
WEST VIRGINIA CODE CHAPTER 38
ARTICLE 13

WV Legislature

§38-13-1. Assignment by insolvent; form; acknowledgment; recordation; assent of trustee; transfer of stockholders' liability.

Every assignment, conveyance or transfer made by an insolvent debtor to a trustee which is intended to operate as an assignment of all of such debtor's property for the benefit of all of his creditors, or of all such property except what is exempt from execution or other process, shall be in writing, and shall specifically state therein the residence and kind of business carried on by such debtor at the time of making the assignment, the place at which such business was conducted, and the name, residence, address and place of business of the trustee and there shall be annexed thereto a statement of the assets of the debtor and the location thereof, and a list of the names and addresses of his creditors.

Every such assignment, conveyance or transfer shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds and shall be recorded in the office of the clerk of the county court of the county in which the principal place of business of the debtor is situated when real property is a part of the property assigned and is situated in a county other than the one in which the original assignment is required to be recorded, a certified copy of such assignment shall be filed and recorded in the county where such property is situated. The assent of the trustee, subscribed and acknowledged by him shall appear in writing embraced in or at the end of, or endorsed upon the assignment, before the same is recorded. In all cases where an assignment is made by a corporation the right to recover the amount due from stockholders on unpaid capital stock issued to or subscribed by them shall pass to the trustee whether mentioned in the assignment or not.

No such assignment, conveyance or transfer shall be valid and no title to the property assigned, conveyed or transferred shall vest in the trustee unless the same be executed as hereinabove provided and unless the same be recorded within five days after the date of the execution thereof. The clerk shall record such instruments in the deed books in his office, and shall also keep them on file in his office.

§38-13-2. Oath and bond of trustee; requiring further security.

Before the trustee shall have any power or authority to sell, dispose of or convert to the purposes of the trust any of the assigned property he shall qualify as such by taking an oath and giving a bond in a penalty double the amount of the estate, with a solvent surety company as surety, before the clerk of the county court of the county in which such assignment, conveyance or transfer has been recorded. The oath of the trustee shall be that he will faithfully perform the duties of the office of trustee to the best of his skill and judgment, and will account for and pay over all money that comes into his hands as such trustee. The bond of the trustee shall be approved by the clerk, shall be conditioned that the trustee shall faithfully perform the duties of trustee to the best of his skill and judgment and account for and pay over all money that may come into his hands as trustee, and shall be filed in the office of the clerk. At any time after the giving of such bond the clerk may, upon his own motion, or upon the application of any party in interest, and on five days' notice given to the assignor, trustee and surety, increase the amount of the bond or require further security to be given, whenever in his judgment the penalty of the bond or the security afforded by it is not adequate.

§38-13-3. Reference to fiduciary commissioner; appraisers.

Upon the qualification of the trustee, the clerk shall refer the estate to a fiduciary commissioner of the county: Provided, That in counties where there are two or more such commissioners, such estate shall be referred to such commissioners in rotation; and the clerk shall appoint three disinterested appraisers to appraise all the property belonging to the estate and, within seven days after their appointment, they shall make to the fiduciary commissioner a report thereof in writing duly sworn to.

§38-13-4. Trustee to file schedule; substitute trustee.

Within ten days after the recordation of an assignment, conveyance or transfer the trustee shall cause to be made and filed with the clerk of the county commission of the county where the same is recorded a schedule containing:

- (1) The name, occupation, place of residence and place of business of the debtor;
- (2) A full and true account of all creditors of the debtor, stating the last-known place of residence of each, if known, or if unknown, the fact to be stated; the sum owing to each, with the true cause and consideration thereof; and a full statement of any existing security for the payment of the same;
- (3) A full and true inventory of all the debtor's estate at the date of the assignment, both real and personal, in law and in equity, with the liens and encumbrances existing thereon. The trustee shall verify the schedule so made by him to the effect that the same is in all respects just and true to the best of his knowledge and belief, and shall state the sources of his information and the grounds of his belief. The trustee shall at the same time file a duplicate of the said schedule with the fiduciary commissioner to whom the estate has been referred. In case said trustee shall be unable to make and file such schedule, within ten days, the fiduciary commissioner may, upon application under oath, showing such inability, allow him such further time as shall be necessary, not exceeding thirty days. If the trustee fails to make and file such schedule within said ten days or such further time as may be allowed, the fiduciary commissioner shall require, by order, the trustee forthwith to appear before him and show cause why he should not be removed, and, if good cause be not shown, such trustee shall be removed and a meeting of the creditors shall be called by the fiduciary commissioner, at which meeting a substitute trustee shall be elected. Any person interested in the trust estate may apply for such order and demand such removal.

