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Case No. 63004-1-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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OPTIMER INTERNTIONAL, INC.,

Claimant/Respondent,

v.

RP BELLEVUE, LLC,

Respondent/Appellant

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OPTIMER INTERNATIONAL, INC.'S SUPPLEMENTAL BRIEF

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## TABLE OF CONTENTS

I.	Introduction .....	1
II.	The Appellant waived the issue of the application of RCW 7.04A.030 to RCW 7.04A.260 under RAP 2.5(a) .....	1
III.	The application of RCW 7.04A.030 and The non-waiver provisions of RCW 7.04A.030 are unconstitutional in the application here ...	3
IV.	CONCLUSION .....	10

## TABLE OF AUTHORITIES

### CASES

<u>Better Fin. Solutions, Inc. v. Caicos Corp.</u> , 117 Wn. App. 899, 912-13, 73 P.3d 424 (2003)	2
<u>Birkenwald Distrib. Co. v. Heublein, Inc.</u> , 55 Wn. App. 1, 776 P.2d 721 (1989) .....	6
<u>Brundridge v. Fluor Fed. Services</u> , 164 Wn.2d 432, 191 P.3d 879 (2008) .....	2
<u>Gillis v. King County</u> , 42 Wn.2d 373, 255 P.2d 546 (1953) .....	6
<u>In Re Estate of Heilbron</u> , 14 Wash. 536, 45 P. 153 (1896) .....	6, 7
<u>In Re Santore</u> , 28 Wn. App 319, 623 P.2d 702, (1981), <i>rev. denied</i> , 95 Wn. 2d 1019, (1981) .....	10
<u>Howard v. Ross</u> , 38 Wash. 627, 80 P. 819 (1905).....	6
<u>Ketcham v. King County Medical Serv. Corp.</u> , 81 Wn.2d 565, 502 P.2d 1197 (1972) .....	7, 9
<u>Martin v. Johnson</u> , 141 Wn. App. 611, 170 P.3d 1198 (2007) .....	2
<u>Optimer International, Inc. v Bellevue, LLC</u> , 134 Wn. App 1027; 2006 Wn. App. LEXIS 1683 (2006) .....	6
<u>Ruano v. Spellman</u> , 81 Wn.2d 820, 505 P.2d 447 (1973) .....	7
<u>State ex rel. Bellingham School Dist. No. 301</u> <u>v. Clausen</u> , 109 Wash. 37, 186 P.319 (1919) .....	6
<u>State ex rel. Phinney v. Superior Court</u> , 21 Wash. 186, 57 P. 337 (1899).....	7

<u>Tremper v. Northwestern Mut. Life Ins. Co.</u> , 11 Wn.2d 461, 119 P.2d 707 (1941) .....	7
--	---

CONSTITUTION

Washington State Constitution, Article I, Section 23 ....	6
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STATUTES

RCW 7.04.010 .....	5
RCW 7.04A.030 .....	1, 3, 4, 8, 9
RCW 7.04A.040 .....	3, 4, 5, 7
RCW 7.04A.240 .....	1, 3
RCW 7.04A.250 (1) and (2) .....	4
RCW 7.06 et seq.....	9
Federal Arbitration Act, 9 U.S.C. Sec. 1 et seq. ....	5
RAP 2.5(a) .....	2
<u>UNIFORM ACTS</u>	
Revised Uniform Arbitration Act (2000) .....	8

## I. Introduction

This supplemental brief is submitted at the direction of the Court to consider whether the retroactive section of RCW 7.04A.030 prohibits the waiver of a party to an arbitration right to file an action in the Superior Court to amend or modify an order under RCW 7.04A.240 and in relation to prior holding of this Court in allowing waivers of appeal rights to an arbitration award.<sup>1</sup>

This issue was never posed by the Appellant, but was first raised by this Court during the Respondent's oral argument on July 21, 2009; and the Court directed briefing on the issue to be submitted within ten days.

