

DISSENTING OPINION OF RAMIL, J.

I respectfully dissent. The legislature enacted Hawai'i Revised Statutes (HRS) chapter 454 (1993 and Supp. 2000) to protect consumers from excessive fees and hidden charges imposed by unscrupulous mortgage brokers. Accordingly, I would hold that section 454-8 (1993) renders void and unenforceable any mortgage brokerage contract between a consumer and an unlicensed mortgage broker. In this manner, section 454-8 is rendered consistent with the plain language and legislative history of HRS chapter 454. In my view, the majority's interpretation of section 454-8 is inconsistent with legislative intent and the plain language of HRS chapter 454, and produces an absurd result.

This court has long held that when interpreting a statute, our "primary duty" is to "ascertain the intention of the legislature and to implement that intention to the fullest degree." Kaiama v. Aguilar, 67 Haw. 549, 554, 696 P.2d 839 (1985). My disagreement with the majority stems from its efforts to ascertain the intent of the legislature in enacting HRS § 454-8, which contains two sentences and reads as follows:

Violation of this chapter shall be punishable by a fine of not more than \$1,000 or imprisonment of not more than one year, or both. Any contract entered into by any person with any unlicensed mortgage broker or solicitor shall be void and unenforceable.

A majority of this court -- that I do not join -- has expressed the view that "where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning." State v. Kalama, 94 Hawai'i 60, 64, 8 P.3d

1224, 1228 (2000) (citing Citizens for Protection of North Kohala Coastline v. County of Hawai'i, 91 Hawai'i 94, 107, 979 P.2d 1120, 1133 (1999)). The language employed in the second sentence of HRS § 454-8 is admittedly both plain and unambiguous. It is also absurdly broad. By its own terms, section 454-8 invalidates and renders unenforceable "any contract" -- be it for long distance telephone service, an automobile lease, or employment -- if one party to the contract is an "unlicensed mortgage broker or solicitor."

Departure from literal construction -- even absent statutory ambiguity -- is appropriate when such construction would produce an absurd and unjust result. Franks v. City and County of Honolulu, 74 Haw. 328, 341, 843 P.2d 668, 674 (1993) (citing Hawaiian Ins. & Guar. Co. v. Financial Sec. Ins. Co., 72 Haw. 80, 807 P.2d 1256 (1991)). Accordingly, and as the majority concedes, a plain language construction of section 454-8 -- or, to use the majority's term, a "hyperliteral construction" -- would yield an absurd result and must be rejected. Id.

To ascertain and implement the intent of the legislature, we must read the language of section 454-8 "in the context of the entire statute and construe it in a manner consistent with the purpose of the statute." State v. Mezurashi, 77 Hawai'i 94, 97, 881 P.2d 1240, 1243 (1994) (internal quotation marks and citations omitted). It is thus incumbent upon this court to ascertain the legislative purpose of HRS chapter 454 and

construe section 454-8 in a manner consistent with that purpose. Id. Here, the legislature's intent is readily discernible from both legislative history and plain language.

Enacted in 1967, HRS chapter 454 was designed to "safeguard the public interest with respect to mortgage brokerage activities[.]" Hse. Stand. Comm. Rep. No. 3, in 1967 House Journal, at 492. Specifically, the legislature enacted HRS chapter 454 in response to concerns about "exorbitant" fees and "hidden charges" that were being "exacted from unwary consumers" by unscrupulous mortgage brokers. Id. The Senate Committee on Ways and Means remarked that "the abuses in this area stem from fly-by-night operators who . . . usually charge excessive fees, and often fail to produce results and disappear with advance fees paid. . . ." Sen. Stand. Comm. Rep. No. 897, in 1967 Senate Journal, at 1244.

