

# PROLOGUE: TOMBSTONES



*"An offer is really an intangible thing."*

**O**n Tuesday morning, June 23, 1987, P. David Herrlinger of Cincinnati called the Dow Jones News Service to announce that he was making a takeover offer on behalf of himself and Stone, Inc., to acquire the Dayton Hudson Corporation, a major midwestern retailer, for \$7 billion in cash. His bid of \$70 a share offered a stunning premium over the New York Stock Exchange opening price of \$53<sup>3</sup>/<sub>4</sub>, and got prompt attention from Dow Jones. The News Service confirmed Herrlinger's identity from Capital Management, a private investment firm that employed him, and thereafter reported the offer on its national news wire at 9:49 a.m.

No one had heard of P. David Herrlinger or Stone, Inc. Seeking clarification about the offer, the New York Stock Exchange asked Dayton Hudson to comment on its terms, and caught it totally off balance and equally ignorant. The Exchange, anticipating confusion, stopped trading in the stock at 9:53 a.m. The halt covered only trades on the Exchange. Speculative buying and selling began

almost immediately in the over-the-counter market and on the Boston Stock Exchange as professional traders sought to get an early position in the imminent takeover.

Meanwhile, Dayton Hudson scrambled for a footing. Shortly after 10 a.m. Dayton Hudson phoned, hooking me into a conference with about seven or eight of its officers in Minneapolis and at least five investment bankers from Goldman, Sachs & Co., some in New York and others in Chicago. As the operator added parties to the call, a dispirited voice confirmed:

“It’s an ambush.”

“Say who’s speaking,” another voice demanded.

We were in disarray in four locations in three cities.

“It all seemed easier yesterday,” said a voice I recognized as that of a Dayton Hudson executive. He was wryly alluding to our meeting the previous day in Minneapolis to discuss procedures to be followed if the Dart Group, a retail holding company for the Haft family of Maryland, made a takeover bid, anticipated in the \$60 per share range. There was no doubt that yesterday’s drill, as composed as a Sunday drive with seat belts strapped, wasn’t preparation for a \$70 cash bid from an unexpected source.

“What do we do now?”

There was no easy answer. But people at the various locations began to talk at once, and the resulting cacophony on the speaker phones sounded as if everyone had suddenly been seized by hiccups. Those talking couldn’t hear the way they sounded, and the equipment didn’t permit interruption until they stopped of their own accord. Getting in a clear word didn’t seem possible. State-of-the-art electronics and stress had produced the modern version of Babel. Finally, we took a roll call and established order.

The question now on the table was: “What do we tell the market?” A prompt answer was necessary. The blackout on the Exchange would ordinarily last until Dayton Hudson issued a statement, but under Exchange policy we had no more than two hours to come up with one, because the Exchange wanted its members to be able to participate in the early trading. As legal counsel, it was my job to decide how to respond: the company should say only what it knew, without speculating on what it didn’t know.

What we knew wasn’t much: only that Dow Jones confirmed that

P. David Herrlinger was a member of the Stone family, a prominent Cincinnati clan, and Stone, Inc. claimed to hold investments in Wal-Mart, the retailer, and Liz Claiborne, the apparel manufacturer. The only Stone from Cincinnati that we knew was Jimmie Stone, an investor in oil and gas properties. In the over-the-counter market, smart money was trading the Dayton Hudson stock up to \$63. It was my move.

“Let’s take a half hour and see if we can find any additional facts. Then we’ll decide what we can say,” I suggested, hoping that something would turn up. Also, it would be easier to think off the phone. About twenty minutes had passed, since we’d begun talking.

We would all resort to our computer terminals to draw on the data bases of *The New York Times* and *The Wall Street Journal*, and call around to our colleagues to see if they knew any more than we did. I set to work and found that there were no investments by Stone, Inc. in any retailers of an amount that would have to be publicly reported, and nothing about the players showed up in either data base. Jimmie Stone couldn’t be reached, but his involvement seemed doubtful, since he was primarily involved in oil and gas ventures and was known never to have made a hostile takeover bid. There was no more information.

I tallied what I knew.

Multibillion-dollar bids by individuals were common by June 1987, and the \$70 offer acknowledged the widely known interest of the Dart Group at \$60 or more and raised the bidding to a level that showed appreciation of takeover strategy.

