

NOTARY LEGAL RESPONSIBILITIES ON ISSUANCE OF COVERNOTES IN CREDIT AGREEMENTS IN INDONESIA

Ratu Shyfa Nur Chodiza^{1*}, Ahmad Sudiro^{1,2}

¹Faculty of Law, Tarumanagara University, West Jakarta 11440, Indonesia

Email: mrsshfyf@gmail.com

*Corresponding author

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ABSTRACT

Covernote is a certificate made and issued by a notary. In general, covernotes are used to obtain applications for credit agreement to a bank with guaranteed land ownership rights that have been tied with mortgage guarantees. In its development, the need for land rights guarantees can be suspended, if it is in the process of obtaining a certificate by a notary. However, in the event of misuse of the covernote creation and publication, the notary can be held liable in accordance with the applicable legal provisions. The legal basis for making and publishing a covernote by a notary has not yet been regulated in Undang-Undang Jabatan Notaris (UUJN), so that it can lead to legal consequences and a vacuum of legal norms occurs. The problem that often occurs is what is the legal responsibility of a notary towards the issuance of covernotes in credit agreements in Indonesia. The legal responsibility of a notary related to the issuance of a covernote is the imposition of sanctions, both legal and administrative sanctions. In addition, the legal consequence for a notary who fails to carry out a covernote is that the notary is required to immediately complete it, based on the agreement of both parties. Publishing and the making of covernotes by a Notary does not have a legal basis. This is because they are only based on a habit accepted by the community, so they are trusted and considered as a binding legal product. Notaries are authorized to issue covernotes because they are classified as a form of agreement that binds the parties, even though it is not regulated in the applicable laws and regulations. This is only regulated based on the legal terms of the agreement as contained in the provisions of Article 1320 Kitab Undang-Undang Hukum Perdata (KUH Perdata).

Keywords: *Covernote, Notary, Legal responsibility*

1. PREFACE

One of the legal products issued by a notary is a covernote which is a letter needed to apply for a certificate or document explaining the deed being made by a notary is currently in process and can be completed within the period specified in the contents of the covernote. In general, covernotes are used in the credit application process at banking institutions. In the world of banking, covernotes have become a habit or customary law which is considered to have binding legal force for the parties. Covernote is used as one of the conditions in the credit application process, which is used as a temporary guarantee during the process of completing the authentic deed made by a notary. The authentic deed in question is the process of changing the name of the land ownership certificate, the roya process, splitting the land certificate into two certificates, and or other arrangements. However, in general, a covernote is made and issued by a notary as a statement to ensure legal certainty regarding the process of issuing a deed or document that is in the process of being completed.

According to the generation type of assumptions, we divided the existed work into two categories. Applications for credit applications at banking institutions require a guarantee. In the event that the debtor submits an application for credit using the right to ownership of a plot of land, then the certificate must be bound with a mortgage guarantee. However, if in the process of

binding the mortgage there are obstacles and problems, and the time required to carry out the binding is very long, then the bank as a creditor can ask the debtor to include a covernote from a notary as proof that the certificate of land ownership is in the process of securing the binding of collateral. mortgage rights or are in the process of being certified by a notary.

The covernote is listed by the bank as part of the credit application requirements to speed up the credit disbursement process. Covernote is used as a substitute if there is insufficient evidence of collateral due to a need and is only temporary evidence until the notary completes the deed of land ownership which is in process to the bank. The role, function, and position of the covernote are not regulated in laws and regulations, especially in Undang-Undang Nomor 2 Tahun 2014 tentang Perubahan Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris (hereinafter abbreviated UUJN), so that there is a legal vacuum in the making and publishing of covernotes by a notary.

In general, a covernote is a letter explaining that there is an ongoing process in the management of unfinished deeds. This usually happens in credit agreements which require a certificate as an object of guarantee. However, the land deeds that have been made one of the equipment in the credit agreement have not been fulfilled. Furthermore, to facilitate the process of completing the credit agreement, the notary makes a covernote as a certificate explaining the conditions related to the certificate processing process that has not been completed.

The duties and authorities of a notary are regulated in Undang-Undang Jabatan Notaris (UUJN), and in the provisions of the Act there is nothing that explains that a notary can issue a covernote to explain the deed that is still in the process of being processed. Therefore, the covernote is not a notary product based on the written law, because it is not stated in the provisions of the Notary Position Act, that a notary can make and issue a covernote as collateral. However, in practice it is often found that covernotes are used for interested parties. The notary who issues a deed or covernote must be selective in providing information regarding the unfinished management process. Covernotes are not used as collateral and evidence of collateral, but rather as a conveyer for interested parties to provide trust and fulfill one of the requirements for credit applications made by notary clients.

