

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2803-13T3  
A-2889-13T3

SALVATORE F. CARFARO,

Plaintiff-Respondent,

and

ELLEN M. CARFARO,

Plaintiff-Appellant,

v.

BLUE HAVEN POOLS NORTHEAST, INC.  
D/B/A BLUE HAVEN POOLS, and CENTURY  
GUNITE, LLC,

Defendants-Respondents,

and

JAMES FARMER,

Defendant.

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SALVATORE F. CARFARO,

Plaintiff-Appellant,

and

ELLEN M. CARFARO,

Plaintiff-Respondent,

v.

BLUE HAVEN POOLS NORTHEAST, INC.

D/B/A BLUE HAVEN POOLS, and CENTURY  
GUNITE, LLC,

Defendants-Respondents,

and

JAMES FARMER,

Defendant.

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Argued April 13, 2015 - Decided May 5, 2015

Before Judges Sabatino, Guadagno, and Leone.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-3198-10.

Daniel Louis Grossman argued the cause for appellants Salvatore F. Carfaro (A-2889-13) and Ellen M. Carfaro (A-2803-13).

Rabinowitz, Lubetkin & Tully, L.L.C., attorneys for Jay L. Lubetkin, Chapter 7 Bankruptcy Trustee for appellant Salvatore Carfaro in A-2889-13 (Barry J. Roy, on the brief).

Daniel Louis Grossman argued the cause for respondent Ellen M. Carfaro in A-2889-13.

Gregory Marchesini argued the cause for respondent Blue Haven Pools Northeast, Inc. (Sandler & Marchesini, P.C., attorneys; Mr. Marchesini, on the brief).

Respondent Century Gunite, L.L.C., has not filed a brief.

PER CURIAM

These appeals, which we consolidate for purposes of this opinion, arise out of a contract for the construction of an in-

ground pool at a New Jersey residence. In particular, we must decide whether the trial court erred in dismissing this lawsuit by New Jersey homeowners against the pool supplier because of forum selection provisions in the supplier's form contract designating Pennsylvania as the forum state for the parties' dispute. We find no such error, and affirm.

I.

Plaintiffs Ellen M. Carfaro and her husband, Salvatore F. Carfaro<sup>1</sup> (collectively, "the Carfaros"), signed a form sales contract in April 2006 with defendant Blue Haven Pools Northeast, Inc. ("Blue Haven"). Blue Haven has corporate headquarters in Pennsylvania but also has two offices in New Jersey listed on the contract. Pursuant to the contract, Blue Haven agreed to install an in-ground pool at the Carfaros' home in Long Valley. Installation of the pool was completed in late 2006, at which point the Carfaros paid Blue Haven the balance of the \$55,935 contract price.

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<sup>1</sup> Mr. Carfaro individually filed a Chapter 7 bankruptcy petition after the present dispute arose. Counsel for his bankruptcy trustee appeared in the trial court and joined with Mrs. Carfaro's lawyer in opposing Blue Haven's motion to dismiss. The trustee has separately pursued one of the present two appeals. The arguments raised in the separate appellate briefs on behalf of Mrs. Carfaro and Mr. Carfaro's trustee are essentially the same.

Large structural cracks and other problems with the pool became apparent in early 2007. After various attempts to resolve the ensuing dispute between the Carfaros and Blue Haven were unsuccessful, the Carfaros filed suit in the Law Division in Morris County in 2010 against Blue Haven. The Carfaros also named as defendants a subcontractor that worked on the project, Century Gunitite, L.L.C. ("Gunitite"), and Gunitite's owner, James Farmer.<sup>2</sup>

The Carfaros' complaint alleges: (1) violation of the Consumer Fraud Act ("the CFA"), N.J.S.A. 56:8-1 to -195,<sup>3</sup> (2) violation of the Truth-in-Consumer Contract, Warranty and Notice Act ("the TCCWNA"), N.J.S.A. 56:12-14 to -18; (3) breach of contract and breach of warranty; (4) breach of the implied covenants of good faith and fair dealing; (5) fraud; (6) breach of the implied warranty of merchantability; (7) breach of the implied warranty of fitness for a particular purpose; (8) negligence; (9) promissory estoppel; (10) unjust enrichment; and (11) violation of the Home Repair Financing Act, N.J.S.A. 17:16C-62 to -94. The Carfaros seek compensatory damages,

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<sup>2</sup> These additional defendants have not participated in the appeals.

