

SUPREME COURT
STATE OF LOUISIANA

NO. 08-C-0094

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

REPLY BRIEF IN SUPPORT OF
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
DAN HIMMELFARB
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.

CLERK
OF COURT

2008 FEB 28 PM 1:28

SUPREME COURT
LOUISIANA




TABLE OF CONTENTS

INDEX OF AUTHORITIES..... ii

INTRODUCTION 1

ARGUMENT 1

A. The Decision Below Conflicts With *Aguillard* In Two Fundamental Respects..... 1

 1. The court of appeal erroneously held, in conflict with *Aguillard*, that plaintiffs have no burden to demonstrate that they “did not consent to the terms in dispute.”..... 2

 2. The court of appeal’s holding that “consent [wa]s called into question” by the features of BellSouth’s arbitration clause conflicts with this Court’s holding in *Aguillard* that consent was not called into question under the materially indistinguishable facts of that case..... 3

B. The Lower Courts’ Failure To Apply The Laws Of The Eight Other Class States Violates The U.S. Constitution As Interpreted By The U.S. Supreme Court..... 6

CONCLUSION..... 7

INDEX OF AUTHORITIES

CASES

Aguillard v. Auction Mgmt. Corp., 04-2804 (La. 6/29/05); 908 So. 2d 1..... *passim*

Boudreaux v. State, DOTD, 01-1329 (La. 2/26/02); 815 So.2d 7.....6

Fonte v. AT&T Wireless Servs., Inc., 903 So. 2d 1019 (Fla. Dist. Ct. App. 2005).....7

Fontenot v. Reddell Vidrine Water Dist., 02-0439 (La. 1/14/03); 836 So. 2d 14.....6

Lafleur v. Law Offices of Anthony G. Buzbee, 06-0466 (La. App. 1 Cir. 3/23/07);
960 So. 2d 1055

Levine v. First Nat'l Bank of Commerce, 06-0394 (La. 12/15/06); 948 So. 2d 1051.....1

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)1

St. Tammany Manor, Inc. v. Spartan Bldg. Corp., 509 So. 2d 424 (La. 1987)1

State v. Castleberry, 98-1388 (La. 4/13/99); 758 So. 2d 7491

Sutton Steel & Supply, Inc. v. BellSouth Mobility Inc., 07-146 (La. App. 3 Cir. 12/12/07);
971 So. 2d 12572, 3, 4, 6

Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362 (N.C. 2008)7

Unwired Telecomm. Corp. v. Parish of Calcasieu, 03-0732 (La. 1/19/05); 903 So. 2d 3921

RULES

Louisiana Supreme Court Rule X.11

INTRODUCTION

In contravention of this Court's decision in *Aguillard v. Auction Management Corp.*, 04-2804 (La. 6/29/05); 908 So. 2d 1, and the constitutional principles established by the U.S. Supreme Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the court of appeal has invalidated an arbitration provision that is part of the service agreements of millions of wireless customers and has required BellSouth Mobility Inc. ("BellSouth") to defend itself at trial in a class action spanning six years and nine states. As BellSouth's Application demonstrates, this Court's review is warranted for three reasons: The court of appeal's decision squarely "conflicts with a decision of * * * this court"; the court of appeal "has erroneously * * * applied the constitution * * * of * * * the United States"; and the court of appeal's decision will both "cause material injustice" and "significantly affect the public interest." La. Sup. Ct. R. X.1(a)(1), (4). Not a word in plaintiffs' opposition casts the slightest doubt on the need for this Court to grant review and reverse the decision of the court of appeal.¹

ARGUMENT

A. The Decision Below Conflicts With *Aguillard* In Two Fundamental Respects.

As we explain in the Application (at 9-20), the court of appeal's decision conflicts with *Aguillard* in not one but two independent respects. First, the court of appeal held the arbitration