In 1988, the legislative auditor, upon conducting a review of the effectiveness and efficiency of the statute, reported that the foregoing problems persisted. See Legislative Auditor of the State of Hawai'i, Sunset Evaluation Report, Regulation of Mortgage Brokers and Solicitors, Report No. 88-21 (1988), at 16. The auditor noted that consumer complaints against mortgage brokers between 1980 and 1988 alleged:

- 1) failure to service accounts before a lock-in rate expired;
- 2) deliberate lying and delays to charge a higher interest rate than originally quoted and promised;
- 3) misrepresentation;

4) false promises; 5) failure to disburse funds and create escrow accounts; 6) withholding of refundable monies; and 7) gross negligence. Id. Accordingly, the auditor recommended that the legislature reenact HRS chapter 454. Id. at 23. The auditor further recommended that the legislature "clarify that the regulation of mortgage brokers covers the brokers' activities in relationship to borrowers and not to investors." Id. (emphasis added).

In accordance with the auditor's recommendation, the legislature, in 1989, reenacted HRS chapter 454. See 1989 Haw. Sess. L. Act 218, at 517. The legislature also amended the statutory definition of "mortgage broker" to clarify the legislature's intent that HRS chapter 454 regulate the relationship between the mortgage broker and the borrower. See Hse. Stand. Comm. Rep. No. 1150, in 1989 House Journal, at 1255; Sen. Stand. Comm. Rep. No. 826, in 1989 Senate Journal, at 1116.

This legislative intent -- to protect consumers from "exorbitant" fees and "hidden charges" -- is equally apparent from the structure and language of HRS chapter 454. Most dramatic is the fact that the statute does not preclude unlicensed "persons" -- such as The Mortgage Warehouse, see HRS 454-1 -- from making, negotiating, or selling mortgage loans, but rather disallows them from receiving commissions, fees, or bonuses in connection with the making, negotiating, or selling of mortgage loans. HRS § 454-3(a) (1993).

The key provision of HRS chapter 454 is section 454-3(a), which instructs that:

No person shall act as a mortgage broker or mortgage solicitor without a license therefor as provided in this chapter, and no person not licensed under this chapter shall charge or receive any commission, fee, or bonus in connection with arranging for, negotiating, or selling a mortgage loan.

A mortgage broker is a person who "for compensation or gain, or in the expectation of compensation or gain," makes a mortgage loan on behalf of a borrower. HRS § 454-1 (1993) (emphasis added). By the statute's plain language, therefore, The Mortgage Warehouse was only a "mortgage broker" because it received "compensation or gain" from the transaction. Id. It is not, therefore, the fact that The Mortgage Warehouse was unlicensed that renders the "contract" in this case void and unenforceable, but rather the fact that The Mortgage Warehouse, while unlicensed, expected to receive, and did receive, several thousand dollars in lender's fees.

The foregoing language with respect to commissions, fees and bonuses is consistent with the remainder of HRS chapter 454 which unambiguously polices the relationship between mortgage brokers and consumers, and specifically brokers' commissions and fees. For example, HRS § 454-7 (1993) authorizes the commissioner to directly regulate brokerage fees:

The commissioner may also adopt rules concerning maximum fees, commissions, and charges on mortgage loan transactions. The maximum fees, commissions, and charges shall be related to the actual amount of money made available to the borrower, over and above the indebtedness of prior mortgages. The commissioner may also adopt rules concerning the full disclosure of the fees, commissions, and charges.

HRS chapter 454 also contains a list of conduct that may lead to the suspension of a mortgage brokerage license. See HRS § 454-4 (1993). Such conduct includes misrepresentation, the failure to disburse funds in accordance with an agreement, and the failure to place funds in escrow "within a reasonable time."<sup>1</sup> HRS § 454-4(a).