This is not an issue which Optimer would raise, and we did not, nor did recent decisions from the Court disturb or overrule the waiver or modification of appeal rights of an arbitration award even under a case where RCW 7.04A was recognized.<sup>2</sup>

## II. The Appellant waived the issue of the application of RCW 7.04A.030 to RCW 7.04A.240 under RAP 2.5(a)

The retroactive application of RCW 7.04A is an issue first raised by this Court. The Appellant had an obligation to raise the issue, but

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<sup>1</sup> This brief is in addition to Respondent's prior brief filed in this case and addresses both the issue of whether the Appellant, by failing to raise this issue below, has waived its right to do so; and that the retroactive application of RCW 7.04A.030 is an unconstitutional intrusion on the rights of the parties to contract.

<sup>2</sup> Judge Kallas discussed a Division I unpublished opinion during oral argument in the case below. *See*, comment in Footnote 5 to Respondent's Brief. This case was also discussed during oral argument.

never did. The Appellant filed a motion/action to modify the award and never raised the issue. It responded to Optimer's brief and did not raise the issue. It filed a motion for reconsideration, a notice of appeal, an opening and reply brief and never in its briefings or oral argument in any court raised the issue.

Under RAP 2.5(a), the failure of a party to raise an issue is a waiver. RAP 2.5(a) states as in part follows:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction.

A party who fails to raise an issue at trial normally waives the right to raise that issue on appeal. RAP 2.5(a). *Brundridge v Fluor Fed. Services*, 164 Wn.2d 432, at 441, 191 P.3d 879 (2008). Similarly, in *Martin v Johnson*, 141 Wn. App. 611, 170 P.3d 1198 (2007), the Court of Appeals refused to consider an issue first raised on appeal, stating that "Metropolitan did not raise this argument below, and generally, we will not review an issue raised for the first time on appeal. (citations omitted) Because the trial court did not have the opportunity to rule on this issue, we decline to consider it." *Martin, supra* at 617.

Even though this Court raises this issue, since RP Bellevue had never before raised it, either in the trial court or in briefing or argument to this Court, since the trial court did not have an opportunity to consider it, and in fairness to the Respondent, the issue should not be considered for the first time almost a year after the Arbitrator's Award.

III. The retroactive application of RCW 7.04A.030 and the non-waiver provisions of RCW 7.04A.030 are unconstitutional in the application here.

The Lease agreement which embodies the detailed arbitration clause was negotiated and entered into in 1997, [CP 34-121] and assumed by the Appellant. [CP 225 – 226] The landlord-tenant relationship under the Lease has been one controversy after another. The arbitration clause, as negotiated, has been relied upon and utilized successfully by the parties many times over the life of this Lease.

The language of RCW 7.04A.040 provides in part as follows:

(1) Except as otherwise provided in subsections (2) and (3) of this section, the parties to an agreement to arbitrate or to an arbitration proceeding may waive or vary the requirements of this chapter to the extent permitted by law.

(2) Before a controversy arises that is subject to an agreement to arbitrate, the parties to the agreement may not:

...

(3) The parties to an agreement to arbitrate may not waive or vary the requirements of this section or ... RCW 7.04A.240 ... .

This statute is made applicable to “agreements to arbitrate even if the arbitration agreement was entered into before January 1, 2006.” RCW 7.04A.030. Thus, after January 1, 2006, one might assert that the prohibitions contained in RCW 7.04A.040 would be applicable to the agreement to arbitrate entered into between these parties. However, both the case law which allows for sophisticated parties knowingly and voluntarily to enter contractual waivers; and the unconstitutional impairment of the obligations of contracts which a retroactive application of the statute would impose, prohibit the retroactive application of RCW 7.04A.030 to the arbitration clause which was executed and effective in 1997. [CP 25].

The parties here have been engaged in five arbitrations over the years.<sup>3</sup> In each engagement, the parties followed the terms of the Arbitration Clause, Paragraph 28.11 of the Lease. [CP 25]

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<sup>3</sup> Since this was not an issue in the Arbitration or the Court below, there is no record. However, the five arbitrations include 1) a breach of contract suit filed in 1999 which was settled after being referred to arbitration (AAA, Case No. 75 115 00061 00); 2) an action in King County Superior Court relating to certain actions which were not covered by the arbitration clause entitled *Optimer International, Inc. v Bellevue, LLC, Schroeder USA Corp. et al*, 02-2-10178-0 SEA which was reversed by this Court on appeal, *Optimer International, Inc. v Bellevue, LLC*, 134 Wn. App 1027; 2006 Wn. App. LEXIS 1683 (2006); 3) an unlawful detainer action filed in King County Superior Court Case No. 06-2-02312-9 on January 12, 2006 which was referred to an arbitration with related counterclaims in Judicial Dispute Resolution, Seattle; 4) a breach of contract arbitration relating to construction noise and vibration filed in the AAA, Case No. 75 115 00243 07 JEPE, which was confirmed in King County Superior Court Case No. 08-2-42932-6SEA; and 5) the current dispute relating to the Landlord’s change of use at the Bellevue Galleria filed in the AAA, Case No. 75-115-00153 AMC.

