

AUG 26 2010

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No. CC-09-1414-KiTapa
		)	
6	PECK/JONES CONSTRUCTION	)	Bk. No. LA 04-35757-VZ
	CORP.,	)	
7		)	Adv. No. LA 07-1060-VZ
	Debtor.	)	
8	_____	)	
		)	
9	D&M STEEL, INC.,	)	
		)	
10	Appellant,	)	
		)	
11	v.	)	<b>M E M O R A N D U M</b> <sup>1</sup>
		)	
12	R. TODD NEILSON, Chapter 7	)	
	Trustee,	)	
13		)	
	Appellee.	)	
14	_____	)	

Argued and Submitted on July 23, 2010  
at Pasadena, CA

Filed - August 26, 2010

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Vincent Zurzolo, Bankruptcy Judge, Presiding

Before: KIRSCHER, TAYLOR,<sup>2</sup> and PAPPAS, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> The Hon. Laura Taylor, Bankruptcy Judge for the Southern District of California, sitting by designation.

1 Appellant D&M Steel, Inc. ("D&M") appeals from a judgment in  
2 favor of Appellee chapter 7 trustee, R. Todd Neilson ("Trustee"),  
3 to recover a preference paid to D&M from debtor Peck/Jones  
4 Construction Corporation ("Peck/Jones") under 11 U.S.C.  
5 § 547(b).<sup>3</sup> For the reasons stated below, we AFFIRM.

## 6 I. BACKGROUND AND PROCEDURAL HISTORY

### 7 A. Factual Background

8 Peck/Jones was a general contractor of large commercial  
9 construction projects. In December, 2002, Peck/Jones entered  
10 into a contract with Hotel Dieu to build living quarters for  
11 seniors and the disabled. D&M is a subcontractor in the business  
12 of providing structural steel and iron works for large and small  
13 commercial and residential projects.

14 On February 17, 2004, Peck/Jones entered into a subcontract  
15 agreement with D&M, which required D&M to provide all labor,  
16 materials, equipment, tools, scaffolding, and the like for  
17 fabrication and erection of all structural steel and other items  
18 for the Hotel Dieu project (the "Subcontract Agreement").

19 The payment method between the parties was as follows: D&M  
20 submitted invoices to Peck/Jones as services were rendered;  
21 Peck/Jones in turn submitted a payment application to Hotel Dieu;  
22 Hotel Dieu paid Peck/Jones; Peck/Jones then paid D&M by check.

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23  
24 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
26 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as  
enacted and promulgated prior to the effective date of The  
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005  
("BAPCPA"), Pub. L. 109-8, 119 Stat. 23.

27 The Federal Rules of Civil Procedure shall be referred to as  
"FRCP" and the Federal Rules of Evidence shall be referred to as  
28 "FRE."

1 Such payments are referred to as "progress payments." Payments  
2 by Peck/Jones to D&M were usually made 60-90 days after invoice.

3 On June 15, 2004, D&M submitted an invoice for the period  
4 from June 1, 2004 to June 30, 2004, which sought payment from  
5 Peck/Jones for \$94,808.20. On June 24, 2004, Peck/Jones  
6 submitted Application 19 to Hotel Dieu for \$462,681.00, the total  
7 amount due to various subcontractors for that time period,  
8 including the \$94,808.20 to D&M. Hotel Dieu paid Peck/Jones the  
9 sum of \$312,681.00 on Application 19 via check, dated July 9,  
10 2004. Peck/Jones deposited the check into its general account on  
11 July 16, 2004. On or about September 10, 2004, Peck/Jones issued  
12 a check to D&M for \$94,808.20, which cleared Peck/Jones's account  
13 on September 20, 2004. A total of 66 days elapsed between the  
14 date Peck/Jones deposited the Hotel Dieu check on July 16, and  
15 the date that its payment to D&M cleared Peck/Jones's account.  
16 This payment prompted this preference litigation.

