



Professional Liability Insurance as an Alternative to Notary Legal Protection from the Legal Consequences of Insolvency Related to Errors in Making Authentic Deeds

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Article Process Abstract

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According to Law 2/2014 concerning amendments to Law 30/2004, notaries are public officials who have the authority to make authentic deeds and other authorities. Furthermore, authentic deeds are evidence with perfect strength in court, as long as it complies with the regulation. Therefore, a notary's mistakes in doing an authentic deed can cause loss to the service user. The notary can be sued for compensation and insolvency if they cannot compensate for those losses due to their financial limitation. This issue raises questions regarding the legal impacts of an insolvency decision on a notary and whether professional liability insurance can protect a notary from the legal impact of an insolvency decision on a notary. From this normative juridical research, the authors conclude that first, insolvency causes a notary to their position as a public official, and second, a notary can use professional liability insurance as a risk transfer mechanism.

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Abstrak

Undang-Undang Nomor 2 Tahun 2014 tentang Perubahan Atas Undang-Undang Nomor 30 Tahun 2004 mengatur notaris sebagai pejabat publik yang memiliki kewenangan untuk membuat akta otentik dan kewenangan lainnya. Selanjutnya, akta otentik merupakan alat bukti dengan kekuatan yang sempurna di pengadilan, sepanjang memenuhi ketentuan peraturan perundang-undangan. Oleh karena itu, kesalahan notaris dalam melakukan akta otentik dapat menimbulkan kerugian bagi pengguna jasa. Notaris dapat dituntut ganti rugi dan pailit jika tidak dapat mengganti kerugian tersebut karena keterbatasan kemampuan finansialnya. Isu tersebut melahirkan pertanyaan mengenai: apa dampak hukum yang timbul dari putusan kepailitan terhadap seorang notaris? apakah asuransi professional liability dapat melindungi notaris dari dampak hukum putusan kepailitan terhadap notaris? Dari penelitian yuridis normatif ini, penulis menyimpulkan bahwa pertama, putusan pailit menyebabkan notaris kehilangan jabatannya untuk selamanya dan kedua, asuransi tanggung gugat profesi dapat digunakan oleh notaris sebagai mekanisme pengalihan risiko.

Kata kunci: *insolvency, liability, insurance, law, notary.*

I. Introduction

In the Indonesian legal system, the definition of Notary is regulated through Article 1 paragraph (1) of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (Law of Notary Profession) as follows:

“... a general officer who has primary authority to make authentic deeds and other powers, as referred to in this Act or under any other law.”

The formulation of the article becomes the basis for regulating the notary profession as a General Officer.¹ General official (*openbare ambtenaar*) is a designation for a person who is appointed and given authority and obligation by the state to serve the public within the corridor of his authority.² Therefore, the main task of a Notary is to serve the interests of the community in accordance with the authority granted by law.³

Regarding the authority of Notaries, the law of the Notary Profession has attributively granted Notaries two types of authority. The first is the authority of the Notary to do authentic deeds and the second is other authorities regulated in the law of the Notary Profession itself and other laws and regulations.

The authority of a Notary to make an authentic deed is further regulated through Article 15 paragraph (1) of the law of the Notary Profession as follows:

“The notary is authorized to make authentic Deeds concerning all deeds, agreements, and determinations required by law and/or desired by the interested person to be stated in the authentic Deed, guaranteeing certainty of the date of making the Deed, keeping the Deed, providing *grosse*, copies, and quotations of the Deed, all of which are so long as the making of the Deed is not also assigned or excluded to any other officer or other person established by law.”

From the formulation of the article, it can be concluded that the authority of a Notary to make authentic deeds includes all legal acts, as long as the laws and regulations do not regulate these actions as the authority of general officials other than Notaries.⁴

As stipulated in Article 1 paragraph (1) of the law of the Notary Profession, in addition to having the authority to make authentic deeds, Notaries also have other authorities. Article 15, paragraph (2) of the UUJN stipulates that these authorities include:

“In addition to the authority as referred to in paragraph (1), the Notary is also authorized to:

1. Certify signatures and establish certainty of the date of the letter under hand by registering in a special book;
2. Record a signed letter by registering in a special book;
3. Make a copy of the original signed letter in the form of a copy containing a description
4. as written and described in the letter in question;
5. Attestation of the match of the photocopy with the original letter;
6. Provide legal counseling in connection with the making of deeds;
7. Make deeds relating to land;
8. Make a deed of auction minutes.”

Based on the formulation of the article, it is clear that in addition to the authority to make authentic deeds, Notaries also have other authorities to certify signatures and set certainty of the date of the signed letter (*legalisatie*), record letters under the hand (*waarmerken*), make copies of the original signed letter (*copie collationnee*), validate the match of photocopies with the original letter (legalized), provide legal education regarding the making of deeds, make deeds relating to the land to make deeds of auction minutes.

¹ Jozan Adolf, Widhi Handoko, and Muhamad Azhar, “Eksistensi Wewenang Notaris Dalam Pembuatan Akta Bidang Pertanahan,” *Notarius* 13 (2020): 1.

² M Syahrul Borman, “Kedudukan Notaris Sebagai Pejabat Umum Dalam Perspektif Undang-Undang Jabatan Notaris,” *Jurnal Hukum dan Kenotariatan* 3 (2019): 78.

³ Franky Roberto Gomie, “Notaris Dalam Status Terpidana Yang Masih Menjalankan Jabatannya,” *Argumentum* 7 (2020): 16–17.

