

CIVIL LIABILITY OF PUBLIC NOTARIES

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Abstract

Our study intends to present the professional obligations of the public notary and his liability for the damage caused to the clients or to the third parties. Under the conditions of the modern society, this responsibility is emphasized as a distinct hypothesis, autonomous of professional liability, which gradually acquires new meanings, standing out against the traditional guidelines.

We intend to summarize the specific features of liability regarding public notary, its legal nature and its foundation and to present a few important jurisprudential judgments given in this matter.

We want to highlight the special significance in what concerns the civil liability of the public notary as a professional in the context of the profound transformation of the civil liability institution.

Key Words: *public notary, civil liability, jurisprudential judgments*

JEL Classification: [K15]

1. Preamble

In exercising his powers regulated by law, the public notary public fulfills a very important social function, his activity being found in most areas of real life, from the purchase of property to inheritance division. The notary must show confidence, professionalism, probity and efficiency. All these attributes have as foundation professional impartiality, a high level of legal training and the status of agent invested with the state authority, a status that makes him a guarantor of the documents' authenticity and lawfulness.

When the notary drafts and authenticates the documents, he must advise the parties as regards the pursuant legal consequences. He must ensure a balance between the parties' interests, permanently focusing on meeting the intended purpose, which should be exclusively located within the boundaries of law or morality. At the moment of document's signing, the notary must ensure that the parties have understood exactly the content of the document, that they have discernment and that their will is free and unaltered.

The public notary exercises his attributes as a liberal profession and this contributes significantly to the efficiency and reliability of services provided. Access to this profession requires extensive specialist training, a traineeship and an objective selection mechanism, under the supervision of the Ministry of

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Justice. Notaries are required to constantly update their knowledge by means of professional training.

On the occasion of court ruling in seven cases¹ (actions for failure to fulfill obligations as Member states), initiated in 2008 by the European Commission (EC) against Belgium, France, Luxembourg, Austria, Germany, Greece and Portugal², on 24 May 2011, the ECJ ruled that the notary activities are not connected with the exercise of public authority in the sense of art. 45, first paragraph of the Treaty on the Functioning of the European Union.³ In the solution's recitals it was shown that the way in which notaries' attributes are designed in domestic law does not involve a direct and specific participation of the public authority. In addition, unless the appointment of a notary is provided through court ruling, each party is free to choose a notary. Although it is true that the notary's fee is set by law, the quality of the services provided can still vary from one notary to another, depending, *inter alia*, on their professional skills. Thus, within the respective territorial jurisdiction, notaries practice under competition conditions, which is not characteristic to the exercise of public authority. However, it was pointed out that notaries are personally and directly responsible to the client for damages caused by exercising their profession improperly.

Thus, in essence, notaries exercise a liberal profession, which is not associated with the exercise of public authority and must show a guarantee of safety, legality and independence. Any breach of professional duties causing damages engages the public notary's liability, and he must bear the consequences.

In this study, we aim to determine the coordinates of engaging the public notary's civil liability, starting from the examination of the legal framework and the specific features of their professional obligations to clients and third parties and with the presentation of some case law solutions relevant to this area.

2. The national legal framework

The civil liability of the public notaries arises from their profession, being considered a reflection of it. Its regulation is found in the provisions of Law 36/1995 on the public notaries and notary activity⁴, supplemented with the provisions of the Civil Code regarding civil liability in general.

¹ Cases C-47/08 Commission v. Belgium, C-50/08 Commission v. France, C-51/08 Commission v. Luxembourg, C-53/08 Commission v. Austria, C-54/08 Commission v. Germany, C-61/08 Commission v. Greece and C-52/08 Commission v. Portugal.

² The ruling is available *in extenso* on the official site ECJ at the address: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=81986&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=153650>.

³ Luxembourg Court ruled that the condition of holding citizenship of one of the Member States in order to have access to the profession of public notary is a discrimination forbidden by the EU law.

⁴ Published in the Official Gazette no. 92/16.05.1995. Republished for the first time in the O.G. no.732/ 18.10.2011. Republished for the second time in the O.G. no. 72/ 4.02.2013. Republished for the third time in the O.G. no. 444/ 18.06.2014 and entered into force on June 21st, 2014.

As for the provisions of Law 36/1995 we note that art. 72 sets as a premise the followings: "The civil liability of the public notary can be engaged under civil law for breach of his professional obligations when he caused an injury guiltily and in bad faith and this is established by final judgment."

