

IN THE SUPREME COURT OF MISSOURI

No. SC85081

**STATE OF MISSOURI ex rel. MASTER FINANCIAL ASSET
SECURITIZATION TRUST 1998-1,**

Relator,

v.

THE HONORABLE DAVID W. RUSSELL, CIRCUIT JUDGE,

Respondent.

Original Proceeding in Prohibition and for Mandamus
against the Circuit Court of Clay County, Missouri,
the Honorable David W. Russell, Circuit Judge

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INTRODUCTION

Plaintiffs, class representatives below, sued a mortgage company and several assignee defendants, including the Master Financial Asset Securitization Trust 1998-1 (“1998-1 Trust” or “Relator”) -- a Delaware business trust that purchased loans in the secondary market -- for alleged violations of Missouri’s Second Mortgage Loan Act (“SMLA”), § 408.231, RSMo 2000, *et seq.*

Plaintiffs’ sole cause of action asserted against the 1998-1 Trust alleged statutory violations of the SMLA in connection with allegedly improper origination fees and costs assessed in October and December of 1997. Although the claims accrued in 1997, Plaintiffs failed to name the 1998-1 Trust as a defendant until July 11, 2001, almost four years later. Claims for statutory violations such as those asserted by the Plaintiffs are subject to a three-year statute of limitations.

The 1998-1 Trust moved for summary judgment since Plaintiffs’ claims were time-barred. The trial court denied the motion and applied a six-year statute of limitations to Plaintiffs’ claims against the 1998-1 Trust. The six-year statute of limitations can only apply if the 1998-1 Trust is found to be a “moneyed corporation.” Under Missouri law, a “moneyed corporation” is a “corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurance.” The 1998-1 Trust is clearly not a “moneyed corporation” because it is a trust and not a corporation, it does not have banking powers or the power to make loans upon pledges or deposits, and is it not authorized by law to make insurance.

On February 4, 2003, the 1998-1 Trust petitioned this Court pursuant to Rule 97 of the Missouri Supreme Court Rules to issue a writ of prohibition to prevent Respondent from acting in excess of jurisdiction and to refrain from any further proceedings in the case of *Baker v. Century Financial, Inc., et al.*, Case No. CV100-004294 in the Circuit Court of Clay County, Missouri (the “Underlying Action”), except to enter summary judgment in favor of the 1998-1 Trust on grounds that the statute of limitations applicable to the 1998-1 Trust is three years. The 1998-1 Trust further petitioned this Court pursuant to Rule 94 of the Missouri Supreme Court Rules to issue a writ of mandamus, or in the alternative, ordering Respondent to enter judgment in favor of the 1998-1 Trust based on the running of the applicable three-year statute of limitations. § 516.130(2), RSMo 2000. On March 4, 2003, this Court issued a preliminary writ of prohibition.

JURISDICTIONAL STATEMENT

This is an original proceeding for the issuance of a writ of prohibition (or, in the alternative, a writ of mandamus) under Rule 97 and Rule 94 of the Missouri Supreme Court Rules to determine whether the Circuit Court of Clay County acted in excess of its jurisdiction in denying Master Financial Asset Securitization Trust 1998-1's motion for summary judgment. The Court has jurisdiction to decide this case pursuant to Article V, Section 4.1 of the Missouri Constitution, which provides in pertinent part: "The supreme court shall have general superintending control over all courts and tribunals. . . . The supreme court . . . may issue and determine original remedial writs."

STATEMENT OF FACTS

On June 28, 2000, Plaintiffs James and Jill Baker (“Bakers”) filed suit against Century Financial, Inc. (“Century”), an originating lender, and Master Financial, Inc. (“Master Financial”), one of Century’s assignees, in the Circuit Court of Clay County Missouri for alleged violations of Missouri’s Second Mortgage Loan Act, § 408.231, RSMo 2000, *et seq.* (Petition for Writ of Prohibition, ¶ 1; Admitted in Respondent’s Answer, ¶ 1)

On July 12, 2001, the Bakers filed their First Amended Petition, which added additional assignee defendants, including the 1998-1 Trust. (A1 -A62, Exhibit 1; Petition for Writ of Prohibition, ¶ 1; Admitted in Respondent’s Answer, ¶ 1)¹ The 1998-1 Trust is a business trust that is the assignee of some of the loans originated by Century. (A113, Exhibit 5; Petition for Writ of Prohibition, ¶ 9; Admitted in Respondent’s Answer, ¶ 9)

On March 11, 2002, the Bakers filed their Second Amended Petition adding Jeffrey and Michelle Cox (“Coxes”), and William and Linda Springer (“Springers”) as named plaintiffs (hereinafter referred to collectively as the “Plaintiffs”). (A63-A87, Exhibit 2)

Plaintiffs alleged that with respect to certain second mortgage loans, Century charged them origination fees or other closing costs beyond those fees and costs allowed by the Missouri Second Mortgage Loan Act. (A63-A87, Exhibit 2; Petition for Writ of

¹All exhibits referenced herein are attached to the Petition for Writ of Prohibition or the Suggestions in Support of and are included in the Appendix to this brief.

Prohibition, ¶ 3; Admitted in Respondent's Answer, ¶ 3) Plaintiffs are seeking damages that include claims for penalties or forfeitures in the form of the return of all interest paid to date, forgiveness of future interest, punitive damages and attorneys' fees. (A63-A87, Exhibit 2) The Missouri Second Mortgage Loan Act, §408.231, *et seq.*, RSMo 2000, provides for, and the Plaintiffs herein are seeking, damages that accrue to the party aggrieved (*i.e.*, the Plaintiffs).

Plaintiffs alleged no relationship between the 1998-1 Trust and Century beyond the fact that the 1998-1 Trust purchased loan packages that included loans originated by Century. (A63-A87, Exhibit 2; Petition for Writ of Prohibition, ¶ 3; Admitted in Respondent's Answer, ¶ 3)

Plaintiffs alleged that assignees of Century, including the 1998-1 Trust, are liable to Plaintiffs who seek recovery of all the allegedly excessive fees and costs, all interest paid on their loans, forfeiture of any additional interest due for the life of their loans, punitive damages and attorneys' fees. (A63-A87, Exhibit 2; Petition for Writ of Prohibition, ¶ 3; Admitted in Respondent's Answer, ¶ 3)

All of the named Plaintiffs' loans originated prior to three years before filing the First Amended Petition. (Petition for Writ of Prohibition, ¶ 2; Admitted in Respondent's Answer, ¶ 2.) The Bakers originated their second mortgage loan from Century Financial on December 8, 1997 ("Baker Loan"). (A73-A74, Exhibit 2 at ¶ 51) The Coxes originated their second mortgage from Century on October 10, 1997 ("Cox Loan"). (A74, Exhibit 2 at ¶ 55) The Springers originated their second mortgage loan from Century Financial on October 22, 1997 ("Springer Loan"). (A75, Exhibit 2 at ¶ 59)

