DISSENTING OPINION OF ACOBA, J.

I respectfully dissent in the present case, because I disagree with the majority's rush to find a conflict between Hawai‘i Revised Statutes (HRS) chapter 431, the insurance code, and HRS chapter 432, pertaining to, inter alia, mutual benefit societies. It is our judicial responsibility to construe statutes enacted by our legislature so as to avoid conflict where possible. Here, the majority has determined that "there is an apparent conflict between HRS §§ 431:1-101 [(1993)] and 431:15-102 [(1993)]." Majority opinion at 14.

In doing so, the majority sweeps too broadly in employing its power of statutory construction, applying rules of conflict where no conflict exists, because a reasonable construction would preserve the presumption of statutory validity. While under the obvious construction of HRS chapters 431 and 432, the proceeding below was questionable, at best, the parties did not raise the invalidity of the initial, separate proceeding. However, it is unclear whether the court exercised its discretion as to the applicability of article 15 of the insurance code, and, therefore, this case should be remanded.

I.

To briefly recap, Pacific Group Medical Association (PGMA), a mutual benefit society providing prepaid health care plans to employers and employee groups, and Defendant-

Appellant/Cross-Appellee Volunteer Employees' Benefit Association of Hawaii (VEBAH), another mutual benefit society, entered into a contract under which VEBAH would collect premiums from its members for PGMA health plans, and PGMA would provide these health plans. Beginning in September 1996, VEBAH began to receive complaints from its members about PGMA's payment of claims. After seeking explanations, VEBAH asked for assurances of PGMA's ability to perform and to pay claims. From mid-January through February 1997, VEBAH withheld payment to PGMA. When no assurances were forthcoming, VEBAH subsequently changed plans effective March 1, 1997.

On March 11, 1997, Plaintiff-Appellee/Cross-Appellant Wayne C. Metcalf, III, State Insurance Commissioner (the commissioner), initiated Special Proceeding No. 97-0135 (the Special Proceeding) to seize PGMA under HRS chapter 431. Subsequently, on April 21, 1997, the commissioner filed a Motion for Approval of Agreement With the Queen's Health Systems [(Queen's)] and Related Relief," which requested the court to approve a transaction whereby Queen's would oversee the future operations of PGMA, assume certain of its debts, and pay a transfer fee to the commissioner as Rehabilitator. Under the transaction, substantially all of PGMA's assets would be transferred to a liquidating trust, which was to be liquidated under HRS chapter 431, the insurance code. At this time, VEBAH raised the question of the applicability of article 15 of HRS

chapter 431. The question was deferred, and other actions associated with the Queen's agreement went forth. On September 26, 1997, the commissioner filed a motion seeking a declaratory judgment that article 15 applied to the proceeding against PGMA. Subsequently, in its order of December 9, 1997, the court determined that article 15 of the insurance code applied to the proceedings filed against VEBAH. All of these actions were made pursuant to the Special Proceeding, which is not at issue in this case.

In a separate action, the commissioner filed a claim against VEBAH for the moneys VEBAH withheld from PGMA for the months of January and February, pursuant to HRS § 431:15-323 (1993), which allows the commissioner to recover any premiums owed, either earned or unearned, at the time the insurer is declared insolvent. VEBAH counterclaimed, asserting, among other things, the setoffs which are at issue. Under HRS § 431:15-319(b) (1993), no setoff or counterclaim is allowed under conditions applicable here. Thus, if HRS § 431:15-319(b) applies, VEBAH may not counterclaim against the commissioner for moneys withheld from PGMA.

VEBAH and the commissioner disagree about the applicability of HRS § 431:15-319(b) to the premiums withheld by VEBAH from PGMA. The crux of this disagreement is the applicability of article 15 of the insurance code, of which HRS § 431:15-319(b) is one of the provisions, to mutual benefit

societies, of which PGMA is one. VEBAH argues that article 15 of the insurance code is not applicable to PGMA, while the commissioner argues that article 15 is applicable to PGMA. The court agreed with the commissioner.

Both parties advance many theories on why their position is correct, based upon the statutory language in several provisions of HRS chapters 431 and 432, and a perceived conflict between the two chapters pertaining to when provisions in chapter 431 apply to mutual benefit societies. The majority agrees with the commissioner, determining that there is an irreconcilable conflict and deciding that article 15 is applicable to the instant case.

I disagree with the majority's resolution of a perceived conflict between HRS chapters 431 and 432 on whether article 15 of HRS chapter 431 applies to mutual benefit societies. The import of the majority's construction is that HRS § 431:15-319(b) applies to the proceedings between VEBAH and the insurance commissioner, thus barring VEBAH's counterclaims and setoffs against the commissioner.