Against the one right pricing gambit, however, was a series of odd omissions that needed explaining. Bids are usually made by a telephone call to the chairman of the company, followed by a hand-delivered letter, usually before the opening of the Exchange, rarely after trading begins. Herrlinger’s bid, as made to the Dow Jones News Service, purporting to come from a well-established family (unlikely to make unorthodox moves), ignored those conventions.

Nothing said Herrlinger’s actions had to be predictable. It could be a brilliant strategy; it had served to put us in disarray. But the failure to call management and alert the company to the bid was inexplicable to me. Since the Stone family didn’t own any retail businesses, they would need management, if only for transition.

And the cleverness, if it was that, came from our ignorance about Herrlinger, and not from any masterstroke. Had the world changed so much that people whom no one knew, and who didn't seem professionally advised, could raise \$7 billion? I didn't think so. Moreover, active trading didn't make the bid real, for in this heated market takeover stocks were eagerly traded on any flimsy information.

All that head scratching led me to believe that the bid wasn't genuine. That wasn't easy to accept: conjectures aren't facts, and the making of a bogus bid was unprecedented.

At about 10:45 a.m. the conference call resumed, with Dayton Hudson calling the roll.

"Has Herrlinger called the company yet?" I asked.

"No," a company officer said, disappointment apparent even in the one-word answer.

The group agreed that Dayton Hudson should keep its public response simple. The prepared release said that the company didn't know Herrlinger and wouldn't comment on proposals made only to the news wires and not to it. That statement would give the trading markets sufficient reason to question the bid, after which the market was on its own, and we'd watch developments.

The release was sent to the news wires at about 11:25 and at 11:49 the stock opened at \$59, sharply down from the trading in the over-the-counter market. To cover the story, *The Wall Street Journal* sent a local reporter to interview P. David Herrlinger, who had set up his takeover campaign headquarters in his elegant home. Impeccably dressed in a blue blazer and gray slacks, at ease in a comfortable chair on his rolling lawn, Herrlinger was the perfect picture of old-line money. He took the opportunity of the interview to launch the public relations phase of his offer by telling the *Journal* about himself, his co-bidders, the Cincinnati Stone family, and their interest in acquiring Dayton Hudson. With the *Journal* now aware that the company hadn't been called, its questions to Herrlinger were pointed:

*Journal*: "Mr. Herrlinger, where will the financing for your offer come from?"

Herrlinger: "That's still undecided."

*Journal*: "It will take over \$7 billion."

Herrlinger: "That's why the financing is very debatable."

*Journal:* "Is the offer a hoax?"

Herrlinger: "I don't know. It's no more a hoax than anything else . . . An offer is really an intangible thing."

*Journal:* "Who is Stone, Inc.?"

Herrlinger: "It's not incorporated yet. I'm a vice president."

At about 12:49 p.m. Dow Jones said that the bid might not be bona fide, and shortly thereafter the Stone family disavowed the bid.

What about the effect of the event on the stock market? I called a friend at an investment banking house who I thought could give a thoughtful assessment of the incident. I could hear the clicking of the keys of his Quotron terminal as he punched in the stock symbol to get the price.

"The stock is practically back to where it was when it opened this morning," he said. "I'd guess, based on the trading volume, about \$15 to \$20 million was lost. Some guys were probably bent out of shape. That's the risk they took."

"People may become more cautious after this," I ventured.

"By tomorrow we'll all forget about it," he said.

"Should we?" I asked.

"There will be a lot of things to do tomorrow." To emphasize the ephemeral effect of Herrlinger's action, he added, "There won't be a tombstone for this deal."

Tombstones are announcements of completed transactions, printed with black borders on the business pages, somewhat in the sparse style of headstones. He was referring, however, to the tombstones that were encased in plastic cubes or imprinted on ashtrays, pen sets, clocks, and the like to commemorate deals meant to be remembered. My office is filled with them, tokens of twenty years of practice.

Looking at the objects around my office, I saw the papers that I'd put aside on the working table opposite my desk, and the message slips of telephone calls I'd allowed to back up. I got back to work, but made room in my day to get reports on Herrlinger.

