

ONE MUST HAVE SIGNED THE PROMISSORY NOTE NOT JUST THE MORTGAGE IN ORDER TO SUE UNDER RESPA

RESPA creates a cause of action but says only “borrower[s]” can use it. 12 U.S.C. § 2605(f). Accordingly, the Sixth Circuit joins the Fifth and Eleventh Circuits in holding that **to have a cause of action under RESPA, a plaintiff must not only sign the mortgage, but also the loan.** *Keen v. Helson*, —F.3d—, 2019 WL 3226989 (July 18, 2019).

A “borrower” is commonly understood and defined as **someone who is personally obligated on a loan—who is actually borrowing money.** Because the plaintiff had never signed the mortgage loan, as her ex-husband had, she could not maintain a claim under RESPA, even though she had an interest in the house that she mortgaged and her husband later transferred his interest in the house to her as part of their divorce, shortly before he died.

The Court noted that Congress could have said that “any person” injured by a RESPA violation could sue, or that “mortgagors” or “homeowners” could sue, but it chose not to do so and specified only “borrowers” could.

The Court added that Congress “had a logical reason to draw a line between loans and mortgages,” based on speculation from the recent Supreme Court decision in *Obduskey v. McCarthy & Holthus LLP*, — U.S. —, 139 S.Ct. 1029, 1037 (2019), that “Congress may well have chosen to treat security interest enforcement differently from ordinary debt collection in order to avoid conflicts with state nonjudicial foreclosure schemes.”

New regulations from the CFPB **now define a “borrower”** in 12 U.S.C. § 2605(f) **to include “successors in interest.”** But those regulations only became effective in April 2018, after the events that led to this lawsuit. The plaintiff relied on these new regulations as persuasive authority, but the Sixth Circuit dismissed it, because “when, as here, the text is clear, that is the end of the matter.” Given this comment and the erosion of deference to regulations at the Supreme Court, one wonders whether the CFPB’s expansion of the definition of “borrower” will survive a challenge.