On November 15, 2002, the 1998-1 Trust moved for summary judgment in accordance with Rule 74.04 of the Missouri Supreme Court Rules, based on the passing of the three-year statute of limitations for actions upon a statute for a penalty or forfeiture where the action is given to the party aggrieved, §516.130(2), RSMo 2000. (A88-A92, Exhibit 3; Petition for Writ of Prohibition, ¶ 4; Admitted in Respondent's Answer, ¶ 4)

Plaintiffs filed their opposition to the 1998-1 Trust's motion on December 17, 2002 and argued that the applicable statute of limitations was § 516.420, which provides for a six-year limitations period for suits to recover a penalty or forfeiture from "moneyed corporations." (A93-A111, Exhibit 4; Petition for Writ of Prohibition, ¶ 4; Admitted in Respondent's Answer, ¶ 4)

The 1998-1 Trust is an unincorporated Delaware business trust created under a Trust Agreement dated February 1, 1998, by and among Bear Stearns Asset Backed Securities, Inc., Wilmington Trust Company, and the Bank of New York. (A112-A113, Exhibit 5 at ¶¶ 3-5) Plaintiffs do not dispute that the 1998-1 Trust is a Delaware business trust and that the 1998-1 Trust is not a bank. (Petition for Writ of Prohibition, ¶ 6; Admitted in Respondent's Answer, ¶ 6) The powers of the 1998-1 Trust are significantly limited by the Trust Agreement under which it was created. Those powers do not include banking powers or the power to make loans upon pledges or deposits. (A113-A114, Exhibit 5 at ¶¶ 10-12) The 1998-1 Trust also is not authorized to issue insurance. (A113-A114, Exhibit 5 at ¶¶ 10-12)

The parties do not dispute that Century originated loans secured by Missouri real estate. (Petition for Writ of Prohibition, ¶ 9; Admitted in Respondent's Answer, ¶ 9)

However, there is no evidence that Century has banking powers or the power to make loans upon pledges or deposits or is authorized to issue insurance. (A93-A111, Exhibit 4)

Respondent, the Honorable David W. Russell, Judge for the Circuit Court of Clay County, denied the 1998-1 Trust's motion for summary judgment on December 19, 2002 and decided that the 1998-1 Trust is a moneyed corporation and therefore the six-year statute of limitations rather than the three-year statute of limitations applied. (A142, Exhibit 6 at page 21:22; A144, Exhibit 6 at page 23:24) Respondent stated that "the bottom line purpose of all of these companies is to handle money by loans. . . ." (A142, Exhibit 6 at page 21:11-13)

After the Circuit Court denied the 1998-1 Trust's motion for summary judgment, the 1998-1 Trust sought a writ of prohibition and/or mandamus from the Western District of the Court of Appeals on January 17, 2003. On January 21, 2003, the Western District of the Court of Appeals denied the petition. (A147, Exhibit 7; Petition for Writ of Prohibition, ¶ 11; Admitted in Respondent's Answer, ¶ 11) On March 4, 2003, this Court issued a preliminary writ of prohibition.

POINTS RELIED ON

First Point:

Relator Master Financial Asset Securitization Trust 1998-1 is entitled to an order prohibiting Respondent from acting in excess of jurisdiction and to refrain from any further proceedings in the Underlying Action other than to enter summary judgment in favor of Relator, or alternatively a writ of mandamus ordering Respondent to enter judgment in favor of Relator, because there was no basis to apply the six-year statute of limitations under §516.420, RSMo 2000, in that: (a) Relator is not a “moneyed corporation”; (b) the statute of limitations applicable to Relator is three years under § 516.130(2), RSMo 2000; and (c) there is no basis for “derivatively” applying the six-year statute of limitations to Relator because Relator is entitled to have the claims against it governed by its own statute of limitations and because Century Financial is not a “moneyed corporation.”

State ex rel. Noranda Aluminum, Inc. v. Rains

706 S.W.2d 861 (Mo. 1986);

Division of Labor Standards v. Walton Construction Management Co., Inc.

984 S.W. 2d 152 (Mo. App. W.D. 1999);

Nolan v. Kolar

629 S.W.2d 661 (Mo. App. E. D. 1982);

Sansone v. Sansone

586 S.W.2d 87(Mo. App. E.D. 1979).

§ 408.231, RSMo. 2000, *et. seq.*

§ 516.130(2), RSMo. 2000

§ 516.420, RSMo. 2000

Second Point:

Relator Master Financial Asset Securitization Trust 1998-1 is entitled to an order prohibiting Respondent from acting in excess of jurisdiction and to refrain from any further proceedings in the Underlying Action other than to enter summary judgment in favor of Relator, or alternatively a writ of mandamus ordering Respondent to enter judgment in favor of Relator, because Plaintiffs' claims are barred by the three-year statute of limitations under § 516.130(2), RSMo 2000, in that: (a) Plaintiffs' time-barred claims are not saved by the doctrine of tolling; (b) Plaintiffs' time-barred claims are not saved by the relation back doctrine; (c) Plaintiffs' claims are not continuing violations; and (d) the five-year statute of limitations under § 516.130 RSMo does not apply because the applicable statute of limitations is § 516.130(2).

Division of Labor Standards v. Walton Construction Management Co., Inc.

984 S.W. 2d 152 (Mo. App. W.D. 1999)

Chevalier v. Baird Sav. Ass'n

72 F.R.D. 140 (D.C. Pa. 1976)

Goodkin v. 8182 Maryland Associates Ltd. Partnership

80 S.W.3d 484 (Mo. App. E.D. 2002)

Miller v. Pacific Shore Funding

224 F. Supp. 2d 977 (D. Md. 2002)

§ 408.231, RSMo 2000, *et seq.*

§ 516.120(2), RSMo 2000

§ 516.130(2), RSMo 2000

§ 516.420, RSMo 2000

Mo. R. Civ. P. 55.33(c)

ARGUMENT

First Point Relied On: Relator Master Financial Asset Securitization Trust 1998-1 is entitled to an order prohibiting Respondent from acting in excess of jurisdiction and to refrain from any further proceedings in the Underlying Action other than to enter summary judgment in favor of Relator, or alternatively a writ of mandamus ordering Respondent to enter judgment in favor of Relator, because there was no basis to apply the six-year statute of limitations under § 516.420 RSMo 2000, in that: (a) Relator is not a “moneyed corporation”; (b) the statute of limitations applicable to Relator is three years under § 516.130(2), RSMo 2000; and (c) there is no basis for “derivatively” applying the six-year statute of limitations to Relator because Relator is entitled to have the claims against it governed by its own statute of limitations and because Century Financial is not a “moneyed corporation.”