<sup>3</sup> The complaint incorrectly cites to N.J.S.A. 56:12-14 as the CFA.

treble damages, punitive damages, prejudgment interest, and attorneys' fees and costs.

The sales contract signed by the Carfaros is on a two-sided printed form supplied by Blue Haven.<sup>4</sup> On the front side of the contract, slightly above the parties' signatures, there are several recitals, including the following words in blue font:

THE UNDERSIGNED JOINTLY AND SEVERALLY AGREE THAT THE TERMS AND CONDITIONS OF THE REVERSE SIDE ARE PART OF THE AGREEMENT AND THAT THIS WRITING CONTAINS THE ENTIRE AGREEMENT BETWEEN THE BUYER(S) AND [BLUE HAVEN], AND FURTHER ACKNOWLEDGE THAT EACH OF THEM HAS READ AND UNDERSTOOD THIS ENTIRE CONTRACT, AND HAS RECEIVED A COPY THEREOF.

A few lines down in that same blue-fonted section the following admonition appears:

DO NOT SIGN THIS CONTRACT UNTIL YOU HAVE READ IN FULL AND UNDERSTAND THE ADDITIONAL TERMS AND CONDITIONS TO THIS CONTRACT CONTAINED ON THE BACK OF THIS DOCUMENT.  
INIT \_\_\_\_\_<sup>5</sup>

The reverse side of the contract contains several boilerplate terms that potentially bear upon the present appeal.

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<sup>4</sup> At oral argument on appeal, Blue Haven's attorney represented that the contract has since been revised in order to comport with certain revised requirements of Pennsylvania law, including the elimination of the contract's provision unilaterally giving the company the sole discretion to refer the case to arbitration.

<sup>5</sup> The copy of the contract furnished in the record is not initialed in this spot by either of the Carfaros.

These provisions include: (a) choice of law language specifying that the parties would be bound by Pennsylvania law; (b) a forum selection clause designating Pennsylvania as the forum state; (c) an arbitration provision granting Blue Haven the sole discretion to choose to have the dispute referred to binding arbitration; (d) a mutual jury trial waiver; (e) a fee-shifting provision entitling Blue Haven to recover its own counsel fees against the Carfaros if Blue Haven sues for default or if the Carfaros do not prevail in a suit against Blue Haven; and (f) a provision designed to shorten the period for filing suit to one year.

Specifically, paragraph 15b of the contract, which appears under a fully-capitalized heading for paragraph 15 entitled "MISCELLANEOUS," states:

15b. Any controversy, action, claim, dispute, breach or question of interpretation relating to or arising out of this contract shall be resolved in the Court of Common Pleas of Montgomery County, Pennsylvania. Pennsylvania law applies.

[(Emphasis added).]

Paragraph 15b continues:

[Blue Haven] may, nonetheless, at its discretion, elect to resolve any controversy, action, claim, dispute, breach or question of interpretation relating to or arising out of this contract by arbitration in Montgomery County, Pennsylvania in accordance with the Commercial Arbitration

Rules of the American Arbitration Association. Pennsylvania law applies.

[(Emphasis added).]

Paragraph 15b concludes with this fee-shifting provision:

In any event, where suit is brought by [Blue Haven] because of the Buyer's default, or if [Blue Haven] successfully defends any claim brought by the Buyer against [Blue Haven], the Buyer shall pay [Blue Haven's] attorney's fees and costs.

[(Emphasis added).]

