

Complaint

98 F.T.C.

IN THE MATTER OF

TENNECO, INC.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED
VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT
AND SEC. 7 OF THE CLAYTON ACT

Docket 9097. Complaint, March 15, 1977—Final Order, Sept. 23, 1981

This order requires, among other things, a Houston, Texas, corporation to timely divest, in accordance with the terms of the order, all assets and properties constituting the Monroe Auto Equipment Company. The order also prohibits the company from acquiring, for a period of ten years, any enterprise engaged in the manufacture or sale of shock absorbers, without prior Commission approval; and bars any corporate officer or employee owning or controlling more than 1 per cent of Tenneco's assets from acquiring any of the divested stock or assets.

Appearances

For the Commission: *K. Keith Thurman, Layn R. Phillips, and Linda C. Martin.*

For the respondent: *John L. Jeffers, Alan Gover, and Henry Kollenberg, Baker & Botts, Houston, Texas, and David C. Murchison, John DeQ. Briggs III, and Bernard Cooney, Howrey & Simon, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents, Tenneco Inc. (hereinafter "Tenneco") and Monroe Auto Equipment Company (hereinafter "Monroe"), corporations subject to the jurisdiction of the Commission, through taking steps to combine Tenneco and Monroe, have violated Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); the proposed acquisition by Tenneco of the stock of Monroe, if consummated, would violate Section 7 of the Clayton Act, as amended (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and it appearing that a proceeding by the Commission in respect thereof would be in the public interest; the Commission hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C.21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C.45(b)) and states its charges as follows:

I. Definitions

1. For the purposes of this Complaint, the following definitions shall apply:

(a) *Exhaust system parts* (hereinafter "ESP") are all exhaust pipes, connecting pipes, tail pipes, mufflers (including "sports" mufflers), resonators and attaching parts for application on automobiles, trucks, buses and farm equipment. [2]

(b) *Shock absorbers* are McPherson strut assemblies, cartridges, and shock absorber kits; steering dampers; and direct-acting, air-adjustable, and spring-assisted shock absorbers for application on automobiles, trucks and buses.

(c) The *replacement market* includes all sales by manufacturers of automotive parts for use as replacement of original equipment parts or of previously replaced parts.

II. Tenneco

2. Tenneco is a corporation organized and doing business under the laws of Delaware, with its principal office at the Tenneco Building, Houston, Texas.

3. In 1975, Tenneco's consolidated operating revenues were \$5,630,338,000 and its net income was \$342,936,000. As of December 31, 1975, Tenneco had total assets of \$6,584,204,000.

4. Tenneco's automotive parts operations are carried on by its Walker Manufacturing Company division (hereinafter "Walker"), which manufactures and distributes a full line of ESP, hydraulic and air jacks, steering dampers (a form of shock absorber), and other parts for passenger cars, light trucks, and heavy duty vehicles in the U.S.

5. In 1975, Walker's worldwide revenues amounted to \$303 million with net operating income before taxes of \$52.1 million. In 1975, Walker's domestic ESP operations had gross sales of \$209.7 million, operating income before taxes of \$38.6 million, and a pretax return on investment of 38.7 percent. Walker operated thirteen plants located in the U.S., eleven of which manufactured ESP, and served domestic customers from twenty-two distribution centers.

6. At all times relevant hereto, Tenneco sold and shipped products throughout the U.S. and engaged in commerce within the meaning of the Clayton Act, as amended; and engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended. [3]

III. Monroe

7. Monroe is a corporation organized and doing business under the laws of Michigan, with its principal office at International Drive, Monroe, Michigan.

8. Through its fiscal year ended June 30, 1976 ("fiscal 1976") Monroe's business consisted mostly of the manufacture and distribution of shock absorbers, primarily for automotive use. Monroe produces and sells shock absorbers for use on virtually all domestic, and many foreign, makes and models of automobiles. Monroe offers the most complete coverage of truck (light, medium and heavy) and bus shock absorbers. Monroe operates three domestic production facilities which, along with Monroe's corporate headquarters, function as distribution points for its independent aftermarket customers.

