT INFORMATION

Circuit: Third Circuit Court of Appeal
Docket Nos.: CM 07-146 & CA 07-512
Action: Motion to Dismiss Denied, Judgment of Trial Court Affirmed
Applicant in Appellate Court: BellSouth Mobility Inc.
Filing Date: January 26, 2007 (Appeal)
Ruling Date: December 12, 2007
Panel of Judges:
Honorable John D. Saunders
Honorable Jimmie C. Peters
Honorable Glenn B. Gremillion
En Banc:

REHEARING INFORMATION

Applicant:
Action on Rehearing:
Panel of Judges:
En Banc

PRESENT STATUS

- Pre-Trial, Hearing/Trial Scheduled date: No trial date scheduled
- Trial in Progress
- Post Trial

Is there a stay now in effect? No

Has this pleading been filed simultaneously in any other court? No

If so, explain briefly _____

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to 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.

1/11/2008
DATE


SIGNATURE

STATEMENT OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. 1) Sutton Steel Supply, Inc.
 2) Kate Davis
 3) Rachel Maddox, individually and on behalf of a class of all other similarly situated customers.
(Plaintiffs-Respondents)

2. BellSouth Mobility Inc. (Defendant-Applicant)

3. Drinker Biddle & Reath LLP
 Seamus C. Duffy (Lead Counsel)
 William M. Connolly
 Alexander S. Helderman
 Christopher P. Coval

Longman Russo, APLC
Gary J. Russo, Bar Roll # 10828
Camille B. Poché, Bar Roll # 22597

Mayer Brown LLP
Evan M. Tager
Archis A. Parasharami
Lauren R. Randell

Dr. Saúl Litvinoff

(Counsel for BellSouth Mobility Inc.)

4. The Andry Law Firm, LLC
 Jonathan B. Andry (Lead Counsel)

The Sutton Law Firm
Lionel Sutton

Domengeaux, Wright, Roy & Edwards
Bob Wright

Breazeale, Sachse, & Wilson
Peter Butler, Sr.
Peter Butler, Jr.

(Counsel for Plaintiffs)

TABLE OF CONTENTS

INDEX OF APPENDIX EXHIBITS vi

INDEX OF AUTHORITIES..... vii

STATEMENT OF CONSIDERATIONS SUPPORTING REVIEW x

MEMORANDUM 1

 A. STATEMENT OF THE CASE 2

 1. Relevant Facts 2

 2. Prior Proceedings 3

 3. This Court’s Decision in *Aguillard*..... 4

 4. Proceedings Below..... 5

 B. ASSIGNMENT OF ERRORS 7

 C. SUMMARY OF ARGUMENT 7

 D. ARGUMENT 9

 ASSIGNMENT OF ERROR # 1: The Decision Below Conflicts With This Court’s
 Decision In *Aguillard* In Two Fundamental Respects. 9

 A. The decision below conflicts with *Aguillard* because it did not
 require the plaintiffs to demonstrate that they “did not consent to the
 terms in dispute.” 9

 B. The decision below conflicts with *Aguillard* because it found that
 features of the arbitration clause “called consent into question,” even
 though this Court reached a contrary conclusion in *Aguillard* on
 materially indistinguishable facts. 15

 ASSIGNMENT OF ERROR # 2: The Lower Courts’ Failure to Apply the Laws Of The
 Eight Other Class States Violates The United States Constitution As
 Interpreted By The United States Supreme Court. 20

 CONCLUSION..... 25

VERIFICATION..... 26

INDEX OF APPENDIX EXHIBITS

Appended pursuant to Supreme Court Rule X.3.5.

- A. Reasons for Judgment with Respect to the Motion to Decertify the Class in *Sutton's Steel & Supply v. BellSouth Mobility, Inc.*, 16th Judicial Dist. Ct., Parish of Iberia, No. 91421-A (12/27/06).
- B. Judgment and Written Opinion of the Court of Appeal for the Third Circuit in *Sutton Steel and Supply, Inc. v. BellSouth Mobility, Inc.*, No. CM 07-146 Consolidated with CA 07-512 (La. App. 3 Cir. 12/12/07).

Separately filed pursuant to Supreme Court Rule X.3.6.

- 1. Affidavit of Joseph M. LaRussa and Exhibit B Thereto.
- 2. Reasons for Judgment with Respect to the Motion for Summary Judgment in *Sutton's Steel & Supply, Inc. v. BellSouth Mobility, Inc.*, 16th Judicial Dist. Ct., Parish of Iberia, No. 91421-A (2/13/03).
- 3. Affidavit of Ronald Cox.

INDEX OF AUTHORITIES

CASES

<i>Aguillard v. Auction Mgmt. Corp.</i> , 04-2804 (La. 6/29/05); 908 So. 2d 1	<i>passim</i>
<i>Alicke v. MCI Commc'ns Corp.</i> , 111 F.3d 909 (D.C. Cir. 1997).....	24
<i>Allstate Ins. Co. v. Hague</i> , 449 U.S. 302 (1981).....	21
<i>Andry v. Murphy Oil, U.S.A., Inc.</i> , 97-0793 (La. App. 4 Cir. 4/1/98); 710 So. 2d 1126	12
<i>Avid Eng'g, Inc. v. Orlando Marketplace Ltd.</i> , 809 So. 2d 1 (Fla. Dist. Ct. App. 2002)	23
<i>Bagneris v. Oddo</i> , 2 Pelt. 278 (La. App. 1919)	10
<i>Banks v. New York Life Ins. Co.</i> , 98-0551 (La. 7/2/99); 737 So. 2d 1275.....	14
<i>Blue Cross Blue Shield v. Rigas</i> , 923 So. 2d 1077 (Ala. 2005).....	22, 23
<i>Boutin v. Rodrigue</i> , 07-566 (La. App. 3 Cir. 10/31/07).....	20
<i>Caddo Parish Sch. Bd. v. Cotton Baking Co.</i> , 342 So. 2d 1196 (La. App. 2 Cir. 1977).....	20
<i>Chiarella v. Sprint Spectrum LP</i> , 04-1433 (La. App. 4 Cir. 11/17/05); 921 So. 2d 106, 123, <i>writ denied</i> , 05-2539 (La. 3/31/06); 925 So. 2d 1263).....	12
<i>Cimino v. Raymark Indus., Inc.</i> , 151 F.3d 297 (5th Cir. 1998)	12
<i>Conseco Fin. Servicing Corp. v. Wilder</i> , 47 S.W.3d 335 (Ky. Ct. App. 2001)	23
<i>Doctor's Assocs., Inc. v. Casarotto</i> , 517 U.S. 681 (1996).....	16
<i>Fonte v. AT&T Wireless Servs., Inc.</i> , 903 So. 2d 1019 (Fla. Dist. Ct. App. 2005)	22
<i>Gay v. CreditInform</i> , No. 06-4036, 2007 WL 4410362 (3d Cir. Oct. 17, 2007)	18
<i>Haun v. King</i> , 690 S.W.2d 869 (Tenn. Ct. App. 1984).....	22
<i>Hoffman, Siegel, Seydel, Bienvenu & Centola, APLC v. Lee</i> , 05-1491 (La. App. 4 Cir. 07/12/06); 936 So. 2d 853	15, 16
<i>LaFleur v. Law Offices of Anthony G. Buzbee, P.C.</i> , 06-0466 (La. App. 1 Cir. 3/23/07); 960 So. 2d 105.....	15
<i>Lomax v. Woodmen of the World Life Ins. Soc'y</i> , 228 F. Supp. 2d 1360 (N.D. Ga. 2002)	23
<i>Long v. Foster & Assocs., Inc.</i> , 136 So. 2d 48 (La. 1961).....	19
<i>Marcus v. AT&T Corp.</i> , 938 F. Supp. 1158 (S.D.N.Y. 1996)	24

