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Accrued Financial Services, Inc. v. Prime Retail, Inc.: Resurrecting Barratry Imposes Detour on Road to Modernization of Maryland Contracts Jurisprudence

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Note

ACCRUED FINANCIAL SERVICES, INC. v. PRIME RETAIL, INC.: RESURRECTING BARRATRY IMPOSES DETOUR ON ROAD TO MODERNIZATION OF MARYLAND CONTRACTS JURISPRUDENCE

In *Accrued Financial Services, Inc. v. Prime Retail, Inc.*,[1] the United States Court of Appeals for the Fourth Circuit considered whether litigation financing contracts and related assignments between Accrued Financial Services, Inc. (AFS) and its clients, a number of shopping center tenants, were void as against public policy.[2] The court held that the assignments, which gave AFS exclusive control over all potential legal claims the tenants might have against their landlord, were unenforceable because they violated Maryland's strong public policy against barratry.[3] The court also rejected AFS's argument that the parties' contractual choice-of-law provision must be honored, reasoning that the provision should not be honored because it violated a fundamental public policy of the forum state.[4] Finally, the court deemed the assignments violative of Maryland public policy because they called for AFS to provide expert testimony for a contingent fee.[5]

In its holding, the Fourth Circuit asserted a public policy against barratry that is unsupported by prior case law or statutory authority. The court also demonstrated an inadvisable paternalism by using an antiquated and seldom-applied doctrine to invalidate an arm's length contractual agreement crafted by sophisticated business entities with equal bargaining power.[6] The decision ignored a body of well-reasoned authority declaring barratry inapplicable to certain modern

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1. 298 F.3d 291 (4th Cir. 2002).

2. *Id.* at 295-96.

3. *Id.* at 298; *see infra* notes 43-71 and accompanying text (providing a discussion of the evolution of the doctrines of barratry, champerty, and maintenance).

4. *Accrued Fin. Servs.*, 298 F.3d at 297, 300. In reaching its conclusion, the court relied on section 187(b)(2) of the *Restatement (Second) of Conflict of Laws*. *Id.* at 297.

5. *Id.* at 300.

6. *Id.* at 291-93. The list of tenants named in the suit included a number of national retailers. *Id.* As the dissent noted, "[t]here [was] every reason to believe that [these] tenants . . . were able to bargain with AFS on equal footing." *Id.* at 306 (Michael, J., dissenting).

contracts.[7] Furthermore, the Fourth Circuit's paternalistic approach is troubling because it disregards the benefits accorded to AFS's tenants by the assignments—namely, protection against their landlord's fraudulent billing practices.[8]

Instead of applying the outmoded doctrine of barratry, the Fourth Circuit should have utilized a balancing-of-the-equities standard for analyzing modern contractual arrangements formerly considered champertous.[9] Such an approach would serve the dual purposes of protecting the parties' freedom of contract, while preserving the court's power to invalidate exploitive or onerous agreements.

I. THE CASE

AFS is a California-based corporation that provides auditing services to clients in the commercial real estate industry.[10] A number of shopping center tenants hire AFS to conduct audits of the common area maintenance charges that landlords add to tenants' rent bills.[11] In exchange for conducting such audits, AFS requires that tenants pay it a percentage of any overcharges recovered on the tenants' behalf, and that tenants assign to AFS any legal claims they might have against their landlord.[12] The agreements also give AFS control over any litiga-

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7. *See infra* notes 72-89 and accompanying text (discussing cases in which courts have narrowed the scope of barratry, champerty, and maintenance to exclude certain contracts).

8. *See Accrued Fin. Servs.*, 298 F.3d at 301 (Michael, J., dissenting). In his dissent, Judge Michael noted that it was not economically feasible for most of the tenants to conduct their own audits. *Id.* Therefore, by grouping with other tenants to hire AFS, these tenants gained protection against the "systematic and pervasive" overbilling exacted by respondent-landlord, Prime. *See Accrued Fin. Servs.*, 298 F.3d at 295. Judge Michael emphasized this point, noting:

> In most cases, each tenant's claim for an audit period (usually one year) is relatively small in dollar amount . . . . But AFS, by securing audit engagements from several tenants in the same mall and then conducting a single audit for those tenants, makes the contractual right to conduct audits meaningful for the individual tenant.

Id. at 301 (Michael, J., dissenting).

9. *See infra* notes 210-211 and accompanying text (describing the advantages of the balancing-of-the-equities test).

10. *Accrued Fin. Servs.*, 298 F.3d at 294.

11. *Id.* at 300 (Michael, J., dissenting).

12. *Accrued Fin. Servs.*, 298 F.3d at 294. AFS regularly enters into a "Letter of Agreement Regarding Leased Locations" with clients. *Id.* This agreement authorizes AFS to act as the "sole and exclusive representative" of the tenant for purposes of evaluating lease details and "to contact, negotiate, and settle with Clients' landlords any overcharge[s] discovered by AFS." *Id.* (internal quotation marks omitted).

The assignment of tenants' legal claims is done through an "Assignment of Cause of Action," by which the tenant assigns to AFS "any and all causes of action [the tenant] may have against its landlord arising solely from periodic (including annual) charges of any

tion occurring as a result of its efforts to enforce the claims and entitle AFS to receive a forty to fifty percent commission on the net recovery.[13] Specifically, the Letter of Agreement empowers AFS to pursue any overcharges using "its normal collection practices, including authority to file all lawsuits under AFS's name as plaintiff and full discretion [after consultation with the tenant] to accept or reject any settlement or other disposition."[14] In addition, if the tenant declines to pursue the discrepancy, the tenant must pay forty percent of the discrepancy as a cancellation fee for services rendered.[15]

In 1997, AFS conducted client lease audits at two factory outlet malls, one in Michigan and one in Baltimore, Maryland.[16] During the audits, AFS discovered that the respondent-landlord, Prime Retail, Inc. (Prime), had made improper charges and assessments that could not be dismissed as errors or aggressive billing practices.[17] Furthermore, AFS explained that the errors were "systematic and pervasive."[18]

In May 1998, AFS initiated the case's circuitous path to the Fourth Circuit by obtaining assignments from a number of tenants, and, on their behalf, sending Prime a demand letter detailing the claims against it.[19] Prime responded by seeking a declaratory judgment in Maryland state court, asserting that AFS lacked standing to pursue the claims.[20] At the same time, AFS filed suit in the District Court for the Central District of California against Prime, alleging, *inter alia*, RICO violations.[21] The California court transferred the case to the District of Maryland, where AFS voluntarily dismissed the suit without prejudice.[22]

Next, AFS filed an action in Maryland state court, alleging nine counts on behalf of several of its tenants and two counts in its own

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type whatsoever made by or on behalf of the Landlord." *Id.* at 295 (internal quotation marks omitted). The assignment authorizes AFS to "adjust, compromise, or settle the assigned cause of action at its reasonable discretion." *Id.* (internal quotation marks omitted).

13. *Id.* at 295. The net recovery is defined as "the total recovery less attorneys fees and litigation costs." *Id.*

14. *Id.* at 294 (internal quotation marks omitted).

15. *Id.* at 295.

16. *Id.* The Michigan mall, at the time of the audit, was owned by Horizon Group, Inc., and the Baltimore mall was owned by Prime Retail, Inc. *Id.* Subsequent to the audits, Prime Retail acquired Horizon, and now the entities together are known as Prime Retail, Inc. *Id.* at 295 n.1.

17. *Id.* at 295.

18. *Id.* (internal quotation marks omitted).