⁴ Ngadino Daniar Ramadhan, “Kewenangan Notaris Dalam Pembuatan Akta Yang Berhubungan Dengan Pertanahan,” *Notarius* 12 (2019): 685–686.

Meanwhile, regarding other authorities owned by a Notary, as mentioned in Article 1 paragraph (1) of the law of the notary Profession, this is a legalization step against a deed under the hands made of a person himself or by the parties above the stamp which is sufficient by way of registration in a special book provided by the Notary as mentioned in Article 15 paragraph (2) of the law of the notary Profession.

Still, regarding the authority of the Notary, in addition to the authority to make authentic deeds and other authorities as regulated in the law of the Notary Profession, Notaries also have the authority regulated in other laws and regulations. This authority is in the form of the authority to certify transactions carried out electronically (cyber notary), make a deed of waqf pledge, and make an aircraft mortgage as stated in the Explanation of the Law of the Notary Profession.⁵

In the doctrine of legal science, there are at least 4 (four) main aspects that affect the authority of a Notary. This is explained by G.H.S. Lumbang Tobing as follows:

- a. The notary must be authorized to draw up the deed.⁶ This means that the Notary has the authority to make deeds as long as they are assigned and/or not regulated as the authority of other general officials by laws and regulations.
- b. The notary must be authorized regarding the persons and for whose benefit the deed was drawn up.⁷ This means that the Notary is authorized to make deeds as long as the laws and regulations do not prohibit them. This is intended to avoid conflicts of interest that can affect the independence of the Notary. For example, Article 52 of the Law of the Notary Profession stipulates that Notaries are not allowed to make deeds for themselves, their spouses, or other people who have a family relationship with the Notary.
- c. The notary must be authorized where the deed was made (area of office).⁸ This means that each Notary is limited to the territory of their respective offices determined by their place of residence. Therefore, the Notary is only authorized to make deeds that are within the territory of his office.
- d. The notary must be authorized as long as the time of making the deed.⁹ This means that the Notary is prohibited from making a deed when he has not obtained a Letter of Appointment, during his leave period or when he has been dismissed from his position.

From the explanation of the authority of the previous Notary, it is clear that the laws and regulations by attribution have given the Notary various powers to carry out his position as a general officer.¹⁰

The authority given to a Notary as various professional obligations also accompanies a general official. These obligations are detailed in Article 15 of the Law of the Notary Profession as follows:

“In carrying out its obligations, the Notary must:

1. Act trustworthy, honest, thorough, independent, and impartial, and safeguard the interests of related parties in legal acts,
2. Make a deed an original deed and keep it part of the notarial protocol.
3. Attach letters and documents and fingerprints to the original deed.

⁵ Rossel Ezra Johannes Tuwaidan, “Kewenangan Notaris Menurut Undang-Undang Nomor 2 Tahun 2014 Tentang Perubahan Atas Undang-Undang Nomor 30 Tahun 2004 Tentang Jabatan Notaris,” *Lex Privatum* VI (2018): 87-88; Syamsul Bahri, Annalisa Yahanan, and Agus Trisaka, “Kewenangan Notaris Dalam Mensertifikasi Transaksi Elektronik Dalam Rangka Cyber Notary,” *Repertorium* 8 (2019).

⁶ G H S Lumbang Tobing, *Peraturan Jabatan Notaris*, Cetakan 3. (Jakarta: Erlangga, 1983), 49-50.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Denico Doly, “Kewenangan Notaris Dalam Pembuatan Akta Yang Berhubungan Dengan Tanah,” *Negara Hukum* 2 (2011): 277-284.

4. Issue *grosse* deeds, copies of deeds, or quotations of deeds based on the original deeds.
5. Providing services in accordance with Law 30/2004 as amended by Law 2/2014, unless there is a reason to reject them.
6. Keep everything about the deed made secret with all information obtained for the making of the deed in accordance with the oath of office unless otherwise provided by law.
7. Bind the deed he made in 1 month into a book containing no more than 50 deeds. If the number of deeds cannot be contained in a single book, they can be bound into more than one book, and record the number of deeds, the month, and the year they were made on the cover of each book.
8. Make a list of deeds of protest against non-payment or non-receipt of securities.
9. Make a list of deeds relating to the will according to the order of time of making the deed every month.
10. Send the list of deeds relating to the will, or the list of nil relating to the will to the center of the will register of the ministry that administers government affairs in the field of law within five days in the first week of each subsequent month.
11. Record in the *repertorium* the date of delivery of the will list at the end of each month.
12. Have a stamp or stamp that contains the national emblem of the Republic of Indonesia and in the space surrounding it is written the name, position, and place of residence concerned.
13. read the Deed before the appellant in the presence of at least 2 (two) witnesses, or 4 (four) special witnesses for the making of the signed Deed of will, and signed at that very moment by the accuser, witness, and Notary; and
14. Accepting an internship for a prospective notary."

Based on the regulation of Article 15 of the law of the Notary Profession number 1 as above, in carrying out his position, the Notary is required to always be professional by always acting trustworthy, honest, thorough, independent, impartial, and maintaining the interests of related parties in legal actions. Notary's obligations are not limited to matters regulated in Article 15 of the law of the Notary Profession only, but Notaries are also obliged always to obey the oath of office and are guided by the code of professional ethics.¹¹

These obligations are regulated with the intention that the Notary can be professional and careful in carrying out his position, to minimize the possibility of errors that can cause losses to the community who use the services of the Notary.¹² Although a preventive step to avoid mistakes, as in other professions, Notaries are always faced with various professional risks.