Additionally, paragraph 19 of the contract sets forth the following terms, under the fully-capitalized heading "NOTICES: LIMITATIONS ON LAWSUITS: JURY TRIAL":

Unless otherwise indicated, all notices must be in writing. You must bring any claim against us within one year after the completion of the pool. If you do not, you will have no right to sue us and we will have no liability to you for that claim. It is critical that you bring any claim in a timely manner. The provisions of this Agreement, which apply to any claim, remain in effect even after this Agreement terminates. WE BOTH GIVE UP OUR RIGHT TO A JURY TRIAL.

[(Underlined emphasis added; all-capital letters in original).]

After responsive pleadings were filed, Blue Haven moved to dismiss this action, invoking the sales contract's Pennsylvania forum selection provisions. Relying upon paragraph 15b, Blue Haven asserted that the case must be pursued in Pennsylvania in

the Court of Common Pleas of Montgomery County or, at Blue Haven's sole election, in arbitration before the American Arbitration Association ("AAA") in Montgomery County.

The Carfaros opposed the dismissal motion, asserting that they are entitled to maintain this case in New Jersey, despite the contract's forum selection provisions. In a certification later filed by Mr. Carfaro, he stated that he was "not given the opportunity to negotiate any of the preprinted terms" on the contract. He further certified that it was a "'take it or leave it' form contract." He also certified that the Blue Haven salesperson "assured" him that the "warranty would always be honored." The Carfaros also argued that, as a matter of law, the enforcement of the forum selection clause would be contrary to the public policies underlying New Jersey consumer protection laws.

The trial court initially denied the dismissal motion without prejudice, affording the Carfaros an opportunity to conduct discovery to support their claims of fraudulent inducement to enter into the contract. The Carfaros did not pursue such discovery. Blue Haven then renewed its application, moving both for summary judgment and to dismiss the complaint. Co-defendant Gunite joined in the motion. Again, the Carfaros



opposed the application, reiterating their rights as New Jersey consumers.

The trial court concluded that the contract's forum selection provisions were enforceable under established New Jersey case law, particularly Caspi v. Microsoft Network, L.L.C., 323 N.J. Super. 118, 122 (App. Div.), certif. denied, 162 N.J. 199 (1999) (holding that forum selection clauses are presumptively valid in New Jersey, unless one of three exceptions are proven). The motion judge determined that the Carfaros had not demonstrated that their case fell into one of the recognized exceptions under Caspi that would preclude the enforcement of the forum selection provisions. The judge rejected the Carfaros' argument that the Blue Haven contract was one of adhesion, because there were no indications of "fraud, unequal bargaining power, or that upholding the [forum selection] clause[s] would be significantly against New Jersey public policy." In addition, the judge found that the terms of the contract were "clear and unambiguous."

In his oral decision, the motion judge did recognize that it was likely that the Carfaros did not understand the "repercussions" of the forum selection provisions contained in Blue Haven's form contract. Nevertheless, the judge noted that a contracting party's possession of "superior knowledge" as to

what litigation forum would be more favorable to its interests did not, in and of itself, establish fraud or an exception to the presumption of a forum selection provision's enforceability. While recognizing that the "potential for overreaching within the contract itself" may exist here, the judge observed that such potential alone was insufficient to establish fraud or another valid basis to set aside the contract's forum selection provisions.

The judge was unpersuaded that what plaintiffs asserted to be superior protections provided to consumers under New Jersey law, as opposed to Pennsylvania law, require this case to be litigated in New Jersey. The judge did not address which state's laws would apply if the Carfaros re-filed their claims in Pennsylvania, by implication leaving that open question to a Pennsylvania judge or arbitrator to sort out.

The present appeals by the Carfaros ensued.

## II.

As a threshold matter, counsel for the parties have stipulated before us that the law of New Jersey — as the state in which suit was filed — governs the question of whether the Blue Haven contract's forum selection provisions are

enforceable.<sup>6</sup> See Restatement (Second) Conflict of Laws §187; see also N. Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 568 (1999).