Therefore, the conditions for the initiation and the success of the civil action in professional liability are essentially those provided by the Civil Code, in Book V "*On obligations*" Title II "*Sources of obligations*," Chapter IV "*Civil Liability*". The specific elements, which are going to be analyzed in detail in the subsequent sections, lie in the professional quality of the offender.

We underline that, in the Regulation for the application of Law 36/1995⁵, expressed mentions are given as regards the public notary's liability for damages caused by the way he exercises his incumbent professional duties. Furthermore, from the beginning of his professional activity, the public notary has to become a member of the Civil Liability Insurance Fund, which operates within the National Union of Public Notaries, according to its statutes.

Regarding the provisions of the Civil Code, in addition to the general ones, we note that in art. 1258 of the Civil Code, a special hypothesis for the notary's liability is included and it states as follows: "*In case of cancellation or finding of nullity of a contract concluded in authentic form for a nullifying case, whose existence results from the actual wording of the contract, the prejudiced party may request remedies from the public notary for the damages in terms of tort for his own deed.*"

Ab initio, we notice that, topographically, the cited article is contained in the Civil Code section dedicated to the principles governing the effects of nullity of the legal act; therefore it is admitted the possibility of engaging the notary's liability for injurious consequences produced by the void act. The hypothesis referred to in art. 1258 is a form of tort liability for the public notary's own deed, and he is made responsible for the existence of a ground for nullity cause arising from the actual content of the contract. The premises of this liability regard the situation of a contract concluded in authentic form, made by a notary, a contract which is null and void.

In order to engage the public notary's liability on this legal basis, the following essential requirements must be fulfilled as regards common law tort liability, and the following special conditions must be met:

- the public notary status of the responsible person;
- improper performance of professional duties during a contract's conclusion or authentication;
- the ground for nullity should result from the actual wording of the contract, the notary's liability being engaged only where there is a close connection between this and the notary activity for the instrumentation and authentication of documents;

⁵ Published in the O.G. with number 479, on August 1st, 2013; approved by the Order of the Ministry of Justice no. 2333/C of July 24th, 2013.

- the existence of a damage; it should be noted that the article refers to the injured party, but it is possible that both sides could be harmed by a contract's nullity, which, for example, can be partially performed. In the same context, the retention of an injured party does not necessarily imply guilt of the other party, but does not exclude it either, because this article refers to the notary and not to the co-contractor.

- the existence of a final judgment by which it ordered the cancellation or the establishment of the nullity of the contract concluded in authentic form on a nullity cause, which results from the actual wording of the contract.

Engaging public notary's liability is left to the choice of the injured party. The special character of the liability mainly takes into account the field of its application, and only then the liability will be related to the common law rules laid down by the provisions of art. 1357 et seq. of the Civil Code. Therefore, the provisions of art. 1258 have in principle the value of a textual empowerment of the injured party to bring an action against a public notary. Substantiating this particular form of liability is found in the idea of safeguarding the parties' confidence in the notary activity.⁶

3. The basis of the public notary's liability

The analysis of the basis of public notaries liability must have as a prerequisite the fact that they play a double role - authentication and counselling, and therefore their situation is emerging in a double professional liability.⁷

Liability arising from the *authentication function* does not raise particular problems in terms of its basis. The public notary professional duties as editor of the act are *legal obligations*. Law 36/1995 on public notaries and notary activity regulates the professional duties of a notary in the authentication matter. Therefore, any violation of these legal obligations represents committing illegal acts, which are sanctioned by art. 72 of the same law, related to the provisions 1357 et seq. of the Civil Code.

The second category of notary's obligations results from his role of *legal counselling*. This is part of notary's duties when drafting any authentic or fixed-time document, but also when the client comes to his office seeking legal advice. Counselling obligations derive from the fundamental legal duties of the public notary and, therefore, they have a considerable importance in the performance of the public notary profession.

The French Court of Cassation, Civil Chamber III ruled in a judgment of 10 July 1970 as follows: "*Whereas, pursuant to their status, notaries have a professional obligation to inform the parties as regards the consequences of their actions, they cannot derogate from the principle of liability simply by granting the*

⁶ C. Zamșa, Annotation to art. 1258 in the *New Civil Code, Articles Annotations*, Second edition, revised and annotated, Coordinators F. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, C. H.Beck Publishing House, Bucharest, 2014, p. 1396.