One of the main risks faced by a Notary is an error in making an authentic deed, confusing the public who use the notary's services (interceptor).¹³ If this happens, the community who uses the services of the aggrieved Notary can file a civil lawsuit against the Notary concerned through the competent court to provide compensation for losses caused by the Notary's mistake.¹⁴ In conditions where the treasury owned by the Notary is insufficient to pay compensation as decided by the court, the aggrieved parties may file an insolvency lawsuit

¹¹ Yogi Priyambodo and Gunarto, "Tinjauan Terhadap Pelanggaran Kode Etik Jabatan Notaris Di Kabupaten Purbalingga," *Jurnal Akta* 4 (2017): 333.

¹² Ida Bagus Paramaningrat Manuaba, I Wayan Parsa, and I Gusti Ketut Ariawan, "Prinsip Kehati-Hatian Notaris Dalam Membuat Akta Autentik," *Acta Comitas* 3 (2018): 62.

¹³ Penghadap selanjutnya disebut sebagai klien.

¹⁴ Habib Adjie, *Sanksi Perdata Dan Administratif Terhadap Notaris Sebagai Pejabat Publik* (Bandung: Refika Aditama, 2008), 64.

against the Notary and may cause the Notary to be declared insolvency based on a court decision of permanent legal force (*inkracht*).¹⁵

Based on the foregoing, the author believes that the aforementioned issues are interesting to study further to determine the legal risks of insolvency judgments against notaries and how professional liability insurance can protect notaries by transferring these risks. This research is expected to be useful for the development of science, especially in the fields of notarial law and insurance. Furthermore, this research is expected to enrich the literature in the literature on the application of insurance in notary protection which can be used as a reference in similar studies.

II. Research Problems

Based on the construction of the problem as previously explained, the formulation of the problem in this study is as follows:

1. What is the legal risk of insolvency judgment against notaries?
2. How can professional liability insurance be used as a risk transfer instrument to protect notaries from the legal consequences of the insolvency judgment?

III. Research Method

This type of research in legal research is normative juridical research with a statute approach and a conceptual approach. Normative legal research is a scientific research procedure to find truth based on normative legal scientific logic.¹⁶ Normative juridical research is carried out to examine the application of rules or norms in positive law.¹⁷

The approach used in this study is the statute approach and the conceptual approach. The statutory approach is carried out by reviewing laws and regulations that are relevant to the problems discussed in this study.¹⁸ While the conceptual approach is carried out by analyzing concepts from the understanding of the law, legal principles, legal rules, legal systems, and various other legal concepts. The conceptual approach moves from the views of scholars/jurists and the doctrines that develop in legal science related to the problems discussed in this study.¹⁹

IV. Result and Discussion

A. Validity of Notarial Deed

As stipulated in Article 1 paragraph (1) of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Law of The Notary Profession, a Notary is a General Officer who has the main duty and authority to serve the community in making authentic deeds.²⁰ The public needs the services of a Notary to make an authentic deed as a basis for fulfilling formal requirements in carrying out a legal relationship as stated by laws and regulations.²¹ In addition, if in the future there is a dispute related to the legal relationship, the community also has an interest in using the authentic deed as evidence in the trial.²²

¹⁵ *Ibid.*

¹⁶ Johnny Ibrahim, *Teori Dan Metode Penelitian Hukum Normatif* (Malang: Bayumedia Publishing, 2005), 295.

¹⁷ *Ibid.*, 57.

¹⁸ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2011), 133.

¹⁹ *Ibid.*, 177.

²⁰ Franky Roberto Gomies, "Notaris Dalam Status Terpidana Yang Masih Menjalankan Jabatannya," 16–17.

²¹ Agus Toni Purnayasa, "Akibat Hukum Terdegradasinya Akta Notaris Yang Tidak Memenuhi Syarat Pembuatan Akta Autentik," *Acta Comitatus* 3 (2018): 401–402.

²² *Ibid.*

This is in line with Sudikno Mertokusumo's statement that deeds have 2 (two) important functions for the community.²³ First of all, the deed functions formally (*causa formalitas*) and the second serves as evidence (*probationis causa*).²⁴ The function of the deed form means that for the sake of the completeness or perfection of a legal act, the deed regarding the legal action must be made.²⁵ Meanwhile, as evidence, since the creation of the deed, it has been deliberately intended to be used in the evidence of the trial if at any time there is a dispute regarding the legal act in the future.²⁶

Authentic deeds have a function as evidence because the deed attaches perfect evidentiary power, so it will be regarded as truth as long as it cannot be proved otherwise.²⁷ Authentic deeds can prove their validity. Therefore, a deed that qualifies and has the form of an authentic deed will then be considered a valid and original deed (*acta publica probant seseipsa*) until it can be proved otherwise.²⁸ The perfection of the evidentiary power of the authentic deed makes the public not need any other evidence, so it is sufficient to base the proof on the content of the authentic deed.²⁹

To have perfect evidentiary power, a deed must meet the following conditions for the validity of an authentic deed as stipulated in Article 1868 of the Civil Code:

“An authentic deed is a deed made in the form prescribed by law by or before the public servants in power therefore, at the place where the deed was made.”

From this arrangement, the conditions that must be met for a deed to be valid as an authentic deed must be:

1. Dibuat dengan dengan bentuk sebagaimana diatur dalam undang-undang. Made in the forms as provided in the la.
2. Made by or in the presence of an authorized public official.
3. The official is authorized where the deed was made.