§38-13-5. Notice by trustee to creditors; publication and mailing.

Within ten days after the filing of the schedule the trustee shall cause to be published a notice reading substantially as follows:

"To the creditors of

Take notice that a general assignment for the benefit of creditors was made by the above named debtor to, trustee, on and that said assignment has been duly recorded in the office of the clerk of the county commission of County.

All persons having claims against the said debtor are hereby notified that the same shall be presented to the undersigned trustee on or before The estate has been referred to, fiduciary commissioner, and the first meeting of the creditors will be held in his office at, in County, West Virginia, on, at o'clockM. Dated this day of

(Signed), Trustee

(Address of Trustee)....."

Said notice shall be published as a Class II legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be the county in which the assignment, conveyance or transfer was recorded.

A copy of said notice shall be mailed by the trustee on or before the date of the first publication thereof to every creditor whose name appears in the schedule or of whom the trustee has notice, to the assignor and to the fiduciary commissioner and an affidavit evidencing such mailing and publication shall be filed by the trustee with the fiduciary commissioner.

§38-13-6. Filing and proof of claims.

The trustee shall specify in the notice a date on or before which claims shall be presented to him which date shall be not less than thirty days nor more than sixty days after the date of the first publication of the notice, and no claim filed with the trustee after the date specified in the notice shall be recognized or allowed, except that if a surplus remain after the payment of the claims presented on or before the date specified such surplus shall be applied to the payment of the claims presented after that date. Claims of creditors shall be itemized, accompanied by proper vouchers, and verified by the affidavit of the creditor or his duly authorized agent, stating the character of the claim, whether open account, note, bond, bill, writing obligatory, judgment, decree or other evidence of debt, and the amount thereof, and from what date and on what items interest runs and at what percent per annum, and stating further that the claim is just and true, and that the creditor, or any prior owner of the claim, if such there was, has not received any part of the money stated to be due, or any security or satisfaction for the same, except what is credited. The vouchers for a judgment or decree shall be an abstract thereof; for a specialty, bond, note, bill of exchange, writing obligatory, or other instrument, shall be the instrument itself, or a true copy thereof, verified by the fiduciary commissioner, or proof of the same in case the instrument be lost; and for an open account, an itemized copy of the account. A surety may prove a claim of a creditor which he has secured when such creditor fails or refuses to do so. Every claim so itemized, so accompanied by proper vouchers, and so verified, shall be taken to be proved and shall be allowed unless, before the trustee shall make up his report of claims, the assignor or a creditor or any party in interest shall file before the trustee a counter-affidavit denying the claim in whole or in part; and when such counter-affidavit is so filed the trustee shall at once refer the claim to the fiduciary commissioner who shall at the request of the claimant fix a time and place for hearing evidence of and against such claim and give reasonable notice of such time and place to the claimant and the party objecting. All hearings on disputed claims shall be completed within seven days after the last day on which claims may be presented to the trustee, unless for good cause shown the fiduciary commissioner extends the time for such hearings.

§38-13-7. Liens requiring or not requiring proof; waiver by lienor; delinquent taxes; sales of property subject to liens or taxes.

Creditors holding valid liens of the following character on property belonging to the estate, to-wit: Vendor's lien reserved in a deed duly recorded; lien created by deed of trust or mortgage, duly recorded, on real or personal property; judgment lien on real estate, duly docketed in the county in which the real estate is situated; lien on personal property created by execution, duly docketed in the county in which the property is located; reservation of title contained in conditional sales contract, duly filed, need not file proof of their said secured claims with the trustee, and in the event they do not do so the property affected shall be sold by the trustee subject to any such liens; but if said creditors file proofs of their secured claims with the trustee and request that the property affected shall be sold by the trustee free of said liens and deliver to the trustee a consent in writing, duly acknowledged in the manner provided for the acknowledgment of releases of liens, the trustee may, if he deems it in the best interest of the estate, record said consent in the release book in the office of the clerk of the county court of the county in which the property is located, and sell the property free and clear of the said lien, but the said lien shall attach to the proceeds of the property at the sale, and the trustee shall pay the said proceeds to the secured creditor to the amount of the secured claim, without any deduction for costs of administration. Creditors holding landlord's liens and other liens not included in those mentioned above shall file proof of their claims in the manner and within the time prescribed for proving unsecured claims, otherwise they shall not be recognized or allowed; but if they are properly filed the lien shall attach to the proceeds of the sale of the property covered thereby. The trustee may sell property belonging to the estate subject to delinquent taxes, or may sell free of taxes, and pay the same, but no proof of delinquent taxes need be filed with the trustee.