A. Prohibition is the Appropriate Remedy for Improper Denial of Motion for Summary Judgment.

A writ is appropriate where necessary to serve “the orderly and economical administration of justice,” where, for example, there is “no adequate remedy by appeal.” *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862 (Mo. 1986). Specifically, a writ is appropriate where there is an important question of law decided erroneously that would otherwise escape review by the appellate courts, and would cause the aggrieved party considerable hardship and expense as a consequence. *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. 1994) (prohibition allowed to address

whether discovery is available in contempt proceedings); *State ex rel. Richardson v. Randall*, 660 S.W.2d 699, 701 (Mo. 1983) (writ appropriate where some “absolute irreparable harm may come to the litigant if some spirit of justifiable relief is not made available to respond to a trial court’s order.”). *See also Ferrelgas, L.P. v. Williamson*, 24 S.W.3d 171, 175 (Mo. App. W.D. 2000); *State ex rel. R.P. v. Rosen*, 966 S.W.2d 292, 295-96 (Mo.App. W.D. 1998).

Even Judge Russell recognized the importance of deciding this issue at the appellate level and took the unusual step of inviting the parties to seek a writ on the issue, saying:

I’m concerned about the future of all this litigation and where it’s going to go, and then are we going to come way back to the original starting point of what statute of limitations applies two or three years down the line?

* * * * *

I’d like to figure out how to resolve it. I’ll throw myself on the sword if necessary and say, “writ me, please.” Let’s do something to figure out, if we can, [how] to be able to resolve this at an earlier stage . . . I would like to save a lot of time and money, if possible, for one side or the other.

(A135, Exhibit 6 at page 14:21-25; A144, Exhibit 6 at page 23:1-4, 20-21)

For the foregoing reasons, a writ is appropriate because if the Circuit Court is wrong, and a three-year statute of limitations applies to claims against the 1998-1 Trust, the 1998-1 Trust would be dismissed entirely from the case. Without relief, the 1998-1 Trust will be forced to defend a multi-faceted class action that may well involve over 300

depositions (as there will need to be inquiry into each class member's loan transactions) in addition to motion practice and preparation for what promises to be a lengthy trial. Even if the 1998-1 Trust is ultimately vindicated on the limitations issue, without a writ, relief will come only after enormous resources have been expended. Reviewing the Circuit Court's decision now will save the resources of everyone involved and will ensure the "orderly and economical administration of justice." *See State ex rel. Noranda Aluminum*, 706 S.W.2d at 862.

For these reasons, it is not uncommon for a court to issue a writ of prohibition to review a trial court's decision regarding whether the statute of limitations has run against a particular defendant. For example, in *State ex rel. Hilker v. Sweeney*, 877 S.W.2d 624, 628 (Mo. 1994), the Supreme Court issued a preliminary writ (ultimately made absolute) to review the trial court's decision to allow a plaintiff to amend his complaint to include untimely claims. *See also State ex rel. National Supermarkets, Inc. v. Dowd*, 1 S.W.3d 595 (Mo. App. E.D. 1999) (holding that plaintiff's workers compensation claims had expired and remanding the case to the trial court for the issuance of a permanent writ). Because a writ of prohibition was proper in *Dowd* and *Sweeney*, cases involving individual litigation and a relatively small amount of money, it is certainly appropriate in this class action case.

In short, a writ is necessary in this case to ensure the orderly and economical administration of justice and to prevent the 1998-1 Trust from undergoing inappropriate hardship and expense.

B. The Court Erred in Holding that the Claims Against the 1998-1 Trust Are Governed by a Six-Year Statute of Limitations.

1. The Statute of Limitations Applicable to Plaintiffs' Claims is Three Years.

All parties agree that Plaintiffs' claims, which arise under the Second Mortgage Loan Act ("SMLA"), §408.231, RSMo, are claims based upon a statute for forfeiture. (A63-A87, Exhibit 2.) The principal relief sought is the forfeiture of all interest paid and to be paid for the remainder of the life of the loans. *Id.* at §408.236. Because each Plaintiffs' sole cause of action is a statutory claim for a penalty or forfeiture under the SMLA, it is governed by the three-year statute of limitations contained in §516.130(2), RSMo 2000:

516.130. What actions within three years, –

(2) An 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.

Plaintiffs' claims in the Underlying Action fall squarely within § 516.130(2). First, the only claim alleged in the Second Amended Petition constitutes an "action upon a statute" under § 516.130(2), as it alleges statutory violations of Missouri's Second Mortgage Loan Act. (A64, Exhibit 2 at ¶² and A75 ("COUNT 1 (Class Action for Violations of Missouri's Second Loans Act (sic)))).

²Second Amended Petition at ¶ 2:

Second, the claim constitutes an action “for a penalty or forfeiture” under § 516.130(2) because the remedies sought by Plaintiffs include the forfeiture of all past and future interest on their loans (§ 408.236, RSMo 2000), as well as other damages, penalties, and attorneys’ fees (§ 408.562, RSMo 2000). (A80-A81, Exhibit 2 at ¶¶ 80-83.) In *Julian v. Burrus*, 600 S.W.2d 133, 141 (Mo. App. W.D. 1980), the Missouri Court of Appeals held that § 516.130(2) applied to an action under a then-existing Missouri usury statute which provided that the prevailing plaintiff was entitled to return of usurious interest. The court reasoned that the interest forfeiture provision brought the action within the three-year statute of limitation of § 516.130(2) because, “whether that is termed a penalty or forfeiture, it deprives them of their business bargain.” *Id.* The court further determined that the provision in the statute for mandatory attorneys’ fees, constituted a statutory penalty. *Id.* at 141-42. Clearly the SMLA, which Plaintiffs have argued provides not only for the return of improper fees and costs, but also for the forfeiture of *all* interest collected on each affected loan, as well as attorneys’ fees, constitutes an action for penalty or forfeiture.

Finally, the SMLA specifically provides that an action may be brought by “any person who suffers any loss of money or property as a result of any act, method or

This action seeks redress on behalf of the plaintiffs . . . for violations of Missouri’s Second Mortgage Loans Act (§ 408.231 *et seq.*, Mo.Rev.Stat.), including claims for injunctive relief.

practice in violation of the provisions” of the SMLA. *See* § 408.562, RSMo 2000. Thus, the statute plainly allows an action to be brought by the “party aggrieved,” *i.e.*, the borrower. The fact that Plaintiffs have asserted a claim under the SMLA implicitly waives any argument to the contrary. In short, Plaintiffs’ sole cause of action falls squarely within the three-year statute of limitations mandated by § 516.130(2).

2. The Six-Year Statute of Limitations Set Forth in § 516.420 RSMo 2000 Does *Not* Apply Because the 1998-1 Trust is Not a “Moneyed Corporation.”

The Circuit Court, ignoring the legal definition of a “moneyed corporation,” incorrectly found that the 1998-1 Trust is a “moneyed corporation” because “the bottom line purpose of all these companies is to handle money” and ruled that the statutory claims against the 1998-1 Trust are governed by the six-year limitations period set forth in § 516.420. (A142, Exhibit 6 at page 21:11-13; A143, Exhibit 6 at page 22:15-18)

Section 516.420 is an exception to the statute of limitations for penal actions³ that applies a six-year statute of limitations only to “suits against *moneyed corporations*” or against the directors or stockholders thereof. § 516.420, RSMo⁴ (emphasis added).

