THE GOLD STANDARD

"Predators don't have to justify their hunger."

"Boone Pickens is like a barking dog chasing a bus. What's he going to do if he catches it?" asked Gordon Parker, the chairman of Newmont Mining Corporation. He didn't expect an answer, but paused anyway to give himself a moment to vent his irritation. T. Boone Pickens, the source of his annoyance, had acquired a large block of stock in Newmont, 9.95 percent (an investment of over $500 million), showing serious intent. Indeed, many companies large enough to be traded on the New York Stock Exchange could be purchased outright for less. But Gordon Parker was expressing his incredulity that Pickens, whose hostile takeover bids had been limited to oil companies, could have any real interest in acquiring Newmont, one of the largest gold-mining companies in North America.

Gordon Parker was a tall, reserved man, whose appearance and urbane manner, reminiscent of Cary Grant, offered abundant charm and suggested quiet command. Parker was a South African, in his mid-forties, running an American company whose largest stockholder was an English company, Consolidated Gold Fields, which in turn had as its largest stockholder a South African company called Minorco, itself controlled by the gold and diamond billionaire, Harry Oppenheimer. Newmont had opposed Gold Fields' acquiring its stock interest and Gold Fields had opposed Minorco's acquiring its position. Neither was pleased with its largest stockholder and the potential threat to its independence. Boone Pickens, the menace of the oil patch who had forced the sale of such giants as Gulf Oil and Cities Service, now had to be factored into the situation, affecting delicate balances.

Gordon Parker didn't want to take any rash action merely because Pickens was on the scene. Like many corporate executives, Parker had become a student of takeovers. It was the summer of 1987 and acquisition activity was still intense and vigorous, confirming takeovers as indigenous to corporate life. The contests often required the target company, in defending itself, to take on staggering debt and sell valued assets to finance massive dividends to shareholders. Newmont was secure in its size and it would take strong and convincing provocation by Pickens before Gordon Parker would take any action.

We were in Newmont's boardroom, but even in his own quarters Gordon Parker showed noticeable detachment. This was my first meeting with him. I'd been called earlier in the day by Newmont's financial adviser, Goldman, Sachs & Co., to come to the meeting in the boardroom and had been introduced, before the meeting, to Richard Leather, general counsel and executive vice president of Newmont. Leather was a fair-skinned, clear-eyed man, very direct in his speech, precise and highly intellectual. He was a master chess player and attacked all problems by analyzing fully the logical moves, the resulting changes of position, and the forces at work. He'd been trained at a large Wall Street law firm much like White & Case, the firm that represented Newmont. The White & Case lawyers were present in force. William F. Wynne, Jr., was their merger specialist. He was young, but was already a knowledgeable and astute strategist. In addition, Leather had Goldman Sachs hire as their legal counsel Cleary, Gottlieb, Steen & Hamilton, and in particular a partner in that firm with whom he had worked before, so that he benefited from the advice of lawyers whom he knew and trusted. We were brought into the matter for our experience with Boone Pickens and because we were known to be able to work well with other lawyers.

Leather set out to brief me and my partner, Bernie Nussbaum, whom I'd brought with me to act as a lead litigator on the matter. I'd chosen Bernie because I valued his judgment. It's unusual to have litigators participate in the boardroom. Ordinarily, their advocacy skills are saved for court, but it had become my practice to have them involved because familiarity with all the steps taken made them more effective in court. With Bernie present, I also had a foil who would contribute a sense of how the court would see our actions, and someone to share the emotional burden of the tough decisions.

I had met Pickens when he bid to acquire Imperial American Energy in 1977. Since then he had become an accomplished raider. Bernie was familiar with Pickens's corporate warfare techniques. He'd opposed Pickens when he tried to take over Phillips Petroleum, and his knowledge was gained from months of skirmishes and the taking of Pickens's deposition. In takeovers, as in modern warfare, adversaries are often only a presence, rarely seen in person, and known mainly by their actions. Litigating lawyers, however, confront them face to face in trial preparation or in court. Bernie had been able to ask Pickens some hard questions on deposition and had gotten a chance to take his measure by baiting him. In the legal challenge, Phillips Petroleum had alleged that Pickens had given members of his Amarillo, Texas, country club inside information about his proposed takeover bid, so Bernie had questioned Pickens about his relationship to the other club members. In a pause in the deposition, while everyone was taking a break, Pickens, who had been very careful and guarded in all his testimony, invited Bernie to visit the Amarillo club. Bernie replied, "From what I've learned about the club, the membership probably wouldn't let me in." That was meant, off the record, to suggest restrictive admission practices to Pickens, a man of some political ambition. But it was said without apparent animus and with a smile and chiding humor. Pickens, in a measured response, said, "No, Mr. Nussbaum, we'd let you in. There's no issue about that." And then, free from any snare, he paused and, while smiling back and catching Bernie's tone, teasingly said, "But once in, we might not let you out." Bernie couldn't prove his case and came away from the deposition knowing Pickens to be a wily, formidable opponent.

In his briefing, Leather told us about the history of Newmont's relationship with Gold Fields and about Pickens's maneuvers. Gold Fields had acquired approximately 26 percent of Newmont in 1981, and Newmont had sued to prevent Gold Fields from attempting to get control. Gold Fields settled the legal action by agreeing to "stand still," limiting its stock purchases. As part of the arrangement, Gold Fields elected two directors of its choosing, one of whom was Rudolph Agnew, the chief executive officer of Gold Fields, a suave, cultivated man, readily likable. The arrangement was initially to last three years and in 1983 was extended to ten years, but it could be terminated earlier if anyone acquired more than 9.9 percent of Newmont's shares. For the last six years under the agreement, Gold Fields had honored all its terms, but Pickens had cleverly changed the balance by buying 9.95 percent of the Newmont shares in the open market, thus freeing Gold Fields from the standstill agreement.

Pickens's takeover vehicle was called Ivanhoe Partners, showing his humor and sense of himself by suggesting courtly times and rescuing knights. His strategy was to separate Gold Fields from Newmont and to induce Gold Fields to join with him, now that he'd freed them. Pickens, in an adroit letter to Gold Fields, which he publicly disclosed, offered to discuss various investment alternatives, including Gold Fields' swapping its stock for some of Newmont's mining assets or participating in Newmont as a minority shareholder when Pickens took control. In any event, the carcass of Newmont would be laid out and stripped.

