

UDK:347.56:347.961+347.13/14:347.961  
DOI: 10.5937/tokosig2003007J

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## **LEGAL POSITION OF A NOTARY PUBLIC AND SPECIFIC FEATURES OF HIS PROFESSIONAL LIABILITY INSURANCE**

REVIEW ARTICLE

### **Abstract**

The legal position of a notary public and the types of services he provides crucially affect the complexity of his liability, which arises from performing legally prescribed activities. Actions to protect and realize the public and private interest for a fee represent a risk from which the professional liability of a notary public may arise, which is equated with errors and omissions insurance. This leads to multiple types of liability: civil, disciplinary, offence and criminal. In this paper, the author explores the interest of the state, parties and notaries public in relation to the performance of notary public services to the extent relevant to this paper, the legal basis and manner of concluding professional liability insurance of notaries public, setting cover limits and some specific excluded risks and specific features of occurrence of insured event in professional liability insurance by getting an insight into comparative legal solutions of the law regulating notary public services, and finally the views of domestic and foreign legal theory.

**Key words:** *notary public, professional liability, insurance, interest, damages*

### **I. Introduction**

Various declarations of will, real estate transactions and activities according to a court decision are unthinkable today without the participation of a notary public. By exercising the authority under law, a notary public contributes to legal security

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Paper received on: 19 August 2020

Paper accepted on: 26 August 2020

and certainty in legal real estate transactions and exercise of other rights by issuing documents that are enforceable or credible in accordance with the law (Ivančević, 2012, 67). By an impartial standard of conduct, a notary public provides his services neutrally and without favouring interests of any party. Therefore, this profession is considered a service of public trust.

Traditional division of legal systems to Anglo-Saxon and European continental is reflected in the legal position and scope of authority of notaries. Their authority in some countries of the Anglo-Saxon and continental legal traditions is greater, while in others is minor. In countries where the authority is greater, notaries public are at the same time members of bar associations and can perform notarial and advocacy services (for example in Germany<sup>2</sup>), while in France and Greece, for example, they cannot be at the same time a lawyer and a notary public (Todorović, Simeonides, 2013, 18), and the same solution was applied in Serbian law (Law on Notary Public, 2015, Article 5, Paragraph 1). In legal systems of some U.S. states, where real estate transactions take place outside the notary public service, the protection of the rights of all parties is endangered due to a possibility that some of them may be denied neutral and professional advice by a notary public on possible legal risks as is the case in civil systems of the law on notary public (Murray, 2011, 283). In legal systems where a notary public is a competitor to a lawyer, and possibly other professions, a notary public is forced to compete in the legal services market and at the same time must apply much stricter rules for his actions (Andressen, 2009, 166). On the other hand, although in our country the notary public service is separated from the legal profession, strict rules on activities and liabilities of notaries public also apply here. Therefore, any general presentation on obligations and liabilities of notaries public is practically impossible.

The legal position of a notary public and the types of services he provides decisively affect the complexity of his liability arising from the performance of legally prescribed actions. A notary public is independent in its work in accordance with the law and bylaws, as well as the regulations and acts of the Notary Public Chamber. He is obliged to act in accordance with the regulations and the principle of conscientiousness and honesty, which means that he is obliged to refuse to perform official duties in cases prescribed by law. Given that the notary public exercises authority under the law for his own account and in his own interest, and that on the other hand financially depends on a continuous provision of services to many clients, a notary public has characteristics of a liberal profession and public service (Verstappen, 2013, 26–27; Ivančević, 2012, 67). Therefore, one section of legal theory states that

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<sup>2</sup> According to the German Federal Code for Notaries, if lawyers commissioned as notaries perform other advisory services it shall be assumed that they have acted in their capacity as notary if the act is intended to prepare or perform official functions. In all other respects, it is to be assumed, that they have acted in their capacity as lawyer (Bundesnotarordnung 1937, Article 24, Paragraph 2).

the legal position of a notary public is hybrid, because he acts in the capacity as a public servant and an entrepreneur (Verstappen, 2013, 27). In Hungarian legal theory, the competence of a notary public, similarly to the previous paragraph, is classified between advocacy and court competence (Molnár, 2019, 26). In Greece for a certain time a notary public had the status of a court clerk, and today he has the status of an unpaid civil servant (Diamantopoulos, 2009, 198; Todorović, Simeonides, 2013, 18). The nature of a notary's official duty is described in American theory as instrumental or administrative (Haberhorn, Wulf, 1998, 736), while in some U.S. judicial positions notaries are described as "quasi-public servants" (Perkins, Spyke, 1998, 41). Actions to protect and realize public and private interest for a fee represent a risk from which the professional liability of a notary public may arise, which is equated with errors and omissions insurance. This leads to multiple types of liability of notaries: civil, disciplinary, offence and criminal liability.