Regarding the form of the deed, Article 38 paragraph (1) of the law of the Notary Profession stipulates that the structure of the deed must consist of the head of the deed, the deed body, and the cover of the deed. Regarding the Head of the deed, Article 28 paragraph (2) of the law of Notary Professio stipulates that the section must contain: “The beginning of the deed or the head of the deed contains :

- a. the title of the deed;
- b. deed number;
- c. hours, days, dates, months, and years; and
- d. the full name and seat of the Notary”

Furthermore, Article 28 paragraph (3) provides that the body of the deed must contain the following:

“The deed body contains:

- a. the full name, place, and date of birth, nationality, occupation, position, position, the residence of the appellants and/or persons they represent;
- b. information about the position of the appellants;

²³ Sudikno Mertokusumo, *Mengenal Hukum Suatu Pengantar* (Yogyakarta: Liberty, 1999), 121–122.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Twinike Sativa Febriandini, “Studi Kekuatan Pembuktian Surat Pada Sengketa Perdata Di Pengadilan Negeri,” *Jurnal Verstek 2* (2014): 180–181.

²⁸ Dedy Pramono, “Kekuatan Pembuktian Akta Yang Dibuat Oleh Notaris Selaku Pejabat Umum Menurut Hukum Acara Perdata Di Indonesia,” *Lex Jurnalica 12* (2015): 252–253.

²⁹ Purnayasa, “Akibat Hukum Terdegradasinya Akta Notaris Yang Tidak Memenuhi Syarat Pembuatan Akta Autentik,” 401–402.

- c. the content of the deed which is the will and desire of the interested parties; and
- d. the full name, place, and date of birth, as well as the occupation, title, position, and residence of each identifying witness."

Meanwhile, in the closing part of the deed, the matters that must be contained are regulated in Article 38 paragraph (4) as follows

"The end or conclusion of the deed contains:

- a. a description of the reading of the deed as referred to in Article 16 paragraph (1) point 1 or Article 16 paragraph (7);
- b. a description of the signing and place of signing or translating the deed if any;
- c. the full name, place, and date of birth, occupation, position, position, and residence of each deed witness; and
- d. a description of the absence of change occurring in the making of the deed or a description of the existence of an alteration which may be in the form of addition, scribbling, or substitution."

Regarding the authority of general officials in making authentic deeds, the law of the Notary Profession has attributively given authority to Notaries to make authentic deeds. The authority of the Notary is regulated in Article 1 number 1 of the law of the Notary Profession as follows:

"... general officers who have the primary authority to make authentic deeds and other powers, as referred to in this Act or under other laws"

The article regulates the profession of Notary as a General Officer (*openbare ambtenaar*).³⁰ A general officer is a person who is appointed and given authority and obligation by the state to serve the public within the corridors of his authority.³¹ Therefore, the task possessed by the Notary is to serve the community.³²

Regarding the Notary's Authority to make authentic deeds, Article 15 paragraph (1) of the law of the Notary Profession further regulates as follows: "The notary is authorized to make authentic Deeds regarding all deeds, agreements, and determinations required by law and/or desired by the interested to be stated in the authentic Deed, guaranteeing certainty of the date of making the Deed, keeping the Deed, providing *grosse*, copies, and quotations of the Deed, all of which are so long as the making of the Deed is not also assigned or excluded to other officials or other persons designated by law."

From the formulation of the article, the authority that a Notary has to make authentic deeds includes all legal acts, as long as the laws and regulations do not regulate this as the authority of other general officials.³³

Finally, regarding the authority of the general officer at the place where the deed was made about the area of the office of the general officer. Article 18 of the law of the Notary Profession stipulates that a Notary must be domiciled in the Regency or City area. Even so, Notaries can still carry out their positions outside the regency or city of their position, as long as they are still within the same provincial area as stipulated in Article 19 of the law of the Notary Profession.³⁴

³⁰ Adolf, Handoko, and Azhar, "Eksistensi Wewenang Notaris Dalam Pembuatan Akta Bidang Pertanahan," 1.

³¹ Borman, "Kedudukan Notaris Sebagai Pejabat Umum Dalam Perspektif Undang-Undang Jabatan Notaris," 78.

³² Franky Roberto Gornes, "Notaris Dalam Status Terpidana Yang Masih Menjalankan Jabatannya," 16-17.

³³ Ngadino Daniar Ramadhan, "Kewenangan Notaris Dalam Pembuatan Akta Yang Berhubungan Dengan Pertanahan," 685-686.

³⁴ Annisa Fitria, "Aspek Hukum Akta Notaris Yang Dibuat Diluar Wilayah Jabatan Notaris," *Lex Jurnalica* 18 (2021): 2-4.

