Statement AB 1721

Since the rise of the AIDS, there has been a number of cases in which insurance companies have denied coverage because of the applicant's sexual orientation. The assumption of course, is that because an applicant is gay, he must have AIDS. Although the Department of Insurance has a regulation that prohibits such discrimination, a statutory prohibition is needed to enhance protection and penalties for such unethical discrimination.

Any health care service plan that violates this section shall be assessed a civil penalty in an amount not less than $1,000 and not more than $5,000.

AB 1721 prohibits health insurance discrimination on the grounds of sexual orientation. This bill prohibits any health care service plan from refusing to provide coverage to an applicant, issue, or cancel a subscription on the grounds of sexual orientation. Race, color, religion, national origin, ancestry or sexual orientation should not constitute a condition or risk for which a higher premium is required.

One health insurance company distributed an "AIDS" profile which required its agents to segregate applications from those "single males without dependents that are engaged in occupations that don't require physical exertion." Another company urged agents to scrutinize applicants who are unmarried, who show evidence of a sexually promiscuous lifestyle and who live in identifiable gay zip codes.

These blatant discriminatory underwriting policies must be prohibited. Insurance is a necessity, and in light of the AIDS epidemic, individuals more than ever need to be guaranteed access to health insurance in an environment free of discrimination. I ask for your aye vote.

4 AXA
CNA
Life

which are enumerated in the bill. This is a reasonable way to allow hospitals to use some of their other buildings for overflow without jeopardizing patient safety.

Assembly Republican Committee Vote
Health -- 5/9/89
(11-3) Ayes: All Republicans except
Abs.: Felando, Hill, Statham
Ways & Means -- 6/20/89
(13-6) Ayes: Baker, D. Brown, Hill, Jones, Mojonnier, Wright
Noes: Felando
Abs.: Nolan, Seastrand
Consultant: Jan Dell

FILE NUMBER 111 **FILE NUMBER 111**

AB 1721 (Friedman) -- INSURANCE DISCRIMINATION
Version: Original Lead: Pat Nolan
Recommendation: Oppose Vote: Majority

Summary: Prohibits life or disability underwriters from discriminating against applicants, as to eligibility or rates, based on sexual orientation. Fiscal effect: No appropriation

Supported by: LIFE AIDS Lobby; National Gay Rights Advocates: California Medical Association. Opposed by: Committee on Moral Concerns. Governor's position: Not known

Comments: Redefining by statute degrees of risk undermines the basic function of insurance. No category of personal behavior which influences life expectancy or health should be precluded from an insurer's actuarial calculations.

Assembly Republican Committee vote
F&I -- 5/9/89
(11-5) Noes: Bader, Brown, Lancaster, Lewis, Wright
Abs.: Nolan, Seastrand, Statham
Ways & Means -- 6/20/89
(14-9) Noes: All Republicans
Consultant: Peter Conlin

FILE NUMBER 112 **FILE NUMBER 112**

Support AB 1721

American Civil Liberties Union
AIDS Project Los Angeles
California Nurses Association
California Teachers Association
California Medical Association
Lobby For Individual Freedom and Equality
National Association of Social Workers

OPPOSE AB 1721

California Association Of Life Underwriters
Committee On Moral Concerns
Traditional Values Coalition

Neutral

Association of California Life Insurance Companies

Statement AB 1721

Since the rise of the AIDS epidemic, there has been a number of cases in which insurance companies have denied coverage because of the applicant's sexual orientation. The assumption of course, is that because an applicant is gay, he must have AIDS. While most major insurers have responsibly followed the Department of Insurance regulations that prohibit such discrimination, there have been a number of cases in which an insurer has denied an application for no reason other than sexual orientation. A statutory prohibition will enhance protection and enhance the penalty for such discriminatory practices.

AB 1721 prohibits health insurance discrimination on the grounds of sexual orientation. This bill prohibits any health care service plan from refusing to provide coverage to an applicant, issue, or cancel a subscription on the grounds of sexual orientation. Race, color, religion, national origin, ancestry, or sexual orientation should not constitute a condition or risk for which a higher premium, or charge may be required of the subscriber for that coverage.

Any health care service plan that violates this section shall be assessed a civil penalty in an amount not less than $1,000 and not more than $5,000.

Because AIDS has been popularly associated with gay men, some members of the insurance industry have responded to AIDS with calls for anti-gay discrimination in issuing policies. One health insurance company distributed an "AIDS profile" which required its agents to segregate applications from those "single males without dependents that are engaged in occupations that do not require physical exertion." The occupations named restaurant employees, antique dealers, interior decorators, consultants, florists, and people in the jewelry or fashion business. These were noted as the stereotypical professional interests of gay men. Another company issued "underwriting guidelines for AIDS" urging agents to scrutinize applicants who are unmarried, who name as a life insurance beneficiary someone other than a spouse or child, or who show evidence of a sexually promiscuous or illicit lifestyle. Insurance companies have also used information about living arrangements, residence, and zip codes in an attempt to identify and then reject those applicants thought to be gay or bisexual.

The essential question remains whether insurers should be allowed to use the claim of economic necessity to exempt themselves from the prohibitions imposed upon the rest of society. The primary argument that insurers use to justify such an exemption is that discrimination is needed in order to make actuarially valid determinations.

These blatant discriminatory underwriting policies must be prohibited. Insurance is a necessity, and in light of the AIDS epidemic, individuals more than ever need to be guaranteed access to health insurance in an environment free of discrimination. I ask for your aye vote.

THIRD READING

SENATE RULES COMMITTEE Office of Senate Floor Analyses 1100 J Street, Suite 120 445-6614	Bill No. AB 1721 Author: Friedman (D), et al Amended: 8/29/90 in Senate Vote Required: Majority

Committee Votes:

COMMITTEE: INS/CLAIMS/CORPS
BILL NO.: AB 1721
DATE OF HEARING: 8-8-90

SENATORS:	AYE	NO
Davis	✓	
Dedden	✓	
Doolittle		✓
C. Green	✓	
Keene		
McCorquodale	✓	
Torres	✓	
Nielsen (VC)		✓
Robbins (Ch)	✓	
TOTAL:	6	2

PLACED ON FILE PURSUANT TO SENATE RULE 28.8

Senate Floor Vote:

Assembly Floor Vote: 43-32, Pg. 3063, 6/29/89

SUBJECT: Insurance discrimination: sexual orientation

SOURCE: National Gay Rights Advocates

DIGEST: This bill would prohibit health care service plans, life and disability insurers, and nonprofit hospital service plans from discriminating in eligibility, rates, underwriting, or use of specific factors on the basis of sexual orientation. (See analysis below for specifics.)

Senate Floor Amendments of 8/29/90:

1. Clarify that health care service plans may not charge different premium rates to individual enrollees within the same group solely on the basis of the enrollee's sex.

2. Make it a violation for any nonprofit health care service plan to 1) consider sexual orientation in its underwriting criteria, or 2) use specific information to infer sexual orientation or to require an AIDS test and clarifies that the section is not intended to change an insurer's existing authority to conduct AIDS tests. Establishes a civil penalty for each violation of not less than $1,000 and not more than $5,000, plus court costs.

Senate Floor Amendments of 8/28/90:

1. Strike a provision which allows health care service plans to charge different prices based on sex if such prices reflect valid actuarial data. Current law

CONTINUED

allows health care service plans, by regulation, to make such price differentials, if they can be actuarially supported.

2. Establishes definitions of what would constitute a violation of the sexual orientation discrimination b a nonprofit health care service plan and establishes penalties for violations. The definitions and penalties are identical to those established for indemnity pursuant to section two of the bill.

ANALYSIS: Current law prohibits a life or disability insurer from discriminating in eligibility or rates on the basis of race, color, religion, ancestry, or national origin.

There is no existing law which prohibits a life or disability insurer from discriminating on the basis of sexual orientation, although the Department of Insurance has adopted regulations which subject insurers to prospective cease and desist orders or injunction for violation of the Unfair Claims Practices Act based upon numerous grounds, including sex, marital status, or sexual orientation.

There is no existing law in the Knox-Keene Health Care Service Plan Act of 1975 which establishes any prohibitions for health care service plans to discriminate on the basis of race, color, national origin, ancestry, religion, sex, marital status, sexual orientation or age.

Specifics of the bill:

1) Prohibits health care service plans or specialized health care service plans from refusing to enter into, canceling, declining to renew, reinstating, or modifying the terms of contract because of race, color, national origin, ancestry, religion, sex, marital status, sexual orientation, or age.

   Premium, price, or charge differentials because or sex or age is allowed if it is based on sound actuarial data.

2) Prohibits every life and disability insurer, when considering an applicant for coverage, or issuing, or canceling coverage, from engaging in the use of sexual orientation on a discriminatory basis.

   Authorizes civil penalties from $1,000 to $5,000, plus court costs for each violation.

3) Prohibits health care service plans and life and disability insurers from utilizing marital status, living arrangements, occupation, gender, designation of beneficiary, zip code, or other territorial classification to establish sexual orientation. However, existing law allowing life and health insurers to conduct specific human immunodeficiency virus and existing law prohibiting health care service plans from conducting tests for the presence or evidence of human immunodeficiency virus remain unimpaired.

4) Prohibits nonprofit hospital service plans from refusing to cover, refusing to continue to cover, or limit the amount and extent of coverage available to individuals, or charging a different rate for the same coverage because of race, color, religion, national origin, ancestry, or sexual orientation. Authorizes civil penalties for each violation.

CONTINUED

5) Specifies that adding these prohibitions against discriminatory practices shall not be construed to emit the authority of the Insurance and Corporations Commissioners to adopt regulations prohibiting discrimination or enforce regulations in effect prior to enactment of the bill.

FISCAL EFFECT: Appropriation: No Fiscal Committee: Yes Local: No

SUPPORT: (Verified 8/23/90) (Unable to reverify at the time of this writing.)

National Gay Rights Advocates (source)
California Medical Association
American Civil Liberties Union
Life AIDS Lobby
California Nurses Association
California National Organization for Woman, INC
Contra Costa County Trauma Relations Commission
National Association of Social Workers
California Teachers Association

OPPOSITION: (Verified 8/23/90) (Unable to reverify at the time of this writing.)

Committee on Moral Concerns

ARGUMENTS IN SUPPORT: According to the Senate Insurance, Claims and Corporations Committee analysis, the author, sponsor, and proponents contend that sexual orientation has no basis as a discriminating factor in the issuance of disability coverage. Further, the AIDS epidemic has seen a proliferation of applicant denial for life and disability coverage and cancellation of that coverage by insurers and health plans without valid reasons. This bill is intended to enhance consumer protections and to permit the regulator and law enforcement to act with sufficient statutory authority.

ARGUMENTS IN OPPOSITION: According to the Senate Insurance, Claims and Corporations Committee analysis, the opponent states: 1) "Private sex acts should not translate into favorable public policy."; 2) "...'sexual orientation' equal high risk... as long as insurance companies are allowed to assess risk in any form, they must be permitted to consider sexual orientation.".