When the parties negotiated the Lease, they bargained for and received a relatively stream lined, quick and inexpensive dispute resolution. Referring to the Commercial Arbitration Rules of the American Arbitration Association, but without referring to either the Washington State arbitration law then in force, RCW 7.04.010 *et seq.*, which by the way had no prohibitions to the parties agreeing to a waiver, or the Federal Arbitration Act, 9 USC Sec. 1 *et seq.*, which does not contain a prohibition against the parties agreeing to a waiver, and affirmatively and correctly makes the statute prospective only<sup>4</sup>, the parties agreed to seven specific time and cost cutting provisions. Of more importance, the parties negotiated and agreed that the “decision of the Arbitrator shall be final and non-appealable and enforceable in any court of competent jurisdiction.” [CP 25]

While they also agreed that they could modify the provisions enumerated as i through vii by stipulation, they did not agree that the final and non-appealable provisions could be modified by stipulation.

RCW 7.04A.040 does not just affect a procedural issue. It affects the entire balance of economic and legal power between the parties. As between these parties, the Landlord has always been the party with the most to spend on litigation. The very history of this dispute and the

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<sup>4</sup> 9 USC Sec. 14 states that this “title shall not apply to contracts made prior to January 1, 1926.”

disputes before this dispute make clear that the Landlord's strategy has been to force the Tenant into arbitration, litigation (on non-arbitrable issues)<sup>5</sup> and even a Chapter 11 Bankruptcy with the intent of forcing this Tenant, which has a very favorable and long term lease, out of the property.<sup>6</sup>

Article I, Section 23 of the Constitution of the State of Washington provides:

§ 23. Bill of attainder, ex post facto law, etc. No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed. Washington Constitution, Art. I, § 23

Both the Court of Appeals and the Supreme Court of this state have honored contracts and vitiated the effects of laws enacted later. For example, the Wholesale Distributors and Supplies of Wine and Malt Beverages Act, enacted in 1984, was inapplicable to a preexisting distributorship agreement under which supplier had right to terminate distributor at will. *Birkenwald Distrib. Co. v. Heublein, Inc.*, 55 Wn. App. 1, 776 P.2d 721 (1989). Even a statute exempting proceeds of life insurance policy from liability for debt may not be applied retroactively. *In re Estate of Heilbron*, 14 Wash. 536, 45 P. 153 (1896). In each case, the law in existence at time contract executed becomes part of contract

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<sup>5</sup> See, *Optimer International, Inc. v Bellevue, LLC*, 134 Wn. App 1027; 2006 Wn. App. LEXIS 1683 (2006).

<sup>6</sup> *In re Optimer International, Inc.*, USBC/WDW 06-10414 KAO.

providing for vested rights to the parties. *State ex rel. Phinney v. Superior Court*, 21 Wash. 186, 57 P. 337 (1899).

All this is so, because a statute may not operate retroactively where result would be to impair obligation of contract. *In re Estate of Heilbron*, 14 Wash. 536, 45 P. 153 (1896); *Gillis v. King County*, 42 Wn.2d 373, 255 P.2d 546 (1953). Legislative action impairs the obligations of a contract if it, either directly or indirectly, lessens the value or alters the terms of the contract. *Ruano v. Spellman*, 81 Wn.2d 820, 505 P.2d 447 (1973).

A contract is impaired by a statute which alters its terms, imposes new conditions or lessens its value. *Ketcham v. King County Medical Serv. Corp.*, 81 Wn. 2d 565, 502 P.2d 1197 (1972). An obligation of contract impaired where terms altered, new conditions imposed or value lessened. *Tremper v. Northwestern Mut. Life Ins. Co.*, 11 Wn.2d 461, 119 P.2d 707 (1941).

