

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2010 APR 23 - 30 AM 10:08
BY RONALD R. CARPENTIER
CLERK

Case No. 83807-1

SUPREME COURT
OF THE STATE OF WASHINGTON

OPTIMER INTERNATIONAL, INC.,

Petitioner,

v.

RP BELLEVUE, LLC,

Respondent.

**RESPONDENT RP BELLEVUE, LLC'S
SUPPLEMENTAL BRIEF**

Paul E. Brain, WSBA #13438
BRAIN LAW FIRM PLLC
1119 Pacific Avenue, Suite 1200
Tacoma, Washington 98402
Tel: 253-327-1019
Fax: 253-327-1021
Email: pbrain@paulbrainlaw.com

Attorneys for Respondent
RP Bellevue, LLC

**FILED AS
ATTACHMENT TO EMAIL**

ORIGINAL

TABLE OF CONTENTS

**I. IDENTITY OF THE PARTIES AND RELEVANT
BACKGROUND.....1**

II. DISCUSSION.....2

TABLE OF AUTHORITIES

Cases

Godfrey v. Hartford Casualty Ins. Corp.,
142 Wn.2d 885, 16 P.3d 617 (2001)

Obert v. Environmental Research,
112 Wn.2d 323, 771 P.2d 340 (1989)

Optimer International Inc. v. RP Bellevue LLC,
151 Wn. App. 954, 214 P.3d 954 (2009)

Statutes

Chap. 7.04A RCW, Washington's Arbitration Statute

I. IDENTITY OF THE PARTIES AND RELEVANT BACKGROUND

RP Bellevue, LLC (“RP”) is the landlord to Optimer International, Inc. (“Optimer”) pursuant to a commercial lease dated September 25, 1997, for a leasehold in a building located in Bellevue, Washington.

RP was the appellant in the proceedings before Division I of the Court of Appeals. The issue on appeal was whether a party to an arbitration agreement could waive the limited right of review available under Washington’s Arbitration Act (Chap. 7.04 RCW; the “Act”) as in force at the time of lease execution.

Amendments to the Act after the execution of the Lease provide that the limited right of review under the Act is non-waiveable (RCW 7.04A.040) and apply retroactively. Based on these amendments, Division I requested supplemental briefing from the parties on whether retroactive application of the amended Act would result in a constitutional infirm impairment of contracts, pursuant to RAP 12.1(b).

In Optimer Inter., Inc. v. RP Bellevue, LLC, 151 Wn. App. 954, 214 P.3d 954 (2009), Division I held:

- (1) Uniform Arbitration Act provision that the right to judicial appeal from an award could not be waived by contract was retroactive and applied to existing agreement to arbitrate;
- (2) waiver of right to judicial review of arbitration decisions was invalid at its inception, such that judicial non-enforcement of that waiver was not an unconstitutional impairment of a contractual obligation; and
- (3) the Act’s nonwaiver provision was reasonably necessary to accomplish a legitimate public purpose and,

thus, did not unconstitutionally impair parties' contractual obligations.

Holding 2 was based on Division I's conclusion that the limited right to review was non-waiveable under the pre-amendment form of the Act: "Because *Godfrey* [142 Wn.2d 885, 16 P.3d 617 (2001)] rendered the waiver clause in Optimer's lease invalid and unenforceable, the current Arbitration Act does not impair any of the parties' contractual obligations." *Optimer*, 151 Wn. App. at 969.

The Petition for Review was taken from this decision.

II. DISCUSSION

RP will keep this short. There are two issues where RP believes some additional briefing may be helpful. The first concerns Petitioner's assertion that any issue relating to the amended Act is an issue first raised on appeal and, therefore, precluded from consideration. RAP 12.1(b) provides:

If the appellate court concludes that an issue which is not set forth in the briefs should be considered to properly decide a case, the court may notify the parties and give them an opportunity to present written argument on the issue raised by the court.

Division I was acting within its authority to consider the issues raised by the amendments to the Act. See, *Obert v. Environmental Research*, 112 Wn.2d 323, 771 P.2d 340 (1989). This is a non-issue.

