PROFESSIONAL LIABILITY. PARTICULARITIES OF CIVIL LIABILITY REGARDING THE LIBERAL PROFESSIONS

Ruxandra-Cristina DUȚESCU[*]

Abstract

With the evolution and modernization of the liberal professions, both practitioners and clients are also aware of their rights and obligations, the risks involved in exercising professions that depend on the accuracy of information, the stability of decisions, and the observance of deadlines. The present study looks at the appearance of the particularities of the civil liability in the liberal professions existing in Romania in relation to the legal obligation to conclude an insurance policy for professional liability, as well as the situations and conditions in which it produces its effects.

Keywords: *liberal profession, liability, insurance, particularities, obligation*

1. Introduction

The term liberal profession is found in many normative acts. According to Law no. 200/2004 on the recognition of diplomas and professional qualifications for regulated professions in Romania[1], regulated professional activity represents the activity for which the access or exercise in Romania is directly or indirectly conditioned by the possession of a document attesting the level of professional training.

Occupational regulated professional activities are considered to be professional activities if the use of such a title is reserved only to holders of documents attesting to the level of professional training. The notion of liberal profession is also found in the Fiscal Code, being defined as the occupation exercised on its own behalf by natural persons, according to the special normative acts that regulate the organization and the exercise of the respective profession. Exercising an independent activity involves doing it on its own and pursuing a lucrative purpose. However, even if exercised on its own account, the liberal profession depends on a professional body and is distinctly regulated by a normative act. Members of the liberal professions are constituted as distinct professional bodies based on their own statute, adopted under the law and by virtue of which they have the right to practice and to be accountable for the professional act they perform.

Professional liability occurs as a result of the activity of protecting and achieving a public interest, as well as of a private interest, in exchange for a payment called honor. Two of the most representative legal professions are those of a notary public and a bailiff. These are specific to the profession of lawyer in that the act of the public notary and of the bailiff is an act of public authority.

2. Content

2.1. The Notary's Responsibility

The conditions for exercising the profession of notary are provided by Law no. 36/1995 of the notaries public and of the notarial activity and in the Regulation for the implementation of Law no. 36/1995.

Notarial activity ensures legal and natural persons to establish non-litigious civil or commercial legal relationships, as well as the exercise of rights and the protection of interests, in accordance with the law[2]. The legislator regulated various types of legal liability of the notary public, each of which interfered with the gravity of the deviation from the legal norms. This will raise the question of the disciplinary, civil or criminal liability of the notary public according to the violated norm[3].

The public notary shall be liable to disciplinary action if it misappropriates its duties as to the legality of the legal relations it finds, the exercise of rights and the protection of the interests of legal persons requesting the conclusion of notarial acts. Disciplinary liability will also arise when the public notary carries out acts that affect the honor and prestige of the notary profession, facts that will impose a sanction proportional to the seriousness of the offense committed. The civil liability of the notary public will intervene in cases where, through his activity, the notary would cause damage to a natural or legal person because he violated some professional obligations by causing guilty liability in the form of bad faith, established by a final court decision. The most severe form of legal liability to which the public notary may be subjected is criminal liability.

From the point of view of the civil liability of the notary, this can be both contractual and tortuous.

[*] PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (email: **cristina.dutescu@ymail.com**).

[1] Art. 2 of the Law no. 200/2004 on the recognition of diplomas and professional qualifications in Romania, published in M.Of. No. 500 of 3 June 2004.

[2] Art. 1 of the Law no. 36/1995 of the notaries public and the notarial activity.

[3] Ionut Alexandru Toader, Legal Responsibility of the Public Notary in National and European Context - Doctoral Thesis, Bucharest, 2016.

Regarding contractual civil liability, it intervenes under the conditions of art. 78 par. (2) of Law no. 36/1995, respectively, if a contract is concluded for a determined period between the latter and a natural or legal person, regarding the consultations given in the notarial legal field.

According to art. 72 of the Law no. 36/1995, the civic liability of the public notary may be engaged under civil law, for violation of his professional obligations, when he caused guilty, in the form of bad faith, an injury determined by a final court decision. Thus, the special law of public notaries has to be interpreted in correlation with the provisions of the Civil Code, since the special rule derogates from the general rule, but this is not capable of opposing the two normative acts.

Article 1258 of the Civil Code regulates a special form of liability of the notary who may be obliged to repair the damage in case of invalidity of the contract concluded in the authentic form[4].

In the event of the annulment or finding of the nullity of the contract concluded in the authentic form for a cause of nullity, the existence of which results from the contract itself, the injured party may require the public notary to pay compensation for the damages suffered, under the conditions of the tort liability for his own deed[5].