17 **B. Procedural History**

18 An involuntary petition under chapter 7 was filed against  
19 Peck/Jones on December 14, 2004. On January 19, 2007, Trustee  
20 filed complaints against several creditors of Peck/Jones to avoid  
21 and recover preferential transfers to them made within 90 days  
22 before the petition date. Trustee sought to recover a total of  
23 \$137,618.20 from D&M.<sup>4</sup>

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26  
27 <sup>4</sup> Trustee also tried to avoid a "retention payment" of  
28 \$42,809.53. The bankruptcy court found in favor of D&M on that  
payment. Trustee does not appeal that ruling.

1 D&M and Trustee stipulated that the elements of section  
2 547(b) were met.<sup>5</sup> However, D&M asserted that the payment in  
3 question fell under the exception to preferential transfers  
4 pursuant to section 547(c)(2), invoking the "ordinary course of  
5 business" defense.<sup>6</sup> Trustee later stipulated that D&M satisfied  
6 section 547(c)(2)(A)- that the transfer was in payment of a debt  
7 incurred by the debtor in the ordinary course of business or  
8 financial affairs of the debtor and the transferee.

9 The bankruptcy court's trial scheduling order, entered on  
10 December 20, 2007, provided deadlines by which D&M was to  
11 designate an expert witness and submit his or her report. D&M  
12 retained expert witness, Tom Keeton ("Keeton"), and filed  
13 Keeton's report.

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14 <sup>5</sup> Section 547(b) provides: [T]he trustee may avoid any  
15 transfer of an interest of the debtor in property--

- 16 (1) to or for the benefit of a creditor;  
17 (2) for or on account of an antecedent debt owed by the debtor  
18 before such transfer was made;  
19 (3) made while the debtor was insolvent;  
20 (4) made--  
21 (A) on or within 90 days before the date of the filing  
22 of the petition; or  
23 (B) between ninety days and one year before the date of  
24 the filing of the petition, if such creditor at the  
25 time of such transfer was an insider; and  
26 (5) that enables such creditor to receive more than such  
27 creditor would receive if--  
28 (A) the case were a case under chapter 7 of this title;  
(B) the transfer had not been made; and  
(C) such creditor received payment of such debt to the  
extent provided by the provisions of this title.

<sup>6</sup> Under section 547(c)(2), a trustee may not avoid a  
transfer to the extent the transfer was (A) in payment of a debt  
incurred by the debtor in the ordinary course of business or  
financial affairs of the debtor and the transferee; (B) made in  
the ordinary course of business or financial affairs of the  
debtor and the transferee; and (C) made according to ordinary  
business terms.

1 On or around November 7, 2008, Trustee filed a motion in  
2 limine seeking to exclude Keeton's testimony for various reasons  
3 under FRCP 26(a)(2) and because his report allegedly failed to  
4 comply with the standards set forth in Daubert and Kumho Tire.<sup>7</sup>  
5 The bankruptcy court held a hearing on Trustee's motion on  
6 December 11, 2008. At the start, the court announced that a  
7 court-appointed expert would be the only expert in the  
8 proceeding, and that no party would be allowed to call its own  
9 expert at trial. Neither D&M nor Trustee orally objected to this  
10 ruling.

11 An Order Striking Designation of Experts and Setting  
12 Procedure For Court Expert was entered on January 26, 2009. The  
13 order instructed the various defendants to provide a list of five  
14 potential expert witnesses to Trustee, who then was to select one  
15 (or none). No party filed a motion to reconsider the court's  
16 order. Trustee chose expert Lonnie Andrews ("Andrews") from the  
17 list proffered by defendants.

18 On January 29, 2009, the bankruptcy court entered an order  
19 appointing Andrews as the expert witness "to testify solely with  
20 respect to [§ 547(c)(2)(C) (2005)] as to whether or not each of  
21 the payments at issue were made according to ordinary business  
22 terms in the Debtor's industry, which was the construction of  
23 multi-million dollar private industrial and commercial  
24 construction projects . . . ."

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27 <sup>7</sup> Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993);  
28 Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).

1           The parties deposed Andrews on April 10, 2009. With respect  
2 to the industry standard for payment practices of contractors-  
3 subcontractors, the following colloquy ensued:

4           Q: Let's talk about the time period to pay a  
5 subcontractor. Remembering, that we're talking about  
6 subcontractors who worked on multimillion-dollar  
7 private industrial and commercial construction projects  
8 such as hospitals and related medical facilities in the  
9 Los Angeles metropolitan area in 2004.