The validity of authentic deeds made by notaries must be in accordance with objective and subjective requirements as stipulated in laws and regulations.³⁵ The inconsistency of the deed with the laws and regulations has the following legal consequences:

1. The deed loses its evidentiary power as an authentic deed so that it only has the power of proof as a deed under the hand.³⁶
2. The deed can be canceled.³⁷
3. The deed is null and void.³⁸

These three possibilities can certainly harm people who use the services of a Notary. Therefore, if in carrying out his position the Notary makes a mistake that causes losses, then he can be held accountable for his mistakes.³⁹

A. Responsibility and Insolvency Judgment Against Notaries

Basically, in making authentic deeds, the task of the Notary is only to record and pour out what is conveyed by the parties into the deed.⁴⁰ Even so, in a trial, an authentic deed made before a Notary can be used as evidence in the evidentiary process and the authentic deed is attached to the value of perfect evidentiary power (*volledig*) and binding. (*bindende*).⁴¹ Therefore, although the Notary only records and pours out the parties' statements, the Notary is required to always apply the precautionary principle as stipulated in Article 16 of the law of the Notary Profession. Notaries do not make mistakes that can harm the interceptors as much as possible.⁴²

Against the authority of the Notary in making authentic deeds, the Notary has the following professional responsibilities:

1. Responsibilities of a civil notary.⁴³ In this sense, the Notary is responsible first of all if in making a deed he does an act that causes losses or second he does not do an act that is a necessity to cause losses to the claimant of his services or other parties.⁴⁴
2. Responsibility of a criminal notary.⁴⁵ The notary is liable if he commits an act that is punishable by criminal penalties in his capacity as a general official.⁴⁶
3. Administrative responsibilities.⁴⁷ A notary is responsible if he violates the provisions as stipulated in the law of the Notary Profession.⁴⁸
4. The responsibility of the Notary in terms of professional ethics in carrying out the duties of his position.⁴⁹

³⁵ Christian Sasauw, "Tinjauan Yuridis Tentang Kekuatan Mengikat Suatu Akta Notaris," *Lex Privatum* 3 (2015): 103-107.

³⁶ Jenifer Maria, "Pembatalan Akta Notariil Oleh Notaris," *Jurnal Ilmu Sosial dan Pendidikan* 4 (2020): 413.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Kunni Afifah, "Tanggung Jawab Dan Perlindungan Hukum Bagi Notaris Secara Perdata Terhadap Akta Yang Dibuatnya," *Lex Renaissance* 2 (2017): 152; Yoefanca Halim, Fricky Soedewo, and Tyas Fidelia, "Tanggung Jawab Notaris Terhadap Ketidaksiasaan Akta Salinan Dengan Minuta Akta," *Kosmik Hukum* 20 (2020).

⁴⁰ Rizky Amalia, Masakkir Musakkir, and Syamsuddin Muchtar, "Pertanggungjawaban Notaris Terhadap Isi Akta Autentik Yang Tidak Sesuai Dengan Fakta," *AL-ISHLAH: Jurnal Ilmiah Hukum* 24 (2021): 199.

⁴¹ Christin Sasauw, "Tinjauan Yuridis Tentang Kekuatan Mengikat Suatu Akta Notaris," *Lex Privatum* 3 (2015): 107-108.

⁴² Fikri Ariesta Rahman, "Penerapan Prinsip Kehati-Hatian Notaris Dalam Mengenal Para Penghadap," *Lex Renaissance* 3 (2018): 425.

⁴³ Afifah, "Tanggung Jawab Dan Perlindungan Hukum Bagi Notaris Secara Perdata Terhadap Akta Yang Dibuatnya," 151.

⁴⁴ *Ibid.*, 152.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, 219.

⁴⁸ *Ibid.*, 152.

⁴⁹ Eudea Adeli Arsy, Hanif Nur Widhiyanti, and Patricia Audrey Ruslijanto, "Tanggung Jawab Notaris Terhadap Akta Yang Cacat Hukum Dan Tidak Sesuai Dengan Ketentuan Pembuatan Akta Dalam Undang-Undang Jabatan Notaris," *Jurnal Bina Mulia Hukum* 6 (2021): 135.

If there is an error in making an authentic deed, then the Notary may be held responsible. The responsibility that can be imposed on the Notary is limited to how much of a mistake he made (*based on the fault of liability*).⁵⁰ Therefore, a Notary can be held liable only if in the process of making an authentic deed he made a mistake or violation committed by the Notary either based on intentionality (*dolus*) or unintentionally (*culpa*). Therefore, if the error or violation is caused by the interceptors, the Notary has no obligation to be responsible.⁵¹

Regarding the responsibility of the Notary, Asnahwati H. Herwidi, S.H., as quoted by Kunni Afifah stated that the Notary is only responsible for the conformity of the formal form of the authentic deed he made with the arrangements in the law.⁵² The notary is not responsible regarding the substance of the deed. This is because making a Notarial deed only confirms what happens, sees, and experiences from the parties and what is the will and agreement of the parties.⁵³ The notary has no obligation to investigate the material correctness of the deed.⁵⁴

Furthermore, Rusiana Suryadi, as quoted by Kunni Afifah, stated that the Notary is responsible for all violations that cause harm to the interceptors except for the contents of the deed. The notary must be held accountable for the material correctness of a deed if the legal advice he gives turns out to be in the future a misnomer.⁵⁵ The notary is considered to have committed an unlawful act if in making the deed made a mistake or negligence that caused the interceptor to suffer losses.⁵⁶ The respondent can sue for compensation to the Notary if the Notary's mistake can be proven as stipulated in Article 84 of the law of the Notary Profession.⁵⁷

Regarding the mechanism of compensation lawsuit against a Notary who made an error or omission in making a deed can use Article 1365 of the Civil Code regarding unlawful acts. The article provides that:

"Any unlawful act that brings harm to another person, obliges the person who wrongly issued the loss, to indemnify the loss."

Based on Article 1365 of the Civil Code, the elements that must be met for a claim for compensation through an unlawful action lawsuit to be granted are:

1. The existence of unlawful acts;
2. The presence of errors;
3. The existence of losses incurred;
4. There is a causal relationship between deeds and losses.