Article 1258 establishes a form of special responsibility for the personal act of a notary public, who is charged with the existence of a cause of nullity resulting from the content of the contract itself. The text of the law takes into account the situation of finding the nullity of a contract concluded in the authentic form and presupposes verification of the following conditions[6]:

- the cause of nullity results from the text of the contract itself. No liability can be assumed by the notary irrespective of the cause of nullity, but only for a cause of nullity in close connection with the notarial act of authentication of acts.
- there is damage;
- the law does not specify whether authentication is an ad validitatem requirement for the contract requirement or only an option of the contracting parties, so that the ubi lex non distinguit nec nos distinguere debemus rule will apply[7].

Moreover, in order for the patrimonial responsibility of the notary to be attracted, it is necessary to have a final decision stating the nullity of the legal act authenticated by the notary public[8].

Taking into account the principles of civil tort liability, the phrase "the cause of nullity of which the existence derives from the text of the contract itself" must be understood as a nullity imputable to the notary in the sense that, although he knew or ought to know that by concluding the contract Violates rules that may invalidate the contract, did not refuse to process the authentication procedure. Per a contrario, the notary can not be held liable if a contract is unenforceable for error, dollar, violence or injury, because it is impossible to censure such causes of nullity if he does not know them[9].

The special responsibility regulated by art. 1258 Civil Code is not a joint or subsidiary liability. The aggrieved party has the right to choose between to excoriate the Contractor or notary public. In the circumstances where the notary public benefits from civil liability insurance, the interested party will address with indemnity to the insurer, within the limits of the insured amount, being able to act on the contractor for possible injury differences not covered by the insurance policy[10].

Regarding the insurance, the public notary is obliged, prior to the commencement of the activity, under the sanction of non-issuance of the operating license, to conclude the insurance contract with the Public Notary Insurance House. During the exercise of the position, the notary is obliged to pay annually the price of the insurance policy established by the insurance contract. Failure to comply with this obligation results in the withdrawal of the operating license.

Specifically to this profession, as in the case of the bailiff, is the fact that the legislator imposed the establishment of an insurance house of the notary public through which the civil liability insurance for its members was to be carried out. Therefore, the Insurance House aims at ensuring the civil liability of the notary public for damages caused by notarial deeds and acts, except for the damages caused by intentional acts. The insured quality of the Notary Public Insurance Company is acquired before the public notary begins to carry out its activity, according to the law, by concluding the insurance contract and will become effective at the beginning of the activity[11]. The civil liability insurance of notaries in service is compulsory, the rights and obligations of each party being determined by the insurance contract and by Law no. 36/1995. According to art. 15 of the Statute of the Romanian Notary Public Insurance Company, the insured risk represents the damage caused by the public notaries, by fault, by notarial acts and legal acts. The civil liability insurance of the notary public guarantees the payment of the damage within the limit of the insured amount established by the contract concluded with the Insurance House.

[4] Gabriel Adrian Nasui, Medical malpractice. Malpractice of Liberal Professions, Ed. Universul Juridic, Bucharest 2016, p. 310.
[5] Art. 1258 Civil Code.
[6] Gabriel Adrian Nasui, Medical malpractice. Malpractice of Liberal Professions, Ed. Universul Juridic, Bucharest 2016, pp. 311.
[7] Cristina Zamsa, New Civil Code. Comment on articles, C.H. Beck, Bucuresti 2012, pp. 1317-1318.
[8] Gabriela Raducan in the New Civil Code. Comments, doctrine and jurisprudence, vol. II, Hamangiu, Bucharest 2012, pp. 561-562.
[9] Gabriela Raducan in the New Civil Code. Comments, doctrine and jurisprudence, vol. II, Hamangiu, Bucharest 2012, pp. 561-562.
[10] Titus Prescure, Roxana Matefi, Civil Law. General. People, Hamangiu , Bucharest 2012, p. 216.
[11] Adina Motica, Oana Elena Buzincu, Veronica Stan, Admission in notarial - grid tests and theoretical synthesis, Hamangiu, Bucharest 2016, p.34.

The insurance is valid from the beginning of the activity of the notary public till the termination of his / her quality, being operative both for the period when the notary is in the exercise of the function, and after this period, provided that the insured event occurred during the exercise of the position.

Failure to comply with the term for the subscription of the subscribed insurance premiums without the approval of the Insurance House in the course of the year results in the failure to pay compensation. The insurance contract is an enforceable title for the amount due for the insurance premium and the related penalties. Depending on the professional risk assessment sheet, the notary will determine the annual amount of the insurance premium, the insured amount, as well as the type of the insurance policy.

