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Shelter

Turning the tide?

Evidence from the free advice sector on mortgage and secured loan possession actions in England in July 2009

Summary

The financial crisis and recession have fuelled a rising tide of mortgage arrears and repossessions. Government, lenders and regulators have taken welcome action to protect people from losing their homes unnecessarily.

Our advisers see evidence of these initiatives working in many cases, but also some gaps. We asked those giving last minute advice to people at court on the day of their repossession hearings about the details of 452 cases they had seen in county courts in England in July 2009.

- Job loss and other loss of income were the most common reasons given for mortgage arrears.
- Overall, 77 per cent of clients advised avoided immediate loss of their home. But their circumstances suggest up to half could find it difficult to sustain repayments set by the court unless their incomes recover quickly.
- In a third of recorded cases, advisers considered the lender had not complied with the mortgage pre-action protocol, which requires them to take court action as a last resort after offering borrowers other options for dealing with their arrears. Although judges did ask questions about this, they only applied sanctions for non-compliance in six cases.

- Sub-prime lenders who specialise in lending to higher risk borrowers were taking court action earlier than high street lenders. A few sub-prime lenders in particular had significantly more court cases than their share of the mortgage market would suggest.
- Low income households were the most likely to lose their homes.
- There appeared to be some under-claiming of support for mortgage interest (SMI), and many borrowers were paying higher monthly interest rates than would be covered by SMI payments.

This report suggests the tide of mortgage repossessions has not yet turned. It calls for further action by lenders, regulators and Government to strengthen help to protect people from avoidable homelessness.

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Introduction

Two years ago, the housing and debt advice sector highlighted the need for government action to tackle rising levels of mortgage arrears and repossessions.¹

At that time, the arrears problems seen through our free services were mainly concentrated amongst the lowest income homeowners, who had struggled to get on the housing ladder and had often taken very risky loans from sub-prime mortgage lenders. In many cases, it appeared they had taken out loans which were not affordable or sustainable from the outset. Safety nets such as state support and private insurance were not always working to help those suffering a temporary income shock to stay in their homes, and the courts had no way of stopping hasty possession action by lenders.

Since then, the financial crisis and recession have brought the arrears and repossessions crisis even more sharply into focus. In 2008, 40,000 homes were repossessed. Although repossessions have not risen as fast as was predicted earlier in 2009, they are still forecast to rise to 48,000 in 2009 and 53,000 in 2010.²

Government, regulators and lenders have, for the most part, been swift to take action to tackle the problems outlined by the housing and debt advice sector. Initiatives to prevent borrowers unnecessarily losing their homes have included:

- The introduction by the Ministry of Justice of a pre-action protocol for possession actions for mortgage and secured loan arrears, from November 2008. This sets out the steps lenders are expected to take to help keep borrowers in their homes before initiating a court possession claim – that is, using court action only as a last resort.
- Reforms to support for mortgage interest (SMI), a benefit which provides some help with mortgage interest payments for claimants of certain means-tested benefits.³ From January 2009, the waiting period for help was reduced from nine months to three, the threshold for help was increased from £100,000 to £200,000 of mortgage outstanding, and the standard interest rate used to calculate help was kept at 6.08 per cent for a year, despite the substantial decrease in Bank of England base rates.
- Introduction of a mortgage rescue scheme (MRS) in England from January 2009. Funds were provided to enable the most vulnerable struggling homeowners to sell and then rent back their home from their local authority or Registered Social Landlord, or to apply for an equity loan to reduce outstanding arrears.
- Introduction of a homeowner mortgage support scheme (HMS) from April 2009. This was designed to help households which have suffered a temporary income shock but are not eligible for help from SMI. Under this scheme, borrowers from participating lenders are able to defer paying a proportion of their mortgage interest for up to two years. The Government guarantees to pay the lender 80 per cent of this deferred interest if the borrower defaults.

1 *Set up to fail – CAB evidence on mortgage arrears and repossessions*, Citizens Advice, 2007, *Policy Briefing: Mortgages and Repossessions*, Shelter 2008

2 Council of Mortgage Lenders, press release, 12 November 2009

3 Income support, income-based jobseekers allowance or income-based employment and support allowance. Pension credit claimants are also eligible for SMI, but different conditions apply

- Trade associations for mortgage lenders, the Council of Mortgage Lenders (CML) and the Finance & Leasing Association (FLA), developed and published guidance on best practice in mortgage arrears and repossessions, in late 2008.⁴ This guidance complemented regulatory requirements of the Financial Services Authority (FSA) and Office of Fair Trading (OFT) and the pre-action protocol.⁵
- Since our survey in July 2009, the OFT and the FSA have taken steps to strengthen their rules and guidance on arrears handling and repossessions, and to act against firms which breach them.

Alongside targeted initiatives, exceptionally low base interest rates have resulted in lower mortgage payments for those borrowers with variable rate mortgages.

We welcomed the introduction of these changes and initiatives, and decided in early 2009 to undertake research into how well they are working in England.

Methodology and research aims

Our initial research in April 2009 assessed adviser and borrower views on the impact of the pre-action protocol introduced in November 2008 on lenders' and judges' practices. It also assessed advisers' experiences so far of MRS and changes to SMI. This research showed a mixed picture, and most worryingly suggested that not all lenders appeared to be following the pre-action protocol.⁶

This report builds on our initial research by examining more closely possession actions in the county courts. It aims to:

- evaluate the effectiveness of the pre-action protocol at court
- understand more about which borrowers are being taken to court, and why
- overall, establish any circumstances in which current measures are not working to avoid repossessions.

We analysed in detail the cases and circumstances of 452 people who sought advice from court duty desks run by AdviceUK members, Citizens Advice Bureaux and Shelter at 65 county courts in England during July 2009. Housing possession court duty desks are emergency schemes which offer anyone in danger of eviction or having property repossessed free legal advice and representation on the day of the hearing, regardless of their financial circumstances.

Unfortunately, many of those faced with repossession hearings do not attend court. Others attend but do not take advice from a duty desk adviser. We have no survey data about these clients, but asked advisers to provide copies of the courts lists of scheduled mortgage/secured loan possession hearings by their courts in July, which identify the lender taking action for all cases. We collected lists from 52 county courts in England, and they contain 2,444 cases.

4 CML is the main trade association for first charge mortgage lenders and the Finance & Leasing Association (FLA) represents second charge lenders

5 The FSA regulates first charge mortgages and the OFT regulates loans regulated by the Consumer Credit Act 1974

6 *Mortgage and secured loan arrears: Adviser and borrower surveys, April 2009* Research from AdviceUK, Citizens Advice, Money Advice Trust and Shelter

Findings about the clients seeking advice from court desks

Demographics

Clients seeking advice from court desks had lower incomes, were more likely to be from minority ethnic backgrounds and were more vulnerable than the population in general. In particular, in our sample:

- clients from black, Asian and minority ethnic (BAME) backgrounds were over-represented – 22 per cent, compared with eight per cent in the UK as a whole⁷
- over half (61 per cent) of households had at least one dependent child
- households with someone disabled or with a long-term illness were also over-represented – 29 per cent, compared with 18 per cent in the UK⁸
- over half (58 per cent) of households appeared likely to qualify as in priority need for re-housing by the local authority because they had at least one dependent child, or someone with a disability or long-term illness, or someone over 65 in the household.

While the survey is not nationally representative and could have some regional bias, we are concerned by the disproportionately high levels of both BAME clients and clients with illness or disability, which might indicate inequalities in mortgage lending and arrears management.

