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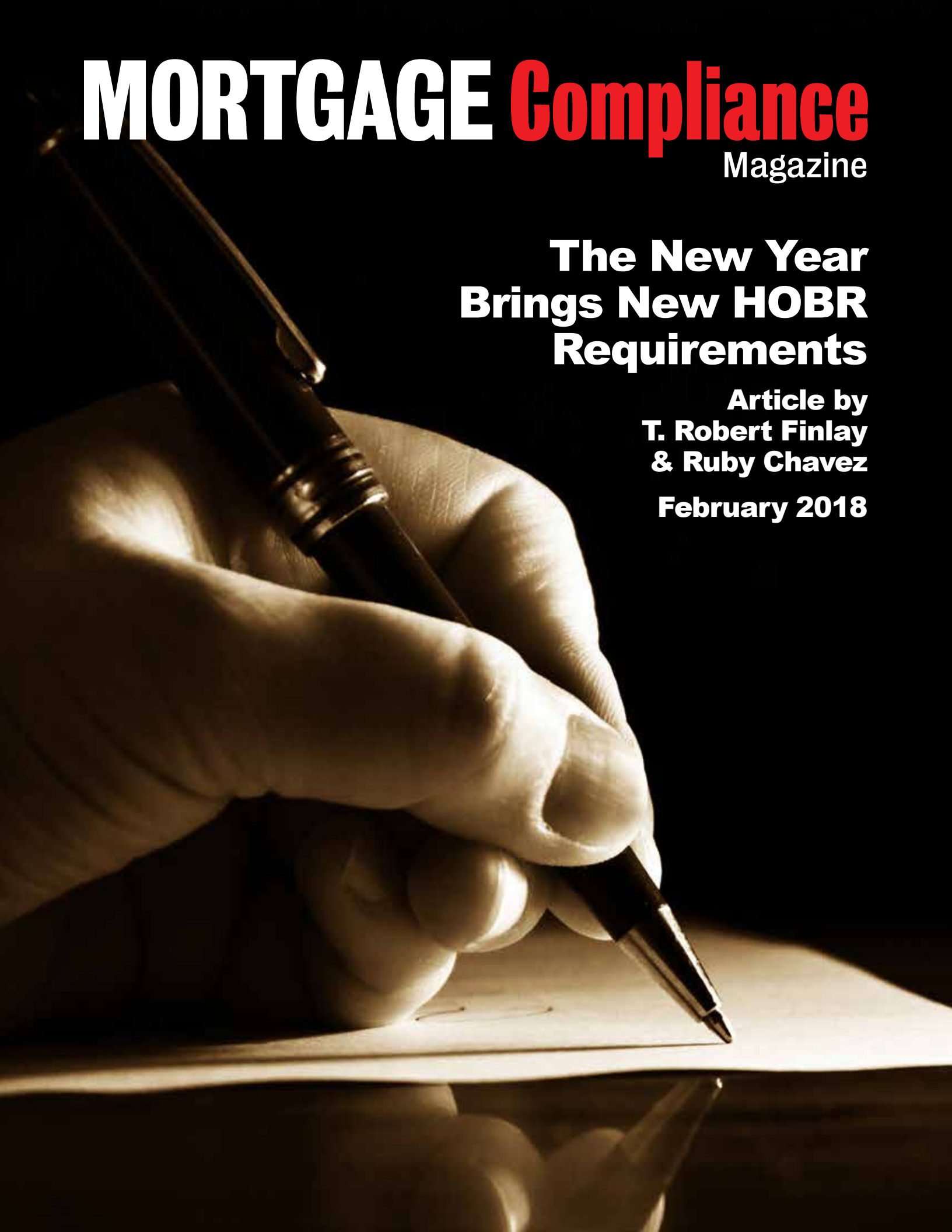