Insurance cover:

- damages caused by the public notary, by fault, by his own deeds or by his employees, in the exercise of his professional duties;
- damages caused by the public notary as a result of the loss, destruction or deterioration of the original documents;
- damage caused to the values entrusted to the warehouse, except for cases where its disappearance, destruction or loss is the result of a fortuitous case or force majeure.

The insurer does not pay damages for damages caused by the notary through his own deeds or employees when the event occurred:

- a case of force majeure;
- from the exclusive fault of the person harmed;
- from the exclusive guilt of a third person.

The insurer will pay the damages to the injured party, insofar as he has not been compensated by the insured.

The Insurance House may conclude reinsurance contracts with insurance companies, the conditions and premiums being determined by the reinsurance contract.

By concluding, liability is incumbent on all damages caused by the public notary, by fault, by his own deeds or by his employees, in the exercise of his professional duties. Therefore, the text establishes responsibility for the notary's own deed, but also a liability for the notary's employees. In both cases, the liability of the insurer is only incidental if the detrimental act has occurred in the "exercise of his professional duties". Civil liability operates in all cases where the notary public or his employees have acted "by fault".

2.2. Liability of the bailiff

The legal liability of bailiffs in Romania is regulated by Law no. 188/2000 on Judicial Bailiffs, the Regulation for the Application of this Law, the Statute of the National Union of Judicial Executives and the Judicial Exercise and the Code of Ethics of the Bailiff. These legal provisions regulate only two types of liability, namely: civil liability and disciplinary liability.

The normative acts indicated do not regulate plenum liability of bailiffs, but this is fully applicable in situations where a bailiff commits a criminal offense[12]. However, the three types of liability co-exist, not excluding each other, but their application is neither mandatory nor concomitant. There are situations in which a bailiff for the same deed can answer civil, criminal and disciplinary. As with other professions, the civil liability of the bailiff may be engaged under civil law, for causing damage by violating his professional obligations[13].

As regards professional insurance for civil liability of bailiffs, the legislator chose a solution similar to that of notaries public, ie an insurance house operating in a mutual system. Thus, according to art. 35 paragraph (1) of the Law no. 188/2000 within the National Union of Judicial Executives operates an insurance house for ensuring the civil liability of bailiffs with legal personality.

If the bailiff works in conjunction with other bailiffs, the liability is not solid, because regardless of the form of the activity, the personal attributions and the responsibility for the drawn up acts belong exclusively to the bailiff who has drafted them.

The conditions in which the civil liability of the bailiff can be undertaken are provided by art. 1357-1371 and art. 1381-1395 Civil Code.

Thus, it must be proved that the bailiff caused damage to one of the persons concerned in forced execution by violating a subjective right as a result of an unlawful act in the exercise of his profession. The damage can be both patrimonial and moral. The reparation of the damage occurs in its entirety, being compensated and for future damage if its production is unquestionable. Injury can only be the result of an illicit act, which means that by an action or inaction the rules of objective law are violated. Regarding the obligation of the bailiff in forced execution, we consider that this is a duty of diligence, not a result obligation. This also results unequivocally from the provisions of art. 627 par. (1) The Code of Civil Procedure, which stipulates that the executor is obliged to play an active role throughout the execution of the execution, stating, by all means permitted by law, for the full and speedy fulfillment of the obligation stipulated in the enforceable title, in compliance with the provisions of the law, the rights of parties and other interested parties. Therefore, the obligation of the bailiff is to carry out all the necessary steps to carry out forced execution.

The engagement of the civil liability of the bailiff presupposes not only the existence of an illicit deed and injury but also a causal relationship between the two. In order to answer civilly, it is necessary that

[12] Ioan Garbulet, The Acts of the Bailiff, Universul Juridic, Bucharest 2014, p. 97.
[13] Art. 45 par. (1) of Law no. 188/2000.

the wrongful act be attributable to the bailiff, so that he is guilty of commiting it.

Ensuring professional liability of bailiffs is mandatory, according to the law. The rights and obligations of the parties are established by statute and by contract. As in the case of notaries, and in relation to the liability of the bailiffs, the existence of an insurance house functioning in a mutual system is regulated. The Insurance Executor's Court is a body with legal personality, which includes all final, or trainees' bailiffs who work on the territory of Romania. The purpose of this structure is the compulsory insurance of the civil liability of the bailiff, for the damages caused to third parties by their own deeds or by their employees.