Second, Division I's decision was the appropriate decision irrespective of whether retroactive application of the amendments is appropriate because the limited right of review was non-waiveable under prior law. The amendments simply did not change prior law.

This conclusion was reached expressly by Division I: that the amendments would not affect the outcome because they simply codified prior case law:

We read Godfrey as also standing for a more far-reaching proposition: that, in the context of an arbitration agreement entered into before a dispute arises, a provision in the agreement that is at variance with the provisions for judicial review set forth in the governing arbitration statute is void and unenforceable. The court in Godfrey emphasized that “arbitration in Washington is exclusively statutory” and that the governing statute did not permit “‘common law arbitration.’. Hence, because “parties to an arbitration contract are not free to craft a ‘common law’ arbitration alternative to the Act[,] ... any efforts to alter the fundamental provisions of the Act by agreement are inoperative.” Godfrey, 142 Wn.2d at 896, 16 P.3d 617 (emphasis added)

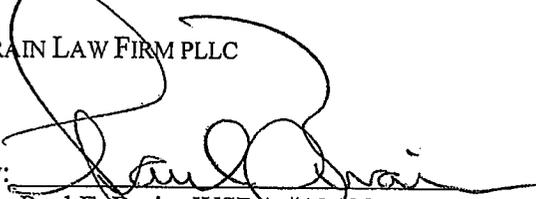
Optimer, 151 Wn. App. at 968.

As noted in RP’s briefing on the Petition for Review, Godfrey is one of a number of cases decided under the prior Act which hold that parties to an arbitration agreement cannot pick-and-choose which provisions of the Arbitration Act will be applicable. Under the law existing at the time the Lease at issue was executed, a waiver of the limited right of review would have been ineffective. Thus, the amendments could not impair any right under the Lease because the right asserted by Optimer to have been impaired did not exist. As Division I observed: “Because Godfrey rendered the waiver clause in Optimer’s lease invalid and unenforceable, the current Arbitration Act does not impair any of the parties contractual rights.” Optimer, 151 Wn. App. at 969.

However, under Washington law, contractual rights can be impaired when the impairment is a legitimate exercise of police power, as Division I again noted: "Promoting arbitration is a legitimate legislative objective." Optimer, 151 Wn. App. at 969. Thus, retroactive application would be appropriate even if there was an impairment because the amendments further a clear and legitimate public interest.

DATED this 30th day of April, 2010.

BRAIN LAW FIRM PLLC

By: 

Paul E. Brain, WSBA #13438

Attorneys for Respondent
RP Bellevue, LLC

CERTIFICATE OF SERVICE

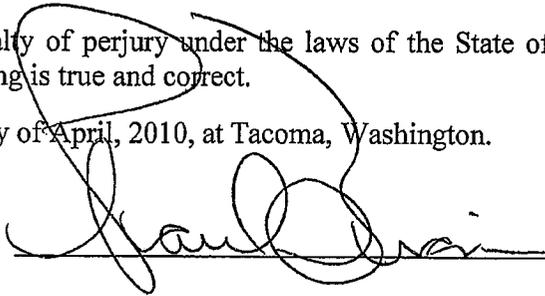
I hereby certify that I have this 30th day of April, 2010, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

Attorneys for Optimer International, Inc.:

| | | |
|---------------------------------------|-------------------------------------|--|
| Craig S. Sternberg | <input type="checkbox"/> | U.S. Mail (first-class, postage prepaid) |
| Sternberg Thomson Okrent & Scher PLLC | <input type="checkbox"/> | Overnight Delivery |
| 500 Union Street, Suite 500 | <input type="checkbox"/> | Facsimile |
| Seattle, WA 98101-4047 | <input checked="" type="checkbox"/> | Email (craig@stoslaw.com) |

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of April, 2010, at Tacoma, Washington.



A handwritten signature in black ink, appearing to read "Craig Sternberg", is written over a horizontal line. The signature is stylized and loops back under the line.

ORIGINAL

**FILED AS
ATTACHMENT TO EVIDENCE**