IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JAMES BAKER, et al.,	)	
	)	
Appellants,	)	
	)	**WD80813**
v.	)	
	)	**OPINION FILED:**
	)	**April 24, 2018**
CENTURY FINANCIAL GROUP, INC., et al.,	)	
	)	
Respondents.	)	

Appeal from the Circuit Court of Clay County, Missouri
The Honorable K. Elizabeth Davis, Judge

Before Division One: Thomas H. Newton, Presiding Judge, and Victor C. Howard and Karen King Mitchell, Judges

Appellants James and Jill Baker, Jeffrey and Michelle Cox, and William and Linda Springer, as named representatives of a class certified in 2003, (collectively, Borrowers) appeal decisions by the Circuit Court of Clay County to grant three motions to dismiss and three motions for summary judgment, all of which were based on the same statute of limitations defense to Borrowers' claims against Respondents under the Missouri Second Mortgage Loan Act, §§ 408.231-408.241 (MSMLA).[1] Respondents are current or former trustees, agents, and/or

[1] All statutory references are to the Revised Statutes of Missouri (2016), unless otherwise noted.

holders of second mortgage loans made by Century Financial Group, Inc. (CFG) and the trustees and/or agents of such holders (collectively, Lenders).[2] Because Borrowers' claims against Lenders are not barred by the applicable statute of limitations, we reverse and remand for further proceedings.

Background[3]

This case has a long and complicated history. For purposes of this appeal, which involves a fairly narrow legal issue, we endeavor to include only those facts necessary for a full understanding and evaluation of that issue.

Borrowers are homeowners who obtained second mortgage loans[4] on their Missouri homes from CFG. The Coxes received their second mortgage loan from CFG on September 30, 1997, the Springers received their loan on October 8, 1997, and the Bakers received their loan on December 2, 1997.[5] After making the loans, CFG sold or assigned them to other entities, many of whom are participants in this litigation. The assignees pooled these (and other) loans and placed them in trusts. The pools were used to collateralize bonds or other investment instruments that were sold to investors. The borrowers' monthly mortgage payments created a revenue stream from

[2] Specifically, Lenders are (1) the Bank of New York Mellon (BNYM); (2) Impac Funding Corporation, Impac Mortgage Holdings, Inc., Impac Secured Assets Corp., IMH Assets Corporation, and Deutsche Bank National Trust Company (collectively Impac); (3) JPMorgan Chase Bank, N.A., as successor by merger to Banc One Financial Services, Inc. (Chase); (4) Ocwen Loan Servicing, LLC (Ocwen); (5) Republic Bank, d/b/a Flagship Funding (Republic); and (6) Wilmington Trust Company (Wilmington).

[3] When considering appeals from dismissals, we treat the facts in the petition as true and construe them liberally in favor of the plaintiffs below. *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008). When considering appeals from summary judgments, we likewise review the record in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

[4] The MSMLA defines "second mortgage loan" as "a loan secured in whole or in part by a lien upon any interest in residential real estate created by a security instrument, including a mortgage, trust deed, or other similar instrument or document, which provides for interest to be calculated at the rate allowed by the provisions of section 408.232, which residential real estate is subject to one or more prior mortgage loans." § 408.231.1, RSMo (2016).

[5] The Bakers initially alleged that they received their loan on November 24, 1997, but that date was incorrect. Whether the Bakers received their loan in November or December 1997 is immaterial to our analysis.

which payments were made to those who bought the mortgage-backed investments. In some cases, the assignees designated a separate entity to process the payments made by mortgagors.

The MSMLA, which governs CFG's loans to the Coxes, the Springers, and the Bakers, provides, with specific exceptions, "[n]o charge other than that permitted by section 408.232 shall be directly or indirectly charged, contracted for or received in connection with any second mortgage loan." § 408.233.1. The MSMLA further provides that "[a]ny person violating [that prohibition] shall be barred from recovery of any interest on the contract," except as otherwise provided in that section. § 408.236.

The Bakers commenced this action on June 28, 2000, by filing a petition alleging, among other things, that CFG, Master Financial, Inc. (a servicer of CFG's Missouri second mortgage loans), and Defendants "Does 1-25," who would later include Lenders, among others, violated the fee limitations of MSMLA, § 408.233.1, in the course of making the Bakers' loan by directly or indirectly charging, contracting for, and/or receiving excessive loan origination fees and other fees not permitted by § 408.233.1. Approximately a year after commencing this suit, the Bakers filed a First Amended Petition, dated July 12, 2001, joining Ocwen, Impac, and Wilmington[6] as defendants.

On February 26, 2002, the Bakers, joined by the Coxes and the Springers, moved for certification of a plaintiffs' class.[7] In their motion, the homeowners argued that their claims "are subject to the 6-year statute of limitations (claims against 'moneyed corporations') [in § 516.420]" and "the class period should therefore include claims arising 6 years before the action was filed."[8]

[6] Wilmington is or was trustee of certain securitization trusts, including, but not limited to, Master Financial Asset Securitization Trust 1997-1, Master Financial Asset Securitization Trust 1998-1, and Master Financial Asset Securitization Trust 1998-2 (collectively the MF Trusts) into which CFG's loans were securitized after closing.