Household income

Many clients facing court action had low household incomes, as shown in the chart overleaf.⁹

In 52 per cent (of 333 recorded) cases, net household income was less than £1,500 per month, and in 26 per cent of cases it was less than £1,000 per month. The median net monthly income was £1,440.

A substantial proportion of households facing loss of their home had income from work:

- 54 per cent of clients had income from employment
- 17 per cent of clients had income from self-employment.

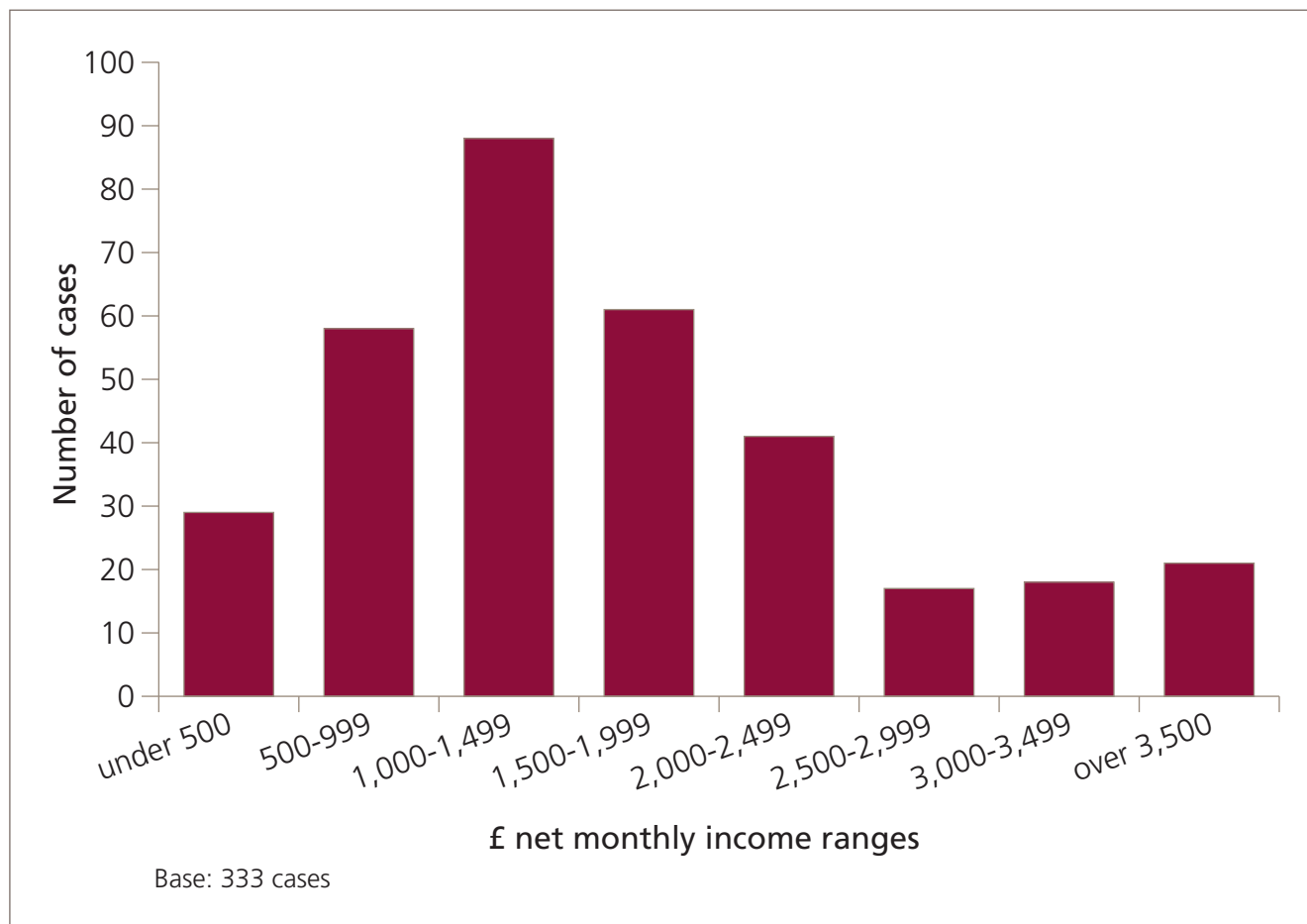
This highlights an important gap in government safety nets. Although both employed and self-employed workers may be suffering significant drops in their incomes due to the recession, very few households with income from work are eligible for SMI through the benefits system.

⁷ 2001 Census

⁸ 2001 Census

⁹ These figures are not directly comparable with national income statistics from the Department of Work and Pensions on households below average income (HBAI), since these are adjusted according to household size

Monthly household income



Reasons for arrears

Our survey asked about the reasons for mortgage arrears problems. Our findings illustrate the impact of the recession, with 63 per cent of clients (284 out of 452 cases) giving one or more reasons which relate to a downturn in economic activity. The table opposite gives more detail.

We asked if the client’s loss of income seemed temporary or permanent.¹⁰ In 58 per cent of cases where this was recorded (164 out of 285) the loss of income seemed temporary. Lender forbearance might have been expected to avoid the court action in these cases, and court desk advisers have a particularly important role in helping these clients show at the hearing how they propose to meet their mortgage and arrears payments in order to avoid immediate possession or eviction.

¹⁰ Based on discussion between the adviser and the client

Reasons for mortgage arrears

Reasons for arrears	Number of clients citing this reason	Percentage citing this reason
Job loss	181	40%
Other drop in income	114	26%
Illness	84	19%
Relationship breakdown	83	19%
Business failure	53	12%
Over-commitment	46	10%
Other	43	10%
Benefit problems	14	3%
Debt consolidation	12	3%

Base: 630 reasons from 452 cases. Advisers could list up to three reasons for the client's arrears problems

Support for mortgage interest (SMI)

Our survey does not capture the extent to which people are avoiding court action altogether due to government schemes and help from lenders. It also surveys only those who attended court and took advice from a duty desk adviser. But in our subset of people with mortgage arrears, we found some indications of potential under-claiming of SMI. Out of 73 households recorded as unemployed (which might therefore be eligible for SMI) only 25 received or had claimed SMI.

It is obviously important that people who have lost their job or their business are advised as soon as possible to claim support for which they may be eligible, to avoid mortgage arrears building up. Lenders and public sector and free advice sector advisers all have a role to play in signposting them to such help.

Free debt advice services see evidence in their wider case-work that Jobcentre Plus advisers are not always advising clients to apply for SMI where they are eligible.

A CAB in the South East advised a client who had been given incorrect information by Jobcentre Plus. She was receiving income-based jobseeker's allowance and had a property with a mortgage of £110,000. She had been told by Jobcentre Plus she would only get help with housing costs if she was renting.

A client contacted a member of AdviceUK the day before his possession hearing. He was single, on jobseeker's allowance and had eight months of mortgage arrears. He had been told by Jobcentre Plus that he was not entitled to SMI because he was single.

Mortgage rescue scheme (MRS)

Our sample is restricted to clients advised at court, but it appears to indicate a shortfall in take-up of MRS.

Overall, advisers considered that four per cent of clients advised were eligible for MRS, 66 per cent were not eligible, and 31 per cent may have been eligible (out of 379 recorded cases).

Advisers noted in 11 cases that the court had allowed time to pursue an application for MRS – in five, the hearing was adjourned for this reason, while in six cases a long possession/eviction order was given (for 42 or 56 days rather than the normal 28 days) for this reason. There were 13 cases where the outcome was an immediate possession/eviction order, despite the fact that the adviser considered the client may have been eligible for MRS.

