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Notary Liability for Formal Defects in Guarantee Deeds in Resolution of Financing Disputes

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Abstract

This study examines the legal liability of notaries for formal defects in security deeds and their implications for the evidentiary value of such deeds in the resolution of financing disputes. Authentic deeds serve as a primary legal instrument for ensuring certainty in high-risk financing transactions; therefore, any formal non-compliance may significantly affect their probative force. The central issue addressed in this research is how formal irregularities influence the evidentiary strength of security deeds and to what extent a notary may be held liable when such defects result in losses to the parties involved. This research employs a normative legal method, applying statutory, conceptual, and case-based approaches. The findings demonstrate that formal defects may undermine both the external and formal evidentiary validity of security deeds, potentially degrading their status to private deeds. Such a shift weakens the creditor's evidentiary position and impairs the effective enforcement of secured rights. From the perspective of liability theory, notarial accountability is generally fault-based, requiring proof of negligence or intent, actual damage, and a causal nexus between the notary's conduct and the loss incurred. The novelty of this article lies in the development of an integrated analytical framework that bridges evidentiary theory and liability theory to distinguish between reparable formal defects and fatal defects that directly diminish evidentiary force. The study underscores the necessity of strict procedural compliance, heightened professional diligence, and proportionate accountability mechanisms to safeguard legal certainty in financing practices while preserving the institutional independence of the notarial profession.

INTRODUCTION

The notary occupies a highly central position within the Indonesian civil law system, particularly in ensuring legal certainty through the drafting and authentication of authentic deeds.[1] As a public official vested with authority by the state, a notary positions the notarial deed as a legal instrument possessing the highest evidentiary value within the civil law system of proof. A notarial deed functions not only as a form of written evidence, but also as a legal

[1] Tengku Rizq Frisky Syahbana, "Peran Notaris untuk Mewujudkan Kepastian Hukum Pengalihan Hak Merek Terdaftar dalam Pelaksanaan Homologasi Akibat Debitor Pailit," *Jurnal Notarius: Program Studi Kenotariatan Pascasarjana UMSU* Vol. 11, no. 2 (2025): 84–99.

instrument designed to establish order, provide legal protection, and ensure certainty for the parties engaging in legal acts.[2] Accordingly, the existence and quality of notarial deeds have direct implications for the stability of civil legal relationships, particularly within the field of financing. In line with this position, notaries essentially perform a preventive function within the civil law system. Through the execution of authentic deeds, a notary does not merely record the intentions of the parties but also ensures that the legal act fulfills the substantive and formal requirements of a valid agreement, does not contravene statutory regulations, and does not violate public interest. This preventive function positions the notary as a gatekeeper of legal certainty, as from the outset the notary is expected to prevent the emergence of disputes arising from ambiguity regarding the parties' rights and obligations.[3]

The preventive role of the notary becomes increasingly significant within the context of complex legal relationships involving substantial economic value. In civil legal relations that encompass financial interests, the risk of default and legal disputes tends to be higher, thereby necessitating a legal instrument capable of ensuring certainty, protection, and clarity of evidence. An authentic deed executed by a notary is therefore expected to function not merely as a reflection of the parties' agreement, but also as a legally accountable instrument that provides assurance that the legal act can be upheld and enforced should a dispute arise in the future.[4] The need for legal certainty is particularly evident in the financing sector, which involves legal relationships between creditors and debtors characterized by a high degree of risk. Financing arrangements are fundamentally grounded in trust; however, such trust must be reinforced by a robust and well-structured legal framework. In this context, the existence of a notarial deed becomes crucial, as it serves as the principal legal foundation governing the rights and obligations of the parties, while simultaneously functioning as decisive evidence in the resolution of disputes. Accordingly, the quality and validity of deeds executed by a notary exert a direct influence on the effectiveness of legal protection in financing practices.

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[2] Ni Luh Gede Astariyani dan Endi Pratama, "Peran Notaris dalam Memperkuat Fungsi Hukum sebagai Sarana Rekayasa Sosial," *Acta Comitas: Jurnal Hukum Kenotariatan* 10, no. 02 (2025): 275–289, https://doi.org/10.24843/AC.2025.v10.i02.p4.

[3] Kostiantyn Gusarov, Olena Oleksandrivna Shchokina, Iryna Mykolayivna Cherevatenko, Olena Viktorivna Kolisnyk, dan Yana Leonidivna Kolomiets, "Preventive Function of a Notary in the Legal System of Society," *Documenta & Instrumenta* 21 (2023): 111–126, http://dx.doi.org/10.5209/docu.88106

[4] Siti Ahsanu Nadya, "The Validity of Credit Agreement Deeds Non-Compliant with the Law on the Office of Notaries: A Review from the Perspective of Legal Certainty and Accountability," *Al-Qanun: Jurnal Kajian Sosial dan Hukum Islam* 7, no. 1 (2026): 43–51.

In financing practices, whether within banking institutions or non-bank financial entities, security deeds executed by a notary constitute the principal foundation for ensuring the debtor's fulfillment of obligations and safeguarding the creditor's interests. Security instruments such as the Deed of Mortgage, the Fiduciary Security Deed, and other financing agreement deeds not only establish secured legal relationships but also confer legal legitimacy and certainty regarding executorial rights in the event of the debtor's default.[5] Accordingly, a security deed performs a dual function: it serves as the legal basis for the creation of a secured legal relationship, while simultaneously constituting an authentic evidentiary instrument that is decisive in ensuring effective legal protection in the resolution of financing disputes.

