

In 1851, Karl Marx wrote the following about the impact of history on human affairs: “Men make their own history, but they do not make it just as they please....The tradition of all the dead generations weighs like a nightmare on the brain of the living.”¹ The same can be said for poor statutory draftsmanship: it also weighs on jurisprudence and litigants like a nightmare. Such is the case of the Michigan legislature’s drafting of two tooling lien laws—the Special Tools Lien Act² and the Plastic Mold Lien Act.³ These statutes grant tool and die fabricators nonconsensual, first-priority liens in the tools and dies manufactured and sold by them provided that certain actions are taken by those fabricators. The problem is that because of the imprecise and ambiguous language of these statutes, it is unclear what exact steps are necessary for tool fabricators to obtain and perfect these liens. Prompt amendments to these statutes are in order to dispel these uncertainties and correct the problems arising from them.

The History and Milieu of the Michigan Tooling Lien Statutes

The Plastic Mold Lien Act was enacted in 1981 by the Michigan legislature to ensure that Michigan-domiciled builders of molds and dies for use in the manufacture of plastic parts are paid for the tooling that they create and sell. The Special Tools Lien Act was enacted in 2002 to further this same policy with respect to builders of tools used to fabricate metal parts.⁴ In 2002, the Plastic Mold Lien Act was amended to make both acts similar in construction and operation. The primary differences between the two acts are the definitions used in each. For example, in the Plastic Mold Lien Act, the fabricator of a die, mold, or form subject to the act is a “moldbuilder.”⁵ In the Special Tools Lien Act, its counterpart is a “special tool builder.”⁶

The need for these protective statutes is strong in light of the current customs and practices in the automotive industry concerning

Amending the Michigan Tooling Lien Statutes

A NECESSARY DIALECTIC

By Patrick E. Mears

FAST FACTS

Because tooling is critical for production of automotive parts, the threat of repossession and foreclosure of unpaid tooling by the fabricator will often seriously threaten a line shutdown.

The ambiguous language of Michigan’s tooling lien statutes concerning attachment, perfection, and priority of these liens often results in expensive and protracted litigation involving the fabricator, the user of the tooling, and the user’s secured lender.

The statutory language concerning “actual or constructive notice” of the tooling lien should be replaced with Article 9 concepts concerning attachment, perfection, and priority of liens.

the fabrication and sale of tooling. The first step in a typical transaction for the manufacture and sale of tooling normally involves the issuance of a purchase order by an original equipment manufacturer (OEM), such as Ford Motor Company or General Motors Corporation, to a Tier 1 automotive supplier describing specifications for parts to be manufactured through the use of tooling obtained by the Tier 1 supplier. This supplier, in turn, will normally contract with a special tool builder or moldbuilder (hereinafter generically referred to as “toolbuilders”) for the design, manufacture, and sale of tooling that will create these parts for delivery to the OEM. The payment terms of the contract between the Tier 1 supplier and the tool vendor will normally be a specific period (e.g., 30 to 90 days) after PPAP occurs. “PPAP” is the acronym for “parts production approval process,” which involves extensive testing processes employed by OEMs for parts to be manufactured from the purchased tools. Once the OEM verifies that parts made from the tooling conform to required specifications and fall within prescribed tolerances, PPAP will occur, triggering (1) the obligation of the OEM to pay the Tier 1 supplier for the contract price of the tooling; and (2) the obligation of the Tier 1 supplier to pay the toolbuilder for the contract price of the tool. Upon payment by the OEM to the Tier 1 supplier, the OEM often takes title to the tooling, although some OEM contracts provide that title to these goods passes to the OEM when the Tier 1 “acquires” the tool.⁷

It often happens, however, that a Tier 1 supplier will fail to pay the toolbuilder for the tooling’s contract price even though the Tier 1 supplier has received payment for the same tooling from the OEM and has taken possession of the tooling. In this situation, unless the toolbuilder retains a lien or security interest in the delivered tooling under Article 9 of the Uniform Commercial Code (UCC) or another statute, the toolbuilder will hold only an unsecured breach of contract claim against the Tier 1 supplier and will have no recourse against the OEM because of lack of contractual privity.