³The case at hand is not a penal action. In *Tabor v. Ford*, 240 S.W.2d 737, 740 (Mo. App. 1951), the court of appeals found that “if a statute imposes a penalty or forfeiture which accrues to the party aggrieved, to be recovered by private action . . . it is remedial and not penal.” Moreover, even if this Court finds the SMLA to be penal, rather

a. **Definition of a “Moneyed Corporation.”**

Though not defined by statute, the Missouri Court of Appeals defined the term “moneyed corporation” to mean a “*corporation* having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurance.” *Division of Labor Standards v. Walton Construction Management Co., Inc.*, 984 S.W.2d 152, 156 (Mo. App. W.D. 1999) (emphasis added).

The *Walton* court took great care in defining “moneyed corporation.” Prior to *Walton*, no Missouri statute or case defined “moneyed corporation.” The court found that § 516.420 first appeared in the 1865 General Statutes of Missouri and was virtually

than civil or remedial, the applicable statute of limitations would still be three years as set forth in § 516.400, which parallels § 516.130(2) in establishing that:

All actions upon any statute for any penalty or forfeiture, given in whole or in part to the party aggrieved, shall be commenced within three years after the commission of the offense, and not after.

⁴Section 516.400 applies a three-year limitations period to “actions upon any statute for any penalty or forfeiture, given in whole or part to the party aggrieved.” Section 516.420 is an exception to this statute of limitations, and not to Section 515.130(2). The Trust maintains that Section 516.400 and its exception do not apply in this case because this is not a penal action. *See footnote 3.*

identical to a contemporaneous New York statute.⁵ *Id.* at 154-55. Therefore, the *Walton* Court looked to New York law for the definition of “moneyed corporation” since:

It is a rule of law that when a statute is borrowed from another state the decisions of the state from which the statute is borrowed, interpreting such statute, are borrowed also. For it is presumed that the legislature adopting the statute of a sister state knew of the interpretation placed upon the statute by the courts of such sister state, and intended that a like interpretation should be put upon the statute after it became a part of the laws of the adopting state.

Id. at 155.

The definition of “moneyed corporation” must be strictly construed because “statutes of limitations are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within a claimed exception.” *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. banc 1995).

Instead of applying the three elements of the “moneyed corporation” definition, Respondent ignored the specific definition and instead generically concluded that the 1998-1 Trust was a “moneyed corporation,” stating:

[w]hen I’m looking at something as a moneyed or non-moneyed corporation so I can distinguish between the three and six-year statute of limitations, I look at it in terms of what’s the real purpose of the defendant

⁵In 1865, § 516.420 was referred to as Chapter 190, Section 10.

in this case, the business I'm dealing with... We can deal with a lot of technicalities on whether or not there's a word in the statute that fits into their purpose . . .

* * * * *

The bottom line purpose of all of these companies is to handle money... Thus I think that they're a moneyed corporation.

(A141, Exhibit 6 at page 20:15-19, A142, Exhibit 6 at page 21:3-5, 11-13.)

Respondent's conclusion that the 1998-1 Trust is a "moneyed corporation" clearly disregarded the definition of a "moneyed corporation."

b. The Relator Trust is Not a "Moneyed Corporation" -- It is Not Even a Corporation at All.

First, and most obviously, the 1998-1 Trust is not a "moneyed corporation" because it is not even a corporation at all. There is no dispute that the 1998-1 Trust is a Delaware business trust. (Petition for Writ of Prohibition, ¶ 6; Admitted in Respondent's Answer, ¶ 6.) Under the Delaware Business Trust Statute, 12 Del. Code § 3801, *et seq.*, a "business trust" is "an *unincorporated* association which is created by a governing instrument under which property is or will be held . . ." 12 Del. Code § 3801(a) (emphasis added). Because the 1998-1 Trust is not a corporation, it cannot possibly be a "moneyed corporation" as that term is clearly defined under Missouri law.

Plaintiffs argue that the fact that the 1998-1 Trust is a trust and not a "corporation" is a form over substance argument directly contrary to Article XI, § 1 of the Missouri

Constitution.⁶ (A93-A111, Exhibit 4.) This argument is raised for the first time in the Answer of Respondent to Petition for Writ of Prohibition and in the Suggestions in Opposition to Petition for Writ of Prohibition.⁷ Regardless, this argument is flawed since trusts and corporations are separate and distinct entities. Regardless, this argument is not persuasive since trusts and corporations are treated as separate entities. *E.g. Hecht v. Malley*, 265 U.S. 144, 146-47 (1924).⁸

Statutory words have specific meaning. In Missouri, the rules of statutory construction provide that “[e]ach word, clause, sentence and section of a statute should be given meaning.” *Hadlock v. Director of Revenue*, 860 S.W.2d 335, 337 (Mo. banc 1993). Likewise, the Court “cannot resort to canons of construction to add words to the statute

⁶Article XI, Section 1: “The term ‘corporation,’ *as used in this article*, shall be construed to include all joint stock companies or associations having any powers or privileges not possessed by individuals or partnerships.” (emphasis added).

⁷Since Plaintiffs did not make this argument to the trial court, it is not appropriately first raised here. *E.g., State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 129 (Mo. 2000) (an issue that was never presented to or decided by the trial court is not preserved for appellate review).

⁸The 1998-1 Trust is legal entity created under the specific provisions of the Delaware Business Trust. By definition it cannot be incorporated. 12 Del. Code § 3801(a). Further, Missouri Statutes have specific provision governing the incorporation that cannot be disregarded. *See* Chapter 351 of the Missouri Revised Statutes.

which are not there.” *Ryder Student Transportation Services, Inc. v. Director of Revenue*, 896 S.W.2d 633 (Mo. banc 1995) (sales tax imposed on sales of “tickets” by bus operators did not extend to all charges for bus rides including chartered rides). Further, the rules of statutory construction provide that the “express mention of one thing implies the exclusion of another.” *Bridges v. Van Enterprises*, 992 S.W.2d 322, 325 (Mo. App. S.D. 1999) (recovery for “death and loss thus occasioned” did not include pre-death loss of consortium claim when not specifically included in the wrongful death statute).

The Legislature specifically limited the application of §516.420 to “moneyed corporations.” Following the rules of statutory construction, the Court cannot expand the term “corporation” to also include a “trust.” Business trusts have been recognized for nearly a century, *e.g.*, *Hecht v. Malley*, 265 U.S. 144, 146-47 (1924), and if the Legislature intended §516.240 to apply to “moneyed corporations, *business trusts or other associations*,” it would have specifically included them in the statute. *E.g.*, *Forest City Manufacturing Co. v. International Ladies’ Garment Workers Union Local No. 104*, 111 S.W.2d 934, 939 (Mo. App. 1938) (since the legislature did not designate associations as suable entities, the “only fair implication” is that the legislature did not intend them to be”). *See also, e.g.*, *Bryan v. Pogue*, 18 S.W.2d 529, 532 (Mo. App. W.D. 2000).

c. **Even if the 1998-1 Trust were a Corporation, it is Not One With Banking Powers or Having the Power to Make Loans Upon**

**Pledges or Deposits Nor is it Authorized to Issue Insurance, and
is Therefore Not a “Moneyed Corporation.”**

Even if the 1998-1 Trust were deemed to be a corporation, it is not a “corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurance.” *Division of Labor Standards v. Walton Construction Management Co., Inc.*, 984 S.W.2d at 156.