The New Year Brings New HOBR Requirements

Article by
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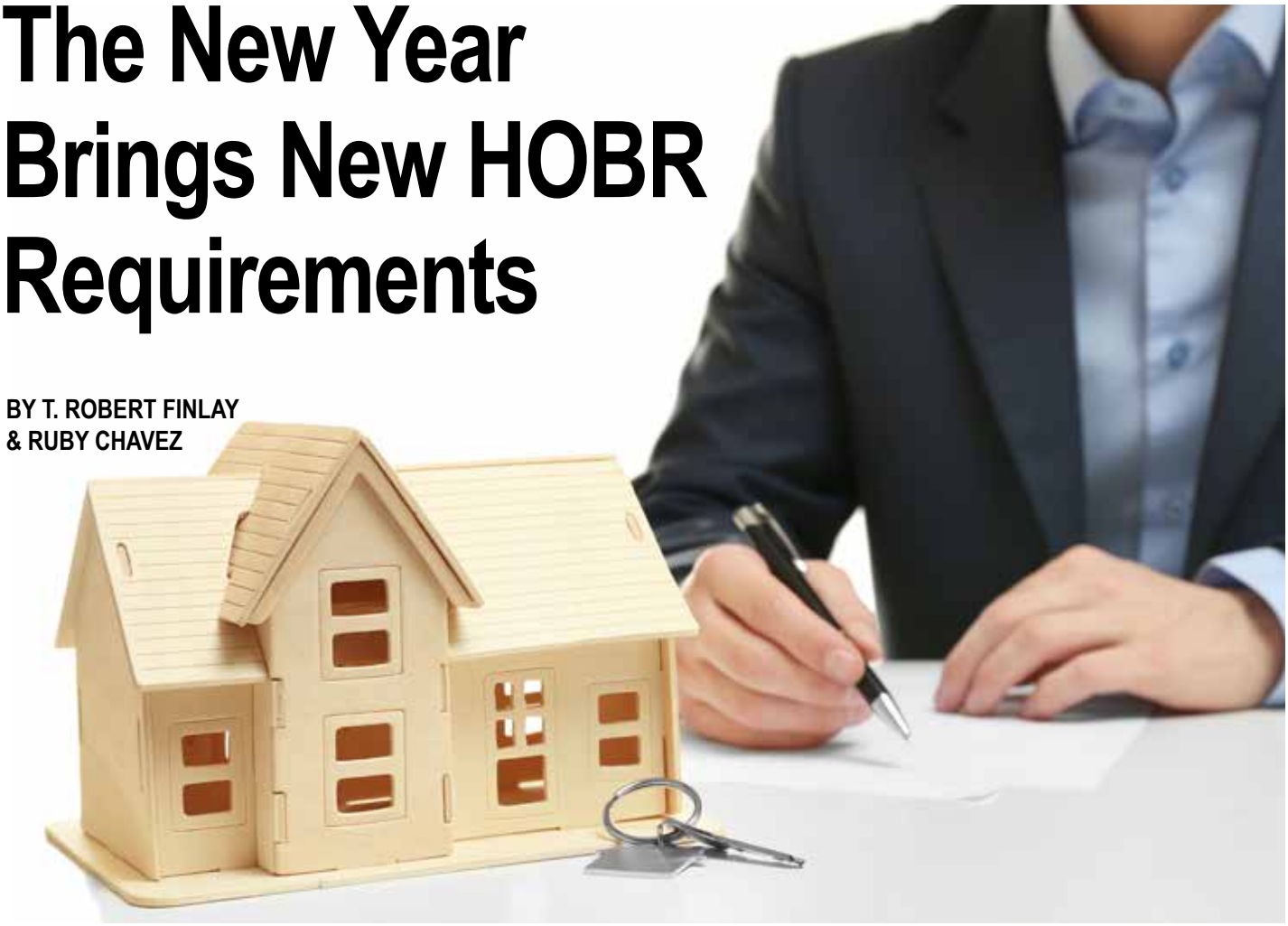

BY T. ROBERT FINLAY & RUBY CHAVEZ

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Riddled throughout California's Homeowner Bill of Rights (HOBR) are the words "repealed" effective "January 1, 2018." Unfortunately, many loan servicers assume that means the entire HOBR will be repealed and that all they have to worry about going forward is complying with the CFPB Loss Mitigation Rules. Unfortunately, that is not the case. Many sections of HOBR are being replaced by new rules that automatically go into effect January 1, 2018. In many instances, the new provisions are less onerous than their predecessors. But, in some very key areas, the new provisions can cause loan servicers more problems. The key is to understand what provisions are being changed and how they impact your compliance procedures.

For starters, "HOBR II" attempts to remove the distinction between loan servicers conducting more or less than 175 annual foreclosures. In most respects, all servicers are treated the same going forward.

Civil Code Section 2923.55 will be history-making in 2018. Going forward, Section 2923.5 sets forth the pre-Notice of Default (pre-NOD) contact requirements for loan servicers of all sizes. The two statutes are substantially similar, except that the written notice regarding servicemembers and the statement that the borrower may request a copy of the note, deed of trust, assignment, or payment history will no longer be required starting in 2018. Since the provisions are substantially

the same, we anticipate that violations of the pre-NOD contact requirements will continue to be a popular allegation in lawsuits; therefore, consider documenting the pre-NOD contact and/or due diligence steps with precise details in case you need it later as evidence. Further, please make sure your foreclosure trustees update their compliance declarations to reflect the Code change.