<i>Market Am., Inc. v. Tong</i> , No. 1:03CV00420, 2004 WL 1618574 (M.D.N.C. July 15, 2004)	23
<i>McKenzie Check Advance of Miss., LLC v. Hardy</i> , 866 So. 2d 446 (Miss. 2004)	23
<i>McMillan v. Gold Kist, Inc.</i> , 577 S.E.2d 482 (S.C. App. Ct. 2003)	23
<i>Mobley v. AT&T Corp.</i> , 717 So. 2d 367 (Ala. 1998)	24
<i>Munoz v. Green Tree Fin. Corp.</i> , 542 S.E.2d 360 (S.C. 2001)	23
<i>Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.</i> , 843 F. Supp. 1027 (D.S.C. 1993)	22
<i>NEC Techs., Inc. v. Nelson</i> , 478 S.E.2d 769 (Ga. 1996)	22
<i>Pac. Life Ins. Co. v. Heath</i> , 370 F. Supp. 2d 539 (S.D. Miss. 2005)	23
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797 (1985)	<i>passim</i>
<i>Porr v. NYNEX Corp.</i> , 660 N.Y.S.2d 440 (App. Div. 1997), <i>appeal denied</i> , 692 N.E.2d 129 (1998)	24
<i>Sanderson Farms, Inc. v. Gatlin</i> , 848 So. 2d 828 (Miss. 2003)	22
<i>Saturna v. Bickley Constr. Co.</i> , 555 S.E.2d 825 (Ga. Ct. App. 2001)	23
<i>Seals v. Calcasieu Parish Voluntary Council on Aging, Inc.</i> , 99-1269 (La. App. 3 Cir. 03/01/00); 758 So. 2d 286	19
<i>Smart v. Bob Wilson Dodge Inc.</i> , No. 8:06-CV-22-T-30TGN, 2006 WL 1037113 (M.D. Fla. Apr. 19, 2006)	23
<i>Sutton's Steel & Supply, Inc. v. BellSouth Mobility, Inc.</i> , 00-511 (La. App. 3 Cir. 12/13/00); 776 So. 2d 589	<i>passim</i>
<i>Sutton's Steel & Supply, Inc. v. BellSouth Mobility, Inc.</i> , 01-0152 (La. 3/16/01); 787 So. 2d 316	3
<i>Sutton Steel & Supply, Inc. v. BellSouth Mobility, Inc.</i> , 03-1260 (La. App. 3 Cir. 12/4/03)	3
<i>Sutton Steel & Supply, Inc. v. BellSouth Mobility, Inc.</i> , 03-3445, 03-3446 (La. 2/20/04); 866 So. 2d 830, 831	4
<i>Sutton Steel & Supply, Inc. v. BellSouth Mobility Inc.</i> , 03-1536 (La. App. 3 Cir. 6/9/04); 875 So. 2d 1062	4, 23, 24
<i>Sutton Steel & Supply, Inc. v. Bellsouth Mobility, Inc.</i> , 04-1654 (La. 11/15/04); 887 So. 2d 478	4
<i>Sutton Steel & Supply, Inc. v. BellSouth Mobility, Inc.</i> , 07-0106 (La. App. 3 Cir. 3/30/07)	6
<i>Sutton Steel & Supply, Inc. v. BellSouth Mobility, Inc.</i> , 07-0902 (La. 6/15/07); 958 So. 2d 1198	6
<i>Sutton Steel & Supply, Inc. v. BellSouth Mobility Inc.</i> , 07-146 (La. App. 3 Cir. 12/12/07); 2007 WL 4326705	<i>passim</i>

<i>Taylor v. First N. Am. Nat'l Bank</i> , 325 F. Supp. 2d 1304 (M.D. Ala. 2004).....	23
<i>Tweedel v. Brasseaux</i> , 433 So. 2d 133 (La. 1983).....	10
<i>Weinberg v. Sprint Corp.</i> , 801 A.2d 281 (N.J. 2002).....	24
<i>Wilkerson v. Nelson</i> , 395 F. Supp. 2d 281 (M.D.N.C. 2005).....	22, 23

STATUTES AND RULES

La. Civ. Code. arts. 1918-20, 1927, 1966-67, 1971.....	19
Louisiana Supreme Court Rule X.1.....	x, xi, xii
Louisiana Supreme Court Rule X.3.6.....	2

REGULATORY AUTHORITIES

FCC, <i>Fourth Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services</i> (June 24, 1999), available at http://wireless.fcc.gov/auctions/data/ papersAndStudies/fc99136.pdf	17
<i>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</i> , 14 F.C.C.R. 19898 (1999).....	3

OTHER AUTHORITIES

RESTATEMENT (SECOND) OF CONTRACTS § 79.....	20
Richard A. Lord, WILLISTON ON CONTRACTS (4th ed. 1990).....	22
Saúl Litvinoff, <i>Consent Revisited: Offer, Acceptance, Option, Right of First Refusal and Contracts of Adhesion in the Revision of the Louisiana Law of Obligations</i> , 47 LA. L. REV. 699 (1987).....	5

STATEMENT OF CONSIDERATIONS SUPPORTING REVIEW

BellSouth Mobility Inc. (“BellSouth”) respectfully applies for a writ of certiorari to review the decisions 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 *Aguillard v. Auction Management Corp.*, 04-2804 (La. 6/29/05); 908 So. 2d 1, this Court’s seminal decision on contracts of adhesion. See Louisiana Supreme Court Rule X.1(a)(1). *Aguillard* unambiguously holds that, to establish the lack of consent that makes a standard form contract adhesionsary, the party seeking to invalidate the contract must first show that consent has been “called into question” by the contract’s features, and, “[o]nce consent is called into question,” the party “must then demonstrate” that he “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. Despite that express language, the Third Circuit, like the district court in the decision it affirmed, held that, under *Aguillard*, “the form of the agreement” controls. *Sutton Steel & Supply, Inc. v. BellSouth Mobility Inc.* (“*Sutton Steel III*”), 07-146 (La. App. 3 Cir. 12/12/07) at p.18; 2007 WL 4326705, at *11. The Third Circuit explained that “separate questions of individualized consent” need *not* “be answered before [a] * * * contract may be invalidated.” *Id.* In view of the clarity of this Court’s holding, the decisions below not only conflict with *Aguillard*, but reflect an apparent disregard for the 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 conflict with *Aguillard* insofar as they concluded that the arbitration provision at issue called the plaintiffs’ consent into question (a conclusion that was sufficient, in the mistaken view of the lower courts, to hold the provision unenforceable). In affirming the district court’s decision, the Third Circuit relied on (1) the size of the print; (2) the fact that the provision is not set off by double spacing and appears on a page with a lot of words; (3) the fact that the provision was not negotiable (and thus, in the view of the courts below, the parties had unequal bargaining power); and (4) the fact that the provision requires claims relating

to debt collection to be brought in court and prohibits class arbitration (and thus, in the view of the courts below, mutuality was lacking). *Sutton Steel III*, 07-146 at pp. 11-15; 2007 WL 4326705, at *7-*9. Three of those four features were the very same ones on which the Third Circuit had previously relied in finding the arbitration provision adhesionary in *Sutton's Steel & Supply, Inc. v. BellSouth Mobility, Inc.* ("*Sutton Steel I*"), 00-511 (La. App. 3 Cir. 12/13/00) at pp. 10-11; 776 So. 2d 589, 596-597, a decision that this Court expressly disapproved in *Aguillard* because it applied a "conservative" approach to the enforceability of arbitration provisions, *see* 04-2804 at pp. 1, 16-19, 25; 908 So. 2d at 4, 13-15, 18. And all four of the features are insufficient for a finding of unenforceability under this Court's reasoning in *Aguillard*. First, this Court held that the print in *Aguillard* was "not unreasonably small" (*id.* at p. 21; 908 So. 2d at 16), and the print here is no smaller. Second, this Court held that the Federal Arbitration Act ("FAA") "preempt[s] a state [law] requiring [a] special notice requirement[] applicable only to arbitration agreements" (*id.*), and spacing and word limitations would constitute just such a requirement. Third, this Court held that parties have unequal bargaining power when the transaction "was such a necessary [one]" that "the plaintiff was compelled to enter [into] it" (*id.* at p. 22; 908 So. 2d at 17), and that is clearly not the case with respect to the purchase of BellSouth's cellular service. Fourth, this Court held that mutuality is lacking when the drafting party "reserve[s] to [itself] the right to litigate an[] issue arising from the contract" (*id.* at p. 21; 908 So. 2d at 16), and that is not the case here. Review is warranted to resolve the conflict between this independent aspect of the decisions below and this Court's decision in *Aguillard*. *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 Louisiana, the decisions below violated the Due Process and Full Faith and Credit Clauses of the U.S. Constitution as interpreted by the U.S. Supreme Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). As that decision explained, when, as here, the majority of class members "ha[ve] no apparent connection to the [forum] State * * * except for th[e] lawsuit," the "application of [the forum state's] law to every claim" in a multi-state class action is "sufficiently arbitrary and unfair as to exceed constitutional limits." *Id.* at 815, 822. The lower courts disclaimed any obligation to analyze the law of the other class states on the asserted ground that, "if BellSouth breached its obligations under the form contracts in question, its

liability under Louisiana law will mirror that provided for by the law of any other member state.” *Sutton Steel III*, 07-146 at p. 23; 2007 WL 4326705, at *15. The lower courts erred in holding that there are no material variations in state law. For example, even if the arbitration provision is not enforceable in Louisiana (as the lower courts mistakenly held), it is enforceable in the eight other class states, which apply the doctrine of unconscionability (rather than “contract of adhesion” analysis). Review is warranted to rectify this violation of the U.S. Constitution as interpreted by the U.S. Supreme Court and the attendant injustice of requiring BellSouth to defend itself at trial against a nine-state class that should have been decertified because of the variations in state law. *See Louisiana Supreme Court Rule X.1(a)(1), (4).*

MEMORANDUM

In 1999, the plaintiffs filed a putative class action in the 16th Judicial District Court, alleging that BellSouth breached its service contracts by billing wireless customers on a rounded-up, whole-minute basis, rather than charging them for the precise number of seconds on each call. Inasmuch as (a) the contracts include an arbitration provision, (b) the contracts explicitly provide that partial minutes will be rounded up to the next whole minute, and (c) the customers acknowledged, by signing the contracts, that they understood and accepted the terms and conditions of service, one would have thought that the lawsuit would not get very far. One would have been wrong. In fact, over the course of the last eight-plus years:

- (1) the district court has denied BellSouth's motion to compel arbitration, finding that the arbitration provision is adhesionary and therefore unenforceable, and the Third Circuit has affirmed that decision;
- (2) the district court has denied BellSouth's motion for summary judgment, finding that the "rounding" provision, like the arbitration provision, is adhesionary and therefore unenforceable;
- (3) the district court has certified a class of plaintiffs spanning nine states, and the court of appeal has affirmed that decision; and, most recently,
- (4) despite an intervening decision of this Court (*Aguillard*) explicitly holding that a contractual provision can be found adhesionary only if there is a lack of consent in fact (an individualized issue that precludes class adjudication), despite *Aguillard's* explicit disapproval of the Third Circuit's prior decision in this very case finding the arbitration provision unenforceable, and despite a showing that courts in the eight other class states would apply materially different legal standards in determining whether the arbitration and rounding provisions are enforceable, the district court has denied BellSouth's motion to decertify the class, and the Third Circuit has affirmed that decision.