Within Indonesia's civil evidentiary system, an authentic deed carries perfect and binding evidentiary force (*volledig en bindende bewijskracht*), as stipulated in Article 1868 of the Indonesian Civil Code. This evidentiary force encompasses external, formal, and material probative value, which, in theory, leaves little room for the parties to deny the truth of the deed's contents, except through a highly stringent counter-evidence mechanism. Accordingly, the authenticity and formal validity of a security deed constitute absolute prerequisites for the deed to function optimally as evidence in judicial proceedings. Nevertheless, in notarial practice, security deeds containing formal defects are not uncommon. Such defects may include non-compliance with formal requirements under the Notary Office Act, such as negligence in reading the deed aloud, the absence of the parties or witnesses, errors in the parties' identities, inconsistencies in the date or place of execution, and failure to satisfy the mandatory structure of an authentic deed.[6] Such formal defects are often perceived as merely administrative irregularities; however, within the context of evidentiary proceedings and financing disputes, they may give rise to significant and far-reaching legal consequences.

The principal implication of formal defects in a security deed lies in the degradation of its status as evidence. A deed that initially holds the status of an authentic instrument may lose its authentic character and be reduced to the status of a private deed, and in certain circumstances, it may even be declared null and void by operation of law. Such conditions generate significant legal uncertainty, particularly for creditors who rely on the validity and executorial force of the security deed to safeguard their rights. In financing disputes, the

[5] Maysarah Maysarah, "Tindak Pidana Kuasa Penuh dalam Perjanjian Fidusia Pembiayaan Kendaraan Bermotor," *IURIS STUDIA: Jurnal Kajian* 1, no. 1 (Juni 2020): 39–48, http://jurnal.bundamediagrup.co.id/index.php/iuris

[6] Gladys Natalie Aurielle Sirait, "Liability of Notarial Deeds as Authentic Deeds in Accordance with the Notary Office Law," *UNES Law Review* 5, no. 4 (2023): 3363–3378, https://doi.org/10.31933/unesrev.v5i4.641

existence of formal defects is frequently invoked by debtors to challenge the validity of the security deed, thereby weakening the creditor's legal position. The degradation of the legal status of a security deed resulting from formal defects does not merely affect its evidentiary value; it also has broader implications for the effectiveness of the legal protection promised under the system of proprietary security rights.[7] A security deed that loses its authentic character may undermine legal certainty regarding the creditor's preferential rights, particularly in the context of enforcement. Once the deed's executorial force is called into question, the realization of the creditor's rights tends to become protracted and wholly dependent on a court judgment, which may ultimately harm economic interests and destabilize financing relationships.

Moreover, formal defects in a security deed can affect the balance of the parties' legal positions within a financing agreement. In theory, a security deed is intended to maintain equilibrium by providing clear legal protection for the creditor without disregarding the debtor's rights. However, when the deed's validity is challenged due to formal defects, this balance is disrupted. The debtor may be placed in a comparatively advantageous position by gaining room to evade performance, while the creditor faces uncertainty in legally enforcing its rights. More broadly, this condition reflects a gap between the normative objectives underlying the establishment of security deeds and their implementation in practice. Normatively, security deeds are designed to ensure certainty, protection, and ease of proof. Yet, in practice, formal defects may shift the function of security deeds from instruments of legal certainty into new sources of dispute. This indicates that formal defects in security deeds should not be treated merely as technical issues, but rather as systemic problems that directly affect the effectiveness of civil law enforcement.

The issue of formal defects in security deeds becomes increasingly critical alongside the rise of financing disputes in Indonesia. Such disputes commonly relate to default, the enforcement of security, objections to the validity of financing agreements, or challenges to the deed-making process. In many cases, judges assess not only the substance of the agreement but also the deed's formal validity as the evidentiary basis. Divergent judicial interpretations regarding the legal consequences of formal defects in security deeds suggest that evidentiary assessment remains a problematic area that has not yet achieved full

[7] Dilla Pyarrani dan Sisca Ferawati Burhanuddin, "Peran Notaris dalam Menjamin Keabsahan dan Autentisitas Akta Kredit Perbankan," *Jurnal USM Law Review* 8, no. 3 (2025), https://doi.org/10.26623/julr.v8i3.10081

consistency in judicial practice. In this context, evidentiary theory is relevant for analyzing the probative status of formally defective security deeds in the resolution of financing disputes. Evidentiary theory explains how evidence is evaluated, tested, and weighted by judges in adjudication. Under this theory, the strength of an item of evidence is determined not only by its formal form but also by its procedural validity and the substantive truth it embodies. Accordingly, a notarial deed that suffers from formal defects may lose its authentic character and open space for the court to reassess its probative value by considering other forms of evidence, such as witness testimony, supplementary documents, or judicial inferences.