[7] The court formally joined the Coxes and the Springers as plaintiffs in this action on March 4, 2002.

[8] Before the court ruled on that motion, the homeowners filed a Second Amended Petition on March 11, 2002.

In opposing the motion to certify and in an earlier motion for summary judgment filed by one of the Master Financial Asset Securitization Trusts (MF Trusts),[9] the defendants urged the court to apply the three-year statute of limitations in § 516.130(2) to the homeowners' claims. On December 19, 2002, the court ruled that the MF Trust was a "moneyed corporation" within the meaning of § 516.420 and that the applicable statute of limitations was six years.

On January 2, 2003, the court issued its Order Certifying Plaintiff Class pursuant to Rule 52.08.[10] The court defined the class as "[a]ll individuals who, on or after June 28, 1994: obtained a 'Second Mortgage Loan' from Century Financial; and who paid [fees or interest in violation of the MSMLA], or who financed the payment of [fees or interest in violation of the MSMLA] as part of the principal loan balance, at or before closing . . . ." In addition to certifying the class, the court determined, consistent with its denial of the MF Trust's summary judgment motion, that the six-year statute of limitations in § 516.420 applied to plaintiffs' claims, stating,

> [t]he 6-year statute of limitations contained in § 516.420 RSMo. applies to "all" lawsuits where the claimant seeks relief (i.e., "to recover <u>any penalty or forfeiture imposed</u> **<u>or</u>** to enforce <u>any liability created by</u> . . . <u>law</u>") from and/or against a "moneyed corporation." . . . Because Plaintiffs are seeking to "enforce a liability" and/or to recover a "penalty or forfeiture" imposed by the MSMLA and § 408.562[11] against and from Century Financial, a "moneyed corporation," and its derivatively liable assignees, Plaintiffs' statutory claims are governed by § 516.420 RSMo. The language of the statute is crystal clear: "all" suits to "recover any penalty or forfeiture imposed, or to enforce any liability created by any . . . law . . . shall be brought within six years after the discovery by the aggrieved party of the facts upon which such penalty or forfeiture attached, or by which such liability was created." § 516.420 RSMo. 2000. Hence, the 6-year statute applies in this case.

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[9] *See* note 6, *supra*. The Trust's motion for summary judgment focused on whether the trust was a "moneyed corporation" for purposes of § 516.420.

[10] All rule references are to the Missouri Supreme Court Rules (2017), unless otherwise noted.

[11] In pertinent part, § 408.562 provides, "[i]n addition to any other civil remedies or penalties provided for by law, any person who suffers any loss of money or property as a result of any act, method or practice in violation of [the MSMLA] may bring an action . . . to recover actual damages. The court may, in its discretion, award punitive damages and may award to the prevailing party in such action attorney's fees, and may provide such equitable relief as it deems necessary and proper."

(Emphasis in original.)

Shortly after class certification, Borrowers filed their Third Amended Petition, dated February 5, 2003, joining Bank of New York Mellon (BNYM) and Republic as defendants. Borrowers filed their Fourth Amended Petition (the Petition), the operative pleading for purposes of this appeal, on February 3, 2004, joining Banc One Financial Services, Inc., predecessor to Chase, as a defendant. The Petition asserts that Lenders, among others, became liable on CFG's Missouri loans just as CFG is and would be liable because the loans are "high-cost" mortgages under the Home Ownership and Equity Protection Act, 15 U.S.C. § 1602(bb) (HOEPA). The Petition further alleges that Lenders, among others, directly violated the MSMLA, and continued repeatedly to violate it, by charging and/or receiving interest and principal on the loans, which included portions of the illegal settlement charges that had been financed as part of the principal loan amounts. Under the authority of § 408.236 of the MSMLA, Borrowers seek to recover all excessive loan origination and other fees they were charged in connection with the CFG loans and all interest paid or to be paid on the loans; they also seek prejudgment interest, punitive damages, reasonable attorneys' fees, and equitable relief under § 408.562.

In 2006, while this case was pending, this court issued an opinion in *Schwartz v. Bann-Cor Mortgage*, 197 S.W.3d 168, 178 (Mo. App. W.D. 2006), where we ruled that the six-year statute of limitations in § 516.420 applies to MSMLA claims. Thereafter, Borrowers and Lenders proceeded with the understanding that the applicable limitations period was six years until the U.S. Court of Appeals for the Eighth Circuit issued its opinion in *Rashaw v. United Consumers Credit Union*, 685 F.3d 739 (8th Cir. 2012). In *Rashaw*, which involved claims under the Missouri Uniform Commercial Code and the Missouri Merchandizing Practices Act, the Eighth Circuit held that § 516.420 "is limited to penal statutes and does not apply to civil actions to recover penalties

and forfeitures governed by § 516.130(2)." *Id.* at 744. Relying on *Rashaw*, the Eighth Circuit subsequently held that MSMLA claims are subject to the three-year limitations period in § 516.130(2), rather than the six-year limitations period in § 516.420. *See Washington v. Countrywide Home Loans, Inc.*, 747 F.3d 955, 958 (8th Cir. 2014); *Thomas v. US Bank NA ND*, 789 F.3d 900, 902 (8th Cir. 2014); *Wong v. Wells Fargo Bank, N.A.*, 789 F.3d 889, 898 (8th Cir. 2015).

