

# Helping Borrowers with DASP Loans

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# Main points

- Don't immediately give up on FHA legal defenses because the loan has been sold through DASP.
  - This supplements New York specific tools.
- There are few, if any, reported decisions addressing FHA defenses in connection with DASP sales.
- Call or e-mail me with any and all questions.



# Goals

- **Discussing DASP mechanics**
- **Addressing legal arguments for borrowers in foreclosure**
- **Thinking about leverage in settlement and loss mitigation**

# Sources

- **National Consumer Law Center, Foreclosures and Mortgage Servicing, Chapter 6 (2014, 5<sup>th</sup> Edition)**
  - Sections on defending foreclosures of FHA loans
  - Detailed discussion of DASP and its history
- **<https://library.nclc.org/forcl>**



# Sources

- There is very little guidance from HUD despite the fact that over 100,000 loans sold totaling billions of dollars.
- HUD's website includes reports on note sales, including who purchased particular pools:
  - [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/housing/comp/asset/hsgloan](http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/comp/asset/hsgloan)
- HUD's October 2015 webinar may provide the most comprehensive information
  - <http://portal.hud.gov/hudportal/documents/huddoc?id=slides.pdf>



# Overview

- **DASP?**
  - **Distressed Asset Stabilization Program**
    - **AKA Single Family Loan Sales (SFLS) AKA Distressed Asset Sales Program**
- **Involves batches of FHA-insured loans sold through a HUD-sponsored auction.**
  - **HUD pays off the insurance claim.**
  - **Investors, mostly private equity, purchase the pools.**

# Overview

- Fannie Mae and Freddie Mac have similar programs, which we are not covering
  - AKA, Non Performing Loan Sales (NPL)
- Check out the new announcement from the FHFA on NPL and principal reduction modifications
  - <http://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-PRM-Program-and-Further-Enhancements-to-NPL-Sales-Reqts.aspx>

# Overview

- There is a lot going on with advocacy on DASP.
- There have been significant news stories, including from New York
  - Matthew Goldstein, “As Banks Retreat, Private Equity Rushes to Buy Troubled Home Mortgages,” N.Y. Times (Sept. 28, 2015)
  - Jared Bennett, Center for Public Integrity, “The Government Is Selling Thousands of Homes to Hedge Funds Without Their Owners' Knowledge,” The Atlantic (Sept. 23, 2015), <http://www.theatlantic.com/business/archive/2015/09/the-government-is-selling-thousands-of-homes-to-hedge-funds-without-their-owners-knowledge/406771/>



# Overview

- **There has been pressure from Congress on HUD:**
  - **Press Release, Sen. Sherrod Brown, “Brown, Cummings Press HUD for Information on Protections for Vulnerable Homeowners,” (Feb. 1, 2016),**  
<http://www.brown.senate.gov/newsroom/press/release/brown-cummings-press-hud-for-information-on-protections-for-vulnerable-homeowners>.
  - **Jared Bennett, Center for Public Integrity, “Members of Congress call for reforms to bulk mortgage sales,” (March 3, 2016),**  
<https://www.publicintegrity.org/2016/03/03/19395/members-congress-call-reforms-bulk-mortgage-sales>



# Overview

- **There's good analysis of DASP**
  - **NCLC Report forthcoming**
  - **Sarah Edelman, Julia Gordon, Aashna Desai, Center for American Progress, “Is the FHA Distressed Asset Stabilization Program Meeting Its Goals?” (Sept. 5, 2014)**

# Overview

- **Get excited!**
- **Your clients' stories and your experiences defending foreclosures are critical.**
- **New York advocates and counselors will soon have a short FAQ to help identify DASP loans.**



# FHA Basics

- **First, a reminder about the FHA program:**
- **Federal Housing Administration (FHA) Single Family Insured Mortgage Program**
- **The United States Department of Housing and Urban Development (HUD) runs the program through the FHA, who manages the Mutual Mortgage Insurance (MMI) Fund. 12 U.S.C. 1708(a).**
- **National Housing Act, 12 U.S.C. §§ 1707 – 1715z25**