9. For fiscal 1976 Monroe had net sales of \$174,346,000 and net income of \$5,411,000. As of June 30, 1976, Monroe had total assets of \$185,854,000. Monroe has experienced a rate of return on its stockholder's equity averaging 21.9 percent after taxes for the ten year period 1965-74. For fiscal 1976, \$123.8 million of Monroe's total sales and all of its profits derived from its domestic operations.

10. Monroe is a leading manufacturer and distributor of shock absorbers in the U.S. and worldwide, especially in the replacement markets. Eighty-one percent of its sales in the latest fiscal year were made to the replacement markets. In 1976, Monroe ranked second in the U.S. replacement shock absorber market. Monroe's sales of shock absorbers domestically are made primarily to warehouse distributors (hereinafter "WDs"), but it also sells to chain stores and other private brand accounts and various vehicle producers for resale. Monroe is the largest seller of shock absorbers to WDs. Monroe has a quality product, a known brand name, and a competent force of field salesmen.

11. At all times relevant hereto, Monroe sold and shipped its products throughout the United States, and engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended. [4]

IV. Agreement Between Tenneco and Monroe

12. On December 20, 1976, Tenneco announced an agreement in principle to acquire Monroe. On December 22, 1976, the Boards of Directors of Tenneco and Monroe approved a proposal for the combination of the two companies to be effected by an exchange of Tenneco common stock for Monroe common stock. Under the

exchange proposal Tenneco would seek to acquire not less than 80 percent of Monroe's common stock. It is anticipated that the proposed acquisition of Monroe by Tenneco will be consummated in March 1977.

V. Nature of Trade and Commerce

A. Market Definitions

13. The relevant geographic market is the U.S. as a whole.

14. The relevant product markets are:

(a) The manufacture and sale of shock absorbers to (1) the U.S. replacement market and (2) the U.S. independent aftermarket.

(b) The manufacture and sale of ESP to (1) the U.S. replacement market and (2) the U.S. independent aftermarket.

15. No practical alternatives exist for shock absorbers and ESP in automotive use.

16. Shock absorbers are an integral part of automotive suspensions. They are responsible to a large degree for the handling characteristics, roadability, safety and comfort of the car. They help to hold a car under control, reduce sway and roll on curves, reduce bottoming, control wheel hop, and smooth the ride.

17. Shock absorbers take three basic forms: McPherson units; steering dampers; and heavy duty, air-adjustable and spring-assisted shock absorbers. Monroe and its principal competitors offer all three forms as a complete shock absorber line. All forms of shock absorbers (1) involve the same basic design and manufacturing technologies; (2) are sold through the same channels of distribution to the same customers; (3) are manufactured by the leading producers of shock absorbers; (4) are installed by the same people; (5) are priced within the same range; and (6) perform the same basic function, to aid in stabilizing the vehicle. [5]

18. ESP serve to dissipate engine exhaust fumes and to provide an acceptable noise level.

19. Both shock absorbers and ESP are sold for incorporation into new vehicles during their assembly (original equipment installation, hereinafter "OE") and for replacement of worn out or damaged units on existing vehicles. The replacement market is distinct from the OE market. Prices of parts sold to the OE market are significantly lower than those sold to the replacement market. There is no cross elasticity of demand between the OE and replacement markets. Demand for OE parts is a function of vehicle production; demand for

replacement parts varies with a number of factors, including wear, failure, and desired upkeep by users.

20. The replacement markets for shock absorbers and ESP are divisible into two submarkets: the service market; and the independent aftermarket. The service market consists of sales made to vehicle producers for resale to their dealers, plus sales by vehicle producers of parts of their own manufacture to their dealers. The independent aftermarket encompasses all other replacement sales, but excludes those sales made to other manufacturers of the same product.

21. Manufacturers of shock absorbers and ESP recognize that the service market and the independent aftermarket are distinct submarkets, utilizing separate sales forces and distinct sales programs. To serve the independent aftermarket for shock absorbers and ESP, it is necessary to have a stock of parts at various distribution points around the country. Such distribution facilities are not necessary to supply the service market inasmuch as the customers themselves already possess a distribution system for parts.