Findings about the mortgage/secured loans

Most cases concerned the main mortgage on the client's main home.¹¹ In 92 per cent of cases, the court action related to their main or only property, and in 83 per cent of cases to their first charge mortgage.

In a third of all cases (36 per cent), the client was recorded as having at least one other loan secured on the property.

In nearly a half of all cases (48 per cent), the client was also recorded as having unsecured debts, and these clients had worse outcomes in court. For those with unsecured debts (205 cases), 30 per cent received an order for immediate possession or eviction, compared with 19 per cent of those who did not have unsecured debts (162 cases).

There were 74 cases of action relating to a second charge secured loan, and although 31 of these loans were regulated by the Consumer Credit Act 1974, there was only one case in which a time order was requested, and no time orders were awarded by the court.¹²

Many people facing possession action were being charged relatively high rates of interest (although we had data in only 130 cases). There were loans by sub-prime lenders and second charge specialist lenders at higher interest rates than high street lenders, as would be expected given they are higher risk loans. The top rate charged for a second charge loan was 24 per cent, and for a first charge mortgage was 9.5 per cent.

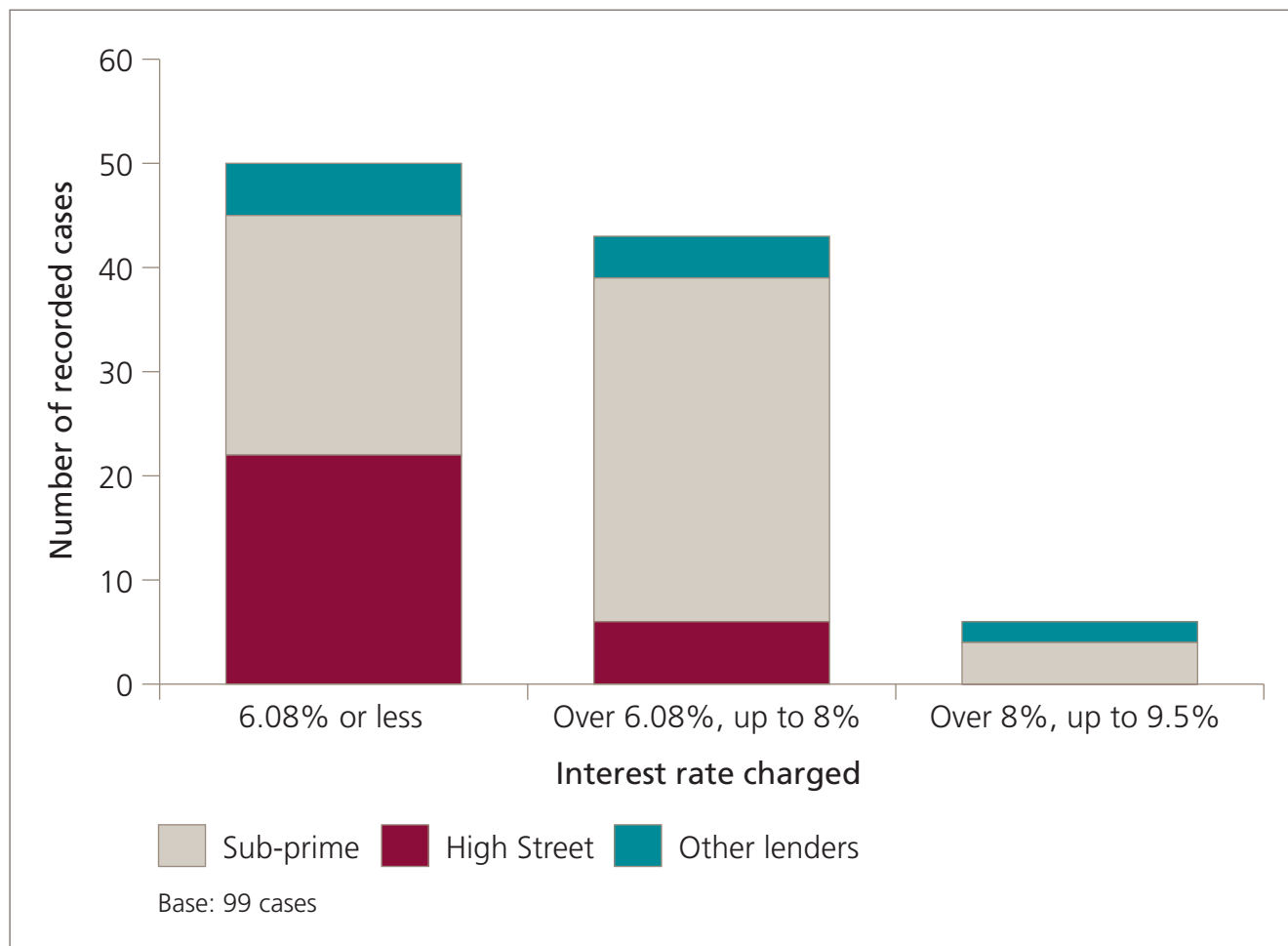
As shown in the chart opposite, 49 out of 99 first charge mortgages were at rates higher than the current standard interest rate of 6.08 per cent used to calculate SMI, which means the SMI support payments would not fully cover the mortgage interest payments.¹³

¹¹ The remaining eight per cent appeared to be commercial properties

¹² The court has more extensive powers to protect borrowers under this legislation compared to its powers under the Administration of Justice Acts: it can re-open the loan agreement to change the amount of the interest rate and the instalment, if it is just to do so, effectively making the lender bear some of the costs of having lent irresponsibly. This is known as a time order.