In this paper, the author explores the interest of a state, parties and notaries in relation to the performance of notarial services, the legal basis and manner of concluding professional liability insurance of notaries, setting coverage limits and some specific excluded risks and specific features of occurrence of insured event in professional liability insurance.

## **II. Interests of a State, Parties and Notaries Public**

Work of a notarial public service realizes the interests of a state, parties and notaries public. By establishing that service, a state has enabled the various rights of citizens to be exercised quickly and in a manner that provides full legal security. Notaries public perform only duties of public interest because they contribute to legal security and prevention of litigation (Andressen, 2009, 165; Murray, 2011, 279). Thus, the general interest of a state, through a notary public, is manifested in an adequate functioning of a national legal system. The said interest is a consequence of an obligation to provide all entities - economic, social, cultural, civil or political - with adequate protection of human rights and fundamental freedoms through facilitated access to legal services provided by an independent legal profession.<sup>3</sup> Therefore, a state has an interest in protecting its citizens from various legal uncertainties and abuses *ex ante*, by requesting or encouraging the intervention of an impartial lawyer at the time of concluding of a legal transaction (Murray, 2011, 279).

Depending on the type of document drawn up or a procedure conducted by a notary public, a party is interested in having its legal interest legally and fully realized, in accordance with its will. Assuming that a party does not have to be

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<sup>3</sup> European Parliament resolution on the legal professions and the general interest in the functioning of legal systems, *Official Journal of the European Union*, C 292 E, 1.12.2006., pp. 105–109.

acquainted with all the details of drawing up and issuing a notarial document in accordance with the law, a notary public must inform the parties about the content and legal consequences of legal actions and warn them of their vague, incomprehensible or ambiguous statements. Interest value of notaries' parties ranges from symbolic to large sums, as it happens in real estate transactions, for the purchase of which a bank loan is taken and a lien is inevitably established - a mortgage on the real estate in favour of the bank.

Interest of a notary public is manifested as a consequence of the fact that this is an entrepreneur interested in his office functioning fully in accordance with the law in order to make a profit. In that sense, a notary public is certainly interested in helping the parties reach an agreement and thus realize their interests by providing impartial and professional advice. Notarial counselling has a special quality, since the task of this function is to reconcile two opposing interests (Ivančević, 2012, 67). When the interests of parties are satisfied in a permissible and lawful manner, a notary public achieves both his entrepreneurial goal and the public interest. It is certain that it is not in his interest to have complaints about his work or to have litigation initiated regarding his documents or work in order to compensate the damage. Notaries are liable for errors and omissions with all their property, and that certainly requires increased professional attention in everyday work. Interest of a notary public in legal systems where this type of professional liability insurance is not required by law is reflected in the redirection of a financial obligation to an insurer to compensate the injured party, i.e. exemption from civil liability if it occurs due to the insured event.

### **III. Legal Basis and Manner of Conducting Professional Liability Insurance of Notaries**

Pursuant to the Law on Notary Public (Article 58), a notary is obliged to compensate the damage he caused in performing his duties. Apart from his duties, a notary is also liable for any damage caused by a notarial trainee, a notarial associate and a notarial assistant, as well as administrative staff working in his office, regardless of whether, according to the general rules, they are liable independently.

General rules on civil liability and insurance of notaries public apply accordingly to liability for damage. In that sense, in one of his papers written with professor Slavnić the author pointed out that the differences between contractual and non-contractual liability, and subjective and objective guilt disappear because the guilt is determined in accordance with the cause-and-effect principle, regardless of whether the service is provided on the basis of a contract or without a contract (Slavnić, Jovanović, 2008, 596). Therefore, a claimant is obliged to prove the guilt of a notary and the existence of conditions for liability of a notary - the existence of

the action from which the damage occurred, occurrence of damage, causation and guilt of a tortfeasor (Ivančević, 2012, 68-69).

In Germany, the Federal Code for Notaries stipulates certain rules in case of intent and gross negligence of a notary public and a person who is trained for a notarial service. Thus, a notary public is obliged to compensate the damage caused to a third party intentionally or by gross negligence, and when he fails to supervise the person working for him, he is jointly and severally liable for compensation, with the right of recourse against his employee. The rules of the German Civil Code apply for everything else.