Beyond affecting the evidentiary status of the security deed, formal defects also raise issues concerning the notary's legal liability. As a public official, a notary is obliged to act with due care, independence, and professionalism in the performance of his or her office.[8] Such obligations are not merely administrative in nature; they also encompass a dimension of legal responsibility where violations result in losses to the parties. Where a formally defective security deed causes harm to either the creditor or the debtor, the question arises as to the extent to which the notary may be held legally liable for negligence or error committed in the performance of his or her duties. The theory of legal liability provides an essential analytical framework for determining the basis and form of a notary's responsibility for formal defects in the deeds he or she has executed.[9] From a civil law perspective, a notary's liability may be grounded either in tort (*unlawful act*) or in breach of contract, depending on the legal construction of the relationship between the notary and the parties. In addition, a notary may be subject to administrative and ethical sanctions through supervisory mechanisms administered by the Notary Supervisory Council. Accordingly, notarial liability is multidimensional in nature, encompassing civil, administrative, and professional ethical dimensions. However, in practice, the imposition of legal liability on notaries for formal defects in security deeds continues to face various challenges. One of the principal obstacles lies in differing interpretations regarding the boundary between mere administrative errors

[8] Chintia Ayala Brigarys, "Pertanggungjawaban Etik Notaris atas Akta Notaril RUPS yang Menyimpang dari Kehendak Para Pihak," *Kertha Semaya: Journal Ilmu Hukum* 13, no. 11 (2025): 2649–2661, https://doi.org/10.24843/KS.2025.v13.i11.p17.

[9] Safira Rasheesa Alfath, "Tanggung Jawab Hukum Notaris dan Pengurus Perusahaan atas Pembuatan Akta Korporasi," *Jurnal Penelitian Serambi Hukum* 19, no. 01: 250–262, https://doi.org/10.59582/sh.v19i01.1427.

and errors that give rise to substantive legal consequences.[10] Not every formal defect automatically gives rise to legal liability on the part of the notary, particularly where such defect does not significantly affect the substance of the agreement or result in actual loss. Accordingly, a careful analysis is required to distinguish between defects that are fatal in nature and those that are reparable.

At the same time, the protection of notaries as public officials constitutes an equally important concern. In high-value financing disputes, notaries often occupy a vulnerable position in relation to civil and even criminal claims. In certain cases, notaries are sued on the basis of formal errors that are in fact influenced by the bad faith of one of the parties or by factual circumstances beyond the notary's control. Such conditions may undermine both the independence of the notarial office and the professional security necessary for notaries to perform their public functions effectively. Therefore, a balanced approach is required one that safeguards the interests of the parties to financing agreements while also ensuring adequate protection for notaries in their capacity as public officials. An analysis grounded in evidentiary theory and liability theory is expected to provide a comprehensive understanding of the probative status of formally defective security deeds, while simultaneously delineating the proportional, fair, and legally certain limits of notarial liability.

Research on the legal liability of notaries for formal defects in security deeds carries significant urgency, both practically and academically. From a practical standpoint, such research is expected to provide guidance for notaries in enhancing diligence and professionalism in the drafting of security deeds, as well as for financing institutions in mitigating legal risks. From an academic perspective, it contributes to the development of notarial law and evidentiary law, particularly in bridging the gap between statutory norms, legal doctrine, and judicial practice. In light of the foregoing analysis, it can be concluded that formal defects in security deeds do not merely affect the validity of the deed as evidence in financing disputes, but also generate serious implications for the construction of notarial legal liability. Accordingly, an in-depth and systematic examination of notarial liability for formal defects in security deeds as evidentiary instruments in the resolution of financing disputes

[10] Sa'adah Sa'adah, Saima Amalia, Hildatul Hidayah, dan Siti Rahma Anggita, "Analisis Yuridis atas Akta Notaris yang Cacat Hukum dan Implikasinya terhadap Keabsahan Perjanjian," *Indonesian Journal of Islamic Jurisprudence, Economic and Legal Theory* 3, no. 2 (2025): 1566–1573, https://doi.org/10.62976/ijijel.v3i2.1146

analyzed through the lens of evidentiary theory and liability theory is both necessary and highly relevant.

This study employs a normative legal research method (doctrinal legal research), positioning law as a set of norms governing human conduct within society. The research adopts several approaches. First, a statute approach is applied through an examination of the Indonesian Civil Code, Law Number 2 of 2014 concerning the Office of Notary, Law Number 4 of 1996 concerning Mortgage Rights, as well as implementing regulations relating to security deeds and civil evidentiary law. Second, a conceptual approach is utilized by analyzing the concepts of authentic deeds, formal defects, evidentiary force, and notarial legal liability based on legal doctrines and scholarly opinions. Third, a case approach is undertaken through a review of judicial decisions relevant to financing disputes and the enforceability of security deeds containing formal defects.

The legal materials employed consist of primary legal materials in the form of statutory regulations and court decisions; secondary legal materials, including legal literature, textbooks, scholarly journal articles, and related research findings; and tertiary legal materials, such as legal dictionaries and encyclopedias. All materials are collected through library research and analyzed qualitatively using a deductive method of reasoning, drawing conclusions from general legal norms to their application in concrete issues concerning formal defects in security deeds and the legal liability of notaries.

