

LIABILITY OF THE NOTARY PUBLIC FOR NOTARIAL AUTHENTIC DOCUMENTS

Claudia ROȘU*

ABSTRACT: *This article analyses the case of liability of the notary governed by art. 639 para. 2 Civil Procedure Code. A public notary will be liable if the document he authenticates and that states an outstanding liquid and payable debt, has been cancelled by the court due to the culpably breach of professional obligations by the notary public, causing a damage, established by final court judgment.*

The form of the notary public's liability is a tort for his own deed.

The conditions involving the liability of a notary public are: the document certified by a notary public was cancelled by civil or criminal court; at the time of the authentication document, the notary public has not complied with his professional obligations; culpable failure to comply with professional obligations in any of the forms indicated in art. 16 Civil Code. (intention or guilt); the deed of the notary (commission or omission) has caused a damage.

The notary public needs to take over civil liability if the conditions are fulfilled for him to do so for his own deed, because the cancellation of the authentic document has the effect of abolishing the legal act and leading to the obligation to repair the caused damage.

KEYWORDS: *notarial authentic documents, cancellation, final judgment, civil liability of the notary public.*

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1. PRELIMINARIES.

The activity of notaries public in Romania is regulated by Law no. 36/1995 on notaries public and notarial activities and the Statute of the National Union of Notaries Public in Romania¹.

According to art. 46 of Law no. 36/1995, in the district of each court of appeal, there functions a Chamber of Notaries Public with legal personality. All notaries public operating in its jurisdiction are members of this Chamber.

The statute mentioned in art. 1 provides that the National Union of Notaries Public in Romania is the only professional organization of notaries public from Romania, established by law, with legal personality, public interest and with its own patrimony and budget.

* Prof. univ. dr. - Faculty of Law, West University Timișoara, ROMANIA.

¹ The Law no. 36/1995 on notaries public and notarial activities was republished in the Official Gazette of Romania, Part I, no. 444 from June 18, 2014; the Decision no. 10/2014 for the endorsement of the Statute of the National Union of Notaries Public in Romania was published in the Official Gazette of Romania, Part I, no. 853 from November 24, 2014.

2. LIABILITY OF THE NOTARIES PUBLIC.

The regulation of the public liability of notaries public is provided by Law no. 36/1995, in the Statute of the National Union of Notaries Public in Romania, in art. 1258 Civil Code² and in art. 639 Code of Civil Procedure³.

The provision of reference from Law. 36/1995, is provided in art. 72 of Law no. 36/1005, which provides that liability of the notary public can be engaged under civil law for infringement upon his professional obligations when he culpably caused damage in the form of bad faith, established by final judgment.

In legal literature (Leș, 2014) it has been indicated that, although this provision is explicit, it also refers to civil law, which leads to the question if the principles of tort and contractual liability are taken into consideration.

The current legislation does not require the need to conclude a contract between the client and the notary public, as such a regulation exists with regard to the activity of the attorneys.

Therefore the issue of civil liability of the notary public has become one of the most delicate (Leș, 2014).

For example, in France, the question of patrimonial liability of the notary public is one of the most delicate, some authors being supportive towards the argument that liability is of a tort, and others being in favour of the opinion that we are talking about a contractual liability based on the rules of the mandate. Also the argument was supported that we are discussing about the liability based on the idea of risk, to which the liability based on culpability is added. French jurisprudence oscillated in adopting a categorical solution (Leș, 2014).

To determine the kind of civil liability of a notary public, we must start from the specific activity of the notary public, as regulated in art. 3 of Law no. 36/1995, which states that the notary is invested to fulfil a public service and has the status of an autonomous function.

According to art. 9 of the Statute, notaries public, in their capacity of delegating authority, are subject to the legislative assembly, practise a service of public interest and are organized in a liberal profession.

One cannot ignore that by law the notarial deed is an act of public authority. The doctrine stated that the notarial activity was embedded in the concept of public office in the traditional sense of the term (Mihail, 1997).