When it comes to the legal regulation of professional liability insurance of notaries at the level of the European Union, the Directive 2006/123/EU on services in the internal market stipulates in Article 23 that Member States may ensure that providers whose services present a direct and particular risk to the health or safety of the recipient or a third person, subscribe to professional liability insurance appropriate to the nature and extent of the risk. Article 2 Paragraph 2 Item (l) explicitly excludes its application to notaries public. Having in mind the above stated, Member States are not obliged to introduce compulsory professional liability insurance of notaries. Thus, Greece, Spain and the United Kingdom did not introduce compulsory professional liability insurance of notaries, while this legal obligation exists in many EU member states such as Austria, Belgium, France, Italy, Germany, Hungary, etc., and also in twenty-seven federal states of the United States of America.<sup>4</sup>

Obligation to insure notaries against professional liability in Serbia is stipulated exclusively for financial losses caused by the actions of a notary and persons working for him. Actions of a notary and persons working for him refer to: 1) drawing up, certifying and issuing public documents on legal affairs, statements and facts on which the rights and verification of private documents are based; 2) taking over for keeping of documents, money, securities and other items; 3) performing activities according to the court's decision, which may be entrusted to him under the law; 4) performing activities in the capacity of an executor of a will, a guardian of the estate, a guardian of an incapacitated person or some other similar activities based on the decision of a competent authority; and 5) undertaking other actions in accordance with the law.

In addition to professional liability insurance, notaries are obliged under law to insure against losses caused by damage to, destruction or disappearance of items of the parties who surrendered them to the repository of a notary public. In this regard, in comparative law we observed that the Austrian Code of Notaries obliges a notary public to insure the items in the repository, as well as to take care

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<sup>4</sup> Notary Bond Prices by State. Available at: <https://www.suretybondsdirect.com/notary-bond-express/notary-bond-prices>, 12. 8. 2020.

of the increase in the sum insured if the value of the repository increases. However, this is a conditional obligation, because a notary public will not have that obligation if a party gives a written statement that he does not want to insure an item placed in the repository. In Serbia and Montenegro, this obligation to conclude the insurance of an item placed in a repository is unconditional. However, unlike the Montenegrin law, the Law on Notary Public of the Republic of Serbia in that sense is precise both in terms of insurance and the type of risks against which a notary public is obliged to insure items in repository. Thus, a notary public is obliged to insure items in repository in case of damage to, destruction of or disappearance due to theft, burglary, fire, flood or consequences of a natural disaster, under the standard general insurance terms and conditions (Law on Notary Public, 2015, Article 170 Paragraphs 1 and 2).

Professional liability insurance of notaries has a dual effect. On one hand, insurance provides protection to persons who may be harmed by use of services of a particular notary public, while on the other hand, insurance protects a notary against a financial compensation for damage caused to a party for whom he performed official duties (Slavnić, Jovanović, 2008, 589).

Professional liability insurance is only one of the forms of civil liability insurance, which includes product liability insurance, liability insurance from performing a certain function and liability insurance from ownership or possession of objects. However, professional liability insurance also covers liability insurance whose source of danger is not a service and use of a service provider's service, but also a liability of a service provider which as a source of danger presents the possession or use of objects used by a service provider in performing his services, i.e. a product of a service provider (Slavnić, Jovanović, 2008, 591).

Professional liability insurance of notaries in Serbia is concluded individually or collectively, through the Public Notary Chamber. Disadvantage of an individual professional liability insurance is that a notary must take care of the expiration date, adjust the amount of sum insured if the Public Notary Chamber changes the amount of minimum insurance coverage, independently negotiate and conclude an insurance policy, and provide evidence of concluded insurance, its renewal, data on insurer, etc.

