









LEX JOURNAL: KAJIAN HUKUM DAN KEADILAN

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**Analysis of Legal Protection for Consumers against the Inclusion of the
Exoneration Clause in the Insurance Contract**

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ABSTRACT

This research aims to analyze the legal consequences of the inclusion of exoneration clauses in insurance contracts and forms of legal protection for consumers. The type of research used in this research is normative legal research using a statutory approach, conceptual approach, and analytical approach. The legal consequences of the inclusion of an exoneration clause in an insurance contract based on the Civil Code, the exoneration clause can be null and void if it does not meet the legal requirements of the agreement, while according to the *GCPL*, the clause can be canceled, with the contract remaining valid without the clause. Legal protection of consumers is carried out through preventive approaches, such as strengthening insurance regulations and literacy, and repressive, through lawsuits to cancel clauses and claims for compensation. Dispute resolution can be through litigation in court or non-litigation through the Consumer Dispute Resolution Agency (*BPSK*). This research recommends strengthening law enforcement and increasing awareness of business actors to ensure the balance of interests in insurance contracts, so that consumers are protected from exploitative practices.

Keywords: Consumer Protection, Exculpatory Clauses, Insurance Contracts

1. INTRODUCTION

In the course of daily life, humans will be faced with various favorable or unfavorable life events that lead to uncertainty. Risks can arise from various unexpected

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circumstances, but events can also come from the scope of possibilities. The need for assurance in living and the uncertainty of the possibility of risk makes the presence of an insurance (Prawoto, 2003). Someone who does not want a risk to become a reality should try to avoid loss or loss

The need for protection or insurance guarantees stems from the desire to overcome *uncertainty*. Uncertainty contains risks that can pose a threat to every party, both as individuals and as business people. This uncertainty creates the need to overcome the risk of loss that may arise as a consequence of this uncertainty (Ganie, 2013). This is what triggers the high use of insurance, an important opportunity for insurance companies as well as a challenge that generates profits in the insurance service business. The insurance market as is known is not limited to region and time where various insurance products can be created to be offered to consumers in an effort to sell (Guntara, 2016).

Insurance is an agreement between the insurer and the insured which is generally outlined in the form of an insurance policy as stated in article 1 paragraph 1 of Law Number 40 of 2014 concerning insurance. An insurance agreement is referred to as an agreement in which in exchange for an agreed premium, one party undertakes to compensate the other party for certain subjects as a result of certain hazards. The agreement of the parties is the main substance that gives birth to rights and obligations

Agreement as contained in Article 1313 of the Civil Code (KUHPerdota) states that an agreement is an act by which one or more people bind themselves to one or more people. According to Subekti, an agreement is an event where one person promises to another person or where the two people promise each other to carry out a matter (Subekti, 2005). The discretion in making an agreement is limited by the norm of decency of order as stipulated in Article 1337 of the Civil Code, discretion can even override the regulations contained in the Civil Code. Agreements, both written and oral, are in standard form or standard agreements.

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In standard agreements in general cannot be negotiated by the parties to the agreement, usually business actors unilaterally standardize or standardize the contents, forms, requirements of a form and are generally collective without considering the different conditions owned by consumers, the provisions contained in *standard* agreements are usually called *standard* clauses (*standardized clause*) (Barkatullah, 2021).

Standard clauses are part of an agreement, which means that the rules are based on the rules contained in the Civil Code in Chapter III concerning general obligations. Standard agreements are still being debated by legal experts regarding the validity or invalidity of an agreement that arises in order to bind or be useful as law for the parties to the contract.

In contract law there are three related principles, namely the principle of consensualism, the principle of binding force and the principle of freedom of contract (Kartikawati, 2019). This standard contract has been used in various forms of business activities. The standard contract is basically a principle of freedom of contract as regulated in articles 1320 and 1338 of the Civil Code due to the absence of substantive rules to balance the position between the parties. Therefore, in practice, various problems are often found regarding standard agreements which are generally used by more dominant economic circles such as insurance. Not a few contents of an agreement are determined unilaterally which is detrimental to consumers, therefore the regulation is also contained in Law No. 8 of 1999 concerning Consumer Protection, hereinafter referred to as UUPK.