CONTINUED

THIRD READING

SENATE RULES COMMITTEE Office of Senate Floor Analyses 1100 J Street, Suite 120 445-6614	Bill No. AB 1721 Author: Friedman (D), et al Amended: 8/15/90 in Senate Vote Required: Majority

Committee Votes:

COMMITTEE: INS/CLAIMS/CORPS
BILL NO.: AB 1721
DATE OF HEARING: 8-8-90

SENATORS:	AYE	NO
Davis	✓	
Deddeh	✓	
Doolittle		✓
C. Green	✓	
Keene		
McCorquodale	✓	
Torres	✓	
Nielsen (VC)		✓
Robbins (Ch)	✓	
TOTAL:	6	2

PLACED ON FILE PURSUANT TO SENATE RULE 28.8

Senate Floor Vote:

Assembly Floor Vote: 43-32, Pg. 3063, 6/29/89

SUBJECT: Insurance discrimination: sexual orientation

SOURCE: National Gay Rights Advocates

DIGEST: This bill would prohibit health care service plans, life and disability insurers, and nonprofit hospital service plans from discriminating in eligibility, rates, underwriting, or use of specific factors on the basis of sexual orientation. (See analysis below for specifics.)

ANALYSIS: Current law prohibits a life or disability insurer from discriminating in eligibility or rates on the basis of race, color, religion, ancestry, or national origin.

There is no existing law which prohibits a life or disability insurer from discriminating on the basis of sexual orientation, although the Department of Insurance has adopted regulations which subject insurers to prospective cease and desist orders or injunction for violation of the Unfair Claims Practices Act based upon numerous grounds, including sex, marital status, or sexual orientation.

There is no existing law in the Knox-Keene Health Care Service Plan Act of 1975 which establishes any prohibitions for health care service plans to discriminate on the basis of race, color, national origin, ancestry, religion, sex, marital status, sexual orientation or age.

CONTINUED

Specifics of the bill:

1) Prohibits health care service plans or specialized health care service plans from refusing to enter into, canceling, declining to renew, reinstating, or modifying the terms of contract because of race, color, national origin, ancestry, religion, sex, marital status, sexual orientation, or age.

   Premium, price, or charge differentials because or sex or age is allowed if it is based on sound actuarial data.

2) Prohibits every life and disability insurer, when considering an applicant for coverage, or issuing, or canceling coverage, from engaging in the use of sexual orientation on a discriminatory basis.

   Authorizes civil penalties from $1,000 to $5,000, plus court costs for each violation.

3) Prohibits health care service plans and life and disability insurers from utilizing marital status, living arrangements, occupation, gender, designation of beneficiary, zip code, or other territorial classification to establish sexual orientation. However, existing law allowing life and health insurers to conduct specific human immunodeficiency virus and existing law prohibiting health care service plans from conducting tests for the presence or evidence of human immunodeficiency virus remain unimpaired.

4) Prohibits nonprofit hospital service plans from refusing to cover, refusing to continue to cover, or limit the amount and extent of coverage available to individuals, or charging a different rate for the same coverage because of race, color, religion, national origin, ancestry, or sexual orientation.

5) Specifies that adding these prohibitions against discriminatory practices shall not be construed to emit the authority of the Insurance and Corporations Commissioners to adopt regulations prohibiting discrimination or enforce regulations in effect prior to enactment of the bill.

FISCAL EFFECT: Appropriation: No Fiscal Committee: Yes Local: No

SUPPORT: (Verified 8/23/90)

National Gay Rights Advocates (source)
California Medical Association
American Civil Liberties Union
Life AIDS Lobby
California Nurses Association
California National Organization for Woman, INC
Contra Costa County Trauma Relations Commission
National Association of Social Workers
California Teachers Association

OPPOSITION: (Verified 8/23/90)

Committee on Moral Concerns

CONTINUED

ARGUMENTS IN SUPPORT: According to the Senate Insurance, Claims and Corporations Committee analysis, the author, sponsor, and proponents contend that sexual orientation has no basis as a discriminating factor in the issuance of disability coverage. Further, the AIDS epidemic has seen a proliferation of applicant denial for life and disability coverage and cancellation of that coverage by insurers and health plans without valid reasons. This bill is intended to enhance consumer protections and to permit the regulator and law enforcement to act with sufficient statutory authority.

ARGUMENTS IN OPPOSITION: According to the Senate Insurance, Claims and Corporations Committee analysis, the opponent states: 1) "Private sex acts should not translate into favorable public policy."; 2) "...'sexual orientation' equal high risk... as long as insurance companies are allowed to assess risk in any form, they must be permitted to consider sexual orientation.".

ASSEMBLY FLOOR VOTE:

ASSEMBLY BILL NO. 1721 (Friedman)—An act to add Section 1365.5 to the Health and Safety Code, and to amend Section 10140 of the Insurance Code, relating to health coverage.

Bill read third time, and passed by the following vote:

AYES—43

Arcias	Cortese	Hayden	O'Connell
Bane	Costa	Hughes	Polanco
Bates	Eastin	Isenberg	Roos
Bronzan	Elder	Johnston	Roybal-Allard
Burton	Epple	Katz	Sher
Calderon	Farr	Killea	Speier
Campbell	Filante	Klehs	Tanner
Chacon	Friedman	Lempert	Vasconcellos
Clute	Hannigan	Margolin	Waters, Maxine
Condit	Harris	Moore	Mr. Speaker
Connelly	Hauser	Murray	

NOES—32

Allen	Floyd	Kelley	Nolan
Bader	Frazee	La Follette	Pringle
Baker	Frizzelle	Lancaster	Quackenbush
Bentley	Hansen	Leslie	Seastrand
Brown, Dennis	Harvey	Lewis	Statham
Chandler	Hill	McClintock	Woodruff
Delaslde	Johnson	Mojonnier	Wright
Ferguson	Jones	Moorhead	Wyman

Bill ordered transmitted to the Senate.

DLW:nf 8/23/90 Senate Floor Analyses

SENATE INSURANCE, CLAIMS AND CORPORATIONS COMMITTEE ASSEMBLY BILL NO. 1721

SENATOR ALAN ROBBINS, CHAIRMAN

ASSEMBLY BILL NO. 1721 (Friedman, et. al.) As Amended June 25, 1990
Health and Safety Code
Insurance Code

Source: National Gay Rights Advocates
Related Legislation: AB 2711 (Moore) of 1990
Support: California Medical Association
American Civil Liberties Union
Life AIDS Lobby
California Nurses Association
California National Organization for Woman, INC
Opposition: Committee on Moral Concerns
Interest: Department of Corporations
Department of Insurance

SUBJECT

Prohibits health care service plans, life and disability insurers, and nonprofit hospital service plans from discriminating in eligibility, rates, underwriting, or use of specific factors on the basis of sexual orientation.

DIGEST

1] Description: This bill:

1) Prohibits health care service plans or specialized health care service plans from refusing to enter into, canceling, declining to renew, reinstating, or modifying the terms of contract because of race, color, national origin, ancestry, religion, sex, marital status, sexual orientation, or age.

Premium, price, or charge differentials because or sex or age is allowed if it is based on sound actuarial data.

2) Prohibits every life and disability insurer, when considering an applicant for coverage, or issuing, or canceling coverage, from engaging in the use of sexual orientation on a discriminatory basis.

Authorizes district attorneys or city attorneys to recover civil penalties from $1,000 to $5,000 for each violation.

3) Prohibits health care service plans and life and disability insurers from utilizing marital status, living arrangements, occupation, gender, designation of beneficiary, zip code, or other territorial classification to establish sexual orientation. However, existing law allowing life and health insurers to conduct specific human immunodeficiency virus and existing law prohibiting health care service plans from conducting tests for the presence or evidence of human immunodeficiency virus remain unimpaired.

4) Prohibits nonprofit hospital service plans from refusing to cover, refusing to continue to cover, or limit the amount and extent of coverage available to individuals, or charging a different rate for the same coverage because of race, color, religion, national origin, ancestry, or sexual orientation.

5) Specifies that adding these prohibitions against discriminatory practices shall not be construed to emit the authority of the Insurance and Corporations Commissioners to adopt regulations prohibiting discrimination or enforce regulations in effect prior to enactment of the bill.

2] Background: Current law prohibits a life or disability insurer from discriminating in eligibility or rates on the basis of race, color, religion, ancestry, or national origin.

There is no existing law which prohibits a life or disability insurer from discriminating on the basis of sexual orientation, although the Department of Insurance has adopted regulations which subject insurers to prospective cease and desist orders or injunction for violation of the Unfair Claims Practices Act based upon numerous grounds, including sex, marital status, or sexual orientation.

There is no existing law in the Knox-Keene Health Care Service Plan Act of 1975 which establishes any prohibitions for health care service plans to discriminate on the basis of race, color, national origin, ancestry, religion, sex, marital status, sexual orientation or age.

FISCAL EFFECT Fiscal Committee: No

STAFF COMMENTS

The author, sponsor, and proponents contend that sexual orientation has no basis as a discriminating factor in the issuance of disability coverage. Further, the AIDS epidemic has seen a proliferation of applicant denial for life and disability coverage and cancellation of that coverage by insurers and health plans without valid reasons. This bill is intended to enhance consumer protections and to permit the regulator and law enforcement to act with sufficient statutory authority.

The opponent states: 1) "Private sex acts should not translate into favorable public policy."; 2) "...'sexual orientation' equal high risk... as long as insurance companies are allowed to assess risk in any form, they must be permitted to consider sexual orientation.".

AB 2711 (Moore) of 1990, sponsored by the California Senior Legislature, prohibits health care service plans, life and disability insurers, and nonprofit hospital plans from discriminating solely on basis of age.

SAL BIANCO
Consultant

TIP PHABMIXAY
Senate Fellow

08/08/90

ASSEMBLY BILL NO. 1721

AMENDED IN SENATE AUGUST 15, 1990

AMENDED IN SENATE JUNE 25, 1990

AMENDED IN SENATE JULY 20, 1989

AMENDED IN ASSEMBLY JUNE 26, 1989

AMENDED IN ASSEMBLY MAY 11, 1989

CALIFORNIA LEGISLATURE—1989-90 REGULAR SESSION

ASSEMBLY BILL No. 1721

Introduced by Assembly Members Friedman, Bates, Burton, Murray, Roos, Speier, Tucker, and Vasconcellos
(Coauthors: Senators Marks, Roberti, and Rosenthal)

March 9, 1989

An act to add Section 1365.5 to the Health and Safety Code, and to amend Section 10140 of, and to add Section 11512.193 to, the Insurance Code, relating to health coverage.

LEGISLATIVE COUNSEL'S DIGEST

AB 1721, as amended, Friedman. Insurance discrimination: sexual orientation.

(1) Existing law prohibits health care service plans from canceling coverage except for specified reasons.

This bill would prohibit health care service plans from refusing to enter into, canceling, or declining to renew or reinstate a contract because of race, color, national origin, ancestry, religion, sex, marital status, sexual orientation, or age. It would also prohibit modification of the terms of the contract, including terms relating to price, for those reasons, except that premium, price, or charge differentials based on sex or age would be permitted if based upon specified data.

(2) Existing law prohibits life and disability insurers from discriminating in eligibility or rates for insurance on the basis

of race, color, religion, ancestry, or national origin.

