

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

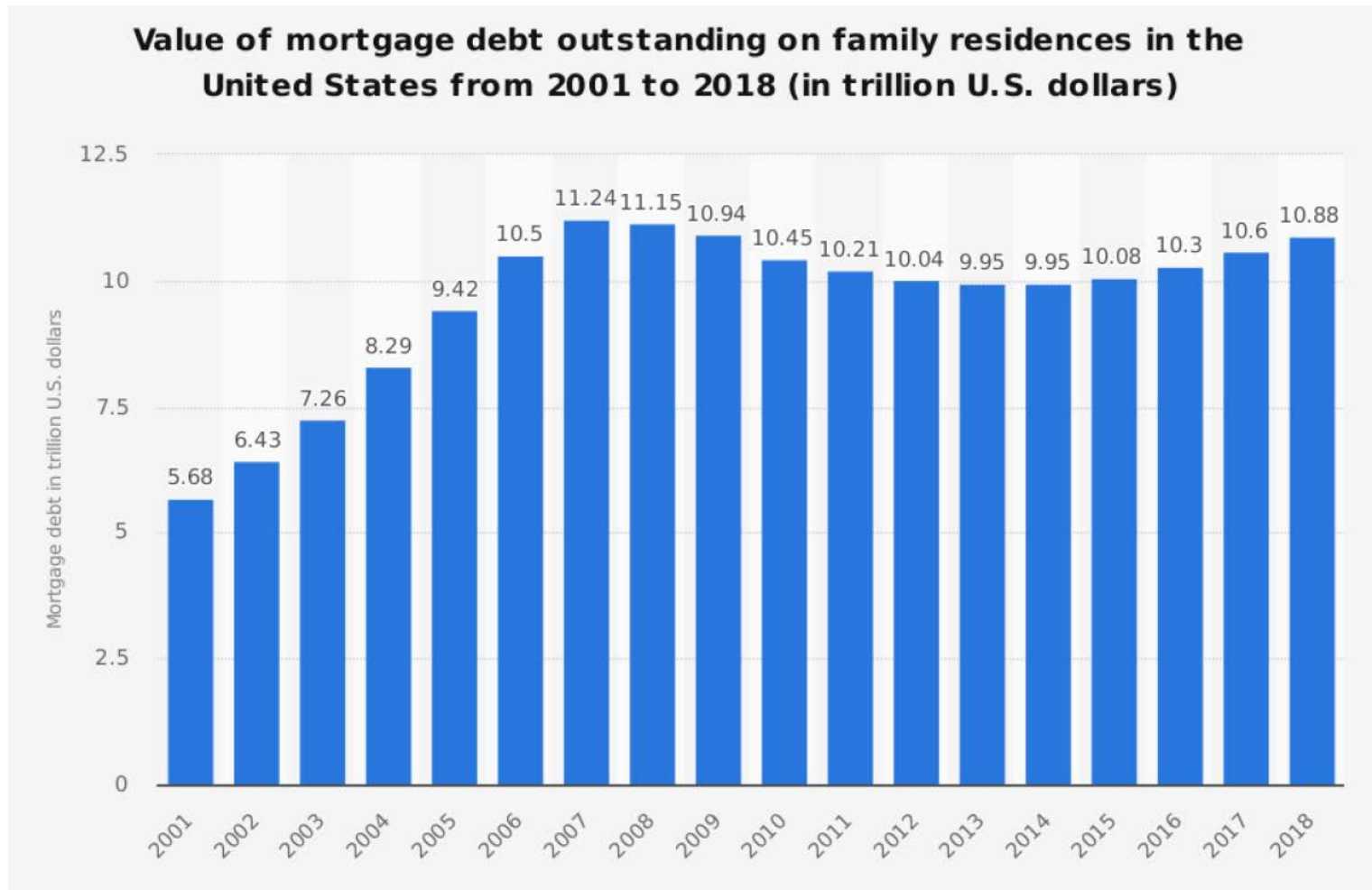
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Overview

Growth in Mortgage Debt in U.S.