¹ In an abundance of caution, BellSouth both took a suspensive appeal from the district court's order and sought a supervisory writ from the Third Circuit. After plaintiffs moved to dismiss BellSouth's appeal and the Third Circuit denied a supervisory writ, BellSouth filed a writ application with this Court, seeking review of the Third Circuit's denial of the writ. The application was denied. See App. 5 n.6. Plaintiffs now contend that, when it denied review of BellSouth's prior writ application, this Court "rejected" the same arguments that BellSouth raises in its pending Application. Opp. 2; see also Opp. 6 (contending that one of BellSouth's arguments was "specifically not accepted" by the Court). Plaintiffs also make the related assertion that, by denying review earlier, this Court "has already decided" that the issues raised in BellSouth's Application "do not warrant the exercise of this Court's extraordinary jurisdiction." Opp. 4. These contentions are frivolous. In denying review, the Court obviously did not decide that BellSouth's arguments lacked merit or that the issues in the case were unworthy of review. The Court decided only that it would not grant review when the sole decision of the court of appeal on the questions presented was a one-line order denying BellSouth's application for a supervisory writ. By contrast, the Application now before the Court seeks review of the Third Circuit's plenary decision on BellSouth's direct appeal. The earlier denial of certiorari does not bar this Court from reviewing the court of appeal's decision. See *St. Tammany Manor, Inc. v. Spartan Bldg. Corp.*, 509 So. 2d 424, 428 (La. 1987) ("A writ denial by this Court has no precedential value."); see also *Levine v. First Nat'l Bank of Commerce*, 06-0394 at p. 7 n.4 (La. 12/15/06); 948 So. 2d 1051, 1057 n.4; *State v. Castleberry*, 98-1388 at p. 5 (La. 4/13/99); 758 So. 2d 749, 755. The case on which plaintiffs rely (Opp. 1) is not to the contrary. See *Unwired Telecomm. Corp. v. Parish of Calcasieu*, 03-0732 at p. 19 n.13 (La. 1/19/05); 903 So. 2d 392, 406 n.13 (Court's denial of review on direct appeal "brought the litigation to a close and precludes a collateral attack of th[e] [court of appeal's] judgment").

clause involved here unenforceable without asking whether plaintiffs “did not consent to the terms in dispute.” *Aguillard*, 04-2804 at p. 12; 908 So. 2d at 10. Second, the court found that “consent [wa]s called into question” by certain features of the clause (*id.*) even though *Aguillard* reached a contrary conclusion on materially indistinguishable facts.²

1. **The court of appeal erroneously held, in conflict with *Aguillard*, that plaintiffs have no burden to demonstrate that they “did not consent to the terms in dispute.”**

Aguillard establishes two separate requirements: “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 or error, which vitiates consent.” 04-2804 at p. 12; 908 So. 2d at 10-11 (emphasis added). Despite that unambiguous language, the court of appeal held that *Aguillard* does *not* “compel[] a two-stage analysis,” and that “questions of individualized consent” need *not* be answered, before a contract may be invalidated. *Sutton Steel & Supply, Inc. v. BellSouth Mobility Inc.* (“*Sutton Steel III*”), 07-146 at pp. 17-18 (La. App. 3 Cir. 12/12/07); 971 So. 2d 1257, 1269-70. The Application (at 10-12) demonstrates why the court of appeal’s holding is wrong.

Plaintiffs make no attempt to engage BellSouth’s specific arguments. Instead, plaintiffs contend that our interpretation of *Aguillard* cannot be correct because it “would mean that, even if a clause in a consumer contract were not enforceable on its face, one would still have to litigate, on a case-by-case basis, the issue of each consumer’s consent to that unenforceable clause.” Opp. 5. But that contention simply assumes that, under *Aguillard*, a contract can be found unenforceable based on the face of the contract alone. That is the question we are asking the Court to decide—whether *Aguillard* so held.

Plaintiffs also contend that our interpretation of *Aguillard* “would preclude class actions in any consumer case with an arbitration clause.” Opp. 2. That is incorrect. As we explain in the Application (at 12 n.8), *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. And if a two-step inquiry must be undertaken in an individual action of that type, as it clearly must, then

² Plaintiffs contend that the court of appeal’s decision does not conflict with *Aguillard* because the court “applied *Aguillard* to this case.” Opp. 7. But BellSouth is not seeking this Court’s review because the court of appeal failed to apply *Aguillard*; it is seeking review because the court applied *Aguillard* *incorrectly*.

it must be undertaken in a class action as well, because class adjudication cannot alter substantive law. *See* App. 12.