DISCUSSION

The Juridical Implications of Formal Defects in Security Deeds on Their Evidentiary Status in Financing Dispute Resolution: A Perspective from the Theory of Evidence

In financing practices, both within banking and non-banking institutions, the existence of a security deed plays a central role as a legal instrument that safeguards the interests of creditors while simultaneously ensuring legal certainty for debtors. Security instruments such as the Deed of Granting of Mortgage, the Power of Attorney to Encumber Mortgage, the Fiduciary Security Deed, and other guarantee agreements are generally executed in the form of authentic deeds before a notary or Land Deed Official in accordance with prevailing statutory regulations.[11] The juridical consequence of its execution in the form of an authentic

[11] Imelda Martinelli, Namira Diffany Nuzan, Putri Meilika Nadilatasya, dan Gratia Ester Simatupang, "Relevansi Hak Tanggungan dan Jaminan Fidusia pada Bank OCBC (Berdasarkan Putusan Nomor: 403/Pdt/2015/PT.MDN)," *Jurnal Pendidikan Sejarah dan Riset Sosial Humaniora* 4, no. 3 (2024): 187–197.

deed is the attachment of full and binding evidentiary force, as stipulated in Article 1868 of the Indonesian Civil Code. Article 1868 of the Indonesian Civil Code further stipulates that an authentic deed is a deed drawn up in the form prescribed by law, by or before a duly authorized public official, at the place where the deed is executed.[12] Accordingly, the authenticity of a security deed is contingent upon the fulfillment of several essential elements: the competence of the public official authorized to execute the deed, compliance with the statutory formal requirements, and adherence to the legally prescribed procedures governing its execution. Where any of these elements is not satisfied, the security deed may be deemed to suffer from a formal defect, which in turn has a direct impact on its status and probative value as evidence in the resolution of financing disputes.[13]

In the context of civil evidentiary law, an authentic deed occupies the position of written evidence endowed with full and binding probative force (*volledig en bindende bewijskracht*), thereby granting it a heightened evidentiary authority in judicial proceedings.[14] This implies that the contents set forth in an authentic deed must be presumed true by the court unless rebutted through legally admissible evidentiary mechanisms. Nevertheless, such probative force is inherently conditional, as it depends upon the formal and substantive validity of the deed in question. Where a formal defect arises, the evidentiary force of the deed may be diminished or, in certain circumstances, entirely nullified. A formal defect in a security deed refers to a discrepancy between the deed-making process and the normative requirements prescribed by statutory regulations. In the notarial context, the formal requirements for executing a deed are regulated in detail under Law No. 2 of 2014 concerning the Amendment to Law No. 30 of 2004 on the Office of Notary (*Undang-Undang Jabatan Notaris/UUJN*). Article 38 of the UUJN stipulates the structure and form of a notarial deed ranging from the deed's heading, to its main body, and to its closing each of which contains mandatory elements that must be complied with.[15]

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[12] Irpan Ramadhan, "Analisis Terkait Akta Otentik sebagai Alat Bukti dalam Perkara Hukum Perdata," *AL-DALIL: Jurnal Ilmu Sosial, Politik, dan Hukum* 2, no. 3: 32–37, https://doi.org/10.58707/aldalil.v2i3.875

[13] Dilla Pyarrani dan Sisca Ferawati Burhanuddin, "Peran Notaris dalam Menjamin Keabsahan dan Autentisitas Akta Kredit Perbankan," *Jurnal USM Law Review* 8, no. 3 (2025), https://doi.org/10.26623/julr.v8i3.10081

[14] Devira Ramadhani, Hasim Purba, dan Sutiarnoto, "Tanggung Jawab Notaris terhadap Akta Perjanjian Jual Beli Rumah yang Dikeluarkan Berdasarkan Keterangan Palsu oleh Para Pihak (Studi Putusan Pengadilan Nomor 433/Pdt.G/2021/PN.Mdn)," *Rewang Rencang: Jurnal Hukum Lex Generalis* 6, no. 4 (2025): 1–29, https://doi.org/10.56370/jhlg.v6i4.1369

[15] Kerina Maulidya Putri, Ichsan Anwary, dan Diana Haiti, "Kewajiban Notaris Melakukan Pembacaan dan Penandatanganan Akta di Depan Semua Pihak secara Bersama-Sama," *Notary Law Journal* 1, no. 2 (April 2022): 157–175, https://notarylaw.journal.ulm.ac.id/index.php/nolaj

Furthermore, Article 16 paragraph (1) letter (m) of the UUJN obliges the notary to read the deed aloud before the appearing parties and witnesses, and to ensure that it is signed at that same time by the parties, the witnesses, and the notary.[16] A breach of this obligation constitutes a form of formal defect that carries explicit legal consequences, as provided under Article 41 of the UUJN. This provision stipulates that a notarial deed which fails to comply with the requirements set forth in Articles 38, 39, and 40 shall possess evidentiary force only equivalent to that of a private deed, thereby losing its status as an authentic deed with full and binding probative value. In the context of specific security instruments, such as the Deed of Granting of Mortgage, formal requirements are likewise governed by Law No. 4 of 1996 concerning Mortgage Rights over Land and Objects Related to Land. Article 10 paragraph (2) of the UUHT mandates that the establishment of a mortgage right must be effected through the execution of an APHT before a Land Deed Official. Where the APHT is executed in a manner inconsistent with the prescribed procedures for instance, in the absence of the parties or without a valid underlying principal agreement its formal validity may be subject to legal challenge, thereby calling into question its evidentiary authority and enforceability.

