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Accrued Financial Services, Inc. v. Prime Retail, Inc.:
Schemes of Barratry Violate Strong Public Policy and Are Void and
Unenforceable in Maryland

By: Dawn Lyon

The United States Court of Appeals for the Fourth Circuit held schemes of barratry violate strong public policy and are void and unenforceable in Maryland. *Accrued Fin. Serv., Inc. v. Prime Retail, Inc.* 298 F.3d 291 (2002). The court held contractual schemes used to stir up and promote litigation for the benefit of the promoter rather than the real party in interest violates Maryland's current public policy. *Id.* at 300. In so holding, the court of appeals narrowly interpreted the statute, ignoring the primary purpose of its enactment. *Id.*

Accrued Financial Services, Inc. ("AFS"), a California corporation in the business of conducting lease audits for tenants in commercial buildings and factory outlet malls, retained a percentage of the lease discrepancy amount collected according to its audits. AFS required each tenant to assign all legal claims the tenant had against the landlord and to give AFS control over any litigation it might initiate to enforce the claims. In a typical "Letter of Agreement" between AFS and the tenant, the tenant authorized AFS to retain a fee of 40-50% of any "discrepancy" discovered and collected. If the tenant chose not to pursue the discrepancy, the tenant was required to pay AFS 40% of the discrepancy in exchange for its client services. AFS conducted

audits at a Baltimore factory mall owned by Appellee, Prime Retail, Inc. ("Prime Retail"). AFS maintained Prime Retail imposed unexplainable charges and assessments to its tenants, which were considered excessive errors.

In May 1998, on behalf of seventeen tenants, AFS sent a demand letter to Prime Retail for claims discovered and acquired through assignments. Prime Retail filed an action in the Circuit Court for Queen Anne's County seeking a declaratory judgment that AFS was not the proper plaintiffs and, therefore, lacked standing. AFS subsequently commenced an action in the Central District of California for claims discovered in Michigan and Maryland stores. The California district court transferred this action to the District of Maryland, after which AFS voluntarily dismissed the case without prejudice. AFS filed a second action in the Circuit Court for Baltimore City, which Prime Retail removed to federal court. In this action, AFS sued on behalf of seventeen tenants in fifty locations alleging nine different causes of action. *Id.* Prime Retail filed a motion to dismiss asserting AFS lacked standing because the alleged assignments violated public policy. The district court granted Prime Retail's motion to dismiss, holding the assignments void as a matter of public

policy. AFS appealed to the Court of Appeals for the Fourth Circuit to determine whether the contractual arrangements between AFS and the tenants were void as they violated Maryland's public policy.

First, the Court of Appeals for the Fourth Circuit analyzed the contractual relationship between AFS and the tenants. *Id.* at 296-97. Under the law of assignments, a claim that is commercial in nature survives the death of the assignor. *Id.* at 297. However, the court explained that generally assignments are only enforceable to the extent they are consistent with public policy. *Id.* at 297. The court noted AFS sought to further its business of uncovering claims and earning fees from collecting on them, although AFS had no prior interest in the claims, and the claims were not based on securing any transaction or preexisting commercial relationship between the tenants and AFS. *Id.* at 297. The AFS assignment was not a routine assignment used to further an existing or underlying commercial transaction. *Id.* at 299. Instead, tenants had only two choices, either to pursue a lawsuit or pay AFS a contingency fee on the money AFS might have collected. *Id.* at 297-98. Regardless, AFS could pursue claims and tenants could not prevent AFS from litigating claims in court. *Id.* at 298-99.

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The court noted the Court of Appeals of Maryland recognized that early common law prohibited barratry, maintenance, and champerty, declaring contracts that provide for such conduct void. *Id.* at 298. The court referred to William Blackstone's definition of "common barratry" as the offense of "frequently stirring up suits and quarrels;" "maintenance" as "an officious intermeddling in a suit;" and "champerty" as a "bargain with a plaintiff or defendant . . . whereupon the champertor is to carry on the party's suit at his own expense." *Id.* at 298. Maryland's common law was codified in a criminal statute, outlawing "barratry" as follows:

Without an existing relationship or interest in an issue, a person may not for personal gain, solicit another person to sue or to retain a lawyer to represent the other person in a lawsuit. Md Code Ann. Bus. Occ. & Prof. Art., § 10-604(a)(1). *Id.* at 299. The court applied the statute and common-law principles and held Maryland's public policy prohibits schemes to promote litigation for the benefit of the promoter rather than the party in interest. *Id.* at 299. The court ultimately held AFS was a solicitor for frivolous litigation, stirring up law suits for personal gain. *Id.* at 299. The court added that the arrangements violated public policy as they provide for expert testimony for a contingent fee. *Id.* at 300. AFS employees were to testify as experts on the landlord and tenant relationship for a contingent fee, and the court stated such testimony also violated public policy. *Id.* at 300.

The dissent argued although

AFS and the tenants were bound by California law regarding the application and validity of assignments, the court failed to apply California law to the barratry issue. *Id.* at 302. If the majority applied California law, the barratry claim would fail. *Id.*

The Fourth Circuit holding takes an unprecedented step in its goal to stop "lawsuit mining arrangements" by redefining the broad definitions of barratry and maintenance in public policy. The court's determination restricts tenants' rights to contract by restricting the right to enter into an assignment contract that provides an affordable means of protection against fraudulent practices by landlords. The Fourth Circuit ruling will prove to be injurious to assignments allowed by law in Maryland, and parties that have interest may never be able to assert that right.

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