Article 1 point 10 of the GCPL explains the definition of a standard clause as any rules or provisions and conditions that have been prepared and determined in advance unilaterally by business actors as stated in a document and/or agreement that is binding and must be fulfilled by consumers. However, on the other hand, business actors in offering goods and/or services intended for trade are prohibited from making or

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including standard clauses in every document, as stated in Article 18 paragraph (1) of the GCPL.

The existence of the GCPL to ensure equality and balance of rights and obligations of consumers and business actors, both providers of goods and services, in general, the provisions are already contained in the Civil Code but are not sufficient to protect the interests of consumers. In fact, problems between consumers and business actors still often occur, especially regarding standard clauses, even though regulations on this matter already exist

With regard to consumer protection, what needs to get the main attention in standard agreements is the exoneration clause in an insurance contract. The exoneration clause, according to Mariam Darus Badruzaman, is a clause that contains restrictions on the liability of creditors, against risks and negligence that must be borne (Kristiyanti, 2008). If simplified, the exoneration clause is defined as a clause excluding liability or responsibility in an agreement against the party that determines the agreement where in this case the insurance party is the insurer and. The imbalance between the parties, namely the insured and the insurer, substantially determines that the party has poured conditions in an agreement with a form of transfer of responsibility or what is often called an exculpatory clause

An exoneration clause is a clause included in an agreement by which one party avoids fulfilling its obligations by paying full or limited compensation, which occurs due to breach of promise or unlawful acts (Badruzaman, 1994). Legal protection of the insured against exoneration clauses in insurance policies is a crucial and interesting legal issue to be studied. In the practice of the insurance industry, there is often an imbalance of position between the insurance company as the insurer and the customer as the insured. The insurance company, with its stronger position, has the authority to determine the contents of the policy unilaterally, while the insured is only faced with the choice to accept or reject the terms that have been set (*take it or leave it*).

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As an example of the inclusion of an exculpatory clause in an insurance policy as used by PT American International Group Life where the provisions are contained:

"If the insured in filling out the insurance policy form contains information, data and statements that change, PT American International Group Life as the insurer is not obliged to pay the claim submitted by the insurance consumer as the insured, even though the insured has previously paid the premium. PT American International Group Life as the insurer can also cancel the insured policy".

The complexity of exculpatory clauses in insurance policies also a problem. Many exculpatory clauses are written in complicated language that is difficult for ordinary insureds to understand. As a result, the insured is often unaware of the limitation of insurer's liability contained in the policy. This has the potential to cause losses to the insured especially when they file a claim and only find out the impact of the exculpatory clause that limits or even eliminates their claim rights.

2. RESEARCH METHODS

The type of research used is the Normative Legal Research Method. Normative legal research is a research process to examine and study the law as norms, rules, expectations, legal principles, legal doctrines, legal theories and other literature to answer the legal problems under study. Normative legal research is usually "only" a document study, which uses sources of legal material in the form of laws and regulations, court decisions, contracts/agreements/contracts, legal principles and principles, legal theories, and doctrines/opinions of legal experts (Muhaimin, 2020).

3. DISCUSSION

Forms of Legal Protection to Consumers Due to the Inclusion of the Exposure Clause in the Insurance Contract

According to Satjipto Raharjo, legal protection is to provide protection for human rights that are harmed by others, so that protection is given to the community so that

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they can enjoy all the rights provided by law (Rahardjo, 2000). Philipus M Hadjon also argues that legal protection is an action to protect or provide assistance to legal subjects by using instruments

Legal protection is a universal concept of the rule of law. The 1945 Constitution has also been formulated in Article 1 paragraph (3) regarding the conception of the rule of law or *rechtsstaat* which states "The State of Indonesia is a state of law". The concept of a *welfare state* is the goal of almost all countries around the world. *Welfare state* is the idea that the state is responsible for each of its citizens, namely by way of the welfare of its people through services, assistance, protection and prevention of social problems (Hadiyono, 2020). In Indonesia itself, the 1945 Constitution of the Republic of Indonesia places itself as a state of law to achieve the goals of a welfare state.