19. *Id.* AFS sued on behalf of seventeen tenants located in Prime Retail malls. *Id.*

20. *Id.* Prime filed this action in the Circuit Court for Queen Anne's County. *Id.*

21. *Id.* AFS also alleged violations of the California Business and Professions Code, fraud, and breach of express and implied lease covenants. *Id.*

22. *Id.*

name.[23] Prime removed this second action to federal district court and subsequently filed a motion to dismiss.[24] The district court granted Prime's motion to dismiss on the ground that the tenants' assignments of claims to AFS were "void as a matter of public policy because they [were] champertous."[25] The district court found that the agreements violated both California and Maryland's prohibition against contingent fees for expert witnesses, particularly because the agreements called for AFS employees to act as audit witnesses in the event of a trial.[26]

The district court initially noted that, under section 187 of the *Restatement (Second) of Conflict of Laws*, as adopted in both Maryland and California,[27] the parties' choice of California law had to be honored unless enforcement of the contract would violate a "fundamental policy of a jurisdiction which has a materially greater interest than California in determining the validity of the assignment . . . ."[28] Thus, the court framed the issue as whether witness contingency fee agreements violate public policy of the United States or Maryland.[29] The court answered in the affirmative, stating that the contracts' financial incentives for the "falsification or exaggeration of testimony threaten[ed] the very integrity of the judicial process."[30] Consequently, the district court dismissed the claims asserted by AFS on behalf of its clients, reasoning that the assignments were void as against

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23. *Id.* AFS filed this suit in the Circuit Court for Baltimore City. *Id.* The suit included nine claims on behalf of AFS and seventeen of its tenants and two claims of tortious interference with contractual relations and prospective advantage solely in AFS's name. *Id.*

24. Accrued Fin. Servs., Inc. v. Prime Retail, Inc., No. CIV.JFM-99-2573, 2000 WL 976800, at *1 (D. Md. June 19, 2000). In support of its motion to dismiss, Prime again asserted that AFS lacked standing because it was not the real party in interest. *Id.*

25. *Id.*

26. *Id.* at *2, *3 n.3.

27. *See* Nat'l Glass, Inc. v. J.C. Penney Props., Inc., 336 Md. 606, 610, 650 A.2d 246, 248 (1994) (noting the adoption of the *Restatement (Second) of Conflict of Laws* section 187 in Maryland); Nedlloyd Lines B.V. v. Superior Court, 834 P.2d 1148, 1151 (Cal. 1992) (adopting section 187 in California).

28. *Accrued Fin. Servs.*, 2000 WL 976800, at *2. The choice-of-law provision specified that the contract between AFS and its clients was to be "governed by and construed in accordance with the laws of California." *Accrued Fin. Servs.*, 298 F.3d at 295 (internal quotation marks omitted).

29. *Accrued Fin. Servs.*, 2000 WL 976800, at *2.

30. *Id.* at *3. The district court acknowledged the important role of auditing services, as provided by AFS, in deterring fraudulent billing practices by mall landlords. *Id.* at *3 n.3. However, the court declared that those services could be provided without contingent fee arrangements. *Id.* Moreover, the district court added that procedural devices, such as class action suits and rules allowing joinder of claims, are available to protect tenants. *Id.*

public policy and that therefore AFS lacked standing to bring claims on the tenants' behalf.[31]

AFS then filed a timely appeal with the Court of Appeals for the Fourth Circuit,[32] and also filed an identical suit in state court to prevent the statute of limitations from barring its state law claims.[33] Prime again removed the case to federal court, where the district court, citing *res judicata*, again dismissed the nine counts brought by AFS on behalf of its tenants.[34] As to the state law claims, which AFS brought in its own name, the district court stayed disposition pending appeal, and ultimately certified final judgment under Federal Rule of Civil Procedure 54(b).[35] AFS again appealed to the Fourth Circuit, presenting the court with two appeals raising an identical issue—whether the contractual arrangements between AFS and its tenants were void as against the public policy of Maryland.[36]

II. LEGAL BACKGROUND

In Maryland and other jurisdictions, contemporary recognition of the related doctrines of barratry, champerty, and maintenance are remnants of the early English common law prohibition against certain types of contractual arrangements.[37] Early manifestations of these doctrines criminalized the "officious stirring up of" or "intermeddling" in a lawsuit by one who was not the real party in interest.[38] Over time, however, states modernized their view of these doctrines in four ways. First, a number of states narrowed their scope via statute.[39] Second, other states abolished these doctrines in recognition of the modern view of the value of contractual arrangements considered champertous at common law.[40] Third, some states never adopted

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31. *Id.* at *3. The district court also declined to exercise supplemental jurisdiction over AFS's state law claims.

32. *Accrued Fin. Servs.*, 298 F.3d at 296.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *See* Son v. Margolius, Mallios, Davis, Rider & Tomar, 349 Md. 441, 456-58, 709 A.2d 112, 119-20 (1998) (discussing the common law origins of champerty, maintenance, and barratry).

38. *Id.* at 457, 709 A.2d at 120.

39. *See, e.g.*, MD. CODE ANN., BUS. OCC. & PROF. § 10-604(a)(1) (2000) (prohibiting individuals from "solicit[ing] another person to sue or to retain a lawyer to represent the other person in a lawsuit").

40. *See, e.g.*, Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 277 (S.C. 2000) (abolishing in South Carolina champerty as a defense to contract enforcement); *see also* Saladini v. Righellis, 687 N.E.2d 1224, 1225-27 (Mass. 1997) (abolishing in Massachusetts the doctrine of champerty, citing its "checkered history" in Massachusetts and elsewhere).

these doctrines in the first place.[41] Finally, other states considered contracts evidencing barratry, champerty, or maintenance to be void as against public policy.[42]

A. *The Origin and Evolution of Champerty, Barratry, and Maintenance*

1. Doctrinal Roots.—In Maryland and other states where barratry is prohibited by statute, these statutes retain remnants of the ancient condemnation of financing or interfering in a third party's litigation.[43] Dating back as far as the ancient Greek and Roman legal systems, champerty and barratry were considered part of a family of offenses known as "maintenance," which generally prohibited helping another person pursue a legal claim.[44] Champerty involved an arrangement by which an individual agreed to finance another person's litigation in exchange for a portion of the ultimate proceeds.[45] Barratry, a related offense, was defined as "the offense of frequently exciting and stirring up quarrels and suits between other individuals."[46]

In their early common law forms, champerty and barratry were aimed at deterring "speculation in lawsuits, the bringing of frivolous lawsuits, [and] financial overreaching by a party of superior bargaining position."[47] By the nineteenth century, however, these objectives were relaxed by a growing judicial acceptance of the legitimacy of assigning causes of action and third-party financing of litigation.[48] Ac-

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41. *See, e.g.*, Bigelow v. Old Dominion Copper Mining & Smelting Co., 71 A. 153, 167 (N.J. Ch. 1908) (declaring that New Jersey has "not adopted the English statutes of champerty and maintenance").

42. Connecticut, for example, uses a public policy test to evaluate potentially champertous arrangements. *See* Rice v. Farrell, 28 A.2d 7, 8 (Conn. 1942) (declaring that "the common law doctrines of champerty and maintenance as applied to civil actions have never been adopted in this state, and the only test is whether a particular transaction is against public policy").

43. *See* MD. CODE ANN., BUS. OCC. & PROF. § 10-604 (prohibiting, *inter alia*, "solicit[ing] another person to sue"); *see also* N.Y. JUD. LAW § 489 (McKinney 1983) (prohibiting the solicitation or assignment of a "bond, promissory note . . . or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon").

44. *In re* Primus, 436 U.S. 422, 424 n.15 (1978).

45. *Osprey*, 532 S.E.2d at 273.