§38-13-8. First meeting of creditors; substitute trustee.

The fiduciary commissioner shall preside over the first meeting of the creditors which shall be held not less than ten nor more than twenty days after the date of the first publication of the notice thereof by the trustee. The assignor and the trustee shall attend the meeting, and either or both of them may be publicly examined at the meeting at the instance of any creditor. The creditors shall at the meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate, and the meeting may be adjourned from time to time if the creditors see fit. If a majority in number and amount of all the unsecured creditors of the assignor, including those absent as well as those present, desire that the trustee named in the assignment shall not serve, at the first meeting of the creditors such a majority may elect a substitute trustee who shall have all the rights, powers and duties conferred upon the trustee named in the assignment. The substitute trustee shall qualify by taking the oath and giving a proper bond before the clerk, and a copy of the order appointing the substitute trustee shall be recorded in each county in which the assignment is recorded. Creditors may be represented at meetings by their agents, employees, or attorneys, duly authorized in writing.

§38-13-9. Sales by trustee; creditors may prescribe manner and terms; powers of fiduciary commissioner; compromising claims; continuing operation of business.

At the first meeting of creditors a majority in number and amount of the creditors present may prescribe in what manner and on what terms the property belonging to the estate shall be sold, and the trustee shall not sell, or otherwise dispose of, any property belonging to the estate prior to the first meeting of the creditors, unless expressly authorized to do so by the fiduciary commissioner after good cause therefor has been shown. The trustee shall not sell or otherwise dispose of, the property belonging to the estate for less than seventy-five percent of its appraised value without the approval of the fiduciary commissioner. The trustee may compromise or compound any claim or debt belonging to the estate with the approval of the fiduciary commissioner. All sales by the trustee shall be made at public auction, unless otherwise ordered by the fiduciary commissioner or authorized by the creditors. The trustees shall give at least ten days' notice by mail to all of the creditors of the time and place of sale of any property belonging to the estate of the value of \$500, or more, and shall advertise the sale as a Class II legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be the county. Such notice and advertisement may be waived by the creditors at their first meeting. Upon application to the fiduciary commissioner, and for good cause shown, the trustee may be authorized to sell any portion of the estate at private sale, in which case he shall keep an accurate record of each article sold, the price received therefor and to whom sold, which account he shall file with the fiduciary commissioner. Upon application by the trustee or a creditor setting forth that a part or the whole of the estate is perishable, the nature and location of such perishable property, and that there will be loss if the same is not sold immediately, the fiduciary commissioner, if satisfied, of the facts stated and that the sale is required in the interests of the estate, may order the same to be sold without notice or with such notice as he may direct. Upon application by the trustee or a creditor setting forth that it is for the best interest of the estate that the trustee continue to operate the business, the fiduciary commissioner may authorize the trustee to operate the business until the first meeting of the creditors, at which meeting a majority in number and amount of the creditors present shall determine whether such operation is to be continued thereafter.

§38-13-10. Trustee's report to fiduciary commissioner; notice to creditors of filing and second meeting.

Within ten days after the last day on which claims may be presented to him the trustee shall file with the fiduciary commissioner a report showing the names of the creditors whose claims have not been contested and who have filed proper proofs of claims, and the amounts thereof; the names of the creditors whose claims have been contested, and the amounts thereof; the disposition he has made of the property belonging to the estate; the costs and expenses he has incurred; the amount of money he has on hand and the name of the bank in which it is deposited; the property of the estate not disposed of and his plans for disposing of the same. The trustee shall attach to said report all proofs of claims, vouchers, exhibits, accounts, writings, affidavits and counter- affidavits which have been filed with him The trustee shall at once notify each creditor who has presented a claim that the report has been filed, and that a meeting of the creditors will be held before the fiduciary commissioner on a date specified in the notice, which date shall not be less than five days after the notice is mailed nor more than ten days after the report is filed.

