

ABI Commission's Final Report on Consumer Bankruptcy Issues Part I: What Creditors Need to Know

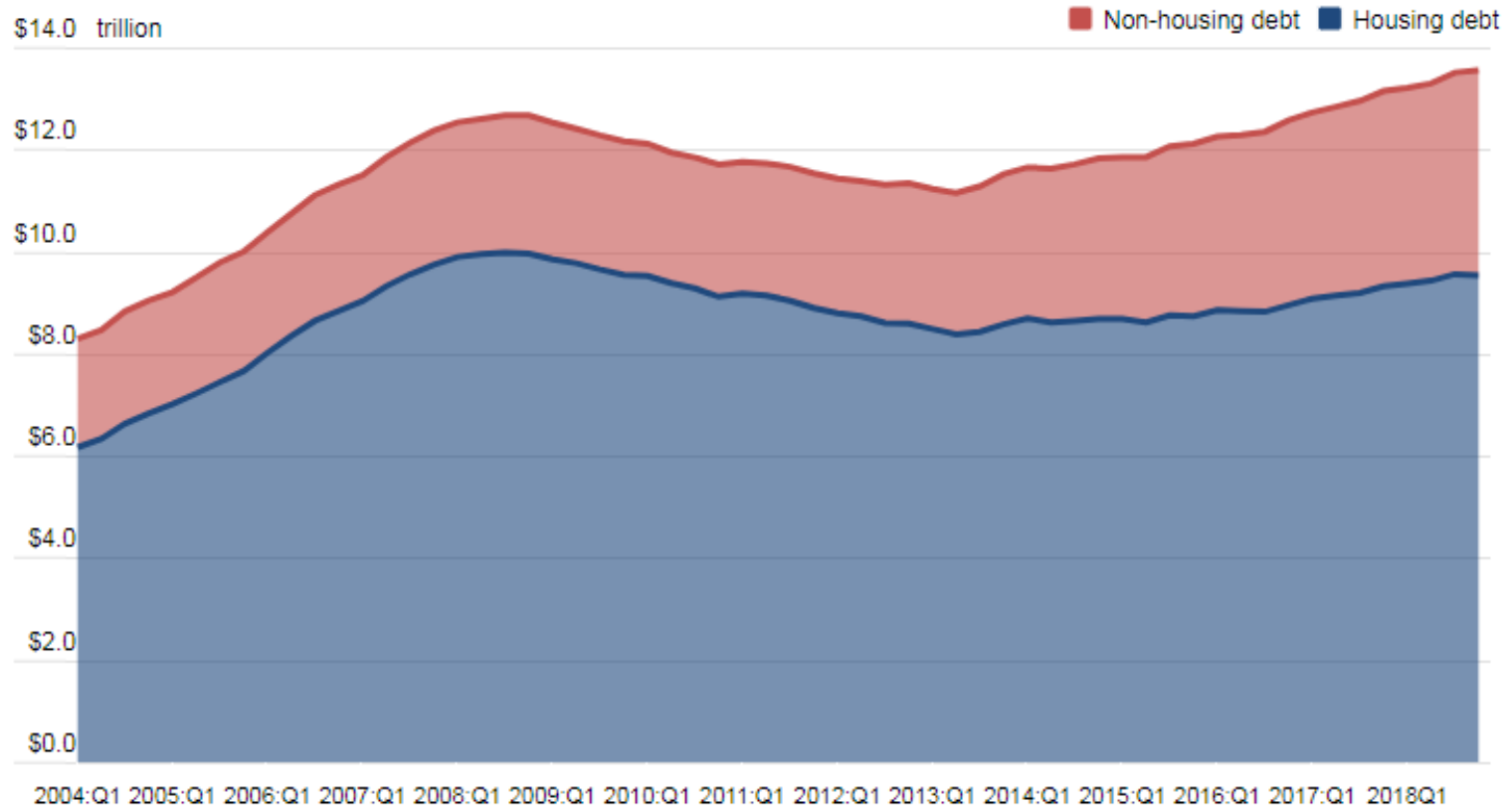
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Overview