46. *Id.*

47. Saladini v. Righellis, 687 N.E.2d 1224, 1226 (Mass. 1997).

48. *See Osprey*, 532 S.E.2d at 275 n.3 (citing cases in which courts upheld agreements by third parties to finance another's litigation); *see also id.* at 277-78 (exalting the modern doctrines of unconscionability, duress, and good faith as negating the need for continued reliance on barratry and related doctrines to protect against contracts between parties with unequal bargaining power).

cordingly, courts began to take a more lenient view of contractual arrangements formerly deemed barratrous or champertous.[49]

2. Maryland Courts' Application of Barratry, Champerty, and Maintenance.—The Court of Appeals of Maryland first narrowed the scope of the doctrines of barratry, champerty, and maintenance in *Schaferman v. O'Brien*,[50] by upholding a contract for the assignment of a bankruptcy judgment.[51] In so holding, the *Schaferman* court acknowledged that historical notions of maintenance had become obsolete.[52] The definition of maintenance had been narrowed to mean cases "where a man, improperly and for the purpose of stirring up litigation and strife, encourages others, either to bring actions [or] to make defences, which they have no right to make."[53]

Similarly, the Court of Appeals in *Wheeler v. Harrison & Byrd*[54] upheld a contract in which a group of shareholders assigned their rights to institute and defend suits to an attorney in exchange for a contingent fee.[55] The court rejected the contention that maintenance required invalidating the contingent fee arrangement.[56] The court declared that the arrangement fit neither the definition for maintenance, which consisted of "the unlawful taking in hand or upholding of quarrels or sides to the disturbance or hindrance of common right," nor that of champerty, which occurred when a person "upholds a controversy under a contract to have part of the property or subject in dispute."[57]

Maryland continued to modernize its contracts jurisprudence in *Schackow v. Medical-Legal Consulting Service, Inc.*[58] In *Schackow*, the Court of Special Appeals considered whether a medical consulting firm's recommendation that an injured party pursue a medical malpractice claim amounted to barratry, champerty, or maintenance.[59] In rejecting the argument that the conduct at issue constituted barratry, the court emphasized that "solicitation" was an essential element

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49. *See id.* at 276 (noting two cases in which courts rejected arguments of champerty in light of the modern view of the assignability of rights).

50. 28 Md. 565 (1868).

51. *Id.* at 576-77.

52. *Id.* at 574.

53. *Id.* at 574 (quoting Findon v. Parker, 11 M. & W. 679, 682 (1843)).

54. 94 Md. 147, 50 A. 523 (1901).

55. *Id.* at 158-59, 50 A. at 526-27.

56. *Id.* at 158, 50 A. at 526.

57. *Id.* at 158-59, 50 A. at 526-27 (internal quotation marks omitted).

58. 46 Md. App. 179, 416 A.2d 1303 (1980).

59. *Id.* at 193-97, 416 A.2d at 1311-13.

of Maryland's statutory prohibition against barratry.[60] Accordingly, because the consulting firm did not solicit the injured party to sue, the court held that barratry had not occurred.[61]

The *Schackow* court employed similar reasoning as the *Wheeler* court, declaring that the medical consultant's contingent fee arrangement was similar to that commonly used by lawyers, and therefore did not constitute barratry.[62] The court further articulated that, as in the practice of law, the "realities of modern medical malpractice," including the expenses associated with technical assistance to educate the plaintiff's attorneys and the gathering of evidence and obtaining of expert witnesses, may necessitate compensation of a medical consultant on a contingent fee basis.[63]

Similarly, in *Son v. Margolius*,[64] the Court of Appeals upheld an agreement by which the plaintiff paid the defendant a fee for referring him to an attorney.[65] The plaintiff in the case was of Korean decent and had limited English skills.[66] After being seriously injured in a car accident, the plaintiff entered into a fee-based contract with a consultant to the Korean community who agreed to find the plaintiff a suitable attorney.[67] The plaintiff then refused to pay the consultant's fee.[68] Relying on *Schackow* and Maryland's barratry statute,[69] the court upheld the contract, holding that the plaintiff failed to prove that the consultant engaged in the solicitation or "meddling" necessary to constitute statutory barratry.[70] Specifically, the court stated that because the plaintiff had already determined he needed a lawyer, it could not be maintained that the consultant "solicited" the plaintiff to file a lawsuit.[71]

3. Other Jurisdictions' Views Regarding Barratry, Champerty, and Maintenance.—Echoing the Maryland approach, a number of other ju-

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60. *Id.* at 193-94, 416 A.2d at 1312.

61. *Id.* at 194 n.5, 416 A.2d at 1312 n.5.

62. *See id.* at 195-96, 416 A.2d at 1313 (accepting the medical consulting firm president's description of the work of his organization as "largely an extension of the attorney's work product in the area of medicine" (internal quotation marks omitted)).

63. *Id.* at 196, 416 A.2d at 1313. The court elaborated that "[c]lients who can afford attorneys only on a contingent fee basis cannot be expected to compensate a service . . . at a flat rate." *Id.*

64. 349 Md. 441, 709 A.2d 112 (1998).

65. *Id.* at 445-47, 709 A.2d at 113-15.

66. *Id.* at 447, 709 A.2d at 115.

67. *Id.* at 447-48, 709 A.2d at 115.

68. *Id.* at 443, 790 A.2d at 113.

69. MD. CODE ANN., BUS. OCC. & PROF. § 10-604(a) (2000).

70. *Son*, 349 Md. at 460-61, 709 A.2d at 121.

71. *Id.*

risdictions have accepted certain contractual arrangements considered champertous or barratrous at common law. Beginning more than a century ago, these jurisdictions have supported the right of parties to divide the costs of litigation, assign causes of action, and enter into contingent fee arrangements.

As early as 1889, the Alabama Supreme Court, in *Gilman v. Jones*,[72] relaxed its definition of barratry to accommodate modern business practices.[73] Specifically, the court stated that "an interference in a lawsuit [is] excusable when it is by one who has, or honestly believes he has, a valuable interest in its prosecution."[74] Other states have adopted a similar approach. Connecticut, for example, has softened its view of litigation financing arrangements,[75] and North Carolina has narrowed its application of champerty to only those cases where "the interference is clearly officious and for the purpose of stirring up strife and continuing litigation."[76]

This trend persisted throughout the twentieth century, as courts continued to tailor these doctrines to permit the assignment of causes of action and arrangements for third parties to finance litigation. For example, in *Temeron, Inc. v. Ferraro Energy Corp.*,[77] the Court of Appeals of Oklahoma upheld an auditor's contractual right to bring a suit on behalf of its gas-supplier client.[78] The auditor contracted with the gas supplier to pursue litigation resulting from the discovery of customers' underpayments.[79] In upholding the arrangement, the Oklahoma court reasoned that the auditor could bring the action on behalf of the supplier because it was agreed to by contract and "[i]t is generally accepted that a bona fide purchaser or assignee of a mere right of action is not guilty of champerty . . . ."[80] Similarly, in *Giambattista v.*

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72. 5 So. 785 (Ala. 1889).

73. *Id.* at 787.

74. *Id.* The court also excluded from champerty's scope the financing of lawsuits between relatives, including spouses, and likewise made exceptions for attorney-client arrangements and the financing of litigation for the poor. *Id.*

75. *See* Metro. Life Ins. Co. v. Fuller, 23 A. 193, 196 (Conn. 1891) (allowing in certain circumstances an impoverished person to assign his cause of action, thereby allowing "a more fortunate friend [to] assist him, and wait for his compensation until the suit is determined"); *see also* Richardson v. Rowland, 40 Conn. 565, 573 (Conn. 1873) (rejecting a champerty defense and permitting a plaintiff who helped the defendant resolve a mortgage dispute recover half of the settlement proceeds).

76. *See* Smith v. Hartsell, 63 S.E. 172, 174 (N.C. 1908) (upholding the assignment of a cause of action because it did not violate the modern threshold for champerty) (internal quotation marks omitted).

77. 861 P.2d 319 (Okla. Ct. App. 1993).

78. *Id.* at 326.

79. *Id.* at 321-22.

80. *Id.* at 326.

National Bank of Commerce,[81] the Court of Appeals of Washington upheld an agreement in which a money broker agreed to finance litigation on behalf of investors.[82] The court reasoned that the agreements were not champertous because there was no evidence of intermeddling by the brokers or that the agreements were not negotiated at arm's length.[83]

Several other recent decisions also indicate that assignments of causes of action and agreements to share the proceeds of litigation do not constitute champerty.[84] For example, in *In re Perrysburg Marketplace Co.*,[85] the Bankruptcy Court for the Northern District of Ohio held that champerty was inapplicable to a contract under which a mortgagee purchased a debtor's loan from a trust company.[86] Likewise, in *Schwartz v. Eliades*,[87] the Supreme Court of Nevada upheld an agreement between taxi drivers to share the expenses of litigation and split litigation proceeds.[88] The court reasoned that because the assigning cab company retained an "equitable interest" in the litigation even after assignment, the arrangement did not constitute champerty.[89]

Other jurisdictions, instead of reshaping or narrowly applying the doctrines, have gone so far as to abrogate champerty, barratry, and maintenance altogether. In Massachusetts, for example, in *Saladini v. Righellis*,[90] the Supreme Judicial Court evaluated whether champerty should invalidate an agreement by which one party agreed to advance funds to allow another party to pursue potential legal claims arising out of his interest in real estate.[91] After reviewing decisions from various jurisdictions, the court abolished the doctrine altogether.[92] Spe-

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81. 586 P.2d 1180 (Wash. Ct. App. 1978).