§38-13-11. Report by fiduciary commissioner; appeal from decision; allowance of expenses and fees; directions to trustee; dividends; closing trusteeship.

At the meeting of the creditors held following the filing of the trustee's report the fiduciary commissioner shall file a report showing how much, if anything, he has allowed on each of the disputed claims. Any party interested may, within ten days thereafter, appeal from the decision of the fiduciary commissioner to the circuit court of the county without any formal bill of exceptions, and the appeal shall be tried and heard in the circuit court, or before the judge thereof in vacation, on the record made before the fiduciary commissioner. At the same meeting the fiduciary commissioner shall approve such expenditures, costs and expenses as he may find necessary and proper in the administration of the estate; shall direct the payment of proper fees and fiduciary commissions; shall direct the trustee to distribute the funds in his hands belonging to secured creditors; and shall direct the trustee to pay a dividend of an equal percent on all allowed claims, except such as have priority or are secured. A secured creditor whose claim is in excess of the security held may share in such dividend on such excess only. The trustee shall not pay such dividend until the time has expired within which an appeal may be taken from the decision of the fiduciary commissioner on a disputed claim, and if any such appeal is pending the trustee shall retain in his hands sufficient money to pay the same dividend thereon, should the claim be allowed on appeal, and shall distribute the remainder to the creditors entitled thereto. After paying any dividend the trustee shall file with the fiduciary commissioner a copy of a dividend sheet showing to whom the dividend was paid. If all of the property belonging to the estate has not been disposed of at the time of said meeting, the trustee shall from time to time make further reports to the fiduciary commissioner, and the fiduciary commissioner may direct the trustee to pay further costs, expenses, fees and dividends. Dividends which are unclaimed for six months shall be distributed among the remaining creditors whose claims have been allowed. After the trustee has disposed of all the property belonging to the estate, and has paid out all of the funds which have come into his hands, he shall without delay make a final report in duplicate to the fiduciary commissioner showing all his receipts and disbursements, and if the fiduciary commissioner finds the same correct and approves it, the fiduciary commissioner shall enter an order discharging the trustee, a copy of which order the fiduciary commissioner shall furnish to the surety on the bond of the trustee, and the fiduciary commissioner shall transmit a copy of said order and a copy of the final report of the trustee to the clerk of the county commission to be filed.

§38-13-12. Powers, duties and qualifications of trustee; substitute for unqualified, removed, deceased or disabled trustee.

It shall be the duty of the trustee to collect and reduce to money the property belonging to the estate; to keep all funds belonging to the estate on deposit in a sound bank; to report promptly to the creditors any claims presented to him which are not provable or are incorrect or false so that counter-affidavits may be filed thereto; to file the reports and give the notices herein provided for; to close up the estate as expeditiously as possible; to furnish such information concerning the estate as may be requested by parties in interest; to keep regular accounts; to pay dividends as often as is compatible with the best interests of the estate. The trustee shall, as to all property transferred by the assignment, be deemed vested with all the rights, remedies and powers of a creditor holding a lien thereon by legal or equitable proceedings. The trustee shall be a resident of West Virginia, and shall not occupy the position of relative, creditor, attorney, agent or employee to the assignor, nor an officer of the assignor, if the assignor be a corporation, and if an assignment, conveyance or transfer be made to such person it shall not for that reason be void, but shall be deemed to be for the benefit of all the creditors of the assignor, and the clerk, at the request of any party in interest, may refer the estate to a fiduciary commissioner who shall proceed to call a meeting of the creditors, at which meeting a majority in number and amount of the creditors present shall elect a substitute trustee. Upon the petition of one or more creditors showing misconduct or incompetency of the trustee, or on the petition of the trustee himself showing sufficient reason therefor, and after due notice of not less than five days to the assignor, trustee, the surety on the bond of the trustee, and the creditors whose claims have been filed with the trustee, the fiduciary commissioner may, after hearing the parties in interest, remove or discharge the trustee; and in that event a majority in number and amount of the creditors present shall elect a substitute trustee. If the trustee shall die or become unable to act, the fiduciary commissioner shall call a meeting of the creditors whose claims have been filed with the trustee, after notice of not less than five days, and a majority in number and amount of the creditors present at the hearing shall elect a substitute trustee.

