WINDOW INTO CORPORATE AMERICA

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That was very important.
We were paying a big price.
They had to understand that we loved them."

Behind Imperial American Energy's grand name was a small Denver-based company that had fared badly in the cyclical oil and gas industry. In September 1977, its marginal oil-drilling business had been in bankruptcy for over five years operating under the stewardship of a trustee. And just as it emerged from under the trustee's protective umbrella, Consolidated Oil and Gas, another relatively small Denver oil company with an imposing name, made a hostile tender offer to acquire a majority of Imperial American's shares. The same rising oil prices that had lifted Imperial American out of bankruptcy, unburdened of the full weight of its debt, had induced Consolidated Oil to become a corporate raider.

Both companies, minor players in a major industry, began battling like titans, and got as much attention. For Wachtell Lipton, taking engagements as they came meant being available to both raiders and target companies. In this case we represented the target, Imperial American.

To a student of the game, Consolidated Oil's tender offer was hastily put together, its precipitousness everywhere evident. So recent had been Imperial American's exit from the bankruptcy courthouse that the shareholders, formerly limited partners in various oil-drilling funds, hadn't yet received their stock certificates in the mail from the court, and the newly appointed board members hadn't held their first meeting. Consolidated Oil was trying to make up in speed and surprise what it lacked in financial strength. In an industry of lumbering giants there were still opportunities for the nimble.

Besides agility, attempting a takeover requires craft and the willingness to take risks. Initial planning usually starts with a small group committed to secrecy, but mounting an attack, even against another small company, calls for a substantial team, including public relations firms, commercial banks (and their staffs), accountants, and printers. All these people leave telltale signs, though to cover their tracks they use code names. Not surprisingly, the paraphernalia of intrigue also signals a coming contest. Extensive rehearsals and thoughtful anticipation of all likely defenses are practically impossible for a raider to achieve before its intentions become known. In going forward quickly, Consolidated Oil knew that it wasn't fully prepared.

It launched its tender offer on a Monday morning in mid-September 1977 with a notice in *The Wall Street Journal*, achieving the objective of taking Imperial American totally by surprise. The offer advised shareholders that they had ten days to tender their shares to receive $17 in cash per share. The share price of $17 was a substantial premium over the pre-tender bid prices of $9 to $10 for the newly minted Imperial American shares. So far, so good.

But seeking only a majority of the shares, a commitment of $22 million for about 1.3 million shares, qualified the offer as weak and signaled that Consolidated Oil was financially stretched. Any counterbid for all of the 2.5 million outstanding shares, even at the same price, would top the offer. The real strength of Consolidated Oil's offer came from its short duration. In ten days it's hard to defend against even a lackluster bid. Also, few shareholders would want to be left in a minority position when majority control passed to Consolidated Oil, and unless a better alternative developed in the brief offering period, shareholders would be forced to tender.

In this contest, Consolidated Oil controlled the timing and had the advantage. Three years later, in 1980, the minimum tender offer period would be extended by law to twenty business days, about twenty-six calendar days, reducing the element of surprise and allowing more time for defense. The tactics and strategy of the offense were largely worked out in the era when tender offers could run their full course in ten calendar days. Defensive strategy flowered only after 1980.

The importance Consolidated Oil had placed on speed and surprise led to its launching the tender offer without having first acquired a significant number of Imperial American shares. That was a costly decision. The well-advised raider usually begins by stealthily buying up to 5 percent of the target's stock in the open market. Amounts up to that level don't have to be publicly reported. Purchases at market, without the payment of the tender offer premium price, reduce the overall cost and provide substantial gains if the target finds another bidder for the company, a White Knight.

But Consolidated Oil couldn't have bought any Imperial American shares during the planning process without calling attention to its hostile motives. Imperial American, although a small company, had approximately 25,000 shareholders, all with relatively small stock positions. The company was an affiliate of King Resources, which had sold interests to "widows and orphans" and then itself had become bankrupt. Any concerted trading activity to accumulate a large share position would have been noticeable. Further, since there were relatively few shares available until the new certificates were in the hands of all the shareholders, it was impossible to buy any blocks. In such an imperfect market situation, any extended buying activity would have also significantly driven up the price of the shares.