82. *Id.* at 1186.

83. *Id.*

84. *See* Berman v. Linnane, 679 N.E.2d 174, 177 (Mass. 1997) (removing from champerty's scope agreements in which the financing party has an interest in the litigation prior to entering into the purported champertous arrangement); Rienhardt v. Kelly, 917 P.2d 963 (N.M. Ct. App. 1996) (holding that an agreement by a testator's son to finance a beneficiary's litigation in exchange for twenty-five percent of the value of the proceeds was not champertous); Kraft v. Mason, 668 So. 2d 679 (Fla. Dist. Ct. App. 1996) (upholding a sister's agreement to finance her brother's litigation in return for a share of the litigation proceeds).

85. 208 B.R. 148 (Bankr. N.D. Ohio 1997).

86. *Id.* at 161.

87. 939 P.2d 1034 (Nev. 1997).

88. *Id.* at 1037.

89. *Id.*

90. 687 N.E.2d 1224 (Mass. 1997).

91. *Id.* at 1224-25.

92. *Id.* at 1225-26.

cifically, the court held that champerty was no longer needed "to protect against the evils once feared [because of new] devices that more effectively accomplish these ends."[93] In addition, the court articulated that the standard for evaluating future agreements to finance lawsuits should be based on balancing the equities of each case.[94] In conducting this balancing test, the court emphasized that it would still closely scrutinize litigation financing agreements, but in doing so, it would also consider "whether the fees charged [were] excessive or whether any recovery by a prevailing party is vitiated because of some impermissible overreaching by the financier."[95] Furthermore, the court noted that its analysis would be guided "by a rule of what is fair and reasonable," including consideration of the circumstances under which the contract was made.[96]

The Supreme Court of South Carolina followed suit in *Osprey, Inc. v. Cabana Limited Partnership*,[97] upholding an arrangement in which one party purchased an interest in another party's lawsuit.[98] Using reasoning similar to that of the *Saladini* court, the *Osprey* court abolished champerty as a defense to contract enforcement in South Carolina.[99] Specifically, the court stated that modern legal principles were better equipped to address the problems once analyzed under "dated notions of champerty."[100]

B. Determining the Validity of Choice-of-Law Provisions in Maryland.

Maryland, like other states, has adopted section 187 of the *Restatement (Second) of Conflict of Laws* to determine the validity of contractual choice-of-law provisions.[101] In *Bethlehem Steel Corp. v. G.C. Zarnas &*

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93. *Id.* at 1226-27. The evils originally feared at common law, according to the court, were "speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining position." *Id.* at 1226.

94. *Id.* at 1227.

95. *Id.*

96. *Id.*

97. 532 S.E.2d 269 (S.C. 2000).

98. *Id.* at 271.

99. *Id.* at 277.

100. *Id.* (explaining that instead of barratry and related doctrines, "the doctrines of unconscionability, duress, and good faith establish standards of fair dealing between opposing parties").

101. *See* Am. Motorists Ins. Co. v. ARTRA Group, Inc., 338 Md. 560, 572, 659 A.2d 1295, 1301 (1995) (noting Maryland courts' application of section 187 to choice-of-law provisions). Section 187(2) of the *Restatement* states that:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless . . . application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue

Co.,[102] the Court of Appeals of Maryland displaced the parties' choice of Pennsylvania law on the ground that the indemnity clause contained in the contract violated Maryland public policy.[103] To support its decision, the court cited a Maryland statute expressly declaring indemnity clauses to be contrary to public policy, and therefore void and unenforceable.[104] The *Bethlehem Steel* court emphasized that a mere discrepancy between another state's law and that of Maryland would not render the other state's law unenforceable in Maryland courts.[105] Furthermore, the court held that to displace the law chosen by the contracting parties, there must be a strong public policy against enforcing that law in Maryland.[106] For the *Bethlehem Steel* court, the statutory prohibition against indemnity clauses was proof that Maryland's public policy against enforcing such clauses was "sufficiently strong" to displace the parties' chosen law of Pennsylvania.[107]

In *National Glass, Inc. v. J.C. Penney Properties, Inc.*,[108] the Court of Appeals again relied on statutory evidence to invalidate a choice-of-law provision.[109] In *National Glass*, a subcontractor and a property owner included in their agreement a waiver of the subcontractor's right to claim a mechanic's lien.[110] Such a waiver was permissible under Pennsylvania law, the law chosen by the parties.[111] A Maryland statute, however, expressly declared that any such waiver was void.[112] By including in the statute an explicit declaration that such a contract was "void as against the public policy of this State," the court determined that the Maryland General Assembly had unequivocally told the Maryland judiciary that a contractual provision waiving the right

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and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971). Comment g to section 187 further specifies that it is for the forum to "apply its own legal principles in determining whether a given policy is a fundamental one." *Id.* § 187, cmt. g.

102. 304 Md. 183, 498 A.2d 605 (1985).

103. *Id.* at 193, 498 A.2d at 610.

104. *Id.* at 187, 498 A.2d at 607; *see, e.g.*, McCabe v. Medex, 141 Md. App. 558, 556, 786 A.2d 57, 62 (2001) (invalidating an employer's commission payment scheme because it violated Maryland's Wage Payment Collection Law and therefore was unenforceable because "a contract conflicting with public policy set forth in a statute is invalid to the extent of the conflict between the contract and that policy").

105. *Bethlehem Steel*, 304 Md. at 189, 498 A.2d at 608.

106. *Id.*

107. *Id.*

108. 336 Md. 606, 650 A.2d 246 (1994).

109. *Id.* at 612-13, 650 A.2d at 249-50.

110. *Id.* at 609, 650 A.2d at 247.

111. *Id.*, 650 A.2d at 248.

112. *Id.*, 650 A.2d at 247-48.

to claim a mechanic's lien was void as against public policy.[113] The court reasoned that the only way the Maryland law would not apply was if Maryland did not have a materially greater interest in the determination of the issue than did Pennsylvania.[114] The party to be protected by the lien was a Maryland corporation that had furnished services on Maryland property, while Pennsylvania's sole interest was a non-party's incorporation in Pennsylvania.[115] The court, therefore, held that Maryland had a materially greater interest in the issue, and thus Maryland law displaced the parties' choice of Pennsylvania law.[116]

In *Kronovet v. Lipchin*,[117] the Court of Appeals of Maryland, in applying section 187, again relied upon statutory evidence to examine the strength of a state's public policy.[118] The *Kronovet* court evaluated whether the parties' choice of Maryland law should be displaced by New York law as a result of the parties' high degree of contacts with New York, giving it a "materially greater interest" in the determination of the issue.[119] In upholding the choice-of-law provision, the court held that New York did not have a sufficiently strong fundamental policy against the purported usurious contract at issue so as to require the court to displace the choice-of-law provision.[120] Specifically, the court relied upon a New York statute that removed interest rate ceilings from loans of $250,000 or more.[121] In light of the statute, the court reasoned, it could hardly be argued that the interest rate in *Kronovet* violated any New York public policy.[122] The court also noted that it was "generally accepted that the parties to a contract may agree as to the law which will govern their transaction, even as to issues going to the validity of the contract."[123]

III. THE COURT'S REASONING

In *Accrued Financial Services, Inc. v. Prime Retail, Inc.*, the United States Court of Appeals for the Fourth Circuit affirmed the district

113. *Id.* at 614, 650 A.2d at 250 (citing MD. CODE ANN., REAL PROP. § 9-113 (1996)). The court cited with approval its reasoning in *Bethlehem Steel*, in which it struck down a choice-of-law provision that similarly would have violated an express legislative mandate declaring such a contract void and unenforceable. *Id.* at 615, 650 A.2d at 250.