§38-13-13. Powers and duties of fiduciary commissioner.

Fiduciary commissioners shall have power to preside over all meetings of creditors; to preside over all examinations of the assignor or trustee; to allow and disallow all claims presented to them for determination; to administer oaths to witnesses; to issue subpoenas for the attendance of any person for examination; to examine accounts filed by trustees hereunder, to hear and determine any objections thereto, and to surcharge any trustee for any moneys improperly expended or for which the trustee shall have failed to account; to authorize the business of the assignor to be conducted for limited periods by the trustee if necessary in the best interests of the estate; to reopen estates whenever it appears that they have been closed before being fully administered; to authorize a trustee to bring an action, which he is hereby empowered to maintain, against any person who has received, taken, or in any manner interfered with the estate, property or effects of the debtor, in fraud of his creditors, and which might have been avoided by a creditor of the assignor, and the trustee may recover the property so transferred or its value; to require or allow any inventory or schedule filed to be corrected or amended, and require and compel from time to time supplemental inventories or schedules to be made and filed; to determine the excess of the claims of secured creditors over and above the value of the securities held by them; to require the trustee to render and file the accounts and reports herein provided for; to authorize and approve the payment of costs, expenses, fees and commissions; to declare dividends; to discharge the trustee and his surety after the trustee has properly completed the performance of his duties; to authorize the appointment of an attorney for the trustee if necessary in the best interests of the estate.

§38-13-14. Duties of assignor.

The assignor shall comply with all lawful orders of the fiduciary commissioner, examine the correctness of all claims presented against the estate if ordered by the fiduciary commissioner so to do, and if any are incorrect or false notify the trustee thereof immediately; deliver to the trustee all his books, papers and records; execute and deliver such papers relating to the estate as shall be ordered by the fiduciary commissioner; execute and deliver to the trustee proper transfers of all his property outside the State of West Virginia; attend the first meeting of the creditors; and submit to an examination under oath concerning the conduct of his business, the cause of his inability to pay his debts, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and all matters which may affect the administration and settlement of his estate, but no testimony given by him shall be offered in evidence against him in any criminal proceedings. The books and papers of the assignor shall at all times be subject to the inspection and examination of any creditor.

§38-13-15. Fiduciary commissioner to certify to circuit court disobedience of order, etc.; punishment for contempt by court.

The fiduciary commissioner shall certify the facts to the circuit court of the county if any person shall disobey or resist any order, process or writ which may be issued, or misbehave during any hearing, or neglect to produce, having been ordered to do so, any pertinent documents, or refuse to appear, take the oath, or be examined according to law, after having been subpoenaed. Upon the filing of such certificate by any fiduciary commissioner the judge shall in a summary manner hear the evidence of the acts complained of, and, if it is such as to warrant him in so doing, he may punish such person in the same manner and to the same extent as for a contempt committed before the court.

§38-13-16. Expenses and fees of trustee, fiduciary commissioner, appraisers and attorneys for trustee.

Trustees shall be allowed their reasonable and necessary disbursements for the costs and expenses and shall receive for their services commissions of all moneys disbursed or turned over by them to any person, including lienholders and secured creditors, which commissions shall be ten percent on the first \$1,500 or less, five percent on moneys in excess of \$1,500 and less than \$10,000, three percent on moneys in excess of \$10,000 and less than \$25,000, and two percent on moneys in excess of \$25,000, or such additional compensation as a majority in number and amount of the creditors present at the meeting provided for in section ten of this article, or at a subsequent meeting held for the purpose of fixing compensations, shall allow, but the compensation shall in no case be less than \$50. Fiduciary commissioners shall be allowed their reasonable and necessary disbursements for costs and expenses and shall receive for their services such compensation as the court shall from time to time prescribe. The fiduciary commissioner shall indicate, in writing, the compensation he believes he is entitled to receive for services performed. Appraisers shall receive for their services a fair and reasonable allowance which shall be fixed by the fiduciary commissioner upon a petition therefor showing the amount of time spent by the appraisers in the performance of their duties. Attorneys for the trustee shall receive for their service a fair and reasonable allowance which shall be fixed by the fiduciary commissioner upon petition showing the service rendered by them.