



*Asesorías y Tutorías para la Investigación Científica en la Educación Puig-Salabarría S.C.
José María Pino Suárez 400-2 esq a Lerdo de Tejada, Toluca, Estado de México. 7223898476*

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TÍTULO: Características de la Responsabilidad Civil del Notario.

AUTOR:

1. Anas G. Nuriev.

RESUMEN: El artículo analiza la responsabilidad civil del notario en presencia de medidas de coerción legal del estado a aplicarse al notario, observándose la introducción a la Federación de Rusia de un modelo de cuatro pasos para garantizar la calidad de los servicios notariales: 1ro, debido a la compensación del seguro en virtud del contrato de seguro de responsabilidad civil de un notario; 2do, en caso de insuficiencia de la compensación del seguro, debido a la compensación del seguro en virtud de un contrato de seguro colectivo de responsabilidad civil notarial celebrado por la cámara notarial; 3ro, en caso de incumplimiento de la última compensación del seguro, debido a la propiedad personal del notario; y 4to, en caso de insuficiencia de su propiedad, debido al fondo de compensación de la Cámara de Notarios Federales.

PALABRAS CLAVES: sistema notarial, actividades notariales, responsabilidad civil, fondo de compensación, responsabilidad profesional.

TITLE: Characteristics of the Civil Liability of the Notary.

AUTHOR:

1. Anas G. Nuriev.

ABSTRACT: The article analyzes the civil responsibility of the notary in the presence of measures of legal coercion of the state to be applied to the notary, observing the introduction to the Russian Federation of a model of four steps to guarantee the quality of the notarial services: 1st, due to the insurance compensation under the civil liability insurance contract of a notary; 2nd, in case of insufficiency of the insurance compensation, due to the compensation of the insurance under a collective insurance contract of notarial civil liability celebrated by the notarial chamber; 3rd, in case of breach of the last insurance compensation, due to the personal property of the notary; and 4th, in case of insufficient property, due to the compensation fund of the Chamber of Federal Notaries.

KEY WORDS: notarial system, notarial activities, civil liability, compensation fund, professional responsibility.

INTRODUCTION.

In accordance with Art. 17 of the Fundamental Principles of Legislation for Notary Activities of the Russian Federation [The Fundamental Principles for Notary Activities of the Russian Federation dated February 11, 1993], a notary engaged in private practice bears full property liability for damage caused by his/her fault to the property of a citizen or a legal entity as a result of a notarial act in violation of the law, as well as full property liability for actual damage caused by an unlawful refusal to commit a notarial act, as well as information disclosure about the notarial acts performed.

DEVELOPMENT.

Methods.

The methodological basis of the study is represented by the general provisions of the science of civil law and civil procedural law. During the study, we used the following methods of scientific knowledge: intersectoral, dialectical, sociological, historical method.

Results.

As a result of the study, we established the features of notary's civil liability and the relationship of the liability bases according to the conditions of occurrence of notary's civil liability.

Discussion.

Since January 1, 2018, a system has been implemented that ensures full coverage of the losses of the participant in the notary's proceedings:

- 1) According to the results of a notarial act.
- 2) According to the results of an unlawful refusal to perform a notarial act.
- 3) As a result of information disclosure constituting a notarial secret.

The essence boils down to the fact that four levels of damage compensation are introduced, each of which is introduced when damage cannot be compensated at the previous level. At the same time, the final stage guarantees full coverage. Thus, the damage caused to the property of a citizen or a legal entity is compensated:

1st level - Due to insurance compensation under a notary's civil liability insurance contract.

2nd level - In the case of insufficiency of insurance compensation - due to insurance compensation under a notary's civil liability collective insurance contract concluded by the notarial chamber.

3rd level - In the case of failure of the last insurance compensation - due to the notary's personal property.

4th level - In the case of insufficiency of his/her property - due to the compensation fund of the Federal Notary Chamber.

It should be noted that the notaries' civil liability is one of the parties to professional responsibility in general.