¹³ SMI is only potentially payable on first charge mortgages

Interest rates on first charge mortgages



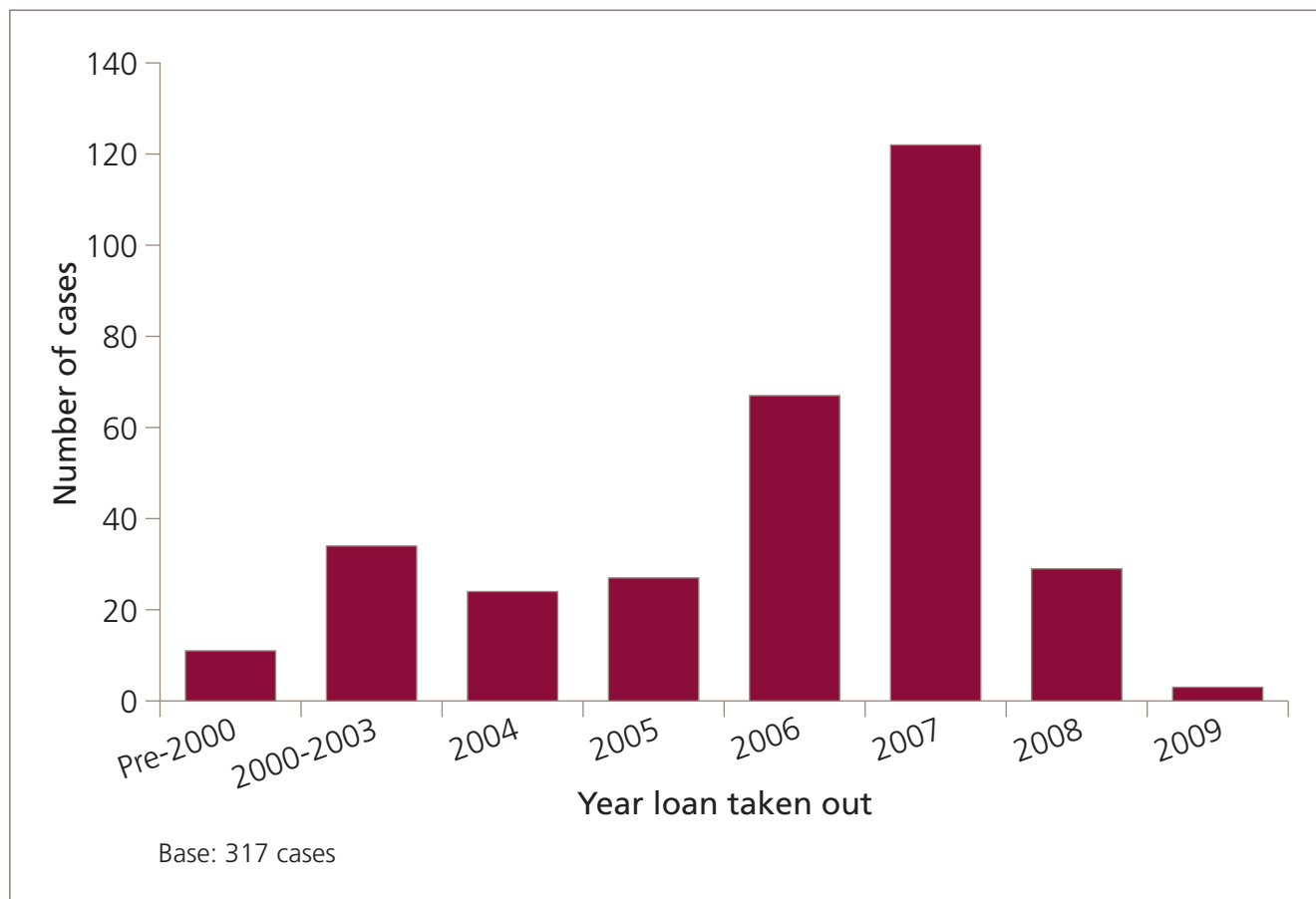
Clients' property values ranged widely, but most were relatively low. Of 360 cases where the client estimated this, the property was worth £100,000 or less in 24 per cent of cases and £150,000 or less in 53 per cent of cases.

We had information to estimate the amount of equity remaining in the property in 295 cases. Of these:

- 66 per cent of households had positive equity remaining in their property (11 per cent had less than £10,000 and 55 per cent over £10,000 of positive equity)
- 34 per cent had negative equity in their property (13 per cent had less than £10,000 and 21 per cent over £10,000 of negative equity).

Repossession rates are typically higher in the early years of a mortgage, as there is unlikely to be equity in the property and payments may be at the margins of affordability. As shown in the chart overleaf, our survey found that 70 per cent of clients had taken out their mortgage since 2006.

Age of mortgage or secured loan



Findings about the lenders and their actions

Types of lender

Overall, our survey and court lists show that court action was relatively concentrated amongst a few lenders, and that sub-prime lenders are taking more action in court than is proportionate to their share of the mortgage market. By contrast, some major high street mortgage lenders hardly appeared in the court lists.

In analysing the data, we classified lenders using public information sources as high street, sub-prime, and specialist second charge, according to their main mortgage/secured loan business. In our sample of 2,444 cases in the court lists, 55 per cent of cases were taken by sub-prime lenders, 34 per cent by high street lenders and seven per cent by specialist second charge lenders.

Four of the main sub-prime lenders accounted together for 21 per cent of all cases in the court lists. Using data published by CML, we estimate these lenders account for only 2.3 per cent of mortgages outstanding, so their court action appears nine times more than proportionate to their combined market share.¹⁴

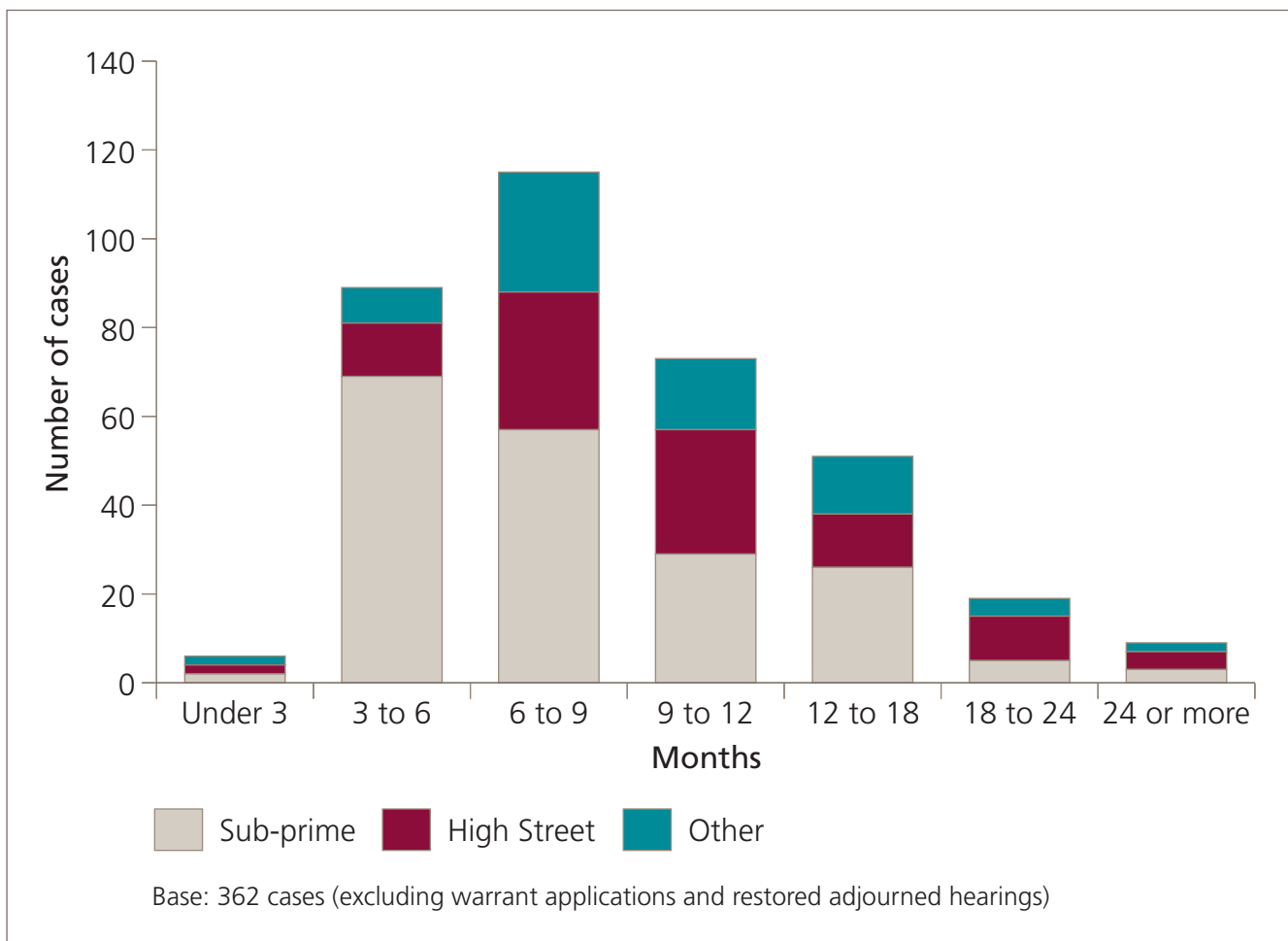
Are lenders taking action only as a last resort?