At about 3:30 p.m. the Dow Jones reported that Herrlinger had been taken to a hospital for psychiatric evaluation. Herrlinger was forty-six years old, a family man with four children. From news-

paper stories later that afternoon I learned that Anthony Covatta, his neighbor and a lawyer speaking for the family, tried to provide additional perspective. "You've got a guy who's got some problems that have come on very suddenly. It looks to me like he got into a fantasy mode today. There's not much more to it than that. He's a lovely guy, just as plain as an old shoe . . . This is a terrible thing. A guy who's never owned a pair of Gucci shoes in his life does this."

Covatta's confusion was touching. He was trying to tell us all, and himself as well, that behavior isn't always the arithmetic sum of past actions. Indeed. When is it ever? Herrlinger's life was now a shambles. I felt sorry for him, and for his family and friends.

At the end of the day, I looked at the price of the Dayton Hudson stock. It had opened at  $53\frac{1}{4}$  and closed at  $53\frac{1}{8}$ . The opening and closing prices didn't reflect the day's aberrant behavior. My blood pressure was probably not as resilient. It's people that are fragile, I thought, not the system.

As I looked around my office, the random scatter of the tombstones caught my eye. Their number, over two hundred of them, reminded me that I'd started out a stranger to corporate America and was now participating in its financial restructuring. All the tombstones were dated, pinpointing events otherwise hard to place, and invitingly offered the possibility of a perspective on a world that had changed and transformed me.

I was no longer the person who had graduated from law school determined to be a law professor. Where had the turnings been? The answer was locked in those mementos, which did more than give notice of the life and death of corporations: they chronicled two decades of activity, each a marker of change. But I couldn't make much sense out of them unless they were in chronological order. No surfaces were large enough to arrange them on, except for the floor. Without much effort, I moved four chairs and my working table to one side to give myself room.

Then I sat on the floor, took off my shoes to be comfortable, and began sorting the blocks and other items, arranging the pieces of my professional life in chronological order. At such moments no one should be able to ask you to explain your behavior. Unfor-

tunately for me, one of the uniformed building night watchmen, apparently attracted by the light, came into my office. He was a tall man with thick glasses that made his eyes look uncompromising. Worse, I didn't know him. I stood up, trying to regain my poise, painfully aware of my shoes off to the side. In stocking feet, I felt unequal to him.

"I'm arranging them," I said, relying on the ambiguity to avoid explanation.

I looked back down at the floor at the strange items that I'd started to align in twenty rows and thought: This is an unconscionable mess. I'm going to wind up in the room next door to P. David Herrlinger. No Quotron for him. No computer terminal or telephone for me. But if they let us read the business pages we'd be able to discuss the progress of the deals.

He bent down and looked at some of the cubes, reading a few carefully. "Do you need any help?" he asked.

Clearly he didn't understand what I was doing.

"It's better if I do this myself," I said. "These are mementos of deals I worked on," I quickly explained.

"Do you like what you do?" he asked. Did he want to talk or was he testing my coherence, the way police do at roadblocks for drunken drivers?

"Yes, I like my work," I said.

"Why?" he asked.

"Each day is a surprise," I said. I gave him a hard look to let him know that I wasn't going to be sociable.

"You have some 1977 ones by your right foot. You missed them in setting up the row."

I found the missed cubes, put them in order with the proper flourish that acknowledged his help, and waited until he obligingly left.

I sat down again and continued to arrange the tombstones, stopping every so often to recall some person or incident, and found myself making the needed connections. In these matters, played for high stakes, I'd encountered deceptions more contrived than Herrlinger's, and experienced the satisfaction of separating appearance from reality. Revelation wasn't always so immediate as

in the bid for Dayton Hudson. Sometimes it took months, even years, for the tale to unfold. Putting the blocks in place illuminated the past in surprising ways.

Through participation in these deals and seeing their effects, I'd drawn the lessons of my education and my perspective. The markers, lined up like memorials on my floor, displayed the changes over two decades in myself, in the people around me, and in corporate America. But not all aspects were fully illuminated on that evening. Within three months of the Herrlinger incident, the stock markets crashed, and in the next two years, with the end of the decade, some transactions I'd participated in failed or soured. Time and change further rounded out the meaning of the events marked by the tombstones. All that is set out here.