Article 41 of the law of the Notary Profession specifies that if a Notary commits an unlawful act or violation of Article 38, Article 39, and Article 40 of the Law on amendments to the law of the Notary Profession, the authentic deed made by the Notary will only have proof as a deed under hand. These conditions, of course, can cause losses for the confronter. Therefore, it can be a reason to claim compensation from a Notary.

B. Legal Consequences of Insolvency Judgment Against Notaries

⁵⁰ Afifah, "Tanggung Jawab Dan Perlindungan Hukum Bagi Notaris Secara Perdata Terhadap Akta Yang Dibuatnya," 153.

⁵¹ Nur Aini, "Tanggung Jawab Notaris Atas Keterangan Palsu Yang Disampaikan Penghadap Dalam Akta Pendirian Perseroan Terbatas," *Jurnal Komunikasi Hukum* 5 (2019): 114-115.

⁵² Afifah, "Tanggung Jawab Dan Perlindungan Hukum Bagi Notaris Secara Perdata Terhadap Akta Yang Dibuatnya," 153-154.

⁵³ *Ibid.*

⁵⁴ Aini, "Tanggung Jawab Notaris Atas Keterangan Palsu Yang Disampaikan Penghadap Dalam Akta Pendirian Perseroan Terbatas," 114.

⁵⁵ Afifah, "Tanggung Jawab Dan Perlindungan Hukum Bagi Notaris Secara Perdata Terhadap Akta Yang Dibuatnya," 154.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

As previously discussed, in carrying out his position as a general officer, a Notary is faced with the risk of being sued by the public who use his services. The suit can at least occur under two different conditions, depending on the capacity of the Notary concerned in that regard. First, a Notary may be sued in his capacity as an ordinary person (*natuurlijk persoon*) for matters outside his profession as a general officer. while the second a Notary can be sued as a result of matters surrounding his profession (profession risk). The discussion in this study is devoted to discussing the second possibility.

Article 1 Paragraph (1) of Law Number 37 of 2004 concerning Insolvency and Postponement of Debt Payment Obligations regulates insolvency (Insolvency Law) as: "Insolvency is a general confiscation of all the assets of the Insolvent Debtor whose management and settlement is carried out by the Curator under the supervision of the Supervising Judge as provided in this Act."

The article provides that in insolvency, the entire property of the insolvent debtor shall be confiscated for safeguarding and clearance by the Curator under the supervision of the Magistrate. Therefore, an insolvency decision will cause legal consequences in the form of a change in a person's status to be incompetent to carry out legal acts, adjust (*daden van beschikking*) or manage (*daden van behoreen*) assets that are included in the insolvency property as stipulated in Article 24 paragraph (1) 2 of the Insolvency Law.

In the construction of the Insolvency Law, insolvency judgments do not affect matters outside the insolvency property.⁵⁸ This is because the insolvency judgment only applies to the insolvency property only and not to a person's personality. Regarding the scope of the insolvency judgment and its relation to matters outside the insolvency code, Hadi Shubhan stated: "Linking insolvency to things outside the property of the insolvent debtor is not appropriate. Insolvency is not a criminal conviction and not a conviction that makes the insolvent debtor incompetent (*bekwaam*) and not authorized (*bevoegd*) to everything".⁵⁹

Therefore, Although the bankruptcy judgment changes the status of the debtor to be legally incompetent, the bankrupt debtor is still capable of carrying out legal actions as long as it is not related to the insolvency property. Such legal acts include exercising his rights to participate in the legal and political spheres as a citizen.⁶⁰

In general, an insolvency judgment does not affect the debtor's legal ability to perform legal acts outside of insolvency property, however, an insolvency judgment will have different legal consequences if the debtor who is terminated by insolvency is a Notary. The law of the Notary Profession with *lex specialis* stipulates that insolvency proceedings to bankruptcy judgments will have legal consequences on the position of the Notary.

A notary can be insolvency, Kadek Ayu and I Made argue on the matter as follows:

"Insolvency law, in this case, is expected to be able to provide a fair, balanced, and useful settlement and can provide legal certainty guarantees... The function of a notary, which is actually to meet the legal needs of the subject of law based on his oath mentioned in Article 4 paragraph (2) of the law of the Notary Profession, is possibly be complicated if the function is not carried out in accordance with the existing achievement contact."

Regarding Notaries who are in insolvency proceedings, Article 9 paragraph (1) letter a of the law of the Notary Profession stipulates that this is the basis for the temporary dismissal of a Notary from his position. In full, the Article provides as follows: "The notary is temporarily

⁵⁸ Hadi Shubhan, *Hukum Kepailitan: Prinsip, Norma Dan Praktik Di Peradilan* (Jakarta: Kencana Prenada Media Group, 2008), 165.

⁵⁹ Ibid.

⁶⁰ Ibid.

dismissed from office because: a) Being in insolvency proceedings or postponement of debt repayment obligations; b) being under guardianship; c) committing despicable acts; d) violating the obligations and prohibitions of office and the Notary's code of ethics; e) serving a period of detention

From this article, it can be concluded that the law of the Notary Profession places a Notary who is in the process of bankruptcy or postponement of debt payment obligations like a Notary who is under guardianship, commits despicable acts, violates obligations and prohibitions of office or is serving a period of detention for committing criminal acts.

The sanction of temporary dismissal from office because he is in insolvency proceedings is a waiting period before a judgment from the court regarding the insolvency suit. The sanction is intended so that the Notary does not perform his duties for a while before it can be decided whether the Notary will be dismissed with disrespect or whether it will be reappointed.