⁷ J. de Poulpiquet, *Responsabilité civile professionnelle*, Dalloz, 2013, no. 249 et seq.

authentic form to the received statements." Thus, the basis of the counselling obligation lies in the notary's mission; failure of its fulfillment engages the tort liability of the professional.

Under exceptional circumstances, such as when the notary exceeds the authentication attributes and assumes, on behalf of his clients, the role of *authorized agent* or *business administrator*, then the professional liability is contractual or quasi-contractual⁸, and we have to refer to the provisions of art. 1350 of the Civil Code in order to engage his liability.

Under such circumstances it is preferable to establish the basis of notary's liability concretely, on a case by case basis, depending on the circumstances and the role played by the professional.

In reality, this duality in the nature of notary's liability is directly linked to the gradual expansion of the counselling obligation. This obligation is indeed necessary in the case of drawing up documents, in the traditional quality of the notary as an editor. However, it is equally imperative in the case of notary's role as authorized agent or business administrator. Given the omnipresence of the counselling obligation, the courts hold liable the notary who has improperly fulfilled his duties, not on the grounds of the contract between him and his client, but for defective performance of the *counselling legal obligation*.⁹

In the Romanian specialized literature¹⁰ it has been shaped the view that the notary's liability should always be a civil contractual liability, a view that has not been accepted by the case-law.¹¹ The grounds for this essentially refer to the fact that for services rendered, the public notary charges a fee. At the same time, the notary work is done only at the request of the interested party.

To counter this opinion we state that for establishing the basis of public notaries' liability one should consider the nature of the notary activity and the relations between the notary and the client. The notary exercises his powers as part of a "*public service with its own legal profile*" specific to liberal professions. Thus, one cannot state that he acts under a contract. However, there is no legal provision to impose the obligation to conclude a contract between a professional and a client, as in the lawyers' case. There is only one exception to this rule, provided by art. 78, para. (2) of Law no. 36/1995 which states that the notary advice are written or verbal and are provided to natural or legal persons, upon request or on the basis of a fixed-term contract.

Considering the above, we conclude that the notary's liability is basically a tort liability, according to the nature of his work, and there may be some exceptional cases that mainly regard the counselling obligations or the situations in which the professional acts as an authorized agent.

⁸ The French Court of Cassation, Civil Chamber, decision of 8 May 1944, s. 1945. 1. 88; The French Court of Cassation, Civil Chamber, decision of 11 May 1960, JCP N 1961. II. 12085.

⁹ V. J. De Poulpique, *Juris Classeur Civil*, art. 1382 à 1386 [fasc. 420-40], LexisNexis.

¹⁰ I. Leș, *Manual de drept notarial*, All Beck Publishing House, Bucharest, 2001, p. 38.

¹¹ In this respect see: First Instance Court of Iași, Civil decision no. 4259/ 13 March, 2009, given in the case file no. 11465/245/2008.

4. Conditions for engaging liability and the specific elements

According to the common law of civil liability, in order to engage the notary's liability, the four traditional conditions need to be met: *the wrongdoing, the fault, the damage and the existence of a causal link*.

a. *The wrongdoing*. The public notary commits an unlawful act susceptible of engaging his liability whenever he fails to fulfill his duties or performs them faultily.

The public notary's duties can be grouped in two broad categories: the *authentication of documents and counselling obligations*.

i. As regards the first category, we note that the majority of obligations included here are obligations of result; the simple failure to fulfill them attracts the professional's liability. The notary document is subject to strict procedural rules. It must be legible, contain no additions or deletions, and respectively provide a qualitative guarantee, which allows preservation over time. Each page shall be numbered and the total number of pages will be shown at the end of the document.

Thus, the case-law¹² has considered that the addition of a clause, handwritten on the back of a page of the document, which has no signature or any stamp, is not allowed, the respective clause being considered void or non-existent. However, it has been considered that a handwritten, signed and stamped addition, made in order to clarify the meaning of a clause, is going to be treated as an intrinsic part of the respective clause.¹³ The dating of the document constitutes another important obligation of the public notary, his responsibility being engaged whenever there is a defective fulfillment of the obligation.¹⁴

ii. As regards the second category of obligations resulting from the counselling role of the notary, it will be applied the rule according to which *the professional is obliged to prove their consistent execution*.¹⁵