More was at risk in going forward than merely forfeiting a possible profit. By mounting a takeover, Consolidated Oil had put its own independence on the line. Entering the hostile arena, it sanctioned takeovers and gave up the moral right to protest against attacks on itself. As a practical matter, its ability to fund a tender offer indicated that it could raise cash to help cover the cost of a takeover of itself. For good reason it would thereafter show up on computer screens as a potential target.

Despite the risks, in the mid-1970s tender offers were no longer unusual. Consolidated Oil was one of many companies willing to attack another. Before 1975, most aggressive acquirers were individuals like Tom Evans. In the corporate world, hostile offers were frowned upon, and very few were willing to endure the social disfavor. After 1975, with the stock market prices of most companies at a low, reflected by the Dow Jones Industrial Average, which hovered around 800, the merger and acquisition market became active. Everyone came to see that it was easier to buy than build, and almost all companies began to consider growth by acquisition a legitimate and even necessary technique. Economics changed social attitudes. Then takeover activity fueled itself. Even target companies made raids, as defensive measures, to achieve a size that made them a more complex and less interesting target. If Consolidated Oil acquired Imperial American, it would take on significant debt and likely become less attractive to others. That put additional incentives in place for winning.

I liked Consolidated Oil's side of the game. Given a choice, I preferred representing raiders. Besides enjoying the planning, as an outsider I was attracted to the entrepreneurial clients, interesting men with a sense of themselves who were trying to make their mark and didn't mind challenging and dismantling rigid corporate empires. Moreover, I had no affinity for the corporate hierarchy that seemed indigenous to most established corporations. But representing the target company Imperial American wasn't a big step to take. The managers of Consolidated Oil, while aggressive, weren't like Tom Evans. For the most part, acquirers were now established corporations, with large staffs ordered in ranking bureaucracies, little different from the people they were out to acquire.

These new acquirers changed the character of the work. Indeed, I sometimes found that I was participating in war games. Many companies simulated or went through takeover routines, playing mock battles, carrying through all the variations of thrust and parry. In effect, they were planning an invasion, often one that was one or two or more years away, more remote than most of their long-term plans. Takeover activity was a diversion for them, frequently separate from the life of the operating businesses. These corporations sought the experience and encouraged the game, for little else in business galvanized people and brought them together as cohesively as organizing an attack that would require speed, surprise, and precision timing. It also prepared them to defend themselves, without acknowledging their target status. Corporate staffs, otherwise keenly protective of their free time, would work in the evenings and even on weekends energized by strike-force apparatus such as beepers, security clearances, and "eyes only" memoranda.

Even when the acquisition got off the planning board, the game aspect of the raider's side sometimes elevated keeping score and beating your opponent above thinking about what the fighting was over. Among corporate executives making or contemplating their first hostile acquisition there was often a locker-room mentality. I found that all the mystery and excitement of sex, of breaking down resistance, of scoring and conquest, were associated with a takeover. Manliness was at stake, and measured. In order to learn the ropes, executives talked to friends who had made acquisitions.

"Was it hostile?"

"Initially."

"What made them come around?"

"There was no choice. Somebody would take them over."

"They didn't mind dealing with you, even though you were the one that put them in play?"

"We told them that we loved them. That was very important. We were paying a big price. They had to understand that we loved them."

"We're looking at some acquisitions. We're on some White Knight lists, but we're preparing to do a hostile."

"Sometimes that's the only way to get what you want."

For some it was a rite of passage, and with it came acceptability. Even more, respect: the takeover told of cunning and daring and the power to take what you wanted. Even those companies that didn't do hostile acquisitions contemplated them. Often they threatened to launch one to coerce a company to negotiate with them.

That is the buyer's side. While it's multifaceted, it's limited to taking. There is another side, that of the seller determined to get the highest price.