This Court has denied previous applications for review in this case (although individual Justices would have granted them), no doubt assuming that the lower courts eventually would get it right. It is now clear, however, that, despite this Court's guidance in *Aguillard*, they have not

and that a grave injustice will occur if the Court does not intervene. The decisions below allowing a multi-state class action to proceed are flatly inconsistent with *Aguillard* in not one but two different respects, and they violate the constitutional principles established by the U.S. Supreme Court in *Shutts*. The issues presented in this Application are critically important, because the lower courts' decisions disregard both the fundamental Louisiana policy (reflected in *Aguillard*) that courts may void arbitration agreements only in rare circumstances and the fundamental federal policy (reflected in *Shutts*) that forum states may apply their own law to out-of-state class members only when the class members have significant contacts with the state. This Court is now all that stands between BellSouth and a trial at which it will have to defend itself against a nine-state, six-year class that remains certified only because the lower courts contravened clearly established law. Requiring BellSouth to undergo the extraordinary burdens and risks of a trial under these circumstances would be grossly unfair and should not be countenanced. The decisions below cry out for review.

A. STATEMENT OF THE CASE

1. Relevant Facts

BellSouth provided wireless telephone service to customers in Louisiana and other states pursuant to a written form contract with standard terms and conditions.¹ The contract is a single document. LaRussa Aff. ¶ 5.² The first page of each contract provides the rate plan for the customer and the number of "airtime minutes." *Id.* ¶ 5 & Ex. B. The terms and conditions appear on the reverse side. Among other things, they inform the customer 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.³ Since 1998, the terms and conditions have also

¹ BellSouth's successor-in-interest is New Cingular Wireless PCS, LLC, a wholly owned subsidiary of AT&T Mobility LLC.

² The Affidavit of Joseph M. LaRussa and accompanying exhibits were filed with the district court in support of BellSouth's motion to decertify the class. This affidavit and its exhibit B (a signed version and exact replica of one of the plaintiffs' contracts) are being filed separately with this Application, as Exhibit 1, pursuant to Supreme Court Rule X.3.6. The remaining six exhibits originally attached to the affidavit (which are other BellSouth service agreements) have been omitted pursuant to that rule.

³ That is the way that telephone companies have billed for decades. The practice also carries the express seal of approval of federal regulators. As the Federal Communications Commission has stated:

included an arbitration provision. *See., e.g., id.* A customer agrees to the terms and conditions by signing the front of the contract. The signature line 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.*

In June 1999, the plaintiffs filed this putative class action.⁴ They alleged that BellSouth breached its service agreements by “rounding up” the last partial minute of all calls to the next minute and billing customers for wireless service in whole minutes rather than one-second increments.

2. Prior Proceedings

Soon after the suit was filed, BellSouth moved to compel arbitration. The district court denied the motion, and BellSouth appealed. The Third Circuit affirmed, holding that the arbitration provision was adhesiary and therefore unenforceable. *Sutton Steel I*. This Court denied BellSouth’s application for a writ of certiorari, while indicating that Justice Traylor would have granted the writ. 01-0152 (La. 3/16/01); 787 So. 2d 316.

BellSouth then moved for summary judgment. The district court denied the motion, holding that the “rounding” provision of the service agreements, like the arbitration provision, was adhesiary. Reasons for Judgment, Feb. 13, 2003 (filed separately with this Application as Exhibit 2). BellSouth filed writ applications in the Third Circuit and this Court, but both were denied. *Sutton Steel & Supply, Inc. v. BellSouth Mobility, Inc.*, 03-1260 (La. App. 3 Cir. 12/4/03); *Sutton Steel & Supply, Inc. v. BellSouth Mobility, Inc.*, 03-3445, 03-3446 (La. 2/20/04); 866 So. 2d 830, 831.

[T]elephone services historically have been billed on a rounded-up, whole minute basis, and this is still the most common billing practice for [land-line] 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).

⁴ 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.

The plaintiffs subsequently moved for class certification. The district court granted the motion, certifying a class of BellSouth customers in Louisiana and eight other states—Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee. See *Sutton Steel & Supply, Inc. v. BellSouth Mobility Inc.* (“*Sutton Steel I*”), 03-1536 (La. App. 3 Cir. 6/9/04) at p. 4; 875 So. 2d 1062, 1067. BellSouth appealed. The Third Circuit held that, while certification was possible, the class certified by the district court was “ambiguous and inadequate” in that (1) the class “covers only one of the two rates plans involved” and (2) the district court “[d]id not provide any time frame for identifying members of the class.” *Id.* at p. 5; 875 So. 2d at 1067-68. The Third Circuit accordingly affirmed the decision but remanded the case so that the district court could “address the inadequacies in its class definition.” *Id.* at p. 10; 875 So. 2d at 1071. This Court denied BellSouth’s application for a writ of certiorari, while indicating that 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.

3. This Court’s Decision in *Aguillard*

After the Third Circuit’s decision in *Sutton Steel II*, this Court decided *Aguillard*, which “resolve[d] a split among the circuits regarding the enforceability of arbitration agreements contained within consumer standard form contracts under a ‘contract of adhesion’ analysis.” 04-2804 at p. 1; 908 So. 2d at 3. The Court rejected the “conservative interpretation in determining the enforceability of arbitration agreements” that had been employed by the First and Third Circuits, including in *Sutton Steel I*, which was specifically discussed (and disapproved) in *Aguillard*. *Id.* at pp. 16, 17-19; 908 So. 2d at 13, 14-15. Indeed, the decision that was reviewed—and reversed—by this Court in *Aguillard* was issued by the Third Circuit, which relied on *Sutton Steel I* in finding the arbitration provision in *Aguillard* unenforceable. *Id.* at p. 5; 908 So. 2d at 6. This Court instead adopted the “liberal interpretation in determining the enforceability of arbitration provisions” that had been employed by the Second and Fourth Circuits. *Id.* at p. 13; 908 So. 2d at 11.

Turning to “contract of adhesion analysis,” the Court explained that “the real issue” is “whether a party truly consented to all the principal terms” of a standard form contract. 04-2804

at p. 12; 908 So. 2d at 10.⁵ The Court then set forth a test for determining when a contract is one of adhesion. “Consent is called into question,” the Court said, “by the standard form, small print, and most especially the disadvantageous position of the accepting party.” *Id.* The Court went on to say 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.” *Id.* After considering the features of the contract at issue that, in the view of the Third Circuit, rendered the contract unenforceable, this Court held that none of the features “call[ed] into question the validity of plaintiff’s consent to the terms of the agreement” and that “[t]he doctrine of contract of adhesion” was therefore “inapplicable.” *Id.* at pp. 23-24; 908 So. 2d at 17-18.

4. Proceedings Below

After the Third Circuit remanded this case, BellSouth filed a motion in the district court contending that a class could not be maintained. Among other things, BellSouth argued that (a) *Aguillard* abrogated *Sutton Steel I*, and the arbitration provisions in the contracts signed by Louisiana subscribers are enforceable under *Aguillard*; (b) a substantial number of out-of-state class members entered into contracts with arbitration provisions that are enforceable under the laws of their states, and those subscribers therefore cannot participate in class litigation; and (c) under *Aguillard*’s test for whether a contractual provision is adhesionary, both the arbitrability and the viability of the plaintiffs’ claims depend upon an individualized inquiry into the consent of BellSouth subscribers that cannot be undertaken in class adjudication. The district court denied BellSouth’s motion and amended the class definition, making clear that the class period is from August 10, 1994, through December 31, 2000 (and reconfirming that the class covers nine states). Reasons for Judgment, Dec. 27, 2006. BellSouth appealed, and the Third Circuit affirmed. *Sutton Steel III*.⁶

⁵ As the Court noted, that principle had been “recognized by [Professor] Litvinoff” (*Aguillard*, 04-2804 at p. 12; 908 So. 2d at 10), who appears on this brief, and who was quoted at length in *Aguillard*’s discussion of contracts of adhesion, *see id.* at p. 10; 908 So. 2d at 9 (quoting 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, 757-59 (1987)).