Prior to the authentication of a document, the notary must carry out a series of procedures as regards the authenticity of certain documents, the identification of persons, goods and others, the purpose being to take every precaution measures on the protection of the involved parties. The notary must have this information, as concrete as possible, then he can advise the parties so that they are fully aware of the legal situation and the consequences of the procedure they are going to follow. Whenever notary's liability is required to be engaged under these coordinates, the professional will be the one charged with the

¹² Orléans Court of Appeal, decision of 11 June 1987, Jurisclasseur périodique 1988. II. 21040, note M. Dagot. A similar decision: The French Court of Cassation, Civil Chamber, 1^{re}, 19 Nov. 1985, Dalloz 1986, IR 208, Defrénois 1986, art. 33675, note by J.-M. Jégu.

¹³ The French Court of Cassation, First Civil Chamber, 16 March 1982, Defrénois 1982, art. 32883, note by G. Morin.

¹⁴ For example the notary's liability was engaged because he failed to update an official record (The French Court of Cassation, First Civil Chamber, 4 January 1963, Civil Bulletin I, n°10; The French Court of Cassation, First Civil Chamber, 6 February 1980, Dalloz 1980, IR 271).

¹⁵ The French Court of Cassation, First Civil Chamber, decision of 19 December, 2006, no. 04-14.487, Civil Bulletin I, no.556, Dalloz 2007, with annotations by I.Gallmeister.

duty of proof. He will have to prove that he has made all necessary efforts to provide complete counselling to parties.

Thus, the notary must know the exact status of the persons involved in order to ensure that their identity,¹⁶ domicile,¹⁷ legal capacity, no criminal convictions or different alleged qualities, for example the quality of owner of the thing sold, match the reality. In the same context, the notary is obliged to initiate investigations also on the situation of the assets involved, specifically, about their existence, about the requirements of the administrative authorities related to the case,¹⁸ about various conditions of a professional character and other similar ones. The notary must inform the buyer about the existence of a mortgage established on the property concerned and everything that this guarantee involves.¹⁹ At the same time, the notary shall notify the parties of the existence of any encumbrances²⁰ or about the building character of the land.²¹

The notary must provide customers with all the information they hold, information that is likely to affect the nature or position of the legal commitment in that case. He has a duty to warn the involved individuals about the potential risks, about any contract irregularities and about the measures necessary for proper execution.

Failure to fulfill these counselling obligations engages notary's liability, the legal mechanism being activated whenever the notary cannot prove the consistent execution of counselling obligations. It should be noted that, generally, these are obligations of means, so it will be sufficient to prove that all the necessary due care has been taken for this purpose in order to remove liability from the professional.

b. *Fault*. This element of civil liability is assessed in terms of professional duties, the notary being at fault if not fulfilling his obligations. It is worth mentioning that the quality of professional is always an aggravating factor in assessing guilt.

¹⁶ Paris Court of Appeal, decision of 11 June 1999, Gaz. Pal. 1999, Somm. 629: the notary did not check the identity of the person that pretended to be the administrator of a company. In the same respect: Paris Court of Appeal, decision of 29 April 2003, Gaz. Pal. 2003, 2289: a notary was found liable for not requiring the death certificate of the deceased; if he had done this he would have noticed that the second marriage of the deceased had not been transcribed.

¹⁷ The French Court of Cassation, First Civil Chamber, decision of 4 February 2003, no. 01-14.889, Civil Bulletin I, no. 39; Gaz. Pal. 2003, 1759, with observations by J. Sainte-Rose: the domicile included in the sale contract is not a simple mention that the notary can ignore (on the grounds that is not into force at the moment of the document signing) without drawing the attention of the buyers.

¹⁸ The French Court of Cassation, Third Civil Chamber, decision of 28 November 2007, no. 06-17.758, Civil Bulletin III, no. 213, RJDA 2008, no. 235.

¹⁹ The French Court of Cassation, First Civil Chamber, decision of 5 October 1999, no. 97-14.545, Civil Bulletin I, no. 258, Dalloz 1999, 244, Defrenois 1999. 1341, with observations by J.-L. Aubert.

²⁰ The French Court of Cassation, Third Civil Chamber, decision of 23 February 1994, no. 92-12.764, Civil Bulletin III, no. 38.

²¹ The French Court of Cassation, First Civil Chamber, decision of 21 February 1995, no. 93-14233, Civil Bulletin I, no. 94.