Under the Delaware Business Trust Statute, which is the statutory authority under which the 1998-1 Trust was created, a “business trust” is bound by the terms of its governing instrument.⁹ 12 Del.Code § 3801(f). The governing instrument may consist of:

1 or more agreements, instruments or other writings and may include or incorporate bylaws containing provisions relating to the business of the statutory trust, the conduct of its affairs and its rights or powers or the rights or powers of its trustees, beneficial owners, agents or employees.

12 Del. Code § 3801(f)(1)

The 1998-1 Trust was formed and created under a Trust Agreement dated February 1, 1998, by and among Bear Stearns Asset Backed Securities, Inc., Wilmington

⁹12 Del. Code § 3801(f) provides that: “Governing instrument” means any instrument (whether referred to as a trust agreement, declaration of trust or otherwise) which creates a statutory trust or provides for the governance of the affairs of the statutory trust and the conduct of its business.

Trust Company, and the Bank of New York. (A112-A113, Exhibit 5 at ¶ 3) The Trust Agreement sets forth very specific powers. (A113-A114, Exhibit 5 at ¶10-12) The 1998-1 Trust is bound by the terms of the Trust Agreement and the powers delineated therein. (A113-A114, Exhibit 5 at ¶ ¶ 10-12)

i. The 1998-1 Trust Does Not Have Banking Powers.

It is undisputed that the 1998-1 Trust is not a bank. (Petition for Writ of Prohibition ¶ 6; Admitted in Respondent's Answer ¶ 6) Further, the 1998-1 Trust does not possess "banking powers." (A113-A114, Exhibit 5 at ¶ ¶ 10-12) The Circuit Court stated that the 1998-1 Trust is a "moneyed corporation" because "the bottom line purpose of all of these companies is to handle money and to handle money by loans" (A142, Exhibit 6 at p. 21:11-13) However, the definition of "moneyed corporation" is clear. It is not simply about "making loans" or "handling money"-- a "moneyed corporation" is a corporation with the power to make loans upon pledges or deposits, or having banking powers.

Plaintiffs and the Circuit Court apparently reason that holding mortgages amounts to banking powers. In fact, Plaintiffs expand the statutory definition to "banking type powers" and argue that the 1998-1's power to collect principal and interest and fees on mortgages is a "banking type power." (Respondent's Answer to Writ of Prohibition, page 5, ¶ C) If that were so, *all* corporations would have banking powers because Missouri law authorizes *any* corporation to loan money secured by real estate. *See* § 351.385, RSMo 2000 ("*Each corporation shall have power . . . (8) to invest its surplus funds . . . and to lend money and take and hold real . . . property as security for the*

payment of funds so invested or loaned”) (emphasis added). Plainly, as this Court held in *Walton Construction*, it was not the Legislature’s intent that *every* for-profit corporation be considered a moneyed corporation; if it were, the Legislature would have said so. *Walton Construction*, 984 S.W.2d at 156.

A more reasonable interpretation is that “banking powers” refers to corporations that are subject to Missouri’s laws or federal laws governing banks. For example, New York – the state from which Missouri borrowed the definition of moneyed corporation – codified its definition of moneyed corporation as “a corporation to which the banking law or the insurance law is made applicable by the provisions of such laws.” N.Y. Gen. Const. Law §66(9). *See also Hartford Accident & Indemnity Co. v. Peat, Marwick, Mitchell & Co.*, 494 N.Y.S.2d 821, 823 (N.Y. Sup. 1985) (applying definition from § 66(9).)¹⁰ Since the 1998-1 Trust is not a bank, it is not subject to laws governing banks.

¹⁰In *Retailers Collateral Security Trading Corp. v. State of New York*, 176 N.Y.S.2d 429 (App. Div. 1958), plaintiff wanted to change its name to include the word “finance,” but the Secretary of State would not approve the change because New York law provided that only moneyed corporations could use the word “finance” in their names. The Appellate Division affirmed the Secretary of State, holding that a moneyed corporation was a corporation “subject to the banking laws,” and even though plaintiff made loans, it was not “subject to the Banking Law to the same degree that organizations formed thereunder are,” and so it did not qualify as a moneyed corporation. *Id.* at 430-31.

ii. **The 1998-1 Trust Does Not Make Loans Upon Pledges or Deposits.**

Although the 1998-1 Trust *acquired* mortgage loans on real estate, the record clearly established that it does not “*make* loans” – let alone make “loans *upon pledges or deposits.*”¹¹ (A113-A114, Exhibit 5 at ¶¶ 10-13.) There is neither an allegation nor evidence that the 1998-1 Trust accepts or makes loans upon deposits. (A93-A111, Exhibit 4.) A mortgage -- a security interest in real estate -- is clearly distinct from a pledge, which is a possessory security interest in personal or intangible property. *E.g.*, *Sansone v. Sansone*, 586 S.W.2d 87, 89-90 (Mo. App. E.D. 1979). Moreover, the 1998-1 Trust does not “make” mortgages – it has only *acquired* them. (A113-A114, Exhibit 5 at ¶¶ 10-13)

¹¹Plaintiffs relied in the Circuit Court on *Fielder v. Credit Acceptance Corp.*, 19 F. Supp. 2d 966 (W.D. Mo. 1998) as authority for the proposition that the six-year statute properly applied. However, *Fielder* is distinguishable in that the lender there – an auto finance company that loaned on car titles – was clearly engaged in “lending...upon pledges.” The same is true of the other case on which plaintiffs relied in the Circuit Court, *Hobbs v. National Bank of Commerce*, 96 F. 396, 398 (2d Cir. 1899), in which the court noted that the lender in that case “had power to make loans upon pledges or deposits,” thus fitting within the definition of a moneyed corporation.

iii. The 1998-1 Trust is Not Authorized by Law to Make Insurance.

Finally, there is no evidence on the record that the 1998-1 Trust is authorized by law to make insurance. (A113-A114, Exhibit 5 at ¶¶ 10-12; A93-A111, Exhibit 4.)

For the reasons stated above, the 1998-1 Trust does not fall within the definition of a “moneyed corporation.” As such, the Circuit Court erred in holding that the six-year statute of limitations applies to Plaintiffs’ claims against the 1998-1 Trust. A writ is appropriate.