II.

It is well established that this court has a responsibility to construe statutes so as to avoid conflict between statutes, if possible. See State v. Griffin, 83 Hawai‘i 105, 108 n.4, 924 P.2d 1211, 1214 n.4 (1996) ("The legislature is

presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction[,] and illogicality." (Citation omitted.)); Reefshare, Ltd. v. Nagata, 70 Haw. 93, 98, 762 P.2d 169, 173 (1988) ("[C]ourts will not presume an oversight on the part of the legislature where such presumption is avoidable."); Ringor v. State, 88 Hawai'i 229, 233, 965 P.2d 162, 166 (App. 1998) ("[L]egislative enactments are presumptively valid and should be interpreted in such a manner as to give them effect.").

The provisions at issue in this case, HRS chapters 431 and 432, were not only passed in the same legislative session, but were part of the same legislative enactment. See 1987 Haw. Sess. L. Acts 347, 348, & 349, vol II. Thus, our obligation to construe these provisions in such a way as to avoid conflict is all the more compelling. In the present case, a reasonable interpretation of the legislature's intent is available.

III.

A mutual benefit society is defined as "any corporation, unincorporated association, society, or entity" that engages in the activities in HRS § 432:1-104(2) (1993). Although mutual benefit societies may perform some of the functions of an insurance company, such as, inter alia, "[m]aking provision for the payment of benefits in case of sickness, disability, or death of its members[,]" HRS § 432:1-104(2)(A)(i), they are treated

separately from other insurance organizations in HRS chapter 432, which deals specifically with mutual benefit societies. Our statutory scheme makes mutual benefit societies subject to HRS chapter 431, Hawaii's insurance code, see HRS § 431:1-100 (1993), only to a limited extent. HRS § 431:1-101 states that "[a]ny person transacting a business of insurance under chapter 432 shall be subject to this code only to the extent provided in chapter 432." (Emphasis added.) HRS § 432:1-101 (1993), which defines the scope of HRS chapter 432, states that, "[e]xcept as expressly provided in this article, mutual benefit societies shall be exempt from the provisions of the insurance code." (Emphasis added.) Therefore, both HRS chapters 431 and 432 provide that the insurance code applies to mutual benefit societies only to the extent indicated in HRS chapter 432.

A.

As would be expected, HRS chapter 432 sets out requirements which are, for the most part, entirely separate and distinct from the insurance code. Part I includes general provisions; Part II sets out the requirements for organization of the mutual benefit societies; Part III governs the authority to offer benefits and registration requirements with the insurance commissioner; Part IV pertains to financial and reporting requirements; Part V sets out the examination powers of the

insurance commissioner and the process by which a receiver is appointed; and Part VI sets out required provisions and benefits.

While, primarily, the statutes deal with mutual benefit societies and insurance entities separately, for some purposes, mutual benefit societies are grouped together with insurance companies. Thus, several sections of HRS chapter 432 expressly refer to HRS chapter 431, making those provisions subject to the insurance code. For example, HRS § 432:1-402 (1993) restricts the type of investments that can be made by any domestic mutual benefit society which promises or offers to pay death, sick, disability, or other benefits to those authorized under article 6 of the insurance code. HRS § 432:1-402 specifically provides that "article 6 of the insurance code . . . [is] hereby extended to and made applicable to the mutual benefit societies."

B.

Examination of a mutual benefit society is one area where mutual benefit societies are treated the same as insurance entities. As noted supra, Part V of HRS chapter 432 deals with financial examination of mutual benefit societies and the process of placing a financially unstable or noncompliant mutual benefit society into receivership. One provision of Part V, specifically, HRS § 432:1-501(a) (1993), references the insurance code, making mutual benefit societies subject to the examination provisions in the insurance code:

> The powers, authorities, and duties relating to examinations vested in and imposed upon the [insurance] commissioner under article 2[1] of the insurance code are extended to and imposed upon the commissioner in respect to examinations of mutual benefit societies.

(Emphasis added.) Article 2 of the insurance code, HRS §§ 431:2-101 through -308 (1993 & Supp. 2001), relates to the powers of the insurance commissioner to examine "the activities, operations, financial condition, and affairs of all persons transacting the business of insurance[.]" HRS § 431:2-301 (1993). Therefore, the insurance commissioner is authorized to exercise "[t]he powers, authorities, and duties relating to examinations vested in and imposed upon the commissioner under article 2 of the insurance code[,]" HRS § 432:1-501(a), with respect to determining whether any person has violated any provision of the insurance code or for securing useful information, see HRS § 431:2-201 (1993).