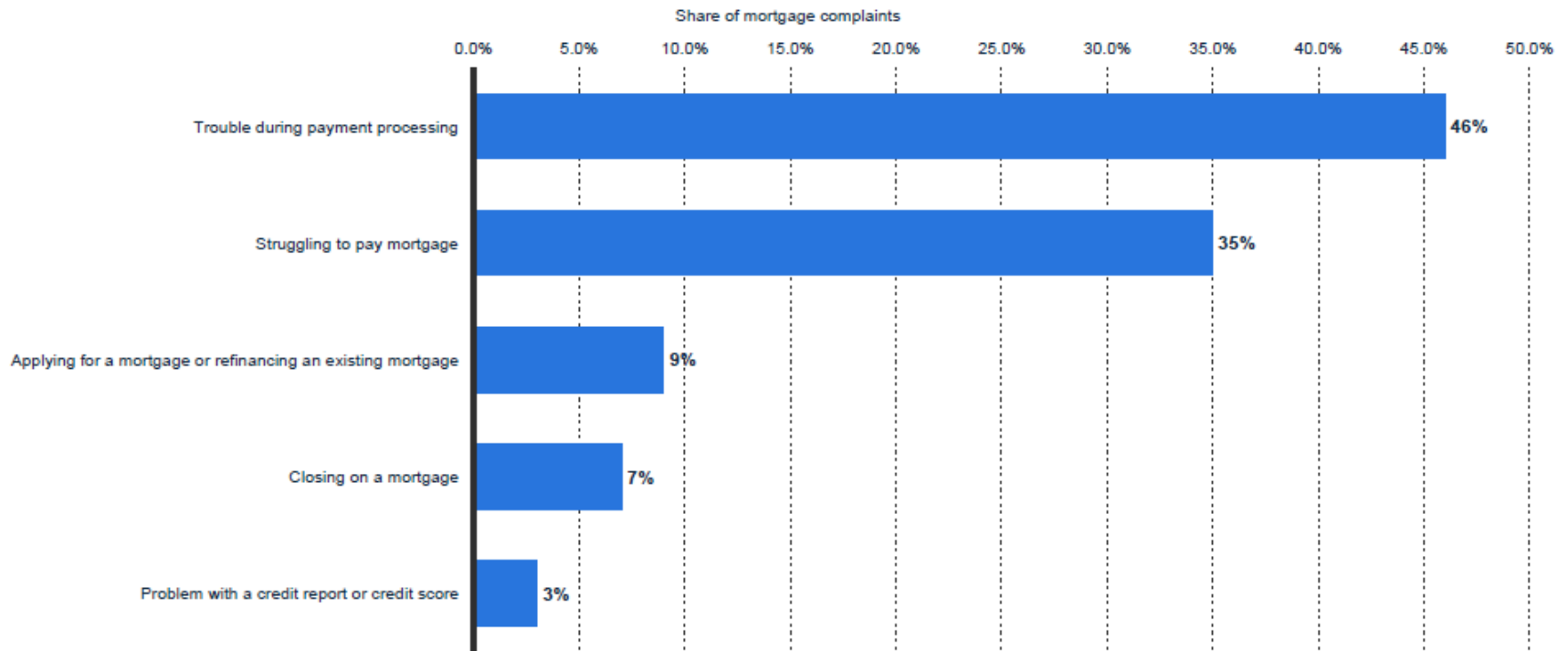


Source: Federal Reserve; St. Louis Fed © Statista 2019

Mortgage Complaints

Distribution of mortgage complaints reported to Consumer Financial Protection Bureau in the United States in 2018

Mortgage consumer complaints reported to CFPB in the U.S. 2018



Note: United States; January 1 to December 31, 2018; 25,500

Source(s): Consumer Financial Protection Bureau

ABI Consumer Law Commission

- December 2016 – Executive Committee of the American Bankruptcy Institute approved the creation of a commission on consumer bankruptcy
 - Commission composed of retired judges, creditor attorneys, debtor attorneys, law professors, Chapter 13 trustees, United States Trustees
- April 2017 to April 2019 – Commission meetings (6 in-person, 28 by phone) including public hearings
- April 2019 – Final Report published

ABI Consumer Law Commission

- Key Recommendations
 - Student Loans
 - Discharge Violations/Comfort Orders
 - HOA Fees
 - Tax Returns
 - Exemptions
 - Repossessions
 - Reaffirmation/Redemption/Surrender
 - Valuation/Information on Mortgage Loans/Property
 - Access to Bankruptcy Courts
 - Chapter 13 Practice
 - Forms/Notice/Service Issues

Effectuating the Fresh Start

Dischargeability of Homeowners Association (HOA) Fees

- Bankruptcy Code Amendment
 - Permit discharge of postpetition condominium fees and assessments only when the debtor
 - (1) specifies an intent to surrender the property and
 - (2) does not retain possession or actively occupy or use the property
- Best Practices
 - Postpetition HOA fees are discharged in a chapter 13 case under § 1328(a)

Improving Creditor Certainty & Lowering Costs

Defining and Valuing the Principal Residence, Timing Issues

- Petition date is appropriate date for determining whether a claim is secured by a debtor's principal residence
- Principal residence value should be determined as of petition date
 - In a case converted to chapter 7, courts should interpret section 348(f)(1)(B) to mean there has not been a binding valuation of the debtor's principal residence

Improvements to Federal Rule of Bankruptcy Procedure 3002.1-Payment Change Notices and Notices of Final Cure