There remained, however, an ambiguity about Pickens's motives. Pickens hadn't crossed the 10 percent threshold. If he bought over 10 percent of Newmont, he'd be subject to short-swing-profit rules and wouldn't be able to sell his stock for six months without forfeiting all profits. Thus his carefully calibrated purchases, more than 9.9 percent, to break the "standstill," and less than 10 percent, so as not to lose profits on short-term sales, suggested that he was rattling his knightly Ivanhoe saber to induce Newmont or Gold Fields to buy his stock at a premium price. This practice is known as greenmail. Supporting the theory that greenmail was Pickens's true motive was the cost of acquiring Newmont, $6 billion or more, a lot of money to raise in a venture in which Pickens had no apparent expertise.

Gold Fields, although now free of the standstill agreement, had informed Pickens publicly that it didn't intend, at this time, to disavow the agreement's terms. The statement was supposed to be a rejection of Pickens, but the qualification "at this time" left open the possibility that Gold Fields could change its mind at any time. The next move was up to Pickens, unless Newmont or Gold Fields wanted to approach Pickens about buying him out and was willing to pay greenmail.

In Newmont's boardroom after Richard Leather's briefing, Gordon Parker immediately made the point that there was no reason for Newmont to buy out Pickens. The boardroom, set up in an oval configuration, was now filled with lawyers from White & Case and Cleary Gottlieb, investment bankers from Goldman Sachs and Kidder Peabody (also acting as financial advisers), and the executive management of Newmont. Gordon Parker was flanked by Richard Leather and Ed Fontaine, his chief financial officer, a tall and lean bookish man. Leather and Fontaine supplied him with legal and financial information and together they made the business decisions.

"Buying out Pickens is probably something we can't do anyway," Bernie said.

"Why not?" Richard Leather asked.

"Pickens won't take greenmail payments. He'll take only what the other shareholders get, and nothing more," Bernie said, expressing his knowledge of Pickens. In Bernie's view, Pickens was now a national figure, and the image he projected of himself, defender of the shareholders against entrenched management, constrained his behavior and limited a quick solution like greenmail, although it would give him a substantial profit.

"What does he want, then?" Ed Fontaine asked, with irritation in his voice.

"Gold," Bernie answered, and chuckled. "You know the desire better than I do. It's the ultimate commodity."

"If we can't buy him out, then there's nothing for us to do," Leather said, steadfast, expressing management's resolve not to change the company. Gordon Parker had been trained as a mining engineer and had risen through the ranks by operating the mines. From his hands-on experience, he knew the disruption that change would cause in the organization.

"What's stopping Gold Fields from buying control of the company now that Pickens has freed them?" I asked.

"They're smaller than us," Fontaine said. "Their bank credit line currently limits them to $500 million, which is not enough to buy another 25 percent. They might have been able to do it a few months ago, but not now. They'll need at least another $700 million for that." The Newmont stock price, in the mid-50s, before Pickens's announcement of his stock position, had risen to the low 80s.

Leather spoke up to emphasize Gold Fields' limitations. "They regard their rejection of Pickens's invitation to do business with them as enough of a reaction to make Pickens go away and sell his stock." Leather smiled and raised his hands in a gesture which said: I don't understand how they can believe that the statement was firm enough. Seeing that we all understood his gesture, he said, "They're not being much of a big brother in this fight, and it's hard to say what they'll do if Pickens increases the pressure."

"Has Minorco spoken?" I asked.

"They're ready to help if we ask them, but Gold Fields objects to Minorco taking any kind of a position in Newmont," Leather said. "Each of the parties is jockeying for position, and with every move the alternatives narrow."

It was something like a chess game, but more involved. Here there were multiple players, with different resources, and none of their motives were known. Besides, it was no game; and as with most things in real life, there would be no rematch.

I turned to the investment bankers. "What economic actions stop Pickens?" I didn't expect a solution, but I wanted to understand their thinking. It would tell us what was making Gordon Parker balk.

"If we gave shareholders a major dividend, that would deliver value to them and deplete our liquidity. That could stop him," Tom Mendell said. Mendell was with the mergers and acquisitions department of Goldman Sachs and was an astute financial analyst.

His ready answer indicated that he'd probably spent considerable time presenting it before the management.

"How do we do that?" I asked.

"The company can raise over $2 billion in cash by borrowing against its assets," Mendell responded. "If we distributed the money to the shareholders in a dividend, about $30 per share, all our cash would be gone and it would be very hard for Pickens to raise money to buy the company." From Mendell's flat delivery, it was easy to see that the suggestion had been rejected.

"That just makes Newmont smaller and helps him," Ed Fontaine, the chief financial officer, said, making known to us his (and Gordon Parker's) distaste for the approach. "We give him money" (about $200 million for his roughly 10 percent of the stock in a $2 billion dividend) "and lower the price of our stock by the amount of the dividend. If the dividend's $30 per share, we lower the price per share by that amount. What we've done is help finance Pickens's acquisition."

"By itself, it may not be a winner," Mendell said defensively. "But if we also substantially increased gold production and told the market so, that might move the stock price up. The combination could work. Once the stock price is high and the cash is out of the company, there's nothing left to interest Pickens and he'll sell his shares." Mendell was pointing out the standard reason companies become targets: low stock price, with assets worth more. If you reversed the situation, pushed up the stock price and distributed the valuable liquid assets to shareholders, you would have the antidote. Standard formulas only work, however, in conventional situations.

"It's not certain," Leather said, expressing management's view.

"No, it's not certain," Mendell admitted.

"We're radically changing the company if we take those steps," Leather said. "It's a $6 billion bus that he's chasing. To declare a massive dividend is to throw money at him." He paused, satisfied with the reasons for management's inertia, but added, "And Gold Fields is not prepared to do anything. There's nothing we should do—or need do," ending the meeting on that note.