114. *Id.* at 615, 650 A.2d at 250.

115. *Id.*, 650 A.2d at 251.

116. *Id.* at 615-16, 650 A.2d at 250-51.

117. 288 Md. 30, 415 A.2d 1096 (1980).

118. *Id.* at 46-47, 415 A.2d at 1106.

119. *Id.* at 46, 415 A.2d at 1106.

120. *Id.* 46-47, 415 A.2d at 1106.

121. *Id.*

122. *Id.* at 47, 415 A.2d at 1106.

123. *Id.* at 43, 415 A.2d at 1104.

court's judgment that the contractual arrangements between AFS and its clients, tenants at various shopping mall outlets, were void as against the public policy of Maryland.[124] Writing for the majority, Judge Niemeyer began by declaring that an assignment of a cause of action is permissible under many circumstances.[125] However, the court clarified that such assignments are not enforceable if they conflict with public policy.[126] The court, therefore, set out to determine whether the assignments did indeed violate Maryland public policy.[127]

In conducting its inquiry, the Fourth Circuit emphasized that the purpose of the assignments in this case was not to satisfy a pre-existing obligation, but instead to "further [AFS's] business of uncovering claims and earning fees from collecting on them."[128] The court noted that when the assignments were entered into, the tenants had no knowledge of whether any claims existed.[129] Furthermore, if AFS discovered a claim, the tenants would be essentially powerless to stop AFS from pursuing the claim because they were required to pay AFS a fee even if it did not pursue the litigation.[130] In the Fourth Circuit's view, this arrangement left the tenants with the "Hobson's Choice" of either allowing AFS to pursue the litigation or paying AFS a fee.[131] Accordingly, the court concluded that by essentially wresting control of the litigation from the tenants, AFS's purpose in suing was not to protect its clients, but rather to promote litigation as a means of generating fees for itself.[132] As such, the arrangements amounted to "intermeddl[ing] and stir[ring] up litigation for the purpose of making a profit," thereby implicating Maryland's public policy against barratry.[133]

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124. Accrued Fin. Servs., Inc. v. Prime Retail, Inc., 298 F.3d 291, 300 (4th Cir. 2002).

125. *Id.* at 296-97. In making this assessment, the court declared that "[a] chose in action in tort is generally assignable, in the absence of a statutory prohibition, if it is a right which would survive the assignor and could be enforced by his personal representative." *Id.* (quoting Hernandez v. Suburban Hosp. Ass'n, 319 Md. 226, 234, 572 A.2d 144, 148 (1990) (internal quotation marks omitted)).

126. *Id.* at 297 (quoting McCabe v. Medex, 141 Md. App. 558, 566, 786 A.2d 57, 62 (2001) (stating "a contract conflicting with public policy set forth in a statute is invalid to the extent of the conflict between the contract and that policy")).

127. *Id.* The court noted that although the assignments contained a choice-of-law provision, which called for the application of California law, the provision was enforceable only to the extent that it was consistent with the public policy of the forum state, Maryland. *Id.*

128. *Id.*

129. *Id.* at 298.

130. *Id.* at 297-98.

131. *Id.* at 298.

132. *Id.*

133. *Id.*

The Fourth Circuit then scrutinized the arrangements in light of Maryland law regarding barratry, champerty, and maintenance.[134] Under Maryland's narrowing form of barratry, the court noted that the state maintained a public policy against improperly encouraging others to instigate litigation.[135] The court concluded that the modern policy condemned "schemes to promote litigation for the benefit of [the promoter] rather than for the benefit of the litigant or the public."[136] The Fourth Circuit also pointed to the existence of a barratry misdemeanor statute as further evidence of Maryland's public policy against such activity.[137] In light of this authority, the court held the contracts in violation of Maryland's strong public policy because they gave AFS the power to "mine lawsuits" and profit from them without regard to the genuine interests of the tenants.[138] In addition, the court concluded that the assignments violated Maryland's public policy against supplying expert testimony for a contingent fee.[139] Specifically, the court found objectionable the contractual provisions calling for AFS's auditors to testify regarding an action in which AFS might receive a contingent fee.[140]

In his dissent, Judge Michael cited two reasons for not joining the majority.[141] First, he explained that a proper conflict of laws analysis required the court to honor the parties' choice-of-law provision, thereby making California law applicable.[142] Second, Judge Michael reasoned that because AFS owned the claims it brought against Prime, it was not supplying expert testimony for a contingent fee.[143] In support of his first argument, Judge Michael declared that the majority misapplied the test for determining the validity of a choice-of-law provision.[144] Specifically, Judge Michael explained that *Restatement (Sec-*

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134. *Id.* at 298-300.

135. *Id.* at 299.

136. *Id.* (internal quotation marks omitted).

137. *Id.* (citing MD. CODE ANN., BUS. OCC. & PROF. § 10-604 (2000), which prohibits a person "without an existing relationship or interest in an issue" from "solicit[ing] another person to sue").

138. *Id.* The court concluded its barratry analysis by noting that even though the assignments were void as against public policy, the tenants could still file the claims uncovered by AFS during its audit, adding that "[o]ur holding focuses only on the promotional efforts of AFS in stirring up litigation primarily at its own initiative and for its own benefit." *Id.* at 300.

139. *Id.*

140. *Id.*

141. *Id.* at 300 (Michael, J., dissenting).

142. *Id.*

143. *Id.*

144. *Id.* at 302. *See supra* note 101 (providing the relevant text of the *Restatement (Second) of Conflict of Laws* section 187(2)(b) (1971)).

ond) of Conflict of Laws section 187 requires three conditions to be met before Maryland law can displace California law on the ground that Maryland public policy is implicated.[145] After finding inconclusive evidence under the first condition, regarding which state's law would apply in the absence of an effective choice-of-law provision, Judge Michael argued that the second condition was not met because barratry, champerty, and maintenance were becoming obsolete in Maryland, and therefore could not constitute a strong public policy.[146] Judge Michael also noted that the barratry statute contained no express pronouncement regarding public policy, as required by Maryland case law.[147] Finally, as to the third factor under the *Restatement* test, Judge Michael argued that California, not Maryland, had a materially greater interest in the resolution of this case.[148] In sum, Judge Michael declared that a full analysis under the *Restatement* required the application of California law as selected by the parties.[149] As a result, the assignments were valid because California does not recognize the doctrines of barratry, champerty, and maintenance.[150]

Judge Michael also argued that AFS's conduct failed to meet the legal standards for the current application of the doctrines of champerty, maintenance, and barratry in Maryland.[151] Specifically, Judge Michael declared that AFS was not "soliciting litigation," the parties to the agreement possessed equal bargaining power, and the doctrines had narrowed to exclude AFS's conduct from their scope.[152] Moreover, Judge Michael explained that the majority's holding ignored important benefits promoted by arrangements similar to those between AFS and its clients.[153]

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145. *Accrued Fin. Servs.*, 298 F.3d at 302 (Michael, J., dissenting). California law should be displaced, Judge Michael declared, only if the analysis shows that Maryland law must apply in the absence of an effective choice-of-law provision, the California law is contrary to a fundamental (or strong) public policy of Maryland, and Maryland has a materially greater interest in the outcome of the issue than California. *Id.*

146. *Id.* at 303. Judge Michael added that, "as far as I can tell, Maryland has not used these common law doctrines to invalidate any contract in the last one hundred years." *Id.*

147. *Id.* at 304 (citing Nat'l Glass, Inc. v. J.C. Penney Props., Inc., 650 Md. 606, 612-15, 650 A.2d 246, 249-50 (1994)).

148. *Id.* at 305. Judge Michael applied the "contacts" test from section 188(2) of the *Restatement (Second) Conflict of Laws* to arrive at the conclusion that "California has significantly more contacts with the matter than Maryland." *Id.* at 304.

149. *Id.* at 300.

150. *Id.* at 302 (citing Abbott Ford, Inc. v. Superior Court, 741 P.2d 124, 142 n.26 (Cal. 1987)).

151. *Id.* at 305.

152. *Id.* at 305-06. Judge Michael also noted that the common law rationale for the doctrines, including protection against unequal bargaining power and financial overreaching, was not present in this case. *Id.* at 306.

