

FRIDAY, MARCH 28, 2008  
11:00 A.M.

NO. 3

#23982, #24001 Rehearing

FIN-AG, INC.,  
Plaintiff and Appellee,  
vs.

PIPESTONE LIVESTOCK AUCTION  
MARKET, INC.,  
Defendant and Appellant,  
and

DACOTAH BANK,  
Defendant.

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#23984

FIN-AG, INC.,  
Plaintiff and Appellee,  
vs.

SOUTH DAKOTA LIVESTOCK SALES  
OF WATERTOWN, INC.,  
Defendant and Appellant,  
and

Dacotah Bank,  
Defendant.

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(FOR APPELLEE)

The Honorable Gene Paul Kean  
Second Judicial Circuit  
Minnehaha County

(CIV 05-633) (#23982/24001)

The Honorable Robert L. Timm  
Third Judicial Circuit  
Codington County

(CIV 05-121) (#23984)

NOTICE OF REVIEW #24001 FILED FEBRUARY 15, 2006

## STATEMENT OF THE ISSUES

### **I. WHETHER ALL OF THE CLAIMS OF FIN-AG ARE BARRED BY SDCL 57A-9-609.1 BECAUSE FIN-AG FAILED TO OFFER TO AUTHORITIES TO FILE A COMPLAINT, OR, AT MINIMUM, WHETHER SOME OF THE CLAIMS WERE BARRED FOR FAILURE TO FILE WITHIN TWENTY-FOUR MONTHS?**

Judge Kean and Judge Timm concluded that Fin-Ag had adequately complied with the statute by making an offer to file a criminal complaint to counsel for the Sale Barns and Berwalds. In any event, Judge Timm ignored the fact that Fin-Ag's claims against SD Livestock included nine sales barred by the 24-month statute of limitations in SDCL 57A-9-609.1.

- SDCL 57A-9-609.1

### **II. WHETHER THE FOOD SECURITY ACT OF 1985, 7 U.S.C. 1631, PROTECTS THE SALE BARNS?**

Judge Kean held that Pipestone was protected from liability to the extent it was acting as a commission merchant, but concluded that on certain sales, Pipestone was acting as a lender and was not protected from liability. Judge Timm found that SD Livestock was not protected by Section 1631.

- 7 U.S.C. 1631
- 9 C.F.R. Part 205
- South Dakota Administrative Rules, 5:04:04:20(4)
- South Dakota Instructions for Completing UCC1 and EFS Forms
- *FDIC v. Bowles Livestock Comm'n Co.*, 937 F.2d 1350 (8th Cir. 1991)
- *Lisco State Bank v. McCombs Ranches, Inc.*, 752 F.Supp. 329 (D. Neb. 1990)

**III. WHETHER FIN-AG FAILED TO PROVE THE ELEMENTS OF COMMON LAW CONVERSION, OR CANNOT RECOVER DUE TO CONSENT, AUTHORIZATION, THE AVOIDABLE CONSEQUENCES RULE, ESTOPPEL, WAIVER, OR MITIGATION?**

Neither Judge Kean nor Judge Timm required Fin-Ag to prove the elements of its conversion cause of action and should have denied summary judgment to Fin-Ag due to these issues.

- *Security State Bank v. Benning*, 433 N.W.2d 232 (S.D. 1988)
- *First Bank of Okarche v. Lepak*, 961 P.2d 194 (Okla. 1998)

**IV. INCORPORATION OF ADDITIONAL ARGUMENTS FROM EARLIER BRIEFS.**

The Supreme Court asked the parties to particularly address two issues in the rebriefs. The Sale Barns do not wish to waive any argument previously made.