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ALBUQUERQUE JOURNAL

x •• Saturday, March 5, 2011

Appeal Rules Against Arbitration

■ *District court ruling regarding payday loans to stay*

By **SCOTT SANDLIN**
Journal Staff Writer

A lawsuit that challenges the legality of certain payday loans can be decided in court rather than being referred to arbitration, the New Mexico Court of Appeals has ruled.

An opinion filed by the court this week upholds a district court ruling by Judge Nan Nash, who found the arbitration provision in loan agreements was unconscionable under state law, including the Unfair Practices Act. Nash refused to order plaintiff Andrea Felts to arbitrate her claims against CLK Management Inc. and Cash Advance Network Inc.

Felts, represented by Albu-

querque attorney Rob Treinen, **Public Justice**, a national nonprofit that litigates consumer issues, and the Schaefer law firm of Minneapolis, claims in the December 2008 lawsuit that the online lending practices employed by the lending companies are in direct violation of state consumer law. She seeks to represent a class of borrowers who obtained loans under \$2,500 from the named companies.

Felts ended up on a "debt treadmill" after taking out three loans for about \$400 each from online lenders in 2007 at rates between 521 and 730 percent. When she couldn't keep up with payments, her lawyers said, she got repeated calls at home and at work.

The New Mexico Attorney General's Consumer Protection Division filed a friend-of-the-court brief siding with Felts because, in the words of

Attorney General Gary King, "lenders in this case took advantage of consumers and such practices are against public policy."

Omaha attorney Joseph Messineo, who argued for the loan companies, declined comment Friday about whether his clients would ask the state Supreme Court to review the ruling.

Lenders argued there was nothing unconscionable

about the class action waiver contained in the loan agreements because Felts had other avenues of relief open to her. Because Felts could recover attorney fees and costs by statute, the class action waiver "does not deprive Felts of a forum in which to seek relief," they argued, and thus is far from unconscionable.

The ruling by Judges Cyn-

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thia Fry, Jonathan Sutin and Roderick Kennedy comes just over a month after oral arguments in Albuquerque.

In an opinion by Fry, the judges said it was up to a court, not an arbitrator, to determine who would decide the case.

The ban on class actions in the loan paperwork was both unconscionable and "in the same vein" as a similar provision the state Supreme Court

invalidated in a 2008 ruling.

The opinion noted that Felts had submitted affidavits from a dozen attorneys highlighting the costs and difficulty of litigating a consumer case such as hers without the ability to bring a class action.

"We think it is significant that (the lenders) had the opportunity to, but did not, submit any counter evidence" that Felts could have brought her claim individually, Fry wrote.