People who have no hope of ever making their contractual mortgage payments may not be helped by long delays before the lender takes court action, as their arrears and costs will increase. But people suffering a temporary loss of income may recover. So lenders are required by regulation to consider offering borrowers options which could help keep them in their homes – in other words, to show forbearance – before taking court action.

One indication of lender forbearance can be the level of arrears at the time of the possession hearing, since deducting one or two months from the level at the hearing normally gives a reasonable proxy for the arrears level when the lender began court action.¹⁵

As illustrated in the chart below, arrears on possession claims actions were less than six months of payments at the time of the hearing (and therefore likely to be under four or five months when the lender initiated action) in 95 cases. On average, sub-prime lenders had lower levels of arrears at the time of court hearings than high street lenders – 10 months compared with 12 months.

Arrears on date of hearing and type of lender



¹⁵ Civil Procedure Rules, Rule 55.5(3) states that the hearing date will be not less than 28 days after issue of the claim, and the standard period between the issue of the claim and the hearing will be not more than eight weeks. So, for possession claims, deducting one or two months from the level at the time of the hearing will normally show the arrears level when court action was initiated (except if the defendant had made a payment to reduce arrears before the hearing – where it would understate arrears at the start of the court action). This proxy calculation does not apply to warrant applications or restored adjourned hearings, and these are excluded from the analysis of length of arrears

Did lenders comply with the pre-action protocol?

The pre-action protocol sets out the steps lenders are expected to take before initiating a court possession claim. We asked about these in the survey.

The protocol requires both lender and borrower to take reasonable steps to communicate with each other. We found that:

- lenders had been in contact with clients before the claim in 80 per cent of cases
- contact was only made after starting court action in nine per cent of cases
- no contact at all was made in 11 per cent of cases.

The pre-action protocol requires that the lender and borrower should consider whether the borrower could pay the arrears in a reasonable time. We found that:

- in 63 per cent of recorded cases the lender had not offered any arrears repayment plan
- in 15 per cent of cases the arrears repayment plan offered was not affordable
- so, overall, lenders had offered an affordable arrears repayment plan in 22 per cent of recorded cases (and these had nevertheless proceeded to a court hearing).

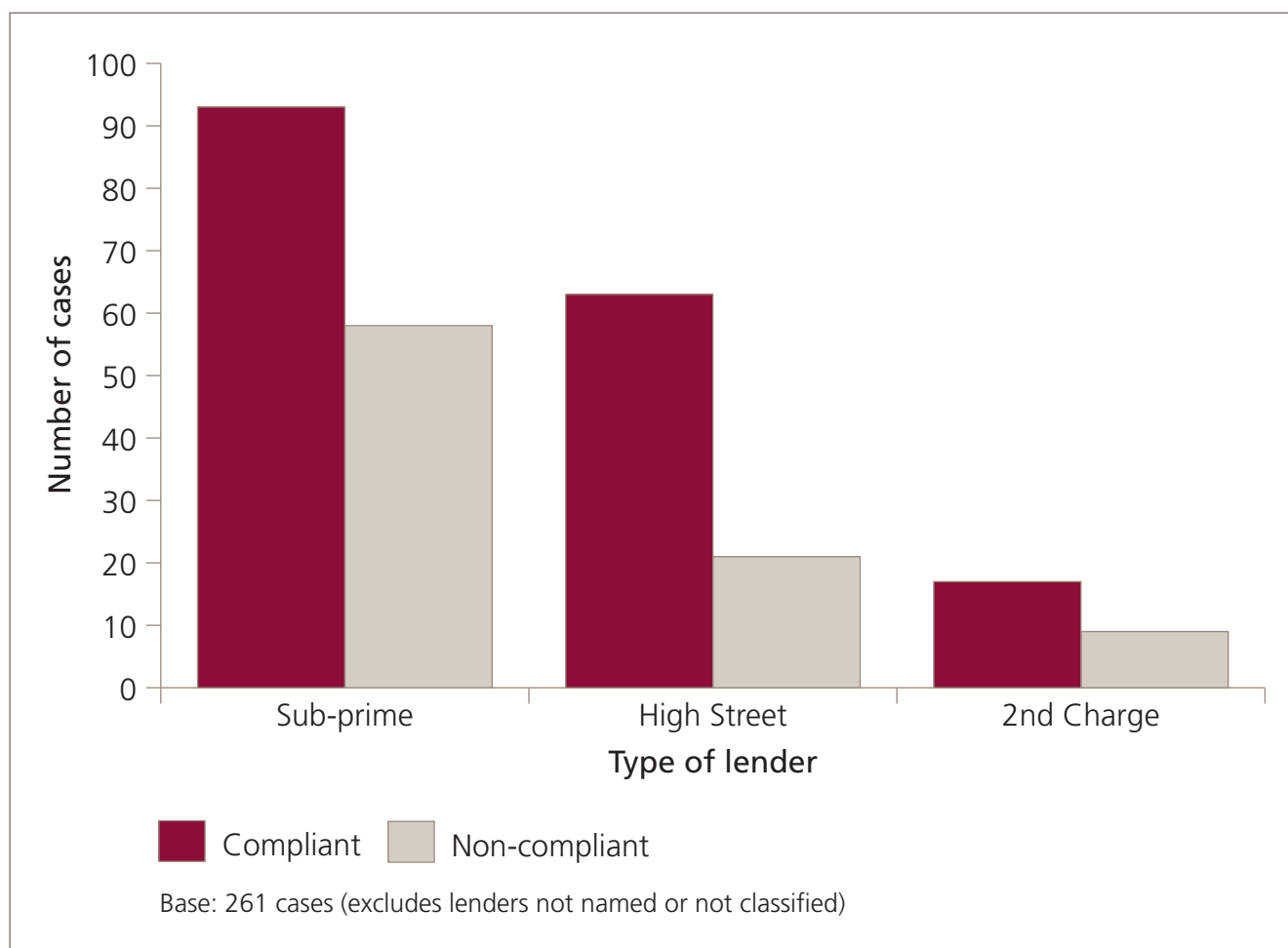
We asked advisers to record if the lender had offered any alternatives to possession, such as time to sell the property or to vary the mortgage:

- Lenders had offered one of these alternatives in 29 per cent of recorded cases.
- But in 71 per cent of recorded cases, the lender had offered none of these alternatives.

We asked advisers if they believed overall that the lender had complied with the pre-action protocol in each case. This question was answered in 300 cases, and in a third of these (101), the adviser believed the lender had **not** complied with the protocol. As shown in the chart opposite, there were cases where advisers believed the lender had not complied with the protocol across all types of lender.

We found, however, that the outcomes in court were not significantly affected by whether or not the lender had complied with the protocol. Judges asked about protocol compliance in 116 cases, but they imposed sanctions due to non-compliance in only six cases. Advisers, however, generally did not raise non-compliance in the court hearing.

Compliance with the pre-action protocol



Findings about the outcomes in court

Overall outcomes

The outcome ordered by the court was a possession order or eviction in 23 per cent of cases.¹⁶ A suspended possession order was given in 56 per cent of cases and the case was adjourned in 21 per cent of cases.¹⁷ So three-quarters of clients in the survey avoided immediate possession or eviction in court.

