CONCURRING AND DISSENTING OPINION BY NAKAMURA, C.J.

I respectfully dissent with respect to: (1) the majority's decision to affirm the Circuit Court's interpretation of the phrase "actual monthly cost of coverage;" and (2) the majority's decision, which followed from this affirmance, that the State's[1/] challenge to the Circuit Court's denial of the State's requests to amend its complaint were thereby rendered moot. I concur in the determinations made by the majority on the other issues it addresses on the merits.[2/]

I believe the overriding issue in this appeal is whether the State has a claim for relief if it can prove that the cost of premiums for certain health and life-insurance plans sponsored by HGEA or UPW (hereinafter, "union-sponsored plans") were set fraudulently or in bad faith. The interpretation of the "actual monthly cost of coverage" limitation, and whether the State was entitled to amend its complaint, should be evaluated in this context.

In my view, the Legislature, in providing government funds to public employee unions to purchase health and life insurance for their members, intended that the cost of the insurance premiums be determined and established in good faith. The Legislature did not intend to pay for the cost of the premiums regardless of how those premiums were set; it did not intend to pay for the cost of premiums that were established in bad faith, were collusively set, or were the result of fraud.

At issue is the interpretation of the phrase "actual monthly cost of coverage" used in statutes authorizing the

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[1/] I will collectively refer to Plaintiffs-Appellants, Cross-Appellees, State of Hawaiʻi, *ex rel.* David M. Louie, Attorney General, and Dean H. Seki, Comptroller, as the "State." I will also collectively refer to Defendants-Appellees, Cross-Appellants, Hawaiʻi Government Employees Association, AFSCME Local 152, AFL-CIO (HGEA); United Public Workers, AFSCME Local 646, AFL-CIO (UPW); Royal State Corporation (Royal State); Royal State National Insurance Company, Limited (RSN); The Royal Insurance Agency, Inc. (TRIA); Management Applied Programming, Inc. (MAP); and Voluntary Employees' Benefit Association of Hawaii (VEBAH) as the "Defendants."

[2/] The majority did not address the merits of the State's claims of error regarding the Circuit Court's order granting in part the motions to compel filed by Royal State, HGEA, and UPW, and I do not address these claims.

porting of government employer contributions to unions to purchase insurance for employee-members in health and life-insurance plans offered by the unions. The Circuit Court interpreted this phrase to mean "the premium charged by and paid to the carrier." In my view, the Circuit Court's interpretation of this phrase was too restrictive because it did not account for the possibility that the premium charged and paid could be tainted by bad faith, collusion, or fraud.

The State contended that it had evidence indicating that the premiums paid on certain union-sponsored plans were not based on *bona fide* negotiations conducted in good faith, but may have been the product of collusion, bad faith, or fraud by related parties. The State relied mainly on a report prepared by Samuel Biggs (Biggs), the State's expert, which concluded that the premiums paid on certain union-sponsored plans resulted in extremely high gross profits to the insurance carriers, and that administrative fees for certain union-sponsored plans represented 45 percent of the total premiums paid.

However, under the Circuit Court's restrictive interpretation of the phrase "actual monthly cost of coverage," the State's allegations did not matter. Under the Circuit Court's interpretation, how the unions and the insurance carriers determined the premiums charged and paid was irrelevant. The State has no remedy as long as the government funds ported to the unions were equivalent to the premiums charged by and paid to the carriers. I do not believe that the Legislature intended such a restrictive interpretation of the statutory language.

It should be noted that Defendants vigorously attack the competency of Biggs, the methodology he used, and the relevance and reliability of his conclusions, and Defendants strongly deny any impropriety in the determination of the premiums paid in any of the union-sponsored plans. I express no view on the validity of the State's allegations or the Defendants' denial of those allegations. However, I believe that the State should have the opportunity to pursue its allegations

and to obtain relief if it can prove that the premiums charged by and paid to the carriers were the product of bad faith or fraud.

The Circuit Court's interpretation of the phrase "actual monthly cost of coverage" was erroneous as unduly restrictive. The Circuit Court's interpretation should have been qualified by the proviso that "actual monthly cost of coverage" means "the premium charged by and paid to the carrier," except if the premium charged was determined in bad faith or through fraud. Under the proper interpretation of the statutory phrase, the State should be allowed to amend its complaint to pursue its allegations.

I.