153. *See id.* at 306-07. Judge Michael noted that:

Finally, Judge Michael acknowledged the prohibition of paying contingent fees to expert witnesses, but explained that AFS's auditors would not be giving expert testimony.[154] To the contrary, he argued that because the assignments made AFS the real party in interest, AFS was entitled to offer the testimony of its employees in support of its case.[155] Consequently, Judge Michael concluded that such arrangements did not violate any public policy.[156]

IV. ANALYSIS

In *Accrued Financial Services*, the United States Court of Appeals for the Fourth Circuit inappropriately resurrected the doctrines of barratry, champerty, and maintenance to invalidate agreements between AFS and its clients.[157] In so holding, the court mistakenly interpreted Maryland case law and statutory authority as requiring the agreements to be invalidated as void against public policy. The court did so even though the barratry statute at issue did not expressly declare that such agreements violate public policy, as required by the Maryland Court of Appeals's decisions in *Bethlehem Steel* and *National Glass*.[158] By betraying Maryland case law in this manner, the Fourth Circuit complicated the legal landscape for Maryland corporations and individuals exercising their freedom of contract.[159]

Furthermore, in rejecting AFS's choice-of-law provision, the Fourth Circuit demonstrated an inadvisable paternalism over the parties' efforts to contract freely. This paternalism ignores the jurisprudential trend of upholding formerly champertous contracts when the contracting parties are sophisticated individuals or entities with equal bargaining power.[160] In addition, by rigidly applying Maryland's infre-

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> [T]he majority's argument that the assignments serve AFS's interests more than its clients' . . . interests is without any foundation. Although it is true the tenants could have retained their claims and sued in their own names, history has proven that option to be uneconomical in most instances. . . . The majority's decision thus hurts the tenants, not just AFS. The decision benefits the mall owners and managers, who could be getting away with overcharging and fraud.

Id.

154. *Id.* at 307.

155. *Id.*

156. *Id.*

157. *Accrued Fin. Servs.*, 298 F.3d at 300.

158. *Id.* at 297-300; *see supra* notes 102-116 and accompanying text (discussing the holdings in *Bethlehem Steel* and *National Glass* stating that strong public policy is required to warrant the invalidation of a choice-of-law clause).

159. *See Accrued Fin. Servs.*, 298 F.2d at 297-300 (interpreting the agreements between AFS and its tenant clients as void as against Maryland public policy).

160. *See* Temeron, Inc. v. Ferraro Energy Corp., 861 P.2d 319, 326 (Okla. Ct. App. 1993) (affirming the accepted notion that "a bona fide purchaser or assignee of a mere right of

quently cited barratry statute, the court failed to consider the equities of the case. Specifically, the court ignored the benefits that the contracts accorded to AFS's clients—namely, protection against their landlord's fraudulent billing practices.[161] Thus, the court betrayed a long-held jurisprudential acceptance of granting exceptions to barratry, champerty, and maintenance when justice so requires.[162]

Instead of invalidating the agreements through an outmoded misdemeanor provision, the court should have upheld the contracts, thereby adhering to the mandate of *Bethlehem Steel* and *National Glass*, while simultaneously acknowledging the utility of modern contractual arrangements once deemed unenforceable under barratry, champerty, and maintenance. Furthermore, the court should have followed the lead of other jurisdictions, and held that barratry, champerty, and maintenance are inapplicable to modern contracts negotiated by sophisticated parties with equal bargaining power.[163] In place of these obsolescing doctrines, the court should have adopted a balancing-of-the-equities standard for evaluating the type of arrangements considered champertous at common law.[164] Adopting this standard would respect the freedom of contract of sophisticated parties, while preserving the court's power to strike down such contracts should the equities of the case demand it.[165]

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action is not guilty of champerty"); *see also* Giambattista v. Nat'l Bank of Commerce, 586 P.2d 1180, 1187 (Wash. Ct. App. 1978) (holding that a money broker's agreement to finance another party's litigation was not champertous because the money broker had a legitimate interest in the dispute).

161. *See Accrued Fin. Servs.*, 298 F.3d at 307 (Michael, J., dissenting) (arguing that the court's decision deprived the tenants of their right to protect themselves against the fraudulent billing practices of their landlords by the cost-effective means of entering into assignment contracts).

162. *See* Metro. Life Ins. Co. v. Fuller, 23 A. 193, 196 (1891) (carving out an exception to champerty when an impoverished person called upon "a more fortunate friend [to] assist him" with litigation expenses); *see also* Schackow v. Medical-Legal Cons. Serv., Inc., 46 Md. App. 179, 197, 416 A.2d 1303, 1313 (1980) (upholding a contingency fee agreement as a legitimate arrangement and not a champertous practice).

163. *See supra* note 160 and accompanying text (describing cases in which courts have upheld assignments of causes of action and agreements to finance litigation).

164. *See* Saladini v. Righellis, 687 N.E.2d 1224, 1227 (Mass. 1997). Although not explicitly labeled as such, the test articulated by the *Saladini* court involves balancing the equities involved in agreements to finance litigation. *Id.* Specifically, the court declared that its champerty-free analysis of such arrangements would be guided "by a rule of what is fair and reasonable, looking to all the circumstances at the time the arrangement is made to determine whether the agreement should be set aside or modified." *Id.* These circumstances include: the "respective bargaining position of the parties at the time the agreement was made, whether both parties were aware of the terms and consequences of the agreement, whether [a party] . . . [is] able to pursue the lawsuit at all without [another party's] funds," and whether the fee charged by the financing party is unreasonable. *Id.*

165. *Id.*

A. *The Court's Manufactured Public Policy Diverges from Prior Statutory Authority and Case Law*

In rejecting the contractual arrangements between AFS and its clients, the court in *Accrued Financial Services* manufactured a public policy against these contracts that is unsupported by Maryland precedent.[166] Specifically, the court's reliance on Maryland's misdemeanor barratry statutory provision infers a public policy that is not evident on the statute's face.[167] Reading the statute in this way contradicts the Maryland Court of Appeals' decisions in *Bethlehem Steel* and *National Glass*, which require the presence of an explicit statutory declaration of public policy to override the law chosen by the contracting parties.[168] Maryland's barratry statute contains no such pronouncement, but is merely, as Judge Michael aptly noted in his dissent, a "run-of-the-mill misdemeanor provision."[169] Thus, while criminalizing the activity certainly indicates Maryland's disfavor of champertous conduct, the statute still fails to establish any *strong* public policy mandate, as required by *Bethlehem Steel*.[170] As such, Maryland's misdemeanor barratry statute fails to "unequivocally" tell Maryland courts that arrangements such as those in *Accrued Financial Services* are void as against Maryland public policy.[171]

Furthermore, the Fourth Circuit's divergence from *Bethlehem Steel* and *National Glass* creates vexing questions for future courts attempting to assess the validity of contractual arrangements that appear to conflict with Maryland statutes. The bright-line rule of *Bethlehem Steel* and *National Glass* requires Maryland courts to invalidate contracts only upon an express statutory declaration that agreements embodying such conduct are void and unenforceable.[172] This rule provides a workable standard by which the judiciary and the legislature together can communicate to arrive at a unified pronouncement of Maryland

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166. *Accrued Fin. Servs.*, 298 F.3d at 303 n.2 (Michael, J., dissenting) (explaining that "[t]he majority does not cite a single case in which a contract was found to violate any Maryland common law against maintenance, champerty, or barratry").

167. *Id.* at 304 (Michael, J., dissenting) (noting that Maryland's barratry statute does not contain an express statement of strong public policy).

168. Nat'l Glass, Inc. v. J.C. Penney Props., Inc. 336 Md. 606, 613-14, 650 A.2d 246, 249-50 (1994) (declaring that a contract was void because a Maryland statute expressly stated that such contracts were "void as against the public policy of this state"); *see also* Bethlehem Steel Corp. v. G.C. Zarnas & Co., 304 Md. 183, 187, 498 A.2d 605, 607 (1985) (invalidating a contract because of a Maryland statute that expressly declared indemnity clauses to be contrary to public policy).