Based on the Eighth Circuit's pronouncement of the applicable limitations period, BNYM filed a Motion to Dismiss the Petition, arguing that Borrowers' claims were barred by the three-year statute of limitations in § 516.130(2).[12] Borrowers filed Suggestions in Opposition to BNYM's Motion to Dismiss, and, after additional submissions by both sides, the court granted BNYM's motion on December 1, 2015, based on the statute of limitations defense.[13] On the heels of BNYM's successful motion, Ocwen and Republic moved to dismiss the Petition as time barred by § 516.130(2). Then, Wilmington filed a motion for partial summary judgment,[14] which was followed by Impac's motion for summary judgment, both relying on the statute of limitations defense. On November 15, 2016, the court dismissed Ocwen and Republic and granted summary judgment to Wilmington and Impac.

On February 9, 2017, Borrowers moved the trial court to enter final judgment on Borrowers' claims and to stay the remainder of the class action pending Borrowers' appeal of the court's prior dismissal and summary judgment rulings. Before the court ruled on Borrowers' motion for a final judgment and stay, Chase moved for summary judgment raising the statute of

[12] BNYM's Motion to Dismiss and Suggestions in Support also raised lack of personal jurisdiction as a basis for dismissal of Borrowers' Petition. BNYM is the only Lender to move for dismissal or summary judgment on a second, alternative basis.

[13] The court did not address BNYM's alternative ground for dismissal, *i.e.*, lack of personal jurisdiction.

[14] Wilmington moved for partial summary judgment because four class member loans were issued fewer than three years before the Bakers named Wilmington in the First Amended Petition.

limitations defense. The court granted Chase's motion on May 23, 2017. The next day, the court granted Borrowers' motion for a final judgment, determining that there was "no just reason for delay" and staying the action as to the remaining defendants pending Borrowers' appeal of the court's statute of limitations rulings. The court's May 24, 2017 judgment ended Borrowers' claims against Lenders based on a common legal issue and is a final judgment subject to appeal pursuant to Rule 74.01(b).[15] This appeal follows.

Standard of Review

All motions at issue in this appeal, whether denominated motions to dismiss or motions for summary judgment, were granted by the trial court based on its finding that the three-year statute of limitations in § 516.130(2), rather than the six-year statute of limitations in § 516.420, governs Borrowers' claims. Which statute of limitations applies to a claim is a question of law, which we review *de novo*. *Mitchell v. Residential Funding Corp.*, 334 S.W.3d 477, 502 (Mo. App. W.D. 2010). Likewise, our review of the grant of both motions to dismiss and for summary judgment is *de novo*. *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008) (grant of motion to dismiss); *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 664 (Mo. banc 2009) (grant of motion for summary judgment).

[15] Rule 74.01(b) states, in relevant part, "[w]hen more than one claim for relief is presented in an action . . . , or when multiple parties are involved, the court may enter a judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay." We review the court's decision to enter a final judgment under Rule 74.01(b) for abuse of discretion. *Exec. Bd. of Mo. Baptist Convention v. Mo. Baptist Found.*, 380 S.W.3d 599, 604 n.10 (Mo. App. W.D. 2012). Where a "trial court resolved all legal issues and left open no remedies" as between the plaintiff and a particular defendant, the court had the authority under Rule 74.01(b) to "enter [a] judgment as to fewer than all parties and certify that there is 'no just reason for delay.'" *Gibson v. Brewer*, 952 S.W.2d 239, 245 (Mo. banc 1997) (quoting Rule 74.01(b)). In the present case, the court's orders granting dismissal and summary judgment resolved Borrowers' only claim against Lenders on a common legal issue that controls the disposition of all the claims asserted in the class action, rendering the orders appealable under Rule 74.01(b). Thus, the court did not abuse its discretion in entering a final judgment on its prior orders, and those orders are properly before us for review.

Under the *de novo* standard of review, appellate courts use the same decision criteria as the lower courts. In the context of a dismissal based on a statute of limitations defense, "[i]f it clearly appears on the face of the petition that the cause of action is barred by the applicable statute of limitations, the motion to dismiss is properly sustained." *Armistead v. A.L.W. Grp.*, 60 S.W.3d 25, 26 (Mo. App. E.D. 2001). In the context of summary judgment, we will affirm if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 74.04(c)(6); *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 378 (Mo. banc 1993). For defendants seeking summary judgment on a properly pleaded affirmative defense, there must be no genuine dispute as to the facts required to support the defense. *Id.* at 381. Here, there is no dispute as to the material facts pertaining to the statute of limitations defense at issue.