We review de novo the trial court's ruling on the legal enforceability of the forum selection provisions. Hoffman v. Supplements Toqo Management, L.L.C., 419 N.J. Super. 596, 605 (App. Div. 2011) (applying de novo review to the enforceability of a forum selection clause); see also Salovaara v. Jackson Nat'l Life Ins. Co., 246 F.3d 289, 295 (3d Cir. 2001) (holding that the "interpretation and enforcement of a forum selection clause is a matter of law, and we exercise plenary review over it").

In general, forum selection clauses are prima facie valid and enforceable in New Jersey. Caspi, supra, 323 N.J. Super. at 122. There are three exceptions to this general rule, under which a court may decline to enforce a forum selection clause: "(1) the clause is a result of fraud or 'overweening' bargaining power; (2) enforcement would violate the strong public policy of New Jersey; or (3) enforcement would seriously inconvenience trial." Ibid. The party seeking to invalidate the forum

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<sup>6</sup> In fact, none of the briefs cite Pennsylvania case law concerning the enforceability of forum selection clauses in that state.

selection clause bears the burden of showing that one of these exceptions is satisfied. Ibid.

The United States Supreme Court has held that a forum selection clause contained in a contract between a consumer and a commercial vendor may be permissible, even if such a clause was not the product of a negotiation between the consumer and the vendor. Carnival Cruise Lines v. Shute, 499 U.S. 585, 593, 111 S. Ct. 1522, 1527, 113 L. Ed. 2d 622, 632 (1991). Under Carnival Cruise, the Court rejected the notion that a non-negotiated forum selection clause in a form ticket contract is unenforceable simply because it is not the subject of bargaining. Ibid.

To find a forum selection clause unenforceable on the basis of unequal bargaining power, a court must find that the parties differed in more ways than simply size, which is often the case with an individual consumer and a large company. Caspi, supra, 323 N.J. Super. at 123 (citing Carnival, supra, 499 U.S. at 593, 111 S. Ct. at 1527, 113 L. Ed. 2d at 632). "A court's focus must be whether such an imbalance in size resulted in an inequality of bargaining power that was unfairly exploited by the more powerful party." Ibid.

The most recent published New Jersey case concerning the enforceability of a forum selection clause to which the Carfaros

cite is this court's 2011 decision in Hoffman, supra, 419 N.J. Super. at 596. In Hoffman, the court found unenforceable a forum selection clause that was located on the defendant product seller's website. Id. at 600-01, 612. The court applied a "reasonable notice" standard to assess whether the forum selection clause was enforceable. Id. at 611. There, the forum selection clause was found to be "presumptively unenforceable," because it was not visible on a purchasing user's computer screen unless he scrolled down to a "submerged" portion of the website. Id. at 612. Because of its positioning, the forum selection clause was "unreasonably masked from the view of the prospective purchasers because of its circuitous mode of presentation." Id. at 611.

Earlier in Caspi, supra, 323 N.J. Super. at 122, we applied a similar analysis, finding that the clause there was clear and had been presented in a "fair and forthright fashion." Id. at 124. The clause in Caspi read: "This agreement is governed by the laws of the State of Washington, [U.S.A.], and you consent to the exclusive jurisdiction and venue of courts in King County, Washington in all disputes arising out of or relating to your use of MSN or your MSN membership." Id. at 121. It was contained within a website's "scrollable window," through which an individual was able to scroll before clicking on an "I Agree"

or "I Don't Agree" button to accept or decline the agreement.  
Id. at 122.

In Caspi, we concluded:

We discern nothing about the style or mode of presentation, or the placement of the provision, that can be taken as a basis for concluding that the forum selection clause was proffered unfairly or with a design to conceal or de-emphasize its provisions. To conclude that [the] plaintiffs are not bound by that clause would be equivalent to holding that they were bound by no other clause either, since all provisions were identically presented.

[Id. at 125-26.]