Latin notarial system is characterized by the full property responsibility of a notary who is engaged in private practice for the unlawful acts committed by him/her. The Latin notarial system received its most consistent study in the French doctrine. As an example, the doctrinal provisions of the French researchers J.-F. Piepu, J. Jagr, classifying some cases of notaries' civil liability in the following form:

- Notary - public official; i.e., responsible for the violation of the requirements for the form of acts certified by him/her.
- Notary - advisor to the parties; i.e., the notary shall check whether all the conditions necessary for the act to enter into force.
- Notary - party attorney; i.e., the notary is responsible as an attorney, since by certifying the act, he/she shall ensure its maximum legal effectiveness.
- Notary - responsible for the actions of clerks and employees of the office; i.e., the notary is responsible for the actions of clerks of his/her office, in cases where the offense has been committed while performing notarial functions.
- Other cases of notary's liability (in cases where the notary performs the duties of a temporarily absent notary, the organizer of public auction, etc.) [J.-F. Piepu, J. Jagr. 2001, p. 193-197].

The representative of domestic doctrine, V.V. Yarkov, characterizing the notary's civil liability, notes that "firstly, the relationship between the notary and the persons who have been applied to him/her for notarial actions have not a private legal, but public legal basis; therefore, the responsibility in this case does not occur in framework of civil law, but in the framework of public legal relations. Hence, we receive an important rule that the consumer protection law does not apply to the relationship between the notary and the persons who have applied for the notarial acts.

Secondly, in all cases, we can talk only about the notary's guilty responsibility, when the court established his/her guilt in violating the rules of notarial proceedings. A different interpretation would actually mean criminal liability in relation to the notary in the form of notary's property seizure.

Thirdly, it should be borne in mind that the notary is responsible for a certain area of activity and interacts with a number of bodies. With respect to legal actions and documents issued by them, he/she has no right to audit and control" [Notary Law of Russia. Study Guide / 2003, p. 101-102].

The current potential of notarial system as a result of qualitative changes in the regulation of the notarial sphere and structural changes in the legislative regulation of related public relations suggest the development of notarial system as a law enforcement institution [Safin Z.F. 2016; Nuriev A.G., Khodzhiev A.R, 2015; Valeev D.K., Golubtzov V.G., 2014].

If any of the three grounds for bringing a notary to civil liability occurs, it is applicable only if there are civil liability conditions. Let us consider each of the conditions separately. The first necessary condition for the application of civil liability consequences is the existence of damage caused by a perfect or imperfect notarial act. Speaking of damages, the legislation for notary activities did not specify the very concept of damage. In accordance with Art. 1064 of the Civil Code of the Russian Federation, the harm caused to the personality or the property of a citizen, as well as the damage

caused to the property of a legal entity, shall be compensated in full by a person who has caused such harm/damage.

In accordance with Art. 15 and 393 of the Civil Code of the Russian Federation, the compensation for damage in full includes compensation for actual damage and lost profits. The fundamental principles of the law in relation to the perfect notarial act use the term harm, but in the case of unlawful refusal and disclosed information, it is only a matter of damage. Thus, it follows that in the sense of fundamental principles, only a notarial act entails compensation for damage in full, while for the other two reasons, only the expenses incurred by a citizen or a legal entity shall be compensated by a notary, and the lost profits cannot be compensated by the notary.

It is also a controversial question about the possibility of a notary's compensation for moral damage caused to a citizen when performing notarial activities. Thus, according to some authors, a notary cannot compensate for moral damage. According to others, such damage is compensable, as moral damage (moral and physical suffering) may be caused to the citizens as a result of notary's illegal actions. As a rule, the notary's illegal actions involve citizens undergoing moral suffering (resentment, helplessness, disappointment, etc.) [Erdelevsky A. 1997, p. 24-25].

According to Art. 151 and 1099 of the Civil Code of the Russian Federation, the moral damage caused by the actions violating personal non-property rights of a citizen or infringing upon other intangible benefits belonging to him/her is subject to compensation in all cases. Thus, in cases of causing moral and physical suffering to a person by the notarial acts, the notary shall compensate for moral damage.

If the harm is caused by the illegal actions of the notary of the public notary office, the liability relations are built in accordance with Art. 1069 of the Civil Code of the Russian Federation. According to Art. 1069 of the Civil Code of the Russian Federation, the harm caused to a citizen or

a legal entity as a result of illegal actions and inaction of the state bodies or their officials shall be compensated by the treasury of the Russian Federation.