Receivership provisions of the insurance code, however, are not found within article 2 of the insurance code, but are contained in article 15 of the insurance code. See HRS §§ 431:15-101 through -411 (1993 & Supp. 2001). Thus, HRS § 432:1-501(a), which incorporates article 2 of the insurance code, does not also incorporate the receivership provisions of the insurance code.

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[1] Among other examination provisions in article 2 of the insurance code, HRS § 431:2-203 (1993 & Supp. 2001) establishes that, "[i]f, upon examination or at any other time, the commissioner has reasonable cause to believe that any domestic insurer requires supervision because it is in such condition as to render the continuance of its business hazardous to the public or to holders of its policies or certificates of insurance, or if the domestic insurer gave its consent, then the commissioner may summarily proceed pursuant to section 431:15-201." (Emphasis added.)

IV.

A.

HRS chapter 432 contains a separate part governing receivership specifically for mutual benefit societies. Part V, HRS §§ 432:1-502 through -503 (1993), details the procedure to be used in appointing a receiver in the case of irregularities or insolvency, should these be found during the examinations pursuant to HRS § 432:1-501 and article 2 of the insurance code. This part is entirely separate from article 15 of the insurance code, HRS §§ 431:15-101 through -411. The specific provisions relating to the appointment of a receiver for a mutual benefit society, and the powers and duties accruing to the receiver, are thus found in HRS § 432:1-502.

The parties disagree on the version of HRS § 432:1-502 to be applied, however. I would agree with VEBAH that the timing of the proceeding governs. In the present case, the commissioner initiated proceedings to rehabilitate PGMA on March 11, 1997, pursuant to HRS chapter 431 of the insurance code. Thus, although the proceeding to rehabilitate PGMA was brought under the wrong chapter, see infra, the date that the proceedings were initiated governs, and the 1993 version of HRS § 432:1-502 applies to PGMA.[2]

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[2] The 1997 version, which became effective in July 1997, specifically refers to article 15 of chapter 431:

> (d) The remedies and measures available to the commissioner under this section shall be in addition to, and not in lieu of, the remedies and measures available to the

(continued...)

B.

Prior to its amendment in July 1997, for purposes of receivership, HRS § 432:1-502 did not group mutual benefit societies with insurance entities as HRS chapter 432 had done for examination purposes, but, instead, grouped them together with financial institutions.[3] Under HRS § 432:1-502, and not according to HRS chapter 431, the receivership process contemplates that a receiver exercises the powers and duties as specified in HRS chapter 412, which governs receivers and conservators for financial institutions. HRS § 432:1-502 states as follows:

> **Receiver; appointment, powers, duties.** (a) The commissioner shall give immediate notice thereof to the society and demand that irregularities be promptly corrected, impairments of assets be made good, that all unsafe or unauthorized practices be discontinued, or that there be compliance with the laws in question, if, upon the examination of any mutual benefit society, as defined in section 432:1-104(2), the commissioner ascertains and finds that:
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> (1) The laws of the State relating to such societies are not being fully observed;
> (2) That any irregularities are being practiced;
> (3) That the assets have been or are in danger of being impaired;
> (4) That the society is conducting its affairs in an unsafe manner so that continuance of its business would be hazardous to the public; or
> (5) That it is necessary for the protection of the members or creditors of the society.
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> (b) If the commissioner's demand issued under subsection (a) is not complied with within a reasonable time fixed by the commissioner, but not exceeding thirty days

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[2](...continued)
commissioner under article 15 of chapter 431.

1997 Haw. Sess. L. Act 367, § 2, at 1153 (emphasis added).

[3] HRS chapter 432 contemplates that receivership may be effected under HRS chapter 412, and, thus, HRS § 432:1-501 states that the insurance commissioner may use the staff of the commissioner for financial institutions, presumably because they would be in the best position to understand the internal workings of a mutual benefit society.

> after the notice, then upon the request of the commissioner, application shall be made by the attorney general on the commissioner's behalf, to a judge or court of competent jurisdiction for the appointment of a receiver for the society. If it appears that any of the facts enumerated in the application as the ground for a receivership exists, the court or judge shall immediately appoint a competent person as receiver, and shall determine such receiver's bond and prescribe the receiver's duties, and may make such other or further orders as shall seem proper.
>
> (c) Except as otherwise provided by the court or judge, any receiver appointed under this article shall have, exercise, and perform all of the powers and duties of a receiver of a financial institution under chapter 412, article 2, part IV.[4]

Thus, mutual benefit societies are specifically grouped for receivership purposes with financial institutions under HRS chapter 412. However, a court may instead make the insurance code's article 15 applicable. HRS chapter 432 specifically