Here, the contract provisions designate "the Court of Common Pleas of Montgomery County, Pennsylvania" as the specific court in which any disputes must be resolved, unless Blue Haven chooses instead to have the case arbitrated in Montgomery County. The provisions here are unlike the contract terms in Hoffman, supra, in that they are immediately viewable, on the reverse side of the sales contract. Printed in hard copy, the clauses here were not hidden or otherwise difficult to access on the sales contract, whereas the website-based clause in Hoffman appeared only upon scrolling down to the bottom of a submerged portion of the screen.

We consequently affirm the motion judge's determination that the Carfaros have not proven fraud or misleading conduct

that induced them to agree to the contract's forum selection provisions. Plaintiffs were fairly afforded a chance to obtain discovery to attempt to prove such deception, and they bypassed that opportunity. The motion judge also reasonably concluded that Blue Haven had not imposed the forum selection provisions through, as he phrased it, "unequal bargaining power." See Caspi, supra, 323 N.J. Super. at 122 (referring to "overweening" bargaining power).

We further agree with Blue Haven that the contract's forum selection provisions should not be negated on the basis of serious inconvenience. Caspi, supra, 323 N.J. Super. at 122. The Court of Common Pleas in Montgomery County is approximately sixty-four miles from the Carfaros' residence in Long Valley, or a drive of two hours or less. If Blue Haven were to elect arbitration, the arbitrator in Montgomery County would presumably be within a comparable distance. Although these Pennsylvania locations are less convenient to the Carfaros, they would not "seriously" burden their ability to litigate or advocate their claims. Cases venued in, say, Cape May or Salem County within New Jersey would be even more distant for a Morris County resident. The present circumstances are far different than those in Hoffman, in which the defendant's forum selection clause would have required the New Jersey consumer to litigate

in Nevada or Arizona. Hoffman, supra, 419 N.J. Super. at 601 n.6.

On appeal, the Carfaros focus on the third and final possible exception — the alleged "strong" public policy interests of the forum state — in an effort to restore their ability to litigate this matter in a New Jersey court. They contend that New Jersey's laws are more protective of consumers than the laws of Pennsylvania in several ways.

For example, the Carfaros point out that the CFA provides that plaintiffs who prevail in showing violations of that New Jersey statute and resultant ascertainable losses must be awarded treble damages, plus reasonable counsel fees and costs. See N.J.S.A. 56:8-19. By contrast, the Pennsylvania consumer fraud statute, the Unfair Trade Practices and Consumer Protection Law (the "UTPCPL"), makes the awarding of treble damages and counsel fees to a successful plaintiff only discretionary. 73 Pa. Cons. Stat. § 201-1 to -9.3. The CFA also has been construed to grant a consumer a right to a jury trial, Zorba Contractors, Inc. v. Housing Auth. of Newark, 362 N.J. Super. 124, 139 (App. Div. 2003), whereas there is no such jury trial right recognized in Pennsylvania under the UTPCPL, Fazio v. Guardian Life Ins. Co. of Am., 62 A.3d 396, 402 (Pa. Super. Ct. 2012). The statute of limitations to file suit under



the CFA is six years, N.J.S.A. 2A:14-1, while the "catch-all" statute of limitations under the UTPCPL is sometimes six years, 42 Pa. Cons. Stat. 5527(6)(b), but may be a shorter period depending upon the nature of the allegations. See, e.g., 42 Pa. Cons. Stat. 5524(7) (providing only a two-year limitation period where the claims are grounded in fraud or deceit).

The Carfaros also invoke the TCCWNA, which protects New Jersey consumers who enter into contracts for, among things, property or services "obtained for personal, family or household purposes." N.J.S.A. 56:12-1. The TCCWNA, like the CFA, grants successful consumers a right to recover their reasonable counsel fees and costs. N.J.S.A. 56:12-17.

