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## **Keeping The Deal Alive 'Til It Closes (Or Dies)**

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# **Handout Version**

# Andrew J. Sherman



Mr. Sherman is a partner in the Washington, D.C. office of Jones Day with over 2,400 lawyers worldwide.

He is the author of 17 books on business growth, capital formation and the leveraging of intellectual property. His eighteenth (18th) book, Road Rules Be the Truck. Not the Squirrel. (<http://www.bethetruck.com>) is an inspirational book which was published in the Fall of 2008. He has appeared as a guest and a commentator on all of the major television networks as well as CNBC's "Power Lunch," CNN's "Day Watch," CNNfn's "For Entrepreneurs Only," USA Network's "First Business," and Bloomberg's "Small Business Weekly." He has appeared on numerous regional and local television broadcasts as well as national and local radio interviews for National Public Radio (NPR), Business News Network (BNN), Bloomberg Radio, AP Radio Network, Voice of America, Talk America Radio Network and the USA Radio Network, as a resource on capital formation, entrepreneurship and technology development.

He has served as a top-rated Adjunct Professor in the Masters of Business Administration (MBA) programs at the University of Maryland for 22 years and at Georgetown University for 14 years where he teaches courses on business growth strategy.

He has served as General Counsel to the Young Entrepreneurs' Organization (YEO) since 1987. In 2003, *Fortune* magazine named him one of the Top Ten Minds in Entrepreneurship and in February of 2006, *Inc.* magazine named him one of the all-time champions and supporters of entrepreneurship.



# State of the M&A Nation

## State of the M&A Nation (Not a pretty picture)



- Deal pace is slow and transactions taking longer to close, thereby increasing the chances of deals getting off track
- More transactions derailing due to market conditions or buyer cold feet / seller remorse / valuation disappointment or overall transactional fatigue (loss of momentum/parties run out of steam and passion)
- Cost of transactional capital is rising and harder to access – another common source of derailment
- Breadth and depth of due diligence is wider and deeper (Post-Madoff effect) with less tolerance for unexpected surprises
- “Sky is Falling” / “Boy who cried Wolf” Market Mindset

## State of the M&A Nation (Not a pretty picture) (Cont'd)

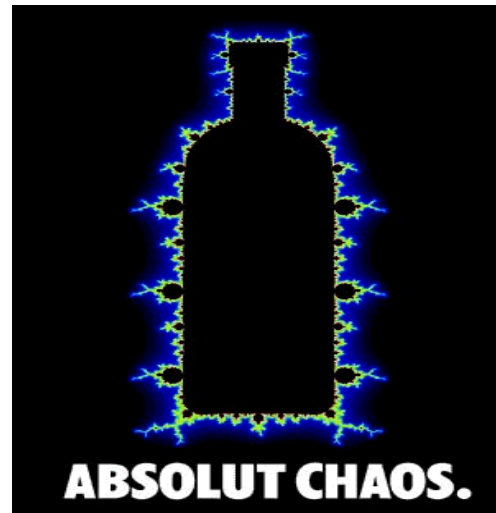


- Perceived vs. Real Lack of Quality Deal Flow Relative to Capital (Overhang)
- Protection & Risk Allocation driven deal terms more hotly-contested (less wiggle room)
- Players seem content on the bench vs. the playing field (are they on injured reserve or out for the season?)
- Post-closing integration challenges persist (if deals do not truly drive stakeholder value, then what's the point?)



# The Big Question

**How can we maintain order  
and focus in a time of confusion  
and uncertainty?**



# Some Preliminary Thoughts To Consider

- Over 500 (reported) transactions were abandoned or withdrawn in the United States during 2007 to 2009 and over 3,000 cross-border (reported) deals. And how many unreported deals never made it to closing? Why did these parties agree to walk down the aisle and then cancel the wedding?
- “Deals will Die 1000 Deaths; Good M&A Advisors Learn How to Bring Them Back to Life Quickly and Cost-Effectively.”
- “How and why do deals die? Sometimes they linger, sometimes they fizzle and sometimes they explode. But often the problem can be laid at the feet of the professional advisors, who take it upon themselves to kill good deals.”

–Unknown

– William May



# **Understanding Deal Derailers and Deal Killers**

# Deal Killers

- Come in a wide variety of shapes and sizes
- All parties think they have good reasons, justification and rationalizations
- Direct (parties/principals/investors) vs. Indirect (customers/suppliers/lenders/partners)
- Where you stand depends on where you sit
- Address problems early on – allowing them to fester only allows them to pollinate and spread

# Problems Dictate Solutions

- Most “deal killers” can be put into one of the following major categories:
  - Price and Valuation
  - Terms and Conditions
  - Allocation of Risk
  - Third Party Challenges

# **Strategic Tools and Solutions**

# How Can All Of Us As M&A Advisors and Professionals Help Keep Deals On Track?

- As mentor and coach
- As orchestrator
- As pacesetter and timetable manager
- As quarterback
- As strategist
- As problem-solver and sounding board
- As mediator
- As diplomat/go-between
- As pragmatist
- As catalyst and facilitator
- As surgeon



# Maintaining Order in the M&A Process: Best Practices for Keeping Deals on Track

- Putting a master strategic plan in place (with realistic financial and post-closing synergy expectations)
- Building the right team
- Designate a quarterback for each team for orchestration and leadership
- Communication and teamwork
- Momentum and timetable accord
- Avoid ego and emotion/don't call my baby ugly syndrome (sellers) and buyers must avoid falling in love with a given transaction or set of deal terms (allow things to evolve – expect change to be the norm, not the exception)

# Maintaining Order in the M&A Process: Best Practices for Keeping Deals on Track (Cont'd)

- Early start on governmental and third party approvals
- Clear understanding of conditions to closing
- Creative problem solving
- Identify potential troublemakers and rabble-rousers
- Cooperation and support from financing sources (and their deal teams)
- Agreement on the key value drivers of the seller's business/intellectual capital issues
- Focus/Focus/Focus

Bottom Line: Coordinate / Communicate / Anticipate =  
No Surprises



## Solutions: Tools to Fix a Broken Deal (assuming it can and should be fixed)



- The dilemma of the hammer and the nail
- Earn-out's/deferred and contingent post-closing consideration
- Representations, warranties and indemnities (tools to adjust allocation and assumption of risk) (weighting of priorities issues)
- Adjusting the post-closing survival period of R&W's
- Holdbacks and security interests
- Closing date audits
- Third party performance guaranties/performance bonds/escrows
- M&A insurance policies
- Restrictions on sale by seller of buyer's securities issued as part of the overall consideration
- Recasting of financial projections and retooling post-closing business plans

## And the Ultimate Solution...

- “...don’t be afraid to...**walk away.**”
- Bad deals deserve to die a peaceful death.
- Not all deals are meant to be done:
  - At this time
  - At this valuation
  - Under these terms and conditions
  - Between these parties
  - With this source of capital