⁶ In an abundance of caution, BellSouth also sought review of the district court’s decision by filing writ applications in the Third Circuit and this Court. Both applications were denied,

The court of appeal first explained that, “notwithstanding the new policy favoring arbitrability announced by *Aguillard*, the validity of arbitration agreements must still be made on a case-by-case basis” and that *Aguillard* considered four factors in addressing whether the arbitration clause at issue there was adhesionary (namely, the physical characteristics of the clause, the distinguishing features of the clause, the mutuality of the clause, and the relative bargaining strength of the parties). 07-146 at pp. 10-11; 2007 WL 4326705, at *6-*7. The court then held that, “[b]ased on [the] application of *Aguillard*’s four-factor test to the arbitration clause at issue here,” the trial court permissibly found that the clause was adhesionary and therefore unenforceable. *Id.* at p. 15; 2007 WL 4326705, at *9. Three of the four considerations on which the court of appeal relied were the same ones on which it had relied in *Sutton Steel I*: that the arbitration clause is in small print; that it was not negotiable; and that it requires claims relating to debt collection to be brought in court and prohibits class arbitration. *Compare id.* at pp. 11-12, 13-15; 2007 WL 4326705, at *7, *8-*9, with *Sutton Steel I*, 00-511 at pp. 10-11; 776 So. 2d at 596-97. The other consideration on which the court relied was that the clause is not set off by double spacing and appears on a page with a large number of words. *Sutton Steel III*, 07-146 at pp. 12-13; 2007 WL 4326705, at *8.

The court of appeal next rejected BellSouth’s claim that “the application of *Aguillard*’s four-factor test to the form of the agreement serves as only the first of two steps in a contract of adhesion analysis” and that “separate questions of individualized consent necessarily must be answered before [a] * * * contract may be invalidated.” 07-146 at p. 18; 2007 WL 4326705, at *11. The court declined to “interpret *Aguillard* as requiring a determination as to consent wholly separate from the analysis of the agreement itself.” *Id.* at p. 19; 2007 WL 4326705, at *12.

Finally, the court of appeal rejected BellSouth’s claim that the district court violated the U.S. Constitution by “applying Louisiana law to the claims of out-of-state class members,” given the “inconsistencies among the member states’ laws regarding unconscionability and arbitrability.” *Id.* at pp. 19-20, 22; 2007 WL 4326705, at *12, *14. The court reasoned that the case involves only “a simple question of contractual breach” and that, “if BellSouth breached its

although this Court indicated that Justice Victory would have granted the writ. *Sutton Steel & Supply, Inc. v. BellSouth Mobility, Inc.*, 07-0106 (La. App. 3 Cir. 3/30/07); *Sutton Steel & Supply, Inc. v. BellSouth Mobility, Inc.*, 07-0902 (La. 6/15/07); 958 So. 2d 1198.

obligations under the form contracts in question, its liability under Louisiana law will mirror that provided for by the law of any other member state.” *Id.* at p. 23; 2007 WL 4326705, at *15.

B. ASSIGNMENT OF ERRORS

The district court and the Third Circuit erred:

- (1) by disregarding the principles this Court announced in *Aguillard*, specifically:
 - (a) failing to apply this Court’s holding that a party seeking to challenge the enforceability of a contractual provision as adhesionary must demonstrate that he or she did not actually consent to the provision; and
 - (b) holding that certain features of the arbitration provision at issue rendered it unenforceable even though the arbitration provision found to be enforceable by this Court in *Aguillard* was not materially different; and
- (2) by adhering to their earlier decisions certifying a nine-state class action without analyzing or applying the laws of the states outside Louisiana, in violation of the Due Process and Full Faith and Credit Clauses of the U.S. Constitution.

C. SUMMARY OF ARGUMENT

The lower courts erred in allowing this multi-state class action to proceed because (1) the arbitration provision is fully enforceable under Louisiana law; (2) the arbitration provision is fully enforceable under the laws of the other eight class states; and (3) a contractual provision cannot be found unenforceable in Louisiana without an individualized determination that consent was lacking, a requirement that precludes class certification. This Court’s review is warranted because the lower courts’ decisions are erroneous in those three independent respects; because the decisions conflict with this Court’s decision in *Aguillard* in two different ways and violate the constitutional principles established by the U.S. Supreme Court in *Shutts*; because the issues presented in this Application—the circumstances in which arbitration provisions may be invalidated, and the circumstances in which the forum state in a multi-state class action may apply its own law to out-of-state class members—have significance far beyond this case; and because it would be manifestly unjust to require BellSouth to defend itself at trial against a nine-state, six-year class certified in disregard of clearly established Louisiana and federal law.

1. *Aguillard* unambiguously holds that a contract may be found to be one of adhesion only if features of the contract call into question the consent of the non-drafting party *and* the non-drafting party then proves that he or she did not in fact consent. The lower courts' decisions conflict with *Aguillard* because they ignored the second requirement and held that the arbitration provision was unenforceable based solely on the contract's features. Satisfaction of the first requirement does not render a contract adhesionary as a matter of law. The lower courts' decisions also conflict with *Aguillard* insofar as they found that the first requirement was satisfied, both because they relied upon a number of the same considerations that the Third Circuit had previously relied upon in the *Sutton Steel I* decision disapproved in *Aguillard* and, more fundamentally, because this Court found that features of a materially indistinguishable arbitration provision did not call consent into question in *Aguillard*.

2. In *Shutts*, the U.S. Supreme Court held that, in a multi-state class action, it violates the Due Process and Full Faith and Credit Clauses to apply the forum state's law to out-of-state class members when they have no apparent connection to the state except for the lawsuit and there is a material variation in the laws of the class states. Those circumstances are present here. The lower courts did not deny that a very large proportion of the class members have no apparent connection to Louisiana except for this lawsuit. And contrary to the lower courts' assumption that all nine class states apply the same principles of contract interpretation, eight class states outside Louisiana apply a different standard—unconscionability, rather than “contract of adhesion” analysis—in deciding whether contractual terms are unenforceable. Under unconscionability analysis as applied in all eight of those states, the arbitration provision is enforceable. The lower courts therefore acted unconstitutionally in failing to analyze and apply the laws of the other class states.

D. ARGUMENT

ASSIGNMENT OF ERROR #1:

**The Decision Below Conflicts With This Court's Decision
In *Aguillard* In Two Fundamental Respects.**

Aguillard holds that, to determine whether a contract is one of adhesion, and therefore unenforceable, a court must ask two questions: whether features of the contract call into question the consent of the party challenging it; and, if they do, whether the party did not in fact consent to the contract. The court of appeal's decision conflicts with *Aguillard* because the court held the arbitration clause here unenforceable (a) without asking the second question and (b) by answering the first question "yes" even though *Aguillard* answered it "no" on materially indistinguishable facts.

A. The decision below conflicts with *Aguillard* because it did not require the plaintiffs to demonstrate that they "did not consent to the terms in dispute."

1. Under *Aguillard*'s test for determining whether a contract is one of adhesion, "[c]onsent is called into question" by "the standard form, small print, and * * * the disadvantageous position of the accepting party," and, "[o]nce consent is called into question," the party seeking to invalidate the contract "must then demonstrate" that he or she "did not consent" to the provision in dispute. 04-2804 at p. 12; 908 So. 2d at 10. That language unambiguously establishes two separate requirements. In case the words left any doubt, however, the Court provided a "summation" of the applicable test. *Id.* "[A] contract is one of adhesion," the Court said, when "either its form, print, or unequal terms call into question the consent of the non-drafting party and it is demonstrated that the contract is unenforceable, due to lack of consent or error, which vitiates consent." *Id.* at p. 12; 908 So. 2d at 10-11 (emphasis added).

Under this two-part test, a contract's features can demonstrate that the contract is *not* one of adhesion (as in *Aguillard*), but they cannot demonstrate that the contract *is* one of adhesion. The standard form, small print, and unequal bargaining positions of the parties can "call into question" the consent of the non-drafting party. But a contractual provision as to which consent has been "called into question" is not unenforceable unless the party challenging it can "then" demonstrate that he or she did not in fact consent to the provision. In other words, regardless of the form of the clause or contract, or the language used, a contract cannot be found to be

adhesionary as a matter of law under *Aguillard* based on the form alone. Consent cannot conclusively be presumed to be lacking solely because of the contract's form. Lack of consent must be proven by any party that claims that his or her consent was vitiated.

That issue is necessarily an individualized one. Although the face of a contract can "call consent into question," it cannot conclusively establish that a party's consent was lacking. As this Court has explained, parties are presumed to be "aware of the contents of writings to which they have affixed their signatures," and it is thus their "burden of proof * * * to establish with reasonable certainty that they have been deceived." *Tweedel v. Brasseaux*, 433 So. 2d 133, 137 (La. 1983) (quoting *Bagneris v. Oddo*, 2 Pelt. 278, 285 (La. App. 1919)), quoted in *Aguillard*, 04-2804 at p. 23; 908 So. 2d at 17. That burden cannot be sustained without evidence specific to the individual circumstances of the party.

2. Despite this Court's unambiguous language, the court of appeal held that *Aguillard* does not "compel[] a two-stage analysis before an agreement may be invalidated as adhesionary." *Sutton Steel III*, 07-146 at p. 17; 2007 WL 4326705, at *11. The court of appeal rejected the view that "application of *Aguillard*'s [multi]-factor test to the form of the agreement serves as only the first of two steps in a contract of adhesion analysis" and that "separate questions of individualized consent necessarily must be answered before an otherwise adhesionary contract may be invalidated as unenforceable." *Id.* at p. 18; 2007 WL 4326705, at *11. The court of appeal instead held that "a contract of adhesion analysis inquiry is complete" when a court undertakes "the analysis of the agreement itself." *Id.* at p. 19; 2007 WL 4326705, at *12. In light of this Court's unmistakable holding, the court of appeal's decision is flatly inconsistent with *Aguillard*. And the court of appeal offered no persuasive justification for interpreting *Aguillard* as it did.