While the buyer chooses, the seller must attract and hold the buyer's interest. "Being a seller is like being a high-priced whore. You hang out in expensive bars. You have to pretend that it's not for sale, except perhaps to them because with them it would be a perfect combination. You stare, and let them look, but never get too forward. Of course, you deliver when they meet your price." Jack Seabrook, former chairman of IU International, told me that view of the seller's side. What he was saying was that no matter how well the boys in the corporate locker room had learned the moves, the rituals of a mating dance were only the beginning. The boys at Consolidated Oil would soon learn how difficult it would be to capture the prey.

Once Consolidated Oil initiated its bid, it expected a fight, even from the trustee of Imperial American. The trustee had been appointed the new chairman of the board, and Consolidated Oil expected that he would want to retain his position. But faced with the Consolidated Oil tender offer the trustee had an unpredictable response. The trustee's charge, all through the bankruptcy, had been to find value for the security holders, and he saw this situation as a continuation of his role. Accordingly, he was prepared to negotiate with Consolidated Oil. He promptly hired Goldman, Sachs & Co. to advise him.

At Goldman Sachs, Peter Sachs, after hearing out the trustee's desire to sell the company, nevertheless decided to oppose the bid and keep Consolidated Oil at arm's length. Peter Sachs was then a vice president in the mergers and acquisitions department and a shrewd observer of changes in the marketplace. Only three days before the Consolidated Oil tender offer, he had visited the trustee and offered Goldman Sachs's services to defend against possible hostile takeovers. The trustee hadn't believed that the services would be necessary. Peter recalls leaving the trustee's office and flying back to New York the next day, only to get a message on his arrival that he should turn around and meet the trustee in Denver because there was some peculiar movement in the company's stock.

The following business day, Consolidated Oil commenced its tender offer. Peter's prescience had gotten him the engagement.

Peter's assessment of the selling opportunities was that Imperial American's distress from the unsolicited attack would induce other bidders to come forward as effectively as Jack Seabrook's method of posturing and hanging out in fancy bars. Peter saw the urgency of the tender offer as creating a climate conducive to an auction and began preparing to organize and call one for the sale of the company in Denver, a center for the oil and gas industry, where the company was headquartered. Consolidated Oil was to get the fight it anticipated but not for the expected reasons.

Peter Sachs recommended that my firm be brought in to represent Imperial American. We were described to the senior management as experienced, using the metaphor of the surgical operating room. "When you're spread out on the table, everything has to be done quickly and you don't want someone learning on the job." Expert efforts would be needed to fend off the raider while Goldman Sachs sought other buyers who would be courted as White Knights.

Goldman Sachs didn't want to stop the tender offer, just slow it down enough to encourage counteroffers to facilitate the auction. My first task, then, was to delay the offer's expiration so that there would be more time to process bids. That meant a challenge in the Denver federal court, claiming that the tender offer was false and misleading, requiring corrective disclosure. If we could convince the judge of the validity of our contentions, he would make Consolidated Oil start over again, which in effect granted a delay.

The offer, precipitously put together, wasn't artful, leaving a lot of room to maneuver. But we were seeking an injunction, extraordinary relief from the court. Our claims had to show unequivocally that shareholders would be detrimentally misled. We had to point to clear mistakes, obvious on the face of the tender offer. Allegations that needed factual substantiation would get bogged down in the presentation of evidence through witnesses, taking days to prove. The longer it took to validate the assertions, the more legitimate the Consolidated Oil offer would seem to the court. Making the task more difficult was that, in our experience, showing the court one mistake wouldn't do. No tender offer is perfect, and the court could reasonably overlook a mistake, unless it was remarkably egregious. We had to find at least three to give the cumulative sense of error and lack of care. Also, three would give the judge a choice to see whether he fancied all or some as the reason for starting the offer over again. Furthermore, we had to find the errors promptly; otherwise they wouldn't look serious. High drama needs fresh tears.

The litigators did the arguing. My job was to help gather their material. There was a bag of tricks that I worked from, knowing that none would be likely to be persuasive in the New York courts most familiar with takeovers. Generally, the knowledgeable courts honored the minimum ten days and wouldn't intervene to create a different time schedule. In Denver this would be a case of first impression.