The authority of a notary in making an authentic deed is at the request of the parties and does not conflict with the provisions of Article 1320 Kitab Undang-Undang Hukum Perdata (Civil Law). On the basis of this authority, notaries are required to carry out their duties and obligations professionally in providing legal guarantees to interested parties. In daily practice, a notary must have a good personality and uphold the dignity of the position of a notary. Notaries are not bound by legal relations/agreements that have been made by the parties previously. Notaries are not involved in the implementation of rights and obligations and are outside the law of the parties, if there is a dispute in the future regarding what was agreed in a deed. Disputes arising from the notary's error either due to negligence or intentional, then the notary must be responsible both morally and legally. The deed made by a notary must contain the necessary conditions to achieve the authentic nature of the deed as regulated in Undang-Undang Jabatan Notaris (UUJN).

In practice, notaries are sometimes involved with legal cases either as witnesses, co-defendants, or as suspects. The involvement of a notary in a legal case can be caused by an error in the deed they made, either because of a notary error or an error from the parties, or one of the parties providing information or documents that are not true or there is no good faith from the parties or

one of the parties. Or there has been an agreement between a notary and one of the parties that causes harm to the other party. Undang-Undang Jabatan Notaris (UUJN) stipulates that when a notary in carrying out his duties is proven to have committed a violation, the notary can be subject to sanctions, either in the form of civil, administrative sanctions, or the code of ethics for the position of a notary. These sanctions have been arranged in such a way by UUJN and a notary code of ethics, and UUJN does not regulate criminal sanctions against notaries.^[1]

However, the absence of criminal sanctions in the UUJN does not result in a notary being free from criminal responsibility in carrying out his position. A notary as a public official who violates the law and/or violates the law and has a criminal aspect, the notary concerned may be subject to criminal sanctions based on the provisions Kitab Undang-Undang Hukum Pidana (Criminal Code), and or other applicable criminal law regulations. One of the cases that occurred in the misuse of covernote publications made by a notary in Pangkalpinang, Bangka Belitung Islands in 2021. Notary GH was detained at the High Prosecutor's Office after going through an examination by the Prosecutor's Office, for allegedly being involved in a fictitious credit case at Bank Rakyat Indonesia (BRI) Pangkalpinang Branch by issuing a covernote. The Assistant for Special Crimes at the Bangka Belitung Islands Attorney General's Office, Ketut Winawa, said that Notary GH had made and issued a covernote or certificate as a requirement to obtain credit facilities for debtors who did not comply with the facts regarding the increase in collateral to a Freehold Title (SHM), thus causing state losses of around Rp. 40 Billion. The Prosecutor's Office ensnared the parties involved in the case under the provisions of Article 3Jo. Article 18 Law Number 31 of 1999, as amended by Law Number 20 of 2001 concerning Eradication of Criminal Acts of Corruption, Jo. Article 55 paragraph (1), Jo. Article 64 paragraph (1) Criminal Law (KUHP), dan Criminal Procedure Code (KUHP).^[2] In this case the defendant GH was found guilty based on the Pangkalpinang District Court Decision No: 21/Pid.Sus-TPK/2021/PN.Pgp., January 21, 2022. Based on this, the author is interested in discussing and analyzing how the Liability and Legal Consequences of Notaries in Issuing Covernotes in Credit Agreements in Indonesia.

Paper Structure

The rest of the paper is organized as follows. Section 2 introduces the legal theory used in this paper, which include Responsibility and Consequence theory. Section 3 presents the result of the research including the case and its legal analytics. Finally, Section 6 concludes the paper

2. RESEARCH METHOD

Responsibility Theory

Raden Soegondo Notodisoerjo states about what can be accounted for by a notary, namely if the fraud or deception originates from the notary himself. This can happen if the notary in a transaction of transfer of rights, for example in a deed of sale and purchase, intentionally includes a lower price than the actual price.^[3] According to Abdulkadir Muhammad, the theory of responsibility in breaking the law is divided into several theories, namely: ^[4] (a) Liability due to unlawful acts committed intentionally, the defendant must have committed such an act, thereby harming the plaintiff or knowing that what the defendant did would result in a loss. (b) Liability due to unlawful acts committed due to negligence (negligence tort liability), is based on the concept of fault related to morality and law that has been intermingled. (c) Strict Liability for violating the law without questioning the error (strict liability), is based on his actions either intentionally or unintentionally, meaning that even though it is not his fault he is still responsible for the losses that arise because of his actions.