Analysis

Borrowers raise six points on appeal. In their first point, they argue that the court erred in granting Lenders' dismissal and summary judgment motions based on the statute of limitations because Borrowers' claims are subject to the six-year limitations period in § 516.420, rather than the three-year limitations period in § 516.130(2). In their remaining five points, Borrowers argue that the court erred in finding their claims time barred under the three-year statute of limitations in § 516.130(2) because, even under the shorter limitations period, their claims are timely based on the following legal theories: (1) HOEPA's derivative liability (Point II), (2) accrual of claims against Lenders occurs when they acquire or begin servicing the loans (Point III), (3) the "continuing or repeated wrong" exception to accrual of claims (Point IV), (4) the relation back doctrine (Point V), and (5) class action tolling (Point VI).[16]

[16] The trial court did not address any of Borrowers' alternative arguments with regard to the timeliness of their suit under the three-year limitations period, but the court's orders implicitly rejected those arguments.

The initial issue on appeal is whether Borrowers' MSMLA claims are subject to the three-year limitations period in § 516.130(2), as the trial court found, or the six-year limitations period in § 516.420, as we concluded in *Schwartz* and Borrowers advocate here (Point I).[17] Because we conclude that § 516.420 applies and Borrowers' claims must be brought within six years, we need not reach Borrowers' alternative arguments regarding the timeliness of their claims under the shorter limitations period (Points II-VI). We begin our analysis by examining the language of §§ 516.130(2) and 516.420.

1. Statutory Language

"Our primary rule in construing statutes is to determine the legislature's intent through the language used." *Mitchell*, 334 S.W.3d at 502. We must "presume every word, sentence or clause in a statute has effect." *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013). But we will not add words that the legislature did not include when drafting the statute. *Ryder Student Transp. Servs., Inc. v. Dir. of Revenue*, 896 S.W.2d 633, 635 (Mo. banc 1995).

In relevant part, § 516.130(2) states, "[a]n action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state" must be brought "[w]ithin three years."[18] The MSMLA provides for penalties and forfeiture. *Mitchell*, 334 S.W.3d

[17] To date, the Missouri Supreme Court has not ruled on the applicability of § 516.130(2) or § 516.420 to MSMLA claims. The Eighth Circuit previously asked the Missouri Supreme Court to consider the following certified question: "Does § 516.130(2) or § 516.420 control plaintiffs' actions against a corporate mortgage lender under the Missouri Second Mortgage Loan Act?" The Missouri Supreme Court declined the request, adhering to *Grantham v. Missouri Department of Corrections*, No. 72576, 1990 WL 602159, at *1 (Mo. banc July 13, 1990), which held that the Missouri Constitution "do[es] not expressly or by implication grant the Supreme Court of Missouri original jurisdiction to render opinions on questions of law certified by federal courts." *See Washington v. Countrywide Home Loans, Inc.*, 747 F.3d 955, 958 n.2 (8th Cir. 2014).

[18] Chapter 516 of the Missouri Revised Statutes does not contain definitions of either "penalty" or "forfeiture." Historically, we have adopted broad definitions of these terms. A "penalty" is "a sum of money of which the law exacts payment by way of punishment for doing some act that is prohibited . . . . It is an elastic term with many different shades of meaning." *Julian v. Burrus*, 600 S.W.2d 133, 141 (Mo. App. W.D. 1980) (quoting 70 C.J.S. Penalties § 1, pp. 387-89). "Forfeiture" is "a comprehensive term which . . . means a divestiture of specific property without compensation, in consequence of some default or act forbidden by law." *Id.* (quoting 37 C.J.S. Forfeiture § 1, p. 4).

at 503; *Schwartz*, 197 S.W.3d at 178. And, under the MSMLA, the cause of action is given to the aggrieved party. Thus, on its face, § 516.130(2) applies to Borrowers' MSMLA claims.

Section 516.420 states,

> [n]one of the provisions of sections 516.380 to 516.420[19] shall apply to suits against moneyed corporations or against the directors or stockholders thereof, to recover any penalty or forfeiture imposed, or to enforce any liability created by the act of incorporation or any other law; but all such suits shall be brought within six years after the discovery by the aggrieved party of the facts upon which such penalty or forfeiture attached, or by which such liability was created.

Because § 516.420 also applies to actions to recover "any penalty or forfeiture imposed," it also facially applies to Borrowers' MSMLA claims, assuming that Lenders are "moneyed corporations," which Lenders do not contest. The overlap between §§ 516.130(2) and 516.420 is resolved by § 516.300, which states, "[t]he provisions of sections 516.010 to 516.370 shall not extend to any action which is or shall be otherwise limited by any statute; but such action shall be brought within the time limited by such statute." Thus, where both §§ 516.130(2) and 516.420 apply, the latter governs, and MSMLA claims must be brought within six years.