George Katz, our lead litigator on the matter, flew out to Denver by himself to work on the court papers with the Denver lawyers at Holland & Hart. They were essential to the effort because they were familiar with local litigation practice and knew their way around the courts. Their offices became our work stations, complete and well equipped, without overhead. Also, they gave us as much help as we needed. The breadth of local legal talent all over the country allowed us to compete with the larger New York firms. Our position as experts, heading a large team effort, freed us from billing on an hourly basis, the traditional arrangement. Hourly compensation was recognizably not adequate. We discovered that a small expert group could command premiums for expertise and premiums for favorable outcome. We began to bill like investment bankers, on the basis of the size and complexity of the matter. Since we were specialized, many local lawyers didn't feel threatened that we would compete for their clients' business and sought the firm's expertise. All this encouraged us to keep the firm small.

As luck would have it, we got Judge Fred M. Winner for our case. He was an activist judge, familiar with the history of Imperial American in bankruptcy, and wanted to see an auction develop. George Katz and the judge found an immediate affinity. "We need to delay the tender offer to help the shareholders, your honor. Some shareholders haven't even gotten their stock certificates, which has created confusion. Some may not be able to tender. An unfair situation has developed." George approached the problem in lawyerly fashion, finding injustice. He was, however, arguing for delay by indirection.

"Is your concern with making sure that all shareholders will be able to tender to Consolidated Oil?" the judge asked, letting George know that he wasn't naïve and wanted frankness.

"Well, not exactly. We'd like the time to develop some competition," George responded, right to the point, confirming what the judge knew, that there would be a sale of the company. The judge appreciated the difficulty involved in selling a company in about a week. Two of the ten days had already elapsed.

The obstacle that even a sympathetic judge faced was finding sufficient reason to stop the offer. Our claims, cobbled in more haste than Consolidated Oil's offer, weren't very persuasive. They were variations of alleged failures to disclose Consolidated Oil's plans for treatment of the minority shareholders, and omissions of descriptions of the majority's obligations to the minority shareholders, which we claimed made the offer coercive and designed to stampede shareholders. Each was almost embarrassing to argue and taken together didn't seem to have enough weight to tip the scale in our favor. Judge Winner found his own reasons. He worked from the following facts. Consolidated Oil had indicated, in accordance with standard tender offer practice, that it could withdraw its tender if the offer was challenged in court. We were, on behalf of Imperial American, objecting to the offer as misleading. Our challenge, Judge Winner found, satisfied that condition of the offer, which meant that the offer could be withdrawn. Judge Winner then concluded that it wasn't clear whether there was an offer outstanding, since it could now be withdrawn at any time on any whim of Consolidated Oil, which made it illusory and confusing. On that basis, he justified judicial intervention and granted an injunction.

Even we, as desirous of getting a favorable order as anyone, hadn't thought seriously of pressing such a circular argument. If the offer didn't exist, why stop it? Since we hadn't raised the question, we fortunately didn't have to answer it. Let it be understood that no court since has ever accepted that decision as persuasive. No matter, the tender offer had to start again, and on the third day, we got a new ten days. All of us felt renewed, and the amazing result confirmed our expertise.

What looked like a compassionate decision of the court to us looked wrongheaded to Consolidated Oil. But it would be foolish to appeal to correct the wrong decision. An appeal would only take up more time and thus be self-defeating. Consolidated Oil had to accept the wound and begin its tender offer again, having lost the speed for which it had already paid dearly. It recommitted itself because it believed that another buyer wouldn't be easy to find in the next ten days.

In the next three years the courts all over the country would come to see that if you interrupted a tender offer for intuitive reasons of fairness, you discouraged the process. Without the assurance of surprise and speed, tender offers wouldn't be made. The courts would let market forces work, without interference. Victories like this were numbered.