"They're not ready yet," I said to Bernie after leaving the meeting. We were walking up Park Avenue from the Pan Am Building, the site of Newmont's headquarters, to our offices.

"They don't want to act too soon," Bernie said. He then asked me technical questions about alternatives. Litigators don't spend sufficient time in boardrooms to develop technical financial expertise, but once immersed in a problem, they can quickly learn all its aspects. In response to his query as to our alternatives, I said, "My feeling is that Tom Mendell of Goldman Sachs is right. Some form of large dividend is going to be required," which made action painful.

"This is difficult," he said, "a mess."

"When isn't it a mess?" I said.

We tried to fathom the motives of all the players as we walked up Park Avenue. We were disturbed by the shadowy figures of Gold Fields and Minorco. Their positions could take any form. Gesturing and arguing as if alone, we were a strange sight, two middle-aged men totally absorbed in our problems, expressing our passions publicly. Realizing our exposure, we became self-conscious, which dampened our animation, but not our concern.

"Don't get busy on something else," I cautioned.

"I'll get us some more help," he said, giving me his assurance that he was involved.

"Let's figure it out first. More people will just get in the way."

If no one was prepared to act until Pickens moved again, we concluded, then there was nothing to do but wait for him. As a consequence, we would see a fine strategist at work.

The wait wasn't long: within a week Pickens sent a letter to each of the Newmont directors offering to buy the company for $95 per share in cash. This type of letter, known as a "bear hug," was coercive, but not lethal because the letter left it up to the discretion of the Newmont board of directors whether to accept or reject the offer. Pickens, however, had now set a price for Newmont, a substantial premium over the trading price, indicating that he was willing to acquire Newmont. On the New York Stock Exchange, Newmont's stock price moved up to the high 80s, a barometer of the pressure. However, Goldman Sachs and Kidder Peabody, acting as financial advisers to the board, were prepared to tell the board members that the price was inadequate, based on their assessment of what the company could bring if sold, which was in the range of $107 to $110 per share. On that advice, Newmont could reject the Pickens initiative and not take any further action. Although feeling the pressure, Gordon Parker resisted being bullied into taking drastic action, for Pickens's motives were still not clear. Pickens had kept his stock position at precisely 9.95 percent and hadn't made any financial commitments to raise the billions needed to buy the company, leading everyone to believe that Pickens might not have an interest in acquiring the company and was simply trying to panic the management.

After three days of silence in response to his letter, Pickens further turned the screw by beginning a tender offer at $95 cash per share for a majority of the shares, which he claimed would be followed by a merger in which the minority shares would be bought out. Pickens made no commitments as to the buyout price, which could be less than the $95 offered, making the offer coercive, to induce shareholders to get the money while they could. The tender offer was a lethal move, and the Newmont stock price advanced into the low 90s, leaving no doubt that in twenty business days, the time period for the tender offer, Pickens would acquire control of Newmont unless Newmont, Gold Fields, or Minorco took some defensive action. While Pickens's bid was subject to financing, his investment bankers, Drexel Burnham, stated that they were highly confident that the financing would be completed. Any bid of this size needed Milken's capacity to raise money. In this case, Milken and Pickens were a natural pair, master takeover entrepreneur and master financier. The marketplace, acknowledging Pickens's determination and knowing the capacity of Milken to raise staggering sums, treated the bid as if the money were in place, substantially increasing the trading volume in the stock. Long-term shareholders were being replaced by arbitrageurs and market professionals, eroding management's constituency and encouraging Pickens. It looked like very little would dissuade him.

In one of our innumerable walks to Newmont's offices, I told Bernie that we should bring a lawsuit against Pickens challenging his tender offer as defective because he didn't have the $3 billion in hand to acquire the majority of the shares he sought in his tender offer.

"You lost that one last year," he said to me, referring to a case brought in Connecticut, defending Warnaco, the apparel company.

"It didn't get fully briefed," I said, meaning that the issue was a small part of a larger case.

"What's your complaint against Pickens?" he asked, making a stern face as if he were the judge.

"He doesn't have the money," I said.

"Counsel, if you believe he won't succeed in getting the money, why are you seeking relief? His tender offer will fail," Bernie responded in high judicial style. "Don't waste the time of the court."

"You're tough," I said. His argument was devastating.

"It's the judge who's tough," he said.

"Let me change the argument," I said. "If he doesn't put up the money until the last minute, we don't know who's buying the company. He could be a front for a lot of strange people. Gold is a strategic material."

"There's nobody behind him," Bernie said.

"How do you know? There could be. He shouldn't be able to begin a tender offer until he tells where he's getting the money from. The issue is: Who is buying America?"

"This is not a good case to win that argument," Bernie said.

"It's the case we've got," I said.

"Even if we win, it won't stop him. He'll just disclose."

"He'll have to pay commitment fees to Milken and the bank lenders for the extension of credit. That's at least $30 to $40 million," I said. "That will tell us if he's serious." I spoke loudly. It was my best point.

"What's the SEC's position?" Bernie asked.

"The SEC has been trying to encourage tender offers and has tolerated this nondisclosure. Yet it's counter to its disclosure philosophy."

"You want me to bring this case?" he asked, not particularly eager. Milken had invented the highly confident letter that served as a substitute for putting up the money at the outset. It had become standard procedure for all bankers.

"Yes," I said.

"We're not only attacking Pickens, we're challenging Milken's method of doing business," he said. That realization gave him pause. He saw a fierce response to any attack we made.

"It should be brought," I said.

"Where?" he asked.

"Newmont's mines are in Nevada. Let's try the federal court in Nevada and take it away from the East to some western judges. We may get a more sympathetic hearing."

"Let's talk to the client," Bernie said when we reached Newmont's offices.

We spoke to Gordon Parker and Richard Leather, who both liked the approach. It fit in with their view that Pickens might still be trying to bully Newmont into doing something, that Pickens didn't really intend to buy the company. The Federal District Court in Nevada would be able to hear the case promptly because it was a purely legal question, without factual issues. No one had any hope, including me, that the case would go anywhere, but it had some emotional appeal and was worth a try.

"It's a warning shot across Pickens's bow," Richard Leather said. "Maybe Milken will get worried."