Legal protection is defined as protection by law or protection using legal institutions and means. There are several ways of legal protection, including the following (Herlina, 2017):

- a. Making regulations (*by giving regulations*), the aim is to provide rights and obligations and guarantee the rights of legal subjects.
- b. Enforcing regulations (*by the law enforcement*), through State administrative law which serves to *prevent (preventive)* violations of consumer rights, by licensing and supervision, criminal law which serves to tackle any violations of laws and regulations by enforcing legal sanctions in the form of criminal sanctions and civil law which serves to restore rights (*curative, recovery*) by paying compensation or compensation.

Referring to the theory of legal protection, legal protection in the Consumer Protection Law can be interpreted as an effort to provide protection to consumers to ensure consumers get fair legal protection in the form of methods, forms and others *preventively* or *repressively*, written and oral. This legal protection is a construction of a legal function that has a concept that provides justice, benefits, and legal certainty.

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Furthermore, in the development of legal thinking in Indonesia by Philipus M. Hadjon, legal protection is the protection of dignity and human rights owned by legal subjects based on legal provisions (Admin, n.d.). According to Philipus M. Hadjon, legal protection is divided into two, namely preventive protection and repressive protection. Preventive protection is a form of protection given to object to his opinion before a government decision is given. Meanwhile, repressive protection is given after the rules of law have been violated or if someone feels their rights have been violated. Therefore, this thought supports the placement of Indonesia as a state of law in the constitution in order to realize a welfare state.

Consumer protection is a term used to describe the existence of laws that provide protection to consumers from losses due to the use of goods and services. According to the legislation, consumer protection is all efforts to provide protection to consumers. Meanwhile, what is meant by consumer is every person who uses goods and/or services available in the community, both for their own interests, families, other people, and other living things and not for trade (Burhanuddin, 2011).

The relationship between consumers and business actors bound in an agreement should ideally be in a balanced position. Both parties have their respective obligations and rights that must be fulfilled. However, in practice, consumers are often in a weak position compared to business actors. This is because the goods or services offered by business actors are needed by consumers, so the term "*take it or it*" appears.

In the imbalance of the position of business actors and consumers, business actors who are in a stronger position often use clauses that exempt, limit or can be called a transfer of responsibility in the agreement. The term used in this type of clause is the exoneration clause. Legal protection of consumers in insurance agreements containing exoneration clauses in Indonesia is a multidimensional issue that reflects the complexity of the relationship between the commercial interests of insurance companies and the rights of consumers to obtain fair protection. An exculpatory clause, as a contractual

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provision that exempts an insurance company from liability for certain risks, is often a point of dispute because it has the potential to limit the insured access to.

In the Indonesian legal system, consumer protection is regulated through a regulatory framework that includes Law No. 8/1999 on Consumer Protection, the Commercial Code (KUHD), the Civil Code, and Law No. 40/2014 on Insurance. These legal instruments collectively aim to create a balance between freedom of contract and protection of consumers who are in a weaker bargaining position.

The Commercial Code, particularly Article 246, provides legitimacy for the existence of exoneration clauses in insurance agreements, provided that such clauses do not conflict with public order, decency, or laws and regulations. This provision allows insurance companies to exclude liability for certain risks, such as losses due to criminal acts of the insured, certain natural disasters, or gross negligence. However, the validity of an exoneration clause under the KUHD must be tested against the principle of good faith set out in Article 1338 of the Civil Code. Good faith requires insurance companies to act honestly and transparently, including by drafting exculpatory clauses that are not misleading or disproportionately harmful to the insured.

Furthermore, through Law Number 8 Year 1999 on Consumer Protection there is already legal protection for consumers against the enforcement of standard agreements. Article 18 paragraph (1) of the Consumer Protection Law regulates standard agreements that are prohibited to be included in an agreement, one of which is a standard agreement that shifts responsibility to consumers. This responsibility transfer clause is called an exoneration clause and this clause is prohibited because it shifts responsibility to consumers.

Insurance as a financial service business actor, has the obligation to provide protection to its consumers (insured) as users of its products and/or services. This is because insurance collects public funds with a sum of money paid by the insured in the

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form of a premium as compensation for the transfer of risk that has been agreed upon, so between the insurer and the insured must have balanced rights and obligations.