According to the court of appeal, rather than mandating a two-step inquiry, the relevant language in *Aguillard* merely "highlights" and "reinforces" the notion that lack of consent is the "overarching" and "determinative" feature of a contract of adhesion. *Id.* at p. 18; 2007 WL 4326705, at *11. *Aguillard* does make it clear that lack of consent is "the real issue" in "a contract of adhesion analysis." 04-2804 at p. 12; 908 So. 2d at 10. But *Aguillard* makes it just as clear that, in order to prevail on that ultimate issue, a party must make two separate subsidiary

showings: The party must show that consent has been “called into question” by the contract’s features; and, “[o]nce consent is called into question,” the party “must then demonstrate” that he or she in fact “did not consent.” *Id.* As the Court explained, “a contract is one of adhesion when [1] either its form, print, or unequal terms call into question the consent of the non-drafting party and [2] it is demonstrated that the contract is unenforceable, due to lack of consent.” *Id.* at p. 12; 908 So. 2d at 10-11 (emphasis added). The court of appeal read *Aguillard* as if it said something that it quite clearly does not: that the ultimate issue of lack of consent can be *conclusively established* by the form, print, and unequal terms of a contract, without any need for further proof.

In holding that “separate questions of individualized consent” need not be answered before a contract may be found to be one of adhesion, the court of appeal also found it significant that this Court “declined to engage in any such inquiry in analyzing the arbitration clause at issue in *Aguillard*, but instead mirrored the approach of the trial court [in this case] in constraining its analysis to the application of its [multi]-factor test to the arbitration clause.” *Sutton Steel III*, 07-146 at pp. 18-19; 2007 WL 4326705, at *11. The fact that the Court engaged only in the first step of the inquiry, however, does not mean that the inquiry has no second step. The reason that the Court did not “bisect its discussion” of the arbitration provision in *Aguillard* (*id.* at p. 19; 2007 WL 4326705, at *12) is that a party challenging a contractual provision must prevail at both steps of the inquiry. The party challenging the provision in *Aguillard* could not prevail at the first step, so there was no need for the Court to proceed to the second step. If the face of a contract does not even “call consent into question,” it is conclusively presumed under *Aguillard* that there has been no lack of consent. Once the Court found that there was “[no]thing in the document * * * that would call into question the validity of plaintiff’s consent to the terms of the agreement,” therefore, it necessarily followed that “[t]he doctrine of contract of adhesion is inapplicable.” *Aguillard*, 04-2804 at pp. 23-24; 908 So. 2d at 17.

Finally, the court of appeal declined to “interpret *Aguillard* as requiring a determination as to consent wholly separate from the analysis of the agreement itself” because, “whereas *Aguillard* dealt with a dispute embodied in a single action, the instant matter involves the cumulation of several disputes in the form of a class action.” *Sutton Steel III*, 07-146 at p. 19;

2007 WL 4326705, at *12. The court believed that interpreting *Aguillard* to require a two-step inquiry would have “potentially serious ramifications”—*i.e.*, the need for individualized determinations of consent would make class litigation difficult or impossible in cases in which a contractual provision is challenged as adhesionary. *Id.* That concern is not a basis for ignoring what *Aguillard* unambiguously requires.

The court of appeal’s refusal to apply *Aguillard*’s requirements is tantamount to a holding that *Aguillard* does not apply in class actions. That is a misinterpretation of this Court’s decision. *Aguillard* set forth the test under Louisiana law for determining whether a contract is one of adhesion. For a variety of reasons described in the opinion, the Court determined that the test should be a demanding one.⁷ If that demanding test applies in a “single action” like *Aguillard* (as it clearly does), the test necessarily applies in a putative class action like this case because of the settled principle that class adjudication “does not alter the required elements which must be found to impose liability and fix damages.” *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 312 (5th Cir. 1998); *see, e.g., Andry v. Murphy Oil, U.S.A., Inc.*, 97-0793 (La. App. 4 Cir. 4/1/98) at p. 2; 710 So. 2d 1126, 1128-29 (“A class action * * * confers no substantive rights.”). If a particular rule of law makes it impossible to pursue a class action—for example, the requirement that plaintiffs alleging fraud prove justifiable reliance (*see, e.g., Chiarella v. Sprint Spectrum LP*, 04-1433 (La. App. 4 Cir. 11/17/05) at p. 25; 921 So. 2d 106, 123, *writ denied*, 05-2539 (La. 3/31/06); 925 So. 2d 1263)—then so be it. Both Louisiana law and the Due Process Clause forbid distorting the law in order to force cases into the class-action mode.⁸

3. The question whether the contract-of-adhesion inquiry entails one step or two is critically important. If the court of appeal’s interpretation of *Aguillard* is correct, and a contractual provision is unenforceable whenever some combination of features of a standard

⁷ The reasons include (1) the Court’s recognition that “the real issue in a contract of adhesion analysis” is not the “form of the contract” but “whether a party truly consented to all the printed terms”; (2) the “well settled” principle that “a party who signs a written instrument is presumed to know its contents”; and (3) the Court’s adoption of a “liberal interpretation policy favoring arbitrability,” which carries with it a “heavy” presumption in favor of arbitration. *Aguillard*, 04-2804 at pp. 12, 22, 24; 908 So. 2d at 10, 17, 18.

⁸ In any event, the universe of cases affected by *Aguillard* is relatively small. *Aguillard* is implicated only when the plaintiff seeks to argue that a particular term did not become part of the contract because the term was adhesionary. *Aguillard* would have no effect on the much more common kind of breach-of-contract class action in which the dispute is over the proper *interpretation* of the contract, which generally can be resolved on a class-wide basis.

form contract can be said to “call into question” the consent of the non-drafting party, contractual provisions, including arbitration provisions, will be held unenforceable in the Third Circuit as a matter of course. The court of appeal held the arbitration provision at issue in this case unenforceable because (1) the print is small; (2) the provision is not set off by double spacing and appears on a page with a large number of words; (3) the provision was not negotiable; and (4) the provision requires claims relating to debt collection to be brought in court and prohibits class arbitration. *Sutton Steel III*, 07-146 at pp. 11-15; 2007 WL 4326705, at *7-*9. Since features of that type are commonly present in standard form contracts (*see, e.g., Aguillard*, 04-2804 at p. 10; 908 So. 2d at 9), it will not be difficult, under the court of appeal’s approach, for a court to find that an arbitration provision in a form contract is unenforceable. Indeed, in every one of the First and Third Circuit decisions that were disapproved in *Aguillard* because they applied a “conservative” approach to arbitrability, the court found an arbitration provision unenforceable based on some combination of the types of factors on which the Third Circuit relied here. *See id.* at pp. 16-20; 908 So. 2d 13-16. Because actual consent is irrelevant under the court of appeal’s interpretation of *Aguillard*, moreover, application of the multi-factor test could presumably lead to the invalidation of an arbitration provision even if there were uncontroverted evidence that the party challenging it had entered into the contract with full awareness of the existence and significance of the provision. The court of appeal’s approach is thus the very antithesis of the “liberal” policy of arbitrability, with its “heavy” presumption in favor of arbitration, that this Court adopted in *Aguillard*. *Id.* at pp. 23-24; 908 So. 2d at 17.

The problems created by the court of appeal’s interpretation of *Aguillard* are especially acute in cases, like this one, that are brought as class actions. If a court invalidates an arbitration provision based solely on the features of the contract in an individual action, the consequence is that the defendant will have to defend itself before a judge (and possibly a jury) rather than an arbitrator. If a court invalidates an arbitration provision based solely on the features of the contract in a putative class action, however, the consequence is not only that the defendant will have to defend itself before a judge (and possibly a jury) rather than an arbitrator, but also that it will have to defend itself against an entire class of plaintiffs rather than one or more individual plaintiffs (assuming that there is no independent bar to class certification). Accordingly, in the

class context, where certification will not be precluded if individualized determinations of consent are deemed unnecessary, application of the court of appeal's erroneous interpretation of *Aguillard* will expose defendants to potential damages awards that are exponentially greater than those to which they would otherwise be exposed, and it will create powerful incentives for defendants to pay exorbitant sums to settle even the most meritless claims. That is particularly true in a case, like this one, in which the class members span nine states and may number in the millions, and the class period covers more than six years.

4. Solely by examining the features of one of the contracts at issue, and without any inquiry into whether there was lack of consent in fact, the district court ruled the arbitration provision adhesionary and therefore unenforceable. The district court then reached the same conclusion, by the same route, with respect to the contract's "rounding" provision. The district court subsequently certified a class, and later declined to decertify it, again finding that the arbitration and rounding provisions were adhesionary.