If the Notary is temporarily dismissed because he is in insolvency proceedings and the insolvency suit is not granted by the court, the Notary can be reappointed by the Minister after being restored his rights as stipulated in Article 10 of the law of the Notary Profession (2004).

Something different happened when the court granted the insolvency suit against the Notary. Article 12 of the law of the Notary Profession (2004) provides that: "The notary is disrespectfully dismissed from office by the Minister on the proposal of the Central Supervisory Board if: a) declared insolvency based on a court decision that has acquired permanent legal force; b) be under continuous guardianship for more than 3 (three) years; c) committing acts that degrade the honor and dignity of the notary's office; d) committed gross violations of the obligations and prohibitions of office."

The article provides that a sanction against a Notary who is declared insolvent based on a court decision that has permanent legal force is dismissal with disrespect from his position.

Regarding Notaries who are dismissed disrespectfully from their posts because of insolvency judgments that have legal force, there is still no mechanism for reappointment in the law of the Notary Profession as is the case with temporary dismissal because it is in bankruptcy proceedings. Although there is a rehabilitation mechanism as stipulated in Article 215 of the Suspension of Debt Payment Law: Upon the expiration of insolvency as referred to in Article 166, Article 202, and Article 207, the Debtor or his heirs shall be entitled to apply for rehabilitation to the Court which has pronounced the judgment of the declaration of bankruptcy."

However, the rehabilitation does not necessarily restore the position of the Notary. This is because rehabilitation only restores the good name of the bankrupt Debtor who has fulfilled his obligations. Rehabilitation cannot restore the legal state of a Notary who has been disrespectfully dismissed from his post to its original state, in which case rehabilitation cannot be a reason for the Minister to re-appoint the Notary. Therefore, the dismissal of a Notary from office due to a bankruptcy judge that has legal force remains *final and binding*.

This condition is certainly a very dangerous risk for a Notary. A Notary's mistake in carrying out his office may result in the Notary being dismissed for the rest of his life. Therefore, there is an urgency for the protection of the Notary from the legal consequences of the bankruptcy judgment against him.

C. Professional Liability Insurance as an Alternative to Notary Protection

Insurance is a translation from Dutch, namely "*verzekering/assurantie*" which means coverage.⁶¹ In an insurance, there are two parties where one party binds itself to cover or become

⁶¹ Abdulkadir Muhammad, *Hukum Asuransi Indonesia*, Cetakan ke. (Bandung: Citra Aditya Bakti, 2011), 7.

the other party and will get reimbursement for a loss that he may suffer as a result of an event that was not necessarily going to happen or was not originally determined when it happened.⁶² The covered party is obliged to pay a sum of money to the insured party as a form of counter-achievement.⁶³ The juridical definition of insurance can be found both in the Trade Law (*KUHD*) and Law Number 40 of 2014 concerning Insurance (Insurance Law).

The definition of insurance according to the Trade Law is regulated in Article 264 which states that: "Insurance or coverage is an agreement, in which the insurer binds himself to the insured by obtaining a premium, to provide him with damages for a loss, damage, or not having the expected profit, which may be suffered due to an uncertain event." Definition of insurance according to Article 246 of the Trade Law is a fundamental definition of insurance. The formulation of the article does not provide a complete understanding of insurance because it is still limited to the definition of general insurance only and does not include the definition of life insurance.

Meanwhile, according to Article 1 paragraph 1 of the Insurance Law, insurance is: "Insurance is an agreement between two parties, that are the insurance company and the policyholder, which forms the basis for the receipt of premiums by the insurance company in exchange for:

- a. Providing reimbursement to the insured or policyholder for losses, damages, costs incurred, loss of profits, or legal liability to third parties that the insured or policyholder may suffer due to the occurrence of an uncertain event; or
- b. Providing payments based on the death of the insured or payments based on the life of the insured with benefits of a predetermined amount and/or based on the results of fund management."

From the definition of insurance, it can be concluded that insurance is a compensation agreement or payment in exchange for premium payments made by the insured/policyholder.

In addition, juridically the Article divides insurance into 2 (two) types based on its business, that are general insurance (*schade verzekering*)⁶⁴ as stipulated in Article 1 paragraph 1 letter a of the Law on Insurance and Life Insurance (*sommen verzekering*)⁶⁵ as stipulated in Article 1 paragraph 1 letter b of the Insurance Law.⁶⁶

General insurance in its development is divided into several types according to the scope of coverage. One type of general insurance is liability insurance which provides compensation to the insured (policyholder) due to third-party claims. Liability insurance is divided into several types as follows:

1. Personal liability insurance
This type of insurance provides the insured with compensation in connection with the legal obligations of the insured regarding third-party losses for which he is legally responsible.
2. General liability insurance
General liability insurance can be categorized into 3 (three) types follows:
 - a. Public liability insurance

⁶² Wirjono Prodjodikoro, *Hukum Asuransi Di Indonesia* (Jakarta: Intermasa, 1986), 1.

⁶³ *Ibid.*

⁶⁴ Wetría Fauzi, *Hukum Asuransi Di Indonesia* (Padang: Andalas University Press, 2019), 20.

⁶⁵ *Ibid.*

⁶⁶ H.M.N. Purwosutjipto, *Pengertian Pokok Hukum Dagang Indonesia: Hukum Pertanggung* (Jakarta: Djambatan, 1990), 15-16.