This bill would prohibit life and disability insurers fror discriminating, as to eligibility or rates, on the basis of sexu orientation. The bill would prohibit these insurers fror considering sexual orientation in their underwriting criteri or utilizing marital status, living arrangements, occupatior gender, beneficiary designation, or zip codes or othe territorial classifications to establish sexual orientation or t determine whether to require a test for huma immunodeficiency virus or antibodies thereto. However, th bill would not limit existing authority of insurers to requir these tests or existing authority of the Insuranc Commissioner to adopt and enforce antidiscriminatio regulations. The bill would authorize ~~district attorneys or cit attorneys, as specified, to recover~~ civil penalties from $1,00 to $5,000 for each violation.

(3) This bill would also prohibit nonprofit hospital service plans from refusing to cover, or refusing to continue to cover or limiting the amount, extent, or kind of coverage available to an individual, or charging a different rate for the same coverage because of race, color, religion, national origin ancestry, or sexual orientation.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 1365.5 is added to the Health and Safety Code, to read:

1365.5. (a) No health care service plan or specialized health care service plan shall refuse to enter into any contract or shall cancel or decline to renew or reinstate any contract because of the race, color, national origin, ancestry, religion, sex, marital status, sexual orientation, or age of any contracting party, prospective contracting party, or person reasonably expected to benefit from that contract as a subscriber, enrollee, member, or otherwise.

(b) The terms of any contract shall not be modified, and the benefits or coverage of any contract shall not be subject to any limitations, exceptions, exclusions,

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reductions, copayments, coinsurance, deductibles, reservations, or premium, price, or charge differentials, or other modifications because of the race, color, national origin, ancestry, religion, sex, marital status, sexual orientation, or age of any contracting party, potential contracting party, or person reasonably expected to benefit from that contract as a subscriber, enrollee, member, or otherwise; except that premium, price, or charge differentials because of the sex or age of any individual when based on objective, valid, and up-to-date statistical and actuarial data are not prohibited.

(c) It shall be deemed a violation of subdivision (a) for any health care service plan to utilize marital status, living arrangements, occupation, gender, beneficiary designation, zip codes or other territorial classification, or any combination thereof for the purpose of establishing sexual orientation . Nothing in this section shall be construed to alter in any manner the existing law prohibiting health care service plans from conducting tests for the presence of human immunodeficiency virus or evidence thereof.

(d) This section shall not be construed to limit the authority of the commissioner to adopt or enforce regulations prohibiting discrimination because of sex, marital status, or sexual orientation.

SEC. 2. Section 10140 of the Insurance Code is amended to read:

10140. (a) No admitted insurer, licensed to issue life or disability insurance, shall fail or refuse to accept an application for that insurance, to issue that insurance to an applicant therefor, or issue or cancel that insurance, under conditions less favorable to the insured than in other comparable cases, except for reasons applicable alike to persons of every race, color, religion, national origin, ancestry, or sexual orientation. Race, color, religion, national origin, ancestry, or sexual orientation shall not, of itself, constitute a condition or risk for which a higher rate, premium, or charge may be required of the insured for that insurance.

(b) It shall be deemed a violation of subdivision (a) for

any insurer to consider sexual orientation in its underwriting criteria or to utilize marital status, living arrangements, occupation, gender, beneficiary designation, zip codes or other territorial classification within this state, or any combination thereof for the purpose of establishing sexual orientation or determining whether to require a test for the presence of the human immunodeficiency virus or antibodies to that virus, where that testing is otherwise permitted by law. Nothing in this section shall be construed to alter, expand, or limit in any manner the existing law respecting the authority of insurers to conduct tests for the presence of human immunodeficiency virus or evidence thereof.

(c) Any insurer that knowingly violates this section shall for each violation be assessed a civil penalty in an amount not less than one thousand dollars ($1,000) and not more than five thousand dollars ($5,000) plus court costs, as determined by the court. ~~The penalty may be recovered by, and shall be paid to, the district attorney of any county, or the city attorney of any city, in which a violation occurs. The district attorney and city attorney shall have concurrent jurisdiction to enforce this provision with respect to violations occurring within a city.~~

(d) This section shall not be construed to limit the authority of the commissioner to adopt regulations prohibiting discrimination because of sex, marital status, or sexual orientation or to enforce these regulations, whether adopted before or on or after January 1, 1991.

SEC. 3. Section 11512.193 is added to the Insurance Code, to read:

11512.193. (a) No nonprofit hospital service plan issuing, providing, or administering an individual or group nonprofit hospital service plan contract entered into, issued, or amended on or after January 1, 1991, shall refuse to cover, or refuse to continue to cover, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage because of race, color, religion, national origin, ancestry, or sexual orientation.

(b) This section does not limit the authority of the commissioner to adopt regulations prohibiting discrimination because of sex, marital status, or sexual orientation, or to enforce those regulations, whether adopted before, on, or after January 1, 1991.

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AMENDED IN SENATE AUGUST 29, 1990
AMENDED IN SENATE AUGUST 15, 1990
AMENDED IN SENATE JUNE 25, 1990
AMENDED IN SENATE JULY 20, 1989
AMENDED IN ASSEMBLY JUNE 26, 1989
AMENDED IN ASSEMBLY MAY 11, 1989

CALIFORNIA LEGISLATURE—1989-90 REGULAR SESSION

ASSEMBLY BILL No. 1721

Introduced by Assembly Members Friedman, Bates, Burton, Murray, Roos, Speier, Tucker, and Vasconcellos
(Coauthors: Senators Marks, Roberti, and Rosenthal)

March 9, 1989

An act to add Section 1365.5 to the Health and Safety Code, and to amend Section 10140 of, and to add Section 11512.193 to, the Insurance Code, relating to health coverage.

LEGISLATIVE COUNSEL'S DIGEST

AB 1721, as amended, Friedman. Insurance discrimination: sexual orientation.

(1) Existing law prohibits health care service plans from canceling coverage except for specified reasons.

This bill would prohibit health care service plans from refusing to enter into, canceling, or declining to renew or reinstate a contract because of race, color, national origin, ancestry, religion, sex, marital status, sexual orientation, or age. It would also prohibit modification of the terms of the contract, including terms relating to price, for those reasons, except that premium, price, or charge differentials based on sex or age would be permitted if based upon specified data.

The bill would prohibit certain provisions from being construed to permit a health care service plan to charge different premium rates to individual enrollees within the same group solely on the basis of the enrollee's sex.

(2) Existing law prohibits life and disability insurers from discriminating in eligibility or rates for insurance on the basis of race, color, religion, ancestry, or national origin.

This bill would prohibit life and disability insurers from discriminating, as to eligibility or rates, on the basis of sexual orientation. The bill would prohibit these insurers from considering sexual orientation in their underwriting criteria or utilizing marital status, living arrangements, occupation, gender, beneficiary designation, or zip codes or other territorial classifications to establish sexual orientation or to determine whether to require a test for human immunodeficiency virus or antibodies thereto. However, the bill would not limit existing authority of insurers to require these tests or existing authority of the Insurance Commissioner to adopt and enforce antidiscrimination regulations. The bill would authorize civil penalties from $1,000 to $5,000 for each violation.

(3) This bill would also prohibit nonprofit hospital services plans from refusing to cover, or refusing to continue to cover, or limiting the amount, extent, or kind of coverage available to an individual, or charging a different rate for the same coverage because of race, color, religion, national origin, ancestry, or sexual orientation. *The bill would prohibit these plans from considering sexual orientation in their underwriting criteria or utilizing marital status, living arrangements, occupation, gender, beneficiary designation, or zip codes or other territorial classifications to establish sexual orientation or to determine whether to require a test for human immunodeficiency virus or antibodies thereto. However, the bill would not limit the existing authority of the plans to require these tests or the existing authority of the Insurance Commissioner to adopt and enforce antidiscrimination regulations. The bill would authorize civil penalties from $1,000 to $5,000 for each violation.*

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 1365.5 is added to the Health and Safety Code, to read:

1365.5. (a) No health care service plan or specialized health care service plan shall refuse to enter into any contract or shall cancel or decline to renew or reinstate any contract because of the race, color, national origin, ancestry, religion, sex, marital status, sexual orientation, or age of any contracting party, prospective contracting party, or person reasonably expected to benefit from that contract as a subscriber, enrollee, member, or otherwise.

(b) The terms of any contract shall not be modified, and the benefits or coverage of any contract shall not be subject to any limitations, exceptions, exclusions, reductions, copayments, coinsurance, deductibles, reservations, or premium, price, or charge differentials, or other modifications because of the race, color, national origin, ancestry, religion, sex, marital status, sexual orientation, or age of any contracting party, potential contracting party, or person reasonably expected to benefit from that contract as a subscriber, enrollee, member, or otherwise; except that premium, price, or charge differentials because of the sex or age of any individual when based on objective, valid, and up-to-date statistical and actuarial data are not prohibited. *Nothing in this section shall be construed to permit a health care service plan to charge different premium rates to individual enrollees within the same group solely on the basis of the enrollee's sex.*

(c) It shall be deemed a violation of subdivision (a) for any health care service plan to utilize marital status, living arrangements, occupation, gender, beneficiary designation, zip codes or other territorial classification, or any combination thereof for the purpose of establishing sexual orientation . Nothing in this section shall be construed to alter in any manner the existing law prohibiting health care service plans from conducting tests for the presence of human immunodeficiency virus or evidence thereof.

(d) This section shall not be construed to limit the authority of the commissioner to adopt or enforce regulations prohibiting discrimination because of sex, marital status, or sexual orientation.

SEC. 2. Section 10140 of the Insurance Code is amended to read:

10140. (a) No admitted insurer, licensed to issue life or disability insurance, shall fail or refuse to accept an application for that insurance, to issue that insurance to an applicant therefor, or issue or cancel that insurance, under conditions less favorable to the insured than in other comparable cases, except for reasons applicable alike to persons of every race, color, religion, national origin, ancestry, or sexual orientation. Race, color, religion, national origin, ancestry, or sexual orientation shall not, of itself, constitute a condition or risk for which a higher rate, premium, or charge may be required of the insured for that insurance.

(b) It shall be deemed a violation of subdivision (a) for any insurer to consider sexual orientation in its underwriting criteria or to utilize marital status, living arrangements, occupation, gender, beneficiary designation, zip codes or other territorial classification within this state, or any combination thereof for the purpose of establishing sexual orientation or determining whether to require a test for the presence of the human immunodeficiency virus or antibodies to that virus, where that testing is otherwise permitted by law. Nothing in this section shall be construed to alter, expand, or limit in any manner the existing law respecting the authority of insurers to conduct tests for the presence of human immunodeficiency virus or evidence thereof.

(c) Any insurer that knowingly violates this section shall for each violation be assessed a civil penalty in an amount not less than one thousand dollars ($1,000) and not more than five thousand dollars ($5,000) plus court costs, as determined by the court.

(d) This section shall not be construed to limit the authority of the commissioner to adopt regulations prohibiting discrimination because of sex, marital status,

or sexual orientation or to enforce these regulations, whether adopted before or on or after January 1, 1991.

SEC. 3. Section 11512.193 is added to the Insurance Code, to read:

11512.193. (a) No nonprofit hospital service plan issuing, providing, or administering an individual or group nonprofit hospital service plan contract ~~entered into, issued, or amended on or after January 1, 1991, shall~~ *shall* refuse to cover, or refuse to continue to cover, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage because of race, color, religion, national origin, ancestry, or sexual orientation.