This is the same conclusion this court reached in *Schwartz* in 2006, which involved MSMLA claims similar to those asserted by Borrowers. Most of the analysis in *Schwartz* focused on whether the defendant mortgage finance company was a "moneyed corporation" as that term is used in § 516.420. Having concluded that the company was a "moneyed corporation," we then found the claims to be governed by that section's six-year limitations period, stating, "[s]ection 516.130(2) would apparently apply here if this were not an action against a 'moneyed corporation.' Section 516.420 is the more specific statute of the two because it deals with claims

[19] The reference to § 516.420 within § 516.420 "is not a typographical error; section 516.420 includes itself within the range of statutes that do not apply in the circumstances described in that section. No party suggests (and [we do] not believe) that [the reference to § 516.420 in that section] should be taken literally because that would completely deprive section 516.420 of all meaning." *Moran v. Mo. Cent. Credit Union*, No. 11-0189-CV-W-ODS, 2011 WL 2110824, *2 n.3 (W.D. Mo. May 26, 2011).

against 'moneyed corporations.'" *Schwartz*, 197 S.W.3d at 178 (internal footnote omitted). In reaching that conclusion, we focused primarily on the wording of § 516.420, noting that it applies to claims under the MSMLA to recover "a 'penalty or forfeiture' and . . . to 'enforce any liability created by . . . any other law' [against] 'moneyed corporations' . . . ." *Id.* "The apparent overall purpose [of § 516.420 is] to allow the pursuit of remedies against a corporation . . . where the corporation . . . ha[s] violated a statutory requirement. . . . Accordingly, the Missouri statute governs claims against a mortgage company arising out of a[n MSMLA] violation." *Id.* at 176-77.

Contrary to our holding in *Schwartz*, Lenders argue that there is no overlap in applicability between §§ 516.130(2) and 516.420 because § 516.130(2) applies to civil causes of action for penalties authorized by statutes like the MSMLA, while § 516.420 applies exclusively to criminal causes of action for penalties authorized by criminal statutes. In support of this contention, Lenders make two arguments. First, Lenders claim that the language of §§ 516.380-.420 demonstrates that the statutes apply to only criminal causes of action. Second, Lenders argue that § 516.420's introductory reference to §§ 516.380-.420 makes its six-year statute of limitations an exception to only those sections and not to the limitations period in § 516.130. For ease of discussion, we address Lenders' second argument first.

Lenders argue that, by referring to §§ 516.380-.410 in the introductory phrase, the legislature intended for § 516.420's six-year statute of limitations to be an exception to only those sections listed and, thus, inapplicable to causes of action otherwise governed by § 516.130. In other words, Lenders see the omission of § 516.130 from that list as "substantive and intentional."

Contrary to Lenders' argument, § 516.420 applies beyond just those causes of action identified in §§ 516.380-.410 insofar as it also addresses "suits against moneyed corporations . . . to recover any penalty or forfeiture imposed, or to enforce *any liability created by the act of*

incorporation or any other law." (Emphasis added.) While §§ 516.380-.400 apply to only actions for penalties or forfeiture, § 516.420 applies to those types of actions *as well as* actions to enforce liabilities. Penalties and liabilities are not the same things. *See Vroom v. Thompson*, 55 S.W.2d 1024, 1026-27 (Mo. App. 1932) (distinguishing between statutory actions for "exemplary damages" for the commission of acts prohibited by statute—a penalty—and actions to recover damages for actual loss—a liability); *State v. Virgilito*, 377 S.W.2d 361, 364-65 (Mo. 1964) (distinguishing statutes that create penalties from those that prescribe a procedure for enforcement of a contractual provision in a civil action). In light of the additional language in § 516.420, the list at the beginning does not serve to limit § 516.420's application to only those actions otherwise subject to the listed sections.[20]

Moreover, as discussed above, the existence of § 516.300 negates any need for an express reference to § 516.130 before the six-year statute of limitations will be applied to actions against moneyed corporations for penalties or forfeiture brought by an aggrieved party.[21] In stating that "[t]he provisions of sections 516.010 to 516.370 shall not extend to any action which is or shall be otherwise limited by any statute," § 516.300 clearly establishes that, when an action that would otherwise be subject to a limitations period in §§ 516.010 to 516.370 is subject to a different limitations period in a separate statute, such as § 516.420 here, that different limitations period controls. But, even in the absence of § 516.300, "[i]t is a well-settled principle of statutory interpretation . . . that '*[w]here there is no clear intention otherwise*, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.'" *Dieser v. St. Anthony's Med. Ctr.*, 498 S.W.3d 419, 431 (Mo. banc 2016) (emphasis added) (quoting *Earth*

[20] Historically, the sections listed in § 516.420 (§§ 516.380-.420) have been grouped together in the Revised Statutes of Missouri in the same chapter or sub-chapter, which may explain why those sections were singled out at the beginning of § 516.420.

[21] Lenders neither mention nor address the effect of § 516.300 in any of their briefs.

Island Inst. v. Union Elec. Co., 456 S.W.3d 27, 33 (Mo. banc 2015)). Here, because § 516.420 is more specific insofar as it applies only when an action is against a moneyed corporation, it controls, and the applicable statute of limitations in this case is six years.

Because § 516.420 applies beyond just those actions mentioned in §§ 516.380-.400, we need not address Lenders' first argument that those other sections apply exclusively to criminal matters, thereby making § 516.420's reference to them render § 516.420 exclusively criminal as well. For, even if Lenders were correct about the exclusively criminal nature of §§ 516.380-.400 (a proposition we do not address), that simply means that § 516.420 applies to *both* criminal and civil matters and is, therefore, not exclusively criminal.