Therefore, it was argued that such a public function is performed outside of contractual relations, and the notary's liability for damages he has caused can only take the form of tort liability (Leș, 2014).

The provisions of art. 1258 Civil Code are the ones that settle the legal nature of the notary public's liability, which provides that in case of cancellation or finding of the invalidity of the contract that has been concluded in authentic form on grounds of invalidity, the existence of which results from the very wording of the contract, the

² Law no. 287/2009 Civil Code was republished in the Official Gazette of Romania, Part I, no. 505 of July 15, 2011.

³ Law no. 138/2010 Code of Civil Procedure was republished in the Official Gazette of Romania, Part I, no. 247 of July 15, 2011.

damaged party is entitled to request the obligation of compensation from the notary public for damage suffered under tort for his own deed.

In such circumstances, the *tort (s.n.)* character of liability of notary public is undeniable.

In legal literature it has been noted that the text of art. 1258 Civil code is not directly applicable also on other acts or notarial procedures, such as notary succession procedure, the procedure of divorce or of the successoral estate liquidation. Therefore, the question was raised about the nature of the notary public's liability if damage occurs through his work in the case of other notarial procedures. The solution that has been proposed and that we share is that we have to see this as a notary public tort liability (Leş, 2014).

To determine the legal nature of the notary public liability, we must also take into consideration the provisions of the Code of Civil Procedure. According to art. 639 para. 2 Code of Civil Procedure, in the event of cancellation by court of the document authenticated by a notary public, the civil liability of the notary public can be engaged only for the culpable infringement of his professional obligations, followed by causing damage, established by final judgment.

And from these provisions it appears that the liability of the notary public is a tort.

3. TORT LIABILITY OF THE NOTARY PUBLIC FOR AUTHENTIC NOTARIAL DOCUMENTS.

This study aims to examine the liability of the notary public, as regulated in art. 639 para. 2 Code of Civil Procedure.

Art. 639 Code of Civil Procedure, with the marginal title *Notarial authentic documents*, is regulated in Book V, *About Enforcement*, in Chapter II, *Enforcement Order*.

Enforcement is the procedure whereby the creditor, as the holder of a right recognized by an enforcement order, coerces his debtor, by the competent state bodies, to execute the obligations arising from the enforcement order.

3.1. Authentic notarial document. According to art. 269 para. 1 sentence I Code of Civil Procedure, the authentic document is drawn up or, where appropriate, received and authenticated by a public authority, by the *notary public (s.-n)* or by another person invested with public authority by the state, in the form and the conditions established by law. Also any other document is authentic that is issued by a public authority to whom the law gives this character (art. 269 par. 2 Code of Civil Procedure). (Boroi, Stancu, 2015).

According to art. 639 para. 1 Code of Civil Procedure, the authenticated public document that finds a certain outstanding, liquid and payable debt turns into an enforcement order. In the absence of the original, the enforcement order may be the duplicate or certified copy of the specimen in the archive of the notary public. A similar provision is found in art. 100 of Law no. 36/1995 (Boroi, Stancu, 2015).

Although it was shown that (Leş, 2014), the problem of the civil liability of the notary public can occur, in practice, in extremely rare cases, due to non-contentious nature of the notarial procedure, we consider it necessary to analyse the provision of art. 639 para. 2 Code of Civil Procedure referring to authentic notarial documents.

If in art. 1258 Civil Code the legislator took void or invalid contracts into consideration, in art. 639 para. 2 Code of Civil Procedure he referred to the document authenticated by a notary public, who finds a certain outstanding, liquid and payable debt.

In legal literature it is indicated that although it would seem that the texts included in the Law no. 36/1995, in the Civil Code and in the Code of Civil Procedure govern the same aspects, actually their scope is different. Thus, art. 72 of Law no. 36/1995 establishes the principle of the notary public's liability for damages caused by infringement of professional duties in any field of notarial activity. The Civil Code applies the principle stated concerning the contracts concluded in authentic form, regardless of the object of the contract. The Code of Civil Procedure in turn applies the same principle that finds a certain, liquid and payable outstanding debt upon which an enforcement order has been made (Gavriș, 2013).