(b) *It shall be deemed a violation of subdivision (a) for any plan to consider sexual orientation in its underwriting criteria or to utilize marital status, living arrangements, occupation, gender, beneficiary designation, zip codes or other territorial classification within this state, or any combination thereof, for the purpose of establishing sexual orientation or determining whether or not to require a test for the presence of the human immunodeficiency virus or antibodies to that virus, where that testing is otherwise permitted by law. Nothing in this section shall be construed to alter, expand, or limit in any manner the existing law respecting the authority of insurers to conduct tests for the presence of human immunodeficiency virus or evidence thereof.*

(c) Any plan that knowingly violates this section shall, for each violation, be assessed a civil penalty in an amount not less than one thousand dollars ($1,000) and not more than five thousand dollars ($5,000) plus court costs, as determined by the court.

(d) This section does not limit the authority of the commissioner to adopt regulations prohibiting discrimination because of sex, marital status, or sexual orientation, or to enforce those regulations, whether adopted before, on, or after January 1, 1991.

O

AB 1721 (Friedman)
Senate Third Reading

STATEMENT

* Because gay men have been the hardest hit by the AIDS epidemic, some health insurers have endeavored to cut their losses by categorically denying health coverage on the basis of sexual orientation.

* One example was a company that refused to write health policies for single men residing in San Francisco.

* Another longstanding case was the recently settled case against Great Republic Insurance Co. Great Republic required its agents to submit a supplemental questionnaire to single men with no dependents working in jobs that require little physical exertion, such as floral design or interior decorating.

* The settlement in Great Republic, which only applies to Great Republic, prohibits discrimination on the basis of sexual orientation and further precludes the use of factors such as living arrangements, beneficiary and ZIP code to establish sexual orientation.

* The settlement is consistent with the provisions of AB 1721. My bill prohibits discrimination on the basis of sexual orientation in the provision of health coverage by health care service plans, life and disability insurers and non-profit hospital service plans.

* The bill is supported by California Medical Assn., California Nurses Assn., LIFE AIDS Lobby, California Teachers Assn., and California NOW.

* The current version of the bill has removed all opposition from the administration and the insurance industry. **(SENATOR ROBBINS - ONLY KNOWN OPPOSITION IS FROM TRADITIONAL VALUES COALITION AND COMMITTEE ON MORAL CONCERNS, BASED ON THEIR DISTASTE FOR GAY MEN AND LESBIANS).**

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Assembly
California Legislature

TERRY B. FRIEDMAN
ASSEMBLYMAN, FORTY-THIRD DISTRICT

CHAIRMAN
Ways and Means Subcommittee
on Health & Human Services
Public Safety Subcommittee
on Drug Abuse

MEMBER
Education
Judiciary
Natural Resources
Public Safety
Ways and Means

September 7, 1990

The Honorable George Deukmejian
Governor, State of California
State Capitol
Sacramento, CA 95814

Dear Governor Deukmejian:

I respectfully request your signature on AB 1721 which would prohibit life and disability insurers, health care service plans and nonprofit hospital service plans from discriminating on the basis of sexual orientation.

Because gay men have been the hardest hit by the AIDS epidemic, some providers of health care coverage have attempted to cut their losses by categorically denying health coverage on the basis of sexual orientation.

The most prominent case of such discrimination involved Great Republic Insurance Company which required its agents to submit a supplemental questionnaire to single men with no dependents working in jobs that require little physical exertion. In a recent non-precedential settlement of that case, Great Republic agreed not to base its decisions on sexual orientation or factors that might be used to establish sexual orientation.

AB 1721 reflects that settlement by prohibiting the use of sexual orientation or factors to establish sexual orientation in decisions regarding health care coverage. The provisions relative to health care service plans replicate regulations executed by the Department of Corporations. The Department of Insurance and the insurance industry guided the development of language covering life and disability insurers and nonprofit hospital service plans. As a result, all known opposition has been removed from the bill.

This measure does not alter existing law which permits a person's medical condition (e.g. AIDS, cancer) to be used for underwriting purposes or for denial of an application.

AB 1721 is simply a matter of fairness. Sexual orientation is not a medical condition, and it is not a lifestyle. Despite the rationalizations of some insurers, sexual orientation is not a predictor of life style or future medical conditions. Thus, sexual orientation is not an appropriate underwriting tool.

Prohibiting insurance discrimination on the basis of sexual orientation also is not an issue of condoning or rebuking homosexuality. Gay men have as much right to health care coverage as other Californians.

I urge your favorable consideration. Thank you.

Sincerely,

TERRY B. FRIEDMAN

TBF:rjm

6 Cal.App.4th 1455; 8 Cal.Rptr.2d 593

Larry BEATY, et al., Plaintiffs and Appellants,

v.

TRUCK INSURANCE EXCHANGE, Defendant and Respondent.

No. C010475.

Court of Appeal, Third District.

May 29, 1992.

Rejected applicants for umbrella liability policy brought action against insurer alleging violation of civil rights. The Superior Court, Sacramento County, No. 509180, Joe S. Gray, J., sustained insurer's demurrer, and appeal was taken. The Court of Appeal, Puglia, P.J., held that insurer's refusal to issue unmarried homosexual couple joint umbrella policy under same terms and conditions as offered to married cou-

ples did not constitute unlawful discrimination in violation of Unruh Act.

Affirmed.

1. Civil Rights ⇐118

Insurer's refusal to issue unmarried homosexual couple joint umbrella policy under same terms and conditions as offered to married couples did not constitute unlawful discrimination in violation of Unruh Act, which forbids discrimination against individuals on basis of sexual orientation; insurer's policy legitimately distinguished between married and unmarried couples, and not on basis of sexual orientation. West's Ann.Cal.Civ.Code § 51 et seq.

2. Civil Rights ⇐119, 123

Unruh Act, which secures equal access to public accommodations and prohibits discrimination by business establishments, does not prohibit discrimination on basis of marital status. West's Ann.Cal.Civ.Code § 51 et seq.

3. Civil Rights ⇐118

Insurer's policy of issuing joint umbrella policy only to married persons did not constitute "arbitrary" discrimination, in violation of Unruh Act; insurer could reasonably conclude that, given legal unity of interest between husband and wife, there was no significant risk in covering both insured and his or her spouse with joint policy for single premium, and that relationship of unmarried couple lacked assurance of permanence necessary to assess with confidence risk insured against in joint policy. West's Ann.Cal.Civ.Code § 51 et seq.

Paul J. Dion, San Francisco, Maureen A. Sheehy, Los Angeles, Feldman, Waldman & Kline, Steven D. Rathfon, and Joyce M. Norcini, San Francisco, for plaintiffs and appellants.

Craig H. Bell, Waldman, Graham & Chuang, Los Angeles, for defendant and respondent.

PUGLIA, Presiding Justice.

The issue presented is whether an insurer violates the Unruh Civil Rights Act (Civ. Code, § 51 et seq.; hereafter referred to as the Unruh Act) when it refuses to offer a couple cohabitating in a homosexual relationship the same insurance policy and at the same premium it regularly offers to married couples. Plaintiffs Larry Beaty and Boyce Hinman applied to defendant Truck Insurance Exchange for a joint umbrella liability insurance policy. Defendant denied the application because joint umbrella policies are issued only to married couples. Defendant offered instead to issue each plaintiff individual umbrella coverage. Plaintiffs refused because they wanted a joint policy at the same premium as would be charged a married couple.

Plaintiffs brought suit claiming, inter alia, defendant's refusal to issue them a joint umbrella policy under the same terms and conditions as defendant offers to married couples constitutes unlawful discrimination in violation of the Unruh Act. The trial court sustained defendant's demurrer without leave to amend and entered judgment of dismissal.

On appeal, plaintiffs reiterate their claim defendant violated the Unruh Act by unlawfully discriminating against them on the basis of (1) sexual orientation and (2) marital status. We shall reject plaintiffs' contentions and affirm the judgment.

I

For purposes of this appeal, we accept as true all facts properly alleged in the complaint. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213–214, 197 Cal.Rptr. 783, 673 P.2d 660.) Plaintiffs are a homosexual couple who have lived together and shared the common necessities of life for approximately 18 years. For the past eight years plaintiffs have owned a home as joint tenants. They maintain a joint credit card account and a joint bank account, and jointly own two cars and the furnishings in their home. Plaintiffs each have wills and life insurance policies naming the other as primary beneficiary. They have also been

issued joint homeowners and automobile insurance policies by defendant.

In February 1986, plaintiffs applied to defendant for a joint umbrella liability insurance policy in the amount of one million dollars.[1] This policy was sought to provide plaintiffs with additional liability coverage over and above that provided by their existing homeowners and automobile policies. Defendant refused to issue plaintiffs a joint umbrella policy for a single premium because such policies are issued only to married couples. Instead, defendant offered plaintiffs separate umbrella policies, each with its own premium. Plaintiffs refused the offer.

In July 1988, plaintiffs requested a ruling from the California Department of Insurance (Department) whether defendant's refusal to issue them a joint umbrella policy violated sections 679.71 and 1852 of the Insurance Code. In March 1989, the Department informed plaintiffs no action would be taken on their request and plaintiffs were free to "to pursue any legal remedies available" to them.

In September 1989, plaintiffs filed their first amended complaint (complaint) in superior court seeking damages and injunctive and declaratory relief. Plaintiffs asserted the refusal to issue them a joint umbrella policy violated (1) section 51 et seq. of the Civil Code (the Unruh Act); (2) section 679.71 of the Insurance Code, which bars an insurer from discrimination in the issuance of policies; and (3) section 1861.05 of the Insurance Code, which bars discrimination in the setting of rates for insurance policies.

Defendant demurred to plaintiff's complaint on various grounds, including failure to exhaust administrative remedies, the Insurance Code offered plaintiffs their exclusive remedy, and discrimination on the basis of marital status is not barred by the Unruh Act. The trial court sustained the demurrer without leave to amend "on whatever grounds are available to uphold [the court's ruling]...." A judgment was entered dismissing the action in its entirety.

On appeal plaintiffs argue only that defendant's refusal to issue them a joint umbrella policy constitutes arbitrary and unlawful discrimination within the meaning of the Unruh Act. For the reasons which follow, we shall hold plaintiffs have not stated and cannot state a cause of action as a matter of law.[2]

II

At the outset, we note this case bears a remarkable similarity to *Hinman v. Department of Personnel Admin.* (1985) 167 Cal.App.3d 516, 213 Cal.Rptr. 410 (hereafter cited as *Hinman*). This similarity is hardly coincidental, as the plaintiffs in *Hinman*—Boyce Hinman and Larry Beaty—are the plaintiffs in the instant action.

At issue in *Hinman* was whether the denial to a cohabitant in a homosexual relationship with a state employee of dental insurance coverage under that employee's group policy unlawfully discriminated against such employee in violation of the equal protection clause of the state Constitution. Hinman, a state employee, applied for dental coverage for himself and for Beaty under the prepaid group plan offered through Hinman's employment. When coverage for Beaty was denied, Hinman and Beaty brought suit against the Department of Personnel Administration. They charged the refusal to provide coverage to Beaty constituted discrimination on the basis of sexual orientation and marital status.

