



Notary liability for Disclaimer Clauses in Authentic Deeds based on the Prudence Principle

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Abstract

Article 16 paragraph (1) point a of the Law on Notary Position (UUJN) mandates that notaries act trustworthily, honestly, thoroughly, independently, impartially, and safeguard the interests of the parties involved in legal acts; however, the principle of freedom of contract in Article 1338 of the Indonesian Civil Code is frequently utilized as the basis for incorporating disclaimer clauses to shift responsibility for material truth. This practice potentially violates the objective requirements of agreements as stipulated in Article 1320 in conjunction with Article 1337 of the Civil Code if used to negate official obligations, thereby impacting the evidentiary strength of authentic deeds as provided in Article 1870 of the Civil Code.

This research aims to analyze the application of the principle of prudence in the inclusion of disclaimer clauses in authentic deeds, and to examine the limits of notary legal liability in the event of legal disputes.

This research is normative legal research employing statutory, conceptual, and case approaches. Primary, secondary, and tertiary legal materials were qualitatively analyzed to address the research problems.

The findings reveal that the validity of disclaimer clauses is conditional. Distinct from prior studies that examined the legal standing or implications of exoneration clauses in general terms, this research establishes that the prudence principle functions as a validity test parameter for disclaimer clauses: such clauses are void by law when used to conceal verification negligence or to facilitate deeds that should have been rejected pursuant to Article 16 paragraph (1) point d of the UUJN, yet retain juridical relevance as liability delimiters for notaries who demonstrably complied with prescribed procedures. Across civil, criminal, and administrative regimes, disclaimer clauses confer no absolute immunity; courts will disregard them upon proof of professional negligence.

It is recommended that notaries prioritize rigorous verification and the rejection of questionable deeds rather than relying on disclaimers. Furthermore, specific legislative regulations regarding the limitations of disclaimer clauses are essential to ensure legal certainty.

Keywords: Notary responsibility, authentic deed, disclaimer clause, and principle of prudence

Introduction

An instrument (akta) attains its status as an authentic document not merely by virtue of statutory designation, but because it is executed by or before a duly authorized public official. The authenticity of a notarial deed is grounded in Article 1, point 7 of the Law on Notary Office (UUJN), whereby a deed drawn up by a notary in such official capacity acquires its authentic character. An authentic deed holds the highest and most complete evidentiary value, thus playing a crucial role in legal relations within society. Through an authentic deed, the rights and obligations of individuals can be ascertained and legally guaranteed, thereby providing legal certainty and preventing future disputes.

The position of a notary in Indonesia is highly strategic, as the authentic deeds they execute constitute written evidence possessing perfect evidentiary value. Through such authentic deeds, the existence of the parties' rights and obligations can be ascertained while simultaneously preventing future disputes. This is in line with the principle of legal certainty, which serves as the cornerstone of civil law. An authentic deed drawn up by a notary not only reflects the intent of the parties but also embodies certainty as to the date, the identities of the parties, and the legality of the contents of the agreement.

Moreover, as a public official, a notary performs a preventive function, namely to avert the emergence of legal disputes through the deeds they execute. A notary does not

merely record the will of the parties, but is also obligated to provide legal advice to ensure that the contents of the agreement do not contravene statutory law, morality, or public order. Accordingly, the role of a notary cannot be viewed merely as that of a drafter of deeds, but rather as a guardian of legal certainty and a protector of the parties' interests.

In practice, issues involving notaries are not uncommon. One such example arises when the appearing parties submit false statements or forged documents. In such circumstances, the notary is often drawn into legal proceedings, even though, in substance, the fault lies with the parties who provided the false information. This indicates that, despite having acted within the scope of their authority, the risk of legal Liability continues to attach to every authentic deed executed by a notary.

This phenomenon gives rise to debate regarding the extent of a notary's Liability for the authentic deeds they execute. On the one hand, a notary is obligated to ensure the formal correctness of the documents submitted. On the other hand, a notary does not possess the authority to investigate the material truth of such documents. This limitation creates a legal gap that may be detrimental to the notary. In this context, the use of disclaimer clauses emerges as one of the legal protection mechanisms for notaries.

To minimize the risk of a notary's involvement in legal disputes, the practice of incorporating disclaimer clauses into authentic deeds has developed. Such a clause

constitutes a statement by the parties that all documents and information provided to the notary are accurate, thereby purporting to release the notary from any legal consequences should issues arise from the deed at a later time. The application of disclaimer clauses has become relevant because, although the Law on Notary Office (UUJN) provides legal protection, in practice, such protection remains limited.