Solidarity as a principle of mutual coverage of losses of one profession is expressed in the system of professional liability insurance of notaries in France so that, in addition to an individual insurance policy for damages due to errors, omissions or negligence, the notarial profession established collective insurance for financial consequences of errors and gross negligence which are not covered by a private insurance policy. The collective professional liability insurance of French notaries is characterized by two types of funds: regional guarantee funds managed by a regional Council of Notaries, funded by contributions of notaries from a particular region, and the central Guarantee Fund, funded by notaries from all over France that is managed by the High Council for the Notarial Profession (contributions are paid

before taking the oath and are returned after the termination of the appointment – author’s comment). In case of a claim against a notary public, the damage is compensated by an insurance company that issued the professional liability insurance policy, and then by a regional and the central Guarantee Fund, if necessary. In case the compensations from the mentioned sources are insufficient, the difference to the amount of full damage is compensated by all notaries of France in proportion to the amount of contributions they paid (Décret N° 55-604, 1955, Articles 11 and 14). It should be borne in mind that the liability for damages of a notary public, in addition to insurance and coverage from guarantee funds, is limited to a minimum of one tenth of a damage, and is maximum at the amount determined by the decree of the Minister of Finance and the Minister of Justice. A multi-level system of excess loss insurance has been established in Italy and Germany (see the third paragraph in the next chapter).

#### **IV. Sum Insured and Certain Specific Excluded Risks**

Limit of professional liability cover of notaries is determined by law or a decision of a state authority (minister) or the Public Notary Chamber, with the consent of the state authority. Sums insured of a professional liability insurance are determined as the lowest amounts at which liability of a notary public is insured from practicing this profession.

Amounts range from 50,000 Euros per insured event in Lithuania, 100,000 Euros in Portugal and Montenegro, to 400,000 Euros in Austria and 500,000 Euros in Germany. Whether the said amounts are sufficient depends on the circumstances of an insured event. It is generally known that real estate values are higher in larger cities and exclusive parts of cities and towns than in smaller towns. In addition, the value of a gift can also be such as to fully fit into a sum insured, but it can also exceed it. In any case, in those legal systems where the professional liability insurance of notaries is stipulated by law as mandatory, the danger of notaries independently contracting extremely low sums insured, which in most cases would not be sufficient in multiple claims, has been avoided. Due to the stated reason, only in German Federal Code for Notaries did we find the right of an insurer to limit its obligation to a double minimum amount of a prescribed cover, i.e. maximum 1,000,000 Euros.

As a rule, professional liability insurance, including professional liability insurance of notaries public, excludes from cover certain risks and types of obligations or damages. Thus, as a rule, cases of violation of fiscal obligations are not covered. In Italian law, if a notary public does not pay the tax collected for the verification of a document or a signature, and such damage is not covered by an insurance policy, the tax administration has the right to demand their collection from the Guarantee Fund of the National Council of Notaries under certain conditions (Legge, 1913, Article 22,

Paragraph 3-bis). According to the German Federal Code for Notaries, insurers can exclude their obligation in case of damages caused by intentional actions of notaries, persons working for them and their employees. However, an insurer under Article 19a Paragraph 2 is obliged to pay the amount of the minimum stipulated cover, but has the right of recourse from the Public Notary Chamber, which is obliged to conclude an insurance policy for an additional 250,000 Euros for damages caused by intentional action, and an additional 500,000 Euros for all other breaches of a notary's duty, where the maximum obligation of an insurer, according to the insurance policy of the Public Notary Chamber, is limited to the four previously stated amounts per year (Bundesnotarordnung, 1937, Article 67, Paragraph 3, Item 3).<sup>5</sup> Insurer, according to the collective insurance policy of the Public Notary Chamber, may exclude its obligation for claims: (1) arising from the provision of advice on the law of a state outside Europe, unless the breach of official duty was caused by ignoring the possibility of exercising that right, and (2) arising from the embezzlement by any employee in the notarial office, unless the notary public is guilty of negligent breach of official duty to supervise his administrative staff. Unlike German law, Austrian law does not allow an insurer to exclude its obligation. When it comes to the professional liability insurance of notaries in France and Italy, it should be borne in mind that the insurance contains a list of excluded risks and damages that is much longer in an individual insurance policy than in a collective professional liability insurance policy, which are concluded by notarial professional organizations. As this is a liability from performing notarial services, the insurance does not cover damages caused by an insured during the period of suspension or temporary ban on work. However, since professional liability insurance is for the benefit of third parties, an insurer's obligation is also excluded for damages caused to a spouse, ancestors and descendants of a notary, as well as relatives who live with him in a joint household. In this second case, it is about the rules on avoiding conflicts of interest of a notary, for which the Law on Notary Public stipulates exemption of a notary public, i.e. the prohibition of acting in cases where the mentioned persons appear.<sup>6</sup> In case of a claim, a cover is first provided under an individual professional liability insurance policy of a notary, if concluded, and only then under a collective professional liability insurance policy at the level of a notarial professional organization.