1. "[Umbrella liability policies] are policies of insurance sold at comparatively modest cost to pick up where primary coverages end, in order to provide an extended protection up to one million, five million, ten million, or more. It gives a financial security, as well as peace of mind, to the individual purchasing such coverage who is hopeful that he will never be involved in any substantial claim or lawsuit, but, if he is, is desirous of not losing the security it may have taken a lifetime to acquire." (Appleman, Insurance Law and Practice (Rev.1981) Vol. 8A, § 4909.85.)

2. Defendant requests we take judicial notice of various items. We deem it unnecessary to take judicial notice of the items specified and the requests are therefore denied.

We rejected these claims. (*Hinman*, supra, 167 Cal.App.3d at pp. 523–531, 213 Cal.Rptr. 410.) No evidence was presented showing the denial of coverage to Beaty was on the basis of his or Hinman's sexual orientation. Indeed, the record in that case revealed all unmarried employees received identical treatment. The distinction was simply "on the basis of married and unmarried employees ... not between heterosexual or homosexual ones." (*Id.* at pp. 525–526, 213 Cal.Rptr. 410.)

With regard to the claim the denial of coverage was based on marital status in violation of the equal protection clause, we noted statutory distinctions based upon marital status need only be rationally related to a legitimate state purpose. (*Id.* at p. 526, 213 Cal.Rptr. 410.) Given the state's legitimate interest in promoting marriage, and noting that interest is furthered by conferring statutory rights upon married persons which are not afforded unmarried partners, we had no difficulty in upholding the decision of the Department of Personnel Administration denying benefits to Beaty. (*Id.* at pp. 526–529, 213 Cal.Rptr. 410.)

Plaintiffs assert that because *Hinman* turned upon the interpretation of constitutional law, i.e., the equal protection clause of the state Constitution, while the instant case involves interpretation of the Unruh Act, *Hinman* is "entirely irrelevant to the legal issues raised here." Plaintiffs are entirely free to change legal theories. As we explain, however, plaintiff's change of legal theory does not effect a different result.

III

[1] The decisions hold the Unruh Act forbids discrimination against individuals on the basis of sexual orientation.[3] (E.g., *Rolon v. Kulwitzky* (1984) 153 Cal.App.3d 289, 292, 200 Cal.Rptr. 217; *Curran v. Mount Diablo Council of the Boy Scouts* (1983) 147 Cal.App.3d 712, 195 Cal.Rptr. 325; *Hubert v. Williams* (1982) 133 Cal.App.3d Supp. 1, 5, 184 Cal.Rptr. 161; see also *Stoumen v. Reilly* (1951) 37 Cal.2d 713, 716–717, 234 P.2d 969.) In their complaint plaintiffs charged "[defendant's] denial of joint coverage to [plaintiffs] is ... based upon the fact that they are a gay couple and, as such, is a denial of the equal service guaranteed by the Unruh Act."[4] We disagree.

Whatever this case is about, it is not one involving discrimination on the basis of sexual orientation. Plaintiffs' complaint alleges: "Defendants have refused and continue to refuse to issue a joint 'umbrella' liability insurance policy to plaintiffs on the alleged grounds that plaintiffs are not married and that, pursuant to certain underwriting criteria adopted by defendants, such joint 'umbrella' liability insurance policies are issued solely to heterosexual married couples." Thus, plaintiffs' complaint alleges that *all* unmarried individuals are treated the same with regard to the issuance of umbrella policies since plaintiffs are not and cannot be married. To the extent plaintiffs were treated differently than a "married couple," it is because they are not married and not because they are homosexuals. No facts are alleged to suggest unmarried heterosexual couples, or any other unmarried persons who live together and jointly own property, are treated any differently by defendant than were plaintiffs. We presume such facts do not exist.

Accordingly, plaintiffs' attempt to hinge the instant action on what they perceive as discrimination on the basis of their sexual orientation must fail. "Homosexuals are simply a part of the larger class of unmarried persons.... [Defendant's policies] have the same effect on the entire class of unmarried persons. Rather than discriminating on the basis of sexual orientation, [defendant's policies] distinguish eligibility on the basis of marriage. There is no difference in the effect of the eligibility requirement on unmarried homosexual and unmarried heterosexual employees." (*Hinman*, supra, 167 Cal.App.3d at p. 526, 213 Cal.Rptr. 410.)

We hold as a matter of law plaintiffs have not stated and can not state a viable claim for discrimination in violation of the Unruh Act on the basis of sexual orientation.

IV

Plaintiffs assert defendant's refusal to issue them a joint umbrella policy constitutes arbitrary discrimination on the basis of marital status in violation of the Unruh Act. In their brief plaintiffs argue: "There are only two possible interpretations of [defendant's] refusal to offer [plaintiffs] the same policy offered to heterosexual married couples: either [defendant] discriminates against all unmarried couples or it discriminates only against gay men and lesbians. Since neither type of discrimination is permitted under the Unruh Act, the trial court's decision to grant [*sic*] the demurrer and enter judgment against [plaintiffs] is incorrect and should be reversed." For several reasons, plaintiffs' arguments are unavailing.

"Enacted in 1959, the Unruh Act [Civ. Code, § 51 et seq.] secures equal access to public accommodations and prohibits discrimination by business establishments." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1150, 278 Cal.Rptr. 614, 805 P.2d 873; hereafter cited as *Harris*.) Amended at various times since 1959, Civil Code section 51 now provides in pertinent 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, or blindness or other physical disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

Civil Code section 52 is designed to provide an enforcement mechanism for section 51 and other provisions of law. This section states in relevant part: "Whoever denies ... or makes any discrimination, distinction or restriction on account of sex, color, race, religion, ancestry, national origin, or blindness or other physical disability contrary to Section 51 ... is liable for each and every offense...."

At the outset, plaintiffs are faced with a difficult hurdle: the Unruh Act makes no mention of discrimination on the basis of "marital status." Plaintiffs concede as much. While the Unruh Act has been extended to include categories not expressly enumerated in Civil Code sections 51 and 52 (e.g., *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 736–741, 180 Cal.Rptr. 496, 640 P.2d 115 [families with children]; *In re Cox* (1970) 3 Cal.3d 205, 212, 216–218, 90 Cal.Rptr. 24, 474 P.2d 992 [unconventional dress or physical appearance]; *Rolon v. Kulwitzky*, supra, 153 Cal.App.3d at p. 292, 200 Cal.Rptr. 217 [sexual orientation]), no court has extended the Unruh Act to claimed discrimination on the basis of marital status and we shall not be the first to do so.

Recently in *Harris*, supra, the court considered whether the Unruh Act should be extended to include "economic status" as a prohibited category of discrimination. Upon examining the history of the Unruh Act, the court came to the unremarkable conclusion the Legislature intended the scope of the Unruh Act be confined to the types of discrimination specifically enumerated therein. (52 Cal.3d at pp. 1154–1155, 278 Cal.Rptr. 614, 805 P.2d 873.) While the *Harris* court refused to overrule prior case law which extended the Unruh Act to classifications not expressed in the statute (*id.* at p. 1155, 278 Cal.Rptr. 614, 805 P.2d 873), the court made it clear future expansion of prohibited categories should be carefully weighed to insure a result consistent with legislative intent. (*Id.* at pp. 1156–1162, 278 Cal.Rptr. 614, 805 P.2d 873; see *Gayer v. Polk Gulch, Inc.* (1991) 231 Cal.App.3d 515, 522–523, 282 Cal.Rptr. 556.)[5]

[2] In light of *Harris*, we decline plaintiffs' invitation to expand the Unruh Act to include "marital status" as an additional category of prohibited discrimination.

3. We use the term "sexual orientation" to refer generally to a person's sexual habits, practices, predilections, or compulsions with respect to heterosexuality, homosexuality, etc.

4. Insurance Code section 1861.03, subdivision (a), provides in part "[t]he business of insurance shall be subject to the laws of California applicable to any other business," including the Unruh Act.

5. The *Harris* court concluded the repeated enumeration of specific classes contained in Civil Code sections 51 and 52, when viewed in light of general principles of statutory construction, "strongly suggests" a legislative intent the protection of the Unruh Act is limited. (52 Cal.3d

There is a strong policy in this state in favor of marriage (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 274–275, 250 Cal.Rptr. 254, 758 P.2d 582; *Norman v. Unemployment Ins. Appeals Bd.* (1983) 34 Cal.3d 1, 9, 192 Cal.Rptr. 134, 663 P.2d 904; *Hinman*, supra, 167 Cal.App.3d at p. 527, 213 Cal.Rptr. 410), and in the context here presented that policy would not be furthered (and in the case of an unmarried heterosexual couple, would actually be thwarted) by including marital status among the prohibited categories. It is for the Legislature, not the courts, to determine whether nonmarital relationships such as that involved in this case "deserve the statutory protection afforded the sanctity of the marriage union." (Fn. omitted; *People v. Delph* (1979) 94 Cal.App.3d 411, 416, 156 Cal.Rptr. 422.)

Moreover, the term "marital status" is hardly foreign to the Legislature. There are scores of statutes in which the Legislature has included "marital status" in antidiscrimination legislation. (E.g., Bus. & Prof.Code, § 125.6; Civ.Code, §§ 798.20, 800.25, 1812.30; Corp.Code, §§ 5047.5, 24001.5; Ed.Code, §§ 230, 45293, 88112; Elec.Code, § 308; Fin.Code, § 40101; Gov. Code, §§ 8310, 12920, 12921, 12926, 12927, 12930, 12931, 12935, 12940, 12955, 12993, 12995, 18500, 19572, 19702, 19704, 19793, 54701.12, 65583; Health & Saf.Code, §§ 1365.5, 33050, 33435, 33436, 33724, 33769, 35811, 37630, 37923, 50955, 51602; Ins.Code, § 679.71; Lab.Code, § 1735; Prob.Code, § 401; Pub. Resources Code, §§ 5080.18, 5080.34; Pub.Util.Code, §§ 453, 3542; Welf. & Inst.Code, §§ 10000, 18907.) Clearly the Legislature knows how to designate marital status as a prohibited category of discrimination when inclined to do so. Because it has not done so in the Unruh Act, we refuse to do so on our own accord.

Civil Code section 51 does not apply for a second reason, made evident by its terms: "This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, or blindness or other physical disability." Applied to the instant facts, this part of Civil Code section 51 indicates the Unruh Act was not intended to create a right of insurance access so long as the insurer's policy is applicable alike to all persons regardless of race, color, sex, religion, etc. (Cf. *Harris*, supra, 52 Cal.3d at p. 1155, 278 Cal.Rptr. 614, 805 P.2d 873; *Gayer v. Polk Gulch, Inc.*, supra, 231 Cal.App.3d at p. 522, 282 Cal.Rptr. 556.)

Here, there is no question defendant's issuance of umbrella policies is uniform and without regard to any of the categories set forth in Civil Code section 51. Plaintiffs are simply in no position to claim they have been singled out for arbitrary treatment with regard to their application for a joint umbrella policy.