C. There is No Basis for “Derivatively” Applying the Six-year Statute of Limitations to the 1998-1 Trust.

It is unclear whether the Circuit Court adopted the “derivative” argument advanced by Plaintiffs, which purports to hold the 1998-1 Trust to the same statute of limitations applicable to the originating lender, Century Financial. While not explicitly adopting this derivative argument, the Circuit Court stated that “this is almost like one entity. Century, Master, trusts, whatever it might be.” (A134, Exhibit 6 at page 13:13-15.) To the extent the Circuit Court’s ruling was based upon this “derivative” argument, it too is wrong.¹²

¹²The Trust also takes exception to the Circuit Court’s characterization of the separate defendants as “almost like one entity.” There is no question that the Trust is a separate and distinct legal entity from all of the other defendants. The Trust simply cannot be deemed to be “almost like one entity” with Century Financial simply by virtue of its

In support of their “derivative liability” theory, Plaintiffs cite the Home Owners Equity Protection Act (HOEPA), 15 U.S.C. §1641(d)(1). However, HOEPA does not determine the statute of limitations in state law claims. While HOEPA provides that an assignee of a HOEPA mortgage is “subject to all claims and defenses with respect to that mortgage that the consumer could assert against creditor of the mortgage,” Plaintiffs’ reliance on HOEPA in this context is misplaced. 15 U.S.C. § 1641(d)(1). The quoted language says nothing about what statute of limitations applies to claims against an assignee in state court – and in fact, under HOEPA, the applicable statute of limitations is *one* year. 15 U.S.C. § 1640(e).

Furthermore, HOEPA does not create a “derivative liability” under state law. In *Dash v. FirstPlus Home Loan Trust 1996-2*, 2003 WL 1038355, *10 and n. 13 (M.D.N.C. 2003), the court rejected plaintiffs’ argument that assignees are liable under state law for loan originator’s illegal acts under HOEPA. The court determined that “[HOEPA] is not intended to bestow any rights upon the borrower nor constitute an independent basis of liability.” *Id.* (citing *In re Rodrigues*, 278 B.R. 683, 688 (Bankr.D.R.I.2002); *Vanderbroeck v. Contimortgage Corp. and Greentree Fin. Servicing Corp.*, 53 F. Supp. 2d 965, 968 (W.D. Mich. 1999); *In re Murray*, 239 B.R. 728, 733 (Bankr. D.R.I. 2002)). Instead, HOEPA merely eliminates the holder in due course defense that may be asserted under state law. *Id.*

having acquired second mortgage loans, some of which happened to have been originated by Century Financial.

Regardless of the validity of their theory, Plaintiffs are judicially estopped from relying on HOEPA to create derivative liability, because they affirmatively *denied* making any claim against assignee defendants based on HOEPA in successfully moving to remand this case to State Court. Under the doctrine of judicial estoppel, parties are prevented “from taking a position in one judicial proceeding thereby obtaining benefits from that position in that instance and later, in a second proceeding, taking a contrary position in order to obtain benefits from such a contrary position at that time.” *Shockley v. Division of Child Support*, 980 S.W.2d 173, 175 (Mo. App. E.D. 1998). *See also St. Louis Public Service Company v. City of St. Louis*, 302 S.W.2d 875 (Mo. 1957).

Specifically, when Defendants removed the underlying case to federal court because of HOEPA preemption, Plaintiffs moved to remand, arguing:

the Bakers are not asserting any claim under, and do not even mention [HOEPA] in their amended petition. Although the Bakers do reference and discuss the statute and its purpose and history in detail in their motion for leave to amend, the Bakers’ motion, like the amended petition, singularly indicates that [HOEPA] is not an element, substantial or otherwise, to the Bakers’ state law claims, but serves only to do away with the holder in due course defense . . .

(A 158) Having successfully disclaimed affirmative reliance on HOEPA, Plaintiffs cannot now use it to derivatively subject the 1998-1 Trust to the “moneyed corporations” statute of limitations under Missouri law.¹³

In further support of its “derivative liability” theory, Plaintiffs argue that a defendant derivatively liable for another’s acts should be regarded as the same entity for statute of limitations purposes. *Miller v. Pacific Shore Funding*, 224 F. Supp. 2d 977, 996-97 (D. Md. 2002). Plaintiffs’ reliance on *Miller* is misplaced. While the Court held that under Maryland law, SMLA claims against a mortgage company were barred by the general state statute of limitations and, therefore, so were the claims against the assignee of the mortgage, there was no argument that any defendant was covered by a special or different statute of limitations. *Id.* at 985. The *Miller* holding does not prove the

¹³None of the cases cited below by Plaintiffs hold that an assignee that acquires a mortgage is subject to the same statute of limitations as the originating lender. *Bryant v. Mortgage Capital Resource Corp.*, 197 F. Supp. 2d 1357, 1364-65 (N.D. Ga. 2002), merely holds that consumers had a right under HOEPA to assert claims against an assignee based on the mortgage lender’s violation of state law. *Cooper v. First Government Mtge. & Inv. Corp.*, 2002 WL 31520158 (D.D.C. 2002) simply recited the language from HOEPA quoted above. Neither *Bryant* nor *Cooper* are about the statute of limitations.

converse, i.e., that if the claims against the mortgage company were not time-barred, neither would the claims against the assignees.¹⁴ *Id.*

1. The 1998-1 Trust is Entitled to Have the Claims Against It Governed by Its Own Statute of Limitations.

To the extent the Circuit Court's holding is based upon the "derivative" theory, *i.e.*, that the 1998-1 Trust is automatically subject to the same statute of limitations as the

¹⁴This Underlying Action is distinguishable from the other cases cited below by Plaintiffs in an attempt to support its derivative liability theory based upon "alter ego" liability. There is no evidence that the 1998-1 Trust is the alter ego of Century. Plaintiffs have not alleged *any* relationship between Century and the 1998-1 Trust other than sale of loans, let alone any common ownership or control or parent-subsiary relationship.

In *National Labor Relations Board v. O'Neill*, 965 F.2d 1522, 1529-1530 (9th Cir. 1992), the defendants were an individual and his inter-related companies created in an attempt to circumvent union obligations. There was no argument that any defendant was covered by a special or different statute of limitations. In *Wm. Passalacqua Builders v. Resnick Developers South*, 933 F.2d 131 (2nd Cir.1991), the defendants were corporate entities controlled entirely by family members or other corporations controlled entirely by them. Finally, in *Livingstone v. Dept. of Treasury*, 456 N.W.2d 684, 780 (Mich. 1990), the corporate officer was derivatively liable for the corporations taxes under a specific provision of the Use Tax Act.

originating lender, that holding is in error, even if the Circuit Court found Century Financial to be a “moneyed corporation.”

In *Nolan v. Kolar*, 629 S.W.2d 661, 663 (Mo. App. E. D. 1982), the court applied the six-year statute of limitations to statutory claims against a bank, but held that the three-year statute of limitations applied to claims against the individual defendants. *Nolan* clearly stands for the proposition that the Court should separately evaluate the applicable statute of limitations for the claims against each defendant. Doing so in the present case results in the conclusion that the claims against the 1998-1 Trust are governed-- and hence barred -- by the three-year statute, § 516.130(2).