According to Hans Kelsen in his theory of legal responsibility states that "a person is legally responsible for a certain act or that he bears legal responsibility". Legal subject means that he is responsible for a sanction in the event of a conflicting event. In addition, Hans Kelsen states that: "Failure to exercise the care required by law is called negligence (negligence), and oversight is usually seen as another type of error (culpa), although not as severe as the error fulfilled by anticipating and willing, by or without malicious intent, harmful consequences".^[5]

Consequence Theory

Legal consequences are consequences caused by law, on an act committed by a legal subject.^[6] Legal consequences are a result of actions taken, to obtain a result expected by legal actors. The consequences referred to in this case are the consequences regulated by law, while the actions taken are legal actions, namely actions that are in accordance with applicable law.^[7] Legal consequences are consequences caused by a legal event, which can be in the form of: (a) the emergence, change or disappearance of a legal situation. (b) the emergence, change or disappearance of a legal relationship between two or more legal subjects, where the rights and obligations of one party conflict with the rights and obligations of the other party, and (c) The emergence of sanctions if an action is against the law.^[8] Legal consequences are events caused by a cause, namely actions committed by legal subjects, both actions that are in accordance with the law, or actions that are not in accordance with the law.

Article 1266 of Criminal Code (KUH Perdata) provide legal consequences for debtors who are not active in the agreement. In addition, legal consequences are all consequences that occur from all legal actions carried out by legal subjects against legal objects or other consequences caused because certain events by the law concerned have been determined or considered as legal consequences.^[9]

Based on this description, to be able to find out whether or not a legal consequence has arisen, it is necessary to pay attention to the following things: (a) the existence of actions carried out by legal subjects against legal objects or there are certain consequences of an act, which consequences have been regulated by law, (b) the existence of actions that are immediately carried out intersect with the implementation of rights and obligations that have been regulated in law (written law).

3. RESULT AND DISCUSSION

A covernote issued by a Notary/PPAT does not have the power of perfect proof, like an authentic deed. The legal consequences of the covernote, if there are legal problems, both civil and criminal, that occur or arise, then the form of accountability to the Notary is the imposition of sanctions. Several categories of notary liability can be classified, namely notary liability based on UUJN, notary code of ethics, and the notary's responsibility based on the Criminal Code. In this case, the notary GH was named a defendant in a corruption case. Notary GH is suspected of having participated in assisting in the disbursement of credit facilities at Bank Rakyat Indonesia (BRI) Pangkalpinang Branch, causing state financial losses.

Provisions regarding sanctions against Notaries are contained in the Law on Notary Positions and the Notary Code of Ethics. Sanctions as a form of effort to enforce the Notary Code of Ethics for violations of the Code of Ethics are defined as a punishment intended as a means of effort and a means of forcing Notary obedience and discipline. This is different from the previous UUJN which stipulates provisions regarding sanctions only in Article 84 and Article 85 only. In the new UUJN, there are 5 (five) kinds of sanctions, namely: (a) verbal warning; (b)

written warning; (c) temporary discharged; (d) honorably discharged; or (e) discharged (Pemberhentian dengan tidak hormat).

A Notary, in carrying out his duties, must be responsible for his position and must be responsible for every sentence and be responsible for all his actions. Basically, responsibility is the obligation to a person to properly carry out what has been obligated to him. Responsibility is exercised by someone who is able to act morally. The object of responsibility is a truly human action departing from the part of a human who acts through free will.^[10] The Notary's responsibility is not only for himself from his professional colleagues, but also for clients and the community who need his services. A notary relationship with a client must be based on:^[11] (a) notaries provide services to people who need the best services; (b) notaries provide legal counseling to achieve high legal awareness, so that community members are aware of their rights and obligations; (c) notaries must provide services to underprivileged members of the community.

A notary as a public official means a person with certain conditions who has attributive authority from the state to carry out some public functions of the state, especially in the field of civil law, namely, to make an authentic deed as evidence. The meaning of the word attributive here is the authority granted by the state through the law. The Notary is equipped with a public authority which is obtained by the Notary after taking an oath. Thus, the Notary can make an authentic deed after the Notary takes the oath. the oath in question contains two elements of promise in it, a promise to the state and a promise to the notary office. In carrying out the oath of office, the notary promises to keep the deed he made in the best possible way and is confidential. This is because the position of a notary is a mandate. In carrying out his position, the notary is prohibited from telling about who the parties or people met, and what was discussed and what was made in the deed.

The responsibilities of a Notary as a public official related to material truth, which are distinguished in: (a) the civil liability of the Notary to the material truth in the deed they made, © the Notary's criminal responsibility for the material truth in the deed he made, (c) the Notary's responsibilities under the Notary Position Act on the material truth in the deed he made, and (d) the responsibilities of a Notary in carrying out his/her duties are based on the Notary Code of Ethics.

In addition, the responsibilities of a Notary are explained in the provisions of Article 65 of the UUJN, as follows: **“Notaries, Substitute Notaries and Temporary Notary Officials are responsible for every deed made even though the Notary protocol is submitted or transferred to the Notary protocol keeper”**.