This opinion was criticized (Dobrican, 2013) with the argumentation that, if a legal institution is governed simultaneously by several pieces of legislation, this does not mean that their interpretation and application will be parallel, but we consider that it reflects the point of view of the legislator to establish different fields of application of the tort liability of the notary for his own deed.

In accordance with art. 157 para. 1 of Law no. 36/1995, the notarial documents can be challenged by any interested party by annulment in Court, in accordance with the provisions of the Code of Civil Procedure.

The notary public is obliged to comply with the final court judgment.

According to art. 163 of Law no. 36/1995, the provisions of the law shall be filled with those of the Civil Code and of the Code of Civil Procedure.

3.2. Conditions Involving the Liability of the Notary Public.

To engage civil liability of a notary public in accordance with art. 639 para. 2 Code of Civil Procedure, it is necessary that the final judgment should determine that the following cumulative conditions have been fulfilled (Gavriș, 2013):

1. *the document authenticated by a notary public was cancelled by a civil or criminal court;*

The notarial authentic documents are those prepared by notaries public in accordance with the authentication procedure, regulated by article. 89-100 of Law no. 36/1995. According to art. 89 para. 1 of Law no. 36/1995, the authentic notarial document is drawn up or, where appropriate, received and authenticated by a notary public or by the staff of the diplomatic missions and consular offices, in the form and under the terms established by law.

The documents authenticated by notaries public are multiple, but the question of enforceability does not apply to all of them. Notarial authentic documents are enforceable only if they state evidence of a certain, liquid and payable outstanding debt (Gavriș, 2015).

In art. 663 Code of Civil Procedure the legislator established when a debt meets these conditions. The claim is certain when its indisputably existence becomes clear from the very order of enforcement; is liquid when its object is determined or when the order of enforcement contains elements which enable it, and it is payable if the debtor's obligation is due or he is deprived of the benefit of the payment deadline.

The power as an order of enforcement of the notarial document derives from the fact that the notary is "vested" by law to perform a public service, he has been delegated the power to do "deeds of public authority" (Deleanu, Mitea, Deleanu 2013).

Unlike the enforcement order consisting of a court judgment, by the notarial order of enforcement the notary public does not "order" but only "ascertain" the debt and

authenticates the legal document. In other words, we can say that the deed acquires mandatory force by the will of the parties and its enforceability is gained by the fact that the notary has authenticated that document (Deleanu Mitea Deleanu, 2013).

The authentic documents drawn up by the staff of the diplomatic missions and the consular offices have no power of enforceability at the date of chargeability, even if they find a certain and liquid debt (Gavriș, 2013).

From the correlation of art. 1246 Civil Code referring to the nullity of the contract with art. 1325 Civil Code, which takes the legal act in consideration unilaterally, it appears that any legal document concluded by infringement upon the conditions required by law to validly conclude it is subject to cancellation, if the law provides no other penalty.

Also, according to art. 88 of Law no. 36/1995, the notary public may not perform notarial acts, under the penalty of *nullity (s.n.)*, if:

a) the cause concerns parties or interested persons in any capacity, he, the spouse, ascendants and their descendants;

b) he is the legal representative or empowered person of a party that participates in the authentication procedure.

According to art. 98 of Law no. 36/1995, the conclusion that finds the authentication of a document shall include, under the sanction of *cancellation (s.n.)*, together with the data referred to in art. 83 (comprising elements of conclusion of fulfilment of notarial acts), also the following statements:

a) the finding that the consent of the parties has been requested;

b) the finding that the entry was signed in front of the notary public by all those who were to sign it.

The specification of the notary public that one of the parties could not sign holds the place of the signature of the party;

c) the disposition of investment with an authentic form, which is expressed through {{the words:}} "*The present document is hereby declared to be authentic*".

Nullity, however, must be stated by a civil court in an action relating to the or infringement upon validity conditions or by a criminal court, in case of establishing that an offense has been committed, when the criminal liability of the notary public is applicable.