[3] Moreover, the Unruh Act prohibits "arbitrary" discrimination. (See *Harris*, supra, 52 Cal.3d at p. 1154, 278 Cal.Rptr. 614, 805 P.2d 873; *In re Cox*, supra, 3 Cal.3d at pp. 212, 216–217, 90 Cal.Rptr. 24, 474 P.2d 992.) Thus, a court must consider whether the defendant possesses a legitimate business interest which justifies different treatment: "'A business establishment may, of course, promulgate reasonable deportment regulations that are rationally related to the services performed and the facilities provided.'" (*Harris*, supra, 52 Cal.3d at p. 1162, 278 Cal.Rptr. 614, 805 P.2d 873, quoting *In re Cox*, supra, 3 Cal.3d at p. 217, 90 Cal.Rptr. 24, 474 P.2d 992.)

On its face there is nothing arbitrary about defendant's issuance of joint umbrella policies only to married persons. Given the legal unity of interest and the shared responsibilities attendant upon a marriage, an insurer could reasonably conclude there is no significant risk in covering both an insured and his or her spouse with a joint policy for a single premium. With regard to unmarried couples of whatever sexual orientation, an insurer could conclude the relationship lacks the assurance of permanence necessary to assess with confidence the risks insured against in a joint umbrella policy.

Equally important, the shared responsibilities and the legal unity of interest in a marital relationship—a status not conferred on unmarried couples whatever their sexual orientation—provide a fair and reasonable means of determining eligibility for services or benefits. (See *Norman v. Unemployment Ins. Appeals Bd.*, supra, 34 Cal.3d at pp. 8, 10, 192 Cal.Rptr. 134, 663 P.2d 904; *In re Cummings* (1982) 30 Cal.3d 870, 873–874, 180 Cal.Rptr. 826, 640 P.2d 1101.)

In *Hinman*, the state employer extended dental insurance benefits to the employee's "family members," which included only the employee's spouse and, in some instances, unmarried children up to age 23. In upholding this scheme against an equal protection attack, we held "the use of the definition of 'family member' ... is a reasonable means of administering the dental benefit program.... '[R]ecognizing and favoring those with established marital and familial ties not only furthers the state's interest in promoting such relationships but assures a more readily verifiable method of proof.... [N]umerous problems of standards and difficulties of proof would arise if we imposed upon an administrative agency the function of deciding which relationships merited treatment equivalent to the treatment afforded those with formal marriages. The inevitable questions would include issues such as the factors deemed relevant, [i.e.] the length of the relationship.... The potential for administrative intrusions into rights of privacy and association would be severe if agencies bore the burden of ferreting out the "true depth" and intimacy of a relationship in order to determine whether the existence and nature of the relationship was the equivalent of marriage. [Citation.]'

"The same difficulties would attend a dental benefits scheme allowing enrollment of homosexual partners. The responsible agencies would have to establish standards which would reach the very foundations of the privacy rights of both homosexual partners in order to properly determine whether the relationship meets some arbitrary standard equating with marriage, and still exclude other unmarried nonspouses, such as roommates, acquaintances or companions.... The great potential for different opinions by the employer, insurers and unions as to who is an eligible homosexual partner could expose all parties to allegations of discriminatory treatment and the making public of any administrative examination of the sexual relationships involved." (Fn. omitted; *Hinman*, supra, 167 Cal.App.3d at p. 528, 213 Cal.Rptr. 410.)

As in *Hinman*, the fact the parties are married provides a reasonable and relevant means whereby an insurer can predict the risk involved in offering umbrella coverage. In order to assess the risk with regard to unmarried individuals, the insurer would necessarily be required to undertake a "massive intrusion" (*Elden v. Sheldon*, supra, 46 Cal.3d at p. 276, 250 Cal.Rptr. 254, 758 P.2d 582) into the private lives of applicants—e.g., inquire into their sexual fidelity and emotional and economic ties. (See *id.* at pp. 276–277, 250 Cal.Rptr. 254, 758 P.2d 582.) We see no reason why an insurer, any more than an administrative agency, should be forced to engage in such inquiry, which could only lead to inconsistent results and predictably to allegations of discriminatory treatment by the insurer. (See *ibid.*; *Hinman*, supra, 167 Cal.App.3d at p. 528, 213 Cal.Rptr. 410.)

Finally, *Harris* holds that before extending the categories set forth in the Unruh Act, the court must consider the consequences of allowing the type of claim sought by the plaintiffs: "When uncertainty arises in a question of statutory interpretation, consideration must be given to the consequences that will flow from a particular interpretation." (52 Cal.3d at p. 1165, 278 Cal.Rptr. 614, 805 P.2d 873.) What plaintiffs seek to achieve by this litigation is that both defendant and this court treat them as if they were in fact married. The result would be that all de facto couples would be treated as a married unit.

at p. 1161, 278 Cal.Rptr. 614, 805 P.2d 873.) *Harris* cautioned against further expansion of coverage under the Unruh Act: "[W]ere we writing on a clean slate, the repeated emphasis in the language of [Civil Code] sections 51 and 52 on the specified classifications of race, sex, religion, etc., would represent a highly persuasive, if not dispositive, factor in our construction of the [Unruh] Act." (*Id.* at p. 1159, 278 Cal.Rptr. 614, 805 P.2d 873.)

Any such holding would be contrary to the strong policy in this state favoring marriage (See *Marvin v. Marvin* (1976) 18 Cal.3d 660, 684, 134 Cal.Rptr. 815, 557 P.2d 106) and would ignore the fact de facto couples are not generally entitled to the benefits afforded to married couples. Indeed, married couples receive special consideration in a number of areas not available to unmarried individuals, including the right to bring a wrongful death action if a third party kills the other spouse (Code Civ.Proc. 377; cf. *Nieto v. City of Los Angeles* (1982) 138 Cal.App.3d 464, 470–471, 188 Cal.Rptr. 31 [holding no unlawful discrimination in refusing to extend this right to unmarried cohabitants]), the right to sue for loss of consortium and negligent infliction of emotional distress (cf. *Elden v. Sheldon*, supra, 46 Cal.3d at pp. 274–275, 277–278, 250 Cal.Rptr. 254, 758 P.2d 582 [denying this right to unmarried cohabitants]), the marital communications privilege (cf. *People v. Delph*, supra, 94 Cal.App.3d at pp. 415–416, 156 Cal.Rptr. 422 [refusing to extend this privilege to nonmarital partners]), and community property laws, including the right to divide community property and to seek spousal support on the termination of marriage (Civ. Code, §§ 4800, 4801; cf. *Marvin v. Marvin*, supra, 18 Cal.3d at p. 684, fn. 24, 134 Cal.Rptr. 815, 557 P.2d 106 [refusing to extend to unmarried cohabitants the rights the Family Law Act gives to valid or putative spouses]; see also *Elden v. Sheldon*, supra, 46 Cal.3d at p. 275, 250 Cal.Rptr. 254.)

Our refusal to grant plaintiffs the relief they seek reaffirms "our recognition of a strong public policy favoring marriage. [Citation.] No similar policy favors the maintenance of nonmarital relationships.... In the absence of legislation which grants to members of a nonmarital relationship the same benefits as those granted to spouses, no basis exists in this context for extending to nonmarital relations the preferential status afforded to marital relations." (*Norman v. Unemployment Ins. Appeals Bd.*, supra, 34 Cal.3d at p. 9, 192 Cal.Rptr. 134, 663 P.2d 904.)

In light of the foregoing considerations, we must decline to extend the protection of the Unruh Act to plaintiffs even as we would to an unmarried, cohabitating heterosexual couple.

In the final analysis, plaintiffs' "real quarrel is with the California Legislature if they wish to legitimize the status of a homosexual partner. Plaintiffs may achieve the reform they seek here only by attacking Civil Code section 4100, which defines marriage to be a civil contract 'between a man and a woman.' We cannot change that law here." (*Hinman*, supra, 167 Cal.App.3d at p. 531, 213 Cal.Rptr. 410.)[6]

The judgment is affirmed.

MARLER and NICHOLSON, JJ., concur.

Harold F. BOOTHBY, Plaintiff and Appellant,

v.

ATLAS MECHANICAL, INC., Defendant and Respondent.

No. C009284.

Court of Appeal, Third District.

June 2, 1992.

Certified For Partial Publication *

Former employee brought suit against employer to recover compensation for unused vacation time that he allegedly accrued over years of employment. The Superior Court, Sacramento County, No. 327664, John J. Boskovich, J., issued order of summary adjudication of issues, holding that employee could recover vacation pay if he could prove existence of agreement to accrue vacation time. Appeal was taken. The Court of Appeal, Nicholson, J., held that: (1) any vacation provided by employment agreement vested as employee labored; (2) employer was required to compensate employee for all vested vacation time remaining unused at termination; and (3) unused vacation time would not accumulate if employment agreement legally prevented accumulation.

Reversed and remanded in part and affirmed in part.

6. Defendant's assertions plaintiffs failed to exhaust their administrative remedies and plaintiffs' exclusive remedy is governed by the Insurance Code have been considered and are without merit.

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication except for parts II, III, IV, and V of the Discussion.

1. Master and Servant ⇐72

Paid vacation provided by employment agreement vests as employee labors. West's Ann.Cal.Labor Code § 227.3.

2. Master and Servant ⇐72

Because vested vacation is nonforfeitable, employer must compensate employee for all vested vacation time remaining unused at termination. West's Ann.Cal.Labor Code § 227.3.

3. Master and Servant ⇐72

Employment agreement may provide that employee does not earn additional paid vacation if specified amount of vested vacation remains unused. West's Ann.Cal.Labor Code § 227.3.

4. Master and Servant ⇐72

Unused vacation time accumulates unless employment agreement legally prevents it. West's Ann.Cal.Labor Code § 227.3.

5. Master and Servant ⇐73(1)

Any forfeiture of private employee's vested vacation time is prohibited; on termination, employee must be paid in wages for all vested but unused vacation unless collective bargaining agreement provides for some other form of compensation. West's Ann.Cal.Labor Code § 227.3.

6. Master and Servant ⇐75

When vacation is earned during period of employment, and employee does not complete period, statute requires compensation for pro rata share of unused vacation based on percentage of period completed. West's Ann.Cal.Labor Code § 227.3.

7. Master and Servant ⇐73(1)

"Use it or lose it" vacation policy provides for forfeiture of vested vacation pay if not used within designated time, while "no additional accrual vacation policy" prevents employee from earning vacation over certain limit; former is impermissible and latter is permissible. West's Ann.Cal.Labor Code § 227.3.

8. Master and Servant ⇐72

Employee's entitlement to accumulate agreed vacation from year to year depended upon whether employment agreement included valid "no accrual" vacation policy; issue required remand where neither party's position required proof of substantive vacation policy in employment agreement. West's Ann.Cal.Labor Code § 227.3.

Gregory D. Thatch and Larry C. Larsen, Sacramento, for plaintiff and appellant.

Patricia K. Poyner, Atty. for Div. of Labor Standards Enforcement, Dept. of Indus. Relations, Berkeley, as amicus curiae, on behalf of plaintiff and appellant.

Sedgwick, Detert, Moran & Arnold and Nicholas W. Heldt, San Francisco, for defendant and respondent.

NICHOLSON, Associate Justice.