This Court's decision in *Aguillard* requires decertification. As explained above, even assuming that the contract on its face "calls into question" whether there was consent to the arbitration and rounding provisions (an assumption, as we demonstrate below, that is incorrect), a contract cannot be found to be one of adhesion under *Aguillard* unless there was a lack of consent in fact, and the latter issue requires individualized determinations. The need for such determinations in turn precludes class certification, because individualized determinations of consent could not be made without a very large number—likely thousands—of mini-trials on the issue, thereby rendering class adjudication entirely impractical. *See, e.g., Banks v. New York Life Ins. Co.*, 98-0551 (La. 7/2/99) at p. 13; 737 So. 2d 1275, 1283 (holding class certification inappropriate where class action "would result in a multitude of mini-trials").⁹

The court of appeal did not deny that, if *Aguillard* requires a two-step inquiry, the class in this case must be decertified. On the contrary, it implicitly acknowledged as much when it stated

⁹ There is already evidence that some class members in fact consented to the rounding provisions. One such person is the Honorable Ronald Cox (retired) of Lafayette Parish, who testified that, when he met with BellSouth representatives to negotiate for wireless service for 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 the sales representative on how to use his phone's timer to utilize the service most economically. Affidavit of Ronald Cox (filed separately with this Application as Exhibit 3).

that it would not interpret *Aguillard* to require a two-step inquiry because class certification would be difficult or impossible if such a requirement existed. *Sutton Steel III*, 07-146 at p. 19; 2007 WL 4326705, at *12. That implicit acknowledgment confirms that a holding by this Court that *Aguillard* mandates a two-step inquiry would change the outcome below (*i.e.*, it would result in decertification). That is another reason why this case is an ideal vehicle for deciding the critically important question whether *Aguillard* means what it says.

B. The decision below conflicts with *Aguillard* because it found that features of the arbitration clause “called consent into question,” even though this Court reached a contrary conclusion in *Aguillard* on materially indistinguishable facts.

Regardless of whether the court of appeal erred in holding that there is no second step to *Aguillard*'s contract-of-adhesion inquiry, the court misapplied the first step. As we demonstrated above, the “liberal” approach to arbitrability adopted in *Aguillard* requires a showing of actual lack of consent to invalidate an arbitration provision. But even if it does not, it certainly requires a court, in deciding whether consent has been “called into question” by the contract, to apply the multi-factor test at least as rigorously as it was applied by this Court in *Aguillard*. The court of appeal did not do that here. As explained below, the relevant features of the contract in this case are materially indistinguishable from those in *Aguillard*, and the result should therefore have been the same: a finding that consent has not been called into question and that the arbitration clause is therefore enforceable.

1. The court of appeal held that “the physical characteristics of the arbitration clause” support a finding that the clause is adhesionary because the court had previously determined in *Sutton Steel I* that the clause was in “exceedingly small print.” *Sutton Steel III*, 07-146 at pp. 11-12; 2007 WL 4326705, at *7 (quoting *Sutton Steel I*, 00-511 at p. 10; 776 So. 2d at 596) (emphasis omitted). That holding squarely conflicts with *Aguillard*.

As an initial matter, *Aguillard* disapproved the Third Circuit’s reasoning in *Sutton Steel I*.¹⁰ More fundamentally, in rejecting the Third Circuit’s reasoning in the decision under review

¹⁰ See, e.g., *LaFleur v. Law Offices of Anthony G. Buzbee, P.C.*, 06-0466 (La. App. 1 Cir. 3/23/07) at p. 6; 960 So. 2d 105, 110 (“to the extent that the trial court relied on the principles found in *Sutton[] Steel [I]*,” it was “legally incorrect per the Louisiana Supreme Court’s recent holding in *Aguillard*,” which “abrogat[ed] *Sutton[] Steel [I]*”); *Hoffman, Siegel, Seydel, Bienvenu & Centola, APLC v. Lee*, 05-1491 (La. App. 4 Cir. 07/12/06) at p. 9; 936 So. 2d 853,

in *Aguillard*, this Court approved the use of nine-point type, which is no larger than the print size of the arbitration provisions at issue here. *Compare Aguillard*, 04-2804 at p. 3; 908 So. 2d at 4 (arbitration agreement in nine-point font), *with, e.g.*, LaRussa Aff. ¶ 9 & Ex. B (exact replica of Sutton's Steel's BellSouth contract, including copy of terms and conditions in *larger* than nine-point font). Indeed, *Aguillard* explicitly held that the nine-point type in which the arbitration provision was printed was not "unreasonably small." 04-2804 at p. 21; 908 So. 2d at 16. *Aguillard* also relied on the fact that "neither the print nor the font size of the arbitration agreement differ[ed] in 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 customers are in capitalized letters and bold-faced print, and many of them are printed in even larger font than other terms in the contracts. *See, e.g.*, LaRussa Aff. Ex. B.¹¹

2. The court of appeal held that "the distinguishing features of the arbitration clause" support a finding that the clause is adhesionsary because the clause "is not set off from the preceding and following paragraphs by double spacing" and appears on a page with a large number of words. *Sutton Steel III*, 07-146 at pp. 11-13; 2007 WL 4326705, at *7-*8. That holding is also irreconcilable with *Aguillard*.

The Third Circuit in *Aguillard* had "found the arbitration agreement unenforceable because it was not distinguished in any way." 04-2804 at p. 21; 908 So. 2d at 16. This Court rejected that reasoning, because "the FAA presumption of arbitrability preempt[s] a state [law] requiring special notice requirements applicable only to arbitration agreements." *Id.* (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). To refuse to enforce an arbitration provision unless it is set off by double spacing, or appears on a page with fewer than a certain number of words, would constitute just such a "special notice" requirement, because no such requirement applies generally to contract terms under Louisiana law. There is good reason for that, inasmuch as formatting rules of this type would render millions of form contracts

859 (in light of *Aguillard*, "the trial court erred when it concluded that the contract herein was a contract of adhesion based on the principles found in [*Sutton Steel I*]").

¹¹ The court of appeal's holding that the print size supports a finding of unenforceability conflicts not only with this Court's decision in *Aguillard* but also with the Fourth Circuit's post-*Aguillard* decision in *Hoffman, Siegel*, which found an arbitration clause enforceable 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." 05-1491 at p. 9; 936 So. 2d at 859.

unenforceable. Indeed, they would render most standard consumer contracts effectively voidable at will, leading to anarchy in the nation's commerce.

There is no way to write a consumer contract that covers all relevant issues without using a lot of words. Had BellSouth chosen to place, say, only 200 words on each page, it would have had to supply its customers with 20-page booklets. The response would have been predictable. The same lawyers would have argued that the arbitration provision was "buried" in the middle of a 20-page contract, and other lawyers would have made the same argument about whatever provision they wished to attack—undoubtedly citing *Aguillard*, which noted with approval that "the contract at issue was only a two-page document." *Id.*

3. The court of appeal held that "the relative bargaining strength of the parties" supports a finding that the arbitration clause is adhesionary because, as the court had previously determined in *Sutton Steel I*, the clause "was not subject to negotiation with individual consumers." *Sutton Steel III*, 07-146 at pp. 11, 14-15; 2007 WL 4326705, at *7, *9; *cf. Sutton Steel I*, 00-511 at p. 10; 776 So. 2d at 596 ("BellSouth presented no evidence * * * that the plaintiffs were even in a position to bargain over the arbitration provisions"). That holding is also inconsistent with *Aguillard*.

As already noted, *Aguillard* disapproved the Third Circuit's reasoning in *Sutton Steel I*. More fundamentally, in rejecting the Third Circuit's reasoning in the decision under review in *Aguillard*, this Court made clear that parties are deemed to have unequal bargaining power when the transaction at issue "was such a necessary [one]" that "the plaintiff was compelled to enter [into] it." 04-2804 at p. 22; 908 So. 2d at 17. If the plaintiff could have "avoided arbitration and the contractual provisions as a whole by simply not signing the agreement," there is no legally relevant inequality in the parties' bargaining positions. *Id.* at p. 23; 908 So. 2d at 17. The plaintiffs in this case cannot plausibly claim that BellSouth's cellular service was so essential that they had no choice but to agree to the terms and conditions under which BellSouth was willing to provide it. Not only were there alternatives to cellular service, including traditional land-line service and pagers, there were alternatives to the cellular service *provided by BellSouth*. See Federal Communications Commission, *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 during period at issue). As in *Aguillard*, which involved “a real estate auction” (04-2804 at p. 22; 908 So. 2d at 17), “there are other businesses that supply [the] same services,” *Gay v. CreditInform*, No. 06-4036, 2007 WL 4410362 at *17 n.15 (3d Cir. Oct. 17, 2007), and the plaintiffs therefore could have “refused to participate” in the transaction and “just walked away” (*Aguillard*, 04-2804 at p. 6, 22; 908 So. 2d at 7, 17).

4. The court of appeal held that “the mutuality of the arbitration clause, in terms of the relative burdens and advantages conferred by the clause upon each party,” supports a finding that the clause is adhesionary because, as the court had previously determined in *Sutton Steel I*, (a) the clause “purports to limit the plaintiffs’ options solely to arbitration” while “grant[ing] BellSouth the option to pursue * * * litigation”—an apparent reference to the non-arbitrability of claims relating to debt collection—and (b) the clause “prohibits the arbitrator from ordering ‘consolidation or class arbitration.’” *Sutton Steel III*, 07-146 at pp. 11, 13; 2007 WL 4326705, at *7, *8; *cf. Sutton Steel I*, 00-511 at pp. 10-11; 776 So. 2d at 597 (“BellSouth has reserved unto itself the right to pursue an open account debt [in court] * * * while * * * limiting the plaintiffs to only the relief available under the arbitration clause for any claims they may have. * * * BellSouth [also] excludes class actions from any relief * * *.”). That holding also is irreconcilable with *Aguillard*.