In addition, the Order of the Minister of Justice No. 2.333/C/2013 approving the Regulation to enforce the Law on notaries public and notarial activity no. 36/1995⁴, established the judicial control of the notary acts and procedures in art. 332 and art. 333.

In this regard, the judicial control of notarial acts and proceedings are carried out according to the law, in an action for annulment or, in case of refusal to fulfil the notarial act, by complaint against the conclusion of rejection issued by the notary public.

An action for annulment of the notarial act shall be exercised by any interested party or by the competent court according to law.

Until the decision becomes final, through which the annulment has been pronounced, the notarial document is considered to be validly fulfilled.

⁴ The Order of the Minister of Justice No. 2.333/C/2013 on approving the Regulation to enforce the Law on notaries public and notarial activity no. 36/1995, was published in the Official Gazette of Romania, Part I, no. 479 from August 1, 2013.

It is not enough that a judgment is delivered by court for the civil liability of the notary public to become applicable, but it must be final.

According to art. 634 Code of Civil Procedure, the following decisions are final:

- Decisions not subject to appeal or recourse;
- Decisions made at first instance, without appeal, not challenged by recourse;
- Decisions made at first instance that have not been challenged by recourse;
- Decisions on appeal, unappealable and those that are not challenged by recourse.
- Decisions on appeal, even if through this the substance of the case was solved.

As provided by para 2 of art. 634 Code of Civil Procedure, these judgments become final on the deadline for exercising the appeal or the recourse or, where applicable, on the date of delivery.

Similar provisions are also found in the Law no. 135/2010 Code of Criminal Procedure⁵. In this regard, according to art. 550 para. 1 Code of Civil Procedure, criminal court rulings are enforceable on the date when they become final.

From the correlation of art. 551. and 552 Code of Criminal Procedure it results that a judgment is final:

- on the date of judgment at first instance when it is not subject to legal contest or appeal;
- on the deadline for appeal or the appeal introduction;
- on withdrawal of the appeal or, where applicable, of the contestation, if it occurred after the deadline for the appeal or after filing a contestation;
- on the date of delivering the judgment by which the appeal, or, where appropriate, the recourse was dismissed;
- on the date of judgment by the appeal court when the appeal was upheld and the process ended in the court of appeal;
- on the date of judgment upon the contestation, when the appeal was upheld and the process ended in the court that judges it;

2. when authenticating document, the notary has not complied with the professional obligations;

To establish the liability of the notary public, we must start from respecting the obligations he has to take over when authenticating a document.

As required by art. 89 para. 2 of Law no. 36/1995, the document authentication shall conform to the following procedure:

- a) establishing the identity of the parties;
- b) the parties express their consent to the contents of the document;
- c) signature of the parties and date of the document.

At the authentication of a document, the parties may be represented by a representative with an authentic power of attorney, except as provided by law. In this situation, the notary public must verify in the National Notarial Register the power of attorney documents and their revocation, and in case of revocation he rejects the authentication request.

Art. 91 of Law no. 36/1995 regulates how the consent of the parties has to be taken. Thus, to get the consent of the parties, after reading the document, the notary public will

⁵ Law no. 135/2010 Code of Civil Procedure was republished in the Official Gazette of Romania, Part I, no. 486 of July 15, 2011, amended and supplemented.

ask them if they understand its contents and whether this content expresses their will. Consent is given by signature.

For good reasons, the notary public may ask the consent of the parties listed in the act separately, but on the same day. In this case, in the conclusion of the agreement to authentication the time and place of taking the consent of each party will be indicated.

The order of the Minister of Justice no. 2.333/C/2013 provides in art. 225, that in case that the deed is authenticated by the notary public, it shall be established by law, in one single original specimen, which is kept in the archives of the notary office.

Each person, as a party in the document, shall be issued upon request, in the requested number, duplicates of the original act, which have the same probative value as the original, and, if the act finds a certain, outstanding, liquid and payable debt, it is, as the original, an enforcement order.

After identifying the parties, their mandatary or legal or conventional representatives, the notary public notify them regarding the content of the document to be authenticated, asks them if they understand the content and the legal consequences and if the things included in the act represent the will of the parties.