# FHA Insurance

- HUD operates the insurance fund to “to meet the housing needs of the borrowers that the single family mortgage insurance program under this subchapter is designed to serve.” 12 U.S.C. 1708(a)(7).
- To avoid unnecessary foreclosures, HUD has a mandatory loss mitigation program
  - 12 U.S.C. § 1715u(a): “Upon default or imminent default, as defined by the Secretary of any mortgage insured under this subchapter, mortgagees shall engage in loss mitigation actions for the purpose of providing an alternative to foreclosure . . . as provided in regulations by the Secretary.”



# FHA Insurance

- HUD has put specific regulations in place to ensure that lenders take specific steps to avoid unnecessary foreclosures
- 24 C.F.R. §§ 203.500 - .681
- 24 C.F.R. § 203.500: “It is the intent of the Department that no mortgagee shall commence foreclosure or acquire title to a property until the requirements of this subpart have been followed.”



# FHA Insurance

- **Generally, the regulations are incorporated into the terms of the contracts between the lender and the borrower.**
  - **Mortgage: “In many circumstances regulations issued by the Secretary will limit Lender's rights, in the case of payment defaults, to require immediate payment in full and foreclose if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary.”**
- **The limitations on foreclosure in the contract and regulation are extremely important for the arguments discussed today.**



# DASP Mechanics

- HUD's general practice is to pay off insurance claim after the lender completes the foreclosure sale process.
- The statute authorizing claims, 12 U.S.C. § 1710, however was amended to allow HUD to pay claims earlier in the process (as long as the loan is at least three months in default).



# DASP Mechanics

- This is where DASP fits in – starting in 2010 and ramped up in 2012.
- Through DASP, HUD sponsors auctions of FHA-insured loans.
- Lenders can participate by selecting loans to include in the pools.
  - Lenders can only include loans, per HUD, in which loss mitigation has been exhausted.
  - Do we think all loss mitigation has been completed?

# DASP Mechanics

- The selected loans are then pooled together
- There are two types of pools: National vs. NSO
  - NSO pools are focused in particular areas of the country and should be more interesting for non-profits
- There are some additional strings attached for NSO pools.

# DASP Basics

- **The potential purchasers have a chance to review information the pools prior to the auction, and then bid.**
- **Generally, loans assigned to HUD and then assigned to the DASP purchaser.**
- **There are a series of contracts involving the seller, HUD, and the purchaser**
- **HUD pays off insurance claims for loans that are sold.**



# DASP Mechanics

- Once the claim is paid, HUD's position that the loan is no longer FHA insured and borrowers are not entitled to FHA-specific loss mitigation options.



# DASP Mechanics

- In response to pressure from advocates, HUD issued a press release in April of 2015 adding some additional rules:

[http://portal.hud.gov/hudportal/HUD?src=/press/press\\_releases\\_media\\_advisories/2015/HUDNo\\_15-048](http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2015/HUDNo_15-048)

# DASP Mechanics

- For post April 2015 sales, borrowers with loans sold through NSO or National pools have to be evaluated “for the Home Affordable Modification Program (HAMP) or a similar loss mitigation program.”
- In addition, prior to April 2015, servicers purchasing loans through DASP had to delay foreclosure for 6 months.
- The April 2015 announcement lengthened this to 12 months and also alluded to heightened reporting requirements and tougher penalties.

# DASP Mechanics

- **Important note:**

- On March 18, 2016, HUD announced an “Aged Delinquent Portfolio Loan Sale” -

[http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/housing/comp/asset/hsgloan](http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/comp/asset/hsgloan)

- Loans that are 48 months behind on average
- Questions: Is this DASP? Do the limits from April 2015 apply?
- The legal strategies outlined below, however, should apply.