Plaintiffs also contend that the arbitration clause at issue is unenforceable without regard to what *Aguillard* said about contracts of adhesion. Opp. 8; *see also* Opp. 16. They claim that the district court “found that the clause failed to comply with principles governing contracts, *whether or not they are adhesionary.*” Opp. 8 (emphasis added). That is also incorrect. The district court held that the arbitration clause is unenforceable as a matter of Louisiana law because it found the clause to be adhesionary. *Reasons for Judgment*, Dec. 27, 2006, at 4-10. The court of appeal affirmed its decision on the same ground. 07-146 at pp. 7-15; 971 So. 2d at 1263-68. The arbitration clause here is unenforceable, therefore, only if the lower courts correctly interpreted *Aguillard*; there was no independent basis for their decisions.

Finally, plaintiffs accuse us of “asking the Justices of this Court to be activists” by “add[ing] a requirement” to *Aguillard* “which would effectively exculpate BellSouth.” Opp. 7-8. That has things exactly backwards. It is plaintiffs who are asking this Court to countenance the use of adhesion doctrine to excuse every class member from his or her contractual obligation to arbitrate without regard to whether that class member actually consented to the arbitration provision. Moreover, in arguing that the Court should affirmatively ignore evidence of consent, plaintiffs would allow class members who were fully aware of the “rounding up” provision, and expressly consented to it, to evade their agreements. *See* App. 14 n.9.

2. The court of appeal’s holding that “consent [wa]s called into question” by the features of BellSouth’s arbitration clause conflicts with this Court’s holding in *Aguillard* that consent was not called into question under the materially indistinguishable facts of that case.

As we explain in the Application (at 15-20), even if the court of appeal was correct in holding that there is no second step to the contract-of-adhesion inquiry, its decision still conflicts with *Aguillard* because it misapplied the first step. That is true for two independent reasons.

First, three of the four contractual features on which the court of appeal relied in finding BellSouth’s arbitration clause adhesionary were the very same ones on which the court had relied in reaching an identical conclusion in the *Sutton Steel I* decision that this Court disapproved in *Aguillard*. *See* App. 15-18. The only new facts invoked by the court of appeal in *Sutton Steel III* are that the clause is not set off by double spacing and that it appears on a page with a large

number of words. *See* App. 16. Those facts cannot possibly make an otherwise enforceable contract unenforceable, particularly because even the court of appeal was “hesitant to conclude that BellSouth actively ‘concealed’ the arbitration clause.” 07-146 at p. 13; 971 So. 2d at 1267.

Second, the arbitration clause here is materially indistinguishable from the clause found to be enforceable in *Aguillard*. As explained below, plaintiffs’ arguments to the contrary (Opp. 11-16) lack merit.³

a. Physical characteristics of the clause. As we explain in the Application (at 15-16), the arbitration provisions at issue are just like the one in *Aguillard* in that they are in nine-point (and in some cases larger) type and do not differ from other provisions of the contract (except that, in some cases, they are printed in even larger type than the other provisions). Plaintiffs contend that the provisions differ from the one in *Aguillard* because the court of appeal found the former to be in “exceedingly small” print, while this Court found the latter to be in “not unreasonably small” print. Opp. 11-12. To begin with, the court of appeal considered only one of several specimens that are in the record; other versions of the terms and conditions appear in materially larger print. *See* LaRussa Aff. Exhs. A-G. But even if the version on which the court of appeal focused were the only one at issue, the court’s characterization of the type size could not alter the fact that the actual print here was at least as large as the print found to be “not unreasonably small” in *Aguillard*. Plaintiffs also contend that the provisions here differ from the one in *Aguillard* because they were “intentionally tucked away in a document completely separate from the document signed by BellSouth’s customers.” Opp. 12. As plaintiffs themselves have previously acknowledged, however, *see, e.g.*, Pls.’ Opp. to Summ. J. 3-4, 9-11, the arbitration provision, like all the other terms and conditions of service, is printed on the reverse side of the very same piece of paper that was signed by the customer. *See* App. 2.

b. Distinguishing features of the clause. As we explain in the Application (at 16-17), the court of appeal’s refusal to enforce the arbitration provision because it is not set off by double spacing, and appears on a page with more than a certain number of words, imposes the same type of “special notice” requirement that this Court found to be preempted by the Federal

³ Plaintiffs repeatedly assert that the issue on appellate review is whether the district court committed “manifest error” in applying the four factors. Opp. 10, 11, 16, 17. As we explain in the Application (at 20 n.14), however, the district court’s decision should be subject to *de novo* review, because the factors are applied to the face of the contract.