As already noted, *Aguillard* disapproved the Third Circuit’s reasoning in *Sutton Steel I*. More fundamentally, in rejecting the Third Circuit’s reasoning in the decision under review in *Aguillard*, this Court held that mutuality was not lacking because “[n]owhere in the document [did] the defendants reserve to themselves the right to litigate any issue arising from the contract.” 04-2804 at p. 21; 908 So. 2d at 16. The same is true of the arbitration clause at issue here, including the two subparagraphs (out of a total of eleven) that were singled out by the court of appeal. *See La Russa Aff. Ex. B*. The debt-collection exception gives *both* BellSouth and its customers the right to litigate particular issues: “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.” *Id.* 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 (for example, under the federal Fair Debt Collection Practices Act and Fair Credit Reporting Act). As for the bar on class arbitration, it does not give *either* Bellsouth or its customers the right to litigate an issue; it merely sets forth a rule of procedure for the arbitration to which both parties are generally subject: “NO ARBITRATOR HAS THE AUTHORITY TO * * * ORDER CONSOLIDATION OR CLASS ARBITRATION.” *Id.*¹²

In any event, although this Court in *Aguillard* addressed the court of appeal’s determination that the arbitration clause lacked mutuality (and found that the determination was erroneous), the Court did not say that non-mutuality is in fact a basis for finding that a party’s consent to a standard form contract has been called into question. If anything, the Court’s opinion suggests the contrary. For example, in setting forth the test for whether a contract is one of adhesion, the opinion states that consent can be “called into question” by “the standard form, small print, and * * * disadvantageous position of the accepting party.” 04-2804 at p. 12; 908 So. 2d at 10. The opinion does not specifically mention “mutuality” in that connection. Moreover, in each of the decisions of the First and Third Circuits that this Court renounced as unduly “conservative” in *Aguillard*, the court of appeal relied heavily—and in one case exclusively—on lack of mutuality as a basis for finding the arbitration provision at issue unenforceable. *See id.* at pp. 16-20; 908 So. 2d at 13-16. Finally, mutuality of obligation is not—and never has been—part of the Louisiana law of contracts; the legal requirements for a valid contract, 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; *see also Long v. Foster & Assocs., Inc.*, 136 So. 2d 48, 52 (La. 1961) (refusing to require “a finding of a reciprocal consideration for each stipulation” because otherwise, “almost none of today’s complicated agreements * * * could stand the test of mutuality”); *Seals v. Calcasieu Parish Voluntary Council on Aging, Inc.*, 99-1269 (La. App. 3 Cir. 03/01/00) at p. 13; 758 So. 2d 286,

¹² The court of appeal in *Aguillard* found a lack of mutuality because the contract provided a remedy to the seller that was not available to the buyer: “the option to retain the earnest money deposit as liquidated damages and re-offer and resell the property in situations of buyer default.” 04-2804 at p. 6; 908 So. 2d at 6. This Court found that the one-sidedness of the remedy did not make the arbitration clause non-mutual, because, under the contract, “a finding of default must be determined through arbitration.” *Id.* at p. 21; 908 So. 2d at 16.

293 (same); *Caddo Parish Sch. Bd. v. Cotton Baking Co.*, 342 So. 2d 1196, 1198 (La. App. 2 Cir. 1977) (same).¹³ Because the FAA precludes a state from applying a rule to arbitration agreements that does not apply to contracts generally (*see Aguillard*, 04-2804 at pp. 8-9; 908 So. 2d at 8), this Court's decision cannot be interpreted to apply a requirement of mutuality to arbitration agreements.¹⁴

ASSIGNMENT OF ERROR #2:

**The Lower Courts' Failure To Apply The Laws Of The Eight Other
Class States Violates The United States Constitution
As Interpreted By The United States Supreme Court.**

In maintaining this multi-state class action, the lower courts disregarded the laws of the class states outside Louisiana. Their refusal to analyze and apply those laws violates the U.S. Constitution as interpreted by the U.S. Supreme Court in *Shutts*. The decisions below also threaten basic federalism concerns by (a) encroaching upon the authority of Louisiana's sister states to determine the rules under which they enforce contracts and (b) impermissibly regulating contracts that were formed and performed outside Louisiana's borders. Review by this Court is

¹³ Nor *could* mutuality be a part of the law of contracts. If every aspect of every contract had to be perfectly bilateral, it would be impossible to have contracts. By necessity, the rule instead is that, so long as there is consideration for the contract as a whole, there is no need for point-by-point mutuality. *See* RESTATEMENT (SECOND) OF CONTRACTS § 79. Here, BellSouth's agreement to provide cellular service is sufficient consideration for the contract as a whole, so even a non-mutual requirement to arbitrate would be perfectly consistent with Louisiana contract law.

¹⁴ There is another respect in which the court of appeal's application of the multi-factor test conflicts with *Aguillard*. Rather than reviewing *de novo* the district court's finding that the face of the contract called consent into question, the court of appeal reviewed the finding under a deferential "manifest error" standard. *See Sutton Steel III*, 07-146 at pp. 10, 15; 2007 WL 4326705, at *6, *9. That standard of review may have affected the court of appeal's ultimate determination that the arbitration clause was unenforceable, particularly because it clearly made a difference with respect to at least one of the four factors the court of appeal considered. *See id.* at p. 13; 2007 WL 4326705, at *8 ("[W]hile this court is hesitant to conclude that BellSouth actively 'concealed' the arbitration clause, neither do we feel justified in declaring the district court's arrival at such a conclusion to be unreasonable."). The district court's finding should have been reviewed *de novo*, because application of the multi-factor test is limited to the face of the contract and thus presents a pure question of law. Indeed, the Third Circuit itself has recently recognized that, "when appellate review is * * * based upon an independent review and examination of the contract on its face, the manifest error rule does not apply" and that, "[i]n such cases, appellate review of questions of law is simply whether the trial court was legally correct or legally incorrect." *Boutin v. Rodrigue*, 07-566 (La. App. 3 Cir. 10/31/07) at p. 3; 2007 WL 3171136, at *2 (internal quotation marks and citations omitted). This Court certainly gave no indication in *Aguillard* that any deference should be accorded to a district court's application of the multi-factor test. *See* 04-2804 at pp. 20-24; 908 So. 2d at 16-18. On the contrary, consistent with the principle described above, the Court said that whether the arbitration clause was correctly found to be adhesionary was a "legal question" and that the court of appeal had erred "as a matter of law" in declaring the clause unenforceable. *Id.* at pp. 1, 20; 908 So. 2d at 3, 16.

necessary to protect those interests and to ensure that parties in multi-state class litigation are not deprived of fundamental constitutional protections recognized by the U.S. Supreme Court.

A. The Due Process and Full Faith and Credit Clauses of the U.S. Constitution place limits on whether the law of a forum state may 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 that principle in *Shutts*, the Court held that, in a multi-state class action in Kansas state court, “application of Kansas law to every claim in th[e] case [was] 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 th[e] lawsuit.” 472 U.S. at 815, 822. Applying the forum state’s law to claims by out-of-state class members, the Court said, would frustrate “the expectation of the parties” (an “important element” of “fairness” in this context), because “[t]here is no indication that when the [contracts] involving [parties] outside of Kansas were executed, the parties had any idea that Kansas law would control.” *Id.* at 822.

Those principles apply equally in this case. As in *Shutts*, a very large proportion of the class members have “no apparent connection to the [forum] State”—here, Louisiana—“except for this lawsuit.” *Id.* at 815. As in *Shutts*, there is no reason to believe that either BellSouth or its customers in the eight class states outside Louisiana “had any idea that [the forum state’s] law would control.” *Id.* at 822. And as in *Shutts*, application of the forum state’s law to out-of-state class members would therefore be “sufficiently arbitrary and unfair as to exceed constitutional limits.” *Id.*

B. The court of appeal acknowledged these general principles, but denied that they apply here. The court reasoned that, under *Shutts*, the principles “come into play only after a threshold finding of conflict” among the laws of “the various member states” and that this case “presents no such ‘material’ variation as to the liability imposed by the laws” of those states. *Sutton Steel III*, 07-146 at p. 21; 2007 WL 4326705, at *13. Instead, the court held, “at issue here is a simple question of contractual breach: if BellSouth breached its obligations under the form contracts in question, its liability under Louisiana law will mirror that provided for by the

law of any other member state.” *Id.* at p. 23; 2007 WL 4326705, at *15.

That holding ignores the critical differences between Louisiana law and the laws of the other states with respect to the enforceability of arbitration provisions. Those differences *are* “material,” because, even if the arbitration provision at issue is unenforceable under Louisiana law, it does not follow that it is unenforceable in the eight class states outside Louisiana. The laws in the other eight states differ from Louisiana’s at a basic level, because those states do not employ contract-of-adhesion analysis. Instead, they follow the related but distinct doctrine of unconscionability. Had the lower courts analyzed whether the arbitration provision is unconscionable under the laws of the other class states, they would have been compelled to find that it is not, and that it is therefore fully enforceable.