Growing Debt for Consumers

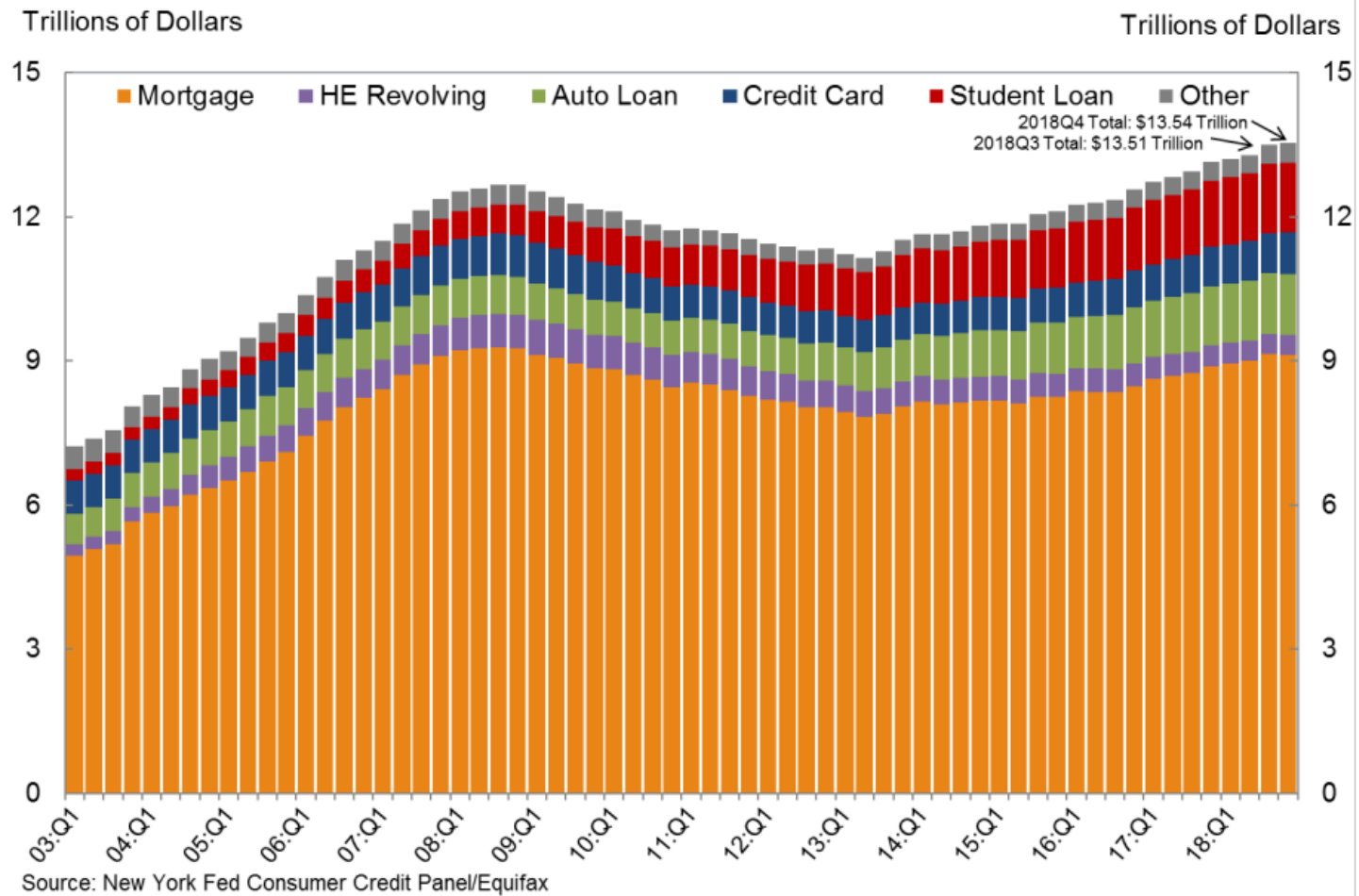
Total Debt Balance



Source: FRBNY Consumer Credit Panel/Equifax

Growing Debt for Consumers

Total Debt Balance and its Composition



Overview of Report

- Commission was charged with recommending improvements to consumer bankruptcy system
 - Amendments to Bankruptcy Code
 - Amendments to Bankruptcy Rules
 - Recommendations on proper interpretations of existing law
 - Best practices
 - Identifying areas where further study is needed
- Categories of Recommendations
 - Effectuating the fresh start
 - Improving creditor certainty & lowering costs
 - Facilitating effective access to bankruptcy
 - Making chapter 13 work for all stakeholders
 - Systems issues

Effectuating the Fresh Start

Remedies for Discharge Violation

- Current law presents difficulties both in enforcing discharge injunction and in determining its scope. Most courts allow enforcement of discharge only through contempt proceedings which may not provide effective relief
- Individuals should have a private right of action for a violation of section 524
 - Provide full range of sanctions, including costs, attorney fees, and punitive damages
- Debtors and creditors should be allowed (but not required) to seek expedited bankruptcy court ruling to determine whether discharge injunction applies to particular action
 - Recommend motion practice rather than adversary proceeding

Judicial Estoppel

- When debtor must disclose cause of action but does not, judicial estoppel is appropriate to prevent unfair advantage through inconsistent statements in bankruptcy and other litigation
- 11 non-exhaustive factors:
 - Did the debtor have actual knowledge of the claim?
 - Did the debtor tell his or her bankruptcy attorney about the claim before filing the bankruptcy disclosures?
 - What were the circumstances under which the omitted claim was discovered?
 - Did the debtor correct the disclosures, and what were the circumstances of the correction?
 - How long was the claim omitted from the bankruptcy schedules?