It is this situation that Michigan’s tooling lien statutes have sought to remedy. If the toolbuilder has not received payment of the contract price for the tooling and if the toolbuilder has taken the actions described in Michigan’s tooling lien statutes to obtain nonconsensual liens in that property, then these liens will attach to and be enforceable against the tooling notwithstanding its ownership. Because tooling is critical for the production of parts in the “just-in-time” inventory regimes, the unpaid toolbuilder’s ability to repossess tooling and foreclose on its statutory lien therein constitutes a serious threat to the OEM’s uninterrupted production of motor vehicles. Because of the uncertainties and delays inherent in the PPAP process, tooling cannot be replaced in a short period and its unanticipated repossession can shut down vehicle production lines.

The Statutory Language

The ambiguous statutory language governing “attachment” of nonconsensual tooling liens has created uncertainty for toolbuilders and has resulted in expensive litigation. These ambiguities are contained in MCL 570.563 (the Special Tools Lien Act) and

MCL 445.619 (the Plastic Mold Lien Act). Except for the different definitions of “special toolbuilder,” “moldbuilder,” “molder,” and “end user” in each statute, the language of these two provisions is similar and reads as follows:

- (1) A [toolbuilder] shall permanently record on every [die, mold, or form] that the [toolbuilder] fabricates, repairs, or modifies the [toolbuilder’s] name, street address, city and state.
- (2) A [toolbuilder] shall file a financing statement in accordance with the requirements of section 9502 of the uniform commercial code, 1962 PA 174, MCL 440.9502.
- (3) A [toolbuilder] has a lien on any [tooling] identified pursuant to subsection (1). The amount of the lien is the amount that a customer or [molder/end user] owes the [toolbuilder] for the fabrication, repair, or modification of the [tooling]. The information that the [toolbuilder] is required to record on the [tooling] under subsection (1) and the financing statement required under subsection (2) shall constitute actual and constructive notice of the [toolbuilder’s] lien on the [tooling].
- (4) The [toolbuilder’s] lien attaches when actual or constructive notice is received. The [toolbuilder] retains the lien that attaches under this section even if the [toolbuilder] is not in physical possession of the [tooling] for which the lien is claimed.
- (5) The lien remains valid until the first of the following events takes place:
 - (a) The [toolbuilder] is paid the amount owed by the customer or [molder/end user].
 - (b) The customer receives a verified statement from the [molder/end user] that the [molder/end user] has paid the amount for which the lien is claimed.
 - (c) The financing statement is terminated.
- (6) The priority of a lien created under this act on the same [tooling] shall be determined by the time the lien attaches. The first lien to attach shall have priority over liens that attach subsequent to the first lien.

To obtain an enforceable lien in tooling, the toolbuilder must “permanently record” on the tool its name, street address, city, and state. This is often done by affixing a metal plate containing this information on the tooling. The statutes also require the filing of a financing statement “in accordance with the requirements of” section 9-502 of the UCC as enacted in Michigan. This section specifies information that must be contained in a filed financing statement to perfect a security interest in personalty. Neither section 9-502 nor Michigan’s tooling lien acts specifies where a financing statement must be filed, however.

Subsections (3) and (4) of MCL 570.563 and MCL 445.619 contain the problematic statutory language. Subsection (3) provides that the amount of the indebtedness secured by the tooling lien is “the amount” that a “customer” or “end user”/“molder” owes the toolbuilder “for the fabrication, repair or modification” of the “special tool” or “die, mold or form.” So far, so good. However, the next sentence of subsection (3) declares that the information that the

toolbuilder is required to record on the tooling (i.e., its name, street address, city, and state) and include in the financing statement (i.e., the name of the debtor, the name of the secured party, and description of the collateral) “shall constitute actual *and* constructive notice” of the lien (emphasis supplied).

However, subsection (4) of these two statutes states that the tooling lien “attaches when actual *or* constructive notice is received.” Here lies the rub. Subsection (3) states that the information permanently recorded on the tooling and contained in the financing statement constitutes actual and constructive notice of the lien’s existence, but subsection (4) provides that in order for the statutory lien to attach, only one of the two types of notice is required. Thus, if just the recording of the name, street address, city, and state of the toolbuilder on the tooling provides either actual or constructive notice of the lien, then the lien attaches to the tooling and the filing of a UCC financing statement would not be necessary for purposes of lien attachment. Nevertheless, in this circumstance the statutory requirement of filing a financing statement would not be superfluous. First, this filing alone may be sufficient for the lien to attach because the financing statement itself provides “constructive notice” of the lien. Second, terminating a financing statement is one method of extinguishing the tooling lien.⁸