Accordingly, formal defects may arise from non-compliance with the UUJN, the UUHT, or other implementing regulations, including Ministerial Regulations of the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency (ATR/BPN) governing, inter alia, the procedures for mortgage registration. Such formal defects do not invariably render the deed null and void by operation of law; however, they may substantially affect the probative force of the security deed in financing disputes. Within evidentiary theory, several principal approaches are commonly identified, including the free proof theory, the bound proof theory, and the negative statutory proof theory. Indonesian civil procedural law essentially adheres to a negative statutory proof system, as reflected in Article 1866 of the Indonesian Civil Code and Article 164 of the HIR, which enumerate the legally admissible forms of evidence namely documentary evidence, witness testimony, presumptions, confession, and oath.

Under the free proof theory (*vrij bewijsstelsel*), the judge is granted broad discretion to evaluate the evidence presented by the parties, without being strictly bound by statutory rules governing either the admissibility or the predetermined probative value of particular types of

[16] Amirahni Zahra Tripipo, Rembrandt, dan Hasbi, "Tanggungjawab Notaris terhadap Akta yang Tidak Dibacakan Notaris di Hadapan Para Pihak (Studi Putusan Mahkamah Agung No. 351 PK/PDT/2018)," *Unes Journal of Swara Justisia* 8, no. 4 (2025), https://doi.org/10.31933/ws1xgd96

evidence. This approach has developed extensively within common law systems, where judicial conviction (*conviction intime*) plays a decisive role in determining the truth of a legal event or claim.[17] Within this system, the judge is not confined to a closed or exhaustive list of admissible evidence, but may take into account any relevant facts, provided they are deemed rational and persuasive. However, the principal weakness of the free proof theory lies in the potential for judicial subjectivity, which may undermine legal certainty particularly in civil cases that require robust protection of the parties' private rights and obligations. In contrast to the free proof theory, the bound proof theory (*positief wettelijk bewijsstelsel*) positions the judge as strictly bound by statutory provisions governing both the admissible types of evidence and their prescribed probative value.[18] This theory was advanced, inter alia, by Wirjono Prodjodikoro and was rigorously adhered to in classical legal systems, wherein judicial decisions were determined solely by the fulfillment of the evidentiary requirements prescribed by statute, without regard to the judge's personal conviction or inner belief.[19] Within this framework, once the formally prescribed evidentiary requirements have been satisfied, the judge is obligated to grant or dismiss the claim in strict accordance with the applicable statutory provisions. Although this theory promotes a high degree of legal certainty, its rigid application is often criticized for being insufficiently responsive to substantive justice, as it disregards the judge's rational assessment and inner conviction regarding the facts established at trial.

As a middle ground, the negative statutory proof theory (*negatief wettelijk bewijsstelsel*) emerged, combining legally prescribed forms of admissible evidence with the judge's personal conviction. This theory has been elaborated upon by scholars such as Van Bemmelen and Sudikno Mertokusumo and is reflected in the Indonesian civil procedural system. Under this approach, a court may render a decision only where legally admissible evidence, as determined by statute, is present and accompanied by the judge's conviction regarding the truth of the disputed legal facts. This framework is embodied in Article 1866 of

[17] Nimerodi Gulo dan Cornelius Dikae Zolohefona Gulo, "Timbulnya Keyakinan Hakim dalam Hukum Pembuktian Perkara Pidana di Peradilan Indonesia," *UNES Law Review* 6, no. 3 (2024): 8115–8122, https://doi.org/10.31933/unesrev.v6i3.1672

[18] Jojor Cristina dan Indri Manalu, "Analisis Peran Alat Bukti dan Keterangan Saksi dalam Menentukan Keputusan Pengadilan Pidana," *Jurnal Kajian Hukum dan Kebijakan Publik* 3, no. 1 (2025): 245–263, https://doi.org/10.62379/6vsnhe93

[19] Sumiaty Adelina Hutabarat, Ica Karina, Jupri Wandy Banjarnahor, Asmak ul Hosnah, dan Nur Asmarani, *Pengantar Hukum Pidana: Teori dan Implementasi pada Era Revolusi Industri 4.0 Menuju Era Society 5.0* (PT. Sonpedia Publishing Indonesia, 2024).

the Indonesian Civil Code and Article 164 of the HIR, which provide a closed enumeration of the legally recognized forms of evidence.[20] Accordingly, this evidentiary system not only ensures legal certainty through the statutory regulation of admissible forms of evidence, but also affords room for the judge's rational and objective assessment in evaluating the facts of the case.

An authentic deed as a form of documentary evidence possesses three distinct layers of evidentiary force: external, formal, and material probative value. The external evidentiary force relates to the validity of the deed's outward form as an authentic instrument. The formal evidentiary force concerns the certainty that the legal act recorded therein was indeed carried out before the authorized public official. Meanwhile, the material evidentiary force pertains to the substantive truth of the statements or declarations made by the parties within the deed. Where a security deed suffers from a formal defect, the first aspects affected are its external and formal probative force. In such circumstances, the deed can no longer automatically be regarded as an authentic instrument but is instead reduced to the status of a private deed. Consequently, it loses its binding effect upon the court and retains evidentiary value only insofar as it is acknowledged by the party against whom it is invoked, as provided under Article 1875 of the Indonesian Civil Code.[21]

The principal juridical implication of a formal defect in a security deed is the degradation of its evidentiary standing. In financing disputes, this consequence is particularly critical, as security deeds frequently serve as the legal basis for enforcing collateral or compelling the debtor's performance of contractual obligations. Once a security deed loses its authentic character, the creditor no longer possesses a form of evidence endowed with full and binding probative force to substantiate the claim. Moreover, a formal defect may create an opportunity for the debtor to raise objections or defenses challenging the validity of the security deed. In judicial practice, it is not uncommon for debtors to contest formal aspects of the deed's execution, such as the failure to read the deed aloud, the absence of witnesses, or discrepancies in the parties' identities. Where the court upholds such arguments and declares