By contrast, where advisers recorded how the lender had instructed their agent to act at the hearing (in 185 cases) the lender sought immediate possession or eviction in 74 per cent of cases.¹⁸

¹⁶ Outright possession means ownership of the property normally passes to the lender 28 days after the court hearing. A long possession order may be made, for example, for 42 or 56 days. If the defendant has not left by that date, the lender can apply to court for a warrant of possession which (if given) results in a date being set for eviction. We refer to all of these outcomes in this report as possession order/eviction

¹⁷ Suspended possession means the borrower retains ownership as long as they pay contractual mortgage payments plus an amount of arrears set by the judge

¹⁸ Lenders are represented at court by an agent, who may be instructed either to discuss and agree terms for repaying arrears with advisers before the hearing or to seek immediate possession or eviction

It was notable that court outcomes were as requested by the court duty desk adviser in 88 per cent of cases recorded, and the reasons given for adjournment and terms set in suspended possession orders were almost always those suggested by the adviser. This underlines how important it is for people to have access to a court duty desk adviser to help them decide what outcome to pursue at their hearing.

While it is encouraging that many clients, particularly those with temporary loss of income, avoided immediate possession/eviction orders, our data suggests many of them may struggle to maintain payments for long at the level set in their suspended possession orders. Where we could estimate this (in 143 cases), income left after paying the mortgage and arrears payments was often very low: in 30 per cent of cases of first charge loans, household income left over was below the poverty line, and in over half of cases it was less than would be expected to meet basic living costs.¹⁹

Effect of client circumstances on court outcomes

We analysed the survey data to look for significant links between the client's circumstances and the outcome of their case at the hearing.

The most common feature of clients who received a possession order/eviction at court was low household income. As shown in the chart opposite, for the 72 cases where this was recorded, 53 per cent had net income under £1,000 per month, and 79 per cent under £1,500 per month.

Not surprisingly, court outcomes were strongly linked with whether or not the client was able to afford the contractual mortgage payments. The Administration of Justice Act 1970 sets out the court's powers in relation to possession for mortgage arrears, and it states that it can only exercise its powers to delay possession if the borrower can demonstrate that they can pay their contractual mortgage instalment (CMI) and clear the arrears 'within a reasonable period'.²⁰ We found that 39 per cent of recorded clients (158 out of 407) could not afford their contractual mortgage payments, and these clients accounted for 89 per cent of the possession/eviction orders.

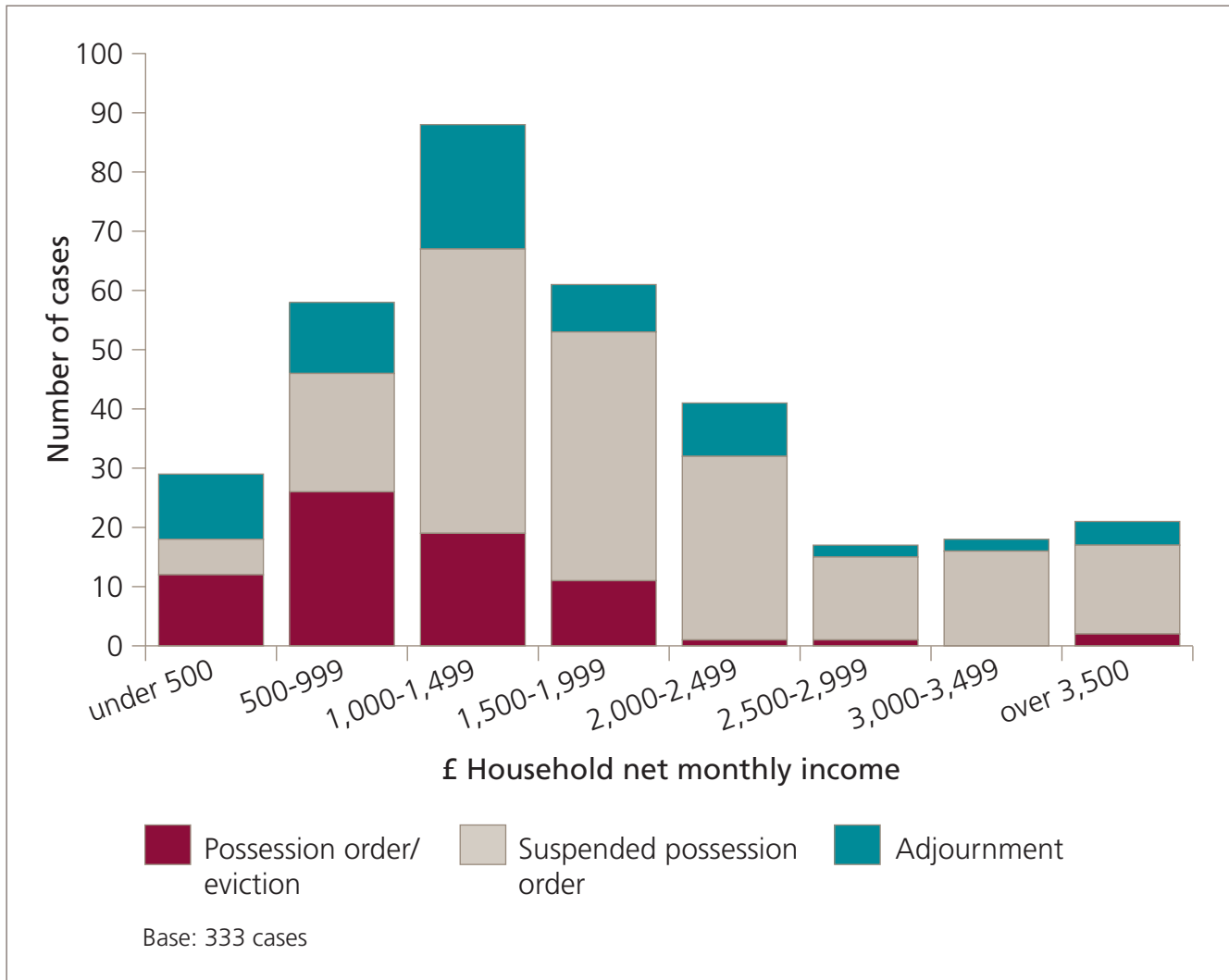
Forty-two per cent of clients said their loss of income was long-term (121 out of 285 cases), and they were also much more likely to receive a possession/eviction order than those who saw the loss as temporary. Of those with long-term loss of income, 49 per cent received a possession order/eviction compared with only 12 per cent who said their income loss was temporary.

We found that clients from households with no recorded income from work were also more likely to receive a possession/eviction order than others, with 37 per cent receiving possession/eviction orders compared with 17 per cent of households that were employed or self-employed.

¹⁹ The poverty line referred to here is 60 per cent median equivalised income after housing costs as defined by the Household Below Average Income survey 2007/08. Amounts to meet basic living costs are from the common financial statement method. We did not include payments needed for other property or unsecured debts, and we equivalised income for household type partially, assuming one child for households with any children

²⁰ Section 36, as amended by section 8 of the Administration of Justice Act 1973. The period could be as long as the remaining term of the loan (*Cheltenham & Gloucester BS v Norgan* (1995) 1 All ER 449)

Court outcomes compared to household income



Conclusions

Whilst our survey can only indicate trends amongst homeowners who were taken to court and sought advice there, it does highlight some successes in protecting against a rising tide of mortgage arrears leading to unnecessary repossessions. The recent announcement by the Council of Mortgage Lenders (CML) that they expect repossessions in 2009 to be lower than previously feared is, of course, good news. We suggest this is due not only to exceptionally low interest rates, but also to improved government safety nets, forbearance and support from lenders, and support from free housing and debt advice agencies.

Our survey highlights remaining bad practice by some lenders, such as failure to forbear or offer alternatives to borrowers, particularly in the sub-prime sector. Our survey also indicates some gaps in government safety nets for low income households.

