

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT



In re:

**ROBERT J. FOSTER, JR., and
SUSAN J. FOSTER,
Debtors.**

**Chapter 7 Case
03-11449**

ORDER DENYING MOTION TO REOPEN

The Debtors filed a Motion to Reopen Chapter 7 Case (doc. #10) on or about February 12, 2004, and served notice of it under the Court's default procedure, see Vt. LBR 9013-1(f). Although no objections were filed, the Court finds the Debtors are not entitled to the relief sought.

According to the Debtor's accompanying Certificate of Service (doc. #13), the affected creditor, Excel Telecommunications, Inc. ("Excel"), was served with Debtors' Motion to Reopen and accompanying Notice "via facsimile transmission and by first class mail, postage pre-paid this date: to:

Legal Department
Excel Telecommunications, Inc.
PO Box 219046
Kansas City, MO 64121-9046

While it is clear that 11 U.S.C. § 350 and Bankruptcy Rule 5010 authorize, and set forth the criteria for, the reopening of a bankruptcy case, the issue of how to serve such a motion is not specifically addressed in either the Bankruptcy Code or Rules. According to the leading treatise on bankruptcy law, neither the Bankruptcy Code nor the Bankruptcy Rules expressly specifies even whether notice is required; however, the prudent approach is to provide notice to the parties whose interests may be affected by the reopening.

There are no Code sections or Bankruptcy Rules that expressly require notice of a case reopening. Further, it does not appear that the filing of a motion to reopen, by itself, constitutes a contested matter within the meaning of Rule 9014, such that the service requirements of Rule 7004 are not applicable. However, the better course would be to serve the motion upon the United States trustee, any standing trustee in an chapter 12 or 13 case, and any party who would be interested in participating, or be required to participate, in litigation should the motion be granted.

COLLIER ON BANKRUPTCY ¶5010.02[5] (15th ed. rev. 2003). This strikes me as an eminently sound approach.

Hence, THE COURT FINDS that it is proper to apply the service requirements of Bankruptcy Rule 7004 to motions to reopen, and to treat them as contested matters when determining the adequacy of notice. Under the dictates of Rule 7004(b)(3), service by first class mail, postage prepaid, upon a domestic or foreign corporation or upon a partnership or other unincorporated association is to be made “to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . .” In this instance, THE COURT FURTHER FINDS, as evidenced by the Debtors’ Certificate of Service, that Excel was not served to the attention of any party. Thus, the Debtors have not properly served Excel with their Motion to Reopen.*

Accordingly, IT IS HEREBY ORDERED that the Debtors’ Motion to Reopen is denied without prejudice to the Debtors’ right to bring the motion before the Court again after effecting service on Excel in compliance with Bankruptcy Rule 7004.

SO ORDERED.

March 3, 2004



Colleen A. Brown
United States Bankruptcy Court

* Bankruptcy Rule 7004 does not contemplate service by facsimile. Moreover, since the Debtors’ Certificate of Service did not identify a facsimile number to which the Debtor’s Motion to Reopen and the accompanying Notice were sent, the Court will not consider such service at this time.