# DASP Mechanics

- **How will I know if the loan has been sold?**
  - **Probably not going to get a notice spelling out that the loan is no longer FHA insured.**
  - **At some point, the servicer will likely mention it.**
  - **Ideas for getting information**



# Problems with DASP

- Advocates have seen loans going into pools that have no business being in DASP because loss mitigation was not exhausted
- We also see poor loss mitigation offers post-DASP sale.
- Community groups have had a very hard time competing with private, for-profit companies to purchase NSO pools.



# Defending Foreclosures of DASP Loans

- I have a case with the loan sold through DASP.
- Should I just give up on legal defenses based on the FHA regulations automatically?
- Is it too late to raise non-compliance with FHA regulations?



**NO!!**

**DON'T JUST  
GIVE UP!**



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# Defending Foreclosures of DASP Loans

- **General idea: If your borrower had a defense to foreclosure because the pre-sale lender did not follow FHA regulations, why should that defense disappear because of the DASP sale?**
- **Remember, this is dependent on your own state law. This is not tailored to New York specific law.**
- **Check for compliance.**
  - **Key: This involves loans that are behind at the time of the DASP sale, not loans that are brought current after the DASP sale.**



# Defending Foreclosures of DASP Loans

- The regulations and, in general, the language of the contracts that incorporate the regulations require the lender to take specific loss mitigation steps.
- The lender has a time window in which to complete these steps and cannot accelerate the loan and foreclosure without following the rules.
- DASP loans are often sold when they are in significant default.
- They often have been accelerated prior to the DASP sale.



# Defending Foreclosures of DASP Loans

- As a result, the loan was likely FHA-insured during the window of time for lender compliance with loss mitigation, and the loan was often FHA-insured prior to acceleration.
- Check for compliance.



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# Defending Foreclosures of DASP Loans

- The pre-DASP lender had a lot to do before it transferred the loan.
- For example, if the loan was sold at 8 months past due, the previous lender had to satisfy, among any other requirements:
  - 24 CFR 203.602 (notice)
  - 24 CFR 203.604 (face-to-face meeting)
  - 24 CFR 203.605 (periodic evaluation of loss mitigation)



# Defending Foreclosures of DASP Loans

- If the previous servicer did not comply with those required steps, then the requirements for proceeding with foreclosure have not been met.
- How would the DASP sale make this disappear?
- Don't give up!
  - Of course, there are some limitations in this type of argument.



# Defending Foreclosures of DASP Loans

- You may need to use discovery to look into the actions of the previous servicer.
  - HUD guidance helps on this:  
<http://portal.hud.gov/hudportal/documents/huddoc?id=slides.pdf>



# Defending Foreclosures of DASP Loans

- Page 43 of the webinar states: “Within ten (10) Calendar Days after the Settlement Date, the Participating Servicer is required to deliver to the Purchaser a complete Collateral File for each of the Mortgage Loans sold to Purchaser pursuant to Section 2.01 (a) and (b) of the CAA on such Settlement Date.”
  - The DASP lender should have information from the previous servicer.



# Defending Foreclosures of DASP Loans

- **Other considerations**
  - Does your client have other claims, including statutory claims?
  - Is there any way to keep the original lender in the case, especially if its actions lead to defenses or claims?
- **These are issues to discuss among advocates on a statewide basis.**



# Relief

- **The relief available depends, among other issues, on your client's leverage and damages.**
- **Once loan is sold, HUD pays off the claim and takes the position that the waterfall no longer applies.**



# Relief

- **However, you can demand a modification that looks identical to the FHA-HAMP modification your client should have received even if it is not exactly FHA-HAMP.**
- **Check your client's eligibility for options throughout the time of default.**



# Relief

- Remember also the April 2015 announcement mentioned above for loans sold after that period.



# Questions?

- I would love to hear how your cases are progressing.
- This is still very new.
- Steven Sharpe, 513-362-2788,  
[ssharp@lascinti.org](mailto:ssharpe@lascinti.org).
- I'm always willing to talk!