In the context of authentic deeds executed before a notary, a disclaimer clause serves a distinct function. Such a clause is not intended to limit the notary's Liability absolutely, but rather to operate as a legal instrument affirming that the material truth rests entirely with the parties. Accordingly, the notary is responsible only for the formal correctness of the deed, while the substantive accuracy of the statements remains within the domain of the appearing parties.

The practice of incorporating disclaimer clauses creates legal uncertainty. On the one hand, notaries seek to safeguard themselves; on the other hand, there is no explicit regulation in the Law on Notary Office (UUJN) or other relevant legislation that expressly permits or prohibits the inclusion of such clauses, nor that delineates their limits and legal consequences. This normative vacuum raises a critical question: can a disclaimer clause absolutely exonerate a notary from professional legal Liability if disputes, breaches of contract, or losses arise for one of the parties in the future? This potential conflict lies in the inconsistency between the intended purpose of the clause and the notary's normative obligation to ensure the formal correctness of the deed and to protect the interests of parties acting in good faith.

In this context, the prudential principle, which notaries must adhere to, plays a central role as a normative control. This principle requires notaries to act with due care, diligence, and professionalism, ensuring that the deeds they execute do not contravene statutory law, morality, or public order. Accordingly, the prudential principle must serve as a limitation on the use of disclaimer clauses. The inclusion of a disclaimer must not be used as a pretext to neglect the notary's primary responsibilities, particularly where it may prejudice seekers of justice or weaken the evidentiary strength of the deed.

A study of notarial Liability in deeds containing disclaimer clauses must also take into account judicial decisions, both from the Supreme Court and from courts of first instance, that have offered differing interpretations of the validity of such clauses. Some decisions hold that disclaimer clauses cannot release a notary from Liability where negligence is proven, while others emphasize the importance of the principle of freedom of contract.

Considering the realities of practice and the development of legal doctrine, research on notarial Liability in deeds containing disclaimer clauses based on the prudential principle becomes highly significant. This research is expected to make both academic and practical contributions by clarifying the legal standing of disclaimer clauses and offering recommendations for reforming notarial law in Indonesia. Based on this background, the author is interested in conducting research, as outlined in a thesis entitled "Notary Liability for Disclaimer Clauses in Authentic Deeds Based on the Prudential Principle."

Materials and Methods

This study employs a normative juridical research method, namely an approach that examines legal theories and

concepts and reviews statutory regulations relevant to the subject matter. Normative juridical research positions law as a system of norms encompassing principles, rules, and doctrines derived from legislation, agreements, and legal scholarship. However, this research utilizes a prescriptive analytical method. As a prescriptive discipline, legal science examines the objectives of law, the values of justice, the validity of legal rules, and legal concepts and norms. This approach aims to provide a comprehensive understanding of disclaimer clauses in authentic deeds, particularly in notarial practice in Indonesia. Furthermore, this approach seeks to relate the existence of such disclaimer clauses to the prudential principle, which constitutes a fundamental obligation of notaries as stipulated in the Law on Notary Office (UUJN) and other relevant statutory regulations.

Results and Discussion

1. Analysis of the Implementation of the Prudential Principle in the Inclusion of Disclaimer Clauses in Authentic Deeds by Notaries

The inclusion of disclaimer clauses by notaries in authentic deeds cannot be viewed solely from the perspective of freedom of contract. Still, it must be tested for its validity in accordance with the Law on Notary Office (UUJN). As a public official, every legal act of a notary is strictly bound by mandatory rules of public law. Therefore, the inclusion of clauses aimed at limiting official Liability must be critically assessed. Whether such action constitutes a discretionary authority justified by law, or instead represents a deviation from the duties of office that have been exhaustively prescribed in notarial regulations.

Specifically, the authority of a notary is defined in Article 15, paragraph (1), of the Law on Notary Office (UUJN), which stipulates that a notary is authorized to execute authentic deeds concerning all acts, agreements, and determinations required by statutory regulations and/or desired by the interested parties. From the perspective of administrative law, this authority is attributive in nature, meaning that a notary may only perform legal acts within the scope prescribed by law. There is no provision in Article 15, nor in any other articles of the UUJN, that provides a legal basis for a notary to include clauses aimed at releasing themselves from the Liability attached to their office. Therefore, the inclusion of a disclaimer that substantively negates the notary's control function may be regarded as an act beyond authority, thereby undermining the integrity of the authentic deed itself.