Notaries must also be responsible to the Notary Code of Ethics based on the provisions of Article 6 paragraph (2) of the Notary Code of Ethics.

Meanwhile, in this case, it can be related to the Notary's responsibility in the form of criminal legal responsibility. Because the Notary is considered involved and has participated in assisting the process of disbursing credit facilities issued by Bank Rakyat Indonesia (Persero) Tbk which is a State-Owned Enterprise (BUMN), causing state financial losses. As for what is meant by criminal liability is something that is criminally responsible for someone who commits a criminal act or criminal act.^[12] Perpetrators of criminal acts can be penalized if they fulfill the

elements and offenses listed in the Act. Based on this, the perpetrator must meet the elements of guilt and guilt, namely: ^[13] (a) the ability to be responsible or accountable from the perpetrator, (b) there is a psychological link between the perpetrator and the deed, namely the existence of intentional or error in a narrow sense (*culpa*), (c) the perpetrator has an awareness that the perpetrator should be able to know the consequences of his actions, and (d) there is no basis for eliminating a crime that removes responsibility for an act to the perpetrator.

In this case, Notary GH as the defendant in the first instance decision, namely the Pangkalpinang District Court Decision Number: 21/Pid.Sus-TPK/2021/PN.Pgp., January 21, 2022, was sentenced to a subsidiary charge, namely the provisions of Article 3 Jo. Article 18 of Law Number 31 of 1999, as amended by Law Number 20 of 2001 concerning Eradication of Criminal Acts of Corruption, Jo. Article 55 paragraph (1), Jo. Article 64 paragraph (1) Civil Law (KUHP) and sentenced to imprisonment for 8 (eight) years and a fine of Rp. 50,000,000.00 (fifty million rupiah) with the condition that if the criminal fine is not paid by the defendant, then it is replaced with imprisonment for 4 (four) months.

Based on the consideration of the Panel of Judges of the Pangkalpinang District Court, it can be related to the authority of a Notary in carrying out the duties and responsibilities of a Notary. However, according to the author, the covernote issued by GH as a Notary in this case actually did not abuse his authority or violate the provisions of the UUJN. This has been explained regarding the authority and form of notary accountability, there is no prohibition on making or publishing covernotes. Referring to the case study, the covernote made and published by Notary GH does not contain an order to disburse the credit facility provided by BRI as a creditor to the debtor, but only regarding the binding of credit and guarantees provided by the Debtor. Therefore, in carrying out their duties and authorities, Notaries must always comply with the provisions of the UUJN, the Code of Ethics, and other relevant laws and regulations.^[14] Thus, every word and legal action taken by a Notary including in the making of a covernote can be held accountable.

Based on the concept and meaning of abuse of authority, the act of a Notary in issuing a covernote cannot be categorized as an abuse of office authority, both in terms of the Corruption Crime Act and the Government Administration Act.. In this case, the Notary is asked to make a covernote which does not include an order to disburse credit funds from the creditor to the debtor. Notaries in making and issuing covernotes contain facts that are appropriate and submitted by both parties, namely creditors and debtors, so that the actions of the Notary in issuing covernotes are not an abuse of office authority. If there are still parties who feel aggrieved by the actions of the Notary, they can submit other legal remedies to the Regional Supervisory Council, Regional Supervisory Council, or Central Supervisory Council, which relates to the supervision of the Notary.^[15]

4. CONCLUSIONS AND RECOMMENDATIONS

Based on the concept and meaning of abuse of authority, the actual act of a Notary in issuing a covernote cannot be categorized as an abuse of office authority, both in terms of the Corruption Crime Act and the Government Administration Act. In this case, the Notary is asked to make a covernote which does not include an order to disburse credit funds from the creditor to the debtor. Notaries in making and issuing covernotes only contain facts that are appropriate and submitted by both parties, namely creditors and debtors, so that the actions of the Notary in issuing covernotes are not an abuse of office authority. If there are still parties who feel aggrieved by the actions of the Notary GH, then they can submit other legal remedies to the

Regional Supervisory Council, Regional Supervisory Council, or Central Supervisory Council, which relates to the supervision of the Notary.

The legal consequences for Notaries if they fail to carry out the covernote, the Notary can be held accountable to immediately resolve it, based on an agreement between the two parties. If there are legal problems related to the issuance and implementation of the covernote, the sanctions given are legal sanctions and/or administrative sanctions. Basically the covernote is not regulated in the legislation or positive law in Indonesia. The making and publishing of a covernote by a Notary has no legal basis because it is made based on a custom accepted by the community, so it is trusted and considered a binding legal product. A notary is authorized to make and issue a covernote because it is a form of agreement that binds the parties, even though it is not regulated in laws and regulations, but is regulated based on the legal terms of the agreement as in the provisions of Article 1320 Civil Codes (KUH Perdata).

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