In accordance with Art. 1081 of the Civil Code of the Russian Federation, Russian Federation has the right of recourse to the notary. In this case, the size of notary's regressive responsibility is determined by the norms of labor legislation, since the notary is in an employment relationship with a notary public office.

The second condition for the occurrence of civil liability is the unlawful nature of the notary's actions. According to the opinion of the Center for Notarial Studies [Conclusion on the Notary's Responsibility for Causing Harm in the Implementation of Notarial Activities [Electronic resource] // Notarial Research Center. - Access mode: www.notiss.ru/index.php?id=17], the notary's behavior is unlawful if he/she, when performing the notarial acts, violates the norms of objective law establishing the procedure for performing the notarial acts. In particular, the Fundamental Principles for Notary Activities, as well as the Order No. 91 dated March 15, 2000 of the Ministry of Justice of the Russian Federation “On Approval of Methodological Recommendations on the Performance of Certain Types of Notarial Actions by the Notaries of the Russian Federation” [Order of the Ministry of Justice of the Russian Federation No. 91 dated March 15, 2000] determines the procedure for performing certain types of notarial activities. Inaction is considered unlawful, if the person has been obliged to perform a certain action, and has had the actual ability to do so, but has not done it.

In all cases, it is necessary to establish a link between the notary's actions (the cause) and the adverse effects that have occurred (the effect). This connection is established by the court according to the case files.

The last condition for the civil liability imposition for the notarial act committed is the presence of the notary's guilt in accordance with Art. 1064 of the Civil Code of the Russian Federation. The notary's guilt is expressed in two forms - intent and negligence. If the notary's guilt is expressed in the form of intent, then the notary shall bear civil liability.

In order to prevent possible cases of notaries' property liability [Review of the Most Typical Mistakes Made by Notaries, 1998], the following recommendations were developed by the Scientific Advisory Board of the Federal Notarial Chamber:

Firstly, when performing notarial acts, to properly verify the identity of a person who has applied for the notarial act, to carefully check the documents submitted by him/her. In the case of the slightest doubt about their authenticity, to require the provision of other documents or raise the question of the examination appointment.

Secondly, to scrupulously observe the registration procedure of notarial proceedings.

Thirdly, to exercise constant control over the work of technical staff of the notary office and to improve their professional level [Cherepanov G.I., 1999].

Having considered the features of notary's civil liability, we should answer one question: is the notary's civil liability a contractual liability or a liability of harm? The answer to this question will allow us answering more important question: Do the notarial bodies notarize the citizens and legal entities, whereby the right to qualified legal assistance is exercised?

It seems to us that the opinion of the representative of Italian doctrine D'Oraci-Flavoni is one of the most justified. He says that the notary's responsibility has a dual nature:

- firstly, the contractual nature, when it results from the non-fulfillment of the optional equalization activities (professional activities that are not necessarily included in the notary's services, but which are often trusted by habit).

- secondly, the non-contractual nature: when it arises from the performance of compulsory equalization activities (transfer of the parties' will in legal forms that correspond to and lead to the desired consequences); when it results from the testimony activity (imparting official power -public trust- to the acts adopted) [Vergasova R.I., 1998].

In summary, we believe that the achievements of the Italian scientific thought are fully applicable to Russian realities and in relation to notaries working in the Russian Federation. We can also talk about the dual nature of the notary's liability. Thus, the notary, when performing notarial actions provided for in Art. 35 of the Fundamental Principles, will bear civil liability for causing harm. In the case of notarial acts not provided for in the Fundamental Principles, in particular when drafting a transaction, when giving a legal advice, it is borne a contractual liability.

CONCLUSIONS.

All this allows us making a conclusion about the important progressive development of the Russian notarial system and the increase in functionality aimed at protecting the rights, freedoms and legitimate interests of the citizens and organizations.

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DATA OF THE AUTHORS.

1. **Anas G. Nuriev.** Kazan Federal University. Email: anasnuriev@yandex.ru

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