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[20] Yossiramah Sucia dan Meissy Putri Deswari, "Bukti Elektronik dalam Sistem Peradilan: Memahami Peran dan Validitasnya," *Innovative: Journal of Social Science Research* 4, no. 4: 13729–13741, https://doi.org/10.31004/innovative.v4i4.14698

[21] Kevin Varrisco Christoven Soenartha, Kadek Januarsa Adi Sudharma, Anak Agung Ayu Intan Puspadewi, dan Dewa Ayu Putri Sukadana, "Kekuatan Hukum Kontrak yang Dibuat Tanpa Akta Notaris Menurut KUH Perdata," *Al-Zayn: Jurnal Ilmu Sosial & Hukum* 3, no. 6 (2025): 8089–8098, https://doi.org/10.61104/alz.v3i6.2517

the deed formally defective, it can no longer function as the principal evidentiary basis in the dispute.

Furthermore, in the context of the enforcement of security rights particularly mortgage rights and fiduciary security formal defects may impede the exercise of *parate executie*. Article 6 of the UUHT grants the holder of a mortgage right the authority to sell the secured object on its own power in the event of the debtor's default.[22] However, this right may only be exercised where the mortgage right has been validly established and evidenced by an APHT that satisfies both formal and substantive requirements. If the APHT is tainted by a formal defect, the creditor must pursue an ordinary civil action, which inevitably entails greater time and financial costs. From the standpoint of legal theory, a formal defect in a security deed is closely linked to the principle of legal certainty (*rechtszekerheid*). Authentic deeds are fundamentally designed to ensure legal certainty for the parties as well as for third parties. When a security deed is formally defective, this objective of legal certainty is undermined, as the legal position of the parties becomes ambiguous and susceptible to dispute.

In the context of the liability of a notary or Land Deed Official, a formal defect in a security deed may also give rise to juridical consequences in the form of administrative, civil, or even criminal responsibility, depending on the nature and degree of fault involved. Article 84 of the UUJN provides the possibility for an aggrieved party to claim damages against the notary where it is established that the defect resulted from error or negligence in the execution of the deed.[23] In judicial practice, courts assess not only the formal validity of a deed from a normative standpoint, but also take into account principles of fairness and the good faith of the parties. Nevertheless, evidentiary theory remains the principal analytical framework for determining the probative force of documentary evidence. A security deed affected by a formal defect is not automatically rendered devoid of evidentiary value; rather, its status is reduced to that of a private deed, whose probative force is relative and contingent rather than full and binding.

This position is consistent with the principles of *lex scripta*, *lex certa*, and *lex stricta*, which require that the application of law be grounded in clear and explicit written provisions. In this regard, evidentiary theory provides both academic and normative justification for the

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[22] Ana Silviana, "Fungsi Surat Kuasa Memasang Hak Tanggungan (SKMHT) dalam Pemberian Hak Tanggungan (Studi Perspektif UU No. 4 Tahun 1996 tentang Hak Tanggungan Beserta Benda-Benda yang Berkaitan dengan Tanah)," *Diponegoro Private Law Review* 4, no. 1 (Juni 2020): 28–39.

[23] Muhammad Alfatahri dan Azhari Yahya, "The Responsibility of the Notary regarding the Fulfillment of the Elements of Article 41 of the Notary Office Law," *Beijing Law Review* 13 (2022): 81.

juridical consequences arising from formal defects in security deeds, while simultaneously underscoring the imperative of strict compliance with prescribed formal procedures in the drafting of such instruments. Based on the foregoing analysis, it may be concluded that formal defects in security deeds carry significant juridical implications for their standing as evidence in the resolution of financing disputes. From the perspective of evidentiary theory, a formal defect results in the loss or diminution of the deed's probative force, such that it no longer possesses full and binding evidentiary authority. This condition not only disadvantages creditors but also undermines the principle of legal certainty, which constitutes the primary objective of authentic deeds. Accordingly, adherence to formal statutory requirements in the execution of security deeds is an indispensable prerequisite to preserving their effectiveness as evidentiary instruments and to ensuring legal protection for the parties within financing relationships.

The Construction of Notarial Legal Liability for Formal Defects in Security Deeds Affecting Their Evidentiary Force in Financing Disputes: A Legal Liability Theory Perspective

In financing practices, particularly within banking institutions and non-bank financial entities, security deeds occupy a central position as legal instruments that ensure certainty in the legal relationship between creditor and debtor. Security instruments such as the Deed of Granting of Mortgage, the Power of Attorney to Encumber Mortgage, fiduciary deeds, and other forms of security agreements are generally executed in the form of authentic deeds by a notary or Land Deed Official within the scope of their statutory authority. The existence of such authentic deeds is crucial, as they function not merely as written evidence but also as a legal safeguard for creditors in the event of default or financing disputes. A notary, as a public official affirmed under Article 1 point (1) of Law No. 2 of 2014 concerning the Amendment to Law No. 30 of 2004 on the Office of Notary, is vested with the authority to draw up authentic deeds concerning all legal acts, agreements, and stipulations desired by the parties. This authority carries juridical consequences in the form of an obligation to ensure that the formal requirements of the deed are fully satisfied, so that the deed may attain full evidentiary force as contemplated under Article 1868 of the Indonesian Civil Code. [24]

[24] Salsabilla Azahra Sriyanto, "Cyber Notary Regulation in Indonesia: Juridical Challenges and Proposed Model for Ensuring the Authenticity and Evidentiary Strength of Electronic Notarial Deeds," *Al-Risalah Jurnal Ilmu Syariah dan Hukum* (2025): 876–893, https://doi.org/10.24252/al-risalah.vi.61843.