In most states, unconscionability is understood to have two components: “procedural” and “substantive.” *See* 21 Richard A. Lord, WILLISTON ON CONTRACTS § 57:15 (4th ed. 1990). Procedural unconscionability refers to the manner in which the contract was formed, while substantive unconscionability involves the fairness of the challenged contractual term. *Id.* In five of the eight other class states—Alabama, Florida, North Carolina, South Carolina, and Tennessee—it is established that the party seeking to avoid a contractual provision must prove both procedural and substantive unconscionability.¹⁵ In one class state—Mississippi—either procedural or substantive unconscionability may suffice for a contractual provision to be deemed unconscionable, *see Sanderson Farms, Inc. v. Gatlin*, 848 So. 2d 828, 845 (Miss. 2003); in another class state—Georgia—the question is an open one, *see NEC Technologies, Inc. v. Nelson*, 478 S.E.2d 769, 773 & n.6 (Ga. 1996); and in a third class state—Kentucky—the courts have not addressed the issue. To invalidate a contract on the basis of procedural unconscionability alone, however, a court would have to find a very high degree of procedural unconscionability—something on the order of fraud. *See, e.g.*, 21 WILLISTON ON CONTRACTS, *supra*, § 57:15.

Regardless of the other states’ specific approach to unconscionability, the arbitration

¹⁵ *See, e.g.*, *Wilkerson v. Nelson*, 395 F. Supp. 2d 281, 289 (M.D.N.C. 2005) (North Carolina law); *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1046, 1046 n.10 (D.S.C. 1993) (South Carolina law); *Blue Cross Blue Shield v. Rigas*, 923 So. 2d 1077, 1087 (Ala. 2005); *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1027 (Fla. Dist. Ct. App. 2005); *Haun v. King*, 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984).

provisions are enforceable in all those states, because neither procedural nor substantive unconscionability could be demonstrated in any of them. As to procedural unconscionability, the factors on which the lower courts relied here—small print and lack of prominence—do not amount to procedural unconscionability under the laws of the other eight class states.¹⁶ As to substantive unconscionability, the courts below determined that the arbitration provisions are not fully mutual, but mutuality is not a requirement for enforcement of arbitration provisions in seven of the eight other class states,¹⁷ and, in the remaining state (Tennessee), the FAA would preempt contrary state law and require enforcement of the provision, because that state does not require that all other contractual provisions be fully mutual.

C. The court of appeal did not dispute that the arbitration provisions would be found enforceable in the eight other class states. Instead, it held that the district court was not obligated to undertake any analysis of unconscionability in those states, because the plaintiffs “have not made any allegations of unconscionability.” *Sutton Steel III*, 07-146 at p. 22; 2007 WL 4326705, at *14 (quoting *Sutton Steel II*, 03-1536 at p. 7; 875 So. 2d at 1069). That conclusion is fundamentally misconceived. The court of appeal’s holding was that there is no difference in the laws of the nine states. Whether or not the plaintiffs have chosen to raise an “unconscionability” challenge, it is undeniable that courts in the other eight states would not invalidate the arbitration provision on contract-of-adhesion grounds. That is enough to establish the error in applying Louisiana law to the claims of customers in the other eight states.

D. Because the lower courts failed to undertake any analysis of whether the arbitration provisions are unconscionable—and therefore unenforceable—under the laws of the eight other class states, and because, if they had, they would have concluded that the provisions

¹⁶ See, e.g., *Smart v. Bob Wilson Dodge Inc.*, No. 8:06-CV-22-T-30TGN, 2006 WL 1037113, at *2 (M.D. Fla. Apr. 19, 2006) (Florida law); *Pac. Life Ins. Co. v. Heath*, 370 F. Supp. 2d 539, 545 (S.D. Miss. 2005) (Mississippi law); *Taylor v. First N. Am. Nat’l Bank*, 325 F. Supp. 2d 1304, 1311-12 (M.D. Ala. 2004) (Alabama law); *Market Am., Inc. v. Tong*, No. 1:03CV00420, 2004 WL 1618574, at *5-*6 (M.D.N.C. July 15, 2004) (North Carolina law); *Lomax v. Woodmen of the World Life Ins. Soc’y*, 228 F. Supp. 2d 1360, 1364 (N.D. Ga. 2002) (Georgia law); *McMillan v. Gold Kist, Inc.*, 577 S.E.2d 482, 486 (S.C. App. Ct. 2003); *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335 (Ky. Ct. App. 2001).

¹⁷ See, e.g., *Wilkerson*, 395 F. Supp. 2d at 287; *Rigas*, 923 So. 2d at 1091; *Avid Eng’g, Inc. v. Orlando Marketplace Ltd.*, 809 So. 2d 1, 4 (Fla. Dist. Ct. App. 2002); *Saturna v. Bickley Constr. Co.*, 555 S.E.2d 825, 826-27 (Ga. Ct. App. 2001); *Conseco Fin. Servicing Corp.*, 47 S.W.3d at 342-43; *McKenzie Check Advance of Miss., LLC v. Hardy*, 866 So. 2d 446, 453 (Miss. 2004); *Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360, 365 (S.C. 2001).

are enforceable in those states, this case cannot proceed as a nine-state class action, and the class must be decertified. The court of appeal held that, “[e]ven assuming that the arbitration provisions are enforceable in one or more of the remaining eight states, this does not automatically render class action an inferior method of adjudicating the Plaintiffs’ claims,” because “[t]he trial court has discretion to create subclasses based on the class members’ resident states.” *Sutton Steel III*, 07-146 at p. 23; 2007 WL 4326705, at *14 (quoting *Sutton Steel II*, 03-1536 at p. 8; 875 So. 2d at 1070). But the district court has never given any indication that it intends to create subclasses along these lines, and it has not been directed to do so by the court of appeal. Indeed, the district court has simply refused to consider the laws of the other eight states, despite being asked directly by Bellsouth to do so. In any event, while the district court may have the discretion to create such subclasses, it does not have the discretion to ignore the law of the other class states. Creating subclasses by state would be appropriate only if the subclasses could themselves be sustained. They could not, because, as explained above, the arbitration provisions would be enforced in the other states. As a consequence, class members in those states are legally bound to bring their claims in arbitration and thus could not be a member of any subclass.

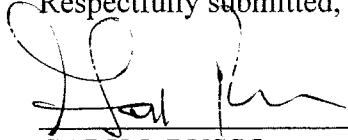
E. The foregoing applies equally to the contracts’ “rounding” provision. The district court found the rounding provision unenforceable for the same reason the arbitration provision was found unenforceable (*i.e.*, it was found to be adhesive). In courts in the eight other class states, however, the rounding provisions would *not* be unenforceable, for the same reasons the arbitration provisions would not be unenforceable (*i.e.*, they would not be found to be unconscionable). The court of appeal was thus mistaken even in its basic conclusion that BellSouth’s “liability under Louisiana law will mirror that provided for by the law of any other member state.” *Sutton Steel III*, 07-146 at p. 23; 2007 WL 4326705, at *15.¹⁸

¹⁸ The Alabama Supreme Court has explicitly rejected a “rounding” claim of the type raised here. *Mobley v. AT&T Corp.*, 717 So. 2d 367, 368-69 (Ala. 1998). Other state and federal courts have done the same. See *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) (similar); *Weinberg v. Sprint Corp.*, 801 A.2d 281, 288 (N.J. 2002) (“no reasonable consumer would have been deceived into believing that he or she was being billed by the second”); *Porr v. NYNEX Corp.*, 660 N.Y.S.2d 440, 447 (App. Div. 1997) (similar), *appeal denied*, 692 N.E.2d 129 (1998).

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,



GARY J. RUSSO

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SEAMUS C. DUFFY
WILLIAM M. CONNOLLY
ALEXANDER S. HELDERMAN
CHRISTOPHER P. COVAL
Drinker Biddle & Reath LLP
One Logan Square, 18th & Cherry Streets
Philadelphia, PA 19103-6996
Phone: (215) 988-2700

EVAN M. TAGER
ARCHIS A. PARASHARAMI
LAUREN R. RANDELL
Mayer Brown LLP
1909 K Street NW
Washington, DC 20006-1101
Phone: (202) 263-3000

GARY J. RUSSO (10828)
CAMILLE B. POCHÉ (22597)
Longman Russo, APLC
Suite 1600, 600 Jefferson Street
Lafayette, LA 70502-3408
Phone: (337) 262-9000

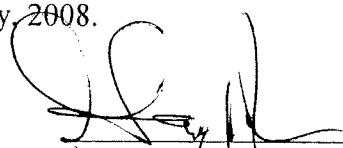
OF COUNSEL:

DR. SAÚL LITVINOFF
Boyd Professor of Law
Paul M. Hebert Law Center
Louisiana State University
366 Law Center Building
Baton Rouge, LA 70803-1000
Phone: (225) 388-1126

Attorneys for BellSouth Mobility Inc.

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 rulings, as required by 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 11th day of January, 2008.


GARY J. RUSSO

Service List:

Counsel for Respondents

Jonathan B. Andry
The Andry Law Firm, LLC
610 Baronne Street
Lafayette, LA 70113
(504) 586-8899

Bob Wright
Domengeaux, Wright, Roy & Edwards
556 Jefferson Street, Suite 500
Lafayette, LA 70501
(337) 233-3033

Lionel Sutton
The Sutton Law Firm
610 Baronne Street
New Orleans, LA 70113
(504) 586-8899

Peter Butler, Sr.
Peter Butler, Jr.
Breazeale, Sachse, & Wilson
909 Poydras Street
New Orleans, LA 70112
(504) 433-9350

Clerk of Court
Third Circuit Court of Appeal
P. O. Box 16577
Lake Charles, LA 70616

Honorable Gerard Wattigny
210 Courthouse
300 Iberia Street
New Iberia, LA 70560