B. Market Structure

(i) Shock Absorbers

22. Sales of shock absorbers to the replacement market in 1975 totalled approximately 51.6 million units, having a value of \$312 million. Sales of shock absorbers to the independent aftermarket in 1975 were 47.5 million units, with an approximate value of \$288 million. [6]

23. Monroe's total sales of shock absorbers to the replacement market during fiscal 1976 exceeded 18.3 million units with a value in excess of \$102 million, and accounted for 33 percent of total industry shipments to that market. Monroe's fiscal 1976 shipments of 17.5 million units represented 34 percent of the 51.7 million units (valued at approximately \$301 million) shipped to the independent aftermarket.

24. In calendar 1976 Walker sold \$2.5 million or approximately 0.8 percent of total industry sales of shock absorbers to the replacement market.

25. Concentration in the sale of shock absorbers to the replacement market and the independent aftermarket is extremely high.

(ii) Exhaust System Parts

26. In 1975, gross sales of ESP totalled approximately \$525

million to the replacement market and \$473 million to the independent aftermarket.

27. Walker's sales of ESP to the replacement market in 1975 were approximately \$188 million, which represented 36 percent of industry sales. Walker's sales of ESP to the independent aftermarket in 1975 were approximately \$184.4 million, which represented a 39 percent share of such sales.

28. Concentration in the sale of ESP to the replacement market and the independent aftermarket is extremely high.

(iii) Barriers to Entry

29. The barriers to entry into the sale of shock absorbers and ESP to the replacement market and the independent aftermarket are very high.

30. To enter into the sale of shock absorbers or ESP to the replacement market, a firm must make a substantial investment in plant and equipment. To enter the independent aftermarket portion of the replacement market, a firm also needs warehousing facilities and inventory; sufficient financial resources to meet seasonal requirements; a substantial marketing organization, including a large national sales force; and the ability to grant a variety of extended payment terms to customers. [7]

31. There are large economies of scale in the production both of shock absorbers and of ESP.

32. Holdings of U.S. and foreign patents provide current producers of shock absorbers and ESP with an absolute cost advantage over potential entrants. Monroe, in particular, benefits from its patent rights in shock absorbers. As of December 29, 1976, Tenneco held 194 unexpired patents including design patents on exhaust system items or their manufacture.

33. The leading sellers of shock absorbers and ESP to the replacement market and the independent aftermarket have developed a high degree of product differentiation. This differentiation has resulted from the use of extensive field sales forces to promote the products at all levels of distribution and substantial advertising and promotional expenditures.

34. To compete successfully in the independent aftermarkets, it is necessary to offer a full line of shock absorbers or of ESP, fitting most vehicles sold in the U.S. A firm must distribute nationally, and be able to fill orders in a relatively short period of time. As of 1974, it took more than 5,000 shock absorber part numbers and a like number of ESP part numbers to fulfill the needs of the replacement market for most vehicles made or sold in the U.S.

C. Compatibility of Shock Absorbers With Walker Product Lines

35. The sale of shock absorbers in conjunction with ESP offers advantages from marketing and manufacturing viewpoints. Such advantages arise from an identity of marketing channels and methods, and from common manufacturing methods. Tenneco and Walker have recognized shock absorbers to be the product line most compatible with ESP.

36. Shock absorbers are distributed through the same channels as ESP, from manufacturer to consumer. Shock absorbers are typically installed in exhaust system repair shops. The two products represent "under-the-car" service items, subject to the same environmental and repair conditions. Both ESP and shock absorbers are sold to the same customers by utilizing similar selling programs, discount structures, and financing arrangements. [8]

37. Shock absorbers and ESP can be combined in one distribution and delivery system. They have been marketed together by Walker, Maremont, and Questor to retail and mass merchandiser marketing channels. Both products are stored jointly by their manufacturers, including Walker, in regional warehouses. If the acquisition of Monroe is consummated, Walker proposes a unified distribution system for both shock absorbers and ESP.