"That won't stop them," Bernie said.

Gordon Parker and Richard Leather went to England to talk to Gold Fields and, while in London, had talks with Minorco. Gordon Parker had been elected a member of the Gold Fields board shortly after Gold Fields had acquired its 26 percent position in Newmont, but these meetings were outside the boardroom. The English weren't participating in Newmont's board meetings now, and Gordon Parker wasn't invited to Gold Fields' meetings, all to avoid conflicts of interest. Unfortunately, the arrangements, while necessary, accentuated the conflicts. Parker and Leather were in Europe about a week, and on their return we all met in the Newmont boardroom. The travel and meetings had been wearing on them and they looked tired.

Parker reported that Gold Fields had stated that if Newmont approached Minorco for help, Gold Fields would feel free to act unilaterally to protect its position. But Gold Fields claimed that it didn't have sufficient cash to buy another 25 percent of Newmont.

Instead Gold Fields offered to sell Newmont one of its assets, a mining company, for $1.2 billion, which would then give Gold Fields the needed funds. As part of the terms of the sale of the mining company, Gold Fields was willing to agree to "stand still" at the purchase of 49 percent of Newmont's stock and to elect only a minority of the directors. The plan offered Newmont the opportunity to keep control of its destiny for another ten years, a reasonably long period by corporate standards. But the problem with the proffered solution was that the mining company to be sold was worth far less than the $1.2 billion that Gold Fields was asking for it. Gordon Parker rightfully bristled at the scheme, and said that he was prepared to reject it, even though it was the only proposal Gold Fields had made after some professed soul-searching. Minorco again said it would help, but Newmont faced Gold Fields' resistance. Thus it seemed that there was no help to be had from the large stockholders.

We had bad news from Nevada. The SEC had intervened against us, and the judge, relying on the SEC's expertise, had ruled against us. We told the group that we were appealing the case to the Federal Court of Appeals in California. The court would give us an expedited appeal, but considering the SEC's opposition, we didn't hold out much hope for the case.

There weren't many options left. Newmont could act on its own to defend itself by competing with Pickens to buy its own shares. But shares that Newmont repurchased could not be voted and would have to be canceled. For the repurchases to effectively repulse Pickens, Newmont would have to make a tender offer for slightly less than 50 percent of the outstanding shares, about 34 million shares, which would reduce the number of outstanding shares and raise Gold Fields' percentage of the stock up to almost 50 percent from its 26 percent position. The cost, at $100 a share (the price necessary to compete with the $95 Pickens tender offer), would be about $3.4 billion. That was more than the Newmont management was prepared to borrow. And if Pickens raised his price it would defeat Newmont's offer.

Interestingly, Boone Pickens was prepared to borrow almost twice that amount against Newmont's assets and radically change the company to help pay off the debt. With Milken behind him, he was encouraged to leverage the company. Milken usually promised that if a company got into trouble because of its debt structure, he would help reorganize it and work out the problems. The decision on the purchase price, however, was for Pickens to make. Pickens had been trained as a geologist, but it was unclear whether he understood all the effects the necessary changes would have on the company. Those changes, which management had been loath to contemplate, included selling its lead, zinc, copper, nickel, and cobalt mines in the United States, Canada, and South Africa, as well as Newmont's interest in Peabody Coal. In addition, the gold company would have to increase its gold production substantially to service the debt. Increasing production, to the degree contemplated by Pickens, wasted assets because recovery of gold was less efficient. Moreover, dedication to paying down massive debt meant abandoning exploration efforts and renewal of the enterprise, which were necessary to keep a mining organization intact. In effect, the company was being liquidated, with the termination of its existence in sight. Such a result was resisted by the mining engineers, including Gordon Parker.

"Pickens has already made at least $100 million on his stock. Isn't that enough?" Ed Fontaine observed.

"Predators don't have to justify their hunger," Bernie answered, directing us all not to look for faults in Pickens's scheme but to seek solutions.

Of all the alternatives, offering value to the shareholders and draining the liquidity of the company by paying a $2 billion dividend started to look like the most acceptable course. The $2 billion was approximately the value that could be raised from selling the non-gold-mining assets, which would make the company solely a gold-mining company. Psychologically, the management and the board had come a long way, prepared to change the company, but the problem with the dividend was that it wasn't certain to stop Pickens. We all sat in the room turning the problem over. Everyone was tense and tired. The four barren walls offered no horizon or windows to provide an avenue for a drifting mind. The dreariness of the room made you think that you had heard or thought of everything before, without a sense of resolution. Moreover, large groups rarely come up with a point of view that will displease anybody, and thus insight is discouraged. Contemplating a problem without a solution is enervating. Finally, however, the frustration conditioned everyone to be receptive to some harsh judgments, which Bernie began to express.

"Gold Fields is being very difficult," Bernie commented. "Offering to sell assets at prices in excess of their value is not a very constructive approach. Are they really interested in buying at these prices or have they become sellers, looking for an excuse to do a deal with Pickens?" He addressed his question to everyone in the room, but it was meant for management.

"They don't want to sell out to Pickens," Richard Leather said. Gordon Parker took out a cigar, which he carefully lit, while Leather continued. "All their other mining interests are in South Africa, and if they lose Newmont, it will seriously affect the value of their stock in the London market and their prestige as an international mining company. Rudolph Agnew told us that he is prepared to do whatever is necessary to retain Gold Fields' investment in Newmont."

"Then why would he try something so one-sided as to sell assets to us at a price well over their value?" Bernie asked, seeking to understand a complex situation. Now that Gordon Parker had started to smoke, Bernie took out a cigar and began chewing on it.

"Maybe he doesn't see it that way," Ed Fontaine responded. But from his voice I could tell that he wasn't convinced.

"He's using the threat of Pickens to get a bargain," Nussbaum said. This was the first suggestion of his point of view, and he got everyone's attention.

"That's probably part of it," Fontaine said. "He's a clever man." But his statement was a grudging acknowledgment, accepting Agnew's business acumen, and nothing more.

Agnew served on the Newmont board of directors, and it was a long time since he had been an adversary.