In preparation for the auction, Peter Sachs sent out brochures by overnight mail, reporting on Imperial American's oil and gas reserves to all the major oil companies (and many minors) and told them to be in Denver the following week to submit bids. About a hundred companies were contacted. The brochure, widely circulated as an invitation, contained only publicly available information, but set out the process. This was still the early days of takeovers and we were making up the rules for the procedures as we went along. Fairness that could withstand judicial scrutiny was our guide. All bidders would be given an opportunity to speak to the management of the company and to review engineering reports in a data room set up for the purpose. About thirty-five prospective bidders showed up. Management had the best view of the potential for finding additional oil reserves. With their cooperation the company became more salable, and the White Knight was advantaged to some degree over the raider, who remained an outsider throughout. It would take another ten years before hostile bidders could claim access to information given to all other potential purchasers.

After making their assessments, potential bidders were told that they could submit sealed bids which would be kept secret. Only the highest bid would be announced. All were asked to make their bids for cash and structure them as tender offers to compete with

Consolidated Oil's tender. The urgency of the situation was duly stressed because a winning White Knight would have to be chosen before the expiration of Consolidated Oil's tender offer.

In making the rules as we went along, we didn't anticipate all the possible moves by the players. After reviewing the data, Petro-Lewis, a Denver-based oil company, ignored the auction process we had so carefully detailed and made a tender offer for Imperial American. By offering $17 for all shares and getting a head start by commencing the tender offer early, Petro-Lewis was attempting to discourage all other parties from bidding. It was a disconcerting gambit but didn't stop the auction. (After that tactic by Petro-Lewis, we would revise the auction rules to require all parties that had received data to agree not to make hostile tender offers competing with the auction process.)

Peter Sachs and I decided to use a conference room at Holland & Hart for the auction. We sat at the center of the table, opposite the door, so we could face the bidders as they came in. Our schedule covered a two-day period, allowing up to half an hour for questions by the prospective buyers and an exchange of last-minute information. The buyers who contacted us first were given the opportunity to see us first.

Bidders entered the conference room with their investment bankers and lawyers and made feeble gestures at asking questions. Our expectation was that after the half-hour session they would submit their bid in a sealed envelope. The early bidders showed great reluctance to do anything that would tip their hand, saying they hadn't made up their minds and wanted to know the deadline for submitting bids. What we hadn't anticipated was that everyone felt that their bid would be opened and disclosed to the next bidders. Those who had eagerly contacted us first wanted to see us last. As the day wore on, the later bidders, after going through the preliminary questions to show serious intent, asked us to tell them the high bid.

We quickly caught on to the dynamics, and to each one we promptly reiterated the rules: no one would be told any other person's bid. Bids could be submitted at the last minute, but that meant waiting around Denver instead of doing other productive work. That caused the cynical to ask a lot more questions so that they could carefully scrutinize us to see if trust was warranted.

We assumed that there would be a small range of prices in the bidding. All Imperial American's wells were mature and the oil reserves were known with a high degree of precision. There was little romance in this company. The only questions, in terms of valuation, were how long it would take to extract the oil and gas and what were the expected prices for oil and gas. Everybody had the same information. The winning bid probably wouldn't be much above the other bids, and we were likely to face the accusation that the winning bidder had been tipped. It wasn't a happy situation.

Sitting in the bare Denver conference room for two full days watching representatives of oil companies and their investment bankers and lawyers come on center stage and then depart, I got a good view of the professionals involved in mergers and acquisitions. The investment bankers were from firms like Lehman Brothers, Morgan Stanley, First Boston Corporation, Kidder Peabody, all recognizable as old-line Wall Street firms. The background of the bankers was as traditional, and with as little variation, as the clothing they wore. The style they affected, however, didn't tell all.