In addition to the limits of authority, the validity of disclaimer clauses is also diametrically in conflict with the fundamental obligations of notaries as stipulated in Article 16, paragraph (1), letter a of the Law on Notary Office (UUJN), namely the obligation to act with integrity, honesty, diligence, independence, and impartiality. The term "diligence" in the said provision carries a philosophical meaning that a notary must perform their duties with utmost prudence, accuracy, and thoroughness in verifying every document and statement provided by the appearing parties.

A violation of these limits of authority and obligations gives rise to serious juridical consequences for the status of the deed itself. An authentic deed possesses perfect evidentiary value precisely because it is executed by a public official who is presumed to have performed their duties properly in accordance with statutory procedures. If such a public official explicitly expresses doubt or disclaims

responsibility through a disclaimer clause, then, as a matter of legal logic, the evidentiary perfection of the deed becomes questionable. Such conduct effectively undermines the very foundation of trust upon which the notarial institution is built, wherein a notary is expected to serve as a guarantor of legal certainty, rather than as a party seeking protection behind uncertainty itself.

Although, in theory, such conduct undermines the dignity of the office, the realities of notarial practice reveal a persistent effort to seek juridical legitimacy from a different perspective. The emergence of disclaimer clauses cannot be separated from the clash of paradigms in understanding the legal relationship between the notary and the appearing parties. On the one hand, the relationship is administrative and public in nature due to the attribution of state authority; on the other hand, it also possesses a strong private law dimension, as it originates from the request of the appearing parties. This dual character is then used as a basis for argument to justify the existence of disclaimers, by shifting the analytical focus from mandatory public law to private law, which is more flexible and accommodating of agreements between the parties.

In practice, notaries often use disclaimer clauses as a shortcut to avoid their obligation to provide adequate legal counseling to the appearing parties. In fact, pursuant to the Code of Ethics and Article 15 paragraph (2) of the Law on Notary Office (UUJN), notaries have an educative role to explain the legal consequences of the deeds they execute clearly. From an ethical standpoint, if a notary suspects dishonesty or potential issues in the documents presented by the appearing parties, the appropriate course of action is to refuse to execute the deed or to provide firm legal advice, rather than allowing the deed to be executed with a disclaimer. Such a permissive stance, coupled with a disclaimer of responsibility, is contrary to the notary's oath of office to safeguard the contents of the deed and to ensure access to justice, as it leaves the client legally vulnerable.

The synthesis of the foregoing practical exposition and normative review leads to a single conclusion: the prudential principle constitutes an absolute prerequisite for the validity of the inclusion of a disclaimer clause. In other words, such an exoneration clause may only be deemed appropriate where the notary has demonstrably fulfilled the obligation of "diligence" as mandated by Article 16, paragraph (1), letter a of the Law on Notary Office (UUJN) comprehensively before the execution of the deed. Absent the prior implementation of rigorous verification procedures, a disclaimer is merely a meaningless statement lacking any protective legal force, as courts, in adjudicating disputes, will assess the factual element of notarial negligence as the primary determinant, rather than relying on the text of a unilaterally inserted disclaimer.

Practically, this means that a notary cannot rely on a disclaimer clause for protection if it is proven that they have acted negligently or intentionally in the performance of official duties. For instance, where a notary accepts physically suspicious documents yet proceeds with the execution of the deed by merely relying on the protection of a disclaimer clause, such conduct cannot be legally justified. In such circumstances, the prudential principle requires the notary to conduct thorough verification or even to refuse to execute the deed, rather than relying solely on an exoneration clause. Therefore, the protective force of a disclaimer is not absolute and will be immediately nullified

if the court finds that the notary failed to exercise due diligence in the initial process of drafting the deed.

Conversely, where a notary has applied an appropriate standard of prudence, such as verifying the physical correspondence between the individual's appearance and the photograph on the identity card, checking the validity of identification through a card reader, and confirming certificates with the relevant authorities, the disclaimer clause attains its strongest juridical justification. In such circumstances, the clause serves a crucial function as a clear demarcation of Liability, affirming that any legal defect arising at a later stage is solely attributable to a "latent defect" stemming from the dishonesty of the appearing parties, rather than from any lack of competence on the part of the notary. Accordingly, the court may regard the clause as evidence of the notary's good faith in attempting to mitigate risks, while at the same time reallocating both criminal and civil Liability to the appearing parties as the primary actors in providing false information.