38. Technological similarities exist in the manufacture of shock absorbers, and ESP and jacks. Most shock absorber components could be made by Walker's jack and exhaust system manufacturing equipment.

39. The manufacture of shock absorbers requires a knowledge of hydraulics. Walker possesses a knowledge of hydraulics, both fluid and air, from its experience in manufacturing jacks. There are also similarities in research and development technology between shock absorbers, and ESP and jacks.

VI. Walker's Entry Into Shock Absorbers

40. Starting as early as 1967, Walker has sought toehold acquisition entry into the manufacture and sale of shock absorbers to the replacement market. At that time, Walker had acquisition talks with Armstrong Equipment Ltd. (hereinafter "Armstrong"), a British manufacturer of shock absorbers for both the OE and replacement markets. Armstrong had shock absorber manufacturing subsidiaries in Australia, Canada, and South Africa, and a marketing organization for shock absorbers in the U.S.

41. Early in 1973, Walker considered acquiring Tropic Industries, a company which produced a self-adjusting shock absorber.

42. In May 1974 Walker commenced acquisition talks with Triple S Industries (hereinafter "Triple S"), a manufacturer of steering dampers. [9]

43. In May 1974 Triple S was experimenting with the Terramatic principle, which allows consolidation and reduction of the number of different shock absorbers required to serve the replacement market. Major automakers and Walker believed the Terramatic principle had great potential.

44. On October 15, 1974, Walker acquired Triple S and rights to use the Terramatic principle. Throughout their consideration of the Triple S purchase, Walker and Tenneco anticipated that this acquisition would provide a significant entry into the replacement shock absorber market. Subsequent to its acquisition of Triple S, Walker has continued to expand in the replacement shock absorber market.

45. Additional toehold acquisitions to assist Walker's expansion in the shock absorber replacement market have been and are available. Even subsequent to the purchase of Triple S, Walker has had discussions regarding the possible acquisition of leading European shock absorber manufacturers, including Armstrong and De Carbon.

46. Tenneco and Walker have made a significant commitment at their decisional levels to effect entry, either *de novo* or by toehold acquisition, to the manufacture and sale of shock absorbers for the domestic replacement market and the domestic independent aftermarket. Walker is one of the few firms likely to become a major factor in the U.S. replacement shock absorber market either by internal development or by additional toehold acquisitions. It is probable that such expansion by Walker would have a procompetitive effect and would result in deconcentration of the shock absorber replacement market and independent aftermarket.

47. Tenneco and Walker have been perceived as potential entrants into the shock absorber replacement market and independent aftermarket. It is probable that this perception has prompted a procompetitive effect in that market.

VII. Monroe Is One Of Few Likely Entrants Into ESP

48. Monroe has sought to expand into other automotive products sold in the replacement market to capitalize on its distribution channels and experience. ESP met or exceeded all of Monroe's developed criteria for diversification. [10]

49. One means Monroe considered for diversification into ESP

was through acquisition. In 1974 Monroe sought to acquire Arvin Industries, Inc. (hereinafter "Arvin"), a small producer of replacement ESP.

50. Monroe has the ability to expand a toehold ESP producer into a significant factor in the ESP replacement market and the independent aftermarket.

51. Of the major shock absorber sellers to the replacement market only Monroe does not currently manufacture or sell ESP. Common manufacturing and distribution of shock absorbers and ESP, make shock absorber producers the most likely entrants into the replacement ESP market.

52. It is probable that entry by Monroe into the production and sale of ESP would result in deconcentration of the ESP replacement market and independent aftermarket.

VIII. Effects

53. The effects of the steps taken by Tenneco to acquire Monroe constitute an unfair method of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended; and the proposed acquisition by Tenneco of Monroe, if consummated, may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, and constitute an unfair act and practice in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended, in the following ways, among others:

(a) Actual competition between Tenneco and Monroe and between Tenneco and other producers of shock absorbers for domestic sale to the replacement market and the independent aftermarket will be eliminated.