"But why isn't he more reasonable and evenhanded? If you assume he doesn't want to lose Newmont to Pickens, you would expect him to be more sensible." Bernie attacked the problem that Gold Fields posed by making management face it. Letting them think about what he said, he lit his cigar.

"Maybe he doesn't feel the pressure management does," someone said.

"He's aware, like the rest of us, that the time is short," one of the bankers answered.

"Then why is he waiting?" a White & Case litigator asked, turning the question back on the banker.

"He expects that management will be more pliant and give him what he wants," Bernie said. We looked at Gordon Parker, and he shook his head, indicating that he wouldn't be coerced into doing something foolish.

"He could lose everything, then," Ed Fontaine said.

"He knows it's a gamble," Leather said, "which means that he must have another card to play, an alternative." Leather recognized Agnew as an adversary.

"What could that be?" a banker asked.

"I'm assuming self-interest," Bernie said softly, waving the cigar like a baton, gathering everyone's attention.

Gordon Parker nodded.

We had all come to the point of being prepared to see beneath the surface congeniality and friendliness that Agnew always managed to convey. "In his public statement rejecting Pickens," Bernie said, "Agnew reserved the right, at a later time, to use his release from the standstill. That annoyed all of us because it weakened the rejection, making it look like he might do a deal with Pickens." Bernie paused to give everyone time to follow where he was headed. The cigar was now a pointer, punctuating his sentences. "Then Agnew threatened us by saying that he would act unilaterally if we dealt with Minorco. Which means he's up to something. Otherwise, his actions make no sense and his threat would be empty." Bernie found eye contact with Gordon Parker, then with Richard Leather and Ed Fontaine, and took a shallow puff on his cigar, before continuing. "It comes down to this: if he wants to keep his investment in Newmont secure, he must be contemplating making hostile purchases of Newmont's shares. That explains the threat—and everything."

"How effective could those purchases be?" Fontaine asked, interested in this turn in perspective.

"Gold Fields could buy 25 percent of the shares in the open market in no more than two days, and then take control. That's why Agnew has time."

"Gold Fields doesn't have enough money," Ed Fontaine curtly reminded the group. Fontaine, as financial officer, always kept his eye on the money.

"If Gold Fields took control of Newmont, they could immediately force Newmont to declare a $2 billion dividend," I said, taking over from Bernie to cover the financial aspects of Gold Fields' strategy. "With Gold Fields then holding half the stock, their share of the dividend would be $1 billion, which would be enough at current prices, along with the $500 million they already have on hand, to more than pay for the stock. They would only need a temporary loan for a few days to be able to do that, and their banks would readily finance them."

"It's efficient," Fontaine acknowledged, "and economically more resourceful than our buying our own stock for over $3 billion."

"It's the path of least resistance, if we're not prepared to give them a bargain by overpaying for their mining company," I said. "Unless, of course, they're prepared to sell out to Pickens."

"That's very aggressive for them," someone in the group said, resisting the idea. "They would have to act hostilely."

"They were never invited to be Newmont's stockholders in the first place," Leather responded. "They were very aggressive six years ago. Six years of peace doesn't make them lambs."

"They've been known to be aggressive," someone said in an understated way that drew a laugh.

"Besides," I said, to dispel any residual disbelief about Gold Fields being hostile, "Joe Perrella of First Boston is their investment banker. He's definitely thought of acquiring control of Newmont, and probably counseled Rudolph Agnew to do it." They all knew Perrella, a tall, thin man, bald, with a well-trimmed beard that made him look like a Renaissance prince. Perrella was known to be aggressive and to counsel quick, affirmative action. It was easy to project the manipulative scheme on Perrella's persona, diffusing any remaining doubt.

"First Boston would probably finance Gold Fields' purchase of stock," Tom Mendell said.

"If we don't act soon, they'll have little other alternative," Bernie said. He put aside his cigar.

"Can they just go into the market and buy the shares against Boone Pickens's tender offer?" Richard Leather asked of all the lawyers.

"That's known as 'sweeping the street,' " I said. "It means that you buy all the shares held by the Wall Street professionals, the arbitrageurs. You pay the tender-offer price, even less if it's clear that the sweep will win. It's effective because you're buying large blocks of stock from people who know their business. The SEC has proposed rules against street sweeps, but those proposals haven't been adopted, which means that it's allowed."

"What about the courts?" Leather asked.

"In the two cases where the SEC has taken the position that street sweeps are illegal, the federal courts have ruled against the SEC. At the moment, the action is legal. Do you agree?" Bernie asked a White & Case litigator for the benefit of the group.

"Gold Fields would win that case," the litigator said. "It's a winning strategy."

"What does this all mean for our idea of declaring a large dividend to drain our liquidity?" Leather asked. His question contained a perceptive observation about Gold Fields.

"If you accept the premise that Gold Fields is intent on getting control of Newmont," I said, "then you have to rethink whether Newmont declares the $2 billion dividend." In declaring the dividend, Newmont was financing Gold Fields, and in effect handing Gold Fields the money necessary to take control. Before Gold Fields' deception had been pierced, everyone had been looking at the effect of the dividend on Pickens, but not on Gold Fields. Newmont didn't want to lose control to either Pickens or Gold Fields.

"Then it doesn't work," someone said, expressing disappointment.

"But Newmont need not give up control, if Gold Fields signs a new standstill arrangement agreeing not to take control," I said. "Gold Fields can buy shares away from Pickens, and Gold Fields can still be kept in a minority position."

"And Pickens can't counter Gold Fields' open-market purchases by doing the same thing," Leather said, "because he hasn't yet raised the necessary money." We all smiled at the irony.

Everyone now saw that we had the seeds of a solution. The question was whether Gold Fields would enter into a new standstill agreement, this time at the 49 percent level, and also agree to take only a minority of the seats on the Newmont board of directors. The arrangement offered Gold Fields the financing it needed, and dovetailed with its plans, but also clipped its wings. We were sure, however, that Gold Fields would go along with the standstill because Newmont's cooperation took away the risks it ran if Newmont opposed its purchases of shares and sided with Pickens or sought help from Minorco.