Law No. 40/2014 on Insurance strengthens consumer protection by establishing the principles of honesty, transparency and accountability in the implementation of insurance, as stipulated in Article 2 paragraph (1). This law requires insurance companies to provide clear information regarding the rights and obligations of the insured, including exclusionary provisions in the policy. An exculpatory clause that is not adequately explained or that is detrimental to the insured can be considered to violate the principle of transparency, thus contradicting the purpose of the Insurance Law to create a balance of interests.

Insurance companies often have prepared a *standardized contract* with an exculpatory clause for reasons of practicality and efficiency so that the insured is only given the opportunity to decide to accept or reject the insurance policy that has been made unilaterally by the insurance company which allows the inclusion of many exculpatory clauses in insurance policy contracts.

Consumer protection efforts aim to provide legal protection that should be provided by consumers and business users in an effort to achieve their business goals so as not to cause harm to consumers. This is to ensure legal certainty and provide legal protection against abuse by consumer service providers. Consumer protection also aims to achieve the principles of expediency, justice, security, legal certainty, and overall security for consumers and service users, the State must be present to ensure legal protection for every. Indonesia, as a legal state, has an obligation to provide legal protection for its people. In insurance contracts that contain exoneration clauses, consumer protection efforts are carried out by preventive and repressive means.

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Preventive Protection Efforts against the Inclusion of Exoneration Clauses in Insurance Contracts

Preventive legal protection (prevention) is an effort to protect the State, in this case the government takes preventive action before a violation of the law occurs and provides signs or prohibitions in carrying out an obligation (Wardah, 2023). To overcome various problems related to losses experienced by consumers, Indonesia enacted Law Number 8 of 1999 concerning Consumer Protection which was issued on April 10, 1999. Law Number 8 Year 1999 on consumer protection outlines the responsibility that must be borne by business actors to consumers.

Law Number 8 Year 1999 on Consumer Protection (UUPK) was enacted to maintain the relationship between consumers and business actors. Article 1 point 10 of Law Number 8 Year 1999 on Consumer Protection defines a standard agreement as "any terms and conditions that have been prepared in advance unilaterally by business actors as stated in a document and/or agreement that is binding and must be fulfilled by consumers".

Insurance companies as business actors often contain exoneration clauses to release themselves from certain responsibilities as in Article 18 paragraph (1) letter a, paragraph (2), paragraph (3), paragraph 4) of the Consumer Protection Law clearly regulates the provisions for the inclusion of standard clauses stating that:

- (1) Business actors in offering goods and/or services intended for trade are prohibited from making or including standard clauses in every document and/or agreement if:
 - a. Stating the transfer of responsibility of the business actor
- (2) Business actors are prohibited from including standard clauses whose location or shape is difficult to see or cannot be read clearly or whose disclosure is difficult to understand.
- (3) Every standard clause stipulated by business actors in documents or agreements that fulfill the provisions as referred to in paragraph (1) and paragraph (2) shall be declared null and void.
- (4) Business actors are obliged to adjust standard clauses that conflict with this Law.

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Observing the understanding of preventive law that efforts to prevent violations of the law are carried out before the occurrence of a legal problem. In relation to insurance contracts as referred to as insurance policies, preventive protection efforts that can be carried out by strengthening regulations and supervision of exoneration clauses need to be directed at increasing insurance literacy, standardizing editorial clauses that are more consumer-friendly, and enforcing sanctions against insurance companies that violate the principle of transparency. In addition, technology development, such as the use of digital platforms to explain policies interactively, can be a solution to increase the understanding of the insured. Thus, the exculpatory clause can still function as a risk management tool for insurance companies without sacrificing the rights of the insured, as well as reflecting the balance between legal certainty and justice in insurance practice. In addition to the GCPL as a preventive effort the above can also be done to reduce the occurrence of legal problems regarding the inclusion of exoneration clauses in insurance contracts.