10          ...  
11          Q: Do you know how long it took the general contractor  
12 to pay subcontractors for the work they did after the  
13 general contractor received payment for that work from  
14 the owner?

15          ...  
16          A: Again, it's averages because it varied. If there's  
17 -- if there was a complete billing with all the correct  
18 paperwork in place, you know, less than 20 days, on an  
19 average, I would say.

20          Upon further examination of Andrews's testimony that "less than  
21 20 days" was the industry standard for payment, the following  
22 inquiry occurred:

23          Q: Using the definition I just gave you of "ordinary  
24 business terms," [the broad range of business terms  
25 employed by similarly situated debtors and creditors,  
26 including those in financial distress, during 2004 in  
27 Los Angeles] in your opinion, it would not be out of  
28 the ordinary course of business for a general to pay a  
sub longer than 20 days after the general got paid by  
the owner; is that correct?

          A: That's correct.

          In response to counsel's question about whether it would be  
an "aberration" for a financially distressed contractor to pay a  
subcontractor 60 days after receiving payment from the owner,  
even when all documents for payment were in order, Andrews  
responded, "I don't believe it would be an aberration, no." Upon  
being asked whether 90 days would be an "aberration," Andrews  
responded, "I've seen chains of events that would take it to

1 90 days." When asked to elaborate on his testimony that it could  
2 take up to 90 days for payment, Andrews clarified that such  
3 circumstances involved only cases where the subcontractor had  
4 filed stop notices or mechanics liens, which the general had to  
5 remove before it could get paid by the owner, and such cases were  
6 very rare.

7 Disputes about Andrews ensued. The parties argued, inter  
8 alia, over the scope of his testimony and questioned his  
9 qualifications. At a June 4, 2009 hearing, the bankruptcy court  
10 stated, "the only thing I want the expert to testify about is  
11 what is the objective standard as applied through the industry,  
12 period." (Hr'g Tr. at 2244:4-6, June 4, 2009). The court  
13 further ordered that all direct expert testimony be submitted by  
14 deposition transcript. At a September 3, 2009 hearing on the  
15 parties' Joint Stipulation Re Dispute Over Testimony of Court  
16 Appointed Expert, the bankruptcy court reminded the parties that  
17 they, particularly Trustee, agreed to Andrews as the court-  
18 appointed expert witness, and thus his objections as to Andrews's  
19 qualifications were overruled. The court also expounded on its  
20 reasoning as to why it preferred a court-appointed expert to the  
21 exclusion of all other experts in this proceeding:

22 I devolved to all of you, Defendants and Plaintiff, the  
23 selection of an expert witness because I told you I  
24 would be appointing a court-appointed expert witness,  
25 not have each of you bring your own witnesses. Because  
26 in my experience, party-selected and paid expert  
27 witnesses are, for the most part --- not always, for  
most part unhelpful to the finder of fact in  
determining issues which are --- factual issues that  
are contested because they testify as paid to testify.  
That's why the rule exists, that's why I employ it  
often.

1 (Hr'g Tr. at 2314:21-2315:5, Sept. 3, 2009). Most importantly,  
2 the court warned the parties about the type of question to  
3 Andrews that would be improper for evidentiary purposes:

4 So just having, like you said, asked the question,  
5 saying is this an aberration, trying to catch a magic  
6 word from Health Central [sic] or from Kaypro, that's  
7 not going to work. You've got to show me facts and you  
8 show me what his knowledge and his opinion is of what  
9 would work in the industry.

10 (Id. at 2316:21-2317:1).

11 The bankruptcy court held a trial on the preference action  
12 on October 21, 2009. Since the parties had stipulated to all of  
13 the elements of a preference under section 547(b), and had  
14 further stipulated that D&M satisfied section 547(c)(2)(A), D&M  
15 had to prove only that the subject progress payment satisfied  
16 sections 547(c)(2)(B) and (C) in order to prevail on its ordinary  
17 course of business defense.