Peter, whose grand-uncle was a founder of Goldman Sachs, looked like he'd been a banker from birth, or at least since he had gotten out of school, but his career hadn't followed a conventional path. After graduating from Harvard College, he spent eight years racing formula cars in Europe and selling high-performance and antique cars in Europe and in the States. He didn't join Goldman Sachs until he was over thirty years of age, and on entry, people at the firm met a well-mannered, suave young man with an aristocratic bearing. Wary of him because of his unusual activities after college and the instant credibility his name afforded, his elders put him to work at tedious tasks with long hours, trying to scrub off the gloss of pride. Finally, they gave him his own deals and let his ambition drive him. Many of his opponents were equally driven, their lives not anywhere near as crisply tailored as their conventional suits.

Most of the takeover law firms, however, weren't part of the Wall Street elite, and many of the lawyers advising participants in the Imperial American auction sharply contrasted with the bankers' regular lawyers. The firm of Skadden, Arps, Slate, Meagher

& Flom, already our firm's main adversary, was headed by Joe Flom, who, slight and stooped, looked like a tailor, concentrating more on your cuffs and sleeves than on your face. One of his assistants and my counterpart on a number of my early transactions, and many since, was Morris Kramer, who was known to wear velvet suits, had shoulder-length hair, and a high-pitched voice with a pronounced Brooklyn accent. But looks and speech can be deceiving, as I well knew growing up in Brooklyn: these were accomplished and knowledgeable men. If there was common ground between the bankers and lawyers involved in takeovers, it was that all were ambitious, intensely competitive, and not rattled by the stakes involved.

Finding commonality, however, didn't explain the sharp differences. Why the involvement of the traditional investment banking firms in takeovers, while their law firms weren't involved? Concern for clients on the part of the law firms couldn't be a sufficient reason, since the bankers were able to overcome that concern. What made them different? I concluded that the banking firms were much more directly fee-driven.

It was no accident that I'd first met Peter Sachs in our offices in 1976, the year before, while mediating a fee dispute. We were representing a corporation contemplating an acquisition of a reluctant seller. The corporate client understood that the acquisition might only be possible on a hostile basis, but it was loath to resort to that. Goldman Sachs was competing with Smith Barney for the investment banking business, but Goldman Sachs would only act as the banker for the corporation if the transaction became a negotiated one. Goldman Sachs had always taken the position that it wouldn't initiate hostile takeovers and would only act as a banker on the defense side. Smith Barney was advising the corporation to commence a hostile tender offer without first contacting the target company's management, thus retaining the elements of surprise and speed. The strategy excluded Goldman Sachs. John Adams Morgan, a grandson of J. P. Morgan (and a lineal descendant of John Adams), was doing the counseling on behalf of Smith Barney, where he was in charge of corporate finance and mergers. Built like a rail splitter, with wide shoulders and thick chest, he looked as if the hostile taking of share certificates was second nature. More so because those shoulders and thick neck supported a powerful, bald head with the fierce Morgan family nose.

Goldman Sachs, in reaction, had positioned itself so that Smith Barney was excluded if the target agreed to negotiate. The fee issue, all or nothing depending on the initial strategic decisions of the client, had to be resolved before the deal could go forward. Even the client was immobilized by the conflict between the Sachses and the Morgans. No one was embarrassed to fight directly over money, and the warfare was open and slightly acrimonious, although socially everyone showed the best manners. Each had their own lawyers from equally well-regarded Wall Street firms ready to protect the fee, but not to work on the deal. Large sums were involved (a percentage of the purchase price which could amount to as much as $5 million), and this kind of aggressiveness seemed bred in the bone and accepted by their lawyers. Mediation between these two groups was necessary to get the deal going, which I took a hand in doing. Finally, they entered into a treaty that provided for intelligent fee splitting, allowing us all to cooperate. While not a very propitious way to meet, it was the beginning of a long relationship.

From that incident I saw that the banking firms were oriented to doing transactions that brought in fee income and were sensitive to changes in the market. Looking further, I came to see that in those firms most partners were well off financially and retired in their early fifties, except for the very few that led the firms. Important responsibilities were necessarily given to young people, all ready to embrace change. In the law firms, however, changes in the marketplace had to filter through to the top-tier lawyers, who were tradition-bound, much older than their banking counterparts, and remote from the market. Also, lawyers billed on an hourly basis, making one kind of work not much more profitable than another. As a consequence, law firms rarely developed new specialties. And lawyers didn't move around from firm to firm as much as business people. Accordingly, there was limited ability to move or to grow into new areas of the law. I was in that room because the market had created a need and my firm was young enough to commit itself to the new area. Our being oriented to resolve disputes in favor of doing the deal is what attracted Peter Sachs. Already I could see that the opportunities were vast.