The ideal legal protection for notaries does not lie solely in the existence of a disclaimer clause, but rather in integrating such a clause with the implementation of strict verification Standard Operating Procedures. In essence, a disclaimer clause functions merely as a second line of defense, whereas the primary safeguard remains the notary's prudence and diligence in carrying out official duties. By positioning the disclaimer as a reinforcing mechanism rather than a substitute for the notary's obligations, this practice becomes legally valid and morally accountable, ensuring a balance of legal certainty between the protection of the notarial profession and the protection of the interests of the public seeking justice.

2. Forms and Limits of Notarial Legal Liability for Authentic Deeds Containing Disclaimer Clauses in Legal Disputes

The civil Liability of a notary who is sued for a problematic deed, even where it contains a disclaimer clause, is generally governed by the unlawful act framework set out in Article 1365 of the Indonesian Civil Code. This provision encompasses all forms of loss arising from violations of legal norms that are not covered under breach of contract. To analyze the effectiveness of a disclaimer, it is necessary to deconstruct this provision into its four constitutive elements:

1. the existence of an unlawful act,
2. the existence of a fault,
3. the occurrence of damage, and
4. The existence of a causal relationship between the act and the damage.

A more precise analysis must focus on the element that spans from intent to negligence. In the doctrine of professional Liability, the standard for assessing a notary's fault is not measured against that of an ordinary person, but rather against the standard of a "careful and prudent public official." Accordingly, the threshold for negligence is set at a very low level; even slight inaccuracy may be qualified as fault. In this context, disclaimer clauses are often used as a shield to conceal negligence. However, from a jurisprudential perspective, a disclaimer cannot eliminate the element of fault where the legal facts demonstrate that the notary failed to carry out the standard verification expected of a reasonably competent peer. The court will

assess the notary's "actual conduct," rather than the "protective wording" contained in the deed. If the notary is proven to have been negligent, the element of fault under Article 1365 of the Indonesian Civil Code is fully satisfied, and the disclaimer is deemed as if it never existed.

The next crucial element, which often becomes the subject of intense debate in court, is causation. Notaries frequently argue that the existence of a disclaimer clause serves to break the chain of causality, on the basis that the appearing parties were aware of the risks from the outset, such that any loss incurred is the result of their own acceptance of such risks. However, this argument can be refuted by applying the Adequate Causation Theory introduced by Von Kries. According to this theory, an act is considered the cause of a consequence if, based on normal and reasonable human experience, such an act is sufficiently capable of producing that consequence. In the context of a defective deed, a notary's act of allowing forged documents or failing to conduct proper verification constitutes the most adequate cause of the resulting loss, regardless of the existence of a disclaimer clause. The court will examine the material facts, namely that the loss would not have occurred had the notary refused to execute the deed, thereby rendering a disclaimer, being merely verbal text, incapable of negating the causal link arising from the notary's actual conduct.

Doctrinally, a disclaimer clause does not possess the legal force to absolve a notary from Liability for damages where it is proven that the notary has breached his or her legal obligations. If the court finds that the loss arose due to the notary's negligence in applying the prudential principle, for example, by failing to verify the authenticity of a certificate with the National Land Agency (BPN) or by not verifying the identity of the appearing parties, then the disclaimer clause will be set aside. In such circumstances, the element of "fault" under Article 1365 of the Indonesian Civil Code is deemed fulfilled, and the notary remains liable to compensate both material and immaterial damages, notwithstanding the existence of an exoneration clause in the deed.

The significant precedent established by this decision in the context of Liability is that the Supreme Court based notarial Liability on Article 1365 of the Indonesian Civil Code concerning unlawful acts, rather than on breach of contract. This means that a notary cannot argue that the relationship with the appearing parties is purely contractual and therefore subject to any agreed limitation of Liability between them. The unlawful nature of executing a deed under circumstances that fail to meet the required standard of prudence constitutes a violation of legal norms derived from statutory law, not from contractual arrangements. It therefore cannot be nullified through private mechanisms such as disclaimer clauses. In this case, the court effectively held that the notary's obligation to ensure the parties' free will is a legal duty inherent to the office, rather than merely a contractual obligation that may be modified by agreement.