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[4] For example, HRS § 412:2-408 (1993) describes the duties and powers of a conservator as follows:

> (a) A conservator of a Hawaii financial institution shall observe the provisions of this part except to the extent preempted by applicable federal law.
>
> (b) Upon assuming office, the conservator may:
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> (1) Immediately take possession of the assets of the Hawaii financial institution and operate the institution with all the rights and powers of the shareholders or members, directors, and officers with the authority to conduct all business of the Hawaii financial institution;
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> (2) Collect all obligations and money due the Hawaii financial institution;
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> (3) Preserve and conserve the assets and property of the Hawaii financial institution;
>
> (4) Set aside and make available for withdrawal by depositors and payment to other creditors on a ratable basis such amounts as in the opinion of the commissioner may safely be used for this purpose; and
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> (5) Take such action as may be necessary to carry out the purposes of the conservatorship, consistent with the conservator's appointment order, and as may be required by law, the commissioner or any court having jurisdiction over the matter. Provided, however, that the conservator shall at all times be subject to the direction and supervision of the commissioner.

HRS § 412:2-412 (1993) further describes the duties and powers of a receiver. HRS § 412:2-416 (1993) notes the priority of claimants when a receiver liquidates the assets of an institution.

provides that the examination provisions of HRS chapter 431 apply to mutual benefit societies, but the receiver's powers and duties should be exercised under HRS chapter 412, "except as otherwise provided by the court or judge." HRS § 432:1-502(c). Accordingly, should a court or judge "otherwise provide[,]" HRS § 432:1-502, article 15 of the insurance code may be applicable to mutual benefit societies, instead of the rights and powers listed under HRS chapter 412.

C.

The fact that a court may authorize a mutual benefit society receiver to utilize powers under article 15 of the insurance code is in harmony with the insurance code itself. HRS § 431:15-102 states that "[t]he proceedings authorized by this article may be applied to . . . [a]ll nonprofit service plans and all fraternal benefit societies and beneficial societies subject to chapter 432, Benefit Societies[.]" (Emphases added). Inasmuch as HRS § 431:15-102 employs the term "may," it is plainly meant to indicate permissive use, rather than mandatory use of article 15 for mutual benefit societies. See Krystoff v. Kalama Land Co., 88 Hawai'i 209, 214, 965 P.2d 142, 147 (App. 1998).

The legislature's intent that application of article 15 to mutual benefit societies be permissive, rather than mandatory, is further established by the legislature's adjustment to the model act from which the insurance code derives. The legislature

changed the term "shall" to the word "may" in HRS § 431:15-102, when first enacting HRS chapter 431. As observed by VEBAH, the insurance code is based upon the National Association of Insurance Commissioners (NAIC) Model Act. See 2 Hawaii Insurance Commissioner, Revised and Consolidated Insurance Laws of the State of Hawaii (1986) (stating that article 15 is based upon the NAIC Model Act, and that HRS § 431:15-102 is based upon the NAIC Insurance Code, Section 2, and Utah Code Ann. § 31A-27-101-1).

Section 2 of the NAIC Model Act states as follows:

> The provisions of this Act shall be applied to:
> A. All insurers who are doing, or have done, an insurance business in this state, and against whom claims arising from that business may exist now or in the future, and to all person subject to examination by the commissioner.
> B. All insurers who purport to do an insurance business in this state;
> C. All insurers who have insureds resident in this state;
> D. All other persons organized or doing insurance business, or in the process of organizing with the intent to do an insurance business in this state;
> E. All nonprofit service plans and all fraternal benefit societies and beneficial societies subject to [insert statute identification if desired];
> F. All title insurance companies subject to [insert statute identification if desired];
> G. All prepaid health care delivery plans [insert statute identification if desired];
> H. [Any other specialty type insurer not covered by the general law which should be subject to this Act].

The legislative amendment to section 2, when adopting the NAIC Model Act as our insurance code, demonstrates that the legislature intended the application of article 15 to mutual benefit societies to be permissive, rather than mandatory. See Helbush v. Mitchell, 34 Haw. 639, 639 (1938) ("Where a legislative body adopts a law of another State[,] all changes in words and phraseology will be presumed to have been made

deliberately and with a purpose to limit, qualify or enlarge the adopted law to the extent that the changes in words and phrases imply."). Thus, if a court directs the procedures set forth in article 15 to apply, then "[t]he proceedings authorized under [article 15] may be applied" to mutual "beneficial societies[.]" HRS § 431:15-102.

V.

A.