Before talking to Gold Fields, we related the plan to the board of directors for their information during one of many status report meetings. The intricacy of the maneuvers made the directors nervous. It was agreed to hire independent counsel for the directors to review all aspects of the plan, which was likely to add a conservative gloss to any action approved by the board. Meredith Brown of Debevoise & Plimpton was hired. We now had another firm of lawyers acting, which made, with local counsel in Delaware where Newmont was incorporated, five firms for Newmont alone, slowing rather than helping the process.

When presented with an outline of the proposal, Gold Fields quarreled with many of the technical aspects and found the standstill constraining now that it wasn't getting the benefit of selling Newmont its mining company. There was more work to be done.

Meanwhile, the Federal Court of Appeals in California ruled against our claim to thwart Pickens. Rather than disheartening us, it had the opposite effect. One of the three judges in the case dissented and strongly criticized the SEC for encouraging nondisclosure about the people buying up America. Ordinarily the next step in the appeal process was the U.S. Supreme Court, but the Supreme Court, even if it was interested in the case, wouldn't be able to act soon enough. Bernie chose to have the case argued before all eleven judges of the Federal Appeals Court. On the basis of the dissenting opinion, the judges decided to hear the case. The SEC was now being forced to carefully examine its articulated reasons for its rules. We knew we had little chance of winning, but getting one strong-minded judge to side with us enhanced, in the Newmont directors' eyes, our legal acumen, which would help us when we asked them to make some hard decisions. Everyone was pleased that Pickens and Milken had an unexpected fight on their hands.

There was one last chance to deflect Pickens, and Newmont took the opportunity. On the basis of the work that Goldman Sachs and Kidder Peabody had done in valuing the company, Newmont publicly rejected the Pickens bid of $95 a share as inadequate. At the same time Newmont also announced that it had obtained a $2.2 billion line of credit from a consortium of banks. The announcement indicated that Newmont was in a position to defend itself, and was a signal to Pickens that if he wanted to talk about selling his shares the money was readily available and he could call Newmont.

Boone Pickens had an uncanny sense of timing. Just as the plans seemed about to coalesce, but before we could implement them, he raised the price of his tender offer to $105 a share, sending everything into disarray. The anticipated action of the Newmont board in declaring a $2 billion dividend was to be justified because Pickens's $95 bid was inadequate in relation to the value of the company. At the higher price, however, the adequacy of the Pickens offer had to be fully reassessed. In addition, by raising the price, Pickens reopened the question of whether Gold Fields was a buyer or a seller. In the stock market, Newmont's stock price moved up a full $10 to well over $101 a share, and the trading volume increased, putting more stock in the hands of professionals. Wall Street traders now almost held control of Newmont. Pickens's entire strategy had been to separate Gold Fields and Newmont; at some price that would happen. To effectuate that strategy, Pickens had bid against his own $95 offer, something few bidders are willing to do. How firm was Gold Fields' resolve?

Everything that Gordon Parker and management wanted to avoid they were now having to face. Newmont would have to borrow more than the $2 billion originally contemplated, and not only would it have to devote itself solely to gold mining but annual gold production would also have to be sharply increased to service the larger debt. If Gordon Parker and the Newmont management didn't act, either Gold Fields or Pickens—or Gold Fields and Pickens together—would acquire Newmont using Newmont's own assets. In other words, either Newmont management sold assets and leveraged Newmont themselves or Gold Fields or Pickens would do it for them. And Minorco, not approached by anybody, would probably sit on the sidelines and watch.

Gold Fields was still committed to its investment in Newmont, even at $105 a share, expressing irritation, however, that they hadn't acted earlier, since, with each escalation of the price, purchases of shares would be that much more expensive. Goldman Sachs made another evaluation for the Newmont board and found the $105 offer for a majority of the shares inadequate.

We again went through a complete assessment of whether the plan would work after Gold Fields finally agreed to a standstill arrangement. The mechanics of the plan operated in the following way: Newmont would declare a dividend of approximately $2 billion, of which Gold Fields would get, as a 26 percent stockholder, approximately $500 million. If Gold Fields promptly purchased in the market an additional 24 percent of Newmont's shares, it would get an additional $500 million from the dividend that went with the shares that were purchased. The billion dollars it received from the dividend and the $500 million that it had from its own line of credit would help finance the purchases of the shares.

William Wynne, the White & Case partner, felt that it was best not to require Gold Fields to buy shares after Newmont declared the $2 billion dividend, but merely to give Gold Fields the opportunity to do so. It was a clever and sensible tactical move. Gold Fields would then be acting totally voluntarily and in a manner consistent with Newmont's contention that Gold Fields would otherwise seize control. The problem from Newmont's perspective was that it left it entirely to Gold Fields' discretion whether to buy additional shares. None of the business people liked the idea of not controlling Gold Fields' purchases. They saw it as a "no win" suggestion. They all saw that Gold Fields could take the dividend money and run, or Gold Fields could have a change of heart and deal with Pickens. Those were the risks. The lawyers saw the suggestion as brilliant, and it was adopted. Mike Overlock, the head of mergers and acquisitions at Goldman Sachs, and Tom Mendell spent four hours with me going over all the ramifications to see if it would work.

"Our case is that they'll buy the stock anyway," I told them. "Let's not tamper with it." Overlock, very experienced, didn't like leaving control in other people's hands. He explored all the alternatives. Ultimately, he and the others accepted the arrangement. When we presented the plan to Gordon Parker, he also was uneasy about a situation in which Newmont declared the dividend and was left to watch what happened.

"It's not all watching," I said. "There are going to be legal challenges to the dividend and the purchases in both the federal and state courts."

"It's going to be very fast, though," Leather said. "The dividend is paid out in ten days."

"Fast, but thorough," Bernie said. "In ten days you can litigate and get a judicial decision on the validity of the Apocrypha."

"What are our chances of winning?" Management wanted to know.

"There are always great risks in litigation," Bernie said, giving his customary admonition. "In Pickens we have a resourceful and determined adversary. We've spent a month analyzing this situation, and so has Pickens. The judge won't have that kind of time. In this type of a case, first impressions can often color the outcome."

"What does that all mean?" Leather asked, cutting through the cant.