Arbitration Act (“FAA”) in *Aguillard*. Plaintiffs contend that the court of appeal did not impose a “special notice” requirement but “simply required that the arbitration clause, like any contract clause, be presented in a way reasonably calculated to lead to its actually being read.” Opp. 12. But using fewer words on each page, so that the contract would span 20 pages, rather than two pages, would not make customers any more likely to read the arbitration clause. See App. 17. And it is absurd to think that this Court in *Aguillard* somehow expressed a “preference” for contracts with “paragraphs that [a]re set off from one another,” as plaintiffs contend. Opp. 13. *Aguillard* found a contract of that type enforceable, but it obviously did not suggest that double spacing between paragraphs is a *sine qua non* of enforceability as a matter of Louisiana law.

c. **Relative bargaining strength of the parties.** As we explain in the Application (at 17-18), this Court made clear in *Aguillard* that parties are deemed to have unequal bargaining power when the transaction at issue was such a necessary one that the party challenging the arbitration provision was compelled to enter into it, a showing that plaintiffs cannot make. Plaintiffs contend that this case differs from *Aguillard* because the plaintiff there “could have ‘attempted to negotiate the terms of the contract’” and “that was not possible” here. Opp. 13. But this Court in *Aguillard* did not find an absence of unequal bargaining power because the plaintiff could have attempted to negotiate the terms of the contract; rather, the Court relied on the fact that the plaintiff “could have *either* attempted to negotiate the terms of the contract *or* refused to participate in the [real estate] auction.” 04-2804 at p. 22; 908 So. 2d at 17 (emphasis added). Like the plaintiff in *Aguillard*, plaintiffs here could have refused to participate in the transaction with BellSouth; and while they might not have been able to negotiate the terms of the contract, there is no indication that the plaintiff in *Aguillard* had that ability either.⁴

d. **Mutuality of the clause.** As we explain in the Application (at 18-20), the arbitration clause here is every bit as mutual as the clause in *Aguillard* and, in any event,

⁴ Contrary to plaintiffs’ contention, the First Circuit has not “rejected BellSouth’s reading of *Aguillard* with respect to the relevance of bargaining position.” Opp. 14. In the case on which plaintiffs rely, the First Circuit distinguished *Aguillard* on the ground that it “did not involve the unequal bargaining power that is inherent in the attorney-client relationship.” *Lafleur v. Law Offices of Anthony G. Buzbee*, 06-0466 at p. 12 (La. App. 1 Cir. 3/23/07); 960 So. 2d 105, 113. Plaintiffs quote only a part of the relevant language (“did not involve the unequal bargaining power”), while omitting the part (“that is inherent in the attorney-client relationship”) that refutes their claim. Opp. 14.

mutuality is not a relevant consideration in deciding whether a party's consent to an arbitration clause has been called into question. Plaintiffs respond only to the former point. They contend that the argument was not raised in the court of appeal and that the arbitration clause is in any event non-mutual because customers "could not sue for basic breach of contract." Opp. 16. But we did argue in the court of appeal that the arbitration clause is fully mutual. C.A. Br. 9 n.11; C.A. Reply Br. 8. And it is simply not the case that the clause allows BellSouth, but not its customers, to "sue for basic breach of contract." If there is a breach-of-contract claim that involves an attempt to collect a debt owed to BellSouth by the customer, both BellSouth and the customer may bring the claim in court. See App. 18-19. As to all other breach-of-contract claims, both BellSouth and its customers must bring the claim in arbitration.

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

As we explain in the Application (at 20-24), the lower courts violated the U.S. Constitution by permitting this nine-state class action to proceed without considering and applying the laws of the eight class states outside Louisiana. The Application demonstrates that, even if the arbitration provision at issue is not enforceable in Louisiana (as the lower courts mistakenly believed), it is enforceable in the eight other class states, which apply the doctrine of unconscionability rather than "contract of adhesion" analysis. See App. 22-23. Plaintiffs' arguments to the contrary lack merit.