In practice, however, formal defects in the execution of security deeds are not uncommon. Such defects may include the absence of the parties, inaccuracies in their identities, failure to comply with the prescribed procedures for reading and signing the deed, or other administrative irregularities. These formal deficiencies may diminish or even nullify the deed's evidentiary force in financing disputes, thereby causing prejudice to the parties, particularly the creditor. This circumstance gives rise to a critical issue concerning the construction of notarial legal liability for formal defects in security deeds. Doctrinally, an authentic deed possesses three layers of evidentiary force: external, formal, and material probative value. The external evidentiary force pertains to the validity of the deed's outward form as an authentic instrument executed by or before a competent public official. The formal evidentiary force relates to the certainty that the legal acts recorded therein were carried out in accordance with prescribed legal procedures before the notary. Meanwhile, the material evidentiary force concerns the substantive truth of the statements or declarations of the parties as embodied in the deed.

Formal defects in security deeds generally stem from non-compliance with the formal requirements prescribed under the UUJN, including, inter alia, Article 16 paragraph (1) letter (m), which obliges the notary to read the deed aloud before the appearing parties and witnesses, and Article 38, which regulates the structure and procedural formalities of deed execution. Failure to comply with these provisions may result in the loss of the deed's authentic character, reducing its evidentiary force to that of a private deed, or in certain circumstances rendering it devoid of probative value altogether. In the context of financing disputes, such a diminution of evidentiary force carries serious consequences. A creditor who initially occupies a strong legal position based on an authentic deed may lose the benefit of conclusive evidence in pursuing performance of contractual obligations or enforcement of collateral. Accordingly, formal defects in security deeds cannot be regarded merely as administrative irregularities; rather, they have direct implications for legal protection and the principle of legal certainty within financing relationships.

To construct the legal liability of a notary for formal defects in security deeds, it is necessary to employ the analytical framework of liability theory. In legal doctrine, several forms of liability are commonly recognized, including fault-based liability, risk-based liability, and strict liability.[25] Within the context of the notarial office, legal liability is generally grounded in fault-based responsibility, whether arising from intentional misconduct (*dolus*) or negligence (*culpa*). This approach aligns with Hans Kelsen's view that legal responsibility emerges as a consequence of a violation of a legal norm to which a sanction is attached.[26] Accordingly, a notary may be held legally liable where it is established that he or she has breached statutory obligations prescribed by law and that such breach has resulted in harm or loss. Article 16 of the UUJN expressly regulates the duties of a notary in the exercise of office, including the obligation to act honestly, carefully, independently, impartially, and to safeguard the interests of the parties. A breach of these obligationsparticularly where it results in a formal defect in a deed may constitute a legal basis for holding the notary accountable, including through:

a. Civil Liability

The civil liability of a notary for formal defects in a deed of guarantee may be legally grounded in Article 1365 of the Indonesian Civil Code, which governs liability for unlawful acts, insofar as the elements of fault, damage, and causation are duly established.[27] The elements of an unlawful act consist of the existence of an unlawful conduct, fault, damage, and a causal relationship between the conduct and the damage. Where a notary negligently fails to comply with the formal requirements governing the execution of a deed of guarantee, resulting in the loss of its evidentiary value and causing harm to the creditor or debtor, the notary may be held civilly liable for damages. Furthermore, civil liability may also be predicated on breach of contract where a contractual relationship exists between the notary and the parties, particularly within the framework of notarial services. Although the legal relationship between a notary and an appearing party is public in nature, legal doctrine and jurisprudence recognize its private law dimension, thereby allowing claims for compensation where the notary fails to perform professional obligations with due care and diligence.

[25] Krisnadi Nasution, "Penerapan Prinsip Tanggung Jawab Pengangkut terhadap Penumpang Bus Umum," *Jurnal Mimbar Hukum Fakultas Hukum Universitas Gadjah Mada* 26, no. 1 (2014): 55–71.

[26] Rohidah Rohidah, Putra Hutomo, dan Yuliana Setiadi, "Tanggung Jawab Notaris terhadap Akta Pernyataan Keputusan Rapat Umum Pemegang Saham yang Didasarkan pada Risalah Rapat Palsu," *Politica: Jurnal Hukum Tata Negara dan Politik Islam* 12, no. 2 (2025): 509–520, https://doi.org/10.32505/politica.v12i2.13182

[27] Mendy Cevitra dan Gunawan Djajaputra, "Perbuatan Melawan Hukum (*Onrechtmatige Daad*) Menurut Pasal 1365 Kitab Undang-Undang Hukum Perdata dan Perkembangannya," *UNES Law Review* 6, no. 1 (2023): 2722–2731, https://doi.org/10.31933/unesrev.v6i1.1074.