"We believe we'll win," Bernie said in a cautious tone. "Otherwise, no one would be suggesting this course of action." The caution in his voice indicated that his conclusion was reasoned, and that there was no firm assurance of success. "The steps that we're taking, the declaration of the dividend, entering into the standstill agreement, and Gold Fields' purchase of shares in the open market, are each legal, valid steps. But if you put all of them together, you get something different. The judge may not like the result. You must appreciate that the court may not see our choices the way we see them, given the result, the defeat of a tender offer which offers shareholders $105 a share."

"We understand," Richard Leather said.

No action of this novelty or magnitude could be taken without touching all the bases. We had to clear it with the independent counsel for the directors who had been appointed to review our actions. Meredith Brown, acting for the directors, had gone over each step. Meredith was the son of the literary critic John Mason Brown and in his own right a scholarly and thoughtful man. Meredith understood the tension between effective defensive action and protecting the directors from responsibility for actions that would be judged too aggressive. Totally familiar with the plan, he approved it. Bernie and I consulted with Lipton, who thought that we were taking a great risk with a street sweep since its legality was the subject of debate at the SEC. He thought the size of the street sweep could color the court's thinking against us. But the street sweep was a critical part of the strategy; otherwise Pickens would buy control before Gold Fields could block him. Thus we told him there was no choice: we had to assume the risk.

Then the board reviewed it with great care. We reported all the risks. The outside directors were all business people, used to taking risks. They were familiar with the plan and all its variations and had gotten comfortable with it. They approved it knowing that if anything went wrong they would be held responsible.

We thought that Gold Fields' response would be immediate once the dividend was declared. We expected Gold Fields to plunge directly into the market. Following the morning announcement of the dividend, Boone Pickens lowered his $105 tender-offer price by the amount of the $33 per share dividend to $72 per share, but Gold Fields didn't begin buying shares on the Exchange. I called Gold Fields' lawyers at Paul Weiss Rifkind Wharton & Garrison, and was told that they were still filing forms. It seemed a lame response, and the game that was supposed to play itself was not in progress. At the same time Pickens was attacking. His lowering of the tender-offer price to $72 and continuing the offer indicated that the dividend, which drained liquidity, wouldn't dissuade him. Had Gold Fields lost its nerve? Was Gold Fields talking to Pickens? There was no way to know. None of us had anticipated our sense of estrangement.

At the end of the first day, Gold Fields went into the market and purchased about 190,000 shares of the additional 16 million shares needed. At that rate it would take them three months to make the purchases, and Pickens would win. Word drifted back to Goldman Sachs that purchases would begin in earnest the following day. But now we all had doubts about their resolve, and by 9:30 a.m., before the stock market opened, Pickens had already brought a lawsuit in the Chancery Court in Wilmington, Delaware, to enjoin purchases by Gold Fields of any stock in the open market. Pickens sought emergency relief, and a hearing was set by Vice Chancellor Jack B. Jacobs for 2 p.m. to hear the application for a restraining order prohibiting purchases.

Although Pickens's legal action was designed to chill Gold Fields' desire to make purchases, the suit galvanized Joe Perrella of First Boston Corporation, Gold Fields' banker, into action. First Boston began to buy all the available stock from arbitrageurs and market professionals. The purchases were made on the New York Stock Exchange for Gold Fields' account, and as the volume of purchases rose, brokers joined in the sales. First Boston was intent on purchasing the 16 million shares that morning. The trading was so intense that at various times the Exchange had to close down trading to maintain an orderly market. By 1:30 p.m. Gold Fields, through First Boston, had purchased all the shares needed, 23.7 percent of the outstanding shares, at a cost of $1.6 billion (an average price of $98 a share), bringing Gold Fields' position to 49.9 percent of the outstanding shares. Never had so much stock of one company been purchased in so short a period. Since all the sales were on the New York Stock Exchange, the sales would not settle for five days, leaving Pickens the opportunity to invalidate the sales and block the closings. It was in that posture that the case came to the chancellor at 2 p.m.

In preparing for the litigation, I went over various questions and answers with Bernie. Finally, I playfully asked him, "What are you going to say when the chancellor, knowing about our fees, says that your presentation was not a million-dollar performance."

"Your honor," Bernie snapped back, "my wife has the same complaint." He was prepared. Bernie would be working with a first-rate team of White & Case litigators and Delaware counsel as well.

In court, Bernie's prediction proved entirely accurate: the chancellor had two hours to try to understand what had happened in the last month and then figure out what to do about it. Pickens's lawyers emphasized the flagrant purchases of stock for over $1.6 billion, made after the legal action was filed but before the court could get to hear the matter. Counsel's challenge in the courtroom was to explain what had been done and not make it sound devious. The chancellor's total focus was on whether he could enjoin the trades from closing on the Exchange and therefore put the matter back to where it was at 9:30 a.m., when Pickens had first filed his application with the court. All at once the issue changed from whether there had been any wrongdoing to whether judicial relief could be granted. It was as if everything had been done wrong.

Somehow the litigators had to deflect the chancellor's desire to give prompt relief, and the human need to have a simple static situation to examine. Newmont's courtroom lawyers and the counsel for Gold Fields pointed out to the chancellor that to enjoin the purchases would be affecting not only those trades but all the trades made in reliance on those trades. Billions of dollars had to be accounted for, invested in innumerable securities. The enormity of the consequences of an injunction was presented to him, and he was told that since there were five days before the trades closed, the decision didn't have to be made hastily. The issues should be fully briefed and time allowed for argument. The chancellor was a careful and thoughtful man, used to reading cogent arguments; without papers before him he realized that he was adrift and set up a briefing schedule and hearing date. He allowed two days for briefing and set the hearing for the third day.

Once the matter had to be briefed, focus would shift from the remedy to the actions taken, and the decision process would be more rational. What we saw as also helping the case was that as each day passed there were sales and purchases of stock, all relying on the sale of the Newmont shares on the New York Stock Exchange. The warp and woof of these trades made a very tight fabric that couldn't be torn easily. Given the additional time, the New York Stock Exchange intervened in the case to tell the court that the consequences of trying to break the trades would devastate the Exchange. As Bernie said, "What's done can't be undone."