Finally, subsection (6) of MCL 570.563 and MCL 445.619 provides rules to determine the priority of a nonconsensual tooling lien held by a toolbuilder vis á vis other liens in the tooling. The priority of this lien “shall be determined by the time the lien attaches. The first lien to attach shall have priority over liens that attach subsequent to the first lien.” This language is also imprecise. Are the “liens” referred to in this subsection only the liens created by these statutes or do they also refer to consensual security interests in the tooling created under Article 9 of the UCC? As previously described, in the automotive industry it is common for a toolbuilder to deliver tooling to its purchaser before the toolbuilder receives payment. If title to the tooling passes to the purchaser upon the tooling’s delivery, then the tooling becomes either “inventory” or “equipment” of the titleholder. If the titleholder has existing financing from a lender collateralized by a security interest in all of the titleholder’s personal property and if the lien priority rule quoted above applies also to UCC Article 9 security interests, then the toolbuilder should take all actions specified in the lien acts before delivering the tooling to obtain a first-priority tooling lien. If the toolbuilder fails to take these actions before delivering the tooling, then the prior security interest of the titleholder’s financing bank would attach to the tooling and be perfected upon delivery of the tool, thereby priming a subsequently attaching tooling lien.

The *Plastech* Litigation and Decision: One Step Forward, Two Steps Back?

The problems created by this poor statutory draftsmanship are illustrated by the recent decision of *H.S. Die Engineering, Inc v Ford Motor Company (In re Plastech Engineered Products, Inc)*.⁹ This litigation arose in the Chapter 11 cases of Plastech Engineered

Products, Inc., and related entities started in 2008. The Plastech debtors were Tier 1 automotive suppliers of blow-molded and injected-molded plastic parts that they produced and sold to OEMs such as Ford. To manufacture these parts, Plastech acquired tooling from moldbuilders and special toolbuilders, including H.S. Die & Engineering, Inc. (H.S. Die).

During the course of the *Plastech* litigation, the bankruptcy court entered an order described as the “tooling procedures order,” which was the product of intense and lengthy negotiations among the OEMs, Plastech, and numerous toolbuilders, including H.S. Die. This order provided that all tooling subject to liens asserted by toolbuilders would not be sold in liquidation sales conducted by Plastech in its Chapter 11 cases and that this tooling would remain subject to claimed liens. This order also permitted toolbuilders to take certain actions to enforce their liens. H.S. Die elected to do just this.

In accordance with the tooling procedures order, H.S. Die commenced an adversary proceeding against Ford by filing a five-count complaint in bankruptcy court. In its complaint, H.S. Die sought to foreclose on tooling in Ford’s possession in accordance with the foreclosure procedures provided in Michigan’s Special Tools Lien Act and the Plastic Mold Lien Act.¹⁰ Also in its complaint, H.S. Die sought to obtain possession of tooling it manufactured that was in Ford’s possession and for which H.S. Die had not been fully paid. Ford later filed a motion to dismiss the complaint in its entirety under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

In this litigation, Ford took the position that obtaining a valid tooling lien under the Michigan statutes requires toolbuilders to make the permanent recordations on the tooling and file a UCC financing statement complying with MCL 440.9502. Even though H.S. Die permanently recorded this information on the tooling as required by Michigan’s tooling lien statutes, Ford claimed that H.S. Die filed “defective” financing statements. According to Ford, these financing statements

...either failed to state the correct name of the debtor, or were filed in the name of an entity that had already dissolved, or were filed post-petition in violation of the automatic stay of § 362 of the Bankruptcy Code.¹¹

In response, H.S. Die argued that it was not necessary to file financing statements to obtain tooling liens. Because H.S. Die had made the permanent recordations on all of the tooling sought to be recovered, the “actual or constructive” notice requirement of these statutes had been satisfied and, therefore, H.S. Die’s tooling liens were enforceable against this tooling.