As in *Ketcham, supra*, there is nothing in the retroactive application of the Uniform Arbitration Act which rises to the dignity of the health, welfare or protection of the public. The contract in this case is a private contract which was negotiated and executed in 1997. There are a number of rights for each party. The Arbitration Clause does not just require arbitration as the sole and exclusive dispute resolution procedure; but contains a number of provisions to which the parties have agreed to

promote efficiency and to save time and money. To eliminate even one such provision would alter the balance negotiated in the contract, would affect the rights of both parties who entered into the contract, and who entered into binding arbitration with the understanding that this would be the end of this dispute.

The National Conference of Commissioners on Uniform State Laws, when adopting the Uniform Arbitration Act in 2000 (“UAA”)<sup>7</sup> included a comment to Section 3, which was codified in Washington as RCW 7.04A.030. This comment indicates, the original drafters of the UAA made the statute prospective only, but that the Drafting Committee rejected this approach so that there would not be two sets of rules:

2. Section 20 of the UAA provided that the law was applicable only to agreements entered into after the effective date of the Act. The Drafting Committee rejected this approach in the RUAA. If it were followed, such a section would cause two sets of rules to develop for arbitration agreements under state arbitration law: one for agreements under the UAA and one for agreements under the RUAA. This is especially troublesome in situations where parties have a continuing relationship that is governed by a contract with an arbitration clause. There would be no mechanism, such as Section 3(b) for these parties to opt into the provisions of the RUAA without rescinding their initial agreement. Section 3(c) also sets a time certain when all arbitration agreements will be governed by the RUAA. The time between when parties may opt into coverage under the RUAA and when parties' agreements must be governed by the RUAA will give parties a reasonable amount of time in which to learn of

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<sup>7</sup> See, [www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm](http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm)

and adapt their arbitration agreements to the changes made by the RUAA.

The one set of rules analysis does not pass muster under the *Ketcham, supra*, constitutional impairment analysis. First of all the RCW 7.04A as enacted does not apply to the Mandatory Arbitration Rules under RCW 7.06, RCW 7.04A.030(3); or to arbitration agreements between employers and employees or associations of employees. RCW 7.04A.030(4). Moreover, there is no rationale to require these two parties, who have relied upon, and acted upon their private arbitration agreement to renegotiate their arbitration clause; or for the state or this Court to concern itself about their private agreement.

In the final clause of this comment the Drafting Committee presumes that all commercial contracts would be revised to adopt the provisions, standards, and prohibitions of the revised act. They apparently did not believe or presume that prior existing contracts could be affected by the new law. This is simply “ivy tower” thinking: the arbitration clause between these parties works. It does not need to be reviewed or revised.

In any event, not only does the retroactive application of RCW 7.04A.030 not meet the *Ketcham* standard which requires that the change in the law must affect the health, welfare or protection of the public; it also does not meet the “unfair and unreasonable” standard set forth in *In re*

*Santore*, 28 Wn. App. 319, 324-25, 623 P.2d 702 (1981), *rev. denied*, 95 Wn. 2d 1019, (1981)

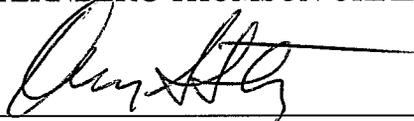
As argued in this supplemental brief both parties have relied on the application of the arbitration clause in their agreement.

IV. Conclusion

The Appellant has waived any right to argue that RCW 7.04A.040 applies to this case; and the Court should not; and does not need to raise it in this dispute. Even if it were to be considered, the application of this statute retroactively to this arbitration clause does not meet the constitutional standards.

Respectfully submitted this 31<sup>st</sup> day of July, 2009.

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CERTIFICATE OF SERVICE

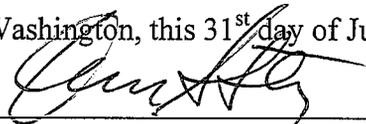
I, Craig S. Sternberg, do hereby declare under penalty of perjury that I have served the attached pleading on the parties in interest either by FAX, first class mail, postage prepaid or by messenger as follows:

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DATED under penalty of perjury at Seattle, Washington, this 31<sup>st</sup> day of July, 2009

  
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Craig S. Sternberg, WSBA 00521

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