169. *Accrued Fin. Servs.*, 298 F.3d at 304 (Michael, J., dissenting).

170. *Bethlehem Steel*, 304 Md. at 189, 498 A.2d at 608 (emphasis added).

171. *Id.* at 190, 498 A.2d at 608.

172. *Id.*; *Nat'l Glass*, 336 Md. at 612-13, 650 A.2d at 249.

public policy. The rule also promotes judicial consistency, and by requesting the legislature to manifestly inform the Maryland judiciary that particular agreements are void, shows appropriate deference to the lawmaking body.[173]

In contrast, the court's decision in *Accrued Financial Services* muddies the waters of future public policy determinations by invalidating a contract without a clear legislative mandate. As a result, future courts will be left to speculate as to whether *any* misdemeanor statute is sufficient evidence of a strong public policy, or whether *Bethlehem Steel* and *National Glass* are still good law.[174] This ambiguity raises the possibility that future courts will be forced to invalidate a properly negotiated choice-of-law provision for the sole reason that the activity involved is prohibited by an archaic and seldom recognized misdemeanor statute.

In *Accrued Financial Services*, the court relied on Maryland's barratry statute, which was enacted in 1908,[175] and has been largely unrecognized by the courts.[176] This judicial apathy toward the statute is evident in the court's opinion, which fails to cite a single case in which a Maryland court applied the statute to invalidate a contract.[177] Furthermore, in *Son v. Margolius*, although the Court of Appeals discussed the statute, it failed to indicate that the statutory prohibitions implicated a *strong* public policy of Maryland.[178] In addition, as the statute slipped into obsolescence in Maryland, other jurisdictions expressed a growing acceptance of contracts once deemed barratrous.[179] In light of this case law, the *Accrued Financial Services* court's invalidation of the parties' contracts was a misapplication of Maryland precedent and contrary to the modernized contracts jurisprudence of other

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173. *Bethlehem Steel*, 304 Md. at 190, 498 A.2d at 608.

174. *See Accrued Fin. Servs.*, 298 F.3d at 303 (Michael, J., dissenting) (noting that "the only time Maryland courts have found a contractually chosen law to violate strong Maryland public policy is when the foreign law conflicts with a Maryland statute that contains a clear statement of policy").

175. Son v. Margolius, Mallios, Davis, Rider & Tomar, 349 Md. 441, 459, 709 A.2d 112, 120 (1998).

176. Only a handful of Maryland decisions mention the statute. *See id.* (citing only one other case, *Schackow*, as relevant to its barratry discussion). *Id.* (citing Schackow v. Medical-Legal Consulting Serv., Inc., 46 Md. App. 179, 416 A.2d 1303 (1980)).

177. *Accrued Fin. Servs.*, 298 F.3d at 297-300. The majority cites no other cases that have utilized Maryland's barratry statute to invalidate a contract. *Id.*

178. *Son*, 349 Md. at 459, 709 A.2d at 121. The *Son* court concluded that solicitation was an essential element of barratry, and because no solicitation was evident, the defendant had not committed barratry. *Id.* The decision, however, stopped short of declaring that barratrous conduct violates a strong public policy in Maryland. *Id.*

179. *See* Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 275 n.3 (S.C. 2000) (citing a number of cases acknowledging the legitimacy of assigning causes of action).

jurisdictions. Thus, the decision sets a perplexing standard for future courts attempting to modernize contracts jurisprudence while adhering to Fourth Circuit authority.

B. The Court's Inadvisable Paternalism Denies the Parties' Freedom of Contract and Ignores the Benefits of Contracts Previously Deemed Champertous

The court in *Accrued Financial Services* relied upon its determination that the agreements between AFS and its clients were void as against public policy to invalidate the parties' selection of California law to govern the contract.[180] In so doing, the court exhibited an inadvisable paternalism over the parties' freedom to enter a type of contract that has been viewed favorably by numerous other jurisdictions.[181] In addition, the court's paternalism contradicts the spirit of numerous other decisions by ignoring the benefits the contract provided to AFS's clients.[182]

The Fourth Circuit failed to appreciate that the common law rationale for barratry is ill-suited to evaluating modern arrangements between sophisticated parties contracting with equal bargaining power.[183] Far from being designed to evaluate business contracts, the historical justification of barratry was the desire to protect disadvantaged parties against "financial overreaching by a party of superior bargaining power."[184] Therefore, in order to apply the doctrine to contracts like those at issue in *Accrued Financial Services*, courts must "mold an ancient doctrine to modern circumstances."[185] Contorting the doctrine in this way ignores the reality of contracts between sophisticated parties—that the parties do not need the court's protection against the financial overreaching practices that occurred in the past.[186] In *Accrued Financial Services*, for example, AFS's clients included such nationwide retailers as Anne Klein, Corning Revere, Pub-

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180. *Accrued Fin. Servs.*, 298 F.3d at 297-300.

181. *See supra* note 84 and accompanying text (discussing cases in which courts have upheld agreements to finance litigation).

182. *See, e.g.*, Schackow v. Medical-Legal Cons. Serv., Inc., 46 Md. App. 179, 197, 416 A.2d 1303, 1313 (1980) (upholding a contingent fee arrangement between a client and his medical consultant because the client could not afford to pay the consultant a flat rate).

183. *See Osprey*, 532 S.E.2d at 277 (declaring that instead of "the dated notions of champerty," modern contractual arrangements are better evaluated using the doctrines of unconscionability, duress, and good faith).

184. Saladini v. Righellis, 68 N.E.2d 1224, 1226 (Mass. 1997).

185. *Id.* at 1227.

186. *See* Harold J. Krent, *The Fee-Shifting Remedy: Panacea or Placebo?*, 71 CHI.-KENT L. REV. 415, 425 (1995) (citing a proposal that "would allow the market to sort out appropriate financing arrangements at the expense of vestigial champerty restrictions").

lishers' Warehouse, and Lechter's.[187] Therefore, as Judge Michael noted in his dissent, it would be reasonable to believe that the clients bargained with AFS on equal footing.[188] Accordingly, because the original justification underlying barratry was absent and the parties were in fact sophisticated entities with equal bargaining power, the Fourth Circuit should have adhered to the position of other jurisdictions and upheld the contracts.[189]

In addition to ignoring the parties' sophistication, the *Accrued Financial Services* court's paternalistic approach rejected the long-held practice of granting an exception to champerty, barratry, and maintenance when required by the equities of a particular case.[190] For example, as early as 1891, courts have cited equitable concerns in deeming as nonchampertous, agreements that allowed third parties to assist an impoverished person with the costs of litigation.[191] In Maryland, the Court of Appeals articulated this idea in *Schackow*, upholding a contingent fee agreement on the ground that a client who could afford an attorney only on a contingent fee basis could not be expected to compensate a medical consultant on a flat rate.[192]

Although AFS's clients certainly were not impoverished, their case did present equitable concerns.[193] Specifically, by assigning their causes of action to AFS, the tenants obtained an economically efficient method of protecting themselves from overbilling and fraud;[194] and by virtue of these assignments, AFS discovered a potential claim of gross overbilling by the landlord.[195] By resorting to a doctrine designed to prevent "financial overreaching," the court's decision exposed the tenants to overreaching on the part of the landlord. In this

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187. Accrued Fin. Servs., Inc. v. Prime Retail, Inc., 298 F.3d 291, 306 (4th Cir. 2002) (Michael, J., dissenting).

188. *Id.*

189. *See* Temeron, Inc. v. Ferraro Energy Corp., 861 P.2d 319, 326 (Okla. Ct. App. 1993) (upholding an auditor's right to bring a lawsuit on behalf of its gas-supplier client); *see also* Giambattista v. Nat'l Bank of Commerce, 586 P.2d 1180, 1188 (Wash. Ct. App. 1978) (upholding a money broker's agreement to finance litigation on behalf of investors).

190. *See supra* note 84 and accompanying text (discussing cases in which courts upheld agreements to finance litigation).