2. The Record Does Not Support Applying the Six-Year Statute of Limitation to the Originating Lender, Century Financial.

Plaintiffs’ derivative theory also fails because the record does not establish that Century is a “moneyed corporation.” In accordance with *Walton Construction*, Century Financial is not a “moneyed corporation.” First, there is no evidence that Century Financial is “authorized to make insurance.” (A93-A111, Exhibit 4) Second, although Century Financial made mortgage loans on real estate, there is neither an allegation nor evidence that Century Financial accepts or makes loans “upon deposits or pledges.” (A93-A111, Exhibit 4) Third, there is no evidence that Century Financial has “banking powers.” (A93-A111, Exhibit 4) Again, Plaintiffs argued that because Century Financial can make loans upon real estate, and banks can make loans upon real estate, Century Financial has “banking-type powers” and is, therefore, a “moneyed corporation.” As explained above, this analysis makes no sense, and the more accurate interpretation is

that the “banking powers” reference is to corporations that are subject to Missouri’s laws governing banks.

In short, it is clear that the record failed to establish that either Century Financial, which is alleged to be a mortgage company, or the 1998-1 Trust, which does not make loans of any sort, is a “moneyed corporation.” Therefore, the Circuit Court erred in applying the six-year statute of limitations in the underlying action, and a writ should issue to prohibit the Circuit Court from further exercising jurisdiction over the 1998-1 Trust.

There is no basis for Plaintiffs’ novel argument about a “derivative” statute of limitations. Even if the claims against Century Financial are not time-barred, the 1998-1 Trust is subject to its own limitations period, which ran long before plaintiffs added the 1998-1 Trust as a defendant. The Circuit Court erred in applying the same statute of limitations to the claims against the 1998-1 Trust.

Second Point Relied On: Relator Master Financial Asset Securitization Trust
1998-1 is entitled to an order prohibiting Respondent from acting in excess of jurisdiction and to refrain from any further proceedings in the Underlying Action other than to enter summary judgment in favor of Relator, or alternatively a writ of mandamus ordering Respondent to enter judgment in favor of Relator, because Plaintiffs’ claims are barred by the three-year statute of limitations under § 516.130(2), RSMo 2000, in that: (a) Plaintiffs’ time-barred claims are not saved by the doctrine of tolling; (b) Plaintiffs’ time-barred claims are not saved by the relation back doctrine; (c) Plaintiffs’ claims are not continuing violations; and

(d) the five-year statute of limitations under § 516.130, RSMo does not apply because the applicable statute of limitations is § 516.130(2).

A. Plaintiffs' Time-Barred Claims are Not Saved by the Doctrine of Tolling.

In an attempt to defeat the 1998-1 Trust's motion for summary judgment, Plaintiffs argued that the limitations period was tolled by the filing of the original Petition. This argument has no merit.

Although "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action," *American Pipe and Constr. Co. v. Utah*, 415 U.S. 952 (1974), that tolling doctrine applies *only* to claims against the parties named as defendants in the original petition:

[T]his tolling doctrine can only be applied to defendants as of the time they were added as party defendants in one of the complaints filed by plaintiffs. *Thus, for example, we hold that the statute of limitations was not tolled for mortgagors of [originator] until it was added as a defendant* in the second amended complaint . . . Otherwise, defendants would be required to defend against actions of which they had no knowledge whatsoever until after the statute of limitations had run.

Chevalier v. Baird Sav. Ass'n, 72 F.R.D. 140, 155 (D.C. Pa. 1976) (emphasis added)¹⁵

Therefore, the mere filing of the original Petition by the Bakers cannot toll claims against the 1998-1 Trust, which was not named as a defendant until the First Amended Petition was filed on July 11, 2001. (A1 -A62, Exhibit 1.)

B. Plaintiffs' Time-Barred Claims are Not Saved by the Doctrine of Relation Back.

Plaintiffs also attempt to argue that their claims against Relators relate back to the original filing date. (Suggestions in Opposition to Petition for Writ of Prohibition, pages 34-36.) It is noted that Plaintiffs failed to raise this argument to the trial court *and* have presented additional evidence that was not part of the trial court's record and was filed

¹⁵In *Appleton Electric Co. v. Graves Truck Line, Inc.*, 635 F.2d 603, 610 (7th Cir. 1980), the court addressed a different question – whether the statute of limitations was tolled where a class of defendants was certified *before* the statute of limitations ran. *See id.* at 4, 12, 16-17 (defendant class certified February 25, 1972 before statute of limitations ran December 21, 1972). That court held that under those circumstances the statute of limitations was tolled from the time the defendant class was instituted until the putative defendant class members had the opportunity to opt out. *Id.* at 16-17. Here, in contrast, the statute of limitations ran years ago and no motion to certify a defendant class has ever been filed.

only as part of the writ proceedings.¹⁶ (A93-A111, Exhibit 4; Suggestions in Opposition to Petition for Writ of Prohibition, pages 34-36 and Exhibits 2, 8, 10, 11 thereto.)

Regardless, under Missouri law, subsequent petitions do not relate back to the filing of the original petition where, as here, they only serve to add additional defendants (as opposed to correcting misidentified parties). MO. R. CIV. P. 55.33(c); *Windscheffel v. Benoit*, 646 S.W.2d 354, 357 (Mo. 1983) (relation back unavailable where plaintiff added new parties); *Goodkin v. 8182 Maryland Associates Ltd. Partnership*, 80 S.W.3d 484, 488-9 (Mo. App. E.D. 2002) (“A mistake in failing to add a party defendant does not trigger relation-back.”); *Hoey v. St. Luke’s Episcopal Presbyterian Hosp.*, 713 S.W.2d 636, 638 (Mo. App. E.D. 1986) (dismissal based on the statute of limitations upheld because addition of new defendant did not relate back).

The fact that Plaintiffs named “John Doe” defendants does not alter the analysis. In *Schultz by Schultz v. Romanace*, 906 S.W.2d 393, 394 (Mo. App. S.D. 1995), the Missouri Court of Appeals specifically rejected plaintiffs’ argument that naming two new defendants was merely a correction of “John/Jane Doe” names in the original petition and that the first amended petition therefore related back to the original. *Id.* at 395-96. The court explained that replacing “John Doe” defendants is not the same as replacing misnamed defendants, but is instead akin to adding new parties. *Id.* Significantly, the court noted that the defendants were not substituted for the “John Doe” defendants as

¹⁶Since Plaintiffs did not make this argument to the trial court, it is not appropriately first raised here. *E.g., State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d at 129.

their names were added with no deletion of the fictitious defendants in the original complaint. *Id.*

The same is true here – Plaintiffs added the 1998-1 Trust as a *new* defendant, not as a replacement for a misnamed defendant. Therefore, Plaintiffs’ claims against the 1998-1 Trust cannot relate back to the filing of the original Petition, and all claims against the 1998-1 Trust are therefore time-barred.

C. Plaintiffs’ Claims are Not Continuing Violations.

Each of the named Plaintiffs has joined in bringing a single cause of action for alleged statutory violations of the SMLA. Specifically, Plaintiffs each allege in the Second Amended Petition at *origination*, Century charged them certain “fees and costs, each of which was an illegal settlement charge, in violation of Missouri’s Second Mortgage Loan Act (§408.231 *et. seq.* MO. REV. STAT.)” (A63-A87, Exhibit 2 at ¶53 (Bakers), ¶57 (Coxes), and ¶61 (Springers.) Plaintiffs argue that their claims are continuing because the 1998-1 Trust continues to “charge” and “receive” the allegedly illegal fees charged to the borrowers at origination.