(b) Potential competition between Tenneco and Monroe and between Tenneco and other producers of shock absorbers for domestic sale to the replacement market and the independent aftermarket will be eliminated; furthermore, the potential for substantial deconcentration as a result of Tenneco's independent expansion into those markets will be eliminated. [11]

(c) Potential competition between Monroe and Tenneco and between Monroe and other producers of ESP for domestic sale to the replacement market and the independent aftermarket will be eliminated; furthermore, the potential for substantial deconcentration as a result of Monroe's independent or toehold entry into those markets will be eliminated.

(d) The dominant position of Monroe in the domestic sale of shock

absorbers to the replacement market and the independent aftermarket will be strengthened.

(e) The dominant position of Tenneco in the domestic sale of ESP to the replacement market and the independent aftermarket will be strengthened.

IX. Violations Charged

54. The steps taken by Tenneco and Monroe to combine the two companies constitute a violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

55. The proposed acquisition by Tenneco of Monroe, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18) and of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

INITIAL DECISION BY

THOMAS F. HOWDER, ADMINISTRATIVE LAW JUDGE

MAY 27, 1980

PRELIMINARY STATEMENT

The Commission's complaint in this case, issued March 15, 1977, charges respondent Tenneco Inc. ("Tenneco") with violating Section 7 of the Clayton Act by acquiring Monroe Auto [2]Equipment Company ("Monroe").¹ Specifically, it was alleged that by virtue of the merger:

(1) Actual competition between Tenneco and Monroe and between Tenneco and other producers of shock absorbers for domestic sale to the replacement market and the independent aftermarket has been eliminated;

(2) Potential competition between Tenneco and Monroe and between Tenneco and other producers of shock absorbers for domestic sale to the replacement market and the independent aftermarket has been eliminated; furthermore, the potential for substantial deconcentration as a result of Tenneco's independent expansion into those markets has been eliminated;

(3) Potential competition between Monroe and Tenneco and between Monroe and other producers of exhaust system parts ["ESP"] for domestic sale to the replacement market and the

¹ Violation of Section 5 of the FTC Act was also alleged.

independent aftermarket has been eliminated; furthermore, the potential for substantial deconcentration as a result of Monroe's independent or toehold entry into those markets has been eliminated;

(4) The dominant position of Monroe in the domestic sale of shock absorbers to the replacement market and the independent aftermarket will be strengthened; and

(5) The dominant position of Tenneco in the domestic sale of ESP to the replacement market and the independent aftermarket will be strengthened.

The complaint was issued prior to the actual merger. Upon its issuance, the Commission initiated an action for injunctive relief in the U.S. District Court for the District of Columbia. Based on its consideration of the parties' papers, various depositions and oral arguments of counsel, the court denied the Commission's application. 433 F.Supp. 105 (D.D.C. 1977) (18-page opinion). The merger was thereafter consummated in July 1977 (*See Finding 24, infra*). Later, by order of February 7, 1978, issued by then-assigned ALJ Needelman, the complaint was amended to reflect the fact of the merger.²

[3]

Prehearing conferences were held in Washington, D. C. on May 18, 1977, January 4, 1978 and April 25, 1978. Following the completion of discovery and exchange of trial briefs, hearings were commenced in Washington, D. C., on June 12, 1978. Trial of this case lasted from June 12, 1978, until August 29, 1979, and consumed almost 120 hearing days. A transcript of over 13,300 pages was created, and several hundred exhibits were received in evidence. In their case-in-chief, presented from June 12 through June 23, 1978, complaint counsel called 10 witnesses; respondent's defense presented from July 10, 1978, through February 2, 1979, included 36 witnesses; the rebuttal case of complaint counsel lasted from February 12 through April 30, 1979, and included the testimony of 11 witnesses; and respondent's surrebuttal was presented from April 30 through August 9, 1979, and included the testimony of six witnesses.³

The record was closed on November 23, 1979, following the resolution of a number of problems regarding exhibits, *in camera* materials and extensive transcript corrections. Proposed findings were simultaneously filed by the parties on December 21, 1979, and reply findings on January 31, 1980.

Any motions not heretofore or herein specifically ruled upon,

² The amended complaint does not include Monroe as a named respondent.