Judicial Estoppel

- Non-exhaustive factors (con'td)
 - What was the amount of the omitted claim?
 - What was the distribution to creditors?
 - Do the circumstances suggest the debtor would have understood the bankruptcy schedules to require disclosure of all causes of actions?
 - Did the debtor identify other lawsuits to which the debtor was a party?
 - Did the bankruptcy court take any action after the omission was discovered?
 - Were the trustee or creditors aware of the civil lawsuit or claim before the debtor amended the disclosures?
- Failure to disclose should not prejudice chapter 7 trustee's rights

Improving Creditor Certainty & Lowering Costs

Protection of Interests in Collateral Repossessed Prepetition

- Circuit court division over whether collateral seized prior to bankruptcy must be returned
- Recommended statutory amendments
 - Creditor's retention of estate property violates automatic stay, but only if proof of insurance or other security is provided for property subject to loss of value
 - Require creditor to deliver collateral
- Recommended procedural amendment to allow party enforce turnover by motion rather than adversary proceeding

Definition of “Surrender”

- Courts should interpret “surrender of property” to mean that a debtor:
 - relinquishes the property;
 - cannot impede a trustee or a secured creditor from taking possession of, or foreclosing its interest in, property in accordance with non-bankruptcy law and subject to any defenses that might be available under non-bankruptcy law; and
 - must make the property available to the trustee or secured creditor (does not require immediate physical delivery of property to another)
- Add statutory definition of “surrender” to Bankruptcy Code incorporating above-referenced elements

Statement of Intention-Deadlines and Consequences

- Primary recommendation is statutory harmonization via amendments to Bankruptcy Code
 - Inconsistent deadlines & ambiguities in sections 362(h), 521(a)(2)(B), and 521(a)(6)
 - Chapter 7 debtor must file statement of intention within 30 days of petition
 - Debtors must file reaffirmation agreement or redemption motion within 60 days after first meeting of creditors is scheduled
 - If redemption occurs, pay any redemption price within 14 days of order approving redemption
- In the absence of statutory amendment, recommend Bankruptcy Rules amendment
 - Deadline to file motion for redemption would be 30 days after first date set for meeting of creditors
 - Redemption payment must be made within 14 days after entry of order authorizing redemption

Reaffirmation Improvements

- Official form for reaffirmation agreements
 - Recommend using existing director's form as starting point
- Rescission of reaffirmation agreement
 - Must be in writing
 - Propose recommended form (but not mandatory)
- Permit certain post-petition communications without violating the automatic stay
 - Include option to authorize such communications in statement of intention
- Recommend that Congress specify whether chapter 7 debtor who assumes lease agreement must comply with reaffirmation requirements
 - If not, recommend amendment to section 365(p) that assumption must be filed with court and lessor of personal property who does not file one before case is closed can't assert it later against debtor

Repeat Filers

- Overhaul of Bankruptcy Code provisions governing repeat filers
- Rewrite section 109(g) to provide that order of dismissal of case may include restriction of debtor's eligibility for subsequent case based on court's discretion
 - Based on various factors as identified by the Commission, such as willful and substantial default in plan and repetitive dismissed bankruptcies
 - Default period of ineligibility is 180 days, could be extended up to 720 days based on finding of substantial abuse
- Dismissal of case does not bar discharge in later case of debts that were dischargeable in earlier dismissed case (except as otherwise provided in Bankruptcy Code)
- Automatic stay should not go into effect in case filed within one year of dismissal of two or more bankruptcy cases but should continue in circumstances where debtor had single bankruptcy case dismissed within the year

Facilitating Access to Bankruptcy

Attorney Competency & Remedying Lawyer Misconduct

- More Vigorous use of existing disciplinary tools
 - Bankruptcy court's ability to sanction attorneys
 - Existing bankruptcy claims process provisions to police misconduct
- Creation of local disciplinary tribunals and procedures
- Recognition of board certification
- Uniform docketing & report

Credit Counseling & Financial Management Course

- Eliminate prepetition credit counseling requirement as qualification to file for bankruptcy
- Eliminate financial management requirement as condition of discharge in chapter 7 proceedings
- Amend FCRA to provide entry on consumer's report related to their bankruptcy case that identified completion of post discharge financial management course

Making Chapter 13 Work for All Stakeholders

Nonuniform Court Practices

- Adopt local rules, standing orders, and practices that promote uniformity within district and across nation
 - Result in reduced costs and facilitate access
- Reduce differences in courtroom procedures where courts have multiple bankruptcy judges
- Increased collaboration and work between ABI, USTP, FJC and other professional associations to promote uniformity in bankruptcy system

Systems Issues

Notice & Service Issues

- Providing a “service” address on POC
 - Creditor should ID name and address of person responsible for receiving service under rule 7004 on POC
- Identification of “officer, managing partner, or general agent or any other agent”
 - Recommend that it does not require identifying person by name
- Permitting all registrants of CM/ECF to have access to database of preferred addresses

Questions?



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