18 D&M called the only witness, Michael Atia ("Atia"), the  
19 president of D&M for the past 26 years. Atia testified that D&M  
20 expected to receive progress payments from Peck/Jones  
21 approximately 60-90 days from the invoice date. The parties  
22 stipulated that all other progress payments made outside the  
23 preference period under this scheme (from invoice date) ranged  
24 from 49-86 days.

25 Atia also reviewed two documents concerning payment terms  
26 between D&M and Peck/Jones: Plaintiff's Exhibit #260, a similar  
27 subcontract agreement, and Defense Exhibit Y, a blank copy of  
28 "General Terms" utilized in D&M's contracts. The General Terms  
provide that the general contractor is not obligated to pay the  
subcontractor progress payments until the general receives

1 payment from the owner - the "pay when paid" provision - and that  
2 the general contractor shall pay the subcontractor within 30 days  
3 of when the general is paid by the owner. Atia testified that  
4 usually the General Terms were included with every D&M contract,  
5 but he could not recall if Exhibit Y was the actual General Terms  
6 from the Subcontract Agreement with Peck/Jones. Accordingly, the  
7 bankruptcy court denied D&M's motion to admit Exhibit Y into  
8 evidence. As for the copy of a similar subcontract agreement,  
9 which also contains the same payment provisions, Trustee  
10 stipulated that it was silent as to the time period when payment  
11 was to be made from Peck/Jones to D&M.<sup>8</sup>

12 The bankruptcy court ruled from the bench. It found that  
13 the subject progress payment did not meet section 547(c)(2)(C),  
14 the "objective" prong:

15 My reading of Mr. Andrews' testimony ... and what is  
16 the ordinary course of business is that you look at the  
17 contract, you look at the statute [Cal. Bus. & Prof.  
18 Code § 7108.5] which calls for [payment in] 10 days --  
19 I think that rarely occurs -- you look to the contract  
20 in which parties, it seems, routinely expand that  
21 period to at least 30 days for payment to come. But  
22 that in the industry at large, that it is common and in  
23 the ordinary course of business for payments to be made  
24 by a general contractor in this industry to a  
25 subcontractor such as the Defendant within 60 days of  
26 payment by the owner to the general.

27 This transfer takes place 66 days. ... When I look at  
28 the expert's testimony again ... the expert testified  
that he had seen it once, maybe twice, where it would  
be beyond 60 days and up to 90 days. ...[T]aking that

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25 <sup>8</sup> Although Trustee asserts in his appellate brief that the  
26 Subcontract Agreement between Peck/Jones and D&M contained the  
27 "pay when paid" provision, as well as the provision that  
28 Peck/Jones was to pay D&M within 30 days of receiving payment  
from Hotel Dieu, he admitted at oral argument that the  
Subcontract Agreement was never part of the record.

1 testimony in its plain meaning, clearly that's not in  
2 the ordinary course of the industry.

3 So ... when ... I look at the other progress payments,  
4 they're within 60 days and many days within 60 days.  
5 So I find that the transfer is not within the meaning  
6 of the ordinary course of business for the progress  
7 payment. So it doesn't meet the objective prong.<sup>9</sup>

8 (Trial Tr. at 2054:2-2055:10, Oct. 21, 2009).

9 The bankruptcy court found in favor of D&M on section  
10 547(c)(2)(B) - that the transfer was made in the ordinary course  
11 of business or financial affairs of Peck/Jones and D&M.

12 On December 17, 2009, the bankruptcy court entered a  
13 judgment in favor of Trustee for the progress payment of  
14 \$94,808.20, plus pre- and post-judgment interest. D&M timely  
15 appealed.

16 <sup>9</sup> D&M contended that the calculation for preference payments  
17 should be the time it took between the day D&M invoiced  
18 Peck/Jones to the day the payment to D&M cleared Peck/Jones's  
19 account. The 49-86 day range cited above is based on D&M's  
20 method.

21 Trustee contended that the calculation should be the time it  
22 took between the day Peck/Jones received payment from Hotel Dieu  
23 to the day the payment to D&M cleared Peck/Jones's account.  
24 Andrews also testified that a general contractor's obligation to  
25 pay a subcontractor does not flow from the date the subcontractor  
26 invoiced the general. Therefore, under Trustee's method, the  
27 time frame for payments to D&M would be fewer days since the  
28 clock does not start to run until Peck/Jones received payment  
from Hotel Dieu, as opposed to starting on D&M's invoice date.