Since the professional liability insurance of notaries is concluded for purely financial loss, the insurance does not cover material damage to objects and animals

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<sup>5</sup> According to the professional liability insurance policy of notaries of the Italian National Council of Notaries (*Polizza per la copertura della responsabilit  civile professionale dei notai*), with an insurance period from 24.00 hours on 1 May 2018 to 24.00 hours on 1 May 2021, Article 1 Paragraph 4, the insurance also covers liability for damage caused intentionally or by gross negligence of a person for whom the insured is liable, but the liability of the notary public is covered only for damage caused by his gross negligence.

<sup>6</sup> Article 54 of the Serbian Law on Notary Public stipulates a much broader list of exceptions in order to preserve impartiality in the actions of a notary public.



that occur in the premises of a notary, as well as non-material damage to individuals. In addition, there is another specific uncovered risk, which is regularly encountered in the property and transport insurance, and refers to a complete exclusion of an insurer's liability for damages, losses, costs and expenses of any nature when directly or indirectly incurred or arising from any of war-like risks (war, hostilities or military operations, regardless of whether the war was declared or not, invasion, hostile actions by foreign nationals or actions by foreign nationals in one state with effect on the territory of another state, civil war, rebellion, unrest, revolution, the fall of a legally formed government, civil unrest spreading to riots, establishment of military power or usurpation of power) and the risk of terrorism.

## **V. Insured Event in Professional Liability**

Generally accepted solution on when an insured event in professional liability insurance arises is the moment when a third injured party claims compensation from an insured. In French law, a notary's fault arises if, after a period of one month after sending a registered letter to a notary's address with a mandatory acknowledgment of receipt and a request for fulfilment of his obligations, a notary public fails to perform the required action or official duty (Décret N°55-604, 1955, Article 12, Paragraph 5).

Since the consequences of an error or omission can be noticed several years after the day when an action was supposed to be performed, insurers often resort to shortening of a deadline for reporting an insured event due to which damage may occur. Therefore, Austrian Code of Notaries does not allow an insurer to limit the statute of limitations of its obligation (Gesetz, 1871, Article 30, Paragraph 4). In Belgium, there is no prohibition of restrictions on insurance in the Law on Notary Public, but the Belgian Insurance Law contains one provision that supports such an expectation of insurers. For all types of civil liability insurance, the contracting parties may agree that the insurance covers only claims made in writing against an insured or an insurer during the insurance period, for damage incurred during the same insurance period (the so-called claims made principle). In that case, provided that a claim is made in writing against an insured or an insurer within thirty-six months after the expiry of the contract, such claims are covered if actions or facts that could lead to damage occurred during the insurance period and if they are reported to an insurer (Loi relative aux assurances, 2014, Article 142). Essentially the same solution is contained in Article 1356 Paragraphs 1 and 2 of the Preliminary Draft of the Civil Code of the Republic of Serbia, which the author of this paper has already proposed in one of his papers from 2010.<sup>7</sup> The last version of the Preliminary Draft of 28 May

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<sup>7</sup> Jovanović, Slobodan (2010). „Osiguranje od odgovornosti – Ugovorno pokriće po sistemu nastanka osiguranog uzroka ili datuma postavljanja odštetnog zahteva“, *Revija za pravo osiguranja*, 9(1), 33–39.

2019, known to the author, still leaves open the additional deadline for reporting claims, while the author believes that it should be maximum two years.

## **VI. Conclusion**

The notarial service has brought a significant improvement in securing the exercise of certain rights of citizens and in legal transactions in general. In addition to a detailed legal regulation and strict rules on performing that activity, errors and omissions in the work of notaries are possible. Upon insight into the comparative legal solutions, we concluded that there are legal systems that have prescribed the obligation by the law to insure notaries against their professional liability, as well as those, we would say a smaller part, who have not done so.

The legal framework for professional liability insurance of a notary public is in line with modern solutions, but there is also room for improvement. The law could prescribe certain conditions of insurance cover and the sums insured that would be concluded by the Notary Public Chamber according to the widest possible cover, following the example of the Italian policy of professional liability insurance of notaries. This would be desirable because an individual insurance policy contains a significantly higher number of excluded risks, so the insurance policy of the Notary Public Chamber would be more efficient when some kind of additional guarantee for covering most risks not covered by policies concluded individually by notaries fails. Thus, the sum insured per individual insured event and totally could amount to 3,000,000 Euros per year, and the scope of cover could be determined by applying only exclusions related to suspension or temporary ban on work, reasons for exclusion, war-like risks and terrorism risks.

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