The following principles are applicable to a court's interpretation of a statute:

> It is well settled that this court's foremost obligation in construing a statute is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

Hanabusa v. Lingle, 119 Hawaiʻi 341, 349, 198 P.3d 604, 612 (2008) (formatting altered; citation omitted). In construing an ambiguous statute, "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it, may be considered to discover its true meaning." Hawaii Revised Statutes (HRS) § 1-15(2) (2009).

"[I]t is well settled that this court may depart from a plain reading of a statute where a literal interpretation would lead to absurd and/or unjust results." Iddings v. Mee-Lee, 82 Hawaiʻi 1, 15, 919 P.2d 263, 277 (1996).

> Although the intention of the legislature is to be obtained primarily from the language of the statute itself, we have rejected an approach to statutory construction which limits us to the words of a statute[,] . . . for when aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may appear on superficial examination. Thus, the plain language rule of statutory construction, does not preclude an examination of

> sources other than the language of the statute itself even when the language appears clear upon perfunctory review. Were this not the case, a court may be unable to adequately discern the underlying policy which the legislature seeks to promulgate and, thus, would be unable to determine if a literal construction would produce an absurd or unjust result, inconsistent with the policies of the statute.

Sato v. Tawata, 79 Hawaiʻi 14, 17, 897 P.2d 941, 944 (1995) (brackets, ellipsis points, and block-quote format in original; citation omitted).

"[T]he legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality." State v. Griffin, 83 Hawaiʻi 105, 108 n.4, 924 P.2d 1211, 1214 n.4 (1996) (brackets omitted); see also HRS § 1-15(3) (2009) ("Every construction which leads to an absurdity shall be rejected."). If a literal construction of a statute would produce an absurd and unjust result, the appellate courts are "willing to look beyond the plain, obvious, and unambiguous language of a statute . . . for the purpose of ascertaining its underlying legislative intent[.]" State v. Haugen, 104 Hawaiʻi 71, 77, 85 P.3d 178, 184 (2004) (formatting altered; internal quotation marks and citation omitted). "[E]ven absent statutory ambiguity, departure from literal construction is justified when such construction would produce an absurd and unjust result and the literal construction in the particular action is clearly inconsistent with the purposes and policies of the act." Franks v. City and County of Honolulu, 74 Haw. 328, 341, 843 P.2d 668, 674 (1993) (internal quotation marks and citation omitted).

II.

The background and history of the Hawaii Public Employees Health Fund (Health Fund) demonstrates the Legislature's intent to provide public employees with health and life insurance benefits in a manner that was economical and cost-effective to both public employers and employees. See O'Gorek v. Hawaii Public Employees Health Fund, No. 28248, 2011 WL 5903874 *15 (Hawaiʻi App. Nov. 23, 2011) (mem. op) ("[T]he statutory

creation and evolution of the Health Fund indicate that its purpose was not limited to benefitting employee-beneficiaries, but also included providing health benefits at costs affordable to the State."). In explaining and justifying its decision to establish the Health Fund in 1961, the Legislature found that authorizing the Health Fund to negotiate and secure health insurance would allow "full utilization of possible volume economies" and maximize the benefit of the government employer's contribution because it would not be considered taxable income to the employee. H. Stand. Comm. Rep. 165, in 1961 House Journal, at 710-11.

Initially, the public employer's contribution to the Health Fund for employee health benefits was a specific dollar amount appropriated by the Legislature. The Legislature later amended the Health Fund statute to provide that the employer's contribution would generally be determined by collective bargaining between the employer and public union. But the Legislature's intent that government funds be used economically did not change.

The legislative history of the phrase "actual monthly cost of coverage" is consistent with the Legislature's intent that government funds be used economically. The "actual monthly cost of coverage" limitation on the amount of ported funds first appeared in legislation governing children's dental plans. The report of the Senate Ways and Means Committee supported the bill because it would not only permit employees to access dental coverage at a lower cost, but "may also have the effect of lowering employer contributions." S. Stand. Comm. Rep. No. 893-80, in 1980 Senate Journal, at 1448. The Senate Ways and Means Committee found the bill to be favorable because: (1) it may be economically beneficial to public employees; (2) it does not significantly impact upon the Health Fund's operations; and (3) "[i]t does not require additional employer contributions and may potentially decrease employer contributions." Id. Certainly, there is nothing in the legislative history of the Heath Fund

statute or the "actual monthly cost of coverage" limitation that suggests an intent by the Legislature that government funds be wasted or spent to cover amounts determined fraudulently or in bad faith.