The Carfaros also argue that the Blue Haven contract's arbitration provision is unenforceable under New Jersey law and against the public policies of this state. In that vein, they rely on the New Jersey Supreme Court's recent opinion in Atalese v. U.S. Legal Services Grp., L.P., 219 N.J. 430, 436 (2014).<sup>7</sup> In Atalese, the plaintiff consumer had contracted with the defendant debt-adjustment services provider and subsequently sought relief under the CFA and the TCCWNA when a dispute arose. Id. at 436. The Supreme Court found that the absence of

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<sup>7</sup> We are aware that a petition for certiorari in Atalese is pending before the United States Supreme Court.

language in the arbitration provision advising the consumer that she was waiving her right to litigate in court rendered the provision unenforceable. Ibid.

Unanimously holding the arbitration clause in Atalese unenforceable, the Court underscored the importance that such clauses provide reasonable notice, "clearly and unambiguously," that the consumer is waiving her right to sue in court and that arbitration would be her exclusive remedy. Id. at 448. In addition, the Court emphasized that arbitration clauses, like all contractual clauses, must be the product of mutual assent, which necessarily requires that the parties understand the terms to which they have agreed. Id. at 442-43. As the Court articulated, such requirements shall apply to all contractual provisions, not only arbitration clauses:

The requirement that a contractual provision be sufficiently clear to place a consumer on notice that he or she is waiving a constitutional or statutory right is not specific to arbitration provisions. Rather, under New Jersey law, any contractual "waiver-of-rights provision must reflect that [the party] has agreed clearly and unambiguously" to its terms.

. . . .

Arbitration clauses are not singled out for more burdensome treatment than other waiver-of-rights clauses under state law. Our jurisprudence has stressed that when a contract contains a waiver of rights — whether in an arbitration or other clause

— the waiver "must be clearly and unmistakably established." Thus, a "clause depriving a citizen of access to the courts should clearly state its purpose." We have repeatedly stated that "[t]he point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue."

[Id. at 443-44 (internal citations omitted) (emphasis added) (alterations in original).]

In Dispenziere v. Kushner Corporation, 438 N.J. Super. 11, 13-14 (App. Div. 2014), we recently applied Atalese and concluded that an arbitration provision in a real estate transition agreement was unenforceable because it failed to provide sufficient notice that the consumer purchaser was giving up the right to litigate in court. The Carfaros assert, without citation to Pennsylvania case law, that Pennsylvania law is not as stringent as New Jersey's approach in Atalese with respect to the enforceability of arbitration provisions.

In response to these policy-laden contentions, Blue Haven counters that Pennsylvania law is not necessarily less stringent or protective of consumers than New Jersey law. For example, it represented at oral argument on appeal that certain Pennsylvania consumer regulations are more demanding of sellers than the New Jersey counterparts.

We need not resolve these open issues of comparative law and choice of law here. Even assuming, for the sake of

discussion, that New Jersey consumer laws and our state's arbitration enforceability standards are more stringent than those that apply under Pennsylvania law, that presumed difference does not require the forum selection provisions in Blue Haven's contract to be negated. We considered similar contentions in Caspi, supra, and rejected them. As we observed:


As a general matter, none of the inherent characteristics of forum selection clauses implicate consumer fraud concepts in any special way. If a forum selection clause is clear in its purport and has been presented to the party to be bound in a fair and forthright fashion, no consumer fraud policies or principles have been violated.

[Id. at 124.]

As the motion judge correctly recognized, all that needs to be resolved at this stage is whether the Pennsylvania forum selection provisions in paragraph 15b of the contract may be enforced. Because none of the three exceptions recognized in Caspi have been proven here, the judge did not err in dismissing this case and leaving the many issues of choice of law to a Pennsylvania tribunal. We have no reason to presume that a tribunal in our sister state will choose to apply the wrong law, or will be incapable of applying New Jersey law if our law is deemed to govern all or some of the issues in this dispute.

We therefore affirm the dismissal of this case, without prejudice to plaintiffs' ability to re-file their complaint in Pennsylvania, subject to whatever defenses that may pertain.<sup>8</sup>

I hereby certify that the foregoing is a true copy of the original on file in my office.

