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## Woman Wants Class-Action Suit Against Payday Lender

By [Scott Sandlin](#)

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The impact of the phrase "reading the fine print" was front and center last week as the New Mexico Court of Appeals tackled questions surrounding a payday loan agreement.

Albuquerque educator Andrea Felts is attempting to press a class-action lawsuit against Internet loan providers from whom she borrowed in 2007, when a divorce left her cash-strapped.

One \$400 loan came at an interest rate of 684 percent, another at 730 percent and Felts' multiple payments over a period of three months still left her far behind. She was on a debt treadmill, as her lawyers put it, even though she had paid back more than the original loan amounts. Almost everything had gone to interest on the loan.

But language in the loan agreements said any disputes between the parties would be submitted to arbitration, and it barred participation in a class-action lawsuit.

Nonetheless, Felts filed a class-action suit in 2008 under the New Mexico Unfair Practices Act and the New Mexico Small Loan Act seeking injunctive relief and damages on behalf of New Mexico borrowers from the companies in question, CLK Management and Cash Advance Network Inc.

Felts, on behalf of the class, wants to recover amounts paid toward the loans, plus triple damages, attorney fees and an injunction from the court barring the companies from collecting any money from New Mexico borrowers.

The proposed class includes borrowers who got loans under \$2,500 that required payments through automatic withdrawal and who made payments toward the loan.

A district court judge said the case could go forward, and the lenders appealed.

Appeals court judges turned their attention to the loan language during oral argument Wednesday.

One 168-word sentence in Felts' loan agreement provoked an exchange between Chief Judge Cynthia Fry and Joe Messineo, an Omaha attorney defending one of the loan companies.

"So you're saying it (the relevant wording) ends at the comma ... not at the period that comes some distance later?" Fry asked.

"Yes, your honor," Messineo said.

"That's pretty hairsplitting if you ask me," Fry responded.

During more than an hour of debate, they were watched by students from Atrisco Heritage High's legal academy, attorneys with cases touching on similar issues and University of New Mexico law

professor Nathalie Martin, whose research on payday loans concluded that 2007 legislative reforms had done little to change short-term lending practices.

Felts' lawsuit also alleged that the loan companies were not licensed in New Mexico when they made the loans and that lenders contended they are immune from consumer protection laws here and elsewhere. It also claims that the companies intentionally set up a lending enterprise that operates under multiple names "in direct defiance of the laws of multiple states, including New Mexico."

Second Judicial District Judge Nan Nash ruled in 2009 that Felts' lawsuit did not have to go to arbitration and that class actions could not be barred. Small consumer claims, Nash decided, fall within the New Mexico Supreme Court's 2008 opinion in *Fiser v. Dell Computer*.

In *Fiser*, a man who purchased a computer online, claimed that it came with less memory than promised. He sued, but the state Court of Appeals ordered his case to arbitration based on provisions in the purchase agreement. The state Supreme Court reversed and found the arbitration provision invalid.

The lenders in Felts' case claim Nash's decision is expanding the outlines of the *Fiser* decision.

And they say a U.S. Supreme Court ruling in another case in June sets up certain hurdles before a case can be heard by a judge rather than an arbitrator — hurdles they say Felts hasn't cleared.

The loan companies argue on appeal that the district court disregarded "clear and unmistakable language" giving an arbitrator exclusive jurisdiction to decide if the agreement is enforceable.

Attorneys Rob Treinen of Albuquerque and Paul Bland of the nonprofit law firm Public Justice say the *Fiser* ruling supports the idea that, when a disputed amount is relatively small, it would be "unconscionable" to bar class actions because consumers could not find an attorney to take such a case.

They filed affidavits from local consumer attorneys saying small individual claims aren't worth the time required to litigate them, particularly given the difficulties of dealing with out-of-state lenders and the complexity of the issues.

Messineo attacked the affidavits as "entirely deficient from an evidentiary point of view."

The loan companies say the case presents important issues about whether an arbitration agreement under the Federal Arbitration Act is enforceable.

"Despite the clarity of her agreement, Felts filed a case in court rather than proceed in an arbitration forum," says one filing on behalf of the lenders.

Bland told judges the loan company lawyers were trying to boil down the language of the agreement to about 20 words when it in fact is 168 words, with 18 commas and seven places where the word "or" appears.

"There's nothing in this that is a clear and unmistakable" agreement to let an arbitrator decide, Bland said. "In order to try to make it 'clear and unmistakable' they have gone nuts with ellipses. ... Without it, it's essentially incomprehensible."