In my view, the Circuit Court's interpretation of the phrase "actual monthly cost of coverage" to mean "the premium charged by and paid to the carrier," without exception for premiums charged and paid that were the product of bad faith, collusion, or fraud, would lead to an absurd and unjust result. See Iddings, 82 Hawaiʻi at 15, 919 P.2d at 277; Sato, 79 Hawaiʻi at 17, 897 P.2d at 944; HRS § 1-15(3). It would mean that even if the State could prove that the premiums were set fraudulently or in bad faith, the State would have no remedy. In light of the reason and spirit of the law, and the cause which induced the Legislature to enact it, I do not believe the Legislature could have intended this result or that the phrase "actual monthly cost of coverage" be construed in this fashion.

My conclusion is supported by Hawaiʻi Supreme Court decisions which have read reasonable, unstated qualifications into statutory language or looked beyond the literal terms of a statute to avoid an absurd and unjust result. E.g. Sato, 79 Hawaiʻi at 17-19, 897 P.2d at 944-46 (construing unqualified statutory prohibition against introducing evidence of workers' compensation benefits in any third party action for damages to permit such evidence in circumstances where it is not offered for the sole purpose of reducing the amount of the plaintiff's recovery); State v. Ribbel, 111 Hawaiʻi 426, 432-34, 142 P.3d 290, 296-98 (2006) (construing the phrase "restrained by a seat belt assembly" to include the unstated qualification that a motorist be properly restrained by utilizing the seat belt assembly in a manner in which it was designed to be worn); Haugen, 104 Hawaiʻi at 75-77, 85 P.3d at 182-84 (despite the plain language of the statute, construing the phrase "person convicted for the first time of any offense under part IV of [HRS] chapter 712" to mean person convicted for the first time of

any offense under part IV of [HRS] chapter 712 *and any offense under similar statues of other jurisdictions*); CARL Corp. v. State Dep't of Educ., 85 Hawaiʻi 431, 459-61, 946 P.2d 1, 29-31 (1997) (refusing to apply literal construction of statute in situation where Legislature did not contemplate the purchasing agency's bad faith in applying the procurement code).

III.

At the time the Legislature adopted the statutory phrase "actual monthly cost of coverage," Black's Law Dictionary defined the term "actual cost" to mean: "The actual price paid for goods by a party, in the case of a real *bona fide* purchase, which may not necessarily be the market value of the goods. It is a general or descriptive term which may have varying meanings according to the circumstances in which it is used." Black's Law Dictionary at 33 (5th ed. 1979) (emphasis added). The term "*bona fide*," in turn, was defined to mean: "In or with good faith; honestly, openly, and sincerely; without deceit or fraud." Id. at 160.

In light of these dictionary definitions and the reason and purpose for the Health Fund statute, I believe that the Circuit Court's construction of the phrase "actual monthly cost of coverage" was too restrictive. It did not account for the possibility that "the premium charged by and paid to the carrier," could be the product of bad faith or fraud and not determined as the result of a *bona fide*, good faith transaction.

In resolving this appeal, we are not called upon to decide whether the State's allegations of impropriety in the determination of the premium charged and paid on certain of the union-sponsored plans are valid. As noted, I express no view on the validity of the State's allegations or the Defendants' denial of any impropriety. The State, however, should have the opportunity to prove that the premiums charged and paid were determined fraudulently or in bad faith and to obtain relief if it can establish such proof. If the State can prove that the premiums charged and paid were determined fraudulently or in bad

faith, then the premiums charged and paid would not reflect the "actual monthly cost of coverage." In that event, the State would be entitled to recovery with respect to the excessive or inflated portion of the premiums paid that was attributable to the bad faith or fraud.

IV.

The Circuit Court erred in defining the phrase "actual monthly cost of coverage" in a manner that failed to account for the possibility that the premiums charged and paid could be tainted by bad faith or fraud. In my view, the Legislature did not intend the "actual monthly cost of coverage" limitation to mean that the government would pay for the cost of the premiums regardless of whether the premiums were set fraudulently or in bad faith, and construing the statutory language in this fashion would lead to absurd results.

I also conclude that the State should be permitted to amend its complaint. The Circuit Court's unduly restrictive reading of the phrase "actual monthly cost of coverage," and the Circuit Court's ruling that limited the State's ability to amend its complaint to theories consistent with the Circuit Court's construction of this phrase, effectively blocked the State's from amending its complaint. Leave to amend a complaint "shall be freely given when justice so requires." Hawaiʻi Rules of Civil Procedure Rule 15(a)(2) (2000). In my view, the State should be permitted to amend its complaint to pursue its allegations of fraud and to provide the proper context and background for evaluating the "actual monthly cost of coverage" limitation and the State's claims for relief.