[1–3] Paid vacation provided by an employment agreement vests as the employee labors. (*Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, 779, 183 Cal.Rptr. 846, 647 P.2d 122.) Because vested vacation is nonforfeitable, an employer must compen-

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July 20, 1992

California Supreme Court
303 - 2nd Street / So. Tower
San Francisco, CA 94107-1317

Re: *Beaty v. Truck Insurance Exchange*
Court of Appeal No. C010475
Published at 6 Cal.App.4th 1455

Request to "Grant and Hold" on
Court's Own Motion pursuant to
Rules 28(a)(1) and 29.2(c),
pending disposition of
Donahue v. FEHC, S024538

TO THE COURT:

Appellants Boyce Hinman and Larry Beaty hereby request that this Court "grant and hold" review of the above-entitled case on its own motion pursuant to Rules 28(a)(1) and Rule 29.2(c) of the California Rules of Court.

Sua Sponte "Grant and Hold." The decision of the Court of Appeal was filed in this case on May 29, 1992. The decision became final as to that court on June 28. Therefore, the deadline for filing a petition for review was July 8, 1992. A timely petition for review was not filed in this case by the previous attorneys of record for appellants. It was not until July 10, 1992, that appellants' previous attorney communicated to Thomas F. Coleman that she and her co-counsel had made a firm decision not to take the case any further and suggested that new counsel could substitute into the case to represent appellants. (See attached declaration of Thomas F. Coleman.) By that date, the time to file a petition for review had already expired. Therefore, the only relief that new counsel can request of this Court, to preserve the rights of appellants and to maintain the status quo pending the decision in *Donahue, supra*, is to suggest that the Court issue a "grant and hold" order on the Court's own motion.

Jurisdictional Deadline for Order Extending Time. This Court will lose jurisdiction to grant review on its own motion unless an order is issued on or before **July 28, 1992** extending time for the Court to consider a *sua sponte* grant of review.

Grounds for Review. The decision in the *Beaty* case involves an important question of law, namely, whether the Unruh Act (Civ.Code Sec. 51) prohibits business establishments from discriminating against unmarried couples on the basis of their marital status. That is one of the issues presently before this Court in *Donahue*. (See attached declaration of Thomas F. Coleman.) The resolution of this issue affects millions of unmarried adults who live together in California. Granting review will also secure uniformity of decision. The Court of Appeal decision in *Beaty* does not address, but in fact conflicts with administrative precedents, including two attorney general opinions (58 *Ops.Cal.Atty.Gen.* 608, 613 (1975) and 59 *Ops.Cal.Atty.Gen.* 223, 224 (1976), and a decision of this Court which cited the 1975 Attorney General opinion with approval (*Marina Point Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 736). The Court of Appeal opinion also conflicts with the decision of the Fair Employment and Housing Commission in the *Donahue* case in which the Commission ruled that the Unruh Act prohibits marital status discrimination and the opinion of the Court of Appeal in *Donahue* which assumed that such discrimination was barred by the Unruh Act.

Reasons for "Grant and Hold." A "grant and hold" order has the effect of preserving the status quo in other cases where the parties could benefit from a decision in a case pending in this Court. Unless this Court "grants and holds" review in the *Beaty* case, the plaintiffs will not receive uniform application of the law, even if this Court ultimately issues a decision that the Unruh Act does prohibit marital status discrimination. Furthermore, issuing a "grant and hold" order will preserve the status quo for many administrative agencies which enforce the Unruh Act and which have interpreted the Act to prohibit marital status discrimination. Such agencies include the Los Angeles City Attorney, the San Francisco District Attorney, the Fair Employment and Housing Commission, and the Attorney General. None of these agencies were parties to or otherwise participated in the *Beaty* case in the Court of Appeal. All of these agencies currently interpret the Unruh Act to prohibit marital status discrimination. Some of them are parties to the *Donahue* case and have filed briefs in this Court in support of a broad interpretation of the Unruh Act. Unless a "grant and hold" order (or an order depublishing the Court of Appeal decision) is issued by this Court, the jurisdiction of these agencies will be eroded because the decision of the Court of Appeal will be binding statewide as the only published decision directly on point.

Judicial Economy. A "grant and hold" order also serves the interest of judicial economy. If such an order does not issue, the plaintiffs in *Beaty* will have to await a decision in *Donahue* before pursuing their case further. If this Court's decision in *Donahue* holds that marital status discrimination against unmarried couples in the context of housing is prohibited by the Unruh Act, plaintiffs will have to initiate their litigation from scratch. They will be required to relitigate whether marital status discrimination against unmarried

couples in the context of insurance is prohibited by the Unruh Act. To do this, they will have to apply for a joint insurance policy again, and if denied, will have to initiate an administrative complaint, lawsuit, and then file another appeal. In other words, they will have to duplicate most of the current litigation. However, a favorable decision in *Donahue* and a "grant and hold" order in this case, would enable this Court to remand the matter to the Court of Appeal for reconsideration in view of its decision in *Donahue*, thus avoiding unnecessary duplication of attorney and court time. On the other hand, a "grant and hold" order will not prejudice the rights of respondent Truck Insurance Company.

For the forgoing reasons, Larry Beaty and Boyce Hinman, through their new attorneys, Thomas F. Coleman and David Link, respectfully urge this Court to issue an order on the Court's own motion to grant review in *Beaty* and defer further action pending the Court's decision in *Donahue*.

Very truly yours,

Thomas F. Coleman

THOMAS F. COLEMAN

THOMAS F. COLEMAN
DAVID LINK
Attorneys for Appellants
Larry Beaty and Boyce Hinman

Enclosed:
Proof of Service
Declaration of Thomas F. Coleman
Substitution of Attorneys
Court of Appeal Opinion

DECLARATION OF THOMAS F. COLEMAN

I, Thomas F. Coleman, declare:

On July 17, 1992, attorney David Link and I substituted in as attorneys of record for Larry Beaty and Boyce Himnan, plaintiffs and appellants in the case of *Beaty v. Truck Insurance Exchange*, Court of Appeal No. C010475. The original substitution of attorneys form is attached hereto, with the exception of the signature of Maureen Sheehy which was faxed to me due to time constraints.

Plaintiffs' previous attorney, Maureen Sheehy, informed me for the first time on July 10, 1992, that she and her co-counsel had made a firm decision not to take the *Beaty* case any further and she suggested for the first time that they would be willing to have new counsel substitute into the case. I immediately contacted the plaintiffs and effectuated the substitution of attorneys as soon as possible.

The time for filing a petition for review in this Court expired on July 8, 1992, two days before plaintiffs' prior attorneys suggested a substitution of attorneys.

At this time, the only remedy available to plaintiffs to preserve the status quo pending this Court's decision in *Donahue v. F.E.H.C.* (1991), 2 Cal.Rptr.2d 32, 34, rev. granted, 5 Cal.Rptr.2d 781, is to request this Court to issue a "grant and hold" order as suggested in the cover letter accompanying this declaration.

The issue decided adversely to plaintiffs by the Court of Appeal in *Beaty* is presently pending before this Court in the *Donahue* case, namely, whether the Unruh Civil Rights Act (Unruh Act) prohibits business establishments from discriminating against unmarried couples on the basis of marital status. The only difference between *Donahue* and *Beaty* is that the former involves a housing context while the latter involves insurance discrimination.

I am attorney of record for the real party in interest in the *Donahue* case. As such, I have read the briefs and am familiar with the issues before the Court in *Donahue* for decision. The following citations to the record in *Donahue* demonstrate that whether the Unruh Act prohibits marital status discrimination is an issue before the Court in that case.

On March 10, 1987, the Director of the Department of Fair Employment and Housing charged the Donahues with arbitrary discrimination by a business establishment in violation of the Unruh Act. (Civ. Code § 51). (See *Donahue v. F.E.H.C.* (1991), 2 Cal.Rptr.2d 32, 34.)

Although the term "marital status" is not listed in the Unruh Act, the Fair Employment and Housing Commission (FEHC) concluded that marital status discrimination against cohabiting couples is prohibited by the Act and that the Donahues violated that prohibition when they refused to rent to Verna Terry and Robert Wilder because they were an unmarried couple. (See p. 7 of FEHC decision in *D.F.E.H. v. John Donahue et al.*, Case No. 89-10, dated August 10, 1989.)

In their petition for a writ of mandate in the Superior Court, the Donahues argued that the FEHC erred when "The Commission found Petitioners violated the Unruh Civil Rights Act for refusing to rent to an unmarried couple, even though the

Unruh Act says nothing specifically about unmarried couples." (See *Donahue v. F.E.H.C.*, Joint Appendix in Lieu of Clerk's Transcript, p. 28.)

When the case was pending in the Court of Appeal, the parties briefed the issue of whether or not the Unruh Act prohibited marital status discrimination against unmarried couples. The FEHC argued that marital status discrimination violated the Unruh Act. (See "Appellant's Opening Brief," p. 17.) The Donahues argued that marital status discrimination is not prohibited by the Unruh Act. (See "Respondent's Brief, pp. 11-13.) The FEHC replied that the Donahues had ample notice that marital status discrimination was prohibited by the Unruh Act. (See "Appellant's Reply Brief," p. 4.)

In order to reach the conclusion that a religiously-based constitutional exemption applied to the Unruh Act, the decision of the Court of Appeal assumed, arguendo, that the Unruh Act prohibited discrimination against unmarried couples. After noting that "The types of discrimination listed in Civil Code section 51 are illustrative and not exhaustive" (*Donahue,* at fn. 2.), the Court of Appeal declared that "To the extent that Civil Code section 51 applies, the existence of a constitutionally based exemption to Government Code Section 12955 . . . would apply, as well, to section 51." (*Donahue*, at fn. 5.)

The issue of whether or not the Unruh Act prohibits marital status discrimination has been fully briefed in this Court by the by respondent landlords and by respondent real party in interest. (See "Opening Brief on the Merits" of Real Party in Interest," pp. 12-18; and respondent's answer thereto, pp. 7-8.)

This Court may very well reach and decide the statutory interpretation of Unruh in the *Donahue* case.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, California, on July 20, 1992.

Respectfully submitted:

THOMAS F. COLEMAN

STATE OF CALIFORNIA

JOHN GARAMENDI, Insurance Commissioner

DEPARTMENT OF INSURANCE
45 FREMONT STREET, 21ST FLOOR
SAN FRANCISCO, CA 94105

July 23, 1992

The Honorable Chief Justice Lucas
and Associate Justices
California Supreme Court
303 - 2nd Street, South Tower
8th Floor, Room 8023
San Francisco, CA 94107-1317

Re: Beaty v. Truck Insurance Exchange,
Third District Court of Appeal
Case No. C010475, Opinion Filed on May 29, 1992

Request to "Grant and Hold", on the Court's own motion, Pursuant to Rules 28(a)(1) and 29.2(c)

To The Honorable Malcolm M. Lucas, Chief Justice of California, and to the Associate Justices of the California Supreme Court:

The Department of Insurance hereby requests that the Court grant review of the above-entitled case on its own motion under Rules 28(a)(1) and 29.2(c) of the California Rules of Court.

The Beaty case held that the Unruh Civil Rights Act does not prohibit marital status discrimination against consumers. This is the first appellate decision to so hold. The Beaty decision conflicts with opinions of the Attorney General and administrative decisions of the Fair Employment and Housing Commission. Although both of these agencies have concluded that Unruh does prohibit marital status discrimination, the Court of Appeal decided otherwise, without making any reference to these agency decisions. The Court of Appeal rendered its decision in a vacuum, without any input, *amicus curiae* or otherwise, from any governmental agency or any civil rights organizations.