The bankruptcy court adopted Trustee's calculation method.  
This likely explains why the court said many of the progress  
payments were made within 60 days and, in some instances, many  
days within 60 days, despite D&M's contention that the court must  
have confused D&M's case with the other defendants in the related  
adversary proceedings.

D&M does not challenge the bankruptcy court's calculation  
method as erroneous, but nonetheless asserts date ranges in both  
its opening and reply brief that adopt its "from invoice date"  
method of calculation.



1 conclude that the court abused its discretion by making a clearly  
2 erroneous finding of fact. Id.

3 **V. DISCUSSION**

4 **A. The Bankruptcy Court Did Not Err When It Determined That The**  
5 **Progress Payment Did Not Fall Within Ordinary Business**  
6 **Terms.**

7 Trustee does not appeal the bankruptcy court's ruling in  
8 favor of D&M on section 547(c)(2)(B) - the "subjective" prong.  
9 Thus, the only issue before us with respect to the preference  
10 payment is the court's ruling under section 547(c)(2)(C) - the  
11 "objective" prong.

12 D&M contends that the bankruptcy court clearly erred when it  
13 determined that the progress payment made on the 66th day did not  
14 fall within ordinary business terms, given an industry standard  
15 of 60 days. More specifically, D&M contends that a six-day  
16 variance from the industry standard cannot be considered, as a  
17 matter of law, "so idiosyncratic as to fall outside the broad  
18 range" of business terms.

19 **1. Governing Law**

20 "To satisfy § 547(c)(2)(C) the creditor must demonstrate  
21 that the relevant payments were ordinary in relation to  
22 prevailing business terms." Sigma Micro Corp. v.  
23 Healthcentral.com (In re Healthcentral.com), 504 F.3d 775, 791  
24 (9th Cir. 2007)(applying pre-BAPCPA law). This breaks down into  
25 two components. First, the creditor must establish the "broad  
26 range" of business terms employed by similarly situated debtors  
27 and creditors, including those in financial distress, during the  
28 relevant period. Id. Second, the creditor must show that the

1 relevant payments were "ordinary in relation to these prevailing  
2 business terms." Id.

3 "If the terms in question are ordinary for industry  
4 participants under financial distress, then that is ordinary for  
5 the industry." Arrow Elecs., Inc. v. Justus (In re Kaypro),  
6 218 F.3d 1070, 1074 (9th Cir. 2000).

7 Section 547(c)(2)(C) should not pose a particularly high  
8 burden for creditors, and only those payments that are so unusual  
9 as to be an "aberration" in the relevant industry fall outside  
10 the meaning of "ordinary business terms." Ganis Credit Corp. v.  
11 Anderson (In re Jan Weilert RV., Inc.), 315 F.3d 1192, 1198  
12 (9th Cir. 2003).

13 A determination of whether a transaction falls outside the  
14 ordinary course of business is a question of fact that depends on  
15 the nature of industry practice. Id. at 1196, citing Kaypro, 218  
16 F.3d at 1073.

## 17 **2. Analysis**

18 The bankruptcy court found that the industry standard for  
19 payments by general contractors to subcontractors, including the  
20 payment practices of those parties in financial distress, with  
21 similar projects in Los Angeles in 2004, is within 60 days -  
22 60 days being the outer limit. Accordingly, it found that the  
23 progress payment on the 66th day did not fall within ordinary  
24 business terms under section 547(c)(2)(C). We must accept the  
25 bankruptcy court's findings of fact unless upon review we are  
26 left with the definite and firm conviction that a mistake has

1 been committed. Latman v. Burdette, 366 F.3d 774, 781 (9th Cir.  
2 2004).

