



California Corporate & Securities Law

A Question That You May Want To Add To Your Investor Suitability Questionnaire

Posted In [California Sui Generis](#), [Financial Institutions](#)

5-9-2011

Issuers typically use investor suitability questionnaires to elicit information from potential investors in order to substantiate exemptions under federal and/or state securities laws. For example, issuers will often ask detailed questions about a potential investor's net worth for purposes of establishing that the investor is an accredited investor (for purposes of Regulation D under the Securities Exchange Act of 1934) or a qualified purchaser (for purposes of Section 3(c)(7) of the Investment Company Act of 1940). I suspect that few issuers ask a prospective investor whether s/he is a convicted felon. A case decided last week by the California Court of Appeal suggests a reason why it may be prudent for issuers to do so.

In [Semler v. General Electric Capital Corp.](#), the plaintiff had intended to purchase units in a limited liability company. However, the plaintiff was not allowed to invest after the proposed mezzanine lender to the project announced that it would not accept the plaintiff as a member in the LLC. The plaintiff then sued the lender, asserting a single cause of action for violation of the Unruh Civil Rights Act.

The Unruh Civil Rights Act, California Civil Code § 51 provides in relevant part:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Although the statute protects a number of listed personal characteristics (*e.g.*, sex, race, etc.), status as a felony is not on the list. Nonetheless, the courts have not limited the statute's protection to those characteristics specifically named. Thus, the question for the Court of Appeal was whether status as a prior felon fell within the statute's protection.

Please contact **[Keith Paul Bishop](#)** at Allen Matkins for more information kbishop@allenmatkins.com

<http://www.calcorporatelaw.com/>

The Court of Appeal applied the three-part test adopted by the California Supreme Court in *Harris v. Capital Growth Investors XIV*, 52 Cal.3d 1142 (1991), concluding:

- Status as a felon is not a personal characteristic similar to those enumerated in the statute;
- The lender had legitimate business reasons justifying its decision — the repayment of the loan and making a return on its investment; and
- The potential consequences of allowing the plaintiff's claim would improperly involve the courts in second-guessing a lending institution's expertise in determining loan and investment criteria.

Because the case frees lenders from potential liability under the Unruh Civil Rights Act, issuers who unwittingly accept convicted felons as investors may be jeopardizing future financings.

A post scriptum re Jesse Unruh

The Unruh Civil Rights Act is named for its author – Jesse M. Unruh who was one of California's most powerful and colorful politicians. He served in the Assembly for 15 years (1955–1970). He then lost to Ronald Reagan in a race for governor. California's unruly and brazen political milieu of that era is captured in this Jesse Unruh quotation about lobbyists: "If you can't take their money, drink their booze, screw their women and look them in the eye and vote against them, you don't belong here" (appearing in this September 14, 1970 *Time* magazine [article](#)). In 1974, he was elected Treasurer and served in that post until his death in 1987 (six years before I took my first job in Sacramento). For more information about this flamboyant figure, see "[Big Daddy, Jesse Unruh and the Art of Power Politics](#)" by former *Los Angeles Times* writer Bill Boyarski. An earlier book that also captures that wild era is James R. Mills, "[A Disorderly House: The Brown-Unruh Years in Sacramento](#)".

Please contact **Keith Paul Bishop** at Allen Matkins for more information kbishop@allenmatkins.com

<http://www.calcorporatelaw.com/>