We believe there is likely to be another surge of mortgage repossessions as the effects of the economic downturn work through, people struggle to find new work and to recover from income shocks, and interest rates eventually begin to rise. The CML predicts 53,000 people will lose their homes next year, and we believe this is too many.

We outline below a number of mitigating actions that can help prevent repossessions over the next few years and beyond.

Key findings and recommendations

Lender practice and the mortgage pre-action protocol

The number of mortgage possession claims being issued has fallen since the protocol came into force, suggesting it is working to deter lenders from taking unnecessary court action.²¹ But our survey suggests some cases are still coming to court when this could have been avoided.

Advisers said they believed the lender had not complied with the mortgage pre-action protocol in around a third of cases, and there was little evidence of judges pro-actively considering compliance with the protocol or possible sanctions for non-compliance. We believe these findings are unacceptable.

In October 2009, the Ministry of Justice introduced a checklist for the pre-action protocol, requiring lenders to record either that they have offered the client each of the options under the protocol or the reason why not. We believe this should enhance the importance and visibility of the protocol when cases come before the court, but it needs further support.

We call on:

- **all lenders to comply fully with the pre-action protocol**
- **the Judicial Studies Board to introduce training to ensure judges are informed of the sanctions already available to them if lenders have not complied with the pre-action protocol, and also of their powers to make time orders**

²¹ During the third quarter of 2009, 24,337 mortgage possession claims were issued on a seasonally adjusted basis, 37 per cent lower than in the third quarter of 2008 and 7 per cent lower than in the second quarter of 2009. Ministry of Justice press release, 12 November 2009

- **the Ministry of Justice to collect and analyse data from the new pre-action protocol checklist to understand better the reasons for non-compliance and courts rarely applying sanctions.**

One reason why courts have rarely applied sanctions may be the lack of clarity in the civil court rules and out of date mortgage possession legislation. The Pre-Action Practice Direction provides for general sanctions for all protocols, but does not explicitly set out appropriate sanctions for mortgage possession cases, including costs. Mortgage contracts currently allow lenders to add costs to the mortgage debt on an indemnity basis which means that costs are rarely raised in court or challenged by the judge. Furthermore, current residential mortgage law has not been updated since the 1970s, when less than half of the homes in the UK were owner occupied.

We recommend that:

- **the Pre-Action Practice Direction should be amended to require courts explicitly to address the costs indemnity issue in mortgage possession cases**
- **the Ministry of Justice should consider introducing a fixed fee regime for mortgage possession claims, and require that lenders (or their agents) should have to ask specifically for costs to be awarded**
- **the Law Commission should undertake its proposed review of mortgage law as soon as possible.**

Support for mortgage interest

Our survey also highlights that, in July 2009, government safety nets were still not catching all those low income households which needed support to get through a temporary loss of income. Further research is needed to understand the reasons for this, but our survey indicated some shortfall in take-up of the mortgage rescue scheme (MRS) and support for mortgage interest (SMI).²²

We found low take-up of SMI amongst clients attending court (although this could indicate SMI has worked to keep other borrowers out of court) and half the recorded mortgage interest rates in our survey were higher than would be fully covered by SMI payments. Participating organisations also see evidence in their wider advice work of clients not claiming SMI because of poor information given by Jobcentre Plus.

We therefore welcome the 2009 pre-Budget report announcement that the Department of Work and Pensions will extend for a further six months the temporary freezing of the standard rate for interest used to calculate SMI, and that once the freeze ends, the Government intends to move towards a fairer, more affordable approach, that more closely reflects mortgage interest rates.

We call on:

- **Jobcentre Plus to ensure it has procedures in place to advise clients who are potentially eligible for SMI to claim it immediately, in addition to signposting them to housing/debt advice agencies if appropriate**

- **the Department of Work and Pensions to take into account the findings of this report when it reviews the basis for calculating SMI after June 2010.**

Getting advice at court

Our survey highlights the value of housing possession court duty schemes in helping borrowers to understand their rights and show at the hearing how they propose to meet their mortgage and arrears payments. Court outcomes were the same as requested by the court duty desk adviser in 88 per cent of cases, underlining their crucial role in helping those clients who have a chance of recovery to avoid immediate possession or eviction.²³

We urge the Legal Services Commission to continue funding housing possession court desk duty schemes. This provision must be a priority within the funding, commissioning and delivery of integrated social welfare law services.

Regulation

Since our survey was carried out, the Financial Services Authority (FSA) and the Office of Fair Trading (OFT) have taken steps towards strengthening the rules and guidance that govern the conduct of firms in the mortgage and secured loan markets. The FSA has also recently announced enforcement action against a lender whose arrears management practices were found to be in breach of FSA rules and principles.

- In October, the FSA proposed major reforms to its mortgage market regulation, including proposals to strengthen the Mortgage Conduct of Business rules on forbearance.²⁴ The review acknowledged that a key problem has been firms' failure to perform proper affordability checks, and it proposed to set standards requiring lenders clearly to check affordability of mortgages.
- Our survey findings that some lenders still appear to be taking court action unnecessarily in some cases, and that certain sub-prime lenders are taking possession actions significantly more than in proportion to their share of the mortgage market, underline the need for these proposals to be carried through.

We urge the FSA not to water down after consultation its proposals to toughen up the Mortgage Conduct of Business rules, and to take prompt enforcement action where the rules are broken.

We also support the OFT in its proposal to step up enforcement against firms which breach the minimum standards it expects in the secured loan market.²⁵

²³ The Legal Services Commission, which runs the legal aid system, provides funding for housing possession court duty schemes at 'busy' court desks. The Department for Communities and Local Government (CLG) also provides some funding to local authorities to commission a local advice agency to provide a county court duty scheme in smaller and less busy courts. And some free advice services also seek funding to deliver a court desk service from charities, the Lottery Fund or their own council.

²⁴ *Mortgage Market Review*, FSA discussion paper, October 2009

²⁵ *Second charge lending – OFT guidance for lenders and brokers*, July 2009

Court data collection

Court actions are listed publicly at individual courts and, in the past, the Ministry of Justice has published aggregate court lists on its website.²⁶ Our research found that possession actions were concentrated amongst a few lenders, and we believe this is useful data which should be published in aggregate to inform policy-makers and the public.

We call on the Ministry of Justice to publish at least annually the top 50 lenders taking court action for possession and the number of possession actions taken by each lender.

Arrears and repossessions over the long term

Whilst short term measures, such as improvements to SMI, have been partially effective, we believe there is a need to ensure that arrears and repossessions can be more effectively managed in the future, particularly for the low income groups we have identified as most at risk.

Section 36 of the Administration of Justice Act does not offer sufficient protection to borrowers with lower incomes, and may lead to unnecessary repossession where these households can recover in the near future. We believe that the time order provisions in the Consumer Credit Act 1974, which allow the court to revise the contractual payment and interest rate, should be applied to all mortgages.

We urge Government to undertake a fundamental review of both private and state safety nets, to ensure that all low income borrowers have access to comprehensive help, and to give courts more flexible powers to help borrowers stay in their homes.