Repressive Protection Efforts against the Inclusion of Exonerations in Insurance Contracts

Repressive legal protection is an effort to resolve disputes or violations that have occurred. This effort is carried out by imposing sanctions, such as fines, imprisonment and collective punishment. Repressive legal efforts aim to restore the situation after the deviation of community values and norms and eradicate crime. Repressive efforts through litigation can be done by filing a lawsuit to cancel the contract with the court. Based on Article 18 paragraph (3) of Law Number 8 Year 1999 on Consumer Protection, standard clauses containing exonerations are declared null and void. This provision provides a legal basis for consumers or consumer organizations to file a lawsuit to the court to cancel the exonerations in the insurance contract.

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Repressive legal efforts that can be made to protect consumers if an insurance contract contains an exoneration clause are consumers can claim. As emphasized in Article 19 of Law Number 8 of 1999 concerning Consumer Protection which states that

- 1) Business actors are responsible for providing compensation for damage, pollution, and/or loss due to consumption of goods and/or services produced or traded;
- 2) Compensation as referred to in paragraph (1) may be in the form of a refund or replacement of goods and/or services of a similar or equivalent value, health care and/or compensation in accordance with the provisions of the applicable laws and regulations;
- 3) The compensation is made within 7 (seven) days after the transaction date;
- 4) The provision of compensation as referred to in paragraph (1) and paragraph (2) shall not eliminate the possibility of criminal prosecution based on further proof of the existence of an element of guilt;
- 5) The provisions as referred to in paragraph (1) and paragraph (2) shall not apply if the business actor can prove that the fault is the fault of the consumer.

Furthermore, it is explained in Article 23 of Law Number 8 Year 1999 concerning Consumer Protection that:

"Business actors who refuse and/or do not respond and/or do not fulfill compensation for consumer demands as referred to in Article 19 paragraph (1), paragraph (2), paragraph (3), and paragraph (4), may be sued through a consumer dispute resolution body or submit to a judicial body at the 's domicile".

In addition to compensation, consumers, hereinafter referred to as the insured, can choose to resolve disputes through the court (litigation) or outside the court (non-litigation). Article 52 of Law Number 8 Year 1999 on Consumer Protection stipulates that the institution authorized by the Law to carry out supervision is the Consumer Dispute Resolution Agency (BPSK).

BPSK as an out-of-court consumer dispute resolution institution also has a role in repressive efforts against the inclusion of exoneration clauses. Based on Article 52 of the Consumer Protection Law, BPSK has the authority to receive complaints, conduct

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research and examination, and impose administrative sanctions on business actors who violate the provisions of law, including the inclusion of exoneration clauses.

Based on Article 1 point 11 of Law Number 8 Year 1999 on Consumer Protection, BPSK is a body that has the task of handling and resolving disputes that occur between business actors and their consumers. Based on Article 42 of Law Number 8 Year 1999 on Consumer Protection, the costs for the implementation of the National BPSK duties shall be borne by the State budget and other sources in accordance with the prevailing laws and regulations.

The advantages of dispute resolution through BPSK are a faster process, more affordable costs, and simpler procedures compared to litigation through the courts. However, the challenges faced are the limited authority of BPSK in handling disputes with large claim values, BPSK decisions that are not final and binding, so that objections can still be filed with the court, variations in the capacity and competence of BPSK in various regions in handling insurance-related disputes that are often technical and complex. In addition to BPSK, there are also Non-Governmental Consumer Protection Organizations that also have a role in providing protection to consumers together with BPSK (Muthmainnah & Asmar, 2023).

4. CONCLUSION

Consumer protection against the inclusion of exoneration clauses in insurance contracts based on Law Number 8 of 1999 concerning Consumer Protection is specifically regulated in Article 18 paragraph (1) letter (a) prohibiting business actors from including standard clauses in every agreement and document that states the transfer of . The form of consumer protection against the inclusion of exoneration clauses in insurance contracts is in the form of preventive protection, namely by using Law Number 8 of 1999 concerning Consumer Protection. Meanwhile repressive legal efforts that can be made to protect the insured due to the inclusion of an exculpatory

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clause can claim compensation as stated in Article 19 paragraph (1) of Law Number 8 of 1999 concerning Consumer Protection. The dispute resolution efforts that can be taken are through the court (litigation) or outside the court (non-litigation).

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