Based on the foregoing, I would interpret section 454-8 in a manner consistent with the purpose of HRS chapter 454 and hold that it renders void and unenforceable any mortgage brokerage contract between a consumer and an unlicensed mortgage

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<sup>1</sup> HRS § 454-4 provides in relevant part as follows:

**§ 454-4. Suspension, revocation.**

(a) The commissioner may suspend a license for a period not exceeding two years for any of the following acts or conduct of a licensee:

- (1) Making a false promise tending to influence, persuade, or induce, or pursuing a course of misrepresentation or false promises through agents, solicitors, advertising, or otherwise;
- (2) Misrepresentation or concealment of any material fact with respect to any transaction resulting in injury to any party;
- (3) Failure to disburse funds in accordance with an agreement;
- (4) Failure to account or deliver to any person any personal property such as money, fund, deposit, check, draft, mortgage, or other document or thing of value which has come into the person's hands and which is not the person's property or which the person is not in law or equity entitled to retain, and at the time which has been agreed upon, or is required by law, or, in the absence of a fixed time, upon demand of the person entitled to the accounting or delivery;
- (5) Failure to place, within a reasonable time upon receipt, any money, fund, deposit, check, or draft . . . in escrow pursuant to a written agreement, or to deposit the funds in a trust or escrow bank account . . .

broker.<sup>2</sup> With respect to the majority's conclusion that the term "contract," as employed in section 454-8, means all contracts which mortgage brokers enter into in their capacity as mortgage brokers, see Majority at 38, I have three observations.

First, the majority ignores the longstanding principle that "laws in pari materia, or upon the same subject matter, shall be construed with reference to each other." International Sav. and Loan Ass'n v. Wiig, 82 Hawai'i 197, 200, 921 P.2d 117, 120 (1996) (citing Richardson v. City and County of Honolulu, 76 Hawai'i 46, 55, 868 P.2d 1193, 1202 (1994)). Specifically, the majority's expansive reading of the term "contract" renders section 454-8 inconsistent with the rest of HRS chapter 454. The statute, in HRS § 454-3(a), expressly disallows unlicensed persons -- such as The Mortgage Warehouse -- from obtaining commissions or fees in connection with making, acquiring or selling mortgage loans. In my view, section 454-8 is consistent with section 454-3(a) because it renders "void and unenforceable" mortgage brokerage contracts and thereby precludes unlicensed entities from enforcing such contracts and obtaining brokerage fees or commissions from consumers -- which is precisely what section 454-3(a) disallowed The Mortgage Warehouse from doing. In this same manner, both HRS §§ 454-3(a) and 454-8 are consistent with the statutory definition of "mortgage broker" as

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"Mortgage brokerage contracts are executed for the purpose of employing a broker to seek financing for the acquisition and development of real estate." D. Barlowe Burke, Jr., Law of Real Estate Brokers, §§ 14.2, 14:4 (2d ed. 1999).

a person who "for compensation or gain, or in the expectation of compensation or gain," makes, acquires or sells a mortgage loan on behalf of a buyer. HRS § 454-1. Pursuant to this definition, if, for example, The Mortgage Warehouse did not anticipate receiving fees or commissions from the transaction, it would not have been a "mortgage broker" or violated any provision of HRS chapter 454.

Second, the majority's conclusion is fundamentally inconsistent with the express purpose of HRS chapter 454. The legislature enacted HRS chapter 454 to discourage the use of unlicensed mortgage brokers. As stated supra, the legislature was expressly concerned about "exorbitant" fees, "hidden charges," and mortgage brokers who collect advance fees and then disappear. The majority, however, interprets section 454-8 to provide an enormous incentive to those consumers who use unlicensed mortgage brokers. I suspect that most consumers would happily use unlicensed mortgage brokers, incurring exorbitant fees and hidden charges along the way, if, at the end of the day, they -- like Kida -- do not have to pay their mortgage.

Finally, the result reached by the majority in this case is absurd. There is no dispute that Novus Financial Corporation loaned \$300,000.00 in exchange for a promissory note secured by a mortgage on Kida's property. The Mortgage Warehouse, apparently for the purpose of obtaining fees or commissions, structured the transaction in such a manner that it



acted as a conduit through which the money passed its way to Kida and the note and mortgage passed on their way to Novus. The majority holds that, because The Mortgage Warehouse structured the transaction in this manner, the note and mortgage are void and unenforceable. In other words, and I emphasize, the majority punishes the holder of the promissory note because an unlicensed mortgage broker has done precisely what HRS § 454-3(a) disallows it from doing -- collecting more fees/commissions.

Accordingly, I dissent.