Consent is required by the fact that the parties, their representatives, by those called to approve the documents that the parties draw up and, where appropriate, by assistant witnesses. The parties declare that they have read the document or that it has been fully read to them and that they have understood the content and legal consequences and that the content of the deed represents their will.

When taking the consent through an interpreter, he will also sign the deed.

In addition, we must consider the public notary duties, as established by art. 71 of Law no. 36/1995 and art. 14 of the Statute of the National Union of Notaries Public in Romania.

Of those stipulated in art. 71 para. 1 of Law no. 36/1995, when authenticating a document, the notary public must meet the following requirements:

a) comply with the law, the regulations, the Statute of the Union, the Statute of the Insurance Fund of Civil law Notaries and the provisions of the Code of the notaries public;

b) comply with the decisions of the elected bodies of the Union, of the Chambers and specialised committees or other entities created on the level the Union to fulfil the tasks he was entrusted with and to work towards achieving the aim of the Union;

c) to have a dignified behaviour in exercising his function;

Among the obligations laid down in art. 14 of the Statute of the National Union of Notaries Public in Romania, we mention the following:

a) to respect and carry on all their occupational activity in accordance with laws, regulations, rules, norms, the statute and the Code of Conduct;

b) to comply with the principles and duties of notarial conduct and to have a dignified behaviour both in the profession and outside of it;

c) to respect the decisions of the Union and of the Chambers, to fulfil the tasks entrusted to them and to act for achieving the purpose of the Union;

d) to immediately inform the Insurance Fund of Civil law Notaries in relation to disputes concerning work, disputes that could trigger the payment of compensation;

e) to provide, within a reasonable time, upon request, information and/or documents that are required to handle notarial procedures to other notaries public colleagues;

g) to be a good colleague towards any other notary; to seek common solutions together with other public notaries, ensuring the interests of all parties, in accordance with the laws and regulations in force, in situations in which they collaborate in the same case;

h) not to commit acts or works of unfair competition in any form whatsoever;

i) to keep the professional secrecy.

The court will verify if at the moment of the document authentication the notary has violated one of his professional obligations.

Art. 9 of the Statute provides that the notary public is the independent, impartial and objective adviser of the parties, being obliged to comply with the ethical rules of the profession.

In exercising his powers, the notary public shall examine the parties' intentions, put into reality by the acts which he processes and preserve them, gives them authenticity and probatory and enforceable value and ensures the legality of the contractual clauses.

The notary public shall also verify if the parties have full capacity to enter into a notarial act and ensure that they understand the legal consequences of the commitment.

Moreover, the notary public cannot instrument notarial acts and procedures containing provisions for his direct or indirect benefit.

As provided by art. 10 of the Statute, the notary public exercises his duties with probity, availability and diligence.

Among the varied duties of a notary public, the law states also the duty to authenticate documents written by him, by the parties themselves or by the lawyer. This regards those documents which establish legal relations between the parties. To these documents the law gives legal force. The text of art. 639 para. 1 Code of Civil Procedure establishes such a rule. He is a partial reediting of the provisions of art. 100 of Law no. 36/1995, which provides that "the document certified by a notary public that finds a certain and liquid debt has the power of an enforcement order on its chargeability date. In the absence of the original, the enforcement order may be the duplicate or certified copy of the specimen in the archive of the notary public." (Leș, 2013).

Therefore, it is unquestionable that the authentic specimen is, by the will of law, enforceable from the date of the chargeability of the claim. Also, the duplicate or certified copy itself on the specimen from the archives of the notary public shall become an enforcement order (Leș, 2013).

3. culpable failure to comply with professional obligations in any of the forms covered in art 16 Civil Code (intentional or culpable);

The guilt required for the liability of the notary public under the provisions of par. 2 of art. 639 is not the same as the guilt required for the liability under art. 72 of Law no. 36/1995 (in the first case the legislator speaks of guilt, without distinction, while in the second case the legislator speaks of guilt as bad faith) (Gavriș, 2013).