For these reasons, we reject Lenders' reading of § 516.420 as applying the statute's six-year statute of limitations exclusively to causes of action that, but for the defendant's status as a moneyed corporation, would be subject to the statute of limitations in §§ 516.380-.400. The express language of § 516.420 covers claims for penalties authorized by civil statutes like the MSMLA.

2. Case Law

Our analysis of the statutory language is consistent with our holding in *Schwartz* that MSMLA claims are governed by the six-year limitations period in § 516.420. However, as Lenders point out, the Eighth Circuit has reached a contrary conclusion in *Rashaw* and its progeny. *Rashaw*, 685 F.3d at 744; *Washington*, 747 F.3d at 958; *Thomas*, 789 F.3d at 902; *Wong*, 789 F.3d at 898.[22] But federal case law interpreting a Missouri statute is not binding on this court's

[22] In granting Lenders' motions to dismiss and for summary judgment, the motion court cited *Rashaw v. United Consumers Credit Union*, 685 F.3d 739 (8th Cir. 2012), three older Missouri cases cited therein, and the subsequent Eighth Circuit decisions applying *Rashaw* to MSMLA claims, adopting the Eighth Circuit's conclusion that MSMLA claims are subject to the three-year limitations period in § 516.130(2). The Orders granting Lenders' Motions to Dismiss and Motions for Summary Judgment do not, however, mention this court's opinion in *Schwartz v. Bann-Cor Mortgage*, 197 S.W.3d 168 (Mo. App. W.D. 2006).

interpretation of that statute. *Russell v. Healthmont of Mo., LLC*, 348 S.W.3d 784, 787 (Mo. App. W.D. 2011). And for several reasons, we disagree with the Eighth Circuit.

To begin, *Rashaw* involved claims under the Missouri Uniform Commercial Code and the Missouri Merchandizing Practices Act; it did not involve any claims under the MSMLA. Nevertheless, the *Rashaw* court considered and rejected our holding in *Schwartz*, finding that *Schwartz* had "ignored both relevant legislative history and what should have been controlling (though dated) [Missouri] Supreme Court precedents."[23] *Rashaw*, 685 F.3d at 744. And, in a later case relying on *Rashaw*, the court concluded that *Schwartz* "was not the best evidence of Missouri law." *Washington*, 747 F.3d at 958.

In reaching its conclusion, the *Rashaw* court relied on two Missouri Supreme Court cases (from 1914 and 1929)[24] and one Kansas City Court of Appeals case from 1932.[25] But none of those cases mentioned or addressed the application of § 516.420. And, though two of them involved suits against moneyed corporations, none of the parties in those cases argued that § 516.420 applied, and that fact limits the precedential value of those cases. "Judicial decisions must be construed with reference to the facts and issues of the particular case, and . . . the authority of the decision as a precedent is limited to those points of law which are raised by the record, considered by the court, and necessary to the decision." *State ex rel. Tivol Plaza v. Mo. Comm'n on Human Rights*, 527 S.W.3d 837, 845 (Mo. banc 2017) (quoting *Byrne & Jones Enter. v. Monroe City R-1 Sch. Dist.*, 493 S.W.3d 847, 855 (Mo. banc 2016)). More importantly, to interpret the

[23] This court's failure to address these cases in *Schwartz* is likely the result of the fact that the parties in that case focused their arguments on the proper definition of "moneyed corporation" and did not address whether the statute of limitations in § 516.420 applies exclusively to criminal causes of action or to those statutes mentioned at the beginning of § 516.420. It may also have been, as we hold here, because those cases are simply inapposite to the issue.

[24] *State ex inf. Attorney General v. Arkansas Lumber Co.*, 169 S.W. 145 (Mo. 1914); *State ex rel. Fichtner v. Haid*, 22 S.W.2d 1045 (Mo. 1929).

[25] *Vroom v. Thompson*, 55 S.W.2d 1024 (Mo. App. 1932).

three older cases to mean that § 516.420, a statute not mentioned in any of the cases, is limited to cases involving criminal causes of action for penalties would require us to ignore the plain language of § 516.420, which we cannot do. For the reasons we discussed earlier, the plain language of § 516.420 indicates that its reach is broader. Accordingly, we disagree with the Eighth Circuit's conclusion that these three dated Missouri cases are the "best evidence of Missouri law" as to the meaning of § 516.420, and, as such, dictated a different outcome in *Schwartz*.[26]

The *Rashaw* court also relied on legislative history to conclude that § 516.420 applied exclusively to criminal causes of action. More specifically, the *Rashaw* court pointed out that, over the course of its lifetime, the statutory language that is now present in § 516.420 has, at times, been placed within the criminal code.[27] However, under our rules of statutory construction, "[w]hen a statute is clear and unambiguous, extrinsic aids to statutory construction cannot be used." *State ex rel. Nixon v. Fru-Con Constr. Corp.*, 90 S.W.3d 533, 536 (Mo. App. E.D. 2002) (quoting *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596, 599 (Mo. banc 1977)). "Missouri

[26] *Rashaw* does not mention an even earlier decision in which the Supreme Court of Missouri applied the predecessor of § 516.400 to a suit to recover a civil penalty on a penal statute. *Revelle v. St. Louis, I.M. & S. Ry. Co.*, 74 Mo. 438, 441 (1881). It is equally plausible that *Revelle*, rather than *Arkansas Lumber* (cited by the Eighth Circuit), was the best evidence of Missouri law on whether § 516.400 applied to only criminal causes of action.