Differentiation of the forms of fault is relevant in the case of notary's liability. While, in the event of negligent acts that are committed and for which there are no provisions, no issues are raised, given the fact that responsibility is engaged even for the slightest fault, in the case of intentional acts the damages increase significantly.

The notary guilt will be established by any means, taking into account the nature of his professional obligations. Thus, the mere failure to fulfill the authentication obligations presupposes the existence of fault. For example, failure to date the document or absence of notary's signature represents the existence of notary's guilt, without being necessary to bring any other evidence. The same situation is applied in the case of counseling obligations. The notary's guilt is established *de facto* in cases such as: committing a mistake of law, the act of forgetting to check the origin of a property or applying for a planning certificate without prior mortgage discharge. However, counseling duties are mostly duty of care, so that proving the failure to fulfill them is more difficult.

The notary public shall inform all parties as regards all legal consequences of the documents they wish to conclude. As a professional, it is assumed that the notary always has to fulfill the obligation of counseling the parties. In the specialized literature²² it is stated that requiring the notary to prove the fulfillment of this obligation directly affects professional conduct by creating an inadmissible presumption that he has not fulfilled one of his most basic obligations. Subsequently, completely in accordance with the jurisprudence in field of professional's liability, it has been generalized the rule according to which *the professional is obliged to prove the consistent fulfillment of the obligations to inform and, implicitly, to counsel.*²³

In general, the issues related to proof of notary's guilt must be analyzed *in concreto*, as there may be situations when the same circumstances require proof of fault or, respectively, the simple misconduct may be sufficient for engaging liability. In this regard, we present a solution of jurisprudence²⁴, which is based on the following facts: the clients of a notary public wanted to purchase a property that was mortgaged for a sum greater than its purchase price. Without waiting for the discharge of the security, they proceeded to the completion of the real estate by investing expensive materials, which resulted in an increased asset value. Clearly it was a great imprudence, since there were no legal means to avoid the encumbrancer and also there was no possibility of selling the property to recover the investment. Aiming to ignore the creditor, the buyers filed an action to engage the liability of the notary before whom the sale contract for the real estate was concluded. Paris Court of Appeal admitted his liability on the ground of non-fulfillment of counseling obligation, considering that the behavior of the buyers

²²J. de Poulpique, *Responsabilité civile professionnelle*, Dalloz, 2013, no. 343 et seq.

²³ Ph. le Tourneau, *Droit de la responsabilité et des contrats, Régimes d'indemnisation*, Dixième Edition, Dalloz, Paris, February 2014, p. 1466, no. 4950.

²⁴ The French Court of Cassation, First Civil Chamber, decision of 25 June 1991, n° 89-20.338, Civil Bulletin I, n° 212.

was sufficient to prove the guilt of the notary. The following reasoning was considered: although the buyers were aware of the mortgage, which was specifically mentioned in the contract, the notary did not fully inform them, namely he did not explain them what that guarantee meant, the expanse of the encumbrancer's rights and the need to discharge this security. If buyers had known this information, they would not have risked completing the building and increasing its value. Their conduct could only be explained by ignorance of the real threat of eviction, respectively, not knowing the consequences involved by the functioning mechanism of the mortgage. Thus, the burden of proof was shifted naturally from the claimant-client to the notary.

It is well known that currently the keywords in the area of professional liability are: the protection and safety of victims. Jurisprudence has permanently tended to privilege the client in a lawsuit concerning professional's liability for failure to inform and counsel. As part of such a process, it is the duty of the notary to prove that he has fulfilled effectively, efficiently and as inclusively as possible this obligation, showing specific caution.

c. *Damage*. The public notary's liability can be incurred only if his faultily act has caused damage. For remedy, the damage must be certain and actual.

The case-law has held in the sense that the invalidity of a contract of sale, even though caused by the notary who authenticated the document, could not lead to the awarding of compensatory damage, since it did not cause the loss of price.²⁵

It should also be noted that a potential damage is likely to engage the notary's liability. This happens for example when the land purchaser, due to the irregularity of documents issued by the notary cannot get a loan to build or another hypothesis when the notary wrongfully records a real estate security, and, in relation to the other entries and the value of the property, it is already certain that the creditor will be unable to recover the debt.²⁶

As regards the damage consisting of loss of an opportunity, this can lead to engaging the notary's liability in the cases when, for example, due to his fault, the victim has lost a chance to perform an act or a judicial action on a certain date and under the provided conditions. In determining compensation for the loss of opportunity, the court will consider the real possibility to award it in relation to the harmful consequences of the professional's faulty act. By definition, an opportunity is not an achievement; therefore compensation for damage cannot be a complete one.²⁷

d. Need for a *causal link*. A notary can be held liable only if a casual connection between the wrongful act and the damage is established. The absence of this element is the most frequent defense argument brought up by the

²⁵ The French Court of Cassation, First Civil Chamber, decision of 6 November 2001, n° 98-20.543, RCA 2002. Comm. 30; The French Court of Cassation, First Civil Chamber, decision of 19 December 2000, Dalloz 2001. 3482.