Guilt is defined as the mental attitude of the author of the illicit and harmful crime against the respective crime and its consequences. Art. 16 para. 1 Civil Code provides the forms of guilt, which are intention and guilt. According to art. 16 para. 2 Civil Code the crime is committed by intent, that is with bad faith when its author foresees the result of his crime and has the intention to produce it, or, although he does not seek it, he accepts the possibility of producing that result. Therefore the intention or the wilful misconduct may be: direct intent (direct wilful misconduct) and indirect intent (indirect wilful misconduct) (Pop, Popa, Vidu, 2015).

According to art. 16 para. 3 Civil Code, the wrongful act is culpably committed if the author foresees the result of his act, but does not accept it, believing without reason that it will not occur or, if applicable, does not foresee that result, although he should. The fault may be with anticipation (imprudence) or without anticipation (negligence) (Pop, Popa, Vidu, 2015).

Thus, the form of guilt which may be alleged regarding the notary does not matter, instead, in order to attract its liability, it is necessary to establish his guilt with respect to his professional obligations.

4. *the deed of the notary (commission or omission) has caused a prejudice.*

As resulting from art. 1349 paragraphs 1 and 2 Civil Code, of art. 1357-1371 Civil Code and art. 1381-1395 Civil Code, liability for damages caused by his own wrongful act and, moreover, of the entire tort liability makes it imperative that four cumulative conditions or constituent elements exist: damage, wrongful act, the causal link between the wrongful act and the damage, guilt of the author of the harmful and illegal act (Pop, Popa, Vidu, 2015).

By damage we refer to the harmful economic or moral outcome or results, which are the consequences of abusing or harming the rights and interests of a person (Pop, Popa, Vidu, 2015; Durac, 2012).

In order for the damage to be repaired or compensated, it must meet the following requirements: to be certain, direct, personal and to result in attainment or impairment of a right or at least of a legitimate interest (Pop, Popa, Vidu, 2015).

A damage is certain when its current or future existence is certain, undeniable, and also its extent to the present may be determined. First, the current damages are certain, that is those damages that occurred entirely until the moment the victim seeks compensation for them. The future damages that have not occurred are also certain if two conditions are met: it is sure that they will occur and their evaluation is possible when required to be repaired ((Pop, Popa, Vidu, 2015).

The damage is direct when between the wrongful act and the unjust damage caused to the victim there is a causal link, that is a link from cause to effect. It is present in the case of damage caused both directly and indirectly (Pop, Popa, Vidu, 2015).

The personal character of the damage is interpreted flexibly at present. It does not prevent repairing the collective damages resulting from infringement of rights or interests belonging to entire categories or groups of persons or for damage by ricochet. Mass torts are those unjustly caused to a group of persons (a collective of employees, co-owners of a building, members of a certain profession, a consumer group, etc.) by an unlawful act of infringement of rights or legitimate interests belonging to them (Pop, Popa, Vidu, 2015).

The damage results from the violation of a legitimate right or interest, is a condition resulting from the very definition of the damage, as a notion of law, and must necessarily be met, whether the damage is patrimonial, bodily or moral. There is no doubt that a damage is repairable if it is the result of the violation of patrimonial or non-patrimonial subjective rights (Pop, Popa, Vidu, 2015).

To be legitimate and to create the appearance of a subjective right by its mode of expression, the interest should have characters of stability, i.e. a permanent plentiful and, at the same time not against the imperative law, public order and morality (Pop, Popa, Vidu, 2015).

By wrongful act we understand human action or inaction contrary to the law or morality, resulting in prejudice or violation of subjective rights or legitimate interests of another person (Pop, Popa, Vidu, 2015).

For the existence and applicability of the civil liability it is required that between the harmful act and the damage suffered by the victim there is a causal link. Most times the harmful act is an illegal act of man. There are also causes that exclude the existence of a causal relationship (cases that exempt from liability) force majeure (art. 1351 Civil Code) unforeseeable circumstances (art. 1351 par. 3 Civil Code.), action of the victim and the action of a third person (art. 1352 Civil Code). (Pop, Popa, Vidu, 2015).