b. Administrative Liability

The administrative liability of a notary is regulated under the Law on Notarial Office (UUJN) through a supervisory mechanism exercised by the Notary Supervisory Councils, namely the Regional Supervisory Council, the Provincial Supervisory Council, and the Central Supervisory Council.[28] Article 85 of the Law on Notarial Office (UUJN) stipulates the administrative sanctions that may be imposed on a notary, ranging from an oral warning and a written warning to temporary suspension and dismissal with dishonor.[29] Formal defects in a deed of guarantee arising from procedural violations may serve as a basis for the Supervisory Council to impose administrative sanctions, particularly where such violations are repeated or produce serious consequences for the interests of the parties. This form of administrative liability is preventive and corrective in character, aiming to uphold the dignity of the notarial office and to ensure the quality and legal reliability of the deeds issued.

c. Criminal Liability

Under certain circumstances, formal defects in a deed of guarantee may also give rise to criminal liability on the part of the notary, particularly where such defects involve intentional misconduct or forgery. Article 264 of the Indonesian Criminal Code regulates the forgery of authentic deeds committed by a public official and provides for more severe criminal sanctions.[30] Nevertheless, the criminal liability of a notary must be clearly distinguished from mere administrative violations or ordinary negligence, in order to prevent the unwarranted criminalization of the notarial office. In financing disputes, establishing a causal link between formal defects in a deed of guarantee and the resulting loss constitutes a crucial evidentiary issue. The diminished evidentiary value of a deed due to formal defects must be demonstrated as the direct cause of the loss suffered by a particular party. For instance, where a court determines that a deed of guarantee fails to satisfy the requirements of an authentic deed and

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[28] Yuli Marlina, Iyah Faniyah, dan Syofiarti, "Pembinaan dan Pengawasan Notaris dalam Upaya Penegakan Tugas serta Fungsi Jabatan oleh Majelis Pengawas Daerah," *Unes Journal of Swara Justisia* 9, no. 3 (2025): 549–558, https://doi.org/10.31933/6ct0z286.

[29] Marcelina Siti Nabila dan Pieter E. Latumeten, "Penerapan Sanksi Administratif terhadap Notaris yang Melakukan Pelanggaran terhadap Jabatannya (Studi Putusan Pengadilan Tata Usaha Negara No. 235/G/2019/PTUN.KT)," *UNES Law Review* 6, no. 2 (2023), https://doi.org/10.31933/unesrev.v6i2.1354.

[30] Jane Patricia Suryanto, "Analisis Yuridis terhadap Tindak Pidana Pemalsuan Akta Otentik oleh Notaris: Studi Kasus No. 146 K/PID/2015," *UNES Law Review* 6, no. 3 (2024): 8095–8104, https://doi.org/10.31933/unesrev.v6i3.1689.

therefore cannot serve as a basis for execution, the creditor's loss may be directly attributed to the notary's negligence in complying with the formal requirements governing the execution of the deed.

Within the framework of the negative statutory theory of proof, judges assess legally admissible evidence in conjunction with their judicial conviction. Consequently, formal defects that weaken the probative force of written evidence may significantly influence judicial determinations in financing disputes. From a theoretical perspective, the construction of notarial liability for formal defects in a deed of guarantee underscores that the notarial office is not merely administrative in character but encompasses a broad dimension of legal responsibility. A notary cannot shield himself or herself behind the formal nature of the office where negligence or violation of legal duties is proven to have caused harm to the parties.

Practically, this construction demands an enhanced duty of care in the drafting of deeds of guarantee, particularly in financing transactions that entail substantial legal and economic risks. Compliance with the Law on Notarial Office (UUJN) and related regulations is not merely a normative obligation but also serves as a protective safeguard for notaries against potential legal claims. Accordingly, the legal liability of a notary for formal defects in a deed of guarantee affecting its evidentiary strength in financing disputes may be conceptualized within a fault-based liability framework that emphasizes both wrongful conduct and its legal consequences. Such formal defects are not merely technical irregularities; they carry serious implications for evidentiary authority and the legal protection of the parties. Therefore, notaries must perform their duties with professionalism, diligence, and accountability in order to ensure legal certainty and justice in financing practices.

CONCLUSION

Formal defects in a deed of guarantee directly affect its status as evidence in financing disputes. An authentic deed retains its full probative force only if all statutory formalities are fulfilled. Non-compliance with requirements under the Civil Code, the Law on Notarial Office, and relevant security regulations may reduce its evidentiary value, potentially degrading it into a private deed or rendering it invalid. Within the negative statutory system of proof, this weakening of evidentiary strength undermines the creditor's position, enables debtor objections, and may obstruct enforcement, including parate execution. Thus, formal defects have serious implications for legal certainty and the balance of the parties' rights.

Notarial liability for such defects is grounded in a fault-based framework. As a public official, a notary has a duty of care to ensure compliance with legal formalities. Civil liability arises where intentional misconduct or negligence causes proven loss, subject to the establishment of fault, damage, and causation. Administrative sanctions may also apply under supervisory mechanisms, while criminal liability is limited to cases involving clear criminal intent, such as forgery. Not all formal defects result in liability; a proportional assessment is required to distinguish minor irregularities from defects that materially impair evidentiary force. Overall, these conclusions highlight the importance of strict procedural compliance, professional diligence, and effective supervision in notarial practice, while ensuring that liability is imposed only upon clear proof of fault and causation to preserve both legal protection and professional independence.

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