The majority agrees that HRS § 432:1-502 "does not indicate that it was intended to be an exclusive remedy and does not limit the applicability of [a]rticle 15 to mutual benefit societies." Majority opinion at 16 n.8. This is correct. However, HRS § 432:1-502 does mandate a process by which a receiver is appointed. It is not at all clear that such procedures were followed in the present case.

As recounted supra, on April 21, 1997, the insurance commissioner, as Rehabilitator of PGMA, filed a motion requesting, among other things, that the court enter an order of liquidation, pursuant to article 15 of the insurance code, HRS § 431:15-305(a) (1993). VEBAH objected to the applicability of article 15, and the question was deferred for later consideration. On September 26, 1997, the commissioner filed a motion seeking a declaratory judgment that article 15 applied to the proceedings against PGMA. At that time, the 1997 version of

HRS § 432:1-502 was in force, see supra note 2, and, arguably, article 15 did apply. Subsequently, in its order of December 9, 1997, the court determined that article 15 of the insurance code applied to the proceedings filed against VEBAH.

Thus, it could be argued that the court, in stating that article 15 applied, rather than the rights and duties of a receiver detailed under HRS chapter 412, exercised its discretion pursuant to HRS § 432:1-502(c). However, there is no indication that the other provisions for appointing a receiver under HRS § 432:1-502(a) and (b) were followed. HRS § 432:1-502(a) mandates that the commissioner "give immediate notice . . . to the [mutual benefit] society and demand that irregularities be promptly corrected, impairments of assets be made good, that all unsafe or unauthorized practices be discontinued, or that there be compliance with the laws[.]" There is no indication that such notice and demands were made by the commissioner.

HRS § 432:1-502(b) provides that if the demand, see supra, is not complied with, then an application to appoint a receiver shall be made by the attorney general on the commissioner's behalf, at the request of the commissioner. See id. In the present case, proceedings were initiated by the commissioner pursuant to HRS chapter 431. In his initial complaint, the commissioner stated that, "[o]n March 11, 1997, the Insurance Commissioner of the State of Hawai'i commenced the proceedings entitled Reynaldo D. Graulty v. Pacific Group Medical

Association, S.P. No. 97-135, Circuit Court of the First Judicial Circuit, State of Hawai‘i, seeking to rehabilitate PGMA pursuant to Chapter 431[.]"

B.

Based upon the record before us, the initial special proceeding instituted against PGMA appears to be at odds with the requirements of HRS § 432:1-502(b), because it could not be brought by the commissioner, and it could not be brought pursuant to HRS chapter 431. Under HRS § 432:1-502, the rights and powers of a receiver could only be altered by a court, pursuant to HRS § 432:1-502(c), after the receiver had been correctly appointed under the foregoing process. Whereas the other procedures were not followed, it is plain that the court did not exercise its discretion under HRS § 432:1-502(c), as it was not following the requirements of the statute but, rather, believed that HRS chapter 431 governed the proceedings. The proceedings were brought under HRS chapter 431, and the court repeatedly granted the commissioner's various motions made pursuant to HRS chapter 431. It is clear the court believed that HRS chapter 431 governed. Thus, the court would have been unaware that applying article 15 was an option under HRS § 432:1-502(c).

Accordingly, although article 15 of the insurance code could have applied had the court exercised its discretion, there was plainly no discretion exercised. However, because the record

before us is limited and the parties have not argued this point on appeal, I do not reach the question of whether the special proceeding initiated against PGMA is, itself, valid.

VI.

What is plainly evident based upon the record before us is that, whereas the court relied upon HRS chapter 431 throughout this proceeding, there could have been no exercise of discretion by the court under HRS § 432:1-502(c) in authorizing the commissioner to exercise rights and powers within article 15 of HRS chapter 431, as the court was apparently unaware that this was a discretionary matter. See State v. Perry, 93 Hawai‘i 189, 198 n.17, 998 P.2d 70, 79 n.17 (App. 2000) ("Because the court believed it had no discretion in choosing the sentence to be imposed other than to sentence [the d]efendant as it did, we remand the case to the court for resentencing to allow it to exercise its discretion within the bounds permitted under the sentencing statutes."); Doe v. Roe, 85 Hawai‘i 151, 163, 938 P.2d 1170, 1182 (App. 1997) (remanding to the family court for reevaluation of support obligations, because the court erroneously believed that its discretion was limited by an earlier judgment).

Therefore, this case should be remanded to the court to (1) determine whether it is authorized to exercise discretion under HRS § 432:1-502(c) to permit the commissioner to proceed

under article 15 of the insurance code, and, if so, (2) allow it to exercise its discretion in applying or not applying article 15 in the present case.