According to art. 15 of the Statute, the notary public is responsible for how he performs his duties concerning the legality of legal relationships that he finds, the exercise of rights and protection under the law of the interests of persons requiring completion of notarial acts, as well as for the violation of the provisions of the law, the regulation of enforcement of the law, the status and other acts that regulate the profession.

Art. 16 of the Statute provides that the liability of the notary public may be engaged under the law.

In the presence of these conditions, notary public liability is engaged under tort liability for its own deed set out in art. 1357-1371 Civil Code, in correlation with art. 639 para. 2 Civil Code Procedure.

It should be noted that the legislator stressed that the notary public will be liable *only* (*s.n.*) for the culpable breach each of his professional obligations, in case of cancellation of the authentic that finds an outstanding, liquid and payable debt, followed by causing damage, established by final judgment (Roșu, 2015).

For this reason, the civil liability of the notary does not apply when the cancellation or revocation reasons are not related to the compliance or failure to comply to the professional duties of a notary public. The civil liability of the notary is not applicable when the reason for nullity was caused solely by a party or a third party (Gavriș, 2013).

Also, the notary's liability cannot be applicable if the authenticated document that was an enforcement order, has no legal effect other than following an action for annulment (Gavriș, 2013).

3.3. The relation between the Code of Civil Procedure and Law no. 36/1995.

In respect of the liability of the notary public, it was considered that the *Code of Civil Procedure is a special law (s. n.)* in respect to Law no. 36/1995. For this reason, it is arguable that Law no. 77/2012, which expressly amended Law no. 36/1995 and is also subsequent to Law no. 76/2012 on implementing and amending the Code of Civil Procedure, would have implicitly amended para 2 of art. 639 Code of Civil Procedure. If the legislator wants that the liability of the notary public under art. 639 para. 2 Code of Civil Procedure to be applicable only for the guilt in the form of intent (the term of guilt as bad faith, introduced by Law no. 77/2012, is correlated only with the old Civil Code) will have to amend the Code of Civil Procedure (Gavriș, 2013).

In legal literature the classification as a special law against the Code of Civil Procedure Law. 36/1995 regarding the liability of the notary public has been criticised (Dobrican, 2013), because through art. 2 para. 2 Code of Civil Procedure it is provided that the provisions of the Code of Civil Procedure represent the common law procedure in civil matters.

We, too, appreciate that the Code of Civil Procedure represents the common law, is the general law regarding civil procedural matters and Law no. 36/1995 represents the special law.

Regarding the insertion in para. 2 of art. 639 Code of Civil Procedure of the liability of notaries public in the variant after the first republication it was considered that it had been done without taking into account the norms of legislative technique, as it is a parallel regulation of the tort liability of the notary public for his own deed (Dobrican, 2013).

On the contrary, we believe that in the case ruled by art. 639 para. 2 Code of Civil Procedure we now have a clear field of application referring only to authentic notarial documents that find an outstanding, liquid and payable debt.

Likewise, it was considered that the field of application of the provisions of art. 639 para. 2 Code of Civil Procedure is limited to the cases of cancellation of authentic notarial documents that are enforcement orders and regarding to which the execution started or has even been completed. If the authentic cancellation was ordered by the court prior to the commencement of enforcement, the provisions of art. 639 do not apply, and the possible liability of the notary will be involved only in terms of art. 72 of Law no. 36/1995 or art. 1258 Civil Code (Gavriş, 2013).

4. RECOVERY OF DAMAGES CAUSED BY THE NOTARY PUBLIC BY THE ENTITLED PERSON.

In order to compensate the damaged persons, according to the model of the French law, a system of professional liability insurances of the notaries has been established. This is achieved by the insurance fund that has been established for this purpose (Leş, 2014).

According to art. 195 para. 2 of Order no. 2333/C2013, the civil liability insurance of notaries public guarantees payment of damages in the amount insured by the contract signed by a notary public with the Insurance Fund under the law.