A claim accrues when the damage resulting from an alleged wrong is “sustained and is capable of ascertainment.” § 516.100, RSMo. The statute of limitations therefore begins to run when the plaintiff could have first maintained the action to a successful result. *Modern Tractor & Supply Co. v. Leo Journagan Constr. Co., Inc.*, 863 S.W.2d 949, 952 (Mo. App. S.D. 1993). Stated differently, the claim accrues when “a plaintiff with a recognized legal theory of recovery sustains compensable damages.” *Goodkin v. 8182 Maryland Assoc. Ltd. Partnership*, 80 S.W.3d 484, 488 (Mo. App. E.D. 2002).

Plaintiffs' reliance on *Davis v. Laclede Gas Co.*, 603 S.W.2d 554 (Mo. banc 1980) is misplaced.¹⁷ While the *Davis* court held that the defendant committed a continuous tort, it specifically limited the rule of law relied on by Plaintiffs to the "peculiar and particular circumstances of this case."¹⁸ Courts have not applied the *Davis* rule of law to

¹⁷Plaintiffs also rely on *Johnson Development Co. v. First National Bank of St. Louis*, 999 S.W.2d 314 (Mo. App. E.D. 1999) which involved multiple forged checks and the UCC statute of limitations. The court held that the statutory one-year period for reporting forged check to bank began to run with each separate forged check. The *Johnson* case does not apply since the Plaintiffs herein are merely alleging that their damages are continuing.

¹⁸Specifically, the Court stated:

We have concluded that the following rule of law should be applied in the peculiar and particular circumstances of this case: if the wrong done is of such a character that it may be said that all of the damages, past and future, are capable of ascertainment in a single action so that the entire damage accrues in the first instance, the statute of limitation begins to run from that time. If, on the other hand, the wrong may be said to continue from day to day, and to create a fresh injury from day to day, and the wrong is capable of being terminated, a right of action exists for the damages suffered within the statutory period immediately preceding suit.

cases where the plaintiff has pled continuing and repeated damages or where the wrong is of such a character that all of that damages, past and future, were capable of ascertainment in a single action. *See Modern Tractor and Supply Company v. Leo Journagan Construction Company, Inc.*, 868 S.W.2d 949, 953 (Mo. App. S.D. 1993); *Lato v. Concord Homes, Inc.*, 659 S.W.2d 593, 595 (Mo. App. E.D. 1983).

In a class action suit involving the Maryland Secondary Mortgage Loan Law, the class representatives presented the continuing violation argument to the United States District Court, District of Maryland. *Miller v. Pacific Shore Funding*, 224 F. Supp. 2d at

9. The District Court rejected the argument stating:

The argument is ingenious, but flawed. The apparently punctuated charging, receipt and collection are no more than the lingering, ongoing, continuing aspects of a unitary action initiated more than three years ago. If, as [plaintiff] alleges, that action violates the SMLL, the violation has inflicted a single monetary injury whose amount increases steadily over time. “The wrong that continues over time,” however, is “different from a wrong which comes into existence or becomes known only after a passage of time.” [citation omitted]....More than three years before filing his suit, at the closing of the loan, [plaintiff] had sufficient knowledge of

Davis v. Laclede Gas Co., 603 S.W.2d at 556. Applying the *Davis* rule to the case at hand, Plaintiffs’ claims are not continuing since all of the damages, past and future, were capable of ascertainment at the loan origination date. *See discussion, infra.*

circumstances indicating he might have been harmed. The allegedly illegal fees were itemized on the face of loan documents he signed on that date. The continuing charging, collecting, and receiving of those fees by the lender or its assignees do not continuously renew the accrual of his cause of action. His claims are time-barred as a matter of law and must, therefore, be dismissed.

Id. See also *Faircloth v. National Home Loan Corp.*, 2003 WL 1232825 at *5-6 (M.D.N.C., March 17, 2003) (rejecting plaintiffs' argument and holding that statute of limitations began to run upon loan closing); *Dash v. FirstPlus Home Loan Trust 1996-2*, 2003 WL 1038355, at n. 10.

Here, the allegedly improper fees and costs and all future damages flowing therefrom were sustained and capable of ascertainment on the date each loan was originated. Plaintiffs acknowledge that the complained-of fees and costs were incurred by each Plaintiff at the moment that they executed their loan documents and agreed to be bound by the terms contained therein:

The [plaintiffs] ***incurred these Origination Fees and closing costs and fees when the loan was funded*** by financing such over the life of the loan, as evidenced by the fact that such charges were included in the principal balance of the note. (A63-A87, Exhibit 2 at ¶ 54 (Bakers), ¶ 58 (Coxes), and ¶ 62 (Springers)) (emphasis added)

In short, Plaintiffs' right to bring suit was triggered by the execution of their respective loan documents at closing, when they actually incurred and were charged the

allegedly improper fees and costs. It is this right to bring an action that triggers the statute of limitations. *Ryan v. Spiegelhalter*, 64 S.W.3d 302, 309 (Mo. banc 2002).

D. The Five-year Statute of Limitations Under § 516.120, RSMo Does Not Apply Because the Applicable Statute of Limitations is § 516.130(2).

As an alternative, Plaintiffs argue that if this Court does not find that the 1998-1 Trust is a “moneyed corporation” or derivatively liable, then the proper statute of limitations is the five-year period under § 516.120(2), RSMo 2000. Section 516.120(2) provides a five-year statute of limitations on “[a]n action upon a liability created by a statute *other than a penalty or forfeiture.*” (emphasis added).

As previously stated, Plaintiffs’ claims, which arise under the SMLA, are claims based upon a statute for forfeiture. (A63-A87, Exhibit 2.) The principal relief sought under the SMLA is the forfeiture of all interest paid and to be paid for the remainder of the life of the loans. § 408.236, RSMo 2000.

The Underlying Action falls outside the scope of §516.120(2) which specifically excludes actions created by a statute for forfeiture. Even though the Plaintiffs seek to recover the forfeiture imposed by the SMLA, this action is not penal. As previously stated in footnote 3, “if a statute imposes a penalty or forfeiture which accrues to the party aggrieved, to be recovered by private action . . . it is remedial and not penal.” *Tabor v. Ford*, 240 S.W.2d 737, 740 (Mo. App. 1951).

The correct statute of limitations is § 516.130(2) which applies to actions upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved.

CONCLUSION

For the reasons stated above, the preliminary writ should be made absolute.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify in accordance with Rule 84.06(c) that this brief complies with the limitations in Rule 84.06(b), and that the number of words in this brief, as counted by the word-processing system used to prepare the brief, is 10,746.

I further certify in accordance with Rule 84.06(g) that the floppy disk submitted with this brief has been scanned for viruses and is virus-free.

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