In his decision on Ford’s motion, Bankruptcy Judge Phillip J. Shefferly, after undertaking extensive and thorough analysis of MCL 570.563 and MCL 445.619, concluded that the statutory language of subsections (3) and (4) of those statutes was “inescapably ambiguous.”¹² The ambiguities arose from the use of the phrase “actual and constructive notice” in subsection (3) and the materially different phrase “actual or constructive notice” in subsection (4). The legislative history of these statutes, the sparse caselaw interpreting them, and legal commentaries gave no guidance for

The need for these protective statutes is strong in light of the current customs and practices in the automotive industry concerning the fabrication and sale of tooling.

the proper resolution of this ambiguity. Judge Shefferly summarized the impact of these ambiguities in the following passage:

Subparagraph 4 injects an additional element of doubt in construing the statutes by providing that the lien “attaches when actual or constructive notice is received.” The problem caused by this language is that under subsection 3, the references to the information required to be inscribed on the tooling and the financing statement required to be filed are written with the conjunctive *and*, which suggests that both acts together constitute actual and constructive notice of the lien. However, subsection 4 arguably calls this construction into question by using the disjunctive *or* between “actual” and “constructive” notice. The disjunctive *or* in this sentence suggests that there might be actual notice without constructive notice and vice versa. In other words, if the lien can attach when there is only the actual notice provided by the inscription on the tooling, does this mean that attachment can occur without the constructive notice that a UCC financing statement provides? Similarly, if there is only a UCC financing statement that provides the constructive notice, can attachment occur without the actual notice that is provided by the inscription on the tooling? These questions seem to support H.S. Die’s contention that only one *or* the other of permanent inscription or UCC financing statement is necessary. According to H.S. Die’s reading, subsection 4 clarifies that attachment occurs when either actual *or* constructive notice is received, thereby reinforcing its position that the lien is enforceable so long as the toolmaker has *either* inscribed the information on the tooling or filed a UCC financing statement.¹³

Nevertheless, Judge Shefferly resolved this ambiguity by giving substantial weight to the use of the word “shall” in these statutes when describing the duty of a toolbuilder to file a UCC financing statement.

After examining the structure of both statutes, and their use of the unambiguous terms “shall” and “required,” the Court is persuaded that Ford’s construction of the ambiguities in the statutes is the better view. The Court holds that both of these statutes require a two step process in order to obtain an enforceable lien: the permanent recording of information on the mold or tool, and the filing of a financing statement in accordance with section 9502 of the UCC. To adopt H.S. Die’s interpretation would re-

quire the Court to ignore legislative imperatives. The Court is convinced that Ford’s reading of the statutes best reflects the intent of the Michigan legislature as manifested in the language of the statutes.¹⁴

Notwithstanding the foregoing, Judge Shefferly declined to dismiss the complaint for failure to state a claim because of allegations by H.S. Die made outside of the pleadings that, if proven, could sustain H.S. Die’s argument that its filed financing statements satisfied the statutory requirements.¹⁵ As of the date of this writing, this adversary proceeding is still pending.

What is to Be Done?

The Michigan tooling lien statutes contain serious flaws in legislative drafting that should be remedied immediately by statutory amendments. The following are suggested statutory amendments.

What Should Be the Statutory Requirements for Lien Attachment and Perfection?

Unlike Article 9 of the UCC, the Michigan tooling lien statutes do not explicitly employ the concept of perfection of tooling liens but rather speak of attachment and actual/constructive notice of the liens. The author suggests that the actual/constructive notice concept be written out of the statute and that the familiar UCC Article 9 concepts of lien attachment and perfection be substituted. The statute could be amended to provide that attachment and perfection of these liens occur when just the name, street address, city, and state of the tooling fabricator is permanently recorded on the tool. Such an amendment would be consistent with the broad statutory policy of providing for full payment to Michigan toolbuilders for tools fabricated and sold by them and would be easier and cheaper for toolbuilders, especially smaller enterprises, to comply with. If the legislature, however, insists on the filing of a financing statement in addition to recordation of the builder’s name and address on the tool for lien perfection, then the statute could be amended to clearly state that the lien attaches on recordation and is perfected on the filing of the financing statement. Either alternative would inject the clarity that is presently lacking in these statutes.

Where Should the UCC Financing Statements Be Filed?