First, plaintiffs contend that BellSouth's federal constitutional argument is not properly before this Court because it was not raised in the district court. Opp. 17-18. But BellSouth specifically argued in the district court that the court was required to consider and apply the laws of the other class states. Def.'s Mot. in Support of Decert. 29-31. In any event, the argument was both raised and decided in the court of appeal. 07-146 at pp. 19-24; 971 So. 2d at 1270-73. That is all that is necessary to preserve it for this Court's review. See, e.g., *Fontenot v. Reddell Vidrine Water Dist.*, 02-0439 at p. 6 n.3 (La. 1/14/03); 836 So. 2d 14, 19 n.3 ("this Court cannot consider contentions raised for the first time in this tribunal which were not pleaded in the court below and which the lower court has not addressed"). The case on which plaintiffs rely (Opp. 18) is not to the contrary. See *Boudreaux v. State, DOTD*, 01-1329 at p. 2 (La. 2/26/02); 815 So.

2d 7, 9 (per curiam) (“we cannot consider contentions raised for the first time in this Court”).⁵

Second, plaintiffs contend that a recent North Carolina decision, *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008), “shows that BellSouth’s claim that the law of the [other] class states conflicts with the law of Louisiana[] is patently false.” Opp. 8 n.1. *Tillman* in fact proves our point, inasmuch as (1) it applied a standard for determining the enforceability of arbitration provisions that is very different from the standard applied in Louisiana and (2) the arbitration provision here would not be unenforceable under the standard applied in that case. See 655 S.E.2d at 370-73 (finding an arbitration provision in loan agreements procedurally unconscionable based on a combination of circumstances, including the fact that the plaintiffs were rushed through loan closings, and substantively unconscionable based on a combination of circumstances, including the high cost of arbitrating).⁶

Third, plaintiffs criticize BellSouth for not “avail[ing] itself of the Third Circuit’s invitation to move the trial court to create subclasses based on possible differences * * * in state arbitration law.” Opp. 20. As the Application explains (at 24), however, creating subclasses by state would be appropriate only if the subclasses could themselves be sustained; and they could not, because the arbitration provisions are fully enforceable in the other states.⁷

CONCLUSION

The Court should grant review and set the case for plenary briefing and oral argument.

Respectfully submitted,



GARY J. RUSSO

DATED: February 28, 2008

⁵ Plaintiffs do not contend that we failed to preserve our contention that the district court ran afoul of Louisiana law by failing to consider the law of the other states. Accordingly, even if the Court agrees that the federal constitutional argument has not been preserved, this Court can and should grant review to resolve the issue under the materially identical law of Louisiana.

⁶ Moreover, a decision from another class state—Florida—enforced an arbitration provision in a wireless carrier’s service agreement that is similar to the one at issue here. See *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1025-27 (Fla. Dist. Ct. App. 2005) (finding the provision was not procedurally unconscionable even though the court found that the carrier “had almost unilateral bargaining power” and the provision “was somewhat buried” in the agreement).

⁷ Contrary to plaintiffs’ assertion, we did not “acknowledge[]” in the district court “the unenforceability of [the] arbitration clause in Tennessee.” Opp. 22. We acknowledged that the Tennessee Supreme Court has held that non-mutual arbitration provisions are unenforceable, but we explained that that rule is preempted by the FAA. Def.’s Mot. in Support of Decert. 13 n.9. In any event, BellSouth’s arbitration provisions are fully mutual. See App. 18-19.

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
DAN HIMMELFARB
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 Reply Brief in Support of Application for Writ of Certiorari are true and correct to the best of my knowledge. I further certify that a copy of the Reply Brief in Support of 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 28th day of February, 2008.


GARY J. RUSSO

Service List:

Jonathan B. Andry
The Andry Law Firm, LLC
610 Baronne Street
Lafayette, LA 70113

Bob Wright
Domengeaux, Wright, Roy & Edwards
556 Jefferson Street, Suite 500
Lafayette, LA 70501

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