In the middle of the second day of taking bids, we met Gaines Godfrey, the chief financial officer for Mesa Petroleum, T. Boone Pickens's company. Gaines Godfrey was a combination of Texas oilman and eastern financial analyst. He unabashedly displayed the mixture in his outfit, a business suit and cowboy boots. He'd come to the meeting himself, but, sitting opposite Peter and me, he kept looking around the room, uneasy with the situation. There was nothing in the room to see other than a bare conference table and a couple of stark wooden chairs opposite us. Watching him for a few moments, Peter was compelled to ask, "Is something on your mind?"

"What's the highest bid?" he asked. There were no other preliminaries. The directness was without guile, but it was nonetheless tiresome after two days of the same question. Moreover, the bidding ran between $18 and $19 a share, bunched around $18.50, which now guaranteed accusations of bid shopping.

"We're not giving out that information," Peter responded, without expressing any irritation. "This is a blind bidding procedure. You'll have to make your bid on the basis of your own estimate of value." Peter was very proper. "Of course, your bid won't be revealed either," Peter added, and smiled.

Again, Gaines Godfrey looked around the room, as if verifying that nothing had changed, obviously disappointed. Something was on his mind. He scanned the room a second time and finally asked, "What's Goldman's fee going to be?"

Peter told him, without hesitation, that the fee would be about ⅞ of 1 percent of the aggregate purchase price. The target company paid all fees, which meant that the buyer absorbed them as part of the purchase price. Looking further around the room, he signaled that another question was forming. "What's your fee?" he asked me. He understood that we wouldn't be billing merely on the basis of time spent. Word travels fast in the marketplace. Calculation of our fee was more complicated since it was still keyed to some extent on estimated time, plus premiums for intensity of effort and success. I had an estimate, which I'd given to Imperial American, and told him.

"You'll have to excuse me for a minute," Gaines Godfrey said, and left the room. He had the same look on his face as a man who had an unexpected and urgent call of nature. He closed the door sharply behind him to assure privacy.

When he came back into the room, he told us that his bid was $20.73. From the odd number, it was almost certain that he'd recalculated his bid, deducting the fees. To follow his mental processes, we did the arithmetic. With 2.5 million shares, the aggregate price for the company was $51,825,000. Not an odd-numbered result like the per-share price, which made it almost certain that, with some rounding on his aggregate price, he'd deducted our fees.

Peter said to him, "Stocks are traded in hat sizes, Mr. Godfrey." Peter was being playful.

"What does that mean?" Gaines Godfrey asked.

"Stocks are traded in eighths," Peter explained. "You should round up your bid." Peter wasn't giving any indication that the bid was off the charts.

"Round down," Gaines Godfrey said.

"If that's the way you want to play it, we're prepared to leave it at $20.73," Peter said. And then added, "Suit yourself," as if rounding down made a substantial detrimental difference.

That gave Gaines Godfrey pause. He scrutinized Peter, trying to evaluate the statement. "Leave it at $20.73," he said.

Turning to procedure, we then asked him if Mesa Petroleum was prepared to make a tender offer. He said, "Boone Pickens won't make a tender offer. We want to buy assets." Pickens had made a tender offer, about a year before, for a company called Aztech Oil and had lost out to other bidders in the contest. Gaines Godfrey insisted that Pickens had sworn off tender offers after his bad experience. He wanted to enter into a traditional asset form of arrangement for buying oil properties. An asset purchase would take sixty days or more, while a tender offer would take only ten days. In an asset purchase, the company sold all its assets to the buyer and then distributed the proceeds to its shareholders in liquidation of the company. The terms of the agreement and the sale and liquidation required a shareholder meeting for approval, which was the time-consuming process. The greater the time period before closing, the greater the risk of nonconsummation. Again we warned him that the terms would be taken into account, and that could affect the likelihood of acceptance of his bid, but he wouldn't reconsider. A tender offer was out of the question. His price was substantially higher than the $17 tender offer by Petro-Lewis so the shareholders would refrain from tendering during the sixty or so days required for the Pickens deal to get the $20.73.