3 D&M contends the evidence established that the industry  
4 standard for payment terms of contractors-subcontractors with  
5 similar commercial projects in 2004 in Los Angeles was 60-90 days  
6 and that the bankruptcy court erred in establishing a "bright-  
7 line" 60-day payment date, as opposed to determining a "range" of  
8 payment dates. Trustee contends that, without contract  
9 provisions to the contrary, California law provides for payment  
10 to subcontractors within 10 days. Further, Andrews's testimony  
11 established that the industry standard for payment terms is "less  
12 than 20 days." Therefore, Trustee argues that the bankruptcy  
13 court was being generous with its finding of 60 days as the outer  
14 limit for payment.<sup>10</sup>

15 D&M is incorrect. To support its contention, it cites to a  
16 page in its opening brief, which cites to a portion of Andrews's  
17 deposition testimony. Nowhere within that cited passage did  
18 Andrews ever assert such an opinion, nor did he assert as much  
19 anywhere else in the record. Moreover, the bankruptcy court did  
20 not establish a "bright-line" rule that the industry standard for  
21 payment was 60 days. The court found that, in the ordinary  
22 course of business in this industry, payments made by a general  
23 contractor like Peck/Jones to a subcontractor like D&M are  
24 "within 60 days of payment by the owner to the general." Thus,

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25  
26 <sup>10</sup> Trustee contends that his expert, DACM Project  
27 Management, was prepared to testify that the industry standard  
28 for payment was 30 days. Trustee cited, erroneously, to D&M's  
expert's report to support this statement. We see no report from  
Trustee's expert witness in the record.



1 ordinary course of business for the industry. Further, Andrews  
2 later clarified his "90-day" testimony explaining that such cases  
3 occurred only when subcontractors had filed stop notices or  
4 mechanics liens, and such cases were "very rare." We see no  
5 evidence that D&M took either of these actions. As the  
6 bankruptcy court noted, Andrews's testimony here established only  
7 that payment of 90 days would not be in the ordinary course of  
8 business for the industry.

9 At best, the evidence established that the industry standard  
10 for payment terms between general contractors and subcontractors,  
11 including those parties in financial distress, with similar  
12 projects in Los Angeles in 2004, was a range of 10-60 days, but  
13 probably something narrower. Based on this record, we are not  
14 convinced that the bankruptcy court made a mistake in finding  
15 that the industry standard for payment was within 60 days, and  
16 that the progress payment on the 66th day did not fall within  
17 ordinary business terms. While some may agree that a payment on  
18 the 66th day is not "so idiosyncratic as to fall outside the  
19 broad range" of business terms, the bankruptcy court's view of  
20 the evidence is supported by the record and cannot be clearly  
21 erroneous. Anderson v. Bessemer City, 470 U.S. 564, 573-75  
22 (1985).

1 **B. The Bankruptcy Court May Have Abused Its Discretion In**  
2 **Striking Keeton's Testimony Under FRE 706(d) But D&M Did Not**  
3 **Sufficiently Preserve This Issue For Appeal.**

4 D&M concedes that FRE 706(a)<sup>11</sup> authorized the bankruptcy  
5 court to appoint its own expert, but contends that the court  
6 violated D&M's right to its own expert under FRE 706(d) when it  
7 excluded Keeton. D&M further contends that the bankruptcy court  
8 abused its discretion when it preemptively concluded that  
9 Keeton's testimony, which satisfied FRCP 26(a)(2) and FRE 702,  
10 would not have assisted the trier of fact. D&M asserts that the  
11 court's ruling went to the testimony's probative value and not  
12 its admissibility, which is contrary to the principles of  
13 Daubert.

14 Courts rarely invoke FRE 706(a). Such appointments of  
15 experts are generally restricted to cases in which the court  
16 requires assistance deciphering complex scientific questions.  
17 See In re Joint E. & S. Dists. Asbestos Litig., 830 F.Supp. 686,  
18 693 (E.D. N.Y. 1993)(recognizing that use of FRE 706 should be  
19 reserved for exceptional cases in which the ordinary adversary  
20 process does not suffice). No complex scientific questions were  
21 at issue in this case, and undoubtedly the adversary process  
22 would have sufficed. Turning now to FRE 706(d), it provides:  
23

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24 <sup>11</sup> FRE 706(a) provides, in relevant part:

25 Appointment. The court may on its own motion or on the  
26 motion of any party enter an order to show cause why expert  
27 witnesses should not be appointed, and may request the  
28 parties to submit nominations. The court may appoint any  
expert witnesses agreed upon by the parties, and may appoint  
expert witnesses of its own selection ....