The procedure by which the Insurance Fund offers compensations is determined by its statutes and rules approved by the Council of the Union.

According to art. 180 from the Order, before the commencement of business, the notary public is obliged, under the penalty not to be issued the operating license, to conclude the insurance contract with the Insurance Funds, thus becoming its member.

During exercising the function, the notary public is obliged, under the penalty of withdrawal of the operating license, to pay the cost of the insurance police annually, as stipulated by the insurance contract.

On withdrawal of the operating license, the insurance contract is terminated or suspended, as appropriate, if the capacity of notary public is ended or respectively suspended.

Art. 181 of the Order provides that each year when issuing insurance policies, the Insurance Funds will require information on the professional conduct of the notary public from the Union, and depending also on those there will be drawn up a sheet regarding the professional risk assessment of the notary public based on which, under the statute, the Board will establish the annual amount of the insurance amount, the mandatory insured sum, the obligation of completion of the maximum insured sum, and, correlative, the payment of the insurance amount and the kind of insurance policy.

So as art. 182 of the Order features, there are also exceptions, in which case no damages are paid because the insured risks are not included in the Insurance Funds

regarding the activities of notaries public as trustees and/or liquidators appointed by the parties.

However, even for such activities, the civil liability of the notary public may be applicable.

5. CONCLUSIONS

The authentic notarial document that finds an outstanding, liquid and payable debt is a ground for enforcement of the debtor, for which its valid conclusion is essential.

In case of cancellation of that document, under art. 639 para. 2 Code of Civil Procedure we have a case of *malpractice*, because the notary public has improperly exercised his professional obligations.

The notary public needs to take over civil liability if the conditions are fulfilled for him to do so for his own deed, because the cancellation of the authentic document has the effect of abolishing the legal act and leading to the obligation to repair the caused damage.

By exercising a service of public interest, the notary public bears liability for the proper fulfilment of his professional obligations and therefore, in case of *malpractice* he undertakes tort liability for his own deed.

REFERENCES

- Boroi Gabriel, Stancu Mirela, *Drept procesual civil*, Hamangiu Publishing House, Bucharest, 2015, p. 966, p. 967.
- Deleanu Ion, Mitea Valentin, Deleanu Sergiu, *Noul Cod de procedură civilă, vol. II (art. 622-1133), Comentariu pe articole*, Universul Juridic Publishing House, Bucharest, 2013, p. 39.
- Dobrican Gheorghe, *Răspunderea civilă delictuală a notarului public pentru fapta proprie*, Buletinul Notarilor Publici nr. 3/2013, p. 7, p. 10.
- Durac Gheorghe, *Comentariu* (la art. 1357), în „Noul Cod civil. Comentarii, doctrină și jurisprudență” vol. II, Art. 953-1649, Hamangiu Publishing House, Bucharest, 2012, p. 686.
- Gavriș Dumitru Marcel, *Comentariu* (la art. 639), în „Noul Cod de procedură civilă. Comentariu pe articole” (coordinator G. Boroi), vol. II, Art. 527-1133, Hamangiu Publishing House, Bucharest, 2013, p. 110, p. 111, p. 112.
- Leș Ioan, *Noul Cod de procedură civilă. Comentariul pe articole, art. 1-1133*, C. H. Beck Publishing House, Bucharest, 2013, p. 906.
- Leș Ioan, *Elemente de drept notarial, Ediția 3*, C. H. Beck Publishing House, Bucharest, 2014, p. 57, p. 58. 59.
- Mihail Mircea, *Unele considerații în legătură cu natura juridică a activității notariale*, Dreptul nr. 3/1997, p. 51.
- Pop Liviu, Popa Ionuț-Florin, Vidu Stelian, *Curs de Drept civil. Obligațiile*, niversul Juridic Publishing House, Bucharest, 2015, p. 329, p. 330, p. 333, p. 335, p. 336, p. 337, p. 350, p. 353.
- Roșu Claudia, *Drept procesual civil. Partea specială conform noului Cod de procedură civilă, Ediția 6*, C. H. Beck Publishing House, Bucharest, 2015, p. 250.