According to art. 24[14] of the Statute of the Insurance Company of the Judiciary Executors the insurance covers:

- damages caused by the bailiff by his own actions or by his employees, due to negligence, mistake or imprudence in the exercise of his professional duties;
- damages caused by the bailiff for the values entrusted to the depository, except for the cases where their disappearance, destruction or loss is the result of a fortuitous case or force majeure case;
- damages caused by the bailiff as a result of the loss, destruction or deterioration of the original documents given by the clients for execution, limited to the cost of their recovery.

Insurance does not cover[15]:

- damages caused by operations which are forbidden to the bailiff by the legal provisions or statutory and statutory provisions of the profession;
- the insured event that was intentionally produced by the insured person, his or her beneficiary or the beneficiary;
- damages due to mistaken drafting, exclusively due to the fault of the beneficiary;
- the part of the damage exceeding the maximum compensation limit, produced in the same year and the same insured event, regardless of the number of beneficiaries;
- prejudice to the insurer's exercise of other activities, including those permitted by law as compatible with the profession of bailiff.

The insured is obliged to notify the insurer of the insurance risk within 30 days of becoming aware of the existence of a claim for compensation. At the same time, he will inform the insurer of any claim or action brought by the lawyer to obtain damages and, in the meantime, will pass on documents, information, and litigation on time. If these obligations are not met, the insurer has the right to refuse to pay the indemnity, if for this reason he could not determine the cause of the insured event and the extent of the damage.

The rights of the indemnified persons will be exercised against those responsible for causing the damage. The insurer may be sued by the injured party within the limits of the obligations incumbent on him or may intervene in his own name in civil actions against the insured.

Compensation is established on the basis of a final court order, whereby the insured / insurer was bound, at the request of the injured party.

The insurer pays the indemnity to the injured party, insofar as he has not been compensated by the insured, indemnity that can not be tracked by the insured's creditors. Compensation is paid to the insured, if he proves that he has compensated the injured. The insurer has the right to offset the premiums due to him by the end of the calendar year, with any compensation due to the beneficiary or the insured. The indemnity established in the insurer's liability in relation to all the insured events occurring in the calendar year of insurance is made according to the Insurance Contract, regardless of the number of events, produced and notified to the insurer.

The maximum limit of indemnity for the calendar year of insurance refers to the insurer's liability for all amounts payable to a beneficiary or number of beneficiaries in respect of all insured events as a result of the insured's professional misconduct from that year of insurance. If the damage caused is greater, the insurer is not responsible for covering the difference. In this case, the bailiff remains solely responsible to the injured person. If the fault occurs through several successive acts, the fault is deemed to have occurred at the time of the first act or guilty omission

3. Conclusions

Characteristic of notaries and bailiffs is the existence of a mutual insurance system, each professional body having its own insurance house. The mutual insurance system can be complemented by the classical civil liability insurance system. Thus, for a greater coverage of the insured risk, over the limit of the mutual system, an additional insurance policy can be concluded with an insurance company.Creating a system for defamation of the person injured by the poor performance of the professional duties by the notary or the bailiff is extremely favorable as it provides a quick and effective way of compensation.

[14] See http://www.executori.ro/Organizare/docs/STATUTUL%20CASEI%20DE%20ASIGURARI%20A%20EXECUTORILOR.pdf.
[15] Art. 25 of the Statute of the Court of Assurance for Judicial Executives.

References:

- Adina Motica, Oana Elena Buzincu, Veronica Stan, Admission in notarial - grid tests and theoretical synthesis, Hamangiu, Bucharest 2016;
- Civil Code;
- Cristina Zamsa, New Civil Code. Comment on articles, C.H. Beck, Bucuresti 2012;
- Gabriel Adrian Nasui, Medical malpractice. Malpractice of Liberal Professions, Ed. Universul Juridic, Bucharest 2016;
- Gabriela Raducan in the New Civil Code. Comments, doctrine and jurisprudence, vol. II, Hamangiu, Bucharest 2012;
- Ioan Garbulet, The Acts of the Bailiff, Universul Juridic, Bucharest 2014;
- Ionut Alexandru Toader, Legal Responsibility of the Public Notary in National and European Context - Doctoral Thesis, Bucharest, 2016;
- Law no. . 200/2004 on the recognition of diplomas and professional qualifications in Romania;
- Law no. 188/2000;
- Law no. 36/1995 of the notaries public and the notarial activity;
- Titus Prescure, Roxana Matefi, Civil Law. General. People, Hamangiu , Bucharest 2012;
- www.executori.ro.