²⁶ The French Court of Cassation, First Civil Chamber, decision of 29 February 2000, no. 97-18734, Civil Bulletin no. 72.

²⁷ V. C. Larroumet, *Droit civil, t. 3, Les obligations. Le contrat*, 4^e éd., 1998, Economica, n° 656.

professional in the cases of his liability. For example, the French Court of Cassation dismissed an action for the prosecution of a public notary by considering this defense and concluded that the damage would have occurred even if the professional had not been guilty.²⁸

In case of a concurrent fault of the notary and the parties' advisers, for example, or even of the victim, the notary may benefit from a total waiving of liability. This is especially true if the other person acts intentionally.²⁹ The justification of this solution is that the wilful misconduct of the victim or of another person, due to its nature, can be considered the only cause of damage. However, even in such a case, the judge can engage the notary's liability on the grounds of committing a faulty act in his profession, an act that affected the guarantees regarding his sovereign power of assessment.³⁰

5. Exoneration of liability

Liability exoneration clauses are prohibited and illegal. However, it is admitted a prior establishment of proof as regards the consistent fulfillment of the counselling obligation and this is meant to lead to the exclusion of liability. In practice, this is determined by a separate written document, under private signature, signed by the clients and dated. It must be drafted in a precise and detailed manner and it must explain in clear terms the nature of the provided counselling. The client must be informed as regards the consequences of this written document. We emphasize once again that by this document the notary cannot be waived of his professional duties.

Case-law has admitted the validity of such a possibility to remove liability also when evidence of fulfilling counselling duty was included in the authenticated document drafted by the notary.³¹ The probative value is not affected if confirmation of fulfilling the obligations is included within the document itself or in a separate document. The authentic document has exceptional virtues, but never guarantees full trust in all its particulars. Nothing prevents the client to bring an action against the notary on the grounds that he has not explained the significance of the advice he provided, or because, due to his incompetence, he suffered an damage.

²⁸ The French Court of Cassation, First Civil Chamber, decision of 26 April 1963, JCP 1966. II N 14639; In the same respect: The French Court of Cassation, First Civil Chamber, decision of 12 February 1980 BC, Journ 1981 art 56115, No. 3, obs. J. Poulpiquet.

²⁹ The French Court of Cassation, First Civil Chamber, decision of 17 December 1996, n° 95-13.091, Civil Bulletin I, n° 458, Defrénois 1997, art. 36516, n° 25; The French Court of Cassation, First Civil Chamber, decision of 16 January 2001, n° 98-15.048, Civil Bulletin I, n° 4.

³⁰ The French Court of Cassation, First Civil Chamber, decision of 14 Oct. 1997, n° 95-19.083, Civil Bulletin I, n° 275, Defrénois 1998. 348, obs. J.-L. Aubert.

³¹ The French Court of Cassation, First Civil Chamber, decision of 10 June 1997, n° 95-14.767, Civil Bulletin I, n° 197, Defrénois 1998, art. 36815, n° 71, obs. J.-L. Aubert, *Actualité juridique droit immobilier* 1998. 1098, note by G. Teilliais.

In order to protect himself, it is appropriate for the notary to draw up a double proof of fulfilling the counseling obligation, both in the notarized document and in a separate document signed by the client himself, and this should be done before proceeding to the authentic document is issued. At the same time it is preferable that this latter document be attached to the notarized document. The client must specify in this separate document that, despite the warning given by the notary, he intends to continue the document's drawing up and that he assumes the risks. This is the surest way to prevent engaging notary's liability as it constitutes proof of actual fulfillment of the counseling obligation and the absence of any irregularities in this regard.

6. A selection of relevant case-law

In order to develop a more complex analysis of the professional liability of notaries we propose to go over a number of case-law practical solutions given by the French courts that are closely connected with this issue.