Donahue v. Fair Employment and Housing Commission, Supreme Court No. S 024538, is currently pending before this Court and involves the identical issue addressed in Beaty -- whether marital status discrimination is prohibited by the Unruh Act -- as well as the related issue of the scope of the marital status anti-discrimination provision of Government Code section 12955. (See former opinion, 2 Cal. Rptr. 2d 32, 34 & n.2, 38 n.5) These cases involve an important question of law.

The Department of Insurance requests that this Court preserve the status quo. Since the business of insurance was expressly made subject to the Unruh Act by the voters by initiative (Insurance Code § 1861.03(a)), the Department of Insurance is concerned that the Beaty case would improperly restrict the scope of Unruh's ban on discrimination.

In the alternative, the Department of Insurance requests that the opinion of the Court of Appeal in Beaty be depublished pursuant to California Rule of Court 979. This alternative is fully discussed in the Department of Insurance's letter dated July 23, 1992 and filed concurrently with this letter brief.

For the foregoing reasons, the Department of Insurance respectfully requests that this Court issue an order on the Court's own motion granting review in Beaty and deferring further action pending the Court's decision in Donahue or, in the alternative, depublishing the Court of Appeal decision in Beaty, which is temporarily published at 6 Cal. App. 4th 1455.

Sincerely,

JANICE E. KERR
General Counsel

COPY

DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE

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July 22, 1992

Honorable Malcolm M. Lucas
Chief Justice
2California Supreme Court
303 2nd Street, South Tower
San Francisco, CA 94107-1317

RE: Granting review of or depublishing Beaty v. Truck Insurance Exchange, No. C010475 (filed May 29, 1992 by Third District Court of Appeal)

Dear Chief Justice Lucas:

I am the attorney of record for the Fair Employment & Housing Commission of the State of California in a case now pending before you, Donahue v. Fair Employment & Housing Com., No. S 024538 (hereafter Donahue.) One of the issues in that case[1/] is whether the Court of Appeal correctly concluded that the Donahues were entitled to a religious exemption from the provisions of Civil Code section 51 (the Unruh Civil Rights Act, which has been held to prohibit arbitrary discrimination by landlords but does not specifically mention marital status as a protected class), as well as from the anti-discrimination provisions of the Fair Employment and Housing Act (FEH Act, which specifically lists marital status as a prohibited category of discrimination.)[2/] The above issue has been fully briefed by the parties.

---

1. See p. 12 of the Commission's Petition for Review and p. 6 of Verna Terry's Petition for Review.

2. Specifically the Court noted in a footnote as follows: "Since the Donahues' conduct in discriminating against an unmarried cohabiting couple is proscribed by Government Code section 12955, we need not address whether the conduct is also proscribed by Civil Code section 51...To the extent that Civil Code section 51 applies, the existence of a constitutionally based exemption to Government Code section 12955...would apply, as well, to section 51." (Donahue v. Fair Employment & Housing Com. (1991) 1 Cal. App. 4th 387, 400, n. 5.)

In Donahue, the Commission and the Court of Appeal concluded that the Donahues discriminated against tenants Verna Terry and Robert Wilder because they were not married. Since the Court of Appeal directed the Commission to dismiss the complaint against the Donahues, and since the complaint accused them of both Unruh and FEH Act violations, the issue of whether marital status is a protected class under the Unruh Civil Rights Act will have to be reached by this Court in order to assess the correctness of the Commission's decision (See Donahue v. Fair Employment & Housing Com., supra, 1 Cal. App. 4th 387, 394, 411.)

It has just come to the Commission's attention that no Petition for Review was ever filed in the case of Beaty v. Truck Insurance Exchange, No. C010475 (hereafter Beaty), and that the time for so doing has lapsed. In that case the Third District Court of Appeal erroneously concluded that the Unruh Act does not cover marital status discrimination (Id., pp. 7256-7258 of the Daily Appellate Report.) This result is in direct conflict with the interpretation the Commission gave to the Unruh Act in the Donahue case, where it concluded that marital status discrimination was prohibited by the Unruh Act (see p. 7 of the Commission's decision in D.F.E.H. v. John Donahue, et al., Case No. 89-10, dated August 10, 1989.)

On behalf of the Commission, it is respectfully requested that, on or before July 28, 1992, the Court issue an order pursuant to Rule 28 (a)(1) of the California Rules of Court extending time to consider more fully whether to grant a sua sponte review of the Beaty case, and that, after due consideration, it grant review and defer briefing in that case pending the Court's decision in Donahue. In the alternative, it is respectfully requested that the Court order the Beaty decision depublished pursuant to Rule 978 of the California Rules of Court, thereby reserving resolution of the Unruh Act issue for the Donahue case.

If review is not granted in Beaty or if the opinion is not depublished, this erroneous decision, which is in conflict with the Commission's Donahue decision and which was arrived at without briefing by the Commission or other interested parties,

will be binding on trial courts and on the Commission until this Court has an opportunity to decide in Donahue whether the Unruh Act covers marital status discrimination.

Sincerely,

DANIEL E. LUNGREN
Attorney General

Kathleen W. Mikkelson

KATHLEEN W. MIKKELSON
Deputy Attorney General

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1663 Mission Street, Suite 460
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July 22, 1992

California Supreme Court
303 Second Street
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Room 8023
San Francisco, Ca. 94107-1317

Re: Beaty v. Truck Insurance Exchange
Court of Appeal, Third District
No. C010475
Opinion Filed May 29, 1992

To the Honorable Justices of the California Supreme Court:

The American Civil Liberties Union of Northern California, the American Civil Liberties Union of Southern California, and the American Civil Liberties Union of San Diego and Imperial Counties (the three California affiliates of the ACLU) write to support the request of the plaintiff in this case that this court either order the Court of Appeal opinion depublished or review the decision of the Court of Appeal on its own motion.

Beaty v. Truck Insurance Exchange is the first case since this court's decision in Harris v. Capital Growth Investors (1991) 52 Cal.3d 1142 to decide if a class not enumerated in the Unruh Act is nonetheless covered by it. The Beaty decision fails to use the analysis for this important question set out in Harris, and actually relies on two arguments which this court disapproved in Harris. Since Beaty departs so significantly from this court's careful Harris opinion, and since it is the first case to consider this important issue in the wake of Harris, this court should either depublish it or grant review on its own motion.

The Beaty court concluded that the Unruh Act does not apply to marital status discrimination because, in its view, the state's policy of promoting marriage would be best served by having the legislature explicitly decide whether to include it. 92 Daily Journal DAR at 7256.

But in Harris, this court held that the critical inquiry was not whether the courts believe public policy is best advanced by including a class within the Act, but rather whether the characteristic which defines the class is a "personal" characteristic such as "geographical origin, physical attributes and personal beliefs." Harmonizing the Legislature's enumeration of certain characteristics with this court's decisions in In Re Cox 3 Cal.3d 205 and its progeny, this court held that the Unruh Act covers the enumerated categories and classes defined by "similar personal traits, beliefs or characteristics." 52 Cal.3d at 1169.

The court in Beaty never addressed the critical question of whether marital status is a personal trait like those explicitly covered by the act. Moreover, after stating its view on the wisdom of including marital status as a matter of policy, the court said its decision was supported by the fact that the legislature has banned marital status discrimination in many statutes, but had not done so explicitly in the Unruh Act. 92 Daily Journal DAR at 7256. But in Harris, this court suggested that a large body of law explicitly protecting the class would be a factor indicating that the class should be included with other protected classes in Unruh. 52 Cal.3d at 1161, n. 9.

Finally, as an alternative basis for its holding, the Beaty court offered the second sentence of section 51, which says the section does not "...confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race religion, ancestry, national origin or blindness or other physical disability." In Harris this court said this sentence meant that Unruh does not create rights if other legislation specifically disclaims them, and that it does not create rights if the same rights are already extended by law to all persons regardless of sex, color, race or the other categories enumerated in Unruh. 52 Cal.3d at 1155. The Beaty court never even suggested that any state law disclaims the right to be free from discrimination based on marital status in insurance or that any other law prohibits discrimination in insurance against all persons without regard to all of the Unruh categories.[1] Instead, the court seemed to hold that this sentence limits the Unruh Act to the enumerated categories. 92 Daily Journal DAR at 7256. This court specifically rejected that argument in Harris. 52 Cal.3d at 1155.

---

[1] Any such holding would appear to be insupportable. Compare Civ. C. §51 with Ins. C. §679.71.

The ACLU affiliates believe that the Beaty court reached the wrong result, and that had it applied the Harris analysis, it would have concluded that marital status discrimination is prohibited by the Unruh Act. See, Harris v. Capital Growth Investors (1991) 52 Cal.3d 1142, 1159-1161; cf., Stoumen v. Reilly (1951) 37 Cal.2d 713; Marina Point Ltd. v. Wolfson (1982) 30 Cal.3d 721. Were the Beaty opinion a single exception to a body of cases applying the Harris analysis to the important issue of coverage under the Unruh Act, its failure to follow this court's decision in Harris might be less critical. But as the first post Harris case to address the question, it has the potential to confuse the careful Harris opinion. This court should not let it stand as is.

Sincerely yours,

MATTHEW A. COLES
American Civil Liberties Union of Northern California

PAUL HOFFMAN
American Civil Liberties Union of Southern California

BETTY WHEELER
American Civil Liberties Union of San Diego and Imperial Counties

By 
Matthew A. Coles

MAC:fmb
\LETTERS\Beat0722

cc: Maureen Sheehy, Esq.
Craig H. Bell, Esq.
Clerk, California Court of Appeal
Third District

JAMES K. HAHN
CITY ATTORNEY

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To Tom Coleman	From Linda Lefkowitz
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July 20, 1992

VIA FEDERAL EXPRESS

Chief Justice Malcolm M. Lucas
and Members of the Court
California Supreme Court
303 Second Street
South Tower, Eighth Floor
San Francisco, California 94107-1317

Re: Beaty v. Truck Insurance Exchange,
Third District Court of Appeal No. C010475,
Opinion file May 29, 1992

Re: Request to Grant Review or to Depublish Decision

To the Court:

This letter is written to request that the Court grant review of the above-entitled matter on its own motion. Rule 28(a)(1) of the California Rules of Court. In the alternative, we urge the decision be depublished.

The Beaty case holds that the Unruh Civil Rights Act does not prohibit marital status discrimination against consumers. This Office recently filed an amicus curiae brief in the case of Delaney v. Superior Fast Freight, Case No. 2 Civ. B063458. In that case, the superior court invalidated a Los Angeles ordinance barring employment discrimination on the basis of sexual orientation upon grounds such ordinances were preempted by the Fair Employment and Housing Act.

Our research in that brief revealed substantial confusion regarding the extent to which various state laws encompass certain classes of discrimination. Accordingly, we urge this Court accept review of the Beaty case to begin to resolve the conflicts and confusion which currently face both

citizens, legislators, and practitioners in the field of employment law. Alternatively, please consider this a request to order the Beaty decision depublished. Cal. Rules of Court, Rule 978.

Very truly yours,

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