The provisions in Section 2923.6 prohibiting dual tracking will be replaced by the (new) Section 2924.11, which prohibits recording a notice of sale or conducting a foreclosure sale upon receipt of a "complete application for a foreclosure prevention alternative." (Note—2923.5 bars recording the notice of default when there is a complete application pending.) Historically, loan servicers were only required to stay foreclosure proceedings upon receipt of a complete loan modification application. Beginning January 1, 2018, the dual tracking prohibition applies to all applications for all foreclosure prevention alternatives. Another change is that Section 2924.11 does not require an appeal period following a written denial. Instead, the denial of a first lien loan modification application must state with specificity the reasons for the denial and must include a statement that the borrower may obtain additional documentation supporting the denial decision upon written request to the mortgage servicer. Oddly, the new Section 2924.11 does not appear to prohibit recording a Notice of Default when there is a pending complete foreclosure prevention alternative. However, the CFPB rules do.

The key is to understand what provisions are being changed and how they impact your compliance procedures.

The old Section 2923.6(g) excused loan servicers from having to review multiple loan modification applications that did not involve a "material change in financial circumstances." While that provision's vagueness caused loan servicers many sleepless nights, at least it afforded some relief. Unfortunately, that provision is gone at the end of the year and there is no replacement. Therefore, it is possible that loan servicers must review multiple applications, regardless of whether there is a material change in financial circumstances. That said, if a loan servicer finds itself in trouble with an issue with multiple applications, there may be an out, but one that requires further discussion.

Section 2923.7 does not expire and remains the same as before, requiring a single point of contact, also known as a "SPOC," to communicate the loss mitigation application process, coordinate documents, notify the borrower of any missing documents, and have access to current information to accurately inform the borrower of the current status. Note that this section still only applies to loan servicers that conduct more than 175 qualifying annual foreclosures.

Section 2924.10 will be expiring, which means loan servicers will no longer be required to provide a written acknowledgment within five business days of receiving loan modification documents. However, the CFPB rules still require an acknowledgement letter.

With Section 2924(a)(5) expiring, loan servicers or their foreclosure trustees will no longer have to provide written notice to a borrower when a sale is postponed more than ten business days.

Section 2924.12 still creates a private right of action for a borrower to enforce HOBR; but it will now only apply to material violation of "sections 2923.5, 2923.7, 2924.11, 2924.17." Like its predecessor, the borrower is only entitled to injunctive relief prior to the Trustee's Deed Upon Sale recording. But, after it records, the loan servicer is potentially liable for any actual economic damages resulting from a material violation of the covered sections and, if the court finds that a material violation was "intentional or reckless, or resulted from willful misconduct by a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent," the greater of treble actual damages or $50,000. This section also still allows for attorney's fees for a prevailing borrower.

With Section 2924.17 remaining in effect, all loan servicers, regardless of size, must still ensure that before recording or filing a declaration pursuant ▷

to section 2923.5, notice of default, notice of sale, assignment of deed of trust, substitution of trustee, or a declaration or affidavit in court relative to a foreclosure proceeding, that it has reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information. However, some of the government enforcement provisions have expired at the end of 2017.

Unfortunately, the challenges with handling "complete," but last-minute, loan modification applications still exist. The new HOBR sections still do not directly address what happens when a loan servicer receives a complete loan modification application minutes or hours before a foreclosure sale. In fact, the new HOBR actually complicates matters by extending the dual tracking restriction to all foreclosure prevention alternatives, not just loan modifications. That said, like before, loan servicers can take steps to address how to deal with these last minute applications ahead of time; but, it will require a separate discussion.

What do all of these changes mean from a litigation perspective? Unfortunately, we anticipate continued litigation over alleged violations of HOBR. In the short term, most lawsuits will implicate the pre-January 1, 2018 HOBR due to when the foreclosure documents were recorded and when the subject loan modification reviews took place. Down the road, litigation could actually increase if loan servicers do not get ahead of the changes.

Note: Since the original drafting of this article, the California Legislature is considering SB 818, which would bring back the original version of HOBR. So, while loan servicers must still adjust their compliance procedures to comply with the 2018 version of HOBR, don't throw away your old manuals, as HOBR could be back in 2019. Stay tuned! MCM

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