The first decision given on 29 May 2013 by the French Court of Cassation, Civil Chamber I, regards the field of applicability of the notaries liability.³² The circumstances of the case regarded the particular circumstances of a legal transaction made by a notary, which involved granting a loan to a company and securing it against a mortgage. On this occasion, the borrowing company remitted to the notary a cheque representing the mortgage fees. Subsequently, based on several transfer orders issued by the borrowing company, the notary tried to transfer the amount to the debt creditor. It turned out that the transfer orders were fake. In these circumstances, the lending company brought an action in court seeking liability of the notary who did not properly fulfill his duties, meaning that he had to check the authenticity of these payment instruments. Initially, the Court of Appeal dismissed the company's action, but the decision was quashed by the Court of Cassation, which invoked the professional liability, grounding their solution on art. 1382 of the French Civil Code.³³ It was held that the notary, by virtue of his profession, ought to have ensured that the signatures on the transfer orders were the same with those on the documents concluded in his presence, at his office. It is not admitted for a public notary to leave out any element that can create suspicions of committing a forgery.

The solution appears to be severe for the profession of public notary. Although in practice this check may seem dull, and the notary must have true graphologist skills, in reality, it is absolutely necessary for the legal professionals to be obliged to make all due efforts to detect and avoid any attempted fraud. This requirement is added to an already long list (checking the identity, capacity, civil status, regularity of prior legal acts), but it is explained by the fact that resorting to

³² Ph. Brun, O. Gout, *Responsabilité civile, novembre 2012-novembre 2013, Responsabilité notariale*, Recueil Dalloz 2014, p. 47.

³³ «*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.*».

the services of a public notary must provide certain and serious guarantees in terms of the efficiency of the operation managed by him.

The second solution given by the judicial practice, which is the subject of our analysis, is the French Court of Cassation decision of 30 January 2013 Civil Chamber III.³⁴ A private limited company purchased a building of another company under liquidation in order to create an establishment for adolescents with disabilities. A few weeks later, the building is sold to another company, which in turn, resold it in three batches. Under those circumstances, the second and third sales are cancelled due to failure to follow the special purpose for which it was initially purchased.

These latter sellers brought a civil action for the liability of the notaries that handled the legal operations.

Notaries have defended by invoking the victims' quality of professionals in sales of real estate, as well as their attitude at the moment of signing the contracts, meaning that they gave their consent freely, and were aware of the situation.

The French Court of Cassation did not consider those allegations, holding that: *"although the sub-buyers were not in good faith, they had no obligation to carry out the necessary checks on the effectiveness of the sales documents. This obligation falls only under the duty of the notaries, who should warn the buyers about the risks subsequent to signing the convention."* It was concluded that the notary failed to fulfill his counseling obligation. Neither the professional quality of the buyers nor their bad faith can lead to the removal of notary's liability.

The case illustrates the severity of the case-law in the analysis of public notary's liability. The court underlines the importance of counseling obligation, which imposes the duty on the notary to alert the buyer about the risks and consequences of any operations. Failure to meet this obligation is likely to engage the notary's liability, with the obligation to pay compensation for the damage caused.

Another relevant solution from the judicial practice has as starting point the following situation: a property which was the subject of a mortgage duly established was sold several times, and the sale price was set and paid without taking into account the existence of this real estate collateral.

The security creditor submits to the court a civil liability action against the notary on the grounds that he has improperly fulfilled his duties, namely that he has omitted the loan payment and the mortgage liquidation. The first instance court admitted the action, but the judgment so rendered was quashed by the French Court of Cassation,³⁵ which ruled that in this case, the creditor was unable

³⁴ The French Court of Cassation, Third Civil Chamber, decision of 30 January 2013, no. 11-26.074, Dalloz 2013. 362 ; Actualité juridique droit immobilier 2013. 625, with observations by F. de La Vaissière.

³⁵ The French Court of Cassation, First Civil Chamber, decision of 27 February 2013, no. 12-16.891, Dalloz 2013. 705 ; Actualité juridique droit immobilier 2013. 775, obs. N. Le Rudulier; RTD civ. 2013. 609, obs. P. Jourdain ; RTDI 2/2013. 20, obs. C. Albiges.

to justify certain damage because it had the right to investigate and therefore could follow the legal ways for directly tracking the security. Notary's liability should be seen as a subsidiary measure. In the present case, the damage could have been recovered by an action against the seller.

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