Criminal Liability: The Irrelevance of Disclaimers in the Offense of Forgery. Upon entering the realm of criminal law, the analysis of the legal force of disclaimer clauses must be situated within the fundamental dichotomy between public law and private law. Criminal law is imperative, aimed at protecting public interests and social order rather than merely individual interests. Within this framework, the state holds a monopoly over imposing sanctions on anyone who violates prohibitive norms, regardless of any settlement

or waiver of Liability agreed upon by the parties involved. Accordingly, disclaimer clauses, grounded in the principle of autonomy of will in civil law, are either totally nullified or lose their juridical relevance when confronted with criminal law. Any agreement between parties to mutually release each other from legal claims cannot negate the state's authority to prosecute criminal offenses.

Unlike the private nature of civil law, criminal Liability focuses on proving the elements of criminal intent and the commission of a criminal act to uphold public order. In this context, a disclaimer clause has no exonerative effect whatsoever against criminal charges. If a notary is proven to have knowingly assisted or participated in inserting false statements into an authentic deed, as penalized under Articles 263, 264, or 266 of the Indonesian Penal Code, the existence of a disclaimer clause does not negate the unlawful nature of such conduct. Investigators and criminal courts will disregard the clause, as criminal law is mandatory in nature and cannot be set aside by agreements between the parties. In other words, a notary cannot "contract out" of criminal Liability through a clause in a deed.

Administrative Liability, Supervisory authority of the notary supervisory council (MPN), unlike civil Liability, which is based on compensation between parties, administrative Liability operates within the realm of disciplinary law, characterized by a vertical relationship between the notary as a public official and the state, represented by professional organizations and the Supervisory Council. In this context, the parameter for determining fault is not measured by whether any party has suffered loss or whether there has been an agreement to waive Liability, but rather by the notary's compliance with the Code of Ethics and the Law on Notary Office (UUJN). Accordingly, a disclaimer clause has no binding effect whatsoever on the Notary Supervisory Council (MPN).

Furthermore, in the process of examining alleged violations of the code of ethics, the existence of a disclaimer clause often becomes a double-edged sword that may, in fact, aggravate the notary's position. Article 16, paragraph (1), letter a of the Law on Notary Office (UUJN) expressly requires notaries to act with integrity, honesty, diligence, independence, and impartiality. The key term "diligence" imposes an obligation to thoroughly verify and examine supporting documents before incorporating them into a deed. When a notary includes a disclaimer clause stating that they are not responsible for the material truth, this may be interpreted by the Supervisory Council as a written acknowledgment that the notary has failed or is unwilling to fulfill the obligation of "diligence."

Accordingly, the limits of a notary's legal Liability are not determined by the existence of a disclaimer clause in the deed, but rather by the extent to which the notary performs his or her official duties professionally and in accordance with the prudential principle. A disclaimer clause may only be regarded as an administrative affirmation, not as an instrument possessing the legal force to absolve the notary from Liability.

Conclusion

The implementation of the prudential principle in the inclusion of disclaimer clauses carries juridical consequences that depend on the notary's good faith. Pursuant to Article 16 paragraph (1) letter a in conjunction

with letter d of the Law on Notary Office (UUJN), such a clause is null and void if it is used in processing documents or appearing parties that are problematic from the outset; in such circumstances, the notary should refuse to execute the deed rather than seek protection behind a disclaimer. Conversely, the clause may be justified as an expression of prudence where the notary has conducted careful formal verification, with its function limited to serving as a moral warning regarding the criminal risks of providing false statements, rather than as an instrument of absolute exoneration. In the event of a dispute, the existence of a disclaimer clause does not eliminate the notary's Liability, as the court may disregard it if negligence or violations of standard operating procedures are proven. Accordingly, the notary may still be held liable under civil, criminal, and administrative law. However, for notaries acting in good faith, such a clause remains relevant as an affirmation of the limits of Liability and as a transfer of responsibility for material truth to the appearing parties who provide false information.

Suggestion

It is recommended that notaries not merely include disclaimer clauses as a formality for self-protection, but also implement the prudential principle in accordance with Article 16 paragraph (1) letter a of the Law on Notary Office (UUJN) through stricter identity verification (for example, biometric systems or e-KTP readers) and by providing clear legal counseling to the parties. Professional organizations should also formulate standard operating procedures (SOPs) regarding the limits on the use of exoneration clauses to ensure uniformity of practice and legal certainty. In addition, legislators need to harmonize and amend the Law on Notary Office to clarify the limits of notarial Liability concerning the material truth of deeds. Meanwhile, the Notary Honorary Council is expected to establish objective parameters for good faith and notaries' diligence, so that institutional protection can be granted proportionally and to prevent the criminalization of the profession.

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