- **Untimely Filed PCNs**

- The Commission recommends amending Rule 3002.1 to clarify the payment effective date for untimely filed PCNs to give the borrower the benefit of a lower payment early, and bar creditors from collecting a higher payment before they fully comply with the 21-day deadline

- **Home Equity Line of Credit**

- The Commission recommend that only an annual notice be filed, provided that (i) the monthly changes are less than \$10, (ii) the notice explains the monthly changes and (iii) a reconciliation amount for any overpayment or underpayment received during the prior year is included
- The monthly payment specified in the annual notice would be adjusted upward or downward to account for the reconciliation amount

- **Reverse Mortgages**

- The Commission recommends amending Rule 3002.1 to clarify that reverse mortgages are subject to the Rule's requirements except for PCN requirements

Improvements to Federal Rule of Bankruptcy Procedure 3002.1-Payment Change Notices and Notices of Final Cure

- **Notice of Final Cure**
 - The Commission recommends amending Rule 3002.1 to:
 - Convert the current notice process to motion practice, allowing for more certainty upon discharge;
 - Add a midcase status review;
 - Emphasize and clarify that creditor's response is required and must include certain data points, including: principal balance owed; date when next installment payment is due; amount of the next installment payment, separately identifying amounts due for principal, interest, mortgage insurance and escrow, as applicable; and amount, if any, held in a suspense account, unapplied funds account, or any similar account; and
 - Allow the debtor or trustee to file a motion to compel creditor's statement and for appropriate sanctions if the creditor does not comply with Rule 3002.1.

Facilitating Access to Bankruptcy

Attorney Competency & Remedying Lawyer Misconduct

- The Commission noted certain examples where creditor's attorneys "falter"
 - Filing POC where should have known that the debtor was not liable, resulted \$700 sanctions
 - Attorney subsequently "compounded error" by filing 102-page motion to reconsider
 - Refusing to communicate with trustee and another creditor about stay relief motion, causing parties to fly to Puerto Rico only to find that creditor withdrew motion hours before it was heard
 - Filing meritless nondischargeability proceedings to gain advantage over debtors by adding costs

Making Chapter 13 Work for All Stakeholders

Chapter 13 Transfer of Debtor's Principal Residence Subject to an Underwater Mortgage

- Bankruptcy Rule 6004 should provide that debtor may seek to satisfy claim secured by principal residence pursuant to section 1325(a)(5)(B) by conveying the property to holder of first-priority mortgage lien or selling property free and clear of liens
- Plan must provide holder with 60 days from confirmation of plan to review and respond to proposed treatment of the mortgage
 - If accepts direct transfer, debtor must issue deed within 14 days of acceptance
 - If rejects direct transfer, debtor must file motion to sell property pursuant to section 363(f) within 14 days of rejection
 - Sale must take place no later than 90 days after notice of motion and
 - any interests attaching to the property with a higher priority than those of the holder of the first-priority mortgage will be paid no more than they would have received under applicable nonbankruptcy law had the property been subject to a foreclosure sale or deed in lieu of foreclosure at the same sale price

Loan Modifications in Chapter 13

- Uniformity & transparency should be encouraged
 - Bankruptcy rulemaking process
 - Online portals & CM/ECF
- Successful modifications early in bankruptcy cases should be approved through plan modification
 - Recommend no more than 45 days after agreement to terms of modification
 - Must contain particular information about terms of modification
 - Require amended budget information if changes original monthly mortgage payment by a substantial amount (10%)
- PCNs should not be required for change resulting from successful modification
- Reasonable fees should be permitted for borrower's attorneys for this work

Conduit Mortgage Payments

- Overall support for conduit payment of mortgage claims
 - USTP and bankruptcy administrators should facilitate adoption and use of conduit payment of mortgage claims, including allowing bifurcated commission rates
- Recommend Bankruptcy Code amendment to clarify that conduit payment is required for mortgages unless compelling reason exists, including:
 - Trustee's commission would cause an unreasonable burden on debtors in that district
 - In a particular case, the debtor would not be able to make plan payments because of trustee's commission
 - Nonfiling co-debtor making payment
- Congress should adopt a clarifying amendment to 28 U.S.C. § 586(e) to allow bifurcated commission rates on mortgage payments and other payments in plan

Conflicts Between Proof of Claim and Chapter 13 Plan Terms

- Recommend amendment to Bankruptcy Rules
- The amount in a timely proof of claim takes precedence over a contrary amount in a chapter 13 plan regarding:
 - If debtor proposes to cure defaults and maintain payments:
 - The amount necessary to cure any default; and
 - The amount of current installment payment;
 - The total amount of creditor's claim (including amount of claim subject to lien avoidance under § 522(f)); and
 - The amount of secured claim excluded from section 506

Questions?



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