[27] In the Revised Statutes of 1919, 1929, and 1939, the precursors to §§ 516.380 to 516.420 were located in the criminal procedures code. Mo. Rev. Stat., 1919, Ch. 25, §§ 3741-3745; Mo. Rev. Stat., 1929, Ch. 29, §§ 3396-3400; Mo. Rev. Stat., 1939, Ch. 30, §§ 3786-3790. But, when enacted in 1855, the predecessors of §§ 516.380 and 516.390 (setting the statutes of limitations for an action upon statute for a penalty or forfeiture where said penalty or forfeiture is given to the governmental actor or the private party that initiates the suit) were originally part of the same statute within Article II of Chapter 103. 1855 Mo. Laws, Ch. 103, Art. II, § 8. Article II began with a statute stating that "[c]ivil actions can only be commenced within the periods prescribed in the sections which follow, after the cause of action shall have accrued." *Id.* at § 1. Thus, it is clear that, as originally enacted, the predecessors to §§ 516.380 and 516.390 applied to civil causes of action. Missouri then added to Chapter 103, Art. II, the predecessor to § 516.400 (setting the statute of limitations for actions for penalty or forfeiture when said penalty or forfeiture is given to the aggrieved party). 1857 Mo. Laws, Art. II, §§ 1, 4-5, 8. Because, as we discuss below, when originally enacted, what is now § 516.420 applied to civil actions, its recodification as part of the criminal procedures code did not change that. When the placement and structure assigned during the codification process cannot be attributed to the legislature, they do not reflect its intent. *See In re Marshall*, 478 S.W.2d 1, 3 (Mo. banc 1972) (refusing to construe statute on the basis of the location and order of section numbers that were assigned in 1835 to an 1824 enactment and perpetuated thereafter in successive codifications). And, recodification of a statute generally does not alter its substance or construction. § 3.060.1; *see Kansas City v. Travelers Ins. Co.*, 284 S.W.2d 874, 878, (Mo. App. 1955) (finding that the Revision Committee, which had no legislative authority, could not alter the meaning or effect of a statute as originally enacted).

courts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning." *Id.*; s*ee Simpson v. Simpson*, 352 S.W.3d 362, 365 (Mo. banc 2011) ("[w]hen 'the intent of the legislature is clear and unambiguous' by giving the statutory language its plain and ordinary meaning, both this Court and the court of appeals are bound by that language and cannot resort to statutory interpretation") (quoting *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 455 (Mo. banc 2011)). Because the language of § 516.420 is clear and unambiguous, we need not resort to principles of statutory construction.

From its original enactment, the language in what is now § 516.420 has remained clear and remarkably consistent. When initially adopted, that section read:

> None of the provisions of this chapter[28] shall apply to suits against moneyed corporations, . . . to recover any penalty or forfeiture imposed, or to enforce any liability created by the act of incorporation, or any other law; but all such suits shall be brought within six years after the discovery, by the aggrieved party, of the facts upon which such penalty or forfeiture attached or by which such liability was created.

Mo. Gen. Stat. 1866, Ch. 190, § 10. The use of broad language like "any liability created by the act of incorporation, or any other law," and the inclusion of language that commenced the running of the statute of limitations upon discovery by the aggrieved party of the facts upon which the penalty attached or the liability was created, demonstrate a legislative intent to enact a statute broadly protecting persons aggrieved by statutory violations committed by moneyed corporations. *See Schwartz*, 197 S.W.3d at 176 ("The adoption of a six-year limitations period from 'discovery of the facts' upon which such penalty or forfeiture attached shows a legislative desire to allow

[28] Although this opening clause ("No provision of this chapter") is broader than the beginning of today's § 516.420 ("None of the provisions of sections 516.380 to 516.420"), that does not change our analysis, which is based primarily of the expansive language of the remainder of § 516.420. The fact that § 516.420 opens by referring to §§ 516.380-.420 likely reflects the fact that those sections have been grouped together as a unit in the Missouri statutes since they were first enacted.

victims of unlawful practices a significant period of time to enforce their claims for a penalty or forfeiture.").