191. Metro. Life Ins. Co. v. Fuller, 23 A. 193, 196 (Conn. 1891).

192. Schackow v. Medical-Legal Cons. Serv., Inc., 46 Md. App. 179, 196, 416 A.2d 1303, 1313 (1980).

193. *See Accrued Fin. Servs.*, 298 F.3d at 307 (Michael, J., dissenting) (noting that the majority decision would disadvantage the tenant, as well as AFS).

194. *Id.* at 301. Indeed, the arrangements made access to auditing services realistic for smaller tenants, who otherwise may not have been able to afford such services. *Id.*

195. *Accrued Fin. Servs.*, 298 F.3d at 295 (noting AFS's contention that Prime's "improper charges and reserve assessments" were "systematic and pervasive" (internal quotation marks omitted)).

way, the court's decision harmed the tenants, not only AFS.[196] As a result, the shopping center tenants are left with a different "Hobson's Choice" than that initially feared by the majority.[197] Left without the ability to assign their causes of action, individual tenants must decide whether to undertake the time and expense of litigating for a small potential recovery or submit to continued fraud on the part of their landlord.[198] This outcome contradicts the reasoning of earlier decisions by failing to consider the inequity that will result from invalidating an agreement that accords important benefits to the contracting parties.[199]

C. *The Court Should Have Adopted a Balancing-of-the-Equities Test to Evaluate Formerly Champertous Agreements*

Instead of relying on Maryland's seldom used barratry statute to find evidence of a strong public policy against the arrangements between AFS and its clients, the Fourth Circuit should have followed the lead of other jurisdictions and held champerty, barratry, and maintenance to be inapplicable to this kind of modern contract.[200] In addition, when the Fourth Circuit evaluates future choice-of-law provisions that implicate Maryland public policy, it should adhere to the commands of *Bethlehem Steel* and *National Glass* by invalidating such provisions only upon the presence of an express legislative mandate.[201] Moreover, in the absence of an express statutory pronouncement, the court should not resort to outdated common law doctrines, but instead should apply a balancing-of-the-equities test as first articulated by the Supreme Judicial Court of Massachusetts in *Saladini*.[202]

The *Saladini* court, after abrogating champerty, barratry, and maintenance, stated that it would still closely scrutinize agreements to

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196. *Id.* at 307 (Michael, J., dissenting).

197. *Accrued Fin. Servs.*, 298 F.3d at 298 (discussing the "Hobson's Choice" faced by the tenants of either allowing AFS to pursue litigation on their behalf or paying AFS a fee).

198. *See id.* at 307 (Michael, J., dissenting).

199. *See, e.g.*, Schackow v. Medical-Legal Cons. Serv., Inc., 46 Md. App. 179, 196, 416 A.2d 1303, 1313 (1980) (upholding a contingent fee arrangement because without such an agreement, "the realities of modern medical malpractice" would lead to the inequitable result of only wealthier individuals being able to pursue malpractice claims).

200. *See, e.g.*, Berman v. Linnane, 679 N.E.2d 174, 177 (Mass. 1997) (holding that a third party may finance litigation under an agreement to receive a portion of the ultimate proceeds as long as the party has an interest or the "possibility of an interest" in the subject litigated).

201. *See* Bethlehem Steel Corp. v. G.C. Zarnas & Co., 304 Md. 183, 498 A.2d 605 (1985); *see also* Nat'l Glass, Inc. v. J.C. Penney Props., Inc., 336 Md. 606, 650 A.2d 246 (1994).

202. Saladini v. Righellis, 687 N.E.2d 1224, 1227 (Mass. 1997).

finance litigation by examining all relevant circumstances to the agreement.[203] Specifically, the court elaborated:

> [I]f an agreement to finance a lawsuit is challenged, we will consider whether the fees charged are excessive or whether any recovery by a prevailing party is vitiated because of some impermissible overreaching by the financier. . . . We shall be guided in our analysis by a rule of what is fair and reasonable, looking to all of the circumstances at the time the arrangement is made to determine whether the agreement should be set aside or modified.[204]

This balancing-of-the-equities test allows individualized determination of the fairness of a particular arrangement. Thus, by adopting this test future courts would be free to uphold formerly champertous contracts as legitimate arrangements under modern jurisprudence. At the same time, courts would be free to reject agreements that demonstrate the type of financial overreaching the doctrines of barratry, champerty, and maintenance seek to protect against.[205] Applying this test to *Accrued Financial Services* would have required the court to weigh the respective bargaining power of AFS and the tenants. The court also would have examined whether the tenants understood the consequences of the agreements and whether they were able to fund the lawsuits without AFS's help. The court also would have acknowledged that the tenants included a number of nationwide retailers.[206] Had the Fourth Circuit applied this test, it likely would have concluded that the contracts were negotiated on equal footing.[207] Likewise, because of the tenants' sophistication, it is fair to assume the tenants understood that they were surrendering their power to control potential litigation in exchange for a valuable service.[208] Finally, although the individual tenants may have been able to finance the

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203. *Id.*

204. *Id.* (footnote omitted).

205. In addition to the balancing-of-the-equities test, other remedies such as unconscionability, duress, and good faith are available to protect against exploitive contracts. Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 277-78 (S.C. 2000).

206. Judge Michael also pointed out in his dissent that the tenants were "substantial companies," while AFS was comprised of less than six employees. Accrued Fin. Servs., Inc. v. Prime Retail, Inc., 298 F.3d 291, 306 (4th Cir. 2002) (Michael, J., dissenting).

207. *Id.* at 306.

208. *Id.* (expressing as a fair conclusion that the tenants would not have entered into the agreements with AFS if the agreements were not advantageous).

litigation on their own, it was undeniably more cost-effective to allow AFS to handle the litigation.[209]

In sum, the balancing-of-the-equities approach to contracts formerly considered champertous is advantageous because it avoids unnecessary paternalism and strengthens parties' freedom of contract. In addition, the test preserves the court's ability to strike down exploitive contracts when necessary.[210] As a final advantage, the test is consistent with the analysis articulated in *Bethlehem Steel* and *National Glass*, allowing courts to invalidate choice-of-law provisions only if the law of the chosen state conflicts with an explicit statutory declaration rendering the contract at issue void and unenforceable as against public policy.[211]

V. CONCLUSION

In *Accrued Financial Services*, the United States Court of Appeals for the Fourth Circuit resuscitated the dormant doctrines of barratry, champerty, and maintenance to declare that litigation financing contracts and related assignments between AFS and its tenants were void as against public policy.[212] The court's declaration was inconsistent with Maryland case law, which requires an express statutory pronouncement before a court may declare a contract void as against Maryland's public policy.[213] The decision also reflects a paternalistic approach in that the court used an antiquated doctrine to nullify a modern contract between parties of equal bargaining power.[214] The court should have followed the lead of other jurisdictions in rejecting the doctrines of barratry, champerty, and maintenance as ill-suited for analyzing modern contractual arrangements.[215] Furthermore, the court should have applied a balancing-of-the equities test to uphold

209. *See id.* at 301 (noting that tenants' claims in most audit periods amounted to a relatively small dollar amount, and that therefore most tenants do not find it financially worthwhile to conduct their own audits).

210. *See Saladini*, 687 N.E.2d at 1227 (describing the factors to be analyzed in evaluating litigation financing agreements).

211. *See* Bethlehem Steel Corp. v. G.C. Zarnas & Co., 304 Md. 183, 498 A.2d 605; Nat'l Glass, Inc. v. J.C. Penney Props., Inc., 336 Md. 606, 650 A.2d 246 (1994).

212. *Accrued Fin. Servs.*, 298 F.3d at 298-300.

213. *See Bethlehem Steel*, 304 Md. 183, 498 A.2d 605; *see also Nat'l Glass*, 336 Md. 606, 650 A.2d 246.

214. *See supra* notes 190-199 and accompanying text (arguing that the court's paternalism is unsupported by precedent and deprives the tenants of an economically advantageous arrangement).

215. *See* Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 277-78 (S.C. 2000) (holding that the problems once addressed by barratry and related doctrines are now more appropriately remedied through the modern doctrines of unconscionability, duress, and good faith).

the agreements between AFS and its clients. In doing so, the court would have protected the parties' freedom of contract, while simultaneously preserving the court's power to invalidate unfair and overreaching agreements designed simply to promote litigation.

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