CONCURRING OPINION OF ACOBA, J.

I concur in the result reached by the majority for the reasons that follow.

In my view, this case sits at the crossroads of the public policy nullifying mortgage loan contracts "either directly or indirectly ma[d]e, negotiate[d], [or] acquire[d], or [so] offer[ed ,]"[1] by unlicensed mortgage brokers and solicitors as evinced in Hawai‘i Revised Statutes (HRS) §§ 454-1 and 454-8 (1993)[2] and the policy favoring the negotiability of promissory notes as essential to the viability of commercial transactions.[3]

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[1] Hawai‘i Revised Statutes (HRS) § 454-1 (1993) defines "mortgage broker" as one who performs these activities for compensation, and "mortgage solicitor" as one who engages in such conduct as an employee of or under the direction of a mortgage broker.

[2] See Butler v. Obayashi, 71 Haw. 175, 177, 785 P.2d 1324, 1325 (1990) (finding that a statute preventing unlicensed contractors from "recovering for work done, or materials or supplies furnished, or both on a contract or on the basis of the reasonable value thereof, in a civil action . . . expresses a very strong public policy that contractors in this state should apply for, and receive licenses, . . . and the provisions are obviously intended to produce harsh results in furtherance of that policy"); Jones v. Phillipson, 92 Hawai‘i 117, 125, 987 P.2d 1015, 1023 (Haw. App. 1999) (finding that statute vindicated the purposes of "protect[ing] the general public against dishonest, fraudulent, unskillful or unqualified contractors" and "ensur[ing] the health and safety of the public by requiring that contractors possess a minimum level of expertise, experience and training" by barring civil actions by unlicensed contractors). Cf. Wilson v. Kealakekua Ranch, Ltd., 57 Haw. 124, 129, 551 P.2d 525, 528-29 (1976) (allowing enforceability of a contract by an unlicensed architect, reasoning that "where a statute is silent with respect to the enforceability of a contract whose performance is malum prohibitum, the legislature could not have intended unenforceability where a forfeiture, wholly out of proportion to the requirements of public policy or appropriate individual punishment, would result and redound solely to the benefit of the defendant").

[3] See, e.g., Manor Bldg. Corp. v. Manor Complex Assocs., Ltd., 645 A.2d 843, 846 (Pa. Super. Ct. 1994) ("The purpose of the Commercial Code is to enhance the marketability of negotiable instruments and to allow bankers, brokers, and the general public to trade in confidence."); Malphrus v. Home Sav. Bank of City of Albany, 254 N.Y.S.2d 980, 983 (1965) (stating that Article 3 of the Commercial Code "was enacted to protect persons engaged in business transactions involving instruments for payment of money").

Following the command of HRS § 1-16 (1993) that "[l]aws . . . upon the same subject matter, shall be construed with reference to each other[,]" it is plain that "contract" in HRS § 454-8 means a "mortgage loan" contract, that is, a contract concerning "a loan secured by a mortgage on real property." HRS § 454-1. Thus, HRS § 454-8 directs that mortgage loan contracts procured by unlicensed brokers or solicitors shall be "void and unenforceable." Void means "[n]ull; ineffectual . . . unable, in law, to support the purpose for which it was intended[; a]n instrument or transaction which is wholly ineffective, inoperative, and incapable of ratification and which thus has no force or effect so that nothing can cure it. " Black's Law Dictionary 1573 (6th ed. 1990). An unenforceable contract means "[a] contract having no legal effect or force in a court action." Id. at 1528. By the express terms of the statute, such a contract may not be enforced in a court of law.

Under HRS § 454-8, the mortgage loan contract affected is that "entered into by any person with any unlicensed mortgage broker or solicitor." Hence, the illegality of such a contract is not absolved by its assignment to third parties so as to permit foreclosure against the person who contracted with the unlicensed broker or solicitor, as Plaintiff-Appellee Beneficial Hawaii, Inc. appears to assert. Otherwise, the public policy in place would be undermined, and the plain intent of the

legislature -- to ban contracts involving unlicensed mortgage brokers or solicitors -- defeated. Likewise, in light of the legislative mandate, those to whom promissory notes secured by a mortgage are negotiated should only be entitled to relief to the extent available, from the transferor from whom such notes were obtained[4] and not from the maker of the note who entered into contract with the unlicensed mortgage broker or solicitor.

The foregoing results, while in isolation appearing harsh, are merely the consequences of the legislative policy choice embodied in the statute, as to which all parties dealing with mortgage contracts and notes are forewarned, and viewed in that framework, are not unjust.

[4] See, e.g., HRS § 490:3-416 (1993) (listing transfer warranties and stating that "[a] person to whom the warranties . . . are made and who took the instrument in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the instrument plus expenses and loss of interest incurred as a result of the breach").