But that pronouncement, as comforting as it seemed, didn't end the case. Pickens resourcefully shifted his request for a remedy, turning the issue away from disruption of the trading markets. The court, Pickens suggested, could require Gold Fields to rescind the purchases by allowing the sellers to buy the stock back from Gold Fields and then let them tender the shares to Pickens or let the sellers instruct Gold Fields to tender the shares to Pickens. Pickens was offering $105 ($72 per share plus the $33 dividend) when Gold Fields had paid an average of $98 in the market. If the court forced Gold Fields to release the shares, they would flow into Pickens's hands, giving the sellers the benefit of the higher price without affecting the trading markets. In this manner, the real issues became the focus of the litigation and Chancellor Jacobs could ask: What happened, and why had it happened? The parties then had to prepare their best case, and began by seeking discovery of each other's case.

There is something remarkable about the discovery process in litigation. Everyone has to disgorge his papers, lay them out in the bright light for examination, and be available for testimony. The details of the conflicting designs can be brought into focus and perspective. With all the information before you, there is a sense of omniscience, for then you learn some of the most secret thoughts of the parties and get answers to questions that in daily life you would never be able to ask. Benign appearances give way to manipulative realities.

What did it all show? Pickens wanted Newmont. There was no doubt about that. Indeed, he thought it was undervalued and that gold production could be increased significantly. Gold Fields wanted, more than anything else, to hold on to its investment in Newmont and to increase that investment so that no one could take it away. Rudolph Agnew had gotten Gold Fields' board, reported in its board minutes, to approve a hostile bid for Newmont to gain control of the company. Once it had control, Gold Fields would cause Newmont to declare a $2 billion dividend, which would pay out the banks for temporary loans to carry out the purchases of Newmont shares. Agnew had already signed the papers and delivered them to his lawyers to put the plan into effect. It was all just waiting for his word. Agnew hesitated to act, testing Pickens's credibility. For Gold Fields, this revelation of its dirty fingernails under its elegant gloves was embarrassing. But for Newmont, the disclosure showed that it hadn't been paranoid: all the threats were real.

By the time Pickens's case came before Chancellor Jacobs for the preliminary injunction, however, he was able to remark that he had extensive briefs on all issues, over 400 pages of argument from twelve different law firms. Reason had overtaken action and the court would be able to properly deliberate. Newmont's case was solid. It was able to show that it was being threatened on the right and the left. What it did was defeat a tender offer at an inadequate price, as well as constrain Gold Fields, so that for at least another ten years Newmont could independently conduct its own business. Chancellor Jacobs found for Newmont, and the Delaware Supreme Court also approved Newmont's actions. The Supreme Court's opinion is a high-water mark in sanctioning complex actions taken to defend against an inadequate takeover offer.

We all met in Newmont's boardroom again after the Delaware court cases were decided. We had finally lost the case in California, but that didn't affect the victory over Pickens. The SEC, however, forced to think through its rules, changed them anyway to require disclosures of sources of funds (and names of investors) at least five business days before shares were purchased in a tender offer. While the SEC still allowed Milken and others to start tender offers without all the necessary funds, bidders couldn't buy without full disclosure of the financing sources.

Our gathering in the boardroom was to recapitulate the battle. Discussion was helped by the glow of victory, and our weariness was satisfying.

"Pickens's mistake was in freeing Gold Fields. Rather than gaining an ally, he wound up with an enemy, and that did him in," someone said.

"That was the risk he took," I said, meaning that it was knowing and calculated.

Gordon Parker, seeing that I had raised a point of contention, said, "He misjudged the English. In the war in the Falkland Islands, it took the English ships three weeks to get from Plymouth Harbor to the Falkland Islands. When they got there, they did the job. It took the English about four weeks this time, but they did the job."

We all smiled. Everyone was appreciative of Gold Fields.

The company had its work cut out for it. It now had a lot of debt and would have to sell assets. The sense of the work ahead kept the meeting short.

As Bernie Nussbaum and I were riding down in the elevator, we had a conversation that only lawyers can have, free from the emotional points of view of those personally involved. He said, "You don't think Pickens made a mistake?"

"He played it very well," I said. "He always faced the threat that Gold Fields would defeat his offer. Gold Fields was the largest stockholder to begin with and he knew that if they bought shares they would be able to defeat him."

"But Pickens freed them to do that," he said.

"In this situation," I answered, "Newmont was always able to free Gold Fields to buy shares. By freeing Gold Fields himself, Pickens gave them the opportunity to talk to him, an opportunity that they otherwise wouldn't have had. That was the right move."

"You're saying he was clever."

"Adept at what he does. And Gold Fields waited too long," I added, commenting on the cost to them.

"But everyone, including Newmont, got the satisfaction of knowing that there was no other choice. That's not insignificant."

As the elevator reached the ground floor, I put my arm fondly around his shoulder and said in mock reproach, "You led your witnesses, counsellor," referring to his questioning technique in the boardroom. "And, using the cigar, almost went too far."

"The boardroom allows for that," he responded and, teasing, said, "It's not as demanding as the courtroom."

"You think so?" I asked.

"There's no judge," he said. "And most of the time you're telling the directors what they want to hear."

"Every time I want to do something serious, they hire another set of lawyers to judge me."

"Not the same thing," he said. "No one's arguing against you."

"When I lose, it's a case I shaped. When you lose, it's a case I gave you to argue," I countered.

"That's true," he said, laughing. "You have trouble getting it right." And then seriously: "But I always remember the losses more than the victories. The losses seem to get etched in my mind, and the victories become unimportant."

"For me as well," I said. "Does that make you less willing to take up the next case and risk defeat?"

"No," he said.

"Good," I said, "because I need you."

"Something permanent came out of all this, where we least expected it," Bernie remarked.

"What?" I asked, curious to see what he saw.

"We got the SEC to change the disclosure rules," Bernie said. "Less opportunity for duplicity."

"We added another rule," I said, "which is not so good. We compounded the difficulty of doing deals."

"Good," Bernie said. "Then we'll both be needed."