This type of insurance provides the insured who in this case is a company, compensated in connection with third-party losses caused by the activities of the insured company for which by law he is responsible.

b. Product liability insurance

This type of insurance provides the insured who in this case is a company, compensated in connection with the claim for damages filed by the consumer caused by the product sold by the insured.

c. Employer's liability insurance

This type of insurance provides the insured against claims for compensation filed by employees caused by accidents, death, and other risks that are not covered by labor insurance.

3. Professional liability insurance

This type of insurance protects the insured from lawsuits in connection with third-party losses caused by activities in the course of carrying out his profession.

Professional liability insurance can protect a person from the risks he faces in connection with his activities in carrying out the profession. The risk arises in line with the professional responsibility in providing services to clients for agreements and / or errors that cause service users to experience losses.⁶⁷ According to Rudolf S. Mamengko, the types of services provided in the relationship between the professional and his client can be distinguished into two types:

a. Merit produces something (*resultaat verbintenis*). In this type, professionals and service users promise certain results, for example, the dentist who is responsible for the results of the work as requested by the patient before.⁶⁸

b. Services strive for something (*inspannings verbintenis*). In this type, professionals and service users promise to simply strive for something and not promise a certain result. For example, an advocate whose services are limited to efforts to protect the legal interests of his client as optimally as possible, the advocate is prohibited from promising results (victories) in handling cases.⁶⁹

In general, professional liability insurance is used by doctors, legal consultants, and financial consultants.⁷⁰ In the Australian legal system, an advocate must have professional liability insurance as a mandatory condition for a minimum amount of coverage required and then regulated by the professional organization.⁷¹ The obligation to have professional liability insurance is intended to provide protection, both to advocates and their clients, in the event of an error that causes service users to suffer losses.⁷² On the one hand, it protects service users in the form of certainty that the advocate can compensate for the losses he caused. On the other hand, an advocate who is sued for the fault of his profession can transfer the risk of such damages to the insurance company.

In Indonesia, the use of professional liability insurance by notaries is not yet common. Even so, the use of this type of insurance by other legal professionals, in this case, advocates, can give an idea of how professional liability insurance can be used as a mechanism for transferring

⁶⁷ Rudolf S Mamengko, "Product Liability Dan Profesional Liability Di Indonesia," *Jurnal Ilmu Hukum* 3 (2016): 4-5.

⁶⁸ Mamengko, "Product Liability Dan Profesional Liability Di Indonesia."

⁶⁹ Ibid.

⁷⁰ Rilawadi Sahputra and Anis Mashdurohatun, "The Transfer Of Notary Legal Responsibilities Through Legal Liability Insurance As A Form Of Legal Protection For Notaries," *International Journal of Business, Economics and Law* 15 (2018): 197.

⁷¹ John K Morgan and Pamela Hanrahan, "Professional Indemnity Insurance: Protecting Clients and Regulating Professionals," *The University of New South Wales Law Journal* 40 (January 2017): 355-359.

⁷² John K Morgan and Pamela Hanrahan, "Professional Indemnity Insurance: Protecting Clients and Regulating Professionals," *The University of New South Wales Law Journal* 40 (January 2017): 353-384.

professional risks.⁷³ In this case, notaries can use professional liability insurance as an alternative to protection in carrying out their profession as general officials. When a Notary is found guilty by the competent court of wrongdoing in carrying out his office causing the user of his services to suffer a large nominal loss and is punished to attest for the loss, the Notary will be protected because the insurance company as the insurer has been bound and therefore obliged to collect the loss.

Therefore, the problem of limiting the financial ability of notaries to compensate for losses can be minimized. This prevents the Notary from any bankruptcy process or decision so that the Notary will avoid legal sanctions of temporary dismissal and even disrespectful dismissal from his position as stipulated in the law of the Notary Profession.

V. Conclusion

If a Notary is declared bankrupt based on a court decision with permanent legal force, based on Article 12 of Law Number 30 of 2004 concerning the Position of Notary as amended by Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 (the law of Notary Profession), the Minister on the proposal of the Central Supervisory Panel will sanction dismissal with disrespect from his position to the notary. Furthermore, the law of the Notary Profession does not provide for a mechanism for the reappointment of notaries dismissed with disrespect based on bankruptcy judgments of permanent legal force. Therefore, a Notary who is disrespectfully dismissed under a bankruptcy judgment of legal force will still not be able to become a notary again in perpetuity.

Professional liability insurance can protect notaries by transferring the financial risks they face to insurance companies. If the court decides the Notary to challenge the losses faced by the user of its services arising from the notary's mistake in carrying out his position, the insurance company as the insurer has been bound and therefore obliged to intercept the loss. Therefore, the problem of limiting the financial ability of notaries to compensate for losses can be minimized. This prevents the Notary from any bankruptcy process or decision so that the Notary will avoid legal sanctions of temporary dismissal and even disrespectful dismissal from his position as stipulated in the law of the Notary Profession.

Based on this research, the author emphasizes the importance of socializing the use of professional liability insurance against Notaries to protect against the legal consequences of insolvency decisions caused by negligence in making authentic deeds. In addition, the author also suggests that harmonization be carried out again regarding the legal consequences of bankruptcy decisions as stipulated in Law Number 30 of 2004 concerning the law of Notary Profession as amended by Law Number 2 of 2014 with Law Number 37 of 2004 concerning Insolvency and Postponement of Debt Payment Obligations. Finally, the authors suggest more in-depth research on the themes raised in this study.

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⁷³ Sahputra and Mashdurohatun, "The Transfer Of Notary Legal Responsibilities Through Legal Liability Insurance As A Form Of Legal Protection For Notaries."

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