But, even if we were to consider legislative history, it would support our holding that § 516.420 is not limited to criminal causes of action. The language of the precursor to § 516.420 was nearly identical to the New York statute on which § 516.420 was modeled. The New York statute was a specific statute of limitations applicable to civil causes of action generally, both as enacted in 1829, and as it existed, after recodification, when the predecessor of § 516.420 was first enacted in Missouri. *Div. of Labor Standards, Dep't of Labor and Indus. Relations, State of Mo. v. Walton Constr. Mgmt. Co.*, 984 S.W.2d 152, 154 (Mo. App. W.D. 1998) (analyzing history of § 516.420 and its relation to the New York statute); *Schwartz*, 197 S.W.3d at 171-74 (finding it appropriate to consider New York's definition of "moneyed corporation" in construing that term for purposes of § 516.420).

Today, §§ 516.380-.420 are grouped together as "Actions on Penal Statutes" within Chapter 516, "Civil Procedure and Limitations; Statutes of Limitation." The current placement of §§ 516.380-.420 dates back to 1949. Although we typically do not consider the names of articles or chapters in construing statutes, *Gurley v. Mo. Bd. of Private Investigators Exam'rs*, 361 S.W.3d 406, 413 (Mo. banc 2012), the recodification of 1949 is different because it was approved by the legislature and thus reflects its intent.[29]

In 1949, as part of a comprehensive initiative to "classify and arrange the entire body of statute laws in a logical order throughout the volumes, the arrangement to be such as w[ould] enable subjects of a kindred nature to be placed under one general head[ing]," §§ 516.380-.420 were moved from the criminal procedures code to their current location in Chapter 516. Report

[29] See discussion, *infra*, in note 27.

No. 11, Plan for the Arrangement of the Revised Statutes of 1949 and Report on Statute Revision, pp. 5, 17, 38 and Appendix, p. 1213-14. As approved by the Legislature, the "chief advantage" of the 1949 revisions "[wa]s that it br[ought] together the laws that are the same kind of laws, or that are intended to accomplish the same general purpose . . . ." *Id.* at p. 4. Thus, the decision to relocate what are today §§ 516.380-.420 to Chapter 516 reflects the Legislature's intent to clarify that § 516.420 applies to civil actions, consistent with the clear and unambiguous language of that section. Thus, we reject *Rashaw*'s conclusion that legislative history dictates that § 516.420 applies exclusively to criminal causes of action.

Finally, when presented with the claim that the broad language of § 516.420 renders it applicable to *all* statutory actions against moneyed corporations, the Eighth Circuit rejected the argument in a footnote, noting that the argument "plainly cannot survive the statute's limited application to penal statutes." *Rashaw*, 685 F.3d at 744 n.6. But, in rejecting this argument, the Eighth Circuit mistakenly equated the word "penal" with "criminal." *See, e.g.*, *id.* at 744 (concluding that, "[a]s construed by the Supreme Court of Missouri since at least . . . 1914, [§ 516.420] applied only to penalties and forfeitures authorized by criminal ('penal') statutes, not to penalties and forfeitures authorized in civil statutes, which are governed by § 516.130(2)"). The word "penal" does not necessarily mean criminal. "Penal" means "of, relating to, or involving punishment, penalties, or punitive institutions . . . ." *Penal*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/penal (last visited April 16, 2018). A penalty that is punitive in nature can arise in either a civil or a criminal cause of action. The proper dichotomy is penal versus remedial rather than penal versus civil. *Vroom*, 55 S.W.2d at 1026.

In short, for the reasons discussed herein, we reject the Eighth Circuit's conclusion in *Rashaw* and its progeny that § 516.420 applies exclusively to criminal causes of action. Because

the plain language of the statute indicates that it applies whenever a suit is filed against a moneyed corporation, and here, the defendants were all moneyed corporations, the six-year statute of limitations applies. Thus, Point I is granted.

Having found that Borrowers' claims are subject to the six-year statute of limitations in § 516.420,[30] rather than the three-year limitations period in § 516.130(2), we do not reach Borrowers' alternative arguments regarding the timeliness of their claims under § 516.130(2) (Points II-IV).

Conclusion

Accordingly, we reverse the motion court's decision to grant BNYM's, Ocwen's, and Republic's motions to dismiss Borrowers' claims as untimely. Likewise, we reverse the court's decision to grant summary judgment to Impac, Wilmington, and Chase on the statute of limitations defense. We remand the case for further proceedings consistent with this decision, including a determination of BNYM's motion to dismiss for lack of personal jurisdiction.[31]

Karen King Mitchell, Judge

Thomas H. Newton, Presiding Judge, and Victor C. Howard, Judge, concur.

[30] In their brief, Borrowers anticipate that three Lenders—Banc One (predecessor of Chase) and two members of Impac—will argue that, even under the longer limitations period in § 516.420, Borrowers' claims against them are barred. The briefs submitted by these Lenders suggest otherwise, however. According to Chase's brief, four loans originated by CFG in 1999 and 2000 were assigned to Banc One; those loans were issued fewer than six years before Banc One was joined as a defendant. In its brief, Impac does not suggest that claims against any of its members would be barred even under the longer limitations period.

[31] The motion court's dismissal of BNYM was based solely on the statute of limitations defense; the court did not address BNYM's jurisdictional argument. Likewise, Borrowers did not address that argument on appeal. Under these circumstances, we remand for consideration of the jurisdictional argument and development of the record below on this issue.