³ Appendix A to respondent's proposed findings contains a list of the witnesses and indicates the location of their testimony in the transcript.

either directly or by the necessary effect of the conclusions in this decision, are hereby denied.

This proceeding is before me upon the complaint, answer, testimony and other evidence, and the proposed findings of fact and conclusions of law filed by counsel supporting the complaint and by counsel for respondent. The proposed findings of fact, conclusions and arguments of the parties have been considered, and those findings not adopted either in the form proposed or in substance are rejected as not supported by the evidence or as involving immaterial issues not necessary for this decision.

Certain abbreviations, including the following, are used in this decision:

- Tr. - Transcript of testimony.
- CX - Commission's exhibit.
- CPX - Commission's physical exhibit.[4]
- CPF - Complaint counsel's proposed finding.
- CRPF - Complaint counsel's reply proposed finding.
- RX - Respondent's exhibit.
- RPX - Respondent's physical exhibit.
- RPF - Respondent's proposed finding.
- RRPF - Respondent's reply proposed finding.

The transcript of testimony is usually referred to with the last name of the witness and the page number or numbers upon which the testimony appears.

Having heard and observed the witnesses, and after having reviewed the entire record in this proceeding, I make the following findings:

FINDINGS OF FACT

I. Tenneco

1. Respondent Tenneco Inc. ["Tenneco"] is a corporation organized and doing business under the laws of Delaware. Its principal office is The Tenneco Building, Houston, Texas (Complaint and Answer, ¶2; CX 106).

2. Tenneco is a conglomerate company with diversified manufacturing and distributing operations in farm and construction equipment, shipbuilding, petroleum, chemicals, packaging and automotive parts. Tenneco also has interests in agriculture and in land development (CX 2A-C; CX 2 pp.8-9, 12-20).

3. In 1975, Tenneco was the 15th largest industrial corporation in the United States with total assets of \$6,584,204,000.⁴ Tenneco's 1975 net income of \$342,936,000 was 18th largest and its consolidated operating revenues of \$5,630,330,000 were 22nd largest among industrial corporations in the United States (Complaint and Answer ¶3, CX 192B).

4. Until 1977, Tenneco's automotive parts operations [5] were carried on by its Walker Manufacturing Division ["Walker"], which manufactured and distributed a full line of exhaust system parts⁵ for passenger cars, light trucks, and heavy-duty vehicles in the United States. The production and sale of ESP accounted for and still accounts for a majority of Walker's revenues (Complaint and Answer, ¶4; Cook 1570-72, 1646; RPF 9).

5. The Mechanex Corporation ["Mechanex"] was part of Walker and a Tenneco subsidiary before the Monroe acquisition. Mechanex distributed steering stabilizers or dampers under the brand name of Steerline, as well as other automotive products for application on passenger cars, light trucks and heavy-duty vehicles (CX 43A-H; CX 44A-F; CX 173A; CX 208K, Admission No. 24; CX 339A-B; Prescott 11,281).

6. Walker began business as a jack and lifting device manufacturer in approximately 1912 and currently manufactures a wide variety of jack products including jack stands, hydraulic and air jacks, mechanical scissors jacks and various other associated accessories and components (Complaint and Answer, ¶4; CX 27R; CX 140; Uhen 1866). In recent years Walker has also manufactured and distributed a line of automotive filters, including air, oil and gasoline filters (CX 106B).

7. In 1975, Walker's worldwide revenues were \$303 million, with net operating income before taxes of \$52.1 million (Complaint and Answer ¶5).

8. In 1975, Walker's domestic ESP operations had gross sales of \$209.7 million, operating income before taxes of \$38.6 million, and a pretax return on investment of 38.7%. Walker documents project similar rates of return through 1981 (CX 26B).

9. In 1975, Walker operated 13 manufacturing and/or distribution facilities in the United States (Complaint and Answer, ¶5; CX 208I, Admission No. 19; RX 233; Schultz 1791-92). Of these, ten were ESP facilities:

⁴ This ranking is measured in terms of total assets as of December 31, 1975.

⁵ ESP is defined in Finding 55, *infra*.