  
CLERK OF THE APPELLATE DIVISION

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<sup>8</sup> We do note that Blue Haven, through its counsel, has conceded that the statute of limitations would be tolled for the period while this appeal was pending. We offer no views on whether further tolling would be justified for the time spent in the trial court litigation.

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**SABATINO, P.J.A.D., concurring.**

I concur in affirming the dismissal of this New Jersey lawsuit with some reluctance because of the uncertainty of what law a Pennsylvania court would apply if the Carfaros re-file their complaint in that state.

Applying the three-factor test of Caspi v. Microsoft Network, L.L.C., ante, 323 N.J. Super. at 122, I agree that there is no proof that the Carfaros were fraudulently induced to agree to the forum selection clause printed on the reverse side of Blue Haven's form contract. I also recognize that the distance between the Carfaros' Morris County home and Montgomery County, Pennsylvania is not unmanageable. The third Caspi factor, requiring an assessment of the relative policy interests of the two states, presents for me a closer question.

As the main opinion of this court spotlights, ante at 16-17, there are several aspects of New Jersey consumer protection laws that seem to be more protective of the Carfaros' interests than Pennsylvania law. Those material differences include mandatory awards of treble damages and counsel fees to New Jersey consumers who prove CFA violations, a right to a jury

trial, clear disclosure of arbitration provisions,<sup>1</sup> a six-year statute of limitations, and other characteristics beneficial to consumers. Unlike in Caspi, there is a plausible "reason to apprehend that the nature and scope of consumer fraud protections afforded by the [designated state] are materially different or less broad in scope than those available in this State." Id. at 124.

Speaking only for myself, I am persuaded that the two sentences in paragraph 15b of the contract generically declaring that "Pennsylvania law will apply" do not suffice to strip these New Jersey homeowners of the enhanced consumer protections they are entitled to receive under New Jersey law. In fact, N.J.S.A. 56:12-11 mandates that "[n]o consumer contract shall contain a waiver of any rights under [the TCCWNA][,]" and N.J.S.A. 56:12-16 further instructs that any such waiver provision set forth in a New Jersey consumer contract "shall be null and void."

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<sup>1</sup> This court previously has expressed "serious concerns regarding the enforceability of [Blue Haven's] arbitration clause in the face of [another New Jersey customer's] statutory consumer fraud claim." Hallowell v. Blue Haven Pools Nat'l, Inc., No. A-3266-04 (App. Div. Oct. 18, 2005), slip op. at 4. Notwithstanding that, we affirmed the dismissal of Hallowell's New Jersey lawsuit, deferring to the courts of Pennsylvania "for the ultimate resolution of the arbitration provision's enforceability, assuming it remains an issue." Id. at 6. I recognize that, as an unpublished decision, Hallowell is not precedential, see Rule 1:36-3, and mention it only because it involved the same defendant and same contract terms, and was cited to us here in the parties' briefs.

None of this would be troubling if we could be sure that a Pennsylvania court will apply these distinctive facets of New Jersey law to this case. The reality is, however, that there is no guarantee that a Pennsylvania tribunal will apply our law, despite the fact that the plaintiffs reside in New Jersey, the pool was installed on their New Jersey real estate, and the contract was apparently executed in this state. See Restatement (Second), ante, § 145 (adopting a "most significant relationship" test for tort matters); see also § 188 (similarly adopting a "most significant relationship" test for contract matters).

Despite being cognizant of this risk, I am willing to accede to the dismissal of this New Jersey case and to honor the contract's stock forum selection provisions. It would be presumptuous to assume that a Pennsylvania court would arbitrarily apply the law of its own state and ignore without justification the more stringent laws of plaintiffs' home state of New Jersey.

But if the Carfaros do indeed file suit against Blue Haven again in Pennsylvania, I would most respectfully urge the Pennsylvania tribunal to apply New Jersey law. In my view, these New Jersey homeowners with a cracked and apparently



unusable pool defendant installed on their property deserve the full benefit of our state's consumer laws.

I hereby certify that the foregoing is a true copy of the original on file in my office.



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