At the very least, the Michigan tooling lien statutes should specify in which filing office or offices a financing statement must be filed. Although the general rule governing where a financing statement must be filed under Article 9 of the UCC is the debtor's "location,"¹⁶ bankruptcy trustees and debtors in possession in Chapter 11 cases have taken the position that these statements must be filed with the Michigan Secretary of State's office even though the debtor is organized in another state. Amendments to the tooling lien statutes specifying where these financing statements must be filed are especially important in the automotive industry where tooling may be first sold to a Tier 1 supplier organized in state A, later conveyed to an OEM organized in state B, and then subsequently moved to a different jurisdiction altogether.

Should Other Provisions of Article 9 of the UCC Be Incorporated into the Tooling Lien Statutes?

In the *Plastech* adversary proceeding, Ford argued that because the name of the particular *Plastech* debtor on certain financing statements filed by H.S. Die was incorrect, those statements should be deemed "seriously misleading" under MCL 440.9506 and, therefore, deemed ineffective. H.S. Die argued that because the tooling lien statutes incorporated only MCL 440.9502, any other provisions of UCC Article 9 were inapplicable to the dispute. Although Judge Shefferly rejected H.S. Die's argument, another judge could logically rule the other way. In any event, when amending these statutes, the Michigan legislature should seriously consider whether the incorporation of other UCC Article 9 provisions affecting financing statements is desirable.

Conclusion

Because of imprecise legislative draftsmanship, the Michigan tooling lien statutes are in desperate need of overhaul. Carefully conceived and drafted amendments to these acts as suggested by the author would foster more predictability in judicial construction and interpretation of the statutory language and would reduce the incidence and costs of litigation over the proper meaning and application of that language. ■



Patrick E. Mears has been practicing insolvency, creditors' rights, and commercial finance law for more than 30 years and is the chair of the Finance, Insolvency, and Restructuring Department of the law firm of Barnes & Thornburg LLP. He is chair of the SBM Business Law Section's Uniform Commercial Code Committee, an elected Fellow of the American College of Bankruptcy, and an elected member of the American Law Institute. Mr. Mears may be contacted at (616) 742-3936 or pmears@btlaw.com.

FOOTNOTES

1. Marx, *The Eighteenth Brumaire of Louis Bonaparte* (1851).
2. MCL 570.541, *et seq.*, which applies to any tools, dies, jigs, gauges, gauging fixtures, special machinery, cutting tools, or metal castings fabricated by a special tool builder for the manufacture of metal products. MCL 570.542(c). These statutes were enacted in 2002.
3. MCL 445.611, *et seq.*, which applies to plastic dies, molds, or forms fabricated by a moldbuilder to produce plastic parts. These statutes were enacted in 1981 and amended in 1986 and 2002.
4. See, e.g., *Eason Automation, Inc v Thyssenkrupp Fabco Corp*, 2007 WL 2225863; unpublished order of the United States District Court, Eastern District of Michigan, issued August 1, 2007 [Docket No. 06-14553].
5. MCL 445.611(b).
6. MCL 570.542(d). Both the Special Tools Lien Act and the Plastic Mold Lien Act have generated a substantial amount of legal commentary since their enactments. See, e.g., Sharkey, *The "car wars" in court: Steel, plastics, terms, and other fronts in automotive supply litigation*, 87 Mich B J 23 (December 2008); Gregg, *Breaking the mold: Subordination of blanket liens under Michigan's Special Tool Lien Act*, 124 Banking L J 816 (October 2007).
7. For an extensive discussion of PPAP in the automotive industry, see *In re Collins & Aikman Corp*, 384 BR 751 (Bankr ED Mich, 2008); *Custom Products Corporation v Internet Corporation*, 170 F Supp 2d 853 (ED Wis, 2001).
8. MCL 570.563(5)(c); MCL 445.619(5)(c).
9. *H.S. Die Engineering, Inc v Ford Motor Company* (*In re Plastech Engineered Products, Inc*), 418 BR 235 (Bankr ED Mich, 2009).
10. The foreclosure procedures in the Michigan Special Tools Act are contained in MCL 570.555 to 570.571. These procedures in the Plastic Mold Lien Act are set forth in MCL 445.618a to 445.620c.
11. *H.S. Die*, 418 BR at 242.
12. *Id.* at 245.
13. *Id.*
14. *Id.* at 247.
15. *Id.* at 247-248.
16. MCL 440.9301(a); MCL 440.9307.

Because of imprecise legislative draftsmanship, the Michigan tooling lien statutes are in desperate need of overhaul.