²⁶ When the Ministry of Justice launched Possession Claims Online in 2006 (allowing lenders and landlords to initiate possession claims electronically) it initially published aggregate court lists on its website. These were removed when it came to light that unscrupulous mortgage brokers and sale and rent back companies were using these to target borrowers

Appendix 1 – Methodology

Participating courts

Court duty desks in England and Wales run by AdviceUK members, Citizens Advice Bureaux and Shelter were invited to participate in the survey, and 65 (out of 201) county courts in England agreed to do so. These were:

Aldershot and Farnham, Aylesbury, Banbury, Barnsley, Bedford, Berwick, Birmingham, Bishop Auckland, Blackpool, Bodmin, Bournemouth, Bradford, Bromley, Cambridge, Carlisle, Cheltenham, Chester, Chichester, Colchester, Croydon, Doncaster, Epsom, Evesham, Gloucester, Goole, Grantham, Guildford, Haywards Heath, Kingston upon Thames, Leicester, Leigh, Lincoln, Liverpool, Lowestoft, Macclesfield, Medway, Melton Mowbray, Milton Keynes, Newcastle upon Tyne, Nottingham, Oldham, Oswestry, Plymouth, Rawtenstall, Reading, Romford, Sheffield, Shrewsbury, Southampton, St Albans, St Helens, Skegness, Stratford upon Avon, Teeside, Telford, Truro, Tunbridge Wells, Wakefield, Walsall, Watford, West London, Weston-super-Mare, Wigan, Woolwich, and Yeovil.

Survey scope and questions

Questionnaires were completed by participating court desk duty advisers for each case on which they advised during July 2009. The survey does not cover cases where the defendant did not attend court or attended but did not take advice from a participating duty desk adviser. In total, 452 questionnaires were returned.

We asked questions on the following: type of case; client demography; household income and occupancy; property value; possession claim (lender and loan details); other charges on property; unsecured debts; reasons for arrears; eligibility and claims for government support; pre-court actions by lender; outcome sought by adviser; order made by court; comments on case.

Government safety nets

The survey included explicit questions on claiming support for mortgage interest (SMI) and eligibility for the mortgage rescue scheme (MRS). The homeowner mortgage support scheme (HMS) became available in April 2009, and there is a lag between applying for a possession claim and the court hearing of at least two months. This implies our July sample could include only one month of HMS availability, so we did not ask a specific question about it. We invited advisers to record comments on government schemes in free text, but had almost no comments on HMS.

Analysing survey results

Not all questions in the survey were answered by all advisers. In analysing the results, we excluded cases where the particular questions were not answered.

We asked advisers to classify cases as possession proceedings, warrant applications (to evict), restored adjourned hearings, possession time orders, or 'other'. Overall, 82 per cent of cases reported were possession proceedings, 12 per cent were warrant applications, and five per cent were restored adjourned hearings. Only one time order case was recorded, and four 'other.'

These distinctions between types of case were not used in analysing the data in general (for example, client circumstances and court outcomes), because the research focuses on the final outcome for the client. In analysing the size of arrears and pre-court actions by lenders, however, the time since court action was first taken is a relevant factor, so we excluded both warrant applications and restored adjourned hearings.

Court lists

County courts typically hear mortgage and secured loan cases on set days of the week, and each case is allocated five minutes. Lists of cases are publicly available for each court, and they record the claimant (that is, the lender) names and the type of case. Since the lists include all cases, they indicate which lenders are taking court action to repossess homes overall.

We asked court duty desk advisers to return court lists throughout July 2009, and these covered 2,444 cases across England. The court desks which returned court lists were mainly the same as those which participated in the survey of advised cases (46 out of the 65 – accounting for 377 out of 452 cases), but included six further courts (with 97 listed cases, but no advised cases). These additional courts were Accrington, Basingstoke, Buxton, Kendal, Morpeth & Berwick, and Middlesbrough. Thus the samples of court list and advised cases overlap significantly, but they are not the same.

The table below shows the distribution of cases by region. We believe this provides reasonable coverage across England, and can find no evidence of bias from the self-selection of participating courts.

Cases by region

	Advised cases	Court list cases
East	2%	3%
Greater London	7%	7%
Midlands	33%	30%
North East	13%	18%
North West	15%	16%
South East	20%	17%
South West	9%	8%
Total	452	2,444

We had particularly strong participation from some county courts: Birmingham provided 398 listed cases (16% of the sample of 2,444), Liverpool 198, Nottingham 113, Bradford 103 and Medway 97. These courts were also strongly represented in the sample of advised cases.

Appendix 2 – Lenders in court lists

There were 146 different lenders (claimants) in our court list sample of 2,444 cases. In order to compare numbers of cases with published data for market shares of mortgage balances outstanding, we added together lenders in the same financial group, using public information sources. Our court list sample had cases from 113 different financial groups. The table below gives the number of cases for each type of lender, showing separately any financial group with over 50 cases (or more than two per cent of our sample). The 12 named financial groups accounted for over 70 per cent of all cases in our sample.

We also classified lenders (using public information sources) as high street, sub-prime, and specialist second charge, according to their main mortgage/secured loan business.²⁷

Cases in court lists by lender group name and lender category

Number of cases	High Street	Second charge	Sub-prime	Other	Total	% of sample
GE Money			386		386	15.8%
Lloyds Banking Group ²⁸	273	39			312	12.8%
Santander ²⁹	181				181	7.4%
Southern Pacific			158		158	6.5%
Kensington			153		153	6.3%
Northern Rock	133				133	5.4%
Bradford & Bingley ³⁰	10		115		125	5.1%
Barclays ³¹	34	38			72	2.9%
Redstone Mortgages			69		69	2.8%
Royal Bank of Scotland	62				62	2.5%
Preferred Mortgages			59		59	2.4%
Nationwide Building Society ³²	19		34		53	2.2%
Other lenders (101) with fewer than 50 cases	117	95	377	92	681	27.9%
Total cases	829	172	1,351	92	2,444	
Per cent of cases	34%	7%	55%	4%		

Source: court lists collected and researchers' classification of lenders from public sources

²⁷ Where groups contain entities with different main business types, they are classified entity-by-entity and so have cases in both high street and specialist categories

²⁸ Includes Lloyds TSB, Bank of Scotland, Birmingham Midshires and Black Horse (specialist second charge)

²⁹ Includes Abbey National and Alliance & Leicester

³⁰ Includes Mortgage Express (sub-prime)

³¹ Includes First Plus Financial Group (specialist second charge)

³² Includes Derbyshire Home Loans and UCB Home Loans (both sub-prime)

Mortgage market share comparison

The Council of Mortgage Lenders (CML) publishes mortgage balances outstanding for the top 30 mortgage lenders. Our court list sample corresponds quite well with CML coverage: it contains court cases brought by 26 of the CML top 30 financial groups, and only one lender with more than two per cent of our sample of cases was not in the CML top 30 (Redstone Mortgages).

It is not possible to compare the overall distribution of cases by lender type with CML data (since it does not classify lenders by type). However, four of the main sub-prime lenders in our sample lists are separately identified in the CML top 30 balances, allowing a direct comparison. As the table shows, the market share of these four sub-prime lending entities together was only 2.3 per cent, whereas their share of listed court cases was over 21 per cent.

Court list cases compared with mortgage market share

	Cases in court lists ³³		CML balances outstanding	
	Number of cases	% of sample	£ billion	% of sample
GE Money Home Lending	174	7.1%	14.4	1.2%
Kensington Mortgages	149	6.1%	5.0	0.4%
Southern Pacific Mortgages	137	5.6%	5.1	0.4%
Preferred Mortgages	59	2.4%	2.7	0.2%
Total		21.2%		2.3%

Base: court lists containing 2,444 cases in total; and CML mortgage balances outstanding for 2008 which total £1,163 billion

³³ Cases are for the named entities only. The court lists included additional cases from other entities in the financial groups concerned, which are excluded from the table. The excluded entities are: Kensington Personal Loans, Southern Pacific Personal Loans and for the GE Money group: GE Money, GE Money Home Finance, GE Money Mortgages, GE Money Secured Loans, and Igroup

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