At the end of the second day, we still hadn't gotten all the bids from those who wanted to bid at the last minute. Peter visited Petro-Lewis at their offices at 7 p.m. (although they were a hostile bidder) and was told that they would increase their tender to $19 a share, and at 10 p.m. Fred Hamilton of Hamilton Petroleum called Peter and me and asked us to come to his office down the street from our hotel. He then put in a bid of about $19, sure that he was the last bidder.

The Mesa Petroleum bid was the highest by far. The auction had produced a price beyond anyone's expectation, even on a property where the value should have been in a narrow band. Corporate auctions became, for that reason, the method of choice for selling companies.

We had no alternative but to go along with Gaines Godfrey's terms and proceed to do the transaction as a sale of assets. We then turned to Pickens and asked him to be prepared to promptly enter into an agreement, but Pickens wanted to do an investigative study of the company, expressed as doing due diligence, before signing. His investigative work would take about a week. The Petro-Lewis tender offer (which topped the Consolidated Oil bid) would attract tenders unless we could discourage them. We felt constrained to announce Pickens's offer, although he wasn't bound at that price, and stated in the press announcement that a definitive agreement would be entered into the following week. At the time of the announcement of the $20.73 price per share, tenders of shares to Petro-Lewis were withdrawn in favor of the Pickens deal.

At the end of the week, the date set for signing, Pickens asked for an additional two to three days' extension. He was still doing his investigative work. The failure to sign was unsettling, but Pickens had us pinned by his high price. Although disappointed, we publicly announced the extension in as positive terms as we could manage. The slippage in the schedule made the two months to completion of the deal seem even more risky and longer than before. If in the next two or three days Pickens decided not to do the transaction, there would be very significant questions about the value of the company's assets. We'd be asked: What had he seen? The fact that he'd been willing to pay more than anyone else would no longer be a comfort. Was Pickens having second thoughts about the price, which any reasonable person would? We had more questions than we had answers.

And then, almost immediately after the failure to sign at the deadline, one of the other bidders rebid. Petro-Lewis called the trustee and Peter Sachs and told them that it was now prepared to pay $20 a share for all outstanding shares. Petro-Lewis saw Pickens's delay as a breach of his agreement, permitting another round of bidding. In fact, the extension we'd granted Pickens didn't legally bind Imperial American. Pickens wasn't bound to follow through on his offer and the extension wasn't meant to be an option tying up the company. While priced at less than Pickens's bid, the Petro-Lewis offer looked more satisfactory, since Petro-Lewis would be immediately bound and would conclude the transaction promptly, at least two months before Pickens. Without hesitation, Peter and I told the trustee that he could accept the Petro-Lewis bid. The arrangement was endorsed within hours and announced only a day after the first deadline for Pickens's investigation had expired.

Pickens publicly protested and expressed his annoyance loudly to the newspapers. His bid was at least $2 million higher, he told the press, and he didn't understand how the board could reject it. Talking to the press, however, made no difference. He could mount a challenge to Petro-Lewis only by commencing a tender offer. When Pickens didn't act to compete, Petro-Lewis acquired the company at $20 a share.

Pickens's failure meant that in the future the fainthearted couldn't participate as White Knights. Two or three days in a data room and a day with management was all the time the process would allow to evaluate complex business enterprises. The next time no one would wait for an anticipated signing. Either the deal would be done immediately after the close of the auction or there would be another round of bidding. And that was the last time that Boone Pickens refused to make a tender offer. He too had to accept the changes in the marketplace. Indeed, no one could resist them, and either you embraced them or you ceased to be a player, sidelined indefinitely.