1 "Parties' experts of own selection. Nothing in this  
2 rule limits the parties in calling expert witnesses of  
their own selection."

3 We could not find any decisions, published or unpublished,  
4 addressing this exact issue, and D&M did not cite any. More  
5 importantly, we are unable to locate in the record where D&M  
6 raised this issue before the bankruptcy court. When the court  
7 decided to strike all experts and appoint an expert witness at  
8 the December 11, 2008 hearing, D&M did not lodge any objections  
9 but, in fact, agreed with the process. D&M conceded as much  
10 before us at oral argument. We generally will not consider  
11 arguments not properly raised before the bankruptcy court.  
12 Franchise Tax Bd. v. Roberts (In re Roberts), 175 B.R. 339, 345  
13 (9th Cir. BAP 1994). We note also that D&M did not address this  
14 issue in its opening brief, but rather in its reply. Generally,  
15 arguments not specifically and distinctly made in an appellant's  
16 opening brief are waived. Golden v. Chicago Title Ins. Co.  
17 (In re Choo), 273 B.R. 608, 613 (9th Cir. BAP 2002).<sup>12</sup> Even if  
18 we considered the issue, D&M has not demonstrated that excluding  
19 Keeton's testimony prejudiced and affected the outcome of its

---

20  
21 <sup>12</sup> Even though we may exercise our discretion to consider  
22 pure questions of law that are central to the case and important  
23 to the public (Consol. Mktg., Inc. v. Marvin Props., Inc. (In re  
24 Marvin Props., Inc.), 854 F.2d 1183, 1187 (9th Cir. 1988), we  
25 decline to do so because D&M did not demonstrate prejudice by the  
26 court's ruling, as noted above, so a different decision here  
27 would not change the outcome of the case.

28 Nonetheless, we question the bankruptcy court's practice of  
appointing expert witnesses to the exclusion of all other  
experts, and believe it violates the plain language of FRE  
706(d). The bankruptcy court's interpretation of FRE 706 renders  
the parties' right to select their own expert meaningless and  
creates a potential for prejudice.

1 case. Defenders of Wildlife, 204 F.3d at 927-28. See 12 Moore's  
2 Federal Practice § 61.06[6] (3d. ed. 2010)(improper exclusion of  
3 evidence will be harmless error unless a substantial right of  
4 party is affected and the excluded evidence would have affected  
5 the outcome of the case); Rule 9005 (incorporating FRCP 61, which  
6 describes "harmless error"). D&M presents neither an outline of  
7 Keeton's probable testimony in relation to the "objective" prong  
8 nor an argument suggesting that such testimony could have led the  
9 bankruptcy court to reach a different conclusion on this issue.

10 Finally, we disagree with D&M's argument that the bankruptcy  
11 court erred by preemptively determining that Keeton's testimony,  
12 which satisfied FRCP 26(a)(2), FRE 702, and Daubert, would not  
13 have assisted the trier of fact. In our review of the record,  
14 the bankruptcy court never expressed any concerns over Keeton's  
15 qualifications or indicated that his report did not comply with  
16 Daubert and Kumho Tire. It struck all experts because it  
17 believed multiple experts "would have led to a cacophony of  
18 testimony from the Plaintiff and the various Defendants telling  
19 [the court] essentially what their clients paid them to tell [the  
20 court] with regards to what the ordinary course of business would  
21 be in the industry at large," which the court considered  
22 unhelpful to its finding of fact. (Trial Tr. at 2053:13-17, Oct.  
23 21, 2009).

24 In summary, even if we were to disagree with the bankruptcy  
25 court's decision to strike all expert witnesses, a practice it  
26 admittedly employs often, D&M did not raise this issue before the  
27 bankruptcy court in order to preserve it for appeal. Moreover,  
28

1 even if we considered the issue, D&M has not shown that it  
2 suffered prejudice when the court struck Keeton's testimony.  
3 Therefore, any possible error here by the bankruptcy court was  
4 harmless.

5 **VI. CONCLUSION**

6 For the foregoing reasons, we AFFIRM.

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